NOTES

CONSERVATOR OVERREACHING AND THE ART OWNER: CONTRACTUAL PROTECTIONS AGAINST THE OVERZEALOUS RESTORATION OF FINE ART*

I. INTRODUCTION

On March 21, 1986, a young man concealing a knife entered Amsterdam's Stedelijk Museum and slashed the Barnett Newman painting *Who's Afraid of Red, Yellow and Blue III.*[1] The man mutilated the painting, making eight slashes in the canvas, four horizontal and four diagonal, spanning from top left to bottom right.[2] Hoping to restore the ruined work, Dutch authorities contacted the American conservation expert Daniel Goldreyer at the suggestion of Newman's widow.[3]

Art conservation is the highly technical craft of restoring works of fine art that have been damaged or soiled.[4] Conservation can

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* © Peter Adelman. The author wishes to dedicate this Note to the memory of John Appel, Professor of Law, Benjamin N. Cardozo School of Law.

1 Hugh Sebag-Montefiore, *Accusations Flying Over Restoration of Slashed Work; Newman Work Back on View*, THE GAZETTE, May 2, 1992, at J5; Sarah Jane Checkland, *What's Red, Blue and Haggled Over?*, THE TIMES OF LONDON, April 24, 1992, at 5; Michael Kimmelman, *Restoration of a Painting Worries Dutch Art Experts*, N.Y. TIMES, Dec. 17, 1991, at C15.

The painting is the third in a series of four works titled *Who's Afraid of Red, Yellow and Blue.* Nearly 18 by 8 feet, the painting consists of a large flat red field, bordered by a vertical blue strip on the left and a yellow strip on the right. Jan Bart Klaster, *Red Alert*, ART NEWS, Feb. 1991, at 31. At the time it was slashed, the Newman painting was considered one of the best-known works of postwar art in Holland. *Id.*

2 Kimmelman, *supra* note 1, at C15. The vandal, whose name was not released by Dutch authorities, later explained that "he was protesting Dutch museums and abstract art." *Id.* at C19.

3 *Id.*

4 A distinction can be made between conservation and restoration; the California Art Preservation Act, for example, provides separate definitions for each. Restoration is defined as "return[ing], or caus[ing] to be returned, a deteriorated or damaged work of fine art as nearly as is feasible to its original state or condition, in accordance with prevailing standards." CAL. CIV. CODE § 987(b)(5) (West Supp. 1994). Conservation is defined as "preserv[ing], or caus[ing] to be preserved, a work of fine art by retarding or preventing deterioration or damage through appropriate treatment in accordance with prevailing standards in order to maintain the structural integrity to the fullest extent possible in an unchanging state." CAL. CIV. CODE § 987(b)(6) (West Supp. 1994). A similar distinction is made in Europe, where it is thought that only the prevention of natural deterioration is possible, and that true restoration is not. Interview with Heather Galloway, Conservator with The Museum of Modern Art, in New York, N.Y. (Sept. 29, 1992) [hereinafter Galloway Interview].

For purposes of this Note, "conservation" will be used generically, to contemplate both conservation and restoration. The reasons for not distinguishing between the two terms are two-fold. First, in the United States, restoration of fine art is performed by conserva-

contemplate a broad array of treatments, including reconstructing broken sculpture, reweaving damaged canvases, and delicately removing stains from the surfaces of paintings.

Conservators have obligations not only to their employers, but to the objects of art on which they work.[5] Among these obligations is respect for the physical integrity of the object on which the conservator works.[6] An additional obligation concerns aesthetic reintegration; the conservator, in compensating for damage to a piece of art, may not "ethically carry compensation to a point of modifying the known character of the original."[7] Another obligation thought to attach to the conservator is the duty to ensure that any work performed on a piece of art can be undone at a future date—the principle of reversibility.[8]

Conservators who restore paintings must sometimes repaint small sections that have been damaged, a technique called "inpainting." Inpainting is but one of many skills, part technical, part creative, that make fine art restoration such a demanding craft. An inexact boundary exists between inpainting and "overpainting," the term used to describe a conservator's inappropriate obscuring of an artist's original work with the conservator's own brush.[9]

The treatment of *Who's Afraid of Red, Yellow and Blue III* was an exceptionally complex project. Goldreyer had first to construct a special platform on which to secure the painting during its treatment.[10] He then removed splinters of paint from the torn threads of the canvas, after which the fibers were "'matched thread-to-

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tors, and is naturally thought a component of the conservator's work. Second, the interest in the integrity of a piece of fine art—the focus of this Note—is equally threatened by the work of the overzealous conservator or restorer.

5 CODE OF ETHICS AND STANDARDS OF PRACTICE, The American Institute for Conservation of Historic Works, § I [hereinafter CODE OF ETHICS].

6 *Id.* § II(A).

7 *Id.* § II(F).

8 "[The conservator] should avoid the use of materials which may become so intractable that their future removal could endanger the physical safety of the object. He should also avoid the use of techniques the results of which cannot be undone if that should become desirable." *Id.* § II(E).

9 To illustrate the concept of overpainting, a conservator with New York City's Museum of Modern Art made an analogy to house painting. If one painted his walls white, and a week later found that a small area had become discolored or stained, it would be extremely difficult to retouch the blemish flawlessly. Even if one used the same can of paint and the same brush, it would be nearly impossible to create a seamless repair of the flaw; the naked eye would likely detect a difference in hue or saturation or brush stroke. The natural temptation is to paint further and further out from the blemish in an attempt to blend the new application with the old. At some indeterminate point, the prominence of the new application is such that it has assumed greater character than the old; it has become, in essence, a new application. Restoration up to that indeterminate point is inpainting; restoration beyond that point is overpainting. Galloway Interview, *supra* note 4.

10 Checkland, *supra* note 1.

thread.'"[11] After reinforcing each slash with a polyvinyl adhesive, Goldreyer relined the painting to reinforce the work completed to that point.[12] He then cleaned the surface of the painting first with a detergent and then with an alcohol solution, after which he "'sealed the slashed areas with a fibre filler.'"[13] After applying several thin layers of oil paint, Goldreyer sealed the painting with an acrylic varnish.[14]

Controversy attended Goldreyer's 1991 delivery of the restored *Who's Afraid of Red, Yellow and Blue III*,[15] focusing public attention on some of the legal ramifications of conservation. After art experts inspected the painting, doubts arose as to the techniques Goldreyer had employed, which then lead to a laboratory analysis of the restoration. The examination, conducted by a government forensic laboratory, suggested that Goldreyer had covered Newman's original paints with a quick-drying alkyd coating that is almost impossible to remove without damaging the painting.[16] Such treatment is controversial because it is irreversible, and thus breaks a fundamental tenet of ethical conservation.[17]

The treatment is also controversial because it masks the artist's original surface, and is therefore thought to result in what is essentially a facsimile of the original work.[18] While untrained observers might not be able to detect a masking of the artist's original surface, schooled eyes would; indeed, describing the restored work, the Dutch art historian, Ernst van de Wetering, commented that "'[i]t looks like a reproduction of itself.'"[19] Moreover, suspicions

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[11] *Id.* (quoting Daniel Goldreyer's report to the Stedelijk Museum).

[12] *Id.*

[13] *Id.* (quoting Daniel Goldreyer's report to the Stedelijk Museum).

[14] *Id.*

[15] Sebag-Montefiore, *supra* note 1; Checkland, *supra* note 1; Kimmelman, *supra* note 1, at C15.

[16] Kimmelman, *supra* note 1, at C15; Klaster, *supra* note 1, at 31. Goldreyer maintained originally that he sealed the painting with Butyl Methacrylate Polymer (a reversible synthetic varnish) "'with several light mist sprays to catch the original patina.'" Checkland, *supra* note 1. In response to the Dutch laboratory report, Goldreyer acknowledged that the surface of the painting was covered with an alkyd seal. Kimmelman, *supra* note 1, at C15.

[17] *See* CODE OF ETHICS, *supra* note 5, at § II(E).

[18] Klaster, *supra* note 1, at 31; Kimmelman, *supra* note 1, at C19.

[19] Montefiore, *supra* note 1.

van de Wetering and Elisabeth Bracht, chief conservator at the Stedelijk, are named by Goldreyer in a pending lawsuit alleging interference with contractual relations. Goldreyer, Ltd. v. van de Wetering, No. 1658-92 (N.Y. Sup. Ct. filed Jan. 16, 1992). Goldreyer maintains that van de Wetering and Bracht were spurned as possible restorers of the painting, and that the two, through their derogatory comments, induced Stedelijk Director Wim W.A.L. Beeren to breach an agreement to inform the public of the successful conservation of the painting. Amended Complaint at 18-20, *Goldreyer* (No. 1658-92). Beeren is charged with breach of contract in connection with that agreement. Amended Complaint at 16-17.

In the same action, Goldreyer brought suit against *De Telegraaf*, *Time Magazine* and *The Wall Street Journal*, alleging libel in connection with stories the publications carried regard-

regarding the work's restoration would bring into question the market value of the painting. *Who's Afraid of Red, Yellow and Blue III* was valued at approximately $3 million at the time of the slashing;[20] a decrease in the market value of the painting would indeed constitute tangible damage beyond that recognizable solely to art experts.

The contract drafted between the Amsterdam City Council (owner of the Stedelijk) and Goldreyer stipulated that disagreements concerning the restoration be settled by arbitration in the United States.[21] Notwithstanding that provision, on November 5, 1993, the City of Amsterdam brought suit against Goldreyer in federal court.[22]

What would be the best course for an aggrieved art owner wishing to bring a legal action against a conservator thought to have violated the ethics of conservation treatment? No decisional or statutory law exists explicitly guiding the art owner seeking redress from an overreaching conservator. While federal[23] and certain state[24] moral rights provisions[25] provide a cause of action against the negligent[26] and grossly negligent[27] conservator, no such statutory cause of action exists against the conservator who overtreats.[28] Hence, no firm guidelines exist for the art owner hoping

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ing the treatment of the painting. Amended Complaint at 23-33. Suzanne Schnitzer, a conservator whose comments appeared in the *Time Magazine* story, was sued for libel and slander. Amended Complaint at 33-35.

20 Checkland, *supra* note 1.

21 Klaster, *supra* note 1, at 32; Kimmelman, *supra* note 1, at C15.

22 In its complaint, the City of Amsterdam alleged breach of contract, conversion, trespass to chattel, fraud, negligence, and negligent misrepresentation. *City of Amsterdam v.* Goldreyer, No. 93 Civ. 5012 (E.D.N.Y. filed Nov. 5, 1993).

23 The Visual Artists Rights Act, 17 U.S.C. § 106A (Supp. 1992).

24 *See, e.g.*, N.Y. ARTS & CULT. AFF. § 14.57 (McKinney Supp. 1994).

25 Moral rights provisions protect a number of interests as to the creator of a work of art, such as the right of integrity—the right of an artist to prevent others from altering her work. For a discussion of the doctrine of moral rights, see *infra* notes 56-106 and accompanying text.

26 *See, e.g.*, N.Y. ARTS & CULT. AFF. § 14.03 (McKinney Supp. 1994). The New York provision does not provide an artist an explicit cause of action against the negligent conservator; rather, it makes conservators immune from moral rights violations, then makes an exception for those who are negligent. "Conservation shall not constitute an alteration, defacement, mutilation or modification within the meaning of this section, unless the conservation work can be shown to be negligent." N.Y. ARTS & CULT. AFF. § 14.03(3)(c)(McKinney Supp. 1994). The Visual Artists Rights Act creates an analogous cause of action in a similar fashion by exempting conservators from its reach, and then making an exception for the sub-class of grossly negligent conservators. "The modification of a work of visual art which is the result of conservation . . . is not a destruction, distortion, mutilation, or other modification . . . unless the modification is caused by gross negligence." 17 U.S.C. § 106A(c)(2)(Supp. 1992).

27 *See* 17 U.S.C. § 106A(c)(2)(Supp. 1992). *See also supra* note 26.

28 While a case of conservator overreaching might be found to constitute negligence or gross negligence within the meaning of state or federal moral rights statutes, these provisions probably would not provide useful causes of action for the aggrieved art owner. The

to recover from a conservator thought to have over-restored.

This Note will examine how owners of fine art might, through careful contracting, endeavor to insulate themselves from an injury arising from conservator overreaching. Section II of this Note will examine various common law theories that an aggrieved art owner might pursue. It will conclude that contract provides the best means of recovery, and will argue that conservation contracts should address non-modification of the character of art works expressly. Section III will argue that the drafters of such contracts would be wise to examine both moral rights provisions and their common law approximations for guidance on protecting the integrity interest in an artwork. It will then provide an overview of the doctrine of moral rights, including its origin and application in the United States and abroad. Section IV will examine statutory moral rights provisions, judicially-constructed moral rights protections, and analogous provisions in motion picture and other entertainment contracts, and suggest how they might be of use to the drafter of a conservation contract wishing to protect an art owner from conservator overreaching.

II. Common Law Theories

Intuitively, the lawyer knows that the owner of an over-restored piece of artwork should have an action at common law. *Something* has been taken, or compromised; some sort of trespass has occurred. Hence, it would seem only natural that the common law afford a remedy to the aggrieved art owner. A number of actions suggest themselves at the outset.

The owner might first consider several theories in tort. An action sounding in negligence might prevail, but not in every case; the conservator might be found to have modified the character of the artwork without having actually engaged in any sort of misfeasance.[29] Those not objecting to overall restorations might not find

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interests protected under the doctrine of moral rights are considered personal to the artist. Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 Harv. L. Rev. 554, 557 (1940); William Strauss, *The Moral Right of the Author*, 4 Am. J. Comp. L. 506, 506 (1955); 2 M. Nimmer & D. Nimmer, Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas § 8.21[A], at 8-264.13 (1992). Hence, unless she were also the work's creator, the owner of an over-restored work of art would be unable to exploit such statutory causes of action against negligent or grossly negligent conservators.

[29] What exactly constitutes misfeasance in conservation is a source of disagreement in the conservation community. The character of the work of post-World War II artists like Barnett Newman, Mark Rothko, and Ad Reinhart makes localized treatments particularly difficult. While textured and polychromatic paintings provide the conservator with detail in which to conceal retouchings, the largely monochromatic works of these artists do not. *See* Kimmelman, *supra* note 1, at C19. To restore a painting such as *Who's Afraid of Red,*

Goldreyer's restoration to be misfeasance at all, while proponents of localized restorations might.[30] Thus, the duty owed art owners is not easily definable, nor an objective standard easily determinable, making identification of its breach difficult. Even if Goldreyer were found to have violated the conservators' *Code of Ethics*, such a breach would not necessarily be indicative of negligence *per se*.[31] Torts like defamation[32] and invasion of privacy[33] are premised respectively on injury to reputation and unwanted publicity,[34] and would be less useful. Such causes of action would necessarily be founded on the notion that a public display of an altered artwork proved injurious to its creator.[35] As such, those torts might be of

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Yellow and Blue III to its original state (if such a thing were possible) could require repainting large fields of color, for a localized treatment would likely not blend perfectly with the existing color of the painted canvas. *See supra* note 9. Paul Goldreyer is known to provide such overall restorations. Many conservators find overall restorations unethical, preferring instead conservative, localized treatments that concentrate only on damaged areas of the painting. Without repainting the areas surrounding the treated area, though, the treated area may not blend in perfectly with the rest of the painting. Galloway Interview, *supra* note 4.

The temptation to over-restore is grounded in contemporary notions of aesthetics. Carol Mancusi-Ungaro, a specialist in the restoration of post-war paintings stated

> I stand strongly against repainting, but I can understand the impetus when a work is severely damaged . . . . The problem is that while society accepts the idea that Old Master paintings can exhibit signs of aging, which includes damage of some sort, people don't accept the aging process for contemporary works. I think it is a reflection of our attitudes toward aging, in general.

Kimmelman, *supra* note 1, at C19.

30 An example of a localized restoration is that of Piero Della Francesca's fresco *A Story of the True Cross*, at the Church of San Francesco in Arezzo, Italy. Conservators revitalized damaged portions of the fresco, but did not recreate missing portions; as a result, significant portions of the bodies of some of the characters depicted in the fresco are simply missing. While those favoring localized restorations would no doubt find the restoration an ethical treatment, the artist's purpose—telling the story of the crucifixion—is not preserved. Interview with Heather Galloway, Conservator with The Museum of Modern Art, in New York, N.Y. (Jan. 11, 1993) [hereinafter Second Galloway Interview]. *See also* ALESSANDRO ANGELINI, PERIO DELLA FRANCESCA 38 (1985) (reproducing the restored fresco). It could be argued that had Daniel Goldreyer not restored the way he did, Newman's huge expanse of red would have been interrupted, also corrupting the artist's original vision.

31 *See, e.g.*, Miami Int'l Realty Co. v. Paynter, 841 F.2d 348 (10th Cir. 1988) (holding that a lawyer's violation of the code of professional responsibility does not constitute negligence *per se*); Hizey v. Carpenter, 830 P.2d 646 (Wash. Ct. App. 1992). Such a violation, however, may be evidence of negligence. Fishman v. Brooks, 487 N.E.2d 1381 (Mass. 1986).

32 Defamation occurs when a communication "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1976).

33 Dean Prosser suggested that the distortion or mutilation of a work might constitute an invasion of privacy. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

34 *See* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 864 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

35 This notion of injury to reputation is central to both the New York moral rights statute and the Visual Artists Rights Act. The New York statute proscribes "knowingly display[ing] in a place accessible to the public or publish[ing] a work of fine art or limited edition multiple of not more than three hundred copies by that artist or a reproduction thereof in an altered, defaced, mutilated or modified form if the work is displayed, pub-

use to artists, but not to art owners.

Perhaps the most appropriate tort action for the art owner would be that of conversion. One of the many forms of conversion occurs when a defendant "so radically damages or alters [plaintiff's chattel] that its character is substantially changed."[36] Since conversion contemplates a violation of ownership interests, and is unrelated to reputation and privacy, it can be asserted by someone other than the artist.

Nevertheless, several factors suggest that a more attractive cause of action would lie in contract. To begin with, it would seem intuitive that the art owner would prefer litigating a dispute under terms she herself prescribed. Under a contract, parties direct prospectively the flow of rights and liabilities among themselves. In tort, a court performs that function retroactively. Hence, a greater degree of autonomy is preserved when litigating under the terms of a contract.

Additional factors militate toward contract as well. Arguably, superior damages could be won in contract, assuming that the parties made express allusion to the possibility of a modified work suffering a loss in market value.[37] An aggrieved art owner could sue for expectation damages from the breaching conservator, hoping to collect the benefit of his bargain.[38] Such damages would be equivalent to the difference in value between the damaged painting and the correctly restored painting (less the price of the conservator's services).[39] Recovery in tort, by contrast, would restore the art owner by awarding compensatory damages; such an award would serve to put the owner in the same position occupied prior

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lished or reproduced as being the work of the artist, or under circumstances under which it would reasonably be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result therefrom . . . ." N.Y. ARTS & CULT. AFF. § 14.03 (McKinney Supp. 1994). The Visual Rights Artists Act provides that the author of a work of visual art "shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation . . . ." 17 U.S.C. § 106A(a)(2) (Supp. 1992). The Act provides further that the author may "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation . . . ." 17 U.S.C. § 106A(a)(3)(A)(Supp. 1992).

36 PROSSER AND KEETON, *supra* note 34, § 15, at 100.

37 Such explicit allusion would serve to make a resulting diminution in value a consequence foreseeable to both parties, bringing such damages within those awarded under the second rule of Hadley v. Baxendale, 156 Eng. Rep. 145 (1854). *See also* JOSEPH D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 14-5, at 594-95 (3d ed. 1987). *See infra* notes 124-27 and accompanying text.

38 "For breach of contract the law of damages seeks to place the aggrieved party in the same economic position he would have had if the contract had been performed." CALAMARI & PERILLO, *supra* note 37, § 14-4, at 591.

39 *See* Hawkins v. McGee, 84 N.H. 114 (1929).

to the injury.[40] Such damages, then, if calculated perfectly, would merely put the art owner in a figurative position equivalent to owning the painting in its damaged, pre-restoration state.

Yet other factors suggest the superiority of an action in contract.[41] Tort actions may be barred by shorter statutes of limitation,[42] and they may not be assignable.[43] Furthermore, a tort claim may not survive the death of one of the parties, whereas a contract claim would.[44]

For an art owner to sue in contract for the alteration of an artwork's character the risk of non-alteration need have been allocated to the conservator.[45] Then, alteration of the work's character being a breach, the art owner who contracted with the overreaching conservator would have a clear cause of action. Such a cause of action might exist in at least three situations. First, the parties could have stipulated such a term expressly in their contract.[46] Second, absent express language disclaiming liability for a modification in character, an art owner might claim non-modification to have been an implied term to the contract.[47] Third, the parties could have achieved the same result by having expressly[48] or impliedly[49] adopted the conservator's *Code of Ethics* as terms of the contract.[50]

The aggrieved art owner might have difficulty pursuing a contract action without the ability to claim non-modification of character as an included contractual term.[51] While guilty of modifying

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40 *See* PROSSER AND KEETON, *supra* note 34, § 94, at 673.

41 One factor suggests that tort is superior to contract—that punitive damages are generally unavailable in contract. CALAMARI & PERILLO, *supra* note 37, § 14-3, at 589. Punitive damages probably would not be awarded to an aggrieved art owner, however, since such damages are traditionally limited to instances in which "defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime . . . ." PROSSER AND KEETON, *supra* note 34, § 2, at 9.

42 PROSSER AND KEETON, *supra* note 34, § 92, at 664.

43 *Id.*

44 *Id.*

45 It is intrinsic to conservation that any treatment necessarily involves some level of modification to a work of art. If the value of a work of art is tied to its authorship, it is the character of the work that the owner wishes to protect from alteration, rather than the physical materials on which the artist worked. Thus, the art owner, in endeavoring to contract with a conservator, would want to prohibit tampering with the artistic expression, thereby confining any alterations to the medium in which the expression is fixed.

46 *See* CALAMARI & PERILLO, *supra* note 37, § 1-12, at 19. Standard conservation contracts typically do not contain non-modification clauses. *See infra* note 111.

47 CALAMARI & PERILLO, *supra* note 37, § 2-9, at 56-57.

48 *Id.* § 1-12, at 19.

49 *Id.* § 2-9, at 56-57.

50 *See supra* note 5.

51 Courts have shown general reluctance to honor moral rights absent specific contractual provisions. *See, e.g.*, Granz v. Harris, 198 F.2d 585 (2d Cir. 1952) (holding that attribution of altered sound recordings to concert producer constituted unfair competition and

the known character of the work of art, the conservator might have nonetheless performed the contract.[52] A breach of conservator decorum would not necessarily rise to a breach of a conservation contract.

Hence, the drafter of the conservation contract would be well-advised to address non-modification of character expressly in the drafting. The doctrine of moral rights—which protects, among other interests,[53] the personal interest of an artist in the integrity of a creation—provides a natural point of reference for the drafter attempting to make such a provision. The protection of the interests contemplated by moral rights has found expression in both statutory[54] and common[55] law.

III. The Doctrine of Moral Rights

A. *Overview of the Doctrine*

While the interest in the physical integrity of an artwork is imperfectly defined in the argot of conventional tort pleadings, its protection under the doctrine of moral rights is express. The interest, though, is protected only as to the art work's creator.

Professor Nimmer finds an artist's moral rights to comprise the following interests:

> [T]o be known as the author of his work; to prevent others from being named as the author of his work; to prevent others from falsely attributing to him the authorship of work which he has not in fact written; to prevent others from making deforming changes in his work; to withdraw a published work from distribution if it no longer represents the views of the author; and to prevent others from using the work or the author's name in such a way as to reflect on his professional standing.[56]

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breach of contract where contract specified credit line on records); *cf.* Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947) (refusing to enjoin publisher from publishing pictures without credit to the artist where the artist failed contractually to reserve right of accreditation). *See also* Preminger v. Columbia Pictures Corp., 267 N.Y.S.2d 594 (Sup. Ct. 1966) (holding that, absent specific contractual provision, right to edit film for television broadcast is governed by prevailing industry custom). For a detailed discussion of the *Preminger* case, see *infra* notes 116-23 and accompanying text.

52 Daniel Goldreyer could make just such an argument, claiming that he delivered the restoration service for which consideration was exchanged, possible modification of the character of the work notwithstanding. Indeed, he might argue that given the severe damage sustained by the painting, modification of character was implicit in restoring the painting. *But see* Gilliam v. American Broadcasting Co., 538 F.2d 14, 23 (2d Cir. 1976) (finding no implied consent to edit scatological references from television program in the granting of a license to broadcast the show on commercial television in the United States).

53 *See infra* note 56 and accompanying text.

54 *See infra* notes 90-108 and accompanying text.

55 *See infra* note 88 and accompanying text.

56 Nimmer, *supra* note 28, § 8.21[A], at 8-264.13 (1992). Unless otherwise stated, for the

Moral rights have also been described as "the creator's personal right to control his creation."[57] Indeed, the fundamental character of the doctrine contemplates an artist's work as an "extension of the author's personality, the means by which he seeks to communicate to the public."[58] As such, it concerns the protection of an artist's personal sovereignty over his work.[59]

Of French origin,[60] the doctrine of moral rights is consonant with the Continental notion of copyright, which recognizes personal rights distinct from the economic interests protected under United States copyright doctrine.[61] Unlike United States copyright doctrine, born of classical utilitarianism and Lockean natural rights theory,[62] the Continental copyright doctrine finds its origin in the Kantian[63] and Hegelian[64] traditions. The Kantian formulation gave rise to the monist theory of authors' rights, which later

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purposes of this Note, the term "author" will be used generically to indicate any creator of art, whether a painter, a musician, or a writer.

57 Thomas J. Davis, Jr., *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 HOFSTRA L. REV. 317, 318 (1989).

58 Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L. J. 1 (1994).

59 "When an artist creates, be he an author, a painter, a sculptor, an architect or a musician, he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use." Roeder, *supra* note 28, at 557.

60 Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 12 n.41 (1985). The term "moral rights" is a rough translation of the French term "droit moral." *Id.* at 3 n.6; Roeder, *supra* note 28, at 554-55. It has been suggested that "the English translation does not convey adequately the idea of an 'intellectual concept' of 'inner meaning,' which is inherent in the French term 'moral.' Therefore, *droit moral* does not refer exclusively to rights inherent in our notion of morality, but also encompasses a right that exists in an entity's ultimate being." Kwall, *supra*, at 3 n.6, (quoting L. Naoum, Federal Preemption Under the Copyright Act of 1976: Do Moral Rights Survive? (1984) (unpublished paper in Kwall's file)).

61 *See* Netanel, *supra* note 58, at 7. "The [United States] copyright law, of course, protects the economic exploitation of the fruits of artistic creation; but the economic, exploitive aspect of the problem is only one of its many facets . . . . There are possibilities of injury to the creator other than merely economic ones; these the copyright statute does not protect." Roeder, *supra* note 28, at 557.

62 *See* Netanel, *supra* note 58, at 8.

63 Because Kant regarded the intellectual work as a part of the creator's person, he saw it as distinct from a res that could be freely exchanged. Netanel, *supra* note 58, at 19. Kant demonstrated the distinction he saw by contrasting books with money. Money, in Kant's view, exemplified the transferability of objects in its clearest form. Money is "the *greatest* and *most useable* of all the Means of human intercommunication through Things, in the way of Purchase and Sale in commerce." IMMANUEL KANT, THE PHILOSOPHY OF LAW 124 (W. Hastie trans., 1974). It "is a thing which can only be made *use* of, by being *alienated* or exchanged." *Id.* at 125. A book, by contrast, rises beyond the status of a mere commodity, being inseparable from the personality of its author. It is "the greatest Means of carrying on the interchange of Thought." *Id.*

64 Hegel, by contrast, regarded the intellectual work not as an extension of personality, but as an external thing; he argued that the medium of expression, be it a book or a painting, "could transform products of the mind into alienable property." Netanel, *supra* note 58, at 19.

found expression in the German Act dealing with Copyright and Related Rights of September 9, 1965.[65] The Hegelian formulation was the basis of the dualist approach, which, while acknowledging intellectual works as alienable products, recognized a distinct right of personality.[66] The dualist approach later found expression in the French Copyright Act of 1957, which differentiated between authors' moral rights and exploitation rights.[67]

Because moral rights protect interests that are thought to be extensions of the creator's personality, they are sometimes considered inalienable by definition.[68] Such a notion of inalienability seemingly puts the moral rights doctrine in tension with copyright, which seeks to encourage the dissemination of artistic product by safeguarding the pecuniary interests of its creators.[69] By deeming inalienable the personal rights of the artist, the moral rights doctrine prohibits the commodification of the entire bundle of rights associated with creation. Thus, in so protecting the artist, the doctrine prohibits her from realizing the potential full value of her creation, a result seemingly contrary to a principle aim of copyright.[70] Such tension is thought to be one reason that the United

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65 *Id.* at 21.

66 *Id.*

67 *Id.* at 22.

68 "Some scholars have argued that moral rights should not be alienable because they protect personal attributes such as personality, honor, and reputation." Kwall, *supra* note 60, at 12. *See also* Netanel, *supra* note 58 (discussing alienability limitations inherent in moral rights and in what ways they are compatible with United States legal norms); NIMMER, *supra* note 28, § 8.2[A][1], at 8-264.14 (noting that moral rights as applied by most Berne Convention countries are thought inalienable by nature); ALAN LATMAN ET AL., COPYRIGHT FOR THE NINETIES 13 (3d ed. 1989) (noting that moral rights are regarded as not assignable, though sometimes waivable).

69 The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

Mazer v. Stein, 347 U.S. 201, 219 (1954) (quoting U.S. CONST. art. I, § 8, cl. 8.) *See also* Davis, *supra* note 57, at 320-22 (noting that copyright concerns itself with the promotion of creativity through economic incentive).

70 An argument can be made that the rationale underlying moral rights is not totally at odds with that of copyright. While moral rights initially contemplate the personal rights of artists, they acknowledge as well "society's interest in preserving its cultural heritage." Kwall, *supra* note 60, at 15. Indeed, in introducing the Visual Artists Rights Act, which amended the copyright law to embrace limited moral rights (*see infra* notes 90-108 and accompanying text), Representative Robert W. Kastenmeier stated "[w]e should always remember that the visual arts covered by this bill meet a special societal need, and that their protection and preservation serve an important public interest." H.R. Rep. No. 514, 101st Cong., 2d Sess. 1, (1990), *reprinted in* 1990 U.S CODE CONG. & ADMIN. NEWS. 6915, 6916 [hereinafter House Report].

Copyright, of course, is also premised on promoting societal welfare. The framers wrote "[t]he Congress shall have the power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to

States has been so slow to embrace the moral rights doctrine.[71] The controversy surrounding recent attempts to colorize black and white films is an example of the tension that can exist between art owners wishing to exploit their property fully, and artists wishing to preserve the integrity of their creations.[72]

Because moral rights are an outgrowth of the Continental copyright tradition, their successful enforcement has taken place almost exclusively in European courts.[73] The fate of moral rights actions brought by the Russian composer Dimitri Shostakovich simultaneously[74] in the United States[75] and France[76] is illustrative in

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their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. The very wording of the framers suggests that the recognition of the rights of the creator is incidental to a larger societal benefit. *See* Davis, *supra* note 57, at 321.

The tension between copyright and moral rights thus springs not from their respective ends, but from the divergent means—commodification and paternalism, respectively—that each doctrine employs to effect greater societal good. Indeed, the House Report asserted that "[a]rtists' rights are consistent with the purpose behind the copyright laws and the Constitutional provision they implement: 'To promote the Progress of Science and useful Arts.'" House Report, *supra* at 6915 (footnote omitted) (quoting U.S. CONST. art. I, § 8, cl. 8).

[71] Joseph Zuber, *Do Artists Have Moral Rights?*, 21 J. ARTS MGT. & L. 284, 284; Kwall, *supra* note 60, at 17 n.67.

[72] Critics of colorization (mainly members of the artistic community) argue that the procedure, at least when not explicitly authorized by the film's director, compromises the original artistic intent of the film's creator and renders the work a bastardized version of its former self. Proponents (mainly owners of films) argue that colorization makes black and white films more palatable to the viewing public and thus more marketable. *See generally* Anna S. White, Comment, *The Colorization Dispute: Moral Rights Theory as a Means of Judicial and Legislative Reform*, 38 EMORY L. J. 237 (1989) (outlining the arguments in the colorization dispute and analyzing the National Film Preservation Act of 1988); Daniel McKendree Sessa, Note, *Moral Right Protections in the Colorization of Black and White Motion Pictures: A Black and White Issue*, 16 HOFSTRA L. REV. 503 (1988) (discussing the shortcomings of the common law and the 1976 Copyright Act as a means of protecting the integrity of black and white films).

While Congress has declined to vindicate the moral rights of filmmakers, it implicitly acknowledged their legitimacy in implementing the National Film Preservation Act of 1988. Pub. L. No. 100-446, 102 Stat. 1782 (1988) (to be codified as 2 U.S.C. § 178). Among the Act's strictures is a requirement that those marketing versions of films materially altered without the participation of the original creators label them as such. White, *supra*, at 269.

Of course, conventional moral rights would be useful only to artists wishing to protect the integrity of black and white films they created, and not to those merely sharing their sentiments about film colorization. The rights protected under the doctrine are thought personal to the artist. *See* NIMMER, *supra* note 28, § 8.21[A], at 8-264.13. If, though, moral rights are partially predicated on protecting societal interests (*see supra* note 70), it should not matter who vindicates those interests.

[73] *See, e.g.*, Buffet v. Fersing, [1962] Recueil Dalloz D. Jur. 570 (Cour d'appel) (holding owner of painted refrigerator enjoined from selling its separate panels as discrete works of art); Bernard-Rousseau v. Soc. des Galeries Lafayette, Judgment of Mar. 13, 1973 (unpublished opinion summarized in [1974] J.C.P., No. 48, 224 (Trib. gr. inst.) (holding that reproducing paintings incorporating images and colors other than those originally used by the artist violates right of integrity); John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1023-35 (1976) (reviewing right of integrity cases in French, German, and Italian courts); Netanel, *supra* note 58, at 21-22 (reviewing right of integrity cases in French and German courts).

[74] *See* Kwall, *supra* note 60, at 28 n.103.

this regard. Shostakovich sought to enjoin the defendant filmmaker from using his compositions in what he perceived to be an anti-Soviet film. The French court granted Shostakovich relief[77] while the American court declined to do so.[78]

B. *Moral Rights Protections in the United States Before the Visual Artists Rights Act of 1990*

Prior to the passage of the Visual Artists Rights Act of 1990,[79] moral rights found no express recognition under United States copyright law.[80] Although the framers of the Copyright Act of 1976 declined to recognize expressly the moral rights of artists, certain writers have argued that the Act implicitly protects certain personal artists' rights. Professor Nimmer and others have construed the Act's mechanical license provision[81] to contemplate the right of integrity.[82] Also, section 106(2),[83] the provision governing the preparation[84] of derivative works[85] based upon copyrighted works has been construed to protect the right of integrity.[86]

Due to the lack of express recognition of moral rights in fed-

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75 Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575 (Sup. Ct. 1948).

76 Soc. Le Chant du Monde v. Soc. Fox Europe et Soc. Fox Americaine Twentieth Century, Judgment of Jan. 13, 1953, [1953] 1 G.P. 191, [1954] D.A.

77 Kwall, *supra* note 60, at 28 n.103; Netanel, *supra* note 58, at 22.

78 *Shostakovich*, 80 N.Y.S.2d. at 604.

79 Pub. L. No. 101-650, 104 Stat. 5128 (1990) (to be codified as 17 U.S.C. § 106A).

80 NIMMER, *supra* note 28, § 8.21[B], at 8-265.

81 17 U.S.C. § 115 (Supp. 1994).

82 NIMMER, *supra* note 28, § 8.21[B], at n. 46. Section 115 governs compulsory licenses for making and distributing phonorecords of nondramatic musical works. Subsection (a)(2) provides that:

> [a] *compulsory license includes the privilege of making a musical arrangement* of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work . . . .

17 U.S.C. § 115 (a)(2) (1988). *See also* Kwall *supra* note 60, at 38 (discussing construction of § 115 of the Copyright Act to embrace the right of integrity).

83 17 U.S.C § 106(2) (Supp. 1992).

84 17 U.S.C. § 106 (Supp. 1992). Section 106 states "the owner of copyright under this title has the exclusive rights to do and to authorize any of the following . . . ." Included in such exclusive rights is the right "to prepare derivative works based upon the copyrighted work . . . ." *Id.*

85 Section 101 states:

> A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

17 U.S.C. § 101 (Supp. 1994).

86 By claiming that a modified work constituted an unauthorized derivative work, a copyright holder could invoke section 106(2) to prevent such alteration. *See* NIMMER, *supra* note 28, § 8.21[B], at n.46; Kwall, *supra* note 60, at 39-41; Netanel, *supra* note 58, at 23-24.

eral copyright law, United States courts wishing to vindicate artists' personal interests prior to 1990 had to use a motley assortment of statutory[87] and common law[88] remedies. It also has been suggested that the United States implicitly embraced moral rights through the Berne Accession.[89]

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[87] *See, e.g.*, Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976) (construing section 43(a) of the Lanham Trade-Mark Act to protect the rights of integrity and paternity). The Lanham Trade-Mark Act provides in relevant part:

> Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device . . . or any false designation of origin, which is likely to cause confusion . . . as to the origin, sponsorship, or approval of his or her goods . . . by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

The Lanham Trade-Mark Act § 43(a), 15 U.S.C. § 1125(a)(1)(A) (Supp. 1992). In *Gilliam* the comic performance group Monty Python sought to enjoin the broadcast of a television program it had produced, claiming that broadcast of the program as edited for insertion for commercials would injure the group's reputation. The Second Circuit Court of Appeals held that broadcast of the altered program would constitute misrepresentation in violation of the Lanham Act, writing "[i]t is sufficient to violate the Act that a representation of a product, although technically true, creates a false impression of the product's origin." *Gilliam*, 538 F.2d at 24. *See generally* Comment, *The Monty Python Litigation—Of Moral Right and the Lanham Act*, 125 U. PA. L. REV. 611 (1977) (analyzing use of the Lanham Act to vindicate author's right of attribution); Larry E. Verbit, *Moral Rights and Section 43(a) of the Lanham Act: Oasis or Illusion?*, 9 COMM. ENT. L. J. 383 (1987) (surveying theories under which the Lanham Act has been used to vindicate moral rights).

[88] *See, e.g.*, Granz v. Harris, 198 F.2d 585 (2d Cir. 1952) (holding that false imputation of a heavily edited phonorecord to a record producer constituted actionable misrepresentation); Prouty v. NBC, 26 F. Supp. 265 (D. Mass. 1939) (refusing to dismiss suit alleging that alteration of a novel for television production constituted unfair competition); Ben-Oliel v. Press Publishing Co., 167 N.E. 432 (N.Y. 1929) (finding that false attribution of a grossly inaccurate article to a known scholar constituted libel); Fisher v. Star Co., 132 N.E. 133 (N.Y. 1921) (holding that publication of cartoons falsely attributed to plaintiff/author constituted unfair competition); Debekker v. Frederick A. Stokes Co., 219 N.E. 1064 (N.Y. 1916) (finding author's residuary right in musical encyclopedia prohibited subsequent publication without attribution). *See generally* Comment, *Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing Legal Doctrines*, 60 GEO. L.J. 1539 (1972) (reviewing judicial vindication of moral rights through use of common law); James M. Treece, *American Law Analogues of the Author's "Moral Right,"* 16 AM. J. COMP. L. 487 (1968) (reviewing judicial vindication of moral rights through use of common law).

[89] The United States became a signatory to the Convention for the Protection of Literary and Artistic Works [hereinafter Berne Convention] in October 1988 by the enactment of the Berne Convention Implementation Act of 1988, 17 U.S.C. § 101 [hereinafter BCIA]. The Berne Convention is an international agreement extending copyright protection across the boundaries of its signatory nations.

There is a question as to whether, by becoming a signatory to the Berne Convention, the United States incorporated moral rights provisions into its copyright law. NIMMER, *supra* note 28, § 8.21[A][2], at 8-264.14. Article 6*bis* of the Berne Convention explicitly recognizes the rights of attribution and integrity:

> Independently of the author's economic rights, and even after the transfer of 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 shall be prejudicial to his honor or reputation.

Berne Convention (Paris text), art. 6*bis*(1). Yet, as Professor Nimmer notes, "[t]he BCIA itself states that the adherence of the United States to the Berne Convention and passage of the BCIA 'do not expand or reduce any right of an author' to assert the rights of attribution and integrity in any copyrightable work." NIMMER, *supra* note 28, § 8.21 [A][2], at 8-

C. *The Visual Artists Rights Act of 1990*

Only recently has the doctrine of moral rights been acknowledged expressly under United States copyright law.[90] Previously, eleven states had enacted moral rights provisions,[91] which are now in most part preempted by The Visual Artists Rights Act.[92]

The Visual Artists Rights Act amends the Copyright Act to protect the rights of attribution[93] and integrity[94] as to the creators of "visual art."[95] The Act defines a work of visual art as "a painting, drawing, print or sculpture, existing in a single copy"[96] or "in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."[97] Still photographs qualify as

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264.16 (quoting BCIA § 3(b)). Further, the House Report on The Visual Artists Rights Act asserted that the purpose of the Act was to provide visual artists with the rights of attribution and integrity, "rights [ ] analogous to those protected by Article 6*bis* of the Berne Convention, which are commonly known as 'moral rights,'" House Report at 1. That Congress felt compelled to grant such "analogous" rights to visual artists suggests it felt the Berne Convention moral rights provisions had not been incorporated into United States Copyright Law. For a discussion of The Visual Artists Rights Act, see *infra* notes 90-108.

90 In 1990, Congress enacted the Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990) (to be codified as 17 U.S.C. § 106A). Section 106A(a) provides in relevant part:

> [T]he author of a work of visual art . . . 1) shall have the right—A) to claim authorship of that work, and B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create; 2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and 3) . . . shall have the right—A) to prevent any intentional distortion, mutilation, or any modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right . . . .

Id.

91 *See* CAL. CIV. CODE §§ 987, 989 (West Supp. 1989); 1988 CONN. ACTS 284 (Reg. Sess.); ILL. ANN. STAT. ch. 121 1/2, para. 99-1401 through -1408 (Smith-Hurd 1992 Supp.); LA. REV. STAT. ANN. §§ 51:2151-:2156 (West 1987); ME. REV. STAT. ANN. tit. 27, § 303 (1988); MASS. GEN. LAWS ANN. ch. 231, § 85S (West Supp. 1988); N.J. STAT. ANN. §§ 2A:24A-1 through -8 (West 1987); N.M. STAT. ANN. §§ 56-11-1 through -3 (Michie. Supp. 1986); N.Y. ARTS & CULT. AFF. § 14.03 (McKinney Supp. 1988); PA. STAT. ANN. tit. 73, §§ 2101-2110 (Purdon Supp. 1988); R.I. GEN. LAWS §§ 5-62-1 through -6 (1987).

92 *See* 17 U.S.C. § 301(f)(1). On or after June 1, 1991, "all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State." *Id.*

93 17 U.S.C. § 106A(a)(1)(A) (Supp. 1992).

94 17 U.S.C. § 106A(a)(1)(B) (Supp. 1992).

95 17 U.S.C. § 106A(a) (Supp. 1992).

96 17 U.S.C. § 101.

97 *Id.* Sculptures produced in limited editions of 200 or fewer are considered works of visual art as well, if they are "consecutively numbered by the author and bear the signature or other identifying mark of the author." *Id.*

works of visual art if they are "produced for exhibition purposes only, [and exist] in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."[98] The statute excludes from its protection authors of various commercial applications, by designating such works as not within the realm of visual art.[99]

The Act limits the scope of the integrity right by delineating two narrow spheres of protection. First, actionable modification (or mutilation or intentional distortion) is limited to only those alterations "which would be prejudicial to [the author's] honor or reputation."[100] Second, the right of an author to prevent destruction is limited to works of visual art "of recognized stature."[101] Assertion of the rights provided by the statute is limited to the author of the work of visual art, consonant with the traditional conception of moral rights.[102] The rights may be asserted by the author regardless of whether she owns the copyright in the work.[103]

The statute further excludes from its reach modifications which are "a result of the passage of time or the inherent nature of [the work of art's] materials."[104] Also outside the scope of the statute is "[t]he modification of a work of visual art which is the result of conservation, or of the public presentation . . . of the work . . . ."[105] Modification caused by gross conservator negligence, however, is actionable under the statute.[106] To date, there has been one reported litigation under the Visual Artists Rights Act.[107]

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98 *Id.*

99 Specifically, excluded as works of visual art are:

> any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication . . . any merchandising item or advertising, promotional, descriptive, covering, or packing material or container . . . [or] any portion or part [*thereof*].

Id.

100 17 U.S.C. § 106A(a)(3)(A)(Supp. 1992).

101 17 U.S.C. § 106A(a)(3)(B)(Supp. 1992).

102 17 U.S.C. § 106A(b)(Supp. 1992).

103 *Id.*

104 17 U.S.C. § 106A(c)(1)(Supp. 1992).

105 17 U.S.C. § 106A(c)(2)(Supp. 1992).

106 *Id. See also supra* note 26.

107 In that action, visual artist Rene Moncada alleged that Lynn Rubin, operator of the eponymous gallery, violated the Act. Moncada, a muralist whose distinctive signature line ("I am the best artist, Rene") is ubiquitous in the Soho area of Manhattan, gained permission to paint a mural on the exterior wall of a building directly opposite the entrance to Rubin's gallery. Moncada alleges that Rubin directed a gallery employee to paint over the mural the day after its completion. The litigation is ongoing as of press time. Moncada v. Rubin-Spangle Gallery, Inc., No. 29076-91 (N.Y. Sup. Ct. filed Aug. 12, 1991), removed Oct. 25, 1991, No. 91 Civ. 7246 (S.D.N.Y.).

The Act has also been used as an affirmative defense to a claim brought under state

The Visual Artists Rights Act, then, would not provide a cause of action for the owner of over-restored art, unless the art qualified as "visual art," its restoration constituted gross negligence, and its owner were also its author. Nonetheless, the statute's narrow protection of the right of integrity provides guidance as to the proper wording of an integrity provision in an art restoration contract.[108]

IV. Contracting to Protect the Interest in Integrity

Part III of this Note suggested a number of sources from which the drafter of a conservation contract might draw ideas when endeavoring to protect the integrity interest in a piece of art. Statutory moral rights provisions provide language specifically designed to protect the right of integrity. Other artists' contracts sometimes have analogous terms.[109] The cases in which courts have honored integrity clauses demonstrate the circumstances in which courts are willing to give effect to such terms.[110] Following are suggestions for how these ideas could be best employed when drafting a contract between an art owner and a conservator.

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unfair competition law. *See* Gegenhuber v. Hystopolis Productions, No. 92-C1055, 1992 U.S. Dist. LEXIS 10156 (N.D. Ill. July 10, 1992). Plaintiff argued that defendant, by failing to attribute the design of puppets to him, was "passing off goods" in violation of state statute. Defendant unsuccessfully argued that the Visual Artists Rights Act preempted state law with respect to the cause of action and that the suit had to be brought under copyright law.

108 *See infra* notes 112-14 and accompanying text.

109 *See, e.g.*, William R. Gignilliat, III, Contracts for Artists 19 (1983). The "Artist's Reserved Rights Transfer and Sale Agreement" includes the following term:

> NON-DESTRUCTION: Purchaser will not permit any intentional destruction, damage or modification of the Work.

See also 2 Lindey on Entertainment, Publishing and the Arts 506 (1977). The standard form contract for motion picture exhibition agreement includes the following term:

> NO ALTERATION: The Exhibitor shall exhibit the Picture in its entirety in the form submitted by the Distributor, and shall not in any way cut or alter the same except to make necessary repairs, or to comply with the requirements of any duly authorized public authority. It shall not duplicate or sub-license the same, and shall return the print in the same condition as when received, reasonable wear excepted.

By contrast, some contracts for the sale of motion picture rights in a book have clauses providing for the waiver of the integrity right. Alexander Lindey's standard form contract has the following clause:

> 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.

Lindey, *supra*, at 302.

110 *See infra* notes 116-23 and accompanying text.

A. *Suggested Wording for a Non-Modification of Character Term*

Standard conservation contracts do not have a non-modification of character term.[111] Art owners wishing protection against conservator overreaching would be wise to include such a term.

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[111] Following is a form for a standard conservation contract for the treatment of a painting:

I. Description of Painting
Title:
Artist: Dimensions: (h) (w)
Owner:
Condition of Painting:
II. Proposed Treatment:
III. Conservation Agreement:
Agreement dated _____ *by and between* _____ *(the "CONSERVATOR") with its* principal place of business located at _____, who is the owner of the above described painting, or, the authorized agent of said owner (the "CLIENT").
The Conservator and the Client agree as follows:
1) The Conservator agrees to treat and restore, and the Client authorizes the Conservator to treat and restore, the painting described in the above Description of Painting (the "PAINTING") substantially as proposed in the above Proposed Treatment (the "TREATMENT").
2) The Conservator acknowledges receipt of the Painting from the Client. The condition of the Painting upon receipt by the Conservator is substantially as set forth in the above Description of Painting. The Conservator expresses no opinion as to the actual value or authenticity of the Painting.
3) Subject to paragraph 4, the maximum fee for the Treatment, to be paid by the Client upon completion of the Treatment, is _____. The Client shall be responsible for, in addition to, the treatment charges, obtaining their own insurance on the Painting and payment of sales tax or delivery charges.
4) The Treatment may be modified or supplemented to a reasonable degree at the sole discretion of the Conservator. In the event that substantial changes in the Treatment prove to be advisable or necessary, the Conservator will not proceed with the Treatment as so changed without the written authorization of the Client. Substantial changes in the Treatment may require an appropriate adjustment of the fees specified in Paragraph 3, and the written authorization of the Client shall recite the fee adjustment agreed to by the Conservator and the Client. The Conservator cannot and does not predict or guarantee the success or effectiveness of any of the proposed treatment.
5) All risk of loss, or damage, whether by theft, fire, vandalism, force majeure, or otherwise, to the Painting and/or frame delivered to the Conservator shall be borne by the client.
6) That the Client hereby agrees to indemnify and hold harmless, the Conservator and any agents, contractors, employees, against any and all claims of any kind whatsoever made by any other person, firm, entity or corporation.
7) That the Client hereby agrees that the Conservator may use any and all photographs, drawings, and/or documents made in the performance of the Treatment, for scientific or educational purposes.
8) Upon completion of the Treatment, the Client shall pick up the Painting at the premises of the Conservator. If the Client is unable to do so, the Conservator may make arrangements to ship or deliver the Painting to the Client at the Client's expense, in accordance with written instruction provided by the Client. Shipping and Treatment fees shall be paid in advance by the Client, and all the risk of loss, with respect to the Painting during any shipment or delivery, shall be upon the Client.
9) The Treatment shall be undertaken by the Conservator, with respect to the Painting and in the best judgement of said Conservator, without any liability to the Conservator and/or any agents, contractors, or employees, except for willful misconduct or gross negligence.
10) This Agreement shall be construed in accordance with the laws of the State of _____. In case any provision of this Agreement shall be held to be contrary to or invalid

The purpose of setting forth express non-modification language in conservation contracts is twofold. First, such a term provides a possible basis of recovery on the contract, by expressly defining modification of character as a breach. Second, a non-modification term would have a prophylactic effect. By shifting the burden of non-modification to the conservator, such a term would serve to make the conservator risk-averse and less likely to undertake treatment that might result in modification of character of the work of art.

The wording of moral rights statutes is most useful in providing insight as to how *not* to word a non-modification term. The Visual Artists Rights Act[112] is especially instructive in this regard. Under § 106A(a)(3), the provision protecting the integrity interest, the author is granted the right to prevent "any intentional distortion, mutilation, or other modification of that work." Intentional distortion and mutilation of the work would arguably constitute "willful misconduct" within the meaning of term 9 of the conservator contract,[113] thus making the inclusion of such text redundant. The third stricture of the phrase, "[o]ther modification of the work," though, is so broad as to prohibit the conservator from performing any meaningful work at all. That the conservator will modify the work is intrinsic to his performing any labor on the work at all. It is rather the character (and implicitly, the authorship) of the work that the art owner wishes to survive the conservation treatment. If the character of the work is unchanged by the treatment, incidental modification to the work of art is not offensive. The drafter, then, would benefit from expressly prohibiting modifications to the character of the work but not the work itself.[114]

To this end, the drafter should specifically set forth what con-

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under the law of the State of _____, such illegality or invalidity shall not affect, in any way, any other provisions hereof.

11) Value of Painting Clause: The Client states the value of the painting is: _____.

12) This Agreement contains the entire understanding of the parties, who hereby acknowledge that there have been and are no representations, warranties, covenants, or undertakings other than those expressly set forth herein. Sample of Standard Conservation Contract (on file with the CARDOZO ARTS & ENTERTAINMENT LAW JOURNAL).

112 17 U.S.C. § 106A (Supp. 1992).

113 *See supra* note 111.

114 The drafter might be tempted to address non-modification by incorporating by reference the terms of The Visual Artists Rights Act of 1990. As just described, this course would be ill-advised, since the statute contemplates not the character of the work of art, but the work of art itself. Additionally, since the moral right of integrity is premised on injury to reputation, and not preservation of property rights, it is not of use to non-creators. *See supra* note 35. The drafter could, however, address non-modification by incorporating by reference the Conservator's Code of Ethics, which addresses modification of character. *See supra* note 5.

stitutes a modification of character.[115] One example of such a term is: "The conservator shall not perform any treatment the character of which is so substantial as to obscure the character of the work being treated." Alternatively, the drafter could address authorship explicitly in the definition: "The conservator shall not perform any treatment the character of which is so substantial as to bring the authorship of the treated work into question."

B. *Employing Preventive Text to Reduce the Possibility of Judicial Interference with Enforcement of the Non-Modification of Character Clause*

Caselaw suggests that the non-modification clause should be augmented by text providing the term a contextual mooring. Such additional text would serve to diminish the possibility of a court's construing the nature of the contracted-for service to imply a right of modification, despite the inclusion of an express clause to the contrary.

Preminger v. Columbia Pictures Corp.,[116] for instance, suggests that a contract term forbidding modification of a work of art may in itself not be sufficient to protect the right of integrity. The case concerned a dispute arising from the distribution of the motion picture *Anatomy of a Murder*, which plaintiff Otto Preminger had produced and directed. Plaintiff Carlyle Productions, Inc., the owner of the rights to the picture, entered into a series of distribution agreements with defendant Columbia Pictures Corporation.[117] Columbia and its subsidiary, defendant Screen Gems, Inc., in turn licensed over 100 television stations to broadcast the motion picture on television.[118] Terms of the licensing agreements gave the licensees "the right to cut, to eliminate portions of the picture, and to interrupt the remainder of the picture for commercials and other extraneous matter."[119] Preminger and Carlyle Productions sought to enjoin Columbia and Screen Gems from performing their obligations under the licensing agreements, claiming that such performance would result in a variety of injuries.[120]

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115 In the case of conservation contracts contemplating the restoration of a painting, a definition of "overpainting" could be substituted.

116 267 N.Y.S.2d 594 (Sup. Ct. 1966).

117 *Id.* at 596.

118 *Id.*

119 *Id.*

120 In their complaint, plaintiffs claimed that performance of the licensing agreements would "a) detract from the artistic merit of 'Anatomy of a Murder'; b) damage Preminger's reputation; c) cheapen and tend to destroy 'Anatomy' 's commercial value; d) injure plaintiffs in the conduct of their business; [and] e) falsely represent to the public that the film shown is Preminger's film." *Id.*

In its contract with Columbia, Carlyle reserved the right to perform the final cutting and editing of the motion picture.[121] Yet because an ensuing clause granted Columbia exclusive rights to broadcast the motion picture on television,[122] a medium in which the editing of films is routine, the court found a right to edit implicit in the agreement.[123]

A conservation contract with an express non-modification clause might be vulnerable to a similar construction. A court might disregard the non-modification of character clause, construing the owner to have implicitly consented to the conservator's modifying the character of the work by requesting a restoration treatment.

The drafter should attempt to diminish the possibility of judicial intervention by indicating an awareness of the conservator's need to modify the artwork itself in the course of its treatment. The conservation contract drafter should do what the *Preminger* drafter failed to: acknowledge that the sort of service being contracted (broadcasting in *Preminger*, conservation in the instant con-

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121 The contract read

> You [Carlyle] shall have the right to make the final cutting and editing of the Picture, but you shall in good faith consider recommendations and suggestions with respect thereto made by us [Columbia]; nevertheless, you shall have final approval thereof, provided however that notwithstanding the foregoing, in the event that cutting or re-editing is required in order to meet censorship requirements and you shall fail or refuse to comply therewith, then we shall have the right to cut and edit the Picture in order to meet censorship requirements without obligation on our part to challenge the validity of any rule, order, regulation or requirement of any national, state or local censorship authority.

Id. at 598 (setting forth Article VIII of the Columbia-Carlyle contract).

122 You hereby give and grant to us throughout the entire world the exclusive and irrevocable right during the term herein specified to project, exhibit, reproduce, transmit and perform, and authorize and license others to project, exhibit, reproduce, transmit and perform, the picture and prints thereof by television, and in any other manner, and by any other means, method or device whatsoever, whether mechanical, electrical or otherwise, and whether now known or hereafter conceived or created.

Id. (setting forth Article X of the Columbia-Carlyle contract).

123 *Id.* at 603. *But see* Gilliam v. American Broadcasting Co., Inc., 538 F.2d 14 (2d Cir. 1976) (holding that a license to broadcast comedy sketches on television does not implicitly grant the right to insert commercials and remove offensive material). The *Gilliam* holding, however, is attributable to factual circumstances particular to the case. Finding that the comedy group Monty Python had not given its licensees implied consent to edit, the court wrote

> [p]rior to the ABC broadcasts, Monty Python programs had been broadcast on a regular basis by both commercial and public television stations in this country without interruption or deletion. Indeed, there is no evidence of any prior broadcast of edited Monty Python material in the United States. These facts, combined with the persistent requests for assurances by the group and its representatives that the programs would be shown intact belie the argument that the group knew or should have known that deletions and commercial interruptions were inevitable.

Id. at 23.

tract) necessarily involves a certain degree of modification. By so doing, the drafter can communicate that, unlike the modification of the character of the work of art, the modification of the physical state of the work of art is a necessary incident to the treatment being requested. The drafter can thus attempt to foreclose the possibility of a court implying new terms in the absence of such an acknowledgment. Such a term could be worded in this manner:

> The Client recognizes that the conservation treatment requested necessarily involves a modification to the physical condition of the work of art. The Client distinguishes such modification from modification of the character of the work of art. Notwithstanding any modification to the physical condition of the work that may be necessary to the requested treatment, the Conservator shall not in any way, nor for any reason, modify the character of the work being treated.

Such a term would serve to diminish the possibility of a court allocating rights retroactively in the absence of clear contractual intent.

C. *Making Explicit the Scope of Possible Injury Resulting from a Modification of the Character of the Work of Art*

The general rule governing the scope of contract damages is that of *Hadley v. Baxendale.*[124] Under the rule of *Hadley,* the injured party may recover such damages "as may reasonably be considered . . . arising naturally, i.e., according to the usual course of things, from such breach of contract itself."[125] The party may also recover damages "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."[126] Damages arising naturally from a breach have come to be known as "general damages"; those not arising naturally from a breach, but found to be in the contemplation of the parties are known as "consequential damages."[127]

A modification to the character of a work of art might not be thought, "in the usual course of things," to result in extraordinary injury. Indeed, a conservation treatment that puts the authenticity of a work in question may nonetheless seem successful on its face

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124 156 Eng. Rep. 145 (1854). *See also* CALAMARI & PERILLO, *supra* note 37, § 14-5, at 594-95 (3d ed. 1987).

125 *Hadley,* 156 Eng. Rep., at 151.

126 *Id.*

127 CALAMARI & PERILLO, *supra* note 37, § 14-5, at 595.

to an observer.[128] It is necessary then to specify that a modification in the character of a work of art, though not outwardly obvious to the naked eye, might diminish the value of the artwork.

Hence, the drafter should expressly set forth language indicating that a diminution in market value could result from the modification of the character of a work of art. By so doing, the drafter would bring the possibility of such injury within the contemplation of the contracting parties, and such ensuing losses within those recompensed under the second rule of *Hadley*. Such language could be worded in this manner:

> The Client and the Conservator acknowledge that the value of the work of art is in substantial part a function of its perceived authenticity. Any modification of the character of the piece being treated that brings into question the authenticity of the work of art could result in a substantial decrease in value in the work of art.

V. Conclusion

To protect themselves from the possibility of conservator overreaching, art owners should explicitly allocate the burden of nonmodification of character to the conservator before a restoration begins. Drafters of conservation contracts hoping to effect such an allocation would be well served by using moral rights jurisprudence as a guide to protecting the interest in the integrity of a piece of fine art. In their drafting, they should expressly forbid the modification of the character of the artwork being treated. Further, they should include language indicating an understanding that some degree of modification to the artwork's physical state is necessary to the requested treatment. Such language would diminish the possibility of a court's construing a request for art restoration to imply permission to modify the character of the work being treated. Drafters should also set forth language indicating that a modification of an artwork's character could result in a decrease in the work's value, so as to bring such losses within the rubric of compensable consequential damages. Including such clauses in conservation contracts would not only serve to provide the art owner with a basis for recovery in case of litigation, but would serve

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128 Wim Beeren, the director of the Stedelijk Museum, viewed the restored *Who's Afraid of Red, Yellow and Blue III* several days before the first allegations of overpainting were levelled and expressed satisfaction over the restoration. Checkland, *supra* note 1; Klaster, *supra* note 1, at 31.

as a prophylactic tool to prevent the potential over-restoration of a work of fine art.

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