

## RESUSCITATING A COLLABORATION WITH MELVILLE NIMMER: MORAL RIGHTS AND BEYOND

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There are ways in which law is a set of illusions, and legal scholarship is about things which are *said* to happen, rather than really occur; where law is the expression of hope and passion rather than the embodiment of practical relationships. I have long thought that the area of intellectual property called "moral rights" or *droit moral* had these qualities of elegant fiction. Moral rights, in this special sense of art and literature, have to do with the personal and continuing involvement of the author or painter in a work of art, even after property owner shifts. Moral rights have to do, in their most dramatic manifestations, with physical changes in works of art—violence, deprecations, even the dissipation in integrity that inevitably comes with the passage of time. Moral rights are or can be violated when an artist's name is associated with a work that is not truly his or hers or when the work is represented as being the creation of another. Closely related are the issues that arise when a work is scarred or defaced, when it is reshaped or even placed in a hostile and unfriendly environment.

Authors have complained that their moral rights are violated when, for example, their films are cut, or where they are presented with interspersed commercials. Artists have complained of violations of moral rights when their work is improperly exhibited, or used as wallpaper, or where reproductions, as in slides, do not have the colors that inform the original. Sculptors have complained when works intended to be minor in scale are recast as monuments or when they are presented in material different from what the artist intended. Moral rights are implicated when works suffer the indignities of wear without conservation by the owner. Indeed, what is especially problematic about the *droit moral* is the inherent conflict between the person who owns the physical object (the painting, the sculpture) and the artist who is deemed to have some continuing interest in the thing. In an electronic world in which the altering and shaping of images is at the center of a new reality, the *droit moral* takes on new qualities demanding inquiry.

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This Occasional Paper laps at the edges of a suddenly more important *droit moral* by looking back at aspects of its historical setting. Thirty years ago, I was a young and eager new faculty member at the University of California, Los Angeles. One of the privileges of being on the faculty was the fact that one of my colleagues was the most distinguished copyright professor in the country, the late Melville B. Nimmer. In the late 1960s, Professor Nimmer was approached by the National Endowment of the Humanities to do a study of the exotic French (and European) rights, often called "neighbouring rights" that grace European arts law but were distant from our own. These rights included the *droit moral*, the *droit de suite*, clumsily translated into English as a resale royalties right, and even the *droit de fondation*, a kind of basket to collect royalties for works where there is no known author—anonymous or folk works—or even works that were in the public domain. That study led, for me, to one of my first law review articles, an essay on the historical grounding and experience of the *droit de suite*.<sup>1</sup>

More than that, the study led to a chance, in 1974, to work with Professor Nimmer on a report for the College Art Association on the *droit moral*. We were asked to write this report by Professor John Merryman of the Stanford Law School, then and now the reigning cultural property law scholar in the country, and Albert Elsen, the distinguished art historian at Stanford with whom Merryman collaborated in developing his course, and then his book, on art and the law. Professors Merryman and Elsen were seeking a report that would underlie and justify a recommendation by the College Art Association (the national aggregation of art historians, teaching artists and art educators) that federal legislation be enacted that would establish a *droit moral* in the United States. These great scholars were heartily and energetically against a *droit de suite*, as I recall, but just as enthusiastically were in favor of a legal regime—the *droit moral* that would honor more the role of the artist and the work of art itself.

The setting was one in which the United States was far from signing on to the Berne Convention, an international agreement to which we have since subscribed, and one of the main reasons was Berne's seeming requirement that member states have the functional equivalent of a moral rights regime. American reluctance may have had many roots, but one prime basis was the fear of the motion picture industry that an unwaivable moral right in an author might wreak havoc with derivative works, such as motion picture adaptations in which, famously, the

movie was never as good as the book. This was a setting in which there were also lots of stories—Calders being reconfigured at provincial airports, conceptual art or minimal art being mistreated in terms of installations at museums, the use of works of art in unappealing environments, like store window fashion displays, murals being redone to eliminate politically unacceptable figures, or even whitewashed to the point of disappearance. Even where there was no copyright violation, artists wanted a right to make a claim, to assert their very magical connection to art, to represent their work as above property.

If one wanted an authoritative view on this—or any question—in copyright, then Professor Nimmer would be the person to ask, even if he would bring along a junior colleague. He had published a definitive treatise on copyright law and was in demand across the country as a lawyer, brief writer, scholar, and teacher. He had a style that was clear and accessible, and a voice that was authoritative without being arrogant. He stood, usually, for sweet reason for law interpretations that were moderate, intelligent, or even, it might be said, established.

What is being printed here is the report that was prepared on the *droit moral* for the College Art Association. The report contained the material that Professors Elsen and Merryman wanted, but, in addition, it suggested shortcomings to the traditional moral rights approach and added some remedies not incorporated in historic *droit moral* jurisprudence.

I have thought, all these intervening years, about whether there was a way in which the paper could see the light of day. Undoubtedly, I have my special selfish reasons. Though I love copyright law, and once thought that it would be more central to my interests, I have not written in the field since those earlier days at UCLA. Second, it was a great honor to work with Mel Nimmer, and publishing a cooperative effort with him is like a little badge, a sign of having been somewhere wonderful, a memento. The paper, to me, is like a little scrapbook. And maybe I want to show it the way one wants to show favorite pictures of one's past.

I like the piece, as well, because it is so revealing of my own approach to scholarship, even at that early moment, and telling of the differences between Professor Nimmer's style and what was already emerging as my own. The reader will note that the essay is entitled "Moral Rights and Beyond." Professor Nimmer was largely responsible for (wrote) the section on Moral Rights; I was primarily responsible for "Beyond." Nimmer was the clear articulator of the law and legal principles as they existed. His emphasis was on trying to understand exactly what the

problem was and to suggest an approach to moral rights legislation which, with precision and economy, met just those areas that needed fixing.

I tried, on the other hand to show why the debate over moral rights did not necessarily ask the right questions or point in the right directions. With Professor Nimmer's permission, encouragement and sympathy, I addressed some of the questions that had remained from our earlier study for the National Endowment for the Humanities, including issues concerning public access to works of art and impediments to the contribution to museums by artists of their own works of art. We saw these issues as connected on some level of abstraction: They were part of thinking through the way in which art should be preserved and made available to the public that legislated for their benefit.

It could be said that the essay is outdated. An Appendix which collects a sample of moral rights cases from Europe is useful for its citations but a bit primitive in terms of our control over quality. More important, since 1975 when the Report was written, the United States, as mentioned, has become a signatory to the Berne Convention after a very interesting debate over whether additional moral rights legislation had to be enacted for American conformance to its requirements. Eleven states have passed their own moral rights legislation, starting with California and including New York. And there is a federal law, the Visual Artists Rights Act, which incorporates many elements of the *droit moral* at least as far as painters and sculptors are concerned.

Time has placed the first part of the essay in a kind of aspic. It is important, however, because it demonstrates the acuity of Professor Nimmer and how his view of the practical problems moral rights legislation presented could be narrowed through careful drafting and through an approach which made the *droit moral* available only to a certain class of creators, and waivable even by them. Those who are unfamiliar with the Visual Artists Rights Act can look at the extensive literature which has sprouted up since its enactment.<sup>2</sup> They can see that many of the issues remain the same: Should moral rights have a term that is the same as the copyright or different; should there be a moral right for destruction of works as opposed to other aspects of integrity; should only works of quality have protection? Professor Nimmer clearly and in his typically graceful treatise-style establishes a way of thinking about the *droit moral* that helps in understanding the post-VARA developments.

The second part of the article, that dealing with "Beyond," strikes my

somewhat oversympathetic eyes as still fairly interesting. The paper raises a question that I have always found haunting: If certain works are so valuable to the public that they should not be destroyed or harmed, if they are so valuable that they should not be moved across national boundaries, should they not also be made available for some degree of public access? Maybe art is just property and should be subject to no protections not available to an old lawnmower or a couch or set of shelves. All this is about the kind of religious awe in which art, icons of a civil religion, should have and where the line should be drawn in their protection and dedication to preservation.

The Appendices are interesting in the same way. The new Copyright Act was passed in 1976, and it did not have the amendments suggested.<sup>3</sup> It is still worthwhile to examine and compare the approach in the draft law included in Appendix A with VARA. There has, more or less, not been anything like the National Patrimony Act proposed in the Appendix. Some ideas, like restoring to artists the charitable deduction for the contribution of their works, are periodically discussed. Other elements of the National Patrimony Act proposal, like many other recommendations and proposals I have made in many different contexts, have hardly made it past the shelf on which they were stored. Ideas come cheap and are often worth little more than they cost.

I have decided to prefer nostalgia to caution and the autoerotic love of my own words (and their conjunction with Professor Nimmer's) over concerns about "sell by" dates. I have decided to compensate for any problems by taking portions of the original essay and then updating them to some extent, or at least indicating important developments that relate to the points raised in 1975. Still, there is a moral rights problem here. I am publishing this some twenty years after the fact, but Professor Nimmer who, much too soon, departed this mortal coil, is not available to indicate whether he thinks that publication is appropriate. I am not sure what question is the right one to put: The essay is best viewed as an artifact, a way of looking at moral rights proposal at a particular time, and a time now past. It is interesting for that reason, and, in retrospect, to test its suggestions against what has occurred since. It is in that spirit that it is presented here with elaborate interventions.

## ENDNOTES

1. Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of Droit de Suite*, 77 Yale L.J. 1333 (1968).

2. See Edward Damich, *The Visual Artists Rights Act of 1990: Toward a System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945 (1990); Robert Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 421 (1990); Robert Gorman, *Visual Artists Rights Act of 1990*, 38 J. COPYRIGHT SOC'Y U.S.A. 233 (1991); Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827 (1992).

3. When the essay was written, this Act had not been enacted. Thus, all the references were made to the Revision Bill, S. 1361, 93d Cong. 2d Sess.

## MORAL RIGHTS AND BEYOND: CONSIDERATIONS FOR THE COLLEGE ART ASSOCIATION

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The long-awaited general version of the United States Copyright Act appears at last to be imminent.<sup>1</sup> Although the proposed new law contains many changes beneficial to authors in general,<sup>2</sup> and to visual artists in particular,<sup>3</sup> there is a significant omission which deserves further consideration before the revision is set in statutory concrete. The copyright laws of the civil law countries include a doctrine known as *le droit moral*, or (translated into the plural) moral rights, which finds no counterpart under either the present or proposed revised American Copyright Act.<sup>4</sup> Under that doctrine an author is said to have the following rights:

1. The right of disclosure or publication.
2. The right to withdraw the work.
3. The right of paternity, i.e., the right to have one's name associated with the work as its author.
4. The right of integrity, i.e., the right to prevent distorting changes in the work.

Moral rights are regarded as personal rights (sometimes referred to as rights of personality) as distinguished from the economic rights of exploitation in the work. While the economic rights are clearly alienable, moral rights are regarded as inalienable in some,<sup>5</sup> but not all, states<sup>6</sup> which recognize the doctrine.

Of the four divisions of moral rights enumerated above, the first two need not concern us. The right of disclosure, or of first publication, is presently recognized under the American doctrine of common law copyright.<sup>7</sup> Upon adoption of the proposed general revision, that right, now a matter of state law, will be preempted so that the right of first publication will become a part of the Federal Copyright Act.<sup>8</sup>

The right to withdraw envisages a situation where an author concludes that his work is no longer acceptable to him, and he, therefore, wishes to withdraw it from public circulation. Clearly, there is no such right under American copyright law. But in a practical sense, neither is

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there such a right in those states which purport to recognize it. Art. 32 of the French Copyright Act<sup>9</sup> qualifies the right of withdrawal by requiring that the transferee subject to such withdrawal be indemnified for losses incurred by reason thereof. Whether because of this impediment, or due to a general judicial hostility to it, this right has remained almost totally theoretical in the moral rights nations.<sup>10</sup> In any event, it has been argued that in France the right is not applicable, even in theory, to the works of artists.<sup>11</sup>

There remain those aspects of the doctrine of moral rights which may be regarded as its core: the right of paternity and the right of integrity. Both of these rights have been widely recognized and applied in the moral rights jurisdictions. They have proved to be most meaningful for the artist.<sup>12</sup> These rights have also received some qualified recognition in American courts, but not under the copyright rubric. Thus, under what would be regarded in moral rights terms as a right of paternity, it has been held that one may not falsely attribute to an author a work which the author did not in fact create.<sup>13</sup> American courts have reached this result by variously applying the laws of unfair competition, defamation, and right of privacy. There is also some authority for the principle that an author's rights are violated if his work is falsely attributed to another.<sup>14</sup> It is not entirely clear, however, that American courts will generally enforce this principle.<sup>15</sup> Furthermore, if no element of misrepresentation is present, then absent a contractual right to credit, an author may not complain if his work is published or otherwise exploited without an attribution of his authorship.<sup>16</sup> In this respect,<sup>17</sup> the American right of paternity is seriously inferior to its European counterpart.<sup>18</sup>

The right of integrity, prohibiting distortion or truncation of a work, has also received some limited recognition in American courts under contract or unfair competition theories.<sup>19</sup> The parameters of the right are, however, rather vague,<sup>20</sup> and may be limited to the circumstance where the defendant is bound to accord authorship credit, and is therefore bound by implication not to change the work in such manner as to render such credit a false attribution.<sup>21</sup>

The Berne Convention requires its members to accord recognition to the moral rights of paternity and integrity.<sup>22</sup> It is, in part, for this reason that the United States has never joined Berne.<sup>23</sup> The Universal Copyright Convention, organized mainly for the purposes of including the United States in a multilateral treaty, does not require moral rights recognition. Why is there American opposition to the moral rights doc-



trine? It would appear that in the main, opposition is not based upon principle but rather upon practical difficulties which user groups envisage if the doctrine were to be formally incorporated in our law. How could one object in principle to the right of paternity? That an author should have the right to be identified as the source of his work and that no one else should be so identified is hardly debatable on the level of abstract principle. The right of integrity is hardly less worthy of recognition. It is not just the author's interest which is at issue, but that of the public as well. Professor Merryman has referred to the public's interest in seeing "the work as the artist intended it, undistorted and 'unimproved' by the unilateral actions of others... We yearn for the authentic, for contact with the work in its true version, and we resent and distrust anything that misrepresents it."<sup>24</sup> Again, on the level of abstract principle, the issue appears to be virtually undebatable.

Opposition to the recognition of moral rights within the United States has, in large part, emanated from the creators of derivative work,<sup>25</sup> particularly the motion picture industry.<sup>26</sup> When a novel is converted into motion picture form, alterations in the work must necessarily occur. It is true that often changes are dictated by the producer's perception of box office demands, by the director's own artistic bent, or by other factors. But even when the filmmakers wish to be completely faithful to the underlying work, the differences in medium between book and cinema necessarily dictate changes in content and structure. Yet, which particular changes are indeed required by medium differences, and which are merely the product of differing artistic (or commercial) judgments is obviously highly debatable. For this reason, although the right of integrity has been held not to prohibit changes required for adaptation to a different medium,<sup>27</sup> even those filmmakers who wish to be faithful to the underlying work are rendered uneasy by the prospect of moral rights legislation.

Similar problems arise in connection with the right of paternity. A derivative work, particularly when it is executed in a different medium, raises serious questions of accuracy in the designation of authorship. When a work is altered for use in a derivative form, difficult questions arise as to who in fact is the "author." The owner of the derivative work often encounters a dilemma if he is bound to recognize the right of paternity. He may incur liability if he fails to accord authorship credit to the author of the underlying work even if such work has been substantially changed in the derivative work.<sup>28</sup> But he may also incur liability if he does accord such authorship credit in circumstances where

the underlying author concludes that the changes render the work no longer his for credit purposes.<sup>29</sup>

These pragmatic considerations may account for the legislative and judicial reluctance to adopt the doctrine of moral rights in the American context. But this rationale for the rejection of moral rights ignores a vital distinction between literary and musical works on the one hand, and the pictorial and plastic arts on the other. The doctrine of moral rights in its European origin is generally applied equally to all copyrightable works, literary, musical, and artistic. Those who have argued against its American adoption have failed to note that the above pragmatic considerations have little or no relevance to paintings, graphics, and sculpture,<sup>30</sup> which are seldom incorporated in a derivative work.<sup>31</sup> When this does occur, the derivative work is often executed in the same medium as that in which the underlying work was originally executed. Even when executed in a different medium, the adaptation does not necessarily require a substantive change as is required when a literary work is adapted to a different medium. For example, a painting may be reproduced in an art book without the need to alter the painting in any perceptible manner.<sup>32</sup> This is not to say that changes are not in fact made in works of art when they are reproduced either in the original or in a derivative medium. It is the fact that such changes occur not infrequently that poses the need for the recognition of moral rights for the artist. The point is that such changes are not necessitated by the mere fact of incorporation in a derivative work as is often true of literary work. For the same reason, problems in paternity are not inherent in converting the plastic and pictorial arts into derivative works in the same or another medium.<sup>33</sup> Since required changes are minimal, determining authorship presents less of a problem. Thus, the pragmatic argument against moral rights described above, if persuasive with respect to literary (and perhaps musical) works, is inapposite with reference to the plastic and pictorial arts.

There is an important political corollary to the above. While there is substantial opposition by the motion picture industry and others to the adoption of moral rights with respect to literary works, there is no organized interest group likely to oppose moral rights legislation if such rights are limited in their scope to the plastic and pictorial arts. This, then, is the time to petition Congress to include such legislation in the Copyright Revision Bill. Appendix A contains, as part of suggested legislation, draft language that could be inserted in an amended copyright revision bill.

## BEYOND THE *DROIT MORAL*

The endorsement of a federal equivalent of the *droit moral*, as traditionally applied in Europe, should be accompanied by an evaluation of the extent to which public concerns about the integrity interest in works of art would be thereby protected. A discussion of these shortcomings may suggest supplementary legislative approaches. Indeed, the *droit moral* has four basic shortcomings:

- a) it does not protect many works the integrity of which is important;
- b) even as to protected works, the scope of the protection is limited;
- c) it is not availing where the heirs or assigns, or indeed, the artist is unwilling or unavailable to protect the integrity right; and
- d) it does not protect works against actions of government.

The first shortcoming involves coverage. A *droit moral* that is governed by the provisions of the revised copyright statute would protect works for the life of the artist plus fifty years.<sup>34</sup> Protection is not extended to works where there is no known authorship. Technical issues involving the status of works now in existence aside, it would mean that, few works created prior to 1900 would be protected. While there are many *droit moral* questions involving contemporary artists, a great threat to the integrity of works of art relates to more ancient pieces: the destruction of murals, the dismemberment of churches, and the separation of panels of important polyptychs. Folk art, for example, would also not receive enhanced protection.<sup>35</sup> To cite one famous case,<sup>36</sup> the Afro-A-Kom could be removed from its tribal context without disturbing the *droit moral* because, among other reasons, the religious figure was created by an unknown artist.

The second shortcoming relates to the scope of protection provided by the *droit moral* to those objects that are covered. The traditional *droit moral* does not cover certain rights of integrity that may be of great public importance. The most obvious of these rights is the right against destruction. It has been generally held (there are a few exceptions) that the *droit moral* protects an artist against the kind of damage to his or her work that would occur when the work is defaced or altered. But the right does not necessarily come into play when a work of art is destroyed.<sup>37</sup> That, according to some legal reasoning, is because the reputation interest is in the integrity of a work of art. If there is defacement, that integrity is impaired; if the work is obliterated, there is nothing to be impugned. Nor does the evolved *droit moral* include the right of an artist to obtain access to his or her work for the purpose of display,<sup>38</sup> of

enhancing reputation through exhibition.

A third shortcoming relates to the focus of responsibility for enforcement. If there is a public interest in maintaining the integrity of the work, reposing that interest in the artist alone may not be the best solution. Here, there is a quite basic issue. Is the *droit moral* advocated solely (or primarily) because of the right of the artist in his or her reputation? Or is the *droit moral* supported, in addition, because the public at large has an interest in certain values and sees the artist or the artist's heirs as efficient enforcers of those values? Put differently, when violence is done to a protected work, is it solely the artist and *his* reputation that is injured or is there an injury to the public at large? The answer does not have to be one interest or the other. But to the extent that the *droit moral* is designed to protect against public injuries, the selection of remedy and the identification of the enforcer become of great significance. For the *droit moral* to operate well as a mechanism for enforcing the public interest, a) the artist must be notified of the alteration or destruction of the work; b) the artist must be concerned enough to fight; and c) the artist must have the financial stamina to undertake a period of protest and perhaps litigation. And if the artist is deceased, the task falls to the heirs, if such exist. What if the artist is indifferent? What if the artist or the artist's heirs agree to accept compensation for the infringement of whatever moral rights exist and thereafter give permission for the destruction or defacement of the work of art? What if the heirs, though genetically related to the artist, do not have the artist's sensitivities and priorities?

Strict reliance on the artist or the artist's heirs is not sufficiently protective of the public's interests in the integrity of certain works of art.

The legal system of the United States has broadened the definition of who is injured by a particular act and who should be empowered to initiate therapeutic government action. There have been several techniques to achieve this broadening process. Public agencies have been enfranchised to enjoin the infliction of injuries or extract compensation for damages.<sup>39</sup> In other instances there has been a broadening of the class of persons with standing to complain of an action, thus rendering the actor more responsive.<sup>40</sup>

The *droit moral*, standing alone in its classic dress, adheres to the older mode. There is only one enforcer even though the class damaged may be more extensive. An example is a recent dispute over Brancusi sculptures. Sylvia Hochfield has written of the "unethical reproduction," in her view, of Brancusi's sculpture, including casts in a material that,

according to the article, Brancusi renounced. In reply, Brancusi's representative, Alexander Istrati, condemns the attack on the ground that he, as the person designated by the artist, is the extension of the personality of the artist and, therefore, by definition, cannot infringe Brancusi's right of authorship.<sup>41</sup> The *droit moral* would leave the decision as to the mode of casting a sculpture in the hands of the artist's representatives. If they are wrong, then the society is blighted with miscasts or casts of a different size or of a different mode. Should the heir be the controlling figure on these questions?

The College Art Association has the opportunity to attempt to define a broadened *droit moral* and to suggest legislative and administrative efforts that address deficiencies in the approaches that currently exist. The legislation in Appendix A seeks to point in that direction. On the other hand, to the extent that it is possible to define and secure the rights of the artist, that should be done promptly. For that reason, we have separated, in the draft statutory language, the traditional *droit moral* (which should become part of the revised Copyright Act) from a broadened approach (which may involve various other state and federal statutes). It is premature to state exactly what kind of supplemental legislation is needed; yet many of the areas for particular concern and examination can be described and a general approach outlined.

First, a broadly conceived *droit moral* should be concerned not only with the integrity of an individual work or an artist's oeuvre, but also with the integrity of what has come to be called the cultural patrimony. The public interest is to prevent violations to the integrity of that patrimony, whether or not they involve a physical defacement or other traditional *droit moral* violation. The cultural patrimony, moreover, may be national, international, state, or even regional. For example, French and English laws concerning the exportation of certain works of art without a license involve a national decision that it would be violative of the cultural patrimony of the nation for certain such works to be removed (without the opportunity for the state to purchase them).<sup>42</sup> The UNESCO Convention is a beginning effort at constructing remedies for international protection of the cultural patrimony, as is the bilateral treaty between the United States and Mexico concerning certain pre-Columbian objects.<sup>43</sup> There is, however, some sense of regional patrimonies and the desirability of protecting them against injury. Two recent disputes are illustrative. In Missouri, there has been public concern about the decision of a public institution holder of some important Bingham drawings, to sell them at auction. The ground for complaint

was that the Bingham drawings somehow "belonged" to the region, particularly since they were presently publicly accessible there. The transmutations of the Pasadena Museum of Modern Art raised similar concerns. Some citizens of Pasadena and the City Council had constructed a special kind of patrimony for the community. Given that patrimony, the question arose of the duties of the Board of Directors of the museum. Under what circumstances could the institution be converted to a totally different kind of museum? Could the conversion be one that did not recognize Pasadena as a relevant constituency or modern art the crux of its direction? Could works of art donated to build a museum of modern art be deaccessioned, sold, permanently transferred, or withheld from exhibition? Because there is no well-articulated broadened *droit moral*, nor a bank of decisions and experiences upon which to draw, the resolution of these disputes is fitful, reflecting the strengths and fears of competing interests rather than a debate over adherence to an agreed-upon principle.

A broadened *droit moral* should also address the destruction and deterioration of works of art. In the last several decades, there has been heightened attention to landmark preservation statutes and other devices directed primarily at architectural features. These statutes contain important elements of a *droit moral* as they are aimed at protecting, for the public, the integrity of certain categories of works of art. The literature concerning the landmark preservation statutes is quite rich,<sup>44</sup> as is the variety of such statutes themselves. But it is usually not the case that such statutes protect interior works of art, even such works (like murals) that are affixed to the building. There are few, if any, cases dealing with the use of landmark preservation statutes to protect such works as public sculptures.<sup>45</sup> And, as the cliff-hanging dispute over Grand Central Station suggests, even as to architecture that is clearly within the statute's range, protection is precarious. Landmark preservation statutes are activated primarily by decisions to raze or radically modify a building rather than by the deterioration of protected works. A broadened concept of the *droit moral* ought to be concerned with deterioration as well as destruction. Implicit, therefore, may be a duty on behalf of the owner to maintain a protected work of art in good repair. In some contexts this duty would have to be accompanied by public subsidy.<sup>46</sup>

A characteristic of the landmark preservation statutes critical for a broadened *droit moral* is that the determination of which objects are to be protected is vested in a public body rather than in the architect or other author of the work.<sup>47</sup> As the principle of the *droit moral* becomes



pervasive, as the cost and restrictions inherent in the right become more significant, the class of objects subject to the more refined and expensive protections require screening that is more institutionally defined. While every building can be classified as "architecture," only those designated as deserving of protection under a landmark preservation statute receive its benefits. As to certain aspects of a broadened *droit moral*—those involving protection against exportation, for example—the right of designation would similarly have to be limited. While every painting or other work of art might have the protection of the traditional *droit moral* (those rights associated with the artist's integrity and paternity), only identified works would be protected against export, against destruction, against removal from a significant context.

The broadened *droit moral* should address limitations on the actions of government, as opposed to private parties. Again, there are seeds of such a principle in present law. Though it is little noted, the National Environmental Policy Act, passed in 1971, requires that the federal government take aesthetic impact into consideration when any significant federal discretionary action is taken.<sup>48</sup> In the half-decade since passage, the working out and meaning of NEPA has been much addressed by the courts. Portions of the Act that require consideration of the impact on the physical environment have, quite obviously, received the brunt of the attention. Thus, the federal government must clearly determine, for example, how a road project affects air quality, water quality, and the extent to which it increases noise pollution. Very few cases have addressed themselves to whether the federal government adequately takes aesthetic considerations into account, in terms of what is constructed, what is destroyed, or what is impacted in the process.<sup>49</sup> Given proper attention, NEPA could be a tool for improving federal architecture, for preserving archeological sites, for the non-destruction of important neighborhoods, and for the maintenance of important natural features. Given a sufficiently heightened sensitivity, the statute could provide guidance into the relationship between federal actions and more ephemeral and portable visual and plastic works.

Much of the implicit *droit moral*, in the broadened sense here described, is in the charge of the art museums of the nation. Direct federal subsidy and the indirect subvention furnished by the federal income tax system, both, at the base, imply a dedication to the building and preservation of a cultural patrimony in the visual and plastic arts. Through the tax laws, the federal government encourages the contribution to the public (through the intermediation of a museum) of signifi-

cant works of art. Yet the nature of a museum's obligation is not always clear, a result, in part, of the failure of the society to articulate the broader *droit moral* to which the museum owes its allegiance. The American system emphasizes pluralism, heterogeneity, and randomness with which purpose is established and goals are developed. There is no elaborate system of national museums.<sup>50</sup>

In a period of aggressive acquisition and competitive institution-building, the absence of articulated national policies may have been appropriate. But changed circumstances may call for a more precise, more demanding regime. Rendering more coherent the broadened *droit moral* function of museums is quite complex. Several avenues can be suggested. The Congress, for example, has before it amendments to the tax code that would permit living artists to take charitable deductions, under certain limitation, for the donation of their work to museums and other institutions. While the statute has been urged by artists to provide parity of treatment with collectors, the New York City Bar Association has advocated passage on a ground more intimately related to the broadened *droit moral*. Legislation roughly as suggested by the Association is included in Appendix A. The building of a national patrimony is partially a function of the assembling of contemporary work. Modification of the tax code to permit deductions would enhance the national patrimony with a limited impact on the Treasury. Congress might insure scholarly and public access to works of art that have yielded a charitable deduction to the donor as they have come into the collection of exempt institutions. Earlier, we addressed the shortcomings of the traditional *droit moral* so far as author access to them is concerned. When a work is donated to a charitable institution and the taxpayers at large bear a portion of the burden through the tax deduction, there should be assured public access. Indeed, when a painting is obtained for public use through the incentive of the tax system, special precautions should be taken before the work is removed from public ownership through sale or other disposition.



## ENDNOTES

1. As of this writing, those in a position to know predict final enactment of general revision by October 1976. For a discussion of earlier difficulties in the twenty year movement for copyright revision, see Melville B. Nimmer, *Foreword: Two Copyright Crises*, 15 UCLA L. REV. 931 (1968).

2. For example, the term for works first created, or obtaining federal copyright after the effective date of the new law term of protection, will be the life of the author plus fifty years. S. 1361 §§ 302, 303, 93d Cong., 2d Sess. (1974) [hereinafter Revision Bill]. This is to be contrasted with current term of protection, which is for 28 years from date of publication, plus, upon renewal, an additional 28 years, or a total of 56 years from publication. 17 U.S.C. § 24. See generally MELVILLE B. NIMMER, NIMMER ON COPYRIGHT, Ch. 9 [hereinafter NIMMER, TREATISE].

3. The general revision for the first time recognizes an exclusion right publicly "to display" certain types of works (including "pictorial, graphic or sculptural works"). Revision Bill, *supra* note 2, § 106(5).

4. See generally Raymond Sarraute, *Current Theory on the Moral Rights of Authors and Artists Under French Law*, 16 AM. J. OF COMP. L. 465 (1968); William Strauss, *The Moral Right of the Author*, in STUDIES ON COPYRIGHT (1963); NIMMER, TREATISE, *supra* note 2, § 110. With particular reference to the moral rights of graphic artists, see John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976).

5. See, e.g., Law of March 11, 1957, art. 6 (1957), Recueil des Lois pt. I, at 239 (France).

6. See, e.g., Act of Dec. 30, 1960, art. 3 (1960), Svensk Forfattningssamling 1949 (Sweden).

7. See NIMMER, TREATISE, *supra* note 2, §§ 110 and 111.

8. Revision Bill, *supra* note 2, § 301.

9. See *supra* note 5.

10. See Sarraute, *supra* note 4, at 477; see also Cour de Paris (19 April 1961), J.C.P. 1961, II 12183.

11. See Sarraute, *supra* note 4, at 477 (relying upon Art. 29 of the French Copyright Act). But cf. Cour de Cassation (4 Dec. 1956), Ann. 1957, 265; Cour d'Orleans (17 March 1965), J.C.P. 1965, II 14186.

12. See generally App. B.

13. See cases cited in NIMMER, TREATISE, *supra* note 2, § 110.42.

14. See *DeBekker v. Stokes*, 168 A.D. 452, 153 N.Y.S. 1066 (1916), modified 157 N.Y.S. 576 (1916).

15. See *Harris v. Twentieth Century-Fox Film Corp.*, 43 F. Supp. 119 (S.D.N.Y. 1942).

16. See *Harris v. Twentieth Century-Fox Film Corp.*, 43 F. Supp. 119 (S.D.N.Y. 1942); see also discussion in NIMMER, TREATISE, *supra* note 2, § 110.5.

17. The question also arises as to whether an author has the right to preclude correct attributions (e.g. attributions to a known artist even though the work was anonymous or used a pseudonym). The right to prohibit truthful attribution is very limited under American law. See NIMMER, TREATISE, *supra* note 2, § 110.41.

18. See, e.g., Tribunal Grande Instance de Paris (31 March 1969), Gaz. Tal. 1969, 2, 82; RTDC 1970, 95 No. 1. But cf. Cour de Cassation (31 Jan. 1961), DdA 1961, 291; D. 1961, 81; Cour de Paris (29 Oct 1957), Ann. 1958, 205.

19. See discussion and citation of cases in NIMMER, TREATISE, *supra* note 2, § 110.3.

20. Consider, for example, the right to prohibit exhibition of the work in an objectionable context. Under the European *droit moral*, this may be regarded as an aspect of the right of integrity. It may include the right of an artist or the artist's heirs or assigns to preclude inclusion of a work in a particular exhibition. For example, if a museum were hav-

ing a show entitled "Kitsch Art of the 1920's," the artist or his successor may be able to preclude inclusion of a work in the show on the grounds that a) the work is not "kitsch" or b) even if it is "kitsch" it is harmful to the artist's reputation to have the work so included.

An artist may also have some right in the disposition of the artist's work by a museum. Currently, for example, the representatives of several important French artists are objecting to the transfer of works by the Musée d'Art Moderne to the Musée George Pompidou on the grounds that the gift of work by the heritiers to the Nation was implicitly conditioned on the kind of museum in which the works would be displayed—the context of the work. The representatives' suggestion is that their right springs not only from the circumstances of the gift but also from their proper concern with the integrity of the work protected. This objection to context right has received only very limited recognition under American law. *Compare Shostakovich v. Twentieth Century-Fox Film Corp.*, 196 Misc. 67, 80 N.Y.S. 2d 575 (1948), with *Williams v. Weisser*, 73 Cal. Rptr. 542 (1969).

21. See, e.g., *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952).

22. "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." Art. 6 bis, Berne Convention for the Protection of Literary and Artistic Works as revised at Paris on July 24, 1971. For the full text of the Berne Convention, see NIMMER, TREATISE, *supra* note 2, App. P.

23. See Melville B. Nimmer, *Implication of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 518 (1967) [hereinafter Nimmer, *Prospective Revisions of Berne Convention*].

24. Merryman, *supra* note 4, at 1041.

25. The Revision Bill defines a "derivative work" as "a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form; in which a work may be recast, transformed, or adapted."

26. Nimmer, *Prospective Revisions of Berne Convention*, *supra* note 23, at 549.

27. See Sarraute, *supra* note 4, at 481-82.

28. See *Paramount Productions v. Smith*, 91 F.2d 863 (9th cir. 1937).

29. See *Granz v. Harris*, 1989 F.2d 585 (2d Cir. 1952).

30. An extended *droit moral* has implications for the scholar as well as the artist. Under the prevailing European mode, the approval of the artist or the artist's designee or heirs must be obtained before a work by such an artist is reproduced. Ordinarily such approval relates to the quality of the reproduction as well as to whether or not the particular work should be reproduced at all. An heritier may, for example, withhold permission to reproduce where the associated text is considered objectionable to the reputation of the artist. Seemingly, monochromatic as well as color reproductions would come within the heritier's purview.

31. For a discussion of derivative works, see NIMMER, TREATISE, *supra* note 2, Ch. 3.

32. The mere reproduction of a work of art in an art book is not in itself a derivative work; the collection, arrangement and compilation of reproductions would, however, be a derivative work capable of supporting a copyright under Section 7 of the Copyright Act.

33. The Steichen photograph of Rodin's sculpture of Balzac is, for example, a derivative work in a different medium but presents no paternal identity problem.

34. Revision Bill, *supra* note 2, § 302.

35. Under the Berne Convention, government entities may be established to protect works of folklore.

36. See DuBoff & Allen, *The Afo-A-Kom: A Plea to Save a Cultural Heritage*, in LEONARD D. DuBOFF, ART LAW (1975).

37. See *Crimi v. Rutgers Presbyterian Church*, 194 N.Y.S.2d 813 (1949), discussed in F. FELDMAN & S. WEIL, ART WORKS 15 (1974).

38. Under French and German Law, there is a limited right of access by the artist to photograph the work.

39. See, e.g., Albert J. Rosenthal, *Federal Power to Protect the Environment: Available Device to Compel or Induce Desired Conduct*, 45 S. CAL. L. REV. 397 (1972).

40. Cf. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965).

41. See Alexander Instrati, letter, *Art News*, December 1975, at 24 (replying to Hochfield, *Problems in the Reproduction of Sculpture*, November 1974, at 20).

42. See Alan Marchisotto, Note, *The Protection of Art in Transnational Law*, 7 VAND. J. TRANSNAT'L L. 689 (1974).

43. See, e.g., William D. Rogers, *The Legal Response to the Illicit Movement of Cultural Property*, 5 LAW & POL'Y IN INT'L BUS. 932 (1973).

44. See, e.g., Paul E. Wilson & H. Jones Winkler II, *The Response of State Legislation to Historic Preservation*, 36 LAW & CONTEMP. PROBS. 329 (1971). See also the comprehensive study in Fowler, *Protection of the Cultural Environment in Federal Law*, in ANDERSON, FEDERAL ENVIRONMENTAL LAW (1974).

45. Cf. *St. Joseph Historical Soc'y v. Land Clearance & Redevelopment. Auth.*, 2 ELR 20749 (W.D. Mo. 1972); *Ely v. Velde*, 321 F. Supp. 1088 (E.D. Va. 1972); Fowler, *supra* note 44, at 1511 et seq. For a different public sculpture issue raising moral rights questions, see *Letter Edged in Black Press, Inc. v. Pub. Bldg. Comm'n*, 320 F. Supp. 1303 (N.D. Ill 1970) (Chicago Picasso).

46. See, e.g., Law No. 1089, June 1, 1939, Rac. Off. 3403 (Italy).

47. See 16 U.S.C. §§ 470 et seq.

48. See *supra* note 45.

49. *Id.*

50. Governance of charitable institutions also has relationship to this aspect of the broadened *droit moral*. As the recent report of the Filer Commission pointed out, the closely held quality of many charitable trusts may lead to charitable determinations, clouded with conflicts of interest, so that truer charitable goals—such as the strengthening of the national patrimony—are deflected. Boards of museums that are designed to be more responsive to broader constituencies may (although the proposition is not proved) be less likely to take actions that are injurious to the collection and the public's interest in it. Museum actions that could be hostile to a broadened *droit moral* could also be affected by the administration of federal and state subsidy incentives, through the proposed Museum Services Act, or through the actions of the National Endowment for the Arts, and at the State Commissions. While Attorneys General of the respective states are generally charged with ensuring that charitable institutions administer their trust in accordance with the law and with the intent of the donors, enforcement has, with notable exceptions, been unduly lax. The government's concern with the integrity of works of art is, of course, exhibited in a myriad of other coercive and non-coercive ways. The Antiquities Act of 1906, for example, proclaims the federal interest in the maintained integrity of certain objects. How the Act is enforced and what gaps remain in its coverage are of vital importance to the concept of the broadened *droit moral*. The public's concerns about reputational interests and the integrity of works of art are also affected by such matters as the implementation of the Hague Convention of 1907 (dealing with the protection of art objects in time of war), the profile of private law remedies for privacy and defamation, and the manner in which consumer fraud laws are interpreted in the various states.

## APPENDIX A

No single statute can provide the implementation for the broader principles that would supplement the traditional *droit moral*. Indeed, much turns on what various government officials consider their present responsibility and the content of present state law. On the other hand, the College Art Association could seek specific federal legislation that would address one or two portions of the broader *droit moral* concept. The suggestions in the statute would accomplish that. The Congress would establish by legislation the principle that there is a national interest that approximates the principles inherent in a broader *droit moral*. The Attorney General, the Secretary of State and the Council on Environmental Quality would be required to report to Congress as to particular aspects of such a *droit moral* that fall within their jurisdiction.

Two positive steps could be included in the legislation as well. One would be to employ this national patrimony vehicle to facilitate passage of an amendment to the Internal Revenue Code permitting artists to obtain a fair market value deduction for a contribution of their work. A study by the New York City Bar Association has concluded that since such a deduction has been excluded, there has been a significant reduction in contributions by artists to museums. The Bar Association committee report considered that the best defense for the deduction was the ameliorative effect it would have on building collections of contemporary art.

The second step is a novel one, we believe. Section 6 of the proposed statute would require charitable institutions receiving works for which a deduction is claimed to provide access to such work for scholars. An additional subsection would place an affirmative obligation on the holding institution to make such works available for public display. Finally, the provision would provide for safeguards before such works could be sold. The basis for the statutory provision is that, in most instances, when a work of art is donated to a charitable institution, the donor is entitled to and takes a charitable deduction. The deduction can be viewed as an involuntary purchase, by the public, of the work of art. The Treasury foregoes revenue because of the enrichment of charitable institutions by the gift. If, however, the work so donated is withheld from access, the "public expenditure" represented by the tax deduction could be viewed as unjustified. The provision provides Congressional recognition that the charitable deduction exists to strengthen museums, but works given so as to result in a deduction are impressed with a public purpose.

## National Patrimony Act of 1976

Section 1. *Purpose.* Congress hereby finds that there is a need to protect and build the national cultural patrimony in works of sculpture, pictorial and graphic art, including archeological and antiquarian aspects of that patrimony, and to determine whether the federal government is taking all appropriate steps possible to reach that goal.

Section 2. *Moral Rights of Artists:* The Revised Copyright Act shall be amended as follows:

### § 101. Definitions.

“Moral Rights” means:

- (1) *the right to be identified as the author in connection with the publication, exhibit, or exploitation of any works created by such author;*
- (2) *the right not to be identified as the author in connection with the publication, exhibition or exploitation of any works not created by such author;*
- (3) *the right to prohibit alterations of a work created by such author, either in its original form, or in connection with reproductions thereof.*

### § 106. Exclusive rights in copyrighted works

- (a) *The author of any pictorial, graphic or sculptural work (other than maps, globes, charts, plans and diagrams) has the exclusive moral rights in and in connection with any such work.*
- (b) *Subject to subsection (a) of this section and sections 107 through 117, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:*

§ 202. Ownership of copyright as distinct from ownership of material object.

- (a) *Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.*

- (b) *Transfer of copyright, or of any of the rights enumerated in subsection (b) of Sec. 106 does not in and of itself constitute a transfer or waiver of the author's moral rights as provided in*

*subsection (a) of Sec. 106. Such moral rights may be transferred or waived only by express consent of the author, executed in writing.*

Section 301. Pre-emption with respect to other laws.

*(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to:*

...

*(4) activities affecting the integrity or paternity of a work of any pictorial, graphic or sculptural work (other than maps, globes, charts, plans and diagrams), whether such right or remedy is vested in the author, the heirs or assigns of the author, or other interested parties as determined by the State.*

Section 3. Charitable Deduction.

Section 170(c) of the Internal Revenue Code of 1954 (relating to certain contributions of ordinary income and capital gain property) is amended by adding at the end thereof the following new paragraph:

“(3) SPECIAL RULE FOR CERTAIN CONTRIBUTIONS OF COPY-RIGHTS, PAPERS, ETC. —

“(A) 75 PERCENT DECREASE IN AMOUNT OF REDUCTION UNDER PARAGRAPH (1)(A).—In the case of a charitable contribution of a copyright, a literary, musical, or artistic composition, a letter or memorandum, or similar property by a taxpayer described in paragraph (3) of section 1221 to an organization described in clause (ii), (v), or (vi) of subsection (b)(1)(A), the reduction under subparagraph (a) of paragraph (1) shall be decreased by 75 percent of the amount computed under such subparagraph (without regard to this paragraph) but only if the taxpayer receives from the donee a written statement that the donated property represents material of historical or artistic significance and that the use by the donee will be related to the purpose or function constituting the basis for its exemption under section 501 (or, in the case of a governmental unit, to any purpose or function described in subsection (c)(2)(B).

“(B) LIMITATION ON DEDUCTION TO WHICH THIS PARAGRAPH APPLIES.—For any taxable year, the aggregate deduction under this section attributable to contributions to which subparagraph (A) applies shall not exceed the taxpayer's gross income for such year from the sale or exchange of copyrights, literary, musical, or artistic compositions, letters, memorandums, and similar property.

“(C) DECREASE NOT APPLICABLE TO CERTAIN CONTRIBUTIONS.—The amount of any reduction under subparagraph (A) of para-

graph (1) shall not be decreased under subparagraph (A) of this paragraph in the case of a charitable contribution of any letter, memorandum, or similar property which was written, prepared, or produced by or for an individual while he held an office under the Government of the United States or of any State or political subdivision thereof if the writing, preparation, or production of such property was related to, or arose out of, the performance of the duties of such office."<sup>1</sup>

Section 4. *Right of Public Access.*

- (a) Any painting, sculpture or other work of plastic art, including works of ethnological interest, the donation of which to a charitable institution results in a deduction to the donor under the Internal Revenue Code may not be alienated (except to another charitable institution qualified under Section 501(c)(3)) of the Internal Revenue Code unless: such alienation is pursuant to regulations promulgated by the charitable institution and approved by the Secretary of the Treasury.
- (b) Any painting, sculpture or other work of plastic art, including works of ethnological interest, the donation of which to a charitable institution results in a deduction to the donor under the Internal Revenue Code shall be accessible to the public for study and scholarship.
- (c) It is the duty of the charitable institution receiving such works to assure that they are periodically accessible to the general public. Where a holding institution does not regularly display such object, it shall not unreasonably refuse a suitable request from another charitable institution, qualified under Section 501 (c) for the loan of such work, provided i) the loan of the object does not involve an unreasonable risk to the object; ii) that the borrowing institution makes satisfactory commitments for the transportation, security and insurance of such works; iii) that no institution shall be obliged to honor any such request with respect to any covered work more than one time within any five year period; and iv) the lending institution may exact a charge that meets its administrative expenses.

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1. This version should, perhaps, be modified to expand the income to which the deduction can be credited and in other ways reflected in the memorandum of the New York City Bar Association (Appendix C).



Section 5. *Reports.* To assist the Congress in fulfilling the purposes described in Section 1, the following reports shall be filed with the Congress by December 31, 1976:

- (a) The Secretary of State shall report on the extent to which the implementation of international obligations by the United States is essential to establishing a climate in which the United States can appropriately protect and build its own cultural patrimony as described in Section 1.
- (b) The Attorney General of the United States shall report on the administration of the criminal laws of the United States to assure appropriate protection of the cultural patrimony as described in Section 1 of this Act, adherence to international obligations, and implementation of the Antiquities Act of 1906. Such report shall include recommendations for legislation to the extent such legislation is necessary.
- (c) The Council on Environmental Quality shall report on the extent to which the Congressional direction to consider aesthetic impact under the National Environmental Policy Act of 1971 is being implemented in the environmental impact statements prepared as a precondition to significant federal actions.



## APPENDIX B

During the spring and summer of 1975, the authors engaged in research and interviews in Sweden, England, France, and Germany as to the status of moral rights for the graphic artist. In particular, the facilities of the Max Planck Institute for Intellectual Property, in Munich, proved most helpful in evaluation of the current legal status of artists' moral rights.<sup>2</sup> The legal literature available in English has generally not considered the *droit moral* in its application to the graphic artist apart from its general application to all "authors." Moreover, such literature has tended to explore the older moral rights cases, without much emphasis on the more recent judicial applications of the doctrine. It may be helpful, then, to consider the following moral rights cases, all concerned with the graphic artist, and all decided within the last twenty years.

### I. *The Right of Paternity.*

#### A. *German cases.*

*Oberlandesgericht Munich* (3 July 1967)

GRUR 1969, 146; UFITA Bd. 57 S. 327 (1970)

(Court of Appeals)

An artist produced a graphic work on commission for advertising purposes. The commissioning party did not include the artist's name on the poster. The artist sued for violation of moral rights.

The court held for the artist, finding a violation of moral rights. An artist has the right to have his name appended to his work. However, the court went on to point out that the name of the artist need not appear in larger or more prominent type than is necessary in order to identify him. Moreover, he does not have a right to have his address or other identification added to his name. The artist's name must be included not for advertising purposes but only to maintain an identification of the artist and his work. The court noted, however, that if a work is interesting the public will naturally inquire as to the address and even as to the name of the artist even if no name is put on it. The court held that the amount of damages should depend upon how extensive was the distribution of the work.

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2. In this regard the authors wish to acknowledge the valuable research assistance of Detlev Aders, Esq., of the Max Planck Institute.

B. *French cases.*

*Cour de Paris* (10 April 1956)

(Intermediate Court of Appeal)

Ann. 1956, 251

An artist painted a portrait which he sold to the model who posed for the portrait. The portrait was then used in a film without mention of the artist's name.

The court held:

1. A violation of copyright (economic rights) because the sale of the tangible painting did not transfer the right to reproduce the work in the film.
2. A violation of moral rights by reason of the film's failure to mention the name of the artist.

The court made the point that whenever the work is shown in public the artist's name must appear in connection therewith.

*Cour de Paris* (25 February 1958)

(Intermediate Appellate Court)

J.C.P. 1961, 12138

An artist created a graphic work for advertising purposes, sold same to the defendant who then published the work under defendant's own name rather than under the artist's name.

This was held to be a violation of moral rights (as well an apparent violation of two criminal statutes).

*Cour de Paris* (19 April 1961)

(Intermediate Appellate Court)

J.C.P. 1961, II 12183

This involves a painting by the artist Vlaminck. The title of the painting is "Champ de Blé." The person who purchased this painting requested the painter to authenticate that it was indeed his signature which appeared on the painting. The painter not only refused to make such authentication but in fact removed the signature of his name which appeared on the painting. The buyer of the painting sued the painter, and the court awarded damages to the buyer. The court stated that even if there were a moral right on the part of the artist to recall the painting because he did not feel it any longer worthy of himself, he nevertheless lost that right of recall when he sold the painting with his signature appearing thereon.

*Tribunal de Grande Instance de la Seine* (19 December 1961)

(Court of First Instance)

RIDA Nr. XXXV, p. 122 (1962)

It was held that an artist who creates a poster for advertising purposes has the right to have his name appear on or in connection with each reproduction, regardless of the manner in which the work is reproduced. Furthermore, the artist's signature, if legible in the first instance, must be legible as reproduced.

*Cour de Paris* (15 November 1966)

(Intermediate Appellate Court)

D. 1967, 284; Gaz. Pal. 1967, 1, 17

A painter and an art dealer entered into a contract whereby the painter agreed to supply the art dealer with all his output, and further agreed that he would in any event supply no less than 20 paintings per month. Of these the art dealer had the right to choose 15, and had further the right to destroy the remainder. Furthermore, the contract provided that some of the paintings were to be supplied under a pseudonym and some were to be supplied with no name at all. The contract was for a three-month period but could be extended by the art dealer for additional three-month periods up to a total of ten years. The art dealer was to hold an exhibition of the painter's works once each year, half of the cost of which was to be paid by the artist. It was further provided in the event the art dealer sold the paintings or otherwise made a profit from them, all proceeds were to go to the dealer. (The art dealer paid a given sum to the artist.) The artist sold some of his paintings to a third party instead of to the dealer. The dealer sued for breach of contract.

The action was dismissed on the ground that the contract is invalid. The court said that a contract whereby an artist is required to deliver a given number of works to a contracting party during a period of time may be valid provided that in return therefor the other party provides facilities whereby the artist is enabled to develop his talent. The court, however, held this particular contract to be invalid since it was not conducive to the development of the artist in view of the fact that he was bound for a period of ten years, and was required to deliver such a voluminous number of works. Furthermore, the contract was defective in that it did not provide for the artist's moral right to have his name identified with his work. The court further found a violation of the moral right of integrity in that the art dealer had the right to destroy some of the artist's paintings without the artist's approval of such destruction.

These moral rights principles, it was held, cannot be varied by contract, and hence the agreement itself is invalid.

*Tribunal de Grande Instance de la Seine* (24 November 1967)

(Court of First Instance)

Affirmed by

*Court de Paris* (17 May 1969)

(Intermediate Appellate Court)

D. 1969, 703

Facts: Plaintiff was a press photographer. His employer reproduced one of his photographs without mention of his name. In addition, a third party obtained the photograph from plaintiff's employer, and also reproduced it without mention of the photographer's name. The photographer sued his employer: the first cause of action for failure to mention his name, the second for having given the photograph to the third party who also reproduced it without using his name. Both actions involve violation of moral rights.

The court held that because the plaintiff was an employee of the defendant, this necessarily involved the right of the defendant to use the photograph in a normal manner within its publication and in similar publications. Moreover, plaintiff apparently consented to the deletion of his name in his employer's publication. However, there was no such consent with respect to the third party. Therefore, the defendant was held liable for violation of plaintiff's moral rights by reason of defendant's permitting publication of the photograph by the third party without requiring that plaintiff's name be mentioned. (This seems to be an example of a case where it is possible to alienate one's moral rights under the law of France.)

*Tribunal de Grande Instance de Paris* (13 December 1966)

(Court of First Instance)

D. 1969, 702

Plaintiffs were a number of photographers for the magazine *Paris Match*. Defendant, a motion picture producer, used a number of such photographs as the background for the opening title scenes in connection with a motion picture he produced.

The court held for the plaintiffs—on both economic-copyright and moral rights grounds. The court went on to state that under the moral rights doctrine in any event it would have been necessary to indicate the name of each photographer in connection with his photograph, or at

least in connection with the listing of other credits even if not juxtaposed with the photographs.

*Cour d'Amiens* (27 May 1969)  
(Intermediate Appellate Court)  
RTDC 1969, 985

The plaintiff made photographs of a number of paintings and other works of art. Such photographs appeared in defendant's magazine. The plaintiff claimed that the photographs were published without his consent, and further that his name had not appeared in connection with the photographs.

The court held for the defendant. It was not clear whether the plaintiff had in fact given his consent. The court ruled against the plaintiff's paternity claim on the ground that his photographs did not constitute works of art but were of a documentary nature, merely depicting the photographed works of art. The court found that the photographs per se failed to evince either originality or creativity.

*Tribunal de Grande Instance de Paris* (3 July 1969)  
(Court of First Instance)  
D. 1969, 703; J.C.P. 1970 II 16417

Plaintiff was a press photographer in an employment relationship with a newspaper. After terminating the employment relationship, the newspaper proceeded to publish some of the photographs which plaintiff had made while he was in the employment relationship. Plaintiff sued, first on the ground of unauthorized publication of the photographs and second because while still in the employ of the defendant his photographs had been published without mention of his name.

The court held that during the period of employment the plaintiff could have validly consented to the use of his photographs without mention of his name. However, the court indicated that such consent would not be applicable to the future, after termination of the employment relationship. There cannot be a granting of one's moral rights for an indefinite future period. (Apparently, there may be an effective waiver of moral rights during the period of the employment.)

*Cour d'Appel de Paris* (30 June 1970)  
(Intermediate Appellate Court)  
D. 1972, 87; Gaz. Tal. 1970, 2, 266

Following termination of an employment relationship, the employer

published some of the employee's photographs. The former employee sued on two grounds. First, unauthorized publication; and second, failure to mention his name. The court of first instance held for the defendant on the issue of unauthorized publication in view of the employment relationship, but held for the plaintiff on the moral rights ground that mention of the photographer's name should have been made. On appeal, the Court of Appeals held for the defendant on the moral rights count for the reason that the photographs (pictures of celebrities) involved no creativity or originality. Therefore, no issue of moral rights arises.

*Tribunal de Grande Instance de Paris* (9 July 1971)

(Court of First Instance)

D. 1972 Somm. 84

Facts: The plaintiff, a photographer, made a number of photographs of paintings by a well-known painter. These photographs were published in a book about the painter. There was but a single mention of plaintiff's name in the book.

The court held that it was not sufficient merely to mention somewhere in the book that a number of the photographs had been taken by the plaintiff. Rather, plaintiff's name must appear in juxtaposition with each of his photographs.

*Cour de Cassation* (31 January 1961)

(Supreme Court)

DdA 1961, 291; D. 1961, 81

Plaintiff was in the business of making book covers. Defendant, in a book exhibition, used three of plaintiff's book covers in an exhibit, but placed his own business card next to the covers.

The court held this to constitute a violation of the plaintiff's moral rights. The court indicated, however, that mere omission of the plaintiff's name would not have created confusion. It was the further fact that defendant's card was placed next to the covers that created the false impression that the defendant was the book cover maker.

*Tribunal Grande Instance de Paris* (31 March 1969)

(Court of First Instance)

Gaz. Tal. 1969, 2, 82; RTDC 1970, 395 No. 1

Facts: Plaintiff, a puppet and doll maker, consented to defendant's publication of photographs of plaintiff's dolls in defendant's magazine.

Defendant not only failed to credit plaintiff as the creator of these works, but further, named another as the creator of plaintiff's works.

The Court held that there were two separate violations of plaintiff's moral rights—first, the failure to mention his name, and second, the false credit accorded to another.

*Cour de Paris* (29 October 1957)

(Intermediate Appellate Court)

Ann. 1958, 205

An artist's moral rights are not violated by the mere failure to mention his name in connection with an exhibition of his works. However, there is a violation of moral rights if the public is falsely led to believe that someone else in fact was the artist of the works.

*Cour de Cassation* (4 June 1971)

(Supreme Court)

D. 1971, 489

The plaintiff created a design for a tapestry and commissioned the defendant to make number of tapestries embodying such design. Defendant made the tapestries but plaintiff refused to pay for them on the ground that defendant's work had a number of errors in it. Plaintiff then requested a return of his designs. Defendant refused to do so until he was paid for his work.

The Intermediate Appellate Court held that the defendant could retain the tapestries until he was paid. The further question arose as to what the defendant might be able to do with the tapestries which the plaintiff said were improperly made. The Intermediate Appellate Court ruled that an expert should determine whether the defendant had made his own original artistic contribution to the tapestries. In the event he did so contribute, he would be regarded as a joint author of the final work. Plaintiff then argued on appeal before the Supreme Court that the defendant did not have the right to retain the designs since this constituted a violation of the plaintiff's moral rights. The Supreme Court disagreed with the plaintiff, dismissed the appeal, and affirmed the Intermediate Appellate Court. The doctrine of moral rights does not prohibit the defendant from retaining the designs subject to his being paid. The court found this was not a violation of the plaintiff's moral rights since the plaintiff was not prohibited from disseminating this work. The Supreme Court also affirmed the Intermediate Appellate Court's decision that an expert is necessary to determine whether the

defendant is a co-author with the plaintiff of the tapestries.

## II. *The Right of Integrity*

### A. *German cases*

*Landgericht Munich I* (2 August 1966)

UFITA Bd. 57 S. 339 (1970)

(Court of First Instance)

An artist was commissioned to make a poster. After making a sketch of the poster, he turned it over to the commissioning party. The latter, without authorization from the artist, made changes in the poster. The court held that this constituted a violation of the artist's moral rights. The court stated that changes without the artist's consent would be justified only when there is an urgent necessity to make such changes in order to be able to use the work in a different medium. The court awarded damages to the artist.

*Bundesgerichtshof* (5 March 1971) ("Petite Jacqueline")

GRUR 1971, 525; Arch Pr 1971, 541; DB 1971, 718;

MDR 1971, 459; NJW 1971; 885; UFITA BD. 60 P. 312 (1971)

(Supreme Court)

The plaintiff was a professional photographer. He made a portrait of a young woman, which was exhibited in Cologne. Because of this exhibition, the artist achieved a degree of fame, and the portrait was included in a book entitled *Total Photography*. This was done with the photographer's consent. The book was announced as including the 400 most important photographers in the world. Without the photographer's consent, a portrait was also produced on the cover of the book. The portion showed only the eyes of the young woman, the subject of the portrait. The photographer sued for violations of his moral rights by reason of this truncation of his work on the cover. The court held for the plaintiff.

### *French cases*

*Tribunal de commerce de la Seine* (20 June 1955)

(Court of First Instance)

DdA 1956, 54

An artist made a sketch to be placed on the cover of a box in which were to be contained children's blocks. The commissioning party requested the artist to make some changes in the sketch, and the artist accordingly did make such changes. Thereafter, the commissioning party accepted the sketch but wished further changes to be made. He had such further changes made by a third party. With such further



changes, the commissioning party had the work reproduced, and omitted from such reproduction the original artist's name. The original artist brought an action for violation of moral rights.

The court held for the plaintiff, finding a violation of moral rights. The court found that the relationship between the original artist and the third party was not such as to constitute them joint authors. Therefore the third party could not make changes in the original artist's work without the artist's consent and without doing so under his supervision.

*Tribunal de Commerce de la Seine* (2 February 1956)

(Court of First Instance)

Rev. Int. DdA, Nr. XII, 147 (1956)

An artist made a poster to publicize a motion picture. Presumably on behalf of the motion picture company or at their request, the artist then ordered a number of copies of the poster to be printed at a designated size. The size ordered was 127 centimeters by 160 centimeters. The defendant printer did reproduce the posters at the requested size. However, in addition, he made additional copies in a different size, namely 60 by 80 centimeters. The artist sued for violation of moral rights by virtue of the improper size of these additional copies.

The court held for the plaintiff, both on the ground of violation of moral rights and also for violation of his pecuniary reproduction rights.

*Court de Cassation* (4 December 1956)

(Supreme Court)

Ann. 1957, 265

This case involves a painting by the well-known artist Bonnard. The question arose as to whether certain paintings by Bonnard were jointly owned by Bonnard and his wife in a form of community property or whether they were his sole property.

The court held that the tangible painting and also the economic rights under the copyright both constituted joint property between husband and wife. However, the moral rights connected with the work remained Bonnard's sole property and were not regarded as joint property. Specifically, the right to alter this work, to complete it, and to destroy it are moral rights which remain his sole property and not owned jointly with the wife (but he may not exercise such rights in a vindictive manner in order to injure his wife). The court further held that included under the moral rights of the artist is the right to recall paintings which had already been sold or otherwise disseminated, sub-

ject to the payment of a reasonable compensation. Such recall may be either for the purpose of completing them or in order to use them as bases for further works. Moral rights further include the right to protect against mutilation or truncation of an artist's works.

This case was then remanded as follows:

*Cour d'Appel d'Orleans* (18 February 1959)

(Intermediate Court)

Rev. Inc. D.A. No. XXIII, 67 (1959); UFITA Bd. 28,

P. 235 (1959)

The court reaffirmed the principle that moral rights remain the sole property of the creator and do not become joint property.

*Tribunal de Grande Instance de la Seine* (8 December 1959)

(Court of First Instance)

RIPIA 1960, 106

A printer was given an artist's sketch for reproduction as an advertising poster. The printer made changes therein without the consent of the artist.

The court held that this constituted a violation of the artist's moral rights. The printer had no right to make any changes not consented to by the artist. Such changes as mitigated or reduced the simplicity and striking quality of the work clearly constituted a violation of moral rights. It was further held that without the artist's consent the poster may not be used as the cover of a book. The artist had given a general consent to the use of his work, but the court held that such consent did not include the right to use it in a special manner such as a book cover.

*Tribunal Civil de la Seine* (7 January 1959) ("Les Fleurs")

J.C.P. 1959, II 10965

This involves a painting by the well-known painter Georges Braque. The painting is known as *Les Fleurs*. Braque made a contract with a publisher for them to produce engravings of this work. The engraver, Crommelynck, was retained by the publisher to create the engravings. The engraver, however, used a different type of paper. Braque brought an action against the publisher by reason of the engraver's use of a different form of paper. He claimed a violation of moral rights.

The court held that this was not a violation of moral rights. Although the paper was less expensive than the agreed-upon paper, it was still able to reproduce the colors more accurately than the paper originally

agreed upon. The court further stated that the engraver, by virtue of his contribution, now could also be regarded as an artist with his own moral rights in the finished work. However, the court added that Braque, the original painter, did have the right to supervise the process of color reproduction in order to assure accuracy, and also to determine the number of reproductions made. Further, the court said the artist can supervise the quality of the paper. Braque's right of supervision was said to exist in part because the public, buying copies of the engraving, might assume that it was the original work of Braque because he signed it, rather than merely a reproduction.

*Cour d'Appel de Paris* (30 May 1962)

(Intermediate Appellate Court)

D. 1962, 570

The painter Bernard Buffet created six paintings on the sides of a refrigerator. The refrigerator was sold at a charity auction. Each of the paintings was signed by Buffet. The buyer of the refrigerator then disassembled the refrigerator and sold each of the six parts as separate metal paintings.

This was held to be a violation of the painter's moral rights. The act of disassembling the refrigerator itself was a violation of his moral rights. The artist further demanded that the paintings on the refrigerator parts be returned to him. This the court refused to do, noting that the artist had the satisfaction of the publication of this decision. No damages were awarded because none was proved.

[Note: This decision was affirmed in the *Cour de Cassation* (Supreme Court) 6 July 1965, Ann. 1966, 82.]

*Cour d'Aix* (23 February 1965)

(Intermediate Appellate Court)

D. 1966, 166

An artist named Damiano made a contract with an art dealer whereby the painter would receive regular compensation each month in return for which the painter agreed to keep the art dealer supplied at all times with no less than 30 of his oil paintings and gouaches.

Such a contract was held to be invalid as a violation of the artist's moral rights. This for the reason that the creative freedom of the artist was unduly hindered.

*Cour de Nimes*, (4 July, 1966)  
(Intermediate Appellate Court)  
J.C.P. 1967, II 14961

The painter Bergerot made a contract with an art dealer. The art dealer agreed to pay Bergerot a given amount of money and also to supply him with materials. In return for that, the painter agreed that during the next six-month period he would supply the art dealer with all of his new works, which would constitute not less than 8 oil paintings and 10 gouaches. The contract thereafter was extended for three additional years by reason of an additional payment to the artist. After the first year of the 3-year period, the artist demanded additional money, which was refused. The contract was terminated as a result of the dispute. The dealer then demanded back the unused canvas material which he had supplied. The artist attempted a settlement of the dispute, but the dealer refused. The dealer then proceeded to sell the paintings that he had already received from the artist, at absurdly low prices. The artist sued claiming both a violation of moral rights and breach of contract. The court held for the artist on both counts and awarded him damages. The court found a violation of moral rights due to the sale of the paintings at an absurdly low price.

The moral rights portion of this decision was appealed to the French Supreme Court with the following decision:

*Cour de Cassation* (3 December 1968)  
(Supreme Court)  
D. 1969, 73; J.C.P. 1969, IV 22

Reversed. Since the art dealer owned the property in the tangible paintings, no violation of moral rights occurred by reason of the dealer selling that which he owned.

*Cour de Paris* (15 November 1966)  
(Intermediate Appellate Court)  
D. 1967, 284; Gaz. Pal. 1967, 1, 17  
See page 4.

*Cour de Cassation* (19 January 1970)  
(Supreme Court)  
D. 1970, 483; J.C.P. 1970 IV 64

A contract between an artist and art dealer whereby the artist was to supply his entire output to the art dealer. The contract term was for one

year but could be extended for a total for five years. The art dealer was to be reimbursed for his costs plus receive an equal amount as profit. Since the art dealer was unable to realize a profit, he terminated the contract. The artist brought an action claiming the contract to be invalid from its inception because it unduly impeded his freedom and constituted a violation of moral rights.

The court held against the artist. The contract was valid since it was sufficiently limited in time. The court further concluded that there was no violation of moral rights.

*Tribunal Civil de la Seine* (15 October 1954)

(Court of First Instance)

Rev. Int. DdA 1955 Nr. VI, 146

An artist created ten sets of scenery for ten scenes in an opera. The producers of the opera decided to delete one of the scenes and hence did not use one of the sets that had been created. The artist sued on the ground that it was a violation of his moral rights to delete the set.

The court found that the artist was not a joint author of the operatic work. Such work consists only of the music and libretto, not the scenery. However, the court found that deletion of scenery from a given scene would be a violation of the artist's moral rights if all of the sets constitute an integral unit, and if in deleting one set, the public is not informed that they are not viewing the entire setting as created by the artist. The court went on to say that the doctrine of moral rights grants to the artist the right to prohibit dissemination of his work in such manner as to render ambiguous that which the artist intended to convey.

*Cour de Paris* (11 May 1965)

(Intermediate Appellate Court)

Ann. 1966, 84; J.T. 1965, 465

(Aff'd Cour de Cassation (5 March 1968)

(Supreme Court)

(D. 1968, 382, J.C.P. 1968 IV 65)

Salvador Dali was retained to create scenery for an opera. After having done so, the producer indicated he wanted the scenery enlarged. Dali refused to do this. The producer thereupon retained other artists who enlarged the scenery by Salvador Dali. Dali brought an action for violation of moral rights. The court held for the defendant. Dali's moral rights had not been violated since the enlargement of the scenery did not in any way distort or disfigure it.

*Tribunal de Grande Instance de Paris* (13 March 1971)

(Court of First Instance)

J.C.P. 1971 IV 294

The plaintiff was employed to create scenery and costumes for a television program. He did so, but his compensation was later reduced on the ground that the program for which the work had been done had been abandoned and never actually broadcast. The plaintiff sued for breach of contract and violation of moral rights. The court held for the plaintiff on the breach of contract count on the ground that he is entitled to the full money, that the defendant is not excused on the ground of force majeure. The court further indicated that the defendant's failure to broadcast the television program deprived the artist of an opportunity to achieve fame in the television medium, thereby affecting his reputation. There were, thus, moral rights overtones to this contract action.

*Cour de Cassation* (7 December 1961)

(Supreme Court)

D. 1962, 550

Retouching of a photograph without the consent of the photographer held to constitute a violation of moral rights.

## APPENDIX C

The Association of the Bar  
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42 West 44th Street  
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### REPORT ON TAX DEDUCTION ON CHARITABLE CONTRIBUTIONS OF ART (H.R. 6057; S. 1435)

by the Committee on Art

In 1969, as part of broad tax reform legislation, the income tax deduction on charitable contributions of art, manuscripts and the like by their creators, those for whom letters or memoranda are prepared, and the donees of either, was drastically reduced. Instead of the fair market value of the donated property, which had previously been the measure of the deduction, the amount allowable as a deduction was restricted to the donor's cost basis in the property (Code sections 170(e) 1221(1), 1221(3)).<sup>3</sup> Since the cost of basis of artistic property and manuscripts in the hands of such persons is, in general, merely the cost of the materials (in most cases a nominal amount), the practical effect of the 1969 amendment was to eliminate completely the charitable contributions deduction for the creator and the other classes of persons enumerated above. A person (other than a dealer) who purchases or inherits an artistic work or manuscript is treated differently, however. Thus, a collector making an identical gift to a museum or library would be entitled to deduct the full appreciated value of the property.<sup>4</sup>

On April 16, 1975, Representatives Brademas, Koch, Thompson and Bell introduced H.R. 6057 (94th Congress, 1st Session), which would restore a broader charitable deduction on gifts of artistic compositions and letters created or received by the donor. Senator Javits introduced a companion bill in the Senate (S. 1435).<sup>5</sup>

As an evaluation of the proposed legislation requires an analysis of

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3. All references to "Code" are to the Internal Revenue Code of 1954, as amended.

4. The charitable deduction allowable in any year is, however, limited to percentage of the donor's adjusted gross income, which varies according to the type of recipient and the nature of the donated property.

5. Similar legislation has been introduced on several occasions since 1969, and in 1972 was passed by the Senate (H.R. 7577 (92d Congress, 2d Session)). In 1973, H.R. 3152, H.R. 6764, H.R. 2151, H.R. 696, H.R. 697 and S.1510 (all 93rd Congress, 1st Session) were introduced. As these bills have died and the new proposals incorporate many of their features, the 1972 and 1973 bills are not specifically discussed in this report.

the effect of the 1969 amendments and of the policy reasons supporting an increased deduction, this report is divided into two sections: (I) a description of the background and justification of the proposed legislation and (II) an analysis of the legislation itself.

## I. BACKGROUND AND JUSTIFICATION OF REMEDIAL LEGISLATION

The Committee believes that the public benefits significantly from the availability of works of art, manuscripts and letters of scholarly significance in museums, libraries and other archival institutions. Empirical data assembled by the Committee suggest that the curtailment of the tax deduction in 1969 has resulted in a substantial reduction in acquisitions of such items by public institutions. Accordingly, the Committee considers an increase in the charitable deduction applicable to gifts of property by living artists, authors and other persons to be in the public interest, as it would provide an incentive for such persons to make their creations and papers available to the public.

In order to determine the effect of the 1969 legislation, the Committee contacted numerous museums, libraries and other organizations to obtain quantitative information as to contributions of art works and papers that had been received as gifts from their creators before and after 1969. In addition, the Committee reviewed various published studies dealing with this question. Although the data were certainly not comprehensive and in some cases were imprecise, certain conclusions are indicated.

The 1969 change appears to have had the most significant effect in the area of manuscripts and letters. In the few years prior to 1969, the Library of Congress received annually about 15 to 20 large gifts of manuscripts from authors; in the four years ended 1974, it received a total of only 1 such gift.<sup>6</sup> A number of prominent authors, artists, composers and others who made regular donations of their papers and works to public institutions before 1969 have subsequently sold such material (in some cases to institutions outside the U.S.) or merely placed it "on deposit," thereby restricting integration into research facilities.<sup>7</sup> Libraries have reported the loss or reduction of gifts of papers from such noted men of letters and composers as Archibald MacLeish, Vladimir Nabokov, Robert Lowell, John Updike, Neil Simon, Walter Piston,

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6. 121 Cong. Rec. H2866 (daily ed. Apr. 16, 1975).

7. *Id.*; see also Tanis, *infra* note 8.



Samuel Barber, and Aaron Copland.<sup>8</sup>

A poll of 26 librarians, conducted by Gordon Ray of the Guggenheim Foundation, confirmed the above conclusions, but found that university libraries and independent research libraries have been less severely affected than the Library of Congress, state libraries and state historical societies.<sup>9</sup> 109 replies to questionnaire sent by the Association of College and Research Libraries ("ACRL") to 50 large university libraries and 205 university libraries of all sizes indicate that the 1969 amendment has hurt institutions with well-established collections of manuscripts and letters as well as new collections, with the latter being more severely hurt. The ACRL study pointed out that well-established collections benefited to some extent by the fact that authors who had previously donated a significant portion of their manuscripts continued in some cases to contribute even after 1969.<sup>10</sup>

No general study has apparently been made of the effect of the 1969 amendment on art museums; but statistics for the Museum of Modern Art and the National Collection of Fine arts have been published, and five other museums with an active interest in modern art furnished data to the Committee indicating a diminution in gifts. The Museum of Modern Art<sup>11</sup> and another major modern art museum each reported declines of over 90% in the number of works donated by their creators since 1969, with a lesser drop in the number of donating artists. A leading museum with a more general collection reported a decline of approximately 50%. Other museums also experienced declines but were unable to quantify them. Finally, it was reported by Senator Javits in 1973 that prior to 1969 nearly all works received as gifts by the National Collection of Fine Arts were donated by their creators, but that as a result of the 1969 Act, such contributions virtually ceased.<sup>12</sup>

From the data collected, the Committee concludes that, while the estate tax structure might eventually force some of this material into the

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8. *Id.*

9. Gordon N. Ray, *The World of Rare Books Re-examined*, 49 THE YALE UNIVERSITY LIBRARY GAZETTE 77, 138-40 (July 1974).

10. NORMAN E. TANIS, REPORT ON THE TAX REFORM ACT OF 1969 AS IT AFFECTS 50 LARGE UNIVERSITY LIBRARIES; NORMAN E. TANIS, SECOND PHASE OF AN ACRL INQUIRY INTO THE EFFECTS OF THE TAX REFORM ACT OF 1969. Both of the above unpublished studies were compiled by Mr. Tanis in 1974 or 1975 as president or past president of the ACRL.

11. See Richard Oldenburg's testimony before the House Ways and Means Committee in 1973, as reprinted in FELDMAN & WEIL, ART WORKS, POLICY AND PRACTICE at 823-824 (1974).

12. 119 Cong. Rec. 56890 (daily ed. April 10, 1973).

public domain, the earlier public access and more systematic acquisition made possible by inter vivos donations justifies a tax incentive for such gifts. Although the Committee recognizes that such an incentive would provide artists with a tax advantage unavailable to other taxpayers (for example, doctors or lawyers who contribute their services, or pharmaceutical manufacturers who donate their products to clinics), the Committee believes that the public would derive a sufficient benefit to warrant such treatment. Moreover, as is discussed in detail below, the proposed legislation contains various limitations on the amount of the deduction allowable to a taxpayer in any year, as well as safeguards intended to ensure that only historically or artistically significant contributions generate a deduction, and it is expected that the revenue loss the Treasury would suffer from restoring such a deduction would be relatively small.

Because of questions as to ownership of papers prepared or accumulated by government officials while in public office, the Committee agrees with the sponsors of legislative remedies that no deduction should be allowed for a donation of personal papers prepared or accumulated during a period in which the donor held any appointive or elective public office.

Having concluded that an increase in the charitable deduction available to artists and authors on gifts of their works and papers is in the public interest, the Committee has consulted with the Committee on Taxation concerning technical matters. The Committee wishes to express its appreciation to the Committee on Taxation, which reached no conclusion with respect to the desirability of the amendment, for its assistance in analyzing the technical provisions of the proposed legislation.

## II. ANALYSIS OF H.R. 6057 AND S.1435

The proposed legislation has five significant features:

1. The amount of the deduction allowable on a charitable contribution of (a) a copyright, (b) a literary, musical or artistic composition or (c) a letter or memorandum, or would include 75% of the appreciation in the value of the property as of the time of the gift in addition to the cost basis of the property. This 75% deduction would apply to (a) the creator of the literary, artistic or musical composition or of the letter, memorandum, or similar property; (b) the person for whom the letter, memorandum or similar property is prepared or produced; or © any person (mainly a donee) whose tax basis in such property is determined by

reference to its basis in the hands of a person specified in (a) or (b) above.<sup>13</sup> Enactment of the bill would not affect other classes of donors, for example, collectors, dealers or persons who acquire an artist's works by will or inheritance.

2. The increased deduction would apply only to gifts to universities, colleges, schools, governmental units, and publicly supported charitable, religious, scientific, literary or educational organizations.

3. To qualify for the increased deduction, the donor would have to obtain from the recipient institution a written statement that the donated property is of historical or artistic significance and that its use by the donee will be related to the exempt purpose of the institution (or in the case of a gift to a governmental unit, to any charitable, religious, scientific, literary or educational purpose).

4. The deduction for gifts of this type would be limited in any year to the donor's gross income for that year "from the sale or exchange of copyrights, literary, musical, or artistic compositions, letters or memorandums, and similar property."

5. The increased deduction would not apply to gifts of papers prepared by an individual while in public office if the writing, preparation or production of the papers was related to or arose out of the performance of the duties of public office.

The Committee endorses the goal and the general approach of the bill, including the limitation of the deduction to less than 100% of the value of the donated property<sup>14</sup> by the recipient institution, but we find several deficiencies in H.R. 6057 and S.1435.

The limitation of the amount of the deduction in any year to the donor's gross income in that year from the sale of artistic properties or manuscripts poses the most significant problems. It does not take into account other income that may be realized by the donor from artistic activities, for example, teaching income or royalty income from licenses of copyrighted material. Also, as an artist's art-related income often fluctuates from year to year, the Committee believes that an appropri-

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13. S.1435 is identical to H.R. 6057, except that the Senate bill would only apply to contributions by the creator of the property, not to persons in classes (b) or (c) above.

14. The Committee recognizes the difficulties inherent in valuing artistic properties and papers, but it believes they do not exceed the difficulties of valuing certain other types of property. Moreover, art and papers must be valued for estate and gift tax purposes or when donated to a charity by a collector or heir. See IRS, VALUATION OF DONATED PROPERTY 561 (1972). The Committee further believes that a deduction of less than 100% of the fair market value of the property may mitigate some of the abuses of overvaluation.

ate ceiling to the deduction might be the greater of (a) such income for the year of the deduction or (b) the average gross income the donor derived from artistic activities during a base period prior to that year. Finally, a limitation of this type would virtually eliminate a deduction for a gift of papers by a historically important figure who is not an artist (for example, a scientist) or by a non-artist correspondent of a historically or artistically significant figure. Accordingly, the Committee opposes application of this limitation to the charitable contribution of papers to a library or museum.

In addition to restricting the deduction to the donor's income from artistic activities, the proposed legislation limits the deduction to the cost basis of the property plus 75% of the appreciation in value. As a result, unless an artist's marginal combined federal and local income tax rate exceeds 57%, his after-tax proceeds from a sale of the property would be greater than the tax savings he would realize from donating the property. While the Committee believes that in most cases a 25% scale-down in the deduction will ensure that an artist does not directly profit from making a contribution, it wishes to point out that a greater decrease would be necessary to ensure that result where (1) the donor's marginal rate exceeds 57%,<sup>15</sup> or (2) a visual artist who normally pays a gallery commission on the sale of his work gives a creation to a museum and is allowed a deduction based on the retail value of the donated work.

The proposed legislation does not amend the definition of a capital asset to include artistic compositions, letters, etc. in the hands of the persons specified in Code section 1221 (3); it merely provides a greater charitable deduction for a gift of such property than for a gift of other appreciated ordinary income property. Accordingly, technical difficulties arise in the interaction of the increased deduction with the general limitations on the percentage of a taxpayer's adjusted gross income which may be offset in any year by a charitable deduction. The Committee believes that since appreciation is taken into account in computing the amount of the deduction for gifts described in H.R. 6057 and S.1435, such gifts should be subject to the 30% limitation applicable to gifts of appreciated capital assets (Code section 170(b)(1)(D)), rather than to the 50% limitation applicable to gifts of ordinary income property (Code section 170(b)(1)(A)).

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15. This would be relatively rare if the donor's income is predominantly earned income.

Finally, the Committee believes that the increase in the deduction should apply to recipients of letters of scholarly significance, as well as to the creators of artistic property or letters; therefore, the Committee prefers the broader approach of the House bill to that of the Senate bill.

The Committee on Art

June 11, 1975

Carl L. Zanger, Chairman

Leslie J. Schreyer, Chairman of  
the Subcommittee on Taxation

Arthur F. Abelman

Kenneth H. Chase

Joel C. Dobris

Jacob Esbeling-Konig

Gilbert S. Edelson

Frederic K. Howard

Harold S. Klein

Howard N. Lefkowitz

Gordon H. Marsh

Michael Panteleoni

Douglas H. Pollak

Peter G. Powers

Ernst Rosenberger

Ruth A. Starr

David P. Steinmann

Palmer Wald

## APPENDIX D

Excerpt from CAA Statement on Sales of Works of Art by the Metropolitan Museum of Art.

2. We disagree with the director's view that the trustees "own" the works of art in the Metropolitan Museum and hence have no accountability to the public.

3. We are concerned that the stated intentions of donors of works of art have not been consistently respected.

4. It is our concern that to the extent possible works of art leaving the museum's collection shall remain available to the public in other public collections.

5. When works of art are sold or traded by the museum we believe that it is the obligation of the museum to make full disclosure to the public and scholars of their new location. Failure to inform scholars of the changed status of works of art is to obstruct the advancement of knowledge.