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Moral Rights in California

PETER H. KARLEN*

“Moral rights” for artists, while recognized in Europe and elsewhere abroad, enjoy little protection in the United States. These rights include the right to restrain excessive criticism, the right to claim credit for one’s work, and the right to maintain the physical integrity of the work of art.

This article provides a critique of the California Art Preservation Act of 1979, the first major legislation in the United States on moral rights for artists. Discussion centers upon the restrictions on protection, e.g., restrictions on the types of eligible art and artists, potential defendants, duration of moral rights, and remedies. Attention is devoted to the relationship of this legislation to other art-related laws in the United States and elsewhere, and particular reference is made to relevant sections of the Copyright Revision Act of 1976.

INTRODUCTION

An all-encompassing aesthetic environment1 is now part of ur-
ban society. This environment is composed of the products of the art and entertainment industries which include art reproductions, *objets d'art*, motion pictures, and broadcast programs. It also consists of the surrounding architecture; music and *Muzak*;\(^2\) advertising art in the form of neon and graphics;\(^3\) the design components of mass-produced commodities which are developed to appeal to the eye of the consumer\(^4\) or to express the commercial identity of the producer;\(^5\) and all of the shapes, sounds, colors, and even tastes and smells which permeate the experiences of millions of people.\(^6\) What is not apparent is the concomitant development of property rights which affect this aesthetic realm. In fact, the aesthetic environment is laced with legally recognized property relations. Not only are aesthetic products subject to the wealth of laws which determine interests in real property and tangible personal property, but they are also affected by intellectual property rights which are separable from the other property rights.

Almost all man-made objects are actually or potentially subject to intellectual property laws. That is, the man-made objects in anyone's surroundings are potentially affected by copyright, trademark, unfair competition, and patent laws. Even an object with minimal artistic form and content,\(^7\) if it is a *work of authorship*\(^8\) fixed\(^9\) in a *tangible medium of expression*,\(^10\) may be pro-

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\(^1\) Whether a design is ornamental or not depends on whether it appeals to the eyes as a thing of beauty. It must be the product of aesthetic skill and artistic conception. There is a difference in the meaning of the terms "artistic" and "aesthetic." The former stresses the point of view of one who produces art and thinks in terms of creating beauty or form; the latter stresses the point of view of one who analyzes and reflects upon the effect of a work of art. Either term may suggest a contrast with the practical, functional, or moral aspects of something.


4. See infra note 17 on ornamental designs subject to design patent protection.

5. See infra notes 12-16 on trademark protection for containers, trade dresses, and configurations of goods.


tected by copyright laws from the moment of its creation.\textsuperscript{11} The shapes or configurations of goods or the containers in which they are sold,\textsuperscript{12} and the trade dresses which serve to distinguish the goods of one party from those of another,\textsuperscript{13} may be protectible under trademark\textsuperscript{14} and unfair competition\textsuperscript{15} laws from the moment they are applied to goods which are circulated in commerce.\textsuperscript{16} Many two-and three-dimensional patterns, configurations and shapes\textsuperscript{17} which are applied to mass-produced articles\textsuperscript{18} are eligible for design patent protection. The extraordinary fact, therefore, is that one is surrounded by a world of objects with aesthetic content which are potentially subject to hidden residual rights of other persons. In relative terms, the effect of law on art is almost as pervasive as the impact of art on society.\textsuperscript{19}

Despite the existence of intellectual property rights in artistic products, one group of creative persons did not really enjoy all of the benefits of the laws affecting art. These were the visual artists such as painters and sculptors.\textsuperscript{20} Perhaps their failure to benefit

\begin{itemize}
\item \textsuperscript{9} \textit{Fixed} is defined at 17 U.S.C. § 101. See 1 M. NIMMER, supra note 7, at § 2.03[B].
\item \textsuperscript{10} 1 M. NIMMER, supra note 7, at § 2.03[C].
\item \textsuperscript{11} Id. §§ 7.16[A][11] n.3, 9.01[A][11].
\item \textsuperscript{12} See 1 J. GILSON, TRADEMARK PROTECTION AND PRACTICE § 2.13 (1980).
\item \textsuperscript{13} Id. § 2.12.
\item \textsuperscript{14} Id. §§ 2.12, 2.13[3].
\item \textsuperscript{15} Id. §§ 2.12, 2.13[4].
\item \textsuperscript{16} Id. § 3.02.
\item \textsuperscript{18} The term \textit{articles of manufacture} appears at 35 U.S.C. § 171 (1976), although there is no requirement of "mass-production." 2 A. DELLER, supra note 17, at § 165.
\item \textsuperscript{19} Of course, not only do artists and other creators benefit from the property rights created by law in their intellectual productions, but they also are the direct and indirect recipients of massive public subsidies under the tax laws (\textit{e.g.}, I.R.C. § 170(c)(2)(B) permitting deductible charitable contributions to organizations operated exclusively for "literary" purposes) and under the legislation creating the National Endowment for the Arts (20 U.S.C. § 954 (1976)) and state arts councils.
\item \textsuperscript{20} \textit{Visual artist} has been defined in relation to the following art forms: "\textit{[P]ainting, sculpture, photography, printmaking, video, performance art, conceptual art, concrete poetry; or... any other field requiring visual perception.}"
fully from the laws of intellectual property was the result of restrictions in the laws themselves or practical difficulties of securing their rights. Or perhaps the causes were the artists' lack of bargaining power to assert their rights, their reluctance to permit the law to enter the domain of art, or their ignorance of the laws in the first place. At the same time it was probably the visual artist who had the greatest need for legal protections. Unlike many other types of artists, visual artists, especially "fine" artists, often work on their own, isolated from cooperative ventures and large-scale productive enterprises. Thus, they have not formed effective guilds, unions or associations, nor have they instigated well-established trade customs to protect their interests.

However, during the last decade or so visual artists and their advocates in the legal profession began to recognize the need for specialized legislation to protect visual artists and their


22. See, e.g., Projansky, The Perilous World of Art Law, 4 JURIS DOCTOR 14, 14-17 (June 1974) which says:

Unorganized, neglected by the state, and seldom able to afford counsel as a matter of course, artists, unlike almost all other professionals, tend to be amazingly ignorant of their legal rights. As clients, many tend to be stubborn, impractical, and loath to follow advice. Engaged in reshaping a vision of the world, they are, almost by definition, never satisfied with what is or what has always been. A factor affecting almost everything artists do is the informality of the art world. People who would not imagine buying the tiniest piece of real estate without every legal safeguard, buy, sell, give, and lend valuable works of art without any documents whatsoever.


24. See, e.g., Sheehan, supra note 21, at 255-61 on artists' beliefs that copyright notices deface or demean works of art.

25. See, e.g., id. at 245-55 and J. MERRYMAN & A. ELSN, LAW ETHICS AND THE VISUAL ARTS 4-(85-88) (1979) on artists' ignorance of or misconceptions about copyright laws.

26. See infra note 116 on artists' organizations. Although most artists may belong to some artists' organization (see Sheehan, supra note 21, at 255), only Artists Equity has made a concerted effort to protect the legal rights of artists, but even Artists Equity cannot claim the same effectiveness as Actors Equity, the Writers Guild, or the Screenwriters Guild within their respective areas of concern.

27. See J. MERRYMAN & A. ELSN, supra note 25, at 5-(317-30) on legal services for artists and the recent emergence of "Volunteer Lawyers for the Arts" organizations.
works. Partly as a result of their efforts there is a trend in the United States concerning rights in artistic creations. Visual artists are now receiving more residual or reserved rights in their works even after parting with ownership. For example, under the provisions of the Copyright Revision Act of 1976 the copyright is expressly reserved for the author even though the work may have been purchased or commissioned by the new owner, unless there is a written transfer of copyright or acknowledgement that the work was created "for hire." California, a major source of innovative legislation on the arts, now recognizes both the droit de suite (the right to resale royalties) and the droit moral (moral rights). Under California Civil Code section 986 the artist is entitled to a "royalty" of five percent of the gross proceeds derived from the resale of his work notwithstanding that he no longer owns the work and that it may be resold several times. Moreover, according to Civil Code section 987, known as the California Art Preservation Act, the artist who parts with his work of fine art can still control the behavior of others which affects the work and can restrain owners from certain acts which are detrimental to the work and to the artist's reputation.

The main purpose of this article is to comment on the California Art Preservation Act, which represents one of the boldest developments in the area of reserved rights for artists. Apart from offering criticism of this legislation, the purpose is to suggest some improvements for future legislation on moral rights. An additional purpose is to discuss some of the aesthetic and legal is-

29. On "reserved" and "residual" rights see infra note 37. A reserved right in an artistic work is a right which remains with the author of the work notwithstanding that the author has parted with the material object in which the work is embodied. As expressed by the Copyright Revision Act of 1976, "transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object." 17 U.S.C. § 202 (Supp. III 1979). In essence, therefore, the copyright in the work is a reserved right as far as the author is concerned.
31. Id. §§ 101, 201.
32. See infra note 304 for California statutes affecting art.
33. CAL. CIV. CODE § 986 (Deering Supp. 1982); see infra authorities cited at note 281 on the right to resale royalties.
34. CAL. CIV. CODE § 987 (Deering Supp. 1982); see infra text accompanying notes 62-68 for enumeration of moral rights.
sues involved in drafting legislation relating to moral rights because moral rights cannot be viewed in isolation but are related to other areas of law, such as copyright, trademark, unfair competition, and privacy laws, which equally affect art, entertainment, and communications. It is beyond the scope of this article to discuss the theory and history of moral rights and their enforcement via other legal doctrines because these questions have been investigated elsewhere.\(^{36}\)

**The Concept of Residual Rights**

The concept of residual or reserved rights is not new to the world of art and entertainment. For many years contracts in the entertainment industry have included provisions for “residuals” so that actors and other contributors can continue to reap benefits from further use of their works.\(^ {37}\) Copyright, of course, is a species of reserved rights which has existed under the common law for centuries and by statute since 1709 in Britain\(^ {38}\) and 1790 in the United States.\(^ {39}\) Nevertheless, entertainment industry residuals had to be enforced by contract, and copyright laws in the United States were usually interpreted so that the author was divested of copyright ownership when the work was purchased or commissioned unless the intent to retain copyright was made evident.\(^ {40}\) What distinguishes the new Copyright Act and the California legislation is that they manifest an intention to preserve residual rights for authors\(^ {41}\) by granting the rights in statutory form and by making these rights more difficult to alienate.\(^ {42}\)

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38. An Act for the Encouragement of Learning by Vesting the Copies of printed Books in the Authors or Purchasers of such Copies during the Times therein mentioned, 1709, 8 Anne, ch. 19.
41. Author here refers to the creator or originator regardless of the type of artistic work involved, and not, in copyright parlance, to either the creator or, if the work is made "for hire," his employer. *See* 1 M. Nimmer, *supra* note 7, at § 1.06 discussing 17 U.S.C. § 201 on the copyright definition of author.
Many individuals in the art world and entertainment industry, especially art collectors, dealers, and those who commissioned artistic works, have been disconcerted by the new laws, as shown by the determined challenge to the California statute on resale royalties. To these individuals it seems anomalous that the individual who has acquired "ownership" of an artistic or literary work can be restricted with regard to what can be done with the work. To them ownership connotes fee simple title in the work, the type of ownership which one associates with real property. Of course, what these owners forget is that in today's world property, including real estate, is seldom owned "outright." The word property, derived from the Latin adjective proprius, meaning "one's own," at most refers to the legal relations between the owner and all other persons concerning the use and enjoyment of a tangible thing. Although ownership in a pre-industrial society may have connoted discrete "bundles" of exclusive rights, in the post-industrial age of greatly expanded productive forces and intricate relations of production, the web of legal relationships denoting one's property rights in a thing is tangled by statutory and administrative rules and regulations.

In light of the numerous intrusions upon exclusive property rights, such as restrictions on use, alteration, or disposal, it should not be surprising that artists are granted residual rights which


44. E. Drones, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 6 (1879).

45. Cf. Reich, The New Property, 73 Yale L.J. 733, 739 (1964) ("A man who has property has certain legal rights with respect to an item of wealth; property represents a relationship between wealth and its 'owner'"); R. Brown, THE LAW OF PERSONAL PROPERTY § 1.5 (3d ed. 1975) ("property means not the thing itself, but the rights which inhere in it").


47. The full use of one's property, especially real property, is restricted by the rights of others and often confined to that which does not offend the sensibilities of others. Today it is difficult to convert one's house for use as a bawdy house or a funeral parlour. See W. Prosser, HANDBOOK OF THE LAW OF TORTS 592 nn.28-29 (4th ed. 1971). Nor can one burn down one's own house. See R. Perkins, Perkins on CRIMINAL LAW 228 (2d ed. 1969). Indeed, one cannot necessarily build a house in a certain fashion or let it deteriorate. See generally Noel, Unaesthetic Rights as Nuisances, 25 CORNELL L.Q. 1 (1939). Even to hang one's clothes on a clothesline in order to create an eyesore may subject the owner to prosecution. See People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272 (1963), appeal dismissed, 375 U.S. 42 (1963).
qualify the rights of owners of artistic works. These new property rights, or choses in action, were developed to protect the livelihoods of those who could not otherwise secure their interests within an economy characterized by rapid communications, complex commercial transactions, and business enterprises of national and even international scale. Artists are individuals who must have new property rights in their works. As any artist can attest, in the art world with its network of galleries and specialized channels for disposition of works of art, the artist must be entitled to certain rights in order to survive as a professional. For instance, the artist must be able to require credit for his work in order to establish a reputation. Conversely, he must be able to disassociate himself from work which is not his including his work which has been so badly altered that it no longer expresses his creative efforts. Further, to mount exhibitions, especially retrospective ones, he should have access to works he has created earlier in his career. To do so, he must be able to locate the owners of the works and to prevent destruction of the works. To effectuate the right to restrain destruction, the artist should have the right to repair damaged works or to conserve decaying works so that careless abandonment does not put the work of art beyond redemption. In addition, to preserve his economic rights in the work including copyright and the droit de suite, the artist must have these rights to maintain the physical integrity of the work.

Many of these "moral" rights were previously protected by utilizing diverse legal theories. However, not until the early part of the twentieth century was the comprehensive concept of the droit moral fully developed. The droit moral has its origins pri-

48. E.g., the droit moral and the droit de suite.
49. See 1 R. Powell, Powell on Real Property §§ 13 (1977) on the development of "new" property rights. Cf. Reich, supra note 45 ("new" property rights in governmental largesse, i.e., franchises, licenses and monopolies).
50. See, e.g., Estate of Rothko, 84 Misc. 2d 830, 379 N.Y.S.2d 923 (Surr. Ct. 1975), modified, 56 A.D.2d 499, 392 N.Y.S.2d 870 (1977), modified, 43 N.Y.2d 305, 372 N.E.2d 291, 401 N.Y.S.2d 449 (1977), the denouement of the saga of Mark Rothko, an artist beleaguered by the demands of international dealers, charitable foundations, accountants, and attorneys whose estate was subject to the ravages of international art theft, incompetent executors, and quarrelsome heirs. For a more thorough overview, see Harrow, The Final Word in the ROTHKO Case: Salient Legal Holdings of the Court of Appeals, 4 Art & the Law 33 (1978).
51. E.g., juried competitions and shows, auctions, state fairs, and donations to museums.
52. Cf. the Projansky-Sieglaub contract for the original transfer of a work of art in L. DuBoff, The Deskbook of Art Law 1131-33 (1977) (reserved and residual rights of artists protected in model contract used for original transfer of work of art).
53. On the development of the droit moral, see Roeder, supra note 36, at 555-56. For a survey of pioneering efforts of French jurists, see Sarraute, Current The-
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marily in two sweeping changes which became evident in the nineteenth century. One of these changes was economic. The artist could no longer rely on aristocratic patronage or church commissions but became subject to the whims of middle class tastes. No longer was the commissioned work the primary source of income for artists. Instead, works were thrust out upon the open market just like any other commodities and were subject to the vicissitudes of the free market economy in aesthetic creations. As an entrepreneur of sorts, the artist became dependent upon his public reputation in order to develop a clientele. This reputation was easily damaged if the artist was deprived of credit or associated with a work which was not his, or if his works were altered so that they did not represent his artistic personality. After all, the artist was never again to be the creature of salons and court chambers but was a businessman who had to guard his name and reputation in the same manner that a merchant has to prevent the tarnishment, dilution, or infringement of his trademark.

The other change which gave rise to the droit moral was a matter of aesthetics. With the flowering of romanticism in the nineteenth century the artist's right to "follow the call of his feelings and individual disposition" was emphasized as never before. The work of art was no longer severely restricted by patrons in terms of subject matter, form and content. Rather, it became the personal expression of the artist, revealing his individual perceptions and sensibilities. Thus, false attribution of the work and interference with the integrity of the work by mutilation, alteration, or presentation out of context, were increasingly construed as personal attacks on the artist. The public, also imbued with romantic notions about art, was sympathetic regarding moral rights, and vociferous artists and their allies were able to persuade the


55. Tarnishment refers to the use of the mark by another in connection with goods or services which are either inferior in quality or which, in relation to the trademark owner's products, raise unsavory associations. 1 J. Gilson, supra note 12, at § 5.05[2]. Dilution refers to the use of the mark by others in connection with non-competing products in such a fashion that the strength, effectiveness, and distinctiveness of the mark deteriorates. Id. § 5.05[9].

56. 3 A. Hauser, The Social History of Art 166 (1951).

57. Id. at 35, 178-79.
courts to recognize new residual rights in artists' works which went beyond the scope of copyright protection.\(^5\)

However, although moral rights have been recognized abroad, for example, under the Berne Convention,\(^5\) generally speaking these rights were not developed in the United States except to the extent that they were enforceable under traditional doctrines of the law of copyright, libel, unfair competition, and invasion of privacy.\(^6\) The California Art Preservation Act, therefore, represents a new approach for the United States and may set an example for other jurisdictions which have not adopted the full spectrum of moral rights in statutory form.

**The California Art Preservation Act**

The term *moral rights* as applied to art is derived from the French *droit moral*, but its intended meaning is more aptly expressed by the German term *Urheberpersonlichkeitsrecht*\(^6\) which means "right of the author's personality." Moral rights may be classified into three basic categories:6

1. The rights to create and to control disclosure and publication of artistic works,\(^6\) and the rights to withhold or withdraw them from

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58. Concerning the development of the *droit moral* by French and German jurists during the nineteenth century, see S. STROMHOLM, LE DROIT MORAL DE L'AUTEUR 115-380 (1986), cited in 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, 676 n.6 (1971). As indicated by Sarraute, supra note 53, at 466, the *droit moral* evolved in France from case law and was not codified until 1957.

59. Berne Convention for the Protection of Literary and Artistic Works, art. 6 bis, 331 U.N.T.S. 217. The Berne Convention is a major international treaty which establishes international protection for copyrights and moral rights of authors and other creators.

(2) The rights of authorship or paternity rights, including the right to be acknowledged as the author of a work under one's own name or a pseudonym, the rights to limited protection of anonymity and protection against false attribution and the right to object to excessive criticism and attacks on the author's professional reputation and

(3) The rights of integrity, including the right to object to the destruction of one's work and to prevent its mutilation, distortion, or alteration.

On August 1, 1979, California once again took the lead in art law in the United States when the Governor of the State approved the California Art Preservation Act which became section 987 of the Civil Code. The Act protects the artist's moral rights as "reserved" rights. The preamble, appearing in subdivision (a), clearly states the purposes of the legislation:

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.

The Act is relatively consistent with its preamble as far as coverage is concerned. The California Legislature, perhaps because it did not want to trespass on areas covered by other legislation, particularly federal copyright legislation, provided only for the rights of integrity and paternity. Conceivably, it was believed that the new federal copyright legislation preempted state laws on the

64. See Diamond, supra note 60, at 253-54; Sarraute, supra note 53, at 476. Cf. 17 U.S.C. §§ 203, 304 (Supp. III 1979) (Copyright Act provisions for termination of grants); Anatole France c. Lemerre (Civ. Trib. Seine, 1911), cited in L. DuBoff, supra note 52, at 800 (rescission of publication contract 25 years after delivery of work).

65. See Roeder, supra note 36, at 561-65.

66. See Diamond, supra note 60, at 254-55; Lord Byron v. Johnston, 35 Eng. Rep. 831 (1816); cf. Merryman, The Refrigerator of Bernard Buffet, 27 Hastings L.J. 1023, 1027 n.14 (1976) (on the right to disclaim authorship). The protection of anonymity is not absolute. The artist may not remain anonymous under all circumstances but should be entitled not to have a work associated with her name if the work does not represent her creative efforts or artistic personality.

67. See Roeder, supra note 36, at 572-74.

68. See id. at 565-72; cf. L. DuBoff, supra note 52, at 799-802 (on associated rights to proper presentation of work as affected by the right to control disclosure).

69. This was added by ch. 668, § 1, 1979 Cal. Stats. 1501, and authored by State Senator Sieroty as S. 668. Full text set forth infra in appendix.

70. According to Cal. S.B. 668, § 1, as amended in Senate, May 31, 1979, the legislation was deemed "an act to add Section 987 to the Civil Code, relating to reserved rights in fine art."
other types of moral rights\textsuperscript{71} or that other laws covered these rights in such a way that further legislation would be superfluous. Even within the two broad classes of moral rights which are covered,\textsuperscript{72} the scope of protection conferred by the Act is restricted.

\textit{Paternity Rights under the Act}

The rights to paternity set forth at subdivision (d) of the Act are succinctly expressed as follows:

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.

By granting such rights the Legislature was satisfying an important need of artists. Anyone involved with the law of literary and intellectual property can affirm that paternity rights are often of equal or greater importance than copyright.\textsuperscript{73} For example, the writer of a first-time best seller depends on being named as the author to acquire publishing contracts, fame, and fringe commercial benefits. The same probably holds true for authors of visual works who are protected by the new statute and who depend on name recognition for future commissions. Not only do paternity rights have an economic importance for artists\textsuperscript{74} but also an overriding emotional importance. After all, the right to credit at least can secure the public recognition which so many artists seek.

Before the new statute, artists were not given paternity rights. If the artist neglected to reserve the right to remain anonymous or the right to receive credit under his own name or under a pseudonym, the purchaser or licensee could display the work without the proper credit\textsuperscript{75} or could indicate the artist's true name or a pseudonym despite the wishes of the artist to the contrary.\textsuperscript{76}

\textsuperscript{71.} See 17 U.S.C. § 301 (Supp. III 1979) on preemption; notes 106-07 infra.

\textsuperscript{72.} Because only limited rights of integrity and paternity are provided by the Act, the disclosure and withdrawal rights will not be discussed.

\textsuperscript{73.} Cf. H.R. REP. No. 1476, 94th Cong., 2d Sess. 68, \textit{reprinted in} 1976 U.S. CODE CONG. & AD. NEWS 5659; Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74, § 9(2) discussed in \textit{Whitford Committee Report}, supra note 60, at 223 (credit for another author considered in granting “fair use” defense to copyright infringement).

\textsuperscript{74.} Cf. Paramount Prods., Inc. v. Smith, 91 F.2d 863 (9th Cir. 1937) (damages awarded for failure to grant screen credit to author of book upon which film was based); cases cited by 3 M. Nimmer, \textit{supra} note 7, at § 14.02 n.24.


Such rights could only be protected by employing other legal doctrines. For instance, anonymity could be preserved by arguing the right to privacy or, if the work were wrongly credited to the artist, by claiming false attribution and in appropriate cases suing for defamation. The right to receive credit under one’s own name could be protected under theories of implied contract. Where there was actual false attribution with the use of another’s name, the common law tort of injurious falsehood could be asserted by the true author. Even tort theories of unfair competition could be used in appropriate cases if the credit line were distorted so that the public was confused as to the true origin of the work.

The Act obviates some of these legal maneuvers for fine artists, but its coverage of paternity rights is quite scanty. In the first place, the legislation does not grant moral rights of the same breadth as those recognized abroad. The right to use a pen name is not expressed in the Act, nor is there an explicit remedy for passing off. In addition, the right to disclaim authorship is preconditioned upon “just and valid reason,” thus seemingly shifting the burden of proof to the artist to show that anonymity


78. See Geisel v. Poynter Prods., Inc., 295 F. Supp. 331 (S.D.N.Y. 1968) (plaintiff, Dr. Seuss, argued that substandard dolls manufactured by defendant, based upon plaintiff’s cartoon characters, were falsely attributed to plaintiff and damaged plaintiff’s reputation), cited in 2 M. Nimmer, supra note 7, at § 8.21[D][1] n.41.

79. Cf. e.g., Granz v. Harris! 198 F.2d 585 (2d Cir. 1952) (implied term read into contract to protect against wrongful attribution).

80. To take credit for another’s work is equivalent to “slander of title” in relation to the true author and owner and may interfere with the ability of the true author to exercise his rights with regard to the work. On this basis an action for “injurious” or “malicious falsehood” may be established. See Prosser, supra note 47, at 915-26 on “injurious falsehood.”


82. “Passing off” consists of attributing one’s goods to or associating them with someone else with the usual object of increased sales. See W. Prosser, supra note 47, at 957.
should be permitted. Why the artist should not maintain privacy through anonymity without justifying such a desire is difficult to understand. Perhaps the legislators thought that, even against the artist's wishes, the owner-collector should be able to attribute the work to a famous artist in order to raise its value. Also, failure to allow anonymity in all cases may be a boon to archivists and art historians who must trace the authorship and provenance of works of art. Auctioneers, too, are more enamored by a name than by artistry. Nevertheless, these reasons certainly cannot outweigh the artist's right to create controversial works under the cover of anonymity so that he will not prejudice his existing reputation. Similar arguments could be made in terms of an artist's right to freedom of speech. The failure to tolerate anonymity, especially in art, restricts expression having religious, political, and sexual contents. One way of preserving the right to remain anonymous would have been to leave it to the marketplace under the clause in the Act which permits artists to waive their rights. In this fashion owner-collectors who wished to assure the value of the work could insist on waiver of the right to anonymity at the time of purchase.

Potentially the most serious fault, which may be dispelled as a matter of statutory interpretation, is that the phrase "the right to claim authorship" has no bite to it. Anyone can claim authorship, and the artist could have done so before the Act. To claim authorship all he had to do was to hire communications equipment for use on the street corner. No one could stop him, assuming that the claim was justified. What the drafters probably intended but did not express is that "the artist shall have the right to claim and receive proper credit for his work of fine art." A similar clause would apply to disclaimer. Thus, in order to give the artist the full and enforceable group of paternity rights, subdivision (d) should have read in part:

The artist at all times shall retain the right to disclaim authorship, and

83. Provenance in art is the history or record of ownership of a work. See, e.g., Mathias v. Comm'r of Internal Revenue, 50 T.C. 994, 999 (1968), where provenance was an issue in relation to the valuation of a work.

84. Cf. Talley v. California, 363 U.S. 60 (1960) (affirming the right to distribute anonymous handbills contrary to local ordinance).

85. CAL. CIV. CODE § 987(g) (3) (Deering Supp. 1982).

86. Phrase derived from art. 6(bis) of the Berne Convention, supra note 59. The Netherlands Copyright Act, art. 25, cited and recommended by the WITHFORD COMMITTEE REPORT, supra note 60, at 17-18, is more to the point.

(a) The right to object to publication of the work under a name other than his own, as well as any alteration of the name of the work or the indication of the author, if such name or indication appears on or in the work or has been made public in conjunction with the work.
shall retain the right to claim and receive proper credit under his own
name or under a reasonable pseudonym of his choosing.

The pseudonym must be *reasonable* in order to prevent artists
from insisting upon ridiculous or inappropriate pseudonyms
which reduce the value of the work to the owner-collector and
perhaps to insulate the owner from liability for displaying the
work with an improper pseudonym. For the sake of clarity it
could be added that “proper credit shall be determined in relation
to the medium of expression and the nature and extent of the art-
ist's contribution to the work.” This latter phrase would help to
settle disputes about *top billing* and *under billing*; an inconspic-
uous credit, after all, is almost equivalent to no credit. Few au-
thors wish to be known only posthumously by archivists; most
want contemporary recognition by a live public.

The disclaimer clause, which does not contain a direct refer-
ce to false attribution and does not permit anonymity in all
cases, could be further amended to read:

The artist shall have the right to disclaim authorship and to restrain false
attribution of works wrongfully credited to him.

This latter phrase would provide a remedy for *passing off* where
the named artist is not the true author of the work. No further
 provision need be inserted for malicious or injurious falsehood
because the right to receive credit provided elsewhere probably
subsumes the right to restrain others from taking credit. Of
course, this wording would still offer no remedy for the artist who
merely wishes to restrain another person from taking credit with-
out claiming it for himself.

The other moral rights which are classed along with paternity

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87. There is some need to restrict what may be used as a pseudonym. For in-
instance, suppose the artist uses a pseudonym in connection with an artistic work
and the pseudonym is confusingly similar to the name of another artist. The own-
er of the work or a licensee, who must associate the work with the pseudonym,
could be subjected to liability for unfair competition. See supra note 82 on “pass-
ing off,” a form of unfair competition.

88. Analogous rights are recognized in the motion picture industry in which
the nature and form of screen credits are prescribed by collective bargaining
agreements. See, e.g., 1 J. Taubman, Performing Arts Management and Law 220
n.5 (1972) (screenwriters' credits). Cf. 17 U.S.C. § 401(c) (Supp. III 1979) and ac-
companying regulations (placement of copyright notices dependent upon type of
work).

89. By *top billing* one means the most conspicuous credit, while *under billing*
connotes an insufficient credit which is not commensurate with the contribution to
the work. See, e.g., Harris v. Twentieth Century-Fox Film Corp., 43 F. Supp. 119
(S.D.N.Y. 1942) (co-author of screenplay only given credit for "story research").
rights, such as the rights to be free from excessive criticism and attacks on the artist’s reputation, are not covered by the Act. Hence, these rights are not discussed here. Presumably the legislators had the impression that the artist’s remedies for defamation and disparagement were sufficient.\textsuperscript{90}

*The Rights to Integrity*

The rights to integrity are the principal concern of the Act, but not all are covered, and the chosen ones are limited in scope. Basically the Act offers remedies to artists for the “physical defacement, mutilation, alteration, or destruction” of their works of “fine art.”\textsuperscript{91} The rights are essentially negative in nature and do not encompass their positive counterparts such as the rights to conserve, restore, or repair works which have been damaged. Of course, even these latter rights are not usually included within the panoply of moral rights abroad.\textsuperscript{92} One reason for their absence is to avoid the conflict between these rights and the interests of landowners to whom the artist may be a trespasser should he enter the owner’s property to minister to his works.\textsuperscript{93} Nonetheless, the rights to conserve, restore, and repair can be very important with respect to works of visual art, especially works which are subject to rapid deterioration. The decision to omit these affirmative rights and to concern the Act primarily with intentional vandalism may permit destruction of art because the purchaser or licensee can allow the work to decay with impunity unless he has already given his covenant not to do so.\textsuperscript{94}

The important advantage of the Act is that it recognizes the


\textsuperscript{91} CAL. CIV. CODE § 987(c) (Deering Supp. 1982).

\textsuperscript{92} There appear to be no cases or statutes which provide for affirmative rights to repair or restore a work of art. However, subd. (c)(1) of the Act, supra note 34, (which prohibits intentional destruction or damage) when coupled with subd. (e)(1) (which provides injunctive relief as a remedy) and subd. (e)(5) (which permits the court to order “any other relief which the court deems proper”) may permit the court to order that the plaintiff be allowed to repair or restore a damaged work. Such an order need not be construed as a mandatory injunction. The defendant is merely enjoined from interfering with restoration or repair by the plaintiff.

\textsuperscript{93} Even the artist as copyright proprietor has no right to enter the premises of the “owner” of the work because copyright law clearly distinguishes ownership of the tangible object from ownership of the reserved rights. See 17 U.S.C. § 202 (Supp. III 1979). This means that the artist as copyright owner may have no guarantee that he may make physical copies of the original copy of the work.

\textsuperscript{94} The word *commission* employed at subdivisions (c)(1), (2) of section 987 along with other words such as *mutilation* seem to exclude guilt by “omission.”
right to restrain destruction. In many other jurisdictions this right does not exist because of the notion that destruction does not have an adverse effect on the artist's reputation.\textsuperscript{95} The California legislators, however, have correctly perceived that destruction does have a harmful effect on the artist's reputation in certain cases.\textsuperscript{96} For instance, where the artist's work is destroyed amid publicity that it is obscene, immoral, or poorly rendered, the artist's reputation may suffer.\textsuperscript{97} Another reason for the ban on destruction is that the legislation is concerned not only with the artist's reputation but also ostensibly with the "public interest in preserving the integrity of cultural and artistic creations."\textsuperscript{98}

In their concern with the most direct types of damage to the artist's work, however, the drafters neglected to cover rights which relate to the use of the work. Certain unconscionable uses, in substance, can amount to alteration or mutilation. These latter rights include the rights to have the work presented in the proper context and in its full form and content. The right to full presentation implies that the work be displayed in its entirety should exhibition of the separate parts detract from the impact of the work as a whole.\textsuperscript{99} Additionally, full form and content means that the title bequeathed by the artist should be exhibited and associated with the work because the title, as an integral part of the work, often conveys the artist's intentions or the meaning of the work.\textsuperscript{100} The right to full presentation also involves the concomitant right to retain the structural and organizational integrity of

\textsuperscript{95} See Merryman, supra note 66, at 1023, 1034-35; Roeder, supra note 36, at 569; Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949) (church mural destroyed without artist's consent and moral rights denied); Lacasse et Welcome c. Abbe Quenard (Cour d'appel Paris, 1934), cited in L. DuBoFF, supra note 52, at 805 (artist denied relief when work destroyed by Abbe).

\textsuperscript{96} But see Judgment of April 3, 1936, Conseil d'etat, 1936 Dalloz, Jurisprudence [D. Jur.] III 56 (relief granted when broken statue used to fill holes in the road).


\textsuperscript{98} See supra the case of Bernard Buffet discussed in Merryman, note 66. Buffet painted six panels on a refrigerator and found that, much to his chagrin, a panel was about to be sold separately as an individual work. He brought an action in the French courts to prevent the separate sale of the panel, and won.

the work. Thus, even if the work is shown in its totality, there will be no excuse to distort the arrangement, shape, or balance of the work in a way which thwarts the artist’s intentions.101 Maintenance of *proper context* is just as important as full presentation and perhaps could have been covered by the Act were there not the problem of preemption by the Copyright Act.102 The serious artist who finds his work duplicated on the face of a matchbox103 or otherwise juxtaposed with crude commercial material or material alien to his beliefs104 is in the same position as one whose work has been physically mutilated. In such cases there is certainly a need to protect the *expression of the artist’s personality* and the *artist’s reputation*.105

The legislature did not involve itself with distortions not resulting from physical alterations seemingly because of the potential conflict with the new federal copyright laws.106 Section 301 of the Copyright Revision Act of 1976 explicitly calls for preemption of all state laws which concern matters falling within the purview of federal copyright laws.107 Once the artist divests himself of copyright the new copyright owner may have the exclusive rights to reproduce, distribute, and display the work and to prepare derivative works based on it.108 To prevent the new owner from presenting the work out of context or from presenting only part of


106. See 2 M. Nimmer, *supra* note 7, at § 8.21[C][2].

107. 17 U.S.C. § 301 (Supp. III 1979) causes preemption of all state laws which cover rights that are equivalent to any of the exclusive rights granted to copyright owners under § 106 of the Copyright Act as such rights affect works which come within the scope of works of authorship covered by §§ 102, 103 of the Copyright Act. The effect of preemption is to bar all state law causes of action which fall within the ambit of the subject matter and exclusive rights covered by the new Copyright Act.

the work would impinge on his rights as a copyright proprietor.\textsuperscript{109} Although partial presentation and presentation out of context may be redressed under the law of defamation or even under the law of unfair competition,\textsuperscript{110} more rigorous protection is needed, and this is one additional reason for the coordination of copyright laws with other laws on the arts.

To the extent that the moral rights imposed by the Act affect the rights of expression of others there may also be a conflict with first amendment right to free speech. Thus, the artist's rights to challenge certain presentations of his work based upon the droit moral could be denied. For example, if the artist's work displayed out of context were used to make a political statement, the rights of the user may prevail over those of the artist.\textsuperscript{111} In fact, an argument could be made that even certain physical alterations could not be restrained if they, too, were made to express political or religious convictions.

\textbf{Restrictions on Coverage}

Apart from the incomplete grant of the rights of integrity and paternity, the Act is restricted to certain types of artistic works created under certain conditions. The aesthetic problems arise because the statute applies only to the "work of fine art," meaning "an original painting, sculpture, or drawing of recognized quality" but excluding the work "prepared under contract for commercial use by its purchaser."\textsuperscript{112} Moral rights as recognized abroad are not confined to these works of "fine art" but apply as well to literary and other types of artistic works.\textsuperscript{113} Probably the drafters of the Act felt that they were already taking a sufficiently large step by enacting controversial legislation to aid the embattled visual artist and to complement the resale royalties statute\textsuperscript{114} which was

\textsuperscript{109} See supra note 102.
\textsuperscript{111} Cf. United States v. O'Brien, 391 U.S. 367 (1967), reh'g denied, 393 U.S. 900 (1969) (an important case involving draft card burning and the balancing of governmental interests and individual rights to free expression through conduct rather than through "verbal speech").
\textsuperscript{112} CAT. CIV. CODE § 987(b) (2) (Deering Supp. 1982).
\textsuperscript{113} E.g., under the Berne Convention, supra note 59, art. 2.
\textsuperscript{114} CAT. CIV. CODE § 986 (Deering Supp. 1982).
already under attack. Moreover, the visual artist has the greatest need for moral rights. He not only lacks the protection of strong guilds and of well-established trade customs which prohibit the mutilation of his creations, but also, as the creator of unique originals, he is more vulnerable to losing a work forever. In addition, a broader statute affecting other forms of art would have created problems with drafting because of the special considerations for different types of artistic works. For instance, the specialized coverage for those who frame, conserve, and restore works of art would not apply to non-visual artistic works such as music or poetry, nor would the provisions on buildings apply to non-visual works. However, there was nothing to bar the legislature from protecting works of artistic craftsmanship as per section 101 of the new Copyright Act. Clearly, the legislators showed concern only for works embodying art in its highest form, usually represented by unique non-utilitarian works the destruction of which would be a great loss to the cultural heritage of the State.

Nevertheless, if the drafters intended to protect only unique

115. See supra note 43.
116. The two nascent trade organizations, V.A.G.A. (Visual Artists and Galleries Association, with a New York central office) and S.P.A.D.E.M. (Societe de la Propriete Artistique et des Dessins et Modeles, with a central office in Paris), are not powerful or well-known, at least in comparison, for example, to A.S.C.A.P. (American Society of Composers, Authors, and Performers) and B.M.I. (Broadcast Music, Inc.). Nor is Artists Equity able to prescribe trade customs and payment schedules as can Actors Equity. For a complete list of artists' organizations see T. Crawfords, Legal Guide for the Visual Artist 213-16 (1977).
117. Unlike writers and entertainers, visual artists have not had the experience of negotiating collective bargaining agreements. Nor are there trade practices, for example, permitting visual artists to register their works as can screenwriters with the Screenwriters' Guild. However, a Code of Fair Practice for artists, dealers, and collectors was drafted by the Joint Committee of the Society of Illustrators, Art Directors Club, and Artists Guild. L. DuBoff, supra note 52, at 1136-37. This terse Code and other similar efforts at making rules for the visual arts are not widely used primers for artists, dealers or collectors.
120. Disagreements among the numerous arts groups also would have presented grave difficulties as evidenced by the intervention and conflict among various interest groups representing the different arts in the revision of the copyright laws. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5659 (House report on the new copyright revision legislation) for the effect of special interest groups.
121. See George Hensher Ltd. v. Restawile Upholstery (Lancs.) Ltd., 1976 A.C. 64, for a full discussion of the term "work of artistic craftsmanship" according to the Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74, § 3(1), cf. Cuisenaire v. South West Imports Ltd., 1969 Can. Exch. 458; Cuisenaire v. Reed, 1969 Vict. 719 (cases on "works of artistic craftsmanship").
works of art they may have failed. The requirements that the works be fine art and original do not preclude protection of multiple "originals." Concededly, fine art may exist in copies. For example, few would deny that Rembrandt etchings or Rodin sculptures, created in multiples, are products of fine art.122 The requirement that the works be original also does not limit the number of protectible copies because in a legal sense original only denotes work derived from the creative efforts of the artist and not born of plagiarism.123 Copyright law, for instance, which is only concerned with original works of authorship,124 is not limited to the protection of the mythical template from which all copies were made but makes provision for multiple originals.125 If original has a similar meaning within the context of the California Act, then the legislation may protect multiple originals such as limited edition prints.

Of course, it has been argued that original, as used at section 986 of the Civil Code on resale royalties, does not apply to multiples.126 However, the issues are not so clear in the case of art preservation. Moral rights, or at least the rights of integrity, should apply to original works produced in a very limited quantity in the same way that exemptions from customs duties apply to unbound, hand-produced prints127 and to ten or fewer sculptural

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122. See Karlen, supra note 1, at 392-93, on the "art" status of copies; cf. Cahn, What is an Original Print?, 37 N.Y. St. Bar J. 546 (1965), on the status of multiple fine prints.

123. See 1 M. Nimmer, supra note 7, at § 2.01[A] n.12, and cases cited therein, including Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970); Wiktol v. Wells, 231 F.2d 550 (7th Cir. 1956); Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 (2d Cir. 1951); accord University of London Press v. University Tutorial Press [1961] 2 Ch. 691; Byrne v. Statist Co. [1914] 1 K.B. 622; Graves Case, 4 L.R.-Q.B. 715 (1869).


125. Cf. id. § 101 (Copyright Act definition of "copies" which includes the original copies from which others were made). On the depreciation of copies see Hoagland, Originality and Aesthetic Value, 16 Brit. J. Aesthetics 46 (1976).

126. See M. Price & H. Sandison, A Guide to the California Resale Royalties Act 19 (1976). The resale royalties legislation, CAL. CIV. CODE § 986, was enacted to provide some measure of royalties to the creator of unique originals, perhaps under the French theory of taxing consumption of the work through time. It was not enacted as another "copyright" statute to provide compensation based upon the sale of multiples. See also Price, Government Policy and Economic Security for Artists: The Case of the Droit de Suite, 77 YALE L.J. 1333, 1340-41 (1968); 2 M. Nimmer, supra note 7, at § 8.22[A] [1].

castings. For instance, if there are only three extant copies of a work, it should not be argued by the owner of one copy that he should be immune from the operation of the statute merely because, if he destroys his copy, there will still be two left. The other two already may have been destroyed or altered either accidentally or intentionally, thus leaving no copies of the work. At the other extreme, however, there is no urgent need for the preservation of mass-produced works. The artist who silkscreens hundreds or thousands of copies should not ask for protection under the Act, assuming that a silkscreen product is otherwise protected as a painting. The Act should have taken the approach of the customs cases and statutes which restricted the number of multiples protected, or limited protection to those multiples executed by the artist or under his direct supervision. On the other hand, these types of restrictions need not be applied to paternity rights because the rights to credit or anonymity should not depend on the number of copies made.

A more severe problem concerns the requirement of recognized quality which represents a substantial departure from most laws on art. Recognized quality refers to that which "artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art" say has recognized quality. In a sense this represents an elitist view of art which lets the art world judge its own creations while

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129. See infra note 149 on customs definitions for paintings.
130. See B. Altman & Co. v. United States, 224 U.S. 583 (1912); William S. Pitcairn Corp. v. United States, 39 C.C.P.A. 15 (1951); United States v. Roth, 22 C.C.P.A. 293 (1934); F.L. Kraemer & Co. v. United States, 34 Cust. Ct. 19 (1955); Gregory v. United States, 32 Cust. Ct. 228 (1954); Thannhauser v. United States, 14 Cust. Ct. 62 (1945) (cases concerning the role of the artist in actually making or supervising the creation of replicas).
131. CAL. CRV. CODE § 3344 (Deering 1972), which forbids the use of another's name for advertising purposes or for soliciting purchases and which may represent a form of "paternity" rights, does not depend for its application on the number of copies made.
132. The only comparable requirement of real importance emanates from the landmark obscenity case of Miller v. California, 413 U.S. 15, reh'g denied, 441 U.S. 881 (1973), in which Chief Justice Burger exempted works of "serious literary or artistic value" from the purview of obscenity laws. The impact of this ruling is to compel judges and juries to decide whether the work has "serious" value in light of contemporary developments in the arts. The intentions of the artist must surely be a factor in such a decision. Accord, Obscene Publications Act, 1959, 7 & 8 Eliz. 2, ch. 66, § 4(1) (works serving the "public good" in the "interests of art"). See 1 M. Nimmer, supra note 7, at § 2.01[B] concerning minimal quality requirements for purposes of copyright protection.
133. CAL. CRV. CODE § 987(f) (Deering Supp. 1982); cf. Obscene Publications Act, 1959, 7 & 8 Eliz. 2, ch. 66, § 4(2) (experts can testify regarding literary or artistic merit to establish or negate "public good" defense to obscenity prosecution).
the man on the street looks on with awe of disbelief.\textsuperscript{134} Of course, it could be argued that the art world is more tolerant toward new art forms and means of expression, thus, in effect, broadening the protection enjoyed by artists. But why \textit{quality} in the first place, and what is \textit{quality}? Does \textit{quality} connote a certain quantum of craftsmanship?\textsuperscript{135} A \textit{de minimis} standard for artistic form and content?\textsuperscript{136} A work which falls into comprehensible categories of art forms and media and which can be understood by others?\textsuperscript{137} Or, in terms of being recognized, that it is the work of an established artist or that the work has been given recognition by being part of a museum or gallery exhibition?\textsuperscript{138} All of these questions

\textsuperscript{134} This institutionalized closed shop has been advocated in G. Dickie, \textit{Art and the Aesthetic: An Institutional Analysis} (1974). \textit{See} McGregor, \textit{Dickie's Institutionalized Aesthetic}, \textit{17 Brit. J. Aesthetics} 3 (1977). On the whole, the elitist approach has been rejected by the courts and commentators. As Lord Reid said in George Hensher Ltd. v. Restawile Upholstery (Lancs.) Ltd., 1976 A.C. 64, 78 with regard to what is artistic:

If any substantial portion of the public genuinely admires and values a thing for its appearance and gets pleasure or satisfaction, whether emotional or intellectual, from looking at it, I would accept that it is artistic although many others may think it meaningless or common or vulgar. \textit{See infra} text accompanying note 140.

\textsuperscript{135} Craftsmanship probably should not be required. Nevertheless, in George Hensher Ltd. v. Restawile Upholstery (Lancs.) Ltd., 1976 A.C. 64, the Lords did discuss the craftsmanship embodied in the original work which plaintiff claimed was a "work of artistic craftsmanship" for purposes of copyright protection. There is no similar American case requiring craftsmanship for copyright protection.

\textsuperscript{136} The new Copyright Act, 17 U.S.C. \textsection 102(a) (Supp. III 1979), which mentions "works of authorship," impliedly imposes a minimal standard for creativity. \textit{See} 1 \textit{M. Nimmer}, \textit{supra} note 7, at \textsection 2.01[B].

\textsuperscript{137} The Copyright Revision Act of 1976, 17 U.S.C. \textsection 102(a) (Supp. III 1979), surely does not limit protection to the enumerated categories of works because such categories are merely illustrative and not definitive. \textit{See} 1 \textit{M. Nimmer}, \textit{supra} note 7, at \textsection 2.03[A]. The customs statutes, however, were limited in terms of exempting established and recognizable art forms. \textit{See infra} notes 148-51 and accompanying text.

\textsuperscript{138} \textit{Cf.}, e.g., I.R.S. Publication No. 561, \textit{Valuation of Donated Property}, which indicates that the exhibitions at which the particular art object has been displayed may be considered in determining fair market value. One difficulty with "recognized" is that the interpreter of the Act cannot be sure whether the plaintiff must prove that the quality of the work has already been "recognized," e.g., by inclusion in a gallery show or other public exhibition, or that the work \textit{a priori} is a "quality" work recognized for its merits by the experts who testify at trial. If prior recognition is required then the plaintiff may rely primarily on provenance and past reviews, shows, and exhibitions. The better the reviews and the more prestigious the shows, exhibitions, and prior owners, the stronger the case for the plaintiff. If the plaintiff must rest her case on proving "recognition" by the experts at trial, then she should select well-known experts as her witnesses. Most likely, the aggrieved artist will be permitted to rely upon both past and present recognition of the quality of work. Nevertheless, subdivisions (a) and (f) of the Act support the
will beset the courts which first hear cases under the Act.\textsuperscript{139} Because the courts have been loathe to become arbiters of taste, the judges in these cases will probably abstain from treading on the uncertain ground of aesthetic judgment, and the oft-quoted maxim of Justice Holmes will be cited on many occasions:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection if seen for the first time. At the other end, copyright [or moral rights] would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of the public, they have a commercial value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change.\textsuperscript{140}

Although the \textit{quality} requirement may have been included to effectuate the purpose of saving valuable works for posterity, it does not achieve this purpose. History shows that one generation should not judge for posterity because, even though most great artists are recognized during their lifetimes, many others are acclaimed only posthumously, often long after their deaths. After all, Mozart was once eclipsed by Salieri, and the Impressionists in France were scorned by the academicians.

The most serious difficulty with \textit{recognized quality} is that it may bar enforcement of the statute in the first place. The legislators may have forgotten to consider all of the ramifications when they used the term. What happens when a unique work has been destroyed and the artist has no available photographs or other tangible evidence concerning its quality or appearance? Is there any way to prove \textit{recognized quality} where the owner has destroyed the work and only the artist can testify for the plaintiff about its appearance? This is a serious practical problem because few artists keep complete photographic records of their works.\textsuperscript{141} Of course, even if photographs are kept there may be no way to discern \textit{recognized quality} from the prints or transparencies. The only virtue of \textit{recognized quality} is that for the first time art crit-

\textsuperscript{139} As of the date of this writing no appellate cases have construed the provisions of the Act.
\textsuperscript{140} \textit{Bleistein v. Donaldson Litho. Co.}, 188 U.S. 239, 251 (1903); \textit{accord} \textit{Walter v. Lane}, 1900 A.C. 539.
ics and journals on aesthetics will not be the only sources of published aesthetic judgments; judges and juries will also have their say. Instead of ruminating on the lives and works of famous artists, the critic or philosopher can now turn his attention to important names in "art" litigation such as *Donaldson Lithographing Company*,142 *Restawile Upholstery*,143 *Mazer*,144 and *Ladbroke (Football) Limited*145 in order to learn about what is happening in the area of art criticism.

In addition to the problem of *recognized quality* there are questions concerning the restricted application of the Act to *fine art*, which is defined in terms of "paintings," "sculptures," and "drawings."146 This parsimonious definition stands in contrast to the more liberal definitions elsewhere in the Civil Code. For instance, section 982(d)(1) of the Civil Code, dealing with reproduction rights, defines *fine art* as:

> any work of visual art, including but not limited to, a drawing, painting, sculpture, mosaic, or photograph, a work of calligraphy, a work of graphic art (including an etching, lithograph, offset print, silk screen, or work of graphic art of like nature), crafts (including crafts in clay, textile, fiber, wood, metal, plastic, and like materials), or mixed media (including a collage, assemblage, or any combination of the foregoing art media).147

In fact, because terms such as *mosaic* and *collage* appear separately from *drawing*, *painting*, and *sculpture* at section 982(d)(1), the Act may be strictly interpreted. For instance, *painting* may only denote pictorial works employing paint. The choice of only three types of works, *i.e.*, paintings, sculptures, and drawings, does not simplify matters very much because, with the emergence of multimedia works and new media of expression,148 there are

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143. *George Hensher Ltd. v. Restawile Upholstery (Lancs.) Ltd.*, 1976 A.C. 64 (copyright protection for furniture designs).
146. **CA. CIV. CODE** § 987(b)(2) (Deering Supp. 1982). **CA. CIV. CODE** § 986 (Deering Supp. 1982) is also restricted to these three types of artistic works.
147. Somehow porcelain painters have extended the scope of what is *fine art* for all statutes including the Act by persuading the legislature to enact **CA. CIV. CODE** § 997 (Deering Supp. 1982) which reads: "In this state, for any purpose, porcelain painting shall be considered a fine art and not a craft."
148. Customs cases on the various art forms are collected in Derenberg & Baum, *Congress Rehabilitates Modern Art*, 34 N.Y.U. L. Rev. 1228 (1959).
still difficulties in delineating what are paintings, sculptures, and drawings. Perhaps, therefore, the legislators should have considered protection for all "pictorial, graphic and sculptural" works which are the concern of copyright, subject to the other limitations in the Act including the limitation that the works be fine art. The legislators were interested in saving valuable works of art and wanted to avoid litigation concerning anything with artistic content. However, the cost and time expended in calling expert witnesses to testify about quality may outweigh the interests in limiting protection.

The solution to the problem of fine art lies not with quality but with the quantum of artistic labor employed in creating the work and the use to which the work is put. Moreover, the term fine art cannot be defined merely in relation to certain types of works such as paintings, sculptures, and drawings. At most, fine art is a term having as much sociological as aesthetic significance and owes its origin to the concept of beaux arts which came into vogue at the end of the eighteenth century with reference to the arts which attained beauty in its highest form or appealed directly to the aesthetic emotions. As such, philosophers, and even case law, have included music, drama, poetry, painting, sculpture, and architecture in the category of fine arts. Thus, the definitions in the customs cases, which delimit fine arts in relation to the nature and purpose of the works, are correct.

149. See, e.g., the customs cases on status as "paintings," United States v. Perry, 146 U.S. 71 (1892) (stained glass); Tiffany v. United States, 66 F. 736 (C.C.S.D.N.Y. 1895) (painted silk and bone fans); Brantman v. United States, 54 Cust. Ct. 444 (1965) (illustrated map).


153. With regard to evidence concerning the "art" status of a work, see Karlen, supra note 1, at 389-400.

154. See R. Collingwood, Principles of Art 6 (1938).


156. See Derenberg & Baum, supra note 148, for collected customs cases.
A work of fine art stands in contrast to an ornament157 or a work of craft158 because it functions purely as art and not merely as decoration or embellishment or as an object of utility. Furthermore, fine art need not be confined to any particular media of expression.159 What usually characterizes fine art is the non-utilitarian purpose and the high degree of artistic labor expended in its creation. Almost all man-made goods are potentially the product of three types of labor, both mental and physical: the labor of the scientist or engineer, the labor of the craftsman or workman, and the labor of the artist or aesthetic designer. The scientific or engineering labor, often largely mental, gives the product its utilitarian characteristic so that the product functions, has stability, and serves its intended purpose. The labor of the craftsman or workman, largely physical, is employed to give the product its physical form and content and its “workmanship.” Finally, the labor of the artist or aesthetic designer is used to make the product appeal to the eye of the beholder160 or to have the work express the personality of the creator.161 Each of these types of labor may be present in varying degrees, and products may embody the full spectrum of each type.162 For example, certain works of “fine art,” especially contemporary art, embody little

157. See Karlen, supra note 1, at 403 n.25, 404 nn.26-27.
158. See id. at 402 nn.21-22, 403 nn.23-24.
159. See id. at 401-04.
160. Cf. supra note 17 on design patents. The United Kingdom statute on design patents reads:

In this Act the expression “design” means features of shape, configuration, pattern or ornament applied to an article by any industrial process or means, being features which in the finished article appeal to and are judged solely by the eye, but does not include a method or principle of construction or features of shape or configuration which are dictated solely by the function which the article to be made in that shape or configuration has to perform.

Registered Designs Act, 1949, 12, 13 & 14 Geo. 6, ch. 88, § 1(3) (emphasis added).

161. CAL. CIV. CODE § 987(a) (Deering Supp. 1982) (fine art as “expression of the artist’s personality”).

or no craftsmanship or scientific labor, whereas most mass-produced articles incorporate significant investments of each type of labor to give the product its full value to the consumer.

Although fine art is characterized by the high degree of artistic labor employed in comparison to the other types of labor expended on its production, all useful works which may be feats of craft or engineering skill should not be excepted from the category of fine art. To do so "would exclude the Ghiberti doors of Florence, or the fountains of Paris or Versailles." The work of fine art, however, appeals primarily to the aesthetic senses even though it can serve a utilitarian or ornamental purpose, and its attraction as art, as the image of the world around it or as the personal expression of its creator, overshadows its other functions. Therefore, any "pictorial, graphic or sculptural" work embodying a very substantial quantum of artistic labor, or designed to appeal to the aesthetic senses but not merely as ornament nor as only incorporated in a useful article, should qualify for protection under the Act. The standard of recognized quality should be discarded and the experts sent back to their curatorial activities. The copyright definition for "pictorial, graphic, and sculptural works" is purely a matter for the judge to decide, and there is recourse to copyright case law. Furthermore, the quantum of artistic labor and the purpose of the work, as well as the intent of the creator, could be determined by the judge or jury directly from observation of the work or from the testimony of the parties.

163. Morris Eur. & Am. Express Co. v. United States, 85 F. 964, 966 (C.C.S.D.N.Y. 1898); accord Almy v. Jones, 17 R.I. 265, 21 A. 616 (1891) ("fine art" described as "art whose aim is beauty rather than utility, though not necessarily to the exclusion of utility, when the two can be combined").
166. Cf. id. (copyright protection for designs of useful articles insofar as they incorporate "pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article").
167. See 1 M. Nimmer, supra note 7, at § 2.08 on definition of "pictorial, graphic, and sculptural" works.
168. On the intent of the artist, see opinions of the Lords in George Hensher Ltd. v. Restawile Upholstery (Lancs.) Ltd., 1976 A.C. 64; e.g., Lord Reid, id. at 78; Lord Morris, id. at 81; Lord Simon, id. at 95; Lord Kilbrandon, id. at 96.
169. See Karlen, supra note 1, at 398-99, 407, on proof of art-related matters. If experts are called, their opinions with regard to quality must be based upon facts. As the court said in Hahn v. Duveen, 133 Misc. 871, 877-78, 234 N.Y.S. 185, 191-92 (Sup. Ct. 1929), one of the most celebrated art cases, involving a clash of world famous art experts:

I have profound respect for critics whose conclusions rest upon facts. What they say should be carefully considered by a jury. The opinions of any other kinds of experts are as "sounding brass and tinkling cymbals."
The commercial use restriction\(^\text{170}\) is even more baffling than the other qualifications. Consider the possibilities. Suppose the purchaser commissions a painting for use in reproductions. Does this mean that the work can be destroyed with impunity?\(^\text{171}\) If a sculpture is commissioned for installation in a storefront or other business premises, may there be carte blanche destruction?\(^\text{172}\) The commercial exclusion operates against the modern trend to grant similar protections to works used incidentally in commerce and works created solely for contemplation by aesthetes. This trend began with the deletion of the "fine arts" clause of the Copyright Act of 1870\(^\text{173}\) and continued with the incorporation of the clause on "works of artistic craftsmanship" in the 1948 Copyright Office Regulations\(^\text{174}\) and the inclusion of this clause in the Copyright Revision Act of 1976.\(^\text{175}\) The opinion of the United States Supreme Court in *Mazer v. Stein*\(^\text{176}\) demonstrated that there is no reason, as far as copyright is concerned, to distinguish between museum pieces and works embodied in commercial articles.\(^\text{177}\) The same conclusion reached by the Court in *Mazer v. Stein* on the objectivity of aesthetic and economic value of works of art, see Sagoff, *On the Aesthetic and Economic Value of Art*, 21 BRIT. J. AESTHETICS 318 (1981); Weiland, *Quality in Art*, 21 BRIT. J. AESTHETICS 330 (1981); Best, *The Objectivity of Artistic Appreciation*, 20 BRIT. J. AESTHETICS 115 (1980).


\(^\text{171}.\) Cf. e.g., United States v. J.E. Bernard & Co., 33 C.C.P.A. 166 (1946); Pitt & Scott v. United States, 18 C.C.P.A. 326 (1931); Progressive Fine Arts Co. v. United States, 18 C.C.P.A. 306 (1930); Whitman Publishing Co. v. United States, 6 Cust. Ct. 465 (1941); American Colortype Co. v. United States, 2 Cust. Ct. 132 (1939) (customs cases on works used commercially in reproductions).


\(^\text{176}.\) 347 U.S. 201 (1954). The Court held that statuettes incorporated in bases for table lamps were protectible under the Copyright Act of 1909.

\(^\text{177}.\) See also *George Hensher Ltd. v. Restawile Upholstery (Lancs.) Ltd.*, 1976 A.C. 64, in accord with *Mazer v. Stein*, 347 U.S. 201 (1954), in holding that copyright protection may overlap with design patent protection (in the United Kingdom, "registered designs").
should apply to the Act.\(^{178}\) If the legislators wanted to provide exemptions for those who procure commercial works, they should have done so by making certain changes in the waiver clause, as discussed below.\(^ {179}\) The lawmakers may have believed that works made for hire\(^ {180}\) to be used commercially, e.g., for advertising art, are not necessarily fine art because they are used primarily to sell merchandise and not to "arouse aesthetic satisfaction."\(^ {181}\) Alternatively, they may have felt that in the commercial setting the owner has more of an interest in the work made for hire and that such works naturally tend to be disposable or susceptible to alteration or damage.\(^ {182}\) Further, following the approach which qualifies first amendment protections for commercial expression,\(^ {183}\) it could be contended that commercial art does not have the same status as speech or as expression of personality conferred on true works of art.\(^ {184}\)

**Plaintiffs and Defendants**

Once the artist can establish that the work is fine art of recognized quality, not purchased for commercial use, he must show that he is a proper plaintiff, determine who are proper defendants, and prove the necessary mens rea\(^ {185}\) for each defendant. If the artist is "the individual" or one of the "individuals who create a

\(^{178}\) But see customs cases on commercial art cited supra note 171 (courts were reluctant to grant exemptions from customs duties).

\(^{179}\) CAL. CIV. CODE \S 987(g)(3).

\(^{180}\) The term is used in the Copyright Revision Act of 1976, 17 U.S.C. \S\S 101, 201(b) (Supp. III 1979). A "work made for hire," the copyright of which is owned by the employer or party commissioning the work, is a work (1) created within the scope of employment, or (2) as a result of a commission or order if (a) the commission agreement is in writing, (b) the agreement states that the work is one made for hire, and (c) if the work falls into certain categories of artistic works.

\(^{181}\) O'Sullivan v. English Folk Dance & Song Soc'y [1955] 2 All E.R. 845 (C.A.) (folk dancing and folk singing are not "fine arts" for purposes of rates exemptions for fine arts organizations).

\(^{182}\) Advertising art, for instance, is ephemeral in terms of content and is usually expected to be destroyed.


\(^{184}\) See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (motion pictures are a form of expression protected by the first and fourteenth amendments to the U.S. Constitution); United States ex rel. Radich v. Criminal Court of New York, 385 F. Supp. 165 (S.D.N.Y. 1974) ("flag" art upheld as protectible speech).

\(^{185}\) Mens rea is the mental state required for criminal liability, and has sometimes been defined as "guilty mind" in the law of crime. R. Perkins & R. Boyce, CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE 400 (5th ed. 1977). Because the equivalent mens rea terms such as "intent," "knowledge," "recklessness," and "negligence" are found in the law of torts, the concept of mens rea is employed here.
work of fine art"\textsuperscript{186} he may be eligible to bring an action under the Act. There should be no obstacle if the artist is the sole author, unless the defendant asserts that the artist did not create the work in question. In this regard it could be said that the Act requires a \textit{work of authorship} as defined by the copyright laws.\textsuperscript{187} Thus, "readymades,"\textsuperscript{188} machine-created works, and industrial and natural jetsam should not qualify, although the artist should have the protection given to creators if he has a hand in shaping the work, for example, by programming the machine or mounting or assembling natural or machine-made objects.\textsuperscript{189}

The real complications are posed by \textit{joint authorship}.\textsuperscript{190} What does the artist have to contribute to the work before he qualifies for the \textit{droit moral}? Once again copyright laws are relevant. Any person who makes more than a \textit{de minimis} contribution to the artistic form and content of the work\textsuperscript{191} should be protected at least with respect to paternity rights,\textsuperscript{192} although perhaps not with respect to rights of integrity.\textsuperscript{193} It may not be feasible to utilize stan-

\textsuperscript{186} CAL. CIV. CODE § 987(b)(1) (Deering Supp. 1982).
\textsuperscript{187} See 17 U.S.C. § 102(a) (Supp. III 1979); 1 M. NIMMER, supra note 7, at § 2.03[A]. The "work of authorship" is a man-made work embodying minimal creativity.
\textsuperscript{188} Marcel Duchamp was the famous progenitor of the "readymades" which consisted of objects such as bottle racks and snow shovels that were signed and displayed as art. See H. JANSON, HISTORY OF ART 529-30 (1962).
\textsuperscript{189} See Karlen, supra note 1, at 389 (machine-created works).
\textsuperscript{190} The Copyright Revision Act of 1976, 17 U.S.C. § 101 (Supp. III 1979), reads: "A joint work is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." The definition of "joint authorship" follows logically. See 1 M. NIMMER, supra note 7, at § 6.01.
\textsuperscript{191} Cf. CAL. CIV. CODE §§ 1025-1033 (Deering 1971) (ownership of objects which are created by uniting the materials and workmanship of two or more persons).
\textsuperscript{192} For most cases involving joint authorship of a copyrightable work the contribution of each joint author must be more than \textit{de minimis}. 1 M. NIMMER, supra note 7, at § 6.07. In some cases involving later reworking of a preexisting work a more "substantial and significant" contribution may be required for status as a joint author. Id. at § 6.03. Regardless of which standard is preferred for moral rights, as a practical matter there is usually some way to grant minor credit to any contributor either in advertising or display. Cf. Marquet c. Lehmann (Trib. Civ. Seine, 1923), cited in L. DuBOFF, supra note 52, at 802; Fleg c. Gaumont (Trib. Civ. Seine, 1922), cited in Strauss, The Moral Right of the Author, 4 AM. J. COMP. L. 506, 506 n.12 (1955) (cases on the rights of multiple authors to credit). But see Harris v. Twentieth Century-Fox Film Corp., 43 F. Supp. 119 (S.D.N.Y. 1942) (contributor denied proper credit despite credit to other contributor). For the French law regarding joint authors, see Sarraute, supra note 53, at 478.
\textsuperscript{193} A minor contribution by a co-author should not necessarily be used to prevent an owner or major contributor from altering the work. Unlike paternity rights which can easily be granted or withheld without significant harm to the owner or
dards such as *substantial contribution* even though they are employed in the law of copyright.\textsuperscript{194} Such standards often call for aesthetic judgments which judges and juries are not equipped to make. On the other hand, craftsmen, foundry workers, and artisans who merely execute the work according to the explicit instructions of the artist, for instance, by pouring molten liquid into the artist's mould\textsuperscript{195} or by drawing lines on a canvas according to detailed plans set forth by the artist,\textsuperscript{196} do not have the same need for moral rights.\textsuperscript{197} It is possible, however, to imagine situations in which their reputations could be damaged by alterations and false credits. Therefore, at most, only limited paternity rights should be granted to such persons to enforce their rights to claim or disclaim credit for certain works.\textsuperscript{198} Obviously this same approach should apply to machine-made works; so, for example, the person who inspires the program for a computer work (if it can quality as *fine art*) should be an eligible plaintiff and not the owner or operator of the computer, unless their contribution is such that they merit limited paternity rights for their execution of the artist's ideas.\textsuperscript{199} Finally, it should be no bar to recovery that the work constitutes a copyright infringement of another work so long as the artist has contributed some original material, notwithstanding the difficulty of establishing paternity rights.\textsuperscript{200}

\begin{footnotes}
\footnote{194. See 1 M. Nimmer, *supra* note 7, at § 6.03.}
\footnote{195. Cf. CAL. CIV. CODE § 1140 (Deering Supp. 1982) (ownership of dies, molds, or forms; manufacturers of molds, perhaps hired by sculptors, permitted to acquire title to molds and to destroy or dispose of them).}
\footnote{196. Sol LeWitt, for example, is an artist whose works are transcribed, often thousands of miles away from him, by others who follow written instructions.}
\footnote{197. Cf. cases cited *supra* note 130 on reproductions executed by or under the direction or supervision of the artist; Karlen, *supra* note 1, at 400-01 (design-execution issues). Note the amusing notator-notatee case of Cummins v. Bond, [1927] 1 Ch. 167 (medium entitled to copyright in writing, not dead person who dictated to medium or party at seance who transcribed automatic writing of medium).}
\footnote{198. Rights analogous to these proposed rights for craftsmen and artisans come from the law of defamation and unfair competition. See *supra* notes 78 & 81.}
\footnote{199. Under the law of copyright both the "conceptualist" (one who conceives the work) and the "executant" (one who executes it) can claim co-ownership in the copyright, although the ideas contributed may not of themselves be protectible. See 1 M. Nimmer, *supra* note 7, at § 6.07. However, in some cases the executant who merely carries out the explicit orders of another may not contribute enough to the work of authorship to qualify as a joint author.}
\footnote{200. Cf. 17 U.S.C. § 103(b) (Supp. III 1979) which says: The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting work. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.}
\end{footnotes}
Having qualified himself as an eligible plaintiff the artist must determine the proper defendants. The California statute seems to include all persons as potential defendants except the artist who created the work. Subdivision (c) (1) granting the rights of integrity applies to intentional acts by persons other than the "artist who owns and possesses a work of fine art which the artist has created." Once more the problem of joint authorship appears. If one co-author is in possession of the work which he still owns (at least partially), the other co-authors have no remedy should he destroy it contrary to their wishes. This situation is not merely hypothetical; it happens many times in practice. The exemption should have been limited to the artist who is the sole owner. As far as paternity rights are concerned, subdivision (d) should be construed to permit an artist to sue a co-author for violation of his rights to claim or disclaim credit.

Mens Rea

If the Act gives rise to litigation the determination of proper defendants should not pose serious problems, but mens rea will often be a vexing issue. The Act is primarily designed to provide remedies for damage to works of art caused by licensees, bailees, and disgruntled owners, and the reason for requiring intentional disfigurement by owners and licensees is that they have considerable interests in the works of art. Nevertheless, it may have been wrong to have applied the same standard to both licensees and owners since the interests of licensees usually do not approach those of full owners. Furthermore, even though the imposition of liability on members of the general public has furthered the cause of art preservation, there is no need to require intentional conduct by those who have few, if any, recognized interests in the work of art. In fact, if the artist is to retain the integrity of his

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202. Cf. CAL. PENAL CODE § 622 (Deering 1971) which provides for criminal sanctions against those who damage works of art, and, thus, along with other "malicious mischief" statutes deters members of the general public. Note that the droit moral, as recognized abroad, is for the most part only addressed to owners, licensees, and others in possession and not to the general public. See H. DESBOIS, LE DROIT DE L'AUTEUR EN FRANCE 549 (1978).
work, why not impose liability for negligent acts by members of the general public?203 A negligent act by anyone may result in destruction of the work. In turn, the destruction may cause the loss of copyright and resale royalties because there will be no work to copy or resell.

There is another problem with intention. It is often difficult to prove because it represents a "subjective" mens rea.204 Even when the owner cracks the work over the head of his or her spouse during a quarrel it could be argued that the intent was to injure the spouse and not the work. Most courts, however, would probably rule that oblique intent205 was sufficient for liability in such a case. Where the owner or licensee has only knowingly or recklessly caused damage there may be no liability if intentionally is strictly construed. For example, the owner who leaves statuary certain to attract freelance carvers and authors of graffiti may not be liable, nor will the owner who displays unprotected charcoal drawings outdoors on a rainy day. At the very minimum, even owners should be responsible at the level of recklessness for conscious disregard of the artist's moral rights.206

Even though owners are not liable for reckless conduct, there is the standard of gross negligence for framers, "conservers," and restorers which points to liability if these persons, while the work is in their charge, "exercise so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art."207 At first glance, this definition is a classic one for recklessness, that is, the disregard for the consequences of one's conduct or failure to act.208 The lesser requirement of gross negligence may be justified by the fact that framers and restorers

203. Cf. CAL. CIV. CODE § 1714.1(b) (Deering Supp. 1981) under which the conduct of minors is imputed to their parents who are liable to pay for "the defacement of property of another with paint or a similar substance."

204. See MODEL PENAL CODE § 2.02(2)(a) (Proposed Official Draft 1962) (definition of "purposely"); S. 1, 94th Cong., 2d Sess. § 302(a) (1975) (definition of "intentional"), cited in Karlen, Mens Rea: A New Analysis, 9 U. TOL. L. REV. 191, 235 n.166 (1978). "Intention" may be proved "objectively" insofar as there is recourse to external factors, e.g., motive; however, it is a "subjective" mens rea because only the defendant's state of mind is at issue unlike cases involving "recklessness" and "negligence" where the judge or jury must be cognizant of external circumstances under which the defendant's conduct took place.

205. See J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. 8, para. 6 (1780). An actor's conduct reflects "oblique" intent in relation to the result of the conduct if, although the result may not be desired, the actor knows that it is substantially certain to occur. Arguably this is equivalent to the mens rea "knowledge."


207. CAL. CIV. CODE § 987(c)(2) (Deering Supp. 1982).

208. See supra note 206.
and those in related occupations are professionals who should be held to a stricter standard.\textsuperscript{209} In addition, these art-related professionals cannot claim the same interests in the work as those of the owner. Prior to this legislation artists had remedies against those who worked for them to frame, conserve, or restore their works if such persons culpably damaged the works. Liability attached at the point of negligence as it would in other cases involving persons hired to repair property.\textsuperscript{210} However, if the artist relinquishes ownership the Act now provides remedies against the art-related professionals who work for other persons, including collectors and museums. This is the purpose of the \textit{droit moral}, to protect the work regardless of who owns the physical object. But why should the Act not be extended to negligent conduct by the art-related professionals when the artist no longer owns the work? Why restrict actions for mere negligence to those brought by the owner? If the artist is to retain residual rights such as moral rights, copyright, and the right to resale royalties, enforcement should not depend on whether the artist has parted with ownership.\textsuperscript{211} One reason for the standard of \textit{gross negligence} is that it is at least an objective standard. The phrase "to justify the belief that there was an indifference to the particular work of fine art" eliminates any requirement for a subjective state of mind on the part of the defendant.\textsuperscript{212}

Despite the attention focused on \textit{mens rea} and the rights to integrity, the Act is silent with regard to paternity rights and the defendant's state of mind.\textsuperscript{213} Certainly the \textit{gross negligence}

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\item \textsuperscript{209} \textit{See} \textit{CAL. CIV. CODE} § 1738.6(c) (Deering Supp. 1982) under which an art dealer is strictly liable for damage or loss while the artist's work remains with the dealer on consignment.
\item \textsuperscript{210} \textit{Cf.} \textit{CAL. CIV. CODE} §§ 1858-58.3 (Deering 1981) (strict liability for theft, fire, and vandalism of personal property brought to depositary for repair). Ordinarily, a bailee is only liable for negligence. \textit{9 CAL. JUR. 3D Bailments} § 34 (1974).
\item \textsuperscript{211} In this situation the art-related professionals are not \textit{owners} in any sense. Note, if the artist is still the owner of the work, his remedies under the Act are greater than those of other owners who must sue for conversion and collect damages under \textit{CAL. CIV. CODE} § 3336 (Deering 1972).
\item \textsuperscript{212} \textit{Cf.} Karlen, \textit{supra} note 204, at 223 n.119 and authorities cited therein including Seavey, \textit{Negligence—Subjective or Objective?}, 41 HARV. L. REV. 1 (1927) and Edgerton, \textit{Negligence, Inadvertence, and Indifference; the Relation of Mental States to Negligence}, 39 HARV. L. REV. 899 (1926). Although "indifference" denotes a subjective state of mind, i.e., lack of caring or concern, "slight degree of care," as used in the same subd. (c)(2), is objective since it only relates to the defendant's conduct. Further, "justify the belief" only refers to the belief of the trier of fact. Actual "indifference" need never be shown.
\item \textsuperscript{213} Subdivision (d) of \textit{CAL. CIV. CODE} § 987 (Deering Supp. 1982) does not
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standard for art-related professionals should not apply to paternity rights, nor should intentional conduct be required for all other persons. Paternity rights can be analogized to certain rights stemming from the laws on privacy, defamation, and unfair competition. For the same reasons that these laws do not generate "intentional" torts, paternity rights should be violated by conduct that is less than intentional. For instance, if by mistake the artist is wrongfully deprived of credit and another's name substituted in his place, he should not have to prove intentional misconduct. Negligence alone should suffice, and perhaps even strict liability should be applicable. The artist may be seriously damaged by false attribution and should be entitled to injunctive relief under the Act even if the defendant's conduct could be described as "negligent" or "excusable." Undoubtedly, if injunctive relief were permitted where liability was imposed at the level of negligence or strict liability, the courts would not award punitive damages and would be hesitant to award attorney's fees.

To mollify the effect of the attorney's fees provision where liability for negligent or even non-negligent conduct is imposed, the statute may be interpreted so that it has the same consequence as that of section 505 of the Copyright Act. That is, the court would award attorney's fees to the prevailing party where the violation has been willful or the action brought in bad faith.

mention the defendant's state of mind. Presumably, because subdivisions (c)(1) and (2) qualify the artist's rights by requiring intention and gross negligence on the part of defendants, plaintiff's action under subdivision (d) should not be so qualified.

214. See supra notes 77-78, 81.

215. Defamation, unfair competition, and invasion of privacy are not intentional torts. See W. Prosser, supra note 47, at 772-76 (defamation); id. at 958 (unfair competition); Time, Inc. v. Hill, 385 U.S. 374 (1967) and Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (reckless disregard suffices for invasion of privacy).

216. Punitive damages are permitted under subdivision (e)(3) of the Act. For the most part, exemplary and punitive damages are only awarded in connection with torts which involve intention, knowledge, or recklessness. Cf. Cal. Civ. Code § 1745 (Deering 1981) (exemplary damages awarded in cases of knowing failure to make disclosures in connection with offer or sale of fine prints); Cal. Civ. Code § 3394 (Deering 1972) (exemplary damages generally); Cal. Civ. Code § 3344 (Deering 1972) (exemplary damages for knowing use of name or likeness in advertising).

217. Attorney's fees may be awarded under subdivision (e)(4) of the Act. California courts are reluctant to award attorney's fees even when empowered to do so. The general rule is that attorney's fees cannot be recovered as costs or damages in law or in equity unless expressly provided by statute or contracted by the parties. The amount of attorney's fees awarded is within the discretion of the court and need not represent what the prevailing party has expended. See 23 Cal. Jur. 3d Damages § 102 (1975).

218. See 3 M. Nimmer, supra note 7, at § 14.10[D] on the interpretation of 17 U.S.C. § 505, which provides for awards of attorney's fees to the prevailing parties in copyright infringement cases.
statute, therefore, may be flexible enough to permit liability at the
level of negligence or strict liability without imposing harsh
sanctions.219

Remedies

Feasibility is the crucial test for the statute. Will artists use it,220 and will it help to preserve works of art? A look at the reme-
dies offered by the statute should enable any lawyer to gauge
whether it is workable.

At first sight the remedies and the duration of protection seem
quite adequate. The potential relief is broad in scope. The artist
can ask for actual damages, equitable relief, and even punitive
damages.221 However, punitive damages are merely retaliatory
from the artist’s point of view because they are not awarded to
the artist but, in the court's discretion, to “an organization or or-
ganizations engaged in charitable or educational activities invol-
voring the fine arts in California.”222 Most importantly, the artist
may recover attorney’s fees and expert witness fees.223 Seem-
ingly, the artist has most of the potential remedies afforded under
federal copyright laws to owners who register their claims to
copyright before infringement.224 In fact, the combination of ac-
tual and punitive damages, attorney’s and witness fees, and equi-
table relief is required to make art-related statutes effective. For
this reason California’s legislation on fine prints, which provides
for treble damages only in some cases,225 and the California droit
de suite226 are seldom used by aggrieved parties and may be con-
sidered “show-case” legislation or museum pieces. To make a
lawsuit under the Act worthwhile, attorney’s fees should have

219. Note that copyright infringement extends to negligent and even innocent
conduct although there are provisions for relief in the case of innocent infringe-
ment. See, e.g., 17 U.S.C. § 405(b) (Supp. III 1979) (recovery of damages not per-
mitted against infringers who are misled by absence of copyright notice, although
recovery of profits and injunctive relief still permitted).
220. Cf. Sheehan, supra note 21 (discussion of the reasons why artists fail to
learn about or use copyright laws).
221. CAL. CIV. CODE §§ 987(e)(1)-(3) (Deering Supp. 1982).
222. Id. § 987(e)(3).
223. Id. § 987(e)(4).
224. See 17 U.S.C. §§ 412, 502-05 (Supp. III 1979) on remedies for the early copy-
right registrant.
226. CAL. CIV. CODE § 986 (Deering Supp. 1982) does not even provide for attor-
ney's fees.
been mandatory for the prevailing artist. Further, punitive damages should have been mandatory for the violator whose unjustified conduct was "willful, malicious, or intentional." However, even despite these proposed measures, bringing suit may be costly and unprofitable for the artist who may only recover attorney's fees. The reason is that actual damages may amount to little or nothing.

The artist who has parted with ownership usually cannot establish damages if the owner or third party destroys the work, because the work was probably paid for in full and because in most cases destruction does not cause injury to reputation. Of course, in the unusual case the artist may be able to substantiate lost copyright and resale royalties when such claims are not speculative. However, unless the artist can show that he had a contract to exploit the copyright or that the owner had a resale contract, there is little to claim. On the other hand, where the work has been mutilated so that its display causes injury to the artist's reputation, damages may be awardable for the same reasons that damages for defamation and disparagement are granted. Such damages, nevertheless, are difficult to prove, and this type of case is not frequently before the courts.

Another problem with actual damages is that where the work is damaged but salvageable the measure of damages may only be

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227. See supra text accompanying note 218, cf. CA. CIV. CODE § 1717 (Deering 1971) (defines "prevailing party" for purposes of awarding attorney's fees).

228. See 17 U.S.C. § 504(c)(2) (Supp. III 1979), which provides for higher awards of statutory damages for copyright infringement where the infringement is "committed willfully." The word unjustified is employed to rule out liability for intentional acts when the conduct is justified, e.g., where the work is obscene or badly deteriorated and the artist refuses to repair or remove it.

229. Cf. 3 M. Nimmer, supra note 7, at § 14.02 (computation of actual damages in copyright cases to include lost sales, decline in value of copyright or of the work itself, and the time and expense of creating the work).

230. See Diamond, supra note 60, at 256-57; Roeder, supra note 36, at 569.


232. See supra note 78. The artist's paternity rights are violated to the extent that she is associated with a work which is not truly hers.

the cost of repair. But how does one establish the cost unless the artist initially spends the money for repair or submits estimates? Should the artist have the burden of paying for repair first and hoping for compensation later? With works of art, are costs of repair a reliable basis for determining actual damages? And what happens when only the artist can undertake the repairs, resulting only in the expenditure of his own labors? Additionally, it is difficult to measure actual damages when paternity rights are involved. Almost always, where there is a failure to give credit, actual damages cannot be substantiated because the damages are speculative. Of course, the artist has been injured, sometimes more so than in the case of copyright infringement. But since punitive damages are not awarded to the artist under the Act, he is left only with injunctive relief except in cases involving false attribution in which the artist's reputation is at stake.

What the legislators might have done with respect to damages was to have followed the lead of Congress when it enacted the new Copyright Act and to have provided for a measure of statutory damages which the plaintiff could recover in lieu of actual damages. Even the range of copyright awards, $250 to $10,000

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234. See 23 CAL. JUR. 3D Damages § 68 (1975).
235. The law of damages with respect to repairs has been stated, in part, as follows:
Where the property has not been wholly destroyed, the proper measure of damages for its partial destruction is the difference between its market value immediately before and immediately after the injury, but if it can be completely repaired for a lesser sum, the cost of repairing thereupon becomes the measure of damages. If the damage cannot be completely repaired, the proper measure of damages is the difference between the property's value before the injury and its value after repairs have been made on it, to which must be added the reasonable cost of making the repairs.
23 CAL. JUR. 3D Damages § 68 (1975); cf. Merchants Fire Assurance Corp. v. Lattimore, 263 F.2d 232 (9th Cir. 1959) (insurance valuation case discussing the law as it concerns repairs and insurance for works of art). As Lattimore illustrates, damage to some works can cause complete loss of value which cannot be restored by repairs. On the other hand, some repaired works become more valuable just because they are restored.
236. See Paramount Prods., Inc. v. Smith, 91 F.2d 863 (9th Cir. 1937); Zovich v. Petroff, 152 Cal. App. 2d 806, 313 P.2d 118 (1957); 3 M. Nimmer, supra note 7, at § 14.02 n.24.
237. Cf. CAL. CIV. CODE § 3344 (Deering 1972) (effectively, an adjunct to the Act for some purposes; it imposes liability for, among other things, using a person's name in connection with the advertising or solicitation of sales of products or goods, including works of art, without their consent).
238. 17 U.S.C. § 504(c) (Supp. III 1979). The amount of statutory damages
(or in special cases, $100 to $50,000), might have been suitable compensation for the aggrieved artist. Another way to remedy the problem of destruction or mutilation would have been to construe the defendant's act as one of conversion and to award the artist the fair market value of the work measured by the value immediately prior to the destructive act. This solution would offer an effective remedy for the artist and might be easier to enforce in terms of calculating damages. Naturally, the owner who has paid for the work and has intentionally destroyed it will claim that it is unfair to pay twice for the same work. Nonetheless, if it is a unique, original work of art and the owner has not purchased copyright (as is the case with most sales) and must pay resale royalties, is market value of the work too much as compensation for the loss of copyright and resale royalties?

Waiver of Rights

The artist who comes to court may not only have trouble pursuing his remedies but may find that his rights under the Act have been lost or dissipated because waiver of rights is permitted under the Act. Subdivision (g)(3) reads:

The rights and duties created under this section: . . . [except as provided in paragraph (1) of subdivision (h) [on works of art installed in buildings] may not be waived except by an instrument in writing expressly so providing which is signed by the artist.

This means that if, as usual, the artist is in a weaker bargaining position, a waiver can be compelled. Although a comparable pro-
vision exists in the new Copyright Act which permits transfer by written agreement,243 the waiver clause is not in accord with the approach of Civil Code section 986 on resale royalties which effectively bars waiver.244 Additionally, it does not reflect the notion that moral rights are inalienable because they adhere to and remain a part of the author's personality and are not property rights which can be conveyed.245 Indeed, in some jurisdictions moral rights are inalienable to a certain extent.246

Nevertheless, in certain circumstances it makes sense to permit waiver. If the work is created with the understanding that it is to be destroyed or altered, then the artist should not complain about injury to the work. Of course, a special provision could have been made for this latter type of situation, and the general waiver clause could have been avoided. Problems with commercial use247 also could have been solved by permitting special waivers where the works are used commercially.

One source of potential confusion is that the Act appears to permit waiver only by the artist and not by the heirs or personal representatives who may bring actions up to fifty years after the artist's death.248 It could be implied that artist includes heirs and personal representatives,249 but perhaps the intent was to rule out bargains between the heirs or representatives and those in possession of the works. The rationale would be that the heirs or representatives were only erstwhile trustees for the cultural heri-

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243. 17 U.S.C. § 204 (Supp. III 1979); cf. id. at § 101 (copyrights in only certain types of commissioned works permitted to pass to the party who has commissioned the work if there is a written agreement stating that the work shall be considered a "work made for hire").
244. CAL. CIV. CODE § 986(a) (Deering Supp. 1982).
245. Art. 6 of the French Law on Literary and Artistic Property of March 14, 1957, 1957 J.0. 2723, 1957 B.L.D. 197, states in part:

   The author shall enjoy the right of respect for his name, his authorship, and his work. This right shall be attached to his person. It shall be perpetual, inalienable and imprescriptible.

246. See Diamond, supra note 60, at 248 n.28 (moral rights qualifiedly inalienable in certain foreign jurisdictions).
247. CAL. CIV. CODE § 987(b) (2) (Deering Supp. 1982).
248. Id. § 987(g)(1).
249. Id. states:

   The rights and duties created under this section: . . . 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. Perhaps, then, the rights to fully alienate or waive the moral rights devolve upon the artist's successors in interest. It would be anomalous to prevent the successors from selling rights which have economic importance.
tage. But what transpires with a collaborative work? Again the Act is not explicit with regard to joint authorship. It would seem anomalous and unfair to let one co-author waive the rights of the others, and once more the copyright rule is relevant. One co-author should not be able to convey all existing rights even though some form of limited licensing may be considered. Nonetheless, with moral rights the licensing rules should be more restrictive because personal feelings and reputation are in the balance, not merely pecuniary rewards. As a general rule, without the prior written consent of all other co-authors, one co-author should not be allowed to license even temporary violations of moral rights, particularly violations of rights which secure the privacy of the other co-authors. For these purposes joint authorship should be defined liberally according to the provisions of the copyright laws.

Works in Buildings

Another way in which artists can lose their rights besides waiving them is by leaving their works in buildings. The strict rules, which are understandable from the viewpoint of property owners, present another obstacle to artists. For works such as murals and reliefs which cannot be removed from buildings without substantial mutilation or alteration, the artist must secure a written recognition of his rights under the Act, signed by the owner of the property. In addition, the artist must "properly" record the instrument, presumably (although it is not mentioned explicitly) with the county recorder in the county where the building is located. If properly recorded the document binds subsequent...
owners of the building in relation to the moral rights of the artist.

The first of many difficulties with subdivision (h)(1) on works left in buildings is that the test of cannot be removed without substantial damage imposes a heavy burden on owners. Cannot is too strong a term. In many instances, if the owner expended a fortune in hiring experts and workmen to delicately remove works of art which were difficult to excise, then it would be said that the owner could remove without substantial damage. Perhaps what the lawmakers wished to express was “cannot be removed without unreasonable expense.” If the installed work decayed or deteriorated to such an extent that its appearance defiled the building, there would be other problems with respect to subsequent owners who were bound by a recorded instrument. In these cases a statutory burden to repair or remove should have remained with the artist so that, if the artist refused to repair or remove, his moral rights would lapse.255

Subdivision (h)(1) on works which cannot be removed without substantial damage was intended to affect cases where the owner desires to remove the art without the consent of the artist. Suppose the artist does not know about the California Art Preservation Act or for any other reason does not secure his rights. Did the legislators mean to give the landlord a free hand to alter or mutilate the work where removal is not intended? As the statute reads, the owner can deface without penalty even if removal is not contemplated because cannot be removed only amounts to an objective test regarding the status of the work and not a subjective test which reflects the intentions of the owner.256 Surely, if

numably an agreement under subdivision (h)(1) of the Act should qualify for recording. On the other hand, registration of the agreement with the U.S. Copyright Office under 17 U.S.C. § 205 (Supp. III 1979), which may be a viable option in a few cases (if the agreement is otherwise recordable with the Copyright Office), is not mentioned nor should it have the effect of binding subsequent owners who would not have actual notice of the reserved rights and who should not be said to have constructive notice of these rights. Cf. CAL. BUS. & PROF. CODE §§ 14700-03 (Deering 1976) (recording of literary or artistic work with Secretary of State for purposes of protection under state law).

255. The law of nuisance is relevant and analogous because the work may be a “nuisance” should it deteriorate to the point where it interferes with the use and enjoyment of the property. The remedies are damages, injunctive relief, and abatement by self-help. See W. PROSSER, supra note 47, at 602-06. A court could permit destruction, for example, if the offending party failed or refused to repair the offending work. See Noel, supra note 47, on “aesthetic” nuisances.

256. Cannot be removed only relates to objective external circumstances without reference to the actor’s state of mind.
the owner were displeased with the work of art in the building and wished to remove it, the statute could permit damage during removal. However, if the work is to remain on display in the building, no owner should be free to mutilate or distort it. Subdivision (h)(1) should have read like subdivision (h)(2) and should have begun with the phrase, "If the owner of a building wishes to remove a work of fine art."

Another problem, not envisioned by the drafters, emerges because of the language of subdivision (h)(1). If a work of art cannot be removed without substantial damage and moral rights are not reserved, are the rights waived not only in cases of removal and non-removal but also with respect to persons other than the landlord? This subdivision should have said that the rights "shall be deemed waived only as against all owners of such building" and also perhaps as against their tenants. Since this wording is not present it may be that lessees can deface works of art without sanctions. In addition, the clause “[s]uch instrument, if properly recorded, shall be binding on subsequent owners of such building" should be expanded to read “... owners of such building and their respective lessees, licensees, and all other persons.”

If the work of fine art can be removed without substantial harm, then the artist's rights are governed by subdivision (h)(2). When the owner has diligently but unsuccessfully attempted to give notice of intent to remove or has given ninety days' written notice to the artist or his heirs or representatives, the protections of the Act do not apply if the artist or his heirs or representatives fail to remove the work or pay for its removal.257 Unfortunately, the mode of service of the notice is not specifically provided in the Act, and it is not clear whether service should be perfected according to other provisions of the Civil Code or the Code of Civil Procedure which affect interests in real or personal property.258 The statute should have been explicit. To protect the artist even personal service or service by mail, return receipt requested,259 should have been mandatory.260

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257. Under subdivision (h)(2) of CAL. CIV. CODE § 987, if the artist or his successors remove the work or pay for removal, they may actually get title to it. In other words, the owner's “wish to remove” may amount to an abandonment. Perhaps this right to acquire title or possession should also be extended to the Arts Council should it be the only party willing to incur the expense of removal. See infra text accompanying notes 262-63 on proposed role for the Council.

258. Cf., e.g., CAL. CIV. CODE § 1861.18 (Deering 1981) (mode of service of papers for levy by innkeeper on boarder's property); CAL. CODE CIV. PROC. § 1162 (Deering 1972) (mode of service of three-day notice to quit leased premises).

259. Cf. CAL. CODE CIV. PROC. § 1020 (Deering 1973) (notices that may be given by registered mail).

260. One problem with the notice requirements of subdivision (h)(2) of CAL. CIV. CODE § 987 (Deering Supp. 1982) is that there is no indication as to which
Another ambiguity concerns the ninety-day period for written notice. This time period seems to apply only to cases in which notice is actually given. *Diligence* is not governed by this ninety-day requirement, and apparently two weeks of "diligence" could be enough according to the Act as it now stands. Subdivision (h)(2) probably should have mentioned the ninety-day period at the very beginning of the subdivision in order to affect directly the *diligence* required. In the alternative, the Act could have called for the exercise of *reasonable* diligence, in some sense following the law of larceny which imposes liability if the finder of lost property appropriates it when he has reasonable means to locate the owner and return the property.\(^{261}\)

There is another logical problem with subdivision (h)(2). If the owner wishes to remove a work of fine art and gives notice or diligently attempts to give notice, the rights under the Act are not enforceable if the artist does not remove the work or pay for removal within a certain time period. However—although the legislators did not intend this—as the Act reads, the owner can wish to remove, give his notice or attempt to give notice, wait out the ninety-day period, and then let the work remain with a free hand to alter it afterwards. The statute does not mention that there is a waiver only in the event of actual removal. To rectify this anomaly subdivision (h)(1) should have read in part:

The rights and duties created under this section shall apply except to harms resulting from removals after the owner has diligently attempted without success to notify the artist . . . or if he did provide notice . . .

One saving clause which could have been added to remedy the imperfections of subdivisions (h)(1) and (2) would require that in all instances notice regarding removal or other conduct which will affect the work should be given to the Arts Council.\(^{262}\) Thus,

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\(^{261}\) See R. *Perkins*, *Perkins on Criminal Law* 248-53 (2d ed. 1969) with regard to the law of larceny. This rule of larceny law is analogous because it also affects unattended or lost property, the owner of which cannot be discerned.

\(^{262}\) The Arts Council mentioned in the text was established under Cal. Gov't Code §§ 8750-56 (Deering Supp. 1982). The broad purpose of the Council is to promote the arts in California through education, financial support, technical assistance, and other means.
when the artist cannot be located by the owner, the Council could try to find the artist or could have the right to remove and retain the work, at the discretion of the Council. Even if the artist or his successors can be located but cannot afford to pay for removal, under a revised version of the Act the Arts Council could undertake removal on behalf of the artist or the people of the State. The early intervention of the Council could help settle controversies about whether the work can or cannot be removed without substantial harm and could prevent an arbitrary decision made by the owner. Furthermore, this role for the Council would follow the example of Civil Code section 986 which allows the Council to receive resale royalties on behalf of artists who cannot be located.\textsuperscript{263} Moreover, these proposed powers for the Council would effectuate the clause in the Act which proclaims the \textit{public interest} in preserving art.\textsuperscript{264} It makes no sense to tolerate destruction without giving the public, through the Arts Council, the right to take the work for a public collection or, if the artist claims it later on, to restore it to the artist with compensation by the artist for the costs of removal. Surely the cost of notice by the owner of the building to the Council would not be an exacting burden when compared to the potential loss.

The last subdivision on works in buildings, subdivision (h)(3), reads as follows:

\begin{quote}
Nothing in this subdivision [(h)] shall affect the rights of authorship created in subdivision (d) of this section.
\end{quote}

This provision was well-intended and necessary to insure that the waiver or extinction of the rights to integrity does not affect the rights of paternity. Apparently it was not inserted to affect the situations described by subdivision (h)(2) on removals which can be made without substantial harm (assuming that subdivision (h)(2) always posits actual removal). Rather, it was employed to remedy the situation where the rights of the artist expired because of no written reservation, as described in subdivision (h)(1). If the work is mutilated and the artist has no right of integrity, subdivision (h)(3) at least permits enforcement of paternity rights so that the artist can disclaim authorship for a "just and valid reason."\textsuperscript{265} The opposite right, the right to claim authorship, of course, may be meaningless once the rights of integrity have been lost. Few authors would want to claim authorship for a mutilated work. In fact, the alterations permitted as a result of

\begin{footnotes}
\textsuperscript{264} \textit{Cal. Civi. Code} § 987(a) (Deering Supp. 1982), which states that "there is also a public interest in preserving the integrity of cultural and artistic creations."
\textsuperscript{265} \textit{Id.} § 987(d).
\end{footnotes}
the waiver clause at subdivision (h)(1) destroy the right to claim authorship because this right depends on the right of integrity.

One other effect of the convoluted subdivision (h) is that the statute does not impose liability for removal alone, assuming that removal is achieved without injury to the work. Arguably, removal by itself is not tantamount to physical defacement, mutilation, alteration or destruction, although it may be contended that placing the work out of context is an alteration forbidden by the Act. In any case, an action against the owner based upon this type of alteration may be preempted by the public display right of the new Copyright Act. Furthermore, even if the removed work was abandoned by the owner, the owner would not be liable for damage resulting from natural causes or from acts of third parties because intention could not be proven, unless perhaps the owner knew with substantial certainty that the work would be damaged.

Duration of Protection

If the artist's work of fine art can traverse the gauntlet of landlords, commercial use exemptions, quality restrictions, and waivers, it may enjoy protection after the artist's death, so that every living artist in California should be amply satisfied. The term of protection, life plus fifty years, applies to each work whenever created. Obviously the term of life plus fifty years

266. See 17 U.S.C. § 106(5) (Supp. III 1979) (the copyright owner's exclusive right to display publicly) which may control because of the effect of the preemption clause, id. at § 301. The right to "display publicly" would entitle only the copyright owner to put the work on public display. The only exception to this rule occurs when the owner of the copyright and the owner of the physical aspect of the work are not one and the same person. See id. at § 109(b). In that case the owner of the physical aspect of the work may display publicly. In the moral rights cases the artist often must oppose the person who owns both the copyright and the object, and, therefore, the artist may find it difficult to counter the right of the owner to display in any manner chosen by the owner.
268. Id. § 987(h).
269. Id. § 987(b)(2).
270. Id.
271. Id. § 987(g)(3).
272. Id. § 987(g)(1). Subdivision (j) would otherwise allow for perpetual terms of protection because of the statement that the Act shall apply to proscribed conduct affecting "works of fine art whenever created." The provision on duration, subdivision (g)(1), would have been improved if it had incorporated some of the provisions of 17 U.S.C. § 302(a), (b) on duration of protection for joint, anonymous, and pseudonymous works. Also, presumptions regarding death, as provided by 17

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was not accidental. Such is the duration of copyright protection in the United States\(^{274}\) and many Berne Convention countries.\(^{275}\) Most importantly, it is the term which signifies rights which are economic in nature, that is, rights which protect the economic interests of the artist.\(^{276}\) In other words, despite the noble declaration that there is a “public interest in preserving the integrity of cultural and artistic creations,”\(^{277}\) the Act essentially caters to the interests of living artists and the property rights of the first few generations of heirs. It does not \textit{preserve} or protect antiquities or works of masters who, at the time of this writing, died before 1932.\(^{278}\) Perhaps those who drafted the statute were relying on other state laws to permanently shield older works of art. Regrettably, Penal Code section 622 and similar criminal statutes which penalize the destruction of works of art,\(^{279}\) even when coupled with property laws which provide remedies for destruction,\(^{280}\) are not adequate. The overriding immunity to the reach of these laws is conferred by private ownership. The owner of a masterpiece may do as he pleases with the work, and there is no redress even if the work has great historical value.

The choice of the “economic” term of protection for moral rights must have important consequences in the same fashion that the apparent choice of the French theory of resale royalties\(^{281}\) gave

\(^{273}\) U.S.C. § 302(e), could have been included in the Act so that users of the work would have some idea about when the heir's moral rights expired.

\(^{274}\) CAL. CIV. CODE § 987(g)(1) (Deering Supp. 1982).


\(^{276}\) Berne Convention, \textit{supra} note 59, at art. 7(1).

\(^{277}\) Cf. Diamond, \textit{supra} note 60, at 247 (on the dichotomy of pecuniary and moral rights); dissenting opinion of Bird, C.J., in Lugosi v. Universal Pictures, 25 Cal. 3d 813, 846-47, 603 P.2d 425, 441-42, 160 Cal. Rptr. 323, 344-45 (1979). The “economic” term of protection not only rewards the artist during his lifetime but also represents a return for the artist's estate for his past labors and perhaps for the contributions and support of the heirs to his career.

\(^{278}\) CAL. CIV. CODE § 987(a) (Deering Supp. 1982).

\(^{279}\) See \textit{supra} note 272 with regard to subdivision (j) of the Act.

\(^{279}\) \textit{E.g.}, CAL. PENAL CODE § 622 (Deering 1971) prohibits the destruction of works of art in public or private places; CAL. EDUC. CODE § 19910 (Deering 1978) prohibits vandalism of artistic and literary works in galleries, museums, libraries and other public facilities.

\(^{280}\) \textit{E.g.}, CAL. CIV. CODE § 3336 (Deering 1972) on remedies for conversion.

\(^{281}\) The legislature, in effect, opted for the French theory of the \textit{droit de suite} which regards the “royalty” as a tax on consumption of the resold work. Thus, CAL. CIV. CODE § 986 imposes a 5% royalty on gross sales proceeds which may result in many inequities, especially if resale prices are only slightly higher than original purchase prices. For example, if the original sales price for a work is $999 and the work is resold for $1,000, the payment of the $50 royalty results in a loss for the first purchaser. In contrast, the German theory of the \textit{droit de suite}, embodied in the Italian statute (Law of 22 April 1941, No. 633) and typically “Idealistic,” is based upon the notion that when the work is first sold by the artist the inherent or intrinsic value is not fully recognized, therefore, the artist should be rewarded later on when the true value of the work, beyond the pittance for which
direction to the California droit de suite. Possibly the choice was dictated by the prevailing importance of the rights of private owners and public users. To have chosen a perpetual term for moral rights and, thus, to construe them as non-economic rights of personality or as property rights deserving of lengthier protection than that of copyright, would have presented quandaries with regard to enforcement. It also would have represented a serious interference with the property rights of owners and a disturbing restriction for public users. Unlike other nations such as the United Kingdom, the United States does not even have export statutes which place restrictions on the exportation of national art treasures, the type of statutes which have been assailed abroad because of their encroachment on private interests. The California Legislature was willing to confront owners with the needs and interests of living artists and the first or second generation of heirs yet, would go no further to allow the people of the state or the remote descendants of the artist to stand vigil at the owner's hearth and guard old works of art. The state would superintend the bellum omnium contra omnes but would not make art res publica.

Besides the argument for the rights of private owners the interests of public users must also be considered. Do not perpetual rights seem absurd in light of contemporary conditions in the world of art and commerce? As Justice Mosk wrote in his concurring opinion in Lugosi v. Universal Pictures, a case involving pub-

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283. E.g., advertisers, commercial exploiters, and other persons addressed by CAL. CIV. CODE § 3344 who use artistic works to make reproductions and to prepare derivative works such as toys and greeting cards.
284. E.g., Import, Export and Customs Powers (Defence) Act 1939, 2 & 3 Geo. 6, ch. 69 places restrictions on exportation of works of art. For other legislation on protection of cultural property, see Niec, Legislative Models of Protection of Cultural Property, 27 HASTINGS L.J. 1089 (1976).
285. See L. DuBoff, supra note 52, at 75.
licit) rights and the interests of the heirs of Bela Lugosi in his portrayal of the Dracula character:

May the descendants of George Washington sue the Secretary of the Treasury for placing his likeness on the dollar bill? May the descendants of Abraham Lincoln obtain damages for the commercial exploitation of his name and likeness by the Lincoln National Life Insurance Company or the Lincoln Division of the Ford Motor Company? May the descendants of James and Dolly Madison recover for the commercialization of Dolly Madison confections?286

At the other extreme, to consider moral rights only as the personal rights of the artist, akin to the right to privacy, and to let them expire upon the death of the artist,287 would bitterly disappoint artists and their living heirs who would have desired at least a short term of posthumous protection. Obviously a balance had to be struck between perpetual and lifetime rights. Thus, the term of copyright protection was chosen for moral rights, in the same way that the dissenters asked for "life plus fifty years" for the heirs of Lugosi.288

There were, of course, other choices, and differentiations could have been made between prospective plaintiffs and defendants, and between the rights in question. For example, a perpetual term could subsist against all non-owners while a limited term remained against owners. After all, perpetual terms of protection with enforcement by the heirs are not unknown to the law of intellectual property. Common law copyright extended for a term which was potentially perpetual,289 and trademark protection may extend indefinitely.290 With regard to plaintiffs, the heirs as plaintiffs could be restricted to the posthumous fifty-year period because their interests thereafter may be outweighed by those of owners and users.291 On the other hand, if the rights were granted to the state, enforcement by public officials could extend perpetually.

The most noteworthy differentiations could be made based on

287. Other "personal" rights expire upon death; e.g., the right to privacy does not apply to the deceased. See W. Prosser, supra note 47, at 815. Neither does the law of defamation apply to dead persons. Id. at 745.
290. See 1 M. Nimmer, supra note 7, at § 9.01[B]. Common law copyright, for the most part, was abolished by the preemption clause of the new Copyright Act, 17 U.S.C. § 301 (Supp. III 1979).
291. As the numbers of heirs multiply and as they grow more remote from their ancestor, their individual interests in the work decrease.
the rights at issue. Undoubtedly, the right of anonymity need not be perpetual and probably should expire at the end of the economic term when the second or third generation of heirs may not be concerned with the attribution of the work to their ancestor. However, the affirmative right to credit need not expire, nor should the right to prevent physical mutilation or destruction. In other words, although it may be important to make Shakespeare's name and likeness and copies of his works freely available by terminating publicity rights and copyright, there is no overriding concern to deprive Shakespeare of credit for his works (notwithstanding the claims of Bacon's disciples) nor to permit destruction of extant manuscripts.

Moral rights may be categorized in terms of societal rights for the public at large and privacy and publicity rights for the individual artist. The individual's rights are Janus-faced in the sense that the privacy and publicity rights (or personal and property rights) are two sides of the same coin. In essence, publicity rights (i.e., property rights as distinguished from personal rights) are economic rights which are bestowed on the artist so that he may derive income from his labors. The privacy rights (i.e., personal rights) protect the artist's feelings and solitude. These two classes of rights and the societal rights are inextricably woven into the fabric of the droit moral. The right to anonymity, for example, is primarily a non-economic right of privacy which shields the artist from unpleasant incidents resulting from the association of his name with a particular work; but it is also economic in nature insofar as the right may have a fair market value. The rights to receive credit and restrain false attribution are primarily

292. As Professor DuBoff points out, the rights passing to the heirs in France are only "negative" in nature. Although the heirs may enforce restrictions and negative rights, the positive components of the droit moral do not survive. L. DuBoff, supra note 52, at 806. This is one possible differentiation which could affect the terms of the rights. See also Strauss, supra note 192, at 517-18:

According to most writers, not all components of the moral right pass to the author's heirs: the "positive" components die with the author; only the "negative" ones pass to the heirs. The right to create a work, to publish it, to change it, to withdraw it from circulation, and to destroy it, are said to be innate positive components. On the other hand, the right to prevent others from making changes or from committing acts detrimental to the author's reputation are considered negative components that require no personal act by the author and may, therefore, be transmitted to his heirs.

economic rights of publicity; they are also non-economic personal rights or rights of privacy to the extent that the artist's public expressions are associated with him and he may be placed in a false light if credited with the works of another.

Moral rights were originally developed in a society without the extraordinary means of communication and mass-replication which prevail today. They were recognized by nineteenth-century continental jurisprudence as rights of the author's personality. But more recently, these rights have been looked upon not only as personal rights associated with the right to privacy but as property rights or publicity rights. As Professor Nimmer said in discussing the right to publicity:

Without in any way implying the right of privacy is less important today than when first suggested by Brandeis and Warren [in their pioneering article which first declared the right of privacy] it is suggested that the doctrine, first developed to protect the sensibilities of nineteenth century Brahmin Boston, is not adequate to meet the demands of the second half of the twentieth century, particularly with respect to the advertising, motion picture, television and radio industries.

To the extent that moral rights are property or economic rights of the artist created as rewards for his labor, they should be protected, at least during the life of the artist and for a limited time thereafter. The economic term, therefore, arguably should apply to the right to credit, the rights of integrity and disclosure, and perhaps to the right to use a pseudonym. As personal rights or rights to privacy, the droit moral should perish simultaneously with the artist, and the heirs should have no right to enforce anonymity. As societal rights, moral rights may be perpetual, and one may contend that the state should have the right to restrain mutilation, destruction, and false attribution of artistic works. Is it really unusual to contemplate perpetual public rights in the work of art? Are not laws protecting historic monuments and buildings becoming more prevalent? Do not other nations

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294. See Roeder, supra note 36, at 555-56.
297. A number of countries, including West Germany and the Netherlands, recognize moral rights only for the duration of the copyright term. See Diamond, supra note 66, at 249 n.31.
298. "Perpetual" protection already exists to some extent. See Cal. Penal Code § 622 (Deering 1971) and Cal. Educ. Code § 19910 (Deering 1978), which provide criminal sanctions for destroying works of art; see also Cal. Civ. Code § 1770 (Deering 1981), which prohibits deceptive commercial practices such as "passing off," disparagement, and misrepresentation of source, sponsorship, approval, connection or association.
place restraints on the exportation of art?300 Once the socialization of art is acknowledged, and export restrictions and other public rights accepted, the only problem is one of enforcement.

Perhaps the legislature would have advanced too far under the circumstances had it endorsed perpetual rights enforceable by the state without the consent of the heirs. One reason is that state intervention could hamper the heirs’ ability to exploit the works of their ancestors. For instance, after the death of the famous sculptor David Smith, the executor of his estate, Clement Greenberg, believed that Smith’s sculptures which were not decorated with paint would fetch higher prices. If the State of New York had intervened against Greenberg to prevent him from removing the paint from Smith’s sculptures, the heirs would have had to remain content with lower sales prices.301 One way to balance public rights with the rights of the heirs would have been to allow the state to enforce perpetual rights only with the consent of the heirs or only to the extent that they did not conflict with the economic interests of the heirs.302 Another solution would have been to permit the interests of the heirs to expire at the end of the *economic* term with state enforcement persisting thereafter. With this latter arrangement state actions during the heirs’ term might be brought with the consent of the heirs or, alternatively, if after due notice of intent to bring suit there was no objection from the heirs.303 A further choice, although somewhat impractical, would be to leave the perpetual rights to the heirs alone. Naturally, in this case if the heirs simply did not exist or were unwilling or unable to initiate legal proceedings, the moral rights would be unenforceable. Also, should the heirs become more numerous with succeeding generations, the perpetual rights may not be enforceable because of conflicts among the heirs.

The perpetual state interest has the major advantage of protect-
ing works of great cultural importance which have inestimable value to the people of the state. Many important works of art have been lost forever because of the careless or malicious behavior of persons who destroyed masterpieces. It is amusing to recollect that some of Shakespeare’s tragedies were given happy endings during the eighteenth century and that during the early nineteenth century Beethoven’s music was performed with the discordant sections removed. Some contemporaries, however, were shocked when Cordelia lived at the end of Lear and when Beethoven symphonies were edited so that they would sound more like eighteenth-century works. One only has to recollect the cries of anguish of Berlioz, upon hearing the altered Beethoven symphonies, to comprehend what the damaged work must have been like—and would be like today—had the alterations been allowed to remain.

Further Suggestions for Amendments

When the first draftsman began his sketch of the California Art Preservation Act he did not sit before a tabula rasa. Facing him were statute books replete with other laws on art, particularly California laws. Many of the weaknesses of the Act could have been avoided had the Act been integrated with other laws on art, and a consistent body of “art law” could have been developed in California. The following are some minor suggestions for coordinating the Act with other statutory schemes.

One way of solving some of the problems of the Act, including the problems of recordation and proof of recognized quality, would be to have a system of registration for all protectible works. Moral rights, copyright, and the right to resale royalties may be said to overlap or to be species of the same genus, and registration for copyright would assist with the enforcement of the other rights. A simple way to proceed without expense to the State would be to require that each work be registered with the United States Copyright Office along with the requisite deposits. In addition, recordation of agreements affecting moral rights (e.g., regarding waivers) could be made with the Copyright Office (if the agreements are otherwise recordable there), although the in-

304. E.g., CAL. CIV. CODE §§ 980-86 (Deering Cal. Civ. Prac. Codes 1981) (on intellectual properties and the droit de suite); id. at §§ 1738-38.9 (on artist-dealer relationships); id. at §§ 1740-45 (on fine prints); CAL. GOV’T CODE §§ 8750-56 (Deering Supp. 1980) (on the Arts Council); id. at §§ 15813-13.7 (on art in public buildings).

instrument required by subdivision (h)(1), which relates to works in buildings, would have to be recorded with the local county recorder. If such requirements were too onerous, at least an optional copyright registration could create a presumption of authorship and recognized quality, thus shifting the burden of proof to the defendant to impugn authorship or quality.

Registration would help not only with the problems of authorship and recognized quality but also with the issues of alteration and mutilation. If photographs of the work in a pristine state were already on file with the Library of Congress after registration, the artist would have less difficulty establishing mutilation or alteration. Furthermore, potential defendants would be insulated from false claims. For similar reasons, copyright registration may also have advantages in relation to the collection of resale royalties. In fact, should works of art become subject to controls similar to those imposed on firearms and automobiles so that provenance can always be traced—rather a dreadful possibility—it would seem logical for the Library of Congress to become the repository for all submitted documents. Although one judge said that selling a work of art is not like selling a barrel of pork, the growing commercialization of the art world and the integration of laws on intellectual property make it foreseeable that art may soon be subjected to controls similar to those affecting other valuable commodities.

As mentioned above, there are numerous other ways in which copyright laws could have influenced the Act. For example, lost copyright royalties could be considered in calculating damages;

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307. CAL. CIV. CODE § 987(b)(2), (f) (Deering Supp. 1982). The Copyright Act, 17 U.S.C. § 410(c) (Supp. III 1979), provides that the certificate of registration is prima facie evidence of the validity of the copyright and the facts stated in the certificate, e.g., facts concerning authorship, ownership, and publication.

308. There would obviously be a problem with the suggested copyright registration if the artist could not register his claim to copyright with the Copyright Office. For example, this could occur if the artist had already transferred copyright according to 17 U.S.C. § 204 or if the copyright were lost as a result of foreclosure on a copyright mortgage.


310. There are already a number of quasi-public registries for art, many of which use advanced scientific and computerized methods. See L. DuBoff, supra note 52, at 470-75. Some of these registries, of course, were established to provide information about provenance, fakes, and forgeries.
statutory damages could be awarded to the artist who cannot demonstrate actual damages; and the concepts of joint work, work made for hire, and pictorial, graphic, and sculptural works could be used in the Act. Not only could the California droit moral be tied to copyright, but it could be made consistent and integrated with other art laws. For instance, because paternity rights should not depend upon the number of copies, the laws on fine prints could be modified to require that fine prints not be sold or offered for sale without proper credits. Should paternity rights apply to fine prints, the artist could be prohibited from bringing actions against owners where he did not comply with Civil Code sections 1740-44, which prescribe disclosures in the offer and sale of fine prints. Also there is no reason for not extending the rights of integrity to the plates from which fine prints originate. Even though a plate may not always appear to be a work of fine art its loss or mutilation may be calamitous because without an undamaged plate there can be no more saleable prints.

The Act could be integrated with Civil Code section 986 on resale royalties. For instance, those owners who neglect to pay royalties could be deemed to have made unauthorized sales and would remain responsible for the moral rights violations perpetrated by their transferees. Additionally, lost resale royalties could be a factor in calculating damages under the Act where the resale value of the work is reduced because of mutilation, alteration, or destruction. Conversely, violations of moral rights which resulted in lower sales prices could be compensated for by higher royalties. Thus, the seller who alters or mutilates the work by selling only a part of it, as for example in the case of Bernard Buffet, could be liable for royalties assessed on the fair market value of the whole work. Perhaps even a statute on resales could direct that all works be sold intact with proper credits.

Another suggestion is that moral rights could be integrated with Civil Code sections 1738-38.9 which regulate the relationships between artists and dealers. These sections of the Civil Code define the consignor-consignee relationship, allocate the risks of loss or damage to the work, and impose certain obligations on the

312. Some of the disclosures required concern the name of the artist, the year of printing the edition of fine prints, the number of editions, the number of prints in each edition, and the preservation or destruction of the plates.
313. See supra note 99; Merryman, supra note 66, at 1023.
315. Id. § 1738.6(c).
dealer with regard to sales proceeds.316 Gallery owners are already strictly liable for the loss or damage to works held on consignment even without the Act,317 and this rule could have been mentioned in the Act in conjunction with the rule regarding framers, conservers, and restorers.318 Where the dealer purchases the work for resale, possibly the standard of gross negligence should apply. The dealer, after all, has at least the same professional status in relation to the art as that of framers and restorers. In no event should a work be sold by a dealer without preserving the artist's paternity rights including the rights to credit and pseudonymity; thus, the dealer should not disclose the artist's true name or deprive the artist of credit against the artist's wishes. The dealer is the confidant of the artist and should remain so even if loyalty means lower sales prices.

Finally, the artist's rights in relation to works in buildings should be maintained against all non-owners even if there has been a failure to record in keeping with subdivision (h)(1) of the Act. Under the California Government Code319 there is already more complete protection of moral rights for works installed in public buildings, but this protection should be extended to art in privately owned buildings by preserving works of art as objects of historic or artistic interest under statutes protecting historic and artistic monuments and buildings.320 In this fashion both the artist and the government could be eligible plaintiffs. The governmental action could be one at criminal law or, in the case of a civil suit, would more likely be an action to protect a work certified to have historic or artistic interest.

The integration of the droit moral with other laws affecting art should not be a cumbersome task, especially in jurisdictions

316. Id. §§ 1738.6(d), 1738.7.
317. Id. § 1738.6(c) which reads: "The consignee [i.e., the dealer] shall be responsible for the loss of, or damage to, the work of fine art."
318. CAL. CIV. CODE § 987(c) (2) (Deering Supp. 1982).
319. CAL. GOV'T CODE § 15813.3(e) (Deering Supp. 1981) imposes a duty on the State Architect to ensure that works acquired for state buildings be properly maintained and free from alterations unless permitted by the artist. The same Code, id. § 15813.5, provides that works acquired for use in public buildings be subject to the artist's right to claim authorship, right to reproduce the work, and limited right to a resale royalty.
which have not committed themselves haphazardly to specific
types of art-related legislation, as has California. The integrated
legislation could be known as “artists’ protection acts” in the
same manner that performers in Britain rely on Performers’ Pro-
tection Acts.321 To the extent that the separate statutes could be
coordinated with each other, each of the statutory schemes would
be more viable. As the California statutes now stand, they are
like drunken men coming out of a pub; unless they put their arms
around each others’ shoulders for support, they will all fall down
as each goes his own way.

Insofar as certain statutes could be incorporated into larger
statutory schemes, the algorithm exemplified by the new Copy-
right Act could be followed. The legislators would then have to
consider separately: (1) the types of artists and works to be pro-
tected;322 (2) the different moral rights involved;323 (3) the owner-
ship of the rights;324 (4) the duration of each of the rights;325
(5) the system of registration or recordation necessary for en-
forcement;326 (6) the remedies for violation of each of the
rights;327 (7) the temporal328 and geographic329 effect of the legis-
lation; and (8) the intersection with other laws.330 The most im-
portant considerations for drafting integrated legislation on moral
rights would be the differences among the rights (e.g., which af-
fect duration, remedies, and enforcement) and the intersections
with other laws.

CONCLUSION

This critique of the California Art Preservation Act has illus-
trated some of the problems besetting legislators who draft laws
relating to art. What mars this legislation is the failure to grant
the full spectrum of moral rights recognized in other countries.

321. Performers' Protection Act 1972, ch. 32; Performers' Protection Act 1963, ch.
These Acts provide a limited measure of protection for performing artists by
preventing the commercial exploitation or reproduction of their performances
without their consent.
323. Id. § 106 (constituent rights of copyright; exclusive rights of copyright
proprietor).
324. Id. §§ 201-05 (ownership and transfer of copyright).
325. Id. §§ 301-05 (duration of copyright).
326. Id. §§ 407-12 (copyright registration, deposits).
327. Id. §§ 501-06, 508-10 (remedies for copyright infringement).
328. Id. §§ 301, 507 (effect of new Copyright Act and limitations on actions for
copyright infringement).
329. Id. §§ 104, 601-03 (copyright protection with regard to author's nationality
or domicile, importation of works made abroad).
330. Id. § 101 (utilitarian works and the relationship of copyright law to the law
of patents); see also note 177 supra.
For instance, the Act does not adequately reflect the importance of paternity rights because the rights to use a pseudonym, remain anonymous, and restrain false attribution are not completely enforceable. More importantly, the Act reveals an inability to come to grips with the realities of the world of art and commerce. The legislators, once they devised their plans, neglected to make their decrees effective and, for that matter, worthwhile. The clauses which mention *recognized quality, intentionally commit, properly recorded, and commercial use* are unworkable. Moreover, the use of the words *reasonable* or *timely* at certain sections would have prevented future controversies by setting up objective standards rather than leaving it to the courts to infer such standards.

In addition to their failure to observe the workings of the real world, the legislators may not have given sufficient consideration to the theoretical problems surrounding moral rights. The Act, which seemingly looks upon the *droit moral* as a conglomeration of economic and personal rights, fails for that reason to grant public rights in worlds of art and renders moral rights alienable and limited in duration. In such new areas of the law the legislator must not only have legs long enough to reach the ground but every so often must assume the air of the metaphysician. Furthermore, somewhere between theory and practice, in the realm of legal discourse, the legislators behaved as if they were working in a vacuum. The new Act could have been interrelated with all of the other legislation on the arts so that art law in California would evolve as a cohesive body of law with consistent theory and practice. In this regard a cursory reading of the Copyright Revision Act of 1976 would have disclosed many points of cross-reference, and many terms and concepts could have been borrowed from the law of copyright so that the Act would have complemented the copyright laws.

Despite these criticisms, the California Art Preservation Act represents the first major step taken in the United States to join the community of nations which already recognize the moral rights of artists and other creators. If the Act merely provides

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the impetus for national legislation on moral rights it will have served a worthwhile purpose, even though it may never preserve art in California.

APPENDIX

CALIFORNIA ART PRESERVATION ACT

(a) The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against such alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.

(b) As used in this section:

(1) 'Artist' means the individual or individuals who create a work of fine art.

(2) 'Fine art' means an original painting, sculpture, or drawing of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser.

(3) 'Person' means an individual, partnership, corporation, association or other group, however organized.

(4) 'Frame' means to prepare, or cause to be prepared, a work of fine art for display in a manner customarily considered to be appropriate for a work of fine art in the particular medium.

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

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

(c) (1) No person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission

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332. A recent attempt to legislate moral rights was the bill by Representative Drinan of Massachusetts, a bill to amend the Copyright Revision Act of 1976 entitled the "Visual Artists Moral Rights Amendment," H.R. 8261, 95th Cong., 1st Sess. (1977).
of, any physical defacement, mutilation, alteration, or de-
stuction of a work of fine art.

(2) In addition to the prohibitions contained in paragraph (1), no person who frames, conserves, or restores a work of fine art shall commit, or authorize the commission of, any physical defacement, mutilation, alteration, or de-
stuction of a work of fine art by any act constituting gross negligence. For purposes of this section, the term ‘gross negligence’ shall mean the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art.

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

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

(1) Injunctive relief.

(2) Actual damages.

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

(4) Reasonable attorneys’ and expert witness fees.

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

(f) 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.

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

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

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

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

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

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

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

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

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

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