

Notes

Moral Rights: Well-Intentioned Protection and Its Unintended Consequences*

Introduction

The issue of moral rights protection has long been one of the most intensely debated issues in American property law. In 1990, Congress ceased its decades-long resistance to providing federal moral rights protection and enacted the Visual Artists Rights Act (VARA) as a step toward compliance with Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Work, which the United States joined in 1988.¹ VARA protects the attribution and integrity rights of “author[s] of a work of visual art.”² Though an artist can waive these rights under narrow circumstances,³ they are otherwise nontransferable,⁴ exist for the duration of the artist’s life,⁵ and are independent of any ownership right or copyright in the work.⁶ Far from ending the moral rights debate, however, the incorporation of VARA into the Copyright Act has sparked further contention, mostly from scholars who claim that VARA’s limited scope and duration provide “too little protection to too few artists”;⁷ that its waiver provision obviates any protection of the artist “against himself”;⁸ and that even the limited class of rights VARA does protect is underenforced by courts.⁹

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1. See Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 946 (1990) (noting that VARA was adopted amidst public sentiment that then-existing legislation was noncompliant with the Berne Convention).

2. 17 U.S.C. § 106A(a) (2006).

3. See *id.* § 106A(e)(1) (requiring that a waiver be “in a written instrument signed by the author” and stating that such waiver applies only to the work and uses of the work specifically identified in the instrument).

4. *Id.*

5. *Id.* § 106A(d)(1).

6. *Id.* § 106A(e)(2).

7. See Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 408 & n.9 (2009) (discussing the shortcomings of VARA and citing several other authors that offer similar criticisms of the Act).

8. Damich, *supra* note 1, at 966.

9. Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 268 (2009).

Despite the ancient philosophic and natural-law arguments advanced for moral rights protection—which date back to the days of Michelangelo¹⁰ and emphasize both the social importance of art as well as art’s role as a continuing communication to the public of the artist’s personality¹¹—moral rights protection has no place in the United States, let alone as part of the Copyright Act, which is principally aimed at promoting artists’ and authors’ incentives to create by granting them a temporary monopoly right over their work.¹² By providing a default rule under which the artist retains the right to “prevent any intentional distortion, mutilation, or other modification of [his or her] work which would be prejudicial to his or her honor or reputation,”¹³ as well as the right to “prevent any destruction of a work of recognized stature,”¹⁴ even after the artist has sold the work, integrity rights protection takes two “sticks” out of an artwork purchaser’s hypothetical “bundle of sticks”—the right to alter the work, and the right to destroy it.¹⁵ The removal of these two traditional indicia of property ownership from the set of property rights a purchaser receives upon buying a piece of artwork diminishes the value of the economic rights in the work, which ultimately harms not only the artist, but also society as a whole, to the extent that artistic expression and the social dialogue it creates are deemed socially desirable.

When considered in conjunction with the arguments advanced in favor of “integrity rights” protection—namely, that such protection is necessary to promote artistic creation and society’s interest in preserving irreplaceable works of art—the real impact of integrity rights protection on artists and society seems truly perverse. In this Note, I will analyze broad moral rights protection from an economic perspective in an attempt to explain why such perverse results are inevitable, focusing on the fact that arguments for integrity rights protection are based on several fundamental misconceptions about the nature of art, the art market, and artists’ supply decisions. In Part I, this Note provides a brief overview of moral rights, discussing what they are, how they originated, and how they are protected in other countries. Part II

10. See Bird, *supra* note 7, at 407 (acknowledging Michelangelo’s assertion of artistic independence against Pope Julius II as a precursor to modern conceptions of moral rights).

11. See *Moral Rights in Our Copyright Laws: Hearing on S. 1198 and S. 1253 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 101st Cong. 26–43 (1989) (statement of Edward Damich, Professor, George Mason University Law School) (explaining how recognition of moral rights will benefit society and arguing that moral rights are a logical implication of the recognition that an artist’s work is “a communication to the public of the personality of the artist”).

12. See Alina Ng, *Copyright’s Empire: Why the Law Matters*, 11 MARQ. INTELL. PROP. L. REV. 337, 344–45 (2007) (discussing monopoly rights as a feature of intellectual property law that facilitates creators’ recovery of their investments).

13. 17 U.S.C. § 106A(a)(3)(A) (2006).

14. *Id.* § 106A(a)(3)(B).

15. See JAMES C. SMITH ET AL., *PROPERTY: CASES AND MATERIALS* 2 (2d ed. 2008) (explaining that property has been defined by some as a “bundle of sticks”—a bundle of individual rights, some of which may be owned by one person, while other rights, or “sticks,” are owned by another person).

outlines several of the most common arguments advanced to support the most controversial moral right—the right of integrity. Then, Part III sets forth an argument against integrity rights protection, arguing specifically that artwork should not be treated differently than other commercial goods and that, to the extent integrity rights advocates argue otherwise, they threaten to harm not only artists but also the public interest in art. I also argue that while the supply decisions of artists are different than the supply decisions of other intellectual property creators, these differences counsel *against* extending protection beyond the artists’ economic interests in their work. Finally, I argue that the principal limitation on integrity rights—the statutory waiver—is an inefficient mechanism that provides little additional protection while multiplying transaction costs for both artists and purchasers. This Note concludes by asserting that the debate over moral rights protection involves an inherent trade-off between artistic veneration and social welfare that requires policy makers to decide whether the expressive value of integrity rights protection is worth the costs it inevitably imposes on artists and society.

I. An Overview of Moral Rights

A. *A Brief History of Moral Rights Protection*

Though the concept of “moral rights” originated in the European civil law tradition and derives its English name from the French *le droit moral*,¹⁶ the idea that artists have unique rights in their work has a doctrinal pedigree that dates back to the Renaissance. Michelangelo, who struggled to free himself from the artistic shackles of the patronage system, is hailed as being the first artist to claim what are currently known as moral rights.¹⁷ The philosophical underpinnings of moral rights doctrine are equally impressive. The theories of such famed German philosophers as Immanuel Kant and Friedrich Hegel, as well as those of German legal scholar Josef Kohler, are hailed as laying the conceptual foundation upon which legal protection of artists’ rights was built.¹⁸ According to Kant, artistic creations were a manifestation of the artist’s will, and as such, the artist’s rights in his work were inalienable “personality” rights rather than mere property rights, which were derived from the artist’s inalienable right to communicate his ideas.¹⁹ Kohler built on the teachings of Hegel to develop a “dualist” theory of

16. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

17. Natalie C. Suhl, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1203, 1206–07 (2002).

18. *See, e.g.*, Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 *N.C. L. REV.* 1, 7–10 (1997) (discussing the history of the *droit moral* and the personality rights scholarship of Kant, Hegel, and Kohler); Suhl, *supra* note 17, at 1208–10 (discussing Kant and Hegel’s ideas that artistic creations are extensions of the artist’s will and explaining the development of these ideas by Gareis, von Gierke, and Kohler).

19. Suhl, *supra* note 17, at 1208.

artistic rights.²⁰ Under this theory, an artist could alienate the physical embodiment of his work and the copyright (i.e., the economic rights in the work) just as he could alienate any other product of his labor; however, because the artist's work was also an embodiment of his personality, he held an inalienable right to preserve his work in its original form, which endured even after he had transferred his economic rights in the work.²¹

B. What Do Moral Rights Protect?

The bundle of rights collectively referred to as "moral rights" embraces four distinct legal entitlements: (1) the right of disclosure, which allows the artist to refuse to expose his work to the public until he feels it has been completed satisfactorily; (2) the right of retraction, which allows the artist to withdraw his work from public view; (3) the right of attribution, under which the artist can condition display of his work upon the attribution of that work to him and can prevent his name from being connected with any work he did not create; and (4) the right of integrity, which allows the artist to prevent the destruction and alteration of his creations.²²

Whether, and to what extent, different countries protect the above-described rights varies, and in light of the apparent international consensus that moral rights protection is desirable, VARA embodies a conservative approach to the issue. While VARA protects only attribution and integrity rights, most European countries recognize all four moral rights.²³ Furthermore, unlike the United States, European countries that recognize these rights often make them inalienable,²⁴ unwaivable,²⁵ and applicable to a broad class of artistic works.²⁶ The French legal system, which is often heralded as offering the most complete moral rights protection, grants to artists perpetual moral rights that secede to, and are therefore enforceable by, either the artist's heirs or the community after the artist's death.²⁷ Some

20. *Id.* at 1209.

21. *Id.* at 1209–10.

22. Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 95–96 (1997).

23. *See, e.g.*, Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 359–63 (2006) (explaining that France, Germany, and Italy protect all four moral rights and discussing all four as part of the "Continental doctrine of moral rights"); *cf.* Adler, *supra* note 9, at 268 (explaining that most European countries recognize the rights of disclosure, attribution, and integrity, and describing France as one of the countries that recognizes the right of retraction).

24. Adler, *supra* note 9, at 268; *see also, e.g.*, Cotter, *supra* note 18, at 10–11 (stating that moral rights in France and Germany are inalienable).

25. *See, e.g.*, Cotter, *supra* note 18, at 10–12 (noting that moral rights are generally unwaivable in Germany and France).

26. *See* Adler, *supra* note 9, at 268 n.23 ("European moral rights doctrine is broader in scope than VARA, sometimes extending to reproductions of original works.").

27. Seth Tipton, *Connoisseurship Corrected: Protecting the Artist, the Public, and the Role of Art Museums Through the Amendment of VARA*, 62 RUTGERS L. REV. 269, 296 (2009). Tipton also cites Spain as another country with legislation that establishes perpetual moral rights. *Id.*

American scholars argue that in order for VARA to effectively protect moral rights, it should be amended to provide for some form of perpetual, unwaivable third-party standing—through a governmental entity or private organization—to protect certain kinds of artwork.²⁸ Currently, there are at least two states that provide for third-party enforcement of moral rights for a period of time after the artist's death, though these provisions may have been preempted by VARA.²⁹

C. *More on the Controversial Right of Integrity*

The right of integrity is the most controversial of the moral rights for several reasons. First, the extent of control it gives the artist over a subsequent owner's use of the work offends traditional American notions of property rights. While the integrity right has been analogized to the artist's reservation of a negative servitude in his work, American property law traditionally disallows negative servitudes in chattel.³⁰ Furthermore, the language used to describe the right, including the recognition of "honor" as a legally protected interest, seems rooted in archaic natural-law principles that were trumped in this country more than a century ago by the emergence of legal realism.³¹ The right of integrity is also distinguishable from the other moral right recognized by VARA, the right of attribution, due to the attribution right's similarity—and some argue co-extensiveness—with other common law rights such as those against fraud and unfair competition.³² It is worth noting, however, that some scholars have analogized integrity rights to dignitary torts, including defamation and invasion of privacy, arguing that both regimes recognize "personality" as the protected interest.³³

28. See, e.g., Cotter, *supra* note 18, at 93 (arguing for expanded protection under VARA, which would ideally include an unwaivable, perpetual right of integrity); Christopher R. Mathews, *VARA's Delicate Balance and the Crucial Role of the Waiver Provision: Its Current State and Its Future*, 10 UCLA ENT. L. REV. 139, 165–66 (2003) (proposing a system by which a public-interest corporation would police the art markets for pieces of art destined for destruction and pay for the removal of this art).

29. See Mathews, *supra* note 28, at 158–68 (describing California and Massachusetts statutes that provide for third-party enforcement of moral rights but acknowledging that there is a still-unanswered question regarding whether VARA preempts state statutes that purport to grant broader standing).

30. Hansmann & Santilli, *supra* note 22, at 101.

31. See Marek Tracz-Tryniecki, *Natural Law in Tocqueville's Thought*, 11 J. MARKETS & MORALITY 27, 31–34 (2008) (explaining how de Tocqueville viewed the relationship between natural law, virtue, honor, and positive law); cf. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533–34 (1928) (Holmes, J., dissenting) (rejecting the idea that there is a "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute").

32. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 276–77 (2003).

33. See, e.g., Edward J. Damich, *A Critique of the Visual Artists Rights Act of 1989*, 14 NOVA L. REV. 407, 411–12 (1990) (describing the similarities in the protection provided by moral rights, privacy rights, and defamation actions).

The absurd practical consequences of integrity rights protection merely confirm the suspicions that are invoked by cursory consideration of the right. In Canada, for example—a country which has an integrity rights provision that mirrors our own³⁴—an artist who created a sculpture featuring sixty geese sued the Toronto shopping mall in which the work was housed after the mall placed ribbons around the necks of each goose as part of a Christmas display.³⁵ The artist claimed that the addition of the ribbons infringed the sculpture’s integrity as a “naturalistic composition” and sought an injunction for their removal.³⁶ The court found that the addition of the ribbons did, in fact, prejudice the artist’s honor in violation of his moral rights and ordered the mall to remove them.³⁷ Similarly, in Europe, integrity rights have been invoked by painters seeking control over how their work is displayed by museums, including control over the other artwork with which it is displayed.³⁸ These cases illuminate the fertile ground that integrity rights protection provides for frivolous lawsuits, which threaten to usurp judicial resources and impose litigation costs that will reduce the return that artwork purchasers are able to reap from their investments.

II. Arguments Advanced in Support of Integrity Rights Protection

The importation of federal statutory moral rights protection into the United States through the enactment of VARA spawned a steady stream of criticism regarding the statute’s narrow scope—criticism that continues to emerge today, more than two decades after VARA’s enactment.³⁹ The extent to which many of these critics’ proposed extensions eviscerate the bundle of potential ownership rights in a piece of artwork is stunning. Their criticisms also raise an important question: What is it about artwork that distinguishes it from other commercial goods, such that an artist who has transferred ownership of his work should retain the right to control the uses to which the new owner puts it, to the detriment of the new owner’s economic rights in the work?

There are four main grounds on which moral rights advocates attempt to distinguish art from other commercial goods, and artists from other

34. See Copyright Act, R.S.C. 1985, c. C-42, § 28.2 (Can.) (offering protection when words are distorted, mutilated, modified, or used for marketing purposes).

35. *Snow v. Eaton Ctr. Ltd.* (1982), 70 C.P.R. 2d 105, at 106 (Can. Ont. H.C.J.).

36. *Id.*

37. *Id.*

38. See Hansmann & Santilli, *supra* note 22, at 107–08 & n.38 (describing painters who have invoked the right of integrity to prevent their work from being displayed in the absence of other works by that painter, or together with works of particular other painters).

39. See, e.g., Bird, *supra* note 7, at 431 (“Any rights granted [by VARA] are narrow in scope and weak in their ability to offer a remedy.”); Damich, *supra* note 1, at 947 (arguing that VARA is not sufficient to bring the United States into compliance with the Berne Convention); Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-first Century*, 2001 U. ILL. L. REV. 151, 153–54 (criticizing VARA’s “extremely narrow” coverage and its “definitional gaps”).

intellectual property producers. This part outlines each of these arguments. Part III then demonstrates why these arguments are misguided and explains how the legal protections they are advanced to support actually harm the interests they purportedly protect.

A. *Protecting the Artist's "Personality" Because of Its Intrinsic Value*

The most common argument advanced in support of moral rights, and the integrity right in particular, attempts to distinguish the process of artistic creation from other productive processes. As the Second Circuit aptly summarized, "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."⁴⁰ In other words, "[a]n artistic creation is not merely a product that can be bought or sold but rather it is a direct reflection on the author's personality, identity, and . . . 'creative soul.'"⁴¹ This argument appears to be derived from the teachings of the German idealist philosophers whose work formed the conceptual basis upon which European statutory moral rights protection was founded.⁴²

While all who advance this argument agree that it is the expression of the artist's "personality" or "spirit" contained in the work that warrants protection of the work itself, there are several different justifications for protecting this expression. Some argue that because the unique nature of the artist's creative process makes his work an extension or projection of his "personhood,"⁴³ the author reserves a "fundamental human right or a personal civil right"⁴⁴ to protect the integrity of his work, similar to his right to protect the integrity of his physical person.⁴⁵ Others invoke a consequentialist justification that focuses on the "subjective personal anguish" an artist feels from seeing his work altered or abused.⁴⁶ As one critic summarized, "It is as if the work has a magical connection to its maker; hurting the piece will hurt the artist as if you were sticking pins in a voodoo doll."⁴⁷ Still others invoke the concept of paternity, using it as a metaphor to explain the artist's profound connection to his work.⁴⁸ Under this line of

40. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

41. Bird, *supra* note 7, at 410.

42. *See supra* subpart I(A).

43. Bird, *supra* note 7, at 410.

44. *Id.*

45. Adler, *supra* note 9, at 269 ("Indeed, moral rights advocates sometimes speak of art works as if they were living things: 'To mistreat the work is to mistreat the artist.'" (citation omitted)).

46. Hansmann & Santilli, *supra* note 22, at 102.

47. Adler, *supra* note 9, at 269.

48. *Id.*

reasoning, because the artist imbues his work with the essence of himself, his creations are more like his children than they are like mere physical objects.⁴⁹

B. Protecting the Artist's "Personality" to Facilitate Art Creation

Another common argument for moral rights protection may be viewed as an extension of the previous argument. Both arguments conceive of art as an embodiment of the artist's personality. The previous argument, however, focuses on the existence of the artist's personality in his work as an interest that warrants protection for its own sake, while this argument focuses on the danger that the artist's fear of the integrity of his work being compromised will have a chilling effect on incentives for artistic creation.⁵⁰ One scholar has summarized three ways in which integrity rights protection supposedly increases an artist's incentives to create: (1) it gives him control over his artistic "voice," thereby enhancing his "personal autonomy as a creative being"; (2) it increases his bargaining power, thereby enabling him "to bargain *ex ante* for greater concessions from those who purchase his work or from those who have to obtain his consent before significant alterations to his work are made"; and (3) it creates a social climate in which the artist feels his creative contributions are acknowledged and respected.⁵¹ Given that intellectual property protection in the United States is chiefly concerned with the maintenance of creation and innovation incentives,⁵² this is perhaps the most compelling argument for integrity rights protection in the United States. Indeed, one of the two motivating justifications for VARA's enactment was Congress's desire to incentivize the production of American art.⁵³

C. Protecting Artwork Integrity to Protect the Public Interest in Art

Another common argument—that the preservation of artwork is in the public interest—is a further extension of the previous two arguments: to the extent that integrity rights can be used to protect existing artwork, protection of these rights advances important social interests.⁵⁴ At least one commenta-

49. *Id.*; see also Hansmann & Santilli, *supra* note 22, at 102 (“[A]n artist may identify with his works as with his children: prize them for their present character and not want that character changed.”).

50. See Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 302 (2003) (“Part of [moral rights'] instrumental value lies in their ability to offer some form of protection to the artist against a nonpecuniary species of harm to his 'personality' interest when undesired alterations are made to his work.”).

51. *Id.* at 302.

52. See *supra* note 12 and accompanying text.

53. See Ong, *supra* note 50, at 302 (“The justifications offered by lawmakers . . . revolved around two basic themes: the creation of incentives for the production of American art works and the preservation of American cultural heritage.”); see also *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 49 (1st Cir. 2010) (“To encourage the creation of [the kind of art that falls within the scope of VARA], VARA protects the 'moral rights' of its creators.”).

54. See Hansmann & Santilli, *supra* note 22, at 105 (“Not only the artist himself, and the other individuals who currently own works (or copyrights in the works) created by that artist, but also the

tor has claimed that “[p]rotecting irreplaceable works from irreversible physical changes presents the most compelling case for moral rights protection.”⁵⁵

The social interest in art preservation can be conceived of in several possible ways. Perhaps the most intuitive is the claim that works of art are socially desirable because they represent important social critiques or ideals that should be preserved for the sake of the ideas they represent.⁵⁶

Another major argument in favor of art preservation as a social interest views art as an embodiment of the culture that inspired its creation. Thus, it is necessary to preserve art in order to “captur[e] the essence of culture . . . for future generations,” and to prevent its distortion, which would “cheat[] the public of an accurate account of the culture” that inspired it.⁵⁷ This, in fact, was another major motivation behind VARA’s enactment—the preservation of America’s cultural heritage.⁵⁸

Finally, some scholars argue not only that art is an embodiment of culture but also that great works of art are themselves a part of social culture. According to this argument, famous works of art “become common reference points or icons that are widely shared in social communication,” the loss of which would deprive the community of a part of its common vocabulary.⁵⁹

D. Protecting the Artist’s Reputation to Maintain the Value of the Artist’s Portfolio as a Whole

As discussed above, an artist’s integrity rights are seen as an interest separate from, and perhaps even more important than, any economic rights that exist in the work.⁶⁰ Consequently, the effect of integrity rights protection on economic value is seen by most moral rights advocates as wholly irrelevant to the desirability or undesirability of moral rights protection.⁶¹ In one of the first (and few) economic analyses employed in support of moral rights, however, Professors Henry Hansmann and Marina Santilli argue that integrity rights protection may be desirable for its ability to preserve the

public at large may have an interest in protecting the integrity of an artist’s work.”); *see also* Adler, *supra* note 9, at 270 (“Thus moral rights protect not only the personality interests of the individual artist; they also protect the public interest . . .”).

55. Damich, *supra* note 1, at 950.

56. Hansmann & Santilli, *supra* note 22, at 106.

57. Adler, *supra* note 9, at 270 (quoting H.R. REP. NO. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915).

58. Ong, *supra* note 50, at 302.

59. Hansmann & Santilli, *supra* note 22, at 106.

60. *See supra* subpart I(A).

61. *See* Ong, *supra* note 50, at 303–04 (advancing both intrinsic and instrumental arguments in support of integrity rights protection while acknowledging that resulting restrictions placed on a purchaser’s ability to make alterations to the work may decrease the value of that work as a private asset).

economic value of artwork.⁶² According to their argument, an artist's reputation and every piece of artwork he creates serve as advertisements for the artist's body of work as a whole; therefore, to the extent that the owners of the artist's work have the ability to modify that work in a way that alters the public's impression of the artist and his portfolio, they possess the ability to lower the value of the artist's entire body of work.⁶³ Thus, a modification by a purchaser of the artist's work can affect the interests of other owners of the artist's work, as well as the interests of the artist himself, since each subsequent piece of art he creates will sell for less than it would have absent the reputational damage he sustained at the rogue purchaser's hands.⁶⁴ Furthermore, an art owner's self-interest may not be sufficient to keep him from making alterations that increase the price he can obtain for the piece that he owns but which cause a concomitant decrease in the value of the artist's portfolio that exceeds the value of the modifier's personal gain.⁶⁵ Integrity rights protection allegedly prevents these net-portfolio-value losses by forcing artwork owners to internalize the reputational externalities created by their alterations and modifications.⁶⁶

III. An Economic Analysis of Integrity Rights Protection

Critics of VARA's narrow scope advance the foregoing arguments to support their pleas that Congress extend VARA's protections and that courts broadly interpret its existing substantive protections. These arguments, however, rest on fundamental misconceptions about the market for art, artists' supply decisions, and even the nature of art itself. This part analyzes how these misconceptions cause moral rights advocates to argue for broad protections that impose real costs but illusory benefits, to the ultimate harm of both of the interests they purport to protect—the artists themselves and the public interest in artistic creation. Furthermore, this part explains why the statutory waiver, a mechanism developed to curtail broad moral rights liability, is not sufficient to prevent these perverse consequences.

62. Hansmann & Santilli, *supra* note 22, at 104–05. Professors Hansmann and Santilli also argue for integrity rights from a public-interest perspective. *Id.* at 105–07.

63. *Id.* at 105.

64. *See id.* at 104 (“[A]lteration of works that an artist has already sold can, by damaging his reputation, lower the prices he can charge for other work that he sells subsequently.”).

65. This might occur where the artist is well-known, but the individual piece of art is not a particularly prominent component of his body of work. In this instance, the owner may be able to make a greater profit if he cuts up the artwork and sells it on a piecemeal basis, advertising each piece as having been created by famous artist X. *See, e.g.,* Mathews, *supra* note 28, at 142–43 (relating the story of a group of entrepreneurs who cut up a Picasso painting and resold it in 500 pieces).

66. *See* Hansmann & Santilli, *supra* note 22, at 95 (“[M]oral rights doctrine serves, among other purposes, to control reputational externalities to the potential benefit, not just of the individual artist, but of other owners of the artist's work and of the public at large.”).

A. *Understanding Artistic Creations as Commercial Goods*

Notwithstanding lofty philosophical notions of art as the embodiment of an artist's personality, artistic creations are commercial goods. Any argument to the contrary ignores market realities and "depends on and glorifies a line between art and everyday objects that no longer exists."⁶⁷ To the extent that integrity rights protection ignores the commercial nature of artwork and rests instead on the antiquated notion that there is some intrinsic value to artistic creation, it imposes real costs on both artists and society by diminishing the value and alienability of artwork.

As is true in the demand function for other commercial assets, one of the components of the art-market demand function is a prospective buyer's expected return on the artwork as compared to his expected return on all potential substitutes.⁶⁸ Integrity rights protection, to the extent that it restricts what the owner can do with the artwork, is an *ex ante* limitation on a prospective purchaser's ability to realize the full possible return on his investment. This limitation on expected return will lower the market demand for the artist's work, thereby lowering both the quantity of artwork demanded by the market and the price the artist (or a subsequent owner) can obtain for each piece of art he desires to sell.⁶⁹ This is especially true given emerging changes in the way art functions in our society, which have increased the importance of art's economic value both pre- and post-purchase.⁷⁰

Commentators point to soaring prices in the contemporary art market to support their assertions that, today, art functions less as a personal expression of its creator and more as a luxury good, with pieces of art serving as "de rigeur trophies for newly minted billionaires."⁷¹ In other words, participants in the contemporary art market may seek expensive pieces of art for their ability to emit social signals about their owner's financial means rather than for their embodiment of artistic spirit. As a result, the economic value of

67. Adler, *supra* note 9, at 297.

68. JAMES HEILBRUN & CHARLES M. GRAY, *THE ECONOMICS OF ART AND CULTURE* 177 (2d ed. 2004).

69. See Cotter, *supra* note 18, at 67 (illustrating that placing limits on what a buyer can do after he purchases a piece of art could either lower the purchase price for the piece or prevent the buyer from purchasing the work). The extent to which a prospective purchaser believes that his use of a piece of artwork will be limited—and thus the extent to which the price he is willing to pay will be lowered—will be affected not only by his expected cost of future *successful* integrity rights claims brought by the artist but also by his expected cost of defending himself against the artist's ultimately *unsuccessful* integrity rights claims. The easier the purchaser believes it will be for the artist to bring suit on an integrity rights claim, and the more litigious he expects the artist to be, the higher this latter expected cost will be. Given the fertile ground for litigation that broad integrity rights protection seems to provide, this expected cost could be substantial. See *supra* subpart I(C). Furthermore, to the extent that such protection facilitates the filing of frivolous lawsuits, it also threatens to impose substantial administrative costs on society by usurping scarce judicial resources.

70. See DAVID THROSBY, *THE ECONOMICS OF CULTURAL POLICY* 17 (2010) (recounting the shift to valuing art for its economic value rather than its cultural value).

71. Adler, *supra* note 9, at 298.

artwork plays an increasingly important and independent role in the demand function of today's art market.

The emergence and popularization of fine-art investment funds also highlights the important role that art's economic value plays in stimulating the demand for art.⁷² Fund managers who utilize art as an investment vehicle will consider the artistic merit of artwork only to the extent that it indicates a potential for future financial returns.⁷³ Furthermore, fund managers will favor modifications of fund artwork that increase the economic value of that work. To the extent that moral rights enable the artist to retain the ability to prevent value-adding modifications, they give the artist the ability to unilaterally prevent investors from realizing the full possible return on their investment. Increasing integrity rights protection will only increase this risk of unrealizable appreciation, which will not only lower investment funds' demand for art as an investment, but could also eliminate artwork appreciation potential to the extent that art will no longer be a sound investment vehicle for these funds. Broad integrity rights protection can be expected to have this kind of especially chilling effect on any artwork demand that is stimulated primarily by a piece of art's economic value and potential for appreciation.

B. Redefining the Public Interest in Art

The substantial costs imposed by integrity rights protection are not adequately justified by the "public interest in art" arguments of integrity rights advocates.⁷⁴ While integrity rights protection may very well function in the ways that advocates claim it does—safeguarding the embodiment of important ideas, preserving the memory of the cultural environment that motivated the artwork's creation, and protecting common social reference points—these functions do not serve the *real* public interest in art—its ability to disseminate ideas and serve as a catalyst for discussion and debate about those (and other) ideas.⁷⁵

72. See Brigitte Yuille, *Fine Art Funds: A Beautiful Investment*, FIN. EDGE (Mar. 3, 2010), <http://financialedge.investopedia.com/financial-edge/0310/Fine-Art-Funds-A-Beautiful-Investment.aspx#axzz1cZt6XYo7> (describing opportunities for investing in fine art); see also FINE ART FUND GROUP, <http://www.thefineartfund.com> (offering investors the opportunity to invest in the art market).

73. See Yuille, *supra* note 72 (explaining that financiers began to form art investment funds because of the art market's high historical performance).

74. See *supra* subpart II(C).

75. Cf. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (acknowledging that to the extent overbroad statutes deter constitutionally protected speech, they harm society as a whole by depriving it of "an uninhibited marketplace of ideas"); *Lamont v. U.S. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them."); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas— . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.").

The argument that integrity rights are necessary to safeguard individual works of art for the public good is premised on a static conception of art.⁷⁶ As one commentator has explained, however, there are vital artistic interests in transforming original works of art through alteration and destruction.⁷⁷ One example of this is Robert Rauschenberg's transformation of a line drawing by Willem de Kooning into a new piece of art, which he accomplished by completely erasing the lines.⁷⁸ Rauschenberg's actions were intended to signal the "impotent rebellion" of emerging artists against the "heroic past" of abstract expressionism that de Kooning's work represented.⁷⁹ Since then, the creation of new art through the symbolic destruction of prior works of art has become an essential component of contemporary art.⁸⁰

Furthermore, the argument that integrity rights are necessary to preserve certain ideas represented by works of art perpetuates an unjustifiable judgment about the relative value of past and future acts of artistic expression. Integrity rights protection creates a default rule under which the original idea embodied in a work of art is always more valuable than any subsequent idea that a particular piece of art could be made to represent; however, there is no basis for concluding that the ideas and history embodied by the original work of art are any more important than those represented by a modification or destruction of that work. For example, there may be symbolic value in altering or destroying a work of art that was created during an oppressive social regime and that embodies the ideals of that regime.⁸¹ This is illustrated by the current debate over whether to preserve or destroy racist public monuments that were erected in the South before the Civil War.⁸²

Given that the social value of art is in its ability to communicate ideas and spark social dialogue, measures that are intended to preserve works of art and the original ideas they represent—thereby ensuring an unchanging, finite universe of ideas—are an improper means of promoting this value. Art's ability to create social value should be measured not by its constancy, but by its malleability and velocity—the extent to which it can be made to communicate new ideas and the frequency with which it changes hands, with the movement of art throughout society serving as a proxy for the movement of ideas throughout society. Integrity rights protection diminishes both of these measures of social value, however, by preventing a work of art from

76. See Adler, *supra* note 9, at 265 (discussing how integrity rights threaten art by preventing works from being changed or destroyed).

77. *Id.* at 281.

78. *Id.* at 283.

79. *Id.*

80. *Id.* at 284–87.

81. *Id.* at 280.

82. *Id.*

communicating anything other than the original artist's ideas and by restricting the demand for art.

C. Integrity Rights Protection Cannot Fully Eliminate Reputational Externalities

While Professors Hansmann and Santilli acknowledge the potential costs of integrity rights protection, they posit an argument that integrity rights still serve an efficient purpose—forcing owners who alter artwork to internalize the externalities of their actions.⁸³ This, their argument claims, is necessary to protect the investments of other owners of the artist's work and to maintain the artist's incentive to produce work. However, while it is possible that destruction or alteration of an artist's work could damage his reputational capital, thereby diminishing the value of his other works,⁸⁴ there is no reason to believe that alteration or destruction of an artist's work would not actually *increase* the value of the artist's portfolio by increasing the scarcity of his work.⁸⁵ Furthermore, it is unclear that the preservation of artwork value that Professors Hansmann and Santilli claim integrity rights can accomplish would be sufficient to offset the diminution in value that results from the post-sale control the artist retains over his work.

The Hansmann and Santilli argument also ignores the fact that, in addition to a purchaser's alteration or modification, there are numerous other events outside of an artist's control that have a similar potential to create reputational externalities; however, integrity rights protection is not extended to limit the occurrence of these events. One example is the sale of an artist's work by an influential collector.⁸⁶ This could harm the artist's reputation because the market is likely to interpret such a sale as an indication that the artist's work is no longer in vogue and therefore is losing value. Consider too the devaluation that occurs when a dealer dumps pieces of an artist's work on the market in large quantities. This dumping could be the result of either innocuous motives (such as the dealer anticipating a change in public taste or a change in the dealer's financial circumstances demanding that he liquidate his assets) or nefarious motives (like revenge-motivated market

83. *See supra* subpart II(D).

84. I am assuming, as Professors Hansmann and Santilli seem to do, that modification or destruction would be alone sufficient to damage the artist's reputation; however, I do not believe that a naked alteration or modification—one that is not accompanied by false attribution—would be harmful to the artist's reputational capital. *See* LANDES & POSNER, *supra* note 32, at 279–80 (concluding that the mutilation of a single work of art shows only that “at least one person disliked” the work or its artist).

85. *Id.* at 280; *see also* HEILBRUN & GRAY, *supra* note 68, at 175 (noting the inverse relationship between the market supply and market price of art, given a constant level of market demand).

86. *See* HEILBRUN & GRAY, *supra* note 68, at 185 (citing an example of a collector who after stimulating a price hike by purchasing seven of an artist's paintings sold those paintings without explanation, causing a price decrease as significant as the original price increase).

manipulation).⁸⁷ While the greater quantity of the artist's work available on the market may alone be sufficient to devalue all of the artist's work, it is likely that there would be some reputational component to this devaluation as well, which could result either from the signal that dumping sends to the market regarding the desirability of the artist's work or from the artist losing his reputation as a creator of "rare" pieces.

Regardless of whether the devaluation is derived from reputational harm or lack of scarcity, however, the foregoing examples illustrate that integrity rights offer incomplete protection against all intentional, self-interested actions by third parties that have the potential to devalue an artist's portfolio of work. These examples also illustrate the impossibility of fully insulating the artist's reputation from these externalities, which would entail requiring collectors to remain anonymous when buying or selling a piece of artwork and placing quotas on the quantity of an artist's work that a dealer is allowed to put on the market at one time. Perhaps most importantly, though, they further highlight the commercial nature of artwork—the fact that the value of artwork is affected by the same market conditions that affect the value of other commercial goods—and that an artist's reputation can both influence and be influenced by those factors.

If integrity rights are unable to fully insulate artists from the reputational externalities of third-party actions, is there a reason to believe that they are desirable for the piecemeal protection they do provide? According to the general theory of second best, there is no reason to believe that by eliminating some externalities, integrity rights protection effects any incremental improvement in social welfare.⁸⁸ Under this theory, if one of the conditions necessary to achieve a Pareto optimal situation—a situation in which there are no externalities—cannot be satisfied, the other conditions necessary to bring about the optimum situation are no longer necessarily desirable.⁸⁹ Therefore, in a world in which optimal circumstances are unattainable—namely, a world in which the value of an artist's portfolio is unaffected by reputational externalities that may diminish the value of his work—there is no reason to believe that social welfare increases with each optimum condition that is fulfilled or each externality-eliminating social policy that is enacted.⁹⁰ It is not necessarily desirable to eliminate as many reputational externalities as possible when the optimal level of reputational

87. See Bird, *supra* note 7, at 433 n.167 (recounting the actions of a vengeful art dealer who sought to destroy a successful painter's career by advertising his paintings at low prices and dumping them on the market in large quantities, which had the intended effect of causing the market price of the painter's work to plummet).

88. See R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11–12 (1956) (“[I]n a situation in which there exist many constraints that prevent the fulfillment of the Par[et]ian optimum conditions, the removal of any one constraint may affect welfare or efficiency either by raising it, by lowering it, or by leaving it unchanged.”).

89. *Id.* at 11.

90. *Id.* at 12.

insulation is not possible, because the fulfillment of any one optimum condition is as likely to work to correct the imperfections in the system (thereby increasing social welfare) as it is to compound those imperfections (thereby decreasing social welfare).⁹¹ This is especially true in the case of integrity rights, where the proscribed actions are as likely to give rise to externalities that devalue an artist's work as they are to increase the scarcity of his work, thereby increasing its value; where the means of incrementally decreasing externalities entail substantial costs in themselves, the benefits of which cannot be fully realized because of the impossibility of reaching the social optimum; and where the costs imposed by integrity rights protection are not mitigated by the creation of countervailing benefits such as stimulating artistic production. It is to this third point that this Note now turns.

D. The Unique Nature of the Artistic-Supply Decision

The artist's insatiable creative drive is infamous. Many have noted the extent to which that drive may subvert all other aspects of an artist's life to its demands.⁹² As George Bernard Shaw once observed, "The true artist will let his wife starve, his children go barefoot, his mother drudge for his living at seventy, sooner than work at anything but his art."⁹³ According to art historians, most artists disclaim expected financial reward as a motive for producing art.⁹⁴ The existence of the "starving artist" stereotype suggests that artistic creation is not motivated solely by the expectation of monetary reward but also by some additional nonpecuniary satisfaction that results from that creation.⁹⁵ The fact that the artist's supply decision is partially motivated by intrinsic, nonpecuniary reward means that the artist's creation incentives are less responsive to a decrease in the monetary reward he

91. See Richard S. Markovits, *Second-Best Theory and Law & Economics: An Introduction*, 73 CHI.-KENT L. REV. 3, 3 (1998) ("According to The General Theory of Second Best, if one or more members of a set of optimal conditions cannot be fulfilled, there is no general reason to believe that fulfilling (or more closely approximating) more of the remaining conditions will bring you closer to the optimum than fulfilling fewer of the remaining conditions.").

92. See, e.g., ROY F. BAUMEISTER, *THE CULTURAL ANIMAL: HUMAN NATURE, MEANING, AND SOCIAL LIFE* 166–67 (2005) (observing that "starving artists" pursue self-actualization through creative work even though their more basic needs remain partially unfulfilled); Monroe E. Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333, 1335 (1968) (presenting the "strongly held" vision of artists as people who will spend their last funds on art supplies rather than on necessities for themselves and their families); Greg R. Vetter, *The Collaborative Integrity of Open-Source Software*, 2004 UTAH L. REV. 563, 676 (acknowledging the "starving artist" stereotype, which is based on the notion that artists value the creative experience over economic security).

93. GEORGE BERNARD SHAW, *MAN AND SUPERMAN: A COMEDY AND A PHILOSOPHY* 22 (Brentano's 1922) (1903).

94. BRUNO S. FREY, *ARTS & ECONOMICS: ANALYSIS & CULTURAL POLICY* 143 (2000); see also HEILBRUN & GRAY, *supra* note 68, at 174 (quoting an artist as saying that "art isn't really done for any reason other than a means of the artist's self-expression").

95. See LEO TOLSTÓY, *WHAT IS ART? AND ESSAYS ON ART* 53 (Aylmer Maude trans., Oxford Univ. Press 1938) (1930) (describing the intense, satisfying pleasure that an artist experiences when creating a work).

expects to receive from selling his work and may not be as responsive as integrity rights advocates claim to fears regarding the post-sale fate of his work. Furthermore, it may help to explain empirical evidence showing not only that greater integrity rights protection does not lead to greater artistic innovation, but also that artistic innovation in the United States since the 1940s has been greater than that in Europe during the same time period, despite Europe's more generous moral rights protection.⁹⁶

An artist's decision to produce speculative works—those works the artist produces without a prior guarantee of sale—has traditionally been viewed as a function of his costs of production and the price for which he expects to be able to sell the work.⁹⁷ According to this theory, an increase in the artist's production cost will have a negative effect on his willingness to produce a particular piece of art, while an increase in his expected selling price will have a positive effect on his willingness to produce a particular piece of art.⁹⁸ The results of labor economists' investigation into artists' time-allocation decisions, however, suggest that an additional variable should be added to the artistic-supply function—one that accounts for the artist's "intrinsic motivation."⁹⁹

The excess supply of labor in the art market, combined with the low earnings that artists receive from artistic production, has been cited as empirical evidence that artists are motivated, at least in part, by something other than financial reward.¹⁰⁰ In his "work-preference model" of artistic behavior, David Throsby utilizes this evidence to conclude that, contrary to traditional labor-theory assumptions, artists derive satisfaction from the work process itself rather than solely from the income it earns, and as a result, that any model of artistic time allocation and career choice must account for this nonpecuniary motivation.¹⁰¹ Throsby refers to the nonpecuniary reward the artist derives from artistic creation as "psychic income," which is a product of the "creative urge, i.e., the motivation that generates pursuit of an artistic

96. See LANDES & POSNER, *supra* note 32, at 276 (noting that American artistic innovation has outpaced European artistic innovation in the modern era).

97. HEILBRUN & GRAY, *supra* note 68, at 175. Artists may also produce commissioned works, which are works of art that are specifically requested by a client of the artist. *Id.* In most common law countries, however, an artist who produces a "work for hire" is not granted a copyright in the work and is not extended moral rights protection. See Hansmann & Santilli, *supra* note 22, at 134 ("In those common-law countries that recognize artists' moral rights, an individual who works for hire is also denied moral rights . . ."). VARA also contains a "work for hire" exception. 17 U.S.C. § 106A(c)(3) (2006).

98. HEILBRUN & GRAY, *supra* note 68, at 175.

99. See RUTH TOWSE, *A TEXTBOOK OF CULTURAL ECONOMICS* 314–15 (2010) (discussing studies suggesting that internal motivation affects artists independently from financial reward).

100. *Id.* at 314; see also THROSBY, *supra* note 70, at 81 ("[E]mpirical evidence indicates that [artists] often forgo lucrative alternative employment in order to spend more time pursuing their creative work.").

101. David Throsby, *A Work-Preference Model of Artist Behaviour*, in *CULTURAL ECONOMICS AND CULTURAL POLICIES* 69, 69 (Alan Peacock & Ilde Rizzo eds., 1994).

vision as the artist's goal rather than response to financial incentives."¹⁰² Throsby points out, however, that artists are necessarily subject to a "minimum-income constraint," which he describes as "necessary to prevent starvation," but which is also necessary to provide the artist with a means of funding his artistic endeavors.¹⁰³ Thus, Throsby models the artistic-production decision as a "constrained optimisation process," in which the artist chooses to allocate his productive time between artistic work (which he prefers, but which is less financially rewarding), and non-artistic work (which he does not prefer, but which is more lucrative), subject to the need to earn some level of "survival-income" during a given time period.¹⁰⁴

Throsby's work-preference model of artistic behavior suggests that an additional variable should be added to the artist's production function to account for the fact that he is intrinsically motivated, i.e., enjoys the creative process itself. This intrinsic-motivation variable should be constant and positive—constant for simplicity's sake and because it is exogenously given by the artist's time-allocation preferences, and positive because his enjoyment of the productive process will cause him to create more art, all else being equal. The presence of this constant intrinsic-motivation variable in the artistic-production function means that the artist's decision to produce art will be less responsive to changes in the market price of his work as well as to any psychic pain he expects to feel from seeing his work altered or destroyed at some point after its completion and sale. Therefore, acknowledgement that an artist derives satisfaction from artistic production itself, not merely from expected financial reward, suggests that, contrary to Hansmann and Santilli's theory of integrity rights' purpose, protection of the artist's reputation in order to protect the market value of his work may not have a significant effect on artistic output. It also highlights a counterargument to integrity rights advocates' claims that integrity rights protection preserves artistic production incentives by mitigating artists' fears that their work will be altered or destroyed: it is not likely that an artist who reaps significant psychic benefits from the artistic creation process, and who is, therefore, internally "driven" to produce art,¹⁰⁵ will be deterred from engaging in productive endeavors out of fear that the work he will ultimately produce will one day be altered. The existence of such a temporally distant, contingent harm is not likely to be sufficient to deter the artist's instant drive to satisfy his creative urge.

Furthermore, as Throsby points out, artists operate subject to a minimum-income constraint, which they would prefer to satisfy through

102. THROSBY, *supra* note 70, at 81.

103. *Id.*

104. *Id.*

105. See Throsby, *supra* note 101, at 69 (describing his model of the "driven" artist—"driven by an irresistible desire to create art" and "largely, though not entirely, oblivious to financial concerns").

artistic creation rather than through non-art work.¹⁰⁶ As noted above, providing reputational protection for the artist in the form of integrity rights is as likely to maximize the value of his body of work (by minimizing reputational externalities) as it is to prevent potential increases in value (by preventing destruction or alteration that would make his work more scarce).¹⁰⁷ Integrity rights *do*, however, decrease the market demand for the artist's work by limiting the ability of artwork purchasers to realize the maximum possible return on their investment.¹⁰⁸ This decreased demand will decrease both the quantity of art the artist will be able to sell as well as the price at which he will be able to sell it. This may not affect the artist's motivation to create art, given his intrinsic motivation; however, it may force him to spend more time doing non-art work, contrary to his preferences, and at some point, the resulting time constraints may prevent him from producing art altogether. This would result because, as the market demand for his work decreases, the income that the artist is able to make from producing art will decrease, eventually forcing him to satisfy his minimum-income constraint by devoting more time to non-art work. With less time to devote to art production, the artist will be *unable*, rather than simply unwilling, to produce more art. Thus, instead of increasing the supply of art by making artists more willing to produce it, integrity rights protection will likely contravene artistic time-allocation preferences and decrease the supply of art by reducing the time the artist is able to devote to art and, thus, the amount of art he is able to produce.

E. The Statutory Waiver Is an Ineffective Means of Limiting the Costs of Integrity Rights

In the most extreme integrity-rights-protection regimes, integrity rights are completely inalienable. Such is the case in France, where an artist can consent to an act that would violate his integrity rights but cannot contractually bind himself to the nonenforcement of these rights.¹⁰⁹ In other countries, such as England, an artist is able to grant a "blanket" waiver of his integrity rights, the benefit of which will "run with the work," thereby allowing subsequent purchasers to benefit from the waiver without independently negotiating with the artist.¹¹⁰

The state of integrity rights waivability in the United States lies somewhere between these two extremes. VARA allows an artist to waive his integrity rights, but it imposes several requirements that must be satisfied in order for the waiver to be enforceable. The waiver (1) must be "in a written instrument signed by the author," and (2) must "specifically identify the

106. THROSBY, *supra* note 70, at 81.

107. *See supra* note 85 and accompanying text.

108. *See supra* subpart III(A).

109. Hansmann & Santilli, *supra* note 22, at 126.

110. *Id.* at 129.

work, and uses of that work” to which the waiver applies.¹¹¹ VARA’s legislative history suggests that the motivation behind the waiver’s inclusion, as well as its design, was the need to find grounds for a compromise between integrity rights extremists and those who expressed concerns about integrity rights’ imposition on personal property rights.¹¹² Thus, Congress created a waiver system that, while allowing artwork purchasers to obtain limited waivers, made obtaining an effective waiver a burdensome process that would discourage waiver use.¹¹³ While evidence is inconclusive regarding whether waivable integrity rights entail an increase in the level of transaction costs that would result in the absence of integrity rights protection, VARA’s waivability requirements impose transaction costs on parties desiring waivers, and those costs are completely independent of the costs imposed by the grant of integrity rights.¹¹⁴

In the absence of integrity rights protection, when an artist sells a piece of art, he has the burden of bargaining for the purchaser’s restricted use of the work. In contrast, under a system of waivable integrity rights, it is the purchaser who has to bargain with the artist regarding his ability to use the work in ways that may violate the artist’s integrity rights. Whether this shift in bargaining power entails an increase in inefficient transaction costs depends on whether the right being bargained for has been allocated to the party who values it most.¹¹⁵ Commentators who have analyzed evidence of pre- and post-VARA waiver usage in order to determine whether the artist values his integrity rights more than purchasers value alteration have not reached conclusive results.¹¹⁶

But even if a system of waivable integrity rights does entail fewer transaction costs than a system of purely contractual moral rights, VARA’s waiver limitations impose their own transaction costs. First, most art sales contracts are oral rather than written; therefore, the parties are required to memorialize the transaction in a written contract in order for the purchaser to obtain an enforceable waiver.¹¹⁷ Because waivers are only effective for

111. 17 U.S.C. § 106A(e)(1) (2006).

112. Mathews, *supra* note 28, at 142–43.

113. *See id.* at 143 (“Congress attempted to form a compromise . . . by drafting a balanced and limited system that allowed for waivers but would discourage such a practice from becoming routine.”).

114. *See id.* (acknowledging waivers’ chilling effects on art markets and artists’ livelihoods); *see also* Ong, *supra* note 50, at 308 (discussing the decreased value of art for artists that choose not to waive their integrity rights).

115. *See* Cotter, *supra* note 18, at 51 (“[T]here will be little need to negotiate over moral or alteration rights, [when] the relevant right already has been assigned to the party who values it more highly, and therefore no negotiating costs will be incurred as an incident thereto.”).

116. LANDES & POSNER, *supra* note 32, at 277–78; Cotter, *supra* note 18, at 52–53.

117. *See* LANDES & POSNER, *supra* note 32, at 277 n.16 (“Sixty-one percent of the respondents to a [1995] survey conducted by the Copyright Office stated that oral contracts are more common than written ones in the art world.”); *see also* RayMing Chang, *Revisiting the Visual Artists Rights Act of 1990: A Follow-Up Survey About Awareness and Waiver*, 13 TEX. INTELL. PROP. L.J. 129

specified uses, the artist and purchaser will have to repeat the negotiation, drafting, and execution processes each time the artwork owner wishes to engage in a new use that potentially violates the artist's integrity rights.¹¹⁸ There are also additional costs involved in drafting descriptions of both the artwork and its intended use that are sufficient to satisfy the "specificity" requirement.¹¹⁹ Furthermore, there is a risk that some waivers will be negotiated, drafted, and executed but will be unenforceable because they fail to meet the specificity requirement.¹²⁰ One commentator has even suggested that the "regime of specificity was intended to limit the prevalence of the waiver clause in the fine-art market by limiting the efficacy of many attempted waivers."¹²¹ Finally, the specificity requirement increases the probability that, even if an effective waiver has been executed, the use to which a subsequent purchaser desires to put the work does not fit within that existing waiver's narrow use description, thereby increasing the likelihood that each subsequent purchaser will have to approach the artist to obtain a new waiver before engaging in a potentially infringing action.¹²² Thus, the statutory waiver is not only unlikely to minimize the social costs of integrity rights, but it also functions as an independent source of inefficiency.

IV. Conclusion

Broad integrity rights protection imposes substantial social costs. While these costs could perhaps be justified if integrity rights protection provided the benefits to artists and to society that it purports to provide—protection of artists' creation incentives and the public interest in art—it simply cannot deliver on its promises to provide such benefits. Furthermore, the incomplete protection that integrity rights may offer against reputational externalities is a weak argument for expanding the scope of these rights, especially in light of their other substantial costs and questionable benefits.

app. at 163 (2005) (summarizing the results of a survey showing that, as of 2003, oral contracts were still more prevalent in the art world than written contracts).

118. See 17 U.S.C. § 106A(e)(1) (2006) (outlining the requirements for waivers).

119. See *id.* (requiring that a waiver "specifically identify the work, and uses of that work" to which it applies).

120. See Chang, *supra* note 117, at 151 (noting that the results of a 2003 survey indicate that as many as half of the waivers in existence are invalid because they do not sufficiently identify both the works and the uses to which the waiver applies); Mathews, *supra* note 28, at 144 (noting that the specificity requirement was created to reduce the prevalence and efficacy of waivers).

121. Mathews, *supra* note 28, at 144. It is disturbing, however, to think that Congress contemplated the wasted costs of ineffective waivers when it drafted the specificity requirement and deemed them an acceptable consequence of limiting waiver use.

122. One commentator interprets § 106A(e) as "clearly stat[ing] that the waiver is not transferable from one owner to another." *Id.* However, I believe the statute is more properly interpreted as making the artist's moral rights themselves—not his waiver of them—nontransferable. See 17 U.S.C. § 106A(e)(1) ("The rights conferred by subsection (a) may not be transferred . . ."); *id.* § 106A(a) (conferring attribution and integrity rights upon authors of works of visual art).

Thus, the only real value that integrity rights protection provides is purely expressive—sending a message to artists that they and their work are socially valuable. Indeed, artistic expression is an important means of communicating ideas, and there is indisputable social value in art’s ability not only to communicate the artist’s ideas but also to serve as a catalyst for discussion and debate about them. Even if there is a need to formally signal art’s social value, however, integrity rights protection is an improper means of doing so because it prevents art from serving its social purpose by making works of art less alienable and less subject to transformation. Furthermore, artists will take little comfort in knowing that society values their work when integrity rights protection diminishes its monetary value, forcing artists to spend more time doing non-art work and less time creating art so that they can afford to produce art in the first place.

Integrity rights advocates must consider these consequences of integrity rights protection before arguing for its expansion. Beneficent intentions alone cannot eliminate the substantial harm that integrity rights protection inflicts on artists and society.

—*Lindsey A. Mills*