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# UNIVERSITY OF MIAMI ENTERTAINMENT & SPORTS LAW REVIEW

## ARTICLES

### MORAL RIGHTS AND THE FIRST AMENDMENT: PUTTING HONOR BEFORE FREE SPEECH?

KATHRYN A. KELLY\*

*Great art is produced by men [and women] who feel acutely and nobly; and it is in some sort an expression of this personal feeling.<sup>1</sup>*

*Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.<sup>2</sup>*

#### I. INTRODUCTION

Artists express themselves through their work. While providing beauty and wonder to those who enjoy their works, they give a part of themselves to their audience. Artists' works reflect the indi-

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1. JOHN RUSKIN, *MODERN PAINTERS* III.iv.

2. John Milton, *Areopagitica*, A Speech for the Liberty of Unlicensed Printing to the Parliament of England (1644).

vidual personalities of the creators. Has society, through its law-making bodies, protected the artists, who give so much of themselves? Generally, artists have been protected economically in developed countries. However, artists' needs extend beyond economics. Artists' reputations and honor are also at stake whenever they submit their work for public inspection.

Some countries do protect artists' reputation and honor, others are just realizing their obligation to protect artists' rights, and still others have not yet taken steps to secure these rights. "Moral rights" is the name given in this country to a bundle of rights protecting the honor and reputation of artists. These rights include the right of integrity, attribution, disclosure, and withdrawal. They are rights "[w]hich are personal to the authors, and as such, viable, separate, and apart from the proprietary aspects of copyright."<sup>3</sup> Most of the Western European countries have recognized moral rights protection, especially France, Germany, and Italy.

With the enactment of the Visual Artists Rights Act of 1990 (VARA),<sup>4</sup> the United States has finally recognized moral rights explicitly.<sup>5</sup> The VARA became effective in 1991 as part of the copyright statute, and with it, visual artists acquired some additional protection not provided by copyright law. Although limited, the protection afforded these artists has extended the economic rights provided by traditional copyright law to include the protection of the reputation and honor of the artist.

In some ways, the copyright statute protects the value of free speech, as expressed by authors and creators.<sup>6</sup> By encouraging creation, and protecting the product of that creation, the First Amendment is promoted. The copyright clause of the Constitution states 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 Rights to their respective Writings and Discoveries."<sup>7</sup> The First Amendment protects the

3. MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, at 8.21[A] (1991).

4. 17 U.S.C. § 106A (Supp. 1992). See *infra* notes 49-93 and accompanying text (discussing the enactment of the Visual Artists Rights Act of 1990).

5. See *infra* note 47 and accompanying text (discussing other legal doctrines used to support a cause of action for harm to an artist's reputation).

6. "In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 558 (1985).

7. U.S. CONST. art. I, § 8, cl. 8.

creator's right to communicate by prohibiting Congress from abridging an individual's freedom of speech. However, the First Amendment protects the freedom of speech of individuals other than authors and creators, namely the "beholders" of art and the public generally. While artists are free to create, others are free to comment, criticize, and convey their ideas in words and expressive acts.<sup>8</sup>

Given the new protection granted to visual artists via section 106A, the statutory VARA, a question of the constitutional rights of beholders is raised. Do these new moral rights impinge upon the First Amendment rights of others? Is it permissible to restrict the constitutional freedoms of those who comment or engage in symbolic speech? The purpose of this article is to explore this potential clash of constitutional rights.

In order to understand the conflict between section 106A and the First Amendment, several hypotheticals will be used throughout the article. Hypothetical #1 involves a limited edition painting, signed and numbered by the artist. The painting depicts a semi-nude woman. The painting is owned by a radical feminist who believes the painting is degrading to women. She includes the painting in a display of what she depicts as pornography at a women's awareness center. She hangs the painting with pictures from magazines such as *Playboy* and *Penthouse*. The artist is offended by the display of the painting in this context.

Hypothetical #2 involves one of many advertisements made from a painting. The painting itself is included in an exhibit at a local museum, and the museum photographed the painting for use with its advertisement of the exhibit. An art critic/historian from a newspaper reviews this painting, stating that it is a copy of an obscure Italian artist who created in the 1700s, particularly pointing to the horizontal brushstroke and subject matter. The review harshly criticizes the creator, accusing the artist of plagiarism. On a television program, the critic tears up the advertisement in protest.<sup>9</sup> The artist claims not to know of the Italian artist, objects to the destruction of the advertisement and asserts she created the painting from her original ideas.

The art at issue in hypothetical #3 is a mural painted on a

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8. See *infra* notes 113-23 and accompanying text (exploring the First Amendment protection built into the Copyright Statute).

9. Interestingly, during the NEA debates, Senator Alphonse D'Amato, protesting Andres Serrano's photograph "Piss Christ," dramatically ripped up a copy of the exhibition catalogue that contained Serrano's photo. Carole S. Vance, *The War on Culture in CENSORSHIP* 190 (Robert E. Long, ed. 1990).

building. The mural contains patriotic themes, and includes an American flag, the seal of the United States, and the monuments of the United States capital. An angry young man, protesting the tax increase and the American involvement in the Middle East, sprays permanent red paint over part of the mural. The artist is shocked at the mutilation of her work, and disclaims it.

The subject of hypothetical #4 is a documentary movie by a young film student. He portrays the plight of the homeless by interviewing homeless persons and observing their lives for a week. A large studio buys the documentary and edits it slightly, but it is still clearly based upon the student's work. The student believes that the editing detracts from the realism of the film and undermines his intended stark and choppy style.

In order to understand the interplay between moral rights and the First Amendment, both doctrines must be examined individually. Part II of this article examines the moral rights doctrine,<sup>10</sup> and the various rights protected by it. The history of the moral rights doctrine will be outlined, in addition to Article 6<sup>bis</sup> of the Berne Convention, recently ratified by the United States. Next, this part will explore the Visual Artists Rights Act of 1990, including its provisions and legislative history.

Part III of this article reviews First Amendment doctrine.<sup>11</sup> First, it discusses the general purposes of the First Amendment. Next, it examines the balancing of free expression and other rights, and the scope of these freedoms. The section then explores specific doctrines such as prior restraint, the overbreadth doctrine, and the *O'Brien* test, addressing speech combined with action. Part IV of this article applies these First Amendment doctrines to situations involving moral rights to determine whether moral rights protection infringe upon First Amendment protection.<sup>12</sup> Both the United States' VARA and other extensive moral rights protection afforded artists may conflict with the First Amendment's edict that Congress will make no law abridging the freedom of speech. As a fundamental right, the First Amendment should supersede less important rights that impinge upon it. However, the problem is not so clear-cut. The U.S. Constitution also explicitly states that the furtherance of creative arts should be encouraged. Therefore, the two competing interests must be balanced.

This article concludes that moral rights protection under sec-

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10. See *infra* notes 13-93 and accompanying text.

11. See *infra* notes 95-158 and accompanying text.

12. See *infra* notes 159-173 and accompanying text.

tion 106A can indeed infringe upon the First Amendment rights of beholders. While Congress determined that an artist's reputation and honor are important societal concerns, the First Amendment prohibition seems to have been ignored. The statute may be over- and under-inclusive, void for vagueness, and overbroad. Because the goal of this article is to expose the inherent conflict between the moral rights and the First Amendment, this article does not suggest a perfect solution to the conflict. Courts may be able to resolve such challenges with a definitional balancing approach if judges find the statute itself is constitutional.

## II. MORAL RIGHTS

Since 1909, with the enactment of the copyright statute, United States law has recognized artists' economic rights.<sup>13</sup> The copyright statute protects "original works of authorship fixed in any tangible medium of expression."<sup>14</sup> The objective of copyright law is to protect the copyright owner's economic interests. Artists are often in an economically weaker position than purchasers and licensees of their artwork. They usually do not own the copyright or the work, and therefore are left with no rights after the sale of their work. Because of this powerless position, a concern for additional artists' rights evolved.

The concern for artists' and copyright owners' economic rights acts in concert with the government's goal to encourage creation and preservation of artistic works and to foster growth in the artistic community. One step further on the spectrum of an artist's rights is moral rights protection. The doctrine of moral rights addresses the concern that once a work and the accompanying copyright are sold, the creator, although compensated, loses all rights as to the work.<sup>15</sup> The effect of this loss could be the damage of the

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13. 17 U.S.C. § 101 (1988). The statute has been revised many times. The most significant revisions occurred in 1976. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

14. 17 U.S.C. § 102 (1988). Works of authorship include: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; and sound recordings. *Id.* The visual arts definition is not synonymous with any other definition in the Copyright Act, and is narrower than the scope of copyright protection. H.R. REP. NO. 514, 101st Cong., 2d Sess. 11 (1990) [hereinafter Report].

15. The authors "claiming the moral right typically no longer own the work itself or the copyright. The claim is thus based on a different, inherent right inhering in authorship itself." ARTHUR R. MILLER & MICHAEL H. DAVIS, *INTELLECTUAL PROPERTY: PATENTS, TRADE-MARKS AND COPYRIGHT* 421 (1990). See also Roberta Rosenthal Kwall, *Copyright and Moral Right: Is an American Marriage Possible?* 38 VAND. L. REV. 1 (1985) (exploring the inclusion

artist's honor or reputation. The doctrine of "droit moral," or moral rights,<sup>16</sup> protects the personality and reputation of the creators of art work, even after the work and/or copyright are sold.

### A. *The Bundle of Rights*

Moral rights are a bundle of rights, as in real property, but rather than protecting the economic rights of creators, as in copyright, moral rights protect the reputation and honor of the artist.<sup>17</sup> These rights developed in Europe, flowering about the time of the French Revolution.<sup>18</sup> The "bundle" of moral rights includes the right of disclosure, the right of attribution, the right of integrity, and the right of withdrawal. Each right protects a different aspect of the intellectual property produced by an artist, and each preserves the reputation or personality of the artist.

#### 1. The Right of Disclosure

The right of disclosure<sup>19</sup> gives the creator the right to control the publication of his or her works. The creator can make the ultimate decision as to whether a work is complete and whether it should be made public. The artist retains the right to modify, destroy or hide the work.<sup>20</sup> This right permits an artist to refuse to

of moral rights into copyright law).

16. See Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940); John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976). In Germany the doctrine is known as *Uhrheberpersönlichkeitsrecht*.

17. "These rights are grounded in the intellectual and moral investments an artist makes in a work of art, and he retains them even after his bundle of property rights in the work are transacted away." A. BRADLEY SHINGLETON ET AL., *ARTISTS' MORAL RIGHTS IN THEIR WORKS OF ART: AN INTRODUCTORY STUDY* 2 (1985).

18. See also 1 JOHN H. MERRYMAN & ALBERT E. ELSER, *LAW, ETHICS & THE VISUAL ARTS* 142 (2d ed. 1987) (discussing Greek artists signing sculptures and medieval guilds' recognition of artists' rights); Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968). France has always been on the vanguard of moral rights recognition. Since the Middle Ages, France has developed and honed the bundle of rights that comprise the "droit moral." Finally codified in 1957, in the Law on Literary and Artistic Property (protecting both economic and moral rights of the artist), France recognizes all the moral rights in some way.

The rights of paternity and integrity are perpetual in France, passed to the artist's heirs or a third party. Although the French law declares moral rights to be inalienable and unassignable, there are many exceptions. For an overview of moral rights history, see Jody A. Van Den Heuvel, *Moral Rights for Artists: The Development of a Federal Policy*, 19 J. ART. MGMT. L. 8 (1989).

19. This right also is known as *droit de divulgation* in France.

20. The destruction of paintings, picturaphagie, recurs throughout the history of art. MOSHE CARMILLY-WEINBERGER, *FEAR OF ART: CENSORSHIP AND FREEDOM OF EXPRESSION IN*

complete a commissioned work.<sup>21</sup> The creator also may prohibit the display of a work that he or she has already destroyed or discarded.<sup>22</sup>

## 2. The Right of Attribution

The right of attribution,<sup>23</sup> or paternity, allows the creator to have his or her authorship recognized, even if the artist has sold or transferred the work. The right encompasses three distinct, but related, rights. First, an author may require that his or her name be used with any work of his or her authorship.<sup>24</sup> This includes a pseudonym, or *nom de plume*. Additionally, the artist has the right to prohibit use of his or her name with a work the artist did not create.<sup>25</sup> Finally, the author may disclaim authorship if the work is altered to such an extent as to not be considered the work of the creator. This third part of the right of attribution overlaps with the right of integrity, discussed below. The right of integrity pro-

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ART 190 (1986). In the search for satisfaction and perfection, artists may lose patience and destroy their "finished" works. *Id.* at 191. "The artist, perhaps more than most people, has the indispensable sensitivity needed for artistic creativity." *Id.* at 193. In fact, artists feel a moral obligation to express truth and to criticize society. *Id.* at 195. Artists also fear negative criticism, and some have destroyed their works after being criticized. *Id.* at 196.

21. The artist is responsible for any damages as a result of this breach of contract, but not for specific performance.

22. See *Eden v. Whistler*, (1900) (D.P.) I. 497, (1900) *Recueil Sirey* (S. Jur.) I. 490 (Cass. civ.). In *Whistler*, James McNeil Whistler, an American artist, was commissioned to paint a portrait of Lady Eden. The portrait was exhibited, but because the artist was dissatisfied with his fee and claimed that he was not satisfied with his work, he painted over Lady Eden's head. The Court de Cassation held that Whistler could not be compelled to deliver the work, although he would be liable for the fee paid to him and damages for breach of contract. The court held that "until the artist has put the painting at the party's disposal and the party has accepted it . . . the painter remains the master of his work." *Id.*

23. This right is also known as *droit a la paternite*. In *Guille v. Colmant*, Cour d'appel Paris, 1967 *Recueil Dalloz-Sirey* [D.S. Jur.] 284, Guille, a painter, contracted with an art dealer who required that the artist's work be created under a pseudonym. The court stated that the dealer could not deprive the artist of the use of his real name. *But see* *Vargas v. Esquire, Inc.*, 164 F.2d 522, 526 (7th Cir. 1947) (holding that absent an express agreement to attribute photographs to the author a magazine could claim authorship).

24. In *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981), a court held for an actor whose name was deleted in the film's credits, instead using another actor's name. This belief in giving credit to the creator has been expressed numerous times, including by Picasso where he wrote that the canvas has no value without the creator's signature: "Les toiles n'ont aucune valeur, tant qu'elles ne sont pas signees chacun peut faire autant." *Sanctis*, V.D. II *Carattere creativo delle Opere dell'ingegno*. Milan:150, quoted by E. Reeves.

25. See *Geisel v. Poynter Prods.*, 295 F. Supp. 331 (S.D.N.Y. 1969) (holding that the plaintiff, also known as Dr. Suess, had the right to prohibit the use of his name on a work he did not create); *Clemens v. Press Pub. Co.*, 122 N.Y.S. 206 (Sup. Ct. 1910) (holding that an author under contract law has the right to have his or her name associated with literary work).



protects a work from distortion or mutilation and the right of attribution extends that right to allow an author the ability to disclaim authorship of a work that has been altered.

### 3. The Right of Integrity

At the core of the moral rights doctrine is the right of integrity,<sup>26</sup> preventing the intentional distortion, mutilation or modification of works of art once they have been presented to the public. The spirit of the author's work is thus protected, and any modification may be actionable.<sup>27</sup> It should be noted that many commen-

26. This right, *droit au respect de l'oeuvre*, is central to moral rights. See Buffet, Cour d'appel Paris, Recueil Dalloz [D. Jur.] 570.

Two cases decided before moral rights recognition in the U.S. exemplify artists' struggle to protect the integrity of their work. See *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813 (Sup. Ct. 1949). In 1937, Rutgers Presbyterian Church invited artists from the National Society of Mural Painters to design and execute a mural for their Manhattan Church. Through a competition, the Church's committee selected the application of Alfred D. Crimi. Crimi executed a fresco mural painting 26 feet wide by 365 feet high. Some of the church members objected to the mural, specifically to the portrayal of Christ with much of his chest bare. In 1946, the mural was painted over without notice to Crimi, and he sued. The court held for the church, finding that moral rights of artists are "not supported by the decisions of our courts." *Crimi*, 89 N.Y.S.2d at 819.

In *Shostakovich v. Twentieth Century-Fox Film Corp*, 80 N.Y.S.2d 575 (Sup. Ct. 1948), *aff'd* 87 N.Y.S.2d 2430 (N.Y. App. Div. 1949), defendant Twentieth Century-Fox produced a movie, "The Iron Curtain," depicting Soviet espionage and containing anti-Soviet themes. The defendant used the music of Soviet composers as background music and used the plaintiffs' names in the credits. The music was in the public domain. Plaintiffs sued to enjoin use of their music or names, claiming the use constituted approval of the film's themes. The court held for defendants, finding plaintiff's libel and intentional infliction claims were insufficient.

In another pre-VARA case, a court eked out protection of artists' rights. In *Gilliam v. American Broadcasting Co.*, 538 F.2d 14 (2d. Cir. 1976), plaintiffs, British writers and performers known as Monty Python, wrote scripts for submission to the BBC. The BBC had the right to make changes, but the parties adhered to a detailed agreement as to alteration procedure. The agreement did not allow alteration of the program once it had been recorded. Plaintiffs had turned down ABC's request to broadcast the show because they believed that the disjointed format (i.e., use of commercials) was unacceptable. ABC acquired rights to the series, and in 1975 broadcast two 90-minute specials, each comprising three 30-minute Monty Python programs. Plaintiffs objected to "the discontinuity and mutilation that had resulted from the editing . . ." *Id.* The court opined that "the copyright law should be used to recognize the important role of the artist in our society and the need to encourage production and dissemination of artistic works by providing adequate legal protection for one who submits his work to the public." *Id.*

27. For example, in 1955, French artist Bernard Buffet painted a work on six panels of a refrigerator, signing the work only once. See Merryman, *supra* note 16 and accompanying text. The work was auctioned off for charity, later dismantled, and a single panel was put on the market six months later. In a French court, Buffet was able to enjoin the sale by arguing that his moral rights were violated. *Id.* See also *Society of Survivors of the Riga Ghetto v. Huttenbach*, 535 N.Y.S.2d 670 (Sup. Ct. 1988) ([A]lthough there is no moral rights doctrine expressly recognized in the copyright law, custom and usage limit a publisher's right to edit

tators do not believe that total destruction of a creation constitutes a violation of this right.<sup>28</sup> This right also protects the public's right to behold the work as the creator intended.

#### 4. The Right of Withdrawal

The right of withdrawal<sup>29</sup> allows the creator to withdraw, modify or disavow a work after it has been published. The creator is able to withdraw a work if he or she is dissatisfied with it, or for any other reason. This right may be problematic after a work has been disseminated widely, but the creator may demand a work's removal from the public. This "stick" in the bundle of moral rights usually receives limited protection.<sup>30</sup>

#### 5. Other Rights

There are several other rights that have been asserted to be included in the bundle of moral rights. The right to protection from excessive criticism is one such right. Because moral rights protect a creator's reputation, this right shields an artist from unnecessarily harsh criticism that may damage his or her reputation.

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and change a manuscript to reasonable modifications only.); *Paramount Pictures Corp. v. Video Broadcasting Sys. Inc.*, 724 F. Supp. 808 (D. Kan. 1989) (assessing a moral rights claim under copyright and section 43(a) of the Lanham Act).

In 1980, the Bank of Tokyo removed a sculpture by American artist Isamu Noguchi from its Wall Street branch. The Bank cut the 1600 pound "Shinto" into pieces to remove it. The artist was not notified, and he had no legal recourse. Grace Gleuck, *Bank Cuts Up Noguchi Sculpture and Stores It*, N.Y. TIMES, Apr. 19, 1980 § 1, at 1; Grace Gleuck, *Art People*, N.Y. TIMES, Feb. 12, 1982 at C29.

28. Merryman, *supra* note 16. Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward A Federal System of Moral Rights Protection for the Artists*, 19 CATH. L. REV. 945, 971 n.141 (1990) ("In the case of complete destruction, there arguably can be no injury to the author's reputation because, unlike the case of a mutilated work where a viewer might form a bad impression of the author from the work, the work does not exist."); PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 15.24.1 (1989) (reasoning that a work's destruction will not injure an author's reputation); Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 9 (1988) (disclosing that until 1975, French law was unclear about the right against complete destruction).

29. France's *droit de retrait ou de repentir* or *modific* is not widely accepted. As explained by Professor Goldstein, in the countries that recognize such a right, it is ineffective. Goldstein, *supra* note 28, at § 15.24.4. See also *Autry v. Republic Prods.*, 213 F.2d 667, 670 (9th Cir.), *cert. denied*, 548 U.S. 858 (1954) (holding that a grant of rights supersedes an unfair competition action).

30. It is very difficult to withdraw works that have been disseminated in multiple copies. Books, for example, would be next to impossible to withdraw because they are easy to copy and can be privately owned. Also, this right would take away full ownership rights from the copy's owner, rather than just limiting the use of works, as the rights of integrity and attribution do.

A similarly related doctrine is the prohibition against any other attacks on the personality of the creator.<sup>31</sup> Although, these rights are not widely accepted, they are, in essence, protected as are other sticks in the bundle of moral rights.<sup>32</sup>

### B. *The Berne Convention and Article 6bis*

Two of the rights discussed above were first recognized in the international legal community in 1886. One of the first international treaties, the Berne Convention of 1886, primarily discussed copyright laws protecting economic rights.<sup>33</sup> However, the Berne Convention included a moral rights article that specifically addressed the rights of attribution and integrity.<sup>34</sup> Although these rights originated in ancient Greece and developed in Europe, the Berne Convention finally established moral rights as a legal doctrine.

Because of requirements such as notice and registration, the United States has not, until recently, adhered to the Berne Convention.<sup>35</sup> On March 1, 1989, the United States became the eight-

31. Roeder, *supra* note 16.

32. Moral rights as a whole protect the honor and reputation of the artist. These additional rights merely state this explicitly, as the rights may be infringed by verbal acts.

33. BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, 99th Cong., 2d Sess., (I) (1986) (Treaty Doc. 99-27) [hereinafter Berne Convention]. The Berne Convention is the oldest and most important multilateral copyright treaty. *Id.* at (III) (letter of submittal George P. Schultz). The Berne Convention's subject matter includes any original work of authorship "in the literary, scientific and artistic domain, whatever may be the mode or form of its expression." U.S. COPYRIGHT OFFICE, LIBRARY OF CONGRESS, CIRCULAR 93A, THE UNITED STATES JOINS THE BERNE UNION 5 (1989) [hereinafter Circular 93a]. These works include paintings, architecture, photographic works, illustrations, and "three-dimensional works relative to geography, topography, architecture or science, as well as books, dramatic works or dramatico-musical works, musical compositions, and cinematographic works." *Id.* In it, members pledge to maintain high levels of protection for the rights of authors in their literary and artistic works. Berne Convention (III). The purpose of the Berne Convention's rule of national treatment is to provide creators the same protection for their works in other countries as the countries accord their own creators. Circular 93a at 5; Berne Convention (III). See also Jon A. Baumgarten & Christopher A. Meyer, *The United States Joins the Berne Convention*, 2 RIGHTS 1-4 (Winter 1988-89) (discussing changes to the political and substantive complexion of U.S. copyrights).

34. Berne Convention, *supra* note 33, art. 6bis.

35. Professor Nimmer includes pressure by the television and film industries in the list of reasons behind the U.S. non-participation in the Berne Convention. Melville B. Nimmer, *Implications of the Prospective Revision of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 524 (1967).

As to registration, the Berne Convention extends U.S. copyright law by exempting from registration Berne Convention works that did not originate in the U.S. Circular 93a, *supra* note 33, at 3. The Convention abolished mandatory copyright notice for all works first published on or after March 1, 1989. *Id.* at 4. However, voluntary use of notice is encouraged. U.S. COPYRIGHT OFFICE, LIBRARY OF CONGRESS, CIRCULAR 93, HIGHLIGHTS OF U.S. ADHERENCE

ith member of the Berne Convention for the Protection of Literary and Artistic Works,<sup>36</sup> joining every country of the European Economic Community in their membership to the Berne Convention.<sup>37</sup> As a result of the United States' adherence to the Berne Convention, only the former Soviet Union and China remained as nonsignatories of the Convention.<sup>38</sup>

After Congress decided to join the Berne Union, the next question was whether the Convention was self-executing, that is, automatically effective law in the United States. If the Convention was indeed self-executing, Congress need only ratify the treaty to make its provisions part of United States copyright law.<sup>39</sup> If the Convention was not self-executing, legislation would be required in order to bring U.S. law into compliance with the Berne requirements.<sup>40</sup> The laws of the country ratifying the Convention dictate this decision.<sup>41</sup> Ultimately, Congress determined that the treaty was not self-executing and that implementing legislation would be needed.<sup>42</sup>

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TO THE BERNE CONVENTION 2 (1989) [hereinafter Circular 93]. The United States was a signatory to the Universal Copyright Convention (UCC), which came into force in 1955. Universal Copyright Convention, Sept. 6, 1952; (revised at Paris, July 24, 1971). "Because the Convention minima are explicit and substantial, the level of assured protection is higher than that afforded by the Universal Copyright Convention." Berne Convention, (letter of submittal) *supra* note 33 at (III). See also Leonard D. DuBoff et al., *Out of UNESCO*, 4 CARDOZO ART & ENT. L.J. 203, 204, 208 (1985) (urging U.S. membership in the Berne union); Nimmer, *supra* at 499-52 (advocating adherence to the Berne Convention). The 79 member countries to the Berne Convention provide copyright protection to citizens of other member countries. Circular 93a, *supra* note 33 at 2. Indicative of its diversity, both developing and developed nations are members to the Convention. *Id.*

36. Circular 93a, *supra* note 33, at 2. In his letter of transmittal, President Reagan stated that "[w]hen we are urging other countries to enhance copyright protection, the United States can no longer remain outside the Berne Union. It is, therefore, a matter of some urgency that the United States finally join the Berne Convention." Berne Convention, *supra* note 33, at (II). "The fundamental principle of the Berne Convention is protection based upon national treatment." See also Circular 93a, *supra* note 33, at 2 (noting that an Ad Hoc Committee of the Department of State examined ratification and submitted findings in 1985).

37. Circular 93a, *supra* note 33, at 2.

38. *Id.* Professor Nimmer noted that the United States joined Berne primarily for the sake of moral leadership in the world copyright community. MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8.21[A] (1992).

39. Nimmer, *supra* note 38 § 1.12[A].

40. Circular 93a, *supra* note 33 at 2.

41. *Id.*

42. The House Committee stated "unequivocally that Berne is not self-executing, that domestic law is not in any way altered except through the implementing legislation itself, and that the implementing legislation is absolutely neutral on the issue of the rights of paternity and integrity." Nimmer, *supra* note 38, § 8.21[A] (quoting the House Report on BCIA).

The Berne Convention Implementation Act of 1988<sup>43</sup> (the BCIA), the enabling legislation for U.S. adherence to the Berne Convention, was the result of much debate.<sup>44</sup> Factions on both sides of the legislative issue reached a consensus on two main objectives: first, to use a minimalist approach and amend the U.S. Copyright Act only where there was a clear conflict; and second, to amend the law only as much as necessary to resolve the conflict.<sup>45</sup>

One specific provision of the Berne Convention, Article 6<sup>bis</sup>, protects moral rights.<sup>46</sup> This provision caused an especially extensive debate in Congress when it considered the BCIA. The rights of paternity and integrity were included in the Berne Convention in Article 6<sup>bis</sup> and Congress determined that current law, such as unfair competition law and state and common law protection, was sufficient for the protection of moral rights.<sup>47</sup> Therefore, the Implementation Act did not include a moral rights provision, and the U.S. did not recognize moral rights explicitly.<sup>48</sup>

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43. P.L. 100-568, 702 Stat. 2853 (October 31, 1988). See also Deborah Ross, Comment, *The United States Joins the Berne Convention: New Obligations for Authors' Moral Rights?* 68 N.C.L. REV. 363 (1990) (proposing legislation guaranteeing author's moral rights).

44. See Nimmer, *supra* note 38, § 8.21[A][2][a].

45. Circular 93a, *supra* note 33, at 2.

46.

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

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiration of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Berne Convention, Paris Act, 1971.

47. Circular 93a, *supra* note 33, at 3. See also M. Marian Clough, *Legal Protection for the Moral Rights: A Growing Trend in State Legislation*, 36 COPYRIGHT L. SYMP. (ASCAP) 99-105 (discussing other causes of action available to the artist, including copyright, libel, privacy, breach of contract, and unfair competition); Yvonne Linsert Morse, *Freedom of the Visual Arts: The Role of Governments in AN INTELLECTUAL FREEDOM PRIMER* 103-29 (Charles N. Busha, ed. 1977); Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of Moral Rights of Authors*, 23 GA. L. REV. 97 (1986).

48. See *Granz v. Harris*, 198 F.2d 585, 589 (2d Cir. 1952) (Frank, J. concurring) (exploring the rejection by American courts of the term "moral rights"). See also Deborah Ross, Comment, *The United States Joins the Berne Convention: New Obligations for Au-*

### C. The Visual Artists Rights Act of 1990<sup>49</sup>

Art lovers argue that the visual arts enrich society. "A work of art is a form created by the artist out of human experience. At the same time, it has a cultural context. It exists in time, and its form reflects the forces of that time — social, economic, political and religious."<sup>50</sup> Moral rights go beyond the link between society and art (the public good) to address the relationship between the artist and his or her work.<sup>51</sup>

Separate legislation had been introduced in Congress since 1979 to explicitly recognize moral rights.<sup>52</sup> Senator Edward Kennedy (D. Mass.) introduced the Visual Artists Rights Act of 1987 (VARA of 1987)<sup>53</sup> several years before the Berne Convention was

*thors' Moral Rights?* 68 N.C.L. REV. 363 (1990) (proposing legislation guaranteeing authors' moral rights).

49. The VARA was part of the Federal Judgeship Act of 1990 passed as the 101st session neared adjournment. See Pub. L. No. 101-650, 104 Stat. 5089 (1990); Allan Parachini, *For Artists, A Measure of Protection*, WASH. POST Nov. 7, 1990 at D9.

The colorization of films has been at the forefront of moral rights publicity. The VARA specifically excludes motion pictures from its protection, but other countries protect the film maker in these circumstances. Film makers assert that the unconsented colorization of black and white films violates their right of integrity. Artists also object to time compression or expansion and "pan and scan." See *Film Labeling Legislation is Debated Before Senate Subcommittee*, DAILY RPTS. EXEC. (BNA) (Sept. 23, 1992) (discussing legislation that would require altered films to be so labeled); Jeffrey L. Graubart, *U.S. Moral Rights: Fact or Fiction?* N.Y.L.J. 5 (Aug. 7, 1992) (relating the French case reviewing *THE ASPHALT JUNGLE* colorization); Daniel McKendree Sessa, Note, *Moral Right Protection in the Colorization of Black and White Motion Pictures: A Black and White Issue*, 16 HOFSTRA L. REV. 503 (1988); Elise K. Bader, *A Film of a Different Color: Copyright and the Colorization of Black and White Films*, 5 CARDOZO ART & ENT. L.J. 497 (1986).

Because the VARA only became effective July 1, 1991, few cases have been decided under section 106A. See *Gegenhuber v. Hystopolis Productions Inc.*, 1992 U.S. Dist. LEXIS 10156 (N.D. Ill. 1992) (finding the defendants improperly removed the case from state court, as the plaintiff's claims did not arise under copyright law, and 106A did not preempt the action).

50. 136 CONG. REC. H3113 (June 5, 1990) (statement of Rep. Markey, quoting Helen Gardner).

51. "A work of art is not a utilitarian object like a toaster. It is an intellectual work like a song, a novel, or a poem. We must not permit the connection between the artist and his or her work to be severed the first time the work is sold." 136 CONG. REC. H3115 (daily ed. June 5, 1990) (statement of Rep. Markey).

52. See S. 3221, 100th Cong., 1st Sess., 133 CONG. REC. E3425 (daily ed. Aug. 7, 1987); S. 1619 100th Cong., 1st Sess., 133 CONG. REC. S11470 (daily ed. Aug. 6, 1987); S. 2796, 99th Cong., 2d Sess., 132 CONG. REC. S12185 (Sept. 9, 1986); H.R. 5722, 99th Cong., 2d Sess., 1323 CONG. REC. E3682 (Oct. 16, 1986); H.R. 1521, 98th Cong., 1st Sess., 129 CONG. REC. H578-579 (Feb. 17, 1983); H.R. 2908, 97th Cong., 1st Sess., 127 CONG. REC. H5689 (1981); H.R. 288, 96th Cong. 1st Sess., 125 CONG. REC. H440 (1979); H.R. 8261, 95th Cong., 1st Sess. 124 CONG. REC. H22,733 (1977).

53. See *Hearing on H.R. 3221, 100th Cong., 2d Sess.* (June 9, 1988). The 1988 legislation provided the author with the right, during his or her life, to claim or disclaim authorship *because of any distortion, mutilation, or other alteration thereof*. *Id.* at 5.

ratified by the United States. In a modified format, the VARA was again introduced in Congress in 1989 by Senators Kennedy and Kasten in the Senate and by Representatives Markey and Berman in the House. This legislation ultimately became the Visual Artists Rights Act of 1990.<sup>54</sup> Despite the determination under the BCIA that moral rights were sufficiently protected in the United States, the passage of the Berne Convention was a catalyst for this federal moral rights legislation.<sup>55</sup>

The goal of the VARA is three-fold. First and foremost, the legislation protects the honor and reputation of visual artists. Second, the VARA attempts to protect the works of art themselves, as the public interest in art might dictate. Finally, the legislation establishes a national standard for moral rights protection.<sup>56</sup>

### 1. Scope

The scope of the legislation's protection is an important component of the VARA. The rights afforded artists under the Act belong to the artist, regardless of who owns the work's copyright.<sup>57</sup> The VARA, as its name suggests, only protects visual arts<sup>58</sup> including paintings, drawings, prints, sculptures, and photographs.<sup>59</sup>

54. The VARA amends the copyright statute by adding section 106A, in addition to related language and definitions. For a general overview of the VARA, see Laura W. Wooton, Comment, *Law for Law's Sake: the Visual Artists Rights Act of 1990*, 24 CONN. L. REV. 247 (1991).

55. "The Visual Artists Rights Act harmonized U.S. law with the Berne Convention to a greater degree." 57 Fed. Reg. 24659 (June 10, 1992).

56. 136 CONG. REC. H3113 (daily ed. June 5, 1990) (statement of Rep. Kastenmeier).

57. "These moral rights do not derive from the artist's economic interests, and they may not be traded, bartered, sold or otherwise handled in an economic transaction." Singleton, *supra* note 17, at 2.

If the artist cannot be found, no other party has standing to protect the work. Especially in the area of visual art on buildings, commentators suggest that public or private non-profit organizations should be able to intervene to protect works of art. The provision limiting standing to artists seems to contradict the three purposes of the VARA legislation discussed above. First, the honor and reputation of the artist should be protected, be it by the artist him or herself or by a designated organization. Second, the public's interest in works of art would cut in favor of allowing specific non-profit organizations to step into the shoes of the artist and protect the integrity of the work so the public can enjoy it. Finally, because the national standard has been established, allowing these organizations to sue on behalf of the artist does not affect the uniformity of the statute.

58. 17 U.S.C. § 101 (Supp. 1993). Visual works are protected because they cannot be physically transformed to meet different uses, and usually are limited edition originals, and are irreplaceable. Report, *supra* note 14, at 9. "Protecting only works of visual art, let alone defining works of visual art in such a narrow fashion, does not measure up to the concept of moral rights embodied in article 6bis." Damich, *supra* note 28, at 953.

59. A work of visual art is:

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited

However, there are restrictions as to what forms of visual art are protected. These works must be single copies or limited editions of 200 copies or fewer.<sup>60</sup> Multiple copies must be signed and consecutively numbered by the author.<sup>61</sup> Still photographic works must be produced for exhibition.<sup>62</sup> Audio-visual works, works-for-hire, and commissioned pieces are excluded from the statute.<sup>63</sup>

## 2. Rights Protected

The VARA protects two of the bundle of moral rights discussed above, those of attribution and integrity.<sup>64</sup> The right of at-

edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed by the author.

17 U.S.C. § 101 (Supp. 1993).

60. *Id.* The statute recognizes the special value inherent in the original or limited edition copy of a work. "The original or few copies with which the artist was most in contact embody the artist's 'personality' far more closely than subsequent mass produced images." Report, *supra* note 14, at 12 (quoting Professor Ginsburg).

61. 17 U.S.C. § 101 (Supp. 1993). Numbering and marking serves to limit the works protected by the VARA. These requirements also provide notice to the buyer of the work's protected status. Report, *supra* note 14, at 12.

62. 17 U.S.C. § 101 (Supp. 1993). This clearly excludes commercial art from protection, as well as posters, maps, globes, charts, and technical drawings. *Id.* §§ 101, 102 (a)(5). The VARA does not protect merchandising items, packaging, or advertising, works made for hire, or any work not protectable by copyright law. This provision's requirement will provide notice, and further limits the VARA's protection. Report, *supra* note 15, at 12-13.

63. A work of visual art does not include:

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio visual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

17 U.S.C. § 101 (Supp. 1993).

*See also* Community for Non-Violence v. Reid, 490 U.S. 730 (1989) (determining whether a work qualifies as a work made for hire. The Supreme Court listed nine factors for courts to apply to a situation to determine whether the work is a work for hire.).

64. The author of a work of visual art

(1) shall have the right -

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the



tribution allows the artist to claim authorship of his or her work, disclaim authorship of a work he or she did not create, and disclaim authorship of works that have been distorted so as to prejudice the honor or reputation of the artist.<sup>65</sup> Interestingly, Article 6<sup>bis</sup> of the Berne Convention provides only the first of these three rights explicitly.<sup>66</sup> Although the House version of the bill required that a violation of this right be committed intentionally or negligently, the final version omitted the state of mind requirement.<sup>67</sup>

The VARA also grants the right of integrity to the artist. Section 106A treats alterations and the destruction of a work a bit differently. The law allows the artist to prevent the distortion, mutilation or other modification of his or her work that is prejudicial to his or her honor or reputation.<sup>68</sup> In order to recover under this right, intentional alteration must be proven and such alteration must be prejudicial to the artist's honor or reputation.<sup>69</sup>

The creator also has the right to prevent any destruction of a work of recognized stature. Although not protected under 6<sup>bis</sup> of the Berne Convention, any intentional or grossly negligent destruction of such a work violates that right.<sup>70</sup> The right to prevent de-

work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.

17 U.S.C. § 106A(a) (Supp. 1993). A violation of this right is remedied by an injunction. Nimmer *supra* note 38, § 8.21[B].

65. 17 U.S.C. § 106A(a)(1) (Supp. 1993).

66. However, the World Intellectual Property Organization expanded this linear understanding to encompass a multi-level tier of rights. These include the rights to create and publish pseudonymously or anonymously, to disclaim a work the artist did not create, and to disclaim authorship if the work was altered to such a degree that the creator believes the work is no longer his or her own. *Moral Rights in Our Copyright Laws: Hearings on S. 1198 Before the Subcomm. on Patents Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 149 (1989) [hereinafter *Hearings*]. The VARA does not expressly include rights of anonymity and pseudonymity, but arguably extends to these rights. See Nimmer *supra* note 38, § 8.21[B] n.127 (looking to the House Report and Berne Convention for support).

67. 136 CONG. REC. H13313 (daily ed. Oct. 27, 1990) (statement of Rep. Brooks). See Nimmer *supra* note 38, § 8.21[B] n.127 (comparing Berne protection with that of the VARA).

68. The author of a work of visual art

- (3) subject to the limitations set forth in section 113(d), shall have the right -
  - (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation and any intentional distortion, mutilation, or modification of that work is a violation of that right.

17 U.S.C. § 106A(a)(3) (Supp. 1993).

69. *Id.*

70. The author of a work of visual art

- (3) subject to the limitations set forth in section 113(d), shall have the right-

struction has an additional requirement not necessary to the right to prevent alteration. The work for which the artist is seeking protection must be of recognized stature.<sup>71</sup> The standard is not a requirement under Berne, and this addition to section 106A differentiates visual artists whose works arguably would be protected under the section 101 definition of visual art.<sup>72</sup> Encouraging such a requirement, museums argue that they must be able to dispose of works that do not "stand [the] test of time" or are abandoned.<sup>73</sup> The limitation excludes young artists not yet recognized and foreshadows a battle of the experts in trial as to who is an artist of recognized stature.

### 3. Exceptions

There are certain exceptions to the VARA. The modification of a work of visual art that is the result of preservation or aging is not actionable under the Act.<sup>74</sup> The presentation, including lighting and placement, is not destruction, distortion or mutilation as defined by the Act, unless it is caused by gross negligence.<sup>75</sup>

### 4. Duration, Waiver & Remedies

Works of visual art created on or after the VARA's effective

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

17 U.S.C. § 106A(a)(3)(B) (Supp. 1993).

71. *Id.* No guidelines exist for this determination. "While generally limiting protected works to irreplaceable ones may be a logical beginning for federal statutory protection of moral rights, the limitation of the right against destruction to works 'of recognized stature' is not easily rationalized from a moral rights standpoint." Damich, *supra* note 28, at 954. Professor Damich also notes the inconsistency of requiring this standard to protect works from destruction, but not to protect works from alteration. *Id.* He finds this standard changes the VARA from moral rights protection to art preservation. *Id.*

72. See Hearings, *supra* note 66, at 136.

73. *Id.* at 137.

74.

(1) The modification of a work of visual art which is the result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).

17 U.S.C. § 106A(c)(1) (Supp. 1993).

75.

(2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

17 U.S.C. § 106A (c)(2) (Supp. 1993). This is referred to as the museum exception, allowing museums the discretion of how to display works.

date<sup>76</sup> are protected only for the life of the artist. Thus, the rights of integrity and attribution provided by the VARA last only for the artist's life.<sup>77</sup> Although earlier versions of section 106A provided protection for the life of the artist plus fifty years, the final version of the bill excluded the additional years after the artists' death.<sup>78</sup> The duration limitation was added immediately before the bill's passage. Earlier VARA versions mirrored copyright law terms.<sup>79</sup>

Generally, the rights provided under the VARA cannot be transferred.<sup>80</sup> However, the rights may be waived if the artist expressly agrees to the waiver in a written instrument signed by the artist.<sup>81</sup> This instrument must identify specifically the work, and the uses of that work, to which the waiver applies. For joint works, a waiver of rights made by one artist waives the rights for all other artists.<sup>82</sup>

76. June 1, 1991. 17 U.S.C. § 106A notes (Supp. 1993).

77. 17 U.S.C. § 106A(d). Other countries that recognize moral rights protect the creator's rights for the life of the creator plus 50 or 75 years. Also, several state statutes protect a creator's moral rights for a period after his or her death. See *infra* note 90. The different durations of protection creates part of the preemption problem between 106A and state statutes.

78. The statute then would have mirrored copyright duration. Some countries recognize moral rights perpetually, including France, Senegal, Benin, and Central African Republic. SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986* 474 (1987). In Germany, moral rights are protected for the life of the author plus 70 years. Senate Hearings at 171. The duration of these rights in the United Kingdom is the life of the author plus an additional 50 years. *Id.* In explaining France's perpetual protection, it has been noted that by restricting the posthumous enforcement of these rights to the artists' family and heirs, the law attempts to limit it to those persons who could reasonably be expected to have the strongest interest in the matter. Shingleton, *supra* note 17 at 3.

79. 136 CONG. REC. H13314 (daily ed. Oct. 27, 1990). Unfortunately, this limitation cuts against the asserted purpose of the VARA to protect art for the public to enjoy. For example, the right of integrity expires with the death of the creator, thus allowing alteration or destruction of the work. The public's interest in the work is lost, perhaps just when the artist's contribution is being realized. Also, the VARA's goal of uniformity is lost, because after the expiration of federally provided rights, state law protection is all that remains. See Nimmer, *supra* note 38, § 8.21[B].

80. 17 U.S.C. § 106A(e)(1) (Supp. 1993).

81. *Id.* The VARA directed the Copyright Office to oversee a five-year study as to the artist's bargaining power and the effects of waiver. 17 U.S.C. § 106A note (Supp. 1993). See also 57 Fed. Reg. 24659 (1992) (discussing the waiver provision, its legislative history, and its impact).

82. 17 U.S.C. § 106A (Supp. 1993). "The artist is better protected under a regime requiring specificity of waivers than under one where an ideologically pure no-waiver law is rarely in fact observed." Report, *supra* note 14, at 18.

Again, looking to the purposes of the VARA articulated by Congress, this result seems inapposite. If the honor and reputation of the artist and the preservation of art are so important as to merit federal protection, why should one co-creator be able to authorize the

The VARA remedies mirror those of the Copyright Act of 1990. Title 17 remedies, providing for injunctive relief, actual damages and statutory damages, costs, and attorney's fees, are available to an artist plaintiff.<sup>83</sup> The only exception to the title 17 remedies is the omission of criminal sanctions against a defendant who violates an artist's right of integrity or attribution.<sup>84</sup>

## 5. Special Provisions

The Act specifically addresses works of visual art on buildings.<sup>85</sup> The statute differentiates between works that are removable without alteration or destruction and those which cannot be removed.<sup>86</sup> The right of integrity is protected unless the building

alteration of a work? While a work created by many artists may present a problem, allowing one artist to waive the rights of another contradicts the policies behind section 106A.

83. 17 U.S.C. § 502, 504, 505 (1988). See Report, *supra* note 14, at 22.

84. 17 U.S.C. § 506 states that the criminal sanctions available under copyright do not apply to the rights conferred by section 106A. 17 U.S.C. § 506 (Supp. 1993).

85. (d)(1) In a case in which-

(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A (a)(3), and

(B) the author consented to the installation of the work in the building either before the effective date . . . or in a written instrument . . . that is signed by the owner of the building and the author and that specifies that installation of the work may be subject to destruction, distortion, mutilation, or other modification, by reason of its removal then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.

(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A (3), the author's rights . . . shall apply unless-

(A) the owner made a diligent, good faith attempt without success to notify the author . . . , or

(B) the owner did provide such notice in writing and the person notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

17 U.S.C. § 113(d) (Supp. 1993). See also Keith A. Attlesley, Comment, *The Visual Artists Rights Act of 1990: the Art of Preserving Building Owner's Rights*, 22 GOLDEN GATE U.L. REV. 371 (1992) (comparing the California Art Preservation Act to the VARA protection of visual art incorporated into buildings); *Serra v. United States*, 847 F.2d 1045 (2d Cir. 1988) (holding that the removal of a sculpture does not violate the First Amendment). See also Judith H. Balfe and Margaret J. Wyszomirski, *Public Art and Public Policy*, 15 J. ARTS MGMT & LAW 5 (1986).

86. 17 U.S.C. § 113(d). See also Matthew A. Goodin, Comment, *The Visual Artists Rights Act of 1990: Further Defining the Rights and Duties of Artists and Real Property Owners*, 22 GOLDEN GATE U. L. REV. 567 (1992) (analyzing the implications of the VARA on property owners, their liability, and the burdens attached to their rights). Compare CAL. CIV. CODE § 987 (Deering 1991) with N.Y. ART & CULT. AFF. LAWS § 14.03 (McKinney

owner and creator make a written agreement recognizing that the work may be damaged if it is removed. Works that can be removed from a building without alteration are specifically addressed. If the owner makes "a diligent good faith attempt without success to notify the author of the owner's intended action," then the owner would not be liable under section 106A.<sup>87</sup> Similarly, if the owner does not provide notice in writing to the creator and the creator does not remove the work or pay for its removal in 90 days, the owner is not liable.<sup>88</sup>

## 6. Preemption

The VARA preempts various state laws enacted before its passage.<sup>89</sup> The VARA provides that "all legal or equitable rights that are equivalent to any of the rights conferred by" the VARA are preempted, and that "no person is entitled to any right or equivalent right in any work of visual art under the common law or statutes of any State."<sup>90</sup> Preemption, however, is not effective if the cause of action arose prior to June 1, 1991.<sup>91</sup> It also is not effective against activities violating legal or equitable rights not

Supp. 1991).

87. 17 U.S.C. § 113(d)(2)(A) (Supp. 1993).

88. 17 U.S.C. § 113(d)(2)(B) (Supp. 1993).

89. 17 U.S.C. § 301(f). The Register of Copyrights in the Library of Congress, Ralph Oman, stated that "[a] single Federal system is preferable to state statutes or municipal ordinances . . . because creativity is stimulated more effectively on a uniform, national basis." Report, *supra* note 14, at 7, 21.

The California statute was the first state law recognizing moral rights. Cal. Civ. Code § 980-990. Enacted in 1979, section 987 of the statute protects "fine art," including paintings, murals, sculptures, drawings, or works of art in glass. Section 987 also protects the rights of paternity and integrity for the life of the artist and for a period of 50 years after death. The statute contains a special provision for artwork attached to buildings. See also Kathryn A. Kelly, Case Summary, *Botello v. Shell Oil Co.*, 2 DEPAUL-LCA J. ART & ENT. L. 52 (1992) (discussing *Botello v. Shell Oil*, applying the California statute to a mural).

Other states also have enacted legislation. N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney Supp. 1991); CONN. GEN. STAT. § 42-116t (1991); ILL. ANN STAT. 121 ½ ¶¶ 1401-1408 (Supp. 1992); LA. REV. STAT. ANN. §§ 51:2151-2156 (West 1987); ME. REV. STAT. ANN. tit. 27, § 303 (West Supp. 1990); MASS. ANN. LAWS ch 231 § 85s (Law. Co-op 1991); NEV. REV. STAT. ANN § 598.970-.978 (Michie 1989); N.J. STAT. ANN. §§ 2A:24A-1 to -8 (West 1987); N.M. STAT. ANN. § 13-4B-3 (Michie 1990); PA. STAT. ANN. tit. 73 § 2102-2108 (Purdon 1988); R.I. GEN. LAWS §§ 5-62-2 to 5-62-6 (Michie 1987); S.D. CODIFIED LAWS ANN. § 1-22-16 (1990); UTAH CODE ANN. § 64-2a-9 (1990). See also Jane Engdahl, *Moral Rights in State Statutes: A Comparison of the California Art Preservation Act and the New York Artists' Authorship Act*, 34 COPYRIGHT L. SYMP. (ASCAP) 203 (1987).

90. *Id.* See also Joseph Zurber, *Do Artists Have Moral Rights?* 21 J. ART MGMT & L. 284 (1992) (discussing the VARA and its probable preemptive effect in analogous state law provisions).

91. 17 U.S.C. §301 (f)(1)(A) (Supp. 1993).

equivalent to the rights of attribution or integrity.<sup>92</sup> Finally, the statute is not preemptive if asserted against "activities violating legal or equitable rights which extend beyond the life of the author."<sup>93</sup>

#### *D. The Implications*

In summary, with the recognition of moral rights for visual artists, the United States has joined countries throughout the western world in protecting the honor and reputation of the artist, thus complying with the Berne Convention requirements. Congress amended applicable copyright laws to include section 106A, the Visual Artists Rights Act of 1990. The VARA protects only visual artists, and protects two of the bundle of rights generally recognized as comprising moral rights: the right of attribution and the right of integrity. The right of attribution gives the artist the right to claim authorship to works the artist created. Further, the artist can disclaim works that are not his or her own, or that have been so distorted or altered as to no longer be his or her own. The right of integrity grants the artist the right to prevent any intentional distortion, mutilation, or other modification of a work that would be prejudicial to his or her honor or reputation. This right further allows the artist to prevent the destruction of a work if the work is of a recognized stature.

In recognizing these two rights, although quite limited by the VARA, the statute may implicate First Amendment concerns. The First Amendment guarantees that Congress shall make no law abridging the freedom of speech.<sup>94</sup> The question is whether section 106A abridges the freedom of speech.

The VARA, in granting the artist the rights of attribution and integrity, does not define clearly what third-party conduct violates the statute. Instead, the statute merely grants the artist the rights, with no affirmative language prohibiting the owner or beholder

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92. 17 U.S.C. § 301(f)(2)(B) (Supp. 1993). This vague parameter is susceptible to multiple interpretations. Perhaps it means that only the parts of state law which are identical to section 106A are preempted, or that the state statute need not be identical to section 106A to be preempted.

93. 17 U.S.C. § 301(f)(2)(C) (Supp. 1993). The issue of preemption raises many problems concerning state legislation. Because the duration of most state statutes is the life of the creator plus fifty years, a question is presented as to an artist's rights: does she claim federal protection during her lifetime and do her heirs claim state protection subsequent to her death? Another question is whether the definitional limitation of state statutes (i.e., fine art) establishes works protected under section 106A but not under state statutes. See *Nimmer*, *supra* note 38, § 8.21[B].

94. U.S. CONST. amend. I.

from conduct that would constitute a violation of the artist's rights. While moral rights are indeed intangible property rights, a vague prohibition against prejudicing an artist's honor or reputation leaves an owner or beholder without guidance as to what constitutes such prejudice. The First Amendment is implicated here because an owner or beholder may be prohibited from engaging in protected First Amendment speech. The Act could chill speakers from engaging in expressive speech or acts that might prejudice an artist's reputation.

The hypotheticals introduced in Part I will help illustrate the potential conflict. The painting in Hypothetical #1 is a painting of a semi-nude woman displayed in an exhibit on pornography. This painting qualifies as visual art under section 101 because it is a limited edition painting, signed and numbered by the artist. Thus, section 106A grants the creator of the work the rights of integrity and attribution. Because the painting is signed by the artist, the right of attribution presumably is not violated. However, the artist may claim a violation of his right of integrity if he feels the display prejudices his reputation and honor. However, the owner has not physically altered the painting at all, so it is unlikely the artist will succeed.

The owner of the painting may believe she is merely exercising her ownership rights. In this situation, the statute clearly requires the visual art be altered in some way. Further, the statute states that modifications made as a result of lighting or placement are not actionable. The artist in this hypothetical is opposed to the placement of the work amidst adult magazine photos. The creator in this hypothetical has no cause of action under section 106A. The First Amendment rights of the owner who chose to display the work with *Penthouse* and *Playboy* photos are protected, as is her right to label the artist's work pornography. Arguably the artist's reputation and honor may be affected, but the owner's actions are protected.

In the second hypothetical, a painting is photographed for an advertisement. A critic alleges that the painting is a copy of another artist's work, and the critic rips up the advertisement on TV. Here, the painting itself is protected under the VARA, but the critic did not alter it at all. Instead, he only destroyed the advertisement containing a reproduction of the work. The advertisement is not protected under the VARA, so the artist has no cause of action under section 106A. Further, because the United States does not recognize the right to prevent excessive criticism, the artist must find an alternative theory in order to pursue a claim, per-

haps defamation. The critic practiced his First Amendment rights by criticizing the work, and engaged in an expressive act by tearing the ad. Again, the artist's reputation and honor arguably were prejudiced and the beholder's rights are protected.

The work of visual art in Hypothetical #3 is an original mural painted onto the side of a building, signed by the artist. It depicts patriotic themes, and a man protesting American foreign policy sprays red paint over part of it. At the same time Congress amended the Copyright Act to include section 106A, section 113 was amended to incorporate visual art that is attached to buildings. The VARA protects the mural, granting the rights of attribution and integrity to the artist. Here, the artist may claim violation of the right of integrity because the work has been mutilated. The artist may also claim her right to prevent the use of her name on her work that has been altered so as to prejudice her. In this case, the artist is protected, yet the man practicing core political speech under the First Amendment is liable.

Hypothetical #4 involves a documentary film by a film student, purchased by a studio. The studio edits the film and the artist objects. The VARA explicitly excludes motion pictures from its protection, so the student artist receives no protection under that statute. Here, the artist believes his reputation and honor are prejudiced by the studio's "polishing" of his work. The studio exercised its right to prepare a derivative work clearly based upon the original. This act of editing also incorporated the editor's First Amendment right of expression.

In addition to these specific hypotheticals, many other examples evidence a potential clash between moral rights and the First Amendment. Any physical addition to a protected work, be it temporary or permanent, for political or social reasons, violates section 106A's right of integrity. Further, any choice not to include a creator's name on or near a work, either to introduce gender equality into a traditionally male-dominated competition, or to express the exhibitor's artistic tastes, violates section 106A's right of attribution.

As evident from the examples above, all artists are not protected by the VARA, nor are all visual artists protected. While each situation presented may prejudice the reputation and honor of the artist, the statute does not apply uniformly. Further, the First Amendment rights of the owners and beholders are subject to the VARA's definition of visual art. With this limitation of the beholders' First Amendment rights, the VARA must contend with challenges to it based on the First Amendment.



### III. THE FIRST AMENDMENT

The First Amendment states that "Congress shall make no law abridging the freedom of speech . . ."<sup>95</sup> The First Amendment was integral to the adoption of the Bill of Rights, guaranteeing freedoms of speech, association, and religion. Colonial America was premised on the abhorrence of England's intolerance of these individual freedoms.<sup>96</sup> Now developed into a substantial body of jurisprudence, courts evaluate First Amendment defenses carefully. This section will examine the First Amendment generally, discussing its purposes and focusing on certain First Amendment doctrines. This section will then analyze the interaction between the First Amendment and moral rights.

#### A. *The Purposes of the First Amendment*

Justice Brandeis in *Whitney v. California*<sup>97</sup> defined the general purposes of the First Amendment.<sup>98</sup> Enlightenment is the first purpose,<sup>99</sup> and includes political, social, and scientific "news" as well as entertainment. Included under this broad umbrella is the "marketplace of ideas,"<sup>100</sup> under which Justice Holmes defined freedom of expression as the catalyst to the discovery of truth.

Our constitutional jurisprudence mandates access to facts and data in order for citizens to form their own opinions and make in-

95. *Id.*

96. While the framers were concerned with eliminating prior restraint, many First Amendment commentators have put forth varying theories as to the intended scope of the First Amendment. See GERALD GUNTHER, CONSTITUTIONAL LAW 997 (12th ed. 1991).

97. 274 U.S. 357, 375 (1927) (Brandeis, J. concurring).

98. Professor Emerson has established four values of the First Amendment's protection of expression that are very similar to those enumerated by Justice Brandeis. THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3 (1966). Each is necessary, but not in itself sufficient, because the elements are interdependent. Emerson lists the purposes as: assuring individual self-fulfillment; a means of attaining truth; a method of securing participation by the members of society in social, including political, decision making; and "achieving a more adaptable and hence a more stable community . . . maintaining precarious balance between healthy cleavage and necessary consensus." *Id.* See also THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970) (articulating legal foundations for an effective system of freedom of expression).

99. *Whitney*, 274 U.S. at 375.

100. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting). "[T]hough all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; whoever knew truth put to the worst in a free and open encounter?" JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND (1644).

formed choices. The First Amendment bestows a right "of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences."<sup>101</sup> Although an audience has a right not to listen, a speaker maintains a right to discuss.<sup>102</sup>

The second purpose Brandeis articulated is that of self-fulfillment.<sup>103</sup> This idea encompasses the need for human self-expression in all forms. "The First Amendment serves not only the needs of the polity but also those of the human spirit--a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity."<sup>104</sup>

The third purpose of the First Amendment as expressed by Justice Brandeis is that of a safety valve.<sup>105</sup> Society has a need for free expression as an alternative for social or political violence.<sup>106</sup> In this way, there is an outlet in the freedoms guaranteed by the First Amendment. "The principle of open discussion is a method of achieving a more adaptable and at the same time more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus."<sup>107</sup>

Although the First Amendment serves these important functions, not all speech receives the same protection. There are many viewpoints as to how speech should be classified. For example, Justice Black believed that the First Amendment was absolute, that "no law . . . abridging the freedom of speech" meant no law, no "ifs, or buts or whereases."<sup>108</sup> This absolutist approach has never been adopted by the Court. Instead, the Court has supported definitional balancing, achieved by categorizing speech.<sup>109</sup> The degree

101. See, e.g., *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) (acknowledging that the First Amendment gives the public access to social, political, aesthetic, moral, and ideas generally). Professor Alexander Meiklejohn defined First Amendment protection broadly, including "education . . . the achievements of philosophy and the sciences . . . literature and the arts." Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 Sup. Ct. Rev. 245, 257 (1961) (emphasis added).

102. See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 8.1[A] (1993); See also *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 559 (1985) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)) ("[F]reedom of thought and expression includes both the right to speak freely and the right to refrain from speaking at all").

103. *Whitney*, 274 U.S. at 375.

104. *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

105. *Whitney*, 274 U.S. at 375. See also Emerson, *supra* note 98.

106. *Whitney*, 274 U.S. at 375.

107. Emerson, *supra* note 98, at 11.

108. *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1951) (Black, J. dissenting).

109. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557

of protection granted to speech depends on the type of speech and its content.<sup>110</sup> For example, commercial speech and obscenity receive less protection than political or symbolic speech. Another approach advocates a case-by-case balancing of competing values.<sup>111</sup> However, this so-called ad-hoc balancing approach does not provide any predictability in the law.

### B. *The First Amendment and Copyright*

With the purposes of the First Amendment in mind, and before exploring the moral rights implications, this section briefly examines the issue of the balancing of First Amendment and copyright law generally. Any law regulating speech must not subordinate the First Amendment, and the Copyright Act is no exception.

During the 1970s, defendants in infringement actions asserted their First Amendment rights in their defense.<sup>112</sup> Although these cases failed to sway the courts, many commentators advocated an explicit First Amendment defense in infringement actions.<sup>113</sup> The Supreme Court in *Harper & Row, Publishers, Inc. v. Nation Enterprises*<sup>114</sup> addressed the defense, effectively closing the door on the debate over the First Amendment.

In *Nation*, the defendant published 300 words of the 20,000-word memoirs of President Gerald Ford before the plaintiff's licensee could publish them.<sup>115</sup> The Court held that the memoirs constituted news, and that the public was entitled to access. After consideration, the Court rejected both the Fair Use and the First Amendment defenses.

In view of the First Amendment protection already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to cre-

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(1980) (stating that commercial speech is protected, yet not as fully as political speech); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (categorizing "fighting words" as outside First Amendment protection).

110. See McCarthy *supra* note 102, at § 8.2[A].

111. See, e.g., *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).

112. See Goldstein, *supra* note 28, § 10.3 n.2.

113. *Id.* nn.5-6. "Reconciliation of copyright with the First Amendment requires the striking of a . . . balance between the property interest of the copyright holder and the public interest." Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 991 (1970).

114. 471 U.S. 539 (1985).

115. *Id.*

ate what amounts to a public figure exception to copyright.<sup>116</sup>

## 1. Fair Use

The *Nation* Court, reviewing the Fair Use defense to decide the case, explored one of two major protections of the First Amendment built into the Copyright Act.<sup>117</sup> The judicially created doctrine of Fair Use is a defense to an infringement suit, permitting persons, without consent of the copyright owner, to use the work, usually for social, political and cultural benefits.<sup>118</sup> Section 107 codifies four factors applied to determine whether a use is fair:

- (1) the purpose and character of the use;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>119</sup>

Though not exclusive, courts apply these factors to decide if the defendant should be immune from liability. Fair Use promotes First Amendment goals, but is not a First Amendment exception to the Copyright Act.<sup>120</sup>

## 2. Idea/Expression Dichotomy

The second protection for the First Amendment incorporated into the Copyright Act is the idea/expression dichotomy. The statute protects an author's expression of ideas, not the ideas themselves.<sup>121</sup> In this way, the statute balances the interests of the creator while maintaining a source of information for the public and other creators. Professor Nimmer observed that this dichotomy "represents an acceptable definitional balance between copyright

116. *Id.* at 560.

117. For an excellent essay arguing against copyright suppression of the First Amendment, see Floyd Abrams, *Copyright Shouldn't Set Aside Values of First Amendment*, *LEGAL TIMES*, Dec. 28, 1987, at 29.

118. See Goldstein, *supra* note 28, § 10.2.1; Memorandum from Prosdauer Rose Goetz & Mendelsohn to the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, *Preserving the Genius of the System: A Critical Examination of Moral Rights Into United States Law* (Sept. 20, 1989) (on file with author). Criticism and comment, teaching, news reporting, and parody are purposes behind the Fair Use doctrine. Goldstein, *supra* note 28, § 10.2.1.

119. 17 U.S.C. § 107 (1988).

120. See *supra* notes 97-111 and accompanying text (enumerating the purposes of the First Amendment).

121. See 17 U.S.C. § 102(b) (1988).

and free speech interests.”<sup>122</sup>

Other protections for the First Amendment built into the Copyright statute include the limited duration of protection and the exclusion of facts from copyrightable subject matter. These two concepts, along with Fair Use and the idea/expression distinction, balance the First Amendment and copyright.<sup>123</sup>

### C. Selected First Amendment Provisions

In addition to the Copyright Act's balancing of First Amendment concerns, other doctrines will be employed to analyze the VARA's relationship with the First Amendment. After these selected doctrines have been reviewed, the conflict between the First Amendment and moral rights will be addressed once again.

#### 1. Strict Scrutiny

At the core of the First Amendment protection of freedom of speech is political speech. Because our government is “by, of and for the people,” the people have a right to participate in government. The public is entitled to receive information, as well as to debate their differing viewpoints.<sup>124</sup> The Supreme Court has recognized explicitly that the First Amendment protects both speech and thought, even if it is offensive to society.<sup>125</sup>

In order for an individual's political speech to be restrained, the government must overcome the heavy burden of strict scrutiny.<sup>126</sup> First, the government must articulate a compelling interest.

122. Nimmer, *supra* note 38, § 1.10[B].

123. See also Lionel Sobel, *Copyright and the First Amendment: A Gathering Storm?* 19 COPYRIGHT L. SYMP. (ASCAP) 43 (1971) (arguing against any First Amendment exception to copyright); Melville D. Nimmer, *Does Copyright Abridge the First Amendment Guarantee of Free Speech and Press?* 17 U.C.L.A. L. REV. 1180 (1970) (concluding that the public interest should overpower the right of the proprietor); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970) (calling for an explicit First Amendment exception).

124. See *supra* notes 92-111 and accompanying text.

125. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) (“[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.”); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

126. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* §§ 11.5 - 11.7 (1990). See also *Gitlow v. New York*, 268 U.S. 652 (1931); *Fiske v. Kansas*, 274 U.S. 380 (1927); *Stromberg v. California*, 283 U.S. 359 (1931).

Next, the regulation by the government must be narrowly tailored to achieve the substantial interest. Finally, there must not be any less restrictive means of achieving the governmental goal.<sup>127</sup>

## 2. Expressive Conduct (Speech Plus)

Freedom of speech is not limited to the written or spoken word.<sup>128</sup> Rather, it encompasses a much broader range of expression. Speech can be combined with non-speech elements and still maintain its protection.<sup>129</sup> However, not all speech which includes an expressive component will be protected. The Supreme Court in *United States v. O'Brien*<sup>130</sup> created a test to determine whether speech combined with action is protected under the First Amendment.

The defendant in *O'Brien* burned his draft notice on the steps of the South Boston Courthouse. He was found guilty of violating the Universal Military Training and Service Act of 1948.<sup>131</sup> *O'Brien* challenged the statute's constitutionality because it restricted his freedom of expression.<sup>132</sup> The Court would not accept *O'Brien's* First Amendment argument as a complete defense, refusing to "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."<sup>133</sup> However, the Court acknowledged that *O'Brien's* actions were not wholly outside the First Amendment.<sup>134</sup> The Court presumed that his actions contained sufficient communicative aspects to invoke the First

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127. Nowak, *supra* note 127 § 14.3.

128. See *Stromberg v. California*, 283 U.S. 359 (1931) (recognizing that speech may be nonverbal); *West Virginia State Bd v. Barnette*, 319 U.S. 624 (1943) ("no official . . . can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein"); *Brown v. Louisiana*, 383 U.S. 131 (1966) (where Justice Fortas stated that First Amendment rights "are not confined to verbal expression [but] embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest").

129. The Supreme Court has recognized that certain types of non-verbal conduct which communicate an idea or belief are protected under the First Amendment. *Spence v. Washington*, 418 U.S. 405, 409-11 (1974). See also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Sherbert v. Verner*, 374 U.S. 398 (1963); *NAACP v. Button*, 371 U.S. 415 (1963).

130. 391 U.S. 367 (1968).

131. The statute made it an offense for a person who "forges, alters, knowingly destroys, knowingly mutilates" or changes a certificate. *Id.* at 370 (citing § 462(b)).

132. *Id.* at 370.

133. *Id.* at 376.

134. *Id.*

Amendment.<sup>135</sup>

In concluding that the First Amendment was called into question, the Court established a four-part test to determine whether a government interest justifies First Amendment restrictions. First, the regulation must fall within the constitutional power of the government.<sup>136</sup> Second, the regulation must further an important or substantial governmental interest.<sup>137</sup> Third, the regulation must be unrelated to the suppression of free expression.<sup>138</sup> Finally, the restriction must be no greater than is essential to further the governmental goal.<sup>139</sup>

Other cases employ the *O'Brien* test to determine whether free speech has been infringed.<sup>140</sup> For example, flag burning cases utilize the *O'Brien* test. In *Spence v. Washington*,<sup>141</sup> a student affixed a peace symbol made of tape to an American flag, protesting the Kent State killings. The state arrested him for improper flag use, and convicted him.<sup>142</sup> The Court, in reversing the conviction, modified the *O'Brien* test and articulated a two-prong test for symbolic speech. First, the court must determine whether the conduct classifies as speech under the First Amendment.<sup>143</sup> The court makes this determination by examining whether there is the intent to convey a specific message, and if there is a great likelihood the message will be understood by onlookers.<sup>144</sup> Second, the court must determine whether the state's interests are of such a substantial nature that they justify infringing the individual's First Amend-

135. *Id.*

136. *Id.* at 377.

137. *Id.*

138. *Id.*

139. *Id.* In *O'Brien's* case, the regulation passed the test. First, the Constitution vests the power to raise and support armies in the government. *Id.* Next, the Selective Service certificate fulfilled several governmental goals, including those of quick notification and rapid induction in the time of national crisis. *Id.* at 378-81. Third, these interests were unrelated to the suppression of free speech. Rather, they related to supporting a national defense. *Id.* at 380-81. Finally, the Court held that the restriction was sufficiently narrow to meet its goals. *Id.* at 382.

140. See, e.g., *Tinker v. Des Moines Indep. School Dist.*, 292 U.S. 503 (1969).

141. 418 U.S. 405 (1974). See also *Smith v. Goguen*, 415 U.S. 566 (1974); *Street v. New York*, 394 U.S. 576 (1969).

142. *Spence*, 418 U.S. at 406-07.

143. *Id.* at 409.

144. *Id.* at 410. The Court found that *Spence's* actions were protected under the First Amendment and would be understood by those viewing his conduct. The analysis under *Spence* diverges from *O'Brien* and seems to create a test focused on the factual context of the speech to determine its status. James R. Dyer, Comment, *Texas v. Johnson: Symbolic Speech and Flag Desecration Under the First Amendment*, 25 NEW ENG. L. REV. 895, 898 (1991).

ment rights. In this case, the Court also relied on the fact that the flag was privately owned by the defendant, resulting in no state interest in its preservation.<sup>145</sup>

### 3. Prior Restraint

Until 1695, writers in England had to have their works licensed before publication.<sup>146</sup> This practice of licensing is known as prior restraint,<sup>147</sup> and is considered the most drastic infringement on free speech. Considered more severe than subsequent punishment, it is still at the core of First Amendment jurisprudence.<sup>148</sup> Rather than being based upon an established licensing system, prior restraint now results from court injunctions imposed before publication of speech. "Any prior restraint on expression comes to . . . [the] Court with a heavy presumption against its constitutional validity."<sup>149</sup>

Injunctions are one of the remedies available to artists under the Copyright Act.<sup>150</sup> Although injunctions may be granted before or after the allegedly infringing work is published, preliminary injunctions are common.<sup>151</sup> A court, in determining the merits of the case before granting an injunction, may prohibit publication completely.<sup>152</sup>

### 4. Overbreadth & Vagueness

An overbroad statute not only affects activities that are not

145. *Spence*, 418 U.S. at 415. This argument could apply to moral rights. However, the public's interest in works of art is one of the purposes of the VARA articulated by Congress.

146. *Nowak*, *supra* note 126, § 16.16. The English Licensing Act of 1662 required official licensing for all printed publications.

147. See William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245 (1982); Thomas Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955).

148. *Nowak*, *supra* note 127, § 16.16. See also *Near v. Minnesota*, 283 U.S. 697 (1931).

149. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). See also *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Interestingly, several leading commentators argue that the role of prior restraint in current First Amendment jurisprudence is unclear. See Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984); John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983).

150. See Tiffany D. Trunko, *Remedies for Copyright Infringement: Respecting the First Amendment*, 89 COLUM. L. REV. 1940 (1989).

151. *Uneeda Doll Co. v. Goldfarb Novelty Co.*, 373 F.2d 851, 852 n.1 (2d Cir.), *cert. dismissed*, 389 U.S. 801 (1967).

152. *Nimmer*, *supra* note 38, § 14.06[B].



constitutionally protected but also affects protected activity.<sup>153</sup> The overbreadth doctrine protects speech from being chilled by the threat of punishment,<sup>154</sup> and guards against statutes susceptible to arbitrary and selective enforcement by government officials. Uniquely, the overbreadth doctrine is the only constitutional challenge that grants an individual defendant standing by allowing the defendant to point to the unconstitutional effect of the statute on another individual's rights.<sup>155</sup>

A related doctrine, vagueness, voids a statute that forbids or requires the doing of an act in terms so vague that a person of common intelligence must guess at its meaning.<sup>156</sup> A vague statute regulating speech gives the speaker no notice of what is prohibited speech.<sup>157</sup> Law enforcement officers and potential plaintiffs then have the difficulty of determining, in their own discretion, what is violative of the statute. Vague statutes operate to inhibit the exercise of First Amendment freedoms.<sup>158</sup> Overbreadth and vagueness, while related, are separate and distinct challenges to statutes violating the First Amendment.

#### IV. THE CONFLICT ANALYZED

With moral rights and First Amendment doctrines explored, the potential constitutional clash between the two must be addressed. This potential conflict has not been dealt with in the courts or Congress, as no plaintiff has asserted this argument, and the legislative history of the VARA does not address the infringement of First Amendment freedoms by the Act.<sup>159</sup> The Constitu-

153. Jeffrey M. Shaman, *The First Amendment Rule Against Overbreadth*, 52 *TEMP. L.Q.* 259 (1979).

154. *Id.* at 259. Justice Thurgood Marshall stated that an overbroad statute "hangs over [a person's] head like a Sword of Damocles. . . . That this Court will ultimately vindicate [a person] if his [or her] speech is constitutionally protected is of little consequence — for the value of a sword of Damocles is that it hangs — not that it drops." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

155. Gunther, *supra* note 96, at 1200. If the statute "is readily subject to a narrowing construction by the state court," an overbreadth attack will not succeed. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 55 (1976). *See also* *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987); *Houston v. Hill*, 482 U.S. 451 (1987); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

156. *See* *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926).

157. This violates the Due Process Clause's notice requirement. Gunther, *supra* note 96, at 1202. "Vague laws may trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

158. *Grayned*, 408 U.S. at 108-09.

159. Chief Minority Counsel for the Senate Judiciary Subcommittee on Technology

tion clearly gives Congress the power to legislate in the area of copyright and moral rights.<sup>160</sup> By enacting the VARA, Congress exercised those rights.

When an idea or opinion is communicated to others, the potential conflict between the First Amendment and other interests becomes more acute.<sup>161</sup> First Amendment jurisprudence has long been concerned with reconciling freedom of expression with the right to protection against unfair damage to reputation.<sup>162</sup> The VARA brings this question into direct scrutiny. The First Amendment doctrines laid out above may guide this inquiry. As noted, any statute violating the First Amendment faces a heavy presumption against its validity. If this potential clash is indeed a reality, the outlook for moral rights may be dim.

### A. *Usefulness of Copyright Defenses*

While copyright law balances First Amendment concerns by incorporating the Fair Use defense and the idea/expression dichotomy, these doctrines do not apply to moral rights very effectively. The rights given by section 106A are subject to the Fair Use defense. However, the House Report states that it is unlikely that such a defense will be successful.<sup>163</sup> Professor Damich notes that there is no application of the Fair Use defense to the two rights protected. The rights apply to irreplaceable works, for the most part,<sup>164</sup> and destruction or physical alteration of a work can hardly be Fair Use when the objective of the user could be accomplished by destroying or altering a reproduction.<sup>165</sup>

The Fair Use factors themselves militate against recognition of the Fair Use defense for moral rights. First, the purpose and character of the use is to alter or destroy the work. Clearly the statute prohibits these actions.<sup>166</sup> Second, the nature of the copyrighted

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and the Law George Smith argues that section 106A raises free speech issues "rich with irony." George Smith, *Let the Buyer of Art Beware*, THE RECORDER, June 10, 1991, at 4. Smith points to the rejection of a flag desecration amendment to support his argument against section 106A. "By the same token, the artists law makes it illegal for the owner to mutilate or disfigure a painting to express a political message. . . . The bizarre irony of this legislative handiwork was entirely lost on the members of the 101st Congress." *Id.*

160. U.S. CONST. art. I, § 8, cl. 8.

161. Emerson, *supra* note 98, at 66.

162. *Id.* at 68.

163. ALEXANDER LINDEY, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 9.07[1][a] (1992) (quoting the House Report on H.R. 2690).

164. Notwithstanding limited edition originals.

165. Damich, *supra* note 28, at 986.

166. As noted above, however, the statute is unclear as to what specifically would con-

work is defined by section 101 of the Copyright Act, limiting protection to visual arts that meet the statute's criteria. By definition, the works protected are original works in single or limited editions. Allowing destruction or alteration would quash the statute's purpose of protecting such works. Third, the amount of the work used seems irrelevant because any alteration to a work, no matter how small, could prejudice the creator's reputation. Finally, the effect on the potential market, arguably the most important factor, dictates that the First Amendment doctrine is inapplicable to moral rights. A work altered would likely not be marketable unless a buyer found the alterations enhanced the work.

It is unlikely that a court would reason that the Fair Use defense would permit the alteration or destruction of a work when the statute's very purpose is to protect the work. Also, any use of a protected work that would damage the creator's reputation or honor cannot be called fair. Therefore, one of the First Amendment protections built into the Copyright Act does apply to moral rights.

Similarly, the idea/expression dichotomy does not apply to moral rights. The distinction between ideas, which are not protected, and expression, which is protected, does not find a basis in moral rights law. Each work of visual art is a unique expression, and therefore all such works would be protected as expression if the copyright's parameters applied to visual art. This dichotomy does not serve to protect the public's First Amendment rights as it does in copyright.

The two protections for the First Amendment in copyright law do not apply to moral rights. Because there is no inherent protection of the First Amendment in section 106A, the statute may be more susceptible to attack. To make this determination, this article will next apply First Amendment doctrines to analyze section 106A's constitutionality.

### *B. Strict Scrutiny*

According to Professor Merryman, traditional *droit moral* does not prevent fair comment and criticism. Rather, it merely allows the public the opportunity to see a work as the creator wanted to show it.<sup>167</sup> While this generally may be true of moral rights, the First Amendment is a fundamental right that must not

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stitute prejudice to the honor or reputation of the artist.

167. Merryman, *supra* note 16.

be abridged by Congress. The glitch in this reasoning is that the Constitution also provides the Copyright Clause, and thus, rights are in conflict. Without detailed analysis, the solution may be determined by the positions these rights enjoy. The First Amendment occupies a "preferred position,"<sup>168</sup> receiving preferential treatment by courts. Further, as a fundamental right of the Bill of Rights, the First Amendment arguably trumps the lesser goal of Congress to promote the useful arts.

This inquiry can also be resolved by applying strict scrutiny to a regulation to determine if the statute violates the First Amendment.<sup>169</sup> The test itself examines the government interest, impliedly balancing it with other rights. Because most violations of section 106A involve conduct, the *O'Brien* test would be applied. The next section explores this application. However, the Court may change its view and determine that conduct so closely aligned with First Amendment expression necessitates the use of strict scrutiny.

The government must first articulate a compelling interest in limiting speech. Arguably, the determination by Congress that visual artists' honor and reputation are compelling could satisfy this prong. However, this argument is belied by section 106A's narrow scope: if these concerns were so important, the rights would apply to *all* artists who satisfy the statute's criteria, not solely visual artists, and would apply to *all* works of art, not just those that satisfy 106A's limited scope.

Second, the regulation must be narrowly tailored to meet the interest. Again, section 106A fails the prong, because while the statute is narrow, the objective of protecting artists' reputations is not. The statute does not protect all visual artists, let alone artists in general. Also, if the interest in artists' reputations was so important, Congress would have extended standing to other groups and would have given perpetual protection to moral rights (or at least for a period after the artist's death). To satisfy strict scrutiny, the statute must not be over- or underinclusive. As pointed out above,<sup>170</sup> the statute does not protect all artists and does not protect all visual artists uniformly. It also may override legitimate First Amendment rights, thus nearing overinclusiveness. In asserting the importance of an artist's honor and reputation, the statute fails to protect them.

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168. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

169. See *supra* notes 124-27 and accompanying text.

170. See *supra* note 94 and accompanying text.

If a court rejects the arguments in the first two prongs, the court will apply the third prong of the test, requiring that no less restrictive means of achieving the government's goal exists. It is difficult to articulate any variation of the statute that potentially would not infringe upon the First Amendment protection. However, the statute's grant of rights to the artist does not articulate specific actions that would violate an artist's rights. The application of strict scrutiny to section 106A is thus far theoretical, but in any such case, the court would struggle with the test.

### C. *Expressive Conduct*

Hypothetical #3, the only one in which section 106A protects the artist, involves expressive conduct. The *O'Brien* test determines whether the First Amendment is violated by the regulation of speech.<sup>171</sup> First, the regulation must fall within the constitutional power of government. The Copyright Clause of Article I and the treaty power of the Senate<sup>172</sup> clearly satisfy this prong. Second, the regulation must further an important or substantial governmental interest.<sup>173</sup> As discussed immediately above, this is problematic because Congress determined only visual artists would be protected. If the reputation and honor of artists is an important interest, all artists would be protected under the statute. In any event, the statute furthers the important government interest of protecting visual artists.

Next, the regulation must be unrelated to the suppression of free speech. It seems that in protecting the honor and reputation of artists, the free speech rights of others who would harm that reputation are implicated. However, the articulated interest, on its face, does not suppress free expression. A court likely would find this prong satisfied. Finally, the restriction must be no greater than necessary. Again, should a court reach this prong, the statute is unclear as to what conduct is prohibited.<sup>174</sup> Therefore, the regu-

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171. See *supra* notes 128-45 and accompanying text.

172. Berne Convention compliance arguably dictates moral rights protection.

173. This seems to lessen strict scrutiny to intermediate scrutiny.

174. Using the alternative test articulated by the *Spence* Court, the result further implicates the First Amendment. See *supra* notes 129, 142-44 and accompanying text. First, the court must determine whether the conduct qualifies as speech under the First Amendment. The person certainly had the intent to convey a specific message. Whether the message would be understood by those who viewed his action depends on what he painted onto the mural, what he said as he did so, or any other indication that he was protesting American policy in the Middle East. Second, the court must determine that the interest is so substantial as to justify infringing the First Amendment. The result of this inquiry remains to be seen.

lation's scope is not readily determined, so lesser restrictions are difficult to imagine. Further, the hypothetical may be complicated by the person's speech in this situation. The person's political speech is at the core of the First Amendment, but section 106A may restrict it. A court applying the *O'Brien* test arguably could find the regulation is unconstitutional as applied to him or her.

A hypothetical based on *Spence*<sup>175</sup> may complicate the conflict even further. If Spence had affixed the peace symbol to a painting fitting the visual art definition, he would have violated section 106A. The symbol was temporary, and part of core political speech, but the statute would have dictated that he had infringed the artist's moral rights. Perhaps an additional requirement of permanency to the destruction portion of the right of integrity would grant some protection to the First Amendment.<sup>176</sup>

#### *D. Prior Restraint*

Section 106A may violate the prohibition against prior restraint. Given the heavy presumption against prior restraint, if a beholder were to be enjoined before exercising his First Amendment rights, the statute could be struck down.

For example, where administrators in a juried art competition choose not to attribute works to their creators, such action arguably violates the artist's right of attribution. An artist who reads the competition's rules and decides not to enter the competition may be able to enjoin this violation. It seems unlikely that the heavy presumption against such prior restraint of the administrator's actions could be overcome by an artist's right to be acknowledged as creator.

#### *E. Overbreadth & Vagueness*

Other challenges to section 106A under the First Amendment are overbreadth and vagueness.<sup>177</sup> Section 106A may punish violations of the right of integrity or attribution, but as shown by the hypotheticals, legitimate First Amendment activity also may be punished. The man who defaced the mural in Hypothetical #3 violated section 106A, and is liable thereunder. However, core First Amendment speech is at issue; the existence of section 106A chills

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175. See *supra* notes 129, 142-44 and accompanying text.

176. However, temporary alteration may prejudice the reputation and honor of the artist. The statute is not clear as to what constitutes such prejudice.

177. See *supra* notes 153-58 and accompanying text.

speech. Because of the broad standing provision of overbreadth, as long as a defendant could articulate one individual whose First Amendment rights are undermined by section 106A, the statute is overbroad. One option is for a court to narrow the statute to cure its overbreadth, but as Congress has stated repeatedly, the VARA is *very* narrow in its scope. Because prohibited actions are unclear, a court could not narrow the statute.

As discussed above, section 106A does not clearly state what activities violate the statute. Persons could differ as to what violates an artist's reputation or honor. The statute also gives a judge unguided discretion to determine whether a destroyed work is of "recognized stature."<sup>178</sup>

### F. A Solution?

The arguments above point out the conflict between First Amendment and moral rights. While some arguments may be stronger than others, the conflict is certainly possible. As one witness before Congress stated, "there will be substantial pressure for the courts to expand the moral rights once recognized."<sup>179</sup> Therefore, the arguments may apply to the right of withdrawal, the right to prevent excessive criticism or other moral rights. In the case of excessive criticism, strict scrutiny may indeed trump moral rights protection.<sup>180</sup>

Interestingly, the purposes that Justice Brandeis articulated in *Whitney* apply on both sides of this argument. In the marketplace of ideas, enlightenment can be fostered by an artist's contribution of visual art. However, the expression of others also contributes to the search for truth.<sup>181</sup> Self-fulfillment also is furthered by encouraging artists to create and express themselves.<sup>182</sup> Similarly, beholders are entitled to express themselves. Finally, as an alternative to political or social violence, free expression serves the artist by functioning as an outlet, and serves the beholders by fostering a

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178. Expert testimony on this point would be as subjective as artists choose to be.

179. Nimmer, *supra* note 38, § 8.21[A]. Hypothetical #4 involves a motion picture, currently excluded from moral rights protection under the VARA. Should the prediction come to pass that a little protection will lead to more, the film student may indeed have a cause of action against the studio. Similarly, the colorization debate discussed in an earlier footnote would be moot if motion pictures were protected by the moral rights statute. See *supra* note 49.

180. Most criticism is in the form of words, be it written or oral, so the lesser *O'Brien* test's analysis would be replaced by strict scrutiny.

181. See *supra* notes 97-102 and accompanying text.

182. See *supra* notes 103-104 and accompanying text.

stable community that engages in healthy cleavage without violence.<sup>183</sup>

The conclusion to be drawn from this article's discussion of the conflict is one of awareness. Congress enacted the VARA, but never explored the First Amendment implications. While it is unlikely that a court would completely void section 106A, First Amendment rights must be addressed. The total elimination of section 106A contradicts the important societal interests it protects. As noted above, narrowing the statute is difficult, if not impossible, to accomplish while still protecting its purposes.

Therefore, perhaps courts should address First Amendment defenses to section 106A just as they do in any other case: by employing definitional balancing. A court should assess the First Amendment protection given to the type of speech at issue in the case. As shown with hypothetical #3, expressive conduct, or speech combined with action, is judged by using the *O'Brien* test. Violations of the right of attribution or integrity, engaged in for commercial purposes, would be analyzed under *Central Hudson* and such cases. Because certain types of speech receive little or no First Amendment protection, section 106A would triumph. In other cases, section 106A would yield to the First Amendment.

Finally, the issue of remedies is important to the First Amendment inquiry. The First Amendment defense, in cases where definitional balancing dictates it, may be only partial. Perhaps the beholder would be held liable, but could not be asked to pay for the exercise of a constitutional right. However, people must take responsibility for their actions, and moral rights are societal interests. The defendant may thus be required to pay only the market value of the work. While this proposed solution is not perfect, the First Amendment is protected.

## V. CONCLUSION

The conflict between moral rights jurisprudence and the First Amendment is not easily resolved. When rights are in conflict, they must be balanced in order to determine the outcome. In recognizing the rights of integrity and attribution, Congress did not consider the potential First Amendment implications of the VARA. Discussion on the potential clash of rights virtually was nonexistent.

Although the VARA protects only a narrow group of visual

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183. See *supra* notes 105-07 and accompanying text.



artists, First Amendment concerns are raised. Should the United States enact further legislation expanding moral rights for the artist, these First Amendment concerns would escalate. Ultimately, courts will determine the implications of moral rights recognition in the United States. Time will tell whether a beholder will question the constitutionality of a statute that impinges upon his or her free speech.

As the quotes from Ruskin and Milton that introduce this article indicate,<sup>184</sup> the dichotomy between the artist's personal feelings and the beholder's right to expression is hard to balance. This article proposes one vehicle by which to alleviate the potential conflict: definitional balancing. Perhaps courts will develop other doctrines to balance the competing yet complimentary rights. While freedom of speech is not absolute, this freedom, which is essential to our government, should not be overcome by the rights of an artist to his or her reputation or honor.

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184. See *supra* notes 1 and 2 and accompanying text.