UNIVERSITY OF OKLAHOMA

GRADUATE COLLEGE

PROTECTING ARTISTS' MORAL RIGHTS IN THE U.S. LEGAL CONTEXT

A DISSERTATION

SUBMITTED TO THE GRADUATE FACULTY

in partial fulfillment of the requirements for the

Degree of

DOCTOR OF PHILOSOPHY

By

JEREMY FRIED
Norman, Oklahoma
2022

PROTECTING ARTISTS' MORAL RIGHTS IN THE U.S. LEGAL CONTEXT

A DISSERTATION APPROVED FOR THE

DEPARTMENT OF PHILOSOPHY

BY THE COMMITTEE CONSISTING OF

Dr. Sherri Irvin, Chair

Dr. Stephen Ellis

Dr. Amy Olberding

Dr. Ralph Beliveau

Acknowledgements

I would like to extend my gratitude to the following people for their support over the course of my doctoral degree and beyond. I would not have been capable of finishing this work without their love and patience. I truly appreciate the different ways they have all helped me throughout this process.

My advisor, Sherri Irvin, who at times had to function as a combination of coach and therapist rather than as a mere advisor. I cannot count the number of times I came to Sherri while working on this dissertation or other projects wondering whether or not I should just give up and run off to the mountains to start a pharmacy-themed goat ranch and fromagerie. (I may not have revealed these cheese-based plans to my advisor.) She always greeted these crises with encouragement and wisdom and I could not have found a better guide for this process.

The members of my committee, Steve Ellis, Amy Olberding, and Ralph Beliveau whose flexibility and understanding were vital. Life on both the macro and micro level was often tumultuous over the course of my graduate career and my committee made it possible to navigate the many expected and unexpected challenges of the last seven years.

I'm not sure how I, or anyone really, would manage to get through the various requirements of being in the Philosophy Department at the University of Oklahoma without our amazing support staff, Shelley Konieczny and Gabriel Serrano. In a building full of professional philosophers, I could always guarantee that the best conversation I would have would be with Gabe and that any problem that actually needed a solution meant taking to Shelley. They really are the heart of the department.

One of the most unique and beneficial experiences I had as a doctoral student was participating in an aesthetics research group with my advisor and fellow graduate students. I am particularly thankful to the most consistent members of the group, Atabak Aklaghi, Cheryl Frazier, Stephanie Holt, and Babak Mohammadizadeh Khoshroo, whose time and attention, as well as insightful feedback, contributed to this dissertation and much of my other graduate work. People took time out of their own busy schedules to support each other and make each other's work better. I learned so much by being able to engage with people doing such interesting and meaningful things. I'll be lucky if I get to work with a similar group in the future.

Many other philosophers have served as inspirations and mentors during my time as a graduate student, including the entire faculty of the Philosophy Department at the University of Oklahoma. I would like to extend particular thanks to Hugh Benson, Brian Burkhart, Monte Cook, A.W. Eaton, Ley David Elliette Cray, Jerry Green, Gregory Heiser, C.F. Peterson, Brian Soucek, Nancy Snow, and Lani Watson.

The long haul that is a dissertation and doctoral program is simply impossible alone, or at least it would have been for me. I cannot imagine doing this without the love and support of friends and family, even if many of their eyes glazed over if I started to detail the actual content of this dissertation. My parents, Ron and Tobi Fried, supported me in spite of many circumstances where they could have done otherwise. Their unwavering love and pride fueled me in difficult times. My brother, Josh, is always one of the first people to celebrate whenever I have good news, and I'm lucky to have his presence in my life. My friends in the philosophy department that I haven't already mentioned - Jewelle Bickel, Kyle Burnard-Fullington, Jordan Droira, Kelly Epley, Pat Eppley, Kazi Huda, Madeline Martin-Seaver, Chase McCumber. Shen Pan, Seth Robertson, Arielle Rodriguez, Wenhui Xie - you all made my experiences in the department better and made philosophy fun. My friends outside the department – Meagan and Rhett Brackeen and Ashley and Mike Walsh – thanks for the Zoom hangs.

To my cats Cajun Justice and Risky Biscuits, you were often more of a hindrance than a help in writing this, but I'm thankful for your love and distraction.

To Cheryl Frazier. I cannot put into words everything you mean and have meant to me. I know I've already said in these acknowledgements that I couldn't have done this without these other people's help, but without you, I *really* could not have done this. You are my partner when it comes to philosophy and when it comes to everything else. I cannot even begin to sufficiently thank you., but I hope this is start.

Sincerely,

Jeremy

Table of Contents

Abstract

The three chapters of this dissertation work together and build on each other to make an argument for stronger uniform artists' moral rights protections in the United States legal system. The current system provides inconsistent protection in a narrow subset of instances and fails to adequately protect moral rights. Many artists lack protections either due to the type of work they produce or due to lack of stature and bargaining power. I argue that by adopting an intimacy-based motivation for protecting moral rights the US legal system could develop laws that sufficiently protect moral rights more broadly and more fairly. This system would guarantee a minimum level of protection for all artists who satisfy the requirements of the intimacy account and provide artists in the United States the same level of protections enjoyed by artists in other countries.

This work fills current gaps in the philosophical and legal literature, as well as offering new insights into areas that have been previously discussed. There are two main philosophers currently working in and around the area of artists' moral rights and copyright law: K.E. Gover and Darren Hudson Hick. Gover focuses on moral rights while not suggesting how these rights should be legally protected and Hick discusses legal protections without discussing moral rights. My work engages with both and provides a bridge, both discussing moral rights and legal application.

In Chapter One, I offer a novel justification for the protection of artists' moral rights based explicitly in the intimate relationship that connects artists to their work. The intimacy account of artists' moral right rights builds from two more general intimacy accounts. Charles Fried's intimacy account justifies protection for acts of sharing information which was

previously private and which a person has no duty to share. Julie Inness's intimacy account justifies protection through appeal to the emotional context that accompanies the relationship between an agent and the act/item/information. This emotional context involves having a loving, caring, or valuing relationship. The intimacy account of artists' moral rights draws from both to create a justification for protecting moral rights based on the idea that artist reveal information and ideas that could have been kept private and do so with the proper accompanying emotional context.

In Chapter Two, I identify the type and scope of artists' moral rights protected by the intimacy account. I apply the intimacy account developed in Chapter One to the traditional rights covered under the umbrella of artists' moral rights: the right of disclosure, the right of attribution, the right of withdrawal, and the right of integrity. I provide examples and arguments to demonstrate the connections between intimacy and all four traditional moral rights. The Chapter concludes with an extended case study of destruction of graffiti artworks at the well-known site 5 Pointz and a brief discussion of a case involving the posthumous retitling of a work by artist Emily Carr.

In Chapter Three, I explore the current state of moral rights protections in the US legal context, offer a critique of the current state of these rights, and offer an initial proposal for what I believe is an improved approach to protecting artists' moral rights. The chapter serves as an initial scholarly response to 2019 Copyright Office Report on the state of moral rights protections. The chapter moves through the current patchwork of protections for moral rights. In doing so, I identify some central themes: for instance, the fact that laws tend to extend to moral rights protections unintentionally and as a result fail to offer protection when tensions occur between moral rights and the stated intent of the law. I conclude by presenting a guide towards stronger moral rights protections. The explicit adoption of a federal statute aimed at protecting artists' moral rights, with acknowledgement of the intimacy-based justifications for these protections, could guide courts towards more accurately enforcing the protection of rights.

Introduction

Protecting Artists' Moral Rights in the U.S. Legal Context

The three chapters of this dissertation work together and build on each other to make an argument for stronger uniform artists' moral rights protections in the United States legal system. The current system provides inconsistent protection in a narrow subset of instances and fails to adequately protect moral rights. Many artists lack protections either due to the type of work they produce or due to lack of stature and bargaining power. This means, as discussed in Chapter Three, that an artist may lack moral rights protections because they advocate for a cause in their art or may be forced to sacrifice their rights to gain employment benefits. The current system unjustly favors artists and companies that already have significant status and power, leaving less well-established artists behind. It leaves much of the protection of artists' rights to contract negotiations, which allows power imbalance to dictate whose rights take precedence. I argue that by adopting an intimacy-based motivation for protecting moral rights the US legal system could develop laws that sufficiently protect moral rights more broadly and more fairly. This system would guarantee a minimum level of protection for all artists who satisfy the requirements of the intimacy account and provide artists in the United States the same level of protections enjoyed by artists in other countries.

I. Literature Addressing Artist's Moral Rights

This work fills current gaps in the philosophical and legal literature, as well as offering new insights into areas that have been previously discussed. There are two main philosophers currently working in and around the area of artists' moral rights and copyright law: K.E. Gover[1] and Darren Hudson Hick.[2] Gover focuses on moral rights while not suggesting how these rights should be legally protected, and Hick discusses legal protections without discussing moral rights. My work engages with both and provides a bridge, discussing both moral rights and legal application.

Gover addresses moral rights issues from a theoretical perspective while omitting to discuss legal application. In her book, *Art and Authority: Moral Rights and Meaning in Contemporary Art*, Gover explains her theoretical views on artists' moral rights. Gover offers a dual-intention theory of authorship, according to which there is an intention to create a work at all and then an intention that the work be considered one's own. Gover considers the ability of an artist to determine the moment of ratification, associated with the latter intention, to be one of the most fundamental artistic rights. For Gover, separating the moment of creation from the moment of ratification and putting the second entirely in the control of the artist is meant to solve many of the controversies surrounding control of artworks, and is at the heart of her view of artists' moral rights. Additionally, she claims that what she calls "emotive accounts," which would include the intimacy account, cannot allow for her dual-intention view.

In Chapter Two, I explain how my intimacy-based justification can embrace Gover's notion of ratification, while also explaining how other moral rights such as disclosure, withdrawal, and integrity are also justified by the intimacy account. Gover's focus on ratification means that much of the force of her theory applies directly only to the right of attribution. I

[1] K. E. Gover, *Art and Authority: Moral Rights and Meaning in Contemporary Visual Art*, First edition (Oxford: Oxford University Press, 2018).
[2] Darren Hudson Hick, *Artistic License: The Philosophical Problems of Copyright and Appropriation* (Chicago ; London: The University of Chicago Press, 2017).

embrace Gover's suggestions while challenging her removal of intimacy and offering a justification of moral rights with broader application. Additionally, Gover does not apply her view to how the law currently protects artists' moral rights, nor to suggestions for how it should do so moving forward. Given the practical importance of the law in protecting these rights, this is a missed opportunity. I embrace this opportunity in Chapter Three, both detailing problems with the current patchwork of legal moral rights protections in the United States and providing suggestions for improvements to these protections in the future.

Darren Hudson Hick does explicitly address legal application of his theory, but his focus is exclusively on economic intellectual property rights, like copyright. Hick does not spend much time discussing the moral rights of artists in his philosophical work. In the afterword of his book *Artistic License: The Philosophical Problems of Copyright and Appropriation*, Hick acknowledges Gover's suggestion that moral rights would be a fruitful area for him to include in his proposed scheme for modifying the current legal schema for both fair use and appropriation art, but he does not take up this suggestion. Hick deals thoughtfully with appropriation art, fair use, and the current copyright schema.

Hick argues that artists have an economic right to their works, or at least the original arrangement of components in their works. This falls out of Hick's ontology, which denies that any of the components of works of art are actually created or original, with the consequence that the particular expression is where the creativity lies. Components of art works can be understood as being like the building blocks of works, such as colors, shapes, notes, and words. The exact line between a component and something more is blurry, but Hick thinks all works break down into components and that none of these are original or created. Expression is the arrangement of these components. Though the components all exist prior to the work's creation, the way they are arranged can be unique and creative via original expression. In coming to this conclusion, Hick rejects a theory based in original genius. I apply Hick's line of reasoning, as he does not, to moral rights and the justification thereof. I offer up an intimacy account as able to encompass the focus on expression and rejection of genius. This stands in opposition to personality theories, which Hick rejects in justifying economic rights.

Additionally, Hick deals directly with the legal applications of his view. He criticizes the current way that fair use law and appropriation art cases are adjudicated and makes suggestions for improvements. I follow this example regarding moral rights in Chapter Three, critiquing the current system of laws deemed sufficient by the US Copyright Office and proposing ways these legal protections could be improved. In doing so, I take up Gover's suggestion to Hick to specifically address legal protections for moral rights.

This dissertation fills a philosophical space left by Gover and Hick by both providing a theoretical justification for artists' moral rights protections and applying that justification to the US legal system. In my first chapter, I present an intimacy account justifying moral rights. In chapter two, I explain how that theoretical framework can be used to justify traditional moral rights protections. In my final chapter, I offer an assessment of current legal protections in light of that theoretical framework and make suggestions for improvement moving forward.

By providing a novel justification for protecting artists' moral rights, I offer something missing from most legal discussions. The legal discussion of artists' moral rights comes primarily in three forms: court cases, legal reports, and law review articles. Court cases are explicitly aimed at interpreting the current law and applying it to cases. While they often canvass the history of moral rights protections, these cases make no theoretical arguments justifying protections. Most cases involving artists' moral rights are determined by whether or not a work in question falls within a narrow scope of protection.

Legal reports regarding artists' moral rights are exemplified by "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019."[3] This report offers a history of moral rights, a summary of the guiding principles used by the Copyright Office in reviewing the sufficiency of current moral rights protections, and an assessment of the current moral rights regime. This report was produced in response to calls for stronger moral rights protections, but despite finding that there are times when artists lack moral rights protections for a variety of reasons, the Copyright Office recommends against necessary change and offers only minor suggestions for potential improvement. In Chapter Three, I offer an initial scholarly assessment of this report in which I challenge both some of the guiding principles, such as a deference to the status quo, and the finding that the current system sufficiently protects artists' moral rights. I critique the reasoning employed by the Copyright Office and highlight areas where the current system fails to protect the intimacy-based rights of artists.

Legal scholarship also comes in the form of publications by law professors and legal practitioners, mainly in the form of law review articles. While philosophical interest in the moral rights of artists has been relatively minimal, the same cannot be said of legal interest in the Visual Artists Rights Act (VARA) of 1990, the only US law directly aimed at protecting artists' moral rights. It has been said that there are more law review articles discussing VARA than actual cases.[4] The majority of these law review articles follow a similar format. They tend to

[3] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019," 2019, 172.
[4] Amy M Adler, "Against Moral Rights," *California Law Review* 97, no. 1 (2009): 38.

focus on narrow legal questions rather than theoretical analysis.[5] They canvass the current cases regarding VARA and note that the law has been interpreted to have an incredibly narrow scope. Then they make recommendations for how a party should navigate within this landscape – usually by suggesting that artists and non-artists alike get a contract in writing that states exactly what rights the parties agree to regarding the work. This can protect the buyers of works from the possibility of having to deal with a VARA case, as they can get the rights protected by VARA waived,[6] or can help an artist expand their rights beyond what VARA tends to actually protect.[7] This is, of course, useful in helping an attorney understand the precedent a court is likely to follow or give their client legal advice, but it is much less useful in understanding whether or how the law should be changed.

Additionally, as I point out in Chapter Three, there are significant concerns about defaulting to contract law to protect artists' moral rights. In negotiations between artists and contractors, there tends to be an imbalance of power. Particularly when dealing with corporations, artists will lack the leverage to make demands, such as additional moral rights protections. Only artists who already have significant power will be able to demand these protections. This means that relying on contracts to protect moral rights will disproportionately harm less established artists without leverage in negotiations, who are most in need of moral rights protections. Unlike most legal scholarship, I both provide a theoretical justification for

[5] One exception to this is Roberta Rosenthal Kwall, whose theoretical analysis I discuss in Chapter Three. Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford, Calif: Stanford Law Books, 2010).

[6] David E Shipley, "The Empty Promise of VARA: The Restrictive Application of a Narrow Statute," *Miss. L. J.* 83 (2014): 985.

[7] Virginia M Cascio, "Hardly a Walk in the Park: Courts' Hostile Treatment of Site-Specific Works under VARA," *Intellectual Property Law* 20 (2016): 33.

protecting artists' moral rights with the intimacy account and focus on solutions meant to make sure that these rights are protected for all deserving artists.

II. Dissertation Chapters

a. Chapter One: An Intimacy Account of Artists' Rights

In Chapter One, I offer a novel justification for the protection of artists' moral rights based explicitly in the intimate relationship that connects artists to their work and audience. I begin by assessing the current justifications given for the protections of artists' moral rights. Moral rights protections in the United States are currently tied to consequentialist justifications and Lockean labor justifications. I explain the basic theory behind these justifications and then note the ineffectiveness these justifications have had in motivating moral rights protection in the United States as well as pointing to some underlying problems with the justifications themselves. I point out that consequentialist justifications would necessitate evidence that artistic production has been stymied by ineffective moral rights protections, and that the evidence does not support this conclusion. Regarding Lockean justifications, I discuss issues with interpreting Lockean property theory as applying to intellectual property and highlight that current jurisprudence explicitly denies labor as the justification for intellectual property protections.

I move on to a discussion of personality theories that have traditionally been relied on to justify moral rights protections in other jurisdictions, particularly in Europe. I present the Kantian and neo-Hegelian ideas that underlie personality theories, which claim that in creating a work, artists inject their personality into the work itself. Using the work of Hick, I critique this idea and its ties to authorial genius. I also point out some metaphysical complications that can be avoided by justifying artists' moral rights protections through intimacy, rather than the infusion of personality.

The intimacy account of artists' moral rights builds from two more general intimacy accounts. Charles Fried's intimacy account justifies protection for acts of sharing information which was previously private and which a person has no duty to share.[8] Julie Inness's intimacy account justifies protection through appeal to the emotional context that accompanies the relationship between an agent and the act/item/information that connects them to other agents.[9] This emotional context involves having a loving, caring, or valuing relationship. The intimacy account of artists' moral rights draws from both to create a justification for protecting moral rights based on the idea that artists reveal information and ideas that could have been kept private and do so with the proper accompanying emotional context. I spend the remaining parts of Chapter One canvassing evidence to support the idea that artistic expression often satisfies these intimacy requirements, looking at artist testimonials and evidence of the artistic process. I conclude by positing a set of requirements that artists must meet in order for their work to justify protection within the intimacy account.

b. Chapter Two: Identifying Artists' Moral Rights

In Chapter Two, I identify the type and scope of artists' moral rights protected by the intimacy account. I apply the intimacy account developed in Chapter One to the traditional rights covered under the umbrella of artists' moral rights: the right of disclosure, the right of attribution, the right of withdrawal, and the right of integrity. I begin by explaining how each of these rights has traditionally been understood, using a combination of real-world examples and hypotheticals to highlight how the rights function beyond a theoretical description.

---

[8] Charles Fried, "Privacy," *Yale L.J.* 77, no. 3 (1968): 475–93.

[9] Julie C. Inness, *Intimacy: The Core of Privacy*, *Privacy, Intimacy, and Isolation* (Oxford University Press), accessed January 27, 2021, http://oxford.universitypressscholarship.com/view/10.1093/0195104609.001.0001/acprof-9780195104608-chapter-6.

Following the initial explication of the traditional rights, I return to each right and discuss how each of them connects to the intimacy account. For example, I argue that the right of an artist to choose whether and when to disclose a work is essential in protecting intimacy, since the artist should be able to choose whether or not to share something that had previously been private. The right of disclosure is a necessary protection for meaningful satisfaction of intimacy requirements determined at the end of Chapter One. I provide examples and arguments to demonstrate these connections between intimacy and all four traditional moral rights. In doing so, I respond to some worries raised by Gover that accounts like the intimacy account which are based in emotion will be unable to justify certain levels of artistic rationality and control required for the ratification of one's work.[10]

The chapter concludes with an extended case study of destruction of graffiti artworks at the well-known site 5 Pointz and a brief discussion of a case involving the posthumous retitling of a work by artist Emily Carr. The discussion of 5 Pointz serves to reveal an important moral right which is obviously included in the traditional moral rights protections: the right of proper notice before modification or destruction of a work. This right is essential to mitigate harms an artist may suffer and to respect the intimate connection between artist and work. The study of 5 Pointz also highlights the danger of requiring that the artist or work have achieved a certain status for a work to be protected, which informs analysis in Chapter 3. The discussion of Emily Carr highlights one of the themes of the chapter, as it presents considerations for determining the scope of moral rights by drawing limits in cases where intimacy either may be lacking or should be subservient to other considerations.

[10] Gover, *Art and Authority*.

c. Chapter Three: Assessing Moral Rights Protections Under US Law

In Chapter Three, I explore the current state of moral rights protections in the US legal context, offer a critique of the current state of these rights, and offer an initial proposal for what I believe is an improved approach to protecting artists' moral rights. The chapter serves as an initial scholarly response to 2019 Copyright Office Report on the state of moral rights protections. Additionally, it assesses how the current protections for artists' moral rights compare to the protection necessitated by the intimacy account, as explained in Chapters One and Two. Finally, it offers a guide to a more adequate system of moral rights protections.

The chapter moves through the current patchwork of protections for moral rights. I look first at the protections provided by statutes other than VARA and assess their adequacy. Then, I examine the Copyright Office's assessment, offering an evaluation and critique. Finally, I discuss how the law protects moral rights as they should be understood in light of the intimacy account. In doing so, I identify some central themes: for instance, the fact that laws tend to extend to moral rights protections unintentionally and as a result fail to offer protection when tensions occur between moral rights and the stated intent of the law.

This analysis reveals priorities and areas of weakness in the Copyright Office's approach to moral rights. These include a particular deference to avoiding changes and a lack of concern with the stated intent of some areas of the law. This leads to overlooking important considerations or downplaying the need for change. I move on to an exploration of VARA protections, which are more directly aimed at protecting moral rights. In line with its general approach, the Copyright Office concludes against significant changes to VARA protections. I argue that this deference to the current system is unjustified and fails to protect intimacy-based moral rights.

I conclude by presenting a guide towards stronger moral rights protections. The explicit adoption of a federal statute aimed at protecting artists' moral rights, with acknowledgement of the intimacy-based justifications for these protections, could guide courts towards more appropriately enforcing the protection of rights. By broadening the scope of works eligible for moral rights protections, the law will protect moral rights for artists and works that satisfy the requirements of the intimacy account. These rights, the scope of which is informed by Chapter Two, will provide minimum protections and can be balanced against other competing values.

III. Conclusion

In the three chapters of this dissertation, I provide a novel theoretical justification for the protection of artists' moral rights, identify the type and scope of rights encompassed by this justification, and provide an analysis of how this new justification interacts with current legal protections. In doing so, I address a gap in philosophical and legal scholarship and offer an important response to those who believe the current system is not in need of change.

Chapter One: An Intimacy Account of Artists' Rights

As of 2005, some legal scholars were concluding that artists' moral rights protections in the United States legal context were a lost cause.[11] Most artists either didn't know they had these rights, waived them, or found them too costly to pursue. Those plaintiffs that did choose to pursue legal cases mostly lost in court.[12] Almost a decade later, little had changed, with legal scholars calling artists' rights protections "weak, anemic, and insufficient."[13] "Time after time the courts…deny plausible moral rights claims asserted by visual artists."[14] Yet, when examining current moral rights protections in 2019, the US Copyright Office recommended maintaining the current framework and scope of legal protections.[15]

Part of the weakness of artists' rights protection might stem from a weak justification, especially when these rights come into tension with other rights. In this chapter, I examine some of the reasons previously provided for protecting artists' rights and find that a more robust foundation is required. In what follows, I posit a justification in the form of a novel intimacy-based account of artists' rights and detail features of the aesthetic process necessary to satisfy such an account.

I. Justifications for Protecting Artists' Rights in the U.S. Legal Context

a. Consequentialist Justification

[11] Susan P Liemer, "How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright," n.d., 41.]

[12] Ibid. pg. 6

[13] Shipley, "The Empty Promise of VARA: The Restrictive Application of a Narrow Statute." pg. 988.

[14] Ibid. pg. 989l

[15] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019."

Many explanations have previously been given to justify the protection of intellectual property rights in the United States. The two most common justifications are consequentialist and Lockean.[16] I'll begin by addressing the consequentialist justification, which is based in the idea that the community as a whole benefits from artistic creation such that it makes sense to protect these rights in order to encourage production of creative works. This type of justification is at the heart of both traditional copyright and patent protection.[17] The idea is basically that the consequential good of what is created is high, and creators need some scheme of legal protection in order to make devoting the time and energy to creating these works worth it. The government provides legal protection, which allows for economic compensation, which in turn leads to the creation of new works. So essentially, the protections are grounded in the overall benefit that creative works provide. According to this theory of justification, if creative works offered no material benefit to the community, there would be no reason to offer a legal scheme of protection.

This consequentialist account is fine as a justification for copyright but offers no additional justification for the protection of artists' moral rights. In order to do so, it would have to be shown that current copyright protections are insufficient to encourage creation and that additional moral rights are needed in order to generate the creative output that benefits society. However, the centuries of creation that existed under a copyright regime that did not include artists' moral rights undercuts this justification. The US was pulled into the protection of artists'

[16] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019."

[17] "Article I Section 8 | Constitution Annotated | Congress.Gov | Library of Congress," accessed January 28, 2021, https://constitution.congress.gov/browse/article-1/section-8/.

rights as part of a trade agreement,[18] not to encourage more artistic creation. At best, a consequentialist justification for artists' moral rights is going to be based purely in the benefits of the various trade agreements and will thus suggest that the protection of artists' rights should only amount to what is minimally required to satisfy those trade agreements. This understanding of the justification goes a long way in explaining our current system of limited protection for artists' moral rights. It is designed purely to avoid conflict and get US copyright protected abroad while actually doing as little as is feasible to achieve that goal. I will argue that there is an independent justification for protecting these rights, that the US system designed to minimally meet treaty requirements fails to adequately protect these independently justified rights, and that the US legal system should enhance the legal structure surrounding artists' rights in order to provide these protections.

b. Lockean Justification

The second most common justification for protecting works of intellectual property in the United States is a Lockean scheme, based on the idea that by putting in labor to create a work, the artist has in some way made the work their own.[19] Locke claims that "Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. . .. For this Labour

[18] Shipley, "The Empty Promise of VARA: The Restrictive Application of a Narrow Statute."

[19] Darren Hudson Hick, "Appropriation and Transformation," *Fordham Intell. Prop. Media & Ent. L.J.* 23 (2013): 1155.

being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to."[20]

There is some debate as to what exactly Locke means here, specifically as to whether something new has been created or not. Though the text suggests creation, this comes into conflict with Locke's religious beliefs wherein only God has the power to create. This is important because, as I'll discuss below, one reason to reject creation-based justifications is that they ignore the social nature of creation, particularly regarding intellectual creation where almost all creative output is built upon preexisting ideas and methods.

Whether this challenge also applies to physical labor, both currently and for Locke, is debatable. While there were still people who went out and found a piece of land untouched by other people to build everything through their own labor and what nature provided, this was far from the only means by which labor produced new things even in Locke's time. Artisans and skilled workers living in a community were likely to have the raw materials provided to them by another laborer. This then creates a possible issue wherein the original laborer would seem to have the only claim to the materials, since it was their labor that removed those materials from the state of nature. This problem can then perpetuate itself as each time a product changes hands for any additional work, multiple people have mixed their labor with the materials. Additionally, while someone might personally perform every task that goes into production, often these efforts are collaborative, with multiple people contributing labor into a single finished product. Locke's theory does not naturally accommodate these complications without the addition of contracts and agreements to give up or share rights.

[20] John Locke edited C. B. Macpherson, *Second Treatise of Government*, 1st ed (Indianapolis, Ind: Hackett Pub. Co, 1980).

While replying on agreements and contracts may help us navigate physical property issues, these complications only become thornier when we start considering knowledge contributions in addition to strictly physical labor, as intellectual property demands. Even if Locke doesn't endorse the creation view, his mixing view is not inherently social, as the raw materials are drawn from what nature provides. It is unclear how this view could accommodate social construction, as what was previously created, using whatever sense you choose, belongs in perpetuity to the original laborer. Most of our intellectual creations are the result of taking ideas that we have previously been exposed to and combining them in new ways to express something different. Painters, except for rare exceptions, familiarize themselves with techniques and examples that precede them. Apprentices learn from their masters. Artists are exposed to ideas and then build upon them. Yet, according to a strictly Lockean understanding, the artist has no right to these ideas as building blocks. So even if the ideas exist, the newcomer will have no right to them and would have to start from nature themselves, re-breaking a new trail rather than merely starting from the point other laborers reached.

An example might help illuminate this idea. In "Pierre Menard, Author of the *Quixote*" a short story by Jorge Luis Borges, Pierre Menard is an author attempting to recreate portions of Miguel de Cervantes' *Don Quixote*. "Pierre Menard did not want to compose *another* Quixote, which is surely easy enough – he wanted to compose *the* Quixote. Nor, surely, need one be obliged to note that his goal was never a mechanical transcription of the original; he had no intention of *copying* it. His admirable ambition was to produce a number of pages which coincided – word for word and line for line – with those of Miguel de Cervantes."[21] What Borges

[21] Jorge Luis Borges, *Collected Fictions*, trans. Andrew Hurley, Penguin Classics Deluxe Edition (New York, NY: Penguin Books, 1998).

describes Menard as trying to do, create *Quixote* again from the state of nature based on personal experience, seems in line with a Lockean version of intellectual property creation. Menard is attempting to mix his labor with only the building blocks of ideas, much like a laborer interacting with land that has not previously been worked by another person. Menard is putting in the labor to make *Quixote* his. Contrast this with Borges, who begins with the existence of *Don Quixote* as a starting point for a work that interrogates notions of creation and authorship. If a Lockean concept of intellectual property requires artists to be Menard rather than Borges, that seems too much to ask and not to match the actual creative process.

One possibility for Locke is that nature provides all the necessary building blocks for this continuous new creation, exposing artists to ideas such that they don't need exposure to prior ideas. It's easier than it might seem at first to be a Menard. While this might be possible, it doesn't seem like it's what happens. Artists cannot help but encounter other works and be influenced by them, even if only subconsciously. Artists create in response not only to raw materials in the state of nature, but also to finished products of other artist-laborers. The idea of artists acting godlike, taking the clay of nature and molding something the world has never seen, isn't merely a problem for Locke's religious views, but for those of us who think the justification of artists' rights should more closely track the actual artistic process.

One other potential issue for a Lockean justification is that it is not clear that Locke's theory even makes sense when discussing intellectual, rather than physical, property. This would help explain the tension discussed above. Part of the nature of physical property is that it is necessarily limited, such that if I have hewn a tree, you can't come along and hew that same tree right behind me. You must find a different tree to hew. However, if I write a story about hewing that tree, you can write an identical story – letter for letter – about hewing that same tree. Or you can use my story as a springboard for another story. Elements of intellectual property lack some of the inherent limits of physical property, so it may not make sense to tie rights to intellectual property in the same manner.

There are similar worries as to whether intellectual labor qualifies as labor under a Lockean interpretation. In his essay *Labour*, Locke says, "Let the gentleman and scholar employ nine of the twelve [hours] on his mind in thought and reading and the other three in some honest labour."[22] Here Locke is discussing how people should spend their workdays. Lior Zemer interprets this as Locke clearly supporting intellectual labor as the proper labor for gentlemen and scholars and as labor that qualifies for creating property in the manner of the *Second Treatise*.[23] I admit that the use of "honest" as a modifier for "labour" when describing traditional manual labor gives me pause in accepting that Locke considered them essentially equivalent in terms of property creation. This pause is not dispositive, and I grant that it is plausible that Locke's theory allows for intellectual property to be included. This does not mean that a Lockean justification of moral rights follows.

One serious problem is that labor does not actually seem to be why US law extends protection to intellectual property. In fact, labor absent creativity has been seen as not worthy of legal protection. In the *Feist* Supreme Court case,[24] a phonebook was deemed not to merit copyright protection. In this case Rural Telephone Service Company created a phonebook for rural Kansas in which they included several fake listings specifically for the purpose of detecting

---

[22] John Locke, *Locke: Political Essays*, ed. Mark Goldie, Cambridge Texts in the History of Political Thought (Cambridge ; New York: Cambridge University Press, 1997).
[23] Lior Zemer, "The Making Of A New Copyright Lockean," *Harv. J.L. & Pub.* 29 (2006): 29.
[24] "Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc., 499 U.S. 340 (1991)," Justia Law, accessed January 28, 2021, https://supreme.justia.com/cases/federal/us/499/340/.

copying. Feist Publications Inc. published a phonebook for a larger geographical area that included the fake entries. Rural sued Feist for copyright infringement. The Court ruled that Rural's phonebook couldn't claim copyright protection because it failed to show sufficient creativity, even though collecting all the information was a laborious process. Merely collecting information and listing it alphabetically may take work, but there are no creative choices being made. The *Feist* decision is a rejection of a Lockean sweat of the brow justification.

This case is focused on copyright, which is wrapped up with, but not the same as, artists' moral rights. Yet, it highlights the fact that what intuitively motivates the drive behind these rights isn't simply that the artist put forth effort. As I'll discuss in more detail later, there are all sorts of things that require intellectual effort that don't then lead to any sense that the person should have rights to the product. When I solve a complex multiplication problem there is no sense that the product is somehow mine.[25] Compiling a store inventory or transcribing poetry from memory are both potentially laborious intellectual tasks, but the person who performs them still doesn't seem to have done anything worthy of rights. One suggestion is that what's missing in these cases is something personal.

II. Justifications for Protecting Artists' Rights Outside the U.S. Legal Context

a. Personality Theories

That suggestion makes for a natural move from Lockean labor theory to personality theory. Outside the United States, personality-based theories are the most common justifications given for protecting artists' moral rights, particularly in Europe.[26] The idea behind those justifications is that the artist puts something of themselves into the work and that in doing so

[25] Math pun fully intended.
[26] Brian Angelo Lee, "Making Sense of 'Moral Rights' in Intellectual Property," *Temple Law Review* 84, no. 1 (February 16, 2012), https://www.templelawreview.org/article/84-1_lee/.

they merit protection. The moral protection that we grant to people extends to the works that they have created because they have now extended themselves into the work. The personality and Lockean theories are related because they both involve the artist taking something of their own – their labor or their essence – and putting it into a work of art, thereby gaining rights in the protection of that work of art.

One of the most notable proponents of personality theories is Kant. Kant argued that an author's words are a continuing expression of their inner self and the artist's moral rights are personal in nature. The right is a personality right in that it is literally "an innate right inherent in [an author's] own person."[27] Kant viewed the ability of authors to control the dissemination of their work as fundamental to maintaining autonomy. Anyone who violates this right is forcing the author to speak against their will. Further, Kant held that an author cannot transfer ownership of their own work, but only grant permission for others to publish it. This follows from his view that works are part of the author's person, rather than independent, external things. As people we cannot alienate ourselves, so we also cannot alienate our works, as they are part of ourselves.

Hegelian dualists, like Josef Kohler, are less committed to personality rights being tied in with economic rights than Kant. These thinkers see economic rights as separate from personality-based rights. Following Hegel, they believe that when an idea is externalized it is in some ways actually an external thing. Intellectual property becomes externalized and the economic rights that attach to it are therefore no longer connected to personality. Artists are free to transfer ownership of their works. However, when discussing moral rights, Kohler no longer treats

[27] Neil Netanel, "COPYRIGHT ALIENABILITY RESTRICTIONS AND THE ENHANCEMENT OF AUTHOR AUTONOMY: A' NORMATIVE EVALUATION," *RUTGERS LAW JOURNAL* 24 (1992): 97. (translated from Kant, Von der Unrechtmdssigkeit des Bilchernachdruckes in IMMANUEL KANTs WERKE 213, 221)

intellectual property as separate from personality. Sounding Kantian, Kohler describes artists' moral rights as stemming from "dominion over my being, over my personality, which thus gives me the right to demand that no one shall share in my personality."[28] In the sphere of moral, rather than economic rights, Hegelian thinking continues to endorse the idea that a work embodies the personality of the author and that other people changing the work in some way are doing something not merely to the external work but to the very personality of the author.

There are reasons to be suspicious of personality-based accounts. The personality-based theories, according to Darren Hudson Hick, are based upon an idea of authors as original geniuses.[29] Hick says that this idea is falsely attributed to Romantic thinkers, but that it arose during the Victorian time period, whose thinkers made the false attributions to their Romantic forbearers. Victorian artists and scholars "simplified and mythified" Romantic focus on the individual artist as the original source for artistic works, creating works from nothing as if by magic. This incorrect interpretation of Romantic thought influences the acceptance of personality rights-based theories, particularly in Europe. The act of creation imbues works with something of the creator. Hick counters this narrative by suggesting that nothing in art is actually original or created. Everything in artworks is made up of pre-existing components. Every sound, color, taste, etc. exists in a simple form before the artist ever comes along. Therefore, according to Hick, it doesn't make sense to credit any sort of creation of these components to the artist.[30] And if the artist is unable to create these components, they are unable to imbue these components with their personality.

---

[28] Netanel. (translated from Josef KOHLER, URHEBERRECHT AN SCHRIFrWERKEN AND VERLAGSRECHT 15 (1907), quoted in Damich)

[29] Hick, *Artistic License*.

[30] Combinations of different components will be discussed below.

Moreover, this account requires some metaphysical commitments that seem, at the very least, unappetizing.[31] This account suggests that works are akin to children, created out of parts of the author, the way that children are created from cells of a parent, and always carrying some of that original creator inside of them. While this connection makes sense for creatures who grow from the cells of another creature, when discussing artistic expression it starts to require a commitment to an unpalatable ontology, if taken in a literal sense. Even if the aspect of the creator carried with the work is non-material, that still requires a metaphysical commitment to the existence of non-material aspects of personality. If the meaning is purely metaphorical, to avoid any metaphysical commitments, then I believe that the theory I'll discuss below captures essentially the same idea while leaving behind some of the other issues associated with personality theories.

What then is the justification for protecting artists' moral rights? I take my inspiration from a variety of sources: Darren Hudson Hick's account of original expression,[32] the accounts of intimacy provided by Charles Fried,[33] Julie Inness,[34] and C. Thi Nguyen and Matthew Strohl,[35] as well as some intuitions that stem from my own consideration of personality and labor-based theories.

Hick's account of original expression explains how copyright protection can be justified if all the components being used pre-exist the artist. It would seem like in that situation

[31] Carter v. Helmsley-Spear, Inc., 71 F. 3d 77 (Court of Appeals, 2nd Circuit 1995).

[32] Hick, 2017

[33] Fried, "Privacy."

[34] J.C. Inness, *Privacy, Intimacy, and Isolation*, Oxford Scholarship Online (Oxford University Press, 1996).

[35] C. Thi Nguyen and Matthew Strohl, "Cultural Appropriation and the Intimacy of Groups," *Philosophical Studies* 176, no. 4 (April 2019): 981–1002, https://doi.org/10.1007/s11098-018-1223-3.

everything would be treated the way basic ideas are treated in US copyright – they lack protection because they are too simple and basic. Hick argues that the way to provide protection is to focus not on components that make up works, but on the original and creative ways that common components are arranged. He labels this the artist's expression, and claims that it should be protected to the degree that the expression is original. Copyright protection should extend only so far as that original expression. There are of course issues that mirror those afflicting the current copyright system in this proposal. It remains blurry and difficult to identify when something goes from a mere arrangement of components to an original expression. This is the same issue flagged above, that mere ideas cannot get copyright protection. The basic idea of a wedding gone wrong is not specific or unique enough to merit copyright protection in the US, although that doesn't mean you can make a new movie about Maggie Carpenter running away from another wedding.[36]

However, while the line may not always be clear, that doesn't mean there isn't something worth protecting about that specific arrangement when it is unique and sufficiently creative. Hick provides a justification for copyright protection, but that is insufficient for my purposes. Copyright protection already exists, yet artists' rights cases routinely end up failing in US courts. Additionally, artists' rights had to be added to US intellectual property rights in addition to copyright in order to satisfy the requirements of the Berne Convention. This suggests that the current copyright system that Hick is concerned with is insufficient to cover artists' rights within it. So while I think that Hick identifies what type of thing we might expect to end up connecting

[36] *Runaway Bride,* Dir. Gary Marshall, Paramount Pictures, 1999.

to artists' moral rights – namely original expression – he has not identified what gives that type of thing a moral weight deserving of protection.

III. Intimacy Accounts

Hick, in identifying the type of thing, does provide a starting point. What is it about an original expression that might justify moral protection? I believe that the answer to this can be found in examining ideas of intimacy and the motivation for theories focused on connecting the creator to the creation. It is worth noting before moving on that my intimacy account is not the first identification of the intimate relationship artists have to their work.

Karen Gover, in analyzing a description of artists' moral rights by Susan Liemer, says, "One of the more vehement articulations…argues that the artwork is such an intimate expression of the artist that any harm to the work is sure to do serious psychological damage to its maker."[37] Gover is noting that works are assumed to be intimate expressions in what she labels "emotivist" theories based upon "a kind of primal emotional and spiritual identification between the artist and work."[38] However, while Gover identifies intimacy in her analysis, what Liemer is describing is essentially a personality account where "[t]he art an artist produces is, in a sense, an extension of herself…. [T]he artist infuses her work with her own personality."[39] Gover rejects these emotivist accounts based on a rationale similar to my own for being skeptical of personality theories, including a rejection of authorial genius and ontological concerns.[40]

---

[37] Gover, *Art and Authority*. 22.
[38] Gover. 22.
[39] Susan Liemer, "Understanding Artists' Moral Rights: A Primer," SSRN Scholarly Paper (Rochester, NY, 1998), https://papers.ssrn.com/abstract=1132887. 43.
[40] Gover, *Art and Authority*. 23-25. She has additional concerns about the theories' ability to account for the process or ratification of works, which she argues is key to artistic creation. I address this concern in Chapter Two.

While personality theories allow for an intimate relationship between an artist and work, that intimacy is not the driving justificatory force. What separates my intimacy account of artists' moral rights from other accounts that happen to invoke the intimate connection between artists and their works is that my account centers the intimate relationship in the justification of artists' moral rights and builds from intimacy theories more generally. The intimacy account of artists' moral rights is based in theories that justify intimacy rights and protections outside of artistic creation.

a. Charles Fried's Intimacy Account

In Charles Fried's work on intimacy, he locates privacy as a necessary precursor to intimacy. He claims that "privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust…. [P]rivacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion."[41] Fried thinks that "Privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves."[42] This control and willingness to trust others by relinquishing some part of it in intimacy has moral implications.

> For privacy is the necessary context for relationships which we would hardly be human if we had to do without – the relationships of love, friendship and trust. Love and friendship, as analyzed here, involve the initial respect for the rights of others which morality requires of everyone. They further involve the voluntary and spontaneous relinquishment of something between friend and friend, lover and lover. The title to information about oneself conferred by privacy provides the necessary something. To be friends or lovers persons must be intimate to some degree with each other. But intimacy is the sharing of information about one's actions, beliefs, or emotions which one does not

[41] Fried (1968). 477-78.
[42] Fried (1968). 482.

> share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love.

The willingness to share and trust others with otherwise private information which we have no duty to share gives rise to moral value which grounds rights in intimate relationships, according to Fried.

One might reasonably read Fried as focused only on relinquishing rights through the disclosure of private information, not on any new rights that emerge amidst that relinquishment. However, in his discussion of love, Fried makes it clear that relinquishment is followed by the creation of something new. Love and friendship are relationships "not simply of relinquishment. The fulfilled form is the mutual relinquishment of rights in favor of new, shared interests which the lovers create and value as the expression of their relationship."[43] I am interpreting these new, shared interests to be tied to moral capital such that it makes sense to understand them as rights that emerge from out of the relinquishment of other rights. Fried does not provide a full analysis of the nature of the "complex" interests, but the intimate act of trust does result in moral value and interests.

I suggest that creating aesthetic works can be seen as resulting from a similar act of trust. Someone takes something that they had the right not to share with anyone and chooses to share it with others. The idea that what an aesthetic work shares is a belief or emotion is not novel. Tolstoy claimed that "whereas by words a man transmits his thoughts to another, by means of art he transmits his feelings. The activity of art is based on the fact that a man, receiving through his sense of hearing or sight another man's expression of feeling, is capable of experiencing the

[43] Fried (1968). 480.

emotion which moved the man who expressed it."[44] However, Tolstoy also thought much of the art of his time was a type of false art that failed to convey true emotion. Though his arguments for this are not especially convincing, it does seem intuitively reasonable that even though some work does reveal a belief or emotion of the artist, some work might not. The commercial artist following specific brand directives may seem to leave themselves entirely out of their art, as will be discussed later. This is where Julie Inness's theory of intimacy becomes particularly useful.

b. Julie Inness's Intimacy Account

In her work, Inness focuses, like Fried, on intimacy. However, unlike Fried, Inness focuses not only on the privacy of the information, but on the motivation behind the act of giving up that privacy. In this way, Inness complicates Fried's picture. She claims that "sharing information with another might be a necessary condition for intimacy, but not sufficient by itself."[45] Inness never resolves whether or not her view considers Fried's sharing a necessary condition, instead focusing on explaining her own theory of what intimacy requires.

Many different things, like access to social security numbers, access to your body, and freedom from coercion in your own action, all fall under the right to privacy, and Inness identifies intimacy as the unifying characteristic of these otherwise divergent types. Inness focuses specifically on how motivation identifies intimate acts. "The act of sharing information, either actively or passively, is intimate if and only if it is understood to take its meaning and value from our love, liking, or care."[46] Intimate acts are motivated by loving, liking, or caring for. It is worth noting that as Inness uses these terms, "they refer to emotions that exist between

---

[44] Leo Tolstoy, translated by Aylmer Maude, *What Is Art?* (New York: Funk & Wagnalls, 1904), http://archive.org/details/whatisart00tolsuoft.
[45] Inness (1996). 82.
[46] Inness (1996). 83.

people; although we may talk about a person ‘loving’ candy, I believe this is not a genuine case of love.”[47] Inness limits the use of these emotional terms to how they are aimed at people. I expand that use here to capture the emotional nature of a relationship between an artist and their work. I believe that this expansion is justified based on aspects of the relationship between artist and audience and the way society views the relationship between art and artist, which I will discuss below when presenting the intimacy account of artists’ moral rights.

Matters are intimate or not based on the relationship between an agent and the information, act, or item. Things gain intimacy through “understanding them as drawing their meaning and value from the agent's love, liking, or care. When the agent no longer links the meaning and value of such matters to her love, liking, or care, she no longer understands these matters as intimate.”[48] Intimacy is defined in terms of the emotional context that surrounds the agent and their relationship as it relates to the information, act, or item.

No information is inherently intimate by its very nature, which distinguishes Inness’s view from Fried’s, on which the privacy of information renders it intimate. Instead, standing in a certain relationship to an agent is what renders certain information intimate. Kissing may seem like an inherently intimate act. However, imagine actors in a play sharing a kiss. These actors’ motivation may be purely based in attempting to provide a compelling performance, not in loving, liking, or caring for the person they are kissing. That isn’t to say these actors dislike or don’t care for each other, but that connection is not what is motivating the kiss. In this situation, the kiss is not an intimate act. This same distinction can be made with information. Inness uses the example of your own old love letters. If disclosed for vindictive or monetary purposes, that

[47] Inness (1996). 78-79.
[48] Inness (1996). 86.

sharing of information is not an intimate act, even if the information contained in the letters might be typically shared with loving, liking, or caring motivations. "It is a context of liking, caring, or loving that makes the act relevant to intimacy. When we provide intimate access to another, the meaning of our act flows from our emotions."[49]

Having tied intimacy contextually to the agent, Inness goes on to explain the moral requirements tied to this intimacy.

> To be respected as a person with the capacity for love, care, and liking, an agent needs a zone with two characteristics: a zone in which she possesses autonomy of action and a zone that gives rise to duties of noninterference from external parties. To satisfy the first requirement, the agent requires autonomy with respect to the actions she takes to embody her love, liking, and care; society must not use the agent in such a way that she lacks the autonomy of action to express these emotions. To satisfy the second requirement, the agent requires a zone to which she can regulate the access of others (including informational access); society must not use the agent in such a way that she is rendered incapable of understanding herself as a source of intimacy. Providing her with such a zone enables her to develop and sustain a self-concept as an originator of love, liking, and care.

The reason we can claim that some information should remain private is that information is contextually intimate, and by releasing that information without the agent's permission their autonomy is violated, harming them by undermining their capacity for legitimate intimacy. If someone shares the information without the agent's permission, the agent is wronged because their ends and personhood are violated. "This failure takes the form of damaging or violating the other's conception of herself as an autonomous source of love, care, and liking."[50]

---

[49] Inness (1996). 83.
[50] Inness (1996). 111.

Similarly, if someone cannot regulate the access of others, her value as an autonomous agent making meaningful emotional choices is undermined. The care and love that underlie relationships is often expressed by actions like granting access, either physical or informational. If this information isn't protected, society is failing to respect and acknowledge its "emotional significance, its connection to the expression of love, liking, and care."[51] By granting control over this access to the agent she "comes to understand herself as a potential originator of intimacy because she understands herself to have control"[52] over the markers that express intimacy.

c. The Intimacy Account of Artists' Moral Rights

I offer an intimacy account justifying the protection of artists' moral rights. I draw from both the Fried and Inness accounts to create an account that requires an artist both to reveal information and ideas they could choose to keep private and to do so with proper accompanying emotional context. Lacking either component would forestall legitimate claims to artists' moral rights based in intimacy, as the creative act would lack proper grounding for rights to attach.

Before moving on, it is worth addressing how Inness's account can be applied to works of art. Inness says, "[t]he intimacy of information stems from the role the information plays for the agent, specifically the role the information plays for the agent when she conveys it to others."[53] The role of information that results in intimacy is that it brings the people closer together: the information helps to convey the relationship that the person has to another, and specifically that it is a relationship of loving, caring, and valuing. I believe that an artist is making a connection with their audience through the decision to reveal their work. While this

[51] Inness (1996). 110.
[52] Inness (1996). 110.
[53] Inness (1996). 81.

relationship is structurally different than the relationships that Inness focuses on, the role that the work is playing for the artist is similar in function to the role of information in other intimate relationships. The artist is revealing something of themselves that allows an audience to gain a connection back to the artist that they otherwise would not. When an audience sees the work, they can feel that connection. The work is providing a bridge by which people can connect. This is particularly true because artists' work often requires them to be vulnerable or reveal parts of themselves, as will be discussed later when detailing the artistic process. The work allows audiences a connection to this aspect of the artist. Though the specifics of the relationship function differently, the same core functions of emotion and connection that Inness discusses in relation to intimacy are present in this relationship.

My second argument for expanding the notion of intimacy to apply to works is based on the role society plays in Inness's account. Inness notes, "there is a substantial core of agreement about intimacy in our society. By living in this society, we tend to assimilate this accepted core into our personal point of view; for example, kissing is intimate from my point of view, but only because I have been socialized to understand it as an intimate act. Because our personal point of view is a product of society, the intimacy claims made from that point of view will largely reflect the understandings of society."[54] Inness points out that societal understanding impacts how we understand intimacy. Inness uses this specifically as a response to the worry that her account might justify anything as intimate if it has the right emotional context and motivation. She does not use it as tool to identify possible acts her account applies to. However, I think it shows that her account is responsive to whether or not society tends to see certain acts as intimate. I believe one of the things society tends to see as intimate is artistic expression. This is captured in various

[54] Inness (1996). 88.

ways. First, the artistic process tends to be described in intimate terms. Additionally, as Gover notes in her rejection of emotivist accounts, the default in legal scholars' discussions of artists and their works is that there is an intimate connection.[55] It seems accurate to say that societal understanding reflects an intimate connection between artists and their work. I do not think this same societal understanding of intimacy is reflected in people's love of candy. As such, though Inness limits her application of intimacy, my expanded understanding falls within the areas her account points to. This is reflected in the emotional context of vulnerability and revelation that accompanies artistic expression, which has more in common with the sharing of intimate information between people than the types of emotional relationship to objects that Inness expressly rejects.

Moving back to how artistic expression can satisfy intimacy requirements, it is not automatic that all acts of aesthetic creation will emerge from the right process for rights to attach. There is good reason to think intimacy-granting context often accompanies the aesthetic act, but such context can also be lacking. Looking at cases where this is presumed to be lacking sheds light on the intuition that many aesthetic acts do feature this accompanying intimacy. One standard type of aesthetic work that seems to lack the necessary aesthetic intimacy is the advertisement. While there are creative aspects at work in advertising, the ultimate purpose of advertisements is to sell a product. Oftentimes, an ad agency will have people work with a company to develop a pitch and then execute the artistic aspects of bringing that pitch to observable status by assigning specific work to an artist. The relative freedom of the artist in this situation will vary – sometimes the directions will be incredibly specific and the artist is essentially following step-by-step instructions, whereas at other times the artist may have more

[55] Gover, *Art and Authority*.

leeway in determining how to realize the instructions. Particularly in the first case, where an artist is executing someone else's vision more so than their own, there is a clear, and I think correct, intuition that this act lacks the type of intimacy described by Inness. It might also fail to satisfy Charles Fried's account of intimacy because the artist lacks the initial starting point of the information being private, though the secondary case where the artist has more control of realization may satisfy that account. This is a case where the artist is using skills to produce a work, but the relationship to the work lacks the right type of connection to create intimacy. Considering the second example, where the artist has more control, it may be possible that the artist has enough emotional connection to the specific realization that it does become an intimate expression, though in the world of advertising my intuition is that this would be the exception rather than the norm, given the goal of the work is not expression by the artist but the sale of a product.

This is not the only case where it seems like intimacy conditions might not be met, as I will explore further when describing the types of rights that attach. There may be works that feature the contributions of so many disparate individuals that granting moral rights in relation to the work does not make sense. It becomes impossible for any singular contributor either to form an intimate connection to the audience or to be meaningfully vulnerable in the work. That said, hopefully by focusing on an example where we can locate the lack of intimacy, we can then more easily identify that this is not the context that accompanies most, and certainly not all, aesthetic creation. While there certainly are pragmatic concerns that artists must take note of, selling a product is not the primary motivation for the aesthetic process. Many artists continue to make art even when financial rewards are not forthcoming. Even when artists do make money, that does not seem to determine what they choose to produce. Some may disagree with the scope of this claim, but I don't think anyone would deny it outright. There is good reason to believe that many cases of aesthetic creation feature artists who do have the proper emotional relationship to their work to make the works expressions of intimacy.

As discussed previously, there are theories of art like Tolstoy's that require emotional connection to even consider something a work of art. Yet, there are also intuitive times where this connection is lacking. Unlike Tolstoy, I have no intention of claiming that aesthetic works that lack this context are not art. Instead, I think Inness has laid a clear way to distinguish between aesthetic works that are and aren't intimate, and this helps explain why things like brand directed commercial aesthetic work would not give rise to moral rights protection according to my account.

I offer up my own account of intimacy that I argue grounds artists' moral rights. When an artist decides to create an artwork and then share that artwork, they are performing an intimate act. The artist is taking something – an original expression – that previously existed only in the privacy of their own mind. In sharing that expression, to whatever degree they do, the artist is now taking something that was previously known only to them and sharing it with others.[56] They are giving up their right to keep this information to themselves. This follows Fried's theory of intimacy. Additionally, artists in many cases are doing so out of motivations tied to liking, valuing, caring, or loving the work and audience. In doing so, the artist is tying the work to the act and motivation of aesthetic production in a way that satisfies the intimacy requirement of Inness' account.

[56] I am relying on my lay understanding of how sharing and communication work. This seems uncontroversial from a non-philosophical perspective, and I don't intend to offer a theory or delve into philosophy of mind.

One objection might be that once an artist chooses to share a work, that work is no longer intimate. Whereas sharing information with a lover or a friend creates a new set of interests with associated rights, the mass exposure of sharing an artwork is a different kind of thing altogether such that it does not make sense to consider it intimate anymore. I have two responses. The first follows naturally from Inness's account of intimacy which, as discussed, defines intimacy in terms of the emotional context that surrounds the intimate action. Here, the relationship would be defined in terms of the artist and the work or audience. If the relationship is still one in which the artist has the proper connection to the work, then that intimate bond can remain, even when the work is shared more widely. This could occur when the author has the proper emotional context in relation to the audience the work is for or has a motivation in creating the work that is inspired by the appropriate emotional context. Essentially, the artist could be emotionally connected to the audience, even if that audience is large, or the aesthetic process could be accompanied by an emotional context such that the art making is in and of itself an intimate act through a vulnerability and revelation that society understands as reflecting intimacy.

There is good reason to think that many forms of aesthetic expression are intimate, such that they satisfy the intimacy account I have described. Most forms of aesthetic expression will satisfy Charles Fried's intimacy requirements. This is because, except in rare cases, the works that artists produce were not previously shared and were private. Even if some aspects of the works build upon non-private elements and even if the artist does not have the whole concept in their head as some finished product just waiting for execution, the elements of expression and the progressions that lead to the finished project are meaningfully private until the work is revealed to others.

There is also reason to believe that a significant amount of aesthetic expression is accompanied by the appropriate emotional context to qualify as intimate according to Julie Inness's intimacy requirements. This emotional context can be achieved in a variety of ways. One way is that the artist's purpose in making and releasing their work is to create a meaningful connection with their audience, similar to the way intimate relationships are formed between people sharing private information with friends. Artists use their works in this way to share their emotions with an audience, through the sharing of their work. In this way, they become closer to those who view the work, as those people come to understand the artist in a way they could not have otherwise. Artist Yasmine Giessa describes her artistic purpose in this language. "I am aiming to present better art in this world, to present art that people can really feel. I want people to get connected to my art, and to me through the art I present."[57] This explicit aim of connection is one way an artistic process can be intimate, but it is not the only way.

The way artists describe connections to the work itself can inform why society often understands there to be an intimate relationship between the artist and the work. Though I argued earlier that it is not metaphysically attractive to consider an artist's artwork as being equivalent to their child, many artists do think of their works in ways like this. In interviews with 30 artists, Patricia Townsend found that many artists relate to their works similarly to the ways a mother relates to a child. Townsend used this information to apply psychoanalytic theory in mother/infant relationships to theorize about stages of the artistic process. Townsend concedes that "[n]o single model will do justice to the complexity and variety of artists' experiences and the metaphor I propose in this paper – the mother/infant relationship – will inevitably be

[57] "Painting Emotion - Artist Interview with Yasmine Giessa," *ArtWeb Blog* (blog), March 25, 2014, https://blog.artweb.com/interviews/painting-emotion-artist-interview-with-yasmine-giessa/.

incomplete and may sometimes be inappropriate. I put it forward not as a 'one size fits all' explanation but, rather, as a starting point for further exploration."[58] However, it is clear from her research that many artists do have an intimate relationship to their work and treat it within the same emotional context that others reserve for their families. Brigitte Lacombe describes her work in a way that makes it clear it has taken the place of many intimate relationship that others form. "My work and my life are the same thing to me. I don't have a life on one side and work on the other side. My entire life has been my work. I don't have a family, I am by myself… no kids… That's what I do and everything is folded into that: my friendships and love stories. I have always been within the world of my work."[59] Lacombe's works define and represent her intimacy. While works that result from this process may not literally be part of the artist, they still have a meaningful emotional connection worth protecting, as society values those things it understands as intimate.

Another way that an artist can be intimate in their expression is by using their work to share emotions. These emotions need not necessarily be love or care, but can include grief, joy, anger, etc. Judy Chicago described how her art became a means of processing grief and how that grief became part of the work. "By the time I created these works, my first husband had been killed in an automobile accident and I was suffused in grief. My studio became my refuge and in this painting, my spirit - as expressed in the butterfly form - was trying to fly out of the constraints of the surface. In fact, in the painting, the bottom half of the painting protruded from the picture plane."[60] Sharing grief in this way, even if creating a connection to the audience is not

---

[58] Patricia Townsend, "A Life of Its Own: The Relationship between Artist, Idea and Artwork.," *Free Associations* 65 (January 1, 2014).
[59] "Brigitte Lacombe," The Talks, accessed November 9, 2021, https://the-talks.com/interview/brigitte-lacombe/.
[60] Tate, "Artist Interview: Judy Chicago," Tate, accessed November 9, 2021, https://www.tate.org.uk/whats-on/tate-modern/exhibition/ey-exhibition-world-goes-pop/artist-interview/judy-chicago.

the explicit goal, is still an intimate act. Chicago is making herself vulnerable through her work and revealing parts of herself to others.

This vulnerability is not limited to the emotional context but is also present in the mother/child context discussed above. Like a parent saying goodbye to a child who is leaving home, an artist faces vulnerability in putting something that means so much to them on view for public consumption. Vulnerability and self-revelation are part of the emotional context Inness is describing in her intimacy account. Many artists express this same vulnerability and self-revelation through their work, providing an emotional context that is an integral aspect of the work and the artist's expression. These types of work are valuable and worthy of protection in part because of the intimacy that attends their creation, which is why it makes sense to attach moral rights to works featuring this intimate aspect.

These are some of the ways in which artists can satisfy the required emotional context necessary for moral rights protections. This is not an exhaustive list because, as Townsend says, the aesthetic process is varied and idiosyncratic, and not prone to being captured in its entirety. There are various parts of the artistic act that can contribute to meeting this requirement. Self-revelation and connection with the work itself through the artistic act can satisfy the emotional requirements. The example of Judy Chicago shows an artist creating an intimate connection with a work that justifies moral rights protection. The vulnerability and expression that creates a connection between the artist and audience member can also inform this. Yasmine Giessa creates an intimate connection with the audience through her work. Many times both methods are at play and the combination of various emotional contexts will satisfy the required emotional context.

However, some instances of aesthetic creation, like the example of advertising previously discussed, will not feature the necessary emotional context at all. Moral protections for those works will not be justified under the intimacy account. Within the categories of aesthetic process that generally are included under this account, not every work exhibits the features of vulnerability, self-revelation, and proper emotional context that motivate the intimacy account. However, many do, and there is no sound way to distinguish those that do from those that do not without further investigation. As it stands, intimacy will be present very often in typical cases of artistic expression. This is sufficient justification for providing moral rights protections that protect this intimate expression and allow artists to be self-revelatory and vulnerable. In typical cases of artistic production there is no great way, absent clear evidence, to identify cases where intimacy is in fact absent. However, there is no great cost to occasionally offering protection in non-intimate cases. The common presence of intimacy and lack of harm provides motivation for a default of protection within those categories that typically involve intimacy, which can be overridden by contrary evidence.

Nguyen and Strohl provide useful resources to support the claim that intimate acts give us reasons to provide rights and protections in response. They offer an account of intimacy analogous to Inness's in their discussion of intimate groups. They argue that intimacy can be achieved within a group such that taking something from that group without permission violates that shared intimacy, constituting a wrong. According to them, what makes a practice intimate for a group is that it "functions to embody or promote a sense of common identity and group connection among participants in the practice, and thereby renders it meaningful and valuable to these participants."[61] Intimate groups are bound together by these practices. In appropriating these practices, people are doing something morally wrong.

[61] Nguyen and Strohl, "Cultural Appropriation and the Intimacy of Groups."

Nguyen and Strohl limit their claims, not going as far as Inness in claiming that considerations of intimacy ground a right. Instead, they focus on the idea that a group's claim that their intimacy has been breached provides normative reason for believing something wrong has happened. They give two prima facie reasons for believing this. First, the meaningfulness of the intimacy grants prima facie importance, such that the agent's beliefs regarding this relation should be given deference unless there is an overriding reason not to. Essentially, the context that gives rise to group intimacy also gives normative reasons to defer to those sharing that intimacy in determining what does and does not constitute a breach. A second prima facie normative reason for respecting these groups' claims is that the practices are important sites of self-determination, and self-determination should be respected by listening to the preferences of the group regarding what does and does not constitute a breach. All of this generates pro tanto normative reasons for not breaching group intimacy and for treating breaches identified by the groups as pro tanto objectionable or harmful.

Nguyen and Strohl speak in terms of a pro tanto reason not to violate group intimacy, rather than using the term "rights." The key purpose of this distinction is to allow that contextual concerns can be in play such that there is justified reason not to respect certain group practices. I refer to artists' moral rights here and in other aspects of my work for two main reasons. First, "artists' moral rights" is the typical term used to refer to the umbrella of things I am discussing. Were the preferred term "moral reasons to respect artists," I would probably use that term. Secondly, I believe that the term "rights" signifies some level of importance and weight which this set of values should be given and which tracks with a basis of legal protection. That said, I do not intend to use the term "right" to refer to something that is sacrosanct and can never be overridden by contextual concerns. As such, I do not think Nguyen and Strohl's choice not to use the term “rights” significantly separates their analysis of intimacy from mine, nor do I believe I am using “rights” in such a robust way that aesthetic intimacy cannot be protected with justifications that mirror those provided by Nguyen and Strohl.

My position, then, is that the intimacy account provides prima facie reasons for respecting and deferring to artists’ moral rights. The meaningfulness of the work to the artist, as drawn from Inness’s account, provides a reason to defer to the artist regarding what harms them in terms of treatment of their aesthetic work. It is also true that aesthetic expression can be an important site of self-determination.

IV. Intimacy and the Aesthetic Process

An important aspect of this project is explaining how the intimacy account should be understood in relation to the aesthetic process. I am offering an account that takes different aspects of intimacy accounts and creates a web of features meant to identify reasons that ground artists’ moral right protections. In order to do so, I will expand upon my understanding of the process that results in works of art and then attempt to tie that process into the above accounts of intimacy.

Before moving into specific requirements of the aesthetic/artistic process, I want to clarify what I think the process requires by explaining what I do not believe it requires. One possible reading of my bringing intimacy into the description of the artistic process is that I believe the artist has an idea fully formed in their head and takes that abstract, nonmaterial idea and through an act of aesthetic process materializes it.[62] This might seem to follow naturally from my discussion of intimacy, that something that was previously only within the artist’s head

[62] Various discussions have made it clear that many people see this as the intuitive reading of my account.

has now been transformed into something tangible. In part, my use of the word "idea" might suggest that I consider it necessary that the work be fully formed when the artist has intimate access to the information in their head. But this is not in fact my position. I am using the term "idea" very broadly to refer to various possibilities for the state of mind of the artist. I believe that in some cases it is true that artists can see their entire work in their minds and merely need to express it, like Athena emerging from Zeus's head. As someone who writes poetry, I have had the experience of having an entire poem in my mind and just needing to find someplace to write it down. Taylor Swift has described this phenomenon as "mystical, magical moments, inexplicable moments when an idea that is fully formed just pops into your head."[63]

However, this is not necessarily the normal process of artistic creation and certainly not the only process. In an article collecting interviews with various creative artists, Mary-Anne Mace found that many of them characterized the artistic process as consisting of collecting resources, finding problems, and figuring out ways to solve those problems which eventually leads to some sort of conclusion.[64] Art making understood this way is a process responsive to various influences: research, previous work, life events, the medium of the work, etc. The final product, under this understanding of the artistic process, is best understood as "determined by a constant interplay between the processes of conceptual redevelopment, conceptual articulation, and conceptual solution."[65]

---

[63] Chelsea Stone, "Taylor Swift Said Her Songwriting Process Hasn't Changed Since She Was 12," Teen Vogue, accessed April 14, 2021, https://www.teenvogue.com/story/taylor-swift-pattie-boyd-interview.
[64] Mary-Anne Mace, "Toward an Understanding of Creativity Through a Qualitative Appraisal of Contemporary Art Making," *Creativity Research Journal* 10, no. 2–3 (April 1997): 265–78, https://doi.org/10.1080/10400419.1997.9651225.
[65] Mace (1997).

This might seem like a problem for my account, as it may be difficult to identify any specific intimate idea that belonged to the artist exclusively and is now being shared, thus making it harder to satisfy Fried's intimacy account. Rather than a specific idea, there is only a process involving inchoate thoughts, emotions, and ephemera colliding with the world. I believe the intimacy account can embrace this understanding of the artistic process. In an earlier work on the artistic process as a form of problem-solving, David W. Ecker also used interviews with artists to understand their process.[66] In one of these interviews, sculptor Henry Moore refers to the point when "idea becomes conscious and crystallizes" and "ordering begins."[67] Picasso in another interview makes similar reference to the idea of coming to a conclusion, if not finalization. "It would be very interesting to record photographically, not the stages of a painting, but its metamorphoses. One would see perhaps by what course a mind finds its way towards the crystallization of its dream...."[68] As long as there is eventually some state of observable expression which can be identified with the artist, then there is something to point to as the product which has now been made accessible to others.[69] This product can be thought of as embodying not only an original idea, but the process that helped bring that idea into being. A full discussion of this idea that artworks should be identified with the entire process is outside the scope of this chapter but has been argued for by others.[70]

As long as the responsive, problem-solving process that went into the final product has the right features, the work that results from that process will fall within the intimacy account.

---

[66] David W Ecker, "The Artistic Process as Qualitative Problem Solving," *The Journal of Aesthetics and Art Criticism* 21, no. 3 (1963): 283–90.
[67] Ecker (1963) quoting from Brewster Ghiselin, *The Creative Process: A Symposium* (New York: New American Library, 1952), http://catalog.hathitrust.org/api/volumes/oclc/9301574.html.
[68] Ecker (1963) quoting from Ghiselin.
[69] I am consciously avoiding the word completion or finished because many artists refuse to use it and because I believe concluded is sufficient for my purposes here.
[70] David Davies, *Art as Performance*, New Directions in Aesthetics 2 (Malden, MA: Blackwell Pub, 2004).

This is not limited to only the accounts presented here but should be true of any account of the artistic process. Now, hopefully, the stage has been set to identify some of the features the artistic process does need to have:

1. The process needs to be aimed at some observable expression.
2. The work that results needs to feature unique expression.
3. The uniqueness of that expression needs to be connected to the person who undertakes the aesthetic process.
4. The unique expression would not have been accessible to others if the person had not undertaken the aesthetic process.
5. The aesthetic process features a caring, valuing, or loving aspect where the objecting of caring, valuing, or loving may be the audience or the work itself.

I believe these requirements follow from the previous discussion of intimacy and the aesthetic process, but each is worth further discussion.

i. Observable expression

I am choosing to focus on the process's being aimed at observable expression, rather than on completion or the work being finished, because some moral rights exist in regard to unfinished works or works in progress. I even think it is too strong to require that an artist aim at completion,[71] as there may be works that an artist shares with the world while thinking an artwork is always a work in progress. This is not to suggest that the robustness or level of protection that attaches to a work is the same at every stage of the process. However, that will be cashed out when I more fully discuss the way the rights should work in Chapter 2. For now, it

[71] The debate on when an artwork is finished is too voluminous to cover in detail here anyway.

does seem like some minimum goal of observable expression is sufficient. This follows, I believe, from the aspects of Fried's account of intimacy that are incorporated into my account. Fried's account lays the groundwork for requiring that the work be sharable with others. Here, I am using 'observable' in a broad sense. It is not meant to be limited to the visual, nor even necessarily to the fully perceptible, as some forms of conceptual art may qualify, but there does need to be some minimum ability to observe the expression; otherwise nothing has been shared in a way that can give rise to protection. Part of what the intimacy account focuses on is the idea that something which was once private and uniquely yours, the original expression, is now being shared with the world.

That said, complications arise when distinguishing between works in progress and works that have a more completed status. Though I will go into more detail later in the project, it is worth laying some of the groundwork here. It makes sense that in making the choice to share your work you would want to be assured that your name will not be separated from this expression, unless that is your choice. This becomes especially clear in cases where an author wants to preserve the right to withhold attribution: that is the artist wants the choice of whether or not to attach their name to the work. Karen Gover focuses on such cases. In her 2018 book *Art and Authority: Moral Rights and Meaning in Contemporary Art*,[72] Gover focuses on a dual-intention theory of authorship. There are two distinct intentions embedded in authorship: an intention to create a work at all, and an intention that the resulting work be considered one's own. This separates authorship into two moments: the moment when a work is created, and the moment when the artist has the intention to endorse the work as their own, making it a part of their

[72] Gover, *Art and Authority*.

oeuvre. For Gover, the separation of the moment of creation from the moment of ratification and the placement of the latter entirely in the control of the artist is meant to solve many of the controversies surrounding control of artworks, and is at the heart of her view of artists' moral rights. It achieves this through an implicit assumption that ratification signals an acceptance of various rights that have not been asserted prior to the moment of ratification. In claiming, "This work is mine," the artist is asserting the rights that go along with the moment of attribution. The author is choosing to move from the point of attempting to form the work, to the point of saying, "I'm ready for this work to represent my expression to the world." Including ratification in the process ensures that the right of attribution covers not just the decision to start making a work, but the further decision to share that work. Thus, while aiming at observable expression is a minimum standard to gain moral rights, ratification also plays a role.

ii. Unique Expression

Following from my earlier discussion of Hick and personality theories, my understanding of the process of artistic expression that results in works does not rely on the concept of creation. I avoid this concept, even though I find the language tempting, to avoid the metaphysical commitments that accompany it. I am not committed to the idea that the process that results in a new work involves creating something new that previously did not exist, particularly in ontological terms. Hence, I follow Hick in focusing on the idea of expression – that a work arranges pre-existing components in a new way. While it is possible that Hick's view can treat expression as synonymous to creation in spite of the lack of creation of underlying elements, I think that the baggage that accompanies this commitment to creation is not worth defending here. As a practical matter, there is nothing lost in embracing creative expression and arrangement of pre-existing components rather than creation for my understanding of artistic production.

The key is that there is a uniqueness or minimum amount of creativity evidenced in the expression or arrangement. As seen in the previous discussion of *Feist*, some minimum amount of creativity is considered essential for copyright protection in the US legal system. Hick points to a similar quality in his discussion of original expression. Both require that something about the end result is unique and can be differentiated from what came before. Moreover, that uniqueness speaks to creative choices made by the creator, rather than merely following the logical path. This focus on uniqueness is part of what separates aesthetic works from science or math, such that it makes sense to consider one tied to intimacy and not the other.

This understanding that uniqueness is essential to art is not unique to Hick and myself.[73] In the introduction to their book *The Creation of Art: Issues and Perspectives*, Berys Gaut and Paisley Livingston say, "There is broad consensus that creative products and acts must exhibit originality and be valuable. Kant captured this dual condition when he defined 'genius' as a matter of exemplary originality."[74] Though I have given reasons previously for my rejection of the necessity of genius, originality is still an important component. It helps identify the unique expression in the artwork and separate it from that which merely existed before. This notion is

[73] Which keeps this understanding from being art, if uniqueness is required.
[74] Berys Nigel Gaut and Paisley Livingston, "Introduction The Creation of Art: Issues and Perspectives," in *The Creation of Art: New Essays in Philosophical Aesthetics*, ed. Berys Nigel Gaut and Paisley Livingston (New York, NY: Cambridge University Press, 2003). 8. I do not endorse the value constraint, at least in a strict sense. If value can extend to merely expressing emotion, entertaining an audience, etc., then I have no particular issue with such broad use. Noël Carroll claims, "In the descriptive sense, artistic creativity is simply the capacity to produce new artworks that are intelligible to appropriately prepared and informed audiences. A creative artist is someone who is able to carry on - to continue to produce new artworks. An uncreative artist, in this light, is someone who lacks the ability to go on producing new works of art - for example, a novelist with writer's block or a plagiarist. In this sense of creativity, the artworks in question need not be especially valuable." Noël Carroll, "Art, Creativity, and Tradition," in *The Creation of Art: New Essays in Philosophical Aesthetics*, ed. Berys Nigel Gaut and Paisley Livingston (New York, NY: Cambridge University Press, 2003). 212.

reinforced by Stein Haugom Olsen in "Culture, Convention, and Creativity": "it is the essence of art to bring something novel into being, not merely in the sense of bringing a new work of art into being, but in the stronger sense of not repeating what has been done before."[75]

Uniqueness, even without the burden of actual creation, consists in the discovery of new ways of expressing ideas. That is what the artist shares in an intimate manner – the new means of expression. Ted Cohen, in "The Inexplicable: Some Thoughts After Kant," describes the process thusly: "the activity of art is not confined to the creation of great works of art, but is an activity potentially available to us in general … [that is] exhibited in every human act of *originality,* every success in finding the right words when there are no formulaic words available. And when one does this … one is acting in freedom, doing something unprescribed, perhaps using the language, but in ways not dictated by the language's own internal regulations."[76] Uniqueness in expression is an essential aspect of the aesthetic process grounding moral rights. Nguyen and Strohl, while not focused on uniqueness, also point to this idea that intimacy cannot attach to something that lacks uniqueness. They cite the example of a private dance performed between a couple to signal intimacy. If that dance is unique, and performed with the appropriate contextual motivation à la Inness, the couple gains some claims of breach if others copy the dance. However, if the couple decides that their intimacy dance is the Macarena, they cannot claim that intimacy has been breached when others perform it, intricately moving hands from head to hips, as this dance had been expressed prior to their attempting to make it their own. Similarly, a lack

[75] Stein Haugom Olsen, "Culture, Convention, and Creativity," in *The Creation of Art: New Essays in Philosophical Aesthetics*, ed. Berys Nigel Gaut and Paisley Livingston (New York, NY: Cambridge University Press, 2003).
[76] Ted Cohen, "The Inexplicable: Some Thoughts After Kant," in *The Creation of Art: New Essays in Philosophical Aesthetics*, ed. Berys Nigel Gaut and Paisley Livingston (New York, NY: Cambridge University Press, 2003).

of unique expression means that an artist lacks the necessary initial state for intimacy, as the work existed prior to their expression.

This is not meant to create overly restrictive boundaries on what is considered unique expression. As Cohen suggests above, an artist can use existing language to express things uniquely. The same is true of simple ideas. As David Novitz says, "After all, human creativity is not creativity ex nihilo; there must be 'inputs' that are combined or condensed or abstracted and recombined in ways that result in creative 'outputs.'"[77] We are not in a position to create from scratch. Yet, this is no reason to think this makes creativity or uniqueness unobtainable. "There are indefinitely many ways of being creative, each starkly different from the other."[78]

iii. Connection to the Artist

The requirement that the unique expression ties back to the person who undertakes the expression implicates both aspects of the intimacy account: revelation and emotional context. In order to be appropriately intimate, the uniqueness of an aesthetic process needs to connect appropriately to the artist. This necessity can be seen by considering cases like the commercial artist who may produce something unique, but the source of that uniqueness being someone other than the artist undercuts the intimacy of the aesthetic process. If the uniqueness has its source in instructions generated by someone else, the artist is not revealing anything private from themselves. In this case, the part of the work that connects to the artist was pre-established, and like the Macarena, is not a candidate for being a unique expression of this artist. It can also be the case that what is unique was not expressed with the proper emotional context, as an artist

[77] David Novitz, "Explanations of Creativity," in *The Creation of Art: New Essays in Philosophical Aesthetics*, ed. Berys Nigel Gaut and Paisley Livingston (New York, NY: Cambridge University Press, 2003). 175.
[78] Novitz. 176.

following instructions may not have an emotional connection to the work or audience, but rather sees themselves as merely executing someone else's idea. This aspect gets complicated, as do many of these issues, when considering collaborative works, but generally, there may either be a communicative property such that the intimacy is established between artists and extended to others, there may be a legitimate claim that multiple artists have shared moral rights, or the work may be better understood as a collection of different works that have given rise to moral rights for particular creators, but where no such rights attach to the conglomeration of those works as a whole. To summarize, though there may be complications, in order for intimacy conditions to be met, the unique expression of the work needs to be connected to the artist.

iv. Accessibility

The requirement that the work be accessible to others follows directly from the aspects of Fried's account of intimacy that are incorporated within my view. Privacy must be relinquished and the work made accessible to give rise to new moral interests. This additionally requires that privacy have initially existed. If the aesthetic process fails this requirement, it lacks the initial standing to qualify as intimate. This privacy can be satisfied by the artist having had the idea for the work in their mind. An artist making an exact copy of another painting would generally lack this initial state as the original work was public.

v. Caring, Valuing, or Loving Aspect

The requirement that there be a caring, valuing, or loving context follows directly from Julie Inness's account of intimacy. If the work is created though an aesthetic process without the proper context, it is not appropriately intimate, as I argue is often the case with commercial works, since the artist lacks the proper emotional connection to the work. This context is required for two reasons. First, it is through this emotional context that the artist is able to use her work to create a connection to their audience. This connection, while distinct from traditional direct intimate relationships between a small number of people, is built on a similar model. The artist is allowing others to understand them and to know them, putting themselves out there. They do this by revealing aspects of themselves and being vulnerable through their art. This allows an audience to gain an understanding of the artist that they otherwise would only gain if they were in a more traditional intimate relationship with the artist, and the audience can gain that understanding if the artist has the right emotional context that accompanies their work.

Second, it is this emotional context that underlies the societal understanding that artistic expression is an intimate process. If general society saw artistic expression as essentially akin to following instructions, as when putting together IKEA furniture, then there would not be this common societal understanding to treat artists as doing something different. Yet, as Gover points out, legal scholars tend to just assume as obvious that artists are doing something intimate in their work. This assumption is representative of the general societal understanding. I believe that this same understanding helped motivate the adoption of personality theories. However, by focusing on the intimacy and using intimacy theories, my account can take note of the importance of intimacy without any ontological commitments that require a belief that an artist actually injects themselves into their work. Instead, what is required is that the artist have the right type of emotional association with their work.

This association, importantly, is not viewed the same way as any emotional association one might have with an inanimate object. The fact that someone loves food or their car does not mean that people generally consider those relationships to be intimate. This is partially because there is nothing that inherently ties candy or a car back to the person who has an emotional relationship to it. While the intimacy account does not take on ontological aspects of personality, it does recognize that the new work is only accessible to others due to the actions of the artist and that these actions involve a particular level of self-revelation or vulnerability. These connections are what result in society understanding artistic expression to be an intimate act. This seems much more similar to the connection that occurs between people than the connection that might develop between a person and another type of inanimate object. This motivates the move to provide legal protections more in line with this relationship.

V. Conclusion

In this article I have canvassed some of the prior justifications given for protecting artists' moral rights and their flaws and have provided a novel justification based in intimacy for protecting these rights. I have explained how the artistic process can and should satisfy intimacy conditions and hope to explain how these rights can be more robustly protected based in this justification in future works. In Chapter Two, I will examine the rights traditionally protected by artists' moral rights laws and explain how these rights can be justified in light of the intimacy account. I will break down cases where moral rights come into play in order to delineate the scope of these rights and identify some aspects of the traditional moral rights protections that may be less obvious from an initial survey.

Chapter Two: Identifying Artists' Moral Rights

Having argued in Chapter One that artists' moral rights should be protected based on the intimate nature of artistic process – both in terms of revealing otherwise private information and in terms of the emotional context that accompanies that creation – there remain two looming questions. What do these rights amount to and how should they be protected? I'll deal with the second question in the next chapter, but here my focus is on defining and delineating the scope and nature of artists' moral rights, as well as explaining how these rights tie back to the intimacy account that grounds them. My methodology in this chapter will be to provide a basic introduction of the traditional rights covered by moral rights protections. Then, I will look at specific cases in an attempt to further explain the rights. I will examine how these traditional rights interact with the intimacy account. I argue that the intimacy account justifies the protections of these traditional moral rights, and moreover, that these rights are essential to allowing artists to establish and maintain intimate connections to their works. In doing so, I intend to provide a guide for my final chapter that will be useful for analyzing current US legal protections and making suggestions for an updated system that more adequately protects artists' moral rights.

I. Traditional Moral Rights Protections

Traditionally, moral rights protections have broken down into several different categories. The National Endowment for the Arts, when breaking down moral rights protections for artists, identified four moral rights. "Moral rights include (1) disclosure or divulgation, which allows the artist to determine when a work is complete and may be displayed; (2) paternity or attribution, which allows an artist to protect the identification of his name with his own work, and to disclaim it when applied to another's; (3) the right of withdrawal, which permits the artist to modify or withdraw a work following publication; and (4) integrity, which allows the artist to prevent his work from being displayed in an altered, distorted, or mutilated form."[79] These four rights are traditionally recognized in international law, to varying degrees depending on the country. These are not the only four categories of moral rights protections. The US Copyright Office, in its study of moral rights, also identified "the right of the author to have access to the original copy of a work in order to 'exercise his author's rights', the right to prevent others from associating one's work with an undesirable 'product, service, cause or institution', the right to pseudonymity; and the right of an author to compel the completion of a commissioned work of art."[80]

In this chapter I focus on the first four rights, in part because they are most commonly codified across jurisdictions. The rights to access is a part of Swiss moral rights law, but not commonly included elsewhere.[81] The right to compel completion of a work appears as a result of French jurisprudence, not written law, and is not a right that appears elsewhere.[82] This right comes into force when an artist has commissioned production of a work by a third party, but that party has failed to complete production for some reason. These highly specific rights that have developed in some countries have not generally been considered in international agreements dealing with moral rights nor in academic studies looking at moral rights protections in the United States. As such, these rights will be outside the scope of this chapter. Other rights will not be addressed specifically because some of the rights identified seem to fall within the scope of

[79] "NEA Art Forms: A Guide to the Visual Artists Rights Act," August 27, 2003, http://web.archive.org/web/20030827213232/http:/arts.endow.gov/artforms/manage/VARA.html.
[80] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 14.
[81] Jacques de Werra, "Moral Rights in Swizerland," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, March 20, 2010), https://papers.ssrn.com/abstract=2149775.
[82] Vera Zlatarski, "Moral Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States," *Columbia-VLA Journal of Law & the Arts* 23 (2000 1999): 201.

the main four rights. Pseudonymity falls neatly within attribution, as it involves control of how a work is attributed. Prevention of unsavory association seems to tie closely to integrity, as that seems to be the motivation for avoiding the connection. Instead, I will focus on disclosure, withdrawal, attribution, and integrity. All four rights are specifically included in the moral rights statutes of countries that frequently serve as models for the protection of artists' moral rights, like France, Germany, and Italy, which are "the strongholds of the Continental moral rights tradition."[83] "Rights of Attribution and Integrity" are specifically included in the 1990 Visual Artists' Rights Act which added moral rights protections into US copyright law.[84] They are also part of the Berne Convention, which standardizes international moral rights for signatory countries.[85] As such, they are the most commonly protected moral rights and in need of further analysis and explanation. Withdrawal and disclosure are also in need of investigation due to their prominence in jurisdictions with strong moral rights protections and frequency of discussion in academic assessment of moral rights.[86] I follow the order presented by the National Endowment for the Arts in examining the rights, as it follows naturally along the artistic process. I begin by presenting some basic information about each right before coming back to delve into complications.

A. Disclosure

The right of disclosure or divulgation is the right of the artist to decide whether a work is still private or if it is complete and ready for display. What this means is that an artist may

---

[83] Cyrill P Rigamonti, "Deconstructing Moral Rights," *Harvard International Law Journal* 47 (2006): 60. (citing to the French, Italian, and German copyright statutes.)
[84] "17 U.S. Code § 106A - Rights of Certain Authors to Attribution and Integrity," LII / Legal Information Institute, accessed May 30, 2022, https://www.law.cornell.edu/uscode/text/17/106A.
[85] "BERNE CONVENTION, AS REVISED - Article 6bis," accessed June 13, 2022, https://www.law.cornell.edu/treaties/berne/6bis.html.
[86] Kwall, *The Soul of Creativity*.

choose not to display a work of art if they deem it either unfinished or, for some reason, unsatisfactory. "Underlying the right of disclosure is the idea that the author, as the sole judge of when a work is ready for public dissemination, is the only one who can possess any rights in an uncompleted work."[87] If I decide to paint a picture of my cat Risky Biscuits, but decide that I have been unable to capture the specific mischievousness behind her eyes that is necessary, I can decide never to show it to anybody. This is the case even if someone has paid me for a portrait of Risky Biscuits. I can decide that it is impossible to capture the spirit of such a cat in the medium of paint and never show anyone any of my failed attempts. I will not get to keep the commission, but I cannot be compelled to reveal a painting.

B. Attribution

The right of attribution is the right by which an artist may control how their name is associated with works of art. This right allows artists, at the most basic level, to ratify a work as their own by attaching their name to it and to be guaranteed the right to having one's name associated with their work if that is what they desire. This means that if I make a painting of Risky Biscuits, it is my right to make sure that I am given proper credit for that. This includes having my name on the original work as well as being credited whenever the painting or copies of the painting are shown. If someone else claimed that they made the painting or simply failed to credit me, that would violate my right to attribution. There are more and less serious violations – failing to tag me on your Instagram post causes less harm than selling reproductions without my name, but both instances violate my right to attribution.

[87] Kwall. 44.

This is the most basic understanding of attribution, but it is worth getting into slightly more advanced territory before moving on. According to K. E. Gover, the right of attribution should be more understood in a more complex manner.[88] In discussing authorship, Gover points to the possibility that an artist may "create *a* work of art…[but] it turns out not to be *the* work that the artist wanted, or thought she wanted."[89] While the author may choose never to disclose the work publicly, exercising the right of disclosure, the author also has another option. Gover says the author has the ability not to ratify the work, to refuse to recognize it as a successful addition to their oeuvre. This does not necessarily mean the artist will not disclose the work, but they will not claim it. Gover points out that this understanding of authorship, which I think also applies to attribution, applies importantly where the artist is creating a work in public, such as an installation, where disclosure of the work in progress is inevitable.[90] The artist can maintain a form of control, rejecting attribution even post-disclosure. I will discuss Gover more later, but it is worth looking now at how attribution can be relevant. Attribution extends beyond making sure the artist gets appropriate credit, to respecting whether or how the artist wants to be credited. In some cases, an artist is choosing to disclose a work without choosing attribution. This understanding of attribution is supported by the fact that in "the civil law tradition the right of attribution typically enables authors to claim authorship as well as remain anonymous or use pseudonyms."[91] While attribution statutes are often written in a way that suggests only that authors can control affirmative attribution, the right has been understood to allow authors the ability to refuse attribution in different ways as well. The issue of attribution can come into play

[88] Gover, *Art and Authority*.
[89] Gover. 32.
[90] Gover. 100-101.
[91] Kwall, *The Soul of Creativity*. 41.

when an artist is deciding whether a work is ready to become part of their oeuvre, when an artist is reevaluating their own work, or when someone else claims that a work is by an artist.

Many artists have failed attempts on the way to completing a work. Imagine Jim Davis is working on his newest *Garfield* strip and his hand slips, resulting in Garfield having a line drawn directly through his eyes. While Davis may attempt to erase the misplaced line, he might also choose to simply discard the work by throwing it in the garbage. If I were to walk by his house and see this discarded sketch poking out from Davis's garbage can, I could conceivably take that sketch. However, if I were to claim that this is an authentic Jim Davis Garfield sketch, Davis would have the right to deny that his name should be attached to an abandoned sketch. He has the ability to deny attribution, limiting it solely to the drawings of Garfield that he considers successful. Something similar happened to Gerhard Richter, who had four works taken from a recycling bin outside his house.[92] Rather than requesting that the works not be attributed to him, Richter requested that the works be destroyed as originally intended. This could be understood as purely an exercise of the right of disclosure, since the works were never intended to be seen, or a combination of refusing attribution to unintentionally disclosed works followed by refusing disclosure by having the court destroy the works, which they did. Sometimes the lines between the different moral rights are not clear cut, as has occurred at other points when Richter has exercised his moral rights. Even under a basic understanding, there are times when the different rights will intersect.

While the right of attribution applies most clearly in instances where someone is simply unhappy with a work and never ratifies it, it can also apply in cases where an artist has a change

[92] Deutsche Welle (www.dw.com), "Man Fined for Taking Gerhard Richter Sketches from Artist's Garbage | DW | 24.04.2019," DW.COM, accessed April 6, 2022, https://www.dw.com/en/man-fined-for-taking-gerhard-richter-sketches-from-artists-garbage/a-48467218.

of heart. During the early part of his career, Richter painted in a realistic, figurative style. His later work is much more abstract. Richter dislikes the style of his early paintings to such a degree that he has removed them from catalogues of his work and no longer acknowledges these works as his own.[93] Richter once attributed these works to himself, but no longer does so. While this does not necessarily mean that Richter can control how people view these works, as collectors may still choose to value them as early Richters, Richter is able to remove these works from retrospectives and catalogues, even those that are attempting to offer perspective on his career. He is not forced to continue to claim these works if he no longer finds them representative. Though the history of attribution makes a complete withdrawal at this stage difficult, he still has a partial ability to disassociate from these works. There may be public policy reasons, such as protecting the investments of those who own the paintings, to limit Richter's right of attribution strictly to controlling how the work is presented. At the present time, Richter has not requested the removal of the works themselves from presentation, so he has only exercised a partial right to deny attribution, rather than a possible right of withdrawal.

The right of attribution also allows artists to keep people from using their name on works that they did not create. Robert Fletcher, a former corrections officer, accused artist Peter Doig of refusing attribution on a painting. Fletcher claimed that while Doig was incarcerated in the 1970s, they developed a relationship and Doig gave him a painting of his as a gift. Decades later, a friend of the Fletcher noticed the painting in his house and informed him that Peter Doig was now an acclaimed artist. When Fletcher attempted to get Doig to authenticate the painting, Doig would not attribute the painting to himself, saying that the painting was not his. Fletcher went to

[93] Henri Neuendorf, "Gerhard Richter Doesn't Acknowledge Early Works," Artnet News, July 21, 2015, https://news.artnet.com/art-world/gerhard-richter-omits-art-from-catalogue-318665.

an outside authenticator who made a determination based on style and technique that Doig was the artist. After this, Fletcher tried to force attribution, but Doig was able to refuse. Eventually, Doig provided evidence that he was never incarcerated. At court, testimony by the sister of a man named Peter Doige established that Doige was incarcerated at the time and location Fletcher claimed and in a case of incredible chance painted in a style similar enough to the famous artist that confusion was possible.[94] Given all the information, Fletcher cannot attribute the work to the well-known artist Peter Doig, as doing so would violate Doig's right to control the use of his name.

C. Withdrawal

Moving on from attribution, once an artist has disclosed an attributed work, they may still be able to exercise the right of withdrawal. This is the right not just to stop claiming a work as your own, but to take it out of circulation. This right is rarely invoked and has been described as being of more theoretical than practical use.[95] One motivation for withdrawal is that the artist believes the work no longer represents their own views or is damaging. Louis-Ferdinand Céline, a notorious French author, asked that his anti-Semitic works no longer be published after World War II ended and he was exiled.[96] The French law requires that an author have serious moral reasons for making such a request.[97] It is unclear what Céline's actual motivations for this request were, but his publisher granted it. Though the previous publications remained in circulation, for over 60 years, no new editions of the works were published. In 2018, Céline's widow revoked this withdrawal and plans were made to republish these works. The publisher

[94] "Artist Peter Doig Wins Case over Painting He Said Was Not His Work," *BBC News*, August 24, 2016, sec. US & Canada, https://www.bbc.com/news/world-us-canada-37171831.
[95] Rigamonti, "Deconstructing Moral Rights."
[96] Mathilde Pavis, "The Céline Affair: What Moral Rights Can and Can't Do…even in France," *The IPKat* (blog), accessed April 2, 2022, https://ipkitten.blogspot.com/2018/02/the-celine-affair-what-moral-rights-can.html.
[97] Rigamonti, "Deconstructing Moral Rights."

reconsidered after a public outcry based on the potential harm the works could cause. Though the case was never brought to court, the artist was able to exercise his right of withdrawal.

D. Integrity

The right of withdrawal may be exercised to protect the artist's honor or reputation. The right of integrity has a similar motivation, as both rights involve an artist taking issue with how a work now connects to them. The key difference is that in rights of integrity cases an outside party is the cause of the change, unlike in cases of withdrawal where the artist themselves is the cause. The right of integrity allows an artist to protect their honor and reputation. This means that the artist can object to displays of the work or potentially derivative works that alter, distort, or mutilate the work in a way that is harmful to their honor or reputation.

For example, in a recent case in Czech Republic, an architect recently brought a successful moral rights case after a large billboard was placed on a building he designed, covering a substantial portion of the building and keeping it from view.[98] The court ruled on appeal that this significantly mutilated the original architectural work, severely reducing the value of the building and damaging the reputation of the architect. The architect had not designed the building with the intent that it have a billboard attached and the building had previously been recognized as a historical and cultural highlight, representing a high water mark for the design of administrative buildings. The advertising structure was found both to be part of the building, as it had been attached, and to be detrimental to appreciating the quality of the building's design.

---

[98] Eleonora Rosati, "[Guest Post] Czech Court Rules That Placement of Advertisements on a Building Constitutes a Moral Rights Infringement," *The IPKat* (blog), accessed April 3, 2022, https://ipkitten.blogspot.com/2020/04/guest-post-czech-court-rules-that.html.

Integrity is often at issue when looking at cases where someone other than the artist makes a change to a work.

II. Intimacy and the Interpretation of the Traditional Moral Rights

These then are the four basic moral rights that have been traditionally protected by artists' moral rights law internationally. That has not been the case in US law, which has only protected the rights of attribution and integrity. This can be explained by looking at the history. In 1989, the United States became a party to the Berne Convention, which is an international copyright treaty. Article 6^{bis} of this treaty requires parties to protect the author's rights of attribution and integrity, which are considered moral rights. The article states, "Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[99]

In 1990, Congress enacted the Visual Artists Rights Act (VARA) in order to bring US copyright law into compliance with Article 6^{bis} of the Berne Convention. This legislation was the first acknowledgement of moral rights at the federal level. These moral rights are independent of an artist's copyright in their work. "These rights are analogous to those protected by Article 6bis of the Berne Convention, which are commonly known as moral rights. The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation."[100] The United States adopted only the rights of attribution and integrity

[99] "BERNE CONVENTION, AS REVISED - Article 6bis."
[100] HOUSE REPORT ON THE VISUAL ARTISTS RIGHTS ACT OF 1990, H.R. REP. No. 101-514, at 6 (1990), reprinted in 1990 U.S.C.C.A.N. 6915.

because that is what was required to be in compliance with the Berne Convention. Had the rights of withdrawal and disclosure been included in that agreement, it seems likely the United States would have included them in VARA legislation as well.

The justification presented in the adoption of VARA seems to be a combination of consequentialist and labor-based theory, given the focus on worth and effort. However, as I explained in Chapter One, the intimacy-based justification I have offered does more to explain why we extend moral rights to individual artists beyond copyright. It provides a separate justification beyond those relied on to justify copyright protection, which is harder to identify when looking to utility-based theories. Additionally, in Chapter One I explained some of the issues in relying on these justifications to support protection of artists' moral rights. I will not rehash those arguments here. Rather, I will explain how intimacy could be reasonably tied to the four traditional moral rights introduced above and then will break down some example cases to get an idea of some specific rights and discuss issues that arise in moral rights application. I will discuss all four of the traditional moral rights, as they can be justified in terms of intimacy and they tend to be interrelated in ways that make it more complicated to try and separate out withdrawal and disclosure.

A. Intimacy and Disclosure

The right of disclosure involves the revealing of something that was previously private and making it available for others to engage with. This ties directly to the justifications at the heart of the intimacy account. The intimacy account justifies moral rights protections, in brief, based on the idea that the artist shares something which they otherwise could have kept private and that they do so within an appropriate caring, loving, or valuing emotional context. As discussed in Chapter One, this emotional context can be satisfied in a variety of ways, but will frequently be a component of artistic expression. Here, the right to choose whether or not to disclose a work is essential. If an artist is forced to disclose a work that they would prefer to keep private, the artist loses control over the intimate connection to their work. Without the ability to keep something private, the choice of whether or not to share is taken away. The artist's rights have been violated. If a person is forced to turn over their love letters or other sensitive personal information, their intimate connection to these things has been violated. Without the ability to decide that they no longer want to divulge their work, an artist loses a meaningful ability to decide if they are ready to share something expressive. There should be a default understanding that an artist gets to decide when to disclose their work to others and that without such a protection, the artist cannot reliably trust that their work is their own to control.

However, while the right is a default, that does not necessarily mean it is absolute. This right was at issue in one of the early landmark cases dealing with artists' moral rights in France in 1897. A painter, James McNeill Whistler, refused to hand over a commissioned portrait of Lady Eden to her husband Sir William Eden. The artist claimed his legal right to refuse disclosure when Sir Eden attempted to compel Whistler to turn over the portrait. According to the Times, Whistler was insulted that Eden had only provided the minimum possible payment out of a prearranged range and decided not to send Eden the portrait.[101] According to Whistler, he had the right to withhold any artwork with which he was not happy, for whatever reason.[102] After a trial and two appeals, the court agreed with the artist, establishing that artists' contracts do not require divulgation of a work.

[101] "Whistler's Paris Suit Ended.; HE MAY KEEP THE PICTURE OF LADY EDEN AND DECLARES HIS TRIUMPH.," *The New York Times*, December 18, 1897, sec. Archives, https://www.nytimes.com/1897/12/18/archives/whistlers-paris-suit-ended-he-may-keep-the-picture-of-lady-eden-and.html.
[102] "The Correspondence of James McNeill Whistler :: Biography," accessed March 31, 2022, https://www.whistler.arts.gla.ac.uk/correspondence/people/biog/?bid=Eden_S&initial=.

The case of Whistler, depending on how one interprets the evidence, may not be the strongest example of intimacy justifying a decision not to disclose a work. In his own description, Whistler claimed to be unsatisfied with the quality of the work, which is why he did not want to deliver it to Lord Eden.[103] However, the fact that the decision not to deliver the work came after a public showing and seemed a direct response to financial affront, rather than seeming to result from dissatisfaction, does potentially call into question whether the emotional connection Whistler had to the work was actually at play in this case.

The specifics of the Whistler case need not undermine the right of disclosure, but can in fact help clarify the possible limits of the right. One of the benefits of the intimacy account is that it can delineate cases, such as commercial for-hire work, where it may not make sense to extend moral rights protections or where the specific context can provide evidence to outweigh a default presumption of moral rights protection. In the case of Whistler, it is worth considering that moral rights based on intimacy considerations rather than on the personality theories being put to use in France in 1897 would produce a different result. The evidence suggests Whistler would have been happy to disclose the portrait if only the higher end of the pre-arranged price scale had been chosen. This isn't to say that financial considerations automatically undermine intimacy-based claims. There is a complicated interaction that occurs between subjective value and external validation, which is to say that an artist might legitimately come to believe that a work isn't good enough partially based on how others value it.

However, even allowing for these complexities, Whistler's case seems more like an instance of an artist being unhappy with a contract than unhappy with a painting. As such, it

[103] "The Correspondence of James McNeill Whistler :: Biography."

illustrates that while intimacy justifies the ability to claim a right of disclosure, that claim is not absolute. This is a situation where the artist claimed to be making a refusal based on the right of disclosure and there is reason to respect that claim initially; however, that claim can be overwhelmed by the evidence of bad faith suggesting that the motivation for refusal to disclose the work to the paying party was not any connection with the work, which is the justification underlying the right. While the right is treated as a default and can be assumed without specific evidence, when the evidence specifically removes that justification, it can provide reason to question whether the default should be maintained in the specific case. The right of disclosure does not require a showing of intimacy in every instance, but certain instances evidencing a lack of intimacy can be relevant in determining whether the right obtains. In cases where there is not evidence to undermine the claim itself, the right of disclosure, like other moral rights, may still be limited if it comes into tension with other rights and values, a possibility discussed in Chapter Three.

B. Intimacy and Attribution

The right of disclosure is not the only moral right where cases can be more complex than is initially obvious. The right of attribution, as discussed above, is the right of an artist to control when and whether their name is attached to a work. Gover separates the making of a work of art into the generative and evaluative moments.[104] The first moment is when an artist generates a work and second is when the artist evaluates the work and decides to accept it as a work of their own. This second evaluative moment can be understood as the moment of attribution, when the artist decides to attribute the work to themselves.

---

[104] Gover, *Art and Authority*.

Gover denies that accounts similar to the intimacy account, which she calls emotive accounts[105] and exemplifies with personality theories, can contend with this second evaluative moment.[106] I believe many of the problems Gover has with emotive accounts are more particular to prior versions than to the intimacy account developed in Chapter One; however, it is worth taking her challenges seriously here. Gover says, "Artworks are not simply emanations of the self that are injected into the public realm, like a squid squirting its ink; rather, the artist *curates* what she authors…. Artistic authorship in its fullest sense implies authorization."[107] Gover claims that personality theories miss an important aspect of authorship, the moment when an artist ratifies the work. Instead, these theories must treat all works as outputs of the artist, whether or not the artist would want to continue claiming the work. The work is inextricably bound to the artist.

If Gover is correct, this creates a potential problem for an intimacy-based theory explaining the right of attribution, since that right is supposed to encompass the right not to include a work as part of an artist's oeuvre if they are unsatisfied with it. Gover says that "the emotivist account offers no theoretical means for the artist to distance herself from the experiments gone awry, the bloopers, the mistakes, and the rejects that issue from her just as authentically as the good ones…. [S]urely it would be an infringement on artists' freedom if they were required to recognize such a bond even with those works they deem to be failures."[108] Essentially, Gover believes that emotivist accounts actually take the right of attribution away

[105] Gover uses this term to capture any account of moral rights where art is a spiritual extension of the artist. Though this does not technically apply to the intimacy account, the function of emotion and intimacy Gover identifies in emotive accounts suggests it would qualify.
[106] Gover, *Art and Authority*. 22.
[107] Gover. 36.
[108] Gover. 38.

from artists. Instead, all artworks must be attributed to the artist to whom they are tied, whether the artist would choose that or not.

My response to Gover's worry is three-fold. First, as I discussed above, the ability not to disclose a work is actually required to satisfy the intimacy account, as some level of control over the work is essential to satisfying the conditions of the intimacy account. Without this control, an artist lacks the ability to decide whether or not to share a work. This is essential to satisfy the first aspect of the intimacy account, as if the artist must share a work, then there is no choice being made. Drawing the line between attribution and disclosure, particularly when discussing the negative aspect of the right of attribution, is difficult. In many cases, the rights not to disclose and to refuse attribution will overlap. This seems particularly to be the case in Gover's examples which focus on pieces the artist wants to distance themselves from based on dissatisfaction. In cases where this overlap occurs, the same considerations that allow the intimacy account to justify a right of disclosure apply to the right of attribution. A lack of control undermines intimacy.

However, this overlap will not always be present. Gerhard Richter's partial rejection of attribution of his earlier works is a case that is post-disclosure and pre-withdrawal. Richter wants to deny the bond between himself and works that he no longer finds palatable, but these works are still available. Gover worries that emotive accounts of artists' moral rights would prohibit Richter from denying this bond. Though Gover specifically worries about the artist in the midst of the artistic process, it seems as though worry could still apply in Richter's case. The works' attribution to Richter must remain because even though Richter no longer wants to ratify the work, the ontological connection to Richter remains and that is what is necessary for attribution. The issue seems to be similar, even if Gover herself might be less sympathetic to Richter than to an artist creating an installation which is visible to others while still in progress. The issue seems to be in both cases that an artist has been denied control over what works they consider part of their oeuvre, which Gover considers an essential aspect of artists' moral rights. Gover's dual-intention theory allows the artist, rather than forces outside the artist, to maintain control.[109]

The intimacy account can respond to this worry by reiterating the role of control in allowing for intimacy to exist. Without this level of control, it is not really intimacy that is connecting artists to their works, but instead a mere causal relationship. Of course, Richter cannot deny being the cause that brought these works into existence, but being the cause is insufficient for recognizing an intimate connection between an artist and their work. Part of what establishes the connection is the control the artist has in the decision to allow others to see the work. This does mean that Richter can disavow his ratification of the works, and in theory would have a possible right to withdrawal. However, the right to make a claim is not necessarily the right to have that claim supported if the harm it would cause is too great or if public policy weighs against it. Richter's claim can be valid, treated with the respect it deserves, and still not ultimately conclude with his work being fully withdrawn. If the details of the case showed that supporting the claim for disavowal or withdrawal would cause undue harm to other parties, that harm would have to weighed against the harm denying the artist their right. My position, as described in Chapter One, is that intimacy provides prima facie reasons for respecting and deferring to artists' moral rights, but that context can provide countervailing concerns that overwhelm that deference.

[109] If Gover would prefer to exclude a case like Richter, her theory could explicitly reject cases where ratification previously occurred. Excluding this case does not change my larger response that the intimacy account can allow for the control in ratification that Gover requires.

Another aspect of intimacy, which provides another way the intimacy account can respond, is that a proper emotional context must exist in order to justify moral rights on intimacy grounds. One way of understanding what has happened in the case of Richter's early work is that the artist no longer has the type of emotional connection to the work that justifies treating it as intimately connected to him. Richter's decision to deny attribution in fact signals the severance of this emotional connection. One worry that this response raises is that it would possibly deny Richter the ability to change his mind in the future or to ever have moral rights in a situation where the emotional connection between an artist and their work has been broken. Using the desire to withdraw attribution as evidence of a lack of emotional connection makes it more difficult to reestablish the emotional context in the future, as some new information will be necessary, and the context that frequently accompanies the making of art will not be present. Given the nature of moral rights, it would be preferable to preserve the right of attribution to include reattribution if an artist has a change of heart.

It is also worth considering the possibility that the rights of disclosure, attribution, and withdrawal reinforce the emotional connection aspect of the intimacy account. It is in fact because the artist has this emotional context related to the making of the art that it is so important that they be able to withhold attribution or refuse disclosure in cases where having the works revealed or their names attached would not reflect that emotional connection. It is only because Richter has such connection to his work as a whole that he feels so strongly about having works that fail to reflect that connection for whatever reason stricken from his catalog. Artists are not forced to keep their names on works because of the connection the work has to them. Indeed, it is that connection which justifies allowing them to have their names disassociated in some contexts.

My third response to Gover's concern that theories like the intimacy account will force artists to be bonded to works they deem failures is based in practicality. Attribution in a practical sense will not be forced upon an artist if they do not want it. While attribution is generally granted automatically, artists' decisions not to claim a work are generally respected. There is a difference between something justifying a right and someone being forced to exercise that right. There is no contradiction in someone having a right that they choose not to take advantage of. This can be seen without having to leave the world of intellectual property. Creative Commons copyright licenses allow "everyone from individual creators to large companies and institutions a simple, standardized way to grant copyright permissions to their creative work."[110] These licenses allow artists to give up some of the control that they have legal right to in order to allow a more free-flowing use of their work by others. This does not mean that the increased control that has been given up by these artists is unjustified, just that they choose not to exercise all the control they have legal rights to. The same is true when considering artists' moral rights like attribution. The fact that an artist *could* claim that a work they are ultimately dissatisfied with is part of their oeuvre does not mean that they *must* make that claim. So even if an artist may lack a theoretical ability to deny an intimate connection to their failed artworks, they retain all the practical ability to do so. While I believe the intimacy account does allow for the distancing, the practical reality makes Gover's worry about emotive accounts less problematic for the intimacy account.

I hope that in responding to Gover's challenge I have also shown how an intimacy-based account of artists' moral rights can justify a right of attribution. Without the ability to control when one's name is attached to a work, intimacy is damaged. The ability to control when and

[110] "About The Licenses - Creative Commons," accessed April 6, 2022, https://creativecommons.org/licenses/.

how a work is public is a necessary condition of intimacy protected by the right of attribution, as well as the rights of disclosure and withdrawal. Intimacy requires the ability to decide which works reflect the emotional connection the artist has with their work and which works do not. One way in which that emotional connection occurs is through the work successfully representing the vision and hopes of the artist. The artist connects to the work through the successful expression of their ideas. An artist will have a different emotional connection to works they do not want to ratify. Protecting the right of attribution is part of following through on the justifications of the intimacy account. Without protecting attribution, there is increased potential for the violation of intimacy.

This does not mean the right of attribution should be unlimited. There are still cases when it might make sense to limit an artist's right of attribution, particularly in the negative case. In the Peter Doig case discussed above the plaintiff accused Doig of refusing attribution out of malicious intent. Though it turned out Doig could prove he was not the actual artist, it was accused that he actually was the artist and was simply withholding attribution in an attempt to hide that he spent time incarcerated and to punish Robert Fletcher for making this knowledge more public through the authentication and sale of the painting. Since Doig is not the artist, it makes sense to allow him to deny attribution.

However, imagine if Fletcher's claim had been correct and it was the famous artist Peter Doig, rather than another person of a similar name, who had painted the work in Fletcher's possession. Continue imagining that it is only a desire to harm Fletcher that motivates Doig to deny attribution. He, for whatever reason, wants to cause Fletcher harm. In such a case it might make sense to limit Doig's right of non-attribution and allow the work to be attributed to him over his protests.[111] Here, like in the case with Whistler, things outside of the connection between the artist and the work are motivating the use of moral rights protections. These other motivations give us reason to limit the scope of moral rights protections, as they should not be so powerful as to be manipulated into harmful use against others, particularly for the sake of that harmful use. Much like disclosure, while intimacy justifies a right of attribution, that right will not be absolute.

C. Intimacy and Withdrawal

As has been discussed earlier, the right of withdrawal has rarely been invoked, and as can be seen in the discussion of attribution and disclosure, will often overlap with the concerns that justify those protections. Much like with those rights, the right of withdrawal protects intimacy by protecting both control and the ability to make sure the work that remains public continues to reflect the emotional context that connects the artist to the work.

Additionally, it is not the case that works are available merely for consumption when made public. Works are open to all sorts of manipulation, especially in the digital age. Meme culture is essentially premised on the ability to take someone else's work and put your own spin on it. While this is often benign or even positive, it isn't always the case. The creator of Pepe the Frog, Matt Furie, learned this through experience. Pepe the Frog was put into the world as a happy, stoned frog who just wanted to hang out with friends and eat snacks. Unfortunately, Furie saw his character co-opted and used as a symbol by the Alt-Right movement. This adoption was so well known and widespread that the Anti-Defamation League has officially designated Pepe

[111] If hypothetical Doig's desire was more self-serving, to hide the history of his incarceration, the actual harm caused to Fletcher would have to weighed against Doig's interest in protecting his reputation from a true revelation. This would be a particularly murky case where the adjudication itself would likely reveal the truth. Though not clear-cut, such a case could benefit from weighing hypothetical Doig's right to control attribution vs public policy.

to be a symbol of hate.[112] Despite declaring at one point, "I, the creator, say that Pepe is love,"[113] Furie ultimately decided to kill his own creation rather than continue to battle the usurpation.[114] While some have made the argument that once Furie put Pepe out into the world he ceded any control over the frog, especially to meme makers who are collective authors of the Pepe memes, Furie at least attempted to withdraw Pepe from the public moving forward by killing the character.[115] Furie felt like the meme-ification of Pepe created such a disconnect between the love frog he originally put into the world and the hate frog that Pepe became that he would rather kill Pepe than continue making comics featuring him. Though this is only a partial withdrawal, since Furie did not also remove the past instances of Pepe, it fruitfully signals a reason an artist might withdraw their works. When either their own views shift and no longer align with the work or the meaning of the work has shifted such that the work no longer aligns with the artist's views, the artist may attempt to withdraw the work. Though Furie may be practically unable to stop Pepe's internet proliferation, he should be able to remove his own work featuring Pepe as a means to disassociate himself from the Alt-Right movement. Whether or not Furie takes this step, it should be his moral right to remove his work from publication as the association has changed the relationship between Furie and his work.

---

[112] "Pepe the Frog," Anti-Defamation League, accessed January 20, 2021, https://www.adl.org/education/references/hate-symbols/pepe-the-frog.

[113] Matt Furie, "Pepe the Frog's Creator: He Was Never About Hate.," Time, accessed January 20, 2021, https://time.com/4530128/pepe-the-frog-creator-hate-symbol/.

[114] Rich Johnston, "Matt Furie Killed Off Pepe The Frog On Free Comic Book Day," Bleeding Cool News And Rumors, May 7, 2017, https://bleedingcool.com/comics/matt-furie-killed-off-pepe-frog-free-comic-book-day/.

[115] Anthony Cross, "The Curious Case of Pepe the Frog: On the Ontology and Value of Internet Memes," *Aesthetics for Birds* (blog), January 26, 2017, https://aestheticsforbirds.com/2017/01/26/the-curious-case-of-pepe-the-frog-by-anthony-cross/.

Whether or not this right to withdraw should extend to cases like Céline, where it is not clear their views have changed and/or there is a danger of whitewashing his earlier anti-Semitism, gets again into the limitations of these rights. There is a danger that in withdrawing works some artists are attempting to sanitize a history that they should not be able to distance themselves from. There is a general worry that an artist may take advantage of the right of withdrawal as a way to hide works from their past that reveal problematic aspects of their character. While there are some cases where an artist may take actions such that allowing them to move on seems just, there might be other cases where they simply want to avoid the ramifications of their prior works. It seems possible that Céline is a case such as this, where he never clearly repudiated his anti-Semitic views. In such a case, withdrawal may not be a right of the artist. Part of the motivation for withdrawing Céline's works was the harmful impact they were said to have in encouraging anti-Semitic views. In such a case it may still make sense to withdraw the works from the public while making a point not to allow that part of the author's history to be forgotten. Much like with other moral rights, if there is reason to believe that the artist is taking advantage of moral rights in order to advance an agenda that cannot be justified in light of the intimacy consideration that undergirds the rights, it makes sense to place limits on the scope of the rights.

D. Intimacy and Integrity

Integrity is the most common cause invoked in moral rights cases and the idea most in need of further analysis. Determining what violates an artist's or a work's integrity is tricky, especially because the violation of the integrity of a work will relate to a violation of the honor or reputation (integrity) of an artist. Anyone who's ever received negative feedback knows that even when it is helpful, it stings. However, no one is suggesting that artists should have the right to have their works universally beloved. There are plenty of works that deserve fair criticism, and others that are bound to be divisive if only due to variance in taste. Intimacy concerns do not extend integrity protections to limiting criticism. While the emotional context that can come with criticism might suggest this extension, there are at least two reasons to limit integrity from having such reach. One reason, related to previous limitations on the reach of moral rights, is that limiting criticism would allow artists the possibility of putting forth harmful or problematic art and using moral rights as a weapon to prevent possibly necessary responses. Moral rights, while providing strong protections, should not be a cudgel. Another reason to limit the reach of intimacy-based protections of integrity is that while criticism may hurt, it does not actually modify the work. The work remains as the artist has chosen to put it into the world. Audiences are free to engage with the work and form their own opinions, agreeing or disagreeing with the criticism. This is not to say that criticism cannot impact the emotional context surrounding the artist and the work. An artist may be impacted by criticism in a way that they choose to modify a work themselves or exercise one of their other moral rights. But they may equally choose to make no changes in response to the criticism, and the criticism cannot force any change upon the artist. The artist's continued control over the work and ability to present the work without modifications allows for criticism to exist within an intimacy-based moral rights context.

Integrity then deals with cases where, unlike criticism, the work is altered in some way that is out of the artist's control. These changes impact the intimate connection between the artist and the work, allowing the person or entity making the change into the relationship of the artist and the work or the artist, work, and audience. This can be seen in the case of the billboard attached to the building discussed earlier. Suddenly, it seems as though the architect had explicitly designed large commercial aspects into the building. This changes the building and reflects on the relationship between the architect and the design. In this case, the architect seems to prioritize commerciality over aesthetics when the billboard is present. The architect reasonably finds this representation both false and harmful. Someone else has made a decision that undercuts the relationship that existed by making a modification that changed said relationship. One possible way of dealing with this, as suggested by Roberta Rosenthal Kwall, is to include a disclaimer that makes it clear that the changes to the building were not the choice or design of the original artist.[116] She believes that this is how integrity rights should be protected moving forward.

Kwall's solution seems to some degree to miss something that is important in integrity violations and reveals something missing in my own discussion. It does not seem to be the case merely that the changes to the work now communicate something different about the artist's original intent or design. Something more is going on. When the billboard is added to the building, the work itself is compromised. Even if people are aware that it was not the intent of the architect to have the billboard, the building is still lessened by its presence and the architect would be reasonable to say that they are still harmed by the modification. The intimate connection the artist has to the work is not defined strictly in terms of how the audience views the work. There is a relationship between the artist and the work itself, as an expression of private ideas, that can be damaged through modification whether or not an audience knows about the process of the change. Integrity is compromised when changes damage that relationship.

III. Case Studies of Moral Rights

[116] Kwall, *The Soul of Creativity*. 154.

Having discussed how each of these rights connects to intimacy considerations, it is worth digging into some case studies. These studies allow us to see some of the issues and rights within these larger categories of moral rights that may not be as obvious, particularly if they have not traditionally been identified when cataloging moral rights.

A. Destruction of Works at 5 Pointz

5 Pointz, or the 5Pointz[117] Aerosol Art Center, Inc., was an abandoned factory located in Queens, New York. It was purchased in the 1970's by Jerry Wolkoff. After it sat vacant for 20 years, Wolkoff was approached by Pat DiLillo who wanted permission to use the building as a legal space for outdoor aerosol murals and art, more commonly referred to as graffiti. Wolkoff granted DeLillo permission, and what would eventually become known as 5 Pointz was born. The factory acted as a safe space for artists to create without fear of legal reprisal, as well as a public outdoor exhibit space and landmark.[118]

This relationship persisted until late 2013. At that time Wolkoff announced plans to destroy and redevelop 5 Pointz into a modern apartment complex. He stated that the aerosol art had always been intended to be temporary and that the redevelopment had been intended for the entirety of the time 5 Pointz was used as a site for graffiti.[119] Scrambling to try and save the work of over 300 artists at what was now known as a graffiti Mecca, United Nations of Graffiti, and graffiti museum frequented by tourists and journalists, individuals submitted over 20,000

---

[117] The name appears both with and without a space between "5" and "Pointz" interchangeably across various references.

[118] "Looking at 5Pointz Now, Extolling a Graffiti Holy Place," accessed January 28, 2021, https://www.brooklynstreetart.com/2013/06/26/looking-at-5pointz-now-celebrating-a-graffiti-holy-place/.

[119] Cara Buckley and Marc Santora, "Night Falls, and 5Pointz, a Graffiti Mecca, Is Whited Out in Queens," *The New York Times*, November 19, 2013, sec. New York, https://www.nytimes.com/2013/11/20/nyregion/5pointz-a-graffiti-mecca-in-queens-is-wiped-clean-overnight.html.

landmark status request forms to the New York City Landmarks Commission to try and confirm landmark status for the building.[120] However, the landmark board rejected the requests, stating that the art needed to have been on the building for at least 30 years to gain protected status as a landmark.

On November 19, 2013, despite continued protests, between the hours of 1 and 7 a.m., with police protection, Wolkoff had workers paint the entirety of 5 Pointz white, effectively destroying all of the pre-existing art. Marie Flageul, one of the people trying to save the building, called the whitewashing a "tragedy" and an "artistic murder." A similar sentiment was expressed when an anonymous person spray painted the words "Art Murder" across the now white building in early 2014.[121] The former 5 Pointz building has now been demolished and replaced by new high-rises which are still called "5Pointz," over the protests of artists who contributed work to the original site.[122] Wolkoff promised that the new high-rises would once again feature a place for aerosol art, but artists have not been receptive to this offer and there is no evidence the current luxury complex delivers on this promise.[123] Artists express both a distrust of Wolkoff and a belief that what has been lost cannot be regained through new art at high-rises. In June, 2015, nine artists whose work was painted over at 5 Pointz sued Wolkoff for "damage to their honor and reputation and for their humiliation, mental anguish, embarrassment, stress and anxiety, loss of self-esteem, self confidence, personal dignity, shock, emotional distress, inconvenience,

---

[120] "Graffiti Mecca 5 Pointz Erased Overnight," accessed January 28, 2021, https://nypost.com/2013/11/19/5-pointz-graffiti-erased-in-overnight-paint-job/.

[121] "5 Pointz Sprayed With 'Art Murder,'" *ANIMAL* (blog), February 3, 2014, http://animalnewyork.com/2014/5-pointz-sprayed-art-murder/.

[122] "'5Pointz' Developers Who Razed Art Mecca Can Use Name for High Rise: State," DNAinfo New York, accessed January 28, 2021, https://www.dnainfo.com/new-york/20150911/long-island-city/5pointz-developers-who-razed-art-mecca-can-use-name-for-high-rise-state.

[123] "5pointz | Luxury LIC Studio-3 Bed Rentals," accessed January 28, 2022, https://www.5pointzlic.com/amenities.

emotion pain [sic] and suffering and any other physical and mental injuries Plaintiffs suffered."[124]

Wolkoff continues to claim that though he loved the art, it was always meant to be temporary, that he never had to give permission to the artists to paint in the first place, that he has a right to do what he wants with his private property, that he thought a fast paint job was kinder than slow destruction, and that he was preventing the artists from doing something that would get them arrested. Artists counter that something irreplaceable has been lost, equivalent to the destruction of the White House, and that only in the future will the exact impact of losing some exemplars of "the most relevant art form of our time" be fully understood.[125]

In recent court decisions, the 5 Pointz case has been one of the few instances when courts have found in favor of artists in artists' rights cases. These cases have hinged on Wolkoff's decision to destroy the works of art without proper notice to the artists and in seeming bad faith. In late 2020, the US Supreme Court declined to hear Wolkoff's final appeal, finalizing the artists' victory.[126] It remains to be seen whether this case will set a precedent moving forward, though some of the details that make 5 Pointz unique might also keep the precedent from being broadly applied.

The 5 Pointz case suggests two different characteristics that should be protected under the umbrella of artists' moral rights. One of these can be derived from the reasons courts have ruled

---

[124] "Artists Sue 5Pointz Owner for Whitewashing Art," artnet News, June 12, 2015, https://news.artnet.com/exhibitions/artists-sue-5ptz-landlord-307640.

[125] Robert Tutton, "In a Brooklyn Lumber Yard, 'Graffiti Mecca' 5Pointz Lives On," Curbed NY, September 29, 2015, https://ny.curbed.com/2015/9/29/9916136/in-a-brooklyn-lumber-yard-graffiti-mecca-5pointz-lives-on.

[126] Eileen Kinsella, "Cementing a $6.8 Million Win for Artists, the US Supreme Court Declines to Hear the Landmark Case Over the Destruction of 5Pointz," Artnet News, October 7, 2020, https://news.artnet.com/art-world/supreme-court-declines-5pointz-appeal-1913903.

for the artists, and the other from considering the attempts to gain legal protection prior to the destruction of the work.

The first of the two requirements is proper notice before significant modifications are made to a work. This right can fall within the right of withdrawal or the right of integrity, depending on the circumstances. In cases of destruction, like 5 Pointz, the artist may need proper notice in order to exercise their right of withdrawal to remove a work before something happens which will make the work inaccessible. Before any destruction or removal of a work of art takes place, there should be proper notice to artists. This provides artists an opportunity to lessen the degree of harm caused by possibly offering some form of preservation. It also allows for the right to object that is written into the Berne Convention. Without any notice, objection becomes impossible. Whether or not that objection leads to a change of outcome will depend on the context and balancing of rights, an issue that I address in Chapter Three.

Part of the harm that occurred at 5 Pointz might have been mitigated if artists could have either documented or physically preserved their works, even if this would have been inferior to preserving the site as a whole. Additionally, providing proper notice allows artists the chance to weigh in on proposed plans and assess whether or not the change to the work violates their moral rights. The artists' opinion in this case will not be dispositive, but it can be action guiding. When Robert Rauschenberg wanted to create a new piece of art through erasing another piece, he discussed it with original artist Willem de Kooning and got his permission, however reluctant, before moving forward.[127] This consultation allowed de Kooning to have a say in how a work that meant something to him was treated.[128]

The difference between the cases of 5 Pointz and de Kooning helps show how a proper notice requirement connects back to an intimacy-based justification for artists' rights. Part of what makes a lack of proper notice seem so malicious is that it ignores what these works mean to the artists. The emotional context that accompanies the creation and gives rise to moral rights also justifies reflections on how we should act when considering making a change to or destroying a work. When someone transfers possession of an aesthetic work they certainly release some claim for consultation. The degree of transfer will depend on the work, but those details will be tied to other characteristics of artists' moral rights. But there will often remain some degree of claim to be notified before a proposed change to or destruction of a work. This is particularly true where the proposed change would predictably be emotionally difficult for the original artist. The predictable emotion can signal either the strength of the ties the artist has to the original piece or the level of violation. A small change to a piece that has a deeper emotional connection to an artist may engender as strong an emotional response as a large change to a piece with somewhat less emotional resonance. In either case, the emotional context connecting the artist to the work justifies sensitivity to providing notice.

It is clear from the artist protests both before and after the destruction of 5 Pointz that Wolkoff had reason to know the destruction would result in emotional distress. Similarly, Rauschenberg brought a bottle of Jack Daniels and a plan to explain the meaningful impact of

[127] "Erased de Kooning Drawing," SFMOMA, accessed January 28, 2022, https://www.sfmoma.org/artwork/98-298/.
[128] "When Robert Rauschenberg Asked Willem De Kooning for One of His Paintings … So That He Could Erase It | Open Culture," accessed January 28, 2022, https://www.openculture.com/2018/05/when-young-robert-rauschenberg-made-his-name-by-asking-willem-de-kooning-for-one-of-his-paintings.html.

erasing his friend de Kooning's work, knowing that it would be painful for the artist to agree.[129] It seems likely that de Kooning would have had a different emotional reaction had Rauschenberg been coming to explain what he'd already done, rather than what he wanted to do. Sudden news about something we care about hits us differently than sudden news about something in which we aren't emotionally invested and differently than news that has had significant buildup and advance warning. Of course, this doesn't always mean that the news, depending on its severity, will be acceptable. Still, there is a meaningful difference tied to emotional involvement and warning. The intimate connection that exists between artists and their work helps explain the predictable emotional distress of sudden change and the ameliorative effect of providing proper notice.

It is possible that the distress is tied not exclusively to an intimate connection, but to some other factor. One could imagine an artist being upset that their work was painted over because being a featured artist at a graffiti landmark like 5 Pointz provided financial opportunities or conveyed status. They might be angry it was painted over without warning because they wanted to remove the work so they could sell it. Intimate connections are not the only reason people would not want to see their works changed, with or without proper notice. However, the emotional connection between the artist and the work need not be the only reason that a sudden change might be impactful to draw a connection between a notice requirement and the intimacy account. As long as the emotional connection is one cause of the increased distress associated with lack of notice, that reasonably includes proper notice within the realm of artists'

[129] Ibid.

moral rights. However, these other factors might contribute to limiting the scope of protection if they undermine the relevance of intimacy in the distress response.

Now, whether there is an expectation of proper notice depends on the circumstances. There needs to be either explicit or implicit reason to think that the work once placed will remain at the site without removal or destruction. While for many works this is not at issue, for works in public spaces or private places not owned by the artist, this is a common area where artists' rights come into play. At 5 Pointz the artists had explicit permission for years to use the space for their works, so the artists had no reason when placing their works on the building to believe that they might be removed without notice. Contrast this to the case in which noted street artist Banksy created works on the walls of Alcatraz prison without permission. In this case, there is a clear policy that the historic building will be preserved and that creating new works using the prison as a canvas is prohibited. Banksy has no reason, in spite of his fame, to believe that the works will be maintained or preserved through removal in a manner that might damage the building.[130] This expectation of change or removal lessens the emotional impact. Even in cases where the change is not based on a conflict of rights, the high probability of change occurring often affects how we react to that change.

Cases of proper notice will not always be clear cut. Long term neglect might imply permission for the placing of works in some spaces. Sometimes, third parties become involved. An artist seems to have believed in good faith that they had been commissioned by a building

[130] Urban Art Association, "Banksy in San Francisco | Urban Art Association," accessed January 29, 2022, https://urbanartassociation.com/post/656699.

owner to place a mural of a Soviet-era cookie monster on the side of a building.[131] Soon after the mural's production, the owner of the building angrily had the artwork painted over, much to the confusion of the artist. Unbeknownst to the artist, the person who had commissioned the mural was not actually the owner of the building, even though they did pay the artist. In this case, it seems like the artist would have no reasons to suspect that their work would be destroyed. Yet, it also seems like the owner of the building had no obligation to continue displaying the mural. The owner of the building did contact the artist, but only to blame him for graffitiing the building, not to provide notice that the mural would be coming down. Now, the building owner is receiving negative feedback online and there is a small memorial to the lost mural.

This case is an example of how even when focused on conditions of notice, things can be very murky. In analyzing the case, it seems the majority of the blame lies naturally with the third party, the mysterious fake owner who hired the artist. Of course, the building owner claims that the artist made that aspect up, which, if true, would impact the analysis. However, assuming the mystery person actually exists and the building owner is not right in putting all the blame on the artist, I think it's fair to say that the building owner, being made aware of the strange situation by the artist, probably should have given the artist notice that they planned to remove the mural. This notice would have allowed the artist either to better document their work or to have a less heated discussion with the building owner about preserving it. Despite the building owner's claim, this was not a simple graffiti tag made with the expectation that it would be removed

[131] "Impersonating a Property Owner, a Man Paid an Artist to Paint a Cookie Monster Mural in Peoria. The Town—and the Internet—Have Questions," artnet News, December 8, 2020, https://news.artnet.com/art-world/soviet-style-cookie-monster-mural-1929712.

when found. Hopefully, this case at least highlights the importance of proper notice before making changes, particularly destructive changes, to artists' work.

A second issue revealed in the 5 Pointz case is the problem of status or the right to be free from status requirements. This is the right to have a work treated as of sufficient status to be considered worthy of moral rights protection. The absence of this right was revealed in the decision of the preservation board, which denied 5 Pointz landmark status based upon a longevity requirement. Though this was not a decision specific to moral rights, it is still revealing. That is because VARA protection currently only extends to works of recognized status. That means that some works lack moral rights protections because they don't meet a status requirement. The status requirement of longevity could reasonably be applied in moral rights cases. One way in which art gains status is over time. Had 5 Pointz been new it is less likely that the case would have gone in favor of the artists. Though some have hailed the case as showing that graffiti has now achieved the status of high art,[132] it is unclear if this is generally the case, or just potentially the case in some circumstances. However, there is nothing to suggest that status ties into the justifications for protecting moral rights – there does not clearly seem to be something that distinguishes works with a certain status from those without from an intimacy or from a personality perspective. Thus, it seems like either a broad understanding of status is required, as recommended here, or status requirements for moral rights protections should be removed. I discuss this in greater detail in Chapter Three, highlighting concerns about traditional notions of status, such as that they reinforce societal norms which favor those in dominant positions.

---

[132] Meredith Burtin, "From the Street to the Courtroom: The Legalization of Graffiti Art Multidistrict Litigation: Judicial and Practitioner Perspectives: Comments," *UMKC Law Review* 89, no. 4 (2021 2020): 1019–36.

B. Retitling of Emily Carr's *Church at Yuquot Village*

Given the strong position taken regarding moral rights, it is worth briefly considering situations where it might make sense to limit the weight given to moral rights, especially when balanced against other ethical interests. An example that brings up these issues is that of Emily Carr. In Michel-Antoine Xhignesse's "Retitling, Cultural Appropriation, and Aboriginal Title" he considers the case of the Art Gallery of Ontario's (AGO) decision to rename a 1929 painting by Emily Carr from *The Indian Church* to *Church at Yuquot Village*.[133] The AGO wanted to rename the painting based on the harm associated with the term "Indian" in Canada.[134] Xhignesse considers the question of whether or not retitling the painting violates Carr's moral right of integrity as an unacceptable modification. He ultimately concludes that the retitling does not violate her moral rights.[135] The specifics of these arguments are less relevant to the current chapter than some of the other considerations that the case brings up.

I have two responses to how to treat Carr's moral right of integrity given the details of the case. The first response is a sense that Carr's moral rights should be weighed less strongly, imparted by Xhignesse's detailing of Carr's "extensive content appropriation (specifically: style and motif appropriation), such as when she re-created Indigenous pottery and rugs and sold them as tourist baubles, or when she used Indigenous motifs on the cover of her National Gallery exhibition's brochure and in her painting."[136] Particularly problematic was Carr's adoption of

---

[133] Michel-Antoine Xhignesse, "Retitling, Cultural Appropriation, and Aboriginal Title," *The British Journal of Aesthetics* 61, no. 3 (August 14, 2021): 317–33, https://doi.org/10.1093/aesthj/ayab014.
[134] A full discussion of the harmfulness or non-harmfulness of the term as it related to different locations is outside the scope of this chapter. For the purposes of this case, acknowledgment that the term is considered harmful in Canada is sufficient.
[135] Xhignesse makes this conclusion based on whether or not the title has semantic weight. He argues that Carr's title lacks semantic weight, so changing it is not really a modification of the painting. An integrity violation requires a modification, so no integrity violation has occurred.
[136] Xhignesse, (2021, p. 319).

Klee Wyck, a false Indigenous identity which she used for decades for profit and self-aggrandizement: many of her recreations of Indigenous cultural products were signed "Klee Wyck" as though they were the creations of an Indigenous artist. This harmful behavior suggests that Carr's rights should be diminished when they come into tension with those she harmed.

The second response is to consider the possibility that Carr's actions mean that she cannot have a caring, loving, or valuing relationship to art featuring Indigenous people or culture. Carr's actions display an attitude towards the Indigenous that may infect any art depicting Indigenous culture. These actions give rise to the possibility that any moral rights Carr might have had to a painting depicting and titled after an Indigenous location have been undermined by her appropriative relationship to Indigenous people. It is reasonable to think that the harm revealed in her actions challenges any claims to intimacy with her work, which would then prevent the establishing of justified moral rights. This is not certain, but it is worth considering whether revealed attitudes on certain subjects make it difficult or even impossible for artists to produce works that satisfy intimacy conditions.

However, even if the proper conditions for justifying moral rights were achieved, that does not mean those moral rights claims should take precedence. When someone is causing harm, as Carr's actions and title did in the past and continue to do, that is relevant when determining how moral rights should be treated. If respecting an artist's moral rights means allowing harm, that should lessen the importance placed on those moral rights. This is particularly true now that Carr is deceased. Weighing the potential harm to someone dead against the current harm to living Indigenous people, there doesn't seem to be much argument for keeping the original title in place. Much like with criticism, moral rights should not be used as a weapon to allow harm.

IV. Conclusion

In this chapter I argued that the traditional moral rights protected under the artists' moral rights umbrella are justified and necessitated by the intimacy account. I provided explanations and examples of each of the four traditional moral rights: disclosure, attribution, withdrawal, and integrity. I then connected them to intimacy which was used to delineate the scope of the various rights. In doing so, I responded to some possible challenges for the intimacy account. Finally, I examined moral rights case studies in order to understand important moral rights protections less obviously included in within the traditional moral rights protections.

This identification of moral rights justified by intimacy informs the final chapter of the dissertation. In that chapter, I provide an analysis of current moral rights protections in the United States legal system. In assessing the current system and the US Copyright Office's Report on the system, I employ an understanding of the moral rights discussed in this chapter. Additionally, I look to these moral rights when making suggestions for ways the legal protection of artists' moral rights could be improved.

Chapter Three: Assessing Moral Rights Protections Under US Law

In the previous two chapters I have offered up a justification for thinking artists have moral rights based in intimacy and I have explained how that intimacy-based justification connects to traditional moral rights and can be applied in case studies. In this chapter, I explore the current state of moral rights protections in the US legal context, offer a critique of the current state of these rights, and offer an initial proposal for what I believe is an improved approach to protecting artists' moral rights.

This chapter is an initial scholarly response to the US Copyright Office's 2019 Report on the current state of moral rights protections. In this Report, the Copyright Office made the "decision not to recommend adoption of a new statutory moral right at this time."[137] This conclusion was made in light of previous scholarship and advocacy in favor of making significant changes to moral rights protections in the United States, including the adoption of a federal moral rights statute.[138] Despite this advocacy, the Copyright Office believed that information included in the report regarding "the existing patchwork, supplemented by the recommended changes to various federal laws … should address many of the concerns expressed by authors during the course of this study."[139] The Copyright Office felt that the Report satisfactorily dealt with many of the issues previous scholarship had brought up regarding moral rights. This chapter provides an assessment of that sufficiency via a breakdown and analysis of both the existing patchwork and the Copyright Office's recommendations. Ultimately, I conclude

[137] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 35
[138] Kwall, *The Soul of Creativity*.
[139] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 36.

that neither the explanation of current protections nor the recommended suggestions satisfactorily protect artists' moral rights.

The Copyright Office Report reveals priorities and areas of weakness in the Copyright Office's approach to moral rights. These include a particular deference to the status quo and lack of concern with the stated intent of some areas of the law. This leads to overlooking important considerations or downplaying the need for change. By responding directly to the Copyright Office Report, this chapter is able to highlight these areas which previous scholarly work did not focus on. This chapter fills specific gaps in the current literature on moral rights by offering the first scholarly response directly to the arguments put forth by those with the power to recommend change and by focusing on areas that were previously in the background of those discussions.

This chapter also assesses how the current patchwork of laws and Copyright Office suggestions interact with an intimacy-based justification for moral rights protections. As discussed in Chapter One, the current system tends to assume either personality or labor-based theories as an underlying justification, though some areas of the patchwork are clearly "tied to the traditional economic copyright model."[140] In most cases, these justifications are merely implicit and not discussed in relation to the sufficiency of the current system.[141] While many of the critiques offered here would still apply if focused on these other possible justifications and apply more generally to various harms that occur, I will focus on how the current system functions in relation to the intimacy account.

---

[140] Kwall, *The Soul of Creativity*. 26.

[141] In an exception the Copyright Office explicitly refers to personality theory to justify VARA's limitation to visual works, which is addressed in Section II.

My structure begins with an assessment of the parts of the current US legal system that are not explicitly aimed at protecting artists' moral rights, but which have nonetheless protected some aspects of these rights in the past. I move on to an extended assessment of the Visual Artists Rights Act of 1990 (VARA), which is the only part of United States law that directly protects artists' moral rights. Finally, I offer a brief overview of what would be involved in providing better moral rights protections.

I. The Non-VARA Patchwork

a. Introducing the Patchwork

The current state of artists' moral rights protections in the United States is based in what the US Copyright Office refers to as a patchwork of different federal and state laws. This means that rather than having one law that applies to artists' moral rights there are several different laws with different foci that also, sometimes seemingly unintentionally, happen to provide some protections for artists' moral rights. To understand what I mean when I say that some of the patchwork seems accidental, consider the attribution protections offered by the Lanham Act.

The Lanham Act is the part of federal law aimed at protecting trademarks and dealing with unfair competition. Section 43(a) of the Lanham act protects against "uses in commerce of any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact… likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."[142] Essentially, this law

[142] "15 U.S. Code § 1125 - False Designations of Origin, False Descriptions, and Dilution Forbidden," LII / Legal Information Institute, accessed May 18, 2022, https://www.law.cornell.edu/uscode/text/15/1125.

protects against people deceiving others about the source of something. The basic idea is that consumers need to be protected from being misled about products and services. If I buy a pack of Oreos, I should be able to trust that it comes from the same place as all the Oreos I've bought before, not some random producer that is merely using the Oreo name. As it happens, artists have sometimes been able to use this law to make sure that their works are attributed to them or make sure that works they do not want to be associated with don't sully their name.[143] However, it is clear that protecting these artists' rights is not the goal of the Lanham Act. The express purpose is protecting consumers, not artists. It just so happens that sometimes those interests will intersect. The problem, as I will discuss later, is that this happenstance protection can easily be circumscribed when the interests of the artists no longer align with consumer protection interests.

The patchwork is made up of a combination of different laws, those like the Lanham Act and Digital Millennium Copyright Act which are more focused on other protections that happen to overlap with moral rights protections, and the Visual Artists Rights Act and state moral rights protections which are more intentionally aimed at protecting artists' moral rights. Though a full analysis and explanation of the current patchwork is outside the scope of this chapter,[144] I will present a sketch of the laws that currently exist, highlighting concerns such as the lack of protection that can result from relying on laws designed for other purposes.

In 2019, the US Copyright Office published a Report on the current state of artists' moral rights protections. They examined the patchwork and provided the following summary:

> The Copyright Office believes that the U.S. moral rights patchwork continues to provide important protections, despite acknowledging the value of targeted

[143] "Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 | Casetext Search + Citator," accessed May 9, 2022, https://casetext.com/case/gilliam-v-american-broadcasting-companies-inc.

[144] For this full analysis and explanation, see "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019."

> improvement in some areas. Title 17 and other federal and state laws, including unfair competition and misappropriation doctrines, combined with a robust private ordering landscape, provide an author with means by which to protect and enforce their interests in being credited as the author of their work and to preserve the integrity of that work. Nonetheless, this patchwork has been narrowly interpreted over the years in ways that could undermine the important rights of individual authors and artists. Should Congress wish to strengthen—and/or streamline—the U.S. moral rights framework, this Report provides a roadmap for doing so.[145]

This summary highlights that the Copyright Office does acknowledge that there are issues with the patchwork, particularly in how courts have limited the applicability of certain pre-existing laws to moral rights cases. However, it is too generous in the assessment of the current patchwork – essentially saying that it is sufficient but could be strengthened if Congress wanted to do so. The Report gives suggestions for ways the current regime could be improved, and as I will discuss, some of these are good suggestions. But the overall viewpoint of deference to the sufficiency of the current system leads to a preference for making small changes and tweaks that don't address some of the substantial issues with the patchwork. This is especially frustrating given the acknowledgement that "other commenters seeking more comprehensive protections for the rights of attribution and integrity in the United States identified several holes in the current U.S. moral rights regime, arguing in effect that the patchwork leaves many areas of the underlying fabric insufficiently or entirely uncovered."[146] While signaling a concern for the rights of artists in language, the assessments of the Copyright Officer highlight a prioritization of

[145] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 6-7.
[146] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 37

maintaining the status quo and minimizing change, even if that means leaving an insufficient patchwork in place.

The patchwork the United States currently relies on to protect artists' moral rights is made up on the federal level of the Lanham Act, the Digital Millennium Copyright Act, the Visual Artists Rights Act, and existing protection in the Copyright Act of 1976. These include protections related to derivative works, cover songs, and the ability to undo the transfer of a work after a substantial time period. There are state laws providing moral rights protections as well, including defamation laws, rights of privacy and publicity, and specific laws aimed at artists' moral rights. There is also a reliance on contracts and industry practices, essentially allowing private regulation and protections of artists' moral rights.

b. The Lanham Act

As discussed above, one of the pieces of the patchwork relied on for protecting artists' moral rights is the Lanham Act and its provision protecting against false or misleading information for consumers. In *Gilliam v. American Broadcast Companies Inc.*, the comedy troupe Monty Python sued ABC for airing severely edited versions of their original British productions, sometimes cutting randomly and removing punchlines or conclusion to skits. The court found that "the edited version broadcast by ABC impaired the integrity of appellants' work and represented to the public as the product of appellants what was actually a mere caricature of their talents. We believe that a valid cause of action for such distortion exists."[147] The integrity of Monty Python's work was protected in part because the resulting product misled the public about what they intended to produce.

[147] "Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 | Casetext Search + Citator.", 25.

So, the Lanham Act was extended to integrity protection in cases where the changes were severe enough to mislead the consumer about whether the final product actually represented the named authors. The court granted protection for integrity, while explicitly noting that these protections were outside the current copyright scheme and tying them to economic and consumer protection incentives, holding that "the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law, …cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent."[148] The issue here, as briefly discussed above, is that the aim of the Lanham Act is not to protect artists' moral rights. It is specifically aimed at consumer protection. Even though some scholars discuss moral rights in terms that seem to invoke product protections, the focus is different. Roberta Rosenthal Kwall generally describes moral rights in this context, saying, "[P]reservation of the author's meaning and message…facilitates the development of authorship dignity. It is human nature to care about how one's product is packaged for external consumption. And when the packaging violates the original author's vision…, there is an assault on the author's dignity…. There is, quite simply, something wrong with damaging the work's textual integrity."[149] Kwall discusses a work as analogous to a product, but the focus is on protecting the producer, not the consumer. The problem is not that the customer might be harmed by missing the message, but that the person who produces the product has a vested interest in making sure the product is not modified. The fact that at times an action damages the integrity of a work and the honor and reputation of an

[148] "Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 | Casetext Search + Citator." 24
[149] Kwall, *The Soul of Creativity*. 3-4.

author when it misleads the consumer does not mean that integrity is always protected by the Lanham Act.

The court's focus in *Gilliam* on the economic rights and the way the public perceives the work highlights that the Lanham Act had to be stretched in order to include protection for moral rights. This was the assessment of concurring Judge Gurfein in *Gilliam*, who said, "the Lanham Act does not deal with artistic integrity. It only goes to misdescription of origin and the like."[150] There is nothing inherent in the Lanham Act that would suggest artists' moral right protections are included, and this means that if those rights come into tension or conflict with other rights or values, the court is likely to support those rights and values which the original law was aimed at over those that have been admitted through the back door.

This narrowing of moral rights protections under the Lanham Act when they come into conflict with other interests is exactly what occurred in the US Supreme Court's decision in *Dastar Corp. v. Twentieth Century Fox Film Corp*.[151] In *Dastar,* Dastar Corp. created a video set about World War II campaigns in 1995 using footage from a 20th Century Fox Production from 1949. The Dastar production featured severe cuts to the original footage and lacked any attribution to 20th Century Fox. Despite the similarities to *Gilliam*, the Court ruled that the Lanham Act did not cover this type of mutilation or misrepresentation of the original work. In their ruling, the Court relied on the idea that "[t]he consumer who buys a branded product does not automatically assume that the brand-name company is the same entity that came up with the idea for the product, or designed the product—and typically does not care whether it is. The words of the Lanham Act should not be stretched to cover matters that are typically of no

[150] "Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 | Casetext Search + Citator." 40.
[151] "Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003)," Justia Law, accessed May 9, 2022, https://supreme.justia.com/cases/federal/us/539/23/.

consequence to purchasers."[152] The Court essentially said that consumers are not always interested in whether the original artists' integrity and attribution have been preserved, and since the Lanham Act is specifically aimed at consumer protection, if consumers don't care, consumers don't need to be protected.

The Court explicitly considered the possibility that the video in *Dastar* might be valued not for the actual product "but for the intellectual content that it conveys"[153] but stated that to extend this understanding to communicative works would bring the Lanham Act into conflict with copyright law, which is designed specifically to cover these types of works. The Court held that "allowing a cause of action under § 43(a) for that representation would create a species of mutant copyright law."[154] The Court is saying that the Lanham Act is not designed to cover artists' moral rights and that stretching it to do so creates a conflict with copyright law. The Court is rejecting the idea that consumer protection laws are an effective means of providing artists' protections and demanding that these protections be provided elsewhere. Doing anything else usurps the current system and creates an unacceptable second form of protections that were not intended.

In the Copyright Office's Report on moral rights protections, they write at length interpreting the scope of the *Dastar* decision, ultimately concluding "the Office believes that, when *Dastar* is properly interpreted, the Lanham Act remains a viable square of the moral rights patchwork."[155] They detail ways in which some claims might still move forward and even propose the possibility that "Congress may consider adopting an amendment to section 43(a) that

[152] "Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003)." 32-33
[153] "Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003)." 33
[154] "Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003)." 34
[155] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 54

would expand the unfair competition protections to include false representations regarding authorship of communicative works."[156]

I believe that this interpretation and suggestion fails to deal with the fundamental conflict of attempting to use a consumer protection law to protect artists' rights. The issue is that in cases under the Lanham Act the heart of the matter in any possible infringement will be how it impacts consumers, and not how it impacts artists. In any situation in which it cannot be shown that consumers are potentially harmed, artists' rights considerations will be preempted. This is an irreconcilable conflict and a fatal defect for anyone whose primary concern is protecting artists' moral rights. It could potentially even backfire and be used as a means to take away the artists' right of anonymity or pseudonym. In advocating for the value of author attribution to consumers, Greg Lastowka noted, "broader social interest[s] in ascertaining and denoting authorship operate independently of the author…and at times fly in the face of the 'moral rights' approach that focuses on protecting the personal interests of the artist."[157] This means that if consumer interests take priority, the Lanham Act could actually be used to force authors to reveal themselves to make sure consumers know the source of the product they are buying. Rather than broadening moral rights protections, the Copyright Office's suggestion of a rule against false representations of authorship could actually narrow them. This is especially possible if this addition is made to the Lanham Act, where the focus is consumer protection, rather than as part of a statute aimed specifically at moral rights.

[156] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 58

[157] Greg Lastowka, "The Trademark Function of Authorship," SSRN Scholarly Paper (Rochester, NY, February 3, 2005), https://doi.org/10.2139/ssrn.656138. 11.

As discussed in Chapter 2, part of the intimate nature of the right of attribution is the right not just to control proper attribution, but to withhold attribution. This can be essential to the intimate connection to the work. *Salamandra* is a work about the Holocaust published under the pseudonym Ka-Tzetnik 135633 (Concentration-Camp Inmate 135633), where part of emotional connection between the author and the work is tied to the idea "that the purpose of his writings is not to speak of his own experiences, but to record those of the other victims who did not survive to speak for themselves."[158] Forcing this author to name themselves for the sake of the consumer would violate the intimate connection between them and their work, as part of the emotional ties to the work are essentially based in publishing only under the number assigned at a concentration camp. Laws aimed at protecting moral rights would not allow this possibility, but laws aimed at consumer protection might.

The focus on the consumer in this area of the patchwork rather than the artist shows a disregard for the intimate connection that justifies the protection of artists' moral rights. The intimacy account's focus on the emotional context that exists around an author and their work involves more than the artist merely being the source of the work. A violation that damages that connection but does not impact the consumer will not trigger Lanham Act protections. A change that does nothing to mislead the consumer, but that meaningfully changes the emotional context surrounding the work, will not be a violation. A publisher might release a severely bowdlerized version of a book labeled as "abridged" that the author feels cuts out the emotional core and connection. As long as information is made available to the consumer about the original origin, the publisher, and the abridged status of the book, it does not seem the author would have a

[158] Jeremy D. Popkin, "Ka-Tzetnik 135633: The Survivor as Pseudonym," *New Literary History* 33, no. 2 (2002): 343–55, https://doi.org/10.1353/nlh.2002.0020.

viable Lanham Act claim to stop the publication, even if their moral rights were violated. Unless the consumer can be shown to be expecting that the abridgement gained the author's involvement or approval, which does not seem obvious, the Lanham Act will offer no protection. The Lanham Act will always deprioritize moral rights protections and exclude them if they are not smuggled in through consumer concerns.

c. The Digital Millennium Copyright Act

This issue of deprioritization and cross-purposes is not exclusive to the Lanham Act. There are several aspects of the current patchwork that sometimes implicate moral rights protections, but that do so as a matter of chance, rather than as a matter of intention. The Digital Millennium Copyright Act (DMCA) was adopted to combat digital piracy of intellectual property, specifically those works protected by copyright. Section 1202 of Title 17 of that act forbids the removal of copyright management information (CMI), and this includes information that identifies the work.[159] This identifying information includes information traditionally considered to be protected by the right of attribution, including the name of the author of a work. This allowed artists a legal response to any digital stripping of attribution from works.

While this was promising legislation, there are issues with relying on it for attribution protection. Initially, courts applied the standard only to digital works, which meant that removal of attribution information for physical works did not fall under the standard.[160] Later courts reversed this limitation, broadening application to physical as well as digital works.[161] This was

[159] "17 U.S. Code § 1202 - Integrity of Copyright Management Information," LII / Legal Information Institute, accessed May 23, 2022, https://www.law.cornell.edu/uscode/text/17/1202.
[160] "IQ Group, Ltd. v. Wiesner Publishing, LLC, 409 F. Supp. 2d 587 | Casetext Search + Citator," accessed May 23, 2022, https://casetext.com/case/iq-group-ltd-v-wiesner-pub.
[161] "Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454 | Casetext Search + Citator," accessed May 23, 2022, https://casetext.com/case/associated-press-v-all-headline-news-corp.

based on the possibility of infringing copyright in physical works, such as copied photographs. This initial debate over the scope of what is protected hinged on the legislative history and the intent of the law. The initial rulings applying CMI protection only to digital works focused on the idea that the law was adopted only in order to combat digital piracy. This highlights the inadequacy of relying on laws aimed at other goals to protect artists' moral rights. Even though courts eventually chose to interpret the law based on the broader language used in the statute, rather than legislative intent, there is a danger in relying on this moving forward. None of the legal decisions have come from the Supreme Court, and as was the case in *Dastar*, there is always the chance that a Supreme Court decision will narrow the scope of the law by focusing on legislative intent and an attempt to avoid having the scope of the DMCA bleed into other areas of intellectual property law.

Additionally, there are already problems with relying on the law in practice. First, the law only applies to the removal or modification of CMI, not to cases in which it CMI was absent from the start. Essentially, it only applies to third parties. If my record company includes proper attribution in releasing my newest hot track and someone removes it, the DMCA applies. If my record company simply fails to give me attribution or gives someone else credit for things I did, the DMCA has no relevancy. So the law applies to changing attribution that has been provided, but has no application whatsoever to cases where no attribution is given in the first place. This can be traced back to the original intent of the law, which is focused on stopping online piracy. Taking identifying information off of works makes them easier to distribute without getting caught, so the law prohibits it. Putting the identifying information into works may make them more difficult to pirate, but if there is no online piracy threat, nothing is lost by not having that information, as far as a law aimed specifically at digital theft is concerned. The right of attribution is implicated under the DMCA only insofar as it connects to the larger goal of stopping piracy. In cases where it might be irrelevant, there is no additional protection of attribution.

This focus on infringement is highlighted in the enforcement of the law. "Under section 1202, plaintiffs must essentially prove that a defendant was (1) expressly contemplating copyright infringement when (2) knowingly misattributing a work or removing CMI."[162] Because the law is aimed at preventing piracy, enforcement requires that the person intended to pirate the material when removing attribution information. This means that in order to bring a successful claim for violating an artist's right of attribution, the artist must be able to prove not only that the attribution was removed, but that the removal was done with the explicit intent to pirate the material. This knowledge and intent standard requires significant evidence, which is outside what most individual artists will be able to obtain to a sufficient degree to win a court case. Because the law is aimed at intentional piracy it requires a standard of evidence beyond mere violation of the right of attribution.

In response to this issue, the Copyright Office "recommends that Congress consider an addition to section 1202 that, while retaining a dual standard, would loosen it slightly to focus on intent to conceal rather than to infringe."[163] There are small issues with this change, such that it seems it will still be burdensome for individual artists to meet the evidence standard of the knowledge and intent requirement. However, much like with the response to the issues with the Lanham Act, this proposed change misses the larger problem of relying on a law aimed at a

---

[162] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 95

[163] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019."98.

different purpose to provide moral rights protections. This proposed change does nothing to address the fact that initial attribution is excluded from the DMCA because it is seen as irrelevant as the law is aimed at stopping piracy, not at ensuring attribution.

The fundamental problem is that protecting artists' rights will always be at best a secondary feature of law aimed at other purposes. Whether or not the intimate connection between artist and work is damaged is not even a consideration in the adoption of these laws. This is highlighted by the lack of protection where attribution is absent in the first place. For an artist, the choice to be connected to their work is essential. If that choice is taken away and the connection severed, the artist may be harmed by this violation of their autonomy. There is also no connection between the pirate's intent to infringe and the harm done to the intimate connections between an artist and their work. Intent to infringe is economic in nature, as copyright is an economic right. The intimate connection between an artist and their work is non-economic in nature. A requirement to show intent to infringe is essentially a requirement to show intentional economic harm. Yet, absence of economic harm is not equivalent to an absence of emotional harm. The focus on infringement highlights the disconnect between DCMA protections and intimacy-based moral rights protections. There is no reason to propose keeping this law under the umbrella of anti-piracy legislation, as the Copyright Office has done. Doing so only allows for the possibility of conflict and cross purposes. Instead, if the right of attribution deserves explicit protection, then it makes sense to advocate for separate moral rights protections.

This fundamental disconnect between the purpose of the law and what it might happen to stretch to cover is why I will not be addressing reforms to the Lanham Act or DMCA in my proposed guidance for artists' moral rights protections. Part of the problem with relying on the current patchwork of laws is not merely that it often leaves areas uncovered, but that there are foundational flaws inherent in trusting a combination of various laws, many of which have no explicit intention to address artists' moral rights, to do the job. There are similar foundational issues with relying on state laws to be part of the patchwork that protects artists' moral rights.

d. State-Level Protections

The problem with state laws, as the Copyright Office notes, is that "reliance on state laws continues to suffer from many of the same defects noted by commenters…—the lack of clear, uniform standards that are consistent throughout the country."[164] Fewer than 15 states have law aimed specifically at protecting artists' moral rights, and those state laws are uniform in neither content nor strength. While there is some information that can be gleaned by looking at these specific state laws which I will address in my own proposal, there is not much to be gained in breaking down the individual state laws when diagnosing the overarching issue with them. There is simply no justification for an artist in California having moral rights protected by law while an artist in Tennessee lacks moral rights protections. There is nothing theoretically in my own or the US legal system's rationale for protecting artists' moral rights that meaningfully differentiates artists working in different locations so as to justify different protections. The artists in California have the same intimate relationship to their works as in other states. So, when considering the sufficiency of moral rights protections for the United States as a whole, the fact that in a few states the rights might be sufficient does nothing for all the artists living and working in other places. I suppose one could argue that artists should consider relocating to

[164] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 107.

states with better moral rights protections if that is a priority for them, but this seems unduly burdensome and does not address the insufficient protections for the whole of the country.

One might think that if all states simply adopted moral rights protections, then that would provide sufficient protection. One issue with this is that on a practical level it seems even less likely than the adoption of a federal moral rights statute. A second is that even when states all adopt some protections, the wide array of differences in those protections can still lead to inconsistency. This is the case with the state laws protecting the right of publicity, which the Copyright Office identifies as part of the patchwork of moral rights protections.

The right of publicity is the right of a person to control the use of their name, image, and likeness by third parties.[165] This generally allows people to limit the use of their personas without permission. In practice, this means that Elvis (or his estate) can make a legal claim to prevent impersonators from performing Las Vegas weddings.[166] Every state except North Dakota and Wyoming has adopted a right of publicity in some form.[167] Ignoring the fact that this seems to unfairly exclude people in those two states, "[t]he appearance of near uniformity in adoption of some version of the right of publicity belies the degree to which the exact contours of the right differ significantly from jurisdiction to jurisdiction."[168] A person in Indiana has significantly stronger protection than one in Massachusetts, a fact which seems completely arbitrary from a theoretical point of view. It is not as though there is some fact about the world necessitating greater persona protection for people from Indiana. It just so happens that the state law passed

---

[165] Melville Nimmer, "The Right of Publicity," *Law and Contemporary Problems* 19, no. 2 (April 1, 1954): 203–23.
[166] "Las Vegas Wedding Chapels Receive Elvis Cease-and-Desist Letters | CNN Travel," accessed June 15, 2022, https://www.cnn.com/travel/article/vegas-wedding-chapels-elvis-impersonators/index.html.
[167] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 115
[168] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 115

there provides greater protection, and once again it places a burden on people to find a location that offers greater protections rather than on a federal law to guarantee that a minimum sufficient level of protection is provided across the country. Relying exclusively on state law protections, even when those protections are nearly universal, allows for the possibility of some states providing protections that are so minimal as to be unfair and ineffective.

As I will discuss later, nothing about the preceding discussion is meant to suggest that state laws must be uniform and that no state could ever decide to provide stronger protections than another. Rather, I am suggesting that without some guidance as to minimal standards, best provided via federal law, there is too much room for people to suffer from a lack of legal protection based on location, which is not a meaningful difference when we consider artists' moral rights.

Returning to the right of publicity, it is a natural right to develop out of an intimacy account. The right of publicity is often associated with and "may be regarded as the reverse side of the coin of privacy."[169] Intimacy can be used to justify the right of privacy,[170] so it makes sense to expect that it could also justify the related right of publicity. The person who puts themselves on display for the public is making a choice not dissimilar from those who put their work on display instead. "[T]he dignity interests at stake in moral rights claims often are operative in right of publicity disputes focusing on the reputational and personality interests of personas."[171] There are also similar harms, where a person will feel that the violation of their persona violates the intimate connection they have to themselves and the ability to control what

[169] Nimmer, "The Right of Publicity." 204.
[170] Fried, "Privacy."
[171] Kwall, *The Soul of Creativity*.130. Kwall references dignity because that grounds her discussion of moral rights, but the point about the overall similarity between publicity and moral rights remains.

part of themselves is available for others and how it is used. The most significant issue with including publicity protections within artists' moral rights from a justification based in the intimacy account is that it is not clear that personas can satisfy the requirements of being works in the sense described in Chapter One. This does not rule out publicity protections, nor does it rule out publicity protection justified by intimacy, but it does suggest that these protections should be addressed by a separate statute more attuned to the specific nature of personas.

Despite the difference between works and personas, the US Copyright Office considers the right of publicity "a versatile tool for protection of moral rights."[172] Much like with the Lanham Act and DCMA, the Copyright Office makes this claim because the right of publicity has occasionally been used to protect rights of attribution and integrity. However, like with those other laws, when the main purpose of the law – protecting the name and likeness of a person – is not implicated, the law offers no moral rights protections. If a work lacks an artist's name or likeness, the right of publicity simply will not apply. Additionally, if a work is not known to be associated with an artist, the law provides no protection. This means that if an artist lacks a certain level of notoriety, without direct reference informing an audience who the artist is, the right of publicity will not be implicated. Publicity requires that the public associate an artist with a work or style of work in order to have a connection to the artist, absent a direct reference. This means that an already famous artist is likely to have a right to publicity claim for unapproved use of work that evokes the artist, but that a lesser or unknown artist will not. This is the case even though less famous artists do not clearly have a less intimate connection to their work. Much like with location, fame is not an indicator of intimate connection. Part of the reason for this

[172] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 113

difference in protection is that like the DMCA, much of the motivation for protecting the right of publicity is economic, rather than strictly moral. State publicity laws tend to focus on commercial usage. When focusing on economics, increasing protection for those who have more recognition has greater justification, as those who are more known have personas with greater economic value.

This highlights that even if publicity protections are justified by intimacy, that is not the current justification that actually underlies these protections. Relying on economic justifications can lead to harms. Publicity protection grounded in economic justification grants those artists whose work traditionally gets recognition greater legal protection than others. This recognition is not neutral. "It is no accident that the work of marginalized groups often counts as craft. Those who see to physical, practical, everyday tasks and needs may well produce artifacts that bear the mark of their work; and even when they do not, stereotypes may determine how these artifacts are classified and evaluated."[173] As will be discussed regarding the VARA requirement of recognized stature later in the chapter, recognition tends to favor dominant groups, much as crafts tend not to be treated with the same respect as art in part because of who makes them. Part of this lack of respect for crafts takes the form of lack of individualization and recognition for the makers of the works. This then translates into less of an ability to have a connection made between the artist and the work, and a decreased chance of protection through the right of publicity.

This underlines the insufficiency identified above in relying on laws aimed at other purposes to protect against moral rights violations. Publicity rights tied to intimacy protections

---

[173] Sally J. Markowitz, "The Distinction between Art and Craft," *Journal of Aesthetic Education* 28, no. 1 (1994): 55–70, https://doi.org/10.2307/3333159.

would function differently than existing laws do. Similar issues occur when looking at state defamation laws. Defamation laws are similar to publicity laws because defamation laws also protect a person's persona, though not from third party use, but from reputational harm from third party statements or assertions.[174] "One of the most significant hurdles an author must overcome to vindicate her attribution or integrity interests through the assertion of a claim for defamation is the requirement that a plaintiff demonstrate that a particular claim is both false and defamatory."[175] The law is aimed at protecting against severe reputational damage, which once again is tied to having a reputation and economic rights. Defamation may happen to take a form that violates moral rights but will often be unrelated. So even state laws that are much more common than explicit moral rights protections suffer from issues of focus and intent such that they often will be irrelevant to questions of moral rights. In this case, as is the case with the DMCA, that can take the form of requiring evidence of things outside of a violation of moral rights.

There are parts of the patchwork that are aimed specifically at protecting the rights of artists, though only one of which is tailored specifically to capture artists' moral rights. The Visual Artists Right Act of 1990 (VARA) was adopted into law specifically to offer increased protection for artists' moral rights on the federal level. As such, it will be the main focus of my attention both in terms of analysis and in my discussion of suggested legal reforms. However, before moving into the extensive discussion of VARA, it is worth briefly addressing a few other parts of the patchwork that currently exist and do offer protections for the rights of artists.

[174] George Christie, "Defamatory Opinions and the Restatement (Second) of Torts," *Michigan Law Review* 75, no. 8 (August 1, 1977): 1621–46.
[175] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 109.

e. Section 203

Section 203 of the Copyright Act allows for the termination of transfers of the right in a work by artists to others. This applies to works created after 1978 that were not made for hire. The original artist has a five-year period to claim the right starting 35 years after the original grant of rights or 40 years after the original publication by those who the rights were granted to.[176] The purpose of this law is to allow artists that may have regretted giving up ownership of a work early in their career a chance to undo that mistake. In theory, this law makes sense as it allows artists an avenue to regain lost rights while still respecting contract law. If any artist could undo a transfer at any time if they decided they were unhappy with the terms, it would undermine the value of making contracts for the transfer of an artist's work.

However, while this provides some safeguard for artists in unhappy contracts, there are issues. This law was adopted in the 1976 Copyright Act, and it took until 2013 for any works to become eligible for reversal of transfer under the act. That is a significant length of time for the act to come into viability, and many artists could suffer significant harm from an unfair contract over a 35-year period, including dying before this right comes into effect. Additionally, this right is not well known, as it spent 35 years in dormancy after its 1978 passage. As such, artists are unlikely to be aware that it is a right they have, and due to the fact that the exercise is limited to a 5-year window many artists might have missed the opportunity to exercise the right simply out of not knowing it was available before the window closed. Also, "derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination."[177] A derivative work is defined as "a work based upon one or

[176] "17 U.S. Code § 203 - Termination of Transfers and Licenses Granted by the Author," LII / Legal Information Institute, accessed May 25, 2022, https://www.law.cornell.edu/uscode/text/17/203.
[177] "17 U.S. Code § 203 - Termination of Transfers and Licenses Granted by the Author."

more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."[178] For example, any movie based on a book, like *Fight Club* or *Gone With the Wind*, is a derivative work. So if the entity that had the ownership made or authorized derivative works, revoking that ownership has no impact on those works, even if those works might have been part of the reason the artist wanted to terminate the transfer. Lastly, there is no trigger in the law for an artist to regain ownership of a work in response to the new owner violating the artists' moral rights. So an artist may have to put up with 35 years of seeing their work used in a way they find damaging while having no recourse under Section 203. In order to provide more meaningful protections for artists, this law would need to trigger sooner, with either greater notice or longer windows for actions, apply to derivative works, and come into play earlier in cases of specific moral rights violations. None of the current limitations can be justified in terms of the intimate relationship the artist has with the work. If anything, intimacy justifies a quicker and more accessible remedy, rather than extending the harm for 35 years.

f. Derivative Works

Protection for derivative works is provided in Section 106(2) of the Copyright Act, which provides copyright owners the exclusive right "to prepare derivative works based upon the copyrighted work."[179] Copyright owners are the only people who can either prepare themselves or allow others to prepare works that are built upon the preexisting work. This is why Sony and

[178] "17 U.S. Code § 101 - Definitions," LII / Legal Information Institute, accessed May 25, 2022, https://www.law.cornell.edu/uscode/text/17/101.
[179] "17 U.S. Code § 106 - Exclusive Rights in Copyrighted Works," LII / Legal Information Institute, accessed May 25, 2022, https://www.law.cornell.edu/uscode/text/17/106.

Marvel had to negotiate extensively over which movies can feature Spider-Man, rather than both studios just doing whatever they want with their own version. Similarly, I cannot publish my own alternate universe sequel to Twilight, even though I know that Bella should end up with Jacob.

Fan fiction complicates this picture, and while a full treatment of the phenomenon is outside the scope of this chapter, generally most fan fiction would be considered a derivative work and could be legally prevented. It is allowed by publishers only as long as it remains non-commercial and is tolerated mostly to avoid negative relationships with fans, rather than as an acknowledgment of its legality. There are exceptions made for what is called fair use, which I will discuss more when proposing my own moral rights protections. Basically, certain uses, including derivative works, are allowed when it is deemed necessary for valuable pursuits such as education or critical commentary.[180] There are also exceptions for cover songs, where they must be allowed as long as they do not stray too far from the original.[181] This exception essentially creates a type of derivative work not covered by Section 106, as long as the cover song is similar enough to the original. If it strays too far, the songs fall back within the scope of being a derivative work prevented by statute. The limited applicability of this provision neither significantly reduces the ability to prevent derivative works nor provides ample moral rights protections. However, it does show that there are works like parody and cover songs that are not prohibited by the derivative works statute.

[180] "17 U.S. Code § 107 - Limitations on Exclusive Rights: Fair Use," LII / Legal Information Institute, accessed May 25, 2022, https://www.law.cornell.edu/uscode/text/17/107.

[181] "17 U.S. Code § 115 - Scope of Exclusive Rights in Nondramatic Musical Works: Compulsory License for Making and Distributing Phonorecords | U.S. Code | US Law | LII / Legal Information Institute," accessed May 27, 2022, https://www.law.cornell.edu/uscode/text/17/115.

Despite these exceptions, according to the Copyright Office, the control of derivative works "remains an important piece of the United States' moral rights patchwork."[182] This is because the ability to control derivative works implicates both attribution and integrity. The ability to stop someone from making a work based on your own helps make sure that no one will be able to make a work using your output without crediting the original nor will they be able to falsely attribute the work to you. Additionally, control over derivative works provides a certain level of quality control such that an artist's honor and reputation should not be maligned through the existence of works related to the original that the artist deems prejudicial, as the artist can simply refuse to approve those derivative works.

Unsurprisingly, there are issues with this part of the patchwork as well. Derivative works protections, as is clear from the name, offer no protection for the original work, but only in relation to works based upon that work. While this does not mean they aren't useful, it does immediately show the limitations of these protections. The rights will not apply in any case where no new work is created but the issue is only about the treatment of a work that already exists.

Additionally, "derivative work rights have been cited as being 'essentially economic rights designed to regulate adaptations or arrangements,' making the comparison to Berne 6bis one of 'apples to oranges.'"[183] Even though derivative work rights can protect the integrity of an artist if the issue at hand is a violation of integrity through a derivative work, this is not the focus

[182] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 103

[183] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 103 Citing 11987 BCIA Hearings at 1257–58 (1987–88) (written statement of Arnold P. Lutzker, Attorney, Dow, Lohnes & Albertson) and Edward J. Damich*, Moral Rights in the United States and Article 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 655, 659 (1986)

or intention of such rights. The purpose is not to protect the intimate connection the artist has with the work, but to make sure the owner of a work gets paid. Importantly, derivative work rights only have the potential to coincide with artists' moral rights in cases where the artist is still the copyright holder, the owner of the work. Any case where the artist has transferred ownership of the work, the current copyright holder will have control over derivative works, whether or not the original artists have objections to the works created. This means that in many cases it will be up to the publisher, not the artist, to authorize derivative works. While some artists may be able to retain more control in their contracts, many others simply will not. Alan Moore's *Watchmen* characters have been brought into the wider DC Comics universe and had an HBO series even though he has been vocal in his disapproval of this.[184] Neil Gaiman has essentially had to seduce the same company into not making similar moves with characters from *Sandman*.[185] Legally, focusing the protections on the copyright owner will make derivative works protections irrelevant to many situations where artists' moral rights come into play, since these are often specifically cases where an artist is attempting to exert some control over a work that they no longer clearly have ownership in. The economic nature of the right is part of why it focuses on the owner, rather than the artist.

g. Private Protections

This highlights one of the last parts of the patchwork not directly aimed at protecting artists' moral rights: private contracts and licenses. These are the contracts that artists sign when agreeing to transfer ownership of a work or when agreeing to create works for hire. These

[184] Adam Epstein, "HBO's 'Watchmen' Is Great. Its Comic Creator Alan Moore Wants Nothing to Do with It," Quartz, accessed May 27, 2022, https://qz.com/quartzy/1732050/why-alan-moore-wants-nothing-to-do-with-hbos-watchmen/.

[185] Author David Allen Green, "How Neil Gaiman Kept Control of the Sandman Characters," *The Law and Policy Blog* (blog), June 8, 2021, https://davidallengreen.com/2021/06/how-neil-gaiman-kept-control-of-the-sandman-characters/.

contracts often explicitly discuss the level of control the artist might maintain over the work after it is transferred or finished. According to the Copyright Office, "freedom to include or exclude moral rights from an agreement is a key element of American copyright law that proponents maintain has long provided authors with the credit and control they desire over their works while allowing users to make modifications necessary to the use of the work."[186] While I cannot delve into the various aspects of American contract law that would be required for a full treatment, there are some aspects of relying on contracts that raise immediate concerns.

First, the inclusion of moral rights in contracts is entirely a voluntary choice. This is because there is not a federal statute that protects moral rights. Essentially, contracts can be used to create moral rights that do not exist outside of the contract, but the parties can also feel free not to address moral rights at all. There is not a baseline of moral rights that must be included or addressed in any contract. This limits the power of using moral rights in contract negotiations. The explicit moral rights protected by VARA cannot be transferred, they can only be waived.[187] While the inability to transfer moral rights is justified by the intimacy account, as the transferee would lack the required intimate connection to the work,[188] it does lessen the bargaining power these rights confer on the original artist. Gaining moral rights themselves, rather than merely getting an artist to waive theirs, might provide a level of control worth bargaining for. However, even transfer might not solve the problems caused by an imbalance of power. Currently, an artist may legally be able to use their VARA rights as a bargaining chip in order to get a better deal for

[186] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 129.
[187] "17 U.S. Code § 106 - Exclusive Rights in Copyrighted Works."
[188] Whether or not the intimacy account supports the waiver of moral rights is a difficult question. Artists must be able to choose not to exercise their rights, but whether that choice might possibly take the form of alienability is theoretically unclear. From a practical standpoint, given the power imbalance described above, it might make sense to make moral rights inalienable due to the general protection it would provide.

their works, but in practice, due to lack of other bargaining power, an artist may have to give up the limited moral rights protections they actually have in order to have their work distributed or to be compensated. Rather than a powerful chip to be traded, the rights are something a company might require an artist to give up in order to sign a contract.

The big issue with securing moral rights through their voluntary inclusion in contracts, given the absence of baseline rights, is that it creates a vast power imbalance in favor of the industries that tend to be in control of contracts. It is telling that when the Copyright Office mentions respondents in favor of relying on contracts to protect moral rights it is the film, music, and publishing industries providing these responses.[189] There is not much question that allowing the industries to determine when and how to include moral rights in contracts benefits those with more bargaining power, namely the industries themselves. Continuing to rely on contract law to protect moral rights essentially limits the number of artists who can legitimately bargain for moral rights protections to those who have already shown significant economic value to the industry, such that their own worth creates bargaining power.

The Copyright Office acknowledged these concerns, noting that "rights may be waived in licensing due to lack of bargaining power rather than true desire to part with such rights. Additionally, of course, private agreements are purely voluntary and do not provide legal baselines that affect all parties regardless of bargaining power, as would statutory moral rights."[190] However, in spite of acknowledging these issues, the Copyright Office "recommends that any potential changes to the moral rights patchwork not upset the existing contractual order.

---

[189] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 130.
[190] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 133.

United States copyright law rarely interferes with private agreements, and this general principle should be maintained with regard to moral rights."[191] The Copyright Office prioritized the status quo in its recommendation. However, when contracts are unfair, relying on an imbalance of power, there is no moral justification for prioritizing them. The intimate connection between an artist and their work is not lessened because the artist has less clout. Allowing moral rights to be determined in this manner undercuts the justification for protecting them. This is especially unacceptable when these contracts are framed as an important part of protecting moral rights. If contracts were simply a means for various industries to handle the idiosyncrasies of their business on top of a baseline of protected moral rights, it would make sense to defer to tranquility. However, when the contracts are meant to be a source and foundation of moral rights protections, if they are failing to provide that service, that deferral to tranquility becomes a failure to adequately protect artists' moral rights.

II. The Visual Artists Rights Act of 1990 (VARA)

There is still one section of the patchwork that needs examination, VARA. The Visual Artists Rights Act of 1990 directly adds protections for the moral rights of attribution and integrity into the Copyright Act as Section 106a of Title 17. The attribution right allows that "the author of a work of visual art shall have the right to claim authorship of that work, and to prevent the use of his or her name as the author of any work of visual art which he or she did not create."[192] The integrity right allows that the artist "shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or

[191] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 137.
[192] "17 U.S. Code § 106A - Rights of Certain Authors to Attribution and Integrity."

other modification of the work which would be prejudicial to his or her honor or reputation; and… to prevent any destruction of a work of recognized stature."[193]

Here is a law clearly and directly aimed at protecting at least some moral rights. So it avoids the problem that many other aspects of the patchwork have, that if push comes to shove artists' moral rights will be curtailed in favor of the main focus and intent of the law. It is also a federal statute, so it applies to artists across the entirety of the United States. These are both positive aspects of VARA that should be carried forth in future federal laws aimed at protecting artists' rights. However, as I will discuss, this does not mean that VARA provides sufficient protections for artists' moral rights. "The narrowness of the statute, both as drafted and as interpreted by the courts, has, according to many, undermined the effectiveness of the moral rights afforded under VARA."[194]

VARA seems on its face as though it would be a solution to many of the problems presented by other parts of the patchwork, but due to limited scope and application, it actually is only even relevant in a small minority of cases.[195] Moreover, "one of the main difficulties with the statute is widespread ignorance of its existence."[196] Artists tend not to invoke VARA rights because they are unaware that they exist. This goes back to one of the issues pointed to earlier in protecting moral rights through contracts and negotiation. Artists are unlikely to use their VARA rights towards making better deals, since many are not aware they have these protected rights in

[193] "17 U.S. Code § 106A - Rights of Certain Authors to Attribution and Integrity."
[194] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 60.
[195] Shipley, "The Empty Promise of VARA: The Restrictive Application of a Narrow Statute."
[196] Kwall, *The Soul of Creativity*. 29.

the first place. However, even if artists are aware of these rights, it still the case that these rights are limited in application.

a. VARA Exemptions: Non-Visual Works

One of the first and most dramatic limitations presented by VARA is in the name of the act itself – the *Visual* Artists Rights Act. VARA applies exclusively to works of visual art. This means that any work of art that is not visual in nature is immediately excluded from moral rights protections under VARA. An artist claimed that they sent their sheet music to several record labels and later heard songs using that music, so claimed that their music was stolen. The artist has no legal recourse under VARA because the work is not considered a visual work.[197] Similarly, an author whose best short story from their creative writing class at college later shows up as the plot of a motion picture has no VARA protection.[198] While neither of the cases cited above seems likely to have been won by the plaintiff based on the evidence, neither case proceeded that far, as both were dismissed at preliminary stages because the works under discussion fell outside the scope of VARA protections.

There are simply no good moral or theoretical grounds for limiting artists' moral rights protections to the visual arts. If one accepts the intimacy-based justification for protecting artists' moral rights that I offered in Chapter One, it is not the case that artists have an intimate connection only to works that are visual. The emotional context is just as present in the expression of works that are written or auditory. VARA was written without an intimacy-based justification in mind. The Copyright Office focused on personality theories, saying that there is

---

[197] "Hijrahannah v. Def Jam Recordings, Case No. 14 C 0872 | Casetext Search + Citator," accessed May 31, 2022, https://casetext.com/case/hijrahannah-v-def-jam-recordings.

[198] "Kettenburg v. University of Louisville, Civil Action No. 3:05CV-79-H | Casetext Search + Citator," accessed May 31, 2022, https://casetext.com/case/kettenburg-v-university-of-louisville-1.

reason to believe that a visual work carries more of an artist's personality because it tends to be one of a kind or limited, rather than reproduced like written and audio works.[199] While I think that this line of argumentation provides good practical reason to move away from relying on personality theories to justify artists' moral rights and helps motivate my initial chapter, I also do not think it is a correct application of personality theory.

The Copyright Office and the scholars it relies on are conflating the original work with the means of reproduction. While it may seem easier to reproduce a novel in our modern era than to make a perfect replica of an oil painting, it isn't at all clear that this means that the artist put less of themselves into their manuscript than into the painting. Even if this application is correct, it seems like there is no reason to limit moral rights protections to visual works. Jane C. Ginsberg, Associate Professor of Law, Columbia University School of Law, made the case when VARA was enacted that "[t]he original or few copies with which the artist was most in contact embody the artist's 'personality' far more closely than subsequent mass produced images."[200] While Ginsberg may have been referring exclusively to the differences between original visual works and reproductions, Congress and the Copyright Office treat the separation more broadly, as "[w]ith these differences in mind, Congress drafted VARA to apply only to visual art and not to other copyrightable works."[201] The problem is if Ginsberg's argument was meant to be limited, Congress misapplied it. It is not an argument for limiting the scope to visual works, but rather an argument for limiting the scope to *limited* works. Based on this it would be the case that protections should be limited to original manuscripts or master recordings, rather than limited

[199] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 62,
[200] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 62 citing H.R. REP. NO. 101-514, at 12 (1990) (quoting 1989 VARA Hearing at 84).
[201] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 62.

based on the medium of the work. Moreover, Ginsberg admitted that this analysis applied exclusively to the right of integrity and thought that attribution should apply without limit based on replication. Yet the statute applies the limitation to both attribution and integrity. Even when accepting all the arguments made to justify limiting VARA protections to visual works and applying them as they were originally applied, the limitation of attribution rights to visual works is arbitrary. There is nothing that justifies limiting attribution rights, but the cases of both the sheet music and the manuscript were attempts by original authors to gain attribution for works they claimed were stolen. These cases were excluded from VARA protections based upon a misapplication of a theory that was never intended to apply to that aspect of moral rights in the first place. Artists are being denied protections based on an unfairly restrictive statute.

The intimacy account might still place some restrictions related to the limited nature of some works versus the treatment of reproductions. Specifically, as it relates to destructions of a work, destruction of an unlimited, massively reproduced work in the form of that mass produced reproduction – like shredding a copy of a novel - might not merit moral rights protection, depending on the circumstances. It is feasible that an artist does not have the same intimate relationship with every single poster reproduction sold in the museum store as they do with the work in the museum itself.

Darren Hudson Hick explores this relationship, pointing out that there is a difference between authoring a work and instantiating it. "[I]nstantiating some work will result in something new—a new instance of the work—but it does not result in a new work. As such, we may distinguish a work's unique context of creation from any particular copy's unique context of instantiation, determined by the instantiator (who may or may not be the same person as the author of the work) and the time and place of the instantiation."[202] The artist may have moral rights related to both the authored work and the instantiation, but the nuances of these rights may differ. An artist may have the right not to have the original, first instantiation destroyed and may have a right not to have subsequent instantiations distorted in ways that harm their reputation or honor, but they may lack a right to prevent destruction of mass-produced instantiations of posters or postcards. As such, it might make sense to limit the scope of protection for destruction of works in cases of mass reproduction. This would not extend to attribution or other integrity violations. It is even possible that the context of destruction, such as a public burning of a reproduction, might constitute an integrity harm over and above the mere destruction of the work. In such cases, those additional harms would still merit the possibility of moral rights protections, balanced against respect for free speech and protected forms of criticism.

When the Copyright Office reviewed the sufficiency of the patchwork and VARA in its Report, it considered whether or not VARA protections should extend beyond merely visual works. They specifically focused on musical works and concluded that most musical works are mass reproduced works-for-hire that are covered by contracts. I have discussed the misapplication of personality-based theories to deny all moral rights protection to works that are reproduced easily and the issues with relying on contracts above. As for work-for-hire, I will discuss that in detail below but generally think that whether or not the work-for-hire status of an artwork should lead to a lack of moral rights protections depends on the level of guidance and creative input from the employer as well as the expected and actual connection between the artist and the resulting work. I think some work-for-hire situations resemble mechanical following of

[202] Darren Hudson Hick, "Toward an Ontology of Authored Works," *The British Journal of Aesthetics* 51, no. 2 (April 1, 2011): 185–99, https://doi.org/10.1093/aesthj/ayr004.

someone else's instructions, whereas others are more defined by contractual relationships at the ownership or employment level while the artist retains autonomy and control at the creative level such that the work produced is essentially the same as what would be produced absent the contract. However, there is certainly nothing in the fact that some musical works are made for hire that justifies removing all musical works from potential moral rights protections. Simply limiting the scope to non-work-for-hire musical works would respond to that concern. As such, there is no good reason given by the Copyright Office that theoretically or morally separates musical works (or written works, though those are not the focus) from those visual works that are granted moral rights protections under VARA. The creators of musical works are able and likely to have intimate connections to these works justifying moral rights protections just as visual artists are.

When the Copyright Office considered the extension of VARA to musical works, it saw that question as part of a larger question about the extension of moral rights more generally. The Copyright Office stated, "Whether musical works or sound recordings should be protected by federal rights of attribution and integrity is part of the fundamental question of whether there should be a blanket statutory federal moral rights regime."[203] After framing the question in this manner, the Copyright Office invoked their previous recommendation against a new federal moral rights statute. I have not thus far addressed the overall argument provided by the Copyright Office, instead going through the patchwork panel by panel. It is worth taking a brief moment to address this overall argument, since it was relied on by the Copyright Office in its assessment of VARA protections, before returning to my own VARA assessment.

[203] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 61.

b. The Copyright Office's General Position

The Copyright Office makes a point that I have already addressed in its general argument for not enacting a federal moral rights statute. It endorses a general deference to contracts and industry norms and a belief that the "ability of parties to freely negotiate the inclusion or exclusion of moral rights in a contract is a flexible way of addressing the interests of both parties."[204] As discussed above, this assumes a parity in negotiations which is usually lacking. Moreover, there is no reason to think that instituting a basic guaranteed level of moral rights protections would necessarily undermine the ability of contracting parties to negotiate further in order to address the interests of both parties. It would instead provide a level of protection for those parties that lack the information, the power, or both, to properly negotiate moral rights into a contract. It would also recognize that artists who lack information and power do not therefore lack intimate connections to their works. The justifications for protecting moral rights remain unchanged by these other parts of the artist's context.

In a similar line of argumentation, the Copyright Office says that industry and social norms around not just contracts, but plagiarism, provide protections in such a way that federal moral protection is unnecessary and might even cause problems if standard practices in some fields suddenly are seen to be violations of federally protected moral rights. The Copyright Office refers to this as the plagiarism patch, essentially saying that norms against plagiarism and societal norms regarding attribution are an important aspect of moral rights protections and that changes could "disrupt the decades of social ordering established via dependence on these

[204] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 39.

practices."[205] While I agree that in some ways attribution norms in particular are served by non-legal expectations, it is unclear that this should pre-empt the adoption of federal protections. In cases where the norms already favor protecting moral rights, nothing about having moral rights protections legally protected will impact those norms. The social ordering will not be disrupted.[206]

In cases where norms tend against attribution, for example where radio and podcasts tend to be less formal about source attribution, there are two immediate responses. The first is that if these norms are seen to be worth preserving then either the law or jurisprudence can be used to exempt them from application of a moral rights statute. If it would be overly burdensome to ask a radio broadcaster to provide on air attribution, radio broadcasts could be explicitly exempt from certain attribution requirements. The other response is to question whether social norms that routinely violate important rights should be protected just because they are norms, or if perhaps some norms should be reevaluated. In a digital age where many things live online, perhaps it would make sense to include written attribution to sources alongside the ability to listen to a podcast or radio broadcast that has been made available after initial broadcast. Social norms have often developed to protect certain segments of society more than others, or have been driven by those with power to their own advantage. Making sure that these norms are either already in line with protecting the intimate relationship between artists and their works, or changing them so that they are, helps make sure that our norms match our moral commitments. Given the

[205] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 39.

[206] Norms that support moral rights should not trigger legal action, and norms that violate them can be assessed and possibly written into the law as exceptions if the value added by the norm is strong enough.

possibility of either preserving or rightfully changing the social ordering, protecting current norms does not give sufficient reason to avoid providing federal moral rights protections.

One general argument that the Copyright Office gives is that implementing "a new moral rights statute could also present tensions with well-established legal principles, such as the First Amendment, on which the copyright ecosystem depends. Thus, the Office concludes that a blanket statutory moral right for authors of all types of copyrightable subject matter would disproportionately disrupt current economic transactions as well as the legal structure that guides them."[207] However, the Copyright Office considered this exact tension earlier in its Report and came to a different conclusion. It said that "[e]xisting protections for attribution and integrity interests in U.S. law have been implemented consistent with the First Amendment. And, while the Office recognizes that enhanced moral rights protections could potentially create new tensions with the right of free speech, it does not see these tensions as inevitable or irreparable."[208] It is not clear what changed in the analysis such that the tensions went from avoidable or fixable to being such a significant problem that it is sufficient to overwhelm considerations in favor of a federal statute. The Copyright Office offers no new analysis, but simply a different conclusion. At best, one could read the inclusion of economic transactions as a way of broadening the analysis to include the contract norms previously discussed. However, lumping the First Amendment concerns in with the economic concerns seems inconsistent with previous analysis at best, and a disingenuous attempt to strengthen a weaker argument at worst.

---

[207] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 39.

[208] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 29-30.

Given the Copyright Office's own assessment that First Amendment issues are an insufficient reason to reject blanket moral rights, this is an unconvincing argument for rejection. Historically, legal jurisprudence has found ways to balance rights that come into tension against each other. As discussed in relation to the destruction of reproductions earlier, there will always need to be a weighing of artists' rights versus important protections for criticism and free speech. There is no reason to think moral rights would be an exception to this, and in fact, this type of balancing is exactly what I suggest when discussing the implementation of moral rights protections later in this chapter.

This balancing is supported in rights justified by intimacy. Intimacy provides a justification for protecting moral rights, but it is defeasible. This is similar to how intimate information is treated in other contexts. The right to privacy is one right amongst many. Some intimate information may need to be shared for the benefit of others or in order to maintain their rights or safety. This is what the court decided in *Tarasoff v. Regents of Univ. of Cal.* which helped established an exception or limit to the confidentiality between therapist and patient, holding that "public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins."[209] The court balanced the various rights, and in this case, found that the right to protection for third parties outweighed the confidentiality right. Similarly, there may be times when the rights protected by the First Amendment will outweigh the moral rights of artists. None of the above gives reason to deny artists moral rights protection for their works. Like confidentiality, the intimate relationship

[209] Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 439 (1976). 442.

between artists and their works is still worthy of protection even if at times other protections will take a higher priority.

The Copyright Office's different general arguments against adopting a federal moral rights statute all stem from the same root. Like the cast of *High School Musical*, the Copyright Office wants to stick to the status quo.[210] This is not implicit, nor is it something that I am reading into the position of the Copyright Office based on their positions. It is an explicit part of the reasoning being employed. The current system of moral rights protections should be maintained "absent significant, detrimental changes to the patchwork that would warrant abandoning the current framework in favor of adoption of a new federal moral right. The Copyright Office does not find that such changes have occurred."[211] This position frames the entire analysis undertaken by the Copyright Office, as it assumes that the patchwork was sufficient when adopted and that only signs of changes to the patchwork signal a change in sufficiency. This blocks a true assessment of whether that sufficiency ever actually existed and leads to defending the efficacy of a patch like the Lanham Act which was never intended to provide moral rights protections and has increasingly failed to do so. The Copyright Office has prioritized equanimity, even if doing so means allowing some artists to be denied moral rights.

There is also a false assumption that adoption of a federal moral rights statute automatically means an abandonment of the current framework entirely. It is possible to put a minimum standard of rights in place that allows for further and different protections to exist above this minimum standard when appropriate. VARA itself is evidence of this, as it was the

[210] "Stick to the Status Quo," High School Musical Wiki, accessed June 6, 2022, https://high-school-musical.fandom.com/wiki/Stick_to_the_Status_Quo.
[211] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 38.

adoption of a moral rights statute alongside other aspects of the patchwork. In fact, had VARA been written in a different manner, it could be exactly the type of minimum standard that would provide sufficient protections. VARA's adoption alongside other federal and state laws and industry standards shows that it is possible to improve protections for artists without abandoning the parts of the patchwork that actually might help. However, by framing change as something to be avoided and as inherently damaging to the current system, the Copyright Office changed what it was doing. The project it undertook was to study the sufficiency of current moral rights protections, but the project became about preserving the current legal structure.

This can be seen in the assessment of VARA, where the question of whether sound recordings and musical works should have moral rights protections relied on the general reasoning that changes to the current system should be avoided. This deference to the status quo allows the Copyright Office to ignore the questions of whether limiting moral rights protections to visual works was a mistake when it happened or whether those rights are insufficiently protected now, which are exactly the questions that need to be asked. Preserving the current system only has value insofar as the current system works. As such, preserving the current system is not a convincing argument against adopting a federal moral rights statute.

c. VARA Exemptions: Posters, Advertising Materials, and Works for Hire

However, a question still remains as to whether VARA is an effective defense of artists' moral rights independent of the problems with defaulting to preserving the current system. As already discussed, part of VARA's limitation is that it only applies to works of visual art. This limitation is symptomatic of the overall issue with VARA as a form of moral rights protection: it is incredibly limited in its application. VARA is not merely limited to visual art, but to certain types of visual art. Another "exclusion is those visual artworks that do not qualify as 'works of visual art' under the section 101 definition, such as posters, advertising material, and works made for hire."[212] While some works in this category, such as advertising material, may often lack the necessary emotional context of connection between artist and work, some other types of works, like posters, seem to be rather arbitrarily excluded from moral rights protections. The format of a poster is capable of expressing the private thoughts of an artist and having the appropriate emotional context. VARA is painting multiple categories of works with a single brush. This lack of nuance in the law has left courts in a difficult spot in determining which works of visual art receive VARA protections.

In *Pollara v. Seymour*, an artist spent over 100 hours creating a banner depicting the harms that losing a right to legal counsel would cause. The court ruled that the artist had no right to protection for her banner because "[n]ot every artist has rights under VARA, and not everything called 'art' is protected by such rights."[213] The court found that the "banner was created for the purpose of drawing attention to an information desk, as part of a lobbying effort, and the banner overtly promotes in word and picture a lobbying message."[214] The limitations of this ruling were noted by District Judge Gleeson, who in a concurrence noted that the "broad construction of the exclusion suggests that a painting commissioned to promote the Olympics, or a sculpture commissioned to promote AIDS awareness, could never receive protection under VARA."[215] This case highlights the problem with lumping various different categories together. While it may be the case that a piece of advertising lacks the type of context that justifies artists' moral rights, the idea that if an artist has a cause they want to promote through their work it

[212] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 61.
[213] "Pollara v. Seymour, 344 F.3d 265 | Casetext Search + Citator," accessed June 8, 2022, https://casetext.com/case/pollara-v-seymour-3. 269.
[214] "Pollara v. Seymour, 344 F.3d 265 | Casetext Search + Citator." 270.
[215] "Pollara v. Seymour, 344 F.3d 265 | Casetext Search + Citator." 271.

therefore falls outside VARA seems absurd. It is also counter-intuitive, as many times artists have the most intimate connection to the works that are attempting to speak to causes they care about. An artist may seek out the ability to create a work for an organization or cause specifically because that cause has emotional resonance in their own lives. Removing moral rights protections because the artist does this too directly or intentionally lacks justification and runs against protecting the intimate connection between artists and their work.

The Copyright Office recognizes this issue, calling for an amendment to VARA to specifically limit the exclusion to art used in the commercial context.[216] While this suggestion would certainly improve things, given the common association between commercial brands and causes this might still be overly restrictive. If Target approaches an artist to create a design for its Pride Collection, leaving creative control to the artist, the commercial context could still undermine the artist's VARA protection. An artist may be forced to choose between reaching a larger audience to send a more powerful message and protecting their work. Another option is to allow commercial context to weigh as a factor against VARA protection, rather than make it dispositive.

The promotional limitation is not the only VARA exclusion that has forced artists to make tough decisions. Artists have also had their works removed from VARA protections because the work was found to be made for hire. The work for hire doctrine is unique to the US legal system and causes challenges for protecting artists' rights.[217]

A "work made for hire" is—

[216] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 68.
[217] Kwall, *The Soul of Creativity*. 92-93.

> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.[218]

I focus my analysis here on the scope of employment exception. The overall work for hire doctrine may seem to match with my exclusion for moral rights in Chapter One, where if the ideas behind a work are substantially supplied by someone other than the artist, the artist lacks the proper connection to claim moral rights. However, work made for hire is a much broader concept where if the artist is seen to be an employee at all and the work was not outside that employment, no VARA protection applies. This was what drove the ruling in *Carter v. Helmsley-Spear, Inc.*, a case which has provided precedent in further VARA cases dealing with work for hire. In *Carter*, artists designed a walk-through sculpture that took up most of a building's entrance lobby. When the company that originally owned the building went bankrupt, the building was sold. The new owners decided that they were going to remove the sculpture from the lobby of the building, as it did not suit the purpose to which they were going to put the building. Due to the nature of the sculpture and its integration with the building, including some aspects being embedded in the walls and floors, the sculpture could not be removed without destroying it.[219]

[218] "17 U.S. Code § 101 - Definitions."
[219] "Carter v. Helmsley-Spear, Inc., 71 F.3d 77 | Casetext Search + Citator," accessed January 28, 2021, https://casetext.com/case/carter-v-helmsley-spear-inc.

The court found that "the employee benefits granted plaintiffs and the tax treatment accorded them, are more than sufficient to demonstrate that the artists were employees, and the sculpture is therefore a work made for hire as a matter of law."[220] The court decided that the work did not qualify for VARA protection solely based on the relationship between the artists and the employers. The fact that the artists were essentially hired to create their own works, rather than realize a different vision, played no part. The court recognized that "artists regrettably are being forced to choose between the personal benefits inuring in an employment relationship and VARA's protection of the artists' work afforded only to independent contractors."[221] Due to the restrictions of VARA, an artist has to decide whether they would rather have health insurance or the ability to stop their work from being destroyed. It is unclear how putting artists in such a bind serves as a means of protecting their moral rights. Whether or not an artist is employed should not be the deciding factor in whether or not they get moral rights protections. The deciding factor should be whether or not the artist has the appropriate intimate connection to the work. Focusing on that connection shifts the focus of courts deciding whether works made for hire have protection to factors that are more relevant to the justification for protecting moral rights and that don't perpetuate harms by making artists choose between protecting their works and sustainable livelihoods.

The Copyright Office recommended against making any changes to add VARA protections to works made for hire. The Copyright Office noted that "works which would otherwise be covered by VARA were ultimately not protected by the statute because of the

[220] "Carter v. Helmsley-Spear, Inc., 71 F.3d 77 | Casetext Search + Citator." 88.
[221] "Carter v. Helmsley-Spear, Inc., 71 F.3d 77 | Casetext Search + Citator." 87.

employee status of the artist."[222] The only distinguishing factor noted by the Copyright Office between these works and works that do gain protections is that the artist has taken on the security of employment. It is possible that when considering actual cases, working as an employee might impact the relationship an artist has to the work. Working with property provided by the employer or under guidance might limit the intimate connection. In these cases, the evidence might show that moral rights protections are unjustified due to lack of intimate connection or that property rights take a greater priority. However, the Copyright Office focused instead on cases where the employment status alone removes protections from works that would otherwise receive moral rights protections.

Rather than see this dilemma for artists as unjust and in need of fixing, the Copyright Office focused on the frequency with which this occurs. They found that "if the universe of works made for hire contain (sic) relatively few otherwise VARA-eligible works, then removing the work made for hire exclusion won't make much of a difference to the majority of working artists."[223] Part of the rationale for this acceptance of harm to the minority of working artists is that the work for hire exception benefits employers as authors and maintains the integrity of contracts. Here the deference to the status quo even over recognized instances of unfairness drives the Copyright Office recommendation. It ignores the fact that these artists still have an intimate connection to their works.

Additionally, changes are treated as all or nothing, as though allowing the possibility of protection in cases where it is warranted would completely undermine the existing system. This

---

[222] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 64.

[223] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 65-66.

is not the case, as there are several ways that the work for hire doctrine could be changed without being eradicated. One system, proposed by Roberta Rosenthal Kwall, is to place the burden on those who want to deny moral rights.[224] Kwall proposes a default that all artists are treated as though they do not fall under the work for hire exception. These artists get moral rights protections, absent compelling reason for divesting them of these rights. Compelling reasons for divestment involve substantial guidance from the employer or public policy concerns which overwhelm the moral rights justification.[225] This proposal would prioritize moral rights protection while still allowing for other considerations to be factored in.

A conservative position that maintains more of the current system is also possible. The default could still be that in commercial art, employment status and contractual language weigh in favor of a lack of moral rights. So works that satisfy work for hire conditions would not generally be granted moral rights. However, an artist could provide evidence showing that the circumstances and context warrant protection. If the artist can show the appropriate intimate connection that would normally justify moral rights protections, those rights would then be weighed against other factors as they would be in a non-work for hire situation. This system would maintain the current prioritization of employers and contracts, but the artist would still have a path towards protections. That way in the minority of cases where a VARA-eligible work is excluded for no reason other than employment status, the justifying factors weighing in favor of protection are legally relevant, rather than disregarded, as is the case with the current system. The artists in *Carter* would be able to provide evidence regarding their connection to the art which would be treated as relevant, even if they also received insurance benefits. This system

[224] Kwall, *The Soul of Creativity*. 102.
[225] Kwall. 102.

would treat the intimacy that justifies moral rights protections as a relevant factor in determining if those protections apply. There are other systems that could also be proposed on the spectrum between a conservative and radical approach to modifying the work for hire exception.

d. VARA Exemptions: Applied Art, Site-Specific Art, and Fixation

VARA does not only exclude work for hire, but also currently excludes applied art, which the statute does not define. It is intended to rule out moral rights protections for objects that are essentially utilitarian, rather than aesthetic, in nature. This has led to inconsistency in legal treatment, as a school bus used in the lobby art discussed in *Carter* was considered part of a sculpture, not applied art, but a school bus in a different case, *La Contessa*, that had been modified to resemble a 16th century Spanish galleon was found to be applied art because the bus *La Contessa* was built over was essentially utilitarian.[226] This ruling occurred despite the fact that "[w]hen completed, the *La Contessa* was approximately sixty feet wide and sixteen feet long with a mast over fifty feet tall"[227] and was a stationary sculpture functioning as an artistic piece. The court focused on the underlying materials rather than on the piece as a whole. The lack of guidance as to what constitutes applied art under VARA leaves room for courts to narrow the law to exclude works merely because an artist chooses materials that could also be merely utilitarian. However, when it is clear those materials are being used as materials in an aesthetic work, not simply as originally designed, moral rights protections should apply. The use of a utilitarian object in part of an intimate expression should still give rise to moral rights protections if it otherwise satisfies the requirements of the intimacy account. The Copyright Office recommended further statutory guidance regarding what is and is not applied art. This seems

[226] "Cheffins v. Stewart, 825 F.3d 588 | Casetext Search + Citator," accessed June 9, 2022, https://casetext.com/case/cheffins-v-stewart-6.
[227] "Cheffins v. Stewart, 825 F.3d 588 | Casetext Search + Citator." 591.

helpful, though simply removing the applied art exemption and focusing on the relationship between the artist and the work, rather than the choice of medium, would be better. This would allow courts to make determinations based on factors more relevant to the justifications for granting moral rights. The utilitarian nature of the resulting work may provide evidence in regard to the relationship between the author and the work, but that factor should be weighed against the other context and evidence in determining if the requirements for moral rights protections have been met.

One important potential VARA exclusion is not even specifically included in the statute itself. VARA makes no mention of site-specific works, yet these are some of the most debated cases where artists' rights come into play. One of the most famous cases dealing with artists' rights prior to the adoption of VARA specifically dealt with site-specific art. That case involved the artist Richard Serra and the work *Tilted Arc*. "'Tilted Arc' was completed and installed at Federal Plaza in 1981. The work is an arc of steel 120 feet long, 12 feet tall, and several inches thick…. The sculpture bisects Federal Plaza. According to Serra, 'Tilted Arc' is site-specific: It was designed for the Federal Plaza and is artistically inseparable from its location. Serra maintains that removing 'Tilted Arc' to another site will destroy it."[228] The court ruled that Serra had no grounds to stop the removal, even if he was factually correct. Serra had transferred ownership of *Tilted Arc* to the people who installed it in the Federal Plaza so had no personal property rights to the sculpture. Additionally, the court found that "though Serra might suffer injury to his reputation as a result of relocation of the sculpture, such an injury without an accompanying loss of government employment would not constitute a constitutionally

[228] "Serra v. U.S. General Services Admin, 847 F.2d 1045 | Casetext Search + Citator," accessed June 9, 2022, https://casetext.com/case/serra-v-us-general-services-admin-3. 1047.

cognizable deprivation of property or liberty."[229] Pre-VARA, there was no federally protected right of integrity in artworks. As such, harm to Serra's integrity through the destruction of a site-specific work was not legally relevant. Both of the deciding factors in the *Tilted Arc* case seem like they would be changed had VARA existed at the time. VARA explicitly extends artists' moral rights beyond the scope of the artist owning the work, so the lack of property rights would not be dispositive. There would also be a legally recognizable protection based on harm to reputation due to the destruction of an artwork.

Yet, when another artist attempted to protect his site-specific work through VARA, a court ruled that VARA excluded site-specific works from protection. In *Phillips v. Pembroke Real Estate, Inc.*, the court considered whether the removal of sculptures and stonework from a site-specific work in Eastport Park in South Boston constituted a VARA violation.[230] David Phillips is an artist who creates large-scale sculptures. These sculptures are created over a large landscape, incorporating large stones, carvings, and smaller sculptures within them. He created one of these sculptures for Eastport Park. "Phillips was responsible for the design and installation of stone walls, granite stones inlaid into the Park's walkways, and other landscape design elements… [and] his large spherical sculpture entitled 'Chords', the centerpiece of the Park, which Phillips personally carved from granite."[231] The owners of the park, Pembroke, decided to redesign the park and in doing so proposed removing much of Phillips's stonework. Phillips challenged this removal, claiming that his work was site-specific. The claim is that "[e]ssentially, for site-specific art, the location of the work is an integral element of the work. Because the

[229] "Serra v. U.S. General Services Admin, 847 F.2d 1045 | Casetext Search + Citator." 1052.
[230] "Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128 | Casetext Search + Citator," accessed June 9, 2022, https://casetext.com/case/phillips-v-pembroke-real-estate-inc-2.
[231] "Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128 | Casetext Search + Citator." 130-131

location of the work contributes to its meaning, site-specific art is destroyed if it is moved from its original site."[232]

The court accepted this definition of site-specific work and that Phillip's work in Eastport Park was in fact site-specific. Still, the court ruled that Pembroke could make changes and remove aspects of the stonework without violating Phillips's VARA rights. Unlike the court in *Tilted Arc* it did not make this finding based on property rights or on the idea that an artist lacks a right of integrity. Instead, the court ruled that VARA simply cannot be applied to site-specific art. The court took an all-or-nothing approach, saying that "[e]ither VARA recognizes site-specific art and protects it, or it does not recognize site-specific art at all."[233] The court reasoned that if VARA rights were to be granted to site-specific art, this would prevent any and all modification of any work that was ever found to be site-specific. Because this would create an imbalance in favor of artists' rights, the court found that there could be no protections whatsoever for site-specific works. To allow these protections would create a separate regime of moral rights protections for site-specific works which do not apply to other works. The court has "simply concluded, for all of the reasons stated, that the plain language of VARA does not protect site-specific art. If such protection is necessary, Congress should do the job."[234] This conclusion further narrows the scope of works that VARA protects and also ignores the fact that artists who create site-specific works will be able to satisfy the underlying justifications for protecting moral rights. Nothing about a work's site-specificity suggests that an artist making a site-specific work has a meaningfully different relationship to that work than they have to other works lacking site-specific conditions. Moreover, the ruling fails to differentiate between cases

[232] "Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128 | Casetext Search + Citator." 134.
[233] "Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128 | Casetext Search + Citator." 140.
[234] "Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128 | Casetext Search + Citator." 143.

where there may be compelling reasons relevant to VARA to offer protections for site-specific works and other cases where the public interest overwhelms those reasons. Allowing VARA protection for site-specific works doesn't mean ignoring the public interest. By making the type of art dispositive rather than simply a factor in making a determination, moral rights have been narrowed.

Other courts and the Copyright Office have noted that the court in *Phillips* has created severe limitations based not on the text of VARA, but on a lack of text. The court in *Kelley v. Chicago Park District* stated that "[n]othing in the definition of a 'work of visual art' either explicitly or by implication excludes [site-specific] art from moral-rights protection… *Phillips's* all-or-nothing approach to site-specific art may be unwarranted."[235] The Copyright Office seized on this language to recommend against making any changes to site-specific art's treatment under VARA or more general moral rights protections, saying, "[a]t this time, the Office agrees with the *Kelley* court that courts have flexibility in applying VARA to works of site-specific art."[236] There are a few problems with this response. First, the court in *Kelley* decided the case on different grounds, so unlike *Phillips*, the commentary creates no precedent. Second, the court in *Kelley* bases its reasoning on the idea that "[s]ite-specific art is not necessarily destroyed if moved; modified, yes, but not always utterly destroyed,"[237] which applies a different understanding of site-specific art than the *Phillips* court. The *Kelley* court also focuses on the possibility that the right of attribution should still apply to site-specific works and that the *Phillips* ruling would unjustly remove these protections. While this seems correct and does

[235] "Kelley v. Chicago Park Dist, 635 F.3d 290 | Casetext Search + Citator," accessed January 28, 2021, https://casetext.com/case/kelley-v-chicago-park-dist. 306-307.
[236] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 73.
[237] "Kelley v. Chicago Park Dist, 635 F.3d 290 | Casetext Search + Citator." 307.

highlight the overreach of the *Phillips* court in not limiting the VARA exclusion for site-specific works to cases of destruction, it does not reach the heart of the issue. The reasoning of the court in *Kelley* does not address cases where removing a site-specific work does destroy the work, and thus fails to address whether the artist should have a moral right to protect against that destruction.

Moreover, while the Copyright Office seems to agree with the *Kelley* court, the recommendation against change allows courts to follow the reasoning of *Phillips* and deny any and all VARA protections to site-specific works. By choosing the status quo, the Copyright Office recommends a level of flexibility such that artists can be denied moral rights in works that would otherwise have protections based on the integration of location. This level of flexibility goes too far. It allows a court to deny moral rights protections in spite of the connection the artist has with the work, based purely on the type of work. If site-specificity undermined intimacy, this would be reasonable, but it does not. An artist can form the same connections with a work located at a specific place as they can with a work that can be moved. In fact, there will be cases where the intimate relationship is tied to site-specificity. Moving the work will modify or destroy not only the work itself, but the connection the artist has with it. Imagine an artist secures the right to install a site-specific work at the same location where their parents first met. In this case, the site may be integral not just to the work, but to the intimate relationship and emotional context surrounding the work. Denying a work protection based on the site-specific nature in such a case would go directly against a justification for protecting the work. Denying site-specific works the possibility of protection undercuts one avenue by which those protections are merited.

Based on this, no court should be able to exclude all site-specific works from VARA protections, and those that consider cases of removal should take seriously the meaning of 'site-specific.' Site can be an essential part of the intimate relationship between an artist and a work. This should not mean that the artist should always win and that "site-specific art…can never be moved and must always be displayed,"[238] as the *Phillips* court worried. Instead, it should mean that protecting artists' moral rights is a compelling interest to be weighed against the possible reasons for removing a site-specific work. It might be the case that the public nuisance of everyone having to walk around a 120 foot long, 12 foot tall wall of rusting steel in the middle of a public thoroughfare outweighs Richard Serra's right to preserve the integrity of his work. But Serra's right to the integrity of *Tilted Arc* should be part of the balancing calculation. As was the case pre-VARA, current jurisprudence and the Copyright Office's recommendation would allow Serra's interests to be ignored.

It is worth noting that the court in *Kelley* did not decide the case based on whether or not the work was site-specific, but instead based on whether or not the work was authored or fixed. The court's discussion of site-specificity but determination based on other factors provides a bridge to discuss those other factors. Authorship and fixation are requirements for copyright, as "[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression."[239] Authorship is not defined in the statute directly, but the "U.S. Copyright Office will register an original work of authorship, provided that the work was created by a human being."[240] As defined by the statute, "[a] work is 'fixed' in a

[238] "Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128 | Casetext Search + Citator." 143.
[239] "17 U.S. Code § 102 - Subject Matter of Copyright: In General," LII / Legal Information Institute, accessed June 17, 2022, https://www.law.cornell.edu/uscode/text/17/102.
[240] "Compendium of U.S. Copyright Office Practices | U.S. Copyright Office," accessed June 17, 2022, https://www.copyright.gov/comp3/.

tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[241] These requirements must be met for a work to gain both copyright and moral rights protections in the current legal system.

In the case, artist Chapman Kelley "install[ed] an ambitious wild-flower display at the north end of Grant Park, a prominent public space in the heart of downtown Chicago. 'Wildflower Works' was thereafter planted: two enormous elliptical flower beds, each nearly as big as a football field, featuring a variety of native wildflowers and edged with borders of gravel and steel."[242] Over the years, some of the composition of the gardens changed as different flowers survived or bloomed and other plants found purchase. 20 years after initial instillation, the work was significantly modified by the Park Department, which cut the size in half and made the ellipses into rectangles.[243] Kelley filed a VARA claim in response. The district court found for the Park Department because while it did consider *Wildflower Works* to be a sculpture, it followed the *Phillips* precedent and held that as a site-specific work it lacked protection.[244] The court of appeals, as noted above, disagreed with the site-specific reasoning in *Phillips*, but did not rely on that disagreement to decide the case.

Instead, the court ruled that due to the changeable nature of the flower beds and the fact that natural forces were contributing to the ultimate presentation of the work, *Wildflower Works* counted as neither authored nor fixed as required under copyright law. This raises two issues –

[241] "17 U.S. Code § 101 - Definitions."
[242] "Kelley v. Chicago Park Dist, 635 F.3d 290 | Casetext Search + Citator." 291.
[243] "Kelley v. Chicago Park Dist, 635 F.3d 290 | Casetext Search + Citator." 294-295.
[244] "Kelley v. Chicago Park Dist, 635 F.3d 290 | Casetext Search + Citator." 295.

whether the court made the correct decision in determining that *Wildflower Works* lacked proper authorship or fixation, and whether these attributes should be necessary for moral rights protections. Based on my own arguments in Chapter One, my answer to the second question is yes. Intimacy requires both an author and some form of fixation. Works that are not fixed or authored lack essential elements that justify moral rights protections in the first place. A work that is not meaningfully authored cannot have the proper connection to the artist to ground moral rights. Authorship requires that the ideas be the work of a human creator, which ties directly back to intimacy requirements, and fixation requires that the work be perceptible or capable of being communicated. Without these basic requirements necessary for access to others, the sharing aspect of intimacy becomes impossible. As such, it is reasonable to expect that works gaining moral rights be both authored and fixed.

The *Kelley* court provides another example of a judge's finding a way to focus on whether works receive VARA coverage. Given the requirements of the intimacy account, whether the fixation and authorship requirements should be maintained is more important than the specifics of the case in *Kelley*.[245] However, the reasoning employed by the court once again shows some of the all-or-nothing reasoning that often ends up excluding works from VARA protection. The court relied on the idea that "authorship is an entirely human endeavor… [and the] work must be the product of 'human authorship' and not the forces of nature."[246] The focus on 'entirely' here seems too strong, and if read narrowly could exclude plenty of works that are treated as authored, like drip paintings. In drip painting, an artist drips or pours paint on a canvas

[245] The specific copyright requirements are addressed here as they were the turning point in the case. They are not discussed in Chapter One because the intimacy account justifies these requirements independently.
[246] "Kelley v. Chicago Park Dist, 635 F.3d 290 | Casetext Search + Citator." 304.

rather than applying it directly with a brush.[247] This allows forces of nature like gravity and friction to determine the ultimate placement of the paint. The role of these forces would bring authorship into question under a strict interpretation.

Much like with the focus on the utilitarian material under the applied art exception, the authorship requirement as interpreted in *Kelley* is overly focused on the material being used. The court ruled, "[s]imply put, gardens are planted and cultivated, not authored. A garden's constituent elements are alive and inherently changeable, not fixed."[248] Much like the *Phillips* court ruling that all site-specific art falls outside VARA, the *Kelley* court rules that works using living plants as a medium cannot be authored or fixed. The court draws this line too firmly. 'Fixed' does not mean unchanging and 'authored' does not mean without any randomness. If it did, not just moral rights, but copyright protection more generally would be restricted. Rather than make a categorical assessment, it would be better to judge gardens like other works to see whether the degree of control and accessibility of expression showed that the artist both expressed an idea of their own and was successfully able to convey that idea to others. Those are the relevant factors when determining whether the minimum requirements have been met, and if they can possibly be met through the medium of living plants, that expression should be protected.

As may have become clear, most VARA cases are actually decided based on whether or not a work is seen to qualify for protection within the statute, and courts tend to rule that works do not fall within the scope of VARA. The Copyright Office notes that "[g]enerally, the courts resolve most VARA cases on the threshold question whether the plaintiff's work is a work of

---

[247] "Drip Painting," in *Wikipedia*, March 10, 2022, https://en.wikipedia.org/w/index.php?title=Drip_painting&oldid=1076388324.
[248] "Kelley v. Chicago Park Dist, 635 F.3d 290 | Casetext Search + Citator." 304.

visual art as defined by the statute. Thus, scant case law exists discussing the specific standards, especially for the appropriate remedies, for violations of the right of attribution and right of integrity under VARA."[249] This general pattern lets "courts avoid construing the extent of VARA protection by finding that works do not meet the threshold requirements for 'visual art' protected by VARA."[250] This lack of case law and court avoidance of dealing with ramifications of works actually being protected by VARA highlights the current restrictiveness of VARA and its lack of meaningful protection for artists' moral rights. The exclusion of so many types of works leaves artists little room to claim VARA protection. This highlights the need for a broader federal moral rights statute or expansion of VARA rights.

e. Integrity Protection Under VARA

While limited, there has been some jurisprudential discussion of the scope of the integrity harm. In *Massachusetts Museum Contemp.("MassMoCA") v. Büchel,*[251] the court stated that while considering "whether the proposed alteration would cause injury or damage to plaintiffs' good name, public esteem, or reputation in the artistic community [is]…a useful approach"[252] it is also important to focus on the impact any modification will specifically have in relation to the work at issue. The Copyright Office interpreted the court as saying "specifically that the harm to the artist's reputation should be assessed in the context of the particular work at issue and not the artist's reputation concerning his or her entire *oeuvre*."[253] The Copyright Office is reading this as

[249] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 74.
[250] "Massachusetts Museum Contemp. v. BÜchel, 593 F.3d 38 | Casetext Search + Citator," accessed June 10, 2022, https://casetext.com/case/massachusetts-museum-contemp-v-buchel. 53.
[251] "Massachusetts Museum Contemp. v. BÜchel, 593 F.3d 38 | Casetext Search + Citator."
[252] "Massachusetts Museum Contemp. v. BÜchel, 593 F.3d 38 | Casetext Search + Citator." 54.
[253] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 77.

a limitation put in place by the court to focus only on specific works, rather than on the artist's reputation as a whole.

There are two issues with this reading. First, it is unclear how to separate an artist's reputation regarding a particular work from their reputation in relation to their body of work. It seems like any reputational damage related to the particular work will apply more broadly. Additionally, it may only be in the context of other works that the reputational harm becomes clear. Imagine an artist defined themselves in terms of dealing only with children's, apolitical subject matter. Parents may want to avoid their children interacting with art from political artists or want an artist to "stay in their lane." If someone modifies a work to make it seem as though the work is dealing with an issue irrelevant to children or making a political statement, this may be damaging to the reputation of the artist. This may be true even if the work seems benign when considered on its own. Imagine the work is modified so as to support moderate tax reform. It is not clear such a modification would be inherently damaging, but it might be harmful by bringing the artist into a context they have intentionally avoided. The artist may even support moderate tax reform in their personal life, but still work to maintain a reputation as an artist who does not engage with political subject matter. It is only when this work is put into the context of the artist's other works that the harm is clearly revealed. The artist themselves may recognize this harm based on their own emotional connection to the work, which may be undermined by the inclusion of subject matter that seems harmless, but actually takes away from what connects the artist to the work. A court is less likely to see this harm without reference to the larger body of work. Yet, the Copyright Office seems to be reading the *MassMoCA* court as excluding these types of cases.

This brings up the second issue with this reading, as it seems to go against the reason the court brought up this limitation. The court emphasized that "the focus is on the artist's reputation in relation to the altered work of art; the artist need not have public stature beyond the context of the creation at issue."[254] The court refers to the specific work not to narrow the scope of integrity protection, but to broaden it. The point is that an artist need not have a well-known body of work or reputation in order to claim that a modification of a specific work harms their integrity. This track well with the intimacy account. As has been noted when discussing publicity, there is nothing inherent in having gained notoriety that impacts the ability for an artist to have an intimate relationship with their work. The court is recognizing that an established reputation is not a prerequisite for a valid moral rights claim. The interpretation of the court makes sure that VARA protection is not unnecessarily limited based on the stature of the artist. The issue is that rather than recognize the court's intent, the Copyright Office read the case in terms of narrowing artists' moral rights. If a future court were to use the Copyright Office's report in applying *MassMoCA* in a future case, it might focus on determining whether the artist was harmed regarding the specific work, rather than on minimizing the importance of artist stature.

This is ironic given that the other area of case law regarding integrity directly limits protections based upon stature. VARA specifically protects against "any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right."[255] This means that any work that is destroyed or potentially going to be destroyed is legally protected only if it has recognized stature. This codifies the problematic status requirement I discussed in Chapter 2. Moral right protections are tied to the recognized status of

[254] "Massachusetts Museum Contemp. v. BÜchel, 593 F.3d 38 | Casetext Search + Citator." 54.
[255] "17 U.S. Code § 106A - Rights of Certain Authors to Attribution and Integrity."

the work. Here, unlike in Chapter Two, I provide a detailed discussion of the way this requirement has been treated under the law and discuss a theoretical defense of stature requirements.

One major issue with this, as noted by the Copyright Office, is that "[d]espite its legal significance, the term 'recognized stature' is not defined in the statute."[256] There is no statutory guidance regarding what constitutes recognized stature. This has left courts to determine for themselves what the expression means. The district court, in a case already discussed at the appellate level, *Carter v. Helmsley Spear*, created a test for recognized stature requiring "(1) that the visual art in question has 'stature,' i.e. is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community."[257] This standard relies on an assessment of the quality of the art as meritorious, which is subjective and may be skewed by the tastes and views of the judge. It also depends on the artistic community to determine what qualifies as recognized. While the artistic community initially makes sense as an arbiter of recognition, there are issues addressed in what follows that come with relying on them.

As seen in the adoption of state moral rights laws that use the artistic community to define art deserving protection, "the most common theme, and often critique, is that the statutes only apply to works of fine art."[258] It is not difficult to see how this occurs. When one relies on status and those who confer status to define art worth protecting, they are likely to identify the same art they see being protected through placement in museums, galleries, etc. Courts have

[256] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 77.
[257] "Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994)," Justia Law, accessed June 10, 2022, https://law.justia.com/cases/federal/district-courts/FSupp/861/303/2261919/. 325.
[258] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 122.

relied on experts and evidence like letters, articles like reviews or focus pieces, and awards to determine whether or not a work has recognized stature.[259] Requiring this type of evidence is likely to reinforce status requirements that favor traditional fine art and connected works.

Similarly, this requirement is likely to favor those already accepted into the art community. In *Scott v. Dixon*, the court said that previously unknown work by Picasso would automatically qualify for VARA protections while the large backyard swan sculpture made under commission for a private collector by artist Linda Scott did not.[260] This was the case in spite of the fact that Scott had created other locally popular works, including a similar large stargazing deer. The only notable difference between the deer and the swan was that the deer was public art and the swan was sold to a private person. The court found that absent greater personal notoriety, Scott would be unable to qualify her works as achieving recognized stature. This, like some of the other requirements of VARA, requires an artist to sacrifice the potential money made from a private sale in order to display a work such that it will be protected from destruction. It also reinforces that those who have power and notoriety will be treated as though they have greater rights to the protection of their works.

This is one of the two main issues with maintaining a recognized stature requirement. The other is that factors that justify moral rights protections do not connect to stature in a meaningful way. This is not a universally accepted statement. Roberta Rosenthal Krall maintains that "moral rights laws should somehow take into account the degree to which a work is well-known and widely recognized."[261] Kwall argues that this is because the external response to the

[259] "Martin v. City of Indianapolis, 982 F. Supp. 625 (S.D. Ind. 1997)," Justia Law, accessed June 10, 2022, https://law.justia.com/cases/federal/district-courts/FSupp/982/625/1528055/.
[260] "SCOTT v. DIXON | 309 F.Supp.2d 395 (2004) | Pp2d3951668 | Leagle.Com," Leagle, accessed June 10, 2022, https://www.leagle.com/decision/2004704309fsupp2d3951668.
[261] Kwall, *The Soul of Creativity*. 144.

work embodies the esteem the author derives from the work and the dignity interests that result.[262] This is based on a justification of moral rights tied to author dignity and an argument that that dignity requires external validation.[263] This actually highlights a weakness of Kwall's justificatory scheme for moral rights. While she begins with the idea that "the very act of authorship entails an infusion of the creator's mind, heart, and soul into her work"[264] which seems to track with personality theory, she soon involves the external both as a way of measuring an author's success at infusing their work and as a source of inspiration.[265] This trust in the external as a valid signal of dignity sometimes tracks with what actually occurs, but sometimes simply does not. As Amia Srinivasan points out, external validation is "a function of what the market happens to value at a particular time. Van Gogh, William Blake, Edgar Allan Poe, Vermeer, Melville and Schubert all died broke."[266] A moral rights theory which would tie both dignity and legal protections to the esteem such artists received while alive does not seem the most attractive.

Moral rights theories that do not invoke external validation do not connect stature and moral rights in the way Kwall proposes. Using a personality-based justification, the famous artist does not obviously put more of their identity into their work than the artist working in obscurity. Similarly, it is not clear that an artist putting more of themselves into their work, whatever that would entail, would necessarily lead to recognition. Working from an intimacy-based justification, the same holds true. There is not a connection such that artists who are more known have displayed greater emotional connection to their works or that greater intimacy leads to

---

[262] Kwall.
[263] Kwall. 4-5.
[264] Kwall. 2.
[265] Kwall. 14.
[266] Amia Srinivasan, "Questions for Free-Market Moralists," *Opinionator* (blog), October 20, 2013, https://opinionator.blogs.nytimes.com/2013/10/20/questions-for-free-market-moralists/.

greater stature. The unfortunate truth for some artists is that there is not an obvious connection where increased status can be tied directly back to the amount the artist cared. Instead, many of the factors that determine notoriety for an artist or stature for a work will be outside of the artist's control, or unrelated to notion of personality or intimacy. If this is the case, it seems odd to then tie some moral rights protections to recognized stature. Moral rights protections do not seem to be any more or less justified based on the degree of uptake the artist has received.

This is not a claim that the stature of an artist or a work can never be a relevant factor when discussing artists' right protections. It may be the case that there is a separate public interest in preserving works of a certain stature which weighs in favor of protecting some works over and above others. Much like with other areas this can be factored into a balancing test. Whereas public needs for access to a site might weigh against leaving a site-specific work in place, the high stature of a work might weigh in its favor. This may make some cases more difficult to resolve, as there will be several factors at play. However, this reflects that many of these cases are complex in reality, so it makes sense that the determination of the fairest outcome requires a delicate consideration of all the relevant factors. The fact that considering all the relevant information in the name of fairness makes things more complicated is not an argument for ignoring some rights. Rather, it is an argument for developing a clear understanding of what considerations need to be balanced in order to come to a fair decision, rather than unfairly excluding wide swaths of works or leaving courts in the dark to figure out what factors should matter on their own. This would help make sure all relevant values are considered, rather than denying rights to artists for something outside their control and irrelevant to the justification for artists' moral right protections.

The other main issue with maintaining a stature requirement is that it will tend to favor the majority and those in power in determining whose work is worthy of protection. Museums and the artworld more generally tend to be spaces that favor the dominant group in society. Museums and the artworld only tend to become more inclusive, if at all, after demands from those outside the group. These demands have "been introduced by the Black Emergency Cultural Coalition, the Art Workers Coalition, Women Artists in Revolution, and others since the turn of the century and before. Until changes are made, there is no volume of social media posts or public letters that could undo museums' willing complicity in white supremacy."[267] It is outside the scope of this paper to provide an extensive argument regarding the favoring of the dominant group in the artworld, but a 2019 study showed that 85% of artworks in major US museums were by white artists and 87% were by men.[268] This along with the demands for change provides at least initial evidence of systemic institutional bias.[269]

What this means is that artists in dominant groups—white, male, straight, cis, able, etc.—are more likely to be accepted by those people who control access to elite institutions. In turn, those artists are more likely to have their work seen by others. As seen in the case of Lisa Scott, having work seen by others has been treated as necessary for recognized stature. As such, members of dominant groups are more likely to have recognized stature for themselves and their works. This practice is self-perpetuating as those artists then take up positions of power withing the artworld, determining the next people who gain access. A recognized stature requirement

---

[267] Kimberly Drew, "What Should a Museum Look Like in 2020?," Vanity Fair, August 24, 2020, https://www.vanityfair.com/culture/2020/08/what-should-a-museum-look-like-in-2020.
[268] Chad M. Topaz et al., "Diversity of Artists in Major U.S. Museums," *PLOS ONE* 14, no. 3 (March 20, 2019): e0212852, https://doi.org/10.1371/journal.pone.0212852.
[269] Micaela Hood et al., "Systemic Racism Is Shaping Our Access to Art. How East Coast Art Institutions Strive for Change," North Jersey Media Group, accessed June 10, 2022, https://www.northjersey.com/story/entertainment/arts/2020/10/22/racism-rampant-in-arts-world-how-east-coast-art-institutions-strive-for-equitable-change/5856580002/.

benefits those people who are most likely to have access to the contexts where stature can be gained. It benefits artists in dominant groups. It also reinforces the taste of dominant groups, as works that cater to those tastes are more likely to be noticed and cared about by members of the dominant group. This means that an artist whose work mostly appeals to Black women is significantly less likely to gain recognized stature for that work than an artist whose work appeals to white men. This is spite of the fact that said artist likely has at least the same emotional connection to the work. By providing more moral rights protections for works that achieve recognized stature, traditional biases in society are supported and exacerbated.

This provides good reason to remove status or recognized stature requirements from moral rights protections. In analyzing the recognized stature requirement, the Copyright Office recommended against removing it entirely. Instead, they recommend the adoption of broader guidance that expands who can be consulted in determining whether or not a work has recognized stature: "In determining whether a work of visual art is of recognized stature, the trier of fact shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of art, as well as the opinion of the relevant community."[270] This broadening of how to identify stature as recognized by the community is inspired by the court in *Cohen v. G & M Realty L.P. ("5Pointz II")*, which found the graffiti at 5 Pointz, discussed in Chapter 2, to be protected by VARA.[271] The court focused on the idea that the artists and works at 5 Pointz were particularly distinguished within the world

[270] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 80.
[271] "Cohen v. G & M Realty L.P., 320 F. Supp. 3d 421 | Casetext Search + Citator," accessed June 10, 2022, https://casetext.com/case/cohen-v-g-m-realty-lp.

of graffiti. The appellate court in the same case noted that graffiti was now considered by those in the contemporary artworld to reach the level of "high art."[272]

The worry about relying on community consultation to establish recognized stature is two-fold. First, it is only because the right group of people have deigned to treat graffiti as a worthy art that the court felt it deserved protection. It was only when the artworld at large decided that graffiti deserved access that a work of graffiti could be considered for protection. Had it not been embraced by the right group, the court would not have embraced it either. The artworld has often been slow to recognize many forms as qualifying as art. Second, even within a community, there will be gatekeepers and biases that favor some people over others. Within the community of graffiti artists there is still liable to be a reinforcement of certain tastes and preferences and an uptake of certain artists over others. This highlights the issue of determining who the relevant community is. If the community that is deemed relevant maintains biases similar to those found in the artworld or society more generally, it is unlikely to avoid the issues that accompany a stature requirement.

f. A Path Forward

What has preceded this is a summary of current moral rights protections in the US legal system followed by my assessment of these protections, the Copyright Office's assessment of these protections, and my response to the Copyright Office's assessment. Given that I am critical both of the current system and of the recommendation to mostly preserve the current system, it seems I should propose a replacement. While I cannot give a complete, detailed vision of everything a new system would include, I can identify general themes and guidance for best

[272] "Castillo v. G&M Realty L.P., 950 F.3d 155 | Casetext Search + Citator," accessed June 10, 2022, https://casetext.com/case/castillo-v-gm-realty-lp.

practices based on my analysis. I hope that the general themes and guidance for how those themes might be brought into the legal system are present throughout the chapter, but I will take some space to briefly sketch key ideas below.

One key feature of new moral rights protections would be a direct and acknowledged connection to the justifications that underlie moral rights. Many of the issues with parts of the patchwork were that the statutes were motivated by other aims and justifications. Motives based in consumer protection, anti-piracy, and economics meant that many of the patches only happened to cover artists' moral rights. This also meant that when these justifications came into tension with protecting moral rights, moral rights were deprioritized. A new law should explicitly connect moral rights protections to the underlying justifications, which would allow the interpretation and execution of that law to track this reasoning. This explicit acknowledgment of what specifically moral rights are protecting would be valuable on any account in providing guidance and focus in analyzing the sufficiency of protections.

What this means is that a new moral rights law should be tied to making sure that the intimate connection between an artist and their work is protected by the laws that are put into place. This would mean building the protection of this connection into the way the law is written, or into the notes that accompany the law. The specifics of the language and placement are less important than the open acknowledgement of what specifically is being protected when making moral rights laws. This is essential because, as can be seen when looking at cases, courts look to the intent and purpose of a law when determining results in individual cases. This means courts would assess whether or not an intimate connection was negatively impacted and whether the law is functioning to protect those connections. Looking at the history, many of the current moral rights protections developed not directly from legislative action, but through legal jurisprudence and court interpretation. Both the inclusion of moral rights in the Lanham Act and the exclusion of moral rights for site-specific works were the results of courts interpreting statutes on areas where they were otherwise silent. Including the motivation to protect the intimate connection between artists and their work provides courts a way to pinpoint the crux of the inevitable cases that the law did not predict and does not provide clear guidance on.

This will require that the United States adopt a new federal moral rights statute, either in the form of a significant expansion of VARA rights, or in an entirely new statute. This statute should be uniform and directly aimed at protecting artists' moral rights. Rather than relying on a patchwork of laws, this will provide reliable tailored legal protections. The new law will not determine whether or not an artist has moral rights in a work based on whether or not it is visual enough, involves certain mediums, has recognized stature, or any of the other current exclusions identified above that have no connection to the justification for providing moral rights. Instead, the threshold question for protection will turn on whether an artist has the appropriate intimate relationship with the work.

Roberta Rosenthal Kwall provides a model for this type of analysis, though her model is based in her own justifications tied specifically to creativity and external response. As discussed above, I think there are weaknesses with this account. However, it is still valuable to see how she ties her account to a proposed threshold for moral rights protections. Kwall advocates that moral rights protections are only justified for works "manifesting heightened originality with substantial creativity."[273] The test for this is two-pronged, with the first prong being an examination of the author's narrative of their design process displaying heightened originality

[273] Kwall, *The Soul of Creativity*. 148. It is not especially clear how many works would be excluded by this standard.

and substantial creativity and the second being whether a reasonable observer would perceive the work as creative.[274] Kwall does not define what would satisfy these tests and assumes that jurisprudence would come to make these determinations. These tests reflect the importance of both creativity and external validation that are part of Kwall's justification for protecting artists' moral rights.

A similar model for the intimacy account will draw on the five factors identified in Chapter One:

1. The process needs to be aimed at some observable expression.
2. The work that results needs to feature unique expression.
3. The uniqueness of that expression needs to be connected to the person who undertakes the aesthetic process.[275]
4. The unique expression would not have been accessible to others if the person had not undertaken the aesthetic process.
5. The aesthetic process features a caring, valuing, or loving aspect where the objecting of caring, valuing, or loving may be the audience or the work itself.

If there is a question as to whether a work qualifies for moral rights protections, the court can look to these standards. Whether these standards are met can be determined based in part on whether the process the artist followed typically satisfies these standards. Artists working from a process that typically falls within these standards would be given a default assumption that their work falls within moral rights protections, with the challenger having to establish through evidence that the work fails in some way. This means most works would have a default of

[274] Kwall. 148.
[275] This requirement helps separate out cases where an artist is merely executing the instructions of another person.

protection and there would need to be good reason to remove that protection – say, a showing that the artist in fact copied someone else's work without any meaningful modification to make it their own. Works that typically result from a process not featuring these qualities, like directed advertising materials, would not have default moral rights protections. In these cases, the artist would need to provide evidence showing that the work produced actually does satisfy these standards. This could be done through a showing of connection and input into the work that is atypical for this process.

This approach could help deal with many of the threshold questions that have overtaken VARA jurisprudence and would generally lead to works being included in moral rights protections, rather than excluded. Site-specific works, advocacy works, non-visual works, etc., would all default to moral rights protections as long as they result from processes that usually satisfy the intimacy account. This also provides a middle ground approach to the work for hire doctrine, as some commercial works will not get default protection based on the typical process, but others will. Making a sculpture without significant oversight from the employer based on your own ideas and passions would generally satisfy the account, whether or not you receive employment benefits. Moreover, even in borderline cases or cases without the default, there is a path for an artist to establish that their case is an exception to the norm and moral rights should be granted. This system deviates from the all-or-nothing exclusions that are present throughout the current system.

This system should allow most works to qualify for moral rights protections, without limiting the ability of states and communities to offer enhanced moral rights protection. When considering the possibility of adopting a federal right of publicity law, the Copyright Office considered two possibilities: "whether to adopt a federal law that preempts state right of publicity laws, or instead adopt language that would serve as a 'floor' for right of publicity protections, while allowing individual states to adopt more extensive protections in the event they determine that such additional protections would be beneficial."[276] The new moral rights law should, unlike VARA, serve as a floor for artists' moral right protections. This would guarantee that all artists receive a minimum level of legal protections, while allowing the possibility of enhanced protections should a community prefer.

This brings up the question: what are sufficient minimum protections? Because courts have generally avoided actually determining what level of protections should be afforded to works that do qualify for moral rights, there is not a clear standard against which to assess a proposed minimum. However, some of the work in Chapter Two can provide the beginnings of a guide.

The minimum level of protection should safeguard the rights described in Chapter Two: disclosure, attribution, withdrawal, and integrity. In that chapter I explain why each of these rights is necessary to protect the intimacy-based rights of artists, so I will not go into those arguments here.

A minimum right of disclosure would allow an artist not to reveal a work to the public if they feel it fails to convey their ideas or is executed a way that undercuts the intimate connection to the work. This right could be challenged by evidence that intimacy is not playing a meaningful role in the refusal to disclose the work.

[276] "Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019." 118.

A minimum right of attribution would allow an artist to decide whether or not to include their name on a work, preserving the possibility of anonymity or pseudonymity, as well as the right to disavow a work without necessarily choosing to hide or destroy it. An artist would not be forced to attribute a work to themselves, absent evidence of a bad faith motivation for denying attribution. If an artist does choose to claim attribution, the artist will have an expectation that when their work is displayed or reproduced, attribution will be included. The form this attribution takes may need to be balanced against practicality and industry norms, such that it might be satisfied in a variety of ways.

A minimum right of withdrawal, which has mostly been theoretical historically, would allow the artist the possibility of removing a previously disclosed work from some forms of publication.[277] This right would allow the artist the ability to stop further publication of a work if there has been a change such that continued publication of the work harms them. This right would only be exercised in rare cases, but would allow an artist to prevent future or continued harm through the ongoing publication of a work. If there is evidence that the motivation for withdrawal is in bad faith or lacks a connection to intimacy, this right would not be enforceable.

A minimum right of integrity will allow artists the ability to object to and in some cases prevent displays or modifications of their work that are harmful to their honor or reputation. In cases of potential destruction, artists must be guaranteed proper notice before any destruction occurs. Proper notice is a minimum requirement, but it will not guarantee that after a certain period of time a work that has not been removed can be destroyed. Destruction cases will still be treated like other integrity violation cases. These cases dealing with integrity violations will

[277] For a visual artist this may include a removal from future public display or a cessation of reproduction.

require a balancing of competing interests, as there are public policy reasons in favor of allowing some actions that an artist would object to, such as fair criticism, parody, or other forms of fair use. The courts will be asked to balance the artist's moral integrity rights against these other considerations. This balancing test will initially be modeled on the balancing test used to determine fair use, in which relevant factors are identified and weighed. Much like the test for fair use, which factors are particularly relevant will develop through jurisprudence and case law.

Current factors used in fair use cases are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[278]

The four factors function not as separate tests for fair use, but rather as a way of judging different aspects of a work to determine fair use as whole. The court in *Campbell v. Acuff-Rose Music, Inc.* made this clear, saying, "[n]or may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright."[279] Determining fair use "is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."[280] A balancing test for integrity modeled on the approach to fair use will maintain this non-isolation of factors and case-by-case system as well as considering how much of the original work was used; however, it will remove

[278] "17 U.S. Code § 107 - Limitations on Exclusive Rights."
[279] "Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)," Justia Law, accessed June 18, 2022, https://supreme.justia.com/cases/federal/us/510/569/. 578
[280] "Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)." 577.

the primarily commercial focus. Instead, it will focus on initial concerns such as the amount of harm done to the honor and reputation of the artist, the level of modification, the impact of the display or modification on the relationship of the original artist to the work, the impact on the property owner (when relevant), and the impact on the public (when relevant). None of these factors will be dispositive; all will have to be weighed more or less heavily as the evidence demands. Cases may also reveal other relevant factors that need to be added into the consideration.

I have attempted to sketch a general outline of the interests that should be at the heart of moral rights protections moving forward, how those interests should be reflected in the law, and some preliminary standards that will be necessary. A federal moral rights statute following this outline would provide significantly greater moral rights protections for artists and reconcile the law protecting moral rights to the justifications grounding those protections.

Conclusion

In this project I have argued for a novel justification for the protection of moral rights, identified what those rights amount to, and critiqued the current US moral rights protection scheme. In doing so, I have filled gaps in the current philosophical and legal scholarship regarding moral rights protections. I will conclude by briefly recapping the individual chapters of the project and by presenting some possible next steps for the application of this work.

I. Summary of Chapters

In Chapter One, I argued in favor of an intimacy-based justification for the protection of artists' moral rights. I began by highlighting concerns about the most common current theoretical justifications for the protecting these rights based in consequences, labor, and personality. As an alternative, I offered a theory that draws on accounts of intimacy that justify the protection of certain acts and information based on the relationship between the person and those acts and information. I developed an account of intimacy that applies directly to artistic expression. This account argued that the revelatory nature and emotional context that accompany artistic expression are sufficient to make that an intimate act and as such to justify protections similar to those advocated in other cases of intimacy. I examined the various ways in which artists are able to meet these intimacy conditions and developed a set of criteria which can be used in determining whether an act of artistic expression counts as intimate so as to justify moral rights protections.

In Chapter Two, I argued that the intimacy account can be used as the grounding for traditional moral rights of disclosure, attribution, withdrawal, and integrity. I articulated the way each of these rights has been historically understood before showing that these historical applications are justified by the intimacy account. In fact, the intimacy account requires these traditional protections because without them the ability of an artist to make and maintain an intimate connection between themselves and their work is undermined. In examining how intimacy interacts with these rights, I presented examples that highlighted not just this connection but also some of the limits of these rights. In doing so, I identified the scope of these rights justified by the intimacy account, which laid groundwork for the legal analysis in Chapter Three. Additionally, I presented an extended case study on art destruction, revealing that a key to respecting artists' moral rights in such cases is providing proper notice and an opportunity for consultation to artists before significant modification or destruction of their work. Providing such notice helps mitigate the harms the action will cause and honors the intimate connection between the artist and work.

In Chapter 3, I explored the current state of moral rights protections in the US legal context, provided a critique of the current state of these rights, and offered an initial proposal for what I believe is an improved approach to protecting artists' moral rights. This chapter represents an initial scholarly response to the 2019 Report of the US Copyright Office, which takes the position that moral rights are sufficiently protected by the current US legal patchwork. I break down individual aspects of this patchwork, pointing out deficiencies in the protections and in the Copyright Office's arguments for their sufficiency. I argue that the current protections fail to adequately focus on moral rights or respect the intimate connection that artists have with their work. Through this analysis, I identify themes that undermine the protection of moral rights, such as a focus on which types of works fall within a statute and a tendency to trust laws aimed at other ends to cover moral right protections. These principles allow other aims to take precedence and exclude works without sufficient justification. I also criticize the general position of the Copyright Office, which favors constancy over fairness. Considering this response to the

Report, I offer my own suggestions for a uniform statute aimed directly at protecting moral rights with broad application. Such a statute would provide the protections justified by the arguments in Chapter One and necessitated by the arguments in Chapter Two.

II. Moving Forward

This project touches on many areas and aspects of artists' moral rights and, as is always the case, some areas received more attention than others. One specific area of tension regarding artists' moral rights that is hinted at but never directly discussed is appropriation art. Appropriation art is work of a new artist that takes the work of a previous artist for use as part of artistic expression. The case of Robert Rauschenberg erasing a work by Willem de Kooning discussed in Chapter Two may qualify as an example of appropriation art, as Rauschenberg's work depended on de Kooning's. More straightforward examples involve an artist taking some or all of the content[281] of a work made by another artist and incorporating it into their own.

Part of the reason that I don't address these cases in the dissertation is that the legal battles over appropriation art have functioned exclusively as copyright cases, where artists are claiming their economic rights have been violated. In these cases, courts have applied the fair use test discussed in Chapter Three to determine whether or not the appropriation qualifies as fair use. Courts often consider whether or not the new work is sufficiently transformative. However, while previous cases have remained in the realm of economic rights, there is no reason to think that an artist could not claim that their moral rights have been violated by an appropriative artwork.

[281] Usually this is visual content, though there are text and audio based version of appropriation art.

One way this project could be developed further is to explain in more detail how to respond to situations when different artists' moral rights come into conflict. Preliminarily, and perhaps unsurprisingly, such an account would involve looking to the specific context on a case-by-case basis. It would attempt to determine the degree to which the proposed/actual appropriative use impacts the first artist's intimate connection to their work and weigh that against the value of the appropriative use. This would be similar to the current fair use test, but with a focus on intimacy rather than commercial concerns.

Another area in which the project could go into more detail is the specifics of the statutory recommendations in Chapter Three. Though a guide for minimum standards and areas for focus is provided, a detailed presentation including specific statutory language and means of enforcement is not. While leaving open the ways in which the suggestions for legal change can be realized has its benefits, more specific guidance could be provided. Future expansion of this project could include detailed blueprints for the adoption of legal protections.

Additionally, the application of the intimacy account could be expanded beyond artistic expression. I do not currently address the way the intimacy account might justify a federal statute protecting the right of publicity,[282] nor do I provide details on what that protection should amount to or how it would be realized. In future projects, the intimacy account could be extended to the protection of personas. There does seem to be an intimate relationship between a person and the characteristics that a persona captures. Though there are complications regarding the requirement of fixation built into the intimacy account of artists' moral rights, since it is not clear that a persona is tangible in the way that a work is, this fixation requirement would not

[282] The ability to protect against the unauthorized use of one's name, likeness, or persona.

necessarily need to be included in an intimacy account of persona rights. Given the increased technological capabilities that allow dead actors to reprise roles[283] and deep fake videos that have economics professors shilling stock-trading algorithms,[284] there is going to be an increased need for the protection of people's personas. The intimacy account provides a promising foundation for justifying such protections and for identifying the rights and harms that accompany publicity rights.

III. The Need for Change

Finally, it is clear that artists' moral rights cases are not going anywhere. In 2020, Vermont Law School decided to conceal two murals painted by Samuel Kerson in 1993. These murals depict the evils of slavery and the role of Vermont activists and abolitionists in the Underground Railroad.[285] Students have complained that the depictions of Black people in the murals are cartoonish and perpetuate stereotypes. The school has submitted a plan that will permanently conceal the murals from view without damaging or altering them. In October 2021, a district court ruled that concealment technically did not count as modification or destruction, and so Kerson's VARA rights did not apply.

Given the content of the murals, it may be for the best that Kerson's work is concealed, since it cannot be removed without damage. However, the court did not make a determination based on the content of the works or based on the balancing of competing interests. Instead, it ruled that permanent concealment does not constitute modification. Yet, by cutting off Kerson's

[283] "'Rogue One' Is a Milestone (and Warning Sign) for CG Resurrection | Engadget," accessed June 21, 2022, https://www.engadget.com/2016-12-20-star-wars-rogue-one-cgi-actor.html.
[284] "Deepfake Technology Is Now a Threat to Everyone. What Do We Do? - WSJ," accessed June 21, 2022, https://www.wsj.com/articles/deepfake-technology-is-now-a-threat-to-everyone-what-do-we-do-11638887121.
[285] Eileen Kinsella, "A District Court Rules That the Vermont Law School Can Conceal a Divisive Mural on Campus Without Violating the Artist's Rights," Artnet News, October 22, 2021, https://news.artnet.com/art-world/court-rules-vermont-law-school-can-conceal-mural-2024444.

ability to share the work, part of his ability to satisfy the intimacy account is undermined. His work is no longer accessible to others in the same way, which limits his control in deciding to share the work. The court may have made this decision in part to keep from having to force the school to display the murals. While that may have worked out in this case, it is not hard to imagine a case where the community had wanted the works concealed not for the unintended stereotypes, but in opposition to the intended message about the harms of slavery. In such a case, it seems the court would still be forced to reach the same conclusion, that VARA rights do not apply because concealment isn't modification or destruction.

Decisions like this perpetuate the moral rights approach characterized by the Copyright Office's Report. Rather than reform moral rights laws to more adequately include artists and balance competing values, the scope is narrowed to avoid making decisions regarding how moral rights actually function. Three years after the Copyright Office Report, no meaningful change has occurred to artists' moral right protections in the United States. Even the modest suggestions for improvement in the Report have not been implemented. The current system is not working. It encourages a denial of rights and continuing limitations. It's time for a change.

Bibliography

ANIMAL. “5 Pointz Sprayed With ‘Art Murder,’” February 3, 2014. http://animalnewyork.com/2014/5-pointz-sprayed-art-murder/.

“5pointz | Luxury LIC Studio-3 Bed Rentals.” Accessed January 28, 2022. https://www.5pointzlic.com/amenities.

DNAinfo New York. “‘5Pointz’ Developers Who Razed Art Mecca Can Use Name for High Rise: State.” Accessed January 28, 2021. https://www.dnainfo.com/new-york/20150911/long-island-city/5pointz-developers-who-razed-art-mecca-can-use-name-for-high-rise-state.

LII / Legal Information Institute. “15 U.S. Code § 1125 - False Designations of Origin, False Descriptions, and Dilution Forbidden.” Accessed May 18, 2022. https://www.law.cornell.edu/uscode/text/15/1125.

LII / Legal Information Institute. “17 U.S. Code § 101 - Definitions.” Accessed May 25, 2022. https://www.law.cornell.edu/uscode/text/17/101.

LII / Legal Information Institute. “17 U.S. Code § 102 - Subject Matter of Copyright: In General.” Accessed June 17, 2022. https://www.law.cornell.edu/uscode/text/17/102.

LII / Legal Information Institute. “17 U.S. Code § 106 - Exclusive Rights in Copyrighted Works.” Accessed May 25, 2022. https://www.law.cornell.edu/uscode/text/17/106.

LII / Legal Information Institute. “17 U.S. Code § 106A - Rights of Certain Authors to Attribution and Integrity.” Accessed May 30, 2022. https://www.law.cornell.edu/uscode/text/17/106A.

LII / Legal Information Institute. “17 U.S. Code § 107 - Limitations on Exclusive Rights: Fair Use.” Accessed May 25, 2022. https://www.law.cornell.edu/uscode/text/17/107.

“17 U.S. Code § 115 - Scope of Exclusive Rights in Nondramatic Musical Works: Compulsory License for Making and Distributing Phonorecords | U.S. Code | US Law | LII / Legal Information Institute.” Accessed May 27, 2022. https://www.law.cornell.edu/uscode/text/17/115.

LII / Legal Information Institute. “17 U.S. Code § 203 - Termination of Transfers and Licenses Granted by the Author.” Accessed May 25, 2022. https://www.law.cornell.edu/uscode/text/17/203.

LII / Legal Information Institute. “17 U.S. Code § 1202 - Integrity of Copyright Management Information.” Accessed May 23, 2022. https://www.law.cornell.edu/uscode/text/17/1202.

“About The Licenses - Creative Commons.” Accessed April 6, 2022. https://creativecommons.org/licenses/.

Adler, Amy M. “Against Moral Rights.” *California Law Review* 97, no. 1 (2009): 38.

Anthony Cross. “The Curious Case of Pepe the Frog: On the Ontology and Value of Internet Memes.” *Aesthetics for Birds* (blog), January 26, 2017. https://aestheticsforbirds.com/2017/01/26/the-curious-case-of-pepe-the-frog-by-anthony-cross/.

“Article I Section 8 | Constitution Annotated | Congress.Gov | Library of Congress.” Accessed January 28, 2021. https://constitution.congress.gov/browse/article-1/section-8/.

BBC News. “Artist Peter Doig Wins Case over Painting He Said Was Not His Work,” August 24, 2016, sec. US & Canada. https://www.bbc.com/news/world-us-canada-37171831.
artnet News. “Artists Sue 5Pointz Owner for Whitewashing Art,” June 12, 2015. https://news.artnet.com/exhibitions/artists-sue-5ptz-landlord-307640.
“Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454 | Casetext Search + Citator.” Accessed May 23, 2022. https://casetext.com/case/associated-press-v-all-headline-news-corp.
Association, Urban Art. “Banksy in San Francisco | Urban Art Association.” Accessed January 29, 2022. https://urbanartassociation.com/post/656699.
“Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights, April 2019,” 2019, 172.
“BERNE CONVENTION, AS REVISED - Article 6bis.” Accessed June 13, 2022. https://www.law.cornell.edu/treaties/berne/6bis.html.
Borges, Jorge Luis. *Collected Fictions*. Translated by Andrew Hurley. Penguin Classics Deluxe Edition. New York, NY: Penguin Books, 1998.
The Talks. “Brigitte Lacombe.” Accessed November 9, 2021. https://the-talks.com/interview/brigitte-lacombe/.
Buckley, Cara, and Marc Santora. “Night Falls, and 5Pointz, a Graffiti Mecca, Is Whited Out in Queens.” *The New York Times*, November 19, 2013, sec. New York. https://www.nytimes.com/2013/11/20/nyregion/5pointz-a-graffiti-mecca-in-queens-is-wiped-clean-overnight.html.
Burtin, Meredith. “From the Street to the Courtroom: The Legalization of Graffiti Art Multidistrict Litigation: Judicial and Practitioner Perspectives: Comments.” *UMKC Law Review* 89, no. 4 (2021 2020): 1019–36.
Justia Law. “Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).” Accessed June 18, 2022. https://supreme.justia.com/cases/federal/us/510/569/.
Carroll, Noël. “Art, Creativity, and Tradition.” In *The Creation of Art: New Essays in Philosophical Aesthetics*, edited by Berys Nigel Gaut and Paisley Livingston. New York, NY: Cambridge University Press, 2003.
Carter v. Helmsley-Spear, Inc., 71 F. 3d 77 (Court of Appeals, 2nd Circuit 1995).
“Carter v. Helmsley-Spear, Inc., 71 F.3d 77 | Casetext Search + Citator.” Accessed January 28, 2021. https://casetext.com/case/carter-v-helmsley-spear-inc.
Justia Law. “Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994).” Accessed June 10, 2022. https://law.justia.com/cases/federal/district-courts/FSupp/861/303/2261919/.
Cascio, Virginia M. “Hardly a Walk in the Park: Courts’ Hostile Treatment of Site-Specific Works under VARA.” *Intellectual Property Law* 20 (2016): 33.
“Castillo v. G&M Realty L.P., 950 F.3d 155 | Casetext Search + Citator.” Accessed June 10, 2022. https://casetext.com/case/castillo-v-gm-realty-lp.
“Cheffins v. Stewart, 825 F.3d 588 | Casetext Search + Citator.” Accessed June 9, 2022. https://casetext.com/case/cheffins-v-stewart-6.
Christie, George. “Defamatory Opinions and the Restatement (Second) of Torts.” *Michigan Law Review* 75, no. 8 (August 1, 1977): 1621–46.

Cohen, Ted. “The Inexplicable: Some Thoughts After Kant.” In *The Creation of Art: New Essays in Philosophical Aesthetics*, edited by Berys Nigel Gaut and Paisley Livingston. New York, NY: Cambridge University Press, 2003.

“Cohen v. G & M Realty L.P., 320 F. Supp. 3d 421 | Casetext Search + Citator.” Accessed June 10, 2022. https://casetext.com/case/cohen-v-g-m-realty-lp.

“Compendium of U.S. Copyright Office Practices | U.S. Copyright Office.” Accessed June 17, 2022. https://www.copyright.gov/comp3/.

Justia Law. “Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).” Accessed May 9, 2022. https://supreme.justia.com/cases/federal/us/539/23/.

Davies, David. *Art as Performance*. New Directions in Aesthetics 2. Malden, MA: Blackwell Pub, 2004.

“Deepfake Technology Is Now a Threat to Everyone. What Do We Do? - WSJ.” Accessed June 21, 2022. https://www.wsj.com/articles/deepfake-technology-is-now-a-threat-to-everyone-what-do-we-do-11638887121.

Drew, Kimberly. “What Should a Museum Look Like in 2020?” Vanity Fair, August 24, 2020. https://www.vanityfair.com/culture/2020/08/what-should-a-museum-look-like-in-2020.

“Drip Painting.” In *Wikipedia*, March 10, 2022. https://en.wikipedia.org/w/index.php?title=Drip_painting&oldid=1076388324.

Ecker, David W. “The Artistic Process as Qualitative Problem Solving.” *The Journal of Aesthetics and Art Criticism* 21, no. 3 (1963): 283–90.

Epstein, Adam. “HBO’s ‘Watchmen’ Is Great. Its Comic Creator Alan Moore Wants Nothing to Do with It.” Quartz. Accessed May 27, 2022. https://qz.com/quartzy/1732050/why-alan-moore-wants-nothing-to-do-with-hbos-watchmen/.

SFMOMA. “Erased de Kooning Drawing.” Accessed January 28, 2022. https://www.sfmoma.org/artwork/98-298/.

Justia Law. “Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc., 499 U.S. 340 (1991).” Accessed January 28, 2021. https://supreme.justia.com/cases/federal/us/499/340/.

Fried, Charles. “Privacy.” *Yale L.J.* 77, no. 3 (1968): 475–93.

Gaut, Berys Nigel, and Paisley Livingston. “Introduction The Creation of Art: Issues and Perspectives.” In *The Creation of Art: New Essays in Philosophical Aesthetics*, edited by Berys Nigel Gaut and Paisley Livingston. New York, NY: Cambridge University Press, 2003.

Ghiselin, Brewster. *The Creative Process: A Symposium*. New York: New American Library, 1952. http://catalog.hathitrust.org/api/volumes/oclc/9301574.html.

“Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 | Casetext Search + Citator.” Accessed May 9, 2022. https://casetext.com/case/gilliam-v-american-broadcasting-companies-inc.

Gover, K. E. *Art and Authority: Moral Rights and Meaning in Contemporary Visual Art*. First edition. Oxford: Oxford University Press, 2018.

“Graffiti Mecca 5 Pointz Erased Overnight.” Accessed January 28, 2021. https://nypost.com/2013/11/19/5-pointz-graffiti-erased-in-overnight-paint-job/.

Green, Author David Allen. “How Neil Gaiman Kept Control of the Sandman Characters.” *The Law and Policy Blog* (blog), June 8, 2021. https://davidallengreen.com/2021/06/how-neil-gaiman-kept-control-of-the-sandman-characters/.

Hick, Darren Hudson. “Appropriation and Transformation.” *Fordham Intell. Prop. Media & Ent. L.J.* 23 (2013): 1155.

———. *Artistic License: The Philosophical Problems of Copyright and Appropriation*. Chicago ; London: The University of Chicago Press, 2017.

———. “Toward an Ontology of Authored Works.” *The British Journal of Aesthetics* 51, no. 2 (April 1, 2011): 185–99. https://doi.org/10.1093/aesthj/ayr004.

“Hijrahannah v. Def Jam Recordings, Case No. 14 C 0872 | Casetext Search + Citator.” Accessed May 31, 2022. https://casetext.com/case/hijrahannah-v-def-jam-recordings.

Hood, Micaela, Rebecca King, Adria R. Walker, and Marina Affo. “Systemic Racism Is Shaping Our Access to Art. How East Coast Art Institutions Strive for Change.” North Jersey Media Group. Accessed June 10, 2022. https://www.northjersey.com/story/entertainment/arts/2020/10/22/racism-rampant-in-arts-world-how-east-coast-art-institutions-strive-for-equitable-change/5856580002/.

artnet News. “Impersonating a Property Owner, a Man Paid an Artist to Paint a Cookie Monster Mural in Peoria. The Town—and the Internet—Have Questions,” December 8, 2020. https://news.artnet.com/art-world/soviet-style-cookie-monster-mural-1929712.

Inness, J.C. *Privacy, Intimacy, and Isolation*. Oxford Scholarship Online. Oxford University Press, 1996.

Inness, Julie C. *Intimacy: The Core of Privacy*. *Privacy, Intimacy, and Isolation*. Oxford University Press. Accessed January 27, 2021. http://oxford.universitypressscholarship.com/view/10.1093/0195104609.001.0001/acprof-9780195104608-chapter-6.

“IQ Group, Ltd. v. Wiesner Publishing, LLC, 409 F. Supp. 2d 587 | Casetext Search + Citator.” Accessed May 23, 2022. https://casetext.com/case/iq-group-ltd-v-wiesner-pub.

Johnston, Rich. “Matt Furie Killed Off Pepe The Frog On Free Comic Book Day.” Bleeding Cool News And Rumors, May 7, 2017. https://bleedingcool.com/comics/matt-furie-killed-off-pepe-frog-free-comic-book-day/.

“Kelley v. Chicago Park Dist, 635 F.3d 290 | Casetext Search + Citator.” Accessed January 28, 2021. https://casetext.com/case/kelley-v-chicago-park-dist.

“Kettenburg v. University of Louisville, Civil Action No. 3:05CV-79-H | Casetext Search + Citator.” Accessed May 31, 2022. https://casetext.com/case/kettenburg-v-university-of-louisville-1.

Kinsella, Eileen. “A District Court Rules That the Vermont Law School Can Conceal a Divisive Mural on Campus Without Violating the Artist’s Rights.” Artnet News, October 22, 2021. https://news.artnet.com/art-world/court-rules-vermont-law-school-can-conceal-mural-2024444.

———. “Cementing a $6.8 Million Win for Artists, the US Supreme Court Declines to Hear the Landmark Case Over the Destruction of 5Pointz.” Artnet News, October 7, 2020. https://news.artnet.com/art-world/supreme-court-declines-5pointz-appeal-1913903.

Kwall, Roberta Rosenthal. *The Soul of Creativity: Forging a Moral Rights Law for the United States*. Stanford, Calif: Stanford Law Books, 2010.

“Las Vegas Wedding Chapels Receive Elvis Cease-and-Desist Letters | CNN Travel.” Accessed June 15, 2022. https://www.cnn.com/travel/article/vegas-wedding-chapels-elvis-impersonators/index.html.

Lastowka, Greg. “The Trademark Function of Authorship.” SSRN Scholarly Paper. Rochester, NY, February 3, 2005. https://doi.org/10.2139/ssrn.656138.

Lee, Brian Angelo. “Making Sense of ‘Moral Rights’ in Intellectual Property.” *Temple Law Review* 84, no. 1 (February 16, 2012). https://www.templelawreview.org/article/84-1_lee/.

Liemer, Susan. “Understanding Artists’ Moral Rights: A Primer.” SSRN Scholarly Paper. Rochester, NY, 1998. https://papers.ssrn.com/abstract=1132887.

Liemer, Susan P. “How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright,” n.d., 41.

Locke, John. *Locke: Political Essays*. Edited by Mark Goldie. Cambridge Texts in the History of Political Thought. Cambridge ; New York: Cambridge University Press, 1997.

Locke, John, and C. B. Macpherson. *Second Treatise of Government*. 1st ed. Indianapolis, Ind: Hackett Pub. Co, 1980.

“Looking at 5Pointz Now, Extolling a Graffiti Holy Place.” Accessed January 28, 2021. https://www.brooklynstreetart.com/2013/06/26/looking-at-5pointz-now-celebrating-a-graffiti-holy-place/.

Mace, Mary-Anne. “Toward an Understanding of Creativity Through a Qualitative Appraisal of Contemporary Art Making.” *Creativity Research Journal* 10, no. 2–3 (April 1997): 265–78. https://doi.org/10.1080/10400419.1997.9651225.

Markowitz, Sally J. “The Distinction between Art and Craft.” *Journal of Aesthetic Education* 28, no. 1 (1994): 55–70. https://doi.org/10.2307/3333159.

Justia Law. “Martin v. City of Indianapolis, 982 F. Supp. 625 (S.D. Ind. 1997).” Accessed June 10, 2022. https://law.justia.com/cases/federal/district-courts/FSupp/982/625/1528055/.

“Massachusetts Museum Contemp. v. BÜchel, 593 F.3d 38 | Casetext Search + Citator.” Accessed June 10, 2022. https://casetext.com/case/massachusetts-museum-contemp-v-buchel.

Matt Furie. “Pepe the Frog’s Creator: He Was Never About Hate.” Time. Accessed January 20, 2021. https://time.com/4530128/pepe-the-frog-creator-hate-symbol/.

“NEA Art Forms: A Guide to the Visual Artists Rights Act,” August 27, 2003. http://web.archive.org/web/20030827213232/http:/arts.endow.gov/artforms/manage/VARA.html.

Netanel, Neil. “COPYRIGHT ALIENABILITY RESTRICTIONS AND THE ENHANCEMENT OF AUTHOR AUTONOMY: A’ NORMATIVE EVALUATION.” *RUTGERS LAW JOURNAL* 24 (1992): 97.

Neuendorf, Henri. “Gerhard Richter Doesn’t Acknowledge Early Works.” Artnet News, July 21, 2015. https://news.artnet.com/art-world/gerhard-richter-omits-art-from-catalogue-318665.

Nguyen, C. Thi, and Matthew Strohl. “Cultural Appropriation and the Intimacy of Groups.” *Philosophical Studies* 176, no. 4 (April 2019): 981–1002. https://doi.org/10.1007/s11098-018-1223-3.

Nimmer, Melville. “The Right of Publicity.” *Law and Contemporary Problems* 19, no. 2 (April 1, 1954): 203–23.

Novitz, David. “Explanations of Creativity.” In *The Creation of Art: New Essays in Philosophical Aesthetics*, edited by Berys Nigel Gaut and Paisley Livingston. New York, NY: Cambridge University Press, 2003.

Olsen, Stein Haugom. “Culture, Convention, and Creativity.” In *The Creation of Art: New Essays in Philosophical Aesthetics*, edited by Berys Nigel Gaut and Paisley Livingston. New York, NY: Cambridge University Press, 2003.

ArtWeb Blog. “Painting Emotion - Artist Interview with Yasmine Giessa,” March 25, 2014. https://blog.artweb.com/interviews/painting-emotion-artist-interview-with-yasmine-giessa/.

Pavis, Mathilde. “The Céline Affair: What Moral Rights Can and Can’t Do…even in France.” *The IPKat* (blog). Accessed April 2, 2022. https://ipkitten.blogspot.com/2018/02/the-celine-affair-what-moral-rights-can.html.

Anti-Defamation League. “Pepe the Frog.” Accessed January 20, 2021. https://www.adl.org/education/references/hate-symbols/pepe-the-frog.

“Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128 | Casetext Search + Citator.” Accessed June 9, 2022. https://casetext.com/case/phillips-v-pembroke-real-estate-inc-2.

“Pollara v. Seymour, 344 F.3d 265 | Casetext Search + Citator.” Accessed June 8, 2022. https://casetext.com/case/pollara-v-seymour-3.

Popkin, Jeremy D. “Ka-Tzetnik 135633: The Survivor as Pseudonym.” *New Literary History* 33, no. 2 (2002): 343–55. https://doi.org/10.1353/nlh.2002.0020.

Rigamonti, Cyrill P. “Deconstructing Moral Rights.” *Harvard International Law Journal* 47 (2006): 60.

“‘Rogue One’ Is a Milestone (and Warning Sign) for CG Resurrection | Engadget.” Accessed June 21, 2022. https://www.engadget.com/2016-12-20-star-wars-rogue-one-cgi-actor.html.

Rosati, Eleonora. “[Guest Post] Czech Court Rules That Placement of Advertisements on a Building Constitutes a Moral Rights Infringement.” *The IPKat* (blog). Accessed April 3, 2022. https://ipkitten.blogspot.com/2020/04/guest-post-czech-court-rules-that.html.

Leagle. “SCOTT v. DIXON | 309 F.Supp.2d 395 (2004) | Pp2d3951668 | Leagle.Com.” Accessed June 10, 2022. https://www.leagle.com/decision/2004704309fsupp2d3951668.

“Serra v. U.S. General Services Admin, 847 F.2d 1045 | Casetext Search + Citator.” Accessed June 9, 2022. https://casetext.com/case/serra-v-us-general-services-admin-3.

Shipley, David E. “The Empty Promise of VARA: The Restrictive Application of a Narrow Statute.” *Miss. L. J.* 83 (2014): 985.

Srinivasan, Amia. “Questions for Free-Market Moralists.” *Opinionator* (blog), October 20, 2013. https://opinionator.blogs.nytimes.com/2013/10/20/questions-for-free-market-moralists/.

High School Musical Wiki. “Stick to the Status Quo.” Accessed June 6, 2022. https://high-school-musical.fandom.com/wiki/Stick_to_the_Status_Quo.

Stone, Chelsea. “Taylor Swift Said Her Songwriting Process Hasn’t Changed Since She Was 12.” Teen Vogue. Accessed April 14, 2021. https://www.teenvogue.com/story/taylor-swift-pattie-boyd-interview.

Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 439 (1976).

Tate. “Artist Interview: Judy Chicago.” Tate. Accessed November 9, 2021. https://www.tate.org.uk/whats-on/tate-modern/exhibition/ey-exhibition-world-goes-pop/artist-interview/judy-chicago.

"The Correspondence of James McNeill Whistler :: Biography." Accessed March 31, 2022. https://www.whistler.arts.gla.ac.uk/correspondence/people/biog/?bid=Eden_S&initial=.

Tolstoy, Leo, and Aylmer Maude. *What Is Art?* New York : Funk & Wagnalls, 1904. http://archive.org/details/whatisart00tolsuoft.

Topaz, Chad M., Bernhard Klingenberg, Daniel Turek, Brianna Heggeseth, Pamela E. Harris, Julie C. Blackwood, C. Ondine Chavoya, Steven Nelson, and Kevin M. Murphy. "Diversity of Artists in Major U.S. Museums." *PLOS ONE* 14, no. 3 (March 20, 2019): e0212852. https://doi.org/10.1371/journal.pone.0212852.

Townsend, Patricia. "A Life of Its Own: The Relationship between Artist, Idea and Artwork." *Free Associations* 65 (January 1, 2014).

Tutton, Robert. "In a Brooklyn Lumber Yard, 'Graffiti Mecca' 5Pointz Lives On." Curbed NY, September 29, 2015. https://ny.curbed.com/2015/9/29/9916136/in-a-brooklyn-lumber-yard-graffiti-mecca-5pointz-lives-on.

Welle (www.dw.com), Deutsche. "Man Fined for Taking Gerhard Richter Sketches from Artist's Garbage | DW | 24.04.2019." DW.COM. Accessed April 6, 2022. https://www.dw.com/en/man-fined-for-taking-gerhard-richter-sketches-from-artists-garbage/a-48467218.

Werra, Jacques de. "Moral Rights in Swizerland." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, March 20, 2010. https://papers.ssrn.com/abstract=2149775.

"When Robert Rauschenberg Asked Willem De Kooning for One of His Paintings … So That He Could Erase It | Open Culture." Accessed January 28, 2022. https://www.openculture.com/2018/05/when-young-robert-rauschenberg-made-his-name-by-asking-willem-de-kooning-for-one-of-his-paintings.html.

The New York Times. "Whistler's Paris Suit Ended.; HE MAY KEEP THE PICTURE OF LADY EDEN AND DECLARES HIS TRIUMPH.," December 18, 1897, sec. Archives. https://www.nytimes.com/1897/12/18/archives/whistlers-paris-suit-ended-he-may-keep-the-picture-of-lady-eden-and.html.

Xhignesse, Michel-Antoine. "Retitling, Cultural Appropriation, and Aboriginal Title." *The British Journal of Aesthetics* 61, no. 3 (August 14, 2021): 317–33. https://doi.org/10.1093/aesthj/ayab014.

Zemer, Lior. "The Making Of A New Copyright Lockean." *Harv. J.L. & Pub.* 29 (2006): 29.

Zlatarski, Vera. "Moral Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States." *Columbia-VLA Journal of Law & the Arts* 23 (2000 1999): 201.