1992

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NOTES AND COMMENTS

THE VISUAL ARTISTS RIGHTS ACT OF 1990: AN ANALYSIS BASED ON THE FRENCH DROIT MORAL

Jill R. Applebaum*

INTRODUCTION

The doctrine of moral rights (le droit moral), protects the artist's spirit as embodied in his or her work. It accomplishes this by arming authors with extraordinary rights. In France, where the moral rights doctrine has been most highly developed, moral rights confer upon the author: (1) the right to decide whether to communicate or divulge work to the public; (2) the right to withdraw or amend a published work; (3) the right to receive credit or attribution for authorship; and, (4) most importantly, the right to preserve the integrity of his or her work.


1. In this Comment the term "artist" refers to all authors or creators.

2. F. Pollaud-Dulian, Moral Rights in France, Through Recent Case Law, 145 R.I.D.A. 126 (July 1990); see INTERNATIONAL COPYRIGHT LAW AND PRACTICE 90-91 (Bender 1988) [hereinafter INT'L COPYRIGHT] (stating that French law "views a work of the mind as bearing the imprint of its author's personality"); see also Peter H. Karlen, Joint Ownership of Moral Rights, 38 J. COPYRIGHT SOC'Y U.S.A. 242, 242 (1990) (noting that artists and other creative persons consider moral rights to be as important as copyrights).

3. See infra notes 23-97 and accompanying text (describing the provisions of the moral right).

4. See Pollaud-Dulian, supra note 2, at 128 (stating that French moral rights law is "one of the most highly developed and affords authors particularly effective protection"); INT'L COPYRIGHT, supra note 2, at 90-91 (explaining that French law elevates the concept of moral rights). See also Russell J. DaSilva, Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States, 28 BULL. COPYRIGHT SOC'Y, U.S.A. 1, 2 (1980) (noting that France is the "vanguard of protection" of artist's rights). Many European and some Latin American countries also embrace the doctrine of moral rights. John H. Merryman, The Refrigerator of Bernard Buffet, 27 HASTINGS L.J. 1023, 1025 (1976).

5. See DaSilva, supra note 4, at 3-4 (delineating the four categories of moral rights). Some scholars, however, believe there are only three categories of moral rights: divulgation, paternity, and integrity. Merryman, supra note 4, at 1028. According to
French law perceives the moral right as a natural and personal right rather than as a purely legal right. This perception derives from the French belief that artists pour a part of their soul into their work, creating a personal link between themselves and their creations. Certain characteristics stem from the nature of the right. French law provides that moral rights are perpetual, inalienable, and non-seizable.

Until last year, the United States had no laws to compare to French moral rights law. With the enactment of the Visual Artists Rights Act of 1990 (VARA), however, the United States has finally adopted a framework for providing moral rights protection to artists. The VARA, which amends the United States copyright statute, provides much more limited protection than French law. It covers visual works of fine art, rather than all works of the mind, and accords to artists

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6. See DaSilva, supra note 4, at 11 (discussing the natural rights origins of authors' rights).

7. See Pollaud-Dulian, supra note 2, at 126 (explaining "[t]he 'moral right' doctrine, as applied in some countries, includes very extensive rights which courts in some American jurisdictions are not yet prepared to acknowledge"); Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947), cert. denied, 335 U.S. 813 (1948) (holding that Esquire Magazine had the right to reproduce the plaintiff's artwork without his name because "[t]he conception of 'moral rights' of authors so fully developed in the civil law countries has not yet received acceptance in the law of the United States"); Geisel v. Poynter Products, 295 F. Supp. 331, 339-40 n.5 (S.D.N.Y. 1968) (finding that the doctrine of moral rights, which might otherwise provide the plaintiff cartoonist with the right to prevent the defendant magazine publisher from altering his drawings, "is not part of the law in the United States"); Crimi v. Rutgers Presbyterian Church, 89 N.Y.S.2d 813, 819 (Sup. Ct. 1949) (holding that plaintiff artist could not prevent the church in which he had created a fresco from painting over that fresco because he relinquished all rights in it by unconditionally selling it to the church, and moreover, moral rights did not exist under New York or United States law); see also DaSilva, supra note 4, at 5-6 (stating that United States law rejects the moral rights doctrine); Merryman, supra note 4, at 1035-36 (observing that the right of integrity does not exist under United States law).

10. See Gilliam v. American Broadcasting Cos., 538 F.2d 14, 27 (2d Cir. 1976) (Gurfein, J., concurring) (pronouncing that the Lanham Act is not a substitute for the droit moral enjoyed by European authors); Geisel v. Poynter Products, 295 F. Supp. 331, 339-40 n.5 (S.D.N.Y. 1968) (finding that the doctrine of moral rights, which might otherwise provide the plaintiff cartoonist with the right to prevent the defendant magazine publisher from altering his drawings, "is not part of the law in the United States"); Crimi v. Rutgers Presbyterian Church, 89 N.Y.S.2d 813, 819 (Sup. Ct. 1949) (holding that plaintiff artist could not prevent the church in which he had created a fresco from painting over that fresco because he relinquished all rights in it by unconditionally selling it to the church, and moreover, moral rights did not exist under New York or United States law); see also DaSilva, supra note 4, at 5-6 (stating that United States law rejects the moral rights doctrine); Merryman, supra note 4, at 1035-36 (observing that the right of integrity does not exist under United States law).


only the rights of attribution and integrity. The VARA differs from French law in other essential respects. For example, it limits moral rights protection to the life of the author and permits authors to alienate their moral rights.

This divergence in treatment of artistic protection reflects fundamental differences between French and American legal attitudes. Since the French Revolution, the French have held artists' rights in the highest esteem; moral rights, central to their notion of copyright, advance well beyond the scope of American copyright law. On the contrary, the United States, until recently, has refused to recognize artists as a distinct class, in need of special protection. Whereas French law differentiates art from other forms of property in order to protect intellectual and moral interests, United States copyright law has traditionally treated art like any other object of property — its primary goal has been to protect only economic interests.

The United States' fledgling moral rights legislation has emerged out of an experience quite distinct from its French counterpart. While history and attitudes differ, however, moral rights legislation can work

15. DaSilva, supra note 4, at 53.
16. Pollaud-Dulian, supra note 2, at 128. The doctrine of moral rights grew out of the philosophy of individualism, as embodied in the French Revolution. Laura L. Van Velzen, Note, Injecting a Dose of Duty into the Doctrine of Droit Moral, 74 Iowa L. Rev. 629, 632-33 (1989). By the late eighteenth century, authors rejected the notion that their artistic rights existed as a sovereign privilege, and came to believe that they were born with certain basic rights, conferred by natural law as an act of creation. Id.
17. See Pollaud-Dulian, supra note 2, at 4 (citing leading French commentator, Henri Desbois, as stating that "[i]n the view of French jurists, moral rights are not trifling interests which merely are appended to the law of copyright. On the contrary, they derive from . . . natural law principles [and] indeed are independent from and superior to any pecuniary interest in a work of art").
18. Pollaud-Dulian, supra note 2, at 128 (commenting that the elevated role of droit moral in French society derives in part from the culture's traditional respect for the arts and sciences); DaSilva, supra note 4, at 7 (translating Pierre Recht as stating that "when droit moral fanatics discuss moral rights, they take the attitude of a religious zealot talking of sacred things").
19. DaSilva, supra note 4, at 54.
20. See Pollaud-Dulian, supra note 2, at 128 (distinguishing the French system from those where economic interests dominate); see also DaSilva, supra note 4, at 12 (emphasizing the romantic nature of droit moral and stating how the French believe that the author, in creating a work of art, makes a gift to the world which in return bestows upon the author the right to respect for his or her genius).
21. Merryman, supra note 4, at 1037; see also DaSilva, supra note 4, at 54 (noting that American law tends to view art "more as an object of commerce than as a product of the spirit").
within the United States legal system. This Comment analyzes the French droit moral and compares it to the American moral rights experience, as codified in the Visual Artists Rights Act of 1990. Part I provides an understanding of the French moral rights doctrine as set forth in the 1957 Law. Part II outlines the Visual Artists Rights Act of 1990. Part III analyzes and compares the moral rights doctrines as articulated in both French and United States law. Part IV offers recommendations for modification of the VARA, based upon the French experience in order to facilitate the successful integration of the moral rights doctrine into United States jurisprudence.

I. DROIT MORAL

A. BACKGROUND

In France, copyright law (droit d'auteur) is composed of two elements, the economic right (droit patrimoniaux) and the moral right (le droit moral). Both rights are codified in a single statute, the Law of 11 March 1957 (the 1957 Law), but operate independently of each other.

22. See Merryman, supra note 4, at 1042-49 (advocating modification of United States law to protect moral rights, but recognizing the difficulty of adopting a French moral rights framework since such a system is “in some basic sense alien to American ideals and experience”); see also Jane C. Ginsburg, A Tale of Two Copyrights: Literary Property in Revolutionary France and America, 64 Tul. L. Rev. 991, 991-96 (1990) [hereinafter Tale of Two Copyrights] (explaining that the differences in French and American copyright law are not as extensive as generally portrayed and thus should not preclude harmonization). But see DaSilva, supra note 4, at 53-56 (contending that it may be impossible to successfully transport moral rights to the United States).

23. See INT'L COPYRIGHT, supra note 2, at 10 (outlining the French dualist theory of copyright).


25. INT'L COPYRIGHT, supra note 2, at 11.

The conveyance of economic right will leave the entitlement of the author to moral right altogether unaffected. Whoever then exploits a work commercially, therefore, may not modify it without the author's consent. Similarly, the transfer of moral right upon the death of an author takes place according to rules different from those applicable to transfers of economic right. Id.
The economic right, akin to the American concept of copyright, is a property right which consists of a temporary monopoly to exploit and draw profits from protected works. The right is typically used when conveying an author's work and is by nature transferrable. Whereas the moral right protects the author's rights, the economic right protects the product of the creative act — the material, corporeal object.

The moral right, akin to a right of personality, predominates over the economic right. It is designed to protect the author's right to maintain respect for his or her name and work. Since the primary justification for the right is the idea that art is an extension of the artist's personality, and that to mistreat the work is to harm the artist, the right attaches to the artist who creates the work, and not to the work itself.

B. Subject Matter

Authors attain moral rights by creating a work, regardless of the form, merit, or purpose of the work. The work, however, must re-
present an “intellectual work” or a “work of the mind.” 37 Although the 1957 Law does not explicitly define “work of the mind,” it offers examples of the types of creations it protects: books, pamphlets, lectures, court pleadings, choreographic works, musical compositions, cinematographic works, drawings, paintings, architecture, sculpture, maps, and computer software. 38 The law thus offers an extremely broad range of protection.

While it seems as if the 1957 Law extends protection to most forms of intellectual work, the subject matter of protection does have limitations. One French court has held that it “only protects specific, individualized, and perfectly identifiable creations, not a genre or a family of forms.” 39 Although the law protects all intellectual works, regardless of kind, courts have been reluctant to extend moral rights protection to works that address the senses of smell and taste. 40 Even with these limitations, the French moral rights doctrine touches upon a wide range of intellectual creations.

C. Features

By its nature, the moral right is perpetual, 41 inalienable, 42 non-seiza-

37. INT'L COPYRIGHT, supra note 2, at 11-13.
38. 1957 Law, supra note 24, at art. 3; see INT'L COPYRIGHT, supra note 2, at 11-12 (noting that the work does not even have to be “fixed,” so that moral rights might extend to, for instance, dance performances or unrecorded law lectures).
40. See INT'L COPYRIGHT, supra note 2, at 14 (citing Judgment of July 10, 1974, Trib. gr. inst., Paris, D.S. somm. 40 (holding that culinary recipes are excluded from copyright protection)); see also id. (citing Judgment of July 3, 1975 (Apaco v. Parfums Ulric de Varens), Paris, R.I.D.A. 1977, No. 91, at 108 (holding that perfume formulas are not works of the mind despite the fact that they are entitled to copyright protection)).
41. 1957 Law, supra note 24, art. 6, 19 and 20. Moral rights endure even after economic rights expire. Pollaud-Dulian, supra note 2, at 216, 232. As long as the work remains, “it is the function of the right to ensure that the author and his work are protected.” Id. at 232.
After death, moral rights transfer to the author’s descendants, spouse, other heirs, or general legatees. INT'L COPYRIGHT, supra note 2, at 102. Ideally, the person or persons left to guard the author’s work will act on behalf of the wishes of the author, rather than in his or her own interest. Pollaud-Dulian, supra note 2, at 232. However, in the case of manifest abuse of the exercise or non-exercise of the right to disclose or rights to exploit a work by the deceased author’s representatives referred to in the preceding article, the tribunal civil may order any appropriate measure. . . .
The matter may be referred to the tribunal particularly by the Minister in charge of Arts and Letters.
ble, and universal. Thus, foreign authors may invoke the right in France, even if their home nations do not have moral rights laws of their own. The 1957 Law has several other significant characteristics. It provides that authors of intellectual works shall have moral rights against all persons. The only limits on protection are that the author must be a natural person and must be the creator of the work. At times, such seemingly benign requirements present practical difficulties. For instance, organizations and private corporations, such as artist guilds, newspapers, or magazines may not claim moral rights if no one author is responsible for the entity's creation. Similarly, where artists such as film makers have collaborated on a work, as occurs with greater frequency in modern society, special rules must apply to pre-

In 1946, the French government created the National Literary Fund. Raymond Sarrate, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 Am. J. Comp. L. 465, 484 (1968). The fund, which was placed under the Minister of Arts and Letters control, is empowered to protect the integrity of literary works, which "after the author's death, have fallen into the public domain." Id. In addition, the 1957 Law creates a special provision for the disclosure of posthumous works. Pollaud-Dulian, *supra* note 2, at 216-32.

42. 1957 Law, *supra* note 24, art. 6. Under French law, moral rights cannot be assigned by contract or waived. Pollaud-Dulian, *supra* note 2, at 132. Courts and scholars have repeatedly emphasized that "inalienability" is a fundamental component of the moral right; see DaSilva, *supra* note 4, at 16 (citing Desbois, who equated alienating one's moral right with "moral suicide"). Moreover, courts will generally refuse to enforce contracts containing a waiver clause as a condition of employment or sale. Id.

While French courts continue to reaffirm the notion that authors cannot explicitly waive their moral rights, they have shown that they are not hostile to the idea of implicit waiver. See infra note 261 (discussing the French courts' treatment of waiver). For example, if an author of a book authorizes a third party to adapt his work into a play, courts may find that he implicitly waived his integrity rights (such as a change in medium). Id.


44. Pollaud-Dulian, *supra* note 2, at 132. Since the French perceive the moral right as a natural right, it is logical that the right apply to all peoples, independent of their nationality. Id.

45. See id. at 156 (explaining that while courts have traditionally protected the rights of foreign authors, the Fourth Chamber of the Paris Court recently denied American authors the right to invoke their moral rights in France in Rowe v. Walt Disney and Turner v. Huston and Maddow); Michael Landau, *Colourization, Copyright and Moral Rights: A U.S. Perspective*, 5 INTELL. PROP. J. 215, 246-252 (1990) (addressing the Turner v. Huston and Maddow litigation).

46. 1957 Law, *supra* note 24, art. 1.

47. DaSilva, *supra* note 4, at 12.

48. DaSilva, *supra* note 4, at 12-13; see 1957 Law, *supra* note 24, at art. 19 (creating a special exception to deal with the problems created by collective works).
vent one author from claiming his or her right to the exclusion of the others.\textsuperscript{49}

\section*{D. Rights Protected}

The moral right is a composite right.\textsuperscript{50} Scholars have traditionally classified the moral right into four components: the right to divulge, the right to withdraw, the right to paternity, and the right to integrity.\textsuperscript{51}

\subsection*{1. Divulgation}

Authors have the right to control the disclosure of their work.\textsuperscript{52} If the author believes his or her work is incomplete or a failure, he or she cannot be forced to bring it to the attention of the public.\textsuperscript{53} Where an author has not entered into a contractual agreement to disclose a work, his or her right to control divulgation is absolute.\textsuperscript{54} Although no statute defines divulgation, French courts commonly understand it as the act of communicating work to others.\textsuperscript{55} Thus, courts have inferred an intent to divulge from the sale or publication of a work.\textsuperscript{56}

Disputes regarding divulgation often arise when third parties commission authors to create works.\textsuperscript{57} In the leading case on the subject, \textit{Whistler v. Eden},\textsuperscript{58} the Paris \textit{Cour de cassation} held that where artists retain their work in good faith (i.e., because they are dissatisfied with their work), they will not be compelled to divulge it to the party that commissioned it, although they may be responsible for damages for

\begin{itemize}
\item \textsuperscript{49} DaSilva, \textit{supra} note 4, at 12-13; see 1957 Law, \textit{supra} note 24, art. 10 (setting forth the Law's treatment of collaborative works).
\item \textsuperscript{50} Merryman, \textit{supra} note 4, at 1027.
\item \textsuperscript{51} DaSilva, \textit{supra} note 4, at 3-4.
\item \textsuperscript{52} 1957 Law, \textit{supra} note 24, art. 19. Article 19 provides, "[t]he author alone shall have the right to divulge his work. He shall determine the method of disclosure and shall fix the condition thereof..." \textit{Id}.
\item \textsuperscript{53} Pollaud-Dulian, \textit{supra} note 2, at 162. Even if the author is destitute, and divul-gation of the work would cover the author's debts, creditors cannot force the author to sell. \textit{Id}. "So long as a work of art has not been completely created — of which the artist alone can be the judge — it remains a mere expression of its creator's personality, and has no existence beyond that which he tentatively intends to give it." Sarraute, \textit{supra} note 40, at 467.
\item \textsuperscript{54} INT'L COPYRIGHT, \textit{supra} note 2, at 94.
\item \textsuperscript{55} INT'L COPYRIGHT, \textit{supra} note 2, at 93.
\item \textsuperscript{56} INT'L COPYRIGHT, \textit{supra} note 2, at 93.
\item \textsuperscript{57} Pollaud-Dulian, \textit{supra} note 2, at 164.
\item \textsuperscript{58} INT'L COPYRIGHT, \textit{supra} note 2, at 92 (citing Judgment of Dec. 2, 1897 (Whistler v. Eden), Cours d'appel, Paris, D.P.II 1898, at 2465, Judgment of March 14, 1900, Cass. civ. Ire note Planiol (Fr.).
\end{itemize}
breach of contract. Similarly, third parties may neither prohibit artists from completing works that have already been commissioned, nor reconstruct works that artists themselves have destroyed.

2. The Right to Withdraw

Even after authors have disclosed their work, they retain the right to withdraw it from the public in order to prohibit its distribution or to modify it. Some specialists do not recognize this right as a separate moral right, but see it instead as a part of the more general moral rights doctrine. The majority of scholars agree that authors may in-

59. DaSilva supra note 4, at 18. In Whistler v. Eden, the Cour de cassation, affirming the Cours d'appel, held that, in keeping with Article 19 of the 1957 Law, Lord Eden could not compel Whistler to deliver the portrait that he had painted for Lord Eden when Whistler did not wish to divulge it. INT'L COPYRIGHT supra note 2, at 92-93. Lord Eden had commissioned James McNeill Whistler to paint a portrait of his wife, and promised payment of between 100 and 150 guineas. Merryman, supra note 4, at 1025 (citing Whistler). Whistler completed the portrait, and proceeded to exhibit it at the Salon du Champs de Mars, but then refused to deliver the work to Lord Eden. Id. He had received payment of 100 guineas. Id. Whistler claimed that although he had shown the work at a salon, he was dissatisfied with his rendering of Lady Eden's face. DaSilva, supra note 4, at 18 (citing Whistler). While the Cour de cassation upheld Whistler's right of divulgation, it held that Whistler refrain from further exhibition of the painting, return his fee, and compensate Lord Eden for breach of contract. Merryman, supra note 4, at 1024 & n.4 (citing Whistler).

60. See Pollaud-Dulian, supra note 2, at 166, 274 n.72 (citing Judgment of Jan. 8, 1980 (Dubuffet v. Régie Nationales des Usines Renault), Cass. civ. 1re, R.I.D.A. April 1980, at 154, A. Francon obs./ Judgment of March 16, 1983, Cass. civ. 1re, R.I.D.A. July 1983, at 80). There, the Cour de cassation held that the Renault Motor Company, which had commissioned Dubuffet to create a monumental sculpture, could not withdraw the commission after Dubuffet had already commenced construction. Id. at 166-68. "[T]he author... has a moral right in that structure insofar as it derives its originality from the model and realizes its author's conception." Id. at 166.

61. See INT'L COPYRIGHT, supra note 2, at 93 n.237.2 (citing Judgment of March 6, 1931 (Camoin v. Carco), Cours d'appel, Paris, D.P.II 88). In Camoin, the Paris Cours d'appel ruled that the plaintiff painter's rights had been violated when a third party retrieved the torn pieces of the painter's work from the trash, put them back together, and displayed them. Pollaud-Dulian, supra note 2, at 162. See also INT'L COPYRIGHT, supra note 2, at 94 (affirming that "it has been repeatedly decided that the publication of a work destroyed by the author and reconstructed by another person constitutes a violation of the moral right").

62. 1957 Law, supra note 24, art. 32. "Notwithstanding the transfer of the exploitation rights, the author, even after the publication of his work, shall enjoy... the right to correct or retake." Id. See Sarraute, supra note 41, at 476-77 (stating that an author may prohibit reproduction and distribution of his or her work, even after disclosure); see also Pollaud-Dulian, supra note 2, at 180 (citing Desbois, who commented that the act of withdrawal is merely a stage in the author's reaction to his own work; "he regrets his decision to publish the work and then withdraws the work").

63. Merryman, supra note 4, at 1028.
voke this right without justification, and that the right applies to written rather than visual artworks.

In theory, the right to withdraw empowers authors with extraordinary rights. It authorizes writers, for example, to demand removal of their books from publication even after a publisher has printed and distributed them in the market. In practice, however, the right to withdraw provides authors with little of value. Since the 1957 Law requires that authors who wish to invoke the right to withdraw indemnify their transferees prior to asserting the right, authors cannot take advantage of the right if they cannot pay for it. The limitations on the use of this component of the droit moral render it virtually useless.

3. Paternity

At all times after creation of a work, authors retain the right to receive both respect for their name and credit for their work. Since artists project their own personality into their work, the doctrine of droit moral grants them the right to claim authorship of their creations. Specifically, creators enjoy three rights: (1) the right to be recognized as the authors of their work or, in the alternative, to publish anonymously or under a pseudonym; (2) the right to prevent their work

64. DaSilva, supra note 4, at 23.
65. Pollaud-Dulian, supra note 2, at 182 (explaining that the language of Article 32 refers to "the transferee of the exploitation rights and not the transferee of the work's physical medium").
66. DaSilva, supra note 4, at 24.
67. See DaSilva, supra note 4, at 24 (posing that the right, if enforced, could impose tremendous problems).
68. See DaSilva, supra note 4, at 24 (explaining that the 1957 Law limits the right's potential harm by imposing statutory restraints); see also Sarraute, supra note 41, at 477 (stating that "[t]he right of withdrawal is clearly of so little efficacy that it has never... been exercised"); Marshall A. Leaffer, Of Moral Rights and Resale Royalties: The Kennedy Bill, 7 CARDOZO ARTS & ENT. L.J. 234, 241 (1989) (agreeing that the right to withdraw holds little practical application, even in France).
69. 1957 Law, supra note 24, art. 32. The author cannot "exercise this right except on the condition that he indemnify the transferee beforehand for the loss that the correction or retraction may cause him." Id. The law also provides, "if the author does [eventually] have his work published... he shall be required to offer his exploitation rights in the first instance to the transferee." Id.
70. DaSilva, supra note 4, at 24.
71. DaSilva, supra note 4, at 26. In fact, since the 1957 Law was promulgated, there has been little to no litigation concerning the exercise of this right. Sarraute, supra note 40, at 477.
72. 1957 Law, supra note 24, art. 6. "The author shall enjoy the right to respect for his name, his authorship, and his work." Id. (emphasis added). Note, the first part of this clause embodies the right of integrity. See infra notes at 80-97 and accompanying text (discussing the integrity right).
73. DaSilva, supra note 4, at 26.
from being attributed to someone else; and (3) the right to prevent their name from being used on works they did not actually create.74

Courts have applied the paternity right broadly. For example, reproducing a work without the author’s name has been held to violate this right.75 Similarly, courts have ruled that an author’s name must appear on all publicity of his or her work,76 and in the case of joint works, all collaborators have the right to be identified as authors of their work.77 In the leading case of Guille v. Colmant,78 the Paris Cours d’appel ruled that third parties cannot bind authors to contracts which require them to renounce their authorship,79 thus upholding and confirming the inalienable nature of the paternity right.

4. Integrity

After artists have completed and disclosed their work, they retain the right to demand respect for their reputation.80 Accordingly, the right of integrity provides authors with all intellectual rights in a work, regardless of whether they physically own that work.81 Thus, third parties may not transform or alter a work without the author’s authorization.82

74. See DaSilva, supra note 4, at 26 (outlining the components of the paternity right); see also INT’L COPYRIGHT, supra note 2, at 95 (describing the French law’s treatment of the paternity right).
76. See DaSilva, supra, note 4, at 27 & n.178 (citing Judgment of Feb. 20, 1922, Trib. civ. Seine, Gaz. Pal. 2282); see also INT’L COPYRIGHT, supra note 2, at 95 (stating that third parties and publishers may not publicize an author’s work without crediting the author for that work).
77. Sarraute, supra note 41, at 478 & n.28 (citing D. Repertoire de Jurisprudence V Prop. Lit. et Art. No. 194, in which the Paris Cours d’appel held that “the collaborator whose name has been omitted without his knowledge from the title of a work may obtain recognition of his authorship and his rights through the courts”).
79. Sarraute, supra note 41, at 478 & n. 36. In Guille, an artist and dealer entered into a contract by which the artist agreed to sign all the canvasses reserved to the dealer with a pseudonym, and to refrain from signing the rest of his paintings. Id. The Paris Cours d’appel held that his contract harmed the artist’s reputation and violated the artist’s rights to have his authorship recognized. Id. at 478-79.
80. 1957 Law, supra note 24, art. 6. “The author shall enjoy the right to respect for his name, ... and his work. This right shall be attached to his person.” Id.
81. Pollaud-Dulian, supra note 2, at 208.
In addition, authors need not show that such modifications have harmed their reputation. This right stems from the notion that the work represents an expression of the author's personality, and that any alteration would injure the reputation of the artist. Scholars consider the right of integrity to be the most essential moral right. It complements the right of divulgation by granting authors a large degree of control over their creations, even after they have parted with them.

The seminal case of Buffet's Refrigerator provides the clearest illustration of the integrity right. In Buffet, the Paris Cours d'appel prohibited an auction house from selling one panel of a larger artwork, a refrigerator comprised of six panels, and held that the public or private disposition of a work of art violates an artist's right to integrity. (citing Judgment of April 29, 1959, Paris, J.C.P. II, at 11134, 402 note Lyon-Caen and Lavigne, Rev. trim. dr. com. 1960, 350. obs. Desbois). Third parties may not modify drawings by adding new colors or erasing parts of the rendering. Id. (citing Judgment of Oct. 31, 1988, CDA 1988, at 22) (citation omitted). Courts prohibit producers from interrupting television shows with commercial advertisements. Id. at 99 & n.245 (citing Judgment of May 24, 1989, Trib. gr. inst. Paris, R.I.D.A. 1990, No. 143, at 353); see also Pollaud-Dulian, supra note 2, at 196. Producers may not inlay logos on television screens during broadcasts. Int'l Copyright, supra note 2, at 99 & n.245.1 (citing Judgment of Oct. 25, 1989, La cinq v. Marchand Paris, D.S. Jur. somm. 54, obs. Colombet). Warnings cannot be added to screen credits. Int'l Copyright, supra note 2, at 98 & n.244.2 (citing Judgment of March 9, 1989, Société Argos Films v. Capi Films Paris, R.I.D.A. 1990, No. 143, at 310, D.S. Jur. somm. 55, obs. Colombet); Pollaud-Dulian, supra note 2, at 192. Such activities may disrupt the enjoyment of works and distort the intentions of the creators. Int'l Copyright, supra note 2, at 98; see Pollaud-Dulian, supra note 2, at 198-99 (stating that courts have ruled that the display of logos during television shows violates Articles 6, 14, 16 and 47 of the 1957 Law); Pollaud-Dulian, supra note 2, at 192 (commenting that in some situations, it is the setting or context in which the work is presented that violates the moral right). But see Article 73 of the Law of Sept. 30, 1986, as amended by the Law of Jan. 17, 1989 (permitting one commercial break per broadcast).

83. See Int'l Copyright, supra note 2, at 95-96 (emphasizing the flexible criteria and the discretionary nature of the right: “it is the author's free choice that triggers protection”).

84. Pollaud-Dulian, supra note 2, at 190.

85. DaSilva, supra note 4, at 31; see supra note 82 (emphasizing the importance that case law affords to the integrity right).

86. See Int'l Copyright, supra note 2, at 96 (emphasizing that “[t]he author alone judges whether, and when, it is fitting to impart his work to the public. . . . and, accordingly, in what form it should reach the public”).

87. Merryman, supra note 4, at 1023 n.1 (citing Judgment of May 30, 1962 (Buffet v. Fersing), Cours d'appel Paris, 1962 Recueil Dalloz [D. Jur.] 570, at 571). In Buffet, the artist Bernard Buffet sought to enjoin the sale of a painted panel that was separated from a larger work that he created some months earlier. Id. The larger work was a refrigerator consisting of six decorated panels. Id. Buffet intended the refrigerator to stand as a single piece of art, and accordingly, had signed only one of its panels. Id.

88. Merryman, supra note 4, at 1023 n.1 (emphasizing the fact that the French trial court only prohibited the panel's public disposition while the Cours d'appel ruled that the right to integrity applies equally to private as well as public disposition).
Despite the holding in *Buffet*, courts still find it difficult to determine whether an artist's right to integrity has been violated. Such complex situations most often arise when authors authorize third parties to create adaptations of their work in other mediums (i.e., writers who permit film adaptations of their books) and are then dissatisfied with the results. While French courts have not found a single solution to this growing problem, courts have generally required the adapter to execute contractual obligations in good faith; and to “refrain from distorting the original work with the intention of doing harm; ... [and to respect] the work’s psychological tenor and the essence of the author’s thought.” Many French scholars note that these requirements represent a dangerous trend. They force the trier of fact to judge aes-

89. Merryman, *supra* note 4, at 1023 n.1 (citing Judgment of May 30, 1962 (Buffet v. Fersing), *Cours d'appel* Paris, 1962 Recueil Dalloz [D. Jur.] 570, at 571). The court also awarded Buffet symbolic damages of one franc, and gave him the right to publish the court’s decision in three art magazines of his choice at the defendant’s expense. *Id.* The court, however, refused to award Buffet the panels as he had hoped. *Id.*

90. See Sarraute, *supra* note 41, at 481 (stating that when authors authorize adaptations of their work, courts often face problems in determining whether the integrity right has been violated). In so doing, courts are compelled to address the tension between the philosophical desire to protect the moral right, and the practical desire to permit adaptations and enforce contracts. *Id.* at 482.

91. *Sarraute, supra* note 41, at 481. In a recent case involving the artist Salvador Dali, the French courts were forced to determine the enforceability of a contract which authorized the adaptation of his work. *INT'L COPYRIGHT, supra* note 2, at 96 (citing Judgment of May 11, 1965, *Cours d'appel* Paris, D.S. Jur., at 555, note Francon). Dali sued the defendant theater company for whom he had created costumes, alleging that the company’s modifications to his designs damaged the integrity of his work. *Id.* The Paris *Cours d'appel* rejected Dali’s claim and held for the theater company, reasoning that while “the author may oppose any correction or modification capable of altering the character of the work,” Dali could not recover since the company’s alterations did not result in an inaccurate portrayal of his designs. *Id.* In so doing, the court was required to study and then compare Dali’s original designs and the ensuing costumes. *Id.*

92. *Sarraute, supra* note 41, at 481. The solution depends on an analysis of the type of contract between the parties. *Id.*

93. *Sarraute, supra* note 41, at 481; see Pollaud-Dulian, *supra* note 2, at 204 (stating the “the adapter must respect the spirit, style and composition of the original work”).

94. DaSilva, *supra* note 4, at 35.

95. *Sarraute, supra* note 41 at 482 (emphasizing that it is not the judge’s place to determine the significance of a work or to decide the essence of the work to be respected). In response to the French case, *Dialogues des Carmelites*, Sarraute cautioned: The court found it necessary to determine whether the adaptation respected the spirit of the adapted work, and proceeded to analyze and compare basic elements. ... This dangerous undertaking is difficult to justify on theoretical grounds. In fact, it is disquieting to see the courts take on such powers. *Id.*
theftics. By characterizing and comparing the artist’s creations, the trier of fact must decide whether an adaptation damages the reputation of the author or the integrity of the author’s original work.97

II. THE VISUAL ARTISTS RIGHTS ACT OF 1990

A. BACKGROUND

Until 1990, United States jurisprudence did not embrace any form of federal moral rights protection.98 Lack of development of an American doctrine of moral rights may be attributed, at least in part, to the constitutional basis of the United States copyright system.99 The Copyright Clause in the United States Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”100 The founding fathers of the United States focused copyright laws on socially-desirable ends,101 aiming to create a balance between the desire to encourage artistic creativity and the need to promote the growth of ideas.102 They pursued this goal by providing authors with property rights and limited monopoly in their works.103

97. See DaSilva, supra note 4, at 36 (stating that courts rarely find that adapters have abused their right to modify). Importantly, in finding for the adapter, courts recognize that authors may implicitly waive their moral rights. See infra note 261 (noting that French courts regard moral rights as being alienable under certain circumstances).

98. See supra text accompanying note 10 (discussing the lack of federal moral rights legislation).


100. U.S. Const. art. I, § 8, cl. 8. United States law has never recognized the French notion that authors inherently retain exclusive rights, simply because of their status as creators; nor does it recognize any sacred bond between artists and their creations. See supra note 10 (noting United States rejection of moral rights); see infra note 109 and accompanying text (explaining that traditionally, the United States has treated artwork as a commodity, rather than as a unique expression of an author’s personality).

101. See Ginsburg, Tale of Two Copyrights, supra note 22, at 992 (noting the American emphasis on social utility as opposed to the French emphasis on the preservation of artistic integrity).

102. Ginsburg, Tale of Two Copyrights, supra note 22, at 992.

103. Ginsburg, Tale of Two Copyrights, supra note 22, at 992.
The American system of copyright, rooted in positive rather than natural law, favors the economic over the personal interest of authors. Some commentators believe that moral rights laws, which extend protection to authors in certain situations, regardless of economic or social impact, are inherently antithetical to this scheme.

Accordingly, the United States has resisted adopting any form of federal moral rights legislation. Even after it acceded to the Berne Convention for the Protection of Literary and Artistic Works in March

104. See the United States Copyright Act (codified as amended in 17 U.S.C. §§ 101-810 (1992) (setting forth United States Copyright law)).
105. DaSilva, supra note 4, at 55. United States copyright exists “primarily to the extent that the positive law creates it.” Id. In France, copyright derives from natural law. Ginsburg, Tale of Two Copyrights, supra note 22, at 992-93.
106. Landau, supra note 45, at 221 & n.20. United States copyright law encourages artistic creativity by providing incentives to authors to build upon the works of others. Id.
107. See Ginsburg, Tale of Two Copyrights, supra note 22, at 991-92 (explaining that French copyright law enshrines the author while United States copyright law grants exclusive rights to authors in order to maximize both the production of their creations and public access to those creations).
109. Beyer, supra note 99, at 1022. Moral rights legislation, by elevating and protecting the sacredness of the author’s work, may accord too much protection to the author, and not enough to: society's need for the promotion of new ideas, and society's more traditional copyright, property, and economic interests. Id. at 1022-23. Critics oppose the fact that, pursuant to moral rights legislation, art buyers may be foreclosed from handling their purchases in certain ways (i.e., from mutilating their purchased artwork) simply because artists retain moral rights in their creations. Rufus C. King, The “Moral Rights” of Creators of Intellectual Property, 9 CARDOZO ARTS & ENT. L.J. 267, 272 (1991). Moral rights critics view art as chattel which should be completely alienable, whereas moral rights proponents view art as a unique object, inseparable from its creator. See Marik, supra note 30, at 10 (illuminating the idea that property rights in art differ, depending upon whether one views art as a special work of the mind or as an ordinary commodity); Carl R. Baldwin, Art & the Law: Property Right vs. “Moral Right”, ART IN AMERICA, Sept.-Oct. 1974, at 34 (pinpointing the tension that exists between the traditional American definition of property and the legal constraints that the moral rights doctrine attaches to it).
110. See Eric Felton, New Law Gives Rights to Artist After Work is Sold, WASH. TIMES, Nov. 28, 1990, at E1 (quoting one critic as stating that while “[i]t may not be desirable for people to purchase works of art and then act like idiots and destroy them, . . . I have a real problem with the idea that a piece of property -- which is ultimately what a work of art is — cannot be treated as other pieces of property”).
111. See Key Senators Frown on Adding Moral Rights to Copyright Act, PUB. WKLY, Nov. 17, 1989, at 11 (noting Senate disapproval of moral rights legislation). The United States refusal to adopt moral rights legislation proved particularly embarrassing in light of the number of other nations that have recognized either domestic or international moral rights doctrine. Jane C. Ginsburg and John M. Kernochan, One Hundred and Two Years Later: The U.S. Joins the Berne Convention, 13 COLUM.
of 1989,112 the United States refused to enact legislation to comply with even the minimal moral rights standards113 outlined in the Convention.114 Congress justified its refusal to act by pronouncing that the United States already offered adequate moral rights protection.115 Leading commentators generally agree that this statement was clearly untrue.116

The lack of federal moral rights legislation has not completely foreclosed moral rights protection in the United States.117 Some courts consider moral rights claims into other recognized causes of action.118 Specifically, courts have protected an artist’s right to integrity and


113. The Berne Convention explicitly creates two categories of moral rights, integrity and attribution. Ginsburg and Kernochan, supra note 110, at 2. See article 6bis: 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 modifications of, or other derogatory action in relationship to, the said work, which would be prejudicial to his honor or reputation. 

Berne Convention, supra note 112, art. 6bis.

To avoid such provisions, the United States promoted an alternative treaty, the Universal Copyright Convention, “a new international treaty largely tailored to the peculiarities of U.S. law.” Ginsburg and Kernochan, supra note 111, at 2-3.


116. Damich, supra note 13, at 946 & n.5. See supra notes 10, 118-24 and accompanying text (explaining that although some American courts have protected an artist’s moral rights through other causes of action, the lack of unified legislation has left significant gaps in coverage).


paternity upon principles of defamation,\textsuperscript{119} contract,\textsuperscript{120} copyright,\textsuperscript{121} unfair competition,\textsuperscript{122} and invasion of privacy.\textsuperscript{123} The majority of scholars

\textsuperscript{119} Kwall, \textit{supra} note 118, at 23; DaSilva, \textit{supra} note 4, at 44-45. The tort theory of defamation has sometimes provided relief to artists in situations where the integrity of their work has been violated or where their work has been altered or mutilated in a manner that has caused harm to their professional reputations. See Edison v. Viva Int'l, 421 N.Y.S.2d 203 (1979) (holding that the author could recover for libel when publisher substantially changed and then printed author's article). \textit{But see} DaSilva, \textit{supra} note 4, at 45 (voicing the view that protection under defamation law is of limited utility; it is a reactive doctrine which does not enable artists to prevent the mutilation of their work); Kwall, \textit{supra} note 118, at 23 (agreeing that this substitute theory of moral rights serves limited purposes since the burden of proof for the author is very high; he or she must show "that the unauthorized act exposed him to contempt or public ridicule, thus injuring his professional standing").

\textit{See also} Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575 (Sup. Ct. 1948), aff'd, 87 N.Y.S.2d 430 (1949). In \textit{Shostakovich}, internationally famous Soviet composers sought to enjoin the use of their uncopyrighted music in an anti-Soviet film produced by Twentieth Century-Fox, alleging that use of their music in the film cast upon them a "false imputation of disloyalty to their country." \textit{Shostakovich}, 80 N.Y.S.2d at 578. The New York Supreme Court denied their requests for relief, stating that use of plaintiffs' music did not constitute libel since the public at large would not associate the film with the composers' political beliefs. \textit{Id}. In so doing, the court commented "that in the present state of our law the very existence of the [moral] right is not clear." \textit{Id}. at 579. It is interesting to note that the same composers brought suit in France, and the opposite conclusion was reached. DaSilva, \textit{supra} note 4, at 1 (citing Judgment of Jan. 13, 1953 (Soc. Le Chant de Monde v. Soc. Fox Europe at Soc. Fox Americaine Twentieth Century), \textit{Cours d'appel} Paris, 1953 1 Gaz. Pal. 191, 1954 \textit{D.A. Jur.} 16, at 80). The Paris \textit{Cours d'appel}, relying on the moral rights doctrine, granted the Soviet composers an injunction. \textit{Id}.

\textsuperscript{120} \textit{See} Zim v. Western Publishing Co., 573 F.2d 1318 (5th Cir. 1978) (ruling that publishing company breached its contract when it published unauthorized revised version of author's book). Where authors have entered into contracts with third parties that specifically address modification rights, courts may use contract theory to protect the authors rights to integrity. \textit{Id}. \textit{But see} Kwall, \textit{supra} note 118, at 21 (emphasizing that "if the contract in question does not address modification rights, American courts will protect a creator only against excessive mutilation of his work").

\textsuperscript{121} \textit{See} Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976). In \textit{Gilliam}, the authors of the British comedy \textit{Mont' Python} sought to enjoin the television broadcast of their film. \textit{Id}. They alleged that the defendants had infringed their copyright and violated the Lanham Act by substantially editing their work. \textit{Id}. at 17-18. The United States Court of Appeals for the Second Circuit granted the injunction, reasoning that while the defendant television station had permission to use the copyrighted script, it did not have permission to revise the original script. \textit{Id}. at 20.

Some commentators believe that \textit{Gilliam} reflects the beginning of American recognition and respect for the doctrine of moral rights. DaSilva, \textit{supra} note 4, at 47-48.

\textsuperscript{122} \textit{See} Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981) (using section 43(a) of the Lanham Act to uphold the paternity right of the plaintiff actor, where the film distributor removed the actor's name from the film's credits, and replaced it with another); \textit{see also} Lanham Act § 43(a), 15 U.S.C. § 1125(a) (1988) (creating a federal cause of action for misrepresentation).

\textsuperscript{123} Kwall, \textit{supra} note 118, at 18; DaSilva, \textit{supra} note 4, at 45. Some courts have used privacy laws to uphold moral rights (specifically, integrity rights) under the theory that alteration of a work constitutes misappropriation of the author's name. \textit{Id}. at 45. \textit{See} Zim v. Western Publishing Co., 573 F.2d 1318 (5th Cir. 1978) (holding that unauthorized publication of works represented a violation of the author's right to privacy, as
agree, however, that such "patchwork" coverage has not afforded auth-
ors adequate moral rights protection.\textsuperscript{124}

In recognition of the need for coherent and workable United States moral rights legislation, Senator Edward M. Kennedy and Representa-
tive Edward J. Markey introduced two moral rights bills into Con-
gress.\textsuperscript{126} Both bills, fashioned after California legislation,\textsuperscript{126} recognized two components of the moral right, the right to paternity and the right to integrity.\textsuperscript{127} Although the bills failed to gain enough support for pas-

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\textsuperscript{124} DaSilva, supra note 4, at 6; Kwall, supra note 118, at 17-18 & n.68; see Leaffer, supra note 68, at 241-42 (noting that "[t]he assertion that the entirety of American law taken as a whole provides \textit{de facto} protection of the author's moral right is inaccurate at best"); JOHN HENRY MERRYMAN & ALBERT E. ELSN, LAW, ETHICS AND THE VISUAL ARTS 157 (2d ed. 1987) (arguing "that 'theoretical' equivalents of the moral right do not compare"). See also TAD CRAWFORD, LEGAL GUIDE FOR THE VISUAL ARTIST 44-47 (revised ed. 1989) (illustrating through an interview with artist, Alfred Crimi, that the United States offered no protection against the destruction of a work by its owner).


\textsuperscript{127} Van Velzen, supra note 16, at 665-66.
The Visual Artists Rights Act serves as an important first step towards protection of moral rights. In the VARA, the United States recognizes that art differs from other forms of ordinary property, and thus demands that it be given special forms of protection in certain cases. Accordingly, the VARA arms authors of visual works of art with the right to claim paternity of their work and to preserve the integrity of their creations. While the VARA, by its very passage, must be commended for introducing a new doctrine of jurisprudence into the United States legal system, it must also be scrutinized and criticized. The VARA remains limited in several respects: it protects only visual works of art rather than all artistic, literary or intellectual creations; it does not provide authors with absolute rights of anonymity, pseudonymity, or require faithful reproduction of works; it

128. Damich, supra note 13, at 946. Groups that opposed the bill included the publishing, broadcasting and movie industries. Cline, supra note 125, at 443; Ginsburg, supra note 12, at 479. Several groups, however, supported the 1989 bill including the AFL-CIO Department of Professional Employees, the American Institute for Conservation of Historic and Artistic Works, American Society of Magazine Photographers, Bay Area Lawyers for the Arts, California Confederation of the Arts, Graphic Artists Guild, National Artists Equity Association, New York Artists Equity Association, Society of Illustrators, Visual Artists & Galleries Association, and the Volunteer Lawyers for the Arts. Cline, supra note 125, at 440 n.45.


131. Damich, supra note 13, at 947; see Marik, supra note 30, at 7 & n.7 (quoting James Minden, President of the National Artists Equity Association, as saying that passage of the VARA “represents a major coup in terms of our government acknowledging the importance of the arts”); New Rights For Artists, ART NEWS, Feb. 1991, at 35 (quoting Nancy Adelson, attorney and Associate Director of Legal Services of Volunteer Lawyers for the Arts, as stating “[i]t’s probably the most important legislation that’s been passed for artists’ rights ever in this country”).

132. See supra note 109 and accompanying text (discussing property rights in art).


134. Damich, supra note 13, at 947.

135. See 17 U.S.C.A. § 101 (defining “work of visual art”); Leaffer, supra note 68, at 235 (noting that the term “visual artist,” as used in the United States moral rights legislation, is a misnomer because only fine artists, rather than all visual artists benefit).

136. See 17 U.S.C.A. § 106A(a)(1), (2) (providing authors with the following limited rights: the right to claim authorship, the right to prevent the use of their names
stipulates that duration of protection lasts only for the life of the author;\textsuperscript{139} and it provides for the waiver of rights.\textsuperscript{140} Study and comparison of the VARA in light of the French \textit{droit moral} illuminate further limitations.

1. Subject Matter

The VARA protects artists when they create "works of visual art."\textsuperscript{141} The VARA defines works of visual art as paintings, drawings, prints and sculptures, existing in limited edition of two hundred or fewer prints, consecutively numbered and signed;\textsuperscript{142} and photographs produced for exhibition purposes only.\textsuperscript{143} The VARA explicitly excludes from coverage, among other things, literary works, movies and other audiovisual works, advertisements, posters, diagrams, works made for hire, data bases, and electronic publications.\textsuperscript{144} The definition of

\begin{itemize}
  \item with works they did not create, and the right to prevent the use of their names with works that have been distorted, mutilated or destroyed).
  \item \textsuperscript{137} Id.
  \item \textsuperscript{138} 17 U.S.C.A. § 106A(c)(3).
  \item \textsuperscript{139} 17 U.S.C.A. § 106A(d).
  \item \textsuperscript{140} 17 U.S.C.A. § 106A(e); Damich, \textit{supra} note 13, at 947.
  \item \textsuperscript{141} See 17 U.S.C.A. § 106A (a)(1) (providing that "the author of a work of visual art shall have the right[s]" described therein).
  \item \textsuperscript{142} 17 U.S.C.A. § 101. A "work of visual art" is:
  \begin{enumerate}
    \item a painting, drawing, print or sculpture, \ldots, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of two hundred or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
    \item 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 and consecutively numbered by the author.
  \end{enumerate}
  \item \textsuperscript{143} Id. The standard limiting protection to photographs produced for "exhibition purposes" is meant to exclude ordinary photographs such as snapshots. Damich, \textit{supra} note 13, at 977. Although consistent with other language in the VARA (i.e., "of recognized stature"), this "quality of art criterion" was probably unnecessary. \textit{Id. See generally infra} note 173 and accompanying text (explaining that the VARA could have achieved the same ends, namely the "barring of law suits arising from the destruction of works of visual art of an amateurish or pedestrian character" by less restrictive means).
  \item \textsuperscript{144} 17 U.S.C.A. § 101. A "work of visual art" does not include:
    \begin{enumerate}
      \item (i) any poster, map globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;
      \item (ii) any merchandizing item or advertising, promotional, descriptive, governing, or packaging material or container;
      \item (iii) any portion or part of any item described in clause (i) or (ii);
    \end{enumerate}
    \item (B) any work made for hire; or
\end{itemize}
work of visual art, as embodied in examples of what it does and does not protect, reveals an intent to apply moral rights protection to what most of society conceives of as "art," rather than to all objects of mass production. The VARA achieves this by limiting moral rights coverage to particular original works (and up to two hundred limited edition copies) of fine art. The VARA does not extend protection to works defined as "craft," or to reproductions or exploitations of works.

As a result, if an artist, for example, sells a painting, and the purchaser subsequently takes and publishes a photograph of his or her purchase that distorts the coloration of the painting, under the VARA, the artist's moral rights have not been violated since the distortion resulted from the photograph, and not from harm to the original piece of art. Similarly, if a photographer produced an image for exhibition purposes, nothing within the VARA could prevent a third party from copying that photograph and pasting it onto placemats or imprinting it upon t-shirts.

The VARA's definition of visual work of art also reveals an intent to "reassure large exploiters, such as publishers of periodicals, that they need not fear... for their publications." It does so by explicitly excluding from coverage motion pictures, audiovisual works, and works

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

Id.

145. Ginsburg, supra note 12, at 480 & n.19. The VARA protects "visual works appreciated solely as works of art, not useful articles or works used for commercial purposes, and generally, visual works in their original versions rather than reproductions." Damich, supra note 13, at 951.


147. See Martha Buskirk, Moral Rights: First Step or False Start?, ART IN AMERICA, July 1991, at 37 & n.3 (citing Leonard DuBoff's criticism of the fact that the VARA would, for example, protect a bronze sculpture but not the work of a well respected potter).

148. 17 U.S.C.A. § 106A. "The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any... work of visual art..." Id.

149. See Ginsburg, supra note 12, at 481-82 (concurring that "an art book publisher who prints a substantially discolored version of a painting, or a poster manufacturer who enlarges and reproduces a small portion of the work, or a magazine publisher who prints only half a photograph, would incur no liability under the Act"); Robert A. Gorman, Visual Artists Rights Act of 1990, 38 J. COPYRIGHT Soc'y 233, 239 (1990) (agreeing that "the right of integrity does not embrace the right to protest reproductions, even if distorted").

150. See Ginsburg, supra note 12, at 482 (noting that such actions "may constitute copyright infringement of the derivative work's right, but a copyright claim avails the artist only if she retains the pertinent copyright interest").

151. Ginsburg, supra note 12, at 480. See Nimmer, supra note 114, at 524 (stating that the motion picture and television industries opposed moral rights legislation).
made for hire. The VARA offers no protection, for example, to film-makers who wish to prevent their films from being colorized, or to television writers who wish to prevent their programs from being interrupted by commercials, or superimposed with logos.

2. Rights Protected

The VARA provides authors of visual works of art with two principal moral rights, the rights of paternity and integrity.

The right to paternity, the crux of the right to respect, provides the artist with numerous rights. For instance, the right to paternity: (1) permits an artist to claim or disclaim authorship of his or her work; (2) serves to prevent the artist's name from being attached to work which he or she did not create; and (3) prevents the artist's name from being attached to a work which he or she has created, but which has been distorted, mutilated or otherwise modified in a manner that

152. 17 U.S.C.A. § 101. This last category, in and of itself, would most likely disqualify films and television broadcasts from receiving moral rights benefits, since the making of movies and television programs routinely entails the collaboration of dozens of "instrumental players," (writers, directors, producers, set-designers, costume designers, make-up artists, etc.) people working for a common employer. Marik, supra note 30, at 8.


(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation.

Id.

See also Damich, supra note 13, at 964-66 (positing that the intention of the work for hire provision of the VARA, which may have been to deny moral rights protection to non-creating employers, has somewhat anomalous implications in that it also denies moral rights protection to creating employees).

153. See supra note 144, and accompanying text (explaining that the VARA excludes motion pictures and audiovisual works, such as television programs, from coverage).


prejudices his or her honor. The right to paternity does not provide authors with the right to remain anonymous or use a pseudonym.

The right to integrity guarantees an artist that his or her artistic vision will be preserved. It protects the physical sanctity of the artist's creation. Specifically, the VARA provides artists with rights against both modification and destruction of their work, and establishes different standards for each. Thus, the artists' burden of proof varies, depending upon whether they allege that their work has been altered or entirely destroyed.

An author of a visual work of art has the right to prevent any intentional distortion, mutilation or other modification of the work, when such action would result in prejudice to his or her honor. This provision contains two conditions. First, the artist's work must have been intentionally mutilated, destroyed or modified. Thus, artists have no recourse against mutilation or deterioration of their work resulting

157. 17 U.S.C.A. § 106A(a). The showing of "prejudice to his or her honor," which derives from Berne Convention language, rather than from more traditional moral rights doctrine, will most likely raise many practical and evidentiary issues. Marik, supra note 30, at 8. Courts, as the triers of fact, will be forced to reach extremely subjective conclusions — whether the alleged actions have harmed an artist's reputation. See id. (stating that "[u]nder U.S. law there are few guideposts by which the courts can judge this standard, thus causing much confusion and abuse").

In comparison, French law imposes no such subjective standards. 1957 Law, supra note 24, art. 6. Article 6 of the 1957 Law simply states that "[t]he author shall enjoy the respect for his name, his authorship, and his work." Id.

158. 1957 Law, supra note 24, art. 6. Note that this paternity right exists whether or not the distortion, mutilation or modification of the artist's work is intentional, whereas the integrity right applies only where the alteration of the artist's work is intentional. See infra notes 163-67 and accompanying text (describing the attributes of the integrity right). See also Damich, supra note 13, at 958-60 (commenting that the right of attribution is not consistent with the right of integrity).

159. See 17 U.S.C.A. § 106A(a)(2), (3) (setting forth the integrity right); Marik, supra note 30, at 8-9 (stating that the integrity right provides authors with the right to prevent others from mutilating, altering, distorting, or destroying their work).

160. See DaSilva, supra note 4, at 31 & n.209 (explaining that the integrity right provides authors with the right to preserve their work against "any alteration or mutilation whatsoever").


163. 17 U.S.C.A. § 106A(a)(3)(A). Generally, the right to integrity differs from the right to paternity in that the former usually centers on the physical alteration of the work itself, whereas the latter usually involves more general violations of the right to respect — including the association of the author's name with a work that is not his; or that has been altered or destroyed so that the author would not want his name associated with that work. See supra notes 72-79 and accompanying text (discussing the use of the paternity and integrity right in traditional French moral rights context).

from the passage of time or the inherent nature of materials, or from efforts of conservation or public presentation, since intent is absent from such forms of modifications.

Second, such mutilation, destruction or modification must prejudice the author's honor or reputation. Commentators agree that this standard will probably be difficult to meet. It requires that artists show, not only that their work has been somehow altered, but that such alterations damage the way that they are perceived by the community. Thus, this language may prevent an author from receiving moral rights protection, even after her work has been physically modified, in cases where the court finds that such modifications either enhance the artist's reputation or increase the monetary value of his or her work.

The right to integrity further provides authors of visual works of art with the right to prevent destruction of their work, if their work "is of recognized stature." This standard "of recognized stature," which

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165. 17 U.S.C.A. § 106A(c)(1). "The modification of a work of visual art which is a 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)." Id.

166. 17 U.S.C.A. § 106A(c)(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." Id.

167. See supra note 164 and accompanying text (explaining the intent factor of the integrity right). The VARA thus absolves, for example, museums and galleries from liability for damage done to works under their control, unless such damage was caused by gross negligence. See Gorman, supra note 148, at 235 (stating that the public presentation of a work — i.e., poor lighting or placement — does not meet the intent requirement). A question still remains, however, as to what constitutes gross negligence, (i.e., whether negligent upkeep of works triggers protection). Id. at 235-36.

168. 17 U.S.C.A. § 106A(a)(3)(A). The VARA also uses this "prejudice to his or her honor or reputation" standard to judge violations of the paternity right. See supra notes 155-58 and accompanying text (describing the paternity right).

169. See supra note 157 and accompanying text (explaining the practical and evidentiary problems presented by this subjective standard); Gorman, supra note 149, at 234-35 (stating that "reputational harm might be difficult to prove").

170. See 17 U.S.C.A. § 106A(a)(3)(A) (providing that any mutilation, distortion or modifications must prejudice the author's honor or reputation).

171. See Buskirk, supra note 147, at 39 & n.12 (relating the VARA to an incident involving deceased American sculptor, David Smith, whereby the executor of Smith's estate stripped the paint off of several of Smith's sculptures in order to increase the sculptures' value, despite Smith's prior objection to such changes); Rosalind Krauss, Changing the Work of David Smith, ART IN AMERICA, Sept.-Oct. 1974, at 30-33 (discussing the alterations of Smith's work; urging laws to protect the integrity of artists).

172. 17 U.S.C.A. § 106A(a)(3)(B); Damich, supra note 13, at 953 & n.40. While the VARA does not define "of recognized stature," legislative history indicates that courts must determine whether works are "of recognized stature," and that they should base such a determination upon the opinions of art historians or experts:

[A] court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, conservators of recog-
was intended to bar nuisance suits, creates both ideological and practical problems by infusing a form of quality criterion into the doctrine of moral rights. It is well settled that courts should refrain from becoming arbiters of aesthetics. Justice Holmes stated over ninety years ago in Bleistein v. Donaldson Lithographing Co., that decisions based on artistic merit “cut against a long copyright tradition eschewing value or aesthetic judgements about works or authorship.” The “of recognized stature” provision is objectionable, not only because it cuts against tradition, but because it raises difficult evidentiary issues. Triers of fact will be forced to weigh the testimony of art experts and community members in order to decide whether the work meets the standard.

The VARA provides special provisions for the integrity right as it relates to works of visual art that have been incorporated into architectural stature, and other persons involved with the creation, appreciation, history, or marketing of works of recognized stature.


It is significant to note that under French law, there is no explicit protection against the destruction of a work of art. See Treece, supra note 118, at 498 (positing that under French law, artists could prevent their murals from being mutilated, but not destroyed).

173. Damich, supra note 13, at 954-55. The provision prevents, for example, the parents of a five year old from seeking to enjoin the destruction of their child’s artwork. Id. (criticizing that this advantage was not “important enough for Congress to limit the right to prevent distortion, mutilation, or other modification to works of recognized stature”). Congress could have achieved the same result by less restrictive means, i.e., by reducing recoverable damages to the market value of the work. Id. at 955.

174. See Damich, supra note 13, at 955 (explaining that “[m]oral rights derive from the fact that a work is an expression of the artist’s personality.” Thus, an insignificant, unappreciated work is no less an expression of the artist’s personality, and is of no less value, than is a work “of recognized stature”); see also Ginsburg, supra note 12, at 480 n.19 (stating that the “of recognized stature” standard penalizes artists who are unknown).

It is important to note that while French courts sometimes make aesthetic judgments (see notes 92-96 and accompanying text) such judgments are not imposed by statute; rather, they result from practical problems in the application of the law.

175. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903). See infra note 177 and accompanying text (explaining the dangers that accompany such judgments).


177. Id. at 251-52. Justice Holmes further stated: [i]t would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits. At the one extreme some works. . . . would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which the author spoke.

Id. at 251.

178. Damich, supra note 13, at 953 & n.40.
tural structures. Assume that the artist cannot remove his or her work from the structure without damaging the creation's integrity. If the artist entered into a written contract with the owner of the building, acknowledging that future removal of the work might modify or destroy it, then the owner may continue to renovate or demolish her property without violating the artist's moral rights. If, on the other hand, the work is not removable and the artist and the owner did not enter into a contract regarding the possible destruction of the work, then moral rights attach to the work. In this instance, the owner must notify the artist prior to destruction of the building, so that the artist has a chance to rescue the work. Where the artist can remove the work without damaging its physical integrity, the law similarly provides that the owner of the building in which the work is located must notify the artist and allow time to claim the work.

3. Features

The VARA prohibits the transfer of the rights of attribution and integrity; however, it permits the waiver of those same rights. The waiver provision makes it clear, however, that such renunciation of

179. 17 U.S.C.A. § 113(d). This right comes into play when property owners plan to renovate or demolish buildings containing artworks such as large sculptures or frescoes. See Ginsburg supra note 12, at 485-86 (describing the right of integrity as it applies to artwork that has been incorporated into buildings).

180. 17 U.S.C.A. § 113(d)(1). In this situation, the law does not even require that the owner notify the artist of his or her intentions. See Ginsburg, supra note 12, at 486 (stating that, in effect, the law here seeks to prevent the artist from holding the building hostage to the artworks it contains).

181. 17 U.S.C.A. § 113(d). Upon notification, the artist has 90 days to remove the work from the site. Id.

182. 17 U.S.C.A. § 113(d)(2)(B). Upon notification, the artist has 90 days to remove the work from the site. Id.

Thomas M. Goetzel, author of draft legislation which became the California Art Preservation Act, criticizes this provision. Thomas M. Goetzel, Peril of Art: Federal and State Laws Protecting Artists' Rights in Their Creations Can Create Traps for Unwary Owners, THE RECORDER, Oct. 8, 1991, at 8. He states, that by providing artists with the power to prevail over the needs of the building owner, the VARA "behooves the owner of any real property who contemplates commissioning the addition of any art work" to either insure that the work is removable, or to obtain a contract absolving him or her of damage which might result from its removal. Id.


184. 17 U.S.C.A. § 106A(e) [hereinafter waiver provision]. The statute reads:

Transfer and Waiver — (1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. . . .

Id.
ARTISTS RIGHTS ACT

right must be specific and advertent.\textsuperscript{185} Any waiver must fulfill three requirements: (1) it must be in writing; (2) signed by the author; and (3) identify the work and the uses to which the waiver applies.\textsuperscript{186} The burden of obtaining a waiver falls on the buyer.\textsuperscript{187} Thus, if a waiver is not executed, then the artist retains all moral rights in his or her work.\textsuperscript{188} Due to the controversial nature of the provision,\textsuperscript{189} the VARA provides for a study of the waiver provision to be conducted by the Copyright Office.\textsuperscript{190} This study will determine the waiver's effect and whether its use becomes so prevalent as to undermine the aim of the VARA.\textsuperscript{191}

The VARA has other significant features. It limits the duration of moral rights protection to the life of the author,\textsuperscript{192} and provides that

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\textsuperscript{185} 17 U.S.C.A. § 106A(e).
\textsuperscript{186} 17 U.S.C.A. § 106A(e). \textit{See also} Ginsburg, supra note 12, at 488 (projecting that general waivers, i.e., "I hereby forego all my rights, title and interest in this work," will not be enforceable).
\textsuperscript{187} \textit{See} Ginsburg, supra note 12, at 488-89 (positing that the law's "reversal of the initial position" may benefit artists, since they often commission works by way of informal arrangements).
\textsuperscript{188} Ginsburg, supra note 12, at 488. While this provision provides artists with the advantage of a presumption in favor of moral rights, it also burdens them with a great disadvantage. \textit{Id.} Artists may be pressured into relinquishing their rights because many of them have less bargaining power than the people who purchase their art. Gorman, supra note 149, at 237.
\textit{See} Buskirk, supra note 146, at 43 (stating that artists who have employed their own contracts and demanded certain rights — i.e., reproduction or resale rights — have lost patrons because of their unwillingness to agree to such contracts). \textit{See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 101-05} (3d ed. 1986) (elaborating upon the dynamics of unequal bargaining power). \textit{But see} Beyer, supra note 98, at 1047 n.103 (questioning whether artists' lack of bargaining power provides a sufficient basis for government intervention).

\textsuperscript{189} \textit{See supra} note 188 (discussing the advantages and disadvantages of the waiver provision); \textit{see also} Gorman, supra note 149, at 237 (emphasizing the concern felt by moral rights proponents that purchasers of art would routinely exert enormous pressure upon artists to relinquish their statutory rights).


\textsuperscript{191} \textit{Id.} The VARA also approved a study on resale royalties, to consider the feasibility of enabling artists, such as authors and composers, to collect royalties from subsequent as well as initial sales of their work. 17 U.S.C.A. § 608(b); \textit{see} Leaffer, supra note 68, at 235-38 (discussing the resale royalties issue). While French law has an equivalent of a resale royalties right (known as the \textit{droit de suite}), that right remains independent from the moral right. \textit{MERRYMAN AND ELSEN, supra} note 124, at 213; Beyer, supra note 99, at 1046 n.95 (suggesting that this separation perpetuates the idea that an author should not benefit economically from a moral right).

\textsuperscript{192} 17 U.S.C.A. § 106A(d)(1). "[T]he rights conferred by subsection (a) shall endure for a term consisting of the life of the author." \textit{Id.} The Copyright Act, in contrast, extends copyright protection for the life of the author plus fifty years. 17 U.S.C. § 302 (a) (1988). Under the Berne Convention, moral rights last after the death of the
only the artist has standing to enforce his or her rights. If an artist decides to invoke his or her moral rights, the VARA provides that he or she may do so without registration where the artist properly delivered the application to the Copyright office, and where the Copyright Office rejected the application. Under these circumstances, the VARA provides that the artist may sue for standard civil remedies, including injunction, damages, and/or profits. The VARA also contains a preemption provision, stating that the VARA will preempt only those states’ rights that are equivalent to the VARA’s.

III. COMPARISON AND CRITIQUE

A. SUBJECT MATTER AND STRUCTURE

The French droit moral, as codified in the 1957 Law, protects authors’ moral rights in almost any creation. The United States VARA extends coverage to only one category of works, visual works of fine art. Many commentators find it difficult to justify the VARA’s omissions until the expiration of the economic rights. See Berne Convention, supra note 111, art. 6bis, para. 2.


193. 17 U.S.C.A. § 106A(b). “Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. . .” Id.


195. 17 U.S.C.A. § 501(b). The VARA adopts the remedies provided by the Copyright Act, but excludes criminal penalties. 17 U.S.C.A. § 506(f); see Damich, supra note 13, at 970 (explaining that the VARA does not need criminal penalties to enforce its provisions).


197. 17 U.S.C.A. § 301(f)(1), (2). Thus, the VARA will not abrogate state laws that provide moral rights protection for a term beyond the life of the author. 17 U.S.C.A. § 301(f)(2)(c); see Damich, supra note 13, at 972-73 (positing that the preemption provision will be given a narrow interpretation: it will only preempt those rights that “exactly correspond” to the rights recognized in the VARA).

198. 1957 Law, supra note 24, arts. 2, 3. The 1957 Law extends moral rights protection to all works of the mind — to books, poems, movies, fine art, crafts, site-specific sculpture, lectures — regardless of whether or not the works are visual, signed, or numbered, or exist in unlimited editions. Id. French law does not differentiate between traditional or non-traditional art forms, and does not discriminate against authors based on their reputation, or the degree to which their work is recognized. Id. art. 2; Damich, supra note 13, at 975.

199. 17 U.S.C.A. §§ 101, 106A. There are limitations even within that category. Works must be signed by the author and can only exist in editions of two hundred or fewer. 17 U.S.C.A. § 101. But see Marik, supra note 30, at 8 & n.12 (citing H.R. No. 101-514, in which Congress states it will interpret subject matter broadly, i.e., it will deem a painting on a canvas or a wall or any surface “a painting” worthy of protection under the statutory definition of a work of visual art).
sion of other categories of works. If the intent of the moral right is to protect authors' interests in their work, even after they no longer physically possess the work, then the right should extend to all forms of authorship, including all visual, musical, and literary creations.

Commentators agree with the theoretical argument that all works of the mind should receive moral rights protection. From a practical standpoint, however, they also acknowledge that the VARA's exclusion of certain categories of authorship is understandable. Collaborative works, such as motion pictures, for example, do not easily fit within the moral rights paradigm. Even France has encountered difficulties in tailoring its moral right laws to accommodate collaborative works because they are usually the product of many authors. Other works,

200. See Damich supra note 13, at 953 (commenting that the VARA's subject matter of protection is extremely narrow); Buskirk, supra note 147, at 37-39, 41-43 (criticizing the VARA's exclusion of less traditional art forms from protection).

Legislative history suggests that some of the VARA's limitations (subject matter of protection, restrictive standards, etc.) stem from a fear that wider coverage would open the doors to a flood of litigation. Damich, supra note 13, at 954-55. Such fears are not well founded. Id. The French experience has shown that while the system is open to great abuse, (INT'L COPYRIGHT, supra note 2, at 100), since it is based entirely on the discretion of the author, abuse is rare. See supra note 173 and accompanying text (discussing nuisance suits).

201. See supra note 174 and accompanying text (discussing the fact that moral rights stem from personality rights, which attach to all authors, and not just to visual artists).


203. But see Michael R. Klipper, Berne Measure Doesn't Incorporate New Moral Rights Into U.S. Law, LEGAL TIMES, Dec. 24, 1990, at 19 (explaining that the VARA's exclusion of works such as books and records is understandable, since those creations typically exist in multiple copies).

204. See Pollaud-Dulian, supra note 2, at 126-28 (explaining that the moral right is a natural right which attaches to any author upon any act of creation).

205. See supra notes 108-10 and accompanying text (explaining that the introduction of moral rights into United States law creates significant practical problems). Political as well as practical reasons (i.e., opposition to the VARA by the film industry) may further account for certain limitations in moral rights coverage. See David Goldberg and Robert J. Bernstein, Legislation by the 101st Congress, NEW YORK LAW JOURNAL, Jan. 18, 1991, at 3 (stating that "there is intense and extensive opposition to extending specific moral rights protection to audiovisual and other works").

206. Karlen, supra note 2, at 242-51 (explaining that since collaborative works are created by various authors, problems regarding ownership and authorship, in terms of both personal and economic rights, inevitably arise); DaSilva, supra note 4, at 16, 33 (discussing problems raised by collaborative works). See infra note 206 and accompanying text (addressing the fact that collaborative works raise special difficulties since they are the product of more than one or two identifiable authors).

207. See Sarraute, supra note 41, at 473-76 (stating that the rights involved with collaborative works such as motion pictures remain very difficult); see also 1957 Law, supra note 24, arts. 15 and 16 (establishing an exception for audiovisual works).
such as computer programs, raise similar practical problems. More generally, the drafters of the VARA may have limited the VARA's coverage to only visual works of art, in an effort to determine whether moral rights can be successfully integrated into United States law.

The 1957 Law and the VARA differ, not only in terms of subject matter protected, but also in terms of the breadth of coverage afforded by the laws. Whereas the 1957 Law explicitly provides that it shall protect the rights of all authors, regardless of the merit or purpose of their work, the VARA provides that it shall protect only those authors whose work is of "recognized stature" or whose reputation or honor has been threatened. The VARA's restrictions — "prejudice to honor or reputation" and "of recognized stature" — have been widely criticized. Scholars agree that they are ambiguous and overbroad, and that they create practical evidentiary problems. The restrictions also contravene basic moral rights doctrine by extending

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208. See Karlen, supra note 2, at 245-46 (stating that problems often arise with regard to computer programs because more than one person creates the product).

209. See Ginsburg, supra note 12, at 479 ("adopting explicit moral rights in a limited domain might afford an opportunity to experiment with adapting U.S. law to moral rights, and might provide experiences permitting further cautious adoption of moral rights in other copyright fields"); Damich, supra note 13, at 953-54 (concurring that the limited coverage presently afforded by the VARA "is a logical starting point").

210. Compare, e.g., 17 U.S.C.A. § 106A (restricting the right of attribution to acts which prejudice the author's honor or reputation and restricting the integrity right to acts which destroy works of recognized stature) and 1957 Law, supra note 24, art. 2 (imposing no such restrictions).

211. See 1957 Law, supra note 24, art. 2. "The provisions of this law shall protect the right of authors of all intellectual works, regardless of their kind, form of expression, merit or purpose." Id.

212. See supra notes 157, 161-79 and accompanying text (addressing the two qualitative standards employed by the VARA).

213. See Damich, supra note 13, at 954-55 (critiquing the VARA's "recognized stature" provision). These standards are also problematic because they are inconsistent. Buskirk, supra note 147, at 37 & n.4. The paternity right and the "modification" subsection of the integrity right define violations in terms of "prejudice to his or her honor or reputation," whereas the "destruction" subsection of the integrity right defines violations in terms of "recognized stature." Id.; see also id. at 37 n.4 (citing the opinion of art-law expert Susan Duke Biederman, who believes that of the two standards, "of recognized stature" will be easier to prove).

214. Buskirk, supra note 147, at 37; see Bruce Fein, Illusory Guarantee for Artistic Rights, WASH. TIMES, Dec. 4, 1990, at G1 (criticizing the authorship of the VARA, and questioning, for example, whether "recognition" in regard to the "of recognized stature" standard must be local, national or international; or whether it applies to the arts community, or to the general public).

215. See, e.g., Damich, supra note 13, at 977-78 (noting that remedy provisions can be more finely tuned than artistic merit criteria). Drafters of the VARA could have achieved the same ends, such as prevention of nuisance suits and a flood of litigation, through far less restrictive means. Id. See also supra note 172 (citing ways to deter frivolous suits).
certain rights to only select authors, depending upon the author's reputation or the merit of their work. In contrast, the 1957 Law provides broad and uniform protection. It does not distinguish between different types of works of the mind. All creations, whether they be books, sculptures, buildings, photographs, or music scores, are subject to the same provisions.

Furthermore, whereas the 1957 Law groups all works of the mind into one category, offering equal protection to all, the VARA separates visual works of art into various categories, providing different standards of protection for each. For example, the VARA distinguishes art that has been incorporated into buildings from art that has not been incorporated into buildings. Such categorization creates problems whereby some types of works, such as site-specific art, are not protected by any category. Site-specific works are pieces that are designed to fit into particular environmental locations. Since such works are theoretically inseparable from the space which they are designed to occupy, removal of these works from their environment

216. See supra note 157, 161-78 and accompanying text (describing the practical problems raised by the standards). Courts will have to judge whether an artist’s reputation has been harmed, or whether his or her work meets the “recognized stature” standard. Id.

217. Buskirk, supra note 147, at 41. For example, if an artist seeks to prevent her work from being destroyed, she will first have to show the court that it is “of recognized stature.” Damich, supra note 13, at 953. Thus, an unknown artist cannot expect to receive the same moral rights protection as a more established colleague. Id.

The law’s recourse to traditional definitions of art “means that the works of many artists, especially those working in non-traditional mediums” are not protected. Buskirk, supra note 147, at 41, 43; see also Marik, supra note 30, at 9 (agreeing that the standard is self-defeating because works that are dismissed as of minor stature one day, may be of great stature the next).

218. 1957 Law, supra note 24, art. 2.

219. 1957 Law, supra note 24, art. 2.

220. 1957 Law, supra note 24, art. 2.

221. See supra notes 179-183 (describing the different standards that apply to works that are and are not separable from the structures in which they were built and the effects of such categorization on site-specific artworks).

222. 17 U.S.C.A. § 113(d)(1)(A), (B), and (d)(2).

223. See infra notes 223-226 and accompanying text (elaborating upon the treatment of site-specific art under both French and United States law).

224. See Ginsburg, supra note 12, at 486 (stating that she believes that the drafters of the VARA anticipated, “but left unstated,” this gap in coverage).

225. Serra v. United States Gen. Servs. Admin., 847 F.2d 1045, 1047 (2d Cir. 1988) (quoting site-specific artist, Richard Serra). They are works “conceived and created in relation to the particular conditions of a specific site.” Id.

In Serra, a pre-VARA case, Serra sought and was denied an injunction against the removal of his sculpture, “Tilted Arc,” from the Federal Plaza in Manhattan. Id. Individuals complained that the work, a 120 foot long slab of curved steel, obstructed previously open space. Id.; Brooks, supra note 112, at 1431.
damages their integrity, regardless of whether the work has been physically altered.\textsuperscript{226}

Under the VARA, site-specific works will, most likely, remain unprotected.\textsuperscript{227} Under French Law, however, site-specific works are protected to the same degree as all other works of the mind.\textsuperscript{228} In France, if a court decides to accord different considerations to different types of works, such decisions are judicially, rather than statutorily, imposed.\textsuperscript{229} This flexible approach, surprisingly, permits courts to provide artists with more uniform moral rights protection.\textsuperscript{230}

The 1957 Law protects the authors of intellectual works rather than the work itself.\textsuperscript{231} The VARA similarly protects authors of visual works

\textsuperscript{226} See Brooks, supra note 112, at 1431-32 (quoting Richard Serra as stating, “I don’t make portable objects. . . . I am interested in a behavioral space in which the viewer interacts with the sculpture in its context”); see also Steven Gibaldi, Artists’ Moral Rights and Film Colorization: Federal Legislative Efforts to Provide Visual Artists With Moral Rights and Resale Royalties, 38 Syracuse L. Rev. 965, 966 n.4 (1987) (“[r]elocating a site-specific work robs it of its raison d’etre and is a form of artistic mutilation”).

\textsuperscript{227} Ginsburg, supra note 12, at 486-87. If Serra was tried today, under the VARA, a court would most likely reach the same conclusion. “Tilted Arc” would be classified as an “unremovable” work and would therefore remain “outside the ambit of integrity rights.” Id. at 487; see also 17 U.S.C.A. § 113(d)(1) (defining unremovable work).

\textsuperscript{228} See supra note 36 (quoting the passage of the 1957 Law which provides that all works of the mind receive equal protection). In the seminal case, Dubuffet v. Régie Nationales des Usines Renault, the French Cour de cassation held that the Renault company could not refuse to carry out to completion the construction of Dubuffet’s site-specific sculpture since Dubuffet had a moral right in that structure. Pollaud-Dulian, supra note 2, at 166-68.

\textsuperscript{229} See supra notes at 87-95 and accompanying text (examining the French judicial protection of artists’ rights). Consider the case of a work of art that has been incorporated into a larger architectural work. Under United States law, courts would apply the particular standards for such a work, as set out in section 113 of Title 17. See 17 U.S.C.A. § 113 (setting forth the applicable moral rights standards). Under French law, courts would apply general moral rights doctrine, as it has been interpreted in case law. See supra note 60 (discussing Dubuffet). French courts might balance the needs of the builder and society (i.e., the importance of urban development, the owner’s “technical reasons” for wanting to alter the property, and other utilitarian needs of the professional and commercial community) against the moral rights of the artists whose work has been threatened. Int’l Copyright, supra note 2, at 101-102; Pollaud-Dulian, supra note 2, at 210, 212. While both systems may achieve similar results in this instance, only the French system insures that all works will be covered, and that the law will evolve to suit the particular circumstances at issue. However, some exceptions to the rule of general coverage under French law do exist. This flexibility was insufficient to encompass audiovisual works. Instead, the 1957 Law had to be amended. See supra note 24 (explaining that 1985 amendments to the 1957 Law address the specific problems raised by audiovisual and computer works).

\textsuperscript{230} See supra note 229 (discussing the benefits of a more generalized moral rights statute).

\textsuperscript{231} 1957 Law, supra note 24, art. 1.
of art. The VARA, however, unlike French law, makes a distinction between copy and image; the VARA provides that moral rights shall not extend coverage to authors when the work at issue is a reproduction, depiction or portrayal of the original visual work of art. In many ways, this distinction seems antithetical to the aims of the VARA. An artist might paint a portrait of a nude, only to have a magazine publisher impose airblown clothing onto the copy it intends to print. Under French law, either the paternity right or the integrity right could protect an author against such an indignity. Under United States law, the VARA would deny such protection. Even if the author could prove that such alterations would cause prejudice to her honor or reputation, the VARA states that paternity and integrity rights shall not apply to reproductions, depictions or portrayals made in connection with conventional forms of image distribution, such as magazines, periodicals, and audiovisual depictions.

Arguably, the VARA's limitation in regard to reproductions serves important practical goals. The VARA's restriction encourages creativity. It permits artists to build upon the works and ideas of their peers or predecessors by limiting moral rights protection to original works and limited editions of 200 copies or fewer (i.e., it would permit an artist to form a collage out of copies of existing works of art). It also extends moral rights protection to those reproductions which qualify, in and of themselves, as visual works of art (i.e., it would, most likely, permit a sculptor to realize his or her vision of a particular painting, if

233. 1957 Law, supra note 24, tit. 1.
234. Ginsburg, supra note 12, at 481.
235. Ginsburg, supra note 12, at 481; see also Damich, supra note 13, at 976-77 (proposing that the law should "protect the fidelity of reproductions of paintings, drawings and sculptures not produced in multiples no matter what the medium of reproduction").
236. See supra notes 72-97 and accompanying text (discussing the degree to which the droit moral protects the rights of artists against distortion of their work).
237. 17 U.S.C.A. § 106A(c)(3). The VARA thus perpetuates the pre-VARA state of the law on this issue. See Wojnarowicz v. American Family Ass'n., 745 F. Supp. 130 (S.D.N.Y. 1990) (finding that the lobbying group which reproduced plaintiff's painting, enlarging and cropping it, was not liable under the New York Artists' Authorship Rights Act).
238. 17 U.S.C.A. § 106A(c)(3); see also infra note 240 (discussing the implications of the VARA's reproduction exception).
239. See Ginsburg, supra note 12, at 481-84 (asserting that moral rights protection does not need to extend beyond the first 200 copies of a work; "[t]hese 200 copies supply the core of the artist's creation, and may afford sufficient representations for the public to consult in order to perceive the work as the artist intended it to be seen").
the sculpture itself met the requirements of the statutory definition of work of visual art).241

While the reproduction limitation furthers legitimate ends, the VARA could have achieved those same ends without imposing the distinction between copy and image, and without automatically precluding authors from making a case.242 The French experience has shown that the language which delineates the moral right is enough, in and of itself, to prevent the stifling of ideas.243 While the language and interpretation of the French law may lead to some uncertainties as to which works will and will not be protected, it provides authors with an opportunity to show that their rights have been violated. It allows courts to decide whether an author's right to respect has been infringed.244

241. Cf. 17 U.S.C.A. § 106A(c)(3) (implying that the limitations on reproduction rights shall not apply to items not defined as "works of visual art").

242. See Damich, supra note 13 at 981-82 (stating that the VARA should recognize more reproduction rights). Consider the case of an artist who adds a moustache and goatee to a copy of Leonardo Da Vinci's Mona Lisa (as Duchamp did to create the now famous "L.H.O.O.Q.") and subsequently prints her adaptation in a magazine, newspaper, poster, or similar publication. Under the VARA, the gesture would be permitted without question. See 17 U.S.C.A. § 106A(c)(3) (stating that rights in the VARA shall not apply to: any reproduction, depiction, portrayal, or other use of a work in, upon, or in connection with any item described in subparagraph (A) or (B) of the definition of "work of visual art"). Id. Section (A) of § 101 states that the definition of "work of visual art" does not include any:
- poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture, or other audiovisual work, book, magazine, newspaper, periodical, . . . or similar publication.

17 U.S.C.A. § 101(A). Under French law, the gesture would, most likely, be similarly tolerated — but only after the artist convinced a court that he or she had not harmed Da Vinci's reputation by altering a copy of the work. See 1957 Law, supra note 24, art. 6; supra notes 71-96 and accompanying text (setting forth the French law and judicial interpretation of paternity and integrity rights). While similar results may be reached under both United States and French Law, United States Law forecloses any chance artists may have to prove that their rights have been violated.

The exceptions as set forth in § 106(A)(c)(3) of the VARA, do not entirely foreclose protection of all reproductions of artworks. But, by precluding the extension of integrity and paternity rights to items such as posters and applied art, the Act undoubtedly limits its scope of protection. This is especially likely given the ambiguity of the terms, "poster" and "applied art." Undefined by statute, these terms could encompass practically any work. 17 U.S.C.A. § 106(A)(c)(3).

243. See supra note 229 (discussing the advantage of the more general French moral rights statute). In France, there is no statutory reproduction exception; courts simply construe the general law. See 1957 Law, supra note 24, tit. 1 (providing that moral rights protect the author of the work, rather than the work itself; this protection extends to all forms of the work, be it the original or the copy). French courts achieve a balance between promotion of ideas and artistic protection by applying different burdens of proof to different scenarios. See infra note 259 and accompanying text (discussing, for example, French common law approach to judging artistic adaptations of works).

244. See supra notes 241-43 and accompanying text (comparing the structure of the 1957 Law and VARA and the advantages afforded by the French statute).
B. Rights

The VARA provides authors with only two of the four basic moral rights recognized under French law, the right to integrity and the right to attribution. Presumably, legislators excluded the right to withdraw from the VARA since it serves little or no practical purpose in the countries that recognize it. While in theory, the right to withdraw complements the other components of the moral rights doctrine, the French experience has shown that in practice, the right is too costly and inefficient for authors to exercise.

Some commentators argue that United States artists do not need the VARA to provide them with the right to divulge or to determine if and when their works are complete and ready to display to the public because the United States Copyright law recognizes an equivalent right. This right, commonly known as the right of first publication, provides copyright owners with the sole authority to perform, distribute or publish their works.

While the right to control publication subsumes much of the right to divulge, including the right to display, perform or publish, it does leave some gaps. For instance, it confers the right upon the copyright owner rather than the artist. Thus, a question remains as to whether a court could compel artists to show their work to the public, where they are not satisfied with their product, but have transferred

246. See supra notes 67-71 and accompanying text (criticizing the value of the right to withdraw).
247. See Pollaud-Dulian, supra note 2, at 126-28, 178-90 (explaining the foundations of moral rights, and discussing the general application of the right to withdraw).
248. Pollaud-Dulian, supra note 2, at 126-28, 178-90. In addition, a right to withdraw is not needed in the VARA since the right applies to literary works which are excluded by the VARA. Id.
249. Leafier, supra note 68, at 240 & n.87 (stating that the right to divulge is recognized under American law); Cline, supra note 125, at 437 (referring to copyright law as recognizing the right of first publication).
250. 17 U.S.C. § 106 (1988). The Copyright Act provides that the owner of the copyright
251. Id.
their rights in that work to a purchaser who wishes to display the work. Additionally, the right of first publication (unlike the French right of divulgation), limits the display right to public display. This restriction would most likely prevent authors from protesting against the private display of their work, even if they disapprove.

C. FEATURES

Both the 1957 Law and the VARA prohibit authors from assigning their moral rights; however, only the VARA allows authors to waive their moral rights. This difference may be attributed to the philosophies from which the rights stem. The VARA’s waiver provision derives from the American notion of freedom to contract. The 1957 Law’s provision derives from the French notion of natural law which bars one from contracting away a personality right.

At first blush, the difference in treatment of waiver appears extreme. However, French case law reveals a judicial tolerance towards waiver, despite the 1957 Law’s provision to the contrary. Both French and

252. See supra note 249 (setting forth the text of the right of first publication). Under the 1957 Law, the “author” has the right to disclose. 1957 Law, supra note 24, art. 1.

253. See supra notes 58-59 and accompanying text (setting forth the Whistler case). The outcome of this situation is clear under French law: the owner of the economic right could not compel divulgation.

254. See supra notes 87-89 and accompanying text (discussing the divulgation right as interpreted in the Buffet case).


256. Id. The author alone has the right to divulge her work under French law. The law does not differentiate between public and private disclosure. 1957 Law, supra note 24, art. 19.

257. Compare 1957 Law, supra note 24, art. 6 (prohibiting waiver, but permitting transfer) and 17 U.S.C.A. § 106A(e) (delineating transfer and waiver rights). Although the VARA has built some safeguards into the law, i.e., by requiring that the artists expressly agree to waive rights in specific pieces of work, for specific uses, the possibility still exists that waiver provisions “will become boilerplate language in all standard contracts.” Marik, supra note 30, at 9.

258. See supra notes 98-110 and accompanying text (comparing the origins and philosophies of the droit moral and the VARA).

259. Damich, supra note 13, at 967 (explaining that the waiver provision for moral rights developed from the freedom to contract).

260. Damich, supra note 13, at 967-68, 990 (stating that moral rights are not transferable under the 1957 Law).

261. See Treece, supra note 118, at 505-06 (stating that as a matter of practice, French courts often enforce waiver clauses). “[T]he notion that the moral right is inalienable is riddled with exceptions: the courts consistently permit reasonable changes without the author’s consent in collective works and in adaptations — where changes are necessary.” Id.; see also DaSilva, supra note 4, at 16 (citing Pierre Recht who states that the courts, in enforcing such provisions, are acting properly; “for any other decision would render meaningless the force of contracts”); id. at 35 & n.236 (quoting the Tribunal de Bordeaux, which states “when transferring the right to adopt his work,
American laws would, in effect, nullify explicit waiver of all moral rights (i.e., “for this project, I hereby waive all of my rights to this creation”).262 Similarly, both laws would, most likely, validate the implicit waiver of certain moral rights (i.e., “for this project, I permit you to realize costumes from my costume designs”).263

While the VARA’s waiver provision might not be as ominous as many fear (because of its safeguards),264 critics suggest that the end result will be the development of a wide range of different types of waivers that would not be tolerated under French law.265 For example, if an artist permits a third party to use his or her artwork as scenery in a play, but then objects to the political context of the production, French law might find that the artist’s moral rights had been violated, whereas United States law might find otherwise.266 The VARA provides for a study of the effects of the provision in order to address the controversy and provide guidance for future possible reform.267

In France, the moral right is perpetual.268 Under the VARA, however, moral rights endure only for the life of the author.269 Although United States limitations regarding duration of the right pose philosophical questions,270 they serve a practical purpose. A term of “life of the author” grants author rights, without unduly prohibiting or re-

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262. See supra note 261 and accompanying text (discussing features of French and American waiver).
263. See supra note 261 and accompanying text (discussing features of French and American waiver).
264. See Buskirk, supra note 147, at 39 (conceding that “[i]n the final act, the waiver provisions are very narrowly drafted”).
265. Marik, supra note 30, at 9 (suggesting that in attempting to display their work, artists will renounce many valuable rights). Richard Serra expressed the fear of many when he stated that the waiver is “hypocritical in that it negates the moral rights of artists and places them in the hands of the client, and no doubt it will be used by both patrons and institutions to deny artists moral rights.” Buskirk, supra note 147, at 39.
266. See supra note 119 (comparing the two verdicts of Shostakovich under American and French law).
268. 1957 Law, supra note 24, arts. 6, 19, 20. See DaSilva, supra note 4, at 14 (observing that while the right is perpetual, the “[artists'] heirs inherit only the right to exercise the right, not the right itself”).
270. See Pollaud-Dulian, supra note 2, at 132 (explaining that the perpetual nature of the moral right is inherent in its origins); Damich, supra note 13, at 993 (agreeing that “perpetual protection logically follows from moral rights theory because the work is not any less an expression of the author's personality as time passes”).
straining future derivative works.\textsuperscript{271} The limited duration may also prevent heirs with little experience or training in art from making decisions which violate the wishes of the deceased.\textsuperscript{272} While a life of the author provision has benefits, it has one marked drawback. That is, it does not further the benefit of arts preservation.\textsuperscript{273} Under the VARA, once an artist dies, an artist's moral rights dissolve; thus, the rightful owners of that artist's work may treat her work in any way they so choose.\textsuperscript{274}

IV. RECOMMENDATIONS

As moral rights gain acceptance in the United States, the VARA should evolve in accordance with the lessons of the French experience. Subject matter should expand to include not only visual works of fine art, but all visual arts and other forms of authorship, including literary and musical works (but excluding audiovisual and computer works).\textsuperscript{275} The VARA should eliminate hypertechnical and arbitrary distinctions (language restricting protection to those works existing in "limited editions of 200 copies or fewer" and "signed by the author")\textsuperscript{276} among works of visual art. Furthermore, the Act should expand coverage to include those intellectual works of the mind that fit comfortably within the moral rights schemework (i.e., books and crafts, but not films and computer programs).\textsuperscript{277}

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\textsuperscript{271} See Beyer, \textit{supra} note 99, at 1079 (advocating that author's rights to prohibit derivative works should not extend beyond the life of the author; "[t]his would permit innovative use of existing creations").

\textsuperscript{272} Buskirk, \textit{supra} note 147, at 39 n.13; Pollaud-Dulian, \textit{supra} note 2, at 218, 236. In France, successors do not have authority to make decisions based on their opinions or taste, since they are the instruments of the author and thus owe her fidelity. \textit{Id}. But, heirs do not always act in the interest of the deceased author. DaSilva, \textit{supra} note 4, at 15; see also \textit{Id}. (stating that the perpetual nature of the moral right has been questioned; "nowhere else in French law does a personal right exist in perpetuity").

\textsuperscript{273} Damich, \textit{supra} note 13, at 993. In France, perpetual moral rights protection benefits society from the alteration or modification of artworks in the public domain. Pollaud-Dulian, \textit{supra} note 2, at 232.

\textsuperscript{274} See \textit{17 U.S.C.A. § 106A(d)} (stating that protection afforded to artists under the VARA expires at the death of the author).

\textsuperscript{275} See Damich, \textit{supra} note 13, at 975 (suggesting that moral rights should extend to "all works that evidence artistic creativity"); \textit{see also supra} notes 197-202 and accompanying text (criticizing the limited subject matter of protection under the VARA).

\textsuperscript{276} See Damich \textit{supra} note 13, at 976 (questioning the usefulness of the limited edition concept).

\textsuperscript{277} See \textit{supra} notes 200-04 and accompanying text (stating that theoretically moral rights protection should extend not only to visual works of art, but to other creations as well).
The provisions excluding reproductions and copies from coverage should be omitted. Although such an exclusion does afford some practical benefits (mainly the promotion of derivative works), common law interpretation of the general moral right attains those same benefits while affording greater flexibility in the law. A general scheme of protection (with no specific reproduction exclusion) should function in much the same way as the French system of implied waiver; that is to generally allow authorized adaptations, thus encouraging creativity, while reserving the right to forbid those which truly harm the authors' reputation, or the integrity of their works.

Categories of protection should be eliminated from the VARA in order to afford more general, but uniform application of the law. The VARA should extend moral rights protection to all works of visual art, regardless of whether the work has been incorporated into a building, and regardless of whether the work can be removed from the building without damaging the creation's integrity. Such application not only prevents gaps in coverage, and thus would extend moral rights protection to site-specific works, but better comports with the philosophical underpinnings of the moral rights doctrine.

Standards of worth, such as "of recognized stature" and "prejudice to honor or reputation," should be excluded in order to prevent discriminatory treatment of artists, to create consistency within the VARA, as well as to eliminate the need to judge aesthetics. Rather, all works should be subject to a single, non-qualitative standard (i.e., the right to respect for an artist's name and the integrity of his or her work) to provide uniformity within the VARA, and encourage non-prejudicial treatment of artists.

Rights should be extended to include a divulgation right in order to protect those rights not covered by the more traditional copyright doctrine of "right of first publication." The divulgation right should explicitly confer all rights encompassed by the VARA upon the author (as

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278. See supra notes 242-44 and accompanying text (comparing the VARA's reproduction exception with the French Law, which has no such exception).

279. See supra note 261 (describing the French common law understanding of implied waiver).

280. See supra notes 223-24 and accompanying text (discussing the problems raised by categorization of works).

281. See Damich, supra note 13, at 979 (advocating that moral rights legislation should dispose of standards based upon artistic merit); supra notes 167-78 and accompanying text (elaborating upon the problems which such standards create).
opposed to the copyright owner), and it should cover the right to both public and private display.\footnote{282}

Duration of coverage should be extended to life of author plus fifty in order to facilitate the balance between protection of works and promotion of ideas, as well as to create consistent copyright treatment. This compromise provides artists with protection for a significant period beyond their own death (and provides society with a limited form of arts preservation), without forever fettering the rights of other artists who wish to build upon their work, and without unduly burdening heirs with a responsibility they might not be capable of executing.\footnote{283}

The VARA’s waiver provision, which affords authors with the limited but potentially dangerous ability to renounce their moral rights in their own creation,\footnote{284} should be excluded from the VARA, regardless of the findings of the Copyright Office study. Notions of implied waiver would suffice to permit adaptations of works, while at the same time affording better protection to the rights of artists.\footnote{285}

CONCLUSION

The Visual Artists Rights Act of 1990 represents a significant victory for United States citizens. For the first time in United States history, the VARA creates a doctrine that protects non-economic, non-tangible interest in property, by virtue of the fact that the property is special. When compared to the French droit moral, however, the VARA falls short of its potential. Its chief obstacle lies not in its economic-based, positive law origins, but in its own methodology. In its effort to draw fine distinctions between whom and what should be protected, the VARA creates varied and unnecessary standards, exceptions, and categories which limit the VARA's application. Thus, the VARA cannot attain the same complete, consistent, and flexible coverage enjoyed by the more general French moral rights doctrine. As the moral rights theory gains acceptance in the United States, the VARA should yield to the French experience. United States legislators should.

\footnote{282. See supra notes 249-56 and accompanying text (describing the right of first publication; and discussing the gaps in coverage that exist between that right and its analog, the right to divulge).}

\footnote{283. See supra notes 257-74 and accompanying text (comparing the pros and cons of finite and infinite moral rights coverage, as codified in the VARA and the 1957 Law, respectively).}

\footnote{284. See supra note 188-89 (explaining how the waiver provision may work to defeat the intentions of the VARA).}

\footnote{285. See supra note 261 and accompanying text (examining some benefits of the French system of common law implied waiver).}
strive to amend the law in accordance with the joint lessons of its own copyright history and French moral rights traditions.