

ARCHITECT AS ARTIST: ARTISTS' RIGHTS AND HISTORIC PRESERVATION

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I. INTRODUCTION

For nearly three decades, it was one of the great rites of modern architecture: a walk through a eucalyptus grove to a serene courtyard overlooking the Pacific Ocean. But last week, half of that sequence . . . was gone. By itself, the grove had no particular value. But architecture is an art of procession, and the grove was . . . a symbolic wilderness through which one passed to reach the man-made order of the Salk's courtyard. To some, the grove represented the continent that ends at the Pacific. To others, it helped endow the courtyard with a spiritual presence rare among the austere forms of modern design.¹

Many years ago, the famed architect, Louis Kahn, and the medical researcher, Dr. Jonas Salk, collaborated on the design and construction of the Salk Institute for Biological Sciences in La Jolla, California. A major addition to the Institute is now under construction and has led to considerable protest by members of Kahn's family and by an advisory committee of distinguished architects, including Philip Johnson, Frank Gehry, James Ingo Freed, Kevin Roche, Robert Venturi, and Richard Meier.² Even as bulldozers were digging trenches on the site, representatives of the Institute refused to meet with this advisory committee, which feels the new addition will destroy Kahn's vision and the spatial relationship among the original buildings.

The addition attempts to echo Kahn's style and will occupy a eucalyptus grove at the entrance to the laboratory complex.³ Opponents of the plan believe the addition will "destroy Kahn's intention that visitors experience the institute as a sequence of landscaped spaces proceeding from the eucalyptus grove to an

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¹ Blair Kamin, *Cutting Criticism*, CHI. TRIB., May 17, 1993, § 5, at 3.

² *Id.*

³ Michael J. Crosbie, *Add and Subtract: The Controversial Building Addition at the Salk Institute is Examined*, 74 PROGRESSIVE ARCHITECTURE, Oct. 1993, at 48.

open courtyard framed by Kahn's two symmetrical laboratory buildings, with views of the Pacific Ocean beyond."⁴ Supporters of the plan describe its opponents as "elitists who are insensitive to the institute's needs for expansion."⁵

This controversy exemplifies several of the legal issues arising more frequently in the United States and presents three major themes: 1) the rights of artists to preserve their work in its original form, with the artist, even after death, being represented by family members, former students, and colleagues; 2) the right of the public to preserve, from alteration or destruction, important elements of cultural property and heritage, including prominent examples of architecture and landmark buildings such as the Salk Institute; and 3) the rights of the owners and users of the cultural property to derive the most beneficial use from their property, with the assumption that progress, economic growth, and efficiency are thereby promoted.

In analyzing the legal issues implicated by these themes, it is necessary to examine two distinct societal developments which have had significant impact on the law of the United States: growth in the recognition of artists' rights in their work, and increased interest of the public in the preservation of the American cultural past.⁶ The issue raised by these developments is, however, whether the past is best protected through recognition of architects' rights in their capacity as artists, or through recognition and expansion of the public's right to protect those examples of architecture which the public's representatives deem most worthy of such protection.

This article will first consider in Section II the position of the architect within the context of copyright law, and, second, the gradual recognition of the artist's moral rights within the framework of American copyright law. Section III then considers the effect on copyright law caused by the adoption of the Berne Convention, focussing on the inclusion of architectural works within the copyright system and the recognition of moral rights for artists. Section IV turns to the protection of architecture through

⁴ Herbert Muschamp, *Altering a Kahn: Protest Widens*, N.Y. TIMES, May 6, 1993, at C17.

⁵ *Id.* For a fuller discussion of the architectural significance of the building and the relationship between Kahn and Salk in creating the Institute, see Michael J. Crosbie, *Dissecting the Salk: Analysis of Louis Kahn's Salk Institute Complex*, 74 PROGRESSIVE ARCHITECTURE, Oct. 1993, at 40.

⁶ Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 479-94 (1981). Rose notes the evolution in motivations for historic preservation from nineteenth century patriotism, to early twentieth century interest in culture, art, and architecture, and finally to a modern concern for "the environmental and psychological effects of historic preservation." *Id.* at 479-80.

historical preservation and landmark statutes in the United States. Finally, in Section V, the article considers whether recognition of an architect's moral rights, or increased efforts for historic preservation through the landmark designation process, is the better mechanism for architectural preservation.

II. BACKGROUND IN THE RIGHTS OF THE ARCHITECT AS ARTIST

Two major developments have recently taken place in American intellectual property law, the significance and application of which are, as yet, unclear. These developments occurred in response to the United States' adoption⁷ of the Berne Convention for the Protection of Literary and Artistic Works⁸ and ultimately resulted in the explicit recognition, through the federal Copyright Act, of artists' moral or personality rights in their works and of the place of architectural works within the copyright protection scheme. In order to understand these developments, however, it is first necessary to understand the conceptual underpinnings of American intellectual property law, particularly in the area of copyrights, as it existed until 1990. Following this introduction, a more detailed discussion of these more recent developments will be presented.

A. *Copyright Law*

In the Anglo-American legal system, the rights of the artist have primarily been protected through copyright laws. The United States Constitution provides: "The Congress shall have Power . . . (8) To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"⁹ The primary motivation for the constitutionally provided protection for authors' and inventors' interest in their works is the benefit which the public will derive.¹⁰ The public benefit is maximized by balancing the rights of original authors against the interests of subsequent au-

⁷ The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

⁸ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised in Paris on July 24, 1971, art. 6bis, 828 U.N.T.S. 221, 235.

⁹ U.S. CONST. art. I, § 8, cl. 8.

¹⁰ Professor Jane C. Ginsburg disputes that the public benefit was originally intended as the exclusive purpose of the Constitution's copyright provision. Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 998-1001 (1990). By examining late eighteenth century sources, she concludes that the utilitarian purpose of public benefit was equal in weight to the desire, inspired by Locke's notions of the origin of property rights, to protect authors' rights in their own creations and labor. However, she acknowledges that later Congressional enactments and statements of

thors.¹¹ This is accomplished by granting authors a time-limited monopoly in their creative works, so that others are then free to utilize the results of their creativity.¹²

The copyright laws are also viewed as providing protection exclusively for artists' pecuniary rights in their art works, rather than for artists' personal and personality rights inherent in the creative process.¹³ Once the various economic rights embodied in the copyright laws are transferred, the artist is no longer viewed as having any continuing rights in the art work. The statutory scheme is intended to protect the copyright holder instead.¹⁴ The notion of any continuing rights in the art work would conflict with the essential characteristics of property ownership recognized in the Anglo-American legal system.¹⁵

However, in recognition of the artist's limited bargaining power with the purchaser of the art work, the recent trend in American intellectual property law has been to provide increased protection for the artist. For example, the 1976 Copyright Act¹⁶

purpose emphasize primarily the public benefit aspect of copyright legislation. *Id.* at 999, 1001-02.

¹¹ For analysis of the balancing of the revenue and cost effects of the exclusive rights created by copyright protection, see William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325 (1989). See also *Apple Computer, Inc. v. Microsoft Corp.*, 799 F. Supp. 1006, 1021 (N.D. Cal. 1992).

¹² For example, the Supreme Court has stated:

the [Copyright] Act creates a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works. The copyright term is limited so that the public will not be permanently deprived of the fruits of an artist's labors.

Stewart v. Abend, dba Authors Research Co., 495 U.S. 207, 228 (1990). See also *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating that the limited monopoly "is intended to motivate creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."); *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 349-50 (1991) (stating that "copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."); *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 545-46 (1985).

¹³ Roberta R. Kwall, *Copyright and the Moral Right: Is An American Marriage Possible?*, 38 VAND. L. REV. 1, 2 (1985).

¹⁴ MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 8.21 (1991).

¹⁵ See, e.g., Colleen Battle, *Righting the "Tilted Scale": Expansion of Artists' Rights in the United States*, 34 CLEV. ST. L. REV. 445 (1986). Linda Lacey has recently questioned the fundamental differences in the rights accorded to the owners of personal and real property in contrast to the owners of intellectual property. Although she focusses, in particular, on the differences demonstrated in the fair use doctrine and the limited duration of copyright ownership, her analysis points to the need for a rethinking of the concepts of property ownership as applied to all aspects of intellectual property. Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1544-67 (1989). She also notes, however, that the doctrine of moral rights may grant to the artist greater rights in his or her property than are given to the owners of other forms of personal property because moral rights continue in the particular object even after ownership has been transferred. *Id.* at 1548-53.

¹⁶ 17 U.S.C. §§ 101-810 (1988).

modified the presumption that the copyright transferred with the physical object.¹⁷ In addition, the 1976 Copyright Act, in combination with its various judicial interpretations, has tended to narrow the work-made-for-hire doctrine. This is significant because the copyright of a work-made-for-hire automatically belongs to the party who commissioned the work.¹⁸ A narrowing of the doctrine results in more situations where the artist is considered the owner of the copyright.¹⁹ While judicial interpretations of the 1976 Act are not uniform, and some of the lower federal courts have perhaps unduly restricted artists' rights, the sense that Congress intended the 1976 Act to expand upon artists' rights and to make it easier for the artist to protect them has generally influenced the course of judicial opinions.²⁰

The position of the architect as artist, under the copyright laws, has been a very limited one. The Copyright Act is premised on the principle that its purpose is to protect items of aesthetic or artistic value.²¹ It therefore excludes from protection any works

¹⁷ 17 U.S.C. § 202. See, e.g., *Effects Assocs. Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990) (holding that any ambiguity in contractual terms purporting to transfer copyright should be construed in favor of the author's retention of the copyright), *cert. denied*, 498 U.S. 1103 (1991). *Cassway v. Chelsea Historic Properties I, L.P.*, 1993 U.S. Dist. LEXIS 5329, *10-11 (E.D. Pa. 1993) (holding that an agreement transferring ownership of architectural drawings is ambiguous and therefore does not transfer ownership of a copyright interest in the drawings). See also § 204(a) (requiring a signed writing to effect a transfer of copyright ownership); Eric M. Brooks, Comment, "Tilted" Justice: Site-Specific Art and Moral Rights After U.S. Adherence to the Berne Convention, 77 CAL. L. REV. 1431, 1444 (1989); Kwall, *supra* note 13, at 60.

¹⁸ 17 U.S.C. § 201(b). See also Kwall, *supra* note 13, at 57-60.

¹⁹ Kwall, *supra* note 13, at 59-60. For example, the statute provides that a specially commissioned work does not automatically qualify as a "work-made-for-hire." 17 U.S.C. § 101(2).

²⁰ In *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), the Supreme Court rejected an expansive interpretation of the work-made-for-hire doctrine proffered, for example, by the Second Circuit in *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.) (adopting the view that the "supervision and control standard" determines who is an employee for purposes of the work-made-for-hire doctrine), *cert. denied*, 469 U.S. 982 (1984). Only when the artist is considered an employee, rather than an independent contractor, or if the work falls into one of nine categories enumerated in the statute, will the work fall under the work-made-for-hire doctrine. Furthermore, the term "employee" should be determined by reference to the general common law of agency. *Reid*, 490 U.S. at 738-51. Factors to be examined in evaluating whether a hired party is an employee include the hiring party's right to control the manner and means of production, the skill required, the source of tools, location of the work, duration of the relationship, method of payment, the hired party's discretion over work conditions, tax treatment, and the provision of employee benefits. *Id.* at 751-52. The Supreme Court's test developed in *Reid* should result in fewer works of visual art being considered works-made-for-hire so that the artist will retain the copyright in more situations. See also *Easter Seal Soc'y v. Playboy Enter.*, 815 F.2d 323, 327-34 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988).

²¹ In *Mazer v. Stein*, 347 U.S. 201, 218 (1954), the Supreme Court made it clear that while copyright protection extends to both the fine and applied arts, the copyright statute in fact protects only the artistic or aesthetic elements of useful articles and not their mechanical or utilitarian aspects. *Id.* Judge Walker stated the distinction more succinctly in considering the copyrightability of a computer program:

which are primarily utilitarian or functional in nature because it is thought that "progress and creativity are retarded by preventing useful objects from being available to others to use, adapt, or modify."²² This is different from most European nations and other nations signatory to the Berne Convention which generally explicitly protect architectural works.

Under American copyright statutes and their judicial interpretations, now codified in the 1976 Act, a work which incorporates both utilitarian and aesthetic elements would be evaluated under the "separability test."²³ Thus, "if a pictorial, graphic, or sculptural work is of primarily utilitarian function, only its nonfunctional elements are eligible for copyright protection,"²⁴ and some elements of a work would be copyrightable while others would not. The elements of a work which are utilitarian in nature are considered more suitable for protection under the more stringent standards of the patent system than the copyright system.²⁵ However, the separability test has proven difficult to apply, particularly in the attempt to distinguish between industrial designs, on the one hand, and pictorial, graphic, and sculptural works, on the other.²⁶

The variations of expression found in purely creative compositions, as opposed to those found in utilitarian works, are not directed towards practical application. For example, a narration of Humpty Dumpty's demise, which would clearly be a creative composition, does not serve the same ends as, say, a recipe for scrambled eggs—which is a more process oriented text.

Computer Assocs Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 704 (2d Cir. 1992). See also *Eales v. Environmental Lifestyles, Inc.*, 958 F.2d 876, 879-80 (9th Cir. 1992) (holding that architectural plans do not fall under the "useful article" exception to the Copyright Act because they do not have a purely utilitarian function); *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1562 (Fed. Cir. 1992) (noting that, before enactment of the Semiconductor Chip Protection Act of 1984, Copyright Office had refused to register copyrights for patterns on printed circuit boards and semiconductor chips because the "pattern was deemed inseparable from the utilitarian function of the chip [and] no separate artistic aspects had been demonstrated.").

²² Raphael Winick, *Copyright Protection for Architecture after the Architectural Works Copyright Protection Act of 1990*, 41 DUKE L.J. 1598, 1602 (1992).

²³ For early formulations of the tests by which to judge whether a work is aesthetic or utilitarian in nature, see *Baker v. Selden*, 101 U.S. 99, 104 (1879) (holding that a process or system is not eligible for copyright protection, although the explanation is); *Mazer v. Stein*, 347 U.S. 201, 213-18 (1954) (holding that copyright protection is available for applied art even though the art object may also be intended for use).

²⁴ Winick, *supra* note 22, at 1602 n.24.

²⁵ *Id.* at 1615 n.80, 1619-20.

²⁶ The structural aspects of an architectural plan are also not copyrightable because of their purely functional nature. As such, they fall under the merger doctrine. See *infra* note 92. The status of copyright protection afforded architectural designs parallels, in some senses, the question of protection to be given to computer program designs. See, e.g., *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693, 707-08 (2d Cir. 1992). See also Steven R. Englund, Note, *Idea, Process or Protected Expression? Determining the Scope of Copyright Protection of the Structure of Computer Programs*, 88 MICH. L. REV. 866, 875-79 (1990); Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since Contu?*, 106 HARV. L. REV. 977, 988 (1993).

Application of the utilitarian/aesthetic dichotomy to architecture leads to the result that the architect's technical plans and drawings are eligible for copyright protection.²⁷ However, the building, because it is a utilitarian work, is not, though some of the individual decorative elements, such as gargoyles and friezes, might be protected as sculptural works.²⁸ If one assumes that the architect is considered the author of the work (that is, not subject to the work-made-for-hire doctrine),²⁹ then the architect would own a copyright in the architectural plans and drawings but not in the three-dimensional building.³⁰ Thus, the allegation that a builder measured an existing building and reproduced a virtually identical one by copying the original would not result in a copyright violation.³¹

It is also important to note that the 1976 Copyright Act explicitly preempts state law from granting equivalent rights in types of art works protected by the federal act.³² Thus, state common law and statutory protection do not exist if the subject matter is cov-

²⁷ See, e.g., *Eales v. Environmental Lifestyles, Inc.*, 958 F.2d 876, 879-80 (9th Cir.) (explaining that architectural plans and drawings are eligible for copyright protection because their intrinsic function is to convey the information necessary to construct a building), *cert. denied*, 113 S. Ct. 605 (1992). Cases holding that architectural plans and drawings are eligible for copyright protection as "pictorial, graphic, or sculptural works" include *Robert R. Jones Assoc. v. Nino Homes*, 858 F.2d 274 (6th Cir. 1988); *Imperial Homes Corp. v. Lamont*, 458 F.2d 895 (5th Cir. 1972); *Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc.*, 829 F. Supp. 1314 (M.D. Fla. 1993); *Demetriades v. Kaufmann*, 680 F. Supp. 658 (S.D.N.Y. 1988). *Eales* further makes the point that architectural drawings are specifically not covered under the Architectural Works Copyright Protection Act of 1990. *Eales*, 958 F.2d at 880 n.2.

²⁸ Winick, *supra* note 22, at 1610.

²⁹ Because of the skill level required for their work, architects are often considered to be independent contractors; they are thus entitled to own the copyright in their works. See, e.g., *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1492 (11th Cir. 1990) (finding drafting services to be highly skilled); *Kunycia v. Melville Realty Co.*, 755 F. Supp. 566, 573-74 (S.D.N.Y. 1990) (finding an architect to be an independent contractor based on some of the factors enunciated in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)).

³⁰ The 1976 Copyright Act specifically protects "pictorial, graphic, and sculptural works" including "technical drawings, diagrams, and models." 17 U.S.C. §§ 101, 102. The Senate Report states that "architect's plans and drawings would, of course, be protected by copyright." S. Rep. No. 1476, 94th Cong., 2d Sess. 55 (1976). See also *Jacobs v. Westoaks Realtors, Inc.*, 205 Cal. Rptr. 620, 623 (1984).

³¹ *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486 (11th Cir. 1990). See also Winick, *supra* note 22, at 1608-09 nn.51 & 53 and cases cited therein.

³² 17 U.S.C. § 301 (1988). Section 301 provides:

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

Id. The judicial interpretation of this preemption provision, however, has not been very clear. See Brooks, *supra* note 17, at 1465-68; Edward J. Damich, *The New York Artists' Author-*

ered by the federal Copyright Act and the claimed right is equivalent to one granted by the federal Copyright Act.³³ The claimant may not then bring suit based on state law in state court but is limited to those protections offered by the federal act. This has particular relevance for the development of artists' moral rights because these rights first arose under state common law and statutory law and only recently became the subject of federal legislation.³⁴

B. *The Development of Moral Rights in the United States*

In many of the European countries, the doctrine of an artist's "moral rights" developed at least as early as the period of the French Revolution.³⁵ While the French and German models of moral rights have their variances, both versions are distinctly different from the Anglo-American concept of copyright. The Anglo-American concept focusses on the economic rights which artists have in their work, rights which are subject to alienation, just like other economic rights. Moral rights, on the other hand, developed as a concept unique to the personality of the artist. As such they are inalienable and not waivable in many of the European models.³⁶

ship Rights Act: A Comparative Critique, 84 COLUM. L. REV. 1733, 1737-39 (1984); Kwall, *supra* note 13, at 72-78.

³³ To avoid preemption, a cause of action based on state law must incorporate elements additional to those necessary to prove a violation based on federal copyright law and "must regulate conduct qualitatively different from the conduct governed by federal copyright law." *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 659 (4th Cir.), *cert. denied*, 114 S. Ct. 443 (1993).

³⁴ For example, the federal Copyright Act, before enactment of the Visual Artists Rights Act, see *infra* notes 94-109 and accompanying text, was held not to preempt the New York State moral rights legislation in *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130, 135-36 (S.D.N.Y. 1990). The court relied on the fact that the state legislature had a different purpose than the federal legislation in that the former aimed to protect the artist's reputation and required different elements of proof. The court concluded, however, that the New York statute may be preempted by VARA, which had been proposed but not yet enacted at the time of the decision. *Id.*

³⁵ For discussions of earlier forms of moral rights protection for authors, see Dan Rosen, *Artists' Moral Rights: A European Evolution, An American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 165, 168-75 (1983); Harold C. Streibich, *The Moral Right of Ownership to Intellectual Property: Part I—From the Beginning to the Age of Printing*, 6 MEM. ST. U. L. REV. 1 (1975); *The Moral Right of Ownership to Intellectual Property: Part II—From the Age of Printing to the Future*, 7 MEM. ST. U. L. REV. 45 (1976) [hereinafter Streibich, *To the Future*]. Ginsburg, however, posits that the French legislative enactments at the time of the Revolution did not yet focus primarily on the authors' rights, rather than the public interest. Author-centrism developed later as a distinguishing feature of French intellectual property laws. Ginsburg, *supra* note 10, at 1005-14. For a summary of current French law protecting the artist's creative personality, see Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 6-35 (1988).

³⁶ For general discussions of the doctrine of moral rights and a comparison with the Anglo-American concept of copyright, see, e.g., Brooks, *supra* note 17, at 1434-39; Damich, *supra* note 35; Kwall, *supra* note 13, at 5-16; John Henry Merryman, *The Refrigerator of Ber-*

The copyright/moral rights distinction is founded on an underlying difference between positive law and natural law. The artist's moral rights are seen as inherent in the creative process. Therefore, they are part of the artist's natural rights and are only minimally subject to government intervention.³⁷ Copyright, however, is the product of positive law, a purely statutory creature, and thus it is entirely subject to government regulation and limitation.³⁸ Copyright is not so much a "right" as a governmentally-granted "privilege".³⁹ Because it is a "privilege," the legislature may impose any limitations or formalities on the right to copyright protection.⁴⁰

The purposes of copyright and moral right are also fundamentally different. Copyright is motivated exclusively by the benefit which the public is to derive.⁴¹ Moral rights, on the other hand, primarily vindicate the artist's individual rights, while the public derives secondary benefits from the recognition of the artist's rights.⁴²

While specific moral rights granted in various nations differ, they generally are viewed as falling into the following categories: the right of attribution, the right of integrity, the right of disclosure, the *droit de suite* or resale royalty right, and the lesser recog-

nard Buffet, 27 HASTINGS L.J. 1023, 1025 (1976); Carl H. Settlemyer III, Note, *Between Thought and Possession: Artists' "Moral Rights" and Public Access to Creative Works*, 81 GEO. L.J. 2291, 2302-06 (1993).

³⁷ Ginsburg, *supra* note 10, at 992-94.

³⁸ The first modern copyright law was the Statute of Anne, enacted in 1710, which granted the exclusive right of publication of books to the author or his or her assigns for a period of 14 years from the date of publication. 8 Anne, ch. 19. See Streibich, *To the Future*, *supra* note 35, at 57; Ginsburg, *supra* note 10, at 998.

³⁹ See, e.g., *Wheaton v. Peters*, 33 U.S. 591 (1834).

⁴⁰ Ginsburg, *supra* note 10, at 994. The Supreme Court has also implied that the legislature may expand upon those rights afforded by the Copyright Act, because such protection is a creature of statute. *Mazer v. Stein*, 347 U.S. 201, 214-15 (1954).

⁴¹ This purpose for the Statute of Anne was recognized by Lord Mansfield in *Sayre v. Moore*, 102 Eng. Rep. 139 (K.B. 1785). This sentiment was echoed by the United States Supreme Court in *Mazer v. Stein*, 347 U.S. 201 (1954), where the Court stated, "[t]he 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 . . ." *Id.* at 219. Lacey provokes a need to re-evaluate what is meant by the "public interest" in the context of intellectual property, see *supra* note 15, at 1584-95, by distinguishing between a group of "autonomous individuals, each acting out of self-interest" and "an interdependent community with certain common interests that affect all its members." *Id.* at 1585. She suggests that intellectual property, at least in its definition of the fair use doctrine, needs to be premised on the latter definition of the "public interest." *Id.* at 1586-92.

⁴² Damich, *supra* note 32, at 1748-49 (noting that the purpose of protecting the *droit moral*, in French law, is the furtherance, not of the public interest, but of the artist's personal rights); Ginsburg, *supra* note 10, at 991-92. Ginsburg, however, also criticizes the view that the United States and the French systems of copyright protection are drastically different in practice. *Id.* at 994-95.

nized rights to withdraw a work from the public and to receive protection from excessive criticism.⁴³ The Berne Convention,⁴⁴ however, recognizes only the rights of attribution and integrity.⁴⁵

In early American case law, there are examples of artists claiming some version of the European moral rights. Such claims were generally denied on the grounds that American law, especially federal copyright law, rejected recognition of the artist's moral rights in favor of the artist's exclusive pecuniary rights. The notion of an artist's continuing rights in a work after it has been conveyed conflicts directly with Anglo-American concepts of property law, according to which owners of an object are free to do with it as they wish. Such rights in the artist would present an inherent contradiction with American property law and would undermine and require a re-evaluation of essential characteristics in the nature of property ownership.

Most attempts by an artist to win explicit recognition of moral rights were rejected. One example of this is the 1938 decision, *Crimi v. Rutgers Presbyterian Church*.⁴⁶ In this case, the court held that the artist of a mural could not prevent its repainting once he conveyed it to the church which became its absolute owner.⁴⁷ In *Shostakovich v. Twentieth Century-Fox Film Corp.*, the court rejected the plaintiffs' attempt to enjoin the use of their music and their names in a film with an anti-Russian bias, based on claims to the right to privacy, defamation, deliberate infliction of injury, and violation of the right of integrity.⁴⁸ Attempts to claim a right of attribution for literary authors and artists also have been rejected.⁴⁹ The well-known children's book author, Theodore Geisel (Dr. Seuss), failed to prevent a doll manufacturer from producing dolls and toys based on the illustrations in his books. In that case, in addition to rejecting claims based on moral rights, the court re-

⁴³ Brooks, *supra* note 17, at 1435; Kwall, *supra* note 13, at 5.

⁴⁴ Berne Convention art. 6bis.

⁴⁵ Brooks, *supra* note 17, at 1435; Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Protection for Visual Art*, 39 CATH. U. L. REV. 945, 949-51 (1990).

⁴⁶ 89 N.Y.S.2d 813 (Sup. Ct. 1949); see Damich, *supra* note 32, at 1753.

⁴⁷ *Id.* at 818-19.

⁴⁸ 80 N.Y.S.2d 575, 578-79 (Sup. Ct. 1948), *aff'd*, 87 N.Y.S.2d 430 (App. Div. 1949). A French court, confronted with the same facts, held that the plaintiffs' moral rights were violated. *Soc. Le Chant du Monde v. Soc. Fox Europe*, Cours d'appel, Paris, D. Jur. 16, 80 (Jan. 13, 1953).

⁴⁹ *Weinstein v. University of Illinois*, 811 F.2d 1091 (7th Cir. 1987) (rejecting a claim to a right of attribution for a contributing author in a work published in an academic journal); *Vargas v. Esquire, Inc.*, 164 F.2d 522, 526 (7th Cir. 1947), *cert. denied*, 335 U.S. 813 (1948) (rejecting a plaintiff's claim for a right of attribution for drawings published in *Esquire Magazine*); see Damich, *supra* note 32, at 1752-53.

jected claims based on copyright infringement and misrepresentation.⁵⁰

Finally, in a controversy concerning his site-specific sculpture, "Tilted Arc", the sculptor Richard Serra failed to prevent the General Services Administration from removing the sculpture from Federal Plaza in lower Manhattan.⁵¹ The sculpture, which consisted of an arc of steel 120 feet long, twelve feet tall, and several inches thick, had been commissioned by the federal government as part of its art-in-architecture program. This program requires that 1/2 of 1% of the cost of federal buildings be devoted to sculpture that will be placed in the building. Serra received the commission to execute a sculpture for the site, but soon after its completion, it became the subject of considerable controversy, and the GSA decided to remove it, barely four years after its installation.⁵² Serra sued the government for allegedly violating his first amendment freedom of expression⁵³ and his right to due process.⁵⁴ He also claimed a moral right, based on state law.⁵⁵ His due process claim was rejected, at least in part, because he was not considered to have a protectable property interest in the sculpture once it was conveyed to the GSA.⁵⁶

The case could also be viewed as presenting a conflict between the moral rights of Serra and the moral rights of the architects who designed the plaza and the buildings surrounding it. This perspective is bolstered by the fact that the architects had not been consulted when Serra's plans were accepted for the commission.⁵⁷

By his own admission, Serra set out to confront what the architects had done and to destroy the decorative character of their plaza. In the architects' view, Serra ignored the existing three-dimensional elements of the square and with his sculpture cut

⁵⁰ Geisel v. Poynter Productions, Inc., 295 F. Supp. 331 (S.D.N.Y. 1968).

⁵¹ Serra v. United States Gen. Serv. Admin., 664 F. Supp. 798 (S.D.N.Y. 1987), *amended*, 667 F. Supp. *aff'd*, 847 F.2d 1045 (2d Cir. 1988). For detailed discussions of this case, see Balfe & Wyszomirski, *Public Art and Public Policy*, 15 J. ARTS MGMT. & L. 5 (1986); Brooks, *supra* note 17, at 1431-33; S. JORDAN, *PUBLIC ART, PUBLIC CONTROVERSY: THE TILTED ARC ON TRIAL* (1987).

⁵² Serra, 847 F. 2d at 1047.

⁵³ *Id.* at 1048-51.

⁵⁴ *Id.* at 1051-52.

⁵⁵ 664 F. Supp. at 802; 667 F. Supp. at 1051-52. The Court refused jurisdiction for the state-based claims because it had no federal jurisdiction for Serra's other claims.

⁵⁶ 847 F. 2d at 1052. The court pointed out that Serra had no protectable property interest in the sculpture, once it had been conveyed to the GSA, pursuant to contract, and no protectable liberty or property interest which could be injured by relocation of the sculpture without an accompanying loss of employment.

⁵⁷ 1 JOHN HENRY MERRYMAN & ALBERT E. ELSER, *LAW, ETHICS, AND THE VISUAL ARTS* 361 (2d ed. 1987).

across a handsome decorative stone pavement.⁵⁸

Serra was successful only in preventing the re-installation of the sculpture in another location because a panel of art experts unanimously concluded that the sculpture was site-specific and therefore could not be displayed elsewhere without destroying its artistic integrity and intent.⁵⁹ The *Serra* controversy is but one example of such controversies concerning public art in the United States. These controversies have increased as federal, state, and local governments have enacted comparable art-in-architecture programs. In fact, controversies like that involving "Tilted Arc" have reportedly caused the repeal of such programs in some communities.⁶⁰

In a few cases, however, courts have found other legal doctrines that could be used to grant protection to the artist's rights.⁶¹ The best known of these cases is *Gilliam v. American Broadcasting Co.*⁶² In *Gilliam*, the court rejected Monty Python Flying Circus' claim that ABC had violated its right of integrity, by significantly editing its programs. Nonetheless, the court held for the plaintiff by relying on principles of copyright, contract and, in particular, the misrepresentation and unfair competition provisions of the Lanham Act⁶³ because, after editing, the television programs could no longer be fairly considered the plaintiff's work. Thus, the court vindicated not the artists' right to control the future of their creations but rather the public's right to be properly informed of the nature of the work. Unless there is a statute which a court is willing to adapt to the artist's cause and some direct public benefit to be derived therefrom, any protection for an artist or author must

⁵⁸ *Id.*

⁵⁹ Douglas C. McGill, *Debating "Tilted Arc,"* N.Y. TIMES, Dec. 18, 1987, at C36.

⁶⁰ Eric Scigliano, *Tacoma Repeals One-Percent Law*, ARTNEWS, March 1986, at 13-14, reprinted in 1 JOHN HENRY MERRYMAN & ALBERT E. ELSSEN, LAW, ETHICS, AND THE VISUAL ARTS, 366-68 (2d ed. 1987). Others have questioned whether this controversy has deterred artists' freedom of self-expression in order to mute any public reaction or controversy. Michael Brenson, *The Messy Saga of "Tilted Arc" Is Far From Over*, N.Y. TIMES, Apr. 2, 1989, at B33.

⁶¹ Brooks, *supra* note 17, at 1449-61 (discussing use of the 1976 Copyright Act, the Lanham Act, and various common law actions based on contract, right of privacy, and right of publicity, to protect the artists' moral rights); Damich, *supra* note 35, at 41-75 (commenting on the 1976 Copyright Act, common-law copyright, the right of privacy, the right of publicity, unfair competition law, defamation, contract law, and waste, as doctrines which permit United States courts to recognize artists' right of personality in their work of art).

⁶² 538 F.2d 14 (2d Cir. 1976).

⁶³ Section 43(a) of the Lanham Act concerns the "use in connection with any goods or services . . . [of] any false description or representation, including words or other symbols tending falsely to describe or represent the same . . ." 15 U.S.C. § 1125(a)(1988).

come from the contract rights specifically negotiated by the artist.⁶⁴ Therefore, protection for artists has depended almost entirely on their legal sophistication and economic bargaining power when entering into a contract for their work.⁶⁵

While most American artists were meeting only limited success in their attempts to claim moral rights protection for their works, a few state legislatures chose to enact statutes to provide protection for a variety of moral rights.⁶⁶ These statutes vary in their purpose, the rights granted, the types of art works protected, and the remedies provided.

State moral rights legislation falls into two main categories depending on the primary justification chosen by the legislature. One such motivation is the public's interest in maintaining various categories of artistic works in their original condition. This approach may be viewed, at least in part, as a vehicle for accomplishing the goal of historic preservation. Such legislation is typified by the California statute, known as the California Art Preservation Act.⁶⁷ This Act grants rights of attribution and integrity for original paintings, sculptures, drawings, and works of art in glass, but only for those which are of recognized quality.⁶⁸ California is also the

⁶⁴ The Ninth Circuit has also held that section 43(a) of the Lanham Act would apply to the claim of two songwriters who wished to assert the right of attribution for their musical compositions. *Lamothe v. Atlantic Recording Corp.*, 847 F.2d 1403, 1405-08 (9th Cir. 1988).

⁶⁵ Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827, 843-45 (1992) (discussing artists' bargaining position when entering into contracts):

⁶⁶ As of 1991, eleven states had enacted such legislation. The eleven states were: California, CAL. CIV. CODE § 987 (West Supp. 1988); Connecticut, CONN. GEN. STAT. ANN. § 42-116 (West Supp. 1990); Louisiana, LA. REV. STAT. ANN. §§ 51:2151-51:2156 (West 1987); Maine, ME. REV. STAT. ANN. tit. 27, § 303 (West Supp. 1987-1988); Massachusetts, MASS. GEN. LAWS ANN. ch. 231, § 85S (West Supp. 1988); Nevada, NEV. REV. STAT. §§ 598.970-598.978 (1989); New Jersey, N.J. STAT. ANN. §§ 2A:24A-1—8 (West 1987); New Mexico, N.M. STAT. ANN. §§ 13-4b-1—3 (Michie 1992); New York, N.Y. ARTS & CULT. AFF. LAW §§ 14.51-14.59 (McKinney 1984); Pennsylvania, PA. STAT. ANN. tit. 73, §§ 2101-2110 (Supp. 1987); Rhode Island, R.I. GEN. LAWS §§ 5-62-2—6 (1987). See PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLE, LAW AND PRACTICE 379 n.68 (Supp. 1992). For a general discussion of state moral rights statutes and the protections afforded, see Edward J. Damich, *State "Moral Rights" Statutes: An Analysis and Critique*, 13 COLUM.-VLA J.L. & ARTS 292 (1989).

⁶⁷ CAL. CIV. CODE § 987 (West 1993). See Brooks, *supra* note 17, at 1462-63; Deborah Ann Chan, Note, *California Art Preservation Act: A Safe Hamlet for "Moral Rights" in the United States*, 14 U.C. DAVIS L. REV. 975 (1981); Karen Gantz, *Protecting Artists' Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform*, 49 GEO. WASH. L. REV. 873 (1981); Peter H. Karlen, *Moral Rights in California*, 19 SAN DIEGO L. REV. 675 (1982); John G. Petrovich, *Artists' Statutory Droit Moral in California: A Critical Appraisal*, 15 LOY. L.A. L. REV. 29 (1981).

⁶⁸ CAL. CIV. CODE § 987(b)(2) (West 1993). The Legislature's statement of intent actually cites as justifications both that "the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation" and that "there is also a public interest in preserving the integrity of cultural artistic creations." *Id.* § 987(a).

only state to recognize the author's *droit de suite*.⁶⁹ The other primary motivation for such legislation is to protect the artists' rights in their works. This group of statutes grants rights such as the right of attribution and the right of integrity, but only when a violation would injure the artist's reputation. This type of statute is typified by that of New York State.⁷⁰

Thus, until 1990, artists who claimed any interests in their art work, other than copyright, were limited either to molding the claim into some other recognized legal doctrine, such as misrepresentation or breach of contract,⁷¹ or to utilizing a state statute, if the artist was able to bring suit in a state with such a statute. The artist, however, was subject to the whims of the state with jurisdiction, the state's choice of protected art forms, and the state's choice of recognized moral rights.

III. UNITED STATES IMPLEMENTATION OF THE BERNE CONVENTION

In the late 1980's, however, artists' rights began to change dramatically in the United States, prompted primarily by the United States' becoming a signatory to the Berne Convention. The decision of the United States to join the Berne Convention was motivated by other concerns—primarily the desire to achieve greater international protection for other forms of intellectual property,

⁶⁹ CAL. CIV. CODE § 986 (West 1993). The artist is entitled to receive 5% of the amount of the subsequent sale of any work of fine art which has a gross sales price greater than \$1000. This right continues for twenty years after the death of the artist. See Ben W. Bloch et al., *An Economic Analysis of the California Art Royalty Statute*, 10 CONN. L. REV. 689 (1978). This provision has survived constitutional and other challenges. *Morseburg v. Balyon*, 621 F.2d 977 (9th Cir.), cert. denied, 449 U.S. 983 (1980). VARA also directed the Register of Copyrights to study the feasibility of implementing a resale royalty requirement at the federal level. 17 U.S.C. § 106A (1992). See *infra* note 114.

⁷⁰ The New York statute, known as the Artists' Authorship Rights Act, prohibits publication, without the artist's consent, of an art work "in an altered, defaced, mutilated or modified form if . . . damage to the artist's reputation is reasonably likely to result therefrom . . ." N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney Supp. 1990); see Brooks, *supra* note 17, at 1464-65; Damich, *supra* note 32, at 1741; Scott & Cohen, *An Introduction to the New York Artists' Authorship Rights Act*, 8 COLUM.-VLA J.L. & ARTS 369 (1984); Sarah Ann Smith, Note, *The New York Artists' Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL L. REV. 158 (1984). This provision was applied to enjoin the unauthorized publication of an artist's works that had been cropped and reproduced in a pamphlet decrying the NEA's support for such works. *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130, 137-41 (S.D.N.Y. 1990).

⁷¹ For example, use of the Lanham Act to prevent distribution of a reproduction of plaintiffs' photographs, cropped in such a manner as to be misleading as to their content, was rejected because the pamphlets were not distributed for commercial purposes. *Wojnarowicz*, 745 F. Supp. at 141-42. The court also rejected plaintiff's claim based on defamation because the defendants did not act with actual malice under the standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964), which requires that the defendant act "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *Wojnarowicz*, 745 F. Supp. at 147-48.

particularly computer software.⁷² However, it had the concomitant effect of requiring the United States to bring its intellectual property laws into conformity with other aspects of the Berne Convention. This meant both the recognition of artists' moral rights and the recognition of architecture as an art form with aesthetic value.

A. *The Architectural Works Copyright Protection Act (AWCPA)*

After the United States formally adopted the Berne Convention, debate raged both in Congress and throughout the intellectual property field as to whether any implementing legislation was required to bring the United States into compliance with Berne. Opponents to further legislation vehemently argued that the protections afforded artists' moral rights through the patchwork of common law legal doctrines and state and federal statutes already in existence constituted sufficient compliance with Berne. Others argued that modification of existing copyright laws would have detrimental effects.⁷³ However, because the Berne Convention explicitly grants copyright protection to buildings, as well as to technical architectural plans and drawings, it was difficult to argue that the United States was already in compliance with Berne with respect to architectural works.⁷⁴ The Paris text of the Berne Convention requires member nations to protect "works of . . . architecture; illustrations . . . plans, sketches and three-dimensional works relative to . . . architecture."⁷⁵ There was thus a direct contradiction between what Berne required and what the United States federal law granted.

In debating the creation of direct protection for architectural works, Congress was concerned with whether such protection would in fact diminish the creative process associated with the development of architectural forms. Many in the architectural field and academic commentators opposed the extension of such protection.⁷⁶ One commentator wrote

An examination of the interrelationship between architecture, society, creativity, and the design process demonstrates that architectural creativity consists of the recombination of separate elements into forms that express both the new context of the

⁷² Settlemyer, *supra* note 36, at 2307 n.71.

⁷³ *Id.* at 2306-11.

⁷⁴ For a discussion of protections granted to architectural works in the Berne Convention and other nations, see Natalie Wargo, *Copyright Protection for Architecture and the Berne Convention*, 65 N.Y.U. L. REV. 403, 409-39 (1990).

⁷⁵ Berne Convention art. 6bis, § 1.

⁷⁶ See, e.g., James Bucher, Comment, *Reinforcing the Foundation: The Case Against Copyright Protection for Works of Architecture*, 39 EMORY L.J. 1261, 1265-71 (1990).

work and the originality of the architect. Legal norms that encourage incremental innovation and novel recombination of existing forms will foster such creativity, and benefit society.⁷⁷

Because architecture is premised on the recombination of previously used forms and therefore reliant on copying, the extension of copyright protection could prevent creativity and the novel recombination of previously used forms into new structures. Arguments against the extension of copyright protection also focussed on the fact that architects, unlike other artists and authors, are considered fully compensated for their services in designing a unique item, i.e., the structure. Other types of authors usually rely on reproductions of their works before they achieve compensation commensurate with the value of their artistic efforts and creativity.⁷⁸ When Congress decided to amend the federal copyright statute, the motivation came not from a perceived need by the architectural community but rather from the recognition that the United States was clearly not in compliance with Berne on this issue.⁷⁹

When the Architectural Works Copyright Protection Act⁸⁰ (hereinafter "AWCPA") was enacted, Congress established two requirements for architectural works to receive copyright protection. First, the work had to fall within the category of "architectural work," that was added to the list of protected "works of authorship."⁸¹ Congress further defined this phrase as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features."⁸² While the use of the term "building" excludes many types of three-dimensional works worthy of copyright protection (such as bridges, walkways, and gardens), legislative history indicates that the word "building" should be interpreted broadly. As such, "buildings" include not only structures

⁷⁷ Winick, *supra* note 22, at 1604.

⁷⁸ *Id.* at 1606.

⁷⁹ *Id.* at 1611. Another commentator, however, noted that enactment of the AWCPA indicated Congress' recognition that "architecture is a form of artistic expression that performs a significant societal purpose, domestically and internationally." Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 78 (1993).

⁸⁰ Pub. L. No. 101-650, 701, 703, 104 Stat. 5128, 5133 (1990) (codified at 17 U.S.C. § 101(5), 102(a)(8) (Supp. II 1990)).

⁸¹ 17 U.S.C. § 102(a).

⁸² Architectural Works Copyright Protection Act § 702(a), 17 U.S.C. § 101 (Supp. 1993). *See, e.g.*, *The Value Group, Inc. v. Mendham Lake Estates, L.P.*, 800 F. Supp. 1228, 1231 (D.N.J. 1992) (extending copyright protection to both architectural plans and drawings and the works based on those plans and drawings).

inhabited by humans but also those used by humans, such as churches, pergolas, gazebos, and garden pavilions.⁸³ It has been suggested that as these terms are given clearer meaning through judicial interpretation, protection should not be extended either to structures that are primarily technical, engineering solutions (because these are not the product of aesthetic creativity) or to works such as gardens and parks which represent primarily spatial organizations rather than enclosed structures.⁸⁴

Second, once a structure qualifies as a "building," its design must be considered both "original"⁸⁵ and "not wholly functional."⁸⁶ Thus, copyright protection may be granted to individual design elements, so long as they are not functionally required. Copyright protection may also be given to overall designs which meet a standard of originality, even if the separate elements would not qualify.⁸⁷

⁸³ Vanessa Scaglione, Note, *Building upon the Architectural Works Copyright Protection Act of 1990*, 61 *FORDHAM L. REV.* 193, 197-99 (1992).

⁸⁴ Winick, *supra* note 22, at 1613. However, another commentator has argued in favor of a more expansive interpretation of "building," pointing out that the AWCOPA does not explicitly require such a narrow reading. Scaglione, *supra* note 83, at 199-201.

⁸⁵ For a recent discussion of the originality requirement, see *Bellsouth Advertising & Publ. Co. v. Donnelley Information Publ., Inc.*, 999 F.2d 1436, 1439-40 (11th Cir. 1993) (applying the originality test to hold that the compilation of a telephone directory is not sufficiently original so as to be protectable).

⁸⁶ If the possible ways of expressing an idea are limited or the form of expression is dictated by function and efficiency concerns, the idea and expression merge so as to render the expression unprotectable under the copyright laws. See, e.g., *Gates Rubber Co. v. Bando Chemical Indus., Inc.*, 9 F.3d 823, 838 (10th Cir. 1993) (discussing application of merger doctrine to computer program); *Bellsouth*, 999 F.2d at 1442-45 (applying the merger doctrine to deny copyright protection to a telephone directory compilation which could only be arranged in a limited number of ways or ways dictated only by function); *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693, 707-08 (2d Cir. 1992) (explaining that "expression" is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would be the equivalent to protection of the idea itself); *Kregos v. Associated Press*, 937 F.2d 700, 705 (2d Cir. 1991); *CSM Investors, Inc. v. Everest Development Inc.*, 840 F. Supp. 1304 (D. Minn. 1994) (rejecting application of merger doctrine to architectural plans where the detailed specifications for construction were the same on the original and allegedly infringing plans).

⁸⁷ Jane Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 *COLUM.-VLA J.L. & ARTS* 477, 491 (1990). In *True Value Group, Inc. v. Mendham Lake Estates, L.P.*, 800 F. Supp. 1228 (D.N.J. 1992), the court considered the degree of originality required under the low standard enunciated in *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 345-48 (1991). The court acknowledged that copyright protection does not extend to individual standard features, 17 U.S.C. § 101, but maintained that so "long as an object embodies originality, copyright protection will not be displaced by the fact that the design was embodied in a 'useful article.'" The court further explained that a "useful" article is one with "an intrinsic utilitarian function that is not merely to portray the appearance of the article." The court used the example of a window as a useful article, and therefore not copyrightable, but the design on the window is not useful and is therefore eligible for copyright protection. *True Value Group*, 800 F. Supp. at 1232 & n.6. Finally, the court concluded that because the standard of originality is so low, copying was proven by the substantial similarity between the original and the infringing plans in their floor plan and

Four of the five exclusive rights granted under the Copyright Act have been extended to protectable architectural works. These are: the right to transform or adapt the work into another form ("the derivative works right"), the right to make copies, the right to distribute copies, and the right to display the work publicly.⁸⁸ One court has interpreted, albeit in dicta, the remedy which the AWCPA permits for copyright infringement of an architectural work. The District Court of New Jersey remarked that the AWCPA permits a court to enjoin the construction of an infringing building, rather than ordering impoundment of the infringing plans, which indirectly achieves the same result.⁸⁹

The derivative works right, when applied to architectural works, was limited by a provision exempting from copyright protection two-dimensional representations of a building located in, or visible from, a public place.⁹⁰ This provision produces two anomalies. First, one is free to make two-dimensional, but not three-dimensional, reproductions of a protected architectural work. Second, because sculptures are now afforded greater protection than architectural works, a problem of classification has arisen. The House Report states that "monumental, nonfunctional works of architecture" should now be protected as architectural works and not as sculptural works.⁹¹ The former category will thus be accorded a narrower version of the derivative works right and be denied any protections of the Visual Artists Rights Act.⁹² This definitional distinction will therefore take on great significance, although it will arguably be difficult to determine.⁹³

many of the details, such as placement, design, and size of the windows. *Id.* at 1233. See also *CSM Investors, Inc. v. Everest Development Inc.*, 840 F. Supp. 1304 (D. Minn. 1994) (holding that a protected architectural "work" includes the form and design but not individual features).

⁸⁸ Winick, *supra* note 22, at 1622.

⁸⁹ Compare *The Value Group, Inc. v. Mendham Lake Estates, L.P.*, 800 F. Supp. 1228, 1235 & n.8 (D.N.J. 1992) (enjoining the construction of an infringing building) with *Demetriades v. Kaufmann*, 690 F. Supp. 289, 295 (S.D.N.Y. 1988) (ordering the impoundment of infringing architectural plans).

⁹⁰ AWCPA § 704(a), 17 U.S.C. § 120(a).

⁹¹ H.R. REP. No. 735, 101st Cong., 2d Sess. at 20 & n.43 (1990) (commenting that architectural works should not be treated as pictorial, graphic, or sculptural works so as not to subject them to the separability test). On the other hand, architectural plans and drawings can now be protected as both "pictorial, graphic and sculptural works" and architectural works. *CSM Investors, Inc. v. Everest Development Inc.*, 840 F. Supp. 1304 (D. Minn. 1994)

⁹² See *infra* notes 103-118 and accompanying text.

⁹³ Ginsburg, *supra* note 87, at 494-95 & n.72; Scaglione, however, disagrees with Ginsburg's conclusion on this question, *supra* note 83, at 201-04. In *Hart v. Sampley*, 1992 U.S. Dist. LEXIS 1154 (D.D.C. 1992), the plaintiffs alleged a copyright infringement based on the allegation that defendants had reproduced and sold items depicting The Three Servicemen statue at the Vietnam Veterans' Memorial. One of the defendants' contentions rested on 17 U.S.C. § 120, in that, because the statue was in an "ordinarily visible and

The right to prevent alteration or destruction, in other words, the right of integrity, was specifically denied to architectural works. This was done so that a building owner could alter or destroy the building without seeking a transfer of the copyrights from the owner of the copyright or the architect.⁹⁴ This restriction was supported by the architectural community apparently out of fear that otherwise the architect would be routinely required to transfer the copyright.⁹⁵ The AWCPA's potential to preserve architectural works is thus nullified.⁹⁶

B. *Federal Moral Rights Legislation (VARA)*

As was previously discussed in connection with the protection for architectural works, at the time of adoption of the Berne Convention, Congress debated whether any additional moral rights legislation was required to bring the United States into compliance with Berne. Some argued that other doctrines and statutes provided sufficient and equivalent protection to artists, as illustrated by the *Gilliam* decision.⁹⁷ Many others argued that this was not the type of protection required by the Berne Convention.⁹⁸

The Berne Convention itself states, in Article 6bis that:

(1) 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 honour or reputation.⁹⁹

public space," it did not receive copyright protection. Rather than considering the definitional aspects of this argument, the court merely rejected it because the statue was created in 1984, considerably before the applicable date of this provision. *Id.*

⁹⁴ AWCPA § 704(a), 17 U.S.C. § 120(b).

⁹⁵ Winick, *supra* note 22, at 1623-25. Winick also suggests, as will be discussed *infra* at notes 124-76 and accompanying text, that buildings of historic or architectural significance are better protected through local landmark and historic preservation laws, rather than through protection of individual architects' rights at the federal level. *Id.* The AWCPA also specifically states that it does not preempt such state and local laws. AWCPA § 705, 17 U.S.C. § 301(b)(2), (4). Another commentator has noted the curiousness of the position taken by architects who participated in the Congressional hearings. Ginsburg, *supra* note 87, at 494.

⁹⁶ For a discussion of the duration of copyright protection for architectural works and the interrelationship with the work-made-for-hire doctrine, see Ginsburg, *supra* note 87, at 492-94.

⁹⁷ See *supra* notes 67-71 and accompanying text.

⁹⁸ See, e.g., Brooks, *supra* note 17, at 1439-43, 1472-74; Edward J. Damich, *Moral Rights in the United States and Article 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 143 (1986); Damich, *supra* note 35, at 3-4, 74-75; VerSteeg, *supra* note 65, at 830-33.

⁹⁹ Berne Convention art. 6bis, § 1 (Paris Act 1971).

Thus, the Berne Convention recognizes two of the moral rights—the right to attribution (that is, the right to claim authorship) and the right to integrity (that is, the right to prevent the mutilation or destruction of the work).

Opposition to the adoption of the Berne Convention and to any modification of existing United States copyright law so as to recognize moral rights centered on a few main arguments. First, opponents argued that adoption of moral rights “would upset existing business practices” in the United States.¹⁰⁰ Second, the introduction of the European concept of moral rights would alter the natural evolution of American statutory and common law and would force or encourage American courts to look at judicial precedents and statutory interpretations of other nations.¹⁰¹ The final primary argument was that artists’ moral rights were already sufficiently protected by existing federal copyright laws, state moral rights legislation, a patchwork of other federal and state statutes, and common law causes of action.¹⁰²

Despite these objections, Congress enacted the Visual Artists Rights Act (VARA) as an amendment to the 1976 Copyright Act.¹⁰³ VARA has limited relevance to the relationship between architecture and an artist’s moral rights, because, as its title implies, it applies only to the visual arts.¹⁰⁴ A “work of visual art” is defined as

a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer . . . , or, in the case of a sculpture, [in 200 or fewer multiple casts]; or a still photographic image produced for exhibition purposes only, existing in a single copy . . . or in a limited edition of 200 copies or fewer¹⁰⁵

Specifically excluded are “any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture, or other audio visual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication.”¹⁰⁶ Also excluded are works made for hire and other

¹⁰⁰ House Report on Berne Convention Implementation Act of 1988, H.R. REP. No. 609, 100th Cong., 2d Sess., at 33-35 (1988). See also generally Settlemyer, *supra* note 36, at 2306-11.

¹⁰¹ H.R. REP. No. 609, 100th Cong., 2d Sess., at 34-35.

¹⁰² *Id.* at 33-34.

¹⁰³ Pub. L. No. 101-650, 603(a), 104 Stat. 5128 (1990) (codified at 17 U.S.C. § 106A (Supp. II 1990)). For a comparison of the moral rights provisions of VARA with those of the Berne Convention, see Damich, *supra* note 45, at 975-96.

¹⁰⁴ VerSteeg, *supra* note 65, at 835-42.

¹⁰⁵ Visual Artists Rights Act of 1990 § 602 (1)-(2), 17 U.S.C. § 101 (1)-(2).

¹⁰⁶ VARA § 602 (2)(A)(i), 17 U.S.C. § 101 (2)(A)(i).

works not previously granted copyright protection under the existing federal statute.¹⁰⁷ The moral rights provisions thus deny an architect protection for both a completed architectural work and the architectural plans and drawings given the express exclusion of technical drawings and diagrams.

Only the rights of attribution and integrity are granted by VARA,¹⁰⁸ although the Copyright Office was directed to investigate the feasibility and practicality of adding the *droit de suite* at a future time.¹⁰⁹ The right of attribution includes the right to claim authorship of a work and the right to prevent the use of the artist's name as the author of a work not created by that artist. The right of integrity permits the artist to "prevent use of his or her name as the author . . . in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation."¹¹⁰ The right of integrity also permits the artist

- (A) to prevent any intentional distortion, mutilation, or other 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

¹⁰⁷ VARA § 602(2)(B)-(C), 17 U.S.C. § 101(2)(B)-(C). The narrow scope of works protected by VARA will permit other forms of work to continue to be protected under the various state statutes and common law doctrines previously discussed, *supra* notes 61-71 and accompanying text. For example, VARA was held not to preempt state law protections for the right of attribution afforded to an artist when the art form involving puppetry was clearly not covered under VARA. The court read the statutory list as exhaustive rather than illustrative. *Gegenhuber v. Hystopolis Prods, Inc.*, 1992 U.S. Dist. LEXIS 10156, at *9-12 (N.D. Ill. 1992).

¹⁰⁸ Damich, *supra* note 45, at 958-66.

¹⁰⁹ 17 U.S.C. § 106A (1992). See Damich, *supra* note 45, at 973-74; Neil R. Siegel, *The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory*, 93 DICK L. REV. 1 (1988). Hearings on the possible enactment of a resale royalty right were held in San Francisco and New York in the spring of 1992. Andrea Maier, *If Art Is Resold, Should Artists Profit?*, N.Y. TIMES, Feb. 8, 1992, § 1, at 11; Daniel Grant, *Paying the Painter—Should Artists Get a Cut when Their Works are Resold?*, CHI. TRIB., Mar. 14, 1993, at C32. In December 1992, the Register of Copyrights presented its report prepared under the Congressional directive. This report recommended that the United States not establish a federal resale royalty right because the Copyright Office was "not persuaded that sufficient economic and copyright policy justification exists." It did, however, conclude that the federal copyright system could provide greater protection to visual artists by, for example, creating a broader public display right which would require that a fee be paid to the artist when a work is displayed in public. The Office also made various recommendations for a model federal system if Congress decided to enact a resale royalty right. This model includes a centralized collection agency and at least the initial application only to public auction sales. *Droit de Suite: The Artist's Resale Royalty*, Executive Summary, A Report of the Register of Copyrights xiii-xx (Dec. 1992). For a summary of United States law pertaining to the right of publication, a moral right not protected by VARA, see Settlemeyer, *supra* note 36, at 2313-43.

¹¹⁰ VARA § 603(a)(2), 17 U.S.C. § 106A(a)(2).

is a violation of that right.¹¹¹

Various types of modifications which result from the passage of time, conservation, and public presentation are excluded from being a destruction, distortion, or mutilation.

VARA thus attempts to vindicate both the author's personality interest in preserving the work of art when the artist's reputation is at stake and the public's interest in cultural property preservation, by requiring that the work be "of recognized stature" in order to receive such protection. VARA does not, however, define "recognized stature,"¹¹² and so this becomes a factual determination. This limitation has also been criticized for failing to follow the Berne Convention's extension of the right of integrity to all works of art which are otherwise protected by moral rights.¹¹³

For most works of art eligible to receive VARA protection, these rights will continue for the life of the artist.¹¹⁴ This provision fails to provide as much protection for moral rights as for the economic rights provided under the Copyright Act.¹¹⁵ One of the most controversial aspects of VARA is the provision pertaining to alienability. While the artist's moral rights are made non-transferable, they are waivable if the author expressly agrees in writing.¹¹⁶ Many critics have suggested that this waiver provision converts moral rights into pecuniary rights, in direct contradiction to the Berne Convention. This provision will subject those artists with the least amount of bargaining power to routine pressure from dealers and collectors who want the artists to waive their rights.¹¹⁷ Finally, VARA explicitly preempts equivalent state rights for works protected by VARA.¹¹⁸

There seems to be little direct linkage between the provisions of VARA and those of the AWCPA. Three points should, however,

¹¹¹ VARA § 603(a)(3), 17 U.S.C. § 106A(a)(3).

¹¹² VARA § 603(a), 17 U.S.C. § 106A(a)(3)(B). See VerSteeg, *supra* note 65, at 867-69.

¹¹³ Damich, *supra* note 45, at 953-55.

¹¹⁴ VARA § 603(a), 17 U.S.C. § 106A(d)(1).

¹¹⁵ See Damich, *supra* note 45, at 969-70 (noting that the Berne Convention in most instances requires moral rights to continue for as long as the economic rights in a work of art).

¹¹⁶ VARA § 603(a), 17 U.S.C. § 106A(e)(1)-(2).

¹¹⁷ Damich, *supra* note 45, at 966-68; VerSteeg, *supra* note 65, at 843-47 (noting, in particular, artists' generally weak bargaining position and their lack of knowledge concerning copyright and contract rights). Another commentator, however, suggested that at least some waivers should be permitted under federal moral rights legislation so as to accord with "the American tradition of balancing the interests of the artist with those of the purchaser and the public." Brooks, *supra* note 17, at 1479-81.

¹¹⁸ VARA § 605, 17 U.S.C. § 301(f)(1)-(2). While this should not reduce the extent of protection granted, judicial interpretation of the preemption provision may have this effect depending on how narrowly the term "equivalent" is viewed. Damich, *supra* note 45, at 972-73.

be recalled. First, VARA's exclusion of technical plans and drawings from its definition of "visual art" seems to exclude architectural plans and drawings from any moral rights protection. Second, works of monumental sculpture may now be classified as architectural works, rather than as sculpture, and they therefore will not receive any protection under VARA. Third, the AWCPA's exclusion of the right of integrity for the architect or copyright owner gives the building owner the right to alter, destroy, or authorize the destruction of a building embodying an architectural work without the consent of the author or copyright owner of the architectural work.

Finally, one section of VARA deals specifically with the visual artist's rights when the art work is affixed to a building.¹¹⁹ This section, however, limits the moral rights of the artist in order to protect the ownership rights of the property owner who later wishes to modify or destroy the building. If the artist agreed to the original installation, and if the art work is affixed in such a manner that it cannot be removed without significant damage, then the building owner may alter or destroy the building without the artist's consent. If the work can be removed without significant damage, then the building owner must attempt to notify the artist and give the artist ninety days in which to remove the work of art at the artist's expense.¹²⁰

VARA's approach to this problem provides an interesting parallel and seems clearly to be an outgrowth of the decisions in both *Crimi* and *Serra*. Because the property owner has protectable or

¹¹⁹ VARA § 604, 17 U.S.C. § 113(d)(1)-(3). See Matthew A. Goodin, Comment, *The Visual Artists Rights Act of 1990: Further Defining the Rights and Duties of Artists and Real Property Owners*, 22 GOLDEN GATE U. L. REV. 567 (1992); VerSteege, *supra* note 65, at 869-71. For discussion of the legislative history of this provision, see Keith A. Attlesey, Comment, *The Visual Artists Rights Act of 1990: The Art of Preserving Building Owners' Rights*, 22 GOLDEN GATE U. L. REV. 371, 382-84 (1992).

¹²⁰ The California moral rights legislation has a similar provision, subjecting the artist's rights to those of the building owner. CAL. CIV. CODE § 987(h) (West 1993). VARA, however, appears to grant the artist greater protection than does the California statute. VARA protects the artist's right of integrity unless the artist waives the right in writing. The California statute, on the other hand, reverses the presumption, so that the artist's rights are protected only if reserved in a written instrument signed by the building owner. Attlesey, *supra* note 119, at 373-75 (arguing that VARA grants excessive protection to the artist's rights in this circumstance). In practice, it is likely that the artist will agree to waive rights protected by VARA because, without such a waiver, the building owner would probably refuse to install the art work. Perhaps the most significant difference in these approaches is that the California reservation of rights agreement must be recorded, so as to give notice to subsequent purchasers. However, the presence of the art work in the building gives inquiry notice to subsequent purchasers, even without a recorded instrument. Perhaps a weakness of VARA is its failure to deal with situations in which the art was attached to a building without the building owner's consent. *Id.* at 387-89. For an opposing view criticizing VARA as not granting sufficient protection to the artist, as opposed to the building owner, see Damich, *supra* note 45, at 955-58.

vested property rights in the building and in the land, while the artist has only contractual rights once the work of art itself has been conveyed, the property owner receives greater protection than does the artist.¹²¹ Although VARA extends rights to the artist in the art work itself, even when the artist no longer owns the object, in a case of a conflict between the artist's rights and the rights of a real property owner, the latter will still receive greater protection.¹²² Thus, the owner of the building and of real property is entitled to greater protection than the artist or the copyright owner, once again illustrating the relative values of different forms of "protectable" interests.

Professor Jane Ginsburg points out an ironic result of the dichotomy in treatment of removable and incorporated art works, when this distinction is applied to "site-specific" art such as Serra's "Tilted Arc." A site-specific work is generally removable without any resulting physical injury to the art work, but separation from its architectural or environmental context may arguably cause aesthetic destruction or mutilation of the work. The artist who asserts that the art object is site-specific and therefore cannot be moved because of the right of integrity may lose the right of integrity entirely because the art work may be classified as an incorporated art work.¹²³

IV. LANDMARKING AND HISTORIC PRESERVATION

It would be interesting to speculate on the linkage that might develop between VARA and AWCPA. Despite the expansion of both artists' rights and the rights of architects as artists, the combination of federal legislation would still fail to prevent the modifications of Louis Kahn's architectural masterpiece discussed at the beginning of this article. Even if the current legislation were to

¹²¹ Battle, *supra* note 15, at 452-63 (noting that traditional concepts of property ownership endow the owner with freedom of alienability and terminate any rights of the seller in the property once it is sold).

¹²² Under VARA, the artist's right of integrity is waivable by the artist. Thus, although VARA appears to protect this right after sale of the art work, in light of the artist's weaker bargaining position, it is likely that in many situations the artist will consent to such installation because otherwise the building owner will refuse to install the art work, 17 U.S.C. § 113 (d)(1)(A)-(B); see also VerSteeg, *supra* note 65, at 843-45 (noting artists' weaker bargaining position when entering into contracts). VARA places a further burden on the artist if the art work is one which could have been removed without injury. Then the building owner can remove it if the owner has attempted to notify the artist. 17 U.S.C. § 113(d)(2)(A)-(B) and § 113 (d)(3).

¹²³ Ginsburg, *supra* note 87, at 486-87. Contrary to Winick's view, Ginsburg suggests that at least the moral rights provisions of VARA could become an effective tool for accomplishing art preservation without creating conflict with the rights of copyright owners. *Id.* at 479.

apply to this building, the dilemma presented by the changes to the Salk Institute would fail to receive any protection for several reasons. First, the moral rights granted by VARA endure only for the lifetime of the author and cannot be asserted by family, friends, students, or colleagues of the author, even if they have a good basis for representing what the author might have wished. Second, in the case of architectural works, the right of integrity is explicitly denied to the author and copyright holder, even though such a right exists for the author of certain types of visual art works.¹²⁴ The reason for this lies in the sanctity accorded by Anglo-American law to property ownership and, in particular, real property ownership.

It is necessary therefore to consider the move in the United States toward protection of buildings and historical monuments, not through vindication of individual artists' rights, but through landmark preservation laws. In fact, historic preservation laws may encourage creativity in architectural design by providing incentives to building owners to use their buildings as a form of artistic expression.¹²⁵ These laws, which limit real property owners' use of their land, have withstood constitutional attack on the ground that they are a taking of property by the government without payment of just compensation, as required by the Fifth Amendment to the Constitution. This fact may demonstrate that such laws represent a more acceptable and productive method, at least within the existing framework of American property law, of protecting significant architectural works.

Just as in American intellectual property law, where the focus is on the benefit the public derives from the rights granted, in the area of historic preservation, the focus is on the rights the public may assert through the legislative and administrative branches of government. Throughout the United States, the federal government, all fifty states, and over 1000 city and local governments have enacted various forms of historic preservation legislation.¹²⁶ It is

¹²⁴ Thus, although one commentator has suggested that enactment of the AWCPA demonstrates Congress' recognition of the importance of architecture as a form of cultural property, Phelan, *supra* note 79, at 78, this conclusion seems overly sanguine in light of the explicit rejection of a right of integrity for architects. Enactment of VARA, granting to authors the rights of integrity in any work of recognized stature, does serve a cultural property preservation purpose, Settlemyer, *supra* note 36, at 2311-12 & n.89, but does not further the more specific goal of architectural preservation.

¹²⁵ Rose, *supra* note 6, at 501-02.

¹²⁶ Examples of federal legislation include the National Trust for Historic Preservation Act, empowering the National Trust to receive donations of sites and buildings, 16 U.S.C. § 468-68d (1988); the National Historic Preservation Act of 1966, directing the maintenance of the National Register of historic districts, sites, buildings and structures, 16 U.S.C.

not possible to describe in detail these statutes and ordinances or the methods for landmarking which they establish. However, the New York City Landmarks Law,¹²⁷ under which over 1000 buildings and other structures have been declared landmarks, may serve as an illustration of this type of legislation.

The purpose of the ordinance is to protect, enhance, and perpetuate architectural features "of special character or special historical or aesthetic interest or value" that "represent or reflect elements of the city's cultural, social, economic, political and architectural history."¹²⁸ The Landmarks Law provides for an independent commission that has the power to designate landmark status on "any improvement, any part of which is thirty years old or older" which fits the stated purpose of the ordinance.¹²⁹ The Commission has authority to hold public hearings and then, at its own discretion, to declare a structure a landmark,¹³⁰ without the consent of the owner. Once a structure has been designated a landmark, the owner cannot "alter, reconstruct, demolish . . . [or] construct any improvement upon land embraced within such site or such parcel and located within such district."¹³¹ In addition, all landmark owners must maintain and repair their structures at their own expense.¹³²

The owner may receive an exemption from these restrictions for: safety reasons,¹³³ alterations that the Commission determines have no architectural effect,¹³⁴ alterations that the Commission determines to be architecturally appropriate,¹³⁵ and economic hardship so that the owner can earn a "reasonable return" on the property.¹³⁶ In the case of not-for-profit organizations, where reasonable return on investment is not an appropriate measure, the

§ 470a-w-b (1988 & Supp. III 1991); and the National Environmental Policy Act of 1969, requiring that environmental and cultural values be considered along with economic and technological issues in assessing the impact of federal projects, 42 U.S.C. § 4321-70a (1988 & Supp. III 1991). For a compilation of such legislation and other methods of historic preservation adopted by the state and federal governments, see James P. Beckwith, *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 WAKE FOREST L. REV. 93 (1976), and Phelan, *supra* note 79, at 69-75. For a discussion of historic district designation and its potential role in building communities, see Rose, *supra* note 6, at 504-53.

¹²⁷ N.Y. City Admin. Code §§ 25.301-25.321 (1992).

¹²⁸ *Id.* § 25.301(b).

¹²⁹ *Id.* §§ 25.303(a)(1), 25.302(n).

¹³⁰ *Id.* § 25.303(a)(2)-(4).

¹³¹ *Id.* § 25.305(a)(1).

¹³² *Id.* § 25.311.

¹³³ *Id.* § 25.312.

¹³⁴ *Id.* § 25.306.

¹³⁵ *Id.* § 25.307.

¹³⁶ Reasonable return is defined as 6% net annual return on assessed value. *Id.* §§ 25.309, 25-302(v).

economic hardship or reasonable return on investment criterion is replaced with the test of whether the landmark designation interferes unreasonably with the organization's charitable purpose.¹³⁷

This type of restriction must be distinguished from broader categories of land use regulation in which a town or city may be divided into various "zones" (hence the name zoning for this type of regulation), and particular uses, density, height, and methods of construction may be specified. In virtually every situation, the process of landmark or historic designation is in addition to, and sets a higher standard than, the more general zoning requirements for the particular area.

Two basic forms of challenges have been brought to landmarking designations in the United States. The first, and more general type of challenge, is that the regulation deprives the landowner of the use of the land, thus constituting a "taking" under the Fifth Amendment to the Constitution.¹³⁸ If a court determines that a particular regulation so deprives a landowner of the use of the property as to constitute a taking,¹³⁹ the government must then either pay the landowner "just compensation" or rescind the regulation.¹⁴⁰ This area of constitutional analysis has received considerable attention in recent years. Under the leadership of Justice Scalia, the Court seems to be breathing new life into the Takings Clause, as it applies to the area of "regulatory takings."¹⁴¹

A landowner can challenge governmental interference with economic rights that are premised on the ownership of the land involved. However, at least since the 1920's, restrictions on land

¹³⁷ See, e.g., *Church of St. Paul and St. Andrew v. Barwick*, 496 N.E.2d 183, 192 n.7 (N.Y. 1986).

¹³⁸ The Takings Clause of the Fifth Amendment states, in part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Takings Clause has been made applicable to state governments through the Due Process Clause of the Fourteenth Amendment. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 122 (1978).

¹³⁹ The Supreme Court recognized as early as its decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), that the Takings Clause applied not only to physical deprivations of private property, but also to governmental regulations pursuant to the state's police power that were in some degree equivalent to a physical taking. How far a regulation had to go for it to be considered a taking is now the subject of considerable debate. See, e.g., *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

¹⁴⁰ The Supreme Court determined that the owner of private property who was deprived of all use of the land by a governmental regulation was entitled to compensation for a "temporary" taking, even if the governmental authority subsequently rescinded the regulation. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, California, 482 U.S. 304 (1987).

¹⁴¹ See, e.g., *Nollan v. California Coastal Comm'n*, 438 U.S. 825 (1987) (holding that a land-use regulation in the form of a development exaction for which the asserted state interest and the means of accomplishing that interest are not a close "fit" constitutes a taking); *Lucas*, 112 S. Ct. 2886 (holding that a land-use regulation which deprives the property owner of all economic value of the property constitutes a taking).

use for the promotion of public safety, health and welfare have been recognized as serving a legitimate governmental purpose.¹⁴² Under both state constitutions and the federal constitution, this has been taken to include regulation for the preservation of aesthetic and historical values.¹⁴³

In the landmark decision, *Penn Central Transportation Co. v. New York City*,¹⁴⁴ the United States Supreme Court conclusively decided that landmark preservation laws were, in fact, constitutional and presented no prima facie example of an unconstitutional exercise of governmental authority.¹⁴⁵ In that case, the owner of Grand Central Terminal was refused permission to construct a tower above the existing terminal because it had been designated a landmark.¹⁴⁶ In its decision, the Supreme Court also held that, so long as the owner could make reasonable use of the land (and, in fact, the landowner was allowed to continue the prior use of the land) and could realize a profit on his or her reasonable investment-backed expectations, the landmark designation did not constitute an unconstitutional taking of the property without compensation.¹⁴⁷

More recent Supreme Court decisions have strengthened the effect of the Takings Clause, but it seems unlikely that these decisions will have any adverse impact on historic preservation laws.¹⁴⁸ In the Supreme Court's most recent decision concerning land use regulation, *Lucas v. South Carolina Coastal Council*,¹⁴⁹ Justice Scalia held that a regulation would constitute a taking when the landowner was deprived of *all* economic benefit in the regulated land.¹⁵⁰ Since most historic preservation laws only prevent the owner from altering the structure and permit the prior use to continue,¹⁵¹ as in *Penn Central*,¹⁵² most landmarking regulation would

¹⁴² See, e.g., *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

¹⁴³ See, e.g., *State of Missouri v. Berkeley*, 458 S.W.2d 305 (Mo. 1970).

¹⁴⁴ 438 U.S. 104 (1978).

¹⁴⁵ *Id.* at 128-35.

¹⁴⁶ *Id.* at 116-18.

¹⁴⁷ *Id.* at 137-38.

¹⁴⁸ Since the Supreme Court's decision in *Penn Central*, *id.*, upholding the constitutionality of New York's landmark designation ordinance, the Supreme Court has apparently turned to the question of environmental regulation as a possible form of governmental taking, as is illustrated in the relatively recent decisions of *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

¹⁴⁹ 112 S. Ct. 2886 (1992).

¹⁵⁰ *Id.* at 2893-95. This holding is partially qualified in that the government may abolish a harmful or noxious use which would be considered a nuisance under the state's common law definition of nuisance. *Id.* at 2896-2902.

¹⁵¹ For example, the New York City ordinance recognizes the owner's need to realize a

presumably pass constitutional muster. It is necessary to remember, however, that state constitutions can set a higher standard and so may preclude some forms of regulation that would be permissible under the Constitution.¹⁵³ Nonetheless, the basic constitutionality of landmark and historic preservation statutes has not been extensively challenged in recent years. The current areas of significant challenge are primarily in the field of environmental protection where greater restrictions are being placed on the uses to which landowners may put their land, such as occurred in *Lucas*.¹⁵⁴

Landmark regulation has received more serious challenges when the landmarked building happens to be a church or some other type of structure with a religious use. Here, the landowner can raise not simply an economic claim but a religious claim, i.e., that the regulation denies the owner the first amendment right of religious free exercise.¹⁵⁵ When such a challenge is brought, the Supreme Court has traditionally given greater scrutiny in reviewing the constitutionality of the regulation. When the regulation imposes a substantial burden on the observation of a central religious practice, the regulation must be justified by a compelling governmental interest or purpose.¹⁵⁶

In *Employment Division v. Smith*,¹⁵⁷ the Court, in an opinion written by Justice Scalia, held that there was no constitutionally compelled exemption to a generally applicable, otherwise valid statute or regulation.¹⁵⁸ Furthermore, the validity of such a regulation should be evaluated under the minimal standard of review, rather than the heightened scrutiny accorded to governmental actions which regulate fundamental rights.¹⁵⁹ Under this approach, buildings with religious uses would be subject to generally applica-

"reasonable" return from the building as a hardship factor and allows this need as the basis for an exemption from the ordinance.

¹⁵² 438 U.S. 104 (1978).

¹⁵³ See, e.g., *Society of Jesus v. Boston Landmarks Comm'n*, 564 N.E.2d 571 (Mass. 1990) (holding that an ordinance prohibiting rearrangement of interior church architecture violated state's Declaration of Rights); *First Covenant Church of Seattle v. City of Seattle*, 787 P.2d 1352 (Wash. 1990) (holding that a landmark designation ordinance was unconstitutional as applied to buildings used for religious purposes under the state constitution, independent of its unconstitutionality under the Constitution).

¹⁵⁴ 112 S. Ct. 2886 (1992).

¹⁵⁵ The First Amendment states, "Congress shall make no law respecting an Establishment of religion or prohibiting the free exercise thereof." U.S. CONST. amend. I.

¹⁵⁶ See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 406-10 (1963); *Thomas v. Review Bd of Indiana Employment Security Div.*, 450 U.S. 707, 718-19 (1981); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 138-42 (1987); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989).

¹⁵⁷ 494 U.S. 872 (1990).

¹⁵⁸ *Id.* at 878-82.

¹⁵⁹ *Id.* at 882-87.

ble, otherwise valid land use regulations, including landmark ordinances, even when the building owner attempts to raise the claim of a first amendment infringement. In *Rectors, Wardens, and Members of Vestry of St. Bartholomew's Church v. City of New York*,¹⁶⁰ this reasoning was used to validate the application of New York City's landmark ordinance which prevented a church from constructing an addition to be used as an office building.

On the other hand, the Massachusetts Supreme Court held that the Boston Landmark ordinance could not be applied to a church to prevent the church from altering its internal arrangement in accord with liturgical changes.¹⁶¹ This decision, however, was based exclusively on Massachusetts' Declaration of Rights, rather than the federal Constitution's First Amendment, and therefore has little national significance.¹⁶² The Washington State Supreme Court also held that a landmark ordinance violated both state and federal constitutions, when applied to religious structures, even though the ordinance provided an exemption for interior and external changes necessitated by liturgical changes.¹⁶³

This area of takings clause jurisprudence may, however, change significantly with the recent enactment by Congress of the Religious Freedom Restoration Act. This Act restores the applica-

¹⁶⁰ 914 F.2d 348, 354 (2d Cir. 1990), *cert. denied*, 499 U.S. 901 (1991). For a discussion of this case and similar cases involving landmarking of religious buildings, see Thomas Pak, Note, *Free Exercise, Free Expression and Landmarks Preservation*, 91 COLUM. L. REV. 1813 (1991).

¹⁶¹ *Society of Jesus v. Boston Landmarks Comm'n*, 564 N.E.2d 571 (Mass. 1990).

¹⁶² 564 N.E.2d at 572-73; see also Pak, *supra* note 160, at 1823 & n.68.

¹⁶³ *First Covenant Church of Seattle v. City of Seattle*, 787 P.2d 1352 (Wash. 1990). At the time of the decision, the holding under the federal constitution seemed incorrect under *Employment Division v. Smith*, 494 U.S. 872, 878-87 (1990). This decision in *First Covenant Church* was vacated by the United States Supreme Court, 499 U.S. 901 (1991), but its holding based on the state constitution seems unassailable. However, upon reconsideration, the Washington Supreme Court reinstated its earlier holding and distinguished *Smith* on the grounds that the landmark designation ordinance was not a neutral regulation because it granted an exemption for architectural changes reflecting liturgical changes. *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 180-81 (Wash. 1992). The ordinance was also not considered generally applicable because it contains a system of individualized exceptions which lend themselves to individualized governmental assessments of the conduct involved. *Id.* at 181. The Washington Supreme Court also distinguished this case from *Smith* on the grounds that the former involved a "hybrid" situation—that is, two constitutional rights, the freedom of speech as well as the free exercise of religion, were implicated. *Id.* at 181. The court then applied the *Sherbert v. Verner* compelling government interest test and concluded that the landmark ordinance could not apply to religious structures. *Id.* at 183. This reasoning may be significant because freedom of speech of the owner would apply to a large category of protected buildings and would thus significantly undermine the general applicability of historical preservation ordinances, beyond the religious context, throughout the nation. For a full discussion of the applicability of landmark preservation regulations to religious structures, see, e.g., Angela Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401, 490-98 (1991); Pak, *supra* note 160, at 1840-43.

tion of the "compelling government interest" test to government regulation which substantially burdens the free exercise of religion,¹⁶⁴ as enunciated in *Sherbert v. Verner*¹⁶⁵ and *Wisconsin v. Yoder*.¹⁶⁶ It remains for future judicial decisions to interpret this Act, particularly in its application to historic preservation regulations.

V. CONCLUSION

The landmarking process is slow because it requires each building or historic district to be individually judged as to its value and significance. Nonetheless, there are now many (probably thousands) of designated buildings throughout the United States, so the process will likely continue.¹⁶⁷ It is interesting to note that the severe modification of the Salk Institute could have been pre-

¹⁶⁴ 107 Stat. § 1488 (1993). The Act, in part, reads:

(a) In General.—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

Id. § 3. While these provisions would seem to substantiate decisions such as that of the Washington State Supreme Court, *supra* note 163, it remains for judicial opinions to interpret the statute's provisions concerning "substantial" burdens and, even more significantly, its apparent emphasis on the burdens placed on individuals' exercise of religion. While the First Amendment is perhaps unclear as to its focus on individuals, as opposed to institutions, some have argued that it is intended only to protect individual free exercise. See, e.g., Ira Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 419-31 (1987). *Contra* Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 495-96 (1991). The Religious Freedom Restoration Act seems explicit in this regard. One could therefore posit that landmark ordinances burden institutions, that is most typically the corporate or associational owners of such buildings, and not individuals and that such ordinances are therefore not subject to the compelling government interest test.

Furthermore, even before the *Smith* decision, lower federal courts had held that buildings intended for religious uses were subject to land-use regulations in such decisions as *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983) and *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984). Both of these decisions held that a community could deny an exemption for religious uses in an area where such uses were forbidden and there was no constitutionally-compelled exemption from such land-use regulations. See Scott D. Godshall, Note, *Land Use Regulation and the Free Exercise Clause*, 84 COLUM. L. REV. 1562 (1984). One could thus argue that even while the Supreme Court utilized a compelling government interest/strict scrutiny test for governmental burdens on the free exercise of religion, building uses were still subject to such generally applicable land-use regulations.

¹⁶⁵ 374 U.S. 398 (1963).

¹⁶⁶ 406 U.S. 205 (1972).

¹⁶⁷ There are approximately 900 buildings which have been landmarked individually in New York City, but the number jumps to 18,000 if one includes historic districts. Pak, *supra* note 160, at 1814 n.10.

vented if that building had been given landmark status.¹⁶⁸ Even more noteworthy is the relative order of significance attached to the various interests represented by these types of conflicts.

The original purpose to the constitutional provision empowering Congress to legislate in the intellectual property field is premised primarily on the public benefit to be derived from granting authors and inventors rights in their creations.¹⁶⁹ Separately asserted rights, which are personal to the artist, must give way before the public interest. The corollary is that the artist's personal rights will also give way to the rights of the property owner (that is, the owner of the art object), with the public benefit to be derived from the vindication of such property rights simply assumed.¹⁷⁰ The dichotomy in the treatment of artists' rights applied to objects (that is, personal property) and the treatment of those rights when applied to land further illustrates the relative value given by the American legal system to various types of vested property interests.

Landmarking, on the other hand, because it serves only the public interest and is asserted only on behalf of the public (rather than individuals), is now granted priority over even the rights of the landowner.¹⁷¹ For a society and a legal system, which purport to value the individual so highly, this subrogation of the individual's rights to those of the public represents an interesting paradox, a paradox well illustrated by the struggle of artists to achieve

¹⁶⁸ Different state and federal legislation may require that a building be a certain age before it is eligible for landmark status. The Salk Institute may not have qualified for such status on that basis. The Federal Advisory Council on Historic Preservation has, however, requested information as to whether the Institute would fall under the National Historic Preservation Act. This Act requires council review of federal actions likely to affect historic properties. In the case of the Salk, the federal undertaking would be premised on the considerable funding being provided by the National Institutes of Health. Herbert Muschamp, *New Party Joins the Salk Addition Dispute*, N.Y. TIMES, June 17, 1993, at C14.

¹⁶⁹ *But see* Lacey, *supra* note 15, at 1553-67 (questioning why the artist's rights in his or her property should be subjected to the public interest to a greater degree than the rights of owners of other types of private property).

¹⁷⁰ Lacey critiques the relative hierarchy of rights accorded to different types of property ownership. However, she suggests that some moral rights, especially the rights of integrity, disclosure, and retraction, grant excessive rights to the artist, when they can be exercised for reasons other than the public's interest in cultural property preservation. In evaluating this interest, she suggests that the public should be defined as an interdependent community. Lacey, *supra* note 15, at 1593-95.

¹⁷¹ An alternative or additional mechanism to an aggressive landmarking program is to encourage the creation of easements or restrictive covenants donated by the property owner to the local government. The substance of such a restriction would be a negative promise by the landowner not to change or destroy the building without governmental permission. In exchange, the landowner would receive a tax deduction for the estimated value of the agreement to restrict the use of the property in this manner. Such a solution emphasizes private agreement, in that the landowner voluntarily agrees to restrict the use of the property, rather than having restrictions imposed on the landowner by the government. Such a system presumably would cause less friction between property owners and government because of its essentially voluntary nature.

recognition for their individual creative contributions to American society, and the even greater struggle to receive comparable recognition of architects, who, unfortunately, work in a medium with particular applications to the sanctity of real property rights.

In conclusion, public art, which should be taken to include both architecture and art placed in public places, requires an explicit balancing of the interests of the author, the present owner, and the public. This is not to deny that the premise underlying the grant of any protection to art works is in fact the benefit which the public will derive therefrom. This notion, however, conflicts directly with the other presumption of Anglo-American property law, that the public benefits the most from the free use and alienability of real property. In this area, therefore, we must recognize that while the application of moral rights to public art and architecture coincidentally helps to further the goals of protection and preservation, artists' rights are not intended primarily for that purpose. Furthermore, they are not the most effective tool for accomplishing these goals. The use of artists' moral rights for this purpose creates new problems and fails to resolve some old ones.

First, there is a major problem of enforcement. In some nations, the moral right does not last beyond the life of the author; so, once the author dies, there is no one to protect the art work. Even if the right outlives the author, there is a question as to who should have standing to enforce it. What qualifies the artist's heirs to assert it, and, even if they are "qualified," will they have the incentive or desire to do so?¹⁷²

Second, even if enforcement may be left to the artist's heirs, are the author and the heirs the most appropriate judges of what the art work's future should be? While authors should have continuing moral rights to their works, particularly the rights of integrity and attribution, there may well come a point when the public should be able to decide what is to be protected and how, especially for those works to be displayed in public and to be maintained by the public or by the owner.¹⁷³ This suggestion would fit

¹⁷² In some nations, such as Brazil, Italy and Portugal, after the creator's death, the creator's moral rights are exercised by a governmental authority rather than by the creator's heirs or legatees, as in France. See Kwall, *supra* note 13, at 16 n.65. This type of mechanism should better serve society's interest in preserving its cultural property. See also Lacey, *supra* note 15, at 1594 (positing that moral rights should not outlast the author because "at that point, the bond between the artist and her work is broken or at least weakened, and the interest of the community in experiencing the work becomes paramount").

¹⁷³ The right of attribution seems distinguishable from the right of integrity, the former deserving perpetual protection or at least protection significantly beyond the lifetime of

the goal of balancing the interests implicit in the case law, even if not explicit in the statutory law.

The alternative, to the extension of the right of integrity beyond the life of the author, is to rely on an aggressive landmarking process to represent the public's interest in the preservation of public art and architecture. As landmarking exists in the United States today, the process is not perfect; buildings have been lost to destruction before they have been landmarked, and landmark commissions may give permission for alterations to which others may object. Nonetheless, it is a process which in recent years has been the subject of relatively little controversy, from either landowners or the artistic and architectural communities.

The proposed model would incorporate a system similar to that currently used by the United States for architecture. However, the concept of landmark should be extended to individual art works in the public and the private domain. Many other nations, in order to protect their ancient past, have declared blanket national ownership of all objects and archaeological sites that are more than a certain age.¹⁷⁴ On the other hand, in the United States, with relatively few exceptions for cultural property found on publicly-owned land, virtually no cultural property of this sort is protected.¹⁷⁵

Blanket national protection for all public art may not be the solution. Nevertheless, individual works of art, as well as buildings, can be granted landmark status that would require the owner,

the artist. There may at times arise a problem of proper attribution, but, so long as this can be accurately determined, there is no reason not to require it.

¹⁷⁴ For example, in Israel, all objects considered "antiquities," although not all owned by the national government, are subject to strict restrictions on ownership, trade, and especially export. In Israel, any antiquity found or discovered after February 10, 1978 and the surrounding area necessary for the object's preservation are the property of the State. Antiquities include any object which is the product of human activity dating from before the year 1700, any zoological or botanical remains dating before the year 1300, and more recently produced objects which the Minister of Education and Culture declares to have historical importance. 885 SEFER HA'HUKIM 776 §§ 1 and 2(a) (Feb. 10, 1978). See Shoshana Berman, *Antiquities in Israel in a Maze of Controversy*, 19 CASE W. RES. J. INT'L L. 343, 344, 351 (1987). See also LYNDEL PROTT & PATRICK O'KEEFE, *LAW AND THE CULTURAL HERITAGE*. I: DISCOVERY AND EXCAVATION (1984); III: MOVEMENT (1989).

¹⁷⁵ Several states have in recent years enacted special legislation prohibiting the possession, sale, transfer, and public display of human remains and associated grave goods. See, e.g., CAL. PUB. RES. CODE ANN. §§ 5097.98 and 5097.99 (West & Supp. 1992); IDAHO CODE § 27-501(2)(a)-(c) (1989). Several states have also enacted legislation protecting unmarked burial sites, often even when found on private land, and requiring that human remains and associated grave goods be returned either to descendants or to related ethnic, kin, or tribal groups, when such groups are identifiable, or sometimes reburied, when such descendants or related groups are not identifiable. See, e.g., CAL. PUB. RES. CODE § 5097.98; FLA. STAT. § 872.05 (West 1991); IND. CODE §§ 14-3-3.4-16 (Burns 1990); KAN. STAT. ANN. §§ 74-2742-2748 (1992); MD. CODE ANN. § 5-627(a)-(b) (1991); MO. REV. STAT. §§ 194.400-194.410 (1992).

whether public or private, to maintain and protect the art work. In the case of an object, it should not need to be as old as the thirty years required by New York landmark law.¹⁷⁶ Thirty years is too long for personal property. Artists should be given the opportunity to seek landmark status during their lifetime, allowing them to vindicate the moral right of integrity. For the same reason, a shorter time could also be required for architectural works. However, the decision to require preservation would not be a unilateral one by the artist. Rather, only a decision by a body responsible to the public, and including representatives of the artistic community, could impose on the owner the duty to preserve and maintain the art work.

While expansion of the artist's or architect's moral right is desirable in the short run, in the long term, this does not seem to take sufficient account of the public interest. However, an aggressive plan of landmarking of both architectural works and individual art objects would represent the appropriate and necessary balancing of interests between the artist, the owner, and the public, if the goal of preservation of artistic monuments is to be accomplished.

¹⁷⁶ N.Y. City Admin. Code § 25-302(n) (defining "landmark" as "any improvement, any part of which is thirty years old or older.").