NEW YORK ARTISTS' AUTHORSHIP RIGHTS ACT OF 1983: WAIVER AND FAIR USE

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I. INTRODUCTION

With the enactment of the New York Artists' Authorship Rights Act of 1983,[1] a pattern appears to be developing whereby states are recognizing the need for legislation to protect the rights of visual artists. This can perhaps be best seen in focus of other state legislation, federal copyright law, and artists' rights abroad.

The first state legislative attempt at providing artists with legal rights occured in 1966 when the New York legislature effectively overruled the New York Court of Appeals decision in *Pushman v. New York Graphic Society*.[2] *Pushman* held that under common law copyright the failure to reserve reproduction rights by an artist upon the sale of a painting vested these rights in the purchaser of the painting. Section 219 of the General Business Law of New York[3] states that the right to reproduce is reserved to the artist unless expressly transferred.[4] The only other state which has attempted to legislatively protect artists' rights is California. In 1977, California went a step further and enacted the Resale Royalties Act,[5] containing the first *droit de suite* in the United States: a law allowing an artist to obtain statutory royalties upon resale of his work of fine art by a third party. A few years later, California enacted the California Art Preservation Act,[6] which protects works of art, that are determined by the trier of fact as being fine art, from being physically defaced, mutilated, altered or destroyed.[7]

Both the New York and California statutes have been linked to moral rights doctrines. Nimmer refers to the California Art Preservation Act as "a form of moral rights law,"[8] and Gantz labels the

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[1] N.Y. GEN. BUS. LAW § 228 (McKinney Supp. 1983–84).

[2] 287 N.Y. 302, 39 N.E.2d 249 (1942).

[3] N.Y. GEN. BUS. LAW § 219-g (McKinney Supp. 1983–84).

[4] Query, what is the effect of preemption under 17 U.S.C. § 301 (1982) of the present federal Copyright Act?

[5] CAL. CIV. CODE § 986 (West 1982 & Supp. 1984) (amended 1982). *See* 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.22[A], at 8-272.1 to .3 (1983).

[6] CAL. CIV. CODE § 987 (West 1982 & Supp. 1984) (amended 1982). *See* 2 M. NIMMER, *supra* note 5, § 8.21[C], at 8-255 to -257.

[7] CAL. CIV. CODE § 987(c), (f).

[8] 2 M. NIMMER, *supra* note 5, § 8.21[C], at 8-255.

California Act and the New York Artists' Authorship Rights Act as "moral rights statutes."[9]

It should be noted that moral rights, commonly called *le droit moral*, do not necessarily have a uniform meaning or comprehend the same concepts in all civil law countries. Thus, Warner refers to the moral rights of performers.[10] Yet, these rights are commonly referred to as "neighboring rights."[11]To make matters more complex, the *droit moral* is not a single right but a bundle of such rights. Da Silva lists four categories:

> 1. *Droit de Divulgation*—right to control if and when the work is disclosed to the public.[12]
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> 2. *Droit de retrait ou de repentir*—right to withdraw the work from publication *(droit de retrait)*, or to make modifications *(droit de repentir)*. Indeed, Da Silva himself refers to these as two rights in this category.[13]
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> 3. *Droit à la paternité*—right of authorship. Da Silva observes that this consists of three rights: a) the right to recognition by name as author of the work, anonymously or pseudonymously; b) the right to prevent attribution by another as author of the work; and, c) the right to prevent use of the author's name on works he did not create.[14]
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> 4. *Droit au respect de l'oeuvre*—right to integrity, to prevent alteration or mutilation of the work.[15]

The major promulgation of *droit moral* is the Berne Convention. The Berne Convention did not contain moral rights until the Rome Conference of 1928.[16] As modified by the 1948 Brussels Conference, article 6 *bis* (1) reads:

> Independently of the author's copyright, and even after the transfer of the said copyright, the author shall have the right, during his lifetime, to claim authorship of the work and to object to any distortion, mutilation or other alteration: thereof, or any other

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[9] Gantz, *Artists Benefit from State 'Moral Rights' Statute*, Legal Times of N.Y., Nov. 21, 1983, at 16. *See also* Da Silva, *Artists Rights in France and the U.S.*, 28 BULL. COPYRIGHT SOC'Y 1, 4 (1980) (discussion of the "moral" origin of *droit de suite*).

[10] H. WARNER, RADIO AND TELEVISION RIGHTS § 192, at 772–73 (1953).

[11] Bogsch, *The World Intellectual Property Organization: Its Recent Past and its Future Plans*, 26 BULL. COPYRIGHT SOC'Y 194, 195 (1979).

[12] Da Silva, *supra* note 9, at 17.

[13] *Id.* at 23.

[14] *Id.* at 26.

[15] *Id.* at 30.

[16] H. WARNER, *supra* note 10, at 775.

> action in relation to the said work, which would be prejudicial to his honour or reputation.[17]

The Paris text of article 6 *bis* (1), as promulgated in 1971, is somewhat different and reads:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.[18]

Gabay summarizes the 1971 Paris text of Berne as follows:

> The Berne Convention divides moral rights into *several categories*. The right to claim authorship of the work; the right to prevent mutilation or other modification of the work; and the right to object to other derogatory action in relation to the work which would be prejudicial to the author's honor or reputation.[19]

The United States does not, however, subscribe to the Berne Convention. Gabay observes in regard to moral rights under the present United States Copyright Act, "The 1976 Act contains almost no recognition of the doctrine of moral rights."[20] While there is no established law of *droit moral* in the United States, some scholars have noted that the American approach is pragmatic. Strauss states, "without using the label 'moral right', or designation of the components of the moral right, the courts in the United States arrive at much the same results as do European courts. Substantially the same personal rights are upheld, although under different principles."[21] Indeed, Da Silva refers to protection of moral rights in American law under doctrines of breach of contract, defamation, privacy, unfair competition, right of publicity and section 43(a) of the Lanham Act.[22] Warner refers to the application of the doctrine of moral rights under the guise of equitable relief.[23]

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[17] Berne Convention, June 26, 1948 (Brussels) art. 6 *bis* (1), *reprinted in* 4 M. NIMMER, *supra* note 5, app. 26, at 26-4.

[18] Berne Convention, July 24, 1971 (Paris) art. 6 *bis* (1), *reprinted in* 4 M. NIMMER, *supra* note 5, app. 27, at 27-5 to -6 (Berne Convention, Paris text).

[19] Gabay, *The United States Copyright System and the Berne Convention*, 26 BULL. COPYRIGHT SOC'Y 202, 211 (1979).

[20] *Id.* at 210.

[21] Strauss, *The Moral Right of the Author*, in 1 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 109, 141 (1960).

[22] Da Silva, *supra* note 9, at 6.

[23] H. WARNER, *supra* note 10, at 776–77.

II. New York Artists' Authorship Rights Act of 1983

The New York Artists' Authorship Rights Act appears to relate to two of the four categories of moral rights. Section 228-n creates the tort of knowingly publicly displaying or reproducing an altered, defaced, mutilated or modified work of fine art if it could reasonably be regarded as the work of the artist.[24] Section 228-o sets forth the rights of authorship of the artists, i.e., to claim authorship, or to disclaim authorship, as the case may be, for a just and valid reason.[25] Disclaimer is deemed just and valid if the work is altered, defaced, mutilated or modified without the artist's consent. However, in order to invoke these sections, probable or resulting damage to the artist's reputation is required.[26]

Section 228-q of the New York statute provides an aggrieved artist relief by way of damages, including exemplary damages where appropriate, equitable relief, attorney's fees and expert witness' fees.[27] However, a court in its discretion may award a defendant attorney's fees and expert witness' fees where an action is dismissed as frivolous or malicious.[28] One can assume that injunctive relief is subsumed within the equitable relief provision as part of the inherent powers of a court of equity.[29]

III. Strength of Act

While the Act on its face may appear to protect the fine artist's rights, at least in matters of ownership, reproduction, and alteration, upon further analysis and by reference to other state and federal laws, it will become obvious that the protections which the Act purports to give to artists may not be enforceable.

A. *Exculpation*

The Act itself contains an exculpatory clause that limits its applicability by excluding from liability any alteration, defacement, mutilation or modification resulting from passage of time or inherent nature of materials, as well as by denying the right of disclaimer of authorship except for gross negligence in maintaining or protecting

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[24] N.Y. Gen. Bus. Law § 228-n (McKinney Supp. 1983–84).
[25] *Id.* § 228-o.
[26] *Id.*
[27] *Id.* § 228-q.
[28] *Id.*
[29] *See id.; see also* Gantz, *supra* note 9, at 19.

the work.[30] Also excluded by the section are changes that are the ordinary result of the medium of reproduction[31] and conservation.[32]

B. *Waiver*

1. Statutory

Section 228-p (4) expressly permits waiver where a work of fine art is prepared under a contract for advertising or trade use.[33] Presumably the artist may agree to waive his rights contractually or otherwise under the statute where his work is used for advertising or trade use. Art work prepared contractually for use in advertising in visual media, e.g., newspapers, periodicals and audiovisual media, might otherwise be protected against alteration, defacement, mutilation or modification under the statute, but for the waiver.

The New York statute is silent as to the meaning of the term, "trade use." A leading treatise on art works and the law[34] fails to refer to "trade use" in its subject index, and the California statute does not mention it.[35] Similarly, the Gantz article on the New York statute does not consider the meaning of "trade use."[36] One can only surmise that the expression relates to uses akin to advertising and possibly illustrations reproduced for commercial use, as in greeting cards, posters, calendars, mugs, etc. In other words, perhaps what is intended is use in mass reproduction in commerce where the very nature of the technology, i.e., mass reproduction, places limits on the nature of the reproduction of the work. Trade use alone, however, would not appear to be such a limitation, since trade use does not necessarily require mass reproduction; but, the uses thereof for purposes of commerce might be deemed to make the rights of authorship waivable.

2. Contractual

There remains then the overriding question as to whether or not the rights granted under the New York statute are waivable other than by the waiver clause of section 228-p (4).[37] While the California Art

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[30] N.Y. GEN. BUS. LAW § 228-p(1) (McKinney Supp. 1983–84).

[31] *Id.* § 228-p(2).

[32] *Id.* § 228-p(3).

[33] *Id.* § 228-p(4).

[34] F. FELDMAN & S. WEIL, ART WORKS: LAW, POLICY, PRACTICE 1201 (1974).

[35] *See* CAL. CIV. CODE § 987 (West 1982 & Supp. 1984).

[36] *See* Gantz, *supra* note 9. *But see* Gordon, *N.Y.'s Artists' Authorship Rights*, N.Y.L.J., Mar. 23, 1984, at 5, col. 3.

[37] N.Y. GEN. BUS. LAW § 228-p(4) (West Supp. 1983–84).

Preservation Act is expressly made waivable in writing [38] the New York Act does not have such an option. However, Gantz opines that the moral rights could be contracted away. Indeed, the Act does not cover reproductions or publications of altered, defaced, mutilated or modified works of art done with the artist's consent.[39]

A useful indication of what may materialize is to reflect upon past practice as to the waiver of *droit moral* contractually. Lindey's form book, as early as 1947, contained a form of "Assignment of All Rights in Original Screen Story Outline," which reads in pertinent part: "I hereby grant, sell, assign, transfer and set over to the Corporation . . .

(g) With respect to the Story, the rights generally known in the field of literary endeavor as the 'moral rights' of authors."[40]

Later, in a different form book, Lindey contained the following in a form of "Grant of Motion Picture Rights in Book:"

> 6. *Alterations:* In producing Motion Pictures hereunder, the Purchaser shall have the right to make such changes in, additions to and eliminations from, the Novel, and to include in the Motion Pictures such language, song, music, choreography, characters, plot, incidents and situations as it in its sole discretion may deem advisable. The Owner shall not institute or maintain any action on the ground that the Motion Pictures constitute an infringement of his 'droit moral,' or a reflection on his professional reputation.[41]

By contrast, the typical waiver clause reads:

> Owner hereby waives the benefits of any provision of law known as the 'droit moral' or any similar law in any country of the world and agrees not to institute, support, maintain or permit any action or lawsuit on the ground that any motion picture or other version of the Property produced or exhibited by Purchaser, its assignees or licensees, in any way constitutes an infringement of any of the Author's droit moral or is in any way a defamation or mutilation of the Property or any part thereof or contains unauthorized variations, alterations, modifications, changes or translations.[42]

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[38] CAL. CIV. CODE § 987(g)(3). *See also* 2 M. NIMMER, *supra* note 5, § 8.21[C], at 8-258; Gantz, *supra* note 9, at 18.

[39] *See id.*

[40] A. LINDEY, MOTION PICTURE AGREEMENTS 66-67, Form I-J (1947).

[41] A. LINDEY, 2 ENTERTAINMENT, PUBLISHING AND THE ARTS 86, Form 5:A-1.01 (2d ed. 1983) (same form appeared in first edition published in 1963).

[42] J. TAUBMAN, 2 PERFORMING ARTS MANAGEMENT AND LAW FORMS, Form 2D-2, para. 3, at 809, 813 (1973) (Purchase Agreement).

The writer, in the course of nine years as house counsel at Columbia Pictures in New York from 1956-1965, recalls seeing either a waiver of *droit moral* in various motion picture agreements or the equivalent grant of rights as in the earlier Lindey form or the implied waiver of the later Lindey form. A court could reasonably take judicial notice that *droit moral* waiver clauses or equivalent grant or implied waiver clauses were, and are, used in the motion picture and television industries where the draftsman on behalf of the grantee of rights thinks of it.

It may be seen, therefore, that just as waiver of moral rights clauses or contractual equivalents were liberally used by motion picture and TV producers and continue to be so used to this day, so one may expect third parties affected by the New York statute to think in like terms of waiver or clauses equivalent thereto.

C. *Fair Use*

Fair use is of a different magnitude in the context of the New York Artists' Authorship Act. Fair use arises in the context of copyright law.[43] Since the present Copyright Act preempts state laws that give rights equivalent to those given by the Copyright Act, i.e., to reproduce, distribute and display[44] works that are in fixed form,[45] the rights given to the works of fine art as defined by the New York statute would be covered by federal copyright law. Consequently, a reproduction or display that falls under the fair use doctrine would presumably override the provisions of the New York statute. (The rationale thereof would be that a fair use does not constitute an infringement of copyright,[46] and thus cannot be prevented by state law.) Thus, a finding of fair use, it would seem, would automatically be a defense to the exercise of rights granted by the New York statute, and would be a further whittling away of the rights granted by New York to artists under the statute.

Just what constitutes a fair use is, however, often a difficult and perplexing issue.[47] The Copyright Act provides a number of methods

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[43] 17 U.S.C. §§ 107, 108, & 110 (1982). *See* 2 J. TAUBMAN, PERFORMING ARTS MANAGEMENT AND LAW, ch. XXV, at 1049 (1972) (Fair Use and Infringement).

[44] 17 U.S.C. § 301 (1982).

[45] *Id.* §§ 102(a), 301.

[46] *Id.* § 107.

[47] *See* L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT (1978), *reviewed by* Taubman, 9 PERF. ARTS REV. 109 (1979); J.S. LAWRENCE & B. TIMBERG, FAIR USE AND FREE INQUIRY (1980), *reviewed by* Taubman, 10 PERF. ARTS REV. 459 (1980).

for fair use to materialize. Section 107 specifies reproduction "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research . . . "[48] subject to the factors for evaluating fair use as set forth in the section. In addition, section 108 provides that certain limited reproductions by libraries and archives, as specified therein, are not to be deemed infringements.[49] Finally, section 110 exempts certain performances and displays from infringement, including face-to-face classroom teaching, and performance or display of works of a religious nature at a place of worship or at a religious assembly.[50]

An artist might, however, contend that an alteration, defacement, mutilation or modification of fine art which damages or could damage his reputation as creator, *ipso facto*, cannot be a fair use. But this would seem to beg the question, by bringing New York's moral rights statute into conflict with federal copyright in the face of express criteria spelled out in section 107 of the Copyright Act.

D. *Works for Hire*

The statute is silent as to works made for hire; but section 228-o refers to the artist's right to claim authorship[51] while section 228-n (1) defines "artist" as the creator of a work of fine art.[52] California has similar sections.[53]

One must conclude that the concept of artist as author in both the New York and California statutes is determined by the federal Copyright Act. Section 201 of the 1976 Act vests copyright initially in the author[54] except in the case of works made for hire where the employer or other person for whom the work for hire was prepared is deemed the author.[55]

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[48] 17 U.S.C. § 107 (1982).

[49] *Id.* § 108.

[50] *Id.* § 110.

[51] N.Y. GEN. BUS. LAW § 228-m (McKinney Supp. 1983-84). *Cf.* CAL. CIV. CODE § 987(d) (West 1982 & Supp. 1984) (contains subheading "Authorship").

[52] N.Y. GEN. BUS. LAW § 228-m(1) (McKinney Supp. 1983-84).

[53] CAL. CIV. CODE § 987(b)(1) (West 1982 & Supp. 1984).

[54] 17 U.S.C. § 201(a) (1982).

[55] *Id.* § 201(b). *See id.* § 101 which defines a "work made for hire." See also 17 U.S.C. § 26 under the 1909 Copyright Act, which defined "author" as including employer of work made for hire. The Copyright Act of 1909, Act of March 4, 1909, ch. 320, 35 Stat. 1075, was completely revised by the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101–810 (1982)).

By virtue of preemption,[56] the federal Copyright Act governs since the works of fine art enumerated in the New York statute[57] are presumed to be pictorial, graphic or sculptural works under section 102 of the Copyright Act,[58] in a fixed form,[59] giving rise to the exclusive rights under section 106 of the Copyright Act.[60]

Consequently, one may exclude works made for hire from the scope of the New York Artists' Authorship Rights Act as well as from the California Art Preservation Act as pre-empted by federal copyright law.

IV. Conclusion

Moral rights *(droit moral)* consist of a congeries of rights of personality, as opposed to economic rights, which were developed in France[61] and in varying degrees in other civil law countries.[62]

The Berne Convention, beginning with the Rome Conference in 1928, has embodied a number of the moral rights in article 6 *bis* thereof.[63]

The United States has not acceded to the Berne Convention to date for various reasons, including its lack of formalities and inclusion of the moral rights section.[64] At the same time, the present United States Copyright Act does not acknowledge moral rights.[65] One might contend that certain sections of the present Copyright Act have elements of *droit moral.* [66] But for all practical purposes, as Nimmer has correctly stated, "[t]he Copyright Act accords no recognition of moral rights."[67] The courts, instead, have sought to meet troublesome problems arising out of a lack of federal statutory *droit moral* in copyright through a variety of theories, including breach of contract, unfair

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[56] 17 U.S.C. § 301 (1982).

[57] N.Y. Gen. Bus. Law § 228-m(5) (McKinney Supp. 1983-84).

[58] 17 U.S.C. § 102(5) (1982).

[59] *Id.* § 106.

[60] *Id.*

[61] Da Silva, *supra* note 9, at 1.

[62] *See* 2 M. Nimmer, *supra* note 5 § 8.21[A], at 8-247; *see also* Gantz, *supra* note 9, at 16; Strauss, *supra* note 21, at 963.

[63] See *supra* notes 16-18 and accompanying text.

[64] *See* Gabay, *supra* note 19, at 217-20 (arguing in favor of U.S. accession to the Berne Convention).

[65] *See* 17 U.S.C. §§ 101-810 (1982).

[66] *See, e.g.*, 1 J. Taubman, *supra* note 43, § 16.9, at 579; *id.* Supp. 1977, at 33 (Right of Arrangement and Copyright Revision).

[67] 2 M. Nimmer, *supra* note 5, § 8.21[B], at 8-248.

competition, common law copyright, libel, right of privacy, right of publicity, and section 43(a) of the Lanham Act.

Into this lacuna of federal copyright have come the sovereign states of California and New York seeking to protect creators of works of fine art.[68] Theoretical underpinnings of artists' rights of personality[69] have given way to the pragmatic attempts to protect fine artists which are embodied in the specifics of the particular legislation.[70]

It remains to be seen whether the New York statute may, in due course, prove to be effective in protecting artists' authorship rights of paternity and integrity as embodied in the statute.[71] Film and television experience has shown that resort may be made to contractual waiver doctrine, express or implied, to negate the statute. Contractual clauses not expressly in the form of waiver, such as the affirmative contractual right to alter, may have the same effect. In addition, one can hardly surmise what use may be made of the never-never land of fair use to provide defenses to the statute. Add to that attacks on the statute that might materialize in the courts, such as constitutionality and jurisidiction. Finally, it must be remembered that important areas are excluded under the work for hire doctrine which further weaken the statute.[72]

New York and California have stepped in to plug a gap in protections for artists where Congress has failed to act and the theoretical underpinnings of judicial protection are so diverse. The legislatures of these states provide assistance to artists because of the importance of art to these states. At the same time, creators of fine art are not organized to protect rights of members, as in the talent guilds, so as to claim rights to residuals, for example, via their collective bargaining agreements.[73]

Perhaps the time is approaching when a federal moral rights policy can come into play as an incident of American adoption of the Berne Convention and the amendment of the United States Copyright Act incidental thereto. It is not too soon for the Copyright Office to

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[68] *See supra* notes 1–3, 5–6 and accompanying text.

[69] *See* Gabay, *supra* note 19, at 202.

[70] *See* 2 M. NIMMER, *supra* note 5, § 8.21[C][2], at 8-255 (analyzing the California Art Preservation Act); Da Silva, *supra* note 9, at 48 (discussing the California statute); Gantz, *supra* note 9, at 16 (comparing and contrasting the California statute with the New York Artists' Authorship Rights Act).

[71] *See supra* note 1 and accompanying text.

[72] 17 U.S.C. §§ 201(b) & 101 (1982) (defining "work made for hire").

[73] *Cf.* Freund, *Residuals in Broadcasting*, in J. TAUBMAN, SUBSIDIARY RIGHTS AND RESIDUALS, ch. IX, at 101 (1968).

undertake updated studies of moral rights for possible accession to the Berne Convention, with reference to the passage of the New York Act in 1983 and possible promulgation of legislation in states other than New York and California for the protection of artists' rights.

Such studies might produce a coherent doctrinal approach to overcome the inherent theoretical problems of civil law moral rights, such as application to films and other audiovisual works, while giving much needed structure to judicial invention, presently in vogue, to meet the lack of federal moral rights legislation in copyright.