Washington and Lee Law Review

Volume 48 | Issue 4 Article 12

Fall 9-1-1991

Federal Recognition Of Performance Art Author Moral Rights

FRANCES LEWIS LAW CENTER PROJECT

A FEDERAL RECOGNITION OF PERFORMANCE ART AUTHOR MORAL RIGHTS*

"I'll have these players
Play something like the murder of my father,
Before mine uncle: I'll observe his looks;
I'll tent him to the quick; if he but blench,
I know my course. . . . [T]he play's the thing,
Wherein I'll catch the conscience of the King."
Hamlet, act 2, sc. ii.

"Speak the speech, I pray you, as I pronounced it to You, trippingly on the tongue."
Hamlet, act 3, sc. ii.

A young playwright, enrolled in a college graduate program, writes a two act play and directs and produces the initial performance of his work for the annual college theater festival. Funny, energetic, and a bit weird, his play is the hit of the festival. Subsequently, the playwright agrees to a more elaborate and "fully realized" production of his script, directed and produced by a fellow graduate student. Halfway through the rehearsal period, the playwright visits a rehearsal. He is shocked to discover that his eccentric, funny work has been twisted into a turgid, overly serious "soap-opera." The playwright protests and demands that the director stage his play in accordance with the manifest intent contained in the playwright's script. The director refuses, claiming the right to interpret and stage the author's play as the director sees fit. On opening night, prior to the commencement of the play, the playwright disavows the production to the discomforted audience.

Another example of college art students taking themselves too seriously? Perhaps; however, the incident graphically illustrates a conflict between the authors and interpreters of performance art[1] that extends well beyond the

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* This article and accompanying model legislation were the product of a 1990-91 Frances Lewis Law Center fellowship awarded to the author. The author wishes to thank Professors Doug Rendleman, Brian Murchison and Sally Wiant for their patience and invaluable assistance. A special thank you is extended to Helen Konrad. Her thoughts and suggestions have added immeasurable worth to this article.

1. For the purposes of this paper, "performance art" or "performing art" means a fixed, self-contained artistic creation that also acts as its author's intended guide for individuals to perform the work. Examples of performance art include, but are not limited to, sheet music, play scripts and video taped or filmed choreography. *See* J. MILLER, SUBSEQUENT PERFORMANCES 34 (1986) (stating that text of work of performance art exists in two capacities: (1) as guide to produce performance; and (2) as authenticating device whose purpose is to provide system of identification that allows one to say that particular performance is instance of work in question).

academic environment. Indeed, the conflict between authors and interpreters of performance art at one time or another has affected much of the professional performance art community.[2]

One of the most dramatic manifestations of this conflict began in 1984 when the Boston American Repertory Theater (Boston ART) purchased the rights to produce Samuel Beckett's "Endgame."[3] Pursuant to these rights, the Boston ART staged a production of "Endgame" that allegedly made significant departures from Mr. Beckett's script.[4] Instead of setting the play in a bare, cell-like room, as specified in Mr. Beckett's script, the Boston ART set the play in an abandoned subway tunnel with a bombed out subway car extending halfway across the stage.[5] The Boston ART also cast two black actors to perform characters specifically described as white in Mr. Beckett's script.[6] At one point during the play these actors froze silently in place while their lines were spoken out over an amplified sound system emanating from the rear of the theater.[7] Finally, instead of the specified silence preceding the play's beginning, the Boston ART added an overture that Phillip Glass composed.[8] Beckett asserted that these changes violated his rights as the author of "Endgame."[9]

Mr. Beckett is not the only notable professional playwright to object to novel interpretations of his works.[10] Playwrights Sam Shepard and Edward Albee strenuously have objected to certain productions of their respective plays.[11] Nor are playwrights the only performance art authors that have complained about subsequent recreations of their works.[12] Recently the Holst estate objected to a synthesized version of Holst's "The Planets,"[13] and in 1948 two Russian composers brought suit against Twentieth Century-Fox for using their symphonic music as a soundtrack to an "anti-russian" movie.[14]

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2. *See infra* notes 3-14 and accompanying text (discussing various examples of conflict between performance art authors and interpretive artists).

3. Freedman, *Playwrights Debate Staging*, N.Y. Times, Mar. 14, 1985, at C21, col. 1.

4. Garbus & Singleton, *Playwright-Director Conflict: Whose Play Is It Anyway?*, Brooklyn L.J., Dec. 28, 1985, at 1, col. 3.

5. *Id.* at 21, col. 3.

6. Freedman, *supra* note 3, at C21, col. 1.

7. Garbus & Singleton, *supra* note 4, at 2, col. 1.

8. Freedman, *supra* note 3, at C21, col. 1.

9. *Id.* at 21, col. 1.

10. *See infra* note 11 and accompanying text (discussing other playwrights who have objected to interpretations of their plays).

11. *See* Freedman, *supra* note 3, at C21, col. 1 (Shepard disowns New York Shakespeare Company production of his play "True West"); N.Y. Times, Aug. 5, 1984, at 7, col. 1 (Albee objects to stock company's all male cast of "Who's Afraid of Virginia Wolfe").

12. *See infra* notes 13-14 and accompanying text (discussing performance art authors, other than playwrights, who have objected to interpretations of their works).

13. *Moral Rights—Practical Perspectives*, 14 COLUM. J.L. & ARTS 25, 51 (1989) [hereinafter *Practical Perspectives*].

14. *Shostakovich v. Twentieth Century-Fox Corp.*, 80 N.Y.S.2d 575 (Sup. Ct. 1948).

The above described incidents all involve a conflict that pits performance art authors—playwrights, composers and choreographers—against the interpretive artists—directors, conductors and choreographers—who stage the authors' works.[15] The authors of performance art are asserting a right to control the use of their work to protect the artistic vision they have imbued in their work, while the interpretive artists are claiming the right to control the author's work to communicate their own artistic vision.[16]

This article will fully explore the nature of the contest for control between the authors and interpreters of performance art. In addition the article will attempt to arrive at a federal statutory resolution to the dispute. More specifically, this article first will concern itself with accurately defining the right that the authors of performance art are asserting.[17] Second, the article will explore some of the existing analogues for the author's moral right that presently exist within the American legal system.[18] Third, the article will discuss the constitutional difficulties that are involved in any federal statutory recognition of this author's right.[19] Fourth, the article will attempt to delineate fully the various interests involved in such a legislative recognition.[20] Finally, the article will conclude with a detailed discussion of how these interests satisfactorily can be incorporated into specific statutory provisions.[21]

I. Defining the Performance Art Author's "Moral Right"

Because all artists have impressed their thoughts and feelings, their inner being, into their art, artists want to control the presentation of their work.[22] Artists are not the only creators who materialize themselves in their creations, but because the artistic mediums are subject to relatively few constraints of economy, efficiency, and physical environment, artists can inject more of their personalities into their creations than can the creator of a drill press.[23] To restate the proposition, when an engineer uses the

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15. *See* Hughes, *The Philosophy of Intellectual Property*, 77 Geo. L.J. 287, 347-48 (1988) (describing conflict between performance art authors and interpretive artists).

16. *Id.* at 347-48 (describing conflict between performance art authors and interpretive artists).

17. *See infra* notes 22-34 and accompanying text (defining right that authors of performance art are asserting).

18. *See infra* notes 35-154 and accompanying text (exploring American analogues to performance art author's moral right).

19. *See infra* notes 155-418 and accompanying text (discussing constitutional difficulties surrounding federal statutory recognition of the performance art author moral right).

20. *See infra* notes 419-44 and accompanying text (discussing various interests involved in federal recognition of performance art author moral rights).

21. *See infra* notes 445-520 and accompanying text (discussing how involved interests can be incorporated into specific statutory provisions).

22. *See* Amarnick, *American Recognition of the Moral Right: Issues and Options*, 29 Copyright L. Symp. (ASCAP) 31, 36-37 (1983) (discussing artist's act of impressing personality into art).

23. Hughes, *supra* note 15, at 342.

physical laws of the universe to design a successful drill press, the very Newtonian laws that are the key to designing the drill press also are the constraints that prevent the creator from instilling his own personality into his creation.[24] Conversely, when an artist uses his human spirit to guide his creating, the constraints of economy, efficiency and physical environment do not impede the impression of his personality into his artistic creation.[25]

The artist's freedom to inject his personality into his art is a double-edged sword, however. Because an artist's art largely is free from the constraints of economy, efficiency and physical environment, individuals other than the artist can easily distort or change the art.[26] If an individual distorts or changes the artist's art, then the individual changes the artist's manifestation of his personality, and thereby wounds the artist's feelings.[27] Thus, the plethora of personality in art, in concert with the fragility of its manifestation explains why artists attempt to control the presentation of their art and justifies recognition of the unique right of artists to protect the manifestations of their personalities from distortion by others: an artist's moral right.[28]

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24. *See id.* at 342-43 (describing constraints of economy, efficiency and physical environment that affect creation of intellectual property).

25. However, cultural limitations may govern the course and form of an artist's creations. *See* BLOTNER, *Continuity and Change in Faulkner's Life and Art*, in FAULKNER & IDEALISM 15 (1983) (discussing effect of cultural conditions on form and course of William Faulkner's writings).

26. *See* Hughes, *supra* note 15, at 342-43 (describing constraints of economy, efficiency and physical restraints that affect creation of intellectual property). Because performance art only is realized fully through the contributions of individuals other than the author, such as directors, conductors, choreographers, actors, musicians and dancers, the risk of distortion is acute especially for the author's of performance art. *See* J. MILLER, *supra* note 1, at 33 (stating that performance art is only complete when performed).

27. *See* Amarnick, *supra* note 22, at 37 (citing Radojkovic, *The Legal Character of "Moral Right,"* COPYRIGHT 203 (1965)).

28. *See id.* (describing author's manifestation of his personality into his art); Hughes, *supra* note 15, at 342-43 (describing constraints on creation of intellectual property). This conception of the moral right is essentially a recognition that distortions to an artist's work harm the artist's psyche. *See* Amarnick, *supra* note 22, at 37 (describing effect of distortion on artist) (quoting Note, *Protection of Artistic Integrity: Gilliam v. American Broadcasting Companies*, 90 HARV. L. REV. 473, 477 (1976)). This approach is distinct from that taken by many commentators and national legislative schemes that link moral rights to the artist's economic interests in his work. *See* S. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY, 576 (1938) (describing economic conception of moral rights); S. RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 473-74 (1987) (describing economic conception of moral rights); Note, *Protection of Artistic Integrity: Gilliam v. ABC*, 90 HARV. L. REV. 473, 477 (1976) (same). The economic approach to moral rights attaches approbation only to those distortions that decrease the marketability of an artist's work. *See* Amarnick, *supra* note 22, at 37 (same). Further, the economic approach measures decreases in an artist's marketability by measuring the harm to the artist's reputation resulting from a distortion to the artist's art. *See id.* (same).

Supplying a remedy that redresses distortions harming the artist's economic interests tangentially may prevent harm to the artist's psyche. *See id.* (noting close relationship between

Theorists have broken the moral right into a multiplicity of subparts, but for the purposes of this article, the moral right will be divided only into rights of paternity and integrity.[29] Such a subdivision accords with the terms of the Berne Convention (Berne),[30] which the United States Congress adopted in part on October 12, 1988.[31] The paternity right encompasses the artist's right to be known as the author of his work.[32] Commentators further subdivide the paternity right into the artist's right to prevent others from being named the author of his work, and conversely, the right to prevent others from falsely attributing authorship to the artist of art that the artist has not created.[33] The right of integrity encompasses the artist's right to prevent others from making deforming changes to his work.[34]

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moral interests and economic interests). However, the scope of protection that the economic approach to moral rights affords is more limited than the personality approach to moral rights. *See id.* (recognizing artists' difficulty in obtaining relief based upon economic approach). Due to the slight market demand for most art, many artists lack an ascertainable artistic reputation. *See* Davis, *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 HOFSTRA L. REV. 317, 358 (1989) (describing difficulties in measuring artist's reputational damage). Thus, under most economic moral right schemes, artists will not possess a recognizable economic interest in their work. *See id.* (same); *see also Tamarind Lithography Workshop, Inc. v. Sanders*, 143 Cal. App. 3d 576-77, 578, 193 Cal. Rptr. 409 (1983) (observing difficulty in quantifying lost profits when film owner refuses to give film producer contracted screen credit). As a result, though a distortion still will harm an artist's psyche, the artist will lack the means to redress the distortion. *Id.* A personality based approach to moral rights redresses any distortion that harms the artist's psyche, independent of any existing economic interest of the artist. *See* Amarnick, *supra* note 22, at 37 (describing personality approach to moral rights); Davis, *supra*, at 358 (describing difficulties in measuring artist's reputational damage).

29. Traditionally, the moral rights doctrine has encompassed two additional rights: The right of disclosure and the right of withdrawal. *See* 2 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS § 8.21[A], at 8-248 (1990) [hereinafter M. NIMMER] (describing right of withdrawal and disclosure). The right of disclosure gives the artist the right, prior to the time he places his art into public circulation, to determine both the form of the art and the time and manner that the art will be disclosed. *See* Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 5 (1985) (citing Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 467 (1968)). The right of withdrawal encompasses the artist's right to withdraw a work from public circulation if it no longer represents the views of the artist. *See* M. NIMMER, *supra*, at 8-248 (describing right of withdrawal).

30. Berne Convention (Paris Text), art. 6*bis*(1) [hereinafter Berne]. Article 6*bis*(1) of the Berne Convention states:

> Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which shall be prejudicial to his honor or reputation.

31. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 3(b), 102 Stat. 2853, 2853-54 (1988) [hereinafter BCIA].

32. M. NIMMER, *supra* note 29, § 8.21[A][1], at 8-248.

33. *Id.*

34. *Id.*

II. Protecting the Moral Rights of Performance Art Authors—The Sufficiency of American Analogues

Europe and a large part of the Third World long have incorporated into their respective common-law and legislative schemes some form of moral rights protection for artists, including the authors of performance art.[35] Within America, however, legal recognition of the moral rights doctrine has been much more recent and limited in scope.[36] State and federal courts never have recognized artists' moral rights.[37] State legislatures have recognized the doctrine, but they have limited its reach to the creators of visual art.[38] Congress has followed the lead of these state legislatures and limited its recognition of moral rights to the creators of visual art.[39] Thus, within the United States, a performance art author finds no explicit, legal recognition of his moral rights.[40]

When Congress enacted the Berne Convention in 1988,[41] it had the opportunity to institute the kind of inclusive moral rights protection that

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35. *See* Kwall, *supra* note 29, at 97-100 (listing scope of moral rights protection in 35 countries).

36. *See infra* notes 37-40 and accompanying text (citing state and federal law that has accorded moral rights protection to visual art artists).

37. *See* Vargas v. Esquire, 164 F.2d 522, 526 (7th Cir. 1947) (noting lack of persuasive case law supporting notion of moral rights); Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 70-71, 80 N.Y.S.2d 575, 578-79 (1948) (explaining difficulty in applying doctrine of moral right), *aff'd*, 275 A.D. 692, 87 N.Y.S.2d 430 (1949). *But cf.* Community for Creative Non-Violence v. Reid, 846 F.2d 1485, 1498-99 (D.C. Cir. 1988) (suggesting that if individual excessively mutilates or alters creator's work, creator may have enforceable non-economic rights); Gilliam v. ABC, 538 F.2d 14, 24-25 (2nd Cir. 1976) (considering implicit support for artist's integrity rights). *See also infra* note 73 (explaining construction of *Gilliam* recognizing author's moral right).

38. *See* Cal. Civ. Code § 987(b)(2) (West Supp. 1991) (granting paternity and integrity rights to creators of "original painting, sculpture, or drawing, or an original work of fine art in glass); Conn. Gen. Stat. Ann. § 42-116s (West 1991) (granting paternity and integrity rights to creators of visual art including, but not limited to, "drawing; painting; sculpture; mosaic; photograph"); La. Rev. Stat. Ann. § 51:2152 (West 1987) (granting paternity and integrity rights to creators of any "work of visual or graphic art"); Me. Rev. Stat. tit. 27, § 303(1)(D) (1988) (granting paternity and integrity rights to creators of "any original work of visual or graphic art"); Mass. Gen. Laws Ann. ch. 231, § 85S(b) (West Supp. 1991) (granting paternity and integrity rights to creators of "any original work of visual or graphic art of any media"); N.J. Stat. Ann. § 2A:24A-3e (West 1987) (granting paternity and integrity rights to creators of "any original work of visual or graphic art"); N.Y. Arts & Cult. Aff. Law § 11.01.9 (McKinney 1991) (granting paternity and integrity rights to creators of any "painting, sculpture, drawing, or work of graphic art, and print"); Pa. Stat. Ann. tit. 73, § 2102 (Purdon Supp. 1991) (granting paternity and integrity rights to creators of an "original work of visual or graphic art"); R.I. Gen. Laws § 5-62-2(e) (1987) (granting paternity and integrity rights to creators of "any original work of visual or graphic art").

39. *See* Visual Artists Rights Act of 1990, Pub. L. No. 101-650, § 601, 104 Stat. 5128 (1990) [hereinafter JIA] (according visual artists moral rights). Congress' 1990 enactment of moral rights legislation for visual artists has been the sole federal recognition of the moral rights doctrine. *See id.* (limiting federal moral rights protection to visual artists).

40. *See supra* notes 36-39 and accompanying text (discussing limited extent of American moral rights recognition).

41. BCIA, *supra* note 31, at 2853-54.

would have encompassed the moral rights of performance art authors.[42] Specifically, Congress could have given full effect to the complete text of Berne, including section 6bis(1), the moral rights provision protecting the paternity and integrity rights of all artists.[43] Instead Congress chose to adopt Berne without giving effect to section 6bis(1), stating that section 6bis(1) did not expand or reduce any right of an author to assert attribution or integrity rights.[44] Congress justified its limitation on its enactment of Berne with the rationale that existing American statutory and common-law already accorded moral rights protection equivalent to that accorded by section 6bis(1).[45]

The limitations that Congress placed on its enactment of Berne have forced authors of the performing arts to find moral rights protection in the statutory and common-law that Congress described as analogues to moral rights.[46] These moral rights analogues include causes of action for breach of contract, libel, invasion of privacy, unfair competition and copyright infringement.[47] Despite Congress' apparent belief in the sufficiency of these analogues, commentators uniformly have found them ill-equipped to properly protect artists' moral rights.[48] Because unfair competition, breach of contract and copyright infringement actions particularly are prevalent in the context of the performance arts, the ability of these analogues to protect the personality interests of performance art authors deserves closer attention.[49]

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42. *See* Berne, *supra* note 30, at *6bis*(1) (containing language establishing integrity and paternity rights provisions).

43. *See id.* (same).

44. BCIA, *supra* note 31, at 2853-54.

45. *See Final Report of Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM. J.L. & ARTS 513, 555 (1986) (stating that U.S. provides moral rights analogues sufficient to comply with paternity and integrity provisions of Berne) [hereinafter *Final Report*].

46. *See id.* (insisting that United States provides moral rights analogues sufficient to comply with paternity and integrity provisions of Berne).

47. *See* M. NIMMER, *supra* note 29, § 8.21[B], at 8-257 (noting causes of action recognizing substance of moral rights); Kwall, *supra* note 29, at 18 (same); Note, *Author's Moral Rights in the United States and the Berne Convention*, 19 STETSON L. REV. 202, 212 (1989) (same).

48. *See* M. NIMMER, *supra* note 29, § 8.21[B], at 8-257 (stating that "it may not be said that . . . [the development of analogues for moral rights] has brought to America authors moral rights protection in the full bloom of its European counterpart"); Amarnick, *supra* note 22, at 61 (noting that "it is necessary to remember that American protection [of moral rights] is a melange of doctrines and statutes whose goals are not specifically those of giving recognition to" artist's personality interests in his work); Kwall, *supra* note 29, at 37 (recognizing that "copyright law cannot function as an adequate moral right substitute"); Note, *Artists' Rights in the United States: Towards Federal Legislation*, 25 HARV. J. ON LEGIS. 153,, 180 (1988) [hereinafter Note] (stating that "all that American creators currently possess to protect their rights in their work is a patchwork of federal and state actions that do not nearly approximate the cohesive protections that would be afforded by an explicit amendment to the copyright laws providing artists with moral rights protection") (citing Amarnick, *supra* note 22, at 60-71).

49. *See* Garon, *Director's Choice: The Fine Line Between Interpretation and Infringement*

In general, of all artists, performance art authors have the closest approximation to a contractual form of moral rights when they contract with interpretive artists and producers.[50] At least some performance art authors, as a group or individually, have the bargaining power to reserve expressly in the assignments or licenses for their works the right to prevent distortion or truncation of their works—a contractual right analogous to the performance art author's right of integrity.[51] Courts have long recognized and enforced such express reservations.[52]

An example of such an express reservation is the prohibition against distortion or truncation contained in the "Approved Production Contract" (APC), a contract used by playwrights belonging to the Dramatist Guild.[53] The APC is a mandatory contract between the playwright and the producer that governs the first production of the playwright's script.[54] The contract provides that no interpretive artist or producer can make changes to the playwright's script without the playwright's prior approval.[55] Further, the APC specifies that the playwright does not have to be reasonable in refusing to make such changes to his script.[56] Similar to the playwright's APC provisions, choreographers often enter into contractual agreements with producers and interpretive artists that reserve quasi-integrity and paternity rights.[57] For instance, these choreography contractual agreements typically

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of an Author's Work, 12 COLUM. J.L. & ARTS 277, 287-303 (1988) (discussing value of copyright, unfair competition and contract law to playwrights); Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. The Custom of the Dance Community*, 38 U. MIAMI L. REV. 287, 295-97 (1984) (discussing value of copyright and contract law to choreographers).

50. *See infra* notes 51-52 and accompanying text (discussing strong contractual provisions against alterations existing within performance art industry).

51. *See* Garon, *supra* note 49, at 278 (stating that Broadway playwrights often have strong contractual protections against alterations due to mandatory Dramatist Guild contract); Singer, *supra* note 49, at 294-95 (stating that choreographer's licensing agreement often will have provision forbidding alterations to choreographer's work); *Practical Perspectives*, *supra* note 13, at 43 (stating that Broadway playwrights often have strong contractual protections against alterations due to mandatory Dramatist Guild contract).

52. *See* Manners v. Famous Players-Lasky Corp., 262 F. 811, 815 (1919) (stating that provision of contract licensing play for movie adaptation, providing that, "no alterations, eliminations, or additions to be made in the play without approval of the author," prohibits changes that constitute substantial deviation from locus of play, or order and sequence of development of plot); Royle v. Dillingham, 53 Misc. 383, 385 (Sup. Ct. 1907) (providing that license authorizing production of play that provides "no changes or alterations in the said play . . . shall be made without consent of the [author]", held to permit injunction against licensee from making unauthorized changes and modifications in text and structural arrangement of play).

53. Garon, *supra* note 49, at 278.

54. *Id.*

55. *Id.*

56. *Id.*

57. *See* Singer, *supra* note 49, at 294-95 (describing terms of choreographer licensing agreement).

reserve the choreographer's right to forbid any alteration to his work without his prior approval.[58]

While the above described contractual provisions appear to protect the personality interests of the performance art author, at best, reliance on contract is a chewing gum and bailing wire approach to protecting these interests.[59] The principal difficulty with the contractual analogue is that economic forces compel even the authors of performance art to waive their personality rights,[60] and the courts consistently have upheld such waivers.[61] In addition the entrepreneurs of the performance art industry have a decided bargaining advantage that performance art authors find hard to counter.[62] Organizations such as the Dramatist Guild may provide effective contractual protection for the artist's personality interests,[63] however, these protections are only available to Dramatist Guild's members.[64] Additionally, the vast majority of choreographers and composers do not belong to any comparable organization.[65] Thus, most performance art authors are placed in an unequal bargaining position with respect to protecting their personality interests and, as a result, are forced to waive their rights.[66]

Even if a performance art author manages to secure contractual provisions protecting his personality interests, the author still faces the difficulty of protecting his personality interests from the virtually unlimited number

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58. *Id.* at 295.

59. *See infra* notes 60-88 and accompanying text (describing difficulties in using contact law as analogue for performance art author moral rights).

60. *See* Kwall, *supra* note 29, at 27 (stating that "unknown creators face disparity of bargaining power that frequently results in loss of protections"); Singer, *supra* note 49, at 296 (stating that choreographer may not possess bargaining power to insure sufficient contractual provisions); *Practical Perspectives*, *supra* note 13, at 43 (stating that economic pressures often force playwrights to consent freely to changes despite reservation of strong contractual rights).

61. *See* Autry v. Republic Prods., 213 F.2d 667, 669 (9th Cir.), *cert. denied*, 348 U.S. 858 (1954) (holding that licensing agreement that allows licensee to cut, edit and otherwise revise in any manner, to any length and for any purpose, prevents licensor from bringing claim for such editing); Granz v. Harris, 198 F.2d 585, 588 (2d Cir. 1952) (holding that contract for sale of master recordings, encoded in 78 format, allowed assignee to issue copies of master recording in 33 format); Vargas v. Esquire, 164 F.2d 522, 525-26 (7th Cir. 1947) (holding that where artist sells copyright to his art and assigns use of his name in connection with art and all rights with respect to his name, including but not limited to right to dispose of his name, the artist has no interest that allows him to assert right to attribution).

62. *See* Kwall, *supra* note 29, at 27 (stating that performance art authors often have disparate bargaining power that makes it difficult to obtain protective provisions). The performance art entrepreneur possesses a strong bargaining position versus performance art authors due to the vast amount of performance art that is available to the entrepreneurs. *See also* C. GRODIN, IT WOULD BE SO NICE IF YOU WEREN'T HERE 183-84 (1989) (describing screenwriter's difficulties in trying to get his screenplays and plays produced).

63. Garon, *supra* note 49, at 278 n.7.

64. *Id.*

65. *See* Singer, *supra* note 49, at 293-94 (stating that interpretive artist and producing organizations directly negotiate contracts with choreographer or choreographer's representative).

66. *See* Kwall, *supra* note 29, at 27 (noting court's reluctance to extend protections on contractual basis); Singer, *supra* note 49, at 296; *Practical Perspectives*, *supra* note 13, at 43 (noting economic pressures that prevent author from exercising control over work).

of wrongful acts falling outside the specific terms of the contract.[67] For example, absent an express contractual provision prohibiting a particular form of modification, the courts will follow one of two equally nonbeneficial courses.[68] They either will rely on the custom prevailing in the performance art industry to evaluate liberally the suitability of modifications falling outside the contractual terms,[69] a determination that obviously will favor the interpretive artist, or the courts simply will allow the modification because the contract does not expressly prohibit that particular type of change.[70]

To further illustrate, a licensing agreement between the author and a producer may prohibit modifications to the dialogue of a play, the choreography of a ballet or the score of an orchestral work. However, a skillful artist performing the work could make dramatic interpretive changes that would not modify the "text" of the work in any way.[71] For instance, an interpretive artist could turn a tragic work into a farce merely by exaggerating the emotional range of his performance or by speaking his lines with an unintended irony.[72] While the "modifications" might harm the author's personality interests, the changes may be beyond the purview of contract law, due to the omission of an express prohibition against changing the tone of the work.[73]

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67. *See infra* notes 69-81 and accompanying text (describing difficulties performance art authors face when attempting to enforce contractual provisions protecting moral rights).

68. *See supra* notes 61-67, *supra* notes 69-71 and accompanying text (discussing judicial approaches to contractual provisions protecting performance art author's moral rights).

69. *See* Preminger v. Columbia Pictures Corp., 269 N.Y.S.2d 913, 915 (1966) (holding that because license to distribute film for television makes no prohibition against cutting film for television, distributor could cut in accordance with custom prevailing in trade and industry); Stevens v. National Broadcasting Co., 270 Cal. App. 2d 886 (1969) (failing to find specific grant of rights to prevent assignee from deleting portions for television, court only enjoined editing that would constitute severe emasculation or material distortion).

70. *See* McGuire v. United Artists Television Prod., Inc., 254 F. Supp. 270 (S.D. Cal. 1966) (holding that where contract for sale transferred all of artist's rights, title and interest in film, nothing barred owner from cutting film for television to accommodate commercials).

71. *See* S. RICKETSON, *supra* note 28, at 468-69 (noting that competent actor can transform farce into tragedy).

72. *Id.*

73. Some commentators have suggested that the 1976 United States Court of Appeals for the Second Circuit opinion, Gilliam v. American Broadcasting Co., Inc., 538 F.2d 14 (2d Cir. 1976), radically may have diverted from the traditional contract rule that a court will only give effect to an express provision in a licensing agreement between an author and a producer. M. NIMMER, *supra* note 29, at 260; Kwall, *supra* note 29, at 21. These commentators suggest that *Gilliam* may stand for the proposition that where a contractual agreement between a copyright owning author and a producer is silent as to the personality rights of the author, specifically the author's integrity rights, the author will retain those integrity rights. M. NIMMER, *supra* note 29, at 260-61; Kwall, *supra* note 29, 21 & 34-35.

In *Gilliam* the Monty Python comedy group wrote and delivered copyrighted scripts to the British Broadcasting Corporation (BBC) in accordance with an agreement providing that no significant changes could be made to the scripts without the express permission of Monty Python. 538 F.2d at 17. The agreement further provided that Monty Python retained all rights

Assuming that performance art authors do have the bargaining power and the legal acumen to draft effective contractual provisions to protect their personality interests, the enforcement of these contractual rights will continue to remain difficult for most authors.[74] First, the cost of pursuing a breach of contract action prevents most artists from enforcing what contractual protections they do have.[75] Second, the remedies available to a performance art author for breach of a contract are limited and possibly ineffective.[76] The typical award for breach of contract is compensatory

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not expressly granted in the agreement. *Id.* The BBC subsequently assigned a completed Monty Python program to Time Life Films who then distributed the program to the American Broadcasting Corporation (ABC) for American broadcast. *Id.* at 17-18. In accordance with the terms of the BBC/Time Life contract, permitting substantial editing of the program, ABC excised 24 minutes from the 90 minute program. *Id.* The Second Circuit ultimately held that ABC infringed on Monty Python's common law copyright in its script because Monty Python had not empowered BBC and its sublicensees "to alter" the program "once made." *Id.* at 21. Thus, by significantly editing the Monty Python program, ABC exceeded the scope of the license that Monty Python indirectly granted ABC through BBC and Time Life Films. *Id.*

One reading of *Gilliam* is that because Monty Python expressly reserved all rights not expressed in its agreement with BBC, it retained the right to prohibit any significant changes to programs derived from its script. Kwall, *supra* note 29, at 21 & 34-35; *see also Gilliam*, 538 F.2d at 22 (stating that because screenwriter's agreement explicitly retains all rights not granted by contract, omission of any terms concerning alterations in program after recording must be read as reserving to licensor exclusive authority for such revisions). Such a reading of *Gilliam* does not suggest that the Second Circuit deviated from the accepted principle of contract law that retained rights must be reserved expressly in the contract.

Professor Nimmer, however, finds the reservation clause in the Monty Python/BBC agreement irrelevant and reads *Gilliam* in a broader fashion. M. NIMMER, *supra* note 29, § 8.21[C], at 8-260 n.63. "[A]bsent an express authorization to make changes, the license to . . . perform is limited to . . . performance in the form in which the authors wrote the work, so that a material departure from such form goes beyond the terms of the license, and hence results in an infringement of [copyright]." *Id.* at 260-61. Such a reading does two things. First, it recognizes that authors who retain their copyrights essentially have some form of an integrity right that prohibits mutilations to the author's work. Secondly, Professor Nimmer's reading of *Gilliam* turns the express reservation rule on its head by suggesting that, absent a provision to the contrary, when an author confers a performance license for the work that is silent as to the author's integrity rights, the license only confers the right to perform the piece as supplied. *Id.* The right to mutilate the work remains solely with the copyright owning author. *Id.* at 261.

Even if one accepts Professor Nimmer's reading of *Gilliam*, the case's usefulness to performance art authors is limited. *Gilliam* links the author's integrity right to the author owning the work's common law copyright. *See Gilliam*, 538 F.2d at 21 (stating that "we find therefore, that unauthorized editing of the underlying work, if proven, would constitute an infringement of the copyright"). Thus, absent copyright ownership, *Gilliam* may not afford a performance artist any integrity right. *Id.* Certainly *Gilliam* does not hold that the author will have such a right if the contract between the author and the producer is silent with regard to making significant changes to the work. *Id.*

74. *See infra* notes 75-81 and accompanying text (describing difficulties facing performance art author trying to enforce contractual provisions that protect author's moral rights).

75. Singer, *supra* note 49, at 296.

76. *See infra* notes 77-81 and accompanying text (describing limited usefulness of remedies for breach of contract).

damages based on some kind of lost profits analysis.[77] In many cases, a paternity or integrity rights violation causes serious harm to the author's personality interests but results in little or no quantifiable lost profits for the author.[78] While injunctive relief may be available,[79] such relief could create serious First Amendment difficulties[80] and could be extremely destructive for the fragile entrepreneurial aspects of the performance art industry.[81]

Similar to the illusionary protections of contract law, federal copyright law initially appears to afford substantial protection to the performance art author's personality interests.[82] These protections basically take the form of two copyright privileges: the exclusive rights to do and authorize the (1) public display and performance of the copyrighted work[83] and (2) derivative works based on the copyrighted work.[84] In addition to these two basic statutory rights, commentators have suggested that *Gilliam v. American Broadcasting Co., Inc.*[85] recognized a third "integrity type" right that authors have in their copyrighted works—the right to prevent unauthorized mutilations to their works.[86]

Commentators have argued that, in a number of fashions, these statutory and common-law copyright protections approximate moral rights protection for authors of performance art.[87] First, an author who has granted a performance license can bring an action for copyright infringement if the licensee performs such a modified version of the author's work that it constitutes a derivative version[88] of the author's work.[89] In effect the licensee

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77. *See* J. CALAMARI & J. PERILLO, CONTRACTS, § 14-4 (3rd ed. 1987) [hereinafter J. CALAMARI].

78. *See* Tamarind Lithography Workshop v. Sanders, 143 Cal. App. 3d 571, 578, 193 Cal. Rptr. 409, 412 (Cal. Ct. App. 1983) (noting that lost profits are difficult to quantify when film owner refused to give film producer contracted screen credit).

79. *See id.* at 578, 193 Cal. Rptr. at 412 (ordering film owner to abstain from showing film until owner gave film's producer his contracted screen credit); *see also* J. CALAMARI, *supra* note 77, at § 16-1.

80. *See infra* notes 289-299 and accompanying text (discussing potential First Amendment difficulties ensuing from enjoining moral rights violations).

81. *See* Amarnick, *supra* note 22, at 40 & 53 (discussing effect of injunctions on performance art industry); *see also infra* notes 294-299 and accompanying text (discussing economic hardship on performance art industry from enjoining moral rights violations).

82. *See infra* notes 83-92 and accompanying text (discussing protections copyright law affords performance art author's moral rights).

83. 17 U.S.C. § 106(4) & (5) (Supp. 1990).

84. 17 U.S.C. § 106(2) (Supp. 1990).

85. 538 F.2d 14 (2d Cir. 1976).

86. M. NIMMER, *supra* note 29, § 8.21[C], at 8-260; Kwall, *supra* note 29, at 41; *see also Gilliam*, 538 F.2d at 21; *supra* note 73 (describing implications of *Gilliam* holding).

87. Kwall, *supra* note 29, at 39-56; Singer, supra *note* 49, at 297; M. NIMMER, *supra* note 29, § 8.21[C], at 8-258.

88. Title 17 U.S.C. Section 101 (Supp. 1990) defines a derivative work as a "work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101 (Supp. 1990). A derivative version of an original work of performance art could

would be infringing on the author's right to perform derivative versions of his work.[90] Second, significant mutilations to the author's work, not rising to the level of a derivative version, might be prohibited by *Gilliam* as exceeding the scope of the performance license.[91] Finally, where an author has granted a license to perform a derivative version of his work, modifications beyond those necessary to make a derivative version, pursuant to *Gilliam*, could constitute a violation of the author's right to prevent mutilation to his work.[92]

While these theories of copyright infringement appear to be powerful analogues for moral rights, in practice their protections are problematic.[93] Most notably, the weak economic position of many performance art authors may force them to sell their copyrights.[94] Obviously, without the copyright to their work, authors will not have access to the protections of the copyright laws.[95] In addition to assigning their copyrights, performance art authors

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include a revival or restaging of a choreographic work made to accommodate modern dancers or modern dance styles. Singer, *supra* note 49, at 305.

89. Singer, *supra* note 49, at 305; Comment, *The United States Joins the Berne Convention: New Obligations for Authors' Moral Rights?*, 68 N.C.L. REV. 363, 379 (1990).

90. Kwall, *supra* note 29, at 40.

91. M. NIMMER, *supra* note 29, § 8.21[C], at 8-258; *Kwall*, *supra* note 29, at 41; *see also* Gilliam v. American Broadcasting Co., Inc., 538 F.2d 14, 23 (2d Cir. 1976) (defendant's extensive editing constituted copyright infringement); *supra* note 73 (discussing commentator's interpretations of *Gilliam*).

92. Kwall, *supra* note 29, 40-47; *see also Gilliam*, 538 F.2d at 23 (while licensees can edit to slight extent to arrange for presentation of licensor's work, licensee's extensive editing constituted copyright infringement); *supra* note 73 (discussing commentator's interpretations of *Gilliam*).

93. *See infra* notes 94-119 and accompanying text (explaining why copyright protections for copyright are problematic).

94. *See Practical Perspectives*, *supra* note 13, at 43 (recognizing economic pressures under which authors work).

95. *See* Kwall, *supra* note 29, at 47 (questioning whether playwright would have protections of copyright law if he sold his copyright). This statement must be qualified by the proviso that if a performance art author sells his copyright in return for a share of the royalties that the work generates, the author still may be able to avail himself of the protection of the copyright laws. *Id.* at 49. Pursuant to 17 U.S.C. § 501(b), the beneficial owner of a copyright can institute an action for any infringement of the copyright. 17 U.S.C. § 501(b) (Supp. 1990). Commentators and some courts have taken the view that the members of Congress intended beneficial owners to encompass authors who, while no longer owning their copyrights, receive royalties for their works. Kwall, *supra* note 29, at 49; *see also, e.g.*, Cortner v. Israel, 732 F.2d 267 (2d Cir. 1984) (authors of musical work who assigned copyrights in work in exchange for payment of royalties may sue for infringement of their beneficial interest in their copyrights); Kamakasi Music Corp. v. Robbins Music Corp., 534 F. Supp. 69 (S.D.N.Y. 1982) (holding that singer Barry Manilow's transfer of certain copyrights in his songs to music corporation in exchange for royalty payments did not preclude action for copyright infringement, given Manilow's status as beneficial owner of copyright).

The principle difficulty with the beneficial owner argument is that if the author transfers his copyright for a one-time fee, rather than a percentage of the royalties, the author might not qualify as a beneficial owner. *See Cortner*, 732 F.2d at 271 (holding that when author assigns copyright title to publisher in exchange for payment of royalties, equitable trust

may also forgo the protections of the copyright laws by failing to register their works, a common event in some areas of the performance arts.[96] In part these performance art authors fail to register because they are skeptical about the usefulness of copyright registration.[97] The United States has conceived and formulated its copyright law primarily to protect a creator's economic interests in his intellectual property.[98] Where intellectual property has little economic potential, as does most performance art,[99] its authors have little motivation to seek out copyright protection for their property.[100]

Another reason why performance art authors have not sought copyright protection for their works hinges on copyright law's historical biases against certain types of performance art.[101] Congress' slow recognition of choreography as an independent art form, one that could be registered under the federal copyright laws, illustrates this bias.[102] Congress did not consider dance an independent art form, copyrightable under federal law, until 1976 when Congress enacted the 1976 Copyright Act.[103] Prior to 1976 federal copyright law treated dance as a subspecies of drama.[104] This inaccurate classification prevented choreographers from registering their works unless their choreography depicted some story or emotion.[105] Because much dance lacks such elements,[106] many choreographers could not register their works.[107]

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relationship is established between two parties, giving author standing to sue for copyright infringement); *Kamakasi Music*, 534 F. Supp. at 74 (stating that where author transfers legal title to the copyright in exchange for royalties based on sales, author is beneficial owner). Thus, the author would not have the protections of the copyright laws. *See Cortner*, 732 F.2d at 271 (same); *Kamakasi Music*, 534 F. Supp. at 74 (same). One commentator has suggested that authors "presumably would not transfer their copyrights absent some type of royalty arrangement." Kwall, *supra* note 29, at 49. However, in view of the weak bargaining position that most performance art authors have versus performance art entrepreneurs, one might question the validity of this presumption. *See* Singer, *supra* note 49, at 296 (stating that performance art authors may not possess bargaining power to insure sufficient contractual protections). While courts might expand the meaning of beneficial interest to encompass all performance art authors who have transferred their copyrights, no court presently has so ruled. Kwall, *supra* note 29, at 49.

96. Singer, *supra* note 49, at 299.

97. *Id.* at 297.

98. Kwall, *supra* note 29, at 2; *see also* Mazer v. Stein, 347 U.S. 201, 219 (1954) (noting that economic philosophy behind copyright clause is belief that encouragement of individual effort by personal gain is best way to advance public welfare).

99. *See* C. GRODIN, *supra* note 62, at 183-84 (describing screenwriters' and playwrights' difficulties in trying to get their screenplays and scripts produced).

100. *See* Kwall, *supra* note 29, at 2 (stating that copyright laws protect author's pecuniary interests); Mazer v. Stein, 347 U.S. at 219 (noting that economic philosophy behind copyright clause is belief that encouragement of individual effort by personal gain is best way to advance public welfare).

101. Singer, *supra* note 49, at 299.

102. *See infra* notes 103-09 and accompanying text (describing the difficulties that dance has faced in becoming copyrightable).

103. Singer, *supra* note 49, at 288.

104. *Id.* at 288, 298.

105. *Id.* at 298.

106. *See id.* at 298 (noting that dance has been defined as art form that "embodies 'an

Though choreography eventually was afforded its own distinct niche within the federal copyright laws,[108] choreographers, particularly those outside the mainstream, remain suspicious of current law and have been reluctant to register their works.[109]

Regardless of whether an artist has registered and retained his copyright, the use of copyright laws to protect the personality interests in a work may be difficult. Similar to the inadequacies of contractual moral rights analogues, copyright is a clumsy legal mechanism for redressing the multitude of personality rights violations that a performance art author can suffer.[110] For instance, as previously mentioned, where the performance art author grants a performance license for his work, and the interpretive artist performs such a modified version as to constitute a derivative work, the author may be able to sue for copyright infringement under title 17 of United States Code section 106(2).[111] However, to constitute a derivative work under section 106(2), the interpretive artist might have to make gross modifications to the author's work, modifications that rise to the level of an adaptation rather than a distortion or mutilation of the author's work.[112] Because most changes to an author's work will be isolated deviations, not rising to the level of an adaptation, many actions brought pursuant to section 106(2) will not redress severe violations to the author's personality rights.[113]

Those personality right violations that fall through the cracks of section 106 might be caught by a suit brought pursuant to *Gilliam v. American Broadcasting Co., Inc.*, a case that commentators have suggested stands for the proposition that artists have a right to prevent mutilations to their work, whether or not the mutilations rise to the level of a derivative work.[114] However, *Gilliam* is too indiscriminate a tool to redress personality right violations.[115] First, in the fifteen years since the United States Court of Appeals for the Second Circuit issued the *Gilliam* opinion, no other court ever has used *Gilliam* to redress personality rights violations.[116] Second, the

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arrangement in time-space, using human bodies as its units of design'") (quoting B. VARNER, STUDY No. 28, COPYRIGHT IN CHOREOGRAPHIC WORKS 110 (1959) (letter from Agnes de Mille)).

107. Singer, *supra* note 49, at 298.

108. *Id.* at 299.

109. *Id.*

110. *See infra* notes 111-19 and accompanying text (describing inadequacies of copyright law as analogue for moral rights).

111. Singer, *supra* note 49, at 305.

112. *See* Comment, *supra* note 89, at 379 (stating that § 106(2) may only cover adaptations of work and not distortions or mutilations to work).

113. *Id.*

114. M. NIMMER, *supra* note 29, § 8.21[C], at 8-260-61; Kwall, *supra* note 29, at 21; *see also* Gilliam v. American Broadcasting Co., Inc., 538 F.2d 14, 23 (2d Cir. 1976) (holding that unauthorized editing of author's work can constitute infringement of copyright); *supra* note 73 (discussing commentator's interpretations of *Gilliam*).

115. *See infra* notes 116-19 and accompanying text (discussing why *Gilliam* cannot redress personality rights violations).

116. *But see* WGN Continental Broadcasting Co. v. United Video, Inc., 693 F.2d 622, 625 (7th Cir. 1982) (citing *Gilliam* on other grounds).

copyright portion of the *Gilliam* opinion simply may be a contract case, in which the plaintiff's victory hinged solely on its explicit reservation of the right to approve all subsequent edits.[117] Finally, even if *Gilliam* does stand for the proposition that an author has an absolute right to prevent mutilations to his work, the facts of *Gilliam* may limit the meaning of "mutilation" to the kind of gross editing that the defendant in *Gilliam* performed on the plaintiff's work.[118] Obviously, such a conception of mutilation does not begin to encompass the multitude of personality rights violations that an interpretive artist can inflict on the work's author.[119]

Besides copyright and contract, potentially the most significant American moral rights analogue for performance art authors is embodied in unfair competition under state common law[120] and particularly section 43(a) of the Lanham Act.[121] These two doctrines originally were conceived as a means to prevent false advertising in the sale of goods or services.[122] However, commentators and a number of court opinions have suggested that unfair

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117. *See Gilliam*, 538 F.2d at 22 (holding that because licensor's agreement explicitly retains all rights not granted by contract, omission of any terms concerning alterations in program after recording must be read as reserving to licensor's exclusive authority for such revisions); *see also supra* note 74 (discussing commentator's various interpretations of *Gilliam*).

118. *See Gilliam*, 538 F.2d at 21 (noting that approximately 24 minutes of 90 minute broadcast was edited out).

119. *See supra* notes 2-14 and accompanying text (describing various violations of performance art author's moral rights).

120. *See* Granz v. Harris, 198 F.2d 585, 588 (2d Cir. 1952) (holding that it is unfair competition for purchaser of master discs to produce and sell abbreviated record if purchaser attributed music to plaintiff); *Shaw v. Time-Life Records*, 38 N.Y.2d 201, 206, 341 N.E.2d 817, 820, 379 N.Y.S.2d 390, 395 (1975) (holding that essence of unfair competition claim is that defendant assembled product that bears striking resemblance to plaintiff's such that public will be confused as to identity of products).

121. The Lanham Act states:

> (a) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which-
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> (1) 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, or approval of his or her goods, services, or commercial activities by another person, or
>
> (2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

§ 43(a), 15 U.S.C. § 1125(a) (Supp. 1989).

122. *See* Gilliam v. American Broadcasting Co., Inc., 538 F.2d 14, 24 (2d Cir. 1976) (holding that section 43(a) of Lanham Act is federal counterpart to state unfair competition law); Derenberg, *Federal Unfair Competition at the End of the First Decade of the Lanham Act: Prologue or Epilogue?*, 32 N.Y.U.L. REV. 1029, 1039 (1957) (stating that primary purpose of section 43(a) is to provide a private remedy in cases of false advertising); Note, *supra* note 28, at 481 (stating that Lanham Act was meant to combat problems associated with false advertising in sale of goods or services related to trademarks).

competition and section 43(a) of the Lanham Act could encompass an author's rights of paternity and integrity.[123]

Simply put, a successful cause of action for unfair competition brought under the common-law or under section 43(a) of the Lanham Act requires the plaintiff to demonstrate that "a representation of a product, although technically true, creates a false impression of the product's origin,"[124] and that the representation harms the plaintiff's reputation.[125] Theoretically, a production of a performance art author's work could so significantly diverge from the author's intent, that the production could be termed as not being the author's work.[126] To avoid criticism or prevent the production from diverging from the author's work, the author could bring either a common-law unfair competition claim or a federal Lanham Act action, claiming that crediting authorship of the work to the author constitutes a false impression of the work's origins.[127]

Despite the apparent suitability of unfair competition as a moral rights analogue, the doctrine in both its state and federal forms inadequately protects the personality interests of performance art authors.[128] As in the case of contract and copyright, unfair competition primarily focuses on protecting the author's economic interests by protecting the author's personal

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123. *See* Smith v. Montoro, 648 F.2d 602, 604-07 (9th Cir. 1981) (holding implicitly that if author's name is eliminated from his work, author has claim under § 43(a) that parallels paternity right); *Gilliam*, 538 F.2d at 25 (holding that edited version broadcast by defendant probably violated Lanham Act in that it impaired integrity of plaintiff's work); Note, *supra* note 47, at 218 (noting that "false designation of origin" language can protect author's paternity right, while possibility of misleading public through false description can be used to protect author's integrity right); Note, *supra* note 48, at 169-70 (stating that artists successfully have convinced courts to use unfair competition to protect paternity and integrity rights).

In 1976, the Second Circuit in *Gilliam* used the Lanham Act as support for a preliminary injunction against the American Broadcasting Companies' (ABC) pending broadcast of a severely edited Monty Python program. 538 F.2d at 25. Monty Python, through its primary licensee, the British Broadcasting Corporation (BBC), granted ABC a performance license to broadcast a ninety minute Monty Python program based on one of Monty Python's screenplays. *Id.* at 17-18. ABC edited more than twenty four minutes from the ninety minute broadcast without obtaining the necessary permission of Monty Python. *Id.* at 21. The Second Circuit asserted that ABC probably had violated the Lanham Act, stating that "the edited version broadcast by ABC impaired the integrity of [Monty Python's] work and represented to the public as the product of [Monty Python] what was actually a mere caricature of their talents." *Id.* at 25.

The opinion is notable for both the court's novel use of the Lanham act to protect Monty Python's personality rights and the court's implicit recognition that the Lanham Act could be used to as a moral rights analogue. *Id.* at 24-25.

124. *Gilliam*, 538 F.2d at 24; *see also Shaw v. Time Life Records*, 38 N.Y.2d 201, 206, 341 N.E.2d 817, 820, 379 N.Y.S.2d 390, 395 (1975) (stating that essence of unfair competition claim is that defendant assembles product that bears such resemblance to plaintiff's product that public will be confused as to identity of products).

125. *Gilliam*, 538 F.2d at 24; *Shaw*, 38 N.Y.2d at 207, 341 N.E.2d at 821, 379 N.Y.S.2d at 396.

126. *See supra* note 124-25 and accompanying text (discussing cause of action for unfair competition).

127. *See Gilliam*, 538 F.2d at 24 (holding that representation of product, although technically true, creates false impression of product's origin sufficient to violate Lanham Act).

128. Note, *supra* note 48, at 177-79.

and business reputation.[129] More specifically, the underlying theory of unfair competition is that an individual should not get economic benefit by falsely presenting his work as that of another.[130] Conversely, a creator should not have his business or personal reputation harmed by false attributions that he has authored shoddy work.[131]

These underlying rationales suggest that a successful state or federal unfair competition claim depends on the performance art author having some kind of professional or personal reputation that has economic value for the author.[132] Most performance art authors have no such reputation.[133] Thus, while a production of a performance art author's work may severely harm the author's personality interests, unfair competition will provide little recourse for the relatively unknown author.[134]

In addition to unfair competition's basic incompatibility with the personality interests of performance art authors, the doctrine's ability to protect performance art author's moral rights often is limited by the author's contractual arrangements with the producer of the author's work.[135] If the author expressly or implicitly has contracted away a personality right attached to his work—the right to forestall editing, for instance—then the artist cannot bring an unfair competition action that arises out of the licensee's valid exercise of that waived right.[136] Because of the disparate bargaining power between performance art authors and performance art

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129. *See Gilliam*, 538 F.2d at 24 (noting that Lanham Act invoked to prevent misrepresentations that may injure plaintiff's business or personal reputation); Comment, *supra* note 89, at 375 (noting that Lanham Act invoked to prevent misrepresentation that may injure plaintiff's business or personal reputation).

130. Comment, *supra* note 89, at 375; *see also* Smith v. Montoro, 648 F.2d 602, 607 (9th Cir. 1981) (recognizing that substituting author's name with that of another "is wrongful because it involves an attempt to misappropriate or profit from another's talents and workmanship").

131. *See Gilliam*, 538 F.2d at 24 (recognizing that Lanham Act "has been invoked to prevent misrepresentations that may injure plaintiff's business or personal reputation"); Shaw v. Time-Life Records, 38 N.Y.2d 201, 207, 341 N.E.2d 817, 821, 379 N.Y.S.2d 390, 396 (1975) (noting that unfair competition protects plaintiff's reputation).

132. Comment, *supra* note 89, at 375; *see also Shaw*, 38 N.Y.2d at 207, 341 N.E.2d at 821, 379 N.Y.S.2d at 396 (recognizing that damage to one's reputation only occurs where inferior work successfully has been palmed off to public as product of another whose goods public has favorably received).

133. Comment, *supra* note 89, at 375.

134. *See id.* (noting that many artists have no professional reputation).

135. *See Gilliam*, 538 F.2d at 27 (Gurfein, J., concurring) (stating that Lanham Act is not implicated where licensee may, by contract, distort author's work); Vargas v. Esquire, Inc., 164 F.2d 522, 526-27 (7th Cir. 1947) (holding that plaintiff cannot bring unfair competition claim where plaintiff has contracted away all his rights in property at issue); *see also* Note, *supra* note 48, at 178 (noting that author cannot rely on § 43(a) of Lanham Act to protect personality interests if author has contracted away his right to alter his work).

136. *Gilliam*, 538 F.2d at 27 (Gurfein, J., concurring) (reasoning that if license grants interpretive artist right to distort work, Lanham Act does not come into play); *Vargas*, 164 F.2d at 526-27 (concluding that it is difficult to discern claim for unfair competition where plaintiff gave defendant rights to work via contract).

entrepreneurs,[137] the interdependence of unfair competition and contracting especially is detrimental to the doctrine's usefulness for the performance art author.[138]

In addition to the difficulties afflicting the general unfair competition doctrine, the federal form of unfair competition, section 43(a) of the Lanham Act, has several unique limitations of its own that limit the doctrines usefulness as a moral rights analogue.[139] First, no court, including the *Gilliam* court, explicitly has held that the Lanham Act encompasses an author's integrity or paternity rights.[140] Second, a producer of a performance art author's work may be able to cure a Lanham Act violation simply by not attributing the author's work to the author.[141] Such a tactic would avoid the misdescription that is basis of a Lanham Act violation.[142] For example, if the defendant in *Gilliam* had broadcast the Monty Python special without attributing the special to the plaintiff, the defendant might have circumvented Lanham Act liability.[143] Third, to use the Lanham Act as a surrogate for an author's integrity right, an author must demonstrate a significant distortion to his work.[144] The existing case law is unclear as to what constitutes such a significant distortion.[145]

The members of Congress engaged in wishful thinking when they pointed performance art authors to existing American law for moral rights protection.[146] Every one of the moral rights "analogues" noted previously has two limitations that forestall performance art authors from using these

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137. *See* Kwall, *supra* note 29, at 27 (stating that unknown authors face disparity of bargaining power that frequently results in loss of protections); *Practical Perspectives*, *supra* note 13, at 43 (stating that economic pressures often force playwrights to freely consent to changes to their works).

138. *See supra* notes 135-37 and accompanying text (discussing relationship between unfair competition and contracting).

139. *See infra* notes 140-45 and accompanying text (discussing specific hindrances on performance art author's use of § 43(a) of Lanham Act to protect author's personality interests).

140. Note, *supra* note 48, at 179.

141. Damich, *The Right of Personality: A Common-Law Basis for the Protection of The Moral Rights of Authors*, 22 INTELL. PROP. L. REV. 547, 608 (1990); Note, *supra* note 48, at 178-79.

142. *See Gilliam*, 538 F.2d at 14, 27 (2d Cir. 1976) (Gurfein, J., concurring) (attributing purpose of Lanham act to redressing misdescription of origins).

143. Note, *supra* note 48, at 179.

144. *Id.* at 178-79.

145. *Id.* at 179. In *Gilliam* the defendant unlawfully removed over twenty four minutes from a ninety minute program based on the plaintiff's script. *Gilliam*, 538 F.2d at 18. In response, plaintiff brought a successful § 43(a) action under the Lanham Act. *Id.* at 23-24. If a significant distortion must approach the severity of removing over 25% of the author's work from a particular performance, the Lanham Act will be of little use for performance art authors. Interpretive distortions in the performing arts can be very significant, but few distortions to the author's work will rise to the level of the distortions in *Gilliam*. *See supra* notes 2-9 and accompanying text (describing Boston ART incident).

146. *See Final Report*, *supra* note 45, at 555 (stating that United States provides moral rights analogues sufficient to comply with paternity and integrity provisions of Berne).

analogues to protect the personality interests contained in their works.[147] The most fundamental of the two is that moral rights analogues are designed to redress economic rather than personal injuries.[148] As a result, these analogues only redress the most extreme forms of personality injury—injuries that result in economic harm to the artist.[149] The vast majority of personality injuries do not rise to the level of economic injury and, thus, escape recognition under so called moral rights analogues.[150]

The second fundamental flaw of the moral rights analogues is that their availability hinges on the amount of bargaining power the performance art author possesses when dealing with the producers and interpreters of his work.[151] Because the supply of performance art far outstrips its demand,[152] performance art authors typically lack the requisite bargaining power to secure the protections of these moral rights analogues.[153] In view of these two limitations on moral rights analogues, effective recognition of moral rights for performance art authors only can come from cohesive federal legislation.[154]

III. Constitutional Issues Surrounding Performance Art Author Moral Rights

Any federal moral rights legislation must contend with two provisions of the United States Constitution: the copyright clause and the First Amendment.[155] Of the two, the copyright clause is the least problematic.[156] The United States Constitution provides that "Congress shall have the power . . . [t]o promote the Progress of Science and useful Arts, by securing for Limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[157] The United States Supreme Court has interpreted this language to mandate that any statute Congress enacts

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147. *See supra* notes 35-145 and accompanying text (discussing two basic flaws afflicting America's moral rights analogues).

148. *See supra* notes 76-78, 97-100 & 129-34 and accompanying text (describing how contract, copyright and unfair competition law all protect economic rather than personality injuries).

149. *See id.* (same).

150. *See id.* (same).

151. *See supra* notes 60-66, 94-95 & 135-38 and accompanying text (describing how performance art author's lack of bargaining power hinders sufficiency of United States moral rights analogues).

152. *See* C. Grodin, *supra* note 62, at 183-84 (describing author's difficulties in trying to produce his play scripts and screenplays).

153. *See* Kwall, *supra* note 29, at 27.

154. *See supra* notes 45-153 and accompanying text (discussing limitations of American moral rights analogues).

155. *See infra* notes 156-363 and accompanying text (discussing copyright clause and First Amendment's effect on federal recognition of performance art author moral rights).

156. *See infra* notes 157-181 and accompanying text (discussing copyright clauses' effect on federal recognition of performance art author moral rights).

157. U.S. Const. art. I, § 8, cl. 8.

pursuant to the copyright clause must have the end of promoting the useful arts.[158] The copyright clause is unique among the Article I powers because it explicitly specifies the means that Congress may use to reach the end of promoting the useful arts.[159] That is, Congress must promote the useful arts and sciences by granting "Authors . . . the exclusive Right to their respective" creations.[160] In the past the Court has limited the meaning of this language to giving artists economic monopolies in their works, in other words, copyrights.[161] Because moral rights, particularly integrity rights, embody the author's personality interests rather than the author's economic interests, congressional enactment of a moral rights statute for performance art authors could conflict with the Court's reading of the copyright clause's specified means.[162]

The apparent conflict between a performance art author's moral rights and the copyright clause's specified means is illusory in nature, however.[163] While in the past the Court has interpreted the word "Right" to denote economic right, the Court's interpretation only may reflect the fact that, until recently,[164] the only rights Congress has attempted to confer on artists have been economic rights.[165] In any case, the copyright clause itself does not delineate what the term "Right" encompasses.[166] Thus, pursuant to the necessary and proper clause of the Constitution,[167] Congress could expand

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158. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984). The Court stated in *Sony*:

> The Monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Id.

159. *See* U.S. CONST. art. I, § 8, cl. 8 (calling for promoting progress of useful arts by securing exclusive rights for limited times to authors).

160. *Id.*; *see* Goldstein v. California, 412 U.S. 546, 555 (1973) (noting that Copyright Clause describes both objective that Congress may seek to promote useful arts and means to achieve objective by granting authors exclusive right to fruits of respective works).

161. *See* Mazer v. Stein, 347 U.S. 201, 219 (1954) (recognizing that economic philosophy behind copyright clause is conviction that encouragement of individual effort by personal gain is best way to advance public welfare through talents of authors and inventors in 'Science and useful Arts').

162. *See* Davis, *supra* note 28, at 321-22 (cautioning that if moral rights only promote author's interest, Congress may not enact such rights).

163. *See infra* notes 164-69 and accompanying text (analyzing conflict between performance art author's moral rights and Copyright Clause).

164. *See* JIA, *supra* note 39 (according visual artists moral rights).

165. *See id.* (providing first federal recognition of visual artist's moral rights).

166. *See* U.S. CONST. art. I, § 8, cl. 8 (permitting Congress to confer upon authors "the exclusive Right to their" creations).

167. *See* U.S. CONST. art. I, § 8, cl. 18 (providing that Congress has power to make all laws necessary and proper to carry into execution all other powers that Constitution vests in Congress).

the term "Right" to encompass the personality interests of performance art authors, provided the expanded definition of "Right" furthered the copyright clause's end of promoting the useful arts.[168] Because moral rights protection for performance art authors would afford a security to performance art authors that would encourage creative activity, expanding the term "Right" to encompass such protections would promote the useful arts.[169]

The duration of a moral right for performance art authors presents a much more serious constitutional problem than whether noneconomic rights are constitutional means to promote the useful arts.[170] Unlike the term "Right," there is no latitude in the copyright clause's directive that Congress only confer exclusive rights on artists for "Limited Times."[171] In examining this problem, one can make a useful comparison between moral rights and copyright.[172] Courts and commentators uniformly have stated that the Constitution does not permit copyrights with perpetual durations.[173] The rationale behind this constitutional limitation is as follows: because human beings typically concern themselves only with their own economic well-being and the economic security of their issue born during their lifetime or soon thereafter, perpetual economic monopolies do not promote the useful arts much more than durationally limited economic monopolies do.[174] Further, after a certain period of time, perpetual economic monopolies only create unnecessary impositions on the First Amendment.[175]

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168. *See* Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 860 (5th Cir. 1979) (holding that Congress does not exceed its powers when its means to constitutional end are 'appropriate' and 'plainly adapted' to achieving that end) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

169. *See* Kwall, *supra* note 29, at 70; Lambelet, *Internationalizing the Copyright Code: An analysis of Legislative Proposals Seeking Adherence to the Berne Convention*, 21 INTELL. PROP. L. REV. 447, 456 (1989).

170. *See infra* notes 171-81 and accompanying text (discussing durational limitations that copyright clause places on performance art author's moral rights).

171. U.S. CONST. art. I, § 8, cl. 8; *see* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

172. *See infra* notes 173-81 and accompanying text (comparing copyright and moral rights).

173. *See Sony*, 417 U.S. at 429; *see also* Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1193 (1970) (considering copyright in perpetuity).

174. *See* Nimmer, *supra* note 173, at 1193 (stating that "[i]t seems most unlikely that an author, assured of the economic fruits of his labor for his own lifetime, that of his children, and perhaps also his grandchildren, would elect not to engage in creative efforts because his posterity in perpetuity would not also so benefit").

175. *Id.* Professor Nimmer has suggested that the inherent conflict between the First Amendment and copyright becomes untenable when copyrights are extended beyond the lives of an author's grandchildren. *Id.* To some extent copyright always abridges the First Amendment interest in freedom of expression. *Id.* at 1181. But copyright extended through the lives of the author's grandchildren has a motivational effect on the author that outweighs the impingement on freedom of expression. *Id.* at 1193. But copyright extended beyond the lives of the author's grandchildren only slightly increases the creative motivation of the author while it continues to abridge the First Amendment interest in free expression. *Id.* Thus, perpetual copyright impermissibly abridges the First Amendment.

Similar to perpetual copyright, perpetual moral rights arguably would not encourage any more creative activity than moral rights of a limited duration.[176] An author's desire to control his creation, like many other personality interests,[177] ends with the author's demise.[178] Further, moral rights for performance art authors, like copyright, might conflict with the First Amendment.[179] As in copyright, the First Amendment interest in expression and the free flow of ideas eventually might outweigh the interests that a moral right promotes: Promotion of the useful arts and the protection of an author's personality interest.[180] For these reasons, a perpetual moral right would be unconstitutional.[181]

The First Amendment presents the most serious challenge to any federal statute extending moral rights protection to the performance art authors.[182] Commentators consistently have suggested that a recognition of performance art author moral rights, particularly performance art author integrity rights, would abridge the First Amendment rights of the interpretive artists who perform the works of performance art authors.[183] Whether or not these commentators ultimately are correct, because of performance art's unique collaborative aspects, affording moral rights protection to performance art

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176. *See infra* notes 177-81 and accompanying text (discussing perpetual moral rights and its imposition on First Amendment).

177. *Cf.* W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 54-66 (5th ed. 1984) (discussing intentional infliction of emotional distress as injury redressable only when victim is alive).

178. One could contest this assertion, however. In many ways the artist's rights of paternity and integrity satisfy a need analogous to the human desire for immortality, a powerful, motivating force in humans. *See* Amarnick, *supra* note 22, at 38 (stating that public has interest in protecting its cultural heritage through preservation of artifacts of its civilization). Perpetual moral rights offer the promise of immortality in the form of a durationally unlimited right of attribution of authorship and the guarantee of the survival of an artist's "self" as expressed in his art. *See id.* at 38 (same). Such a promise could do much to promote the useful arts. *See id.* at 38 (stating that purpose of moral rights in part is to promote creation of artistic works).

179. *See* Nimmer, *supra* note 173, at 1193-1200 (explaining how perpetual rights for author's will conflict with First Amendment).

180. *See id.* (same).

181. *See id.* (same).

182. *See infra* notes 185-417 and accompanying text (discussing First Amendment difficulties that performance art author moral rights protection raises).

183. *See* Note, *supra* note 48, at 207-08 (stating that First Amendment problems are threatened when granting moral rights to performance art authors); Tribe, *First Amendment Endgame*, Boston Globe, Dec. 15, 1984, at 19, col. 4 (stating that First Amendment should fully apply to protect producer's right to perform modern stage version of Beckett's *Endgame*); *see also U.S. Adherence to the Berne Convention: Hearings Before Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. 427 at 366 (1985-86) (citing statement of Edward A. Merlis, Vice-President Government Relations, National Cable Television Ass'n) (stating that American commitment to balance public's interest in access to creative works against private interest of authors may create situation of friction with some of Berne Convention's concepts).

authors raises more First Amendment concerns than moral rights recognition in any other artistic context.[184]

For instance, in comparing performance art to visual art, the creator of a work of visual art originates and realizes the work by fixing it in a permanent, finished form.[185] From that point forward, the only interaction with the visual artist's work typically will involve passive spectator observation, observation entailing very little communicative activity.[186] In contrast, once an author has created a work of performance art, typically individuals other than the author will have to contribute effort involving communicative activity to fully realize the author's work.[187] For example, while the composer of a symphonic work creates a self-contained piece of art in the form of finished sheet music, a conductor and many different musicians must perform the author's work to fully realize it.[188] Thus, because of performance art's collaborative aspects, performance art affords many more opportunities for communicative activity than does visual art.[189] As a result, Congress implicates the First Amendment if it attempts to control this communicative activity through statutory recognition of the moral rights of performance art authors.[190]

For the purposes of simplicity, this article will discuss the First Amendment concerns that performance art author moral rights implicate in what is, admittedly, an artificial, two step approach. First, this article will discuss the First Amendment issues surrounding federal recognition of the performance art author's basic moral right, independent of the remedies used to

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184. *See infra* notes 185-417 and accompanying text (discussing First Amendment concerns implicated by recognition of visual artist moral rights).

185. *See* Amarnick, *supra* note 22, at 40-41 (describing examples of visual art).

186. *See id.* at 40 (defining visual art in terms of physical works of art that are collected and passively observed); *but see id.* at 41 (describing incidents where an individual, other than the author, intentionally modifies author's work).

187. *See* J. MILLER, note 1, at 33 (stating that play can only be completed when someone other than playwright has supplied work).

188. *See id.* (same).

189. *See* Amarnick, *supra* note 22, at 43 (stating that performance of author's work of performance art involves other creators who will add their own interpretations). Note, however, that even visual artists' moral rights protection could raise First Amendment questions where an individual other than the artist wrongfully modifies the artist's work in some expressive manner. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (stating that where speech and nonspeech elements are combined in same course of conduct, only sufficiently important government interest in regulating nonspeech element can justify limitations on First Amendment freedoms). In the event of such an alteration, the visual artist could have a cause of action under the moral rights provisions of the Justice Improvement Act of 1990. *See* JIA, *supra* note 39 (according visual artist integrity rights). However, such a cause of action might constitute state abridgement of the defendant's First Amendment freedoms. *See O'Brien*, 391 U.S. at 376 (requiring sufficiently important government interest in regulating nonspeech element to justify limitations on First Amendment freedoms).

190. *See* Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV., 549, 533 & 559 (1962) (stating that First Amendment prohibition against any law abridging freedom of speech means any law).

enforce it.[191] Second, the article will discuss the First Amendment issues surrounding the various moral rights remedies.[192]

Any analysis of the First Amendment issues surrounding federal recognition of a performance art author's basic moral right must begin with the concession that such legislation, particularly its integrity right component, would abridge the range of expression that interpretive artists could exercise when performing an author's work.[193] When an interpretive artist performs an author's work in such a manner as to diverge from the author's text or fails to give correct attribution to the author, to some extent the interpretive artist is engaging in communicative activities.[194] Federal legislation that punishes interpretive artists for such communicative acts would appear to fly directly in the face of the First Amendment's command: "Congress shall make no law . . . abridging the freedom of speech."[195]

However, the courts never have held that every law abridging an individual's expressive conduct violates the First Amendment.[196] Instead, the courts have engaged in what Professor Nimmer has called "definitional balancing" to determine whether the First Amendment's protection encompasses a particular type of speech.[197] Specifically, the courts have created definitions that: (1) demarcate protected speech from unprotected speech; and (2) embody a balance between the non-First Amendment interests underlying the demarcation and the First Amendment interests underlying the demarcation.[198] When performing this balancing act, the courts consider,

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191. *See infra* notes 192-263 and accompanying text (discussing First Amendment issues surrounding federal recognition of performance art author's basic moral right).

192. *See infra* notes 264-384 and accompanying text (discussing First Amendment issues that moral rights remedies raise).

193. *See infra* notes 194-95 and accompanying text (discussing how moral rights legislation abridges expression).

194. *See* Amarnick, *supra* note 22, at 43 (stating that performance of author's work of performance art involves other creators who add their own interpretations); *see also* Nimmer, *supra* note 173, at 1181 (asserting that copyright punishes unauthorized expression).

195. U.S. CONST. amend I.

196. *See* Roth v. United States, 354 U.S. 476, 483 (1957) (stating that unconditional phrasing of First Amendment was not intended to protect every utterance); Nimmer, *supra* note 173, at 1182-83 (stating that no one believes every law abridging speech falls before First Amendment). If courts did treat every state abridgement of expression as a First Amendment violation, then espionage, antitrust, obscenity and nuisance laws would all be unconstitutional. Nimmer, *supra* note 173, at 1183-84.

197. *See* Nimmer, *supra* note 173, at 1184-90 (discussing definitional balancing); Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. REV. 685, 687 (1978) (discussing definitional balancing approach to First Amendment). Three of the most famous cases exemplifying definitional balancing are Roth v. United States, 354 U.S. 476, 485 (1956) (holding that "obscenity is not within the area of constitutionally protected speech"), New York Times v. Sullivan, 376 U.S. 254 (1964) (holding that actual malice is constitutional element of libel action against public figure) and Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (stating that state may not prescribe advocacy of use of force except where advocacy is directed to inciting imminent lawless action and is likely to produce such action).

198. Nimmer, *supra* note 173, at 1184. Justice Brandeis identified the interests underlying the First Amendment in his famous *Whitney v. California* concurrence. *Whitney v. California*,

according to Nimmer, whether a proposed demarcation effectively serves its non-First Amendment interests without unduly "encroaching upon the interests" underlying the First Amendment.[199]

To withstand a First Amendment challenge, therefore, any federal legislation according performance art author moral rights would have to encompass an appropriate definitional balance.[200] In developing such a definitional balance, one might consider importing copyright law's recognized demarcation between protected and unprotected speech, the "idea/expression dichotomy."[201] This demarcation accords First Amendment protection to ideas.[202] Therefore, to avoid abrogating free speech rights, authors are prevented from copyrighting the ideas used in their creations.[203] On the other hand, the idea/expression dichotomy does not extend First Amendment protection to the manner in which authors express their ideas.[204] Thus, authors can copyright their expressions.[205] While questions have arisen as to what differentiates idea from expression,[206] most commentators and courts

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274 U.S. 357, 374-75 (1927) (Brandeis, J., concurring). These interests include: (1) furthering the democratic process; (2) providing a safety valve for societal discord; and (3) affording individuals a means to attain self-fulfillment. *Id.*; *see also* Nimmer, *supra* note 173, at 1187-89 (discussing copyright and three interests underlying First Amendment).

199. Nimmer, *supra* note 173, at 1189.

200. *See id.* at 1184-90 (discussing definitional balancing).

201. *Id.* at 1189; Goldwag, *Copyright Infringement and The First Amendment*, 23 COPYRIGHT L. SYMP. (ASCAP) 1, 7 (1983); *see also* 17 U.S.C. § 102(b) (Supp. 1990) (stating that in no case does copyright protection for original work extend to any idea); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (stating that "there is a point in this series of abstractions where [the elements of a play] are no longer protected [by copyright], since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended"), *cert. denied*, 282 U.S. 902 (1931).

202. Nimmer, *supra* note 173, at 1189-90.

203. *Id.*; *see also* Wainwright Sec. Inc. v. Wall St. Journal Transcript Corp., 558 F.2d 91, 95-97 (2d Cir. 1977) (holding that news event was idea, and thus not copyrightable), *cert. denied*, 434 U.S. 1014 (1978).

204. Nimmer, *supra* note 173, at 1189-90; *see also Wainwright*, 558 F.2d at 95-97 (stating that words used to communicate idea constitute expression that First Amendment does not protect).

205. Nimmer, *supra* note 173, at 1189-90.

206. *See* Nichols v. Universal Pictures Corp., 45 F.2d at 119, 121-22 (2d Cir. 1930) (stating that wherever line is drawn between idea and expression, determination will appear arbitrary), *cert. denied*, 282 U.S. 902 (1931). While admitting the arbitrary nature of the distinction between idea and expression, Justice Hand in *Nichols* described a method of ascertaining the nature of an idea underlying a play:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected [by copyright], since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property never extended.

Id. at 121.

Justice Hand was probably correct to call the line between idea and expression arbitrary.

have considered the dichotomy workable within existing law and an effective balance between the interests underlying the First Amendment and copyright.[207]

At first consideration, the idea/expression dichotomy appears aptly suited to the context of moral rights for performance art authors.[208] A performance art author's moral rights only would encompass the author's expression.[209] An author's integrity and paternity rights never would extend to the theme, message, or idea that a work of performance art attempts to communicate.[210] Thus, an interpretive artist, with impunity, could inject new ideas into the author's work, distort the original ideas contained in the author's work or refuse to give attribution to the author's original ideas.[211]

Despite the facial suitability of the idea/expression dichotomy as a definitional balance for performance art author moral rights, the idea/expression dichotomy and performance art moral rights, particularly integrity rights, are incompatible.[212] This incompatibility stems from the fact that, particularly within the context of the performing arts, the distinctions between idea and expression are meaningless.[213] Idea and manifested expression often are inextricably intertwined in performance art.[214] In other

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See id. at 121-22 (discussing distinction between idea and expression). He appears to consider a work's "idea" to be something analogous to a work's "theme." *See id.* (same). However, one does not have to describe a theme in general terms. Rather one can state a work's theme with such particularity as to incorporate a great deal of the work's "expression." *See* Consumers Union of U.S., Inc. v. General Signal Corp., 724 F.2d 1044, 1049-50 (2d Cir. 1983) (stating that copying exact expression may be only way precisely to report idea), *cert. denied*, 469 U.S. 823 (1984). Indeed copyright law, in what is called the merger doctrine, recognizes that in some cases a work's expressive components inseparably are tied to the ideas underlying a work. *See* 3 M. NIMMER, *supra* note 29, § 13.03[B][3], at 13-58 to 13-60 (discussing merger doctrine). However, regardless of the entwined relationship between idea and expression, copyright law has accepted Justice Hand's over-simplified demarcation. *See* 17 U.S.C. § 102(b) (Supp. 1990) (providing that copyright protection does not extend to any idea, regardless of form in which it is embodied in work).

207. *See* Nimmer, *supra* note 173, at 1192 (stating that idea/expression line represents acceptable definitional balance between First Amendment and copyright); *Nichols*, 45 F.2d at 121 (discussing idea/expression dichotomy).

208. *See infra* notes 209-11 and accompanying text (discussing suitability of idea/expression dichotomy for performance art authors' moral rights).

209. *See Nichols*, 45 F.2d at 121 (discussing copyright idea/expression dichotomy).

210. *See id.* (same).

211. *See id.* (same). Under this view, to extend moral rights to encompass the performance art author's ideas would forestall further creation of performance art and new ideas, ideas that our democratic system of government requires. *See* Nimmer, *supra* note 173, at 1190-91 (preventing authors from drawing freely on others' ideas stifles creative process and free speech).

212. *See infra* notes 213-19 and accompanying text (discussing idea/expression dichotomy's incompatibility with performance art moral rights).

213. *See* 3 M. NIMMER, *supra* note 29, § 13.03[B][3], at 13-58 to 13-60 (discussing copyright merger doctrine).

214. *See id.* (same). Modern dance is one illustration of the intertwined nature of ideas and expression within the performing arts. *See* Singer, *supra* note 49, at 299 n.50 (discussing nature of modern dance). Modern choreographers often build their works around a single

words, the elements compromising the expressive component of a work of performance art—be they words, musical notes, characters, or movement—define the author's underlying ideas.[215] Therefore, any modification to the author's expression, in some subtle manner, will inject new ideas into the author's work—ideas with First Amendment protection.[216]

In practice, interpretive artists would attempt to use the intertwined nature of idea and expression to circumvent liability for violations of an author's integrity rights.[217] Specifically, whenever an interpretive artist distorted an author's work in a manner actionable under moral rights legislation, the interpretive artist would assert that he had engaged in a form of "idea" creation that the First Amendment protects.[218] Indeed, to secure the protection of the idea/expression dichotomy, interpretive artists would ensure that all of their modifications to authors' works reflected new ideas.[219]

A definitional balance based on the idea/expression dichotomy, clearly raises the prospect of interpretive artists using the First Amendment as a shield against moral rights liability, allowing them to make radical changes to performance art author's works.[220] Therefore, if moral rights recognition for performance art authors is to have any real meaning, federal legislation must be based on an alternative definitional balance. A more functional balance might be developed from the following two assertions: (1) speech that does not distort another's speech is presumptively a valuable addition to the marketplace of ideas and thus, should be encouraged; (2) speech that distorts or silences another's speech harms the marketplace of ideas and, thus, should be remedied.

A speaker's freedom of speech is meaningless without assurances that the speaker's speech will remain relatively unchanged as it enters the marketplace of ideas.[221] In some contexts, such assurances exist absent any

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movement rather than an idea that concerns a character or story. *Id.* In such an instance, the choreography's idea and expression are merged to the point of inseparability. *Id.* Idea and Expression are also inseparable in many musical compositions.

215. *See* 3 M. NIMMER, *supra* note 29, § 13.03[B][3], at 13-58 to 13-60 (discussing copyright merger doctrine); Consumers Union of U.S., Inc. v. General Signal Corp., 724 F.2d 1044, 1049-50 (2d Cir. 1983) (stating that copying exact expression may be only way to describe idea precisely), *cert. denied*, 469 U.S. 823 (1984).

216. *See* 3 M. NIMMER, *supra* note 29, at 15-58 (stating that where idea is inseparably connected to particular expression, affording protection to author's expression would confer monopoly over idea itself in violation of First Amendment).

217. *See infra* notes 218-19 and accompanying text (discussing how interpretive artists can use intertwined nature of idea and expression to circumvent moral rights liability).

218. *See supra* notes 212-16 and accompanying text (discussing entwined nature of idea and expression).

219. *Id.* (same).

220. *See supra* notes 217-219 and accompanying text (discussing how idea/expression dichotomy affords performance art authors First Amendment shield against moral rights liability).

221. Hughes, *supra* note 15, at 359. Conversely, "[t]he right of free speech of . . . any . . . individual does not embrace a right to snuff out the speech of others." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); *see also.* First Nat'l Bank of Boston v.

legal interference.[222] For instance, public figures often find that the media distorts their statements.[223] However, as the Supreme Court has observed, public figures typically have access to forums where they can correct these distortions.[224] However, where nonlegal mechanisms do not exist to ensure that a speaker's speech remains undistorted, the legal system can take action to ensure that a speaker's speech reaches the marketplace of ideas in an undisturbed form.[225] Such activism is supported by the goals underlying the First Amendment itself, particularly free speech's vital role in the democratic process.[226] Uncorrectable distorted speech fills the market place of ideas with destructive information that confuses participants in the democratic process.[227] Further, distorted speech interferes with two other goals under-

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Belloti, 435 U.S. 765, 789-90 (1977) (stating that where speaker imminently threatens to drown out other points of view, such that democratic process and other First Amendment interests are threatened, Court will consider whether state action to silence intrusive voice is appropriate).

222. Hughes, *supra* note 15, at 360.

223. *Id.*

224. *Id. See also* Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 164 (1979) (stating that public figures are less vulnerable to injury from defamatory statements because of ability to resort to self-help); Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) (stating that "public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy").

225. Hughes, *supra* note 15, at 359-60. In Red Lion Broadcasting Co. v. FCC, the United States Supreme Court upheld such legal assurances. 395 U.S. 367, 400-01 (1968). In *Red Lion* the Court upheld the Federal Communication Commission's (FCC's) "fairness doctrine" in part because the scarcity of the airwaves prevented many legitimate messages from reaching the airwaves. *Id.* at 400; *see also First Nat'l Bank*, 435 U.S. 765, 789-90 (citing *Red Lion*) (stating that where legislative findings or record demonstrate that one voice is silencing others to detriment of First Amendment interests, state may take corrective measures). *But cf.* Buckley v. Valeo, 424 U.S. 1, 48-49 (1975) (stating that concept that government may restrict speech of some elements of our society to enhance relative voices of others is wholly foreign to First Amendment).

Libel law may be another area in which the Court has created a mechanism to ensure a speaker's message reaches the market place of ideas. *See Gertz*, 418 U.S. at 348 (holding that private figure does not have to show malice for prima facie libel case). Specifically, because private individuals may not have a public figure's potential access to the media, the Court adjusted the constitutionalized version of libel it created in New York Times Co. v. Sullivan, 376 U.S. 254 (1963), to permit private figures to bring successful libel suits without proving malice. *See id.* This adjustment to the Court's balance between libel and the First Amendment only may reflect the Court's solicitude for the private individual's reputational interests. *See id.* (stating that private individuals are more vulnerable to reputational injury than public figures). However, the Court may have been attempting to further First Amendment interests as well. Allowing private figures easier access to a libel action, as compared to public figures, may have been the Court's attempt to ensure that the "truth" enters the market place of ideas. *See Gertz*, 418 U.S. at 340 (false statements of fact have no constitutional value and neither intentional lie nor careless error materially advance society's interest in uninhibited, robust, and wide open debate on public issues).

226. *See* First Nat'l Bank of Boston v. Belloti, 435 U.S. 765, 789-90 (1977) (stating that First Amendment furthers democratic process); Whitney v. California, 274 U.S. 357, 374-75 (1927) (stating that free speech furthers democratic process).

227. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)

lying the First Amendment. Uncorrectable distorted speech reduces the effectiveness of the First Amendment's social safety-valve effect,[228] and, because of audience miscomprehension, it thwarts the First Amendment's facilitation of speaker self-fulfillment.[229]

A work of performance art essentially is speech that uses carefully contrived expression to communicate an elaborate message from the author to the public.[230] To ensure that the public accurately receives these messages, performance art authors, particularly those who have sold their copyrights or cannot secure strong contractual arrangements,[231] need legal mechanisms to ensure that interpretive artists do not distort their messages or the fragile means by which authors communicate their message.[232] Federal recognition of performance art author moral rights would be such a mechanism.[233]

These observations lead to the following proposed demarcation between protected and unprotected speech: (1) where an interpretive artist incorporates speech into a performance of an author's work that is consistent with the author's message or the author's expression of that message, the First Amendment protects the interpretive artist's speech and prevents the government from regulating it;[234] (2) where the interpretive artist incorporates speech into a performance of an author's work that modifies the author's message or expression of that message, the First Amendment does not protect the interpretive artist's speech, and the government may regulate it.[235] The terms "author's message" or "author's expression" encompass any statement the author inserts in his work, including any attribution of authorship to the author. The term "modify" encompasses the interpretive artist's failure to communicate any message the author has placed in his work, including statements of authorship. Thus, this demarcation encompasses both the performance art author's rights of paternity and integrity. [For ease of discussion this demarcation will be termed "the corrective view of moral rights" or "corrective view"].

(stating that best test of truth is power of thought to get itself accepted in competition of marketplace); Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (discussing classic market approach to First Amendment—repression of speech interferes with market's ability to ascertain truth).

228. *See* Hughes, *supra* note 15, at 359-60 (asserting that individual does not achieve any release through "sounding off" if his communication has not been understood by anyone).

229. *See id.* (same).

230. *See* Note, *supra* note 48, at 207-09 (stating that playwrights produce works that First Amendment protects).

231. *See supra* notes 59-81 & 93-119 and accompanying text (discussing difficulties plaguing contract and copyright analogues to performance art author moral rights).

232. *See* First Nat'l Bank of Boston v. Belloti, 435 U.S. 765, 789-90 (1977) (stating that where speaker imminently threatens to drown out other points of view, threatening the democratic process and other First Amendment interests, courts will consider whether state action to silence voice is appropriate).

233. *See supra* notes 220-29 and accompanying text (discussing need for legal mechanisms to ensure speaker's undistorted message enters marketplace of ideas).

234. *See id.* (same).

235. *See id.* (same).

Having established a tentative demarcation for a basic performance art author moral right, the next step in a definitional balance analysis is to consider whether this demarcation advances the interests underlying both federal moral rights recognition and the First Amendment.[236] The corrective view advances the copyright clause purpose that must underlie any congressional conference of exclusive rights on authors, promotion of the useful arts.[237] If performance art authors are assured that their undistorted messages will reach the public, author are encouraged to create, and, accordingly, will do so more often.[238] In addition, because the corrective view allows performance art authors to protect the personality interests in their works, the corrective view furthers the interests underlying moral rights recognition for performance art authors.[239]

Whether the corrective view of moral rights encroaches on the interests underlying the First Amendment is a slightly more complicated question that may turn in part on whose First Amendment interests one is considering. Clearly, the corrective view of moral rights promotes the author's and the public's First Amendment interests in ensuring that the author's message reaches the public in the author's intended form.[240] However, the corrective view of moral rights hampers the interpretive artist's ability to modify the performance art author's message.[241] As has been suggested previously, this hampering may curtail the interpretive artist's freedom of expression.[242] However, as also was suggested previously, expression that distorts or silences another's message harms the marketplace of ideas[243] and thus, should be subject to legal regulation.[244] Therefore, the corrective view of moral rights does not encroach upon the First Amendment simply because it

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236. Nimmer, *supra* note 173, at 1189.

237. *See* U.S. CONST. art. I, § 8, cl. 18 (providing that Congress must promote useful arts by granting authors exclusive rights to their creations).

238. Kwall, *supra* note 29, at 70 ; Lambelet, *supra* note 169, at 478.

239. *See* Amarnick, *supra* note 22, at 37 (describing author's manifestation of his personality into his art).

240. Hughes, *supra* note 15, at 359; *see also* First Nat'l Bank of Boston v. Belloti, 435 U.S. 765, 789-90 (1977) (stating where speaker imminently threatens to drown out other points of view, threatening the democratic process and other First Amendment interests, courts will consider whether state action to silence intrusive voice is appropriate); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 & 400 (1968) (stating that where legislative findings or record demonstrate that one voice is silencing others to detriment of First Amendment interests, state may take corrective measures).

241. *See supra* notes 193-95 and accompanying text (discussing how performance art author moral rights legislation abridges interpretive artist's ability to modify author's expression).

242. *See id.* (discussing how performance art moral rights curtail interpretive artist expression).

243. *See First Nat'l Bank*, 438 U.S. at 789-90 (stating that where speaker imminently threatens to drown out other points of view, such that democratic process and other First Amendment interests are threatened, courts will consider whether state action to silence voice is appropriate).

244. *See Red Lion*, 395 U.S. at 390 (providing that right of free speech of any individual does not encompass right to snuff out speech of others).

abridges an interpretive artist's ability to modify an author's message.[245]

While the corrective view of moral rights does not directly encroach on the interests underlying the First Amendment, the corrective view nonetheless may implicate the interpretive artist's First Amendment interests in a more indirect fashion. Specifically, the corrective view of moral rights might inhibit interpretive artists from ever exercising their First Amendment rights[246] (*i.e.*, the right to incorporate speech into a performance of an author's work that is not inconsistent with the author's message or the author's expression of that message).[247] In other words, the corrective view might chill interpretive artists from exercising their First Amendment rights.[248]

Determining whether the corrective view of moral rights impermissibly could chill interpretive artists from exercising their First Amendment rights turns in part on the probability of the courts erroneously holding interpretive artist's liable for violations of authors' moral rights.[249] The clarity and the simplicity of the corrective view's demarcation between protected and unprotected speech directly will affect this probability.[250] If the demarcation

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245. Additional support for this proposition can be found by analogy Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). The *Lloyd* Court rejected respondent's claim that since a shopping center was open to the public, the First Amendment prevented the private owner from enforcing a handbilling restriction on the shopping center premises. *Id.* at 568-69; *see also* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 80-81 (1979) (discussing *Lloyd* and its holding). The *Lloyd* Court held that when a shopping center owner opens his private property to the public for shopping, the First Amendment does not accord individuals handbilling on the premises rights of expression beyond those existing under applicable state law. *Lloyd*, 407 U.S. at 568-69; *Pruneyard*, 447 U.S. at 81.

While a performance art author's interests are not the equivalent of a shopping center owner's property rights, they are sufficiently analogous to allow a performance art author to assert that although the "public" (as embodied in interpretive artists and audiences) has access to the author's work, the "public" does not have a First Amendment right of expression that supersedes the author's personality interests in his work. *See Lloyd*, 407 U.S. at 569 (holding that where individual opens his private property to public, First Amendment does not accord public rights of expression exercisable upon individual's property).

246. *See* Schauer, *supra* note 197, at 685 (stating that unconstitutional statute might inhibit exercise of First Amendment freedoms).

247. *See supra* notes 233-35 and accompanying text (describing corrective view's demarcation between protected and unprotected speech).

248. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1963) (stating that an unconstitutional law can force possessor of First Amendment rights to forego exercising his rights for fear that court incorrectly will find that possessor violated law); *see also* Schauer, *supra* note 197, at 693 (defining First Amendment chilling effect as where "individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity").

249. *See* Schauer, *supra* note 197, at 694-96 (stating that one component of fear causing First Amendment chill is probability of courts erroneously imposing legal liability). The extent of First Amendment chill also increases in direct relation to the magnitude of the harm resulting from erroneous court determinations of liability. *Id.* at 696. However, discussion of this component of First Amendment chill will await this article's examination of the First Amendment issues surrounding the various moral rights remedies. *See supra* notes 266-384 and accompanying text (discussing First Amendment chill generated by moral rights remedies).

250. *See* Schauer, *supra* note 197, at 695-96 (suggesting that fear of erroneous court determinations increases and decreases in direct relation to complexity and vagueness of legal concepts that demarcate protected speech from unprotected speech).

is unduly complex or vague, there will be a corresponding rise in the risk of erroneous court decisions that will punish interpretive artist for exercising their protected rights of free speech.[251] Because interpretive artists are less likely to assert their free speech rights if they face significant risk of unwarranted liability, a rise in the probabilities of erroneous court determinations translates into increased First Amendment chill.[252] However, if the corrective view's demarcation between protected and unprotected speech is fairly clear and analytically simple, the risk of erroneous court determinations will drop, along with interpretive artist's fear of erroneous court determinations.[253] Thus, the corrective view would be less likely to chill interpretive artists from engaging in the expressive conduct that the First Amendment protects.[254]

Because the corrective view of performance art author moral rights constitutes a simple and fairly clear demarcation between protected and unprotected speech, federal legislation using the corrective view would not create significant First Amendment chill.[255] The corrective view of moral rights conditions an interpretive artist's liability on whether or not the interpretive artist's expressive conduct modifies speech that the author placed in his work of performance art.[256] If federal legislation limited the "author's speech" to the explicit expression contained in the author's actual work of performance art (including the author's statement of authorship), determining moral rights liability would be a fairly straightforward task for the courts.[257] Essentially, the courts would compare the alleged modification with the pertinent portions of the author's work of performance art.[258]

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251. *See id.*; *cf.* New York Times v. Sullivan, 376 U.S. at 278-79 (stating that demarcating protected speech from libelous speech solely on basis of speech's truthfulness will create self-censorship because of courts' difficulties in ascertaining truthfulness).

252. *See* Schauer, *supra* note 197, at 694-70 (discussing relationship between fear and First Amendment chill).

253. *See id.* at 695-96 (suggesting that fear of erroneous court determinations decreases in direct relation to complexity and vagueness of legal concepts that demarcate protected speech from unprotected speech).

254. *See id.* (discussing relationship between fear and First Amendment chill). However, even a law encompassing the clearest demarcation between protected and unprotected speech will have some chilling effect. *Id.* at 700. Due to the unavoidable cost and uncertainty of the legal process, combined with the variability of an individual's risk-aversion, any regulation of unprotected expressive conduct will deter some from engaging in expressive conduct that the First Amendment protects. *Id.* at 700-01. Thus, the question in a First Amendment analysis of a proposed definitional balance is not whether the proposed balance chills, but whether the proposed definitional balance impermissibly chills. *See id.* at 701 (stating that determining the constitutionality of legislative enactments involves ascertaining whether legislative enactments chill exercise of First Amendment rights to point that judicial invalidation is necessary).

255. *See supra* notes 249-54 and accompanying text (discussing clarity of corrective view definitional balance).

256. *See infra* notes 502-07 and accompanying text (discussing "four corners" rule).

257. *See id.* (same).

258. *See id.* (same).

Any vagueness inherent in this analysis would be limited to situations where the author's message was particularly subtle.[259] In such instances it might be difficult for the courts to ascertain whether an interpretive artist's performance has diverted from the author's message.[260] Nonetheless, the analysis would remain a simple process of comparison.[261] As a result, the corrective view of moral rights continues to be a simple and fairly clear demarcation between protected and unprotected speech, particularly when compared to other demarcations that the United States Supreme Court has accepted.[262] Therefore, the corrective view of moral rights would not create a significant probability of erroneous court decisions whose prospect would deter interpretive artists from exercising their First Amendment rights.[263]

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259. *See infra* note 260 (discussing subtle speech in Samuel Beckett's play "Endgame").

260. *See* S. BECKETT, ENDGAME (providing excellent illustration of difficulty courts might face in attempting to apply correctional view to integrity rights claims involving subtle messages in author's work). Mr. Beckett's play contains instructions to the actors specifying the number of pauses the actors are to take between their lines. *Id.* at 1 (containing dialogue with specified pauses). These pauses constitute a portion of Mr. Beckett's "message" that federal moral rights legislation, incorporating the corrective view, would protect. *See supra* notes 234-35 and accompanying text (discussing corrective view of moral rights). Clearly, however, this portion of Mr. Beckett's message constitutes subtle direction to the interpretive artists. *See* S. BECKETT, *supra*, at 1 (containing dialogue with specified pauses). As a result, an interpretive artist choosing to perform Mr. Beckett's work would run the risk of a court erroneously holding the interpretive artist responsible for omitting these pauses. *See* Schauer, *supra* note 197, at 695-96 (stating that probability of erroneous court determinations increases in direct relation to complexity and vagueness of legal concepts that demarcate protected speech from unprotected speech).

The difficulty in applying the corrective view of moral rights in certain instances makes it imperative that federal moral rights legislation not employ remedies that will cause undue First Amendment chill. *See infra* notes 265-84 and accompanying text (discussing First Amendment chill that could result from various moral rights remedies).

261. *See infra* notes 502-07 and accompanying text (discussing "four corners" rule).

262. *See* Schauer, *supra* note 197, at 695-96, 698-99 (discussing vague statutes and their chilling effect on exercise of free speech rights). In Roth v. United States, 354 U.S. 476, 485 (1956), the court held that the First Amendment did not protect obscenity from state regulation. The Court then went on to define obscenity: "Material which deals with sex in a manner appealing to prurient (having a tendency to excite lustful thoughts) interest." *Id.* at 487 (explanation added). Despite repeated criticism that this demarcation is imprecise, the Court has continued to uphold it as a definitional balance that is consistent with the interests of the First Amendment. *See* Paris Adult Theater I v. Slaton, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting) (stating that court has failed to define obscenity standards "with predictable application to any given piece of material"). Compared to obscenity's demarcation between protected and unprotected speech, the corrective view of moral rights has a much clearer definition of unprotected speech: Speech that modifies the author's explicit communication as contained in the author's work of performance art. *See supra* notes 249-61 and accompanying text (discussing clarity of correctional view of moral rights).

263. In addition to the simplicity and basic clarity of the correctional view's demarcation between protected and unprotected speech, the corrective view arguably avoids unconstitutional chill because the interpretive artist could easily check his compliance with the federal legislation. *See* Schauer, *supra* note 197, at 698 (stating that subjects of regulations are not only troubled by possibility of court reaching erroneous determinations, but also by the uncertainty in their own minds as to whether First Amendment protects their behavior). Because interpretive artists

In view of the corrective view's compatibility with the First Amendment, federal legislation encompassing this definitional balance should pass First Amendment scrutiny.[264] However, any First Amendment analysis of federal performance art author moral rights legislation must extend beyond the basic moral right to include the remedies used to enforce that right.[265] These remedies fall into three categories—monetary damages, injunctions, and labeling.[266] In discussing these three remedies, this article will consider the First Amendment issues raised by applying each remedy to the performance art author's integrity and paternity rights respectively.[267]

Because the imposition of monetary damages does not abridge directly an individual's rights of free speech,[268] First Amendment chill is the primary First Amendment concern that monetary damages implicate.[269] As previously indicated, one of the primary factors that creates First Amendment chill is the probability that court's erroneously will hold individuals liable for exercising their First Amendments rights.[270] Because of the basic clarity and simplicity of the corrective view's demarcation between protected and unprotected speech, performance art author moral rights legislation using the corrective view would not create a significant risk of erroneous court determinations.[271] However, ascertaining the probability of erroneous court determinations does not end a First Amendment chill analysis. To completely quantify the chilling effect of a government regulation, one must factor the probability of erroneous court determinations with the magnitude of harm that a court would cause an individual by erroneously holding the individual

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actually have access to authors' works of performance art, interpretive artists easily could check their performances against the works of performance art authors to ascertain if discrepancies exist between the two. *See id.* at 700 & n.69 (noting that where factual assertions easily can be verified, no chill will result from requiring publishers to guarantee truth of his statements). Thus, in some ways the interpretive artist is analogous to a commercial advertiser. *See* Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, 425 U.S. 748, 777-78 (1976) (Stewart, J., concurring) (stating that commercial advertising resists chill because advertiser easily can verify truthfulness of their statements). In both instances, if the state subjected the false or misleading components of their creations to regulation, their access to the truth underlying their creations would help eliminate the danger of First Amendment chill.

264. *See supra* notes 236-63 and accompanying text (discussing corrective view's compatibility with both First Amendment and non-First Amendment interests).

265. *See supra* notes 191-92 and accompanying text (discussing two-part approach to analyzing First Amendment issues surrounding moral rights).

266. *See infra* notes 268-384 and accompanying text (discussing First Amendment issues that various moral rights remedies raise).

267. *See id.* (same).

268. *See* Schauer, *supra* note 197, at 696-97 (suggesting that use of fines to enforce government law indirectly implicates First Amendment because of resulting chilling effect).

269. *See id.* (same).

270. *See supra* notes 249-54 and accompanying text (discussing relationship between fear of erroneous court decisions and First Amendment chill).

271. *See supra* notes 246-63 and accompanying text (explaining how corrective view's simple nature and analytic clarity forestalls chilling interpretive artist's exercise of First Amendment rights).

liable.[272] Application of this formula to federal legislation using monetary damages to enforce performance art author integrity rights, suggests that, even where a low probability exists of erroneous court determinations, monetary damages could be so traumatic for the performance art industry that First Amendment chill would result.[273]

The financial resources of the typical performance art producer or interpretive artist are relatively meager.[274] As a result even moderate monetary judgments could have a catastrophic impact.[275] While the corrective view of moral rights does not create a significant risk of erroneous court determinations, the corrective view does not completely eradicate such a risk either.[276] Further, the numerous messages in any work of performance art that afford courts countless opportunities to wrongfully hold interpretive artists liable for integrity rights violations heighten the corrective view's unavoidable risk. Therefore, when coupled with the catastrophic impact of a monetary judgment, the slight but unavoidable risk of courts erroneously holding interpretive artists liable for integrity rights violations would create the necessary fear to deter interpretive artists from exercising their First Amendment rights.[277]

While a monetary damage remedy might create First Amendment chill if coupled with an integrity right, monetary damages might not cause First Amendment chill if coupled with an author's paternity right.[278] Clearly, trial courts wrongfully could hold interpretive artist liable for violating an author's paternity rights.[279] However, the number of potential integrity rights violations in any one performance does not compare to the limited number of potential paternity rights violations. Further, the factual question underlying a paternity rights claim, (Did the interpretive artist attribute authorship of the author's work to the author?), is a simple one for the courts to resolve, and the inquiry does not vary much from one case to another.

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272. *See* Schauer, *supra* note 197, at 694-96 (suggesting that First Amendment chill also increases and decreases in direct relation to magnitude of harm that would result from erroneous court determinations of liability).

273. *See id.* at 696-97 (discussing confluence of uncertainty of erroneous court determinations and magnitude of resulting harm in creating First Amendment chill).

274. *See infra* notes 493-94 and accompanying text (discussing financial status of performance art entrepreneurs).

275. *See id.* (same).

276. *See* Schauer, *supra* note 197, at 700-01 (stating that because legal process is subject to unavoidable errors, no demarcation between protected and unprotected speech completely removes possibility of court wrongfully holding individual liable); *see also supra* notes 259-60 and accompanying text (discussing difficulties courts face in applying corrective view to integrity rights claims involving subtle messages in author's work).

277. *See* Schauer, *supra* note 197, at 696-97 (discussing confluence of fear of erroneous court determinations and magnitude of resulting harm in assessing First Amendment chill).

278. *See infra* notes 279-81 and accompanying text (discussing why coupling of paternity right and monetary remedy does not create intolerable First Amendment chill).

279. *See* Schauer, *supra* note 197, at 700-01 (stating that due to unavoidable uncertainty of legal process, trial courts will make erroneous determinations of liability regardless of clarity of demarcation between protected and unprotected speech).

Thus, paternity rights claims have a tightly focused quality that reduces the risk of erroneous court determinations to an extremely small probability.[280] Thus, even if coupled with monetary damages, paternity right claims would not deter interpretive author's from exercising their First Amendment rights.[281]

If a monetary damages remedy for integrity rights violations implicates First Amendment chill, then injunctive relief for integrity rights violations suggests First Amendment freeze.[282] Federal moral rights legislation would conflict with the First Amendment if it allowed courts, after they found a potential integrity rights violation, to preliminarily enjoin interpretive artists from engaging in that particular expressive conduct.[283] Likewise, federal moral rights legislation would create First Amendment problems if it permitted courts, after finding an integrity rights violation, to enjoin interpretive artists from performing an author's work at all.[284] In both instances, the courts would be imposing prior restraints.[285] In other words the courts would be preventing interpretive artists from disseminating material that the First Amendment typically protects, absent a prior judicial determination that the material does not have First Amendment protection.[286] According to the United States Supreme Court in *Near v. Minnesota*,[287] such judicial restraints on interpretive artist's speech are unconstitutional.[288]

Conceivably, federal legislation protecting performance art authors' integrity rights could use a more tailored injunctive remedy that might withstand First Amendment scrutiny.[289] For instance, the legislation could limit a court's injunctive powers to enjoining specific expressive conduct within a performance that the court previously has found to constitute an integrity rights violation. Such tailored injunctive relief would avoid First

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280. *See id.* at 695-96 (stating that fear of erroneous court determinations increases or decreases in direct relation to complexity and vagueness of legal concepts demarcating protected from unprotected speech).

281. *See id.* at 694-96 (discussing significance of erroneous court determinations to First Amendment chill).

282. *See* A. BICKEL, THE MORALITY OF CONSENT 61 (1975) (stating that prior restraints freeze); *see also* Note, *Remedies for Copyright Infringement: Respecting the First Amendment*, 89 COLUM. L. REV. 1940, 1942 (1989) (stating that First Amendment issues arise in copyright cases because enjoining publication of book upon finding infringement may abridge alleged infringer's right to freedom of speech).

283. *See* Near v. Minnesota, 283 U.S. 697, 722-23 (1931) (holding that prepublication injunction of protected speech violates First Amendment).

284. *See id.* (same).

285. *See id.* (same).

286. *See* Note, *supra* note 282, at 1946 (stating that prior restraints violate defendant's constitutional rights because they prevent him from disseminating matters that First Amendment ordinarily protects, absent prior judicial determination that material does not qualify for First Amendment protection).

287. 283 U.S. 697 (1931).

288. *See* Near v. Minnesota, 283 U.S. 697, 718-19; *see also* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (stating that any system of prior restraint of expression comes to Court bearing heavy presumption against its constitutionality).

289. *See infra* notes 290-299 and accompanying text (discussing tailored injunctive remedy for integrity rights violations).

Amendment difficulties because, according to the corrective view of moral rights, the First Amendment does not protect speech that actually is found to constitute an integrity rights violation.[290] Thus, tailored injunctive relief only would forestall the dissemination of speech that a court previously has found to be unprotected.[291] As a result, tailored injunctive relief would not constitute an unconstitutional prior restraint.[292]

While a tailored injunctive remedy might avoid First Amendment freeze as a prior restraint, the remedy might still lead to unconstitutional chill if used as an integrity rights remedy.[293] As previously stated, the corrective view of moral rights does not eradicate completely the risk of erroneous court determinations,[294] particularly where portions of an author's work of performance art contain subtle messages.[295] If this slight risk of erroneous court determinations is coupled with a moral rights remedy that could cause significant harm to an interpretive artist, First Amendment chill would result.[296]

Admittedly, a court order enjoining an interpretive artist from engaging in certain expressive conduct found to be violative of an author's integrity rights, at first consideration, does not appear to be especially onerous. However, were a court to hold an interpretive artist in contempt for violating such an order, the resulting punishment would be very severe.[297] Thus, where a court has enjoined an interpretive artist from engaging in specific expressive conduct that violates an author's integrity rights, the prospect of a court erroneously holding an interpretive artist in contempt for violating the order, combined with the severity of the resulting punishment, would deter many interpretive artists from engaging in protected speech falling close to the boundaries of the court's injunction.[298] In other words, a

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290. *See* Note, *supra* note 282, at 1946 (suggesting that interpretive artist's First Amendment rights would not be violated if court only enjoined speech that court previously determined was unprotected); *see also supra* notes 234-35 (discussing corrective view of moral rights).

291. *See* Note, *supra* note 282, at 1946 (suggesting that interpretive artist's First Amendment rights would not be violated if court only enjoined speech that court previously determined was unprotected).

292. *See id.* (same).

293. *See supra* notes 289-92 and accompanying text (discussing why tailored injunctive remedy chills interpretive artists from exercising their First Amendment rights).

294. *See* Schauer, *supra* note 197, at 700-01 (stating that due to unavoidable uncertainty of legal process, no demarcation between protected and unprotected speech completely removes risk of erroneous court determinations).

295. *See supra* notes 259-60 and accompanying text (discussing difficulties courts face in applying corrective view to integrity rights claims involving subtle messages in author's work).

296. *See* Schauer, *supra* note 197, at 696-97 (stating that First Amendment chill is product of uncertainty of erroneous court determination and magnitude of harm that would result from erroneous court determination).

297. *See* A. BICKEL, *supra* note 282, at 61 (suggesting that court would hold violator of injunction in contempt).

298. *See* Schauer, *supra* note 197, at 696-97 (stating that First Amendment chill is product of uncertainty of erroneous court determination and magnitude of harm that would result from erroneous court determinations).

tailored injunction against integrity rights violations would unconstitutionally chill interpretive artists from exercising their First Amendment freedoms.[299]

While tailored injunctive relief for integrity rights violations irreconcilably conflicts with the First Amendment,[300] tailored injunctive relief for paternity rights creates fewer First Amendment problems.[301] Obviously, if in response to a single paternity rights violation, a court could enjoin an entire performance of an author's work, the injunction would constitute a prior restraint on protected speech.[302] However, an injunctive remedy for paternity rights violations would not constitute a prior restraint if the remedy only allowed courts to permanently enjoin interpretive artists from failing to give proper attribution to the author.[303] Such a tailored injunctive remedy would permit courts to enjoin only specific speech that the court first classified as unprotected due to its failure to properly attribute authorship.[304] This form of an injunction would not be a prior restraint.[305]

Further, tailored injunctions to enforce performance art author paternity rights would not create First Amendment chill.[306] Although the interpretive artist would face serious punishment for violating a court order enjoining

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299. *See id.* (same). To some extent federal moral rights legislation could counteract the chill that results from a tailored injunctive or monetary remedy by conditioning liability for integrity rights violations on a showing that the interpretive artist intended to violate the performance art author's integrity rights. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (holding that, in order to avoid First Amendment chill created by common law libel action, public figure must prove all common law elements of libel plus actual malice). Such a condition would create in a effect a buffer zone against liability for interpretive artists engaging in protected speech falling close to the boundaries of unprotected speech. *See* Schauer, *supra* note 197, at 706-07 (discussing buffer zone against liability that *New York Times v. Sullivan*'s malice standard creates for individual's engaging in speech whose truthfulness is hard for court to ascertain).

However, while such a scienter requirement reduces the tension between the First Amendment and monetary and injunctive remedies, such a requirement frustrates one of the chief purposes underlying moral rights legislation, protection of the author's personality interests. *See* Amarnick, *supra* note 22, at 37 (describing author's manifestation of his personality into his art). Regardless of whether or not an interpretive artist intends to modify an author's work, a modification will harm the author's personality interests. Conditioning integrity rights liability on a showing of intent would allow many violations of an author's personality interests to go unremedied.

300. *See supra* notes 289-299 and accompanying text (discussing First Amendment difficulties surrounding tailored injunctive remedy for integrity rights violations).

301. *See infra* notes 302-11 and accompanying text (discussing First Amendment and tailored injunctive remedy for paternity rights violations).

302. *See* Note, *supra* note 282, at 1946 (stating that regulations constitute prior restraints if they prevent individual from disseminating matters ordinarily protected by First Amendment, absent prior judicial determination that material does not qualify for First Amendment protection).

303. *See id.* (suggesting that interpretive artist's First Amendment rights would not be violated if court only enjoined speech that court previously determined was unprotected).

304. *See id.* (same).

305. *See id.* (same).

306. *See supra* notes 301-05 and 307-11 and accompanying text (discussing First Amendment chill and injunctive remedies for paternity rights violations).

integrity or paternity rights violations,[307] injunctions to enforce paternity rights carry with them much less risk of erroneous court determinations.[308] As previously discussed, determining whether a paternity rights violation has occurred would be a straightforward inquiry for the courts, one that would not vary substantially from case to case.[309] Likewise, affording correct attribution to the author would be a simple task for the performance art author.[310] Thus, although the punishment for violating a court order enjoining paternity rights violations would be severe, when coupled with the slight risk of erroneous court determinations, tailored injunctive relief would not deter interpretive artists from engaging in protected speech.[311]

This First Amendment analysis of moral rights remedies concludes with a consideration of the First Amendment issues surrounding a labeling remedy for integrity rights violations. In the context of moral rights, the term "labeling" encompasses a court ordered declaration, placed in the credits or advertisements of the production at issue, that communicates to the public a message that the production of the author's work of performance art objectionably diverges from the text of the author's work.[312] This is a rudimentary definition. A fully developed labeling remedy would resolve such issues as whether the court or the author creates the declaration and whether the size of the declaration is fixed or whether it varies in relation to the size and nature of the particular credit or advertisement.[313] Nonetheless, this definition will suffice as the starting point for a First Amendment analysis of an integrity rights labeling remedy.[314]

An examination of the above described labeling remedy reveals that it would affect two distinct classifications of speech: (1) the expressive conduct that the interpretive artists places in the production at issue; and (2) the speech that the interpretive artist places in the production's credits or

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307. *See* A. BICKEL, *supra* note 282, at 61 (suggesting that court would hold violator of injunction in contempt).

308. *See supra* notes 279-81 and accompanying text (discussing risk of erroneous court determinations when applying paternity right).

309. *See id.* (same).

310. *See id.* (same).

311. *See* Schauer, *supra* note 197, at 696-97 (stating that First Amendment chill is product of uncertainty of erroneous court determinations and magnitude of harm that would result from erroneous court determinations).

312. *See* Amarnick, *supra* note 22, at 52 (defining labeling remedy as "a court's declaration that a work as to which a violation of the integrity interest has been found but as to which no injunction is to be granted must indicate, on its credits and advertisements, that the author's work has been tampered with").

313. *See infra* notes 314-84 and accompanying text (discussing various aspects of labeling remedy for performance art author moral rights).

314. Diverging from the discussion of injunctive relief and monetary damages, this article will not discuss the suitability of labeling as a paternity rights remedy, primarily because an injunction enforcing an author's paternity rights effectively constitutes a labeling remedy. *See supra* notes 301-11 and accompanying text (discussing injunctive enforcement of performance art author paternity rights).

advertisements.[315] Considering the first of these two classifications, because a labeling remedy would not suppress directly any of the messages an interpretive artist places in the performance of an author's work,[316] the remedy does not constitute a prior restraint.[317] Therefore, a First Amendment analysis must focus on whether or not the labeling remedy would create First Amendment chill by deterring the interpretive artist from inserting protected speech into the performance of the author's work.[318]

Whether or not a labeling remedy would cause this form of First Amendment chill depends on the confluence of the two basic factors previously discussed—the probability that courts erroneously would hold interpretive artist's liable for integrity rights violations, coupled with the magnitude of harm that such erroneous court determinations would cause interpretive artists.[319] The probability of erroneous court determinations primarily is a function of the clarity and simplicity of moral rights legislation's demarcation between protected and unprotected speech.[320] Assuming federal moral rights legislation incorporated the corrective view of moral rights, the demarcation between protected and unprotected speech would be fairly clear and simple in application.[321] Thus, the corrective view of moral rights significantly would decrease the risk of erroneous court determinations.[322]

However, despite the basic clarity and simplicity of the corrective view, this demarcation still possesses enough ambiguity to deter interpretive artists from inserting protected speech into their performances, assuming that an integrity rights labeling remedy caused harm comparable to the harm that injunctive and monetary remedies cause.[323] However, of the three remedies,

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315. *See* Amarnick, *supra* note 22, at 52 (positing definition of labeling that suggests remedy is contingent on interpretive artist engaging in expressive conduct in two contexts: (1) during performance of author's work; and (2) within credits or advertisements for performance).

316. *See supra* note 312 and accompanying text (defining labeling remedy).

317. *See* Near v. Minnesota, 283 U.S. 697, 711-12 (1931) (stating that statute suppressing publication of offending newspaper violates First Amendment); Note, *supra* note 282, at 1946 (stating that prior restraints violate defendant's constitutional rights because they prevent him from disseminating matters that First Amendment ordinarily protects absent prior judicial determination that material does not qualify for First Amendment protection).

318. *See* Schauer, *supra* note 197, at 687 (discussing importance of chilling effect to First Amendment analysis).

319. *See id.* at 696-97 (stating that First Amendment chill is product of uncertainty of erroneous court determinations coupled with magnitude of harm that would result from erroneous court determinations).

320. *See id.* at 695-96 (suggesting that fear of erroneous court determinations decreases in direct relation to complexity and vagueness of legal concepts that demarcate protected speech from unprotected speech).

321. *See supra* notes 249-61 and accompanying text (discussing simplicity and clarity of corrective view's demarcation between protected and unprotected speech).

322. *See* Schauer, *supra* note 197, at 695-96 (suggesting that fear of erroneous court determinations increases and decreases in direct relation to complexity and vagueness of legal concepts that demarcate protected speech from unprotected speech).

323. *See supra* notes 269-77 and accompanying text (discussing chilling effect that would

labeling, far and away, would cause the least amount of harm to interpretive artists.[324] Compared to the devastating effect of monetary damages, placing court ordered declarations into preexisting credits or advertisements would be much less expensive for many interpretive artists.[325] Perhaps the most serious economic risk that a labeling remedy creates for the interpretive artist is the danger that the declaration would reduce the economic potential of the production at issue.[326] On the other hand, if recent history is any guide, such declarations may create controversy that only would increase the production's economic potential.[327]

Moreover, a labeling remedy for integrity rights violations would cause significantly less harm than a court injunction protecting the same author's right.[328] Because ascertaining whether an interpretive artist has complied with a labeling order is a much simpler task for the courts than ascertaining whether an interpretive artist has breached an injunction protecting an author's integrity rights, the risk of courts erroneously holding an interpretive artist in contempt for noncompliance with a labeling order is de minimis.[329] As a result, interpretive artists are less likely to face the serious harm that can be the end result of a court order enjoining an interpretive artist from violating an author's integrity rights.[330] Because an integrity

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result from coupling of corrective view and monetary damage remedy for integrity rights violations); *supra* notes 293-299 and accompanying text (discussing chilling effect that would result from coupling of corrective view and injunctive remedy for integrity rights violation).

324. *See supra* notes 293-299 and accompanying text (discussing slight harm that would result from coupling corrective view with integrity rights labeling remedy).

325. *See* Amarnick, *supra* note 22, at 53 (stating that labeling might forestall performance art author's "blackmail" efforts).

326. *See id.* (stating that labeling might reduce economic potential of interpretive artist's production).

327. *See* Bell, *Some Final Words on Critics of the 'Last Temptation of Christ'*, L.A. Times, Oct. 13, 1988, at 6, col. 4 (stating that controversy surrounding "Last Temptation of Christ" aided its profitability); Browne, *The Music Business Watches Its Own Step*, N.Y. Times, Sept. 23, 1990, at 26, col. 1 (stating that warning labels and police harassment have transformed "2 Live Crew" record into multi-million seller).

328. *See infra* notes 329-30 and accompanying text (discussing how labeling integrity rights remedy would cause less harm than injunctive relief for integrity rights violations).

329. *See* Schauer, *supra* note 197, at 695-96 (suggesting that fear of erroneous court determinations decreases in direct relation to complexity and vagueness of legal concepts that demarcate protected speech from unprotected speech).

330. *See* A. BICKEL, *supra* note 282, at 61 (stating that where individual violates court order, he faces court holding him in contempt). One last First Amendment issue arises from the labeling remedy's effect on the speech contained in the interpretive artist's performance of the author's work. Because the labeling remedy essentially is a forced right of access to certain public communications that the interpretive artist publishes, and because this right of access is contingent on the interpretive artist engaging in certain speech, the labeling remedy might constitute a content-based right-of-access. *See* Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1, 9 (1986) (stating that Commission's order to place newsletter of third party in utility's billing envelope constituted content-based right-of-access); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 257 (1974) (stating Florida right-of-reply statute

rights labeling remedy would not burden interpretive artists unduly,[331] any ambiguity in federal legislation employing the corrective view will not deter interpretive artists from exercising their First Amendment rights when performing an author's work of performance art.[332]

While the labeling remedy does not significantly chill the protected speech in the interpretive artist's performance, as previously suggested, a labeling remedy would affect another category of speech: the interpretive artist's credits or advertisements.[333] Because a labeling remedy limits the placement of court ordered declarations to the interpretive artist's credits or advertisements, the remedy would affect the speech that interpretive artists place in such public communications.[334]

For purposes of a First Amendment analysis, the exact nature of the labeling remedy's effect on the speech contained in interpretive artists' public communications is very significant. First, because the speech in these public communications does not constitute integrity right violations, the labeling remedy solely would affect speech that the First Amendment

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exacted penalty on basis of content of paper).

In both *Miami Herald Publishing Co. v. Tornillo* and *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, the Court held that certain content-based rights-of-access violated the First Amendment. *Pacific Gas*, 475 U.S. at 9; *Tornillo*, 418 U.S. at 258. According to the Court, these content-based rights-of-access violated the First Amendment because they punished the speaker for engaging in the protected speech that triggered the right-of-access. *Pacific Gas*, 475 U.S. at 10; *Tornillo*, 418 U.S. at 257. Thus, the right-of-access discouraged the speakers from engaging in the protected speech. *Pacific Gas*, 475 U.S. at 10; *Tornillo*, 418 U.S. at 257.

However, the labeling remedy deters and is triggered by speech that is very different from the speech that triggered the rights-of-access in *Pacific Gas* and *Tornillo*. In both of these cases the First Amendment fully protected the speech triggering the right-of-access. *See Pacific Gas*, 475 U.S. 13-14 (stating that utility's expression of viewpoint that is hostile to third party triggers third party's right-of-access); *Tornillo*, 418 U.S. at 244 (stating that statute affords right-of-reply to political candidate if newspaper criticizes his record or character). Thus, the regulations in *Pacific Gas* and *Tornillo* directly chilled protected speech. *Pacific Gas*, 475 U.S. at 14; *Tornillo*, 418 U.S. at 257. In the case of labeling, unprotected speech triggers the remedy (*i.e.*, speech that modifies the author's message). *See supra* notes 312-14 and accompanying text (discussing mechanics of labeling remedy); *supra* notes 234-35 and accompanying text (describing corrective view of moral rights). Therefore, the labeling remedy only directly chills unprotected speech. *See supra* notes 234-35 and accompanying text (discussing corrective view of moral rights). While the labeling remedy peripherally may chill protected speech (*i.e.*, speech that does not modify the author's expression), the previous analysis in this article has demonstrated that this chill is not constitutionally significant. *See supra* notes 318-29 and accompanying text (discussing First Amendment chill and labeling remedy).

331. *See supra* notes 324 and 330 and accompanying text (discussing harm integrity rights labeling remedy would cause interpretive artists as compared to monetary damages and injunctions).

332. Schauer, *supra* note 197, at 696-97 (stating that First Amendment chill is product of uncertainty of erroneous court determinations coupled with magnitude of harm that would result from erroneous court determinations).

333. *See supra* note 315 and accompanying text (discussing two classifications of speech that labeling remedy affects).

334. *See id.* (same).

protects.[335] Second, because an interpretive artist only can trigger a labeling remedy by publishing public communications pertaining to the wrongful performance of the author's work,[336] the labeling remedy in effect would punish interpretive artists for engaging in protected speech.[337]

The United States Supreme Court has looked with great disfavor on governmental regulations, like the labeling remedy, that have the above described qualities.[338] The Court has termed them compelled access[339] or content-based rights-of-access.[340] According to the Court, such rights of compelled access deter speakers from engaging in the protected speech that triggers the compelled access.[341] Further, the Court has held that rights of compelled access force the penalized speakers to alter their speech to conform to another's agenda.[342]

On two occasions the Court has struck down rights of compelled access as violative of the First Amendment ;[343] however, the Court has not created

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335. *See supra* notes 234-63 and accompanying text (discussing corrective view of moral rights). This statement assumes that the speech contained in these public communications does not fall into one of the other unprotected categories of speech (*i.e.*, obscenity or libel).

336. *See supra* note 312 and accompanying text (discussing definition of integrity rights labeling remedy).

337. *See Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 9 (1986) (stating that compelled access penalizes expression of particular points of view); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (striking down Florida statute that exacts penalty on basis of content of newspaper).

338. *See Pacific Gas*, 475 U.S. at 11 (holding that Commission's order requiring utility to place newsletter of third party in its billing envelopes constitutes compelled access that violates utility's First Amendment rights); *Tornillo*, 418 U.S. at 257 (holding that right-of-reply statute that forces newspaper to print messages from speakers with whom paper disagrees constitutes compelled access in violation of newspaper's First Amendment rights).

339. *Pacific Gas*, 475 U.S. at 9 (terming Commission's order to place newsletter in utility's billing envelope compelled access); *Tornillo*, 418 U.S. at 258 (terming right-of-access statute compulsory access).

340. *See Pacific Gas*, 475 U.S. at 15 (stating that commission's order to place newsletter of third party in utility's billing envelope constitutes content based grant of access); *Tornillo*, 418 U.S. at 256 (stating Florida right-of-reply statute exacts penalty on basis of content of paper).

341. *Pacific Gas*, 475 U.S. at 9; *Tornillo*, 418 U.S. at 256.

342. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (stating that compulsory access law intrudes on function of editors).

343. *See Pacific Gas*, 475 U.S. at 20-21; *Tornillo*, 418 U.S. at 257. In *Tornillo*, the Court considered whether a Florida right-of-reply statute violated the First Amendment. *Tornillo*, 418 U.S. 241, 243 (1974). The statute provided that if a newspaper assailed a political candidate's record or character, the newspaper would have to print, free of cost to the candidate, any reply to the newspaper's charges that the candidate submitted. *Id.* at 244.

The Court characterized this right-of-reply statute as coercive. *Id.* at 256. The Court also stated that the statute exacted a penalty on the basis of newspaper content by forcing newspapers to incur the costs of printing and composing the candidates' replies. *Id.* at 256. These costs included the expenses that newspapers would incur from forgoing coverage of other topics in order to afford adequate space for candidates' replies. *Id.* at 256-57. The Court concluded that these penalties would create First Amendment chill because newspaper editors would forgo assailing political candidates to avoid the above described costs. *Id.* at 257. As an alternative

a *per se* rule against such rights.[344] Nor has the Court created a strong presumption against their constitutionality,[345] as it did in the case of prior restraints.[346] Instead the Court has focused on whether compelled access is properly tailored and whether it serves an important governmental interest.[347] This examination varies in relation to the nature of the speech that compelled access regulates.[348] If the regulated speech is political in nature, the actual test is straightforward and stringent: compelled access must be a narrowly tailored means that promotes a compelling state interest.[349]

If the regulated speech is commercial speech, then the Court uses a less stringent, if more cumbersome, four-part test.[350] First, the First Amendment must protect the regulated speech.[351] To obtain such protection, the speech must be lawful and not misleading.[352] Second, the regulation at issue must serve a substantial governmental interest.[353] Third, the regulation directly must advance the asserted governmental interest.[354] Finally, the regulation

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basis for its holding, the Court concluded that the right-of-reply statute violated the First Amendment because it intruded on the function of the editor. *Id.* at 258.

In *Pacific Gas*, the Court considered whether the California Public Utilities Commission (CPUC) could require a privately owned utility to include a third party's hostile newsletter in the utility's billing envelopes. *Pacific Gas*, 475 U.S. at 4. After concluding that the First Amendment fully protected the utility's newsletter, the Court held that CPUC's order constituted compelled access that both penalized the utility's point of view and forced it to alter its speech in accordance with an agenda it did not set. *Id.* at 8-12.

The Court then noted that CPUC's order could be valid if it was a narrowly tailored means to a compelling state interest. *Id.* CPUC alleged one compelling interest: The order furthered the State's interest in effective ratemaking proceedings. *Id.* at 19. However, the Court went on to conclude that the State could serve that interest through means other than those violating the utility's First Amendment rights. *Id.* CPUC attempted to assert that because the order disseminated a number of views to CPUC's customers, the order advanced the state's compelling interest in promoting free speech. *Id.* at 20. Rejecting this claim, the Court noted that the State could not promote free speech through the use of a content-based right-of-access that advanced some points of view while burdening the expression of others. *Id.*

344. *Pacific Gas*, 475 U.S. at 19 (stating that compelled access could be valid if it were narrowly tailored means of serving compelling state interest).

345. *See id.* (same).

346. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

347. *See Pacific Gas*, 475 U.S. at 19 (stating that content-based compelled access can withstand First Amendment scrutiny if it is narrowly tailored and serves compelling state interest).

348. *See Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 8 & 19 (stating that because First Amendment fully protected utility's newspaper, order compelling access must be narrowly tailored means to serve compelling state interest); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980) (outlining four part First Amendment analysis for commercial speech cases).

349. *Pacific Gas*, 475 U.S. at 19.

350. *See Central Hudson*, 447 U.S. at 566 (outlining four-part First Amendment test to analyze state restrictions on commercial speech).

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

must be narrowly tailored.[355] In the context of commercial speech, the term "narrowly tailored" has a fairly relaxed meaning: a reasonable fit between the governmental interest and the regulation used to achieve it.[356]

Before applying either of these tests to an integrity rights labeling remedy, one must ascertain whether the affected speech is political or commercial speech.[357] Although what constitutes political speech is fairly amorphous, the Court specifically has defined what constitutes commercial speech: speech that solicits a commercial transaction.[358] As previously discussed, a labeling remedy would afford the performance art author a right-of-access to the interpretive artist's credits and advertisements pertaining to the production at issue.[359] If the interpretive artist charged an admission fee to the performance of the author's work, then one could characterize these credits or advertisements as soliciting a commercial transaction, and thus, they would constitute commercial speech.[360]

If an interpretive artist's credits and advertisements constitute commercial speech, then satisfying the four-part commercial speech test is a simple matter. Because the interpretive artist's integrity rights violations are contained in the performance of the author's work, rather than in the advertisements and credits,[361] these public communications presumably are not

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355. *See id.* (stating that law regulating commercial speech must not be more extensive than is necessary to serve substantial interest).

356. Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 480 (1989).

357. *See supra* notes 343-56 and accompanying text (discussing First Amendment analysis for political and commercial speech).

358. *Board of Trustees*, 492 U.S. at 473 (citing Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)).

359. *See supra* note 312 and accompanying text (defining labeling remedy).

360. *See Board of Trustees*, 492 U.S. at 473 (stating that commercial speech proposes commercial transaction). Public communications soliciting the public to pay money to view a performance of an author's work, also may contain political speech. *See id.* at 475 (discussing commercial advertisement that links commercial product to public debate). For example, a playbill advertising the performance of a play about the Vietnam War may depict scenes from war that effectively constitute commentary about the Vietnam War.

However, unless political speech is "inextricably intertwined" with commercial speech, communications containing both forms of speech do not gain the status of political speech. *Id.* at 474. Commercial speech is inextricably intertwined with political speech if either a law of man or nature requires the presence of both types of speech. *See id.* (stating that communications did not contain commercial speech inextricably linked with political speech because no law of man or nature required commercial speech to be coupled with political speech). In the case of the playbill no law of man or nature requires the playbill to include depictions of the Vietnam War to fulfill its commercial purpose of selling tickets to the performance. *See id.* (same). Therefore, the playbill retains its status as commercial speech. *Id.*; *see also* Riley v. National Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781, 796 (1988) (holding that state-law requirement that fundraising organizations for charities include statistics in their solicitations describing amount of money turned over to charities within previous twelve months constituted commercial speech that was inextricably intertwined with political speech).

361. *See supra* notes 234-60, 362-63 and accompanying text (discussing corrective view of moral rights).

misleading nor unlawful.[362] Thus, the First Amendment protects these public communications.[363]

Having satisfied the first prong of the commercial speech four-part test, a substantial state interest must underlie the labeling remedy.[364] The primary purpose of an integrity rights labeling remedy is to protect the personality interests of performance art authors.[365] Because protecting performance art authors' personality interests would promote the useful arts in accordance with the Copyright Clause,[366] a substantial governmental interest underlies the labeling remedy.[367] Because labeling would afford performance art authors with a method to correct distortions to their work, the remedy satisfies the next prong of the four-part test: labeling directly advances the substantial state interest.[368] Finally, because labeling would not place a substantial economic burden on the performance art industry[369] and because labeling is the only moral rights remedy that would not significantly chill the protected political speech that interpretive artists insert into their performances,[370] a reasonable fit exists between the labeling remedy and its end of protecting the author's personality interests.[371] Thus, the labeling remedy is narrowly tailored.[372]

If the interpretive artist's public communications constitute commercial speech, then the four-part test suggests that labeling withstands a First

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362. *See* Central Hudson Gas & Elec. v. Public Service Comm'n, 447 U.S. 557, 566 (1980) (stating that First Amendment protects commercial speech if speech is lawful and truthful).

363. *See id.* (stating that first prong of First Amendment analysis of law regulating commercial speech is whether First Amendment protects commercial speech).

364. *See id.* (stating that substantial state interest must underlie state law regulating commercial speech if law is to withstand First Amendment challenge).

365. *See supra* notes 22-28 and accompanying text (discussing how moral rights protects author's personality interests).

366. *See supra* notes 157-69 and accompanying text (discussing how moral rights promote useful arts, thereby complying with dictates of Copyright Clause).

367. *See* Central Hudson Gas & Elec. v. Public Service Comm'n, 447 U.S. 557, 566 (1980) (stating that substantial state interest must underlie state law regulating commercial speech if law is to withstand First Amendment challenge).

368. *Id.* (stating that law regulating commercial speech only will withstand First Amendment challenge if it directly advances its underlying substantial state interest); *see infra* note 511 and accompanying text (discussing how labeling remedy effectively protects author's personality interests).

369. *See infra* notes 511-12 and accompanying text (discussing slight economic impact of labeling on performance art industry).

370. *See supra* notes 265-311 and accompanying text (discussing various moral rights remedies and whether they significantly chill interpretive artists from inserting fully protected speech into their performances).

371. *See* Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 480 (1989) (stating that government must demonstrate that law regulating commercial speech reasonably fits interest it seeks to promote).

372. *See id.* (interpreting "narrowly tailored" to mean "reasonable fit" in context of commercial speech).

Amendment challenge.[373] However, if the interpretive artist's public communications do not promote a commercial transaction, perhaps because the performance is free to the public, the interpretive artist's public communications might constitute political speech.[374] Assuming this is true, the labeling remedy would have to be a narrowly tailored means of advancing a compelling state interest.[375] As discussed in the commercial speech analysis of labeling, the primary purpose of the labeling remedy is to protect the author's personality interests.[376] Because protecting authors' personality interests promotes the useful arts[377] and accords with the dictates of the Copyright Clause,[378] this purpose constitutes a compelling governmental interest.[379]

If a compelling interest underlies the integrity rights labeling remedy,[380] the remedy must be a narrowly tailored means of advancing that interest if the remedy is to withstand a First Amendment challenge.[381] Labeling is narrowly tailored for two reasons. First, labeling is the only moral rights remedy that would protect the author's personality interests without significantly chilling the protected speech that interpretive artists' inject into their performances.[382] Second, labeling would not unduly burden the economic health of the performance art industry.[383] Thus, the labeling remedy withstands a First Amendment challenge regardless of whether the interpretive artist's public communications are commercial speech or political speech.[384]

One final constitutional issue that any federal legislation recognizing performance art authors' moral rights must address, is the place within such

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373. *See supra* notes 364-72 and accompanying text (stating that labeling remedy satisfies four-part test for commercial speech).

374. *See Board of Trustees*, 492 U.S. at 481 (stating that commercial speech proposes commercial transaction).

375. *See* Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1, 19 (1986) (stating that compelled access must be narrowly tailored means of promoting compelling state interest to withstand First Amendment challenge).

376. *See infra* note 511 and accompanying text (discussing how labeling remedy protects performance art author personality interests).

377. *See supra* note 169 and accompanying text (discussing how moral rights promote useful arts).

378. *See* U.S. CONST. art. I, § 8, cl. 8 (providing "The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

379. *See Pacific Gas*, 475 U.S. at 19 (stating that state's interest in effective electrical ratemaking proceedings may be compelling).

380. *See supra* notes 376-78 and accompanying text (discussing compelling interests underlying integrity rights remedy).

381. Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1, 19 (1986).

382. *See supra* notes 265-311 and accompanying text (discussing various moral rights remedies and whether they significantly chill interpretive artists from inserting protected speech into their performances).

383. *See infra* notes 511-14 and accompanying text (discussing slight economic impact of labeling on performance art industry).

384. *See supra* notes 333-83 and accompanying text (discussing whether labeling remedy withstands First Amendment challenge if it affects commercial speech or political speech in interpretive artist's public communications).

legislation for the fair use doctrine.[385] The fair use doctrine excludes from copyright liability certain limited, expressive uses of copyrighted material.[386] These expressive uses include the utilization of copyrighted material for news reporting, teaching, scholarship, criticism, and comment.[387] The latter two uses encompass parody and satire.[388] As enacted, the members of Congress did not intend fair use to relate in any way to First Amendment concerns like the free flow of ideas or First Amendment chill.[389] Rather, the members of Congress intended the federal incarnation of fair use to be only a restatement of the common-law fair use privilege.[390]

Nonetheless, despite these intentions, the federal courts and commentators have expanded the fair use doctrine to encompass First Amendment concerns,[391] including the fostering of the free flow of ideas and the promotion of creative activity.[392] Professor Kwall, for example, has taken the additional step of suggesting that fair use would limit the scope of any moral rights recognition within the United States.[393] This alleged limitation on the scope of moral rights recognition stems from a perceived conflict between fair use and moral rights.[394] Moral rights protect the performance art author's personality interests both by ensuring that authorship is properly attributed and by preventing harmful distortions to an author's work.[395] Fair use conflicts with moral rights because the doctrine would allow

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385. *See infra* notes 386-409 and accompanying text (discussing fair use and performance art author moral rights).

386. *See infra* notes 387-409 and accompanying text (discussing fair use doctrine).

387. 17 U.S.C. § 107 (1988).

388. Kwall, *supra* note 29, at 66-67.

389. *See* H.R. REP. No. 1476, 94th Cong., 2d Sess. 66, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5678, 5680 (stating that federal fair use privilege encompasses general scope of judicial doctrine of fair use).

390. *Id.*

391. *See* Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1174 (5th Cir. 1980) (stating that fair use doctrine serves to eliminate potential conflicts between copyright and free speech); Kwall, *supra* note 29, at 65 (suggesting that federal fair use avoids conflict between copyright and First Amendment); *see generally* Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970) (recognizing need to resolve conflict between copyright laws and First Amendment).

392. *See* Kwall, *supra* note 29, at 65 (quoting Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984), for proposition that fair use reflects Congress' attempt to balance interests of authors against such First Amendment interests as free flow of ideas and creativity).

393. *Id.* at 68 (suggesting that fair use will limit United States recognition of moral rights). Professor Kwall has stated:

> Our deep rooted tradition of free speech stemming from the first amendment's mandate requires the same balance of interests when a creator alleges violations of his personal, rather than pecuniary, rights . . . . Important social policies underlying section 107 may compel a creator's acceptance of perceived mutilations, unwarranted criticisms, and even objectionable contextual uses of his work.

Id. (citations omitted).

394. *See* Kwall, *supra* note 29, at 68-69 (stating that fair use may compel author's acceptance of certain integrity rights violations).

395. Amarnick, *supra* note 22, at 37.

individuals to use the author's work for certain purposes without giving proper attribution.[396] Further, fair use permits certain kinds of serious distortions that integrity rights expressly prohibit, including parodies and satires.[397] Because of the perceived First Amendment purposes underlying fair use, federal moral rights recognition would have to make significant accommodations to fair use.[398]

However, because of a number of restrictions on the fair use doctrine that the federal courts have developed, fair use will have little impact on federal performance art author moral rights.[399] The first of these restrictions is that fair use has no applicability if an individual violates an author's copyright while performing a textual, verbatim copy of the author's work.[400] Because most moral rights violations would occur when the interpretive artist allegedly is performing a textual, verbatim version of the author's work, fair use often would not protect the interpretive artist from a federal moral rights cause of action.[401]

Another restriction on fair use that would limit its impact on federal moral rights is the "recall or conjure up" test.[402] Whenever an individual has performed less than a exact rendition of an author's work, federal courts will deny that individual the protection of fair use, provided the performance incorporates more of the original than is necessary to "recall or conjure up" the copyright holder's work.[403] As in the case of the "verbatim rule," federal courts presumably would apply the "recall or

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396. *See* Kwall, *supra* note 29, at 68 (suggesting that fair use may permit individuals to use excerpts of author's work without giving proper attribution to author).

397. *See id.* (suggesting that fair use will excuse certain integrity rights violations). In determining whether the federal fair use doctrine would excuse particular personality right violations, the courts, in addition to common law, probably would look to the four factors that Congress mentions in section 107:

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

17 U.S.C. § 107 (1988).

398. *See* Kwall, *supra* note 29, at 68 (incorporating fair use into moral rights recognition requires balancing of interests).

399. *See infra* notes 400-08 and accompanying text (discussing fair use restrictions that will limit doctrine's impact on performance art author moral rights).

400. *See* Benny v. Lowe's, Inc., 239 F.2d 532, 536 (9th Cir. 1956) (stating that fact that serious dramatic work is copied practically verbatim and then presented with actors walking on their hands or with other grotesquiries, does not avoid infringement of copyright), *aff'd by an equally divided Court*, 356 U.S. 43 (1959), *reh'd denied*, 356 U.S. 934 (1958).

401. *See id.* at 536 (same).

402. *See* Berlin v. E.C. Pub. Inc., 329 F.2d 541, 545 (2d Cir. 1964) (stating that fair use is inapplicable where defendant incorporates more of copyright holder's work than is necessary to recall or conjure up work), *cert denied*, 379 U.S. 822 (1964).

403. *See id.* (same).

conjure up" test to limit the usefulness of the fair use doctrine to an interpretive artist attempting to escape a moral rights claim.[404] Thus, where an interpretive artist performs a version of an author's work that only slightly differs from the author's work of performance art, the interpretive artist could not use fair use to shield himself from moral rights liability.[405]

The last restriction on fair use that will limit the doctrine's impact on federal moral rights legislation applies specifically to satires or parodies of an author's work.[406] Any parody or satire of a copyrighted work claiming the protection of fair use must "do more than merely achieve a comic effect. It must also make some critical comment or statement about the original work which reflects the original perspective of the parodist [or satirist]—thereby giving the parody [or satire] social value beyond its entertainment function."[407]

As applied to federal moral rights, if an individual performed a satire or parody of an author's work without injecting the necessary critical comment, the individual would not escape moral rights liability through the use of the fair use doctrine.[408]

To summarize what has been an extensive discussion of the constitutional issues surrounding performance art author moral rights, constitutional impediments to recognition of performance art author moral rights, while substantial, are not insurmountable. Beyond limiting the duration of any moral right, the Copyright Clause does not present any impediment to according moral rights to performance art authors.[409] The First Amendment presents the more significant obstacles, but they too are not overwhelming.

First, because copyright's idea/expression dichotomy is unworkable as a definitional balance for performance art author moral rights,[410] federal legislation will have to be based on an alternative demarcation between protected and unprotected speech.[411] Adequate case support exists to create the demarcation that this article has termed "the corrective view of moral

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404. *See id.* (same).

405. *See id.* (same).

406. *See* Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prod. Inc., 479 F. Supp. 351, 357 (N.D. Ga. 1979) (stating that because copyright infringer failed to make critical comment about infringed work, infringer's play was not satire and fair use did not apply); Dallas Cowboys Cheerleaders v. Pussycat Cinema, 467 F. Supp. 366, 376 (S.D.N.Y.) (suggesting that parody and satire must contain critical commentary), *order aff'd*, 604 F.2d 200 (2d Cir. 1979).

407. *Metro-Goldwyn-Mayer*, 479 F. Supp. at 357.

408. *See id.* at 357 (holding that to obtain fair use protection, parody or satire must contain critical commentary regarding original work).

409. *See supra* notes 156-81 and accompanying text (discussing copyright clause and performance art author moral rights).

410. *See supra* notes 212-19 and accompanying text (discussing inadequacies of idea/expression dichotomy as basis for definitional balance for performance art author moral rights).

411. *See supra* notes 196-200 and accompanying text (discussing necessity of workable definitional balance if performance art author moral rights are to withstand First Amendment challenge).

rights."[412] The corrective view of moral rights is based on the proposition that the performance art author's right to speak through his work is meaningless without sufficient protections to ensure that the author's message actually reaches the marketplace of ideas.[413] Because the corrective view is a fairly clear and simple definitional balance, independent of the remedies used to enforce the author's moral right, interpretive artist's will not be unduly chilled from exercising their free speech rights when performing authors' works.[414]

First Amendment chill is a more significant problem when specific remedies are attached to the performance art author's moral right. While monetary damage remedies and injunctive remedies do not cause First Amendment chill when coupled with an author's paternity right,[415] these same remedies would cause intolerable chill if moral rights legislation used them to enforce an author's integrity right.[416] However, a labeling remedy could be an effective method of enforcing a performance art author's integrity right without unduly chilling interpretive artists from exercising their free speech rights when they either perform an author's work or issue public communications pertaining to the performance.[417] Finally, due to existing common-law restrictions on the fair use doctrine, fair use would have little impact on the effectiveness of performance art author moral rights.[418]

IV. IDENTIFICATION OF THE INTERESTS INVOLVED IN THE RECOGNITION OF PERFORMANCE ART AUTHOR MORAL RIGHTS

Any federal legislation protecting the moral rights of performance art authors will have to accommodate the disparate interests of the author, entrepreneur, interpretive artist and public.[419] In one fashion or another, this article already has identified most of these interests; however, this section will delineate them in a more complete and systematic fashion.[420]

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412. *See supra* notes 221-63 and accompanying text (discussing corrective view of moral rights).

413. *See supra* notes 234-35 and accompanying text (describing corrective view of moral rights).

414. *See supra* notes 246-63 and accompanying text (discussing corrective view and First Amendment chill).

415. *See supra* notes 278-81 & 300-11 and accompanying text (discussing extent of First Amendment chill resulting from joinder of paternity right with monetary damage remedy and injunctive remedy).

416. *See supra* notes 269-77 & 293-299 and accompanying text (discussing First Amendment chill resulting from joinder of integrity right with monetary damage remedy or injunctive remedy).

417. *See supra* notes 318-84 and accompanying text (discussing First Amendment chill and labeling remedy).

418. *See supra* notes 385-408 and accompanying text (discussing fair use and performance art author moral right).

419. Amarnick, *supra* note 22, at 40 ; Kwall, *supra* note 29, at 92.

420. *See infra* notes 421-44 and accompanying text (discussing disparate interests surrounding federal recognition of performance art author moral rights).

The interests of the performance art author fall into two major categories.[421] First, the author has a personality interest in his work, essentially a right to prevent distortions to his work that harm the author's psyche.[422] Second, the author has a First Amendment interest in ensuring that his speech actually reaches the marketplace of ideas in an undistorted form.[423]

In addition to these two major interests, the performance art author has an ancillary interest that is related to the author's First Amendment interest in ensuring that his message reaches the marketplace of ideas.[424] Simply put, the author has an interest in securing interpretive artists and entrepreneurs to perform the author's work.[425] Obviously, without such

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421. *See infra* notes 422-28 and accompanying text (discussing performance art author interests).

422. *See supra* notes 22-34 and accompanying text (discussing definition of performance art author moral right). A broader view of moral rights would expand the author's personality interests to include economic damage to the author as measured by harm to the author's reputation. *See* Comment, *supra* note 28, at 477 (describing economic conception of moral right); *see also supra* note 28 (discussing economic conception of moral right). Expanding an author's personality interests to encompass these economic concerns raises questions as to when an author's economic interests are at their peak and whether these interests ever decline. *See* Davis, *supra* note 28, at 357-58 (discussing issues surrounding state visual artist moral rights statutes that define integrity rights violations in terms of likelihood of damage to artist's reputation). One response to these questions is that an author's economic interest in his work is at its highest when the work is initially produced, and thereafter it declines. *See* Garon, *supra* note 49, at 279 (stating that there is no interest as compelling as author's in initial production). Often the initial production will determine whether an author's work subsequently will be performed and published. *Id.* Because isolated performances will not harm a work's overall reputation, once the public initially has viewed the author's work, and it has been published, poorly done subsequent performances do not unduly threaten the author's economic interests. *See id.* (stating that after initial performance, poor school production in Denver will not affect market for play in Dallas).

While this assessment may have some validity, particularly for performance art that has it origins in New York's mainstream fine arts communities, the assessment underestimates the economic importance of subsequent performances in the increasingly decentralized performance art industry. *See Practical Perspectives*, *supra* note 13, at 47-48 (stating that "[t]hese days, with Broadway productions so hard to get—and I mean by established playwrights and composers and lyricists—author's have just as much stake in a good regional production as they used to have on Broadway").

Further, although a performance art author is often present for the initial production of his work, and thus, can act as a check on interpretive artist abuses, economic realities prevent the author's presence during subsequent productions, and thereby defeat a consistent check on moral rights abuses. *See id.* (suggesting that integrity rights violations occur in subsequent productions because original creators are no longer involved). Thus, if anything, the author has a greater interest in the protection of his personality interests in subsequent productions of his works than in the initial productions. *See id.* (same).

423. *See* First Nat'l Bank of Boston v. Belloti, 435 U.S. 765, 789-90 (1978) (stating that where speaker imminently threatens to drown out other points of view, such that democratic process and other First Amendment interests are threatened, courts will consider whether state action to silence voice is appropriate); *see also supra* notes 220-29 and accompanying text (discussing First Amendment law that supports corrective view of moral rights).

424. *See infra* notes 425-28 and accompanying text (discussing author's interest in obtaining interpretive artists and entrepreneurs to perform author's work).

425. Amarnick, *supra* note 22, at 42-43.

individuals, an author has a much less significant chance of injecting his message into the marketplace of ideas.[426] To a certain extent, this ancillary interest conflicts with the author's personality interests.[427] In order to secure the necessary interpretive artists and entrepreneurs, performance art authors to some extent have to tolerate a certain amount of objectionable modifications to their works.[428]

In addition to the interests of the performance art author, moral rights recognition for the performance art author must also accommodate the interests of the entrepreneurs who finance the production of an author's work.[429] The entrepreneur's principle interest is a financial one.[430] No matter what contractual arrangements the other participants in the performance arts have obtained, the entrepreneur always has the most immediate and the largest financial interest in the production of an author's work.[431]

Entrepreneurs also have an interest in accommodating physical and economical constraints when producing an author's work of performance art.[432] Because, physical and economical constraints often force compromises in the performance of a work of performance art, the entrepreneur's interest in accommodating these constraints often conflicts with performance art author's personality interests.[433] For instance, entrepreneurs promoting tour-

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426. *Id.* Of course, it is always possible that the public will read the author's work of performance art and thereby disseminate the author's message. However, because publication often depends on an initial, successful performance of the work, the author needs interpretive artists and entrepreneurs to obtain even this limited dissemination of his work. *See* Garon, *supra* note 49, at 279 (stating that publication of author's play conditioned on successful first performance).

427. *See infra* note 428 and accompanying text (discussing how author's interest in obtaining interpretive artists to perform author's work conflicts with author's personality interests).

428. *See* Amarnick, *supra* note 22, at 43 (stating that price of dissemination through performance is that interpretive artists change author's original vision).

429. *See* Garon, *supra* note 49, at 279 n.11 (stating that producer is individual with most immediate financial interest in success of production and presumably would want to protect this interest).

430. *See id.* (same).

431. *Id.*

432. *See id.* at 284-85 (suggesting that community theater and touring companies repeatedly face physical constraints and budget restrictions).

433. *See* Jerry Herman, Golly Gee Fellas (1963) (unpublished comments) (available in Lincoln Center Branch of New York Public Library, clippings file, Copyright-Theater-U.S.) (describing integrity rights violations that result from physical and monetary constraints). Jerry Herman assessed the problem as follows:

> Let's examine what happens to a musical a decade after its final Broadway curtain. The Walla-Walla Music Tent opens its summer season with a big Met star in the title role. Of course, she's never acted before, so the book is cut to ribbons. The only thing resembling choreography she is able to face is a Gavotte she once did in the "Marriage of Figaro" so . . . she does the Gavotte. Those award winning sets, once the talk of Broadway, have been replaced by canvas, rigging, and an audience in the round and the costumes have been salvaged from the aforementioned production of Figaro . . . .

Id.

ing companies and community art groups repeatedly have to alter elements of authors' performance art to accommodate budget restraints and space limitations.[434] The distortions become even more extensive when an entrepreneur produces an adaptation of a work of performance art.[435] In such instances, the extensive constraints that plague any medium-transfer can result in almost overwhelming changes to authors' works.[436]

The interpretive artist shares many of the same interests with the performance art entrepreneur. Like the entrepreneur, the interpretive artist has a financial stake in the production, albeit much smaller than that of the entrepreneur. Further, the interpretive artists shares with the entrepreneur the same interest in accommodating for physical and budgetary constraints when performing or adapting the author's work.[437] Interpretive artists also have a strong First Amendment interest in self-expression that is second only to the author 's.[438] Finally, interpretive artists working in an educational setting have an unique interest that may compromise the author's moral rights.[439] In an educational setting interpretive artists are learning and teaching the performance arts, and thus, federal moral rights legislation must make some sort of accommodation for distortions that would otherwise be intolerable in a professional context.[440]

The final interested party to any moral rights legislation is the public itself. Clearly, the public has a First Amendment interest in receiving the author's message.[441] The public also has a First Amendment interest in any additional expression that the interpretive artist generates.[442] Finally, beyond

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434. *See id.* (same); Garon, *supra* note 49, at 284-85 (suggesting that community theater and touring companies repeatedly face physical constraints and budget restrictions).

435. *See Practical Perspectives*, *supra* note 13, at 64, 67-68 (discussing difficulties involved in adapting work created for one medium to constraints of another medium).

436. *See id.* For instance, if an entrepreneur is adapting a work of performance art for television or film, the constraints of these mediums will require serious modifications to the author's work. *Id.* at 64. Take the example of a play adapted for television. A hour of television must have four acts that each conclude with a piece of unresolved drama that will bring the audience back after the commercials. *Id.* If the entrepreneur is adapting a stageplay that has two acts, the adaption to television will require radical changes to the play. *Id.*

437. *See Practical Perspectives*, *supra* note 13, at 64, 67-68 (discussing modifications that result from transferring work of performance art to constraints of another medium).

438. *See supra* notes 182-408 and accompanying text (reconciling performance art author moral rights with interpretive artists' First Amendment interests).

439. *See* Garon, *supra* note 49, at 284 (stating that interpretive artists in university setting need extensive artistic flexibility because interpretive process is educational experience for students and professors).

440. *See id.* (same).

441. *See* First Nat'l Bank of Boston v. Belloti, 435 U.S. 765, 789-90 (1977) (stating that where speaker imminently threatens to drown out other points of view, such that democratic process and other First Amendment interests are threatened, courts will consider whether state action to silence voice is appropriate); *see also supra* notes 220-63 and accompanying text (discussing First Amendment and corrective view of moral rights).

442. *See First Nat'l Bank*, 435 U.S. at 789-90 (stating that where speaker imminently threatens to drown out other points of view, such that democratic process and other First Amendment interests are threatened, courts will consider whether state action to silence voice is appropriate).

any specific message of any one author, the public has an interest in the overall health of the performing arts.[443] To return to the copyright clause, federal moral rights recognition for the performing arts must promote the performance arts.[444]

V. Balancing the Interests—Developing Specific Provisions for Federal Moral Rights Legislation for Performance Art Authors

Any federal recognition of the performance art author's moral rights should encompass the two components of the moral right: the author's right of paternity and the author's right of integrity.[445] However, because of the disparate impacts of these two components on the involved interests, balancing them through statutory provisions must be done separately for each component.[446]

Implementing paternity rights into the present framework of American law would be a simple and effective method to promote the useful arts.[447] Because correctly attributing authorship is easy and inexpensive,[448] performance art author paternity rights would not intrude on the financial interests of interpretive artists or performance art entrepreneurs.[449] Further, attributing correct authorship to a work has little to do with the performance of the work.[450] Thus, a right of paternity for performance art authors would have little effect on the expressive interests (First Amendment or otherwise) of entrepreneurs or interpretive artists.[451]

Because a paternity right fits comfortably within existing American law and the performance art industry, the ancillary provisions effectuating the right should be strong and effective. For instance, because recognition of the performance art author 's paternity right is neither onerous nor expensive[452] and because it does not implicate the First Amendment, monetary damages

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443. *See* U.S. Const. art. I, § 8, cl. 8 (stating that author's limited rights must promote useful arts).

444. *See id.* (same).

445. *See supra* notes 29-34 and accompanying text (discussing definitions of paternity right and integrity right).

446. *See supra* notes 182-418 and accompanying text (discussing impact of integrity and paternity rights on First Amendment).

447. *See* Kwall, *supra* note 29, at 92 (stating that existing copyright law could easily accommodate author's right of paternity); *see also* U.S. Const. art. I, § 8, cl. 8 (requiring that Congress award exclusive rights to authors to promote useful arts). Indeed, American moral rights analogues, specifically contract and unfair competition, already protect an author's paternity rights to a limited extent. *See* Smith v. Montoro, 648 F.2d 602, 604-07 (9th Cir. 1981) (holding implicitly that if author's name is eliminated from his work, author has claim under § 43(a) of Lanham Act that parallels paternity right).

448. *See supra* notes 278-81, 300-11 and accompanying text (discussing paternity right and First Amendment).

449. *See id.* (same).

450. *See id.* (same).

451. *See id.* (same).

452. *See id.* (same).

and injunctive relief would be appropriate means to enforce the right.[453] Congress' previous enactments support such enforcement mechanisms.[454] When Congress accorded paternity rights to visual art artists in 1990, with the exception of criminal penalties, Congress afforded visual artists the full panoply of legal and injunctive remedies available under the federal copyright laws.[455] Because, paternity rights in the context of visual art and performance art essentially have the same impact, Congress' paternity right damage provisions for visual art artists are suitable equally for performance art author paternity rights.[456]

The comfortable fit between paternity rights, American law and the performance art industry also argues for federal legislation prohibiting any form of an inter vivos transfer of an author's paternity right.[457] Absent such a provision, the weak bargaining position of most performance art authors would allow interpretive artists and entrepreneurs to coerce authors into contracting away their paternity rights.[458] Performance art authors' lack of bargaining power[459] also should make the paternity right nonwaiveable.[460]

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453. *See supra* notes 278-81 & 300-11 and accompanying text (discussing paternity right and First Amendment).

454. *See* Visual Artists Rights Act of 1990, *supra* note 39 (according visual artists moral rights).

455. *See* H.R. REP. No. 514, 101st Cong., 2nd Sess. 22 (1990), *reprinted in* 1991 U.S. CODE CONG. & ADMIN. NEWS 6915, 6931-32 (stating that Visual Artists Act of 1990, with exception of criminal penalties, provides full panoply of copyright remedies for visual art artist's integrity rights violations).

456. *See id.* (same).

457. *See infra* note 458 and accompanying text (discussing inter vivos transfers of performance art author paternity right); *see also* JIA, *supra* note 39, at 5129 (providing that paternity rights for visual art artists "may not be transferred"); Marcus, *The Moral Right in Germany*, 25 COPYRIGHT L. SYMP. (ASCAP) 93, 113 (1975) (stating that German paternity right is nontransferable); Reeves, Bauer & Lieser, *Retained Rights of Authors, Artists and Composers under French Law on Literary and Artistic Property*, 14 J. ARTS MGMT. & L. 7, 16 (1985) (stating that French paternity right is inalienable).

458. *See Practical Perspectives*, *supra* note 13, at 43 (discussing enormous economic pressures that interpretive artist and producers place on playwrights); Singer, *supra* note 49, at 296 (suggesting that choreographers do not have adequate bargaining power to obtain contractual protections); *see also* H.R. REP. No. 514, 101st Cong., 2nd Sess. 18 (1990), *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6928 (stating that Committee on Judiciary recognizes that visual artists have weak bargaining position that may cause them to bargain their rights away).

459. *See Practical Perspectives*, *supra* note 13, at 43 (discussing enormous economic pressures that interpretive artist and producers place on playwrights); Singer, *supra* note 49, at 296 (suggesting that choreographers do not have adequate bargaining power to obtain contractual protections).

460. *See* Marcus, *supra* note 457, at 113 (reporting that German artist cannot contractually waive paternity right). *But cf.* The JIA, *supra* note 39, at 5129 (1990) (providing that paternity "rights may be waived if the author expressly agrees to such waiver in written instrument signed by author"). *See also* H.R. REP. No. 514, 101st Cong., 2nd Sess. 18 (1990), *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6928 (stating that though routine waivers will eviscerate protections of Visual Artists Rights Act, nonwaiver would inhibit normal commercial practices and would not avoid de facto waivers).

Finally, because attribution of authorship is both easy and inexpensive and does not implicate the expressive interests of the participants in performance art to any great degree,[461] Congress, consistent with the durational limitations of the copyright clause, could promote the useful arts by extending the duration of the author's paternity right to a period coextensive with copyright: the life of the author plus fifty years.[462]

While implementing a paternity right for performance art authors would be a relatively simple matter, implementing a performance art author right of integrity would be much more difficult.[463] Central to such an implementation is determining exactly what constitutes an integrity rights violation.[464] Once the scope of the integrity right is delineated, one can define ancillary provisions to the integrity right that will effectively balance the disparate interests involved.[465] Essentially, there are two approaches to defining an integrity rights violation. The first approach defines the concept as those distortions, mutilations or other modifications that harm the artist's "honor or reputation."[466] Both the Berne Convention and Congress' 1990 visual artists moral rights enactments use this approach.[467]

The "honor or reputation" approach (Berne approach) uses a two part analysis to identify an integrity rights violation. First, the interpretive artist must modify the author's work.[468] Second, the interpretive artist's modification must harm the author's professional honor or reputation.[469] Both prongs of the test essentially are objective in that neither prong exclusively relies on the author's testimony to determine whether either prong is satisfied.[470] Rather, a court applying the Berne approach would look to independent evidence to determine if the interpretive artist has modified an

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461. *See supra* notes 278-81, 300-11 and accompanying text (discussing First Amendment and paternity right).

462. *See id.*; *see also* 17 U.S.C. § 302 (1978) (stating that author's copyright endures for term consisting of life of author and fifty years after author's death).

463. *See supra* notes 447-62 and accompanying text (discussing implementation of performance art author paternity right).

464. *See infra* notes 465-499 and accompanying text (discussing various approaches to defining integrity right); *see also supra* notes 220-63 and accompanying text (discussing corrective view of moral rights).

465. *See* Amarnick, *supra* note 22, at 40 (discussing importance of moral rights legislation striking different balances among various interests, depending on type of moral right).

466. *See* Berne, *supra* note 30, at 6bis(1) (stating that author shall have right to "object to any distortion, mutilation, or other modification of" author's work that prejudices his honor or reputation); *see also* JIA, *supra* note 39, at 5129 (providing that "the author of a work of visual art . . . shall have the right . . . to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation . . . .").

467. Berne, *supra* note 30, at 6bis(1); JIA, *supra* note 39, at 5129.

468. *See* S. RICKETSON, *supra* note 28, at 468 (stating that words "distortion, mutilation or other modification" appear wide enough to cover any change that is made to actual work).

469. *Id.* at 471.

470. *See id.* at 468-71 (discussing basic objectivity of Berne approach to defining integrity right).

author's work in a manner that harms the authors's honor or reputation.[471]

The advantages and disadvantages to the Berne approach primarily reside in the second prong: an integrity rights violation must harm the author's professional honor or reputation. The American judicial system is familiar with this reputational standard, having applied it in the context of libel for years.[472] However, other than the American judicial system's familiarity with the second prong of the Berne approach, the approach has serious disadvantages.[473] First, the second prong of the Berne Approach is resoundingly pro-interpretive artist.[474] Because many performance art authors lack a public reputation,[475] in many cases it would be very difficult for authors to demonstrate that a modification to their work has harmed their professional reputations.[476] Further, even if an author has a reputational interest, the public may perceive the distortion to the author's work as benefiting the author's reputation rather than harming it.[477]

The Berne approach's bias towards the interpretive artist is symptomatic of the test's more fundamental flaw—the test does not directly protect the personality interests of the author.[478] Instead of focusing on the performance art author's psyche, the Berne approach ultimately protects the artist's economic interests,[479] an interest many artists do not have.[480] Thus, the second prong of the Berne approach effectively forestalls the performance

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471. *See* H.R. REP. No. 514, 101st Cong., 2nd Sess. 15-16 (1990), *reprinted in* 1990 U.S. CODE CONG., & ADMIN. NEWS 6915, 6925-26 (stating harm to visual artist's professional reputation may be proven through use of expert testimony).

472. *See* New York Times v. Sullivan, 376 U.S. 254, 267 (1963) (discussing Alabama law defining "libelous per se" as tending "to injure a person . . . in his reputation"). *But see* H.R. REP. No. 514, 101st Cong., 2nd Sess. 15 (1990), *reprinted in* 1990 U.S. CODE CONG. & NEWS 6915, 6925 (stating that "honor or reputation" standard of Visual Artists Rights Act is not standard analogous to that of defamation case).

473. *See infra* notes 474-81 and accompanying text (discussing problems plaguing Berne approach).

474. *See infra* notes 475-81 and accompanying text (discussing why Berne approach is pro-interpretive artist).

475. *See* Davis, *supra* note 28, at 358 (suggesting that past devoid of commercial success weakens artist's chance of demonstrating that integrity rights violation harmed professional reputation).

476. *See id.* (suggesting that under Berne approach to defining integrity right, many artists would have trouble demonstrating harm to professional reputation).

477. *See* S. RICKETSON, *supra* note 28, at 472 (stating that in some circumstances modifications to author's work may falsely enhance author's reputation).

478. *See supra* notes 473-77 and *infra* notes 479-80 accompanying text (discussing why Berne approach to defining integrity right violation does not protect author's personality interests).

479. *See* Amarnick, *supra* note 22, at 37 (suggesting that economic approach to moral rights defines integrity right violation in terms of harm to author's reputation); Note, *supra* note 28, at 477 (describing economic conception of moral rights); *see also supra* note 28 (discussing inability of economic approach to protect author's personality interests).

480. *See* Davis, *supra* note 28, at 358 (suggesting many artists do not have professional reputation).

art author's recovery for many serious violations to the author's personality interests.[481]

Another approach to defining an integrity rights violation is the German approach which defines an integrity violation as a distortion or mutilation to an author's work that "prejudice[s] [the author's] lawful . . . personal interests" (German approach).[482] Like the Berne approach, the German approach has a two part test that has the same first prong: the author must demonstrate that the interpretive artist has modified the author's work in some fashion.[483] As in the Berne approach, this prong is essentially an objective test, not requiring the court to rely solely on the author's belief that the interpretive artist has modified the author's work.[484] The German approach breaks with the Berne approach, however, in the second prong wherein the author must demonstrate that the modification prejudices his personal interests.[485]

The second prong of the German approach is a much more subjective test than the "honor and reputation" prong of the Berne approach,[486] and herein lies the strength and weakness of the German approach.[487] By divorcing the author's integrity interests from the author's economic interests, the "prejudice" prong of the German approach defines an integrity violation much more accurately.[488] However, the "prejudice" prong also runs the risk of becoming a completely subjective standard that inordinately favors the performance art author.[489] "[I]nevitably [the author will] be the

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481. *See* Tamarind Lithography Workshop, Inc. v. Sanders, 143 Cal. App. 3d 571, 576-78, 193 Cal. Rptr. 409, 412 (1983) (observing that lost profits are difficult to quantify when film owner refused to give film producer contracted credit). Georges Michaelides-Nouaros has summarized the shortcomings of the Berne approach in the following fashion:

> The [honor and reputation standard] is clearly . . . unsatisfactory . . . as the right to respect for the integrity of the work includes protection not only against modifications that might be prejudicial to the author's honor or reputation, *but also against any other modification or use of the work that is contrary to his intellectual interests . . ., his personal style or his literary, artistic or scientific conceptions.*

Michaélidès-Nouaros, *Protection of the Author's Moral Interests after his Death as a Cultural Postulate*, 15 COPYRIGHT 35, 37 (1979) (emphasis added).

482. Marcus, *supra* note 457, at 102.

483. *See id.* (stating that German approach prohibits alterations to author's work).

484. *See id.* at 102-03 (stating that because German courts apply their integrity right in objective fashion, artist's belief that his interests have been prejudiced does not suffice to constitute integrity rights violation).

485. *See id.* (stating that integrity rights violation is any distortion or other mutilation of work which would prejudice artist's personal interests).

486. *See id.* at 102 (stating that German commentators consider German approach broader in application than Berne approach); S. RICKETSON, *supra* note 28, at 471 (stating that prejudice to author's "personal interests" would raise more subjective issues than prejudice to "honor and reputation").

487. *See infra* notes 488-499 and accompanying text (discussing strengths and weaknesses of German approach).

488. *See supra* note 28 (discussing inadequacies of economic approach to moral rights).

489. Marcus, *supra* note 457, at 102-03. Even the German courts have recognized the subjectivity inherent in their approach to defining an integrity violation and have attempted

best judge of what affects him in relation to his work,"[490] and therefore, the objective, rather than subjective, test of prejudice to the author used in the German approach raises the specter of countless numbers of successful integrity right claims based solely on the whims of the performance art author.[491]

If these easy judgments for the author were coupled with monetary and injunctive remedies, the chill to the performance art industry could be overwhelming.[492] While performance art producers are wealthy compared to performance art authors, the vast majority of producers nonetheless operate in a fragile economic environment.[493] A single monetary judgment or injunction could put a producer permanently out of business.[494] Such an outcome would harm every interest involved in the performing arts. The performance art author permanently would lose a means of communicating his message to the public as well as a potential source of income.[495] The entrepreneur and interpretive artist would lose money and the opportunity to express themselves,[496] and the public would see less performance art.[497] Further, the mere prospect of authors obtaining monetary or injunctive relief solely on the basis of their personal whims would discourage many interpretive artists from exercising their free speech rights when performing an author's work of performance art.[498] Indeed, such a subjective approach to defining an integrity rights violation might even discourage individuals from even attempting to perform performance art.[499]

Clearly then, the German approach's ability to accurately define an integrity violation carries with it the potential to seriously harm the performance art industry.[500] Thus, its use in any federal legislation protecting

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to interpret the second prong in a more objective fashion. *Id.* Further, German commentators have suggested that prejudice to "personal interest" covers the same territory as the Berne approach's "honor or reputation" standard. *Id.* at 102.

490. S. RICKETSON, *supra* note 28, at 471.

491. *See* Marcus, *supra* note 457, at 102-03 (recognizing weakness of German approach).

492. *See supra* notes 269-77, 293-299 and accompanying text (discussing First Amendment chill resulting from coupling integrity rights legislation with monetary damages and injunctive relief).

493. *See* Garon, *supra* note 49, at 277 (discussing economic health of New York theater).

494. *See id.* (same).

495. *See* Amarnick, *supra* note 22, at 42-43 (stating that author has interest in disseminating his ideas through performance of his work).

496. *See* Garon, *supra* note 49, at 279 n.11 (stating that producer is individual with most immediate financial interest in success of production and presumably would want to protect this interest).

497. *See supra* notes 246-63 and accompanying text (discussing First Amendment and corrective view of moral rights).

498. *See supra* notes 269-77, 293-299 and accompanying text (discussing First Amendment chill that would result from coupling corrective view of moral rights with monetary damages or injunctive relief).

499. *See id.* (same).

500. *See supra* notes 489-499 and accompanying text (discussing how German approach could harm performance art industry).

the integrity rights of performance art authors is problematic.[501] Nonetheless, a legislative scheme could use the German approach to define a moral rights violation and effectively accommodate all of the disparate interests in the performance art industry if two provisos were added.[502] First, legislation using the German approach must direct the courts to strictly apply the first prong of the German approach. Specifically, courts must ascertain whether an interpretive artist has modified an author's work solely by comparing the particular performance at issue to the "four corners" of the author's work of performance art.[503] The author's "work of performance art" encompasses the author's fixed expression, including a script or a musical score, provided that the author intended the fixed expression to be a "blueprint" from which interpretive artists could create a fully realized work of performance art.[504] Only when an interpretive artist modifies an ascertainable element of the author's fixed expression could a court find an actionable integrity violation.

This strict approach to identifying actionable modifications to a performance art author's work ensures that the law only would hold interpretive artist's responsible for real diversions from an author's expression, as opposed to holding them liable for bad interpretive choices.[505] Where the author's work is silent, an interpretive artist's expressive conduct within those areas cannot violate the author's integrity rights, and thus, receives First Amendment protection.[506] The "four corners" rule is the first step to

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501. *See id.* (same).

502. *See infra* notes 503-06 and accompanying text (discussing "four corners" rule and labeling).

503. *See* BLACK'S LAW DICTIONARY 591 (5th ed. 1979) (defining term "four corners"—face of written instrument); *see also* Freedman, *supra* note 3, at C21, col. 1 (stating that rather than altering Samuel Beckett's play, if Boston ART wanted play in subway, Boston ART should have written play that takes place in subway).

504. *See* J. MILLER, *supra* note 1, at 34 (stating that text of work of performance art exists in two capacities: (1) as guide to produce performance; and (2) as authenticating device whose purpose is to provide system of identification that allows one to say that particular performance is instance of work in question).

505. *See supra* notes 503-04, *infra* notes 506-07 and accompanying text (discussing "four corners" rule).

506. *See supra* notes 246-63 and accompanying text (discussing corrective view of moral rights). The "four corners" not only delineates the interpretive artist's responsibilities, but it also allows performance art authors to control the interpretive latitude that collaborative artists can exercise when performing the author's work. *See* Freedman, *supra* note 3, at C21, col. 1 (suggesting that author's text provides parameters for interpretive artist's expressive conduct). The more detailed an author's "blueprint," the less interpretive latitude exists for the collaborative artist. For instance, Eugene O'Neill's plays are very complete in their expression. *See* E. O'NEILL, LONG DAY'S JOURNEY INTO NIGHT (Yale University Press 1955) (containing great deal of playwright direction). O'Neill specifically describes his character's appearances, what the sets must look like and a great deal of the stage business. Thus, O'Neill's plays leave little interpretive latitude in these areas. In contrast, William Shakespeare's plays explicitly specify little beyond the basic verse, thereby affording much more interpretive latitude. *See* BARTON, PLAYING SHAKESPEARE 6-7 (Methuen 1984) (discussing Shakespeare's hidden direction to actors contained in his works). Thus, when performing works like William Shakespeare's, the interpretive artists has much more latitude in which to independently speak to the audience.

a balanced application of the German approach to defining an integrity violation.

However, by itself, the "four corners" rule would never create a balance among all of the involved interests.[507] The subjective nature of the second prong to the German approach would still permit a multiplicity of integrity right actions that would overwhelm the performance art industry.[508] Thus, to reach an effective balance of interests, another legislative limitation on the German approach is necessary. Limiting the author's remedy for an integrity right violation to a "labeling" remedy, in conjunction with the "four corners" rule, would create the appropriate balance among all of the involved interests within the performance art industry.[509]

A labeling remedy for an integrity right violation would involve a court ordering the producer and/or the interpretive artist to indicate in the performance's credits and/or advertisements that the interpretive artist has modified the author's work against the wishes of the author.[510] Such a remedy in large part would avoid both economic and expressive chill to the performing arts, while still protecting the integrity interests of performance art authors.[511] For the producers of performance art, compliance with a labeling order would be a relatively inexpensive task.[512] Further, while compliance with a labeling order might be inconvenient for the producer,

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507. *See infra* note 508 and accompanying text (discussing inadequacies of "four corner" rule).

508. *See supra* notes 276-77 and accompanying text (discussing numerous potential integrity right violations in any one performance and First Amendment chill this can cause if legislation couples integrity right with severe remedy).

509. *See* Amarnick, *supra* note 13, at 52 (discussing advantages of labeling remedy); Katz, *The Doctrine of Moral Right and American Copyright Law—a Proposal*, 24 So. CAL. L. REV. 375, 403 (1951) (stating that labeling approach "is not intended to put an author's work in a literary strait jacket—but to save him from taking the responsibility for a work which is not as he intended it").

510. *See* Amarnick, *supra* note 22, at 52 (defining labeling remedy); *see also supra* note 312 and accompanying text (defining labeling remedy). A labeling remedy might require the producer and/or the interpretive artist to elucidate in the credits and advertisements precisely what aspects of the author's work have been modified. *See* Amarnick, *supra* note 22, at 52 (discussing nature of labeling remedy). In one French case, where the set designer's sets were removed from production of opera, the court ordered that all future advertisements and credits contain the words, "[t]he settings for the Crossing of the Arals were deleted because this scene was suppressed." Leger v. Reunion des Theatres Lyriques Naturaux, *reprinted in* Marvin, *The Author's Status in the United Kingdom and France: Common Law and the Moral Right Doctrine*, 20 INT'L & COMP. L.Q. 675, 695 (1971). However, such precise descriptions of wrongful modifications to an author's work may be unduly burdensome on the performance art entrepreneur if required in every advertisement, especially given the fact that the requisite terseness of such a description communicates very little to the public. Such fuller explanations should be limited to the credits of a performance of the author's work.

511. *See Amarnick*, *supra* note 22, at 52-53 (discussing benefits of labeling remedy); *see also supra* notes 315-84 and accompanying text (discussing First Amendment chill and labeling remedy).

512. *See supra* notes 315-84 and accompanying text (discussing First Amendment chill and labeling).

it might actually increase the production's profits through the public controversy that labeling tends to engender.[513] Most importantly, a labeling remedy does not prevent the producer or the interpretive artist from proceeding with their intended performance.[514]

In addition to serving the interests of the performance art entrepreneur and the interpretive artists, the labeling remedy also serves the interest of the public in that both the author's message and the interpretive artist's message reach the public.[515] Indeed, because the labeling remedy increases dialogue and the amount of information that enters the market place of ideas, the remedy actually would promote the public's First Amendment interests.[516]

As for the author, while labeling does not stop the integrity rights violation from occurring,[517] the remedy does allow the author to communicate his message to the public and disassociate himself from the performance without destroying a future means to perform his works.[518] Further, the labeling approach allows the author to maintain some control over the personality interests contained in his work.[519] Finally, the labeling approach has the added benefit of allowing more latitude for pro-author ancillary provisions within performance art author moral rights legislation. For instance, inalienable performance art author integrity rights would be much more onerous for the performance art industry if moral rights legislation did not limit the remedy for an integrity rights violation to labeling.[520]

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513. The profits that the film *The Last Temptation of Christ* and 2 Live Crew's record *Nasty as They Want to Be* have garnered suggest that labeling a work only increases public interest and profits. *See* Bell, *supra* note 327, at 6, col. 1. (stating that controversy surrounding *The Last Temptation of Christ* increased film's profits); Browne, *supra* note 327, at 26, col. 1 (stating that 2 Live Crew's record has made millions as result of labeling and police harassment). There is certainly a counterarguement, however, that labeling will cause the public to lose interest in a performance of an author's work, thereby reducing the performance's economic potential. *See* Amarnick, *supra* note 22, at 53 (stating that labeling might reduce economic potential of production).

514. *See supra* note 317 and accompanying text (discussing labeling and prior restraints).

515. Hughes, *supra* note 16, at 359 ; *see also* First Nat'l Bank of Boston v. Belloti, 435 U.S. 765, 789-90 (1977) (stating where speaker imminently threatens to drown out other points of view, such that democratic process and other First Amendment interests are threatened, courts will consider whether state action to silence intrusive voice is appropriate); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 & 400 (1968) (stating that where legislative findings or record demonstrate that one voice is silencing others to detriment of First Amendment interests, state may take corrective measures).

516. *See supra* notes 315-84 and accompanying text (discussing First Amendment chill and labeling remedy).

517. *See* Amarnick, *supra* note 22, at 56 (stating that labeling is imperfect remedy for author because he must tolerate interpretive artist's continuing integrity rights violation).

518. *Id.* at 53.

519. *Id.*

520. *See* H.R. REP. No. 514, 101st Cong., 2nd Sess. 15-16, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6915, 6928 (stating that waivers are normal American commercial practice).

CONCLUSION

With the enactment of the Visual Artist's Act of 1990, Congress took the first significant step towards a cohesive system of federal moral rights laws.[521] Federal recognition of performance art author moral rights could be the next step. Current moral rights analogues for performance art authors are inadequate,[522] and a real need exists for a system of federal law protecting the personality interests of performance art authors.[523] While interfacing such protection into our present legal and commercial systems would be a complex task, as this article has demonstrated, it is not an impossible one.

Once one overcomes the initial hurdle of contemplating a non-economic author's right,[524] the chief obstacles revolve around reconciling a performance art author's moral right with our strong free speech tradition[525] and the economic constraints of the performance art industry.[526] This article has demonstrated that if Congress carefully fashions the basic moral right and its associated remedies, the performance art author's moral right actually can promote our tradition of free speech[527] as well as the health of our performance art industry.[528]

OTTO W. KONRAD**

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521. *See* Visual Artists Rights Act of 1990, *supra* note 39 (according visual artists moral rights).

522. *See supra* notes 35-154 and accompanying text (discussing performance art moral rights analogues and their inadequacies).

523. *See supra* notes 2-21 and accompanying text (discussing need for performance art author moral right).

524. *See supra* notes 22-34 and accompanying text (defining performance art author moral right).

525. *See supra* notes 182-418 and accompanying text (discussing First Amendment issues surrounding performance art author moral right).

526. *See supra* notes 419-44 and accompanying text (discussing disparate interests that federal performance art moral rights legislation must accommodate).

527. *See supra* notes 182-418 and accompanying text (discussing First Amendment and performance art author moral right).

528. *See supra* notes 445-520 and accompanying text (discussing various formulations of moral right and how they accommodate disparate interests).

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ADDENDUM

THE FEDERAL PERFORMANCE ART AUTHOR RIGHTS MODEL LEGISLATION

TABLE OF CONTENTS

Article 1

Definitions

Section 1-101. Definitions.

As used in this act

(1) Author: means an individual who has created a work of performance art.

(2) Parody: means a work in which the language or style of another work is imitated or mimicked for comic effect or ridicule.

(3) Performance: means a public presentation of the author's work of performance art in which individuals perform the author's work of performance art.

(4) Public Communication: means any intentional communication, made to more than one person, concerning the author's work of performance art or performance of the author's work of performance art. Public communications include, but are not limited to: Credits, programs, print and electronic media advertisements, and posters.

(5) Rehearsal: means a private presentation of the author's work of performance art in which individuals practice performing the author's work, in preparation for a performance.

(6) Satire: means a work which holds the vices or shortcomings of an individual or institution up to ridicule or derision.

(7) Work of Performance Art: means a fixed, self-contained artistic creation that also acts as its author's intended guide for individuals to perform the work.

(a) A work of performance art does not include works of performance art that are "works made for hire" as defined in Title 17 U.S.C. Section 101.

Commentary

Subdivisions (2) & (6) — The definitions of satire and parody are taken in large part from the case *Dallas Cowboys Cheerleaders v. Pussycat Cinema*, 467 F. Supp. 366, 376 (S.D.N.Y. 1979). *See also Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prod., Inc.*, 479 F. Supp. 351, 357 (N.D. Ga. 1979).

Subdivision (7) — American recognition of moral rights must proceed in a piece meal fashion, being careful to individually balance the disparate interests within the different disciplines of the arts. Section 1-101's definition of "Work of Performance Art" is responsive to this concern. The term has a narrowly constructed meaning that is meant to significantly limit the scope of this Act.

To qualify as a "work of performance art" the work must be a fixed, self-contained artistic expression that an observer can enjoy without the benefit of experiencing an actual performance of the work. Further, the author must intend the work to be a guide for other artists to create a fully realized performance of the author's work. Examples of works of perform-

ance art could include, but are not limited to: Sheet music, play scripts, screenplays and video taped or filmed choreography. Note that to qualify as a "work of performance art," an electronically recorded performance must have been recorded with the intent to use the recording as guide for subsequent productions of the work.

Subdivision (7)(a) — Performance art that is created as "work made for hire," as defined in Title 17 U.S.C. Section 101, does not qualify as a "work of performance art" under this Act. This limitation reflects the fact that artistic works that are created as "work made for hire" often have vast numbers of contributors to the finished work. In such cases, it is meaningless to apply the designation "author" to any of these contributors. Arguably, there is no author, or the author is the employer/producing organization who guides and controls these contributors. Such an entity lacks the psyche or "personality interests" that attribution and integrity rights seek to protect.

Article 2

Author's Rights

Section 2-101. The Author's Right of Attribution.

(1) The author shall have the right of attribution, which shall encompass the author's right:

(a) To claim authorship of any work of performance art that the author creates.

(b) To prevent the use of his or her name as the author of any work of performance art which he or she did not create.

(2) The author's right of attribution shall extend to any and all performances of the author's work of performance art.

Commentary

A performance art author's ability to get his or her works produced depends to a large extent on the commercial and artistic success of the author's previous works. Where the author has not received appropriate credit for his past works, the critical and financial success of these works, no matter how extensive, will do little to help the author get his subsequent works produced. Section 2-101 ensures that an author receives this vital attribution where appropriate. As a result, Section 2-101 protects the author's economic interests more than any other provision in this act.

Section 2-101(1)(a) confers on a performance art author the right to claim authorship of any work of performance art that the author creates. Conversely, section 2-101(1)(b) confers on a performance art author the right to prevent third parties from attributing authorship to the author for a work that the author did not create. Note Section 2-101(2) extends the author's right of attribution to all performances of the author's work of performance art. Thus, whenever an author's fixed work of performance

art is performed, the author has the right to have his authorship of the fixed work attributed to the author.

Section 2-101 does not give the author the right to deny authorship of his work where the work is distorted, mutilated or modified. This remedy, often called the right of withdrawal, is not commensurate with the wrong it seeks to correct. Distortions, mutilations or other modifications to an author's work may not be attributable to the author, but a great deal of the undistorted work can be attributed to the author. To allow the author to disown work he has created in addition to the modified portions is deceptive and unduly prejudices the producer's interests. A statutory response to unauthorized modifications to the performance art author's works is better left to the more particularized rights and remedies afforded by the integrity rights provisions of this act.

Section 2-102. The Author's Right of Integrity.

(1) The author shall have the right of integrity, which shall encompass the author's right:

(a) To prevent any distortion, mutilation, or other modification to the author's work of performance art.

(2) The author's right of integrity shall extend to any and all performances of the author's work of performance art.

Commentary

The primary purpose of Section 2-102 is to prevent emotional harm to the author resulting from unauthorized distortions, mutilations or other modifications to the author's performance art. Section 2-102 effectuates this goal by affording the author the right to prevent any distortion, mutilation or other modification to the author's work.

Because a performance art author's creation is relatively free from the constraints of economy, efficiency and physical environment, the author can inject a great deal of his or her personality into the creation. However, the author's freedom to inject his or her personality into his or her art is a double edged sword for the author. Because performance art is largely free from the constraints of economy, efficiency and physical environment, individuals other than the author can easily distort or modify a work of performance art. When a performance art author's works are distorted or modified, the manifestation of the author's personality is modified such that the author suffers emotional harm.

Because Section 2-102 concerns itself with protecting the performance art author's psyche, it's provisions do not define an integrity rights violation in terms of a modification to the author's work that harms the author's reputation or honor. Such an approach protects the author's economic interests, but in many cases, does little to protect the author's emotional interests. This is primarily because many modifications to a performance art author's work will not harm the author's reputation or honor, but will harm the author's psyche.

Admittedly, Section 2-102 defines the performance art author's integrity right in a very subjective fashion; however, a satisfactory balance among the disparate interests within the performance art industry is created when Section 2-102 is applied in conjunction with the other provisions of this Act.

The secondary purposes of Section 2-102 include preserving our artistic heritage, protecting the performance art author's economic interests and ensuring that the public receives the message that a performance art author communicates through his or her works.

Note that Section 2-102 extends the author's right of integrity to include all performances of the author's work of performance art. Thus, whenever the author's work of performance art is performed, the author shall have the right to ensure that the performance does not divert from the author's fixed work.

Article 3

Scope and Exercise of Rights

Section 3-101. Scope and Exercise of Rights of Attribution and Integrity. Only the author of a work of performance art has the rights that this Act confers, whether or not the author owns the copyright for the work.

(a) Joint authors of a work of performance art are co-owners of the attribution and integrity rights that this act confers. Each co-owner independently may exercise his or her attribution and integrity rights.

Commentary

Section 3-101 confers on the performance art author attribution and integrity rights that exist independently of copyright ownership. Thus, when a performance art author transfers the copyright to the author's work to another individual, the author will still retain attribution and integrity rights.

Subdivision (a) — Joint authors of a work of performance art may exercise their attribution and integrity rights with or without the cooperation of the work's other joint author(s).

Article 4

Duration of Rights

Section 4-101. Duration of Rights of Attribution and Integrity. The rights that this Act confers shall endure for the life of the author.

(a) In the case of a work of performance art prepared by two or more authors, the rights that this Act confers shall endure solely for the life of the last surviving author.

Commentary

Because this act primarily concerns itself with protecting the psyche of performance art authors, Section 4-101 limits the duration of the author's

rights of attribution and integrity to the life of the author. At death, a performance art author's psyche no longer exists and thus, needs no further protection.

Section 4-101 also complies with the Constitutional mandate that Congress shall only confer exclusive rights to authors for limited periods of time. *See* U.S. Const. art. I, § 8, cl. 8.

Article 5

Transfer and Waiver

Section 5-101. Transfer and Waiver of Rights of Attribution and Integrity. The protections, rights, causes of action or remedies that this Act affords the author cannot be waived or transferred.

Commentary

Section 5-101 forecloses the author or anyone else from transferring or waiving the protections, rights, causes of action or remedies that this act affords the performance art author. While an author may of his own volition forgo pursuing his rights under this act, such forbearance will not constitute a transfer or waiver of those rights. Further, such forbearance will not prevent the author, at some later date, from asserting his rights under this act.

Section 5-101's purpose is to forestall the entrepreneurial aspects of the performance art industry from using their superior bargaining position to force performance art authors from contracting away their protections under this act.

Article 6

Attribution and Integrity Rights Enforcement

Section 6-101. Enforcement of Rights of Attribution and Integrity. An author may bring an action in federal court to enforce the author's rights of attribution and integrity against any individual or entity.

Article 7

Remedies

Section 7-101. Remedies for Enforcement of Rights of Attribution. In any action to enforce the author's rights of attribution, the author:

(a) May recover actual damages. The author's recovery shall be limited to reasonable compensation based on proof of lost earnings, diminished earning capacity, lost profits, loss of commercial value, or any other pecuniary loss that proximately results from the infringement of the author's attribution rights.

(b) May obtain temporary and permanent injunctions to prevent or restrain violations of the author's attribution rights.

The author's remedies for enforcement of his or her rights of attribution shall be limited to those described above in subparts (a)

Commentary

Section 7-101 affords the performance art author strong remedies for attribution rights violations in that the provision allows the performance art author to recover both actual damages and injunctive relief. The strength of this remedy reflects the economic significance of proper attribution for the performance art author. The remedy's strength also reflects the marginal impact that the attribution right places on the performance art industry. Attribution rights inflict very little financial hardship on interpretive artists or the entrepreneurs involved in the performing arts. In most cases, correct attribution of authorship is easy and inexpensive. Further, attributing correct authorship to a work has little to do with the performance of the work. As a result an attribution right for performance art authors has little effect on the expressive interests (First Amendment or otherwise) of entrepreneurs or interpretive artists within the performing arts.

Section 7-102. Remedies for Enforcement of Integrity Rights.

In any action to enforce an author's rights of integrity, the author:

(a) May obtain, without cost to the author, reasonable space within any public communication that the defendant or the defendant's instrumentalities publish pertaining to the author's work of performance art or performance of the author's work of performance art. The author may use this space to convey that the particular copy or performance of the author's work does not accord with the author's intent. Reasonable space to make this communication shall vary in relation to the nature and size of the public communication.

The author's remedies for enforcement of his or her integrity rights shall be limited to those described above in subpart (a) of section 7-102.

Commentary

Section 7-102 limits a performance art author's remedies to enforce integrity rights to a labeling remedy. There are no provisions for either monetary or injunctive relief within Section 7-102. Instead the author may obtain reasonable space in a defendant's public communications, pertaining to the author's performance art, to inform the public that a particular copy or performance of the author's performance art does not accord with author's intent. Such reasonable space shall be provided without cost to the author.

In determining what constitutes reasonable space within a particular public communication, Section 7-102 directs the courts to consider the nature and size of the communication. That is, the courts should grant authors as much space as possible to communicate their message without unduly destroying the character and usefulness of a particular public communication. For instance, pin-on buttons advertising the film version of an author's play provide very little space for anything beyond the film's title

and perhaps a little art. To allot an author any space on such a button to communicate his or dissatisfaction with the film would destroy the character of the button as well as its usefulness. On the other hand, the credits to a film essentially provide the author with unlimited space to communicate to the public. Further, such communication does little to disrupt the integrity of the film or its credits. Thus, a court might grant an author a larger portion space in the film credits to communicate the author's dissatisfaction.

The unique and limited scope of Section 7-102 is in part a response to the delicate balance of interests within the performance art industry. Section 2-102 of this Act, defines an integrity rights violation in an extremely subjective fashion, essentially any distortion, mutilation or other modification to the author's work. This definition accurately encompasses the author's personality interests that this Act seeks to protect. However, in application, such a definition could lead to a multitude of law suits that would impose overwhelming hardship on the performance art industry, particularly if the subjective definition were coupled with monetary or injunctive relief. Section 7-102's labeling remedy is calculated to remove a great deal of this hardship while still allowing the performance art author a meaningful method of enforcing his or her integrity rights.

In addition to maintaining the balance of interests within the performance art industry, Section 7-102's labeling remedy is also calculated to accommodate the First Amendment rights of the producers and interpretive artists who perform performance art. Unlike attribution rights, an author who asserts his or her integrity rights can directly interfere with the manner in which producers and performers of performance art express themselves. This First Amendment issue requires that any relief for integrity rights enforcement be carefully tailored to interfere as little as possible with the producer's and interpretive artist's expression. Thus, injunctive relief, whether temporary or permanent, has been excluded from the range of remedies available under Section 7-102.

Section 7-103. Attorney's Fees.

Any author who brings a successful suit under this Act or who reaches a settlement with the defendant after filing a complaint under this Act, shall collect attorney fees and court costs from the defendant provided the author demonstrates by clear and convincing evidence that:

(a) prior to filing his complaint the author contacted the defendant and made a good faith, reasonable attempt to persuade the defendant to cease violating the author's attribution or integrity rights.

Commentary

The purpose of this provision is simple. Due to the relative poverty of most performance art authors, and the limited monetary awards available under this Act, the Act must have a provision that awards attorney fees to an author who wins a suit brought pursuant to this act or settles after filing

a complaint. Absent such a provision, the act might never be enforced.

To discourage a performance art counterpart to corporate strike suits and to encourage the extra-judicial resolution of disputes involving moral rights violations, Section 7-103 conditions the award of attorney fees on the performance art author approaching the defendant prior to commencing the suit and attempting to persuade the defendant to cease his wrongful activities. The author must perform such attempts in good faith.

Article 8

Fair Use; Miscellaneous Provisions

Section 8-101. Fair Use.

(1) The defendant to any action brought under this Act may assert the privilege of fair use, as provided for in Title 17 U.S.C. Section 107.

(2) The fair use privilege is inapplicable in the following situations:

(a) Where the defendant commits an attribution or integrity violation while using more of the author's work of performance art than is absolutely necessary to recall or conjure up the author's work of performance art.

(b) Where the defendant performs a satire or parody of the author's work of performance art that lacks some critical comment or statement about the author's work of performance art that reflects the original perspective of the parodist or satirist.

Commentary

Section 8-101(1) imports the federal fair use privilege from federal copyright law to federal protection of performance art author's rights of attribution and integrity. In the context of attribution and integrity rights, the fair use privilege excludes certain limited uses of author's performance art from liability. These uses shall include using limited portions of the author's performance art for news reporting, teaching, scholarship, criticism and comment. (Criticism and comment encompass parody and satire.) Facially, attribution, and in particular, integrity rights appear to conflict with this fair use privilege. For instance, the author's integrity rights protect the performance art author's personality interest from harmful distortions to an author's work, while fair use permits certain kinds of serious distortion to the author's work, including parodies and satires.

However, Section 8-101(2) imports and codifies several common law restrictions on fair use that the federal courts have developed for copyright applications of the privilege. These restrictions substantially reduce the tension between fair use and the author's integrity and attribution rights. The first of these two limitations is the "recall or conjure up" test. Section

8-801(2)(a) provides that where a defendant commits an integrity or attribution violation while using more of the author's work than is necessary to conjure up or recall the author's work, the fair use privilege will not protect the defendant from liability under this act. Thus, where the defendant performs a version of the author's work that only slightly differs from the author's fixed work, fair use will not protect a defendant for an integrity or attribution violation. *See Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Berlin v. E.C. Pub. Inc.*, 329 F.2d 541 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964); *Benny v. Lowe's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided Court*, 356 U.S. 43 (1959); *Lowe's Inc. v. Columbia Broadcasting System*, 137 F. Supp. 348 (S.D. Cal. 1955).

Note that determining what constitutes using more of the author's work than is necessary to conjure up or recall the author's work will vary in relation to what type of limited use the defendant is engaging in. Obviously more of the author's work will have to be utilized if the defendant is doing a parody of the author's work than if the defendant utilizes the author's work for the purposes of criticism.

The second limitation on the fair use privilege that Section 8-101(2)(b) imports from copyright law to this Act concerns performing a parody or satire of the author's work of performance art. Any parody or satire of an author's work performance art claiming the protection of fair use privilege must "do more than merely achieve a comic effect. It must also make some critical comment or statement about the original work which reflects the original perspective of the parodist [or satirist] — thereby giving the parody [or satire] social value beyond its entertainment function." *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prod., Inc.*, 479 F. Supp. 351 (1979); *see also Dallas Cowboys Cheerleaders v. Pussycat Cinema*, 467 F. Supp. 366 (S.D.N.Y. 1979).

Section 8-102. Limitations on Actions.

All claims brought under this Act shall be barred unless the author commences his action within a federal district court of competent jurisdiction within one year of the alleged violation of the author's integrity or attribution rights.

Section 8-103. Pleadings.

Whenever an author brings an action under this act:

(a) To enforce the author's rights of integrity, the author shall describe with particularity the following in his or her complaint:

(1) Those portions of the author's work of performance art that have been distorted, mutilated or modified;

(2) The distortions, mutilations or other modifications that the author objects to;

(3) The time and place where the distortions, mutilations or other modifications are occurring.

Commentary

Section 8-103 requires the author to plead with great specificity when bringing an integrity rights enforcement action under this Act. Specifically, the author must delineate: (1) those portions of his fixed work that have been distorted; (2) the actual distortions, mutilations or modifications that the author is objecting to; and (3) the time and place where these distortions, mutilations or modifications are occurring.

These provisions enable and implicitly direct the courts to use a constructionalist approach to identifying integrity rights violations. That is, the courts are to ascertain whether an interpretive artist has modified an author's work solely by comparing the particular performance at issue to the "four corners" of the author's fixed work of performance art. Only when a defendant modifies an ascertainable element of the author's fixed work, can a court find an integrity violation. The pleading requirements specified in Section 8-103 will ensure that courts and juries have the means to apply this constructionalist approach.

When coupled with the Section 7-102 labeling remedy, Section 8-103 effectively will counterbalance the subjectivity of the author's integrity right, as defined by Section 3-102, thereby limiting the detrimental financial and creative impact that this Act has on the performance art producers and interpretive artists. Producers and interpretive artist will only be held responsible under this Act for actual diversions from the author's fixed work. Where the author's work is silent, an interpretive artist's expressive conduct within those areas will not violate the author's integrity rights.

Section 8-104. Author's Right of Access to Rehearsals and Performances.
The author shall have a right of reasonable access to all rehearsals and performances of the author's works of performance art.

Commentary

Section 8-104 is intended to counter a pragmatic difficulty for the author attempting to enforce his or her integrity rights under this Act. Because most productions of performance art have short runs and because Section 7-102's labeling remedy is contingent on the defendant issuing public communications pertaining to the production, an author's action for an integrity rights violation often will face dismissal for mootness. By the time the author has a judgment, the production at issue will have ended and the defendant will no longer be issuing any public communications regarding the production for the author to label.

Section 8-104 partially counters this difficulty by permitting the author reasonable access to all rehearsals and performances of the author's work, thereby affording the author an opportunity to obtain notice of potential integrity rights violations.

Section 8-105. Burden of Proof.
Unless specified otherwise, the burden of proof under this Act shall be by a preponderance of evidence.

Section 8-106. Applicability and Effective Date.

(1) The rights created by this Act shall apply to works of performance art created before or after the effective date of this act, as set forth in subsection (2).

(2) The effective date of this Act shall be one year after the enactment of this Act.

Section 8-107. Preemption.

On or after the effective date set forth in Section 8-106, all state legal or equitable rights that are equivalent to any of the rights conferred by this Act are governed exclusively by federal law. Thereafter no person is entitled to any such rights or equivalent rights in any work of performance art under the common law or statutes of any state. Nothing in this Section annuls or limits any rights or remedies under the common law or state statutes with respect to:

(a) Any cause of action from undertakings commenced before the effective date, as set forth in Section 8-106 of this Act.

(b) Activities violating state legal or equitable rights that are not equivalent to any rights conferred by this Act.