



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles
Entertainment Law Review

Volume 17 | Number 1

Article 2

9-1-1996

When Museums Act like Gift Shops: The Discordant Derivative Works Exception to the Termination Clause

Jill I. Prater

Follow this and additional works at: <https://digitalcommons.lmu.edu/elr>



Part of the [Law Commons](#)

Recommended Citation

Jill I. Prater, *When Museums Act like Gift Shops: The Discordant Derivative Works Exception to the Termination Clause*, 17 Loy. L.A. Ent. L. Rev. 97 (1996).

Available at: <https://digitalcommons.lmu.edu/elr/vol17/iss1/2>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

WHEN MUSEUMS ACT LIKE GIFT SHOPS: THE DISCORDANT DERIVATIVE WORKS EXCEPTION TO THE TERMINATION CLAUSE

Jill I. Prater*

I. INTRODUCTION

American law has a long history of protecting the economic interests of artists and authors. The Constitution, for example, empowers Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹ This Article will discuss how copyright law implements the policy of protecting the economic rights of artists. Based on this underlying policy of copyright, this Article argues that the derivative works exception to the termination clause² of the Copyright Act of 1976³ should not apply to purely commercial derivative works such as posters and notecards commonly sold by museum gift stores.

The market for reproductions of fine art and derivative works, such as those found in museum gift shops, is a lucrative one. For the fiscal year 1993-1994, the New York Metropolitan Museum of Art had gross sales of \$82 million.⁴ That figure included \$28.7 million in sales in the main building, \$22.7 million in sales through mail-order catalogs, \$22.8 million through satellite stores, and \$7.8 million through wholesale sales.⁵

Similarly, the Boston Museum of Fine Arts had an impressive year in sales with an estimated \$35 million in revenue from the catalog, shops, and wholesale in 1994.⁶ Even exhibitions at smaller museums profit from sales of derivative works. An exhibit including works by Cezanne and Matisse at the Art Gallery of Ontario “rang up nearly \$4 million (\$5.6 million

* B.A., University of Louisville, 1991; J.D., Harvard Law School, 1995.

1. U.S. CONST. art. I, § 8, cl. 8.

2. 17 U.S.C. § 203(b)(1) (1994).

3. 17 U.S.C. §§ 101-810 (1994).

4. Telephone Interview with Valerie Troyanski, Manager of Merchandising Activities, The Metropolitan Museum of Art (Apr. 12, 1995).

5. *Id.*

6. Telephone Interview with Susan Russell, Director of Product Sales and Marketing, Boston Museum of Fine Arts (Apr. 12, 1995).

Canadian) in sales of T-shirts, posters and other memorabilia.”⁷ Many of the larger museums have their own production facilities to control quality and increase profits.⁸ Selling reproductions in the form of posters, notecards, and T-shirts is definitely big business for museums.⁹

The typical troublesome scenario is one in which an unestablished artist is fortunate enough to have a museum interested in purchasing a piece of her work. In this situation, an artist may be unaware of what rights she has under copyright law for her work.¹⁰ Due to this lack of legal education and weak bargaining position, the artist may sign whichever contract the museum presents to her. This contract usually confers all rights in the work to the museum. For example, the following sample contract¹¹ clearly intends to favor museums:

I. Transfer of Copyright

In consideration of the Acquisition by (name of museum) of my (medium) entitled _____ I hereby relinquish and transfer to the said (name of museum) all my right, title and interest in copyright which I have or may be deemed to have in said work and more particularly transfer the exclusive rights of reproduction, adaptation and distribution to said (name of museum).

(Witness, Seal for Notary, and Comment Omitted)

Terms and Conditions for Purchase of Works of Art

If this work has been copyrighted the museum will not purchase it unless the vendor and the owner (in most cases the artist) of the copyright interests of the rights of reproduction, adaptation,

7. *Record numbers see Barnes Toronto exhibit*, UPI, Jan. 6, 1995, available in LEXIS, Nexis Library, UPI File.

8. *Museum Licensors Focus on Home Furnishings*, Licensing Letter, EPM Communications, Inc., May 1, 1993, available in 1993 WL 2557092.

9. The author realizes that only a fraction of these sales would be affected by an artist's ability to terminate a right to produce derivative works from a piece the artist sold to a museum when she was younger and less well-known.

10. Sarah A. Smith, Note, *The New York Artists' Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL L. REV. 158, 165 n.40 (1984).

11. Nicholas D. Ward, *Copyright in Museum Collections: An Overview of Some of the Problems*, 7 J.C. & U.L. 297, 317-20 (1980-81).

and distribution agree to transfer the exclusive rights of reproduction, adaptation and distribution to the museum

II. Deed of Conveyance and Dedication

This Deed of Conveyance and Dedication is made this ____ day of _____ in the year one thousand nine hundred and _____ (19__) by and between (name of artist and address) hereinafter known as the First Party and (name of museum and address) hereinafter known as the Second Party.

WITNESSETH, That in consideration of the Second Party's agreement to display the hereinafter enumerated work publicly, for a period to be determined by the Second Party, and to distribute such reproductions of said work as Second Party may wish to produce, when and as it may appear appropriate to the Second Party, the First Party does hereby grant, convey and forever release unto the Second Party, absolutely, the following described pictorial, graphic or sculptural property: _____ together with all rights privileges and appurtenances thereunto appertaining, including any and all copyright interests in said work which First Party has or may be deemed to have, including more particularly the rights of reproduction, adaptation, distribution and display. . . .

Comments:

1 . . . If for any reason the artist's waiver of right is found inoperative, the deed in the alternative transfers exclusive rights to the museum. . . .¹²

As this sample contract demonstrates, the artist is required to transfer all possible interests in the work to the museum.¹³ In exchange, the

12. *Id.*

13. The author recognizes that not all museums require such onerous contracts transferring all copyright interest to the museum. The Smithsonian Institution is probably a good example, although its policies may be reflective of its overall educational mission. Interview with Ronald F. Cuffe, Manager, Revenue, Concessions and Business Activity, Office of Contracting and Property Management, Smithsonian Institution, in Washington, D.C. (Oct. 25, 1994); Interview with Billie Munroe, Contract Negotiator, Revenue, Concessions and Business Activity, Office of Contracting and Property Management, Smithsonian Institution, in Washington, D.C. (Oct. 25,

museum merely agrees to display the work for a period of time solely at its discretion. Notwithstanding the difficult legal jargon, this one-sided contract is also being negotiated between a museum agent experienced in making contracts and an artist, who is usually unaware of the legal rights pertaining to her work.¹⁴

In light of the purely commercial nature of this enterprise, this Article argues that derivative works of the type currently sold in museum gift shops should not be exempt from the termination clause of the Copyright Act of 1976. Part II examines the underlying policy and history of the 1909 and 1976 copyright acts. Part III focuses on the nature of derivative works and their history in conjunction with the termination clause of the Copyright Act of 1976. This section of the Article then discusses related copyright issues and finds an underlying rationale to protect the economic interests of artists. Part IV explores the doctrine of fair use, citing recent cases as examples of this policy in action. Part V covers the United States concept of resale royalties and the European *droit de suite*. Part VI discusses the issues and arguments in the current American debate over moral rights for artists. In conclusion, this Article suggests a change in the current application of the termination clause.

II. THE POLICY UNDERLYING THE COPYRIGHT ACTS OF 1909 AND 1976

The Constitution grants Congress the authority to protect the economic interests of the works of artists and authors.¹⁵ The rationale behind securing these economic interests is that artists and authors will have an incentive to create if they are assured a "limited monopoly in the fruits of their labors."¹⁶ A secondary interest in preserving the limited monopoly is that artists and authors will be given incentives "to publish innovation[s] for the common good."¹⁷ The Supreme Court explicitly noted the economic basis of copyright in the landmark case *Mazer v. Stein*,¹⁸ stating: "[t]he economic philosophy behind the clause empowering

1994); Interview with Stephen E. Weil, Deputy Director, Hirshhorn Museum & Sculpture Garden, in Washington, D.C. (Oct. 26, 1994).

14. Smith, *supra* note 10, at 165 n.40.

15. U.S. CONST. art. I, § 8, cl. 8.

16. Virginia E. Lohmann, Note, *The Errant Evolution of Termination of Transfer Rights and the Derivative Works Exception*, 48 OHIO ST. L.J. 897, 898 (1981). *But cf.* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' Art. I, § 8, cl. 8.").

17. See CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61, 66 (2d Cir. 1994).

18. 347 U.S. 201 (1954).

Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Sciences and useful Arts.'"¹⁹ Thus, the limited monopoly serves the dual purposes of protecting an artist's economic interests and encouraging the production of innovations for the public.

The Copyright Act of 1976 (the "1976 Act") governs current copyright law.²⁰ Exclusive rights reserved to the artist²¹ are delineated in § 106 as follows:

Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.²²

These basic rights of reproduction, preparation of derivative works, distribution of copies, public performance, and display clearly show the intent to reserve to an artist a limited economic monopoly in the work. The Copyright Act of 1909 (the "1909 Act"), while not as comprehensive as the 1976 Act, was an improvement compared to its predecessors because it

19. *Id.* at 219.

20. 17 U.S.C. §§ 101-810 (1994).

21. Although these copyrights belong to various kinds of "authors" of copyrightable work, this Article will refer primarily to artists with the understanding that the law does not single out visual artists for treatment different from that of other artists, including literary artists or musical artists.

22. 17 U.S.C. § 106 (1994).

increased the length of protection to twenty-eight years.²³ In addition, under the 1909 Act, an artist could choose to renew the copyright upon expiration of a twenty-eight year term. The 1976 Act changed this renewal system²⁴ to a set term system.²⁵ The current term is defined as the life of the artist plus an additional fifty years.²⁶

The renewal provisions of the 1909 Act were drafted specifically to protect the economic value of an artist's work that might not be recognized until years after the artist had sacrificed her rights through contracting. The legislative history of the 1909 Act illustrates this protective stance of the legislators toward the artist:

It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term . . . so that he could not be deprived of that right.²⁷

Renewal terms were designed to protect unestablished artists who, having relatively little bargaining power, may have struck imprudent bargains at early points in their careers. Having a right in renewal was thought to provide the artist or her heirs the ability to renegotiate for better terms after the work had been exploited in the market.²⁸

Unfortunately, the Supreme Court's holding in *Fred Fisher Music Co. v. M. Witmark & Sons* severely undermined the underlying concept of the renewal provision.²⁹ In that case, the authors of the song *When Irish Eyes Are Smiling* assigned both their original copyright and renewal rights in the song to the publisher.³⁰ The Court found that under the 1909 Act, the authors were able to sign away their renewal rights during the original term of the copyright.³¹ This holding harmed those authors whom the 1909 Act specifically sought to protect because it allowed them to waive their

23. 17 U.S.C. §§ 1-216 (repealed 1976). This version of the 1909 Act was replaced by the comprehensive Copyright Act of 1976.

24. See 17 U.S.C. § 24 (1970 & Supp. V 1974).

25. 17 U.S.C. § 302 (1994).

26. *Id.*

27. H.R. REP. No. 60-2222, at 14 (1909).

28. Daniel A. Saunders, Comment, *Copyright Law's Broken Rear Window: An Appraisal of Damage and Estimate of Repair*, 80 CAL. L. REV. 179, 185 (1992).

29. 318 U.S. 643 (1943).

30. *Id.* at 645.

31. *Id.*

economic interests permanently in the face of poor bargaining positions.³² In response to the *Fred Fisher* holding,³³ Congress eventually adopted the 1976 Act with the set term of the life of the artist plus an additional fifty years.³⁴ Other major influences in the decision to enact the 1976 Act included the longer life span of people, and rapidly developing communication technology, which expanded the commercial life span of the works.³⁵

III. THE TERMINATION CLAUSE AND DERIVATIVE WORKS EXCEPTION

A. *The Termination Clause*

The termination clause of the Copyright Act of 1976 continues the policy of protecting the economic rights of artists.³⁶ The termination clause allows artists who have assigned their copyrights in a work to reclaim those rights by giving written notice to the copyright owner. This right to terminate vests thirty-five years after the date of the assignment, during which time the commercial value of the work has had a chance to be exploited.³⁷ The termination clause reads in pertinent part:

(a) CONDITIONS FOR TERMINATION—In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination . . .

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant . . .

(4) The termination shall be effected by serving an advance notice in writing . . .

(5) Termination of the grant may be effective notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

32. Lohmann, *supra* note 16, at 900–01.

33. *Id.* at 901.

34. 17 U.S.C. § 106A(d) (1988 & Supp. II 1990).

35. H.R. REP. No. 94-1476, at 47, 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5660, 5664.

36. 17 U.S.C. § 203 (1994).

37. *Id.*

(b) Effect of Termination—Upon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the author³⁸

The House Committee Report again noted Congress' intent to protect artists from poor bargains:

[The termination provisions] are based on the premise that the reversionary provisions of the [1909 Act] on copyright renewal (17 U.S.C. § 24) should be eliminated, and that the proposed law [1976 Act] should substitute for them a provision safeguarding authors against unremunerative transfers. A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited.³⁹

Specifically, Congress restricted the ability of artists, saddled with weaker bargaining power, to waive future interests in their work through the termination clause.⁴⁰ By making this right non-waivable, Congress reversed the unwise policy wrought by the *Fred Fisher*⁴¹ decision and precluded this right from being taken to the bargaining table.

Additionally, the 1976 Act mooted a common law rule widely known as the *Pushman* presumption.⁴² In *Pushman v. New York Graphic Society, Inc.*,⁴³ the New York Court of Appeals held that there is a presumption upon the sale or transfer of a copyrighted work that all the copyright interests in that work were also conveyed with the original sale, whether explicitly mentioned or not.⁴⁴ Section 202 of the 1976 Act explicitly overturns that presumption.⁴⁵ In fact, the House Committee Report refers specifically to overruling the *Pushman* decision.⁴⁶ This statute only served to further the economic interests of the unwitting artist selling her work, but made no reference to the transfer of any copyrights to the buyer of such work.

38. *Id.*

39. H.R. REP. No. 94-1476, at 124 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5739-40.

40. 17 U.S.C. § 203 (a)(5) (1994).

41. 318 U.S. 643 (1943).

42. MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 115 (1985).

43. 39 N.E.2d 249 (N.Y. 1942).

44. *Id.* at 251.

45. MALARO, *supra* note 42, at 115 n.226.

46. H.R. REP. No. 94-1476, at 124 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5739-40.

B. *The Derivative Works Exception*

The termination clause of § 203 was a hard-won compromise.⁴⁷ Professor Jessica Litman describes the tortuous negotiations that took place over the entire 1976 Act between major players, such as the Motion Picture Association of America; the American Society of Composers; Authors and Publishers; the Authors League of America; the Music Publishers Association of the United States; and the American Textbook Publishers Institute.⁴⁸

The resulting termination clause carved out an exception for those derivative works⁴⁹ produced under the original grant of copyright. The exception came to be known as the derivative works exception,⁵⁰ and was the subject of a particularly vociferous debate. The exception is embodied in § 203 (b)(1):

A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.⁵¹

Consider the lesser-known artist who sold her work to a museum, along with all accompanying copyrights in the work. Under this clause, if she later became famous and wished to terminate the original transfer of the rights to prepare derivative works or reproductions to recoup the commercial value from those rights, she could not stop the museum from producing whatever derivative works it has already prepared.

The Motion Picture Association of America and other special interest groups battled for the derivative works exception.⁵² Movie producers were primarily concerned with purchasing a copyright in a story and making it

47. Jessica D. Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857, 891–93 (1987).

48. *Id.* at 865–67. One may additionally note a prominent lack of representation of any such organized voice for visual artists. To this author's knowledge, no such lobbying organization exists for visual artists.

49. A derivative work is defined as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101 (1994).

50. Litman, *supra* note 47, at 893.

51. 17 U.S.C. § 203(b)(1) (1994).

52. Litman, *supra* note 47, at 893.

into a movie, only to pay exorbitant sums later, because the story's author could terminate the copyright transfer and hold out during renegotiations.⁵³

Their concern was well-founded, because such a case actually occurred with a copyright that was governed by the 1909 Act and its renewal provisions. In *Stewart v. Abend*,⁵⁴ producers of the movie *Rear Window* owned the copyright to the story on which they based the motion picture.⁵⁵ Along with the original transfer of copyright, the parties also agreed to transfer the renewal term.⁵⁶ The movie was made during the original copyright term.⁵⁷ Justice O'Connor, writing for the Court, held that because the author of the story had died before the renewal rights had vested, his statutory successors were entitled to the reversion of those rights, notwithstanding the author's contract to transfer the renewal rights.⁵⁸ By protecting the author's right to renegotiate as provided by the renewal rights, the Court found that the owners of the derivative work (the producers) did not retain the right to continue exploiting the film.⁵⁹ This holding enforced Congress' intent to reserve future economic benefit to the artist by creating the renewal term.

Congress addressed this same issue in §§ 203 and 304 of the 1976 Act.⁶⁰ In the House Committee Report, Congress explained the operation of § 304:

[U]nder the [1909 Act] renewal provisions, any statutory beneficiary of the author can make a valid transfer or license of future renewal rights, which is completely binding if the author is dead and the person who executed the grant turns out to be the proper renewal claimant. Because of this, a great many contingent transfers of future renewal rights have been obtained from widows, widowers, children and next of kin, and a substantial number of these will be binding. After the present twenty-eight year renewal period has ended, a statutory

53. *Id.*

54. 495 U.S. 207 (1990).

55. *Id.* at 212.

56. *Id.*

57. *Id.*

58. *Id.* at 207-08.

59. *Id.*

60. 17 U.S.C. §§ 203, 304 (1994). Section 304 deals with the termination of transfer for those works originally prepared under the 1909 Act and subject to renewal terms of copyright. H.R. REP. No. 94-1476, at 140-41 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5756-57.

*beneficiary who has signed a disadvantageous grant of this sort should have the opportunity to reclaim the extended term.*⁶¹

Here, Congress explicitly noted its intent to protect the economic interests of authors in their works as well as the interests of their statutory successors. Congress, however, also recognized the interests of owners of the derivative works. Barbara Ringer, then Register of Copyrights, explained:

[I]n fairness to the owner of the derivative work, and to avoid depriving the public of access to derivative works in this situation, a “derivative works exception” should be written into both §§ 304 and 203. The purpose of the exception was to keep the derivative work in circulation and not to deprive the owner of the derivative work of the use of its own property. The sole beneficiary of the exception was intended to be the owner of the derivative work who wanted to continue utilizing it.⁶²

Thus, to give protection to both parties, the 1976 Act distinguishes the copyright in the original work and the copyright in a derivative work as follows:

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.⁶³

Given these definitions, it is understandable why the motion picture industry sought to protect its interests in producing films which are often based on already copyrighted stories. A motion picture creates a new, separately copyrightable work that requires authorship in the same sense as the original story.⁶⁴ Indeed, the definition of derivative works in the 1976

61. H.R. REP. No. 94-1476, at 140-41 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5756-57 (emphasis added).

62. Lohmann, *supra* note 16, at 911.

63. 17 U.S.C. § 103(b) (1994).

64. *See* Saunders, *supra* note 28, at 190-96 (discussing rights of derivative works owners as being subordinate to those of the original copyrights owner' versus a derivative work as having "new-property-rights"). Christine Wallace, Note, *Overlapping Interests in Derivative Works and Compilations*, 35 CASE W. RES. L. REV. 103, 127 (1984) (discussing the requirement of originality in derivative works).

Act requires modifications to a degree amounting to original authorship.⁶⁵ Musical arrangements, dramatizations, fictionalizations, and motion pictures based on the original work are examples of derivative works that could contain the requisite original creativity.⁶⁶ Based on that concept of derivative works, one can understand the basis for the “separate innovation” requirement of the derivative works exception. All would agree that a classic film like *Rear Window* should not be archived merely because the author who sold Alfred Hitchcock a novel refused to grant a license.⁶⁷ This conflict of interests illustrates how the derivative works exception can create a perverse outcome when viewed in light of the copyright doctrine’s intentions to protect the economic interests of an artist.

This Article suggests a small change comporting with the realities of the fine art market, particularly with respect to derivative works produced by museums. Most large museums have gift stores and catalogs that sell a wide array of reproduced works⁶⁸ including postcards, T-shirts, and posters.⁶⁹ Many people would recognize that these types of items require no independent artistic authorship. With no independent creativity to reward, the policy of copyright and the related doctrines of fair use, moral rights, and *droit de suite* dictate that those purely commercial derivative works not be exempted from the termination clause that allows artists to retain the economic value of the original copyright interest in their work.

The courts have focused on the economic effect of derivative works on the market for the original work.⁷⁰ One approach the courts have taken with respect to infringement cases focuses on the economic effects on the work that the derivative work is allegedly infringing.⁷¹ In *Midway Manufacturing Co. v. Arctic International, Inc.*,⁷² the court held that the

65. 17 U.S.C. § 101 (1994).

66. *Id.*

67. See Saunders, *supra* note 28, at 189–90.

68. Congress was aware that the rights to reproduce and to prepare derivative works were quite similar and not very well defined in the statute. See H.R. REP. NO. 94-1476 at 62 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5675 (“The exclusive right to prepare derivative works, specified separately in clause (2) of section 106, overlaps the exclusive right of reproduction to some extent.”).

69. For example, the Boston Museum of Fine Arts includes in its Fall 1994 gift catalog a poster reproducing a Janet Fish oil painting. Similarly, the Art Institute of Chicago sells calendars based upon the work of Andy Warhol, notecards based upon the work of Georgia O’Keefe and posters based on the work of Keith Haring.

70. Michael Wurzer, Note, *Infringement of the Exclusive Right to Prepare Derivative Works: Reducing Uncertainty*, 73 MINN. L. REV. 1521, 1526–27 (1989).

71. *Id.* The other approach discussed focuses on whether the works are “substantially similar.”

72. 704 F.2d 1009 (7th Cir. 1983).

exclusive right to prepare derivative works grants authors a limited monopoly in all markets related to the work that generate a significant demand.⁷³ This holding is consistent with the general copyright theory that the artist, upon creation of the work, has the right to prepare derivative works. By allowing an artist to derive income from these reproductions, the policies of copyright law are furthered. These policies recognize that granting an artist a limited monopoly encourages her to create because the commercial value of her work is secured. Furthermore, these incentives benefit the public by allowing them to enjoy the artist's new work.⁷⁴

IV. THE FACTOR OF ECONOMIC EFFECT IN FAIR USE

The doctrine of fair use codifies the desire to reserve to an artist the economic benefit of a work.⁷⁵ While the doctrine of fair use is actually an affirmative defense to an alleged infringement, it also recognizes the economic effect that the alleged infringing work has on the original work's market as a factor for determining infringement.⁷⁶ The statute reads:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) *the effect of the use upon the potential market for or value of the copyrighted work.*⁷⁷

In the watershed case of *Harper & Row, Publishers, Inc. v. Nation Enterprises*,⁷⁸ the Supreme Court recognized the explicit nature of this legislative command, and its logical correlation to the underlying purpose of copyright law. In that case, *Time* magazine acquired a license to publish excerpts of President Ford's memoirs but was scooped by *The Nation* which secretly procured an advance copy of the book.⁷⁹ In holding that

73. *Id.* at 1013.

74. Wurzer, *supra* note 70, at 1530.

75. 17 U.S.C. § 107 (1994).

76. *Id.*

77. *Id.* (emphasis added).

78. 471 U.S. 539 (1985).

79. *Id.* at 542.

The Nation infringed the copyright, the Court noted that the fourth factor regarding the effect on the potential market was “undoubtedly the single most important element of fair use.”⁸⁰ This unequivocal recognition of economic effect as the most important factor in determining fair use demonstrates the Court’s understanding of the underlying objective of copyright law as striving to protect the economic rights of authors.

Additionally, the language of the first factor refers to the economic nature of the original and derivative works.⁸¹ This part of the test requires the trial court to consider the purpose and character of the work, specifically whether the use could be characterized as commercial or non-profit.⁸² Moreover, Congress chose this language to guide interpreters of the law by identifying this crucial consideration as key to the advancement of the policy behind copyright law.

The Court in *Sony Corp. of America v. Universal City Studios, Inc.*,⁸³ acting on this reasonably clear mandate,⁸⁴ established that the commercial effects of works should be given significant weight in determining infringement. *Sony* involved the video recording of copyrighted programs from television for personal home use at a later time. This “time-shifting” was held to be fair use under the § 107 factors.⁸⁵ As a result of the case, courts began emphasizing the importance of the commercial versus non-commercial nature of secondary works. The Court stated definitively, “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright”⁸⁶ This recognition of the importance of the economic value of copyright ownership comports with the original theory of copyright. Where a museum produces derivative works such as posters and T-shirts (commercial products with no artistic value of their own apart from the original work), the derivative works exception does not promote the economic interests of the artist. The exception does not give incentives the

80. *Id.* at 566.

81. *Id.* at 562.

82. 17 U.S.C. § 107(1) (1994).

83. 464 U.S. 417 (1984).

84. *But see* Lloyd L. Weinreb, Lecture to Intellectual Property Seminar at Harvard Law School (Apr. 20, 1995) [hereinafter Weinreb, Lecture] (arguing that in fact the 1976 Copyright Act is anything but clear and that the examples of commercial nature versus non-profit use should be read as exemplary and not determinative); Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV L. REV. 1137, 1139, 1151 (1990) [hereinafter Weinreb, *Fair’s Fair*] (referring to the doctrine of fair use as “confusion compounded,” a “muddled statutory provision,” and a “botched job”).

85. *Sony*, 464 U.S. at 420, 454–55.

86. *Id.* at 451.

artist to create, or to act in accordance with the themes codified by the fair use doctrine.

Since *Sony*, the Court has retreated from the absolutist viewpoint that all commercial works presumptively infringe upon the original work. The Court has, however, not abandoned the idea that the commercial nature of the work is central to the fair use determination. A year after *Sony*, the Court in *Harper & Row*⁸⁷ continued to advance the commercial versus non-profit distinction stating, “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”⁸⁸

In 1994, in *Campbell v. Acuff-Rose Music, Inc.*,⁸⁹ the Court pronounced its latest view on the commercial nature of works. The Court found that the appellate court did not place enough emphasis on factors other than the commercial character of the parody.⁹⁰ Although the case was remanded for consideration of the additional factors under § 107, the Court reaffirmed that the first and fourth factors, that is, the nature of the use and economic effect on the market, are integral to the fair use determination.⁹¹ The Court distinguished *Sony* by reasoning that the presumption of infringement, if used for commercial purposes, was applicable in cases of wholesale copying as in *Sony* (although there were also noncommercial purposes),⁹² but not necessarily in parodies where the use has been transformative.⁹³ Focusing on the issue of whether the work was a transformative use of the copyrighted material, the Court noted “when . . . the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.”⁹⁴

The Court relied, at least in part, upon the scholarship of Judge Pierre N. Leval defining the concept of transformative use.⁹⁵ Leval suggests this factor depends upon the extent of the transformative use:

87. 471 U.S. 539 (1985).

88. *Id.* at 562.

89. 510 U.S. 569 (1994) (addressing 2 Live Crew’s parody of Roy Orbison’s “Oh, Pretty Woman”).

90. *Id.* at 583–84.

91. *Id.*

92. *But see* Weinreb, *Fair’s Fair*, *supra* note 84, at 1154 (challenging home-recording as a noncommercial purpose).

93. *Campbell*, 510 U.S. at 579 (“transformation” is the use of a copyrighted work to create new independent artistic value).

94. *Id.* at 591.

95. *Id.* at 591 n.21.

I believe the answer to the question of justification [of the first factor] turns primarily on whether, and to what extent, the challenged use is *transformative*. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original . . . [i]f . . . the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.⁹⁶

It is this understanding of transformation which supports the derivative works exception, especially in the case of motion pictures. This exception, heavily lobbied for by the Motion Picture Association of America, makes sense in this medium since a film inherently requires a tremendous amount of original artistic work.

However, the idea that a derivative work may add value to the original work of art is exactly what is lacking when museums replicate art on notecards and posters. When one examines the types of products that museums generally sell in their stores and catalogs, these purely commercial items have no independent artistic value. The T-shirts, posters or postcards do not embody any “new information, new aesthetics, [or] new insights and understandings”⁹⁷ of the original work, which Judge Leval highlighted as the value of transformative works. Because these museum products lack any inherent artistic value independent of the original artist’s work, the policy arguments for protecting derivative works from the threat of the termination clause do not exist. Instead, the purpose of the termination clause is better served by allowing artists to renegotiate their right to create derivative works when the derivative works produced by the museum have no separate artistic value of their own.

Professor Lloyd Weinreb questions Judge Leval’s reliance on the idea that transformative use is the seminal inquiry.⁹⁸ In response to two decisions authored by Judge Leval, Professor Weinreb and Judge Leval discussed and elaborated on the notion of transformative works.⁹⁹ Both *Salinger v. Random House, Inc.*¹⁰⁰ and *New Era Publications International*

96. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (footnotes omitted).

97. *Id.*

98. Weinreb, *Fair’s Fair*, *supra* note 84, at 1142.

99. Leval, *supra* note 96, at 1112–18. *See generally* Weinreb, *Fair’s Fair*, *supra* note 84.

100. 650 F. Supp. 413 (S.D.N.Y. 1986), *rev’d*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

v. *Henry Holt & Co.*¹⁰¹ involved written biographies which included sets of quotations, some of which did not qualify as fair use. Regarding literary works, Professor Weinreb's criticism of Judge Leval's confidence in the promotion of the transformative use test is well-founded. It is difficult to discern what criteria are involved in identifying a transformative use; as such, the test does not alleviate Judge Leval's concerns as one would expect from a bright-line test.

Within the realm of visual arts, on the other hand, determining what is a transformative use is a more precise inquiry. A work of visual art expresses its idea and message to the viewer only through its visual element. The message remains the same when it is reproduced on a poster or notecard. Examining the difference in purpose between a quotation in a biography and a reproduced visual work on a poster one can see that the quotation may have a different purpose from the original work. The poster, by comparison, has the same function as that of the original piece hanging in the museum.

It is conceivable that a museum might produce derivative works that could have some transformed use or independent value. One example that arguably has some independent merit is the reproduction of the central figure in Edward Munch's *The Scream* in the form of a large blow-up doll. Although this type of reproduction is clearly a commercial product with more frivolous than serious overtones, it is possible to argue that there is artistic merit in such a doll, especially in the post-modernist art movement. Professor Weinreb explains the difficulty of relying on the "transformative use" determination by noting other uses: "[a] use may serve an important, socially useful purpose without being transformative, simply by making the copied material available."¹⁰² This concern, while applicable in the context of quotations in biographies, is not as relevant in the proposed situation of derivative works produced by museums. Even if one were to argue that the reproduction of a visual work on a T-shirt makes that piece of art more accessible to a mass audience, the original piece of art will be on display within the museum. Thus, there is no risk of foreclosing public access to any given work of art. Indeed, by excluding commercial derivative works created by museums under the derivative works exception, the public is not deprived of access to the original works of art. In this way, the artist's economic interest in her exploited work can be recouped. The economic interests of the artist are preserved through the four fair use factors

101. 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989).

102. Weinreb, *Fair's Fair*, *supra* note 84, at 1143.

enumerated in § 107, and the concept of the transformation of copyrighted works into a secondary use with artistic or economic value of its own is consistent with the fundamental policy of protecting the artist's monopoly interest in her work, and maintaining incentives to create.

The most recent example of the tension between the idea of transformative use and the commercial aspects of copyright in visual art was captured in *Rogers v. Koons*.¹⁰³ This case involved a sculpture created by Jeff Koons, a postmodernist artist.¹⁰⁴ The court found that the sculpture infringed upon a photograph taken by Art Rogers of a man and woman holding eight German Shepherd puppies.¹⁰⁵ Rogers initially took the picture in 1980 and licensed it to be reproduced in notecard form in 1984.¹⁰⁶ His picture, entitled "Puppies," was simply that of a woman and man each holding four puppies in their arms.¹⁰⁷ Koons, associated with the postmodernist art era which includes the appropriation school of thought,¹⁰⁸ purchased a copy of the picture in notecard form with the thought in mind that he might draw upon it for inspiration for one of his own shows.¹⁰⁹ Part of the philosophy underlying appropriation is that all artistic work is in some way a derivative work drawn from the artists' surroundings and life experiences.¹¹⁰

Koons went on to create a large sculpture that mimicked the picture. The sculpture depicted a man and a woman with daisies strewn throughout their hair seated on a bench holding blue puppies with large, circus clown-like noses.¹¹¹ In order to produce this work, Koons sent the notecard to his artisans with instructions that they should create the sculpture "as per photo."¹¹² He included the sculpture, entitled "String of Puppies," in the show "Banality" to illustrate the very commonplace and unoriginal image

103. 960 F.2d 301 (2d Cir.), *cert. denied*, 506 U.S. 934 (1992).

104. Telephone Interview with John B. Koegel, Attorney for Jeff Koons (July 22, 1994) [hereinafter Interview with Koegel] (describing the case as a debate over whose rights are more important: the expression of the artist, the rights of future artists, or the rights of society to have access to a broad array of art).

105. *Rogers*, 960 F.2d at 304.

106. *Id.*

107. *Id.*

108. *Id.* at 309.

109. *Id.* at 305.

110. Interview with Koegel, *supra* note 104.

111. Willajeanne F. McLean, *All's Not Fair in Art and War: A Look at the Fair Use Defense After Rogers v. Koons*, 59 BROOK. L. REV. 373 (1993).

112. *Rogers*, 960 F.2d at 305.

popular in current culture.¹¹³ Rogers later discovered that Koons had apparently used the picture and brought suit.¹¹⁴

The Second Circuit ultimately found that Koons' use of the notecard infringed upon Rogers' copyright.¹¹⁵ On the issue of copyright infringement, Koons conceded that he had relied upon the picture in fashioning his sculpture.¹¹⁶ The court took this admission as direct evidence of copyright infringement.¹¹⁷ Koons went on to argue that while he used the photograph, his use was acceptable under the fair use doctrine.¹¹⁸ The court dismissed his argument that, as a postmodernist, his work was meant as commentary or critique in the form of parody. The court then explored the commercial nature of Koons' sculpture as part of the discussion on the first factor.¹¹⁹ One commentator suggests that the court relied too heavily on the commercial nature of Koons' sculpture, which was for sale at the "Banality" show:

In its review of the profit element of the first factor, the Second Circuit seemed to be mesmerized by the commercial character of the Koons sculpture. Although the court stated that the profit element in the fair use calculus was not controlling, it nevertheless found that Koons' "substantial" profit, realized from the sales of the statues, weighed in Rogers' favor. In fact, other commentators, in criticizing the court's interpretation of commercial use, have noted that the court's interpretation suggests that "anytime a work is sold, it will not be protected as fair use" Its opinion seems to fly in the face of the stricture that the commercial purpose of the work should not traditionally be controlling in the fair use calculus.¹²⁰

Under the fourth factor, the court also considered the economic effect of the sculpture on the market for the original piece.¹²¹ Here, the court determined that Koons' sculpture would in fact have a harmful effect on Rogers' ability to sell the right to reproduce his work and to make derivative works from his original photograph.¹²²

113. *Id.* at 304–05.

114. *Id.* at 305.

115. *Id.* at 306.

116. *Id.* at 307.

117. *Id.*

118. *Rogers*, 960 F.2d at 308.

119. *Id.* at 308–09.

120. McLean, *supra* note 111, at 402-03 (footnotes omitted).

121. *Rogers*, 960 F.2d at 311.

122. *Id.* at 312.

Rogers strongly suggests that the protection provided by the 1976 Act to preserve an artist's rights in reproduction and derivative works is grounded in the policy of protecting the economic interests of the artist. Even if one disagreed with the holding of this case, by taking issue with the claim of Koons' sculpture impairing *Rogers*' market or some other reason, it is clear that this decision revolved around protecting an artist's economic interests. This philosophy, found throughout the field of copyright, demonstrates that when an artist has granted rights to museums while at an inferior bargaining position, the museum should not be able to continue profiting from derivative works that have no artistic merit of their own.

V. DROIT DE SUITE

The European concept of *droit de suite*, translated from the French, means imprecisely, "art proceeds right."¹²³ It refers to the right of an artist to collect a portion of the resale price of the work and stems from the theory that an artist should benefit from the increase in value of her work over time.¹²⁴ *Droit de suite* parallels the underlying theory of United States copyright law: protecting the economic interests of artists. Although many foreign countries recognize *droit de suite*, the United States has not yet accepted this right.¹²⁵ Professor Monroe Price delineated the concept:

[*Droit de suite*] is an expression of the belief that (1) the sale of the artist's work at anything like its "true" value only comes late in his life or after his death; (2) the postponement in value is attributable to the lag in popular understanding and appreciation; (3) therefore the artist is subsidizing the public's education with his poverty; (4) this is an unfair state of affairs; (5) the artist should profit when he is finally discovered by the newly sophisticated market.¹²⁶

This set of assumptions closely parallels the policies underlying American copyright law. The stated intent in *droit de suite* is analogous to the fourth factor of the fair use doctrine.

The *droit de suite* concept is primarily concerned with visual artists who generally work in media in which unique pieces are created, and by virtue of their uniqueness are thought to be more valuable. Copyright laws

123. Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333 (1968).

124. *Id.* at 1334.

125. Copyright Office Report Executive Summary, *Droit de Suite: The Artist's Resale Royalty 2* (1992) [hereinafter Copyright Report].

126. Price, *supra* note 123, at 1335.

do not adequately protect the economic interests of visual artists as they do for authors and composers because visual artists typically create singular works.¹²⁷ In visual arts, there is no well-developed and widely followed system of licensing and royalties as in the publishing and music industries. Due to the nature of visual art works, it is crucial to protect the means from which artists may derive their income. This includes not only a right to royalties, but also giving artists opportunities to exploit their works through reproductions and derivative works.

Currently, California is the only state with a resale royalty statute for visual works of art.¹²⁸ The crux of the statute, providing for a percentage return on future sales, is found in California Civil Code § 986, subsection (a):

Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale. The right of the artist to receive an amount equal to 5 percent of the amount of such sale may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale. An artist may assign the right to collect the royalty payment provided by this section to another individual or entity. However, the assignment shall not have the effect of creating a waiver prohibited by this subdivision.¹²⁹

This type of legislation furthers the congressional intent behind the 1976 Act. Protecting the economic rights of artists serves the common good by creating an atmosphere in which artists can be sure to gain the economic benefit of their works as they are recognized in the market. The California

127. William A. Carleton, III, Note, *Copyright Royalties for Visual Artists: A Display-Based Alternative to the Droit de Suite*, 76 CORNELL L. REV. 510, 514 n.9 (1991) (quoting John B. Koegel, *VLA Perspectives: Memorandum of Support for S. 2796: Introduced in the 99th Congress by Senator Edward M. Kennedy (D. Mass.)*, 11 COLUM.-VLA J.L. & ARTS 347, 349 (1987): "Unfortunately, the intrinsic nature of distribution for most pictorial, graphic, and sculptural works is different [from works of writers, composers, choreographers, performing artists and filmmakers]. Since, as a practical matter, reproductions are not significantly marketable, the visual artist must gain his entire return from the initial, one time sale.").

128. CAL. CIV. CODE § 986 (West 1982 & Supp. 1996). Puerto Rico also has a statute that addresses resale royalties. P.R. LAWS ANN. tit. 31, § 1401 (1993).

129. CAL. CIV. CODE § 986(a) (West 1982 & Supp. 1996). Subsection (b) lists those circumstances under which the royalty does not apply including: (1) the first sale of the work from artist to buyer; (2) works selling for less than \$1000; (3) works after the death of the artist; and (4) sales for less than the seller's purchase price. *Id.* § 986(b).

statute also mirrors the 1976 Act by limiting the term to the life of the artist plus a stated number of years.¹³⁰

Like the 1976 Act, the California statute has inspired its share of controversy. In *Morseburg v. Baylon*, the statute was challenged as being unconstitutional and preempted by the federal copyright laws,¹³¹ but was upheld. To date, no federal resale royalty legislation has passed.¹³² Perhaps this is because the art world itself seems conflicted as to whether such legislation would enhance the art market, or act as a market deterrent.¹³³ However, the Visual Artists Rights Act of 1990 did include a provision to establish a study on the feasibility of implementing legislation providing for resale royalty.¹³⁴ The Copyright Office, in conjunction with the Chair of the National Endowment for the Arts, explored the national implementation of legislation to protect the economic interests of artists.¹³⁵ The study suggested that although the European Community had not settled on a consistent policy for handling resale royalties, the United States might wish to seriously consider legislation harmonious with European standards.¹³⁶ Other suggestions included a broader right of public display, a commercial rental right, a system of compulsory licensing, and the financial promotion of art by the federal government through grants and purchases of art for federal buildings.¹³⁷ These suggestions underscore the need to protect and promote the economic rights of artists.

130. See CAL. CIV. CODE § 986(a)(7) (stating: "Upon the death of an artist, the rights and duties created under this section shall inure to his or her heirs, legatees, or personal representative, until the 20th anniversary of the death of the artist.").

131. 621 F.2d 972 (9th Cir. 1990).

132. Several times bills have been introduced that included resale royalty provisions but were ultimately defeated or deleted from the final piece of legislation. See Visual Artists Rights Act of 1987: Hearings on H.R. 3221 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 100th Cong. (1988) and Visual Artists' Residual Rights Act, H.R. 11403, 95th Cong. (1978).

133. H.R. REP. No. 101-514, at 23 (1990) ("H.R. 3221, introduced in the 100th Congress, granted authors the rights of attribution and integrity, but it also provided that artists could share in any profits from resale of their works. This was a controversial provision, which was not included in H.R. 2690.") (footnote omitted); MALARO, *supra* note 42, at 123 ("It became apparent that the art community was deeply divided on the merits of the legislation.").

134. Act of Dec. 1, 1990, Pub. L. 101-650, 104 Stat. 5089, Sec. 8(b) (Studies by Copyright Office).

135. Copyright Report, *supra* note 125, at 1.

136. *Id.* at 10.

137. *Id.* at 10-11.

VI. MORAL RIGHTS

The idea of moral rights in art is fairly new in the United States. The Visual Artists Rights Act of 1990¹³⁸ was the first federal enactment granting personal rights to artists as derived from the European concept.¹³⁹ Moral rights are described both as personal rights and natural rights. These rights are thought to spring from the personality of the artist and her actions in creating the work.¹⁴⁰ Additionally, these personal rights are thought to precede the economic rights of artists, and to be the basis on which economic rights are granted to the artist.¹⁴¹ The Nimmer treatise on copyright describes these moral rights as:

the right to be known as the author of his work; the right to prevent others from falsely attributing to him the authorship of work which he has not in fact written; the right to prevent others from being named as the author of his work . . . the right to prevent others from using the work or the author's name in such a way as to reflect adversely on his professional standing . . . the right to prevent others from making deforming changes in his work . . . the right to withdraw a published work from distribution if it no longer represents the view of the author¹⁴²

While these rights are grounded in the personality of the artist and are arguably inherent in the creation of a work of art, it cannot be denied that these rights also relate to the economic value of those works. The right to prevent others from using an artist's work in a way that reflects poorly on her professional reputation is tied to the economic value of that reputation. California's art preservation provision¹⁴³ prohibits anyone other than the artist from committing "physical defacement, mutilation, alteration, or destruction of a work of fine art."¹⁴⁴ The provision allows the artist to

138. 17 U.S.C. § 106 (1994).

139. Several states have statutes addressing one or more of the rights generally thought of as moral rights, including: California, Connecticut, Louisiana, Maine, Massachusetts, New Jersey, New York, Pennsylvania, and Rhode Island. Thomas J. Davis, Jr., *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 HOFSTRA L. REV. 317, 326-47 (1989).

140. See generally Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1 (1980).

141. *Id.* at 5.

142. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 821[A], at 8-247 (1987).

143. CAL. CIV. CODE § 987 (West 1982 & Supp. 1996).

144. *Id.* § 987 (c)(1).

claim or disclaim a work,¹⁴⁵ and permits an artist to seek an injunction, actual and punitive damages, and attorney's fees.¹⁴⁶

These remedies indicate the true economic nature of the right. Subsection (a) describes the interest: "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."¹⁴⁷ Similarly, New York's Artists' Authorship Rights Act indicates concern for the economic detriment to an artist and finds that there have been cases where works of art have been altered, defaced, mutilated or modified thereby destroying the integrity of the artwork and sustaining a loss to the artist and the artist's reputation.¹⁴⁸

Economic impact is not the only factor supporting the recognition of moral rights:

Recognition of artists' moral rights is usually urged on two distinct grounds. The first is that the failure to attribute authorship, the false attribution of authorship, or the alteration of a work may interfere with a creator's ability to market his reputation and talent. This is a purely economic argument, grounded in the adverse impact on the creator's ability to fully exploit the monetary reward of creativity. The second is that interference with moral rights is offensive to the artist and constitutes an insult to his person.¹⁴⁹

Both justifications support the argument that an artist should have full control over the ability to terminate an earlier imprudent grant of rights to prepare derivative works when that work of visual art is now being used solely as a commercial product. The artist, now knowing the full value of her exploited work, should be able to reap the economic benefits of her work. Furthermore, she may be offended to find her work plastered all over T-shirts and posters.¹⁵⁰

145. *Id.* § 987 (d).

146. *Id.* § 987 (e)(1)-(4).

147. *Id.* § 987 (a).

148. N.Y. ARTS & CULT. AFF. LAW, § 14.03(1) (McKinney 1984 & Supp. 1996).

149. Davis, *supra* note 139, at 320 (footnotes omitted).

150. Pablo Picasso reportedly carefully guarded the associated copyrights to his works. Andy Warhol, on the other hand, became well known for the commercialization and reproduction of his works. Similarly, Keith Haring's works emphasizing wiry stick figures are mass produced on everything from notecards to animated commercials. In contrast, one must wonder if Janis

VII. CONCLUSION

Visual artists are at a distinct disadvantage when attempting to guard their economic rights in their works. The Copyright Act of 1976 sought to remedy the imbalance of power and uncertainty regarding the value of unexploited works through the termination clause of 17 U.S.C. § 203.¹⁵¹ While the exception for derivative works in the termination clause is arguably appropriate for works such as motion pictures, which have inherent artistic, transformative value, the exception undermines the underlying policy of copyright when it allows museums to reap profits from derivative works with no independent artistic value. The related doctrines of fair use, *droit de suite*, and moral rights all evince the policy of copyright, which is to protect the economic interests of artists in order to promote creation. In light of the foregoing discussion, copyright law would become more coherent if courts and Congress prohibit the application of the derivative works exception to works with no independent artistic value, such as those typically found in museum gift shops.

Joplin would feel outrage that her song, "Lord, Won't You Buy Me a Mercedes-Benz?," is being used to sell Mercedes' cars in television commercials.

151. 17 U.S.C. § 203 (1994).

