
Edward J. Damich
ARTICLES

THE VISUAL ARTISTS RIGHTS ACT OF 1990:
TOWARD A FEDERAL SYSTEM OF
MORAL RIGHTS PROTECTION
FOR VISUAL ART

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On March 1, 1989, the United States acceded to the Berne Convention for the Protection of Literary and Artistic Works. As a result, the United States moved away from its traditional insistence on copyright notice and accepted, in principle, the Berne Convention's concept of moral rights. This concept is embodied in the language of article 6bis:

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 of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

When the United States joined the Berne Convention, however, Congress did not change the Copyright Act to comply with the language of article 6bis; instead, Congress claimed that moral rights were already sufficiently protected in the United States to permit adherence. To bolster this rather

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2. Berne Convention, supra note 1, art. 6bis, para. 1, at 41.

dubious conclusion, Congress pointed to nonliteral compliance with article 6bis by some Berne Union members and to comments published by the World Intellectual Property Organization (WIPO), the administrative arm of the Berne Convention, which indicated flexibility in complying with article 6bis.\(^4\)

The view that the United States extended sufficient protection to moral rights to permit adherence to the Berne Convention did not meet with universal acceptance.\(^5\) Thus, moral rights advocates looked to the introduction of bills to protect moral rights in the visual arts as a possible remedy to defects in the adherence legislation. Further encouragement for specific moral rights legislation came from the United Kingdom where, motivated in part by the need to comply with Berne Convention obligations, the United Kingdom enacted express moral rights protections as part of a revision of the British copyright law.\(^6\)

In the 101st Congress, Senator Edward Kennedy and Representative Robert Kastenmeier introduced two moral rights bills, S. 1198\(^7\) and H.R. 2690,\(^8\) respectively. These moral rights bills were both entitled the Visual Artists Rights Acts of 1989.

On October 27, 1990, Congress passed the Visual Artists Rights Act (now of 1990) (Act).\(^9\) In general, the Act provides for attribution and protection.

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\(^4\) Id. at 37. The Berne Convention provides for administration of the Berne Union through the World Intellectual Property Organization. Berne Convention, supra note 1, art. 24, at 112.


\(^6\) Copyright, Designs and Patents Act, 1988, ch. 48, § 12(1).


of the physical integrity of certain works of visual art. The rights recognized by the Act last for the life of the author and, although they cannot be transferred, they can be waived. The Act provides for the same remedies as those of the Copyright Act (of which it is a part) except for criminal penalties. The Act contains a preemption provision different from that of the Copyright Act, and there is a special provision dealing with the removal of visual art from buildings. In addition, there are provisions for a study of the effect of the waiver provision and for a study of resale royalties.

The passage of the Visual Artists Rights Act is a major advance for the rights of American artists. It represents the victorious culmination of a hard-fought, multi-year effort, and it can rightly claim to be a triumph of principle over moneyed interests, given the relatively minor political clout of creators vis-a-vis exploiters of artwork. Yet, while recognizing the importance of this first step toward federal moral rights protection, it must be acknowledged that the Act does not bring United States law into conformity with article 6bis. First, article 6bis applies to all literary and artistic works; it is not limited to visual art. Second, even within the realm of visual art, the new Act does not provide rights as broad as those under article 6bis. For example, the Act does not provide for anonymity and pseudonymity, nor does it provide a right of faithful reproduction. Third, the Act confines the term of moral rights to the life of the author in direct contradiction to article 6bis which requires that moral rights last as long as economic (copyright) rights. Fourth, by providing for waivers of moral rights, the Act does not fully reflect article 6bis' concern about protecting the artist even "against himself." Given these deficiencies, it is important that the preemption provision of the Act be given a narrow reading to allow the more expansive protections of state moral rights statutes to continue to bring American law

10. Id. sec. 603(a), § 106A (to be codified at 17 U.S.C. § 106A).
11. Id. sec. 603(a), § 106A(d)(e) (to be codified at 17 U.S.C. § 106A(d)(e)).
12. Id. sec. 605, § 301(f)(2) (to be codified at 17 U.S.C. § 301(f)(2)).
13. Id. sec. 604, § 113(d) (to be codified at 17 U.S.C. § 113(d)).
15. Berne Convention, supra note 1, art. 2, para. 1, at 12.
16. Anonymity and pseudonymity, under article 6bis, refer to the right to publish a work under a pseudonym or anonymously, and the right to stop publishing under a pseudonym or anonymously. Berne Convention, supra note 1, art. 6bis, para. 1, comment 6bis.3, at 41.
18. Id. sec. 603(a), § 106A(d) (to be codified at 17 U.S.C. § 106A(d)); Berne Convention, supra note 1, art. 6bis, para. 2, at 43.
19. Visual Artists Rights Act of 1990 sec. 603(a), § 106A(e) (to be codified at 17 U.S.C. § 106A(e)); Berne Convention, supra note 1, art. 6bis, para. 1, comment 6bis.6, at 42.
closer to the requirements of article 6bis. These state laws, after all, were cited by Congress as partial proof that American law already complied with article 6bis. It is also important that comprehensive, but realistic, federal protection of moral rights for visual art be identified.

Although this Article elaborates on the criticisms just mentioned, its primary purpose is to sketch out the form of federal legislation regarding visual art that would provide the kind of comprehensive protection of moral rights that is envisioned by article 6bis. This proposal can serve not only as a guide to future legislation, but also as an inducement to courts to interpret the substantive provisions of the new Act expansively and the preemption provision of the new Act narrowly by recalling the new Act's broader context.

This Article begins with a brief examination of moral rights in general. Part II analyzes and critiques the Visual Artists Rights Act of 1990 with reference to its precursors, the Kennedy and Kastenmeier bills. These bills are important because they give a sense of the realm of the possible regarding federal moral rights legislation, and by comparison with the new Act, they help identify political compromises. Part III proposes a model for comprehensive federal moral rights protection of visual art.

Because the proposed model includes only visual art, it tacitly accepts an incremental medium-by-medium approach rather than bringing all kinds of works under the protection of a few general principles as does French law. This seems a realistic approach given the recent enactment of a moral rights bill limited to visual art. The model generally accepts the definition of works of visual art found in the Act except for the "of recognized stature" limitation of the right against destruction. The proposed model suggests, however, that the right of attribution might easily be expanded to cover more kinds of works because such an expansion poses fewer problems for copyright owners and owners of the material object in which the work is embodied. The constituent rights of the right of attribution found in the Act are also expanded to include rights of anonymity and pseudonymity. The model adopts the right of integrity of the Act, which is composed of the right against modification and the right against destruction. It rejects, however, the limitation of the general right to intentional acts and would include a right of faithful reproduction if this were politically viable. Unlike the Act, the proposed model equates the term of moral rights protection to the term of copyright protection—normally the life of the author plus fifty years. This term is required by article 6bis and was found in both the Kennedy and

Kastenmeier bills. Furthermore, the model does not permit waivers (although it recognizes consent), and it reduces the scope of the work for hire exception found in the Act. The last major departure from the Act regards damages. The proposal finds the use of the damages provisions of the Copyright Act inappropriate because they are aimed at injury to property rights rather than personal rights.

I. MORAL RIGHTS IN GENERAL

A proper assessment of moral rights legislation requires an understanding of moral rights theory and article 6bis. Article 6bis follows the moral rights theory of French law, which recognizes that works of the mind have two aspects: the economic aspect, which treats the work as a good in commerce, and the personal aspect, which treats the work as an expression of the author’s personality.\(^22\) The legal protection of the personal aspect gives rise to moral rights (droit moral). Article 6bis recognizes two moral rights: the right of attribution and the right of respect.

The right of attribution gives the author the right to control the association of his name with the work. This right includes not only the right to make sure that the work is attributed to him, but also the right not to associate his name with the work, and the rights of anonymity and pseudonymity.\(^23\)

The right of respect is the author’s right to ensure that the work always authentically expresses his vision or concept. As expressed in article 6bis, the right of respect not only protects against mutilations and distortions in the form of acts that mar the physical integrity of the work, but also “other derogatory action in relation to[ ] the said work, which would be prejudicial to his honor or reputation.”\(^24\) In the case of the adaptation of a novel to the screen, the right of respect “allows the author to demand, for example, the preservation of his plot and the main features of his characters from changes

\(^{22}\) “Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have . . . ” Berne Convention, supra note 1, art. 6bis, para. 1, at 41.

\(^{23}\) The official comment to article 6bis, paragraph 1 states:

This provision enshrines two of the author’s prerogatives: first and foremost, to claim the paternity of his work—to assert that he is its creator. Usually he does so by placing his name on the copies (title pages or fly leaves, film subtitles, signatures on pictures, sculpture). This right of paternity may be exercised by the author as he wishes; it can even be used in a negative way, i.e., by publishing his work under a pseudonym or by keeping it anonymous, and he can, at any time, change his mind and reject his pseudonym or abandon his anonymity.

Berne Convention, supra note 1, art. 6bis, para. 1, comment 6bis.3, at 41.

\(^{24}\) Id. art. 6bis, para. 1, at 41.
which will alter the nature of the work or the author's basic message." But not every modification of the work is a violation of the right of respect; only those modifications that "would be prejudicial to [the author's] honor or reputation" violate this right. Note that article 6bis does not protect only reputation; the inclusion of "honor" as well as reputation supports the conclusion that the author's moral rights could be violated even if the act enhanced his reputation. Curiously, there is no explicit right against destruction, although some instances of destruction surely could be labeled "a derogatory action... prejudicial to [the author's] honor or reputation."

Protecting irreplaceable works from irreversible physical changes presents the most compelling case for moral rights protection. When a book is photocopied, it substitutes for the original, provided the copy is complete and legible. If the original were wholly destroyed, the literary work would still survive intact in the copy. The fact that a bookstore has no problem selling each copy of a book at the same price reflects this phenomenon. In the case of an oil painting, however, a reproduction, no matter how faithful, cannot substitute for the original. The market reflects this perception; when an oil painting is identified as a copy, it drops immediately in value.

Prints, such as lithographs, silkscreens, photographs, and multiple cast sculptures (bronzes, for example), fall between books and paintings on the irreplaceability spectrum. There is a sense that each print or casting is an "original," even though all prints and castings may resemble each other, especially if they are made under the same circumstances. Thus, insofar as prints and castings are "originals," protecting their physical integrity can be justified as preventing an irreplaceable loss.

As previously indicated by the example of the adaptation of a novel to the screen, the right of respect is not only concerned with physical acts done to the work itself, but also with other acts that result in a false communication of the author's personality. Thus, the official WIPO comment states: "Generally speaking, a person permitted to make use of a work (for example by

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25. Id. art. 6bis, para. 1, comment 6bis.5, at 42.
26. Id. art. 6bis, para. 1, at 41. The requirement of prejudice to honor or reputation may apply only to "other derogatory action," such that any distortion, mutilation, or other modification of the work would be a per se violation of the right of integrity, i.e., without the need to show prejudice to honor or reputation. Note, however, that even if prejudice to honor or reputation is required in the case of distortion, mutilation, or other modification, this does not preclude a finding that some such acts might be per se violations of the right of respect. This Article proceeds on the latter premise.
27. Thus, in implementing article 6bis, a member country might decide that every instance of destruction is prejudicial to the author's honor, but article 6bis does not require this.
28. Although fidelity to the original is a value both in the case of books and oil paintings, no matter how faithful the reproduction is to the original in the case of oil paintings, it cannot substitute, in the true sense of the word, for the original.
reproducing or publicly performing it) may not change it either by deletion or by making additions.29 Because paintings, drawings, prints, sculptures, and photographs can be reproduced in copies, it is logical to extend those rights to these works as well. Thus, generally speaking, article 6bis indicates that the right of respect for paintings, drawings, prints, sculptures, and photographs should consist of the right of physical integrity for originals, and the right of faithful reproduction.

II. THE VISUAL ARTISTS RIGHTS ACT OF 1990

A. Works Protected

Although the Kennedy and Kastenmeier bills30 did not extend moral rights protection to all literary and artistic works, as required by the Berne Convention, the bills did protect those works that comprise the central case for moral rights protection, namely, irreplaceable works of visual art. The new Act adopted the definition of visual art found in the later versions of both bills. A “work of visual art” must be copyrightable.31 The definition indicates a restriction to unique, visual works of the “fine” arts. These are visual works appreciated solely as works of art, not useful articles or works used for commercial purposes, and generally, visual works in their original versions rather than reproductions. The Act defines a “work of visual art” as:

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated, sculptures of two hundred or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

Specifically excluded from protection are:

29. Berne Convention, supra note 1, art. 6bis, para. 1, comment 6bis.5, at 42.
30. The reader may assume that the provisions of the bills are common unless otherwise indicated. The moral rights recognized by both bills were to create a new section 106A in the Copyright Act, 17 U.S.C. §§ 101-810 (1988) (subsequently referred to as Copyright Act proposed § 106A).
32. Id.
(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.\(^3\)

It is fortunate that the Act applies to photographs because photographs were not included in the first versions of the bills. It is not clear, however, what constitutes a “still photographic image produced for exhibition purposes only.”\(^3\)\(^4\) What if Ansel Adams made a positive for his own use, which he signed, but later, it was sold and exhibited in a museum? Presumably, the work would not qualify for moral rights protection because it was not intended for exhibition purposes only.

Further problems arise regarding the application of the limited edition provision to paintings and drawings. The limited edition provision grammatically seems to modify “painting, drawing, print, or sculpture,”\(^3\)\(^5\) but the concept of a limited edition painting or drawing, as opposed to print or sculpture, requires some thought. Presumably, legislators contemplated reproductions of paintings and drawings. It seems unusual, however, that such reproductions would appear in limited editions of 200 or fewer, and even more unusual that such reproductions would be signed and consecutively numbered as the provision requires. Nevertheless, it would seem that such reproductions would be protected as long as they did not appear in, upon, or in any connection with the items specifically excluded from protection in section (2)(A) of the definition.\(^3\)\(^6\)

But if some reproductions are protected by the Act, how does the right of integrity apply to them? Clearly, such reproductions would be protected against physical acts done to the reproductions themselves. The important right for reproductions, however, is the right of faithful reproduction, that is, that the reproduction will give as accurate a reflection of the original as is possible under the circumstances. Because the right of integrity uses the

\(^{33}\) Id.

\(^{34}\) Id.

\(^{35}\) Id.

\(^{36}\) Id. sec. 603, § 106A(c)(3) (to be codified at 17 U.S.C. § 106A(c)(3)).
words "distortion" and "modification," it would be a fair reading of the statute to recognize a right of faithful reproduction as part of the right of integrity as to those reproductions included in the definition of "work of visual art." Nevertheless, because the reproductions would have to be signed by the author, it is difficult to conceive how the right of faithful reproduction would operate. The right would only apply to reproductions that were signed, yet, why would the author sign a reproduction that was not faithful to the original? The author might sign if he were contractually bound to do so, or simply invoke the Act so that he then could sue the reproducer. The signing itself would not constitute a waiver because the Act requires other formalities. Clearly, the Act provides only the soupçon of a right of faithful reproduction.

It is also important to point out a limitation on the kinds of works protected that is not found in the Act's definition section. The right against destruction applies only to works "of recognized stature." A "work of recognized stature" is not expressly defined in the Act, but the Kennedy bill provided that the determination of whether a work is one of "recognized stature" is to be made by the "court or other trier of fact," which may take into account the opinions of various persons familiar with the art world. Protecting only works of visual art, let alone defining works of visual art in such a narrow fashion, does not measure up to the concept of moral rights embodied in article 6bis. Nothing in the text of the Berne Convention indicates that the moral rights of article 6bis do not apply to all works protected by the Convention. Article 1 states that the Convention protects "the rights of authors in their literary and artistic works," and article 2 sets out an extremely broad definition of "literary and artistic works." Nevertheless,

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38. See id. sec. 603, § 106A(e)(1) (to be codified at 17 U.S.C. § 106A(e)(1)).
40. See S. 1198, supra note 7, § 3(a) (Copyright Act proposed § 106A(a)(3)) which states: [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.

41. Berne Convention, supra note 1, art. 1, para. 1, at 8.
42. Article 2 states:

(1) The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or with-
as long as the Act does not preclude further development on the state or federal level, protecting irreplaceable works is a logical starting point.

While generally limiting protected works to irreplaceable ones may be a logical beginning for federal statutory protection of moral rights, the limitation of the right against destruction to works "of recognized stature" is not easily rationalized from a moral rights standpoint. The advantages of the "of recognized stature" qualification include barring nuisance law suits, such as the destruction of a five-year-old's fingerpainting by her classmate, and barring law suits arising from the destruction of works of visual art of an

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out words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

(2) It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.

(3) Translations, adaptations, arrangements of music and other alterations of literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

(4) It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.

(5) Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

(6) The works mentioned in this Article enjoy protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title.

(7) Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.

(8) The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.

Berne Convention, supra note 1, art. 2, paras. 1-8, at 12-22.
amateurish or pedestrian character. Nevertheless, these advantages were not important enough for Congress to limit the right to prevent distortion, mutilation, or other modification to works of recognized stature. A quality of art criterion, however, is so opposed to moral rights theory, the Berne Convention and American copyright law tradition, that it is not an appropriate solution to the problems presented by nuisance law suits. The incentives to sue for such acts can be reduced by relating recoverable damages to, among other things, the market value of the work.\textsuperscript{43}

Moral rights derive from the fact that a work is an expression of the artist's personality. An insignificant, unappreciated work is no less an expression of the artist's personality than is a work "of recognized stature." Thus, adopting a quality criterion changes the focus of the statute from moral rights to art preservation.\textsuperscript{44} Copyright law has traditionally eschewed judgments of quality, mainly because the courts are not especially competent to make this type of judgment.\textsuperscript{45} Neither does the Berne Convention distinguish on the basis of quality; indeed, the official comment remarks: "It is generally agreed that the value or merit of a work, essentially a subjective value judgment, is also of no account; in trying a case, for example, the judge does not have to appreciate the artistic merits or cultural advantages of a work."\textsuperscript{46}

Because works that have become part of buildings present a particularly difficult problem, the Act contains special provisions which limit the artist's moral rights in this situation.\textsuperscript{47} In general, the scheme adopted distinguishes between works that cannot be removed without violation of the right of integrity, and works of art that can be removed without such a violation.

In the case of works that cannot be removed without violation of the right of integrity, if the author consented in writing to the installation of the work before the effective date of the Act, or if after the effective date of the Act, the author recognizes in writing that the integrity of the work may be compromised by removal, the owner can remove the work without liability for

\textsuperscript{43} See infra note 266.

\textsuperscript{44} An example of preservation legislation is the National Film Preservation Act of 1988, Pub. L. No. 100-446, 100 Stat. 1782 (codified as amended at 2 U.S.C. §§ 178-178L (1988)), which provides for film selection according to artistic merit.

\textsuperscript{45} "It 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." Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903). The same could be said of juries.

\textsuperscript{46} Berne Convention, \textit{supra} note 1, art. 2, para. 1, comment 2.4, at 13.

\textsuperscript{47} Visual Artists Rights Act of 1990 sec. 604, § 113(d) (to be codified at 17 U.S.C. § 113(d)).
such violation. It would appear, however, that even if the owner does not remove the work, he can still destroy or modify the work without liability because the provision waives the right of integrity without limitation to the case of removal, although this result was surely not intended. In addition, after having modified the work, whether it has been removed or not, the owner arguably can continue to use the author's name as author of the work without liability under the Act because the right to prevent the use of the author's name as author of the work also does not apply.

In the case of works that can be removed without violation of the right of integrity, if the owner has made a diligent, good faith attempt without success to notify the author, or gives the author the prescribed notice of removal and the author fails to remove the work or pay for its removal within 90 days, the owner is not liable for acts that violate the right of integrity or the right of the author to prevent the use of his name as author of the work. If the work is removed at the expense of the author, the author receives the title to that copy of the work. This section of the Act also provides for the Copyright Office to establish a system to allow authors whose works have become parts of buildings to record their identities and addresses, and to allow owners of buildings to record their efforts to comply with this provision. The owner is presumed to have made a diligent, good faith attempt to notify if he sent a notification by registered mail to the most recent address recorded at the Copyright Office.

Aside from certain ambiguities, inconsistencies, and minor problems, the general scheme of the art in buildings provisions can be criticized for going beyond the point necessary to accommodate the legitimate needs of building owners. In the case of works that cannot be removed without violating the right of integrity, the possibility that the owner is not liable for violations of the right of integrity outside of the actual act of removal permits the owner to escape liability for acts that do not outweigh the author's

48. Id. sec. 604, § 113(d)(1)(B) (to be codified at 17 U.S.C. § 113(d)(1)(B)).
49. This interpretation is not likely for works installed after the effective date of the Act because the required writing would limit consent to actual removal. Id.
50. Id. sec. 604, § 113(d)(2)(A)-(B) (to be codified at 17 U.S.C. § 113(d)(2)(A)).
51. Id. sec. 604, § 113(d)(2)(B), (d)(3) (to be codified at 17 U.S.C. § 113(d)(2)(B), (d)(3)).
52. Id. sec. 604, § 113(d)(2)(B) (to be codified at 17 U.S.C. § 113(d)(2)(B)).
53. First, as amended, 17 U.S.C. § 113(d)(2) is inconsistent with 17 U.S.C. § 113(d)(1) in that the latter refers to a work that “has been incorporated in or made part of a building,” while the former refers to a work that “is a part of” a building. This may or may not be significant. Second, because 17 U.S.C. § 113(d)(2) begins with: “If the owner of a building wishes to remove a work” (emphasis added), it is arguable that he need not actually remove it. Third, 17 U.S.C. § 113(d)(1) does not deal with the problem that a work may become non-removable without violation of the right of integrity after it has been installed. Visual Artists Rights Act of 1990 sec. 604, § 113(d)(1)-(2) (to be codified at 17 U.S.C. § 113(d)(1)-(2)).
personality interest in his work. For example, the owner would be able to change the colors of a mural on a whim. It would seem preferable to allow the owner to be free from liability, aside from removal, only for changes reasonably necessary to enhance the structural utility of the building. The author should also be able to insist that he no longer be billed as author of the work after the owner has modified the work, even if the modifications are permissible.

In the case of works that can be removed from buildings without violating the right of integrity, there is no reason to free the owner from liability, other than to eliminate the possibility that the very removal of the work from the building is a "distortion" or "modification" of the work. Concern about possible liability for the removal itself would also explain why the provision frees the owner from liability for violating the author's right to prevent the use of his name as author of the work. Unless the removal itself was a violation of the right of integrity, and if the work remained intact after the process of removal, the author would have no reason to assert the right to prevent attribution. Thus, the owner would not need to escape liability for attributing the work to the author.

Another explanation for freeing the owner from liability when the work can be removed without violation of the right of integrity is that the Act intended to free the owner from liability for disposition of the work after removal. This explanation provides a more compelling rationale for the notice provision and the requirement that the author remove or pay for the removal of the work; these provisions allow the author to "rescue" the work from later modification or destruction. According to the interpretation that the removal itself could be a violation of the right of integrity, the notice provision and the requirement that the author remove or pay for the removal of the work only provide the author with the opportunity to perform the delicate operation himself.

The owner ought to be free from liability for actions after removal in certain circumstances. Allowing the owner to dispose of the work freely is justifiable because the owner might have difficulty finding another place for the work. It is one thing to say that the owner of a painting should not be able to impair its physical integrity, and another thing to saddle the owner of a building with a gigantic mural that might not have a ready new home after

54. See id. Note that these subsections provide an argument that the Act's right of integrity protects the interest of site specificity. Removal of a site specific work is arguably a "distortion" or a "modification" of the work, even though it is not physically damaged or physically destroyed. Id.

55. See generally id. sec. 604, § 113(d)(1)-(3) (to be codified at 17 U.S.C. § 113(d)(1)-(3)) (discussing authors' and owners' rights in removing works of visual art from buildings).
demolition of the building. Even if this rationale is persuasive, however, it might be argued that the provisions go too far. Ultimately, the owner might acquire the right to destroy the work, but this right should become operative only after the author has refused to give the owner permission to modify the work, and only after the owner has offered the work to the author as a gift and the author has refused it. The owner should give the author a sufficient period of time to arrange for other disposition of the work, and the author should not have to pay for the removal. Even if the author permits the owner to modify the work after removal, however, there is no good reason to eliminate the author's right to prevent the use of his name as author of the work.

**B. Rights Recognized**

The Act recognizes the right of attribution and, the core of the right of respect, the right to preserve the physical integrity of the work. The Act calls the latter right the “right of integrity.”

**1. Right of Attribution**

The right of attribution includes three rights: (1) the right to claim authorship of the work; (2) the right to prevent the use of the author's name as author of a work which he or she did not create; and (3) the right to prevent the use of the author's name as author of the work if the work has been distorted, mutilated, or modified so as to prejudice the author's honor or reputation. Note that because it applies whether or not the distortion, mutilation, or modification was intentional, the right to prevent the use of the author's name as author of the work in the case of distortion, mutilation, or modification is not exactly coextensive with the right of integrity. The right of attribution is less comprehensive than that envisioned by article 6bis.
for two reasons. First, the right to prevent attribution where the author originally created the work depends on a physical act done to the work itself (except possibly for some reproductions), while the right of respect in article 6bis is broader. Second, the right of attribution does not provide for the author's right to remain anonymous or to use a pseudonym. In addition, there are some ambiguities. The use of the word "prevent" in two of the components of the right of attribution causes confusion because it suggests that the author could not recover monetary damages for infringements that have already occurred. This result was not intended because the Act clearly provides for monetary recovery. Further, it is not clear whether the author has the right to remove his name, or the right to insist on attribution, except with a disclaimer.

Nothing in the language of article 6bis compels the conclusion that the right of attribution is coextensive with the right of respect. Logically, they need not be, and there is evidence in the WIPO comments that, in the event of any change, the author could exercise the right to prevent attribution. The right to prevent attribution, for example, might conceptually include a right to disclaim authorship where the work was modified without prejudice to the author's honor or reputation. It cannot be argued, then, that logic or article 6bis requires that the right of attribution in the Act must be limited to violations of the right of integrity. In fact, the language of the Act reflects that the right to prevent the use of the author's name as author of the work when it has been distorted, mutilated, or modified with prejudice to the author's honor or reputation applies whether or not the distortion, mutilation, or modification was intentional. Even if the right to prevent attribution in article 6bis is limited to violations of the right of integrity, it is not advisable to follow this pattern in interpreting the Act because the result would be a

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61. See supra notes 35-38 and accompanying text.
63. The Act amends 17 U.S.C. § 501(a) (1988) to provide for monetary damages pursuant to 17 U.S.C. § 504. There is no indication that the damages sections of the Copyright Act would apply only to the right to claim authorship.
64. "[A]n author may refuse to have his name applied to a work that is not his; nor can anyone filch the name of another by adding it to a work the latter never created." Berne Convention, supra note 1, art. 6bis, para. 1, comment 6bis.3, at 41. Both clauses deal with the right not to have one's name associated with the work. The fact that the phrase, "a work that is not his," is used in one clause, while the phrase, "a work the latter never created," is used in the other, however, suggests that the right to prevent attribution applies in the case where the author originally created the work and it has undergone changes, as well as where the author never created it. The comment also suggests that the right to prevent attribution can be exercised in the event of any unauthorized change because any such change would cause a work not to be "his." Id.
far more narrow scope for the right of attribution in the case of the Act than in the case of article 6bis. The right of integrity in article 6bis, it will be recalled, extends to "any derogatory action in relation to [the said work]," while the right of integrity in the Act virtually stops at intentional, physical acts.  

Although not expressly mentioned in the Act, the right to prevent the use of the author's name as author also includes the right to compel removal of the author's name as author of the work. Thus, if a museum exhibits a sculpture that has been modified, infringing the right of integrity, the sculptor has the right to compel the museum to remove the sculptor's name from the piece, if it is signed, where the modification is irreparable. Removing the author's signature is a way of preventing the use of the author's name as author of the work.

Although WIPO's interpretation of article 6bis expressly includes the right to remain anonymous or to use a pseudonym, the Act does not contain such a provision. The right to prevent use of the author's name as author of the work does not imply the right to remain anonymous because the author can rightfully prevent the use of his name only if he did not create the work, or if the work was distorted, mutilated, or modified. Thus, if the work has not been changed, there is no moral right to prevent anyone from identifying the author. The same is true for pseudonymity. The right to claim authorship does not by its terms include the right not to claim authorship, and it is overly optimistic to rely on this extension by judicial interpretation. Because the right to claim authorship is unlimited, however, one might argue that the Act complies with article 6bis by allowing the author to abandon anonymity or reject pseudonymity.

65. Id. at 42. The "prejudicial to . . . honor or reputation" criterion of Article 6bis, para. 1, however, may apply to the right of attribution even though the criterion is not grammatically related to the right of attribution.

66. Note, however, that the Act provides broader protection than article 6bis because it does not limit the right against destruction to prejudice to honor or reputation. Visual Artists Rights Act of 1990 sec. 603(a), § 106A(a)(3)(A) (to be codified at 17 U.S.C. § 106A(a)(3)(A)).

67. It may be argued that the use of the word "prevent" meant that only future acts may be prohibited. Id. sec. 603(a), § 106A(a)(2) (to be codified at 17 U.S.C. 106A(a)(2)). Given the unlikelihood that the author would know of the misattribution in advance, however, this interpretation is unwarranted.

68. Id. The right to remove the author's name may have to be restricted where it would amount to the removal of the copyright notice.

69. Berne Convention, supra note 1, art. 6bis, para. 1, comment 6bis.3, at 41.


71. Id. sec. 603(a), § 106a(a)(1) (to be codified at 17 U.S.C. § 106A(a)(1)). Section 106A(a)(1) would provide an unqualified right to claim authorship.
2. **Right of Integrity**

Article 6bis of the Berne Convention recognizes a broad right of respect that goes beyond protection of the mere physical integrity of the work. The Act, however, recognizes a right of integrity that consists of the right against distortion, mutilation and modification, and the right against destruction, both of which are primarily aimed at the physical integrity of the work, the essential consideration when the subject matter is irreplaceable. The language in which these rights are expressed, however, raises questions about the exact scope of these rights.

The right against modification is the right “to prevent any intentional distortion, mutilation, or other modification... which would be prejudicial to his or her honor or reputation,” and to this statement is appended: “and any intentional distortion, mutilation, or modification of that work is a violation of that right.” The meaning of the latter provision is unclear. It may have been added to clarify that the author would have not only the right to prevent impending violations of the right but also the right to recover damages for violations that had already occurred. This provision is also susceptible to the interpretation that, whereas the author has the right to prevent distortions, mutilations, and modifications that would prejudice his honor or reputation, he has the right to recover damages for such acts whether or not they were prejudicial to his honor or reputation; the provision regarding intentional acts does not contain the phrase, “prejudicial to his or her honor or reputation.”

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72. The right against distortion, mutilation, and modification will be referred to as the “right against modification.”

73. “Distortion” arguably does not require a physical change to the work, so that removing a site specific sculpture from a building would be a violation of the right of integrity. The thrust of the provision dealing with protected works, which is toward protecting irreplaceable works, however, seems to require a physical change to the work itself. *But see* text accompanying *supra* note 54.


75. *Id.*

76. Note that the added provision only makes clear that the right against modification applies to acts that have already occurred. If it were necessary to achieve this result, the right to prevent the use of the author’s name as author of a work that he or she did not create and the right to prevent the use of the author’s name as author of a work that had been distorted, mutilated, or modified would apply only to impending actions, because these rights do not have added provisions as does the right against modification. Congress probably did not intend this because the Act includes a damages remedy. Nevertheless, Congress may have meant for damages to apply only to the right against modification and the right against destruction.

anomalous, because there would seem to be no difference between a violation that was impending as opposed to one that had occurred that would justify applying the criterion of prejudice to honor or reputation in the case of the former and not the latter. Furthermore, the result would be a right broader than the language of article 6bis, which requires that the violation of the right of respect be prejudicial to honor or reputation. Finally, the reference to "that" right in the second provision regarding intentional acts refers to the right contained in the first provision, which is a right dependent on prejudice to honor or reputation. Thus, it would seem that the second provision merely has the function of emphasizing that the right against modification is not limited to impending distortions, mutilations, and modifications that are prejudicial to honor or reputation.

The right against destruction, however, is not so symmetrical. The Act recognizes a right "to prevent destruction of a work of recognized stature" and then adds: "and any intentional or grossly negligent destruction of that work is a violation of that right." The added provision not only emphasizes that destructions that have already occurred are violations, but also provides that intentional or grossly negligent destructions are *ipso facto* violations of the right. But if a destruction has occurred through mere negligence, no cause of action apparently exists. Because the right to *prevent* destruction is not limited to intentional and grossly negligent acts, there is an asymmetry between the first and the second provisions, although it is difficult to think of examples of impending destructions that are not intentional. If there can be no impending destructions that are not intentional, then the second provision is broader than the first because it protects against grossly negligent as well as intentional acts.

The right against destruction is also asymmetrical with the right against modification because the right against destruction is not limited to destructions that would be prejudicial to the author's honor or reputation. The right against destruction is also broader than the right against modification because the former provides for recovery for grossly negligent as well as intentional acts. The right against destruction, however, is narrower than the right against modification because the former is limited to works "of recognized stature." Limiting the right against destruction to works of recognized stature is inconsistent with moral rights theory, the Berne Convention, and the United States copyright law tradition of refraining from judgments as to quality.

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78. Id. sec. 603(a), § 106A(a)(3)(B) (to be codified at 17 U.S.C. § 106A(a)(3)(B)).
79. Id.
80. Supra notes 44-46 and accompanying text.
Nevertheless, in recognizing a right against destruction at all, the Act arguably exceeds the scope of moral rights protection contemplated by article 6bis because the right against destruction is neither expressly mentioned in article 6bis nor in the official comments. A strict reading of the language of article 6bis supports the conclusion that the right against destruction is not recognized because destruction is not a "distortion, mutilation, or modification" of a work. Although it is arguably a "derogatory action" under the Berne Convention, destruction is not something that is done "in relation to" a work; rather, one talks about destruction "of" a work. The fairly recent recognition of the right against destruction, even in French law, further supports the ambiguous position of this right as a moral right. Thus, because compliance with article 6bis may not require recognition of any right of destruction, the Act can hardly be criticized for limiting the right against destruction to works of recognized stature. A persuasive case, however, can be made that comprehensive moral rights protection must include the right against destruction, and must not limit it to works of recognized stature. Furthermore, if article 6bis does contemplate a right against destruction, limiting that right to works of recognized stature would contradict the theory of moral rights expressed in the language of that article.

The Act also deviates from article 6bis by limiting the right against modification to intentional acts, and seemingly limiting the right against destruction to intentional and grossly negligent acts. Article 6bis does not limit violations of the right of respect to grossly negligent or intentional acts. Article 6bis is consistent with moral rights theory because even the mutilation of a painting done through mere negligence results in an inaccurate portrayal of the artist's concept or vision. The precursors of the Act, the Kennedy and Kastenmeier bills, contained broader provisions. The Kennedy bill included grossly negligent as well as intentional acts as violations of the right.

82. Berne Convention, supra note 1, art. 6bis, para. 1, comment 6bis.3, at 42.
83. Id. art. 6bis, para. 1, at 41.
84. "The Versailles Court... valued the artist's moral right more than Renault's property right, in forbidding Renault to demolish the work undertaken and in ordering Renault to complete it." Le Salon d'Ete de Jean Dubuffet, Societe de la Propriete Artistique et des Dessins et Modeles (SPADEM), Propriete Artistique, p. 1, nos. 7-8, Jun.-Oct. 1983 (author's translation).
85. See infra notes 185-92 and accompanying text.
86. Article 6bis does not contemplate any limitation on the right of respect except that the violation be prejudicial to the author's honor or reputation. Berne Convention, supra note 1, art. 6bis. para. 1 at 41.
against modification.\textsuperscript{88} The Kastenmeier bill complied with article 6bis by not limiting either the right against modification or the right against destruction to grossly negligent or intentional acts.\textsuperscript{89} Indeed, the Kastenmeier bill, as originally introduced, did not impose the prejudice to honor or reputation requirement on destruction, distortion, mutilation, or other modification of works of recognized stature.\textsuperscript{90}

\textbf{C. Persons Entitled}

The rights recognized by the Act are exercisable by the author of the work of visual art.\textsuperscript{91} Although "artist" might be a more appropriate term given the kinds of works protected by the bills, "author" was undoubtedly chosen because it is used in the Copyright Act,\textsuperscript{92} of which the Visual Artists Rights Act is an amendment. The use of the word "author" without qualification, however, results in a grant of moral rights to employers instead of employee-creators because of the work for hire provision of the Copyright Act.\textsuperscript{93} This result would be truly anomalous from the standpoint of moral rights theory,

\begin{itemize}
\item \textsuperscript{88} S. 1198, \textit{supra} note 7, § 3(a) (Copyright Act proposed § 106A(a)(3)(A)).
\item \textsuperscript{89} H.R. 2690, \textit{supra} note 8, § 3(a) (Copyright Act proposed § 106A(a)(3)).
\item \textsuperscript{90} H.R. 2690, 101st Cong., 1st Sess. 3-4, 135 CONG. REC. E2199, E220 (daily ed. June 20, 1989).
\item \textsuperscript{92} 17 U.S.C. § 101 (1988).
\item \textsuperscript{93} The work for hire doctrine also includes certain commissioned works.
\end{itemize}

\textit{Works Made For Hire} — In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

A "work made for hire" is —

\begin{itemize}
\item (1) a work prepared by an employee within the scope of his or her employment; or
\item (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.
\end{itemize}

which seeks to protect the personality of the creator of the work. The Visual Artists Rights Act deals with this problem by excluding works for hire from moral rights protection.\textsuperscript{94} This solution not only avoids giving moral rights to noncreating employers, but also denies them to creating employees.

Although this denial of moral rights protection to employee-creators is inconsistent with moral rights theory,\textsuperscript{95} it is permissible under the Berne Convention. According to article 6bis, the author has the rights of attribution and respect, but the Berne Convention does not define "author;"\textsuperscript{96} it merely presumes that the author is the person whose name appears as such on the work.\textsuperscript{97} The official comments reveal that this omission was a conscious effort to accommodate the work for hire concept.\textsuperscript{98} Nevertheless, the work for hire concept should be limited to the sphere of economic rights, especially given its incompatibility with moral rights theory.\textsuperscript{99} Furthermore,

\begin{itemize}
\item \textsuperscript{95} French law, for example, does not recognize the work for hire concept except for computer programs. Even there, although the employer is the owner of the economic rights in the first instance, the employee retains the moral rights. See Ginsburg, Reforms and Innovations Regarding Authors' and Performers' Rights in France: Commentary on the Law of July 3, 1985, 10 COLUM.-VLA J. LAW & ARTS 83, 89 (1985).
\item \textsuperscript{96} "The Convention does not define 'author' but establishes a presumption that it is he who is entitled to bring action to assert the copyright in the work." Berne Convention, supra note 1, art. 15, para. 1, comment 15.2, at 93.
\item \textsuperscript{97} Article 15 paragraph 1 states:
In order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner. This paragraph shall be applicable even if this name is a pseudonym, where the pseudonym adopted by the author leaves no doubt as to his identity.
Berne Convention, supra note 1, art. 15, para. 1, at 93.
\item \textsuperscript{98} Comment 15.4 states:
Note that the Convention merely says that, unless the contrary is proved, the author is the person whose name appears as such on the work. It goes no further and thus leaves member countries free to make their own rules on the subject. This is of some importance in connection with works made in the course of their creator's employment by someone else (whether an individual or a legal entity) and with commissioned works.
Berne Convention, supra note 1, art. 15, para. 1, comment 15.4, at 93. And further, comment 1.16 states:
The Convention speaks of "the rights of authors in their works" but it does not specifically define the word "author" because on this point too, national laws diverge widely, some recognising [sic] only natural persons as authors, while others treat certain legal entities as copyright owners, some imposing conditions for the recognition of authorship which others do not accept.
Berne Convention, supra note 1, art. 1, comment 1.16, at 11; see also Ad Hoc Report, supra note 31, at 101(613) - 106(618).
\item \textsuperscript{99} Article 6bis states that the author has moral rights "[i]ndependently of [his] economic rights, and even after the transfer of the said rights." Berne Convention, supra note 1, art.
because of the limited kinds of works protected by the Act, the restriction of
the right of integrity to physical acts, and the nature of the right of attribu-
tion, it is possible to work out a compromise between the economic interests
of the employer and the moral rights of the employee-creator. Therefore,
there is no need for a categorical exclusion of works for hire from moral
rights protection.

In addition, the Act deals with the issue of joint authorship. The Act
establishes that joint authors are "co-owners" of the work, provides for
waiver of moral rights, and allows the waiver of one joint author to bind the
other joint author(s). This is a rather anomalous result because a jointly
authored painting could be destroyed without liability provided that one au-
thor executed a binding waiver. The rule adopted by the Act is unobjection-
able in the context of economic exploitation where the work is not physically
altered. In the context of moral rights, however, it is difficult to understand
why one author's evaluation of his personality should take precedence over
the other's, possibly causing irreparable harm to both.

D. Assignment and Waiver

The Act provides that moral rights can be waived in a written instrument
signed by the author. The waiver, however, must specifically identify the
work and the uses to which the waiver applies, and the waiver will cover
only those uses. WIPO's interpretation of article 6bis evinces concern for
protecting the author "against himself." A waiver provision would largely
undermine the purpose of federal moral rights legislation by eliminating
moral rights in situations of unequal bargaining power. Furthermore, the
stipulation of use is not much of a safeguard. For example, this provision
allows the enforcement of an agreement by which an artist waived all of his
moral rights regarding the use of the specifically identified work for exhibi-
tion purposes. Presumably, the other party is then free to change the color
of the work, as was done with the Calder mobile, and he is free not to
attribute the work to the artist in connection with its public exhibition. In-

6bis, para. 1, at 41; see also Ad Hoc Report, supra note 31, at 104(616) n.9 (the author retains
his moral rights even after he transfers his economic rights).
100. See discussion infra Part III D.
101. Visual Artists Rights Act of 1990 sec. 603(a), § 106A(b), (e) (to be codified at 17
U.S.C. § 106A(b), (e)).
(Dec. 1, 1990) (to be codified at 17 U.S.C. § 106A(e)(1)-(2)).
103. See infra notes 108-10 and accompanying text.
104. The Calder mobile was repainted and locked into the stationary position of a sculpture
by its owner. See N.Y. Times, Aug. 14, 1983, § 1, at 1, col. 5; Kernan, The Great Debate Over
deed, the Act itself evinces insecurity about the wisdom of the waiver provision by requiring a study on the use of waivers as part of the bill.\textsuperscript{105}

The Kennedy bill was consistent with moral rights theory and with article \textit{6bis} in not allowing the moral rights to be waived or assigned.\textsuperscript{106} Because moral rights are theoretically personal rights, or rights protective of the human personality, they fall into the category of rights which, in American law, has traditionally been subject to restraints on the freedom of contract, such as contracts of slavery and contracts to allow oneself to be physically beaten.\textsuperscript{107} Furthermore, because artists ordinarily have little or no bargaining power,\textsuperscript{108} they fall into another category that has traditionally been tolerant of restraints on freedom of contract.\textsuperscript{109} The Copyright Act itself, for example, makes the power of termination inalienable for this reason.\textsuperscript{110}

Article \textit{6bis}, although it does not expressly make the moral rights inalienable and nonwaivable, implies this result from the phrase, "[i]ndependently of the author's economic rights, and even after the transfer of the said rights."\textsuperscript{111} The official interpretation supports this implication by stating that "[t]his protects the author against himself and stops entrepreneurs from turning the moral right into an immoral one."\textsuperscript{112} Similarly, the French law

\begin{itemize}
\item \textsuperscript{105} Visual Artists Rights Act of 1990 sec. 608, § 608 (to be codified at 17 U.S.C. § 608). The final report must be completed no later than 5 years after enactment. \textit{Id.} sec. 608(a)(2), § 608(a)(2) (to be codified at 17 U.S.C. § 608(a)(2)).
\item \textsuperscript{106} S. 1198, \textit{supra} note 7, § 3(a) (Copyright Act proposed § 106A(e)). The Kennedy bill provided that after the author's death, moral rights can pass by will or by intestacy. The legatee or distributee, however, did not appear to be able to transfer the moral rights. \textit{Id.}
\item \textsuperscript{107} See, e.g., Calhoun v. Everman, 242 S.W.2d 100, 103-04 (Ky. 1951) ("The modern philosophy of the law is that a man may sell his services but not himself . . . ."); Hudson v. Craft, 33 Cal. 2d 654, 204 P.2d 1 (1949) (promoter of illegal boxing match liable for boxer's injuries despite boxer's consent).
\item \textsuperscript{108} Barbara Ringer, former Register of Copyrights, states that Congress provided for renewal because the lawmakers recognized that "author-publisher contracts must frequently be made at a time when the value of the work is unknown or conjectural and the author (regardless of his business ability) is necessarily in a poor bargaining position." Ringer, \textit{Renewal of Copyright}, in \textit{Studies on Copyright} (1960), \textit{excerpted} in A. LATMAN, R. GORMAN & J. GINSBURG, \textit{COPYRIGHT FOR THE EIGHTIES: CASES AND MATERIALS} 207 (2d ed. 1985). An example of the results of unequal bargaining power is the museum copyright licensing agreement. Some museums have gone so far as to require transfer of the entire copyright when only a few rights are necessary. Martin, \textit{Museum Copyright Licensing Agreements and Visual Artists}, 10 COLUM.-VLA J. LAW & ARTS 421, 436-437 (1986); see also DaSilva, \textit{Droit Moral and the Amoral Copyright: A Comparison of Artist's Rights in France and the United States}, 28 BULL. COPYRIGHT SOC'Y 1, 56 (1980) (artists' inferior bargaining power is only partially compensated when or if they gain well-known status).
\item \textsuperscript{109} \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 208 (1981).
\item \textsuperscript{110} See 17 U.S.C. § 203 (1988); see also H.R. REP. No. 1476, 94th Cong., 2d Sess. 124-25 (1976) (the right to affect a termination cannot be waived in advance, or contracted away).
\item \textsuperscript{111} Berne Convention, \textit{supra} note 1, art. \textit{6bis}, para. 1, at 41.
\item \textsuperscript{112} Berne Convention, \textit{supra} note 1, art. \textit{6bis}, para. 1, comment \textit{6bis.6}, at 42.
\end{itemize}
of authors declares that moral rights are inalienable.\textsuperscript{113} Henri Desbois, in his famous treatise on the French law of authors, states that allowing alienation would be tantamount to allowing "moral suicide."\textsuperscript{114}

Despite the categorical statements of the French statute and of the commentators, French cases have recognized that moral rights are waivable to a limited degree. In the case of the adaptation of a novel to the screen, for example, contracts limiting the scope of the novel author's right of creative control have been enforced.\textsuperscript{115} A contract by which the author of the novel absolutely waived his moral rights, however, would not be enforceable, nor would a contract by which the author purported to transfer his moral rights.\textsuperscript{116} The official comments to article 6bis also recognize that there is some flexibility in this regard.\textsuperscript{117} Thus, to be faithful to moral rights theory or to article 6bis, it is not necessary to bar the author from consenting to any violation of moral rights.

Because of the Act's narrow subject matter, "hard cases," such as adaptation and editing, do not arise. Therefore, an absolute prohibition against waiver and alienation is more easily justified. The art in buildings exception\textsuperscript{118} and the limitation of the right against destruction to works of recognized stature,\textsuperscript{119} which provide for certain practical considerations, further justify absolute inalienability and nonwaivability. Finally, because the artist cannot be legally bound by a waiver does not mean that he cannot consent to acts that are violations of moral rights.\textsuperscript{120}

\textsuperscript{113} Loi de 11 mars 1957 sur la propriete litteraire [hereinafter 1957 Law]. "Law of authors" is used instead of "copyright law," not only because it is more literally correct (droit d'auteur) but also because it more accurately describes the content of the law, which deals with moral rights in addition to the economic rights traditionally associated with copyright.

\textsuperscript{114} H. DESBOIS, LE DROIT D'AUTEUR EN FRANCE 470 (3rd ed. 1978).


\textsuperscript{116} See H. DESBOIS, supra note 114, at 470.

\textsuperscript{117} "[S]ome laws expressly lay down that the moral right cannot be assigned and that the author may not waive it. On this point, too, however, the courts have some freedom of action." Berne Convention, supra note 1, art. 6bis, para. 1, comment 6bis.6, at 42.

\textsuperscript{118} See supra text accompanying notes 42-54.


\textsuperscript{120} For example, if the author consents to the modification of his work, the modifier cannot be held liable for violation of moral rights as long as the consent is not withdrawn. Even then, although the modification cannot be carried out, the author might be liable for detrimental reliance. See infra note 241.
E. Duration

A major departure from article 6bis is the Act's limitation of the term of moral rights protection to the life of the author.121 Paragraph two of article 6bis provides that moral rights should last after the author's death at least until the expiration of the economic rights.122 In general, the term of copyright in the United States Copyright Act is the life of the author plus fifty years.123 Although paragraph two of article 6bis contains an "escape clause" that permits countries to provide that certain moral rights expire at the death of the author124 if the country's legislation at the time of the country's accession does not provide that all moral rights protection continues after the death of the author, this clause does not justify post-Berne Convention accession legislation for a shorter term. According to the official comment, this clause was intended to allow countries in the Anglo-American legal tradition to continue to depend upon common law doctrines, such as defamation, to protect moral rights even though they ordinarily expire at death.125 The Act, by contrast, is a post-accession legislative enactment to conform United States law to the requirements of article 6bis of the Berne Convention. The Kennedy and Kastenmeier bills provided the copyright

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121. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, sec. 603(a), §106A(d)(1) (Dec. 1, 1990) (to be codified at 17 U.S.C. § 106A(d)(1)). The term of moral rights is the same as the copyright term for works created before the effective date of the Act, if the works have not been transferred from the author. Id. sec. 603(a), § 106A(d)(2) (to be codified at 17 U.S.C. § 106A(d)(2)). In the case of joint authors, the moral rights last for the life of the last surviving author. Id. sec. 603(a), § 106A(d)(3) (to be codified at 17 U.S.C. § 106A(d)(3)). All moral rights terms run to the end of the calendar year. Id. sec. 603(a), § 106A(d)(4) (to be codified at 17 U.S.C. § 106A(d)(4)).

122. "The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed." Berne Convention, supra note 1, art. 6bis, para. 2, at 43.

123. 17 U.S.C. § 302(a) (1988). There are special terms for anonymous works, pseudonymous works, and works for hire. Id. § 302(c).

124. This "escape clause" provides:

However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

Berne Convention, supra note 1, art. 6bis, para. 2, at 43.

125. The official position is reflected in comment 6bis.10 which states:

This provision takes account of the practice of member countries with an Anglo-Saxon legal tradition, according to which the protection of the moral right is mainly a matter for the common law, and, in particular the law of defamation. This does not normally permit the bringing of an action after the death of the person defamed.

Berne Convention, supra note 1, art. 6bis, para. 1, comment 6bis.10, at 44.
term for moral rights, but this was changed at the suggestion of one of the members of the Senate Judiciary Committee.126

F. Remedies

In general, the Copyright Act provides for injunctions,127 impoundment or disposition of infringing articles,128 damages and profits,129 costs and attorneys' fees,130 and criminal penalties.131 The Visual Artists Rights Act generally adopted the remedies of the Copyright Act for moral rights,132 but excluded criminal penalties.133 Article 6bis(3) expressly states that remedies for moral rights violations "shall be governed by the legislation of the country where protection is claimed;"134 therefore, inquiry should be focused on whether the remedy provisions of the bills adequately deter violations and compensate adversely affected parties.

Unlike the Copyright Act, which provides criminal penalties for infringement of section 106 rights,135 the Visual Artists Rights Act does not provide for criminal penalties for infringement of moral rights.136 Criminal penalties, however, are probably not necessary for the enforcement of the moral rights provided by the Act. Because moral rights protect rights of personality, the proper analogy would be to common law or statutory actions, such as defamation or privacy, which are normally civil actions. By contrast, economic rights are analogous to property rights, which are usually protected

128. Id. § 503.
129. Id. § 504.
130. Id. § 505.
131. Id. § 506.
133. Id. sec. 606(b), § 506(f) (to be codified at 17 U.S.C. § 506(f)).
134. Berne Convention, supra note 1, art. 6bis, para. 3, at 44.
135. Section 506(a) of the Copyright Act makes it a crime to infringe a copyright "willfully and for purposes of commercial advantage or private financial gain," and sections 506(c)-(e) make it a crime (1) with fraudulent intent to place a false notice of copyright on any article or to distribute or import for public distribution articles bearing a knowingly false notice of copyright, (2) with fraudulent intent to remove or alter notice of copyright, and (3) knowingly to make a false representation of fact in an application for copyright registration or in any supporting written documents. For works of visual art, violations of section 506(a) carry a maximum penalty of $250,000 or one year in prison; violations of sections 506(c)-(e) carry a maximum penalty of $25,000. 17 U.S.C. § 506 (1988).
by both criminal and civil penalties.\textsuperscript{137} Sections 506(c) and (d) of the Copyright Act, however, basically provide for fines for fraudulent notice.\textsuperscript{138} Arguably, the same penalties should be provided for violations of the right of attribution, but these sections appear to protect fraud in connection with property rights rather than fraud in general. In a broad sense, defamation involves a fraud, but defamation is normally viewed as an injury to an interest rather than the deprivation of an asset; moreover, the person who is defamed is not the person who is deceived. Aside from these theoretical arguments, adequate civil remedies are probably sufficient to deter behavior violative of moral rights.\textsuperscript{139}

Adapting the Copyright Act's injunction remedy to the rights recognized in the Act should not present much of a problem, but the actual damages and profits provisions of the Copyright Act are ill-suited to moral rights. In the case of moral rights, compensation is for injury to personality, as in the case of the dignitary torts such as injury to reputation, humiliation, and outrage; the actual damages and profits provisions of the Copyright Act are aimed at injury to economic rights. Even the statutory damages provisions, which seem to be tailor-made for situations in which actual damages and profits are difficult to prove, present problems. For example, the statutory damages provisions of the Copyright Act can be criticized as setting too low a ceiling for monetary recovery. Although at first $100,000 might appear ample, the destruction of a painting of recognized stature would cause a loss considerably in excess of this amount if the injury bore any relation to the market value of the painting.\textsuperscript{140} Even if the market value of the work were modest, injury to honor and reputation might exceed this amount if the destroyed work were the artist's most famous, or only, work.\textsuperscript{141} These considerations make the framework of the statutory damages provisions of the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{137} Section 506(a) provides: "Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be punished as provided in section 2319 of title 18." 17 U.S.C. § 506(a) (1988). Chapter 113 of Title 18, under which 18 U.S.C. § 2319 (1988) falls, is captioned "Stolen Property."
\item \textsuperscript{138} 17 U.S.C. § 506 (c),(d) (1988).
\item \textsuperscript{139} Even regarding economic rights, criminal prosecutions are comparatively rare. N. Boorstyn, Copyright Law § 10:29 (1981).
\item \textsuperscript{140} The Wall Street Journal reported the sale of Vincent Van Gogh's sunflower painting at $39.9 million (Wall St. J., Dec. 11, 1987, § 1, at 22, col. 1.), while Van Gogh's painting "Irises" was reportedly sold for $53.9 million. (Wall St. J., Apr. 30, 1987, § 1, at 34).
\item \textsuperscript{141} In the case of complete destruction, there arguably can be no injury to the author's reputation because, unlike the case of a mutilated work where a viewer might form a bad impression of the author from the work, the work does not exist. Therefore, a viewer cannot receive a bad impression. Broadly speaking though, it seems that the destruction of the artist's most highly regarded work or of his entire opus would harm his reputation. See Merryman, The Refrigerator of Bernard Buffet, 27 Hastings L.J. 1023, 1035 (1976). Moreover, there can be recovery for injury to honor as well as to reputation.
\end{enumerate}
\end{footnotesize}
Copyright Act, aimed as they are at economic loss, particularly procrustean, although the instances of the intentional destruction of a famous and expensive work by its owner would be rare.  

G. **Preemption**

The Act contains a provision preempting those states’ rights that are equivalent to the rights recognized in the Act, insofar as the rights apply to works protected by the Act.  

Under a literal interpretation of this provision, preemption would not result in reduced national protection because the Act would only preempt rights that exactly corresponded to the rights recognized in the Act and only insofar as they applied to the same subject matter. Nevertheless, if the interpretation of similar language in section 301 of the Copyright Act is any guide, the Visual Artists Rights Act could preempt many useful provisions of state moral rights statutes. Although the meaning of “equivalent” in section 301 is a matter of some dispute, there is general agreement that the state created right need not be exactly coextensive with the federal right in order to be preempted.  

For example, this provision might preempt the right of faithful reproduction provided by some state statutes on the theory that in not recognizing this right, or in recognizing it only for a narrow range of reproductions, Congress implicitly disapproved of a broad right of faithful reproduction. If comprehensive federal protection of moral rights is to be achieved in stages, the nonpreemption provision of a former version of the Kennedy bill is preferable. That version provided that the bill would not preempt state moral rights protection under the common law or statute as long as the state statute did not diminish or prevent the exercise of the federal moral rights created by the bill. This kind of provision is common in federal legislation. In the absence of such a provision,

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142. Note that the Act does not confine moral rights liability to the owner of the work.  
145. The Kennedy bill states:  
Nothing in section 106a or subsection (d) of section 113 preempts the common law or statutes of any State except to the extent that such common law or statutes would diminish or prevent the exercise of the rights conferred by, or the implementation of, section 106a or subsection (d) of section 113.  
S. 1619, 100th Cong., 2d Sess. § 10 (1988) (version of this bill containing this provision was reported out of the full committee to the Senate Floor on October 17, 1988, but did not receive final action)(on file at the Catholic University Law Review).  
146. See, e.g., Federal Trade Commission Act: “Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law.” 15 U.S.C. § 57b(e) (1988); Fair Packaging and Labeling Act: “It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States ... which are less stringent than ... the requirements ... of this title ...” Id.
however, the preemption provision of the Act should be interpreted narrowly. Incrementalism and the lack of generalized language of the kind present in section 301 justify a narrow interpretation.\textsuperscript{147} For example, the preemption provision specifically excludes the longer term of protection found in many state statutes.\textsuperscript{148} Moreover, nonpreemption is consistent with the intent of Congress, which relied on the state statutes in concluding that the United States complied sufficiently with article 6bis to join the Berne Convention.\textsuperscript{149}

\textit{H. Miscellaneous Provisions}

The Act provides that when a work is modified because of the passage of time or the inherent nature of the materials, a violation of the right of modification does not occur.\textsuperscript{150} The Act also provides that modification of a work which is the result of conservation or of the presentation of a work, including lighting and placement, is not a violation of the right of integrity absent gross negligence.\textsuperscript{151}

The Act does not make registration a prerequisite for suit for violation of the moral rights nor for the recovery of statutory damages or attorney's fees.\textsuperscript{152} It also expressly makes moral rights subject to the fair use defense of section 107 of the Copyright Act,\textsuperscript{153} and does not authorize any government entity to violate the first amendment.\textsuperscript{154}

The last major section of the Act requires studies of the feasibility of resale royalties and of the effect of the waiver provision. The resale royalties provision directs the Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, to conduct a study on:

(A) a requirement that, after the first sale of a work of art, a royalty on any resale of the work, consisting of a percentage of the price, be paid to the author of the work; and

\begin{itemize}
  \item[147.] Section 301 not only preempts rights that are equivalent to the specific rights found in section 106, but also rights "within the general scope of copyright as specified by section 106." 17 U.S.C. § 301(a) (1988).
  \item[148.] Visual Artists Rights Act of 1990 sec. 605, § 301(f)(2)(C) (to be codified at 17 U.S.C. § 301(f)(2)(C)).
  \item[149.] H.R. REP. No. 609 100th Cong., 2d Sess. 34, 38 (1988).
  \item[151.] Id. sec. 603(a), § 106A(c)(2) (to be codified at 17 U.S.C. § 106A(c)(2)). This provision is inconsistent with the right of modification, which speaks only of "intentional" modification. Id. sec. 603(a), § 106A(a)(3)(A) (to be codified at 17 U.S.C. § 106A(a)(3)(A)).
  \item[152.] Id. sec. 606(c), §§ 411(a), 412 (to be codified at 17 U.S.C. §§ 411(a), 412).
  \item[153.] Id. sec. 607, § 107 (to be codified at 17 U.S.C. § 107). It is hard to imagine circumstances in which physical harm to the work itself would be fair use.
  \item[154.] Id. sec. 609, § 609 (to be codified at 17 U.S.C. § 609).
\end{itemize}
(B) other possible requirements that would achieve the objective of allowing an author of a work of art to share monetarily in the enhanced value of that work.\footnote{155}

The first concept, usually called "resale royalties," was a major substantive portion of the 1988 Kennedy bill as originally introduced,\footnote{156} but it was deleted and replaced with the study provision when it was voted out of committee. Under the Act, the Register has eighteen months to complete the study.

The Act also directs the Register to conduct a study on the extent to which moral rights have been waived under the waiver provision in the Act. The Register is required to submit a report on the progress of the study two years after enactment, with the final report due five years from enactment.\footnote{157}

The moral rights provisions of the Act take effect six months after enactment, but the feasibility study takes effect upon enactment.\footnote{158} Moral rights apply to all works created after the effective date of the Act, and to works created before the effective date of the Act whose copyrights have not been transferred from the author. There is an exception for the right of integrity. It cannot be violated by acts that occurred before the effective date of the Act.\footnote{159} In other words, all works created before the effective date of the Act, whose copyrights were transferred from the author, have no moral rights protection under the Act. Furthermore, even after the effective date of the Act, there is no cause of action for acts violative of the right of integrity that occurred prior to the effective date if the acts pertained to works created before the effective date of the Act. Under these circumstances, there is no cause of action even if the copyright had never been transferred from the author. There would be a cause of action, however, for acts violative of the right of attribution committed before the effective date of the Act if the acts were related to works whose copyrights were not transferred from the author. The transfer of a copy of a work or the transfer of the copyright in a work does not affect moral rights nor does the waiver of moral rights affect the transfer of a copy or the copyright.\footnote{160}

\footnote{155} Id. sec. 608(b)(1)(A), § 608(b)(1)(A) (to be codified at 17 U.S.C. § 608(b)(1)(A)).  
\footnote{156} S. 1619, supra note 9, § 3.  
\footnote{157} Visual Artists Rights Act of 1990 sec. 608(a), § 608(a) (to be codified at 17 U.S.C. § 608(a)).  
\footnote{158} Id. sec. 610(a), (c), § 610(a), (c) (to be codified at 17 U.S.C. § 610(a), (c)).  
\footnote{159} Id. sec. 610(b), § 610(b) (to be codified at 17 U.S.C. § 610(b)).  
\footnote{160} Id. sec. 603(a), § 106A(e)(2) (to be codified at 17 U.S.C. § 106A(e)(2)).
III. TOWARD FEDERAL MORAL RIGHTS PROTECTION FOR VISUAL ART

The foregoing discussion of the Act gives an appreciation of the realm of the possible regarding federal moral rights legislation. The Act suggests that, unlike the British Parliament which recently passed comprehensive moral rights legislation, American lawmakers favor an incremental approach to federal moral rights legislation which proceeds by subject matter, starting with the visual arts. Thus, the outline of federal moral rights legislation that follows confines itself to this general subject area, although it does not slavishly follow the Act’s definition. The Act also indicates a willingness to consider the rights of attribution and respect. As delineated in the Act, however, these rights are not as comprehensive as those envisioned by article 6bis and moral rights theory. The outline of model legislation suggested below goes beyond the narrowly defined rights of the Act to reflect more closely article 6bis. Where article 6bis is unclear, the model is supplemented by moral rights theory. Although the Act allows waivers of moral rights, the requirement of a study of the effect of this provision, plus the non-waiver provision of the Kennedy bill, suggest that the no-waiver position is still viable. Furthermore, given the adoption of the copyright term by the Kennedy and Kastenmeier bills and the last minute insistence on the life term, it seems that the copyright term has political support.

A. Works Protected

Ideally, all works that evidence artistic creativity should receive moral rights protection. Article 6bis, for example, applies broadly to “literary and artistic works”; the French Law of March 11, 1957 applies moral rights to “all works of the mind”; and the recent British statute recognizes moral rights in “the author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film.” American legislative activity, however, has been confined generally to works of visual art. Although comprehensive protection is more desirable, it is not objectionable

162. Berne Convention, supra note 1, art. 2, para. 1, at 12.
163. 1957 Law, supra note 113, art. 2.
to begin the process by concentrating on works of visual art, which represent
the classic case for moral rights protection.

As far as the physical integrity of a work is concerned, the most basic kind
of protection for works of visual art would be limited to one-of-a-kind works
that would be lost when physical changes affect the material object in
which the work is embodied. This criterion is easy to apply to a Van Gogh
oil painting or to Michelangelo's "Pieta," but it becomes attenuated when
applied to prints, multiple cast sculptures, and photographs. This difficulty
also exists with regard to reproductions of paintings, drawings, and sculpt-
ures not produced in multiples. The Act, however, extends protection not
only to single copies, but also to limited editions of 200 or fewer prints,
esculptures, photographs, paintings, and drawings as long as they are signed
and consecutively numbered by the author. Although this strains the ir-
replaceability criterion, it would be self-defeating to criticize the Act for not
rigidly adhering to the irreplaceability requirement because article 6bis
would protect any number of prints and photographs and any number of
sculptures produced in multiples as well as reproductions of paintings, draw-
ings, and sculptures not produced in multiples.

It may be pointed out, however, that the "limited edition" concept is awk-
ward when applied to reproductions of paintings, drawings, photographs,
and sculptures not produced in multiples. Furthermore, one wonders where
the number "200" came from. The figure does not seem to correspond with
the exhaustion point of a lithographic stone or a metal plate or a photo-
graphic negative, and surely more than 200 photographic reproductions of a
painting or drawing can be made without loss of quality. The signing and
numbering requirement does not seem to make much sense outside of prints
and sculpture produced in multiples, and in the case of photographs, the
"still photographic image produced for exhibition purposes" is fraught with
ambiguity, as we have seen.

Ideally, federal moral rights legislation should protect the fidelity of repro-
ductions of paintings, drawings, and sculptures not produced in multiples no
matter what the medium of reproduction. Such protection may not be
within the realm of the possible, however, given the very narrow category of

166. "Lost" should not be limited to total destruction. A one-of-a-kind work might be lost
through an irreparable physical alteration, for example, any physical change that cannot be
reversed so as to return the work to its original state. In such a case, the work might be "lost"
even if the change were not substantial.

to be codified at 17 U.S.C. § 101). In the case of multicast, carved or fabricated sculptures,
the signature may be replaced by some other identifying mark. In the case of photographs,
even single copies must be signed by the author.

168. See supra text accompanying note 34.
reproductions protected by the Act, and given the fact that the Act focuses on physical acts done to the work.\footnote{169} If complete protection is impossible, at least the very limited protection of reproductions ought to be retained. Because Congress seems bent on limiting prints, sculptures produced in multiples and photographs, the limited edition criteria of the Act seem as good as any. One might argue, however, that, because the limited edition concept is not usual for photographs, perhaps all photographic images signed by the author of the image ought to be protected.\footnote{170}

Model federal moral rights legislation, however, should avoid any limitation on protected works that depends on a court decision on artistic merit. A limitation as to artistic merit is one of the purposes of the "exhibition purposes only" qualification regarding photographs.\footnote{171} Specifically, the limitation is designed to exclude ordinary photographs such as snapshots. This anxiety about protecting pedestrian art is also evident in the "of recognized stature" limitation on the right against destruction. The concern also arises frequently in state enactments.\footnote{172} Aside from the inconsistency that the Act displays in protecting paintings, drawings, sculptures, photographs, and prints from physical acts other than destruction, regardless of artistic merit, such limitations are contrary to United States copyright law tradition, the Berne Convention, and moral rights theory.\footnote{173} Furthermore, neither French law\footnote{174} nor the recently enacted British statute\footnote{175} qualify moral rights based on artistic merit. Although artistic merit limitations could be explained as the result of confusion between protecting the author's moral rights and protecting the public's interest in art preservation, it is more likely that the limi-

\footnote{169. See supra text accompanying notes 35-38.}

\footnote{170. In a recent case dealing with the right to attribute to Ansel Adams photographic prints made from photographs taken by Adams, the court declared what makes a photograph an Adams original. The court stated that it was not enough that Adams had selected the subject, composed the shot, and set the exposure and focus. According to the court, Adams himself must have developed the negative. Furthermore, the print must be made from the original negative, using Adams' methods, and the reproduction printed using a special ink that Adams developed. Adams is famous for devising the "zone method" of exposing, developing, and printing black and white photographs. Adams v. Day Dream Publishing Inc., 75 A.B.A. J. 37, Oct. 1989, at 37, C-89-0873-WDK (C.D. Cal. 1989).}


\footnote{173. Supra notes 44-46.}

\footnote{174. 1957 Law, supra note 113, art. 2.}

\footnote{175. Copyright, Designs and Patents Act, 1988, ch. 48, § 12(1).}
tations were triggered by fears of an avalanche of litigation. Such fears, however, can be allayed by tinkering with remedy provisions to discourage nuisance lawsuits and lawsuits over insignificant works. Remedy provisions can be more finely tuned than can criteria regarding artistic merit, and remedy provisions have the further advantage of better predictability.176

B. Rights Recognized

The language of article 6bis requires recognition of the right of attribution and the right of respect.177 Although the right of attribution is expressed as merely the right to claim authorship,178 the official interpretation also clearly embraces the right to be anonymous, the right to use a pseudonym, the right to abandon anonymity and pseudonymity, and the right to prevent false or improper attribution of the author's name to a work.179 The right of respect gives the author the right to object to any derogatory action in relation to the work which would be prejudicial to his honor or reputation including, but not limited to, distortion, mutilation, or other modification.180 Therefore, the right of respect in article 6bis goes beyond a mere right to physical integrity. It does not, however, forbid all modifications or all derogatory treatment, only modifications or derogatory treatment that is prejudicial to the author's honor or reputation.181

1. Right of Respect

Despite the broad language of article 6bis, and despite the example of the British Act which recognizes a broad right to object to derogatory treatment of the work,182 United States legislation, both state and federal, describes the right of respect only in terms of particular acts such as defacement, distortion, mutilation, and alteration or modification,183 with occasional refer-

176. See discussion infra at Part III, G.
177. Berne Convention, supra note 1, art. 6bis, para. 1, at 41.
178. Id.
179. Berne Convention, supra note 1, art. 6bis, para. 1, comment 6bis.3.
180. The WIPO Guide notes: “At the Brussels Revision (1948) there was added ... the words 'or other derogatory action in relation to the said work' to emphasize that it is not only distortion, mutilation or modification which may damage the author's honour or reputation.” Berne Convention, supra note 1, art. 6bis, para. 1, comment 6bis.6, at 42.
181. From the very connotations of the terms, arguably all mutilations and distortions of the work would be prejudicial to the author's honor or reputation.
182. The right to object to derogatory treatment of the work is defined as any addition, deletion, alteration, or adaptation that amounts to a distortion or mutilation or is otherwise prejudicial to the honor or reputation of the author. Copyright, Designs and Patents Act, 1988, ch. 48, § 80, 80(2)(a) & (b).
ences to destruction and unfaithful reproduction. As with the kinds of works protected, this approach is acceptable as long as it is the first step toward comprehensive moral rights protection and does not preempt broader state rights.

The particular acts mentioned in the Act, when coupled with the subject matter, indicate that the Act focuses on protecting the physical integrity of irreplaceable works of visual art. Thus, the Act includes the right against modification, that is, the right against making any physical change to the work itself, and the right against destruction. Future federal moral rights legislation, however, should extend these rights to all works of visual art as defined above, regardless of artistic merit. Furthermore, if the focus is on irreplaceable works, physical changes made to the works themselves or their destruction should be presumed to be prejudicial to honor or reputation.

184. Destruction is mentioned in section 106A(a)(3)(B) of the Act, and in the following state statutes: CAL. CIV. CODE § 987(c); MASS. GEN. LAWS ANN. ch. 231, § 855(c); N.M STAT. ANN. § 13-4B-3(A); 73 PA. CONS. STAT. ANN. § 2104(a). Reproductions are mentioned in the following state statutes: LA. REV. STAT. ANN. §§ 51:2154(B), 2155(B); ME. REV. STAT. ANN. tit. 27, § 303(2) (1989) ("altered, defaced, mutilated or modified"); N.J. STAT. ANN. §§ 2A:24A-4, -6(b); N.Y. ARTS & CULT. AFF. LAW § 14.03(3)(b); R.I. GEN. LAWS §§ 5-62-3, -5(b).

185. This approach would not avoid the question of whether the removal of Richard Serra’s “Tilted Arc” would be a violation of the right of respect because it was not physically damaged. Arguably, it was “distorted,” because it was site-specific. N.Y. Times, Apr. 2, 1989 § 2, at 33, col. 1.

186. Visual Artists Rights Act of 1990 sec. 603(a), § 106A(a)(3)(A)-(B) (to be codified at 17 U.S.C. § 106A(a)(3)(A)-(B)). It would seem appropriate, however, to except from the right of physical integrity irreplaceable works of art that are created to be part of useful objects. By uniting his work with a useful object, the author cannot have a reasonable expectation that the physical integrity of the work will not be impaired by the use of the object.

187. Physical acts done to the work, such as cleaning, restoration, and preservation, would ordinarily not be violations of the right of physical integrity because they would not interfere with the work’s communication of the artist’s personality. These acts conceivably would be violations if, for example, the artist intended his work to age, as in the case of a metal sculpture. On the other hand, the right of physical integrity and the right against destruction could be violated by not taking steps to prevent inauthenticity when these steps would fall within the
Although article 6bis expressly deals with distortion, mutilation, and modification, neither the text nor the official comments mentions the right against destruction. This omission, however, does not justify cutting down the right of integrity to include merely the right against modification; the right against destruction can easily fit into "other derogatory action in relation to[ ] the said work." Moreover, it is not uncommon to find the right defined as a moral right. In addition to the Act, the right against destruction has recently been recognized in France, and it appears in four state moral rights statutes.

The initial reluctance to accept the right against destruction as a moral right in France probably stemmed from confusion as to whether moral rights only protected the author's reputation: if the work were completely destroyed, there was nothing to which to make odious reference. This conclusion, however, neglected to take into account the effect on the artist's reputation of the destruction of the artist's whole opus or his masterpiece. Further, it failed to appreciate that moral rights theory is also concerned with the author's "honor," that is, his right to have his work continuously and authentically express his personality.

Including the right against destruction in federal moral rights legislation, however, poses a problem of reconciliation with the Copyright Act because the right restricts the expectation of the owner of the material object in which the work is embodied to be able to dispose of it as he pleases, a right that is reflected in some sections of the Copyright Act. Nevertheless, one cannot maintain that Congress intended the property right in the material object to remain inviolable, because the Copyright Act also contains restrictions on the use of the material object in which a work is embodied.

duty of care for the particular work at issue. See discussion of knowledge and intent infra notes 209-10.

188. Berne Convention, supra note 1, art. 6bis, para. 1, at 41.
189. See supra note 84 and accompanying text.
190. CAL. CIV. CODE § 987(c) (West 1989); MASS. GEN. LAWS ANN. ch. 231, § 85S(c) (West 1989); N.M. STAT. ANN. § 13-4B-3(A) (1988); 73 PA. CONS. STAT. ANN. § 2104(a) (Purdon 1989).
192. See Merryman, supra note 141, at 1035.
193. Article 6bis expresses a concern with the author's "honor or reputation." Berne Convention, supra note 1, art. 6bis, para. 1, at 41 (emphasis added).
194. See, e.g., 17 U.S.C. § 109 (1988) (right to "sell or otherwise dispose of the possession" of copy or phonorecord; right to display copy publicly); id. § 202 (ownership of copyright distinct from ownership of material object).
195. Section 109 provides in relevant part:

[U]nless authorized by the owners of copyright in the sound recording and in the musical works embodied therein, the owner of a particular phonorecord may not, for
The rights to prepare derivative works and to copyright the new material in them also pose problems of reconciliation with the right to forbid any physical alteration of a work where the derivative work consists of the physical alteration of the work, such as painting a mustache on the Mona Lisa, or a physical and inextricable incorporation of the original into another work.\textsuperscript{196} If the author has transferred the copyright and the material object to someone else, there is a potential conflict between the author's right of integrity and the transferee's right to prepare a derivative work. Theoretically, even in the case of an irreplaceable work of visual art, it cannot be said that an irreversible, physical alteration can never be sufficiently creative to constitute an original work of authorship in its own right. Congress, however, should make the value choice of foregoing the creativity involved in physical alterations of irreplaceable works of visual art in favor of preservation. Indeed, in enacting the Visual Artists Rights Act, Congress has already implicitly done so.

The concept of moral rights expressed in article 6\textit{bis}, in addition to the right of physical integrity, includes the right of faithful reproduction.\textsuperscript{197} Copies of a work that are supposed to be reproductions of the original, but are needlessly\textsuperscript{198} unfaithful to the original, propagate a misimpression of the author's work, and may offend his honor and compromise his reputation. Ideally, federal moral rights legislation should recognize this right. In doing so, the legislation need not confine itself to irreplaceable works; the criterion of irreplaceability is irrelevant to guaranteeing the fidelity of reproductions.\textsuperscript{199} Faithful reproduction is, perhaps, the most fruitful area for expansion because the Act already protects certain reproductions.\textsuperscript{200}

\textsuperscript{196} A derivative work can be created without copying the original. Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341 (9th Cir. 1988); National Geographic Soc. v. Classified Geographic, Inc., 27 F. Supp. 655 (D. Mass. 1939). Nimmer, however, contends that "if the right to make derivative work[s] . . . has been infringed, then there is necessarily also an infringement of either the reproduction or performance rights." 2 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 8.09[A] at 8-113-14 (1988).

\textsuperscript{197} "Generally speaking, a person permitted to make use of a work (for example by reproducing or publicly performing it) may not change it either by deletion or by making additions." Berne Convention, supra note 1, art. 6\textit{bis}, para. 1, comment 6\textit{bis}.5, at 42.

\textsuperscript{198} Some changes may be necessary due to the medium of reproduction.

\textsuperscript{199} The problem of unfaithful reproduction of irreplaceable works of visual art is indistinguishable from unfaithful reproduction of other works of visual art and from motion pictures, which are created to be experienced in copies.

\textsuperscript{200} See supra text accompanying notes 35-38.
Although the Act bases protection on prejudice to honor or reputation,\(^{201}\) there is sufficient confusion about the purpose of moral rights, and the requirement of reputation damage is sufficiently common in state legislation as a qualification of the right of respect as well as the right of attribution to justify brief treatment.\(^{202}\) The imposition of an injury to reputation requirement, rather than honor or reputation, must confront the following objections: (1) it is contrary to article 6bis of the Berne Convention which protects "honor" as well as "reputation";\(^{203}\) (2) it is contrary to moral rights theory which is concerned about the effect of inauthenticity upon the author as well as upon others; and (3) it is not found in the moral rights provisions of the French and British statutes, neither of which require injury to reputation as a prerequisite for moral rights violations.\(^{204}\) At bottom, the injury to the author from violation of moral rights is not only to his reputation but also to his dignity, his autonomy as a person. Federal moral rights legislation should never be restricted to injury to reputation.

2. Right of Attribution

Model federal moral rights legislation for works of visual art ought to adopt the right of attribution as envisioned by article 6bis by recognizing: (1) the author's right to be identified as the author of his work; (2) the author's right not to be identified as author of a work that he did not create; (3) the author's right not to be identified as the author of his work if the work has undergone changes that violate the right of respect; (4) the author's right to anonymity and pseudonymity; and (5) the author's right to abandon anonymity and pseudonymity and to be known as the author under his real name.\(^{205}\) In the case of irreplaceable works, however, the right not to be

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\(^{202}\) In a former Kennedy bill, the right to prevent attribution was limited to material mutilations or alterations of the work that harm the author's reputation. S. 1619, 100th Cong., 2d Sess. § 3, 133 CONG. REC. S1502-03 (daily ed. Aug. 6, 1987). Four of the ten states that have moral rights statutes limit the right of respect by imposing a damage to reputation requirement. LA. REV. STAT. ANN. § 51:2153(3) (West 1989); ME. REV. STAT. ANN. tit. 27, § 303(3) (West 1989); N.J. STAT. ANN. § 2A:24A-4 (West 1989); N.Y. ARTS & CULT. AFF. LAW § 14.03(1) (McKinney 1989).

\(^{203}\) Berne Convention, supra note 1, art. 6bis, para. 1, at 41.

\(^{204}\) This is not to say that reputation is not an interest protected by moral rights. Indeed, some French moral rights cases give prominence to reputation protection. See Merryman, supra note 141, at 1030.

\(^{205}\) Ambiguity about anonymity and pseudonymity and whether they can be abandoned is a common shortcoming in proposed federal and existing state moral rights legislation. See supra text accompanying notes 69-71. See generally Damich, State "Moral Rights" Statutes: An Analysis and Critique, 13 COLUM.-VLA J. LAW & ARTS 291 (1989). Of the ten states that offer protection of moral rights by statute, nine recognize the right to disclaim authorship.
identified as the author of the work if the work has undergone changes that violate the right of respect effectively becomes the right not to be identified as the author where someone has physically altered the work. There is no need to show prejudice to honor or reputation.\(^{206}\) This result follows from the principle that any irreparable physical alteration results in the loss of the work when the work is irreplaceable.

Model federal legislation should also expressly deal with removal of attribution and the alternative of using a disclaimer. The author's right not to be identified as the author of a work that he did not create, and the author's right not to be identified as the author of his work if the work has been physically altered, should include the right to physically remove attribution from the work itself by such means as removing the signature from a painting. Where the work has been physically altered, the author should have the alternative of allowing attribution with a disclaimer. Indeed, the author should have the alternative of requiring attribution with a disclaimer to prevent someone from making a slight change in order to remove attribution.\(^{207}\)

Although model federal legislation ought to protect anonymity and pseudonymity and the right to abandon them, there are situations in which these rights ought to yield to conflicting interests. The right of anonymity should not be construed as the right to insist on becoming anonymous or pseudonymous at any time. To allow the author to exercise this right at any time conflicts with the author's right not to be identified as the author of his work, a right which is limited in the case of physical alterations to irreplaceable works. If a well-known artist suddenly decides that his painting should no longer be attributed to him, the value of the painting might be seriously affected.\(^{208}\) Thus, in the case of irreplaceable works of visual art, model...
legislation should balance the artist's right against the right of the owner of the work. This balance can be accomplished by forbidding the artist to change the original attribution if the author attributed it when the author first transferred the work. Where the original of an irreplaceable work of visual art has been irrevocably transferred and the artist previously manifested his intent to remain anonymous or to use a pseudonym, however, the artist should have the right to change his mind and be properly identified as the artist. Article 6bis, as officially interpreted, requires this result. In this case, injury to the owner of a work would be infrequent or minimal.

Finally, the author's right not to be identified as author of a work that is not his, and the author's right not to be identified as the author of his work if the work has been physically altered, should not be expressed solely in terms of the right to "prevent" attribution; it should be clear that the author has the right to sue for damages in these cases.

Although the Act does not provide comprehensive protection for reproductions, the reasoning that applies to the attribution of originals applies equally as well to reproductions. For example, if the right of attribution allows the author to prevent attribution where his work has been physically altered lest others form a misimpression of his work then the same right should apply in the case of unfaithful reproductions of his work because a misimpression can similarly result. Thus, even if the right of integrity is not extended to reproductions, and even though a right guaranteeing the fidelity of reproductions is not recognized, the right of attribution should apply to reproductions of works of visual art.

recognizes a right to be identified as author or director. Copyright, Designs and Patents Act, 1988, ch.48, § 77.

209. A method to determine the author's intention will also have to be created. For example, if the work is signed with his usual name, it should be conclusively presumed that the artist intended to be identified. Where the work is not signed, it might be rebuttably presumed that the artist intended not to be identified.

210. Legislation might provide that if the work is signed with a pseudonym such an intention is present.

211. Berne Convention, supra note 1, art. 6bis, para. 1, comment 6bis.3, at 41.

212. It may be, however, that the artist could not insist that his pseudonym be physically removed from the work. Moreover, the owner of the work might be permitted to expose the work publicly with both the pseudonym and the real name of the artist. See infra notes 239-42 for a discussion of the enforceability of contracts of nonattribution or misattribution.

213. See supra notes 58-67 and accompanying text.


215. Admittedly, there is a lesser expectation of authenticity in the case of a reproduction than in the case of the original.
In the case of reproductions that are faithful to the original, the author should have the right to be identified as the author on each copy. Moreover, if the original was intended to be anonymous or pseudonymous, the author should have the right to be anonymous or pseudonymous as to each copy insofar as this is practicable given the work to be reproduced and the medium. The author should also have the right to abandon anonymity or pseudonymity as to each copy even if that right has not been exercised as to the original. Once the work is reproduced, however, and attributed or not according to the wishes of the author, the author should not have the right to change his mind for that particular series of reproductions even though he would certainly be free to abandon anonymity and pseudonymity for future series. For unfaithful reproductions, the author should have the right to prevent public distribution or public display unless, at the author's option, reference to the author's name as author is removed or each copy contains a disclaimer.

C. Other Limitations

In addition to the major limitations regarding public exposure and injury to reputation, American moral rights legislation often contains: (1) requirements of intent and/or scienter; (2) special provisions about conservation, framing, and preservation; (3) provisions about natural changes and...

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216. The standard of fidelity should be: as close as reasonably possible to the original, given the medium of reproduction.

217. The party guilty of the unfaithful reproduction should not be allowed to publicly distribute or publicly display any copies over which he has control. If the owners distributed copies to the public, the owners would be liable for further public distribution or public display with knowledge that the reproduction is unfaithful. For example, where the copyright has been transferred from the first reproducer to another, and the unfaithful reproduction is reproduced, the second reproducer would also be liable for any knowing public distribution or display. See discussions of knowledge and intent, infra notes 218, 222-23; contracts, infra notes 237-43; work for hire, infra notes 229-33; and remedies, infra notes 256-66.


changes necessitated by different media; provisions dealing with works in buildings; and (5) fair use limitations.

Article 6bis does not limit violations of moral rights to intentional acts. Moral rights theory argues against such a limitation because, whether the act is intentional or negligent, the injury is sustained. The Act seems not to limit violations of the right of attribution to intentional or grossly negligent acts. In the case of the right of integrity, the Act seems to limit the right of modification to intentional acts, while, except for modification of a work by the passage of time, the inherent nature of the materials, and conservation, the Kastenmeier bill did not limit moral rights violations to intentional or grossly negligent acts. Model federal moral rights legislation should follow the Kastenmeier bill.

In the absence of an artistic quality test, however, drafters of model federal moral rights legislation may hesitate to impose a broad duty of care. Nevertheless, there is every reason to believe that courts will be as adept at judging violations of moral rights as they are at judging other torts. Allowing courts to judge moral rights on basic tort principles takes care of many of the concerns reflected in American moral rights legislation with greater flexibility than can be obtained through statutory language. For example, because courts consider the gravity of the harm in establishing the standard of conduct in tort law, courts can apply a lesser degree of care in the case of an amateurish painting of Elvis Presley on black velvet, as opposed to a painting by Jamie Wyeth, by considering the differences in the monetary values of the paintings. Similarly, because courts consider superior skill, knowledge, and intelligence in tort law, courts can hold an art dealer or a museum curator to a higher standard than an average person.


221. See, e.g., Visual Artists Rights Act of 1990 sec. 604, § 113(d) (to be codified at 17 U.S.C. § 113(d)); CAL. CIV. CODE § 987(h) (West Supp. 1991); CONN. GEN. STAT. ANN. § 42-116t(e) (West Supp. 1990); LA. REV. STAT. ANN. § 51:2155(F); MASS. GEN. LAWS ANN. ch. 231, § 855(h) (West Supp. 1990); N.M. STAT. ANN. § 13-4B-3(F), (G); 73 PA. CONS. STAT. ANN. § 2108.


223. The Act provides that the modification of a work which is the result of the passage of time or the inherent nature of the materials or conservation is not a violation of moral rights. It also provides that modification resulting from conservation or from public presentation is not a violation unless caused by gross negligence. Visual Artists Rights Act, sec. 603(a), § 106A(c), (c)(2) (to be codified at 17 U.S.C. § 106A(c), (c)(2)).

224. See discussion supra in Part II, B.2.
Thus, the courts would take care of many of the concerns reflected in the provisions about framing, conservation and preservation, and the provisions about natural changes, absent special provisions.225

Reconciling the interests of building owners and the authors of artwork installed in these buildings is complicated enough to justify special provisions dealing with this problem. The provisions of the Act have already been discussed, and that discussion identified more appropriate provisions.226 In summary, for works that cannot be removed without a violation of the right of integrity, the exemption from liability for modification and destruction should largely be confined to the act of removal. For works that can be removed without a violation of the right of integrity, freedom to modify or destroy ought to depend upon the unavailability of alternative uses.

The Act provides for the application of the fair use doctrine to moral rights.227 The application of the fair use doctrine is inappropriate in the case of the right of integrity as applied to irreplaceable works, and in the case of the right of attribution. It is hard to imagine how the destruction or physical alteration of the original would be a fair use when the user could make the same point by destroying or altering a reproduction instead.228

D. Persons Protected

The two important issues that arise concerning who may assert moral rights are: (1) the work for hire doctrine; and (2) the problem of joint authorship. The work for hire doctrine grants the status of author to the employer rather than to the employee-creator when the employee creates the work in the course of his employment, and to the commissioning party rather than to the creator for certain commissioned works.229 By virtue of their status as authors, the employer and the commissioning party are also the owners of copyright in the first instance. Thus, if moral rights are granted to the author as part of the Copyright Act, someone other than the creator of the work might exercise the moral rights — a result antithetical to moral rights theory — unless some special provision is made. The granting of the economic rights to someone other than the actual creator of the work, however, is not inconsistent with moral rights theory. Article 6bis, for ex-

225. See supra note 223. Note, however, that a heightened duty of care rather than liability for gross negligence would result for art dealers, conservators, etc.
226. See supra notes 47-57 and accompanying text.
229. Supra note 93.
ample, recognizes that moral rights are independent of economic rights, and French law has bifurcated moral and economic rights regarding computer programs.

American moral rights legislation has generally rejected both the work for hire doctrine and moral rights theory by not recognizing moral rights at all in works created in an employer-employee relationship, or in works created for advertising, trade, or commercial use. Thus, neither the employer nor the employee can assert moral rights. The British Act also provides certain exceptions to moral rights for works produced in the course of employment, and for films of which the author is the director’s employer. The urge to depart from strict moral rights theory in these instances arises from the need to locate the control and direction of the creative process in the one who is bearing the financial risk, and from the need to be able to adapt the work to changing uses and circumstances after public exposure.

For all works of visual art, there is nothing inherent in the employer-employee relationship that necessitates denial of the right of attribution as structured in this Article where there is no question of the integrity of the work. An exception to this principle arises when attribution is impractical because, for example, of the nature of the medium or the size of the object. For irreplaceable works of visual art created by an employee, the employee would have the right to abandon pseudonymity and anonymity at any time with respect to that work. The employee, however, would not be able to prevent attribution once her real name had been attributed to the work and where the work had not been altered. For reproductions of works of visual art, there is no question of the integrity of the work. The right to object to derogatory treatment cannot be asserted against the copyright owner in the case of works produced in the course of employment and works in which the director’s employer is considered author of the work, unless the author or director is identified at the time of the relevant act or the author or director has been identified in or on published copies of the work, but even in that case the right is not infringed if there is a sufficient disclaimer.

230. Berne Convention, supra note 1, art. 6bis, para. 1, at 41.

231. The work for hire concept only occurs in French law for certain collective works and for computer programs, but only with regard to economic rights. See Damich, supra note 205, at 320-21.


233. The right to be identified as author or director does not apply to anything done by the copyright owner of a work where copyright in the work originally vested in the author’s employer by reason of works produced in the course of employment, or where copyright originally vested in the director’s employer. Copyright, Designs and Patents Act, 1988, ch. 48, § 79(3). The right to object to derogatory treatment cannot be asserted against the copyright owner in the case of works produced in the course of employment and works in which the director’s employer is considered author of the work, unless the author or director is identified at the time of the relevant act or the author or director has been identified in or on published copies of the work, but even in that case the right is not infringed if there is a sufficient disclaimer. Id. at § 82(2).
art where there is no question of the integrity of the work, the rule would essentially be the same except that the employee could not insist on a change of attribution for reproductions or copies already produced.

The right of attribution for works created in the employer-employee relationship and later altered is best understood in tandem with the components of the right of respect. To preserve the employer’s control over the ultimate appearance of the work, the right of physical integrity cannot apply until after the work has been exposed to the public. For example, an artist-employee cannot sue the employer for changes that the employer made to the artist’s work before that time. The artist-employee, however, can assert his right of nonattribution or disclaimer so that the work of which the artist does not approve will not be represented to the public as the artist’s.

In the case of an irreplaceable work of visual art, however, once the public views the work, the right of physical integrity that forbids any physical change should apply in the employer-employee context with equal force. Therefore, the artist-employee can prevent further public distribution or display of the work if it has been altered. In the alternative, the artist should have the right: (1) to allow the work to be publicly exposed without attribution, or with attribution but with a disclaimer; or (2) even if the work is not publicly exposed, to physically remove any attribution that might appear on the work.

For a commissioned work that meets the work for hire definition of the Copyright Act, the rights of attribution and respect should be the same as in the employer-employee context. For commissioned works that are not works made for hire, however, the right of physical integrity should attach to commissioned works that are irreplaceable works of visual art even before public exposure. Thus, where a drawing is submitted as a pictorial illustration to accompany a literary text, and where there is no agreement that the illustration will be a work made for hire, the publisher is not authorized to make physical changes to the drawing itself without the consent of the author; the publisher could, however, make physical changes on a reproduction of the drawing, such as a photographic plate.

As the above discussion indicates, the right of attribution and the right of respect are not necessarily incompatible with the policies underlying the work for hire doctrine. The only exception to the moral rights scheme set out in this Article that is necessary to further the policy of total control over the creative process is not recognizing the right of physical integrity for irreplaceable works of visual art until the work is exposed to the public. No significant changes in the right of attribution are required to carry out the policies of the work for hire doctrine.
The Act recognizes that joint authors can share in the moral rights by virtue of their creative input, just as they share in the economic rights of copyright. Designating the joint authors of a work can be accomplished by using the creative contribution test that copyright law traditionally uses. How the joint authors can exercise their rights, however, is more problematic. It would seem to follow from moral rights theory that one joint author cannot exercise his moral rights to the detriment of the other. This principle is more workable in the case of the right of attribution because attribution can be independently exercised. In the case of the right of respect, an irreplaceable work cannot be physically altered or destroyed without the consent of all joint authors. Allowing one author to waive the rights of all other authors is a serious deficiency in the Act.

E. Assignment, Waiver, and Consent

The assignment and waiver of moral rights must be closely scrutinized to protect the creative personality which is the foundation of moral rights. Thus, moral rights cannot be assigned during the author's lifetime because moral rights should not be exercisable by persons other than the author. The question of whether their exercise can be subject to a binding waiver by the author himself, however, depends upon the kinds of rights recognized and the works protected. For irreplaceable works of the visual arts, for example, there arguably cannot be binding consent to a physical alteration of the work because courts should not be in the position of forcing the author to violate his own personality when he no longer wishes to do so. On the other hand, if the author consents and the consentee changes his position in reliance, then the author should not be able to repudiate his consent without indemnifying the consentee for the costs of his reliance, and the author should not be able to repudiate his consent once the act has been perpetrated. Of course, if the author owns the irreplaceable work, then he would


235. See generally 6 M. Nimmer & D. Nimmer, Nimmer on Copyright § 6.07 (1989) (a person seeking joint authorship must demonstrate that he worked in collaboration with the other author or authors in furtherance of a common design, and that the contribution made was more than de minimis).

236. See supra text accompanying note 101.

237. See discussion supra notes 102-20 and accompanying text.

238. If moral rights are assignable, then there is always the possibility that they were assigned for money rather than because the author reposed particular confidence in the assignee to protect the author's moral rights.
be able to alter or destroy it as long as such alteration or destruction does not impair the rights of others in the work.\textsuperscript{239}

Generally, waivers of the right of attribution should not be enforceable against the author.\textsuperscript{240} If an author makes an unenforceable agreement, however, then the promisee should be able to rely upon the agreement until he is notified of revocation. If the promisee has relied to his detriment, then the author should be required to reimburse him, even if only to enforce the agreement to some extent.\textsuperscript{241} For example, despite an agreement to the contrary, the author can insist on proper attribution where he has promised to remain anonymous or to use a pseudonym, as long as the promisee is protected in his reliance.\textsuperscript{242} The moral rights scheme suggested in this Article, however, does not give the author the right to become anonymous or pseudonymous once his work has been properly attributed with his express or implied consent.\textsuperscript{243} The general rule regarding nonwaiver of the right of attribution should also apply where the right of respect has been violated. The artist, however, should not be able to repudiate agreements regarding attribution if the agreements are made after the artist has seen and approved of the physical changes.

The article 6bis requirement that moral rights last post mortem at least until the expiration of the economic rights\textsuperscript{244} raises the question of alienation because one must determine who inherits the power to exercise the moral

\textsuperscript{239} For example, if the author had lent his painting to a museum for a definite period of time, he would not be able to alter or destroy it while it was still in the museum's possession without the museum's consent.

\textsuperscript{240} Waivers of the right of attribution where there is no question of integrity would take the following forms: (1) agreements not to be attributed as the author where the work is to be unattributed; (2) agreements to allow the author's work to be attributed to someone else; (3) agreements requiring the author to use a pseudonym; (4) agreements not to abandon anonymity and pseudonymity; and (5) agreements not to abandon correct attribution in favor of anonymity and pseudonymity.

\textsuperscript{241} For example, if at the time the author revokes his consent, the promisee has already printed thousands of copies of a reproduction of a painting without proper attribution, relying on an agreement with the author of the original to do so, the court might allow the public distribution and display of those copies, but prohibit the making of any more.

\textsuperscript{242} The author's right to abandon anonymity and pseudonymity is expressly recognized in the official interpretation of article 6bis. Berne Convention, supra note 1, art. 6bis, para. 1, comment 6bis.3, at 41. It is unclear, however, whether an agreement to attribute the author's work to another would be enforceable. On the one hand, if the author cannot be held to anonymity or pseudonymity, why should she be held to an agreement whereby her work is attributed to some one else? On the other hand, making these agreements unenforceable would jeopardize accepted practices such as "ghost" writing (in the case of literary works). Diminishing the use of such practices, however, might be beneficial to society. See, e.g., Not Bright; Notebook—Joe Biden Plagiarism, 197 New Republic 10 (Oct. 5, 1987).

\textsuperscript{243} See discussion supra notes 205-12.

\textsuperscript{244} Berne Convention, supra note 1, art. 6bis, para. 2, at 43.
rights. In France, the author's moral rights are generally exercisable by the author's heirs. In the British Act, moral rights pass by testamentary disposition to whomever the author specifically directs, with the copyright if the copyright is part of the author's estate, and if neither of the above occurs, moral rights are exercisable by the author's personal representative. The Kennedy and Kastenmeier bills provided for post mortem disposition of moral rights by will or intestacy. The Act, however, generally limits moral rights to the life of the author. To allow moral rights to pass to the author's heirs by intestate succession or by testamentary disposition is appropriate. Should the author, however, be allowed to transfer moral rights to others? Allowing moral rights to pass to someone other than an heir would allow the author to sell his moral rights by contractually agreeing to make a will under which the moral rights would be transferred to another. This result is the same "vice" that prevents the inter vivos assignment of moral rights. The current Copyright Act reflects concern regarding this outcome. The Copyright Act limits the post mortem exercise of the power of termination to the author's surviving spouse and children, and makes the power of termination inalienable inter vivos.

On the other hand, although the author's spouse and children may be quite capable of acting in their own economic interest, they do not inherently have an interest in protecting the personal aspect of the deceased author's work. In addition, the author might have greater confidence in another author's ability to judge whether the deceased author's work has been distorted. Thus, model federal moral rights legislation might provide for testamentary transfer of moral rights to someone other than the author's spouse and children where the decedent has expressly so directed. In the absence of such direction, the moral rights should pass according to the scheme established for the power of termination in the Copyright Act, and

245. 1957 Law, supra note 113, art. 21.
246. Does this method of disposition mean that the personal representative can exercise the author's moral rights as long as he is the personal representative or as long as he lives, or can he dispose of it inter vivos or post mortem? The right to be identified as author or director and the right to object to derogatory treatment last as long as copyright. In Britain, copyright lasts for the lifetime of the author plus fifty years.
247. S. 1198, supra note 7, § 3(a); H.R. 2690, supra note 8, § 3(a).
249. See supra notes 102-20.
251. This would mean, e.g., that moral rights would not pass via a general residuary clause to the residuary legatee.
inter vivos contracts regarding will provisions that affect moral rights should not be enforceable.252

F. Duration

To comply with article 6bis, federal moral rights legislation should provide that the moral rights last as long as the economic rights, generally, for the life of the author plus fifty years.253 The Kennedy and Kastenmeier bills met this standard and half of the state statutes expressly meet it, but the Act does not.254

In France, moral rights are perpetual. Perpetual protection logically follows from moral rights theory because the work is not any less an expression of the author's personality as time passes. Perpetual protection is not foreign to American copyright law either. Perpetual copyright protection was available at common law for all unpublished works before the 1976 Act became effective.255 Under federal law, although the Copyright Clause of the United States Constitution speaks of "limited times," moral rights arguably are not strictly copyright rights, that is, economic rights. Therefore, moral rights could last in perpetuity. Furthermore, insofar as moral rights protection indirectly benefits art preservation, perpetual protection is appropriate. Because perpetual protection poses difficulties, however, and because the Berne Convention only requires that protection last until the expiration of the economic rights, federal moral rights legislation should at least meet the Berne Convention standard.

G. Remedies

Article 6bis leaves the means of redress for safeguarding moral rights to each country.256 Therefore, model federal legislation may choose any scheme that secures moral rights through effective remedies. The Act provides for injunctive relief. To secure the scheme of rights that this Article

252. Otherwise, the author could effectively alienate his moral rights for the post mortem period without the possibility of repenting of an anti-personal decision.

253. See supra notes 122-25.


255. Perpetual protection is, of course, still available insofar as common law copyright is not preempted. See 17 U.S.C. § 301 (1988).

256. Berne Convention, supra note 1, art. 6bis, para. 3, at 44.
suggests, courts should be able to issue injunctions against intended physical alterations of or destruction of irreplaceable works of visual art. Courts should also be able to enjoin the public display of such works when they have been physically altered. For the right of attribution, injunctive relief would amount to: (1) attributing the work; (2) preventing, removing, or disclaiming attribution of a work; or (3) preventing public exposure or removing a work from public exposure if the work violates the right of attribution.\textsuperscript{257}

Monetary damages should also be available when, for example, an irreplaceable work of visual art has been destroyed, making injunctive relief moot. Unlike injunctive relief, however, monetary damages raise the issue of intent and negligence, and the issue of the nature of the injury sustained. Insofar as the public exposure of the work violates the moral rights, monetary damages ought to be assessed only if the public exposure was intended, and if the person exposing the work knew or had reason to know that the work was altered. For irreplaceable works of visual art, where liability does not depend on intent, negligence should depend on traditional tort principles in establishing the duty of care.\textsuperscript{258}

Because a violation of moral rights is akin to a dignitary tort, adopting the damages provisions of the Copyright Act, which are aimed at economic loss, is inappropriate.\textsuperscript{259} When moral rights are violated, the personality of the author is injured. This concept is captured in the phrase "prejudicial to . . . honor or reputation" in article 6bis, and can best be understood by those familiar with the American legal system in terms of the dignitary torts such as defamation, invasion of privacy, intentional infliction of mental distress,

\textsuperscript{257} It has been suggested, however, that if an irreplaceable work of visual art has been physically altered, then the author could physically remove his attribution, for example, his signature, from the work whether or not the work is publicly exposed.

\textsuperscript{258} See discussion supra notes 222-25 and accompanying text.

\textsuperscript{259} While the Copyright Act equates the damages suffered by the owner with the profits gained by the infringer, the equation cannot be neatly balanced for the loss and gain of honor or reputation between the author and one who violates his or her moral rights. Section 504 of the Copyright Act provides in relevant part:

The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

assault, and battery.\textsuperscript{260} In many defamation cases, and to a large extent in
the other dignitary torts, plaintiffs have been able to recover substantial
damages even though no economic, physical, or other definite kind of harm
has been shown.\textsuperscript{261} Thus, the amount of damages reflects a rough assess-
ment of the degree of humiliation, outrage, and emotional distress suffered
by the plaintiff.

Although monetary awards for dignitary offenses are a traditional part of
American jurisprudence, the imprecision of awarding monetary damages for
the author's humiliation, outrage, and emotional distress because of a viola-
tion of moral rights, without any proof of actual injury, probably adds to the
anxiety surrounding excess litigation. This anxiety manifests itself in limita-
tions such as the "of recognized stature" criterion in the Act.\textsuperscript{262} Courts
have not awarded monetary damages in these cases in an entirely arbitrary
and irrational manner, however. Rather, courts have focused on factors
such as whether the tort was committed publicly, the nature, motive, and
extent of the defendant's conduct, and the plaintiff's own motives and mis-
behavior.\textsuperscript{263} In the case of moral rights, relevant factors should include the
following: (1) the degree of public exposure; (2) whether the work altered is
the original or one of many existing copies;\textsuperscript{264} (3) whether the irreplaceable
work altered or destroyed is the sole work or the best work of the author;\textsuperscript{265}
(4) whether the defendant acted intentionally or negligently; (5) whether the
altered work was attributed; (6) whether association with the author was
disclaimed; (7) whether the author was readily available for consultation; (8)
whether less intrusive alternatives existed; (9) whether the defendant had the

\footnotesize
\textsuperscript{260} DOBBS, REMEDIES § 7.3 (1973). Other dignitary torts include false imprisonment,
malicious prosecution, alienation of affection, intentional interference with voting, invasion of
statutory civil rights. \textit{Id.}

\textsuperscript{261} \textit{Id.}

\textsuperscript{262} See supra notes 39-40.

\textsuperscript{263} See generally DOBBS, supra note 260, § 7.3. Although specific proof of emotional
harm is not necessary for a damages award in suits involving dignitary tort, emotional distress
is a strong component of any resulting damages award. Any evidence of publicity surrounding
the commission of the tort operates to aggravate the element of emotional distress. As for
punitive damages, the defendant's conduct dictates whether punitive damages should be
awarded; however, any evidence of the plaintiff's own misbehavior may mitigate, if not elimi-
nate, any punitive damage award.

\textsuperscript{264} If the general pattern of the Act is followed, there would be no cause of action for
violation of the right of integrity for reproductions, except for the limited editions mentioned
in the Act. See supra notes 166-70, 185-86. Damages for the right of attribution may vary,
however, depending on whether the violation occurs with regard to the original or a reproduc-
tion. See supra notes 213-16.

\textsuperscript{265} Note that whether the work is of recognized stature would here be reintroduced as a
factor in determining whether the work was the author's "best." Given its imprecision, it is
more appropriate that the "of recognized stature" factor influence the measure of damages
rather than determine whether there is a cause of action.
right to create a derivative work; and (10) the market value of the work.\textsuperscript{266} The application of these factors in measuring damages should alleviate anxiety about an avalanche of litigation by reducing the recovery for amateurish and pedestrian works and, thus, the incentive to sue.

IV. SUMMARY AND CONCLUSION

Strictly speaking, the Visual Artists Rights Act of 1990 does not meet the requirements of the Berne Convention because it does not recognize moral rights in all literary and artistic works, and because it does not recognize rights in the same scope as article 6bis. Nevertheless, in recognizing the right of attribution and the right of respect in works of visual art insofar as physical integrity is concerned, the Act is a step in the right direction. An incremental approach to fulfilling our Berne Convention obligations is acceptable, as long as it is honestly perceived as incremental rather than a complete fulfillment of our Berne Convention obligations, and as long as the approach does not preempt the more comprehensive protection of state statutes and common law.

The increment represented by the Act is, however, too modest. The Act protects a very narrow range of works of visual art, and falls short of the requirements of article 6bis in other respects. For example, it does not protect against unfaithful reproduction, it does not recognize the right to remain anonymous or to use a pseudonym, and it only protects works “of recognized stature” from destruction. In addition, the Act allows moral rights to be waived and limits the term of moral rights to the life of the author.

The outline of federal moral rights legislation for the visual arts suggested in this Article more closely complies with article 6bis and moral rights theory, while taking into consideration the concerns that are reflected in the limited scope of the Act. This model federal legislation accepts, for example, Congress’s incremental approach by dealing only with the visual arts, but takes a broader approach to defining “visual art” in the case of the right of attribution by including reproductions. Furthermore, the model legislation does not limit subject matter coverage based on artistic merit.

The right of respect under the proposed model consists of three rights: (1) the right against any physical alteration of an irreplaceable work of visual art; (2) the right against destruction of any irreplaceable work of visual art; and (3) the right of faithful reproduction. There is no requirement to show

\textsuperscript{266} Note that the market value of the work cannot be the sole criterion because the market value is not equivalent to the humiliation or indignity suffered. It seems reasonable to assume, however, that the degree of humiliation and indignity suffered by the author might depend in part on the market value of the work.
prejudice to honor or reputation in the case of physical changes of irreplaceable works. There is also no artistic merit criterion.

The model legislation proposes a right of attribution consisting of: (1) the right against nonattribution and misattribution; (2) the right to be anonymous and to use a pseudonym; and (3) the right to abandon anonymity and pseudonymity. The author does not retain the right to become anonymous or pseudonymous once the work is publicly exposed with correct attribution, however, unless the work is an irreplaceable work of visual art that has been physically altered; in this case, the author could insist on nonattribution or on attribution with a disclaimer.267 The suggested scheme does not confine the right of attribution to the scope of the right of integrity for two reasons. First, the right of attribution does not impinge upon traditional personal property rights in the material object in which a work is embodied. Second, the right of attribution is akin to the law of unfair trade practices, which traditionally protects against deceit, mistake, and customer confusion. Thus, the suggested scheme allows the right of attribution to apply to reproductions.

Moral rights are authors' rights. Therefore, the proposed scheme recognizes moral rights in works made for hire once they have been publicly exposed, and it forbids the assignment of moral rights during the author's lifetime. The model recognizes moral rights for joint authors, but requires the consent of all joint authors to escape liability for violations of the right of integrity. Although the author may consent to acts that would be violations of moral rights, he cannot contractually bind himself to waive moral rights. The proposed scheme follows article 6bis in not requiring that moral rights extend beyond the copyright term, but serious consideration should be given to the possibility of perpetual protection for some kinds of works.268

Moral rights are akin to the dignitary torts such as defamation, invasion of privacy, intentional infliction of mental distress, assault, and battery. In line with traditional tort principles, the proposed scheme provides for liability for negligence that results in physical alteration of an irreplaceable work of visual art. The application of traditional tort principles should also result in a variation of the degree of care, depending on such factors as the market value of the work, expertise, and knowledge of the particular importance of the work to the author.

Tort principles also influence the amount of monetary damages under the proposed scheme. As a kind of dignitary tort, moral rights violations should

267. Arguably, the right of respect would also permit the author to prevent public display of a physically altered work.
268. The constitutional issue is not insurmountable. See supra note 255.
not depend on actual damages because, as in the case of defamation, often there will be none. But the absence of calculable damages under ordinary circumstances raises the spectre of outrageous awards. To meet both objections, the proposed scheme relies on the courts to assess damages in moral rights cases by considering all relevant factors as they have done with other dignitary torts.\footnote{269}

It is heartening to see serious Congressional interest in moral rights continuing in the wake of solemn pronouncements that moral rights were already sufficiently protected in the United States to comply with the requirements of the Berne Convention. Indeed, the passage of the Act is astounding when one considers visual artists' lack of organization and political clout. Such developments suggest that there is a compelling justness to properly crediting the creators of works of art, and to ensuring the authenticity of their creations, as well as to honestly fulfilling our treaty obligations. It is imperative, however, that those sympathetic to moral rights not rest on their laurels. The Act, as we have noted, has serious shortcomings. Future legislative activity is necessary to achieve the kind of comprehensive federal protection of moral rights in visual art that is outlined in this Article.

\footnote{269. One of these factors is the market value of the work. This factor should virtually eliminate huge recoveries for works of little artistic merit.}
SEC. 602. WORK OF VISUAL ART DEFINED

Section 101 of title 17, United States Code, is amended by inserting after the paragraph defining "widow" the following:

"A 'work of visual art' is—

"(1) a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of two hundred or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

"(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

"(A)(i) any poster, map globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

"(ii) any merchandizing item or advertising, promotional, descriptive, governing, or packaging material or container;

"(iii) any portion or part of any item described in clause (i) or (ii);

"(B) any work made for hire; or

"(C) any work not subject to copyright protection under this title."

SEC. 603. RIGHTS OF ATTRIBUTION AND INTEGRITY.

(a) RIGHTS OF ATTRIBUTION AND INTEGRITY.—Chapter 1 of title 17, United States Code, is amended by inserting after 106 the following new section:

"§ 106A. Rights of certain authors to attribution and integrity

"(a) RIGHTS OF ATTRIBUTION AND INTEGRITY.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

"(1) shall have the right—
“(A) to claim authorship of that work, and
“(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
“(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor reputation; and
“(3) subject to the limitations set forth in section 113(d), shall have the right—
“(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
“(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

“(b) SCOPE AND EXERCISE OF RIGHTS.—Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are coowners of the rights conferred by subsection (a) in that work.

“(c) EXCEPTIONS.—The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not distortion, mutilation, or other modification described in subsection (a)(3)(A).

“(2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

“(3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of ‘work of visual art’ in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).

“(d) DURATION OF RIGHTS.—(1) With respect to works of visual art created on or after the effective date set forth in section 9(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.
“(2) With respect to works of visual art created before the effective date set forth in section 9(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.

“(3) In the case of a joint work prepared by two or more authors, the rights conferred by subsection (a) shall endure for a term consisting of the life of the last surviving author.

“(4) All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.

“(e) Transfer and Waiver.—(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.

“(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may otherwise be agreed by the author in a written instrument signed by the author, a waiver of the rights conferred by subsection (a) with respect to a work of visual art shall not constitute a transfer of ownership of any copy of that work, or of ownership of a copyright or of any exclusive right under a copyright in that work.”

(b) Conforming Amendment.—The table of sections at the beginning of chapter 1 of title 17, United States Code, is amended by inserting after the item relating to section 106 the following new item:

“106A. Rights of certain authors to attribution and integrity.”.

SEC. 604. REMOVAL OF WORKS OF VISUAL ART FROM BUILDINGS.

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

“(d)(1) In a case in which—

“(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will
cause the destruction, distortion, mutilation, or other modification of
the work as described in section 106A(a)(3), and
“(B) the author consented to the installation of the work in the build-
ing either before the effective date set forth in section 9(a) of the Visual
Artists Rights Act of 1990, or in a written instrument executed on or
after such effective date that is signed by the owner of the building and
the author and that specifies that installation of the work may subject
the work to destruction, distortion, mutilation, or other modification,
by reason of its removal,
then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall
not apply.
“(2) If the owner of a building wishes to remove a work of visual art
which is a part of such building without the destruction, distortion, mutila-
tion, or other modification of the work as described in section 106A(a)(3),
the author's rights under paragraphs (2) and (3) of section 106A(a) shall
apply unless—
“(A) the owner has made a diligent, good faith attempt without success to
notify the author of the owner's intended action affecting the work of visual
art, or
“(B) the owner did provide such notice in writing and the person so noti-
fied failed, within 90 days after receiving such notice, either to remove the
work or to pay for its removal.
For purposes of subparagraph (A), an owner shall be presumed to have
made a diligent, good faith attempt to send notice if the owner sent such
notice by registered mail to the author at the most recent address of the
author that was recorded with the Registrar of Copyrights pursuant to para-
graph (3). If the work is removed at the expense of the author, title to that
copy of the work shall be deemed to be in the author.
“(3) The Register of Copyrights shall establish a system of records
whereby any author of a work of visual art that has been incorporated in or
made part of a building, may record his identity and address with the Copy-
right Office. The Register shall also establish procedures under which any
such author may update the information so recorded, and procedures under
which owners of buildings may record with the Copyright Office evidence of
their efforts to comply with this subsection.”.

SEC. 605. PREEMPTION

Section 301 of title 17, United States Code, is amended by adding at the
end the following:
“(f)(1) On or after the effective date set forth in section 9(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

“(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

“(A) any cause of action from undertaking commenced before the effective date set forth in section 9(a) of the Visual Artists Rights Act of 1990;

“(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or

“(C) activities violating legal or equitable rights which extend beyond the life of the author.”.

SEC. 606. INFRINGEMENT ACTIONS.

(a) IN GENERAL.—Section 501(a) of title 17, United States Code is amended—

(1) by inserting after “118” the following “or of the author as provided in section 106A(a)”; and

(2) by striking out “copyright.” and inserting in lieu thereof “copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a).”.

(b) EXCLUSION OF CRIMINAL PENALTIES.—Section 506 of title 17, United States Code, is amended by adding at the end thereof the following:

(f) RIGHTS OF ATTRIBUTION AND INTEGRITY.—Nothing in this section applies to infringement of the rights conferred by section 106A(a).”.

(c) REGISTRATION NOT A PREREQUISITE TO SUIT AND CERTAIN REMEDIES.—(1) Section 411(a) of title 17, United States Code, is amended in the first sentence by inserting after “United States” the following: “and an action brought for violation of the rights of the author under section 106A(a)”.

(2) Section 412 of title 17, United States Code, is amended by inserting “an action brought for a violation of the rights of the author under section 106A(a) or” after “other than”.

SEC. 607. FAIR USE
Section 107 of title 17, United States Code, is amended by striking out "section 106" and inserting in lieu thereof "section 106 and 106A".

SEC. 608. STUDIES BY COPYRIGHT OFFICE.

(a) Study on Waiver of Rights Provision.—

(1) Study.—The Register of Copyrights shall conduct a study on the extent to which rights conferred by subsection (a) of section 106A of title 17, United States Code, have been waived under subsection (e)(1) of such section.

(2) Report to Congress.—Not later than 2 years after the date of the enactment of this Act, the Register of Copyrights shall submit to Congress a report on the progress of the study conducted under paragraph (1). Not later than 5 years after such date of enactment, the Register of Copyrights shall submit to the Congress a final report on the results of the study conducted under paragraph (1), and any recommendations that the Register may have as a result of the study.

(b) Study on Resale Royalties.—

(1) Nature of Study.—The Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, shall conduct a study on the feasibility of implementing—

(A) a requirement that, after the first sale of a work of art, a royalty on any resale of the work, consisting of a percentage of the price, be paid to the author of the work; and

(B) other possible requirements that would achieve the objective of allowing an author of a work of art to share monetarily in the enhanced value of that work.

(2) Groups to be Consulted.—The study under paragraph (1) shall be conducted in consultation with other appropriate departments and agencies of the United States, foreign governments, and groups involved in the creation, exhibition, dissemination, and preservation of works of art, including artists, art dealers, collectors of fine art, and curators of art museums.

(3) Report to Congress.—Not later than 18 months after the date of the enactment of this Act, the Register of Copyrights shall submit to Congress a report containing the results of the study conducted under this subsection.

SEC. 609. FIRST AMENDMENT APPLICATION.

This title does not authorize any governmental entity to take any action or enforce restriction prohibited by the First Amendment to the Constitution of the United States.
SEC. 610. EFFECTIVE DATE.

(a) IN GENERAL.—Subject to subsection (b) and except as provided in subsection (c), this title and the amendments made by this title take effect 6 months after the date of the enactment of this Act.

(b) APPLICABILITY.—The rights created by section 106A of title 17, United States Code, shall apply to—

(1) works created before the effective date set forth in subsection (a) but title to which has not, as of such effective date, been transferred from the author, and

(2) works created on or after such effective date, but shall not apply to any destruction, distortion, mutilation, or other modification (as described in section 106A(a)(3) of such title) of any work which occurred before such effective date.

(c) SECTION 608.—Section 608 takes effect on the date of the enactment of this Act.