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### Recommended Citation

Sarah Ann Smith, *New York Artists' Authorship Rights Act Increased Protection and Enhanced Status for Visual Artists*, 70 Cornell L. Rev. 158 (1984)

Available at: <http://scholarship.law.cornell.edu/clr/vol70/iss1/7>

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# THE NEW YORK ARTISTS' AUTHORSHIP RIGHTS ACT: INCREASED PROTECTION AND ENHANCED STATUS FOR VISUAL ARTISTS

"In this mechanical century, surely is not art sometimes the miracle?"

—Georges Roualt\*

## INTRODUCTION

An artist's enduring interest in her work enjoys recognition and protection in Europe under the doctrine of *droit moral*.<sup>1</sup> Translated literally as "moral right," *droit moral* encompasses a collection of prerogatives that preserve the integrity of a creative work and the personality rights<sup>2</sup> of its creator. The seventy-four member countries of the International Union for the Protection of Literary and Artistic Works<sup>3</sup> (the "Berne Convention") subscribe to this doctrine. Conspicuously absent from this

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\* Roualt, *The Painter's Rights In His Work*, reprinted in F. FELDMAN & S. WEIL, ART WORKS: LAW, POLICY, PRACTICE 7 (1974).

<sup>1</sup> For excellent discussion of the historical origins and jurisprudential development of the *droit moral*, see DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 COPYRIGHT SOC'Y BULL. 1 (1980); Katz, *The Doctrine of Moral Right and American Copyright Law—A Proposal*, 24 S. CAL. L. REV. 375 (1951); Roeder, *The Doctrine of Moral Right: A Study of the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940); Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968); Tournier, *The French Law of March 11, 1957 on Literary and Artistic Property*, 6 COPYRIGHT SOC'Y BULL. 1 (1958).

*Droit moral* is codified in France as Law of March 11, 1957, 1957 Journal Officiel de la République Française [J.O.] 2723, 4143; 1957 Recueil Dalloz [D.L.] 102, 166 [hereinafter cited as French Law of Mar. 11, 1957], in West Germany as Law of Sept. 13, 1965, Bundesgesetzblatt [BGBl] 1273 [hereinafter cited as German Law of Sept. 13, 1965], and in Italy as Law of April 22, 1941, No. 633, Gazzetta Ufficiale della Repubblica Italiana [Gaz. Uff.], as amended by Law of Aug. 23, 1946, No. 92 and Law of Jan. 8, 1979, No. 19. Translations of these statutes appear in UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1980).

<sup>2</sup> The majority of civil law doctrines classify *droit moral* as a right of personality rather than as a property right. Thus, like the right to one's identity, name, and privacy, *droit moral* recognizes and protects an aspect of the artist's personality, not a pecuniary interest in an artwork. See Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1025 (1976) (distinguishing property right of copyright law from personality right embodied in *droit moral*).

<sup>3</sup> The International Union for the Protection of Literary and Artistic Works [hereinafter cited as Berne Convention], was originally signed in 1886 in Berne, Switzerland. It was subsequently revised in 1908 (Berlin), 1928 (Rome), 1948 (Brussels), 1967 (Stockholm) (but not ratified by a sufficient number of member states to bring the Stockholm Act into force), and 1971 (Paris). Article 6bis of the Paris text provides in part:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

group is the United States.<sup>4</sup>

Federal law does not recognize any equivalent of *droit moral*;<sup>5</sup> all attempts to enact federal legislation establishing *droit moral* have been unsuccessful.<sup>6</sup> Increased awareness<sup>7</sup> of the need for such legislation, however, has prompted state action. In 1983 the New York legislature passed the Artists' Authorship Rights Act,<sup>8</sup> becoming the second state to

Reprinted in 4 M. NIMMER, NIMMER ON COPYRIGHT app. 27 (1983). As of Jan. 1, 1983, 74 countries had ratified the Berne Convention. *Id.* app. 22.

<sup>4</sup> The other notable exception is the Soviet Union.

<sup>5</sup> Merryman, *supra* note 2, at 1035-36 ("[T]he moral right of the artist . . . simply does not exist in our law."); see also Geisel v. Poynter Prods., Inc., 295 F. Supp. 331, 340 n.5 (S.D.N.Y. 1968) ("[T]he doctrine of moral right is not part of the law in the United States except insofar as parts of that doctrine exist in our law as specific rights—such as copyright, libel, privacy and unfair competition." (citations omitted)).

<sup>6</sup> Such efforts date back to 1940 when Sen. Elbert Thomas of Utah introduced a bill to consolidate the copyright laws. S. 3043, 76th Cong., 3d Sess. (1940). Section 5 of the proposed legislation, popularly called the Shotwell Bill, provided that:

(1) Nothing in this Act, nor any election to have copyright under this Act, shall be deemed to alter or in any manner impair any legal or equitable right or remedy of an author under common law or statutory law other than this act, to claim the paternity of his work as well as the right to object to every deformation, mutilation, or other modification of the said work which may be prejudicial to his honor or to his reputation.

(2) Nothing in this Act shall be deemed to limit or otherwise affect any present or future valid contract or waiver in respect to the subject matter of subdivision (1) of this section.

Little is known of the bill's legislative history, however, because no printed records of any report or hearing on the bill are known to exist. Katz, *supra* note 1, at 419-20 & nn.229-32.

A moral rights amendment to the Copyright Act has been proposed in each Congress since 1977, initially by Rep. Robert Drinan, and subsequently by his successor Rep. Barney Frank. The most recent version of the proposal provides in part:

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

Visual Artists Moral Rights Amendment of 1983, H.R. 1521, 98th Cong., 1st Sess., 129 CONG. REC. H578 (daily ed. Feb. 17, 1983). Each bill has died in the House Judiciary Committee. A legislative aide to Rep. Frank attributes this inaction to the absence of a mobilized constituency to lobby for passage. Telephone interview with legislative aid to Rep. Frank (Oct. 6, 1983).

<sup>7</sup> This increased awareness is attributable to at least two factors—the substantial body of commentary on moral rights generated within the last decade and the relatively recent ascendancy of American art. In 1951 one writer explained that:

[T]he doctrine of moral rights has fared badly in America, not because of any of the doctrine's weaknesses, or because it is basically repugnant to American law, but rather because it has *not* received the serious intellectual examination by either bench, bar, legislature or law school, to which it has been entitled.

Katz, *supra* note 1, at 420 (emphasis in original). Furthermore, it is only within the last quarter century that American art has achieved international recognition, and "[l]egal change usually lags behind social and cultural change." Merryman, *supra* note 2, at 1042.

<sup>8</sup> Artists' Authorship Rights Act, ch. 994, 1983 N.Y. Laws 1933 (codified at N.Y. ARTS & CULTURAL AFF. LAW § 314.51-59 (McKinney 1984)).

establish a version of *droit moral*.<sup>9</sup> Similar measures have been introduced in several other states.<sup>10</sup>

The New York Artists' Authorship Rights Act gives artists exhibiting work within the state the legal right to claim or disclaim authorship of a work of art<sup>11</sup> and to object to the display of their work if it has been altered, defaced, mutilated, or modified without their consent.<sup>12</sup>

This Note reviews the doctrine of *droit moral* and describes the inadequacies of its common law analogues. The Note then analyzes the New York Artists' Authorship Rights Act, focusing on the purpose, parameters, and problems of the legislation. In creating a new legal right, the drafters sought to balance *droit moral* with the countervailing principles of private ownership. Thus, the New York Act conservatively approximates its European statutory counterparts.<sup>13</sup> Comparisons with select provisions of the California Art Preservation Act<sup>14</sup> illustrate an alternative method of adapting *droit moral* to domestic law.

Finally, the Note proposes amendments to the New York Act which, while respecting ownership rights, would more fully protect the lasting interests of both the artist and society in the integrity of a work of art.

#### A. The Doctrine of *Droit Moral*

*Droit moral* is a right of personality,<sup>15</sup> independent of property rights and economic interests. The right is predicated on the conviction that a

<sup>9</sup> In 1979 California enacted the California Art Preservation Act. 1979 Cal. Stat. 1501 (codified as amended at CAL. CIV. CODE § 987 (West 1982 & Supp. 1984).

In 1983, the Maine legislature passed a resolution authorizing the preparation of a form contract, to be available to all artists selling their work in Maine, which stipulates that the owner will not "physically deface, mutilate or destroy the work of art without permission of the artist or the heir of the artist." 1983 Me. Acts 40. Although this resolution does not recognize moral rights independent of contract rights, it is a positive step in that direction. In fact, Rep. Meryl Nelson, the sponsor of the resolution, has introduced moral rights legislation in Maine for the past four years. In the next legislative session, Rep. Nelson plans to reintroduce a bill on moral rights similar to the New York Act. Telephone Interview with Meryl Nelson, Maine State Representative (Oct. 6, 1983).

<sup>10</sup> Connecticut, Committee Bill No. 6228 (1983); Iowa H. No. 340 (1979); Massachusetts, H. Nos. 1079, 5316 (1981), H. No. 4314 (1982), H. No. 2021 (received initial approval in the House, June 1983); Oregon, S. 355 (1979); Tennessee, S. 520 (1979); Texas, Health Bill No. 422 (1983). Although these measures and similar legislation in Washington have failed to win approval, several state legislatures will reconsider the bills in their next legislative sessions.

<sup>11</sup> N.Y. ARTS & CULTURAL AFF. LAW § 14.55 (McKinney 1984).

<sup>12</sup> *Id.* § 14.53.

<sup>13</sup> See *supra* note 1. The French codification of *droit moral* will be the basis for comparison in this Note because *droit moral* has attained its fullest jurisprudential articulation in France, the country of its origin. Even in France, however, the doctrine is relatively young, and "has not reached anything like its full development." Merryman, *supra* note 2, at 1026.

<sup>14</sup> See *infra* text accompanying notes 83, 98-100, 118, 136 & 148.

<sup>15</sup> See *supra* note 2.

work of art is more than a tangible commodity.<sup>16</sup> Art embodies the private vision of its creator. Picasso once remarked, "[t]he oeuvre one creates is a form of diary."<sup>17</sup> Just as certain aspects of personality are safeguarded by the Constitution<sup>18</sup> and state privacy statutes,<sup>19</sup> artwork, as a manifestation of personality, merits protection from exploitation against unauthorized treatment.<sup>20</sup>

Closely aligned with this premise is respect for the inherent worth and integrity of the work itself. Preservation is important because art isolates, abstracts, and reflects a society's identity, values, turmoils, and truths. Art enhances the cultural environment and endures as an important historical record for future generations.<sup>21</sup> The significance of cultural preservation was aptly expressed in the 1954 Hagne Convention: "Damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each person makes its contribution to the culture of the world."<sup>22</sup> These interrelated concerns—protecting the artist's personality rights, preserving the integrity of artworks, and advancing society's interest in art preservation—have promoted the growth of artists' rights.

*Droit moral* traditionally consists of four components:<sup>23</sup> the right of

<sup>16</sup> Cf. *Clemens v. Press Publishing Co.*, 67 Misc. 183, 183, 122 N.Y.S. 206, 207 (Sup. Ct. 1910) ("Even the matter-of-fact attitude of the law does not require us to consider the sale of the rights to a literary production in the same way that we would consider the sale of a barrel of pork. . . . [A purchaser] cannot make as free use of them as he could of the pork which he purchased.").

<sup>17</sup> D. ASHTON, *PICASSO ON ART: A SELECTION OF VIEWS* 45 (1972) (quoting P. Picasso).

<sup>18</sup> A constitutional right to privacy was recognized in *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

<sup>19</sup> See N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 1983-84) (action for injunction and damages to any person whose "name, portrait or picture is used within [the] state" for purposes of advertising or trade without written consent).

<sup>20</sup> The protection accorded individuals requires periodic redefinition: "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society." Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 192, 192 (1890).

<sup>21</sup> Professor of Art History Albert Elsen has written that art preservation is "essential to knowledge and wisdom," and that a cultural heritage is "a country's identity card for the present and passport to the future." Elsen, *Why Do We Care About Art?*, 27 HASTINGS L.J. 951, 952 (1976).

Another reason to protect works of art is that:

Paintings and sculptures . . . are the last handmade, personal objects within our culture. Almost everything else is produced industrially, in mass, and through a high division of labor. Few people are fortunate enough to make something that represents themselves, that issues entirely from their hands and mind, and to which they can affix their names.

Schapiro, *The Liberating Quality of Avant-Garde Art*, ART NEWS, Summer 1957, at 36, 38.

<sup>22</sup> Reprinted in Elsen, *supra* note 21, at 953. Since the early 1900s "all 50 states and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 107 (1978).

<sup>23</sup> In addition to the four rights enumerated in the text, some writers also include the

paternity,<sup>24</sup> which is essentially the right to claim or disclaim authorship of a particular work of art; the right of integrity,<sup>25</sup> which protects a work from alteration or defacement; the right of divulgation,<sup>26</sup> which grants the author the exclusive privilege of deciding when a work is ready to be released to the public; and the right of withdrawal,<sup>27</sup> which permits an author to retract a work from its owner. The New York Act addresses the rights of paternity and integrity, the most important components of *droit moral*.

## B. Artists and The Common Law

Under American common law, property and contract rights override all other interests in a work of art. For example, in 1975, the Bank of Tokyo Trust Company commissioned Isamu Noguchi to create a sculpture for its Manhattan headquarters. Five years later bank executives, without notifying the artist, ordered the work cut up, removed, and relegated to storage. Noguchi considered this an act of "vandalism and very reactionary."<sup>28</sup> Yet, because the Bank had purchased the piece, Noguchi lacked a legal remedy.<sup>29</sup>

Other prominent artists have encountered similar problems.<sup>30</sup> Al-

right to a prohibition against excessive criticism. See Roeder, *supra* note 1, at 572-73 (work of artist "should be protected against abusive and malicious criticism, even if [criticism] is . . . not libellous").

<sup>24</sup> The paternity right is itself divided into four components: the right to require association of one's name with one's work, the right not to be named the creator of works not substantially one's own, the right to prevent false attributions and the right to use a *nom de plume*. Hathaway, *American Law Analogues to the Paternity Element of the Doctrine of Moral Right: Is the Creative Artist in America Really Protected?*, 30 COPYRIGHT L. SYMP. (ASCAP) 121, 125 (1983).

<sup>25</sup> The right of integrity is well-established in French jurisprudence; for a case upholding the right of integrity, see Judgment of July 6, 1964, No. 62-13.544 (Cass. Civ. Ire, Fr.) (available on LEXIS) (artist painted composition of six panels for refrigerator and successfully objected when the owner tried to sell one of the panels separately).

<sup>26</sup> For a review of cases on this aspect of the *droit moral*, see Sarraute, *supra* note 1, at 467-73 and Treece, *American Law Analogues of the Author's "Moral Right,"* 16 AM. J. COMP. L. 487, 487-94 (1968); see also Petrovich, *Artists' Statutory Droit Moral in California: A Critical Appraisal*, 15 LOY. L.A.L. REV. 29, 34 n.35 (1981) (citing unpublished article by Nimmer and Price arguing that the artist's right of divulgation is adequately protected under federal copyright law).

<sup>27</sup> Under the French Law of March 11, 1957, the right of withdrawal applicable to publishing contracts permits the author to retract a work from its owner on payment of an indemnity. Sarraute, *supra* note 1, at 477. French jurisprudence is devoid of any cases claiming this right. See *id.*

<sup>28</sup> Glueck, *Bank Cuts Up a Noguchi Sculpture and Stores It*, N.Y. Times, Apr. 19, 1980, at A1, col. 2.

<sup>29</sup> Glueck, *supra* note 28; *Sculptures Vandalized*, 68 ART AMERICA 202 (1980). The sculpture was later donated to the Jacksonville Museum of Art. Noguchi refused a request by the Museum to supervise the reinstallation of his work. According to an assistant in his New York studio, Noguchi had "'washed his hands of it.'" Barbanel, *New York State Law Gives Artists Right to Sue to Protect Work*, N.Y. Times, Aug. 14, 1983, § 1, at 1, col. 5 & 37, col. 1.

<sup>30</sup> For examples of such incidents, see, Rose, *Calder's Pittsburgh: A Violated and Immobile*

though David Smith won acclaim as the preeminent American sculptor of the twentieth century for his pioneering work in welded steel, his reputation did not prevent the owners of one of his works from deliberately stripping off its painted finish.<sup>31</sup> Outraged by the unauthorized alteration, but lacking any effective means of redress, Smith wrote to two art publications in the summer of 1960 disclaiming the defaced sculpture as his original work and suggesting that the art community "should start an action for protective laws."<sup>32</sup>

Although the esteem accorded Noguchi and Smith did not ensure the integrity of their work, it did generate publicity and public awareness. For the majority of artists, however, such incidents not only occur with some regularity, but excite little comment.<sup>33</sup> In most cases the acts go unchallenged. Artists who seek judicial remedies usually fail due to the difficulty of fitting their claims into existing forms of action in tort, property, or contract.<sup>34</sup>

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*Mobile*, ART NEWS, Jan. 1978, at 39; Crawford, *Moral Rights and The Artist*, AM. ARTIST, Apr. 1978, at 98; *Art Gives Way to Nature*, N.Y. Times, July 14, 1979, at 43, col. 3; Note, *The Americanization of Droit Moral in The California Art Preservation Act*, 15 N.Y.U. J. INT'L L. & POL. 901, 931-32 & nn. 134-35 (1983) [hereinafter cited as Note, *Americanization of Droit Moral*]; Note, *Artworks and American Law: The California Art Preservation Act*, 61 B.U.L. REV. 1201, 1225-26 & nn. 132-38 (1981) [hereinafter cited as Note, *Artworks*].

<sup>31</sup> Smith's painted sculptures were not as critically well-received or commercially valuable as his works in unadorned metal. Nevertheless, according to art critic Hilton Kramer, Smith had "a burning ambition to take constructed sculpture a step beyond . . . to join the syntax of constructed sculpture to the esthetics of color, and thus produce a sculpture in which both construction and color were given co-equal power." Kramer, *Questions Raised by Art Alterations*, N.Y. Times, Sept. 14, 1974, at 25, col. 1. Whether Smith successfully realized his ambition is irrelevant—these pieces contribute to the dynamic, vital quality of Smith's work. As Picasso once observed, "[f]rom errors one gets to know the personality." D. ASHTON, *supra* note 17, at 45.

<sup>32</sup> *Editor's Letters*, ART NEWS, Summer 1960, at 6; *Letters*, ARTS, June 1960, at 5.

The executors of Smith's estate also altered his works. Art critic Clement Greenberg, fellow artist Robert Motherwell, and Washington lawyer Ira Lowe authorized removal of the finish from several works by sand-blasting or by allowing the works to remain outdoors and unprotected. See Krauss, *Changing The Art of David Smith*, ART AMERICA, Sept.-Oct. 1974, at 30, 32.

<sup>33</sup> Letters to New York Governor Cuomo urging him to sign the Authorship Rights bill into law testified to the frequent occurrence of such incidents and the lack of effective remedies. The past President of the Illustrators Guild and the Graphic Artists Guild of New York commented, "I know personally of many cases where artists have been unduly injured in New York State because they simply have no protection under the law." Letter from Simms Taback to New York Governor Cuomo (July 6, 1983). Lawyers who represent artists wrote: "I am an arts attorney, and a former Director of Legal Services at Volunteer Lawyers for the Arts, and have seen many abuses to which artists are subjected." Letter from Leonard D. Easter to New York Governor Cuomo (July 6, 1983). "I believe, from my substantial experience in dealing with matters relating to artists, that this bill would redress many problems now faced by artists and be a significant benefit for a large number of New York citizens who will be protected by it." Letter from Joel L. Hecker to Governor Cuomo (July 7, 1983) (Letters on file at *Cornell Law Review*).

<sup>34</sup> Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 521 (1967).

### 1. *Tort and Statutory Actions*<sup>35</sup>

Aggrieved artists have resorted to common law theories of unfair competition<sup>36</sup> and defamation,<sup>37</sup> privacy statutes,<sup>38</sup> section 43(a) of the Lanham Trademark Act,<sup>39</sup> and copyright law in order to establish au-

<sup>35</sup> For comprehensive discussion of the case law in this area, see Roeder, *supra* note 1, at 558-72; Treece, *supra* note 26, at 487-500; Note, *Artworks, supra* note 30, at 1205-15; Comment, *Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrines*, 60 GEO. L.J. 1539, 1540-58 (1972).

<sup>36</sup> Unfair competition claims stem from product misrepresentation in the marketplace. See, e.g., *Fisher v. Star Co.*, 231 N.Y. 414, 132 N.E. 133 (1921) (defendant's unauthorized use of "Mutt" and "Jeff" cartoon characters found to deceive public and reduce financial value of characters to creator).

Unfair competition claims involve the relationship among creators of a work, the seller, and the public. In contrast, *droit moral* concerns the relationship among the artist, the work of art, and the public. See *supra* text accompanying notes 15-22.

<sup>37</sup> In a defamation claim an artist asserts that a change or distortion in the work damages his or her reputation. See, e.g., *Clevenger v. Baker Voorhis & Co.*, 8 N.Y.2d 187, 168 N.E.2d 643, 203 N.Y.S.2d 812 (1960) (actionable defamation claim by lawyer for injury due to unauthorized use of his name on revised edition of his book where revision contained numerous inaccuracies); *Ben-Oliel v. Press Publishing Co.*, 251 N.Y. 250, 167 N.E. 432 (1929) (plaintiff libeled by publication under her name of an article that she did not write and that contained inaccurate information). But cf. *Meliodon v. Philadelphia School Dist.*, 328 Pa. 457, 195 A. 905 (1938) (holding that plaintiff sculptor had set forth no ground justifying relief where he claimed his work was so altered that as an artist he had become an object of ridicule and unable to gain new commissions).

One of the shortcomings of defamation actions is that the death of the artist extinguishes all claims because a defamation claim is personal to the person defamed. Cf. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 111, at 744-45 (4th ed. 1971). Furthermore, any artist who is a "public figure," i.e., "anyone who has arrived at a position where public attention is focused upon him as a person," must meet the rigorous standards of proof of malice set by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). W. PROSSER, *supra* § 118, at 824. For a discussion of the *Sullivan* case and its progeny, see *id.* at 819-33.

<sup>38</sup> See, e.g., *Neyland v. Home Pattern Co.*, 65 F.2d 363 (2d Cir.), *cert. denied*, 290 U.S. 667 (1933). In *Neyland*, a well-known marine painter brought an action under New York's privacy statute, N.Y. CIV. RIGHTS LAW § 51 (McKinney Supp. 1983-84), to prevent defendants from selling a crude reproduction of one of his paintings as a design for an embroidered sofa cushion with the legend "straight from the painting by Harry Neyland." 65 F.2d at 363. The statute provided a remedy because Neyland had not sold reproduction rights to the defendants, but had merely allowed a magazine to photographically reproduce the painting. *Id.* at 363-64. The court suggested that Neyland would have been without redress if the Home Pattern Company had been direct purchasers because "[n]othing contained in [§ 51] shall be so construed as to prevent any person . . . from using the name . . . of any . . . artist in connection with his . . . artistic productions which he has sold or disposed of with such name . . . ." *Id.* at 364 (quoting N.Y. CIV. RIGHTS LAW § 51).

<sup>39</sup> 15 U.S.C. § 1125(a) (1982) prevents the deceptive packaging of goods in interstate commerce. For cases applying the Lanham Trademark Act to artworks, see, e.g., *Gilliam v. ABC, Inc.*, 538 F.2d 14 (2d Cir. 1976) (order enjoining broadcasts because televising drastically edited version of Monty Python would cause harm to plaintiffs' reputation); *Yameta Co. v. Capitol Records, Inc.*, 279 F. Supp. 582 (S.D.N.Y.) (recording misrepresented as featuring Jimi Hendrix held to violate Lanham Act), *vacated on other grounds*, 393 F.2d 91 (2d Cir. 1968). For commentary on the ad hoc use of the Lanham Act to protect authorship rights, see Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADE-MARK REP. 244, 267-69 (1978); Maslow, *Droit Moral and Sections 43(a) and 44(i) of the Lanham Act—A Judicial Shell Game?*, 48 GEO. WASH. L. REV. 377 (1980); Sokolow, *A New Weapon for Artists' Rights: Section 439(a) [sic] of the Lanham Trademark Act*, ART & LAW, Issue 2, 1980, at 32.

thorship rights.<sup>40</sup> None of these analogues, however, affords a degree of protection, comparable to the European *droit moral*, or sufficient to safeguard the artist's personality rights and the integrity of an artwork.<sup>41</sup> Further, such an array of theories fosters confusion and inconsistent results. Redress depends more on the fortuity of facts conforming to established precedents than on the merits of a claim. A comprehensive cause of action addressing an essentially homogeneous problem would eliminate such inequity.

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<sup>40</sup> The purpose of copyright law is "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. See generally *The Copyright Act of 1976*, 17 U.S.C. §§ 101-810 (1982). The law "as presently written, does not recognize moral rights or provide a cause of actions for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors." *Gilliam v. ABC, Inc.*, 538 F.2d 14, 24 (2d Cir. 1976).

Copyright law vests the exclusive right to reproduce and distribute copies of a work in the copyright owner, but this may not necessarily be the creator of the work. See 17 U.S.C. § 202. The Copyright Act does not address the right of paternity. See Hathaway, *supra* note 24, at 126-29. Further, most artists are reluctant to use copyright. See Sheehan, *Why Don't Fine Artists Use Statutory Copyright?*, 22 COPYRIGHT SOG'Y BULL. 242, 271 (1975) (citing survey indicating some artists lack "sufficient knowledge" of statutory copyright while others believe "a visible notice [would deface] a work of art"). Cf. Note, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490, 1504-05 (1979) (suggesting way that copyright can be used to protect artworks).

The separate but related issue of whether the Copyright Act preempts state moral rights legislation is beyond the scope of this Note. For persuasive arguments that it does not, see *Morseburg v. Balyon*, 621 F.2d 972, 978 (9th Cir.), *cert. denied*, 449 U.S. 983 (1980) (application of preemption doctrine depends on area of law because "crucial inquiry is not whether state law reaches matters also subject to federal regulation, but whether the two laws function harmoniously [together]"); Gantz, *Protecting Artists' Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform*, 49 GEO. WASH. L. REV. 873, 893-900 (1981) (arguing that California's Art Preservation Act is not subject to federal preemption); Nimmer, *supra* note 34, at 519 ("most probable that the federal preemption provision of the bill does not vitiate state protection of moral rights"); Note, *Artworks, supra* note 30, at 1231-39 (California Act not preempted). *But see* Francione, *The California Art Preservation Act and Federal Preemption by the 1976 Copyright Act—Equivalence and Actual Conflict*, 18 CAL. W.L. REV. 189, 214-17 (1982) (California law preempted due to actual conflict, not on equivalency grounds).

<sup>41</sup> A comparison of two cases provides a graphic demonstration of the disparity between artists' rights in this country and under *droit moral* in France. In 1948, the Russian composer Dmitri Shostakovich sued Twentieth Century Fox for using his music in an anti-Soviet movie. Shostakovich claimed that the use of his music in the film suggested that he was disloyal to his country. *Shostakovich v. Twentieth-Century Fox Film Corp.*, 196 Misc. 67, 80 N.Y.S.2d 575, 578 (Sup. Ct. 1948), *aff'd*, 275 A.D. 692, 87 N.Y.S.2d 430 (1949). The court denied relief under § 51 of the New York Civil Rights Law and under defamation and moral rights theories. 196 Misc. at 69-70, 80 N.Y.S.2d at 577-78.

When the same case was brought in France to prevent foreign distribution of the film, however, the composer prevailed. Judgment of Dec. 16, 1953, Cour d'appel, Paris, 1954 Recueil Dalloz [D. Jur.] 16, 80. *But see* Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506 (1955) (American courts offer artists substantially same degree of protection afforded by European courts under *droit moral*); Comment, *Moral Rights in the United States*, 35 CONN. B.J. 509, 516 (1961) ("moral rights of the artist are substantially protected under the existing law").

## 2. *Property Rights*

Every artist initially has a vested proprietary interest in a finished creation. As the owner, the artist can control the disposition or use of the work. Property law upholds this prerogative. Upon selling or otherwise disposing of the artwork, the artist loses this control.<sup>42</sup> Even if the artist retains a colorable property claim, a legal action to enforce authorship rights on that ground is indirect and inefficient. The case of *Stella v. Mazoh*<sup>43</sup> illustrates this use of a property claim.

In 1966 Frank Stella placed two rain-damaged canvases on the landing outside his loft-studio, intending to discard them. Before he could do so, the canvases disappeared. In the spring of 1982, Stella discovered the paintings offered for sale at a New York gallery.<sup>44</sup> Stella sued to enjoin the gallery from selling the paintings and from representing them as his work. One portion of his affidavit reads:

I verily believe that as an artist and as a creator, I am entitled to pick and choose and select those items which are to be sold, distributed and more important, to be known to the general public and the world as a painting or work of Frank Stella . . . . I respectfully submit that no one is entitled to cause another to have his reputation demeaned, diminished or tarnished by taking his rejected paintings *from within or without his premises* and then offer them to the public and to the world as the artist's works and representative of his abilities, talents and creativity.<sup>45</sup>

Because American courts do not acknowledge artists' moral rights, Stella instituted a property action to regain control of the canvases.<sup>46</sup> The New York trial court granted Stella a temporary restraining order pending a hearing.<sup>47</sup> Shortly thereafter, the parties settled the case out of court. Stella recovered the paintings and destroyed them.

The specific purpose of Stella's suit was not to recover stolen property, but to prevent the damaged paintings from being represented as his work and thereby harming his reputation as an artist. Had Stella abandoned or sold the canvases, he probably would not have succeeded. In contrast, the doctrine of *droit moral* entitles an artist to disclaim au-

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<sup>42</sup> See *Harris v. Twentieth Century Fox Film Corp.*, 43 F. Supp. 119, 121 (S.D.N.Y. 1942) ("It is true that the law recognizes certain property rights of an author in his finished creation. But, as in other property rights, the law gives effect to a clear unequivocal transfer of such rights pursuant to a contract and for valuable consideration.")

<sup>43</sup> No. 07585-82 (N.Y. Sup. Ct. Apr. 1, 1982).

<sup>44</sup> See ART NEWS, Summer 1980, at 11.

<sup>45</sup> Affidavit of Frank Stella at 6-7, *Stella v. Mazoh*, No. 07585-82 (N.Y. Sup. Ct. Apr. 1, 1982) (emphasis in original).

<sup>46</sup> See *id.* at 4-5; Verified Complaint, *Stella v. Mazoh*, No. 07585-82 (N.Y. Sup. Ct. Apr. 1, 1982).

<sup>47</sup> Order to Show Cause For a Preliminary Injunction and Temporary Restraining Order, *Stella v. Mazoh*, No. 07585-82 (N.Y. Sup. Ct. Apr. 2, 1982).

thorship and prevent the public display of mutilated paintings despite a lack of ownership or possession.

### 3. *Contract Claims*

If an artist shows an express or implied contractual agreement to have her name associated with a work, courts generally uphold the agreement.<sup>48</sup> An artist can also use contract language to prevent being misrepresented as the creator of a work.<sup>49</sup> In these cases vindication of authorship rights hinges upon the terms of the agreement and the circumstances surrounding the transfer of the artwork. The issue is not one of moral rights, but of contract interpretation.

For example, in *Vargas v. Esquire*,<sup>50</sup> an artist produced a series of drawings for *Esquire Magazine* under a contract that provided in pertinent part: "The drawings so furnished, and also the name 'Varga,' 'Varga Girl,' 'Varga Esq.,' and any and all other names, designs or materials used in connection therewith, shall forever belong exclusively to Esquire . . . ." <sup>51</sup> When *Esquire* published some of the illustrations without crediting the artist, Vargas sued to enforce his authorship rights. The court denied his petition, stating that Vargas had "divested himself of every vestige of title and ownership of the pictures."<sup>52</sup>

Comparing *Vargas* with a factually similar French case reveals the striking disparity in protection and status granted to artists in this country and abroad. In *Guille c. Colmant*,<sup>53</sup> the artist's right of paternity overrode a specific contract provision obligating the artist to sell some works without signatures and some under an assumed name. The case graphically demonstrates that under the French Law of March 11, 1957, the right of paternity is "perpetual, inalienable and imprescriptible."<sup>54</sup>

Granting such explicit priority to artists' moral rights is necessary

<sup>48</sup> See *Clemens v. Press Publishing Co.*, 67 Misc. 183, 122 N.Y.S. 206 (Sup. Ct. 1910) (implied agreement between parties required author's name to appear on byline); cf. 1 M. NIMMER, *supra* note 3, § 110 (author's right to demand that his name be affixed to his work is only imperfectly recognized in this country).

<sup>49</sup> See, e.g., *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952) (where defendant agreed to produce records bearing legend, "Presented by Norman Granz," contract implied duty not to sell records which made legend false representation).

<sup>50</sup> 164 F.2d 522 (7th Cir. 1947).

<sup>51</sup> *Id.* at 525.

<sup>52</sup> *Id.* In addition to the more conventional contract argument, Vargas asserted a moral right claim, to which the court gave short shrift:

What plaintiff in reality seeks is a change in the law in this country to conform to that of certain other countries. We need not stop to inquire whether such a change, if desirable, is a matter for the legislative or judicial branch of the government; in any event, we are not disposed to make any new law in this respect.

*Id.* at 526.

<sup>53</sup> Judgment of Nov. 15, 1966, 1967 Recueil Dalloz-Sirey [D.S. Jur.] 284.

<sup>54</sup> French Law of Mar. 11, 1957, *supra* note 1, art. 6.

to ensure recognition of authorship and preservation of artistic integrity. Relying on contract terms for such protection is tenuous because artists tend to be unaware of their legal rights<sup>55</sup> and may be in a weak bargaining position relative to the purchasers of their work.<sup>56</sup> Furthermore, the characteristic informality of most art sales affords little opportunity to contract for integrity and paternity rights.<sup>57</sup> As one New York art lawyer noted, "[t]here is no branch of commerce in which the UCC and the Statute of Frauds seems more irrelevant than in the art market."<sup>58</sup>

### C. Property and Contract Rights v. Authorship Rights

The preceding sections demonstrate that the common law inadequately safeguards an artist's authorship rights and the public's interest in art preservation, especially when those interests clash with property and contract rights. Further, artists' claims to protect their rights of authorship and the integrity of their artwork are frequently fragmented in order to fit within a conventional legal theory. Enactment of comprehensive artists' rights laws requires legislators to reconcile the conflicting social interests represented by artist, owner, and the artwork.<sup>59</sup> *Droit moral* necessarily limits the property or contract rights<sup>60</sup> of an artwork

<sup>55</sup> See, e.g., Projansky, *The Perilous World of Art Law*, 4 JURIS DR., June 1974, at 14, 15 ("artists, unlike almost all other professionals, tend to be amazingly ignorant of their legal rights"); Weil, *The "Moral Right" Comes to California*, ART NEWS, Dec. 1979, at 88.

<sup>56</sup> See generally Letter from Walter J. Maroney on behalf of Franklin Furnace Archives to New York Governor Cuomo (July 21, 1983) ("Too often . . . the price of exhibition in a prestigious forum has been a . . . ceding of control over display conditions.") (on file at *Cornell Law Review*); Sheehan, *supra* note 40, at 268 (factors contributing to "an art market in which the fine artist is left with very little bargaining power with which to assert legal rights": (1) very few influential art collectors determine financial success or failure of new artist, (2) financial status of most art galleries is precarious, and (3) many collectors are uncertain and distasteful of fine art copyright); Note, *Artworks, supra* note 30, at 1225 & nn. 132-37 (citing further authority in support of this proposition).

The lack of bargaining power often subjects artists to contracts of adhesion; because American law permits the surrender of paternity rights, the right may be waived without an artist's true consent. See *Harris v. Twentieth Century Fox Film Corp.*, 43 F. Supp. 119 (S.D.N.Y. 1942).

<sup>57</sup> Projansky, *supra* note 55, at 17.

<sup>58</sup> *Id.*

<sup>59</sup> Statement by Matthew J. Murphy, Chairman, New York State Assembly Committee on Tourism, the Arts and Sports Development (June 26, 1983) ("This legislation seeks to balance the property rights of owners against the creative rights of artists and society's right to safeguard its artistic treasures . . .") (on file at *Cornell Law Review*).

<sup>60</sup> Alan Sieroty, California State Senator and sponsor of the California Art Preservation Act, acknowledged the necessity of limiting owners' property and contract rights and described how his state's legislators overcame their initial reservations about doing so:

To pass this law, you have to get legislators to rethink their concepts of property rights. Property rights are very strong in this country, and that's why we have not adopted art preservation laws. You have to begin to think that maybe the person who created the work of art, and perhaps also the public, retain some interest in seeing that the art is not destroyed, not mutilated, and not changed without the artist's consent. The first impression that members of the judiciary committee had when we presented our bill was, "it's mine, I

owner, but such restrictions are not new to the law.<sup>61</sup> Zoning,<sup>62</sup> nuisance,<sup>63</sup> and historic preservation statutes<sup>64</sup> reflect similar balancing of competing social interests. The need to accommodate these competing values, as well as the need to provide a uniform cause of action for a unique legal problem, demands enactment of artists' moral rights legislation.<sup>65</sup>

## II

### THE NEW YORK ARTISTS' AUTHORSHIP RIGHTS ACT

The New York Artists' Authorship Rights Act<sup>66</sup> increases the protection of artworks and enhances artists' rights in their artwork within New York State. The protection the New York Act accords artists is modest compared to that conferred by European statutes based on the *droit moral* doctrine.<sup>67</sup> The Act, however, takes a significant first step in a new and positive direction towards encouraging acceptance of artists' moral rights throughout the country.

The New York Act entitles an artist to legal and injunctive relief<sup>68</sup> if any person knowingly displays, in a public place within the state, the

can do anything with it, I can cut it up if it's too big for a certain place that I want to put it." But gradually the committee members recognized what we were trying to say and accepted it.

Excerpt from miscellaneous materials from the National Conference of State Legislatures (on file at *Cornell Law Review*).

<sup>61</sup> See *Nebbia v. New York*, 291 U.S. 502 (1934) (neither property rights nor contract rights are absolute; private rights are subject to public regulation).

<sup>62</sup> See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding zoning law prohibiting industrial establishment in residential section despite injury to complaining landowner).

<sup>63</sup> See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (upholding ordinance prohibiting continuation of brickyard business because that activity was inconsistent with neighboring land uses).

<sup>64</sup> See, e.g., *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978) ("States . . . may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city . . ."). See generally *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (public good often curtails use or economic exploitation of private property).

<sup>65</sup> The limitations imposed by moral rights legislation do not amount to a taking of property. The restrictions do not deprive the collector of the enjoyment and investment advantages of art acquisition. "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

<sup>66</sup> N.Y. ARTS & CULTURAL AFF. LAW § 14.51 (McKinney 1984). The Act, co-sponsored by Assemblyman Richard Cottfried and Senator Tarky Lombardi, was signed into law on August 8, 1983, and took effect on January 1, 1984. The measure passed the Assembly by a vote of 145 to 3 and was adopted unanimously by the Senate. See New York State Assembly Comm. on Tourism, Arts & Sports, Bill Memorandum A. 5052 (as amended), 206th Sess. (Apr. 19, 1983); 1983 N.Y. ASSEMBLY J. (June 26, 1983); 1983 N.Y. SENATE J. 140 (June 26, 1983).

<sup>67</sup> See *supra* note 1 (citing French, German, and Italian laws protecting artists' moral rights).

<sup>68</sup> N.Y. ARTS & CULTURAL AFF. LAW § 14.59 (McKinney 1984).

artist's work (or any reproduction of it) in an altered, defaced, mutilated, or modified form. The law, however, contains two limiting provisos. First, the work must be reasonably regarded as that of the artist. Second, the display must be reasonably likely to damage the artist's reputation.<sup>69</sup> The Act also allows an artist to claim authorship, or, upon a showing of just and valid reasons, to disclaim authorship of a work of art.<sup>70</sup> The New York Act, thus, establishes a continuing relationship between artist, artwork, and owner that is not otherwise sufficiently respected in general commercial law.

### A. Purpose of the Act

Several factors prompted the enactment of the New York Artists' Authorship Rights Act. First, the Act's statement of legislative findings and declaration of purpose emphasize the need to protect the rights and reputations of New York artists.<sup>71</sup> Acknowledging that the alteration of artwork may destroy a work's integrity and injure the artist's reputation,<sup>72</sup> the Act seeks to protect these intertwined interests by prohibiting certain unauthorized modifications to the works and by providing legal redress to the artist if violations occur.

Second, the Act benefits the public. The drafters recognized that society has an interest in safeguarding art.<sup>73</sup> The New York State legislature has acknowledged that "the general welfare . . . will be promoted by giving further recognition to the arts as a vital aspect of our culture and heritage."<sup>74</sup>

Finally, the Act ensures that New York's statutes reflect the stature of art produced and displayed in the state.<sup>75</sup> New York has long been a cultural mecca<sup>76</sup> and a forerunner in arts legislation;<sup>77</sup> the legislature wanted it to remain so.<sup>78</sup>

### B. Nature of the Rights Protected

In letters to the Governor of New York urging approval of the Artists' Authorship Rights Act, two sponsors described the bill as guaran-

<sup>69</sup> *Id.* § 14.53.

<sup>70</sup> *Id.* § 14.55.

<sup>71</sup> Artists' Authorship Rights Act, ch. 994, § 1, 1983 N.Y. Laws 1933, 1933.

<sup>72</sup> *Id.*

<sup>73</sup> See Statement by Matthew J. Murphy, *supra* note 59.

<sup>74</sup> N.Y. ARTS & CULTURAL AFF. LAW § 3.01 (McKinney 1984).

<sup>75</sup> See Letter from Matthew J. Murphy, Chairman, New York Assembly Committee on Tourism, the Arts and Sports Development, to New York Governor Cuomo (July 22, 1983) (on file at *Cornell Law Review*).

<sup>76</sup> See Artists' Authorship Rights Act, ch. 994, § 1, 1983 N.Y. Laws 1933 ("New York state is the home of many artists of international repute").

<sup>77</sup> See generally *id.*

<sup>78</sup> See N.Y. ARTS & CULTURAL AFF. LAW § 3.01 (McKinney 1984).

teeing artists' right of paternity.<sup>79</sup> Their emphasis is not surprising. The right of paternity does not radically interfere with private ownership, and, therefore, it is more palatable to critics of artists' moral rights than is the right of integrity. The law, however, by prohibiting the public display or reproduction of an artwork in a defaced or modified form,<sup>80</sup> also establishes a limited integrity right.<sup>81</sup>

### 1. *Paternity Rights*

The right to claim authorship granted in section 14.55 of the New York Act inheres in the artist during her lifetime, whether or not she contracts for the right or sells the work. The French Law of March 11, 1957,<sup>82</sup> and the California Art Preservation Act<sup>83</sup> provide similar rights. Thus, if the *Vargas*<sup>84</sup> case were retried in New York today, the decision, like that in the *Guille*<sup>85</sup> case, would vindicate the illustrator's authorship rights.

An artist's right to disclaim authorship—to disassociate her name from a work of art—requires a “just and valid reason” under the New York Act.<sup>86</sup> Alteration or mutilation of the work without the artist's consent would be a “just and valid” reason if “damage to the artist's reputation is reasonably likely to result or has resulted therefrom.”<sup>87</sup> An artist can also disclaim authorship for other reasons that meet the “just and valid” standard if damage to the artist's reputation is reasonably likely.<sup>88</sup>

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<sup>79</sup> Letter from Richard Gottfried, Assistant Majority Leader, New York Assembly, to New York Governor Cuomo (July 5, 1983); Letter from Matthew J. Murphy, *supra* note 75. The sponsors' emphasis on the paternity provision, *see infra* text accompanying notes 82-88, was adopted by the Governor. A press release describing the new law makes no mention of § 14.53 and the right of integrity. *See* Memorandum dated Aug. 8, 1983, filed with A. 5052-B, 206th Sess. (N.Y. 1983). *See supra* note 24 and accompanying text and *infra* notes 82-88 and accompanying text (discussing right of paternity).

<sup>80</sup> N.Y. ARTS & CULTURAL AFF. LAW § 14.53 (McKinney 1984).

<sup>81</sup> *See supra* note 25 and *infra* notes 89-93 and accompanying text (discussing right of integrity).

<sup>82</sup> French Law of Mar. 11, 1957, *supra* note 1, art. 6.

<sup>83</sup> CAL. CIV. CODE § 987(d) (West 1982).

<sup>84</sup> 164 F.2d 522 (7th Cir. 1947) (discussed *supra* notes 50-52 and accompanying text).

<sup>85</sup> Judgment of Nov. 15, 1966, Cour d'appel, Paris, 1967 D.S. Jur. 284; *see supra* text accompanying notes 53-54.

<sup>86</sup> N.Y. ARTS & CULTURAL AFF. LAW § 14.55 (McKinney 1984).

<sup>87</sup> *Id.*

<sup>88</sup> An earlier draft of the Act stated that “nothing contained in this article shall abridge the right of a person to frame . . . a work of fine art.” A. 5052, 206th Sess., 228-o(3) (N.Y. 1983). The definition of “to frame” was “to prepare or cause to be prepared a work of fine art for display, in a manner customarily considered appropriate for a work of fine art in a particular medium.” *Id.* § 228-m(2). Omission of this language from the final Act evidences the drafters' belief that the manner of display can, under certain circumstances, alter or modify a work to such an extent that the artist should be entitled to a cause of action under the

## 2. *Integrity Rights*

Section 14.53 of the New York Act provides a limited right of integrity.<sup>89</sup> The law does not bar an owner from altering, defacing, mutilating, or modifying a work of art. It does prohibit the artwork's subsequent public display if the work is represented as, or would reasonably be regarded as, belonging to the artist, and if such display is reasonably likely to damage the artist's reputation.<sup>90</sup>

The limited nature of the right conferred in section 14.53 is a compromise between traditional principles of private ownership on the one hand and the integrity of artworks and artists' personality rights on the other.<sup>91</sup> The statutory ban on public display of an altered work should deter abusive treatment and thereby protect artists, but it does so without interfering with the prerogatives of purely private collectors. The prohibition, however, exists only during the lifetime of the artist. Extending the application of the Act beyond the lifetime of the artist would increase the force of the law in deterring alteration or defacement of artwork.<sup>92</sup> Nevertheless, to fully guarantee a work's integrity and society's interest in preservation would necessitate a prohibition against all acts of alteration, an encroachment on ownership rights that the New York legislature was apparently unwilling to pursue.<sup>93</sup>

### C. Scope of the Law

#### 1. *Works of Fine Art*

The New York Act applies "to works of fine art knowingly displayed . . . , published or reproduced" in New York.<sup>94</sup> A "work of fine art" includes "any original . . . painting; drawing; print; [or] photo-

law. Telephone Interview with Wendy E. Feuer, Legislative Associate, New York Assembly Committee on Tourism, the Arts and Sports Development (Oct. 25, 1983).

Section 14.55 may also permit an artist to prevent false attributions, traditionally an element of the right of paternity. If construed liberally, § 14.55, allowing an artist to disclaim authorship of her work for just and valid reason, should also permit an artist to disassociate her name from another's work.

<sup>89</sup> See N.Y. ARTS & CULTURAL AFF. LAW § 14.53 (McKinney 1984). In contrast, the French law vests in the artist an exclusive, perpetual right to respect for her work. See French Law of March 11, 1957, *supra* note 1, art. 6.

<sup>90</sup> N.Y. ACTS & CULTURAL AFF. LAWS § 14.53.

<sup>91</sup> An earlier version of the Act gave artists the right to prevent alterations or destruction of artworks, but the "practical, political, legal and constitutional obstacles" necessitated legislative modifications in order to secure support for passage of the bill. See Letter from Richard Gottfried, *supra* note 79. The fact that the California Art Preservation Act prohibits not only display of an altered work, but also intentional physical alteration or destruction of a work of art suggests that the legal and constitutional obstacles to a fuller right of integrity are not insurmountable and that the real hurdles are practical and political. See CAL. CIV. CODE § 987(c) (West 1982).

<sup>92</sup> See *infra* notes 145-48 and accompanying text.

<sup>93</sup> See *supra* note 91.

<sup>94</sup> N.Y. ARTS & CULTURAL AFF. LAW § 14.57(5) (McKinney 1984).

graphic print or sculpture of a limited edition of no more than three hundred copies,"<sup>95</sup> but excludes "sequential imagery" such as motion pictures or video art.<sup>96</sup> The New York definition resembles that of the French law, which applies without distinction to "authors of all intellectual works, regardless of their kind, form of expression, merit or purpose."<sup>97</sup> The California Art Preservation Act defines fine art more narrowly as "an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality."<sup>98</sup> The drafting of New York's statute improves upon California's in two respects. First, the open-ended New York definition avoids a rigid delineation of "fine art,"<sup>99</sup> obviating the need for varying groups of artists to lobby for inclusion within the protective ambit of the statute.<sup>100</sup> Second, by not adopting the California "recognized quality" caveat, the New York Act better serves the needs of all artists and the purpose of moral rights legislation.

The courts should not be called upon to determine whether art is of "recognized quality." Inconsistent holdings would inevitably result and would frustrate the uniform and predictable application of the law.<sup>101</sup> The California statute stipulates that in making such determinations "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."<sup>102</sup> Yet, experts often disagree.<sup>103</sup>

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<sup>95</sup> *Id.* § 14.51(5). There are two technical difficulties with this definition. The art world does not regard either an unlimited edition print or a sculpture in an edition of 300 as a work of fine art. Letter from Ralph F. Colin, Administrative Vice President, Art Dealers Association of America, Inc., to Ben Wilcs, Assistant Counsel to the Governor of New York (July 12, 1983) (on file at *Cornell Law Review*). According to one legislative associate, the definition of prints was an error and will be corrected by an amendment. Telephone Interview with Wendy E. Feuer, *supra* note 88. The provision for works of sculpture was intentional because many are produced or cast more than once. *Id.*

<sup>96</sup> N.Y. ARTS & CULTURAL AFF. LAW § 14.51(5). The collaborative nature of sequential imagery art might make application of authorship rights unwieldy. The French Law of March 11, 1957, for example, lists five people who must be considered the "authors" of a film. *See* French Law of March 11, 1957, *supra* note 1, art. 14.

<sup>97</sup> French Law of March 11, 1957, *supra* note 1, art. 2.

<sup>98</sup> CAL. CIV. CODE § 987(b)(2) (West Supp. 1984).

<sup>99</sup> *Cf.* *Mazer v. Stein*, 347 U.S. 201, 214 (1954) ("Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art.").

<sup>100</sup> As first enacted, the California statute applied only to paintings, sculptures, and drawings. Ch. 409, § 2, 1979 Cal. Stat. 1500-03. Lobbying efforts by artists who work in glass led to an expansion of the definition in 1982. Ch. 1517, § 1, 1982 Cal. Stat. 5885; *see supra* text accompanying note 98.

<sup>101</sup> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.

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

<sup>102</sup> CAL. CIV. CODE § 987(f) (West 1982).

<sup>103</sup> *See, e.g., Your Word Against Mine—Expert Testimony in The Valuation of Fine Art*, 5 ART &

Basing protection on such a standard is arbitrary, capricious, and inconsistent with the philosophy behind artists' moral rights legislation. The law purports to protect the personality and reputation of artists. These rights arise from the creation of artwork, not just the creation of a critically acclaimed work. As Justice Holmes wrote in 1903, "even . . . a very modest grade of art has in it something irreducible, which is one man's alone."<sup>104</sup> It is this intangible quality, distinguishing art from mere economic chattels, that artists' moral rights legislation is intended to protect and promote.

## 2. Trade Use

New York's Authorship Rights Law does not apply to work "prepared under contract for advertising or trade use unless the contract so provides."<sup>105</sup> The scope of this exemption is ambiguous because "trade use" is a nontechnical term undefined by the Act.<sup>106</sup> Although art prepared for advertising may be a readily identifiable and discrete category, a broad reading of the term "trade use," equating it with any commercial use, could deny the Act's protection to commissioned works by professional artists. This result contravenes the spirit and intent of the law. Although courts have been sensitive to legislative intent when construing "trade" in statutes,<sup>107</sup> the legislature should define "trade use" rather than rely on the courts to determine which technical and professional artists<sup>108</sup> are included within the Act's protection.

One possible approach is to exclude "work for hire" as that term

LAW 69 (1980) (where IRS sought value of a Corot canvas from Art Advisory Panel, the estimates varied by \$210,000, from \$40,000 to \$350,000 and the Court settled on \$125,000.); Note, *Artworks*, *supra* note 30, at 1222 n.117 and cases cited therein.

<sup>104</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

<sup>105</sup> N.Y. ARTS & CULTURAL AFF. LAW § 14.57(4) (McKinney 1984). An earlier version of the bill extended protection to commercial art but permitted artists to waive these rights at any time. A. 5052, 206th Sess., § 228-d(4) (N.Y. 1983).

<sup>106</sup> According to one of the legislative associates who worked closely on the drafting of the Act, the term was intentionally left vague. The drafters wanted to protect some art produced for sale, but not, for example, the graphic art designed for gum wrappers. Telephone Interview with Wendy E. Feuer, *supra* note 88. It is left to the courts to interpret and give effect to the drafters' intent by defining the trade exemption on a case by case basis.

<sup>107</sup> *See, e.g.*, *Paulsen v. Personality Posters*, 59 Misc. 2d 444, 447-48, 299 N.Y.S.2d 501, 505-06 (Sup. Ct. 1968) (restrictive reading of "for the purposes of trade" because statute *not intended* to reach activities involving the dissemination of news or public information); *People v. Polar Vent of Am.*, 10 Misc. 2d 378, 381-82, 174 N.Y.S.2d 789, 793-94 (Sup. Ct. 1957) (given purpose and wording of statute prohibiting trade on Sabbath, the legislature must have intended that "trade" be defined broadly).

<sup>108</sup> Letters supporting the bill were submitted by the Executive Director of the Cartoonists Guild, Letter from Ron Wolin to New York Governor Cuomo (June 16, 1983), the President of the New York Metropolitan Chapter of the American Society of Interior Designers, Letter from Michael Wiener to Governor Cuomo (July 19, 1983), a medical illustrator, Letter from Robin Tarasov to Governor Cuomo (June 15, 1983), and numerous other professional graphic artists whose work could ostensibly be considered to be prepared under contract for trade use. (Letters on file at *Cornell Law Review*).

developed under the 1909 Copyright Act.<sup>109</sup> There, when an employee created "something in connection with his duties under his employment, the thing created [was] the property of the employer and any copyright obtained thereon by the employee [was] deemed held in trust for the employer."<sup>110</sup> The critical question in determining whether the creation of art was within the scope of employment was "whether the employer possessed the right to direct and to supervise the manner in which the work was being performed."<sup>111</sup>

This standard effectively balances the competing interests of contractor and artist. If an employer directs and supervises the creation of a work, that employer should have free rein to use or modify the work. Ceding control to the employer would not dilute authorship rights because "work for hire" is not a manifestation of the artist's personality. The purpose of *droit moral* is to protect an act of creation, not mechanical execution.

### 3. Conservation

Acts taken to correct or prevent deterioration or alteration are not actionable as alterations or defacements under the New York Act unless the conservation work is negligently performed.<sup>112</sup> Although some conservators are concerned that the Act fails to "clearly allow curing harm which results from accidental damages or curing an 'inherent defect,'"<sup>113</sup> permissible acts to correct alterations should encompass correction of accidental damages, and license to prevent deterioration should authorize curing inherent defects. In any event, New York museums should have little to fear because an artist complaining of an act of

<sup>109</sup> 17 U.S.C. § 26 (1976). For a discussion of the different meanings of work for hire under the common law, the 1909 Copyright Act, and the current Copyright Act, 17 U.S.C. § 201(b) (1982), see Meltzer v. Zoller, 520 F. Supp. 847, 854-56 (D.N.J. 1981); 1 M. NIMMER, *supra* note 3, § 5.03[B].

<sup>110</sup> Sawyer v. Crowell Publishing Co., 46 F. Supp. 471, 473 (S.D.N.Y. 1942), *aff'd*, 142 F.2d 497 (2d Cir.), *cert. denied*, 323 U.S. 735 (1944).

<sup>111</sup> Scherr v. Universal Match Corp., 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970); see also Siegel v. National Periodical Publications, Inc., 508 F.2d 909, 914 (2d Cir. 1974) (Work for hire rule applies only when work is done "at the instance and expense of employer"; it was not work for hire where plaintiff conceived of Superman cartoon and later revised and expanded it at direction of publisher.).

<sup>112</sup> N.Y. ARTS & CULTURAL AFF. LAW §§ 14.51(2), 14.53, 14.57(3) (McKinney 1984). An earlier draft immunized only restoration measures, defined as acts "to return, or cause to be returned, a deteriorated or damaged work of fine art as nearly as feasible to its original state." A. 5052, 206th Sess. § 228-m(5) (N.Y. 1983). The major New York museums were concerned by the passive role permitted. Fearing interference with the development of new conservation techniques, they sharply criticized this draft. Telephone Interview with Wendy E. Feuer, *supra* note 88. The revised Act, the product of close consultation with many conservators, *id.*, reflects this concern.

<sup>113</sup> Letter from Carolyn Clark, Counsel to Whitney Museum of American Art, to Ben Wiles, Assistant Counsel to New York Governor Cuomo (July 14, 1983) (on file at *Cornell Law Review*).

conservation would have the burden of proving that the museum performed the work negligently. Artists may also sue when gross negligence in maintaining the work results in its alteration.<sup>114</sup>

#### 4. *Damage to Reputation*

Reputation is "[t]hat by which we are known and is the total sum of how we are seen by others."<sup>115</sup> Under the New York Act, actions based on alteration or defacement of artwork<sup>116</sup> and actions to disclaim authorship<sup>117</sup> must include a showing of potential damage to the artist's reputation. Although the California Act<sup>118</sup> and the Berne Convention<sup>119</sup> contain similar references to reputation, the French law does not.<sup>120</sup> Because even fledgling and unpopular artists have reputations, this language in the New York Act should not limit a cause of action to artists of renown.<sup>121</sup> It could, however, impose stringent limitations on actions depending upon the quantum of proof the courts require to demonstrate potential damage to reputation.

Under the New York Act, it is unclear whether the artist must prove actual damages. In defamation cases, a slanderous remark affecting the plaintiff in his business, trade, or calling is actionable without

<sup>114</sup> N.Y. ARTS & CULTURAL AFF. LAW § 14.57(1) (McKinney 1984).

<sup>115</sup> BLACK'S LAW DICTIONARY 1171-72 (rev. 5th ed. 1979).

<sup>116</sup> N.Y. ARTS & CULTURAL AFF. LAW § 14.53; *see supra* text accompanying notes 89-90 (discussing right of integrity under New York Act).

<sup>117</sup> N.Y. ARTS & CULTURAL AFF. LAW § 14.55; *see supra* text accompanying notes 86-88 (discussing right of paternity under New York Act).

<sup>118</sup> CAL. CIV. CODE § 987(a) (West Supp. 1984) (legislative finding that "physical alteration and destruction" of art is "detrimental to artist's reputation").

<sup>119</sup> Berne Convention art. 6*bis*, quoted *supra* note 3, gives an author the right to object to changes that would be prejudicial to "honor or reputation," honor being more personal than reputation, which connotes renown, fame and status in the art market.

<sup>120</sup> Two recent cases make this explicit. In *Guille c. Colmant*, Judgment of Nov. 15, 1966, 1967, Cour d'appel, Paris, 1967 D.S. Jur. 284, discussed *supra* text accompanying notes 53-54, the Court annulled a contract clause obligating an artist to transfer his work without signing it, deeming such terms injurious to the artist's name and reputation. The French legal scholar, Raymond Sarraute, in an article commenting on the case, vigorously rebutted the theoretical underpinning of the decision. He argued that Articles 1 & 2 of the French Law of Mar. 11, 1957, *supra* note 1, were granted solely for the performance of the creative act, regardless of the merit of the work produced. He concluded: "Les divers éléments traditionnels du droit moral: . . . le droit de paternité . . . sont absolument étrangers aux notions de notoriété de l'artiste et de valeur pécuniaire des ses oeuvres." Sarraute, Note [1967] Gaz. Pal I. 18,19. ("The traditional elements of *droit moral*: [including] the right of paternity . . . are absolutely unrelated to the artist's reputation and the monetary value of his work.") (translation by author of this Note).

In another case, one year later, the Cour de Cassation, the highest French court of ordinary jurisdiction, settled the point by declaring that "la notoriété et la reputation d'un auteur ne sont pas l'un des attributs de son droit moral." Judgment of Dec. 3, 1968, Cass. 1969 D. 73, 76 ("An artist's fame and reputation are not aspects of his moral rights.") (translation by author of this Note).

<sup>121</sup> *Contra* Note, *Artworks*, *supra* note 30, at 1209 & n.42.

proof of actual damages; rather, damage is assumed to follow.<sup>122</sup> If the remark does not affect his calling directly, courts demand proof of actual pecuniary loss.<sup>123</sup> This proof may be elusive, often leaving plaintiffs in defamation cases injured but without redress. Because anything affecting the work of an artist necessarily affects the artist in her calling, the courts should not require proof of actual damage. Such a requirement would cripple the effectiveness of the Act.<sup>124</sup>

For example, David Smith's unadorned metal sculptures are more critically acclaimed than his painted works. Consequently, by removing the paint, the owners may not have harmed Smith's reputation or career.<sup>125</sup> They did infringe on the artist's and society's interest in maintaining the integrity of the work, however, and the Act should redress such unauthorized alterations.

#### D. Enforcement

An action under the New York Act accrues to any aggrieved artist whose work is displayed in an altered form within New York State.<sup>126</sup> Rights granted under the Act are strictly personal and terminate upon the death of the artist. The statute does not vest enforcement in the artist's representatives, heirs, legatees, or executors. This limited duration of protection contrasts with the French Law of March 11, 1957, which grants the *droit moral* in perpetuity,<sup>127</sup> and with other *droit moral* statutes which recognize the right at least until the economic rights in the work expire.<sup>128</sup>

If the sole justification of the New York Act were to safeguard the career and personal interests of artists, the current enforcement provisions would fulfill the purpose. Society's interest in preserving the integrity of artworks, however, survives the artist's death and warrants more durable protection.<sup>129</sup>

#### E. Remedies

The New York Act provides for "legal and injunctive relief" for any

<sup>122</sup> W. PROSSER, *supra* note 37, § 112, at 790-92.

<sup>123</sup> *Id.*

<sup>124</sup> Unlike the tort of defamation, which "is not concerned with the plaintiff's own humiliation, wrath or sorrow," *id.* at 737, *droit moral* does protect the purely personal interests of an artist. *But see* Letter from Matthew J. Murphy, *supra* note 75 ("[T]he artist must prove that such a showing could damage his or her reputation."). Murphy does not suggest what type of proof would be sufficient.

<sup>125</sup> *See supra* notes 31-32 and accompanying text.

<sup>126</sup> N.Y. ARTS & CULTURAL AFF. LAW §§ 14.57(5), 14.59(1) (McKinney 1984).

<sup>127</sup> French Law of March 11, 1957, *supra* note 1, art. 6.

<sup>128</sup> *See, e.g.*, Berne Convention, *supra* note 3, art. 7 (term of protection is life of author and 50 years after his or her death); German Law of Sept. 13, 1965, *supra* note 1, art. 64(1) (copyright expires 70 years after author's death).

<sup>129</sup> *See infra* notes 145-48 and accompanying text.

violation of the Act.<sup>130</sup> Injunctive relief might include a court order to associate the artist's name with a work,<sup>131</sup> to prevent such association,<sup>132</sup> or to prevent the public display of an altered work if it is represented as the work of the artist or would reasonably be regarded as such.<sup>133</sup>

The nature and extent of legal relief under the Act is less clear. An earlier draft of the Act provided for "damages, exemplary damages where appropriate, equitable relief and reasonable attorney's and expert witness's fees."<sup>134</sup> By eliminating this language and substituting a provision for "legal and injunctive relief," the drafters intended to preclude large punitive damages that might encourage frivolous claims.<sup>135</sup>

Confronted with the same dilemma, but cognizant of the positive deterrent effect of punitive damages, the California legislature devised an alternative solution. Under the California law, punitive damages accrue not to the artist, but to a court-selected charitable or educational organization involved in the fine arts.<sup>136</sup> A similar approach would strengthen the deterrent effect of the New York Act.

## F. Summary

The foregoing analysis highlights the key provisions of the New York legislature's efforts to enhance the rights of visual artists working within the state. The New York Act is an eclectic and creative piece of legislation, tailoring the tenets of moral rights to comport with the legal, philosophical, and social concepts underlying New York law. The Act offers artists a direct remedy to redress certain grievances. Had the statute been in effect in the spring of 1982, for example, when Frank Stella

<sup>130</sup> N.Y. ARTS & CULTURAL AFF. LAW § 14.59 (McKinney 1984).

<sup>131</sup> *Id.* § 14.55(1).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* § 14.53.

<sup>134</sup> A. 5052, 206th Sess. § 228-p (N.Y. 1983).

<sup>135</sup> See Letter from Matthew J. Murphy, *supra* note 75 ("The bill only allows for injunctive relief and *legal fees*, forcing an artist to think seriously before bringing an action against an owner.") (emphasis added). This fear on the part of the sponsors may have been exaggerated; to date no case has been brought under the California statute. For dicta suggesting that the courts would be receptive to proper claims under the Act, see *Jacobs, Inc. v. Westoaks Realtors, Inc.*, No. B003486, slip op. (Cal. Ct. App. Aug. 24, 1984) (available on LEXIS).

Only one suit has been filed to date in New York, *Newmann v. Delmar Realty Co.*, No. 2955-84 (N.Y. Sup. Ct. Apr. 26, 1984) (on file at *Cornell Law Review*). The case involves the right of artist Robert Newmann to complete a mural on an exterior wall of the Palladium Theater in Manhattan. In April, Judge Wilk granted Newmann's motion for an injunction barring the defendants from altering the wall in the course of renovating the building. The court based its decision on the fact that Newmann had an easement in gross, and that defendants had constructive knowledge of the plaintiff's interest in property when they leased the theater. Supplementing these reasons was the court's ruling that defendants' actions were "a violation of the spirit and letter of the Artists' Authorship Rights Act." *Id.* at 9.

A second hearing in the matter was pending when this Note went to press.

<sup>136</sup> CAL. CIV. CODE § 987(e)(3) (West 1982).

discovered the two damaged paintings for sale as his original works,<sup>137</sup> he could have disclaimed authorship and prevented their public display without employing the indirect method of a property action.<sup>138</sup>

### III

#### PROPOSED AMENDMENTS

##### A. Right to Claim or Disclaim Authorship of Reproductions

Under the New York Act, the right to claim or disclaim authorship does not explicitly extend to reproductions.<sup>139</sup> An understanding of the goals of the Act—protection of artists' personality rights and the integrity of original artworks— and a review of other provisions of the Act suggest that this omission was inadvertent. Section 14.53, prohibiting certain displays of defaced or modified works,<sup>140</sup> extends to "a work of fine art . . . or a reproduction thereof."<sup>141</sup> Section 14.57(2), limiting claims arising from reproduction, refers both to violations of section 14.53 and to the right to disclaim authorship under section 14.55.<sup>142</sup> Indeed, if an artist could disclaim authorship of an altered reproduction, there would be less need to object to its publication or display.<sup>143</sup> A reproduction is not a unique work of art, and if the artist's reputation is not at risk, alterations harm neither the artist, the original artwork, nor society's interest in preserving the artwork.<sup>144</sup> Therefore, an amendment providing the right to claim or disclaim authorship of a reproduction would remedy an oversight in the statute.

##### B. Extension of Enforcement Period

Under the current New York Act, all rights and protection terminate with the artist's death. Such short-lived authorship rights fail to fully defend the needs of artists, the integrity of artworks, and the public's interest in cultural preservation. The Berne Convention demands that, at a minimum, the artist's interests in a work continue until the

<sup>137</sup> See *supra* text accompanying notes 43-47.

<sup>138</sup> N.Y. ART & CULTURAL AFF. LAW §§ 14.53, .55 (McKinney 1984).

<sup>139</sup> *Id.* § 14.55.

<sup>140</sup> See *supra* text accompanying notes 89-90.

<sup>141</sup> N.Y. ART & CULTURAL AFF. LAW § 14.53.

<sup>142</sup> *Id.* § 14.57(2) ("In the case of a reproduction, a change that is an ordinary result of the medium of reproduction does not by itself create a violation of section 14.53 . . . or a right to disclaim authorship under . . . section 14.55 . . .").

<sup>143</sup> For example, in *Neyland v. Home Pattern Co.*, 65 F.2d 363 (2d Cir. 1933) (discussed *supra* note 38), *Neyland* had no right to object to or prevent the sale of the embroidered cushion because it was not his original work. However, the improper association of his name with the altered and inferior design could inflict a loss to him and his reputation. The New York Act should protect this interest.

<sup>144</sup> For example, the numerous altered reproductions of Grant Wood's *American Gothic* have not diminished his reputation or the original work, and arguably may have enhanced our appreciation of the painting.

economic interests in it expire.<sup>145</sup> A copyright is enforceable for at least fifty years after the artist's death.<sup>146</sup> Lengthening the enforcement period provided in the New York Act would bolster the deterrent effect of the Act and still remain consistent with the New York legislature's approach of harmonizing *droit moral* with private ownership.

Extending the duration of protection under the Act raises the issue of who, after the artist's death, should be entitled to enforce these rights. Whether the artist's executors or heirs are competent to do so is debatable, as the actions of David Smith's executors demonstrate.<sup>147</sup> The California Act entrusts enforcement to a public agency or private not-for-profit organization acting "in the public interest."<sup>148</sup> Because the balance of interests among artist, owner and public may shift after the artist's death in favor of society's interest in preserving the integrity of the work, some form of public enforcement may be the optimum solution.

### C. Notice Prior to Destruction of Works

The New York Act should be amended to provide the artist with the right to object to the unauthorized destruction of a work of art without prior notice.<sup>149</sup> The purpose of the Act is to protect an artist's enduring personality interest in a work of art, preserve the integrity of a work, and safeguard society's artistic treasures without unconstitutionally or unreasonably encroaching on an owner's property rights. A notice requirement would not unduly interfere with the prerogatives of ownership and would provide the artist an opportunity to negotiate or arrange for the preservation of the work.<sup>150</sup> If no notice is given and an act of removal borders on vandalism, as in the Noguchi incident described earlier,<sup>151</sup> monetary damages may be appropriate. Injunctive relief is clearly inadequate.

<sup>145</sup> Berne Convention, *supra* note 3, art. 6*bis*.

<sup>146</sup> 17 U.S.C. § 302(a) (1982) (copyright expires 50 years after artist's death); *see also* German Law of Sept. 13, 1965, *supra* note 1, art. 64 (copyright expires 70 years after artist's death).

<sup>147</sup> *See supra* note 32 (discussing acts by executors of David Smith's estate).

<sup>148</sup> *See* CAL. CIV. CODE § 989(c) (West Supp. 1984).

<sup>149</sup> Unlike the California Act, the New York Act contains no protection for an artist whose work has been destroyed. *See* CAL. CIV. CODE § 987(a), (c) (West Supp. 1984).

In its present form the New York Act would not have benefited Isamu Noguchi, whose sculpture "Shinto" was cut up and removed from the Bank of Tokyo's Manhattan office. *See supra* notes 28-29 and accompanying text.

Whether European *droit moral* statutes extend to acts of destruction is unclear. *See* Merlyman, *supra* note 2, at 1038-39 (suggesting that they do). *Contra* Note, *Artworks*, *supra* note 30, at 1218 n.94.

<sup>150</sup> The removal of the gargoyles from the old Bonwit Teller building exemplifies the importance of notifying the artist, a public agency, or a museum before a work is destroyed. The incident is reported and discussed in Barbanel, *Grillwork Missing at Bonwit Building*, N.Y. Times, June 7, 1980, at A23, col. 2; Note, *Artworks*, *supra* note 30, at 1224-26; Note, *Americanization of Droit Moral*, *supra* note 30, at 931 & nn.133-34.

<sup>151</sup> *See supra* notes 28-29, 149 and accompanying text.

## CONCLUSION

The New York Artists' Authorship Rights Act is a creative and progressive response to a void in our legal system. Rather than a rote adoption of the *droit moral*, the law adapts principles of moral rights to New York's existing laws. An exercise of state power in an area previously the exclusive province of private property laws not unexpectedly provokes opposition from some quarters.<sup>152</sup> Yet, precedent has unequivocally established that the exercise of this power is fully justified whenever there is an overriding public interest at stake.<sup>153</sup> There is substantial public interest in protecting the personality rights of artists, the integrity of artworks, and the cultural heritage of the residents of New York.

The amendments proposed in this Note extend the protection available under the new law, yet remain in harmony with the framework of the Act and the intent of the drafters. The amendments do not significantly alter the balance among the competing interests of artists, art owners, and the public. Other states should enact similar legislation. By increasing the protection and enhancing the status of visual artists, widespread recognition of artists' moral rights will improve the general welfare.

*Sarah Ann Smith*

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<sup>152</sup> See, e.g., *supra* note 60 and accompanying text; Memorandum from the State Education Department to Counsel to the Governor (July 15, 1983) (recommending disapproval of the bill since it "is inconsistent with traditional legal concepts of the rights of owners of works of art"); Maslow, Letter to the Editor, N.Y.L.J., Jan. 3, 1984, at 2 (The state should not impose modifications of traditional property concepts on art owners; such modifications constitute takings of property without due process.). *But cf. supra* notes 61-65 and accompanying text.

<sup>153</sup> The Supreme Court has referred to the police power as "one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily." *Hadachck v. Sebastian*, 239 U.S. 394, 410 (1915).