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II. OF MORAL RIGHTS AND RESALE ROYALTIES: THE KENNEDY BILL

MARSHALL A. LEAFFER***

A. *The Dilemma of the Fine Artist: The Inadequacies of the Current American Copyright Law*

Art is a unique form of intellectual property requiring special protection. However, many say that American law discriminates against artists and our artistic heritage, and have called for amendments to the Copyright Act of 1976 ("Copyright Act").⁵² The current legislative attempt to undo this perceived insensitivity is the Visual Artists Rights Act ("Kennedy Bill"), introduced by Senator Edward M. Kennedy (D-Mass.), in varying forms, since 1986.⁵³

As its name suggests, the objective of the Kennedy Bill is to provide increased protection to the rights of visual artists. The purpose of this portion of the symposium is to examine the status of the artist under the inadequacies of the current American copyright law, and to examine the scope and content of the Kennedy Bill. It will also explore the now defunct resale royalty provision of the pre-1988 Kennedy Bills. This provision, although omitted from the current Kennedy Bill, continues to be a goal of the creative artistic community, and thus merits discussion. In the final analysis, federal legislation is the preferable solution to the current concerns of artists, and with certain modifications the Kennedy Bill is a solid legislative initiative that deserves widespread public support.

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⁵² 17 U.S.C. § 401 (1982 & Supp. V 1987).

⁵³ The Kennedy Bill was first introduced as the "Visual Artists Rights Amendments of 1986." S. 2796, 99th Cong., 2d Sess., 132 CONG. REC. S12,185 (daily ed. Sept. 9, 1986). The Kennedy Bill has gone through several significant changes. Most notably, in its present 1988 version, *supra* note 34, it no longer contains its most controversial aspect: the provisions concerning a resale royalty for certain works of art. See Visual Artists Rights Act, *supra* note 2.

Additionally, earlier versions of the Bill contained a provision deleting the notice requirement for works of art. This aspect of the Bill is moot in view of the United States' recent adherence to the Berne Convention and the abrogation of the notice requirement for all works of authorship. See Berne Convention, *supra* note 38. What is essentially left in the 1988 version of the Bill are the moral rights provisions. Senator Kennedy plans to reintroduce this 1988 version in virtually the same form to the 101st Congress. Companion legislation has been introduced into the House by Representative Markey. See H.R. 3221, 100th Cong., 1st Sess., 133 CONG. REC. H7352 (daily ed. Aug. 7, 1987) [hereinafter Markey Bill].

The key provisions of the Kennedy Bill establish a "moral right of integrity" for certain visual artists and, in its earlier versions, a resale royalty. As used in the Kennedy Bill, the term "visual artist" is a misnomer because not all visual artists benefit from this legislation.⁵⁴ The more appropriate term would have been "fine artist." The fine artist occupies a disfavored position in the world of copyright.⁵⁵ Unlike other authors who benefit from selling multiples of their works, notably an author or musician, the fine artist is often limited to a single sale of a one-of-a-kind work. In significant ways, the fine artist loses total control over his work. Section 109(a) of the Copyright Act,⁵⁶ known as the "first sale doctrine," permits the owner of an artistic work to dispose of it physically, so long as the owner of that work does not reproduce it, adapt it or commit any other acts contrary to the exclusive rights granted under section 106.⁵⁷ Thus, once a painting or sculpture is sold, nothing in the Copyright Act would prohibit its buyer from defacing it, destroying it, or cutting it up into little pieces and selling it in fragmented form. When any of these acts occur, both the artist and our cultural heritage are harmed.

The need for our legal system to sanction rights of integrity is illustrated by the inequitable result reached in the seminal case of *Crimi v. Rutgers Presbyterian Church*.⁵⁸ Crimi had painted a large

⁵⁴ See *infra* notes 64-66 and accompanying text discussing the many visual art forms excluded from the Kennedy Bill.

⁵⁵ See Goetzl & Sutton, *Copyright and the Visual Artist's Display Right: A New Doctrinal Analysis*, 9 COLUM. J.L. & Arts 15, 16 (1984).

⁵⁶ 17 U.S.C. § 109(a) (1982 & Supp. V 1987) provides:

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

Id.

⁵⁷ Subject to sections 107 through 118, the owner of copyright under . . . [section 106] has the exclusive rights to do and to authorize any of the following:

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

17 U.S.C. § 106 (1982 & Supp. V 1987).

⁵⁸ 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949).

fresco on the wall of Rutgers Presbyterian Church depicting Christ in a graphically physical manner. Crimi's portrayal of Christ offended some of the parishioners, who eventually had the fresco painted over in 1946. Outraged by the destruction of his work, Crimi sued the church, but without success. He based his suit on the doctrine of *droit moral*,⁵⁹ or the moral right of the artist to maintain the integrity of his work.⁶⁰ Crimi sought an action to compel the Church to remove the painting, or to permit him to remove the fresco for his own use and to pay damages. The court refused Crimi's request, unable to find redress under American law for the injury that the artist suffered.⁶¹ According to the court, any control the artist may have over his work's physical destruction was defined under the existing contract law.⁶² However, few if any artists consider negotiating such matters in a contract prior to the sale of a painting or sculpture.⁶³

The first sale doctrine discriminates against fine artists in another significant way—it deprives them of their ability to control the secondary market for their work.⁶⁴ After an artist sells a painting for a modest sum, art speculators are able to resell the same painting for a significantly higher sum. The inequity is that the fine artist can only benefit from the first sale of his work.⁶⁵ One of the fundamental questions engendered by the dispute

⁵⁹ *Id.* at 573, 89 N.Y.S.2d at 816.

⁶⁰ See *supra* notes 37-43 and accompanying text.

⁶¹ *Crimi*, 194 Misc. at 576, 89 N.Y.S.2d at 819.

⁶² *Id.* To retain the right to prevent obliteration by express contract, Crimi would have had to do so in writing, in conformance with § 242 of the New York Real Property Law.

⁶³ A Calder mobile donated to the Pittsburgh airport provides another example of the powerlessness of the artist facing the destruction or mutilation of his work of art. Alexander Calder, the artist who created the mobile, lost all right to control the display of his work once title was conveyed. See Rose, *Calder's Pittsburgh: A Violated and Immobile Mobile*, ARTNEWS, Jan. 1978, at 39.

⁶⁴ [T]he copyright owner's exclusive right of public distribution would have no effect upon anyone who owns "a particular copy or phonorecord lawfully made under this title" and who wishes to transfer it to someone else or to destroy it. . .

[F]or example, the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition.

H.R. REP. NO. 1476, 94th Cong., 1st Sess., reprinted in 17 U.S.C. § 109, at 35 (1982)(historical revisions and notes).

⁶⁵ Contractual arrangements for a royalty upon a subsequent resale of a work have largely been unsuccessful due to either the artist's lack of awareness of the possibility of a contractual arrangement or the artist's inferior bargaining position. The best known attempt at a contractual solution is known as the Projansky contract, under which the artist retains a 15% royalty on the enhanced value of his work. Under this contract, "the buyer agrees that he will not alienate the work without procuring the transferee's agreement to be bound by the terms of the original contract." Solomon & Gill, *Federal and State Resale Royalty: "What Hath Art Wrought"*, 26 UCLA L. REV. 322, 327 (1978).

over resale royalties is whether the artist should have the right to share in the profits derived from the subsequent sale of his works. An often cited example of this inequity was the sale of a Robert Rauschenberg painting for \$85,000 which the seller, Robert C. Scull, had bought for \$1,000 several years earlier.⁶⁶ Rauschenberg, of course, would have liked to have shared in the enormous profit and believed he had a *right* to share the profit.⁶⁷

Fine artists have long felt short-changed by copyright law. By comparison, the composer of a popular song has a statutory entitlement to a fee for every performance of the song played on the radio, television, and other public settings.⁶⁸ Nothing given to the fine artist in the Copyright Act approximates the lucrative performance right of the musical copyright owner. In comparison, the analog of the public performance right — the display right — is ineffective in compensating the fine artist.

Under section 106(5) of the Copyright Act,⁶⁹ an author of a pictorial, graphic or sculptural work is given the exclusive right to display his work publicly. At first blush, the display right would appear to confer similar benefits on the fine artist that the performance right does for the musical copyright owner. In reality, however, the explicit limitations on the display right render it a much less powerful "exclusive" right than that of the public performance right. First, section 106(5) limits the display right to *public* displays.⁷⁰ Second, and more important, the limitation on the display right found in section 109(c) gives the owner of a *copy* of the work the right to display it publicly.⁷¹ Thus, absent an

⁶⁶ *Artists Decide They Should Share Profits on Resale of Paintings*, Wall St. J., Feb. 11, 1974, at 1, col. 4. Due to the inequity resulting from the sale of the Rauschenberg painting, Mr. Rauschenberg and others, such as Rubin Gorewitz, a New York accountant and financial advisor, have lobbied in Washington "for a federal law that would make royalties mandatory for all sales over a certain amount, probably \$1,000." *Id.* Under the proposed plan, "the artist would validate the authenticity of a work, as well as collect a royalty, each time it changed hands." *Id.*

⁶⁷ There are other examples of even greater discrepancies between the original and resale price. For example, the artist James Rosenquist is said to have originally sold a work for \$500 which was subsequently resold for \$274,000. See *The Great Debate Over Artist's Rights*, Washington Post, May 22, 1988, at F4, col. 2.

⁶⁸ Composers receive performance fees for the use of the copyrighted composition of the sound recording. See 17 U.S.C. § 102(a) (1982 & Supp. V 1987). Composers are represented by collection agencies such as the American Association of Composers and Performers ("ASCAP") and Broadcast Music, Inc. ("BMI"), which monitor performances, and, based on statistical extrapolations, collect and distribute payments from the users.

⁶⁹ 17 U.S.C. § 106(5) (1982 & Supp. V 1987). See *supra* note 57 for text of the section.

⁷⁰ *Id.*

⁷¹ 17 U.S.C. § 109(b) (1982 & Supp. V 1987):

... the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copy-

agreement to the contrary, the owner of a copy of a painting, drawing, or sculpture can display the work publicly, and charge an admission to see it without ever having to reimburse the author.

The Kennedy Bill does not purport to change the Copyright Act generally, but to aid the fine artist specifically. It would incorporate two aspects of copyright law relatively foreign to American law: what is known as the moral right and, from the 1987 version of the Bill, the resale royalty right.

The moral right and the resale royalty are interrelated concepts.⁷² First, both have been recognized for some time in civil law jurisdictions⁷³ and both are at odds with the basic thrust of American copyright law. Second, the goal of each is to protect the fine artist and encourage artistic creation. This is accomplished by allowing the artist to have a degree of artistic and economic control over a work beyond its initial sale.

The moral right and the resale royalty differ, however, in the interests they protect. The moral right is a personal right protecting an artist's expression as an extension of the artist's personality.⁷⁴ By comparison, the resale royalty right is basically an economic right — allowing an artist to recover a percentage of the resale price of his work.⁷⁵ Although both concepts are foreign to federal copyright law as yet, they have been accepted in varying degrees in state law. The moral right has been adopted by nine states⁷⁶ and the resale royalty right by one state, California.⁷⁷

right owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

Id.

⁷² See, e.g., Plaisant, *Droit de Suite and Droit Moral under the Berne Convention*, 11 COLUM. J.L. & ARTS 157, 157 (1986) [hereinafter Plaisant]. "[They] both appear to be the lost children of the *Droit D'Auteur*."

⁷³ The *droit de suite* is part of the law of, for example, the Federal Republic of Germany, Belgium, France, Italy, Luxembourg, and many eastern European and developing countries. See *id.* at 159. The *droit moral* is also part of German and French law, and is law in many eastern European and South American countries. *Id.* at 162-63.

⁷⁴ See Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 578 (1940). Moral rights "may be defined as the right of the creator to create, to present his creation to the public in any desired form or to withhold it, and to demand from everyone respect for his personality as creator and for his works." *Id.* (citing MICHAELIDES-NOUARIOS, *LE DROIT MORAL DE L'AUTEUR* 68 (1935)).

⁷⁵ See, e.g., Plaisant, *supra* note 72, at 159. The resale royalty right provides "a form of maintenance . . . [since] [i]t is unjust that a work, say a painting or sculpture by a young author, should be sold by him for a minimal sum, . . . [and] resold for a larger amount of money without the author or his heirs . . . benefiting from that resale." *Id.*

⁷⁶ See *supra* note 16.

⁷⁷ CAL. CIV. CODE § 986 (West 1982 & Supp. 1989).

The basic thrust of the Kennedy Bill is not new. Since the late 1970s, legislation has been introduced proposing moral right protection and resale royalties for artists.⁷⁸ What has changed is a heightened interest in copyright and intellectual property in general and a less ethnocentric view of our place in the world community. Congress has recently shown a more receptive attitude toward reassessing our traditional notions of copyright law, as evidenced by America's recent adherence to the Berne Convention.⁷⁹ Thus, the 1988 Kennedy Bill has a more favorable chance of being enacted than before; this is particularly true since its most recent version has deleted the highly controversial resale royalty rights provisions.⁸⁰

B. *The Moral Right: An Overview*

The moral rights provisions in the Kennedy Bill are clearly its most important aspect. The concept of "moral rights," derived from the term *droit moral* in French law,⁸¹ regards an author's work as an extension of his personality, something that remains a part of his life, even after he has physically parted with the work.⁸²

Although its origins can be traced back to the French

⁷⁸ See, e.g., bills introduced by Rep. Robert Drinan, H.R. 8261, 95th Cong., 1st Sess. (1977) and by Rep. Barney Frank, H.R. 2908, 97th Cong., 1st Sess. (1981) and H.R. 1521, 98th Cong., 1st Sess. (1983).

⁷⁹ Berne Implementation Act, *supra* note 37.

⁸⁰ The original Kennedy Bill provided for an artist's royalty of seven percent of the difference between the seller's purchase price and the amount the seller received on the resale. Visual Artists Rights Act, *supra* note 2, § 3. The 1988 version makes no reference to royalties whatsoever. Kennedy Bill, *supra* note 34.

⁸¹ French law officially recognized *droit moral* in their 1957 copyright law. See Loi de 11 Mars 1957, *supra* note 10. In addition to France, sixty other countries recognize some version of the moral right. See Comment, *The Monty Python Litigation—Of Moral Rights and the Lanham Act*, 125 U. PA. L. REV. 611, 615 (1977) (citing Comment, *Copyright, Moral Right—A Proposal*, 43 FORDHAM L. REV. 793, 797 n.47 (1975)); see also Kwall, *Copyright and the Moral Right: Is An American Marriage Possible?*, 38 VAND. L. REV. 1, 97 (1985).

⁸² By comparison, under American law, we treat the output of an artist much like any other commodity, conferring what are known as economic or pecuniary rights. These are principally embodied in the exclusive rights provisions of Section 106 of the Copyright Act, encompassing the rights of reproduction, adaptation, distribution, public performance, and public display. 17 U.S.C. § 106 (1982). See *supra* note 57.

The exclusive rights are not absolute, however, since they are subject to "the first sale doctrine." See *supra* notes 54-57 and accompanying text. The first sale doctrine allows the author to benefit only from the first sale of a copy of a work. But once the author has sold that copy, its new owner has the right to dispose of it as he wishes absent a contractual agreement to the contrary. See, 17 U.S.C. § 109(a) (1982). See *supra* note 56. H.R. REP. NO. 1476, 94th Cong., 1st Sess., reprinted in, 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5693 explains that the effect of § 109(a), for example, would be that the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. "A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose [subject to a conditional contract between buyer and seller]."

Revolution, the moral right does not exist in one definitive version.⁸³

Article 6*bis* of the Berne Convention, Paris text, provides in part:

(1) Independently of the author's economic rights, and even after the 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 . . . which would be prejudicial to his honor or reputation.⁸⁴

In sum, Berne permits an artist—independent of economic rights—the right to claim authorship of the work (the paternity right)⁸⁵ and the right to preserve this work from any distortion or mutilation of the work (the integrity right). These rights exist independently of a transfer of the copyright. There are other components of the moral right which are sometimes included under this umbrella term. The right of first publication—otherwise known as the right of divulgation—gives an artist the absolute right to determine if and when a work is complete and ready to be shown to the public,⁸⁶ and has long been recognized under American law.⁸⁷ Another component

Id.

As *Crimi* indicates, current American copyright law prohibits the new owner of the fresco from intentionally obliterating it. See *supra* notes 59-62 and accompanying text. The Kennedy Bill, however, would recognize, for the first time, the moral right of the artist on the federal level, and in doing so, would preempt state statutes. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 376-77 (1978).

[S]tates are [often] deemed powerless to act because of a vacuum deliberately, even if not expressly, created by federal legislation. In such cases, any state or local action, however consistent in detail with relevant federal statutes, is held invalid—not because of a “dormant” federal power thought to be constitutionally exclusive but rather because the federal legislative scheme announces, or is best understood as implying, a congressional purpose to “occupy the field!”

Id.

Tribe notes, however, that the “question whether federal law ‘preempts’ state action, [is] largely one of statutory construction, [and] cannot be reduced to general formulas.” *Id.* at 377.

⁸³ See, e.g., Plaisant, *supra* note 72.

⁸⁴ Berne Convention For The Protection of Literary and Artistic Works, Paris Act, July 24, 1971, art. 6*bis* (1) 828 U.N.T.S. 221, reprinted in 4 M. NIMMER, NIMMER ON COPYRIGHT at §§ 27-1 to -14 [hereinafter Berne Convention, Paris Act]. Moral rights have been a part of the Berne Convention since the Rome revision of 1928. In addition to the United States, some seventy-six countries are members of the Berne Convention. See *Hearings before the Subcomm. on Patents, Copyrights, and Trademarks of the Comm. on the Judiciary On U.S. Adherence to the Berne Convention*, 99th Cong., 1st & 2d Sess. 11 (1985) (statement of Arpad Bogsch).

⁸⁵ This often includes the converse right to renounce credit where the artist feels that the integrity of the work has in some way been damaged.

⁸⁶ The right of first publication is generally recognized in the distribution right granted under section 106(3). 17 U.S.C. § 106 (1982 & Supp. 1987). See *supra* note 57.

⁸⁷ Justice Brandeis argued that “[t]he principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against

of the moral right is the right of withdrawal which would allow the author to withdraw a work after the payment of just compensation. This right has seen little practical application even in a country like France, which recognizes it.⁸⁸

Congress avoided the question of including a moral rights provision in the Berne Convention Implementation Act of 1988.⁸⁹ The Berne enabling legislation was instead based on a "minimalist" approach to adherence — that is, to change the Copyright Act only where necessary.⁹⁰ Under this approach, moral rights of the author, as required by 6bis of Berne, were deemed to be adequately protected when the entirety of United States law was taken into account.⁹¹ Advocates of the minimalist approach asserted that unfair competition,⁹² defamation law,⁹³ and the adaptation right⁹⁴ under copyright law constructed a web of protection equivalent to the paternity and integrity rights. For example, the display of an altered work of art could contravene, depending on the circumstances, one or more bodies of law. It might, for instance, constitute a false designation of origin under Section 43(a) of the Lanham Act⁹⁵ or defamation of the artist's professional reputation.

The assertion that the entirety of American law taken as a whole provides *de facto* protection of the author's moral right is inaccurate

publication in any form, is in reality not the principle of private property, but that of an inviolate personality." Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

⁸⁸ See Loi De 11 Mars 1957, *supra* note 10. See also DaSilva, *Droit Moral And The Amoral Copyright: A Comparison of Artists' Rights in France And The United States*, 28 BULL. COPYRIGHT L. SOC'Y 1 (1981). *Droit de retrait* is the right of the author to withdraw a work which already has been made public. Although this right was discussed by French jurists prior to 1957, it was not actually applied until this time. Even after 1957, however, few French cases have dealt with this right, and those actually supporting this right continue to differ on the nature and scope of its application. *Id.* at 23-24.

⁸⁹ See Berne Implementation Act, *supra* note 37. See also *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, reprinted in 10 COLUM. J.L. & ARTS 513 (1986) [hereinafter *Final Report*].

⁹⁰ Berne Implementation Act, *supra* note 37. See also *Final Report*, *supra* note 89.

⁹¹ Berne Convention, Paris Act *supra* note 89, art. 6bis; see also Geller, *Comments on Possible U.S. Compliance with Article 6 bis of the Berne Convention*, 10 COLUM. J.L. & ARTS 665 (1986).

⁹² See *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981). An action was brought against a film distributor for removing the author's name from the film credits and substituting that of another. This amounted to "express passing off" and constituted a valid claim under § 43(a) of the Lanham Trademark Act, which forbids the use of false designations of origin and false descriptions concerning the advertising or sale of goods and services. *Id.*

⁹³ *Clevenger v. Baker Voorhis & Co.*, 8 N.Y.2d 187, 203 N.Y.S.2d 812, 168 N.E.2d 643 (1960). The court held that because a jury could reasonably conclude that defendant's revision of plaintiff's book, in which defendant made numerous errors, misled the public into believing the work had been done by plaintiff, a defamation action was maintainable.

⁹⁴ 17 U.S.C. § 106(2) (1982 & Supp. V 1987); For text, see *supra* note 57.

⁹⁵ 15 U.S.C. § 1125(a) (1982 & Supp. V 1987).

at best. Protection under the Lanham Act or defamation law falls short of a direct recognition of the artist's moral right.⁹⁶ First, it is not clear whether an unfair competition action could be brought if a defendant had properly disclosed prior to public showing that the alteration had taken place.⁹⁷ Second, because these causes of action are based on reputational harm or unfair competition, they fail to protect the artist from the total destruction of a work of art.⁹⁸ The Kennedy Bill, however, vindicates the moral right of the artist by prohibiting the display of an intentionally altered work of art. It stops short, however, of an absolute recognition of an artist's integrity right.

C. Moral Right Provisions of the Kennedy Bill

In its latest version, the Kennedy Bill creates a moral right for *certain* visual artists. The Kennedy Bill would add a new section 106(a) to the Copyright Act, giving those artists exclusive *unwaivable* and *unassignable* rights of paternity and integrity during their lifetimes.⁹⁹ This provision, however, both falls short of the

⁹⁶ See generally Damich, *Moral Rights in the United States and Article 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM. J.L. & ARTS 655 (1986).

[T]he Second Circuit recognized . . . that an artist has a right based on section 43(a) of the Lanham Act "to have his works attributed to him in the form in which he created it." However, this leaves open the question whether a work could be modified as long as it was not attributed, or . . . as long as a disclaimer was added. . . . [A]ny fraud-based cause of action such as section 43 (a) arguably requires some kind of attribution. Given the absence of a real right of attribution in the U.S., the potentiality of the Lanham Act to protect the right of integrity is significantly weakened.

. . . .
 . . . [T]he law of defamation is inherently inadequate to protect works to the extent required by the plain meaning of Article 6bis. . . . [S]ince libel requires injury to reputation, it implies that the work must be attributed, and . . . there is the question whether it is an appropriate cause of action in the case of complete destruction of the work.

Id. at 660-61 (citations omitted).

⁹⁷ This disclosure may imply the existence of contractual negotiations and terms between the author and the defendant which would protect the defendant against any false attribution claims. See 15 U.S.C. § 1125(a)(1982 & Supp. V 1987) which reads in part:

Any person who shall affix, apply, or annex, or use in connection with any goods or services . . . any false description or representation . . . shall be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or representation.

See also Verbit, *Moral Rights and Section 43(a) of the Lanham Act: Oasis or Illusion?*, 9 HAS-TINGS COMM/ENT. L.J. 383, 405-14 (1987).

⁹⁸ For a discussion of the limitations of American law in protecting the moral right through unfair competition law and related doctrines, see Horowitz, *Artists' Rights in the United States: Toward Federal Legislation*, 25 HARV. J. ON LEGIS. 153, 173-84 (1988).

⁹⁹ Sec. 3 of the Kennedy Bill reads in relevant part:

Berne Convention—by confining protection to visual artists¹⁰⁰—and exceeding it—by specifying that these rights are unassignable and unwaivable.

As indicated, the Kennedy Bill contains an expanded right of paternity and a somewhat less protective right of integrity. A paternity right under the Bill would permit an artist to claim or disclaim authorship of publicly displayed works and to bring infringement actions when such works are mutilated or altered by acts of intentional or gross negligence.¹⁰¹ The author would possess the exclusive right to bring an action for infringement during his lifetime for violation of the paternity right. For example, the copyright owner who is not the author of the work cannot claim the paternity right.¹⁰² Therefore, the Bill precludes an action to remedy alterations of the work unless the work was publicly displayed in that condition. Under the Bill, the integrity right is more limited. It would make the destruction of a work of recognized stature by an act of intentional or gross negligence an

(a) Independent of the copyright owner's exclusive right . . . , the author of a work of visual art . . . shall have the right during his life to claim . . . or to disclaim authorship of . . . his works of visual art

(b)(1)(A) . . . Where the author is not the copyright owner, he alone shall still have the exclusive right during his lifetime to assert infringement of the copyright

(c) The author's rights provided in subsections (a) and (b) *may not be waived or assigned*.

Kennedy Bill, *supra* note 34, § 3 (emphasis added).

¹⁰⁰ A comparison of S.1619 with the provision of the Berne Convention reveals that the bill's moral rights provisions are both broader and narrower. For example, under Article 6*bis* of the Convention, all categories of works are protected. The Kennedy bill would protect only pictorial, graphic, and sculptural works. . . . Taken literally, the bill would permit the creators of publicly displayed works of fine art to disclaim authorship where any alteration of the work was made. Berne allows the author to object to changes only when they prejudice the artist's honor or reputation.

Hearings on S. 1619, supra note 6, at 22 (statement of Ralph Oman, Register of Copyrights) [hereinafter Statement of Ralph Oman].

¹⁰¹ *Id.*

(B)(2). . . [T]he destruction, by an intentional act or gross negligence, of a work of recognized stature is a violation of the exclusive rights of the author of the work. Where the author is not the copyright owner he shall still have the exclusive right during his lifetime to assert infringement of the copyright

Kennedy Bill, *supra* note 34, § 3(b)(2).

¹⁰² (b)(1)(A) [T]he substantial mutilation or alteration of a work of visual art, which is publicly displayed caused by an intentional act or gross negligence is a violation of the exclusive rights of the copyright owner where the author of the work is the copyright owner. Where the author of the work is not the copyright owner, he alone shall still have the exclusive right during his lifetime to assert infringement of the copyright

Id. at § 3.

infringement of copyright.¹⁰³ This limited integrity right follows the model of the New York Authorship Act¹⁰⁴ rather than the California Art Preservation Act.¹⁰⁵

As manifested in several key provisions, the Kennedy Bill essentially protects works of fine art, paintings, graphic arts, and sculpture. The Bill applies only to works existing in a single or in a limited number of copies, including limited edition prints or multiple cast sculptures of 200 or less.¹⁰⁶ It also excludes a whole range of works such as photographs, posters, maps, globes, technical drawings, and motion pictures.¹⁰⁷ The Bill does not directly address the colorization of black and white films¹⁰⁸ and excludes works made for hire.¹⁰⁹

When a work cannot be removed from a building without mutilation or defacement, the artist's moral rights are waived, absent a contract between the owner of the building and the author that indicates otherwise. This contract must be recorded in the applicable state real property registry.¹¹⁰ The origin of this provision can be traced to a powerful real estate lobby which has always feared moral rights legislation and has focused its attention on this class of works.¹¹¹ The fact that most state moral right statutes have public building limitations can be attributed to the efforts of this lobby.¹¹²

The Bill contains several provisions directed specifically to museums and others who display and conserve art. One provi-

¹⁰³ *Id.*

¹⁰⁴ See N.Y. ARTS & CULT. AFF. LAW §§ 14.53 - .59 (McKinney's 1987). The New York act is even more limited by not recognizing an actionable wrong outside the display context.

¹⁰⁵ See California Art Preservation Act, CAL. CIV. CODE § 987 (West 1982 & Supp. 1989) which states, in relevant part: "(a) *Legislative findings and declaration.* The . . . physical alteration or destruction of fine art . . . is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works . . . against such alteration or destruction"

The reason for the difference in the approach of the California and New York statutes has been explained by interest group influence on the legislation. In New York, the power of the major museums and art dealers was apparently much stronger than in California. The New York groups feared liability for improper conservation of a work of art. See Levy, *Artists' Moral Rights*, 11 L.A. LAW., Mar. 1988, at 11.

¹⁰⁶ Kennedy Bill, *supra* note 34.

¹⁰⁷ *Id.*

¹⁰⁸ The Film Integrity Act of 1987, H.R. 2400, 100th Cong., 1st Sess. (1987), allows authors the exclusive right to authorize colorization.

¹⁰⁹ Kennedy Bill, *supra* note 34, § 11 reads: "Nothing in this Act, or the amendments made by this Act, shall be construed to apply . . . [to] a work made for hire as defined in section 101 of title 17, United States Code".

¹¹⁰ *Id.* at § 4. See CAL. CIV. CODE § 987(h)(1) (West 1982 & Supp. 1989).

¹¹¹ See *infra* note 162 and accompanying text.

¹¹² This provision is similar to that of the California Art Preservation Act. See CAL. CIV. CODE, § 987(h)(1) (West 1982 & Supp. 1989).

sion allows a work to be displayed in an altered state, when the alteration has occurred from acts beyond the possessor's control.¹¹³ When a museum conservator actively alters a publicly displayed work, however, the Bill requires this alteration to be accomplished non-negligently.¹¹⁴ This provision appears to place enhanced responsibility on conservators of works of art in the exercise of their profession.

The Bill protects only those works that have attained "recognized stature".¹¹⁵ This provision of the bill, borrowed from the California Art Preservation Act,¹¹⁶ is a radical departure from American Copyright law. Ever since *Bleistein v. Donaldson Lithographing Co.*,¹¹⁷ courts may not consider artistic quality in deciding whether to protect a work. The purpose of this departure is to preclude nuisance suits brought, for example, by irate parents whose six-year-old's work is thrown away by her teacher.¹¹⁸ The occasional nuisance suit, however, hardly justifies a provision which may discriminate against avant-garde or experimental art forms which may not achieve "recognized stature" in traditional art circles.

¹¹³ "The alteration or mutilation of a work of visual art which is a result of the passage of time or the inherent nature of the materials" is actionable only if the "alteration or mutilation" occurs through gross negligence in maintaining or protecting the work. Kennedy Bill, *supra* note 34, § 3(B).

¹¹⁴ *Id.* (alteration which occurs from competent and appropriate observation is not a violation).

¹¹⁵ *Id.* The concept of "recognized stature" is a question of fact which may be based on opinions of artists, art dealers, museum personnel, and other specialists. *Id.* A "work of recognized stature" is defined as:

a work of visual art determined to be of recognized stature. In determining whether a work is of recognized stature, 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, conservators of recognized stature, and other persons involved with the creation, appreciation, history, or marketing of works of recognized stature. Evidence of commercial exploitation of a work as a whole or of particular copies, does not preclude a finding that the work is a work of recognized stature.

Id. § 2.

¹¹⁶ As defined in the California Civil Code, "fine art" is "an original painting, sculpture, or drawing, or an original work of art in glass, of *recognized quality*, and of substantial public interest." CAL. CIV. CODE § 989(b)(1) (West 1982 & Supp. 1989) (emphasis added).

¹¹⁷ 188 U.S. 239 (1903). In *Bleistein*, a plaintiff lithographing company designed picture posters for a circus to use as advertisements. Plaintiff lithographing company brought suit against defendant lithographing company for infringement of copyright, claiming defendants reproduced three lithographs prepared by employees of plaintiff for circus advertisements.

The question presented to the Supreme Court was whether the lithographs were within the protection of the copyright law. Justice Holmes, writing for the majority, held that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." *Id.* at 251.

¹¹⁸ See *infra* note 169 and accompanying text.

D. *The Kennedy Bill and Resale Royalty Rights/Droit de Suite*

The national resale royalty provision of previous Kennedy Bills is a far more controversial issue than the moral right.¹¹⁹ The resale royalty right provision was replaced in the 1988 version of the Kennedy Bill with a mandate to study the resale royalty right for one year in order to determine its feasibility.¹²⁰ Many advocates argue that equitable considerations require that the United States join countries like France and Germany, as well as the State of California,¹²¹ which recognize the resale royalty.¹²² Resale royalties also advance the policy behind moral rights of maintaining a continuing relationship between the artist and the work of art.¹²³

The Bill's 1987 version of the royalty provision, like the California Act, applied to works resold for \$1,000 or more.¹²⁴ Unlike the California Act, it applied only when the seller resold the work at a price no less than 150% of the purchase price.¹²⁵ The purpose of this provision was to avoid imposing a resale royalty on a work unless a substantial profit was realized. The 150% resale

¹¹⁹ Unlike its treatment of the moral right, the Berne Convention allows but does not mandate recognition of the resale royalty right—*droit de suite*. The question is left to national legislation. See Berne Convention, Paris Act, *supra* note 84, art. 14*bis*.

¹²⁰ Visual Artists Rights Act, *supra* note 2, § 3.

¹²¹ See generally *infra* notes 143-210 and accompanying text. In 1976, California enacted a resale royalty right law—the first time such a right was recognized in the common-law world. *Id.* The 1987 version of the the Kennedy Bill adopted the general structure of the 1976 California Resale Royalty Act. See CAL. CIV. CODE § 986 (West 1989). However, it modified some of the California Act's provisions objectionable to buyers and sellers of art. The 1987 version of the Bill also imposed an unwaivable, although transferable, seven percent royalty on the resale of a work of art as defined by the Bill. Visual Artists Rights Act, *supra* note 2, § 3:

Whenever a pictorial, graphic, or sculptural work is sold, the seller shall pay a royalty to the author. . . . Such royalty shall be equal to 7 percent of the difference between the seller's purchase price and the amount the seller receives in exchange for the work. The right of the author to receive this royalty may not be waived.

The royalty would attach to the resale of the work for the life of the author plus fifty years. *Id.* "Where the author is deceased at the time of the sale, and the sale occurs within 50 years after the death of the author, such royalty shall be paid to the estate of the author." *Id.* at (d)(1).

¹²² Although only twenty-one of the fifty-one nations polled in a 1983 UNESCO survey had resale royalty right laws, in Europe these included France, Germany, and Italy. See J. MERRYMAN & A. ELSÉN, LAW, ETHICS, AND THE VISUAL ARTS 213 (2 ed. 1987)[hereinafter MERRYMAN & ELSÉN].

¹²³ See Koegel, *Memorandum of Support for S. 2796: Introduced in the 99th Congress by Senator Edward M. Kennedy (D. Massachusetts)* 11 COLUM. J.L. & ARTS 347, 349 (1987). "[I]t is hardly unreasonable for artists to seek respect for a continuing connection with the original unique work. It is not inappropriate for this connection to be economic." *Id.* at 349.

¹²⁴ See *id.* (denying a resale royalty right when the resale price of a work is less than \$1,000).

¹²⁵ See *id.* (denying a royalty right where the resale price is less than 150% of the price paid by the reseller).

limitation took into account both inflation and the costs of resale so as not to unduly penalize the buyer.¹²⁶ To benefit from the resale royalty, the 1987 Bill required that the artist register the work in the Copyright Office prior to resale.¹²⁷

Whether the resale royalty act would benefit the fine artist and create a healthier climate for artistic production and dissemination is a widely debated question¹²⁸ which will receive further scrutiny by those who evaluate the feasibility of a national resale royalty as mandated by the current version of the Kennedy Bill.

Supporters of the California resale royalty argue that it benefits artists and encourages creative production, subsidizing the artist as the public performance right does for the composer of music.¹²⁹ While admitting that the resale royalty is often ignored and difficult to enforce, they would point to the considerable number of artists who have benefited from it. For example, studies conducted of both the California statute¹³⁰ and the French resale royalty¹³¹ show that many artists have been significantly remunerated since the royalty's adoption in 1920.

Critics of the resale royalty claim that it has not worked and has harmed the art market in countries having long experience with it. For example, some French art dealers insist that the resale royalty has driven a portion of the art market away from France. In effect, they argue that a rational buyer will avoid purchasing a work in France if its equivalent can be obtained without incurring extra cost elsewhere. One cannot, however, blame the decline of the French art market on the resale royalty. Although the French art market is not what it was before World War II, its decline cannot be traced to the resale royalty. There are simply too many other factors at play—such as the advent of a dynamic New York market after the Second World War.

Those who disfavor the resale royalty have cogent economic arguments, but have difficulty proving them empirically. Generally, critics argue that the resale royalty will create the worst of all

¹²⁶ One might compare this provision with that of France, which imposes a resale royalty on the gross sale of a work whether it appreciates or depreciates. See *Loi de 11 Mars 1957*, *supra* note 10, art. 42.

¹²⁷ Visual Artists Right Act, *supra* note 2, § 3.

¹²⁸ See F. FELDMAN, S. WEIL & S. BIEDERMAN, *ART LAW: RIGHTS AND LIABILITIES OF CREATORS AND COLLECTORS* 555-605 (1986); S. BRANDOW, *LAW AND FINE ART SELECTED BIBLIOGRAPHY* 13-17 (1984).

¹²⁹ See *supra* notes 66-68 and accompanying text.

¹³⁰ *Hearing on S. 1619*, *supra* note 6 (remark of Leonard DuBoff).

¹³¹ See, e.g., Note, *The Applicability of Droit de Suite in the United States* 3 B.C. INT'L & COMP. L. REV. 433, 440 (1980).

possible worlds for both artists and art buyers.¹³² Essentially, the resale royalty imposes a seven percent tax on the sale of art, which, like any tax, lowers the demand for a particular good or service. In this case, the seven percent tax on the sale of art will arguably depress the art market. Moreover, critics assert that the resale royalty will remunerate the well-known artist at the expense of the unknown artist.¹³³

Finally, critics argue that the resale royalty will encourage neither the production nor the dissemination of art. Because at least ninety percent of the artwork available does not have a resale market at all,¹³⁴ and most new artists lack any initial market for their work,¹³⁵ an increase of funds is needed to purchase works of art. This increase could be accomplished by providing tax breaks or direct subsidies.¹³⁶ The resale royalty, however, reduces those funds by imposing a tax on a work of art. The result will be a smaller and less dynamic art market.

It appears that a national resale royalty will not become an immediate reality. If the Kennedy Bill is passed, the question will be studied during the one year mandate. We are left, however, with an unsatisfactory situation that calls for national uniformity one way or another. What would happen if another state, besides California, passed a resale royalty law? For example, take the situation in which a California resident sold a painting in New York. Because the two bases of jurisdiction are residency of the seller and the place of sale, could royalties be imposed by both California and New York?¹³⁷ The answer is not clear. Finally, the California Act is subject to strong preemption arguments under section 301 of the Act, even though the issue was resolved in favor of the legislation under the 1909 Act.¹³⁸ The lone state might eventually be deprived of recognizing the resale royalty.

If the resale royalty is revived, it should incorporate the re-

¹³² At the Senate Subcommittee Hearings on Patents, Copyrights, and Trademarks, several speakers argued that "such a law would be difficult to administer, at the least, and possibly injurious to the careers of some young artists." See McGill, *U.S. Bill on Artists Right is Debated*, N.Y. Times, Nov. 19, 1986, at C33, col. 1.

¹³³ Visual Artists Rights Act: *Hearing on H.R. 3221 Before the Subcomm. on Courts Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 291 (1987) (statement of R. Fredrick Woolworth) [hereinafter *Hearing on H.R. 3221*].

¹³⁴ See, e.g., Bolch, Damon, & Hinshaw, *Visual Artists Rights Act of 1987: A Case of Misguided Legislation*, 8 CATO J. 71 (1988).

¹³⁵ See Weil, *Resale Royalties: Nobody Benefits*, ARTNEWS, Mar. 1978, at 58.

¹³⁶ *Hearings on S. 1619*, *supra* note 6, (remark of David Lloyd Kreeger).

¹³⁷ See L. DUBOFF, ART LAW IN A NUTSHELL 240-44 (1984).

¹³⁸ See *Morseburg v. Baylon*, 621 F.2d 972 (9th Cir.), *cert. denied*, 440 U.S. 983 (1980); 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.22[B] (1988).