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ARTISTS' RIGHTS: SHOULD MARYLAND GRANT MORAL RIGHTS?

Eric C. Schneider†

Artists in the United States who sell their works without contractually reserving any rights in the same currently enjoy only limited rights under federal copyright laws to exercise continuing control over such works. The author assesses the shortcomings of copyright protection in comparison with the protection afforded artists' so-called "moral rights" by many foreign jurisdictions, in particular France and Germany. "Moral rights" legislation has been introduced unsuccessfully in the United States both on the federal level and before the Maryland General Assembly. The author examines the draftsmanship and constitutionality of the proposed Maryland legislation and advises its adoption with recommended changes.

I. INTRODUCTION

A work of art, once the artist sells it, has little more protection from destruction than a toy, an automobile or any other piece of personal property. With few exceptions,¹ the purchaser may alter, mutilate or destroy the work of art at will commensurate with his ownership rights in the artwork as personal property.² Bills have been introduced before the Maryland General Assembly and the United States Congress which, if passed, would give artists continuing rights in their works of art.³ This

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1. Some protection exists under a combination of common law doctrine and statutory authority. See *infra* notes 54-60 and accompanying text; see also Comment, *Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrines*, 60 GEO. L.J. 1539 (1972).
2. Furthermore, prior to the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (1977)), the additional rights to reproduce and publish a work of art were presumed to be conveyed to the purchaser as well, unless there was an express reservation of these rights or unless a court could find an implied reservation. P. Nolan, *All Rights Not Reserved After the First Sale*, 23 COPYRIGHT SOCIETY OF U.S.A. BULLETIN 76, 76-77 (1975-76). Under the Copyright Act of 1976, the sale of the artwork does not automatically transfer all copyrights to the purchaser. See *infra* notes 52-53.
3. The Maryland Art Preservation Act, S. 233 (1985), received an unfavorable report from the Maryland Senate Judicial Proceedings Committee on February 7, 1985. In its latest form, proposed bill S. 458 (1986), sponsored by State Senator Lapides, was assigned to the Maryland Senate Economic and Environmental Affairs Committee, where it was disapproved on March 18, 1986. See Appendix I (proposed state bill).

On the federal level, the proposed Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong., 2d Sess. (1986), sponsored by Senator Edward Kennedy, was referred to the Senate Committee on Judiciary on September 9, 1986, and subsequently referred to the Subcommittee on Patents, Copyrights, and Trademarks, on September 30, 1986, where it "died" without report. A similar amendment, H.R.

article explores the continuing rights that artists presently have in sold works of art and evaluates the need for additional legislation to ensure such rights.

II. ARTISTS' RIGHTS UNDER PRESENT LAW

An artist's continuing rights in his work of art after its initial sale are generally referred to as "moral rights."⁴ This phrase is taken directly from a concept of protection available to artists in many European and Latin American countries.⁵ Moral rights are divided into five classifications: (1) the right to claim authorship, (2) the right to prevent others from being named as author, (3) the right to prevent others from attributing one's authorship to work one did not create, (4) the right to prevent others from using one's work or name in a way that reflects on one's professional standing, and (5) the right to preserve the work from alteration or mutilation.

The concept of moral rights has not been recognized judicially in the United States.⁶ Thus, in the United States, unlike in Europe, an artist must specifically reserve these rights in the contract of sale.⁷ Courts in

5722, 99th Cong., 2d Sess. (1986), introduced by Representative Edward Markey, was referred on October 16, 1986, to the House Committee on Judiciary, where it "died" without report or further referral. See Appendix II (federal bill).

4. The term "moral rights" is a literal translation of the French "droit moral" and the use of the term has been criticized as inaccurate and misleading. See Diamond, *Legal Protection for the 'Moral Rights' of Authors and Other Creators*, 68 TRADE-MARK REP. 244 n.3 (1978). It is suggested that the term "moral right" is too ambiguous in that it means different things in different civil law countries and is thus a misleading term. J. Treece, *American Law Analogues to the Author's "Moral Right"*, 16 AM. J. COMP. L. 487, 505-06 (1968). This article will concentrate on the two primary models of France and Germany.
5. Gantz, *Protecting Artists' Moral Rights: A Critique of the California Art Preservation Act as A Model For Statutory Reform*, 49 GEO. WASH. L. REV. 873, 874 (1981).
6. See Weinstein v. University of Illinois, 811 F.2d 1091 (7th Cir. 1987) (court noted that no jurisdiction in United States has recognized moral right as such and refused to adopt principle that an author has a moral right to prevent alterations by a co-author); Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976); Granz v. Harris, 198 F.2d 585 (2d Cir. 1952); Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947); Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (1949); Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 80 N.Y.S.2d 575 (1948); Lugosi v. Universal Pictures Co., 172 USPQ 541 (Cal. Super. 1972); Price v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975).

In *Gilliam*, the court found that the presentation of an edited version of the plaintiff's work was a mutilation of that work and thus a violation of section 43 of the Lanham Act. *Gilliam*, 538 F.2d at 24-25. On the question of moral rights, however, the court noted, "American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors." *Id.* at 24.

7. Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947) (court refused to apply the "civil law" of foreign countries to imply moral rights into a contract of sale). Professor Melville Nimmer notes, however,

[T]he time honored judicial practice of distilling new wine in old bottles has resulted in an increasing accretion of case law which in some de-

the United States have afforded artists some non-contractual continuing rights in their work, however, by combining traditional legal concepts with existing legislation.⁸

The primary legislation protecting continuing economic rights of artists in their works is the Federal Copyright Act of 1976⁹ (the "1976 Copyright Act"). It grants to an artist or the owner of a copyright certain economic rights, but not rights pertaining to artistic reputation or the integrity of the work of art; hence, it does not provide as broad a range of protection as that afforded by the European concepts of moral rights.¹⁰ Even so basic a right as the right to be known as the author of a work is not protected under the 1976 Copyright Act unless the author has been careful to place such a right in the contract of sale.¹¹ Copyright law does, however, protect an author¹² in the event that someone else claims to be the author of his work even absent express contractual language to that effect¹³ and may, to some extent, prevent the alteration or mutilation of a work of art.¹⁴

gree accords the substance of moral rights either under copyright, or under other conventional and respectable labels such as unfair competition, defamation, invasion of privacy or breach of contract. It may not be said that this development has brought to American authors moral rights protection in the full bloom of its European counterpart.

2 M. NIMMER, NIMMER ON COPYRIGHT § 8.21[B] (1987).

8. See *infra* notes 54-60 and accompanying text.

9. Pub. L. No. 94-553, 90 Stat. 2541 (codified at 7 U.S.C. §§ 101-810 (1977)).

10. 2 M. NIMMER, *supra* note 7, at § 8.21[B].

11. Copyright law gives no remedy for failure to place the author's name on a work. This right is only protected through a breach of contract cause of action when the contract has clearly provided for this right. See *Vargas v. Esquire, Inc.*, 164 F.2d 522 (7th Cir. 1947); *Lake v. Universal Pictures Co.*, 95 F. Supp. 786 (S.D. Cal. 1950); *Clemens v. Press Publishing Co.*, 67 Misc. 183, 122 N.Y.S. 206 (1910). *But see* *Bajpayee v. Rothermich*, 53 Ohio App. 117, 372 N.E.2d 817 (1977) (defendant, who used an article written by plaintiff in a way which indicated it was defendant's work, held liable for tort of invasion of plaintiff's right to publicity).

12. The 1976 Copyright Act does not require that a work be registered with the Copyright Office to initially secure a copyright, 17 U.S.C. § 102 (1977), but registration of the copyright is important since it is a prerequisite to the bringing of any action for infringement. See 17 U.S.C. § 411(a) (1977).

13. See 17 U.S.C. §§ 501-510 (1977).

14. See 2 M. NIMMER, *supra* note 7, at § 8.21[C][1] (discussing *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976), where the right to prevent distortion or truncation of a work was, for the first time, afforded copyright protection). When the assignment or license of the work is silent on the subject of alteration, according to *Gilliam*, unauthorized changes in the work that are so extensive as to impair the integrity of the original work constitute copyright infringement of reproduction and performance rights. *Gilliam*, 538 F.2d at 21. If the "alteration" of the work can be brought under the right of a copyright holder to prepare derivative works they may be protected by 17 U.S.C. § 106(2) (1977). Section 107 of the 1976 Copyright Act does, however, provide for "fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship or research. . . ." 17 U.S.C. § 107 (1977). A recent case upheld the right of an author to prevent alteration under the Copyright Act. See *Midway Mfg. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1013-1014 (7th Cir. 1983) (sped-up video game created by licensee with circuit boards supplied by defendant was derivative work based upon

The first Congress passed copyright legislation¹⁵ pursuant to its power under the United States Constitution "to promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries."¹⁶ This legislation was amended occasionally before 1909.¹⁷ The 1909 legislation (the "1909 Copyright Act") remained relatively unchanged until 1976, when Congress enacted the most recent Copyright Act, which took effect on January 1, 1978.¹⁸

Before January 1, 1978, a common law copyright protected a work from the instant of its creation.¹⁹ If the work was never published, the copyright remained in its author in perpetuity.²⁰ Before the work was published the artist could obtain a federal statutory copyright by registration.²¹

Once the work was published, however, the common law copyright and, if obtained by registration, the federal statutory copyright were lost by operation of law.²² After the first publication, the author had statutory copyrights in the work only if he complied with the statutory requirements of the 1909 Copyright Act by having published the work with a proper copyright notice.²³ Registration after publication was not nec-

copyrighted videogame, and defendant's sale of circuit boards that sped up rate of play of plaintiff's video games was infringement of plaintiff's copyrights). There is a highly disputed area of case law on the issue of whether state moral rights legislation is preempted by federal copyright law. See *infra* notes 136-194 and accompanying text.

15. 17 U.S.C.A., Explanation, vi to viii (1977).

16. U.S. CONST. art. I, § 8.

17. 35 Stat. 1075, ch. 320 (effective July 1, 1909).

18. Pub. L. No. 94-553, 90 Stat. 2541 (October 19, 1976) (effective January 1, 1978).

19. Before the 1976 Copyright Act, "the American law of copyright had been the subject of a dichotomy between federal and state law. Unpublished works were automatically protected by state law, referred to somewhat inaccurately [because in some states protection was based on statute] as common law copyright. Such protection began at the moment of creation." 1 M. NIMMER, NIMMER ON COPYRIGHT § 2.02 (1987).

20. 1 M. NIMMER, *supra* note 19, at § 4.03. This was according to state "common law" copyright. Under the 1909 Copyright Act, protection for unpublished works was for a limited time. See *Marx v. United States*, 96 F.2d 204, 206 (9th Cir. 1938) ("It would appear that Congress intended that the time limit . . . should have application to all copyrights secured by the act. . . . [W]orks of which copies are not produced for sale [are protected for twenty-eight years from] the date of deposit.").

21. Section 12 of the 1909 Copyright Act. This, however, did not include unpublished books, periodicals, maps, reproductions of works of art, prints and labels and sound recordings. See 2 M. NIMMER, *supra* note 7, at § 7.16[A][2][c][i].

22. *Public Affairs Assocs. v. Rickover*, 284 F.2d 262, 270 (D.C. Cir. 1960), *vacated*, 369 U.S. 111 (1962) (court found record insufficient for appellate review); *Hill and Range Songs, Inc. v. London Records, Inc.*, 142 N.Y.S.2d 311 (Sup. Ct. 1955); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 347 (1908) ("Thus, when a work is published in print, the owner's common-law rights are lost, and, unless the publication be in accordance with the requirements of the statute, the statutory right is not secured.").

23. *Holmes v. Hurst*, 174 U.S. 82 (1899); *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 191 F.2d 594, 601-02 (2d Cir. 1951); *Metro Associated Servs.*,

essary to create the statutory copyright, but section 13 of the 1909 Copyright Act required that once a statutory copyright had been obtained by publication with notice, the author "shall promptly deposit" copies and a registration claim.²⁴ If the holder of the statutory copyright did not comply with this requirement, he did not lose the copyright but would be prevented from bringing an infringement action until he had complied with section 13.²⁵ Under the 1909 Copyright Act, copyright holders were protected for twenty-eight years from the date of first publication and could obtain an additional twenty-eight years upon application for renewal.²⁶ Under the 1976 Copyright Act, the creator of any copyrightable work²⁷ created after January 1, 1978 obtains the copyright in that work the moment it is fixed in a tangible medium from which it can be read or visually perceived, either directly or with the aid of a machine or otherwise.²⁸ If he publishes the work with proper copyright notice, the copyright is retained without the necessity of registration.²⁹ The artist may lose his rights under the 1976 Copyright Act if he publishes the work without placing proper notice on it.³⁰ The Act prescribes³¹ that the general form of notice shall consist either of the word "copyright," the abbreviation "Copr.," or the symbol © accompanied by the year of the first publication of the work and the name of the copyright proprietor.³² For a work of art the Act allows a shorter form of notice consisting of © accompanied by the initials, monogram, mark or symbol of the copyright proprietor, "affixed in such a manner and location as to give reasonable notice of the claim of copyright."³³

Inc. v. Webster City Graphic, Inc., 117 F. Supp. 224, 234 (N.D. Iowa 1953) (plaintiff lost in suit for copyright infringement where plaintiff had not complied with statute relating to notice of copyright).

24. 2 M. NIMMER, *supra* note 7, at § 7.16[A][2][b].

25. Washingtonian Publishing Co. v. Pearson, 306 U.S. 30 (1939) ("prompt deposit" should not be a condition subsequent which if not satisfied resulted in destruction of the copyright); Primcot Fabrics v. Kleinfab Corp., 368 F. Supp. 482, 485 (S.D.N.Y. 1974) (plaintiff's failure to register design copyright until after defendant published was not fatal to infringement cause of action); Pittway Corp. v. Reliable Alarms Mfg., 164 U.S.P.Q. 379 (E.D.N.Y. 1969).

26. 2 M. NIMMER, *supra* note 7, at § 9.01[C].

27. Copyright protection is given to "original works of authorship," including without limitation, "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audio-visual works; and (7) sound recordings," which are "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a) (1982).

28. 17 U.S.C. §§ 102, 302(a) (1980).

29. 17 U.S.C. § 401 (1982).

30. For a definition of "publication," see 17 U.S.C. § 101 (1982), quoted *infra* at text accompanying note 46.

31. 17 U.S.C. § 401 (1982).

32. 17 U.S.C. § 401(b)(1), (2) (1982).

33. 17 U.S.C. § 401(b)(3), (c) (1982).

The proper interpretation of this statutory language is the subject of debate. Some argue that the sort of notice required must be on the front of a work of art, whereas others suggest that an artist's signature alone is enough.³⁴ The reluctance of artists to use federal copyright law protection has been attributed to insufficient knowledge of copyright generally, and the perception that such protection requires defacement of their work.³⁵ The failure to attach notice, however, may be excused and the artist will retain the copyright if:

- (1) the notice has been omitted from no more than a relatively small number of copies . . . distributed to the public; or
- (2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies . . . that are distributed to the public in the United States after the omission has been discovered; or
- (3) the notice has been omitted in violation of an express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies . . . , they bear the prescribed notice.³⁶

Even when a work is published with notice, the artist cannot sue for copyright infringement if he has not registered the copyright.³⁷ The registration can occur after the alleged infringement since the cause of action is based on the underlying copyright which came into existence with the creation of the work.³⁸ Nevertheless, if the artist has allowed the work to enter the public domain by publication without copyright notice, the copyright will be invalidated unless a reasonable effort is made to add notice to all copies subsequently distributed and unless, within five years after such publication without notice, registration for the work has been made.³⁹

Copyrights created after January 1, 1978 are protected from the moment they are fixed in tangible form until fifty years after the author's death.⁴⁰ If the copyright holder is a corporate entity or other non-individual, the protection is for one hundred years from the creation of the work or seventy-five years from its first publication, whichever expires first.⁴¹ A corporation usually obtains a copyright under the "work for hire" doctrine whereby an employer acquires ownership of the copyright of a work produced by an employee within the scope of his

34. Sheehan, *Why Don't Fine Artists Use Statutory Copyright? — An Empirical and Legal Survey*, 24 COPYRIGHT L. SYMP. (ASCAP) 157, 174-188 (1980).

35. *Id.* at 193.

36. 17 U.S.C. § 405 (1982).

37. 17 U.S.C. § 411(a) (1982).

38. 2 M. NIMMER, *supra* note 7, at § 7.16[B].

39. *Id.*; see 17 U.S.C. § 405(a)(2) (1982).

40. 17 U.S.C. § 302(a) (1982).

41. 17 U.S.C. § 302(c) (1982).

employment.⁴²

Any work that was published without copyright notice prior to January 1, 1978 is in the public domain and receives no protection under 1976 Copyright Act.⁴³ If a work was published with proper notice before January 1, 1978, it is protected for an initial term of twenty-eight years beginning on the date when a copyright was first secured and may be extended for an additional forty-seven years.⁴⁴ The total protection for pre-1978 works should not exceed seventy-five years.⁴⁵

As the preceding discussion makes clear, the act of publication has important consequences to an artist's rights under copyright law. The 1976 Copyright Act defines publication as:

the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.⁴⁶

Under the definition of "publication" set forth in the 1976 Copyright Act, a publication does not occur when the public merely obtains a right to view a work without obtaining possession of tangible copies of the work.⁴⁷ If the circulation is expressly limited as to persons and purpose, it will not be considered a distribution "to the public" and thus not a "publication" under the 1976 Copyright Act.⁴⁸ "Limited publication" has been defined as an act which "communicates the contents of a manuscript to a definitely selected group and for a limited purpose, and without a right of diffusion, reproduction, distribution or sale."⁴⁹

The owner of the copyright has the following exclusive rights:

- (1) To reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

42. 17 U.S.C. § 201(b) (1982).

43. See 17 U.S.C. § 303 (1982).

44. 17 U.S.C. § 304(a) (1982).

45. 17 U.S.C. § 304(b) (1982); 2 M. NIMMER, *supra* note 7, at § 9.01[C].

46. 17 U.S.C. § 101 (1982). Although the 1909 Copyright Act did not define publication, the present statutory definition generally conforms to prior case law development of the concept of "publication." 1 M. NIMMER, *supra* note 19, at § 4.04.

47. 17 U.S.C. § 101 (1982).

48. *White v. Kimmell*, 193 F.2d 744, 746-47 (9th Cir. 1952) (evidence was sufficient to show publication was not limited, because there was no limitation "put on the number of copies she might turn out, and none on the persons to whom they would go").

49. *Id.*

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audio-visual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomime, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audio-visual work, to display the copyrighted work publicly.⁵⁰

An artist who creates a copyrighted work has rights in the work itself and in its copyright. The artist, therefore, can sell the work of art and retain the copyright, sell both, or even sell parts of the copyright. Prior to the 1976 Copyright Act, when an artist unconditionally sold a work of art, the law presumed that the copyright went to the buyer.⁵¹ Under the 1976 Copyright Act, the sale of the artwork does not automatically transfer all copyrights to the buyer.⁵² The buyer does have the right to display the work, but unless the contract specifies otherwise, the artist retains the exclusive right to reproduce the work, distribute reproductions, and control, to some extent, its display.⁵³

In addition to the protection afforded artists by federal copyright law, courts in the United States have recognized continuing rights of artists in their works by combining other legislation with state common law causes of action. Without the necessity of registration, some protection has been afforded to artists under section 43(a) of the Lanham Trademark Act⁵⁴ which, along with traditional concepts of misrepresentation,⁵⁵ unfair competition,⁵⁶ defamation,⁵⁷ and libel,⁵⁸ can protect an author from having his name attributed to something he did not do and

50. 17 U.S.C. § 106 (1982).

51. *Grandma Moses Properties, Inc. v. This Week Magazine*, 117 F. Supp. 348 (S.D.N.Y. 1953) (plaintiff was denied a preliminary injunction to restrain defendant from advertising and selling prints because plaintiff had made an unrestricted sale of a picture and thus lost the copyright); *Pushman v. New York Graphic Society, Inc.*, 287 N.Y. 302, 39 N.E.2d 249 (1942).

52. 17 U.S.C. § 202 (1982).

53. Stroupp, *A Practical Guide to the Protection of Artists Through Copyright, Trade Secret, Patent, and Trademark Law*, 3 COMM/ENT L.J. 189, 206 (1981) ("Barring a written agreement, . . . the copyright owner continues to have [the right to] . . . control the public display of additional material objects including the work. Unfortunately the law does not give an artist automatic right of access to his or her work, and without access the artist cannot exercise the right of reproduction.").

54. 15 U.S.C. § 1125(a) (1976); see also Sokolow, *A New Weapon for Artists' Rights: Section 439(a)[sic] of the Lanham Trademark Act*, 5 ART & LAW 32 (1980). Section 43(a) of the Lanham Trademark Act "prohibits the use of a false designation of origin or any false description or representation in connection with any goods or services which are introduced in commerce." 15 U.S.C. § 1125(A) (1976).

55. See *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976); *Noone v. Banner Talent Assoc.*, 398 F. Supp. 260 (S.D.N.Y. 1975) (use of name "Herman's Hermits" by former members of the group was misleading in that it implied that plaintiff, known by the public as Herman, was part of the new group and thus violated Lanham Trademark Act); *Rich v. RCA Corp.*, 390 F. Supp. 530 (S.D.N.Y. 1975) (a misleading use of plaintiff's photograph on record album violated Lanham Trademark Act); see also Allen, *Copyrights Color Wrongs: Are Old Films Pro-*

from having his artwork used in a way that negatively reflects on his professional reputation.⁵⁹

An artist's right to protect his work from alteration or mutilation has also been recognized to some extent under traditional theories, such as breach of implied contract.⁶⁰ Whether an artist will have a remedy under any traditional theory is quite uncertain. As one commentator has complained, "[t]he application of so many different doctrines to a subject matter which is intrinsically homogeneous produces confusion; choice of theory becomes dependent on a fortuitous combination of factors, rather than on the basic needs of the problem."⁶¹ Absent legislation, whether an artist has a right to protect his reputation or work depends upon either the strength of his bargaining position at the time of sale and his ability to get the proper language into the contract of sale, or his performance of the steps necessary for copyright protection, or a judicial finding of the proper facts affording protection under a common law concept. The attitude of most artists towards business and their usually weak bargaining positions reduce the likelihood that an artist will retain such rights.⁶²

III. ARTISTS' RIGHTS IN OTHER LEGAL SYSTEMS

Recognizing that art deserves protection and that the artist is in the best position to understand when a work is in danger, numerous countries have become signatories⁶³ to the Berne Convention.⁶⁴ The multilat-

tected?, 7 CAL. LAW. 12 (1987) (regarding protection of film artists' moral rights against "colorization").

56. See *Prouty v. National Broadcasting Co.*, 26 F. Supp. 265, 266 (D. Mass. 1939) (plaintiff entitled to recover damages for misappropriation of title of plaintiff's novel under "unfair competition" theory).
57. The court in *Gilliam*, 538 F.2d 14 (2d Cir. 1976), held that presentation of a mutilated work, if accompanied by the author's name, violated section 43(a) of the Lanham Act, because it "impaired the integrity of appellants' work and represented to the public as the product of the appellants what was actually a mere caricature of their talents." 538 F.2d at 25. Cf. *Consumers Union of U.S., Inc. v. General Signal Corp.*, 724 F.2d 1044, 1053 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984).
58. *Benson v. Paul Winley Sales Corp.*, 452 F. Supp. 516 (S.D.N.Y. 1978); *Clevenger v. Baker, Voorhis & Co.*, 8 N.Y.2d 187, 168 N.E.2d 643, 203 N.Y.S.2d 812 (1960).
59. *Clevenger v. Baker, Voorhis & Co.*, 8 N.Y.2d 187, 168 N.E.2d 643, 203 N.Y.S.2d 812 (1960).
60. See *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952) (a contractual obligation to use author's name implies a duty not to change the work).
61. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 575 (1940).
62. Sheehan, *supra* note 34, at 188-189.
63. For a list of signatories see Flacks, *Out of UNESCO and into Berne: Has the United States Participation in the Berne Convention for International Copyright Become Essential?*, 4 CARDOZO ART. & ENT. L.J. 203, 204 n.39 (1985).
64. The Berne Convention for the Protection of Literary and Artistic Works, signed at Berne, Sept. 9, 1886 reprinted in UNESCO & WORLD INTELLECTUAL PROPERTY ORGANIZATION, 3 COPYRIGHT LAWS AND TREATIES OF THE WORLD, Multilateral Conventions, Berne Copyright Union, item A-1 (1982); revised at

eral treaty sets forth minimum standards for the protection of literary and artistic works. Under the treaty, ratifying nations will extend to writers and artists of other signatory nations at least the minimum protection mandated by the Convention. Such minimum protection is prescribed in Article 6*bis* of the Paris Revision of the Berne Convention, which provides:

(1) Independently of the author's economic rights, and even after transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.⁶⁵

This is clearly a general articulation of "moral rights" and is intended to be additional to the rights obtained under copyright law.⁶⁶ Because this recognition of moral rights is the bare minimum which signatories to the treaty must afford the artists of other signatory nations, the United States has not been able to participate in the Berne Convention and has been criticized for not doing so.⁶⁷

The United States is unusual in not recognizing artists' continuing rights in their works. No less than 76 nations⁶⁸ are signatories to the Berne Convention and recognize, in one form or another, artists' continuing moral rights. Although the Berne Convention "is generally recognized as the superior instrument in that its adherents agree to a higher standard of protection,"⁶⁹ the United States has found that membership in other treaties, such as The Universal Copyright Convention,⁷⁰ is more

Paris, July 24, 1971 (effective July 10, 1974) *reprinted in* 4 M. NIMMER, NIMMER ON COPYRIGHT app. 27 (1987) [hereinafter "Paris Revision"].

65. Paris Revision, art. 6*bis* (1) *reprinted in* 4 M. NIMMER, *supra* note 64, at app. 27, 27-5 to 6 (1987).
66. Flacks, *supra* note 63, at 222 ("there is a clear statement of obligation to protect the author's moral rights in addition to well established economic rights. This derives from the French and German . . . moral rights.").
67. *Id.* at 208 n.39. United States copyright holders commonly secure Convention benefits by "simultaneously" (within 30 days) publishing works in a Convention country, such as Canada. Folsom, Gordon, Spangola, Jr., INTERNATIONAL BUSINESS TRANSACTIONS 663 (1986).
68. Flacks, *supra* note 63, at 204.
69. *Senate Subcommittee Hears Views on Berne Adherence Legislation*, 35 Pat. Trademark & Copyright J. (BNA) No. 871, 372 (Mar. 10, 1988) [hereinafter "*Berne Adherence Legislation*"].
70. Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, amended July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868. Other treaties on copyright to which the United States is a signatory include the Pan American Copyright Convention (Buenos Aires), Aug. 11, 1910, 38 Stat. 1785, T.I.A.S. No. 593, 155 U.N.T.S. 179; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, *opened for signature* Oct. 29, 1971, 25 U.S.T. 309, T.I.A.S. No. 7808, 866 U.N.T.S. 67; Amity and Economic Relations, May 29, 1966, United States-Thailand, 19 U.S.T. 5843, T.I.A.S. No. 6540; Industrial Property in Korea, May 19, 1908, United States-Japan, 35 Stat. 2041 (abrogated April 22, 1953).

compatible with its present law. These conventions afford a copyright holder the protection of the country in which the copyright was formally obtained,⁷¹ but do not define that protection and thus avoid the moral rights issue.⁷²

Legislation is presently being considered in both houses of Congress which would affect the United States' ability to adhere to the Berne Convention.⁷³ In the debate that has raged around the proposed legislation, magazine publishers have argued against an explicit statutory provision for moral rights on the ground that it would "drastically limit the editor's freedom of judgment."⁷⁴ In favor of moral rights, filmmaker George Lucas testified before a Senate Subcommittee that engineers, with the permission of copyright owners but without consulting the artists who produce films, currently can add color to black-and-white movies, change the soundtrack, speed up the pace, and add or delete material.⁷⁵ The apparent consensus emerging from the debate is that the United States could adhere to the Convention without amendment of the 1976 Copyright Act to include moral rights provisions, since adequate protection is already afforded under common law and other federal statutes.⁷⁶ Recently, Representative Robert Kastenmeier seems to have accepted this minimalist view and dropped moral rights from his proposed legislation, the "Berne Convention Implementation Act of 1988."⁷⁷ Most dangerous to the future of moral rights is legislation proposed by Senator Orrin Hatch. Under his proposed legislation, section 306(b) of the 1976 Copyright Act would provide, "No Author . . . shall be entitled . . . to any moral rights under Federal or State statutes or the common law."⁷⁸

Each nation that recognizes moral rights allows a different duration of protection depending upon such nation's concept of the nature of the right being protected. Most nations, following the lead of France, view moral rights as distinct from copyrights in that moral rights protect not only an artist's rights in his work but the work itself. These nations, taking a "dualist" approach, tend to allow the perpetual protection of

71. See sources cited *supra* note 70.

72. Flacks, *supra* note 63, at 206.

73. H.R. 1623, H.R. 2962, S. 1301, S. 1971, 100th Cong., 1st Sess. (1987); see *Berne Adherence Legislation*, *supra* note 69, at 372. Note that H.R. 4262, 100th Cong., 2d Sess. (1988) was sent to the House Committee on Judiciary in lieu of H.R. 1623 on March 28, 1988, was approved by the full committee on April 28, 1988, and was passed by unanimous vote of the House of Representatives on May 10, 1988. The Senate Subcommittee on Patents, Copyrights, and Trademarks incorporated provisions of S. 1971 into S. 1301 on April 13, 1988.

74. *Berne Adherence Legislation*, *supra* note 69, at 373 (citing John Mack Carter of the American Society of Magazine Editors).

75. *Id.* at 373-74.

76. *Id.* at 373.

77. H.R. 1623, 100th Cong., 1st Sess. (1987); see 35 Pat. Trademark & Copyright L.J. (BNA) No. 872, 414-417 (Mar. 17, 1988) (reprinting text of H.R. 1623).

78. *Berne Adherence Legislation*, *supra* note 69, at 373 (quoting S. 1971, 100th Cong., 1st Sess. (1987)).

moral rights by an artist or the artist's representatives.⁷⁹

It is remarkable that the concept of moral rights was developed judicially in France, a civil law country where "one of the most treasured tenets of the conventional wisdom . . . is that law is made by legislators and executives, not by judges."⁸⁰ Although originally developed by case law,⁸¹ moral rights in France were finally codified.⁸² Under the French Code, an artist's moral rights are not dependent on contract and in fact cannot be relinquished by contract.⁸³ The concept of the inalienability of an artist's moral rights is so deeply ingrained in France that courts will not grant specific performance against an artist who has contracted to do a work of art.⁸⁴

Although French courts have protected an artist's right to prevent the alteration or mutilation of his work, the judges were initially uncertain whether, under their Code, an artist could prevent the total destruction of a work of art. Some judges reasoned that if the work no longer existed, it could not injure the artist's reputation in the same way that a public display of a distorted version would.⁸⁵ Although this reasoning

79. Lubic, *New York Artists' Authorship Rights Act Incorporates European Moral Rights Doctrine*, 8 FORDHAM INT'L L.J. 362, 371 (1985). French law contains a dual doctrine of *droit d'auteur*, which is essentially the French version of copyright protection, and the *droit moral*, which has been characterized as "the negative right to prevent violations of the literary personality of the author." *Id.* at 465 (quoting Pierre Masse).

80. Merryman, *The Refrigerator of Bernard Buffet*, 27 HAST. L.J. 1023, 1026 (1976).

81. Roeder, *supra* note 61, at 556 (citing Fortin v. Prevost-Blondel, Cour de Paris, Jan. 25, 1889, D.P. 1890.2.243 (paternity right); Agnes dit Sorel v. Fayard Freres, Trib. Seine, Dec. 16, 1899, D.P. 1900.2.152 (integrity right); Cinquin v. Lecocq, Civ., June 25, 1902, D.P. 1903.I.5 (official recognition of the doctrine by the Cour de Cassation, the highest civil court in France)).

82. Law No. 57-296 art. 6 ("Journal Official" March 14, 1957, p.2723; April 19, 1957, p.4143 (effective March 11, 1958). See generally Strauss, *The Moral Right of the Author*, 2 STUDIES ON COPYRIGHT 965, 966-67 (A. Fisher ed. 1963). Article 6 provides:

The author shall enjoy the right to respect for his name, his authorship, and his work. This right shall be attached to his person. It shall be perpetual, inalienable and imprescriptible. It may be transmitted *mortis causa* to the heirs of the author. The exercise of this right may be conferred on a third person by testamentary provisions.

Id. at 967.

83. See Sarraute, *Current Theory of Moral Rights of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 478 (1968) reprinted in FELDMAN AND WEIL, ART WORKS: LAW, POLICY, PRACTICE 29-51, at 41 (1974) (C. Civ. art. 543(6) "the author enjoys the right to have his name, his authorship, and the integrity of his work respected. This right is appurtenant to the individual artist. It is perpetual, unassignable, and cannot be barred by limitations of time.").

84. See Merryman, *supra* note 80, at 1024 (citing Guille v. Colmant, [1967] Recueil Dalloz-Sirey [D.S. Jur.] 284 [1967] Gazette du Palais [Gaz. Pal.] I. 17 (Cour d'appel, Paris)). This is so even though the normal remedy for breach of contract in France is specific performance rather than money damages. R. SCHLESINGER, COMPARATIVE LAW 665 (5th ed. 1988).

85. See Merryman, *supra* note 80, at 1034-35 (citing Sudre v. Commune de Baixas, [1936] D.P. III 57 (Conseil d'Etat) (when City Council removed a poorly main-

might preclude a cause of action in a nation taking a more objective view of moral rights, the French courts have held that moral rights protection does extend to an artist's protection of his work from total destruction.⁸⁶ Indeed, French courts have even extended this continuing right to work that the artist himself discarded and nearly destroyed.⁸⁷ An artist has the right to prevent the public from seeing his work, and if he has attempted to destroy it and the remains are found by another person, that person may not, against the artist's wishes, restore and display the work.⁸⁸ The French Code provides not only that moral rights are "unassignable" or inalienable, but also that they are perpetual and cannot be barred by time limitations.⁸⁹ Under French law, the artist's heirs, as well as art associations, may exercise in perpetuity the rights of a deceased artist.⁹⁰

Other nations, such as Germany, have a "monist" approach and conceive of an artist's moral rights and copyrights as a unified whole, even though they are viewed as encompassing rights of different qualities.⁹¹ Copyrights in Germany are considered patrimonial or property rights, which protect the artist's pecuniary interest in the artwork. Moral rights are classified as "personality" rights which are constitutionally protected and surpass copyrights to include rights of reputation, occupation, profession, integrity of one's person, name and privacy.⁹² Because moral rights in Germany are viewed as protecting the artist rather than the work itself, they are not perpetual but are allowed the same duration as copyrights,⁹³ and all of the artist's rights pass only to his heirs.⁹⁴ One civil law scholar asserts that this limited duration of moral rights is one of the substantive distinctions constituting what at first blush appears to be a purely academic divergence between French and German views of moral rights.⁹⁵

European concepts of moral rights have been particularly troublesome to courts in the United States, because such concepts conflict with traditional United States notions of freedom of contract and the right of

tained sculpture from a city fountain, destroyed it, and used the pieces to fill holes in the road, artist was awarded substantial damages)).

86. Merryman, *supra* note 80, at 1034.

87. Sarraute, *supra* note 83, at 468-69 (citing *Camoin v. Carco*, Judgment of Mr. G, 1931 (Cour d' Appel, Paris 1931)).

88. Sarraute, *supra* note 83, at 468-69.

89. *Id.* at 478.

90. *Id.* at 483-84. Art associations may only exercise the artist's moral rights if the artist has no heirs. *Id.* at 484.

91. Lubic, *supra* note 79, at 371.

92. Merryman, *supra* note 80, at 1025.

93. Marcus, *The Moral Right of the Artist in Germany*, 25 COPYRIGHT L. SYMP. (ASCAP) 93, 115 (1975) (right lasts for life of the artist plus seventy years).

94. Michaelides-Nouaros, *Protection of the Author's Moral Interests After His Death as a Cultural Postulate*, 15 COPYRIGHT SOCIETY OF U.S.A. BULLETIN 35, 38 (1979).

95. Marcus, *supra* note 93, at 95.

free and unencumbered transfer of property.⁹⁶ Nevertheless, four states have passed moral rights legislation,⁹⁷ and federal legislation has been proposed to give artists' continuing rights in their work.⁹⁸

IV. MORAL RIGHTS LEGISLATION IN THE UNITED STATES

Attempts to incorporate moral rights by name in federal copyright legislation have been unsuccessful.⁹⁹ Senator Edward Kennedy recently introduced moral rights legislation before Congress.¹⁰⁰ Oregon,¹⁰¹ Massachusetts,¹⁰² New York,¹⁰³ and California¹⁰⁴ have passed legislation granting artists continuing rights in their works. State legislation in this area is subject to challenge on the ground that state statutes violate the Supremacy Clause¹⁰⁵ or the derivative challenge¹⁰⁶ that this area is preempted by the 1976 Copyright Act.¹⁰⁷

A. *The Proposed Maryland Art Preservation Act*

The Maryland Art Preservation Act ("MAPA"),¹⁰⁸ as proposed, would give an artist continuing rights of integrity and paternity in his work even if such rights are not reserved in a contract of sale. The subject matter of the proposed legislation is limited to only original art of "recognized quality."¹⁰⁹ In determining whether a work of fine art is of recognized quality, the trier of fact is directed to 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.¹¹⁰

The proposed legislation protects the following types of art: (1) visual renditions including paintings, drawings, sculptures, mosaics or photographs; (2) works of calligraphy; (3) works of graphic art, including

96. See *Weinstein v. University of Illinois*, 811 F.2d 1091 (7th Cir. 1987) (court strongly criticized moral rights); *Monta, The Concept of 'Copyright' versus the 'Droit d' Auteur'*, 32 S. CAL. L. REV. 177, 185 (1959).

97. See *infra* notes 101-104.

98. Kaufman, *It's Time to Grant Rights to Artists: Kennedy Bill Would Help*, 9 LEGAL TIMES, Oct. 13, 1986 at 15, col. 1.

99. See Strauss, *supra* note 82, at 978.

100. See Kaufman, *supra* note 98, at 15, col. 1; Chapin & Arthurs, *A Bill of Rights For Arts*, N.Y. TIMES, Oct. 29, 1987, at A31, col. 1.

101. OR. REV. STAT. § 359.350-.365 (1981) (Art Work Reproduction Rights).

102. MASS. GEN. LAWS ANN. ch. 231, § 85S (West 1987). See V. Koven, *Observations on the Massachusetts Art Preservation Act*, 71 MASS. L. REV. 101 (1986).

103. N.Y. ARTS & CULT. AFF. LAW, §§ 11.01, 14.03 (McKinney Supp. 1988).

104. CAL. CIV. CODE §§ 987-997 (West Supp. 1984).

105. U.S. CONST. art. VI, cl. 2.

106. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-23, at 376-377 (1978); Gantz, *Protecting Artists' Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform*, 49 GEO. WASH. L. REV. 873, 893-895 (1981).

107. 17 U.S.C. §§ 101-810 (1977 & Supp. 1981).

108. Maryland Art Preservation Act, S. 458 (1986) (see Appendix I).

109. *Id.* § 404A(C).

110. *Id.*

etchings, lithographs, offset prints or silk screens; (4) craft works in materials including clay, textile, fiber, wood, metal, plastic, or glass; and (5) works in mixed media including collages or works consisting of any combination of works included in the above list.¹¹¹ The proposed legislation expressly does not protect work prepared by an artist under contract to be used for commercial purposes by its purchaser.¹¹²

The rights given under the proposed legislation can be waived contractually by the artist.¹¹³ Further waiver can occur with respect to a work of art that has become part of a building. MAPA provides that unless an instrument expressly reserving the artist's rights and signed by the building owner is recorded among the land records of the county where the building is located, the artist's rights in his artwork "shall be waived."¹¹⁴ If the artwork which is part of the building can be removed without unreasonable expense or substantial harm to the work, the owner of the building may not remove it without the artist's consent, unless the owner shows diligence without success in trying to notify the artist in writing of his intended action affecting the artwork or shows the artist's failure within ninety days after notification either to remove the artwork himself or to pay for its removal.¹¹⁵

An artist's "rights of paternity" are protected by section 404C, which provides, "The artist shall retain at all times the right to claim authorship, and to receive proper credit, or for just and valid reason, to disclaim authorship of the artist's work of fine art."¹¹⁶ This section is intended to give the author of a work the right to be acknowledged as its creator, a right to which he is not clearly entitled under common law unless he is well known to the public.¹¹⁷ State courts generally do recognize a cause of action in favor of a person who has acquired a reputation. Such right of action is labeled the "right of publicity," generally considered a property right and, as such, is both alienable and inheritable.¹¹⁸ In California this common law right has been likened to copyright and has been held to have a duration for the well-known artist's life plus fifty

111. *Id.* § 404A(C)(1)(I-V).

112. *Id.* § 404A(C)(2).

113. *Id.* § 404F(3).

114. *Id.* § 404G(A). This section is unclear in many respects and should be redrafted. For example, the section does not indicate whether artwork affixed to the land on which the building is located is considered "part of the building." Also, the section does not provide the time when an instrument reserving the artist's rights must be recorded. Conceivably, waiver may be precluded by recordation of such an instrument some time after the artwork is installed. Finally, the section begins to address circumstances in which removal of the artwork will cause significant damage to the same, but is an incomplete sentence.

115. *Id.* § 404G(B).

116. *Id.* § 404C.

117. *See supra* notes 7-11.

118. *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 221 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979). *Cf. Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 823-24, 160 Cal. Rptr. 323, 329, 603 P.2d 425, 431 (1979) (an artist's publicity or "exploitation" right deemed personal in nature and as such assignable but not inheritable).

years.¹¹⁹ The artist who has little or no reputation has uncertain or no protection without the proposed legislation.¹²⁰ MAPA would make clear that both well-known and unknown artists have an assignable and inheritable paternity right.¹²¹

Of course, even with the proposed legislation, an artist, whether well-known or unknown, must be careful not to contract away his paternity right. In this regard the proposed legislation is consistent with prior case law under which the right of paternity, even when attached to a right of publicity, is assignable by contract and limited to a duration of fifty years after the author's death.¹²²

There may be situations in which an artist, because of modifications or alterations to his work, will want to be disassociated from that work. Under MAPA, the artist would have the right to disclaim authorship for "just and valid reason."¹²³ There are no examples in the proposed legislation of a just and valid reason. Unless these are added or this language is clarified, courts construing MAPA may limit this right to situations when defacement, mutilation, or alteration of the work has occurred.

Most artists naturally are more concerned that they be able to prevent unwanted changes to their work. This "right of integrity" is protected under the proposed legislation by section 404B(A), which provides, "Except an artist who owns and possesses a work of fine art which the artist has created, a person may not intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art."¹²⁴

Absent such legislation, the artist has no right of integrity unless he is careful to reserve such right in the contract of sale.¹²⁵ Under MAPA, the artist will not be deemed to have waived the right of integrity in the contract of sale unless such waiver is express, in writing, and signed by the artist.¹²⁶ MAPA provides an exception, however, for artwork that

119. *Lugosi v. Universal Pictures*, 25 Cal. 3d at 847, 160 Cal. Rptr. at 344-45, 603 P.2d at 446-47.

120. See Note, *Lugosi v. Universal Pictures: Descent of the Right of Publicity*, 29 HAST. L.J. 751, 752-59 (1978). Commentators have debated whether an unknown person has a cause of action based on a right of privacy, whether the plaintiff's status as a celebrity should determine the possession of a right of publicity and whether the right is a personal right or a property right in terms of inheritability and assignability.

121. Maryland Art Preservation Act § 404F (providing with respect to "any" artist that the rights under MAPA are inheritable for a period of fifty years after the artist's death by the artist's heir, legatee or personal representative).

122. *Id.*; see *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 160 Cal. Rptr. 323, 603 P.2d 425 (1979); see also *Vargas v. Esquire, Inc.*, 164 F.2d 522, 526 (7th Cir. 1947), cert. denied, 335 U.S. 813 (1948) (court refused to recognize moral rights in contravention of express contractual assignment of use of well-known artist's name in connection with artwork to be provided under same contract).

123. Maryland Art Preservation Act § 404C.

124. *Id.* § 404B(A).

125. Roeder, *supra* note 61, at 570; see *supra* note 15 and accompanying text.

126. Maryland Art Preservation Act § 404F(3).

has become part of a building.¹²⁷

Under common law, even if a right of integrity is recognized, an adequate remedy may not be available.¹²⁸ Relief may be limited to monetary damages based on injury to the artist's reputation, rather than an injunction to prevent continued injury to the work itself.¹²⁹ The proposed Maryland legislation is clearly intended to protect the work of art itself as well as the reputation of the artist. MAPA sets forth the following remedies for violation of its provisions: (1) injunctive relief; (2) actual damages; (3) punitive damages; (4) reasonable attorney and expert witness fees; or (5) any other relief which the court deems proper.¹³⁰

Another aspect of the remedies afforded by the proposed legislation which would not be available at common law is the continuing enforceability of rights after the artist's death. The rights created by this legislation are available for the duration of the artist's life plus fifty years.¹³¹ Moral rights would have the same duration as copyrights.¹³² After the artist's death, his heirs or personal representative can assert these rights.¹³³ MAPA does, however, contain a statute of limitations which provides that a cause of action must be brought within three years after the act constituting a violation of MAPA or within one year after the discovery of such act, whichever period is longer.¹³⁴

In summary, the Maryland Art Preservation Act would give an art-

127. *Id.* § 404G(A) (discussed *supra* note 114 and accompanying text).

128. *See, e.g., Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 579, 89 N.Y.S.2d 813, 819 (Sup. Ct. 1949) (court rejected moral rights argument advanced by artist in support of claim against church to restore frescoes painted by artist, brought after church had painted over frescoes pursuant to artist's transfer of copyright to church). *But see Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976) (discussed *supra* notes 6, 14).

129. *E.g., Meliodon v. School Dist. of Philadelphia*, 328 Pa. 457, 195 A. 905 (1938).

130. Maryland Art Preservation Act § 404D(A). This section should be redrafted, because in its present form it suggests that the enumerated remedies are mutually exclusive. Punitive damages will be sought under moral rights legislation. *See Pelletier v. Eisenberg*, 177 Cal. App. 3d 558, 223 Cal. Rptr. 84 (1986). The punitive damages provision under the proposed legislation has been criticized, however, because the court may award such damages to an organization engaged in charitable or educational activities involving the fine arts rather than to the artist himself. Artists' lawyers argue that a plaintiff will seek punitive damages more aggressively if he has a better chance of receiving such damages, and it is the likelihood of having to pay such damages that will most heavily impress upon purchasers of fine art the seriousness of the rights afforded by MAPA.

131. Maryland Art Preservation Act § 404F(1).

132. As in Germany, the moral rights granted under MAPA would not be of an indefinite duration but would last only as long as copyrights. This is so even though the general introductory language of MAPA sounds like the modified dualist approach found in France, under which moral rights are also seen as protecting the work of art itself. *See supra* notes 79-90 and accompanying text. The indicated purpose of MAPA is to provide "against the enumerated acts being committed against a work of fine art," thereby encompassing both economic and artistic concerns. Marcus, *supra* note 93, at 95.

133. Maryland Art Preservation Act § 404F(1).

134. *Id.* § 404H.

ist a bundle of rights consisting of the right to claim authorship and to prevent others from claiming authorship as well as the right to disavow a work of art. Along with paternity rights, MAPA would grant an artist the right to prevent others from intentionally altering, destroying or mutilating a work of art. In addition to these traditional moral rights, the artist can also prevent the negligent commission of such acts by a framer, conservator, restorer or dealer.¹³⁵

B. Constitutional Vulnerability of MAPA

1. Preemption

The Supreme Court in *Goldstein v. California*¹³⁶ ruled that the Copyright Clause of the Constitution¹³⁷ does not prohibit states from exercising control over copyrights and stated that "[a]lthough the Copyright Clause . . . recognizes the potential benefits of a national system, it does not indicate that all writings are of national interest or that state legislation is, in all cases, unnecessary or precluded."¹³⁸ Although *Goldstein* dealt with the Copyright Act of 1909, there is no reason to believe that the enactment of the 1976 Copyright Act makes state copyright laws constitutionally invalid. The 1976 Copyright Act does, however, set forth its own preemption test,¹³⁹ under which a state law is preempted if it protects "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of [federal] copyright [law] . . . [for] works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright. . . ."¹⁴⁰

The 1976 Copyright Act grants to an artist exclusive rights to reproduce, to prepare derivative works, and to perform, distribute copies of, and display, the work.¹⁴¹ Whether these rights are equivalent to the rights of paternity and integrity granted under MAPA will determine MAPA's constitutionality. Unfortunately, in spite of Congress's stated purpose of the 1976 Copyright Act to create a clear test for preemption,¹⁴² the concept of "equivalency" lacks clear definition, in part because of the confusing legislative history of the 1976 Copyright Act.¹⁴³

Initially, the House Report for the 1976 Copyright Act stated that the equivalency test provided that a state cause of action was not preempted if it contained elements that were "different in nature" from

135. *Id.* § 404B(B).

136. 412 U.S. 546 (1973).

137. U.S. CONST. art. I, § 8, cl. 8.

138. *Goldstein v. California*, 412 U.S. 546, 556-57 (1973).

139. 17 U.S.C. § 301 (1976).

140. 17 U.S.C. § 301(a) (Supp. III 1979); § 301(b)(1)-(3) (1976).

141. 17 U.S.C. § 106 (1976).

142. H.R. Rep. No. 1476, 94th Cong., 2d Sess., 130 (1976).

143. For a detailed account see G. Francione, "California Art Preservation Act and Federal Pre-emption by the 1976 Copyright Act-Equivalence and Actual Conflict," 31 Copyright L. Symp. 105, 122-125 (1984) [hereinafter "Francione"].

copyright infringement.¹⁴⁴ Examples of such state causes of action were listed as follows: breach of contract, breach of trust, invasion of privacy, defamation, and deceptive trade practices.¹⁴⁵ Because these state causes of action require the proof of elements beyond what is needed to show infringement of copyright, their inclusion as examples would have indicated that Congress did not intend to preempt them by passing the 1976 Copyright Act.

The version of the bill actually voted upon by the House of Representatives contained an additional type of state cause of action, "misappropriation," intended not to be preempted, exemplified by *International News Service v. Associated Press* (the "INS" case).¹⁴⁶ In *INS*, the state cause of action for misappropriation was founded on the defendant's "copying news from bulletin boards and from early editions of complainant's newspapers and selling this, either bodily or after rewriting it, to defendant's customers."¹⁴⁷ Prior to the debate on the bill, the Justice Department pointed out that *INS* had been overturned in the wake of *Erie v. Tompkins*.¹⁴⁸ This disclosure prompted the House Judiciary Committee to delete all examples of state causes of action not preempted by the 1976 Copyright Act. The subsequent debate nevertheless indicates that the state causes of action listed were not intended to be preempted,¹⁴⁹ even though the elements of misappropriation were not different in kind from the elements of copyright infringement.

Recently, however, courts have held that *INS*-type state causes of action are preempted under the 1976 Copyright Act,¹⁵⁰ because a "state statute creating rights which could be violated by the mere act of reproduction, performance, distribution or display is preempted by the statute."¹⁵¹ Under these holdings, if the artist, in order to maintain a cause

144. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 132 (1976).

145. *Id.*

146. 248 U.S. 215 (1918). See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 132, 133 (1976).

147. *International News Service v. Associated Press*, 248 U.S. 215, 231 (1918).

148. 304 U.S. 64 (1938). The *International News Service* case was considered "no longer authoritative" in *Columbia Broadcasting Sys., Inc. v. De Costa*, 377 F.2d 315 (1st Cir.), *cert. denied*, 389 U.S. 1007 (1967).

149. Part of this debate is reproduced in 1 M. NIMMER, *supra* note 19, § 1.01[B][1], at 1-14.5 to 1-16 (1987).

150. Professor Nimmer believes that the state cause of action articulated in *International News Service* would not be preempted under the 1976 Copyright Act because the subject matter (news) is not protected under the Act. *Id.* § 1.01[B][1] at 1-17; see Francione, *supra* note 143, at 126 (citing recent district court decisions which hold that state causes of action for misappropriation based on similar elements are preempted); see also *Suid v. Newsweek Magazine*, 503 F. Supp. 146 (D.D.C. 1980); *Mitchell v. Penton/Industrial Publishing Co.*, 486 F. Supp. 22 (N.D. Ohio 1979); *Orth-O-Vision v. Home Box Office*, 474 F. Supp. 672 (S.D.N.Y. 1979).

151. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 443 (S.D. Ohio 1980), *aff'd*, 679 F.2d 656 (6th Cir. 1982) (court found that an Ohio statute prohibiting licensing of a motion picture to a theater owner without the theater owner first viewing it was not preempted by 1976 Copyright Act); see also *Factors Etc., Inc. v. Pro Arts, Inc.*, 496 F. Supp. 1090 (S.D.N.Y. 1980), *rev'd*, 652 F.2d 278 (2d Cir.

of action for violation of his integrity or paternity rights under MAPA, must allege only those facts sufficient to maintain a cause of action under federal copyright law, the state cause of action is preempted.¹⁵²

The Supreme Court has not yet defined the equivalency test, and the opinions of those who have written on the subject are divided. Professor Nimmer's position,¹⁵³ which is based on current lower court decisions, stresses a qualitative difference test.¹⁵⁴ He argues that the confusing legislative history of the 1976 Copyright Act should be ignored and that the preemption section should be applied according to its terms in two steps.

First, a court should ask whether the state right or law by its terms or as applied involves copyrightable work.¹⁵⁵ State moral rights legislation generally and MAPA in particular do cover the same subject matter as the 1976 Copyright Act, namely visual renditions and graphic, sculptural, or mixed media works.¹⁵⁶ If the type of property concerned is the same as that mentioned in the 1976 Copyright Act, it meets the first step of the test for preemption, even if for some other reason it does not qualify for copyright protection.¹⁵⁷

Second, if the work does meet the first step, the court should ask whether the conduct which constitutes the state cause of action requires proof of an element other than the mere act of reproduction, distribution, performance or display. Professor Nimmer suggests that in applying this step of the test, a state right, in order to be preempted, need merely be "within the general scope of copyright . . . even if the precise contours of the right differ from those contained in [the 1976 Copyright Act]. . . . The fact that the state created right is either broader or narrower . . . will

1981), *cert. denied*, 456 U.S. 927 (1982) (allowing a state cause of action for invasion of privacy because it required the additional proof of celebrity).

152. "If under state law the act of reproduction, performance, distribution or display, no matter whether the law includes all such acts or only some, will *in itself* infringe the state created right, then such right is pre-empted." 1 M. NIMMER, *supra* note 19, § 1.01[B][1] at 1-12. See *Harper & Row, Publishers, Inc. v. Nation Enter.*, 501 F. Supp. 848 (S.D.N.Y. 1980) (court denied plaintiff's state causes of action for conversion and tortious interference with contract, because they were based on equivalent copyright protection of exclusive rights of reproduction and distribution of copyrightable work, despite fact that state causes of action needed proof of additional elements of intent), *aff'd*, 723 F.2d 195 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985) (the appeal to Supreme Court predicated on the defense of "fair use").
153. 1 M. NIMMER, *supra* note 19, § 1.01[B][1] at 1-9.
154. See *Harper & Row, Publishers, Inc.*, 501 F. Supp. at 852-53 (court looked to "the essence of the plaintiff's . . . claim" to see if "rights under the facts of a particular case [are] . . . qualitatively different from [copyright protection]." *Id.*).
155. "If a work by reason of its content falls within the subject matter of copyright as specified by sections 102 and 103 [of the 1976 Copyright Act] it is not excluded from . . . pre-emption simply because it is ineligible for federal protection by reason of its failure to meet the prescribed federal standards," such as lack of originality or lack of notice. 1 M. NIMMER, *supra* note 19, § 1.01[B][2], at 1-22.2.
156. 17 U.S.C. § 301 (1977); Maryland Art Preservation Act § 404A(C)(1).
157. 1 M. NIMMER, *supra* note 19, § 1.01[B][2], at 1-22.1.

not save it from preemption."¹⁵⁸

The application of this two-step test might mean that even if the 1976 Copyright Act will not give protection (perhaps because the subject matter lacks some federal formality),¹⁵⁹ the state cause of action will be preempted simply because the act of reproduction, performance, distribution or display alone will give rise to that state cause of action.

Professors Hoffman¹⁶⁰ and Katz¹⁶¹ and Ms. Gantz¹⁶² argue that moral rights are qualitatively different from copyright protection, which protects only economic interests. This argument apparently proceeds from the premise that a state right of action is preempted only when its sole object is to protect an author's or artist's economic interest in his or her work. Professor Francione asserts that this argument confuses the origins of moral rights protection with the elements which must be shown to acquire such protection in a cause of action.¹⁶³

Assuming that courts will use, as they have in the recent past, Professor Nimmer's approach to the equivalency test, the issue becomes whether the state rights provided by MAPA will require more or different proof for their vindication than mere proof of reproduction, distribution, performance or display. MAPA requires that the plaintiff prove that the acts done by the defendant were done either intentionally or in the case of framers, conservators or dealers, negligently. Cases indicate that this is not a qualitative difference such as to avoid preemption.¹⁶⁴

The assertion of the right of paternity under MAPA will require the plaintiff to prove in some cases not only acts of reproduction, distribution, performance or display, but also the act of attribution or misattribution by the defendant.¹⁶⁵ This would be an additional element¹⁶⁶ to those

158. *Id.* § 1.01[B][1], at 1-10 to 1-12; see *Walker v. Time Life Films, Inc.*, 615 F. Supp. 430 (S.D.N.Y. 1985) (plaintiff could not maintain a state cause of action for unfair competition based on misappropriation of his book's contents, ideas and concepts since such claim is based on rights within the scope of 1976 Copyright Act).

159. 1 M. NIMMER, *supra* note 19, § 1.01[B][2], at 1-22.1.

160. Hoffman, *The California Art Preservation Act*, 5 ART & L. 53, 56 (1980).

161. Katz, *Copyright Preemption Under the Copyright Act of 1976: the Case of Droit de Suite*, 47 GEO. WASH. L. REV. 200, 217 (1978).

162. Gantz, *supra* note 5, at 877-78.

163. Francione, *supra* note 143, at 129-30.

164. See *Harper & Row, Publishers, Inc. v. Nation Enter.*, 501 F. Supp. 848 (S.D.N.Y. 1980), *aff'd*, 723 F.2d 195 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985); *Rand McNally & Co. v. Fleet Management Sys., Inc.*, 591 F. Supp. 726, 739 (N.D. Ill. 1983) (state cause of action for misappropriation does not avoid preemption to protect reproduction rights even though it requires additional element of commercial immorality); see also *Crow v. Wainwright*, 720 F.2d 1224, 1226 (11th Cir. 1983), *cert. denied*, 469 U.S. 819 (1984) (defendant's conviction under state law of dealing in stolen property (bootleg recording tapes) reversed because 1976 Copyright Act preempted state law even though state law required prosecutor to establish scienter).

165. Maryland Art Preservation Act § 404C.

166. *Editorial Photocolor Archives, Inc. v. Granger Collection*, 1983 Copyright L. Dec. (CCH) ¶ 25,547 (N.Y. App. Div. 1983) (state cause of action for unfair competition

listed in the 1976 Copyright Act. In those cases where the artist is complaining that the work of art is being displayed without any attribution, there may be a greater problem with preemption, in that mere display may violate MAPA.¹⁶⁷ Furthermore, since failure to attribute paternity to an artist or an author may not be actionable infringement of the 1976 Copyright Act an artist might be left without a remedy.¹⁶⁸

For an artist to maintain a cause of action for a violation of his right of integrity under MAPA, the artist must prove, in addition to the acts mentioned by the 1976 Copyright Act, that the defendant defaced, mutilated, altered or destroyed the work.¹⁶⁹ This does not mean that there will never be a problem of preemption in the assertion of integrity rights under MAPA. For instance, the mere hanging of a painting upside down arguably would be enough for a violation of MAPA, and this would require proof of no element other than display.¹⁷⁰ The artist in this situation would have to prove some act of alteration in addition to, or instead of, mere display in order to avoid preemption.

Professors Nimmer and Francione disagree about whether rights granted artists by other state legislation are preempted when they apply to reproduction or derivative works. An argument exists that protection against alteration in MAPA includes protection against unauthorized reproduction or the use of one's work in a derivative work.¹⁷¹ If so, then the right to prevent alteration under MAPA would be equivalent to the right under the 1976 Copyright Act to prevent derivative works based upon a copyrighted work. This would be true unless the "alteration" is also a "defacement" or "mutilation," thus adding an element to the artist's cause of action under MAPA. Professor Nimmer argues that if the defacement or mutilation claim is merely subjective, it is not truly an additional element and thus does not avoid preemption.¹⁷² The protection of MAPA would apply specifically to "original art work"¹⁷³ and if so limited will not be subject to preemption with regard to the reproduction right of the 1976 Copyright Act.

Professor Francione has raised yet another potential problem with

and misappropriation exists when defendant wrongfully held out to public that defendant had reproduction rights).

167. The language in Maryland Art Preservation Act § 404C, "[t]he artist shall retain at all times the right to . . . receive proper credit," is broad enough to encompass mere unauthorized display within those acts intended to be prohibited.
168. Professor Francione argues to the contrary that there is a qualitatively different right under state and federal law. His argument does, however, seem to be based on the same premise which he criticizes in other commentators: that the origin of the right makes it qualitatively different. See Francione, *supra* note 143, at 133-34.
169. Maryland Art Preservation Act § 404B.
170. Francione, *supra* note 143, at 134.
171. 2 M. NIMMER, *supra* note 7, § 8.21[C][1], at 8-250 to -252. Cf. Francione, *supra* note 143, at 137.
172. NIMMER, *supra* note 7, § 8.21[C][2] at 8-261. *Contra* Francione, *supra* note 143, at 137-38.
173. Maryland Art Preservation Act § 404A(C).

state moral rights legislation which might affect MAPA. He points out that when applying the equivalency test, commentators have assumed that the artist and the copyright-holder are the same person.¹⁷⁴ Preemption might occur, however, not only because a state right is equivalent to a federal right, but also when a state right conflicts with a federally conferred right.¹⁷⁵ For example, an artist might sell a modern painting together with the copyright to X, and X might later display the painting publicly in a 17th century gold frame. X has the exclusive federal copyright to display publicly and the artist has the state granted moral right to prevent alteration. The 1976 Copyright Act does not state that a copyright-holder has the right to alter a work, although this may be the "logical implication of the statutory scheme."¹⁷⁶ Congress, in enacting the 1976 Copyright Act, did not express its intention regarding such conflicts as it did its intention to eliminate equivalent state rights. Congress's intent to preempt conflicting state rights is drawn from its stated intent to establish a "uniform national copyright system."¹⁷⁷

The conflict issue arose under the 1909 Copyright Act¹⁷⁸ in the case of *Morseburg v. Balyon*.¹⁷⁹ Upholding the state legislation, the United States Court of Appeals for the Ninth Circuit reasoned that "[t]he crucial inquiry is not whether state law reaches matters also subject to federal regulation, but whether the two laws function harmoniously rather than discordantly."¹⁸⁰

This finding by the court that no conflict in fact existed between state and federal law has been criticized.¹⁸¹ It should be noted, however, that the court recognized that the Supreme Court's emphasis in applying the doctrine of preemption has varied from time to time from being, "applied with nationalistic fervor"¹⁸² to "... periods with generous tolerance of state involvement in areas already to some extent the subject of national concern."¹⁸³ The Court's position on preemption is to a large extent influenced by "the area of law in which the issue arises."¹⁸⁴ For example, in dealing with foreign affairs the emphasis will be on national interest, and conflict will be easily found. When dealing with artists' rights, however, the court of appeals predicted that the Supreme Court would shift the emphasis in favor of state legislation.¹⁸⁵ In making this

174. Francione, *supra* note 143, at 140.

175. *Id.* at 139.

176. *Id.* at 142. *But see* Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976) (discussed *supra* note 14).

177. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 130 (1976).

178. 17 U.S.C. §§ 1-27 (1970).

179. 621 F.2d 972 (9th Cir.), *cert. denied*, 449 U.S. 983 (1980).

180. *Morseburg*, 621 F.2d at 978.

181. 2 M. NIMMER, *supra* note 7, § 8.22[B], at 8-272.6 -8-272.8.

182. *Morseburg*, 621 F.2d at 976.

183. *Id.* at 976 (citing Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975)).

184. *Morseburg*, 621 F.2d at 976.

185. *Id.* at 977.

prediction, the court of appeals looked to the Supreme Court's attitude toward artists' rights as shown in *Goldstein v. California*.¹⁸⁶ There, the Supreme Court upheld a California statute making it a criminal offense to "pirate" recordings, an activity against which the copyright-holder had no protection.¹⁸⁷ In reviewing *Goldstein* the court of appeals in *Morseburg* deduced that ". . . the interests of California in particular and of federalism in general were given emphasis."¹⁸⁸

The problem of possible conflict between MAPA and federal law can be overcome by adding language to MAPA making it clear that the written explicit transfer of these copyrights amounts to a waiver of rights under MAPA.¹⁸⁹ Mere sale of an art work, however, does not automatically transfer the copyright. In such cases the artist would retain his MAPA rights.

If the 1976 Copyright Act is amended in accordance with the Kennedy proposal,¹⁹⁰ MAPA clearly will be preempted. The Kennedy proposal would add to the 1976 Copyright Act the same sort of moral rights of paternity and integrity granted by MAPA. The proposed amendment explicitly states that it grants rights "[i]ndependently of the artist's economic right in copyright. . . ."¹⁹¹ In fact, the Kennedy proposal goes further than MAPA in that it would not only grant artists rights of paternity and integrity, but would also give an artist, or in the case of his death, the National Endowment for the Arts, a right to royalties on each resale of the art work for fifty years beyond his death.¹⁹²

In some ways, the proposed Kennedy amendment runs counter to what one would expect to find in the 1976 Copyright Act. For example, the artist's right to receive a royalty on re-sale cannot be waived although the artist can assign the right to collect the royalty payment.¹⁹³ Also, as an amendment to federal legislation, the Kennedy proposal will not be subject to attack on preemption grounds, so it allows an artist to transfer copyright and still maintain the right to assert infringement of copyright for distortion, mutilation or other alteration.¹⁹⁴

186. 412 U.S. 546 (1973).

187. *Id.* at 571.

188. *Morseburg*, 621 F.2d at 977.

189. In order to transfer a copyright there must be a writing signed by the owner of the rights conveyed. 17 U.S.C. § 204(a) (1977).

190. Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong., 2d Sess. (1986) (*see* Appendix II).

191. Visual Artists Rights Amendment § 3 (adding subsection (b)(1) to title 17, section 106 of the United States Code).

192. This is based on the French "Droit de Suite." Emley, *The Resales Royalties Act: Paintings, Preemption and Profit*, 8 GOLDEN GATE U.L. REV. 239, 240 n.9 (1978); Hauser, *The French Droit de Suite: The Problem of Protection For the Underprivileged Artist Under Copyright Law*, 6 BULL. COPYRIGHT SOC'Y 94 (1959).

193. Visual Artists Rights Amendment § 3 (adding subsection (d)(1) to title 17, section 106 of the United States Code).

194. Visual Artists Rights Amendment § 3 (adding subsection (c) to title 17, section 106 of the United States Code).

2. Due Process and the Contract Clause

Other state statutes¹⁹⁵ conferring moral rights have been criticized as violating the Contract Clause¹⁹⁶ and the fourteenth amendment Due Process Clause of the United States Constitution.¹⁹⁷ A similar criticism may apply to MAPA. Section 2 of the proposed bill states that "this Act shall apply to any claim based on proscribed acts occurring on or after July 1, 1986 to any work of fine art whenever created."¹⁹⁸ MAPA arguably has a retroactive effect since a person who purchased a work before July 1, 1986 had certain rights in that work, including the right to alter the work, which the statute may take away in contravention of the Contract Clause and without due process.

The Contract Clause argument is the easiest to overcome. Not all impairments of contracts are improper under the Contract Clause.¹⁹⁹ The Supreme Court has held that "[s]tates must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired or even destroyed, as a result."²⁰⁰ In *Morseburg*, the court found the impairment of the contract insignificant and thus not in need of extensive justification that might otherwise be necessary, noting that for the impairment of a contract right to violate the Contract Clause, such impairment must be "severe, permanent, irrevocable and retroactive and which serves no broad, generalized economic or social purpose. . . ."²⁰¹ The purpose of MAPA is stated to be the protection of the artist or the public, and the harm to the owner of the work will rarely be severe.

The Due Process Clause raises two issues: (1) whether MAPA constitutes a permissible exercise of the state's police power and (2) if so, whether compensation must be paid to the owner for the taking of these rights. MAPA should be viewed by the courts as a form of economic regulation to promote artistic endeavors generally. As such, it is the proper subject of legislation and "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality. . . . [T]he burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."²⁰² In *Morseburg*, the court of appeals, reviewing

195. See *supra* notes 101-104.

196. U.S. CONST. art. 1, § 10, cl. 1.

197. U.S. CONST. amend. V (applicable to states through U.S. CONST. amend. XIV, § 1).

198. Maryland Art Preservation Act § 2. The reference to July 1, 1986 will be changed to the year in which MAPA is passed.

199. *Morseburg v. Balyon*, 621 F.2d 972, 979 (9th Cir.), *cert. denied*, 449 U.S. 983 (1980) (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)).

200. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977).

201. *Morseburg*, 621 F.2d at 979 (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250 (1978)).

202. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (Federal Coal Mine Health and Safety Act of 1969 held constitutional against a challenge by twenty-two coal mine operators).

state artist protection legislation, held that the state legislation was neither arbitrary nor capricious.²⁰³

To some degree the state's interest in MAPA is an aesthetic one, although the State of Maryland may gain or lose economically by becoming either more or less attractive to artists. Aesthetic considerations alone have been a sufficient basis for state action if they "bear substantially on the economic, social and cultural patterns of a community or district."²⁰⁴ In light of the arguments asserted in favor of moral rights legislation in the United States and the experience of European countries and Berne Convention signatories, this test evidently is met.

In *Morseburg*, the plaintiff also argued that the retroactivity of the state legislation removed it from the sphere of usual economic regulation.²⁰⁵ To this argument the court responded that legislation which readjusted rights and burdens was not invalid solely because it upset otherwise settled expectations²⁰⁶ and that "[o]nly when such retroactive effects are so wholly unexpected and disruptive that harsh and oppressive consequences follow is the constitutional limitation exceeded."²⁰⁷ The state legislation was held not to have consequences of that magnitude,²⁰⁸ and although MAPA would apply to any work of fine art whenever created,²⁰⁹ MAPA will likely survive attack on this issue.

The question remains whether the art-owner should be compensated for the state's taking of the rights of ownership by enactment of MAPA. Generally, the right of citizens to just compensation for property taken by the government is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."²¹⁰ In applying this policy courts have tended to take account of an owner's economic expectations as well as the severity of the diminution in the value of his property caused by the government's action and have weighed these against the public purpose served by the regulation.²¹¹ MAPA neither decreases the value of the artwork to the owner nor interferes with present use and enjoyment except to the extent that destruction, alteration or mutilation are not allowed. The owner's interest in destroying, altering, or mutilating artwork he owns is not likely to weigh very heavily against the public purpose served by the legislation.

203. *Morseburg*, 621 F.2d at 979.

204. *Gantz*, *supra* note 5, at 899.

205. *Morseburg*, 621 F.2d at 979.

206. *Id.* at 979-80.

207. *Id.* at 980 (citing *Hazelwood Chronic & Convalescent Hospital, Inc. v. Weinberger*, 543 F.2d 703, 708 (9th Cir. 1976)).

208. *Morseburg*, 621 F.2d at 980.

209. Maryland Art Preservation Act § 2.

210. *Gantz*, *supra* note 5, at 900 (citing *Armstrong v. United States*, 364 U.S. 40 (1960)).

211. *Gantz*, *supra* note 5, at 900.

V. CONCLUSION

MAPA is designed to create a receptive climate for artists working in Maryland. Such legislation is needed in those rare instances when art work and artists' reputations are threatened. In view of the potential for confusion when courts attempt to implement artists' rights through existing common law doctrines or federal statutory schemes, explicit state protection of moral rights is desirable. MAPA, with the changes recommended in this article, can achieve that goal.

APPENDIX I

SENATE OF MARYLAND

61r1961

SB 233/85 — JPR

No. 458

By: Senator Lapidés

Introduced and read first time: January 27, 1986

Assigned to: Economic and Environmental Affairs

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.

A BILL ENTITLED

AN ACT concerning

Maryland Art Preservation Act

FOR the purpose of providing for the protection of an artist or the public against the defacement, mutilation, alteration, or destruction of a work of fine art in the lawful possession of a person other than the artist; prohibiting any person, except an artist who owns and possesses a work of fine art of the artist's own creation, from intentionally committing or authorizing another to intentionally commit, as specified, any physical defacement, mutilation, alteration, or destruction of a work of fine art; prohibiting any person who frames, conserves, restores, or sells a work of fine art from committing, or authorizing another to commit, any such acts by the use of negligence; permitting the artist to seek specified judicial relief in a court action to enforce certain rights and duties; providing that the court action must be commenced within a prescribed period following the proscribed action or its discovery, whichever is longer; providing that the enforcement of prescribed rights and duties by the artist or the artist's heir, legatee, or personal representative applies only to proscribed action which takes place prior to a certain anniversary of the artist's death; providing for exceptions; providing that this Act applies only to acts of physical defacement, mutilation, alteration, or destruction occurring on or after a certain date regardless of the date of creation of the work affected thereby; providing that the provisions of this Act are severable; and generally relating to the protection of any work of fine art in the State.

BY adding to

Article 41 — Governor — Executive and Administrative Departments

Section 404A through 404H to be under the new subtitle "36A Maryland Art Preservation Act"

Annotated Code of Maryland

(1982 Replacement Volume and 1985 Supplement)

Preamble

The General Assembly hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against such alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations; now, therefore,

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article 41 — Governor — Executive and Administrative Departments

36A. MARYLAND ART PRESERVATION ACT
404A.

(A) IN THIS SUBTITLE THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.

(B) "ARTIST" MEANS AN INDIVIDUAL WHO CREATES A WORK OF ART.

(C) (1) "WORK OF FINE ART" MEANS AN ORIGINAL ART WORK OF RECOGNIZED QUALITY THAT IS:

(I) A VISUAL RENDITION INCLUDING A PAINTING, DRAWING, SCULPTURE, MOSAIC, OR PHOTOGRAPH;

(II) A WORK OF CALLIGRAPHY;

(III) A WORK OF GRAPHIC ART, INCLUDING AN ETCHING, LITHOGRAPH, OFFSET PRINT, OR SILK SCREEN;

(IV) A CRAFT WORK IN MATERIALS INCLUDING CLAY, TEXTILE, FIBER, WOOD, METAL, PLASTIC, OR GLASS; OR

(V) A WORK IN MIXED MEDIA INCLUDING A COLLAGE OR A WORK CONSISTING OF ANY COMBINATION OF WORKS INCLUDED IN THIS SUBSECTION.

(2) "WORK OF FINE ART" DOES NOT INCLUDE WORK PREPARED UNDER CONTRACT FOR COMMERCIAL USE BY ITS PURCHASER.

(D) "PERSON" MEANS AN INDIVIDUAL, PARTNERSHIP, CORPORATION, ASSOCIATION, OR OTHER GROUP, HOWEVER ORGANIZED.

(E) "FRAMER" MEANS A PERSON WHO PREPARES OR CAUSES TO BE PREPARED A WORK OF FINE ART FOR DISPLAY IN A MANNER CUSTOMARILY CONSIDERED TO BE APPROPRIATE FOR A WORK OF FINE ART IN THE PARTICULAR MEDIUM.

(F) "RESTORER" MEANS A PERSON WHO RETURNS OR CAUSES TO BE RETURNED A DETERIORATED OR DAMAGED WORK OF FINE ART, AS NEARLY AS FEASIBLE, TO ITS

ORIGINAL STATE OR CONDITION, IN ACCORDANCE WITH PREVAILING STANDARDS.

(G) "CONSERVATOR" MEANS A PERSON WHO PRESERVES OR CAUSES TO BE PRESERVED A WORK OF FINE ART BY RETARDING OR PREVENTING DETERIORATION OR DAMAGE THROUGH APPROPRIATE TREATMENT, IN ACCORDANCE WITH PREVAILING STANDARDS, IN ORDER TO MAINTAIN THE STRUCTURAL INTEGRITY TO THE FULLEST EXTENT POSSIBLE IN AN UNCHANGING STATE.

(H) "ART DEALER" MEANS A PERSON WHO REGULARLY AND IN THE ORDINARY COURSE OF BUSINESS SELLS, OR CAUSES TO BE SOLD, A WORK OF FINE ART CREATED BY AN ARTIST.

(I) "COMMERCIAL USE" MEANS FINE ART CREATED UNDER A WORK-FOR-HIRE ARRANGEMENT FOR USE IN ADVERTISING, MAGAZINES, NEWSPAPERS, OR OTHER PRINT AND ELECTRONIC MEDIA.

(J) "NEGLIGENCE" MEANS THE FAILURE TO EXERCISE REASONABLE CARE FOR THE PARTICULAR WORK OF FINE ART.

404B.

(A) EXCEPT AN ARTIST WHO OWNS AND POSSESSES A WORK OF FINE ART WHICH THE ARTIST HAS CREATED, A PERSON MAY NOT INTENTIONALLY COMMIT, OR AUTHORIZE THE INTENTIONAL COMMISSION OF, ANY PHYSICAL DEFACEMENT, MUTILATION, ALTERATION, OR DESTRUCTION OF A WORK OF FINE ART.

(B) IN ADDITION TO THE PROHIBITIONS CONTAINED IN SUBSECTION (A) OF THIS SECTION, A FRAMER, CONSERVATOR, RESTORER, OR DEALER OF A WORK OF FINE ART MAY NOT COMMIT, OR AUTHORIZE THE COMMISSION OF, ANY PHYSICAL DEFACEMENT, MUTILATION, ALTERATION, OR DESTRUCTION OF A WORK OF FINE ART BY ANY ACT CONSTITUTING NEGLIGENCE.

404C.

THE ARTIST SHALL RETAIN AT ALL TIMES THE RIGHT TO CLAIM AUTHORSHIP, AND TO RECEIVE PROPER CREDIT, OR FOR JUST AND VALID REASON, TO DISCLAIM AUTHORSHIP OF THE ARTIST'S WORK OF FINE ART.

404D.

(A) TO EFFECTUATE THE RIGHTS CREATED BY THIS SUBTITLE, THE ARTIST MAY COMMENCE AN ACTION TO RECOVER OR OBTAIN ANY OF THE FOLLOWING:

- (1) INJUNCTIVE RELIEF;
- (2) ACTUAL DAMAGES;

- (3) PUNITIVE DAMAGES;
- (4) REASONABLE ATTORNEY AND EXPERT WITNESS FEES; OR
- (5) ANY OTHER RELIEF WHICH THE COURT DEEMS PROPER.

(B) IF PUNITIVE DAMAGES ARE AWARDED UNDER SUBSECTION (A) (3) OF THIS SECTION, THE COURT MAY SELECT AN ORGANIZATION ENGAGED IN CHARITABLE OR EDUCATIONAL ACTIVITIES INVOLVING THE FINE ARTS IN MARYLAND TO RECEIVE SUCH DAMAGES.

404E.

IN DETERMINING WHETHER A WORK OF FINE ART 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.

404F.

THE RIGHTS AND DUTIES CREATED UNDER THIS SUBTITLE:

(1) WITH RESPECT TO ANY ARTIST, OR IF ANY ARTIST IS DECEASED, THE ARTIST'S HEIR, LEGATEE, OR PERSONAL REPRESENTATIVE, EXIST FOR 50 YEARS AFTER THE DEATH OF SUCH ARTIST;

(2) SHALL EXIST IN ADDITION TO ANY OTHER RIGHTS AND DUTIES WHICH MAY NOW OR IN THE FUTURE BE APPLICABLE; OR

(3) EXCEPT AS PROVIDED IN SECTION 404G(A) OF THIS SUBTITLE MAY NOT BE WAIVED EXCEPT BY AN INSTRUMENT IN WRITING EXPRESSLY SO PROVIDING WHICH IS SIGNED BY THE ARTIST.

404G.

(A) (1) UNLESS THE RIGHTS AND DUTIES CREATED UNDER THIS SUBTITLE ARE EXPRESSLY RESERVED BY AN INSTRUMENT IN WRITING SIGNED BY THE OWNER OF A BUILDING AND PROPERLY RECORDED WITH THE CLERK OF THE COURT OF THE COUNTY IN WHICH THE BUILDING IS LOCATED, SUCH RIGHTS AND DUTIES SHALL BE WAIVED. IF THE OWNER OF THE BUILDING WISHES TO REMOVE A WORK OF FINE ART WHICH IS PART OF THE BUILDING AND THE WORK OF FINE ART CANNOT BE REMOVED WITHOUT:

- (I) UNREASONABLE EXPENSE; OR
- (II) SUBSTANTIAL PHYSICAL DEFAACEMENT, MUTI-

LATION, ALTERATION, OR DESTRUCTION OF THE WORK OF FINE ART.

(2) THE INSTRUMENT IN WRITING REQUIRED UNDER PARAGRAPH (1) OF THIS SUBSECTION, IF PROPERLY RECORDED, IS BINDING ON ANY SUBSEQUENT OWNER OF THE BUILDING.

(B) (1) IF THE OWNER OF A BUILDING WISHES TO REMOVE A WORK OF FINE ART WHICH IS A PART OF THE BUILDING AND WHICH CAN BE REMOVED AT REASONABLE EXPENSE FROM THE BUILDING WITHOUT SUBSTANTIAL HARM TO THE FINE ART, AND IN THE COURSE OF OR AFTER REMOVAL, THE OWNER INTENDS TO CAUSE OR ALLOW THE FINE ART TO SUFFER PHYSICAL DEFAACEMENT, MUTILATION, ALTERATION, OR DESTRUCTION, THE RIGHTS AND DUTIES CREATED UNDER THIS SUBTITLE APPLY UNLESS:

(I) THE OWNER HAS DILIGENTLY ATTEMPTED WITHOUT SUCCESS TO NOTIFY THE ARTIST, OR IF THE ARTIST IS DECEASED, THE ARTIST'S HEIR, LEGATEE OR PERSONAL REPRESENTATIVE IN WRITING AND BY PERSONAL SERVICE OR CERTIFIED MAIL OF THE OWNER OF THE BUILDING'S INTENDED ACTION AFFECTING THE WORK OF FINE ART; OR

(II) THE OWNER PROVIDED NOTICE AND THE PERSON SO NOTIFIED FAILED WITHIN 90 DAYS AFTER THE NOTICE EITHER TO REMOVE THE WORK OR TO PAY FOR ITS REMOVAL.

(2) IF ANY WORK OF ART IS REMOVED FROM ANY BUILDING BY OR AT THE EXPENSE OF THE ARTIST OR THE ARTIST'S HEIR, LEGATEE, OR PERSONAL REPRESENTATIVE UNDER PARAGRAPH (1) OF THIS SUBSECTION, TITLE TO THAT WORK OF FINE ART PASSES TO THAT PERSON.

(C) NOTHING IN THIS SECTION AFFECTS THE RIGHTS OF AUTHORSHIP CREATED IN SECTION 404C OF THIS SUBTITLE.

404H.

AN ACTION MAY NOT BE MAINTAINED TO ENFORCE ANY LIABILITY UNDER THIS SUBTITLE UNLESS BROUGHT WITHIN 3 YEARS OF THE ACT COMPLAINED OF OR 1 YEAR AFTER DISCOVERY OF THE ACT, WHICHEVER IS LONGER.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall apply to any claim based on proscribed acts occurring on or after July 1, 1986 to any work of fine art whenever created.

SECTION 3. AND BE IT FURTHER ENACTED, That if any provision of this Act or the application thereof to any person or circum-

stance is held invalid for any reason, the invalidity shall not affect the other provisions or any other application of this Act which can be given effect without the invalid provisions or application, and to this end all the provisions of this Act are declared to be severable.

SECTION 4. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1986.

APPENDIX II

179920.468

S.L.C.

99th Congress

2d Session

S. _____

IN THE SENATE OF THE UNITED STATES

Mr. Kennedy introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend the copyright law to secure the rights of artists of pictorial, graphic, or sculptural works to prevent the distortion, mutilation, or other alteration of such works, to provide for resale royalties, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Visual Artists Rights Amendment of 1986".

Sec. 2. Section 101 of title 17, United States Code, is amended by—

(1) inserting between the paragraph defining "created" and the paragraph defining "derivative work" the following:

"A 'critical embodiment' as applied to a work of fine art within the category of pictorial, graphic, and sculptural works is one or more of (1) the only copy, e.g., a painting or a sculpture; (2) one of a specifically limited class of copies, e.g., one of a limited edition of fine prints; or (3) a master from which copies can be made, e.g., a mold or photographic negative.";

(2) inserting between the paragraph defining "pictorial works" and the paragraph defining "pseudonymous work", the following:

"'Price' as used herein, is the aggregate of all installments paid in cash or in-kind for a work.";

(3) inserting between the paragraph defining "publicly" and the paragraph defining "sound recordings", the following:

"'Sale' and 'resale' as used herein, shall include transactions essentially equivalent to a sale including long-term lease, lease-purchase arrangements, and the like."; and

(4) inserting between the paragraph defining "widow" and "widower" and the paragraph defining "work of the United States Government", the following:

"A 'work of fine art' is a work of recognized fine art stature. In determining whether a work of fine art is of recognized quality, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, restorers and conservators of fine art, and other persons involved with the creation, appre-

ciation, history, or marketing of fine art. Evidence of commercial exploitation of a work as a whole or of particular copies, standing alone, does not preclude a finding that the work is a work of fine art.”.

Sec.3. Section 106 of title 17, United States Code, is amended by adding “(a)” before “Subject” at the beginning of the section and adding at the end thereof the following:

“(b)(1) Independently of the artist’s economic right in copyright in a pictorial, graphic, or sculptural work of fine art, the artist shall have the right during his life to claim authorship of his works which are publicly displayed or to disclaim authorship of such works because of any distortion, mutilation, or other alteration thereof. This right shall not apply to works made pursuant to contract for trade or advertising use.

“(2) Upon the death of an artist, his estate shall have the exclusive right, up to 50 years after his death, to exercise the rights granted to the artist in paragraph (1) of this subsection.

“(c) Subject to the limitation in section 113(d), the destruction or significant or substantial distortion, mutilation, or other alteration to the critical embodiment or totality of a pictorial, graphic, or sculptural work caused by an intentional act or by gross negligence is a violation of the exclusive rights of the copyright owner where the creator of the work is the copyright owner. Where the artist is not the copyright owner, he shall nonetheless have the exclusive right during his lifetime, and his estate shall have the exclusive right for up to 50 years after his death, to assert infringement of the copyright by distortion, mutilation, or other alteration.

“(d)(1) Whenever a pictorial, graphic, or sculptural work is sold, the seller shall pay to the artist or to the artist’s agent, a royalty. Where the artist is deceased at the time of the sale, and the sale occurs within fifty years after the death of the artist, such royalty shall be paid to the National Endowment for the Arts for use in the visual arts program. Such royalties shall be in addition to and not a substitute for, appropriated funds for the Visual Arts Fellowship program. Such royalty shall be equal to 7 percent of the difference between the seller’s purchase price and the sale price or the fair market value of any property received in exchange for the work. The right of the artist to receive this royalty may not be waived. An artist may assign the right to collect this royalty payment, provided however, such assignment shall not have the effect of creating a waiver prohibited by this subsection. Failure of a seller to pay the artist a royalty due under this section shall constitute an infringement of the copyright.

“(2) Paragraph (1) shall not apply to the following:

“(A) The resale of a work for a gross sales price of less than \$500, or in exchange for property with a fair market value of less than \$500.

“(B) The resale of a work for a gross sale price of less than 140 percent of the purchase price paid by the seller.

“(e) Any artist seeking royalty payments for the sale of his work

must register with the Copyright Office. The Register of Copyrights is directed to establish such registration procedures by regulation.

“(f) All sales or other transfers of pictorial, graphic, or sculptural works by registered artists must be registered by the seller or transferor with the Copyright Office. The Register of Copyrights is directed to establish such registration procedures by regulation. For transfers involving sales or exchanges, such registration shall include the title of the work, name and address of the buyer and seller, the date of sale, the seller’s purchase price, and the sale price or fair market value of any property received in exchange for the work.

“(g) Failure of a transferor or a seller of a pictorial, graphic, or sculptural work by a registered artist to register such transfer or sale with the Copyright Office shall constitute an infringement of copyright.”.

Sec. 4. Section 113 of title 17, United States Code, is amended by adding at the end thereof the following:

“(d)(1) If a pictorial, graphic, or sculptural work of recognized quality cannot be removed from a building without distortion, mutilation, or other alteration of such work, the artist’s rights under subsections (b) and (c) of section 106, unless expressly reserved by an instrument in writing signed by the owner of such building and properly recorded, in the applicable State real property registry for such building, prior to the installation of such work, shall be deemed waived. Such instrument, if recorded, shall be binding on subsequent owners of such building.

“(2) If the owner of a building wishes to remove a pictorial, graphic, or sculptural work of recognized quality which is a part of such building but which can be removed from the building without substantial harm to such work, the artist’s rights under subsections (b) and (c) of section 106 shall apply unless the owner has diligently attempted without success to notify the artist, or, if the artist is deceased, his heir, legatee, or personal representative, in writing of his intended action affecting the work of fine art, or unless he did provide notice and that person failed within ninety days either to remove the work or to pay for its removal. If such work is removed at the expense of the artist, his heir, legatee, or personal representative, title to such work shall be deemed to be in such person.”.

Sec. 5. Section 401 of title 17, United States Code, is amended by adding at the end thereof the following:

“(d) The provisions of this section shall not apply to pictorial, graphic, or sculptural works of fine art.”.

Sec. 6. The criminal penalties provided by section 506 of title 17, United States Code, shall not apply to infringement of the rights created in section 106 (b), (c), and (d) of such title.

Sec. 7. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.