LAW, VISUAL ART, AND MONEY

by
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This Essay explores areas where law and art interact, and where, it seems, money changes things. It discusses three areas of the law that encourage the creation of visual art, starting with the basic combination of property and contract, and moving to the more targeted law of copyright and, finally, the law specifically aimed at the visual arts: the Visual Artists Rights Act (VARA). The Essay then takes up the task of exploring the ways in which both the rights and protections offered by VARA and by copyright law are affected by commercial exploitation of visual artworks. It also examines the effect that commercial exploitation of works of art have in the context of rights of publicity. In the case of VARA, copyright's fair use factors, and many states' approaches to the limits on the rights of publicity, the taint of money or commercial exploitation is a cause for suspicion, inconsistent with romanticized notions of the pursuits of a true artist, and thus leads to less or no protection for the creation or the creator. In these contexts, visual art created for overt monetary gain, especially through pieces reproduced in multiple copies or used in promotions or advertisements, are just like any other commodity; no special solicitude or protection is to be given to those artworks or those artists. And, at the other end of the commercial spectrum, wild commercial success of an artist permits a court to assume a true artist, because the external art world has bestowed that judgment already and judges are relieved of having to make the determination. While judging what is art and who is a real artist is a task the law may be ill-equipped to handle, the proxy of money is only superficially appealing because it is based on an outdated and romanticized notion of who is an artist and, ultimately, what is art.

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INTRODUCTION

Law's relationship to art has many dimensions.[1] This Essay focuses on two of those dimensions. First, law has a role in encouraging the creation of art, by protecting the creations of artists and also by providing a protected zone for creative expression. Second, money changes things. Sometimes the law's treatment of art changes when money is involved: the availability of protection is affected or the zone of free expression changes. It is those changes, in the context of visual art, on which this Essay is particularly focused.

Art definitely predates money;[2] and art also predates law—certainly it predates any formalized law, although the "law" of social norms and behavior was likely present at the time man first started creating what today we call "art." Today, certain laws designed to help facilitate the creation of art or to protect artists employ commerciality as a proxy for what is not art. In these areas of the law, the taint of money or commercial exploitation is a cause for suspicion, inconsistent with romanticized notions of the pursuits of a real artist. In these areas the entanglement of art and money leads to less or no protection for the creation or the creator. Additionally, in a much smaller set of cases, at the far end of the commercial spectrum, significant commercial success in the art world appears to influence judges to afford broader protection to the artist. While judging what is art and who is a real artist is a task the law may be ill-equipped to handle,[3] the proxy of money is only superficially appealing because it is based on an outdated and romanticized notion of who is an artist[4] and,

[1] For an exploration of some of the different definitions of art and artists in different legal contexts, see Herbert Lazerow, Mastering Art Law 4–12 (2015).

[2] The widely familiar examples of early art date to between 30,000 and 32,000 years old in the Chauvet Cave, in France. Jo Marchant, *A Journey to the Oldest Cave Paintings in the World*, Smithsonian Magazine (Jan. 2016), https://www.smithsonianmag.com/history/journey-oldest-cave-paintings-world-180957685/#Xds1vZDLej1ykr06.99. More recently discovered examples are even older, dating to 39,900 years old in Sulawesi, Indonesia. *Id.*

[3] Whether the law, and in particular judges, are as ill-equipped to handle this task as anyone else, it is a common refrain that judges lack adequate training in this area. *See* Christine Haight Farley, *Judging Art*, 79 Tul. L. Rev. 805, 810–19 (2005) (discussing the articulated arguments for why judges should not judge art).

[4] The trope of the romantic artist is often invoked as a justification for special treatment of artists under the law. *See* Gregory N. Mandel, *Left-Brain Versus Right-Brain:*

ultimately, what is art.

Part I of this Essay identifies three areas of the law that encourage the creation of visual art, starting with the basic combination of property and contract, moving to the more targeted law of copyright, and then addressing the law specifically targeting the visual arts: The Visual Artists Rights Act (VARA). Part II then turns to the task of exploring the ways in which both VARA and copyright law are affected by commercial exploitation of visual artworks. Part II also discusses the effect of commercial exploitation of works of art in the context of rights of publicity. A final portion of Part II highlights the way significant commercial success in the art world has appeared to influence some important decisions involving visual art.

I. HOW LAW ENCOURAGES THE CREATION OF ART

A. Property and Contract

Two pillars of law and the free market—property and contract—clearly play an important role in encouraging the production and dissemination of visual art. Property law recognizes various marketable rights in the artwork created and vests those rights in the artist, while contract law provides the basic protections artists need to successfully engage in commercial transactions related to their creations. The law recognizes a property interest in one's creations, be it an apple pie, a bookcase, or a piece of canvas that has been smeared with pigment. English philosopher John Locke would say the artist has mixed her labor with those apples, that wood, or that canvas, and the result is something in which the law should recognize a property interest.[5]

If someone takes that item of tangible property without the owner's permission, the law would recognize that as theft, a crime, and as conversion, a civil wrong for which the true owner of the property can obtain a remedy in court.[6] The point being that the law protects the property interest of the creator of that object. That simple mechanism, the fundamental core of property law, facilitates the creation of art, at least by artists who are interested in ownership of the items they create.

Many artists, although not all, are interested in that ownership. They may want to gift the artwork they have created to a friend or a loved one,

Competing Conceptions of Creativity in Intellectual Property Law, 44 UC DAVIS L. REV. 283, 319 (2010); *see also* Roberta Rosenthal Kwall, *"Author-Stories:" Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 18–19 (2001).

[5] JOHN LOCKE, TWO TREATISES ON GOVERNMENT bk. II ch. V (For R. Butler et. al., 1825) (1690).

[6] *See Theft*, BLACK'S LAW DICTIONARY (10th ed. 2014); RESTATEMENT (SECOND) OF TORTS § 222A (1965).

or they may want to trade that artwork for something else of value, such as money. Receiving an item of value in exchange for the artwork created not only requires the law to recognize the artist's property interest, but it also requires the law to enforce contracts. That civil cause of action for conversion, described above, might, depending on the facts, actually be a breach of contract. If an artist sells the artwork to a collector, and if that collector promises to pay the artist an agreed-upon sum but then fails to pay, or pays less than promised, the artist can sue for breach of contract.

Fundamental principles of contract law protect the artist, as they protect anyone seeking to engage in an exchange of items for money—a transaction that we call a sale. While these laws help artists, these laws are not specifically or specially designed for artists. Whether you are a pie maker, a carpenter, or a sculptor, basic property and contract law are there to protect you. There is, however, another law that is designed specifically to protect artistic expression as embodied in the objects of artworks that artists create: copyright law.

B. Copyright

Copyright protection grants those who create "works of authorship" that are original and fixed in a tangible medium of expression[7] a set of exclusive rights to control certain uses of the creative expression contained in those works.[8]

Modern day copyright can be traced back to 1710 and the Statute of Anne, a statute adopted in England at the urging of publishers who had the misfortune of having their exclusive licensing rights expire.[9] The publishers turned to a new tactic: they held up the author as one whose toiling for years, sequestered away from the rest of the world, brought us great masterpieces.[10] The publishers urged protection for this romantic figure. These geniuses, the publishers argued, needed protection from those who would copy their masterpieces. These creative individuals needed a right to control unauthorized copying. Of course that right, once granted to authors, would be fully transferable to the publishers, on whatever terms a publisher might offer and an author might be hungry enough to accept. By granting the author this fully transferable right, the publishers argued, the authors could find remuneration in their art, and thereby produce great works for the public to enjoy.[11]

Our modern-day Copyright Act,[12] at its core, adheres to this same fundamental design. Federal law grants authors and artists a set of trans-

[7] 17 U.S.C. § 102(a) (2012).

[8] 17 U.S.C. § 106 (2012).

[9] LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 138–42 (1968).

[10] *See id.* at 142.

[11] *See id.* at 147–54.

[12] The Copyright Act of 1976, codified at 17 U.S.C. §§ 101 et seq. (2012).

ferrable rights in their "works," separate and apart from the rights that property law recognizes in the tangible object the artist might create.[13] The law grants this protection as a reward to the creator, but that reward is meant to serve a public purpose, namely the advancement of knowledge and learning.[14]

The law grants these exclusive rights to encourage those with artistic talent to invest their time, effort, and talent in the creation of works that will help us as a society grow and flourish.[15] Federal copyright protection applies to all works of authorship, from literary works[16] and architectural works,[17] to choreographic works[18] and dramatic works,[19] from paintings and sculptures,[20] to movies and music.[21]

For the purpose of examining the intersection of visual art and money, in many ways, the basic grant of copyright is only as interesting as basic property doctrine. Admittedly, many types of personal "property" are created or manufactured that receive only the protection from basic property law (backed up by contract), for example, pies, bookcases, and automobiles.[22] Copyright provides a special kind of encouragement to

[13] The Copyright Act makes this separation between the intangible work and the tangible object express. 17 U.S.C. § 202 (2012). There is the "work of authorship" protected by copyright and the "copy" in which that work is embodied (or "fixed" to use the copyright term of art). *Id.* The Copyright Act specifies that "[t]he term 'copies' includes the material object . . . in which the work is first fixed." 17 U.S.C. § 101 (defining "copies").

[14] The constitutional provision that grants Congress the power to adopt a copyright act provides that the purpose for copyright is to "promote the Progress of Science and useful Arts . . . ." U.S. CONST. art. I, § 8, cl. 8. It is important to recognize the full meaning of the term "science." At the time of the drafting of the Constitution, "science" denoted broadly "knowledge and learning." Arthur H. Seidel, *The Constitution and a Standard of Patentability*, 48 J. PAT. OFF. SOC'Y 5, 12 n.14 (1966) (noting the authoritative dictionary at the time listed "knowledge" as the first definition of "science"). *See also* Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 51 n.173 (1994). The modern connotation of "science," meaning technical, mathematical, or non-arts studies, did not begin to emerge until the 1800s. JOHN AYTO, DICTIONARY OF WORD ORIGINS 461 (1990).

[15] "[T]he limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

[16] 17 U.S.C. § 102(a)(1) (2012).

[17] 17 U.S.C. § 102(a)(8).

[18] 17 U.S.C. § 102(a)(4).

[19] 17 U.S.C. § 102(a)(3).

[20] 17 U.S.C. § 102(a)(5).

[21] 17 U.S.C. §§ 102(a)(6), (2).

[22] There may, of course, be other types of intellectual property protection

artists—to those who create "works of authorship" that embody original creative expression. Not only does property law protect the *object* that embodies the creative expression, the painting, for example, but copyright law also protects the *expression* itself that is embodied in that painting.[23]

C. The Visual Artists Rights Act

A particular part of copyright law is aimed specifically at promoting and protecting works of visual art. The Visual Artists Rights Act (VARA), enacted by Congress in 1990, grants special rights to artists who create certain types of artwork.[24] While basic copyright law protects economic rights, VARA protects aspects of what are known as "moral rights."[25] The moral rights protected by VARA are "rights of a spiritual, non-economic and personal nature."[26]

VARA applies to a narrow category of artistic expression, what the statute terms "works of visual art." Congress defined "works of visual art" to include: "(1) a painting, drawing, print or sculpture . . . ." or "(2) a still photographic image produced for exhibition purposes only . . . ."[27]

If a work qualifies as a work of visual art, then the statute provides the artist with two types of rights: rights of attribution and rights of integrity.[28] The right of attribution is codified at 106A(a) and provides that the creator of a work of visual art:

> (1) shall have the right—
>
> (A) to claim authorship of that work, and

embodied in those objects such as trade secrets or utility or design patents.

[23] To be clear, the law provides that protection to the *owner* of the object or to the *owner* of the expression. *See generally* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927).

[24] Visual Artists Rights Act of 1990, Pub. L. No. 101–650, 104 Stat. 5089, 5128–33.

[25] ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 27 (2010).

[26] Carter v. Helmsley–Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995). The spiritual non-economic nature of the right is further confirmed by the fact that the rights granted by VARA are non-transferable and endure only for the life of the artist. 17 U.S.C. §§ 106A(d)–(e) (2012). While non-transferable, the rights are waivable. 17 U.S.C. § 106A(e).

[27] 17 U.S.C. § 101 (2012) (defining "work of visual art"). The part of the definition quoted here does not provide the full description of what can qualify as a work of visual art. Additionally, one should not rely solely on the positive definition of what *is* a work of visual art because the definition contains a negative component as well, specifying what *is not* a work of visual art. The qualifications contained in the definition, as well as the negative component of the definition, are discussed below. *See infra* Part II.A.

[28] 17 U.S.C. § 106A(a) (2012); *see also* Kwall, *supra* note 4, at 26.

> (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create; [and]
>
> (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation . . . .[29]

The rights both to claim authorship and to disclaim authorship are important to many artists.[30] As Professor Roberta Kwall has noted:

> Authors draw inspiration for creation from the powerful forces deep within their souls. When this inspiration becomes manifest in the form of a concrete work of authorship, that work reflects the individual spirituality and personality of the author. As such, the work embodies a concrete connection with its author and the human need for attribution symbolizes this linkage.[31]

Artists also care deeply about their artistic reputation,[32] and recognition of a right of attribution can further both pecuniary and expressive incentives that are bound up with an artist's reputation.[33] By providing a right of attribution, VARA encourages visual artists to create because artists can rest assured knowing that the law will aid them in obtaining the credit they deserve and also will protect them from having their name associated with a work they did not create through false attribution.[34]

The remedy available for a violation of the attribution right granted by VARA is understood to be injunctive only.[35] Thus, the cost of federal civil litigation,[36] when the only relief anticipated is non-monetary, threat-

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[29] 17 U.S.C. § 106A(a).

[30] One indication of the importance of attribution to creators is the initial experience of the Creative Commons licensing options. In its initial suite of licenses, 97% chose an option that required attribution. *See* Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 80 (2007).

[31] Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(a)*, 77 WASH. L. REV. 985, 985–86 (2002).

[32] *See* Jon M. Garon, *Commercializing the Digital Canvas: Renewing Rights of Attribution for Artists, Authors, and Performers*, 1 TEX. A&M L. REV. 837, 843–45 (2014).

[33] Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1790 (2012).

[34] *See* Kwall, *supra* note 31, at 995–96 (discussing the incentive nature of protection for attribution).

[35] *See* Massachusetts Museum of Contemp. Art Found., Inc. v. Büchel, 593 F.3d 38, 55–56 (1st Cir. 2010) (discussing the statutory language and interpretation that leads to this conclusion). Not all agree with this interpretation of the statutory language. *See* LAZEROW, *supra* note 1, at 135.

[36] Because the Visual Arts Rights Act amended the Copyright Act, claims brought under VARA are understood to be claims under copyright. The federal courts have exclusive jurisdiction over copyright claims. 28 U.S.C. §§ 1338(a)–(c) (2006).

ens the genuineness of the protection.[37] Artists would need sufficient funds to hire lawyers to assert their claims, with no viable option for contingency fee agreements. However, the Copyright Act does contain a fee-shifting provision that is available to artists asserting claims under VARA.[38] Although not automatic, artists asserting claims under VARA are eligible for attorney's fee awards without having to register the copyright in their work, a requirement with which copyright owners must timely comply to be eligible for fee awards in copyright infringement litigation.[39]

In addition to the rights of attribution, VARA grants artists rights to protect the integrity of the works of visual art that they create. The rights of integrity are two-fold. First, the statute provides a right to prevent destruction of a work of recognized stature.[40] This right restricts what is commonly thought to be an important "stick[] in the bundle" of the owner of property—the right to destroy property that one owns.[41] A critical element of a claim of destruction or threatened destruction under this provision is demonstrating that the artwork is a "work of recognized stature."[42]

Martin v. City of Indianapolis is an example of a successful destruction claim under this provision of VARA.[43] Artist Jan Martin created a large metal sculpture for an outdoor space. The city of Indianapolis subsequently acquired the property as part of an urban renewal project. The city then removed the sculpture, and, since the work was made of metal, the city sent the metal to a scrap yard. The city owned the sculpture and the land on which the sculpture sat. The city decided to dispose of the land by selling it and to dispose of the sculpture by trashing it. But the artist, who was able to demonstrate that the sculpture was a "work of recognized stature," was able to recover damages in a lawsuit against the city.[44] To prove the required element of recognized stature, Mr. Martin used "newspaper and magazine articles, and various letters, including a

[37] Non-lawyers may not consider the realities of enforcement of the right and its associated costs. The mere fact that the law grants the protection may, nonetheless, increase the incentive to create.

[38] 17 U.S.C. § 505 (2012).

[39] 17 U.S.C. § 412 (2012). Generally, to be eligible for a fee award as a prevailing party, a copyright owner must register the copyright in their work prior to the infringement commencing, or within a 90-day grace period following publication. *Id.*

[40] Specifically, VARA grants the artist a right "to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right." 17 U.S.C. § 106A(a)(3)(B) (2012).

[41] Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 794 (2005).

[42] 17 U.S.C. § 106A(a)(3)(B).

[43] Martin v. City of Indianapolis, 192 F.3d 608 (7th Cir. 1999).

[44] *Id.* at 611–12. The Seventh Circuit affirmed the district court's award of $20,000, the maximum statutory damages award permitted by the statute at the time for non-willful violations of the Act. *See* Martin v. City of Indianapolis, 4 F. Supp. 2d 808, 812 (S.D. Ind. 1998), *aff'd*, 192 F.3d 608 (7th Cir. 1999).

letter from an art gallery director and a letter to the editor of *The Indianapolis News* . . . as well as a program from the show at which a model of the sculpture won 'Best of Show.'"[45]

In *Martin*, the city had violated the artist's rights under VARA by destroying a work of visual art; it did not matter that the city owned the sculpture.[46] It would not have made any difference if, instead of the city, the defendant had been a private individual or a private corporation.[47] The law grants the artist a right to prevent such destruction, and if the destruction has already occurred, and is shown to have been intentional or grossly negligent, the statute provides a right to be compensated for the destruction.[48] For example, in *Martin*, the court awarded the artist $20,000 in damages.[49] More recently, a district court awarded artists $6.7 million in damages when the owner of a large warehouse building had 45 different paintings covered in white paint pending demolition of the building.[50] The compensation awarded for a VARA violation is not for the loss of a piece of property—the artists need not be owners of the artwork. Instead, compensation pursuant to a successful VARA claim is for the harm to the artist's moral rights.

The second type of right of integrity protected by VARA is a right granted to artists to prevent any "intentional distortion, mutilation, or

[45] *Martin*, 192 F.3d at 612. The District Court used a test formulated in a previous VARA case: recognized stature requires "a two-tiered showing: (1) that the visual art in question has 'stature,' i.e. is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society." Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995). The Seventh Circuit in *Martin* noted that the test "may be more rigorous than Congress intended," but nonetheless affirmed the district court's grant of summary judgment and its award of damages. *Martin*, 192 F.3d at 612.

[46] *Martin*, 192 F.3d at 614.

[47] "The right of integrity allows the [artist] to prevent any deforming or mutilating changes to his work, even after the title in the work has been transferred." Cort v. St. Paul Fire & Marine Ins. Cos., 311 F.3d 979, 985 (9th Cir. 2002) (internal quotation marks omitted) (alteration in original).

[48] *See* Massachusetts Museum of Contemp. Art Found., Inc. v. Büchel, 593 F.3d 38, 55–56 (1st Cir. 2010) (discussing the statutory language that makes clear that a damages award is appropriate for an intentional or grossly negligent destruction that has occurred).

[49] Martin v. City of Indianapolis, 28 F. Supp. 2d 1098, 1101 (S.D. Ind. 1998), *aff'd*, 192 F.3d 608 (7th Cir. 1999). The court also awarded Mr. Martin $131,000 in attorney's fees and costs. *Id.* For a discussion of the award of attorney's fees for successful VARA claims see text accompanying *supra* note 42.

[50] Cohen v. G & M Realty L.P., No. 13-CV-05612, 2018 WL 851374 (E.D.N.Y. 2018). The paintings in the *Cohen* case had been done by various aerosol artists with the undisputed permission of the building owner. The damages awarded were based on the Copyright Act's statutory damages provision that permits an award of $150,000 per work if the violation is willful. 17 U.S.C. § 504(c)(2) (2012).

other modification" of their artwork "which would be prejudicial to [the artist's] honor or reputation . . . ."[51] As with the right to protect a work from destruction, the statutory language supports an interpretation that this component of the right of integrity provides a damages remedy in addition to the possibility of injunctive relief.[52] And, again, it does not matter that the artwork at issue has been sold, what matters is if the modification is intentional and if that modification would harm the artist's honor or reputation.

VARA grants the protection against unauthorized modifications to all authors of works of visual art, without regard to the stature that the artwork or artist may have. Thus, unlike the right to prevent destruction, which requires proof that the work is of recognized stature, no such proof of the importance of the piece is required. However, the need to prove "harm to honor or reputation" as an element of the claim may translate into the artist needing to have a reputation that could be harmed,[53] although the legislative history indicates that an artist "need not prove a pre-existing standing in the artistic community.''[54]

Artist Christoph Büchel's claim against the Massachusetts Museum of Contemporary Art (MassMOCA) is an example of a preliminary successful claim under this provision.[55] MassMOCA entered into a collaborative project with Büchel, an artist known ''for building elaborate, politically provocative environments for viewers to wander, and sometimes to crawl, through."[56] Büchel directed the creation of the exhibition, titled "Train-

[51] 17 U.S.C. § 106A(a)(3)(A).

[52] Specifically, that statute provides that "any intentional distortion, mutilation, or modification of that work is a violation of that right." 17 U.S.C. § 106A(a)(3)(A).

[53] Note that the act permits proof of harm to the artists "honor" or to the artist's "reputation." Thus, following the disjunctive "or" contained in the statute, an artist that lacks reputation, may, nonetheless, suffer harm to his or her honor that could meet the statute's requirement. The House Report recommends that the prejudice inquiry should ''focus on the artistic or professional honor or reputation of the individual as embodied in the work that is protected,'' and ''examine the way in which a work has been modified and the professional reputation of the author of the work.'' H.R. Rep. No. 101-514, at 15–16 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6915, 6925–26 (footnotes omitted).

[54] *See* H.R. Rep. No. 101-514, at 15. The First Circuit looked to this language to "emphasize that the focus is on the artist's reputation in relation to the altered work of art; the artist need not have public stature beyond the context of the creation at issue." *See* Massachusetts Museum of Contemp. Art Found., Inc. v. Büchel, 593 F.3d 38, 54 (1st Cir. 2010).

[55] *Büchel*, 593 F.3d at 65–66. The ruling was "preliminary" because after the Court of Appeals reversed the grant of defendants' motion for summary judgment, the parties subsequently settled. *See* Jennifer Huberdeau, *From Idea to Reality. Mass MoCA: A Timeline*, THE BERKSHIRE EAGLE (May 28, 2017), http://www.berkshireeagle.com/stories/from-idea-to-reality-mass-moca-a-timeline,508744.

[56] Randy Kennedy, *The Show Will Go On, but the Art Will Be Shielded*, N.Y. TIMES (May 22, 2007), https://www.nytimes.com/2007/05/22/arts/design/22muse.html.

ing Ground for Democracy," with museum staff attempting to carry out the artist's instructions. The relationship became strained, and as the museum attempted to get the show ready for the planned opening date, staff made changes to the installation that Büchel had not approved and that Büchel asserted were not consistent with his vision.[57] In an effort to salvage the planned exhibition, the museum covered the work in yellow tarps and announced a new exhibition, titled ''Made at MassMOCA,'' which was to be ''a documentary project exploring the issues raised in the course of complex collaborative projects between artists and institutions.''[58] Büchel sued the museum for making modifications to his artwork that were prejudicial to his honor or reputation.[59]

The First Circuit concluded that the artist had presented enough evidence to support his claim, reversing a grant of summary judgment that the lower court had entered in favor of MassMOCA.[60] As with the right protecting works of recognized stature from destruction, VARA provides the artist the right to prevent modification and, if the modification has already occurred, a right to be compensated for the destruction.[61] The compensation is not for the diminution in value that the modification might have caused to the artwork itself, but rather it is compensation for the damage to "honor or reputation" that the artist has suffered.[62] In *Büchel*, the artist offered articles from the *New York Times* and the *Boston Globe*, as well as other publications, commenting on MassMOCA's planned exhibition with Büchel's work covered in tarps to demonstrate that "viewers of the installation reacted unfavorably to the work in its allegedly modified and distorted form."[63] The First Circuit held that from those articles it would be reasonable for a jury to conclude that MassMOCA's modifications had the effect of "diminishing the quality of the work and thereby harming Büchel's professional honor or reputation as a visual artist."[64]

Targeted specifically at works of visual art, VARA is the federal law most directly aimed at protecting visual artists and thereby encouraging visual art in the United States. In *Büchel*, the First Circuit, citing VARA's legislative history, acknowledged the role protecting moral rights can play in encouraging the creation of art: "The recognition of moral rights

[57] *See Büchel*, 593 F.3d at 45.

[58] *Id.* (quoting Press Release, Massachusetts Museum of Contemp. Art, Made at MASS MoCA (May 22, 2007) https://massmoca.org/event/made-mass-moca/).

[59] *Id.* at 46.

[60] *Id.* at 65–66.

[61] 17 U.S.C § 504(b) (2012).

[62] 17 U.S.C. §§ 106A(a)(2)–(3), 504(b) (2012).

[63] *Büchel*, 593 F.3d at 60.

[64] *Id.*

fosters a 'climate of artistic worth and honor that encourages the author in the arduous act of creation.'"[65]

II. HOW MONEY CHANGES THINGS

A. VARA

The rights of attribution and integrity are only granted to artists who create "works of visual art," which the act defines as "(1) a painting, drawing, print or sculpture . . . or (2) a still photographic image produced for exhibition purposes . . . ."[66] Other works of visual art that are outside of those categories do not garner the special protections of VARA. But this positive beginning of the definition of what qualifies as a work of visual art belies the actual narrowness of the full definition, which significantly curtails the types of works that qualify. If you are an artist that seeks to commercialize your work through certain means, the law refuses to recognize you as an artist whose work and whose honor and reputation are worthy of protecting.

Several aspects of VARA's definition of a "work of visual art" aim directly at commercialization as a disqualifying characteristic. First, a work meets the definition of a "work of visual art" only if the work exists in a single copy or in a limited edition series of 200 or less that are signed and consecutively numbered.[67] Second, in addition to limiting protection to single or limited edition works, the Act also expressly excludes from protection any work done as a work made for hire,[68] "any merchandising item or advertising," and any work that can be classified as "promotional" in nature.[69]

These limitations on the types of works that qualify as a work of visual art directly relate to monetary reward for artistic endeavors. Thus, it seems, under VARA, when money is involved with art, it changes the calculus concerning the protection to which an artist is entitled. If the artist has the purpose of seeking monetary reward by producing artwork in multiple copies of more than 200, that artist is no longer afforded protection for his or her moral rights. Similarly, if the artist creates a work as a work made for hire or for advertising or promotional purposes, that art-

[65] *Id.* at 49 (quoting H.R. Rep. No. 101-514, at 6 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6915, 6916).

[66] 17 U.S.C. § 101 (2012) (defining "work of visual art").

[67] *Id.*

[68] The Copyright Act specifies two ways a work may be a work made for hire—either as a work created by an employee within the scope of their employment or as a specially commissioned work of a particular type. *Id.* Because the second option requires that the work fit within one of nine expressly identified categories, not many works of visual art will qualify as a work made for hire under the second option.

[69] *Id.*

work is not eligible for the protections that VARA grants. Only certain types of artists, seemingly idealized true artists, are the ones that the law protects; true artists do not stoop to the level of crass commercialism.[70]

Under VARA, there is fine art and true artists, and then there is common art and artists for the masses. In other words, fostering the "climate of artistic worth and honor" that supports the artist in the "arduous act of creation"[71] is reserved for a certain class of visual artist. And members of that class of artists do not sully themselves in the ways in which many visual artists, in fact, make a living.[72]

The prohibition on recognizing VARA rights for works deemed "promotional" has led courts to deny protection to works that exist even in single copy because they advertise and promote services. For example, in *Pollara v. Seymour*, the Second Circuit denied protection for a painting, approximately ten feet high and thirty feet long, that had been commissioned by the Gideon Coalition, a non-profit group that provides legal services to the poor.[73] The Gideon Coalition had arranged for an information table in Empire State Plaza, a public space in downtown Albany, New York, surrounded by a complex of New York State government office buildings. The information table was planned as part of the Gideon Coalition's annual one-day legislative effort known as Lobbying Day. Artist Joanne Pollara spent over 100 hours creating the painting, for which the Gideon Coalition paid her $1,800. The night before Lobbying Day, the painting was installed, mounted to freestanding poles, as a backdrop to the Gideon Coalition's table. Overnight, workers with the State's Office of General Services tore the banner down because a permit for the display of the banner was not on file.[74] The court dismissed the artist's

[70] Indeed, the legislative history indicates a desire to motivate artists with something other than monetary concerns. "If there exists the real possibility that the fruits of this effort will be destroyed after a mere ten to twenty years the incentive to excel is diminished and replaced with a purely profit motivation." H.R. Rep. No. 101-514, at 6 (quoting testimony of sculptor Weltzin B. Blix).

[71] H.R. Rep. No. 101–514, at 5.

[72] In 2001, in the United States there were just over 2.5 million artists, constituting approximately 1.8 percent of the civilian workforce. *How Many Artists Are There?*, PRINCETON UNIV. CTR. FOR ARTS & POLICY STUDIES (2002) https://www.princeton.edu/culturalpolicy/quickfacts/artists/artistemploy.html. This figure uses 11 occupational categories that National Endowment for the Arts (NEA) classifies as artistic occupations and includes all self-identified artists, whether employed in primary or secondary jobs or not. *Id.* Painters, sculptors and craft artists made up only 11.5% of the total number of artists while designers constituted 34.5% of the total number of artists. *Id.*

[73] Pollara v. Seymour, 344 F.3d 265, 266 (2d Cir. 2003).

[74] *Id.* Proving what artist Jim Pallas has said, "[t]he enemy of art is often the janitor." *Jim Pallas Quotes*, ART QUOTES, http://www.art-quotes.com/auth_search.php?authid=6831#.Wnd5jHxG200. Another example is the case of *Pfaff v. Denver Art Museum*, 94 Civ. 9271 (JSM), 1995 U.S. Dist. Lexis 8573, at *2–3 (S.D.N.Y. June 20, 1995). In that case, workers for a shipping and moving company, who arrived during

VARA claim based on the mutilation of her work because the court found the painting to be promotional in nature and thus it did not qualify as a "work of visual art" deserving of protection.[75]

Similarly, the prohibition on "promotional" works qualifying as works of visual art led the Fifth Circuit to affirm denial of VARA protection for a work made from an automobile because the work was closely associated with a retail store.[76] The work, in fact, had become part of the store's corporate image and had become a distinctive symbol of the business.[77] What these cases show is that when art is used in the service of commercialism, the artist ceases to be deserving of protections for the artist's moral rights.[78]

Some view moral rights protection as a form of cultural property protection—protecting important works of art from mutilation and destruction.[79] Viewed in this way, it makes sense that works that exist only as single copies or limited editions are afforded the protections of the Act. But justifying VARA as a mechanism for protection of important cultural property rings hollow for two fundamental reasons. First, VARA grants the right to prevent mutilation and destruction to the artist, not to the public or to some public-minded entity, thus leaving the protection of cultural property to the discretion of artists.[80] Second, the rights granted by VARA endure only for the life of the artist.[81] Once the artist is dead, the artwork can be mutilated or destroyed by the owner with no legal consequences under federal law.[82]

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the lunch hour when museum personnel were not available, cut up the work in order to fit it into packing boxes. *Id.*

[75] *Pollara*, 344 F.3d at 270.

[76] Kleinman v. City of San Marcos, 597 F.3d 323, 329 (5th Cir. 2010).

[77] *Id.*

[78] The statutory definitions exclude not just promotional art. The definitions also exclude "any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication." 17 U.S.C. § 101 (2012). Courts have used this negative definition to exclude other works from VARA protection. *See, e.g.*, Cheffins v. Stewart, 825 F.3d 588, 595 (9th Cir. 2016) (applying the exclusion for "applied art" for a work known as *La Contessa,* a replica of a 16th century Spanish galleon used during the countercultural festival called Burning Man).

[79] When Representative Markey introduced the legislation he specifically referenced the cultural property dimension of the protection VARA would provide, urging that it was "paramount to the integrity of our culture that we preserve the integrity of our artworks as expressions of the creativity of the artist." H.R. Rep. No. 101-514, at 6 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6915, 6916.

[80] Additionally, the statute permits the artist to waive any or all of the moral rights protection granted by VARA. 17 U.S.C. § 106A(e)(1) (2012).

[81] 17 U.S.C. § 106A(d) (2012).

[82] *Id.* California extends state moral rights protection beyond the life of the artist. CAL. CIV. CODE § 987(g)(1) (West 2018).

Instead, what VARA reflects is a Congress begrudgingly attempting to comply with international treaty obligations to protect the moral rights of authors. VARA can be viewed as a forced and fairly unwelcomed addition to U.S. law. Two years prior to the passage of VARA, the United States joined the century-old extant major international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works.[83] The U.S. joined this major international copyright convention after over 100 years of refusing to do so, because it knew that intellectual property rights were going to be a big part of multilateral trade agreements and the U.S. wanted to be a leader on those issues.[84] Being on the outside of the Berne Convention was going to be an impediment to that effort.

The Berne Convention obligates member countries to protect the moral rights of authors:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.[85]

Protecting moral rights had been a major stumbling block to the U.S. joining the Berne Convention.[86] At the time that Congress passed the Berne Convention Implementation Act, the U.S. asserted that U.S. law already provided sufficient protection for moral rights.[87] "[D]omestic and foreign skepticism . . . greeted that pronouncement."[88] VARA's passage came two years later, as part of a much larger piece of federal legislation that included the creation of 71 new federal judgeships.[89] While not part

[83] Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, § 1, Sept. 9, 1886, 828 U.N.T.S. 221 (revised at Paris on July 24, 1971).

[84] Indeed, shortly after the U.S. accession to the Berne Convention, the United States played a major role in the Uruguay Round negotiations creating the World Trade Organization. That round included the major intellectual property agreement known as TRIPS: The Agreement on Trade Related Aspects of Intellectual Property Rights. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 108 Stat. 4809, 1869 U.N.T.S. 299 (1994).

[85] Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, § 1, Sept. 9, 1886, 828 U.N.T.S. 221 (revised at Paris on July 24, 1971).

[86] H.R. Rep. No. 101–514, at 7 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6915, 6917 (noting that it took over 100 years for the United States to join the Berne Convention and that "consensus over United States adherence was slow to develop in large part because of debate over the requirements of Article 6bis.").

[87] *See id.* §§ 2, 3; *see also* S. Rep. No. 100–352, at 9–10 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3714–15.

[88] RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, & ARTISTS, VOLUME II 1088 (4th ed. 2012).

[89] VARA is Title VI of Pub. L. No. 101-650. Visual Artists Rights Act, Pub. L. No. 101-650, 104 Stat. 5128 (1990). Title II of that law created 11 new appellate judge

of the formal Berne Convention Implementation Act, those supporting VARA touted greater treaty compliance as weighing in favor of passage.[90] The insufficient state of moral rights protection was, and continues to be, a glaring violation of U.S. treaty obligations.[91]

In addition to being a "forced" addition to U.S. law, protections for moral rights also can be described as unwelcomed[92] because moral rights protection conflicts with fundamental notions of property ownership, including the ability to modify or destroy one's own property. Notions of the inviolability of private property rights in the United States run strong and deep.[93]

In the face of significant opposition to moral rights protection,[94] the U.S. joined the Berne Convention but embraced moral rights as sparingly as possible—only a very narrow category of visual art qualifies. Congress was able to pass this legislation because VARA protects a narrow definition of "art" that comports with romantic notions of a true artist; an artist is not one that stoops to the commercialism of mass production, or to allowing her work to be used in the crassest of artistic endeavors, i.e. advertising.

VARA's reliance on commercialism as a proxy for what is real art worthy of protecting the artist's moral rights may be seen as better than an alternative that could require judges to determine artistic value. Determining artistic value is something to which U.S. courts have an intense

positions and 60 new district court judge positions. Federal Judgeship Act of 1990, Pub. L. No. 101-650, 104 Stat. 5098-5100. Pub. L. No. 101-650 also contained the Judicial Improvements Act of 1990 (Title I); the Federal Courts Study Committee Implementation Act of 1990 (Title III); Judicial Discipline and Removal Reform Act of 1990 (Title IV); Television Program Improvement Act of 1990 (Title V); Architectural Works Copyright Protection Act (Title VII); and Computer Software Rental Amendments Act of 1990 (Title VIII). As Professor Kwall has recounted, "VARA was passed by the full Senate only because those Republican senators [who had blocked passage of VARA in the Senate] acquiesced in light of their desire to pass the federal judgeships bill." Kwall, *supra* note 4, at 27 n.112.

[90] H.R. Rep. No. 101-514, at 14 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6920 (footnotes omitted) (noting that the Register of Copyrights asserted that VARA would bring "the law into greater harmony with laws of other Berne countries" and an important object of the Berne Convention is the "harmonizing national copyright laws").

[91] *See* KWALL, *supra* note 25, at 37 (warning that "there is the stark reality that [the United States] may not be in compliance with obligations under the Berne Convention").

[92] During the debate over the Berne Convention Implementation Act, "Congress faced an avalanche of opposition to moral rights, including denunciations of moral rights by some of the bill's most vociferous advocates." 3 MELVILLE D. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.02[C], at 8D-13 (2017).

[93] *See* William Michael Treanor, *Supreme Neglect of Text and History*, 107 MICH. L. REV. 1059, 1066 (2009).

[94] *See* NIMMER & NIMMER, *supra* note 92, at 8D-15.

aversion. Professor Christine Haight Farley has called this "the doctrine of avoidance of artistic determinations," noting that it is "one of the most stable and explicitly stated doctrines across art law." [95] Professor Farley attributes judicial aversion to making a determination of whether something is "art" to thinking that such a determination "would conflict with the law's twin goals of objectivity and neutrality."[96] And to an often-repeated sentiment that "the judiciary has no particular competence to assess artistic merit."[97]

Rather than judge the art or the artist on the merits of the artistic worth, VARA uses a commercialism proxy as a litmus test for protection. This gatekeeping function that commercialism serves is unsatisfying because it relies on an outdated sense, a romanticized myth of who is an artist and what is art.[98]

B. Copyright

While VARA withholds protection from artists that create artwork that has a distinctly commercial aim, an aspect of copyright law also prejudices artists who seek monetary reward. Determining what types of works are eligible for copyright protection adheres to the doctrine of avoidance of artistic determinations, allowing all types of works to gain copyright protection. But a different aspect of copyright law, the fair use doctrine, allows money, or at least the attempt or intention at being a commercially successful visual artist, to reduce an important protection on which an artist might otherwise seek to rely when facing claims that their work infringes on another's copyright.

Avoidance of any judgment concerning the quality or purpose behind artistic expression is a fundamental aspect of the inquiry into what works are eligible for copyright protection. The rights granted by copyright are provided without regard to the aesthetic merit of the work, and, importantly, without regard to the work's commercial value. Justice Holmes famously articulated what today is referred to as the aesthetic non-discrimination doctrine, in a case ruling that certain posters were el-

[95] Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 815 (2005) (internal quotations omitted).

[96] *Id.* at 812.

[97] *Id.* at 814.

[98] Professor Amy Adler puts the point more forcefully:

> [M]oral rights are premised on the precise conception of "art" that artists have been rebelling against for the last forty years. Moral rights law . . . 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.

Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265 (2009); *see also* Peter K. Yu, *Moral Rights 2.0*, 1 TEX. A&M L. REV. 873, 877 (2014).

igible for copyright protection even though they were used to advertise a circus.[99] Writing for the majority, Justice Holmes stated:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to 'pictures which appealed' to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value,—it would be bold to say that they have not an aesthetic and educational value,—and the taste of any public is not to be treated with contempt.[100]

From this passage, probably the clearest articulation of a doctrine of avoidance, U.S. Copyright has developed a strong baseline. Copyright law today is clear: authors who create any type of "original work of authorship" are granted a set of powerful exclusive rights from the moment their works are fixed—i.e., written down, painted, sketched, or sculpted. Judicial avoidance of whether something is a work of art, here, benefits the artist. Whether a judge would classify the work as "art" is not relevant—all works of creative expression are granted copyright protection, even if they are used for the crass commercial purpose of advertising. How valuable the copyright right actually turns out to be depends on the market demand for the work—how popular it is, how much others are willing to pay for copies of it, and other standard market-based factors, e.g. how good the marketing and distribution channels are. In that sense, normal market factors all contribute to the economic value of the rights granted by federal copyright law.

The part of copyright law that is specifically affected by money comes in the context of fair use, a doctrine that limits the scope of rights that the Copyright Act grants to copyright owners. The genesis of fair use is in the recognition by courts of a need to allow for some copying of the expressive content of copyrighted works, lest copyright lead to monopolistic stagnation in expression.[101] In the context of visual art, fair use provides

[99] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

[100] *Id.* at 251–52.

[101] The idea expression distinction also plays an important role in warding off monopolistic stagnation. *See* Computer Assoc. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 696 (2d Cir. 1992) (discussing the importance of limits on the extent of protection "so as to avoid the effects of monopolistic stagnation"). The Supreme Court has referred to these two doctrines, fair use and the idea expression distinction, as part of the "traditional contours" of copyright. Golan v. Holder, 565 U.S. 302, 328 (2012).

important latitude for artists to copy expression from works that are already in existence. Copying is a fundamental part of artistic expression—echoing, learning from, and expanding on what has come before. While copyright has been called the engine of free expression,[102] fair use ensures that there is sufficient fuel to power that engine.

Modern codification of the fair use doctrine employs four factors.[103] Two of those factors expressly reference monetary considerations, and, perhaps not surprisingly, those two factors turn out to be the most important—despite what the statute and the Supreme Court have said about needing to pay attention to all four factors.[104] The first and fourth factors in the fair use analysis weigh the commercial nature and the commercial consequences of the defendant's use.[105] In other words, in the fair use analysis, money changes things.

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[102] "The Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." Harper & Row, Publ's, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

[103] The statute provides:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C § 107 (2012).

[104] "Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994). The Supreme Court had previously stated that the fourth factor "is undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566 (citing MELVILLE B. NIMMER, & NIMMER ON COPYRIGHT § 13.05[A], at 13–76 (1984)). The Supreme Court had also previously indicated that commerciality resulted in a presumption of unfairness: "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984). Later, in *Campbell*, the Court reversed the decision of the court of appeals, in part because it had applied this presumption. Despite the Supreme Court in *Campbell* being clear that all factors are to be explored together, lower courts continue to refer to the fourth factor as "the most important factor." *See, e.g.*, Authors Guild v. Google, Inc., 804 F.3d 202, 223 (2d Cir. 2015). And it is not uncommon to see a court order its analysis of the factors by examining factor one, then factor four, and then factors two and three—sometimes even combining two and three in a short final section. *See, e.g.*, Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013) (addressing the first and fourth factors first, then turning to the second and third).

[105] *Sony*, 464 U.S. at 448–51.

The first factor in a fair use analysis requires examination of "the purpose and character of the use, including whether such use is of a *commercial nature* or is for nonprofit educational purposes."[106] This factor can be read to disadvantage artists who are "in it for the money." A true artist, in the romanticized notion of what it means to be a true artist, would not create with a commercial purpose or engage in a use of a commercial nature. The true artist would see this first factor weigh in favor of fair use, while other artists, those who seek to actually be paid for their art, would be at a disadvantage. Thankfully, many courts (although not all) have rejected this romanticized notion of creative endeavors.[107]

In a case involving the rap group 2 Live Crew's parody of the Roy Orbison classic, "Oh, Pretty Woman," the Supreme Court acknowledged that if commercial use alone barred a finding of fair use it would limit the doctrine too narrowly.[108] The Court reversed the lower court's decision that the commercial nature of 2 Live Crew's music made their song presumptively unfair. Although the Supreme Court rejected a presumption of unfairness, it repeated its understanding of the first statutory fair use factor: commercial use by the defendant "tends to weigh against a finding of fair use."[109]

As the Second Circuit has articulated it, the "greater the private economic rewards reaped by the secondary user (to the exclusion of broader public benefits), the more likely the first factor will favor the copyright holder."[110] Focusing on economic rewards an artist seeks in pursuing his or her passion disadvantages artists who seek to profit from their work. The core concern addressed by this sub-factor is "the unfairness that arises when a secondary user makes unauthorized use of copyrighted material to capture significant revenues as a direct consequence of copying the original work."[111]

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[106] 17 U.S.C. § 107(1) (2012) (emphasis added).

[107] The Supreme Court itself has noted the fallacy of using commerciality as a litmus test for fair use:

> If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country." *Harper & Row,* 105 S.Ct, at 2246 (Brennan, J., dissenting). Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that "[n]o man but a blockhead ever wrote, except for money."

Campbell, 510 U.S. at 584 (citing BOSWELL'S LIFE OF JOHNSON 19 (G. Hill ed. 1934)).

[108] *Id.*

[109] *Id.* at 585.

[110] Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006).

[111] *Id.* (quoting Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 922 (2d Cir. 1994)).

An additional fair use factor also focuses, albeit indirectly, on the commercial aspects of the artist's activities by weighing "the effect of the use upon the potential market for or value of the copyrighted work."[112] This fourth factor, often seen as the most important factor,[113] or at least "*primus inter pares*,"[114] also has a potential to disadvantage artists who seek commercial reward for their work. To the extent that the commercial exploitation of an artistic creation might result in loss of revenue for the copyright owner, this factor will weigh against fair use.

A true artist of the romanticized kind would not have much or really any impact on the commercial exploitation of a work whose expression the artist may have copied in some way when creating the work. If, however, the artist is seeking to commercially exploit the new work, that commercial exploitation could have an adverse impact on the copyright owner's market. If that impact is likely, the fourth factor will weigh against a finding of fair use.

An early example of commercial purpose disadvantaging a visual artist in the fair use analysis involved Jeff Koons' sculptural work titled *String of Puppies*.[115] Koons modeled his work after a photograph by Art Rogers, titled *Puppies*.[116] Three of the four copies of Koons' work "were sold to collectors for a total of $367,000," a fact noted prominently by the court in a decision finding the work to be an infringement of the photograph on which it was based.[117] In analyzing Koons' claim to fair use, the court found that "[t]he circumstances of this case indicate that Koons' copying of the photograph 'Puppies' was done in bad faith, primarily for profit-making motives . . . ."[118] The court went on to say that there was "nothing in the record to support a view that Koons produced 'String of Puppies' for anything other than sale as high-priced art. Hence, the likelihood of future harm to Rogers' photograph is presumed, and plaintiff's market for his work has been prejudiced."[119]

One way to understand what Congress was attempting through the fourth factor is a vision of commercial exploitation as inconsistent with romantic notions of artists and thus commercial exploitation results in a loss of protections that might otherwise exist. Another way to view the

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[112] 17 U.S.C. § 107(4) (2012).

[113] In its first case interpreting the 1976 Copyright Act, the Supreme Court called the fourth factor "perhaps the most important." Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 476 (1984). Ten years later, that characterization of the fourth factor was noticeably absent. *See Campbell*, 510 U.S. at 590.

[114] Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1385 (6th Cir. 1996).

[115] Rogers v. Koons, 960 F.2d 301, 305 (2d Cir. 1992).

[116] *Id.*

[117] *Id.*

[118] *Id.* at 310.

[119] *Id.* at 312.

fourth factor is through the lens of diversion. Rather than ask whether the defendant's work is a work of art, given the limits of judicial competence and a desire for the law to remain objective and neutral, Congress directed attention at a different matter: money.

Of course, as a law that is designed to provide an incentive for artists to invest their time and talent in the creation of new works, and as a law that exists in a capitalistic economy, a focus in copyright on monetary effects of the use of another's expression is understandable. If a use by another of expressive content from a copyrighted work affects the sales of that copyrighted work, then that use should be treated with less tolerance in an effort to preserve the incentive effect of the marketable right of the copyright. Creating multiple copies of a work has the potential to cause the most market harm from substitution. If the defendant's alleged infringing activity was a work existing in only a single copy, it is less likely to interfere with the market for the copyrighted work. At the same time, as seen in the *Koons* case, the proxy of commercialism has allowed courts to discount the potential fairness of a work, even a work that exists in a single copy.[120] The fair use factors, with their command to consider the commerciality of a work, have resulted in certain types of works of visual art failing to receive the protections that the fair use doctrine otherwise provides.[121]

Copyright's fair use doctrine codifies a kind of unease with art and money—the purity of art should not involve money, and when it does, art becomes "just like" other commodities of commerce, undeserving of special protections or solicitudes.

C. Right of Publicity

We see the unease with art and money in the context of a different type of right—a right known as the right of publicity. "The right of publicity is an intellectual property right of recent origin which has been defined as the inherent right of every human being to control the commercial use of his or her identity."[122] The right of publicity provides

[120] *See id.* at 310.

[121] "Although the fair use provision does not single out commercial speech or advertising, some courts have indicated that uses in advertising are particularly disfavored for fair use purposes." Jennifer E. Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929, 1948 n.71 (2015). Professor Rothman cites as examples Davis v. Gap, Inc., 246 F.3d 152, 175 (2nd Cir. 2001) ("concluding that where a use in an advertisement is not transformative, its status as an advertisement weighs heavily against fair use because advertisements are at the outer limit of commercialism") (internal quotation marks omitted); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 115 (2d Cir. 1998) ("suggesting that because parody appeared in an advertisement there was more limited 'indulgence' for the use, but nevertheless holding that the use was fair").

[122] ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 928 (6th Cir. 2003).

individuals "with a cause of action against anyone who makes a commercial use of their name, image, likeness, or other indicia of identity."[123] It is a state based right, not one granted by federal law, so the shape of the right varies from state to state.

Some state statutes that protect rights of publicity specifically exempt original works of fine art.[124] This protects visual artists that want to include a likeness of celebrities in their art. But, as they say, the devil is in the details. Just what is a "work of fine art"? Some states exempt "original" works of art and some specify that to be exempt the work must exist in a single copy or a very limited number of copies.[125] California's statute concerning the right of publicity for deceased celebrities exempts a "single and original work of art."[126] Under California's definition, if an artist makes multiple copies, even limited edition prints, the work is no longer statutorily exempt from a right of publicity claim.[127]

The California Supreme Court explained that the exemption was based on the right of publicity's aim "at preventing the illicit merchandising of celebrity images."[128] Thus, the exemption makes sense. "[B]ecause single original works of fine art are not forms of merchandising, the state has little if any interest in preventing the exhibition and sale of such works, and the First Amendment rights of the artist should therefore prevail."[129]

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[123] Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891, 893 (2017) (collecting cases). This often-repeated definition of the right of publicity does not really provide a fair statement of what the right encompasses. "[W]hat courts and commentators have been calling 'the right of publicity' is really multiple rights: the endorsement right, the merchandizing entitlement, and the right against virtual impressment." *Id.* at 894.

[124] *See, e.g.*, CAL. CIV. CODE § 3344.1(a)(2) (West 2016).

[125] Nevada's statute exempts a use if it "is in connection with an original work of art except that multiple editions of such a work of art require consent." NEV. REV. STAT. ANN. 597.790(2)(e) (LexisNexis 1999). *See also,* 765 ILL. COMP. STAT. § 1075/35(B)(1) (2018) (exempting "a single and original work of fine art"); OHIO REV. CODE ANN. § 2741.09(A)(1)(c) (LexisNexis 2018) (exempting "[o]riginal works of fine art"); OKLA. STAT. ANN. tit. 12, § 1448(N)(3) (West 1993) (exempting "[s]ingle and original works of fine art"); 42 PA. CONS. STAT. § 8316(e)(2)(iv) (2018) (exempting "an original work of fine art"); TEX. PROP. CODE ANN. § 26.012(a)(4) (West 2018) (exempting "single and original works of fine art"); WASH. REV. CODE ANN. § 63.60.070(2)(a) (West 2005) (exempting "[s]ingle and original works of fine art, including but not limited to photographic, graphic, and sculptural works of art that are not published in more than five copies").

[126] CAL. CIV. CODE § 3344.1(a)(2). California's statute concerning the right of publicity of still-living individuals does not contain a similar express exemption. *See* CAL CIV. CODE § 3344.

[127] *See* CAL. CIV. CODE § 3344.1(a)(2).

[128] Comedy III Prods., Inc. v. Saderup, 21 P.3d 797, 810 (Cal. 2001).

[129] *Id.*

The Court's invocation of the First Amendment in this context is unnecessary,[130] but it is also telling because the work at issue in the case did not exist in just a single copy. The work at issue in the case involved a charcoal drawing of the comedy trio known as the Three Stooges created by artist Gary Saderup.[131] However, because Saderup sold multiple copies of his work, as lithographs and also printed on t-shirts, the lower court found he had violated the right of publicity belonging to the heirs of the Three Stooges.[132] The trial court enjoined the further sale of the lithographs and t-shirts.[133] But, presumably due to the express statutory exemption, the court did not enjoin sale of "Saderup's original charcoal drawing from which the reproductions at issue were made."[134]

On appeal, the California Supreme Court recognized that even if the statutory exemption did not apply to the lithographs and t-shirts, the First Amendment did.[135] The lower court had erred in concluding that reduced First Amendment protection was warranted because the defendant's art had appeared in large part on less conventional avenues of communications, namely T-shirts.[136] Instead, the California Supreme Court held that "[s]uch myopic vision not only overlooks case law central to First Amendment jurisprudence but fundamentally misperceives the essence of visual communication and artistic expression."[137]

The court went on to "formulate . . . what is essentially a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation."[138] Importantly, the court juxtaposed the type of t-shirt reproductions with a notion of "true art." Holding that "a reproduction of a celebrity image that contains significant creative elements is entitled to as much First Amendment protection as an original work of art."[139] The court focused on preventing "others from misappropriating the econom-

[130] It is unnecessary because the exemption is statutorily provided. In the case of an original work of art existing in single copy, a court does not need to address First Amendment claims because the work is statutorily exempt from a claim of a violation of the right of publicity. *See* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2163 (2014).

[131] *Comedy III Prods., Inc.*, 21 P.3d at 801–02.

[132] *See id.* at 810.

[133] *Id.* at 801.

[134] *Id.*

[135] *See id.* at 802; *see also* Johnson, *supra* note 123, at 903–12 (discussing the ways in which the courts use the First Amendment to give the right of publicity its "essential shape" and why that is problematic).

[136] *Comedy III Prods., Inc.*, 21 P.3d at 804.

[137] *Id.* (quoting Bery v. City of New York, 97 F.3d 689, 695 (2d Cir.1996)).

[138] *Id.* at 799.

[139] *Id.* at 810.

ic value generated by the celebrity's fame through the merchandising of the 'name, voice, signature, photograph, or likeness' of the celebrity."[140]

The court concluded that "depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment."[141] But if the work at issue contained "significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation," then the artist's First Amendment interests would outweigh the celebrities' right of publicity.[142] Applying this new First Amendment infused test to the defendant's work, the court concluded that it could "perceive no transformative elements" in the image of the charcoal drawing of *Three Stooges* that was created by Saderup and reproduced in lithographs and on t-shirts.[143] The image did not have additions of "significant creative elements" and was no more than a "mere celebrity likeness or imitation."[144] In other words, artist Saderup lost because the court found that "the marketability and economic value of Saderup's work derives primarily from the fame of the celebrities depicted."[145]

The court could "discern no significant transformative or creative contribution," noting that the artist's "undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame."[146] As Professor Eric Johnson has observed, "where First Amendment . . . defenses succeed with likeness-bearing products, it seems to coincide with a determination that the product somehow rose above the level of mere merchandise to constitute art."[147]

The statutory exclusions from right of publicity claims for artwork that exists in a single copy and even the First Amendment infused limits employed by the California Supreme Court demonstrate that when an artist steps outside of the protected walls of the art studio, and more importantly, steps outside of the narrow confines of a romanticized notion

[140] *Id.* at 807.

[141] *Id.* at 805.

[142] *Id.* at 799.

[143] *Id.* at 811.

[144] *Id.* at 799.

[145] *Id.* at 811.

[146] *Id.* Contrast the Three Stooges case with the work at issue in ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915, 918 (6th Cir. 2003), a lithograph sold in multiple copies depicting famous golfer Tiger Woods. The Sixth Circuit held that "the substantiality and market effect of the use of the celebrity's image [should be] analyzed in light of the informational and creative content of the defendant's use." *Id.* at 937. Applying that balancing test, the court concluded that the artist's work had "substantial informational and creative content which outweigh[ed] any adverse effect on [Tiger Woods'] market" and, thus, under Ohio Law, the multiple-copy lithographs did not violate Tiger Woods's right of publicity. *Id.*

[147] Johnson, *supra* note 123, at 934.

of the activities of a true "artist" and enters the world of commerce, she enters a world that is full of many more restrictions on what an artist can, and cannot, do. Significantly, in the context of rights of publicity claims, she enters a world in which the content and significance of her creative expression is examined and, if found wanting, can result in liability. Seeking monetary reward, and in particular aiming at obtaining compensation through the sale of multiple copies of a work, changes the way the artist is treated.

D. Coda: Wild Commercial Success

There is a final thinner thread where money appears to alter the calculus found in both the copyright fair use cases and the right of publicity cases. That thread uses significant commercial success of an artist seemingly as a proxy for "true art" that is worthy of protections from claims by others. In these cases, the courts appear to be freed from the need to decide whether the work at issue is "real" art. Instead, the courts in these cases seem to rely on commercial success as a testament to who is a "true artist." And those "true artists" are given wide latitude for their creations.

For example, in the case involving Saderup's charcoal drawing of the Three Stooges, the California Supreme Court held up Andy Warhol's work as examples of clearly transformative works that would not run afoul of the rights of publicity:

> The silkscreens of Andy Warhol, for example, have as their subjects the images of such celebrities as Marilyn Monroe, Elizabeth Taylor, and Elvis Presley. Through distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself.[148]

As Professor Rebecca Tushnet has observed, the California Supreme Court asserted Warhol's work was transformative "essentially because Warhol was famous and therefore the art world reacted as if the silkscreens commented on the celebrities depicted, reactions the court attributed to Warhol's 'distortion' and 'careful manipulation of context.'"[149] But really "the California Supreme Court reacted to Warhol's reputation, not to the content of his work or its conditions of produc-

[148] *Comedy III Prods., Inc.*, 21 P.3d at 811.

[149] Rebecca Tushnet, *A Mask That Eats into the Face: Images and the Right of Publicity*, 38 COLUM. J. L. & ARTS 157, 169 (2015) (quoting *Comedy III Prods., Inc.*, 21 P.3d at 811). Professor Tushnet also notes that "[t]he choice of Warhol as a representative non-infringing artist is at best ironic, given Warhol's lack of involvement in many of 'his' artworks and his explicit rejection of a line between art and commerce." *Id.* at 170.

tion."[150] The court saw transformation in Warhol's artwork because of his anointed status in the art world, but it did not see sufficient transformation in Saderup's mere craftsmanship in depicting the Three Stooges.[151] The level of wild commercial success enjoyed by Warhol also comports with a romanticized notion of the artist. Only a handful, the anointed few, make it big, and when they do, we can recognize them for the true artistic geniuses that they must be.[152]

The use of artistic fame as a proxy for art[153] can be seen not just in the cases concerning rights of publicity, but also in the copyright fair use cases. A ruling by the Second Circuit involving artist Richard Prince is a prominent example of this phenomenon.[154] Photographer Patrick Cariou had published a book, titled *Yes Rasta,* which contained "classical portraits and landscape photographs that he took over the course of six years spent living among Rastafarians in Jamaica."[155] Prince altered and incorporated several of Cariou's *Yes Rasta* photographs into a series of paintings and collages, called *Canal Zone*.[156] Cariou sued Prince and the Gagosian Gallery that had displayed Prince's work, alleging that Prince's *Canal Zone* infringed on Cariou's copyrights in his photographs.[157]

In discussing whether there was evidence of market substitution relevant to the fourth factor of the fair use inquiry,[158] the court noted that the opening dinner for the Gagosian show "included a number of the wealthy and famous."[159] The court then listed:

> Jay-Z and Beyonce Knowles, artists Damien Hirst and Jeff Koons, professional football player Tom Brady, model Gisele Bundchen, Vanity Fair editor Graydon Carter, Vogue editor Anna Wintour, authors Jonathan Franzen and Candace Bushnell, and actors Robert DeNiro, Angelina Jolie, and Brad Pitt.[160]

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[150] *Id.*

[151] The California Supreme Court acknowledged Saderup's "undeniable skill" but did not acknowledge Saderup's artistic creativity. *Comedy III Prods., Inc.*, 21 P.3d at 811.

[152] *See generally* MICHAEL FINDLAY, THE VALUE OF ART: MONEY, POWER, BEAUTY (rev. ed. 2014).

[153] Fame does, however, bring lawsuits. Even Warhol was sued several times over his use of photographs as starting points for several of his series. Emily Meyers, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J.L. & ARTS 219, 226–27 (2007) (recounting three instances in which Warhol was sued).

[154] *See generally* Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).

[155] *Id.* at 698.

[156] *Id.* at 699.

[157] *Id.* at 704.

[158] *See supra* notes 118–34 and accompanying text (discussing the fourth factor in the fair use analysis).

[159] *Cariou*, 714 F.3d at 709.

[160] *Id.*

The court then recounted that Prince had sold eight artworks from the show for over ten million dollars. The court contrasted the circles in which Prince's work was popular with the plaintiff photographer, noting that Cariou had "not aggressively marketed his work" and had "earned just over $8,000 in royalties."[161]

In *Cariou v. Prince*, the Second Circuit seemed to be embracing an idea that the "true art" market is a fundamentally different market, such that the risk of market substitution for a work that does not appeal to that market is effectively zero. The Second Circuit noted that Prince's work "appeals to an entirely different sort of collector than Cariou's."[162]

Prince was later sued by a different photographer, Donald Graham, asserting that Prince had infringed his photographs by copying images available online, enlarging them, and adding text below the image.[163] In that case, Prince attempted to use his fame and appeal to the rarified art world in order to obtain a dismissal of Graham's infringement claims. Prince argued that "art collectors would never consider buying Prince's appropriation art in lieu of Graham's photograph."[164] The court seemed to indicate that, if true, such facts might weigh in favor of a finding of fair use.[165]

Allowing the artist's collectors to define the market favors the artist that has gained recognition within the celebrity art world circles. For example, the Second Circuit seemed to focus on "Prince's celebrity, the exclusive price tag on his work, and the Gagosian Gallery's portfolio of wealthy contacts"[166] and compared that with the plaintiff photographer's relatively meager earnings.[167] Professors Gilden and Greene suggest that following the precedent of *Cariou* means that "wealth and fame may entitle an author not just to a robust legal defense, but also to a privileged position in harnessing copyright's rhetoric."[168]

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[161] *Id.*

[162] *Id.*

[163] Graham v. Prince, 265 F. Supp. 3d 366, 372 (S.D.N.Y. 2017).

[164] *Id.* at 385.

[165] Because the court was ruling on Prince's motion to dismiss, the court was required to draw all reasonable inferences in favor of the plaintiff photographer, Graham. With those inferences, the court found that Prince's alleged infringing works "can serve as substitutes because they present the entirety of Graham's photograph in the same sizes in which the photograph is sold by Graham, without obstructing or distorting it in any physical sense." *Id.*

[166] Andrew Gilden & Timothy Greene, *Fair Use for the Rich and Fabulous?* 80 U. CHI. L. REV. DIALOGUE 88, 99 (2013). Professors Gilden and Green assert that as to this aspect of its fair use analysis, the *Cariou* opinion "loses its footing in emphasizing the differences in cultural and economic status among the art, artists, and audiences in question." *Id.* at 93.

[167] *Cariou*, 714 F.3d at 709.

[168] Gilden & Greene, *supra* note 166, at 99. Professors Gilden and Greene also observe that "conventionally popular litigants do tend to win in fair use case law." *Id.*

It is as if the fame of the artist sweeps away concerns—they are, after all, already adjudged, external to the case at hand, to be "true artists" deserving the level of solicitude and protection reserved for only true artists.

CONCLUSION

This Essay is, for the most part, descriptive, seeking to explore three areas where law and art interact, and where, it seems, *money changes things*. The desire for the law to remain objective and neutral, to not have to judge whether something is art or someone is an artist, leads legislatures and judges to rely, in these three areas, on the proxy of commercialism as an indication of artistic worth.

In the case of VARA, copyright's fair use factors, and many states' approaches to the limits on the rights of publicity, the taint of money or commercial exploitation is a cause for suspicion, inconsistent with romanticized notions of the pursuits of a true artist, and thus leads to less or no protection for the creation or the creator. In these contexts, visual art created for overt monetary gain, especially through pieces reproduced in multiple copies or used in promotions or advertisements, are just like any other commodity; no special solicitude or protection is to be given to those artworks or those artists. And, at the other end of the commercial spectrum, wild commercial success of an artist permits a court to assume a true artist, because the external art world has bestowed that judgment already and judges are relieved of having to make the determination. While judging what is art and who is a real artist is a task the law may be ill-equipped to handle, the proxy of money is, I submit, only superficially appealing because it is based on an outdated and romanticized notion of who is an artist and, ultimately, what is art.

at 101 n.88.