PROTECTING THE MORAL RIGHTS OF ARTISTS: THE SCOPE OF CURRENT AMERICAN LEGISLATION

Artists, critics, philosophers, sociologists and countless others have pondered the importance of art and the artist in society. Although there may never be a consensus of opinion on this subject, few of those that have been inspired by great paintings, sculptures, novels, films, or other artistic forms would argue with the eloquent words of Joseph Conrad:

> [A]rt itself may be defined as a single-minded attempt to render the highest kind of justice to the visible universe, by bringing to light the truth, manifold and one, underlying its every aspect. It is an attempt to find in its forms, in its colors, in its light, in its shadows, in the aspects of matter and in the facts of life, what of each is fundamental, what is enduring and essential—their one illuminating and convincing quality—the very truth of their existence. The artist, then, like the thinker or the scientist, seeks the truth and makes his appeal.
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> The changing wisdom of successive generations discards ideas, questions facts, demolishes theories. But the artist appeals to that part of our being which is not dependent on wisdom: to that in us which is a gift and not an acquisition. . . .He speaks to. . .the latent feeling of fellowship with all creation—to the subtle but invincible conviction of solidarity that knits together the loneliness of innumerable hearts, to the solidarity in dreams, in joy, in sorrow, in aspirations, in illusions, in hope, in fear, which binds men to each other, which binds together all humanity—the dead to the living and the living to the unborn.[1]

It is this understanding about the enduring value of art that has lead to the development of moral rights laws.

Put simply, moral rights are an artist's right in protecting the integrity of his or her work. They are promoted in the United States as both a means of securing the continued viablity of an artist's creation and of insuring the protection of the artist's reputation. While moral rights as they have developed in Europe are considerably broader and more complex than this,[2] moral rights laws in the United States are designed to insure one primary right: integrity.

Currently, seven states have enacted moral rights legislation.[3] Understandably, these jurisdictions tend to have a higher concentration of artists and collectors

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1. J. CONRAD, THE NIGGER OF THE NARCISSUS, preface at xi-xii (1897).
2. *Droit moral* is the French term for moral rights law. *See generally* Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law,* 16 AM. J. COMP. L. 465 (1968); DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States,* 28 BULL. COPYRIGHT SOC. U.S. 1 (1980), *reprinted in* ART LAW 435-91, at 443 (Elman ed. 1980) [herinafter DaSilva]. The German term for moral rights law is *Urheberpersonlichkeitsrecht* (creator's personalty right). *See* Marcus, *The Moral Right of the Artist in Germany,* 25 COPYRIGHT L. SYMP. (A.S.C.A.P.) 93 (1980).
3. California Art Preservation Act, CAL. CIV. CODE § 987 (West Supp. 1988); Artists' Authorship Rights, N.Y. ARTS AND CULTURAL AFFAIRS LAW, §§ 14.01-.02 (McKinney Supp. 1988); Massachusetts Moral Rights Statute, MASS. GEN. LAWS ANN. ch. 231, § 85S (West Supp. 1986); Libraries, History and Culture Law, ME. REV. STAT. ANN. tit. 27, § 303 (1987) ("Preservation of works of art"); Pennsylvania Fine Arts Preservation Act, PA. STAT. ANN. tit. 73, §§ 2101-2110 (Purdon Supp. 1988); WORKS OF ART—ARTISTS' RIGHTS, R.I. GEN. LAWS 5-62-1 (1987).

than most states.[4] California enacted the first American moral rights law, followed by New York, Massachusetts, Maine, Louisiana, Pennsylvania and Rhode Island.

France, where moral rights laws initially developed, has extensive moral rights statutes.[5] West Germany also has substantial moral rights laws.[6] Though these are only two of the few countries with individual moral rights legislation, over eighty nations currently belong to the international copyright organization known as the Berne Convention,[7] which has established a commitment to protect moral rights.[8]

A variety of commentators, as well as a host of artistic organizations, pressed the United States to join the Berne Convention[9] or, in the alternative, to establish federal moral rights legislation.[10] This pressure recently intensified, reflecting the emotional debate surrounding the colorization of motion picture classics,[11] and the heavily publicized destruction of public artworks.[12] Recently the United States joined the Berne Convention[13] but refused to adopt its moral rights provision.[14]

This case note will review the nature and scope of contemporary moral rights law and explore the potential benefits of federal legislative action. Section I will discuss current artistic controversies involving moral rights. Section II will detail the historical development of moral rights law. The third section will review the

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4. *See generally*, OCCUPATION OUTLOOK HANDBOOK 1988-89, at 180-99 (1988).
5. Loi du 11 Mars 1957 Sur La Propriete Litteraire Artistique, 1957 J.O., *translated in* U.N. EDUC., SCI. CULTURAL ORGANIZATION, COPYRIGHT LAWS AND TREATIES OF THE WORLD at "France, Item 1" (1976).
6. Law of Sept. 9, 1968, [1968] BGBl I, 1924, § 29.
7. Berne Convention for the Protection of Literary and Artistic Works (Paris Revision, July 24, 1971), *reprinted in* BOORSTYN, COPYRIGHT LAW 715-55 (1981) [hereinafter Berne Convention].
8. Berne Convention, art. 6bis; *see infra* note 34 and accompanying text.
9. *See generally* 132 CONG. REC. S12,197-98 (daily ed. Sept. 9, 1986) (remarks of Hon. Ralph Oman before WIPO governing bodies meeting in Geneva, Switzerland); Note, *Internationalizing the Copyright Code: An Analysis of Legislative Proposals Seeking Adherence to the Berne Convention*, 76 GEO. L.J. 467 (1987) [hereinafter Berne Note].
10. *See generally* Berne Note, *supra* note 9; *see also* Davis, *State Moral Rights Laws and the Federal Copyright System*, 4 CARDOZO ARTS & ENT. L.J. 233 (1985).
11. *See generally* Davis, *supra* note 10; *see also*, Note, *Film of a Different Color: Copyright and the Colorization of Black and White Films*, 5 CARDOZO ARTS & ENT. L.J. 497, (1986) [hereinafter Colorization Note]; Greenstone, *A Coat of Paint on the Past*, 5 ENT. SPORTS LAW. 1 (1986); Durie, *Colorisation of Films*, 10 EUR. INTELL. PROP. REV. 37 (1988); KOHS, *Paint Your Wagon—Please!: Colorization, Copyright and the Search for Moral Rights*, 40 FED. COMM. L.J. 1 (1988); Cook, *Colorization—Actors and Directors: Color them Mad as Hell*, 9 NAT'L L.J. 10 (July 27, 1987) [hereinafter *Actors and Directors*]; Note, *The Colorization of Black and White Films: An Example of the Lack of Substantive Protection for Art in the United States*, 63 NOTRE DAME L. REV. 309 (1988); *Film Stars Protest Coloring*, N.Y. Times, May 13, 1987, at C19, col. 1.
12. *See generally Visual Artists Rights Amendment of 1986: Hearings on S. 2796 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986) [herinafter *Hearings*]; Glueck, *Bank Cuts up Noguchi Sculpture and Stores It*, N.Y. TIMES, APR. 19, 1980, § 1 at 1, col. 1; *Sculptures Vandalized*, 68 ART IN AMERICA 202 (1980).
13. Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853 (1988).
14. *Id.* at Sec. 3(b).
Certain Rights Not Affected—The provisions of the Berne Convention, the adherence of the United States thereto, and the satisfaction of the United States obligations thereunder, do not expand or reduce any right of an author of a work. . .
(1) to claim authorship of the work; or
(2) to object to any distortion, mutilation, or other modification. . .that would prejudice the author's honor or reputation.

current extent of moral rights protection in the United States. Lastly, Section IV will suggest the advantages of a federal standard.

I. CURRENT ARTISTIC CONTROVERSIES INVOLVING MORAL RIGHTS

A. Motion Picture Colorization

In recent years, film distributors have found that audiences far prefer motion pictures photographed in color to those created in black and white.[15] This consumer preference has fostered a successful marketing trend that threatens to damage artistic integrity: motion picture colorization. Prior to the 1950's, the majority of motion pictures were created by using black and white film.[16] Although color technology was available early in the twentieth century, many directors and producers felt color filmmaking was an unduly expensive and artistically limited medium.[17] Filmmakers were more comfortable with the predictible contrasts available from black and white film.[18] With the advent of color television, and the subsequent popularity of color programming,[19] the motion picture industry felt compelled to move toward color. This shift was so extensive that today a new black and white feature, such as Woody Allen's *Manhattan*, Martin Scorsese's *Raging Bull* or David Lynch's *The Elephant Man*, attracts considerable attention.

While Allen, Scorsese, Lynch and a handful of other directors have proven audiences will still purchase tickets to see black and white films, owners of film libraries have found the distribution of black and white classics exceptionally difficult.[20] In increasing numbers, these organizations have found that sophisticated computer technology can transform black and white movies into color,[21] and thus their distribution value can be increased.[22]

Directors, screenwriters, producers and movie critics have nearly uniformly denounced colorization as a corruption of artistic integrity.[23] They argue that

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15. *See* Colorization Note, *supra* note 11, at 498 n.4.
16. G. MAST, A SHORT HISTORY OF THE MOVIES 265 (3rd ed. 1981).
17. Around the turn of the century some filmmakers created hand-tinted color films. Although some of these were created frame by frame to create the impression of color photography, most tinting was used merely to create tonal washes. In 1908, Kinemacolor, a color photographic technique, was patented, but this process was not used in commercial filmmaking. Technicolor, developed in 1917, was used sparingly from the late 1920's through the 1940's. The early color processes were costly and produced a limited range of tones. For these reasons, color filmmaking failed to gain commercial acceptance until the 1950's when inexpensive processes and realistic color became available. *Id.* at 265-66.
18. *See* Kehr, *The Big Canvas*, Chicago Tribune, March 27, 1988, § 13 at 18, col. 1 ("Though Technicolor's trade advertisements always emphasized its 'natural' hues, they were, in fact, anything but. . . .These were colors that jumped from the screen, loud, hard and vibrant—colors that always proclaimed themselves as something extra. . . .")
19. *See* L. BROWN, THE NEW YORK TIMES ENCYLOPEDIA OF TELEVISION 90-91 (1977) (discussing the development of color television programming from a medium reaching only 1% of television households in 1954 to 75% in 1977).
20. *See* Colorization Note, *supra* note 11, at 498, n.4.
21. *Id.* at 503-4 and accompanying notes; *Play it Again Sam—In Color,* N.Y. Times, Apr. 22, 1987, at D7, col. 1 (discussing the colorization process and estimating the cost at as much as $350,000 per film).
22. Colorization Note, *supra* note 11, at 498, n.5.
23. *See Actors and Directors, supra* note 11.

federal moral rights legislation should be enacted to protect black and white motion pictures.

B. Physical Alteration and the Display of Mutilated Artworks

In 1982 Frank Stella, an established contemporary artist, found displayed in a New York gallery two rain-damaged paintings which had been stolen from his studio in 1966. He brought suit against the gallery (this was prior to the passage of the New York Artists' Authorship Rights Act), claiming that he intended to dispose of these works and that their continued display harmed his reputation. Stella's claim against the gallery owner[24] settled out of court, but if this claim had proceeded to trial it is unlikely Stella would have prevailed.

In 1980, a sculpture by the prominent American artist, Isamu Noguchi, was destroyed when it was removed from the New York branch of the Bank of Tokyo. The owner gave little thought to the artist's interest in his work, since the owner considered its right to the artistic property absolute.[25] Noguchi proceeded to bring suit, but failed to recover for the destruction.

Larry Rivers, a New York pop artist, was commissioned by *Vanity Fair* magazine to create drawings reflecting his impression of the Statue of Liberty. He made a series of five drawings, one of which showed the Statue of Liberty in the shape of the United States. Although he understood that the drawings would be printed as a series, *Vanity Fair* printed only the one drawing showing the statue as the United States. Appearing next to the drawing was "a kind of stupid doggerel. . .[in which] someone compared. . .the Statue of Liberty to some kind of disco."[26] Although Rivers was paid for his drawings, he was incensed because he felt that the overall impression was that his drawing had been created to illustrate the writing.

These situations are generally presumed to be covered by copyright law. Yet, the federal law appears to support the position that, with the copyright vested in the controlling authority, an artist's right to protect the integrity of his or her creation is nonexistent absent a significant Lahnam Act dispute. Therefore, artists must rely on the limited protections afforded by state law.

II. THE HISTORICAL DEVELOPMENT OF MORAL RIGHTS LEGISLATION

Moral rights law emerged as judicial remedies created by eighteenth-century French courts.[27] These evolved from the enlightenment concept of natural rights.[28] Furthermore, the protection of artistic integrity was recognized by many as an important cultural goal.

As the strength of moral rights law grew, so did the academic debate over its origins. Legal scholars disputed whether these were actually personal rights attached to the artists or property rights tied to their creations.[29] In Germany the

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24. Stella v. Mazoh, No. 07585-82 (N.Y. Sup. Ct., Apr. 1, 1982).
25. *See generally Hearings, supra* note 12.
26. *Id.* at 15 (statement of Larry Rivers).
27. DaSilva, *supra* note 2, at 443.
28. *Id.* at 487.
29. *Id.* at 443-45.

property theory prevailed, while in France the personal theory became the established rationale.[30] Regardless of theoretical underpinnings, the statutory moral rights law which eventually developed in each country is quite similar.

The French moral rights statutes have become the model for other codifications. Established in the Law of 11 March 1957,[31] the statute's moral right protections can be separated into four overlapping categories.[32] First, the law gives the artist the right to determine when a work is complete (the right of completion). Second, the creator has the right to withdraw, modify or hide a displayed creation. Third, the artist has the right to claim or disclaim authorship (the right of paternity). Last, the creator has the right to shield the work from alteration or mutilation (the right of integrity).

Current American statutes focus on protecting the artist's right of paternity as well as the artist's right to protect against the mutilation of artistic work or the display of mutilated work.[33] Although the current New York, Maine, Louisiana and Rhode Island laws do protect the right of completion, no state statute allows an artist the ability to withdraw, modify or hide an otherwise finished, intact piece of artwork after it has been sold. This would seem to reflect the strong American predilection for the alienability of property.

Although French law forms the model for other moral rights codifications, the current international standard provides far less protection. The Berne Convention,[34] an international copyright convention of which eighty nations are now members,[35] allows an artist limited, but significant, moral right protection.[36] These include the rights most often seen in American statutes: the right of paternity and the right of physical integrity.[37]

Until 1988, the United States had never been a signor of the Berne Convention. Although legal commentators and artistic unions had argued for our admission,[38] numerous groups opposed admission because of the Convention's

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30. *Id.* at 444-45.
31. *See supra* note 5.
32. *See generally* Hathaway, *American Law Analogies to the Paternity Element of the Doctrine of Moral Right: Is the Creative Artist in America Really Protected?*, 30 COPYRIGHT L. SYM. (AM. SOC. OF COMPOSERS, ARTISTS PRODUCERS) 121 (1983); DaSilva, *supra* note 2; Stevenson, *Moral Right and the Common Law: A Proposal*, 6 COPYRIGHT L. SYMP. (AM. SOC. OF COMPOSERS, ARTISTS & PRODUCERS) 89 (1955); Katz, *The Doctrine of Moral Right and American Copyright Law*, 4 COPYRIGHT L. SYM. (AM. SOC. OF COMPOSERS, ARTISTS & PRODUCERS) 78 (1952); Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940); Diamond, *The Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244 (1978).
33. *See infra* notes 38-39, 52.
34. *See supra* note 7.
35. *See* 24 Copyright (WIPO) 444 (1988).
36. Similar to current state statutes, the moral rights provision in the Berne Convention protects paternity and integrity rights:

> Independent 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.

Berne Convention, art. 6bis.
37. *Id.*
38. *See* Deboff, Winter, Flacks & Keplinger, *Out of UNESCO and into Berne: Has United States Participation in the Berne Convention for International Copyright Protection Become Essential?*, 4 CARDOZO ARTS & ENT. L.J. 203 (1985); Krigsman, *Section 43(a) of the Lanham Act as a Defender of Artists' Moral Rights*, 73 TRADE MARK REP. 251, 255 (1983).

moral rights provisions.[39] As set-forth in the Berne Convention Implementation Act of 1988, our entrance into Berne does not reflect any intention to expand American moral rights protections.

III. AMERICAN LEGISLATIVE ACTION

A. State Statutes

As noted above, at the present time seven American states have moral rights statutes. California was the first state to pass a moral right law. New York and Massachusetts soon followed. Recently, Maine, Louisiana, Pennsylvania and Rhode Island each enacted moral right legislation.

The American statutes are more limited in scope than their European counterparts. The seven states share the desire to protect an artist's right of paternity. The statutes all allow an artist to "claim or disclaim authorship" of an artwork.[40] Furthermore, the states all seek to prevent the mutilation of artistic creations; however, the theory and scope of this protection varies between two distinct groups of states.

The first group, represented by California, Massachusetts and Pennsylvania (Group One), protects against the intentional or grossly negligent commission of "physical defacement, mutilation, alteration, or destruction"[41] of a work of "fine art."[42] This standard promotes the physical integrity of a limited variety of works of "recognized quality."[43]

The three states in Group One vary in the type of work protected by their statutes. The California law protects only "fine art" which is defined to include "an original painting, sculpture, drawing, or an original work of art in glass"[44] so long as these objects were not prepared for commercial use.[45] The Massachusetts statute promotes an expansive view of what may be considered "fine art." While the California act only affords protection for what could be considered traditional fine arts, Massachusetts provides moral right protection to crafts, photography, audio or video tape, film, holograms and mixed media works—as well as the typical fine arts.[46] Pennsylvania's Fine Arts Preservation Act, rather than specifically enumerating the forms of art protected, allows protection to

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39. *See* Davis, *supra* note 10, at 258 (discussing the lobbying efforts of "heavy users of works of art"); Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 449, 524 (1967) (discussing the early opposition of film producers and others engaged in the commercial exploitation of art to the Berne Convention's moral rights protections).
40. CAL. CIV. CODE § 987(d) (West Supp. 1988); N.Y. ARTS AND CULTURAL AFFAIRS LAW, § 14.03(2)(a) (McKinney Supp. 1988); MASS. GEN. LAWS ANN., ch. 231, § 85S(d) (West Supp. 1986); ME. REV. STAT. ANN. tit. 27, § 303(3) (1987); LA. REV. STAT. ANN. tit. 51, § 2154(B), (C) (West 1987); PA. ST. ANN. tit. 73, § 2103 (Purdon Supp. 1988); R.I. GEN. LAWS 5-62-4 (1987); PENNA. ST. ANN. tit. 73, § 2103.
41. Cal. Civ. Code § 987(c) (West Supp. 1988); Mass. Gen. Laws Ann. ch. 231, § 85S(c) (West Supp. 1986); PA. STAT. ANN. TIT. 73, § 2104 (Purdon Supp. 1988).
42. CAL. CIV. CODE § 987(b)(2) (West Supp. 1988); MASS. GEN. LAWS ANN. ch. 231, § 85S(b) (West Supp. 1986); PA. ST. ANN. tit. 73, § 2102 (Purdon Supp. 1988).
43. CAL. CIV. CODE § 987(b)(2) (West Supp. 1988); MASS. GEN. LAWS ANN. ch. 231, § 85S(b) (West Supp. 1986); PA. ST. ANN. TIT. 73, § 2102 (Purdon Supp. 1988).
44. CAL. CIV. CODE § 987(b)(2) (West Supp. 1988).
45. Id.
46. MASS. GEN. LAWS ANN. ch. 231, § 85S(b) (West Supp. 1986).

any "original work of visual or graphic art" in "any medium. . .[including] but not limited to a painting, drawing or sculpture."[47] Additionally, all of the states in Group One require that coverage only extend to works of "recognized quality."[48] The "recognized quality" criterion of the California, Massachusetts and Pennsylvania statutes requires a test. Rather than leave this exclusively to judicial interpretation, the statutes each set forth the form for establishing the evidentiary evaluation.[49] For the most part, they require the trier of fact to review the testimony of artists and art market "insiders"[50] to determine whether a particular work is of established quality. This attempts to free individual owners from liability based on the destruction or mutilation of marginally creative works. However, commentators have argued that this means of presenting evidence will be prejudicial to evolving styles, and will undercut the protection of new creative visions.[51] This would defeat the general goals of moral rights law—promoting the continued integrity and vitality of socially and spiritually significant creations.

If an artwork is housed in or attached to a building so that removal cannot be accomplished without "substantial physical defacement, mutilation, alteration, or destruction of such work," Group One states require artists to reserve their moral rights protections in a written instrument signed by the building owner.[52] California and Massachusetts further require that the document be properly recorded.[53] If not, the artist's rights are deemed waived.

The second group of states, consisting of New York, Maine, Louisiana and Rhode Island (Group Two), protect an artist's reputation by prohibiting the knowing display or publication of "an altered, defaced, mutilated or modified" work when "damage to the artist's reputation is reasonably likely to result."[54]

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47. PA. ST. ANN. tit. 73, § 2102 (Purdon Supp. 1988).
48. CAL. CIV. CODE § 987(b)(2) (West Supp. 1988); MASS. GEN. LAWS ANN. ch. 231, § 85S(b) (West Supp. 1986); PA. ST. ANN. tit. 73, § 2102 (Purdon Supp. 1988).
49. CAL. CIV. CODE § 987(f) (West Supp. 1988); MASS. GEN. LAWS ANN. ch. 231, § 85S(f) (West Supp. 1986); PA. ST. ANN. tit. 73, § 2016 (Purdon Supp. 1988).
50. CAL. CIV. CODE § 987(f) (West Supp. 1988); MASS. GEN. LAWS ANN. ch. 231, § 85S(f) (West Supp. 1986); PA. ST. ANN. tit. 73, § 2016 (Purdon Supp. 1988). These include art dealers, collectors of fine art, curators of art museums and other people engaged in the art trade. The Massachusetts statute specifically includes restorers and conservators of fine art.

    These people generally can be seen as involved in the marketing or preservation of art. Their interests are clearly commercial or, in some cases, historical. Although dealers, collectors and curators are instrumental to the development of an artist's reputation, they are primarily concerned with profitable, popular art.

    In developing an opinion on whether or not a particular work is of recognized quality an "insider" will necessarily look to see if the artist has an established following. A dealer might question whether the artist's prior work has been shown, and whether any of it was purchased. A collector, frequently an investment-oriented purchaser, will wonder whether a particular *objet d'art* is worth a significant price. Museum curators necessarily ask whether this piece will please the viewing public.

    The opinions of these people are useful, but they are likely to show bias toward established artists, and they may fail to recognize the value of a developing artist's creations.
51. *See supra* note 33, at 173.
52. CAL. CIV. CODE § 987(h)(1) (West Supp. 1988); MASS. GEN. LAWS ANN. ch. 231 § 85S(h)(1) (West Supp. 1986); PA. ST. ANN. tit. 73, § 2108(a) (Purdon Supp. 1988).
53. CAL. CIV. CODE § 987(h)(1) (West Supp. 1988); MASS. GEN. LAWS ANN. ch. 231 § 85S(h)(1) (West Supp. 1986).
54. N.Y. ARTS AND CULTURAL AFFAIRS LAW § 14.03(a) (McKinney Supp. 1988); ME. REV. ST. ANN. tit. 27, § 303(2) (1987); LA. REV. STAT. ANN. tit. 51, § 2153(3) (West 1987); R.I. GEN. LAWS 5-62-4(a) (1987).

These statutes focus on the retention of personal reputation, rather than the physical integrity of artwork. Although the two groups of states tend to protect the same—albeit limited—moral rights, the groups vary considerably in determining which types of work deserve coverage. Group Two states limit protection to "fine art," but refrain from requiring a specific quality criteria.[55] By adopting this position, this group appears to follow the federal copyright scheme. That is, it extends coverage to work displaying even minimal creativity.[56] Although New York does not link moral rights protection to the "artfulness" of a particular work, the forms of art covered by its statute are limited to "painting, sculpture, drawing, or work of graphic art, and print."[57] The Maine, Louisiana, and Rhode Island acts define "fine art" as "any work of visual or graphic art of any medium which includes, but is not limited to, [the following] painting, drawing, print, photographic print or sculpture of a limited edition of no more than 300 copies."[58]

Both states in Group Two explicitly deny protection to "sequential imagery, such as that in motion pictures."[59] New York accomplishes this by establishing an exception to normal protection.[60] Maine, Louisiana, and Rhode Island, on the other hand, state that "'[w]ork of fine art' does not include sequential imagery, such as that in motion pictures."[61]

In all seven of the states having moral rights statutes, the artist may bring suit for injunctive and legal relief.[62] Massachusetts further allows the attorney general to request injunctive relief on the artist's behalf for up to fifty years after the artist's death.[63] The California and Pennslyvania statutes specifically allow punitive damages that, at the court's discretion, may be given to a "charitable or educational" organization "involved in the fine arts."[64] Six of the seven states require that an action be instituted "within three years of the

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55. N.Y. ARTS AND CULTURAL AFFAIRS LAW § 14.03(3)(e) (McKinney Supp. 1988); ME. REV. ST. ANN. tit. 27, § 303(1)(d) (1987); LA. REV. STAT. tit. 51, § 2155(E) (West 1987) (Although sec. 2152 of the Louisiana does contain a definition of "recognized quality" this appears to be an inadverent addition. The substantive portions of the act never use the term); R.I. GEN. LAWS 5-62-5(e) (1987).
56. 1 M. NIMMER, NIMMER ON COPYRIGHT § 208 (1987).
57. N.Y. ARTS AND CULTURAL AFFAIRS LAW § 11.01(9) (McKinney Supp. 1988).
58. ME. REV. ST. ANN. tit. 27, § 303(1)(d) (1987); LA. REV. STAT. ANN. tit. 51, § 2152(7) (West 1987); R.I. GEN. LAWS 5-62-2(e) (1987). (Louisiana and Rhode Island include "the following;" Maine does not).
59. N.Y. ARTS AND CULTURAL AFFAIRS LAW § 14.03(1) (McKinney Supp. 1988); ME. REV. ST. ANN. tit. 27, § 303(1)(d) (1987).
60. "[T]his section shall not apply to sequential imagery such as that in motion pictures." N.Y. ARTS AND CULTURAL AFFAIRS LAW § 14.03(1) (McKinney Supp. 1988).
61. ME. REV. ST. ANN. tit. 27, § 303(1)(d) (1987); LA. REV. STAT. ANN. tit. 51, § 2152(7) (West 1987); R.I. GEN. LAWS 5-62-2(e) (1987).
62. CAL. CIV. CODE § 987(e) (West Supp. 1988); N.Y. ARTS AND CULTURAL AFFAIRS LAW § 14.03(4) (McKinney Supp. 1988); MASS. GEN. LAWS ANN. ch. 231, § 85S(e) (West Supp. 1986); PA. ST. ANN. tit. 73, § 2105 (Purdon Supp. 1988); ME. REV. ST. ANN. tit. 27, § 303(5) (1987); LA. REV. STAT. ANN. tit. 51, § 2156(A) (West 1987); R.I. GEN. LAWS 5-62-6(a) (1987).
63. MASS. GEN. LAW ANN. ch. 231, § 85S(g) (West Supp. 1986).
64. CAL. CIV. CODE § 987(e)(3) (West Supp. 1988); PA. ST. ANN. tit. 73, § 2105(3) (Purdon Supp. 1988); CAL. CIVIL CODE 987(i) (West Supp. 1988); NEW YORK ARTS AND CULTURAL AFFAIRS LAW § 14.03(4)(b) (McKinney Supp. 1988); ME. REV. ST. ANN. tit. 27, § 303(5) (1987); LA. REV. STAT. ANN. tit. 51, § 2156(B) (West 1987); PA. ST. ANN. tit. 73, § 2109 (Purdon Supp. 1988); R.I. GEN. LAWS 5-62-6(b) (1987). The Massachusetts statute does not mention the appropriate statute of limitation.

act complained of or" one year after discovery, "whichever is longer."[65]

B. Case Law

There have been very few reported cases interpreting these statutes. This may well be due to the recent enactment dates of these laws; they have only been around a few years. Although American courts have long recognized a creator's interest in having the creator's name associated with the his or her work,[66] prior to the development of these moral rights statutes, creators were forced to depend on contract, copyright or Lahnam Act actions for relief.[67]

When called upon to adopt moral rights principles by judicial decision, courts have balked.[68] Nonetheless, American courts have provided some protection to artists concerned with the integrity of their work. These protections have generally been limited to egregious situations.[69] In *Gilliam v. American Broadcasting Companies*,[70] the English comedy troupe, Monty Python, brought suit against the ABC television network for broadcasting edited versions of their British television program. Though ABC owned the rights to these productions, the plaintiffs claimed that by presenting the programs in an edited, episodic format ABC destroyed the continuity and overall quality of the work.[71] The U.S. Court

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65. CAL. CIVIL CODE 987(i) (West Supp. 1988); NEW YORK ARTS AND CULTURAL AFFAIRS LAW 14.03(4)(b) (McKinney Supp. 1988); ME. REV. ST. ANN. tit. 27, 303(5) (1987); LA. REV. STAT. ANN. tit. 51 2156(B) (West 1987); PA. ST. ANN. tit. 73, 2109 (Purdon Supp. 1988); R.I. GEN. LAWS 5-62-6(b) (1987). The Massachusetts statute does not mention the appropriate statute of limitation.

66. *See* Clemens v. Press Publishing Co., 67 Misc. 183, 122 N.Y.S. 206 (N.Y. App. Term 1910) (an author's right to have his name placed on a work "necessarily affects his reputation and standing"); Paramount Prods., Inc. v. Smith, 91 F.2d 863 (9th Cir. 1957) ("[c]ourts have recognized the importance of having an author's name attached to a work that is presented to the public").

67. Greenstone, *supra* note 11, at 24, n.88. Regarding previous theories of recovery for film distortions, see, *e.g.*, Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976) (misrepresentation of designation under the Lahnam Act); Stevens v. National Broadcasting Company, 270 Cal. App. 2d 886, 76 Cal. Rptr. 106 (1969); Preminger v. Columbia Pictures Corp., 49 Misc. 2d 363, 372, 267 N.Y.S.2d 594 *aff'd* 25 A.D.2d 830, 269 N.Y.S.2d 913, *aff'd* 18 N.Y.2d 659, 273 N.Y.S.2d 80 (1966) 219 N.E.2d 431; Autry v. Republic Prods., Inc., 213 F.2d 667, 669 (9th Cir. 1954) (contract).

68. *See* Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949) In Crimi, a large fresco was painted for a church, but eight years after its creation it was painted over without notice to the artist. Apparently the work was covered because parishioners felt "a portrayal of Christ with so much of His chest bare placed more emphasis on His physical attributes than on His spiritual qualities." The court refused to recognize the artist's reputation interest in his mural.

See also Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 80 N.Y.S.2d 575 (1948), *aff'd* 275 A.D. 695, 87 N.Y.S.2d 430 (1949) In Shostakovich, four eminent Russian composers charged that use of their music in an anti-Soviet documentary falsely implied that they were disloyal to their country. The court failed to grant damages or an injunction because they refused to recognize the artists' moral rights claim. *But see* Soc. Le Chant de Monde. v. Soc. Fox Europe et Soc. Fox Americaine Twentieth Century (judgment of Jan. 13, 1953), 1 Gaz. Pal. 191, 1954 D.A. Jur. 16, 80 (Cour d'Appel Paris 1954) (the same claim was brought in a French court and the composers were victorious).

69. *See supra* note 64. *See also*, Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985); Amarnick, *American Recognition of the Moral Right: Issues and Options,* 29 COPYRIGHT L. SYM. (AM. SOC. OF COMPOSERS, ARTISTS PRODUCERS) 31 (1983); Hathaway, *supra* note 30.

70. 538 F.2d 14 (2nd Cir. 1976).

71. *Id.* at 18.

of Appeals for the Second Circuit found that although relief was not generally available in the United States for infringements of moral rights,[72] the plaintiffs could recover because ABC's actions represented a violation of the Lahnam Act.[73] Essentially, the court found that by significantly altering Monty Python's work, yet continuing to broadcast it under the troupe's name, ABC was engaging in deceptive trade practices in violation of § 43(a) of the Lanham Act.[74]

In the early case of *Geisel v. Poynter Products,*[75] the U.S. District Court for the Southern District of New York pointed out that, while moral rights actions were not available to American creators, copyright, libel, privacy and unfair competition suits may provide adequate relief.[76] *Geisel* was brought by the famous cartoonist and author, Theodor Seuss Geisel (Dr. Seuss), against a doll manufacturer who produced dolls developed from Geisel's drawings for a *Liberty* magazine story.[77] Geisel's suit pleaded five causes of action: a violation of § 43(a) of the Lanham Act, unfair competition, violation of his right of privacy, defamation and prima facie tort. The court held against Geisel on all claims except the one based on the Lanham Act. Yet, there the court found only a technical violation, and refused to grant any damages.[78]

The one significant case that has been decided under the California moral rights statute is *Jacobs v. Westoak Realtors.*[79] In this case, an architect brought suit against a developer for altering the architectural plans for a building complex. The California Court of Appeals held that the architect's work fell outside the scope of the moral rights law. They stated that building plans were "works for hire," and specifically excluded them from California moral rights protection.[80]

C. Federal Legislative Action

The United States has never passed a federal moral rights bill. This is true even though for nearly every year in recent memory moral rights bills have been introduced into the United States Congress.[81] The United States clearly needs a federal moral rights law. It is essential for the nation's cultural development to protect artistic contributions of the present from destruction or defacement in the future. The state laws now in effect provide a degree of protection, but they vary in whether they protect against physical harm to artwork, or harm to artistic reputation in the display or publication of altered works.[82] Also, the state statutes

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72. *Id.* at 24.
73. *Id.*
74. 15 U.S.C. § 1125(a) (1982). In regard to the strength of sec. 43(a) as a tool in artistic controversies see Krigsman, supra Note 39.
75. 295 F. Supp. 331 (S.D.N.Y. 1968).
76. *Id.* at 338-39, n.5.
77. The retail "hang tags" for these dolls are displayed in the text of the opinion. They state that the dolls were "[f]rom the Wonderful World of Doctor Suess." *Id.* at 348-49.
78. *Id.* at 353.
79. 159 Cal. App. 3d 637 (Cal. Ct. App. 1984).
80. *Id.* at 644.
81. *Supra* note 33, at 159 n.6. A moral rights amendment to the Copyright Act was first presented in 1940. The Shotwell Bill, S 3043 76th Cong. 3rd Sess. (1940). Since that time, numerous bills have been introduced, but to this point, each has died in the House Judiciary Committee.
82. *See supra* notes 39 and 52 and accompanying text.

generally fail to extend their protection to films.[83] A federal moral rights law would help inject consistency into current artistic protection.

Although aimed exclusively toward providing moral rights protection for motion pictures, the Film Integrity Act of 1987,[84] introduced by U.S. Representative Richard Gephardt (D-Mo.), sought to prevent the unauthorized alteration of film. The proposed amendment to the copyright act states, "[I]n the case of a motion picture, once the work has been published, no material alteration, including colorization, of the work shall be permitted without the written consent of the artistic authors of such work."[85] Although this bill serves its stated purpose—the protection of the basic integrity of films, especially from colorization—it fails to protect any other forms of art. In that respect, it falls short of the comprehensive statute necessary in this area.

In 1986, Senator Edward Kennedy (D-Mass.) introduced the Visual Artists Rights Amendment of 1986.[86] After this bill failed to reach the floor of the Ninety-ninth Congress, it was reintroduced in the same form in the One-hundredth Congress.[87] This bill, presented as an amendment to the Copyright Act, provides federal moral rights protection.[88]

Significantly, this bill recognizes the problem of artists working in a "commercial medium." Whereas state statutes generally fail to protect the artist's work when they are produced for commercial exploitation,[89] the Kennedy Bill states that "[e]vidence of commercial exploitation of a work as a whole or of particular copies does not preclude a finding that the work is a work of fine art."[90]

However, like the Group One states' statutes, the Kennedy bill requires that a work be "fine art" and of "recognized stature" in order to attract protection.[91] The test of whether a work fits these criteria is to be determined by art market "insiders"[92] as well as "other persons involved with the creation, appreciation [or] history" of fine art.[93]

D. Potential Federal Preemption of State Statutes

The Copyright Clause of the United States Constitution specifically entrusts to the federal government the right to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the

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83. *See supra* note 42, 58, and 59 and accompanying text, *but c.f.* note 44 and 45 and accompanying text.
84. H.R. 2400, 100th Cong. 1st Sess. (1987).
85. *Id.* at sec. 2(a).
86. S. 2796, 99th Cong, 2d Sess.
87. S. 1619, 100th Cong. 1st Sess., 133 CONG. REC. S11,471-01 (daily ed. Aug. 6, 1987) [hereinafter KENNEDY BILL].
88. *Id.* at sec. 3. The Kennedy Bill protects the artist's paternity right, sec. 3(b)(1), the right to protect against the public display of a mutilated work, sec. 3(c)(1), and the right to protect the work from mutilation or destruction, sec. 3(c)(2). This formulation affords protection for reputation as well as physical integrity; therefore, eliminating one of the most troubling conflicts between the current state statutes.
89. See e.g. CAL. CIV. CODE § 987(b)(2).
90. KENNEDY BILL *supra* note 84 at sec. 2(3).
91. *Id.*
92. *Id.* See also *supra* note 46.
93. KENNEDY BILL *supra* note 84 at sec. 2(3).

exclusive right to their respective writings and discoveries."[94] Therefore, state laws interfering with federal copyright protections may be suspect as a violation of the Supremacy Clause.[95] Nonetheless, prior to the 1976 Copyright Act,[96] state copyright protections were permitted in conjunction with federal laws. However, the 1976 Act explicitly declares the congressional intent to preempt state copyright laws. Under § 301(a), all state-created rights "equivalent to copyright," involving "works that are copyrightible,"[97] are preempted.

Up to this point, no state moral rights statute has been successfuly attacked on federal preemption grounds. In fact, California's controversial Resale Royalties Act of 1976,[98] which allows five percent royalty payments to artists on the resale of their work—a provision seemingly more in the traditional province of economic protection provided by federal copyright laws—withstood federal preemption under the prior copyright act.[99] Nonethless, preemption of moral rights statutes by the 1976 Copyright Act remains a possibility.

The seminal question is whether state moral rights provisions are "equivalent to copyright." The distinction between moral rights and copyright depends on whether moral rights are personal rights, and therefore different, from the economic protections of copyright or property rights. If not, this would place moral rights squarely in the area specifically regulated by federal copyright.

It may be argued that moral rights provide protection to an artist's reputation and, since reputation interests have been viewed as personal by the courts, they are unlike rights provided by the federal copyright scheme.[100] On the other hand, since moral rights tend to travel with the artworks they protect, they appear to attach to property. The 1976 Act, through its preemption provision, attempts to establish a clear federal scheme for the registration and transfer of artistic property rights. Since moral rights place encumbrances upon artistic works beyond those imposed by federal copyright laws, they may act "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[101] and may therefore be found subject to federal preemption.[102] This potential conflict between state and federal treatment of artistic rights calls for the creation of a distinct federal policy on the protection of moral rights.

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94. U.S. CONS. ART I., SEC. 8, CL. 8.
95. U.S. CONS. ART VI, CL. 2.
96. 17 U.S.C. § 101-810 (1982).
97. *Id.* at § 301(a). Preemption exists under § 301(a) to all state created rights "equivalent to copyright" if the works involved are copyrightable.

    Under § 102 and 103 eight types of work are copyrightable; 1) literary works; 2) musical works (including lyrics); 3) dramatic works (including musical score); 4) pantomimes and choreography; 5) pictorial, graphic, and sculptural works; 6) motion pictures and other audiovisual works; 7) sound recordings 8) compilations and derivative works. *Id.* at §§ 102-103.
98. CAL. CIV. CODE § 986.
99. Morseburg v. Balyon, 621 F.2d 972 (9th Cir. 1980), *cert. denied*, 449 U.S. 983 (1980).
100. *See* Davis, *supra* note 10, at 247.
101. Hines v. Davidowitz, 312 U.S. 52 (1941).
102. *See generally* Davis, *supra* note 10, at 249-256; Francione, *The California Art Preservation Act and Federal Preemption by the 1976 Copyright Act—Equivalence and Actual Conflict*, 18 CAL. W.L. REV. 189 (1982).

IV. CONCLUSION

Currently artists concerned about the integrity of their work have limited protection. Lahnam Act, contract, and privacy actions may provide relief in some circumstances,[103] but specific moral rights protections exist in only a small fraction of the fifty states. Furthermore, these states' statutes, with the exception of Massachusetts', fail to protect the integrity of one of the nation's most influential art forms: motion pictures. Additionally, not one of these states extends moral rights protection to commercial artforms such as architecture. Among the states that allow moral rights protection, there remains a distinction between Group One states that protect art of "recognized quality" against physical alteration and Group Two states that protect work of minimal creativity from being displayed or published in an altered or mutilated condition. Obviously, this inconsistency could lead to potentially unusual and inequitable results when artwork is involved in interstate commerce. A minimally creative work could be altered and displayed in California, Massachusetts or Pennsylvania, but if it were displayed in New York, Maine, Louisiana or Rhode Island it would attract moral right protection. On the other hand, a work of "recognized quality" could be altered or destroyed in Rhode Island, Louisiana, Maine or New York without any liability to the alterer. Furthermore, it could then be displayed "as is" in Pennsylvania, Massachusetts or California. Such inconsistent results undermine the fundamental purpose of moral rights laws.

A coherent federal moral rights bill would make it possible for artists to feel secure that their works will remain intact and be correctly identified with their creators. A national standard would provide protection to countless artists in jurisdictions that have not passed moral rights laws, and establish consistency among those states that already have statutes. Also, such legislation would reflect the nation's keen interest in protecting motion pictures, architecture and other commercially created works of art. Lastly, by exercising its authority, Congress would make moot the threat of preemption. Passage of the Kennedy Bill would fulfill these objectives. However, it is unlikely that the bill as it stands will ever reach a floor vote. Although numerous artistic and professional organizations support the proposed legislation, it contains some controversial proposals. In particular, it contains a seven percent resale royalty provision.[104] Although similar to California's already-adopted resale royalty provision,[105] opposition to the federal proposal has become clear in the past few years.[106]

In adopting the Berne Convention the Congress could have easily established a federal moral rights law; however they chose not to adopt Berne's moral rights provisions.[107] Nevertheless, it should be recognized that the federal government has a strong interest in protecting artists' reputations and in

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103. *Supra* note 64.
104. KENNEDY BILL *supra* note 84 at sec. 3(d)(1).
105. *Supra* note 95; *See* Siegal, *The Resale Royalty Provision of the Visual Artists Rights Act: Their History and Theory,* 93 DICK. L.J. 1 (1988).
106. *Supra.*
107. *Hearings, supra* note 12.

providing for the integrity of culturally significant works. Finally, adoption of a federal moral rights statute similar to the standard respected by other Berne Convention nations would bolster American status in the art world and help promote international cultural exchange.[108]

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108. *See* Davis, *supra* note 10, at 258-259.

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