Washington and Lee Law Review

Volume 54 | Issue 1 Article 3

Winter 1-1-1997

Rethinking the Compatibility of Moral Rights and Fair Use

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Rethinking the Compatibility of Moral Rights and Fair Use

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In 1990, Congress amended the Copyright Act to recognize limited federal moral rights of integrity and attribution. Under this legislation, American visual artists can prevent others from misattributing their works of art and from altering such works under certain circumstances. These moral rights, however, are expressly limited by copyright's fair-use doctrine, a doctrine that permits the otherwise unauthorized use of a copyrighted work for socially desirable purposes such as criticism, comment, news reporting, teaching, research, or parody. This Article argues that the fair-use doctrine is inherently incompatible with federal moral rights. Particularly, federal moral rights and fair use affect different types of property; federal moral rights and fair use relate to different types of rights; and federal moral rights and fair use are supported by different moral justifications. For these reasons and others, this Article calls for courts to decline Congress's statutory invitation to apply the fair-use doctrine as a limitation on artists' federal moral rights.

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I. Introduction

The moral-rights doctrine preserves for artists limited rights in their works, even after such works are transferred to others. Although moral rights vary among the jurisdictions that recognize them, these rights typically include the continuing right to prevent alterations and misattributions

of an artist's work. For example, if Leonardo da Vinci were alive today, the moral-rights doctrine would, under certain circumstances, give him the right to prevent the alteration of the *Mona Lisa* by a parodist who wished to paint a mustache on the depicted woman's face.[1] Moreover, Leonardo could enforce his moral rights regardless of whether he still owned the tangible painting or the copyright in the underlying work of authorship.

Developed in nineteenth-century France as an element of the artist's right of personality,[2] moral rights traditionally protected an artist's work — "his spiritual child" — as an outgrowth of his soul.[3] Despite the sentimental appeal of the doctrine, moral rights met formidable resistance in the United States. Indeed, American courts initially refused to recognize any moral rights of artists. Indicative of this early hostility toward moral rights is the reported opinion of one New York court in 1949: "The conception of 'moral rights' of authors so fully recognized and developed in civil law countries has not yet received acceptance in the law of the United States. No such right is referred to by legislation, court decisions or writers."[4] Over the years, however, the United States has retreated considerably from its early hard-nosed stance against moral rights. Perhaps the most notable evidence of this American retreat is the Visual Artists' Rights Act of 1990

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1. It has become standard fare in moral-rights conversation to discuss the painting of a mustache on the *Mona Lisa*. *See, e.g.*, Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 981 (1990); Geri. J. Yonover, *The "Dissing" of Da Vinci: The Imaginary Case of* Leonardo v. Duchamp*: Moral Rights, Parody and Fair Use*, 29 VAL. U. L. REV. 935, 937 (1995) [hereinafter Yonover, *"Dissing" of Da Vinci*]; Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 84-85 (1996) [hereinafter Yonover, *Precarious Balance*]; E. Kenly Ames, Note, *Beyond* Rogers v. Koons*: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1484 (1993); Jennifer T. Olson, Note, *Rights in Fine Art Photography: Through a Lens Darkly*, 70 TEX. L. REV. 1489, 1514 (1992); Laura W. Wooton, Comment, *Law for Law's Sake: The Visual Artists Rights Act of 1990*, 24 CONN. L. REV. 247, 290 (1991).

2. *See, e.g.*, Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 14 (1988); Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1, 10-11 (1980); John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1025 (1976); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 555 (1940); *see also* 1 MARCEL PLANIOL & GEORGE RIPERT, TREATISE ON THE CIVIL LAW, no. 2549A, pt. 2, at 505-06 (12th ed. 1939) (Louisiana State Law Inst. trans., 1959) (author's moral right "falls within the general category of personal rights").

3. SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, at 456 (1987).

4. Crimi v. Rutgers Presbyterian Church, 89 N.Y.S.2d 813, 818 (Sup. Ct. 1949) (emphasis omitted) (quoting Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947)).

(VARA).[5] Although it is not expansive moral-rights legislation in the continental European tradition, VARA represents the first federal endorsement of moral rights[6] inhering in an artist to protect his work after transferring its physical embodiment and its copyright to another. More particularly, VARA grants artists limited rights of integrity and attribution in their works of visual art.[7] Hence, American artists now have the right (1) to claim authorship of their own works of visual art and to prevent the use of their names on works that they did not create (right of attribution)[8] and (2) to prevent the "distortion, mutilation or modification" of their works under certain circumstances (right of integrity).[9]

Despite Congress's recognition of federal integrity and attribution rights, those rights are significantly more limited than their European counterparts. Among other limitations, federal moral rights are expressly subject to copyright's fair-use doctrine.[10] Often termed an "equitable rule of reason,"[11] the fair-use doctrine permits users of copyrighted works to engage in otherwise infringing conduct if their use of the copyrighted work is "fair" in light of all of the circumstances.[12] Uses favored by the fair-use

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5. Visual Artists' Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506 (1994)).

6. For a host of reasons, *see infra* Parts II.A, III.A, III.B, VARA attribution and integrity rights are not "true" moral rights of the type long recognized in Europe. Rather, they are *sui generis* rights merely analogous to continental moral rights. Nevertheless, most commentators and courts refer to artists' VARA rights as "moral rights." As a result, this Article refers to congressionally enacted VARA rights as either "moral rights" or "federal moral rights." To distinguish VARA rights from their European counterparts, however, this Article refers to continental moral rights as either "true moral rights," "continental moral rights," "European moral rights," or "traditional moral rights."

7. *See* 17 U.S.C. § 106A(a) (1994). A "work of visual art" includes a painting, drawing, print, sculpture, or photograph (if the photograph is produced for "exhibition purposes"), existing in a single copy or in an enumerated limited edition of two hundred or fewer signed copies. *See id.* § 101 (providing definitions).

8. *Id.* § 106A(a)(1)-(2).

9. *Id.* § 106A(a)(3).

10. *See id.* §§ 106A(a), 107.

11. *E.g.*, Sony Corp. v. Universal City Studios, 464 U.S. 417, 448 (1984) (stating that fair-use section of Copyright Act enables court "to apply an 'equitable rule of reason' analysis to particular claims of infringement"); H.R. REP. NO. 94-1476, at 65-66 (1976) (fair-use doctrine "is an equitable rule of reason"); S. REP. NO. 94-473, at 62 (1975) (same). *But see* WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 4-5 (2d ed. 1995) (arguing that fair use did not develop as *equitable* rule of reason given that law courts contributed to development of doctrine). However, the term "equitable" in the context of a fair-use rule of reason analysis connotes "fairness" rather than "equity" in the sense of the law-equity dichotomy.

12. *See infra* Part II.B.

doctrine include those for purposes of "criticism," "comment," "news reporting," "teaching," "research," and "parody."[13] Courts and commentators have long struggled with the contours of the fair-use doctrine, one court branding it "the most troublesome in the whole law of copyright."[14]

While the doctrine is troublesome in general, it is especially so in its application to moral rights. This is so because federal moral rights and the fair-use doctrine are manifestly incompatible for a number of doctrinal and practical reasons. First, fair use is a doctrine born of intellectual property law for the purpose of permitting certain nonrivalrous uses of intangible copyrighted works. But the federal moral rights adopted by Congress have little relationship to intellectual property at all; rather, they govern the relationship of artists with tangible property.[15] Second, fair use is a doctrine that permits certain uses of a work in preference to a copyright owner's otherwise valid copyright exclusive rights. But the federal moral rights adopted by Congress — rights which fair use may trump — are rights of an entirely different order from copyright exclusive rights. Namely, federal moral rights are either "personal" rights or "personal property" rights, both of which arguably deserve greater respect (and hence less deference to fair use) than ordinary copyright exclusive rights.[16] Third, fair use is a doctrine justified largely by the consequentialist goal underlying copyright law in general: that of promoting the creation of new works of authorship. But federal moral rights exist for reasons that are decidedly *non*consequentialist — namely, to promote artistic respect and artifact preservation. Applying fair use to limit federal moral rights would disregard these nonconsequentialist goals without furthering any of the consequentialist goals of the fair-use doctrine.[17] Finally, and on a more practical level, the statutory factors that guide the fair-use analysis — factors designed to further the economic goals of copyright — simply do not work when applied to a "use" of tangible property protected by federal moral rights.[18]

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13. *See* 17 U.S.C. § 107 (1994); *see, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580-83 (1994) (parody); Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 541-69 (1985) (criticism or comment); Allen v. Academic Games League, 89 F.3d 614, 617 (9th Cir. 1996) (teaching); American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 920 (2d Cir. 1994) (research), *cert. dismissed*, 116 S. Ct. 592 (1995); Diamond v. Am-Law Publ'g, 745 F.2d 142, 147 (2d Cir. 1984) (news reporting).

14. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam).

15. *See infra* Part III.A.

16. *See infra* Part III.B.

17. *See infra* Part III.C.

18. *See infra* Part III.D.

This Article rethinks the compatibility of fair use and moral rights. After briefly surveying the historical development of the moral-rights and fair-use doctrines, it critically evaluates Congress's adoption of artists' rights analogous to continental moral rights and its ill-conceived attempt to limit those rights through copyright's fair-use doctrine. Concluding that fair use and federal moral rights are inherently incompatible, this Article ends with a call for courts to decline Congress's statutory invitation to limit federal moral rights through fair use.

II. Historical Background of Moral Rights and Fair Use

A. Moral Rights

1. Moral Rights in Europe

Moral rights, or *droit moral*,[19] evolved in France[20] and elsewhere in continental Europe during the nineteenth century.[21] Intended to protect the

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19. Doris E. Long & Anthony D'Amato, *Introduction* to INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY 8 (Anthony D'Amato & Doris E. Long eds., 1996) ("In France the concept is referred to as '*droit moral*,' in Germany, '*urheberpersonlichkeitsrecht*,' in the United States, 'moral rights or inherent rights.'").

20. *See* DaSilva, *supra* note 2, at 5 (stating that moral rights were created by judges in France); Merryman, *supra* note 2, at 1026 (same).

21. For a more detailed discussion of the development of moral rights in Europe, see generally Harold C. Streibich, *The Moral Right of Ownership to Intellectual Property: Part I - From the Beginning to the Age of Printing*, 6 MEM. ST. U. L. REV. 1 (1975) [hereinafter Streibich, *Part I*] (detailing development of moral rights from beginning of time to Renaissance); and Harold C. Streibich, *The Moral Right of Ownership to Intellectual Property: Part II — From the Age of Printing to the Future*, 7 MEM. ST. U. L. REV. 45 (1976) [hereinafter Streibich, *Part II*] (detailing development of moral rights from Renaissance through present). Over the past decade, numerous articles have discussed moral rights in Europe and the United States. For a sampling of this literature, see Lawrence A. Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 NW. U. L. REV. 1011 (1988); Dane S. Ciolino, *Moral Rights and Real Obligations: A Property-Law Framework for the Protection of Authors' Moral Rights*, 69 TUL. L. REV. 935 (1995); Edward J. Damich, *Moral Rights Protection and Resale Royalties for Visual Art in the United States: Development and Current Status*, 12 CARDOZO ARTS & ENT. L.J. 387 (1994); Damich, *supra* note 1; Damich, *supra* note 2; Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 421 (1990); John M. Kernochan, *Moral Rights in U.S. Theatrical Productions: A Possible Paradigm*, 17 COLUM.-VLA J.L. & ARTS 385 (1993); Otto W. Konrad, *A Federal Recognition of Performance Art Author Moral Rights*, 48 WASH. & LEE L. REV. 1579 (1991); Roberta R. Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985); Merryman, *supra* note 2; Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1 (1994) [hereinafter Netanel, *Alienability Restrictions*]; Neil Netanel, *Copyright Alienability Restrictions and Enhancement of Author*

personal rights of artists as distinguished from their economic rights,[22] the moral-rights doctrine was developed almost entirely by the French judiciary.[23] Although often termed a "doctrine," moral-rights law is more an assemblage of artist-related rights than a unitary body of law.[24] While there are considerable differences among the particular moral rights recognized in different jurisdictions, the most commonly recognized are the right of attribution and the right of integrity.[25]

Autonomy: A Normative Evaluation, 24 RUTGERS L.J. 347 (1993) [hereinafter Netanel, *Normative Evaluation*]; Roeder, *supra* note 2; Dan Rosen, *Artists' Moral Rights: A European Evolution, An American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155 (1983); Raymond Sarraute, *Current Theory on the Moral Right of Authors Under French Law*, 16 AM. J. COMP. L. 465 (1968); William Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506 (1955); Yonover, *"Dissing" of Da Vinci*, *supra* note 1; Yonover, *Precarious Balance*, *supra* note 1, at 79; Brett Sirota, Note, *The Visual Artists Rights Act: Federal Versus State Moral Rights*, 21 HOFSTRA L. REV. 461 (1992); and Patrick G. Zabatta, Note, *Moral Rights and Musical Works: Are Composers Getting Berned?*, 43 SYRACUSE L. REV. 1095 (1992).

22. Roeder, *supra* note 2, at 554-55.

23. Merryman, *supra* note 2, at 1026 (noting that "[t]his is in itself remarkable, since one of the most treasured tenets of the conventional wisdom about the civil law is that law is made by legislators and executives, not by judges."). In 1957, the French legislature enacted moral-rights legislation, which remains law today. *See* Law No. 57-298 of March 11, 1957, J.O., Mar. 14, 1957, art. 19, p. 2723, *amended by* Law No. 85-660 of July 3, 1985, J.O., July 4, 1985, p. 7495, *translated in* UNITED NATIONS EDUC., SCIENTIFIC AND CULTURAL ORG., COPYRIGHT LAWS AND TREATIES OF THE WORLD, France section, item 1, art. 19 (1992) [hereinafter *French Moral Rights Legislation*].

24. *See* Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law — A Proposal*, 24 S. CAL. L. REV. 375, 390-91 (1951) ("[T]he term [moral right] enjoys almost as many definitions as it has adherents."); Kwall, *supra* note 21, at 12 (stating that "countries that have adopted the moral right do not endorse a uniform position with respect to these matters"); *id.* at 97-100 (listing characteristics associated with moral rights of thirty-five countries and thereby illustrating lack of uniformity); Merryman, *supra* note 2, at 1027 ("The moral right of the artist is actually a composite right."); Strauss, *supra* note 21, at 536 (discussing lack of moral rights uniformity among countries); James M. Treece, *American Law Analogues of the Author's "Moral Right,"* 16 AM. J. COMP. L. 487, 505 (1968).

25. Moral rights, in addition to the attribution and integrity rights, include the right of "divulgation" and the right of "withdrawal." The right of divulgation provides that the "author alone shall have the right to divulge his work." *French Moral Rights Legislation*, *supra* note 23, art. 19. The divulgation right includes "the decision to sell, unveil, or by any other means make his work public." DaSilva, *supra* note 2, at 17. In contrast to the integrity, paternity, and withdrawal rights, the right of divulgation provides protection for the artist prior to publication. *See* Treece, *supra* note 24, at 487. This right is personal to the artist, *see* DaSilva, *supra* note 2, at 2, discretionary, *see* Sarraute, *supra* note 21, at 467 (artist has sole discretion to divulge or to withhold work), and exclusive, *see* DaSilva, *supra* note 2, at 17-21.

The right of attribution generally consists of (1) the right of the artist to be identified as the author of any work that he actually created, and (2) the right of the artist to prevent the use of his name as the author of a work that he did not create.[26] The French legislature has characterized the attribution right as the artist's right to "respect for his name, his authorship."[27] As a component of the artist's personality, the right of attribution attaches to the author himself,[28] is perpetual,[29] and is nontransferable.[30]

The right of integrity, perhaps the most notable component of *droit moral*,[31] protects the author's reputation and prevents others from deforming, destroying,[32] or otherwise altering the artist's work.[33] In so doing, it

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The rights of withdrawal and modification give the author the right to "correct or retract" a work after its publication. *French Moral Rights Legislation*, *supra* note 23, art. 32. Moreover, the author has the right to purchase any reproductions of his work created under license from him. *See* Roeder, *supra* note 2, at 561. The withdrawal and modification rights give the author the ability to monitor the presentation of his works to the public. *See* Damich, *supra* note 2, at 23-24.

The rights of withdrawal and modification, however, are awkward to exercise. The author must "indemnify the transferee beforehand for the loss that the correction or retraction may cause him." *French Moral Rights Legislation*, *supra* note 23, art. 32. Likewise, upon republication after retraction the author must "offer his exploitation rights in the first instance to the transferee he originally chose, and under the conditions originally determined." *Id.* Also, these rights exist only as long as the artist retains all property rights in the work. *See* DaSilva, *supra* note 2, at 25. For these reasons, the rights of withdrawal and modification have limited usefulness and are rarely employed. *See* Sarraute, *supra* note 21, at 477.

Other, less common moral rights have occasionally been recognized in some jurisdictions. For example, some commentators have identified a moral right to prevent "any other violation" of the author's personality. *See* Roeder, *supra* note 2, at 573; Strauss, *supra* note 21, at 514. Others have considered the moral-rights doctrine to be a fluid concept whose contours cannot be fully delineated. *See* Streibich, *Part II*, *supra* note 21, at 82 ("The precise bounds of such rights will be determined by innovative advocates and enlightened judges in the exercise of reason.").

26. DaSilva, *supra* note 2, at 26.

27. *French Moral Rights Legislation*, *supra* note 23, art. 6.

28. *Id.*

29. *Id.* The perpetual nature of the right of attribution is demonstrated by the author's ability to donate it *mortis causa*.

30. *Id.*

31. DaSilva, *supra* note 2, at 30-31.

32. *But see* Roeder, *supra* note 2, at 569 (arguing that destruction is not part of right of integrity because destruction, unlike deformation, does not present author to public as creator of work not his own).

33. Damich, *supra* note 2, at 7; DaSilva, *supra* note 2, at 31-32; Merryman, *supra* note 2, at 1035.

gives the author the "right to respect for . . . his work,"[34] and guarantees that his work will remain an authentic representation of his artistic personality — even after he has sold or otherwise transferred the physical manifestation of the work and its copyright. The right of integrity is well illustrated by the French case of *Buffet c. Fersing*.[35] Bernard Buffet painted six panels of a refrigerator. Considering the six panels to be a unitary work of art, Buffet signed only one panel. Despite Buffet's intention that the work remain intact, a subsequent owner sold off one of its panels. Recognizing that the alteration harmed Buffet's integrity interest, France's highest court awarded him damages.[36]

Although the attribution right, the integrity right, and other moral rights have some functional similarities with property rights,[37] continental moral rights are decidedly personal. Moral rights protect an artist's work as an outgrowth of his soul and, hence, are a component of his personality.[38] Thus, when that work is criticized, altered, or destroyed, so too is the artist.[39] For these reasons, French law assures that moral rights relating to an art work "shall be attached to [the author's] person."[40] Even when an employee-artist creates a work for his employer, the employee has moral rights relating to the work that vest in his person.[41] Similarly, because moral rights are among the rights of personality, artists are incapable of transferring them.[42] Thus, a transfer of the *physical embodiment* of an artist's work (such as a painting or a sculpture) does not thereby transfer the artists' moral rights in the work. Nor does a transfer of the *copyright*

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34. *French Moral Rights Legislation*, *supra* note 23, art. 6.

35. CA Paris, 1e ch., May 30, 1962, D. Jur. 1962, 570, *aff'd*, Cass. 1e civ., July 6, 1965, Gaz. Pal. 1965, 2, pan. jurispr., 126; *see* Merryman, *supra* note 2, at 1023.

36. D. Jur. 1962, at 570-71. For an entertaining discussion of this decision, see Merryman, *supra* note 2, at 1023 n.1.

37. *See* Ciolino, *supra* note 21, at 969-71 (property rights and moral rights both relate to things, exhibit right to follow, can be enforced against world, can be avoided by dispossession, and can be created and abandoned unilaterally).

38. *E.g.*, RICKETSON, *supra* note 3. One commentator has defined one's personality as "*the outward representation of one's innermost self.*" Katz, *supra* note 24, at 401.

39. Roeder, *supra* note 2, at 557 (noting that author of published art work "projects into the world part of his personality and subjects it to the ravages of public use").

40. *French Moral Rights Legislation*, *supra* note 23, art. 6; DaSilva, *supra* note 2, at 12.

41. *French Moral Rights Legislation*, *supra* note 23, art. 1 ("The existence of . . . a contract to make a work, or an employment contract shall imply no exception to the enjoyment of the right recognized . . . .").

42. *Id.* art. 6. *See generally* Katz, *supra* note 24, at 406-09 (discussing nontransferable nature of moral rights).

in a work effect a transfer of the artists' moral rights. To be sure, many European jurisdictions expressly prohibit the transfer of moral rights.[43]

In an effort to unify European moral-rights law, the Berne Convention for the Protection of Literary and Artistic Works[44] (Berne Convention) was amended in 1928 to include a moral-rights provision. That amendment, codified in Article *6bis*,[45] provides that artists have "the right to claim authorship of the work" (right of attribution), and the right "to object to any distortion, mutilation or other modification of . . . the said work, which would be prejudicial to his honour or reputation" (right of integrity).[46] Given that the Berne Convention presently has over one hundred signatories,[47] the

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43. Strauss, *supra* note 21, at 515. While transfer is prohibited in most jurisdictions, waivers of moral rights are more often permitted. *Id.* at 517. Waivers do not alienate the moral right, but merely make it unenforceable.

44. The Berne Convention, now administered by the World Intellectual Property Association, is the oldest of the major international copyright treaties. First negotiated in 1886 for the purpose of protecting "the rights of authors in their literary and artistic works," the Berne Convention now has over one hundred member states, "including virtually every highly industrialized country and many developing countries as well." 1 NEIL BOORSTYN, BOORSTYN ON COPYRIGHT § 1.02, at 1-4 (2d ed. 1994).

45. WORLD INTELLECTUAL PROPERTY ORG., PUB. NO. 615E GUIDE TO THE BERNE CONVENTION, art. *6bis* (1978) [hereinafter WIPO]. Article *6bis* of the Berne Convention provides:

> (1) Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim the 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.
>
> (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
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> (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Id.

46. *Id. See generally* 1 BOORSTYN, *supra* note 44, § 5.07, at 5-21. One commentator notes: "In the U.C.C. and the Berne Convention, *bis* indicates a statutory article added to the original text and 'sandwiched in' so as not to effect the original numbering scheme (much as §§ 106A and 116A were added to the 1976 Copyright Act subsequent to its enactment)." MARSHAL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW § 8.28[A], at 278 n.328 (2d ed. 1995).

47. *See* 1 BOORSTYN, *supra* note 44, § 1.02, at 1-4.

moral rights of attribution and integrity that developed in post-Revolutionary France are now firmly entrenched in international law.[48]

2. *Moral Rights in the United States*

While moral rights have flourished in continental Europe, the United States has been slow to protect artists' noneconomic rights.[49] Characteristic of the early American antagonism toward moral rights is the 1949 decision in *Crimi v. Rutgers Presbyterian Church*.[50] Artist Alfred Crimi painted a fresco mural on a wall of the Rutgers Presbyterian Church in Manhattan. When the congregation later painted over "his" mural, Crimi protested and demanded that the church either restore the mural or remove it at the church's expense. The court, however, refused to recognize an enforceable moral right of integrity and held that moral rights are "not supported by the decisions of our courts."[51]

Like the *Crimi* court, most American courts initially refused to recognize moral rights explicitly. Nevertheless, some courts marshaled existing legal doctrines to provide artists protection somewhat analogous to that provided by traditional moral-rights regimes. For example, courts used federal copyright law[52] and federal unfair-competition law, particularly Section 43(a) of the Lanham Act,[53] to protect rights similar to the moral rights

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48. For a general discussion of current moral rights in the European Community, see ADOLF DIETZ, COPYRIGHT IN THE EUROPEAN COMMUNITY 66-78 (1978).

49. *E.g.*, Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 992 (1990) ("Anglo-American exponents of copyright law and policy have viewed the author's right grudgingly.").

50. 89 N.Y.S.2d 813 (Sup. Ct. 1949).

51. Crimi v. Rutgers Presbyterian Church, 89 N.Y.S.2d 813, 819 (Sup. Ct. 1949).

52. Damich, *supra* note 2, at 41-47. The right of integrity is implicated by provisions relating to derivative works and to musical and cable licenses. *See* 17 U.S.C. § 111(c)(3) (1994) (cable licenses); *id.* § 115 (musical licenses); *id.* § 106(2) (derivative works); *id.* § 203 (termination of transfers); *see also* WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 1022 n.12 (1994) ("The right of integrity is quite similar to the § 106(2) right to prepare derivative works."); Damich, *supra* note 2, at 41. Likewise, the right of divulgation is implicated by the public-performance right, the distribution right and the public-display right. *See* 17 U.S.C. § 106(3)-(5).

53. The right of attribution is implicated by Section 43 of the Lanham Act, which provides as follows:

> Any person who, on or in connection with any goods or services, . . . uses in commerce . . . any false designation of origin, false or misleading designation of fact, or false or misleading representation of fact, which . . . is 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,

of integrity and attribution. Likewise, other courts used various state-law doctrines, including contract law[54] and the tort theories of defamation,[55] invasion of privacy,[56] and unfair competition,[57] in an effort to protect rights analogous to moral rights.

Beginning in the mid-1970s, however, several states began to enact legislation intended to protect directly rights analogous to continental moral rights.[58] For example, the New York Artists' Authorship Rights Act

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> or approval of his or her goods, services, or commercial activities, . . . shall be liable in a civil action by any person who believes that he is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1) (1994). The leading Lanham Act case in this context is *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976). In *Gilliam*, the writers of *Monty Python* sued under the Lanham Act to prevent the rebroadcast of abbreviated *Monty Python's Flying Circus* episodes. *Id.* at 24. The Second Circuit held that the writers sufficiently stated a cause of action under Section 43(a) (prohibiting any false designation of origin of goods and services). *Id.* at 24-25. Particularly, the court held that what ABC had "represented to the public as the product of [the Monty Python writers] was actually a mere caricature of their talents." *Gilliam*, 538 F.2d at 25. *See generally* Susan L. Solomon, Comment, *"Monty Python" and the Lanham Act: In Search of the Moral Right*, 30 RUTGERS L. REV. 452 (1977); Comment, *Moral Rights for Artists Under the Lanham Act:* Gilliam v. American Broadcasting Cos., 18 WM. & MARY L. REV. 595 (1977).

54. Contract law can provide a limited degree of protection to authors. For example, contractual provisions in the act of sale of an artwork conceivably could reserve to the artist rights similar to the moral rights of attribution, integrity, divulgation, and withdrawal. *See* Granz v. Harris, 198 F.2d 585, 588 (2d Cir. 1952); Clemens v. Press Publ'g Co., 122 N.Y.S. 206, 208 (App. Div. 1910); Preminger v. Columbia Pictures Corp., 267 N.Y.S.2d 594, 602 (Sup. Ct. 1966).

55. Defamation law can potentially provide a means to redress injury to an author's professional reputation. *See* RESTATEMENT (SECOND) OF TORTS § 559 (1977). To be actionable, the conduct must harm the plaintiff's reputation in the community in which the defamatory statement was published. *Id.* Likewise, the author must prove injury to his professional reputation. *See* Kwall, *supra* note 21, at 25. Courts have also used defamation law to prevent false attribution. *See* D'Altomonte v. New York Herald Co., 139 N.Y.S. 200, 201-02 (App. Div.), *aff'd*, 208 N.Y. 596 (1913); Edison v. Viva Int'l, Ltd., 421 N.Y.S.2d 203, 207 (Sup. Ct.), *aff'd*, 70 A.D.2d 379 (App. Div. 1979); Damich, *supra* note 21, at 391.

56. *See* Kerby v. Hal Roach Studios, 127 P.2d 577, 580 (Cal. Dist. Ct. App. 1942); RESTATEMENT (SECOND) OF TORTS § 652A (1977).

57. For a discussion of unfair competition causes of action under state law, see *Stevens v. National Broadcasting Co.*, 148 U.S.P.Q. (BNA) 755, 756 (Cal. App. Dep't Super. Ct. 1966); and Damich, *supra* note 21, at 395.

58. *See, e.g.*, CAL. CIV. CODE § 987 (West 1996); CONN. GEN. STAT. ANN. § 42-116s (West 1996); LA. REV. STAT. ANN. § 51:2154 (West 1995); ME. REV. STAT. ANN. tit. 27, § 303 (West 1995); MASS. ANN. LAWS ch. 231, § 85S (Law. Co-op. 1995); NEV. REV. STAT. ANN. §§ 598, 970 (Michie 1994); N.J. STAT. ANN. § 2A:24A-1 (West 1996); N.M. STAT. ANN. § 13-4B-2 (Michie 1995); N.Y. ARTS & CULT. AFF. LAW § 14.01

directly recognizes the right of integrity and the right of attribution in visual artworks.[59] Works protected by this statute cannot knowingly be displayed in a public place in an "altered, defaced, mutilated, or modified form."[60] Moreover, an author can compel that his name appear on a work created by him and also prevent his name from appearing on an altered, defaced, mutilated, or modified work.[61] The remedies available under New York's statute for violations of the integrity and attribution rights include damages and injunctive relief.[62]

Despite such efforts to graft moral rights onto American law, it was not until the late-1980s, when Congress was considering whether the United States should accede to the Berne Convention, that the United States first considered systematically addressing the issue of artists' moral rights.[63] As leading exporters of copyrighted works,[64] United States citizens were at a distinct disadvantage in protecting their copyrighted works abroad because the United States had not acceded to the Berne Convention. In response to increasing foreign piracy of American works, the United States joined the Berne Convention as of March 1, 1989.[65] During the debate over accession, considerable controversy arose over the necessity of adopting moral-rights legislation comparable to Article *6bis*.[66] Although the original House bill contained such a provision, Congress ultimately chose not to "expand or reduce any right of an author" under existing American law.[67] Indeed, Congress somewhat insincerely concluded that moral-rights protection as it existed at the time of accession was sufficient to comply with the Berne Convention's *droit moral* provisions.[68] Nevertheless, the moral-rights issue

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(McKinney 1996); 73 PA. CONS. STAT. ANN § 2101 (West 1993); R.I. GEN. LAWS § 5-62-2 (1994); R.I. GEN. LAWS § 42-75.2-3 (1996).

59. N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 1996).

60. *Id.* § 14.03(1).

61. *Id.* § 14.03(2).

62. *Id.* § 14.03(4)(a).

63. Great Britain also resisted adopting continental moral rights. However, in 1988, it "finally capitulated" and recognized certain moral rights. *See* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 500 n.179.

64. Anne Moebes, *Negotiating International Copyright Protection: The United States and European Community Positions*, 14 LOY. L.A. INT'L & COMP. L.J. 301, 325 (1992).

65. 1 BOORSTYN, *supra* note 44, § 1.02, at 1-5 to 1-6.

66. *See generally* Ralph S. Brown, *Adherence to the Berne Copyright Convention: The Moral Rights Issue*, 35 J. COPYRIGHT SOC'Y 196 (1988).

67. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.02[C], at 8D-14 to 8D-16 (1996).

68. *Id.* § 8D.02[D], at 8D-17 & n.39.

resurfaced just two years later in 1990 when Congress debated and ultimately passed VARA.[69]

In VARA, Congress formally recognized federal moral rights similar to, but more limited than, the rights of integrity and attribution set forth in the Berne Convention. VARA recognizes a three-fold right of *attribution* under which the author has (1) the right to claim authorship of his works of visual art, (2) the right to prevent the use of his name on works of visual art that he did not create, and (3) the right to prevent the use of his name on works that have been distorted, mutilated, or modified, if the use would be prejudicial to his honor or reputation.[70] VARA also recognizes a limited right of *integrity* under which the author can prevent (1) any intentional distortion, mutilation, or other modification of his work of visual art that would be prejudicial to his honor or reputation, and (2) any intentional or grossly negligent destruction of a work of recognized stature.[71] Although these rights are not transferrable, they may be waived by the author through an express writing.[72] Rights under VARA expire at the end of the calendar year in which the author dies.[73]

Although a significant step toward more comprehensive recognition of moral rights, VARA provides less protection for moral rights than is available under comparable European moral-rights regimes. Most notably, VARA protects only "work[s] of visual art,"[74] namely, (1) single paintings,

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69. *See* 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506 (1994); *see also* Damich, *supra* note 1, at 946. VARA was adopted partly out of concern that the United States needed to adopt some type of federal moral rights provision in order to comply with the Berne Convention. *Id.* The House report to VARA characterized the shortcomings of pre-VARA copyright law with regard to protecting artists' moral rights:

> [A]n artist who transfers a copy of his or her work to another may not, absent a contractual agreement, prevent that person from destroying the copy . . . . Further, with respect to modifications of a work, only an artist who retains the copyright in his or her work is able to invoke title 17 rights in defense of the integrity of the work, and then only where a modification amounts to the creation of a derivative work.

H.R. REP. NO. 101-514, at 8 (1990).

70. 17 U.S.C. § 106A(a)(2).

71. *Id.* § 106A(a)(3)(A)-(B). VARA provides exceptions to the right of integrity with regard to works incorporated into buildings. *See id.* § 113(d)(1)(A)-(B). An exception to the right of integrity also exists with regard to modifications resulting from the "passage of time or the inherent nature of the materials." *Id.* § 106A(c)(1). Moreover, the fair-use doctrine is an exception to these rights. *Id.* § 107.

72. *Id.* § 106A(e)(1). To be effective, a visual artist's waiver of rights under VARA must be written and unambiguous. *Id.*

73. *Id.* § 106A(d)(1), (4).

74. *Id.* § 106A(a).

drawings, prints, sculptures, or photographic images made "for exhibition purposes only," and (2) multiple paintings, drawings, prints, sculptures, and certain photographs, in limited editions of two hundred or fewer signed and numbered copies.[75] Additionally, VARA specifically excludes a wide range of works, including posters, maps, and audiovisual works; merchandising and advertising items; works made for hire; and works not subject to copyright protection.[76] Finally, and most pertinent to this Article, VARA specifically provides that the attribution and integrity rights are "[s]ubject to" copyright's fair-use doctrine.[77]

B. Fair Use

The fair-use[78] doctrine is an affirmative defense to copyright infringement which, if proved by the defendant,[79] justifies his unauthorized copying

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75. *Id.* § 101.

76. *Id.* VARA specifically excludes:

> (A) (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture, or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;
>
> (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
>
> (iii) any portion or part of any item described in clause (i) or (ii);
>
> (B) any work made for hire; or
>
> (C) any work not subject to copyright protection under this title.

Id.

77. *Id.* § 106A(a) ("Subject to *section 107* . . . .") (emphasis added); *id.* § 107 ("Notwithstanding the provisions of section 106 *and 106A*, the fair use of a copyrighted work . . . .") (emphasis added).

78. Some courts have treated as a "fair use" any use that is not substantially similar to the original work of authorship or that involves use of only noncopyrightable elements of the plaintiff's work. *See generally* Twentieth Century-Fox Film Corp. v. Stonesifer, 140 F.2d 579 (9th Cir. 1944); Mathews Conveyor Co. v. Palmer-Bee Co., 135 F.2d 73 (6th Cir. 1943); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir.) (L. Hand, J.), *cert. denied*, 298 U.S. 669 (1936); Meredith Corp. v. Harper & Row Publishers, 378 F. Supp. 686 (S.D.N.Y. 1974). *See generally* 3 NIMMER & NIMMER, *supra* note 67, § 13.05[A], at 13-155 to 13-156. This Article, however, employs the more modern meaning of the term "fair use" — that is, a "fair use" is a use that, although a prima facie infringement of the plaintiff's copyright, is permitted by § 107 of the Copyright Act.

79. *E.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (stating that fair use is affirmative defense); Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 561 (1985) (same). *See generally* 3 NIMMER & NIMMER, *supra* note 67, § 13.05, at 13-150; PATRY, *supra* note 52, at 725-26. At the trial level, the affirmative defense of "fair use is a question of fact, appropriate for the jury to decide." *Id.* at 725 n.27.

of the copyright owner's expression.[80] Unlike traditional moral rights that developed after the French Revolution in civil-law jurisdictions, fair use emerged more than one hundred years earlier in England.[81] English courts then recognized that permitting subsequent authors to use creatively and productively an earlier author's otherwise protected expression would advance learning and further the purpose of English copyright law — to encourage authors to "Compose and Write useful Books."[82]

American courts readily adopted the English fair-use doctrine in the mid-1800s, likewise to further the purpose of copyright law — to promote "the Progress of Science."[83] Originating as a judge-made doctrine in America, fair use remained so until codified by Congress in § 107 of the Copyright Act of 1976.[84] As codified, the fair-use defense is a limitation on all of the exclusive rights of the copyright owner, including reproduction, adaptation, distribution, public-performance, and public-display rights.[85] Moreover, the fair-use doctrine is an express limitation on artists' VARA attribution and integrity rights.[86]

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80. *See, e.g.*, DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW § 4F[3], at 4-176 (1992). On the fair-use defense in general, see HOWARD B. ABRAMS, THE LAW OF COPYRIGHT §§ 15.01-15.06 (1995); PAUL GOLDSTEIN, COPYRIGHT §§ 10.1-10.3 (1989); LEAFFER, *supra* note 46, § 10, at 317-48; 3 NIMMER & NIMMER, *supra* note 67, § 13.05, at 13-150 to 13-271; PATRY, *supra* note 52, at 718-84; and PATRY, *supra* note 11, at 413.

81. *See* PATRY, *supra* note 52, at 718 ("Fair use was developed by the courts, initially the English law and equity courts in the late-eighteenth and early-nineteenth centuries construing the 1710 Statute of Anne.").

82. *Id.* (discussing development of fair use as means of promoting purposes underlying 1710 Statute of Anne); *see also* Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1259-60 (2d Cir. 1986) (discussing history of fair use).

83. *See* PATRY, *supra* note 52, at 718-19. *See generally* Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) (Story, J.). That American courts readily embraced the English doctrine of fair use is another interesting contrast with their reluctance to adopt the continental doctrine of *droit moral*. *See supra* Part II.A.2.

84. Although Congress enacted the first American copyright statute in 1790, *see* 1 BOORSTYN, *supra* note 44, § 1.02, at 1-3, fair use was not codified until nearly two hundred years later when incorporated into the 1976 Copyright Act. *See* 17 U.S.C. § 107 (1994). In codifying fair use in 1976, Congress specifically noted that it did not intend to change the judge-made law on the subject. *See* 3 NIMMER & NIMMER, *supra* note 67, § 13.05, at 13-151. Patry observes, however, that § 107 *did* change the law by mandating that courts "*must* consider all four statutory factors. In the past, courts considered as few factors as they believed necessary, and applied whatever factors they believed relevant." PATRY, *supra* note 52, at 722-23.

85. 17 U.S.C. § 107 ("Notwithstanding the provisions of section 106 . . . ."); *id.* § 106 ("Subject to sections *107* through 120, the owner of copyright under this title has the exclusive right to do and to authorize any of the following . . . .") (emphasis added).

86. *Id.* § 106(A)(a) ("Subject to *section 107* . . . .") (emphasis added); *see also id.* § 107

Defining the fair-use doctrine and surveying its origins are easy; describing when it applies is not. Many judges have grappled with the problem of whether the circumstances at bar justified application of the defense.[87] Justice Story, the first American jurist to attempt to articulate when the fair-use doctrine permits otherwise unauthorized copying, set forth in *Folsom v. Marsh* an assortment of general considerations rather than a bright-line rule to resolve fair-use issues:

> In short, we must often, in deciding questions of this sort, look to the nature of the objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.[88]

In codifying the fair-use doctrine more than 125 years later, Congress could be no more specific. Like Justice Story did more than one hundred years before, Congress set forth a series of nonexclusive[89] "factors" for courts to consider in resolving fair-use questions, including "the purpose and character of the use," the "nature of the copyrighted work," the "amount and substantiality" of the copyrighted work used, and the "effect of the use upon the potential market for or value of the copyrighted work."[90] Over

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("Notwithstanding the provisions of section 106 *and 106A*, the fair use of a copyrighted work . . . .") (emphasis added).

87. Judge Leval has observed that in the context of fair use: "Reversals and divided courts are commonplace." Pierre N. Leval, *Commentary: Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106-07 (1990). Professor Weinreb similarly has noted that "[t]he field is littered with the corpses of overturned opinions" and that "[i]t is de rigueur to begin a scholarly discussion [of fair use] by quoting one of the judicial laments that fair use defies definition." Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1137 (1990).

88. Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901) (Story, J.).

89. *See* Weissmann v. Freeman, 868 F.2d 1313, 1323 (2d Cir. 1989) ("Congress established these nonexclusive factors as a guide to courts considering fair use."); Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1260 (2d Cir. 1986) (noting that "factors listed in the statute are not intended to be exclusive"); Financial Info., Inc. v. Moody's Investors Serv., Inc., 751 F.2d 501, 508 (2d Cir. 1984) ("Rather than a sequence of four rigid tests, the fair use analysis consists of a 'sensitive balancing of interests.'").

90. 17 U.S.C. § 107(1)-(4) (1994). The entirety of § 107 provides as follows:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is fair use the factors to be considered shall include —
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> (1) the purpose and character of the use, including whether such use is of a com-

the years, courts[91] and commentators[92] have attempted to refine and recast the analysis of these statutory factors and to devise alternative approaches to fair use in an effort to bring greater uniformity and predictability to the application of this enigmatic doctrine. Although these goals are laudable, fair use is, and likely will remain, a doctrine that courts will apply on a case-by-case basis, despite the inconsistency and unpredictability that necessarily results from such an ad hoc approach.

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mercial 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.
The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id. § 107.

91. For example, the Supreme Court in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), attempted to formulate presumptions to expedite the analysis of the four factors. The Court noted that a finding of commercial purpose as to the first factor gave rise to a conclusion that the defendant's copying was "presumptively . . . unfair," which in turn gave rise to a presumption as to the fourth factor that the defendant's use adversely affected the potential market for the copyrighted work. *Id.* at 451. More recently, however, the Court held that a finding of commercial use does not render the use presumptively unfair: "No such evidentiary presumption is available to address either the first factor . . . or the fourth . . . in determining whether a transformative use, such as parody, is a fair one." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994) (Souter, J.).

92. For a sampling of the voluminous commentary in this regard, see generally Michael G. Anderson & Paul F. Brown, *The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law*, 24 LOY. U. CHI. L.J. 143 (1993); Frank P. Darr, *Testing an Economic Theory of Copyright: Historical Materials and Fair Use*, 32 B.C. L. REV. 1027 (1991); Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233 (1988); William W. Fischer, III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661 (1988); Wendy J. Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the* Betamax *Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982); Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677 (1995); Pierre N. Leval, Campbell v. Acuff-Rose*: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19 (1994) [hereinafter Leval, *Rescue of Fair Use*]; Pierre N. Leval, *Fair Use or Foul?*, 36 J. COPYRIGHT SOC'Y 167 (1989) [hereinafter Leval, *Fair Use or Foul?*]; Leval, *supra* note 87; William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667 (1993); Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67 (1992); Leo J. Raskind, *A Functional Interpretation of Fair Use*, 31 J. COPYRIGHT SOC'Y 601 (1984); Weinreb, *supra* note 87, at 1137; and L. Ray Patterson, *Understanding Fair Use*, 55 LAW & CONTEMP. PROBS., Spring 1992, at 249.

III. The Incompatibility of Moral Rights and Fair Use

Although the fair-use doctrine is an explicit statutory limitation on artists' federal moral rights, moral rights are utterly incompatible with fair use. Although other commentators have mentioned the problem,[93] none has analyzed it thoroughly.[94] For example, during the congressional debate over VARA in 1989, Professor Ginsburg of the Columbia Law School noted that it would be "inappropriate" to subject the integrity and attribution rights to fair use.[95] Lawyer Peter Karlen similarly commented: "I don't see

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93. *See* PATRY, *supra* note 52, at 1049 ("One potentially fascinating area of conflict between traditional copyright law and VARA is the provision making Section 106A rights subject to the fair use defense."); PATRY, *supra* note 11, at 393-94 (same); Damich, *supra* note 1, at 987 ("The application of the fair use doctrine is inappropriate in the case of the right of integrity as applied to irreplaceable works, and in the case of the right of attribution."); Peter H. Karlen, *California Art Legislation Goes Federal: AALS Art Law Section Symposium-Moral Rights and Real Life Artists*, 15 HASTINGS COMM. & ENT. L.J. 929, 939 (1993) ("[I]t is difficult to imagine what a fair use of an art work can be, especially based on the kinds of 'fair use' arguments we have encountered in litigation."); *see also* Eric M. Brooks, Note, *"Tilted" Justice: Site-Specific Art and Moral Rights After U.S. Adherence to Berne Convention*, 77 CAL. L. REV. 1431, 1477 (1989); Robert J. Sherman, Note, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 412 (1995). In the context of traditional moral rights, Patterson and Lindberg have noted that moral rights and fair use are antithetical notions: "The moral-rights doctrine is to the author what the fair-use doctrine is to the user — each being a limitation on the monopoly of copyright to benefit a class of persons favored by the constitutional copyright clause." L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USER'S RIGHTS 171 (1991).

94. The only extended discussion of the application of fair use to artists' integrity rights reached the surprising conclusion that fair use should be given "wide berth" in this regard. *See generally* Yonover, *"Dissing" of Da Vinci*, *supra* note 1; Yonover, *Precarious Balance*, *supra* note 1 (substantially similar later version of *"Dissing" of Da Vinci*). For all of the reasons discussed below, however, fair use should not be given "wide berth" to limit federal moral rights. *See infra* Part III.

95. On the application of fair use to VARA, Professor Ginsburg noted:

> The bill would subject the integrity and attribution rights to the § 107 fair use exemption. I believe this is inappropriate. What is "fair" about mutilating an original (or one of a limited edition)? What public policy does it advance; what public benefit does it secure? Fair use generally concerns the productive use of a prior work in the creation of a new expression. Under the bill as drafted, one can certainly mutilate a multiple (one of over 200) to make a point (parodistic or otherwise) about a work; what social need is there to destroy the original? Similarly, what is "fair" about denying authorship credit, or falsely attributing an artist's name? In this context, it is worth noting that many Berne countries whose copyright laws include provisions essentially equivalent to the fair use exception make that exception subject to acknowledging the authorship of the copied source.

how the [fair-use] factors enumerated at Section 107 particularly relate to these rights of artists."[96] Mindful of these comments, Congress acknowledged that "the modification of a single copy or limited edition of a work of visual art has different implications for the fair use doctrine than does an act involving a work reproduced in potentially unlimited copies."[97] Instead of exploring these "different implications," however, Congress hastily[98] included a fair-use limitation on federal moral rights, relying upon little more than the following assurance from a subordinate in the Copyright Office: "Our preliminary assessment has been that there isn't any significant conflict between the fair use doctrine and the copyright law and the proposed rights of integrity and attribution."[99] Congress's haste is apparent from the ungrammatical nature in which it integrated federal moral rights

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Visual Artists' Rights Act of 1989: Hearings on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary, 101st Cong. 89 (1989) [hereinafter *H.R. Hearings on the Visual Artists' Rights Act of 1989*] (statement of Prof. Jane C. Ginsburg) (citations omitted).

96. *Moral Rights in Our Copyright Laws: Hearings on S. 1198 and S. 1253 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 101st Cong. 105-06 (1989) [hereinafter *S. Hearings on Moral Rights in Our Copyright Laws*] (statement of Peter H. Karlen). Pointedly, Karlen raised the following questions: "How can it possibly be a fair use to destroy or mutilate a work of art? How can it be a fair use to deprive the artist of credit, especially since giving credit is one of the considerations in determining that there has been a fair use." *Id.* at 105. He also stated: "I still don't see how users have any need to use an artwork to deprive the artist of moral rights. Dealers, collectors, museums, and art administrators have no need to use works of fine art in a manner which causes destruction or mutilation or deprives the artist of credit." *Id.* at 106.

97. H.R. REP. NO. 101-514, at 22 (1990).

98. VARA passed on the very last day of the 101st Congress as part of a larger bill authorizing eighty-five new federal judgeships. *See* Sirota, *supra* note 21, at 463-64.

99. Congressman Cobel asked Register of Copyrights Ralph Oman as "[o]ne final question" if he would comment on Professor Ginsburg's statement that it would be "inappropriate to subject the integrity and attribution right to the 107 fair use exemption." *H.R. Hearings on the Visual Artists' Rights Act of 1989*, *supra* note 95, at 77. Oman apologized that he had not "read her testimony" and then deferred to one of his deputies, Ms. Schrader. *Id.* Schrader testified as follows:

> MS. SCHRADER. Our preliminary assessment has been that there isn't any significant conflict between the fair use doctrine and the copyright law and the proposed rights of integrity and attribution. However, to the extent that Congress has any doubt — and this bill suggests there may be some doubt — then it would be a wise move to subject the moral right to the fair use provision just as the economic rights are subjected to the fair use provision. So in practical terms, we don't really think it is going to be a problem. But we would support the bill subjecting the moral right to the fair use provision.

Id.

into the fair-use provision of the Copyright Act.[100] But its lack of deliberation is most apparent upon considering both the doctrinal incompatibility of fair use and federal moral rights and the difficulties associated with trying to apply the former to limit the latter.[101] This Part explores the different implications of applying fair use in the context of federal moral rights and concludes that these differences illustrate the fundamental incompatibility of the doctrines.

A. The Nature of the Things Affected by the Fair-Use Doctrine and by Federal Moral Rights Are Distinctly Different

The Copyright Act and VARA create rights in things.[102] However, the nature of the *intangible* things affected by the Copyright Act (and its fair-use doctrine) and the nature of the *tangible* things affected by federal moral rights are vastly different. For the following reasons, copyright's fair-use doctrine is out of place in the tangible domain of federal moral rights.

1. Things Affected by Copyright and Its Fair-Use Doctrine

The Copyright Act creates and governs property rights in certain intangible intellectual things, particularly "original works of authorship."[103] American copyright law, therefore, is not primarily about governing rights in the tangible objects[104] embodying intellectual works. Section 202 makes

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100. The fair-use provision, § 107, presently provides: "Notwithstanding the *provisions of sections 106 and 106A*, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by *that section* . . . is not an infringement of copyright." 17 U.S.C. § 107 (1994) (emphasis added). In leaving untouched the phrase "that section," Congress failed to conform the existing language of § 107 to the revision that inserted the reference to § 106A. Thus, Congress's utilization of the singular limiting adjective "that" rather than the plural "those" was a sloppy oversight.

101. Given that Congress does not seem to have thought through *any* of the implications of limiting federal moral rights with the fair-use doctrine, the title of this Article perhaps should be *Thinking Through the Compatibility of Fair Use and Moral Rights* rather than *Rethinking* . . . .

102. Technically speaking, the provisions of VARA are now part of the Copyright Act, 17 U.S.C. §§ 101-810. For purposes of this Article, however, the term "Copyright Act" refers to those portions of Title 17, including §§ 102, 106, and 107, that govern traditional economic exclusive rights; the term "VARA" refers to those portions of Title 17, including § 106A, that govern "works of visual art" as defined in § 101.

103. 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated . . . .").

104. "Tangible property, whether real or personal, relates to a physical object. Intangible property . . . refers to a set of rights defined by the law that are not related to a phys-

this abundantly clear: "Ownership of a copyright . . . is distinct from ownership of any material object in which the work is embodied."[105] Thus, the Copyright Act carefully distinguishes the intangible copyrighted work ("work of authorship") from a tangible "material object" in which that work is fixed ("artifact"). Thus, even when an artist sells an oil-on-canvas painting, he retains the exclusive right to the intangible intellectual thing that he has created (the work of authorship), and he is free to reproduce that work in an infinite number of copies. In contrast, although the owner of the artifact may sell the tangible object at will,[106] he may not violate the artist's rights in the intellectual work embodied therein by, for example, reproducing the work in copies.[107]

As a body of law governing the ownership of intangible, intellectual things, copyright is a branch of intellectual property law. One commentator has described intellectual property law as "a system of rights in things that are not really there."[108] Justice Story similarly observed in a celebrated

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ical object." DONALD A. GREGORY ET AL., INTRODUCTION TO INTELLECTUAL PROPERTY 1 (1994); *see also* Weinreb, *supra* note 87, at 1139 ("[C]opyright is not only intangible, and in that respect different from most of the ordinary things that one holds as property, but complex . . . ."). Note, however, that a few provisions of the Copyright Act do regulate rights in tangible things embodying works of authorship. *See* 17 U.S.C. § 109 (first-sale doctrine; record-rental provisions).

105. 17 U.S.C. § 202. Section 202 states:

> Ownership of a copyright, or any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object . . . does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

Id.; *see, e.g.*, Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 818 (1990) ("Intellectual property rights are rights in ideal objects, which are distinguished from the material substrata in which they are instantiated.").

106. *See* 17 U.S.C. § 109(a) (1994) (first-sale doctrine) ("Notwithstanding the provisions of section 106(3), the owner of a particular copy . . . lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy . . . .").

107. *See id.* § 106(1) (reproduction right).

108. Stephen L. Carter, *Owning What Doesn't Exist*, 13 HARV. J.L. & PUB. POL'Y 99, 99 (1990) ("Intellectual property . . . might best be described as a system of rights in things that are not really there, which is why I often describe the proprietary rights that intellectual property rules vest as *owning what doesn't exist.*"). Professor Hughes has opined that "atypical forms of property, such as intellectual property, are becoming increasingly important relative to the old paradigms of property, such as farms, factories, and furnishings." Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 288 (1988).

copyright decision that intellectual property law is "what may be called the metaphysics of the law."[109] Although it is difficult to define precisely what intellectual property is,[110] it is instructive to consider some of the differences between intellectual property (including copyrightable "works of authorship") and tangible property.

First, intellectual property, unlike most tangible property, is a "public good."[111] In simplest terms, a "public good" is a thing that is not consumed by use.[112] Because they are not consumed by use, public goods often can be used simultaneously by numerous people in diverse locations. For example, a copyrighted work embodied in an oil painting can be reproduced in thousands of art-history books and then can be used simultaneously by thousands of people around the world. In contrast, at any given time a thing such as a framed painting or a car can be used in only one place.

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109. Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901) (Story, J.).

110. *See* GREGORY ET AL., *supra* note 104, at 1 ("Intellectual property is an intangible that is not easily described."). A positivist would define intellectual property as "property created or recognized by existing legal regimes of copyright, patent, trademark, and trade secret." Hughes, *supra* note 108, at 292. Professor Hughes further notes: "A universal definition of intellectual property might begin by identifying it as nonphysical property which stems from, is identified as, and whose value is based upon some idea or ideas." *Id.* at 294. This definition is problematic in the context of copyright because copyright does not protect ideas — only expression. *See* 17 U.S.C. § 102(b). Therefore, copyright's purpose is not to protect value attributable to the ideas contained in an otherwise copyrightable work.

111. *E.g.*, Fischer, *supra* note 92, at 1700 ("Unlike most goods and services, [works of intellect] can be used and enjoyed by unlimited numbers of persons without being 'used up.'"); Gordon, *supra* note 92, at 1610-11 (discussing public-good characteristic of intellectual property and copyrighted works of authorship); Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1554 (intellectual property is a "public good"); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUDIES 325, 326 (1989) ("A distinguishing characteristic of intellectual property is its 'public good' aspect."); Palmer, *supra* note 105, at 818 n.3 ("The relevant difference between [intangible goods constituting intellectual property] and tangible goods is that the former can be instantiated an indefinite number of times, that is, they are not scarce in a static sense, while tangible goods are spatially circumscribed and are scarce in both the static and the dynamic sense of the term.").

112. *E.g.*, BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 31 (1994); Carter, *supra* note 108, at 102 (public goods are "*non-excludable*, in the sense that once they are brought forth from the mind, they can generally be taken by a second user at a cost close to zero, and they are subject to *non-rivalrous consumption*, in the sense that one user's use of the idea does not reduce the value of the idea to another who wishes to use it"); Gordon, *supra* note 92, at 1611 (public goods are "virtually inexhaustible once produced, in the sense that supplying additional access to new users would not deplete the supply available to others"); Lacey, *supra* note 111, at 1554 (public goods are "those whose consumption by individual A does not preclude consumption by B, C, D, and others").

Hence, if you photocopy my painting, we can both use the underlying work at the same time in different locations; but if you use my car, I walk. The copyrighted work is a public good; the car is not.

A second characteristic of intangible intellectual property is that it is more difficult to protect intellectual property than most tangible things. As a result, intellectual property is susceptible to use by persons who have paid nothing to create the work (free riders).[113] For example, a painting reproduced in an art-history book can be copied in seconds by anyone operating a photocopy machine. Having made his painting available to the public, the painter will have a difficult time preventing others — free riders — from making unauthorized copies of the work of authorship.

A third characteristic of copyrighted intellectual property, and for purposes of this Article the most important characteristic, is that rights in intellectual property are potentially limited by the fair-use doctrine. An integral part of the Copyright Act, fair use limits copyright's protection of intangible intellectual works of authorship.[114] The fair-use doctrine, however, has never been applied to *tangible* property. As a result, one commentator has noted that "[t]he single most significant difference between intellectual property and other forms of property is the fair use 'defense.'"[115] To illustrate, consider a hypothetical school teacher's efforts to educate her art-appreciation class. The fair-use doctrine would permit her to use freely a slide of a painting to demonstrate a particular genre of contemporary art.[116] But what if she needed a car to take a few members of the class to a local art museum to see the painting in person? Would it be "fair use" for her to use her neighbor's car for free and without permission for this clearly educational purpose?[117] Absolutely not. It would be criminal.[118]

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113. *See, e.g.*, Gordon, *supra* note 92, at 1611 ("[P]ersons who have not paid for access cannot readily be prevented from using a public good. Because it is difficult or expensive to prevent 'free riders' from using such goods, public goods usually will be under-produced if left to the private market."); Lacey, *supra* note 111, at 1554 (stating that it is difficult to protect intellectual property from "unauthorized uses — it is much easier to copy a book than to steal a car"). The free-rider problem exists largely because intellectual property is a public good.

114. *See supra* Part II.B.

115. Lacey, *supra* note 111, at 1544; *see also* Hughes, *supra* note 108, at 295 (observing that fair use is "limitation[ ] on intellectual property rights").

116. *See* 17 U.S.C. § 107 (1994) (allowing use for purposes of "classroom teaching" that would have little or no impact on market for copyrighted work).

117. This is a slight variation on the following hypothetical by Professor Lacey in her *Duke Law Journal* article:

> The fair use defense may seem unremarkable and logical when applied to intellectual property, but consider its extension to other types of property. Imagine

Similarly, consider a parodist seeking to mock the modern architectural design of a home. In order to show that the home looks like it came from outer space, the parodist spray-paints fanciful Martians all over the front facade. Given that the parodist was just using the homeowner's house to produce a new work of art, should the homeowner's rights in his tangible property be limited by the fair-use doctrine? Please. Fair use simply does not limit rights in tangible property. Here, one man's parody is another's graffiti.[119]

As an *intellectual property* institution, fair use simply does not permit the "entry or physical interference" with *tangible* property.[120] In sum, the fair-use doctrine does not now, and has never in its 150-year history in the United States, affected property rights in tangible property.[121]

> a teacher appropriating someone's van to take his children on a field trip (clearly an educational purpose), a collector removing just one gem from the crown jewels (a *de minimis* amount taken), or a person inhabiting without rent one of Donald Trump's thousands of New York apartments (almost no economic effect on the market). These examples may seem frivolous or impractical, but they are completely consistent with the underlying assumptions behind the concept of "fair use." It is only because we are so conditioned to the traditional rules of private property ownership that we cannot seriously imagine a "fair use" of cars or housing.

Lacey, *supra* note 111, at 1545-46.

118. *See* MODEL PENAL CODE § 223.9 (1962) (Unauthorized Use of Automobiles and Other Vehicles) ("A person commits a misdemeanor if he operates another's automobile . . . without consent of the owner. It is an affirmative defense to prosecution under this Section that the actor reasonably believed that the owner would have consented to the operation had he known of it."). Note that fair use is not an affirmative defense to this crime. *Id.*

119. For this reason, parody that violates artists' integrity rights in tangible artifacts arguably is nothing more than vandalism by another name.

120. *See* Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1367-68 (1989) (discussing concerns of intellectual property law in general). That fair use permits certain unauthorized uses of intangible copyrighted works is partly attributable to the public nature of intellectual property. That is, permitting one person to use fairly a copyrighted work does not deprive others, particularly the copyright owner, from simultaneously using the work for other purposes. *See* Lacey, *supra* note 111, at 1555 ("The 'public good' characteristics of intellectual property have been used to justify the fair use defense."); Posner, *supra* note 92, at 73 ("Intellectual property is a public good. A pencil is not. If you take my pencil I cannot use it, but if you take my intellectual property I can still use it — but my incentive to create it will be diminished if I cannot make you pay for it."). For a discussion of other justifications for the fair-use defense, see *infra* Part III.C.1. In contrast, because of the nonpublic nature of most *tangible* goods, any purportedly fair use by another would in fact deprive the copyright owner of his work.

121. Lacey, *supra* note 111, at 1536 (noting that any attempt to apply such a limitation "to other forms of property would strike most people as dangerous and unnatural"). Like-

2. *Things Affected by Federal Moral Rights*

Unlike the Copyright Act, VARA creates rights in *tangible art objects* (artifacts) — not in intangible, intellectual things. That Congress granted artists limited moral rights in a limited variety of tangible artifacts stands in marked contrast to the continental moral-rights tradition from which VARA descended. European moral rights, including those recognized and protected by Article *6bis* of the Berne Convention, are expansive personality-based rights that protect a wide range of artistic creations.[122] For example, creators of musical works, motion pictures, literary works, and works of visual art, among other works, have in Europe protectable attribution and integrity rights relating to such works.[123] Moral rights in these works are implicated not only when another misattributes or harms the tangible artifact in which the artist originally fixed the work, but also when another misattributes or harms a *reproduction* of the work.[124] As a result, traditional moral rights protect the integrity of not only tangible art objects embodying works of authorship, but also the intangible work of authorship itself.[125]

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wise, Judge Posner has observed that artists are not "allowed to steal paper and pencils" with the blessing of the fair-use doctrine in order to create parodies. *See* Posner, *supra* note 92, at 73. The Supreme Court in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), noted that the fair-use doctrine would not allow someone to "use" tangible jewelry under the auspices of fair use:

> The use to which stolen jewelry is put is quite irrelevant in determining whether depriving its true owner of his present possessory interest in it is venial; because of the nature of the item and the true owner's interests in physical possession of it, the law finds the taking objectionable even if the thief does not use the item at all.

Id. at 450 n.33.

122. *See, e.g.*, 2 NIMMER & NIMMER, *supra* note 67, § 8D.02[A], at 8D-11; Damich, *supra* note 1, at 953 (VARA rights do "not measure up to the concept of moral rights embodied in article *6bis*"); Sirota, *supra* note 21, at 467 (VARA does "not provide equivalent protection to article 6bis of the Berne Convention"); Note, *Visual Artists' Rights in a Digital Age*, 107 HARV. L. REV. 1977, 1986 (1994) ("Explicit and implicit limitations on the VARA integrity right render it unequal to its civil law origins . . . .").

123. 2 NIMMER & NIMMER, *supra* note 67, § 8D.02[A], at 8D-11 ("Under Continental notions of moral rights, the author's personality may be said to pervade works of authorship across categories, from the literary to the graphical to the musical.").

124. *E.g.*, PATRY, *supra* note 52, at 1025-33 (VARA, unlike the Berne Convention, does not protect reproductions); WIPO, *supra* note 45, at 42 ("Generally speaking, a person permitted to make use of a work (for example by *reproducing or publicly performing it*) may not change it either by deletion or by making additions.") (emphasis added); *id.* at 41 (noting that moral rights are "exercisable even against those permitted by the Convention to reproduce the work"); Damich, *supra* note 21, at 389, 404 (subright of Berne's "right of respect" (right of integrity) prohibiting "unfaithful reproduction" is "the subright to object to poor-quality reproductions or derivative works involving copies that pervert the work").

125. *See* Jaszi, *supra* note 63, at 478 n.87 ("It is interesting to note that in Continental

Federal moral rights are considerably different. Unlike traditional moral rights, federal attribution and integrity rights do not and were not intended to protect the *intangible* work of authorship embodied in the VARA-protected artifact.[126] On the contrary, these rights relate only to the original artifact in which the artist fixed the work.[127] For example, because an artist who creates an original oil-on-canvas artifact has created a work of visual art,[128] he has the right to prevent others from distorting, mutilating, or modifying it in a manner "prejudicial to his or her honor or reputation."[129] But he only has the right to prevent others from modifying *that artifact*; VARA does not prevent others from making noninfringing copies[130] of the underlying work of authorship and then distorting, mutilating, or

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law the distinction between the physical object in which a 'work' is embodied and the 'work' itself, so crucial to Anglo-American jurisprudence, is sometimes blurred.").

126. In enacting VARA, "Congress made clear its antipathy to the expansion of copyright law to embrace general moral rights." 2 NIMMER & NIMMER, *supra* note 67, § 8D.06, at 8D-63; *see also* Note, *supra* note 122, at 1986 ("Explicit and implicit limitations on the VARA integrity right render it unequal to its civil law origins . . . .").

127. *E.g.*, 1 BOORSTYN, *supra* note 44, § 5.07[3][a]-[b], at 5-24 to 5-29 (VARA integrity and attribution rights do not apply to reproduced copies of original work); 2 NIMMER & NIMMER, *supra* note 67, § 8D.02[D][5], at 8D-30 (noting that "distinction between art and artifact . . . permeates (and effectively vitiates)" VARA). Nimmer and Nimmer state:

> Another distinction bears noting. As previously explained, the copyright categories of § 102(a) pertain to conceptual creations. By contrast, the . . . definition of "works of visual art" refers solely to physical items. To illustrate, a "pictorial work" could be portrayed on canvas, in a magazine, on a billboard, or on a computer screen; but a "work of visual art" can consist only of the artist's original "painting" and limited edition supervised copies, all other representations of the same image being definitionally ineligible.

Id. § 8D.06[A][2], at 8D-69 to 8D-70; *see also* PATRY, *supra* note 52, at 1032-33 (noting that "VARA's principal goal is to preserve the physical integrity of the physical embodiment of visual art"); Damich, *supra* note 21, at 402 (noting that "perhaps its biggest drawback is that VARA does not provide for the subright against unfaithful reproduction"); *id.* at 403 (Article 6*bis* "applies to all literary and artistic works. VARA applies only to a very narrow definition of visual art."). As a result, VARA does not prevent the misattribution or the infliction of harm to a copy: "VARA does not provide for the subright against unfaithful reproduction." *Id.* at 401.

In keeping with VARA, Congress passed the National Film Preservation Act of 1992, which preserves only celluloid film and does not accord true moral rights protection to films. 2 NIMMER & NIMMER, *supra* note 67, § 8D.02[D][4], at 8D-27 to 8D-28; *see* 2 U.S.C. § 179(a)-(k) (1994) (National Film Preservation Act).

128. *See* 17 U.S.C. § 101 (1994) (defining "work of visual art" to include "a painting . . . existing in a single copy").

129. *Id.* § 106A(a)(3)(A) (integrity right).

130. To be noninfringing, the copies either (1) must be substantially different from the copyrighted work, (2) must be authorized by the copyright owner, or (3) must otherwise be permitted by a limitation on § 106 exclusive rights, such as the fair-use defense.

otherwise modifying any of the new copies. Considering that VARA's principal effect is to create rights in tangible artifacts,[131] and considering that the fair-use doctrine has never limited rights in tangible property, fair use should not limit artists' federal moral rights in tangible artifacts.

B. The Rights Trumped When Fair Use Limits Federal Moral Rights Are Distinct from Those Trumped When Fair Use Limits Copyright Exclusive Rights

Just as the nature of the things affected by the Copyright Act and VARA differs, so too does the nature of the *rights* created by each. The Copyright Act creates property rights to protect works of authorship. VARA, however, creates difficult to define, but property-like, rights in artifacts distinctively bound up with the artist's person. Regardless whether federal moral rights are characterized as personality-based rights or as property rights in "personal property," their intimate affiliation with the artist suggests that they deserve greater respect than ordinary property rights, including those created by copyright. Because federal moral rights arguably deserve greater respect than the copyright rights trumped by fair use, the fair-use doctrine should not impinge on moral rights to the same extent that it impinges upon copyright's exclusive rights.

1. Federal Moral Rights as Personality-Based Rights

Continental moral rights are a component of the artist's right of personality. For this reason, they are distinct from any property rights that the artist may have in a work of authorship or in an artifact embodying such a work.[132] As rights of personality, true moral rights are not a part

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131. *See* 17 U.S.C. § 106A(a)(1)(A) (right of attribution); *id.* § 106A(3) (right of integrity). Note, however, that VARA also gives the artist the right "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." *Id.* § 106A(a)(1)(B) (emphasis added). This right is personal to the author and does not relate to a tangible artifact created by him.

132. *See* Long & D'Amato, *supra* note 19, at 8 (true moral rights are "premised on the value added to the work by the unique personality of the human creator" and "differ from the rights granted under a nation's copyright laws"); *see also* LEAFFER, *supra* note 46, § 8.27, at 275-76 ("[T]he moral right of the author . . . treats the author's work not just as an economic interest, but as an inalienable, natural right and an extension of the artist's personality."); PATTERSON & LINDBERG, *supra* note 93, at 165-66 ("Moral rights are personal in nature, whereas economic rights are essentially proprietary."); Damich, *supra* note 1, at 955 ("Moral rights derive from the fact that a work is an expression of the artist's personality."); Sirota, *supra* note 21, at 464-65 (moral rights under Berne Convention are rights "of personality, separate from economic and property rights").

of the artist's patrimony, which includes only those "rights and charges appreciable in money."[133] Hence, to violate a European artist's moral right of attribution or integrity is "to mistreat the artist, to invade his area of privacy, to impair his personality" more than it is to hurt his pocketbook.[134]

Unlike continental moral rights, however, federal integrity and attribution rights are difficult to characterize.[135] Several features of those rights suggest that they are similar to their personality-based European counterparts. First, VARA traces its roots to the European moral-rights tradition.[136] Indeed, in enacting VARA, Congress clearly was attempting to create attribution and integrity rights similar to those developed in continental Europe and codified in the Berne Convention.[137] Second, federal moral rights can be enforced only by the artist,[138] cannot be transferred by the

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133. 1 PLANIOL & RIPERT, *supra* note 2, pt. 2, at 266-67. Nonpatrimonial rights in France include "the right of man to his own body and name; or the intellectual right of an author to a work of art." 2 AUBRY & RAU DROIT CIVIL FRANCAIS § 162.4 (Paul Esmein ed., 7th ed. 1961), *translated in* 2 LA. STATE LAW INST., CIVIL LAW TRANSLATIONS 5 (Jaro Mayda trans., 1966). Traditionally, nonpatrimonial (or extrapatrimonial) rights cannot be alienated by the holder. *Id.* § 162, at 6.

134. 1 JOHN MERRYMAN & A. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 145 (2d ed. 1987).

135. *See, e.g.*, PATRY, *supra* note 52, at 1021 (noting both personal and economic attributes of §§ 106 and 106A rights); Sirota, *supra* note 21, at 468 ("VARA is a difficult law to categorize."). Some commentators have described VARA rights as "moral rights" or have stated that VARA rights are personality-based rights like true continental moral rights. *See, e.g.*, 1 BOORSTYN, *supra* note 44, § 5.07, at 5-20 to 5-21 (VARA rights are "personal to the author and exist independently of his or her economic rights in the copyright."). Nevertheless, VARA cannot be so easily classified.

136. *See, e.g.*, 2 NIMMER & NIMMER, *supra* note 67, § 8D.06[A][2], at 8D-69 ("In recognition of their link more to the author's personality than pocketbook, moral rights stand in contrast to economic rights. Accordingly, the newly created artists' rights are independent of copyright ownership rights."); Jaszi, *supra* note 63, at 500 n.179 ("Adherence to the Berne Convention had the effect of exposing the United States to the 'culture' of the Convention, which is rooted in the 'authors' rights' tradition of Continental European law, and thus in the Romantic vision of 'authorship.'").

137. *E.g.*, H.R. REP. NO. 101-514, at 5 (1990) (VARA rights are "analogous to those protected by Article *6bis* of the Berne Convention, which are commonly known as 'moral rights'").

138. *See* 17 U.S.C. § 106A(b) (1994) ("Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner."). That only the author may sue to redress VARA violations (and not his successors and assignees) suggests that VARA seeks to address personality considerations rather than economic ones. Professor Hughes notes:

> A creator concerned only with economic return might allow radical brutal changes in his work if this produced the most profit. Personality considerations, by contrast, cause owners to prohibit change, deletions, or misattributions during

artist during his life, and cannot be distributed to his heirs or legatees upon his death.[139] Third, federal moral rights, like the rights set forth in Article *6bis*, are intended to protect an artist's "honor and reputation"[140] — something harkening back to personality.[141]

If federal moral rights, like continental moral rights, are components of the artist's right of personality, then mere intellectual property rights, such as those conferred upon certain users by the fair-use doctrine, should yield in the case of conflict.[142] No European jurisdiction that recognizes personality-based moral rights limits those rights through a doctrine analogous[143] to fair use.[144] Moreover, although not explicitly addressing a con-

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> any reproduction. Indeed, a creator concerned purely with personality expression might allow free reproduction of his work as long as these restrictions were honored.

Hughes, *supra* note 108, at 349 n.244.

139. *See, e.g.*, 17 U.S.C. § 106A(e)(1) ("The rights conferred by subsection (a) [attribution and integrity rights] may not be transferred . . . ."); *id.* § 106A(d) (with regard to works of visual art created after June 1, 1991, the attribution and integrity rights "shall endure for a term consisting of the life of the author"); *see also* PATTERSON & LINDBERG, *supra* note 93, at 173 ("Moral rights are personal rights, limited to the creator and thus not assignable; the rights of copyright protected interests, are not limited to the author, and are assignable.").

140. *See* 17 U.S.C. § 106A(a)(2) (author can prevent use of his name as author of any modified work "which would be prejudicial to his or her honor or reputation"); *id.* § 106A(a)(3)(A) (author can prevent any "distortion, mutilation, or other modification . . . which would be prejudicial to his or her honor or reputation"); H.R. REP. NO. 101-514, at 5 (1990) (VARA protects "the reputations of certain visual artists . . . ."); *see also* PATRY, *supra* note 52, at 1032 n.62 (noting that VARA is "concerned with the artist" in protecting his reputation); PATTERSON & LINDBERG, *supra* note 93, at 170 ("A person's name and reputation are just as much the subject of ownership as his or her house or automobile or shares of stock in a corporation. The difference is that the latter are deemed to entail proprietary rights, while the former are labeled personal rights.").

141. Also indicative of the personal nature of federal moral rights is a component of VARA's attribution right that does not relate to any particular work of art, but rather solely to the artist. Particularly, the artist has the right "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." *See* 17 U.S.C. § 106A(a)(1)(B) (emphasis added). Given that this component of the attribution right does not relate to any tangible or intangible thing (other than the artist himself), it appears to relate to the artist's personality.

142. *See* Lacey, *supra* note 111, at 1548-49 ("In a direct conflict, the artist's moral rights limit the purchaser's property rights.").

143. The American fair-use doctrine has been characterized as "*sui generis*." *See* PATRY, *supra* note 11, at 589. Thus, there is no identical doctrine in Europe. *See id.* at 590.

144. *E.g.*, Yonover, *"Dissing" of Da Vinci*, *supra* note 1, at 1002-03 (noting that "most countries that provide moral rights protection do not recognize a fair use defense");

flict between moral rights and fair use, the Supreme Court in *Harper & Row Publishers v. Nation Enterprises*[145] deliberated whether the fair-use doctrine sanctioned the defendant's publication of portions of the then-unpublished autobiography of President Gerald Ford. Determining that the user's conduct did *not* constitute fair use, the Court in essence held that fair use must yield to the author's interest in choosing when and in what form to publish his work. This interest correlates to the author's personality-based moral right of divulgation, a right that is well recognized in Europe and that underlies the publication right of Copyright Act Section 106(3).[146] Thus, in at least one instance, the Court has subordinated fair use to an author's personal interests.[147]

2. *Federal Moral Rights as "Personal Property" Rights*

The notion that federal moral rights, like traditional moral rights, are components of the author's right of personality is sentimentally appeal-

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Yonover, *Precarious Balance*, *supra* note 1, at 121 (same); Note, *supra* note 122, at 1991 ("[S]ubjecting the VARA rights to the fair use provision of the Copyright Act places American visual artists at a distinct disadvantage as compared with artists in countries that do not recognize a fair use defense to violations of moral rights."). *But see* Gorman, *supra* note 21, at 427 (stating that "[a] number of national laws incorporate the doctrine of fair use as a defense against moral rights claims (as with copyright claims), or permit certain educational uses or parodies," without citing a single source or example). It is interesting to note that when the Berne Convention's counterpart to the fair-use doctrine is applied to permit the otherwise unauthorized use of an intangible work of authorship, the user must respect the original author's right to attribution. *See* PATRY, *supra* note 11, at 592-93. That is, the Berne Convention explicitly permits others to "make quotations" from works available to the public, provided that the quoting is "compatible with fair practice." *Id.* However, that right is qualified in Article 10(3) "by the requirement that the user 'mention . . . the source, and . . . the name of the author if it appears thereon.'" *Id.* at 593-94. "[T]his condition is designed to protect the author's right of attribution, granted in Article 6*bis*(1)." *Id.* at 594.

145. 471 U.S. 539 (1985).

146. 2 NIMMER & NIMMER, *supra* note 67, § 8D.02[C], at 8D-13 to 8D-14 ("[T]he author's right to control publication of his work can be seen as a species of the *droit de divulgation.*").

147. *See* PATRY, *supra* note 52, at 1021 n.11 ("[T]he Supreme Court [in *The Nation* case] has recognized that § 106 rights may implicate personal interests" of author); Fischer, *supra* note 92, at 1690-92 (characterizing *The Nation* case as fair-use decision that took into account the artist's "privacy rights" and "rights of artistic integrity"). Of course, there are other explanations for the Court's decision in *The Nation* case. *See generally, e.g.*, Gary L. Francione, *Facing the Nation: The Infringement and Fair Use of Factual Works*, 134 U. PA. L. REV. 519 (1986); John M. Kernochan, *Protection of Unpublished Works in the United States Before and After the "Nation" Case*, 33 J. COPYRIGHT SOC'Y 322 (1986); William F. Patry, *Fair Use After "Sony" and "Harper & Row,"* 8 COMM. & L. 21 (1986).

ing.[148] However, several other features of federal moral rights function more like property rights than like personality rights. Federal moral rights, like property rights, relate to a thing (an artifact). Federal moral rights, like property rights, may be enforced against the world, that is, against anyone that violates the artist's integrity or attribution rights. Federal moral rights, like property rights, follow the thing to which they are attached[149] and can be waived.[150] And perhaps most importantly, although attribution and integrity moral rights trace their roots to Europe, VARA's legal footing in the United States is the property-based institution of copyright. To be sure, in enacting VARA Congress noted that federal moral rights are "consistent with the purpose behind the copyright laws and the Constitutional provision they implement."[151] It is well established that the Constitution, and the copyright laws enacted pursuant to its Patent and Copyright Clause, create copyright law rights through positive grant[152] to provide economic incentives for artistic creation — not to enforce for their

148. Hughes, *supra* note 108, at 366 ("[R]ights to labor and rights to individual expression *do* have much more of a siren's call than property rights.").

149. *See* Ciolino, *supra* note 21, at 964-67 (noting similarities between property rights and traditional moral rights); Hughes, *supra* note 108, at 345-46 (noting that "[s]pecific covenants and restrictions on property" function like continuing personality rights in property because all permit person to retain "the specific stick(s) in the bundle of property rights which will 'contain' his continuing personality stake"); *id.* at 351 (noting that traditional moral rights prevent alienation of certain rights in intellectual property and therefore "prevent the complete alienation of the property"); Lacey, *supra* note 111, at 1548-49 (in context of true moral rights, noting that "the artist never really gives up her interest in the work of art to the subsequent property holder"); *id.* at 1583 n.222 (same).

150. *See* 17 U.S.C. § 106A(e)(1) (1994). VARA attribution and integrity rights

> may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified.

Id.; *see also* PATRY, *supra* note 52, at 1021 n.11 (VARA rights are not "purely personal" as evidenced by fact that "an artist may waive his or her § 106A rights in exchange for money"). However, true personality-based moral rights are waivable in most European jurisdictions. *See* Brooks, *supra* note 93, at 1479 ("Because it is conceptually abhorrent to forfeit 'ownership' of a personality right, assignment or transfer of paternity and integrity interests are forbidden; however, an artist may waive her right to enforce those rights as against a specified purchaser or commissioner."); Strauss, *supra* note 21, at 515. Nor does the Berne Convention prohibit waiver of 6*bis* rights. *See* WIPO, *supra* note 45, at 41-44.

151. H.R. REP. NO. 101-514, at 5 (1990).

152. PATTERSON & LINDBERG, *supra* note 93, at 110 (stating that in 1976 Copyright Act, Congress "clearly selected a single theory on which to build the new law: the statutory-grant theory"); Leval, *supra* note 87, at 1108 (copyright exclusive rights "exist only by virtue of statutory enactment").

own sake natural-law rights in artists' creations.[153] Considering that Congress enacted VARA pursuant to the limited power granted to it by the Patent and Copyright Clause, and considering that other features of VARA do not appear to function as personality rights, federal moral rights are better characterized as property rights.[154]

Even so, all property rights are not equal. Some warrant greater protection than others. Professor Margaret Jane Radin has persuasively argued that certain property is "bound up with a person" to such a degree that its loss would cause the owner "pain that cannot be relieved by the object's replacement."[155] Radin uses the following example to illustrate the distinct nature of such property: "[I]f a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo — perhaps no amount of money can do so."[156] To distinguish property "bound up with a person" from property held instrumentally (that is, property "replaceable with goods of equal market value"), Radin uses the terms "fungible property" and "personal property."[157] Arguing that personal property "gives rise to a stronger moral claim than [fungible] property,"[158] she maintains that personal property rights "should

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153. *E.g.*, Leval, *supra* note 87, at 1108 (copyright exclusive rights are not "absolute or moral right[s], inherent in natural law").

154. Some commentators have questioned whether VARA's exceedingly limited recognition of authors' rights jeopardizes the United States' accession to the Berne Convention, Article *6bis* of which recognizes significantly more expansive moral rights. *See* PATRY, *supra* note 52, at 1025 n.25; Damich, *supra* note 21, at 406-07.

155. MARGARET J. RADIN, RETHINKING PROPERTY 37 (1993) (reprinting Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982)). Radin's contention that persons can become bound up with external objects traces its roots to Hegel, who "argued in his *Philosophy of Right* that placing the will into an object takes the person from abstract to actual," and to Kant, who "argued in his *Rechtslehre* that property was necessary to give full scope to the free will of persons." *Id.* at 7. Interestingly, the continental moral-rights tradition likewise is philosophically rooted in the works of Hegel and Kant. *See* Netanel, *Alienability Restrictions*, *supra* note 21, at 20-21. For a recent critique of Radin's property-law theories, see generally Neil Duxbury, *Law, Markets and Valuation*, 61 BROOK. L. REV. 657 (1995).

156. RADIN, *supra* note 155, at 37. Radin uses the home as another example of property bound up with a person: "Our reverence for the sanctity of the home is rooted in the understanding that the home is inextricably part of the individual, the family, and the fabric of society." *Id.* at 71.

157. *Id.* at 37.

158. *Id.* at 48. *But see* Duxbury, *supra* note 155, at 667 (characterizing as "questionable" Radin's contention that personal property has stronger moral claim to protection than fungible property).

be protected to some extent against invasion by government and against cancellation by conflicting fungible property claims of other people."[159] Conversely, fungible property rights generally "should yield to some extent in the face of conflicting, recognized personhood interests."[160] Rather than advocating a rigid dichotomy between personal and fungible property, Radin proposes that "it makes more sense to think of a continuum that ranges from a thing indispensable to someone's being to a thing wholly interchangeable with money. Many relationships between persons and things will fall somewhere in the middle of this continuum."[161] Where on this continuum a certain thing falls can change over time as the holder's relationship with the object changes and as it is transferred from person to person.[162]

Evaluating VARA's property-like attribution and integrity moral rights in light of Radin's continuum further illustrates why those rights, even if not considered to be personality-based rights, should prevail over conflicting fair-use claims. Federal moral rights are more "bound up" with the person of the artist, and hence closer to the "personal" end of the continuum than copyright's exclusive economic rights typically are.[163] After all, there exists a "uniquely strong bond"[164] between an artist and his creations; "[t]he man who brings out of nothingness some child of his thought has rights therein which cannot belong to any other sort of property."[165]

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159. RADIN, *supra* note 155, at 71.

160. *Id.*

161. *Id.* at 53.

162. *Id.* at 16-17, 54. Radin notes that the personhood dichotomy

> focuses on the person with whom [the object] ends up — on an internal quality in the holder or a subjective relationship between the holder and the thing. The same claim can change from fungible to personal depending on who holds it. The wedding ring is fungible to the artisan who made it and now holds it for exchange even though it is property resting on the artisan's own labor. Conversely, the same item can change from fungible to personal over time without changing hands.

Id. at 54. Radin notes that the connection of a wedding ring to its owner could "become personal over time (its emotional significance could grow); or it could become abruptly depersonal, perhaps even reverting to fungible, if the relationship with which it was associated suddenly became a source of resentment and betrayal." *Id.* at 16.

163. Patterson and Lindberg have noted the possibility of viewing the moral right as "a personal-proprietary right." PATTERSON & LINDBERG, *supra* note 93, at 175.

164. Lacey, *supra* note 111, at 1593.

165. Zechariah Chafee, Jr., *Reflections on the Law of Copyright (I)*, 45 COLUM. L. REV. 503, 506-07 (1945) (quoting Thorvald Solberg, *Copyright Reform*, 14 NOTRE DAME L. REV. 343, 358 (1939)); Sirota, *supra* note 21, at 469 ("A piece of fine art may be a piece

Furthermore, federal moral rights descended from personality-based moral rights can vest only in the author,[166] cannot be transferred to others, can be exercised only by the author himself, and protect, among other things, the author's personal honor and reputation.[167] For these reasons, federal moral rights should be considered closer to the personal end of Radin's continuum than to the fungible end.

In marked contrast to federal moral rights, the Copyright Act's exclusive rights do not stem from the artist-centered moral-rights tradition.[168] And, unlike federal moral rights, copyright exclusive rights can vest initially in a person or entity other than the artist,[169] can be freely transferred in whole or in part to others,[170] can be exercised by any transferee,[171] and protect more an economic market for the artist's creations than the artist himself.[172] Although some aspects of the Copyright Act reflect Congress's concern for protecting artists' personal interests in artistic creations,[173] Copyright Act rights are decidedly closer to the fungible end of Radin's continuum than are VARA rights.

The fair-use doctrine vests in users of preexisting works the right to trump relatively fungible copyright exclusive rights. For example, in *Sony*

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of personal property, but more than any other kind of property, that art is inextricably bound up with the personality and reputation of its author.").

166. 17 U.S.C. § 106A(b) (1994) ("Only the author of a work of visual art has the [attribution and integrity] rights . . . whether or not the author is the copyright owner.").

167. *See supra* Part III.B.1.

168. *See infra* Part III.C.1.

169. 17 U.S.C. § 201(b). Section 201(b) states:

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

Id.

170. *Id.* § 201(d)(1) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.").

171. *Id.* § 501(b) ("The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.").

172. *See infra* Part III.C.1.

173. For example, the distribution right protects a right similar to the moral right of divulgation, *see* 17 U.S.C. § 106(3) (1994), and the termination-of-transfers provision gives an artist a continuing interest in his work of authorship even after transferring the copyright to another, *see id.* § 203.

Corp. v. Universal City Studios,[174] the Supreme Court held that home VCR owners using Betamax machines to time-shift television programs could rely upon fair use to trump certain rights of the copyright owners of publicly broadcast television programs. Given that the studios holding the copyrights were interested only in commercially exploiting the works, the studios were not "bound up" with the copyrighted works at issue. As a result, their property rights in the works were fungible and, hence, readily trumpable.

Although applying fair use to trump relatively fungible copyright exclusive rights is well accepted, applying it to trump more personal federal moral rights should not be. Consider the painter of an oil-on-canvas work: As the painting's creator, the artist may be "bound up" with it to such a degree that she does not want the artifact misattributed or altered without her permission.[175] As a visual artist "bound up" with her work of visual art, she has the continuing right to protect her interest in the artifact even after she has transferred it to another. This right is more personal than typical economic rights. To apply fair use, a doctrine born as a restriction on more fungible economic rights, in an effort to trump decidedly more personal federal moral rights would be troubling.

C. The Moral Justifications for the Fair-Use Doctrine and for Federal Moral Rights Are Irreconcilable

Laws exist for reasons.[176] The reasons for the Copyright Act and VARA — their respective justifications — are largely dissimilar. While the Copyright Act and its fair-use doctrine exist primarily to further the consequentialist goal of promoting the creation of new works of authorship, VARA exists primarily to further nonconsequentialist notions of artistic respect and artifact preservation. For the following reasons, the utilitarian fair-use doctrine should not limit federal moral rights intended to further nonutilitarian goals.

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174. 464 U.S. 417 (1984).

175. If not, she may simply waive her attribution and integrity rights in the artifact, *see* 17 U.S.C. § 106A(e)(1), transfer her copyright, *see id.* §§ 201(d), 204-05, and then sell to the highest bidder.

176. These reasons often go unconsidered: "Law's underpinnings, like many foundations or backgrounds, can be easily overlooked because we usually stand upon them or because we are straining to see something more specific on the horizon." KUKLIN & STEMPEL, *supra* note 112, at 2.

Ethical theories justifying the existence of property laws,[177] including laws creating property rights in intangible works of authorship, typically fall into one of two general categories: consequentialist or nonconsequentialist.[178] On the one hand, consequentialist theories, particularly utilitarian theories, maintain that the rightness or wrongness of a legal rule turns on the goodness or badness of its consequences.[179] Hence, utilitarians justify property rights "on the basis of the *good consequences* of their legal recognition, as distinct from their *moral rightness*."[180] On the other hand, nonconsequentialist theories — deontological theories — maintain that the rightness or wrongness of a legal rule turns solely on its moral propriety, regardless of its "consequences for human weal or woe."[181] Deontologists

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177. To consider the foundation of legal principles is to engage in moral philosophy, a "philosophical inquiry about norms or values, about ideas of right and wrong, good and bad, what should and what should not be done." D.D. RAPHAEL, MORAL PHILOSOPHY 8 (1994).

178. *E.g.*, Lacey, *supra* note 111, at 1564-67; Dale A. Nance, *Owning Ideas*, 13 HARV. J.L. & PUB. POL'Y 757, 763 (1990); *see also* Carter, *supra* note 108, at 100 (stating that most people "who write on intellectual property today justify the rules either on the moral ground that each of us possesses a natural right to control what we create or on the utilitarian ground that absent regulation, there will be no optimal supply of intellectual creations"); Barbara Friedman, Note, *From Deontology to Dialogue: The Cultural Consequences of Copyright*, 13 CARDOZO ARTS & ENT. L.J. 157 (1994). For discussions on the justifications for property rights in general, see LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS (1977); STEPHEN R. MUNZER, A THEORY OF PROPERTY (1990); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); and Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

179. J.J.C. Smart, *Utilitarianism*, *in* 8 ENCYCLOPEDIA OF PHILOSOPHY 206, 206 (Paul Edwards ed., 1967).

180. Nance, *supra* note 178, at 763. Nance adds that utilitarian theories, including economic theories,

> generally measure the good in terms of the satisfaction of human preferences, without imposing a judgment about whether those preferences are, in some objective sense, appropriate or correct. This measurement is done, by and large, by allowing aggregate preferences to be registered by the operation of the market, in this context by the demand that is revealed for the ideas in question.

Id.; *see also* Hughes, *supra* note 108, at 764-65.

181. Robert G. Olson, *Deontological Ethics*, *in* 2 ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 179, at 343, 343. Olson states: "The first of the great philosophers emphatically to enunciate the deontological principle was Immanuel Kant. . . . Kant went so far as to argue that it is wrong to tell a lie even to save another man's life. Moral rules, he claimed, are universally valid and admit of no exceptions." *Id.*; *see also* Palmer, *supra* note 105, at 820 (commenting that "personality-based rights theory forms the foundation of German and French copyright law" and harkens "back to Kant's discussions of the nature of authorship and publication and to Hegel's theory of cultural evolution").

typically justify property rights on one of two grounds:[182] (1) that a creator of a thing deserves to own the fruits of his labor (labor theory),[183] or (2) that a creator of a thing deserves to own the thing because it is an extension of his personality (personality theory).[184] Unlike utilitarian theories, these two deontological justifications focus on the relationship between the creator and property, and on assuring that creators "get and keep what is due them."[185]

1. Justifications for Copyright and Its Fair-Use Doctrine

The ethical justifications for American copyright law are schizophrenic: sometimes utilitarian, sometimes deontological. Illustrative of the conflux of these inconsistent notions is the Supreme Court's opinion in *Mazer v. Stein*.[186] In *Mazer*, the Court articulated both a utilitarian basis for copyright ("to advance public welfare") as well as a deontological one (to provide "deserve[d] rewards" for "[s]acrificial days devoted to . . . creative activities").[187] While some copyright law institutions can be explained only

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182. Hughes, *supra* note 108, at 290 ("Properly elaborated, the labor and personality theories together exhaust the set of morally acceptable justifications of intellectual property."); Nance, *supra* note 178, at 763-64. These two deontological theories reflect "the 'moral rights' tradition." *Id.*

183. This is the Lockean labor theory of property. Nance, *supra* note 178, at 764. For more on this justification for property, see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993).

184. This is the personality theory of property that "is most commonly attributed to the German philosopher Hegel and is better established in continental law." Nance, *supra* note 178, at 764; *see also* Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1240-42 (1996) ("The notion that intellectual property rights are essential to protect personal identity is often traced to Hegel. For Hegel, property is the means by which personality is objectified.").

185. Michelman, *supra* note 178, at 1203-05. Michelman states:

> A [nonconsequentialist] "desert" theory . . . is one which justifies property by appeal to an ethical postulate about individual merit, asserting that property is desirable because under its regime individuals are able to get and keep what is due them. Such a theory makes no assertion that property is desirable because it leads to consequences which can be regarded as good for society "as a whole."

Id.

186. 347 U.S. 201 (1954).

187. Mazer v. Stein, 347 U.S. 201, 219 (1954). The Court goes on to state:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and the useful Arts" [the Utilitarian justifica-

in deontological terms,[188] most reflect the predominance of utilitarian thinking.[189] Indeed, the Supreme Court has often observed that copyright law exists to pursue utilitarian goals rather than to recognize authors' natural rights.[190] Likewise, Congress recently noted that "[t]he primary

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tion]. Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered [the Deontological justification].

Id. Several commentators have discussed the coexistence of deontological and utilitarian justifications for copyright. *See, e.g.*, Ginsburg, *supra* note 49, at 998-1002 (observing that American copyright law prior to 1790 reflected influence of Lockean desert theory, but later turned to utilitarian theories); Sterk, *supra* note 184, at 1199 (stating that copyright rhetoric in America has championed "needs of the deserving author, emphasizing the need to induce creative activity, or both").

188. For example, copyright's termination-of-transfer provision, *see* 17 U.S.C. § 203 (1994) (permitting author and certain of his relations to terminate copyright transfer 35-40 years after transfer), reflects an effort to reward "the deserving author and his family." Sterk, *supra* note 184, at 1228-29. This "provision is difficult to justify as an incentive to creative efforts." *Id.* at 1217-20. *See generally* Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79, 108 (1991) (copyright cannot be "totally explained through [utilitarian] efficiency" theory).

189. 1 BOORSTYN, *supra* note 44, § 1.02, at 1-6 to 1-7 ("[W]hile the immediate effect of copyright is to grant valuable rights to authors, thereby enabling them to secure a fair return for their creative efforts, the ultimate aim of this incentive is 'to stimulate artistic creativity for the general public good.'"); LEAFFER, *supra* note 46, § 1.6, at 13 (utilitarian copyright law uses reward to authors merely as "means" to promote "consumer welfare"); PATTERSON & LINDBERG, *supra* note 93, at 49 (protection of authors' rights is merely instrument to promote learning and preserve public domain); Fischer, *supra* note 92, at 1687-91 (stating that Constitution's Patent and Copyright Clause "emphasizes the maintenance of incentives for creativity," reflecting the "primary theme" of "utilitarianism"); Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 2 (1995) ("Copyright's *raison d'etre* is to benefit the public by encouraging the production and dissemination of new copyrighted works."); Lacey, *supra* note 111, at 1540-41 (copyright exists to further public purpose — not to protect artists' natural rights); Leval, *supra* note 87, at 1108-09 (Copyright Clause's granting of copyright "'for limited times' confirms that it was not seen as an absolute or moral right, inherent in natural law"); Nance, *supra* note 178, at 764 ("American intellectual property law is imbued with a consequentialist tone reflected in our constitutional language."); Yen, *supra* note 188, at 81 ("Courts have traditionally viewed copyright as an instrument for encouraging creative activity."); *see also* Friedman, *supra* note 178, at 159 ("[I]t seems that copyright protection is not an intrinsically good natural right, but rather a government-granted privilege instrumental to the achievement of good consequences."); Tal Vigderson, Note, *Hamlet II: The Sequel? The Rights of Authors vs. Computer-Generated "Read-Alike" Works*, 28 LOY. L.A. L. REV. 401, 433-34 (1994) ("The philosophy behind intellectual property law in the United States is based on a utilitarian theory that is conceptually opposed to moral rights."). Perhaps not surprisingly, the Statute of Anne, which most view as the English predecessor to American copyright law, was also highly utilitarian. *See* Leval, *supra* note 92, at 1108-09.

190. *See, e.g.*, Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1029 (1994); Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 546 (1985); Sony Corp. v. Universal City

objective of our copyright laws is not to reward the author, but to secure for the public the benefits from the creations of authors."[191] The Court's and Congress's observations rest on sound authority — the Constitution's Patent and Copyright Clause, which describes copyright's goal in distinctly utilitarian terms: "[t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings."[192] Thus, while both utilitarian and deontological justifications underlie the Copyright Act, one utilitarian concern predominates — that of providing authors exclusive rights in their creations so that they will have an economic incentive to create works of authorship and thereby benefit the public.

Like the Copyright Act of which it is an essential part, fair use exists primarily to further utilitarian goals. Although, no doubt, some deontological justifications underlie the doctrine,[193] fair use exists primarily[194] to

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Studios, Inc., 464 U.S. 417, 429 (1984); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834). The Court in *Wheaton v. Peters* made it clear that authors' rights exist in the United States purely by virtue of statutory enactment rather than by virtue of natural rights: "That Congress, in passing the Act of 1790, did not legislate in reference to existing rights, appears clear . . . . Congress, then, by this act, instead of sanctioning an existing right . . . created it." *Id.* at 661.

191. H.R. REP. NO. 100-609, at 22 (1988) (report on Berne Convention Implementation Act).

192. U.S. CONST. art. I, § 8, cl. 8 (Patent and Copyright Clause). James Madison, in *Federalist No.* 43, noted that "[t]he utility of [Congress's power under the Patent and Copyright Clause] will scarcely be questioned. . . . The public good fully coincides in both cases with the claims of individuals." FEDERALIST NO. 43, at 186 (James Madison) (C. Beard ed., 1959).

193. Some of these articulated deontological bases for fair use include the following: Fair use exists because certain would-be infringers such as artists and teachers are not ordinary thieves and "deserve" to use copyrighted works to create additional works. *See* Lacey, *supra* note 111, at 1563. Fair use is a natural-law concept that reflects the authors' limited right to take from the public domain. *See* Darr, *supra* note 92, at 1049 ("While some claim that fair use is a utilitarian device, others have found in copyright elements of natural law, Hegelian allocation to facilitate use and the limited power of positive law to describe rights."); Patterson, *supra* note 92, at 249 ("The natural law basis of the common law copyright was . . . the source of the fair use doctrine."); Yen, *supra* note 188, at 108 (arguing that nonutilitarian theories based on individual rights explain application of fair use to parody). Finally, fair use has a "multiform function" that includes the pursuit of societal and intuitive fairness. *See* Weinreb, *supra* note 87, at 1137.

194. Deontological labor and personality theories do not readily support the fair-use doctrine. As to the inadequacies of the labor theory, Professor Lacey argues: "The fair use defense is totally unjustifiable under the Lockean view of property, which does not allow exceptions to its absolutist proposition that a person must either receive the actual product of her labor or receive just compensation for it." *See* Lacey, *supra* note 111, at 1564. As to personality theory, Lacey argues: "The personality theory, which many commentators

pursue the same goal as copyright itself — to promote the creation of new works of authorship.[195] Confirming the utilitarian nature of fair use, the Supreme Court in its most recent fair-use opinion noted: "From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts . . . .'"[196] Fair use

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believe makes an even stronger case for possession of intellectual property than for other types of 'ordinary' property, is equally unhelpful in providing a reason for the fair use limitation on intellectual property." *Id.* Professor Lacey perhaps overstates the absolutist nature of the property rights contemplated by Locke and Hegel. *See* Gordon, *supra* note 183, at 1592 (discussing natural-law basis for limiting property rights); Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1046 (1990) (arguing that Lockean labor theory does not support absolute property rights); Alfred C. Yen, *Restoring the Natural Law: Copyright As Labor and Possession*, 51 OHIO ST. L.J. 517, 553 (arguing that scope of natural-law property rights is not unlimited). Nevertheless, that the *primary* justification for fair use is utilitarian rather than deontological is beyond question.

195. *E.g.*, MAVIS FOWLER, THE LAW OF COPYRIGHT 59 (1996) ("Fair Use is like an easement or a right of way through private property for the public's benefit."); PATRY, *supra* note 52, at 718-19 ("Fair use was adopted by American courts in 1839, operating under a constitutional goal of promoting 'the Progress of Science.'"); PATTERSON & LINDBERG, *supra* note 93, at 196 ("The role of the fair-use doctrine in copyright is to ensure that copyright does not become an undue obstacle to learning."); Darr, *supra* note 92, at 1027 ("One purpose of fair use is essentially utilitarian, the creation of new works of independent significance."); Fischer, *supra* note 92, at 1687 ("The fair use doctrine enables the judiciary to permit unauthorized uses of copyrighted works in particular situations when doing so will result in wider dissemination of those works without seriously eroding the incentives for artistic and intellectual innovation."); Gordon, *supra* note 92, at 1657 ("[F]air use is ordinarily granted when the market cannot be relied upon to allow socially desirable access to, and use of, copyrighted works."); Landes & Posner, *supra* note 111, at 333 (Fair use is an attempt "to promote economic efficiency by balancing the effect of greater copyright protection — in encouraging the creation of new works by reducing copying — against the effect of less protection — in encouraging the creation of new works by reducing the cost of creating them."); Leval, *supra* note 87, at 1110 ("Briefly stated, the use [to be a fair use] must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity."); Patterson, *supra* note 92, at 266 (stating that fair use is "a limited easement" given to society "to benefit from [the author's] creative efforts"); Posner, *supra* note 92, at 69 (noting that fair-use doctrine is "most easily understood in economic terms"); Weinreb, *supra* note 87, at 1150 ("There is broad agreement that a determination of fair use should depend largely, if not exclusively, on answers to . . . questions about the social utility of the secondary use, which are drawn from utilitarian assumptions about the copyright scheme generally.").

196. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (Souter, J.). The Court similarly observed: "The fair use doctrine thus 'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'" *Id.* at 577 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

furthers this purpose by permitting the socially desirable use of one work to create another, thereby bringing about the favorable consequence of an increased number of works available to the public. Mindful that fair use must not undermine copyright's greater goal of providing incentives for original creation, courts invoke the fair-use doctrine only when no reasonable opportunity exists for the would-be user to obtain a consensual license from the owner of the copyright in the preexisting work,[197] and only when the use would not otherwise substantially frustrate copyright's core incentive system.[198]

2. *Justifications for Federal Moral Rights*

In enacting VARA, Congress paid lip service to the same utilitarian justification underlying copyright, declaring that moral rights would provide an additional incentive for authors to create new works of authorship.[199] Hence, the House report to VARA declared the rights of integrity and attribution to be "consistent with the purpose behind the copyright laws and the Constitutional provision they implement."[200] But while Congress espoused this utilitarian rhetoric, VARA's supporters, and occasionally its legislative proponents, articulated two nonutilitarian concerns: the need to promote artistic respect and artifact preservation.[201] For example, Representative Markey noted the importance of preserving "the integrity of our artworks as expressions of the creativity of the artist."[202] Likewise, Profes-

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197. *See* Gordon, *supra* note 92, at 1614-15.

198. *Id.* at 1618-19.

199. Incorrectly characterizing European moral rights as creatures of utility rather than deontological personality concerns, the House report noted: "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.*" H.R. REP. NO. 101-514, at 5 (1990) (emphasis added); *see also* Sterk, *supra* note 184, at 1202 ("Even in enacting the Visual Artists' Rights Act, which extended a form of 'moral rights' protection to works of art, the committee report managed to articulate an economic justification . . . .").

200. H.R. REP. NO. 101-514, at 5. It may be that attribution and integrity rights will in fact provide additional incentives for artistic creation. *See* Lacey, *supra* note 111, at 1584 ("[M]any artists care more about protection of the fundamental integrity of their work than the financial gain the work will realize. This concern may mean that moral rights actually provide greater incentive for creation of artistic works than copyright protection.").

201. Sterk, *supra* note 184, at 1202 (while Congress articulated utilitarian justifications, VARA's advocates "advanced desert-based arguments for expanding copyright protection").

202. H.R. REP. NO. 101-514, at 6. A proponent of VARA legislation, Weltzin Blix similarly noted that distortion of works "cheats the public of an accurate account of the culture of our time." *Id.* Similarly, Arnold Lehman noted that "the arts are fundamental to our national character and are among the greatest of our national treasures." *Id.* at 7.

sor Ginsburg, who testified before the House subcommittee considering VARA, noted:

> The 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. Accordingly, the physical existence of the original itself possesses an importance independent from any communication of its contents by means of copies . . . . Were the original defaced or destroyed, we would still have the copies, we would all know what the work looked like, but, I believe, we would all agree that the original's loss deprives us of something uniquely valuable.[203]

The distinctly nonconsequentialist nature of these articulated concerns becomes clear by comparison with copyright's avowedly utilitarian goal of promoting the creation of new works.

a. Promoting Artistic Respect

The notion that artists and their art works inherently deserve respect descends from the deontological Hegelian personality theory that underlies traditional moral rights.[204] That is, the notion of artistic respect stems from the belief that a work of art is the reification of its creator, and as a result, to harm the work would be to harm the person of the artist. That artists' works deserve greater regard than the handiwork of other creators is, like many deontological principles, somewhat illogical.[205] One commentator has observed:

> So deeply rooted is our sense that art and authorship are different than other kinds of market transactions, that it is difficult to realize how striking a provision this really is. Could we imagine giving a plumber a control over the pipes she installs even after the work is paid for, or a cabinet maker the right to veto the conversion of her writing desk into a television cabinet? The author is different than other workers, is outside the ordinary world of work and exchange, precisely because of her romantic status.[206]

The House report further states that destruction of art "has a detrimental effect on the artist's reputation, and . . . also represents a loss to society." *Id.* at 16.

203. *Id.* at 12 (citing *H.R. Hearings on the Visual Artists' Rights Act of 1989*, *supra* note 95, at 4 (statement of Prof. Jane C. Ginsburg)).

204. On Hegelian personality theory, see *supra* Part II.A.1.

205. On the illogical nature of many nonconsequentialist principles, see generally LEO KATZ, ILL-GOTTEN GAINS (1996).

206. James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U.L. REV. 625, 629 (1988).

This nonutilitarian idea of artistic respect "is difficult to explain except as a legislative expression of unreconstructed faith in the gospel of Romantic 'authorship.'"[207]

Despite its questionable rationality, the sentimental image of artist as romantic genius is firmly entrenched in VARA. VARA primarily protects works of art that are romantically viewed as "fine art," including paintings, drawings, and sculptures touched by the hand of the artist.[208] VARA expressly excludes "lower" forms of art, such as art appearing in technical drawings, audiovisual works, magazines, newspapers, computers, and advertisements.[209] Moreover, VARA protects the "honor" and "reputation" of artists.[210] No other class of citizens is the beneficiary of federal legislation explicitly protecting that which has traditionally been protected, if at all, by state laws regarding the right of publicity, defamation, libel, and slander. Thus, Congress's effort to protect "fine" artists demonstrates the underlying nonconsequentialist goal of protecting the sensitive creative genius.

b. Promoting Artifact Preservation

The notion that artifacts deserve protection from alteration and destruction likewise reflects deontological thinking. The intrinsic worth of originals is undeniable.[211] What visitor to the Louvre has not waited in line to bend close to the *Mona Lisa* to see Leonardo's actual brush strokes? Here was his hand! It is a qualitatively different experience to view in person *the*

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207. Jaszi, *supra* note 63, at 500; *see id.* at 497 ("The connection between 'moral rights' and the complex values associated with the Romantic conception of 'authorship' is clear."); *see also* Beyer, *supra* note 21, at 1027 (arguing that underlying moral rights is belief that authors are "almighty creators who pour particular meanings into their creations and therefore inherently have undisputed authority over the uses and interpretations of those creations"); Boyle, *supra* note 206, at 629 (observing that "[t]he romantic conception of authorship" underlies "author's 'moral rights' to control a work").

208. *See* 17 U.S.C. § 101 (1994) (defining "work of visual art"); 2 NIMMER & NIMMER, *supra* note 67, § 8D.02[A], at 8D-11 ("[M]oral rights in the United States display a pronounced bias in favor of fine artists — painters, sculptors, photographers and the like."); Sirota, *supra* note 21, at 473 (tracing VARA's protection of only limited types of works to "the romantic notion of protecting the struggling author of 'fine art'"). Note that VARA also protects paintings, drawings, prints, sculptures, and still photographs "produced for exhibition purposes only" in limited editions of two hundred or fewer copies. *See* 17 U.S.C. § 101.

209. *See* 17 U.S.C. § 101.

210. *Id.* § 106A(a)(2); *id.* § 106A(a)(3)(A).

211. *See* H.R. REP. NO. 101-514, at 12 (1990) (statement of Prof. Jane C. Ginsburg); Lacey, *supra* note 111, at 1584 ("[I]t is to most people's benefit that an original sculpture not be altered.").

canvas painted by Leonardo than it is to see yet another copy.[212] One philosopher of aesthetics has summed up the difference as follows:

> An original drawing . . . is more valuable than the finest reproduction, even one all but indistinguishable from it. This is true not merely in the economic sense that the original is scarce and hence costly. The original is also more valuable and more exciting aesthetically because our feeling of intimate contact with the magic power of the creative artist heightens awareness, sensitivity, and the disposition to respond. Once a work is known to be a [reproduction], that magic is gone.[213]

This, however, is puzzling from a consequentialist perspective. After all, if a painting of the *Mona Lisa* and a copy of it are visually indistinguishable, then we would expect to enjoy both the same.[214]

But we do not. The difference can be explained only in deontological terms — the pedigree of an experience matters.[215] That is, it often matters more how a physical object came to be, than what its physical attributes are.[216] Consider philosopher Peter Unger's compelling example of a human reproduction: would a father exchange his eight-year-old daughter for an indistinguishable molecule-for-molecule clone?[217] A consequentialist might consider the end result to be the same thing and opt for the clone; a deontologist would want his little girl.

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212. Perhaps the best evidence of the intrinsic value of originals is the prevalence of art museums throughout the world. If copies were just as good as originals, then people would be content simply viewing reproductions of art works. This, however, is not the case.

213. Leonard B. Meyer, *Forgery and the Anthropology of Art*, *in* THE FORGER'S ART: FORGERY AND THE PHILOSOPHY OF ART 77, 86-87 (Denis Dutton ed., 1983).

214. A number of aesthetic philosophers have reached the conclusion that there should be no difference between the enjoyment one gets from looking at an original work of art and at a forgery, and "that sheer foolishness is displayed by our behaving as if there were such a difference." KATZ, *supra* note 205, at 76. Such philosophers believe that "claiming that the original is more valuable than a perfect fake is much like George Bernard Shaw's joke that Wagner's music is better than it sounds." *Id.* There is, nevertheless, a difference. For an interesting collection of essays on the aesthetics of forgeries, see THE FORGER'S ART: FORGERY AND THE PHILOSOPHY OF ART (Denis Dutton ed., 1983).

215. KATZ, *supra* note 205, at 73-83.

216. Even an otherwise unattractive fragment of broken pre-Columbian pottery is an enjoyable artifact because of its pedigree — because we know that it was made centuries ago by the hand of a long-dead artist in the wilds of South America. If a seemingly identical fragment broke off of a pot made last week by a guy named Al, who would care to see it?

217. PETER UNGER, IDENTITY, CONSCIOUSNESS AND VALUE 301-02 (1990) (discussed in KATZ, *supra* note 205, at 76-77). The father would decline the swap "[n]ot because the clone is lacking in any attribute that [his] original daughter possesses but just because it isn't [his] original daughter. It lacks the right pedigree. The same goes for works of art." UNGER, *supra*, at 301-02.

VARA's integrity right exists to further the deontological goal of preserving originals.[218] Perhaps most telling in this regard is that VARA, unlike traditional moral-rights regimes, protects only touched-by-the-artist originals and not reproduced copies of the works of authorship embodied in such artifacts.[219] This suggests that VARA, although concerned about protecting the artist as romantic genius,[220] is even more concerned about protecting artists' originals. After all, the reputation and honor of an artist presumably could be damaged by the VARA-permitted misattribution or alteration of a mere copy of his work.

3. The Irreconcilable Conflict Between Justifications

Fair use exists to further copyright's broader consequentialist goal of promoting the creation of new works of authorship. Thus, fair use and copyright are working together to further the same utilitarian goal. In contrast, federal moral rights exist to further the deontological goals of promoting artistic respect and artifact preservation. Thus, fair use and federal moral rights, although in the same boat of copyright's Title 17, are paddling in different directions. Considering this, federal moral rights are out of place in the utilitarian realm of copyright.[221] To apply fair use to limit these rights would be to disregard the deontological goals of VARA.[222]

Some commentators, however, have suggested that it would be appropriate to disregard the deontological goals underlying federal moral rights in order to further a more important, albeit utilitarian, goal of fair use —

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218. *See, e.g.*, H.R. REP. NO. 101-514, at 5 (1990) (VARA "protects both the reputations of certain visual artists *and the works of art they create*") (emphasis added); *id.* at 6 (Representative Markey stating that preserving "the integrity of our artworks" is "paramount to the integrity of our culture"); *id.* at 7 (Weltzin Blix noting that distortion of art "cheats the public of an accurate account of the culture of our time"); *id.* at 8 (Arnold Lehman characterizing art works as "among the greatest of our national treasures"); *id.* at 12 (Jane Ginsburg opining "that the original's loss deprives us of something uniquely valuable").

219. 17 U.S.C. § 101 (1994) (defining "work of visual art" to include only original artifacts).

220. *See supra* Part III.C.2.a.

221. *E.g.*, Damich, *supra* note 21, at 388 ("That the artist should have a personal right based on the act of artistic creation itself seem[s] . . . to depart from the utilitarian basis for copyright protection found in the United States Constitution."); Yonover, *"Dissing" of Da Vinci*, *supra* note 1, at 1002-03 (noting that Congress in making VARA part of Copyright Act has attempted "to fit a square peg into a round hole — natural, personal, moral rights into an economic rights-based copyright scheme"); Yonover, *Precarious Balance*, *supra* note 1, at 121 (same).

222. To the extent that VARA's integrity and attribution rights do provide an additional incentive for authors to create works of authorship, limiting those rights through fair use undercuts this articulated, if unpersuasive, utilitarian justification.

that of encouraging the creation of new derivative works, particularly parodies. These commentators are concerned that unless fair use permits parodists to violate artists' moral rights, artists will use those rights to suppress socially beneficial derivative works.[223]

These concerns are unfounded. Sacrificing artists' moral rights and the goals they further would advance none of the utilitarian goals of copyright and its fair-use doctrine. First, allowing users to violate artists' attribution and integrity rights would result in the creation of no additional works. If a person violates an artist's integrity right by, for example, drawing a mustache on a painting to parody it, the parodist has in effect created a new work of visual art. But in so doing, he literally and physically has supplanted the "old" work. Hence, the net gain from his artistic effort is zero.[224] Considering that society receives no net increase in works from

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223. *See* PATRY, *supra* note 52, at 1049. Patry states:

> For parody or satire to succeed, the original must be distorted or modified in a way that prejudices the original artist's honor or reputation. Authors of works of visual art who have deliberately sold a copy of their work should not be able to stifle criticism by resort to VARA.

Id.; *see* Yonover, *"Dissing" of Da Vinci*, *supra* note 1, at 943 (arguing that "fair use, based on a parody which infringes upon an artist's moral right of integrity, should be given a wide berth" and that "an artist's moral right of integrity should in most circumstances yield, under fair use, to the right of the parodist"); Yonover, *Precarious Balance*, *supra* note 1, at 85-86 (same); Note, *supra* note 122, at 1992 (noting that "VARA has the potential to stifle digital technology in a manner contrary to the constitutional mandate"). Professor Yonover argues that courts should "presume" parodic infringements of artists' moral rights to be fair, *see* Yonover, *"Dissing" of Da Vinci*, *supra* note 1, at 990, even though the Supreme Court recently rejected the use of presumptions to simplify fair-use analyses. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 583-85 (1994).

Other commentators have expressed concern that *traditional, continental* moral rights, if adopted in the United States, might endanger the creation of socially desirable derivative works, including parodic uses. For this reason, some of these commentators have called for the application of fair use in order to permit such beneficial uses. *See* PATTERSON & LINDBERG, *supra* note 93, at 176 ("The [traditional] moral-rights doctrine should not, for example, be used . . . to inhibit the genres of burlesque, parody and satire."); Kwall, *supra* note 21, at 71 (noting that fair-use doctrine "represents a particularly significant limitation on [traditional] moral rights" and that such limitation is "justifiable as a 'necessary concomitant' of living in a democratic society"); Lacey, *supra* note 111, at 1595 n.267 (stating that artists should be prevented "from asserting [their] right of integrity to prevent genuine parodies of [their] work"). These commentators' concerns are warranted in the context of continental, personality-based moral rights, which can prevent alterations of even *reproductions* of art works. If such broad moral rights were recognized in the United States, fair use should permit the unauthorized creation of desirable derivative works. However, the rights recognized by VARA are significantly less expansive than traditional moral rights, protecting only original "works of visual art."

224. The net gain of "works of visual art" is zero. In contrast, the net gain of "works of authorship" could be one. That is, if a reproduction of the original artist's painting earlier

such uses, allowing a user to violate federal moral rights does not further fair use's utilitarian goal of increasing the number of works available to the public.[225]

Second, allowing users to violate federal moral rights is unnecessary to permit the creation of derivative works such as parodies. Permitting unauthorized parodic uses of copyrighted works has the beneficial consequence of encouraging the creation of new derivative works without substantially eroding the market for (and hence the incentive to create) other works. Fair use assures that the public is not deprived of such socially desirable derivative works by uncooperative or unaccessible original authors. It is unnecessary, however, to limit federal moral rights through the fair-use doctrine in order to further this utilitarian goal. Rather than harming the integrity of an original artifact, the parodist could simply copy the underlying work of authorship embodied in the artifact (conduct which may be permitted by fair use), and then alter that copy to achieve the desired parodic effect (conduct permitted by VARA). The result: a socially desirable derivative work produced without harm to the VARA-protected original work of visual art.[226] Thus, to apply pointlessly the fair-use doctrine to limit artists' attribution and integrity rights would disregard VARA's deontological goals without furthering any of the utilitarian goals of fair use.

For these reasons, there exists neither a utilitarian nor a deontological justification for limiting federal moral rights through the fair-use doctrine.

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had been fixed in a copy, then arguably there would be two distinct works of authorship after the drawing of the mustache. However, a more persuasive argument can be made that the mere drawing of a mustache on the original work of visual art would not result in a new work of authorship. In order to create a derivative work, one must first *reproduce* some portion of the copyrighted work of authorship in a copy. *See* C.M. Paula Co. v. Logan, 355 F. Supp. 189, 191-92 (N.D. Tex. 1973) (finding no violation of adaptation or distribution right in cutting decals from copyrighted pictorial art works); LEAFFER, *supra* note 46, § 8.5, at 228; 1 NIMMER & NIMMER, *supra* note 67, § 3.03, at 3-13.

225. Put another way, this use is not "productive" because it has not created an additional work. Nonproductive uses are less likely to be considered fair by courts. *See, e.g.*, Landes & Posner, *supra* note 111, at 360.

226. Throughout her articles, Professor Yonover uses the example of Duchamp's *L.H.O.O.Q.* (the mustachioed *Mona Lisa*) to demonstrate why fair use should foreclose Leonardo from invoking his VARA integrity right to veto Duchamp's parody. Unless fair use permits parodic violations of artists' integrity rights, she suggests, parodists will be unable to create new parodies. *See* Yonover, *"Dissing" of Da Vinci*, *supra* note 1, at 935; Yonover, *Precarious Balance*, *supra* note 1, at 79. However, what Duchamp *actually* did would not have violated Leonardo's federal integrity right. Duchamp did not march into the Louvre with a can of spray paint and alter the original artifact in the name of fair use. Rather, he altered a copy, which VARA does, and fair use should, permit. Would Professor Yonover approve of Duchamp spray painting the real thing when he could have achieved the same parodic effect by altering a copy?

That neither consequentialist nor nonconsequentialist reasoning supports a fair-use limitation on federal moral rights compellingly suggests that those rights should not be so limited.[227]

D. The Statutory Fair-Use Factors Are Difficult to Apply in the Context of Federal Moral Rights

Section 107 of the Copyright Act permits the "fair use of a copyrighted work" for purposes such as "criticism, comment, news reporting, teaching . . . scholarship, or research."[228] Furthermore, § 107 sets forth four "factors" that courts "shall" consider in evaluating the fairness of any particular use.[229] Although § 107's statutory framework is difficult to apply in the context of an ordinary copyright infringement action,[230] it is especially troublesome in the context of purportedly "fair" violations of federal attribution and integrity rights.

1. "Using" and "Consuming" VARA-Protected Property

Section 107 authorizes certain "uses" of copyrighted works — it does not authorize the consumption of such works. When a critic, commentator, reporter, teacher, scholar, researcher, or parodist utilizes a preexisting copyrighted work for purposes of criticism, comment, news reporting, teaching, scholarship, research, or parody, he does not consume the work and thereby take it from the copyright holder. Because of the public nature of the copyrighted work,[231] the copyright holder can still enjoy the work

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227. *See* Nance, *supra* note 178, at 767 ("[O]ur confidence in the justifiability of [an intellectual property institution] should depend upon the existence and convergence of coherent deontological and consequentialist theories that support the rights in question . . . ."); *see also* Randy E. Barnett, *Of Chickens and Eggs — The Compatibility of Moral Rights and Consequentialist Analyses*, 12 HARV. J.L. & PUB. POL'Y 611, 615-16 (1989). Barnett states:

> [I]f both methods [consequentialist and nonconsequentialist] generally reach the same result in entirely different ways, then each method can provide an analytic check on the other. Because any of our analytic methods may err or may be used to deceive, we can use one method to confirm the results that appear to be supported by the other.

Id.

228. 17 U.S.C. § 107 (1994) (preamble). In enacting § 107 as part of the 1976 Copyright Act, Congress purportedly sought to "restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way." H.R. REP. NO. 94-1476, at 66 (1976); S. REP. NO. 94-473, at 62 (1975); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576-77 (1994) (citing House and Senate reports).

229. *See* 17 U.S.C. § 107.

230. *See supra* Part II.B.

231. *See supra* Part III.A.1.

himself irrespective of another's simultaneous use. Moreover, because fair uses are typically those that do not appreciably harm the copyright owner's market for the work,[232] a fair use does not deprive the copyright owner of that which the Copyright Act is fundamentally designed to protect — the economic market for his copyrighted work of authorship. For these reasons, a *fair use* of a copyrighted work does not constitute a consumption of the work, but rather is a mere *use* as explicitly contemplated by § 107.

In contrast, if a critic, commentator, reporter, teacher, scholar, researcher, or parodist were to utilize a preexisting *work of visual art* — rather than a *work of authorship* — in a manner inconsistent with VARA, he in effect would be consuming rather than "using" the work of visual art. For example, any purported use of a work of visual art by a parodist in violation of the artist's integrity right would involve the intentional "distortion, mutilation, or other modification" of that artifact.[233] Such a use of the VARA-protected tangible artifact would deprive the artist of that which Congress sought to protect — the integrity of his work of visual art. Hence, a purportedly fair use of a work of visual art would materially harm the visual artist's protectable interest in the physical artifact — an interest in maintaining the integrity of a work even after it leaves his possession. For this reason, a purportedly fair use of a VARA-protected artifact, irrespective of its purpose, arguably does not constitute a "use" within the meaning of § 107.

2. *The Four Fair-Use Factors Applied to Federal Moral Rights*

Section 107 enumerates four factors that courts "shall" consider "[i]n determining whether the use made of a work in any particular case is fair use."[234] These statutory factors include (1) the "purpose and character of the use," (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."[235] No single factor is dispositive; "[a]ll are to be explored . . . together, in light of the purposes of copyright."[236] Although

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232. *See infra* Part III.D.2.d.

233. 17 U.S.C. § 106A(a)(3).

234. *Id.* § 107 (preamble). *See generally* 3 NIMMER & NIMMER, *supra* note 67, § 13.05, at 13-150 to 13-195; PATRY, *supra* note 11, at 413-569.

235. 17 U.S.C. § 107(1)-(4) (1994).

236. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994) (Souter, J.). To emphasize that no single factor is dispositive, Congress amended § 107 in 1992 to state: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." *See* Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145, 3145 (amending 17 U.S.C. § 107).

courts evaluating fair-use issues must consider all four statutory factors, courts are not limited to them and may weigh other relevant considerations.[237] Unfortunately, § 107 gives little guidance regarding how these factors should be applied generally.[238] It gives even less guidance regarding how they should be applied to limit federal attribution and integrity rights.[239]

a. Purpose and Character of the Use

The first factor directs courts to consider "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[240] In evaluating the "purpose and character" of the use, courts may consider, among other things, whether the use is of a type illustrated in the preamble to § 107, namely, whether the use is for "purposes such as criticism, comment, news reporting, . . . teaching, scholarship or research."[241] Although parodic uses are not listed in the preamble,

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237. *E.g.*, Brewer v. Hustler Magazine, Inc., 749 F.2d 527, 529 (9th Cir. 1984) (stating that "section 107 sets forth four nonexclusive factors"); Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 n.10 (5th Cir. 1980) (stating that "the statute indicates that these four factors are not necessarily exhaustive"); DC Comics, Inc. v. Unlimited Monkey Bus., Inc., 598 F. Supp. 110, 119 n.2 (N.D. Ga. 1984) ("Section 107 does not limit a court to consideration of only the four factors enumerated in the statute."); *see* PATRY, *supra* note 11, at 568-69 (noting that courts have considered other, unenumerated factors such as "privacy interests, defendant's good faith or lack thereof, 'wrongful denial of exploitative conduct towards the work of another,' commission of error, and the plaintiff's misuse of his or her copyright to suppress unfavorable comment" (citations omitted)); Leval, *supra* note 87, at 1125-30.

238. PATRY, *supra* note 11, at 414; *see also* 3 NIMMER & NIMMER, *supra* note 67, § 13.05[A], at 13-154 (stating that § 107 "does not, and does not purport to, provide a rule that may automatically be applied in deciding whether any particular use is 'fair'"); Leval, *supra* note 87, at 1105-06 (stating that Copyright Act furnishes "little guidance on how to recognize fair use"). The Supreme Court has recently stated that the fair-use analysis "is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for a case-by-case analysis." *Campbell*, 510 U..S. at 577; *see also* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 455 n.40 (1984) (stating that fair-use analysis calls for a "sensitive balancing of interests"); *id.* at 449 n.31 (noting that Congress "eschewed a rigid, bright-line approach to fair use").

239. Section 107 merely states that it limits the federal moral rights set forth in § 106A without articulating how this is so. *See* 17 U.S.C. § 107 (1994). With regard to applying § 107 to the rights of integrity and attribution, lawyer Peter Karlen stated as follows during the congressional hearings on VARA: "I don't see how the factors enumerated at § 107 particularly relate to these rights of artists." *S. Hearings on Moral Rights in Our Copyright Laws*, *supra* note 96, at 105-06.

240. 17 U.S.C. § 107(1). *See generally* 3 NIMMER & NIMMER, *supra* note 67, § 13.05[A][1], at 13-157 to 13-172; PATRY, *supra* note 11, at 419-504.

241. *Campbell*, 510 U.S. at 578-79, 584.

they are favored by the fair-use doctrine.[242] Nevertheless, the fair-use analysis does not entail merely pigeonholing a use into a particular category. Rather,

> [t]he central purpose of this investigation is to see . . . whether the new work merely "supersede[s] the objects" of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative."[243]

Hence, the "more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[244]

The purpose underlying a violation of the federal integrity right often may fall among the favored types of uses.[245] Consider again a purchaser who buys an oil-on-canvas portrait by a well-known artist and then paints a mustache on it to poke fun at the work or the artist. Such a parodic use would be for purposes of criticism or comment and would be among those favored by § 107(1).[246] Moreover, even if the parodist created the parody to turn a profit, that commercial purpose would not weigh dispositively against a finding of fair use.[247] Hence, the purpose prong of § 107(1) might

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242. *Id.* at 579.

243. *Id.* (citing Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901) (Story, J.); Leval, *supra* note 87, at 1111).

244. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994); *see also* Leval, *supra* note 87, at 1110-16. The Court in *Campbell* noted the significant weight given to "transformative" uses in fair-use analyses. *Campbell*, 510 U.S. at 579. This is a variation on an earlier theme in fair-use case law and commentary noting that "productive" uses are favored by the fair-use doctrine. *See, e.g.*, Landes & Posner, *supra* note 111, at 360. Landes and Posner state:

> A productive use is one that lowers the cost of expression and tends to increase the number of works, while a reproductive one simply increases the number of "copies" of a given work, reduces the gross profits of the author, and reduces the incentives to create works. Not surprisingly, a fair use defense for a productive use is looked upon more favorably than such a defense for a reproductive use.

Id.

245. Yonover, *"Dissing" of Da Vinci*, *supra* note 1, at 998 ("Thus, a parody that comments upon, targets, or criticizes the original work . . . is the special focus of section 107."); Yonover, *Precarious Balance*, *supra* note 1, at 117 (same).

246. *See Campbell*, 510 U.S. at 579 ("We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107.").

247. *See id.* at 584-85; Yonover, *"Dissing" of Da Vinci*, *supra* note 1, at 998; Yonover, *Precarious Balance*, *supra* note 1, at 117.

sometimes support fair use, at least for purposes of parody, even as applied to artists' integrity and attribution rights.

However, the § 107(1) analysis does not end with the purpose of the use. Rather, § 107(1) further directs courts to consider the character of the defendant's use.[248] In contrast to the purpose prong of § 107(1), the character prong is difficult to apply to prima facie infringements of federal moral rights. To illustrate the problem, consider the principle articulated by the Court in *Campbell v. Acuff-Rose Music, Inc.* that the "more transformative" the character of the defendant's use, the more likely the fair-use defense will permit the use.[249] In the context of traditional uses of copyrighted works of authorship, this holding is sensible. After all, the more the subsequent user modifies his copy of the preexisting work, the less the resulting product will serve as a market substitute for the original work, and the less will be the harm to the copyright owner's economic interest in commercially exploiting the original work of authorship.[250]

However, in the context of purportedly fair infringements of federal moral rights, characterizing a VARA-infringing use as "transformative" should have the opposite effect. That is, the more transformative the VARA-infringing use — the more the user distorts, mutilates, or modifies the original artifact — the *less fair* it should be considered. This is so because a highly transformative use of the VARA-protected physical artifact makes the resulting product less true to the touched-by-the-artist artifact. Indeed, a highly transformative use produces a new work that physically supersedes the original artifact. Hence, the more transformative the use of an artifact, the greater the harm to the artist's and the public's deontological interests in preserving it.[251]

Notwithstanding this problem, to the extent that the character prong of § 107(1) can be stretched to apply to uses which infringe upon the VARA integrity right, the character of such uses should weigh *against* a finding of fair use. Any prima facie violation of the artist's integrity right necessarily involves the alteration or destruction of an original artifact. At a visceral level, such a destructive use is of a materially different "character" from a

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248. 17 U.S.C. § 107(1) (1994).

249. *Campbell*, 510 U.S. at 579.

250. *See id.*; Leval, *supra* note 87, at 1111-16.

251. For similar reasons, the alteration of an original work of visual art is not a use of a "productive" character. *See supra* note 244 (distinguishing productive use from reproductive use). Although altering an artifact essentially produces a "new" one, it does so at the expense of the original; that is, it physically supersedes the original. Therefore, there is no net gain in the number of works available to the public. Given that such a use has not netted the public additional works, the use should not be considered "productive."

constructive one affecting only copies of a work of authorship.[252] Moreover, a user can often pursue the same purpose, such as creating a parody, through a use of a different character. Particularly, the user can simply copy the work of authorship (leaving the original artifact undisturbed), and *then* parody it.[253] In light of this alternative, a use of a destructive character seems all the less fair.

b. Nature of the Copyrighted Work

The second factor directs courts to consider "the nature of the copyrighted work."[254] This factor, according to the Supreme Court, "calls for recognition that some works are closer to the core of intended copyright protection than others."[255] Creative, expressive, entertaining works, such as works of art and fiction, are closer to copyright's core than are factual works such as histories, biographies, and scientific works. As a result, the fair-use doctrine tends to permit wider use of factual works than creative ones,[256] partly because the enforcement of exclusive rights in factual works is believed to pose a greater risk of inhibiting the dissemination of important information than does the enforcement of such rights in fiction.[257]

As is the case with factor one, Congress did not draft the second factor with federal moral rights in mind.[258] Thus, the "copyrighted work" to which this factor refers is obviously the intangible "work of authorship" protected by the Copyright Act — not the tangible "work of visual art" protected by VARA. Nevertheless, to the extent that this second factor is applicable in the context of VARA rights, it should consistently weigh *against* a finding of fair use. After all, VARA-protected works of visual art will almost always be highly creative and expressive works rather than works of a biographical, scientific, historical, or reportorial nature. Indeed, VARA specifically excludes a number of works of a scientific or technical nature (such as maps, globes, charts, and technical drawings),[259] and a number of works with

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252. *See supra* notes 95-96 and accompanying text (statements of Prof. Ginsburg and Mr. Karlen).

253. *See supra* notes 128-30 and accompanying text.

254. 17 U.S.C. § 107(2) (1994). *See generally* 3 NIMMER & NIMMER, *supra* note 67, § 13.05[a][2], at 13-172 to 13-183; PATRY, *supra* note 11, at 504-49.

255. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

256. *E.g.*, 3 NIMMER & NIMMER, *supra* note 67, § 13.05[A][2][a], at 13-172 to 13-177.

257. GOLDSTEIN, *supra* note 80, § 10.2.2.2, at 226.

258. Indeed, it was drafted nearly fifteen years before Congress adopted attribution and integrity rights in VARA.

259. *See* 17 U.S.C. § 101 (defining "work of visual art").

a high potential for being of a factual nature (such as books, magazines, newspapers, periodicals, and databases).[260] Therefore, considering that the limited types of works protected by VARA[261] are near the "core" of intended copyright protection, they are of a type less susceptible to fair use.[262]

c. Amount and Substantiality of the Copyrighted Work Used

The third factor directs courts to consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[263] This factor calls for an evaluation of both the "quantity" and the "quality" of what the defendant used.[264] Generally, the greater the percentage of the copyrighted work used, the less likely it is that the defendant's use will be considered fair.[265] However, "[q]ualitative measures outweigh quantitative measures" in this determination,[266] especially considering that even the use of a small percentage of a copyrighted work will *not* be fair if the portion that the defendant used constituted the "heart" of the copyrighted work.[267]

This factor, unlike the other three, is somewhat easier to apply to the fair use of VARA-protected works.[268] That is, the greater the extent of the user's alteration of the original artifact — the more he takes — the less likely that the use will be considered fair. If the user alters only a small portion of a relatively unimportant part of the work of visual art (for example, a purchaser slightly recolors a tree in the background of a portrait), then it is more likely that the use should be considered fair. Conversely, if the user

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260. *See id.*

261. During congressional hearings, Representative Markey noted that Congress went "to extreme lengths to very narrowly define the works of art that [are] covered." H.R. REP. NO. 101-514, at 11 (1990).

262. The amount of weight this factor carries in a fair-use analysis in the context of parody is questionable. The Court in *Campbell* noted that this factor was not much help "in separating the fair use sheep from the infringing goats" in parody cases "since parodies almost invariably copy publicly known, expressive works." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994). More generally, Nimmer has opined that "this second factor more typically recedes into insignificance in the greater fair use calculus." 3 NIMMER & NIMMER, *supra* note 67, § 13.05[A][2][a], at 13-172 to 13-173.

263. 17 U.S.C. § 107(3) (1994). *See generally* 3 NIMMER & NIMMER, *supra* note 67, § 13.05[A][3], at 13-183 to 13-184; PATRY, *supra* note 11, at 549-55.

264. 3 NIMMER & NIMMER, *supra* note 67, § 13.05[A][3], at 13-183 to 13-184.

265. GOLDSTEIN, *supra* note 80, § 10.2.2.3, at 230.

266. *Id.* at 231.

267. *See* Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 569 (1985).

268. Note that the reference to "the copyrighted work" in § 107(3), like the reference in § 107(2), is undoubtedly a reference to the intellectual work of authorship embodied in the VARA-protected artifact — it is not a reference to the "work of visual art" itself.

alters a large portion of an important part of the artifact (for example, a purchaser paints a mustache on the depicted subject's face), then it is less likely that the use should be considered fair.

d. Effect of the Use on the Market for Copyrighted Work

The fourth factor directs courts to consider "the effect of the use upon the potential market for or value of the copyrighted work."[269] This factor requires courts to consider not only the extent of market harm caused by the defendant's conduct, but also "'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original."[270] Although some courts have characterized this factor as "the single most important element of fair use"[271] and have branded as "presumptively unfair" commercial uses that adversely affect the market for the preexisting copyrighted work,[272] the Supreme Court's most recent fair-use opinion[273] rejects the use of formulaic presumptions and confirms that this factor, "no less than the other three, may be addressed only through a 'sensitive balancing of interests.'"[274] Notwithstanding its role as but one of four considerations, the fourth factor remains critically important: the Court noted that a defendant relying on a fair-use defense would "have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets."[275]

Like factors one and two, the fourth is much more difficult to apply to uses of VARA-protected artifacts[276] than to uses of copyrighted works of

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269. 17 U.S.C. § 107(4) (1994). *See generally* 3 NIMMER & NIMMER, *supra* note 67, § 13.05[A][4], at 13-184 to 13-191; PATRY, *supra* note 11, at 555-69.

270. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (quoting 3 NIMMER & NIMMER, *supra* note 67, § 13.05[A][4] and citing *Nation*, 471 U.S. at 569; Folsom v. Marsh, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4901); S. REP. NO. 94-473, at 65 (1975)).

271. *E.g.*, Stewart v. Abend, 495 U.S. 207, 238 (1990) (dictum); *Nation*, 471 U.S. at 566 (dictum).

272. *E.g.*, Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

273. *Campbell*, 510 U.S. at 569.

274. *Id.* at 590 n.21 (quoting *Sony*, 464 U.S. at 455 n.40); *Campbell*, 510 U.S. at 594 ("No . . . evidentiary presumption is available to address . . . the fourth [factor], market harm, in determining whether a transformative use . . . is a fair one.").

275. *Id.* at 590.

276. Even a commentator who proposes that fair use be given "wide berth" in the context of VARA-protected rights acknowledges that "it is difficult to apply this fourth fair use factor to a right of integrity claim." Yonover, *"Dissing" of Da Vinci*, *supra* note 1, at 1000; Yonover, *Precarious Balance*, *supra* note 1, at 119. Section 107(4) focuses upon "hits on [the artist's] pocket, not upon attacks on his artistic sensibilities of honor and

authorship.[277] First, it is difficult to identify the relevant market to analyze for purposes of determining the market effect of a VARA-infringing use of a protected artifact. The fourth factor exists to assure that the defendant's use will not "substantially harm" the market for the *copyrighted work of authorship* and hence impair "the important economic incentive to the creation of originals."[278] Is the relevant market to analyze in the context of moral rights the market for the *copyrighted work*? If so, then this factor peculiarly would consider the effect of an alteration to a tangible artifact on the market for an *entirely different thing*, namely the market for the intangible work of authorship. Or is the relevant market the market for the artists' *federal moral rights*, as contrasted with the market for the work of authorship? This is unlikely, however, given that no such market exists: federal moral rights cannot be transferred.[279] Or is the relevant market the market for the *tangible artifact* that has been altered? This, too, is unlikely, given that § 107(4) identifies the relevant market as the market for the "copyrighted work." But if so, then any mutilation, distortion, or other modification presumably would by its very nature substantially devalue the original artifact. Thus, as presently drafted, the reference to a "market" in § 107(4) simply does not mesh comfortably with the facts to be analyzed in the context of a VARA-infringing use.

Finally, unlike the fourth fair-use factor (and copyright law in general), VARA simply does not exist to protect a market. Rather, it exists to protect authors and their artifacts.[280] Therefore, even if a relevant market could be identified for analytical purposes, any market effect of a mutilation, distortion, or alteration of an artifact should be an irrelevant consideration in assessing the fairness of such conduct.[281] For these reasons, it is difficult to

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reputation." Yonover, *"Dissing" of Da Vinci*, *supra* note 1, at 1000; Yonover, *Precarious Balance*, *supra* note 1, at 119.

277. Like the second and third factors, the fourth factor also makes explicit reference to the "copyrighted work" rather than to the physically and conceptually distinct "work of visual art" that is protected by VARA. *See* 17 U.S.C. § 107(4) (1994).

278. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 593 (1994).

279. *See* 17 U.S.C. § 106A(e); Jaszi, *supra* note 63, at 497 ("[M]oral rights (unlike other copyright interests) are not in the market place; they are inalienable, although subject to waiver in particular instances.").

280. *See supra* Part III.C.2.

281. *Cf.* Leval, *supra* note 87, at 1124. Leval notes:

> The Court's recognition of the importance of this factor underlies, once again, that the copyright is not a natural right inherent in authorship. If it were, the impact on market values would be irrelevant; any unauthorized taking would be obnoxious. The utilitarian concept underlying the copyright promises authors the opportunity to realize rewards in order to encourage them to create. A second-

apply factor four, just as it is difficult to apply factors one and two, to VARA-infringing uses of protected tangible artifacts.

IV Conclusion

The federal moral rights created by Congress in VARA are inherently incompatible with copyright's fair-use doctrine. Although federal moral rights are rights in tangible art objects, fair use does not affect rights in tangible things. Although federal moral rights are distinctly personal in nature, fair use typically limits more impersonal economic rights. Although federal moral rights exist to further the deontological goals of promoting artistic respect and artifact preservation, fair use exists to further copyright's utilitarian goal of increasing the number of works of authorship available to the public. Finally, the statutory fair-use factors set forth in § 107 of the Copyright Act simply do not work when applied in the context of federal moral rights.

Despite this doctrinal and practical incompatibility, fair use remains an explicit statutory limitation on federal moral rights.[282] Nevertheless, courts considering fair-use claims in moral-rights cases[283] should decline Congress's invitation to so limit artists' integrity and attribution rights. Limiting these rights through fair use would disregard the nonconsequentialist goals of promoting artistic respect and furthering artifact preservation, which drove Congress in 1990 to recognize federal moral rights in the first place. Considering that artists' federal integrity and attribution rights, properly understood, are no barrier to the creation of derivative works from preexisting ones, limiting artists' rights in the name of fair use would further none of the goals of copyright while ignoring completely those which drove Congress to adopt federal moral rights.

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ary use that interferes excessively with an author's incentives subverts the aims of copyright. Hence the importance of the market factor.

Id.

282. *See* 17 U.S.C. §§ 106A(a), 107

283. Although VARA has only been in effect for approximately six years, a number of federal courts have handled cases presenting VARA issues. *See generally, e.g.*, Dielsi v Falk, 916 F Supp. 985 (C.D. Cal. 1996); Choe v Fordham Univ Sch. of Law, 920 F Supp. 44 (S.D.N.Y 1995); Carter v Helmsley-Spear, Inc., 861 F Supp. 303 (S.D.N.Y 1994), *aff'd in part, rev'd in part, and vacated in part*, 71 F.3d 77 (2d Cir. 1995); Gegenhuber v Hystopolis Prods., Inc., No. 92-C-1055, 1992 WL 168836 (N.D. Ill. July 13, 1992).