ARTISTS' MORAL RIGHTS: A EUROPEAN EVOLUTION, AN AMERICAN REVOLUTION*

DAN ROSEN**

"The author of a work of the spirit enjoys in that work, by sole virtue of its creation, a right of incorporeal property, exclusive and opposable against all."

—Law of 11 March 1957 (France)[1]

"[T]he doctrine of moral right is not part of the law in the United States. . . ."

—United States District Court[2]

From the time primitive man first painted on the wall of his cave to the most recent "wrapping" of a geographic area by the artist Christo, every society has confronted the problem of artists' rights. Not surprisingly, different legal systems have reached different conclusions.[3] The influences that led to the divergent results are the subject of this article.

France serves as the leading exponent of artists' moral rights or *droit moral*.[4] The concept consists of four discrete rights: paternity, disclosure, withdrawal, and integrity.[5] Additionally, France has created a resale right, or *droit de suite*, that allows the artist to receive some compensation each time his work is sold.[6] While *droit moral* and

---

* An earlier version of this paper was awarded First Prize, Southern Methodist University School of Law, in the 1982 ASCAP Nathan Burkan Memorial Competition.

** B.A., 1974, Trinity University; M.A., 1976, University of Texas; J.D., 1982, Southern Methodist University; LL.M., 1983, Yale Law School.

1 Loi du 11 mars 1957 Sur La Propriété Littéraire et Artistique art. 1, *translated in* UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1976) [hereinafter cited as French Law].

2 Geisel v. Poynter Prods., 295 F. Supp. 331, 340 n.5 (S.D.N.Y. 1968).

3 *See* 1 K. ZWEIGERT & I. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 25 (1977), *in* which the authors observe that "the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results."

4 *See generally* DaSilva, *Droit Moral and the Amoral Copyright*, 28 BULL. COPYRIGHT SOC'Y 1 (1980); Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940); Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968).

5 The categories have been articulated by the French copyright expert Raymond Sarraute. *Id.* at 467.

6 *See generally* 1 J. MERRYMAN & A. ELSEN, LAW ETHICS AND THE VISUAL ARTS 4-1 to 4-41 (1979); M. NIMMER, NIMMER ON COPYRIGHT § 8.22 (1983); Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333 (1968).

droit de suite are commonly considered separate ideas, they are part of the broader concept that an artist's relationship with his creation does not end upon its completion. Both moral rights and resale rights recognize that a work of art is not fungible and should not be so treated. Thus, those who produce works of art are considered to have a greater continuing interest in the work than a factory worker would have in overseeing the life of a cog he stamped out on the assembly line. The work of art is created from the unique vision of the artist. The cog is produced without significant creativity by the assembly line worker. Thus, under French law, the artist is treated differently.

The United States, in contrast, adheres to the antithesis of artists' moral rights.[7] Under the Copyright Act, once a work of art is sold, the artist's legal rights are, to a great extent, divested.[8] At that point, the buyer is deemed to possess a continuing stake in how the work is used. That, at least, is the paradigm. Several courts have reached to other sections of the law to achieve equitable results. California recently enacted statutory resale and integrity rights,[9] and New York has just passed an artists' authorship rights bill.[10] These developments are not only unprecedented in this country, but are also revolutionary in light of federal copyright laws.

This article will analyze and examine the historical forces that fostered the development of artists' moral rights in countries such as France,[11] Italy,[12] and Germany.[13] In addition, some possible explanations for the absence of this idea from the United States and the United Kingdom will be explored. The hypotheses are derived from the school of legal ethnology which adheres to the theory that "a group of people in a particular geographical social and economic situation

[7] *See, e.g.*, Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976), in which the court stated that American copyright law protects only economic interests of artists.

[8] Section 109 of the Copyright Act entitles the owner of a particular copy to sell or dispose of the copy and to display it publicly to viewers that are present where the copy is located without the artist's consent. 17 U.S.C. § 109 (1982).

[9] CAL. CIV. CODE §§ 986 (resale), 987 (integrity and paternity) (West 1982 Supp. 1983)

[10] N.Y. GEN. BUS. LAW § 228 (McKinney 1983), *reprinted in* 7A Session Law News of N.Y., p. 1933 (1983) (Artists' Authorship Rights Act).

[11] *See generally* Blanc-Jouvan & Boulouis, *France*, 1 INT'L ENCY. COMP. L. F-47, -77 to -80 (1972).

[12] *See generally* Cappelletti & Beseigno, *Italy*, 1 INT'L ENCY. COMP. L. I-93, -105 to -106 (1972).

[13] *See generally* Kruger-Nieland, *The Moral Right of the Author, A Particular Manifestation of the General Personal Right*, GEMA NEWS-NOUVELLES-NOVEDADES 5 (1980), *reviewed in* 28 BULL. COPYRIGHT SOC'Y 80 (1980); Marcus, *The Moral Right of the Artist in Germany*, 25 COPYRIGHT L. SYMP. ASCAP 93 (1980); Pakuscher, *Recent Trends of the German Copyright Law*, 23 BULL. COPYRIGHT SOC'Y 65 (1975).

develops in a particular way with regard to law as well as other things."[14]

The rise of artists' moral rights in Europe corresponded to the improvement of their social and economic status as well as to the influence of natural law. As artists' work became more desirable, artists gained bargaining power and were able to use moral rights as leverage in negotiating contracts. Once private acknowledgment of moral rights became widespread, the groundwork was laid for subsequent statutory recognition. Lacking such an evolutionary period, the United States did not develop any rights beyond those that also benefited the rest of society.[15]

I. AN OVERVIEW OF THE SYSTEMS

The attributes of the systems that recognize artists' moral rights have been reviewed extensively by various commentators.[16] This article does not concentrate on such comparisons but instead provides a brief overview to put subsequent discussion in context. Historians divide the modern history of moral rights into three periods: 1793 to 1878; 1878 to 1902; and 1902 to 1957.[17] The initial period was marked by disagreement as to whether artists' rights were to be found in concepts of property or, under the influence of Kant, from the right of personality.[18] Later, the incorporation of Marxist philosophy largely minimized the property theory of artists' rights in France. In Germany during the second period, Joseph Kohler developed the *Doppelrecht* theory, reasoning that creative works give rise to personality rights which are either patrimonial or moral.[19] In contrast, Gierke,

[14] 1 K. ZWEIGERT & H. KOTZ, *supra* note 3, at 8. The authors attribute this approach to Koschaker, whom they characterize as espousing a more modern approach to legal ethnology. *Id.*

[15] American courts have, on occasion, reached results which gave rights similar to moral rights by drawing from other areas of the law. *See* Treece, *American Law Analogues of the Author's "Moral Right,"* 16 AM. J. COMP. L. 486 (1968). It is important to note that the discussion of common law copyright remedies in Treece's article is no longer of practical importance, as the 1976 Copyright Act preempted such state protection. 17 U.S.C. § 301 (1982).

[16] The author of this article relies heavily on the following articles for the reporting of foreign cases: Marvin, *The Author's Status in the United Kingdom and France: Common Law and the Moral Right Doctrine*, 20 INT'L & COMP. L.Q. 675 (1971); Sarraute, *supra* note 4. Other important works in the area include the following: Da Silva, *supra* note 4, at 3 n.13, 4 n.22; H. DESBOIS, COURS DE PROPRIÉTÉ LITTÉRAIRE, ARTISTIQUE ET INDUSTRIELLE 4 (1961); J. MERRYMAN & A. ELSEN, *supra* note 6; S. STRÖMHOLM, 1, DROIT MORAL DE L'AUTEUR 423-24 (1966).

[17] The divisions are briefly explained in Da Silva, *supra* note 4, at 9-11.

[18] Gastambide led a group that adhered to the property notion; Renouard and his adherents advanced the personality notion. *See* Da Silva, *supra* note 4, at 9-10.

[19] Patrimonial rights are those akin to property granted by the state. *Id.* at 10-11.

another leading German theorist, believed such rights to be the indivisible parts of a unified *Persönlichkeitsrecht*.[20] Kohler's view prevailed in France during the third period and remains the dominant theory, while Germany has adopted Gierke's approach.[21] The French Law on Literary and Artistic Property of March 14, 1957, codified that country's artists' rights doctrine,[22] recognizing both patrimonial or copyright-type rights and non-economic moral rights. Germany incorporated its doctrine into positive law by means of the Law of September 9, 1965.[23] However, the United States recognized only economic rights in its Constitution, predicating its copyright protection on the belief that this incentive would cause artists to continue to create, thus benefiting the public.[24] Consequently, the laws codifying the constitutional copyright clause remained pecuniary in scope.[25] The United Kingdom, similarly, limits its statutory protection to copyright.[26]

A. *Right of Paternity*

In a recent account of the work of Volunteer Lawyers for the Arts in America, the tale is told of a young free-lance design artist who, because of limitations in American copyright law, will never be known as the creator of her works.[27] The woman sold a series of

[20] *Id.*
[21] *Id.* at 11.
[22] French Law, *supra* note 1.
[23] *See generally* Marcus, *supra* note 13.
[24] Article I, section 8 of the Constitution provides that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," U.S. CONST. art. I, § 8, cl. 8.
[25] The original Copyright Act, Act of May 31, 1790, ch. 15, 1 Stat. 124, has been amended many times. Currently, the law is codified at 17 U.S.C. §§ 101-810 (1982). The Supreme Court emphasized this economic rationale in Mazer v. Stein, 347 U.S. 201 (1954), stating that the copyright law makes reward to the artist a secondary consideration. The law's primary purpose, according to the Court, is to encourage the production of works to the benefit of the public. Thus, "the economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors. . . ." *Id.* at 219. *See generally* Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 U.C.L.A. L. REV. 1100 (1971); Breyer, *Copyright: A Rejoinder*, 20 U.C.L.A. L. REV. 75 (1972). *See also* M. NIMMER, CASES and MATERIALS ON COPYRIGHT 26 (1979).
[26] *See* Marvin, *supra* note 16, at 675-76.
[27] Appleson, *Attorney Groups Aid Artists in Their Brushes with the Legal System*, 67 A.B.A.J. 1251 (1981).

drawings to a company that made decorative household accessories. She noticed that the first set of finished products included the name of another artist. The company told her that the misattribution was a mistake and would not occur again. She submitted more drawings, and different names were again printed on the products. Finally she discovered that the company had copyrighted the designs under a fictitious name. In the absence of a written contract, this artist had little chance of remedying the situation. Thus, the artist was not recognized as the creator of her works.

In France, such misattribution could be redressed by invoking article 6 of the 1957 statute: "The author enjoys the right to have his name, his authorship, and the integrity of his work respected. This right is appurtenant to the individual artist. It is perpetual, unassignable, and cannot be barred by limitations of time."[28] The Paris Court of Appeal strongly affirmed this principle when it voided a contract calling for an artist to sign some canvasses with a pseudonym, while leaving others blank. The court recognized that the agreement violated the artist's right of paternity and was therefore invalid.[29]

Both the United States and the United Kingdom recognize that an artist's right to recognition is contractual. However, in the absence of such an agreement, the artist must look to means less direct than copyright law to protect his interests. Of all fifty states, only California and New York statutorily permit an artist to claim attribution. However, in California he may waive this right in writing.[30]

B. *Disclosure*

Article 19 of the French Act of 1957 states that "[t]he author alone has the right to divulge his work . . . he determines the means of disclosure, and fixes their conditions."[31] The Paris Court of Appeal recognized this right ten years before the statute was enacted in a case involving a contract between Georges Rouault, the artist, and Ambroise Vollard, the renowned art dealer.[32] Rouault agreed to turn over his entire production to Vollard. The artist stored 806 unfinished canvasses in the dealer's attic, occasionally returning to add finishing

[28] French Law, *supra* note 1, art. 6, *quoted in* Sarraute, *supra* note 4, at 478.
[29] Judgment of Nov. 15, 1966, Cour d'appel, Paris, 1967 Gaz. Pal. 17, *discussed in* Sarraute, *supra* note 4, at 478-79.
[30] CAL. CIV. CODE § 987(g)(3) (West 1982 Supp. 1983).
[31] French Law, *supra* note 1, at art. 19.
[32] Judgment of March 19, 1947, Cour d'appel, Paris, 1949 Recueil Periodique et Critique [D.P.] II 20, *discussed in* Sarraute, *supra* note 4, at 469-79.

touches. After Vollard's death, his heirs claimed ownership of the unfinished paintings. Rouault contended that they were unfinished and that only he could determine when they were ready to be released. The court held for Rouault, stating that, "until final delivery the painter remains master of his work, and may perfect it, modify it, or even leave it unfinished if he loses all hope of making it worthy of himself."[33] In the United States, disclosure is governed by copyright law. Under section 102 of the 1976 Copyright Act, protection is afforded as soon as the work is "fixed in any tangible medium of expression."[34] Thus, the artist has the right to control his work from the point of creation until it is sold. The Copyright Act also gives the artist some post-sale control over the disclosure of his work by separating ownership of the material object from ownership of the copyright.[35] Thus, absent a contractual provision, the buyer of a work of art obtains only the ownership of the object; the artist retains the right of reproduction.

C. *Withdrawal*

Article 32 of the 1957 French Act states:

> [N]otwithstanding the transfer of his right of exploitation, the author, even after his work has been published, enjoys the right of modification or withdrawal as against the assignee. He may not, however, exercise this right without accepting the obligation to compensate the assignee for the losses which the author's act of renunciation or withdrawal might cause him.[36]

This section regulates only publishing contracts and does not control the visual arts. Article 29, on the other hand, characterizes the artist's rights as incorporeal and independent of the physical object.[37] The French copyright expert Sarraute has interpreted this section to mean

[33] *Id.* The final delivery would only have occurred when the artist himself had determined that he had no more work to do on the paintings and had turned over control to the buyer.

[34] Section 102 of the Copyright Act provides: "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a) (1982). Section 302 confers protection from the point at which the work is created and endures for a term consisting of the life of the author and fifty years after his death. *Id.* § 302(a). "Created" is defined as the time "when [the work] is fixed in a copy or phonorecord for the first time. . . ." *Id.* § 101.

[35] 17 U.S.C. § 202 (1982).

[36] French Law, *supra* note 1, art. 32, *quoted in* Sarraute, *supra* note 4, at 477.

[37] *Id.* Article 29, 1957 French Act.

that an artist may not compel return of the work.[38] In a decision of April 10, 1961, the Paris Court of Appeal reached a similar conclusion.[39] The artist Vlaminck had expunged his signature from a painting submitted to him for authentication, claiming it was a forgery. The court ordered the artist to pay damages, for if the painting was forged, he had no right to alter another's property, and if it was authentic, his moral right did not allow him to reclaim the canvas after its sale. Neither the United States nor Great Britain recognizes a right of withdrawal in any form.[40]

D. *Integrity*

French copyright law recognizes the right of an artist to prevent distortion or alteration of his work.[41] This integrity provision was relied upon in the highly publicized case involving Bernard Buffet.[42] Buffet had painted the panels of a refrigerator. The owner decided to separate the sides and sell them as individual pieces of art. Buffet complained, contending that the refrigerator was one indivisible artistic unit. The Paris Court of Appeal rendered judgment for Buffet, and the Court of Cassation affirmed.[43]

The British Copyright Act affords protection somewhat similar to that of France's article 6. Under section 43(4) a third party is not permitted to use an artist's work or reproduction commercially if he knows that it has been altered since it left the artist's possession.[44]

The laws of the United States, on the other hand, do not grant artists the right to preserve their work as originally envisioned. In *Fowler v. Morkovsky*,[45] a Texas court refused to award damages to an artist whose mural had been partially covered by members of the Catholic church where it hung. The court found that once the artist parted with possession of the work, his legal interest in it ended.

[38] *Id.*

[39] Judgment of April 19, 1961, Cour d'appel, Paris, 1961 Gaz. Pal. II 218, *discussed in* Sarraute, *supra* note 4, at 477-78.

[40] *See* Treece, *supra* note 15, at 501 (United States); Marvin, *supra* note 16, at 692 (Britain).

[41] French Law, *supra* note 1, at art. 6. Sarraute notes that the right of integrity always has been recognized by French courts but does not vest until after the work has been put on the market by the author, has been sold, or has been made subject to contracts of publication or performance. Sarraute, *supra* note 4, at 480.

[42] *See* Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976).

[43] Judgment of May 30, 1962, Cour d'appel, Paris, 1962 D. 570, *aff'd*, Judgment of July 6, 1965, Cour de Cassation, 1965 Gaz. Pal. II 126.

[44] The Copyright Act of 1976; 4 & 5 Eliz. 2, Ch. 74, § 43(4), *discussed in* Marvin, *supra* note 16, at 701.

[45] Civ. No. 941751, Slip op. (Dist. Ct. Harris Cty., 129th Jud. Dist. Texas, Dec. 10, 1975).

Courts are beginning to protect the right of integrity through various legal theories. In one case, the Second Circuit held that unauthorized changes that radically affect a work constitute a false designation of origin under section 43(a) of the Lanham Act and can be enjoined.[46]

The most notable developments in the United States are the California Art Preservation Act and the New York Artists' Authorship Rights Act. The New York Act provides that:

> No person other than the artist or a person acting with the artist's consent shall knowingly publicly display or publish a work of fine art of that artist or a reproduction thereof in an altered, defaced, mutilated or modified form if the work is displayed, published or reproduced as being the work of the artist, or under circumstances under which it would reasonably be regarded as being the work of the artist, and damage to the artist's reputation could result therefrom.

In contrast, the California Act states that:

> No person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art.[47]

Professor Nimmer, only having occasion to comment on the California statute, believes that it might be subject to a preemption attack, at

---

[46] Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976).

[47] CAL. CIV. CODE § 987(c)(1) (West 1982 Supp. 1983). Unlike the Copyright Act, the California Art Preservation Act is designed to protect the artist and the public. The Preservation Act states:

> The Legislature hereby finds and declares 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 artists therefore have an interest in protecting their works of fine art against such alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.

Id. § 987(a). Subsection(d) specifies that "[t]he artist shall retain at all times the right to claim authorship, or, for just and valid reason, to disclaim authorship of his or her work of fine art." *Id.* § 987(d). The statute authorizes recovery of actual and punitive damages as well as the entering of injunctive relief. *Id.* § 987(e).

The New York Artist's Authorship Act is quite similar. It provides:

> [T]he artist shall retain at all times the right to claim authorship, or, for just and valid reason, to disclaim authorship of his or her work of fine art. The right to claim authorship shall include the right of the artist to have his or her name appear on or in connection with the work of fine art as the artist. The right to disclaim authorship shall include the right of the artist to prevent his or her name from appearing on or in connection with the work of fine art as the artist. Just and valid reason for disclaiming authorship shall include that the work of fine art has been altered, defaced, mutilated or modified other than by the artist, without the artist's consent, and damage to the artist's reputation could result or has resulted therefrom.

N.Y. GEN. BUS. LAW § 228-30 (McKinney 1983).

least insofar as it prevents alterations short of mutilation, because alteration would appear to be the equivalent of the federal right to prepare derivative works under the Copyright Act.[48] Nimmer states, however, that by constructing objective standards of defacement and mutilation, courts should be able to save the statute.[49]

E. *Resale Rights*

In 1958, American artist Robert Rauschenberg, sold a painting entitled *Thaw* to collector Robert Scull for $900. Fifteen years later, Scull sold the painting at an auction for $85,000. Rauschenberg reviled Scull after the auction, shouting, "I've been working my ass off for you to make this profit."[50] In 1921, the French artist Fourain published a sketch which portrayed two poverty-stricken children looking through the door of a luxurious auction house where paintings were selling for enormous prices. One said to the other, "Look. They're selling one of daddy's paintings."[51]

The Fourain drawings touched off a campaign for artists' resale rights in France, culminating in their inclusion in the 1957 statute.[52] Similarly, in this country, the Rauschenberg episode was widely publicized and, at least indirectly, led to the passage of the California Resale Royalties Act.[53] France's resale right extends for the life of the artist plus fifty years, while protection under the California Act ends upon the death of the artist. The French law allows the artist to collect three percent of the gross amount of sale at a public auction if the sale price is greater than 10,000 francs.[54] The California law applies to any sale in that state and any sale anywhere by a California resident[55] when the resale price is not less than $1,000.[56] Questions of

---

[48] M. NIMMER, *supra* note 6, § 8.21(c). Section 301 of the Copyright Act preempts any rights that are equivalent to those specified in the Act. 17 U.S.C. § 301(a) (1982). The right to prepare derivative works is specified in 17 U.S.C. § 103 (1982).

[49] *Id. See also*, Francione, *The California Art Preservation Act and Federal Preemption by the 1976 Copyright Act-Equivalence and Actual Conflict*, 18 CAL. W.L. REV. 189 (1982).

[50] The story is recounted in Camp, *Art Resale Rights and the Art Resale Market: An Empirical Study*, 28 BULL. COPYRIGHT SOC'Y 146 (1980), and in Crawford, *Legislation: Art Resale Proceeds Rights*, AM. ARTIST, July 1979, at 82-83.

[51] *See* Crawford, *supra* note 50, at 82.

[52] French Law, *supra* note 1, at art. 42. Other countries that recognize the resale right include Belgium, Chile, Germany, Italy, Luxembourg, Poland, Portugal, Turkey, Tunisia, and Uruguay. *See* Crawford, *supra* note 50, at 82.

[53] CAL. CIV. CODE § 986 (West 1982 Supp. 1983). *See generally* Weil, *The 'Moral Right' Comes to California*, ART NEWS, Dec. 1979, at 88-89.

[54] *See* Crawford, *supra* note 50, at 82.

[55] CAL. CIV. CODE § 986(a) (West 1982 Supp. 1983). The royalty is five percent. *Id.*

[56] *Id.* § 986(b)(2).

federal copyright preemption appear to have been resolved in favor of the California law.[57]

No other state recognizes a right to resale royalties. Legislation introduced in Congress has been unsuccessful.[58] Artists in some cases have, nevertheless, been able to achieve the same result by resorting to contract. An artists' attorney, Bob Projansky, introduced a form contract that gives the artist fifteen percent of the resale profits for his life or the life of his spouse plus twenty-one years.[59] This contractual arrangement could be a harbinger of future legislative action, for, as will be shown in subsequent sections of this article, the rights that today are legally recognized as moral rights in many countries began as private agreements.

II. Origins of Anonymity: The Early Guilds and the Power of Patrons

To the modern mind, the artist represents an individual, perhaps a personality, possibly an eccentric. We think of Andy Warhol painting pop art soup cans or Claes Oldenburg sculpting larger-than-life geometric mice or Salvador Dali appearing at an exhibit in a deep-sea diver's suit. Our stereotype conjures up the image of a person possessed by following his own distinct vision: from minimalism to photorealism with a plethora of variations in between.

The twentieth century view of artists, however, bears little resemblance to the thirteenth and fourteenth century progenitors of the modern painter. Far from being an individual, the artist of that era was an unknown member of a collective work organization. Hardly the initiator of unique approaches to artistic expression, he slavishly followed the direction of his patron. His only legal protection was the

[57] Morseburg v. Balyon, 621 F.2d 972 (9th Cir.), *cert. denied*, 449 U.S. 983 (1980). The court relied on Goldstein v. California, 412 U.S. 546 (1973) which held that the states may value rights differently and may reflect those values in their laws so long as they are not substantially equivalent to rights afforded under the Copyright Act. *Id.* at 557.

[58] *See* Crawford, *supra* note 50, at 84. *See generally* Schulder, *Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States*, 61 Nw. U.L. Rev. 19 (1966). One commentator, Monroe Price, argues that *droit de suite* rewards the wrong painters with inconsequential amounts of money at the wrong time in their lives. For example, he notes that in France, most proceeds go to the artists' heirs and that less than 200 living artists received any benefits—roughly one-tenth of all the artists whose works were sold in a given year. Price, *Government Policy and Economic Security for Artists: The Case of Droit de Suite*, 77 Yale L. J 1333-49 (1968). A study conducted in the United States also showed that only a few living artists would receive any benefits under a resale act with a $1,000 floor. Camp, *supra* note 50, at 147.

[59] *See* Crawford, *supra* note 50, at 83.

law prohibiting plagiarism,[60] and that proscription arguably was designed more to protect the public than the artist. The painter was regarded as an ordinary craftsman, entitled to no more freedom with his work than any other worker.[61]

While anonymity was widespread, it was not uniform. The thirteenth century provided a base for the future extension of artists' rights. It was during this time that nations began enjoying particular pride in the quality of their products, and purveyors of those products began asserting their rights collectively. Florence, particularly, was revelling in its reputation for fine quality wool and silk.[62] By the first half of the thirteenth century, the cloth finishers and manufacturers, as well as the silk manufacturers, constituted three of the seven greater guilds of the city.[63]

Guild membership meant more than merely association with one's peers; it defined political and social status. Under the Constitution of 1293, the *Ordinamenti di Giustizia*, only those persons actively engaged in the profession of the guild, which included noblemen, who formerly ruled the country, enjoyed political rights.[64] The greater guilds represented the wealth of the city. The members of the lesser guilds, which embraced the independent craftsmen and small shopkeepers, benefited very little by their association. Similarly, the workers of low status even in the greater guilds were not afforded full rights. In the woolen industry, for example, only the entrepreneurs—the industrialists and traders—were allowed complete rights of membership and, hence, political rights.[65]

Prior to the 1293 Constitution, painters, sculptors, and architects belonged to one guild. Shortly thereafter, however, a schism developed, and the painters ascended to a more prominent guild status. Nevertheless, this rise did not indicate any emerging respect for artists. Rather, it occurred by virtue of a curious system of unification that resulted in the alignment of painters with the greater guild of physicians and apothecaries, and the relegation of sculptors and architects to the lesser guild of bricklayers and carpenters.[66] Organization-

[60] *See* DaSilva, *supra* note 4, at 8.

[61] F. Antal, Florentine Painting and Its Social Background 283 (1948).

[62] *Id.* at 16-21.

[63] *Id.* at 17. The other greater guilds were the bankers, furriers, physicians and apothecaries, and judges and notaries. *Id.*

[64] *Id.* at 16-17.

[65] *Id.* at 20-21.

[66] Others who joined the physicians and apothecaries guild included color merchants and dealers who supplied various products to physicians and painters (i.e. drugs to the doctors, dyes, pigments and other wares to the painters). *Id.* at 278.

ally, this fusion was predicated on a theory of craft similarity. Because of the undoubted disparity in their true statuses, however, the painters did not enjoy the same rights as the physicians.

Art, during and prior to the fourteenth century, was a poor man's profession. Neither upper middle-class citizens nor nobles would have chosen it as a career. To have done so would have been considered degrading to them and their families.[67] Thus, when physicians, apothecaries and their suppliers, who had high status, joined with painters, house painters and colorgrinders, the latter group assumed a less privileged position within the guild.[68] Through this position, though, the painters forged the beginning of artists' rights.

Sometime before 1350, the painters won the most coveted prize in the struggle of the various professional groups—the right to meet separately from the main guild and to elect their own leaders.[69] While a small step, this separatist movement revealed the increasing independence of the painters. In 1378, they demanded full equality with the primary professions in the guild and the addition of their name, *dipintori*, to the guild's title.[70] Though the attempt to achieve equality was unsuccessful, it symbolized the improving social and economic position of those who, a century before, had been dismissed as mere craftsmen.

Advances in the guild, however, did not immediately result in advances in aesthetic autonomy. Through most of the Middle Ages, artists generally worked anonymously for communal enterprises, without distinction from those who toiled at other crafts. According to guild rules, a prospective painter was required to apprentice himself to a master member of the guild. The master was allowed, and in fact expected, to specify "proper" painting, thus restricting artistic options.[71]

---

[67] Almost all Florentine artists in the fourteenth century came from craftsmen, petty bourgeois, or peasant families. *Id.* at 277-78.

[68] While the union of the medical professionals and the artists was a strained one, it did prove beneficial to both on occasion. For example, when the guild was given supervision of the church of Saint Barnaba, the physicians conveniently were able to delegate the task of decoration to the painters. *Id.* at 285 n.21.

[69] For a few years, a painter actually served as a consul of the guild. That state of affairs ended, however, in 1382. *Id.*

[70] The painters allied themselves with the Compagnia di St. Lucia, a religious fraternity of laymen under the official control of the church. However, the professional duties of the painters were still enumerated in the Statutes of the Medici e Speciali guild. *Id.* at 278-79. Through the Compagnia, the church was able to channel democratic movements and direct them toward its own ends. *Id.* at 279.

[71] Artistic freedom was stifled as well by the emphasis placed on an apprentice's copying the works of his master as part of his training. The guild went so far as to prescribe which colors and materials could be used: ultramarine, but not blue, for example. These restrictions became less onerous, however, as time passed. *Id.* at 280.

While the masters were not subject to the artistic vision of any higher guild members, they were restrained by the desires of their patrons. Contracts between artist and patron specified the size of the painting, where it would hang, what would be portrayed, and how it would be executed. Except where paintings were produced to be sold at local fairs, the artist looked to his patron for guidance, although occasionally one was able to surreptitiously include an unordered image.[72]

To a great extent, the glory associated with a great work of art in the Middle Ages was bestowed upon the patron, not the artist. Thus, families such as the Medici acquired lasting reputations for the quality of the art they commissioned.[73] Ironically, the competition among the upper class created the climate within which artists were freed from the tyranny of patron domination. As wealthy patrons tried to outdo one another, artists and their associations travelled from town to town to execute commissions. Individual reputations began to emerge. As word spread of the value of an artist's most recent work and of his entire oeuvre, the bargaining power of the artist increased.

Vasari relates the story of Domenico Ghirandaio, a Florentine painter commissioned to paint the tomb of the wife of Francesco Tornabuoni, a wealthy Roman merchant.

> Francesco treated Domenico [Ghirandaio] so well that when the latter returned to Florence with honor and money he brought with him a letter to his patron's kinsman, Giovanni, describing how well he had done his work and how highly the Pope was delighted with his paintings. When Giovanni heard this he immediately resolved to employ Domenico on some great work which would do honor to himself and bring fame and riches to the artist.[74]

This anecdote illustrates the self-interested motive for employing Ghirandaio: to bring honor to the patron. It also demonstrates the

---

[72] An artist who violated his contract was without redress. The guild would not intervene because of the inferior status of the painters in that organization, the Compagnia was not involved in economic aspects of artists' lives, and the arbitration courts found themselves bound to enforce the specific language of the contracts, despite their one-sided nature. *Id.* at 281-82. In 1341, one dissatisfied patron, Ridolfo de' Bardi, obtained a court order allowing him to confiscate all the paintings in the artist Maso's workshop as well as his paint and instruments. *Id.* at 286 n.46.

[73] *See* M. Gilmore, *The World of Humanism 1453-1517* in 2 RISE OF MODERN EUROPE 231-34 (W. Langer ed. 1952). *See generally* F. HASKELL, PATRONS AND PAINTERS (1963).

[74] 2 G. VASARI, THE LIVES OF THE PAINTERS, SCULPTORS AND ARCHITECTS 71 (A.B. Hinds trans. 1927).

emergence of an individual artist's reputation, and reveals the increasing compensation being paid for a particular artist's work, not simply an anonymous craftsman's finished product. Although the picture still was associated with the patron, it was beginning to be linked to its creator too.

Giotto appears to have been the first artist of the Middle Ages to acquire significant recognition, wealth and independence. The chroniclers of his life described him as a type of celebrity. What is especially remarkable is the fact that he developed this reputation in the early part of the fourteenth century. Ghirandaio, in contrast, was not even born until 1449. Giotto's reputation was doubtless exceptional as were his extraordinary fees: 2,200 florins for a mosaic at St. Peter's, 800 florins for an altar piece there, 500 florins for frescoes in the choir, and an annuity of ten ounces of gold from the King of Naples.[75]

If Giotto was a star in his time, Leonardo DaVinci was a supernova one hundred years later. His fame had spread far beyond Florence, so much so that the citizens of that city realized that it would transcend time as well. Accordingly, they set out to propose a project that would act as a memorial to him while adorning and honoring the state "by the genius, grace and judgment characteristic of his work."[76] The populace presented him with the walls of the great hall of the council to serve as his canvas. DaVinci accepted the honor and began work on the outlines. When he commenced applying the paint, however, his sketch was ruined by an incompatability of the oil and the wall. The project was abandoned, but Leonardo's reputation survived.[77]

DaVinci, like many artists who enjoyed individual reputations, built his fame on a foundation of science. His technical drawings earned the admiration of both the intelligentsia and the masses at a time when respect for science was rising. Subsequently, other artists were able to separate themselves from craftsmen and forge a new alliance with the esteemed occupation of the hour.[78]

Beginning in 1452, Ghiberti attempted to turn this salutary association with science to the artist's advantage. Ghiberti eventually

[75] F. ANTAL, *supra* note 61, at 282-83.

[76] G. VASARI, *supra* note 74, at 165.

[77] *Id.* at 166.

[78] Among the artists/scientists were Brunelleschi, who experimented with mathematical models of perspective, as well as Masaccio, Donatello, Uccello, and Ghiberti. F. ANTAL, *supra* note 61, at 376. The exalted position of science was reflected by the special privileges governments began giving to its practitioners by the Middle Ages. By 1332, Venice had created a special privilege fund for encouraging invention. A document of that year reflects a payment from the fund to Bartolomeo Verde in exchange for his promise to build a windmill. He was given six months to do the job. Failure to perform would require the return of the money. Such payments

wrote a book, *I Commentari*, explaining the theoretical basis of art in scientific terms.[79] His vision was to improve the social status of artists. In his book, he subtly linked art with science and pointed out the insignificance of worldly wealth compared to the transcendent value of science and the arts.[80] Ghiberti's scientific analysis was less than flawless; he is said to have confused several concepts, borrowing his explanations of proportion from Vitruvius, anatomy from the Arab Avicenna, and optics from Ptolemy, Witelo, and the Arabic textbook of Alhazen.[81] Nevertheless, *I Commentari* became an important book, for it underscored the self-confidence of artists and helped link their accomplishments in the public mind with the scientists, whose achievements had already been granted special government favors.

While artists benefited from their newly formed alliance with scientists, they did not receive the same sort of governmental encouragement and protection granted to scientists. This is understandable since states granted specific rights to inventors because their inventions proved useful to society, not merely because they invented them. A new machine for silk-making could increase an area's trade advantage. A new windmill could contribute to more efficient use of labor. The usefulness of a new work of art, however, is more ephemeral. Artists' moral rights are premised on the idea that the creator is entitled to control his work simply because he created it, not because it is useful to society. Accordingly, artists, unlike scientists, were required to look to natural law for moral rights protection, not to the patrimonial protection of the state, as the latter was predicated on the societal utility of the invention. While some nations eventually recognized a natural law basis for protecting artists, others, such as the United States, adopted copyright systems that, based on the idea that art is socially useful, only protect economic rights.[82] The work for hire section of the American copyright law illustrates this dichotomy.[83]

had become common by the fifteenth century as governments attempted to promote technological progress. *See* R. CHOATE & W. FRANCIS, CASES AND MATERIALS ON PATENT LAW 4 (1981).

A landmark event in intellectual property protection occurred in 1432 when the state of Venice passed the first modern patent statute: "If somebody invents any machine or process to speed up silkmaking or to improve it, and if the idea is actually useful, the inventor can obtain an exclusive privilege for ten years from the General Welfare Board of the Republic." *Id.* (quoting Prager, *The Early Growth and Intellectual Property*, 34 J.P.O.S. 106, 111 (1952).

[79] F. ANTAL, *supra* note 61, at 376.

[80] *Id.*

[81] *Id.* at 377.

[82] This social value theory emanates from the constitutional Copyright clause, which predicates protection on promoting the progress of science and the useful arts. U.S. CONST. art. I, § 8. *See generally* M. NIMMER, *supra* note 6, § 8.21.

[83] 17 U.S.C. § 201(b) (1982) provides:

In the case of a work made for hire, the employer or other person for whom the work

Under American law, the employer is considered the author of an artist's work made for hire for copyright purposes. The law severs the connection of the artist to his work because the underlying policy is protection of economic, not moral, rights.[84] The concept holds that the employer, as the party who enabled the work to be created, is the one to encourage in order to support the creation of new works. Accordingly, the development of moral rights took a different path from the evolution of patrimonial social-value copyright protection. Artists' rights emerged, not through positive law, but through favorable contractual arrangements, made possible by the emergence of individual artists' reputations and their increased bargaining power.

III. Michelangelo and Dürer: The Emergence of Moral Rights

Until the time of Michelangelo and Dürer, the most that could be said for artists' moral rights was that the public was beginning to recognize artistic work as the product of individual creativity, and that the state was willing to protect society from plagiarism in some cases. The artists, however, remained tied to their patrons, and individual aesthetic autonomy was still a rarity. Thus, only a sort of inverse paternity right existed: although the artist was not entitled to be known as the creator of the work, in some instances, he was entitled to prevent others from taking credit for it.

Michelangelo Buonarotti was an artist whose personal strength and creative achievement broke the bond that tied the painter to the preferences of his patron. Vignettes of his life, as related by Vasari, reveal the emergence of the panoply of moral rights recognized in Europe today. While Michelangelo enjoyed these rights by force of his reputation, not law, his presence nonetheless served as the source for legal recognition of artists' rights in later years.

A. *Paternity*

While considered a Florentine painter, Michelangelo spent much of his time in Rome, in the service of the Pope and the church. The French cardinal of St. Denis, Cardinal Rohan, called on the artist to create a memorial to him in the city. Michelangelo agreed and began work on a marble pieta to be placed in the chapel of St. Maria della Febbre in St. Peter's. The commission proved important, not merely because of the sculpture he created, but also because of the events that led Michelangelo to assert his right to be known as the creator of his work. According to Vasari:

> Michelagnolo devoted so much love and pains on this work that he put his name on the girdle crossing the Virgin's breast, a thing he never did again. One morning he had gone to the place to where it stands and observed a number of Lombards who were praising it loudly. One of them asked another the name of the sculptor, and he replied, "Our Gobo of Milan." Michelagnolo said nothing, but he resented the injustice of having his work attributed to another, and that night he shut himself in the chapel with a light and his chisels and carved his name on it.[85]

B. *Disclosure*

Michelangelo's greatest achievement, the Sistine Chapel, was also the source of his greatest frustration. Pope Julius was anxious to see the artist's plans, but Michelangelo would allow him to see nothing. This secrecy served only to excite the curiosity of the Pope, and one day he demanded to see the sketches. The artist refused, insisting that the work was not ready to be shown.[86]

The continuing intransigence of Michelangelo angered the Pope. Michelangelo, his suspicions aroused, believed his assistants had ac-

was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

"Work made for hire" is defined as:

> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specifically ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. . . .

17 U.S.C. § 101 (1982).

Thus, under American law, "where an employee creates something as part of his duties under his employment, the thing created is the property of his employer unless, of course, by appropriate agreement, the employee retains some right in or with respect to the product." Zahler v. Columbia Pictures, 180 Cal. App. 2d 582, 589, 4 Cal. Rptr. 612, 617 (1960) (citing Nelson v. Radio Corp. of Am., 148 F. Supp. 1 (S.D. Fla. 1957)) (Composer's heirs cannot obtain an injunction to prevent use of composer's composition when music written for film, while under contract to studio, was licensed to television station). *See* Treece, *supra* note 15, at 494.

[84] *See generally* M. Nimmer, *supra* note 6, § 8.21.

[85] G. Vasari, *supra* note 74, at vol. 4, p. 115. Other fifteenth century artists devised less obvious ways of asserting their authorship. Masaccio is said to have given his features to one of the apostles in the fresco depicting Saint Peter enthroned. Ghiberti placed a self-portrait on his first and second Baptistry doors. F. Antal, *supra* note 61, at 380 n.26.

[86] G. Vasari, *supra* note 74, at 125.

cepted bribes from Pope Julius and betrayed their master by allowing the Pope to see another chapel he was painting. One day, Michelangelo decided to test this theory and preserve his right of disclosure. He secreted himself away at the chapel, waiting for the impatient Pope to appear. Pope Julius arrived. Michelangelo sprung from his hiding place, threw some planks in his path, and insisted that the meddlesome visitor be ejected.[87] Pope Julius continued to annoy Michelangelo, constantly asking when the Chapel would be done. On one occasion, in what might be interpreted as an artistic declaration of independence, Michelangelo replied that he would be finished when he had satisfied his own artistic sense.[88] Implicit was the notion that the customer pays for a finished product, but the artist decides when the product is finished.

C. *Integrity*

The right of integrity is considered to be the right of the artist to prevent disfigurement of his work. The inherent assumption is that the work is his. Thus, until artists were freed from the control of their patrons, a right of integrity was inconceivable; the painting was the product of the patron's vision. The artist was viewed merely as the instrument used to achieve that vision. No matter how talented or skilled, the artist could not insist on a moral right to preserve the integrity of the work when the work was not his conception.

While a few of the early individualists, such as Giotto, were allowed some latitude in executing their commissions, most artists continued to create what they were told to create. Even Giotto's independence was limited primarily to the arrangement and treatment of the subjects specified by his patrons.[89] Michelangelo, however, was able to sever this tie and assert his own artistic ideas. While he continued to accept major commissions, he also painted pictures to please himself, knowing that because of his talent and reputation, he would find a buyer for his work. Thus, in 1503, he made a round painting of the kneeling Virgin offering the Christ child to Joseph. When he finished, he wrapped the painting and sent it by messenger to Agnolo Doni, a citizen of Florence who had asked to purchase one

[87] *Id.* at 122.

[88] *Id.* at 126. The Pope replied, however, "and we require you to satisfy us in getting it done quickly," adding that the scaffolding would be removed if Michelangelo did not finish soon. Indeed, the Pope prevailed in his impetuousness, opening the Chapel for all of Rome to see when it was only half finished. Although upset at this breach of his secrecy and right of disclosure, Michelangelo completed the mural in twenty months. *Id.* at 125-26.

[89] F. ANTAL, *supra* note 61, at 283.

of his works. Accompanying the painting was a note from the artist setting the price at seventy ducats. By this act, Michelangelo had accomplished a reversal of the traditional roles.[90] It was he, not the patron, who decided what to paint, and what the price would be. Doni was not accustomed to this new state of affairs:

> Agnolo being a careful man, thought this a large sum for one picture, though he knew it was worth more. So he gave the bearer forty ducats, saying that was enough. Michelagnolo at once sent demanding one hundred ducats or the return of the picture. Agnolo being delighted with the picture, then agreed to give seventy ducats, but Michelagnolo being incensed by Agnolo's mistrust, demanded double what he had asked the first time, and Agnolo, who wanted the picture, was forced to send him one hundred and forty crowns.[91]

In Germany, events similar to this one began to occur at the same time. Albrecht Dürer had become the most well known individual artist in Germany. Like Michelangelo, he was set apart as not simply another craftsman but rather as a genius, independently identified by virtue of his special creative ability.[92] During the late fifteenth and early sixteenth centuries, Michelangelo and Dürer, at the peak of their careers, joined forces across Europe and led the artists of the continent toward recognition of their moral rights.

Dürer began his career in the traditional manner, serving as an apprentice at his godfather's publishing business. In 1498, he extricated himself from the patronage and artistic repression of his mentor and produced his first great work, a set of woodcuts of the Apocalypse. Dürer allowed his prominent godfather to print the pieces, but they were published by Dürer's own firm.

Perhaps even more than Michelangelo, Dürer determined for himself what he would create. While Michelangelo attempted gargantuan projects that by necessity required a patron, Dürer appealed to the masses by working in a medium that allowed him to reproduce his work in large quantities. Not only did Dürer create what he wished, knowing that a willing buyer would take it on his terms, he also engaged in mass marketing, encouraging the public to develop a taste for his work. The women of Dürer's family went to the market booth at the Heiltumsfest in Nuremberg and the great fairs of Augsburg,

[90] G. VASARI, *supra* note 74, at 117-18.

[91] *Id.* at 118.

[92] *See* M. GILMORE, *supra* note 73, at 234-52. *See generally* E. PANOFSKY, ALBRECHT DÜRER (4th ed. 1971).

Frankfurt, and Ingolstadt to sell his prints. Friendly merchants from Nuremberg carried parcels of his creations across the country.[93]

The medium in which Dürer worked created new legal problems. Skillful artists such as Israel von Meckenem and Wenzel von Olmütz in the Netherlands and Marcantonio in Italy copied his engravings and reproduced them by the score.[94] The authenticity of his work was not even safe in his home country. In 1502, Hieronymus Groff reprinted his famous Apocalypse series. The technology of printing meant that Düirer, unlike Michelangelo, could not depend soley on his reputation to solve his marketplace problems.[95] In fact, his reputation created his problems. Thus, Dürer was forced to turn to the government for legal enforcement of his artistic right to prevent others from falsely attributing a work to him, commonly known as paternity.

The Council of Nuremberg continually had to enact special laws to protect Dürer against dealers who forged his monogram. Later, his widow obtained a privilegium[96] from Charles V to prevent unauthorized reproduction of the four books of his Treatise on Human Proportions.[97] The government's involvement was significant for two reasons: it transformed a moral right into a legal right, and it granted the right, not to inspire the creation of useful items for the public, as under early patent law protection, but at least in part to protect the interests of the individual artist.

[93] *See* W. Waetzoldt, Dürer and his Times 8 (1950).

[94] *Id.*

[95] *Id.* The printing press, however, also liberated Dürer and other artists from the patrons, the church, and the guild, allowing them to seek an audience in the mass market. This freedom flowered into a notion of art for art's sake by the seventeenth century, a concept that continues today. *See* Bensman & Vidich, *The Cultural Contradictions of Daniel Bell*, 6 J. Aesthetic Educ. 53, 54 (Jan.-April 1972).

[96] A "privilegium" was a specific right given to an individual apart from the general rights afforded all persons under the law. The concept arose from Roman law, in which the Emperor could impose special punishments (odious privilegia) or confer special rights (favorable privilegia). *See* Black's Law Dictionary 1079 (5th ed. 1979). *See generally* M. Kaser, Roman Private Law 28 (R. Dannenbring trans. 2d ed. 1968); H. Jolowicz & B. Nicholas, Historical Introduction to Roman Law 29 (3d ed. 1972). The first printing privilege is believed to be that granted by the city of Venice to publisher Aldus Manutius sometime between 1469 and 1495. France followed suit in 1507, and most of Europe adopted the practice subsequently. Generally, the privilegia granted exclusive rights to publishers and prohibited others from printing or selling the works in question. *See* E. Ploman & L. Hamilton, Copyright: Intellectual Property in the Information Age 9 (1980). The policy behind the privilegia, however, appears to have been regulation of trade and a form of governmental censorship, not recognition of moral rights. *Id.* at 10. Dürer frequently sought protection for his artistic rights from government officials. Even after his wife obtained an imperial privilege for greater protection, she was forced to return to the Magistrates of Nuremberg to stop Hans Guldemude from selling impressions of the *Triomph-Wagen* that he had re-engraved from an unauthorized plate. The Magistrates summoned all of the city's booksellers to caution them about selling unauthorized editions. They sent copies to the Magistrates of Strasbourg, Frankfurt, Leipzig, and Antwerp with requests that similar orders be issued for protection in those cities. *See* Streibich, *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, 54-55 (1976) (quoting 2 G. Putnam, Books and Their Makers in the Middle Ages 409, 410 (1897)). There was no universal protection for literary output during and after that time (1450-1650). *Id.* at 55.

Although the recognition of artists' moral rights had been introduced in Europe, the road to their eventual codification was not uninterrupted. The end of the Renaissance and the onset of the Counter Reformation signaled a temporary retrenchment. The experiences of the painter Veronese before the Inquisition illustrates the setback. Inspired by a Council of Trent decree declaring that art must avoid all erroneous teaching, officers of the Inquisition summoned Veronese and demanded to know why his painting, *The Feast in the House of Levi*, included 'irreverent irrelevancies' such as parrots, dwarfs, Germans, buffoons, and halberdiers.[98] The artist replied that his "commission was to ornament the picture as seemed good to me. It was big, and with room for many figures. . . . Whenever an empty space in a picture needs filling up, I put in figures as the fancy takes me."[99] Veronese's response was consistent with the artists' increasingly recognized autonomy, but the Inquisition had the effect of subjugating moral rights to the perceived interests of the church. Veronese was ordered to alter his painting to conform to the officers' standards, which he did at his own expense.

Despite such setbacks, by the end of the sixteenth century artists were acknowledged as individual creators; they were no longer nameless, faceless laborers in an art factory. Works of art had come to be regarded as expressions of artistic personality, not mere extensions of a patron's reputation. As a result, individual artists were able to assert what were the precursors of today's moral rights in their relationships with buyers. Additionally, a limited amount of legal protection had become available. But artists' moral rights were by no means entrenched in the law. Their assertion depended on the weight of the artist's individual reputation and hence, his individual bargaining power. The assertion of these rights, however, led to their articulation in a philosophical framework known as natural law, which eventually resulted in their ultimate acceptance in positive law.

[97] W. Waetzoldt, *supra* note 93, at 8.

[98] W. Durant, The Story of Civilization 683 (1953).

[99] *Id.*

IV. Moral Rights as Natural Law

Pierre Recht has observed, "[w]hen *droit moral* fanatics discuss moral rights, they take the attitude of a religious zealot talking of sacred things, or a Girondin reading the Declaration of the Rights of Man."[100] If that is true, it is because the doctrine of moral rights finds expression in the philosophy of law that looks to the transcendental as its source: natural law. French scholars regard artists' rights as natural rights, deserving protection by a system that developed from a Revolution immersed in natural rights fervor.[101] The more artists became acknowledged as individuals engaged in self-expression, the more they fit within the natural law paradigm. Like a rosebush, Thomas E. Davitt wrote, "man [seeks] to reach the highest development of which he is capable—that is, to seek the attainment of his perfection."[102] This simile communicates the central historic theme of natural law and illustrates the propriety of placing the moral rights of artists in its main stream.

If artists are to create, if they are to reach perfection, if they are to seek their most pronounced development they must be allowed to control the corpus of their creativity. A society that accepts the assumption of St. Thomas Aquinas that "there is in man a natural and initial inclination to good,"[103] axiomatically must allow him to achieve it. Accordingly, such a society will allow an artist to decide when his work is the best it can be and ready to be released. Such a society will allow the artist to take the work back when he realizes he can make it better. It will prevent the artist's work from being debased and perverted, and will afford him the privilege of announcing to the world, "This is my work, and I am pleased with it."

Not surprisingly, France, Italy, and other societies steeped in the natural rights tradition recognize the moral rights of artists. This is nothing more than justice, defined in the Thomistic perspective of natural law as giving each one his due—that is, "that to which each one is ordered according to his natural tendencies toward perfection."[104] Giving an artist his due, however, does not require giving him a property interest; it only requires that he be allowed to control

[100] DaSilva, *supra* note 4, at 7.

[101] Rousseau emphasized the revolutionary elements of natural law and argued for sovereignty of the general will rather than any particular ruler. *See* D. Lloyd, Introduction to Jurisprudence 59-60 (2d ed. 1965).

[102] 1 Southern Methodist Studies in Jurisprudence 30 (A. Harding ed. 1954).

[103] *See* D. Lloyd, *supra* note 101, at 77 (quoting T. Aquinas, Summa Theologica, Qu. 94, art. 2).

[104] W. Luijpen, Duquesne Studies: Philosophical Series 22 87 (1967).

the integrity of his work. The distinction is an important one, for ownership rights and moral rights are separate interests. Ownership is not derived from a natural law theory of aesthetics. It is a separate concept and one that almost all nations, including the United States, protect by means of copyright laws.[105] Moral rights, however, are creatures of the natural law and implicit in their enforcement is the recognition that artists do not desire to keep their creations to themselves. To the contrary, they want to sell their work so that others may enjoy them. Creating such enjoyment, no doubt, is part of the artist's attempt to achieve perfection. Moral rights attempt to insure that the artist will continue to have a relationship with his creation. The buyer has purchased an object that represents the artist's creative expression. The buyer has a property right to the work he has purchased, but the artist has the right to see that the work is not used in an unintended manner.

Commenting on the views of Grotius, Rutherforth explained why the artist's making of a thing does not make him its owner:

> We do not produce the materials: these existed before, and all that we do is to give a new shape or form to them. Now the materials, out of which a thing is made, are either our own property; or they are the property of some other person; or they are the property of no one, but are in common to all. If, before we made the thing, the materials were our own it is plain that, by making the thing, we do not introduce any new or original claim, but only continue our former claim. The materials were our own before the thing was made; and nothing else is our own afterwards: they are still the same materials, but only in a different shape.[106]

According to this rationale, the painter, for example, sells the property rights in the materials with the painting: the oil, the pigment, the canvas, the hair of the brush accidentally affixed to the paint. The doctrine of moral rights does not purport to displace the purchaser's property interest. Rather, it acknowledges a different set of personal rights, those that protect the intellectual and creative elements added by the artist. Thus, moral rights protect the form of a creation and not its substance.

Moral rights have not been widely accepted in the United States since, upon superficial examination, they appear to contradict property rights. In fact, they are not recognized by the 1976 Copyright Act

[105] *See* Da Silva, *supra* note 4, at 8-9.

[106] T. Rutherforth, Institutes of Natural Law 61-62 (1832).

because of the Act's economic foundation.[107] Yet, these same rights are readily understood and accepted by those countries whose social development was, in great part, intertwined with artistic development: the great civilizations that produced DaVinci, Degas and Dürer; the nations that revered art not for its resale value but rather for its ability to glorify the divine and ennoble its patrons; the countries whose "collective consciousness" includes the spirit of a people living and working in common and striving for artistic perfection for centuries.[108] For these cultures, artists' moral rights are manifestations of natural law. For countries such as the United States, they are alien ideas.

The notion of natural rights is apparent even in modern documents of legal protection for artists. Article 6 bis, paragraph 1 of the Berne Copyright Union Convention is clearly predicated on respect for the creator:

> Independently of the author's economic rights, and even after the *transfer of said rights, the author shall have the right to claim* authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.[109]

Similarly, the 1948 Universal Declaration of Human Rights addresses the moral rights of artists and other creators. Article 27, paragraph 2 addresses the issue directly: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[110] Article 22 embodies the Thomistic conception of natural rights, those that facilitate man's striving for perfection:

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.[111]

[107] *See generally* Gabay, *The United States Copyright System and the Berne Convention*, 26 BULL. COPYRIGHT SOC'Y 202, 203-04, 210-16 (1979).

[108] *See* D. LLOYD, *supra* note 101, at 339 (quoting C. VON SAVIGNY, SYSTEM OF MODERN ROMAN LAW (1840)). Savigny was the seminal thinker in the historical school of jurisprudence.

[109] The Berne Convention, art. 6 bis, para. 1 (Sept. 9, 1886, revised in 1908, 1928, 1948, 1967, 1971). 3 COPYRIGHT LAWS AND TREATIES OF THE WORLD (UNESCO 1982), Item H-1, at 3 (Supp. 1971), *reprinted in* M. NIMMER, *supra* note 6, at vol. 4, app. pp. 26-27.

[110] 217 U.N. GAOR at 76, U.N. Doc. A/810 (1948).

[111] *Id.* at 75.

The French Law on Literary and Artistic Property provides that an author enjoys certain rights in his work by virtue of having created it, including "attributes of an intellectual and moral nature. . . ."[112] These laws emphasize the individuality of the artist and his creation. They are premised on the natural law view of man as a reasonable being acting in conformity with his moral nature.[113] In contrast, artists' moral rights are not recognized in the United States where economic history is characterized by mass production and interchangeability, two ideas that de-emphasize individuality.

V. THE UNITED STATES EXPERIENCE: A DIFFERENCE IN TIME AND PLACE

Unlike European countries, the United States has not had the benefit of a long period of artistic development. Rather than following the European progression from guild workshop production to individual artistic creativity, the United States moved toward mass production, making heroes of men like Henry Ford and Frederick Taylor. Legal realism, not natural law, has come to dominate American jurisprudence. Until recently, artistic realism has dominated American aesthetics. It is this legal, aesthetic and economic context that offers some explanation for why artists' moral rights are not protected in this country.

The copyright clause of the Constitution has been interpreted to mean that any rights to be afforded artists in this country are economic property interests, not moral rights. Moreover, the basis for extending these property rights is not the relationship of the artist to his work but rather the interest of society in encouraging creativity. Copyright protection can be viewed as a type of social bribe grudgingly given to induce the artist to continue production. The copyright clause vests Congress with the power to pass legislation "[t]o promote the Progress of Science and the Useful Arts."[114]

British history offers an explanation for this approach to copyright. Artists in England did not enjoy the same developmental period as their peers in other European nations. In his 1750 *Notes on Universal History*, Turgot wondered why England fostered almost no renowned artists for 200 years, while artists in France, Germany, Italy and Holland were flourishing. His conclusion was that the Puritans

[112] UNESCO COPYRIGHT LAWS & TREATIES OF THE WORLD (1976); French Law, *supra* note 1, art. 1.

[113] G. PATON, A TEXT-BOOK OF JURISPRUDENCE 104 (4th ed. 1972).

[114] U.S. CONST. art. I, § 8, cl. 8.

were to blame.[115] Distrustful of anything in religion that was not an expression of pure faith, the Puritans destroyed not only religious art but also the small workshops that produced religious crafts. In other countries, as has been discussed, these workshops served as training centers for artists. As Robert Nisbet, a prominent sociologist, recently wrote in an essay on the phenomenon of genius, "[t]o have destroyed the many craft ateliers in England was to have destroyed the roots of the art of painting. No painters of talent were thenceforth even possible, no matter how many boys of potential talent were born."[116] The point made by Nisbet and Turgot is that "genius" results from the close interaction of a multitude of people working in the same milieu. As a result of the Puritans' intervention, Britain lost its training ground for artists, and consequently the development of great talent was stunted. British artists were thus prevented from making the same legal inroads as their colleagues on the continent.

The idiosyncracies of the common law and courts of equity, however, provided for some artists' rights in Great Britian. British legal theorists have argued that equity courts adequately protect interests that other countries protect through moral rights statutes.[117] Indeed, under the common law system in Great Britain, the sale of intellectual property is governed by contract law, modified for this special purpose.[118] None of this, however, is explicit. Thus, when the United States began considering its system of artists' rights, it acted out of a tradition that did not include any specific articulation of those rights.

The early American political and social experience does not appear to have focused on artistic expression either. The settlers were not

---

[115] *See* Nisbet, *Genius*, 6 WILSON Q., No. 5, at 98, 104-05.

[116] *Id.* at 105.

[117] *See generally* Marvin, *supra* note 16, at 675-76.

[118] Because of the special nature of a contract for artistic or literary property, British courts are disposed to imply special conditions to protect the artist or author. *Id.* at 684. In an American decision, Judge Seabury articulated this idea:

> Even the matter of fact attitude of the law does not require us to consider the sale of the rights to a literary production in the same way that we would consider the sale of a barrel of pork. Contracts are to be so construed as to give effect to the intention of the parties. The man who sells a barrel of pork to another may pocket the purchase price and retain no further interest in what becomes of the pork. While an author may write to earn his living, and may sell his literary productions, yet the purchaser, in the absence of a contract which permits him so to do, cannot make as free a use of it as he could of the pork which he purchased.
>
> The rights of the parties are to be determined primarily by the contract which they make, and the interpretation of the contract is for the court.

Clemens v. Press Pub. Co., 67 Misc. 183, 183-84, 122 N.Y.S. 206, 207-08 (Sup. Ct. App. Term 1910)(Seabury, J., concurring).

consumed by a fascination with aesthetic achievement. Commerce was their principal concern. The colonists searched for ways to improve their economic lot and devoted their energies to that goal. Europeans, long secure in their maturity, devoted much of their leisure time to appreciation of the arts. The upper classes enjoyed them, encouraged them, and purchased them. In the United States,

> [t]he overwhelming mainstream consisted of commercial expansion, westernization, industrialization, and, for millions of immigrants, Americanization. The expansion and development of the United States served the same functions in using up the energy released by economic development as did the arts, self-indulgence, leisure, warfare and politics in Europe.[119]

Unlike European artists, who had gained reputations as the creative geniuses of their countries,[120] Indian artists were ridiculed and reviled. Native Americans were thought to be heathens and primitives whose creations could not glorify the divine or enhance the reputation of a patron. Moreover, the Indian was the enemy; the hostile force to be conquered in pursuit of manifest destiny.[121] This deterred the development of any broad-based spirit of appreciation of native American art and artists, and militated against a concern for the protection of artists and their moral rights.

Westward expansion and economic development were the desiderata of America. The former allowed little opportunity for artistic development and appreciation, while the latter offered little tolerance for them. Winchester's interchangeable parts sowed the seeds of mass production. Henry Ford's assembly line reaped the harvest. Frederick Taylor's scientific management expanded the field. As one historian said in describing the frenzy for all things efficient:

> [I]ncreased industrial competition and a narrow margin of profit led employers to intensify the application of scientific management to the most efficient use of materials, labor, and machinery. Billions of dollars were saved by industry through the processes of "standardization" and "simplification."[122]

The artist, on the other hand, has historically played a leading role in opposing certain aspects of a technological society, insisting on the

---

[119] Bensman & Vidich, *supra* note 95, at 56-57.

[120] *See* M. GILMORE, *supra* note 73, at 234.

[121] American Indians are still far from acculturated in modern America. *See* M. GORDON, ASSIMILATION IN AMERICAN LIFE 78, 108-09 (1964).

[122] 2 H. WISH, SOCIETY AND THOUGHT IN MODERN AMERICA 439-40 (2d ed. 1962).

value of individual creativity and lack of regimentation.[123] The conflict between art and technology was patent during this period, and the more powerful technological forces prevailed.

American ideas about art, lacking the long developmental period of the Europeans', continued to value verisimilitude. A good picture was one that accurately portrayed something else, not one that displayed a different way of looking at the world. This distinction is important because it creates a dichotomy between a utilitarian view of art and one that recognizes the intrinsic value of expression. A society that only appreciates the ability to recreate something is less likely to confer moral rights upon the artist, who is merely reproducing an object that already exists. On the other hand, a society that recognizes the unique creativity which goes into every artistic work is more likely to extend moral rights to the artist because the artist is considered to have made something unique. Since the object of his activity was not to copy something from nature but to add something to nature by insight and talent, he has a continuing interest in his creation. America, however, continued to cling to realism as the artistic apogee long after Europe had left it behind.[124] The European nations had progressed beyond that stage, and their laws began to reflect that advancement through the recognition of artists' moral rights.

[123] Nemser, 2 FEMINIST ART J. 19-21 (Winter 1973). *See* H. ARENDT, BETWEEN PAST AND FUTURE 197-226 (1961) (Tension exists between the producers of art and society.). *Cf.* Bell, *The Cultural Contradictions of Capitalism*, 6 J. AESTHETIC EDUC. 11 (Jan.-April 1972)(Tension has existed, but artists have become the dominant party in modern American culture, shaping public tastes rather than being shaped by them.).

[124] This is not to say that inspiration to recreate an existing object realistically is necessarily devoid of artistic insight. Artist Leonard Baskin, who primarily produces renderings of human figures and faces, distinguishes between naturalism, which he defines as "the transference to canvas of retinal impressions," and necessary distortion, a concept developed by Jacob Landau acknowledging the insights added by artists who use natural objects as their subjects. Baskin decries naturalism as "useless and uninforming" but applauds necessary distortion as properly eliminating the confusion between subject and content. Baskin says:

> Works of art in their myriad manners probe at reality. Reality is the totality of human experience, nature, all personal-emotional relationships, the visible and invisible links and synapses, to wit, the structures of being. No artist can deal with this whole; he does in fact apportion to himself a segment of reality. An example: Two artists observe a sunset. One declares the sun is moving around the earth; the other says, no, the earth is circling the sun. From an observable phenomenon the wise artist employs distortion to achieve reality. Artists have universally and necessarily distorted in achieving their vision. Not to distort is not to invent; not to distort is not to magnify or diminish, or simplify or make complex.

L. BASKIN, SCULPTURE, DRAWING AND PRINTS 14 (1970).

In the 1860's, a group of painters known as the Impressionists began to experiment with a new art form that was slightly removed from realism. Instead of mixing colors and applying them to the canvas, they juxtaposed the pigments, creating pictures that blurred when viewed up close but shimmered at a distance. Reality, although remaining the Impressionists' inspiration, was depicted as influenced by each artist's intuition. The intervention of the artist's viewpoint into his work was a radical change, for it offered convincing evidence of the importance of the artist's subjective judgments in his work.[125] Although even the most realistic painting includes an interpretative element, as some interpretation is necessary to convert three dimensions into two, the Impressionists transcended the ordinary level of interpretation. Van Gogh, in painting his bedroom, revealed the new role of the artist: "It's just simply my bedroom, only here colour is to do everything and, giving by its simplification a grander style to things, it is to be suggestive here of *rest* or of sleep in general. . . ."[126]

While Impressionism thrived in France, realism dominated America and Great Britain. The difference in philosophy of these schools of art is illustrated by the picture known as Whistler's Mother. James Whistler, an American Impressionist, painted the picture well-known by that title. As an expression of his creativity, it was called *An Arrangement in Gray and Black.*[127] Both the American and British public saw it as a sympathetic portrait of a family member. Whistler saw it as a juxtaposition of colors that used his mother as a motif.[128] Impressionism belonged to a world beyond America—the avant garde of Europe.

Whistler's paintings led to celebrated legal battles over his rights and reputation. As a reflection of his European training, Whistler espoused art for art's sake and insisted on the separation of aesthetics from morals and storytelling. John Ruskin, a traditionalist, criticized his work, saying, "I have seen and heard much of Cockney impudence before now, but never expected to hear a coxcomb ask two hundred guineas for flinging a pot of paint in the public's face." The painter sued but won only a farthing in damages.[129] In France, however,

[125] H. WISH, *supra* note 122, at 376.

[126] H. READ, A CONCISE HISTORY OF MODERN PAINTING 25 (3d ed. 1974).

[127] H. WISH, *supra* note 122, at 376-77.

[128] *Id.* at 386. Cezanne distinguished between a "motif" (a subject in effect) and an "abstraction" (the incomplete representation of the painter's field of vision, or a cone into which objects focused upon fall with a sense of order or cohesion). H. READ, *supra* note 126, at 18.

[129] H. WISH, *supra* note 122, at 376-77. In France, the law now provides an artist with recourse against excessive criticism, affording him an opportunity to respond. *See* Judgment of

Whistler was more successful in asserting his artistic rights. Whistler had been commissioned to paint a portrait of Lady Eden for 100 to 150 guineas. He accepted payment of the lesser amount, but complained that the picture was worth more. While the portrait was on public display in an exhibition of his works, and before Lord Eden took delivery of it, Whistler expressed dissatisfaction with the canvas and painted over the part that contained Lady Eden's face. Lord Eden sued for restoration of the picture and delivery. The lower court ruled in his favor, but the Paris Court of Appeal reversed, calling the contract executory because Eden had not taken possession of the work. Thus, Whistler was not required to restore the painting or give it up. He was enjoined only from using it in any other manner and was ordered to return the fee plus damages. The Court of Cassation affirmed this expression of the right of disclosure.[130]

In America, the 1913 Armory Show brought Postimpressionism and other modern art to New York. It shocked the viewing public because the prevailing concept of art in America was realism. In the nineteenth century, Winslow Homer and Thomas Eakins established realism as the American tradition for artistic expression. Homer concentrated on landscapes and realistic paintings of New England, primarily painting what he saw and knew thoroughly. Eakins emphasized description in his images, painting boat races, prize fights and portraits.[131] Further into the twentieth century the mainstream of American art continued to follow the realist tradition, although various artists travelled in a number of tributaries. The Ash Can School, for example, consisted of social realists who portrayed the city slums. They rejected the doctrine of art for art's sake in favor of a utilitarian idea of raising people's social consciousness.[132] Through World War II, painters such as Ben Shahn led the social realists to preeminence in America. Their realism ceased to be of the pure variety and their personalities thus became evident in their work. However, the realist tradition continued, as the artists' images remained tied to existing subjects. Meanwhile, Europeans, such as Picasso, were venturing even deeper into abstraction.[133]

June 17, 1899, Crim., 1899 Recueil Périodique et Critique [D.P.] I 289, *cited in* Marvin, *supra* note 16, at 693 n.62.

[130] Judgment of May 14, 1900, Cour de Cassation, 1900 Recueil Périodique et Critique [D.P.] I 500, *cited in* Sarraute, *supra* note 4, at 467-68.

[131] H. WISH, *supra* note 122 at 378.

[132] *Id.* at 379.

[133] H. READ, *supra* note 126, at 67-104.

The artists pushing the frontiers of the visual media were concentrated in Europe. Thus, America's acceptance of art as the expression of pure individualism was retarded. This condition enhanced Europe's ability to appreciate art for art's sake and to acknowledge a legal relationship between the artist and his work. Groups of artists formed in Paris, Munich, Milan and other cities across the continent. Picasso and Braque promoted cubism in Paris, an extension of Cezanne's idea that reality could be broken down into cylinders, spheres and cones.[134] In Germany, Hugo Ball and Richard Huelsenbeck laid the foundation for Dadaism, a movement that disclaimed any association with realism. Huelsenbeck wrote:

> Archipenko, whom we honored as an unequalled model in the field of plastic art, maintained that art must be neither realistic nor idealistic, it must be true; and by this he meant above all that any imitation of nature, however concealed, is a lie. In this sense, Dada was to give the truth a new impetus. Dada was to be a rallying point for abstract energies and a lasting slingshot for the great international artistic movements.[135]

Only since the end of World War II has abstraction become accepted in American art. This is not to say that abstract art is better in any aesthetic sense than representational art, only that as art diverges from reproduction, society perceives it differently. The career of Mark Rothko illustrates this transition, as he moved from representation in the 1920's and 1930's, to complicated patterns of abstraction in the 1940's; through large, flat, cool areas of color in the 1950's and 1960's, and finally to huge brooding canvasses of a few somber hues at the end of his career. Rothko, too, had removed himself from the realm of reproduction and had attempted to achieve the most individualistic painting of all: an idea, not the representation of an idea, but the idea itself. He wrote:

> The progression of a painter's work, as it travels in time from point-to-point, will be toward clarity: toward the elimination of all obstacles between the painter and the idea and between the idea and the observer. As examples of such obstacles, I give (among others) memory, history or geometry, which are swamps of generalization from which one might pull out parodies of ideas (which are ghosts) but never an idea in itself. To achieve this clarity is, inevitably, to be understood.[136]

[134] *Id.* at 17.

[135] *Id.* at 117.

[136] D. WALDMAN, MARK ROTHKO, 1903-1970, A RETROSPECTIVE 61 (1978).

America has only recently come to understand this notion. A painting that is an idea owes its existence to the thinker, not to any object that is pictured. The artist does not simply reproduce an external object. He embodies his internal cognition. Sociologist Daniel Bell believes that the United States has not only accepted the artist's role, but has undergone a dramatic role reversal such that the artist now shapes public taste rather than being shaped by it. Painters, writers, and filmmakers, Bell says, now dominate the audience instead of being dominated by it.[137] Indeed, America has co-opted the individuality of the artist and made self-actualization a goal for everyone, so much so that the current generation is thought to represent an age of narcissism. By all signs, the United States appears ready to acknowledge the moral rights of artists; however, powerful impediments remain in the way.

The timing of America's transformation has come long after the entrenchment of pervasive economic interests. Art is big business. Millions of dollars pass through the auction houses as record prices are set month after month. A distribution system has developed in which multiple layers of middlemen compete for the opportunity to secure profits by association with the artist's work; these middlemen include publishers, agents and gallery owners. Some even violate the unmistakable intention of deceased artists to exercise their right of withdrawal once a plate has been used to produce a maximum number of quality prints. Artist Leonard Baskin complains:

> Masses of Kollwitzs and Goyas and Rembrandts are distributed; weak, pale emanations of their former selves, distorting beyond recognition those artists' intentions. These ghosts, cheap and plentiful, betray the artists they mean to extoll; but business is business even in the dried and shriveled coppers that once bespoke their glory. And prints are pulled from canceled plates. When a limited edition is achieved, the plate is *destroyed* by lines arbitrarily struck across its face, canceling it in effect. But at dealers' urging, the cancel lines can be cunningly traced to avoid distorting the print's intent.[138]

The visual arts have also become entrapped in a support system that infringes upon their autonomy. Art groups and artists clamor for business and government support, yet both of these sources of patronage, to a large extent, value art economically. The corporate chairman wants to support art which will attract audiences, enhance his company's reputation and, ultimately, its profitability. As a result, the most popular work is encouraged and the artists on the frontiers are left unsupported. Governments are developing "worthiness indices" which they use to make judgments concerning the priority which should be accorded to artists asking for public support.[139] A critic of this system argues that "one doesn't measure the value of the Colorado River or the Teton Mountains by how many tourists they attract or how many hot dog stands they support; by the same reasoning, the arts must not be subject to economic or numerical criteria."[140]

In their attempt to gain moral and economic rights, artists have encountered fierce opposition from gallery owners, who have opposed any attempt to extend these rights to the United States. They succeeded in stopping congressional legislation that would have introduced *droit de suit* nationwide,[141] and not only opposed California's recent legislation,[142] but have been less than diligent in complying with it.[143]

The fact that California was the first state to recognize artists' moral rights is understandable. Unlike most other states, California has a large population of artists. They contribute to California's economy and are recognized as unique and creative individuals with special legal needs. New York, another state with a large artistic population, has recently enacted its own moral rights legislation.[144] However, convincing states that do not have strong artistic communities to enact such laws is more problematic.

VI. Conclusion

The doctrine of artists' moral rights is an outgrowth of the social, cultural, economic and philosophical history of Western Europe. The early emergence of artists as individuals and the recognition of their work as valuable, for other than commercial reasons, led toward the legal recognition of artists' rights. The United States, in contrast, did not experience this development until well into the twentieth century. Its early years were dominated by expansionist and economic con-

[137] Bell, *supra* note 123, at 17-18.

[138] L. Baskin, *supra* note 124, at 11-12.

[139] Swaim, *The Arts and Government: Public Policy Questions*, 12 J. Aesthetic Educ. 43, 45 (Oct. 1978).

[140] *Id.* at 47 (quoting Brustein, *Can the Show Go On?*, N.Y. Times Mag., July 10, 1977, at 59).

[141] *See generally* Crawford, *supra* note 50, at 84.

[142] Cal. Civ. Code § 986 (West 1982 Supp. 1983).

[143] Camp, *supra* note 50, at 149.

[144] *See* N.Y. Gen. Bus. Law § 228 (McKinney 1983).

cerns. Artists were not considered nearly as important to the social fiber as they were in Italy, France and Germany; thus, their concerns did not pervade the collective consciousness of the people. Today, America is attuned to the artists' ethic and emphasis on individuality. Self-expression seems to have become a national goal, as if the population has read about "the pursuit of happiness" anew. Even so, because the United States was so late in acknowledging the unique role of the artist, significant obstructions stand in the way of an American system of artists' moral rights. European nations were able to evolve such recognition as a result of their long history of artistic development. This development occurred before economic and business interests in art had matured, and, as a result, acknowledgment of moral rights was not nearly so difficult. The social climate of the United States is ripe for the moral rights doctrine to arise, but the powerful economic interests that have become associated with the arts are likely to prevent any widespread legal recognition of artists' moral rights for years to come.