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ARTISTS' STATUTORY *DROIT MORAL* IN CALIFORNIA: A CRITICAL APPRAISAL

*By John G. Petrovich**

I. INTRODUCTION

It is generally accepted that the visual artist owns the rights to exploit the economic value of his creations. These patrimonial or pecuniary rights, falling collectively under the familiar rubric of copyright, exist in largely the same form both in the United States and throughout the world.[1] Many countries outside of the United States, however, have also recognized that the artist has certain personal rights in his work, which rights are retained by the artist even after a work is sold.

The most popular name identifying this bundle of personal rights is the French term *droit moral*, loosely translated as "moral rights."[2] In those countries where *droit moral* exists, it has been acknowledged that the work of art is a statement of the artist's personality. In order to protect the creator's artistic reputation, which is built upon such tangible expressions of personality, the artist has been given certain legal rights with respect to his creations, including the right to control the creative process, the right to withhold his works from public disclosure, the right to have his name associated with his creations, and the right to prevent alteration of the creation which might damage its integrity.[3] Although the doctrine has been developed most extensively in France and other European civil law countries,[4] many other nations recognize

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1. *See, e.g.*, 17 U.S.C. §§ 101-801 (Supp. III 1979) (United States Copyright Act); The Berne Convention for the Protection of Literary and Artistic Works (Paris Text, July 24, 1971) (international copyright act with 28 listed signatories), *reprinted in* 4 M. NIMMER, NIMMER ON COPYRIGHT app. 27 (1981) [hereinafter cited as M. NIMMER]; Universal Copyright Convention (Paris Text, July 24, 1971) (international copyright act adopted by at least 12 countries, including the United States), *reprinted in* 4 M. NIMMER, *supra*, at app. 25.

2. For the purpose of this article, the terms *droit moral*, moral rights, personal rights, and rights of personality are used interchangeably.

3. *See infra* text accompanying notes 22-52.

4. For translations from the texts of the moral rights provisions of France, Germany, and Italy, and for the text of the Berne Convention moral rights provision, see J. MERRYMAN & A. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 4-4 through 4-7 (1979) [hereinafter cited as MERRYMAN & ELSEN].

droit moral in one form or another.[5]

Perhaps due in part to a feeling that *droit moral* is at odds with America's collective legal and proprietary sensibilities,[6] and in part to an acceptance of the assertions of some courts and legal commentators that equivalent rights may be exercised by American artists through the application of existing common law doctrine,[7] American artists have never benefited from explicit recognition of moral rights.[8] Until recently, there has been little movement on the part of either the federal government or individual states to introduce moral rights legislation.

On January 1, 1980, however, the California Art Preservation Act[9] (Act) became effective, making California the first state to provide specific statutory protection for the moral rights of visual artists. The Act provides for the protection of the most important moral rights—the right of the artist to have his authorship recognized,[10] known as the *right of paternity*, and the right to prevent unauthorized or intentional alteration of his work,[11] known as the *right of integrity*. Moreover, by also allowing the artist, for good reason, to prevent the association of his name with a work,[12] and providing sanctions against one who completely destroys a work as opposed to altering or defacing it,[13] the Act expands upon the traditional moral rights and recognizes interests not explicitly protected by the Act's European predecessors.

Unfortunately, however, the Act has several drawbacks. These flaws include a troubling definition of the works of art that are protected, which may prove too narrow in many cases, and too broad in others. Also, the new protection against destruction may be in conflict

5. Comment, *Copyright: Moral Right—A Proposal*, 43 FORDHAM L. REV. 793, 797 (1975). The author states that *droit moral* is recognized by more than 63 nations throughout the world.

6. *See* Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1043 (1976) [hereinafter cited as Merryman, *Bernard Buffet*].

7. This paper will not focus on the American common law analogs to European moral rights. For a complete discussion of these American substitutes and their shortcomings, see Treece, *American Law Analogues of the Author's "Moral Right,"* 16 AM. J. COMP. L. 487 (1968) [hereinafter cited as Treece, *American Law Analogues*]; Comment, *Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrines*, 60 GEO. L.J. 1539 (1972) [hereinafter cited as *Toward Artistic Integrity*].

8. *See, e.g.*, Gilliam v. American Broadcasting Co., 538 F.2d 14, 24 (2d Cir. 1976); Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947); Crimi v. Rutgers Presbyter. Church, 194 Misc. 570, 575, 89 N.Y.S.2d 813 (1949) (all holding that the doctrine of *droit moral* has never explicitly been adopted by any United States jurisdiction).

9. CAL. CIV. CODE § 987 (West 1982).

10. *Id.* § 987(d).

11. *Id.* § 987(c)(1).

12. *Id.* § 987(d).

13. *Id.* § 987(e).

with traditional American property law notions of an owner's right to dispose of his property in any way he sees fit. The Act also deals inadequately with works of art incorporated into usable objects and buildings. Finally, the group of persons which has been granted standing to enforce the moral rights of the artist has been so sharply limited that the public interest in preserving the integrity of artistic creations, recognized by the Act,[14] may not be adequately safeguarded.

After a brief survey of the development of *droit moral* in Europe[15] and an analysis of the Act,[16] these problems will be discussed and suggestions for change offered. First, while this article will not attempt the impossible task of developing an all-inclusive definition of fine art, it will propose amendments to the Act and suggest guidelines and considerations to which courts should be sensitive when interpreting the statutory language.[17] Second, this article will examine the right of integrity and conclude that there is sufficient justification for limiting an art owner's property rights in this manner through the state's police power.[18] Third, the lack of attention given to the problem of art on usable objects and buildings will be discussed, and statutory changes will be suggested.[19] Finally, this article will discuss the possibility that, after the death of the artist, those who have been given standing to enforce the artist's moral rights may not be able or willing to protect the interests of either the artist or the public, and will suggest that the California Arts Council[20] be given standing to enforce the artist's moral rights in certain circumstances.[21]

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14. *Id.* § 987(a).

15. *See infra* text accompanying notes 22-52.

16. *See infra* text accompanying notes 53-71.

17. *See infra* text accompanying notes 72-102.

18. *See infra* text accompanying notes 103-25.

19. *See infra* text accompanying notes 126-31.

20. The California Arts Council is an arm of the state government. It is composed of eleven members; the Speaker of the Assembly and the Senate Rules Committee each appoint one member to represent the general public, and the Governor appoints the remaining nine members. In making these appointments, the Governor "shall give consideration to the various art disciplines and ethnic and geographic parts of the state." CAL. GOV'T CODE § 8751(a) (West 1980).

The Arts Council is vested with, among other powers, complete authority to adopt regulations, hold hearings, execute agreements, and perform any acts necessary and proper to: (1) encourage artistic awareness, participation, and expression; (2) help independent local groups develop their own art programs; (3) promote the employment of artists and those skilled in crafts in both public and private sectors; (4) provide for the exhibition of artwork in public buildings throughout California; and (5) enlist the aid of all state agencies in the task of ensuring the fullest expression of artistic potential. *Id.* § 8753(a)-(o).

21. *See infra* text accompanying notes 132-52.

II. THE MORAL RIGHTS OF THE ARTIST

A. Traditional Perceptions of Moral Right Under European Law

Moral rights have been said to include "non-property attributes of an intellectual and moral character which give legal expression to the intimate bond which exists between a literary or artistic work and its author's personality."[22] These rights are to be distinguished from patrimonial or property rights—rights designed to protect the pecuniary interest of an author in his work—which are protected both in the United States and abroad through the vehicle of copyright.[23] The rights of personality are designed to safeguard the artist's reputation[24] and include the right to create and disclose the work of art, the right to withdraw the work from public view, the right to have the artist's name associated with the creation, and the right to have the integrity of the work respected.

1. Creation, disclosure, and withdrawal rights

The first of the artist's moral rights quite naturally attaches at the beginning of the creative process. The artist alone has the right to create or not to create a particular work, and cannot be forced to create or publish against his will.[25] Such a right would come into play, for instance, when an artist has contracted to paint a work, then fails or refuses to perform. Since the act of creation is so closely related to the personal and moral interests of the artist, his honor, and his reputation,[26] several authors suggest that an artist's failure to complete a work due to lack of inspiration cannot even be considered a breach of contract, unless his refusal to complete the work was made in bad faith.[27]

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22. Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 465 (1968) [hereinafter cited as Sarraute, *French Moral Right*].

23. Merryman, *Bernard Buffet, supra* note 6, at 1025; Sarraute, *French Moral Right, supra* note 22, at 465. For citations to the copyright acts of the United States and foreign nations, see *supra* notes 1 & 4.

24. Merryman, *Bernard Buffet, supra* note 6, at 1025; Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506, 506 (1955) [hereinafter cited as Strauss, *Moral Right*].

25. Strauss, *Moral Right, supra* note 24, at 511.

26. *Id.*

27. It is fair to say that in agreements whose object is the production of a work of art, the artist's failure constitutes a normal risk, one which is foreseen by all parties. The artist could be held responsible only if it were established that he refused in bad faith to execute the contract—for example, if he were to transfer the canvas, which he claimed to be unworthy of him, to a third party at a higher price.

Sarraute, *French Moral Right, supra* note 22, at 468.

The case law, however, does not bear out this feeling. The classic case cited on this point is Judgment of Mar. 14, 1900 (Eden c. Whistler), Cass. civ. 1re, Paris, 1900 Recueil Périodique et Critique [D.P.] I 497. In 1893, Lord Eden commissioned American artist

Closely related to the right of creation is the right of disclosure. This right empowers the artist to decide when and how to communicate his completed work to the public, or whether to do so at all. Until the work is completed to the satisfaction of the artist,

> it remains a mere expression of [the artist's] personality, and has no existence beyond that which he tentatively intends to give it. It is only a rough draft, and no one but the artist can have any rights in it. Only the [artist] can decide whether his work corresponds to his original conception, at what moment it is completed, and whether it is worthy of him.[28]

An interesting example of the exercise of this right involved the French painter Camoin.[29] Dissatisfied with several completed canvases, he slashed and discarded them. Some of the discarded works were found, restored, and sold to writer Francois Carco. The paintings were subsequently offered for sale as a part of Carco's private collection, and were attributed to Camoin. Upon his discovery of the proposed sale, the artist had the paintings seized, and asked that they be destroyed—or, more accurately, *re*destroyed. The Paris Court of Appeal declared that the painter had the right "during his lifetime to surrender his work to the public only in such a manner and under such

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James Abbott McNeill Whistler to paint Lady Eden's portrait for an unspecified price "between" 100 and 150 guineas. Whistler completed the portrait, *Brown and Gold, Portrait of Lady E*, for which Lord Eden gave Whistler a check for 100 guineas. Whistler was insulted by this amount—but cashed the check nonetheless—and proceeded to paint out Lady Eden's head, substitute another, and refuse to deliver the painting to Lord Eden. Eden sued to require the restoration of Lady Eden's face to the portrait, and to force Whistler to deliver the work.

Although the trial court found for Lord Eden on all counts, on appeal it was held that while Whistler could be required to pay damages for breach of contract, he could not be forced to perform the contract or to deliver the work. Most text writers agree that general refusal of the court to order specific performance of the contract is based on the artist's moral right to control the creation of his work. Strauss, *Moral Right, supra* note 24, at 511 & n.5; *see also* Merryman, *Bernard Buffet, supra* note 6, at 1024; Sarraute, *French Moral Right, supra* note 22, at 467-68 (both discussing the *Whistler* case).

Another case illustrates the importance of the right to create. In Judgment of Nov. 15, 1966 (Guille c. Colmant), Cour d'appel, Paris, 1976 Recueil Dalloz-Sirey, *Jurisprudence* [D.S. Jur.] 284, a dealer sued an artist for breach of a production contract. The contract required the artist to produce at least 20 paintings a month for the dealer for a period of ten years. The artist was either to leave the paintings unsigned, or sign a pseudonym to them. The court nullified the contract, finding that the sustained rate of production was "destined inevitably to injure his reputation." Sarraute, *French Moral Right, supra* note 22, at 479. A more direct theory would have been to nullify the production provisions as an infringement of the artist's right to control the creative act.

28. Sarraute, *French Moral Right, supra* note 22, at 467; *see also* Merryman, *Bernard Buffet, supra* note 6, at 1028; Strauss, *Moral Right, supra* note 24, at 512.

29. Judgment of Mar. 6, 1931 (Carco c. Camoin), Cour d' appel, Paris, 1931 D.P. II. 88.

conditions as he sees fit," and stated that "although whoever gathers up the pieces [of the destroyed paintings] becomes the undisputed owner of them through possession, this ownership is limited to the physical quality of the fragments, and does not deprive the painter of the moral right which he always retains over his work."[30] The Court held that Camoin had the right to oppose the restoration of his partially destroyed works, and also to demand that they again be destroyed.[31]

While the rights of creation and disclosure allow an artist to suppress a creation before its publication, the right of withdrawal "envisages a situation where an author concludes that his work is no longer acceptable to him, and he, therefore, wishes to withdraw it from public circulation."[32] The rationale is that after the artist has undergone a change of conviction, he may view his past works as "obsolete"[33] and not an accurate portrayal of his present view of the world. The past works, now a detraction from his present reputation, should be withdrawn from public view.

These creation and withdrawal rights are generally thought to be of lesser importance among the artist's moral rights in those countries where they are recognized,[34] and commentators see no compelling need to include them in any American version of a moral rights statute. As to the rights of creation and disclosure, Professors Nimmer and Price feel that they are adequately covered by traditional copyright law.[35] On the other hand, the right of withdrawal has never existed in the United States under copyright, or any common law doctrine.[36] The right has been criticized as having a dubious legal basis and limited

30. Sarraute, *French Moral Right, supra* note 22, at 468.

31. *Id.* Summaries of other disclosure cases may be found in Sarraute, *French Moral Right, supra* note 22, at 469-73.

32. Nimmer & Price, Moral Rights and Beyond: Considerations for the College Art Association, at 2 (Jan. 5, 1976) (unpublished manuscript in the author's files) [hereinafter cited as Nimmer & Price, Moral Rights and Beyond].

33. Strauss, *Moral Right, supra* note 24, at 513.

34. *Id.* at 507-11; *see also* Nimmer & Price, Moral Rights and Beyond, *supra* note 32, at 2 (recognizing rights of paternity and integrity as the most important of the moral rights).

35. Nimmer & Price, Moral Rights and Beyond, *supra* note 32, at 1-2. The right of disclosure, or of first publication, was recognized prior to 1978 under the doctrine of common law copyright. The 1909 copyright law, formerly 17 U.S.C. § 2, provided: "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

The new copyright act specifically preempts common law copyright for all works created after January 1, 1978. 17 U.S.C. § 301 (Supp. III 1979). Now, this same right of first publication is a part of federal copyright law.

36. Nimmer & Price, Moral Rights and Beyond, *supra* note 32, at 2; Treece, *American Law Analogues, supra* note 7, at 500.

usefulness even in those countries which purport to recognize it.[37] In a practical sense, its exercise is sharply curtailed in many such countries by the requirement that the artist indemnify the owner of the work of art for damages caused by the artist's exercise of his withdrawal right.[38] Presumably, this requirement would have the effect of forcing the artist to "buy" the work from the owner at prevailing market prices.

Although the creation and disclosure rights may arguably be protected by corollary American legal doctrines, there are two aspects of *droit moral* for which no true equivalent exists. These rights—paternity and integrity—are truly the core of *droit moral*, and have, over the years, proved to be the most meaningful to visual artists.

2. The right of paternity

An artist's moral right of paternity protects him in three situations. First, he may prevent the association of his name with a work he did not create. Second, he may oppose the attribution of his own work to another. Finally, the artist may insist that he be recognized as the author of his work.[39]

In France, the right of paternity is unassignable and perpetual.[40] The right has had a wide range of applications, running from the mention of the author's name in advertisements, to questions of collaborators' rights, to protection of the artist's signature, among others.[41] Some examples will serve to illustrate this right.

The French painter, Guille, entered into a production contract with his dealer, the terms of which obligated Guille to turn over his entire production to the dealer for a period of ten years. The agreement also provided that Guille would sign a pseudonym to the works delivered to the dealer, while leaving all his other creations unsigned. After

37. Strauss, *Moral Right, supra* note 24, at 513. One commentator has suggested that an author or artist who modifies his style has only one recourse: to express this style in a new work. "In this sense every work constitutes a critique of an author's previous creations." Sarraute, *French Moral Right, supra* note 22, at 477.

38. *See, e.g.*, Article 32, Law of March 11, 1957, 57-296, [1957] J.O. 2723, [1957] B.L.D. 197 [hereinafter cited as Law of March 11, 1957], *quoted in* Sarraute, *French Moral Right, supra* note 22, at 477. M. Sarraute, however, feels that this right of withdrawal upon indemnification is applicable only to literary works. Where fine arts are involved, Article 29 of the Law of March 11, 1957, provides that since moral rights exist apart from the physical work of art, the artist may not require that the physical object be returned in order for him to exercise the moral rights. *Id.*

39. Strauss, *Moral Right, supra* note 24, at 508; *Toward Artistic Integrity, supra* note 7, at 1540-41.

40. *See* Article 6 of the Law of March 11, 1957, *supra* note 38, *quoted in* Sarraute, *French Moral Right*, *supra* note 22, at 478.

41. Sarraute, *French Moral Right, supra* note 22, at 478.

a dispute arose, Guille began to sign his own name to his works, and the dealer sued Guille for breach. Even though it did not appear that the artist was either forced into this contract, or that he lacked the capacity to contract, the Court of Appeal of Paris held that the dealer could not prohibit Guille from signing his own name to each of his works.[42]

Another case involved the right of an unnamed collaborating artist to have his authorship recognized along with that of the master artist. Sculptor Richard Guino sued for recognition as a coauthor and for a share of the authorship and reproduction rights in several sculptures, which had been released only under the name of the famed painter Renoir. Guino claimed that the sculptures were executed by himself alone, with only minimal direction from Renoir, who was then aging and partially paralyzed. Guino himself had, over the years, allowed the works to be reproduced under Renoir's signature alone, and on several occasions had even authenticated the signature of Renoir on the works; in his old age, however, Guino desired to share in the profits of his work. After hearing much expert testimony, the court held that Guino had imparted sufficient amounts of his own personality to the sculpture to be recognized as a coauthor, entitling him to share in future royalties.[43]

Closely associated to the right of paternity is the artist's right to have the physical integrity of his work respected. Paternity and integrity rights share a common base, for both rights relate to the propriety and effect on the artist's reputation of the association of his name with his creations. The rights differ, however, in the respect that the paternity right allows an artist to compel the association of his name with his creations, while the right of integrity envisions a situation where such an association between the artist's name and a creation that has been subsequently altered is misleading and erroneous, for to deform an artist's work is to "present him to the public as the creator of a work not his own, and thus make him subject to criticism for work he has not done."[44]

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42. Judgment of Nov. 15, 1966 (Guille c. Colmant), Cour d'appel, Paris, 1976 Recueil Dalloz-Sirey, *Jurisprudence* D.S. Jur. 284. Summaries of the case appear in Merryman, *Bernard Buffet, supra* note 6, at 1024, and Sarraute, *French Moral Right, supra* note 22, at 478-79.

43. Judgment of Jan. 11, 1971 (Guino c. Consorts, Renoir), Trib. gr. inst., Paris, 1971 Juris-Classeur Périodique, la semaine juridique [J.C.P. II] No. 16697 (English translation *reprinted in* F. FELDMAN & S. WEIL, ART WORKS: LAW, POLICY, PRACTICE 18 (1974) [hereinafter cited as FELDMAN & WEIL]).

44. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and*

3. The right of integrity

Professor Merryman has noted that the notion of integrity is that "the work of art is an expression of the artist's personality. Distortion, dismemberment or misrepresentation of the work mistreats an expression of the artist's personality, affects his artistic identity, personality and honor, and thus impairs a legally protected personality interest."[45] The classic example of a violation of the right of integrity occurs when the owner of a work of art alters it in some way and then continues to display the altered work.

One of the more notable cases involved the dismemberment of a refrigerator which had been decorated by Bernard Buffet. The artist had painted six distinct panels on the refrigerator—one on each side, one on the top, and three on the door—but signed the refrigerator only once, designating it a single, integrated work of art. The refrigerator was auctioned with several similarly decorated refrigerators done by other artists, with the proceeds going to charity. Several months later, Buffet noticed that an auction catalog offered a single "painting on metal" attributed to him. Further investigation revealed that the painting was actually one of the six panels from the refrigerator which had been severed from the door. Buffet brought an action against the owner to prevent the sale of the panel, and prevailed.[46]

Creators, 53 HARV. L. REV. 554, 569 (1940) [hereinafter cited as Roeder, *Doctrine of Moral Right*].

45. Merryman, *Bernard Buffet, supra* note 6, at 1027.

46. Judgment of June 7, 1960 (Buffet c. Fersing), Cour d'appel, Paris, 1962 Dalloz, *Jurisprudence* [D. Jur.] 570, *summarized in* Merryman, *Bernard Buffet, supra* note 6, at 1023. Buffet sought, among other relief, to have the owner prohibited from transferring any of the six panels, and to have them awarded to him as damages. On the first claim, the trial court only prohibited the owner from disposing of the separate panels *publicly*, stating that only such public disposition was a serious enough violation of Buffet's moral rights to justify the requested limitation of the owner's property rights.

Buffet appealed this ruling, and was successful in having the trial court judgment revised to prohibit any disposition of the individual panels, public *or* private. The result reached by the appellate court is clearly the correct one, but the use of the words "public" and "private" is misleading, and serves only to confuse the issues, insofar as "public" is commonly understood to describe a sale of an altered work at an auction or through a gallery, and "private" to characterize an unadvertised, negotiated sale of such a work between a buyer and seller. It is submitted that in terms of an artist's moral rights and the interests protected thereby, both categories of transactions are sufficiently public to do substantial damage to an artist's reputation, and that there can be no purely "private" disposition. If the seller of an altered painting represents it as being a work by Buffet to only a single buyer, who in turn represents it as such only to his houseguests who view the work in the buyer's sitting room, Buffet's personality and reputation are still being misrepresented to the public, albeit only the limited sector of the public comprised of the buyer and his houseguests.

Buffet's other prayer for relief—that the six panels be awarded to him as damages—was

Although such cases of the physical defacement of artworks represent the most extreme violations, the right of integrity has been successfully invoked in a myriad of contexts which do not involve the actual alteration of the original work of art. Some of these contexts include attempts to publish flawed reproductions of an artist's work,[47] the removal of part of a set of opera stage settings from a stage production which was necessitated by the cutting of a scene,[48] and the mounting of a major retrospective exhibition of an artist's work which, according to the artist, underrepresented his later works.[49] Such cases make it clear that the touchstone of traditional *droit moral* doctrine is the protection of the honor and reputation of the artist, with the protection of the work of art itself being only incidental.

The apparent overriding concern for remedying public affronts to

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denied by the trial court, and the appellate court upheld this portion of the judgment. Doctrinally, such a result is defensible, in that had the court granted Buffet's request, the artist would in effect have been allowed to exercise his right of withdrawal without meeting the requirement that the owner be indemnified for his loss. *See supra* notes 28-38 and accompanying text. Query, though, whether the artist should be given more freedom to withdraw a work free from the indemnification requirement when the reason for the withdrawal is an intentional alteration by the owner rather than an arbitrary determination on the part of the artist that his past work is "obsolete."

47. *See, e.g.*, Merryman, *Bernard Buffet, supra* note 6, at 1029. Professor Merryman discusses the case wherein a son of the late painter J.F. Millet intervened in a suit between publishers concerning which one had the right to publish a reproduction of Millet's *The Angelus*. The son was successful in enjoining both publishers, claiming that neither version was a true, undistorted representation of Millet's work. The court stated that the reproductions "brightened the light in the painting, made objects look real and vulgar, added a bonnet on one person's head and a scarf around a woman's neck, and changed an evening scene to one suffused by a glaring noonday sun." *Id.* The court determined that no one who looked at either reproduction could have believed that Millet was a great artist.

In another case, a granddaughter of artist Henri Rousseau was successful in claiming that the use in a store window display of reproductions of the artist's work in which the images and colors were altered constituted a violation of the right of integrity. *Id.* at 1030.

48. *See id.* at 1029-31. Ferdinand Léger was commissioned to design stage settings for an opera. In a subsequent production of the opera one scene was cut, and hence the stage setting for that scene was never shown. Léger claimed that the theatre's actions violated his right of integrity in the stage settings.

The court held that the stage settings indeed constituted an integrated work of art worthy of moral rights protection, but also noted that the rights of the composer and producer of the opera to control the production of the opera were also involved. The court ordered that all future advertisements concerning the opera must contain a statement attributing authorship of the settings to Léger and noting that the particular setting in dispute was not shown because of the removal of a scene from the opera.

49. *See id.* at 1032. The trial court noted that the exhibition of Italian artist Giorio De Chirico's work "would be viewed as a critical and representative exhibition of the artist's work, that it would strongly affect the public estimation of the artist, and that accordingly the artist had a legally protectable interest in being accurately and fairly represented in it." *Id.*

the honor and reputation of the artist, with only an incidental concern for the original work of art, can produce anomalous results. For example, if the owner of a house commissions a mural depicting several nude figures and sometime later, responding to a streak of prudishness, has the figures "clothed" by another artist, a clear violation of the first artist's moral rights exists.[50] However, if the owner had instead completely obliterated or otherwise destroyed the entire mural, the weight of authority in the case law and commentary would hold that no violation had taken place.[51] The theory behind the right of integrity is, as previously discussed, that defacement of a work of art presents to the public an altered work that may affect the artist's legally protected interest in his artistic honor and reputation. If the artwork is completely destroyed, however, there is nothing remaining to be impugned by public opinion, and hence there is no moral rights violation.

This viewpoint has been strongly disputed by at least one commentator, and has not been followed in some cases.[52] The legal impact of the destruction of fine art continues to be an object of controversy in

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50. *See* Judgment of June 8, 1912 (Felsenerland mit Sirenen), Reichsgericht, Berlin, 1912 Reichsgericht in Zivilsachen [RGZ] 397, *discussed in* Merryman, *Bernard Buffet, supra* note 6, at 1038 n.56.

51. Nimmer & Price, Moral Rights and Beyond, *supra* note 32, at 9; L. DUBOFF, THE DESKBOOK OF ART LAW 844 (1978) [hereinafter cited as DESKBOOK]; Roeder, *Doctrine of Moral Right, supra* note 44, at 569; Comment, *The Moral Rights of the Author: A Comparative Study*, 71 DICK. L. REV. 93, 94 (1966).

In Judgment of Apr. 27, 1934 (Lacasse et Welcome c. Abbé Quenard), Cour d'appel, Paris, 1934 Recueil Hebdomadaire de Jurisprudence [D.H. Jur.] 385, the dispute arose out of a commission awarded to Lacasse to paint frescoes in a chapel in a French town. The frescoes were completed without the knowledge or permission of the bishop, who owned the chapel. Upon hearing of the frescoes and the criticism they were attracting, he inspected the chapel, found the frescoes to be unacceptable even with substantial modification, and ordered them obliterated. The artist sued, but the trial court upheld the property rights of the bishop over the moral rights of Lacasse. Merryman, *Bernard Buffet, supra* note 6, at 1034.

Also, in the case alluded to in the text concerning the nude figures in the mural, the court noted in dicta that there would have been no moral rights violation had the owner completely destroyed or removed the mural. *Id.* at 1038 n.56.

52. Professors Merryman and Elsen believe that the question of whether the destruction of a work of art constitutes a violation of the artist's moral rights is all but well-settled. They discuss a case involving artist Raymond Sudre which arose out of a commission given to the artist by his home village to decorate a fountain. The resulting sculpture—a woman dressed in local garb—was not well-maintained against the abuse of birds, nature and the local children. The city decided to have the sculpture removed and destroyed. On a visit to the village, Sudre discovered the destruction, and also found that the pieces of the statue had been used as fill for road repairs. He brought a damage action based on moral rights and won. Judgment of Apr. 3, 1936 (Sudre c. Commune de Baixas), Conseil d'état, Paris, 1936 D.P. III 57, *discussed in* MERRYMAN & ELSEN, *supra* note 4, at 4-26. Professors Merryman and Elsen also cite an Italian case which indicated that the total destruction of a work of art violates the artist's moral rights. *Id.* (citing Judgment of Mar. 25, 1955 (Ente autonomo "La

the development of moral rights doctrine, and one that should be resolved definitively both in those countries where *droit moral* presently exists, and in any new statutory moral rights proposal. The Act, the provisions of which will be explained now, breaks some new ground in this respect, while at the same time introducing into American law the most important traditional elements of *droit moral*.

B. The California Art Preservation Act

The Act, as it emerged from the legislative process, is a complicated scheme of rights and duties, containing many definitions, qualifications to, and exclusions from protection. The Act's practical application remains a mystery, for there have been no reported cases decided under it since it became effective on January 1, 1980. The following analysis of the Act's provisions will shed some light on how such application may take shape, and will also show that as the Act evolved through various drafts, its provisions were the subject of much debate and compromise on key issues concerning the extent of protection given by, and the ability to enforce, the moral rights created.

The Act adopts the right of paternity by providing that "the 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."[53] The latter clause, concerning the right to disclaim authorship, represents an interesting addition, not found in a prior version of the Act.[54] Although this notion fits comfortably into traditional *droit moral* doc-

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Biennale" di Venezia c. De Chirico), Corte app., Venezia, 1955 Foro Italiano [Foro It.] I 717).

Furthermore, Professor Merryman notes that the murals which were the subject of the Lacasse case, *supra* note 51, were painted without the knowledge and consent of the owner of the property, and that the result might have been different had the owner personally commissioned the murals and known of their content beforehand.

One French commentator argues that even under French moral right, the artist's reputation is not the primary focus of protection. M. Sarraute has expressed the view that after several redistillations, the moral right of the artist is currently understood to have as its main object the assurance of respect for the work of art itself. Sarraute, *French Moral Right, supra* note 22, at 466.

Sarraute also notes that if the primary goal was indeed to protect reputation, several unacceptable consequences might follow. For example, he says that a painter might attempt to control the conditions surrounding the resale of his works, such as opposing a large sale that would lower prices and thereby ruin the artist's name. *Id.* at 479. If it is the case that the work of art itself is now the object of protection, it is proper that the public interest and the right against destruction be given explicit recognition.

53. CAL. CIV. CODE § 987(d) (West 1982).

54. A version of the Act introduced in the previous legislative session set forth only the positive right to claim authorship. S. 2143, § 987(c) (1978) (current version at CAL. CIV. CODE § 987(d) (West 1982)).

trine, it has not found explicit recognition even in European statutory and case law.[55]

The only troubling aspect of the right to disclaim authorship is that the Act offers no guidance in determining what constitutes a sufficiently "just and valid reason" to allow the artist to disown his creation. The language is certainly broad enough to allow an artist to disown a work of art based only upon the artist's good faith determination that his art has evolved so much that the prior work no longer represents his artistic personality, thus giving the artist something along the lines of a modified withdrawal right.[56] It may be, however, that in practice the exercise of this right to disclaim authorship will be limited to those situations where the impetus for the artist's desire to disown the work was an alteration prohibited by the Act.

The Act protects the right of integrity by prohibiting any person, except an artist who owns and possesses a work of fine art of his own creation, from intentionally committing, or authorizing another intentionally to commit, any act of physical defacement, mutilation, alteration, or destruction of fine art.[57] The commission of such acts by a person who frames, conserves, or restores fine art would not be a violation of the Act so long as the acts were not committed as a result of gross negligence.[58]

By unequivocally recognizing that the destruction of a work of fine art violates the artist's moral rights, the Act puts an end to the confusion concerning this aspect of integrity that has plagued the application of *droit moral* in Europe. With respect to most works of art, then, the Act provides an even greater degree of protection than its European predecessors.

Curiously, though, the works of fine art which are most in danger of being intentionally damaged or destroyed—those integrated into

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55. *See* Merryman, *Bernard Buffet, supra* note 6, at 1027 n.14. While noting that there are no cases on point, Professor Merryman concludes that the existence of the right to disclaim authorship is "in principle undebatable."

56. Although an artist's reasons for wishing to disclaim authorship of a work may be the same as those behind his desire to withdraw it from artistic circulation, the analogy is not complete, for the offending work of art still remains on the market after the artist merely disclaims it. Presumably, the artist would be able to compel others not to use his name in association with the exhibition or sale of a disclaimed work of art. What is in a name? Query how much a painting by Picasso would bring at auction if it could not be sold as "a Picasso."

57. CAL. CIV. CODE § 987(c)(1) (West 1982).

58. *Id.* § 987(c)(2). "Gross negligence" is defined as "the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art." *Id.*

buildings and other structures—are given a rather limited degree of protection. The Act would not apply where the work of fine art could not be removed from a building without substantial defacement, mutilation, alteration, or destruction of the work, unless the artist's moral rights had been reserved in a writing signed by the owner of the building and duly recorded.[59] If a work of art could be so removed from a building, the provisions of the Act would apply, but only where the artist can be successfully notified of the owner's proposed actions with respect to the work through the owner's diligent effort, and only if the artist is able to remove the work at his own expense within 90 days of receiving such notice. If the artist does so remove the artwork, however, title to the work shall pass to him.[60] The Act purports to protect only works of "fine art," defined by the statute to be "an original painting, sculpture, or drawing of recognized quality . . . [other than] work prepared under contract for commercial use by its purchaser."[61] In making its determination of whether a work of fine art is of recognized quality, "the trier of fact shall rely on the opinion of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art."[62] This definition is significantly narrower than that contained in a prior version of the Act, which included more classes of fine art objects and contained no quality restrictions.[63]

The Act further provides that the rights and interests granted shall exist until the 50th anniversary of the artist's death,[64] making the term of protection coextensive with that provided under copyright law.[65] To enforce the rights guaranteed by the Act, the artist, while he is alive, or his heir, legatee, or personal representative if the artist is deceased,[66] may commence an action for injunctive relief, actual damages, punitive damages, attorneys' fees, and any other appropriate relief.[67]

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59. *Id.* § 987(h)(1). This reservation of rights, if properly executed and recorded, is binding on subsequent owners of the building. *Id.*

60. *Id.* § 987(h)(2).

61. *Id.* § 987(b)(2).

62. *Id.* § 987(f).

63. An earlier version of the Act defined "fine art" as "an original painting, sculpture, drawing, work of calligraphy or work in mixed media." S. 2143, § 987(b)(2) (1978).

64. CAL. CIV. CODE § 987(g)(1) (West 1982).

65. 17 U.S.C. § 302(a) (Supp. III 1979). Limiting the protection of moral rights to life plus 50 years has been criticized by Professors Nimmer and Price as being insufficient to protect important works of antiquity. This problem is discussed *infra* in text accompanying notes 135-36.

66. CAL. CIV. CODE § 987(e), (g)(1); *see infra* note 135.

67. CAL. CIV. CODE § 987(e)(1-5) (West 1982). The statute provides, however, that when "punitive damages are awarded, the court shall, in its discretion, select an organization

Earlier versions of the Act provided two independent avenues of protection for the artist's reputation and his creations. The first avenue of protection, just discussed, was based upon the recognition that an artist has a protectable interest in his artistic personality, identity, honor and reputation.[68] The prior version of the Act also recognized, however, that "there is a public interest in preserving the integrity of cultural and artistic creations."[69] The proposed version further provided that any person acting pursuant to this public interest may bring an action to recover or obtain the same relief available to the artist,[70] and that with respect to the public interest, the rights and duties created by the Act shall exist in perpetuity.[71] The final version of the Act, however, retained only the explicit recognition of the public interest and deleted all means by which the public could protect this interest on its own behalf.

The complete absence of an independent method by which the public may protect its own interest in the artist's work is one of several problems with the Act to be discussed in the sections that follow. Some of these problems are shared by the Act's European ancestors, while others are peculiar to the Act itself; all, however, carry the potential to cause serious and perhaps unforeseen consequences for the artist and the public.

III. Suggestions For Amendment Of The Act

As enacted, the Act has four major problem areas. First, the statutory definition of "fine art" appears to exclude from protection many works the integrity of which is important. Second, the right of integrity, while it is the cornerstone of *droit moral*, seems at first blush to conflict with American legal principles concerning an individual's use and disposition of his property. Third, the protections of the Act may be grossly undercut because the Act does not deal at all with the problems surrounding works of art which are incorporated into utilitarian objects, and deals in an unsatisfactory manner with works of art on buildings. Finally, by vesting only the artist, or his heir, legatee, or

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or organizations engaged in charitable or educational activities involving the fine arts in California to receive such damages." This presumably serves to prevent the artist from being enriched beyond his actual damages, yet still provides the means for punishing a defendant who mutilates artwork when actual damages are negligible or cannot be proved.

68. S. 2143, § 987(a) (1978) (codified at Cal. Civ. Code § 987(a) (West 1982)).

69. *Id. See generally* Merryman, *Bernard Buffet, supra* note 6, at 1041 (discussing extent of public interest in preservation of art).

70. S. 2143, § 987(d) (1978) (current version at Cal. Civ. Code § 987 (West 1982)).

71. *Id.* § 987(e)(1)(ii) (current version at Cal. Civ. Code § 987(e)(1) (West 1982)).

personal representative with the power to exercise moral rights on behalf of the artist and the public, the public interest may be inadequately protected when those who have been granted standing to sue are not willing or are unavailable to protect this interest.

A. Works of Fine Art Protected by the Act

Justice Holmes stated at the beginning of the century that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[72] In perhaps a more wry manner, it has been noted that "[t]he attempt to define art is a perennial, and insoluble, problem for critics, philosophers, legislators, and people with nothing better to do."[73] While it may not be possible to create a single, all-encompassing legal definition of fine art, it is entirely possible to fashion a functional concept of fine art suited to a particular purpose, such as *droit moral*, which speaks to the precise rights and interests protected thereby. After the troubling aspects of the Act's present definition are discussed, just such a functional concept will be proposed.

1. "An original painting, sculpture, or drawing"

The French *droit moral* statute contains no specific definition of protected works, but the statutory explanations of the rights, interests, and protections of *droit moral* indicate that its coverage is broad, extending to all tangible or realized expressions of the mind.[74] This same

72. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (suit to determine whether certain chromolithographs were "pictorial illustrations" subject to copyright); *see infra* text accompanying notes 101-02.

73. M. PRICE & H. SANDISON, A GUIDE TO THE CALIFORNIA RESALE ROYALTIES ACT 18 (1976) [hereinafter cited as PRICE & SANDISON].

74. For example, Article 2 of the Berne Convention, *translated in* MERRYMAN & ELSEN, *supra* note 4, at 4-6 through 4-7, defines protected works as being "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression." As nonexclusive examples, the Article lists music, choreography, cinematography, drawing, painting, architecture, sculpture, engravings and lithography, maps and photography, among many others.

The Law of March 11, 1957, *supra* note 38, on the other hand, does not specifically define which types of works are protected. Instead, the scope of protection must be "reasoned out" from several provisions. Basically, the law protects "works" of artists and authors. Article 2 provides that works are protected "regardless of the kind, form of expression, merit or purpose of such works. . . . [E]ach and every idea having taken form in the mind of the author, will give birth to a work, on the condition that the aforesaid form has itself been the object of an expression." Article 7 states that a work is deemed to have been created when an "author's conception [has been] realized." Thus, it appears that in

concept is also used to establish the scope of protection for copyright under the European statutes,[75] and is very similar to the definition adopted under American copyright law.[76] The Act, on the other hand, protects only "fine art"—a much narrower range of works defined to include only "an original painting, sculpture, or drawing."[77]

This definition is similar to the definition appearing in the California Resale Royalties Act,[78] a version of the French *droit de suite*, which allows artists the right to obtain a percentage royalty based upon the proceeds of certain resales made after the original transfer of the work of art.[79] One commentator, in discussing the Resale Royalties Act defi-

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France, any realized conception or idea from the mind of an author is protected by *droit moral*. Tournier, *The French Law of March 11, 1957 on Literary and Artistic Property*, 6 BULL. COPYRIGHT SOC'Y 1, 3-4 (1958).

M. Tournier is not in favor of such a broad definition. As he has written, "[i]t appears certainly regrettable . . . that the French Law has insisted on deliberately placing on the same level the masterpieces and the simple 'realized expression' of the most modest intellectual effort." *Id.* at 5.

75. Both the Law of March 11, 1957, *supra* note 38, and the multinational Berne Convention for the Protection of Literary and Artistic Works (Paris Text, July 24, 1971) are copyright statutes which also provide moral rights protection for authors and artists.

76. The United States Supreme Court's view towards the breadth of copyright protection closely parallels the definition of protected works in foreign statutes for both copyright and moral rights protection. *See, e.g.*, Mazer v. Stein, 347 U.S. 201 (1954) (involving copyright protection of a decorative table lamp). There, the Supreme Court stated that to be copyrightable, a work must only be "original, that is, the author's tangible expression of his ideas. . . . Such expression, whether meticulously delineating the model or mental image or conveying the meaning by modernistic form or color, is copyrightable." *Id.* at 214. In dismissing the customs definition of fine art as too drastic a limitation on the scope of copyright, the Court further stated, "[i]t is clear Congress intended the scope of the copyright statute to include more than the traditional fine arts." *Id.* at 213.

The definitions section of the copyright act, 17 U.S.C. § 102(A)(5) (Supp. III 1979), provides coverage for "pictorial, graphic, and sculptural works." In so phrasing the definition, Congress did not intend to limit coverage to traditional works of art, but instead to embrace

> graphic art and illustrations, art reproductions, plans and drawings, photographs and reproductions of them, maps, charts, globes, and other cartographic works, works of these kinds intended for use in advertising and commerce, and works of "applied art."

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 54, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5667, *quoted in* DESKBOOK, *supra* note 51, at 713; *see also* 37 C.F.R. § 202.10 (1979). This regulation states that a work of art, to be copyrightable, must "embody some creative authorship in its delineation or form." The predecessor regulation, 37 C.F.R. § 202.8 (1979), defined protected works of art as "works of artistic craftsmanship . . . such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture."

77. CAL. CIV. CODE § 987(b)(2) (West 1982).

78. CAL. CIV. CODE § 986 (West 1982). For a discussion of *droit de suite*, see *infra* note 79.

79. *Droit de suite*, roughly translated as "art proceeds right," is designed to furnish visual artists with some stated portions of the increase in value of their works each time they

nition, concludes quite justifiably that the legislature obviously meant to exclude all other forms of the visual arts not specifically included.[80] Indeed, in drafting other definitions of fine art for other purposes, the legislature has been more comprehensive.[81] Limiting the definition so

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are resold. Statutes vary widely with respect to the types of resale covered, the percentage royalty payable, whether the percentage is based upon the total sales price or just the amount of any increase, and the minimum price for which an object sells before *droit de suite* is brought into play. Price, *Government Policy and Economic Security for Artists: The Case of the* Droit de Suite, 77 YALE L.J. 1333, 1333-34 (1968).

With regard to the rationale behind *droit de suite* Professor Price has written:

> The *droit de suite* evolved from a particular conception of art, the artist, and the way art is sold. At its core is a vision of the starving artist, with his genius unappreciated, using his last pennies to purchase canvas and pigments which he turns into a misunderstood masterpiece. The painting is sold for a pittance, probably to buy medicine for a tubercular wife. The purchaser is a canny investor who travels about artists' hovels trying to pick up bargains which he will later turn into large amounts of cash. Thirty years later the artist is still without funds and his children are in rags; meanwhile his paintings, now the subject of a Museum of Modern Art restrospective and a Harry Abrams parlor-table book, fetch small fortunes at Park-Bernet and Christie's. The rhetoric of the *droit de suite* is built on this peculiar understanding of the artist and the art market. It is the product of a lovely wistfulness for the nineteenth century with the pure artist starving in his garret, unappreciated by a philistine audience and doomed to poverty because of the stupidity of the world at large. The *droit de suite* is *La bohème* and *Lust for Life* reduced to statutory form.

Id. at 1335 (footnote omitted).

80. The California Resale Royalties Act similarly defines "fine art" to mean "an original painting, sculpture, or drawing." CAL. CIV. CODE § 986(c)(2) (West 1982). Commentators have said of this definition that two things are clear: First, the limiting word "original" indicates protection for only unique, one-of-a-kind artworks. Fine art multiples, such as lithographs or silkscreens, would not be included. Second, the definition as written is significantly narrower than those appearing in other California arts-related legislation, implying that many of the works included in the other definitions are not included here. PRICE & SANDISON, *supra* note 73, at 19.

It is not clear, however, that Professor Price and Mr. Sandison are correct with regard to their first conclusion on fine art multiples. There is general agreement within each classification of art as to what constitutes an "original." The Print Council of America, for example, has adopted standards regarding what features are found in an "original" print:

> An original print is a work of art, the general requirements of which are:
>
> 1. The artist alone has created the master image in or upon the plate, stone, wood block or other material, for the purpose of creating the print.
>
> 2. The print is made from the said material, by the artist or pursuant to his directions.
>
> 3. The finished print is approved by the artist.

"What is an Original Print? (Principles Recommended by the Print Council of America)," *reprinted in* FELDMAN & WEIL, *supra* note 43, at 441. The four major techniques for making original prints are relief processes, incised processes, lithography and serigraphy (stencil process or silkscreen). *Id.*

81. *See, e.g.*, CAL. CIV. CODE § 982(d)(1) (West 1982) (transfer of ownership of rights of reproduction) which provides:

> "Fine art" shall mean any work of visual art, including but not limited to, a drawing, painting, sculpture, mosaic, or photograph, a work of calligraphy, a work of graphic art (including an etching, lithograph, offset print, silk screen, or a work

drastically appears contrary to the spirit of *droit moral*, for protection does not even extend to the broader range of visual arts, let alone all other creative efforts.

In this regard, the definition found in the Act most closely resembles the concept of "free fine arts" developed in custom and tariff case law. At one time, only those media which were "intended solely for ornamental purposes, and including paintings in oil and water, upon canvas, plaster or other material, and original statuary of marble, stone or bronze,"[82] were entitled to duty-free entry into the country, and a rather large body of case law developed concerning the narrowness and rigidity of the "free fine arts" category.[83] Today, however, the "free" category has been expanded by federal regulations to include other media generally accepted as being among the visual fine arts,[84] making the Act's definition something of a statutory dinosaur.

It appears that the legislature may have been overly cautious against extending too far such novel rights—novel, at least, to the

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of graphic art of like nature), crafts (including crafts in clay, textile, fiber, wood, metal, plastic, and like materials), or mixed media (including a collage, assemblage, or any combination of the foregoing art media).

See also CAL. GOV'T CODE § 15813.1(b) (West 1980) (similar definition applicable to the Art in Public Buildings Act); CAL. CIV. CODE § 1738(b) (West Supp. 1982) (less comprehensive definition applicable to statutory scheme regulating the consignment of fine art).

82. The classic categorization of works of art for customs purposes appears in United States v. Perry, 146 U.S. 71, 74 (1892). The case arose out of the importation of stained glass windows which had been executed by a noted European artist. In the course of its opinion the Court noted that there were four classes of art:

> 1. The fine arts, properly so called, intended solely for ornamental purposes, and including paintings in oil and water, upon canvas, plaster, or other material, and original statuary of marble, stone or bronze . . . .
>
> 2. Minor objects of art, intended also for ornamental purposes, such as statuettes, vases, plaques, drawings, etchings, and the thousand and one articles which pass under the general name of bric-a-brac, and are susceptible of an indefinite reproduction from the original.
>
> 3. Objects of art, which serve primarily an ornamental, and incidentally a useful, purpose, such as painted or stained glass windows, tapestry, paper hangings, &c.
>
> 4. Objects primarily designed for a useful purpose, but made ornamental to please the eye and gratify the taste, such as ornamented clocks, the higher grade of carpets, curtains, gas-fixtures, and household and table furniture.

Id. at 74-75. Only the first group, the Court held, was entitled to free entry as "fine art." *Id.* at 75.

83. *See, e.g.*, M.H. Garvey Co. v. United States, 65 Cust. Ct. 45 (1970); Ebeling & Reuss Co. v. United States, 40 Cust. Ct. 387 (1958); Abercrombie & Fitch Co. v. United States, 49 C.C.P.A. 129 (1962); Wm. S. Pitcairn Corp. v. United States, 39 C.C.P.A. 15 (1951); United States v. Ehrlich, 22 C.C.P.A. 1 (1934); United States v. Royal Copenhagen Porcelain, Inc., 17 C.C.P.A. 464 (1930); United States v. Olivotti & Co. 7 C.C.P.A. 46 (1916); Brancusi v. United States, 54 Treas. Dec. 428 (Cust. Ct. 1928).

84. *See* former 19 U.S.C. § 1201, ¶ 1807, *reprinted in* MERRYMAN & ELSEN, *supra* note 4, at 3-6.

United States—for clearly the fine arts, even in their purest form, extend far beyond the confines of the present definition in the Act. While it is not suggested that the definition be expanded to the extent provided for under United States copyright law or French *droit moral*, some broadening is desirable, if for no other reason than to avoid the cumbersome task of the piecemeal expansion of the Act's definition by special legislation, a task which the legislature seems already to have embarked upon.[85]

As limited as the Act's protection may seem from the foregoing, it is not even clear that all original paintings, sculptures, and drawings are protected. The statute carries a further restriction on the quality of protected works which, while on its face may appear reasonable and harmless enough, may also prove to be most pernicious if not applied with extreme caution.

2. "[O]f recognized quality"

The Act further provides that its protections apply only to works adjudged to be "of recognized quality."[86] Very little guidance on the possible interpretation of this requirement may be found in either *droit moral* case law from other nations or in the commentaries. The quality of a particular work is never in issue in other nations since the definitions in their *droit moral* statutes focus on the artist and the creative process, and not on the nature and quality of the art work.

The Act itself is somewhat helpful, but in a manner that is highly unsatisfactory. It provides that in making the determination whether or not a specific work is "of recognized quality," the trier of fact "shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art."[87] It has been acknowledged that these are perhaps the best sources of evidence in an area where no "hard" evidence is available.[88] By placing so much weight on the testimony of art market

85. It appears, unfortunately, that this is the course the legislature has elected to follow. Already there has been added to the Civil Code a short section which provides: "In this state, for any purpose, porcelain painting shall be considered a fine art and not a craft." CAL. CIV. CODE § 997 (West 1982). This will probably be only the first of many such enactments, as artists and collectors representing different media of the fine arts pressure the legislature for inclusion.

86. CAL. CIV. CODE § 987(b)(2) (West 1982).

87. *Id.* § 987(f).

88. Karlen, *What is Art?: A Sketch for a Legal Definition*, 94 LAW Q. REV. 383, 406-07 (1978) [hereinafter cited as Karlen, *What is Art?*].

"experts," however, the Act may have skewed its protections in favor of a sometimes elitist art establishment.

This state of affairs has been accepted as a necessary evil by those[89] who view the art world as likely to provide a "complacent receptacle" for new or eccentric art forms.[90] While this may indeed be true in many cases, history is fraught with examples of the art establishment, and often artists themselves, being the first and loudest to deny a new work its place among the "fine arts."[91] There is enough evidence of an eternal struggle between many innovative artists and the art establishment[92] that a court, in applying the Act's language, would have to remain constantly on the alert for indications of institutionalized bias. The prospect that a court might lapse in its duty of vigilance is serious enough to indicate that some change is necessary with respect to the Act's quality restriction.

With a definition of fine art so narrow and exclusive in a world of art already so broad and constantly expanding into new media and techniques which defy traditional classification, the Act seems certain to administer injustice and provide inadequate protection. Though the controversy over the seminal legal definition of fine art may, in the final analysis, prove to be irresolvable, it is certainly possible to remove the major flaws in the Act's present definition through amendment.

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89. *Id.* at 400.

90. *Id.* at 385.

91. [W]henever there appears an art that is truly new and original, the men who denounce it first and loudest are artists. Obviously, because they are the most engaged. No critic, no outraged bourgeois, can match an artist's passion in repudiation. The men who kept Courbet and Manet and the Impressionists and the Post-Impressionists out of the salons were all painters. They were mostly academic painters. But it is not necessarily the academic painter who defends his own established manner against a novel way of making pictures or a threatened shift in taste. The leader of a revolutionary movement in art may get just as mad over a new departure or betrayal in a revolutionary cause.

L. STEINBERG, OTHER CRITERIA: CONFRONTATIONS WITH TWENTIETH CENTURY ART 4 (1972), *reprinted in* MERRYMAN & ELSEN, *supra* note 4, at 3-26. Another art historian, in commenting on the influence of the art academies, has noted that "academies are bound to foster pedestrian talent and to harm genius." N. PEVSNER, ACADEMIES OF ART, PAST & PRESENT (1973), *reprinted in* MERRYMAN & ELSEN, *supra* note 4, at 3-40.

92. Many artists today share a need to reach beyond traditional forms of art, and in doing so, they more often than not implicitly reject the art establishment and its institutions. . . . Many of these same artists have a greater need of these institutions than ever before, to validate and define their work as art, since the works' [sic] own boundaries are, in many cases, dematerialized or nearly dissolved. Perhaps it is this basic (and in some cases possibly debilitating) dependency on museums which creates the irresistable desire on the part of so many artists to pass judgment on them, implicate them and engage them in challenges, often with a curious combination of self-righteousness and unrealistic avenging zeal.

Editorial, Artists v. Museums, 70 ARTNEWS 25 (May 1971).

3. A proposal for a new definition

With regard to the range of visual arts media covered by the Act, quite simply the statutory definition of fine art should be broadened to bring within the Act's protection those works which are, for most purposes, indisputably among the visual fine arts.

A more difficult question to address is whether any further qualifying criteria should be included, and, if so, what form these criteria should take. It should be clear from the discussion above that the "recognized quality" requirement is unacceptable. It is equally clear, however, that some constraints are necessary, because the notion that protection extends to "all tangible creations of the mind" has caused concern among French commentators on *droit moral*[93] as well as American courts in the copyright area.[94] It would seem appropriate, given the rationale behind *droit moral*, that whatever constraints are chosen, their purpose should be only to insure that the protectable interest being asserted is both present and genuine.

As a step towards achieving this goal, it is suggested that section 987(b)(2),[95] the Act's definition of fine art, be amended to read:

> (2) "Fine art" means any work of visual art, including but not limited to, a drawing, painting, sculpture, mosaic, or photograph, a work of calligraphy, a work of graphic art (including an etching, lithograph, offset print, silkscreen, or a work of graphic art of a like nature), crafts (including crafts in clay, textile, fiber, wood, metal, plastic, and like materials), or

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93. The French *droit moral* extends protection to all works "regardless of the kind, form or expression, merit or purpose [of the work]." Tournier, *The French Law of March 11, 1957 on Literary and Artistic Property*, 6 BULL. COPYRIGHT SOC'Y 1, 3-4 (1958). In response to such a broad extension of protection, M. Tournier has observed that

> the definition of Article 2 of the Berne Convention, as revised at Brussels, which avoids mentioning the "merit" of the work and which, consequently, does not prevent this merit from being precisely taken into consideration, seems preferable. It appears certainly regrettable to us that the French Law has insisted on deliberately placing on the same level the masterpieces and the simple "realized expression" of the most modest intellectual effort.

Id. at 5.

94. As Justice Douglas noted incredulously in Mazer v. Stein, 347 U.S. 201, 220-21 (1954) (Douglas, J., concurring):

> The Copyright Office has supplied us with a long list of such articles which have been copyrighted—statuettes, book ends, clocks, lamps, doorknockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles and ash trays. Perhaps these are all "writings" in the constitutional sense. But to me, at least, they are not obviously so.

95. The current code defines "fine art" as "an original painting, sculpture, or drawing of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser." CAL. CIV. CODE § 987(b)(2) (West 1982).

mixed media (including a collage, assemblage, or any combination of the foregoing art media) which represents a serious creative statement of the artist's personality.

Because the "recognized quality" standard would be replaced by the restriction that the work of fine art represent a serious creative statement, section 987(f) also should be replaced by the following:

(a) In determining whether a work of fine art is a serious creative statement of the artist's personality, the trier of fact shall consider, among other relevant evidence:

(1) The intention of the artist in creating the work of fine art;

(2) The circumstances surrounding the creation of the work of fine art; and

(3) The acceptance of the work of fine art as a serious creative statement of the artist's personality by some segment of the artistic community or the general public.

The bulk of proposed section 987(b)(2) has been borrowed substantially unchanged from another California Civil Code provision dealing with the transfer of ownership rights in artistic properties.[96] While the proposed definition is not as broad as that of the French *droit moral* or American copyright, it is a strong, functional, and, most importantly, nonexclusive listing of protected visual arts media which will provide the flexibility currently lacking in the present definition.

The only aspect which may cause concern is the inclusion of "crafts" within the definition. What distinguishes "true" fine art from "mere" craft is not entirely clear, but the latter category is often thought to be of lesser importance, and hence held in lower esteem, by artists and the public. If this is indeed so, there are likely to be few moral rights issues concerning crafts, so their inclusion would seem to pose few, if any, problems of administration, especially in light of the additional definitional considerations discussed below. On balance, it seems wise to include objects which may now be classified as "crafts" but which, if preserved until another time, may rightfully take their place as objects of "fine art."[97]

The most significant change, however, is the replacement of the

96. CAL. CIV. CODE § 982(d)(1) (West 1982).

97. Even if the creator intended the work to be a work of craft, this intention should not be determinative of the art status of the work. "One reason for this is that older works which were originally intended in another social context or historical period to be merely works of craft or ornament may be rightfully considered works of art or 'objects of artistic interest.'" Karlen, *What is Art?*, *supra* note 88, at 398.

quality standard by the requirement that the work of fine art, to be protected, must be "a serious creative statement of the artist's personality." This consideration is most likely to be contested in connection with new, bizarre, nonobjective art forms. One author has noted that there is sometimes "widespread suspicion that such art is some kind of put-on, that the artist is laughing at the public through his painting or sculpture."[98] Admittedly, such is often the case, and has never been more clearly exemplified than by an incident involving the Italian artist Manzoni. In an attempt to protest the near-commodity status of art in the mid-1950's, the artist saved his own excrement, canned it in small numbered tins labeled *Merda d'artista*, and offered them for sale at the current market price of gold. Somewhat surprisingly, one of the little tins showed up at a full-scale retrospective of Manzoni's work at the Tate Gallery in London in 1973.[99] Notwithstanding such examples, it seems beyond question, given the rationale behind *droit moral*, that regardless of how bizarre a work of art is, if the artist can establish, through reputation or otherwise, that the work was intended to be a serious artistic effort, this evidence should be given great weight in determining whether or not the protections of *droit moral* should apply.

Clearly, though, the work of an artist cannot be protected solely because the creator intends it to be a work of art, or designates it as such, as suggested by the first proposed consideration.[100] Hence, the second prong of the proposed amendment suggests that the trier of fact consider evidence of the circumstances surrounding the creation of the work. It can be said that in many cases there are certain trappings which surround the execution of a work of art: notes, sketches, preliminary studies, small-scale models, and the like. The presence of such items should be persuasive evidence of the seriousness of the creative effort regardless of our independent judgments as to the ultimate success or merit of the completed work. The absence of such evidence, on the other hand, should not be conclusive of a lack of seriousness, for spontaneity is as often the source of great masterpieces as is careful planning.

Finally, the proposed amendment directs the trier of fact to consider whether a work has been accepted as a serious creative statement by some segment of the art community *or the general public*. This third point interjects an element of social opinion into the balance, but since the opinion base has been broadened beyond so-called art market ex-

98. L. ADAMS, ART ON TRIAL 43-44 (1976).
99. *But is it art?*, 73 ARTNEWS, 68-69 (Oct. 1974).
100. *See* Karlen, *What is Art?, supra* note 88, at 398-99.

perts, this provision is not likely to introduce as strong an institutional bias as does the Act's current "recognized quality" standard. It may well be that an artist seeking protection for his work and reputation will always prevail on this point, for few works of art ever meet with universal rejection; however, as Justice Holmes said in *Bleistein v. Donaldson Lithographing Co.*[101] with respect to extension of copyright protection, "if [works of art] command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt."[102]

Phrasing the definition in the manner suggested would actually streamline the application of the Act. Under the proposed amendment, the trier of fact would focus immediately on the artist's reputation and personality rather than spend time assessing the quality and recognition of the artwork—issues that are at best marginally relevant.

Although the problems with the Act's definitional section can be resolved only through substantial amendment, the questions surrounding the right of integrity are dealt with more easily. The crucial issues are the extent to which the artist and the public may claim an interest in the preservation of privately owned art, and whether the protection of this interest infringes on rights guaranteed to property owners by the fifth amendment to the Constitution.

B. The Right of Integrity and the Fifth Amendment

It is clear that there is no right of integrity under American common law. For example, in the case of *Crimi v. Rutgers Presbyterian Church*,[103] artist Alfred Crimi painted a large fresco depicting Christ on the wall of a church. Over time, more and more parishioners objected to the mural, "feeling that a portrayal of Christ with so much of His chest bare placed more emphasis on His physical attributes than on His spiritual qualities."[104] In 1946, during a remodeling of the church, the mural was completely painted over. Crimi contended that this act violated his "continued, albeit limited, proprietary interest" in the mural.[105] The court found no basis in American law to make the obliteration actionable, absent a specific reservation of rights by Crimi at the

101. 188 U.S. 239 (1903).
102. *Id.* at 252.
103. 194 Misc. 570, 89 N.Y.S.2d 813 (1949).
104. *Id.* at 571, 89 N.Y.S.2d at 815.
105. *Id.* at 572, 89 N.Y.S.2d at 815.

time of the sale.[106]

It is fair to say that most American art owners still abide by a belief in an unfettered right to alter or destroy artworks which they own. To be sure, the Act's recognition of the right of integrity contradicts this belief, and although some commentators may feel that such interference is justifiable on one ground or another,[107] the question remains whether the recognition of a right of integrity constitutes a taking of property by the state.

The fifth amendment to the United States Constitution prohibits the taking of private property for public use without the payment of just compensation.[108] The Act, however, obviously does not sanction the physical taking of artwork from private owners to accomplish its goals—it merely regulates the possession of artwork through the police power[109] to benefit the greater public interest.[110] Nevertheless, it has

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106. *Id.* at 576-77, 89 N.Y.S.2d at 819.

107. At present, owners of private collections must base their claims of ownership on uninhibited property rights in works that may be acknowledged, quite generally, to be of importance to the community at large. Under our present rather modest incursions into strict property rights, there may be a state claim that an owner may not arbitrarily destroy a valuable work.

Price, *State Arts Councils: Some Items for a New Agenda*, 27 HASTINGS L.J. 1183, 1188 (1976) (footnote omitted) [hereinafter cited as Price, *State Arts Councils*].

Professor Merryman observes that

> There is another sense in which the right of integrity (and the other components of the moral right) appears to come into conflict with property rights—if by property rights one means the right of the owner to deal with the thing as he wishes. The right to integrity arguably reduces to some extent the owner's legal power over the work of art by forbidding him to modify it. Consequently one whose definition of property rights is based on a priori religious, philosophical, or political preconceptions—as most definitions of property are—may well see the right of integrity as an infringement or limitation of the property right of the owner of the work of art. Conversely, a thorough positivist will insist that property rights are defined (for legal purposes) by the positive legal order, so that the right of integrity—like the law of nuisance or zoning—is merely one element of the legal definition of the right of property and consequently cannot be in conflict with it.

Merryman, *Bernard Buffet, supra* note 6, at 1047.

108. U.S. CONST. amend. V. This amendment has been made applicable to the states via the fourteenth amendment. Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897).

109. The police power is the power of the state to prevent certain uses of property which "impair the health, safety, or morals of others, or affect prejudicially the general public welfare." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 375 (1926). "In every ordered society the State must act as umpire to the extent of preventing one man from so using his property or rights as to prevent others from making a correspondingly full and free use of their property and rights." *Id.*

110. Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgement by the State of rights in property without making compensation. But restrictions imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibi-

become an accepted part of fifth amendment doctrine that even mere regulation, if it "goes too far" in its restraints, is tantamount to a physical taking of property, and requires that the affected property owner be compensated.[111]

Regulation to protect the physical integrity of objects of historic or aesthetic importance has been acknowledged as being within the ambit of the police power.[112] Such regulation has been used with great success in several cities under the rubric of "landmark preservation." In New York, for example, local governments have been "empowered to provide by regulations, special conditions and restrictions for the protection, enhancement, perpetuation and use of places, districts, sites, buildings, structures, *works of art*, and other objects having a special character or special historical or aesthetic interest or value."[113] The New York City landmark preservation statute[114] protects parcels containing an "improvement," which term is defined to include works of art,[115] as well as landmark sites. It is unlawful for the owner of any such site or parcel to alter or destroy any landmark or improvement, other than in the course of ordinary maintenance and repair, without the prior approval of the Landmarks Preservation Commission.[116]

The validity of these regulations was tested in *Penn Central Trans-*

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tion of a noxious use. The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting).

111. *Id.* at 415.

112. In speaking of the breadth of regulations which may be encompassed by the police power, Justice Douglas has written that "it is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Berman v. Parker, 348 U.S. 26, 33 (1954).

113. N.Y. GEN. MUN. LAW § 96-a (McKinney 1977) (emphasis supplied) (note that there is another § 96-a in the General Municipal Law which deals with the use of lands for neighborhood youth centers).

114. NEW YORK CITY, N.Y. ADMIN. CODE, ch. 8-A, §§ 205-1.0–207-21.0 (1976).

115. "Improvements" is defined in the ordinance as any "building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment." *Id.* § 207-1.0(i).

116. *Id.* § 207-4.0(a)(1). Once a property has been designated as a landmark site or improvement parcel, the owner is "under an affirmative duty to maintain the landmark in good repair. He can only alter or demolish it if the Landmark Commission authorizes him to do so, or after a judicial determination." Rosensaft, *New York City Landmark Preservation Law as Applied to Radio City Music Hall*, 4 ART & THE LAW 83, 84 (1979) (footnotes omitted) [hereinafter cited as Rosensaft, *Landmark Preservation*].

If an owner wishes to alter or demolish a landmark, he must petition the Landmarks Preservation Commission for a certificate of appropriateness. NEW YORK CITY, N.Y. ADMIN. CODE, ch. 8-A, § 207-4.0(a) (1976). The factors governing the issuance of the certificate are found in § 207-6.0. The most common ground for requesting permission to alter or

portation Co. v. City of New York.[117] In that case, New York City had prohibited the construction of a multi-story office structure over Grand Central Station on the ground that the station was a landmark under the preservation ordinance. Penn Central challenged the constitutionality of the regulation. The United States Supreme Court upheld generally the power of New York City to designate landmarks, and to prevent their alteration or destruction without effecting a compensable taking under the fifth amendment.[118] In upholding the New York law, the Court found that use restrictions on property did not constitute a taking where (1) the public interest requires such interference, (2) the means are reasonably necessary to the accomplishment of the purpose, and (3) the use restrictions do not have an unduly harsh impact on the owner's use of the property.[119] As long as the restrictions do not adversely affect the value of the property,[120] or interfere with its primary or intended use,[121] the restraints do not constitute a compensable

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demolish a landmark is that the property is not capable of generating a sufficient return in its present state. The grounds for ruling on such a claim appear in § 207-8.0.

The Commission may reject an application for a certificate of appropriateness by merely not accepting the validity of the grounds stated in the owner's request. If the owner claims insufficient return, the Commission may deny the request if it believes that under "reasonably efficient management" the property could earn a reasonable return. If the Commission finds that there is an actual hardship, it may propose a plan which, in its judgment, allows for a reasonable return. The plan will usually be made up of tax credits and exemptions for the property. The property owner has no option to reject the plan. Rosensaft, *Landmark Preservation, supra* at 84-85.

If the owner feels that the Commission's actions are arbitrary, or amount to an abuse of discretion, he may appeal the decision under N.Y. CIV. PRAC. § 7803.3 (McKinney 1981). *See, e.g.*, Lutheran Church v. City of New York, 35 N.Y.2d 121, 128 n.2, 359 N.Y.S.2d 7, 13 n.2, 316 N.E.2d 305, 309 n.2 (1974) (designation of property as a landmark was a compensable taking where it prevented owners from demolishing a building to construct offices, where the current building was not suitable for such use).

117. 438 U.S. 104 (1978).

118. *Id.* at 107, 136.

119. *Id.* at 127 (citing Goldblatt v. Hempstead, 369 U.S. 590, 594-95 (1962)); *see* Lawton v. Steele, 152 U.S. 133, 137 (1894).

120. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590, 594-95 (1962). In that case the Supreme Court upheld a safety ordinance that effectively prohibited the claimant from continuing to use his property for mining purposes on the grounds that (1) the regulation did not prevent the reasonable use of the property since the owner made no showing of an adverse effect on the value of the land, and (2) the restriction served a "substantial public purpose."

121. In *Penn Central*, Justice Brennan concluded that the restrictions under the Landmarks Preservation Law "[did] not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel." 438 U.S. at 136. He further noted that the statute not only permitted, but indeed contemplated, that Penn Central may continue to use the property precisely as it did before: as a railroad office building. *Id.*

At another point, Justice Brennan stated that the restrictions were constitutional because they were "substantially related to the promotion of the general welfare," and because

taking.

As to the first point, it is clear that the protection of the interests of artists and the public in the preservation of all serious creations of fine art requires some degree of interference with private ownership rights, since only a small percentage of existing artwork is owned by the state. Second, limiting the right to alter or destroy art while it remains in the possession of the owner is indeed reasonably necessary to the preservation of the integrity of artwork, since the only other means of accomplishing this goal is for the state to acquire the art directly and preserve it under its ownership. Given the recent trends of tighter state budgets—particularly for the arts—and skyrocketing art prices, even if the state could isolate those works thought to be "worthy" of preservation, the cost of such a limited effort would still be prohibitive.

Finally, the impact of the recognition of the right of integrity on an owner's use and possession of artwork would be negligible when assessed in terms of its effect on value and the degree of interference with the primary or intended use of the art. It is safe to say that an art owner places little value on his ability to alter or destroy an artist's work. In this respect he is quite different from the owner of a landmark site, who might be expected to put a great value on his ability to alter or destroy the landmark, for to undertake such actions might free the underlying asset, the land, to be put to a more profitable use. The same cannot be said for fine art not integrated into real property, for there simply is no underlying asset which is made more valuable by the alteration or destruction. To the contrary, such acts might well constitute the ultimate form of devaluation of a work of fine art.[122]

Further, the right of integrity would not impair the reasonable expectations surrounding the creation and possession of fine art. The primary use of a work of art, intended by artist and collector alike, is for display and appreciation, not as a target for alteration or destruction. Indeed, perpetuating the uninhibited right of art owners to mutilate

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Penn Central was able to continue using the terminal "for its intended purposes." *Id.* at 138 & n.36.

122. It may be argued that where the mutilated or destroyed work is one of only a few examples of an artist's work, others of which are in the collection of an owner, the mutilation or destruction may serve to increase the value of the works remaining intact by increasing their rarity, thus providing a potential financial benefit to the owner from the destruction. The relationship is at best indirect, however, for increased rarity is only one of many factors assessed in the valuation of the remaining works. Even if it were true that such economic benefit would accrue to the owner, thereby giving a value to the right to destroy a work, in such circumstances, where the work is one of only a small total production by an artist, the public's interest in the preservation of the work would be proportionately greater as well, and would seem to outweigh the owner's speculative economic gain.

works of art would seem to be more of a threat to the primary, intended use than would allowing a right of integrity.

Thus, the Act's right of integrity meets the criteria established in the *Penn Central* case, and appears to be a constitutionally sound exercise of the police power. Curiously, though, while the right of integrity would have allowed artist Graham Sutherland to prevent Lady Churchill's destruction of a much-despised portrait of Sir Winston,[123] it would not have stood to prevent the painting over of "Beverly Hills Siddhartha," a large painting covering the exterior of a prominent Los Angeles building, when the building changed owners.[124] Furthermore, it is unclear what would have been the result with respect to a brightly painted DC-8 jet aircraft decorated by Alexander Calder, which had been used in the regular service of a commercial airline and was recently stripped of its Calder paint job as part of regular aircraft maintenance.[125] This unevenhanded and uncertain application of the Act is the result of a failure to consider adequately the problems surrounding usable art and art on buildings.

C. The Problems of Usable Art and Art on Buildings

Artistic expression often takes many unorthodox sizes, shapes, and colors. More often in recent years, however, such expression has been

123. In 1954, the late artist Graham Sutherland was commissioned by Parliament to paint a portrait of Churchill as a gift for his 80th birthday. After seeing the final product, Churchill reportedly commented that the glowering, semi-crouching pose made him look as if he were sitting on the toilet. His wife promised family members that the portrait would "never see the light of day." After Lady Churchill died, it was revealed that she had indeed destroyed the painting some years earlier. Sutherland was not unduly distressed, but viewed the destruction as an act of vandalism. Los Angeles Times, Jan. 13, 1978, § I, at 5, col. 1.

124. A group of artists who called themselves the "Los Angeles Fine Arts Squad" was hired by the owner of a highly visible building on La Cienega Boulevard in Los Angeles to execute an enormous painting which covered most of the building's exterior. The work was entitled "Beverly Hills Siddhartha," and attracted a great deal of public attention. After a year or so, a new owner acquired the building and had the entire mural painted over. MERRYMAN & ELSEN, *supra* note 4, at 4-41.

125. Los Angeles Times, Sept. 12, 1979, § II, at 5, col. 1. The jet, decorated under the supervision of Calder in 1973 at a price of $100,000, was stripped of paint as part of a regular maintenance procedure of its owner, Braniff Airlines, whereby the fuselage is checked for corrosion. The plane was to be repainted in the normal color scheme of the Braniff fleet. A Braniff official stated that the company had decided not to repaint the jet as it had been decorated by Calder, since "[i]t would be recreating a work of art without the artist himself present."

Opinion among the local art community was split. One Dallas sculptor and art restorer viewed the Calder jet as a "national treasure" and objected to the airline's action. The curator of a Dallas museum, however, did not view the stripping of the paint as a tragedy, saying that "We [museum curators] never considered the plane a work of art." *Id.*

appearing on many unconventional types of support—specifically, upon objects of utility such as automobiles, furniture, and other household items rather than the traditional canvas or paper.

When artwork merely appears on a utilitarian object, which neither the artist nor the collector intends for use other than display as a work of art, there is no problem in applying *droit moral* to that object the same as with any other creation. If we accept the rationale that it is the artist and his expression that are being protected, the support to which that expression is affixed is of no importance. The refrigerator decorated by Bernard Buffet, previously discussed, is a perfect example of such art.

Serious questions arise, however, with respect to the unmodified application of *droit moral* to art on buildings and what has been called "usable art"—art which falls within the suggested definition of fine art, but which also is incorporated into an object that actively continues to serve some useful purpose.[126] The owners of such buildings or useful objects, in dealing with them only as such and not as works of fine art, may find it necessary or desirable to commit acts of destruction or alteration affecting the incorporated work of fine art. In so doing, however, the owner comes into direct conflict with the interests of the artist and the public protected by the Act.

The Act presently responds to this conflict by separating fine art on buildings from all other art, and all but excluding it from meaningful protection: if the work of art cannot be removed from the building without substantial damage to the work, the Act does not apply unless the artist reserved his moral rights in a writing signed by the building owner and properly recorded; if the work can be so removed, then the moral rights shall apply, but only to allow the artist to remove the work at his own expense. Thus, if the work of art is sufficiently well-attached or prohibitively expensive to remove, both likely circumstances with building art, the Act's protections will not apply in most circumstances. It must be stressed that the Act, even in its present form, does not *define*

126. Usable Art, still an evolving category, is made both for aesthetic contemplation and for serviceability. It is essentially sculpture—that is, it is three-dimensional—but it is sculpture that can be sat on, eaten from, worn, flown, driven; it can be used to light a room, or to divide a space.

. . . .

. . . [T]oday's artists rarely conceive their pieces as prototypes for mass production. Like other artworks, their clothing, furniture, lamps, and so on are produced either in editions or as unique items. Most works of Usable Art are intended as serious and important art statements; they are not spinoffs, private amusements, or pay-the-rent schemes.

Perrault, *Usable Art*, 3 PORTFOLIO 60, 61-62 (July/Aug. 1981).

fine art to exclude art on buildings; to the contrary, by providing protection under limited circumstances, the Act implicitly recognizes that protectable fine art may appear on buildings. The practical exclusion of such art from protection is merely an ad hoc legislative determination that the building owner's interest in using his property shall prevail in nearly all situations.

The problems posed by usable art, on the other hand, may well be definitional. Usable art is never mentioned in the Act as being within the "fine art" category, and the resulting uncertainty surrounding its treatment is troubling. One art critic has argued that none of the many useful objects which are decorated with painting, embroidery, carvings or inlays may be considered works of fine art.[127] Fortunately, this position has not been adopted by the Legislature, which recently passed a special statute which provides that works of painting on porcelain, presumably including such useful objects as cups, dishes and vases, are to be protected as works of fine art.[128] How much further the Legislature might go in protecting such objects is open to speculation.

The problem posed by art on useful objects was also wrestled with at great length by the customs courts, where the standard ultimately settled upon was whether the primary value, use, or character of the object was as a work of fine art or as a utilitarian article; only those objects in which the artistic attributes predominated were classified as "fine art."[129] Persuasive evidence of this characteristic is found where

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127. [E]very ornament must have a content. Its content, however, is affected by its function. An ornament is almost always a part of something else. It is an attribute meant visually to interpret the character of a given object or situation or happening. It sets a mood; it helps define the rank and *raison d'être* of a tool, a piece of furniture, a room, a person, a ceremony. . . . Being a part of something else, the ornament is specific in nature—that is, its content is limited to the particular character of its carrier. Such a limitation is inadmissible in the work of art proper. Whereas the ornament is a part of the world in which we live, the work of art is an image of that world. . . . The work of art is either quite independent of its environment, as, for example, in the neutral setting of a museum, where in contemplating the work we forget what is around it, or, as in a stage performance, it is the center and climax of a place designed to make us receive the view of the world that is represented in the work.

R. ARNHEIM, ART AND VISUAL PERCEPTION 135 (1966), *quoted in* Karlen, *What is Art?*, *supra* note 88, at 403-04.

128. CAL. CIV. CODE § 997 (West 1982). The text of this provision is quoted *supra* note 85.

129. *See, e.g.*, United States v. Olivotti & Co., 7 C.C.P.A. 46 (1916). The court was deciding whether marble chairs, the arms of which were sculpted to form lions' heads, were works of fine art. The court said: "These carvings . . . were evidently designed as an embellishment of the seats, and it would be going far to say that of themselves they were sufficient to give the character of sculptures to the entirety of which they are a minor, not a predominating, part." *Id.* at 49. The court concluded that when an artist makes a utilitarian object more beautiful, the completed work reaches no higher plane than the purely decorative arts,

the object has " 'no utilitarian value at all proportionate to . . . [its] cost.' "[130] Such a standard would be inappropriate for the purposes of the Act since, as with the Act's present definition of fine art discussed earlier, it focuses too much attention on the object and not on the interests protected.

The task of accommodating the conflicting interests involved in a workable standard is a difficult one, and not easily accomplished by being arbitrary in the case of building art and unclear with respect to usable art. The interests of the artist, the public, and the owner are similar enough with respect to both categories of art, however, so that by focusing on those interests, a single standard may be derived which is suitable for application to both. Toward this end, it is suggested that subdivisions (h)(1) and (h)(2) of the Act, dealing with art on buildings, be deleted in their entirety and replaced by the following:

> (h)(1) With respect to works of fine art incorporated into improvements upon real property, such as buildings, or into useful objects of personal property, if the owner of such property wishes to make use of it in such a manner that he shall, in the course of such use, intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of the incorporated work of fine art, the rights and duties created under this section shall not apply if the trier of fact determines that the owner's interest in making such use of his property outweighs the injury to the interests of the artist and the public which results from such use. In making this determination, the trier of fact shall consider, among other relevant evidence:
>
> (A) the value of the work of fine art in relation to the value of the property as a whole;

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unless the artwork is so compelling that the utilitarian aspects of the article are "lost in the realized sentiment of the artist." *Id.* at 49-50. *Contra*, Karlen, *What is Art?, supra* note 88, at 395.

130. United States v. Ehrich, 22 C.C.P.A. 1, 11 (1934) (Bland, J., dissenting) (quoting United States v. Baumgarten & Co., 2 Ct. Cust. App. 321, 322 (1911)). At issue in *Ehrich* was whether certain vases could be classified as works of art. The dissenting justice disagreed with the majority's finding that the vases were not works of art, noting, among other factors, that the inventoried value of the vases ranged as high as 2,400 French francs, which precluded the conclusion that the objects were designed to be mere vases. Justice Bland's dissent in *Ehrich* has been cited with approval as a more accurate statement of the standard to be applied than that used by the majority. *See* Ebeling & Reuss Co. v. United States, 40 Cust. Ct. 387, 394 (1958) (holding that ornamental vases and decanters are works of art). The *Ebeling* court stated that the majority opinion in *Ehrich* had been effectively overruled by subsequent case law. *Id.*

(B) the injury to the personality and reputation of the artist;

(C) the public interest in the preservation of, or in allowing the mutilation, defacement, alteration or destruction of, the work of fine art;

(D) the necessity of the owner's actions with respect to his property which are detrimental to the incorporated work of art, and the availability of reasonable alternatives to such actions.

(h)(2) Any person who commits, or authorizes the commission of, any act of defacement, mutilation, alteration, or destruction of a work of fine art in the course of the ordinary use, maintenance or repair of such property shall not have violated this section so long as such acts were not performed with gross negligence, as defined in subdivision (c)(2) of this section.

The proposal offers several improvements over the Act's current scheme. First, it does not require that the artist reserve his moral rights in a signed, recorded writing in order to protect a work of fine art permanently executed on a building. Such a requirement has no place in a moral rights statute because it places too much emphasis on the negotiating strength of the artist at the time the work is created. It also leaves the artist no better protected than at common law under *Crimi v. Rutgers Presbyterian Church*,[131] where the court held that Crimi could have reserved his moral rights by contract. Also, the proposed amendment does not hinge protection of art on buildings upon the artist's financial ability to remove his creation. In addition to relaxing the Act's present treatment of art on buildings, proposed subdivision (h)(1) would resolve any uncertainties as to the status of usable art by specifically recognizing such a category, and providing that it be treated in the same manner as art on buildings.

Under proposed subdivision (h)(1), the trier of fact would be free, with respect to both categories of art, to consider a wide range of factors in its determination of whether and to what extent the artist's or the owner's interests should prevail, and to exercise its broad remedial powers to fashion a flexible remedy which accommodates as many of those interests as possible. The new (h)(2) would relieve the owner from the risk that normal use and care of his property would violate the

131. 194 Misc. 570, 89 N.Y.S.2d 813 (1949). For discussion of the facts of the case, see *supra* notes 103-06 and accompanying text.

Act, but the gross negligence standard would prevent an owner from being so callous with respect to the property that the incorporated artwork is needlessly endangered or damaged.

Thus, rather than having a free hand to alter or destroy a work of fine art on a building merely by showing either that the artist did not reserve his moral rights in the work, or that the artist could not remove the work in time, the owner would at least have to make some showing that the work of fine art substantially interfered with the planned use of the property and that all reasonable alternatives had been explored before a court would allow the defacing of a mural or other art object which may, now or in the future, form a meaningful and important part of the state's religious, cultural or artistic heritage. On the other hand, the standard is flexible enough to allow for the stripping of paint from the Calder Jet, for instance, if an adequate showing were made to indicate that the action was necessary in the interest of passenger safety.

Another complicating feature in the episode surrounding the Calder Jet was that Alexander Calder was no longer living at the time his painting was removed. If there were indeed a violation of *droit moral*, who would assert it on Calder's behalf? The class of persons who have been granted standing to enforce the rights guaranteed by the Act has been limited to the artist during his lifetime, and a narrow range of others after his death. In many cases, after the artist's death, the self-interest of those who have been granted standing to sue may conflict with both the artist's own sensitivities and priorities expressed during his lifetime, and the public's interest in the preservation of the artwork, with the possible result that the integrity of the artwork will be severely compromised.

D. Standing to Enforce Droit Moral

During his lifetime, the artist alone may be relied upon to resist changes in his works and to enforce his moral rights.[132] As a corollary to this power, the artist should also have the right to ratify and accept modifications made in his works by others. "While the creator is alive, the interest of society in preserving the integrity of the work is at a minimum, for who can judge better than the creator what constitutes the true and ultimate form of the work."[133] Thus, it should be the case

132. DESKBOOK, *supra* note 51, at 845.

133. Roeder, *Doctrine of Moral Right, supra* note 44, at 570. Professors Nimmer and Price disagree with the position that the artist's rights are paramount during his lifetime. They suggest that some individual or entity should be empowered to enforce moral rights on

that, during the artist's lifetime, no other individual or group should be able to interfere with the artist's decision to enforce or not to enforce his moral rights. The Act adopts this viewpoint.[134]

The Act further provides that after the death of the artist, the artist's rights may be enforced by his heir, or personal representative for a period of 50 years following the artist's death.[135] Several commentators have suggested that after the death of the artist, those who have inherited the moral rights of the artist may find themselves more interested in pecuniary gain than in representation of the deceased artist's or the public's interest in the integrity of the surviving works.[136] Several cases of such conflict of interests have been documented, the most notable of which involves the late sculptor David Smith.

After Smith's death, the executors of his estate, among them a well-known art critic, an artist, and a lawyer,[137] sent tremors through the art community by their handling of several of Smith's large metal sculptures. Some were deliberately stripped of their brightly-colored paint by sandblasting, allowed to rust, and then varnished. Others were left outdoors where the paint eventually cracked, chipped and peeled off at the hands of the elements.[138] A clue to the motivation behind the executor's actions may have been that many of Smith's earlier sculptures were composed of unpainted metal, and in general those

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behalf of the public where the artist, although still living, is not concerned with the violation of moral rights. Nimmer & Price, Moral Rights and Beyond, *supra* note 32, at 9-10.

134. CAL. CIV. CODE § 987(e) (West 1982).

135. *Id.* § 987(g)(1). The French law is very similar, but adopts a hierarchy of classes of persons which may enforce the deceased artist's rights. Article 19 of the Law of March 11, 1957, *supra* note 38, provides that after the death of the artist, the rights shall be exercised by the executors of the estate during their lives. If there are no executors, or after the death of the last of them, the rights shall be exercised by (1) descendants, (2) the spouse, (3) heirs, and (4) general legatees, in that order of preference. Article 20 gives the court supervisory powers, and allows the court to exercise the rights where the above inheritance fails, or where there has been a disinheritance. Sarraute, *French Moral Right, supra* note 22, at 483.

Not all rights are said to pass to the heirs and descendants, however. It has been suggested that the "positive" rights—the rights to create, publish, alter or withdraw—die with the author. Only the "negative" components—the right to enjoin alteration or other detrimental acts committed against the work or the artist's reputation—are transmitted at death. Only the latter rights require no personal action or creative judgment by the artist himself. Strauss, *Moral Right, supra* note 24, at 517-18.

136. For instance, the heirs may be willing to publish a work the artist thought to be incomplete or inferior, or to authorize a profitable adaptation or reproduction regardless of the quality. DESKBOOK, *supra* note 51, at 806. Lacking the artist's sensitivities and priorities, the heirs may agree to accept compensation for the destruction or defacement of the work of art. Nimmer & Price, Moral Rights and Beyond, *supra* note 32, at 10.

137. Respectively, Clement Greenberg, Robert Motherwell, and Ira Lowe.

138. Krauss, *Changing the Works of David Smith*, 62 ART IN AMERICA 30 (1974) [hereinafter cited as Krauss, *David Smith*].

works drew higher prices than Smith's painted work.[139] Regardless of their lack of commercial success, however, these experiments in painted sculpture make up an important chapter in the artist's development.[140]

The executors claimed that the results were faithful to the artist's intention, even though a similar stripping of one sculpture during Smith's lifetime incurred the wrath of the artist, who denounced the work as "partially destroyed."[141] Incidents such as this show that the heirs and representatives of the deceased artist are not necessarily the most effective guardians of the public interest, and demonstrate the need for broadening the range of potential enforcers to include true

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139. DESKBOOK, *supra* note 51, at 845. One reason for this difference in value was the influence of executor Clement Greenberg, an art critic himself, who constantly denigrated the painted works, even during Smith's lifetime. *Id.* One writer has accused Greenberg of implementing, without Smith's consent, an "alternative realization" of the artist's intentions. In stripping the paint off the sculptures, Greenberg "revised not only certain works but the esthetic scenario of Smith's last period." Kramer, *Questions Raised by Art Alterations*, N.Y. Times, Sept. 14, 1974, § 1, at 25, col. 1.

A similar dispute arose out of the work of the late Constantin Brancusi, a modern sculptor. Brancusi's personal representative was accused of making "unethical reproductions" of Brancusi's sculptures out of a material that Brancusi had renounced. The representative replied that he, as the person designated by the artist, is the extension of the personality of the artist. By definition, he stated, it was impossible for him to infringe on Brancusi's right of authorship. Nimmer & Price, Moral Rights and Beyond, *supra* note 32, at 11.

140. "Smith's was a complex mind, and among its complexities was a burning ambition to take constructed sculpture a step beyond . . . to join the syntax of constructed sculpture to the esthetic of color, and thus produce a sculpture in which both construction and color were given co-equal power." Kramer, *Questions Raised by Art Alterations*, N.Y. Times, Sept. 14, 1974, at 25, col. 1. Smith painted, stripped, and repainted works himself several times over, rarely satisfied, never completely realizing his goals. *Id.*

141. Smith wrote the following letters to two art journals following the mutilation of his work:

> Since my sculpture, *17 h's* (44 3/4 inches high), 1950, painted cadmium aluminum red, during the process of sale and resale, has suffered a willful act of vandalism . . . , I renounce it as my original work and brand it a ruin.
>
> My name cannot be attributed to it, and I shall exercise my legal rights against anyone making this misrepresentation.
>
> All persons involved in this act of vandalism will be, to the best of my ability, prohibited from acquiring any more of my work.
>
> I declare its value to be only its weight of 60 lbs. of scrap steel. [letter to ARTNEWS].
>
> My sculpture *17 h's*, made in 1950, painted with six coats of cadmium aluminum red, has been partially destroyed by one or more parties involved in its sale and donation to a collection.
>
> This willful work of vandalism causes me to deny this work and refuse any future sale to any of those connected with this vandalism.
>
> I tried to repurchase this work but was refused. There seems to be little legal protection for an artist in our country against vandalism or even destruction. Lacking full proof, I cannot name the guilty participants; but I ask other artists to beware. Possibly we should start an action for protective laws. [letter to ARTS].

Krauss, *David Smith, supra* note 138, at 32-33.

representatives of the public interest who may enforce the artist's rights when those who should be primarily responsible do not act.

A related problem is the rather short duration of the rights and duties under the Act—the life of the artist plus 50 years.[142] This is significantly different from the French *droit moral* and that of other countries, where the moral right is perpetual.[143] This means that under the Act, few works created prior to 1900 would be protected; as Professors Nimmer and Price have noted, "[w]hile there are many *droit moral* questions involving contemporary artists, a great threat to the integrity of works of art relates to more ancient pieces . . . ."[144] It is important, then, that some person or entity be given standing to enforce moral rights beyond the time when rights in the heirs and others expire.

The original version of the Act responded to these needs not only by recognizing a public interest in the preservation of art, but by granting standing to enforce the Act to any person acting in the public interest,[145] and provided that with respect to such persons the rights and duties under the Act shall exist in perpetuity.[146] In light of the obvious caution being exercised by the Legislature in introducing *droit moral* into California, however, it is not surprising that a grant to *all* persons of rights of preservation in *all* artwork in California gave some members of the Legislature pause. In the end, provisions granting rights to the general public were deleted, and the Act became law retaining the specifically recognized public interest, but with no means by which it could be enforced.

To the extent that a public interest is still recognized, however, the choice of an enforcer of the public's rights is significant. As we have experienced, the artist's heirs and representatives may have at best conflicting interests in many crucial circumstances. Other countries have also recognized this problem, and have dealt with it in a number of ways. In France, for instance, in addition to a hierarchy of heirs, legatees, representatives, and the like who are entitled to sue on behalf of the deceased artist, the establishment of a legal entity for this purpose is also permitted.[147] Other nations provide for such enforcement by a

142. CAL. CIV. CODE § 987(g)(1) (West 1982).

143. Merryman, *Bernard Buffet, supra*, note 6, at 1041-42.

144. Nimmer & Price, Moral Rights and Beyond, *supra* note 32, at 8.

145. S. 2143, § 987(d) (1978) (as introduced).

146. *Id.* § 987(e)(1).

147. Merryman, *Bernard Buffet, supra*, note 6, at 1042. The concept of entity standing has had an uneven history in the French courts, however. The Society of Men of Letters, a French society of professional writers, once sought an injunction against the use of a novel's title in connection with a film based on the novel, and a preliminary injunction was granted.

public official in pursuance of the public interest.[148]

It is suggested that a similar provision be included in the Act, both to increase the degree of protection for artists and their works, and to bring the Act substantially in line with its civil law counterparts. Fortunately, an appropriate entity for this role already exists in the California Arts Council.[149] The Act should be amended to grant the Arts Council perpetual standing to enforce the moral rights of artists, as an additional party during the 50 years following an artist's death, and the only entity with standing thereafter. Such involvement by the Arts Council is arguably well within its legislative mandate, wherein the Council is empowered to employ personnel and promulgate regulations necessary to "[e]ncourage artistic awareness, participation and expression"[150] and to ensure "the fullest expression of our artistic potential."[151] Moreover, it has been suggested that *droit moral* is a particular area where the Arts Council might be of utility in effectuating the "public right to share reasonably in the aesthetic value of a work of art."[152]

When the case was brought to trial on the merits, the Society presented questionable arguments in justification of its capacity to represent the interests of deceased authors who had not themselves ever been Society members, and consequently the Seine Tribunal, the Paris Court of Appeal, and the Court of Cassation all ruled that the Society could not continue its case. Sarraute, *French Moral Right, supra* note 22, at 483-84.

In another case, the National Literary Fund—a governmental entity created for the task of "protecting the integrity of literary works, regardless of their country of origin, which, after the author's death, have fallen into the public domain"—sought to have confiscated a distorted abridgment of Victor Hugo's *Les Misérables*. The Seine Tribunal rejected the suit, however, based on a conflict between the statutory mandate of the Foundation and Article 6 of the Law of March 11, 1957, *supra*, note 38. The Tribunal found that the latter law, providing that the artist's right of integrity must be exercised by a hierarchy comprised of the artist's executors, descendants, spouse, heirs, and others, took priority. Since Victor Hugo had heirs who were still living, they alone could sue. Sarraute, *French Moral Right, supra* note 22, at 484.

148. Merryman, *Bernard Buffet, supra* note 6, at 1042.

149. *See supra* note 20.

150. CAL. GOV'T CODE § 8753(a) (West 1980).

151. *Id.* § 8753(e).

152. Price, *State Arts Councils, supra* note 107, at 1188. Professor Price goes on to say:

> [T]raditional European concepts require that ownership of a Rembrandt does not include a right to deface the painting. Such a limitation on ownership does not necessarily spring from the work itself; it might be found in the relationship of the work to the community. The object is part of the body of society's cultural wealth. One individual, by virtue of temporary custody of the work, does not have the right to mar or destroy it.

Id.

IV. CONCLUSION

The California Art Preservation Act is a creative new step in the direction of increasing artists' rights in their works, and preserving an already rich legacy of creativity and culture in the state. As a modern enactment of an ancient doctrine, the Act is in a unique position to refine, improve, and expand upon the statutory and decisional law of *droit moral* which has developed in the civil law countries over the past several decades. Though the Act, like its foreign counterparts, presently contains several flaws, through careful, thoughtful amendment and interpretation it will be capable of providing protections superior even to those which exist in Europe, the birthplace of *droit moral*.