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# Against Moral Rights

Amy M. Adler<sup>†\*</sup>

“Art has become a synonym for the destruction of art.”

—Bruno Latour<sup>1</sup>

“[T]o imagine a new art, one must break the ancient art.”

—Marcel Schwob<sup>2</sup>

“A picture is a sum of its destructions.”

—Picasso<sup>3</sup>

## INTRODUCTION

Normally when you buy something, you can do what you want with it. If you buy a chair, or a dress, or a car, you can alter it, embellish it, neglect it, abuse it, destroy it, or throw it away. But if you buy a work of art, your freedom to do what you want with that object—your own property—is severely curtailed. This is because artists have powerful special rights, called “moral

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\* In keeping with the conventions of the Essay format, the footnotes in this piece are relatively sparse. I would be pleased to provide a fuller list of sources or a fuller explication of my arguments to anyone who writes to me at amy.adler@nyu.edu.

1. BRUNO LATOUR, *ICONOCLASH: BEYOND THE IMAGE WARS IN SCIENCE RELIGION AND ART* 21 (Bruno Latour & Peter Weibel eds., 2002).

2. DARIO GAMBONI, *THE DESTRUCTION OF ART* 257 (2004).

3. Christian Zervos, *Conversations avec Picasso*, *CAHIERS D'ART*, 1935, at 173, 175 (quote translated from the original French by Amy Adler).

rights,” unlike the creators of other objects. Moral rights allow an artist to control what you do with his work of art even after he has sold it and even if you are not in privity of contract with him. European in origin, moral rights have been part of U.S. federal law since the enactment of the Visual Artists Rights Act of 1990 (“VARA”), an amendment to the Copyright Act.<sup>4</sup>

Moral rights scholarship is startling in its uniformity. Scholars take it as gospel that moral rights are crucial for art to flourish and that, if anything, we need a more robust moral rights doctrine.<sup>5</sup> Commentators routinely lament the gap between our modest American moral rights laws and the more expansive European ones.<sup>6</sup> In contrast to copyright law, which has produced a vibrant body of scholarship critical of the law’s excesses, the main scholarly criticism of moral rights is that they do not reach far enough.<sup>7</sup> Wading through the largely repetitive law review literature, it doesn’t take long to get the implicit message: if you don’t support moral rights, you’re a philistine who doesn’t

4. Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2000). For a discussion of various state statutes enacted prior to VARA, see *infra* note 12 and accompanying text.

5. For just a few examples of important scholarship on moral rights, see Roberta R. Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1986 (2006) [hereinafter Kwall, *Inspiration*]; Roberta R. Kwall, “Author-Stories”: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine, 75 S. CAL. L. REV. 1 (2001) (describing the urgent importance of moral rights as a way to encourage the creative process) [hereinafter Kwall, *Author Stories*]; Susan P. Liemer, *Understanding Artists’ Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 41-42, 44 (1998); John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976) (pre-VARA article urging American adoption of moral rights). See generally JOSEPH SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* (1999) (explaining the urgent public interest in preserving important cultural objects, including art).

6. See, e.g., Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9 (2001); Kwall, *Author Stories*, *supra* note 5, at 22; Roberta R. Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)*, 77 WASH. L. REV. 985 (2002); Roberta R. Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1 (1997) [hereinafter Kwall, *How Fine Art Fares Post VARA*]; Robert J. Sherman, Note, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 416-17 (1995). Cf. Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 853 (2005) (praising VARA’s “balanced and sophisticated approach”). Several important articles predating VARA urged the United States to adopt moral rights laws. See Edward J. Damich, *The Right of Personality: A Common-Law Basis for Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988); Roberta R. Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985).

For one of a handful of articles criticizing VARA from a free speech perspective, see Eric E. Bensen, Note, *The Visual Artist’s Rights Act of 1990: Why Moral Rights Cannot be Protected Under the United States Constitution*, 24 HOFSTRA L. REV. 1127 (1996).

7. See, e.g., Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation* (Nov. 27, 2007) <http://ssrn.com/abstract=1033021> (predominant trend in scholarship urges “adopting . . . stronger protection of [moral] rights in the United States”). Even the fiercest, most influential copyright critic, Lawrence Lessig, has refrained from criticizing moral rights. Lessig wrote: “I don’t see where I’ve ever said anything against moral rights . . . [T]he moral rights tradition has actually proven to be an important check on . . . publishers.” Lessig Blog: On the Challenge of Moral Rights, [http://lessig.org/blog/2005/02/on\\_the\\_challenge\\_of\\_moral\\_righ.html](http://lessig.org/blog/2005/02/on_the_challenge_of_moral_righ.html) (Feb. 26, 2005, 8:30 a.m.).

understand the sanctity of art.

This essay seeks to undermine the foundations of moral rights scholarship, law, and theory. My argument is that moral rights laws endanger art in the name of protecting it. Drawing on contemporary art theory and practice, I focus on the moral right of "integrity," called "the heart of the moral rights doctrine."<sup>8</sup> This right allows an artist to prevent modification and, in some cases, destruction of his art work. As I show, the right of integrity threatens art because it fails to recognize the profound artistic importance of modifying, even destroying, works of art, and of freeing art from the control of the artist. Ultimately, I question the most basic premise of moral rights law: that law should treat visual art as a uniquely prized category that merits exceptions from the normal rules of property and contract.

To put it mildly, this is not a popular argument. Indeed, it challenges the key assumptions of virtually all moral rights scholarship. But moral rights scholars have overlooked a surprising problem: the conception of "art" embedded in moral rights law has become obsolete. As a result, the law is on a collision course with the very art it seeks to defend. In fact, as I will show, moral rights are premised on the precise conception of "art" that artists have been rebelling against for the last forty years. Moral rights law thus purports to protect art, but does so by enshrining a vision of art that is directly at odds with contemporary artistic practice. It protects and reifies a notion of art that is dead. In this Essay I ask the question: does moral rights law make sense in an era in which "art," at least as we have known it for centuries, is over?

My goal is to provoke us to rethink our fundamental assumptions about moral rights law. Rather than offering a detailed proposal for legal reform, this Essay attacks the very foundations of the law. Part I offers a brief introduction to moral rights doctrine in the United States, and outlines the doctrine's major theoretical tenets. Parts II and III set forth my claim that moral rights endanger art in the name of protecting it. Specifically, Part II challenges the premise in moral rights law that the artist is the proper person in whom we should vest the power to enforce moral rights. Here I dispute the pivotal assumption in moral rights law that an artist's interests and the public's interest in a work of art will be aligned. Ultimately I question the romantic assumptions about authorship and meaning embedded in moral rights law. In my view, these assumptions threaten to freeze the vitality of artistic discourse. Part III in turn argues that moral rights law obstructs rather than enables the creation of art because the law fails to recognize the defining role that destruction has come to play in contemporary artistic practice. In Part IV, I challenge the most basic premise of moral rights law: that visual art is an exalted and distinct category of property

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8. Kwall, *How Fine Art Fares Post VARA*, *supra* note 6; see also Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 37 (1994) ("The right of integrity is generally seen as the central tenet of moral rights jurisprudence.").

that deserves special legal treatment.

A note about the definition of “art”: I use the term “art” to describe work that critics, scholars, galleries, museums, and “artists” generally discuss as “art.” But I also use the term “art” to include works that make us ask the question “what is art?” in the first place.<sup>9</sup> By using the term so broadly, I mean to illustrate a central point of this piece: attacks by “artists” on the category of “art” have at once constituted and begun to destroy the meaning of that term.<sup>10</sup>

## I

### THE RATIONALES FOR MORAL RIGHTS

#### *A Brief Introduction to U.S. Moral Rights Doctrine*

Moral rights were only recently and grudgingly accepted in the United States. The concept of moral rights originated in nineteenth century France and has long been recognized by most civil law countries. Moral rights are a centerpiece of the international Berne Convention for the Protection of Literary and Artistic Works,<sup>11</sup> which the United States resisted signing for years in part because of the moral rights provision in the Convention. In the interim, several states filled the gap; led in 1979 by California, eleven states enacted various forms of moral rights protections for visual artists.<sup>12</sup> Eventually, in 1988, the United States ratified the Berne Convention.<sup>13</sup> Two years later, Congress enacted VARA as an amendment to the Copyright Act.<sup>14</sup>

VARA grants three basic moral rights to artists who create “visual art,” a narrowly defined statutory category that I describe below. The first and most important moral right is the right of “integrity” of the work of art, which grants an artist “the right . . . to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right.”<sup>15</sup> The second right, which I do not address in any depth in this Essay, is traditionally known as the right of “paternity” or

9. I discuss this in depth in Amy Adler, *The Folly of Defining “Serious” Art*, in *THE NEW GATEKEEPERS: EMERGING CHALLENGES TO FREE EXPRESSION IN THE ARTS* 90 (Christopher Hawthorne, András Szántó et al. eds., 2003).

10. As I will show, these attacks include both conceptual attacks on the category of “art,” and physical attacks on works of art.

11. Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, as amended on Sept. 28, 1979, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3. Article 6bis became part of the Convention in 1928.

12. For a discussion of the state statutes and the extent to which VARA preempts them, see WILLIAM F. PATRY, 4 PATRY ON COPYRIGHT § 16:44 (2007).

13. Congress passed the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified as amended in scattered sections of 17 U.S.C.).

14. Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2000).

15. *Id.* § 106A (a)(3)(A).

"attribution." It allows the artist to insist that his work be properly attributed to him and that works not be misattributed to him.<sup>16</sup> Finally, to artists who have created works of visual art that are "of recognized stature," VARA expands the right of integrity, allowing the artist to prevent not merely modification but outright destruction of the work.<sup>17</sup>

What qualifies as a work of "visual art" for purposes of VARA? The statute defines visual art to include "a painting, drawing, print, or sculpture, existing in a single copy, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."<sup>18</sup> The definition includes photography that has been "produced for exhibition purposes only" and exists "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."<sup>19</sup> VARA explicitly excludes from its definition of visual art a number of materials such as motion pictures, audiovisual works, books, magazines, electronic publications, and advertising or promotional materials.<sup>20</sup> And, aside from a few exceptions, VARA applies only to visual art created after its

16. *Id.* § 106A (a)(1). This Essay focuses on the right of integrity, which is considered to be the central moral right, and not on the right of attribution. Nonetheless, I want to briefly note that the right of attribution, while not unproblematic, *see, e.g., infra* note 201, can serve some of the same goals as the integrity right while avoiding the major problems addressed in this Essay. By allowing an artist to remove his name from a modified artwork, the right of attribution protects the artist's reputational interest while not interfering with the public interest in modification. The mutilated work, a new and potentially valuable work of art, can still exist, but the artist can protect his reputation (albeit imperfectly) by choosing to disassociate himself from the altered work.

17. *Id.* § 106A(a)(3)(B). VARA does not define "recognized stature." For a few opinions interpreting the term's meaning, *see* *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999); *Scott v. Dixon*, 309 F. Supp. 2d 395 (E.D.N.Y. 2004); *Pollara v. Seymour*, 150 F. Supp. 2d 393 (N.D.N.Y. 2001); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994), *rev'd on other grounds*, 71 F.3d 77 (2d Cir. 1995).

The right to prevent destruction is not universal in civil law countries. *See Carter*, 71 F.3d at 81. This variation illustrates the different purposes that moral rights laws serve. To the extent that the right of integrity serves primarily to protect the artist's reputational interest, destruction tends not to be prevented; the theory is that continued display of mutilated work misrepresents an artist's intention and thus harms him more than if the work were destroyed altogether. To the extent that the right of integrity is seen as primarily protecting the public interest in preserving cultural heritage, destruction is prohibited.

18. 17 U.S.C. § 101. The statute protects "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." *Id.* VARA's legislative history directs courts to "use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition." H.R. REP. NO. 101-514, at 11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921. But my argument in Part IV suggests that in light of the direction of contemporary art, "common sense" and "generally accepted standards of the artistic community" could lead to opposite outcomes.

19. 17 U.S.C. § 101.

20. *Id.* For some cases finding material did not meet the definition of "visual art" under VARA, *see Nat'l Ass'n for Stock Car Auto Racing, Inc. v. Scharle*, 356 F. Supp. 2d 515 (E.D. Pa. 2005); *Lilley v. Stout*, 384 F. Supp. 2d 83 (D.D.C. 2005); *Pollara*, 344 F.3d 265.

Section 113(d) of VARA makes special provisions for works attached to buildings; this category raises a particular set of problems. 17 U.S.C. § 113(d).

effective date, June 1, 1991.<sup>21</sup>

European moral rights laws are far more extensive than their U.S. counterparts in a number of important ways.<sup>22</sup> Most prominently, many European countries grant artists other moral rights in addition to integrity and paternity.<sup>23</sup> Most recognize a right of divulgation, giving the artist the right to decide when (and whether) the work is complete and can be shown.<sup>24</sup> The rights can even extend to allowing an artist to compel construction of a not-yet-built, commissioned work. For example, Jean Dubuffet sued Renault to force it to construct a 2,000 square foot "environmental sculpture" designed by the artist on a commission from the company. A French Court ordered Renault to complete the sculpture, even though Dubuffet had received his fee.<sup>25</sup> French law also provides a "right to repent or retake" a work at any time in exchange for payment.<sup>26</sup> In addition, moral rights in most countries are inalienable;<sup>27</sup> in France the rights are perpetual.<sup>28</sup> In contrast, under VARA, moral rights are waivable and endure only for the life of the artist.<sup>29</sup>

Unlike those countries, the United States has never fully embraced moral rights. VARA extends to a limited class of material. Critics lament that even within that limited class, VARA is under-enforced; courts tend to read the statute narrowly. Because of this and other pressures, legal scholars have

21. See *infra* note 29.

22. For a comparative analysis of U.S. and European moral rights, see Netanel, *supra* note 8; Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353 (2006); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940). John Merryman's 1976 article, *supra* note 5, was profoundly influential on American scholars.

23. European moral rights doctrine is broader in scope than VARA, sometimes extending to reproductions of original works. See, e.g., *Bernard-Rousseau v. Galeries Lafayette*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction], Mar. 13, 1973, J.C.P. 1974, IV, 48, at 224 (Fr.). New York moral rights law also extends to reproductions. See *Wojnarowicz v. Am. Family Ass'n.*, 745 F. Supp. 130 (S.D.N.Y. 1990).

24. JOHN H. MERRYMAN & ALBERT ELSÉN, LAW, ETHICS AND THE VISUAL ARTS 423 (5th ed. 2007).

25. *Id.* at 443 (describing *Dubuffet v. Renault*, Supreme Court of Cassation.) *Dubuffet* didn't enforce the judgment. Compare *Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526, 535 (S.D.N.Y. 2001) (denying artist's VARA claim to have commissioned sculpture completed). In the recent litigation between *Christoph Buchel and Mass Moca*, the court found VARA inapplicable to the unfinished sculpture at issue in that case. *Mass. Museum of Contemporary Art Found., Inc. v. Buchel*, No. 07-30089-MAP, 2008 WL 2755842, at \*13 (D. Mass. July 11, 2008).

26. MERRYMAN & ELSÉN, *supra* note 24, at 423.

27. See Netanel, *supra* note 8, at 2.

28. This is true in some other civil law countries. Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 213-217 (1995).

29. This applies to artworks created after the effective date of VARA, June 1, 1991. 17 U.S.C. § 106A(d) (2000). Works created prior to that date but not transferred enjoy longer protection: life of the author plus 70 years (copyright term). VARA does not apply to works created and transferred prior to the effective date. Cf. California Art Preservation Act, CAL. CIV. CODE § 987 (West 2006) (granting rights for life plus fifty years).

increasingly called for the expansion U.S. moral rights.<sup>30</sup>

### *B. Moral Rights Theory*

Why do we wish to preserve the integrity of art? And why do we grant moral rights only to the rarified category of “visual art” and not to other objects? Embedded in moral rights law are two basic assumptions about visual art. First is that a work of art is an extension of the artist himself. I use the term “himself” rather than “herself” advisedly because of the language of “paternity” that is a refrain in moral rights scholarship.<sup>31</sup> Scholars invoke the metaphor of paternity to explain the artist’s profound connection with his work: he cares so deeply about the fate of his art because it is somehow his child and not just another object.<sup>32</sup> Thus the artist feels personal anguish when someone else modifies his artwork/child. This is so even though the child has grown up and left home, and even though the artist/father has *sold* his child (more about commerce later).<sup>33</sup> The work of art is not just another product he has sold, but rather an “expression of his innermost being.”<sup>34</sup> As the Second Circuit observed, moral rights “spring from a belief that an artist in the process of creation injects his spirit into the work.”<sup>35</sup>

Indeed, moral rights advocates sometimes speak of art works as if they were living things: “To mistreat the work is to mistreat the artist.”<sup>36</sup> It is as if the work has a magical connection to its maker; hurting the piece will hurt the artist as if you were sticking pins in a voodoo doll. Because of this emphasis on the artist’s (and indeed, the art’s) personhood, moral rights are said to have a “spiritual, non-economic and personal nature.”<sup>37</sup>

The second assumption embedded in moral rights law, deeply related to the first, is that works of visual art deserve special treatment in the law because they are especially valuable and unlike other objects. As a prominent French

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30. See, e.g., Bird, *supra* note 7 (surveying scholarship and finding predominant trend urges “stronger protection of rights in the United States”).

31. On this and other points, moral rights law seems to invite a feminist analysis.

32. See, e.g., Morris E. Cohn, *Author’s Moral Rights: Film and Radio*, 1 HOLLYWOOD Q. 69, 69-70 (1945).

33. The relationship between art and commerce is so rich and complex that I could not begin to do it justice within the confines of this piece. I look at one aspect of the relationship in Part IV, where I show that contemporary art questions the distinction between art and ordinary commercial products.

34. MERRYMAN & ELSÉN, *supra* note 24, at 423.

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

36. MERRYMAN & ELSÉN, *supra* note 24, at 423.

37. *Carter*, 71 F.3d at 81. Although moral rights are almost always described as non-economic, Professors Hansmann and Santilli have argued that the rights protect pecuniary interests. Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 106 (1997); see also William Landes, *What Has the Visual Artists Rights Act Accomplished?* (John M. Olin Law & Economics Working Paper No. 123 (2d Series, 2001), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=270985](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=270985) (providing economic analysis of moral rights)).



legal decision explained, moral rights protect “the superior interests of human genius.”<sup>38</sup> We must preserve a work as the artist intended it so that his genius can be “conveyed to posterity without damage.”<sup>39</sup> Thus moral rights protect not only the personality interests of the individual artist; they also protect the public interest by preserving for posterity the object that immortalizes the traces of the artist’s greatness.<sup>40</sup> As Professor Merryman, a great champion of American moral rights law has argued: “[T]here is more at stake than the concern of the artist . . . . There is also the interest of others in seeing, or preserving the opportunity to see, the work as the artist intended it, undistorted . . . . We yearn for the authentic, for contact with the work in its true version.”<sup>41</sup>

Members of Congress invoked the “special societal need” and “important public interest” served by the arts as a justification for enacting VARA.<sup>42</sup> Members repeatedly noted the dual purposes of the bill to protect “not only . . . the artistic community, but also . . . the American public[’s] . . . access to artistic creations.”<sup>43</sup> Describing art as necessary for the “integrity of our culture,” one representative claimed that “[a]rtists in this country play a very important role in capturing the essence of culture and recording it for future generations.”<sup>44</sup> A prominent witness testified about the importance of “preserving [the public’s] cultural legacy,” arguing that “[a]ny distortion of [art] works . . . cheats the public of an accurate account of the culture of our time.”<sup>45</sup> In this sense, it would be a crime against society as a whole to modify or destroy a significant work of art. Professors Hansmann and Santilli, in an important economic analysis of moral rights, describe the public interest in the integrity right as follows:

[W]orks of art often become important elements in a community’s culture: other works of art are created in response to them, and they become common reference points . . . . The loss or alteration of such works would therefore be costly to the community at large, depriving that community . . . of a widely used part of its previously shared vocabulary.<sup>46</sup>

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38. Merryman, *supra* note 5, at 1029 (quoting Millet, Tribunal de la Seine, May 20, 1911, *Amm. I.* 271).

39. *Id.*

40. This emphasis on public interest is not universal in moral rights laws. *See supra* note 22 and *infra* notes 50-54 and accompanying text.

41. Merryman, *supra* note 5, at 1041.

42. H.R. REP. NO. 101-514, at 5-6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6915-16 (footnote omitted). The California moral rights statute significantly emphasizes the public interest. *See* CAL. CIV. CODE § 987(a) (West 2006); *cf.* MASS. GEN. LAWS, ch. 231, § 85S (2008) (serving dual purpose of protecting public and private interests).

43. 1990 U.S.C.C.A.N. at 6920.

44. *Id.* at 6916 (statement of Rep. Markey).

45. *Id.* (statement of Weltzin Blix, a representative of the National Artists Equity Association).

46. Hansmann & Santilli, *supra* note 37, at 106.

Thus, moral rights laws serve the public interest by preserving our shared cultural heritage, the best in our society and, by extension, in us.<sup>47</sup>

## II

### THE ARTIST AND THE PUBLIC:

#### FREEING ART FROM THE CONTROL OF THE ARTIST

Does the artist know what's best for his art? Is he the right person to entrust with the enforcement of moral rights? Should his intent govern the "meaning" of the piece? And for that matter, who is the artist anyway? In this Part I focus on a notion that predominates in U.S. moral rights law: by granting moral rights to the individual artist, the law assumes he will act not only in his own interest, but in the interest of the public in general. I believe moral rights law is wrong to assume those interests converge. I begin by exploring circumstances in which an artist's interests have conflicted with those of the public. I then question the fundamental assumptions about authorship and meaning at the foundation of moral rights laws. Ultimately, I argue that the best thing for the public's interest in art might be to free art from the shackles of the artist—or more precisely, from our fantasies of the solo genius artist.

Of course to suggest, as I do, that the artist doesn't necessarily know what's best for his own art seems like sacrilege. The understandably indignant response typically will be something like this: The artist should have the last word on his art because it is his unique expression. He is the genius without whom there would be nothing worth protecting in the first place. Wrestling control of a work away from the artist would be like wresting control of a child from his parent.

But I believe this response relies on assumptions about art that are overbroad, historically contingent, and at odds with the way people create. This view overlooks that the child/artwork has grown up and left home—that works continue to evolve over time based on how they are presented and received. It overlooks that the child/artwork left home because the father *sold* him/it. It also overlooks numerous instances in which artists are not the best judges of their work, of whether it is good or bad or worth preserving, or of what would make it even better. (Parents can't always see their children clearly either.) But on a deeper level, as I will argue below, moral rights law is premised on a transitory, albeit deeply powerful notion of artistic authorship: the romantic myth of the solo genius artist. I am not sure that this vision of authorship was ever true.<sup>48</sup> In

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47. Compare the limited protection in the United States for film provided by the National Film Preservation Act of 1996, 2 U.S.C. § 179 (2000), and the more robust protection for architectural landmarks. National Historic Preservation Act, 16 U.S.C. § 470 (2000).

48. For some of the important scholarship attacking romantic notions of authorship embedded in intellectual property law, see MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of*

any event, it is a relatively new concept. For just one example, consider that prior to the Romantics, Samuel Johnson described the artist as a "skilled manual worker."<sup>49</sup> But even if the romantic vision were once true, contemporary artists have been relentlessly attacking it for at least the last forty years. Moral rights law enshrines notions of art directly at odds with contemporary artistic practice.

*A. The Assumed Convergence of Public and Private Interests in Moral Rights Laws*

VARA and most U.S. state moral rights laws are premised on the view that moral rights serve not only the interests of individual artists, but also a shared public interest in art.<sup>50</sup> VARA's concern for the public interest is evident in its legislative history as well as its heightened protection for certain works that have achieved "recognized stature." And yet, although VARA and most state statutes purport to protect both public and individual interests, these statutes vest sole power to enforce the moral right in the individual artist.<sup>51</sup> They do so based on the assumption that there is an unproblematic convergence between the public interest and the interest of the artist who created the work. His decisions, according to the assumption, will inevitably be in the public interest.<sup>52</sup> Thus, even in the case of a work of "recognized stature" under VARA, only the artist can enforce or not enforce the right of integrity. The public has no cause of action.<sup>53</sup> Moreover, the artist always has the right to destroy his work, even if it is a work "of recognized stature" and thus the kind of work that the public presumably has an interest in preserving.<sup>54</sup>

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"*Authorship*," 1991 DUKE L.J. 455 (1991); Martha Woodmansee, *The Genius and Copyright: Economic and Legal Conditions of the Emergence of 'Author,'* 17 EIGHTEENTH-CENTURY STUD. 425 (1984); James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625 (1988).

For my scholarship exploring postmodern notions of authorship in First Amendment law, see Amy Adler, *What's Left? Hate Speech, Pornography and the Problem for Artistic Expression*, 84 CALIF. L. REV. 1499 (1996) [hereinafter Adler, *What's Left?*]; Amy Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990) [hereinafter Adler, *Post-Modern Art*].

49. ALEXANDER STURGIS ET AL., *REBELS AND MARTYRS: THE IMAGE OF THE ARTIST IN THE NINETEENTH CENTURY* (2006).

50. New York's law does not purport to protect the public interest. See N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 2006). Note that VARA significantly preempts state moral rights laws. See, e.g., PATRY, *supra* note 12.

51. California's statute is an exception. See *infra* note 53.

52. See, e.g., Hansmann & Santilli, *supra* note 37, 102-07 (seeing harmony between private and public models of moral rights laws). Strahilevitz also defends VARA's grant of control to the artist. Strahilevitz, *supra* note 6, at 853.

53. California, however, allows an "organization acting in the public interest" to bring a cause of action to protect a work of "fine art" if it merits "substantial public interest." CAL. CIV. CODE § 989(a)(1), (c) (West 2006).

54. This is true even in California, where the moral rights law goes much further than VARA to protect the public interest. See *supra* note 53 (describing public interest provisions of California law). But even in California, if the artist wishes to destroy his own masterpiece,

### *B. The Conflict Between Artist and Public: The Myth of the Artist*

Here I explore a series of examples in order to unravel the assumed harmony between the artist's and the public's interests in works of art.

#### *1. Artists Who Destroy Their Work*

First, there are cases in which artists wish to destroy work that the public arguably has an interest in preserving. Moral rights laws permit an artist to do so. But history is rife with examples of artists who destroyed or attempted to destroy what we now see as masterpieces. Alberto Giacometti, George Rouault, and Jasper Johns, among others, attacked their own works.<sup>55</sup> In the literary realm, Kafka famously told his friend Max Brod, the executor of his estate, to burn his unpublished manuscripts upon his death. Brod defied Kafka's wishes, saving for the public *The Trial* and *The Castle* among other works.<sup>56</sup>

This tendency of artists to destroy their work is not uncommon; it goes hand in hand with the romantic myth of the tortured artist. For example, Chaim Soutine, an artist who took that myth to great extremes during the early twentieth century, spent much of his anguished, brilliant, and short career destroying his own canvasses in fits of self-loathing. Soutine developed a hatred for paintings he had created during an early period of his career. He spent considerable energy toward the end of his short life trying to recover those early paintings so he could destroy them. Museums, scholars, and critics now prize what remains of the work from that period.

Where is the public interest in this example? Of course, one could argue that laws giving the painter what he wanted, that is, the ability to destroy his work, would encourage the production of more art by creating favorable conditions for artists in general. This argument assumes, as I do, that most artists would wish to retain control over their works. But one could also argue that the public interest is served by saving the paintings, contrary to the artist's wishes. Whatever the answer may be, these conflicting arguments show that VARA is wrong to assume an unproblematic harmony between the interests of the artist and the public. VARA would allow an artist to destroy his own work even if it were a masterpiece. Even the California moral rights statute, which emphasizes the public interest more than VARA does, still allows an artist to

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presumably the type of work that the phrase "substantial public interest" is intended to protect, he would have the right to do so even if the public tried to stop him. See CAL. CIV. CODE § 987(c)(1) (West 2006) ("No person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art.").

55. See, e.g., CECILE NEBEL, *THE DARK SIDE OF CREATIVITY: BLOCKS, UNFINISHED WORKS, AND THE URGE TO DESTROY* 95-132 (1988); Louis Menand, *Capture the Flag: Jasper Johns's Own Private Icon*, SLATE, Oct. 30, 1996, <http://www.slate.com/id/2905>. In the realm of music, Brahms, who famously destroyed more work than he published, provides another example.

56. See Strahilevitz, *supra* note 6, at 830-38 (discussing authors who destroy their work).

destroy his work regardless of the public interest in its preservation.<sup>57</sup>

## 2. *The Public Interest in Destroying Work the Artist Wants to Preserve*

Sometimes, the clash of interests between artist and public is reversed: as I will argue in Part III, the public interest may sometimes lie in the destruction of art, even when the artist favors preservation. The case of Richard Serra's famous *Tilted Arc*, involving the removal of his site-specific sculpture from Federal Plaza in downtown Manhattan, provides an interesting example.<sup>58</sup> Although there was by no means a public consensus about the work,<sup>59</sup> it is fair to say that many, many people detested *Tilted Arc*.<sup>60</sup> Some of them, including people who worked in the building where the sculpture stood, waged a campaign against the piece. In response to this public vehemence, the government removed *Tilted Arc*; in Serra's view, the removal constituted destruction because the piece was site-specific.<sup>61</sup> He fought the government's action, bringing a variety of unsuccessful claims, but was unable to invoke VARA because his piece was destroyed before the statute was enacted. Had *Tilted Arc* been created after VARA's effective date, it might still be in Federal Plaza.<sup>62</sup> This case illustrates that artists will sometimes want to preserve works that many if not most members of the public wish to destroy or modify.<sup>63</sup>

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57. Compare the "right to repent" in some civil-law countries, which in theory allows some authors to withdraw already-published written work. See Merryman, *supra* note 5, at 1028 (and source cited therein).

58. Serra v. U.S. Gen'l Servs. Admin., 847 F.2d 1045 (2d Cir. 1988).

59. Many members of the art world testified on behalf of Serra. *Id.*

60. They detested it on a variety of grounds, only some aesthetic. *Id.* at 1047. I believe it was an extremely aggressive sculpture.

61. Based on the design of the piece, I find his claim convincing.

62. Could Serra have won had he created the work after VARA? Serra would have had to convince the court that the government had destroyed the work rather than merely relocated it, as the government argued. If *Tilted Arc* had been relocated, then the government's actions might arguably have been a modification of placement, excepted under VARA Section 106A(c)(2). Cf. Bd. of Managers of Soho Int'l Arts Condominium v. City of N.Y., No. 01 Civ. 1226, 2005 WL 1153752 (S.D.N.Y. May 13, 2005) (considering if relocating sculpture constituted destruction). Serra would also have had to prove the work was of "recognized stature." Because Serra is arguably the greatest living American sculptor, *Tilted Arc* should have easily qualified for "recognized stature." I am less confident that a court would have accepted the artistic importance of site specificity, although I think the piece was clearly site specific. The rationale articulated in a 2006 First Circuit decision further undermines the possibility that Serra would have received VARA protection. Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128 (1st Cir. 2006) (holding VARA inapplicable to site-specific art).

63. See also Carter v. Helmsley-Spear, 71 F.3d 77 (2d Cir. 1995) (holding that lobby installation was a work for hire and allowing removal). The Second Circuit's decision in *Carter* that the sculpture was outside VARA's scope was not inevitable. I suspect unstated policy implications affected the decision. To the extent there was an identifiable public interest, it arguably lay on the side of removal.

### 3. Making "Better" Art by Violating the Artist's Intent

Sometimes violating the artist's intent makes the work better from an artistic perspective. For example, Clement Greenberg, the great modernist critic and champion of master sculptor David Smith, reportedly changed some of Smith's sculptures after the artist's death in direct violation of Smith's wishes. Smith's most famous sculptures are in unpainted steel, but he sometimes executed painted steel forms as well. Greenberg found the unpainted work artistically superior. After Smith died, Greenberg, as executor of his estate, stripped several of the painted sculptures and exposed others to the elements, destroying their painted surfaces. He did so in direct violation of Smith's intent.<sup>64</sup> The art world was horrified, labeling Greenberg's act vandalism.<sup>65</sup> These accusations were well founded; there is clear evidence that Smith would have been outraged by Greenberg's violations and would have disowned the sculptures.<sup>66</sup>

And yet, consider this: Greenberg's vandalism, his flagrant violation of the artist's intent, made the sculptures "better."<sup>67</sup> The art market (although not necessarily a good indicator of artistic merit)<sup>68</sup> agreed with Greenberg: unpainted Smiths are more valuable than painted ones.<sup>69</sup> Critics, museums and collectors prize the unpainted over the painted sculptures.<sup>70</sup>

### 4. From Romantic Genius to Multiple Authors

The example of Smith and Greenberg shows that we might sometimes get "better" art if we allow subsequent users to violate the artist's intentions.<sup>71</sup> But this example also suggests something deeper about authorship, and in

64. Rosalind Krauss, *Changing the Work of David Smith*, ART IN AMERICA, Sept.-Oct. 1974, at 30, 31.

65. Merryman, *supra* note 5, at 1040 (internal citations omitted).

66. *Id.*

67. See *infra* Part V for discussion of the extraordinary complexity of defining what makes art "better."

68. Perhaps it should not even be a relevant one. In battles over government funding for art, the pro-funding side argues that the market cannot begin to support worthy art. And the market fluctuates and can be "wrong" or slow. Van Gogh is but one famous example of an artist prized today but impoverished in his lifetime. See *infra*, notes 200, 209 accompanying text, discussing the present art market's peculiarities.

69. Richard Serra, *Art and Censorship*, 17 CRITICAL INQUIRY 574, 576 (1991).

70. Even critic Rosalind Krauss, arguing for the importance of the painted work in Smith's oeuvre, still recognized the stripped work's appeal. Krauss, *supra* note 64, at 30.

Of course it is nearly impossible, as I have argued elsewhere, to pinpoint the proper method to evaluate artistic merit. See generally, Adler, *Post-Modern Art*, *supra* note 48 (analyzing lack of critical consensus for evaluating art and shifting evaluations of art over time; showing implications for obscenity law). In this case, the critical consensus favored Greenberg's preferences, but this observation may be circular since Greenberg's sensibility held such sway over critics. Merryman, *supra* note 5, at 1038 (arguing that higher prices may have reflected Greenberg's power).

71. Compare our attitude toward Greek sculpture, which we often forget was once painted. Krauss, *supra* note 64.

particular, about the assumptions regarding authorship that undergird moral rights law. Most of us share a fantasy of artistic creation, particularly in those moments of awe we feel when looking at works that move us. We imagine a solo genius author who had a vision and expressed it in the work. The work he touched now bears some trace of his genius. It is as if we can be in his presence by being in the presence of the work. It follows that we must preserve the work as he intended it to access his singular vision. This fantasy of artistic creation has persisted even though it has been under assault for a very long time, not only by scholars, but by artists themselves

Although assaults against the author as romantic genius tend to be associated with postmodernism, one does not need to resort to postmodern jargon about the “death of the author” to see that the romantic concept of a singular, all-knowing artist was always a distortion. If we look into the heart of modernism itself, to the greatest icon of modernist poetry, T.S. Eliot’s *The Waste Land*, we find an example of how complex authorship can be. In the dedication to the poem, Eliot writes “to Ezra Pound, il miglior fabbro” (“the better craftsman”).<sup>72</sup> Why did Eliot, author of one of the greatest poems of the century, call Pound “the better craftsman”? Apparently, Pound edited Eliot’s manuscript so heavily that Eliot credited Pound with turning *The Waste Land* “from a jumble of good and bad passages into a poem.”<sup>73</sup> Pound rescued from Eliot’s hand parts of the poem that now seem essential, as if Pound—not the author—understood better what the poem ultimately “meant.”<sup>74</sup> Why was Eliot “the author” and Pound merely “the editor”? When does writing stop and editing begin? Were they co-authors? And did *The Waste Land* have authors other than Eliot or Pound?

Eliot willingly collaborated with his editor. In contrast, the moral rights problems I examine in this Essay involve what I might charitably call “unwilling collaboration.” But the Eliot example still shows something important about authorship: even though we might imagine *The Waste Land* as a product of a singular artistic vision, its creation was far more complicated. From this perspective, we can begin to see many creative endeavors as the product of collaboration. The relationship between Pound and Eliot is merely one example of how multiple authors might lie beneath the surface of the singular author.

This hidden multiplicity of authorship has led to significant controversy in the realm of photography, where the printer of a photograph (often someone other than the photographer) exercises dramatic control over the resulting work.<sup>75</sup> Similar controversies about authorship arise in other realms where

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72. T.S. ELIOT, *THE WASTE LAND AND OTHER POEMS* 28 (1930).

73. RICHARD BADENHAUSEN, *T.S. ELIOT AND THE ART OF COLLABORATION* 76 (2004) (quoting T.S. Eliot, *On a Recent Piece of Criticism*, 10 *PURPOSE* 93 (1938)).

74. *Id.* at 75-79.

75. See Michael Rips, *Who Owns Seydou Keita?*, N.Y. TIMES, Jan. 22, 2006; see also

artists delegate the fabrication of their work to others. Consider the recent VARA litigation between MASS MoCA (the Massachusetts Museum of Contemporary Art) and Swiss artist Christoph Büchel over the museum's right to display the artist's enormous, unfinished installation.<sup>76</sup> The judge at oral argument questioned the artist's claim of sole authorship of the work given the process of its creation. Dwelling on the months spent by museum workers assembling the piece and acquiring objects for display, compared to the mere six weeks spent on site by the artist, the judge asked, "Who owns the work when what is being created is collaborative art? The museum spent most of the money and did most of the work."<sup>77</sup>

As the next section will show, it is not only what happens in the process of creation, but also the continuing life of the work that further complicates the notion of authorship.

### 5. Multiple Authors and Multiple Meanings: The Curator as Artist

At its most basic level, moral rights law assumes that the artist rather than subsequent users should control the meaning of his work. Moral rights scholars repeatedly invoke the need to protect authorial intention. Professor Merryman explained that the purpose of the right of integrity was to preserve "the work as the artist intended it."<sup>78</sup> Professor Kwall, one of the most important and passionate moral rights scholars, wrote that "the *essence* of moral rights protection is the idea of respect for the author's original meaning."<sup>79</sup> As she explained: "Assaults upon a work's integrity damage authorial dignity because the author's external embodiment of his message no longer represents his intended meaning."<sup>80</sup> Thus the right of integrity is fundamentally a right that protects authorial intention.

The belief—that we can discern, let alone police, artistic intention, that it is necessarily relevant to the meaning of a work—is premised on naïve theories

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Michael Kimmelman, *Walker Evans. Or Is It?*, N.Y. TIMES, Aug. 25, 2006. Cf. SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 310 (S.D.N.Y. 2000) (copyright dispute between printer and photographer).

76. Mass. Museum of Contemporary Art Found., Inc. v. Buchel, No. 07-30089-MAP, 2008 WL 2755842, at \*13 (D. Mass. July 11, 2008).

77. Posting of Paul Schmelzer to Off Center, <http://blogs.walkerart.org/offcenter/2007/09/22/mass-moca-wins-show-buchel-work/> (Sep. 22, 2007, 11:26 CDT) (quoting Judge Michael Ponsor).

78. Merryman, *supra* note 5, at 1041.

79. Kwall, *Inspiration*, *supra* note 5, at 1986 (emphasis added); see also *id.* at 1972 ("Central to moral rights is the idea of respect for the author's meaning and message as embodied in a tangible commodity . . .") (emphasis added). The French court in *Millet* stated that work must be preserved exactly as "it emerged from the imagination of its author and later conveyed to posterity without damage." Merryman, *supra* note 5 (quoting *Millet*, Tribunal de la Seine, May 20, 1911, Amm. I. 271). Merryman describes violating integrity as "misrepresent[ing] the artist's intention." *Id.*

80. Kwall, *Inspiration*, *supra* note 5, at 1975.



of interpretation.<sup>81</sup> But more importantly for our purposes, this belief is also particularly inapt when thinking about contemporary art. As I have argued previously elsewhere, one of the virtues of artistic expression is its capacity to convey multiple meanings.<sup>82</sup> Even when left intact, a work of art is constantly reworked and re-authored, depending on who views it and in what context.<sup>83</sup>

This multiplicitous quality of a work—its openness to being re-infused with meaning—permits us to imagine that there are multiple artists, even when only one artist created the original piece. Think of curating with this in mind. I propose that the curator (along with the “original” artist) is always an author of the art she displays. From the initial act of choosing to place an object in an art setting, to deciding on its lighting or placement, all curatorial choices change the meaning of a work. The growing reliance on wall text only highlights the curator’s ability to affect art’s meaning.<sup>84</sup> And all of these are changes that we should celebrate rather than mourn. In short, the curator is an artist.

Consider the conflict that arose in the 1990s around a traveling exhibition about artists’ responses to the pioneering photographer of movement Eadweard Muybridge. Included in the original exhibition was an early work by artist Sol Lewitt that used optics to show a woman’s nude body advancing toward the viewer. When the show came to the Museum of American Art, Elizabeth Broun, a curator there, objected to the Lewitt piece, claiming it raised associations of peepholes and was degrading to women. She proposed to move it to a separate room with wall text explaining the issue and a blank book for visitors to record their thoughts. Critics demonized Broun for her act of “censorship.”<sup>85</sup> Although I strongly disagree with Broun’s cramped interpretive stance—that the piece was *necessarily* degrading to women—I want to defend her actions on another level. Putting aside that she was altering a prior curator’s choices, her work was no more censorship than other decisions that curators make every day. The very choice of putting a Lewitt in a Muybridge show changed the meaning of the Lewitt. Putting it in a room and making it about objectification of female bodies would have changed its meaning as well. Even though Lewitt may have intended the work to be about Muybridge, surely that was not all he intended, nor should his intent hold the work hostage from other meanings or interpretations.

This example illustrates a problem with the assumption in moral rights

81. This Section depends heavily on my previous work. Adler, *What’s Left?*, *supra* note 48.

82. I treat these arguments in depth in Adler, *What’s Left?*, *supra* note 48, and also in Amy Adler, *The Thirty-Ninth Annual Donley Memorial Lectures: The Art of Censorship*, 103 W. VA. L. REV. 205 (2000).

83. Adler, *What’s Left?*, *supra* note 48, at 1541-46.

84. Blake Gopnik, *Read All About It: With Explanatory Labels Papering Museum Walls, Are We Still Looking at the Pictures They Explain?*, WASH. POST, Dec. 9, 2001 at G01 (describing the expanding role of wall text in the museum visitor’s experience).

85. Barbara Gamarekian, *Show Closing Demanded at Washington Museum*, N.Y. TIMES, July 13, 1991.

scholarship that a major purpose of the right of integrity is to protect an artist's intent about the meaning of his work.<sup>86</sup> It is important to note, however, that in spite of this theoretical foundation, VARA does not go so far as to allow an artist to sue a curator.<sup>87</sup> The statute provides that the "modification of a work of visual art which is the result of . . . the public presentation, including lighting and placement, of the work" is not a violation of the right of integrity.<sup>88</sup> Notwithstanding this limitation, however, the theoretical foundations of moral rights, advanced in the scholarship, rest on assumptions about meaning and authorship that are incompatible with the way we view and interpret art. As this example shows, art is constantly changing and we are constantly changing it. Rather than see such change as a violation of the spirit if not the letter of the law, we should see it as commitment to the vitality of art.

Some European moral rights laws might allow artists to sue their curators in circumstances similar to the example described above. Recently, the highest court in Germany protected a painter's control over the display of his paintings. The court held that "adding customized frames to paintings that extended" their patterns violated the painter's right of integrity.<sup>89</sup> In a famous Italian case, de Chirico sued a curator for over-representing his later work and under-representing his earlier work in a 1950 exhibition at the Venice biennale. The lower court found for de Chirico, but the appellate court reversed the decision on other grounds.<sup>90</sup> In spite of the victory, the very possibility of such a lawsuit disrupts the necessary collaboration, willing or not, between artist and curator.

### III

#### AGAINST INTEGRITY: THE VALUE OF DESTROYING AND ALTERING WORKS OF ART

"Use a Rembrandt as an ironing board"

—art work by Marcel Duchamp<sup>91</sup>

Here I make a claim that many might find repugnant: that there is an artistic value in modifying, defacing and even destroying unique works of art. In fact, these actions may reflect the essence of contemporary-art making. As a result, moral rights law endangers art in the name of protecting it. But is this

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86. See *supra* note 79.

87. Professor Merryman expressed clear disapproval of this possibility. Merryman, *supra* note 5, at 1048. He strictly limits his concern for artistic intentions to physical violations of works.

88. 17 U.S.C. § 106A(c)(2) (2000). Such modification is actionable if caused by gross negligence. *Id.*

89. See Rigamonti, *supra* note 8, at 366 (describing the *Hundertwasser* case, Bundesgerichtshof [BGH] [Federal Court of Justice], 150 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 32 (F.R.G.)).

90. MERRYMAN & ELSÉN, *supra* note 24, at 316.

91. Marcel Duchamp, *Apropos of "Ready-mades,"* Talk at the N.Y. Museum of Modern Art (Oct. 19, 1961), in *ART AND ARTISTS* (July 1966), at 47.

danger at least justified by a countervailing benefit? In the last section of this Part, I argue that moral-rights law does less good than we might assume. This is because the urgency of preserving contemporary works of art—the only kinds of works that VARA protects—has diminished in the wake of changes in contemporary culture.

### *A. The Artistic Value of Attacking Art*

Of course, there may be a non artistic value in destroying or defacing works of art. The history of regime change attests to this. Often the first act of a new regime is to destroy the prior one's art works, particularly public monuments, to symbolize change.<sup>92</sup> In revolutionary France, the painter Jacques-Louis David wrote: "Thus we shall pile up in Paris the effigies of the kings and their vile attributes to serve as the pedestal for the emblem of the French people."<sup>93</sup> Although there are compelling arguments in favor of preserving the remnants of an old regime, there is also a strong symbolic value to altering or destroying them, particularly when the fallen regime was a repressive one.

An analogous problem in this country is the question of whether to preserve racist public monuments from our history.<sup>94</sup> For example, in his book, *Written in Stone*, Sandy Levinson describes the dilemma faced by New Orleans in deciding what to do with a nineteenth-century monument to racism. On the one hand, there is a public interest in destroying the monument to symbolically repudiate the racist past. Destroying it would also avoid the risk of spreading its hateful message or seeming to endorse it. Yet on the other hand, if we destroy the monument, we lose a chance to study it as history or to be reminded of the continued need to fight racism. I submit that the best solution is one that draws on the principles of "creative destruction": to "create" a new work by vandalizing the monument.<sup>95</sup> Indeed, this is precisely what happened in 2004 when anti-racist vandals attacked the statue, defacing it with angry graffiti. Such mutilation preserves the memory of the past, but with a violent statement of repudiation, allowing both messages to co-exist.<sup>96</sup>

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92. Consider the history of the Soviet Union, the vast destruction of monuments in revolutionary France, or the symbolically fraught choices made during the invasion of Iraq regarding the Saddam statue.

93. JAKE & DINOS CHAPMAN, *Introduction to INSULT TO INJURY* (2004) (quoting David Proposes a Monument to the French People (1793)).

94. Compare the treatment of other remnants of racism, such as racist memorabilia. See Adler, *What's Left?*, *supra* note 48, at 1559, n.252 (comparing artists David Levinthal and Fred Wilson, both of whom work with racist memorabilia).

95. Cf. JOSEPH A. SCHUMPETER, *CAPITALISM SOCIALISM AND DEMOCRACY* (3d ed. 1962) (employing the concept of creative destruction).

96. A significant trend in European monument design is to re-use or mutilate vestiges of the tainted past. James E. Young, *The Counter-Monument: Memory Against Itself in Germany Today*, 18 *CRITICAL INQUIRY* 267 (1992); Allan Cochrane, *Making up Meanings in a Capital City: Power, Memory and Monuments in Berlin*, 13 *EUR. URB. & REG'L STUD.* 5 (2006).

Moral rights law assumes that the “public interest” in a work of art is always uniform and readily discernible, and that it always favors preservation. But as this example shows, the public may vehemently disagree about whether to preserve a work; the public interest may also change over time. Amidst the uncertainty, one can argue that it is sometimes in the public interest to mutilate a work rather than to preserve it.<sup>97</sup>

More to the point, there are vital *artistic* interests, not merely social or political ones, in altering, vandalizing or even destroying unique works. Of course, it is much easier to grasp the value of alteration or destruction when we think of changing *reproductions* of art rather than original, unique objects themselves. (One state’s moral rights law protects reproductions of artworks, not merely originals.)<sup>98</sup> The copyright concept of fair use attempts to capture this interest in altering reproductions.<sup>99</sup> Thus it is easy for law professors to describe dutifully the value of Duchamp drawing on a copy of the Mona Lisa in his famous L.H.O.O.Q. But it is one thing to draw on a *copy* of the Mona Lisa and quite another to draw on the Mona Lisa itself. That would be—perhaps—unbearable. The Mona Lisa is a masterpiece, a unique work, part of our shared cultural history, with an aura that persists even in this age of mechanical reproduction—isn’t it?<sup>100</sup>

Yet I want to argue that there is a value in modifying or even destroying the original artwork itself, not just the copy. Consider an example that straddles the border between modifying a reproduction and an original: the alteration of a revered, extremely rare, limited edition print series by Goya.

In 2001, artists Jake and Dinos Chapman bought one of the few remaining sets of Francisco de Goya’s canonical *Disasters of War* series. A meditation on the horrors of war, Goya’s prints are agonizing in their portrayal of brutality.

97. The complete destruction of a monument could also result in a new work; the absence of the sculpture becomes meaningful. As Vincent Scully mournfully observed about the destruction of the twin towers, “the vacancy becomes a presence we must recognize.” Alec Applebaum, *A Professor Learns to Love the Twin Towers—and Hate the Void They Left Behind* (*Q & A: Vincent Scully*), METROPOLIS MAG, Dec. 2001, available at [http://www.metropolismag.com/html/content\\_1201/scu/index.html](http://www.metropolismag.com/html/content_1201/scu/index.html).

98. See N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 2006). VARA doesn’t protect reproductions, but does protect limited editions. 17 U.S.C. § 106 (A) (1) (2000).

99. Although the fair use provisions of the Copyright Act technically apply to VARA, no fair use defense to a moral rights case has been adjudicated. I doubt a court would extend the provisions very far in the case of a permanent alteration of a unique work of art. The fair use concept seems to depend on copying. The original remains intact. Permanently defacing someone’s work to create a new one seems far more troubling than market damages caused by unauthorized copies. The hearings on VARA hint that Congress didn’t envision the fair use exception being easily invoked in this context: “The Committee does not want to preclude fair use claims in this context. However, it recognizes that it is *unlikely that such claims will be appropriate . . .*” H.R. REP. NO. 101-514, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6932 (emphasis added). The House Report stated 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 involving a work reproduced in potentially unlimited copies.” *Id.*

100. But see *infra* Part III.C.

Robert Hughes deemed the series “the greatest antiwar manifesto in the history of art.”<sup>101</sup> It has been idolized by artists, inspiring, for example, Picasso’s *Guernica*.<sup>102</sup> Indeed, the series has been called “the most revered set of prints in existence.”<sup>103</sup> It is also extremely rare: the Goya Foundation produced forty sets in total as a limited edition in 1937 from the artist’s original plates.<sup>104</sup> The set that Jake and Dinos Chapman acquired was all the more extraordinary because it was complete and in mint condition. A critic said of the set they bought: “In terms of print connoisseurship, in terms of art history, in any terms, this is a treasure . . . .”<sup>105</sup>

The Chapman brothers took this “treasure”—this rare and precious expression of art’s moral power—and systematically defaced it. Instead of the faces of Goya’s agonized victims of war, the artists superimposed drawings of puppies and clowns. Claiming that they had “rectified” the images, they called the new work “Insult to Injury.” Critic Jonathan Jones wrote of the Chapman’s act of vandalism: “To destroy a work of art is a genuinely nasty, insane, deviant thing to do. What the Chapmans have released is something nasty, psychotic and value-free.”<sup>106</sup>

But, curiously, as Jones thought about the piece, he began to see redemption in the Chapmans’ act of shocking deviance. Viewing their work as an extension rather than desecration of Goya’s despair, he wrote: “What they share with [Goya] is the most primitive and archaic and Catholic pessimism of his art—the sense not just of irrationality but something more tangible and diabolic. The Chapmans have remade Goya’s masterpiece for a century which has rediscovered evil. And I have fallen into their trap.”<sup>107</sup> The Chapmans’ “insanity” and “deviance” become essential to the work, a way of recreating the horror that Goya conveyed. But this time, the horror becomes more complicated: the Chapmans also assaulted the possibilities of art. Goya, as the Chapmans remind us, was a symbol of the “individuated Romantic artist.”<sup>108</sup> Goya held out hope that art could address our deepest humanity.<sup>109</sup> By attacking the ultimate expression of art’s moral voice, *Insult to Injury* becomes a meditation on the loss of that conception of art.<sup>110</sup> The Chapmans’ work proclaims that the romantic idea of art as an exalted realm, expressive of our humanity and imbued with the creative spirit of the author, is over. Their work

101. ROBERT HUGHES, *GOYA* 304 (2003).

102. Alan Riding, *Goya Probably Would not be Amused*, N.Y. TIMES, Apr. 6, 2003.

103. Jonathan Jones, *Look What We Did*, GUARDIAN, March 31, 2003.

104. Goya produced the plates between 1810–1829, but they were too daring to print during his lifetime. KERSTIN MEY, ART AND OBSCENITY 58 (2007).

105. Jones, *supra* note 103.

106. *Id.*

107. *Id.*

108. CHAPMAN, *Introduction to INSULT TO INJURY*, *supra* note 93.

109. Hughes, *supra* note 101.

110. To fully understand this loss, see Part IV.

attacks the very idea of art that moral rights seek to protect.

With this in mind, consider now a “creative” attack on a unique work: Robert Rauschenberg’s “Erased de Kooning Drawing.” In 1953, Rauschenberg took a drawing by Willem de Kooning and spent a month erasing it.<sup>111</sup> The resulting work is a “sheet of paper bearing the faint, ghostly shadow of its former markings.”<sup>112</sup> Entitling the work “Erased de Kooning Drawing/Robert Rauschenberg/1953,” Rauschenberg exhibited the erasure as his own art. Rauschenberg wrote: “I wanted to create a work of art by [erasing] . . . Using my own work wasn’t satisfactory . . . I realized that it had to be something by someone who everybody agreed was great, and the most logical person for that was de Kooning.”<sup>113</sup>

Here is an example of how art can emerge from the near destruction of a previous piece. The Rauschenberg work depends on the fact that he violated not a reproduction of a work but an original, and not just any original, but an original by Willem de Kooning.<sup>114</sup> To fully grasp the radical quality of Rauschenberg’s work, one must remember the place of de Kooning in 1950s America. At that time, abstract expressionism so dominated American art (and our artistic place in the world) that de Kooning and his compatriots had come to be viewed as heroic and almost godlike. In that climate, erasing a drawing by de Kooning was a shocking, sacrilegious act. It captured, perhaps better than anything else Rauschenberg did, his scandalous assault on a particular conception of “art.” For the generation of artists after de Kooning the question was: how would it be possible to make art in the wake of the godlike artists who came before them?<sup>115</sup> Rauschenberg’s answer was that new art might be about its own failure to achieve greatness, its impotent rebellion against the heroic past. Rauschenberg began to make art that, in the words of Douglas Crimp, was about “its own destruction.”<sup>116</sup>

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111. It is important that De Kooning *gave* the drawing to Rauschenberg. Thus, even if the drawing had been protected by VARA, this was a willing collaboration, not a moral rights violation. As with the example of Goya, above, I offer this example to establish that destruction and modification are central modes of creation.

112. CALVIN TOMKINS, *OFF THE WALL* 97 (1980).

113. CALVIN TOMKINS, *THE BRIDE AND THE BACHELORS: FIVE MASTERS OF THE AVANT GARDE* 210 (Penguin Books, 1976) (1965).

114. It may be hard for us to appreciate now how radical Rauschenberg was. We might have some insight into the issue from the current valuation of de Kooning in the art market: a small de Kooning drawing was recently on view at Christie’s for three million dollars.

115. My reading here, pun half-intended, is influenced by HAROLD BLOOM, *THE ANXIETY OF INFLUENCE* (2d ed. 1997).

116. DOUGLAS CRIMP, *ON THE MUSEUM’S RUINS* 56 (1993) (explaining that in Rauschenberg’s work, “photography began to conspire with painting in its own destruction”).

*B. Reconceiving Art as the Destruction of Art*

“I was trying to make art and therefore I had to erase art.”

—Rauschenberg<sup>117</sup>

As I contend above, destroying art can be a valuable way of making art. But I want to claim something more. Destruction is not simply an occasionally valuable thing, but rather, a central quality of “art” itself. This is because of a surprising development within art history: “art” as a category has come to be about its own metaphorical destruction. If we accept this precept, then the physical destruction of works of art becomes a powerful expression of the metaphorical *essence* of art. In the following sections, I begin by arguing that metaphorical destruction lies at the heart of contemporary art. I then offer a glimpse of the broader place of destruction in art history.<sup>118</sup>

*1. From Dada and Pop to Postmodernism: Contemporary Art as the Destruction of “Art”*

“[T]he most ambitious art will henceforth ‘make history’ by . . . committing acts of destruction against what is most valued.”

—Alan Liu, *The Laws of Cool*<sup>119</sup>

In 2006, a French performance artist used a hammer to attack the venerated 1917 sculpture *Fountain* by Marcel Duchamp.<sup>120</sup> Duchamp’s most notorious work, *Fountain* was a “readymade” manufactured urinal which he elevated to the status of art by placing it in a gallery setting.<sup>121</sup> The French artist who attacked *Fountain*, Pierre Pinoncelli, claimed upon his arrest that his vandalism was itself a work of art. He also claimed that the new art work he made in his attack was in the spirit of Duchamp.<sup>122</sup>

I think he was right on both counts. Crazy, but right. Like Rauschenberg or the Chapman brothers, Pinoncelli made a new work of art by attacking an

117. ROBERT RAUSCHENBERG, BARBARA ROSE & ELIZABETH AVEDON, RAUSCHENBERG 51 (1987).

118. Two exceptionally important caveats are necessary. First, for the sake of argument, I have dramatically oversimplified my narrative about contemporary art and art history. This is essential to emphasize because of the extreme pluralism that characterizes recent art. Second, my argument is also contentious. I have taken a strong position on the state of affairs in art, and although some scholars, critics, curators and artists would likely agree with me, I have no doubt that others would vigorously contest my account.

119. ALAN LIU, *THE LAWS OF COOL* 8 (2004).

120. Note that no “original” of the 1917 work exists. Eight are in existence. See Part III.C. discussing preservation and authenticity. Duchamp turned the urinal on its side and submitted it under the pseudonym “R. Mutt” to a 1917 exhibition. It was refused.

121. Duchamp’s pseudonymous signature was also significant in this regard; it simultaneously transformed the urinal into “art” while undermining the concept of “art.” This was not the first attack against *Fountain*. In 2001, two artists urinated on the *Fountain* in the Tate Modern. Alan Riding, *Conceptual Artist as Vandal: Walk Tall and Carry a Little Hammer (or Ax)*, N.Y. TIMES, Jan. 7, 2006.

122. *Id.*

old one. But while both Rauschenberg and the Chapmans chose art that was romantic and heroic, Pinoncelli's choice of target gave his creation a different meaning. By attacking a Duchamp, he was indeed working in that artist's spirit. This spirit exposes something deeper about the centrality of destruction to contemporary art-making.

Consider the work that was the target of Pinoncelli's attack. Duchamp's initial intervention into artistic discourse—inserting a lowly, commercially manufactured urinal into gallery space and calling it art—was itself an act of metaphorical destruction. French sociologist Pierre Bourdieu spoke of the Duchampian readymade as “a ritual desecration” of art. Duchamp's *Fountain* was an assault on the sacred boundary between art and everyday objects. By violating this boundary, his work attacked the category of “art” itself. Another work of Duchamp's underscores the shocking violence of his stance. That work was a proposed “reciprocal readymade” consisting of an injunction to the viewer: “*Use a Rembrandt as an ironing board.*” Duchamp's oeuvre is aptly called “anti-art.”<sup>123</sup>

Anti-art was not a passing creed. Although out of vogue for several decades, Duchamp's work caught the attention of pop artists like Rauschenberg at mid-century. And since at least the 1980s, Duchamp has become transcendent in his influence. Renowned critic and philosopher Arthur Danto describes the contemporary art world as almost completely “defined by Duchamp as its generative thinker.”<sup>124</sup> A recent poll of five hundred art critics called Duchamp's *Fountain* “the most influential work of modern art” by any artist.<sup>125</sup> Contemporary artists (postmodern and post-postmodern) have taken up his destructive spirit with a vengeance.

For instance, critic Alan Liu writes that the strong art of the future “will be about the ‘destruction of destruction’ . . . the recognition of the destructiveness in creation.”<sup>126</sup> He argues that the art of destruction has become the central theme of digital art, evident, for example, in art from collectives like Critical Art Ensemble, which makes “hacktivism” or disturbance art.<sup>127</sup> These artists draw on a rich late twentieth century history of “Destruction Art,” the name of the school associated with artist Gustav Metzger. Jean Tinguely's self-destructing sculptures and machine happenings are another paradigm. For example, Tinguely created a “machine for the destruction of sculptures” that

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123. For background, see, for example, JANIS MINK, *MARCEL DUCHAMP, 1887–1968: ART AS ANTI-ART* (1995); HANS RICHTER, *DADA: ART AND ANTI-ART* (David Britt trans., 1997) (1965).

124. ARTHUR DANTO, *AFTER THE END OF ART* 85 (1997) [hereinafter DANTO, *AFTER THE END OF ART*].

125. BBC News, *Duchamp Urinal Tops Survey*, Dec. 1, 2004, available at <http://news.bbc.co.uk/1/hi/entertainment/arts/4059997.stm>.

126. LIU, *supra* note 119, at 8–9.

127. *Id.*



was itself later destroyed.<sup>128</sup>

Walking through Chelsea galleries today, one can sense this destructive spirit.<sup>129</sup> Consider one of the most celebrated shows of 2007, Turner Prize winner Simon Starling's exhibition.<sup>130</sup> Starling took a boat into the water and hacked it into pieces until it was gone. The "work of art," such as it is, consists of nothing more than a lone slide projector showing still images of Starling destroying his boat until it sinks. Two prominent group shows from the summer of 2008 were organized to display destruction as a mode of artistic creation. "Cancelled, Erased, Removed," at the Sean Kelly Gallery, showed artists whose creative process depended on erasing or removing images; the show took its "conceptual point of departure [from] Robert Rauschenberg's *Erased de Kooning*."<sup>131</sup> "Who's Afraid of Jasper Johns," the critical hit of the summer season, was a meditation on art as a kind of "vandalism updated for our digital age."<sup>132</sup> Inspired by a notorious attack against an artwork, the mind-bending show consisted of one exhibition displayed on top of a precise replica of a previous one that had itself raised the issue of vandalism.<sup>133</sup>

Destruction is also at the heart of a controversy unfolding in New York. In 2007, a mysterious vandal began attacking the work of street artists in Brooklyn by throwing colorful buckets of paint on them. The vandal was quickly dubbed "the Splasher." His choice of target was not run-of-the-mill graffiti but rather pieces by highly-acclaimed street artists, such as Swoon<sup>134</sup> and Faile,<sup>135</sup> whose works appear on the street—often illegally—but also in major museums and galleries.<sup>136</sup> Although we don't know the Splasher's

128. A wide range of recent artists, from Gordon Matta-Clark, to Felix Gonzalez-Torres, to Urs Fischer, make work that seems indebted to Tinguely. Cf. Man Ray's 1923 assemblage *Object to Be Destroyed*. The piece was stolen and destroyed. Man Ray recreated it, naming it *Indestructible Object*.

129. Once again, I describe these works not because they necessarily involve technical violations of VARA but rather because they expose the vital importance of destruction as a mode of creation in the contemporary art world.

130. Simon Starling 2007, <http://chelseaartgalleries.com/Casey+Kaplan/Simon+Starling+2007.html>. Starling used the wooden pieces chopped from the boat to fuel it as it sank.

131. Press Release, *Cancelled, Erased & Removed* (June 21, 2008), [http://www.skny.com/exhibitions/2008-06-21\\_cancelled-erased-and-removed/pressrelease/](http://www.skny.com/exhibitions/2008-06-21_cancelled-erased-and-removed/pressrelease/).

132. R.C. Baker, *Digital Vandalism at Shafrazi Gallery*, VILLAGE VOICE, June 3, 2008, available at <http://www.villagevoice.com/2008-06-03/art/likes-all-lies/>.

133. Roberta Smith, *When Artworks Collide*, N.Y. TIMES, May 16, 2008, at E25. The show was inspired, in part, by the history of the Tony Shafrazi Gallery where it took place: Shafrazi rose to fame for defacing Picasso's *Guernica*. See *infra* note 153 and accompanying text. The title of the show also alludes to a famous painting that had been vandalized, Barnett Newman's *Who's Afraid of Red, Yellow and Blue?* Furthermore, the underlying exhibition, featuring four prominent graffiti artists, also implicated vandalism; some of their works originally appeared in subway stations and other public spaces.

134. Kirk Semple, *Lawbreakers, Armed with Paint and Paste; Underground Artists Take to the Streets*, N.Y. TIMES, July 9, 2004, at B1.

135. *Id.*

136. Colin Moynihan, *Defacer with Mystery Agenda Is Attacking Street Art*, N.Y. TIMES,

identity, we do know that he<sup>137</sup> considers himself an artist. His manifesto, deposited at the site of his attacks, includes the motto “The passion for destruction is a creative passion.”<sup>138</sup> The art collective Faile offered an extraordinary response to the Splasher’s attacks on their artworks. Faile created new pieces from the violated originals, incorporating the Splasher’s modifications. A member of Faile said, “We’re going to start co-opting it and just embracing [the attacks].”<sup>139</sup>

This is a vision of art completely at odds with the moral rights regime. Art becomes a dialogue among vandals, in which destruction and creation merge. The initial artist/vandal creates work by “destroying” property; the Splasher mutilates the initial artist’s work in an act of “creative passion”; the first artist builds upon the previous destruction, modifying it to create yet another artwork. In my view, this model of creative vitality captures the ethos of the present era. Yet it is worlds away from the model of creation that moral rights law presumes.

The interest in destruction is so pervasive in contemporary art that, in 2002, French critic Bruno Latour declared: “Art has become a synonym for the destruction of art.”<sup>140</sup> In fact, as I argue in Part IV, the defining feature of contemporary art has been its attack on the coherence of “art” as a category. In this light, physical attacks against art objects can be understood as particularly valuable forms of expression. Moral rights law therefore rests on a vision of art at odds with contemporary art practice. The law obstructs rather than enables the creation of art.

I return to the contemporary assault on “art” in Part IV. In the next Section, however, I look at art’s past, briefly exploring the importance of destruction in art history. Although the metaphorical (and sometimes physical) destruction of art is a central tenet of postmodernism, art’s reliance on destruction has a longer history. Destruction was also central to modernism, the very movement against which contemporary art rebels.

## 2. *Situating Destruction within the History of Art*

“‘Creation’ itself may be constituted of several interventions . . . . Some of these interventions aimed at lengthening [the object’s] existence, others . . . at terminating it, and many—maybe all—at modifying it.”

—Dario Gamboni<sup>141</sup>

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Mar. 7, 2007, at B2.

137. Rumor has it that the Splasher is a man.

138. Alex Mindlin, *For Vandals, an Ironic Target: Street Artists*, N.Y. TIMES, Jan. 28, 2007, § 14, at 6.

139. *Id.* (quoting a member of Faile).

140. Latour, *supra* note 1, at 21.

141. GAMBONI, *supra* note 2, at 25.

"The desire to create art always expresses itself as the desire to destroy art."

—NewYorkisDead.biz (Gavin Brown Gallery)

"I want to assassinate painting."

—Joan Miró<sup>142</sup>

Describing how "intimate destructivity has always been to creativity," Alan Liu writes that "the history of art is incomprehensible without a matching history of 'de-arting.'"<sup>143</sup> Certainly, one could see destruction as a central principle of twentieth century modernism. Inherent in the idea of the avant-garde, valorized by modernism, is the idea of continually breaking with the past. Modernism depended on shattering tradition; the progress of art entailed a kind of metaphorical iconoclasm.<sup>144</sup>

Other periods in the history of art have also pictured destruction as integral to creation. In the nineteenth century, for example, the idea arose that artists needed to destroy past art to free themselves from its weight. A blank slate would liberate the individual genius to create something new. Thus novelist Joris-Karl Huysmans wrote at the turn of the century: "Fire is the essential artist of our time. And the architecture of the [past] so pitiful when it is raw, becomes imposing, almost splendid, when it is baked."<sup>145</sup> Similarly, in 1851, anarchist philosopher Pierre-Joseph Proudhon called for burning museums. He explained that it was only "once the past was forgotten [that] we would do something."<sup>146</sup> One striking modern example of the idea that creativity requires destruction of the past comes from Jasper Johns. While he was still an unknown artist, Johns decided to destroy all of his work "with a view to purging himself of influence."<sup>147</sup> The strategy seems to have worked. After destroying his art, Johns had a dream about painting a flag. Thus began his iconic flag series, the work that established his greatness.<sup>148</sup>

142. MoMA.org, Exhibitions 2008, Joan Miró: Painting and Anti-Painting 1927–1937, <http://www.moma.org/exhibitions/exhibitions.php?id=3993> (last visited Nov. 24, 2008). A reviewer of this exhibition wrote: "Amputate tradition, torture the past, terrorize the present. The impulse to destroy was part of what" defined early modern art. Holland Cotter, *Miró, Serial Murderer of Artistic Conventions*, N.Y. TIMES, Oct. 30, 2008, at C23.

143. LIU, *supra* note 119, at 327.

144. Although I note a commonality between modernism and postmodernism, their targets of destruction differ. Modernism destroyed *tradition*, not the artist/genius. Postmodernism destroyed the latter as part of a broader attack on individuality. One might also consider the ascetic, anti-representational turn in art, evident in works by such varied artists as Mondrian, Kandinsky, Rothko, Hoffmann, Reinhardt, Motherwell, as evidencing an iconoclastic impulse.

145. J-K HUYSMANS, CERTAINS 29 (1889) (quote translated from the original French by Amy Adler).

146. JAMES M. THOMPSON, TWENTIETH CENTURY THEORIES OF ART 277 (1990). Similarly, Italian Futurists such as Marinetti wanted to demolish museums. GAMBONI, *supra* note 2, at 259.

147. Louis Menand, *Capture the Flag*, SLATE, Oct. 30, 1996, <http://www.slate.com/id/2905>.

148. *Id.*

Another rationale for destruction in the name of advancing art arose in the modern period: modifying the original artists' efforts would renew works of art and rescue them from death in the museum/mausoleum.<sup>149</sup> As artist Felix Gmelin observed, when we turn a picture into a "masterpiece, the museum helps to make the picture historic, thereby rendering it invisible in the present."<sup>150</sup> Asgor Jorn, a post-war artist, took this view a step further, contending that mutilation would revive art that had been entombed in museums. He argued that artists should "improve old canvases, collections and entire museums" by painting over pictures.<sup>151</sup> This vandalism would not destroy the works; rather, it would "preserve their actuality and . . . help them from falling into oblivion."<sup>152</sup> When art critic Tony Shafrazi defaced Picasso's *Guernica* by spray-painting on it the year after Picasso's death, his actions could be interpreted as putting this theory into practice. He claimed that he attacked the painting because he wanted to "bring the art absolutely up to date, to retrieve it from art history and give it life."<sup>153</sup> In a similar gesture, artist Hans Haacke broke replicas of Duchamp's readymades because he believed they had been transformed from vital art into "relics."<sup>154</sup>

There is even a movement in contemporary scholarship to reclaim iconoclasm itself as a form of art. There is precedent for this position. One of the leading artists of the Fluxus movement of the 1960s described Byzantine iconoclasm as the inspiration for Fluxus.<sup>155</sup> The recent and important "Iconoclasm" exhibition in Germany began from this principle. Bruno Latour, a curator of the show, wrote that the exhibition's premise was to picture iconoclasm as not merely the destruction of art, but rather as a "source of new images."<sup>156</sup> In the same vein, W.J.T. Mitchell, the father of the field of "visual studies" wrote in 2005: "[I]conoclasm is more than just the destruction of images; it is a 'creative destruction' in which a secondary image of defacement or annihilation is created at the same moment that the 'target' image is

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149. Adorno called museums "sepulchers" of art. THEODOR W. ADORNO, *Valéry Proust Museum*, in PRISMS 175, 181 (Samuel & Shierry Weber trans., 1981) (1967). See also CRIMP, *supra* note 116.

150. Dario Gamboni, *Image to Destroy, Indestructible Image*, in ICONOCLASH, *supra* note 1, at 88, 127.

151. *Id.* at 124.

152. *Id.*

153. *Id.* Although most in the art world decry attacks on art, there have been defenders. For example, in 1997, performance artist Alexander Brener sprayed a dollar sign on a Malevich painting in Amsterdam, calling his action "'a political and cultural action against corruption and elitism in culture.'" *Id.* at 127. The editor and publisher of *Flash Art* defended the artist/vandal, calling his arrest "an offense to the artist's freedom of expression." *Id.*

154. *Id.* at 124.

155. KEN FRIEDMAN, THE FLUXUS READER 95 (Ken Friedman ed., 1998). Fluxus was an international, experimental art movement dating from the early 1960s. A highly eclectic movement that traversed different media, Fluxus drew on (and in some cases influenced) other artistic movements including performance art, conceptual art and Dada.

156. Latour, *supra* note 1, at 21 (emphasis omitted).

attacked.”<sup>157</sup>

This history suggests that moral rights’ quest to preserve physical integrity overlooks the central role of metaphorical and indeed physical destruction in art. I do not claim, however, that destruction and mutilation are always valuable. In many cases, perhaps most, it may turn out that the original object was “better” than the subsequent one produced from its destruction.<sup>158</sup> Furthermore, there is a long and sinister history of attacks on art, shown, for example, in the Taliban’s recent, tragic destruction of the Bamiyan Buddhas in Afghanistan or the hateful Nazi attacks on “degenerate art.”<sup>159</sup> But this history is not the only one. At least when we are dealing with contemporary art, we should seek a deeper and more complicated understanding of integrity and destruction. And contemporary art—art created since June 1991—is the *only* kind of art that VARA protects. We may be truer to the spirit of contemporary art if we start from the premise that it exists to be violated, reworked, and even destroyed rather than to be embalmed and preserved just as the artist intended.

Thus the right of integrity imposes a cost on art. And as I argue in the next section, its benefit to art is surprisingly less significant than we might expect.

### *C. The Diminished Value of Authenticity and Preservation*

“Whatever art is, it is no longer something primarily to be looked at.”

—Arthur Danto, *After the End of Art*<sup>160</sup>

Have you ever seen the Mona Lisa? Isn’t it disappointing? There you are, seeking to be in the presence of greatness, and instead, there are fifty people in your way, cameras whirring, and there’s bulletproof glass blocking your view, and the picture itself is so surprisingly small. But perhaps the biggest letdown is that you’ve already seen the Mona Lisa, even if this is your first time in the Louvre. You’ve seen the Mona Lisa so many times that you can’t even “see” the real one anymore. What do we hope for when we go to see it at the Louvre in the first place? What is this magic we seek in the presence of the painting? Perhaps we hope that the thing itself will exceed anything conveyed by its reproductions. Perhaps we hope that by being near the original object, we will be in the presence of Leonardo’s genius. It is as if we seek some sort of grace.

157. W.J.T. MITCHELL, *WHAT DO PICTURES WANT?* 18 (2005).

158. Of course, as I discuss in Part V, defining which is “better” is extraordinarily complex. We would have to worry about who should make the determination, and also when it should be made, since our estimation of art often shifts dramatically over time.

159. See GAMBONI, *supra* note 2, at 45-47 (discussing Nazi attacks on so called “degenerate art”); LATOUR, *supra* note 1, at 18-19 (describing Taliban destruction of Buddhas in 2001).

160. DANTO, *AFTER THE END OF ART*, *supra* note 124, at 16; see also SYLVÉRE LOTRINGER & PAUL VIRILIO, *THE ACCIDENT OF ART* 73 (Michael Taormina trans. 2005) (“The visual arts no longer speak to the eyes.”).

Walter Benjamin would say that we seek the painting's "aura."

Yet as Benjamin presciently saw, endless reproductions of unique works of art would ultimately destroy their aura.<sup>161</sup> Writing in 1936, Benjamin could never have imagined how true his vision would become in our digital culture of endless copying. There is no more aura. We can't fully experience the magic of the Mona Lisa because it is gone; it is a casualty of the triumph of mechanical reproduction.<sup>162</sup> And it is not only mechanical reproduction—with its relentless mediation of our vision—that has ushered in this loss. The loss might also come from the very act of honoring and revering the work. As noted above, one artist warned that when we turn a picture into a masterpiece, we render it "invisible in the present."<sup>163</sup>

This reality has influenced my analysis of moral rights law. Moral rights law seeks to preserve unique objects, but these objects are already in some way lost. The desire to preserve the real thing made sense when moral rights were born in nineteenth century France. As Professor Merryman has argued, preserving works of art exactly as the artist intended them is crucial because "[w]e yearn for the authentic, for contact with the work in its true version."<sup>164</sup> But if we cannot see the "true" Mona Lisa anymore, the value of preserving the painting diminishes. At the same time, those very reproductions that destroyed the aura of the original have become rivals to the thing itself. To the extent that we want to preserve great works of art in order to protect our shared vocabulary—the primary rationale advanced in moral rights scholarship for the public interest in preservation—reproductions are no longer as paltry an alternative to the real thing as we might believe.<sup>165</sup> Furthermore, since these

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161. Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 217 (Hannah Arendt ed., Harry Zohn trans., 1968) (1955) ("The situations into which the product of mechanical reproduction can be brought may not touch the actual work of art, yet the quality of its presence is always depreciated . . . . [T]hat which withers in the age of mechanical reproduction is the aura of the work of art.").

162. In 1911, after the Mona Lisa was stolen, people lined up to look at the empty space on the wall where it had been in the Louvre. See ROY McMULLEN, *MONA LISA: THE PICTURE AND THE MYTH* 200 (1975). I believe our modern pilgrimage to the painting bears an echo of this—among the things we look at is a marker of what is lost.

163. Gamboni, *supra* note 150, at 127 (emphasis supplied).

164. Merryman, *supra* note 5, at 1041. Cf. HAL FOSTER, *Preface to THE ANTI-AESTHETIC* 10 (Hal Foster ed., 1983) (describing shift from viewing artifacts as modernist "works" to "contingent" postmodernist "texts"). It follows that the importance of preservation diminishes.

165. I am most comfortable with this argument when applied to painting and two dimensional art forms. Sculpture and architecture pose deeper problems because of the difficulty of translating their spatial components into two dimensions. (Sculptures are more easily reproduced in three dimensions than architecture, but neither can be satisfactorily reproduced in the 2D world of cyberspace.) Finally, my argument responds to the claim in moral rights scholarship that preservation is important because it assures our common vocabulary. Thus I focus on the *aesthetic* value of works of art. Reproductions deny scholars important historical information (as well as other kinds of valuable information, for example about authenticity). Furthermore, although the aura is lost, we don't easily admit it. Perhaps the sense of authenticity that many feel before the "real thing" might still be valuable, even if it is based on what I believe

reproductions are so widely available, and to the extent we cannot see the “real” Mona Lisa anymore, the value of the original as opposed to the copy diminishes. Yes, I know that a digital reproduction can’t convey lushness, texture, the true color of paint, the power of scale, and other unique aspects of a particular work.<sup>166</sup> Of course, I recognize the limits of reproductions compared to the real thing. But we also must recognize the limits of the real thing in a world of reproductions.<sup>167</sup>

In fact, although they certainly don’t inveigh against preservation, theorists as diverse as Jean Baudrillard,<sup>168</sup> Ludwig Feuerbach,<sup>169</sup> and Bill Miller have observed that we sometimes *prefer* reproductions to originals. Miller, for example, describes our “shame of having felt more for a photo or reproduction than for the thing itself.”<sup>170</sup>

There are further reasons why the concept of integrity in moral rights law seems less urgent to me than it might once have. This is because when dealing with contemporary art works—again, the only kind that VARA protects—we must consider the difference between what “art” means today and what it meant in the past. The word “art” used to invoke beauty, mastery and transcendence. But postmodern art, drawing on Dada and Pop, moved art from the realm of the beautiful, physical, or even visual to the realm of the conceptual. Arthur Danto writes that in contemporary art, “visuality drops away, as little relevant to the essence of art as beauty proved to have been.”<sup>171</sup> Compare the experience of viewing a Duchamp urinal with the experience of viewing a Rembrandt painting. I am not saying that viewing the former is devoid of value (although Duchamp himself was dismayed when people evaluated *Fountain* aesthetically).<sup>172</sup> But, in contrast to the Rembrandt, it is clear that a great deal of the value of the Duchamp is conveyed simply by describing it and how it was made (or not) by the artist: “Duchamp took a manufactured urinal and put

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is a fantasy.

166. Of course, good digital reproductions could reproduce scale and color. And non-digital reproductions—forgeries, for example—can capture texture and can be astonishingly convincing.

167. Important questions arise: if the aura is gone, why do artists need to destroy originals? Won’t copies suffice? I think that someday, perhaps, copies will suffice. Indeed the interest in destruction may soon wane. We are in a moment of transition as we are bombarded by limitless reproduction. It is hard to predict how we will one day regard the notions of “original” and “copy.” But for now, many of us still believe in the aura, or at least still long for it. The destruction of the original still hurts. Thus, the shock of such destruction forces us, perhaps better than any other conceivable artistic action, to confront the aura’s decline.

168. See Jean Baudrillard, *The Precession of Simulacra*, in *ART AFTER MODERNISM: RETHINKING REPRESENTATION* 253 (Brian Wallis ed., 1984).

169. LUDWIG FEUERBACH, *Preface to THE ESSENCE OF CHRISTIANITY* (Harper Torchbook ed., George Eliot trans., 1957) (stating that our era “prefers the image to the thing, the copy to the original, the representation to the reality”).

170. WILLIAM I. MILLER, *FAKING IT* 161 (2003).

171. DANTO, *AFTER THE END OF ART*, *supra* note 124, at 16.

172. Duchamp complained in dismay that critics “admire [my readymades] for their aesthetic beauty.” *Id.* at 84.

it in a gallery space.” Given this move of art from the physical to the conceptual realm, the value of preserving physical objects that artists make today is diminished.

Indeed, much contemporary art reflects this loss of interest in the object. The curators of the recent Whitney Biennial<sup>173</sup> described two major themes of the show as “failure” and “ephemerality.”<sup>174</sup> On a recent trip to Chelsea galleries, I saw abundant evidence of the theoretically-touted “dematerialization of art.”<sup>175</sup> I saw gallery after gallery of works that reveled in their physical contingency: self-destroying boats, gnawed piles of chocolates, and crumpled notes casually tacked to the wall. Of course there are still many artists who continue to make lushly beautiful, virtuosic work. But often their work exists on conceptual as well as formal levels.<sup>176</sup> For example, the “hot” contemporary painter John Currin isn’t just a great painter; part of the point of his work is that he paints so masterfully after painting was pronounced dead. Currin paints as if there were quotation marks around the word “painter,” marking it off as a sly conceptual move.

Finally, moral rights’ focus on preservation glosses over what a deeply unstable concept “preservation” is. As noted above, some critics and artists maintain that “preservation” of a work in a museum is itself a form of destruction. Adorno called museums “sepulchers”;<sup>177</sup> Pissarro called them “necropolises.”<sup>178</sup> Some artists intend their work to age ungracefully, to show the vagaries of time. Brice Marden has directed preservationists not to repair accidental scuffs and other damage done to his monochromatic paintings.<sup>179</sup> For other artists, part of the point of the work may be that it will fall apart. George Herms called his early assemblage works an “indictment of materialism”; preserving them might then be a contradiction.<sup>180</sup>

Sculptor Eva Hesse did pioneering work in the 1960s in fragile, new materials such as resin, latex, and fiber.<sup>181</sup> Hesse died, tragically young, in 1970. Some of her sculptures are disintegrating; they may not last. Was it part of the art that the pieces would degrade? Or was it her intent to have them somehow preserved? Would “preservation” destroy her sculptures? Would we

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173. The Whitney Museum’s Biennial exhibitions are important attempts to capture the essence of the art world every two years. See Adler, *What’s Left?*, *supra* note 48, at 1543 n.181 (noting importance of Biennials).

174. Holland Cotter, *Art’s Economic Indicator*, N.Y. TIMES, Mar. 7, 2008, at E31 (quoting curators).

175. See, e.g., MARTHA BUSKIRK, *THE CONTINGENT OBJECT OF CONTEMPORARY ART* (2003).

176. Or it exists as commodity. See *infra* Part IV.

177. ADORNO, *supra* note 149.

178. GAMBONI, *supra* note 2, at 256 (quoting Pissarro).

179. Randy Kennedy, *Giving the Artists a Voice in Preserving Their Work*, N.Y. TIMES, June 29, 2006, at E1.

180. *Id.*

181. LUCY R. LIPPARD, *EVA HESSE* (1976).



“preserve” them by letting them fall apart?<sup>182</sup> The answers are unclear. The uncertainties surrounding Hesse’s work raise deeper questions that moral rights law glosses over: should the artist’s wishes always determine the fate of the object? What is the value of the unique physical object itself? Does the work cease to be authentic if we “preserve” it by re-creating it, removing the trace of the artist’s hand? These are deeply complex questions. Moral rights law enshrines a simplistic notion of integrity without recognizing the complexity of the concept.

#### IV

##### THE END OF ART: DESTROYING “ART” AS A CATEGORY

“There seems to be something in the air that art is commerce itself.”

— Jasper Johns<sup>183</sup>

“Art? Isn’t that a man’s name?”

—Andy Warhol<sup>184</sup>

“Will the last painter please turn off the light when leaving art?”

—Peter Weibel, *An End to the “End of Art”*<sup>185</sup>

Throughout this essay, I have argued that moral rights law is incompatible with contemporary artistic practice because the law is based on romantic and outdated assumptions about art. Here I want to confront a deeper problem at the heart of moral rights law: the doctrine’s very existence is premised on the idea that “the bond between an artist and his work is different from that between any other craftsman and his product.”<sup>186</sup> In my view, this premise is problematic.

What is so special about visual art?<sup>187</sup> Why do we grant it special rights and treat it differently from other objects, excepting it from the normal rules of property and contract? At its heart, moral rights law rests on the notion that a work of visual art is not merely another product in our capitalist society.

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182. From Jean Tinguely’s self destroying sculptures, described *supra*, to Robert Smithson’s earthworks, some artworks are designed to be ephemeral. Others are meant to constantly change. For example, Hesse made some sculptures that would change with each installation. See, e.g., Expanded Expansion (1969), available at [http://www.guggenheimcollection.org/site/artist\\_work\\_md\\_63\\_1.html](http://www.guggenheimcollection.org/site/artist_work_md_63_1.html).

183. Carol Vogel, *The Gray Areas of Jasper Johns*, N.Y. TIMES, Feb. 3, 2008, at C1 (quoting Johns).

184. ARTHUR C. DANTO, ENCOUNTERS AND REFLECTIONS 286-87 (1990) [hereinafter DANTO, ENCOUNTERS].

185. Peter Weibel, *An End to the “End of Art”? On the Iconoclasm of Modern Art*, in ICONOCLASH, *supra* note 1, at 614.

186. Cohn, *supra* note 32, 69-70.

187. Hansmann and Santilli justify the special treatment of art by explaining that “creators of . . . ‘art’ . . . typically [create] unique and highly individual works that require substantial skill and effort, [and] commonly feel a peculiarly strong attachment” to their work. Hansmann & Santilli, *supra* note 37, at 103.

Instead, it is alive with the creative spirit of the individual genius/artist who, to quote the Second Circuit, “injects” himself into the work.<sup>188</sup> His interests in the work are loftier and richer than mere pecuniary ones. Indeed they transcend his individual interests and become interests shared by the public. The mundane laws of copyright protect only economic interests. They could never fully capture what the artist and all of us value about artistic expression. Thus we must make special rules for works of art.

But does visual art as a category merit this special treatment? I think the answer might be no. It once seemed obvious that there was a distinction between art and other objects. But that is no longer the case. Indeed, I would argue that the incoherence of the category of “art” has become *the subject* of contemporary art. The lack of distinction between art and other objects is now a central preoccupation in contemporary art.

Moral rights law thus protects art under a justification that is the very target of the art it purports to protect. Think back to the discussion of Duchamp’s urinal in Part III, the piece selected by critics as the most influential work of modern art, the work that defines the ethos of our era. Earlier I discussed Duchamp to establish the central place of destruction in art. I now want to focus on the *target* of Duchamp’s destruction. His *Fountain*, like most of his oeuvre, attacked the boundary between art and everyday objects. And by attacking this boundary, Duchamp began to destroy the category of “art.”<sup>189</sup> Contemporary artists have renewed his attack with a vengeance.<sup>190</sup> Moral rights law, by insisting that art is special, reifies the boundary these artists attack. It enshrines in law the precise vision of art against which contemporary artists rebel.

It is important to note that Duchamp’s attack was not an initial success. In fact, it was rejected by artists and theorists for several decades. Instead, a different vision of art flourished: modernism. Moral rights seem rooted in this vision.<sup>191</sup> To understand it, contrast Duchamp’s work with the paradigmatic artist of mid-century America, Jackson Pollock. The theory of moral rights makes sense when we think of Pollock, both because of the deeply expressive character of his works and because they fit so clearly within the lofty realm of high art.

When we think of Pollock, we think not only of his canvasses, but also of the process of his creation: the great, tortured genius in an existential confrontation with his art, pouring his soul onto canvas in a burst of creative

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

189. Adler, *Post-Modern Art*, *supra* note 48, at 1364-69 (discussing Duchamp and his relation to postmodernism).

190. Once again, I should note that by emphasizing the importance of this movement, I do not mean to claim that it is universal in contemporary art. *See supra* note 118.

191. And in romanticism, as I have explained above.

angst.<sup>192</sup> Pollock's paintings became hallmarks of modernism. Not only was his work a formal breakthrough,<sup>193</sup> it was also a record of his individual will. It is easy to see why we would consider Pollock's art "an expression of his innermost being."<sup>194</sup> Pollock's paintings, aptly called "action paintings," are a record of his transcendent struggle; we feel him in his work.

Pollock's paintings belonged firmly in the domain of high art as opposed to popular culture. Indeed, the boundary between these realms was an essential feature of modernism. The defining characteristic of late modernism was its insistence on the purity and sanctity of art.<sup>195</sup> For example, Clement Greenberg, the critic who ruled mid-century American art with "papal authority,"<sup>196</sup> insisted that "art . . . in its 'purity' [would] find the guarantee of its standards of quality."<sup>197</sup>

It was against this heroic backdrop that artists renewed Duchamp's attack on the category of "art." The revival began in the 1950s and 60s with artists like Rauschenberg, discussed above, and Jasper Johns. But no one was more important in this regard than Andy Warhol, who attacked the idea that art was somehow worthy of more reverence than other objects. Instead of the tortured artist baring his soul on canvas as an expression of his innermost being, Warhol gave us the vacant artist, reproducing celebrity photographs, Brillo boxes and cans of soup, rolling them off the production line in the studio he called the "Factory." Warhol did not only render consumer products as art; he also made art into a consumer product. He turned the hallowed artist into just another businessman. Warhol's subject matter and his technique were depersonalized and commercial. In his Factory, he mass-produced photo-silkscreens that never even touched the romantic hand of the artist. (In modernism, the artist's touch was the guarantor of his sincerity and presence, investing the canvas with his magic.) Boasting of his lack of connection with his own objects, addressing a group of admiring interviewers, Warhol said: "Why don't you ask my assistant Gerry Malanga some questions? He did a lot of my paintings."<sup>198</sup> No wonder de Kooning was rumored to have uttered to Warhol at a cocktail party: "You're a

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192. This is primarily because the pictures themselves—action paintings—record the artist's movement, but also because Pollock was famously photographed in the process of painting. When Life featured him in 1949, he became a "pinup of seething manhood." Peter Schjeldahl, *American Abstract: Real Jackson Pollock*, NEW YORKER, Jul. 31, 2006.

193. That is, reducing painting to line and to action.

194. To quote Merryman's justification for the special treatment of art in moral rights law. MERRYMAN & ELSÉN, *supra* note 24, at 423.

195. See Adler, *Post-Modern Art*, *supra* note 48, at 1363-64.

196. Barry Gewen, *State of the Art*, N.Y. TIMES, Dec. 11, 2005, § 7 (Book Review), at 28 (quoting art historian Robert Rosenblum).

197. Clement Greenberg, *Modernist Painting*, in MODERN ART AND MODERNISM: A CRITICAL ANTHOLOGY 5, 6 (Francis Francina & Charles Harrison eds., 1982).

198. CAROLINE A. JONES, MACHINE IN THE STUDIO 422 n.35 (1996) (quoting interview with Warhol).

killer of art: you're a killer of beauty."<sup>199</sup>

The present era owes its spirit to Warhol.<sup>200</sup> Consider the trend toward artists working as collectives and under fictional identities. For example, Reena Spaulings, the toast of the last Whitney Biennial, is a fictional artist (and dealer).<sup>201</sup> A shifting group of collaborators produce "Spaulings's" work. Like so much contemporary work, Spaulings's art is often manufactured commercially, emphasizing the artist's distance from the process of creation. For example, "her" Biennial piece was a manufactured store canopy that the "artist" ordered from a Chinatown company.<sup>202</sup> Similarly, the Bernadette Corporation, another prominent Whitney "artist," is also a shifting collaborative that brands itself a corporate entity.<sup>203</sup> There is no artist. Or, if there is, the artist is a corporation and its work just another product.

What are the implications of this shift in art for moral rights? Moral rights law depends on and glorifies a line between art and everyday objects that no longer exists. *The New York Times* recently reported that youth culture now views brands as "an artistic medium." Eschewing the non-existent or at least tired category of "art," future "artists" may find their medium in consumer products, making T-shirts and sneakers instead of paintings and sculptures.<sup>204</sup> Indeed, young artists seem to embrace commercialism in a casual way that previous generations would have considered heresy. Downtown art star du jour Dash Snow maintains his hipster "cred" while modeling for AG jeans.<sup>205</sup> Richard Prince, fresh from his Guggenheim one-man show, is busily collaborating on a handbag line with Marc Jacobs, while Takashi Murakami's latest exhibition featured a Murakami-Louis Vuitton boutique in the middle of the Brooklyn Museum.<sup>206</sup> Of course, Warhol's spirit reigns over this merger of retail and art. It was Warhol who wrote that "[b]eing good in business is the

199. VICTOR BOCKRIS, *WARHOL: THE BIOGRAPHY* 320 (1989).

200. And to his inspiration in Duchamp. Danto wrote that we live in the "age of Warhol." DANTO, *ENCOUNTERS*, *supra* note 184, at 293. Auction prices reflect this. Paul Virilio wrote: "When you look at Christie's or Sotheby's auction prices, Rembrandt comes after Warhol, Monet after Duchamp." LOTRINGER & VIRILIO, *supra* note 160, at 64.

201. CHRISSIE ILES & PHILIPPE VERGNE, *WHITNEY BIENNIAL 2006: DAY FOR NIGHT* 334 (2006). This model of production raises significant questions not addressed here about the necessity of paternity rights as incentives to creation. More fundamentally, an incompatibility appears between the paternity right's valorization of the author and the rejection of the author in the kind of contemporary art that Reena Spaulings exemplifies.

202. *Id.*

203. Reena Spaulings is in fact a creation/product of the Bernadette Corporation. *Id.* at 178.

204. Rob Walker, *The Brand Underground*, N.Y. TIMES, July 30, 2006 § 6 (Magazine), at 29. The recent copyright skirmish between Barney's "window dresser" Simon Doonan, and "high artist" Jack Pierson evidences the increasing absurdity of trying to separate art from commerce. Simon Doonan, *How Did I Become the Typhoid Mary of the Art World?*, N.Y. OBSERVER, Apr. 17, 2006, (Culture), at 1.

205. ILES & VERGNE, *supra* note 201, at 330 (describing Snow's self-presentation as "artist/outlaw"). This is remarkable considering that his work is all about cred—documenting his life of coke, sex, and stealing.

206. Ruth La Ferla, *The Artist's Fall Collection*, N.Y. TIMES, Nov. 8, 2007, at G1.

most fascinating kind of art.”<sup>207</sup>

In the wake of soaring prices in the contemporary art market, it has become even harder to conceptualize art as a category that transcends commerce.<sup>208</sup> One could argue that contemporary art functions less as creative personal expression and more as a luxury good marketed to the very rich.<sup>209</sup> Artworks have become de rigueur trophies for newly minted billionaires.<sup>210</sup> Several of the most highly acclaimed contemporary artists make work that simultaneously critiques and caters to this new market reality. Consider a recent piece by Damien Hirst, a critical darling and the best-selling living artist.<sup>211</sup> Endeavoring to produce the “most expensive piece of contemporary art ever created,”<sup>212</sup> Hirst encrusted a skull with diamonds and sold it to an investor for a hundred million dollars cash.<sup>213</sup> A critic said that Hirst “uses the art market as his medium.”<sup>214</sup> Works like this participate in and mock the market’s excesses. And collectors want more: contemporary art now outpaces old masters at auction.<sup>215</sup> As art increasingly functions like other luxury commodities, this shift undermines the notion that art is distinct from other products and therefore merits special protection.

Just as art has merged with commerce, the merger between art and pornography, once a scandalous assault on the demarcation between art and non-art, high and low, has become so commonplace as to be dull.<sup>216</sup> Artist John Currin, in an interview about his latest exhibition with its de rigueur blend of art and hard-core pornography explains: “It’s not a shock tactic. In every art school in the world there’s a guy doing porn. As a failed shock tactic, that’s kind of interesting to me.”<sup>217</sup>

The foundation of moral rights law depends on a boundary between art and other objects, but it is this precise boundary that contemporary artists have attempted to destroy. I believe that art has been (almost) successful in destroying the line separating art from everything else. In an ultimate act of

207. ANDY WARHOL, *THE PHILOSOPHY OF ANDY WARHOL* 92 (1975).

208. Ula Illytzyk, *No End in Sight for Soaring Art Market*, ABC News, Dec. 25, 2007, available at <http://abcnews.go.com/Business/wireStory?id=4050458>.

209. Calvin Tomkins, *A Fool for Art*, NEW YORKER, Nov. 12, 2007, at 64-75. For more on the extraordinary state of the art market, see *Artforum*’s recent issue devoted to the subject. Ai Weiwei et al., *Art and Its Markets: A Roundtable Discussion*, ARTFORUM, Apr. 2008.

210. *Id.*

211. Colin Gleadell, *Hirst’s £16m for a Slice of Bacon*, TELEGRAPH, Nov. 20, 2007, (Features: Art Sales), at 30. Jeff Koons and Hirst have both laid claim to the title of best-selling living artist at auction.

212. *Id.*

213. William Shaw, *The Iceman Cometh*, N.Y. TIMES, June 3, 2007 § 6 (Magazine), at 30.

214. Tomkins, *A Fool for Art*, *supra* note 209.

215. *Id.*

216. See Adler, *Post-Modern Art*, *supra* note 48, at 1369-75 (analyzing merger between art and pornography).

217. Karen Rosenberg, *Influences: John Currin*, N.Y. MAG., Nov. 19, 2006, available at <http://nymag.com/arts/art/features/24355/>.

iconoclasm, the great achievement of contemporary art, has been to destroy the category of art as we know it.<sup>218</sup>

### CONCLUSION

The reader may have noticed that this piece resembles the art I describe: an exercise in destruction. The main goal of this Essay has been to undermine the foundations of moral rights law and scholarship. But here, I pause briefly to assess what's left in the wake of my assault. Eliminating moral rights and treating artworks like ordinary objects would solve some of the problems I describe, but it would also leave other problems unsolved and, in fact, create new ones.<sup>219</sup> Perhaps the most significant drawback to any "solution," including eliminating moral rights is this: problems will always arise from enshrining in law a particular, inevitably transitory, understanding of art. I am wary of blithely etching in stone a vision of art, reflecting the current moment, that is doomed to become just as outmoded as the romantic concepts underlying moral rights. Furthermore, artists are not necessarily the best ones to make decisions about the future of their art. But who should make these decisions? And when should they be made? These are urgent and yet extraordinarily difficult questions. Whether art is good or bad, valuable or not, varies greatly depending on whom you ask and when you ask. Although it's unlikely, it may turn out that future generations reject every "important" contemporary artist who would be entitled to VARA's protections. It wouldn't be the first time in the history of art that critics got it "wrong" or that an entire generation was

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218. Or at least, to have come close to destroying it. Adorno wrote that "art revolts against its essential concepts while at the same time being inconceivable without them." THEODOR W. ADORNO, *AESTHETIC THEORY* 465 (Gretel Adorno & Rolf Tiedemann eds., C. Lenhardt trans., 1984) (1970). Has the contemporary revolt against the category of art been so successful that it has destroyed art's "essential concepts"? Has contemporary art turned "art" into a category that is "inconceivable"?

219. Eliminating moral rights would have the virtue of treating art like other objects and thus would comport with a central thematic concern of contemporary art. It would also free art from the control of the artist. But new problems would arise: most prominently, this "solution" would merely shift control to buyers and to the art market. (For those artists who waive their moral rights, which few in fact do, Landes, *supra* note 37, buyers already make these decisions.) Eliminating moral rights would expose decisions about destruction or preservation to the market, which is notoriously bad at predicting which art will stand the test of time. *See supra* notes 200, 209 and accompanying text. The overheated current art market, in which contemporary artists outsell old masters, seems particularly unsound to many critics. *See, e.g., supra* note 200 and accompanying text (describing price disparity between contemporary works and old masters).

My goal in this Essay has been diagnostic rather than prescriptive. Nonetheless, my diagnosis points to how difficult any solution to the problem of moral rights will be. If we accept my argument, that preservation as achieved through moral rights laws imposes a cost on artistic innovation, then how should we craft a set of rules that strikes the proper balance between the conflicting goals of artistic preservation and innovation? It is particularly hard to answer this question if you start from the premise, as I do, that no one—certainly not judges, but not even art critics or the art market—knows what art will stand the test of time.

completely written off.<sup>220</sup> And the art that the current generation destroys may be judged “better” by future generations, at least for a while. For these reasons, it is extremely hard to predict what kind of rules will produce the “best” art. I want lawyers and legislators who draft moral rights laws to be sufficiently daunted by these problems. And although I do not purport to solve them, I do know at least this: contemporary art, to the extent that we care about it, is distinctly ill served by the present moral rights regime.

Let me end with a story. In 2001, Damien Hirst, the wildly celebrated artist and winner of England’s prestigious Turner Prize, exhibited a work of “trash” at a well-known London gallery.<sup>221</sup> The piece consisted of garbage—coffee cups, empty beer bottles, candy wrappers, full ash trays, newspapers—strewn on a gallery floor. It was valued at six figures.<sup>222</sup> After Hirst installed the work, a janitor arrived at the gallery and promptly cleaned up by throwing out the art. Gallery staffers later salvaged it from the garbage and meticulously reconstructed the installation from photographs taken earlier. Remember that Hirst is no marginal figure. His garbage art would surely be described as a work of “substantial artistic merit” no matter how you measure it—critical acclaim, prizes, market value, fame, or museum and gallery attention. Is Damien Hirst making work that merits a special right of integrity, that is distinct from other kinds of objects in the world in the way that moral rights envision? Did the janitor violate Hirst’s work in a way that would be akin to violating Hirst’s child? Did he harm Hirst’s soul, his innermost being? Has he robbed us of what Merryman describes as our shared public interest in seeing “the work as the artist intended it, undistorted” in satisfying our “yearn[ing] for the authentic, for contact with the work in its true version”?<sup>223</sup>

Hirst’s work begs us, or at least me, to ask the question that VARA cannot fathom: who is the better artist in this story, Hirst or the janitor who threw the art out? I take the janitor. He is the true artistic heir of Warhol and Duchamp and Hirst himself. And with his gesture, perhaps we should consign moral rights law to the dustbin as well. It is a relic of a moment when “art” meant something that is now long gone.

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220. See MARC J. GOTLIEB, *THE PLIGHT OF EMULATION* (1996).

221. Hirst was not the first to display trash as art. Gustav Metzger did it in 1960. Nor was Hirst the first to have his trash/art thrown out—Metzger achieved that too. See Sam Jones, *How Auto-Destructive Art Work Got Destroyed Too Soon*, *GUARDIAN*, Aug. 27, 2004.

222. Gewen, *supra* note 196.

223. Merryman, *supra* note 5, at 1041.