CAUTION—
Contains Extremely Offensive Material *David Wojnarowicz v. American Family Association*, the Visual Artists Rights Act, and a Proposal to Expand Fair Use to Include Artists' Moral-Rights

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I. Introduction

While some artists build their careers by offending or challenging mainstream culture, these artists still strive to protect their reputations and the integrity of their works. These artists do not seek public approval. Rather, they wish to hold the right to control the way in which they, and their works, are represented to the public.

These rights are referred to as "moral rights." The concept of moral rights originated from the French term "droit moral," which describes the idea that an author—writer, artist, creator—has a personal connection to his or her creations, and thus has

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a right to control the eventual fate of those works.[1] An artist's moral rights are tied to more than just an artist's claim to monetary compensation for her work; they are also tied to the artist's claim of control over the "personal and reputational aspects of the creation."[2]

While European countries have recognized the importance of protecting the moral rights of artists and have codified moral rights protections throughout their copyright laws,[3] the United States has yet to embrace the value of artists' rights in a similar fashion.[4] The U.S. Constitution establishes intellectual property rights through the stated-goal of "promot[ing] the Progress of Science and useful Arts,"[5] which provides the authority under which the Copyright Act[6] and Patent Act[7] were enacted. This theoretical foundation for intellectual property law is undergirded by utilitarian and economic considerations, and is aimed at striking a balance between rewarding the labor of creators and incentivizing useful creation and shared creativity.[8] Under U.S. copyright law, subject to the limitations imposed by section 106, once an author has licensed or transferred ownership of his copyright, the transferee is entitled to reproduce and adapt the work, as well as authorize others to do so.[9] The

[1] *See* Betsy Rosenblatt, *Moral Rights Basics*, Berkman Center for Internet and Soc'y, Harvard University (Mar. 1998), http://cyber.law.harvard.edu/property/library/moralprimer.html. The term "moral rights" has its origins in civil law and is a translation of the French *le droit moral,* which is meant to capture those rights of a spiritual, non-economic and personal nature. The rights spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist›s personality, as well as the integrity of the work, should therefore be protected and preserved. *See* Ralph E. Lerner & Judith Bresler, Art Law: The Guide For Collectors, Investors, Dealers & Artists 417 (1989) [hereinafter Art Law]; *see generally* Office of the Register of Copyrights, United States Copyright Office, Resale Royalties: An Updated Analysis (Dec. 2013), *available at* http://copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf.

[2] *Id.*

[3] *See* Marjut Salokannel, Alain Strowel, & Estelle Derclaye, *Study Contract Concerning Moral Rights in the Context of the Exploitation of Works Through Digital Technology: Final Report*, European Commission 5-154 (Apr. 2000), http://ec.europa.eu/internal_market/copyright/docs/studies/etd1999b53000e28_en.pdf.

[4] "Although moral rights are well established in the civil law, they are of recent vintage in American jurisprudence. Federal and state courts typically recognized the existence of such rights in other nations, but rejected artists' attempts to inject them into U.S. law." Carter v. Helmsley- Spear, Inc., 71 F.3d 77, 82 (2d Cir. 1995) (citing Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947); Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 573–76 (N.Y.Sup.Ct.1949). Nonetheless, American courts have in varying degrees acknowledged the idea of moral rights, cloaking the concept in the guise of other legal theories, such as copyright, unfair competition, invasion of privacy, defamation, and breach of contract. *See also* Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8.D (1994); Lerner & Bresler, *supra* note 1, at 423.

[5] U.S. Const. art. I, § 8.

[6] 17 U.S.C. §§ 101-1332 (2012).

[7] 35 U.S.C. §§ 1-390 (2012).

[8] *See generally, e.g.*, Comments of the Copyright Alliance, Study on the Right of Making Available; Request for Comments, 2, http://copyright.gov/docs/making_available/comments/docket2014_2/Copyright_Alliance.pdf; Jodie Griffin, *The Economic Impact of Copyright,* Public Knowledge (Oct. 2012), https://www.publicknowledge.org/files/TPP%20Econ%20Presentation.pdf; *Copyright: An Interpretation of the Code of Ethics*, American Library Association (Jul. 1, 2014), http://www.ala.org/advocacy/proethics/copyright.

[9] H.R. REP. 94-1476 (1976), at 79, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5693 ("Section 109(a)

author, having been compensated for the transfer, can no longer control the use of his work by the transferee, the new copyright owner.[10]

But alongside these incentive-focused foundational principles, intellectual property concepts in the U.S. have also developed in response to less pragmatic or measurable values like changing cultural values, norms, and creations.[11] America's musicians, filmmakers, photographers, sculptors, and painters are crucial players in the creation of culture, despite the fact that their contributions may not be easy to quantify, translate to monetary terms, or evaluate based on contributions to job creation or economic growth.[12] The value these creators add to our cultural narrative merits protection.[13] However, creating a mechanism that properly recognizes and protects the intangible connection between artists' identity and their individual works is challenging, and even seemingly inconsistent with the incentive-based theory upon which the U.S. intellectual property protection system is built.

Today, federal copyright law recognizes moral rights for visual works that fall within narrow categories under the Visual Artists Rights Act of 1990 (VARA).[14] Among other rights, VARA gives an artist the right to "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."[15] The scope of this protection is limited, as it only ap-

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restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means. Under this principle, which has been established by the court decisions and section 27 of the present law, the copyright owner's exclusive right of public distribution would have no effect upon anyone who owns 'a particular copy or phonorecord lawfully made under this title' and who wishes to transfer it to someone else or to destroy it.").

[10] This concept is exemplified by the exchange of economic privilege for rights provided under the First Sale Doctrine. 17 U.S.C. § 109(a) (2012).

[11] The legislative history of the 1976 Copyright Act is instructive. *See, e.g.*, H.R. REP. 94-1476 (1976), at 73, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5687 ("The efforts of the Library of Congress, the American Film Institute, and other organizations to rescue and preserve this irreplaceable contribution to our cultural life are to be applauded, and the making of duplicate copies for purposes of archival preservation certainly falls within the scope of 'fair use.'"); *id.* at 5740 ("A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited. [This] reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved.").

[12] Copyright-intensive industries contributed 5.1 million jobs and grew by 46.3 percent between 1990 and 2011, outpacing other IP-intensive industries and non-IP-intensive industries alike.

Dept. of Com. Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy*, UNITED STATES PATENT AND TRADEMARK OFFICE, 3 (Jul. 2013), http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf.

[13] *See* H.R. REP. NO. 101-514, at 6915-16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6915-16 (statement of Rep. Robert W. Kastenmeier, Chairman, H. Judiciary Subcom. on Courts, Intellectual Property, and the Administration of Justice) ("The Visual Artists Rights Act is a pragmatic response to a real problem. It is directed toward development of Federal rights that would enable visual artists to protect the integrity of their works and the fact of their authorship. We should always remember that the visual arts covered by this bill meet a special societal need, and that their protection and preservation serve an important public interest.").

[14] 17 U.S.C. § 106A (2012).

[15] 17 U.S.C § 106A(a)(3)(A) (2012).

plies to a "work of *visual art*" (emphasis added), a term defined in section 101 of the Copyright Act to mean either a unique work or part of a limited edition (200 copies or fewer) that has been "signed and consecutively numbered by the author."[16] While VARA may help some artists, these moral rights protections are often insufficient to remedy the harms artists have suffered. For example, in *Wojnarowicz v. American Family Association,* a seminal case that highlighted the shortcomings of moral rights protections, an artist sued an organization under the New York Artists' Authorship Rights Act (NYAARA) for mischaracterizing and slandering his work.[17] While the court recognized that the artist's moral rights were indeed violated, it denied his trademark and defamation claims and held that the organization did not infringe the artist's rights under copyright law.[18]

It may be difficult to square the divergent concepts of personal, emotional, and artistic expression with utilitarian economic principles that simultaneously inform copyright law. However, a balance must be struck. It is possible to protect moral rights under U.S. law more effectively. The Copyright Act, specifically, the fair use principle, provides a framework within which artists' moral rights can and should be more robustly protected. The fact-intensive nature of the fair use inquiry renders the doctrine highly adaptable and capable of providing a framework within which courts could more meaningfully consider and protect the moral rights of artists.

Section II of this article will provide an overview of moral rights protections in the U.S. and internationally. Section III will discuss the *Wojnarowicz* case and its analysis of the nexus of artists' moral rights, freedom of expression, and fair use. Section IV will propose that the fair use doctrine should be reoriented and utilized by courts to both supplement VARA and more comprehensively recognize moral rights for artists today.

II. Moral Rights Protections

A. *Background of Moral Rights*

Artists' moral rights have been formally recognized in many legal systems.[19] For example, in many European countries, such as France and Germany[20], an artist can claim an actionable offense based on the wrongful reproduction or harm to the integrity of a work; the artist also has "the exclusive right to control the reproduction and the performance or exhibition of [her] creation."[21]

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[16] 17 U.S.C. § 101 (2012).

[17] Wojnarowicz v. Am. Family Ass'n, 745 F. Supp. 130 (S.D.N.Y. 1990).

[18] *Id.* at 130.

[19] *See*, e.g., Irma Sirvinskaite, *Toward Copyright "Europeanification": European Union Moral Rights*, 3 J. Int'l Media & Ent. Law 263 (2011); Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. Legal Stud. 95 (1997).

[20] *See* Sirvinskaite, *supra* note 19, at 265.

[21] *See* Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists under French Law*, 16 Am. J. Comp. L. 465-67 (1968).

In the United States, *Gilliam v. American Broadcasting Companies* set the high water mark for artists' moral rights in 1976.[22] In *Gilliam*, the court stated that "[t]o deform [an artist's] work is to present him to the public as the creator of a work not his own, and thus makes him subject to criticism for work he has not done,"[23] and "it is the creative artist that 'suffers the consequences of the mutilation, for the public will have only the final product by which to evaluate the work.'"[24] The rationale underlying the court's holding in favor of the authors was "the need to allow the proprietor of the underlying copyright to control the method in which his work is presented to the public."[25] Since the landmark decision, several courts have followed *Gilliam*'s rationale,[26] and others have relied on *Gilliam* to protect moral rights indirectly through copyright law's economic interest provisions or contract principles.[27] Although courts have analyzed moral rights differently, most decisions have focused on recognition of the right of artistic control and integrity.[28] Despite the indication that moral rights were gaining strength in the 1970s and 80s based on the *Gilliam* precedent, the United States was reluctant to adopt federal moral rights laws.[29] Finally, the U.S. enacted the Visual Artists Rights Act of 1990.[30]

[22] Gilliam v. Am. Broad. Cos., 538 F.2d 14 (2nd Cir. 1976).

[23] *Id.* at 24.

[24] *Id*. at 24 (citing Martin Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 569 (1940)).

[25] *Id.* at 20–21.

[26] *See* WGN Cont'l Broad. Co. v. United Video, Inc., 693 F.2d 622 (7th Cir. 1982); Nat'l Bank of Commerce v. Shaklee Corp., 503 F. Supp. 533 (W.D. Tex. 1980) (finding "an author should have control over the context and manner in which his or her work is presented").

[27] *See, e.g.*, Salinger v. Random House, Inc., 811 F.2d 90, 96 (2d Cir. 1987) (finding protection of unpublished letters included in the exclusive right of first publication under § 106(3), granting Salinger, as copyright owner, the right to protect the expressive content of his unpublished letters) *opinion supplemented on denial of reh'g*, 818 F.2d 252 (2d Cir.1987).

[28] *See, e.g.*, 3 THOMAS D. SELZ ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS & BUSINESS PRACTICES § 20:42 (3d ed. 2012) ("[T]he Salinger court was inclined to protect via copyright law those aspects of the artist's work closely tied to the concept of integrity, the 'accuracy and vividness' of the author's expression, however; the court also suggested that distortion through copying of 'minimal amounts' of expressive content may be subject only to the sanction of literary and public criticism.").

[29] *See* 135 CONG. REC. E2199 (daily ed. June 20, 1989) (statement of Rep. Kastenmeier) ("After almost 100 years of debate, the United States joined the Berne Convention, effective in March 1989. While the Convention is the premier international copyright convention, consensus over United States adherence was slow to develop in large part because of debate over the requirements of Article 6. The principal question was whether that article required the United States to enact new laws protecting moral rights."); H.R. REP. NO. 101-514, at 6918 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6918 ("While the Berne Convention implementation debate crystallized attempts by artists to obtain protection for their creations, efforts to enact artists' rights laws had begun well before that time. Bills seeking to protect visual artists dated from 1979, and H.R. 2400, introduced in the 100th Congress, was designed to grant film directors and screenwriters certain moral rights. Adherence to the Convention did not end the efforts in support of these and similar bills.").

[30] The U.S. enacted VARA after it became an adherent of the Berne Convention in part to "bring[] U.S. law into greater harmony with laws of other Berne countries. Numerous developed and developing countries provided by positive law for moral rights. Enactment of moral rights legislation serves another important Berne objective–that of harmonizing national copyright laws." *The Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property, and the Admin.*

B. *The Enactment of the Visual Artists Rights Act and its Protection*

The Visual Artists Rights Act provides copyright protection for works of visual art independent of the exclusive rights provided elsewhere in the Copyright Act.[31] Under copyright law in the United States, subject to the limitations provided by section 106, once an author has transferred ownership of his copyright, the transferee is entitled to reproduce and adapt the work, and may authorize others to do so.[32] The author, having been compensated for the transfer, can no longer control the copyright owner's use of his work. However, under VARA, the author's (or artist's) connection to the work continues after transfer, and it is treated as more than an economic right.[33] Specifically, VARA provides authors with the rights of attribution, integrity, and disclosure.[34] However, VARA has been widely criticized by artists' rights groups[35] because it only applies to visual arts, does not apply to works for hire,[36] and thus only allows authors to make claims in limited circumstances. Under VARA, artists can bring an action for false attribution of a work, to prevent "intentional distortion, mutilation, or other modification that would be prejudicial to his or her honor or reputation," or to thwart any destruction of a work of "recognized stature,"[37] but the provision generally does not transcend the physical embodiment of the work itself.

Although VARA provides these protections for artists' moral rights, courts have been reluctant to utilize VARA.[38] For instance, most courts have interpreted the "other modification" provision narrowly to pertain only to physical damage, removal, or destruction of works.[39] Specifically, courts have interpreted the provision as a viola-

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of Justice of the H. Comm. on the Judiciary, 101st Cong. 37 (1988) (statement of the Hon. Ralph Oman, Register of Copyrights.).

[31] 17 U.S.C. § 106A (2012).

[32] H.R. REP. 94-1476, at 79, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5693 ("Section 109(a) restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means. Under this principle, which has been established by the court decisions and section 27 of the present law, the copyright owner's exclusive right of public distribution would have no effect upon anyone who owns 'a particular copy or phonorecord lawfully made under this title' and who wishes to transfer it to someone else or to destroy it.").

[33] 17 U.S.C. § 106A (2012).

[34] *Id.* (The rights established under VARA include provisions allowing "[t]he author of a work of visual art . . . the right to claim authorship of that work, and to prevent the use of his or her name as the author of any work of visual art which he or she did not create" and "the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.").

[35] *See, e.g.*, *Copyright Information,* ARTISTS RIGHTS SOCIETY, http://www.arsny.com/other.html#Moral (last visited Oct. 18, 2014) (referring to VARA as a "flawed moral rights measure").

[36] Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 79 (2d Cir. 1995).

[37] 17 U.S.C § 106A(a)(3)(A)-(B) (2012).

[38] *See* Lee v. A.R.T. Co., 125 F.3d 580, 580 (7th Cir. 1997) (using VARA to limit the extent of moral rights, even though the Ninth Circuit, before VARA was enacted, had protected the artist under very similar facts in Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341 (9th Cir. 1988)).

[39] *See, e.g.*, Leicester v. Warner Bros., 232 F.3d 1212 (9th Cir. 2000); Flack v. Friends of Queen Catherine Inc., 139 F. Supp.2d 526, 535 (S.D.N.Y. 2001) (dismissing artist's claim explaining that "VARA

tion of an economic or contract-based interest, rather than recognizing the personal or reputational aspects of works.[40] Further, rather than recognizing a moral right, courts have utilized contract law to enforce an artist's rights even though the issue regarding the quality of licensed depictions of the artist's work surely implicated moral rights.[41] VARA's provision regarding protection for the integrity of an artist's work intended to cover and provide artists a means of preventing low-quality reproductions or displays of their work that have the effect of devaluing the work or damaging the artist's reputation.[42] Yet, even as the court in *Rey v. Lafferty* recognized that "there would be 'irreparable harm' to . . . the *artistic reputation* of the holder, if the exploitation of [the artist's works] continue[d] without regard to [the licensor's] high standards of quality control," the court refused to enforce these claims as moral rights violations.[43]

Subsequently, Judge Posner granted more credence to moral rights in American law in *Ty, Inc. v. GMA Accessories, Inc.*, stating that the award of a preliminary injunction to remedy copyright infringement by a Beanie Baby competitor "draws additional sustenance from the doctrine of 'moral right,' the right of the creator of intellectual property to the preservation of the integrity of his work – a doctrine that is creeping into American copyright law."[44] Further, in *Seshadri v. Kasraian*, Judge Posner asserted that "there are glimmers of the moral-rights doctrine in contemporary American copyright law" and distinguished U.S. provisions from those in Europe.[45] Yet nearly 10 years after the enactment of VARA, moral rights were still

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mandates preservation of protected art work. It does not mandate creation. Nothing in the statute compels defendants to allow plaintiffs to engage in further creation. Contrary to plaintiff's assertion, defendants' refusal to permit plaintiffs to 'finish' the Work does not constitute 'distortion, mutilation, or other modification' under 17 U.S.C. § 106A(a)(3)(A)") (citing Carter v. Helmsley-Spear, Inc., 861 F.Supp. 303, 329 (S.D.N.Y.1994), *aff'd in part, rev'd in part,* 71 F.3d 77 (2d Cir.1995)).

[40] *Id*.

[41] Rey v. Lafferty, 990 F.2d 1379, 1393 (1st Cir. 1993) ("[U]nder copyright law, while a licensor has no 'moral right' to the quality of licensed depictions, she may insist, contractually, on approval provisions to control quality control and high standards in the exploitation of her creative work.").

[42] *See* Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81-82 (2d Cir. 1995) ("In some jurisdictions the integrity right also protects artwork from destruction. Whether or not a work of art is protected from destruction represents a fundamentally different perception of the purpose of moral rights. If integrity is meant to stress the public interest in preserving a nation's culture, destruction is prohibited; if the right is meant to emphasize the author's personality, destruction is seen as less harmful than the continued display of deformed or mutilated work that misrepresents the artist and destruction may proceed.") (internal citations omitted).

[43] Rey, 990 F.2d at 1393 (citing *Clifford Ross Co. v. Nelvana, Ltd,* 710 F. Supp. 517, 520 (S.D.N.Y. 1989)) (emphasis added).

[44] Ty Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1173 (7th Cir. 1997).

[45] Seshadri v. Kasraian, 130 F.3d 798, 803-04 (7th Cir. 1997) (Posner, C.J., joined by Judge Bauer and Judge Evans) (citing Lee v. A.R.T. Co., 125 F.3d 580, 582-83 (7th Cir. 1997); Weinstein v. Univ. of Ill., 811 F.2d 1091, 1095 n.3; WGN Cont'l Broad. Co. v. United Video, Inc., 693 F.2d 622, 625 (7th Cir. 1982); Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81-82 (2d Cir. 1995); Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976)) (internal citations omitted).

merely a "glimmer," and the American concept of those rights still seemed to emanate from economic, contract or property-based rights.[46]

C. *State Protection of Moral Rights*

Several states have enacted laws protecting artists' moral rights.[47] Most of these state statutes protect an artist's right of integrity by providing relief on the grounds of physical or other alteration or destruction of fine art that is detrimental to the artist's reputation.[48] Several states provide an analog to the right of "paternity" recognized in European countries, which gives the author the right to have his name attributed to the work or remain anonymous - whichever the artist prefers.[49] Massachusetts and California's statutes provide the broadest moral rights for artists and assert that "[t]here is also a public interest in preserving the integrity of cultural and artistic creations."[50] These statutes are a clear indication that many states may go further than VARA to protect the moral rights of artists.[51] Moreover, in some cases, courts have also been more willing to recognize moral rights beyond the physical work in interpreting these provisions.[52] These state moral rights laws represent a step toward protections that would more effectively remedy the types of harms VARA seems poised, but fails, to address.

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[46] *Id.*

[47] *See, e.g.*, California Art Preservation Act (CAPA), CAL. CIV. CODE § 987 (West, Westlaw through 2014 Sess.); Connecticut Art Preservation and Artists' Rights (CAPAR), CONN. GEN. STAT. ANN. § 42-116t(a) (West, Westlaw through 2014 Sess.); Illinois Consignment of Art Act (ICAA), 815 ILL. COMP. STAT. ANN. 320/1-8 (West, Westlaw through 2014 Sess.); Louisiana Artists' Authorship Rights Act (LAARA), LA. REV. STAT. ANN. §§ 51:2151-2156 (West, Westlaw through 2014 Sess.); Maine Art Preservation Statute (MAPS), ME. REV. STAT. ANN. tit. 27, § 303 (West, Westlaw through 2013 Sess.); Massachusetts Art Preservation Act (MAPA), MASS. ANN. LAWS ch. 231, § 85S (LEXIS through 2014 Sess.); Works of Art (WOA), NEV. REV. STAT. ANN. §§ 597.720-.760 (LEXIS through 2014 Sess.); New Jersey Artist's Rights Act (NJARA), N.J. STAT. ANN. §§ 2A:24A-1 to 24A-8 (West, Westlaw through 2014 Sess.).

[48] *See* CAPA; CAPAR; ICAA; LAARA; MAPS.

[49] *See, e.g.*, ICAA (allowing art dealers to display or use the artwork "only if notice is given to users or viewers that the work of fine art is the work of the artist"); MAPS (providing the artist with the right at all times to claim or disclaim authorship of her work of fine art); MAPA (providing the artist with the right to claim or disclaim authorship of her work of fine art); WOA (granting the artist the right to have her name associated or disassociated with her work protects the right of paternity).

[50] CAPA at § 987(a); MAPA at § 85S(a).

[51] Unfortunately, VARA preempts most of these state statutes. *See, e.g.*, Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, No. 01 Civ.1226 DAB, 2003 WL 21403333, at *1 (S.D.N.Y 2003) (holding that the New York Artists' Authorship Rights Act (NYAARA) preempted by VARA).

[52] *See* Gegenhuber v. Hystopolis Prods. Inc., No. 92-C-1055, 1992 WL 168836, at *1 (N.D. Ill. July 13, 1992) (finding state moral rights statute not preempted by VARA and granting permanent injunction against defendants for improperly crediting plaintiff puppeteer in production of plaintiff's show, *The Adding Machine*). However, some courts have interpreted the state statutes narrowly. *See* Morita v. Omni Publ'ns Int'l, Ltd., 741 F. Supp. 1107 (S.D.N.Y. 1990) (finding that the placing of Morita's anti-nuclear artistic concept in Omni's pronuclear context did not amount to a mutilation or alteration under NYAARA).

Although moral rights may be "creeping" back into our jurisprudence as Judge Posner stated,[53] courts are largely reluctant to push toward greater adoption of integrity principles. This raises the question of whether any remedy is available to artists whose work has not been physically harmed but has been misrepresented, and whose reputation is at stake. The answer lies in the fair use doctrine. Given the strictures of state and federal moral rights provisions and the unwillingness of courts to utilize them, the fair use doctrine provides the flexibility and consideration of intangible public good factors necessary to provide stronger protection for moral rights.

III. *Wojnarowicz v. American Family Association*

The *Wojnarowicz* court squarely confronted the shortcomings of VARA, the New York Artists' Authorship Rights Act (NYAARA), and the fair use doctrine in addressing the moral rights claims brought by artist David Wojnarowicz. His work incorporated sexually explicit images in order to raise awareness of the AIDS epidemic and shape community attitudes towards sexuality.[54] His work was included in an exhibition entitled "Tongues of Flame," which highlighted issues surrounding AIDS, homophobia, racial intolerance, and spirituality.[55] The National Endowment for the Arts (NEA) funded the show. The works in the exhibit consisted of images that were intended to convey composite messages about AIDS, homophobia, racial intolerance, and spirituality.[56] The artist owned the copyright to all of his works, including the reproductions that appeared in the exhibit catalog.[57]

The American Family Association (AFA), an anti-pornography political action group purportedly advancing Judeo-Christian ethics and decency in American society, engaged in a campaign against the NEA for funding artwork the AFA found "offensive" and "blasphemous."[58] As part of this campaign, the AFA distributed a pamphlet publicizing NEA-funded exhibitions in a negative light.[59] This booklet included fourteen fragments of Wojnarowicz's work taken from the exhibition catalogue without his permission.[60] Eleven of the images explicitly depicted sexual acts, three portrayed Christ with a hypodermic needle inserted in his arm, and others

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[53] Ty Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1173 (7th Cir. 1997).

[54] *Wojnarowicz*, 745 F. Supp. at 133 ("A professional artist, plaintiff earns his living by selling his art works, many of which are directed at bringing attention to the devastation wrought upon the homosexual community by the AIDS epidemic. Plaintiff attempts, through his work, to expose what he views as the failure of the United States government and public to confront the AIDS epidemic in any meaningful way.").

[55] *See University Galleries Archives: Exhibitions from 1998-1987*, Illinois State University, College of Fine Arts, http://finearts.illinoisstate.edu/galleries/archive_exhibits/more.shtml (last visited Sep. 9, 2014); *see also Exhibitions: David Wojnarowicz: Tongues of Flame*, Santa Monica Museum of Art, https://smmoa.org/programs-and-exhibitions/david-wojnarowicz-tongues-of-flame/ (last visited Sep. 9, 2014).

[56] *Wojnarowicz*, 745 F. Supp. at 134.

[57] *Id*.

[58] *Id*. at 133.

[59] *Id*.

[60] *Id*.

showcased ambiguous scenes in which Wojnarowicz depicts an African purification ritual and two men dancing together.[61] The distorted and fragmented mode in which the images were reproduced highlighted their potentially offensive characteristics while dampening their artistic message. The AFA mailed its pamphlet entitled, "Your Tax Dollars Helped Pay For These 'Works of Art,'" to 523 members of Congress, 3,230 Christian leaders, 947 Christian radio stations and 1,578 newspapers, and included the warning: "Caution—Contains Extremely Offensive Material."[62]

Wojnarowicz sued the AFA claiming violations of the Lanham Act[63] and NYAARA.[64] NYAARA prohibits the display or publication of artwork that has been altered, defaced, mutilated, or modified if damage to the artist's reputation is reasonably likely to result from the display or publication.[65] Although the court found that the AFA's use of photocopied images in the pamphlet fell within the fair use doctrine, and thus was exempt from liability under the Copyright Act, the Court held that Wojnarowicz was entitled to an injunction based on a violation of the NYAARA.[66] The court determined that because the NYAARA was "qualitatively different than federal copyright law in both its aim and its elements," it was not preempted by the fair use affirmative defense.[67]

The court concluded that the AFA's distribution of a photocopy of the artist's works violated the NYAARA because the "unfaithful reproductions . . . [were] publicly displayed as to damage the reputation of the author of the original."[68] An expert witness established that there was a reasonable likelihood that defendants' actions jeopardized the monetary value of plaintiff's works and impaired plaintiff's professional and personal reputation.[69] By only displaying the parts of Wojnarowicz's work that included homosexual or explicit religious imagery, the witness testified that museums unfamiliar with his work would hesitate to include it in their exhibitions.[70] In turn, this "self-censorship" would have an adverse impact on the value of Wojnarowicz's work for galleries as well as on the reputation of his work to corporate and other potential buyers.[71] The court found that the AFA acted with actual malice, stating that "the public display of an altered artwork, falsely attributed to the original

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[61] *Id*. at 134.

[62] *Id*.

[63] The Lanham Act, trademark, and commercial speech aspects of the case will not be discussed in this article.

[64] New York's Artists' Authorship Rights Act (NYAARA), N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 1990) *preempted by* Bd. of Managers of Soho Int'l Arts Condo. v. City of New York, No. 01 Civ.1226 DAB, 2003 WL 21403333, at *1 (S.D.N.Y 2003). The Visual Artists Rights Act was not implemented until December 1, 1990.

[65] NYAARA § 14.03.

[66] *Wojnarowicz*, 745 F. Supp. at 148.

[67] *Id.* at 135.

[68] *Id.* at 136-137 (quoting Edward J. Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, *84* COLUM. L. REV. 1733, 1740 (1984)).

[69] *Id.* at 139.

[70] *Id.*

[71] *Id.*

artist . . . is not the type of speech or activity that demands protection because such deception serves no socially useful purpose."[72] Despite a holding in favor of the artist under the artist's rights claim, the court only awarded nominal damages of $1 because Wojnarowicz could not prove actual damage to his reputation.[73]

Further, the court's holding that the AFA's display of Wojnarowicz's work constituted a fair use undercut the artist's rights. The fair use analysis requires that a court employ a balancing test, weighing four factors to determine whether a use of copyrighted work is permissible without the permission of the author. The factors are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or the value of the copyrighted work.[74]

Under the first factor of the fair use analysis, the court found that a "reasonable person could find the distortion [of the artist's work in the pamphlet] to be the product of mere carelessness," rather than one of intended defamation or bad faith.[75] Under the same factor, the court found that the exhibition in which the work appeared was publicly funded by the NEA and thus, the pamphlet could be classified as "an essay expressing a certain point of view on the [federal funding] issue,"[76] which was "highly significant to the scope of fair use," since the funding could be classified as "an issue of public concern."[77] The court also found that the use did not harm the market for Wojnarowicz's works.[78]

Nevertheless, this case represents a formal recognition of moral rights for artists, given the court's grant of an injunction and award of nominal damages under NYAARA. The court's discussions of misleading or distorted uses of works, the First Amendment implications of critique, and the market effect of misrepresentation informed post-VARA jurisprudence. However, the influence of the controversial *Wojnarowicz* case on the forward progress of moral rights recognition is still unclear as the court weighed the fair use argument against the assertion of moral rights, and found

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[72] *Id.* at 140.

[73] *Id.* at 149.

[74] *See, e.g.*, Campbell v. Acuff -Rose Music, Inc., 510 U.S. 569 (1994) (holding that, although the use at issue was commercial, parody is a transformative use that caters to a different audience and purpose, and therefore fair use); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (holding that because the purpose and character of a use was primarily commercial, the use was not good faith news reporting and not a fair use); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006) (holding that the transformative nature of the use at issue outweighed any harm to the market for the value of the original).

[75] *Wojnarowicz*, 745 F. Supp. at 144 (alteration in original) (quoting Maxtone–Graham v. Burtchaell, 803 F.2d 1253, 1262 (2d Cir. 1986)).

[76] *Id*.

[77] *Id.* at 143 ("[T]he pamphlet is entitled to great protection because the appropriateness of such funding must remain open to vigorous challenge and those who accept federal funds must also accept the right of others to protest such expenditures.").

[78] *Id.* at 146.

that despite constituting a violation of the artist's moral rights, federal copyright law allowed the AFA's transformative use under the fair use doctrine.

The case also helps demonstrate the shortcomings of moral rights protection even after VARA was enacted. Had Wojnarowicz brought his case against AFA under NYAARA after the enactment of VARA, his claim would have mostly likely been preempted.[79] If Wojnarowicz had based his argument on VARA, the court would probably have found that a misrepresentation without physical damage to the work did not entitle him to relief. Further, because Wojnarowicz could not prove actual damages, the court would not have been able to rely on economic copyright principles to recognize his moral rights.

Even considering the fact that Wojnarowicz was unable to secure more than nominal relief, the issues the court discussed regarding the interplay between the rights protected under NYAARA and the fair use doctrine may have significant implications for the interpretation of federally recognized artists' moral rights under VARA.

IV. PROTECTION OF MORAL RIGHTS THROUGH THE FAIR USE DOCTRINE

A. *The Fair Use Doctrine*

While copyright jurisprudence in the U.S. has been slow to embrace the concept behind an artist's moral rights as protected by VARA under section 106A, courts have been more enthusiastic about expanding the application of the fair use doctrine to account for new developments in the subject matter of copyrighted material and the way in which works are distributed or utilized.[80] Most recently, the fair use doctrine has played an important role in providing a basis by which courts can allow new consumer behaviors, business models, and technological innovations in the digital environment.[81] The doctrine has also received recent congressional attention in a hearing entitled, "The Scope of Fair Use," which evidenced that, like the courts, Congress now recognizes that the fair use doctrine is an important tool through which copyright law can adapt to new technologies, consumer behaviors, and societal values not contemplated in the 1976 Act.[82] Moreover, in July 2013, the Commerce Department referred to the fair use doctrine as "a fundamental linchpin

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[79] *Id.* at 136 n.2. (explicitly stating that VARA's passage "would arguably preempt state laws such as" NYAARA).

[80] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (expanding the scope of fair use subject matter to include parody); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (holding home recording constitutes a fair use and explaining "[i]t may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written. Applying the copyright statute, as it now reads, to the facts as they have been developed in this case, the judgment of the Court of Appeals must be reversed."); *Fox Broadcasting Co., Inc. v. DISH Network LLC*, 747 F.3d 1060, 1068 (9th Cir. 2013).

[81] *See e.g.,* Kelly v. Arriba Soft Corp., 336 F.3d 811, 815-16 (9th Cir. 2003); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1163-68 (9th Cir. 2007).

[82] The Scope of Fair Use: Hearing Before the Subcomm. On Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary, 113th Cong. 1-2 (2014) (statement of Rep. Coble, Chairman, S. Comm. on Courts, Intellectual Property, and the Internet).

of the U.S. copyright system."[83] The fair use doctrine provides an important means of balancing "the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."[84]

The fair use doctrine has undergone great development throughout its history.[85] Its invocation and application has been informed by the changing nature of information use and dissemination,[86] as well as changes in user activities.[87] Today, fair use claims are largely evaluated based on whether the transformative use of the work trumps the commercial purpose and economic impact of the work.[88] Additionally, some fair use analyses have included a consideration of good or bad faith regarding the use since "the propriety of the defendant's conduct" is also relevant to the "character" of the use inquiry.[89] Finally, "[t]he [fair use] factors enumerated [in the Copyright Act] . . . are not meant to be exclusive,"[90] and can include additional considerations depending on the facts of each case. As such, the fair use doctrine should be used to supplement artists' moral rights claims by providing the framework to

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[83] *See* Dept. of Com. Internet Policy Task Force, *supra* note 12, at 13.

[84] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

[85] The fair use doctrine has its roots in England's "fair abridgement" law. Justice Story laid the foundations for fair use in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901). His conceptualization was based on the accepted principle that citing an original work for criticism or other useful purposes was permissible, but he also acknowledged that free riding or not substantively adding to the value of the work was disfavored. Following the enactment of the 1976 Copyright Act, U.S. courts focused primarily on the first fair use factor and often found that commercial uses were presumptively unfair. *See e.g., Sony Corp. of Am.*, 464 U.S. at 449, 456 (weighing the first factor heavily in its analysis, explaining that "although not conclusive, the first factor requires that 'the commercial or nonprofit character of an activity' be weighed in any fair use decision" and holding Betamax "capable of substantial noninfringing uses"). Today, courts focus primarily on whether the use is transformative and whether the amount of material used in the new work is reasonable given the nature of the transformative use. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc*.,* 510 U.S. 569 (1994); Time, Inc. v. Bernard Geis Assocs., 239 F. Supp. 130, 146 (S.D.N.Y.) (holding taking as fair use on the ground that "the public interest in having the fullest information available" outweighed the copyright owner's interest in the work.").

[86] For example, libraries and institutional information users like universities were among the lobbying groups who fought hardest to codify Fair Use in the 1976 Act. *See* International Federation of Library Associations and Institutions, Limitations and Exceptions to Copyright and Neighbouring Rights in the Digital Environment: An International Library Perspective (2004), *available at* http://www.ifla.org/publications/limitations-and-exceptions-to-copyright-and-neighbouring-rights-in-the-digital-environm.

[87] *See, e.g.*, *Sony Corp. of Am.* 464 U.S. at 450-451(finding home recording of television programming for private, noncommercial uses to be a fair use and in the interest of consumers who seek to time-shift content).

[88] *See, e.g.*, *Campbell*, 510 U.S. at 583 (holding that although use was commercial, parody is a transformative use that caters to a different audience and purpose); *Bill Graham Archives*, 448 F.3d at 605 (holding that the transformative nature of use outweighed any harm to the market for the value of the original); *Harper & Row*, 471 U.S. at 559 (holding that because the purpose and character of use was primarily commercial, it was not good faith news reporting and was not a fair use).

[89] 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.05[A] (2014).

[90] *Harper & Row*, 471 U.S. at 560 (quoting H.R. REP. No. 94-1476, at 65 (1976)).

analyze and balance the economic and integrity interests of artists with the First Amendment interests of users.[91]

Freedom of expression is an important right that is highly valued in American law and culture. Still, actions[92] or expressions[93] that are offensive and conducted with actual malice do not benefit from the broad protections of the First Amendment. The fair use doctrine includes freedom of speech considerations by protecting uses of works for purposes of debate, comment, and criticism on issues of public concern.[94] The *Wojnarowicz* court stated, "criticism and comment are uses expressly recognized by the fair use provision of the Copyright Act and are the 'most universally recognized in connection with' the defense of fair use."[95] However, for cases like *Wojnarowicz*, where the deceptive use "serves no socially useful purpose," the fair use protection should not be available.[96] The *Wojnarowicz* court explained that "defendants remain free to criticize and condemn plaintiff's work if they so choose. They may present incomplete reproductions labeled as such or, alternatively, without attribution of such images to plaintiff. However, they may not present as complete works by plaintiff, selectively cropped versions of his originals."[97] Here, the court seems to find that a "socially useful purpose" implicates the fair use consideration of whether a use is transformative, rather than just a misrepresentation or defamation of the work or the artist himself. The court's consideration of both the rights of attribution and the elements of the fair use in its explanation demonstrates the compatibility of moral rights considerations and fair use determinations.[98]

B. *Moral Rights As Fair Use*

Instead of employing a reasonable person standard, and relying on ambiguous determinations of bad faith,[99] this article argues that courts should expand the fair

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[91] See Guylyn Cummins & Valerie E. Alter, *Can Intentional or Knowingly Reckless Misuse of Copyrighted Material Be Considered "Fair Use?"* 26 COMM. LAW. 10 (2009). *But see* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

[92] Snyder v. Phelps, 131 S. Ct. 1207 (2011).

[93] *Wojnarowicz*, 745 F. Supp. at 144.

[94] *See, e.g.*, *Harper & Row*, 471 U.S. at 579 (Brennan, J., White, J., and Marshall, J., dissenting) ("The progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by this constricted reading of the fair use doctrine . . .").

[95] *Wojnarowicz*, 745 F. Supp. at 143 (citing 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.05[B], at 13–90.1 (1989)).

[96] *Id.* at 140.

[97] *Id*.

[98] The applicability of the fair use doctrine is further exemplified in *Maxtone-Graham v. Burtchaell*. There, the Second Circuit articulated the standard for analyzing fair use claims where the use implicates moral rights. The court's test focused on the intent of the user and the effect on the public. It stated that "[o]nly where the distortions [are] so deliberate, and so misrepresentative of the original work that *no* person could find them to be the product of mere carelessness would we incline toward rejecting a fair use claim." Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1261 (2d Cir. 1986).

[99] Only a few courts have found that infringing actions constituted bad faith. *See Harper & Row,* 471 U.S. at 562-63, (purloined manuscript); *NXIVM Corp. v. Ross Inst.,* 364 F.3d 471, 478 (2d Cir. 2004)

use analysis by adopting a standard that more meaningfully considers moral rights. Courts should employ an analytical framework informed by the constitutional malice standard under the character and purpose factor of the fair use doctrine to better address moral rights violations. The constitutional malice standard directs courts to consider the veracity and intent of the statements as applied to artists who are like public figures that assume the risk of public criticism or attention.[100] Additionally, the malice standard requires proof of deliberate falsehoods (setting a high bar that favors finding fair use) and serves the public good by promoting useful discourse.[101] As such, considering moral rights through this lens would provide a narrow but still meaningful way for courts to account for artists' claims of moral rights violations that would not prevent other copyright owners from rightfully invoking the fair use defense.

By including a greater consideration of defamation, false light, and similar claims in the fair use analysis, courts could more satisfactorily address cases where works are used in an intentionally and knowingly false or misleading manner. While this expansion of the fair use doctrine in the context of moral rights has not been addressed directly, the Second Circuit recently stated, "[o]ur observation that the fair use doctrine encompasses all claims of First Amendment in the copyright field . . . [has] never has been repudiated."[102] Further, the *Wojnarowicz* court stated that "[w]here vital First Amendment concerns are implicated, as here, that breadth expands and accords greater protection to what might otherwise constitute an infringement."[103] In today's information age where anyone can distort, alter, and falsely portray an artist's work with the touch of a button, courts will have to reconsider their stances on the convergence of the First Amendment, moral rights, and copyright law.

In addition to expanding the first fair use factor—which considers the purpose and character—courts should expand the fourth factor—which considers the market effect of a use—to more fully account for damage to reputation caused by deliberately false representation. This factor will provide a way for courts to bridge the divide between utilitarian and economic considerations, and moral or identity-related factors that underlie artists' claims. American courts have demonstrated that they are much more comfortable relying on contract or economic principles to justify moral rights-esque claims, since payment or performance as recognition of value are easier

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(breach of confidentiality agreement); *Rogers v. Koons,* 960 F.2d 301, 309 (2d Cir. 1992) (tearing off of copyright mark); *Weissmann v. Freeman,* 868 F.2d 1313, 1324 (2d Cir. 1989) (total deletion of the original author's name and substitution of the copiers).

[100] *See* New York Times v. Sullivan, 376 U.S. 254, 279-280 ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

[101] *See generally* Mark A. Petrolis, *An Immoral Fight: Shielding Moral Rights with First Amendment Jurisprudence When Fair Use Battles with Actual Malice*, 8 J. Marshall Rev. Intell. Prop. L. 190 (2008).

[102] New Era Publ'ns Int'l v. Henry Holt & Co., Inc., 873 F.2d 576, 584 (2d Cir. 1989).

[103] *Wojnarowicz*, 745 F. Supp. at 147.

to explain and justify than is the value of non-property, intellectual attributes which bond the artist to his work.[104] Using a fair use analysis allows courts to look to the market effect of the alteration or misrepresentation of artists' work. This approach may make recognizing moral rights seem more appealing to courts. Furthermore, since the "copyright system creates private property in creative works so that the market can simultaneously provide economic incentives for authors and disseminate authored works," using economic principles to assess fair use is the most appropriate analytical tool.[105]

The market effect factor has been considered to be the "single most important element of fair use" by some courts.[106] Actual damages need not be proven under this factor, but courts require "a preponderance of the evidence that some meaningful likelihood of future harm exists."[107] Yet, it is difficult to prove the effect a use will have on an artist's potential market. A copyright violation does not occur even where a bad review decreases demand for the work.[108] Nevertheless, uses that are misleading and create economic damage or unjustly benefit the defendant weigh against a finding of fair use.[109] Scholars have previously advocated for an economic view of fair use, and some argue that fair use should be granted only when there is a market failure.[110] Where the work cannot be licensed, there is an imbalance of interests, and, thus, the use would unfairly harm the author and not benefit the public.[111] This approach to analyzing the market impact factor in fair use would help courts recognize that economics are tied to moral rights.

The commercial success of an artist is inextricably linked to his reputation. In some ways, payment for a work validates both the artist's personal bond with the work and the artist's property interest in the creation.[112] In *Salinger v. Random House*, the court found that the publication of an excerpt from a previously unpublished body of the artist's works would damage the potential market for the works.[113] Additionally, the court was inclined to protect the aspects of the artist's work that were closely tied to the concept of integrity, finding that sacrificing the "accuracy and

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[104] *See* Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1128 (1990) ("Our copyright law has developed over hundreds of years for a very different purpose and with rules and consequences that are incompatible with the droit moral."); *see also* Salinger v. Random House, Inc., 811 F.2d 90, 90 (2d Cir. 1987).

[105] Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982).

[106] *Harper & Row*, 471 U.S. at 566; *New Era Publ'ns Int'l*, 904 F.2d at 159.

[107] *Sony Corp. of Am.*, 464 U.S. at 451.

[108] Consumers Union of United States v. Gen. Signal Corp., 724 F.2d 1044, 1051 (2d Cir. 1983).

[109] *Wojnarowicz*, 745 F. Supp. at 146.

[110] *See generally*, Gordon, *supra* note 106.

[111] *See id.* at 1614.

[112] *See* Melville B. Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth*, 68 VA. L. REV. 1505, 1525-34 (1982) (discussing the practicality of various methods of payment, thus revealing an implicit concern with market cure).

[113] *Salinger*, 811 F.2d at 96.

vividness" of his expression by allowing others to use his unpublished works would violate the author's moral rights.[114]

In *Blanch v. Koons*,[115] famed artist Jeff Koons created a collage painting in which he copied, but altered, the appearance of part of a copyrighted photograph taken by fashion photographer Andrea Blanch. The court deemed this a fair use.[116] Koons reported that his net compensation attributable to the work was $126,877, and his net gain for the whole series was $2 million, while Blanch licensed her image for $750.[117] Blanch did not claim that the potential market for her work was harmed by Koons' use; however, she did claim infringement by violation of her exclusive rights under section 106 of the Copyright Act, including the right to display the work, which courts have interpreted as implicating moral rights by misrepresenting the work or displaying it in a context or manner that modifies or distorts the original.[118] In addition to there being no market harm in this incident, there was no market failure.[119] Blanch previously licensed the work to a magazine and likely would have licensed the work to Koons.[120] As one scholar stated, "[f]air use is one label courts use when they approve a user's departure from the market."[121] But how can courts approve this use? By allowing artists to free ride in this way, the court implies that there is no value in the artistic contribution Blanch made. Even if the potential market harm of a use is not immediately clear, demoralizing authors in this way will decrease the production of valuable works, and thus will not serve the purpose of the Copyright Act.[122]

Today's art market is filled with artists making millions through mass-appeal pieces, such as giant balloon animals and crystal-encrusted skulls,[123] while other artists watch private owners sell their works at auctions for exorbitant profits, without the artist ever seeing a penny.[124] The gross failure of the system to recognize artists'

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[114] *Id.*

[115] Blanch v. Koons, 467 F.3d 244 (2006).

[116] *Id.* at 259.

[117] *Id.* at 249.

[118] *See, e.g.*, *Wojnarowicz*, 745 F. Supp. at 137 (quoting Edward J. Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 Colum. L. Rev. 1733, 1740 (1984)).

[119] *Blanch* at 249.

[120] *Id.* at 247-48.

[121] *See* Gordon, *supra* note 106, at 1614.

[122] *See id.* at 1601.

[123] *See* Kathryn Tully, *The Most Expensive Art Ever Sold at Auction: Christie's Record-Breaking Sale*, Forbes (Nov. 13, 2013, 12:34 PM), http://www.forbes.com/sites/kathryntully/2013/11/13/the-most-expensive-art-ever-sold-at-auction-christies-record-breaking-sale/; Alan Riding, *Alas, Poor Art Market: A Multimillion-Dollar Head Case*, N.Y. Times (Jun. 13, 2007), http://www.nytimes.com/2007/06/13/arts/design/13skul.html?_r=0; *see also* Hannah Furness, *Painter Could Beat Damien Hirst to Become Britain's Most Expensive Living Artist*, Telegraph (Jun. 9, 2014, 10:00 PM), http://www.telegraph.co.uk/culture/art/art-news/10887111/Painter-could-beat-Damien-Hirst-to-become-Britains-most-expensive-living-artist.html ("The world record price set by [Damien Hirst's] Golden Calf work, the dead cow in formaldehyde which fetched £10.3 million in 2008, could now be broken by a simple-looking, colourful painting by Peter Doig.").

[124] Whitney Kimball, *Shouldn't Artists Benefit When Their Paintings Auction for Millions,* Slate (Jun.

economic rights indicates the need for change. In response to these issues, entities like the Artists' Rights Society ("ARS") and the Visual Arts and Galleries Association ("VAGA") have been imploring moral rights provisions, arguing that artists should be owed royalties for the use of their images in auction catalog illustrations.[125] Furthermore, artists themselves are suing auction houses for resale royalties.[126] The California Resale Royalties Act ("CRRA") is the first piece of legislation in the United States that recognizes *droit de suite*, or the resale royalty right, though similar provisions are common in Europe.[127] Although the right does not explicitly implicate moral rights, it establishes an ongoing connection with a work that is not severed by one economic transaction or physical separation from the work; as such, *droit de suite* in some ways recognizes the unique personal connection between an artist and a work that *droit moral* does. Despite California's attempt to provide increased protection, a California district court found that the CRRA was unconstitutional.[128] The decision, however, will likely be appealed. The next decision could provide an opportunity for the court to recognize the connection between artists' economic interests and moral rights through fair use.

Finally, at its heart, the fair use analysis applies an equitable rule of reason.[129] It considers all circumstances of the case, weighs each factor, and asks whether the use at issue furthers the interests of the Copyright Act to "reward[] the individual author in order to benefit the public."[130] Fair use exists to allow creators to build on the

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29, 2014, 11:45 PM), http://www.slate.com/articles/arts/culturebox/2014/06/artists_royalties_and_droit_de_suite_the_american_royalties_too_act.html.

[125] *See* Artists Rights Society (ARS), *Submission of Comments for the Equity for Visual Artists Act of 2011 by Artists Rights Society*, UNITED STATES COPYRIGHT OFFICE, 1 (2012), http://www.copyright.gov/docs/resaleroyalty/comments/77fr58175/Artists_Rights_Society.pdf [hereinafter *ARS Comments*] ("The benefits derived from the appreciation in [visual artists'] works accrue primarily to collectors, auction houses, and galleries."); VAGA (Visual Arts and Galleries Association), *Written Comments of VAGA Notice of Inquiry Concerning the Resale Royalty Right 77 Fed. Reg. 58175 (Sept. 19, 2012)*, UNITED STATES COPYRIGHT OFFICE, 1 (2012), http://www.copyright.gov/docs/resaleroyalty/comments/77fr58175/VAGA.pdf [hereinafter *VAGA Comments*] ("[T]he artist . . . usually does not benefit directly from the increasing value of his work. Those rewards go to the art market: collectors, dealers, galleries and auction houses.").

[126] Kelly Crow, *Artists Sue Auction Houses,* WALL STREET JOURNAL (Oct. 19, 2011), http://online.wsj.com/article/SB10001424052970203658804576639602318043910.html.

[127] The California Resale Royalty Act entitles artists to a royalty payment upon the resale of their works of art under certain circumstances. CAL. CIV. CODE §§ 980-989 (West 1988). In the European Union, the European Counsel enacted the EC Directive on the resale right with the intention of harmonizing the resale right recognized in various member states. *See* Sirvinskaite, *supra* note 19, at 285 (citing European Parliament and Council Directive of Sept. 27, 2001 on artist's resale right).

[128] Estate of Graham v. Sotheby's Inc., 860 F. Supp. 2d 1117, 1124 (C.D. Cal. 2012) (holding the Act violated the Commerce Clause because it "explicitly regulates applicable sales of fine art occurring wholly outside California. Under its clear terms, the CRRA regulates transactions occurring anywhere in the United States, so long as the seller resides in California. Even the artist—the intended beneficiary of the CRRA—does not have to be a citizen of, or reside in, California.") (citing CAL. CIV. CODE §§ 986(a), 986(c)(1)) (internal citations omitted).

[129] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984) (applying an "equitable rule of reason"').

[130] Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 545-46 (1985).

work of others and to promote important areas of intellectual activity to spur creation and innovation.[131] Courts tend to favor a finding of fair use when the use provides the public with access to important information.[132] However, there is "no public interest in false facts."[133] A use that distorts a work or misleads viewers should not be awarded fair use protection since, in these cases, copyright law's goal of "promoting the Progress of Science and useful Arts" would be better served by preventing the use than by allowing it.[134] Additionally, the legislative history of the Copyright Act indicates Congress' intent to apply the VARA with reference to fair use[135] and resale royalties,[136] and to use VARA to protect and preserve artists' rights in order to "serve an important public interest."[137] When applying the overall public interest consideration to a fair use analysis, courts should give greater weight to the moral rights implicated by the use.

V. Conclusion

The enactment of VARA and state recognition of artists' moral rights represent movement toward a more comprehensive recognition of artists' rights of integrity in the United States. Despite this progress, VARA's preemption of most state statutes, the limited protections VARA affords, and the reluctance of courts to invoke VARA indicate the need for amendment of VARA or the creation of an alternate doctrine

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[131] *See* Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569, 579 (1994) (explaining that creators may use the works of others and "[a]lthough [a finding of] transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.").

[132] *See, e.g.*, *id.*; Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966)*;* Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977); Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968).

[133] Guylyn Cummins & Valerie E. Alter, *Can Intentional or Knowingly Reckless Misuse of Copyrighted Material Be Considered "Fair Use?"* 26 Comm. Law. 10, 13 (2009); *see also* Hart v. Warner Bros., Inc., No. 1:97cv01956 (E.D. Va., filed Dec. 4, 1997) (settled); Lawrence Siskind, *The Devil's Advocate*, Legal Times, Mar. 23, 1998, at 23 (discussing the unlicensed use of a likeness of artist Frederick Hart's *Ex Nihilo*, a massive bas relief sculpture which "represents [the artist's] search for the Divine" in "The Devil's Advocate," and reporting the artist stated the movie "desecrated his work" by making the likeness of the sculpture writhe to embody evil in the movie).

[134] *See* Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006).

[135] 17 U.S.C. § 106A (2012) ("Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art . . . ."); H.R. Rep. No. 101-514, pt. 4, at 6932 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6932 ("section 107's fair use provisions apply to violations of new section 106A").

[136] H.R. Rep. No. 101-514, at 6932 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6932–33 (explaining that section 8(b) of the bill directs the Copyright Office, in consultation with the National Endowment for the Arts, to study the feasibility of implementing a system that provides authors with a share of the profits from any resale of their works, or any similar system).

[137] H.R. Rep. No. 101-514, at 6915-16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6915-16 (statement of Rep. Robert W. Kastenmeier, Chairman, H. Judiciary Subcom. on Courts, Intellectual Property, and the Administration of Justice).

through which artists may seek relief. By including a consideration of moral rights in the fair use analysis through the purpose and economic impact factors, courts can recognize moral rights in a context that is more flexible than VARA. Additionally, this analysis could include some of the same considerations that courts have previously invoked in moral rights cases, which are not explicitly included under VARA on its face. In addition to bringing the United States closer to Berne compliance, recognizing moral rights for artists will benefit the public by recognizing artists as culturally and economically valuable, which, in turn, will promote artistic and creative development and serve the purpose of the Copyright Act.[138]

Clearly, the art world has not fully resolved the issues posed in *Wojnarowicz*. It is still ambiguous how explicit or offensive art implicates funding, display, and endorsement by American cultural institutions, and how fair use applies to misleading or distorted uses of fine art. For example, in 2010, the National Portrait Gallery, bowing to pressure from the Catholic League and a few members of Congress, removed an excerpt from Wojnarowicz's short silent film, "Fire in My Belly," from a show because it contained an eleven-second scene of ants crawling over a crucifix.[139] This evidences the current need to strengthen protection for moral rights to better fight removal of works (or segments of work) and provide institutions with tools to fight censorship. It is not clear whether the Catholic League employed tactics similar to those used by the AFA against Wojnarowicz, but it is clear that the same issues that sparked the 1990 litigation are still prevalent today. In the words of Wojnarowicz, "[b]ottom line, if people don't say what they believe, those ideas and feelings get lost. If they are lost often enough, those ideas and feelings never return."[140] It is necessary to continue to promote this type of creative freedom and defend artistic expression from the chilling effects of misleading and distorted representations of artists' works. Providing moral rights protection through an expanded fair use analysis provides a solution.

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[138] *See generally* Brian T. McCartney, *Creepings and Glimmers of Moral Rights of Artists in American Copyright Law*, 6 UCLA ENT. L. REV. 35 (1999).

[139] *See* Jacqueline Trescott, *Ant-covered Jesus Video Removed from Smithsonian After Catholic League Complains*, WASH. POST (Dec. 1, 2010, 12:00 AM), http://www.washingtonpost.com/wp-dyn/content/article/2010/11/30/AR2010113004647.html.

[140] Dan Cameron & Dennis Szakacs, *David Wojnarowicz*, QUEER ARTS RESOURCE, http://www.queerarts.org/archive/9902/wojnarowicz/wojnarowicz_bio.html.