University of Miami Law School
Institutional Repository

University of Miami Entertainment & Sports Law Review

4-1-1984

Fine Art: Protection of Artist and Art

Cordia A. Strom

Follow this and additional works at: http://repository.law.miami.edu/umeslr

Part of the Entertainment and Sports Law Commons

Recommended Citation
Cordia A. Strom, *Fine Art: Protection of Artist and Art*, 1 U. Miami Ent. & Sports L. Rev. 99 (1984)
Available at: http://repository.law.miami.edu/umeslr/vol1/iss1/7

This Notes and Comments is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Entertainment & Sports Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

FINE ART: PROTECTION OF ARTIST AND ART*

"Above all, it is a matter of loving art, not of understanding it."

Fernand Leger

I. INTRODUCTION

Protection of fine art involves two primary interests: the economic or property interests, preserved by copyright and resale royalty laws and the artist's personality interests, supported by moral rights doctrines. All are not available in the United States at the present. This article will examine the types of protection available in general for fine art and the presence or absence of each type in the United States. In addition, existing safeguards in the United States will be analyzed as to their effectiveness. This article will also recommend improvement of existing safeguards through further statutory revisions and an educational program.

In this article, "artist" is used to describe a person who creates one-of-a-kind (unless otherwise indicated), visual works of art as an aesthetic expression for enjoyment and communication. Primarily, painters, sculptors and some graphic artists are such persons. These fine artists are distinguished from applied artists whose work is created for design, decoration or utilitarian use. This distinction draws a fine line between fine art and applied art and the line is not always highly visible. However, since the interests of a fine artist and an applied artist differ, this distinction is necessary. Fine artists are concerned with the original, unique creation, whereas, applied artists are interested in maximized reproduction of each work.

The protection of fine art must also be contrasted with that of literary and musical works. Although all of the works require creativity, protection of each are not the same. Literary and musical works are created for mass reproduction, economic benefits in the form of royalties being directly tied to the volume of sales. In contrast, the value of fine art is calculated not by quantity of copies but by quality of the original unique work. In general, no royalty scheme similar to that of musicians and literary authors is granted to fine artists.

---

* This Note was awarded First Prize, University of Miami School of Law, in the 1983 ASCAP Nathan Burkan Competition and was entered in the National ASCAP Competition.

The value of the original work of fine art to its creator is increased since any destruction or mutilation of the work destroys it permanently. Music or literary works need not share in this risk since such works are easily copied without decreasing their value.

These distinctions make necessary separate examination of the protection of fine art.

II. Protection of Fine Art Under the 1976 Copyright Act

A. *Copyrightability*

Under section 102 of the 1976 Copyright Act,[1] copyrightable works are "original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated."[2]

To determine originality, the courts follow the two requirements set forth in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*:[3] that "1) the particular work 'owe its origin' to the author" (i.e. originality) and 2) the " 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own' " (i.e. individual contribution).[4] No tests for novelty, ingenuity or aesthetic value must be applied.[5] In *Bleistein v. Donaldson Lithographing Co.*,[6] the Supreme Court stated that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [art] . . . ,"[7] thus mandating courts not to use their own aesthetic values in judging the copyrightability of a work.

To a fine artist, originality is a deceptive issue. The same subject used in the original may be copied in another artistic process, method or style, not within copyright protection,[8] or, alternatively, the same process, method or style may be copied, using a different subject. Both types of copying are considered to be original. In both instances, the copier has usually fulfilled the originality and

1. Copyright Act of 1976, Pub. L. No. 94-533, 90 Stat. 2541 (1976) (effective Jan. 1, 1978) (revising 1909 Copyright Act).

2. Copyright Revision Act, 17 U.S.C. §102 (1976).

3. 191 F.2d 99 (2d Cir. 1951).

4. *Id.* at 102-103.

5. H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976) [hereinafter cited as House Report]; S. Rep. No. 473, 94th Cong. 1st Sess. 47-49, at 50 (1975) [hereinafter cited as Senate Report].

6. 188 U.S. 239 (102).

7. *Id.* at 251.

8. *See* 17 U.S.C. §101 (1976); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951).

individual contribution requirements sufficiently enough to secure a copyright, by not identically copying the original.[9]

Section 102's second requirement necessary for copyrightability is that such original work be "fixed in any tangible medium of expression."[10] Fixation is defined in section 101 as authorized, permanent embodiment in a copy, which is able to be perceived, reproduced or otherwise communicated.[11] Traditional artists, such as painters and sculptors have no problem meeting the fixation requirement since their work is embodied in the canvas, paper, clay or stone and has the ability to be perceived permanently.[12]

Under section 101, copies are the material objects in which copyrightable works are capable of being fixed.[13] The House and Senate Reports draw a distinction between "original work" which is the "product of authorship" and "copies" which are the material objects.[14] Both must exist before the subject matter can be copyrightable.[15] Thus, a physical painting, sculpture, photograph or drawing would not be deemed an original work of authorship but only a copy embodying the original work. This technical distinction causes an artist both confusion and distress.

The category of pictorial, graphic and sculptural works defined in section 101, includes two and three-dimensional works of fine art, photographs, prints and art reproductions, among others.[16] Such works fall within this category based upon their form but not on mechanical or utilitarian aspects. In a useful article, the design will fall within the pictorial, graphic and sculptural works category "only if, and only to the extent that such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[17] Design incorporated in a useful article or applied art, and separately identifiable, falls within the

---

9. *See* Oppenheimer, *Originality in Art Reproductions: Variations in Search of a Theme,* COPYRIGHT L. SYMP. (ASCAP).

10. 17 U.S.C. §102 (1976).

11. *Id.* §101.

12. *See* Millinger, *Copyright and the Fine Artise,* 48 GEO. WASH. L. REV. 354, 359 (1980). Conceptual artists, such as Christo, whose work is temporary, do not meet the fixation requirement unless their work is embodied in film or photographs. *Id.*

13. 17 U.S.C. §101 (1976).

14. H.R. REP. No. 1476, 94th Cong., 2d Sess. at 51 (1976) [hereinafter cited as HOUSE REPORT]; S. REP. No. 473, 94th Cong., 1st Sess. at 50 (1975) [hereinafter cited as SENATE REPORT].

15. *Id.*

16. 17 U.S.C. §101 (1976).

17. *Id.*

pictorial, graphic or sculptural works category regardless of mass production, commercial exploitation and potential availability of design patent availability, as declared by the Supreme Court in *Mazer v. Stein*.[18] Without this separate identity, however, no copyright protection will be given.[19]

B. *Exclusive Rights and Their Limitations*

Section 106 enumerates the copyright owner's exclusive rights to do or to authorize.[20] Limitations on these exclusive rights are found in sections 107 through 118.[21] A copyright owner of visual art owns the exclusive rights of reproduction,[22] adaptation,[23] publication[24] and display.[25] Of these, only the rights of reproduction and adaptation remain with the artist, as copyright owner, after the initial sale of the work. The buyer of a particular work of art may freely display publicly the purchased copy[26] and dispose of possession without the authority of the copyright owner.[27]

The copyright owner's right of reproduction of the work of art is limited by several provisions of the 1976 Act. Under section 107, the fair use of a copyrighted work for "purposes such as criticism, comment, news reporting, teaching, scholarship, or research" is not an infringement.[28] In section 108, libraries and archives may reproduce no more than one copy if: a) the purpose is not commer-

---

18. 347 U.S. 201, 214 (1954).

19. Copyright of applied art which meets the *Mazer* standards and which has been offered for distribution to the public, does not include a right to prevent pictures or photographs of the art where used "in connection with advertisements or commentaries related to the distribution or display of such articles, or in connection with news reports." The exclusive right of reproduction of the underlying copyrighted pictorial graphic and sculptural works remains with the owner of such work and includes the right "to reproduce in or on any kind of article, whether useful or otherwise." 17 U.S.C. §113 (1976).

20. 17 U.S.C. §106 (1976).

21. 17 U.S.C. §§107-18 (1976).

22. "Reproduction" is the right to duplicate in a material object a copyrighted work exactly or by imitation or simulation. HOUSE REPORT, *supra* note 5, at 61; SENATE REPORT, *supra* note 5, at 58.

23. "Adaptation" is the right to prepare derivative works based upon the copyrighted work. 17 U.S.C. §106(2) (1976).

24. Publication is "the distribution of copies . . . of a work to the public by sale. . . ." 17 U.S.C. §101 (1976).

25. Display is "to show a copy of [a work] either directly or by . . . device . . . ." 17 U.S.C. §101 (1976). The exclusive rights of reproduction, adaptation, publication, and display are enumerated in 17 U.S.C. §106 (1976).

26. 17 U.S.C. §109(b) (1976). "Publicly" means " . . . to display that copy publicly, either directly or by projection of no more than one image at a time, to viewers present at the place where the copy is located." *Id.*

27. 17 U.S.C. §109(a) (1976).

28. 17 U.S.C. §107 (1976).

cial advantage, b) the public or all researchers in a specialized field have access to the collections of the library or archives; and c) the reproduction includes a notice of copyright.[29] Section 113 allows a copyrighted work, lawfully reproduced in useful articles offered publicly to be photographed for advertisements or commentaries on such useful articles.[30] In section 118, the transmission by non-commercial broadcasting stations of published pictorial, graphic and sculptural works may be simultaneously reproduced by a governmental body or non-profit organization.[31]

A fine artist owning the copyright in a work of art has an exclusive yet limited right of adaptation. New works are adjudged to be copyrightable subject matter by the originality and individual contribution requirements, allowing any work having more than a merely trivial variation from another to satisfy the requirements. Thus, the right of adaptation in the visual arts is not as strong as first perceived.[32]

Sections 110, 113, and 118 limit the artist's right to display.[33] Section 110 exempts from copyright liability: displays in face-to-face teaching activities, instructional broadcasting, religious services and mere reception of broadcasts in a public place.[34] Display of pictures or photographs of work lawfully reproduced in utilitarian articles is allowable under section 113.[35] Again, a display of published pictorial graphic and sculptural works, may be transmitted by noncommercial educational broadcast stations through a compulsory license.[36] As previously mentioned, section 109(b) allows a purchaser to publicly display the work in any gallery, museum or other public place without the copyright owner's authority.[37]

The right of publication is a vital concept as to unique works of fine art, for many provisions of the 1976 Act hinge upon the publication of the work of art.[38] The existence of publication can eventually invalidate an artist's copyright if the appropriate steps

29. 17 U.S.C. §108 (1976).
30. 17 U.S.C. §113 (1976).
31. 17 U.S.C. §118(d)(3) (1976).
32. *See supra* notes 1-9 and accompanying text.
33. 17 U.S.C. §§110, 113, 118 (1976).
34. 17 U.S.C. §110 (1976).
35. 17 U.S.C. §113(c) (1976).
36. 17 U.S.C. §118(d)(3) (1976).
37. 17 U.S.C. §109(b) (1976).
38. *See generally* as to publication: 17 U.S.C. §§104, 113(c), 118, 201(b), 303, 401 (1976).

to cure any procedural defects are not taken.[39]

Publication is "the distribution of copies . . . of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending."[40] As to unique works of fine art, an implication may be drawn that since "copies" are the material objects of fixation, then publication is the public sale or transfer of that unique work of art. This implication has not been acknowledged by the courts; however, Representative Kastenmeier, a sponsor of the Copyright Revision Bill, stated during the House debates that publication as to works of art would exist only where reproductions of the work were offered or sold to the public or where sale of the one-copy work was offered or sold by an untraditional method.[41] This distinction between traditional and untraditional means is not based upon explicit statutory language. An argument can be made that because a unique work of art is one copy and the plural "copies" was used in the definition of publication, publication can occur only where the unique work has been reproduced, to constitute "copies."[42] If no publication existed, all one-copy works of art could be displayed publicly or sold continuously without the need to follow the notice provisions[43] in order to preserve the artist's exclusive rights.[44]

Regardless of the validity of the plurality argument and its conclusions, a compromise exists. Under the 1976 act, public displays of the work, despite reproduction restrictions, do not equal publication.[45] Notice requirements have been liberalized;[46] thus making it more difficult to invalidate an artist's copyright.[47] A weakness still exists, however, in the case of a private sale (i.e., no publication) where the purchaser causes publication by publicly displaying the work of art, allowable under section 109(b).[48] Unless

---

39. *See infra* notes 67-77 and accompanying text.

40. 17 U.S.C. §101 (1976).

41. H.R. Res. 1550, 94th Cong., 2nd Sess., 122 CONG. REC. 31979-80 (daily ed. Sept. 22, 1976).

42. *See* Weissman, *Can An Artist's Copyright Be Jeopardized?: An Analysis of Current Marketing Practices in the Sale of Art Works*, 6 ART & LAW 66, (1981); Schilit, *A Look at the Copyright Revision Act Through the Eyes of the Art Collector*, 6 ART & LAW 31, 32-33 (1981); Kunstadt, *Can Copyright Law Effectively Promote Progress in the Visual Arts?* 25 COPYRIGHT L. SYMP. (ASCAP) 159, 183-85 (1980).

43. *See infra* notes 67-72 and accompanying text.

44. *See* Weissman, *supra*, note 42.

45. 17 U.S.C. §101 (1976); HOUSE REPORT, *supra* note 5, at 144; SENATE REPORT, *supra* note 5, at 126.

46. 37 C.F.R. §201.20 (1983). *See infra* notes 67-77 and accompanying text.

47. To hold otherwise, in cases where no notice was affixed to the work, would make the artist dependent upon the purchaser to preserve the artist's copyright.

48. 17 U.S.C. §109(b) (1976).

the notice requirements of section 401[49] were previously met by the artist, the purchaser would have the power to throw the noticeless work into the public domain, thus defeating all of the artist's exclusive rights and making those rights (though now nonexclusive) available for the purchaser. This construction would not take into account the underlying policy to prevent unnecessary forfeitures. This author hopes that the courts will soon require the owner of the work of art to place proper notice on the work upon its publication.

C. *Ownership and Transfer*

Under section 202, copyright ownership and ownership of the material object (i.e., copy) are distinct and separate things.[50] Transfer of ownership in one does not of itself convey nor necessitate conveyance of ownership in the other.[51] Section 204(a)[52] states that a transfer of copyright ownership is only valid upon a written, signed conveyance agreement,[53] which can be recorded in the copyright office.[54] Without an agreement, transfer of copyright does not convey any property rights in the material object.[55]

Initial copyright ownership vests in the creator of the work of art.[56] If the work was made for hire,[57] absent an express, written, signed agreement to the contrary, the employer or one who commissioned the work is considered to be the author and thus owner of the copyright.[58] However, for a commissioned work to be considered a work made for hire, it must fall within a category enumerated in section 101. In the case of contributions to collective works, "copyright in each separate contribution . . . is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution."[59] Copyright belonging to an individual author cannot be taken away by involuntary transfer.[60] Without an express transfer of copyright or any exclusive rights, the copyright owner of the collective work owns only reproduction and distribu-

---

49. 17 U.S.C. §401 (1976).
50. 17 U.S.C. §202 (1976).
51. House Report, *supra* note 5, at 124; Senate Report, *supra* note 5, at 107-08.
52. *Id.*
53. 17 U.S.C. §204(a) (1976).
54. *Id.* §205(a).
55. 17 U.S.C. §202 (1976).
56. *Id.* §201.
57. 17 U.S.C. §101 (1976).
58. *Id.* §201(b).
59. *Id.* §201(c).
60. *Id.* §201(e).

tion rights in the individual contributions as part of the collective work.[61]

Termination of transfers of copyright or any of its rights after January 1, 1978 is subject to termination at any time during the period of 30 to 35 years from the date of execution of the grant.[62] Various provisions for death of the author,[63] joint works,[64] notice[65] and effect[66] provide further requirements.

D. *Notice and Deposit*

Copyright is required to be on "all publicly distributed copies" whenever the copyright protected work of art is published by authority of the copyright owner.[67] The notice, which must include "©," "Copyright" or "Copyr.," the year of first publication and the copyright owner's name,[68] should be placed so as to "give reasonable notice" of the copyright claim.[69] For all two-dimensional pictorial, graphic and sculptural works, the notice may be durably affixed to the front or back of the actual copies or "to any backing, mounting, matting, framing or other material to which the copies are durably attached or in which they are permanently housed."[70] For all three-dimensional works of art, notice may be attached to any visible part of the work, even a permanent base.[71] Other forms may be acceptable if notice is visible and permanent.[72]

Many artists are unaware of these liberalized notice requirements.[73] Even many artists who are familiar with the requirements intentionally omit any notice because they fear it may deface the work,[74] make purchasers less willing to buy due to the artist's retained rights[75] or give it a commercial or mass-produced appear-

---

61. *Id.* §201(c).
62. *Id.* §203(a)(3).
63. *Id.* §203(a)(1)(2).
64. *Id.*
65. *Id.* §203(a)(4).
66. *Id.* §203(b).
67. *Id.* §401(a).
68. *Id.* §401(b)(1)(2)(3).
69. *Id.* §401(c). These notice requirements also satisfy the notice requirements of the Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868 (revised) (twenty-six parties are signatories, including the United States).
70. 37 C.F.R. §201.20(i)(1).
71. 37 C.F.R. §201.20(i)(2).
72. 37 C.F.R. §201.20(i)(3)(4)(5).
73. Sheehan, *Why Don't Fine Artists Use Statutory Copyright?: An Empirical and Legal Survey*, 24 COPYRIGHT LAW SYMP. (ASCAP) 157, 161-62 (1980).
74. *Id.* at 171-73.
75. *Id.* at 159.

ance.[76] Omission of notice, intentional or inadvertent, will not automatically invalidate the copyright if: 1) no more than "a relatively small number of copies" publicly distributed are missing the notice; or 2) the artist registers the work within five years after publication without notice and makes a reasonable effort to add notice to publicly distributed copies upon discovery of the omission.[77] Failure to use these curative provisions will thrust the work of art into the public domain.

Even with the liberalization of notice requirements, notice arguably is unnecessary on fine art since copyright exists from the time of creation and fixation.[78] The mere physical embodiment of the creation would then be adequate notice of copyright protection. Also, the date of publication of artistic works created after January 1, 1978, is now irrelevant since copyright duration for such works is the author's life plus fifty years with no renewal provisions.[79] Simply requiring the artist's name would give sufficient information to a purchaser so as to determine the expiration of the copyright.[80]

Due to generous deposit requirements, the Copyright Office will accept one copy of identifying material[81] for any published or unpublished pictorial, graphic or sculptural work. For published pictorial, graphic or sculptural works to fall within this deposit exception, the individual artist must be the copyright owner and either: (a) not more than five published copies exist; or (b) not more than 300 numbered copies of a published limited edition have been offered for sale or sold.[82] Specific relief from deposit in unusual cases may be granted by the Register upon request.[83]

---

76. *Id.* at 158.

77. 17 U.S.C. §405 (1976).

78. *See* Millinger, *supra* note 12, at 374.

79. 17 U.S.C. §302(a) (1976). The life of the author plus fifty years provision is applicable to works created on or after January 1, 1978.

80. *See* Millinger, *supra* note 12, at 374-75; 17 U.S.C. §409(2) (1976); 17 U.S.C. §706 (1976); 37 C.F.R. §203.4. The Copyright Office keeps records, including the date of the original copyright owner's death.

81. "[T]he material shall consist of photographic prints, transparencies, photostats, drawings, or similar two-dimensional reproductions or rendering of the work, in a form visually perceivable without the aid of a machine or device. In the case of pictorial or graphic works, such material shall reproduce the actual colors employed in the work." 37 C.F.R. §201.21(a) (reserved).

82. 37 C.F.R. §202.20(c)(2)(iv).

83. 37 C.F.R. §202.19(e).

E. *Manufacturing Clause*

The manufacturing clause, section 601,[84] requiring United States authored works and other specified works to be produced in United States or Canada, generally does not apply to the visual arts. The requirements do, however, apply to works: 1) consisting of pictorial and graphic works incorporated into predominantly nondramatic literary work in English; 2) where the owner of the copyright in the nondramatic literary material also owns the copyright of the pictorial or graphic works; and 3) where the work is not otherwise exempt from the manufacturing clause.[85] Thus, where lithographs of a work of art by a United States national are incorporated in a book or periodical of predominantly nondramatic literary materials, and, where the artist owned the copyright in the text, the text but not the lithographs, would be subject to the restrictions of the manufacturing clause.[86]

III. Droit de Suite

Artists do not automatically receive royalties or income after the initial sale of an original work of art for use in commercial ventures or in exhibitions. Authors, composers and performing artists continually benefit economically through exploitation of their reproduction right; yet an artist's original, the product of his creativity, is of more value to him or her than any reproduction.[87] Upon the artist's initial sale of his one-copy work, his right of reproduction, though existing theoretically, is effectively destroyed since access is restricted unless explicit contractual provisions for future access are obeyed. Most fine artists create their works of art with no intent to mass produce them, and in fact, shun all intimations that a work is commercial or a subject of mass production.[88]

The first droit de suite legislation was enacted in France, in 1920, after the public was educated to the existence of poor, starving artists whose works were being resold for enormous sums of money.[89] The French legislature, in an attempt to redress the

84. 17 U.S.C. §601 (1976).

85. *Id.*; House Report, *supra* note 5, at 166-67, Senate Report, *supra* note 5, at 149.

86. *Id.*

87. 2 M. Nimmer, Nimmer on Copyright §8:22(A) (1983) (hereinafter cited as 2 M. Nimmer). "Reproductions of works of art have not in the past, and probably still do not to any great extent, represent a meaningful source of income for most artists." *Id.*

88. *See* Sheehan, *supra* note 7, at 171-73.

89. Hauser, *The French Droit de Suite; The Problem of Protection for the Underprivileged Artist Under the Copyright Law*, 11 Copyright L. Symp. (ASCAP) 1 (1962).

problem, granted an inalienable three percent (3%) resale royalty to the artists and their heirs for the artist's life plus fifty (50) years on original graphic or plastic art works resold for over one hundred new francs.[90] Theoretically, all resales are covered, however, in practice, private sales are exempted.[91] Royalties are paid by the seller of the art work, regardless of any depreciation in value, to a professional organization named Societe de la Propriete Artistique Des Dessins et Modeles (S.P.A.D.E.M.). S.P.A.D.E.M. in turn pays the percentage to the artists.[92]

The French droit de suite has been a mixed success. Because the legislation builds on a premise of commercial success, the relatively prosperous artists and their heirs benefit the most while the lesser known, struggling artists remain exploited.[93]

In 1965, a similar droit de suite was enacted in West Germany providing that a resale through an art dealer or an auctioneer commands from the seller a royalty of 5% of the resale price if over one hundred marks, even if a loss is realized. The alienable royalty entitlement applies to all resales during the artist's life plus seventy (70) years.[94]

Italy's droit de suite statute, unlike its French and German counterparts, attempts to correlate payment with an increasing value of the work. Royalties are only computed as to the seller's realized increase above the previous sale price. Payment by the seller is based upon a sliding percentage scale tied to factors including appreciation of sales price, public versus private sale and initial public sale.[95] Another facet of Italian law is that royalty rates apply to private as well as public sales.[96]

Under the Universal Copyright Convention, any artist of a party country living in France, as well as any other party country granting royalty rights to artists, may receive any royalty conferred by that country, even though the artist's origin country has no reciprocal royalty law.[97]

---

90. R. Duffy, Art Law: Representing Artists, Dealers and Collectors 266 (1977) (hereinafter cited as R. Duffy).

91. *Id.*

92. *Id.* at 267.

93. *Id.* at 269.

94. *Id.* at 270.

95. *See* Katz, *Copyright Preemption Under the Copyright Act of 1976; The Case of Droit de Suite*, 47 Geo. Wash. L. Rev. 200, 203 (1978).

96. *Id.* at 203. Where an exhibition is not involved, increased minimum resale prices, a different percentage royalty and a price floor of five times the original sale price all apply. *Id.*

97. Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868,

The United States has no comprehensive federal resale royalty legislation for artists.[98] However, droit de suite was successfully introduced on the state level in the form of the California Resale Royalties Act.[99] No other state droit de suite legislation has been successfully passed.[99a]

A. *Legislation as a Possible Remedy*

The California legislation applies to the sale of work of "fine art,"[100] regardless of its date of creation, where either the seller is a California resident or the sale occurs in California.[101] The seller pays the artist a royalty of 5% of the sales price of $1,000 or greater, as long as the increase is attained in the resale price above the original price.[102] Although the resale right ends at the artist's death,[103] during the artist's life the right to royalties can only be waived by a written contract giving the artist more than the 5% statutory royalty rate.[104]

The seller pays the royalty fee directly to the artist and if the artist cannot be found the seller must pay the 5% royalty to the California Arts Council or be subject to a possible damage suit by the artist.[105] If the Arts Council is unable to locate the artist and, if seven (7) years after the sale of the work the artist fails to file a written claim for the money, then right of the artist terminates and the money is used to fund programs of the Arts Council.[106]

In 1980, the constitutionality of the California Resale Royalties Act was upheld in *Morseburg v. Balyon*.[107] However, because the art work involved in *Morseburg* was resold in 1977 and the

---

Art. II (1). However, the artist must comply with copyright formalities requirements of the Convention as well as any other formalities the legislation requires. *Id.*

98. A bill providing for a federal royalty right to artists was introduced by Representative Henry Waxman (D. Cal.) in 1978. Visual Arts Bill of 1978, H.R. 11403, 95th Cong., 2nd Sess., 125 CONG. REC. 6176-78 (daily ed. Mar. 8, 1978). This bill seems to have been shelved.

99. California Resale Royalties Act, CAL. CIV. CODE §986 (West 1980) (amended 1982).

99a. However, legislation has been proposed in nine other states (Georgia, Iowa, Maine, Minnesota, New York, Ohio, Pennsylvania, Tennessee and Texas).

100. "Fine Art" means an original painting, sculpture, or drawing, or an original work of art in glass." CAL. CIV. CODE §986(c)(2) (West 1980).

101. *Id.* §986(a).

102. *Id.* §§986(a) and (b)(2).

103. *Id.* §986(b)(3).

104. *Id.* §986(a).

105. *Id.* §986(a)(3).

106. *Id.* §986(a)(5).

107. 621 F.2d 972 (9th Cir. 1980), *cert. denied*, 449 U.S. 983 (1980).

1976 Copyright Act became effective January 1, 1978,[108] the challenge fell under the previous 1909 Copyright Act.[109] No decision has yet been made under the present Copyright Act as to the validity of the California Act.

A major concern as to the validity of the California Act under the 1976 Copyright Act is preemption. The preemption test of section 301(a) is two-fold. The State law is preempted if: 1) it provides "equivalent rights"[110] to the exclusive rights enumerated in section 106 and 2) those rights apply to works which are "fixed in a tangible medium of expression and come within the subject matter of copyright."[111] Works of "fine art" under the California Act are also within the "pictorial graphic and sculptural works"[112] category of copyrightable material.[113] "Fine arts" in California then are copyrightable and satisfy the second part of the section 301 test. The preemption question turns on the meaning and application of the term "equivalent rights."[114] Past interpretation of the "equivalent rights" analysis[115] have produced approaches which sometimes work individually but fail to result in consistent conclusions.[116] This analysis should not be used if Congress did not intend preemption of state laws, such as in California, which merely extend rights equal to and not conflicting with federal rights.[117] Instead, a traditional preemption approach[118] may be more appropriate for such analysis and would consider the purposes of the Copyright Act. The courts have derived these purposes to be the provision incentive for authors to devote themselves to intellectual

108. 17 U.S.C. §301 (1976).

109. 17 U.S.C. §§1-63 (1909).

110. 17 U.S.C. §301(a) (1976).

111. 17 U.S.C. §101 (1976). "'Pictorial, graphic, and sculptural works' include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams, and models."

112. *Id.* §102(a)(5).

113. Clarke, *The California Resale Royalties Act as a Test Case for Preemption Under the 1976 Copyright Law*, 81 COLUM. L. REV. 1315, 1322 (1981).

114. 17 U.S.C. §301(a) (1976).

115. Approaches to an "equivalent rights" analysis include: the extra-element approach, *Id.* at 1322; the economic-noneconomic distinction, *Id.* at 1324; the use of a broad definition of 'equivalent rights,' *Id.* at 1324; the absence of differences between the state and federal laws, *Id.* at 1324-25.

116. *Id.* at 1325.

117. *Id.*

118. The traditional preemption analysis asks: 1) Has Congress occupied the field in question expressly or impliedly? and, 2) Does the state statute conflict with a federal statute so as to impair Congress' purpose of enactment? *Id.* at 1320-21.

and artistic creation[119] and the circulation of ideas through the public domain.[120] Support exists for both sides of the preemption question as applied to the California Resale Royalties Act.[121]

Aside from the preemption question, the California Act presents other problems. The act fails to benefit many artists since only the few most successful artists have a significant resale market during their lifetime.[122] Struggling artists whose works have low resale demand benefit minimally. Also, without an adequate inflation formula the profit realized upon resale may only reflect inflation and not a true increase in the value of the art work.[123] Royalty enforcement is virtually impossible because the average transactions involve only small sums and many transactions go unreported.[124]

The California Resale Royalties Act does not appear to be the answer to an artist's dreams. Federal legislation would eliminate the preemption problem but drafters would need to correct the flaws shown in the California Act, including practical distribution procedures.[125]

B. *Other Remedies*

Artists also turn to contracts as a method of reserving resale royalties rights. The famous "Projansky Agreement"[126] attempts to control future resales by providing that each buyer obtain written agreement to the terms of the original contract from each subsequent transferee.[127] However, the use of this agreement has both

---

119. Mazer v. Stein, *supra* note 18, at 219; Goldstein v. California, 412 U.S. 546 (1973).

120. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 237 (1964).

121. For authors who support preemption, *see* 2 M. NIMMER 8:272.4(2)-8:272.8; Katz, *supra* note 95, at 219-22. For Authors concluding that the California Act should not be preempted *see* Clarke, *supra* note 113, at 1332; *Comment, The Resale Royalties Act: Paintings, Preemption Profit*, 8 GOLDEN GATE L. REV. 239 (1978).

122. Camp, *Art Resale Rights and the Art Resale Market: An Empirical Study*, 28 BULL. COPYRIGHT SOC'Y 146, 147 (1980); R. DUFFY, *supra* note 90, at 277.

123. R. DUFFY, *supra* note 90, at 279.

124. *Id.* at 280; Katz, *supra* note 95, at 220-21. Other questions arise: Should works of art be treated differently from other art considered by most to be crafts? Will the costs of resale imposed by California Act force some marginal art dealers out of business and prevent remaining dealers from subsidizing the promotion of unknown artists? Will the Act put California art dealers at a disadvantage with dealers in other states?

125. For example, a federal regulatory body could be created to perform similar functions to those of ASCAP, BMI, and the Copyright Royalty Tribunal which regulate royalties for literary and musical authors.

126. The Projansky Agreement was created in 1971 by an attorney, Robert Projansky.

127. R. DUFFY, *supra* note 90, at 283-84.

legal and practical weaknesses. Legally, the provisions attempting to bind future buyers into paying royalties may violate the rule against perpetuities. Also, enforcement may prove to be problematic since no privity exists between the artist and subsequent transferees.[128] As a practical matter, most artists do not have the necessary bargaining power to require galleries or collectors to sign such agreements. Most galleries and dealers reject any type of royalty agreement because they believe that it: affects sales,[129] "invades the intrinsically trusting nature of the art world"[130] and turns the artist-dealer relationship into an adversarial one.[131] Also, the artist must somehow overcome the considerable burden of checking on adherence to the agreement by future buyers.[132] Perhaps the answer to assisting struggling professional artists is legislation designed to subsidize them. A federal sales tax on all works of art could be levied, collected and placed into a reserve to be allocated to artists, according to their needs.[133]

IV. Droit Moral

Copyright is a property interest, protecting the economic, exploitive interests of the artist. In contrast, moral rights, or droit moral, is a bundle of rights which protect an artist's personality and artistic reputation.[134] An artist's moral rights can be classified into three categories: 1) the right of publication which includes rights to create, to publish, *not* to publish and to withdraw from publication; 2) the right of paternity, which includes the rights to be recognized as creator of a work, to prevent misattribution, to use a pseudonym and to protect anonymity; and 3) the right of integrity which is the right to control modifications of the work by objecting to mutilation or distortion of a work.[135] Whereas copyright may be transferred by the artist to another, moral rights are inalienable with the artist retaining their exclusive ownership, above and beyond ownership in copyright or in the material

128. *Id.* at 284.
129. *Id.* at 289.
130. Pick, *Artists Need Lawyers, Too*, 10 Student Law. 16, 20 (Sept. 1981).
131. *Id.*
132. R. Duffy, *supra* note 90, at 289.
133. *Id.* at 282.
134. "It has been pointed out that the theoretical dichotomy between pecuniary and moral rights is artificial, since many if not all of the author's moral rights can also have a pecuniary impact." Diamond, *Legal Protection for "Moral Rights" of Authors and Other Creators*, 68 Trade-Mark Rep. 244, 249 (1978).
135. For a more detailed discussion, see Diamond, *supra* note 134, at 252-59; and R. Duffy, *supra* note 90, at 290-93.

University of Miami Entertainment & Sports Law Review, Vol. 1, Iss. 1 [1984], Art. 7

object.[136]

The doctrine of moral rights first emerged in the French courts and was there developed until its formal statutory recognition in 1957.[137] The French statute is based upon the protection of personality and artistic reputation of the artist through respect for the work of art; it does not focus upon the work of art itself.[138] French moral rights may not be waived and they are perpetual and inalienable.

Moral rights are addressed in the statutes of many other countries but not in the laws of the United States. The Berne International Copyright Convention[139] affords moral rights to non-members as well as its members. Any artist of the United States, a non-member, is entitled to legal protection if the author first publishes a work in a Berne Convention country.[140]

The United States cannot be a member of the Berne Convention because its domestic laws fail to meet the minimum requirements for copyright protection of a work absent formalities[141] and for protection of moral rights.[142] Representative Barney Frank has introduced into the United States House of Representatives the "Visual Artists Moral Rights Amendment of 1983,"[143] modelled closely after the Berne Convention. To the present time, however, similar attempts have always failed.[144]

In the United States an artist has economic and property protection through copyright law or by contract. However, most courts refuse to accept, or even acknowledge, protection of moral rights of

---

136. Crawford, *Moral Rights and the Artist*, 42 AM. ARTIST 98 (Apr. 1978).

137. Diamond, *supra* note 134, at 245.

138. Moral rights of artists have been statutorily recognized in 63 nations; they are included in international conventions on literary property. UNESCO, Copyright Laws and Treaties of the World. France, "Law of March", 1957, article 6 states: "the author shall enjoy the right of respect for his name, his authorship and his work, this right shall be attached to his person."

139. Berne Convention for the Protection of Literary and Artistic Property (Paris Act), July 24, 1971, Copyright Laws and Treaties of the World, vol. 3, item H-1, (Supp. 1972) (hereinafter cited as Berne Convention).

140. R. DUFFY, *supra* note 90, at 294 (citing Berne Convention, *supra* note 139, article 5).

141. Berne Convention, *supra* note 139, article 5(2).

142. *Id.* article 6 bis.

143. H.R. 1521, 98th Cong., 1st Sess., 129 CONG. REC. H578-79 (daily ed. Feb. 17, 1983).

144. Congressman Barney Frank introduced the same bill in 1981, H.R. 2908, 97th Cong., 1st Sess., 127 CONG. REC. 1217 (daily ed. Mar. 30, 1981). Representative Robert Drinan introduced the same bill in 1979, H.R. 288, 96th Cong., 1st Sess. (1979) and in 1977, H.R. 8261, 95th Cong., 1st Sess. (1977). All bills were assigned to the House Committee on the Judiciary. No further action has been taken.

a work of art.[145] Moral rights, if recognized at all, are viewed as elements of analogous, traditional rights. Such traditional legal theories are breach of contract, copyright infringement, libel, defamation, invasion of privacy, unfair competition and misappropriation. In certain instances where artists have attempted to preserve their moral rights under these "more conventional and respectable labels,"[146] such rights are indirectly upheld without even using the term "moral rights."[147] These instances have yet to become reliable answers to the moral rights problem.

A. *The Rights in Particular*

Right of first publication is granted both under the 1976 Copyright Act[148] and under a moral rights doctrine. A correlative right of first publication, the right to withhold a work from publication, is necessarily implied.[149] Yet another aspect of publication rights, withdrawal from publication, overlaps with the right of integrity, since an artist may wish to withdraw a work feeling that the work no longer represents his or her personality or ability.[150] Typical avenues for seeking legal protection for right of publication and the rights contained in it include right to privacy, copyright, libel and unfair competition[151] as well as breach of contract.[152]

The moral right of paternity goes to the very heart of an artist's interest. In the United States the paternal right to receive credit for a work is not recognized absent express contractual reservation,[153] and is not protected under the Copyright Act. Further, under section 201(b), in a work made for hire, authorship is not granted to the artist but to the employer.[154] The artist's right to prevent attribution of another's name to his or her work, is pre-

145. The courts in Vargas v. Esquire, Inc., 164 F.2d 522, (7th Cir. 1947) and in Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949), rejected the moral rights doctrine as alien to common law tradition.

146. Diamond, *supra* note 134, at 252.

147. *See* Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976); Granz v. Harris, 198 F.2d 585, 590 (2d Cir. 1952) (Frank, J., concurring); Chesler v. Avon Book Div. Hearst Publications, Inc., 76 Misc.2d 1048, 352 N.Y.S.2d 552 (1973) (quoting Clemens v. Press Pub. Co., 67 Misc. 183, 122 N.Y.S. 206 (App. Term 1910) (Seabury, J., concurring)).

148. 17 U.S.C. §102 (1976).

149. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 n.1 (1890).

150. However, this right may interfere with the rights of a third party. *See* Diamond, *supra* note 134, at 253-54.

151. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573 (1973).

152. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

153. *See* Harris v. Twentieth Century Fox Film Corp., 43 F. Supp. 119 (S.D.N.Y. 1942); Granz v. Harris, 198 F.2d 585 (2d Cir. 1952); 2 M. NIMMER at §8:267 (1982).

154. 17 U.S.C. §201(b) (1976).

served by the 1976 Copyright Act only to the extent that any exclusive right (i.e., reproduction, derivative works, publication, display) is violated.[155] Upon transfer of the artist's copyright to another, the artist's paternal rights are unprotected, and remedies must be sought under the label of unfair competition[156] or libel. Misattribution has also become actionable in some cases using sections 43(a) and 44(i) of the Lanham Act,[157] a source of unfair competition. Likewise, attribution of an artist's name to another artist's work will mandate the use of unfair competition, libel or right to privacy theories. Similarly, an artist's use of a pseudonym on his or her work, although not a recognized right, has occasionally been upheld on a theory of a right to privacy.[158]

The right of integrity is the protection against deformation, mutilation and other modifications of artistic works resulting in prejudice towards the artist's reputation or honor. This right is especially vital to the artist creating original, one-of-kind works, for harm to that single copy effectively destroys the work as well as the artist's personality. Until recently, this right has received little support in the visual arts area.[159]

If the plaintiff did not contract away the right to object to mutilation or deformation of the work, relief may be found by the court through contractual interpretation. Unfortunately, an artist may not always have privity of contract with the person disfiguring the work of art, thus weakening the viability of remedy under contract law. Depending upon the circumstances, theories of defamation and equity are possible vehicles of relief to the artist. Also, a number of mutilation cases have been determined upon unfair competition[160] using section 43(a) of the Lanham Act.

The prevention of total destruction of the work is not a right of an artist in the United States absent contractual provisions or

---

155. 17 U.S.C. §106 (1976).

156. Granz v. Harris, *supra* note 153, at 589.

157. The Lanham Act, 115 U.S.C. §1126(i), §§(43)(a) and (44)(i) (1982).

158. Diamond, *supra* note 134, at 264-67.

159. R. Duffy, *supra* note 90, at 304; Diamond, *supra* note 134, at 255-56. *See also* Jenson, *The Selling of Picasso: A Look at the Artist's Rights In Protecting the Reputation of His Name*, 6 Art & Law 77 (1981), describing the theories on which the Visual Artists and Galleries Association was able to obtain a preliminary injunction to prevent street vendors from selling t-shirts with a facsimile of Pablo Picasso's signature.

160. *See* Meliodon v. School District of Philadelphia, 328 Pa. 457, 195 A. 905 (1938). Analogous cases involving motion pictures may lend some help to the establishment of this right. *See generally*, Gilliam, *supra* note 147; Stevens v. National Broadcasting Co., 148 U.S.P.Q. 755 (Cal. Sup. Ct. L.A. County 1966); Seroff v. Simon & Schuster, Inc. 6 Misc.2d 383, 162 N.Y.S.2d 770 (Sup. Ct. 1957).

retention of copyright by the artist.[161] Apparently, the interests of the owner of the material work of art prevail over the moral rights of the artist, perhaps due to the argument that the artist's reputation or honor is not damaged when the work is made unavailable.[162]

B. *Alternative Legal Theories*

In general, most aspects of moral rights, though not explicitly recognized, may be enforced through analogous, accepted theories of law. These avenues to remedy, however, do not necessarily provide strong alternatives in every fact situation.

In a breach of contract action, no relief is available without privity of contract; thus, any resale makes this relief ineffective.[163] Also, most artists do not have the bargaining power necessary to insist upon inclusion of moral rights provisions in their contracts. In an "appropriate" case, the court may somehow imply a term to the contract in order to protect a moral right;[164] in other cases a court, in strictly construing a contract, will refuse to enforce any moral claim.[165]

The use of copyright infringement actions to enforce moral rights are limited for the visual artist. Many artists do not perfect their copyright;[166] other artists lose any potential protection upon transfer of their copyright ownership.[167]

Libel actions are deficient since only those renowned artists who have established a reputation may bring an action for its injury. Such an artist would most likely be considered a "public figure" plaintiff and must bear a stringent burden of proof for malice under *New York Times v. Sullivan* and its progeny.[168] A cause of action for libel may only produce damages.[169] Injunctions to stop

161. *See* Granz, *supra* note 153, at 589.

162. R. DUFFY, *supra* note 90, at 310.

163. *See* Crimi v. Rutgers Presbyterian Church, *supra* note 145.

164. Diamond, *supra* note 134, at 261.

165. *Id.* at 263 (citing Granz, *supra* note 153, at 588).

166. *See generally* Vargas, *supra* note 145.

167. *See supra* notes 73-76 and accompanying text.

168. By transfering ownership of all exclusive rights, the artist loses all copyright protection. 17 U.S.C. §201(d)(2) (1976). The artist may terminate the transfer at any time during five years at the end of thirty-five years from the date of execution of the transfer. 17 U.S.C. §203(a)(3) (1976).

169. The artist would have to prove that the "libel" (i.e. "damage" to the artist's work and thus his/her reputation) was published with actual knowledge of its falsity or with reckless disregard of whether or not it was false. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Curtis Publishing Co. v. Butts, *supra* note 152; Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Time, Inc. v. Firestone, 424

the defamatory publication may not be issued.[170] In addition, libel does not survive the artist's death. An unfair competition cause of action also is dependent upon the fame of the artist, as the theory maintains that the name indicates to the public a particular source of creation. Sections 43(a) and 44(i) of the Lanham Act have been invoked as a source of unfair competition to protect artists' rights. Through a gradual trend courts are broadly reading those sections, extending protection to more rights for artists.[171] Absent moral rights legislation, unfair competition under the Lanham Act has become an increasingly viable alternative.

C. *Droit Moral Legislation*

Attempts have been made to legislate moral rights in the United States. On the federal level, Congressman Frank's bill, "Visual Artists Moral Rights Amendment,"[172] gives the artist[173] the right "to claim authorship" (right of paternity) and the right "to object to any distortion, mutilation, or other alteration thereof, and to enforce any other limitation recorded in the Copyright Office that would prevent prejudice to the author's honor or reputation," (right of integrity).[174]

Only one successful state attempt, the California Art Preservation Act (hereinafter California Act),[175] has afforded fine artists any moral rights. The California Act defines "fine art" as "an original painting, sculpture, or drawing of recognized quality," not including work under contract for commercial use.[176] The quality of the work is the focal point, not the rights of the artist.[177] This em-

---

U.S. 448 (1976).

170. Diamond, *supra* note 134, at 264.

171. *Id.*

172. Maslow, *Droit Moral and Sections 43(a) and 44(i) of the Lanham Act - A Judicial Shell Game*? 48 GEO. WASH. L. REV. 377, 387 (1980).

173. *Supra* at note 143. The test is as follows:

> (d) Independently of the author's copyright in a pictorial, graphic or sculptural work, the author or author's legal representative shall have the right during the life of the author and fifty years after the author's death, to claim authorship of such work and to object to any distortion, mutilation, or other alteration thereof, and to enforce any other limitation recorded in the Copyright Office that would prevent prejudice to the author's honor or reputation.

174. Also, the artist's legal representative. *Id.*

175. California Art Preservation Act, CAL. CIV. CODE §987 (1979).

176. *See* Hoffman, *The California Art Preservation Act*, 5 ART & LAW 5354 (1980); Gantz, *Protecting Artist's Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform*, 49 GEO. WASH. L. REV. 873, 883 (1981).

177. Hoffman, *supra* note 176, at 54.

Strom: Fine Art: Protection of Artist and Art

phasis on the "quality" of artistic works is in recognition of a societal interest in preserving the integrity of cultural products. Granting an artist moral rights is an indirect way of protecting the artistic work as well as society's interest in it.[178]

The California Act confers upon artists the rights of integrity[179] and paternity.[180] In section 987(c), the right of integrity is defined as the right to prevent the "intentional" commission of "physical" defacement, mutilation, alteration or destruction,[181] thus limiting the scope of the right granted. A claim of First Amendment protection for acts of mutilation or physical distortion would fall to the California Act's protection of the art under the *United States v. O'Brien* test.[182] Looking to the values underlying the First Amendment, its interest is considerably less than the legitimate and substantial governmental interest in protecting cultural objects for the public as well as protecting the artist's personality embodied in such works of art.[183] Protection lies only to abuse of the *original* work, thereby avoiding disputes originating where a work is altered only as to a new artistic medium.[184] The California Act's rights to paternity explicitly allows an artist to either claim or disclaim authorship.[185] On the other hand, in the absence of a contract stating otherwise, an artist may not object to a truthful statement that such artist did create the work.

Preemption is at issue with the California Art Preservation Act, as it was with the California Resale Royalties Act.[186] The same arguments may be made for both statutes. Additionally, because moral rights protect an artist's personal interests and do not go to the purely economic interests afforded by copyright, the equivalent rights test would not allow preemption.[187]

In light of judicial reluctance to accept moral rights per se, legislation is an important vehicle for their preservation. Efforts to

---

178. *Id.*
179. CAL. CIV. CODE §987(c) (1979).
180. *Id.* §987(d).
181. *Id.* §987(c).
182. Hoffman, *supra*, note 176, at 56, citing United States v. O'Brien, 391 U.S. 366 (1968). The test is: "[A] government regulation is sufficiently justified . . . [1] if it furthers an important or substantial governmental interest; [2] if the governmental interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."
183. Hoffman, *supra* note 176, at 56.
184. *Id.* at 54.
185. *Supra* note 180.
186. *See supra* notes 110-120 and accompanying text.
187. Hoffman, *supra* note 176, at 56.

procreate moral rights from existing, accepted legal theories have instead produced inconsistent and muddled decisions. A more coherent, understandable set of standards in the form of moral rights legislation is thus highly desirable.

V. Major Obstacles to Adequate Protection of Fine Art

To gain optimal effectiveness of rights already furnished, artists must first strive for maximum exploitation of the 1976 Copyright Act. At present, the majority of artists, art dealers and galleries, and art collectors lack sufficient knowledge of the copyright law for such use.[188] Since lack of knowledge is the problem, education is the answer. Reliable information must be readily accessible to artists and others involved.

To begin with, more art educational programs should give instruction in copyright protection as a requisite part of their curriculum. Workshops and seminars may be established in continuing education departments for those artists already out of school or for those who never attended school.[189] Knowledgeable instructors are indispensible to this approach.[190] Perhaps a team-teaching system consisting of an attorney, knowledgeable of the Copyright Act,[191] and an art instructor, familiar with the practical concerns of artists, would fill this need.

As informational sources, art gallery operators and art organizations should educate themselves so as to give artists basic but necessary information on copyright protection.[192] Because struggling artists rarely can turn to attorneys for copyright advice,[193] art gallery directors and art organizations are frequently their primary source of information. Galleries, art organizations and widely distributed art periodicals should assume some responsibility for disseminating complete and accurate copyright information.

Some fine artists renounce copyright protection, because, in their opinion, notice defaces a work of art[194] and disturbs the integrity of the work. Similarly, they fear that notice gives a com-

188. *See* Sheehan, *supra* note 73, at 161-71.

189. Most university art departments offer no courses covering copyright. *See Id.* at 163-64.

190. *Id.* at 164.

191. A possible pool of attorneys would be those belonging to volunteer lawyers for the arts organizations.

192. Sheehan, *supra* note 73, at 166-67.

193. This is probably due to the high cost of legal advice. *Id.* at 168.

194. *Id.* at 171-72.

mercial, mass-produced appearance.[195] To the fine artist whose works are valued for their uniqueness and originality, this fear may be overpowering. Furthermore, artists believe that the commercial aura will make art dealers less willing to handle the art work and collectors less willing to buy them, which may in fact be true.[196] These apprehensions originate in the traditional notion of integrity, and, more importantly, out of ignorance of the relaxed notice requirements.[197] Again, education will help to disperse the artist's anxieties of transgressing the integrity of a work.

Another aspect of economic protection of fine arts is resale royalty rights. At present, such rights exist only in California[198] and the California Resale Royalties Act has enough weaknesses to render its usefulness at least doubtful.[199] A workable royalty scheme has yet to be found.

An artist's moral interests in his or her creations have been virtually neglected in the United States. Absent explicit legislation, the moral rights decisions grounded upon accepted legal theories, have been inconsistent and confusing. In an educated society which enjoys and exploits the creative efforts of its nationals, the least that can be done is to protect the moral rights of artists without whom these works would not exist. Moral rights exist traditionally in the majority of educated societies, and most certainly exist in the hearts and minds of the artists themselves. Without explicit federal legislation, artists may never totally attain these rights which, to many artists, are more dear than economic success.

Cordia A. Strom

195. *Id.* at 173-74.
196. *Id.* at 158-59.
197. *See supra* notes 70 and 72.
198. *See supra* notes 100-106 and accompanying text.
199. *See supra* notes 110-124 and accompanying text.