STATE MORAL RIGHTS LAW AND THE FEDERAL COPYRIGHT SYSTEM*

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I. INTRODUCTION

In 1976, California became the first state to enact legislation specifically designed to protect certain aspects of the moral rights of artists who create works of fine art.[1] Since then, New York in 1983[2] and Massachusetts in 1985[3] have passed laws dealing with this same subject. The legislation in all three states is modeled on two aspects of the moral rights doctrine, the right of paternity[4] and the right of integrity,[5] both of which originated in France[6] and later spread to many other nations in Europe and the Third World.[7]

In general, the moral rights doctrine, as sanctioned by Article 6*bis* of the Berne Convention, protects the personality of the artist embodied in a creative work;[8] such rights are to some degree viewed as separate from the bundle of economic rights conferred by copyright protection.[9] The right of paternity or attribution enables the author to vindicate a claim of authorship in the work. The right of integrity allows the author to object to distortion, mutilation, or other alteration of the work that would

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1 CAL. CIV. CODE §§ 987-989 (West Supp. 1984).

2 N.Y. ARTS AND CULTURAL AFFAIRS LAW §§ 11.01, 14.03 (McKinney Supp. 1986) (formerly codified at §§ 14.51-14.59).

3 MASS. GEN. LAWS ANN. ch. 231, § 85S (West Supp. 1985).

4 *See infra* note 10 and accompanying text.

5 *Id.*

6 *See, e.g.*, Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 556 (1940); *see generally* H. DESBOIS, LE DROIT D'AUTEUR EN FRANCE (3d ed. 1978) 469-599.

7 *See* Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 97 (1985) for a recent list of countries with moral rights protection in their copyright laws.

8 *See* Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis* (Paris Revision, July 24, 1971), *reprinted in* 4 M. NIMMER, NIMMER ON COPYRIGHT, app. 27-5 to 6 (1985).

9 *See, e.g.*, Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968).

cause prejudice to the author's honor or reputation.[10] Underlying these rights is the notion established in foreign copyright law that because a work is an expression of the personality of the author, it remains linked to that author throughout his or her lifetime.[11]

Courts in the United States have, in certain instances, protected a personality interest in artists' work. Such protection has become available through the creative use of state common law,[12] the federal Lanham Act,[13] and the 1976 Copyright Act.[14] That these theories are sometimes accepted by the courts indicates recognition of the need to protect the link that exists between the artist and his work, by imposing a duty of care beyond that which may or may not exist contractually.[15]

A major study, published in 1961, surveyed the various existing means of protecting moral rights in the United States and concluded that no specific provision for these rights would be necessary in the *General Revision of Copyright Law*.[16] Since then, continued reliance on such makeshift devices to vindicate an art-

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[10] *Id.* at 478-80.

[11] *See, e.g.*, S.M. STEWART, INTERNATIONAL COPYRIGHT & NEIGHBOURING RIGHTS 6 (1983). *But see* P. RECHT, LE DROIT D'AUTEUR, UNE NOUVELLE FORME DE PROPRIETE 272-325 (1969).

[12] A detailed discussion of the alternative theories of moral rights protection is beyond the scope of this Article. Some of the theories used at common law include unfair competition, breach of contract, defamation, and invasion of privacy. For a discussion of the use of these theories and the problems associated with them, see, for example, Kwall, *supra* note 7, at 18; Treece, *American Law Analogue of the Author's "Moral Right"*, 16 AM. J. COMP. L. 487 (1968); *see also* Comment, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490, 1496 (1979).

[13] 15 U.S.C. § 1125(a) (1982) [hereinafter also referred to as Lanham Act § 43(a)]. The leading case in this area is Gilliam v. ABC, Inc., 538 F.2d 14, 24 (2d Cir. 1976) (holding that unauthorized editing so deformed a work as to make it misleading to attribute the work to its original author). For a discussion of the elements needed to prove a Lanham Act § 43(a) moral rights claim, see, for example, Maslow, *Droit Moral and Sections 43(a) and 44(i) of the Lanham Act—A Judicial Shell Game?*, 48 GEO. WASH. L. REV. 377-91 (1980); Comment, *Protection of Artistic Integrity: Gilliam v. ABC*, 90 HARV. L. REV. 473 (1976).

[14] 17 U.S.C. §§ 101-810 (1982, Supp. I 1983, & Supp. II 1984); *see* Gilliam v. ABC, Inc., 538 F.2d 14, 24 (2d Cir. 1976) (holding that because a licensee was not granted the right to make changes, the copyright was infringed by changes extensive enough to impair the integrity of the original work); *see also* Barnett, *From New Technology to Moral Rights: Passive Carriers, Teletext, and Deletion as Copyright Infringement—The WGN Case*, 31 J. COPYRIGHT SOC'Y 427, 449-50 (1984).

[15] *See* Clemens v. Press Publishing Co., 67 Misc. 183, 183-84 [sic], 122 N.Y.S. 206, 207 (Sup. Ct. 1910) (Seabury, J., concurring) (an author is entitled to have a work published in a nongarbled manner notwithstanding the lack of a relevant contract provision because of the special need to protect works of art).

[16] SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, STUDY NO. 4, THE MORAL RIGHT OF THE AUTHOR 124 (Comm. Print 1961), *reprinted in* 2 FISHER, STUDIES ON COPYRIGHT 963-92 (1963).

ist's moral rights has been criticized.[17] Indirect forms of protection prevent individuals from knowing their rights and responsibilities in advance.[18] Only if the artist is fortuitously able to fit his case into certain fact patterns, based on laws designed for other purposes, will protection be forthcoming.[19] Furthermore, reliance on indirect theories of protection may not satisfy the minimum requirements for the protection of moral rights that the Berne Convention requires of all its members.[20]

While attempts to enact moral rights legislation have so far failed at the national level,[21] a movement has begun at the state level that aspires, at least in part, to codify the moral rights recognized internationally.[22] This Article will examine the three recently enacted moral rights statutes to determine how such state legislation fits into the federal copyright scheme.[23] This federal system was designed to implement the basic constitutional aims of "uniformity and the promotion of writing and scholarship"[24] more effectively than under prior law.[25]

Because the works of art protected by state moral rights legislation also fall within the Copyright Act of 1976,[26] the rights newly granted by state law may conflict with federal copyright law.[27] This Article will also consider the factors bearing on a decision as to whether or not federal copyright law preempts the state legislation on moral rights.

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17 *See* 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, 152-53 (1983); *see also supra* note 12.

18 Note, *The Americanization of Droit Moral in the California Art Preservation Act*, 15 N.Y.U. J. INT'L L. & POL'Y 901, 909 (1983).

19 *Id.*

20 Diamond, *The Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADE-MARK REP. 244, 246 (1978).

21 *See id.* at 274 for discussion of the 1977 proposed Federal Visual Artists Moral Rights Amendment.

22 *See supra* note 8.

23 *See infra* text accompanying notes 118-34.

24 H.R. Rep. No. 1476, 94th Cong., 2d Sess. 1, 21, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5745 [hereinafter cited as HOUSE REPORT].

25 *Id.*

26 17 U.S.C. § 102 lists the works of authorship protected under copyright law. This list includes pictorial, graphic, sculptural works, and motion pictures and other audiovisual works. As will be discussed subsequently, the works covered by the new state moral rights laws fall within these categories.

27 *See infra* text accompanying notes 135-66.

II. State Moral Rights Legislation in the United States

A. *The Preservation Approach: The California and Massachusetts Moral Rights Laws*

1. Overview of the Acts

a. *California Art Preservation Act.* The California approach to moral rights is selective; it does not adopt a comprehensive doctrine comparable to that found in foreign law.[28] The statute protects both the integrity of the work and the artist's right to be identified as the creator through remedies that include injunctive relief, actual damages, and under certain circumstances, punitive damages.[29] Within the body of the statute, the legislature declared "that physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against such alteration or destruction."[30] The California legislature also proclaims "a public interest in preserving the integrity of cultural and artistic creations."[31] This concern for the preservation of the state's cultural heritage, similar to the preservation of historic landmarks,[32] recognizes policy considerations beyond the goal of simply protecting the artist's honor and reputation.

Not all works are included within the California statute. Protection is limited to "fine art," narrowly defined in terms of an "original painting, sculpture, or drawing, or an original work of art in glass of recognized quality."[33] Works prepared under a work for hire arrangement are excluded if destined for use in advertising, magazines, newspapers, or other print and electronic media.[34]

The California Act enables the artist to claim authorship, or for just and valid reason, to disclaim authorship of his work of fine art.[35] The Act prohibits the intentional commission of any physical defacement, mutilation, alteration, or destruction of a work of fine art by any person, except for that artist who owns

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28 *See* Note, *supra* note 18, at 910.

29 Cal. Civ. Code § 987(e). The court awards punitive damages to an educational or charitable organization of its own choosing.

30 *Id.* § 987(a).

31 *Id.*

32 Scott & Cohen, *An Introduction to the New York Artists' Authorship Rights Act*, 8 Colum. J. Arts & L. 369, 382 (1984).

33 Cal. Civ. Code § 987(b)(2).

34 *Id.* § 987(b)(2), (7).

35 *Id.* § 987(d).

and possesses a work of fine art which he has created.[36] "Gross negligence" in the conservation of a work is prohibited,[37] and special provisions govern the removal of works that are part of a building.[38]

The rights specified in the Act are granted to the artist or, if the artist is deceased, to his heirs, until the fiftieth anniversary of that artist's death.[39] The artist may, however, waive these moral rights in a signed writing.[40]

b. *Massachusetts Moral Rights Legislation.* The most recent law on the subject was passed by Massachusetts in January 1985. In most respects, it resembles the California Art Preservation Act, including a set of findings and declarations concerning public policy. The right of integrity is similarly defined in both statutes, and Massachusetts, like California, insists that a protected work be of recognized quality.[41] Other provisions, such as those concerning duration,[42] removal of works from buildings,[43] and waiver,[44] are also quite similar.

The Massachusetts law uses slightly different wording from that of the California law to define the artist's attribution right. Both states allow the artist to disclaim authorship "for [a] just and valid reason."[45] In Massachusetts, however, the artist is not given the right to claim "authorship," rather he can "claim and receive credit under his own name or under a reasonable pseudonym."[46] Massachusetts further specifies that "[c]redit shall be determined in accord with the medium of expression and the nature and extent of the artist's contribution to the work of fine art."[47] This provision apparently aims to expand and clarify the phrase "right to claim authorship" that is used in California, but its terminology is rather foreign to copyright law and could produce unforeseen results.[48]

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36 *Id.* § 987(c)(1).
37 *Id.* § 987(c)(2).
38 *Id.* § 987(h).
39 *Id.* § 987(g)(1).
40 *Id.* § 987(g)(3).
41 MASS. GEN. LAWS ANN. ch. 231, §§ 85S(a), (b), (f).
42 *Id.* § 85S(g).
43 *Id.* § 85S(h).
44 *Id.* § 85S(g).
45 *Id.* § 85S(d); *cf.* CAL. CIV. CODE § 987(d).
46 MASS. GEN. LAWS ANN. ch. 231, § 85S(d).
47 *Id.*
48 For example, difficulties may arise in determining what may be considered a "contribution" to a work. This language also creates the potential for a confusing situation where a number of contributors to a work may be forced to compete for their share of credit.

The scope of the Massachusetts legislation is broader than that of California in the sense that it covers more works of art and gives standing to more parties. Massachusetts broadly defines "fine art" as "any original work of visual or graphic art of any media which shall include, but is not limited to, any painting, print, drawing, sculpture, craft object, photograph, audio or video tape, film, hologram, or any combination thereof . . . ."[49] As will be seen, this broad definition tracks that of the New York statute.[50]

Standing to bring an action under the Massachusetts law is given to the artist and his heirs,[51] and to a bona fide union or other artists' organization authorized by the artist.[52] If the artist is deceased and the work of art is in "public view," the attorney general may also intervene. "Public view" is defined as being on the exterior or the interior of a public building.[53] No special showing of damages is required as a prerequisite to bringing a suit in Massachusetts.[54]

2. Recognized Quality Requirement

The most restrictive and controversial feature of both the California and Massachusetts laws is the requirement that the work be of "recognized quality."[55] Certain commentators have criticized this restriction, claiming that it shifts the focus of the law from protection of the artist to the protection of works deemed by the trier of fact to possess aesthetic value.[56] Because both Acts stipulate that the trier of fact will rely on the opinion of artists, art dealers, collectors of fine art, curators of art museums, and other persons who may be deemed "experts" in the fine arts,[57] there is concern that protection may be skewed in favor of a "sometimes elitist art establishment."[58] This in turn might further aggravate the tension between this establishment and innovative artists.[59] Unusual works by currently unknown artists or

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49 MASS. GEN. LAWS ANN. ch. 231, § 85S(b).
50 *See infra* note 79 and accompanying text.
51 MASS. GEN. LAWS ANN. ch. 231, § 85S(g).
52 *Id.* § 85S(e).
53 *Id.* §§ 85S(b), (g).
54 *Id.* § 85S(c).
55 *Id.* § 85S(b); CAL. CIV. CODE § 987(b)(2).
56 Francione, *The California Art Preservation Act and Federal Preemption by the 1976 Copyright Act—Equivalence and Actual Conflict*, 18 CAL. W.L. REV. 189, 198 (1982).
57 MASS. GEN. LAWS ANN. ch. 231, § 85S(f); CAL. CIV. CODE § 987(f).
58 Petrovich, *Artists' Statutory "Droit Moral" in California: A Critical Appraisal*, 15 LOY. L.A.L. REV. 29, 49 (1982).
59 *Id.*

works that have a popular audience but not much critical appeal could have greater difficulty meeting the "recognized quality" standard.[60]

This emphasis on quality creates a potential conflict with federal copyright law, in view of the doctrine expressed in *Bleistein v. Donaldson Lithographing Co.*[61] that merit should not be a justiciable issue. A "recognized quality" standard, as used in both statutes, evokes the qualitative creativity standard imposed upon works of applied art by courts in the Federal Republic of Germany. These courts allow copyright protection only to exceptionally creative works of applied art as determined by "the opinion of circles receptive to art and somewhat connoisseurs in such matters," while most ornamental designs are relegated to a *sui generis* design law.[62] In the Federal Republic, works of art not applied to industry continue to benefit from the general rule that forbids discrimination on the basis of merit, and the moral rights of their creators are also protected.

Use of a quality criterion to discriminate between works of fine art and lesser artistic works will not be easy to manage in the United States, where the anti-merit norm is strong. The owner of a work of "fine art" may not easily determine if in fact it ultimately will be regarded as one of recognized quality. Suppose the owner purchased a decorative painting in a furniture store and altered this work in the belief that it was of inferior quality. Should his estimate prove to be wrong, moral rights liability may attach all the same. While this does promote the purpose behind a moral rights law, it could operate in a potentially arbitrary manner by putting the court in a position of judging the artistic merit of a work.

3. Cultural Preservation

Several provisions of both the California and Massachusetts laws reflect a particular concern with the preservation of artwork that contributes to a state's cultural heritage. This concern may be implied from the requirements that the work be original and of recognized quality,[63] and the express declaration of "a public interest in preserving the integrity of cultural and artistic cre-

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[60] Scott & Cohen, *supra* note 32, at 384.

[61] 188 U.S. 239 (1903).

[62] *See* Reimer, *The Relations Between Copyright Protection and the Protection of Designs and Models in German Law*, 98 REVUE INTERNATIONALE DE DROIT D'AUTEUR 38, 40-42 (1978); *see generally* Reichman, *Design Protection After the Copyright Act of 1976: A Comparative View of the Emerging Interim Models*, 31 J. COPYRIGHT SOC'Y 267, 336-40 (1984).

[63] CAL. CIV. CODE § 987(b)(2); MASS. GEN. LAWS ANN. ch. 231, § 85S(b).

ations."[64] This policy is reinforced in Massachusetts by expansive provisions on standing.[65]

A similar effort to preserve the state's cultural heritage is encountered in the area of historical preservation. Government interference with property rights in this area raises fears that moral rights laws will lead to more interference with property rights in the future. For example, the right of integrity transfers to the artist some of the right to control the presentation of his work to the public by forbidding defacement, mutilation, or destruction.[66] This reduces the owner's legal control over the work of art embodied in the physical support, which is otherwise the owner's property.[67] How much a moral rights law interferes with the interests of the owner of the work may depend on the legitimate expectations of the property owner,[68] and these expectations may have to accommodate what is, at bottom, an internationally accepted policy.

The Supreme court, in *Penn Central Transportation Co. v. New York City*,[69] has articulated the standard for evaluating whether a regulation that limits a property owner's rights in order to benefit the greater public interest amounts to a taking of property by the state. A regulation would not be a taking if it did not interfere excessively with the primary or intended use of the property or if the effect on the value of the property was limited.[70]

Particular efforts have been made to avoid interference with commercial users of art in both the California and Massachusetts statutes. As a result, those most likely to be affected are persons who own original works of fine art for their own personal enjoyment or investment. This class of owners would be less likely to alter works of art than would the commercial user. The inability to make alterations would not amount to such substantial interference with the intended use or value of the work, thus this exercise of state police power could not be seen as inappropriate.

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[64] MASS. GEN. LAWS ANN. ch. 231, § 85S(a); *cf.* CAL. CIV. CODE § 987(b)(2).

[65] *See supra* notes 51-54 and accompanying text.

[66] Amarnick, *American Recognition of the Moral Right: Issues and Options*, 29 COPYRIGHT L. SYMP. (ASCAP) 31, 45, 50, 65 (1983).

[67] *See infra* notes 157-62 and accompanying text.

[68] Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1047-48 (1976).

[69] 438 U.S. 104 (1978).

[70] *Id.* at 136.

B. *The Attribution Approach: New York Artist's Authorship Rights Act*

1. Purpose of the Act

In 1983, after three years of deliberation,[71] New York finally passed its moral rights bill. Earlier versions of the bill gave artists the right to prevent destruction or alteration by subsequent owners of their works.[72] However, those versions presented "practical, political, legal, and constitutional obstacles."[73] Thus, the bill that was finally signed into law was much narrower in scope and protected only the names and rights of authorship.[74] By addressing the right of paternity, the legislature avoided much of the controversy about interference with the owner's right to alter or destroy a work at will.[75]

Much public testimony, particularly by artists, favored protection of a broader preservation interest.[76] But the committee decision, however, was prompted in part by fears of discouraging business and other organizations from commissioning works or otherwise becoming involved in the display of art.[77] The legislature thus devised a measure, limited in scope, to serve as a beginning step in this area of artists' rights that would also provide a deterrent to certain abuses of art.[78]

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71 Letter from Matthew J. Murphy to Governor Mario Cuomo (July 22, 1983) (available from New York State Assembly Archives).

72 *Letter from Richard N. Gottfried to Governor Mario Cuomo* (July 5, 1983) (available from New York State Assembly Archives).

73 *Id.*

74 *Id.*

75 *Id.*

76 *Artist's Authorship Rights: Hearing on A. 9477 before N.Y. Assembly Standing Committee on Tourism, The Arts, & Sports Development*, Feb. 18, 1982 (testimony of Alfred Crimi, Isamu Noguchi, and David Margolis, artists) (tape recording of hearing available from New York State Assembly Archives) [hereinafter cited as *Public Hearing*]. Alfred Crimi, an artist involved in an unsuccessful moral rights dispute in the late 1940's regarding the destruction of a mural he had been commissioned to do for a church, stated that when a work is placed in either a public or semi-public institution where the public interest is invited, that work becomes a part of the patrimony of the community and should not be destroyed or altered. Isamu Noguchi was commissioned to do a work by the Bank of Tokyo in New York, which later destroyed the work; the bank claimed that the work frightened customers and was therefore detrimental to business. Noguchi's position was that when an artist works in a public situation, he is no longer simply working for a private institution, but rather, he has entered into a dialogue with the public. Therefore, the decision of whether to preserve the work should not be left entirely to the private institution. David Margolis, who stated that he gave up mural painting after several of his works were covered over, expressed concern for preserving the civilization of this young country for future generations.

77 *See id.* (testimony of Isamu Noguchi).

78 *See id.* (opening statement of Richard Gottfried).

2. Works Protected

While the California statute provides relatively few kinds of works with a fairly substantial amount of protection, the New York statute provides more limited protection to a much broader array of works. Here, the definition of fine art "means a painting, sculpture, drawing, or work of graphic art, and print, but not multiples."[79] "Multiples" are defined to include prints and photographs produced in more than one copy and for more than $100.[80] In contrast to the California and Massachusetts statutes, New York will protect reproductions if these works are "displayed or published under circumstances that, reasonably construed, evinces [sic] an intent that [they] be taken as a representation of a work of fine art . . . created by the artist."[81] Among other things, this definition was said to exclude copies of an artistic work made by a second artist for use in a collage, when the second artist does not intend for the viewer to think that he is seeing the original artist's work.[82] In such a case, it should be clear that the second artist was creating a new work of authorship, and that the copied work would still be protected under copyright law.

3. Limitations on Protection

a. *Emphasis on Attribution.* The New York Act imposes substantial limitations on the scope of protection. Because the Act focuses on the artist's reputation, it only applies to works "knowingly display[ed] in a place accessible to the public."[83] A publicly accessible work that has been "altered, defaced, mutilated, or modified" may not be "displayed, published, or reproduced" as the work of the artist if "damage to the artist's reputation is reasonably likely to result therefrom."[84] This requirement places what could be a difficult burden on the artist to demonstrate how his or her reputation has actually been damaged.[85]

Well-known works, or works by artists with distinctive styles,

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79 N.Y. ARTS AND CULTURAL AFFAIRS LAW § 11.01(9).

80 *Id.* § 11.01(19)

81 *Id.* § 11.01(16).

82 *See Public Hearing*, *supra* note 76 (comment of Richard Gottfried during testimony of Gus Harrow).

83 N.Y. ARTS AND CULTURAL AFFAIRS LAW § 14.03(1).

84 *Id.*

85 *Cf.* Amaducci v. Metropolitan Opera Ass'n, 33 A.D.2d 542, 304 N.Y.S.2d 322 (1st Dept. 1969) (damages to reputation not recoverable in a contract action for wrongful discharge). For a related discussion of the difficulties encountered by artists and entertainers in demonstrating causation enabling them to recover for loss of reputation resulting from a breach of an employment contract, see Comment, *The Loss of Publicity as an*

would not require express attribution if displayed, published, or reproduced under circumstances in which "it would be reasonably regarded as being the work of the artist."[86] Nevertheless, through the authorship rights portion of the statute, the artist could prevent the association of his or her name with a distorted work by disclaiming authorship.[87] Although such a disclaimer must be for a "just and valid reason," the Act specifies that a just and valid reason arises when a work is altered, defaced, mutilated, or modified without the artist's consent and "damage to the artist's reputation is reasonably likely to result or has resulted therefrom."[88]

According to Professor Nimmer, an owner of a work, who wishes to publish or display it in an altered form without mention of the artist's name or with an appropriate disclaimer, could still be held liable under the New York Act, because the artist always retains the right to claim authorship.[89] However, this interpretation cuts against the Act's limited purpose. If the artist acknowledges that a work has been altered, the statute can be understood to mean that he "will not be able to stop an owner from altering a work of art, but at least the artist will then be able to keep his or her name from being wrongly associated with it."[90] This view could absolve the owner who relies on a disclaimer. Whether the artist can further object that the public will nonetheless associate his style with the altered work, and that by being associated with it he has sustained a loss of reputation, remains to be seen. The view, as expressed above by one of the sponsors of the bill, militates against this reading, even though it undermines basic policies behind moral rights protection.[91]

Limiting the Act mainly to the attribution aspect of the moral right does not entirely eliminate interference with the property rights of owners of works of art. Much of the value of art often stems from its attribution to a respected artist. An owner who cannot make such an attribution when the work is altered could find the value of the work lessened, whether or not he was responsible for the alteration. All the same, the right of paternity

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Element of Damages for Breach of Contract to Employ an Entertainer, 27 U. MIAMI L. REV. 465 (1973); *see also* Annot., 96 A.L.R.3d 437 (1979).

86 N.Y. ARTS AND CULTURAL AFFAIRS LAW § 14.03(1).

87 *Id.* § 14.03(2).

88 *Id.*

89 2 M. NIMMER, *supra* note 8, § 8.21[D], at 8-263.

90 *See* Gottfried, *supra* note 72 ("Thus, the bill now before the governor in no way interferes with the owner's right to destroy a work of art at will . . . .").

91 *Id.*

generally acts as a hook to pull in the right of integrity indirectly by discouraging owners from altering works of art.[92] In any event, the statute leaves the courts a substantial degree of discretion in interpreting whether an artist in fact has a just and valid reason for wishing to disclaim authorship.[93]

b. *The Trade Use Exclusion.* An attempt was made in New York not to overly burden those needing flexibility in adapting art to meet commercial needs. For this reason, motion pictures were excluded from the statute,[94] along with works prepared under contract for advertising or for "trade use," unless the contract otherwise provided.[95] Graphic artists objected to the vagueness of the term "trade use" and to the fact that commercial artists seem to be treated as "the ugly step-child of the arts" by being denied the ability to control changes in their work on a par with other artists.[96]

A recent commentator has suggested that such a limitation is justified by the fact that a work would be less of a manifestation of the artist's personality if an employer directs and supervises the creation of the work.[97] This ignores the possibility that the employer may direct the employee to produce an artistic work for trade use, in which case the work could bear the individual stamp of the artist. The problem is not that such works are made by employees or that they are destined for trade use as such. Rather, work destined for trade use, such as ornamental designs, often "cater to the mass market and exhibit only a particular style trend or fashion."[98] To the extent that the artist's output is conditioned by "impersonal organizational needs that include technical demands, economic considerations, and the modern marketing strategies of a consumer economy,"[99] he may produce a standardized object that bears no stamp or personality, irrespective of his status as an employee or as an independent contractor.[100] Yet, it is precisely the artist's personality that a moral

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92 *See Public Hearing*, *supra* note 76 (testimony of Martin Bressler).
93 Scott & Cohen, *supra* note 32, at 375.
94 N.Y. ARTS AND CULTURAL AFFAIRS LAW § 14.03(1).
95 *Id.* § 14.03(3)(d).
96 *See Public Hearing*, *supra* note 76 (testimony of Sims Taback, representing N.Y. Graphics Artists Guild).
97 Note, *The New York Artists' Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL L. REV. 158, 175 (1984).
98 Reichman, *supra* note 62, at 280.
99 *Id.* at 280-83. These arguments have been used by leading scholars in the Federal Republic of Germany to limit copyright protection for ornamental designs of useful articles. *See generally id.* at 276-83 (discussing theories of Hubmann and Ulmer).
100 *Id.*

rights provision is designed to protect.

Professor Nimmer's suggestion that the term "trade use" includes work of commission even if not for hire,[101] leads to an unnecessarily broad exclusion. Unless the commission prescribed a standardized result and unduly restricted the artist's freedom of expression to this end, the artist working under commissions should be allowed moral rights protection consistent with the individual imprint, if any, that characterizes his output.

c. *Waiver.* Unlike California, New York opted not to include a specific waiver in its moral rights statute. The general consensus among those testifying was that a waiver provision would endanger the effectiveness of the law because of the unequal bargaining strength of artists with respect to exhibitors.[102] The weak economic status of many artists would make them vulnerable to the temptation of signing away their moral rights if this could be made a condition to receiving their fees.

Even without a waiver provision, the New York Act may not have completely avoided every possibility of waiver since it permits an altered work to be displayed publicly if the artist consents.[103] Such consent could later bar the author from disclaiming authorship.[104] While this risks exposing the artist to some bargaining pressure, it must be weighed against the opportunities the artist would otherwise be given for strike suits and harassment.[105] Hence this section of the New York Act reflects the legislative intent not to impair unduly commercial flexibility when changes are needed to render a work marketable.[106] Even in France, where moral rights are considered to be inalienable, the French judiciary has enforced contracts that permit reasonable alterations if these alterations do not distort the spirit of the creator's work.[107]

d. *Heirs* A further limitation on the scope of the New York Act is the exclusion of the artist's heirs from protection.[108] Whether

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101 2 NIMMER, *supra* note 8, § 8.21[D], at 8-264.

102 *See Public Hearing*, *supra* note 76 (testimony of Tad Crawford and Martin Bressler).

103 N.Y. ARTS AND CULTURAL AFFAIRS LAW § 14.03(1).

104 *But see* Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733, 1744 (1984) ("Consent, however, may be distinguished from binding waiver. It is possible that the artist may be able to consent and at the same time retain his right to withdraw that consent.").

105 Comment, *supra* note 13, at 479.

106 *See id.*

107 Sarraute, *supra* note 9, at 481-82; *see also* Kwall, *supra* note 7, at 12 n.45 for a list of countries, in addition to France, where the moral right is inalienable.

108 *See* N.Y. ARTS AND CULTURAL AFFAIRS LAW § 14.01.

or not to extend moral rights to the artist's heirs for the duration of federal copyright protection was the subject of much debate.[109] While heirs in California and Massachusetts may bring a moral rights action on the artist's behalf fifty years after his death, New York's decision to limit protection to the life of the artist[110] was based in part on fears that the heirs might abuse their power for economic reasons rather than to protect the dead artist's personal interests.[111] In France, where the copyright law confers a perpetual moral right, a statutory provision expressly authorizes judicial review of cases involving a possible abuse of such rights by heirs or by representatives of the deceased artist.[112]

In California and Massachusetts, where primary emphasis is placed on preserving works for the public interest,[113] standing is given to both the artist and the heirs. The prospect that the heirs would be natural defenders of the integrity of the work seems to outweigh fears of abuse. In New York, there is no prohibition against altering works *per se*, and encouraging such defenders of a work's integrity is less necessary.

The purpose of the New York law is to prevent changes in a work from adversely affecting the artist's reputation.[114] Yet, the artist's reputation may be even more important to heirs who depend on the artist's works as their primary asset. If the artist's reputation is impaired because a work is altered, the artist would no longer be available to create more works to undo the damage.

The approach taken in New York evokes the distinction between the right of privacy and the right of publicity that courts use in determining whether the right of publicity is descendible. In *Price v. Hal Roach Studios, Inc.*,[115] the Southern District of New York distinguished the personal right of privacy designed to prevent injury to feelings, which should logically terminate at death, from the more property-oriented right of publicity. Based on this latter right, the heirs of the individual, who was exploited, can collect profits from commercial exploitation of the deceased

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109 *See generally Public Hearing*, *supra* note 76.

110 *See* N.Y. ARTS AND CULTURAL AFFAIRS LAW § 14.03(2)(a).

111 *See Public Hearing*, *supra* note 76 (testimony of Gus Harrow).

112 Michaelidas-Nouraros, *Protection of the Author's Moral Interests After His Death as a Cultural Postulate*, 15 COPYRIGHT 35, 36 (1979).

113 CAL. CIV. CODE §§ 987(a), (b)(2); MASS. GEN. LAWS ANN. ch. 231, § 85S(a); *see also supra* text accompanying notes 63-65.

114 N.Y. ARTS AND CULTURAL AFFAIRS LAW § 14.55 (Legislative Findings and Declaration of Purpose) (subsequent history omitted).

115 400 F. Supp. 836, 844 (S.D.N.Y. 1975) (right of publicity as a property right may descend to the widows of Laurel and Hardy).

relative's personality after his death.[116]

While the moral right does protect the artist's personality and reputation, this personality may be embodied in a commercially valuable work of art. Any sharp distinction between personal and property rights is hard to defend.[117] By limiting protection to the life of the artist rather than allowing the right to descend for the duration of the statutory period, New York has chosen to remain nearer to the personality end of this personality/property continuum.

III. State Moral Rights Protection Within a Federal Copyright System

A. *Basic Premises*

The difficulties that can arise in distinguishing protection of personality from the protection of economic value also serve to introduce the larger problem of federal preemption. Are the moral rights provisions of the recent state laws sufficiently distinct from the economic rights protected by the federal copyright law as to avoid preemption under section 301 of the Copyright Act of 1976?[118]

The method used most frequently by the courts[119] to conduct the preemption analysis under section 301 is to break down the state-created right into elements and to compare those elements with the rights granted by section 106 of the 1976 Act.[120] If the courts finds "extra elements" in the state right that are not found in the federal one, then the state right is not preempted.[121]

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116 *Id.*.

117 *See infra* notes 170-72 and accompanying text; *see also* Follett v. New American Library, Inc., 497 F. Supp. 304 (1980).

118 17 U.S.C. § 301(a) (1982) reads in pertinent part:

> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

See generally, Goldstein, *Preempted State Doctrines, Involuntary Transfers, and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. Rev. 1107 (1977).

119 *See infra* note 121.

120 17 U.S.C. § 106 grants the copyright owner the exclusive rights to (1) reproduce the copyrighted work in copies or phonorecords; (2) prepare derivative works; (3) distribute copies of phonorecords; (4) perform the copyrighted work publicly; and (5) display the copyrighted work publicly.

121 *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 501 F. Supp. 848 (S.D.N.Y. 1980), *rev'd on other grounds*, 723 F.2d 195, 200 (2d Cir. 1983), *rev'd on other grounds*, 105 S. Ct. 2218 (1985); Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408 (S.D. Ohio 1980), *aff'd*, 679 F.2d 656 (6th Cir. 1982); Factors Etc., Inc. v. Pro Arts,

The problem with this analysis is that it focuses too heavily on the form of the state and federal rights and ignores many of the policy concerns that surround the preemption issue.

B. *The "Extra Elements" Test*

The preemption issue becomes particularly obscure in areas where the rights in question bear similarities to copyright but are given different legal labels.[122] In close situations, the state claim—under the extra element test—must contain something "qualitatively different" or "different in kind"[123] from federal copyright protection to avoid preemption.[124] Courts may further require that such elements be "key elements."[125] But these terms fail to provide a concrete standard, and courts are left with little guidance in determining the extent to which state and federal rights may differ and still be essentially "equivalent."[126]

In the area of artists' moral rights, commentators have attempted to predict how courts will apply the "extra elements" test in addressing the preemption issue. According to one view, moral rights do not directly protect economic interests, hence, by definition, the rights conferred by a moral rights statute are not equivalent to those of copyright.[127] Another view states that the mere fact that a moral rights statute has its origin in, and primarily involves, non-economic rights, is insufficient to add a qualitatively different element to the cause of action that would distinguish the moral right from rights granted under section 106 of the 1976 Act.[128] However, the analysis must proceed one step further by evaluating whether an activity that gives rise to a copyright violation may, when combined with a qualitatively different

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Inc., 496 F. Supp. 1090 (S.D.N.Y. 1980), *rev'd*, 652 F.2d 278 (2d Cir. 1981); Orth-O-Vision, Inc. v. Home Box Office, 474 F. Supp. 672 (S.D.N.Y. 1979).

[122] These may include claims in the areas of unfair competition, claims in quasi-contract for the use of an idea, and claims for tortious interference with contract.

[123] *See* Crow v. Wainwright, 720 F.2d 1224, 1226 (11th Cir. 1983), *cert. denied*, 105 S. Ct. 89 (1984); Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905 (2d Cir. 1980); Giangrasso v. CBS, Inc., 534 F. Supp. 472 (E.D.N.Y. 1982); Werlin v. Reader's Digest Ass'n, Inc., 528 F. Supp. 451, 467 (S.D.N.Y. 1981); Kamakazi Music Corp. v. Robbins Music Corp., 522 F. Supp. 125, 137 (S.D.N.Y. 1981), *aff'd*, 684 F.2d 228 (2d Cir. 1982); Harper & Row Publishers, Inc. v. Nation Enters., 501 F. Supp. 848 (S.D.N.Y. 1980), *rev'd on other grounds*, 723 F.2d 195 (2d Cir. 1983), *rev'd on other grounds*, 105 S. Ct. 2218 (1985); DC Comics, Inc. v. Filmation Assocs., 486 F. Supp. 1273 (S.D.N.Y. 1980).

[124] Francione, *supra* note 56, at 214.

[125] Comment, *The Fine Art of Preemption: Section 301 and the Copyright Act of 1976*, 60 OR. L. REV. 287, 292 (1981).

[126] Comment, *Copyright Preemption: Effecting the Analysis Prescribed by Section 301*, 24 B.C.L. REV. 963, 967 (1983).

[127] Francione, *supra* note 56, at 208.

[128] 17 U.S.C. § 106(2).

moral rights element, also give rise to a violation of a moral rights statute.[129] Under this approach, such a combination could confer the extra element needed to avoid preemption.

Using the California Art Preservation Act as an example, this test could be applied by asking whether acts of defacement, mutilation, alteration, and destruction are qualitatively different from the right to prepare derivative works under section 106(2) of the 1976 Act.[130] The term "alteration" is closest to the derivative work right; therefore, according to one authority, the right to prevent an alteration which does not amount to a defacement or a mutilation would appear to be preempted.[131] However, this raises such issues as the increasingly strict standard of originality required for a derivative work, and the need for derivative works to be authorized.[132] If the alteration lacks sufficient originality or authorization, the moral right to prevent it should not be preempted by the right to prepare derivative works.

Nevertheless, defacement and mutilation can be regarded simply as matters of subjective aesthetic judgment; it can be argued that they are not additional legal elements and would therefore be preempted.[133] Yet, a more persuasive interpretation is that the element of aesthetic judgment in evaluating defacement constitutes precisely the factor that saves the California Act from preemption. Under this Act, the artist or his representative must persuade the trier of fact that the aesthetic integrity of the work has been violated. This aesthetic judgment, when affirmative, establishes a right that is qualitatively different from the bundle of rights conferred by section 106 of the Copyright Act.[134]

C. *Conflict Between State and Federal Law*

1. Framework of Analysis

Although the "extra elements" test is rooted in case law and finds some support in legislative history, to rely exclusively on such a test would ignore fundamental principles that surround the preemption doctrine.[135] A complete preemption analysis re-

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129 Francione, *supra* note 56, at 208.

130 *Id.* at 209.

131 2 NIMMER, *supra* note 8, § 8.21[D], at 8-261.

132 *See, e.g.*, Gracen v. Bradford Exchange, 698 F.2d 300, 305 (7th Cir. 1983); Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 910-11 (2d Cir. 1980); L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490-91 (2d Cir.) (en banc), *cert. denied*, 429 U.S. 857 (1976).

133 2 NIMMER, *supra* note 8, § 8.21[D], at 8-261.

134 Francione, *supra* note 56, at 213.

135 *But see* Kwall, *supra* note 7, at 79 (advocating use of an elements rather than an objectives test to avoid speculating about undefined state objectives). Kwall claims that

quires a comparison between the purposes and effects of federal and state legislation in order to determine whether the state legislation necessarily conflicts with federal law in contravention of the supremacy clause of the Constitution.[136]

Unless state moral rights statutes interfere with or hinder the "accomplishment and execution of the full purposes and objectives of Congress,"[137] they should not be preempted. In *Goldstein v. California*,[138] Chief Justice Burger cited Alexander Hamilton's analysis concerning the power reserved to the states in the federal system:

> But as the plan of the [Constitutional] convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by this act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation of state sovereignty, would . . . exist . . . where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.[139]

States thus retain the power to address many areas that have not as yet been set aside as matters of federal concern.

Although section 301 of the 1976 Copyright Act did eliminate much of the power that states concurrently exercised in the area of copyright, the legislative history suggests that Congress did not intend to eliminate all areas of state protection for artistic works.[140] By analogy to other areas that Congress listed in an earlier draft of section 301 as areas not intended to be preempted,[141] the New York, California, and Massachusetts statutes can arguably remain within the limits of traditional state protection. Nevertheless, both technical and policy conflicts with the 1976 Copyright Act must be examined in order to ascertain whether state moral rights laws con-

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differences in goals and origins of a given cause of action "will be manifested by a difference in the elements necessary to support the state cause of action." *Id.* (footnotes omitted).

136 U.S. CONST. art. VI, cl. 2.

137 *See, e.g.*, Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 479 (1974) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

138 412 U.S. 546 (1973).

139 *Id.* at 553 (footnote omitted).

140 *See* 1 NIMMER, *supra* note 8, § 1.01[B], at 1-13. (An earlier draft of section 301 listed examples of rights that the states could continue to protect. This list, which includes breaches of contract, invasion of privacy, defamation, and deceptive trade practices was eliminated from the final version of section 301, but it still serves as evidence of the kinds of areas not preempted.).

141 *Id.*

tradict or interfere with federal copyright law in some crucial manner.

2. Technical Conflict

To a certain extent, moral rights legislation does restrict the exercise of federally created rights under the 1976 Copyright Act by limiting the copyright owner's options in dealing with his property. Under the California and Massachusetts Acts, an artist may prevent alteration of his original works even if he no longer owns the copyright in those works. At the same time, the copyright owner acquires the right to prepare derivative works,[142] as part of his "bundle of rights." Thus, the artist's right to prevent alterations could sometimes conflict with the right to prepare derivative works. Yet, courts may avoid such a conflict either by finding that the alleged derivative work lacked authorization, or by finding that the alleged alteration rose to the level of a new work. On the whole, the interference with copyright law here need not be serious enough to justify preempting these state laws without more.

Another possible area of conflict may be found in the works made for hire provision of the 1976 Act.[143] Neither California nor New York specifically excludes all work made for hire arrangements from protection;[144] in certain circumstances the artist could retain control of a moral right while the employer or the contractor could possess the copyright. Conceivably, the courts could interpret moral rights statutes in a way that would upset the balance established by the work for hire provisions in the 1976 Copyright Act. However, such an interpretation need not be carried to the point where it presents a serious conflict between state and federal law. All three state statutes have included provisions excluding the bulk of the work for hire arrangements and these exclusions could be further extended by the courts.

However, section 109 of the 1976 Copyright Act[145] presents a real possibility of conflict between state and federal law. Section 109(a) gives the owner of a particular material support, in

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142 17 U.S.C. § 106(2).

143 17 U.S.C. § 101. Under the work made for hire provision, the employer and certain specified independent contractors may assume the rights of the author for purposes of copyright protection. One author believes this reflects the legislative judgment that creativity may be most effectively promoted by allowing employers to retain great control over their property. *See* Scott & Cohen, *supra* note 32, at 395.

144 CAL. CIV. CODE § 987(b)(7); N.Y. ARTS AND CULTURAL AFFAIRS LAW § 14.03(3)(d).

145 17 U.S.C. § 109.

which a work is embodied, the right to sell or otherwise to dispose of that material support without the permission of the copyright owner, notwithstanding provisions found in section 106(3) of the 1976 Copyright Act. The legislative history indicates that the term "disposed of" would include the right to destroy,[146] and destruction of the material object would also destroy the work it embodied.

Section 109(b) similarly gives the owner of the material object the privilege to display it publicly to viewers present at the place where it is located, notwithstanding the display right in the work granted to the copyright owner by section 106(5).[147] The purpose of this section is to allow the owner of the material object a traditional right to display the property directly, while restricting his possibilities for indirect display of the work embodied in the material object that would interfere with the market created by the copyright owner's reproduction and distribution rights.[148] In general, section 109 codifies the first sale doctrine that eliminates the copyright holder's ability to control "copies" of a work once "placed in the stream of commerce."[149]

Section 109 deals with the interaction between the owner of the material support and the owner of a copyright in the work as a matter of copyright law. While the section frees the owner of the material support from interference by the copyright owner, it does not explicitly state that no further regulations should be imposed on the owner of that material support. What the state moral rights legislation does is to impose this kind of regulation as a matter of state law with regard to the treatment of certain property located within the state[150] and usually deemed to be of importance to the state's cultural heritage.

The rights of the owner of the material object are undoubtedly restricted by the prohibition in California and Massachusetts against altering and destroying certain works of fine art. To some extent, the right of ownership is also restricted by New York's prohibition against publicly displaying a work in altered form under certain circumstances. These restrictions should, however, be evaluated in terms of whether or not they are legitimate exercises of state police power, notwithstanding federal

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146 HOUSE REPORT, *supra* note 24, at 79.

147 17 U.S.C. § 106(5).

148 *See* 1 NIMMER, *supra* note 8, § 8.20[A], at 8-241.

149 *See* American Int'l Pictures v. Foreman, 576 F.2d 661, 664 (5th Cir. 1978).

150 *But see* 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, 882-83 (1981) for a discussion of the extraterritorial effect of the California Act.

copyright law. Even though moral rights theory in the abstract protects the author's personality right, these statutes as drafted limit the exercise of the owner's dominion over the material object in the same way that a state may limit what a property owner may actually do with a pond that lies on his property. Here the owner is charged with exercising his ownership rights in a manner consistent with the public policy of the state. This does not diminish the first sale doctrine of section 109; it arguably subjects this class of property owners, like all others, to reasonable state regulation.

3. Possible Interference with Federal Copyright Policy

Once the determination is made that, at the technical level, conflict between the 1976 Copyright Act and the state moral rights legislation is not substantial enough to justify preemption, it remains to be considered whether the state laws might nonetheless interfere with federal copyright policy. The new state legislation may be seen as consistent with the fundamental copyright policy of rewarding authors for devoting themselves to intellectual and artistic creation.[151]

Protecting the artist against acts injurious to his or her personality and reputation would further enhance this policy without diminishing the economic incentives provided under copyright law. Problems begin to arise, however, from terminology used in the state statutes suggesting notions of natural rights that have never been fully accepted in United States copyright law.[152]

A closely related federal policy that must also be examined involves balancing the author's right of control against public access to works of authorship.[153] Yet, the ultimate objective of the federal scheme is broad use and dissemination of literary and artistic works. Therefore, any conception of the authors' rights must be compatible with the interests of the public and with those of the legitimate users of works of art.[154] The relationship among the artist, the public, and the entrepreneur is a complex one.[155] The moral right, although based on a personality interest, also has an effect on various pecuniary interests that must be considered within the context of this relationship. The doctrine

[151] *See* United States v. Paramount Pictures, 334 U.S. 131, 158 (1947); *see also* Mazer v. Stein, 347 U.S. 201, 219 (1954).

[152] *See* Sony Corp. v. Universal City Studios, 464 U.S. 417, 428-30 (1984).

[153] Comment, *supra* note 12, at 1501 (Copyright Act of 1976 guarantees the author greater protection of his work than he was previously afforded).

[154] *Id.* at 1515.

[155] Amarnick, *supra* note 66, at 39.

of moral rights may be seen as favoring the creator's interest in his reputation and, to some extent, the public's interest in the integrity of its culture above the purely economic interests of the entrepreneur.[156] The public interest pulls both ways, however, because of the public's dependence on the entrepreneur to make works widely available.

Under the present copyright statute, the author who invests a work with the stamp of his personality and who wishes to submit this work to the rigors of public use must maintain some kind of contractual tie to the work in order to preserve any degree of control over the integrity of the expression.[157] This need to rely on contractual protection could have an adverse impact on the wide dissemination of an artist's work. The artist might be more willing to sever all economic ties and thereby make works more generally accessible to the public if that artist did not fear loss of reputation from unauthorized alteration or mutilation.

The most likely area of interference with federal copyright policy arises in the area of national uniformity. Congress intended section 301 of the Copyright Act to establish a single federal system of copyright protection in response to "the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States."[158] Although Congress did not completely succeed in its attempt to establish a clear line of demarcation between state and federal law, the overall goal of achieving national uniformity in copyright matters is clear.[159] A further motive behind the drive toward national uniformity was a need to improve international copyright relations by ensuring that treaty obligations would receive standard implementation throughout the national territory.[160]

The fact that moral rights protection has developed on the state level has created a new situation that may run counter to the desire to achieve national uniformity. The protection granted by each state differs from that of the others in significant ways, and conflicts are likely to develop as artists and works of art move from state to state. Furthermore, isolated state moral rights statutes will not necessarily bring the United States into line with the

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156 Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 570 (1940).

157 *See* Gilliam v. ABC, Inc., 538 F.2d 14, 22 (2d Cir. 1976).

158 HOUSE REPORT, *supra* note 24, at 129.

159 *See supra* note 140 and accompanying text.

160 HOUSE REPORT, *supra* note 24, at 129.

Berne Convention's provisions, though it may pave the way towards meeting them.[161]

Problems associated with lack of uniformity should not, however, justify preempting the state moral rights legislation. Congress has not yet chosen to legislate in the area of moral rights. Congress has also implicitly allowed the states to continue to govern in areas of traditional state concern, even if the subject matter involved is also protected under copyright law. The moral rights statutes have been so tightly drafted that they may be considered as special defamation laws and as cultural preservation statutes for certain classes of artists and certain recognized pieces of artwork. The fact that these "tort" statutes have developed rather unique forms in different states should be seen as no more of an interference with uniform copyright policy than the various state laws dealing with the rights of privacy and publicity.[162]

4. Limitations on State Moral Rights that Reduce Interference with Federal Copyright Law

New York, California, and Massachusetts have all attempted to limit the moral rights concepts in certain ways to avoid some of the most direct interference with users of art that could create conflicts with federal copyright policy. The California and Massachusetts statutes cover only alterations of original works of fine art of recognized quality and they exclude much of the work for hire product.[163] New York limits interference by primarily focusing on the attribution remedy, by excluding works prepared for advertising and trade use, and by limiting the definition of reproduction.[164] In addition, all three statutes have permitted some form of waiver.[165]

The common focus of all the new moral rights laws is on the more passive uses of art, such as collection and display, which avoids interference with federal policies of wide public dissemi-

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[161] The moral rights provision of the Berne Convention encompasses both rights of paternity and of integrity:

> [T]he 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.

Art. 6*bis*, *reprinted in* 4 M. NIMMER, *supra* note 8, app. 27-5 to 6.

[162] Treece, *supra* note 12, at 501.

[163] CAL. CIV. CODE § 987; MASS. GEN. LAWS ANN. ch. 231, § 85S.

[164] N.Y. ARTS AND CULTURAL AFFAIRS LAW §§ 11.01(16), (17), 14.01-14.03.

[165] CAL. CIV. CODE § 987(h); MASS. GEN. LAWS ANN. ch. 231, §§ 85S(g), (h)(2); N.Y. ARTS AND CULTURAL AFFAIRS LAW § 14.03(1).

nation. The public has an interest in being able to see and evaluate the unaltered, original version of an artist's creative vision. The public would also benefit from allowing changes to be made in an original work of art, if those changes were authorized or approved by the artist. The altered work would then become part of the artist's vision and would not defeat the public interest in seeing accurate examples of the artist's work.[166]

California, New York, and Massachusetts have restricted themselves to the kind of protection traditionally left to the states in the area of tort law by defining the duty of care that the owner of a work of fine art owes to the creator. California and Massachusetts define this duty more broadly than New York, in the sense that they prevent altering or even destroying a work when the artist finds such action to be offensive or damaging to his or her reputation. Although this duty is defined broadly in California and Massachusetts, the scope of these statutes is extremely limited by requirements that the works in question be original and of recognized quality. The California statute is further restricted by including only four categories of fine art. The effect is to restrict protection to certain kinds of fine art that the state has a particular interest in preserving.

In New York, the duty that the owner of a work owes to the creator extends only to works that are publicly displayed, and the law prohibits attribution to the artist only if the work has been altered. Like a defamation action, the statute protects the artist's reputation by not allowing an altered work that represents a false expression of the artist's personality to be attributed to that artist.

The fact that the statutes have been drafted so narrowly may, ironically, force artists to continue to rely on the alternative theories of protection that the statutes were thought to replace. Although the statutes do serve to bring the concerns of artists to the public's attention, in practical terms they may have simply added another aspect to the moral rights story in the United States rather than providing a coherent, integrated form of protection. Such integration is not likely to occur until the issue is addressed at the federal level.

IV. Conclusion

The limitations inherent in all states' moral rights laws so far

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166 *See supra* notes 63-66 and accompanying text; *see also supra* notes 67-68 and accompanying text; *cf. supra* notes 69-70 and accompanying text.

enacted have avoided much of the potential conflict with the federal copyright law. The rights protected under these statutes, although closely related to copyright, are different enough from the present interpretation of the federal copyright laws and operate sufficiently within the area that Congress left to state protection, not to be preempted. These differences are particularly pronounced under a theory that stresses moral rights as "personal rights, separate and distinct from any pecuniary interest . . . ."[167] At the base of this theory is the indissoluble bond between the artist and the work, a bond that requires a kind of regulation different from that currently provided by United States' copyright law.[168]

Isolating the personality interests of the author, along with the state's interest in preserving works of art, and allowing separate state legislation that protects these interests, provides a reasonable solution to a current deficiency in federal copyright protection. Any complete solution to these deficiencies must recognize that it is copyright law as a whole that must be adjusted to more fully protect both the financial and moral interests of the author.[169] A unified approach would recognize the practical interdependence of the artist's personal and material interests. The property aspect itself is so interwoven with the emotions and ideas of the author that separation becomes difficult.[170] Part of the artist's incentive to create is based on the assurance that he can create freely according to his own inspiration and conscience for the public, without censorship[171] or alteration of the expression and with the honor of being recognized as the creator. Moral rights provide such an incentive by recognizing the intimate nexus that exists between the artist and his work and by allowing it to remain vested in the artist despite any transfer of other more commercial rights.[172]

Past inability to incorporate such protection into federal copyright law[173] has been explained by the belief that the doc-

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167 Comment, *The California Art Preservation Act: A Safe Hamlet for "Moral Rights" in the U.S.*, 14 U.C.D. L. REV. 975, 979 (1981). *But see* P. RECHT, *supra* note 11, at 273-77 (rejecting this separation as a "false idea").

168 A. DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY 67 (1978).

169 *Id.*

170 S.M. STEWART, *supra* note 11, at 4.

171 *Id.* at 307.

172 Note, *supra* note 18, at 907.

173 *But see* 17 U.S.C. § 115(a)(2) (in a compulsory license for a sound recording of a musical work, one is not to "change the basic melody or fundamental character of the work").

trine is incompatible with our system.[174] Yet other countries, such as the United Kingdom, which also reject the natural right theory, have found it both feasible and expedient to move towards the recognition of moral rights in copyright law.[175]

One consequence of the United States' reluctance to recognize moral rights, fueled in part by the lobbying efforts of heavy users of works of art, has been to prevent the United States from becoming a signatory to the Berne Convention. While the 1976 Copyright Act brought the United States closer to meeting the requirements of the Berne Convention,[176] the lack of national moral rights legislation remains an obstacle to improved international copyright relations.[177]

The development of moral rights legislation on the state level, although plagued with limitations and problems, should serve to enhance the public's understanding that moral rights are in many ways consistent with existing United States law. The fact that so many other nations have recognized the need for this kind of legislation[178] and that other nations with market economies have not found moral rights to be a threat to free competition, should further stimulate lawmakers to remove this as an argument against joining the Berne Convention.

The incorporation of moral rights protection into United States law, even at the state level, can serve to lessen residual hostility to the Berne ideals. This doctrine can continue to operate at the state level until the concept is fully understood and developed enough to be accepted at the federal level. Granting moral rights protection serves the interest of society in maintaining the integrity of its cultural artifacts and in promoting accurate information about authorship and about art. It also acts to instill respect for the artistic process and its end products. The New

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174 *See* Diamond, *supra* note 20, at 244 & n.3.

175 The British government, although not yet successful, has been struggling to ratify the Stockholm/Paris version of Berne Convention that includes express recognition of moral rights. *See* Dietz, *The Harmonization of Copyright in the European Community*, 16 INT'L REV. OF INDUS. PROP. & COPYRIGHT L. 379, 404 (1985); *see also* COPYRIGHT L. REP. (CCH) ¶ 20,306 (May 16, 1985) (report of hearing before the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks). Testimony was received favoring United States adherence to the Berne Convention, and recognizing the need to make the terms of the Copyright Act consistent with the minimum Berne provisions, including moral rights. Such testimony is evidence of the beginnings of a struggle in the United States similar to that taking place in Britain regarding adherence to the Berne Convention.

176 Gabay, *The United States Copyright System and the Berne Convention*, 26 BULL. COPYRIGHT SOC'Y 202, 205-07 (1979).

177 *See id.* at 210-16; *see also generally*, Ringer, *The Role of the United States International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050 (1968).

178 *See supra* note 7 and accompanying text.

York, California, and Massachusetts statutes may thus foreshadow the creation of a more comprehensive national moral rights law that would satisfy the federal copyright policy of uniform national protection. Such a law would eventually improve international copyright relations and would have the symbolic value of ensuring respect for the creative process as a matter of national legislative policy.