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PRAGMATISM, ECONOMICS, AND THE *DROIT MORAL*

THOMAS F. COTTER*

Under the continental doctrine of droit moral, or moral right, the creator of a work of authorship (such as a literary work, a painting, or a film) is viewed as having an inalienable right to prevent others from, among other things, modifying, distorting, or otherwise interfering with the integrity of that work—even after the creator alienates both the physical object in which the work is embodied and its copyright. Over the past two decades, a somewhat weaker version of the doctrine has begun to make inroads into American law as well, culminating in the passage of the Visual Artists Rights Act of 1990. In this Article, Professor Cotter examines the doctrine of moral right through the lens of philosophical and legal pragmatism. Applying first the insights of pragmatic aesthetic theorists, he considers the implications of the droit moral on “art as experience.” Second, he applies economic analysis in an effort to predict the likely consequences of moral rights upon the well-being of artists, patrons, and audiences. He concludes that the weak version of the doctrine adopted in the United States has much to recommend it from both a philosophical and economic perspective, but that the more robust version adopted in France and Germany imposes too substantial a risk of stifling artistic innovation and experimentation.

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I. INTRODUCTION

In a collection of essays entitled *Testaments Betrayed*, the novelist Milan Kundera quotes from correspondence between the composer Igor Stravinsky and the conductor Ernest Ansermet concerning Ansermet's plan to make certain cuts in Stravinsky's composition *Jeu de Cartes* during a performance that was to take place in Paris on October 27, 1937.¹ In a letter to Ansermet dated October 14, 1937, Stravinsky forbade the proposed alterations, stating that they were likely to distort the work and that it would be "better not to play it at all than to do so reluctantly."² A few days later, Stravinsky refused Ansermet's amended request to make one "small cut in the March from the second measure of 45 to the second measure of 58,"³ arguing that even this relatively modest alteration would "cripple[] my little March, which has its form and its structural meaning in the totality of the composition (a *structural meaning* that you claim to be protecting)."⁴ In conclusion, Stravinsky wrote:

You cut my March only because you like the middle section and the development less than the rest. In my view, this is not sufficient reason, and I would like to say: "But you're not in your own house, my dear fellow"; I never told you: "Here, take my score and do whatever you please with it."⁵

1. See MILAN KUNDERA, *TESTAMENTS BETRAYED* 243-46 (Linda Asher trans., 1995).

2. *Id.* at 244 (quoting Letter from Igor F. Stravinsky to Ernest Ansermet (Oct. 14, 1937), in 1 STRAVINSKY: *SELECTED CORRESPONDENCE* 226 (Robert Craft ed., 1982), with several minor word changes).

3. *Id.* at 245 (quoting Letter from Ernest Ansermet to Igor F. Stravinsky (Oct. 15, 1937), in 1 STRAVINSKY: *SELECTED CORRESPONDENCE*, *supra* note 2, at 227).

4. *Id.* (quoting Letter from Igor F. Stravinsky to Ernest Ansermet (Oct. 19, 1937), in 1 STRAVINSKY: *SELECTED CORRESPONDENCE*, *supra* note 2, at 226).

5. *Id.*; cf. Bernard Holland, *Updated, and That's Not All*, N.Y. TIMES, Oct. 7, 1996, at

For a contrasting perspective, consider the case of the late nineteenth/early twentieth-century composer and conductor Gustav Mahler. Although one might expect Mahler, as a composer, to have shared Stravinsky's passion for faithful adherence to the score, at least in his role as conductor Mahler exhibited few inhibitions when it came to altering the works of other composers—for example, by introducing thematic alterations and suggested cuts into the works of Schumann,⁶ by making cuts to the second and fourth movements of Bruckner's Romantic Symphony,⁷ and by altering the orchestration of Beethoven's Ninth Symphony.⁸ Many of Mahler's contemporaries objected to these alterations,⁹ although at least one critic thought that Mahler had shown the Bruckner work "love and comprehension, whereas others battled 'for the letter of the law, and against Bruckner.'"¹⁰ Mahler himself responded to critics of the Beethoven interpretation by arguing that Beethoven's deafness had caused him to lose contact with the reality of physical sound; that, in light of the improvement in the quality of brass instruments since Beethoven's day, "it would be a crime not to use them to give a more perfect rendering of Beethoven's works"; and that the "customary increase in the number of stringed instruments has made it equally necessary to increase the number of wind instruments, and this was done solely to balance the volume of sound and not to give instruments a new significance."¹¹

C1 (speculating whether Stravinsky's heirs would sue over director Peter Sellars's inventive production of Stravinsky's opera *The Rake's Progress*).

6. See KURT BLAUKOPF, *GUSTAV MAHLER* 155-56 (1973) (discussing Mosco Carner's investigations into Mahler's Schumann arrangements).

7. See 2 HENRY-LOUIS DE LA GRANGE, *GUSTAV MAHLER* 231 (1995).

8. See BLAUKOPF, *supra* note 6, at 150-56; 2 DE LA GRANGE, *supra* note 7, at 232-37; MICHAEL KENNEDY, *MAHLER* 63-64 (1990).

9. See BLAUKOPF, *supra* note 6, at 150-52, 156; 2 DE LA GRANGE, *supra* note 7, at 231, 233-37.

10. 2 DE LA GRANGE, *supra* note 7, at 232 (paraphrasing and quoting uncited review by *Wiener Abendpost* music critic Robert Hirschfeld, following January 28, 1900, performance of Vienna Philharmonic Orchestra). Compare the following story told by Alastair Reid, concerning his English translation of Pablo Neruda's poetry:

[Neruda] was always ready to answer any questions I had about [the poems], even to talk about them, fondly, as about lost friends, but he was not much interested in the mechanics of translation. Once, in Paris, while I was explaining some liberty I had taken, he stopped me and put his hand on my shoulder.

"Alastair, don't just translate my poems. I want you to improve them."

Alastair Reid, *Neruda and Borges*, *NEW YORKER*, June 24 & July 1, 1996, at 56, 70.

11. KENNEDY, *supra* note 8, at 208 (quoting leaflet prepared by Mahler and distributed prior to Vienna Philharmonic Orchestra concert of February 22, 1900); see also BLAUKOPF, *supra* note 6, at 153-55 (describing controversy over Mahler's interpretation of Beethoven); 2 DE LA GRANGE, *supra* note 7, at 232-37 (same).

In a nutshell, these stories illustrate the tension that often arises between the “author”¹² of a creative work, on the one hand, and those who would like to perform, display, or otherwise use the work, on the other. Should Stravinsky have had the right to stop Ansermet from performing an altered version of *Jeu de Cartes*—even if, let us suppose, Stravinsky no longer owned the copyright to the work—or should the conductor have had free rein to use Stravinsky’s work to express the conductor’s own creative vision?¹³ Should someone—Beethoven’s nearest living relatives? the state?—have had the right to prevent Mahler’s experimentation? Should a painter or sculptor who sells her work to another be able to enjoin the buyer from subsequently altering the work, even though the artist no longer retains ownership of the physical object in which the work is embodied? Should a novelist or dramatist who purports to sell the right to adapt or perform his work nevertheless retain some veto power over an adaptation that renders his work trivial or vulgar?¹⁴

Blaukopf argues that Mahler’s retouching of the Ninth Symphony was a laudable attempt to better discern the composer’s vision, which had become distorted over the years due in part to the changed acoustics of the late nineteenth-century concert hall. See BLAUKOPF, *supra* note 6, at 153-55. Mahler himself argued that his interpretation of Beethoven was neither a “re-orchestration” nor an “improvement,” but rather a more faithful rendering of “what the Master demands.” KENNEDY, *supra* note 8, at 208 (quoting Mahler’s leaflet).

12. Throughout this Article, I shall use the terms “author,” “artist,” and “creator” interchangeably to refer to any person who creates a literary work, musical composition, motion picture, or other “work of authorship” as that term is defined under the Copyright Act. See 17 U.S.C. § 102(a) (1994).

13. Under United States law, copyright in works created on or after January 1, 1978, subsists from creation of the work and, subject to certain exceptions, endures for a term consisting of the life of the author plus 50 years. See *id.* § 302(a). For most works created prior to January 1, 1978, and not yet in the public domain as of that date, the copyright term endures for a total period of 75 years. See *id.* § 304(a)-(b). The owner of the copyright acquires the exclusive right to reproduce the work in copies or phonorecords, to prepare derivative works based upon the copyrighted work, to distribute copies or phonorecords of the work to the public, and, with respect to most works of authorship, to publicly perform and display the work. See *id.* § 106. Thus, in the above example, if Stravinsky had assigned or licensed the copyright to *Jeu de Cartes* to Ansermet without restriction, then under U.S. copyright law Ansermet would have had the right to perform the work publicly however he saw fit, over Stravinsky’s objections.

I do not know whether, as a matter of historical fact, Stravinsky owned the copyright to *Jeu de Cartes* at the time of his quarrel with Ansermet, or whether he had assigned or licensed it to someone else. Presumably, any issues relating to the performance would have been governed by French law.

14. Cf. John Lyttle, ‘Mike Sarne? Mike Sarne? Why?’, INDEP. (London), July 17, 1993, at 30, available in LEXIS, News Library, Arcnws File (quoting novelist Gore Vidal as stating that the film version of his novel *Myra Breckinridge* is “one of the worst films ever made”); Gary Arnold, *All Rogues Lead to Rome*, WASH. POST, Mar. 31, 1980, at B1, available in LEXIS, News Library, Arcnws File (discussing Vidal’s disavowal of film *Caligula*). One can only guess the reaction of Nathaniel Hawthorne, from whatever

Under the doctrine of *droit moral* or "moral right," the author would prevail in disputes of this nature, regardless of whether she continues to own the physical embodiment of or copyright to the work.¹⁵ Originally developed in the courts of France and later adopted throughout continental Europe, the *droit moral* in recent years has begun to win acceptance, albeit on a relatively modest scale, in the United States as well.¹⁶ Whether to encourage the further expansion of the *droit moral* in this country as a means of defending and preserving the integrity of artistic visions, or to reject the doctrine out of preference for the alternative visions of owners, interpreters, and audiences, has been the subject of considerable scholarly debate.¹⁷

In this Article, I consider an aspect of the *droit moral* known as the right of integrity from the standpoint of philosophical and legal pragmatism. As discussed in greater detail herein, I view pragmatism as a perspective that conceives of human thought as both a contingent human construction, emerging from the context of past experience, and as an instrument that enables the human organism to predict, control, and cope with its environment;¹⁸ and I have argued before that pragmatism provides a framework for simultaneously reaffirming and mediating among our commitments to such conflicting values as individuality and community, efficiency and egalitarianism.¹⁹ I shall demonstrate that pragmatism, and in particular a pragmatic approach to aesthetics, helps to illuminate some of the tensions inherent in the moral rights dilemma in surprising ways. I also shall argue that a pragmatic commitment to

realm his spirit now inhabits, to the 1995 retelling of *The Scarlet Letter* featuring Demi Moore.

15. See *infra* notes 54-70 and accompanying text.

16. See *infra* notes 40-144 and accompanying text.

17. See, e.g., Lawrence Adam Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 NW. U. L. REV. 1011 (1988); Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988); Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1 (1980); Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985); John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976); Neil Weinstock Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347 (1993); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940).

18. See *infra* notes 146-56 and accompanying text.

19. See Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2073-98 (1996).

instrumentalism recommends a greater use of the methods of social science, for the purpose of trying to predict the consequences of alternative systems of moral rights, than has been evidenced in most discussions of moral rights to date.

I begin in Part II with a brief overview of the history of the *droit moral* and its development in the courts and legislatures of France, Germany, and the United States. In Part III, I discuss the principal tenets of pragmatism, with special attention to pragmatic aesthetic theory; the implications of pragmatic aesthetics for the doctrine of moral rights; and, through the application of economic analysis, the likely welfare and distributional consequences of alternative moral rights regimes. In Part IV, I attempt to mediate among the pragmatic arguments for and against moral rights recognition. I will argue, among other things, that a waivable moral right offers small positive benefits to artists and the rest of society; that the effects of a nonwaivable right may vary somewhat from one culture to another, but that nonwaivability threatens to harm both the producers and consumers of works of art; and that one of the benefits of having several different models of moral rights regimes in place in the United States and Europe may be to provide empirical evidence concerning the advantages and disadvantages of the various possible methods of securing artists' rights. I conclude that the limited recognition accorded moral rights under current United States law is close to the optimal system for this country at this time—not because the status quo is always preferable to change, but rather because under the particular circumstances in which we find ourselves today a more vigorous system poses substantial risks to the well-being of both artists and audiences.

II. AN OVERVIEW OF THE *DROIT MORAL*

A. *Philosophical Antecedents*

In the United States, rights in works of authorship and inventions traditionally have been viewed as resting upon either a natural-law or an instrumentalist theory (or both). Natural law theorists claim that an author or inventor is morally entitled to enjoy the fruits of her labor and therefore that she has an inherent right to exclude others from copying her work.²⁰ Instrumentalist theorists

20. Attempts to ground intellectual property rights in natural law typically rely upon a Lockean theory of property rights, in which a person is deemed to be morally entitled to private ownership of an object appropriated from the common when she joins her labor to

argue instead that the state creates intellectual property rights to induce people to create or disseminate works of authorship and inventions—the assumption being that, in the absence of intellectual property rights, free riding would discourage the creation or dissemination of these works.²¹

European intellectual property law, by contrast, derives in large part from a concept of property developed by Immanuel Kant and Georg Wilhelm Friedrich Hegel. As viewed by Kant and Hegel, private property is acquired not necessarily by labor, but rather by one's joining of his individual Will to some object external to the self.²² As a result of this process, the thing possessed comes to embody the owner's personality;²³ and by like reasoning a person may alienate property by removing his Will from the thing possessed.²⁴ As Margaret Radin notes, however, for Kant and Hegel "only objects separate from the self are suitable for alienation."²⁵ Thus, in the words of Hegel:

[T]hose goods, or rather substantive characteristics, which constitute my own private personality and the universal essence of my self-consciousness are inalienable and my right to them is imprescriptible. Such characteristics are my

it, so long as "enough and as good" remains in the common for others to use. In the context of copyright law, for example, the creator of a work of authorship is viewed as deserving some form of copyright protection as a reward for her intellectual labor. For discussions of natural law/desert-based theories of copyright, see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540-83 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296-330 (1988); Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 821-35 (1990); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1227-39 (1996); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 522-24 (1990).

21. For discussions of instrumentalist theories of copyright, see Hughes, *supra* note 20, at 302-05, William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 344-47 (1989), Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 308-11 (1996), and Sterk, *supra* note 20, at 1204-09.

22. See G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* §§ 44, 50, 51-58 (T.M. Knox trans., Oxford Univ. Press 1952) (1821); IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 81-84 (W. Hastie trans., Augustus M. Kelley Publishers 1974) (1796); see also Hughes, *supra* note 20, at 334 (noting that, for Hegel, labor is a sufficient but not necessary condition for occupation of object by Will); Palmer, *supra* note 20, at 838 (same). In Hegel's philosophy, it is specifically through the acquisition of private property that the Will comes to actualize itself as Idea, allowing the individual to attain a higher sphere of freedom. See HEGEL, *supra*, §§ 41, 44-46.

23. See HEGEL, *supra* note 22, § 51.

24. See *id.* §§ 53, 65; KANT, *supra* note 22, at 101.

25. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 34 (1996).

personality as such, my universal freedom of will, my ethical life, my religion.²⁶

Both Kant and Hegel devoted some attention to the subject of property rights in works of authorship. Kant, in the *Rechtslehre* and in his essay *Von der Unrechtmässigkeit des Büchernachdrucks* ("On the Injustice of Copying Books"), distinguished between the book as an external thing—which the publisher (and, thereafter, the purchaser) may possess and alienate just as he may possess and alienate other external things—and the book as the author's discourse or speech (*Rede*).²⁷ In Kant's view, the mere ownership or possession of a book does not entitle one to copy it, because copying would interfere with the author's prerogative of deciding when and how he will communicate, through his authorized publisher, with the public.²⁸ Kant viewed the author's interest in deciding how and when to speak as an inalienable part of his personality,²⁹ concluding that the author may license, but not alienate, the right to copy his work.³⁰ As an agent, the publisher is obligated to present the work according to

26. HEGEL, *supra* note 22, § 66; see also KANT, *supra* note 22, at 98-99 (discussing man's ability to dispose of his property, but not himself, at will); RADIN, *supra* note 25, at 36 (describing man's inability to "dispose [of] himself because he is not a thing") (quoting IMMANUEL KANT, LECTURES ON ETHICS 165 (Louis Infield trans., J. Macmurray ed., rev. ed. 1930)).

27. See KANT, *supra* note 22, at 129-31; IMMANUEL KANT, *Von der Unrechtmässigkeit des Büchernachdrucks* [hereinafter KANT, *Injustice*], in 4 IMMANUEL KANTS WERKE 213, 215, 218-21 (Artur Buchenau & Ernst Cassirer eds., 1922); see also Netanel, *supra* note 17, at 374 (noting that, for Kant, "an author's words are a continuing expression of his inner self"); Palmer, *supra* note 20, at 839 (discussing Kant's distinction between book as external thing and as discourse).

28. See KANT, *supra* note 22, at 130; KANT, *Injustice*, *supra* note 27, at 219. In places, Kant seems to be saying that the plagiarist injures only the authorized publisher. See KANT, *supra* note 22, at 130 (arguing that "unauthorized Publication is a wrong committed upon the authorized and only lawful Publisher, as it amounts to a pilfering of the Profits which the latter was entitled and able to draw from the use of his proper Right"); KANT, *Injustice*, *supra* note 27, at 216 (arguing that "the pirate causes injury to the publisher in regard to his rights, not to the author") (my translation). Neil Netanel argues, however, that for Kant the publisher's rights are "derived from those of the author, and do not amount to an independent proprietary interest." Netanel, *supra* note 17, at 376 n.122 (citing KANT, *supra* note 22, at 21).

29. See KANT, *Injustice*, *supra* note 27, at 221 (stating that the author has inalienable right "to speak for himself through another, that is, that no one else may publicly perform the same speech as if in the author's name"); see also Netanel, *supra* note 17, at 376 (finding "inalienability of the author's rights in his work . . . implicit in Kant's categorization of a literary work as part of the author's person instead of an external thing").

30. See KANT, *Injustice*, *supra* note 27, at 215; Netanel, *supra* note 17, at 376; Palmer, *supra* note 20, at 839.

the author's wishes.³¹

Hegel similarly contended that literary works, as well as other works such as inventions, embody the author's "[a]ttainments, erudition, talents, and so forth," and that these attributes are "owned by free mind and are something internal and not external to it."³² Hegel differed from Kant, however, in arguing that the author's *expression* of his mental aptitudes, as embodied in a work of authorship, is *external* to the author and therefore freely alienable.³³ Hegel thus concluded that the author may alienate the copyright in his work to the same extent that he may alienate any other product of his labor.³⁴

Expanding upon the Kantian view that an author's copyright is a single, personal, and inalienable right, one school of theorists in the late nineteenth century concluded that an author may license her work for publication but may not assign or waive her rights in it.³⁵

31. See KANT, *Injustice*, *supra* note 27, at 219-20. Kant did not envision, however, many restrictions upon the publication of derivative works (that is, works based upon one or more preexisting works, such as translations, see 17 U.S.C. § 101 (1994) (defining "derivative works")). Kant argued that one may publish an abridgement, enlargement, or other adaptation of an author's book, without obtaining permission from the author or his authorized publisher, as long as the work does not purport to speak in the author's name, and that translations do not infringe because they are not "the same speech of the author, even though the thoughts are likely to be the same." KANT, *Injustice*, *supra* note 27, at 221-22.

32. HEGEL, *supra* note 22, § 43.

33. See *id.* §§ 43, 68, 69. Hegel also noted with apparent approval the instrumental argument that patents and copyrights help to spur creativity and compared these rights to capital assets. See *id.* § 69; see also Hughes, *supra* note 20, at 338-39 (discussing these aspects of Hegel's theory); Palmer, *supra* note 20, at 841 (discussing capital asset theory).

34. See HEGEL, *supra* note 22, § 69. For Hegel, the only restriction on the alienability of such external works is that no one may alienate *all* of his labor because this would be tantamount to agreeing to sell oneself into slavery. See *id.* § 67. Radin notes, however, that this position raises some conundrums; for example, why is the *partial* alienation of property that one has infused with one's personality not forbidden? See RADIN, *supra* note 25, at 37-38.

Interestingly, neither Kant nor Hegel believed that it was wrong to copy works of visual art, such as painting and sculpture. Kant distinguished a work of art (*Kunstwerk*) from a literary work by characterizing the former as an author's "work" (*opus*)—an external thing—and the latter as an "action" or exercise of authorial power (*opera*). See Kant, *Injustice*, *supra* note 27, at 220-21; see also Netanel, *supra* note 17, at 374 n.110, 377 n.126; Palmer, *supra* note 20, at 839-40. Hegel argued that a copy of a "work of art," unlike an infringing literary work or invention, "is essentially a product of the *copyist's* own mental and technical ability." See HEGEL, *supra* note 22, § 68 (emphasis added); see also Hughes, *supra* note 20, at 338 n.209 (suggesting that, due to the technology of his day, "Hegel did not consider the possibility of mass production capable of imitating an artist's work").

35. See STEPHEN LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 8-9 (1938); Damich, *supra* note 17, at 27; DaSilva, *supra* note 17, at

This theory is reflected in the modern German copyright statute.³⁶ Other theorists, such as Josef Kohler, followed Hegel's view that an author may alienate the copyright to her work.³⁷ Kohler argued, however, that because works of authorship embody the author's inalienable personality, the author retains the right that "no strange work be presented as his, but that his own work not be presented in a changed form," even after the author transfers both the physical embodiment of the work and its copyright.³⁸ Kohler's theory—which posits two classes of rights, one alienable, the other not—is reflected in the modern French copyright statute.³⁹

B. Moral Rights in France and Germany

While scholars refined these ideas, French and German courts developed a body of legal doctrine based on the principle that authors have inalienable rights in their works. Over time, the courts came to recognize four aspects of the author's "moral right":⁴⁰ the

10-11; Netanel, *supra* note 17, at 378-79.

36. See Gesetz über Urheberrecht und verwandte Schutzrechte v. 9 Sept. 1965 [hereinafter German Act], translated and reprinted in UNESCO, 2 COPYRIGHT LAWS AND TREATIES OF THE WORLD, at Germany: Item 1—Page 8, art. 29 (1987). Several authors have discussed the influence of Kantian theory on German copyright law. See, e.g., Damich, *supra* note 17, at 30; DaSilva, *supra* note 17, at 11; Adolf Dietz, *Germany*, in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, § 4[2], at GER-48 to -49 (Melville B. Nimmer & Paul Edward Geller eds., 1996); Netanel, *supra* note 17, at 379.

37. See LADAS, *supra* note 35, at 9-10; Damich, *supra* note 17, at 27-29; DaSilva, *supra* note 17, at 10-11; Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law—A Proposal*, 24 S. CAL. L. REV. 375, 401-04 (1951); Netanel, *supra* note 17, at 379-81; Palmer, *supra* note 20, at 842.

38. JOSEF KOHLER, URHEBERRECHT AN SCHRIFTWERKEN UND VERLAGSRECHT 15 (1907), quoted in Katz, *supra* note 37, at 402 & n.148.

39. See Code de la propriété intellectuelle [hereinafter French Act], reprinted in ANDRÉ FRANÇON, COURS DE PROPRIÉTÉ LITTÉRAIRE, ARTISTIQUE ET INDUSTRIELLE 289-322 (1993). For discussions of the influence of Hegelian theory on French copyright law, see, for example, Damich, *supra* note 17, at 30, DaSilva, *supra* note 17, at 11, and Netanel, *supra* note 17, at 381.

40. "Moral right" is a translation of the French *droit moral*, a term coined by the French jurist André Morillot and subsequently codified in the French Intellectual Property Code. See Damich, *supra* note 17, at 29; André Lucas & Robert Plaisant, *France*, in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 36, § 7, at FRA-97. The analogous German term, *Urheberpersönlichkeitsrecht*, means "author's right of personality." Dietz, *supra* note 36, § 7[1], at GER-85. Although the term "author's right of personality" seems preferable to the term "moral right" for conveying the idea that the rights at issue are viewed as arising out of the creator's personality, see Netanel, *supra* note 17, at 383 n.162, in this Article I follow the convention of using the term "moral right."

Neil Netanel has pointed to four other continental alienability restrictions that protect an author's artistic control over her work: the author's right to revoke a transfer if the transferee fails to exploit the work in certain ways; rules that require courts to

droit de divulgation, or right of disclosure;⁴¹ the *droit de repentir ou de retrait*, or right to correct or withdraw works previously disclosed to the public;⁴² the *droit de paternité*, or right of attribution; and the *droit au respect de l'oeuvre*, literally "the right to respect of the work," usually translated as the right of integrity.⁴³ These rights are inalienable⁴⁴ and, to the extent that at least some purported waivers

construe contractual provisions against the transferee, or to narrow the scope of a transfer; the prohibition against retransfer of a work without the copyright owner's permission; and restrictions on the transferability of rights in works not yet created. See Netanel, *supra* note 17, at 388-92. Many countries, including France and Germany, also accord visual artists a right, known as the *droit de suite*, to share in the proceeds from the resale of their works. See French Act, *supra* note 39, art. 42; German Act, *supra* note 36, art. 26; see also Dietz, *supra* note 36, § 4[3][e], at GER-61 (discussing German law of *droit de suite*); Lucas & Plaisant, *supra*, § 4[3][e], at FRA-83 (discussing French law of *droit de suite*). These additional rights are beyond the scope of this Article.

41. This right, codified in article L.121-2 of the French Act, *supra* note 39, and article 12(1) of the German Act, *supra* note 36, recognizes the artist's exclusive right to determine when his work is completed and to determine when, if ever, the work is ready to be disclosed to the public. For representative cases, see, for example, Cass. 1e civ., Mar. 13, 1900, D.P. I 1900, 497 (the *Whistler* case) (refusing to compel artist to deliver a promised canvas, in light of artist's representation that it was not complete) and CA Paris, 1e, Mar. 6, 1931, D.P. II 1931, 88 (ordering destruction, in accordance with artist's wishes, of paintings defendants had found and restored after artist had discarded them). The relevant legal principles have been explored extensively elsewhere. See, e.g., Françon, *supra* note 39, at 214; Damich, *supra* note 17, at 8-12; DaSilva, *supra* note 17, at 17-20; Dietz, *supra* note 36, § 7[1][a], at GER-85 to -86; Lucas & Plaisant, *supra* note 40, § 7[1][a], at FRA-99 to -100; Merryman, *supra* note 17, at 1024-25, 1028; Netanel, *supra* note 17, at 383-85; Roeder, *supra* note 17, at 558-60; Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 467-70 (1968); William Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506, 511-13 (1955).

42. This right, codified in the French Act, guarantees the author a right of correction or retraction even after she has transferred the copyright to her work, on condition that she "indemnify the transferee beforehand for the loss that the correction or retraction may cause him." French Act, *supra* note 39, art. L.121.4. The German Act provides a similar retraction right but does not state whether the author is entitled to correct his work. In practice, these rights are rarely invoked. See German Act, *supra* note 36, § 42. For discussions, see Damich, *supra* note 17, at 24-25, DaSilva, *supra* note 17, at 25, Netanel, *supra* note 17, at 385-86, Sarraute, *supra* note 41, at 477, and Strauss, *supra* note 41, at 513.

43. Article L.121.1 of the French Act codifies these latter two rights, stating that "[t]he author shall enjoy the right of respect for his name, his authorship, and his work," and that "[t]his right shall be attached to his person." French Act, *supra* note 39, art. L.121.1. The analogous provision of the German Act is article 13, which states that the author "shall have the right of recognition of his authorship of the work," may "determine whether the work is to bear an author's designation and what designation is to be used," and "shall have the right to prohibit any distortion or any other mutilation of his work which would prejudice his lawful intellectual or personal interests in the work." German Act, *supra* note 36, art. 13.

44. See French Act, *supra* note 39, art. 6; Dietz, *supra* note 36, § 7[4], at GER-92; Lucas & Plaisant, *supra* note 40, § 7[4][a], at FRA-110.

may be deemed unenforceable or revocable, nonwaivable.⁴⁵ In France, the moral right also is perpetual,⁴⁶ while in Germany it expires when the author's copyright expires, seventy years after the author's death.⁴⁷

The most important aspects of the moral right are the rights of attribution and integrity. With respect to the former, French and German law recognize (1) a right against misattribution⁴⁸ (being attributed as the author of another's work,⁴⁹ or having another attributed as the author of one's own work);⁵⁰ (2) a right against nonattribution (the omission of one's name from one's own work);⁵¹ (3) a right to publish anonymously or pseudonymously;⁵² and (4) a right to void a promise to publish anonymously or pseudonymously.⁵³

45. See Edward J. Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733, 1744 (1984) (suggesting that waivers are generally unenforceable under French law); Dietz, *supra* note 36, § 7[4], at GER-93 ("[O]ne can say that the core of moral right protection always remains 'with' the authors."); Lucas & Plaisant, *supra* note 40, § 7[4][a], at FRA-110 (discussing inalienability and waivability), § 7[4][b], at FRA-112 (discussing waivability). *But see* Lucas & Plaisant, *supra* note 40, § 7[4][b], at FRA-113 ("The *Cour de cassation*, while reaffirming the principle that the respect due the work 'prohibits any alteration or change,' has stated that this right is 'subject to limitations of the author's moral right resulting from agreements which the author may have entered into regarding his works . . .'" (quoting Cass. 1e civ., Dec. 17, 1991, 152 REVUE INT'L DU DROIT D'AUTEUR 1992, 190)). An author who permits an adaptation of her work, however, may be deemed to have waived any objection to changes that do not seriously distort that work. *See infra* text accompanying notes 68-70.

46. See French Act, *supra* note 39, art. 6; Lucas & Plaisant, *supra* note 40, § 7[3], at FRA-110.

47. See Dietz, *supra* note 36, § 7[3], at GER-91.

48. See Damich, *supra* note 17, at 13; DaSilva, *supra* note 17, at 26; Merryman, *supra* note 17, at 1027; Netanel, *supra* note 17, at 386-87; Strauss, *supra* note 41, at 508-09.

49. See DaSilva, *supra* note 17, at 26; Neil Weinstock Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 34 (1994); Strauss, *supra* note 41, at 508. Netanel argues, however, that, strictly speaking, this "right against false attribution is not properly included in the author's right of attribution, since it pertains to general reputational interests, rather than to the relationship between an author and his work." Netanel, *supra*, at 34 n.170 (citing Damich, *supra* note 17, at 13).

50. See Damich, *supra* note 17, at 13 (citing HENRI DESBOIS, *LE DROIT D'AUTEUR EN FRANCE* 510 (3d ed. 1978)); Dietz, *supra* note 36, § 7[1][b], at GER-86 to -87; Lucas & Plaisant, *supra* note 40, § 7[1][b], at FRA-102.

51. See Damich, *supra* note 17, at 13; DaSilva, *supra* note 17, at 26; Dietz, *supra* note 36, § 7[1][b], at GER-86; Lucas & Plaisant, *supra* note 40, § 7[1][b], at FRA-101 to -102; Merryman, *supra* note 17, at 1027; Netanel, *supra* note 17, at 386; Sarraute, *supra* note 41, at 478; Strauss, *supra* note 41, at 508-09.

52. See Dietz, *supra* note 36, § 7[1][b], at GER-86 to -87; Lucas & Plaisant, *supra* note 40, § 7[1][b], at FRA-101.

53. See, e.g., CA Paris, 1e ch., Nov. 15, 1966, Gaz. Pal. 1967, 1, pan. jurisp., 17, note Sarraute (refusing to enforce agreement to sign works pseudonymously); *see also* Dietz,

My principal focus in this Article, however, is on the right of integrity, the precise scope of which is somewhat more difficult to define. At a minimum, the right prevents the alteration of the artist's work in a manner that injures his honor or reputation.⁵⁴ Under a more expansive definition, the right protects against acts that "mistreat[] an expression of the artist's personality, affect[] his artistic identity, personality, and honor, and thus impair[] a legally protected personality interest,"⁵⁵ or against the public presentation of the artist's work "in a manner or context that is harmful to [the artist's] reputation or contrary to [the artist's] intellectual interests, personal style, or literary, artistic or scientific conceptions."⁵⁶ Still others argue that the right obligates the transferee of a work to "preserve and publicly display or disseminate the author's work in accordance with the author's wishes, notwithstanding any contractual provision to the contrary."⁵⁷

Courts have found violations of the artist's right of integrity when, for example, the defendant painted over,⁵⁸ cut up,⁵⁹ or otherwise destroyed the artist's work;⁶⁰ displayed distorted

supra note 36, § 7[4], at GER-93 (stating that ghost writer's waiver of attribution right is generally binding, except in "special circumstances" in which "we encounter the core of an author's moral rights that may not be fully alienable or waivable"); Lucas & Plaisant, *supra* note 40, § 7[4][b], at FRA-112 (stating that author may renounce attribution right temporarily, but that he retains "the right to reveal himself as author of the work at some subsequent point and in lawful fashion").

54. See, e.g., Roeder, *supra* note 17, at 569 ("The doctrine of moral rights finds one social basis in the need of the creator for protection of his honor and reputation.").

55. Merryman, *supra* note 17, at 1027.

56. Netanel, *supra* note 17, at 387 (citing Stig Strömholm, *Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint*, 14 INT'L REV. INDUS. PROP. & COPYRIGHT L. 1, 30 (1983)).

57. *Id.* at 388 (citing Damich, *supra* note 17, at 20-22; André Françon & Jane C. Ginsburg, *Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work*, 9 ART & LAW 381, 389 (1985)).

58. See RGZ 79, 397, 398 (affirming judgment in favor of artist, when homeowner who commissioned mural subsequently painted over certain portions of it), discussed in Merryman, *supra* note 17, at 1038 n.56, and Geri J. Yonover, *The "Dissing" of da Vinci: The Imaginary Case of Leonardo v. Duchamp: Moral Rights, Parody, and Fair Use*, 29 VAL. U. L. REV. 935, 948 n.79 (1995). But see CA Paris, 1e ch., Apr. 27, 1934, D.H. 1934, 385 (rejecting artist's claim for damages for destruction of murals he painted on walls of church without authorization of diocese that owned church).

59. See Cass. 1e civ., July 6, 1965, Gaz. Pal. 1965, 2, pan. jurispr., 126 (affirming judgment for artist, who objected to owner's separation and sale of one of six panels of refrigerator artist decorated).

60. Although neither the French nor the German statute expressly forbids the destruction of the artist's work, some courts have held that destruction violates the author's rights. See CA Paris, 25e ch., July 10, 1975, D. 1977, 342 (awarding artist damages for the harm suffered when shopping center owner removed and destroyed

reproductions of the work;⁶¹ staged a play or opera contrary to the author's⁶² or designer's⁶³ directions, or with substantial additions or deletions to the text;⁶⁴ colorized a film;⁶⁵ or otherwise presented the artist's work out of context.⁶⁶ In some of these cases, the right of integrity may be viewed as overlapping with the right of attribution—as, for example, when the artist believes that his work has been so distorted that it can no longer truthfully be attributed to him.⁶⁷

Courts have limited the right of integrity in two important respects. First, the owner of the physical object in which the work is embodied is generally entitled to use the work in ways that do not materially impinge upon the work's integrity or that are reasonable under the circumstances.⁶⁸ Second, the courts generally permit one

fountain designed by the artist); Conseil d'Etat, Apr. 3, 1936, D.P. III, 57 (recognizing sculptor's right to damages, when town council failed to properly maintain public sculpture and subsequently removed it). *But see* CA Paris, 1e ch., Apr. 27, 1934, D.H. 1934, 385 (discussed *supra* note 58); Trib. adm. Grenoble, Feb. 18, 1976, Rev. trim. de Droit comm. 1976, 120 (rejecting artist's request to order city to reassemble decaying monument that city had removed on ground of public safety), *discussed in* Damich, *supra* note 45, at 1747 & n.101, and Damich, *supra* note 17, at 19.

61. *See* T.G.I. Paris, 3e ch., Mar. 13, 1973, JCP 1974 IV, 224 (providing a summary of decision holding that department store violated painter's moral right by using distorted reproductions of painter's works as window displays).

62. *See* T.G.I. Paris, 3e ch., Oct. 15, 1992, 155 REVUE INT'L DU DROIT D'AUTEUR 1993, 225 (holding that director violated Samuel Beckett's moral right by staging *Waiting for Godot* with leads, contrary to Beckett's stage directions, played by two women).

63. *See* Trib. civ. Seine, Oct. 15, 1954, 6 REVUE INT'L DU DROIT D'AUTEUR 1955, 146 (holding that a theater company violated stage designer's moral right by omitting scenery from opera without stage designer's permission and awarding damages to the stage designer), *discussed in* Merryman, *supra* note 17, at 1029-30. *But see* CA Paris, 1e ch., May 11, 1965, D. 1967, 555 (denying Salvador Dali's request for relief against theater that represented, as Dali's work, costumes begun by Dali but completed by others), *aff'd*, Cass. 1e civ., March 5, 1968, D. 1968, 382, *discussed in* DaSilva, *supra* note 17, at 34, and Lucas & Plaisant, *supra* note 40, § 7[c][i], at FRA-102 to -103.

64. *See* BGHZ 55, 1 (affirming judgment that defendant violated author's moral right by producing operetta *Maske in Blau* with material alterations and deletions), *discussed in* Netanel, *supra* note 17, at 387 & n.181 (citing Paul Goldstein, *Adaptation Rights and Moral Rights in the United Kingdom, the United States and the Federal Republic of Germany*, 14 INT'L REV. INDUS. PROP. & COPYRIGHT L. 43, 57 (1983)).

65. *See* Cass. 1e civ., May 28, 1991, 149 REVUE INT'L DU DROIT D'AUTEUR 1991, 197 (enjoining broadcast of colorized version of John Huston's film *The Asphalt Jungle*).

66. *See, e.g.,* CA Paris, 1e ch., Jan. 13, 1953, Gaz. Pal. 1953, 1, pan. jurispr., 191 (finding defendants violated Soviet composers' moral rights by inserting their musical compositions into anti-Soviet film); *see also* Lucas & Plaisant, *supra* note 40, § 7[c][i], at FRA-103 (discussing other cases). *But see* Cass. 1e civ., Dec. 3, 1968, D. 1969, 73 (rejecting argument that broker must refrain from flooding market with artist's work in order to drive down price).

67. *See, e.g.,* Strauss, *supra* note 41, at 509.

68. *See* Damich, *supra* note 17, at 23 (noting limitations upon exercise of right of integrity under French law); DaSilva, *supra* note 17, at 34 (noting that "many courts limit

who has been authorized to adapt a work into another medium to make such changes as may be necessary to transfer the work into that medium, as long as the adapter does not grossly distort the work.⁶⁹ As a consequence of these rather vague limitations, a court may be called upon to make a quasi-aesthetic judgment as to whether a given use or adaptation is consistent with the spirit of the original work.⁷⁰

C. Moral Rights in the United States

In comparison with their French and German counterparts, American courts and legislatures were slow to embrace the concept of moral right in works of authorship. Writing in the *Harvard Law Review* in 1940, Martin Roeder argued that a mix of Anglo-American common-law doctrines already provided artists in this country with something akin to moral rights protection under some limited circumstances.⁷¹ The authorities Roeder cited in support of an attribution right, however, were precarious,⁷² and he conceded that a

the exercise of *droit au respect* to protection of 'the material integrity of the work' " (quoting Dominique Giocanti, *Moral Rights: Authors' Protection and Business Needs*, 10 J. INT'L L. & ECON. 627, 640 (1975)); Dietz, *supra* note 36, § 7[1][c], at GER-87 (stating that German law precludes author from asserting moral right "in vexatious legal actions because of his hypersensitive reactions to slight changes in his work"), § 7[2], at GER-88 to -91 (noting other limitations on exercise of moral right); Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 421, 426 (1990) (stating that moral right has "not been enforced when a user is taking action that is consistent with 'proper usage' or with the 'accepted manner and extent' or that is 'reasonable' or 'de minimis'"); Lucas & Plaisant, *supra* note 40, § 7[2], at FRA-107 to -110 (stating that courts have responsibility of preventing authors from abusively exercising moral right, and that "author's right to respect for his work has to be reconciled with the rights of the owner of the material object embodying the work"); Netanel, *supra* note 17, at 397-98 (discussing restrictions on authors' rights under French and German law).

69. See Damich, *supra* note 17, at 15-16, 23; DaSilva, *supra* note 17, at 34-36; Dietz, *supra* note 36, §§ 7[2], 7[4], at GER-88 to -95; Gorman, *supra* note 68, at 426-27; Lucas & Plaisant, *supra* note 40, § 7[4][a], at FRA-110 to -111.

70. See DaSilva, *supra* note 17, at 36-37; Gorman, *supra* note 68, at 426-27, 429; Sarraute, *supra* note 41, at 482.

71. See Roeder, *supra* note 17, at 578.

72. For example, Roeder noted one case in which a court, citing a privacy theory, had upheld the right of a pseudonymous author to prevent the publication under his real name of certain works that had fallen into the public domain; but he neglected to mention the fact that, at a later proceeding in the same case, the court expressly reversed itself on this issue. See *id.* at 562 (citing *Ellis v. Hurst*, 121 N.Y.S. 438 (Sup. Ct. 1910)); cf. *Ellis v. Hurst*, 128 N.Y.S. 144, 146-47 (Sup. Ct. 1910), *aff'd mem.*, 130 N.Y.S. 1110 (App. Div. 1911) (holding that the defendants had the right to state the true name of the author). Roeder also cited, as further support for a common-law right of attribution, a case in which only one of the three judges of a New York appellate panel had concluded that the plaintiff author had a right, absent agreement to the contrary, to have his work attributed to him rather than published without attribution. See Roeder, *supra* note 17, at 562-63

plaintiff wishing to vindicate a quasi-right of integrity under a libel or unfair competition theory would face substantial obstacles.⁷³ In the decades to follow, courts for the most part narrowly construed these common-law analogues of moral rights. Except for the occasional case involving an alleged false attribution,⁷⁴ courts generally refused to acknowledge attribution rights⁷⁵ and were equally disinclined to recognize an expansive right of integrity.⁷⁶ These decisions led one prominent scholar to conclude that, as of 1976, "[t]he moral right of the artist, and in particular that component called the right of integrity of the work of art, simply does not exist in our law."⁷⁷

Over the past twenty years, however, the picture has changed, as courts and legislatures gradually have begun to recognize, and to expand upon, an American doctrine of moral right. The first significant development occurred in 1976, in the case of *Gilliam v. American Broadcasting Cos.*,⁷⁸ when the United States Court of Appeals for the Second Circuit endorsed a limited version of moral

(citing *Clemens v. Press Publ'g Co.*, 122 N.Y.S. 206 (Sup. Ct. 1910)). Roeder did cite some cases, however, in which courts had affirmed authors' rights to prevent others from falsely attributing works to them, typically under a libel or unfair competition theory. See *id.* at 563-64 (collecting cases).

73. As Roeder explained, in some cases the publication of a deformed version of an author's work might be viewed as defaming the author's reputation or misrepresenting the source of the work. See Roeder, *supra* note 17, at 566-70. Roeder noted, however, that the defamation theory often would be of limited utility in light of (1) the rule that equity will not enjoin a libel (thereby limiting the prospective plaintiff to money damages); (2) certain technical rules relating to pleading and proof in libel cases; and (3) the inapplicability of libel as a safeguard for the rights of creators of non-literary works or deceased authors. See *id.* at 567. Similarly, the law of unfair competition would provide a remedy only when the deformation of the plaintiff's work caused or threatened economic harm. See *id.* at 567-68.

74. See, e.g., *Granz v. Harris*, 198 F.2d 585, 588 (2d Cir. 1952) (stating that defendant would be liable for unfair competition when defendant, after deleting eight minutes of music from a recording produced by plaintiff, marketed the altered recording with attribution to plaintiff).

75. See, e.g., *Vargas v. Esquire, Inc.*, 164 F.2d 522, 526 (7th Cir. 1947). But see *Harms, Inc. v. Tops Music Enters.*, 160 F. Supp. 77, 83 (S.D. Cal. 1958) (citing *Clemens* for proposition that courts "protect against . . . the omission of the author's name unless, by contract, the right is given to the publisher to do so").

76. See, e.g., *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813, 818 (Sup. Ct. 1949) (rejecting claim that artist retained rights in his work following unconditional sale, when defendant church had painted over mural earlier commissioned from plaintiff); *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575, 577-79 (Sup. Ct. 1948) (rejecting Soviet composers' claims that use of their noncopyrighted works as background music for an anti-Soviet film constituted a violation of their rights of privacy or a libel, and declining to recognize a separate moral rights doctrine), *aff'd mem.*, 87 N.Y.S.2d 430 (App. Div. 1949).

77. Merryman, *supra* note 17, at 1035-36 (footnote omitted).

78. 538 F.2d 14 (2d Cir. 1976).

rights protection under federal copyright and statutory unfair competition principles. The plaintiffs, members of the popular comedy troupe Monty Python, had agreed with the British Broadcasting Corporation (“BBC”) that the troupe would write and deliver scripts for a series of television programs, subject to the conditions that BBC could make only minor changes in the work without prior consultation with the writers, and that the writers otherwise retained all rights in the scripts.⁷⁹ In 1973, BBC licensed the right to distribute the series in the United States to Time-Life Films, which in turn licensed the American Broadcasting Company (“ABC”) to broadcast two ninety-minute specials, each comprising three thirty-minute Monty Python programs.⁸⁰ When ABC’s broadcast of the first special, however, omitted twenty-four of the original ninety minutes of recording—allegedly to make time for commercials and to delete portions ABC deemed offensive or obscene—Monty Python sued to enjoin the scheduled broadcast of the second special, alleging violations of its rights under copyright law and under § 43(a) of the Lanham Act.⁸¹

Although unsuccessful in their attempt to convince the district court to issue a preliminary injunction,⁸² the plaintiffs prevailed on appeal, with the Second Circuit expressly finding a likelihood of success on the merits for both the copyright and Lanham Act claims.⁸³ With respect to the copyright claim, the court concluded that, just as a copying of the television programs also would constitute, for copyright purposes, a copying of the underlying work (the scripts) on which the programs were based, ABC’s editing of the programs also constituted an editing of those scripts.⁸⁴ In view of the fact that

79. *See id.* at 17.

80. *See id.* at 17-18.

81. *See id.* at 18-20 & n.3, 23-24. In relevant part, the current version of Lanham Act § 43(a) states:

Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1) (1994).

82. *See Gilliam*, 538 F.2d at 18.

83. *See id.* at 19-26.

84. *See id.* at 19-23.

Monty Python had never expressly authorized BBC (or anyone else) to materially edit the scripts, however, ABC's acts violated the troupe's exclusive right to editorial control.⁸⁵ With respect to the Lanham Act claim, the court agreed with the plaintiffs that the broadcast of a distorted version of their work falsely represented that work as originating from Monty Python, concluding that "an allegation that a defendant has presented to the public a 'garbled,' distorted version of plaintiff's work seeks to redress the very rights sought to be protected by the Lanham Act."⁸⁶ Subsequent decisions have expressed agreement with the *Gilliam* court's view that substantial unauthorized editing may violate the copyright owner's exclusive right to adapt her work,⁸⁷ and that § 43(a) provides a cause of action for passing off a materially distorted version of the plaintiff's work as the genuine item.⁸⁸ Courts also have concluded that defendants may be liable under § 43(a) for falsely attributing the plaintiff's work to the defendant,⁸⁹ or vice versa,⁹⁰ for falsely attributing a jointly authored work to only one co-author,⁹¹ and for falsely advertising a plaintiff's earlier works as recent ones.⁹²

A second development was the passage, beginning in the late 1970s, of state moral rights statutes.⁹³ The first of these was the

85. See *id.* at 21. Although the court did not specify the source of this right of editorial control, it probably is best viewed as an aspect of the author's exclusive right, under 17 U.S.C. § 106(2) (1994), to prepare derivative works. See, e.g., 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.04[A][1], at 8D-51 (1996); see also *WGN Continental Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 626 (7th Cir. 1982) (stating that if book seller were to inscribe Lord's Prayer on blank inside covers of book he would infringe publisher's copyright); *National Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533, 542-45 (W.D. Tex. 1980) (holding that unauthorized addition of advertising materials to copyrighted book constituted infringement).

86. *Gilliam*, 538 F.2d at 24-25 (citation omitted).

87. See *supra* note 85 (citing cases).

88. See, e.g., *Choe v. Fordham Univ. Sch. of Law*, 920 F. Supp. 44, 47-49 (S.D.N.Y. 1995), *aff'd per curiam*, 81 F.3d 319 (2d Cir. 1996).

89. See, e.g., *Waldman Publ'g Corp. v. Landoll, Inc.*, 43 F.3d 775, 780-85 (2d Cir. 1994).

90. See, e.g., *King v. Innovation Books*, 976 F.2d 824, 828-29 (2d Cir. 1992).

91. See *Lamothe v. Atlantic Recording Corp.*, 847 F.2d 1403, 1405-08 (9th Cir. 1988).

92. See, e.g., *Benson v. Paul Winley Record Sales Corp.*, 452 F. Supp. 516, 517-18 (S.D.N.Y. 1978). For further discussion of the protection of moral rights under § 106(2) of the Copyright Act and § 43(a) of the Lanham Act, see 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 27:77 to :90 (4th ed. 1997); 3 NIMMER & NIMMER, *supra* note 85, §§ 8D.03, 8D.04.

93. So far, fourteen states (California, Connecticut, Illinois, Louisiana, Maine, Massachusetts, Nevada, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, South Dakota, and Utah) and the Commonwealth of Puerto Rico have enacted some form of moral rights legislation. See Yonover, *supra* note 58, at 957-61 & n.126; see

California Art Preservation Act,⁹⁴ which recognizes moral rights in “fine art,” defined as “an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality.”⁹⁵ The Act recognizes both an attribution right, which allows the artist to “retain at all times the right to claim authorship, or, for a just and valid reason, to disclaim authorship of his or her work of fine art,”⁹⁶ and an integrity right, which prohibits the intentional “physical defacement, mutilation, alteration, or destruction of a work of fine art.”⁹⁷ These rights terminate fifty years after the artist’s death,⁹⁸ unless the artist has chosen to waive them in a signed written instrument.⁹⁹ In a provision unique among state and federal moral rights laws, California law also authorizes “[a]n organization acting in the public interest” to “commence an action for injunctive relief to preserve or restore the integrity of a work of fine art” from the acts proscribed under § 987(c).¹⁰⁰

Among the other state statutes, the one that has generated the most case law and commentary is the New York Artists Authorship

also P.R. LAWS ANN. tit. 31, §§ 1401-1401h (1993) (recognizing that an author has the exclusive right to benefit from and dispose of his work in accordance with the special laws in effect on the matter).

94. CAL. CIV. CODE § 987 (West Supp. 1997).

95. *Id.* § 987(b)(2). Because the Act does not define the word “original,” “it is not clear whether a reproduction of the work, as distinguished from the work as first executed by the artist, is protected” under the Act. 3 NIMMER & NIMMER, *supra* note 85, § 8D.07[A], at 8D-99 n.6; *cf.* Damich, *supra* note 45, at 1741 (concluding that reproductions are not covered). To decide whether a work is “of recognized quality,” the trier of fact is directed to “rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art.” CAL. CIV. CODE § 987(f).

96. CAL. CIV. CODE § 987(d). For a discussion of what may count as a “just and valid reason,” see 3 NIMMER & NIMMER, *supra* note 85, § 8D.08[B], at 8D-107.

97. CAL. CIV. CODE § 987(c)(1). In addition, the Act forbids any person who frames, conserves, or restores a work of fine art from committing a physical defacement, mutilation, alteration, or destruction of the work “by any act constituting gross negligence,” defined as “the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art.” *Id.* § 987(c)(2).

98. *See id.* § 987(g)(1).

99. *See id.* § 987(g)(3). The artist is deemed to have waived her rights, however, if the “work of fine art cannot be removed from a building without substantial physical defacement, mutilation, alteration, or destruction of the work,” unless she expressly has reserved her rights in a written instrument “signed by the owner of the building, containing a legal description of the property and properly recorded.” *Id.* § 987(h)(1). The Act goes on to prescribe various steps to be taken before removing a work that is capable of being removed from a building without suffering substantial harm. *See id.* § 987(h)(2)-(3).

100. *Id.* § 989(c); *see also id.* § 989(b) (discussing further requirements); § 989(e) (imposing restrictions if work cannot be removed from real property without suffering substantial harm).

Rights Act.¹⁰¹ The New York Act applies not only to original works of "fine art" (defined as a "painting, sculpture, drawing, or work of graphic art, and print, but not multiples"),¹⁰² but also to "limited edition multiples of not more than three hundred copies"¹⁰³ and to reproductions.¹⁰⁴ Like the California Act, the New York Act recognizes an attribution right that allows the artist both to claim authorship and, "for just and valid reason," to disclaim it.¹⁰⁵ The New York Act also recognizes an integrity right, which forbids anyone other than the artist (or someone acting with his consent) from knowingly displaying in a place accessible to the public, or publishing, such a work

in an altered, defaced, mutilated or modified form if the work is displayed, published or reproduced as being the work of the artist, or under circumstances under which it would reasonably be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result therefrom, except that this section shall not apply to sequential imagery such as that in motion pictures.¹⁰⁶

Unlike the California Act, the New York Act does not create any statutory exceptions for works that are incorporated into buildings; does not expressly permit the artist to waive his rights;¹⁰⁷ and does not specify when his rights terminate.¹⁰⁸

A third major development in the history of *droit moral* in the

101. N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney Supp. 1997).

102. *Id.* § 11.01(9).

103. *Id.* § 14.03(1). In the case of works of fine art, or of limited edition multiples, the Act applies only if the works or multiples are "knowingly displayed in a place accessible to the public, published or reproduced" in the State of New York. *Id.* § 14.03(3)(e).

104. *See id.* § 11.01(16).

105. *Id.* § 14.03(2)(a). A "just and valid reason" may include the fact "that the work has been altered, defaced, mutilated or modified other than by the artist, without the artist's consent, and damage to the artist's reputation is reasonably likely to result or has resulted therefrom." *Id.*

106. *Id.* § 14.03(1). The Act also exempts "[a]lteration, defacement, mutilation or modification . . . resulting from the passage of time or the inherent nature of the materials," unless such alteration, defacement, mutilation, or modification is the result of gross negligence in maintaining or protecting the work; any "change that is an ordinary result of the medium of reproduction"; and any conservation efforts, unless shown to be negligent. *Id.* § 14.03(3)(a)-(c).

107. For a discussion of whether waivers are enforceable under New York law, see Damich, *supra* note 45, at 1744-45.

108. Damich argues that the author's rights probably terminate upon his death. *See id.* at 1748; *see also* Sarah Ann Smith, *The New York Artists' Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL L. REV. 158, 179 (1984) (same).

United States is the passage of the federal Visual Artists Rights Act of 1990 ("VARA"),¹⁰⁹ which amends the Copyright Act of 1976 by expressly providing for limited federal recognition of moral rights.¹¹⁰ Like the California and New York statutes,¹¹¹ VARA's scope is limited, applying only to "works of visual art," which are defined as (1) paintings, drawings, prints, or sculptures existing in a single copy or in specified limited edition copies,¹¹² or (2) still photographic

109. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, §§ 601-610, 104 Stat. 5089, 5128-33 (codified as amended in scattered sections of 17 U.S.C.).

110. Pressure to enact some form of federal moral rights protection increased following the United States's accession in 1988 to the Berne Convention, article 6bis of which requires signatory nations to provide authors with "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." Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 6bis, as last revised, Paris, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221, 235. In ratifying the Convention, Congress initially took the position that existing laws were sufficient to satisfy the obligations imposed by article 6bis. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 2(3), 102 Stat. 2853 (1989) (published in the notes following 17 U.S.C. § 101 (1994)); S. REP. NO. 100-352, at 9-10, 38-39 (1988), reprinted in 1988 U.S.C.C.A.N. 3706, 3714-15, 3735-36; H.R. REP. NO. 100-609, at 32-40 (1988), reprinted in 1988 U.S.C.C.A.N. 3749, 3773-80; 3 NIMMER & NIMMER, *supra* note 85, § 8D.02[D][1], at 8D-16 n.39. The decision to enact VARA shortly thereafter may be viewed as a reversal of this interpretation of article 6bis, although it is doubtful that VARA would have passed when it did, had the sponsors of a bill creating 85 new federal judgeships not agreed to include in their bill several unrelated pieces of legislation, including VARA, in order to appease senators who otherwise threatened to withhold their support. See Yonover, *supra* note 58, at 965-66 (quoting George C. Smith, *Let the Buyer of Art Beware: Artists' Moral Rights Trump Owners' Property Rights Under the Visual Artists Rights Act*, RECORDER, Jan. 10, 1991, at 4).

111. Although VARA preempts "all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply," 17 U.S.C. § 301(f)(1), it leaves intact any state laws with respect to "activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art," and "activities violating legal or equitable rights which extend beyond the life of the author." *Id.* § 301(f)(2)(B)-(C). Generally speaking, then, it would appear that a state may extend moral rights protection to works that do not qualify as "works of visual art" under VARA and may recognize moral rights, in addition to the rights of attribution and integrity established under VARA, in works of visual art and other works of authorship. Several preemption puzzles, however, which are beyond the scope of this Article, persist. For further discussion of preemption issues, see, for example, 3 NIMMER & NIMMER, *supra* note 85, § 8D.06[F][2], at 8D-91 to -94, Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 972-73 (1990), Robert A. Gorman, *Visual Artists Rights Act of 1990*, 38 J. COPYRIGHT SOC'Y 233, 239-41 (1991), and Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. (forthcoming 1997).

112. See 17 U.S.C. § 101. Limited editions of "200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author" fall within the

images produced for exhibition purposes only, existing in a single copy signed by the author or in certain limited edition copies.¹¹³ All other works (including motion pictures, literary works, and all “works made for hire”) are outside the scope of the Act,¹¹⁴ as are reproductions of works of visual art other than the specified limited edition copies¹¹⁵ and any work created before the Act’s effective date (June 1, 1991) if the author had transferred title to it prior to that date.¹¹⁶

Like the state statutes, VARA recognizes both attribution and integrity rights. The former include the rights to claim authorship of the work and to prevent the use of one’s name as the author of a work created by another;¹¹⁷ in addition, the statute recognizes an overlapping attribution/integrity right similar to the right at issue in *Gilliam*, which allows the author to prevent the use of his or her name as the author of the work in the event of a “distortion, mutilation, or other modification . . . which would be prejudicial to his or her honor or reputation.”¹¹⁸ Finally, VARA establishes an integrity 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 “to prevent any destruction of a work of recognized stature.”¹¹⁹ Unlike her French or German counterpart,

statutory definition. *Id.*

113. *See id.* Limited editions of “200 copies or fewer that are signed and consecutively numbered by the author” fall within this definition. *Id.*

114. *See id.* A “work made for hire” is “a work prepared by an employee within the scope of his or her employment” or “a work specially ordered or commissioned” for certain specified uses. *Id.*

115. *See id.* § 106A(c)(3); *see also* Damich, *supra* note 111, at 952 (discussing the exclusion of most reproductions from protection under VARA); Gorman, *supra* note 111, at 236 (same).

116. *See* 17 U.S.C. § 106A(d)(2).

117. *See id.* § 106A(a)(1)(A)-(B).

118. *Id.* § 106A(a)(2).

119. *Id.* § 106A(a)(3)(A)-(B). An intentional distortion, mutilation, or modification of the work violates the first of the two integrity rights; an intentional or grossly negligent destruction of the work violates the second. *See id.* Both rights are subject to certain limitations applicable to works that have been incorporated into or made part of buildings and that cannot be removed from the building without being destroyed, distorted, mutilated, or otherwise modified. If the author consented to the installation of such a work (1) prior to June 1, 1991, the effective date of VARA, or (2) in a written instrument executed on or after that date, signed by both the author and the owner of the building, and specifying that installation may subject the work to destruction, distortion, mutilation, or other modification by reason of its removal, the work is not protected by either the quasi-integrity right of § 106A(a)(2) or the integrity rights of § 106A(a)(3). *See id.* § 113(d)(1). If the work *can* be removed without damage, the author retains his integrity rights unless “the owner has made a diligent, good faith attempt without success to notify the author of the owner’s intended action,” or “the owner did provide such notice in

however, the American author may waive her rights, as long as she does so in a signed written instrument specifically identifying the work and the uses to which the waiver applies.¹²⁰ If not waived, her rights terminate at death, if the work was created after June 1, 1991.¹²¹

Thus far, there have been only two reported cases interpreting the substantive provisions of VARA. The one, *Pavia v. 1120 Avenue of the Americas Associates*,¹²² holds only that the continued display of a work that was mutilated prior to June 1, 1991, does not create an ongoing actionable wrong under VARA.¹²³ The other, *Carter v. Helmsley-Spear, Inc.*,¹²⁴ involved the threatened alteration or removal

writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal." *Id.* § 113(d)(2). In other words, in such a case the owner may destroy the work if the author is not willing to pay for its removal. In all other circumstances, the work may not be destroyed without consent of the author.

Modifications resulting from the passage of time or the inherent nature of the materials used, as well as those resulting from conservation or public presentation (unless caused by gross negligence), do not violate the artist's right of integrity. *See id.* § 106A(c)(1)-(2). These qualifications were added to avoid the situation that arose in a Canadian case in which the court held that a shopping center violated the moral rights of a sculptor by decorating his sculpture with ribbons during the Christmas season. *See H.R. REP. NO. 101-514*, at 17 (1990) (citing *Snow v. Eaton Ctr., Ltd.*, 70 Can. Pat. Rptr. 2d 105 (Ont. High Ct. 1982)), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6927.

120. *See* 17 U.S.C. § 106A(e)(1). Alternatively, if the author of a work of visual art that "has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work" consents to the installation "in a written instrument . . . that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal," the author may not assert a violation of her right of integrity attributable to such removal. *Id.* § 113(d)(1).

The House report on VARA states that a waiver of moral rights "applies only to the specific person to whom waiver is made," so that if A, upon selling his work to B, agrees to waive his moral rights, and B then resells the work to C, A would not be deemed to have waived his rights as to C. H.R. REP. NO. 101-514, at 18-19, *reprinted in* 1990 U.S.C.C.A.N. at 6928-29. The portion of the report specifically addressing the waiver of moral rights in works incorporated into buildings, however, states that the § 113(d)(1)(A) waiver "in effect extends to all subsequent owners of that building." H.R. REP. NO. 101-514, at 20, *reprinted in* 1990 U.S.C.C.A.N. at 6930. The statutory text is silent on the issue of whether a waiver applies to subsequent purchasers, and it remains to be seen whether or to what extent the courts will defer to these portions of the legislative history. *See generally* 3 NIMMER & NIMMER, *supra* note 85, § 8D.06[C][3], at 8D-81; § 8D.06[D], at 8D-84 (discussing legislative history concerning transfers of waivers).

121. *See* 17 U.S.C. § 106A(d)(1). Works created before June 1, 1991, are covered only if the author did not transfer title to them prior to that date. Apparently due to a drafting oversight, moral rights in these earlier-created works do not terminate until 50 years *after* the author's death. *See id.* § 106A(d)(2); 3 NIMMER & NIMMER, *supra* note 85, § 8D.06[E], at 8D-88 to -89 & n.198.

122. 901 F. Supp. 620 (S.D.N.Y. 1995).

123. *See id.* at 628-29.

124. 861 F. Supp. 303 (S.D.N.Y. 1994), *aff'd in part, vacated and rev'd in part*, 71 F.3d

of a sculpture from the lobby of a commercial building located in Queens, New York. In 1991 the managing agent of the building's lessee had hired the plaintiff artists to "design, create and install sculpture and other permanent installations" in the building.¹²⁵ Before the work was completed, however, the lessor and its agent fired the artists and announced their intention to alter or remove the work, prompting the artists to file suit.¹²⁶ Following a bench trial, the court concluded that the work was a "work of visual art" and not a work made for hire,¹²⁷ that the distortion or mutilation of the work would be prejudicial to the artists' reputations,¹²⁸ and that the work was of sufficient stature that its destruction also would violate the act.¹²⁹ On the basis of these findings, the court entered an order forbidding the distortion, mutilation, modification, destruction, or removal of the work until the last-surviving plaintiff's death.¹³⁰ On appeal, however, the Second Circuit reversed, concluding that the sculpture *was* a work made for hire, and therefore outside the scope of VARA.¹³¹

Whether these developments have made a significant difference in the lives of American artists remains to be seen. Even under the *Gilliam* court's expansive reading of the Copyright Act, the author's right to adapt or edit her work is completely alienable and is

77 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1824 (1996).

125. *Id.* at 312.

126. *See id.* at 313.

127. *See id.* at 314-23.

128. *See id.* at 323-24. On the basis of the legislative history of VARA, the court concluded that a plaintiff may prevail under § 106A(a)(3)(A) without having to show that his reputation is "derived independently of the art work that is the subject of this dispute" or that he has any "pre-existing standing in the artistic community." *Id.* at 323 (citing H.R. REP. NO. 101-154, at 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6925). Thus, the court accepted the testimony of the plaintiffs' expert witnesses that "plaintiffs' honor and reputation in the artistic community would be damaged if the Work is modified because the Work would then present to viewers an artistic vision materially different from that intended by plaintiffs." *Id.* at 324.

129. *See id.* at 324-26. To determine whether a work qualifies as a "work of recognized stature," the court stated that "a plaintiff must make 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." *Id.* at 325.

130. *See id.* at 336-38.

131. *See Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 85-88 (2d Cir. 1995). Specifically, the court concluded that the artists were employees who had created the sculpture in the course of their employment, thus rendering the work a work made for hire. *See id.* at 86-88. Several writers have forcefully criticized this reading of the evidence. *See Kwall, supra* note 111, at 6-12; Note, Recent Case, 109 HARV. L. REV. 2110, 2113-15 (1996); *Sculpture Installed in Building Lobby Is Work for Hire, Not Covered by VARA*, 51 Pat. Trademark & Copyright J. (BNA) 139, 141 (Dec. 7, 1995).

enforceable only by the copyright owner, who may be different than the author.¹³² Future Monty Pythons who assign their adaptation rights therefore will have no right under the Copyright Act to prevent the performance of their scripts in truncated form. And while the same court's reading of § 43(a) provides the author with a claim against one who represents a distorted version of the author's work as genuine, § 43(a) arguably provides no affirmative right of attribution,¹³³ may authorize the court to allow the publication or performance of an altered work with a disclaimer,¹³⁴ and may provide no relief for an author who cannot show some injury to her reputation.¹³⁵ Section 43(a) also would appear to provide no recourse for a plaintiff who is injured by a defendant's noncommercial activity, such as (perhaps) the display of an altered work in a not-for-profit museum.¹³⁶

The state statutes and VARA also fall short of establishing the extensive protection guaranteed under French and German law. Among the deficiencies of the American statutes, as viewed from the standpoint of moral rights advocates, are that the California, New

132. See Note, *Protection of Artistic Integrity: Gilliam v. American Broadcasting Cos.*, 90 HARV. L. REV. 473, 480 n.51 (1976).

133. See *Cleary v. News Corp.*, 30 F.3d 1255, 1260-61 (9th Cir. 1994) (dictum); 3 MCCARTHY, *supra* note 92, § 27:08[2][c][iii], at 27-113 to -114; § 27:08[3], at 27-124 to -125 (citations omitted). *But see* *Lamothe v. Atlantic Recording Corp.*, 847 F.2d 1403, 1407 n.2 (9th Cir. 1988) (suggesting that failure to attribute may be actionable under § 43(a) on an implied reverse passing off theory (citing *Smith v. Montoro*, 648 F.2d 602, 605-06 & n.5 (9th Cir. 1981))).

134. Compare *Gilliam v. American Broad. Cos.*, 538 F.2d 14, 25 n.13 (2d Cir. 1976) (expressing doubt whether a disclaimer aired at the beginning of ABC's Monty Python special would have been sufficient to absolve ABC of liability), *with id.* at 26-27 (Gurfein, J., concurring) (endorsing disclaimer theory), and *Rosenfeld v. Saunders*, 728 F. Supp. 236, 243-44 (S.D.N.Y. 1990) (denying preliminary injunction, in case involving medical textbook, on ground that disclaimer was sufficient to prevent consumers from mistakenly attributing plaintiff's work to defendants), *aff'd mem.*, 923 F.2d 845 (2d Cir. 1990).

135. See, e.g., *Henry Hansmann & Marina Santilli, Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 116 (1997) (stating that trademark law "might not provide protection to an artist who does not already have a substantial reputation"); *Kwall, supra* note 17, at 24 (stating that any protection an author receives for his personality rights under unfair competition law or § 43(a) is "fortuitous"); cf. *Edward J. Damich, A Critique of the Visual Artists Rights Act of 1989*, 14 NOVA L. REV. 407, 410-11 (1990) (arguing that author whose communication is distorted suffers injury to personality, even if she suffers no injury to reputation).

136. See 15 U.S.C. § 1125(a) (1994) (holding liable only those persons whose activities constitute a "use[] in commerce"); *id.* § 1127 (defining "use in commerce" to mean "bona fide use of a mark in the ordinary course of trade"); see also *Tax Cap Comm. v. Save Our Everglades, Inc.*, 933 F. Supp. 1077, 1080-81 (S.D. Fla. 1996) (holding that nonprofit political organization's petitions were not "used in commerce" for purposes of § 43(a)). I thank Margreth Barrett for calling this point to my attention.

York, and federal acts apply only to visual art; that the protection afforded under the California Act and portions of VARA is specifically limited to works of recognized quality or stature; that the New York Act arguably provides no remedy for alterations that cause no injury to the artist's reputation; and that both VARA and the California Act allow the artist to waive her rights.¹³⁷ Moreover, none of the statutes has generated a substantial body of reported case law,¹³⁸ and perhaps this fact suggests that they have had little effect thus far.

The suggestion that the statutes have had little effect is consistent with some of the findings disclosed in a recent Copyright Office Report on the Waiver of Moral Rights in Visual Artworks.¹³⁹ The report discloses that more than one quarter of the respondents surveyed by the Copyright Office in 1994-95 were unaware that artists who create certain works of art have moral rights,¹⁴⁰ and it suggests that written waivers may become increasingly common with respect to commissioned works and works incorporated into buildings.¹⁴¹ Inasmuch as VARA renders oral waivers ineffective, however, artists who have sold their works pursuant to entirely oral contracts presumably have not waived their moral rights, whether they realize those rights exist or not. The fact that oral contracts for the sale of movable works of art appear to be more common than

137. See, e.g., Damich, *supra* note 45, at 1735-37.

138. However, case law on the subject is not entirely lacking. See, e.g., Chamberlain v. Cocola Assocs., 958 F.2d 282, 283-85 (9th Cir. 1992) (rejecting claim that California Act requires all contracts for the sale of works of art governed by the Act to be in writing); Pavia v. 1120 Avenue of the Americas Assocs., 901 F. Supp. 620, 624-25 (S.D.N.Y. 1995) (discussing allegations that defendants publicly displayed plaintiff's sculpture in altered form stated claim under New York Act); Wojnarowicz v. American Family Ass'n, 745 F. Supp. 130, 136-41 (S.D.N.Y. 1990) (holding that publishing cropped images of plaintiff's photographs violates New York Act); Morita v. Omni Publications Int'l, Ltd., 741 F. Supp. 1107, 1114-15 (S.D.N.Y. 1990) (holding that publishing photograph of anti-nuclear sculpture on cover of magazine promoting pro-nuclear stance violates New York Act), *vacated*, 760 F. Supp. 45 (S.D.N.Y. 1991); Lubner v. City of Los Angeles, 53 Cal. Rptr. 2d 24, 27-29 (Ct. App. 1996) (denying recovery under California Act for negligent destruction of artist's work); Botello v. Shell Oil Co., 280 Cal. Rptr. 535, 538-40 (Ct. App. 1991) (holding that murals are protected works under California Act); Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc., 205 Cal. Rptr. 620, 624 (Ct. App. 1984) (holding that architectural plans are not protected under California Act).

139. See U.S. COPYRIGHT OFFICE, WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS: A REPORT OF THE REGISTER OF COPYRIGHTS (1996) [hereinafter REPORT].

140. See *id.* at 132-33.

141. See, e.g., *id.* at 134 (discussing survey results concerning frequency of waiver clauses); *id.* at 144 (discussing waivers); *id.* at 164-80 (discussing various types of waiver provisions); *id.* at 189 (discussing "consensus . . . that waivability is necessary for works incorporated into buildings").

written contracts¹⁴² therefore suggests that, at least with respect to this class of works, VARA has altered the balance of power in favor of the artist.¹⁴³ But whether this putative shift in power is meaningful is an open issue. If movables are less likely than nonmovables to be intentionally distorted or to subject their owners to suit in the event of a violation, even this power shift may be illusory.¹⁴⁴

III. A PRAGMATIC ANALYSIS OF MORAL RIGHTS

As we have seen, the doctrine of moral right initially developed out of efforts to apply principles derived from German idealist philosophy to the emerging field of intellectual property law. In previous work, however, I have joined with a growing number of scholars who advocate the application of a radically different philosophical perspective—a perspective grounded primarily in the writings of American pragmatists and neopragmatists—to issues of law and public policy.¹⁴⁵ Thus, in this part of the Article, I shall consider issues relating to the desirability and scope of moral rights protection from the standpoint of philosophical and legal pragmatism. I begin in Part A with a discussion of pragmatism generally, focusing largely on pragmatic theories of aesthetics. In Part B, I attempt to tease out some of the implications of these theories for the doctrine of moral right. I conclude that the recognition of artists' moral rights is consistent with a pragmatic aesthetic, but that the optimal contours of the right cannot be fully assessed without a firmer grasp of the likely consequences of recognition. In Part C, I predict those consequences through the use of economic analysis. On the basis of this analysis, and while recognizing its inherent limitations as a decision-making paradigm, I conclude that a waivable right probably is preferable to a nonwaivable right if our goal is to increase the well-being of artists and audiences.

142. See, e.g., *id.* at 135 (stating that 61% of visual artists surveyed agreed that oral contracts were most common in the art world); *id.* at 191 (noting that “most contracts for sale of moveable art are oral and thus cannot include a valid waiver”).

143. See *id.* at 190 (noting lack of “evidence that galleries are refusing to sell works without waivers,” or that abolition of waivers “would affect established artists to the same degree as lesser-known artists”).

144. Cf. *id.* at 141 (statement of Carol Pulin, director of the American Print Alliance) (suggesting that artists generally are hesitant to assert violations of their moral rights, due to lack of economic resources and fear of retaliation).

145. See Cotter, *supra* note 19.

A. Pragmatic Aesthetics

The term “pragmatic aesthetics” will no doubt strike some readers as an oxymoron, particularly if the term “pragmatic” is taken to be a synonym for words such as “practical,” “expedient,” or (need I say) “nonaesthetic.” In any sense other than the colloquial, however, this equation of pragmatism with the merely practical or expedient is erroneous. As a philosophical term, pragmatism refers to a set of principles or beliefs commonly shared by, among others and to varying degrees, the philosophers Charles Sanders Peirce, William James, and John Dewey, as well as contemporary theorists such as Richard Rorty, Richard Bernstein, and Cornel West; a diverse body of legal thinkers including Thomas Grey, Richard Posner, and Margaret Radin; and literary figures such as the poet Wallace Stevens and the critic Richard Poirier.¹⁴⁶ Although differing in many particulars, these authors generally converge upon a view of human thought—our theories, our norms, our ways of consciously interacting with the world—as simultaneously both a contingent human construct, emerging from the context of past experience,¹⁴⁷ and as an instrument that enables the human organism to predict, control, and cope with its physical and social environment.¹⁴⁸ This focus on the simultaneously contextual and instrumental character of thought leads most pragmatists to reject conventional definitions of truth as correspondence with reality,¹⁴⁹ as well as attempts to ground

146. See, e.g., RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* (1983); JOHN DEWEY, *THE QUEST FOR CERTAINTY* (Capricorn Books 1960) (1929); THOMAS C. GREY, *THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY* (1991); WILLIAM JAMES, *PRAGMATISM* (World Publishing Co. 1961) (1907); RICHARD POIRIER, *POETRY AND PRAGMATISM* (1992); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* (1982); CORNEL WEST, *THE AMERICAN EVASION OF PHILOSOPHY* (1989); CHARLES SANDERS PEIRCE, *What Pragmatism Is*, in 5 *COLLECTED PAPERS* 272 (Charles Hartshorne & Paul Weiss eds., Belknap Press 1960); Margaret Jane Radin, *The Pragmatist and the Feminist*, in *PRAGMATISM IN LAW & SOCIETY* 127 (Michael Brint & William Weaver eds., 1991).

147. See, e.g., GREY, *supra* note 146, at 116 n.11 (describing human thought as “an activity emergent from a context of tacit and culturally constituted practices, rather than as a set of logical operations upon foundational mental elements”).

148. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 4 (1995); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787, 798 (1989).

149. See Cotter, *supra* note 19, at 2075-76. With respect to the related issue of whether there is some objective truth “out there” waiting to be discovered, there is some disagreement within the pragmatist camp. Pragmatists following in the tradition of Dewey and Rorty tend to argue that there is little to be gained from positing the existence of any such external standard; pragmatists following in the tradition of Peirce tend to disagree. See *id.* at 2075-76 & n.23, 2078 n.31, 2081 n.40. For a forceful critique of some contemporary legal thinkers’ apparent adoption of the Peircean view, see Richard Warner, *Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory*, 1993 U.

our beliefs and norms in some transcendent standard or all-encompassing "grand theory."¹⁵⁰ Instead, for the pragmatist the truth is, in Williams James's famous phrase, "whatever proves itself to be good in the way of belief"¹⁵¹—whatever proves itself useful, in light of all its consequences, to the task at hand. On this view, what may seem "true" "from one angle, for one purpose, at one time, might not serve as well from another perspective, rooted in another temporal context, and aimed at different goals."¹⁵²

Like any other human institution, law can be viewed both as a product of past experience and as an instrument for the attainment of specific human purposes. A focus on the instrumental character of law leads many legal pragmatists to emphasize the importance, for purposes of choosing among various possible legal rules, of being able to predict the consequences of those rules through the use of theories or models of human behavior.¹⁵³ At the same time, a pragmatic emphasis on context and perspective suggests that no human theory is perfect, but rather that our theories are tentative and revisable, provisionally serving to illuminate certain phenomena only at the inevitable cost of obscuring others.¹⁵⁴ Legal pragmatists

ILL. L. REV. 535, 541-44, 549-51, 555-62.

150. See Warner, *supra* note 149, at 542-43 (arguing that, for the pragmatist, "there can be no *external* standard of evaluation; our norms of justification neither have nor need a ground outside themselves"); Cotter, *supra* note 19, at 2075-78, 2082-84; Grey, *supra* note 148, at 799; Radin, *supra* note 146, at 134.

151. JAMES, *supra* note 146, at 43 (emphasis omitted).

152. Grey, *supra* note 148, at 804-05; see also Cotter, *supra* note 19, at 2078-79 (discussing "perspectivism").

153. See, e.g., POSNER, *supra* note 148, at 15-21; CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 19, 97-98 (1996); cf. Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 NW. U. L. REV. 995, 1039-44 (1994) (discussing advantages and disadvantages of applying social scientific methodology to legal issues). It is important to note, however, that a pragmatic interest in consequences need not result in the equation of pragmatism with utilitarianism. A pragmatist may be interested not only in the substantive consequences of a given rule, but also in its systemic and expressive consequences. A rule constraining judicial discretion over a specific matter, for example, may be viewed as serving the systemic purpose of promoting consistency and predictability, which in turn facilitates planning and reliance. Similarly, a rule prohibiting discrimination on the basis of race or sex may be viewed as serving the purpose of expressing a common value, aside from whatever other consequences the rule may have. For further discussion of the similarities and differences between pragmatism and utilitarianism, see generally Cotter, *supra* note 19, at 2085 nn.55-56, 2091-95, 2135.

154. See, e.g., GREY, *supra* note 146, at 106 (describing "[t]heory as the pragmatist conceives it" as "no more than articulate reflection sufficiently detached from everyday practice so as to extend premises extracted from that practice, or imported from other practices, beyond their usual limits"); Cotter, *supra* note 19, at 2084 n.53 (discussing the inevitability and limitations of theory); cf. SUNSTEIN, *supra* note 153, at 97-98 (1996) (observing that while "economic analysis helps untangle the social consequences of legal

therefore tend to reject the idea (known as foundationalism) that any one theory can adequately explain a given body of law, as well as the belief (known as formalism) that "correct" outcomes in individual cases can always be deduced from such foundational principles.¹⁵⁵ For purposes of deciding legal and policy issues, legal pragmatists advocate instead the use of "practical reason"—a method that emphasizes the need for choice, deliberation, and communication in the face of radical uncertainty—as a way of simultaneously affirming and mediating among our conflicting norms.¹⁵⁶

The rebirth of interest in pragmatic thought over the past twenty years has brought with it a renewed attention to the long-neglected subject of pragmatic aesthetics.¹⁵⁷ Although different writers stress different aspects of the relationship between pragmatism and art, one common thread is the view that the creation, interpretation, and appreciation of art objects are, like other human activities, simultaneously rooted in past experience and instrumental to the engendering of new experience.¹⁵⁸ Jonathan Levin, for example, has

rules," it is "far too sectarian" to serve as a "complete guide to the goals of the legal system").

155. See Cotter, *supra* note 19, at 2083-85 (discussing pragmatists' rejection of foundationalism and formalism); see also SUNSTEIN, *supra* note 153, at 14-17 (discussing limitations of general theoretical approaches to law).

156. Drawing upon the work of Aristotle and of contemporary philosophers such as Gadamer, Habermas, and Rorty, Richard Bernstein describes practical reason (*phronesis*) as "a form of reasoning that is concerned with choice and involves deliberation," involving "a mediation between general principles and a concrete particular situation that requires choice and decision." BERNSTEIN, *supra* note 146, at 56. Legal pragmatists tend to emphasize similar characteristics. See, e.g., POSNER, *supra* note 146, at 71-73 (describing practical reason as "the methods by which people who are not credulous form beliefs about matters that cannot be verified by logic or exact observation"); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 536-37 (1992) (describing practical reason as a method of decision "not by deductive logic, but by a less structured problem-solving process involving common sense, respect for precedent, and an appreciation of society's needs" (footnotes omitted)); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 65 (1984) (comparing the way judges decide cases to the way people make everyday moral decisions); Vincent A. Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45, 87 (1985) (describing practical reason as the methods people use to reason from ends to means). For further discussion and criticism of the concept of practical reason, see Cotter, *supra* note 19, at 2086-91.

157. See, e.g., THOMAS M. ALEXANDER, *JOHN DEWEY'S THEORY OF ART, EXPERIENCE, AND NATURE: THE HORIZONS OF FEELING* (1987); GREY, *supra* note 146; JOHN J. MCDERMOTT, *THE CULTURE OF EXPERIENCE: PHILOSOPHICAL ESSAYS IN THE AMERICAN GRAIN* (1976); POIRIER, *supra* note 146; RICHARD SHUSTERMAN, *PRAGMATIST AESTHETICS: LIVING BEAUTY, RETHINKING ART* (1992); Jonathan Levin, *The Esthetics of Pragmatism*, 6 AM. LITERARY HIST. 658 (1994).

158. As Richard Shusterman points out, with its stress on context, instrumentality, and

noted how James's contemporary, George Santayana, applied the pragmatic concepts of contextuality, nonfoundationalism, and instrumentality in his writings on aesthetics. Levin describes as "the key to Santayana's esthetic and religious attitudes" the idea that felt unities and harmonies are valuable not because they point to some overarching or transempirical unity or harmony (be it God's, Nature's, or Self's) but because they animate experience, render it meaningful and purposeful, and provide a concrete discipline for sustaining and developing its possible meanings and purposes.¹⁵⁹

Similarly, Richard Poirier finds pragmatic ideas at work in the aesthetic writings of Ralph Waldo Emerson (whom he views as having anticipated much of James), claiming that

Emerson never asks us to reclaim some heritage of civic or rational virtues as these have been embedded, so it is assumed, in works of the past; he wants us instead to discover traces of productive energy that pass through a text or a composition or an author, pointing always beyond any one of them. "[T]he arts, as we know them, are but initial[.]" he says. "Our best praise is given to what they aimed and promised, not to the actual result. He has conceived meanly of the resources of man, who believes that the best age of production is past. The real value of the Iliad, or the Transfiguration, is as signs of power . . . tokens of the everlasting effort to produce, which even in the worst estate the soul betrays."¹⁶⁰

According to these readings of Santayana and Emerson, then, the value of a work of art inheres not so much in the "truth" it reveals as in the experience it generates in the reader or interpreter, which in turn creates new possibilities for future experience. As John Dewey was later to argue, "there is no final term in appreciation of a work of art."¹⁶¹

Building on the works of his predecessors, Dewey, in his 1934 work *Art as Experience*, went so far as to claim that the term "work of art" describes neither a physical embodiment (such as a painting or sculpture) nor an intangible work of authorship (such as a poem or

experience, pragmatic aesthetics turns much of conventional analytic aesthetics—with its commitment to formalism, which denies the importance of context, and noninstrumentality as the defining features of the aesthetic—on its head. See SHUSTERMAN, *supra* note 157, at 6-33.

159. Levin, *supra* note 157, at 660.

160. POIRIER, *supra* note 146, at 37-38 (quoting RALPH WALDO EMERSON, *Art, in ESSAYS & LECTURES* 437 (1983), with several minor changes).

161. JOHN DEWEY, *ART AS EXPERIENCE* 139 (1934).

musical composition), but rather what this tangible or intangible thing “does with and in experience.”¹⁶² In constructing his theory, Dewey distinguished between generic “experience”—that which an organism undergoes as it interacts with its environment¹⁶³—and “an experience,” which occurs when “the material experienced runs its course to fulfillment.”¹⁶⁴ “An experience” can be “something of tremendous importance—a quarrel with one who was once an intimate, a catastrophe finally averted by a hair’s breadth”—or as simple as eating a good meal or carrying on a conversation; what distinguishes “an experience” is the unity “that pervades the entire experience in spite of the variation of its constituent parts,”¹⁶⁵ leaving the encounter “so rounded out that its close is a consummation and not a cessation.”¹⁶⁶ Dewey considered aesthetic experience to be a “clarified and intensified” form of such consummated experience,¹⁶⁷ in which that which we perceive is neither exclusively an end in itself,

162. *Id.* at 3, 162 (emphasis added). In an essay published in 1939, Stephen Pepper praised *Art as Experience* as “one of the four or five great books on esthetics,” but he argued that Dewey’s theory departs from pragmatism in some crucial respects. Stephen C. Pepper, *Some Questions on Dewey’s Esthetics*, in *THE PHILOSOPHY OF JOHN DEWEY* 371, 389 (Paul Arthur Schilp & Lewis Edwin Hahn eds., Open Court 3d ed. 1989) (1939). For Pepper, the principal criteria of value under a pragmatic aesthetic are “the extensity, depth, and degree of vividness of quality in experience.” *Id.* at 374-76. Pepper contrasts this perspective with a position he associates with the neo-Hegelian Bernard Bosanquet and which he refers to as that of an “organic idealist.” *See id.* at 371-73. According to Pepper, the general principle of organic idealism is that “experience is intrinsically coherent or internally related, from which it follows, that the process of elucidating or of comprehending or of adequately seeing into experience consists in making explicit out of the fragments of experience as we originally find them the implicit coherence that lies there.” *Id.* at 373. Under an organic idealist aesthetics, then, aesthetic value is determined by the degree to which a work “coheres.” *See id.* at 379-88. As Jonathan Levin has pointed out, some influential modern pragmatists, including Cornel West and Richard Rorty, agree with Pepper in finding too much idealism and too little pragmatism in *Art as Experience*. *See Levin, supra* note 157, at 672-74. In response to Pepper’s critique, however, Dewey and his defenders argue that when Dewey uses terms (such as coherence, integration, and whole) that Pepper associates with organic idealism, he hardly means to suggest that these entities exist as universal categories, “out there” waiting to be discovered; rather, he considers these concepts, like other human constructs, to be instrumental to the purpose of organizing, classifying, and perceiving experience so as to intensify the satisfaction and meaning we derive from that experience. *See John Dewey, Experience, Knowledge and Value: A Rejoinder*, in *THE PHILOSOPHY OF JOHN DEWEY, supra*, at 515, 549-54; ALEXANDER, *supra* note 157, at 1-13, 198-213, 233-66; ALAN RYAN, *JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM* 253 (1995); Levin, *supra* note 157, at 671-81.

163. *See DEWEY, supra* note 161, at 22, 35.

164. *Id.* at 35.

165. *Id.* at 36-37.

166. *Id.* at 35.

167. *Id.* at 46.

nor solely a means to further experience, but simultaneously both means and ends.¹⁶⁸ For Dewey, then, as for Emerson and Santayana, the beholder of an object of art creates his own experience, both by recreating, in a sense, the artist's process of fashioning disparate elements into an ordered whole,¹⁶⁹ and by relating the work to his own previous experience;¹⁷⁰ at the same time, the work itself serves the instrumental functions of instilling a "refreshed attitude toward the circumstances and exigencies of ordinary experience,"¹⁷¹ and of creating a springboard for new experience.¹⁷²

Although what typifies those works we come to think of as great is the inexhaustibility of their ability to "inspire new personal realizations in experience,"¹⁷³ one important aspect of Dewey's aesthetics is that its subject matter is not limited to what traditionally is referred to as the "fine arts." Dewey, like Emerson and Santayana before him,¹⁷⁴ rejected any rigid distinction between "fine" and "useful" art, arguing instead that

168. See *id.* at 197-98 (describing aesthetic experience as successful integration of ends and means into satisfying whole); see also JOHN DEWEY, *EXPERIENCE AND NATURE* 361, 364-65 (Dover Publications 1958) (1929) [hereinafter DEWEY, *EXPERIENCE AND NATURE*] (describing art as unification of "means and consequence, process and product, the instrumental and consummatory"); DEWEY, *supra* note 146, at 236 (stating that all experienced objects are both consummatory and instrumental); SHUSTERMAN, *supra* note 157, at 46-50 (discussing Dewey's theory of art as simultaneously consummatory and instrumental); ROBERT B. WESTBROOK, *JOHN DEWEY AND AMERICAN DEMOCRACY* 338-39, 383-85 (1991) (same).

Dewey's attempt to transcend the traditional dichotomy between means and ends was in part a response to the criticism that pragmatism, with its emphasis on the instrumental nature of thought, threatens to degenerate into nothing more than a crass utilitarianism—in Dewey's words, "a doctrine of tools which are not tools for anything except for more tools." See JOHN DEWEY, *The Pragmatic Acquiescence*, in 3 *THE LATER WORKS* 147, 150-51 (JoAnn Boydston ed., S. Ill. Univ. Press 1984) (1927), quoted in WESTBROOK, *supra*, at 384. For further discussion, see Cotter, *supra* note 19, at 2092-93, and Grey, *supra* note 148, at 854-55.

169. See DEWEY, *supra* note 161, at 48-49, 54, 273-74, 325; see also POIRIER, *supra* note 146, at 98 (discussing act of reading as duplication of actions that went into writing).

170. See DEWEY, *supra* note 161, at 54, 309-10.

171. *Id.* at 139; see also *id.* at 214 (stating that "[t]he work takes place when a human being cooperates with the product so that the outcome is an experience that is enjoyed because of its liberating and ordered properties"); WESTBROOK, *supra* note 168, at 338-39 (discussing Dewey's theory that great art has the "capacity to provide satisfaction under changing conditions and on repeated approach"); Levin, *supra* note 157, at 678 (noting that, instead of focusing on aesthetic finality or autonomy, "Dewey looks to art as an agency of continuous recreation and renewal").

172. See DEWEY, *supra* note 161, at 273-74.

173. *Id.* at 109; see also DEWEY, *EXPERIENCE AND NATURE*, *supra* note 168, at 365 (stating that "[t]he 'eternal' quality of great art is its renewed instrumentality for further consummatory experiences").

174. See Levin, *supra* note 157, at 661.

[i]t is [the] degree of completeness of living in the experience of making and of perceiving that makes the difference between what is fine or esthetic in art and what is not. . . . Wherever conditions are such as to prevent the act of production from being an experience in which the whole creature is alive and in which he possesses his living through enjoyment, the product will lack something of being esthetic. No matter how useful it is for special and limited ends, it will not be useful in the ultimate degree—that of contributing directly and liberally to an expanding and enriched life.¹⁷⁵

Dewey's goal, therefore, was to transcend the dichotomy between fine and useful art by "recovering the continuity of esthetic [sic] experience with normal processes of living."¹⁷⁶ As Levin writes, for Dewey "artistically based rituals provided the glue that not only held a culture together but made an individual life meaningful within that culture," providing a "vital and compelling link between individuals and the natural and social environments in which they live their lives."¹⁷⁷ It was in this spirit that Dewey called for the reorganization of modern industrial society in ways that, he hoped, would lend a unifying, enriching, aesthetic quality to everyday experience.¹⁷⁸

The capacity of artworks to enrich experience is also a central theme in the writings of contemporary neopragmatists such as Richard Rorty. Although Rorty eschews Dewey's efforts to *describe* the "'generic traits' of experience,"¹⁷⁹ Rorty shares with Dewey the conviction that meaning is something that is neither fixed nor final, but rather always subject to imaginative revision and reinterpretation.¹⁸⁰ As Richard Shusterman notes, Rorty views

175. DEWEY, *supra* note 161, at 26-27.

176. *Id.* at 10.

177. Levin, *supra* note 157, at 676-77; *see generally* DEWEY, *supra* note 161, at 80-81 (arguing that "[w]orks of art that are not remote from common life, that are widely enjoyed in a community," are both "signs of a unified collective life" and "also marvelous aids in the creation of such a life"); DEWEY, EXPERIENCE AND NATURE, *supra* note 168, at 204-05 (describing communication "as a sharing in the objects and arts precious to a community, a sharing whereby meanings are enhanced, deepened and solidified in the sense of communion").

178. *See, e.g.*, DEWEY, *supra* note 161, at 8-11, 80-81, 261-62, 341-44; DEWEY, EXPERIENCE AND NATURE, *supra* note 168, at 362-70; JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 185-86 (Beacon Press 1948) (1920).

179. Levin, *supra* note 157, at 673 (quoting RORTY, *supra* note 146, at 73 (quoting DEWEY, EXPERIENCE AND NATURE, *supra* note 168, at 412)).

180. *See, e.g.*, RORTY, *supra* note 146, at 16 (approving Dewey's vision that "the arts, the sciences, the sense of right and wrong, and the institutions of society are not attempts to embody or formulate truth or goodness or beauty," but rather "attempts to solve

interpretation as “‘a matter of choice,’ always the product of a recontextualizing redescription aimed to ‘get us what we want’ by reweaving our web of beliefs and desires,” creating “new meanings, new vocabularies, ‘new ways of speaking.’”¹⁸¹ Rorty therefore suggests that we avoid asking ourselves questions such as “Does this book aim at truth?” or “What is the aim of the writer?” and that we focus instead on the purposes the work serves.¹⁸² Adhering to a traditional (and often criticized¹⁸³) distinction between public and private, Rorty argues that some books are better used to fashion our own private morality (“What shall I be?”), while others better serve to “work[] out a new *public* final vocabulary,”¹⁸⁴ helping us to see how social practices and institutions, as well as our own private idiosyncracies, affect others.¹⁸⁵

Although Rorty’s commitment to nonfoundationalism and instrumentalism is evident, his theory seems vulnerable in some respects to a variety of pragmatic critiques. One problem is that Rorty’s focus on art as an instrument for personal change seems to omit any consideration of the aesthetic as an end in itself. This omission in turn threatens to undercut the instrumentalism, for, as Levin suggests, it may be impossible to “envision change and articulate a viable cultural criticism except by entertaining new harmonies, imagining possible unities and beautiful relations, that are satisfying as ideals and therefore compelling as motivating forces.”¹⁸⁶

problems—to modify our beliefs and desires and activities in ways that will bring us greater happiness than we have now”); RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 80 (1989) [hereinafter RORTY, *CONTINGENCY*] (“For us ironists, nothing can serve as a criticism of a final vocabulary save another such vocabulary; there is no answer to a redescription save a re-re-redescription.”).

181. SHUSTERMAN, *supra* note 157, at 101 (quoting Richard Rorty, *Philosophy Without Principles*, in *AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM* 132, 134 (W.J.T. Mitchell ed., 1985), and RORTY, *supra* note 146, at 150 (citations omitted)); see also GREY, *supra* note 146, at 31-32 (discussing Rorty on literature); Levin, *supra* note 157, at 673-74 (same).

182. RORTY, *CONTINGENCY*, *supra* note 180, at 142, 145; cf. DEWEY, *EXPERIENCE AND NATURE*, *supra* note 168, at 411 (“Poetic meanings, moral meanings, a large part of the goods of life are matters of richness and freedom of meanings, rather than of truth; a large part of our life is carried on in a realm of meanings to which truth and falsity as such are irrelevant.”).

183. See, e.g., SHUSTERMAN, *supra* note 157, at 255-57; Allan C. Hutchinson, *The Three ‘Rs’: Reading/Rorty/Radically*, 103 *HARV. L. REV.* 555, 566-69 (1989) (reviewing RORTY, *CONTINGENCY*, *supra* note 180); Joseph William Singer, *Should Lawyers Care About Philosophy?*, 1989 *DUKE L.J.* 1752, 1761-62 (reviewing RORTY, *CONTINGENCY*, *supra* note 180).

184. RORTY, *CONTINGENCY*, *supra* note 180, at 142-43.

185. See SHUSTERMAN, *supra* note 157, at 141-42.

186. Levin, *supra* note 157, at 680.

Another difficulty, which Shusterman has noted, is the implicit elitism in Rorty's privileging of innovative interpretation over more commonplace reactions to works of art—the "shared background of meaning which enables us to identify what we agree to call 'the same text' so that we can then proceed to interpret it differently"—as if the former were the only type of aesthetic experience worth having.¹⁸⁷ Shusterman also argues that, by placing so much emphasis on art as a tool for personal change, Rorty accords too little weight both to competing personal values, such as the need for stability, and to the role of society in shaping our responses to works of art.¹⁸⁸ If Dewey at times threatens to slip into metaphysical speculation, Rorty sometimes seems perilously close to solipsism.

B. *Pragmatic Aesthetics and Moral Rights*

In this section, I discuss some of the implications of pragmatic aesthetic theory for the doctrine of moral right. I will argue that considerations derived from pragmatic aesthetics relating to the value of art and artists provide some support for endowing artists with moral rights protection, as a means of cultural preservation and of affording respect to the artist and her work. I conclude, however, that aesthetic theory alone provides insufficient guidance as to the desirable scope of the *droit moral*, in the absence of further theoretical and empirical analysis regarding its likely consequences.

One possible implication of pragmatic aesthetics centers on art's distinctive power, as described in the writings of, among others, Emerson, Santayana, Dewey, and Rorty.¹⁸⁹ If works of art have a unique power to transform the way we interact with our environment, by providing us with new ways of redescribing and reinterpreting our existence¹⁹⁰—or if, as Dewey argued, there is something exceptionally satisfying about the way in which aesthetic experience merges the consummatory with the instrumental,¹⁹¹ then the recognition of some form of special protection for these works might seem compelling. Works bearing this unique power, after all,

187. SHUSTERMAN, *supra* note 157, at 132-33, 257.

188. *See id.* at 239-61.

189. *See supra* notes 157-88 and accompanying text.

190. *See supra* notes 157-88 and accompanying text; *cf.* DEWEY, *supra* note 161, at 95 ("The conception that objects have fixed and unalterable values is precisely the prejudice from which art emancipates us. The intrinsic qualities of things come out with startling vigor and freshness just because conventional associations are removed.").

191. *See supra* notes 162-72 and accompanying text; *see also* DEWEY, *supra* note 161, at 84 (arguing that art has the unique quality of "clarifying and concentrating meanings contained in scattered and weakened ways in the material of other experiences").

need to be preserved if they are to continue to serve this function for us and for our descendants; if we destroy or alter them, future generations will not be able to share this experience.

Although this view of moral rights as a means of protecting the public interest in the preservation of art departs from the French view that moral rights serve exclusively to protect the artist's interest in her unique personality,¹⁹² it is consistent with some aspects of American moral rights legislation. Both VARA and the California Act, for example, prohibit not only the alteration of protected works, but also their destruction,¹⁹³ this latter proscription arguably serves the public interest in preservation more than it serves the artist's interest in respect for her personality.¹⁹⁴ The California Act also empowers public interest organizations to sue for damage to works of art under some circumstances,¹⁹⁵ and explicitly recognizes "the public interest in preserving the integrity of cultural and artistic creations" as one reason for protecting those works.¹⁹⁶

The argument that moral rights serve the public interest in art preservation nevertheless may be challenged on at least three grounds. The first is that endowing artists with moral rights is a haphazard way of protecting the public interest in art because even under a system of nonwaivable rights the artist may choose not to object to the alteration or destruction of her work.¹⁹⁷ One possible

192. Courts and commentators who adhere to this traditional understanding therefore reject the idea that the doctrine of moral rights should be viewed as serving any interest other than that of respecting the artist's personality. See Damich, *supra* note 45, at 1748-49 (noting that, under French law, moral rights doctrine is viewed as protecting creator's interest, not public interest; separate national treasures law protects public interest in preservation of works of outstanding artistic or historic value). France and some other countries also have statutes that permit the public enforcement of moral rights in the works of deceased authors under some circumstances. See Kwall, *supra* note 17, at 16 & n.65.

193. See 17 U.S.C. § 106A(a)(3)(B) (1994); CAL. CIV. CODE § 987(c)(1) (West Supp. 1997).

194. See, e.g., Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 328 (S.D.N.Y. 1994) (stating that VARA protects the public interest in the preservation of cultural resources), *aff'd in part, rev'd and vacated in part*, 71 F.3d 77, 81-82 (2d Cir. 1995) ("If integrity is meant to stress the public interest in preserving a nation's culture, destruction is prohibited . . ."), *cert. denied*, 116 S. Ct. 1824 (1996). As we have seen, however, in a few instances courts in France have held that destruction violated the author's moral right, see *supra* note 60, presumably on the theory that destruction can be an affront to the author's personality.

195. See CAL. CIV. CODE § 989(c).

196. *Id.* § 987(a).

197. See Ellen R. Porges, Note, *Protecting the Public Interest in Art*, 91 YALE L.J. 121, 125 (1981) (arguing that moral rights are inadequate to protect the public interest because they are enforceable only by the artist or his heirs); cf. Palmer, *supra* note 20, at 848

response to this problem might be to vest rights in the public as well as in the artist, as the California Act attempts to do; but this solution is also fraught with difficulty, relying as it does upon the expectation that a self-appointed organization not only will have the initiative to litigate but also will adequately represent the public interest.¹⁹⁸ Moreover, in many jurisdictions (France being one notable exception) moral rights are not perpetual; under German law, for example, all of the artist's rights expire seventy years after the artist's death, and under VARA moral rights in works created after June 1, 1991, terminate immediately upon the artist's death.¹⁹⁹ Moral rights therefore may fail to secure the interest, such as it is, of future generations in the preservation of the artist's work.²⁰⁰

A second difficulty arises if we agree with Dewey in rejecting the traditional dichotomy between fine and useful art.²⁰¹ If, as Dewey argued, any work in which the consummatory and instrumental successfully merge is an aesthetic object, then, to borrow Congress's words, virtually "anything under the sun that is made by man"²⁰² is at

(arguing that "if special personal rights governing works of art are to be recognized anywhere, they should be in the audience, and not in the artist, for it is on the audience that the art work depends for its continued existence, and not on the artist").

198. Other possible solutions within the moral rights framework seem even more flawed. For example, instead of relying upon public interest organizations to do the work, we could invest a public official, or establish a public commission, with the authority to seek injunctions against buyers who plan to alter or destroy certain works of art. The more works we decide to cloak with the protection of moral rights, however, the more complicated such a system would become and the greater would be the possibility of abuse or governmental favoritism. Moreover, even under European law *some* alterations are permitted—for example, alterations that are necessary when a work is being translated into a different medium. See *supra* notes 68-70 and accompanying text. Subjecting the buyer who wishes to make some arguably reasonable alteration to the risk of being sued not only by the artist but also by some official or commission may have a significant negative effect on the demand for art. Every work of art covered by this hypothetical legislation in effect would become the subject of a historic preservation scheme, requiring the owner to seek public approval before making any alterations. While this type of regulation may make sense in the context of architectural works of historic significance, requiring such approval in other contexts might impose substantial costs on buyers and the public.

199. See 17 U.S.C. § 106A(d)(1) (1994).

200. See Porges, *supra* note 197, at 125. Even in France, where moral rights are perpetual, those rights may not adequately protect the interest of future generations in preservation. After the artist's death, her moral rights are enforceable only if she has heirs who are willing to invest the time and money to enforce them or, in the absence of heirs, if the state or National Literary Fund decides to do so. See Kwall, *supra* note 17, at 16 n.65.

201. See *supra* notes 173-78 and accompanying text; see also DEWEY, *supra* note 161, at 26-27, 116 (challenging that dichotomy).

202. *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980) (quoting S. REP. NO. 82-1979, at 5 (1952), reprinted in 1952 U.S.C.C.A.N. 2394, 2399; H.R. REP. NO. 82-1923, at 6

least potentially endowed with the moral rights of its creator; and yet, as Jamie Boyle has noted, it is difficult to imagine “granting a plumber control over the pipes she installs even after the work is paid for, or a cabinet maker the right to veto the conversion of her writing desk into a television cabinet.”²⁰³ One reason, of course, that it is difficult to imagine such things is that to recognize moral rights in these objects would pose insurmountable conflicts with our need to use them *as objects*; prohibiting the alteration of the pipes or cabinet probably would impose more serious hardships on their owners than would imposing similar prohibitions on the owners or licensees of works of authorship. A realistic assessment of the capabilities of judges and legislators also makes it difficult to imagine successfully establishing a moral rights regime premised on the assumption that policymakers can accurately apply Deweyan criteria to distinguish between the aesthetic and the non-aesthetic in everyday objects.²⁰⁴ Given these limitations, then, one might still choose to recognize moral rights only in works that fit within traditional definitions of art, on the theory that some protection, however imperfect, is better than none. It is nevertheless important to recognize that, from the standpoint of Deweyan aesthetics, so confining the right will be simultaneously over- and underinclusive—overinclusive because some hackneyed works that fall into traditional definitions of art will be protected, underinclusive because some aesthetic but useful articles will not—and may tend to fortify the very distinction that Dewey and other pragmatists attempted to transcend between the fine and useful arts.

(1952) (not reprinted in U.S.C.C.A.N.)). Although the quotation above was made in the context of patent law (it describes what qualifies as patentable subject matter), it seems equally applicable to the subject at hand.

203. James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 629 (1988).

204. This is not to deny that, in determining whether a product feature qualifies as intellectual property, courts sometimes are called upon to draw what may at first blush appear to be similar distinctions. For example, the design of a useful article may qualify as a copyrightable sculptural work if it incorporates features that are physically or conceptually separable from the article. See 17 U.S.C. § 101; *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987). Similarly, a product design may qualify as a trademark only if the design is not functional (that is, something that competitors must be able to use on their products in order to compete). See *generally Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164-65 (1995) (discussing whether product colors are functional); *Wallace Int’l Silversmiths, Inc. v. Godinger Silver Art Co.*, 916 F.2d 76, 79-83 (2d Cir. 1990) (discussing whether baroque silver pattern is “aesthetically functional”). The distinctions that a judge would have to draw under Dewey’s criteria, however, for purposes of determining whether a product is aesthetic or non-aesthetic, seem to be qualitatively different, and even less subject to any sort of objective oversight.

A third problem arises from what may be viewed as a tendency on the part of pragmatist theoreticians to value the experience of the reader or interpreter over the authenticity and physical integrity of the text or art object. As noted above, for example, in Dewey's aesthetics the work of art is not an object at all, but rather the experience derived from the interaction of observer with the text or object. If the meaning of a text or object resides in its consequences,²⁰⁵ however, then considerations of authenticity and integrity might appear to be a matter of less importance than assuring the desirability of those consequences.²⁰⁶ Moreover, each new reading or interpretation has the potential to change that meaning and, therefore, from a pragmatic perspective, to change the work itself. As Shusterman observes:

[A]n artwork turns out to be a continuous and contested construction of the efforts to determine its understanding and interpretation—that is, of efforts to determine how and what the work will be taken to be, which amounts, pragmatically speaking, to how and what it actually is. . . .

. . . .

. . . Since our individuation of textual objects depends on our literary interests and values, radically changing our understanding and experience of texts can result in changing their individuation. We may no longer find them worth individuating in the same way, no longer care about distinguishing their authentic copies from drastically abridged or bowdlerized versions. In other words, though we can and must distinguish individuation of the work from

205. See Cotter, *supra* note 19, at 2078 (stating that, for pragmatists, “the meaning of a proposition resides in its consequences, such that two propositions with the same consequences have (for all relevant intents and purposes) the same meaning” (citations omitted)).

206. As Richard Poirier notes:

This effort to remake history requires the most strenuous sort of writing/reading, of ourselves no less than of those in the past whose work we recreate by our readings of it. Since we literally make the past, it is a dereliction of duty to worship texts, monuments, and artifacts, including literature, as if these are products only the past has produced.

POIRIER, *supra* note 146, at 13. In a similar vein, Shusterman claims that Dewey’s “most important aesthetic theme” is

the privileging of dynamic aesthetic experience over the fixed material object which our conventional thinking identifies—and then commodifies and fetishizes—as the work of art. For Dewey, the essence and value of art are not in the mere artifacts we typically regard as art, but in the dynamic and developing experiential activity through which they are created and perceived.

SHUSTERMAN, *supra* note 157, at 25.

the particular meanings and content interpretively ascribed to it, the latter can sometimes reciprocally modify our determining of the former.²⁰⁷

On this view, efforts to preserve the authenticity and integrity of works of art might seem not only undesirable—because of the constraints imposed upon subsequent users or interpreters—but also futile. If we re-create a work of art every time we read or interpret a text or object, moral rights can never eliminate our ability to alter those texts and objects for our own purposes.

These last arguments nevertheless seem to overstate the potential drawbacks of moral rights protection: The fact that reading or interpretation may involve the reader or interpreter in an act of re-creation, after all, hardly suggests that we should advocate the slashing of canvases and the bowdlerizing of books. Thus, even if our principal concern is with the value of interpretive experience, we might support some form of moral rights protection as a way of preserving the very texts and objects from which new interpretive experiences may continue to be forged. Perhaps more importantly, these arguments tend to overemphasize the instrumental benefits of artistic creation, to the neglect of its consummatory value. Dewey was careful to avoid the conclusion that the work of art is “just a stimulus to and means of an overt course of action,”²⁰⁸ viewing the art object as a connecting link that allows a message (though one not necessarily fully contemplated, intended, or delimited by the artist) to be communicated from artist to interpreter.²⁰⁹ Thus, as Shusterman notes, Dewey “does not deny the importance of art’s material objects” and insists “on the unavoidable ‘need for objectification,’ for something reasonably fixed and qualitatively conducive to guide and structure the creation of aesthetic

207. SHUSTERMAN, *supra* note 157, at 94-95, 104. For a similar, but negative, view of the potential for interpretation to affect the way we view art, see Michiko Kakutani, *Culture Zone: The Trickle-Down Theory*, N.Y. TIMES, Sept. 22, 1996, § 6 (Magazine), at 28:

The black-and-white television ad that uses Fellini-esque imagery (a fat woman on a swing, a little girl dressed as a ballerina, etc.) to sell mortgages not only rips off Fellini for the crudest of purposes, but also makes people who see it less likely to appreciate the radical achievement of “8 1/2” if and when they see it. If familiarity does not exactly breed contempt, it does breed indifference and impatience.

208. DEWEY, *supra* note 161, at 273-74; *see also id.* at 214 (stating that work of art “takes place when a human being cooperates with the product so that the outcome is an experience that is enjoyed because of its liberating and ordered properties”).

209. *See id.* at 104, 106.

experience."²¹⁰ Altering or destroying texts and objects may remove this necessary focus, rendering the text or object merely a stimulus to a cheapened experience.²¹¹

A pragmatic analysis therefore suggests that there are good reasons for preserving those objects that communicate aesthetic experience, and that the recognition of moral rights is one means (albeit an imperfect one) of achieving this result.²¹² A second pragmatic argument in favor of moral rights centers not so much on the work of art or its effect on the reader or interpreter as on the person of the artist.²¹³ A pragmatist committed to the idea of human flourishing, for example, might conclude that according respect to the integrity of the artist's work also shows respect for the person of the artist, and that showing respect for this person (who is, after all, a member of the human community) is a satisfying end in itself.²¹⁴

210. SHUSTERMAN, *supra* note 157, at 25 (quoting THEODOR W. ADORNO, *AESTHETIC THEORY* 263 (1984)); *see also* Netanel, *supra* note 17, at 404-07 ("[E]ven if authors do not control the thematic interpretation of their work, they do set forth the basic vocabulary of signs—words, sounds and images—that serves as a framework of reference for the work's meaning.").

211. *Cf.* DEWEY, *supra* note 161, at 197 ("Esthetic objects belong intrinsically to their medium; when another medium is substituted, we have a stunt rather than an object of art.").

212. Note, however, that this rationale may suggest only that the original physical embodiment of a work, such as a canvas or a manuscript, should be preserved from alteration or destruction. Neither a performance that departs from the author's intent, nor an altered copy of an original work, necessarily prevents subsequent interpreters from enjoying the original. *But see* Kakutani, *supra* note 207, at 28 (arguing that appropriation of artist's imagery may prevent subsequent audiences from appreciating innovativeness of original).

213. In other words, a pragmatist might agree with a Kantian or Hegelian analyst that the personality of the artist is deserving of some form of special protection, though not for the reasons propounded by the German idealists and their followers. *See supra* notes 22-39 and accompanying text (discussing Kantian and Hegelian theories of intellectual property).

214. There is, of course, nothing inherently "in" pragmatism that requires a commitment to human flourishing, as Richard Rorty and Stanley Fish, among others, have pointed out. *See* Stanley Fish, *Almost Pragmatism*, in *PRAGMATISM IN LAW & SOCIETY*, *supra* note 146, at 57; Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1815-16, 1819 (1990) [hereinafter Rorty, *Banality*]. One aspect of human experience, however, is to have commitments, even if one believes that these commitments cannot be grounded in any universal, transcendental standard. *See, e.g.*, GREY, *supra* note 146, at 76 (relating Stevens's idea of the "supreme fiction" to James's "will to believe" (second quote from LETTERS OF WALLACE STEVENS 430 (Holly Stevens ed., 1966)); POIRIER, *supra* note 146, at 24 (similar); RORTY, *CONTINGENCY*, *supra* note 180, at 189 (arguing that having a system of values is inescapable even if one believes that these values are supported by "nothing deeper than contingent historical circumstance"). The analysis above therefore assumes that our pragmatist policymaker is committed to a vision of human flourishing, even though, in Rorty's words, other people may well "dream different dreams." Rorty, *Banality*, *supra*,

Similarly, one might argue that endowing artists with moral rights sends a message that art is not just a commodity, to be traded off against other commodities, but rather that artists' contributions to society are specially valued and appreciated. Moral rights therefore may be viewed as a means of alleviating the otherwise alienating conditions imposed upon artists by an economic system that, at present, may leave them little choice but to consent to the commodification and defilement of their work.²¹⁵ Finally, according respect to the personality of the artist may serve an instrumental function of encouraging artists to create, by fostering a climate that is conducive to artistic activity.²¹⁶

The preceding analysis, however, raises the issue of whether due respect for the personality of the artist necessarily requires legal protection of the integrity of her work. Neil Netanel argues that it does, because the retention of control over one's expression is vital to "individual self-development, autonomy, and identity."²¹⁷ Netanel observes that, in expressing herself, the artist chooses which aspects of her identity to reveal and achieves greater knowledge of herself and her individuality;²¹⁸ therefore, a special attachment and commitment to her works of authorship as manifestations of her identity and individuality may be essential to the artist's conception of her own personhood.²¹⁹ Thus, according to Netanel, the author's work is an example of what Margaret Radin refers to as property for personhood:

As [Radin] has shown, personhood requires "contextuality," a set of stable relationships with "the environment of things and other people," as well as a certain continuity of identity and ability to exert one's will. Accordingly, certain objects, such as one's home or family keepsakes, may be no less

at 1816 (citation omitted).

215. Cf. DEWEY, *supra* note 161, at 341-44 (arguing that the modern industrial worker, in his transition from skilled artisan to mass production laborer, lost much of the aesthetic pleasure in creation that makes life satisfying and meaningful).

216. Cf. H.R. REP. NO. 101-514, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6915 ("The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation." (quoting *The Visual Artists' Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong. 32 (1990) (statement of Hon. Ralph Oman at 3))).

217. Netanel, *supra* note 17, at 400.

218. *See id.* at 401.

219. *See id.* at 423. Netanel recognizes that one can express oneself in ways that do not involve the creation of original works—for example, by reciting or performing the works of another—but he argues that the expression of one's own creative work "carries a far greater potential for self-realization than do imitations and recitals." *Id.* at 402.

integral to one's sense of self than are one's beliefs, commitments, loved ones or personal attributes. Such objects may properly be the subject of marketability restrictions where free exchange would be injurious to personhood. They are both commodities, in the sense that they may be bought and sold, and non-commodities, in the sense that their sale is regulated in order to protect personal contextuality, identity and autonomy.²²⁰

On the basis of this analysis, Netanel suggests that the state should accord the artist an ongoing legal interest in the integrity of her work; and that this interest should be inalienable, even if the artist is otherwise free to alienate the physical embodiment of and copyright to her work.²²¹ Requiring the artist to bargain for something so central to her sense of self, he submits, may be destructive of the artist's self-integrity.²²²

One might nevertheless argue that, although some (perhaps most) artists and authors have strong negative feelings concerning the potential alteration or destruction of their works, the provision of an ongoing right to the integrity of these works cannot be justified solely by reference to principles of self-development, autonomy, and identity. Lawrence Adam Beyer, for example, argues that a right of integrity has no bearing on the author's freedom to create and to express because those freedoms do not depend upon the preservation of works that have already been completed.²²³ Similarly, the right promotes neither self-knowledge, which the artist presumably acquired during the creation of the work,²²⁴ nor self-confidence, inasmuch as the right stops short of providing artists with the power to *demand* subsequent alterations to their work.²²⁵ Viewing the creation of a work of authorship as "only the *first* step in the author's assertion of self in the external world,"²²⁶ however, Netanel responds that "[e]xpression fulfills a self-realization function . . . not just in the formulation of words or images, but also in their communication to

220. *Id.* at 422-23 (citing Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1904-06, 1919 (1987)).

221. *See id.* at 423.

222. *See id.* at 411-15.

223. *See Beyer, supra* note 17, at 1094.

224. *See id.* at 1094-95. After the creation of the work, Beyer argues, the artist can rely upon memory, "supplemented, if necessary, by photos or other aids," to preserve the self-knowledge she gained during its creation. *Id.* at 1094.

225. *See id.* at 1095. Beyer ignores the possibility, however, that under French and German law the artist may have a right to correct or withdraw some works from publication. *See supra* note 42.

226. Netanel, *supra* note 17, at 403 (emphasis added).

others.”²²⁷ Netanel therefore concludes, contra Beyer, that “continuing authorial control is vital to self-realization and autonomy.”²²⁸ Moreover, while recognizing that an “author’s subjective feeling of identification with a work might diminish as the initial creative impetus becomes more remote,”²²⁹ Netanel suggests that this consideration is balanced by the ability to transmit the work to “many people in diverse times and places,” which “greatly magnifies the force and meaning of the work and its communication for most authors.”²³⁰

A second objection to Netanel’s conception of moral rights as a means for promoting self-autonomy is that a system of nonwaivable moral rights, of the type Netanel advocates, *takes away* one aspect of the author’s autonomy—namely her freedom to bargain—and that some artists may prefer to exercise this aspect of their autonomy by waiving their moral rights in exchange for higher sales prices. With this problem in mind, Beyer argues that allowing artists so to “commodify” their integrity interests is a positive good because commodification itself can pave the way for personal change and self-formation; freedom of contract and private property, after all, which make commodification possible, also allow us to control physical things in ways that may be crucial to self-innovation.²³¹ In response, however, Netanel points out that the adoption of *either* a waivable *or* nonwaivable rule threatens to take away someone’s autonomy: while a nonwaivable rule takes away the freedom of those who would prefer to waive, a rule of free alienability takes away the sovereignty of those who lack the means to bargain freely because they may have little choice other than to waive their rights if they wish to sell their works.²³² Netanel suggests that, on balance, a nonwaivable right is the lesser threat to autonomy, given what he views as an emerging social consensus as to the importance of moral rights, as evidenced by (1) the importance of autonomy of expression in First Amendment

227. *Id.* By focusing on the work as the author’s communication to the public, Netanel hearkens back to Kant’s argument, *see supra* notes 27-31 and accompanying text, that publication constitutes “an ongoing presentation of the author’s discourse to the public.” Netanel, *supra* note 17, at 403.

228. Netanel, *supra* note 17, at 403; *see also id.* at 412-15 (arguing that inalienable right to continuing authorial control is vital to preservation of individual identity and autonomy).

229. *Id.* at 404.

230. *Id.*

231. *See* Beyer, *supra* note 17, at 1104; *cf.* RADIN, *supra* note 25, at 60-63 (arguing that both stability and flexibility of context are important for personal development).

232. *See* Netanel, *supra* note 17, at 411-12.

jurisprudence; (2) “the increasing, if hesitant support” for moral rights in the courts and legislatures; and (3) “the numerous public statements in which authors themselves have expressed a profound sense that their creations are inextricably related to their person.”²³³ Netanel concedes, however, that these factors are not conclusive.²³⁴

My own sense of the matter is that, in the abstract, Netanel has the better of the argument concerning the potential for moral rights to promote important values such as authorial self-realization and self-autonomy; if the Stravinsky example with which I began this Article is any guide, many artists *do* seem to feel that their identities continue to be embodied in their works after the works’ completion. If we agree with the pragmatists, however, that legal rules should be assessed in light of their consequences, it would be helpful to have a better idea precisely what the consequences of various moral rights regimes may be—and in particular whether there are likely to be any unintended consequences that writers such as Netanel and Beyer have failed to take into account. Should we, for example, expect the adoption of a waivable or nonwaivable moral right to affect the demand for works of art? Should the rule that applies to one class of works, such as works of visual art, apply to others such as musical works? Are the consequences of a rigorous system of moral rights likely to depend upon other factors, such as the level of government subsidization of the arts?

In previous work, I have argued that economic analysis often can provide the pragmatic policymaker with reasonably accurate predictions concerning the likely consequences of legal rules and can assist her by clarifying some of the tradeoffs between efficiency and equity inherent in choices among competing rules.²³⁵ The resulting information may be useful in either of two ways. First, it may provide an additional reason for supporting (or opposing) a choice of rule that is already supported (or opposed) by other reasons such as text, history, and moral intuition.²³⁶ As Daniel Farber and Philip Frickey have argued, a legal outcome that is supported by a “web” of various arguments is inherently more satisfying and stable than one that is supported by one foundational theory alone.²³⁷ On the other

233. *Id.* at 412-15.

234. *See id.* at 412 & n.250.

235. *See Cotter, supra* note 19, at 2137-39.

236. *See id.* at 2139.

237. *See* Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1336 (1988); Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1640-43 (1987); cf. Charles Sanders Peirce, *Some*

hand, the predictions generated by economic analysis may help to challenge the policymaker's initial reaction to the desirability of a given rule—by suggesting, for example, that a rule that on its face appears to benefit one class of persons actually may wind up harming them.²³⁸ At the same time, I have emphasized the importance of recognizing the limitations of the economic paradigm, including the highly contestable nature of the assumptions upon which economic analysis is based and the difficulty of falsifying its predictions.²³⁹ Recognizing that the paradigm at best illuminates only a portion of reality, while obscuring other portions, I have suggested that the pragmatic policymaker can incorporate economic analysis into her “grab bag” of practical reasoning methods, “balancing the relative precision it offers in terms of policy analysis against the fuzziness of less quantifiable, but more inclusive, measures of social welfare.”²⁴⁰

In light of these considerations, I present in the following subsection an economic analysis of moral rights. I begin by analyzing the likely consequences of a system of waivable rights, of the type established under VARA, for the parties to a typical artist-buyer transaction. I then consider the likely effects of a system of nonwaivable rights, on both the parties and the rest of society. Finally, I consider how to assess this analysis in light of the economic paradigm's inherent limitations.

C. *The Economics of Moral Rights*

1. Waivable Moral Rights vs. No Moral Rights

Suppose that Georgia, an artist, creates a work that she is prepared to sell to a prospective buyer, Alfred. Suppose further that the work is a painting—though it could just as easily be a sculpture, photograph, musical composition, film, or dramatic work—and that, just prior to selling the work, Georgia owns both its physical

Consequences of Four Incapacities, in 5 COLLECTED PAPERS, *supra* note 146, 156, ¶ 5.265, at 157 (arguing that philosophy ought “to trust rather to the multitude and variety of its arguments than to the conclusiveness of any one”).

238. See SUNSTEIN, *supra* note 153, at 19; Cotter, *supra* note 19, at 2139.

239. See Cotter, *supra* note 19, at 2114-29. Many other scholars have recognized these limitations. See, e.g., POSNER, *supra* note 146, at 363-65 (arguing that nature of economic inquiry lends itself more to confirmation than falsification); Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309, 1314-25, 1352-62 (1986) (discussing assumptions); Herbert Hovenkamp, *Positivism in Law and Economics*, 78 CAL. L. REV. 815, 822-23 (1990) (arguing that very little work in law and economics “could be described as a rigorous attempt to falsify alternative explanations for a given phenomenon”).

240. Cotter, *supra* note 19, at 2134.

embodiment (the canvas) and its copyright.²⁴¹ Depending on the governing law, either (1) Georgia also owns a moral right in the work, or (2) Alfred owns a right to distort, mutilate, modify, or destroy any physical property he owns. (In the interest of brevity, I will refer to Alfred's right as the "alteration right" or "right to alter.") Focusing exclusively on the well-being of Georgia and Alfred, does it make any difference whether Georgia's bundle of rights, or "initial endowment," includes a moral right of integrity, or whether Alfred instead owns a right of alteration?

The answer, of course, may depend on how one defines "well-being." In analyzing issues of this nature, legal economists generally proceed upon the following assumptions: (1) The value that each party accords to a right is stable and "exogenous," or innate; (2) at least in theory, these values can be measured along a common metric and summed; and (3) value is defined by the amount each party would be willing to pay to acquire the right, or the amount he or she would be willing to accept to give it up (otherwise known, respectively, as the parties' "offer" and "asking" prices).²⁴² The validity of each of these assumptions is open to debate, and in following subsections I will consider the implications of relaxing or eliminating them. For present purposes, however, I would like to explore first the implications of accepting these assumptions as true. What, if anything, can a conventional law and economics analysis tell us about the likely consequences of a system of waivable moral rights?

As good a place as any to begin the analysis of this question is with an application of the Coase Theorem to the transaction between Georgia and Alfred.²⁴³ The Theorem posits that, if transaction costs (and other obstacles to bargaining, such as strategic behavior²⁴⁴) are

241. Under the 1976 Copyright Act, ownership of copyright vests in the author of the work. See 17 U.S.C. § 201(a) (1994). Normally the author is the individual who creates the work, but an employer or commissioning party is deemed to be the author of works made for hire. See *id.* §§ 101, 201(b); see also *supra* note 114 (defining works made for hire). In this section, I assume that the painting is not a work made for hire.

242. See Cotter, *supra* note 19, at 2114-29 (discussing contours of economic paradigm); see also ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 16-18 (2d ed. 1997) (discussing assumptions common to economic analysis); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 10 (2d ed. 1989) (same); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.1, at 3-12 (4th ed. 1992) (same); Harrison, *supra* note 239, at 1329-30 (discussing commensurability).

243. See Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 *passim* (1960). For further discussion of the Coase Theorem, see COOTER & ULEN, *supra* note 242, at 4-6 (1988); POSNER, *supra* note 242, § 3.6, at 49-52.

244. Strategic behavior, which occurs when "what one individual is prepared to do

not present, the initial assignment of rights as between parties such as Georgia and Alfred is irrelevant to the maximization of their aggregate wealth²⁴⁵—although different initial endowments will have different distributional consequences. Perhaps more importantly, the Theorem also predicts that when transaction costs are *not* zero, the initial endowment *may* affect the parties' ability to increase their well-being.²⁴⁶ Thus, as I have argued previously, the Coase Theorem can be useful in at least three ways: first, by predicting the consequences of different initial endowments in light of the specific transaction costs that are likely to arise in the real world;²⁴⁷ second, by predicting when the alteration of legal rules may generate desirable

depends on his assessment of what others are likely to do," JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 200 (rev. ed. 1990), is the principal subject matter of game theory. See generally DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 1-5 (1994) (introducing concept of strategic behavior).

245. That is, the Theorem claims that the initial allocation of endowments is irrelevant to the attainment of Kaldor-Hicks efficiency—otherwise known as “potential Pareto efficiency,” “wealth maximization,” or “value maximization”—but it is not necessarily irrelevant to the attainment of Pareto superiority or utility maximization.

To illustrate the differences among these concepts, suppose that we have a two-person economy consisting of A and B; that A is initially endowed with a good that she is willing to trade for \$5; and that B, whose initial endowment consists of \$10 in cash, is willing to pay as much as \$8 for A's good. The end result of a voluntary exchange of (say) \$6 for the good is that A owns \$6 in cash, which she values more highly than she valued the good, and B owns both \$4 and a good that he values at \$8; aggregate wealth has thus increased from \$5 + \$10 = \$15 to \$6 + \$8 + \$4 = \$18. The end result is “Pareto superior” to the initial state, because both parties are better off than they were under the status quo; it is also Pareto efficient, because no further allocation can be made that would render one party better off without rendering the other worse off, assuming that each party derives equal pleasure from an additional increment of value. For further discussions of Pareto efficiency, see COOTER & ULEN, *supra* note 242, at 44-45, POLINSKY, *supra* note 242, at 7 n.4, and POSNER, *supra* note 242, § 1.2, at 13-14. The end result is also value- or wealth-maximizing because no further rearrangement can increase aggregate wealth beyond \$18. Note, however, that a forced transfer of the good from A to B also would have been wealth maximizing—A would have wound up with \$0, and B with \$10 in cash plus a good he values at \$8, resulting again in aggregate wealth of \$18—but that this allocation would not have been Pareto superior to the status quo because one party, A, would have been rendered worse off in comparison with her initial state. In addition, the end result of the forced transfer may or may not be utility-maximizing. If A would derive greater pleasure from an extra dollar than would B, a possible result if B's marginal utility (the pleasure he derives from each additional dollar added to his pocket) declines, a further forced transfer from B to A would increase aggregate utility. Aggregate *wealth*, however, would remain constant. For further discussion, see Cotter, *supra* note 19, at 2099-2100, 2115-29.

246. See, e.g., NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* 110 & n.21 (1994); see also *infra* text accompanying notes 252-70 (discussing, among other things, how presence of transaction costs may prevent artist from “purchasing” moral right from art buyer).

247. See Cotter, *supra* note 19, at 2103-04.

distributional effects;²⁴⁸ and third, by focusing attention on the deficiencies of the conventional economic model, when real world observation conflicts with Coasean predictions.²⁴⁹

Applying the Coase Theorem, then, to the hypothetical transaction between Georgia and Alfred, suppose first that Georgia's initial endowment includes a waivable right of integrity. The Theorem predicts that, in the absence of transaction costs, if Alfred values the right to alter the work more than Georgia values the right of integrity, Georgia will agree to waive the latter; and that otherwise Georgia will retain her moral right. In the alternative, suppose instead that Alfred's initial endowment includes the alteration right. In the absence of transaction costs, Georgia (in effect) will "buy" a right of integrity from Alfred, by accepting a lower purchase price for her work, if Georgia values the right of integrity more highly than Alfred values the right to alter; she will not do so if she values integrity less than Alfred values alteration. Whether the legal system initially endows Georgia with a moral right or Alfred with an alteration right, therefore, the parties' aggregate welfare is exactly the same: the relevant right, either to alter or prevent alteration, winds up in the hands of the party who values it more highly (where value is defined by the parties' offer and asking prices). Endowing Georgia with a moral right, however, will affect the distribution of wealth because if Georgia's endowment includes such a right, Alfred must pay more to acquire Georgia's work; if her endowment does not include a moral right, Georgia must demand a lower price for her work if she wishes to prevent its alteration.

Once we step outside this hypothetical world of no transaction costs, however, the initial endowment of rights may either facilitate or hinder the parties' ability to maximize their aggregate welfare. Suppose, for example, that assigning an integrity right to Georgia would generate higher transaction costs than would assigning an alteration right to Alfred; the higher these costs, the greater the aggregate loss and the greater the likelihood that some exchanges that would make both Alfred and Georgia better off will be foregone.²⁵⁰ It is also possible, for reasons discussed hereafter, that Georgia may be willing to pay less to acquire a moral right than she would be willing to accept to give up a right that is part of her initial endowment. This potential gap between offer and asking prices can

248. See *id.* at 2104-05, 2111 n.181.

249. See *id.* at 2137 & n.277.

250. See, e.g., POSNER, *supra* note 242, § 3.6, at 52.

have significant welfare consequences.²⁵¹ In the following subsection, I consider the transaction costs that are likely to arise in the context of negotiations over moral rights, as well as the efficiency and distributional consequences of these costs. I then consider the possible existence and consequences of an offer/asking price gap.

a. Transaction cost analysis

One transaction cost that would arise in connection with negotiations over moral rights is, simply, the cost of negotiating—the cost of getting together and bargaining over whether Georgia will have an ongoing right in her work. This cost will be minimized if (1) Georgia is initially endowed with a moral right and she values that right more highly than Alfred values alteration, or (2) Alfred is endowed with an alteration right and he values it more highly than Georgia values the integrity of her work. In either case, there will be little need to negotiate over moral or alteration rights, because the relevant right already has been assigned to the party who values it more highly, and therefore no negotiating costs will be incurred as an incident thereto. Thus, if we knew that, in a world without transaction costs, most artists would wind up owning moral rights, we could minimize negotiating costs by assigning those rights to them in advance; and if we knew instead that most buyers would wind up owning alteration rights, we could minimize these costs by assigning alteration rights to buyers.²⁵²

The difficulty lies in knowing which of these two outcomes—artists owning moral rights, or buyers owning alteration rights—would be more common in a transaction-cost-free world. In a recent

251. See *infra* notes 271-305 and accompanying text.

252. In general, a policymaker interested in maximizing aggregate wealth may choose from among three types of rules to reduce transaction costs. First, she may assign the right to the party who probably would have wound up owning it in the absence of transaction costs. If the policymaker guesses correctly, her assignment obviates the need for any further transactions; but the efficacy of this strategy depends upon her ability to guess correctly. See POSNER, *supra* note 242, § 3.6, at 52; Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 18 (1982). Second, the policymaker may assign the right to the party who can facilitate an exchange at lower cost. For example, if it costs \$100 for A to transfer the right to B and only \$50 for B to transfer the right to A, then, all other things being equal, the right should be assigned to B. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1097 & n.18 (1972); Cooter, *supra*, at 18 & n.20. Third, the policymaker may impose rules that reduce the incentives for the parties to engage in strategic behavior. See Cooter, *supra*, at 18-19. See generally Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027 (1995) (demonstrating how divided entitlements to property can reduce incentive to engage in strategic behavior).

article, Henry Hansmann and Marina Santilli suggest that the artist may place a high value upon his moral right not only because he feels attached to his work and wishes to communicate a message, but also out of the pecuniary motive of wishing to protect his reputation; the alteration or distortion of one work may affect the market for the artist's other work.²⁵³ The results of a recent Copyright Office survey also suggest that many artists endowed with moral rights under VARA prefer to retain those rights, even when doing so raises a risk of obtaining fewer commissions.²⁵⁴ On the other hand, the fact that there appear to be few attempts in the real world to create moral rights protection by agreement²⁵⁵ might suggest that few artists would negotiate for moral rights protection, absent a redistribution of wealth or power in their favor, in a transaction-cost-free world. Even if negotiation and other transaction costs are generally high, after all, one would expect *some* artists and buyers to find it in their interest to create moral rights by contract, if in fact artists generally value these rights more highly than buyers value their absence. One might also hazard a guess that buyers of works that, once installed, cannot be removed from the premises without being dismantled or destroyed (murals and some sculptures, for example) would be hesitant to consent to the installation of such works if the artist demanded a

253. See Hansmann & Santilli, *supra* note 135, at 102-05.

254. See REPORT, *supra* note 139, at 136-37 (indicating that 50% of artists surveyed stated they would not waive their moral rights if asked (42% were unsure), and that 55% of those expressing an opinion on the subject believed that rejecting a requested waiver would preclude a sale). Some economists, though, might question the empirical validity of such self-reporting. Compare POSNER, *supra* note 148, at 554 ("Economists are known for their distrust of people's declared motives and their consequent insistence on inferring preferences from behavior ('revealed preference,' or putting one's money where one's mouth is)"), with Harrison, *supra* note 239, at 1316-19 (criticizing revealed preference theory).

255. My research, at any rate, has failed to uncover relevant examples. I am not aware of any case law involving attempts to create moral rights protection solely by contract; moreover, oral contracts appear to predominate in the art world, at least in transactions involving moveable works of visual art, see REPORT, *supra* note 139, at 118 (statement of Professor John Henry Merryman); *id.* at 135 (noting a survey indicating 61% agreement with the statement that "oral contracts are most common in the art world"); Merryman, *supra* note 17, at 1043. It seems unlikely that parties would attempt to create something as novel and difficult to enforce as moral rights protection by oral agreement. See *infra* notes 258-65 and accompanying text. Parties sometimes may attempt, however, to prevent others from altering their works either by retaining the right to prepare derivative works, or by transferring that right only on condition that it be exercised in certain ways (as in the *Gilliam* case, see *supra* notes 78-92 and accompanying text). Cf. Kwall, *supra* note 17, at 38-56 (discussing how existing copyright doctrines can be used to protect moral rights); *infra* note 265 (discussing possible alternative ways of advancing interests protected by moral rights).

moral right.²⁵⁶ Of course, if these latter arguments are correct, even the limited protection created under VARA may be inefficient because the costs VARA generates in connection with the negotiation of waivers would be avoided under a system that does not endow artists with moral rights.²⁵⁷

There may be reasons, however, other than artists' placing a low value upon moral rights, that explain why parties so infrequently attempt to create these rights by contract. One possible reason is the difficulty of enforcing moral rights agreements against remote purchasers.²⁵⁸ Suppose that Alfred is initially endowed with an alteration right, but that Georgia wants to "buy" a right of integrity as an incident to the sale of her work to him. Although the parties can agree to whatever they want as between themselves, Georgia may have a difficult time enforcing her integrity right against the person who subsequently buys the painting from Alfred. Contract law provides no direct method for Georgia to bind the remote purchaser because Georgia and the remote purchaser are not in privity.²⁵⁹ One possible option would be for Georgia to create an equitable servitude in her painting, by affixing to it some sort of

256. See REPORT, *supra* note 139, at 159 (stating that "[n]early all participants" in Copyright Office proceedings concerning report "expected waivers to increase for works incorporated into buildings following the decision of the U.S. District Court in *Carter v. Helmsley-Spear*").

257. Except, of course, to the extent these works are considered works made for hire, they are exempted from coverage under VARA. See *supra* note 114 and accompanying text.

258. An analysis similar to that which follows can be found in Hansmann & Santilli, *supra* note 135, at 100-02, 125. Hansmann and Santilli argue, among other things, that the artist may wish to retain a moral right of integrity because a modification made to any one embodiment of her work may affect her reputation, and therefore the value of her other works; "[i]n effect, each of an artist's works is an advertisement for all of the others." *Id.* at 104-05.

259. Suppose, for example, that A sells a painting to B, who promises that he will not destroy it; B then resells the painting to C, who destroys the painting. A has no claim against B, who did not breach his promise not to destroy the painting, or against C, with whom he is not in privity. Conceivably, A and B might agree that if B ever resells the painting, he will require purchaser C (1) to assume a duty not to destroy it, and (2) to promise to include a similar clause in any subsequent resale contract. This is, to say the least, a cumbersome method of enforcing obligations against C. See generally RESTATEMENT (SECOND) OF CONTRACTS §§ 316 cmt. b, 318 (1979) (discussing privity of contract); Zechariah Chafee, Jr., *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945, 951-52 (1928) (discussing method for obligating C to A); Kwall, *supra* note 17, at 9 n.32 (noting that moral rights "cannot always be vindicated in an action by the creator for breach of contract because the creator may not have a direct contractual relationship with the alleged wrongful perpetrator" (citing Sidney A. Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244, 257, 261 (1978))).

notice that subsequent owners may not alter the work,²⁶⁰ but Georgia's right to enforce an obligation of this nature against a remote purchaser is uncertain. There are few reported decisions in which parties have attempted to enforce servitudes in chattels, and the few that exist have elicited mixed results.²⁶¹ Professor Merryman also suggests that some artists may view the affixation of such a notice as itself a defacement of their work.²⁶² One other possible option would be for Georgia to retain her right, under the Copyright Act, to prepare derivative works. Under *Gilliam* this option might provide Georgia with the right to prevent some unauthorized alterations of her work, but the scope of this right remains uncertain and (to my knowledge) has never been construed to cover a proposed destruction of a work.²⁶³

By contrast, suppose instead that Georgia is initially endowed with a right of integrity and that Alfred wishes to induce a waiver. In comparison with the cost of creating an enforceable equitable servitude, the cost of creating an effective waiver of Georgia's rights

260. See Merryman, *supra* note 17, at 1043-44.

261. See generally Zechariah Chafee, Jr., *The Music Goes Round and Round: Equitable Servitudes and Chattels*, 69 HARV. L. REV. 1250 (1956) (discussing whether equitable servitudes in chattels are enforceable); Chafee, *supra* note 259, at 953-1013 (same). My research has uncovered only two reported cases decided since Chafee's 1956 article (other than the case that was the subject of the article, and that also was the subject of a subsequent proceeding) in which a court has expressly enforced an equitable servitude in a chattel. See *Tri-Continental Fin. Corp. v. Tropical Marine Enters.*, 265 F.2d 619, 625-26 (5th Cir. 1959); *Nadell & Co. v. Grasso*, 346 P.2d 505, 508-12 (Cal. Ct. App. 1959). Other courts have expressed doubt as to the enforceability of servitudes in chattels. See *Original Appalachian Artworks, Inc. v. Granada Elecs., Inc.*, 816 F.2d 68, 75-76 (2d Cir. 1987); *American Bell Inc. v. Federation of Tel. Workers*, 736 F.2d 879, 887 (3d Cir. 1984).

262. See Merryman, *supra* note 17, at 1044 ("[M]ost works of art would be unacceptably defaced by any attempt to attach notice of restrictions to them in some permanent and indelible, and at the same time reasonably apparent, way."). On the other hand, one might question whether many artists would object to placing such a notice on, say, the back of a painting or the base of a sculpture. The objection also seems to carry little force with regard to literary works, films, musical compositions, and dramatic works.

263. Suppose, for example, that Georgia retains her right to prepare derivative works, and that Alfred or a remote buyer paints over a portion of the painting. Has Alfred or the remote buyer created an infringing derivative work, or does the *Gilliam* principle not cover alterations to the original work? Cf. *Yonover*, *supra* note 58, at 964, 966-67 (raising, but not resolving, issue of whether drawing a mustache on another's original painting violates Lanham Act § 43, under *Gilliam*). Compare *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1342-44 (9th Cir. 1988) (finding that cutting pictures from book and gluing them onto tiles created derivative work), with *Paramount Pictures Corp. v. Video Broad. Sys.*, 724 F. Supp. 808, 821 (D. Kan. 1989) (finding that placing commercials at beginning of videocassettes did not create derivative work).

should be minimal.²⁶⁴ Perhaps, then, endowing Georgia with a moral right can be viewed as economically efficient because this endowment allows the parties to avoid the transaction costs that otherwise would be incurred as an incident to an attempt to create a servitude enforceable against remote purchasers.²⁶⁵

This rationale, however, still fails to explain why, if artists generally place a higher value on the integrity of their works than buyers place on the alteration of those works, artists do not negotiate for integrity rights that would be enforceable against their immediate purchasers, even if not against remote buyers. Perhaps, though, the failure to include moral rights provisions in agreements for the sale of works of art can be attributed more to lack of foresight than to lack of demand on the part of artists. Presumably, few people buy works of art with the present intention of materially altering them (unless they plan to adapt the work to another medium, in which case they are likely to obtain an express assignment or license of the adaptation right), much less destroying them. Unexpected conflicts between the artist's interest in integrity and the buyer's interest in alteration nevertheless can arise for any number of reasons: Alfred may grow tired of the work, or his tastes may change so that what he once

264. Under VARA, for example, a waiver generally needs only to be in writing and to specifically identify the work. See 17 U.S.C. § 106A(e)(1) (1994). There is some question, however, whether waivers under VARA are enforceable by subsequent purchasers. See *supra* note 120.

265. Of course, there may be other ways to reduce this cost. One way might be to clarify whether equitable servitudes in chattels are enforceable, rather than (in effect) to read a servitude into every contract for the sale of art. Another option might be to establish a registration system to record servitudes in works of art. See Merryman, *supra* note 17, at 1044 (noting the nonexistence of such a system as of 1976); cf. Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1354-58 (1982) (arguing that equitable servitudes in real property should be generally enforceable, in light of the fact that recording statutes put remote purchasers on notice). However, experience thus far with the voluntary registry set up under VARA, which allows the author of a work of visual art that has been incorporated in or made part of a building to record his identity with the Copyright Office, see 17 U.S.C. § 113(d)(3), has been disappointing. Since the statute took effect in 1991, only one entry has been submitted to the registry. See REPORT, *supra* note 139, at 193; cf. Carl H. Settlemeyer III, *Between Thought and Possession: Artists' "Moral Rights" and Public Access to Creative Works*, 81 GEO. L.J. 2291, 2334 n.206 (1993) (recounting opposition due to privacy interests to proposed public registration of details of purchases and sales of works of art during congressional hearings on *droit de suite* legislation). A third option would be to clarify, and perhaps expand, the circumstances under which *Gilliam* renders alterations actionable under either the Copyright or Lanham Act. A fourth would be to provide visual artists with a more effective right to control the display of their works. Under current law, the "first sale" doctrine prevents the author from controlling the owner's public display of the work. See 17 U.S.C. § 109(c); Hansmann & Santilli, *supra* note 135, at 117-20 (discussing advantages and disadvantages of an expanded display right).

enjoyed he later finds to be trite or offensive; or Alfred may discover that the public display of Georgia's work renders his property less valuable;²⁶⁶ or (assuming, for the moment, that the work is a book, score, drama, or film instead of a painting) he may decide that he would like to adapt or perform the work in a manner that is contrary to Georgia's express directions, or that was technologically infeasible at the time of agreement.²⁶⁷ If the risk of these events is low, however, the parties' failure to bargain over moral rights conceivably may owe more to simple lack of imagination than to a lack of interest on the artist's part in the work's integrity.

Even if this argument concerning foresight is correct, however, it provides the policymaker with little guidance in deciding whether in the absence of express agreement artists or buyers should bear the risk of the events described in the preceding paragraph. As before, the policymaker is faced with the dilemma of trying to guess what the parties' agreement would have been if transaction costs (in this case, the cost of foresight) had been zero. VARA clearly allocates these risks to buyers, by requiring an affirmative act of waiver to give rise to an alteration right; and perhaps this choice can be defended on the grounds that the buyer of a work of visual art is likely to have greater insight into the magnitude of these potential risks than is the artist (inasmuch as the risks all involve the buyer's subsequent use of the work), and that the buyer will have better access to advice in structuring the transaction.²⁶⁸ If buyers are rational actors, however, one would expect that, even in the absence of a moral rights rule they would invest in acquiring knowledge of the potential risks up to the point at which it no longer becomes profitable to do so, and that they would disclose those risks whenever disclosure would be helpful in

266. When the work is not complete at the time the parties come to terms, it may be particularly difficult to foresee its final form and how it will interact with its surroundings. Cf. REPORT, *supra* note 139, app. part IX, at 37-38 (relating statement of artist Johnny Swing that if parties in *Carter* had foreseen moral rights conflict, artists would have designed the project so as to be removable; and that "clearly predetermin[ing]" final version of works of art "is contradictory to the nature of making art").

267. *But see* Beyer, *supra* note 17, at 1048 (stating that "[u]nforeseen technological and social changes are a common fact of life," and that "there exist contractual ways to prepare for such eventualities").

268. At least, one might expect *some* buyers of works of visual art—for example, building owners and public entities that commission public or semi-public works of art, or producers of motions pictures or sound recordings—to be in a better position than many artists to initiate discussions concerning moral rights. Cf. REPORT, *supra* note 139, at 133, 143, 152 n.552 (discussing varying levels of awareness among visual artists of moral rights). On the other hand, individual buyers may be less familiar with the relevant legal principles than are artists, but they are also probably less likely to be interested in retaining a right to alter. *See infra* notes 290-92 and accompanying text.

inducing the artist to contract for moral rights. The fact that buyers generally do not act in this fashion once again might suggest that artists are unlikely to value moral rights protection more than buyers value alteration.

One final consideration is the distributive consequences of a rule endowing artists with waivable moral rights, versus a rule endowing buyers with a waivable right of alteration. If transaction costs are low, either rule will facilitate transactions that leave each party better off than before; the former, however, will distribute wealth in favor of artists, while the latter favors buyers. If transaction costs are low, then, a rule endowing artists with a waivable moral right works unambiguously to the advantage of artists.²⁶⁹ If transaction costs are high, however, one rule may be more efficient than the other, and the policymaker may have to choose between a rule that maximizes wealth and one that distributes income to the favored party.²⁷⁰

To summarize, then, in the absence of any endowment or third-party effects, two advantages of endowing the artist with a waivable moral right are that this arrangement (1) facilitates some voluntary bargains that otherwise would be difficult to enforce, and (2) may distribute income in favor of artists. The principal disadvantage of this endowment is that it increases transaction costs when the artist values the integrity of her work less than the buyer values the right to alter. Even if the latter situation is more common than its opposite, however, the increase in transaction costs attributable to waivers may be small, and it may be outweighed by the (arguably more substantial) decrease in the cost of enforcing moral rights against

269. Whether this attempt to redistribute income in favor of artists would succeed in the long run, however, is unclear. If the return on investing in becoming an artist goes up, one would expect more people to decide to become artists; precisely how many, of course, will depend on the elasticity of would-be artists' supply curves, and it may be the case that most artists are not significantly affected by the prospect of financial reward. Similarly, if the return on investing in patronage goes down, one would expect fewer people to become patrons, though again the magnitude of the effect is unknown. Attempts to redistribute income by the manipulation of initial entitlements raise many complex issues and, in the opinion of some commentators, may be futile. For further discussion, see, for example, RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 170-74 (1988), POSNER, *supra* note 242, § 3.12, at 81-83, and Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2672-73 n.18 (1994).

270. An economist might argue, however, that the efficient rule is always preferable because the resulting surplus over the wealth that would have been created under the inefficient rule can be redistributed so as to render everyone better off. See, e.g., Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667-74 (1994). I have taken issue with this argument on practical and theoretical grounds in my previous work. See Cotter, *supra* note 19, at 2106-14.

remote purchasers, even if the latter cost is incurred in only a minority of cases. A system of waivable moral rights therefore may have a positive welfare effect within the context of the artist/buyer transaction, as well as a small positive distributional effect if the policymaker's goal is to distribute income to artists. No stronger conclusion is forthcoming, however, in the absence of further empirical evidence.

b. Offer/asking price gaps

Aside from transaction costs, a second phenomenon that may cause the initial allocation to affect whether Georgia or Alfred winds up owning the relevant right is the "offer/asking price gap" or "endowment effect."²⁷¹ To illustrate the phenomenon, suppose first that the policymaker initially endows Alfred with an alteration right, which he is willing to waive for a price of \$100. Suppose further that Georgia is willing to pay \$ X to induce a waiver. The Coase Theorem predicts that, if $X > 100$, Georgia and Alfred will agree to confer moral rights upon Georgia by contract (in the absence of prohibitive transaction costs), and that if $X < 100$ no agreement will take place.²⁷²

Now suppose instead that the policymaker initially endows Georgia with a waivable moral right; that Alfred still values the absence of moral rights protection at \$100 (that is, Alfred is willing to pay \$100 for Georgia's consent to a waiver); but that Georgia now values moral rights protection at \$ Y (meaning that she is willing to accept that amount, rather than \$ X , in exchange for waiving her right). On these facts, if both X and Y are greater than 100, or both X and Y are less than 100, the initial allocation of rights does not affect their ultimate distribution; if the former is true, Georgia winds up owning a moral right, and if the latter is true, Alfred winds up owning an alteration right. If, however, $Y > 100 > X$, Georgia will wind up retaining a moral right if her initial allocation includes such a right, but she will wind up *not* owning a moral right if her initial allocation does *not* include such a right. In other words, where there is a gap between a party's offer and asking prices, the initial allocation of a right may determine where the right comes to rest; as we shall see, it also may determine, contrary to the Coase Theorem,

271. Some commentators use the term "endowment effect" as a synonym for the offer/asking price gap, while others use the term exclusively to refer to gaps that are not attributable to wealth or substitution effects. See *infra* notes 279-84 and accompanying text (discussing gaps not attributable to wealth or substitution effects). I will use the terms synonymously.

272. See *supra* paragraph following text accompanying note 249.

whether aggregate wealth will be maximized.

A growing body of empirical evidence suggests that offer/asking price gaps are more common and larger than conventional neoclassical economic theory had predicted.²⁷³ One possible explanation for these gaps is the wealth or income effect—that is, the tendency to demand more of a good as a result of an increase in one's wealth or income.²⁷⁴ Suppose, for example, that Georgia's initial net worth is X if her initial endowment does not include a moral right, and that it is $X + Y$ (where Y is the value she attributes to the right) if her initial endowment does include it; as long as $Y > 0$, Georgia is wealthier if her initial endowment includes a moral right. On these facts, the price Georgia would be willing to accept to waive her right will exceed the price she would be willing to pay to purchase it.²⁷⁵

Although neoclassical economic theory suggests that the offer/asking price gap caused by wealth effects often will be small (much smaller, in fact, than the disparity typically observed in experiments designed to measure the endowment effect),²⁷⁶ scholars have demonstrated that the effect may be substantial when there are no close substitutes for the relevant good, especially when the value of the good constitutes a large portion of a party's wealth.²⁷⁷ Suppose, for example, that Georgia has a strong desire to retain control over the integrity of her work, but that she has a net worth of only \$500. If

273. See, e.g., DOUGLAS D. DAVIS & CHARLES A. HOLT, *EXPERIMENTAL ECONOMICS* 457-60 (1993); Harrison, *supra* note 239, at 1358-61; Elizabeth Hoffman & Matthew Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 WASH. U. L.Q. 59, 66-85 (1993); Herbert Hovenkamp, *Legal Policy and the Endowment Effect*, 20 J. LEGAL STUD. 224, 227-28 (1991); Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 *passim* (1990); Russell Korobkin, *Policymaking and the Offer/Asking Price Gap: Toward a Theory of Efficient Entitlement Allocation*, 46 STAN. L. REV. 663, 667-69 (1994); Cass R. Sunstein, *Endogenous Preferences, Environmental Law*, 22 J. LEGAL STUD. 217, 225-27 (1993).

274. See, e.g., GEORGE J. STIGLER, *THE THEORY OF PRICE* 63-65 (3d ed. 1966) (discussing the income effect).

275. See, e.g., Hovenkamp, *supra* note 273, at 225-26 (footnote omitted) ("Someone will generally be willing to pay less to have something than he would accept as compensation for giving up the same thing because the dollars in the first transaction come out of his current money income or savings, while the second adds to his income or savings. Under diminishing marginal utility of income, the money added to his wealth gives him less utility per dollar than the money he already has, so he would demand more in exchange.")

276. See DAVIS & HOLT, *supra* note 273, at 458; W. Michael Hanemann, *Willingness to Pay and Willingness to Accept: How Much Can They Differ?*, 81 AM. ECON. REV. 635 *passim* (1991); Hovenkamp, *supra* note 273, at 226.

277. See Hanemann, *supra* note 276, at 635-37; Hoffman & Spitzer, *supra* note 273, at 85-87.

the policymaker initially endows Alfred with a right of alteration, the most Georgia can offer to induce Alfred to waive is \$500. If instead the policymaker initially endows Georgia with a moral right, Georgia may demand a much higher price in exchange for a waiver—potentially an infinite price, if Georgia feels that no amount of money is an adequate substitute for the integrity of her work.²⁷⁸ Under these circumstances, then, the fact that Georgia's offer price is lower than Alfred's asking price does not rule out the possibility that Georgia's asking price exceeds Alfred's offer price; the initial endowment therefore may dictate where the right comes to rest.

A second situation in which the endowment effect may arise occurs when a party derives greater disutility from negative departures from her initial endowment than she derives positive utility from upward departures from that same endowment.²⁷⁹ To illustrate, assume again that the artist has a net worth of \$500, and that her asking price is only a small portion of this total—say \$10—perhaps because she needs the remaining \$490 to satisfy other, more basic needs, such as food and shelter. Assume further that giving up \$10 to acquire moral rights from the buyer would increase her net satisfaction by x "utils." If instead the policymaker initially allocates moral rights to the artist, the artist's net worth is equal to \$500 plus whatever value she accords these rights. If \$500 is Georgia's "reference point," however, the price she will demand to acquire the same x utils that cost her \$10 under the first scenario will be greater than \$10:

278. See Hanemann, *supra* note 276, at 635-36. Thus, one explanation for some endowment effects may be that no amount of money can adequately compensate for the loss of certain goods, or that trading these goods for money is inconsistent with the way we value them. See Korobkin, *supra* note 273, at 691-95; see also *infra* notes 360-74 and accompanying text (discussing incommensurability).

279. The initial endowment is sometimes referred to as the party's "reference point." For discussions, see Hoffman & Spitzer, *supra* note 273, at 87-91 (reviewing the work of Daniel Kahneman, Jack Knetsch, Richard Thaler, and Amos Tversky). Again Hovenkamp offers a good description of this phenomenon:

One explanation for the endowment effect is that the individual's marginal utility curve for money is steeper than once thought. It may also have a "kink," or sudden change in slope, at or near the point of the individual's current income. That is, for many individuals, money subtracted from current income is worth much more, in utility per dollar, than money added to current income. Or, to put it another way, the burden of a downward shift in one's standard of living is felt more heavily than is the benefit of an upward shift of the same dollar amount.

Hovenkamp, *supra* note 273, at 228; see also Hovenkamp, *Marginal Utility and the Coase Theorem*, 75 CORNELL L. REV. 738, 800-01 (1990) [hereinafter Hovenkamp, *Marginal Utility*] (describing phenomenon similarly).

If an individual owns a good and is offered money to relinquish it, he regards the potential sale as the loss of the good. If he does not own the good, however, and is considering purchasing it, he views the potential purchase as a gain of the good. Because losses loom larger than gains, the individual will demand more to part with a good he already owns than he will be willing to pay for the same good.²⁸⁰

Once again, then, the initial allocation of the right may determine its ultimate disposition.

Scholars have suggested various psychological explanations both as to why people may value losses more heavily than gains, and as independent reasons for the existence of endowment effects. One explanation is that people tend to become psychologically attached to their initial endowments, perhaps because they come to view these endowments as aspects of their personalities rather than as exchangeable commodities,²⁸¹ or because the trait of being reasonably content with what one already owns provided human beings, at some point in the distant past, with some evolutionary advantage.²⁸² Another possible explanation is that people have a desire to "close" transactions; having once closed a transaction by, for example, purchasing a commodity, the buyer suffers some psychic disutility when another offers to buy the good from him.²⁸³ Yet another explanation combines the loss-aversion theory with the theory that people often are uncertain about their own preferences, and that they suffer regret over "bad" transactions; thus, in order to avoid incurring feelings of regret, they tend to overvalue their initial entitlements.²⁸⁴

The preceding analysis suggests that, if an endowment effect exists in the context of the artist/buyer transaction, it is probably more likely to affect artists' offer and asking prices for moral rights than to affect buyers' offer and asking prices for alteration rights. One reason is that a substantial number of buyers are commercial entities such as corporate and governmental patrons and motion

280. Hoffman & Spitzer, *supra* note 273, at 89.

281. See *id.* at 90-91 (citing Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982)); Korobkin, *supra* note 273, at 689-91.

282. See Hoffman & Spitzer, *supra* note 273, at 89-90; Sunstein, *supra* note 273, at 227-28.

283. See Hoffman & Spitzer, *supra* note 273, at 91-93 (discussing Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 691-93 (1979)); Korobkin, *supra* note 273, at 695-96.

284. See Hoffman & Spitzer, *supra* note 273, at 94-96; Korobkin, *supra* note 273, at 696-97; Sunstein, *supra* note 273, at 228-29.

picture production companies, and that endowment effects are probably less likely to affect these entities than they are to affect human beings. As noted above, one explanation for the endowment effect attributes it to a combination of wealth constraints and a low elasticity of substitution between the relevant good and all other goods, including money.²⁸⁵ Firms are, in general, less likely than are individuals to find their offer prices prohibitively constrained by wealth, due to better access to wealth itself and to credit; they are also probably less likely to have a low elasticity of substitution between the relevant good and money.²⁸⁶ The alternative explanation for endowment effects—that they arise due to a steep change in the marginal utility curve just to the right of one's "reference point"²⁸⁷—is also less likely to affect the commercial buyer because a firm whose goal is profit maximization will have a *constant* marginal utility curve that precludes the loss-aversion phenomenon.²⁸⁸ It also seems less likely that a firm would be as susceptible as an individual to any emotional or sentimental attachment to its initial endowment.²⁸⁹ Finally, all of the empirical studies documenting endowment effects of which I am aware have involved human beings, not business entities, although this fact hardly constitutes affirmative proof that the phenomenon cannot affect the latter.

Of course, not all buyers are corporate or other commercial actors. Individuals also buy art, and some artists engage in the production of art as a business (perhaps all artists do so to varying degrees). It may well be the case, then, that in some circumstances the endowment effect will work in a direction precisely opposite to that which I have just described, affecting buyers' offer and asking prices more extensively than artists'. If we focus our attention exclusively on those transactions in which buyers are likely to place some positive value on the right to alter the artist's work, however,

285. See *supra* notes 274-78 and accompanying text.

286. See generally Cotter, *supra* note 19, at 2132 (suggesting that firms "are more likely than individuals to be guided by the norm of wealth maximization (as well as to have better access to credit, information, and insurance against losses)"); Hovenkamp, *Marginal Utility*, *supra* note 279, at 801, 804-05 (suggesting that firms are more likely than individuals to be wealth maximizers); Korobkin, *supra* note 273, at 672-73 (same).

287. See *supra* notes 279-80 and accompanying text.

288. See Hovenkamp, *Marginal Utility*, *supra* note 279, at 801. Hovenkamp notes, however, that this generalization may not always hold: "A growth conscious manager might regard an annual report showing a 10 cent per share decline in profits as far more harmful than a report showing a 10 cent increase as beneficial. But this would be an indicator that the manager was maximizing output, not profits." *Id.* at 801 n.59.

289. Cf. *supra* text accompanying note 281 (suggesting that individuals may come to view initial endowments as aspects of their personalities).

the analysis above appears to remain generally valid. As we have seen, some of the more common situations in which the interests of artist and buyer conflict arise when, for example, the buyer wants to remove a work from a building or public space, or to translate it into another medium;²⁹⁰ at least in these circumstances, the stereotype of the individual artist pitted against the commercial buyer seems to hold. In contrast, I would suspect that, in the vast majority of cases involving noncommercial buyers, the right to alter the artist's work is probably of little value to the buyer, so that even if there were a gap between the buyer's offer and asking prices it would probably be de minimis.²⁹¹ Finally, one might expect even the typical, individual, noncommercial buyer to be wealthier than the typical artist; this disparity in wealth suggests, once again, that gaps induced by the wealth effect are more likely to affect artists.²⁹²

The hypothesis that endowment effects more frequently affect artists than buyers nevertheless would have little bite if the resulting gap between artists' offer and asking prices were small. But there is reason to expect that the gap may be substantial. Some of the empirical studies suggest that a person's asking price sometimes will be several times his offer price for the same good;²⁹³ to the extent that these findings are valid, there is no obvious reason to expect artists' gaps to differ substantially from the mean. Indeed, one might expect artists' offer and asking prices for moral rights to be even greater than the gaps observed in other contexts. The fact that so many

290. See, e.g., *supra* notes 58, 60, 78-85, 124-31 and accompanying text.

291. The next time you buy a painting at your local gallery or art fair, consider whether you would value the painting more if you knew that you would have the right, when you tire of it, to slash it, or to paint over it, or to cut it into panels. My guess is that for most of us occasional, noncommercial buyers of art these rights would mean very little. There may be some situations, though, in which the noncommercial buyer places substantial value on alteration: a garage band may want to perform a songwriter's musical composition in a way that distorts the songwriter's intent, for example, or a local acting troupe may want to stage a play in a way that the playwright finds objectionable (as in the *Beckett* case, see *supra* note 62). But then maybe these are not good examples of purely private, noncommercial use.

292. Although, as before, the stereotype does not always hold; some artists are far wealthier than the typical consumer of their works. See, e.g., Robert La Franco, *The Top 40*, FORBES, Sept. 23, 1996, at 164, 164-78 (listing 40 entertainers and other celebrities whose two-year income was estimated at \$25 million or higher). Even outside the field of popular entertainment, some artists eventually achieve substantial commercial success within their lifetimes. See, e.g., Laura Stewart, *The Arts: What Price Willem de Kooning?*, DAILY TELEGRAPH, Apr. 7, 1997, at 18, available in LEXIS, News Library, Curnws File (estimating value of estate of late abstract expressionist painter at \$75 million).

293. See generally sources cited *supra* note 273 (discussing experimental evidence).

artists make little money from their calling²⁹⁴ suggests that their offer prices are likely to be highly constrained by wealth, and this constraint may correlate with a substantial endowment effect.²⁹⁵ In addition, a strong psychological attachment to the work may translate into a strong attachment to the work's integrity, when a right to the latter is viewed as part of the artist's initial endowment. This attachment may render the artist relatively loss averse with respect to her moral right.²⁹⁶ And perhaps for many artists there are no close substitutes for their integrity interests; the very idea of accepting money in exchange for the right to alter or destroy one's work may strike many artists as barbaric. A lack of close substitutes, as we have seen, also may correlate with a substantial endowment effect.²⁹⁷

If I am correct in concluding that there is likely to be a large gap between the typical artist's offer and asking prices for moral rights, and little or no gap between the typical buyer's offer and asking prices for alteration rights, a comparison of artists' and buyers' offer and asking prices yields three possible outcomes. Outcome Number One is that the artist's offer price exceeds the buyer's asking price, and that the artist's asking price exceeds the buyer's offer price. When this is the case, the artist will retain her moral right if it is part of her initial endowment and otherwise will "buy" one from the buyer; the efficient solution is to endow the artist with a moral right. Outcome Number Two is that the artist's offer price is less than the buyer's asking price, and that her asking price is less than the buyer's offer price. When this is the case, assigning a moral right to the artist is inefficient because it requires the parties to engage in an otherwise unnecessary transaction.²⁹⁸ Outcome Number Three is that the artist's offer price is lower than the buyer's asking price, and that the artist's asking price is higher than the buyer's offer price. To whom should the policymaker allocate the right under Outcome Number Three, given that the right will remain with the person to whom it is initially assigned?

Unfortunately, there is no clear answer to the preceding

294. See, e.g., REPORT, *supra* note 139, at 132-33 (73% of survey participants reported earning less than \$10,000 in gross income from their artwork in an average year); Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1568-80 (discussing statistics relating to artists' earnings).

295. See *supra* notes 274-78 and accompanying text.

296. Cf. *supra* notes 281-84 and accompanying text (offering psychological explanations for why people may value losses more heavily than gains).

297. See *supra* notes 276-78 and accompanying text.

298. See *supra* notes 252-57 and accompanying text.

question. On the one hand, scholars such as Herbert Hovenkamp argue that it is always preferable to assign the right to the party with the higher asking price because asking prices are less dependent on wealth and therefore are more likely to reflect a party's "true" valuation.²⁹⁹ If Hovenkamp is correct, the policymaker confronted with Outcome Number Three should assign the right to the artist: Because the buyer's offer and asking prices are assumed to be equivalent, and the artist's asking price is higher than the buyer's offer price, the artist's asking price is necessarily the higher of the two asking prices.

On the other hand, Russell Korobkin has argued that the policymaker should inquire into the source of the offer/asking gap before deciding whether to assign the right to the party with the higher offer or asking price.³⁰⁰ Korobkin challenges Hovenkamp's view that asking prices are always preferable on the ground, among others, that a party who lacks wealth—and whose offer price is therefore correspondingly low—may value nonmarket goods, such as leisure, more than he values money; under these circumstances, the party's offer price may be a more accurate measure of value.³⁰¹ Korobkin therefore argues that offer prices better reflect value

if the claimant can acquire the dollars necessary to raise his bid, if he so chooses. [Willingness to pay] can be an invalid measure of value . . . but only when a claimant's inability to offer [an offer] price as high as his [asking] price does not reflect ex ante choices about wealth acquisition versus other activities.³⁰²

Even if Korobkin is correct, however, it is unclear whether the artist's inability to raise the money necessary to increase her offer price reflects a conscious choice to forgo wealth acquisition in favor of

299. See Hovenkamp, *supra* note 273, at 229-30, 236-37; Hovenkamp, *Marginal Utility*, *supra* note 279, at 809-10; see also Richard S. Markovits, *Duncan's Do Nots: Cost-Benefit Analysis and the Determination of Legal Entitlements*, 36 STAN. L. REV. 1169, 1179-82 (1984) (recommending that policymaker should imagine transfer of right to party who does not have it under status quo, then compare hypothetical transferee's asking price with hypothetical transferor's offer price, and compel transfer if former exceeds latter). In the present context, Hovenkamp's and Markovits's proposals become indistinguishable because the buyer's offer and asking prices are assumed to be equivalent.

300. See Korobkin, *supra* note 273, at 682-84, 697-706.

301. See *id.* at 685-86.

302. *Id.* at 686. To illustrate his point, Korobkin uses the example of a lazy man who enjoys opera. Because he prefers leisure to work, he has little money, and his offer price for an opera ticket is only \$5; his asking price, however, is \$30. Korobkin argues that if the man's lack of wealth is due to his choice not to work, his offer price is a better measure of value. See *id.* at 685-86.

other pursuits. In one sense, of course, it clearly does—few people go into the arts expecting to become millionaires—though at the same time the artist's decision about which career to pursue may be largely an inescapable aspect of her personality.³⁰³ On these facts, which measure better estimates the value the artist places on the integrity of her work?

Korobkin also suggests that other factors not related to wealth may in some cases render either offer or asking prices more appropriate as a measure of value. To the extent that the assumed endowment effect is based upon the artist's attachment to her interest in the integrity of her work, for example, Korobkin would argue that the asking price more accurately measures her appreciation, perhaps built up over time, for that interest.³⁰⁴ On the other hand, Korobkin advocates the use of offer prices when the endowment effect derives from a low elasticity of substitution, the psychic disutility of bargaining, or the ex ante fear of regret, on the ground that in these situations "the offer/asking price gap is caused by disutility from selling an entitlement, as opposed to increased utility from owning one."³⁰⁵ If Korobkin's analysis is correct, whether to value the artist's rights by reference to offer or asking prices is indeterminate, absent further evidence as to the source of the gap.

Until the theoretical argument is resolved, therefore, it is difficult to conclude whether assigning an integrity or an alteration right is efficient in the one instance—Outcome Number Three—in which an endowment effect would cause the right to remain with the party to whom it is initially allocated. For the present, then, the possible existence of an endowment effect remains at best only a potential justification for assigning the artist a waivable moral right. Of course, one might still defend such an assignment on the grounds that (1) the losses otherwise incurred under Outcome Number One may be great; (2) the additional transaction costs incurred under Outcome Number Two probably are not; (3) the assignment is arguably, though not dispositively, efficient under Outcome Number Three; and (4) the assignment redistributes income in favor of artists. These conclusions are far from certain, however, and they are subject to confirmation or refutation only by further theoretical or empirical analysis.

303. See Lacey, *supra* note 294, at 1574.

304. See Korobkin, *supra* note 273, at 691.

305. *Id.* at 696.

2. Nonwaivable Moral Rights vs. No Moral Rights

The preceding analysis demonstrates that a plausible, though hardly dispositive, case can be made from within the framework of neoclassical economics in support of endowing the artist with a waivable moral right. A system of nonwaivable rights, however, is more problematic. Suppose once again that Georgia is prepared to sell her work to Alfred. On the one hand, if Georgia values the integrity of the work more than Alfred values the right to alter, endowing Georgia with either a waivable or nonwaivable right achieves the same result: Georgia retains her right; both parties are better off than they were before the transaction occurred; and Georgia is better off than she would have been if she had had to "buy" a moral right from Alfred. But if Georgia values the integrity of her work less than Alfred values its alteration, endowing Georgia with a nonwaivable right prevents the parties from entering into a transaction—the sale of an alteration right to Alfred—that would have rendered both of them better off.³⁰⁶ Thus, under a system of nonwaivable rights, either (1) Alfred will buy Georgia's work at a lower price than he would have been willing to pay had her moral right been waivable, or (2) Alfred will decline to buy the work at all. I provide a mathematical demonstration of these conclusions in the margin,³⁰⁷ but the underlying intuition is straightforward: If I know

306. Technically, of course, the rule does not prevent Georgia and Alfred from agreeing to whatever they want; it only renders a waiver of Georgia's right legally unenforceable. The parties therefore may go forward with a waiver agreement if Alfred thinks he can trust Georgia to abide by a promise not to interfere with any alterations. But if Georgia subsequently changes her mind, the agreement is a nullity.

307. To illustrate, assume first that Georgia is endowed with a waivable right and that she is willing either to (1) waive that right and sell her work to Alfred for price WTA_1 (where "WTA" stands for "willing to accept"), or (2) retain her right and sell her work to Alfred for price WTA_2 . The difference between WTA_1 and WTA_2 therefore is the price Georgia is willing to accept to waive her right. Assume further that Alfred is willing to pay price WTP_1 ("WTP" stands for "willing to pay") if Georgia is willing to waive her right and price WTP_2 if she is not; $WTP_1 - WTP_2$ then is the price Alfred is willing to pay to induce a waiver. Finally, assume that $WTP_1 > WTA_1$ (that is, that Alfred is willing to buy the work if Georgia waives her moral right). If the price Alfred is willing to pay to induce the waiver ($WTP_1 - WTP_2$) is greater than the price Georgia is willing to accept to waive ($WTA_1 - WTA_2$), Georgia will waive her right and sell the work at price p_1 , where $WTA_1 \leq p_1 \leq WTP_1$. At the close of the transaction, Georgia's wealth has increased in the amount of $p_1 - WTA_1$ and Alfred's by $WTP_1 - p_1$, causing aggregate wealth to increase in the amount of $WTP_1 - WTA_1$. Alternatively, if (1) Georgia values her moral right more than Alfred values the waiver (that is, $WTP_1 - WTP_2 < WTA_1 - WTA_2$), and (2) Alfred is still willing to buy the work even if Georgia retains her right (that is, $WTP_2 > WTA_2$), then Georgia will retain the right and sell the work for p_2 , where $WTA_2 \leq p_2 \leq WTP_2$. At the close of the transaction, Georgia's wealth has increased in the amount of $p_2 - WTA_2$, and Alfred's by $WTP_2 - p_2$, causing aggregate wealth to increase in the amount of $WTP_2 -$

that, once I commission a mural, I may never be able to get rid of it, I may be less willing to commission it in the first place. A conventional economic analysis therefore suggests that a nonwaivable moral right threatens to render both artist and buyer worse off than would a system of waivable rights.

One might nevertheless argue that a nonwaivable right could be wealth-maximizing under certain conditions. A crude paternalism, for example, might suggest that artists, like children, need to be protected from their own poor judgment; perhaps Georgia values the integrity of her work more highly than Alfred values its potential alteration, but somehow or another Georgia will be tricked into waiving her right if left to her own devices.³⁰⁸ The obvious flaw in this argument, however, as a rationale for endowing the artist with a nonwaivable moral right, is its overbreadth.³⁰⁹ Surely *some* artists would benefit from protection against their own bad judgment, but then so would some people in every other walk of life, and there is no reason to believe that artists generally, or even a significant plurality of them, are more inept than others in deciding where their interests lie. Moreover, even if the stereotype were correct, the paternalist

WTA₂.

Now assume that Georgia's initial endowment includes a nonwaivable moral right instead. If Georgia values this right more than Alfred values alteration, the fact that the right is nonwaivable makes no difference; as before, if $WTP_2 > WTA_2$, Georgia will retain the right and sell her work for p_2 , where $WTA_2 \leq p_2 \leq WTP_2$, resulting in a net increase in aggregate wealth of $WTP_2 - WTA_2$. If Alfred values alteration more than Georgia values integrity, however, the assignment of a nonwaivable right changes the outcome. If $WTP_2 < WTA_2$, Alfred will decline to buy Georgia's work, resulting in a stagnant aggregate wealth. If, on the other hand, $WTP_2 > WTA_2$, Alfred will still agree to buy the work, but he will pay p_2 instead of p_1 , resulting in an increase in aggregate wealth of $WTP_2 - WTA_2$ (as opposed to $WTP_1 - WTA_1$ under a waivable-right rule). By hypothesis, however, $WTA_1 - WTA_2 < WTP_1 - WTP_2$ (because Alfred values alteration more than Georgia values integrity), and this equation can be rearranged as $WTP_2 - WTA_2 < WTP_1 - WTA_1$. Thus, even if the sale of the work goes forward, aggregate wealth is lower than it would have been under the nonwaivable rule. So too is Georgia's individual wealth (which will be $p_2 + WTA_1 - WTA_2$, as opposed to p_1 under the waivable rule), if the price Georgia and Alfred negotiate under either rule is equal to WTA plus a constant fraction X of the difference between WTP and WTA, where $0 < X \leq 1$. To prove, substitute $(WTP - WTA)X + WTA$ for p in both sides of the equation $p_2 + WTA_1 - WTA_2 < p_1$; this gives us $(WTP_2 - WTA_2)X + WTA_2 + WTA_1 - WTA_2 < (WTP_1 - WTA_1)X + WTA_1$, or $WTP_2 - WTA_2 < WTP_1 - WTA_1$. Notice, however, that this result does not necessarily follow if X is not a constant. For the possible implications of assuming that X may be variable, see *infra* notes 315-18 and accompanying text.

308. See Netanel, *supra* note 17, at 418 n.270 & 418-19 (dismissing Jerome Frank's assertion that "authors are hopelessly inept in business transactions" as a stereotype).

309. See Hansmann & Santilli, *supra* note 135, at 126-27 (suggesting the unlikelihood that "artists commonly undervalue the benefits they derive from the right of integrity"); Netanel, *supra* note 17, at 418-19.

would need some reason to believe that the adoption of a nonwaivable rule would better serve the artist's "true" interests before adopting such a rule; the fact that the artist's judgment may be flawed hardly counsels in favor of imposing someone else's judgment in its place, absent some reason to believe that the other's judgment is more likely than the artist's to be correct.

A more sophisticated argument in favor of nonwaivable moral rights might be based upon the notion that the artist will be better off if the policymaker prevents her from waiving because the long-term benefits of refusing to waive (preservation of the mature artist's reputation, perhaps) outweigh the short-term financial benefits of waiving.³¹⁰ This argument may be viewed as resting upon an application of "multiple selves" analysis—the idea that, for some purposes, it is useful to consider our present and future selves not as one but rather as two different people, such that decisions of the present self that affect the future self's well-being are likely to discount significantly that future self's interests. This tendency to discount the interests of the future self may, in turn, justify measures designed to protect that self, such as compulsory savings for retirement and the criminalization of addictive substances.³¹¹ In the present context, then, the analysis might suggest that the "young" artist should be prevented from waiving her moral right because of the regret to be incurred by the "old" artist—who, since she does not yet exist, cannot otherwise protect her interest in the integrity of the work.³¹²

310. See Netanel, *supra* note 17, at 419-20.

311. For an interesting discussion of multiple selves analysis and further citations, see RICHARD A. POSNER, *AGING AND OLD AGE* 84-95 (1995) [hereinafter POSNER, *AGING AND OLD AGE*]; see also Richard A. Posner, *Are We One Self or Multiple Selves? Implications for Law and Public Policy*, 3 *LEGAL THEORY* 23 (1997) (further elaborating upon multiple selves analysis). Whether to include future persons in one's utilitarian calculus is, of course, a question that economic theory itself cannot answer. As Posner states:

[W]elfare economics does not provide an answer to the question whether future selves should be considered members of the community whose utility is to be taken into account, along with the utility of the present self, by the community's legal and ethical rules. . . .

. . . [I]t cannot answer the question of what the boundaries of the society are.

POSNER, *AGING AND OLD AGE*, *supra*, at 88-89.

312. This same theory might be viewed as supporting § 203 of the Copyright Act, which grants the author an inalienable right to terminate any post-1977 transfer of copyright after 35 years, see 17 U.S.C. § 203 (1994), inasmuch as this provision restrains the present-day author from entering into an enforceable agreement that might work to the detriment of his future self. On the other hand, since the present value of the

The use of multiple selves analysis as a justification for endowing artists with an inalienable moral right nevertheless also seems highly speculative.³¹³ One problem is the assumption that the artist's future self would disagree with the present self's decision to waive its moral right in a given work. The future self, after all, may feel less connection with the work than the present self that created it; and (if she really is a future self) she may have reason to believe that the work will be of little interest to future connoisseurs or critics anyway, whether it retains its integrity or not. Thus, in some circumstances we may expect the future self to be more, not less, willing than the present self to waive its rights and accept the highest price the work will command today. A second problem is that there is no consensus on how precisely to balance present and future interests.³¹⁴ While this lack of agreement may not dissuade us from concluding that the disadvantages facing the improvident or addicted person's future self probably outweigh the pleasures of the moment, a similar confidence in our ability to balance correctly the interests of the present and future artist seems much less warranted. Finally, even if multiple selves analysis were persuasive in the present context, it would suggest only that relatively *young* artists should be given nonwaivable moral rights because older artists are less likely to live long enough to ripen into significantly different future selves. Yet any decision as to which artists are sufficiently young to merit moral rights may well seem arbitrary, and to my knowledge no regime has yet considered assigning nonwaivable moral rights only to the young.

Perhaps a more persuasive argument in favor of nonwaivable moral rights rests upon what might be referred to as the "false consciousness" rationale.³¹⁵ Jeffrey Harrison has argued that under some circumstances endowing a party with a nonwaivable right may render that party better off, by altering her expectations about what constitutes a "fair" bargain. Specifically, Harrison contends that the expanded use of the doctrine of unconscionability in contract law would help to empower people—primarily those poor and working class persons whose low self-esteem and self-worth may be viewed as the product of an unjust social system—to demand a larger share of

copyright in the year 2032 of a work that is created today is likely to be next to nothing, § 203 is probably better viewed as a mechanism for redistributing wealth to authors, rather than as a means of protecting the future self's unrepresented interest. See Sterk, *supra* note 20, at 1228-29.

313. See Netanel, *supra* note 17, at 419-20.

314. See POSNER, AGING AND OLD AGE, *supra* note 311, at 89.

315. See Netanel, *supra* note 17, at 420-21.

the surplus value generated by exchanges.³¹⁶ Harrison's theory therefore rejects the conventional economic assumption that preferences are exogenous and posits instead that legal rules can shape preferences in ways that will lead to the attainment of greater satisfaction.³¹⁷

In the present context, the false consciousness argument might suggest that endowing the artist with a nonwaivable moral right will empower her to grab a larger share of the value created by the sale of her work, thus rendering the artist, though not the buyer, better off than she would have been under a waivable rule.³¹⁸ As with the preceding arguments, however, the problem is one of overbreadth. Even if we assume that the adoption of some nonwaivable legal entitlements may empower the poor to achieve greater self-actualization, is it fair to assume that the same principle justifies granting artists nonwaivable moral rights? Granted, many artists are indeed poor, or at least make very little money from their art. One

316. See Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 489-500 (1994).

317. See *id.* at 480-81; see also Cotter, *supra* note 19, at 2125 (discussing problems with assuming that all preferences are exogenous).

318. For example, suppose that Georgia would be willing to accept \$20 in exchange for her work if she were to retain her moral right, and \$25 if she were to waive that right; and that Alfred would be willing to pay \$30 to acquire the work if Georgia were to retain her right, and \$40 if she were to waive. Suppose further that, regardless of whether Georgia is endowed with a waivable or nonwaivable right, she and Alfred will negotiate to a price that is equal to (1) the lowest price Georgia is willing to accept for her work, plus (2) a constant fraction (say, one-fourth) of the difference between the highest price Alfred is willing to pay and the lowest price Georgia is willing to accept. See *supra* note 307. Under a waivable rule, Georgia will agree to waive her right and sell her work for $25 + (40 - 25)/4 = \$28.75$. Under a nonwaivable rule, Georgia will sell her work for $20 + (30 - 20)/4 = \$22.50$, while retaining a right she values at \$5, leaving her with a net worth of \$27.50. Thus, her net worth under the nonwaivable rule is lower than it would have been under the waivable rule; and so is the increase in the parties' aggregate wealth (\$10 versus \$15).

Harrison's empowerment theory suggests, however, that the parties will not always bargain to the same fraction of the difference between the artist's lowest acceptance price and the buyer's highest offer price, but rather that the choice of rule will affect the amount of that fraction. See Harrison, *supra* note 316, at 478 (arguing that "a change in the parties' relative senses of compensatory justice affects the division of the surplus created by the exchange"); *id.* at 479-80 (applying theory to unconscionability doctrine). In other words, perhaps a nonwaivable rule will empower Georgia to demand a "fair" share—say, one half, as opposed to one fourth—of the difference between her lowest acceptance price and the buyer's highest offer price. Under the nonwaivable rule, then, Georgia will agree to sell her work for $20 + (30-20)/2 = \$25$, while retaining a right she values at \$5. At the end of the day, Georgia has a net worth of \$30, as opposed to \$28.75 under the waivable rule. Aggregate wealth is still lower than it would have been under the waivable rule, but only Alfred is worse off than he would have been under a waivable-right system.

nevertheless might expect the typical artist to be somewhat better educated and more literate than the average member of the working poor—and if so, for artists as a class to encounter no greater obstacles than does the average non-poor person in the course of negotiating for a share of the surplus that is generated by voluntary transactions.³¹⁹ Moreover, even if Harrison is correct in asserting that a more robust unconscionability standard would empower consumers to demand “fairer” terms (“You can’t make me agree to that—it’s illegal!”), the effect of a nonwaivable moral right upon artist/buyer exchanges seems much less direct. For the latter effectively to redistribute income in favor of artists, we would have to assume, first, that the right does, in fact, raise artists’ self-esteem; and second, that this increase in self-esteem translates into a demand for a greater share of the surplus. Given the potential for a nonwaivable rule to render artists worse off, however, the absence of strong evidence that *both* conditions are likely to hold suggests that the false consciousness argument provides only weak support for the adoption of a nonwaivable rule.

One final argument in favor of the efficiency of nonwaivable rights is that, “if the overwhelming majority of artists would not agree to waive their moral rights, then giving them the opportunity to do so” will be inefficient if the act of deciding whether or not to waive itself causes sufficient disutility.³²⁰ To illustrate this argument, Hansmann and Santilli provide the example of a struggling artist who, each time he sells a painting, must decide whether to waive his right in return for a higher income with which to provide for his wife and children. If artists rarely would agree to waive their rights even under these circumstances, the result of a waivable right “may be needless angst and guilt.”³²¹ The success of this argument, however, depends on whether such waivers would in fact be rare; if even a substantial minority of artists would choose to waive, the aggregate gains from permitting waivers are likely to outweigh the attendant mental anguish. Thus far, at least, the empirical evidence does not prove that the “overwhelming majority of artists” would never agree to waive their rights.³²²

319. Cf. John Kreidler, *Leverage Lost: The Nonprofit Arts in the Post-Ford Era* 4 (Aug. 31, 1995) (unpublished manuscript, on file with author) (suggesting that “educational attainment may be the strongest predictor of an individual’s likelihood of becoming an arts consumer or an artist”).

320. Hansmann & Santilli, *supra* note 135, at 127.

321. *Id.*

322. See REPORT, *supra* note 139, at 136 (stating that 8% of survey respondents would

3. Third-Party Effects

The above analysis assumes that the artist/buyer transaction affects only the artist, the buyer, and remote purchasers of the work, but a more comprehensive model should take into account the potential effects of the transaction upon third parties. Suppose, once again, that Georgia sells a painting to Alfred, this time in a jurisdiction that does not recognize moral rights, or else that Georgia agrees to waive her right in a jurisdiction that permits waivers. A decision on the part of Alfred to exercise his right to alter or destroy the painting effectively prevents the rest of the world from thereafter being able to enjoy the work in its original state.³²³ An alteration that injures Georgia's reputation also may affect those third parties who own Georgia's other works, to the extent that the value of those other works is in part a function of her reputation.³²⁴ To the extent that the public values the integrity of the work, an agreement providing Alfred with an alteration right therefore potentially imposes a negative external cost (an externality) upon third parties to the transaction.³²⁵ Of course, if transaction costs were zero, these third parties could offer to pay Alfred in exchange for Alfred's promise to preserve the work, and one would expect Alfred to accept that payment if the third parties value the integrity of the work more highly than Alfred values the right to alter. As the number of third parties affected by the externality increases, however, the likelihood of any such agreement diminishes, due to the presence of transaction costs (the more parties, the higher the costs) as well as strategic behavior (each third party having an incentive to free ride on the others' efforts).³²⁶ Moreover, if we take into account the interests not only of third parties who are alive today, but also of future generations who may wish to enjoy the work in its unaltered state (as some commentators suggest we should),³²⁷ these obstacles to

be willing to waive their rights and that 42% were unsure).

323. See Hansmann & Santilli, *supra* note 135, at 105-07, 127.

324. See *id.* at 105, 127-28. Hansmann and Santilli argue that owners of an artist's other work, in order to protect the value of their investment in that work, might want some assurance that the artist will never compromise the integrity of her work; and that a nonwaivable moral right makes such an assurance more credible than it otherwise would be, given the difficulty of structuring assurance as an enforceable contractual obligation. See *id.* The fact that the artist may choose not to enforce even a nonwaivable moral right, however, suggests once again that the right is a highly imperfect means of securing third-party benefits. See *id.* at 127-28.

325. See COOTER & ULEN, *supra* note 242, at 38-40 (discussing externalities); POSNER, *supra* note 242, § 3.9, at 71 (same).

326. See, e.g., KOMESAR, *supra* note 246, at 18; POSNER, *supra* note 242, § 3.6, at 51.

327. See, e.g., Gorman, *supra* note 111, at 234 (stating that integrity right serves "both

bargaining become even more significant. The inability to obtain consent from unborn individuals to the alteration or destruction of a work, after all, is "the ultimate transaction cost."³²⁸ Perhaps, then, moral rights can be justified on economic grounds as a means of correcting for a failure in the market for cultural preservation.³²⁹

This analysis is problematic, however, for several reasons. One difficulty, as we have seen, is that endowing the artist with a moral right is a rather awkward method for protecting the public interest in the preservation of art.³³⁰ A more substantial problem is that adopting a system of moral rights imposes costs as well as benefits upon third parties. Perhaps the most obvious cost is administrative. A society that endows artists with moral rights necessarily incurs costs related to the enforcement and administration of those rights, whereas a society that chooses not to recognize them incurs analogous costs only on the rare occasion that someone chooses to attempt to create moral rights by contract. Experience thus far under VARA, however, suggests that the costs incurred under a limited system of waivable moral rights may not be very substantial either; as noted above, in the past six years there have been only two reported decisions interpreting VARA's substantive provisions.³³¹ But more expansive systems will generate higher costs—and these costs may be substantial indeed in a system in which rights are nonwaivable because virtually every transaction involving a work of art under such

to protect the artist's reputation and to preserve the work for posterity as an artifact of our present culture"); Merryman, *supra* note 17, at 1041 (arguing that moral rights enforce public interest in authenticity of works of art); cf. Albert Elsen, *Why Do We Care About Art?*, 27 HASTINGS L.J. 951, 955 (1976) ("[A]n artist's standing in history depends on the quality of all his work, not just his most celebrated pieces."); John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1211 (1989) ("Ascertained group members simply cannot account for the preferences of unascertained members."). Whether to include future generations' interests in one's utilitarian calculus (and if so, how much weight to accord it) is, however, a moral, not an economic, issue. Economics does not define the scope of the group whose utility or wealth is to be maximized. See *supra* note 311.

328. Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 634 n.86 (1985), quoted in Moustakas, *supra* note 327, at 1212 n.132.

329. In this light, the American statutes that expressly prohibit the destruction or modification of works of recognized stature—and in particular the California Act, which authorizes third parties to sue for moral rights violations—may be viewed as having some advantages over the European model. At the same time, the fact that moral rights are waivable under VARA and the California Act may be viewed as potentially undermining this interest in preservation. See *supra* notes 93-100 (outlining the California Act); *supra* notes 109-21 (outlining VARA).

330. See Porges, *supra* note 197, at 125.

331. See *supra* notes 122-31 and accompanying text.

a system carries with it a risk of future litigation.³³²

Even more significant are the potential costs incurred by third parties who do not value preservation. Perhaps the public would be happier if some works were *not* preserved, as critics sometimes suggest with respect to controversial examples of public art,³³³ and the fact that such complaints may reflect nothing more than poor taste or philistinism counts for little within the economics paradigm, where the philistine's dollar-vote carries as much weight as the connoisseur's.³³⁴ Critics of moral rights also frequently argue that enjoining others from interfering with the integrity of the artist's work threatens to stifle the creativity of present and future authors and interpreters—thereby rendering both those authors and interpreters, on the one hand, and the present and future consumers of their new creations, on the other, worse off.³³⁵ This argument may have little force with respect to original works of visual art, however;

332. See Gorman, *supra* note 68, at 422-24 (arguing that recognition of moral rights is likely to be costly, "particularly if these rights are statutorily declared to be inalienable and non-waivable," given that many artists collaborate on certain works such as motion pictures, and given the large number of subsidiary uses of such works); cf. Hansmann & Santilli, *supra* note 135, at 111 (suggesting that permitting destruction of less famous, possibly lower quality, works is efficient, due to high cost of preservation). Gorman also alludes to the uncertainty that may arise when judges and juries must decide issues of aesthetics, see Gorman, *supra* note 68, at 428, as arguably they must under statutes such as VARA, see 17 U.S.C. § 106A(a)(3)(B) (1994) (extending protection against destruction to works of "recognized stature"). Damich argues, however, that these issues are not necessarily more difficult than other issues judges routinely confront, see Damich, *supra* note 135, at 415-16, a position that arguably was vindicated in *Carter*, see *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325-26 (S.D.N.Y. 1994) (reviewing expert testimony on whether artists' work was recognized as meritorious by other members of arts community), *aff'd in part, vacated and rev'd in part*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1824 (1996).

333. See, e.g., ALICE GOLDFARB MARQUIS, *ART LESSONS: LEARNING FROM THE RISE AND FALL OF PUBLIC ARTS FUNDING 191-99* (1995) (discussing works of art funded by the National Endowment for the Arts that have met with widespread public distaste). *But see* Richard Serra, "Tilted Arc" Destroyed, 14 NOVA L. REV. 385, 392-94 (1990) (disputing claim that author's own dismantled public sculpture was widely disliked).

334. See Cotter, *supra* note 19, at 2136 (discussing how economic view of preferences differs from common moral intuitions).

335. See, e.g., Beyer, *supra* note 17, at 1026 (arguing that moral rights inhibit "interpretive creativity," which "contributes enormously to cultural development"); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 497 (arguing that moral rights are "a charter for private censorship"). Of course, if the artist's right is waivable, a third-party performer or interpreter can acquire a waiver, as long as the price he is willing to pay is one the artist is willing to accept. If the artist's asking price exceeds the performer's offer price, on the other hand, the efficient result is that the performance not take place. From the standpoint of value-maximization, therefore, the "stifling" problem discussed above arises only when the moral right cannot be waived (or when transaction costs are prohibitive).

enjoining third parties from interfering with these works does not impose substantial costs when the interference would consist of destroying an original painting or sculpture, as long as there are other avenues open for third parties to express their creativity. But restrictions may impose substantial costs when the interference would take the form of an innovative performance of a musical or dramatic composition, or an adaptation of a literary work or motion picture. Who is to say that a production of *Waiting for Godot* with two women in the lead roles,³³⁶ or a colorized version of *The Asphalt Jungle*,³³⁷ would not render third parties in the aggregate better off, as long as they are willing to pay for such adaptations?³³⁸

An economic analysis of third-party effects therefore casts substantial doubt upon the proposition that moral rights serve to reduce the negative externalities imposed by the artist/buyer transaction upon present and future generations. The argument is strongest when moral rights are limited to original works of visual art, but even with respect to these works moral rights may be a mixed blessing. Perhaps, though, economic analysis simply fails to capture some of the nonquantifiable benefits of moral rights, or errs in assuming that the preferences of third parties can be meaningfully summed and compared with those of the artist. It is to arguments of this nature that I now turn.

4. Limitations of the Economic Approach

[P]roblems of welfare economics must ultimately dissolve into a study of aesthetics and morals.

—Ronald H. Coase³³⁹

Critics of economic analysis of law sometimes charge that this analysis depends upon assumptions that are contradicted by observable reality—for example, that human beings are rational and have stable, innate preferences, and that, as a result, economic predictions are, at best, frequently wrong, and, at worst, a smokescreen for a right-wing, free-market ideology.³⁴⁰ In my own

336. See *supra* note 62.

337. See *supra* note 65.

338. But see *infra* notes 344-48 and accompanying text (discussing whether third parties would be better off under a strict system of moral rights if, contrary to conventional economic wisdom, preferences are endogenous).

339. Coase, *supra* note 243, at 43.

340. See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 114-85 (1987).

previous work, I have expressed agreement with these critiques up to a point, arguing that economic analysis threatens to lead us astray when we lose track of its strengths and weaknesses in comparison with other decision-making paradigms.³⁴¹ Among the potential weaknesses of conventional economic analysis are its assumptions that preferences are entirely exogenous; that these preferences are revealed exclusively through offers to pay or accept; and that all preferences can be measured and compared along a common metric. While these assumptions render the analysis more tractable and sometimes generate sufficiently accurate predictions as to the likely consequences of alternative systems of rules, I have argued that the policymaker cannot safely ignore the fact that the economic paradigm illuminates some issues only at the cost of simultaneously obscuring others. At the very least, she needs to be aware of what is being obscured in order to assess its significance to the task at hand.

Perhaps the economic paradigm obscures some matters of particular importance to the issue of moral rights. If preferences are not entirely innate, for example, but rather are at least in part the product of legal rules, the conventional economic wisdom against nonwaivable rights may be incorrect for two reasons. First, as noted above, endowing the artist with a moral right may empower her to demand a larger share of the surplus generated by the artist/buyer transaction, potentially leaving her better off than she would have been in the absence of moral rights.³⁴² For reasons already discussed, however, I believe that this argument provides only weak support for a nonwaivable moral right.³⁴³

A second way in which legal rules might affect preferences in the present context, however, is by their ability to help shape public taste. Netanel argues, for example, that publishers, producers, and other entities that often wind up owning a creator's copyright have no inherent interest in communicating that author's expression, and therefore that they frequently market distorted versions of the author's work so as to appeal to the lowest common denominator of public taste; in Netanel's view, this marketing strategy results in a diminished level of "cultural diversity and resonance."³⁴⁴ In response to the argument that at least some segment of the market apparently prefers these altered works, Netanel questions the blind reliance

341. See Cotter, *supra* note 19, at 2130.

342. See *supra* text accompanying notes 315-17.

343. See *supra* notes 318-19 and accompanying text.

344. Netanel, *supra* note 17, at 431-39.

upon consumer demand as an adequate measure of social well-being, arguing that the preferences on which this demand is based are themselves creatures of the marketplace.³⁴⁵ Netanel's analysis therefore suggests that the recognition of moral rights preserves and promotes eccentric authorial visions, which a public accustomed to less challenging fare would otherwise reject; and that, if public taste is itself shaped by experience and discourse, including the discourse of legal institutions, then a legal system that accords greater respect to the preservation of these visions may, in the long run, change preferences in ways that lead to greater satisfaction.

With its focus on the transformative power of art, pragmatic aesthetics might at first blush seem more consistent with Netanel's theory than with the conventional economic view of preferences as static and innate. Even if Netanel is generally correct, however, in perceiving a shortage of "cultural diversity and resonance,"³⁴⁶ it does not necessarily follow that moral rights are the optimal tool for remedying this problem. Netanel neither considers other possible methods of raising audience consciousness—a point to which I shall return in the following section—nor discusses the potential for moral rights to *diminish* cultural diversity, either by reducing the demand for art or by stifling creative interpretations and performances of which the author disapproves.³⁴⁷ Of course, one might argue that some of these latter examples of diversity *should* be discouraged, on the theory, as suggested by Michiko Kakutani's comments on the use of Felliniesque imagery in commercial advertising, that a public accustomed to a distorted or sanitized version of a work will never appreciate the beauty or innovativeness of the original.³⁴⁸ If this is correct, however, the argument seems to be that moral rights should

345. See *id.* at 439.

346. See *supra* note 344. I will assume, for the sake of argument, that Netanel's perception is correct, although he offers no criteria for determining when we have attained the optimal degree of cultural diversity. It seems at least as likely to me, however, that the greater threat to the continued vitality of the arts in America is the lack of public appreciation of the arts, rather than the lack of cultural diversity; in other words, while the general public may prefer less challenging, more homogeneous works, more diverse and demanding works are available for those who wish to enjoy them.

347. Cf. Beyer, *supra* note 17, at 1028-31 (arguing that opponents of film colorization underestimate its artistic potential).

348. See *supra* note 207. But then we may simply be deluding ourselves if we think that any audience ever *can* appreciate the artist's original conception of the work, given all the differences between the context in which the work was created and the context in which future interpretive communities find themselves. For discussions, see Beyer, *supra* note 17, at 1034-35, and Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1598-1601, 1615-27, 1634-39 (1991).

be promoted as a means of inhibiting, rather than promoting, some forms of cultural diversity. Perhaps, then, the most we can say is that the recognition of moral rights may help to instill greater public respect for and understanding of the artist's vision; whether recognition actually has the effect of increasing the supply of visionary works remains open to question.

A second reason to question the economic analysis of moral rights is based upon the economist's use of revealed preference theory to generate predictions. Economists tend to be skeptical of people's statements concerning how they would react in response to hypothetical situations, preferring instead to infer what an individual's preferences are by observing her behavior.³⁴⁹ Specifically, an economist will infer the value that a person accords to a given thing by observing how much she is willing to pay or willing to accept in exchange for it.³⁵⁰ Thus, when an economist states that, in the absence of transaction costs, a right will wind up in the hands of the person who values it more highly, he generally means that ownership will come to rest in the person who is willing to pay the most for it.³⁵¹

This reliance upon revealed preference theory has been subjected to criticism on several grounds. One problem is that the relationship between preferences and willingness to pay may not be as simple as the economist assumes; for example, preferences may be unstable, or may depend upon the specific context in which the choice among two or more goods is presented, or may be expressed in certain ways but not others due to cultural norms.³⁵² A second problem arises from the bias inherent in defining value in terms of willingness to pay, given that willingness to pay is in part a function of ability to pay, or wealth.³⁵³ Suppose, for example, that a poor person has a stronger desire for a new drug (without which he will suffer serious harm or die) than does a rich person (for whom the drug will only marginally improve his quality of life). Because the rich person has more dollar-votes with which to register his preference for the drug, he may be willing to pay more for it than the indigent. From

349. See Cotter, *supra* note 19, at 2125-26; see also *supra* note 254 (contrasting Posner's and Harrison's views on revealed preference theory).

350. See Cotter, *supra* note 19, at 2125-26.

351. See *supra* notes 242, 245 and accompanying text.

352. See Harrison, *supra* note 239, at 1351-62; Sunstein, *supra* note 273, at 242-53; Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 794 n.48 (1994) [hereinafter Sunstein, *Incommensurability*].

353. See Cotter, *supra* note 19, at 2127.

the standpoint of economics, therefore, the efficient or "value-maximizing" solution is to allocate the drug to the rich man.³⁵⁴ Doing so nevertheless strikes many people as both unjust (in that the rich man has no greater moral entitlement to the drug than the indigent) and nonutilitarian (in that aggregate utility would be increased by allocating the drug to the person who would derive more happiness from it, whether he can afford to pay for it or not).³⁵⁵

Perhaps a similar criticism can be brought to bear in the context of moral rights. Suppose, for example, that Georgia has an intense desire to protect the integrity of her work but would be unable to translate this preference into an offer price due to constraints upon her wealth. Endowing her with an integrity right may be inefficient (if the typical buyer's asking price for moral rights protection exceeds the typical artist's offer price) and yet utility-maximizing (if the artist would gain more happiness from the ownership of the right than the buyer would forgo). On this reasoning, the fact that real-world artists and buyers generally do not voluntarily agree to the creation of moral rights by contract may be attributable more to the disparity of bargaining power between them than to transaction-cost economics. Thus, the argument would go, if our goal is to maximize utility, rather than value or wealth, we should endow the artist with a moral right.

The soundness of this utility-maximization or disparity-of-bargaining-power argument, however, is far from certain. One problem is that it is very difficult to prove the underlying assumption that the artist would gain more utility from a moral right than the buyer would lose. Perhaps the intensity of the desire for moral rights varies considerably from one artist to another or differs depending on the type or quality of the work.³⁵⁶ Moreover, even if the assumption is true, endowing the artist with a nonwaivable right raises serious questions.³⁵⁷ The fact that a nonwaivable right causes the artist's

354. Cf. POSNER, *supra* note 146, at 380 (discussing similar hypothetical); Cotter, *supra* note 19, at 2127 (discussing similar hypothetical).

355. See Cotter, *supra* note 19, at 2127; cf. POSNER, *supra* note 146, at 380-81 (discussing ethics of using wealth maximization as criterion for allocating goods in situations like that described above).

356. Contrast, for example, the attitudes of Stravinsky and Neruda, discussed *supra* at notes 1-5, 10 and accompanying text.

357. Endowing the artist with a waivable right may be justified, however, on the ground that doing so will allow her to reveal her preferences through asking (willingness-to-accept), as opposed to offer (willingness-to-pay), prices. If the artist's asking price exceeds her offer price due to the presence of an endowment effect, initially endowing her with a moral right may maximize aggregate utility. See Korobkin, *supra* note 273, at 679-82. Whether this initial endowment also maximizes wealth, under these assumptions, is unresolved. See *supra* notes 299-305 and accompanying text.

utility to increase more than the buyer's decreases does not guarantee that the potential effect on third parties would be positive; because a nonwaivable rule may impede the ability of third parties to employ the work for their own purposes, the rule could still lead to an aggregate decrease in utility.³⁵⁸ Perhaps more importantly to the artist, there is no guarantee that her utility would really increase either, given that one of the potential systemic consequences of a nonwaivable rule is a decline in the demand for art.³⁵⁹ Attempting to level the playing field between artists and buyers does not work to the advantage of artists, if the likely consequence is a decrease in the commissioning of art.

Perhaps the best reason to question the economic analysis of moral rights rests upon the concept of incommensurability. In general, neoclassical economics assumes that an individual's preferences are reducible to a common metric of utility or happiness, such that one "good" always can be traded off for some quantity of other goods.³⁶⁰ Over a broad range of occurrences this assumption may well be true, or at least adequate for the purpose of generating accurate predictions; for example, I may generally prefer apples to oranges, but at some point enough oranges will more than compensate me for the loss of a single apple.

As several scholars have argued, however, some human goods do not appear to be reducible to such a common metric, such that judgments based upon the assumption of commensurability often will be deeply flawed.³⁶¹ To illustrate by way of some everyday examples, Cass Sunstein argues that one may not accord a pet's life infinite value, and yet one nevertheless may refuse any sum of money in

358. Cf. *supra* notes 333-38 and accompanying text (discussing externalities imposed by nonwaivable moral right upon future authors, interpreters, and consumers). Even a waivable rule may decrease aggregate utility when the effects on third parties are taken into account. Suppose that the amount a third-party performer is willing to pay to acquire a waiver from the artist is lower than the artist's asking price. On these facts, it is efficient for the performance to not take place, *see supra* note 335, but it may not be utility-maximizing. The performer may have stood to gain more utility from the performance than the artist stood to lose; but just as the artist's poverty may constrain her from revealing her preference through a hefty offer price when negotiating with the buyer, the performer's poverty may constrain him from revealing his preference when negotiating with the buyer.

359. *See supra* notes 306-07 and accompanying text.

360. *See Cotter, supra* note 19, at 2127-28.

361. *See, e.g., RADIN, supra* note 25, at 9; Harrison, *supra* note 239, at 1328-29; Sunstein, *Incommensurability, supra* note 352, at 796. For a critical view of incommensurability, see Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 1995 UTAH L. REV. 683.

exchange for granting someone permission to perform medical experiments upon the animal; neither would one offer to pay a friend money to get out of a luncheon date that has unexpectedly become inconvenient.³⁶² In both instances, Sunstein claims, it would be inconsistent with the way in which one values the animal or friend to reduce one's feelings for them to a monetary amount. Affection and money therefore are, in Sunstein's view, incommensurable, meaning that they "cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized."³⁶³ In a similar vein, Margaret Radin argues that the "universal commodification" implicit in economic analysis, in which all values are reducible to monetary amounts, "cannot capture—and may debase—the way humans value things important to human personhood."³⁶⁴ Radin further argues that certain goods, such as one's body, children, sexual identity, and perhaps even housing and work, are intrinsic to one's sense of identity and personhood, and that to treat these "elements of self-constitution" as fungible with other commodities therefore "does violence to the self."³⁶⁵

If we accept the thesis that some values and goods are not reducible to a common metric, an economic approach to moral rights might seem seriously flawed, or at least incomplete. Economic analysis seems to suggest, for example, that we should recognize these rights only if the preferences of those who favor the preservation of works of art in some sense outweigh the preferences of those who favor the right to alter or destroy them; if all tastes are fungible, after all, then the alteration or destruction of a work disliked by the majority may render society better off than would its preservation.³⁶⁶ And yet while some aesthetic theories are more self-consciously elitist than others, no theory that I am aware of, whether rooted in pragmatism or any other philosophical tradition, adheres to the view that aesthetic value is closely correlated with popularity. Indeed, common experience would suggest just the opposite; there are many examples of works that initially met with both popular and critical disapproval, only to become recognized as masterpieces in later years.³⁶⁷ Similarly, in everyday life, we commonly find ourselves

362. See Sunstein, *Incommensurability*, *supra* note 352, at 785, 839.

363. *Id.* at 796 (emphasis omitted).

364. RADIN, *supra* note 25, at 9.

365. *Id.* at 74-75.

366. See *supra* text accompanying notes 333-34.

367. For examples, see DEWEY, *supra* note 161, at 301-04, and WILLIAM GADDIS, *A FROLIC OF HIS OWN* 39 (1994).

arguing that the creators or consumers of some works have better taste than the creators or consumers of other works. To speak of one taste as being superior to another, however, suggests the existence of some criteria of judgment; and whether one views these criteria as objective, subjective, or somewhere in between, there seems to be no inherent reason to believe that "good" taste, whatever that happens to be, will be maximized simply by putting the matter to some form of majority vote, economic or otherwise. Of course, one might still argue in favor of an economic approach on the pragmatic ground that the assumption that tastes are fungible, even if invalid, generates results that are preferable, in light of some criteria, to those that will obtain under an approach that entrusts aesthetic decisions to some other decision-making process. To do so, however, does not detract from the basic insight that making aesthetic decisions by summing up preferences among individuals is, to a significant degree, inconsistent with the way in which we actually value works of art.³⁶⁸

A second, somewhat related way in which incommensurability may affect the analysis of moral rights relates to Sunstein's view that some legal rules may express community standards regarding "an appropriate valuation of an event, person, group, or practice."³⁶⁹ Sunstein argues, for example, that one might advocate adopting an antidiscrimination law in light of its expressive value—its ability to convey the message that skin color is an inappropriate criterion for evaluating human beings, even in the absence of evidence concerning the likely consequences of such a law.³⁷⁰ In the same vein, one might argue that the recognition of moral rights expresses a community standard that, in light of the unique quality of art objects both to embody and to stimulate experience, these objects are entitled to some form of special protection. Allowing one to buy or sell the right to alter or destroy these works therefore may be viewed as inconsistent with the community's "considered judgment" concerning the appropriate way to value them.³⁷¹

Finally, if we agree with the traditional defenders of moral rights that in some meaningful sense a work of art embodies the personality of its creator, then a system that fails to recognize moral rights, or which allows for the waiver of these rights, might be viewed, in

368. Cf. Cotter, *supra* note 19, at 2136 (arguing that the incommensurability thesis suggests that we need not view all preferences as being of equal weight).

369. Sunstein, *Incommensurability*, *supra* note 352, at 820-23.

370. *See id.* at 823.

371. Cf. *id.* at 849 (arguing that to allow the purchase or sale of some goods means that the goods "will be wrongly valued in the qualitative sense").

Radnesque terms, as doing violence to some aspect of the artist's self. As we have already seen, a strong case can be made in favor of the proposition that the retention of control over one's expression is in some way vital to "individual self-development, autonomy, and identity";³⁷² requiring the artist to bargain for something so critical to his self-worth therefore may be viewed as conveying a message that the artist's self is fungible with other commodities.³⁷³ For these reasons, moral rights advocates such as Netanel and Kundera argue that recognition of a nonwaivable right reflects a more appropriate valuation of the unique personality or creativity of the artist.³⁷⁴

It should nevertheless be clear that none of these arguments relating to incommensurability provides a knockdown case in favor of moral rights protection. One might, for example, reject the assumption of commensurability altogether and still be concerned that the recognition of moral rights will, on balance, harm artists by reducing the demand for their works and the supply of their source material. Or one might agree that tastes are not fungible and still conclude that some works simply do not possess sufficient merit to deserve preservation in perpetuity; does a strict moral rights rule threaten to divert scarce resources to the protection of kitsch?³⁷⁵ An awareness of the potential flattening tendency of the economic approach nevertheless adds an important component to the analysis; for while economics can tell us something about the possible welfare and distributional consequences of alternative rules, it cannot supply the values with which to determine whether a given result is desirable or not. Deciding what to do therefore involves a complex interplay of both values and consequences. In the following section of this Article, I hazard four tentative conclusions as to how the relevant values and consequences affect the optimal scope of the *droit moral*.

IV. SOME TENTATIVE CONCLUSIONS

From the standpoint of pragmatic aesthetics, as we have seen, there is much to admire in the continental system of *droit moral*, and in particular the moral right of integrity. Moral rights may assist in promoting the social interest in the preservation of works that

372. Netanel, *supra* note 17, at 400; *see also supra* notes 217-34 and accompanying text (discussing Netanel's arguments in favor of moral rights).

373. *See* Netanel, *supra* note 17, at 411.

374. *See* KUNDERA, *supra* note 1, at 271; Netanel, *supra* note 17, at 429-30.

375. *Cf.* REPORT, *supra* note 139, at 37-38 (discussing German court's recent rejection of claim brought by sculptor of Lenin sculpture dismantled and buried after reunification, on the ground that artist must "accept the effects of historical change").

simultaneously and uniquely embody, stimulate, and provide us with new ways of redescribing and reimagining human experience. Moreover, a commitment to the goal of human flourishing suggests that according respect to the person of the artist, as well as to works of art generally, may be desirable ends in and of themselves; moral rights recognition therefore may be viewed as a communal expression as to the appropriate way in which to value the unique contribution and personality of the artist, as well as the unique role of art in civic life. At the same time, however, moral rights are highly imperfect both as a means and as an end. As a means of advancing cultural preservation, moral rights are flawed because they place the authority to preserve works of art primarily in the hands of the author, who may or may not choose to exercise that power. As an end, moral rights tend to reify what pragmatists such as Dewey view as a false dichotomy between fine and useful art and, more importantly, threaten to inhibit future experience by preventing interpretations and performances that are at odds with the intentions of the author. Moral rights therefore may serve to impose the dead hand of the past on the desires of present and future generations to forge new experience from existing reality.³⁷⁶

In an effort to further clarify the potential consequences of waivable and nonwaivable rules, I devoted considerable attention in the preceding section to a hypothetical transaction between an artist and a buyer, as viewed from the standpoint of economic analysis. On the basis of this analysis, I predicted that endowing the artist with a waivable moral right would redistribute income from buyers to artists and, although the analysis is not conclusive, could have a positive effect on aggregate wealth by removing legal obstacles to the creation of what is, in effect, an equitable servitude in a chattel. This analysis also suggested, however, that a system of nonwaivable rights threatens to render artists, in the aggregate, worse off, unless the effect of the rule is either (1) to protect them from their own poor bargains, to empower them to demand a greater share of the benefits

376. See *supra* notes 189-234 and accompanying text. Of course, as Professor Kwall has suggested to me in correspondence, *all* intellectual property protection is subject to the critique that it threatens to impose the dead hand of the past on the desires of present and future generations. See Letter from Roberta Rosenthal Kwall, Professor of Law, DePaul University College of Law, to Author 7 (Jan. 20, 1997) (on file with author). Although some scholars find in this critique a compelling reason to abandon all or most of intellectual property law, see Palmer, *supra* note 20, at 855, most (including me) conclude that the potential gains from having some form of patent and copyright protection outweigh these potential losses. With respect to moral rights, however, the potential benefits are more attenuated, as I have attempted to demonstrate throughout this Article.

of trade, or to substantially reduce the cost of anxiety; or (2) to change the preferences of the consuming public so as to increase its appreciation for preserving the integrity of works of art. Although I expressed skepticism as to whether the recognition of moral rights is likely to have such effects, I left open the possibility that further experience may prove me wrong. And of course economic analysis by itself can tell us nothing about the desirability of these or other potential consequences.

In this final section, I offer some tentative conclusions as to the optimal scope of moral rights protection—recognizing, however, that the pragmatic analysis I have employed throughout this discussion offers no final resolution of these, or any other, issues. Indeed, the primary virtue of pragmatism, as I view it, lies not in its effectiveness in guiding us to specific conclusions—I tend to agree with Posner and Rorty that pragmatism by itself tells us very little about specific conclusions³⁷⁷—but rather in its emphasis on the dialectical nature of human thought. On the one hand, pragmatism suggests that every system of human thought is the product of past experience and therefore is necessarily limited by the finiteness of that experience; on the other, it recognizes the inevitability of theory-building as a way of predicting and coping with one's environment.³⁷⁸ Pragmatism therefore encourages a skeptical attitude to claims of certainty, perceiving theory as a continually evolving practice of observation, testing, and revision in light of further experience.³⁷⁹ Subject to these caveats, let me suggest four conclusions I draw concerning moral rights, based upon my own perception of the interplay between relevant theory and observation.

My first conclusion is that, from several different perspectives, a system of waivable moral rights has much to recommend it. To the extent that a system of waivable rights facilitates the author's ability to bargain for a right to preserve the integrity of her work, the system potentially increases the number of works preserved from alteration or destruction; conveys a message that artists and their works are

377. See POSNER, *supra* note 148, at 395; Rorty, *Banalities*, *supra* note 214, at 1816.

378. See *supra* notes 146-54 and accompanying text.

379. Cf. Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 829 (1988) (finding in pragmatism "a disposition to scoff at pretensions to certainty, to question claims (even my own) to the possession of powerful methodologies founded on professional expertise, and to disbelieve in absolutes and unobservable entities"); Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1668 (1990) (describing "pragmatism in the style of Peirce and Dewey" as "a generalization of the ethic of scientific inquiry—open-minded, forward-looking, respectful of fact, willing to experiment, disrespectful of sacred cows, anti-metaphysical").

valued in a special way; redistributes income to the arts community; and, arguably, may increase both aggregate utility and aggregate wealth. This interlocking "web of beliefs"³⁸⁰ in support of a waivable moral right provides reasonably strong support for statutes such as VARA and the California Act, and for decisions such as *Gilliam*.³⁸¹ Perhaps the type of protection afforded to works of visual art under VARA should be expanded, on an experimental basis at least, to other works of authorship as well, either through a more liberal application of the *Gilliam* court's interpretation of the right to authorize derivative works,³⁸² or through other statutory amendments.

A second conclusion, however, is that the advantages of a waivable right may be quite limited if, as some commentators predict, artists who are asked to waive their rights often will have little choice but to agree to do so.³⁸³ Perhaps the most we can expect, then, from a system of waivable rights is only a small improvement in the well-being of artists, an incremental increase in respect for them and their works, and a marginally higher probability that these works will be preserved for future enjoyment. The expectation of such minimal effects may seem to make this type of reform hardly worth the effort. And yet, if the analysis in the preceding section is correct, the nonwaivable alternative may be undesirable as well, inasmuch as it threatens to reduce the demand for art and to discourage innovative interpretations. Are we stuck, then, with a choice between a reform that accomplishes relatively little, and one that threatens to cause perverse unintended consequences?

In other contexts, Margaret Radin has referred to similar unenviable choices as examples of a "double bind." In Radin's view, there is always a gap between "ideal justice," which she defines as "the best general ideals we can formulate," and "nonideal justice," which is the "theoretical working out of what changes would now count as social improvements."³⁸⁴ As Radin explains:

Pursuing nonideal justice is linked with a dilemma of

380. See *supra* note 237 and accompanying text.

381. But see *supra* note 120 (discussing whether waivers apply to subsequent purchasers under VARA). To the extent waivers do not apply to subsequent purchasers, the claim that VARA promotes economic efficiency is weakened.

382. But see Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1029-72, 1074-77 (1997) (arguing that, under current law, the copyright owner's exclusive right to prepare derivative works leads to underinvestment in innovation).

383. See, e.g., REPORT, *supra* note 139, Part IX, at 21 (statement of Debra Benson).

384. RADIN, *supra* note 25, at 123.

transition from where we are now to a better world. If we compromise our ideals too much because of the difficulties of our circumstances, we may reinforce the status quo instead of making progress. . . . On the other hand, if we are too utopian about our ideals given our circumstances, we may also make no progress. . . . This practical dilemma of nonideal justice is what I call the double bind.³⁸⁵

Using Radin's terminology, one might view a decision to adopt a system of nonwaivable moral rights as a form of ideal justice—a rule that ideally would promote respect for artists, their work, and the preservation of that work—and a system of waivable rights as a form of nonideal justice that takes into account the potential unintended consequences of the ideal. At the same time, however, the adoption of a waivable rule may tend to reinforce the status quo of disrespect for authors and their works. How might one attempt to mediate between these ideal and nonideal visions?

Radin suggests that, when confronted with a double bind, one possibility is to consider alleviating the underlying problem giving rise to the bind.³⁸⁶ With respect to the question, for example, of whether to allow the commodification of human goods, such as sexuality, that seem necessary for the development of a sense of personhood, Radin suggests that the double bind has two consequences. The first is that, if both permitting and banning a sale seems inconsistent with respect for personhood, "justice requires that we consider changing the circumstances that create the dilemma. We must consider wealth and power redistribution."³⁸⁷ The second is "we still must choose a regime for the meantime, the transition, in nonideal circumstances."³⁸⁸ Thus, one might decide that a rule prohibiting people from selling their bodily organs is desirable because such sales would be degrading to personhood; and yet, "[i]f people are so desperate for money that they are trying to sell things we think cannot be separated from them without significant injury to personhood," we neither cure their desperation, nor avoid injury to personhood, by banning sales.³⁸⁹ As Radin notes, "perhaps the desperation is the social problem we should be looking at, rather than the market ban."³⁹⁰

385. *Id.* at 123-24.

386. *See id.* at 124.

387. *Id.*

388. *Id.*

389. *Id.* at 125.

390. *Id.*

Perhaps a similar analysis can be brought to bear on the question of whether moral rights should be waivable or nonwaivable. I recognize, of course, that an agreement to permit someone to interfere with the integrity of one's work of art is unlikely to evidence the same level of desperation as would an agreement to permit someone to interfere with the integrity of one's body; but the difference is more one of degree than of kind. If the advocates of moral rights are correct, many artists do view distortions of their work as serious affronts to their sensibilities and agree to waive their rights only out of necessity. Perhaps, then, in thinking through the moral rights dilemma, we should consider changing the circumstances that give rise to it in the first place. If we wish to show respect for artists and their works, and to advance the public interest in preservation, what options might we have other than endowing the artist with a nonwaivable moral right?

One alternative would be to increase the social resources devoted to the production and promotion of the arts and to arts education. This option, of course, is hardly a perfect substitute for the recognition of a nonwaivable moral right. For one thing, it would continue to leave it up to the artist to bargain for the integrity of her work; and even an artist who is financially more secure than before may feel that, with respect to a given project, she has little choice but to waive her rights. Throwing money at the problem also may seem like an inadequate response to the argument that works of art are, in some meaningful sense, incommensurable with money; or that forcing the artist to bargain for her integrity degrades her. A substantial increase in funding for the arts nevertheless might enable artists more frequently, if not universally, to refuse waivers; and by helping to foster a climate more protective of the arts, a reform of this nature might also decrease the likelihood that the buyer would place a high value on the right to alter or destroy the work. Coupled with a waivable right of integrity, an increase in arts funding and education might do more to promote the appreciation of artists and their works than would a system of nonwaivable moral rights, with all its potential attendant consequences.

In theory, the United States could be devoting significantly more resources to the funding of the arts. At present, the federal government provides direct funding for the arts through the National Endowment for the Arts and the National Endowment for the Humanities, as well as through a series of other programs, such as federal funding for arts education and programs that allow a small

portion of the cost of federal buildings to be spent on artwork.³⁹¹ Altogether, federal, state, and local funding for the arts was estimated to total approximately \$1 billion, or about \$4 per capita, in 1996.³⁹² By contrast, national funding for the arts in Great Britain totals approximately \$1.5 billion, or about \$25 per capita; while in Germany and France national funding totals approximately \$3 billion, or about \$38 and \$50 per capita, respectively.³⁹³ On the other hand, private funding of the arts in the United States is higher than in Europe,³⁹⁴ due in part to the greater availability in the United States of tax deductions for charitable contributions.³⁹⁵ Nevertheless, and

391. See, e.g., 34 C.F.R. § 75.607 (1996) (permitting up to one percent of cost of certain projects to be spent on artwork); 36 C.F.R. § 910.35 (1996) (similar); *Serra v. United States Gen. Servs. Admin.*, 847 F.2d 1045, 1047 (2d Cir. 1988) (describing "Art-in-Architecture" program); General Services Administration, Public Buildings Service, *Cultural and Environmental Programs* (visited July 21, 1997) <<http://www.gsa.gov/pbs/pt/pts/cultural.htm>> (discussing activities of General Services Administration's Cultural and Environmental Programs Division).

392. See Sid Smith, *An Awkward Fit: High Culture Is a Tough Sell in an America That Has Never Quite Connected with the Fine Arts*, CHI. TRIB., Aug. 25, 1996, § 7, at 1.

393. See *id.*; Robert Hughes, *Pulling the Fuse on Culture: The Conservatives' All-Out Assault on Federal Funding Is Unenlightened, Uneconomic and Undemocratic*, TIME, Aug. 7, 1995, at 60, 64. As Hughes illustrates, local spending on the arts in other countries also can be lavish. He notes, for example, that for fiscal 1995 the City of Berlin was set to spend approximately \$800 million—2.6% of its total municipal budget, or about \$225 per capita—on art and culture. See *id.*; see also OUR CREATIVE DIVERSITY: REPORT OF THE WORLD COMMISSION ON CULTURE AND DEVELOPMENT 248 (UNESCO 1995) (comparing public sector arts funding with gross national product for several Western European nations and the United States).

394. See Smith, *supra* note 392, at 1. Private donations to the arts in the United States have been estimated at approximately \$9.3 billion. See Prepared Testimony of Charles T. Clotfelter Before the Subcommittee on Education, Arts and Humanities Senate Labor and Human Resources Committee, Federal News Service, Feb. 23, 1995, available in LEXIS, News Library, Arcnws File [hereinafter Clotfelter]. North American corporate sponsorship for the arts was estimated to reach \$5.4 billion in 1996. See Howard Reich, *Art Meets Commerce: Cultural Groups Turn to Corporate America for Needed Cash*, CHI. TRIB., Aug. 27, 1996, § 5, at 1.

395. Forgone tax revenues attributable to donations for the arts have been estimated as falling somewhere between \$2 billion and \$3 billion. MARQUIS, *supra* note 333, at 167; Clotfelter, *supra* note 394; see also Charles T. Clotfelter, *Government Policy Toward Art Museums in the United States*, in THE ECONOMICS OF ART MUSEUMS 239 & n.3 (Martin Feldstein ed., 1991) (noting widespread reliance in United States upon tax deductions to support services directly provided by governments in Europe). But see Herbert Stein, *Generous to a Fault*, N.Y. TIMES, July 2, 1997, at A23 (estimating forgone tax revenues of only \$1.25 million annually).

Although tax deductions for charitable contributions are more generous in the United States than in Europe, some other countries do grant artists special tax breaks. In Ireland, for example, artists (including writers, musicians, visual artists, and filmmakers) are exempt from income tax. See Shane de Búrca, *Artists' Exemption in Ireland: Guidelines, Film-Makers*, 7 ENT. L. REV. 16, 16 (1996); J. Mark Schuster, *Questions to Ask of a Cultural Policy: Who Should Pay? Who Should Decide?* 9 (June 28-30, 1995)

although precise comparisons are difficult, arts funding in the United States appears to be considerably lower than in Europe.³⁹⁶

In practice, however, the recommendation that we devote substantially more resources to the promotion of the arts in the United States is probably not feasible at the present time. It would be a gross understatement, in my view, to suggest that there is no popular consensus in this country in favor of significantly increasing governmental funding for the arts; and while private funding and corporate sponsorship may continue to increase, it is unclear whether there is any significant role for government to play in encouraging this trend.³⁹⁷ Critics are also quick to point out that government funding for the arts is itself a highly imperfect option that can give rise to undesirable consequences; one frequently voiced complaint is that government-sponsored art tends to be safe, unambitious, and mediocre.³⁹⁸ In any event, and whether it is for the better or the worse, I think it is safe to say that we are unlikely to observe a significant increase in the direct or indirect subsidization of the arts anytime in the foreseeable future.

A more limited alternative might be to expand our laws relating to historic preservation so as to bring more works within their scope. One student commentator, for example, has suggested that courts should consider any artwork donated, sold, or lent to museums as being cloaked with a public trust that permanently prohibits its owner

(unpublished manuscript, on file with author). The French government, on the other hand, is in the process of phasing out a long-standing income tax break for journalists. See David Buchan, *French Press Sends an SOS*, FIN. TIMES (London), Jan. 13, 1997, at 14; *French Dailies Fail to Appear After Printworkers Back Journalists' Strike*, AGENCE FRANCE PRESSE, Nov. 15, 1996, available in LEXIS, News Library, Curnws File. At one time, the Dutch government paid qualifying pictorial artists a yearly salary of up to \$16,000, but this practice came to an end in 1987. See *Dutch Artists Hunting Alternatives to the Dole*, N.Y. TIMES, July 9, 1987, at C13.

396. According to the figures quoted in the text and notes above, it would appear that public funding for the arts in the United States by means of direct public expenditures and tax subsidization amounts to somewhere between \$2.5 billion and \$4 billion—only \$10 to \$16 per capita. See *supra* notes 391-95 and accompanying text. If private donations of \$9.3 billion are added to this figure, see *supra* note 394, per capita expenditures from all sources come to, at most, \$53, just slightly higher than France's per capita public expenditures, at the national level, alone. See *supra* text accompanying note 393. But see Smith, *supra* note 392, at 1 (quoting Daniel Ritter, director of the Center for Arts and Culture, as professing uncertainty whether American tax structure effectively equalizes U.S. and European arts subsidies).

397. But see Clotfelter, *supra* note 394 (discussing possible tax incentives for increasing arts patronage).

398. See MARQUIS, *supra* note 333, at 234; Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 98-99, 115 (1996).

from treating the work in a manner inconsistent with that trust.³⁹⁹ Expanding the role of historic preservation law in this or some other manner, in the opinion of the commentator, would be a more dependable method of preserving the integrity of works of art, in that enforcement of the rule would rest with the appropriate state or local officials rather than with the artist or her heirs.⁴⁰⁰ In addition, a rule of this type might have less of a disincentive effect than a nonwaivable moral right because it would affect only works of a certain stature and would take effect only upon transmittal of the work to a museum.⁴⁰¹ In light of factors such as these, even critics of moral rights tend to agree that works in which the public interest is very strong deserve some form of legal protection from alteration or destruction.⁴⁰² Like a system of waivable moral rights, however, the effect of such a rule is likely to be fairly mild; even under a more liberal system relatively few works are likely to be of the necessary stature to qualify for historic preservation, let alone find their way into museums.⁴⁰³ Thus, while a reform of this nature may provide some welcome benefits, it is unlikely to do very much to protect the average artist's interest in preserving the integrity of her work.

At the end of the day, then, there just may not be very much more we can do to foster greater respect for the artist and her work. And so the double bind persists. In the absence of a greater public commitment to the arts, the weak reform of waivable rights may not accomplish very much. And yet the adoption of a system of nonwaivable rights constitutes an even greater threat to its intended

399. See Porges, *supra* note 197, at 132-33.

400. See *id.* at 125-26.

401. Of course, one might argue that a rule cloaking a work transmitted to a museum with a public trust will discourage transmittals to museums. The student commentator suggests that sales and donations will not be deterred because future owners generally will intend to treat the work with care whether or not a trust is imposed, *see id.* at 134 n.69, and that loans will not be deterred because the sale price of the work is likely to rise after it has been loaned for the purpose of public display, *see id.* at 134 n.71. If the former premise is correct, however, it calls into question the need for any rule at all with respect to works being sold or donated. Perhaps the better view is that sales or donations to entities that would prefer to have the right to alter or destroy the work are the only ones that will be deterred, but that it is consistent with the goal of preservation to deter these transactions.

402. See Beyer, *supra* note 17, at 1035-40 (endorsing a ban on the alteration of works that occupy "a special, venerated position in the culture," when such alteration "would so transform the entity that it would be regarded as having had its essence lost or destroyed," and the change "would be permanent and irreversible").

403. The easier it becomes for works to qualify for historical preservation, of course, the more indistinguishable the proposed rule becomes from a nonwaivable moral right, with all its potential drawbacks.

beneficiaries, in the absence of a countervailing public commitment to the production of art; if economic theory is correct in predicting that a system of nonwaivable rights reduces the demand for art, then some form of subsidy may be necessary to push the demand back up to its original position. Perhaps, then, it should come as no surprise that cultures with a strong commitment to moral rights also engage in a higher level of government arts funding than we do. The two phenomena not only spring from the same basic impulse of enthusiasm for the arts; the one also complements the other. What the preceding analysis suggests, then, is something of a paradox. In the absence of a strong public commitment to the arts, a meaningful system of moral rights threatens to harm the interests of artists and art consumers; at the same time, the existence of such a commitment might alleviate much of the need for nonwaivable rights, both by providing artists with greater bargaining power and by instilling greater social sanctions against those who interfere with the integrity of artists' works. Perhaps only those societies in which the role of the artist is already the most secure can afford to endow the artist with a nonwaivable moral right!

A third observation is that, even if the ideal form of moral rights protection were attainable, it is not clear that the ideal would be to subject all creative works to the same degree of protection. It is easiest to defend a right to protect the original, physical embodiment of an author's work from physical alteration or destruction, given the likely strength of the author's psychic connection to that embodiment and the likely impossibility of ever reconstituting the work once it has been destroyed. The protection afforded under VARA and the California Act to original embodiments of works of visual art is therefore the least controversial of any form of moral rights recognition; and it would be only a small, and arguably desirable, step to expand the protection afforded under these acts to original embodiments of other works such as motion pictures,⁴⁰⁴ photography produced for other than exhibition purposes, and original manuscripts. Moreover, in an ideal world—though not necessarily the nonideal place we actually inhabit—this right of integrity in original embodiments probably would be both nonwaivable and perpetual.

Whether the ideal would be to afford similar protection to

404. Cf. 2 U.S.C.A. §§ 1791-179w (West 1997) (authorizing the Librarian of Congress to maintain a National Film Registry consisting of archival quality copies of films selected on the basis of cultural, historical, or aesthetic significance).

reproductions (so as, for example, to prevent the distribution of low-quality, cropped, or colorized copies of photographs or films) or to performances of dramatic works or musical compositions is, however, a much more difficult question. With respect to these works and acts, there are, as we have seen, substantial countervailing considerations, including the desires of future audiences and interpreters to subject existing works to new readings, as well as to use them as the raw material for their own creative endeavors, and these considerations conflict with the interest in respecting authorial visions. Even such a champion of moral rights as Kundera seems to recognize as much when he writes that he, like Max Brod, would not have found the strength to fully carry out Franz Kafka's request that his unfinished manuscripts be burned upon his death.⁴⁰⁵ In support of this view, Kundera cites an episode from *Don Quixote* in which a poet had asked his friend Ambrosio to burn the poet's works upon his death.⁴⁰⁶ As Ambrosio is about to burn the poems at the poet's funeral, a mourner steps forward and asks him not to accede to the poet's wish. Before Ambrosio can answer, however, the mourner seizes a few pages from the ground, prompting Ambrosio to state, "Out of courtesy, sir, I will permit you to keep those that you have taken; but it is futile to think that I will refrain from burning the rest."⁴⁰⁷ Kundera admires Ambrosio's position:

"Out of courtesy, I will permit you"; meaning that even

405. See KUNDERA, *supra* note 1, at 276. For that matter, Stravinsky too was hardly immune from the temptation to depart from strict obedience to his predecessors. His ballet *Pulcinella*, for example, transforms into a modern idiom music attributed to the eighteenth-century composer Giovanni Battista Pergolesi. In the words of one critic, "Pergolesi has been transformed at every moment into something quite new. The baroque progressions are no longer representatives of a musical direction and motion; they are literally sound objects or blocks of sound which gain new meanings from new contexts." ERIC SALZMAN, *TWENTIETH CENTURY MUSIC: AN INTRODUCTION* 48 (1967). Cf. Levinson & Balkin, *supra* note 348, at 1643 (arguing that "Stravinsky's eclecticism and his demands for 'objectivity' in performance are two sides of the same coin," in that "[i]t is precisely because one has become so detached from the past and thus from a living tradition . . . that one must make reference to 'objective' indicia—for example, the written text, the actual size of the musical forces at the first performance, and so on"). Compare NORMAN LEBRECHT, *THE COMPANION TO 20TH-CENTURY MUSIC* 342 (1992) (describing the work as a "rape" of Pergolesi), with Letter from Pierre Monteux to Igor F. Stravinsky (Mar. 11, 1923), in 2 STRAVINSKY: *SELECTED CORRESPONDENCE*, *supra* note 2, at 64 (stating that some critics had been expecting a "complete deformation" of Pergolesi, and "regretted that there was not more 'Stravinsky' in the arrangement").

406. See KUNDERA, *supra* note 1, at 276-77.

407. *Id.* at 277 (quoting MIGUEL CERVANTES, *DON QUIXOTE*). Kundera does not state which edition of the text he is quoting. A slightly different translation of the passage quoted above, however, may be found at page 103 of the Penguin Classics edition (J.M. Cohen trans., 1950).

though a dead friend's wish has for me the force of law, I am not a lackey to the laws, I respect them as a free being who is not blind to other values, values that may stand opposed to the law, such as, for instance, courtesy or the love of art. That is why "I will permit you to keep those that you have taken," while hoping that my friend will forgive me. Still, in making this exception I have violated his wish, which for me is law; I have done so on my own responsibility, at my own risk, and I've done so *as a violation of a law*, not as a denial and nullification of it; that is why "it is futile to think that I will refrain from burning the rest."⁴⁰⁸

Unfortunately, there is no algorithm that tells us precisely how such conflicts between the individual and the interpretive community should be resolved. Both individuality and community are important aspects of human flourishing, and perhaps no proposed reconciliation can be sufficiently sensitive to both needs.

I would nevertheless suggest that, although there may be no ideal way to handle this dilemma, perhaps the best we can hope for is something like the method ordained under the American copyright system: namely, providing the author with a waivable right, of finite duration, to authorize the public performance of her work and to create derivative works based upon that work. Thus, as long as they retain the copyright to their works, future Stravinskys should be allowed to prevent conductors from rendering distorted versions of *Jeu de Cartes*, and future Becketts should be allowed to enjoin companies from performing altered versions of *Waiting for Godot*. But this right should be both waivable and terminable—perhaps terminable much sooner than the current span of author's life plus fifty years, not only for the nonideal reasons relating to the potential negative consequences of nonwaivable rights, but also because in these cases a nonwaivable right would conflict with the need of each generation to reshape and refashion its own experience. Of course, if moral rights are waivable and nonperpetual, some performers and some interpreters will abuse the system by trivializing, distorting, or exploiting for commercial purposes the work of an author who has given up her rights or whose rights have expired. But if we wish to have a vital culture, we may need to tolerate some such lapses of taste and respect; perhaps some "wrongs" cannot be remedied without creating worse wrongs. In the case of moral rights, the prospect of worse wrongs is substantial, for a culture that respects, but refuses to confront, challenge, and remake the works of the past,

408. KUNDERA, *supra* note 1, at 277-78 (quoting CERVANTES, *supra* note 407, at 103).

risks consigning those works to the irrelevance of the museum.⁴⁰⁹

My final observation is that the knowledge to be gained from what might be viewed as different judicial and legislative experiments with moral rights protection may eventually provide us with empirical evidence that will be useful in further refining the optimal scope of these rights. Someday, for example, we may have a firmer basis for deciding, one way or another, such issues as whether endowing artists with moral rights is likely to have an effect on the preferences of either artists or the public; whether most artists will waive their rights under a waivable rights system;⁴¹⁰ and whether the demand for art really does decrease if artists are endowed with nonwaivable rights. The only way to learn is to test our theories against further experience. Perhaps the great variation among jurisdictions in response to the moral rights dilemma provides the seeds for the closest we may be able to come to controlled experimentation on these and other issues.

409. Cf. DEWEY, *supra* note 161, at 8 (arguing that “[o]ur present museums and galleries to which works of fine art are removed and stored illustrate some of the causes that have operated to segregate art instead of finding it an attendant of temple, forum, and other forms of associated life”); POIRIER, *supra* note 146, at 101-02 (describing the “Emersonian conviction” that no great writers “ever wholly own or pretend to own what they produce; it is corporately owned by all of them and issues from a ‘genius’ to which no individual can claim exclusive rights. Originality is something in which all of us own a share.”).

410. Compare REPORT, *supra* note 139, at 184-85 (noting lack of hard evidence thus far concerning whether need for employment forces artists to waive their rights under VARA), with Peter H. Karlen, *Moral Rights and Real Life Artists*, 15 HASTINGS COMM. & ENT. L.J. 929, 936 (1993) (asserting, without citation, that “[w]ith most commissioned works, the agreement between the parties usually does not have a waiver clause,” but that “contracts for large public works, commissioned by a developer or public agency, often contain a waiver clause, albeit usually a defective one”), cited in Hansmann & Santilli, *supra* note 135, at 128 n.92.