California Art Preservation Act: Proving Actual Damages

Ronald T. Michioka
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by RONALD T. MICHIOKA*

Introduction

Creation of a work of fine art represents much more than the production of a unique commodity capable of commercial exploitation. The work should also be recognized as an extension of the artist's personality which he has injected into the world.1 It is the embodiment of the artist's reputation and honor and is the ultimate gauge by which his success is measured.2

Notwithstanding the important interests an artist has in his work, the rights of an artist in his creations are only partially protected by the legal system of the United States.3 His pecuniary rights are protected within the traditional concept of copyright.4 The artist's personal or “moral rights,”5 however, have

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3. See infra notes 9-13 and accompanying text.
4. U.S. Copyright Revision Act, 17 U.S.C. § 106 (1982). The Copyright Act reserves for the artist certain rights which enable the artist to put his or her creations to profitable uses. Section 106 gives the artist the exclusive rights to (1) reproduce the copyrighted work; (2) prepare derivative works based upon the work; (3) distribute copies of the work for sale to the public; and (4) to publicly display the work. Id. § 106(1)-(4). Any attempt by someone other than the artist to exploit any of these exclusive rights without the artist's authorization constitutes an infringement of the artist's copyright. Id. § 501(a). See also Diamond, Legal Protection for the "Moral Rights" of Authors and Other Creators, 68 TRADEMARK REP. 244 (1978) (pecuniary rights include exclusive rights of reproduction, adaption, and performance). A pecuniary right is a financial right, one which can be valued in terms of money. See BLACK'S LAW DICTIONARY 1018 (5th ed. 1979).
5. These personal rights are also referred to as an artist's "moral rights" or "droit moral." For a comprehensive discussion of the moral rights doctrine, see gen-
been somewhat neglected by American jurisprudence; they are neither statutorily protected nor specifically recognized at common law.\(^6\) In contrast, continental jurisprudence has embraced the "moral rights" doctrine since 1901.\(^7\) In addition, member nations of the Union for the Protection of Literary and Artistic Works, which is governed by the Berne Convention, have recognized moral rights since the 1928 Rome Convention.\(^8\)

American courts, on the other hand, have consistently held that artists wishing to retain such rights must do so by contract.\(^9\) Consequently, efforts to uphold an artist's moral rights generally Roeder, supra note 1. See also id. at 556 (moral rights consist of right to create and publish in any form desired, right to claim authorship, right to prevent alteration, right to withdraw or destroy the work, prohibition against excessive criticism and prohibition against injuries to creator's personality); L. DUBOFF, supra note 2, at 797-855; Note, The Americanization of Droit Moral in the California Art Preservation Act, 15 N.Y.U. J. INT. L. & POL. 901, 905-09 (1983).


7. See Roeder, supra note 1, at 556 ("In 1901 the Cour de Cassation, the highest French Court, gave official recognition to the [moral rights] doctrine in Cinquin C. Lecocq."). For a comparative summary of continental treatment of the moral rights doctrine, see Diamond, supra note 4, at 247-50.

8. The Berne Convention is an international copyright convention and multilateral treaty setting standards of protection for literary and artistic works. Article 6bis of the Berne Convention, reprinted in 4 M. NIMMER, NIMMER ON COPYRIGHT 27 app. (1986), provides for the artist's right to claim paternity of the work as well as object to any alteration of the work which may harm his reputation. Its provisions are enforced differently from country to country. Id. § 8.21. The doctrine of moral rights is recognized in the more than 50 countries that are signatories to the Berne Convention. See Note, supra note 5, at 903 n.6. The United States is not a signatory nation for various reasons. A discussion of these reasons and the impact on our copyright laws is beyond the scope of this Note. Instead, see generally DuBoff, Winter, Flacks & Keplinger, Out of UNESCO and into Berne: Has the United States Participation in the Berne Convention for International Copyright Protection Become Essential?, 4 CARDOZO ARTS & ENT. L.J. 203 (1985). One important impact, however, is that an artist's moral rights are not recognized in American jurisprudence.

9. Gilliam, 538 F.2d at 24 (court protecting artist's personal right to prevent misrepresentation of work under theories of contract and unfair competition); Crimi, 194 Misc. at 576-77, 89 N.Y.S.2d at 819. This strict standard ignores the inequitable bargaining position from which the artist must negotiate and the informal nature of business transactions by artists. See Diamond, supra note 4, at 261-63; Merryman, supra note 2, at 1043. See also Note, supra note 2, at 1211 n.55 (artists do not execute formal agreements because of custom, aversion to business transactions or lack of bargaining power). A product of this judicial attitude is a reluctance on the part of American artists to act to protect their interests in their creations. See Merryman, supra note 2, at 1036. In 1980, the Bank of Tokyo Trust Company in New York removed a seventeen-foot rhomboid sculpture which had graced the bank's American headquarters.
have been pursued under the guises of "other conventional and respectable labels" such as copyright infringement, breach of contract, libel, invasion of privacy and unfair competition. These doctrines, however, are generally too cumbersome to adequately protect the artist's personality. Each in its own way fails to specifically address the personal interests which moral rights protect.11

Moreover, because of their basic inability to compensate or prevent the mutilation or destruction of valuable works of art, these doctrines fail to protect society's interest in preserving its cultural heritage.12 A work of art is a necessary part of our culture and heritage, and its integrity should be preserved.13

Since 1975. The sculpture's removal required it to be cut into smaller pieces, in effect destroying the work of art. Isamu Noguchi, internationally renowned artist and creator of the sculpture, remarked upon hearing of the incident: "It's vandalism, and very reactionary. I should think they'd ask the artist before they did something like that." When queried what he intended to do about it, he answered, "As long as they paid for it, I have no legal right." Glueck, Bank Cuts Up a Noguchi Sculpture and Stores It, N.Y. Times, Apr. 19, 1980, at 1, col. 2.

Another artist took more drastic measures in response to such mutilating acts, but also doubted the existence of a legal right. In 1960, the influential sculptor, David Smith, wrote letters to Art News and Arts magazines protesting the removal of the red paint he put on one of his sculptures:

My sculpture '17 h's,' made in 1950, painted with six coats of cadmium red, has been partially destroyed by one or more parties involved in its sale and donation to a collection.... This willful work of vandalism causes me to deny this work and refuse any future sale to any of those connected with this vandalism.... Possibly we should start an action for protective laws.


10. 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.21(B) (1986).

11. Professor Roeder asserts that applying such numerous doctrines to an "intrinsically homogenous" subject matter produces confusion as to the basic elements of the cause of action. Roeder, supra note 1, at 575. He goes on to note the problems with each doctrine: libel's burdens of proof and resistance to injunctive relief; unfair competition's inapplicability "to the protection of personal, nonpecuniary rights;" copyright's focus on the exploitative value of creations and protection of the owner of the copyright rather than the creator; the extreme limitations of invasion of privacy especially in jurisdictions which niggardly apply their statutes; and contract's denial of the tort nature of the moral rights doctrine. Id. at 566-68, 575-78. For a comprehensive, comparative discussion of these functional equivalents, see Diamond, supra note 4, at 261-69. See also Note, supra note 2, at 1203-14.

12. See Merryman, supra note 2, at 1042:

[O]ur law provides no way to protect the public interest in preservation of our culture against revision of works of art by unilateral unauthorized action.

The underdeveloped state of our law on this topic is not surprising.... What has been rather lyrically called the "triumph of American art" is a very recent phenomenon. Legal change usually lags behind social and cultural change.

13. Besides protecting the integrity of society's culture, the preservation of art
California was the first state to statutorily recognize a work of fine art as an expression of an artist's personality when it declared that artists have an interest in protecting their works from alteration or destruction. The California Legislature also recognized the public's concomitant interest in preserving its cultural and artistic heritage. These legislative acknowledgements are embodied in the California Art Preservation Act (Act) which provides that no person may intentionally deface, mutilate, alter or destroy a work of fine art. Violations of this statute allow the creator of the altered work to recover, among other remedies, actual damages.

This Note discusses initially the interests the statute is designed to protect. It then compares other tort causes of action which protect analogous interests, specifically libel, invasion of privacy, and intentional and negligent infliction of emotional distress. Prima facie causes of action under each of

also stimulates creation by protecting the creator. See Elsen, supra note 2, at 952 (Art is "a nation's identity card for the present and its passport for the future."); Note, supra note 5, at 911-12 (protecting an artist's work preserves our cultural heritage and "promotes the collective interest").

14. CAL. CIV. CODE § 987(a) (West Supp. 1986) reads:
[T]he Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against such alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.

15. Id.


17. Id. § 987(e)(1).

18. Id. § 987(e)(2). Although the Act provides for injunctive relief (§ 987(e)(1)), punitive damages (§ 987(e)(3)), attorneys' and expert witness fees (§ 987(e)(4)), and "any other relief which the court deems proper" (§ 987(e)(5)), this Note will focus only on the proving of actual damages (§ 987(e)(2)). Actual, or compensatory, damages are defined as the amount awarded to a complainant in compensation for what he or she suffered as the result of his or her injury. Ward v. DeMartini, 108 Cal. App. 745, 749, 292 P. 192, 193 (1930). This Note postulates that, of all the authorized remedies, actual damages are the most problematic. Section 987(e)(5) seems to provide a catch-all solution to this problem by allowing for any relief deemed proper by the court. Since the award for damages is left to the jury's discretion, the question becomes whether this section is meant to supersede the jury's discretion. In practice, a court will rarely impose its judgment over the jury's discretion. See, e.g., Clark Equipment Co. v. Mastelloto, Inc., 87 Cal. App. 3d 88, 99, 150 Cal. Rptr. 797, 804 (1978) (trial court not allowed to correct jury verdict by adding to damages; its only recourse is granting motion for new trial on subject of damages); Bisnett v. Hollis, 207 Cal. App. 2d 142, 150-51, 24 Cal. Rptr. 231, 235-36 (1962) (where jury verdict is insufficient, the court should require the jury to deliberate further). In addition, the court may only award the plaintiff relief which is consistent with the allegations in the complaint and included within the issues. See CAL. CIV. PROC. CODE § 580 (West 1982).
these torts are discussed from the perspective of an unauthorized alteration of a work of art. This discussion examines the standards of proof required by each tort and how they may be applied in a cause of action under the Act. By incorporating the standards of proof used in these analogous torts, this Note offers an objective approach to the otherwise speculative task of proving actual damages under the Act. Special emphasis is placed on the tort of defamation because of its shared interest in protecting the reputation of the individual.

This Note concludes that the highly speculative nature of proving actual damages under the Act can pose severe problems, especially when an "unestablished" artist is involved. This Note proposes the allowance of statutory damages as an alternative remedy to ensure that the artist will be adequately compensated and that the defendant will be sufficiently deterred from mutilation of artwork.

I

Nature of Interests Protected

The moral rights doctrine protects a "bundle of rights."20

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19. Arguably, the Act's provision for actual damages is no more speculative than that allowed in other similar torts. However, the value of an unestablished artist's reputation may often be the source of the problem of speculation under the Act. Reputation is based on an opinion by a member of the artist's community. Tingley v. Times Mirror, 151 Cal. 1, 27, 89 P. 1097, 1107 (1907). Consequently, an unknown, unestablished artist will have difficulty in proving his reputation in a community where he has not had the opportunity to generate community opinion of his professional abilities. As a result, juries will have greater difficulty valuing harm to his reputation than they would valuing harm to the reputation of an established artist. See Behrendt v. Times-Mirror Co., 30 Cal. App. 2d 77, 91, 85 P.2d 949, 964 (1938).

Concededly, courts will presume greater harm to reputation in the case of an unestablished artist than in the case of an established artist. Cf. Behrendt, 30 Cal. App. 2d at 91, 85 P.2d at 964 (libel case involving a physician). However, even this presumption may yield only a nominal amount in damages where the artist is unable to prove sufficient reputational harm to warrant a meaningful award of damages. Unless the artist is convinced that the jury will have grounds to assess damages at a greater-than-nominal amount, he may be reluctant to assert his or her rights under the Act. The prospect of recovering only nominal damages in compensation for reputational harm may deter, rather than encourage, the artist from enforcing his rights under the Act.

20. Varying by jurisdiction, the bundle of rights may include the right to paternity (to demand that one's name be associated with one's work), divulgation (to determine when a piece is finished and ready to be exhibited in public), and integrity (to prevent the alteration or destruction of one's work). Some jurisdictions add the right to create or not to create, the right of access to one's work, the right to withdraw one's work, or the right to modify. See generally L. Duboff, supra note 2, at 797-867; Lubic, New York Artists' Authorship Rights Act Incorporates European Moral Right Doctrine, 8 Fordham Int. L.J. 362, 362-69 (1985); Merryman, supra note 2; Roeder, supra note 1.
The Act adopts two of these rights—paternity and integrity.\footnote{21} The Act protects the right of paternity by providing that "[t]he artist shall retain at all times the right to claim authorship, or, for just and valid reason, to disclaim authorship of his or her work of fine art."\footnote{22} It protects the right of integrity by prohibiting any intentional "defacement, mutilation, alteration or destruction of a work of fine art."\footnote{23}

The Act’s prohibitions against both the mutilation and the destruction of works of art\footnote{24} protect the public’s interest in "preserving the integrity of [its] cultural and artistic creations."\footnote{25} By providing protection until fifty years after the death of the artist,\footnote{26} the Act coextensively protects the individ-

\footnote{21} CAL. CIV. CODE § 987 (West Supp. 1986).
\footnote{22} Id. § 987(d).
\footnote{23} Id. § 987(c)(1). The Act defines "fine art" as "original painting[s], sculpture[s], or drawing[s], or an original work of art in glass, of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser." Id. § 987(b)(2) (emphasis added). "Commercial use" is then defined as work "created under a work-for-hire arrangement for use in advertising, magazines, newspapers, or other print and electronic media." Id. § 987(b)(7). See also Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc., 159 Cal. App. 3d 637, 205 Cal. Rptr. 620, 624 (1984) (architectural plans expressly excluded).

\footnote{24} Both the alteration and destruction of a work of art harm a society’s cultural heritage. The alteration of a work of art "affect[s] the public enjoyment of art and affect[s] the national cultural heritage." Note, supra note 5, at 903. Destruction of a work of art irretrievably "removes something from the cultural heritage of society." Diamond, supra note 4, at 258. Cf. Roeder, supra note 1, at 570 (destruction of artwork is of relative importance if the artist is still alive).

\footnote{25} CAL. CIV. CODE § 987(a) (West Supp. 1986); see also Roeder, supra note 1, at 577 (public is interested in moral rights doctrine "for it protects the integrity of [the] culture and, protecting the creator, it stimulates creation"). The California Legislature reiterates this public interest in section 989: "The Legislature hereby finds and declares that there is a public interest in preserving the integrity of cultural and artistic creations." CAL. CIV. CODE § 987(a). Professor Merryman notes:

There is also the interest of others in seeing, or preserving the opportunity to see, 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. . . . To revise, censor, or improve the work of art is to falsify a piece of the culture.

Merryman, supra note 2, at 1041.

\footnote{26} Once an artist dies, the rights under the Act remain with the artist’s "heir, legatee, or personal representative . . . until the 50th anniversary of the death of [the] artist." CAL. CIV. CODE § 987(g)(1) (West Supp. 1986). This duration period for rights under the Act is equivalent to the duration of rights under the Copyright Act of 1976. Copyright subsists from the moment of creation and endures for the life of the creator and fifty years after his or her death. 17 U.S.C. § 302(a) (1982). Further protection of the artist’s name is provided by section 990 of the California Civil Code. Under this section, a property right in the artist’s name is made transferable by contract, trust, testamentary document or intestate succession. Grantees may exercise this right of
The alteration or destruction of an artist's work also infringes on his statutory rights to reproduce his work and to prepare derivative works. The altered work is no longer reproducible in the form the artist originally intended. In addition, the devaluation of the work brought about by its unauthorized alteration affects the artist's right to resale royalties.

II
Objectives of Remedies

To effectuate these rights, the Act provides a variety of remedies designed to compensate the artist for the violation of his moral rights and for pecuniary losses sustained. Of these remedies, the Act specifically allows the aggrieved artist to seek recovery of actual damages caused by the unauthorized alteration of an artist's work. Publicity can be disallowed or consented to by the artist, and the Act also provides for the protection of the artist's right to refusal of publicity by disallowing or consenting to the commercial use of the artist's name. Cal. Civ. Code § 990 (West Supp. 1986).

27. Ostensibly, once an artist passes away, he can no longer be harmed by attacks on his reputation. His family and heirs, however, can be harmed. It is probably for this reason that the Act extends the rights beyond the death of the artist. One commentator offers a broader explanation:

The basis of the moral right . . . is not pecuniary but is of a dual nature, protecting both the creator and the integrity of the culture. During the lifetime of the artist, the first basis is emphasized . . . . The real reason, however, for protection of the moral right after the creator's death lies in the need of society for protection of the integrity of its cultural heritage.

Roeder, supra note 1, at 575.

28. These rights are afforded under the federal Copyright Act, 17 U.S.C. § 106(1), (2) (1982). The unauthorized alteration of a copyrighted work of fine art would preclude the copyright owner (artist) from reproducing the work since it would no longer be in its intended form. The right to prepare derivative works may or may not be infringed since a derivative work is by definition a work of art in and of itself. See Note, supra note 2, at 1214 n.70 ("the destruction or mutilation of an original work of art does not result in another artwork."). Cf. Note, An Author's Artistic Reputation Under the Copyright Act of 1976, 92 Harv. L. Rev. 1490, 1504-05 (1979).

29. In California, if a buyer subsequently sells a work of art for an amount exceeding $1,000, the artist is owed a resale royalty of five percent of the subsequent selling price. Cal. Civ. Code § 986 (West Supp. 1986). In other states, the artist must secure an equivalent right under contract. A model contract, the Projansky-Sieglaub contract, is available for this purpose. See L. DuBoff, supra note 2, at 1131-33 (reprint of contract). A cause of action for resale royalties, however, would logically require proof that the defendant actually intended to resell the work.

30. The Act allows an artist to seek injunctive relief, punitive damages, and reasonable attorneys' and expert witness fees. Cal. Civ. Code § 987(e)(1), (3), (4) (West Supp. 1986). The court may also award any other relief it deems proper. Id. § 987(e)(5). This Note addresses the Act's provision which allows an artist to seek recovery of actual damages. Id. § 987(e)(2).
of his work. Unfortunately, while allowing recovery of actual damages, the California Legislature has not provided any guidance for calculating actual damages to a sufficient degree of certainty. Actual damages compensate for injuries the artist has in fact suffered. In the context of the Act, actual damages would primarily be harm to the artist's reputation.

III
Other Torts Protecting Analogous Interests

Since the principal harm caused by the alteration or destruction of a work of art is to the artist's reputation, there exists a close parallel to the tort of defamation. By altering a work of art, the actor, in effect, falsely attributes the creation of the al-

32. See infra notes 50-51 and accompanying text.
33. Actual damages represent the amount awarded to the artist in compensation for what he has suffered as the result of an unauthorized alteration of his or her work. See Ward v. DeMartini, 108 Cal. App. 745, 749, 292 P. 192, 193 (1930).
34. In its opening subsection, the Act declares that the unauthorized alteration of fine art "is detrimental to the artist's reputation." CAL. CIV. CODE § 987(a) (West Supp. 1986). See also Elsen, supra note 2, at 955; Merryman, supra note 2, at 1027 (a work of art is an expression of the artist's personality, therefore distortion of the work affects the artist's identity, personality, and honor). In the art world, an artist's success depends on preserving and building his reputation. This reputation is based on the quality of the artist's work as perceived by others in the art community. Interference with the integrity of the work by alteration, destruction, or otherwise, becomes a personal attack on the artist himself. As one commentator has observed, the artist must be afforded certain rights to protect the integrity of his works which constitute his reputation. Karlen, supra note 2, at 682. The sponsor of the Act, State Senator Alan Sieroty, also expressed similar concerns. In a statement to the media, Senator Sieroty declared that "destruction or alteration of an artwork offends the artist and harms the artist's reputation." Press release from the office of State Senator Alan Sieroty (Aug. 1, 1979).
35. See supra note 34.
36. California Civil Code Section 44 states that defamation is affected by either libel or slander. CAL. CIV. CODE § 44 (West 1982). Section 45 then defines libel as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Id. § 45. This definition of libel has been held to include almost any communication which has a natural tendency to injure a person's general or professional reputation. Smith v. Los Angeles Bookbinders Union, 133 Cal. App. 2d 486, 493, 284 P.2d 194, 197 (1955). See also Roeder, supra note 1, at 566 (court's use of libel law to prevent mutilation of artwork denotes recognition of the personal nature of the interest in reputation and the need to protect such reputation). A cause of action based on defamation alone, however, is unsatisfactory to vindicate infringements of an artist's moral rights because of its cumbersome requirements. A plaintiff artist must set forth the specific words, prove pecuniary damage, and show the improbability of injunctive relief. Id. at 575-76.
tered work to the artist. This directly affects the personality of the artist, as expressed in his creation, and denies the artist his right to present the work in its desired form. Like a defamatory statement, it has the potential to denigrate the artist's credibility and esteem in the artistic community, and harm the good will the artist has established throughout his career. The resultant harm to the artist's reputation may therefore affect his pecuniary interest in his future marketability.

The false attribution of the altered work to the artist also closely resembles a violation of the artist's right of privacy.

37. Consistent with the American judicial attitude which denies protection of an artist's moral rights, courts fail to specifically define the term "personality." Webster defines personality as "that which constitutes distinction of person; distinctive personal character; or individuality." WEBSTER'S NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1828 (2d ed. 1956). Character, on the other hand, seems to refer more directly to the person's moral tendencies and values rather than considering the entirety of his being. Webster defines character as "the aggregate of distinctive mental or moral qualities belonging to an individual." Id. at 451. As a legal term in American jurisprudence, "personality" seems to carry no notable legal consequences. As used in this Note, "personality" refers to the totality of the artist as expressed in his creations. It is distinguishable from "reputation" which is an "indication of the opinions of others." Id. at 2116.

38. Alioto v. Cowles Communications, 430 F. Supp. 1363, 1372 (N.D. Cal. 1977) (court considering plaintiff's professional standing and reputation to support recovery of general damages); Turner v. Hearst, 115 Cal. 394, 399, 47 P. 129, 130 (1896) (allowing evidence showing extent of plaintiff's law practice because natural and probable consequence of defamatory statement is harm to professional standing and practice). As in defamatory communications, unauthorized alterations of an artist's work would tend to expose the artist to ridicule or contempt and disparage his integrity, thereby adversely affecting his financial standing in the community. RESTATEMENT (SECOND) OF TORTS § 559 comment b (1977). For discussions of the ramifications of injury to an artist's reputation, see L. DuBOFF, supra note 2, at 773; Karlen, supra note 2, at 682. Arguably, a cause of action for interference with prospective commercial or economic relations may also arise. However, the tenuous nature of the business of fine art may present insurmountable hurdles when an artist attempts to show that he would have received the anticipated sales. In addition, the mere alteration of an artist's work, even if done intentionally so as to interfere with the artist's prospective economic relations, is insufficient to serve as a basis for recovery unless the act also involves conduct which is tortious by itself. Ross v. Wright, 286 Mass. 269, 274-75, 190 N.E. 514, 516-17 (1934). See also W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS, § 130, at 1007-08 (5th ed. 1984). For examples of proofs of reputational harm, see infra pages 316-19.

The alteration of the work misappropriates the artist's name for the benefit of the actor and places the artist in a false light before the public. 40

The alteration may also subject the artist to severe emotional distress 43 brought about by his concern over the threatened or actual harm to his reputation. Buyers will often rely partially on the artist's reputation when deciding on their purchases. An artist with a tainted reputation would be viewed by the buying public as a poor investment. Understandably, damage to this valuable reputation could reasonably be expected to cause the artist severe emotional distress since it would detract from his livelihood. In addition, the buyer of an artist's work stands in a relationship with the artist different from the usual buyer-seller relationship. Because of the intensely personal relationship between the artist and his work, the artist expects the buyer to protect the integrity of the work, and may be extremely averse to changes to that work. 42 Altering the work of art without the artist's consent or direction destroys this trust and infringes on the artist's interest in being free from emotional harm.

By incorporating the proof of damages allowed in the torts of libel, 43 invasion of privacy, 44 and infliction of emotional distress, 45 an artist may proceed to objectively prove the compen-

40. Fairfield, 138 Cal. App. 2d at 86-87, 291 P.2d at 197. In addition to the misappropriation and false light invasions, the right of privacy may also be infringed by intrusion on another's seclusion and unreasonable publicity of his private life. See infra notes 110-12 and accompanying text.

41. Sections 46 and 312 of the Restatement (Second) of Torts make actionable the intentional infliction of emotional distress. The former section requires "extreme and outrageous conduct" which intentionally or recklessly causes severe emotional distress. The latter protects against conduct designed to inflict emotional distress. The latter conduct may be less than extreme and outrageous, but nonetheless must involve an unreasonable risk of foreseeable bodily harm. Section 313 of the Restatement creates liability for conduct which unintentionally, but negligently subjects another to emotional distress likely to result in bodily harm. RESTATEMENT (SECOND) OF TORTS §§ 46, 312 & 313 (1977).

42. The defendant's knowledge of this aversion on the part of the artist, and the concomitant susceptibility to emotional harm, is immaterial with regard to liability. If the defendant intends to cause injury to the artist, he must take the victim as he finds him. Golden v. Dungan, 20 Cal. App. 3d 295, 311, 97 Cal. Rptr. 577, 588 (1971). If the act was negligent, there is no cause of action under the Act, which requires an intentional alteration. CAL. CIV. CODE § 987(c)(1) (West Supp. 1986). See also infra notes 148, 158 and accompanying text.

43. See infra notes 52-108 and accompanying text.

44. See infra notes 109-41 and accompanying text.

45. See infra notes 142-74 and accompanying text.
sable harms he or she has suffered by the unauthorized alteration of his or her work.

IV  
Proof of Damages

A. Prima Facie Cause of Action Under the Act

A cause of action under the Act is established upon proof of the intentional act of altering or authorizing the alteration of the artist’s work of art without the artist’s consent. The Act requires the artist to further prove that the altered work was “of recognized quality.” The artist must also show that the work was not created under a contract for commercial use of the artwork by the purchaser. Commercial use is defined in the Act as the creation of fine art “under a work-for-hire arrangement for use in advertising, magazines, newspapers, or other print and electronic media.”

B. Proving Actual Damages

Actual damages are those losses or injuries which the artist has in fact sustained by the unauthorized alteration of his work. Proving actual damages under the Act may be an onerous burden for an injured artist to bear. Pecuniary damages, such as costs to return the artwork to its original condition, or loss of a promised commission, will usually be relatively assessible. Obstacles arise, however, where the artist seeks compensation for harm in that area which the Act is designed to protect—his reputation. The artist may place himself at the discretion of a jury with the hope that jurors will provide adequate compensation for the injury to his valuable reputation. A wiser course to follow, however, would be to offer affirmative,

47. Id. § 987(b)(2). A plaintiff artist may rely on the opinions of art experts to establish the “recognized quality” of the altered work. Id. § 987(f).
48. Id. § 987(b)(2). See also supra note 23 and accompanying text.
49. Id. § 987(b)(7). See also supra note 23 and accompanying text.
51. Pecuniary damages are those injuries which are capable of compensation and estimation in terms of money. They are not strictly the loss of money, property or rights, but include any loss, deprivation or injury which can be subjected to calculation and compensation in money. BLACK’S LAW DICTIONARY 353 (5th ed. 1979).
objective proof of specific reputational harms the artist has suffered upon which the jury may base its assessments. Establishing the artist's reputation in the art community will provide the foundation from which actual damages will flow. By drawing from the standards of proof used in the tort causes of action of libel, invasion of privacy and infliction of emotional distress, a system of valuation may be created and applied in causes of action under the Act.

1. Applying Standards Used in Actions for Libel

In its initial paragraph, the Act declares that "the physical alteration or destruction of fine art . . . is detrimental to the artist's reputation." A presumption is raised that the alteration is libelous and actionable per se. Damage to the artist's reputation would therefore be conclusively presumed and proof of special damages, such as loss of sales or business opportun-

52. CAL. CIV. CODE § 987(a) (West Supp. 1986) (emphasis added).
53. A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence. CAL. EVID. CODE § 600(a) (West 1982). For hypothetical purposes, this Note postulates that because the Legislature has declared an unauthorized alteration of artwork to be harmful to an artist's reputation, a court may presume the fact that an unauthorized alteration of a work of art produces reputational harm. Damages would therefore be presumed and proof of reputational harm would be unnecessary. This Note still recommends, however, that the injured artist offer proof of harm to his reputation in order that the jury may objectively assess damages.
54. By definition, a defamatory "statement" is libelous on its face when it is "defamatory [i.e. injurious to the reputation] of the plaintiff without the necessity of explanatory matter." CAL. CIV. CODE § 45(a) (West 1982). Section 45 defines libel as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Id. § 45 (emphasis added).
55. See Manguso v. Oceanside Unified School Dist., 153 Cal. App. 3d 579, 583, 200 Cal. Rptr. 535, 540 (1984) (communication harming plaintiff in his profession and defamatory without explanation is actionable even absent a showing of lost employment); Rosenberg v. J.C. Penney Co., 30 Cal. App. 2d 609, 620-21, 86 P.2d 696, 702 (1939) (words with a tendency to injure plaintiff in her trade, even if directed only towards her goods, may be actionable per se). See also CAL. CIV. CODE § 45(a) (West 1982):

A libel which is defamatory of the plaintiff without the necessity of explanatory matter . . . is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. [emphasis added]. The Restatement additionally defines "actionable per se" as referring to the fact that the character of the defamatory statement is such that liability arises despite the absence of special harm. RESTATEMENT (SECOND) OF TORTS § 569 comment b (1977).
56. Special damages are defined as those which really took place and are not im-
ties, would be unnecessary. Furthermore, evidence of a lack of injury to reputation would be inadmissible.

Actual malice on the part of the defendant need not be shown unless the artist seeks exemplary or punitive damages, or needs to overcome a qualified privilege held by the defendant. Actual, or common law malice is defined as ill-will or improper purpose or motive. It can be shown by proving that the defendant altered the work of art knowing that the alteration was false. Such a showing would not be necessary where

plied by law. They are those damages which do not necessarily arise from the action complained of and are therefore not implied by law. In such a case, the facts out of which the damages arise must be asserted in the complaint. See Gomes v. Fried, 136 Cal. App. 3d 924, 939-40, 186 Cal. Rptr. 605, 614 (1982); McCready v. Bullis, 59 Cal. App. 286, 290, 210 P. 638, 640 (1922).

57. See Manguso, 153 Cal. App. 3d at 583, 200 Cal.Rptr. at 540 (even without loss of employment, statement that is libelous on its face is actionable); Di Giorgio Fruit Corp. v. AFL-CIO, 215 Cal. App. 2d 560, 569, 30 Cal. Rptr. 350, 355 (1963) (special damages need not be proven if the article is libelous per se). See also RESTATEMENT (SECOND) OF TORTS § 822 (1977). Although courts will presume greater harm to reputation in the case of an unestablished artist, Behrendt v. Times-Mirror Co., 30 Cal. App. 2d 77, 91, 85 P.2d 949, 961 (1938), the fledgling artist should nevertheless show the extent of the harm to his reputation for the purpose of assessing damages beyond a nominal sum. See infra notes 71-74, 83-106 and accompanying text.


59. Exemplary or punitive damages are those damages which may be awarded for the sake of example or as a means of punishing a defendant who has defamed the plaintiff with actual malice. CAL. CIV. CODE § 48(a)(4)(c) (West 1982). Ordinarily, malice is not an element of a defamation cause of action and need not be pleaded. Davis v. Hearst, 160 Cal. 143, 156, 116 P. 530, 536 (1911) ; 5 B.E. WITKIN, CALIFORNIA PROCEDURE, PLEADINGS § 145 (3d ed. 1985). When, however, a plaintiff seeks to recover punitive or exemplary damages, he must plead and prove that the defendant acted with malice. Hall v. Berkell, 130 Cal. App. 2d 800, 804, 279 P.2d 832, 835 (1955).

60. An artist must show that the defendant acted with actual malice when the defendant asserts that he had a qualified or conditional privilege to commit the alteration of the work of art. See Mullins v. Brando, 13 Cal. App. 3d 409, 420, 91 Cal. Rptr. 796, 802-03 (1970). The Restatement (Second) of Torts indicates that a qualified privilege exists when the defendant acts in order to protect an interest. The interest may be held by the defendant himself or by a third party, or it may be a public or societal interest. Restatement (Second) of Torts § 592a Scope Note, at 258 (1977). See, e.g., Hoesl v. United States, 451 F. Supp. 1170, 1179 (N.D. Cal. 1978) (conditional privilege where employee under a duty to publish defamatory statement in report to defendant employer regarding plaintiff). Section 47 of the California Civil Code lists situations where a publication is considered to be privileged. Conditional privileges exist under the Code when a communication is made to an interested person by one who is (1) also interested; (2) in a relationship with the recipient which will render the motive for the communication innocent; or (3) requested by the recipient to give the information. CAL. CIV. CODE § 47(3) (West 1982).


62. Hoesl, 451 F. Supp. at 1179 (privilege is lost if abused by acting with malice, i.e., knowledge of the falsity of the communication or motivated by ill-will).
the artist merely seeks actual damages. Where, however, the defendant asserts and proves that he was conditionally privileged in committing the alteration, the artist would then have the burden of proving actual malice. Such a privilege is usually only afforded in situations where the act is deemed necessary to further some interest. In the context of alteration of a work of art, a defendant faces a formidable burden in proving that the alteration served an interest which outweighs the artist's interest in protecting his reputation.

In actions under the Act, the injured artist would rarely need to show the stricter constitutional malice required by New York Times v. Sullivan and its progeny. If, however, the artist holds such an extensive reputation that he would be considered a public figure and if his work is so treasured as to be considered of public concern, then New York Times malice may have to be shown. However, if an artist in fact achieves such stature and his work becomes so valuable as to be of public concern, it seems unlikely that an unauthorized alteration or mutilation would occur, except in instances of vandalism where the value of the object of the vandalism is of no consequence to the actor. Artwork by an artist of such stature will usually command enough reverence that its mutilation becomes an improbability.

In spite of these initial burdens of proof, the artist will be entitled to at least nominal damages. This would be appropri-

63. Davis, 160 Cal. at 156 (compensatory damages recoverable without pleading malice, without proving malice, and in the absence of malice).
65. See, e.g., Robison v. Lescrenier, 721 F.2d 1101 (7th Cir. 1983) (no privilege where no interest of the defendant was protected by the defamatory publication, nor was there any reason to believe that any interest was endangered so as to make the defamation necessary).
66. Constitutional malice has been defined by the Supreme Court as acting with knowledge of the falsity of the act, or with reckless disregard of whether the act was false or not. New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).
70. Dun & Bradstreet, 472 U.S. at 749; Rosenbloom, 403 U.S. at 29.
71. Hearne v. De Young, 132 Cal. 357, 361, 64 P. 576, 578 (1901); Hotel & Restaurant Employees and Bartenders Union v. Francesco's B., Inc., 104 Cal. App. 3d 962,
ate when the jury finds that there has been no substantial harm to the artist’s reputation either because the artist has not shown that the alteration of his work has caused serious harm, or because of the insignificance of the alteration.\textsuperscript{72}

It is therefore advantageous for the artist to affirmatively prove his damages. Although he is not required to make such a showing, he is entitled to do so.\textsuperscript{73} By not proving damages, the artist runs the risk of recovering only nominal damages. In addition, if he should be awarded a substantial sum, the court may deem the award excessive and reduce it to what it considers to be a reasonable amount.\textsuperscript{74}

When proving damages, the artist may testify as to his mental suffering. Mere statements by the artist that he has suffered mental upset, insomnia, shame, humiliation and loss of creativity will suffice.\textsuperscript{75} He may not, however, introduce evidence of the mental suffering of others, such as members of his family or friends.\textsuperscript{76} If he holds a good faith belief that these others would suffer distress because of the mutilation of his work, he may testify that his own mental suffering was augmented by such a belief.\textsuperscript{77} If members of his family or friends in fact suffer mental distress, the artist’s mental worry caused by their suffering will be inadmissible.\textsuperscript{78} The artist will be restricted to showing only such mental suffering as was actually

\begin{footnotes}
\footnote{973. 164 Cal. Rptr. 109, 115 (1980). \textit{See also} \textsc{Cal. Civ. Code} § 3360 (West 1982) (allowing recovery of nominal damages where a breach of duty causes no appreciable detriment).}

\footnote{72. \textsc{Di Giorgio Fruit Corp.} v. AFL-CIO, 215 Cal. App. 2d 560, 577, 30 Cal. Rptr. 350, 360 (1963) (court will award at least nominal damages without proof or allegation of special damages if defendant is guilty of a libel per se); \textsc{Hearne}, 132 Cal. at 361, 64 P. at 578 (nominal damages awarded when a jury finds no substantial harm to reputation).}

\footnote{73. \textsc{Di Giorgio}, 215 Cal. App. 2d at 577, 30 Cal. Rptr. at 360.}

\footnote{74. \textsc{Bertero v. National General Corp.}, 13 Cal. 3d 43, 64, 118 Cal. Rptr. 184, 529 P.2d 608 (1974); \textsc{Rosenberg v. J.C. Penney Co.}, 30 Cal. App. 2d 609, 628-29, 86 P.2d 696, 706 (1939).}

\footnote{75. \textsc{Douglas v. Janis}, 43 Cal. App. 3d 931, 940, 118 Cal. Rptr. 280, 286 (1974) (plaintiff’s testimony of his suffering mental upset is admissible); \textsc{Grimes v. Carter}, 241 Cal. App. 2d 694, 702, 50 Cal. Rptr. 808, 813 (1966) (plaintiff testifying as to shame, humiliation); \textsc{Earl v. Times-Mirror Co.}, 185 Cal. 165, 170, 196 P. 57, 60 (1921) (one element of damages is injury to feelings of the plaintiff which may be inferred by a direct statement of the plaintiff that his feelings were injured). \textit{See also} \textit{Hall, Proof in Libel Actions in California}, 24 S. Cal. L. Rev. 339, 365 (1951).}

\footnote{76. \textsc{Earl}, 185 Cal. at 170-72, 196 P. at 60-61; \textit{Hall, supra} note 75, at 365-66.}

\footnote{77. \textsc{Waite v. San Fernando Publishing Co.}, 178 Cal. 303, 306, 173 P. 591, 592 (1918); \textit{see also} \textsc{Earl}, 185 Cal. at 170-71, 196 P. at 60; \textit{Hall, supra} note 75, at 366.}

\footnote{78. \textit{Earl}, 185 Cal. at 171-72, 196 P. at 60 (plaintiff’s mental worry caused by family’s actual mental suffering is inadmissible).}
\end{footnotes}
caused by the alteration of the work. 79

The standard of measuring an artist’s mental suffering is “the susceptibility of the ordinary person occupying the same position as plaintiff at the time of the [alteration].” 80 Evidence of the artist’s particular sensitivity to alterations of his work would therefore be inadmissible, 81 as would evidence tending to show an artist’s incapacity to suffer mental anguish. 82

The artist may also show that he has been subjected to ridicule or contempt in the art community because of the distortion of the work. 83 In Meliodon v. Philadelphia School District, 84 the plaintiff, a sculptor commissioned by the school district to produce some models for the Board of Education Building, sued for damages caused by the district’s alteration of the models after delivery. As part of his claim for relief, the artist claimed that members of the art world subjected him to ridicule and contempt since he was attributed with the creation of the altered models. The sculptor further claimed difficulty in securing subsequent sculptural contracts. The court found that his claim stated a cause of action for damages to his reputation. Unfortunately, the school district was entitled to governmental immunity and therefore could not be held liable in tort for the acts of its agents. 85

In an action under the Act, the artist’s general good reputa-

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79. Id.
81. Tingley, 151 Cal. at 16-19, 89 P. at 1103-04; Hall, supra note 75, at 367 & n.97.
82. Tingley, 151 Cal. at 16-19, 89 P. at 1103-04; Hall, supra note 75, at 367 & n.97.
84. 328 Pa. 457, 195 A. 905 (1938).
85. The court found that the school district was a state agency performing governmental functions. The district therefore could not be held liable for the negligence or malfeasance of its officers or agents. Meliodon, 328 Pa. at 459-60, 195 A. at 906.

In California, the matter of governmental tort liability is entirely controlled by statute. The court in Datil v. City of Los Angeles, 283 Cal. App. 2d 655, 660, 69 Cal. Rptr. 788, 791 (1969), declared that the Tort Claims Act, CAL. GOV’T CODE § 810 (West 1980), abolished all governmental tort liability except that which is specifically provided for by statute. Section 815 of the Tort Claims Act expressly provides that, except as otherwise provided by statute, a public entity is not liable for an injury caused by an act or omission by the public entity, a public employee, or any other person. CAL. GOV’T CODE § 815(a) (West 1980).
tion will be presumed\textsuperscript{86} and evidence of this general reputation will be inadmissible.\textsuperscript{87} He may not show, for instance, that he holds a reputation for honesty and veracity in the community where he lives. He may, however, prove his social and financial standing and his reputation as a professional artist since the mutilation of his work tends to adversely reflect upon that reputation.\textsuperscript{88} Evidence of demands for his work by museums, galleries and collectors would be admissible as would evidence of invitations to speak at art institutes and universities. The evidence of his professional reputation, however, should be confined to that held in the local art community.\textsuperscript{89}

In establishing his professional standing in the local art community, the artist may rely on opinion evidence.\textsuperscript{90} This would

\textsuperscript{86} Davis v. Hearst, 160 Cal. 143, 185-86, 116 P. 530, 548-49 (1911); C. McCormick, supra note 83, at 426; Hall, supra note 75, at 347-48 (it is difficult, however, to determine when a plaintiff’s general reputation has been attacked by the defendant).

\textsuperscript{87} The artist may offer evidence of his good reputation only upon attack by the defendant. Davis, 160 Cal. at 186, 116 P. at 548-49; Scott v. Times-Mirror Co., 178 Cal. 688, 691, 174 P. 312, 313-14 (1918); C. McCormick, supra note 83, at 426.

\textsuperscript{88} Alioto v. Cowles Communications, 430 F. Supp. 1363, 1372 (N.D. Cal. 1977), aff’d, 623 F.2d 616 (9th Cir. 1980), cert. denied, 449 U.S. 1102 (1981) (court considering plaintiff’s prominence in community, and professional reputation and standing); see also Earl v. Times-Mirror Co., 185 Cal. 165, 170-90, 196 P. 57, 67-68 (1921) (evidence detailing plaintiff’s social and business history in the local community admissible).

The presumption of a good general reputation is not applicable to an artist’s professional reputation. Scott v. Times-Mirror Co., 178 Cal. 688, 691, 174 P. 312, 313-14 (1918). When an artist pleads a good reputation in his professional or business capacity, he has assumed the burden of proving such reputation. The artist cannot wait until the defendant attacks his professional reputation before offering evidence of a good professional reputation.

\textsuperscript{89} Hall, supra note 75, at 348. But cf. C. McCormick, supra note 83, at 426 (proof of a person’s good professional reputation accomplishes the same result as proof of his good general reputation). Evidence of the artist’s professional reputation is admissible on the question of damages and does not violate the general rule that evidence of the plaintiff’s personal character and reputation is admissible only upon attack by the defendant. Examiner Printing Co. v. Aston, 238 F. 459, 464-68 (9th Cir. 1916).

\textsuperscript{90} Hall, supra note 75, at 348-49 (evidence restricted to plaintiff’s reputation in the local community; evidence of specific acts inadmissible). However, courts will allow evidence of the artist’s reputation \textit{where he has done business} if the circumstances so require. People v. Schmidt, 79 Cal. App. 413, 418-19, 249 P. 832, 834 (1926) (allowing such evidence in large urban setting where it is less likely that neighbors would know of plaintiff’s reputation in his community). The defendant may thereafter attack the plaintiff’s professional reputation, but may not resort to rumors or reports unless they are so prevalent that they may have affected the plaintiff’s reputation. Hall, supra note 75, at 348-49. In addition, such evidence must be restricted to a period prior to the mutilation of the artist’s work and should address the artist’s reputation for producing works similar to the work as it has been altered. United States v. Lewis, 482 F.2d 632, 641 (D.C. Cir. 1973). Witnesses testifying to this effect must be shown to possess personal knowledge of such reputation. State v. Faafiti, 54 Haw. 637,
allow testimony of art experts—conceivably the same experts that were used to establish the "recognized quality" of the work.\(^9\) The applicable sections of the California Evidence Code\(^9\) would control the admissibility of such expert and other opinion testimony.

In general, the artist would be required to establish the art expert's business or professional qualifications.\(^9\) The artist should show that the witness is acknowledged as having a strong background in the visual arts and a broad knowledge of aesthetics and art trends. He must also lay a foundation for the opinion-of-reputation testimony by establishing some association between himself and the art expert.\(^9\) A showing of the expert's frequent contact with persons who know of the artist, such as gallery owners, or persons who have heard of the artist, such as art critics or collectors, is sufficient to establish this association.\(^9\)

When selecting reputation witnesses, the artist should take care to select persons who are respectable, highly qualified, and neutral.\(^9\) He should consider individuals such as professors emeritus in contemporary art history, or directors and curators

\(643-44, 513 P.2d 697, 701-02 (1973)\) (citing Michelson v. United States, 335 U.S. 469 (1948)).

91. Although an expert is not required to offer evidence of the artist's reputation, in the context of the fine arts business, an art expert would possess the requisite business qualifications, frequent contacts with persons knowing the artist and possibly some association between the artist and the defendant. If such expert witnesses are unavailable, an artist might attempt an opinion survey within the art community. His testimony concerning the survey results would be admissible into evidence. People v. Franklin Nat'l Bank of Franklin Square, 200 Misc. 557, 566, 105 N.Y.S.2d 81, 90-91 (1951).


95. Faafiti, 54 Haw. at 643-44, 513 P.2d at 701-02; see also Tingley v. Times-Mirror Co., 151 Cal. 1, 27, 89 P. 1097, 1107 (1907).

96. ROBERT L. SHAW, CALIFORNIA COURTROOM PRACTICE & PROCEDURE 156 (rev. ed. 1980); 3 AM. JUR. PROOF OF FACTS 179 (1959); Annot., 17 A.L.R.3d 327, 332 (1968). Preference should be given to highly qualified witnesses, especially those outstanding in business or professions, or public officials. Testimony from such witnesses tends to command more respect at trial. As to neutrality of the witness, see People v. Tiner, 11 Cal. App. 3d 428, 434-35, 89 Cal. Rptr. 834, 839 (1970). In general, the personal interest of a character witness in the outcome of the case will make his testimony suspect because the artist himself has selected him.
of preeminent museums. The leading art critic in the artist’s community should also be considered as a potential reputation witness. Ideally, these witnesses should be acquainted with the artist’s history and development.\footnote{\textit{Faafiti}, 54 Haw. at 643-44. 513 P.2d at 701-02 ("witness must be shown to have known the [artist] for a sufficient length of time such that it is conceivable that he would have seen or heard remarks concerning [the artist’s work and the quality thereof]").}

An alternative means of establishing reputation is through negative evidence.\footnote{Negative evidence is defined as "testimony that an alleged fact did not exist." \textit{BLACK’S LAW DICTIONARY} 930 (5th ed. 1979).} The absence of evidence of a bad reputation raises the presumption that the artist holds a good reputation in the art community.\footnote{People v. Adams, 137 Cal. 580, 582, 70 P. 662, 663 (1902); People v. Buchanan, 119 Cal. App. 523, 526, 6 P.2d 538, 539 (1932). A witness so testifying must be acquainted with the artist before he can testify that he has never heard anything denigrating about the artist’s reputation as an artist. \textit{See supra} notes 94-95, 97 and accompanying text.} For example, the lack of disfavorable reviews of the artist’s exhibits or public art commissions may sufficiently serve this function.

The testimony regarding his professional standing should also convey the effect the mutilation of the work has had on the witnesses’ opinions of the artist.\footnote{C. MCCORMICK, \textit{supra} note 83, at 429 (citing Van Lonkhuyzen v. Daily News Co., 195 Mich. 283, 161 N.W. 979 (1917)).} Testimony to the effect that conduct towards the artist has changed since the alteration is particularly persuasive.\footnote{Poleski v. Polish American Publishing Co., 254 Mich. 15, 20-21, 235 N.W. 841, 842-43 (1931) (testimony of conversation in which prospective customer rebuffed plaintiff based on defamatory statement is admissible to establish claim of damage by showing particular instance).} If a collector can testify that, after seeing the altered work, he held doubts as to the artist’s future aesthetic capabilities and would subsequently hesitate to make purchases of his work, such testimony would lend substantial support to the claims of the artist.

The artist may also offer evidence of the defendant’s wealth, but only as an indicator of the defendant’s social standing and influence in the art community.\footnote{Barkly v. Copeland, 74 Cal. 1, 7, 15 P. 307, 310 (1887); C. MCCORMICK, \textit{supra} note 83, at 429-30 & nn.48-54.} This will allow a jury to infer the probable effect of the defendant’s actions. However, the artist may not show the defendant’s wealth to demonstrate the defendant’s ability to compensate the artist.\footnote{Barkly, 74 Cal. at 7, 15 P. at 310; C. MCCORMICK, \textit{supra} note 83, at 429-30 & nn.48-54. However, once the evidence of the defendant’s wealth has been admitted, it would allow a jury to infer the probable effect of the defendant’s actions. However, the artist may not show the defendant’s wealth to demonstrate the defendant’s ability to compensate the artist.}
Evidence of the defendant's social standing and influence in the art community may also be probative of the probable effect of his alteration of the artist's work. In the incident involving David Smith's estate, the two trustees who altered the deceased artist's work were a widely-respected art critic and a well-respected artist. Due in part to their stature in the art community, their alteration of Smith's works went unsuspected and the artist was unquestioningly attributed with the creation of the altered works. Arguably, if the actors had been less respected in the art community, the authorship of the altered works might have been questioned. Damage to David Smith's reputation might have been avoided and authorship of the altered works properly disclaimed.

The jury will have broad discretion to decide the amount of the damages that should be awarded. Its determination will not be questioned on appeal unless the award is so excessive that the reviewing court can only conclude that the determination was based on passion or prejudice. Once the affirmative offers of proof have been made, the jury will have objective grounds on which to base its assessment of the amount of damages the artist should recover.

is difficult to imagine it not influencing a jury's calculation of compensatory damages. See C. MCCORMICK, supra note 83, at 429-30.

104. C. MCCORMICK, supra note 83, at 429-30 & nn.48-54 (citing Sclar v. Resnick, 192 Iowa 669, 185 N.W. 273 (1921)) (evidence of defendant's social standing will help the jury assess the probable weight the community would give to the defendant's alteration of the work).

105. The trustees of the estate of the deceased sculptor took it upon themselves to strip the paint from some of the sculptures to give them the appearance of the earlier, and more acclaimed, unpainted works by the sculptor. See Kramer, supra note 9, at 28, col. 1; Krauss, Changing the Work of David Smith, ART IN AMERICA, Sept.-Oct. 1974, at 30.

106. One of the trustees was Clement Greenberg, whose critical acclaim of Mr. Smith's work substantially contributed to the success of the sculptor's career. Mr. Greenberg personally "favored the unpainted sculptures and depreciated the painted ones." Merryman, supra note 2, at 1040. The other trustee was Robert Motherwell, an internationally renowned abstract expressionist and contemporary of David Smith. See Kramer, supra note 9.


2. **Applying Standards Used in Actions for Invasion of Privacy**

The right of privacy has been defined as the right to be let alone.\(^\text{109}\) There are four ways in which this right may be invaded.\(^\text{110}\) Because of their applicability to the interests protected under the Act, this Note will only examine two of the ways this right may be invaded—the tort of appropriation of a person's name\(^\text{111}\) and the tort of publicity which places a person in a false light before the public.\(^\text{112}\)

a. **Appropriation of a Person's Name**

A person who alters an artist's work of art and attributes the altered work to the artist may be said to have appropriated the artist's name for his own advantage. Once the work has been altered, it is no longer the artist's work. If the defendant continues to hold or display the altered work as a work of the artist, the artist's name has been appropriated for the benefit of the defendant.\(^\text{113}\) As a general rule, the appropriation need not be of the artist's name per se, but may be merely an exploitation of his personality.\(^\text{114}\) Altering a work of art so that its style or form is still attributable to the artist would be an exploitation of the artist's personality rather than a strict appropriation of the artist's name. Nor does the defendant need to realize a pecuniary benefit from the appropriation. All that is needed is

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110. Although tied together by the common name of invasion of privacy, each of the four ways in which one's privacy may be invaded violates separate and distinct interests. The four torts are: (1) intrusion upon one's seclusion or solitude, or into one's private affairs; (2) public disclosure of embarrassing private facts; (3) appropriation of one's name or likeness for the actor's advantage; and (4) publicity which places one in a false light before the public. Lugosi v. Universal Pictures, 25 Cal. 3d 813, 819, 603 P.2d 425, 428, 160 Cal. Rptr. 323, 326 (1979); *Restatement (Second) of Torts* §§ 852A(2)(a)-(d) & 652B-652E (1977).


112. *Id.* § 652E.


an unauthorized use of the artist's identity for the defendant's own purpose and benefit.\textsuperscript{115} For example, if the owner of a sculpture repaints the sculpture so that it matches the upholstery on his newly acquired love seat and continues to present the sculpture as a creation of the artist, he will have invaded the artist's privacy. By repainting the sculpture, the owner has appropriated the artist's name for the owner's prestige and standing. It is irrelevant that the owner did not realize any monetary gain.

For the appropriation of his name, the artist may recover damages for impairment of reputation and standing in the art community, personal humiliation, and mental suffering.\textsuperscript{116} The artist's recovery for mental distress is limited to what he actually suffered and to the kind of distress which normally results from the mutilation of an artist's work.\textsuperscript{117} In addition, the artist may recover for the loss of the value of the exclusive use of his name.\textsuperscript{118}

Unlike libel, where injury to the character or reputation is the gist of the cause of action, the gravamen of an invasion of privacy action is a direct wrong of a personal nature which results in injury to the feelings of the artist. The wrong usually involves a measure of disregard for the effect the act may have on the standing of the artist in the art community.\textsuperscript{119} This suggests that the primary damage would be mental distress and hurt feelings.\textsuperscript{120} The artist should therefore offer evidence of

\begin{thebibliography}{99}
\bibitem{115} Fairfield, 138 Cal. App. 2d at 86-87, 291 P.2d at 197-98; see, e.g., Hinish v. Meier & Frank Co., 166 Or. 482, 113 P.2d 438 (1941) (use of name on telegram to Governor urging veto of a bill).
\bibitem{117} Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); \textsc{Restatement (Second) of Torts} \textsection 652H comment b (1974). In one incident of mutilation, a sculpture by Mary Miss was dismantled by a troop of boy scouts from the sculpture's site at Lake Placid. The artist expressed feelings of frustration and anger at the loss which also caused her to miss an opportunity to gain added exposure of her work. Glueck, \textit{Sorry Footnote to Lake Placid}, \textit{N.Y. Times}, May 16, 1980, at C24, col. 4. Other possible scenarios may find an artist so distraught that he cancels a planned exhibit thereby losing a prime business opportunity. Of course, the mental suffering need not entail some pecuniary loss to the artist, but if such loss can be proved, it would be recoverable as special damages. \textit{Fairfield}, 138 Cal. App. 2d at 88-90.
\bibitem{118} Clark v. Celeb Publishing, Inc., 530 F. Supp. 979, 983-84 (S.D.N.Y. 1981) (applying California law) (compensation for use of plaintiff's identity recoverable only in appropriation cases); see also \textsc{Restatement (Second) of Torts} \textsection 652H comment a (1977).
\bibitem{119} Fairfield, 138 Cal. App. 2d at 86, 291 P.2d at 197.
\bibitem{120} "The right of privacy concerns one's own peace of mind, while the right of
his hurt feelings, shame, humiliation, and the like. Although the measure of damages is left to a jury's discretion, such affirmative evidence of actual harm will provide an objective basis for an award in the artist's favor.

As in libel, the social status and reputation of the artist should be averred so that the trier of fact may infer injury to the artist's feelings. The artist may personally testify as to his injured feelings in order to establish damages.

Proof of actual damages allowed in an action for invasion of privacy for appropriation of an artist's name is similar, if not identical, to that used in actions for libel. In an action under the Act, the artist would not find much to borrow from an appropriation cause of action beyond the proofs of actual damages he or she may have already borrowed from the tort of libel. In this sense, the proofs allowed in the appropriation type of invasion of the artist's privacy are redundant within the proposed scheme for proving actual damages.

b. False Light Publicity

If the alteration of a work of art places the artist in a false light which would be highly offensive to a reasonable person, and the defendant knew or recklessly disregarded the falsity of the alteration and the false light in which the artist would be placed, the artist would have a cause of action for freedom from defamation concerns primarily one's reputation.” Id. at 86. “As in libel, substantial compensation is allowed for injury to feelings even in the absence of special damages.” Id. at 88-89 (quoting Warren & Brandeis, supra note 109, at 219).

121. Id. at 88 (citing Taylor v. Pole, 16 Cal. 2d 668, 673, 107 P.2d 614, 616 (1940); Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 137, 188 Cal. Rptr. 762, 774 (1983)).

122. Ibid., 139 Cal. App. 3d at 137, 188 Cal. Rptr. at 774 (impairment of reputation and standing in the community included as compensable actual injuries).

123. Fairfield v. American Photocopy Equip. Co., 138 Cal. App. 2d 82, 90, 291 P.2d 194, 199 (1955) (testimony as to social status of plaintiff implies injury to his feelings; direct statement by plaintiff that his feelings were injured bolsters this implication).

124. See supra notes 75-104 and accompanying text.


126. Gill v. Curtis Publishing Co., 38 Cal. 2d 273, 280, 239 P.2d 630, 634-35 (1952); Restatement (Second) of Torts § 652E comment c (1977). At the very least, a court will look to see if there is anything uncomplimentary or discrediting in the alteration which has placed the artist in a false light.

127. This actual malice requirement must be met in order to satisfy the constitutional restrictions placed on actions based on false or defamatory publications. Actual malice has been defined as acting with knowledge of the falsity of a statement or with
invasion of privacy. It is not necessary that the artist be defamed. The artist need only claim that he has been attributed with characteristics or beliefs that are false, and has thereby been placed before the public in a false position.\textsuperscript{128} The false position, however, must be of a kind that would be highly offensive to a reasonable person.\textsuperscript{129} A good example of an alteration which would have been actionable under the Act is an incident which involved Alexander Calder, the innovator of the mobile as an art form. In 1958, Calder's black and white mobile, entitled \textit{Pittsburgh}, was donated by a private owner for installation at the Greater Pittsburgh International Airport. The municipality unilaterally repainted the mobile in the county colors of green and gold. For security and liability reasons, the mobile was also immobilized so that its original configuration was altered. Despite the artist's heated protests, the mobile was not restored until after Calder's death in 1978.\textsuperscript{130}

A cause of action for false light publicity will not lie, however, unless the alteration has been communicated to the public in general, or else to a substantial number of people.\textsuperscript{131} In the Calder incident, the public display of the mobile satisfied this limitation. An exception to this limitation exists when a disclosure of the mutilation is made to a limited number of people in several states who are acquainted with the artist, but not acquainted with each other.\textsuperscript{132} Thus, if the Calder incident had reckless disregard for its falsity. \textit{See} New York Times Co. v. Sullivan, 376 U.S. 254 (1964).


\textsuperscript{130} Weil, \textit{The Moral Right' Comes to California}, 1979 \textit{Art News} 88.


\textsuperscript{132} \textit{Kinsey}, 107 Cal. App. 3d at 271-72, 165 Cal. Rptr. at 612 (finding adequate publicity in publication to a small, but widespread group of people with nothing in common except possible acquaintance with the plaintiff).
been publicized in a multistate, exclusive art publication, this exception would probably apply.

If the false publicity is also defamatory, the artist may recover for harm to his reputation caused by the false position in which he has been placed. Under Gertz v. Robert Welch, Inc., the artist would be limited to recovering for only actual injuries. Such actual injuries need not be pecuniary in nature, but may also include any damages he is able to prove. The artist's testimony alone may serve as proof of injury in the form of emotional distress.

The artist must therefore show that the alteration attributed false aesthetic sensibilities to him, thereby causing harm to reputation and humiliated him, contempt and mental suffering. As in the misappropriation tort, the proof of actual damages allowed in a false light cause of action mirrors the proof allowed in a libel cause of action. For this reason, the false light tort fails to offer additional help in establishing a scheme for proving actual damages.

3. Applying Standards Used in Actions for Infliction of Emotional Distress

a. Intentional Infliction of Emotional Distress

If the defendant's alteration of the work of art is extreme
and outrageous, with the intent to cause the artist severe emotional distress, the artist may bring an action for the resulting emotional distress and bodily harm. The defendant’s conduct must be shown to have exceeded all bounds of decency so as to be considered atrocious and intolerable. This can be evidenced by a showing of any one of the following situations: (1) repeated and prolonged mutilation of works of art; (2) abuse of a relationship which gives the defendant authority over the artist or the power to damage the artist’s interests.


One who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue.

146. Even if the act of mutilating the work of art is, in and of itself, insufficient grounds to constitute extreme and outrageous behavior, when it is repeated or prolonged to the point of hounding, it may then constitute the type of behavior for which relief may be granted. E.g., W. PROSSER & W. KEETON, supra note 38, § 12, at 61 (repeated invitation to illicit intercourse, accompanied by indecent pictures or exposure, as grounds for relief). A possible scenario in the fine arts world may involve continued and consistent alterations of a particular artist’s work by a gallery or investment buyer. Such acts may approach “outrageousness” where gallery catalogues supplement the alteration by visually representing the altered works as those of the artist without acknowledging the unauthorized alterations by the gallery. In the case of the investment buyer, he might repeatedly misrepresent the altered works in a series of sales at auction houses.

147. Stoiber v. Honeychuck, 101 Cal. App. 3d 903, 921, 162 Cal. Rptr. 194, 202 (1980) (citing Newby v. Alto Riviera Apartments, 60 Cal. App. 3d 288, 296, 131 Cal. Rptr. 547, 552 (1976)). See also RESTATEMENT (SECOND) OF TORTS § 46 comment e (1977). The relationships which have served as grounds for relief have typically involved police, collecting creditors, employers, and the like. An artist must show that the relationship he shared with the defendant made him sufficiently vulnerable to the defendant’s position that emotional distress was a reasonably foreseeable result of the
or (3) knowledge on the part of the defendant of the artist's special sensitivity or vulnerability to emotional injury.\textsuperscript{148}

If the artist has established himself to such a degree that he may be considered a public figure,\textsuperscript{149} the artist must then prove that the defendant's alteration of the artwork was done with "actual malice" under New York Times v. Sullivan.\textsuperscript{150} This standard is met when the jury finds that the emotional distress has been proximately caused by the defendant's intentional or reckless mutilation of the artist's work.\textsuperscript{151}

The defendant may also be liable for mutilations intended to inflict emotional distress although not extreme or outrageous.\textsuperscript{152} A cause of action lies if the mutilations involve an unreasonable risk that bodily harm would result.\textsuperscript{153} For example, in Melidolon v. Philadelphia School District,\textsuperscript{154} the school district's unauthorized alteration of the artist's models may not have reached the level of outrageousness normally required. The act, however, could have been characterized as carrying an unreasonable risk of causing bodily harm to the artist. The district should have realized that its alterations would cause shock and substantial mental suffering to the artist.

In either case, the artist should offer evidence of the severe emotional distress he has suffered.\textsuperscript{155} The artist may accom-

\begin{itemize}
\item[\textsuperscript{148}] Stoiber, 101 Cal. App. 3d at 921, 162 Cal. Rptr at 202. See also Restatement (Second) of Torts § 46 comment f (1977).
\item[\textsuperscript{149}] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
\item[\textsuperscript{150}] 376 U.S. 254 (1964).
\item[\textsuperscript{151}] Falwell v. Flynt, 797 F.2d 1270 (4th Cir.), reh'g denied, 805 F.2d 484 (4th Cir. 1986), cert. granted, 107 S. Ct. 160 (1987).
\item[\textsuperscript{152}] Vargas v. Giacosa, 121 Cal. App. 2d 521, 263 P.2d 840, 844 (1953); Restatement (Second) of Torts § 312 comment b (1977). Conduct which is designed to inflict emotional distress, is less than extreme and outrageous, but involves an unreasonable risk that harm will result, is actionable. In such a case, the known risk makes the act one of extreme outrage.
\item[\textsuperscript{153}] Bowden v. Spiegel, Inc., 96 Cal. App. 2d 793, 794-95, 216 P.2d 571, 572-73 (1950) (mere words held actionable where collection agency telephoned at 11:00 p.m., threatening plaintiff with regard to overdue bill which she did not in fact owe, resulting in her illness).
\item[\textsuperscript{154}] 328 Pa. 457, 195 A. 905 (1938). See supra notes 84-85 and accompanying text.
\item[\textsuperscript{155}] In addition to the severe emotional distress, the artist may show bodily harm which is caused by the emotional distress. Golden, 20 Cal. App. 3d 295, 308, 97 Cal. Rptr. 577, 586 (1971).
\end{itemize}
plish this by direct testimony of his suffering from anxiety, depression, nervous shock, or any highly unpleasant mental reaction such as fright, grief, humiliation and the like.\textsuperscript{156} The artist must additionally show that the distress is reasonable and justified under the circumstances,\textsuperscript{157} unless he is able to prove the defendant knew of the artist's peculiar susceptibility to distress.\textsuperscript{158} Courts will consider the intensity and duration of the distress in deciding whether it is of the kind that a reasonable person could not be expected to endure.\textsuperscript{159}

Attendant bodily harm need not be shown, but in its absence courts will require more outrage in the defendant's conduct to ensure the validity of the artist's claim.\textsuperscript{160} Proof of shock or other disturbance to the nervous system is sufficient to establish that the artist has suffered physical injury from the mutilation of his work.\textsuperscript{161}

Finally, the artist must establish that the mutilation of the artwork was the proximate cause of his distress.\textsuperscript{162} If the defendant intended to cause serious emotional distress, and the distress which results is shown to be a substantial factor in causing other injury, the defendant is liable for that other


\textsuperscript{157} Kiseskey v. Carpenters’ Trust for S. California, 144 Cal. App. 3d 222, 231, 192 Cal. Rptr. 492, 497 (1983) (courts will take into account the intensity and duration of the distress). See also W. PROSSER & W. KEETON, supra note 38, § 9, at 59. The artist must show distress beyond mere annoyance or affront to dignity. Otherwise, “the distress must be such as a reasonable person of ordinary sensibilities would undergo under the circumstances.” W. PROSSER & W. KEETON, supra note 38, § 12, at 63 (citing March v. Cacioppo, 37 Ill. App. 2d 235, 242-43, 185 N.E.2d 397, 400-01 (1962)).

\textsuperscript{158} See supra note 148.


\textsuperscript{161} Alcorn v. Anbro Engineering, Inc., 2 Cal. 3d 493, 468 P.2d 216, 218 (1970) (psychopathological states considered “physical” and include nervous disorders, depression and nervous shock); Leasman v. Beech Aircraft Corp., 48 Cal. App. 3d 376, 382, 121 Cal. Rptr. 768, 771 (1975); Vanoni v. Western Airlines, 247 Cal. App. 2d 793, 797, 56 Cal. Rptr. 115, 117 (1967). See also BOOK OF APPROVED JURY INSTRUCTIONS (BAJI) § 12.71 (1986). The term “physical harm,” as used in these instructions, includes not only physical injury and bodily illness, but also the physical consequences of shock to the nervous system. Id.

\textsuperscript{162} Causation is initially decided as a question of law by the court. If the evidence offered is such that conflicting conclusions can be drawn, the decision becomes a question of fact for the jury. See Golden, 20 Cal. App. 3d at 311, 97 Cal. Rptr. at 588.
CALIFORNIA ART PRESERVATION ACT

b. Negligent Infliction of Emotional Distress

The defendant may negligently cause emotional harm to the artist and may be liable for the bodily harm the artist suffers as a result of the negligent act.\textsuperscript{164} If the defendant should have known that his mutilation of the artwork carried with it an unreasonable risk of causing the distress, he will be liable.\textsuperscript{165} A resulting physical injury is no longer required so long as a proper showing is made that the defendant should have foreseen shock severe enough to cause substantial injury in an ordinary person.\textsuperscript{166}

c. Damages for Emotional Distress

The measure of damages for emotional distress is the amount which will adequately compensate the artist for the harm he has suffered.\textsuperscript{167} In contrast to libel and invasion of privacy, the reputation of the artist is immaterial in an action for infliction of emotional distress.\textsuperscript{168}

\textsuperscript{163} Tate v. Canonica, 180 Cal. App. 2d 898, 909, 5 Cal. Rptr. 28, 36 (1960).
\textsuperscript{165} The tort of negligent infliction of emotional distress rests on grounds of foreseeability. If the defendant should have known that his conduct carried with it an unreasonable risk of causing harm to the artist, then the law will hold him liable. Ochoa v. Superior Ct., 39 Cal. 3d 159, 166, 703 P.2d 1, 5, 216 Cal. Rptr. 661, 665 (1985); \textit{Dillon}, 68 Cal. 2d at 739-40, 441 P.2d at 921-22, 69 Cal. Rptr. at 81-82; Kessell v. Superior Ct., 186 Cal. App. 3d 1060, 1067, 231 Cal. Rptr. 183, 187 (1986); \textit{Bowden}, 96 Cal. App. 2d at 795, 216 P.2d at 573. \textit{See also} RESTATEMENT (SECOND) OF TORTS § 313 comment b (1977).
\textsuperscript{167} The measure of damages is the same as in other tort actions, and is equal to the amount "which will compensate for all the detriment proximately caused thereby." CAL. CIV. CODE § 3333 (West 1982).
\textsuperscript{168} The tort is designed to compensate for hurt feelings, pain, and suffering regardless of the status of the plaintiff. If the defendant’s act defames the artist, a cause of action is stated for defamation. Emotional distress then becomes a factor in determining damages. It does not create a second independent cause of action. Grimes v. Carter, 241 Cal. App. 2d 694, 702, 50 Cal. Rptr. 808, 813 (1966).
Elements of damages which may be elicited from the artist or other witnesses include any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.\textsuperscript{169} Compensable physical consequences of emotional distress include directly or indirectly resulting illness or bodily injury such as shock, nausea, and insomnia.\textsuperscript{170} Other physical consequences include excitement,\textsuperscript{171} miscarriage,\textsuperscript{172} aggravation of pre-existing conditions,\textsuperscript{173} and personality disorders.\textsuperscript{174} The artist should offer evidence of any or all of these injuries caused by the defendant’s alteration of the artist’s work.

4. **Value of Lost Resale Royalties**

A separate and distinct damage the artist may suffer is loss of his statutory right to a resale royalty.\textsuperscript{175} Section 986 of the California Civil Code entitles an artist to a five percent resale royalty for any resales of his or her artwork in California for any price exceeding one thousand dollars.\textsuperscript{176} Mutilation or destruction of an artist’s work would operate to deny the artist this potential royalty.\textsuperscript{177} The defendant’s act could devalue the work so that it could no longer command the requisite one thousand dollar resale price.\textsuperscript{178} Also, the artist may exercise his right to disclaim authorship of the work,\textsuperscript{179} in which case he would no longer be eligible for the resale royalty since he

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\textsuperscript{174} Tate v. Canonica, 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960).

\textsuperscript{175} When the original purchaser of a work of art resells the work at an appreciated price, California law requires the seller to remit a resale royalty to the creator of the work of art. \textit{See infra} notes 176-78 and accompanying text.

\textsuperscript{176} \textsc{Cal. Civ. Code} § 986(b)(2) (West Supp. 1986). The right to the royalty may not be waived unless by contract providing a higher rate of payment than that provided by this section. \textit{Id.} § 986(a).

\textsuperscript{177} \textit{See} Karlen, \textit{supra} note 2, at 712.

\textsuperscript{178} \textsc{Cal. Civ. Code} § 986(b)(2) (West Supp. 1986). The section does not apply to any resale for a gross price of less than one thousand dollars.

\textsuperscript{179} \textsc{Cal. Civ. Code} § 987(d) (West Supp. 1986). If there exists a “just and valid reason,” the artist may disclaim authorship of his or her work of fine art. \textit{Id.}
would no longer be "the artist of such work of fine art."\(^{180}\)

The "potential" status of the resale royalty suggests that the artist must show the probability of a resale of the artwork. Since no resale royalty is generated until the artwork is actually sold, the artist would undoubtedly have to show that the work was intended for, or scheduled for resale. Existence of a contract between the defendant and a third party for such a resale would be conclusive,\(^ {181}\) while showing that the defendant is a speculator or investment buyer in art would be persuasive.\(^ {182}\)

If this burden of proof is met, the artist would then have to establish the value of the lost work.\(^ {183}\) In attempting to value a work of art at the time it sustained damage, the United States Court of Appeals for the Ninth Circuit, in *Merchants Fire Assurance Corp. v. Lattimore*,\(^ {184}\) held that original or unique works of art do not necessarily lose their entire value when damaged. According to expert testimony at trial, properly restored works of art may regain their original value and continue to appreciate with the passage of time.\(^ {185}\) An artist who is bringing an action under the Act would have to rebut this finding by showing that the altered work is either unsuitable for restoration or could no longer be resold for more than one thousand dollars.

If this rebuttal is successful, the artist must then prove the resale value of the altered work. This may be based on the original selling price of the work with a reasonable increase brought about by appreciation.\(^ {186}\) The artist himself may contribute other factors such as the worth of the lost piece in comparison to other works in his *oeuvre*\(^ {187}\) or the existence, or

\(^{180}\) A seller is required to pay the royalty to "the artist of such work of fine art." [CAL. CIV. CODE § 986(a) (West Supp. 1986)].

\(^{181}\) See Karlen, *supra* note 2, at 712 n.231.

\(^{182}\) Showing that the defendant regularly engages in speculative investment in fine art would imply that he always intended to resell the altered work as is his custom.

\(^{183}\) This would presume, of course, that the artist has kept accurate records of past sales or exhibitions which would be necessary to substantiate his estimates of the value of the altered work. However, artists in general tend to avoid formal business transactions. See sources cited *supra* note 9.

\(^{184}\) 263 F.2d 232, 237 (9th Cir. 1959).

\(^{185}\) *Id.* (citing testimony of Benjamin W. Langman).

\(^{186}\) In order to establish a reasonable rate of appreciation, the artist would have to depend on the testimony of experts experienced in the sale of fine art such as appraisers, auctioneers, or gallery owners.

\(^{187}\) An artist's *oeuvre* is the entire body of work he has created during his career.
nonexistence, of duplicates of the altered work.\textsuperscript{188} An expert appraisal, however, would have the most evidentiary value because of its greater objectivity and neutrality.\textsuperscript{189}

The resultant resale value may then be used as the basis for assessing the loss of resale royalties the artist has sustained. The artist's actual damages would equal five percent of the proven resale value.

VI

Proposal for Statutory Damages

The Act represents the introduction of the moral rights doctrine to American jurisprudence. Its provision allowing an injured artist to seek recovery of actual damages, however, presents problems in proving such damages. The artist may find himself the subject of a system of judicial determination which arbitrarily awards compensation according to the persuasiveness of the parties. To relieve this situation, a system of proving actual damages can be devised by drawing analogies to other torts which protect similar interests.

Despite this possibility, the speculative nature of calculating such damages still remains. As a rule, the amount recoverable remains primarily within the discretion of a jury which may or may not be sensitive to the issues involved in the fine arts. Thus the artist is left at the mercy of changing sentiments and baseless approximations of the harm he has suffered. The artist is also exposed to the risk that he may recover only nominal damages which are insufficient compensation for the reputational harm suffered.

The proposed analogous system of proving actual damages also fails to properly address the personal nature of the rights involved and merely skirts the issue of moral rights.

Through statutory amendment, the gap left by the provision for actual damages can be filled. An additional provision for

\textsuperscript{188} Section 987(b)(2) provides an exclusive definition of fine art which includes only original paintings, sculptures, drawings and works in glass. \textit{Cal. Civ. Code} § 987(b)(2) (West Supp. 1986). Of these types of fine art covered by the Act, only sculptures are capable of being produced in duplicates. \textit{Id.} Through the use of master molds, a limited series of the same sculpture may be produced. Of course, the value of each sculpture in the series will be diluted as the number in the series is increased.

\textsuperscript{189} As in the case of an art expert testifying as to the artist's professional reputation, an art appraiser would be expected to take a neutral stance in his appraisal. \textit{See} sources cited supra note 96.
statutory damages\textsuperscript{190} would offer a meaningful alternative for the injured artist. Statutory damages would also be especially applicable to an unestablished artist who lacks a professional reputation upon which compensation for his or her injuries may be based.

Statutory damages have proven to be an effective remedy in cases arising under the copyright laws. A plaintiff artist bringing an action under the Copyright Act\textsuperscript{191} is assured a better-than-nominal amount if he prevails in his action. In addition, the Copyright Act allows for an increase in the amount of statutory damages in the event of a willful infringement and a reduction in the event of an innocent infringement.\textsuperscript{192} In this way, the damages serve to deter willful acts of infringement while tempering their punitive role where there is an absence of malice. The assurances conveyed by this remedial system provide a realistic incentive for artists to enforce their copyrights.

Borrowing from the Copyright Act of 1976,\textsuperscript{193} an amendment to the Act may read as follows:

\textit{Section 987(e)}: To effectuate the rights created by this section, the artist may commence an action to recover or obtain any of the following:

(6) Statutory damages. The artist may elect, at any time before final judgment is rendered, to recover, instead of actual damages, an award of statutory damages for all physical defacements, mutilations, alterations, or destruction of a work of fine art in a sum of not less than $1,000 or more than $10,000 as the court considers just.

(i) In a case where the creator of the work of art sustains the burden of proving, and the court finds, that a physical defacement, mutilation, alteration, or destruction of a work of fine art was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $50,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of the

\textsuperscript{190} Statutory damages are damages resulting from statutorily created causes of action, as opposed to actions at common law. BLACK'S LAW DICTIONARY 354 (5th ed. 1979).

\textsuperscript{191} 17 U.S.C. §§ 101-914 (1982).

\textsuperscript{192} Id. § 504(c)(2).

\textsuperscript{193} Id. § 504(c) (remedies for infringement: damages and profits).
artist's rights under this section, the court in its discretion may reduce the award of statutory damages.

Conclusion

The moral rights of an artist are for the most part unprotected in the United States. It has been the tradition of American jurisprudence to protect the economic rather than the personal rights of artists. If an artist's work is mutilated or destroyed, he has the choice of accepting the loss, disclaiming authorship of the altered work, or attempting to enforce his rights under "analogous" legal doctrines. These legal doctrines, however, are either too cumbersome, or too insufficient to offer a meaningful remedy for the aggrieved artist.

In landmark legislation, California became the first jurisdiction to provide protection for an artist's moral rights. The Art Preservation Act\(^\text{194}\) protects the artist's right of integrity by making actionable any intentional alteration or destruction of his work. It also protects the right of paternity by allowing the artist to claim or disclaim authorship. The Act permits an injured artist to recover, among other remedies, actual damages.

Artists, especially unestablished artists, may encounter numerous obstacles in attempting to prove actual damages under the Act. Borrowing proofs allowed in other torts which protect similar interests\(^\text{195}\) is helpful, but fails to address the personal nature of the issues and still involves a substantial measure of speculation.

By adding a provision for statutory damages to the Act, artists in California would have a meaningful alternative remedy for harms they have suffered as a result of unauthorized alterations of their work. A scheme of remedies which includes statutory damages as an alternative remedy will ensure the efficacy of the Act and allow a more complete realization of its objectives. In conjunction with the Act's existing remedies, an artist's moral rights in California will more than adequately protect the artist's interests in his reputation and the public's interest in preserving its cultural heritage.

\(^{194}\) CAL. CIV. CODE § 987 (West Supp. 1987).

\(^{195}\) For purposes of this Note, these analogous torts are libel, invasion of privacy, and infliction of emotional distress.