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## The "Dissing" of Da Vinci: The Imaginary Case of Leonardo v. Duchamp: Moral Rights, Parody, and Fair Use

Geri J. Yonover

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# Article

## THE "DISSING" OF DA VINCI: THE IMAGINARY CASE OF LEONARDO v. DUCHAMP: MORAL RIGHTS, PARODY, AND FAIR USE\*

GERI J. YONOVER\*\*

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"Diss" has become an idiomatic expression for disrespect or disparagement. Although it is pure slang, it seems to have been coined by rap musicians as a short and concise verb, "to diss," to express disrespect. See Lee Bey, *Kickin' the Ballistics and Resurrecting Old Verbs; New Dictionary Preserves Lively Language of Blacks*, CHI. SUN-TIMES, Aug. 28, 1994, Show Section, at 14; Larry Fiquette, *Do Your Own Thing, Reporters*, ST. LOUIS POST-DISPATCH, June 12, 1994, at 2A. "What a word," says one author. "Listen to it hissing at you snake-like, hurled through clenched teeth with pure disdain. It sounds like you feel. My gosh, it's almost onomatopoeia . . ." Jim Sollisch, *Ask a Teacher*, PLAIN DEALER (Cleveland, OH), July 31, 1994, Sunday section, at 17.

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*The subjects [of the world] are many.*<sup>1</sup>  
 Leonardo da Vinci

*I was interested in ideas—not merely in visual products . . . .  
 I wanted to put painting once again at the service of the mind.*<sup>2</sup>  
 Marcel Duchamp

*Only one thing is impossible to God, to find any sense in any  
 copyright law on this planet.*<sup>3</sup>  
 Mark Twain

Many of you are familiar with *La Giocanda*, a/k/a the Mona Lisa, painted by the very first “Renaissance Man,” Leonardo da Vinci (1452-1519), some

1. 1 LEONARDO DA VINCI, THE NOTEBOOKS OF LEONARDO DA VINCI 12 (Jean Paul Richter ed., 1970). I chose this subject for my inaugural lecture to honor the memory of my father, Irving Schinder (1914-1993), who came to this country from Russia in 1922. He almost entered the legal field but detoured permanently into the world of visual art reproductions and manufacture of decorative accessories, negotiating for reproduction rights with such artists as Andrew Wyeth, Walter Keane, and Peter Max. While considering the law, my father's first job as a quasi “go-fer” for a law firm was to evict tenants. He found it so distasteful and emotionally wrenching that it nipped his legal interest in the bud. But the stage was certainly set for my appreciation of art and interest in the legal profession. Of course, I do not teach anything about forcible entry and detainer.

2. CAROL STRICKLAND & JOHN BOSWELL, THE ANNOTATED MONA LISA 148 (1992).

3. MARK TWAIN, NOTEBOOK 381 (1935 ed.). Cf. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (Story, J.) (stating that copyright and patent laws involve cases which approach, more than any other type of case, “the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent”).

time between 1503 and 1505.<sup>4</sup> Perhaps a few of you remember that, as school-children, one of the earliest acts of "up the establishment" may have been for you or one of your grammar school buddies to draw a moustache on a picture of your first grade teacher or another similar icon of your youth. Depending upon your age today, you may even have accomplished this deed before Marcel Duchamp<sup>5</sup> (1887-1968) did so in 1919, when he added a moustache to his [in]famous replica of Leonardo's Mona Lisa. If we were to manipulate time, place, and some other facts, the moustachioed Mona Lisa would raise questions of classic copyright infringement<sup>6</sup> as well as pose a serious affront to Leonardo's artistic reputation; that is, his moral rights, specifically the right of integrity.<sup>7</sup>

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4. Leonardo's portrait has been described as enigmatic and mysterious. It is at once a rendition of a particular individual, probably the wife of a Florentine merchant named Giocondo, and an expression of the High Renaissance ideal of woman. The woman's features, her half-smile, and the "sfumato" (hazy) background have intrigued viewers for more than four hundred years, inspiring songsters (Nat King Cole's "Mona Lisa") and other artists, including Marcel Duchamp. The Mona Lisa is "the most reproduced . . . image in all art." STRICKLAND & BOSWELL, *supra* note 2, at 34. To some, the portrait "embodies a quality of maternal tenderness which was to Leonardo the essence of womanhood." H.W. JANSON, *HISTORY OF ART* 421 (2d ed. 1977). It has been suggested by computer artist Lillian Schwartz that the Mona Lisa is actually a self-portrait of Leonardo. See Louis Montana, *Commercial Applications of Realist Art: Lillian Schwartz, 54 AMERICAN ARTIST* 60-65 (1990). If this is so, then maybe Duchamp's moustache reveals Leonardo's "secret."

It is conceivable that Leonardo may have used parody in the Mona Lisa. Her intriguing smile evokes the "Archaic smile" of Greek figures of the fifth and sixth centuries B.C. See JANSON, *supra*, at 101, 421.

5. Duchamp was one of the founders of the post-World War I artistic movement self-titled: "Dada." Dada allegedly was a random word choice, considered an infantile "all-purpose" word. Dada, in part, stood for anti-art and was a reaction to the senseless destruction caused by the War. Duchamp is probably most remembered for his 1912 *Nude Descending a Staircase, No. 2*, a cubist portrait of a woman's continuous motion as she walks down a flight of stairs. See generally JANSON, *supra* note 4, at 660 & fig. 820. The *Nude* was the most talked about hit of the famous 1913 Armory show in New York, which showed 1600 modern works. See MARCEL JEAN, *THE HISTORY OF SURREALIST PAINTINGS* 31 (1960). The Armory Show, exhibiting works of such artists as Duchamp, Matisse, and Picasso, has been called the "most significant art show in American History" because "it burst the bubble of American provincialism." The *N.Y. Times* called the show "pathological." Public officials demanded the closing of the Armory show "to safeguard public morals." STRICKLAND & BOSWELL, *supra* note 2, at 150.

In addition to his jibe at Leonardo, Duchamp also took on Cézanne: a framed toy monkey's title—*Portrait of Cézanne*. JANSON, *supra* note 4, at 660. For insight into Duchamp's creative mind, combining both wit and scientific precision, see MARCEL DUCHAMP, *THE BRIDE STRIPPED BARE BY HER BACHELORS, EVEN* (George Heard Hamilton trans., 1960). In fact, Duchamp's mathematical precision is not unlike that with which Leonardo planned his paintings. Mona Lisa is drawn in the shape of a truncated cone, one example of Leonardo's thinking that "every branch of knowledge . . . dovetail[s] with every other." LIANA BORTOLON, *THE LIFE, TIMES AND ART OF LEONARDO* 72 (1965).

6. For example, the Copyright Act provides to an "author" the exclusive right to reproduce his or her work, 17 U.S.C. § 106(1) (1988 & Supp. IV 1993), and to prepare derivative works 17 U.S.C. § 106(2) (1988 & Supp. IV 1993).

7. 17 U.S.C. § 106A (Supp. V. 1993). See also *infra* notes 177-200 and accompanying text.

When Congress enacted the Visual Artists Rights Act of 1990 (VARA)<sup>8</sup> as a measure subsequent to the United States joining the Berne Convention,<sup>9</sup> it represented the first explicit federal recognition of the continental European notion of the protection of an artist's moral rights,<sup>10</sup> specifically the rights of

8. 17 U.S.C. § 106A (Supp. V 1993).

9. The Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (Oct. 31, 1988), eff. Mar. 1, 1989. Article 6<sup>bis</sup> of the Berne Convention for The Protection of Literary and Artistic Works (Paris Text, 1971) provides:

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

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

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

Berne Convention for the Protection of Literary and Artistic Property, Sept. 9, 1886, 123 L.N.T.S. 233, reprinted in 3 COPYRIGHT LAWS AND TREATIES OF THE WORLD (UNESCO 1982), as revised in Paris on July 24, 1971, art. 6<sup>bis</sup>.

As of 1985, 76 nations adhered to the Berne Convention, which was signed initially in 1886 and which is the oldest multilateral treaty providing for copyright protection. Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 10 & n.38 (1985). In order to join the Berne Convention, which required member nations to afford moral rights protection, see Art. 6<sup>bis(1)</sup>, the United States had to represent that moral rights were already given some protection by various methods, including the Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1976), which, until VARA, did not afford explicit protection for moral rights. See S. REP. NO. 352, 100th Cong., 2d Sess. 9-10, reprinted in 1988 U.S.C.C.A.N. 3714-15. See also Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention 35, published in 10 COLUM.-VLA J. L. & ARTS 513 (1986).

10. Several authors have examined the nature and extent of moral rights. See, e.g., Robert A. Jacobs, *Work-For-Hire and the Moral Right Dilemma in the European Community: A U.S. Perspective*, 16 B.C. INT'L & COMP. L. REV. 29 (1993); John M. Kernochan, *Moral Rights in U.S. Theatrical Productions: A Possible Paradigm*, 17 COLUM.-VLA J. L. & ARTS 385 (1993); Brett Sirote, Note, *The Visual Artists Rights Act: Federal Versus State Moral Rights*, 21 HOFSTRA L. REV. 461 (1992); Moana Weir, *Making Sense of Copyright Law Relating to Parody: A Moral Rights Perspective*, 18 MONASH U. L. REV. 194 (1992); Patrick G. Zabatta, Note, *Moral Rights and Musical Works: Are Composers Getting Berned*, 43 SYRACUSE L. REV. 1095 (1992); Joseph Zuber, *The Visual Artists Rights Act of 1990—What it Does, and What it Preempts*, 23 PAC. L.J. 445 (1992); Otto W. Konrad, *A Federal Recognition of Performance Art Author Moral Rights*, 48 WASH. & LEE L. REV. 1579 (1991); 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 (1990); Eric M. Brooks, Comment, *"Tilted" Justice: Site-Specific Art and Moral Rights after U.S. Adherence to the Berne Convention*, 77 CAL. L. REV. 1431 (1989); Lawrence Adam Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 NW. U. L. REV. 1011 (1988); Kwall, *supra* note 9; Sydney A. Diamond, *Legal Protection for the "Moral*

attribution and integrity.<sup>11</sup> To date, there has been little litigation brought under VARA. Thus, in assessing the proper balance between protection of an artist's moral rights, the fairness of an alleged infringer's use of the artist's work in parodying that work, and society's interest in providing incentives to create more art, this Article is, in one sense, writing on a clean slate. But prior case law focusing on parody and fair use,<sup>12</sup> especially the recent Supreme Court decision in *Campbell v. Acuff-Rose Music, Inc.*,<sup>13</sup> as well as a significant body of literature which addresses the parody and fair use issue in the non-moral rights context,<sup>14</sup> does inform the discussion herein which is based on the

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*Rights of Authors and Other Creators*, 68 TRADEMARK REP. 244 (1978); John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976); Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968); William Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506 (1955); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940).

11. 17 U.S.C. § 106A provides in relevant part:

(a) Rights of Attribution and Integrity.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

(1) shall have the right—

- (A) to claim authorship of that work, and
- (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

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

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

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

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

17 U.S.C. § 106A (Supp. V 1993).

12. See *infra* notes 249-316 and accompanying text.

13. 114 S. Ct. 1164 (1994).

14. See, e.g., William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667 (1993); Brian R. Landy, Comment, *The Two Strands of the Fair Use Web: A Theory for Resolving the Dilemma of Music Parody*, 54 OHIO ST. L.J. 227 (1993); E. Kenley Ames, Note, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473 (1993); Richard A. Posner, *When is Parody Fair Use?*, 21 J. LEGAL STUD. 67 (1992); Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79 (1991); Charles J. Sanders & Steven R. Gordon, *Stranger in Parodies: Weird Al and the Law of Musical Satire*, 1 FORDHAM ENT. MEDIA & INT. PROP. L. FORUM 11 (1990); Michael A. Chagares, *Parody or Piracy: The Protective Scope of the Fair Use Defense to Copyright Infringement Actions Regarding Parodies*, 12 COLUM.-VLA

following hypothetical facts.

I am now about to go back to the future. Assume that sometime after June 1, 1991,<sup>15</sup> our modern Leonardo executed a portrait of *La Giocanda* and made a limited edition of 100 lithographs. He numbered them consecutively, e.g., 1/100, 2/100, etc., and signed each one.<sup>16</sup> Leonardo complied with all provisions of the relevant copyright act.<sup>17</sup> Assume also that in July 1991, our modern Marcel Duchamp bought one of these lithographs and added a moustache to the face of Mona Lisa, not unlike what Duchamp actually did in 1919. Duchamp then exhibited this picture at a local art gallery. On October 1, 1994, in the federal district court for the Northern District of Indiana, Leonardo filed a complaint, alleging, *inter alia*,<sup>18</sup> copyright infringement based on VARA.<sup>19</sup> Duchamp answered the complaint in typical fashion. He moved

J.L. & ARTS 229 (1988); Harriette K. Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B.U. L. REV. 923 (1985); Charles C. Goetsch, *Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. NEW ENG. L. REV. 39 (1980); Sheldon N. Light, *Parody, Burlesque, and the Economic Rationale for Copyright*, 11 CONN. L. REV. 615 (1979). There is also an excellent treatise on the subject. See WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (BNA) (1985).

15. In order to receive federal protection under VARA against interference with the right of integrity, a work must be destroyed, distorted, mutilated, or modified after June 1991, the effective date of VARA. Pub. L. No. 101-650, Tit. VI, § 610, 104 Stat. 5128 (Dec. 1, 1990).

16. Our modern Leonardo's work qualifies as a work of visual art protected by VARA. Section 101 defines a work of visual art thusly:

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

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

17 U.S.C. § 101 (Supp. V 1993).

17. Leonardo's "modern" Mona Lisa is protected by copyright as it qualifies as an "original work . . . of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (1988 & Supp. V 1993). As a pictorial work created after March 1, 1989, affixation of copyright notice, registration of the work in the copyright office, and recordation as a precondition to suit are discretionary not mandatory. See 17 U.S.C. §§ 401, 408, 411, 412 (1976).

18. The claims might include copyright infringement under §§ 106(1), 106(2); an unfair competition claim under section 43(a) of the Lanham Act, 15 U.S.C. § 1125 (1988); and assorted state claims such as state unfair competition, defamation, and misrepresentation.

19. 17 U.S.C. § 106(A) (Supp. V 1993) (violation of rights of attribution and integrity). Federal question jurisdiction is based on 28 U.S.C. §§ 1331, 1338 (1988). We will assume that venue is appropriate in Hammond, Indiana, as Duchamp or his agent either resides or is found there. 28 U.S.C. § 1400 (1984). We will also assume that personal jurisdiction over Duchamp is also available in the Hammond federal district court. See *Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co.*, 8 F.3d 441 (7th Cir. 1993).

to dismiss for failure to state a claim<sup>20</sup> or alternatively for summary judgment<sup>21</sup> claiming: (1) he did not infringe; and (2) even if he did, his use is a fair one,<sup>22</sup> based on parody, which immunizes his alleged infringement. The case of *Leonardo v. Duchamp* may well be one of first impression in the federal district court in Hammond, Indiana, or indeed in any federal court.<sup>23</sup>

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20. Fed. R. Civ. P. 12(b)(6). There are alternate views about whether fair use can be raised in a motion to dismiss. *Compare* *Chicago Lawyer, Ltd. v. Forty-Sixth Ward Regular Democratic Org.*, 220 U.S.P.Q. 511 (N.D. Ill. 1982) (stating that a motion to dismiss is not appropriate) *with* *Broadway Music Corp. v. F-R Pub. Corp.*, 31 F. Supp. 817 (S.D.N.Y. 1940) (holding that a defendant may bring a motion to dismiss based on fair use).

21. Fed. R. Civ. P. 56. Fair use is a factual determination. *D. C. Comics, Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 27 (2d Cir. 1982). Thus, where there are no genuine issues of material facts in dispute, a defendant could conceivably succeed on a motion for summary judgment.

22. The moral rights given to visual artists are tempered explicitly by section 106(A): "Subject to section 107 . . . ." 17 U.S.C. §106A (Supp. V 1993). Section 107 delineates fair use:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(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 value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. (As amended, Pub.L. 101-650, 104 Stat. 5089 (1990); Pub.L. 102-492, 106 Stat. 3145 (1992)).

17 U.S.C. §107 (1988 & Supp. V 1993).

23. Since the effective date of VARA, June 1991, there has been only one reported case brought under the Act. In *Carter v. Helmsley-Spear, Inc.*, 852 F. Supp. 228 (S.D.N.Y. 1994), three sculptors sought to prevent building owners from dismantling a large sculptural installation from the lobby of a former Macy's warehouse in Queens, New York. On May 18, 1994, Judge Edelstein granted to the plaintiffs a preliminary injunction which permitted them to visit the unfinished work and which restricted the defendants from removing the sculpture. The ruling was based on the plaintiffs' claim that the defendants attempted removal would "deface, modify, or mutilate" the work in violation of § 106A(a)(2), (3). *Carter*, 852 F. Supp. at 229. Plaintiffs also raised several supplemental state law claims. *Id.* On Aug. 31, 1994, Judge Edelstein recognized the VARA claim and enjoined the defendants from removing the work from the lobby, because moving it would require destruction of the elements of the work. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 803, 814 (S.D.N.Y. 1994).

The issues raised in *Carter* are not new. In 1980, the New York branch of The Bank of Tokyo cut up and removed a large sculpture by the noted artist and architect, Isamu Noguchi, from the bank's Wall Street office. Grace Glueck, *Abstract*, N.Y. TIMES, Apr. 19, 1980, § 1, at 1. This occurred more than a decade before VARA and more than five years before a New York moral rights statute became effective. Thus Noguchi, unlike the *Carter* sculptors, had no remedy. See Edward J. Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84



The imaginary juxtaposition of these two artists is not without some logic.<sup>24</sup> Leonardo's renown persists through the centuries not only because of his few, but incredibly beautiful paintings, such as *The Last Supper*, the Mona Lisa, and *The Virgin of the Rocks*, but because of his encompassing vision of the artist as inventor, scientist, physicist, and architect, which led to innumerable detailed drawings of flying machines, embryos in the womb, human anatomy and a host of other subjects. His approach to these drawings was scientific and analytical. Leonardo believed that artists should "know not only the rules of perspective but also all laws of nature . . . ." <sup>25</sup> In short, Leonardo tried to bridge the gap between art and craft, between painting and science. Similarly, in his "Ready-Mades," for example, a very slightly embellished bicycle, urinal, or bottlerack, and in his precise, scientific drawings that are "a sort of mathematics of signs and significations,"<sup>26</sup> Duchamp, like Leonardo, attempted to bridge the gap between art and science. Thus, in one sense perhaps, *L.H.O.O.Q.* (the moustached Mona Lisa)<sup>27</sup> represents a conscious or subconscious attempt to link Duchamp with Leonardo—art as science; art as both homage and critique.

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COLUM. L. REV. 1733 (1984). However, the New York statute, N.Y. Arts & Cult. Aff. Law § 14.03 (McKinney Supp. 1991), does not protect the artist against destruction of the work. See Zuber, *supra* note 10, at 465. Cf. *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S. 2d 813 (N.Y. Sup. Ct. 1949) (holding that an artist had no remedy when the defendant obliterated a church fresco painted by him). *Crimi* was decided before the New York Act.

In a Canadian case brought on similar facts, a sculptor was successful in preventing the Toronto Eaton Centre from tying Christmas ribbons around the necks of the 60 geese making up his sculpture. *Snow v. The Eaton Centre Ltd.*, 70 C.P.R.2d 105 (Ont. H.C. 1982). The plaintiff claimed that the ribbons around the necks of the geese were similar to dangling earrings on the *Venus de Milo*. *Id.* Canadian copyright law has an express provision for protection of the right to integrity, Copyright Act, R.S., c. C-30 §§ 14.1-14.2, 28.1, 28.2 (1970). Authors of paintings, sculptures, and engravings do not have to show prejudice to honor or reputation, as do other authors. Rather, the distortion, modification, or mutilation of these works are presumed to cause the requisite harm. *Id.* § 28.2(2). See generally LESLEY ELLEN HARRIS, CANADIAN COPYRIGHT LAW (1992).

24. The artificial placing of two or more chronologically and/or geographically separate individuals who interact in the same place and time is a frequent literary device. See, e.g., E.L. DOCTOROW, *RAGTIME* (1974) (book involving Henry Ford, Emma Goldman, Harry Houdini, J.P. Morgan, Theodore Dreiser, Sigmund Freud, and Emiliano Zapata); TOM STOPPARD, *TRAVESTIES* (1974) (play involving Lenin, James Joyce, and Tristan Tzara, a noted and early Dada-ist; *Travesties* is itself a parody of OSCAR WILDE, *THE IMPORTANCE OF BEING EARNEST* (1895)); STEVE MARTIN, *PICASSO AT THE LAPIN AGILE* (1993) (play where Picasso and Einstein meet at the noted Parisian bistro).

25. JANSON, *supra* note 4, at 421.

26. MARCEL JEAN, *THE HISTORY OF SURREALIST PAINTING* 36 (1960). In Venice, the 1993 Biennale presented a Duchamp retrospective at the Palazzo Grassi which contained several of his "Ready-Mades," paintings, and drawings. The impetus for this article was formed when I viewed this exhibit.

27. *L.H.O.O.Q.* is Duchamp's title for the mustached Mona Lisa. See *infra* text accompanying notes 227-28.

This Article will discuss the appropriate resolution of the moral rights issues raised in *Leonardo v. Duchamp*. Perforce, after a brief introduction describing the nature of copyright protection,<sup>28</sup> the discussion will focus on the current state of moral rights protection (Part II),<sup>29</sup> parody,<sup>30</sup> and fair use (Part III).<sup>31</sup> Part IV will then propose that fair use, based on a parody which infringes upon an artist's moral right of integrity,<sup>32</sup> should be given a wide berth.<sup>33</sup> Put another way, an artist's moral right of integrity should in most circumstances yield, under fair use, to the right of the parodist. Part IV will also explore other means of resolving the tension between parody and moral rights, including a per se rule of non-liability, based either on copyright law or First Amendment considerations,<sup>34</sup> a limitation of remedies where the use is determined to be unfair,<sup>35</sup> and the availability of a compulsory license for the parodist.<sup>36</sup> This Article concludes that these alternatives will not be as effective a solution as an interpretation of fair use that presumes a parodist's use is fair when section 106A rights of integrity are at stake.

#### I. INTRODUCTION: A VERY BRIEF GUIDE TO CURRENT COPYRIGHT PROTECTION

Our copyright law can be directly traced to sixteenth century England. In order to stem a rising tide of Protestant heresy and political opposition, the reigning monarch bestowed a publishing monopoly on a group of loyal subjects—the Stationers Company. The group agreed not to publish objectionable books in exchange for exclusive publishing privileges.<sup>37</sup> By the late seventeenth century, the official license expired leaving the publishing field unregulated. Some years later, Parliament attempted to impose some order and, in 1710, enacted the Statute of Anne,<sup>38</sup> the first copyright act. United States copyright law was modeled after the Statute of Anne and based on a constitutional provision which urged Congress “To promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>39</sup> Since the first United

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28. See *infra* notes 37-68 and accompanying text.

29. See *infra* notes 69-200 and accompanying text.

30. See *infra* notes 201-72 and accompanying text.

31. See *infra* notes 273-322 and accompanying text.

32. 17 U.S.C. § 106A(a)(3)(A) (Supp. V 1993).

33. See *infra* notes 323-404 and accompanying text.

34. See *infra* notes 355-65 and accompanying text.

35. See *infra* notes 347-54 and accompanying text.

36. See *infra* notes 328-46 and accompanying text.

37. See generally LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968); B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1967).

38. 8 Anne, Ch. 19 (1710).

39. U.S. CONST. art. I, § 8, cl. 8.

States Copyright Act of 1790,<sup>40</sup> there were significant revisions in 1831, and 1870, and a major overhaul resulting in the Copyright Act of 1909<sup>41</sup> which lasted until the Copyright Act of 1976, as amended from time to time until the present date.<sup>42</sup>

The remainder of this introduction will focus on the "pre-moral rights" 1976 Act. Part II will then address the concept of moral rights and explain how it fits, not necessarily too comfortably, into the present copyright scheme.

Until the enactment of the Visual Artists Rights Act of 1990 (VARA),<sup>43</sup> the focus of the 1976 Copyright Act was the protection of the pecuniary rights of copyright owners.<sup>44</sup> The Copyright Act grants owners a bundle of exclusive economic rights: to reproduce the protected work; to prepare derivative works; to distribute copies by sale, transfer, rental, lease, or lending; to perform publicly certain types of works; and to display publicly certain types of works.<sup>45</sup> These rights are then tempered in two ways: generally, by the fair use provisions of section 107 and by more specific limitations enunciated in sections 108 through 120.<sup>46</sup> Thus, it can fairly be said that section 106 "giveth" certain rights but that sections 108 through 120 "taketh away" some of the broad statements of economic rights contained in section 106. In any event, due to explicit constitutional time constraints,<sup>47</sup> protection is afforded the copyright owner for the life of the author plus fifty years or, in certain cases, seventy-five years from publication or 100 years from publication or creation, whichever expires first.<sup>48</sup>

40. Act of May 31, 1790, Ch. 15, 1 Stat. 124.

41. 17 U.S.C. § 1-601 (1909 Act).

42. 17 U.S.C. §§ 101-1010 (1933 & Supp. V 1993). A full discussion of both the 1909 and 1976 Acts can be found in Robert A. Gorman, *An Overview of The Copyright Act of 1976*, 126 U. PA. L. REV. 856 (1978). There are a number of excellent treatises on copyright law: See, e.g., DONALD S. CHISUM & MICHAEL A. JACOBS, *UNDERSTANDING INTELLECTUAL PROPERTY LAW* (1992); PAUL GOLDSTEIN, *COPYRIGHT* (1989); MARSHALL LEAFFER, *UNDERSTANDING COPYRIGHT LAW* (1989); MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* (1992).

43. Pub. L. No. 101-650, Tit. VI, § 610, 104 Stat. 5128 (Dec. 1, 1990), *codified at* 17 U.S.C. § 106A (Supp. V 1993).

44. A copyright owner could be the author, an employer, one who commissions a certain type of work under the provisions of 17 U.S.C. § 101(1) or (2), or someone who now owns the copyright due to transfer of ownership under the provisions of 17 U.S.C. §§ 201-05 (1988).

45. 17 U.S.C. § 106(1)-(5) (1988).

46. 17 U.S.C. §§ 107-20 (1988 & Supp. V 1993).

47. The Constitution mandates that copyright and patent protection be "for limited Times." U.S. CONST. art I, § 8, cl. 8. In contrast, the other part of the intellectual property triumvirate, trademark protection, can subsist as long as a mark is used properly as a trademark. This potentially unlimited duration is due to trademark's different constitutional source—the commerce clause. U.S. CONST. art I, § 8, cl. 3. See generally *The Lanham Act*, 15 U.S.C. §§ 1051-1127 (as amended) (1988). Patent protection is afforded by the Patent Act, 35 U.S.C. §§ 1-376 (1988).

48. 17 U.S.C. §§ 302-303, 305 (1988), § 304 (1988 & Supp. V 1993).

Works protected by copyright comprise such diverse matter as literary and artistic works, including pantomimes, sculpture, audiovisual works, sound recordings, architectural works, and musical works,<sup>49</sup> as well as compilations of such.<sup>50</sup> Maps,<sup>51</sup> case reports,<sup>52</sup> computer programs,<sup>53</sup> an artistic lamp base,<sup>54</sup> a circus advertisement,<sup>55</sup> yellow, but not white pages of a telephone directory,<sup>56</sup> ornamental belt buckles,<sup>57</sup> and this Article are just a few examples of copyrightable subject matter. Provided that these examples and other subject matter fulfill the constitutional requirement of originality and authorship,<sup>58</sup> are fixed in a "tangible medium of expression,"<sup>59</sup> and do not smack of ideas, principles, systems, methods, or such,<sup>60</sup> then copyright protection attaches at creation, that is, when the work is fixed in a copy or phonorecord.<sup>61</sup>

The formalities of copyright notice, deposit of works for the Library of Congress, and registration with the Register of Copyrights vary, but since the Berne Implementation Act of 1988,<sup>62</sup> notice is permissive for works published after March 1, 1989. Further, for Berne country works, registration is no longer required as a precondition for an infringement suit, nor is recordation required as a precondition to suit.<sup>63</sup>

The pecuniary protection afforded copyright owners by the 1976 Act is the ability to prevent and be compensated for wrongful use of the particular work.

49. 17 U.S.C. § 102 (1988 & Supp. V 1993).

50. 17 U.S.C. § 103 (1988).

51. *United States v. Hamilton*, 583 F.2d 448 (9th Cir. 1978).

52. *West Pub. Co. v. Mead Data Central, Inc.*, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987).

53. *Whelan Assocs. v. Jaslow Dental Lab, Inc.*, 797 F.2d 1222, (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984). Professor Oddi has argued that protection for computer programs fits more comfortably within the patent scheme. See A. Samuel Oddi, *An Uneasier Case for Copyright than for Patent Protection of Computer Programs*, 72 NEB. L. REV. 351 (1993).

54. *Mazer v. Stein*, 347 U.S. 201 (1954). Cf. *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978) (finding that the overall shape of an outdoor lighting fixture is an uncopyrightable industrial design rather than a work of applied art).

55. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

56. *Feist Publications, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340 (1991).

57. *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980).

58. *Feist Publications*, 499 U.S. at 340.

59. 17 U.S.C. § 102(a) (1988 & Supp. V 1993).

60. 17 U.S.C. § 102(b) (1988).

61. 17 U.S.C. § 101 (1988 & Supp. V. 1993).

62. Pub. L. No. 100-568 (1988). The Berne copyright amendments afforded the United States the chance to join the Berne Union, the largest international copyright convention. Berne Convention for the Protection of Literary and Artistic Property, July 24, 1971.

63. See 17 U.S.C. §§ 401-412 (1988 & Supp. V 1993).

Such unpermitted use of the protected work constitutes infringement. Infringement occurs when an unauthorized party violates one or more of the exclusive bundle of rights afforded by section 106, such as the right to reproduce, to make derivative works, to distribute, to display, or to perform.<sup>64</sup> To prove infringement, the copyright owner must prove a valid copyright in the work and copying by defendant. Copying is indicated by showing that the defendant's work is substantially similar<sup>65</sup> to the plaintiff's and not the product of independent creation and, also, that direct or circumstantial evidence indicates that the defendant had access<sup>66</sup> to the plaintiff's work. Remedies include injunctive relief, impounding of infringing copies, actual damages and profits, or statutory damages ranging from \$200 to \$100,000.<sup>67</sup> As a discretionary matter, the court may also award costs and reasonable attorneys' fees to the prevailing party.<sup>68</sup>

The above "cut to the chase" description of the property rights and remedies afforded by the 1976 Act is sufficient to set the stage for an examination of the history of moral rights and its recent adoption, in part, in this country. As will be shown, the European concept of moral rights differs significantly from the English and American copyright models and fits, as a newcomer to our shores, somewhat uneasily into our copyright scheme.

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64. 17 U.S.C. § 106 (1988).

65. *See, e.g., Eckes v. Card Prices Update*, 736 F.2d 859 (2d Cir. 1984) (stating that there were many common errors in plaintiff's and defendant's guides for baseball card prices).

66. *Compare Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976) (stating that the plaintiff's very popular song, "He's So Fine," played extensively on the radio and, thus, George Harrison must have heard it and unintentionally copied it) with *Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984) (stating that the defendants Bee Gees' song did not infringe as the plaintiff's song had very limited exposure only in the Chicago area, whereas the Bee Gees' "How Deep is Your Love" was created in a French chateau studio).

67. 17 U.S.C. §§ 502-504 (1988 & Supp. V 1993).

68. *Id.* at § 505. *See also Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023 (1994) (prevailing plaintiffs and defendants are to be treated alike; defendant need not show that plaintiff's suit was frivolous or in bad faith).

## II. MORAL RIGHTS

"No man but a blockhead ever wrote except for money."<sup>69</sup>  
 "NOT!"<sup>70</sup> (or, at least, not entirely true).

"Art is the most intense mode of individualism the world has known."<sup>71</sup>

### A. The European Experience

The concept of moral rights, from the French *droit moral*, is based upon the notion that an artist expresses his or her individualism and personality, in his or her art: that, in effect, we cannot "know the dancer from the dance."<sup>72</sup> Moral rights encompass personality rights,<sup>73</sup> which inure to the artist as creator and which protect the artistic integrity of the artist's creation and require recognition of the artist as author/creator.<sup>74</sup>

In any one country, the bundle of personal moral rights may also include the right of disclosure (the exclusive ability to decide when or if the work should be disseminated publicly), the right of withdrawal (the exclusive ability after publication of the work to recall all existing copies of the work), and the right to prevent excessive criticism whose only focus is to abuse the author.<sup>75</sup> As

69. JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS, *Samuel Johnson*, 355, quote #20 (15th ed. 1980).

70. My use of this word does not infringe on any "Wayne's World" skit as "words and short phrases such as names, titles, and slogans" are not copyrightable. 37 C.F.R. § 202.1 (1989).

71. GEORGE SELDES, THE GREAT QUOTATIONS 744 (1993) (quoting Oscar Wilde). Cf. JOHN RUSKIN, THE STONES OF VENICE ch. 4 (1851-1853) ("All great art is the work of the whole living creature, body and soul, and chiefly of the soul."). Oscar Wilde made, incidentally, his own history in the U.S. copyright scheme. In *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), the Court concluded that a commercial photography studio portrait of Oscar Wilde constituted protected copyrightable subject matter.

72. WILLIAM BUTLER YEATS, THE TOWER, AMONG SCHOOL CHILDREN, stanza 8 (1928).

73. I S. LADAS, THE INTERNATIONAL PROTECTION OF ARTISTIC AND LITERARY PROPERTY § 272 (1938). The author uses the German word "urheberpersönlichkeitsrecht," translated as "right of the author's personality."

74. Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 478 (1968). The latter right is known as the "right of paternity." *Id.*

75. Kwall, *supra* note 9, at 5-8. Another right that is both personal and explicitly pecuniary is the "droit de suite," or resale royalty provision, which requires the owner of a work of art, should it be resold, to pay a percentage of the resale price to the artist, even if the artist is no longer the copyright owner. The droit de suite is a French concept dating from 1920. See generally John Henry Merryman, *The Wrath of Robert Rauschenberg*, 40 J. COPYRIGHT SOC'Y 241 (1993); Elliot C. Alderman, *Resale Royalties in the United States for Fine Visual Artists: An Alien Concept*, 40 J. COPYRIGHT SOC'Y 265 (1993); Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the*

of 1981, there were approximately three dozen countries in Asia, Africa, Europe, and South America that recognized one or more of the personal, moral rights of artists.<sup>76</sup> Predominantly, these countries were and are civil, rather than common law, jurisdictions. It is in these countries, especially perhaps in France,<sup>77</sup> Italy,<sup>78</sup> and Germany,<sup>79</sup> that the eighteenth century romantic

*Register of Copyrights' Report*, 40 J. COPYRIGHT SOC'Y 284 (1993); Carol Sky, *Report of the Register of Copyrights Concerning Droit de Suite, the Artist's Resale Royalty: A Response*, 40 J. COPYRIGHT SOCIETY 315 (1993). The authors split 2/2 on the advisability of droit de suite in this country: Merryman and Alderman against; Perlmutter and Sky believe it worth exploring. A constitutional challenge to California's Resale Royalty Act, Cal. Civ. Code § 986 (West 1982), was rejected. See *Morseburg v. Balyon*, 201 U.S.P.Q. 518 (C.D. Cal. 1978).

76. Kwall, *supra* note 9, at 97-100.

77. Law No. 57-298 on Literary and Artistic Property, Mar. 11, 1957, arts. 6, 19, 32 (the inalienable right of paternity, the right of disclosure, and right of withdrawal when the artist agrees to indemnify the owner of the work). Kwall, *supra* note 9, at 98. France is thought to be the foremost exponent of an artist's personal rights, Russell J. Da Silva, *Droit Moral and the Amoral Copyright*, 28 BULL. COPYRIGHT SOC'Y 1, 2 (1980), followed by Germany and Italy. See Diamond, *supra* note 10, at 247.

A leading scholar on civil law systems, notes:

The moral right of the artist in French law is entirely judicial in origin. This is in itself remarkable, since one of the most treasured tenets of the conventional wisdom about the civil law is that law is made by legislators and executives, not by judges. The development of the moral right of the artist is merely another example of the extent to which this tattered brocard is inapplicable to France.

JOHN HENRY MERRYMAN & ALBERT E. ELSÉN, LAW, ETHICS, AND THE VISUAL ARTS 144 (1987). See also Jack A. Hiller, *The Law-Creative Role of Appellate Courts in the Third World*, 226-27 & nn.270-77 (1994), in *ESSAYS ON THIRD WORLD PERSPECTIVES IN JURISPRUDENCE* (M.L. Marisinghe & William E. Conklin eds., 1994); JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* (1994).

78. Law for Protection of Copyright and Other Rights Connected with the Exercise Thereof, No. 633, Apr. 22, 1941, as amended up to January 8, 1979, Arts. 20, 142 (rights of paternity, integrity, and withdrawal subject to indemnity). Kwall, *supra* note 9, at 99. In an illustrative Italian case, *De Chirico v. Ente Autonomo "La Biennale" di Venezia*, [1951] *Diritto de Autori* 220, [1951] *Temi* 568, [1952] 50 *Rivista Diritto Commerciale* [Riv. Dir. Comm.] II, 128 (Tribunal di Venezia) (note by Fioretta), the trial court ruled in favor of artist Giorgio de Chirico's claim that a proposed exhibition of a number of the artist's works in the Biennale misrepresented him by including too many early works and not including enough later works. Merryman, *supra* note 10, at 1032-33 & nn.27-31.

79. Act dealing with Copyright and Related Rights, Sept. 9, 1965, as amended up to Mar. 2, 1974, Arts. 12-14, 42, 46(4) (rights of disclosure, paternity, integrity, to revoke a license with indemnity if the work no longer reflects artist's views). Kwall, *supra* note 9, at 98.

The "Rocky Island with Sirens" case, 79 RGZ 397, June 8, 1912, is typical. By commission, the plaintiff painted a mural in the stairway of the defendant's home. The homeowner objected to the naked sirens and had them painted with clothing. The court said that the homeowner violated the artist's right against unauthorized changes. Strauss, *supra* note 10, at 510 n.22.

Moral rights are on the march. There is sentiment within the European Community urging the strengthening of moral rights, especially in connection with the film industry. See *EC Moral Rights Measures Proposed*, J. PROPRIETARY RTS., Nov. 1993, at 34. In May 1991, the former U.S.S.R. Supreme Soviet passed a law granting authors and their heirs the right of integrity, among others. See Eric J. Schwartz, *Recent Developments in The Copyright Regimes of the Soviet Union*

notions of authorship took hold: art as an expression of the unique personality of an author who captures and records the very essence of culture.<sup>80</sup> Once artists are regarded in this manner, it is practically inevitable that legal doctrine will appear to protect the personal, if not also the pecuniary, rights of artists.

It would be helpful at this point to examine several French cases, brought on the basis of a moral rights violation, which illustrate how the concept of moral rights is a powerful tool in an artist's hands. Perhaps, the paradigmatic moral rights case is the one involving the painter Bernhard Buffet and his refrigerator.<sup>81</sup> Buffet painted a refrigerator's six sides and regarded the finished piece as one painting, thus signing only one of the panels. After auctioning the refrigerator, Buffet became aware of another auction that offered one of the six painted panels. He sued to prevent this sale because he regarded the six-panelled work as an indivisible artistic whole. The Paris Court of Appeals agreed and the Court of Cassation affirmed that this violated Buffet's right of integrity and ordered that there be no separate sale of one panel.<sup>82</sup>

Three other French decisions confirm France's commitment to moral rights by recognizing the special bond that exists between creator and creation. A late nineteenth century case involved James McNeil Whistler, the son of *Whistler's Mother*. Lord Eden commissioned a portrait of his wife. Whistler painted the portrait, altered it, and refused to deliver the portrait to Lord and Lady Eden. When Lord Eden sued Whistler, the court held that Eden should receive restitution and damages for Whistler's breach of contract, but that Whistler would be required neither to restore nor to deliver the commissioned portrait.<sup>83</sup> Half a century later, the Russian composer Dimitry Shostakovich met with similar success in French courts. Twentieth Century-Fox distributed a movie, *The Iron Curtain*, with a decidedly anti-Soviet theme. (The halcyon days of World War II "friendship" between the U.S. and the Soviet Union had quickly palled). The picture depicted Soviet espionage in Canada and contained approximately forty-five minutes of music, credited to all individual composers including Shostakovich. Shostakovich sought to enjoin the use of his name and

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and *Eastern Europe*, 38 J. COPYRIGHT SOC'Y 123 (1991).

80. See generally Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 (1992); see also Christopher Aide, *A More Comprehensive Soul: Romantic Conceptions of Authorship and the Copyright Doctrine of Moral Right*, 48 U. TORONTO FAC. L. REV. 211 (1990).

81. See generally John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976).

82. Buffet v. Fersing, 1962, Cour d'appel, Paris, Dalloz, Jurisprudence [D. Jr.] 570, *aff'd* 1965, Cour de Cassation. See generally Merryman, *supra* note 81.

83. Edén v. Whistler, 1898 Recueil Périodique et Critique [D.P.] II. 465 (Cour d'appel, Paris), *aff'd*, 1900 D.P.I. 497 (Cass. Civ.). See also Merryman, *supra* note 81, at 1024, 1028; Saurraute, *supra* note 10, at 467-68.



music in the picture and in any advertising or publicity matter relating to the film claiming that his moral right as a composer was violated because the use of his music indicated his "approval," "endorsement," and "participation" in an anti-Soviet theme thereby "false[ly] imput[ing] disloyal[ty]" to his country.<sup>84</sup> (It may be that Shostakovich had more at stake than his moral rights as an artist. The Stalinist purges and "show trials" took place less than a decade prior to the movie's release, the "Cold War" was in full bloom, and the silencing of any "un-Soviet spirit in literature and the arts by Zhdanov, next to Stalin, the most important Politburo member,"<sup>85</sup> posed a real and potent threat to both artistic integrity and the artist's life itself). The French court ruled in favor of Shostakovich, ordered the film seized, and declared that Shostakovich sustained "moral damage."<sup>86</sup>

In a more recent moral rights case brought in France, the court in 1991 again ruled in favor of an artist's personal rights. In *Huston v. Société de l'Exploitation de la Cinquieme Chaîne*,<sup>87</sup> the estate of director John Huston<sup>88</sup> sued to enjoin a French television broadcast of a colorized version<sup>89</sup> of

84. These facts are taken from the identical case brought in New York, *see Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575, 578 (N.Y. Sup. Ct. 1948) (quoting the plaintiff's argument), but the composer was not successful in the New York case.

85. JESSE D. CLARKSON, *A HISTORY OF RUSSIA* 614-19, 694-705, 714-17, 735-37 (Random House 1962). In 1948, Zhdanov conferred with Soviet musicians who, in accord with the new "Decree of Music," confessed their errors. *Id.* at 717. "Shostakovich, thoroughly chastened, turned out political potboilers in Hollywood vein and was rewarded by being sent to New York in 1949 for the 'Congress in Defense of Peace'." *Id.*

86. *Soc. Le Chant du Monde v. Soc. Fox Europe* (Cour d'appel, Paris, Jan. 13, 1953, Dallez, Jurisprudence [D. Jr.] 16, 80). *See also* William Strauss, *The Moral Right of the Author*, 4 AM J. COMP. L. 506, 534-35 n.56 (1955). Strauss, then Attorney Advisor, Copyright Office, Library of Congress, worries about the result in the French Shostakovich case: "To arm a composer with the right to suppress the use of his music in a film because he disapproves of the political view expressed in the film, would come close to censorship and would have little, if anything, to do with the protection of his personality." *Id.* at 534.

87. Cour de Cassation, 1991. For a thorough history of this case, see Paul Edward Geller, *French High Court Remands Huston Colonization Case*, 39 J. COPYRIGHT SOC'Y 252 (1992).

88. Among Huston's great films are: *Treasure of Sierra Madre*, *Maltese Falcon*, and *Chinatown*.

89. Technology permits a computer to scan a black and white film for shades of gray and then apply an appropriate color. *See* James T. Duggan & Neil V. Pennella, *The Case for Copyrights in "Colorized" Versions of Public Domain Feature Films*, 34 J. COPYRIGHT SOC'Y 333 (1987). Provided the colorized version indicates authorship, the colorized film could be granted copyright registration as a derivative work. 37 C.F.R. § 202 (1987). "Colorization" is a registered trademark of Colorization, Inc. *See Official Gazette of the United States Patent and Trademark Office*, Nov. 3, 1987, at TM 3.

Colorization, which has been compared to "painting a mustache on the Mona Lisa," *see* Jennifer T. Olson, Note, *Rights in Fine Art Photography: Through a Lens Darkly*, 70 TEX. L. REV. 1489, 1514 & nn.150-51 (1992), is a subject of tremendous controversy in this country. Woody Allen and other filmmakers have testified frequently in Congress that colorization interferes with

Huston's black and white film, *Asphalt Jungle*. Although in the United States, colorized films are subject only to the most minimal of constraints,<sup>90</sup> the French trial court enjoined the broadcast of Huston's film. The Cour d'appel reversed. It noted that although French law permits such relief, American law would not recognize Huston's (who was not the copyright owner) moral right. The Cour d'appel did, however, require the television station to state Huston's objections and to remind the audience that they could tune their television sets to blot out the color. The next appeal, to the Cour de Cassation, was successful. This court reversed the intermediate appellate court and stated that moral rights inure to the benefit of an author, even a foreign one.<sup>91</sup>

The Whistler,<sup>92</sup> Shostakovich,<sup>93</sup> Buffet,<sup>94</sup> and Huston<sup>95</sup> cases illustrate the significant moral rights protections afforded artists under French law and are typical of the moral rights approach in those countries which have a much longer history of "droit moral" than does the United States. The following sections discuss why moral rights may have bloomed so late in our country. The state

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their right of integrity. *Legal Issues that Arise When Color is Added to Films Originally Produced, Sold and Distributed in Black and White: Hearings Before the Senate Subcomm. on Technology and the Law of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 62 (1987). However, the congressional response has been relatively meager. The National Film Preservation Act of 1988 and 1992 are a very small sop to Woody Allen, et al. See *infra* note 90.

The colorization debate is a lively one. See, e.g., Craig A. Wagner, Note, *Motion Picture Colorization, Authenticity, and the Elusive Moral Right*, 64 N.Y.U. L. REV. 628 (1989); Daniel McRendree Sessa, Note, *Moral Rights Protections in the Colorization of Black and White Motion Pictures: A Black and White Issue*, 16 HOFSTRA L. REV. 503 (1988); Lawrence Adam Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 NW. U. L. REV. 1011 (1988); Alberta L. Cook, *Colorization; Actors and Directors: Color Them Mad as Hell*, NAT'L L.J., July 27, 1987, at 10, 11; Roger L. Mayer et al., *Colorization: The Arguments For*, J. ARTS MGMT. & L., Fall 1987, at 64; Woody Allen et al., *Colorization: The Arguments Against*, J. ARTS MGMT. & L., Fall 1987, at 79.

90. See National Film Preservation Act, 2 U.S.C. §§ 179-179K (Supp. IV 1992) and *supra* note 89. The National Film Preservation Act of 1988, 2 U.S.C. § 178 (1988) (repealed 1992), permitted a panel to include up to 25 movies per year in a national registry of classic films. See generally David A. Honicky, *Film Labelling as a Cure for Colorization [and other Alterations]: A Band-Aid for a Hatchet Job*, 12 CARDOZO ARTS & ENT. L.J. 409 (1994); Warren H. Husband, *Resurrecting Hollywood's Golden Age: Balancing the Rights of Film Owners, Artistic Authors and Consumers*, 13 COLUM.-VLA J. L. & ARTS 327 (1993). The authors agree that currently there is inadequate protection for authors of altered films. One solution is proposed in The Film Disclosure Act of 1993, H.R. Doc. No. 1731, 103d Cong., 1st Sess. (1993), which amends The Lanham Act, adding 15 U.S.C. § 1125(c), under which networks or any distributor must comport with certain requirements should they wish to show a materially altered film.

91. See Jeffrey L. Graubart, *U.S. Moral Rights: Fact or Fiction?*, N.Y. L.J., Aug. 7, 1992, at 5, 7.

92. See *supra* note 83 and accompanying text.

93. See *supra* notes 84-86 and accompanying text.

94. See *supra* notes 81-82 and accompanying text.

95. See *supra* notes 87-91 and accompanying text.

of moral rights protection that existed in this country prior and subsequent to VARA will then be described.

### B. Moral Rights in the United States

There are several answers to the question of why the moral rights doctrine has taken so long to gain a foothold in this country. One theory is that United States copyright law, such as tort,<sup>96</sup> property,<sup>97</sup> or contract<sup>98</sup> law, is very much the child of Anglo-Saxon jurisprudence with its emphasis on economic property rights. Recall that our very first copyright statute<sup>99</sup> was modeled on its English progenitor, the Statute of Anne.<sup>100</sup> Thus, the American notion of copyright as protective of economic property rights, rather than personal rights, was borne directly from its earlier English counterpart.<sup>101</sup>

Aside from the geneological explanation for tardy moral rights acceptance in this country, the history and geography of art may also be a factor.<sup>102</sup> In terms of the history of western art, the art "capitol" of the western civilized world over the centuries has moved westward – from the classical period in Athens, the neo-classical in Rome, medieval and gothic art in various continental European cities, the high Renaissance in Florence, and late nineteenth century impressionism in Paris. It is only in the twentieth century that New York has become a major art center; the Armory Show of 1913 brought together approximately 1600 seminal modern works of art and was considered by some to be the "most significant art show in American history."<sup>103</sup> This is not to suggest that, prior to 1913, America had not seen its share of important visual artists; James Whistler,<sup>104</sup> Thomas Eakins, Mary Cassatt, and Winslow Homer were but a few. But it is only quite recently that American visual artists have achieved international renown and that the American public has paid the kind of

96. RESTATEMENT (SECOND) OF TORTS § 520 (1977). Strict liability for abnormally dangerous activities finds its origins in such cases as *Rylands v. Fletcher*, 1 Ex. 265, *aff'd*, L.R. 3 H.L. 300 (1868). See, e.g., *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 916 F.2d 1174, 1176 (7th Cir. 1990).

97. The feudal English doctrine, the "Rule in Shelly's Case," 1 Coke, 93 b (1581) was for many years in this country part of the common law of real property. BLACK'S LAW DICTIONARY 1234 (5th ed. 1979).

98. See, e.g., *Hadley v. Baxendale*, 9 Ex. Ch. 341, 156 Eng. Rep. 145 (Ct. Excheq. 1854), which is very much alive and well. See, e.g., *Rardin v. T&D Machine Handling, Inc.*, 890 F.2d 24, 26-27 (7th Cir. 1989) (Judge Posner applying Illinois law).

99. Act of May 31, 1790, ch. 15, 1 stat. 124 (Copyright Act of 1790).

100. 8 Anne 1 ch. 19 (1710). See *supra* text accompanying note 38.

101. See Kwall, *supra* note 9, at 17 n.67.

102. See Merryman, *supra* note 10, at 1042.

103. See *supra* note 5.

104. See *supra* note 83 and accompanying text for a discussion of the French moral rights case involving Whistler.

attention and homage to art heretofore found in the art centers of Europe. In the last sixty years, such American artists as Robert Rauschenberg,<sup>105</sup> Jim Dine, Jasper Johns,<sup>106</sup> Robert Indiana, Roy Lichtenstein, Andy Warhol, Larry Rivers, Georgia O'Keefe, Edward Hopper, and Alexander Calder have established our country as a major art center, and major art movements, such as the "Ash Can School" and "Pop Art," were developed and flourished within our borders.<sup>107</sup> But the relative youth of our country and its art, some commentators believe, may explain why moral rights protection in this country lagged so far behind the international art communities.<sup>108</sup> The artist as hero, icon, celebrity, and media event is, in this country, a recent phenomenon. Contrast this situation with the story of the intense competition for, and great public attention in the fifteenth century to, the design of the bronze Baptistry doors at the Piazza del Duomo in Florence. Ghiberti beat out fellow artists Brunelleschi, Donatello, and Jacopo della Quercia.<sup>109</sup> The intense rivalry, machinations worthy of Machiavelli, and public attention to the competition<sup>110</sup> were not atypical of the role of artists in Renaissance and post-Renaissance society. American art, in a chronological sense, has just entered this milieu. Chicagoans will not burn down the city over a painting—"Paris maybe, but

105. Rauschenberg parodied Mona Lisa. See *infra* note 225 and accompanying text.

106. Johns also parodied Mona Lisa. *Id.*

107. See JANSON, *supra* note 4, at 675. George Bellows represents the Ash Can School's emphasis on realistic, gritty scenes. STRICKLAND & BOSWELL, *supra* note 2, at 154-55. Roy Lichtenstein and Andy Warhol ("the Pope of Pop") were Pop Artists who depersonalized art and used consumer items as "art." *Id.* at 174-75. As such, they may represent the artistic progeny of Duchamp.

108. Merryman, *supra* note 10, at 1042; Roeder, *supra* note 10, at 557. Even internationally, the notion of art as reflection of an artist's personality did not achieve recognition until the age of positivism and Freud. Albert Elsen, *Why Do We Care About Art?* 27 HASTINGS L.J. 951, 954 (1976). Elsen, an art historian, explained:

[T]he concept of self-expression is historically recent in art, originating in the last century, when pioneering modernists such as the Impressionists took it upon themselves to work from personal experience in individually acquired styles rather than by interpreting the experience of others in academically approved modes. With the development of abstract art early in this century, artists looked for art's sources in the self. They radically changed the conditions of art in order to capture the unique qualities of their private vision, and this change resulted in the creation of the very vocabulary and grammar of their art. Painters such as Kandinsky could look upon their art as creations and as intimate extensions of themselves. Picasso saw his art as a diary. . . . By extension, the modern artist's work, grounded in the self, becomes a tangible manifestation of his personality. In view of their country's early leadership in modern art, it is not surprising that by the mid-19th century French jurists began to recognize and protect this intimate relationship between the artist and the work of art.

*Id.* at 954-55.

109. Italy 95 (Michelin 1992).

110. See GIORGIO VASARI, *THE LIVES OF THE ARTISTS* 86-87, 116-17 (1550) (Bondella trans. Oxford U. Press 1991). Vasari's book is a wonderful source of information about Italy's quattrocento and cinquecento artists. Vasari himself was an artist of some repute.

Americans have never taken culture that seriously."<sup>111</sup>

The delayed birth of moral rights in this country, as opposed to the continental European experience, may also be due to the strong values we attach to free expression as embodied in the First Amendment. Those civil law countries where moral rights have received their greatest reception, such as France, Germany, and Italy, have no explicit speech protection analogous to that of our 200-year experience with an amendment which is thought to be at the top of the hierarchy of the rights enumerated in the Bill of Rights. Because the moral right of integrity directly affects expression, for example, a parody which may injure an artist's honor or reputation, First Amendment concerns may lurk behind our slow acceptance of moral rights. While traditional copyright law also affects expression, relying on fair use to effect the proper balance, it does not protect "honor and reputation" per se but rather the pecuniary rights of artists. In contrast, "honor and reputation" issues have heretofore been subsumed in defamation law with its concomitant constitutional constraints. Interestingly, there has been a case where an artist was sued for libel based on a painting, *Mugging of the Muse*. The defendant and plaintiffs were friends but the friendship dissolved over artistic disputes. The plaintiffs claimed that the allegorical painting defamed them and were successful in the trial court when the case went to the jury. The New York appellate court reversed and dismissed the case with costs (one bill). The court concluded that although libel could, arguably, be committed by a painting, "there was no proof of injury to the plaintiffs . . . [other than perhaps] extreme embarrassment . . . but that is not cognizable injury."<sup>112</sup> But if libel were shown, it would be tested under constitutional standards of malice or reckless disregard.<sup>113</sup>

### 1. Moral Rights in the United States Before VARA

Prior to our adherence to Berne<sup>114</sup> and subsequent enactment of explicit but limited federal moral rights protection for certain visual arts under section

111. *Nelson v. Streeter*, 16 F.3d 145, 150 (7th Cir. 1994) (Posner, J.) In May 1988, three Chicago aldermen removed a painting of Harold Washington dressed in women's frilly white lingerie from the School of The Art Institute. The student painter filed a civil rights suit which was settled for \$95,000. See Matt O'Connor, *Suit Ended on Picture of Washington*, CHI. TRIB., Sept. 21, 1994, § 2, at 1.

112. *Silberman v. Georges*, 456 N.Y.S.2d 395, 397 (N.Y. App. Div. 1982).

113. *Id.* Moreover, the painting could properly be viewed as critical opinion, rather than a defamatory statement of fact and would be constitutionally protected. See generally Laura Cohen, *Beyond Silberman v. Georges: Shielding the Artist From Claims of Libel*, 17 COLUM. HUM. RTS. L. REV. 235 (1986); Leslie Kim Treiger, Note, *Protecting Satire Against Libel Claims: A New Reading of the First Amendment's Opinion Privilege*, 98 YALE L.J. 1215 (1989).

114. Berne Convention for the Protection of Literary and Artistic Property, July 24, 1971 (Paris).

106A,<sup>115</sup> there were differing views as to the extent of quasi-moral rights protection under copyright or other state or federal doctrines. While many commentators have thought that the personal rights of artists received insufficient protection prior to VARA,<sup>116</sup> at least one observer found that as of 1986, United States law did offer several meaningful equivalents to moral rights protection.<sup>117</sup> However, most of the controversies that arose between artists and defendants resulted in judicial decisions that strained to apply doctrine ill-fitting to the moral rights issues raised in those cases.

a. State Law and Moral Rights

In one of the earliest cases directly raising a moral rights claim, *Shostakovich v. Twentieth Century Fox Film Corp.*,<sup>118</sup> a New York court rejected Shostakovich's argument that use of his music in an anti-Soviet movie violated his moral rights as it falsely imputed to him disloyalty to his country.<sup>119</sup> The court reasoned:

There is no charge of distortion of the compositions nor any claim that they have not been faithfully reproduced. Conceivably, under the doctrine of Moral Right the court could in a proper case, prevent the use of a composition of work, in the public domain, in such a manner as would be violative of the author's rights. The application of the doctrine presents much difficulty however. With reference to that which is in the public domain there arises a conflict between the moral right and the well established rights of others to use such works. So, too, there arises the question of the norm by which the use of such work is to be tested to determine whether or not the author's moral right as an author has been violated. Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be? In the present state of our law the very existence of the right is not clear,

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115. 17 U.S.C. § 106A (Supp. V 1993).

116. See Kwall, *supra* note 9, at 18 & n.68.

117. See *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J. L. & ARTS 513, 547-57 (1986). See also Sam Ricketson, *U.S. Accession to Berne: An Outsider's Appreciation (part 2)*, 8 INTELLECTUAL PROP. J. 87, 103-04 (1993) (quoting Letter from Dr. Arpad Bogsch, Director General, World Intellectual Property Organization to Irwin Karp, Esq., June 16, 1987).

118. 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948). See *supra* notes 84-86 and accompanying text for a more extended discussion of the French case. Other cases denying the validity of moral rights claims include *Vargas v. Esquire*, 166 F.2d 651 (7th Cir. 1947) (holding that the defendant need not attribute authorship), *cert. denied*, 335 U.S. 813 (1948); *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949) (finding that the defendant could obliterate the plaintiff's fresco).

119. *Shostakovich*, 80 N.Y.S.2d at 579.

the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined.<sup>120</sup>

Still other plaintiffs have sought to cast their moral rights claims in other legal clothes, such as contract, not necessarily with any more success.<sup>121</sup> Other state doctrines relied upon by plaintiffs seeking to vindicate their moral rights include invasion of privacy,<sup>122</sup> defamation,<sup>123</sup> and unfair competition.<sup>124</sup> However, the lack of a uniform approach and the unpredictability of results in these moral rights cases make state law protection problematic. Further, lurking behind any of these state law claims is the possibility of preemption under one or more federal laws, especially the Copyright Act.<sup>125</sup>

120. *Id.* at 578-79 (citations omitted).

121. *See, e.g.*, *Edison v. Viva Int'l, Ltd.*, 421 N.Y.S.2d 203, 205 (N.Y. App. Div. 1979) (holding that the plaintiff's moral right claim was subsumed in his contract right to seek remedy for mutilation of his article and must be dismissed). *But see, e.g.*, *Granz v. Harris*, 198 F.2d 585, 588 (2d Cir. 1952) (finding that the defendant breached a contract by selling abbreviated records made from the plaintiff's master discs; the contract required appropriate attribution of authorship); *Zim v. Western Publ. Co.*, 573 F.2d 1318 (5th Cir. 1978) (publishing a revised version of plaintiff's book violates agreement between author and publisher); *Packard v. Fox Film Corp.*, 202 N.Y.S. 164 (N.Y. App. Div. 1923) (stating that false attribution and unauthorized use of author's name constitutes breach of contract).

122. *Zim v. Western Pub. Co.*, 573 F.2d 1318, 1326 (5th Cir. 1978); *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 339 n.5 (S.D.N.Y. 1968).

123. *Edison v. Viva Int'l, Ltd.*, 421 N.Y.S.2d 203, 207 (N.Y. App. Div. 1979).

124. *Granz v. Harris*, 198 F.2d 585, 588 (2d Cir. 1952); *Jaeger v. American Int'l Pictures, Inc.*, 330 F. Supp. 274, 278 (S.D.N.Y. 1971); *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 354 n.15 (S.D.N.Y. 1968).

125. 17 U.S.C. § 301(a) (1988) provides:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression . . . whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

*Id.*

Even without the specific preemption language of section 301, state law moral rights claims could be preempted if 1) Congress has occupied the field in such manner as to foreclose state law, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), or 2) state law conflicts with the objectives of a federal statute, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Div. Comm'n*, 461 U.S. 190, 203-04 (1983).

Intellectual property plaintiffs usually are well aware of the preemption problem, but nevertheless may try to bring claims in state courts for a variety of reasons. *See generally* Ted D. Lee & Ann Livingston, *The Road Less Traveled: State Court Resolution of Patent, Trademark, or Copyright Disputes*, 19 ST. MARY'S L.J. 703 (1988). Plaintiffs may prefer state courts because of different jury pools, decreased litigation costs, greater familiarity with state court, less crowded dockets and other reasons.

As a response, perhaps, to this murky state of moral rights protection, a number of states have enacted artist and author rights statutes in the last decade or so. The House Report on VARA noted that as of 1990, eleven states had such statutes:<sup>126</sup> California,<sup>127</sup> Connecticut,<sup>128</sup> Illinois,<sup>129</sup> Louisiana,<sup>130</sup>

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The Supreme Court has considered the intellectual property/preemption issue in several cases. See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (stating that the state plug molding statute was preempted by the Patent Act); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (holding that the state trade secret law was not preempted by the Patent Act); *Goldstein v. California*, 412 U.S. 546 (1973) (holding that the state anti-piracy statute protecting sound records (then not protected under federal copyright law) was not preempted); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964) (holding that the state unfair competition law was preempted by the Patent and Copyright Acts). See generally Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 U.C.L.A. L. REV. 1107 (1977) for a discussion of preemption under § 301 of the 1976 Act; 1 NIMMER & NIMMER, *supra* note 42, § 1.01 for a discussion of preemption under the 1909 Act.

126. H. REP. NO. 514, 101st Cong., 2d Sess. 9, reprinted in 1990 U.S.C.C.A.N. 6915, 6919. Three other states protect artists' rights. Nevada, NEV. REV. STAT. ANN. § 597.720 to .760 (Michie 1994); South Dakota, S.D. CODIFIED LAWS ANN. § 1-22-16 (1992); and Utah, UTAH CODE ANN. § 9-6-409 (1992). Nevada law grants the rights of attribution and integrity. NEV. REV. STAT. ANN. § 597.730, 597.740 (Michie 1994). South Dakota grants the rights of attribution and integrity to an artist whose work has been acquired by the state. S.D. CODIFIED LAWS ANN. § 1-22-16(1) to 1-22-16(3) (1992). Utah grants to artists who create art work commissioned by its Arts Development Program the right of attribution and integrity. UTAH CODE ANN. § 9-6-409(2), 9-6-409(5) (1992).

127. CAL. CIV. CODE § 987 (West 1982 & Supp. 1994). The California Art Preservation Act is intended to prevent a person who acquires "fine art" from physically altering or destroying that art. The statute prohibits "any physical defacement, mutilation, alteration, or destruction of a work of fine art" by anyone other than the artist who owns and possesses the work. *Id.* § 987(c)(1). The same prohibitions apply to a person who mutilates, alters, or destroys a work of fine art through gross negligence. *Id.* § 987(c)(2).

The aim of the statute is two-fold: (1) to uphold the artist's reputation, since fine art is "an expression of the artist's personality" thereby triggering the artist's interest in protecting the work; and (2) to promote the "public interest in preserving the integrity of cultural and artistic creations." *Id.* § 987(a).

The statute provides several remedies for the artist who is injured by a violation of this section. These remedies include: injunctive relief, actual and punitive damages, attorney and expert witness fees, and any other relief the court finds proper. If a court awards punitive damages, they will be given to a California organization(s) that is dedicated to fine arts. *Id.* § 987(e)(1-5).

The act contains a statute of limitations under which actions must be brought within the longer period of three years after the time of the injury or one year after discovery of the injury. *Id.* § 987(h)(4)(i). The statute applies to artists and their heirs, personal representatives, or devisees until the 50th anniversary of the artist's death. *Id.* § 987(g). The effective date of the statute is January 1, 1980, and the statute applies to injurious acts occurring on or after that date, regardless of when the work of art was created. *Id.* § 987(j).

California courts have held that architectural plans are not covered by the Act, see *Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc.*, 205 Cal. Rptr. 620, 624 (Cal. Ct. App. 1984), but that a painted mural is. See *Botello v. Shell Oil Co.*, 280 Cal. Rptr. 535, 540 (Cal. Ct. App. 1991). For a general discussion of the Act, see G.L. Francione, *The California Art Preservation Act and Federal Preemption by the 1976 Copyright Act—Equivalence and Actual Conflict*, 18 CAL. W. L.



Maine,<sup>131</sup> Massachusetts,<sup>132</sup> New Jersey,<sup>133</sup> New Mexico,<sup>134</sup> New

REV. 189 (1982); John G. Petrovich, *Artists' Statutory "Droit Moral" in California: A Critical Appraisal*, 15 LOY. L.A. L. REV. 29 (1981).

128. CONN. GEN. STAT. ANN. §§ 42-116s to 116t (West 1992). The statute protects artists from intentional physical defacement or alteration of their fine art by another person. *Id.* § 42-116(a). The artist is given the right to violate these provisions if she owns and possesses the work of art that he or she created. *Id.* The statute applies to works of art created on or after October 1, 1988. *Id.* § 42-116(g).

The statute provides remedies identical to the California Act, *see supra* note 127, except that the Connecticut provision does not allow for punitive damages. CONN. GEN. STAT. ANN. § 42-116t (West 1992).

The Connecticut statute includes a limitations period, requiring an artist to bring an action within the longer period of three years after the violation or one year after the artist's discovery of the violation. No action, however, can be maintained more than ten years from the date of injury. *Id.* § 42-116(f). The statute applies to artists and their heirs, personal representatives, or devisees until the 50th anniversary of the artist's death. *Id.* § 42-116(d).

129. ILL. COMP. STAT. ANN. ch. 815, para. 320/1 - 320/8 (West 1993).

The Illinois statute does not address explicitly an artist's moral right to ensure the unaltered maintenance of a piece of art. However, the statute does hold an art dealer liable for the "loss of or damage to" a work of fine art while in the dealer's possession. *Id.* para. 320/2 § 2(5). The statute indicates that an artist's transfer of fine art to an art dealer constitutes a consignment, rendering the art dealer an agent of the artist and the art "trust property" and making the art dealer "trustee for the benefit of the artist until the work of fine art is sold to a bona fide purchaser or is returned to the artist." *Id.* para. 320/2, § 2(1)-(4).

The statute also prohibits an art dealer who accepts fine art on consignment from using or displaying the art or a photograph of the art unless notice is given to persons who use or view the art that the product is the artist's creation. *Id.* para. 320/5, § 5(2). A violation of this section subjects an art dealer to damages of \$50 and any actual damages, including incidental and consequential damages, as well as reasonable attorneys' fees. *Id.* para. 320/7, § 7.

130. LA. REV. STAT. ANN. § 51:2151 to 2156 (West 1987). The Louisiana statute, entitled the Artists' Authorship Rights Act, prohibits a person other than the artist or person acting with the artist's consent from displaying, making accessible to the public, or publishing:

(1) A work of fine art of an artist in an altered, defaced, mutilated, or modified form.

(2) A reproduction of a work of fine art of an artist if the work is depicted as, or the reproduction is, in an altered, defaced, mutilated, or modified form.

(3) Work, if it is in its original or reproduced form and is displayed, made accessible to the public, or published as being the work of the artist, when the work is known to be generally regarded by the public as that of the artist, or under circumstances in which it would be reasonably regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result therefrom.

*Id.* § 51:2153.

Moreover, a person who defaces, mutilates, alters, or modifies a work of fine art as a result of gross negligence is liable under this Act. *Id.* § 51:2155(A). The Act is inapplicable to works prepared under contracts for advertising or trade usage unless the contractual arrangement provides for its application. *Id.* § 51:2155(D).

A violation of this section provides the artist with a cause of action for legal and injunctive relief. *Id.* § 51:2156(A). A suit under this act must be brought within three years after the violation or within one year after actual or constructive discovery of the violation. *Id.* § 51:2156(B).

131. ME. REV. STAT. ANN. tit. 27, § 303 (West 1988). This statute provides that no person other than an artist or person authorized by an artist may knowingly display in a place accessible to the public or publish fine art or a reproduction of fine art that is in an "altered, defaced, mutilated or modified form" if: (1) the work is represented as the work of the artist or could reasonably be regarded as his or her work; and (2) the artist's reputation is reasonably likely to be damaged as a result of displaying, reproducing, or publishing the art. *Id.* § 303(2). In addition, if conservation work on a piece of fine art is grossly negligent, the statute will apply. *Id.* § 303(4).

A violation of this statute enables an artist or the artist's personal representative to bring an action for legal and injunctive relief (in the form of the artist's disclaiming authorship of the piece). *Id.* § 303(5). Maine's statute contains a limitations period allowing suits within the longer period of three years after the injurious act occurs or one year after the injurious act is discovered or reasonably should be discovered. *Id.* § 303(5).

132. MASS. GEN. LAWS ANN. ch. 231, § 85S (West Supp. 1994). The law's purpose is to prevent the "physical alteration or destruction of fine art" in order to prevent harm to the artist's reputation. Further, the public has an interest in "preserving the integrity of cultural and artistic creations." *Id.* § 85S(a). This statute prohibits anyone other than the artist who owns and possesses the art, or a person authorized by the artist, from intentionally defacing, mutilating, altering, or destroying fine art. Intent includes gross negligence, as well as deliberate action. *Id.* § 85S(c).

If the statute is violated, the artist "or any bona fide union or other artists' organization authorized in writing by the artist" may bring an action in superior court without any initial showing of damages. The recovery can include injunctive or declaratory relief, actual damages, reasonable attorneys' and expert witness fees, other costs, and other court-ordered relief. *Id.* § 85S(e).

The statute applies to the artist or, upon his or her death, to the artist's heir, devisee, or personal representative until the 50th anniversary of his or her death. Further, if the artist is dead, the state attorney may act on behalf of the deceased artist and bring suit for injunctive relief if the work of art is in the "public view." *Id.* § 85S(g).

The limitations period within which an action must be commenced under § 85S is two years after the injurious event occurs or one year after the discovery of the act, whichever is later. MASS. GEN. LAWS ANN. ch. 260, § 2C (West 1992).

For a general overview of the Massachusetts Act, see Vance R. Koven, *Observations on the Massachusetts Art Preservation Act*, 71 MASS. L. REV. 101 (1986).

133. N.J. REV. STAT. ANN. §§ 2A:24A-1 to 24A-8 (West 1987). The Artists' Rights Act, recognizes that the physical nature of fine art "is of enduring and crucial importance to the artist and the artist's reputation" and that the alteration, defacement, mutilation, or modification of fine art could affect this. *Id.* § 2A:24A-2. Consequently, the statute recognizes that destruction of the integrity of the art causes a loss to the artist and the artist's reputation. The statute permits an artist to object to these actions when certain circumstances occur. *Id.* § 2A:24A-2(a)-(d). The statute prohibits anyone other than the artist (or person authorized by the artist) from knowingly displaying in a public place fine art that is "altered, defaced, mutilated or modified" if the artist's reputation is reasonably likely to be damaged. *Id.* § 2A:24A-4. Moreover, the statute also prohibits anyone other than the artist (or person authorized by the artist) from knowingly displaying in a public place fine art that is "altered, defaced, mutilated or modified" if the artist's reputation is reasonably likely to be damaged and if the fine art is "published or reproduced as being the work of the artist by use of the artist's name in conjunction with the reproduction or publication." *Id.*

Gross negligence in allowing the work to be adversely affected over time will also subject the holder of fine art to liability under this section. *Id.* § 2A:24A-6. The act is inapplicable to works prepared under contract for advertising or trade use unless contractually prescribed. *Id.* § 2A:24A-7. The remedy under this act is legal and injunctive relief. *Id.* § 2A:24A-8(a). Any action under this statute must be brought within the later time of six years after the violation or two years after the constructive discovery of the violation. *Id.* § 2A:24A-8(b).

York,<sup>135</sup> Pennsylvania,<sup>136</sup> and Rhode Island.<sup>137</sup> The protections afforded

134. N.M. STAT. ANN. §§ 13-4B-1 to 13-4B-3 (Michie 1978). The Fine Art in Public Buildings Act protects an artist's right of integrity, *id.* § 13-4B-3A, and attribution, *id.* § 13-4B-3B, provided the work is "fine art . . . of recognized quality." *Id.* § 13-4B-2B. Relief may include injunctions, actual damages, and reasonable attorneys' fees and other costs. *Id.* § 13-4B-3C. The rights endure for the life of the artist plus 50 years, *id.* § 13-4B-3E, and can only be waived by a written instrument. *Id.*

135. N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney Supp. 1994). This statute protects the authorship rights of artists. The statute prohibits anyone other than the artist or a person duly authorized by the artist from knowingly displaying in a place accessible to the public or from publishing "a work of fine art or limited edition multiple of not more than three hundred copies by that artist or a reproduction thereof in an altered, defaced, mutilated or modified form." *Id.* § 14.03(1). This prohibition will apply if the work is claimed, or could reasonably be regarded, as being the artist's work and if the artist's reputation is reasonably likely to be damaged by the injurious act. *Id.*

Gross negligence in maintaining or protecting fine art will trigger a violation of this statute. *Id.* § 14.03(3)(a). This statute is inapplicable to art composed under an advertising contract or used in trade unless provided for contractually. *Id.* § 14.03(d). To remedy a violation of the statute, an artist can sue for legal and injunctive relief. *Id.* § 14.03(4)(a). Any suit brought under the statute must fall within the longer of a three year period after the time of the injurious event, or one year after the violation has been discovered through constructive discovery. *Id.* § 14.03(4)(b).

Artists have tried to avail themselves of the Act's protections without much success. *See, e.g.,* Morita v. Omni Publications Int'l, Ltd., 741 F. Supp. 1107, 1114-15 (S.D.N.Y. 1990) (holding that the defendant's placement of the plaintiff's sculpture with an anti-nuclear message in a pro-nuclear context was not a mutilation or alteration under the Act); Tracy v. Skate Key, Inc., 697 F. Supp. 748, 751 (S.D.N.Y. 1988) (holding that the plaintiff's claim under the New York Act was preempted by the Copyright Act as it "tracks the rights protected by the Copyright Act").

For a general discussion of the New York Act, see Edward J. Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733 (1984); Sarah A. Smith, Note, *The New York Artists' Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL L. REV. 158 (1984).

136. PA. STAT. ANN. tit. 73, §§ 2101-2110 (1993). The "Fine Arts Preservation Act" prohibits a person other than an artist who owns and possesses a work he or she created from committing or authorizing, in an intentional manner, "any physical defacement, mutilation, alteration or destruction" of fine art. *Id.* § 2104(a). The statute applies only to fine art that is displayed in Pennsylvania in a place of public access. *Id.* § 2110(a). This act also applies to a person who acts with gross negligence while framing, conserving or restoring a work of fine art. *Id.* § 2104(b).

The following remedies are provided for an artist aggrieved by a violation of the statute: injunctive relief, actual damages, reasonable attorney and expert witness fees, and other relief the court deems proper. Also, punitive damages may be awarded, but these damages shall be given by the court to a charitable or educational organization(s) that focuses on the fine arts in Pennsylvania. *Id.* § 2105(3).

The rights under the act extend to a living artist or to the heir, legatee, or personal representative of an artist until the end of the 50th anniversary of the artist's death. *Id.* § 2107(1). This statute is inapplicable to art composed under an advertising contract or for commercial use unless provided for contractually. *Id.* § 2107(3). This statute applies to works existing in, or created after, 1986. *Id.* § 2110(6). An action may be maintained under this statute only within the later time of three years after the violation or one year after its discovery. *Id.* § 2109.

to artists' moral rights vary greatly among these statutes. New York is probably the most protective of an artist's personal rights,<sup>138</sup> while the California act seems to stress the preservation of art with no provision for affronts to an artist's reputation.<sup>139</sup> The laws of Connecticut,<sup>140</sup> Massachusetts,<sup>141</sup> Pennsylvania,<sup>142</sup> and Rhode Island<sup>143</sup> are of the California model, while Louisiana,<sup>144</sup> Maine,<sup>145</sup> and New Jersey<sup>146</sup> focus, like New York,<sup>147</sup> on the artist's reputation. Though the House Report lists Illinois, the Illinois statute really does not encompass any moral rights protections, other than a de minimis right of attribution.<sup>148</sup> These varying laws have been described by an artists' rights attorney as a "patchwork of rules which by itself vitiates somewhat the single, unified system of copyright."<sup>149</sup> However, Congress said that certain statutes, like those discussed above, were sufficient safeguards of paternity and integrity rights such that Article 6<sup>bis</sup> of Berne<sup>150</sup> could be satisfied:

This existing U.S. law includes various provisions of the Copyright Act and Lanham Act, *various state statutes*, and common law principles such as libel, defamation, misrepresentation, and unfair competition, which have been applied by courts to redress authors' invocation of the right to claim authorship or the right to object to distortion.<sup>151</sup>

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137. R.I. GEN. LAWS §§ 5-62-2 to 62-6 (1987). The law prohibits anyone other than the artist or person authorized by the artist from knowingly and publicly displaying fine art, or from publishing a reproduction of fine art, in an "altered, defaced, mutilated or modified form," if the work is represented as that of the artist or if the work would reasonably be considered as being that of the artist. *Id.* § 5-62-3.

Gross negligence in maintaining or protecting art will also trigger the application of this statute. *Id.* § 5-62-5. The statute is inapplicable to advertising or trade use, subject to contract, unless contained in the contract. *Id.* § 5-62-5(d). Relief can be legal or injunctive. *Id.* § 5-62-6(a). The statute contains a limitations period of the longer of three years after the violation, or one year after discovery of the violation. *Id.* § 5-62-6(b).

138. *See supra* note 135.

139. *See supra* note 127.

140. *See supra* note 128.

141. *See supra* note 132.

142. *See supra* note 136.

143. *See supra* note 137.

144. *See supra* note 130.

145. *See supra* note 131.

146. *See supra* note 133.

147. *See supra* note 135.

148. ILL. COMPILED STAT. ANN. ch. 815, para. 320/5, § 5(2) (West 1993).

149. H.R. REP. NO. 514, 101st Cong., 2d Sess. 6915, 6919 (1990) (testimony of John Koegel).

150. Berne Convention for the Protection of Literary and Artistic Property, Article 6<sup>bis</sup>, Paris, July 24, 1971.

151. S. REP. NO. 352, 100th Cong., 2d Sess. 9-10, *reprinted in* 1988 U.S.C.C.A.N. 3714-15 (emphasis added). *See also* H.R. REP. NO. 609, 100th Cong., 2d Sess. 38 (1988); H.R. REP. NO. 609, 100th Cong., 2d Sess. 32-40 (1988).

Even before VARA, however, there was always the possibility of preemption of state statutes of the type described.<sup>152</sup> Provided the state statute at issue and federal copyright law protect common subject matter and grant equivalent rights, the state statute will be explicitly preempted.<sup>153</sup> Further, implied preemption might occur, even if the state laws were not "equivalent" under section 301, if the state statute frustrated the objectives of federal copyright law.<sup>154</sup> Post VARA, the preemption of these state moral rights statutes is even more complicated, but perhaps more likely to occur.<sup>155</sup> The preemption problem does not, of course, occur when moral rights protections are afforded under federal, as opposed to state, law.<sup>156</sup>

#### b. Pre-VARA Protection of Moral Rights Under Federal Law

Prior to VARA, federal copyright law offered only minimal and indirect protection of the personal rights of artists. Professor Kwall noted the possibility that sections 115(a)(2), 106(2), 203, 304, and 501(b) of the Copyright Act might be read to protect an artist's moral rights, but to date this has not been the case.<sup>157</sup> The legislative history of section 115(a)(2)<sup>158</sup> indicates Congress' intent "to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without

152. See, e.g., *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130, 135 (S.D.N.Y. 1990) (stating that the pre-VARA 1976 Copyright Act does not preempt the New York statute); *Tracy v. Skate Key, Inc.* 697 F. Supp. 748, 751 (S.D.N.Y. 1988); *Ronald Litoff, Ltd. v. American Express Co.*, 621 F. Supp. 981, 986 (S.D.N.Y. 1985) (stating that when the right of reproduction is involved, the New York statute is preempted). See also Brett Sirota, Note, *The Visual Artists Rights Act: Federal Versus State Moral Rights*, 21 HOFSTRA L. REV. 461 (1992); Francione, *supra* note 127; Damich, *supra* note 135. For a detailed description of state moral rights law and preemption problems, see Edward J. Damich, *State "Moral Rights" Statutes: An Analysis and Critique*, 13 COLUM.-VLA J.L. & ARTS 291, 329-47 (1989).

153. 17 U.S.C. § 301 (1982).

154. See *Goldstein v. California*, 412 U.S. 546, 561 (1973).

155. See PAUL GOLDSTEIN, COPYRIGHT 291-92 (Supp. 1993); Zuber, *supra* note 10, at 508. VARA added a new explicit preemption section, 17 U.S.C. § 301(f), which preempts state common or statutory law granting rights equivalent to section 106A. Any state claim filed prior to June 1, 1991, the effective date of VARA, is not preempted by section 301(f), nor are state moral rights which extend beyond the life of the author. See 17 U.S.C. § 301(f)(2)(A), (C) (Supp. V 1993).

156. 17 U.S.C. § 301(d) (1988) provides: "Nothing in this title annuls or limits any rights or remedies under any other Federal statute." *Id.*

157. Kwall, *supra* note 9, at 38-56.

158. 17 U.S.C. § 115(a)(2) (1982) provides:

A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

*Id.*

allowing the music to be perverted, distorted, or travestied."<sup>159</sup> Section 106(2) grants to the author the exclusive right "to prepare derivative works based upon the copyrighted work."<sup>160</sup> This section might allow an author to sue someone who substantially distorts the author's work.<sup>161</sup> The termination procedures of sections 203<sup>162</sup> and 304(c)<sup>163</sup> could be interpreted to safeguard a creator's personal rights.<sup>164</sup> Finally, section 501(b),<sup>165</sup> permitting "beneficial" as well as legal owners of a copyright to sue for infringement, indicates that even an artist who has given or sold all copyright interests might be able to sue for violation of his or her exclusive right under section 106(2) to make a derivative work.<sup>166</sup> To date, however, federal copyright law, as it existed before the enactment of VARA, was a negligible,<sup>167</sup> if not non-existent, source of moral rights safeguards.

Another federal statute, the Lanham Act, specifically its unfair competition provision,<sup>168</sup> furnished the basis for the high water mark of federal moral rights protection pre-VARA. In *Gilliam v. American Broadcasting Cos.*,<sup>169</sup> the Monty Python group (Python) sued to enjoin ABC from broadcasting two ninety-minute specials of Monty Python programs. ABC cut, without Python's permission, twenty-four minutes out of each of the ninety-minute programs. ABC edited the material to make time for commercial advertising and to eliminate "offensive or obscene matter."<sup>170</sup> Python argued, and both the trial

159. Kwall, *supra* note 9, at 39 & n.149 (quoting H.R. REP. NO. 1476, 94th Cong., 2d Sess. 109, reprinted in 1976 U.S.C.C.A.N. 5659, 5724).

160. 17 U.S.C. § 106(2) (1988).

161. Kwall, *supra* note 9, at 40-41, 47-48. See also *National Geographic Soc'y v. Classified Geographic, Inc.*, 27 F. Supp. 655, 659-60 (D. Mass. 1939) (stating that cutting up, rearranging, and rebinding articles from the plaintiff's magazine and then selling the "new" books violates the 1909 Act).

162. 17 U.S.C. § 203 (1988).

163. 17 U.S.C. § 304(c) (1988).

164. Kwall, *supra* note 9, at 56.

165. 17 U.S.C. § 501(b) (1988).

166. Kwall, *supra* note 9, at 49. In Part III.B.2 of her article, Professor Kwall discusses various provisions in the copyright act which circumscribe moral rights. *Id.* at 57-72.

167. *But see Gilliam v. American Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976) (interpreting the Copyright Act of 1909, 17 U.S.C. §§ 1-216 (1970) (repealed 1976), to grant plaintiff relief). See discussion of *Gilliam*, *infra* notes 169-73 and accompanying text.

168. 15 U.S.C. § 1125(a) (1976) provided in part:

Any person who shall affix, apply, or annex, or use in connection with any goods or services . . . a false designation of origin, or any false description or representation . . . and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or representation.

*Id.*

169. 538 F.2d 14 (2d Cir. 1976).

170. *Id.* at 18. Such words as "hell" and "damn" were deleted. *Id.* at 23.

and appellate courts agreed, that broadcasting of the Python shows in the truncated ABC version violated the integrity of Python's work and could make Python subject to criticism—the very stuff of section 1125(a) protection.<sup>171</sup> For instance, ABC distorted one of the skits thusly:

[A]n upper class English family is engaged in a discussion of the tonal quality of certain words as “woody” or “tinny.” The father soon begins to suggest certain words with sexual connotations as either “woody” or “tinny,” whereupon the mother fetches a bucket of water and pours it over his head. The skit continues from this point. The ABC edit eliminates this middle sequence so that the father is comfortably dressed at one moment and, in the next moment, is shown in a soaked condition without any explanation for the change in his appearance.<sup>172</sup>

Section 1125(a) of the Lanham Act, as interpreted creatively by *Gilliam*<sup>173</sup> and other courts<sup>174</sup> (not without criticism however),<sup>175</sup> indicates the lengths to which some courts will go to protect an artist's moral rights even absent explicit federal law. Unlike the patchwork of state moral rights, section 1125(a) could provide national uniformity. However, most commentators and a few courts believe the fit between Lanham and droit moral is an extremely tenuous one.<sup>176</sup>

## 2. Moral Rights Under VARA

Despite state moral rights statutes,<sup>177</sup> state law doctrines such as contract, unfair competition, defamation, and privacy,<sup>178</sup> and strained reliance on

171. *Gilliam*, 538 F.2d at 24. The court also held that ABC violated the 1909 Copyright Act. *Id.* at 19.

172. *Id.* at 25 n.12.

173. *Gilliam v. American Broadcasting Co.*, 538 F.2d 14, 124 (2d Cir. 1976).

174. *See, e.g.,* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992) (stating that the Lanham Act provides a remedy to the plaintiff in a “sound-alike” suit because of “an economic interest akin to that of a trademark holder in controlling the commercial exploitation of his or her identity”); *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981) (holding that the substitution of the plaintiff's name constitutes “reverse passing off” and is actionable under § 1125).

175. *Halicki v. United Artists Communication, Inc.*, 812 F.2d 1213 (9th Cir. 1987) (holding that a false description of the plaintiff's film as an “R” rated movie was not actionable under § 1125).

176. *See, e.g., Halicki*, 812 F.2d at 1213; *Gilliam*, 538 F.2d at 26-27 (Gurfein, J., concurring); *Kwall, supra* note 9, at 24 & n.89. *But see* Diana Elzey Pinover, *The Rights of Authors, Artists and Performers under Section 43(a) of the Lanham Act*, 83 TRADEMARK REP. 38 (1993).

177. *See supra* notes 126-51 and accompanying text.

178. *See supra* notes 121-24 and accompanying text.

Copyright and Lanham Act provisions,<sup>179</sup> it was not until July 1, 1991, the effective date of VARA,<sup>180</sup> that copyright law explicitly protected the moral rights of attribution and integrity. Thus, VARA creates the potential for a nationwide, uniform scheme, albeit limited, of moral rights safeguards. Whether Congress enacted VARA to comport with Berne moral rights requirements<sup>181</sup> or as a supremely political compromise between the arguments tendered by folks in both camps of the colorization debate,<sup>182</sup> is not made clear by VARA's legislative history. George C. Smith, chief minority counsel for the Senate Judiciary Subcommittee on Technology and the Law, describes the birth of VARA thusly:

On the last day of the 101st Congress, a major bill was passed authorizing 85 new federal judgeships. To placate senators in a position to block the bill, sponsors were forced to include several unrelated measures. The judgeships legislation became a "Christmas Tree"—a vehicle for enactment of bills that could not have passed as free-standing legislation.

One of the baubles on this tree was a seemingly innocuous provision known as the Visual Artists Rights Act. [Senator] Edward Kennedy, D-Mass., had been promoting the law for years, and it had finally been passed by the House of Representatives. But the bill had not been cleared by the Senate Judiciary Committee, where it faced opposition from some Republican members.

The bill was ultimately passed by the full Senate only because of its linkage to the critical judgeships legislation. The few Republican senators opposed were not about to block the creation of 85 judgeships merely to prevent passage of a measure that seemingly affects a narrow range of interests. Without so much as a word of debate or discussion, the artists act became law.

The lack of debate is unfortunate because the new statute

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179. See *supra* notes 157-76 and accompanying text.

180. Pub. L. 101-650, Tit. VI, 104 Stat. 5128 (1990), (codified at 17 U.S.C. 106A (Supp. V 1993)).

181. Recall that Congress had, perhaps disingenuously, stated that protection of moral rights in this country was sufficient to admit us into Berne. See *supra* text accompanying notes 150-51. Adherence to Berne was desired to curb international piracy and to make the U.S. an effective participant in international copyright. See Carl H. Settlemyer III, *Between Thought and Possession: Artists' "Moral Rights" and Public Access to Creative Works*, 81 GEO. L.J. 2291, 2307 n.71 (1993).

182. See *supra* note 89. The narrow range of works protected by VARA was not unintentional. See 17 U.S.C. § 101 (Supp. V 1993). Compare 136 Cong. Rec. H 3113 (daily ed. June 5, 1990) (statement of Rep. Kastenmeier) ("We will continue to consider whether claims arising in the film context meet the same standards as visual artists' claims did.") with *id.* at 3115 (statement of Rep. Fish) ("[T]his legislation should not be viewed as a precedent for the extension of so-called moral rights into other areas.").



constitutes one of the most extraordinary realignments of private property rights ever adopted by Congress—albeit in a very specialized context. The act grants artists a continuing right to restrict the use and disposition of artistic works that they have sold to private citizens.<sup>183</sup>

To highlight the coverage now afforded by VARA and the unresolved copyright issues created by the addition of these moral rights to what previously was a pecuniary-based protection scheme, let us now return to our imaginary case of *Leonardo v. Duchamp* to see whether VARA offers any redress when Duchamp purchases a single copy of Leonardo's Mona Lisa edition of 100 and draws a moustache upon those famous smiling lips. Initially, Leonardo will need to show that the Mona Lisa edition is a "work of visual art" protected by VARA. Since the Mona Lisa lithographs are in a limited edition, under 200 copies, and are signed and numbered by Leonardo, he could satisfy the definitional requirements of section 101(1).<sup>184</sup> However, not only must the protected work be a work of visual art, but the offending work must also be a work of visual art.<sup>185</sup> Duchamp's *L.H.O.O.Q.* is such a work. Because the hypothetical assumes that Leonardo created the Mona Lisa after June 1, 1991, and that he is still alive today, the rights afforded by section 106A are in full force<sup>186</sup> and are independent of any of the exclusive rights provided in section 106.<sup>187</sup> We will also assume that Leonardo has not waived any 106A rights; waiver must be evident in a written instrument signed by Leonardo which specifically identifies the Mona Lisa lithograph edition.<sup>188</sup>

Leonardo's main claim under VARA is that Duchamp, in adding a moustache to one of Leonardo's lithographs, intentionally distorted, mutilated, or modified the work in a way "prejudicial to his . . . honor or reputation."<sup>189</sup> In short, Duchamp violated Leonardo's right of integrity. Leonardo might also

183. George C. Smith, *Let the Buyer of Art Beware; Artists' Moral Rights Trump Owners' Property Rights Under the Visual Artists Rights Act*, RECORDER, Jan. 10, 1991, at 4.

184. 17 U.S.C. § 101 (Supp. V 1993). Note that, if we had not massaged the facts, Leonardo's portrait could be considered owned by Signore Giocando as a work for hire, 17 U.S.C. § 101 (1988), and, thus, not a "work of visual art" protected by VARA. 17 U.S.C. § 101(2)(B) (Supp. V. 1993).

185. See 17 U.S.C. § 106A(c)(3) (Supp. V 1993).

186. See 17 U.S.C. § 106A(d)(1) (Supp. V 1993).

187. See 17 U.S.C. § 106A(a) (Supp. V 1993).

188. See 17 U.S.C. § 106A(e)(1) (Supp. V 1993). Although an artist can waive her moral rights, the waiver is not transferable. *Id.* § 106A(e)(2). Several possibilities stem from these provisions. First, even if Leonardo had sold all of his 106 rights, his 106A rights remain throughout his life. Second, even if he had sold his 106 rights and waived his 106A rights to that same person, an action could still be maintained against a third party under 106A because waiver of moral rights is not transferable.

189. 17 U.S.C. § 106A(a)(3)(A) (Supp. V 1993).

assert that Duchamp violated his right of attribution;<sup>190</sup> that, except for the moustache, the rest of the lithograph was authored by him, not Duchamp. However, for purposes of this Article, the right of integrity claim will be emphasized.

To succeed on his integrity claim, Leonardo will not have much difficulty showing that Duchamp intentionally distorted, mutilated, or modified his Mona Lisa. Duchamp clearly knew what he was doing and intended at least to "modify" the work to accomplish the desired result. Duchamp relates the history of his creation:

In 1919 I was back in Paris and the Dada Movement had just made its first appearance there: Tristan Tzara who had arrived from Switzerland, where the movement had started in 1916, joined the group around André Breton in Paris. Picabia and I had already shown in America our sympathy for the Dadas.

This Mona Lisa with a moustache and a goatee is a combination readymade and iconoclastic Dadaism. The original, I mean the original readymade is a cheap chromo 8 x 5 on which I inscribed at the bottom four [sic] letters which pronounced like initials in French, made a very risqué joke on the Gioconda.<sup>191</sup>

A more sticky issue arises as to whether Duchamp's parodic modification "would be prejudicial to [Leonardo's] honor or reputation."<sup>192</sup> The fuzziness of the phrase "prejudicial . . . to honor or reputation" is not made appreciably clearer by VARA's legislative history. The House Report on VARA tells the courts to focus on "the artistic or professional honor or reputation of the individual as embodied in the work that is protected . . . . While no *per se* rule exists, modification of a work of recognized stature will generally establish harm to honor or reputation."<sup>193</sup> But the House Report emphasizes that the standard of harm "is not analogous to that of a defamation case, where the general character of the plaintiff is at issue."<sup>194</sup> Based on this amorphous standard—harm to artistic honor or reputation—it is not very clear what Leonardo would have to show: that art galleries no longer give him single artist shows, that the price of the other Mona Lisas in the lithograph series have plummeted, that the

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190. *Id.* § 106A(a)(1)(A).

191. MARCEL DUCHAMP, MARCEL DUCHAMP 289 n.131 (Anne D'Harnocourt & Kynaston McShine eds., 1973). The artist made a second, larger version of *L.H.O.O.Q.* in 1930. *Id.*

192. 17 U.S.C. § 106A(a)(3)(A) (Supp. V 1993).

193. H.R. REP. NO. 514, 101st Cong., 2d Sess. 15-16 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6925-26.

194. *Id.* at 15.

*New York Times* art critic now views this series as banal and an object of derision, that he can no longer get "commissions"<sup>195</sup> to do portraits, that he has been asked to resign from the Valparaiso, Indiana, Post-Renaissance Artists Society, or that no gallery will accept any of his work, either on consignment or as part of a sale? Most commentators agree that this subjective standard may raise insurmountable practical and evidentiary issues,<sup>196</sup> although expert testimony can be sought to show whether the modification does indeed affect the honor or reputation of the artist.<sup>197</sup>

Assuming that Leonardo can show the requisite harm, the only barrier to recovery under the panoply of remedies of the Copyright Act<sup>198</sup> would be the fair use doctrine.<sup>199</sup> As a parodist,<sup>200</sup> Duchamp would attempt to raise this defense. The following sections will discuss the nature of parody and fair use (Part III) and the proper resolution of Leonardo's claim against Duchamp (Part IV).

195. The New York Artists' Authorship Rights Act, N.Y. ARTS AND CULT. AFF. LAW § 14.03, 14.03.1 (McKinney Supp. 1993), *see supra* note 135, provides a marginally more concrete standard: recovery is appropriate if damage to the author's reputation is reasonably likely to result from defendant's alteration, defacement, mutilation, or modification.

196. *See* Jill R. Applebaum, Note, *The Visual Artists Rights Act of 1990: An Analysis Based on the French Droit Moral*, 8 AM. U. J. INT'L L. & POL'Y 191, 213-14 & nn.157, 169 (1992); *see also* Note, *Visual Artists' Rights in a Digital Age*, 107 HARV. L. REV. 1977, 1986-87 & n.65 (1994).

197. *See* H.R. REP. No. 514, 101st Cong., 2d Sess. 15-16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6925-26.

198. These include injunctions, impounding, damages and profits or statutory damages, costs, and reasonable attorneys' fees. *See* 17 U.S.C. §§ 501-505 (1988 & Supp. V 1993). Section 501 explicitly states that these remedies are available to authors whose 106A(a) rights are violated. *See* 17 U.S.C. § 501(a) (Supp. V 1993). Note that, even if Leonardo's actual damages are slight or difficult to quantify, he may alternatively elect to seek statutory damages under § 504(c). Recently doubled under the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 102 Stat. 2853, 2860, the sums range from a minimum of \$500 to a maximum of \$20,000; from \$50,000 to \$100,000 for willful infringements; and \$200 for innocent infringements. On the Duchamp facts hypothesized here, Duchamp would probably be found to have infringed willfully. Willfulness could be shown by reckless disregard of Leonardo's copyright, *see* *Lauratex Textile Corp. v. Allton Knitting Mills*, 519 F. Supp. 730 (S.D.N.Y. 1981), or by Duchamp's knowledge of infringement. *See* *Broadcast Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233, 236 (5th Cir. 1988). *Cf. Supra* text accompanying *supra* note 191.

199. 17 U.S.C. § 107 (Supp. V 1993). *See infra* notes 229-322 and accompanying text.

200. *See infra* notes 229-322 and accompanying text.

## III. PARODY AND FAIR USE

Parody is "the tribute that mediocrity pays to genius."<sup>201</sup>  
"[P]arodies and caricatures are the most penetrating of criticisms."<sup>202</sup>  
"Larceny is the sincerest form iv flattery [sic]."<sup>203</sup>

A. *Parody in the Arts*

Parody has been a recognized art form in western civilization,<sup>204</sup> as well as in other societies,<sup>205</sup> for thousands of years. Apparently, even the great Homer himself did not escape parody's sting, either in ancient or in more recent times. "The rhapsodists who strolled from town to town to chant the poems of Homer were immediately followed by another set of strollers—buffoons who made the audiences merry by the burlesque turn which they gave to the solemn strains";<sup>206</sup> for instance, by relating tales of frogs and mice doing battle as if they were heroes of Homeric proportions.<sup>207</sup> Similarly, Hegemon of Thasos' play, *Gigantomachia*, was a Homeric parody that turned an Athenian defeat in the Syracuse expedition into a victorious tale of Athenian exploits. Some two thousand years later, Shakespeare parodied several episodes of *The Iliad* in *Troilus and Cressida*.<sup>208</sup> In the twentieth century, James Joyce used Homer's *Odyssey* in a parodic fashion in *Ulysses*,<sup>209</sup> encapsulating the ten years of Homeric adventure into a twenty-four hour day, June 16, 1904, with Leopold

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201. Robert A. Bernstein, *Parody and Fair Use in Copyright Law*, 31 ASCAP COPYRIGHT L. SYM. 1, 12 (1984) (quoting Oscar Wilde).

202. *Id.* at 11-12 (quoting Aldous Huxley).

203. FINLEY PETER DUNNE, MR. DOOLEY ON IVRYTHING AND IVRYBODY 155 (1963).

204. Leon R. Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130, 1133 (1955).

205. For example, Masami Teraoka's watercolor, *New Views of Mt. Fuji: Sinking Pleasure Boat*, 1976-1977, is an ironic, modern version of an 1823 Japanese print. All the figures are wearing traditional garments, but Teraoka's painting contains ideograms, placed near cameras and golf clubs, which, translated from the Japanese, say "Golf Craze" and "Leave Wives Behind." JEAN LIPMAN & RICHARD MARSHALL, ART ABOUT ART 94 (1978). A late 16th century Chinese novel, *THE PLUM IN THE GOLDEN VASE OR CHIN PING MEI* (Roy English trans., Princeton University Press 1993), is another non-western example. Professor English notes that Chin Ping Mei, "[l]ike Joyce's *Ulysses*, . . . weaves into its plot verbatim quotations from the entire Chinese cultural spectrum—songs, jokes, popular literature, parodies of a variety of conventional styles." Roy English, UNIV. CHI. MAG., Apr. 1994, at 16.

206. DWIGHT MACDONALD, PARODIES: AN ANTHOLOGY FROM CHAUCER TO BEERBOHM—AND AFTER 562 (1960).

207. *See id.*

208. *Id.*

209. GILBERT HIGHET, THE ANATOMY OF SATIRE 109-10 (1962). Shakespeare's work, in turn, became the object of parody: *Hamlet* was parodied by Tom Stoppard's play *Rosencrantz and Guildenstern Are Dead*. *See* WILLIAM SHAKESPEARE, *HAMLET: PRINCE OF DENMARK* (1600); TOM STOPPARD, *ROSENCRATZ AND GUILDENSTERN ARE DEAD* (1967).

Bloom as a wandering Jew in Dublin representing the Greek hero<sup>210</sup> and Molly Bloom, his wife, as Penelope.<sup>211</sup> The widespread recognition of the underlying Homeric work gives to all of these later parodies zest and life. The second artist—writer, painter, composer, or political pundit—expects us to be cognizant of the original work and forces us to deliberate about the changes wrought by his or her parody. Is this a paradigmatic case where familiarity breeds contempt or, perhaps, wit, humor, and a sly understanding of what is going on and, thus, more art?

Parody can be found not only in literature, as the Homer parodic odyssey described above illustrates,<sup>212</sup> but also in politics, the visual arts, and music. A few illustrative examples will suffice to indicate the breadth of parodic uses—all of which, it must be recognized, have enriched and expanded those arts which are the focus of copyright protection and which further copyright's goal: "[t]o promote . . . useful Arts."<sup>213</sup>

Political parody in our country dates at least as early as 1776. In that year, the New York press published a parody of the Declaration of Independence, barely after the penned signatures were dry.<sup>214</sup> The parody used the actual preamble of the Declaration but then targeted the Continental Congress, instead of the royal government of Great Britain, with a list of abuses. Such icons of musical Americana as "Yankee Doodle," "The Star Spangled Banner," and "My Country 'Tis of Thee," started out as English ballads and were then made into political song parodies.<sup>215</sup> In the New Deal era of the 1930s, one author parodied both President Franklin Roosevelt and Lewis Carroll's *Alice in Wonderland* in his 1936 novel entitled *Rosie in Squanderland*, complete with such Carroll characters as the Dormouse (who becomes the taxpayer), and the White Rabbit who, in *Squanderland*,

can pull [the country] out of debt by spending more and more money.  
No one else has ever been able to do that. But I can, because . . . it

210. HIGHT, *supra* note 209, at 67-147.

211. The episodic arrangement of Joyce's *Ulysses* corresponds to the adventures of Ulysses in Homer's *Odyssey*, such as Cyclops (ch. 12), Calypso (ch. 4), Sirens (ch. 11), and Circe (ch. 15). Further, 1904 Dublin can be thought to stand-in for a Hellenic city-state. STUART GILBERT, JAMES JOYCE'S ULYSSES: A STUDY 16, 30 (2d ed. 1952). See also FRANK DELANEY, JAMES JOYCE'S ODYSSEY, A GUIDE TO THE DUBLIN OF ULYSSES (1981); RICHARD ELLMANN, ULYSSES ON THE LIFFEY (1972).

212. See *supra* notes 208-11 and accompanying text.

213. U.S. CONST. art. I, § 8.

214. See BRUCE INGHAM GRANGER, POLITICAL SATIRE IN THE AMERICAN REVOLUTION, 1763-1783, at 127-28 (1960).

215. See JOHN TASKER HOWARD, OUR AMERICAN MUSIC: A COMPREHENSIVE HISTORY FROM 1620 TO THE PRESENT 37, 113-18, 121-28 (4th ed. 1965).

is not my money. It belongs to the Dormice [taxpayer], and they are just too damn dumb to understand what I am doing to them.<sup>216</sup>

More recently, during the Gulf War, many disk jockeys at commercial radio stations wrote and aired such parodies as "Hussein is Crazy" (to the tune of "She Drives Me Crazy"), "Iraquity-Raq" (to "Yackety-Yak"), and "Iraqi Blues" (to "Summertime Blues").<sup>217</sup> The underlying works were all protected by subsisting copyrights. Similarly, such groups as the Capitol Steps in Washington, D.C., use parodies of copyrighted songs to target recent denizens of the Beltway; for example, "Why not take Al and Me" (a jab at the Clintons and Gores to the tune of "Why Not Take All of Me") and "Day Care" (a poke at "Nannygate"—a/k/a the "Zoe" factor—the difficulties endured by President Clinton's nominees for Attorney General, to the tune of the calypso classic, "Day-O").<sup>218</sup> On the other coast, the song "Walk Like an Egyptian" was used to parody the political disputes between a former governor of California and Rose Bird, former Chief Justice of the California Supreme Court. The parody was entitled "Walk Like a Deukmejian."<sup>219</sup>

In the musical arts sphere, parodies have been written to deflate the pomposity of operas<sup>220</sup> and to spoof other compositions. Mozart, Wagner, Bartok, Debussy, and Peter Schickele (a/k/a P.D.Q. Bach) have all employed parody. For instance, in his Concerto for Orchestra, Bartok took on Dimitri Shostakovich's<sup>221</sup> Symphony No. 7 as follows: "trumpets give a Bronx cheer;

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216. J. LEWIS STACKPOLE, *ROSIE IN SQUANDERLAND 5* (1936). The layers of parody are often like archeological strata. Lewis Carroll's *Alice in Wonderland* itself often parodies Victorian verse of the late 19th century. See MACDONALD, *supra* note 206, at 278.

217. See Brief for Petitioners, *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994) (No. 92-1292).

218. Brief for Amici Curiae Capitol Steps Prod., Inc. at app. A, para. 3, *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994).

219. *Id.* at app. D, para. 3.

220. Donald J. Grout, *Seventeenth Century Parodies of French Opera—Part I*, 27 *MUSICAL Q.* 211, 219 (1941). For more recent put-downs of operas, no one was more adept than Sid Caesar and Imogene Cocoa, with the assistance of Carl Reiner and others, in several classic episodes of "Your Show of Shows" in the early days of television.

221. Ironically, Shostakovich had raised, unsuccessfully, one of the earliest moral rights claims in our courts based upon a movie studio's use, with attribution, of parts of his music in the movie, *The Iron Curtain*. *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948). Shostakovich's fear was that the anti-Soviet theme of the movie which used his music would cast aspersions on his loyalty to the Soviet nation. The New York court squarely rejected the composers moral rights claim and denied the "drastic relief" sought by Shostakovich. *Id.* at 578. It should be pointed out that Shostakovich could not have maintained a copyright infringement suit. Prior to May 27, 1973, when the Soviet Union acceded to the Universal Copyright Convention, all works first published in that country before that date were considered in the United States to be in the public domain. Interestingly, Shostakovich brought essentially the same case to a French court. The French court granted Shostakovich relief, ordered the film seized,

high strings and woodwinds shriek derision . . . woodwinds trail off in giggles; trombones fart, *glissando*. The whole wind band combines trills with an um-pah bass to introduce . . . violins in varied repetition of the Shostakovich tune."<sup>222</sup> 2 Live Crew's alleged parody of Roy Orbison's song, "Oh, Pretty Woman," is a more recent example.<sup>223</sup> Let the listener decide which is sublime and which is ridiculous.

The visual arts have also seen more than their fair share of parody. The 1919 Duchamp parody of Leonardo's 1506 *Mona Lisa*, which is the starting place for this Article, is just one illustration. Others range from the ridiculous, which include *Mad Magazine's* "Sports Titillated" parody of the swimsuit issue of *Sports Illustrated*, to the sublime, such as Titian's *Venus* (1538) parodied by Manet's *Olympia* (1893), and the putatively sublime, such as Andy Warhol's 1963 parody of the *Mona Lisa* entitled *Thirty are Better than One, M\*A\*S\*H's* 1970 film containing a parody of Leonardo's *The Last Supper* (circa 1497), and Larry Rivers' 1970 parody of Manet's *Olympia* entitled *I Like Olympia in Blackface*. Warhol's parody, which reproduces identical images of the *Mona Lisa* in rows six across and five down was intended to critique "a consumer society that loves quantity more than quality and can use a popular icon of highbrow art as a mass-produced product."<sup>224</sup> Several other prominent twentieth century artists also have parodied the *Mona Lisa*: Charles Addams (*Monster Rally 89* (1950) (a cartoon of *Mona Lisa* sitting in a movie audience)); Robert Rauschenberg (*Mona Lisa*, 1958); Jasper Johns (*Figure 7*, 1969); Tom Wesselman (*Great American Nude #35*, 1962); Philippe Halsman (*Mona Dali; What Dali sees when he looks at Mona Lisa*, 1954); Marisol (*Mona Lisa*, 1961-62); Robert Arneson (*George [Washington] and Mona in the Baths of Coloma*, 1976); Shusako Arakawa (*Portrait of Mona Lisa*, 1971); and Peter Max (*Mona Lisa*, 1991).<sup>225</sup>

Thus, Duchamp's parody is well-grounded in a long and solid parodic

and declared that there was "undoubtedly a moral damage" caused by the use of Shostakovich's music. *Soc. Le Chant du Monde v. Soc. Fox Europe Cours d'appel*, Paris, D. Jur. 16, 80 (Jan. 13, 1953).

222. William Austin, *Bartók's Concerto for Orchestra*, 18 MUSIC REV. 21, 37 (1957).

223. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994).

224. LINDA HUTCHEON, A THEORY OF PARODY 47 (1985). As for American art, Grant Woods' *American Gothic* must be one of the top ten targets for parody.

225. JEAN LIPMAN & RICHARD MARSHALL, ART ABOUT ART 28, 58-62 (1978). A recently formed art group, the "Guerrilla Girls," produced a poster of *Mona Lisa* with a fig leaf covering her mouth to protest censorship and sexism. CAROL STRICKLAND, THE ANNOTATED MONA LISA 194 (1992). As of 1952, there were more than five dozen versions of the *Mona Lisa*. *Id.* at 34.

tradition.<sup>226</sup> While the hypothetical case of *Leonardo v. Duchamp* is based on a chronological glitch with a moral rights twist, the "invasion" is much the same as Duchamp's actual 1915 parody, which is an exact reproduction of the Mona Lisa with several zingers. First, Duchamp painted a large black moustache and small goatee—graffiti—on what is undoubtedly one of the most celebrated, if not one of the most beautiful and serene, female faces in western art. Second, Duchamp changed the title of the work to the initials *L.H.O.O.Q.*, which serve as a French acronym that translates into something along the lines of "She has

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226. One art museum recently mounted a display recognizing the work of parodists. In June 1994, the museums at Stony Brook, New York, presented "Parodies of the American Masters: Rediscovering the Society of American Fakirs, 1891-1914." The Fakirs were a group of art students who painted outrageous parodies of such well known artists as George Bellows, Winslow Homer, and John Singer Sargent.

It should be noted that copyright is not the only branch of intellectual property that involves problems of parody. Trademark parodies are fairly common, and infringement is judged by a "likelihood of confusion" test. See 15 U.S.C. § 1114 (1) (1988). Representative trademark cases alleging infringement by parody include *Anheuser-Busch, Inc. v. Balducci Pubs.*, 28 F.3d 769 (8th Cir. 1994) (concerning a "Michelob Oily" parody in the defendant's humor magazine, *Snickers*); *Anheuser-Busch, Inc. v. L & L Wings, Inc.*, 962 F.2d 316 (4th Cir.) (concerning a "King of Beaches" parody of "Bud" slogan, which was printed on a series of T-shirts), *cert. denied*, 113 S. Ct. 206 (1992); *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc.*, 886 F.2d 490 (2d Cir. 1989) (finding that printing "Satire" prominently on "Spy Notes" parody of Cliffs Notes was unlikely to cause confusion); *Jordache Enterprise, Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482 (10th Cir. 1987) (dealing with a "Lardashe" parody of Jordache jeans); *Shieffelin & Co. v. The Jack Co. of Boca, Inc.*, 850 F. Supp. 232 (S.D.N.Y. 1994) (holding that "Dom Popignon," a popcorn product mark, infringes upon the "Dom Perignon" champagne trademark); *Nike, Inc. v. "Just Did It" Enters.*, 799 F. Supp. 894 (N.D. Ill. 1992) (concerning the parody of Nike's "Just Do It" slogan); *General Elec. Co. v. Alumpa Coal Co.*, 205 U.S.P.Q. 1036 (D. Mass. 1979) (concerning a "Genital Electric" parody). See generally Tammi A. Gauthier, Note, *Fun & Profit: When Commercial Parodies Constitute Copyright or Trademark Infringement*, 21 PEPP. L. REV. 165 (1993); Peter W. Smith, Note, *Trademarks, Parody, and Consumer Confusion: A Workable Lanham Act Infringement Standard*, 12 CARDOZO L. REV. 1525 (1991); Tyrone Tasker, *Parody or Satire as a Defense to Trademark Infringement*, 77 TRADEMARK REP. 216 (1987).

When a parodist seeks trademark protection for his or her mark, the Lanham Act poses several hurdles. Section 1052(d), 15 U.S.C. § 1052(d) (1988), provides that no mark can be registered if it is likely to cause confusion, mistake, or deception with a previously registered mark. Section 1052(a), 15 U.S.C. § 1052(a) (1988), does not permit registration of marks that are "immoral, deceptive, or scandalous" or which "disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute." See, e.g., *In re Runsdorf*, 171 U.S.P.Q. (BNA) 443 (TTAB 1971) (holding that "Booby Trap" as a mark for brassieres is not registrable).

In stark contrast to trademark law, copyright law has no explicit content-based restriction for protection and courts have rejected reading such a restriction into the Copyright Act. See, e.g., *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) (rejecting the defendant's assertion that the plaintiff's pornographic movie, *Behind the Green Door*, is not copyrightable subject matter).



a hot ass."<sup>227</sup> *L.H.O.O.Q.* can be pronounced phonetically in English as the single word "look," referring perhaps to the enigmatic countenance of La Gioconda, or, in French phonetics, it can also stand for the phrase "elle a chaud au cul," translated more daintily as "she has hot pants."<sup>228</sup> These visual and aural puns are what gives Duchamp's parody its kick to its viewers and its sting to Leonardo's moral rights as an artist.

### B. Parody and Fair Use

Parody, by its very nature, smacks of irreverence. Whether it involves a send-up of a work protected by traditional copyright law<sup>229</sup> or one protected additionally by the new moral rights provisions of state<sup>230</sup> or federal law,<sup>231</sup> a parody is almost always quasi-revolutionary<sup>232</sup> in concept and rarely is it a loving, respectful, or deferential use of the underlying work. One example of this is, of course, Duchamp's hirsute and bawdy version of Leonardo's Mona Lisa. Another recent literary example is Ronald Richard Roberts' *Ditches of Edison County*,<sup>233</sup> which mocks, not at all gently, the runaway bestseller and tearjerker, Robert James Waller's *The Bridges of Madison County*,<sup>234</sup> with characters named Pancetta (an Italian word for ham) (the original heroine is Francesca) and Robert Concave (the original hero is Richard Kincaid). Thus, given the essential, even if subtle, naughtiness of most parodies, it is highly

227. See H.W. JANSON, HISTORY OF ART 693 (3d ed. 1986). Duchamp later "undid" part of the 1919 parody in 1965, when he signed an un-mustachioed reproduction of Leonardo's Mona Lisa and called it, *L.H.O.O.Q. Shaved*. See LIPMAN & MARSHALL, *supra* note 225, at 57.

228. See LAWRENCE D. STEEFEL, JR., THE POSITION OF DUCHAMP'S "GLASS" IN THE DEVELOPMENT OF HIS ART 368 n.40 (1977). Such punning is hardly surprising from an artist who made a self-portrait, entitled *With My Tongue in My Cheek* (1959). Duchamp's *L.H.O.O.Q.* was the cover for the issue of the March 1920 Dadaist publication, entitled 391. CALVIN TOMKINS, THE WORLD OF MARCEL DUCHAMP 1887, at 61 (1966).

229. 17 U.S.C. § 106 (1988 and Supp. V 1993).

230. See *supra* notes 126-51 and accompanying text.

231. 17 U.S.C. § 106A (Supp. V 1993).

232. Parody as revolution is as recent as Chinese political discontent. People wore "dissatisfaction T-shirts" which turned political party propaganda into parody. See ORVILLE SCHELL, MANDATE OF HEAVEN 273-74 (1994).

233. RONALD RICHARD ROBERTS, THE DITCHES OF EDISON COUNTY (1993).

234. ROBERT JAMES WALLER, THE BRIDGES OF MADISON COUNTY (1992). It may even be that *Madison's* author is parodying his own work in his latest runaway bestseller and tearjerker, SLOW WALTZ AT CEDAR BEND (1993). Another current literary parody of a more ancient story is JOHN UPDIKE, BRAZIL (1994), a rollicking, rich, bawdy South American tale based on the medieval legendary characters, Tristan and Isolde, which legend Wagner fashioned into his eponymous opera. In Updike's take on the legend, the English White Knight sent to fetch the Princess Isolde becomes a black charmer from the favelas of Rio de Janeiro and Isolde is a young privileged white suburban maiden.

unlikely that any author or author's estate<sup>235</sup> will voluntarily permit the parodist to use the underlying work. This may be especially true when it is the moral right of integrity, the protection of "honor and reputation,"<sup>236</sup> that is at stake. If parody is intended to criticize or mock an author's work, then almost inevitably an artist's "honor and reputation" is on the line.

In parody, imitation is most often *not* the sincerest form of flattery to which numerous examples will attest, ranging from a masturbating Mickey Mouse<sup>237</sup> to 2 Live Crew's "Pretty Woman."<sup>238</sup> As the Ninth Circuit noted in *Fisher v. Dees*, "[t]he parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought."<sup>239</sup> It cannot be bought because the original artist fears not only a deleterious economic effect on his or her work (a hit on the pocketbook—traditional copyright protection), but the negative effect on his or her artistic sensibilities, reputation, and honor (a hit on the psyche—moral rights protection). Indeed, the authors of a leading copyright casebook note that a licensed parody is oxymoronic.<sup>240</sup> To obtain permission

235. The Copyright Act of 1976 affords protection against infringement for the author's life plus 50 years. See 17 U.S.C. § 302(a) (1988 & Supp. V 1993) (for works created after Jan. 1, 1978). For works that are the subject of subsisting copyrights on January 1, 1978, see 17 U.S.C. § 304 (1988 & Supp. V 1993). Federal moral rights expire with the author's death. See 17 U.S.C. § 106A(d) (Supp. V 1993).

236. 17 U.S.C. § 106A(a)(3)(A) (Supp. V 1993). Cf. WILLIAM SHAKESPEARE, *OTHELLO*, act 3, sc. 3:

Good name in man and woman, dear my lord  
 Is the immediate jewel of their souls:  
 Who steals my purse steals trash; 'tis something, nothing;  
 Twas mine, 'tis his, and has been slave to thousands;  
 But he that filches from me my good name  
 Robs me of that which not enriches him,  
 And makes me poor indeed.

*Id.*

237. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).

238. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994).

239. *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) (citations omitted). See also Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

240. ROBERT A. GORMAN & JANE C. GINSBURG, *COPYRIGHT FOR THE NINETIES* 600 n.5 (4th ed. 1993). Cf. *Acuff-Rose*, 114 S. Ct. at 1178 (stating that it is "unlike[ly] that creators of imaginative works will license critical review or lampoons of their own productions"); Richard H. Posner, *When Is Parody Fair Use?* 21 J. LEGAL STUD. 67, 69 (1992) ("The credibility of book reviews . . . would be undermined if a reviewer needed the author's permission to quote from the book."); Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 67 ("[T]he granting of a license . . . constitutes an official seal of approval, the modern day equivalent of an imprimatur."). See also the front cover of Ronald Richard Roberts' (pseudonym) *The Ditches of Edison County*, *supra* note 233, which has stamped upon it "unauthorized . . . a parody." It would be hard to imagine that Robert James Waller, the author of *The Bridges of Madison County*, would permit this second author to ridicule so barbedly his book.

from an artist who may assert personal, moral rights would seem to be virtually impossible. Further, we may well wonder how parody could function effectively as commentary and/or critique if the authority to satirize, criticize, ridicule, or jibe is given. Permission connotes approval—few parodists wish that blessing, and few artists, whose moral right of integrity is at risk, would wish that curse.

There have been, however, a few instances where the parodist has been able to obtain a license from the copyright holder of the underlying work. For example, the producers of *Forbidden Broadway*, a New York show that uses recent Broadway hit songs as grist for parody's mill, purchased licenses to use songs by composers such as Richard Rogers, Oscar Hammerstein, Irving Berlin, Leonard Bernstein, Alan Jay Lerner, and Frederick Lowe. Humorous lyrics were then added to these songs, for example, "Madonna's Brain" sung to the tune of Lerner and Lowe's *My Fair Lady* classic, "The Rain in Spain."<sup>241</sup> Most of such licensed, so-called parodies have been kinder, gentler jabs—more homage than sharp jibe—than the usual parodying work presents.<sup>242</sup>

Permitted parody is, for the most part, a non-starter. In an Amici Brief in support of 2 Live Crew, William A. Strauss, a Vice-President and Director of Capitol Steps Productions, Inc., explains why:

5. The Capitol Steps do not seek or obtain licenses from copyright owners for two reasons. First, we have been advised by counsel that our songs constitute a "fair use" of the copyrighted material we use, and for which we give full, album-jacket credit to the original authors and composers. See the album notes to our twelfth and most recent album, "The Joy of Sax," submitted as Exhibit 3 to this declaration. Second, we have found that, in the business of social or political satire, obtaining permissions from song publishers is, for all practical purposes, impossible.

6. On one occasion, the producers of a network television show, against our advice, tried to get publisher permission to perform seven of our songs. After much time and discussion, permission was denied in six of the seven cases.

7. Asking permission for such uses is interpreted by music publishers as seeking their endorsement of the political ideas contained in our lyrics. Many copyrights are controlled by large corporations, such as Sony or Walt Disney, which have ongoing issues and

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241. Amici Curiae Brief of Composers and Songwriters Fred Ebb, John Kander, Alan Menken Mike Stoller, and the Estates or Trusts of Irving Berlin, Leonard Bernstein, et.al, in support of respondent at A-1, *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994) (No. 99-1292).

242. The licensed parodies listed in the Amici's Brief seem rather tame. See *id.* at A-1, A-2.

relationships in Washington. These companies have no interest in endorsing barbed political satire directed at Members of Congress, the President, or even the federal judiciary. Nor do we wish to submit our lyrics to them for censorship. On the other hand, if we do not seek or obtain permission, then the ideas and lyrics of our songs—good or bad—are solely ours. And prior to the issuance of the *Acuff-Rose* decision by the Sixth Circuit Court of Appeals, no one had ever sued us for copyright infringement . . . .

. . . .

9. Finally, the very nature of social and political satire makes it impossible to obtain timely permission. The Capitol Steps perform up-to-the-minute political satire based on current political events; the process of asking for and receiving permission would make it impossible for us to perform the kind of current repertoire which our audiences have come to expect . . . .<sup>243</sup>

Comedian/political satirist, Mark Russell, similarly notes:

6. I do not seek nor do I obtain license from copyright owners for several reasons. First, I have been advised that my use of copyrighted songs constitutes "fair use" of the copyrighted material. Second, the very nature of social and political satire makes it impossible to obtain timely permission. When, for instance, it's known that the President has spent \$200 on a haircut, it is not possible to wait more than the few hours necessary to write and memorize "He Looked Pretty" to the tune of "I Feel Pretty." When the video tape of the Rodney King beating became known, it was not possible to wait for more than the few hours necessary to write and memorize "On The Streets of LA" to the tune of "On the Street Where You Live."

7. It is not possible to wait for permission because at 7 or 8 p.m. on a Friday evening, there is no way to get in touch with someone who might be able to get in touch with someone from whom permission might be obtained; the story may not last more than one day—in which case the exercise of getting permission would be moot; and because audiences have come to expect comment in song on the topic of the day from me. To wait for permission means to disappoint an audience—something that I, as a professional performer would try never to do. On the rare occasion when permission has been requested it was denied. On one particular occasion, NBC made the request of the Disney Studios that just the first notes of its copywritten

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243. *Amici Curiae Brief of Capitol Steps Prod., Inc., Mark Russell, et al., in support of Petitioners at 3a-4a, Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164 (1994) (No. 99-1292).*

song "Chim-Chimney" be used to start my song about Gary Hart's trip to Bimini. I started my song "Bim-bimini."

8. Asking permission would also be interpreted by music publishers as a request for an endorsement of the political ideas contained within the lyrics. Since the comments contained within a song are mine, no endorsement is needed or wanted. In my nearly 40-year career I have never been sued for copyright infringement; nor has anyone ever claimed to be injured by what I have said or sung . . . .<sup>244</sup>

Even in a non-parody context, voluntary licensing is often prohibitively expensive. For instance, in the digital sampling<sup>245</sup> context, "artists often ask ridiculous prices for permission to sample their works, [with fees ranging] from \$500 to \$50,000, and some albums have been delayed, and tracks removed, when clearances proved either too expensive or were simply not negotiable."<sup>246</sup> The silencing effect of this is self-evident. Thus, to escape liability for infringement that is an unauthorized use of the underlying work, there are only two avenues open to parodists (and samplers): silence (not to use the protected work) or reliance on the fair use defense.<sup>247</sup> When an artist's moral rights of honor and reputation are at stake, the parodist may well decide to self-censor, fearing that the current formulation of the fair use doctrine might not provide sufficient immunization. Silence will not, of course, add to society's storehouse of "useful arts" contemplated by the constitutional grant of limited copyright monopoly.<sup>248</sup>

### 1. Case Law Prior to 1994: Lower Court Decisions

Almost four decades of copyright cases in which parodists have been charged with infringement<sup>249</sup> have not resulted in any consistent, predictable,

244. *Id.* at 12a-13a.

245. Technological advances permit musicians the use of "virtually any sound—live or recorded, natural or synthetic—at a performer's finger tips . . . to reshape borrowed sound in new contexts." Jon Pareles, *Digital Technology Changing Music*, N.Y. TIMES, Oct. 16, 1986, at C23.

246. A. Dean Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135, 135-36 n.4 (1993) (citation omitted).

247. 17 U.S.C. § 107 (1988 & Supp. V 1993).

248. U.S. CONST., art. I, § 8, cl. 8 provides in pertinent part that copyright protection be for "limited Times."

249. Representative parody/fair use cases since the 1950s include in chronological order: *Loew's Inc. v. CBS*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom.*, *Benney v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956) (holding that the Jack Benny "Autolight" parody was not fair use), *aff'd by an equally divided Court*, 356 U.S. 43 (1958) (Douglas, J., recusing himself); *Columbia Pictures Corp. v. NBC*, 137 F. Supp. 348 (S.D. Cal. 1955) (holding that the parody "From Here to Obscurity" was fair use); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964) (holding that *Mad* magazine's satirical lyrics sung to 25 of composer Irving Berlin's songs was fair use); *Walt*

and coherent application of the fair use doctrine, at least until the Supreme Court's attempt in *Campbell v. Acuff-Rose Music, Inc.*<sup>250</sup> Obscenity may cut against a defendant<sup>251</sup> or not,<sup>252</sup> perhaps depending on the sexual practice involved in the parody: sodomy (fair use);<sup>253</sup> cunnilingus (unfair use);<sup>254</sup> masturbation (unfair use);<sup>255</sup> general "horniness"<sup>256</sup> (unfair use);<sup>257</sup> intercourse and fellatio (unfair use).<sup>258</sup> Neither the relative outrageousness of the parody nor the cleverness of the newly titled song seem to be a reliable

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Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978) (holding that bawdy counter-culture depiction of Walt Disney's cartoon characters was not fair use); MGM, Inc. v. Showcase Atlanta Coop Prods., 479 F. Supp. 351 (N.D. Ga. 1979) (holding that re-enactment of *Gone With the Wind* as a comedy was not fair use); Elsmere Music, Inc. v. NBC, 482 F. Supp. 741 (S.D.N.Y.) (holding that "I Love Sodom," an eighteen-second "Saturday Night Live" skit was fair use), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (per curiam); MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981) (holding that the parodizing song "Cunnilingus Champion of Company C" was not fair use); Pillsbury Co. v. Milky Way Prods., 215 U.S.P.Q. (BNA) 124 (N.D. Ga. 1981) (holding that a depiction of the Pillsbury characters engaging in sexual intercourse and fellatio, and the reproduction of the Pillsbury baking song was not fair use); Warner Bros., Inc. v. ABC, 720 F.2d 231 (2d Cir. 1983) (holding that the television show "The Greatest American Hero" did not infringe upon the plaintiff's "Superman" character); Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986) (holding that the parody song "When Sonny Sniffs Glue" was fair use); Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031 (N.D. Ga. 1986) (holding that "Garbage Pail Kids" was not fair use); New Line Cinema Corp. v. Bertelsman Music Group, Inc., 693 F. Supp. 1517 (S.D.N.Y. 1988) (holding that an alleged parody of "Freddy Krueger," a character from the movie *A Nightmare on Elm Street* was not fair use); Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826 (S.D.N.Y. 1990) (holding that a beer company's use of a sound-alike and look-alike rap group in a commercial parody was not a viable fair use defense); Eveready Battery Co. v. Adolph Coors Co., 765 F. Supp. 440 (N.D. Ill. 1991) (holding that a defendant's use of a plaintiff's mechanical rabbit beating on a drum was presumed to be fair use); Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992) (holding that a derivative sculpture based on a photo of a man and a woman holding seven puppies was not fair use); Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (6th Cir. 1992) (holding that the "Pretty Woman" song parody by the Rap Group 2 Live Crew was not fair use), *rev'd*, 114 S. Ct. 1164 (1994) (reasoning that a commercial parody is not presumptively unfair).

It is not surprising that most of the parody cases emanate from the Ninth and Second Circuits, in which Hollywood and New York are located, respectively.

250. 114 S. Ct. 1164 (1994).

251. See MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981).

252. See Elsmere Music, Inc. v. NBC, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (per curiam).

253. *Id.* at 746.

254. MCA, 677 F.2d at 180.

255. Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978).

256. William Safire devoted a recent column to this interesting word. See William Safire, *On Language: The Horny Dilemma*, N.Y. TIMES, Feb. 6, 1994, § 6, at 10.

257. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (6th Cir. 1992), *rev'd*, 114 S. Ct. 1164 (1994).

258. Pillsbury Co. v. Milky Way Prods., 215 U.S.P.Q. (BNA) 124 (N.D. Ga. 1982).

predictor of whether the use will be deemed a fair one.<sup>259</sup>

Additionally, courts have expressed divergent views about fair use depending upon the focus of the infringing parody. The Sixth Circuit held recently in *Acuff-Rose* that a "fair" parody cannot be a general social commentary but must target the plaintiff's specific protected work.<sup>260</sup> In contrast, the Second Circuit in *Elsmere* squarely rejected the notion that the challenged parody must poke fun at the original work, rather than using that work as a means to facilitate a more general critique of society.<sup>261</sup> It should be noted here that either of these interpretations of parody as fair use could facilitate Duchamp's defense in a traditional, property-based copyright infringement claim. His *Mona Lisa* seems to target generally the Renaissance ideal of woman (the original "feminine mystique"), as well as to attack specifically Leonardo's work as an artistic icon.

Perhaps the best illustration of the slippery nature of the parody/fair use defense can be found in two of the earliest cases decided only several months apart by the same California federal judge. In the "Autolight" case, Judge James M. Carter had to decide whether Jack Benny's 1953 television program, parodying the movie *Gaslight*, constituted fair use. Benny had earlier made a parody of the movie in a 1945 radio program and a 1952 television program. The third time, 1953, was Benny's third strike. Loew's sued. Judge Carter concluded that Benny's use amounted to a "substantial taking" and that a parody or burlesque taking should be "treated no differently from any other appropriation."<sup>262</sup>

A short time later, Judge Carter considered whether NBC's twenty-minute parody of *From Here to Eternity* constituted fair use. Struggling, albeit rather unsuccessfully, to distinguish adequately Benny's pirated taking of *Gaslight* in his "Autolight" parody from Sid Caesar's fair use in his "From Here to Obscurity's" take-off on Columbia Pictures classic, *From Here to Eternity*, Judge Carter drew a very shaky line between permissible and impermissible takings. He found the NBC work to be a "new, original and different . . . work," unlike Benny's, and, thus, a fair use.<sup>263</sup> It is very difficult to reconcile

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259. *Cf. Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) (holding that "When Sonny Sniffs Glue" is a fair use parody of "When Sonny Gets Blue") with *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981) (holding that "Cunningham Champion of Company C" is not a fair use of "The Boogie Woogie Champion of Company C").

260. *Acuff-Rose*, 972 F.2d at 1436 n.8.

261. *Elsmere Music, Inc. v. NBC*, 623 F.2d 252, 253 n.1 (2d Cir. 1980) (per curiam).

262. *Loew's, Inc. v. CBS*, 131 F. Supp. 165, 177 (S. D. Cal. 1955), *aff'd sub nom.*, *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided Court*, 356 U.S. 43 (1958) (Douglas, J., recusing himself).

263. *Columbia Pictures Corp. v. NBC*, 137 F. Supp. 348, 352 ¶ 10 (S.D. Cal. 1955).

these two decisions issued by the same judge in the same year. This indeterminacy and seeming lack of predictable results stems from the very nature of the fair use defense which requires application of the fair use doctrine on a "case-by-case" basis.<sup>264</sup>

Still other courts have articulated what has become to be known as the "conjure up test." Recognizing that the very nature of parody requires that the audience make the connection between the original work and the parodying work, some courts concede that a parodist must necessarily use "a substantial enough portion of the original [and fairly well-known<sup>265</sup>] work to evoke recognition,"<sup>266</sup> to make both a successful and fair parody. These courts acknowledge, as they should, that the artistic genre itself requires significant use of the protected work. The "joinder of reference and ridicule" is thus the essence of parody.<sup>267</sup>

However, the line between a fair "conjuring up" and an impermissible, substantial, pirated taking is often quite difficult to draw. This lack of a bright-line test is hardly surprising. The classic definition of parody is "counter song," a song beside another.<sup>268</sup> Thus, for the parodying work to succeed at all it must be sung, painted, written, sculpted, in short, *expressed* in such a way as to be evocative of the underlying work. In other words, the second artist must, to parody, always take from the first artist. On the other hand, if the second work amounts to a substantial taking, that is, something considerably more than evoking or conjuring up the original work, the parody/fair use defense generally fails. The *Fisher* court described the fine-tuning necessary to separate piracy from permissible parody:

The unavailability of viable alternatives is evident in the present case. Like a speech, a song is difficult to parody effectively without exact or near-exact copying. If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience. This "special need for

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264. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1170, 1172 (1994). Although the fair use factors were not codified until 1976, 17 U.S.C. § 107 (1976), the judicially crafted doctrine of fair use employed virtually the same analysis. Thus, in the 1955 Jack Benny and Sid Caesar cases, Judge Carter presumably used the same "case-by-case analysis" as the Court in *Acuff-Rose*. See *supra* note 249 and accompanying text.

265. For a second work to function at all as parody, the audience must be familiar with the underlying work. Recognition gives parody its punch. See *infra* text accompanying notes 266-67.

266. *Fisher v. Dees*, 794 F.2d 432, 435 n.2 (9th Cir. 1986).

267. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1173 (1994).

268. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1064 (College ed. 1957). It derives from the Greek, "paroidia," "para" meaning beside, and "oide" meaning song. See *id.*



accuracy," provides some license for "closer" parody . . . . To be sure, that license is not limitless: the parodist's desire to make the best parody must be "balanced against the rights of the copyright owner in his original expressions."<sup>269</sup>

As the above discussion indicates, when the Supreme Court decided *Acuff-Rose*,<sup>270</sup> it was writing on its own clean slate (its first written decision in a parody/fair use case<sup>271</sup>), but on a national slate made very rough and murky by inconsistent, confusing, and uneasily reconcilable lower court opinions of the last four decades.<sup>272</sup> The following discussion will present a brief overview of the Supreme Court's *Acuff-Rose* decision and its fair use antecedents, which have addressed fair use in the traditional, property right mode of copyright infringement. This overview should facilitate later analysis of the clash between moral rights and parody and fair use.

## 2. Parody and Fair Use in the Supreme Court

Before engaging in a brief analysis of three Supreme Court cases that addressed the fair use doctrine, *Campbell v. Acuff-Rose, Inc.*<sup>273</sup> and its non-parody ancestors, *Sony Corp. v. Universal City Studios*<sup>274</sup> and *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>275</sup> it might be helpful to present the fair use continuum in chart form.<sup>276</sup> The chart considers the four permutations of two variables, which also comprise one of four statutory factors in section 107:<sup>277</sup> whether the use is transformative or merely replicative and whether the use is for profit or not. At either extreme (I or IV) the chart presents fact patterns which are presumably easiest to decide re: fair use *vel non*. In Category I-type cases, fair use will inevitably be denied. In category IV-type cases, defendants can make the strongest argument for fair use and should be

269. *Fisher*, 794 F.2d at 439 (citing *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978)).

270. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994).

271. The Supreme Court had granted *certiorari* in *Loew's* case, *CBS v. Loew's Inc.*, 353 U.S. 946 (1957), but did not issue a written opinion as *Loew's* was affirmed by an equally divided Court. See *supra* notes 249, 262; *infra* note 289.

272. This is one statement most commentators seem to agree upon, even if their views may differ as to the proper resolution of the parody/fair use dilemma. See, e.g., Thomas A. Smart, *Fair Use Doctrine is No Use as it Stands*, NAT'L L.J., Dec. 13, 1993, at 15. See also *supra* notes 249 and accompanying text.

273. 114 S. Ct. 1164 (1994).

274. 464 U.S. 417 (1984).

275. 471 U.S. 539 (1985).

276. Other commentators have furnished precedents for this chart which tries to synthesize the fair use doctrine. See, e.g., MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 318, § 10.14 & n.130 (1989).

277. See 17 U.S.C. § 107(1) (1988 and Supp. V 1993).

successful. The closer, more difficult cases are those represented by Categories II and III.

## A FAIR USE CONTINUUM

	I.	II.
	<i>Easiest Cases/ No Fair Use</i>	<i>Hard Cases/ May Be Fair Use</i>
<i>Character of Use</i>	replicative, reproductive non-transformative, non- commentary	replicative, reproductive non-transformative, non- commentary
<i>Purpose of Use</i>	commercial; for profit	non-commercial; non- profit
<i>Representative Cases or Fact Patterns</i>	<i>Association of American Colleges v. Mikaelian</i> <sup>278</sup> (photocopies of MCAT questions for commercial preparation of students for MCAT exam is not fair use)	a) <i>fair use</i> <i>Sony Corp. of America v. Universal City Studios</i> (6-4 decision) <sup>279</sup> (unauthorized time shift- ing by video tape recorder owners is fair use; thus the sellers of VTRs are not contributorily infringing)  b) <i>not fair use</i> Dissent in <i>Sony</i> <sup>280</sup> (absent congressional action, the reproductive nature and effect on plaintiff's potential market suggest no fair use)

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278. 571 F. Supp. 144 (E.D. Pa. 1983).

279. 464 U.S. 417 (1984). See also *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1354 (Ct. Cl. 1973) (stating that photocopying by scientists at the National Institute of Health and the National Medical Library is free from the "taint" of commercial gain and is fair use). Cf. *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992) (stating that for-profit copying by Texaco's scientists is not fair use).

280. *Sony*, 464 U.S. at 457-500 (Blackmun, J., dissenting).

	III.	IV.
	<i>Hard Cases/ May Be Fair Use</i>	<i>Easiest Cases/ Fair Use</i>
<i>Character of Use</i>	transformative, productive, creative, commentary	transformative, productive, creative, commentary
<i>Purpose of Use</i>	commercial, for profit	non-commercial, non- profit
<i>Representative Cases or Fact Patterns</i>	<p>a) <i>not fair use</i>  <i>Harper &amp; Row, Publishers,                      Inc. v. Nation Enterprises</i>                      (6-3 decision) (news                      reporting "scoop" an                      unauthorized first                      publication)<sup>281</sup></p> <p>b) <i>fair use</i>                      1. Dissent in <i>Harper &amp;                      Row</i><sup>283</sup> (news reporting                      purpose and grist for                      robust debate tip the fair                      use balance in favor of                      defendant)</p> <p>2. <i>Campbell v. Acuff-Rose                      Music, Inc.</i><sup>284</sup> (commercial                      parody may be a fair use;                      "conjuring up" is necessary                      to the art form)</p>	<p>1. a law review article                      commenting upon an                      earlier one</p> <p>2. student book review                      prepared for class quoting                      from the reviewed                      book<sup>282</sup></p>

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281. 471 U.S. 539 (1985).

282. Cf. *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4901).

283. *Harper & Row*, 471 U.S. at 604-05 (Brennan, J., dissenting).

284. 114 S. Ct. 1164 (1994).

Note that this chart does not include three other factors mentioned in section 107 which focus on the nature of the protected work, the quantity and quality of the portion taken by defendant, and the effect on plaintiff's potential market for the work.<sup>285</sup> Depending on the resolution of these other determinants of fair use, the ultimate disposition of the cases in categories I through IV could be affected.

Although the judicially crafted doctrine of fair use has been available to defendants at least since 1841<sup>286</sup> and codified in the 1976 Copyright Act<sup>287</sup> without any substantial change,<sup>288</sup> the Supreme Court did not address fair use<sup>289</sup> until 1984 in *Sony*<sup>290</sup> and again a year later in *Harper & Row*.<sup>291</sup> Neither *Sony* nor *Harper & Row* involved parody. This past spring in *Campbell v. Acuff-Rose*,<sup>292</sup> the Supreme Court expanded upon its earlier analyses of fair use in its unanimous decision,<sup>293</sup> which considered the special problems posed by the intersection of parody and fair use. In concluding that 2 Live Crew's use of Ray Orbison's ballad, "Oh Pretty Woman," might be fair, the Court alternatively relied upon and distinguished *Sony* and *Harper & Row*.

*Sony* presented an unusual set of facts. Sony Corp. manufactures and sells home video tape recorders.<sup>294</sup> Universal, as owner of several copyrighted television programs, sued Sony, claiming that the taping of nationally broadcast

285. 17 U.S.C. §§ 107(2), (3), (4) (1988 & Supp. V 1993).

286. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901). Justice Story described the defense as an "intricate and embarrassing question . . . [where it was not] easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases." *Id.* at 344. But he then proceeded to do so: "[W]e must . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." *Id.* at 348.

287. 17 U.S.C. § 107 (1988 & Supp. V 1993).

288. Congress intended, by statutory enactment, "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1170 (1994) (quoting H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5679-80; S. REP. NO. 473, 94th Cong., 2d Sess. 62 (1975)).

289. Because of Justice Douglas' recusal and a 4-4 split, the Court issued no opinion in *CBS, Inc., v. Loew's Inc.* 356 U.S. 43 (1958) (Jack Benny/"Gaslight" case). *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975), raised fair use but was also affirmed by an equally divided vote.

290. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

291. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). The Supreme Court also discussed fair use in *Stewart v. Abend*, 495 U.S. 207, 236-38 (1990), but the treatment was relatively brief and unremarkable for purposes of this article.

292. 114 S. Ct. 1164 (1994).

293. Justice Kennedy concurred to stress that while he agreed substantially with the Court's fair use analysis, he believed it could still be possible for the District Court on remand to find that 2 Live Crew's song was not fair use. *Acuff-Rose*, 114 S. Ct. at 1182 (Kennedy, J., concurring).

294. The very machines that have caused incredible angst to entire generations and to those precious few among them, excluding this author, who know how to fix "the flashing twelve."

television programs by home viewers made Sony a contributory infringer.<sup>295</sup> In deciding that taping for "time shifting" purposes constituted fair use,<sup>296</sup> the Court engaged in a typical multifactor fair use analysis that regarded the doctrine as an "equitable rule of reason."<sup>297</sup> Although the Court concluded that the Betamax recorder was "capable of substantial noninfringing uses," and would not affect in a more than de minimis way the potential market for Universal's copyrights,<sup>298</sup> the decision contained language which impacted significantly upon the Sixth Circuit's 2-1 decision in *Acuff-Rose* which found 2 Live Crew's alleged parody to be an unfair use.<sup>299</sup> The *Sony* majority stated that "use for a commercial or profit-making purpose . . . [is] . . . presumptively . . . unfair," while the contrary presumption, non-commercial use is presumptively fair, benefited Sony.<sup>300</sup> This latter presumption seemed to convince the Court of the fairness of the use even though the activity at issue, taping, was merely reproductive.<sup>301</sup>

The presumption of unfairness attached to commercial use was reiterated the very next year by the majority in *Harper & Row*,<sup>302</sup> even in the context of news reporting which involves transformative and productive work and fits into the category of the kinds of activities subject to fair use.<sup>303</sup> In *Harper & Row*, defendant *Nation* magazine had "scooped" parts of former President Ford's

295. Universal did not sue any individual home tapper. Although the Copyright Act does not contain explicitly a provision making someone (i.e., the manufacturer and seller) liable for infringement committed by another (i.e., the home tapper), the Court adopted the notion of contributory infringement from the Patent Act, 35 U.S.C. § 271(c) (1988). This borrowing was "appropriate," said the Court, because of "the historic kinship between patent law and copyright law." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 & n.19 (1984).

296. If the taping public did not infringe, then Sony, of course, would not be liable as a contributory infringer.

297. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. at 448 (citing H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659).

298. *Sony*, 464 U.S. at 456. Cf. The Patent Act, 35 U.S.C. § 271(c) (1988) which provides:

Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

299. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429 (6th Cir. 1992), rev'd, 114 S. Ct. 1164 (1994).

300. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 499 (1984).

301. Justice Blackmun, on the other hand, stressed the notion that fair use should generally not apply when the use is reproductive, rather than productive, although he would not suggest "that every productive use is a fair use." *Sony*, 464 U.S. at 479 (Blackmun, J., dissenting).

302. 471 U.S. 539, 562 (1985) ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.") (quoting *Sony*, 464 U.S. at 451)

303. See 17 U.S.C. § 107 (1988 & Supp. V 1993).

memoirs which were to appear, by agreement, in *Time* magazine. The Court, stressing strongly the right of first publication and the fact that *Nation* took the heart of Ford's memoirs about Ford's pardon of Nixon, found *Nation's* infringement not excused as a fair use.<sup>304</sup>

Neither *Harper & Row* nor *Sony* involved parody. Taken together, however, it would appear that, prior to *Acuff-Rose*, the Supreme Court meant what it said: if an alleged infringer uses the copyrighted work for commercial purposes, then its use is presumptively unfair, even if the use results in a transformative, productive, or creative work like the news reporting in *Harper & Row*. Since fair use is an affirmative defense,<sup>305</sup> a commercial-use defendant would thus be hard-pressed to overcome that presumption. *Acuff-Rose* reined in the presumption, at least with regard to parody.

Despite the language in *Sony*, Justice Souter, writing for the unanimous Court in *Acuff-Rose*, said that *Sony* "called for no hard evidentiary presumption."<sup>306</sup> Thus when the Sixth Circuit elevated this one sentence to a "per se rule," it was both "counter to *Sony* itself [and] . . . to the common-law tradition of fair use adjudication."<sup>307</sup> Rather, the commercial nature of the use is but one factor, to be added onto the scales with the other, non-exclusive section 107 inquiries.<sup>308</sup>

What triggered the Court's apparent softening of what seemed to be inexplicably clear language in *Sony*, also reiterated by *Harper & Row*? First, Justice Souter noted the transformative nature of 2 Live Crew's song and, as a transformative work, the song furthered copyright's goal "to promote science and the arts."<sup>309</sup> Second, Justice Souter appreciated "parody's need for the recognizable sight or sound"<sup>310</sup>—the conjure up test.<sup>311</sup> Finally, in assessing the effect of 2 Live Crew's use upon the potential market for the copyrighted song, Justice Souter emphasized that, in the case of parody, even a commercial one, it is likely that the second work "will not affect the market for the original in a way cognizable"<sup>312</sup> by the fair use doctrine.<sup>313</sup> This is so because there

304. *Harper & Row*, 471 U.S. at 568-69.

305. The affirmative nature of the defense has been stressed since Justice Story's decision in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901). See generally PATRY, *supra* note 14, at 22, 477-78.

306. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1174 (1994).

307. *Id.*

308. *Id.*

309. *Id.* at 1171.

310. *Id.* at 1176.

311. See *supra* note 270 and accompanying text.

312. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1177 (1994).

313. Cf. 17 U.S.C. § 107(4) (1988 & Supp. V 1993).

is "no protectable derivative market for criticism."<sup>314</sup> Since it is not likely that creators will authorize the slings and arrows of criticism, the "potential licensing market" for such is simply not present.<sup>315</sup> While there might be, however, a derivative market for non-parody rap music, the record was silent on that issue, which would need to be explored upon remand.<sup>316</sup>

*Acuff-Rose*, although based on "traditional" copyright infringement (property rights), teaches several lessons that are important in resolving the *Leonardo v. Duchamp* case based on a moral rights violation. First, *Acuff-Rose* indicates that there are no fixed presumptions with regard to the commercial character of use, at least in the parody situation. Rather, the for-profit character of the use is to be regarded as one ingredient in the fair use recipe. Second, transformative uses, as are both Duchamp's and 2 Live Crew's, furnish the very stuff of copyright's goal,<sup>317</sup> 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."<sup>318</sup> Third, the Court gave its seal of approval to the "conjure up" test, articulated heretofore by a few lower courts,<sup>319</sup> which recognizes the special needs of parody as an art form: Mimesis is the *sine qua non* of parody. Moreover, the nature of parody as criticism requires a sensitive inquiry into the potential market effect.<sup>320</sup> It is one thing to reduce the potential market by disparagement and criticism. This is *not* the negative market effect contemplated by section 107. It is quite another to reduce demand by the substitution effect of the parodying work. In short, a defendant can destroy a plaintiff's market, but cannot replace it. This would violate section 107(4), and, thus, it likely would not constitute fair use.

Therefore, we are left then with no bright-line test in traditional copyright infringement cases. Each case must be analyzed on its own and all section 107 factors are to be considered together.<sup>321</sup> In eschewing any hard and fast application of the fair use doctrine, the Court sacrificed, of course, a certain

314. 114 S. Ct. at 1178.

315. *Id.* at 1178 (quoting SOMERSET MAUGHAM, OF HUMAN BONDAGE 241 (Penguin ed. 1992): "People ask . . . for criticism, but they only want praise.").

316. *Id.* at 1178-79.

317. The *Acuff-Rose* Court cited Judge Leval's position on fair use several times as well as Justice Blackmun's dissent in *Sony*. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1170-71, 1178 (1994) (citing Pierre Leval *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990)); *Acuff-Rose*, 114 S. Ct. at 1171 (citing Blackmun, J., dissent in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 478-80 (1984)).

318. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1171 (1994).

319. *Id.* at 1176 (citing *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980); *Fisher v. Dees*, 794 F.2d 432, 438-39 (9th Cir. 1986)).

320. See *Acuff-Rose*, 114 S. Ct. at 1177.

321. See *id.* at 1170 (citing Leval, *supra* note 317, at 1110-11; Patry & Perlmutter, *supra* note 14, at 685-87).



degree of predictability and uniformity. But this sacrifice, presumably at the altar of copyright's purpose to foster creativity,<sup>322</sup> may complicate the application of the fair use defense raised in conjunction with a moral rights claim.

So, while *Acuff-Rose* dealt with traditional, property rights-based copyright infringement, its lessons in the moral rights context have great import for us, even though this author rejects an *Acuff-Rose* type solution to the very different problem of a moral rights violation based on parody.

#### IV. RESOLVING THE MORAL RIGHTS/PARODY DILEMMA THROUGH FAIR USE

In *Acuff-Rose*, a non-moral rights case, the Supreme Court specifically and even-handedly rejected two proffered and contrary presumptions. The first proposal, from defendants 2 Live Crew, was to treat parody as a presumptively fair use.<sup>323</sup> The second, put forth by *Acuff-Rose* and adopted by the Sixth Circuit,<sup>324</sup> was to view commercial use as presumptively unfair use, even in the context of parody.<sup>325</sup> While neither presumption succeeded in *Acuff-Rose*, this Section will argue that, in the moral rights setting involving parody, a parodist's use should be presumed fair. Other means of resolving the tension between an artist who claims moral rights and a parodist will also be explored and, ultimately, rejected. The discussion takes place in the context of contrasting positions. On the one hand, section 106(A)(a) makes explicit that the right of integrity is subject to section 107's fair use defense.<sup>326</sup> On the other hand, Congress has expressed ambivalence about the viability of the fair use defense in the moral rights arena:

[It is not clear that fair use claims will be] appropriate given the limited number of works covered by the Act, and given that the modification of a single copy or limited edition of a work of visual art has different implications for the fair use doctrine than does an act

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322. *Id.* at 1170 (citing *Stewart v. Abend*, 495 U.S. 207, 236 (1990)). This emphasis on "creativity" is also found in *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). In *Feist*, Justice O'Connor, for the Court, in order to assess the copyrightability of telephone white pages, mentioned originality and authorship numerous times. Professor Goldstein says that O'Connor referred to originality 13 times. GOLDSTEIN, *supra* note 155, § 2.2.1 n.11 (Supp. 1993).

323. See *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1168 (1994).

324. 972 F.2d 1429, 1435, 1437 (6th Cir. 1992). The Sixth Circuit "ostensibly [and erroneously] culled" this presumption from *Sony*. *Acuff-Rose*, 114 S. Ct. at 1173-74 (citing *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

325. See *Acuff-Rose*, 114 S. Ct. at 1168-69.

326. 17 U.S.C. § 106(A)(a) (Supp. V 1993).

involving a work reproduced in potentially unlimited copies.<sup>327</sup>

Given this somewhat schizophrenic situation with respect to fair use in the moral rights context, it might be wise to consider solutions, other than giving a presumption of fair use to the moral rights/parodist defendant, which might balance effectively the rights of the artist and parodist.

#### A. *Compulsory License*

The relationship between artist and critic can be described as one of worthy adversaries, supportive and empathetic friendship, symbiosis at its finest, or the art world equivalent of a dysfunctional family—a “can’t live with ‘em/can’t live without ‘em” conundrum. Although artists may “ask . . . for criticism,” even if implicitly so, by putting their creations out for public consumption, “they only want praise.”<sup>328</sup> Parody is a form of criticism, and it is rarely kind, gentle, or affectionate,<sup>329</sup> or sought by the artist. In fact, I suspect that if all the art, theatre, dance, and book critics, as well as parodists, would vanish from this world this afternoon, artists world-wide would be dry-eyed. Thus, when moral rights are at risk, “honor or reputation,” copyright monopoly might be used to prevent or chill the critic/parodist.

The concern that copyright owners could use their copyright (including moral rights) to censor parody might be alleviated by establishing a “Parody Licensing Clearance Center.” The Center would be authorized by Congress to provide a license on a percentage of revenue basis to anyone who chooses to parodize the copyrighted work.<sup>330</sup> Compulsory licenses function as “permission to use intellectual property, compelled by the government to accomplish some political or social objective.”<sup>331</sup> Presumably, in the moral rights context, a compulsory license would afford some monetary incentive to Leonardo without endangering Duchamp any more than by requiring him to pay a royalty.

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327. H.R. REP. NO. 514, 101st Cong., 2d Sess. 22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6932. The stark contrast between explicit statutory language and legislative history may be explained by VARA’s somewhat hasty passage in Congress. *See* Smith, *supra* note 184 and accompanying text.

328. MAUGHAM, *supra* note 315, at 241, *quoted in* Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1178 (1994).

329. *See supra* notes 234, 240-42, 244 and accompanying text.

330. *See* EDMUND W. KITCH & HARVEY S. PERLMAN, *LEGAL REGULATION OF THE COMPETITIVE PROCESS* 212-13 (rev. 4th ed. 1993). The authors’ suggestion did not address the section 106(A)(a) parody problem, but it works equally well or equally ineffectively in the moral rights context.

331. J.T. MCCARTHY, *MCCARTHY’S DESK ENCYCLOPEDIA OF INTELLECTUAL PROPERTY* 51-52 (1991).

Compulsory licensing is a rarity in copyright law, but not a stranger. At one time or another, the 1976 Copyright Act listed six areas covered by compulsory license: cable television transmissions;<sup>332</sup> making and distributing phonorecords;<sup>333</sup> jukebox recording or performing of musical compositions;<sup>334</sup> non-commercial (public) broadcasting;<sup>335</sup> satellite retransmissions;<sup>336</sup> and importation and manufacture of digital audio recording devices.<sup>337</sup> It has even been suggested by the then Register of Copyrights that the political compromise between the "protected interests of creators" and the "pressures . . . of newly emergent user industries" might result in more, rather than less use of compulsory license.<sup>338</sup> In one sense, this is true. In reviewing the then new 1976 Act, Professor Paul Goldstein listed the four areas subject to compulsory license: cable transmission, phonorecords, jukeboxes, and public broadcasting.<sup>339</sup> Since 1977, two new areas were added: satellite retransmission and digital audio recording devices.<sup>340</sup> On the other hand, Congress recently endorsed private, voluntary licensing negotiations and arbitration with reference to government fiat as a last resort.<sup>341</sup>

Compulsory license for parody seems a strange animal when used in either the economic or moral rights context, but seems particularly inappropriate to the right of integrity. Under VARA, moral rights cannot be sold or assigned, but they can be waived in writing. Compulsory license works best, or at least seems most necessary, when new technology presents issues of copyright infringement not even dreamed of when the 1909 or 1976 copyright laws were enacted. Thus, such uses as satellite transmissions and digital recording devices seem amenable to compulsory license—parody does not. This point is illustrated by the 1976 Act compulsory license scheme for making and distributing phono records. A compulsory license is *not available* to someone who changes the protected work. Section 115(a)(2) provides:

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332. 17 U.S.C. § 111(c), (d) (1988 & Supp. V 1993).

333. *Id.* § 115 (1988).

334. *Id.* § 116 (1988 & Supp. V 1993). Currently, section 116 problems are handled by a negotiated license which may include arbitration, *Id.* § 116(b),(c) (1994).

335. *Id.* § 118 (1988 & Supp. V 1993) (determining the royalty fee either by negotiated license or compulsory license, *see Id.* § 118(b)(2)).

336. *Id.* § 119(b) (1988 & Supp. V. 1993). After December 31, 1992, the royalty fee is determined by voluntary negotiation or compulsory arbitration. *Id.* § 119(c)(1) (1988).

337. *Id.* §§ 1003, 1004 (Supp. V 1993).

338. Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. REV. 1107, 1128 n.83 (1977) (citing Barbara Ringer, *Copyright and the Future of Authorship*, 101 LIB. J. 229, 231 (1976)).

339. Goldstein, *supra* note 338, at 1127-35.

340. 17 U.S.C. § 119 (1988 & Supp. V. 1993). *See generally* Michael L. Baroni, *A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65 (1993).

341. *See* 17 U.S.C. §§ 801-803 (1988 & Supp. V 1993); *supra* notes 334-35.

A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, *but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work . . . except with the express consent of the copyright owner.*<sup>342</sup>

Similarly, a compulsory license should not be available to a parodist who infringes upon an artist's moral right of integrity by some fundamental change—which parody always makes—to the protected work. It is not a question of accommodating emerging technology by political compromise.<sup>343</sup> The compulsory license scheme ill-fits the balancing of interests between an artist's moral rights and a parodist's right to "conjure up" and fundamentally change that work<sup>344</sup> to achieve the desired parodic effect.

Two further difficulties arise in connection with a compulsory license scheme. The first relates to the essence of the right of integrity. Designed to protect an artist's honor and reputation, the right would be threatened into extinction if the author is forced to "approve" the parodist's use by compulsory license. The second difficulty relates to the nature of parody, which thrives, perhaps, on its iconoclastic and unpermitted status. Compulsory license, though freeing the parodist from liability, takes away from the zing that is the essence of parody, the "civil disobedience"<sup>345</sup> of art. A compulsory license affects negatively the transgressive quality of parody.<sup>346</sup> How can you "up the establishment" if the establishment says "right on?"

### B. Limitation of Remedies

While the first solution, compulsory license, affects the "liability" phase, this second alternative focuses on the "damage" phase. We assume that a

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342. 17 U.S.C. § 115(a)(2) (1988) (emphasis added).

343. See Goldstein, *supra* note 338, at 1127 n.83.

344. In *Acuff-Rose*, the Supreme Court recognized the need for conjuring up the original work. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1176 (1994).

345. John Carlin, Remarks at A.A.L.S. Intellectual Property Law Section (Orlando, Jan. 7, 1994). Dr. Carlin is an art historian, former Professor of Art History, sometime curator at the Whitney Museum of American Art, and Director of the Red Hot Organization, New York. In speaking about the history of the appropriation art movement in the visual arts, Dr. Carlin called Duchamp the "King of appropriation." *Id.* In balancing the interests implicated in appropriation art, Carlin proposes, *inter alia*, a model, voluntary license agreement. See John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J. L. & ARTS 103, 139-41 (1988).

346. Cf. A.A.L.S., *supra* note 345 (Remarks of Prof. Peter Jaszi).

parodist has been found liable to the original artist through infringement and a failed fair use defense. As described earlier, the Copyright Act affords to copyright owners, including those who assert moral rights' violations, a full range of remedies including injunctions, damages, and profits.<sup>347</sup> One way to accommodate the interests of the parodist and the first artist is to tinker with the remedy phase.

One model that would preserve an artist's honor and reputation while alleviating the hit on the parodist's purse would permit an injunction, but no money damages or profits. However, this would ill-serve our copyright goal to encourage more art. Injunctions are silencers. Permanent injunctions involving works of a derivative nature, such as parody, are frequently blanketed. That is, a court will enjoin dissemination of the whole parody, even if it consists of both infringing and non-infringing material since they are often "inextricably intertwined."<sup>348</sup> Thus, parodies would neither be seen nor heard. Further, it is questionable whether an injunction truly protects artistic honor. Injunctions might be issued too late to ameliorate the "dissing" effect of the parody while pre-publication injunctions are generally disfavored as prior censorship.<sup>349</sup>

A second possibility is to eschew entirely injunctive relief and award damages and profits to the artist whose right of integrity is sullied. This would seem to work well when it is difficult to separate the infringing from the non-infringing parts of the parodist's work. Where "the proportion [of the plaintiff's work used] is so insignificant compared with the injury from stopping [the defendant's] use . . . an injunction would be unconscionable" and the plaintiff should recover only money damages.<sup>350</sup> In *Acuff-Rose*, the Court urged sensitive inquiry into whether injunctive relief should be awarded "when parodists are found to have gone beyond the bounds of fair use."<sup>351</sup>

It is not clear, however, that the legal remedy of monetary damages, as opposed to the equitable remedy of injunctive relief, will well-serve the interests of artist, parodist, and public, at least under the present formulation of the fair use doctrine. It is rare that the second artist/parodist will be able to afford an

347. 17 U.S.C. §§ 502, 504 (1988). See also *supra* note 198 and accompanying text.

348. Goldstein, *supra* note 338, at 725 n.7.

349. See Leval, *supra* note 317, at 1130-35 & n.112. Note that Judge Leval believes that our copyright law seems "incompatible" with moral rights. *Id.* at 1128.

350. *Dun v. Lumbermen's Credit Ass'n*, 209 U.S. 20, 23-24 (1908). Seventy-six years later, Justice Blackmun recognized the need for a sensitive tailoring of remedies to accommodate "traditional copyright principles." See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 500 (1984) (Blackmun, J., dissenting). See also A.A.L.S., *supra* note 345 (Remarks of Prof. Marci Hamilton, Possible Property Models for Art Appropriation).

351. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1171 n.10 (1994).

infringement suit.<sup>352</sup> Under the existing formulation of fair use where the parodist has the burden of proof, the second artist may be disinclined to parody, especially when the parody often will trample on the first artist's "honor and reputation." Thus, the silencing problem inherent in the injunctive remedy model may still be unsolved in the damages only model. In addition, the damages only model does not seem to give moral rights artists what they really want—freedom from the criticism<sup>353</sup> that injures their honor or reputation.

### C. *Per Se* Rule of Non-Liability

A *per se* rule of non-liability is an effective shield for Duchamp, but eviscerates entirely Leonardo's section 106A rights. A right without a remedy is, of course, no right at all. So if Congress enacted a provision, such as section 106(B), which makes explicit that the remedies afforded by sections 501-505 are not available in actions involving moral rights, it would render section 106A a nullity and, arguably, jeopardize our status as an adherent to Berne.<sup>354</sup>

### D. *Moral Rights, Copyright, and the First Amendment*

At least one author has argued that, in the context of moral rights, a first amendment defense to liability should be established since moral and first amendment rights inevitably conflict.<sup>355</sup> The test would vary depending upon the type of speech at issue. For example, "[v]iolations of the right of . . . integrity engaged in for commercial purposes would be analyzed under *Central Hudson* . . . ."<sup>356</sup> Several other authors have recognized the delicate relationship between copyright monopoly and first amendment freedom of

352. The noted artist and defendant, Jeff Koons, *see, e.g.*, *Rogers v. Koons*, 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992), is a rare exception. Koons was a commodities broker on Wall Street. *Id.* at 304. He charges extraordinarily high prices for his art works and collectors do not balk at paying \$137,500 for a Koon's collection of vacuum cleaners. *See* Steven Shonack, *Postmodern Piracy: How Copyright Law Constrains Contemporary Art*, 14 *LOY. L.A. ENT. L.J.* 281, 294 & n.114 (1994). In some sense, Koons may be thought to be an heir of Duchamp's "Readymades."

353. *Cf. supra* note 322. Professor Gordon refers to the "anti-dissemination motives" of plaintiffs in parody suits which have little to do with the economic value of plaintiff's copyright. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 *COLUM. L. REV.* 1600, 1632 (1982).

354. *See supra* notes 180-81 and accompanying text.

355. *See generally* Kathryn A. Kelly, *Moral Rights and the First Amendment: Putting Honor Before Free Speech* (unpublished manuscript, on file with the *Valparaiso University Law Review*).

356. *Id.* at 38-39. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), established a four-prong test to assess commercial speech.

speech.<sup>357</sup> Professor Denicola argues for a limited first amendment privilege to allow potential users access to protected expression when traditional copyright law does not so permit.<sup>358</sup> Professor Goldstein proposes constitutional tests when copyright protections encroach upon "overtly constitutional areas."<sup>359</sup> A student author opines that "[i]f the Mona Lisa were copyrighted and da Vinci sued for infringement, Duchamp's [f]irst [a]mendment defense should clearly prevail."<sup>360</sup>

Courts, however, have been fairly uniform in rejecting first amendment defenses in copyright cases. In *Walt Disney Productions v. Air Pirates*, (the bawdy, promiscuous Mickey Mouse parody), the defendants urged that the "First Amendment should bar any liability for their parody because otherwise protected criticism would be discouraged."<sup>361</sup> The Ninth Circuit recognized the possible tension between a copyright and the First Amendment but held that the first amendment argument failed because defendants "could have expressed their theme without copying Disney's protected expression . . . ."<sup>362</sup> Similarly, in *Dallas Cowboy Cheerleaders Inc. v. Scoreboard Posters, Inc.* (poster of partially nude cheerleaders), the court noted: "The judgment of the constitution is that free expression is enriched by protecting the creations of authors from exploitation by others, and the Copyright Act is the congressional implementation of that judgment . . . . The [F]irst [A]mendment is not a license to trammel on legally recognized rights in intellectual property."<sup>363</sup> In 1985, the Supreme Court forestalled further development of a separate first amendment defense in copyright cases. In the *Nation* case (*Nation* magazine's news scoop of *Time's* publication of parts of President Ford's memoirs), the Court found no

357. See, e.g., David A. Householder, *The Progress of Knowledge: A Reexamination of the Fundamental Principles of American Copyright Law*, 14 *LOY. L.A. ENT. L.J.* 1, 38-42 (1993); Floyd Abrams, *First Amendment and Copyright*, 35 *J. COPYRIGHT SOC'Y* 1 (1987); Patricia Krieg, Note, *Copyright, Free Speech, and the Visual Arts*, 93 *YALE L.J.* 1565, 1583-84 (1984); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 *CAL. L. REV.* 283 (1979); Paul Goldstein, *Copyright and the First Amendment*, 70 *COLUM. L. REV.* 983 (1970); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?* 17 *UCLA L. REV.* 1180 (1970).

358. Denicola, *supra* note 357, at 316.

359. Goldstein, *supra* note 357, at 1057.

360. Krieg, *supra* note 357, at 1584.

361. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).

362. *Id.* at 758-59 (citing *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 & n.13 (1977)).

363. *Dallas Cowboy Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187-88 (5th Cir. 1979) (citations omitted). *But see Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875 (S.D. Fla. 1978), *aff'd on other grounds*, 626 F.2d 1171, 1178 (5th Cir. 1980). In *Triangle*, the district court held the defendant's use not to be fair, *id.* at 881, but privileged nonetheless under the commercial speech prong of the First Amendment, *id.* at 884.

inherent conflict between the Copyright Act and the First Amendment.<sup>364</sup> Rather, the Court noted:

In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas . . . . In view of the [f]irst [a]mendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright . . . . [T]he traditional equities of fair use [should govern].<sup>365</sup>

Having shown that neither compulsory licenses, remedy tinkering, per se non-liability, nor a separate [f]irst [a]mendment privilege will resolve appropriately the *Leonardo v. Duchamp* case, we are left then with fair use—the final barrier to liability in both section 106 and 106A cases.

#### *E. Presumptive Fair Use for Parodists Who Violate an Artist's Right of Integrity*

An analysis of the four fair use factors shows that, even in cases involving commercial parodies and section 106A(a)(3)(A), Duchamp should be afforded presumptive fair use. In one sense, this conclusion is made possible because *Acuff-Rose* eschewed a presumption of unfairness when the use is commercial,<sup>366</sup> thus levelling the playing field. What this author suggests then is to tilt this ground. Even though the Court did not treat parody as presumptive fair use in a property based, traditional copyright suit, this should not foreclose shifting the burden from the defendant/parodist in a moral rights case. Heretofore, fair use had been viewed as an affirmative defense that a defendant, parodist or not, had to plead and prove.<sup>367</sup> In moral rights cases based on infringement of the right of integrity, the first artist should bear the burden of pleading and proving that a review of the four section 107 factors shows that the parodist's use was unfair. This adjustment of the fair use doctrine to accomplish the desired effect is not foreclosed by section 107. Section 107 represents not the "creation of new law," but rather "a direction to the courts to continue to

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364. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985). See also *supra* notes 302-04 and accompanying text.

365. *Id.* at 558, 560.

366. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1174 (1994).

367. *Id.* at 1177.



develop the common law<sup>368</sup> as they had from the days of Justice Story in *Folsom v. Marsh*.<sup>369</sup> Faced with a bundle of new rights, such as the personal right of integrity, courts should be free to tailor the fair use doctrine to the particular case. This is, in fact, what courts have done since 1841.

### 1. The Purpose and Character of the Use

Parody, as criticism or comment, is one of the favored purposes specified in section 107. Though not affording parody a per se non-infringement status, such productive, transformative material is often treated as fair use, even when it is for-profit.<sup>370</sup> As is often the case, a parody "adds something new, with a further purpose or different character, altering . . . with new expression, meaning, or message" the host work and thus, it furthers "the goal of copyright, to promote science and the arts."<sup>371</sup> Because parody relies on recognition of the host work, it necessarily "copies" at least enough of that work to conjure it up for the viewing or listening public. Thus, a parody that comments upon, targets, or criticizes the original work, as L.H.O.O.Q. surely does, is the focus of section 107.

Additionally, it is no longer crucial that Duchamp exhibited L.H.O.O.Q. at a local art gallery and sold the painting to an enamored viewer. The presumption of unfairness attached to commercial use, arguably arising from the *Harper & Row*<sup>372</sup> and *Sony* cases,<sup>373</sup> exists no more.<sup>374</sup>

### 2. The Nature of the Copyrighted Work

Nor is it critical that Duchamp copied Leonardo's creative expression (rather than a fact-based work). *Acuff-Rose* teaches that "[t]his fact . . . is not much help . . . in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works."<sup>375</sup> So, although the *Mona Lisa* "falls within the core of . . .

368. Patry & Perlmutter, *supra* note 14, at 674; see also *Stewart v. Abend*, 495 U.S. 207, 236 (1990).

369. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4, 901).

370. See, e.g., *Acuff-Rose*, 114 S. Ct. at 1164 (holding that 2 Live Crew's parody may be fair use); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *Eveready Battery Co., Inc. v. Adolph Coors Co.*, 765 F. Supp. 440 (N.D. Ill. 1991); *Elsmere Music, Inc. v. NBC*, 482 F. Supp. 741 (S.D.N.Y. 1980).

371. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1171 (1994).

372. *Harper & Rose, Publishers, Inc., v. Nation Enterprises*, 471 U.S. 539 (1985).

373. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

374. *Acuff-Rose*, 114 S. Ct. at 1174.

375. *Id.* at 1175.

copyright's protective purposes,"<sup>376</sup> the L.H.O.O.Q.s of this world must conjure up that creative expression. To afford any weight to Leonardo on this score is, for all practical purposes, to destroy parody as a genre.

### 3. The Amount and Substantiality of Defendant's Use

Under this Article's scheme, Leonardo would have the burden here, as with the other 107 factors, to show that both the quantity and quality<sup>377</sup> of Duchamp's use exceeds the boundaries of fairness. This determination should be made with a view "to the copyrighted work as a whole."<sup>378</sup> Because "the extent of permissible copying varies with the purpose and character of the use,"<sup>379</sup> Duchamp's parody necessarily must evoke the Mona Lisa to succeed at all as parody. The problem here, of course, is that unlike 2 Live Crew's less than 100% use of Roy Orbison's song,<sup>380</sup> Duchamp has taken 100% of Leonardo's work and merely added some hair to lip and chin and changed the title. Leonardo would have to show then that this use went far beyond the necessity to conjure up his Mona Lisa. The conjure up test recognizes that Duchamp must use the "most distinctive or memorable features, which the parodist can be sure the audience will know,"<sup>381</sup> but it might be argued that Duchamp went beyond the pale. On the other hand, the iconographic stature and nature of the Mona Lisa as a portrait suggests that to parody it at all requires almost an entire appropriation. In fact, virtually all the other artists who have parodied the Mona Lisa have used it almost in its entirety.<sup>382</sup> Thus, parody of a visual art, which is the only type of work protected under section 106A, may necessitate a more complete appropriation than a parody of a non-106A work such as a song or a play. Less than verbatim copying of "I Love New York"<sup>383</sup> or "Oh Pretty Woman"<sup>384</sup> may still result in parody, while visual art parodies may require very substantial, near verbatim, copying.<sup>385</sup>

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376. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1175 (1994).

377. *Cf. Harper & Row, Publishers, Inc., v. Nation Enterprises*, 471 U.S. 539, 564-566, 568 (1985).

378. 17 U.S.C. § 107 (1988 & Supp. V 1993).

379. *Acuff-Rose*, 114 S. Ct. at 1175.

380. *Id.* at 1176-77.

381. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1176 (1994). *Cf. Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490, 494 (2d Cir. 1989) ("The keystone of parody is imitation.").

382. *See supra* note 225 and accompanying text.

383. *Elsmere Music, Inc. v. NBC*, 482 F. Supp. 741 (S.D.N.Y. 1980) ("I Love Sodom.").

384. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994).

385. Justice Kennedy suggests this conclusion in *Acuff-Rose*, 114 S. Ct. at 1181 (Kennedy, J., concurring). *Cf. 3 NIMMER & NIMMER, supra* note 42, § 13.05D, at 13-211-225 (1994) ("[T]here may be certain very limited situations wherein copying of even the entire work for a different functional purpose may be regarded as fair use."). Although the text refers to use in judicial proceedings, incidental reproduction, and reverse engineering of computer software, it does cite

Under the scheme this Article proposes, Leonardo would have to show that the use was not true parody (factor 1) and, if it was, that the conjure up test could be satisfied by far less than what Duchamp appropriated.

#### 4. The Effect of Duchamp's Use Upon the Potential Market for or Value of the Mona Lisa

Although "[t]his last factor is undoubtedly the single most important element of fair use,"<sup>386</sup> the impairment of the marketability of the underlying work is affected differently when the use is parody, rather than another form of use. As both *Fisher* and *Acuff-Rose* note, the economic effect of parody is not its likelihood of destroying or lessening the market for the original, which any parody as critique may do, but rather whether the parody has a substitutive effect on the host work.<sup>387</sup> "[P]arody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically," but that is not the harm encompassed by copyright law.<sup>388</sup>

In some ways it is difficult to apply this fourth fair use factor to a right of integrity claim. Section 107(4) focuses on Leonardo's pocket, not upon attacks on his artistic sensibilities of honor and reputation. Yet, Congress notes that expert testimony can show whether the use actually affects the honor or reputation of the artist.<sup>389</sup> Presumably this testimony will proffer evidence as to whether damage to reputation is indicated by actual or potential deleterious market effects on the Mona Lisa. However, the Supreme Court cautions that when "the second use is transformative," as in parody, "market substitution is at least less certain and market harm may not be so readily inferred."<sup>390</sup> Further, Leonardo's market for other permitted derivative parodying works is somewhere between slim and none. As demonstrated earlier, artists are unlikely

*Haberman v. Hustler Magazine*, 626 F. Supp. 201 (D. Mass. 1986), where the court held that full reproduction of a fine art postcard was necessary for the purpose of comment.

386. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985) (citations omitted).

387. See *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986); *Acuff-Rose*, 114 S. Ct. at 1177-79; *Acuff-Rose*, 114 S. Ct. at 1181 (Kennedy, J., concurring).

388. *Acuff-Rose*, 114 S. Ct. at 1178 (citing BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 69 (1967)).

389. See *supra* note 197.

390. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1177 (1994). Cf. H.R. REP. NO. 2237, 89th Cong., 2d Sess. 64 (1966); H.R. REP. NO. 83, 90th Cong., 1st Sess. 35 (1967) ("[W]ith certain exceptions (use in parodies or as evidence in court proceedings . . .) a use which supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement.") (emphasis added); Patry & Perlmutter, *supra* note 14, at 693 (stating that, in most parody cases, the effect on plaintiff's potential market "will tend to weigh in favor of fair use" since there is little chance the parody will supplant the market for the original).

to authorize criticism or to license disparagement.<sup>391</sup> There is little or "no derivative market for critical works."<sup>392</sup>

To shift the burden of pleading and proof on this factor from Duchamp to Leonardo in a right of integrity case does not seem unfair for several reasons. First, section 106(A)(a)(3)(A)'s concept of prejudice to honor or reputation is relatively amorphous. It tracks the language of article 6<sup>bis</sup> of Berne, but in our country honor and reputation issues have arisen mostly in conjunction with defamation law which, at least since 1964, outermost limits have been expressly constrained by the First Amendment.<sup>393</sup> In copyright law, fair use itself is thought to represent the compromise, the "breathing space" between copyright monopoly and First Amendment free expression interests,<sup>394</sup> but the reputational interests in right of integrity cases are not so unlike those in defamation cases where the plaintiff does bear the burden of proof.<sup>395</sup>

The second reason that supports the shift of burden to demonstrate negative market effect from Duchamp to Leonardo relates to access to such proof. "Such proof is peculiarly in the hands of the copyright owner, and consequently he should have the burden of proof."<sup>396</sup> Presumably, Leonardo knows whether prejudice to his honor or reputation has occurred. For example, the price of his lithograph series has dropped significantly since and because of Duchamp's parody.<sup>397</sup> Further, Leonardo already has to show reputation damage in conjunction with his 106A suit, so we would not be imposing a new and difficult burden.

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391. See *supra* notes 241-42, 244 and accompanying text. Cf. Strauss, *supra* note 10, at 534.

392. *Acuff-Rose*, 114 S. Ct. at 1178.

393. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Negative opinions, such as most parodies, that ridicule plaintiffs are constitutionally protected. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

394. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1171 (1994). See also *supra* notes 357-60 and accompanying text.

395. In defamation cases, the plaintiff must proffer evidence "from which harm to reputation could reasonably be inferred or direct evidence of harm to reputation." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 797 (student ed. 1984); see also RESTATEMENT (SECOND) OF TORTS §§ 613, 621 (1977). Section 613(f) states that the plaintiff has the burden to prove special harm resulting from the defendant's defamatory statement. Special harm is construed to mean economic injury and is presumed in defamation per se. *Id.* §§ 568, 570.

396. Copyright Law Revision: Part 5 1964 Revision Bill with Discussions and Comments, 89th Cong., 1st Sess. 98-100 (Comm. Print 1965) (Remarks of Harry N. Rosenfield, counsel for the Ad Hoc Committee of Educational Organizations on Copyright Law Revision). Although Rosenfield's comments were made in the context of nonprofit educational uses, it is equally applicable in right of integrity/parody cases.

397. See *supra* notes 192-95 and accompanying text.

## 5. The Effect of Burden Shifting

In the easiest cases, where the defendant's use is productive but not parody and not-for-profit, or non-productive and for profit,<sup>398</sup> it might make little difference who carries the burden of pleading and proving the four fair use factors. But, in harder cases where the parody, which strikes at the artist's right of integrity, is a commercial use or even not-for-profit,<sup>399</sup> the potential censoring effect of section 106A(a)(3)(A)<sup>400</sup> is mitigated by shifting proof of the fair use factors from Duchamp to Leonardo. In "hard" moral rights cases, doubts should be resolved in favor of the parodist.<sup>401</sup> We should have more art rather than less. This solution balances appropriately the three interests served by current copyright law—protection of an artist's personal, moral, and proprietary (economic) rights, protection of the parodist's right to create transformative works, and protection of the public's interest in fostering the kind of creativity which promotes science and the arts.<sup>402</sup> This tinkering with what had been viewed as the affirmative nature of the fair use defense is necessary due to the attempt to fit a square peg into a round hole—natural, personal, moral rights into an economic rights-based copyright scheme.<sup>403</sup> In this regard, it

398. See *supra* notes 278-84 (Fair Use Continuum, Parts I, IV).

399. See *supra* notes 279-81, 283-84 and accompanying text.

400. See *supra* notes 326 and accompanying text. Cf. Yen, *supra* note 14 at 107 (“[A]uthors [may] value their copyright rights for non-monetary reasons . . . [and] authors will consistently refuse to sell others the rights to use their works because money will not be an adequate substitute for any interests harmed by the contemplated use.”). Granting authors an “aesthetic veto” has resulted in numerous European decisions in which expression has been prevented. See Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 422, 424-27 & nn.3-15 (1990).

401. In a non-moral rights claim, doubts would be resolved in favor of the first artist. See *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1181 (1994) (Kennedy, J., concurring).

402. Cf. *Fogerty v. Fantasy Inc.*, 114 S. Ct. 1023, 1025 (1994) (“[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works . . . .”); *Acuff-Rose*, 114 S. Ct. at 1171 (stating that transformative works are “at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright”); *Harper & Row, Publishers, Inc.*, 471 U.S. 539, 546 (1985) (stating that copyright “rewards the individual author in order to benefit the public”); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (holding that copyright “makes reward to the owner a secondary consideration”) (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948)). That these goals remain the core of copyright is evidenced by section 801’s balancing of maximizing the availability of creative works to the public and giving the copyright owner a fair return and the user a fair income. 17 U.S.C. § 801(b)(1)(A), (B) (1988).

403. Cf. *Leval*, *supra* note 317, at 1128 (“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*.”). Judge Leval authored two important copyright/fair use decisions that did not survive appellate review: *New Era Publications Int’l v. Henry Holt & Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff’d on other grounds*, 873 F.2d 576 (2d Cir. 1989); *Salinger v. Random House, Inc.*, 650 F. Supp. 413 (S.D.N.Y. 1986), *rev’d*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987). His fair use article was frequently cited by the Supreme Court in *Acuff-Rose*, 114 S. Ct. at 1170 &

should be noted that most countries that provide moral rights protection do not recognize a fair use defense.<sup>404</sup>

## V. CONCLUSION

"Vita brevis est, ars longa"<sup>405</sup>

"Whatever else art is good for, its chief effectiveness lies in propagating more art . . . . [O]f all the things art has an impact on, art is the most susceptible and responsive. All art is infested by other art."<sup>406</sup> This is hardly surprising given the nature of the artistic muse. Robert Motherwell, a noted American artist of this century, explained the import of prior art: "Every intelligent painter carries the whole culture of modern painting in his head. It is his real subject, of which everything he paints is both an homage and a critique."<sup>407</sup> Contrary to the advice given by Polonius to his son Laertes, "Neither a borrower nor a lender be,"<sup>408</sup> many artists have their feet (or paintbrushes, pens, sculpting tools, pianos, etc.) in both camps. They use ideas, plots, and themes, often parodying earlier works, while still other artists feed on this art. In this sense, much art is symbiotic. That legal doctrine which can protect both the "host" artist and the "parasite" artist, or at least balance carefully the interests of both, best serves the artistic and cultural needs of society and "promote[s] the progress of science and the useful arts . . . ."<sup>409</sup> But the balance is a delicate one. Too much protection for the "host" artist can stifle creation of new, transformative works. Too much protection for the second artist might cause the original artist to lose the incentive to create.

Because art begets art,<sup>410</sup> society wants to furnish incentives for artists to create. Copyright is one vehicle by which to accomplish this. The monopolistic property and moral rights given to authors under sections 106 and 106A of the Copyright Act, even though explicitly tempered by fair use, section 107, and other specific limitations, sections 108-120, are in inherent conflict with the ability to create freely and without fear of lawsuits. Courts have, however, endeavored to resolve the conflict by employing, often successfully, the fair use doctrine on a case-by-case basis in traditional, "property" rights cases. Whether

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n.8, 1171 & n.10, 1174 n.18, 1177 n.21, 1178 & n.23.

404. See Anne Moebes, *Negotiating International Copyright Protection: The United States and European Community Positions*, 14 LOY. L.A. INT'L & COMP. L.J. 301, 320 (1992).

405. SENECA, DE BREVI-TATE VITAE, I, 1.

406. LIPMAN & MARSHALL, *supra* note 205, at 9.

407. *Id.* at 7.

408. WILLIAM SHAKESPEARE, HAMLET: PRINCE OF DENMARK, act I, sc. iii, line 75.

409. U.S. CONST. art. I, § 8, cl. 8.

410. "Worldmaking as we know it always starts from worlds already on hand; the making is a remaking." NELSON GOODMAN, WAYS OF WORLDMAKING 6 (1978).

there can be a similar successful use of the doctrine as an affirmative defense on such an ad hoc basis in the context of moral rights, that is, Leonardo's freedom from an "intentional distortion, mutilation, or . . . modification of his . . . work which would be prejudicial to his . . . honor or reputation,"<sup>411</sup> is much more problematic. This is so for several reasons. First, a moral rights violation is fuzzier than a property right violation. Second, it must be conceded that artists rarely seek out criticism and at most endure it grudgingly. This, in turn, raises a third difficulty: artists could use section 106A to chill or prevent art. Since monopoly is the linchpin of copyright, artists may use the new grant of moral rights to censor.

Because of these concerns, this Article proposed that when moral rights under section 106A are asserted against a parodist, such as Duchamp in the hypothetical case delineated here, a court should presume that the parodist's use is a fair one, even if it is a commercial use. This presumption recognizes the need to protect both da Vinci and Duchamp, but gives Duchamp, as parodist, the benefit of a fair use presumption in section 106A/right of integrity cases. Language in Supreme Court fair use cases prior to *Acuff-Rose* indicates that the Court is not too uncomfortable with speaking in terms of presumptions in the property rights/fair use/non-parody context.<sup>412</sup> In the moral rights/fair use/parody context, Duchamp should, presumptively, win.

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411. 17 U.S.C. § 106A (a)(3)(A) (Supp. V 1993).

412. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984).