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Reconciling the "Moral Rights" of Authors with the First Amendment Right of Free Speech

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I. INTRODUCTION

The United States may be copyright's most enthusiastic cheerleader. In its pursuit for stronger copyright protection throughout the world, the United States consistently claims that copyright serves the interests of both authors and society.[1] That view is also reflected in United States law, as the past several decades have witnessed a continual strengthening of copyright protection in the United States. In some respects, the United States and other industrialized countries seem to be engaged in a frenzied race to see who can offer the strongest copyright protection.

On the other hand, the United States has steadfastly (or stubbornly, depending on one's view) resisted the international trend to augment the copyright with additional authors' rights. In contrast to the civil-law nations of continental Europe, the United States has never firmly embraced the concept of "moral rights" for authors.[2] Many view copyright as the best way to encourage authors to produce and disseminate the works of art and literature that society desires.[3] A copyright is

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1. *See, e.g.*, Mazer v. Stein, 347 U.S. 201, 219 (1954):

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors and inventors in science and the useful arts.

A more recent expression of the same sentiment appears in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("[T]he immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the public good.").

2. The various rights that comprise the moral rights are described in more detail in Part I *infra*.

3. *See, e.g.*, Adam Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorizaton and the Philosophy of Moral Rights*, 82 Nw. U. L. Rev. 1011 (1988); Edward L. Carter, *Promoting Progress or Rewarding Authors? Copyright Law and Free Speech in* Bonneville Interna-

an economic right that can be readily transferred, allowing publishers to recoup their costs of printing and distribution. Moral rights – which exist in the author and are usually non-transferable – are viewed as interfering with this smooth distribution process, resulting in an undesirable "anti-commons."[4]

Notwithstanding these objections, it now seems clear that moral rights are here to stay, even in the United States. A major step on the road to acceptance of moral rights occurred when the United States ratified the Berne Convention in 1988.[5] Article *6bis* of Berne requires all signatory nations to provide certain types of moral rights protection.[6] To help satisfy this new obligation, Congress enacted the Visual Artists Rights Act of 1990 ["VARA"] shortly after Berne came into force.[7] Although far from a comprehensive moral rights statute, VARA does provide certain specific rights in "works of visual art," a small subset of the body of works covered by copyright.[8] Along with various other federal and state moral rights statutes, VARA is evidence that the longstanding

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tional Corp. v. Peters, 2002 B.Y.U. L. Rev. 1155, 1176-77 (suggests that moral rights are inconsistent with the goals of copyright); Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. Rev. 1, 85 (1997); Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 Nova L. Rev. 421, 422 (1990) (moral rights are inefficient and "sharply conflict with fundamental United States legal principles of copyright"); Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1128 (1990).

4. The term "anti-commons" describes a situation in which numerous people retain the legal right to control use and disposition of property. The concept owes its origins to Michael A. Heller's groundbreaking article, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harv. L. Rev. 621 (1998). An anti-commons creates significant inefficiency, as nothing useful can be done with the property without the time and expense of obtaining the consent of everyone with an interest.

5. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

6. Berne Convention for the Protection of Literary and Artistic Works [hereinafter "Berne Convention"]. Article *6bis*(1) of the 1971 Paris Text provides:

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

7. Pub. L. 101-650, 104 Stat. 5089.

8. 17 U.S.C. § 101 provides:

> A "work of visual art" is –
>
> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
>
> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

resistance to moral rights in the United States is finally beginning to lose purchase.

But the debate over moral rights in the United States is far from complete. Even though the United States has adopted certain limited moral rights protection,[9] a heated debate continues about whether such rights serve any useful purpose. Opponents of moral rights protection remain convinced that copyright offers sufficient incentive.[10] Proponents, by contrast, argue that the existing moral rights are not enough, and should be expanded in both scope and extent.[11]

The smoke generated by this core policy debate largely shrouds another important issue. Even if Congress were wholeheartedly to embrace broad moral rights, it is unclear whether a comprehensive moral rights statute would be constitutional. This constitutional debate actually has two separate aspects. First, some question whether Congress has legislative authority to enact moral rights legislation.[12] Second, to the extent an author's exercise of moral rights impairs the speech of others, there are potentially serious First Amendment concerns with moral rights legislation.[13]

Other scholars have addressed the issue of Congress's power to enact moral rights legislation.[14] This article explores the second consti-

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9. Part II.B discusses the various federal and state moral rights laws in force in the United States.

10. *See* sources cited *supra* note 3. *See also* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 Harv. Int'l L. J. 353 (2006) (arguing that moral rights protection in the United States and the United Kingdom have actually decreased the total legal protection for authors); Vera Zlatarski, *"Moral" Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States*, 23 Colum.-VLA J.L. & Arts 201 (1999) (argues that moral rights do not provide proper incentives in the case of public art).

11. Otto W. Konrad, *A Federal Recognition of Performance Art Moral Rights*, 48 Wash. & Lee L. Rev. 1579 (1991); Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. Ill. L. Rev. 151; Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 Wash. & Lee L. Rev. 795 (2001); Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 Colum. J.L. & Arts 297 (2002); Lior Jacob Strahilevitz, *The Right to Destroy*, 114 Yale L. J. 781 (2005).

12. *See, e.g.*, Eric Bensen, *Note, The Visual Artists' Rights Act of 1990: Why Moral Rights Cannot be Protected Under the United States Constitution*, 24 Hofstra L. Rev. 1127, 1133-38 (1996); Matt Jackson, *Harmony or Discord? The Pressure Toward Conformity in International Copyright*, 43 IDEA 607, 625 (2003).

13. *See infra* note 15.

14. The authors cited *supra* note 12 make the case against Congressional authority. Taking a contrary position are Konrad, *supra* note 11, at 1598-99, and Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 Vand. L. Rev. 1, 70 (1985).
Although this article will not delve into the issue of where Congress derives the power to enact moral rights legislation, that question is not completely irrelevant to the topic at hand. As discussed *infra* at text accompanying notes 166 to 174, federal copyright law enjoys a special first amendment

tutional question: whether VARA and other moral rights legislation can be reconciled with the free speech command of the First Amendment. Although some limited discussion of this issue already exists in the literature,[15] no one has undertaken a comprehensive analysis of the issue. Most of the existing scholarship focuses exclusively on VARA, ignoring the considerable body of state moral rights legislation.[16] Few consider branches of free speech law, such as content-neutral regulation of speech, commercial speech, and defamatory speech, that may have significant bearing on the First Amendment analysis.[17] But perhaps most importantly, all of the authors seem to assume that the same First Amendment principles apply to all moral rights.[18] In fact, the truth is just the opposite. Different moral rights present significantly different

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status because of its roots in Article I of the Constitution. Whether federal moral rights legislation enjoys that same status is discussed *infra* at text accompanying notes 166 to 210.

15. A number of scholarly articles recognize the First Amendment issues in moral rights. Of these, most suggest that at least some moral rights laws are unconstitutional, including Bensen, *supra* note 12, at 1139-44; Anne K. Fujita, *The Great Internet Panic: How Digitization is Deforming Copyright Law*, 2-FALL J. Tech. L. & Policy 1, 50 (1996); Gorman, *supra* note 3, at 422; Jackson, *supra* note 12, at 625, Kathryn A. Kelly, *Moral Rights and the First Amendment: Putting Honor Before Free Speech?*, 11 U. Miami Ent. & Sports L. Rev. 211, 246 (1994); Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(a)*, 77 Wash. L. Rev. 985, 1029 (2002) (suggests that a non-waivable integrity right could violate the First Amendment, but that other rights would be acceptable); Michael C. Penn, *Comment, Colorization of Films: Painting a Moustache on the "Mona Lisa?"*, 58 U. Cin. L. Rev. 1023, 1036 (1990) (discussing proposed Film Integrity Act); and Greg R. Vetter, *The Collaborative Integrity of Open-Source Software*, 2004 Utah L. Rev. 563, 657 ("First Amendment freedom of expression traditions arguably conflict with strong moral rights."). Other articles argue that moral rights would be justified, including Konrad, *supra* note 11, at 1608 (moral rights laws that prevent distortion of author's message are valid); Strahilevitz, *supra* note 11, at 828-29; 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, 995-97 (1995); and Zlatarski, *supra* note 10, at 219; *see also* Wojnarowicz v. American Family Association, 745 F. Supp. 130, 140 (1990) (New York moral rights provision does not violate right to free speech).

16. Notable exceptions are Konrad, *supra* note 11, and Penn, *supra* note 15, both of whom deal with issues not covered by VARA.

17. Again, some of the articles go into more depth than others. For example, Fujita, *supra* note 15, at 50, recognizes that the law of defamation may provide a useful tool in some moral rights cases. Kelly, *supra* note 15, at 239-41, recognizes that some moral rights legislation will be judged under the standard applicable to "symbolic speech." Yonover, *supra* note 15, at 995, recognizes that different standards could apply in some cases, but fails to address how these standards might apply.

18. Of the articles discussing the free speech question, only four explore the First Amendment issues in considerable depth: Bensen, *supra* note 12, Kelly, *supra* note 15; Konrad, *supra* note 11, and Yonover, *supra* note 15 (Professor Yonover revisited the question again a year after the cited article, *see* Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 Cardozo Arts & Ent. L. J. 79, 114-16 (1996). However, this article closely parallels her earlier piece, and adds nothing to the First Amendment analysis.). Of these four works, only Professor Kelly recognizes that each moral right presents its own unique First Amendment problems, and should be analyzed under different tests.

free speech problems. Rather than a "one size fits all" approach, this article will demonstrate that each of the moral rights must be judged on its own, often under quite different aspects of First Amendment doctrine. Thus, although the current literature does provide a number of useful observations, a more complete analysis is missing. This article attempts to provide that comprehensive, multifaceted analysis.

The article concludes that the First Amendment does not significantly limit the enforcement of those moral rights recognized by state and federal law. Several features of moral rights laws support this conclusion. First, many acts that infringe moral rights do not qualify as speech, and therefore receive no First Amendment protection.[19] For example, the *droit de suite*, or resale right, is clearly constitutional under this rationale, as it involves no speech whatsoever.[20] Second, even when the offending act is speech, most moral rights laws can be justified, depending on the circumstances, by one or more of several arguments. Indeed, many moral rights statutes are categorically valid under the First Amendment. The rights to preserve the integrity of works and to prevent destruction of those works[21] are valid even when the offending act involves speech, as the governing laws regulate speech without regard to its content.[22] The right to control when a work is disclosed to the public is also a valid content-neutral regulation for the same reason.[23] The various rights to police who can be named as author of a work[24] are categorically valid when they are applied to commercial speech, as those rights either regulate false statements in commerce or require the disclosure of additional relevant information.[25] Taken together, these situations comprise most of the moral rights disputes that are likely to arise. Thus, in most cases a party who seeks to enforce her moral rights will have no difficulty overcoming a First Amendment defense.

The only moral rights laws that do not survive a constitutional challenge under the content neutral or commercial speech arguments are those dealing with (a) non-commercial speech about the identity of the

19. *See infra* text accompanying notes 151 to 161.

20. The *droit de suite* is discussed *infra* at text accompanying note 100.

21. From a moral rights perspective, the rights of integrity and destruction are closely linked. However, as the two rights present significantly different free speech concerns, this article treats them as separate and distinct rights.

22. *See infra* text accompanying notes 282 to 283 (integrity) and 276 to 281 (destruction).

23. *See infra* text accompanying notes 286 to 320. The law is also valid because it is a traditional part of federal copyright law. *See infra* text accompanying notes 390 to 394 .

24. As will be discussed in Part I, the law recognizes both a right to be named as the author of works one actually produces, as well as a right *not* to be named as author of works one did not produce.

25. *See infra* text accompanying notes 287 to 292.

author of a work, and (b) display or publication of an unaltered work or faithful reproduction under the Louisiana display right.[26] Of these remaining cases, some moral rights laws can be sustained under the First Amendment principles that apply to defamatory speech. If the author is suing someone who made a false statement of authorship – that is, either claiming that the author created a work that she did not, or that someone else created one of the author's works – the law of defamation applies directly. Here the First Amendment will allow recovery as long as the author can demonstrate constitutional malice.[27] On the other hand, the defamation analogy is of no avail in cases of "non-attribution," where the defendant has made no statement. Similarly, defamation law is inapplicable when a defendant displays accurate versions of the artist's work. These last two cases are governed by the compelling interest standard. Under that standard they are almost certainly unconstitutional. Thus, of all the moral rights provided by state or federal law, only a claim for non-attribution in a non-commercial setting, and a claim challenging display of a work in violation of the Louisiana display right, categorically violate the First Amendment.

Before beginning the analysis, a pair of *caveats* are in order. First, the conclusions of this article apply only to existing moral rights laws. The article identifies certain key features of these existing laws that prove beneficial in a First Amendment challenge. If those features were changed, the outcome may well differ. In the same vein, should Congress or a state legislature adopt some of the moral rights recognized in other nations – such as the right of withdrawal or the right to be free of excessive criticism – the First Amendment arguments set out in this article might not apply.

Second, this article is limited to the right to free speech under the United States Constitution. United States free speech law is particularly idiosyncratic. In much of the rest of the world, considerations of human dignity temper any discussion of speech that impugns an individual's reputation.[28] Human dignity in these systems is itself a human right that

26. La. Rev. Stat. 51:2153(3) (2005). This provision is discussed in depth *infra* at text accompanying notes 138 to 141.

27. *See infra* text accompanying notes 363 to 414.

28. For example, the Supreme Court of Canada's landmark decision in *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, held that considerations of human dignity and reputation could be invoked to sustain a common-law defamation claim against a free expression challenge. The Canadian *Charter of Rights and Freedoms* explicitly contains a right of freedom of expression in section 2. Conversely, there is no explicit right to human dignity. Nevertheless, the Court held that the *Charter*, taken as a whole, includes human dignity as a basic principle. *Id.* at paragraphs 120-121. The Supreme Court of Canada employed similar reasoning in *R. v. Lucas*, [1998] 1 S.C.R. 439 at

must be balanced against another's right to speak about that person. As a result, the core value of human dignity might save a Canadian or European moral rights statute from a free speech challenge. In the United States, by contrast, there is significantly less concern for protecting a person's reputation and dignity. The free speech analysis in other nations would proceed along very different lines than that appearing in this article. Although the ultimate conclusions would probably be the same, the reasoning would differ.

Finally, it might also behoove the reader if the article were to employ a uniform terminology for the entire discussion. This article will use the terms *author* and *rightholder* to refer to the party asserting a moral right. It will use the term *author* in cases where the person asserting the right is in fact the party that created the work in question,[29] saving the term *rightholder* for cases involving the right of dissociation, where the person asserting the right did not create the work. The author or rightholder will always enforce her rights against a person called the *infringer*.[30] Moreover, to make the references even more uniform, the author or rightholder will always be feminine, while the infringer will always be masculine.[31]

II. A BRIEF OVERVIEW OF MORAL RIGHTS

A. Moral Rights in International Law

The term "moral rights" derives from *droit moral*, the French term for the collection of additional rights afforded to an author in her creations.[32] Borrowing from French is appropriate, as it was in that nation that the moral rights were first fully fleshed out, and still receive the greatest support.[33] In France, the *droit moral* is treated as a type of natu-

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paragraph 94 (*per* Cory, J.) (the criminal offense of defamatory libel is constitutional notwithstanding the *Charter* guarantee of freedom of expression), and *Aubry v. Editions Vice-Versa* [1998] 1 S.C.R. 591 (right to prevent publication of private facts does not violate free expression, as such right protects individual interest).

29. As used in this article, the term "author" refers to all those who produce works that qualify for copyright or moral rights protection. Thus, the term includes not only novelists and poets, but also painters, composers, architects, and computer programmers.

30. This usage is consistent with the federal Copyright Act. Section 501(a) of that Act (17 U.S.C. § 501(a)) defines infringement as a violation of any of the copyright owner's rights under § 106, or a violation of any of an author's moral rights under § 106A.

31. It is an escapable fact that English pronouns are gender-based. Rather than bemoan this feature, this article uses it as an advantage.

32. Lee, *supra* note 11, at 818.

33. *Id.* at 803-04; 2 Ralph E. Lerner & Judith Bresler, *Art Law* 944 (2d ed. 1998).

ral right, a reflection of the author's infusion of her personality into her work.[34] Under this view, the moral rights are personal rights, distinguishable from and existing independently of the primarily economic copyright.

However, the English translation distorts the real meaning of the French term.[35] And the adopted Anglicization has proven particularly unfortunate, perhaps explaining in part the reluctance of the Anglo-American legal systems to adopt moral rights. As will be demonstrated below, the United States actually provides several rights that are the functional equivalent of various moral rights.[36] But labeling these rights "moral" rights does not sit well with many legal scholars. First, the term "moral rights" is often used in Anglo-American discussions to describe rights that exist not at law, but solely because of a moral or ethical duty.[37] The moral rights of authors, however, are true legal rights that are fully enforceable in court. Second, the adjective "moral" also suggests that the author has some sort of irrefutable entitlement to certain rights. Although that sense of natural-law entitlement might exist in France, Germany, and some of the other ardent advocates for moral rights, it does not sit well with traditional Anglo-American arguments for authors' rights.

Yet one need not invoke natural law to justify a regime of moral rights. Moral rights can also fit comfortably into Anglo-American notions of intellectual property, in which rights are justified primarily because they provide incentive for people to create and disseminate their creations to society.[38] Copyright provides a monetary incentive to create. On the other hand, authors create for a number of reasons. Al-

34. Lee, *supra* note 11, at 801-03; Ong, *supra* note 11, at 203-04.

35. Lee, *supra* note 11, at 801-02 and 818, contains a good discussion of the problems with the term "moral rights."

36. *See infra* text accompanying notes 76 to 101 for a discussion of other state and federal rights that are equivalent to moral rights.

37. *See generally* Granz v. Harris, 198 F.2d 585, 590 (1952) ("'Moral right' seems to indicate to some persons something not legal, something meta-legal."); *see also* United States v. John K. & Catherine S. Mullen Benevolent Corp., 63 F.2d 48, 55 (1933) (plaintiff's claim for a right of reassessment is not enforceable, with court stating, "At most there is a moral right which the Legislature of the state can recognize and enforce and . . . by . . . statute); Erin E. Byrnes, *Therapeutic Jurisprudence: Unmasking White Privilege to Expose the Fallacy of White Innocence: Using a Theory of Moral Correlativity to Make the Case for Affirmative Action Programs in Education*, 41 Ariz. L. Rev. 435, 563 (1999) (distinguishing between moral rights and enforceable legal rights).

38. "'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.' Artists' rights are consistent with the purpose behind the copyright laws and the Constitutional provision they implement: 'To promote the Progress of Science and useful Arts.'" H.R. Rep. 101-514, 101st Cong., 2nd Sess. 1990, 1990 U.S. Code Cong. and Admin. News 6915 [hereinafter *Legislative History*].

though economic reward can be and often is an important motivator, an overwhelming amount of art and literature is created in situations where there is no possibility of reward.[39] Rewards other than money may also be important to authors. Fame, which can only occur if society continues to associate the author with her work, is an important, albeit difficult to measure, incentive for authorship.[40] Moral rights provide that unbreakable bond between the author and her work, and accordingly help to ensure that these nonmonetary benefits accrue to the author. Furthermore, moral rights help preserve the integrity of the author's intended message.[41] In this fashion, moral rights complement the copyright, while serving the same ultimate goal.

1. The Primary Moral Rights

At first glance, the moral rights look like an arbitrary collection of "perks" for authors. However, there is a theme that defines the moral rights and distinguishes them from the copyright. In one way or another, moral rights are designed to protect or enhance the *reputation* that an author derives from her works.[42] There is a general consensus that protect-

39. For example, a person making entries in a personal diary, or doodling during a boring meeting, is not motivated by any expectation of financial reward.

40. Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. Rev. 1171, 1176-77 (2005).

41. Immanuel Kant justified a theory of limited moral rights on this basis. Immanuel Kant, *Von der Unrechtmäßigkeit des Büchernachdrucks* (1785), as reprinted in 106 UFITA 137, at 142-43 (1987). More recent scholars have also invoked the need to preserve the author's message as a basis for many of the moral rights. *See, e.g.*, Konrad, *supra* note 11, at 1631; Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 Notre Dame L. Rev. 1945, 1985-86 at text accompanying notes 233-34; Margaret Ann Wilkinson, *The Public Interest in Moral Rights Protection*, 2006 Mich. St. L. Rev. 193, 214-15.

42. The very first sentence of the House Report issued in connection with VARA states, "H.R. 2690, the Visual Artists Rights Act of 1990, protects both the reputations of certain visual artists and the works of art they create." *Legislative History*, *supra* note 38, at 6915. The legislative history also indicates that the statute is concerned only with a person's reputation *as an artist*, not her more general reputation in society. *Id.* at 6925 (focus is on the person's "professional honor;" and that the "standard used is not analogous to that of a defamation case, where the general character of the plaintiff is at issue."). *See also* Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. Legal Stud. 95 (1997) (an economic analysis of moral rights that demonstrates how such rights serve to limit "reputational externalities"). In truth, moral rights laws protect more than reputation. VARA itself speaks both of an artist's reputation and her "honor," at least in connection with the right of integrity. 17 U.S.C. § 106A(a)(2). Professor Kwall argues persuasively that they protect the author's human spirit, a notion that includes, but is far more encompassing, than reputation. Kwall, *supra* note 11, at 152. Professor Ong asserts that they protect an artist's "aesthetic vision." Ong, *supra* note 11, at 301. And Professor Lee argues that considerations of human dignity justify moral rights protection. Lee, *supra* note 11, at 799. However, as notions of honor, spirit, vision, and dignity are difficult to define with precision, much less quantify, this article will risk oversimplification and speak primarily in

ing an author's reputation is a desirable norm, even if scholars disagree on why that is so, or why non-author creators do not warrant similar protection.

Of course, myriad things can affect an author's reputation. As a result, creative minds have devised a number of different moral rights. For example, some nations give an author the right to withdraw a work from public view even after it has been sold to another.[43] Canada recognizes a right of anonymity: a right to prevent others from associating the author's name with her own work.[44] At least one scholar has advocated a right to destroy a work, which would effect a permanent withdrawal.[45] French law even recognizes a right to choose whether to create at all,[46] a right to compel completion of a commission,[47] and a general right to be free from "excessive criticism."[48] Even the *droit de suite*, or resale right, has a sufficient reputational flavor to justify including it in a discussion of moral rights.[49] Taken together, this collection of rights helps an author thwart various threats to her reputation.[50]

Many of these rights are actually fairly rare. The most common moral rights are those of disclosure, attribution, and integrity.[51] The right of *disclosure* is the right to determine when – or whether – a given work is published. This right recognizes that the author is the best judge of whether a work is complete. As drafts and works-in-progress lack the

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terms of authorial reputation.

43. The withdrawal right – sometimes referred to by its French name *droit de retrait ou de repentir* – may also allow the artist to modify the work. Lerner & Bresler, *supra* note 33, at 945. However, if the work has been sold to another, the author is normally required to compensate the owner for any harm. *Id.* at 945-46.

44. Copyright Act (Can.), R.S.C. chap. C 42, § 14.1.1 (1985). This provision is discussed in depth in Wilkinson, *supra* note 41, at 224-31.

45. Strahilevitz, *supra* note 11.

46. Lee, *supra* note 11, at 803-04.

47. Zlatarski, *supra* note 10, at 205-06.

48. Lee, *supra* note 11, at 803-04; Kelly, *supra* note 15, at 219. Rights allowing withdrawal and preventing excess criticism are fairly rare, possibly because they raise serious practical and policy concerns. Nevertheless, at least one state may recognize an analogous right. *See infra* text accompanying notes 138 to 141.

49. The *droit de suite* recognizes that as an author's reputation increases over time, the value of her works – even those produced when the author was relatively unknown – will also increase. The *droit de suite* does nothing to preserve or augment that reputation. However, it allows the author to reap some of the benefits attributable to that enhanced reputation. As such, it should also be considered one of the collection of moral rights.

50. A French scholar has argued convincingly that as moral rights law has developed, it has increasingly drifted from its roots, to the point where the law now conflicts with the core values justifying additional authors' rights. Christophe Geiger, *Droit D'auteur et Droit du Public a L'information – Approche de Droit Compare* 115-162 (2004).

51. Lee, *supra* note 11, at 801.

refinement and quality of completed works, a right to prevent premature disclosure gives the author significant control over how her reputation develops.

The right of *attribution*, traditionally referred to as "paternity,"[52] is the author's right to be acknowledged as the creator of her own works. This right relates directly to reputation, as it ensures that the author receives credit for the work she has produced. An author may invoke the attribution right to prevent removal or alteration of the author's name, pseudonym, or other identifying information, or the false attribution of the author's work to another. Although the precedent is not as clear, there may also be a positive duty to name the author even in cases where the person displaying the work has said nothing about authorship, as might occur if the work was originally distributed as an anonymous work. Many jurisdictions also recognize a right of *dissociation*, which is the right not to be connected with works that the author did not create.[53] Although this right of dissociation is in some ways merely a corollary of the attribution right, in other ways it goes even further.[54] Because the dissociation right presents different free speech issues, it deserves separate mention.[55]

The right of *integrity* allows an author to prevent alteration or mutilation of her work. From a reputational standpoint, this right is logically intertwined with the rights of attribution and dissociation. Changes to a work that render it less attractive will in most cases harm the author's reputation only if the public thinks that the altered work was the author's product. If the public recognizes that a third party made the changes, the author's reputation will remain unchanged.[56] Some nations

52. The term "paternity" reflects the French name for the right, *Droit à la paternité*. Lerner & Bresler, *supra* note 33, at 946. The right is also commonly referred to as the right of "authorship." The Berne Convention uses this last term, discussing the author's right to "claim authorship." Berne Convention, Article 6*bis*(1).

53. Most courts and commentators refer to the dissociation right as the right of "non-attribution." However, that term presents several difficulties. When discussing the right of attribution, it is sometimes necessary to distinguish between situations where the infringer makes a false statement of authorship and those where the defendant says nothing about authorship. The word "non-attribution" more accurately describes the situation where the infringer is silent. To prevent confusion with the attribution right, this article will use the term "dissociation" to refer to the right *not* to be associated with a work.

54. The full scope of the VARA dissociation right is discussed *infra* note 68.

55. In some jurisdictions, including possibly some in the United States, the dissociation right applies even to works that the author did create. This broader right will be referred to as the right of "disavowal". *See infra* note 141. A disavowal right presents serious free speech concerns. *See infra* note 388.

56. In theory, an author's reputation could also be damaged even if the changes are not attributed to the author. This sort of harm can be likened to the trademark-law concept of "tarnishment"-

recognize an affiliated right to prevent *destruction* of works. Although the difference between alteration and outright destruction is in one sense a difference in degree rather than kind, destruction presents a special problem from the perspective of authorial reputation. If a work is destroyed, there will be no altered work for people to use to gauge the author's talents. The destruction right therefore helps to preserve the work so that it can continue to spread the author's message, and thereby influence the author's reputation.[57]

2. Moral Rights Obligations Imposed by International Law

France began to develop its concept of moral rights approximately two hundred years ago, during an era of political, social, and intellectual revolution.[58] Although France's efforts to export its political and social ideals would ultimately meet with only modest success, its notion of moral rights received a much warmer reception, at least in western continental Europe. Within a few decades, these same western European nations were to spearhead an effort to internationalize intellectual property rights, eventually culminating in a series of treaties that allow parties to transport existing intellectual property rights to other systems.[59] Because the moral rights were considered part of the package of authors' rights, it was perhaps inevitable that they would find their way into this treaty regime.

The effort to include moral rights in the intellectual property treaty system bore fruit in the 1928 revision to the Berne Convention for the Protection of Literary and Artistic Works.[60] That revision saw the addition of Article 6*bis*, which reads in relevant part:

> (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim au-

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style dilution. Suppose that someone paints a Hitler mustache on a face in a painting. That symbolism carries such a strong message that it could possibly make viewers think less of the art, even if they realize that the author is not responsible.

57. This notion of "preservation" proves particularly useful in the free speech analysis. *See infra* text accompanying notes 297 to 302.

58. Lerner & Bresler, *supra* note 33, at 944. In the spirit of the moral right of attribution, the French do not deserve all of the credit. Similar developments occurred in Germany at roughly the same time. Wilkinson, *supra* note 41, at 195.

59. In addition to the Berne Convention, which dates from 1886, the same powers also entered into the Paris Convention for the Protection of Industrial Property in 1883, which covers patents, trademarks, and industrial design.

60. An interesting discussion of the genesis of the moral rights provision in Berne is set out in Wilkinson, *supra* note 41, at 195-96.

thorship 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 honour or reputation.

* * *

Article 6*bis* does not effect a wholesale adoption of the western European moral rights paradigm. Berne signatories are required to implement only two of the recognized moral rights: attribution and integrity. Moreover, the integrity right applies only when modification of the work would harm the author's honor or reputation.[61] Notwithstanding these limitations, Article 6*bis* affirmed that moral rights were an important part of the overall scheme of legal protection of authorship. After 1928, all nations that joined the Berne Convention were under an obligation to amend their national legislation to provide authors effective, non-alienable[62] moral rights of attribution and integrity.

B. Moral Rights in the United States

Moral rights have received a cooler reception in the United States than in continental Europe. The United States resisted joining Berne for over a century; a recalcitrance due at least in part to that treaty's moral rights obligation.[63] Even after ratification, the United States has taken only minor steps to meet the mandate of Article 6*bis*. Moreover, the adoption of TRIPS[64] in 1994 heralded a significant retreat from Article

61. As Professor Ong has already noted, honor and reputation are not the same. Ong, *supra* note 11, at 307.

62. The Berne Convention does not explicitly state that moral rights cannot be transferred. However, Article 6*bis* does indicate that the moral rights are "independent" of the economic rights, and persist in the author even after the author has transferred the moral rights. That language lends itself to an interpretation that the moral rights are not transferable, a view that comports completely with the French dualist view of moral rights.

63. Part of the problem is the historic Anglo-American view of authors' rights, which focuses more on the benefits to society rather than the direct interest of the author. Under this view, authors' rights are justified mainly by measuring the extent to which they encourage creation and dissemination of works. For an excellent discussion of the Anglo-American "marketplace" view and the authorial view that prevails in France and Germany, *see* Paul Edward Geller, *Must Copyright Be For Ever Caught between Marketplace and Authorship Norms?*, in Brad Sherman and Alain Strowel, *Of Authors and Origins* 159 (1994). Copyright fits easily into the Anglo-American mold. Moral rights – which afford non-monetary incentives and cannot be commodified because of the prohibition on transfer – were considered at best superfluous, and possibly even counterproductive. Wilkinson, *supra* note 41, at 216.
Of course, these policy arguments were not the only reason the United States hesitated to accept moral rights. Article 6*bis* also suffered from guilt by association, and much of the objection to its provisions stemmed from objection to other requirements of Berne.

64. Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in

6bis. Although TRIPS Article 9(1) incorporates the provisions of Berne virtually wholesale, at the urging of the United States it explicitly excludes the obligations of Berne Article *6bis*.[65] Therefore, failure to have effective rights of attribution and integrity violate Berne, but are not enforceable by trade sanctions through the World Trade Organization.

In spite of this history, it would be wrong to suggest that moral rights have been a complete failure in the United States. In fact, the United States affords authors a number of significant rights above and beyond the copyright. Although these rights may not bear the "moral" rights label, many are functionally similar to true moral rights. Therefore, no inventory of moral rights in the United States is complete without mentioning of all of the federal and state laws providing moral rights-like protections.

1. VARA

Congress's immediate response to Article *6bis* of Berne was the Visual Artists' Rights Act of 1990.[66] VARA, codified at §106A of the Copyright Act, remains to this day the leading moral rights statute in the United States – and the only one drafted with Article *6bis* specifically in mind. The statute provides both of the moral rights called for by Berne. Section 106A(a)(1)(A) deals with attribution, giving the author a right to "claim authorship" of her work.[67] Section 106A(3) provides a right of integrity, limited, as Berne allows, to situations where alteration would affect the author's honor or reputation.

VARA also affords authors two rights that Article *6bis* does not require. Sections 106A(a)(1)(B) and (a)(2) provide a right of dissocia-

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Counterfeit Goods (1994). Because of its unwieldy title, this agreement is usually referred to by the semi-acronym TRIPS.

65. TRIPS Article 9(1) reads:
Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article *6bis* of that Convention or of the rights derived therefrom.
Thus, of all the requirements in Berne, TRIPS omits only the requirement to adopt meaningful moral rights.

66. Pub. L. No. 101-650, 101st Cong., 2nd Sess. (1990) (part of the Judicial Improvements Act of 1990).

67. The phrase "claim authorship" is somewhat curious. Read literally and without an understanding of moral rights laws in other nations, 17 U.S.C. § 106A(a)(1)(A) could be interpreted as nothing more than a defense for an author who takes credit for one of her own works. Nothing in the language suggests that the author can force others to give her credit. However, Article *6bis* of Berne uses the same phrase. When it enacted VARA, Congress merely parroted the language of Berne. Because Berne's right of attribution is widely understood to create positive duties on those in possession of works, VARA's attribution right should be interpreted the same way.

tion.[68] Section 106A(a)(3) creates a right to prevent destruction of works of "recognized stature." However, the destruction right is limited to intentional or grossly negligent destruction of those works.

In many respects, VARA closely tracks the language of Article 6*bis*. Its moral rights remain in force until the death of the author.[69] VARA rights cannot be transferred to others (although they can be waived[70]) and exist independently of ownership or control of the work itself.[71] Nevertheless, VARA comes nowhere close to satisfying the requirements of Berne. Some of the issues are technical. For example, VARA does not apply to "works for hire,"[72] and limits the integrity right to *intentional* modifications of a work[73] – two important restrictions that are not explicitly allowed by Article 6*bis*. But the most important limit on VARA is its exceedingly narrow subject-matter coverage. Article 6*bis*, read literally, requires moral rights protection for all copyright works (although it is doubtful that any signatory actually goes that far). VARA, by contrast, applies only to "works of visual art," a term that is defined to include only original paintings, drawings, prints, sculptures, or photos that exist in 200 or fewer copies.[74] Thus, many of the most economically important copyright works – books, poetry, films, sound

68. 17 U.S.C. § 106A(a)(1)(B) applies to works that the author played no role in creating. 17 U.S.C. § 106A(a)(2), by contrast, applies to works that the author did originally create, but which have been altered in ways the would harm the author's reputation if people attribute the altered work to the author. One author has labeled the latter right the right of "disavowal." Joseph Zuber, *The Visual Artists Rights Act of 1990 – What it Does, and What it Preempts*, 23 Pac. L. J. 445, 478 (1992). Although there are admittedly differences between the rights set out in (a)(1) and (a)(2), for purposes of the First Amendment these differences are of scant, if any, relevance. The ensuing discussion will accordingly refer to both rights as the right of dissociation.

69. 17 U.S.C. § 106A(d)(1).

70. 17 U.S.C. § 106A(e)(1).

71. 17 U.S.C. § 106A(a), (e)(2).

72. 17 U.S.C. § 106A(a) specifies that VARA's moral rights apply only to works of visual art. Section 101 defines the key phrase "work of visual art." Section 2(B) of that definition explicitly provides that a work of visual art does not include "any work made for hire." Because of the way this definition is structured, the treatment of works for hire is different under VARA than it is in the rest of the Copyright Act. In most situations, an employer or commissioning party, rather than the author, owns rights in a work for hire. However, because works for hire are excluded from the definition of works of visual art, there are no moral rights at all in a work for hire, either in the employer/commissioning party or the author.

73. 17 U.S.C. § 106A(a)(3)(A). Similarly, VARA's destruction right applies only to intentional or grossly negligent acts. 17 U.S.C. § 106A(a)(3)(B). However, the dissociation right set out in § 106A(a)(2) is not subject to the same limitation. This discrepancy is somewhat unusual. The dissociation right of (a)(2) is in many respects a hybrid of the attribution and integrity rights, as it prevents associating the author with a work that she produced, but which has been altered in an unflattering way. It would therefore have been consistent to limit the hybrid right to intentional or grossly negligent violations.

74. 17 U.S.C. §101.

recordings, musical compositions, and architecture – fall completely without VARA's ambit. Because of these limitations, VARA falls far short of meeting the United States' Berne requirements.[75]

2. Other Federal Moral Rights

VARA is not the only federal law providing moral rights. Several other federal statutes afford rights analogous to moral rights. Although Congress rarely enacted these laws for the express purpose of preserving or enhancing authors' reputations, the laws nevertheless provide useful tools to authors concerned with their reputation.[76]

The Copyright Act provides at least one additional moral right. Section 106 of the Act gives a copyright owner the rights to perform, distribute, and display many different types of works.[77] Taken together, these § 106 rights constitute a form of disclosure right. Most acts that would violate the right of disclosure involve performance, distribution, or display of a work.[78] Moreover, the rights of performance, distribution, and display are not limited to works of visual art, but instead apply to almost all copyright works.[79] Even though §106 differs from the traditional moral right of disclosure insofar as the right can be transferred,

75. These limitations may also explain the dearth of cases brought under VARA. In its thirteen year history, there have been only a dozen cases brought under the statute. The vast majority of these were brought in New York. *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006); *Pollara v. Seymour*, 344 F.3d 265 (2nd Cir. 2003); *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2nd Cir. 1995), *cert. denied* 517 U.S. 1208 (1996); *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999); *Lilley v. Stout*, 384 F.Supp.2d 83 (D.D.C. 2005); *Scott v. Dixon*, 309 F.Supp.2d 395 (E.D.N.Y. 2004); *Board of Managers of Soho Intern. Arts Condominium v. New York*, 2003 WL 21767653 (S.D.N.Y. 2003) (unreported); *Flack v. Friends of Queen Catherine, Inc.*, 139 F.Supp.2d 526 (S.D.N.Y. 2001); *Peker v. Masters Collection*, 96 F.Supp.2d 216 (E.D.N.Y. 2000); *Pavia v. 1120 Avenue of the Americas Associates*, 901 F.Supp. 620 (S.D.N.Y. 1995); *National Ass'n for Stock Car Auto Racing, Inc. v. Scharle*, 356 F.Supp.2d 515 (E.D. Pa. 2005); *Hunter v. Squirrel Hill Assoc., L.P.*, 413 F.Supp.2d 517 (E.D. Pa. 2005).

76. It has been recognized for some time that existing laws can provide the functional equivalent of various moral rights. Indeed, in the debates concerning United States accession to the Berne Convention, several argued that Article 6*bis* would actually require no changes to United States law, as these other federal laws already provided all the rights called for by Article 6*bis*. H.R. Rep. No. 609, 100th Cong., 2d Sess. 32-40 (1988).

77. The performance right is set out in 17 USC §§ 106(4) and (6); the display right in § 106(5).

78. The author's right to control presentation of her work to the public is also a factor in fair use analysis 17 USC § 107. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 551-52 (1985), the Court indicated that publishing passages from another person's book is less likely to qualify as fair use when the book in question was unpublished.

79. 17 USC §§ 106(4), (5), and (6) list the works covered by each right. The § 106(4) performance right does not apply to sound recordings, and the § 106(5) display right does not cover architectural works.

this feature is not that important in actual practice, as most authors will not transfer the copyright until they are preparing to publish the work.

Other federal laws provide additional attribution rights. For example, the Digital Millennium Copyright Act ["DMCA"][80] provision dealing with "copyright management information" creates a form of back-door attribution right. It prevents people from removing information about the author that is physically connected to the work.[81] Because this DMCA provision applies to all categories of copyright works, and may be enforced not only by the copyright holder, but by "any person injured by a violation,"[82] it affords a potentially useful means for authors to ensure they receive credit for their work.[83]

Federal trademark law also creates both attribution and dissociation rights.[84] The dissociative function of trademark law is well known. The main focus of trademark law is providing a remedy for "passing off" against a person who attempts to sell his goods or services under someone else's trademark. A claim for passing off is, at its core, a claim for dissociation. Several well-known cases have extended the dissociative principles of trademark law to works of art and literature. For example, in *Gilliam v. American Broadcasting Companies, Inc.*,[85] the Second Circuit held that a comedy troupe that created a television show could recover against a television network that aired a significantly altered version of the show under circumstances suggesting the troupe had produced the altered version. Similarly, in *PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc.*,[86] the court held defendant liable for falsely claiming that Jimi Hendrix was the feature performer in recordings in which Hendrix either did not play, or was merely a background performer.

Less well-known is the Lanham Act's right of attribution. Courts

80. Although the DMCA and the Copyright Act are both codified in title 17 of the United States Code, the DMCA is technically not part of the Copyright Act.

81. 17 USC § 1202(b)(1). Note that this section specifically refers to the "copyright holder," not the author. However, the copyright owner can prevent removal of both her name, § 1202(c)(3) and the name of the author, § 1202(c)(2). Because it protects designations of authorship, this provision functions in some ways like a moral right.

82. 17 USC § 1203(a).

83. Of course, this right is not as broad as the attribution right envisioned by Article *6bis* and contained in VARA. 17 USC § 1202(c)(2) does not impose a positive obligation on anyone to add the author's name, or disclose authorship. It merely prevents removal of identifying information that has already been attached. Thus, it would not apply to anonymous works.

84. The primary federal trademark law is the Lanham Act, codified at 15 USC §§ 1051 to 1141n.

85. 538 F.2d 14 (2nd Cir. 1976).

86. 818 F.2d 266 (2nd Cir. 1987).

interpreting § 43(a) of the Lanham Act[87] have developed a doctrine of "reverse passing off."[88] Unlike ordinary passing off, where defendant misleads consumers into thinking that plaintiff produced or sponsored defendant's goods, reverse passing off involves situations where defendant sells goods produced by plaintiff, but under circumstances suggesting the goods are produced by defendant. The reverse passing off doctrine has been applied in several cases involving disputes over authorship.[89] A claim of reverse passing off in such a case is in many ways functionally equivalent to a right of attribution, as it allows an author to insist that her name or other identifying information remains on her work.[90] Admittedly, unlike a "true" attribution right, reverse passing off is available only when a work is being offered for sale. However, as statements concerning authorship are especially important in a situation where the work is being sold, this limitation is as a practical matter not that significant.[91] Because the Lanham Act covers virtually every good or service sold in commerce, it could apply to all the works covered by Berne.

However, a recent United States Supreme Court decision has greatly limited the usefulness of the reverse passing off doctrine as an effective attribution right in works of art and literature. In *Twentieth Century Fox v. Dastar*,[92] the Court held that the Lanham Act did not afford a cause of action to a film company when someone else copied the company's film footage without attributing the company in the credits. The full reach of *Dastar* is not clear. Because the original film had previously been protected by copyright, the case could be read narrowly to

87. 15 USC §1125(a).

88. Although it was not the first case to recognize a claim for reverse passing off, the Ninth Circuit's decision in *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981) was highly influential in the development of the doctrine. Other important decisions are *Williams v. Curtiss-Wright Corp.*, 691 F.2d 168 (3rd Cir. 1982), and *Pioneer Hi-Bred Int'l v. Holden Fdn. Seeds, Inc.*, 35 F.3d 1226 (8th Cir. 1994). For a critique of the doctrine of reverse passing off, *see* John T. Cross, *Giving Credit Where Credit is Due: Revisiting the Doctrine of Reverse Passing Off in Trademark Law*, 72 Washington L. Rev. 709 (1997).

89. In *Waldman Publishing Corp. v. Landoll*, 43 F.3d 775 (2nd Cir. 1994), for example, plaintiff and defendant both produced children's versions of classic novels. Defendant's work borrowed heavily from plaintiff. However, defendant sold its works under the name of a different author. *Id.* at 778-79. The court held defendant liable for reverse passing off under § 43(a) of the Lanham Act.

90. Whether reverse passing off covers cases of complete non-attribution is less clear. On its face, Section 43(a) applies only when defendant makes a false statement of origin. If the defendant says nothing at all about origin, but merely fails to tell consumers who the true source is, some courts will not hold the defendant liable. *See, e.g.*, Morita v. Omni Publications International, Ltd., 741 F.Supp. 1107 (S.D.N.Y. 1990).

91. For the same reason, most attribution disputes involve commercial speech, an area of free speech law governed by a special standard. *See infra* text accompanying notes 384 to 385.

92. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).

prohibit use of the Lanham Act reverse passing off claim only when a work formerly protected by copyright has entered the public domain.[93] However, much of the language in the opinion is broader, focusing on the language of the Lanham Act. *Dastar* may stand for the proposition that a reverse passing off claim under the Lanham Act[94] is never available when a person merely *copies* something designed or produced by another and sells the copy under his own name.[95] Under this broader reading, reverse passing off would be actionable only in so-called "resale" cases,[96] where a party resells an original tangible item manufactured by another without crediting the actual manufacturer. In the case of resale of a work of visual art, VARA already provides a remedy for failure to attribute authorship. Although the Lanham Act does expand the scope of the attribution right to works not covered by VARA, the result of *Dastar* is to deny the potentially most valuable use of the Lanham Act reverse passing off claim; namely, use by an author to demand attribution when her works are copied.[97]

3. State-Law Moral Rights

The federal laws discussed in the prior section augment VARA by affording additional moral rights. However, federal law is not the only source of moral rights in the United States. Sixteen states and Puerto Rico also give authors some form of moral rights protection.[98]

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93. Certain portions of *Dastar* stress the fact that the work had been previously protected by copyright. *Id.* at 33-35.

94. State law may also afford a right to recover for reverse passing off. Cross, *supra* note 88, at 742-51. The effect of *Dastar* on these state laws is not clear. Language in the *Dastar* opinion suggests that the Copyright Act may trump any other laws that would purport to provide a cause of action. *Dastar*, 539 U.S. at 36-37.

95. Most of the *Dastar* opinion is devoted to defining the term "origin" in Section 43(a). The Court concluded that in the case of a good that is copied from another, the "origin" is the producer of the physical copy, not the party that produced the original that served as the model. *Dastar*, 539 U.S. at 35-37.

96. *See* Cross, *supra* note 88, at 722-23 for a discussion of the difference between resale and copying cases.

97. If the broad § 43(a) right of attribution is limited to resale cases, the United States may not be in compliance with its obligation under Berne. Article 6*bis* of Berne does not limit the integrity and attribution rights to physical art works. Thus, nations may be obligated to provide those rights even when a work is copied. And some nations do, in fact, word their moral rights statutes broadly enough to cover both originals and copies. *See, e.g.*, Copyright, Designs, and Patents Act (c. 48) (U.K.) § 77; Act on Copyright in Literary and Artistic Works (Sweden) Art. 3 (1996).

98. Cal. Civ. Code §§ 985, 986, 987, 989, & 997 (2006); Conn. Gen. Stat. Ann. §§ 42-116s & 116t (2004); Off. Code Ga. Ann. § 8-5-7 (2005); La. R.S. § 51.2151-2156 (2005); 27 Maine R.S. § 303 (2005); Annot. Laws Mass. GL ch. 231, § 85S (2005); Mont. Code. Ann. § 22-2-407 (2005); Nev. Rev. Stat. Ann. §§ 597.720, 597.730, 597.740, 597.750, & 597.760 (2005); N.J. Stat. §§ 2A:24A-1 – 24A-8 (2006); N.M. Stat. Ann. § 13-4B-1 – 4B3 (2006); N.Y. CLS Art & Cult. Affairs

Read literally, many of these state statutes give rights equal to or greater than those set out in VARA.[99] California, for example, has both a *droit de suite* and a residual ownership right in certain derivative works; rights nowhere recognized by federal law.[100] Louisiana law allows the author to prevent disclosure not only of altered versions of her work, but in some cases unaltered versions.[101] Similarly, while VARA rights terminate at the death of the author,[102] several states allow moral rights to pass to the author's heirs.[103]

As a practical matter, however, these state laws do not add much to the collection of moral rights. Article VI of the United States Constitution provides that federal law preempts state law under certain circumstances. A law that is preempted has no legal effect. Several authors have argued that most state moral rights laws are preempted by VARA or other provisions of federal copyright law.[104] Although these analyses mainly consider the New York, California, and in one case Massachusetts moral rights statutes, they are nevertheless useful in dealing with preemption under all of the state moral rights regimes. Even these authors concede that not all state moral rights laws are preempted. Limited

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§ 14.01 – 14.07 (2005); N.Y. CLS Penal § 275.35 (2005); 73 Penn. Stat. § 2101 – 2110 (2005); Leyes de Puerto Rico Anotadas tit. 31 § 1401 (2005); R.I. Gen. Laws § 5-62-2 – 5-62-6; 42-75.2-8 (2006); S.D. Codified Laws § 1-22-16 (2006); Utah Code Ann. § 9-6-409 (2005); Wis. Stat. § 44.57 (2005). The Puerto Rican law is analyzed in depth in Pedro G. Salazar, *The "Acuff-Rose" Parody Case: Give Unto the Congress' and to the States What is the States'*, 29 Rev. Jur. U.I. P. R. 159 (1995).

99. For example, several state laws explicitly deal with reproductions. La. R.S. § 51.2153(2) (2005); Nev. Rev. Stat. Ann. § 597.740(1); N.J. Stat. § 2A:24A-3 (2006). Puerto Rico's statute contains rights of publication and retraction of authorship. Leyes de Puerto Rico Anotadas tit. 31 § 1401 (2005).

100. The *droit de suite* is contained in Cal. Civ. Code § 986 (2006); the residual ownership right in § 988.

101. La. R.S. ¶ 51.2153(3) (2005), discussed in greater depth *infra* at text accompanying notes 138 to 141.

102. 17 U.S.C. § 106A(d). Section (d)(2) contains an exception for certain works created prior to VARA's effective date.

103. Several states provide that their moral rights remain in force for fifty years following the death of the author. Cal. Civ. Code ¶ 987(g)(1) (2006); Conn. Gen. Stat. ¶ 42-116t(d) (2005); Annot. Laws Mass. G.L. ch. 231, § 85S(g) (2005); N.M. Stat. Ann. § 13-4B-3(E) (2006); 73 Penn. Stat. § 2107(1) (2005); The South Dakota right (which applies only to state-acquired art) expires twenty years after death. S.D. Cod. Laws § 1-22-16(6) (2006). Several of the remaining state statutes do not specify whether the right survives the author's death.

104. Zuber, *supra* note 68, at 492-508 (1992); Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 Marq. Intell. Prop. L. Rev. 1, 29-45 (1997); Joshua H. Brown, *Creators Caught in the Middle: Visual Artists Rights Act Preemption of State Moral Rights Laws*, 15 Hast. Comm./Ent. L. J. 1003, 1005-1030 (1993); Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 Rutgers L. J. 347, 351 n. 9 (1993), Salazar, *supra* note 98, at 165.

state moral rights protection remains available for authors to use in appropriate cases. To determine what state-law protections continue to be available, it is necessary to discuss the scope of preemption.

Copyright preemption is in some ways unusual. Unlike the typical case of preemption, the Copyright Act explicitly defines when federal copyright law preempts state law. When state-law moral rights are involved, there are two separate steps to this analysis. The first step involves § 301(f) of the Copyright Act, a special preemption provision added to the Copyright Act along with VARA. The second – and often overlooked – step in the analysis involves § 301(a), the general preemption provision of the Copyright Act. Even if a state law is not preempted under the special VARA preemption provision of § 301(f), it can be preempted if it parallels ordinary federal copyright too closely.

a. Preemption under § 301(f)

Congress's main goal in enacting § 301(f) was to ensure that VARA is the exclusive source of integrity and attribution rights for works of visual art. If a state law provides protections in works of visual art that parallel the protections provided by VARA, it is likely preempted. The section provides:

> (f)(1) On or after the effective date set forth in section 9(a) of the Visual Artists Rights Act of 1990, 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 are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.
>
> (2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to –
>
> > (A) any cause of action from undertakings commenced before the effective date set forth in section 9(a) of the Visual Artists Rights Act of 1990;
> >
> > (B) 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;
> >
> > (C) activities violating legal or equitable rights which extend be-

yond the life of the author.[105]

Basically, there are two broad sets of laws that escape preemption under this provision. First, under § 301(f)(2), three types of state laws are categorically valid. Second, subsection (1) provides that even if a law does not qualify for one of the categorical exceptions, it will be preempted only if it affords rights that are "equivalent" to those afforded by VARA.

The three categorical exceptions will save a handful of the state moral rights provisions. First, although this exception is of increasingly little importance, a state can apply all of its moral rights laws to acts that occurred prior to VARA's effective date of June 1, 1991.[106] Second, as VARA's protections terminate on the death of the author, state law is not preempted to the extent it provides posthumous protection.[107] Given that several states extend moral rights protections for fifty years after the author's death, this provision will allow state law to apply once federal protection under VARA terminates.

The third of the categorical exceptions appears at first glance to offer the most promise. Both subsection (1) and subsection 2(B) specify that state laws protecting works that do not qualify as "works of visual art" are not preempted.[108] None of the state laws use the phrase "works of visual art" to define its scope of coverage. They instead use terms such as "fine art"[109] or simply "art."[110] On the other hand, a careful

105. 17 U.S.C. § 301(f).

106. 17 USC § 301(f)(2)(A). For a case applying this provision, *see Pavia v. 1120 Avenue of the Americas Associates*, 901 F. Supp. 620 (S.D.N.Y. 1995). One scholar has suggested that this exception applies only if the author actually *files* her moral rights claim prior to June 1, 1991. Zuber, *supra* note 68, at 493. This conclusion seems directly at odds with the statutory language, which requires only that the "undertakings" giving rise to the cause of action, not the cause of action itself, be "commenced" prior to VARA's effective date.

107. 17 U.S.C. § 301(f)(2)(C). *Accord* Brown, *supra* note 104, at 1028-1030; Zuber, *supra* note 68, at 500; Kwall, *supra* note 11, at 33.

108. 17 U.S.C. § 301(f)(1). *Accord* Gegenhuber v. Hystopolis Productions, Inc., 1992 WL 168836 (N.D. Ill.) (because VARA does not apply to puppets, states are free to grant moral rights protections to authors in their puppets); Brown, *supra* note 104, at 1013-1015; Zuber, *supra* note 68, at 494; Kwall, *supra* note 104, at 38-39. Professor Kwall's analysis also demonstrates how this result is consistent with Congress's policy concerns. The only arguably contrary authority is *Board of Managers of Soho International Arts Condominium*, 2003 WL 21403333 (S.D.N.Y.) (unpublished), where the court indicates in *dictum* that this exception applies only if the state law covers works that fall entirely outside the subject matter of *copyright*, not merely outside the definition of "works of visual art." *Id.* at *13. Indeed, Section 301(f)(1) by its very redundancy underscores the point that it does not preempt state efforts to protect non-VARA works. Both sentences in that section make it clear that states are prevented only from offering VARA-type rights in works of visual art.

109. *See, e.g.*, Cal. Civ. Code. § 987(a) (2006); Conn. Gen. Stat. § 42-116t(a) (2005); La. R.S. § 51:2153 (2005); 27 Maine R.S. § 303 (2005).

110. Nev. Rev. Stat. Ann. § 597.740 (2005).

analysis of the definitions of these terms reveals that the state laws by and large protect the same kinds of works as those falling under VARA: original or limited edition paintings, sculptures, statues, and other static visual works, where the expression is embodied in a discernable original or set of originals rather than in mass-produced copies.[111] Other works that might fall within the lay definition of "fine art," such as music and poetry, are excluded from these state laws, just as they are excluded from VARA. Nevertheless, in a few cases significant differences exist between the scope of VARA and state law. California and Connecticut, for example, extend moral rights to graphic arts, as well as "crafts in clay, textiles, fiber, wood, metal, plastic, and like materials."[112] Massachusetts law likewise covers crafts, and further protects films, audio and videotapes, and holograms.[113] Moreover, while VARA excludes works for hire from the definition of works of visual art,[114] many states give moral rights protection without consideration as to whether the work is produced by an employee or is commissioned.[115] For these works that fall without VARA, states are free to provide rights of attribution and integrity, even if those rights are identical to those provided by VARA.[116]

Even if a state law does not fit within one of these categorical exceptions, § 301(f)(1) preempts it only if it provides rights that are equivalent to any of the rights set out in VARA. There is almost no

111. The New Jersey statute is fairly typical. It defines a "work of fine art" as:

> any original work of visual or graphic art in any medium, which includes, but is not limited to, paintings, drawings, prints, and photographic prints or sculptures of a limited edition of no more than 300 copies; provided, however, that a work of fine art shall not include sequential imagery as in motion pictures.

N.J. Stat. §2A:24A-3(e) (2006). As discussed *infra* at text accompanying notes 138 to 141, Louisiana law also contains a unique right to prevent the display of authentic originals produced by the artist. Unlike the other moral rights in Louisiana law, this right extends to all "works," not merely works of fine art. La. R.S. § 51:2153(3) (2005). To the extent this right protects items other than VARA works of visual art, it is not preempted by § 301(f).

112. Cal. Civ. Code §982(a)(1) (2006); Conn. Gen. Stat. Ann. §42-116s(2) (2004).

113. Annot. Laws Mass. G.L. ch. 231, § 85S(b) (2005).

114. 17 U.S.C. § 101 (definition of "work of visual art" part 2(B)).

115. *Compare* Cal. Civ. Code § 987 (2006) (no rights in work prepared under contract for commercial use); Conn. Gen. Stat. § 42-116s(2) (fine art does not include works prepared by employees within the scope of their employment); *and* Annot. L. Mass. G.L. ch. 231, § 85S(b) (2005) (definition of artist excludes employees acting within scope of employment), *with* Utah Code Ann. § 9-6-409 (2005) (rights exist even in commissioned works).

116. As will be discussed below, § 301(a) of the Copyright Act also preempts some state law. However, a state law is preempted under that section only if it affords rights that are equivalent to those provided by § 106. Rights of attribution and integrity are not equivalent to any of the rights set out in § 106.

precedent directly dealing with what § 301(f) means by "equivalent".[117] However, because § 301(f) is modeled after § 301(a), the general preemption provision of the Copyright Act, courts should use a similar approach to both provisions. Like § 301(f), § 301(a) turns on "equivalency." And there is plenty of case law under § 301(a) defining that term. The basic analysis under § 301(a) involves the "extra element" test. Under this approach, a state law that is similar to copyright is preempted unless it contains a meaningful extra element that distinguishes it from an ordinary § 106 copyright infringement claim.[118] Applying this test to § 301(f) requires dissecting the VARA and state-law rights to compare their elements.

Certain state-law rights are not equivalent to any of VARA's rights, and are accordingly not preempted. For example, VARA has nothing like the California *droit de suite* or residual ownership right. But most of the state-law rights are generally similar to the rights set out in VARA. Like VARA, the state laws focus on attribution, dissociation, and integrity.[119] Nevertheless, when one turns to the particulars, there are numerous differences between the state laws and VARA. While technical differences alone are not enough to make rights non-equivalent, significant differences may save the state law from preemption.

There are six major differences between various state laws and VARA. First, while VARA's integrity right covers only intentional alterations, many state laws also allow recovery when the alteration is effected by gross negligence.[120] In this case, two scholars have argued that the state law right is still equivalent to VARA's integrity right.[121] This

117. The only case directly dealing with the question is *Board of Managers of Soho International Arts Condominium*, 2003 WL 21403333 (S.D.N.Y.) (unpublished), which held that the integrity right in New York law was preempted because it was equivalent to the integrity right set out in VARA.

118. Del Madera Props. v. Rhodes & Gardner, 820 F.2d 973, 977 (9th Cir. 1987), *overruled on other grounds*, Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994) (unfair competition and unjust enrichment claims preempted); Ritchie v. Williams, 395 F.3d 283, 288 n.3 (6th Cir. 2005) (state-court contract action preempted).

119. *See, e.g.*, Nev. Rev. Stat. Ann. §§ 597.730 (attribution and dissociation), 597.740(1) (display of altered work); 73 Penn. Stat. §§ 2103 (attribution and dissociation), 2104 (integrity); R.I. Gen. Laws § 5-62-4 (2006) (right of attribution and to disclaim authorship of altered work).

120. Cal. Civ. Code § 987(c)(2) (2006) (person who damages work in the process of framing, conservation, or restoration can be liable for gross negligence); Annot. Laws Mass. G.L. ch. 231, § 85S(c); Nev. Rev. Stat. Ann. § 597.774(c) (no state of mind requirement other than reasonable foreseeability of harm); N.M. Stat. Ann. § 13-4B-3(A) (2006); 73 Penn. Stat. §2104(b) (2005) (person who damages work in the process of framing, conservation, or restoration can be liable for gross negligence) S.D. Cod. Laws § 1-22-16(3) (2006) (no state of mind requirement).

121. Kwall, *supra* note 104, at 32; Robert A. Gorman, *Visual Artists Rights Act of 1990*, 38 J.

conclusion is correct. This difference in the infringer's state of mind does not affect the author's core right to protect the integrity of her work.

Second, some state laws differ from VARA in the *types* of acts that violate the integrity right. VARA deals with the act of alteration itself. Under some state laws, however, the author cannot sue unless someone *displays* the altered work.[122] This difference can be significant. Because the person who alters the work and the person who displays it could be different, the state laws could create rights against different infringers. Notwithstanding these differences, state laws that turn on display rather than alteration should be preempted.[123] Note that VARA does not give the author the right to sue for all alterations. Instead, alteration of a work is actionable only when that alteration could affect the author's honor or reputation. If an alteration occurs in private, and the altered work is never viewed by the public, the author's honor or reputation will not suffer, and VARA's integrity right would not apply. Thus, even though the VARA integrity right is sometimes viewed as nothing more than an art preservation law, the requirement of harm to reputation suggests that Congress was also concerned with protecting the author's good name. Because VARA and the state laws serve the same ends, and because the integrity right under both only comes into play when the altered work is available to the public, state integrity rights are preempted regardless of whether they make alteration or display the operative act.

The third difference between VARA and state laws likewise involves the integrity right. As noted just above, VARA allows an author to sue for an alteration of her work only when the alteration could damage her honor or reputation. While many state statutes contain a similar limit, at least five states purport to allow the author to sue for *any* alteration, without requiring her to prove such damage.[124] Although these state laws involve a similar concern with artistic reputation,[125] these states let the author, rather than a court, determine when such harm has occurred. These state laws should also be preempted. Indeed, the House

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Copyright Soc'y 233, 240 (1990).

122. La. R.S. §§ 51:2153, 2154 (2005); 27 Me. R.S. § 303(2); Nev. Rev. Stat. Ann. § 597.740(1) (2005); N.J. Stat. §2A:24A-4 (2005); N.Y. CLS Art & Cult. Aff. § 14.03(1) (2005); R.I. Gen. Laws § 5-62-3 (2006).

123. Although Professor Kwall has discussed this issue, she never concludes whether the state laws that turn on display are preempted under § 301(f). Kwall, *supra* note 104, at 34-35.

124. Cal. Civ. Code § 987(a) (2006); Conn. Gen. Stat. Ann. § 42-116t(a) (2004); Annot. Laws Mass. G.L. ch. 231, § 85S(c) (2005); 73 Penn. Stat. § 2104(a) (2005); R.I. Gen. Laws § 42-75.2-8 (2006).

125. Four of the state statutes contain explicit findings that alteration and destruction affect an artist's reputation. Cal. Civ. Code. § 987(a) (2006); Annot. Laws Mass. G.L. ch 231, § 85S(a) (2005); N.J. Stat. § 2A:24A-2 (2005); N.M. Stat. Ann. § 13-4B-1 (2006).

Report for VARA directly touches upon this particular question:

> For example, the new law [VARA] will preempt a state law granting the right of integrity in paintings or sculptures, even if a State law is broader than Federal law, such as by providing a right of attribution or integrity with respect to covered works without regard to injury to the author's honor or reputation.[126]

The state-law right is not qualitatively different than the VARA integrity right; it is merely a difference in degree.[127]

Fourth, there is occasionally some discrepancy between state-law and VARA dissociation rights. VARA gives an author the right to prevent use of her name both in connection with works she did not create, and in connection with works that she did create, but have since been altered in a way that could harm her reputation. Several state laws provide a similar right, but with significantly different conditions. Under these state laws, the author can dissociate herself from her prior work for any "just and valid reason."[128] Some statutes specify that a just and valid reason "includes" situations where the work has been altered in a way that may harm the author's reputation.[129] The Nevada statute is slightly different, giving the author the right to disclaim authorship whenever necessary to protect her reputation, but providing that defacing or mutilation is "presumed" to harm reputation.[130] However, as the term "include" does not necessarily mean "limited to," these statutes leave open the possibility that there could also be reasons to dissociate that have nothing to do with the author's reputation. The California, Massachusetts, and New Mexico statutes go still further, as they do not attempt to define what constitutes a just and valid reason.[131] Puerto Rico law arguably goes the furthest, giving the author a right to retract her claim of authorship without any conditions whatsoever.[132] Because all of these

126. *Legislative History*, *supra* note 38, at 6931.

127. Nor do these state laws contain an extra element. Indeed, they actually contain one *fewer* element than the VARA integrity right, as the author need not demonstrate harm to reputation in order to recover under state law.

128. Cal. Civ. Code § 987(d) (2006); La. R.S. § 51:2154(C) (2005); 27 Maine R.S. § 303(3) (2005); Annot. Laws Mass. G.L. ch. 231, § 85S(d) (2005); N.J. Stat. § 2A:24A-5 (2005); N.M. Stat. Ann. § 13-4B-3(B) (2006); N.Y. CLS Art & Cult. Aff. § 14.03(2)(a) (2005); R.I. Gen. Laws § 5-62-4(a) (2006). Pennsylvania, by contrast, provides that mutilation is a *per se* reason to disclaim authorship. 73 Penn. Stat. § 2103 (2005).

129. La. R.S. § 51:2154(C) (2005); N.J. Stat. § 2A:24A-5 (2005); N.Y. CLS Art & Cult. Aff. § 14.03(2)(a) (2005); R.I. Gen. Laws § 5-62-4(a) (2006).

130. Nev. Rev. Stat. Ann. § 597.730(2) (2005).

131. Cal. Civ. Code § 987(d) (2006); Annot. Laws Mass. G.L. ch. 231, § 85S(d) (2005); N.M. Stat. Ann. § 13-4B-3(B) (2006).

132. Leyes de Puerto Rico Anotadas tit. 31, § 1401.

laws may allow for dissociation in cases where dissociation would not be available under VARA, they arguably go further than VARA's integrity right. Nevertheless, there is a clear consensus that these state laws are preempted.[133] Although the legislative history quoted above is less directly on point, it also supports this conclusion.[134]

Fifth, while VARA's rights only apply to original works, several of the state laws extend moral rights to situations where the infringer has *reproduced* the original. This extension can affect both the integrity and dissociation rights. With respect to integrity, some state statutes allow the author to prevent public display of distorted reproductions.[135] Similarly, once a distorted reproduction is produced, some states allow the author to sue for dissociation when her name is used in connection with that reproduction.[136] Although these rights are in one sense merely broadened versions of the VARA rights, they are qualitatively different, and therefore should not be considered equivalent under § 301(f). With respect to the dissociation right, the legislative history to VARA indicates that VARA would not preempt a cause of action for misattribution of a reproduction of a work of visual art.[137] Although the legislative history does not discuss integrity rights in copies, it stands to reason that § 301(f) would not preempt such state laws. A right to control the integrity of a reproduction is fundamentally different than VARA's right to control the integrity of the author's own physical works. Thus, while state-law dissociation and integrity rights would be preempted when applied to originals, they are not preempted by § 301(f) when applied to reproductions. Unless these state laws are preempted by § 301(a) – an issue to be discussed below – they would remain available to authors in the appropriate case.

The sixth difference between state-law moral rights and VARA involves the Louisiana moral rights statute. That statute contains a unique "right of display," which gives an author the right to prevent display or other publication of work[138] in circumstances where such display

133. Zuber, *supra* note 68, at 499; Kwall, *supra* note 104, at 32; Brown, *supra* note 104, at 1019.

134. *See supra* text accompanying note 126.

135. La. R. S. §§ 51:2153(2) & (3) (2005); 27 Maine R.S. § 303(2) (2005); Nev. Rev. Stat. Ann. § 597.740(1) (2005); N.J. Stat. § 2A:24A-4 (2005); N.Y. CLS Art & Cult. Aff. § 14.03(1) (2005).

136. L.A. R. S. § 51:2154(C)(2005); 27 Maine R.S. § 303(2) (2005); Nev. Rev. Stat. Ann. § 597.730(2) (2005); N.Y. CLS Art & Cult. Aff. § 14.03(2)(a) (2005); R.I. Gen. Laws § 5-62-3 (2006).

137. *Legislative History*, *supra* note 38, at 6931. *Accord* Zuber, *supra* note 68, at 503-04.

138. As noted *supra* in note 111, the display right applies to all copyright works, not merely works of visual art. To the extent that an author uses this provision to protect a work that does not

or publication would harm the author's reputation.[139] This right is equivalent to the VARA dissociation right in situations where the work itself has been altered, or where lighting or some other aspect of display alters the appearance of the work.[140] However, the Louisiana law on its face also applies to originals or reproductions that are displayed without any alteration or distortion. For purposes of discussion, this right to disown one's own work can be labeled a right of "disavowal."[141] Although VARA would preempt use of this provision in situations where someone presented a distorted alteration or original to the public, nothing in VARA deals with the display of accurate versions of the author's work. Indeed, under VARA any harm to the author caused by the way a work is presented to the public is actionable only if it modifies the appearance of the work, such as poor lighting.[142] To the extent that this section applies to display or publication of the author's own work, or faithful reproduction, it provides rights that are not equivalent to any rights in VARA. On the other hand, like state moral rights laws that apply to reproductions, the Louisiana law may also run the risk of preemption under § 301(a), as the rights it affords look much like the § 106 rights of display and reproduction. The issue, then, is whether these moral rights laws that are valid under § 301(f) are nevertheless preempted under § 301(a).

b. Preemption under § 301(a)

Like § 301(f), § 301(a) employs an equivalency analysis to determine the scope of copyright preemption.[143] But it focuses on a differ-

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qualify as a VARA work of visual art, § 301(f) clearly does not preempt the law.

139. La. Rev. Stat. § 51.2153(3) (2005).

140. Admittedly, the VARA rule governing lighting (17 U.S.C. § 106A(c)(2)) applies only in situations where the infringer acted with gross negligence, while the Louisiana law on its face imposes strict liability (La. Rev. Stat. § 51.2153(3) (2005)). However, that difference in level of culpability is not enough to render the laws non-equivalent. *See supra* text accompanying note 121.

141. The Louisiana law is not the only one that can be read to create a right of disavowal. The absolute right of retraction in the Puerto Rican law, if read literally, allows the author to dissociate herself from her work for any reason, or for no reason. Similarly, under the state laws which allow dissociation for any just and valid reason (*see supra* note 128), an author could possibly demonstrate a reason even if the work is not altered. To the extent the statutes actually do create a right of disavowal, they present a very different preemption problem. Arguably, the disavowal right is qualitatively different than anything provided by VARA, and accordingly would not be considered "equivalent." However, this author strongly doubts that either the Puerto Rican law or the state laws discussed in *supra* note 128 were intended to create a right of disavowal. There are certainly no cases recognizing such a right in those jurisdictions, nor any of which this author is aware where such a claim was even asserted.

142. 17 U.S.C. § 106A(c)(2).

143. 17 U.S.C. § 301(a).

ent set of federal rights. Whereas § 301(f) asks if the right in question is equivalent to a right afforded by VARA (§ 106A), § 301(a) asks if the right is equivalent to any of the exclusive rights of a copyright holder under § 106.[144] A state law right that is not equivalent to VARA may nevertheless be equivalent to one of the § 106 rights.

Section 301(a) could in theory affect any state-law moral right that is not preempted by § 301(f).[145] In truth, however, § 301(a) is likely to play a role only in the two cases discussed above; namely, moral rights in reproductions and Louisiana's display right as applied to unaltered works. In the other situations where § 301(f) does not preempt – attribution and integrity rights in *originals* that qualify for one of § 301(f)'s explicit exceptions (e.g., rights in non-VARA works) – the right in question is qualitatively different than anything afforded by § 106, and is therefore not equivalent for purposes of § 301(a).[146] Discussion will therefore focus only on reproduction and the display right.

A state-law right to control reproductions resembles both the § 106(1) right to reproduce a work and the § 106(2) right to prepare derivative works.[147] Notwithstanding this facial similarity, however, state-law moral rights in reproductions should not be preempted under § 301(a) because they contain a significant extra element that distinguishes them from the § 106(1) and § 106(2) rights. Unlike a copyright owner suing under § 106, under most state laws an author suing because of an

144. 17 U.S.C. § 106.

145. Of course, if a law *is* preempted by §301(f), it is unnecessary to consider whether § 301(a) might also apply. The discussion accordingly ignores laws such as the state integrity laws that apply only when a work is displayed. *See supra* text accompanying notes 122 to 123.

146. Professor Kwall has suggested that in the case of one of § 301(f)'s explicit exceptions – a state-law right of integrity that protects non-VARA works – the state-law right would be preempted by § 301(a) because it is equivalent to the § 106 right to create derivative works. Kwall, *supra* note 104, at 41. But that conclusion is problematic. Professor Kwall's argument turns on the premise that if copyright law affords someone a remedy in a particular situation, state law cannot also allow recovery. However, that argument reads all meaning out of the "extra element" test. Under that test, it is often possible for both federal and state law to allow recovery. The key to the preemption issue is whether state law requires the claimant to prove a significant fact that she would not need to prove in a copyright infringement claim. Thus, regardless of whether alteration of a work violates the right to produce derivative works (a point that is itself in some doubt; *compare* Lee v. A.R.T. Co., 125 F.3d 580 (7th Cir. 1997) (mounting art on a ceramic tile is not preparation of a derivative work) *with* Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 865 F.2d 1341 (9th Cir. 1988) (same situation, court finds that mounted work is a derivative work), the state law preventing alteration will survive preemption as long as it conditions recovery on a meaningful extra element. As discussed in the next paragraph of the text, state law integrity rights do contain a meaningful extra element.

147. A derivative work, after all, is essentially a work that is based upon another, but is sufficiently different that it does not constitute a reproduction. 17 U.S.C. § 101 (definition of "derivative work").

altered reproduction must demonstrate harm to her reputation.[148] That requirement of harm to reputation makes it clear that the moral right focuses on a concern not directly pertinent to either the § 106(1) or § 106(2) right, and should accordingly qualify as a distinguishing extra element.

For the same reason, the Louisiana display right should survive preemption under § 301(a). That right turns on the same operative events as several § 106 rights, including the rights of display and distribution.[149] But like state laws dealing with reproductions, the Louisiana law contains the extra element of proving harm to reputation.[150] The purpose of the law is to protect the author's reputation rather than the economic and proprietary interests that are the focus of copyright.

In summary, most of the state-law moral rights are preempted. But several categories of state moral rights laws will escape preemption. These unpreempted rights complement the rights set out in federal law, and may present similar First Amendment issues.

III. AN OVERVIEW OF FIRST AMENDMENT ISSUES IN MORAL RIGHTS LEGISLATION

A. When Moral Rights Laws Clash with the First Amendment

At the risk of sounding tautological, the First Amendment free speech clause protects only speech. However, the definition of speech includes more than the spoken word. All forms of verbal communications, including books, sign language, and software, are covered.[151] The First Amendment also protects non-verbal communication such as music, painting, and sculpture.[152] Generally speaking, the First Amendment definition of speech includes all recognized forms of communication.[153]

Some moral rights disputes clearly involve speech. Cases involv-

148. Of the statutes cited *supra* in notes 135 and 136, only La. R. S. § 51:2153(2) and R.I. Gen. Laws § 5-62-3 (2006) do not require the author to demonstrate harm to her reputation. These two laws would be preempted because they lack an extra element.

149. The right of display is set out in 17 U.S.C. § 106 (5), while distribution is set out in § 106(3).

150. La. R. S. § 51:2153(3) (2005). For some reason, while the display right requires proof of harm to reputation, the right of integrity in § 51:2153(2) does not require proof of harm.

151. *See, e.g.*, Universal City Studios v. Corley, 273 F.3d 429 (2nd Cir. 2001) for an excellent discussion of how the First Amendment protects software.

152. Lerner & Bresler, *supra* note 33, at 667 *et seq.*

153. However, not all forms of speech are actually protected by the First Amendment. Certain categories, such as obscene speech and that posing a clear and present danger, receive no First Amendment protection.

ing the rights of attribution and dissociation are the most obvious examples. These moral rights regulate verbal statements that the infringer makes about who created the work, statements that undoubtedly qualify as speech. In some cases, the infringer is prevented from making false statements of attribution.[154] In others, the infringer may be under a positive obligation to speak.[155] Because the First Amendment right to free speech includes the right to refrain from speaking, coerced speech is also a First Amendment concern.[156] Therefore, all attribution and dissociation cases will involve First Amendment speech.

Other moral rights cases typically involve non-verbal acts rather than words or symbols. For example, one can destroy or alter a painting without uttering a word. But that fact alone does not render the First Amendment inapplicable. In some situations, conduct may qualify as First Amendment speech. However, conduct is protected as speech only if it is "sufficiently imbued with elements of communication."[157] If conduct lacks that communicative aspect, nothing in the First Amendment in any way limits government's power to regulate it. To determine whether conduct is speech, courts consider both the actor's intent and the audience's perception.[158] Some forms of conduct, such as flag-burning and marching, are so often used to communicate that they almost always qualify as speech,[159] while other cases call for a more individualized inquiry.

A considerable number of moral rights disputes will involve only non-communicative conduct, and accordingly present no First Amendment issues. Consider, for example, the *droit de suite*. This right to re-

154. The right of attribution prevents the infringer from stating that anyone other than the author created the work. The right of dissociation involves the converse, as it prevents the infringer from saying that the author produced a work actually produced by someone else.

155. In some dissociation cases, a person has stated that the author is the source of a particular work which she did in fact not prepare. These cases involve a limit on voluntary speech. But dissociation cases may also involve coerced speech. For example, if the person displaying the work says nothing about source, but the circumstances surrounding the display lead people to believe the plaintiff author is the source, the person displaying the work may be required to make a statement that the author is not the source.

156. West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1943) (requiring the pledge of allegiance in schools violates First Amendment).

157. Spence v. Washington, 418 U.S. 405, 409 (1974).

158. *Id.* at 410.

159. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (burning draft cards); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (black armbands); Spence v. Washington, 418 U.S. 405 (putting a peace symbol on a flag); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (nude dancing); Texas v. Johnson, 491 U.S. 397 (1989) (flag burning), United States v. Eichman, 496 U.S. 310 (1990) (same); Boy Scouts of American v. Dale, 530 U.S. 640 (2000) (exclusion of member of a group based on sexuality).

ceive a percentage of the profits on resale does not implicate the First Amendment for the simple reason that the regulated act – the payment – communicates money, not ideas. Although there are situations where a forced payment has been found to implicate the First Amendment, the sort of payment required by the *droit de suite* is not one of them.[160] The payment of a percentage of the sales price conveys no message by itself. Nor is the money earmarked to fund particular speech with which the person disagrees.[161] The *droit de suite* has no greater effect on the purchaser's speech than a sales tax, and is therefore constitutional under the First Amendment.

The integrity and destruction rights are a closer question. Suppose the owner of a statue purposefully drops it on the pavement and smashes it. If the sculpture is a work of "fine art" or of "recognized stature," that act violates the destruction right. However, the simple act of dropping a statue does not constitute speech protected by the First Amendment. Even if the infringer intended the destruction as a comment on the quality of the statue, and even if the act of dropping the statue occurred in public, it is unlikely that the act would be perceived by the audience as conveying any message. On the other hand, it is easy to conceive of situations where destruction or mutilation of a work would qualify as speech. Burning a book or painting in a public square is speech. Altering a painting by adding well-recognized symbols such as a blindfold, a swastika, or a fig leaf would likewise be recognized as an act of communication.[162] Therefore, a court adjudicating an integrity or destruction claim would need to evaluate all the underlying circumstances to determine whether an alteration or destruction would qualify as speech.[163] If it concludes that the alteration or discussion was either not intended or not understood as speech, allowing the author to recover presents no First Amendment concerns.

The moral right of disclosure presents a similar situation. Merely displaying a work publicly does not in and of itself qualify as speech. Although the work is the speech of the author, the act of disclosure need

160. For example, in *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Court held that compulsory bar dues could not be used to endorse views with which a member disagreed.

161. The money goes to the author, who can choose what to do with it. The author may use it to produce more art, or simply take a trip.

162. For this reason, one commentator has suggested that the integrity right is the moral right that intrudes most greatly on artistic expression. Ong, *supra* note 11, at 298.

163. Several integrity and destruction cases have involved a landowner who wants to alter or raze a building that contains an integrated mural or sculpture. In these cases, the landowner is not engaging in speech. Although erecting a new building may be speech in certain cases, tearing down the old building is not a comment on the work of art.

not involve speech *by the infringer*.[164] Again, however, this conclusion is not absolute. There could well be situations in which, given the overall context, the act of presenting the work to the public could both be intended and perceived as a communication by the presenter. Like the destruction and integrity rights, whether the disclosure right involves speech depends on the circumstances.

The remainder of this article focuses on cases where the infringer's act is speech. Note, however, that these cases are a minority of all moral rights cases. Many moral rights disputes will not involve any form of speech protected by the First Amendment. In these cases, the infringer cannot invoke the First Amendment as a defense to liability. Concluding that a particular moral rights violation involves no speech spares one the trouble of dealing with the multi-part analysis set out below.

B. Special Considerations That May Apply to Moral Rights Protections in Federal Copyright Law

VARA and the §106 disclosure right are the most important of the moral rights laws currently in force in the United States. Although it protects fewer works than some of its state-law counterparts,[165] VARA is more influential because of its nationwide reach. That VARA and §106 are federal laws may also prove helpful in dealing with the First Amendment. Two theories could conceivably give these federal laws an edge in any First Amendment challenge. The first turns on the fact that they are part of federal copyright law, a body of law than itself enjoys a somewhat special First Amendment status. The second theory, which applies only to VARA, relies on the Supreme Court precedent dealing with the effect of a treaty on Congress's legislative jurisdiction.

1. Copyright and Free Speech

Moral rights are not the only authors' rights that implicate the First Amendment free speech clause. Copyright itself limits speech. A copyright gives the owner the power to prevent others from reproducing, disseminating, or making public her expression.[166] In addition, the right to produce "derivative works" prevents anyone other than the copyright

164. A similar conclusion would apply to the Louisiana display right in La. R. S. § 51:2153(3), which has some of the traits of a right of disclosure.

165. *See supra* text accompanying notes 99 to 103 for a discussion of how some provisions of the state laws are broader than VARA.

166. *See* 17 U.S.C. § 106.

owner from producing a work that is merely recognized as based upon the author's work, even if the derivative work is a sequel or otherwise notably different.[167] The infringing work in all of these cases usually qualifies as a form of speech under the First Amendment.[168] Remedies for copyright infringement include not only actual damages and injunctions, but also "statutory damages," which bear no direct relation to the copyright owner's actual harm.[169] Thus, copyright substantially limits a potential infringer's speech.

Debate persists in the academic literature about whether copyright is consistent with the First Amendment.[170] To the Supreme Court, however, the answer is clear. In its 1985 decision in *Harper & Row Publishers, Inc. v. Nation Enterprises*,[171] the Court held that the First Amendment did not shield a media defendant from liability for reproducing portions of President Ford's copyrighted memoirs.[172] The Court confirmed that ruling almost twenty years later in *Eldred v. Ashcroft*,[173] where it held that nothing in the First Amendment or the Copyright Clause[174] precluded Congress from extending the term of existing copyrights by twenty years. The opinions in both cases suggest that federal copyright law, by its nature, presumptively satisfies the First Amendment. If copyright is categorically exempt from the First Amendment, VARA and the § 106 disclosure right might be *per se* constitutional

167. 17 U.S.C. § 106(2).

168. Even a verbatim reproduction could qualify as speech by the reproducer. The infringer might be choosing to send his message by using another's words or drawings.

169. 17 U.S.C. § 504(c).

170. *See, e.g.*, Floyd A. Abrams, *First Amendment and Copyright*, 35 J. Copr. Socy 1 (1987); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 Calif. L. Rev. 283 (1979); Gary L. Francione, *Facing the Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. Pa. L. Rev. 519 (1986); Charles C. Goetsch, *Parody as Free Speech – The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. New Eng. L. Rev. 39 (1980); Paul Goldstein, *Copyright and the First Amendment*, 70 Colum. L. Rev. 983 (1970); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum. L. Rev. 1600; Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. Rev. 1180 (1970); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vand. L. Rev. 1 (1987); David E. Shipley, *Conflicts Between Copyright and the First Amendment After* Harper & Row, Publishers v. Nation Enterprises, 1986 BYU L. Rev. 983 (19860; Alfred C. Yen, *A First Amendment on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 Emory L.J. 393 (1989).

171. 471 U.S. 539 (1985).

172. *Id.* The holding in *Harper & Row* is especially noteworthy because the work in question – President Ford's memoirs – arguably involved political speech of significant public interest, which lies at the "core" of First Amendment protection.

173. 537 U.S. 186 (2003).

174. U.S. CONST. Art. I, sec. 8, cl. 8.

simply because they are part of the federal Copyright Act.

a. VARA

Because VARA is in the Copyright Act, it is tempting to conclude that the ruling of *Harper & Row* and *Eldred* applies with equal force to VARA's moral rights. But that conclusion does not automatically follow. Although VARA is part of the Copyright Act, it is different in many respects from the copyright rights at issue in those cases. Before concluding that *Harper & Row* and *Eldred* govern the constitutionality of VARA, it is important to consider *why* the Court in those cases held that copyright enjoys a special First Amendment status. VARA shares copyright's presumption of validity only if it shares the features of copyright that the Court identified as important in those cases.

Harper & Row and *Eldred* cited several features of copyright that helped make it consistent with the right to free speech. These various features can be grouped in two broad categories: *protections* and *pedigree*. *Harper & Row* focused on the former, citing two significant doctrinal limits on copyright that reduce its impact on free speech. The first, commonly called the "idea/expression" distinction, is the core concept that copyright protects only expressions of an idea, not the idea itself.[175] Even if someone has a copyright in a particular expression, everyone is free to express the same idea (or equally importantly, a competing idea) using different words or symbols.[176] Second, the Court noted that copyright's "fair use" defense allows others to use even the copyrighted expression itself for educational, critical, or in some cases even personal, purposes.[177] Both of these limits temper copyright's effect on speech, as they leave a potential infringer with a number of ways to deliver any message he might desire to convey.

Eldred affirmed the importance of these protections, but also bolstered the case for copyright by invoking copyright's "pedigree." The *Eldred* Court made considerable weight of the fact that copyright itself is

175. *Harper & Row*, 471 U.S. at 556.

176. *Id.* A corollary to the idea/expression rule in copyright is the notion of "idea/expression merger." In those rare cases where there is only one, or a very few, number of ways to express an idea, even the chosen expression cannot be protected, out of a concern that allowing protection would give the copyright owner a monopoly on the idea itself. *See* Morrissey v. Procter & Gamble Co., 379 F.2d 675 (1st Cir. 1967) (no copyright protection for rules to simple game, because of limited number of ways those rules can be expressed).

177. *Harper & Row*, 471 U.S. at 560.

a constitutional value.[178] Article I's Copyright Clause explicitly gives Congress the authority to enact copyright laws.[179] Although the First Amendment was adopted after the Copyright Clause, the two provisions were adopted quite near to each other in time.[180] To the Court, this "proximity in time" indicates that the Framers saw no clash between copyright's limited monopolies and free speech.[181] Had the Framers considered copyright a free speech problem, they would have included language in the First Amendment explicitly addressing the issue.[182] That the Framers were instead silent is strong evidence that they perceived of copyright, as least as it existed at that time, as a right that presented no real threat to freedom of expression.[183]

It is crucial that neither *Harper & Row* nor *Eldred* suggests that copyright is completely exempt from the First Amendment.[184] The Copyright Clause is not a blanket exception to the Bill of Rights. The Supreme Court in both cases makes it clear that it is necessary to look beyond the label and consider the particular aspects of the law in question. First, it is essential that the law provide certain protections to speakers, either the idea/expression and fair use limits or possibly something equivalent. Second, *Eldred* stresses that the law in question should not only be enacted under the Copyright Clause, but should comport with the Framers' perception of copyright law.[185] Thus, VARA benefits from the rationale of *Harper & Row* and *Eldred* only if it shares the protections and pedigree of the rights at issue in those cases. As both cases dealt with § 106,[186] it is necessary to compare VARA with that section.

VARA does afford some of the same protections as § 106. For

178. *Eldred*, 537 U.S. at 219.

179. U.S. CONST. art. I, §. 8, cl. 8.

180. The original Constitution took effect in 1787, while the First Amendment came into force in 1791.

181. *Eldred*, 537 U.S. at 219.

182. *Id.*

183. *Id.*

184. The appellate court in *Eldred* found that "copyrights are categorically immune from challenges under the First Amendment." Eldred v. Reno, 239 F.3d 372, 375 (D.C. Cir. 2001). The Supreme Court expressly disavowed this broad statement. *Eldred*, 537 U.S. at 221. Other courts and commentators share the sentiment of the appellate court. *See* Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979) ("The first amendment is not a license to trammel on legally recognized rights in intellectual property.").

185. *See Eldred*, 537 U.S. at 199-200.

186. *Eldred* technically deals with 17 U.S.C. § 302(a), which defines the *term* of a copyright. However, the real effect of that provision is to define the life of the § 106 rights. Note that the term of VARA rights is not defined by § 302(a), but is instead specifically defined by VARA itself. 17 U.S.C. § 106A(d). Because the amendment at issue in *Eldred* had no effect on VARA, the Court had no occasion to consider whether its argument applied to moral rights.

example, while there are no cases on point, the idea/expression distinction certainly applies to VARA.[187] Even when an act that violates a moral right qualifies as speech,[188] VARA does not foreclose all possible ways of conveying the underlying idea. An infringer could choose to alter a painting either to criticize the original, or because he feels that the message of that painting could better be expressed in a different way. VARA prevents him from conveying that idea by altering the original. However, it does not prevent him from expressing that idea in other ways. The infringer could have criticized the work by writing a critical essay.[189] Similarly, if he wants to express the core idea of the painting in a better way, nothing in VARA prevents him from creating his own painting, provided that he does not attribute his painting to the author.[190] As adequate opportunities for expressing the idea will always be available, VARA does not squelch the infringer's underlying message.[191]

Fair use, the second inherent protection cited by *Nation* and *Eldred*, presents a more difficult question. True, the Copyright Act explicitly provides that a fair use defense is available in a VARA case.[192] But the statutory language provides no clues as to how the § 107 fair use factors apply in moral rights cases.[193] And the legislative history for VARA hints that few moral rights defendants would prevail on a fair use defense.[194] Because the nature of a moral rights violation is different than a

187. Professor Kelly has stated that the idea/expression principle "does not apply to moral rights." Kelly, *supra* note 15, at 244. The basis for this statement is unclear. Professor Kelly is certainly correct when she goes on to state that every work of visual art is a "unique expression" entitled to protection. *Id.* However, underlying that particular expression is an abstract idea. Moral rights laws protect the expression. But like copyright, they do not protect the idea.

188. *See supra* text accompanying notes 152 to 171 for a discussion of what sort of moral rights violations will qualify as speech.

189. Moreover, the doctrine of fair use, discussed just below, would allow him to make limited use of photographs or other reproductions of the original in crafting his critical essay.

190. Of course, the painting would have to be different enough from the original so as not to qualify as a reproduction or derivative work of the original. However, that requirement stems from §106, not from VARA.

191. It is possible, although hardly conceivable, that in some rare cases the only way to criticize a work would be to alter it. In this situation, the "idea/expression merger" doctrine would come into play, and allow the person to alter the work. Under that doctrine, when there is only one or a very few ways to express an idea, all expressions are deemed to be the idea, and are accordingly not protected by copyright.

192. The first sentence of 17 U.S.C. § 107 provides that the fair use defense is available in cases under both § 106 *and § 106A*.

193. *Accord* 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, 986 (1990). Yonover, *supra* note 15, at 997-1001 also contains a good discussion of this issue.

194. *Legislative History*, *supra* note 38, at 6932 ("it is unlikely that such claims [that is, moral rights claims] will be appropriate").

§ 106 violation, it is not immediately clear that fair use affords a sufficient First Amendment safeguard in moral rights cases.

To illustrate, consider a hypothetical variation on the well-known Supreme Court fair use case of *Campbell v. Acuff-Rose Music, Inc.*[195] That case held that a "rap" version of a rock song was likely to qualify as a fair use, based mainly on the conclusion that the song was intended as a parody of the original.[196] To make the case fit the context of VARA, suppose that an infringer alters a painting instead of a song, intending the alteration to parody the original. The author of the original painting sues under VARA. It might seem that the fair use argument would proceed along the same basic lines as in *Campbell*. After all, defendant's use is for purposes of criticism or commentary, uses explicitly recognized by § 107. However, certain key differences between the hypothetical situation and *Campbell* might affect how the fair use factors apply.

First, it is unclear whether the "nature of the work" and "percentage of the work used" factors would have any impact on the analysis at all. The former factor recognizes that copyright protects a wide variety of works, ranging from maps and factual works (where greater borrowing tends to be allowed) to works of pure fiction or imagination. VARA, by contrast, only applies to a very narrow category of work – works of visual art – which are typically works of fiction or imagination.[197] Similarly, VARA applies only when someone alters the original itself. Thus, in one respect every defendant in a VARA case will have used *all* of the original work.[198] Because *Campbell* noted that the defendants in that case had taken no more than necessary,[199] the ultimate conclusion in that case does not easily translate to the different VARA context.

Applying the other two fair use factors to the scenario suggests that it is even less likely that the hypothetical alteration would qualify as fair use. Consider the "nature of defendant's use" factor.[200] The infringer did intend to parody, just as in *Campbell*. However, the infringer could have accomplished that parody in other ways – including, as in *Campbell*, producing *his own* work that merely reproduces identifiable elements of the original. The infringer's choice to use the original also implicates the fourth fair use factor, which considers the effect of the de-

195. 510 U.S. 569 (1994).

196. *Id.* at 588.

197. *Accord* Yonover, *supra* note 15, at 998.

198. *Accord id.* at 999. The legislative history for VARA also stresses this point as one reason why fair use is unlikely to prove a viable defense. *Legislative History*, *supra* note 38, at 6932.

199. *Campbell*, 510 U.S. at 586-88.

200. *See* 17 U.S.C. § 107(1).

fendant's act on the potential market for or value of the work.[201] This factor often proves the most important in the case law.[202] The infringer's alteration of a painting may cause far more market harm than the alteration at issue in *Campbell*. First, that alteration destroys the market for *that original painting*, as that original no longer exists. Second, the alteration reduces the value of the work to the author. Although VARA, unlike a *droit de suite*, gives the author no legal right to the profits earned on future resales of a painting, the incentive that VARA provides is reputational rather than purely proprietary. If the painting is changed into a parody of itself, the author will not receive the credit she would otherwise have received from exposure of her work to the public. A parody that engenders criticism of the author will diminish the value of the work to the author, and accordingly her incentive to produce additional works.

This discussion is not meant to suggest that the fair use analysis would clearly come out different in the hypothetical case than it did in *Campbell*. The ultimate outcome might be the same – although more likely because of the language of VARA rather than that of § 107.[203] The point is merely that fair use does not necessarily protect speakers in VARA cases the same way, or to the same extent, as in ordinary copyright infringement cases. Because fair use operates differently, the rationale of *Harper & Row* and *Eldred* may not apply.

Eldred also made it clear that copyright's pedigree was an important part of the First Amendment analysis.[204] Here, an argument analogizing VARA to copyright is more likely to flounder. Even if VARA protects free speech to the same extent as § 106, it does not have the same pedigree as the copyright rules at issue in *Harper & Row* and *Eldred*.

Reduced to its essentials, the Court's pedigree argument turns on the temporal proximity between the Copyright Clause and the First Amendment. The First Amendment was enacted so shortly after Article I that, had those who drafted the provisions perceived a significant conflict between copyright and free speech, they would have included spe-

201. *See* 17 U.S.C. § 107(4).

202. The case of *Video-Cinema Films, Inc. v. Lloyd E. Rigler-Lawrence E. Deutsch Foundation*, 2005 WL 2875327 (S.D.N.Y.) is typical. The court's discussion of fair use focuses primarily on the effect of the infringer's use on the market, largely ignoring the other statutory factors.

203. If people recognize the work as a parody, there is unlikely to be any effect on the author's reputation, precluding any claim under VARA. By requiring harm to reputation, VARA itself deals indirectly with parodies.

204. *See Eldred*, 537 U.S. at 219-20.

cific language addressing the conflict.[205] But this argument turns on the ever-elusive notion of the "Framers' intent." One must consider what the Framers had in mind when they envisioned the sorts of "exclusive rights" that Congress might create pursuant to the Copyright Clause. Modern conceptions of the scope of the Copyright clause do not control. The Court in *Eldred* specifically confirmed the importance of this historical perspective when it stated, "when, as in this case, Congress has not altered *the traditional contours* of copyright protection, further First Amendment scrutiny is unnecessary."[206] If Congress goes outside these traditional contours, the presumption of validity will not apply. Only if a particular sort of copyright rule was anticipated by the Framers can one imply anything from the fact that the Framers did not see to address it when they enacted the First Amendment.[207]

What, then, did the Framers envision by a copyright? There is little doubt that as a general matter they perceived of copyright as a purely economic right that afforded the owner control over dissemination of the protected work.[208] The rights in § 106 generally comport with this historical understanding.[209] The fundamentally different moral rights – rights borrowed from continental European law during the past fifty years – were unknown in the Anglo-American legal system of the late eighteenth century.[210] Thus, whatever picture of copyright was in the Framers' minds when they enacted the First Amendment would not have included most of today's moral rights. There is accordingly no guarantee that the Framers, had they been presented with the question, would not have perceived a clash between VARA and the First Amendment.

For these reasons, one cannot conclude that the Supreme Court would apply the reasoning of *Harper & Row* and *Eldred* to VARA. Al-

205. *Id.* at 219.

206. *Id.* at 221 (emphasis added).

207. The historical lens used in First Amendment analysis of author's rights differs from the historical analysis used to determine whether moral rights fall within Congress's legislative jurisdiction. When considering the First Amendment, we are not asking whether Article I, section 8 is flexible enough to allow Congress to adopt new sorts of authors' rights such as moral rights. Instead, the issue is the narrower question of what the Framers could possibly envision at the time of the First Amendment.

208. The first Copyright Act gave the copyright owner the exclusive right to printing, reprinting, publishing, selling, and importing, protected works. Copyright Act of 1790 § 1 and 2, 1 Stat. 124. Taken together, these rights allowed the owner to regulate distribution of the work.

209. Current copyright law gives the owner the rights to reproduce the work, prepare derivative works, and, for certain categories of works, to distribute copies, perform, display, and perform by digital audio transmission. 17 U.S.C. § 106.

210. Traditional copyright law gave the copyright owner no control over what a buyer did to or said about the work after the work is sold. A buyer was free to alter the work in any way, and to make whatever statement of authorship he chose.

though both copyright and VARA may represent the valid exercise of Congress's authority under the Copyright Clause, there are significant differences between the VARA rights and traditional copyright. These differences, both historical and practical, may create a clash between moral rights and free speech.

b. The § 106 Disclosure Right

Unlike the rights set out in VARA, the § 106 disclosure right[211] is likely to benefit from the presumption established by *Harper & Row* and *Eldred.* As far as pedigree is concerned, the basic notion of a disclosure right would have been familiar in the late 1700s. Since its very beginning in the United States, federal copyright law has given the author control over if and when her work is published.[212] Current § 106 therefore fits neatly into the historical notion of a copyright incorporated in Article I, § 8.

In addition, the § 106 disclosure right affords potential infringers the forms of free speech protections deemed essential in both *Harper & Row* and *Eldred.* The disclosure right does not squelch expression of any idea, but prevents people from borrowing the author's particular means of expressing that idea. The infringer is free to express that idea in his own words. The disclosure right also readily accommodates the § 107 fair use factors, enabling others to use even the author's own expression in limited situations.[213] Because the §106 disclosure right enjoys traditional copyright's pedigree, and gives the same protections against undue encroachment on speech, it should categorically satisfy

211. As discussed above at text accompanying *supra* notes 77 to 79, § 106's rights of performance, distribution, and display, taken together, are highly similar to the traditional moral right of disclosure.

212. The first copyright act protected unpublished works, giving the author the exclusive rights to print and publish those works. Copyright Act of 1790, 1 Stat. 24, § 1. By the 1909 Act, however, federal protection was available only from the point of publication. Copyright Act of 1909, § 2. Nevertheless, prior to publication an author could invoke a "common law copyright," which included the right to prevent others from publishing the work. For an excellent discussion of common-law copyright and the notion of "publication," *see Estate of Martin Luther King, Jr. v. CBS, Inc.*, 194 F.3d 1211 (1999). One of the main features of the 1976 Act was that it accelerated the point at which federal copyright was available from publication to fixation. 17 U.S.C. § 102(a). Therefore, the current act clearly gives the author a right to control disclosure to the public.

213. Admittedly, *Harper & Row* suggests that it is tougher to demonstrate fair use if a work is unpublished. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 564 (1985) ("The fact that a work is unpublished is a critical element . . . ."). However, the Court did not establish a *per se* rule that use of an unpublished work could never be fair. Indeed, such a rule would contradict the statute. 17 U.S.C. § 107(4) explicitly provides, "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

the First Amendment.[214]

2. The Treaty Power and Free Speech

Congress enacted VARA after the United States finally acceded to the Berne Convention. Article 6 *bis* of this treaty requires signatory nations to provide a right of attribution, and a limited right of integrity, to authors.[215] The provisions of the Berne Convention are not self-executing, but depend on implementing legislation in the member nations.[216] VARA represents the United States' main implementing legislation.

VARA's roots in a treaty may also have constitutional ramifications. In *Missouri v. Holland*,[217] the Supreme Court held that Congress may enact laws "necessary and proper" to implement the terms of a treaty.[218] More importantly, *Holland* indicates that the treaty adds to Congress's base legislative power, enabling it to enact laws on subjects otherwise outside its constitutional authority.[219] Although criticized in the literature,[220] *Holland* has never been overturned.

The possible implications of *Holland* for VARA are obvious. The First Amendment is a constitutional limit on Congress's authority. But the Berne Convention requires the United States to enact certain moral rights legislation. If *Holland* stands for the proposition that a treaty trumps existing constitutional limits on federal legislative jurisdiction, Congress could enact a law to enforce the obligations of Berne without regard to the First Amendment. All that Congress would need to show in the case of VARA is that it enacted that law at least in part to satisfy the United States' obligations under Berne.

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214. The § 106 disclosure right can also be sustained under another argument, set out *infra* at text accompanying notes 286 to 288.

215. The newer and more comprehensive GATT TRIPS incorporates many of the terms of the Berne Convention. However, TRIPS does not incorporate the moral rights provisions of Article 6 *bis*. Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods of the General Agreement on Tariffs and Trade, Article 9(1) (incorporates most of Berne, but explicitly excludes Berne Article 6bis). Therefore, a nation that refused too provide the moral rights called for in Article 6 *bis* would be in violation of Berne, but not TRIPS.

216. Berne Convention, *supra* note 6, Article 5(1), 6*bis* (3).

217. 252 U.S. 416 (1920).

218. *Id.* at 432.

219. A similar, albeit more limited, rule applies in Australia. In *Koowanta v. Bjelke-Petersen*, (1982) 56 SLJR 625, 39 ALR 417 (High Court), the High Court held that a treaty could augment the legislative jurisdiction of the federal Parliament, but only if the treaty involved "external affairs" within the meaning of Section 51 (xxix) of the Australian Constitution.

220. For a recent criticism of the rationale of *Holland*, *see* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005).

However, nothing in *Holland* frees Congress from the First Amendment. When applying *Holland*, it is important to distinguish between issues involving how to interpret positive grants of legislative authority (primarily but not exclusively Article I) and the effect of affirmative limits on that authority (primarily the Bill of Rights and the post Civil War amendments, but also other scattered provisions elsewhere). *Holland* dealt with the former. The issue in the case was Congress's power to enact laws governing migratory birds.[221] Congress had enacted a federal statute designed to implement the terms of a treaty dealing with migratory birds.[222] Because nothing in the Constitution explicitly gives Congress the power to regulate migratory birds, and because precedent suggested that the states owned wildlife, the state of Missouri argued that the statute encroached on the authority reserved to the states by the Tenth Amendment.[223] The Court rejected the argument, reasoning that Congress had the power to implement the treaty.[224] However, the Court was careful to note that, "[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution."[225] The clear import of this language is that the result would have been different if a different provision of the Constitution barred Congress from enacting such a law. The First Amendment, which clearly states that, "Congress shall pass no law ..." is an example of just such a prohibitory clause.[226]

The Supreme Court confirmed this more limited interpretation in *Reid v. Covert*.[227] That case held that civilians could not be tried before a court martial in another nation, even though an international agreement with the nation allowed those civilians to be tried before a United States military court rather than a foreign domestic court.[228] The Supreme Court found that it would violate the civilians' constitutional rights to try them before a court martial.[229] Nor was that result in any way inconsistent with *Holland*. Unlike *Holland*, where there was no specific provision barring Congress from acting, the Court found several provisions in the Constitution that limited Congress's power to subject civilians to

221. *Holland*, 252 U.S. at 432.
222. *Id.* at 430-31.
223. *Id.* at 431.
224. *Id.* at 435.
225. *Id.* at 433.
226. David M. Golove, *Treaty Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1083 (2000).
227. 354 U.S. 1 (1957).
228. *See id.* at 7-14.
229. *Id.* at 7-10.

military tribunals.[230] No mere treaty could give Congress the authority to violate those explicit restrictions.[231] Similarly, the Berne Convention cannot authorize Congress to enact laws that violate the First Amendment.

Reid does not render the Berne Convention completely irrelevant to a discussion of VARA's constitutionality. Because a treaty can augment Congress's authority relative to the states, Berne is an answer to the claim that Congress lacks the constitutional authority to enact moral rights legislation.[232] But beyond this issue of federalism, Berne has no effect. Berne does not, and cannot, limit the First Amendment. Thus, the fact that VARA stems from an international treaty is irrelevant to the free speech issue that is the focus of this article.

In conclusion, neither VARA's origins in the Berne Convention nor its current status as part of federal copyright law affect the First Amendment question. *Harper & Row* and *Eldred* do suggest that traditional federal copyright law enjoys a virtual presumption of First Amendment validity. However, although the reasoning of those cases can be applied to the § 106 disclosure right, the VARA rights are so significantly different than traditional copyright that those cases are inapposite. Similarly, VARA's roots in the Berne Convention provide no defense against a First Amendment challenge. VARA should therefore be analyzed like any other law under the First Amendment.

IV. APPLYING THE FIRST AMENDMENT TO MORAL RIGHTS

In many cases the First Amendment will provide little or no protection to a party who infringes another's moral rights. Many acts of infringement do not involve speech, and accordingly receive no protection from the First Amendment. For this reason, the First Amendment will not be a factor in virtually all cases involving the *droit de suite*, as well as most cases involving the rights of destruction, integrity, and disclosure. Second, one of the moral rights – the federal disclosure right created by § 106 of the Copyright Act – will survive a First Amendment challenge even in cases where the disclosure would constitute speech. Because the right to control when a work is disclosed to the public lies at the core of traditional copyright, it enjoys the *de facto* presumption of validity established by *Harper & Row* and *Eldred*.

230. *Id.* The Court discusses the right to a jury in Article III, § 2 and the Sixth Amendment, as well as the grand jury right in the Fifth Amendment.

231. *Id.*

232. *See supra* notes 12 and 14.

In all other situations, however, the First Amendment stands as a potential obstacle to imposing liability for a moral rights violation. Many moral rights infringements do involve speech. Holding an infringer liable for that speech is sufficient government involvement to satisfy the "state action" requirement of the First Amendment, even though the suit is instigated by a private party.[233] Regardless of whether the remedy is an injunction or damages, the First Amendment limits a court's authority to impose legal consequences on speech.

Of course, the law of free speech is a complex, multifaceted topic. Different situations present their own idiosyncratic policy concerns, making a unitary analysis of free speech impossible. Because of the widely different concerns, there is no single approach used to resolve First Amendment cases. Instead, the courts have developed a Byzantine array of tests for use in different circumstances.[234] Moral rights cases likewise present different types of policy concerns, suggesting that no one approach fits all situations. Determining how a particular moral rights dispute will be analyzed under the First Amendment requires one to identify which test applies.

Any decent primer on free speech law will discuss a number of tests. The Supreme Court has developed tests to deal with the particular issues of obscenity,[235] hate speech,[236] speech posing a danger to social order or life,[237] and speech in schools,[238] to name just a few. However,

233. New York Times v. Sullivan, 376 U.S. 254 (1964).

234. *See* Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* § 2:13 (2006). *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964) (public official plaintiff must prove actual malice standard to recover in a libel suit); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (speech that poses danger of lawless action may be prohibited by law only if it is directed at provoking imminent lawless action).

235. *See* Roth v. United States, 354 U.S. 250 (1957); Miller v. California, 413 U.S. 15 (1973) (First Amendment does not protect obscene speech). The test to determine whether speech is obscene depends on "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Roth*, 354 U.S. at 489.

236. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (First Amendment protects person from liability for burning cross on another person's yard).

237. *Id.*

238. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S.503 (1969) (school policy against wearing armbands violated students First Amendment right to free speech). Under the *Tinker* test, a student's right to free speech may not be infringed unless the speech "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Id.* at 509. *See also* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 679, 683 (1986) (First Amendment does not protect students from punishment for "lewd and obscene" speech that is "plainly offensive to both teachers and students."); Hazelwood Sch. Dist. v. Kuhlmeier 484 U.S. 260, 273 (1988) (First Amendment does not protect student speech from school principal "exercising control over style and content of student speech in school-sponsored expressive activities so

only a few of these tests are relevant to the question of moral rights. Because of the nature of moral right disputes, such cases are likely to involve only four of the free speech tests: the default "compelling interest" standard, the more lenient tests that apply to commercial speech and content-neutral regulations, and the special rule that applies to defamation and similar torts.

A. Determining the Applicable Standard

Freedom of speech, along with its First Amendment cousins freedom of religion and freedom of the press, are central tenets of the United States legal system. Although all constitutional rights are important, the Supreme Court has indicated that freedom of speech, religion, and press occupy a "preferred position" among the panoply of civil liberties.[239] This preferred position makes it extremely difficult for government to justify a regulation of pure speech when that regulation is based on the content of that speech. Unless the case falls into one of several special categories, government may regulate speech only if it can demonstrate a compelling interest, and if its regulation is narrowly tailored to achieve that interest.[240]

Laws rarely satisfy the compelling interest standard. First, few interests qualify as compelling. Aside from speech that poses an immediate threat to life or limb, or incites specific illegal acts, government usually cannot show that its interest is compelling.[241] Second, most laws also fail the "narrowly tailored" part of the test. To determine if a law is narrowly tailored, a court will ask if the regulation is the least restrictive means to accomplish government's goals.[242] If government could effec-

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long as their actions are reasonably related to legitimate pedagogical concerns.").

239. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

240. *See* Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105 (1991) (content-based discrimination is only constitutional if it can pass the strict scrutiny standard).

241. John E. Nowak & Ronald D. Rotunda, Constitutional Law 1131 (7th ed. 2004). Professors Nowak and Rotunda mention several areas in which the high standard is typically satisfied, including obscenity, child pornography, defamation, commercial speech, and campaign financing. However, in these cases it is not clear whether government has a compelling interest, or whether courts apply a more lenient standard because of the limited value of the speech.

242. *See* Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989):

> The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest . . . The Government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms . . . It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.

tuate its interest through a different regulation – one that restricted less speech, or existing speech less – the law is unconstitutional. In most cases, a court finds one or more less restrictive alternatives available.[243]

The problem of "coerced" speech involves a variant on this basic theme. Most free speech cases involve situations where the government wants to restrict speech. Sometimes, however, government wants to force people to speak. "Coerced speech" is a First Amendment issue, as the right of free speech includes a right not to speak.[244] Moreover, again assuming the speech does not involve one of the exceptions discussed below, a court will apply the same basic standard to a law that coerces speech as it applies to a law that restricts speech. Thus, government may coerce speech only if it has a compelling interest, and only if the statute is narrowly tailored to achieve that interest.[245] As it is difficult for government to demonstrate a compelling interest, and there will usually be a less restrictive alternative than forcing someone to speak, most statutes that coerce political or everyday speech will fail a First Amendment challenge.[246]

If the compelling interest applies, moral rights laws are likely to be found unconstitutional. None of the policy reasons supporting moral rights laws qualify as compelling interests. Moral rights violations certainly pose no risk to human safety or health. And even if the interests somehow were deemed compelling, it is easy to contemplate other means of achieving those interests that involve less of a restriction on the infringer's speech. A system of government grants, for example, would encourage art without restricting speech.[247] Likewise, if government considers it important to ensure the accuracy of an author's reputation, government itself could publish information about the author; a method that while perhaps not as effective does not affect the infringer's speech.

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243. *See* Hynes v. Major of Oradell, 425 U.S. 610 (1976) (municipal ordinance requiring notice be given to police by people wishing to solicit door to door violated the First Amendment because less restrictive means were available); *Sable Communications*, (ban on lewd telephone messages violated the First Amendment because it went beyond what was necessary to prevent minors from accessing such messages); Schaumburg v. Citizens for Better Env't, 444 U.S. 620 (1980) (municipal ordinance designed to protect citizens from fraud found to be overbroad).

244. West Virginia State Board of Educ. v. Burnette, 319 U.S. 624 (1943).

245. State v. Lundquist, 262 Md. 534 (Md. 1971) (statute requiring teachers and students to take part in flag salute ceremony unconstitutional).

246. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (U.S. 1977) (forcing a Jehovah's Witness to display state motto "Live Free or Die" on license tag violated First Amendment; state interest in promoting state history and state pride not compelling enough to justify law that motto be displayed).

247. In *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), the Supreme Court upheld a system of government grants for the arts against a First Amendment challenge, even though the grants turned on the content of the art.

Moral rights protection may be a lofty and laudable goal, but it is unlikely to trump the "preferred" position of free speech under the compelling interest analysis.

Yet it is entirely possible that a moral rights claim will *not* be governed by the compelling interest standard. The compelling interest test is in some ways a default rule. The Supreme Court has developed a number of other specific tests for particular First Amendment situations. These tests are significantly less demanding than the compelling interest test, and a challenged law is thus more likely to be upheld.

Therefore, rather than plunging directly into a detailed discussion of how each of the moral rights laws would fare under the compelling interest test, we will first venture down another path. If one of the Court's more lenient First Amendment tests applies to a particular moral rights law, an author seeking to enforce that right will not need to deal with the compelling interest standard. This section will demonstrate that most moral rights laws actually fit into one of three special First Amendment cases: content-neutral laws, commercial speech, or laws dealing with defamation. Moreover, the analysis will show that in most cases, the moral rights statute should survive the analysis applicable to these special situations.

B. Content-Neutral Regulation of Speech

Laws can limit speech in a number of different ways. Most discussions of free speech in the case law and literature focus on a law that punishes or imposes liability based on what the speaker said. The compelling interest test is designed to deal with such content-based laws. Still, many laws restrict speech based not on the message contained in that speech, but instead on other attributes. For example, a law might bar anyone from speaking in public places after midnight, regardless of what a particular person might be saying. Or, a law could prevent people from loitering outside the mayor's office, regardless of whether the act of loitering was intended as speech (for example, a sit-in) or merely as conduct.

Restricting speech for reasons other than its content may stifle communication every bit as effectively as content-based regulation. However, content-neutral regulation generally poses less of a threat to core First Amendment values. Because the First Amendment considers most messages of equal worth, it prevents government from controlling which messages will be heard. But when government regulates a message based not on its content, but for other non-speech reasons, it is not

trying to police what messages are available to the public. Of course, facially content-neutral regulations should not escape all scrutiny, as there is a risk that government will use a facially content neutral law as a way to restrict disfavored speech.[248] To accommodate these concerns the Supreme Court has developed a separate test to evaluate content neutral laws. Although this test does review government's ends and means carefully,[249] it is noticeably more lenient than the compelling interest standard.

1. The Law Dealing with Content-Neutral Regulation

a. The Meaning of "Content Neutral"

There is much confusion about which laws qualify for the content neutral test.[250] The trouble stems from the Supreme Court's failure to define precisely what it means by a content-neutral law. The Supreme Court considers both the effect of the law and the governmental purpose underlying the law, although it remains unclear which, if any, predominates in the analysis.[251] With respect to a law's effect, the notion of content neutrality has two distinct aspects. The first is *viewpoint* neutrality. A law that restricts speech critical of an author, but allows speech that praises the author, is not content neutral because it distinguishes based on the viewpoint expressed.[252] The second aspect of content neutrality is *subject matter* neutrality. Continuing with the same example, a law that prohibits all speech – positive, negative, or neutral – about an author is not subject-matter neutral, even though it is viewpoint neutral. A law must be both viewpoint and subject matter neutral to qualify for the content neutral analysis.[253]

248. For example, a law that makes it a crime to burn a flag is on its face content neutral. However, because flag burning is a common and effective way to voice displeasure with government, courts closely analyze flag burning laws. United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

249. *See* Smolla, *supra* note 234, at 3-3, where the author indicates that content neutral laws do not receive a "free pass."

250. *See* James Weinstein, *Database Protection and the First Amendment*, 28 U. Dayton L. Rev. 305, 330-1 (2002).

251. *Compare* Smolla, *supra* note 234, at 3-5 to 3-7 ("principal inquiry" focuses on intent) *with* Erwin Chemerinsky, Constitutional Law: Principles and Policies 904 to 909 (2d ed. 2003) (main inquiry is the effect, although a valid purpose can save a law with a content based effect).

252. *See, e.g.* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 197-200 (1983).

253. Chemerinsky, *supra* note 251, at 904. A third aspect of neutrality can arise in some cases. In addition to being viewpoint and subject matter neutral, a law must be "speech neutral" to qualify as a content neutral law. In other words, when a law regulates conduct, it is not content-neutral if it

The Court will occasionally consider a law's purpose in determining whether it is content neutral. In some cases, the Court has concluded that a law which is content-based on its face is nonetheless content neutral because government had a content neutral purpose when it enacted the law. In *Hill v. Colorado*,[254] the Court applied this reasoning to a law that prohibited people from approaching others outside a health care facility for purposes of education, oral protest, or counseling.[255] Although this law was subject matter based – it would allow a person to approach another to discuss the weather, but not to educate the listener about global warming – the Court considered it content neutral because government's demonstrated purpose was to protect the privacy of people entering health facilities such as abortion clinics.[256] Similarly, in *City of Renton v. Playtime Theaters, Inc.*,[257] the Court upheld an ordinance providing that theaters showing adult films could not be situated within one thousand feet of certain other uses. Although the law applied only to certain types of speech, the Court deemed it content neutral because the City's purpose was to regulate crime and other "secondary effects" of adult theaters, not the speech itself.[258] The Court's application of this "purpose" analysis has been inconsistent and confusing.[259] Others have argued[260] that the Court is conflating the threshold issue of whether a law is content neutral with the separate question of whether it is valid under the test that is used to judge the constitutionality of content neutral laws – a test that also considers government's purpose in passing the law. Nevertheless, the case law does suggest that although a party challenging a content-based law need not demonstrate a *bad* intent to prevail,[261] a convincing content neutral purpose can sometimes save a facially con-

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applies only in situations where that conduct involves speech. Texas v. Johnson, 491 U.S. 397, 406 (1989) (government may not "proscribe particular conduct *because* it has expressive elements); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 570 (1991) (upholds a law barring nude dancing; Court notes that state was not limiting such speech because of its message).

254. 530 U.S. 703 (2000).

255. The law was clearly intended to protect those entering abortion clinics. It barred anyone from coming within eight feet of a person who was within 100 feet of a health care facility, unless the person who is approached consented. *Id.* at 703.

256. *Id.* at 723.

257. 475 U.S. 41 (1986).

258. *Id.* at 47.

259. *Compare Hill* (law upheld because purpose was to prevent emotional harm to those entering abortion clinics) *with* Boos v. Berry, 485 U.S. 312 (1988) (a law that prevented critical speech near a foreign embassy violated First Amendment notwithstanding government's argument that the prohibition was intended to protect the dignity of foreign ambassadors).

260. Chemerinsky, *supra* note 251, at 906-07.

261. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991).

tent-based law.[262]

Two other Supreme Court cases present a variation on this purpose-based theme, which involves notions of "commodification." Because both cases involve a form of intellectual property right, they are potentially significant to any discussion of moral rights. In *Zacchini v. Scripps-Howard Broadcasting Co.*,[263] the Court held that the First Amendment did not protect a broadcast company from liability for airing a recording of a performer's fifteen-second "human cannonball" act on a news broadcast. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*[264] the Court held that it did not violate the First Amendment for Congress to give the United States Olympic Committee the exclusive right to use the term OLYMPICS and related symbols in commerce. The Court considered both laws content neutral. And yet, on their face, the laws in both cases were content based. Liability in both cases turned on the content of what defendant said. The broadcast company in *Zacchini* was liable for showing the film of the performance, but would not be liable if it had devoted the same fifteen-second segment of the news to some other subject. Similarly, the defendant in *San Francisco Arts* was liable for using the word OLYMPICS, while it would be free to use almost any other term to describe its event.[265]

The key to both *Zacchini* and *San Francisco Arts* lies in the Court's characterization of the underlying rights as "property." The performer's state-law right of publicity in *Zacchini* was a property right.[266] The federal law in *San Francisco Arts* similarly gave what the Court called a "limited property right" in the Olympic name and symbols.[267] Because the plaintiffs' rights were property, the Court could characterize government's purpose as the content neutral and important purpose of protect-

262. Whether the converse of this proposition is true is unclear. The Supreme Court has never squarely addressed whether a law that is on its face content-neutral can be held to violate the First Amendment if the government's purpose in enacting the law was to discriminate against certain particular views or categories of speech. Although there are a number of statements in the case law that suggest such an invidious purpose would render the law unconstitutional, the issue remains undecided. And the *O'Brien* test seems to make it clear that a bad purpose (that is, one designed to suppress speech) is enough to render the law invalid. However, as moral rights laws do not present the problem of invidious purpose, this article need not consider the question of whether a discriminatory purpose is alone enough to make a law violate the First Amendment.

263. 433 U.S. 562 (1977).

264. 483 U.S. 522 (1987).

265. *See San Francisco Arts*, 483 U.S. at 536 (where the court stated that "neither Congress nor the USOC has prohibited the SFAA from conveying its message," and SFAA has called its event other names without using the word Olympic).

266. *Zacchini*, 433 U.S. at 573.

267. *San Francisco Arts*, 483 U.S. at 534.

ing private property, rather than restricting speech.[268] Speech using a tape of Zacchini's performance, or the word OLYMPIC, violated that property right, and could result in liability.

The broader implications of *Zacchini* and *San Francisco Arts* are intriguing. Both cases suggest that government has a limited ability to create a property right in certain words, symbols, or other elements of speech.[269] If it creates such a property right, a law that bars use of those symbols or words will be treated as a content neutral law protecting that property, even though liability turns on what defendant said.[270] This broader argument may have implications for both moral rights and copyright.

b. General Analysis of Content-Neutral Speech

Once a court determines that a law is content neutral, it analyzes that law under the *O'Brien* standard.[271] A government regulation is valid under that test if

> [1] it is within the constitutional powers of government,
>
> [2] if it furthers an important or substantial governmental interest,
>
> [3] if the governmental interest is unrelated to the suppression of free expression, and
>
> [4] if the incidental restriction on alleged First Amendment freedoms is

268. *Id.* at 536 (law giving property right protects Congress's interest in "encouraging and rewarding" owner's activities); *Zacchini*, 433 U.S. at 576-77.

269. *San Francisco Arts*, 483 U.S. at 536; *Zacchini*, 433 U.S. at 576-77.

270. *Zacchini* and *San Francisco Arts* are not the only cases supporting this proposition. *See also* Adderley v. Florida, 385 U.S. 39 (1966) (government may punish trespass on country property even when that trespass is a protest); DVD Copy Control Assoc., Inc. v. Andrew, 75 P.3d 1, 14 (a law barring disclosure of a trade secret does not violate the First Amendment because a trade secret is a form of "property"); Chicago Joint Board v. Chicago Tribune Co. 435 F.2d 470 (7th Cir. 1970) (right to speak does not give speaker the right to command use of someone else's newspaper). *But see* O'Grady v. Superior Court, 139 Cal.App.4th 1423, 44 Cal.Rptr.3d 72 (2006) (when there is a clash between property interest in a trade secret and the First Amendment, the property interest "must give way").

271. *United States v. O'Brien*, 391 U.S. 367 (1968), the case that created the standard, involved expressive conduct. As a result, the *O'Brien* test is sometimes referred to as the standard for "symbolic speech." However, the test is not limited to cases involving conduct. It applies instead to any case involving a content-neutral law. The reason the standard is evolved in, and continues to be affiliated with, symbolic speech cases is because the government regulation at issue in those cases is often content neutral. Many statutes regulating conduct apply regardless of whether the conduct involved is speech, or the nature of any messaged conveyed by that conduct. Instead, they apply to any conduct of a particular nature.

no greater than is essential to the furtherance of that interest.[272]

The threshold requirement of an "important or substantial" interest is considerably more forgiving than the "compelling interest" standard applied in pure speech cases. State interests that would not be considered compelling – such as preserving public decorum, protecting property rights, or ensuring peace and quiet – will be held important or substantial.[273] Similarly, the proportionality element of the *O'Brien* test, which asks whether the restriction on speech is "greater than necessary," is in practice far easier to satisfy than the compelling interest test's "least restrictive means" analysis.[274] *O'Brien* demands only that the law be reasonably proportional, which means that a law can satisfy the test even though other less restrictive means might be available.[275]

2. Application of the Standard

a. Moral Rights Laws as Content-Neutral Regulation

The first step in applying the *O'Brien* analysis is to determine whether the law in question is content neutral. Many of the moral rights laws will meet the two-part test used to determine neutrality. Consider the right of destruction. All of the laws governing the right of destruction are content neutral. They apply to all acts of destruction, regardless of whether it is intended as speech[276] or, assuming the destruction is speech, the message or viewpoint conveyed.

A law preventing destruction is likely to affect certain viewpoints more than others. Those who destroy physical objects as a means of

272. *O'Brien*, 391 U.S. at 376-77.

273. *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (law prohibiting posting of signs on public utility poles did not violate the First Amendment; government interest in preventing visual clutter and preserving public decorum was substantial enough to validate a total ban); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (ordinance controlling the volume of music in Central Park bandshell with purpose of preserving peace and quiet for those using surrounding grassy area did not violate the First Amendment); Grayned v. City of Rockford, 408 U.S. 104 (1972) (anti-noise ordinance prohibiting persons nearby a school from making noise that disrupts peace and order did not violate the First Amendment).

274. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 286 (2000) (city ordinance prohibiting public nudity did not violate the First Amendment; restricting exotic dancers by requiring them to wear minimal covering was proportional to the government interest in prohibiting nudity).

275. *Id.* The Court mentioned the possibility of zoning as an effective alternative to the ordinance prohibiting public nudity but reiterated that the "least restrictive means analysis" did not apply.

276. If it did, the law might well be deemed objectionable because it singled out speech for less favorable treatment than non-speech. *See supra* note 253.

communication usually do not intend their message as a compliment. Instead, the destruction is almost always meant as a criticism. Flag burning is a good example. A law imposing liability for destruction of art will disproportionately affect critical messages, while leaving laudatory messages unaffected. Nevertheless, this disproportionate impact on critical messages is not enough to make the law content-based. After all, there could be many different critical messages underlying an act of destruction. The destroyer could intend the destruction as criticism of the technical quality of the art. Or, as in book burning, destruction could be intended to criticize the message contained in the art itself. Indeed, destruction of a work of art need not even be intended as criticism of the art. If the author espoused a different political or social view than the infringer, or engaged in some act deemed reprehensible to the infringer, destruction of the author's works could be – and often has been in history – intended as a comment on the author rather than the art. Finally, in some cases destruction of the work may have little to do with the art or author, but instead with some other connection that people make. Thus, if an infringer burned the art collection of a brutal dictator, the destruction would send yet another message.[277] The destruction right treats all of these situations exactly the same. Because the destruction right does not distinguish between messages – or depend on whether the destruction even sends any message – it is content neutral.

Nor does the fact that the destruction right is limited to works of "visual art"[278] or "fine art"[279] affect this conclusion. Admittedly, this limitation means that someone who criticized a work of fine art by destroying it would be liable, while that same person would not be liable if he criticized a different work in the same manner. But that distinction does not make the law content based. Focusing on the destruction of different works approaches the question from the wrong perspective. Instead, the analysis should consider the different messages that could result from destruction of the *same* work. A law is content based only if it treats the same act differently depending on the message being conveyed.[280] For the same reason, VARA's limitation to works of "recog-

277. A variation on this theme is the destruction of the Buddha statues in Afghanistan by the Taliban government. Paul Salopek, *Buddha icons are huge in their absence; Ancient heritage among Taliban's many victims*, Chicago Tribune Nov. 28, 2001, at 4.

278. 17 U.S.C. § 106A.

279. *Supra* note 109 cites the state statutes creating rights in "fine art."

280. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) presents a useful analogy. The law in that case prohibited camping in a public park. Certain people wanted to camp in the park as a protest, and accordingly challenged the law under the First Amendment. The Court found that law content neutral, because it barred camping regardless of whether it was intended as

nized stature" does not make it content based.[281]

The right of integrity, which prevents alterations and mutilations of a work, is closely related to the destruction right.[282] The content-neutral analysis of integrity laws accordingly proceeds along the same lines as the analysis of the destruction right. Like the destruction right, the right of integrity does not distinguish between alterations intended as speech, and those with no intended communicative element. Similarly, even when the alteration is intended as speech, the governing laws impose liability regardless of the message or viewpoint being presented. Alteration of a work can be intended as a parody of the work or the author. In the alternative, the alteration may have a satirical purpose, criticizing or commenting on some other aspect of society.[283] Although parody and satire are certainly protected as speech, the right of integrity does not treat parodical or satirical messages any more or less favorably than any other message.

The only potentially significant difference between integrity and destruction laws is that VARA and many of the state integrity statutes apply only to alterations that have a negative effect on the author's reputation or honor.[284] This additional limitation is arguably a viewpoint-based distinction. A person is free to alter a work in ways that flatter the author, while alterations that criticize the author or the work would result

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speech, and regardless of any message conveyed.

Note that a law like that in *Clark* would not be content based even if it prevented camping in public parks but not in national forests. Regulation of different acts may well result in certain messages being limited, while others are freely allowed. While that may possibly create an Equal Protection challenge, it does not by itself render the law content based for purposes of the First Amendment.

281. *See also* the extensive discussion of content neutrality in *Board of Managers of Soho International Arts Condominium v. City of New York*, 2004 U.S. Dist. LEXIS 17897 (S.D.N.Y.). That case, which dealt with application of a historical landmark law to a mural, held that the law was not content based merely because it applied only to works of historical significance. *Id.* at *38-39.

282. In one sense, destruction and mutilation are merely differences of degree. However, because a private act of destruction will not necessarily directly affect the artist's reputation, forcing the artist to sue under the integrity right might prevent her from recovering. To recognize the indirect effect that destruction has on the artist's reputation, as well as society's interest in preserving works of recognized stature, VARA also contains a destruction right. *Legislative History*, *supra* note 38, at 6926.

283. *See* Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Co-op. Productions, Inc., 479 F. Supp. 351, 357 (1979) The court held:

> [a] parody must do more than merely achieve comic effect. It must also make some critical comment or statement about the original work which reflects the original perspective of the parodist--thereby giving the parody social value beyond its entertainment function. Otherwise any comic use of an existing work would be protected, removing the "fair" aspect of the "fair use" doctrine and negating the underlying purpose of copyright law of protecting original works from unfair exploitation by others.

284. 17 U.S.C. § 106A(a)(2) & 3(a); 27 Maine R.S. § 303(2) (2005); N.J. Stat. § 2A:24A-4 (2005); N.Y. CLS Art & Cult. Affr § 14.03 (1) (2005).

in liability. But this argument falls short. The reputation or honor provisions in integrity laws do not distinguish between messages based on what they say, but instead on the statement's effect. If a vandal paints a mustache on a painting, that act will result in liability only if there is harm to the author's reputation. Note that liability does not turn on what the vandal is trying to say with his added mustache. The law draws a distinction based only on whether the message has any effect. In this respect, the honor or reputation limitation in integrity laws is more of a standing requirement than it is a content-based distinction. These statutes do not allow the author to protest petty changes, but only those that cause real harm to the author.[285]

The § 106 disclosure right presents a more difficult question. Part II.B of this article demonstrated that the disclosure right that can be cobbled from §§ 106(4), (5), and (6) would probably be held valid based on the precedent of *Harper & Row* and *Eldred*.[286] However, because the disclosure right presents unique issues when analyzed as a content neutral law, it is a useful exercise to consider whether and how the *O'Brien* test applies to that right. The threshold issue of whether § 106 is content neutral presents difficulty. The statute does involve subject matter distinctions. Defendant is not free to speak by publicizing the works of another. On the other hand, that same party can speak by presenting his own works, or the works of a consenting copyright holder.[287] Because liability depends on the symbols the defendant uses to convey his message, the law is facially content based.

Nevertheless, the § 106 disclosure right involves a situation where a court should apply the "purpose" doctrine. Congress's goal in preventing disclosure was not to prevent others from speaking. Instead, the disclosure right recognizes that the timing of publication of a work can have a significant effect on the value of that work. Uncontrolled disclosure is harmful not because it is speech, but because it has the secondary effect of reducing the economic benefit that the author receives from the work, which in turn may lessen the author's incentive to produce. Thus, rather than intending to squelch one person's speech, Congress meant to maximize the amount of speech by ensuring the author has the opportunity to earn the optimal return on her investment. More-

285. Some have argued that the integrity right is unconstitutionally vague, because of the difficulty in measuring honor and reputation. However, at least one court disagrees. Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994), *rev'd in part on other grounds* 71 F.3d 77 (2nd Cir. 1995), *cert. denied* 517 U.S. 1208 (1996), which finds that honor and reputation are not unconstitutionally vague.

286. *See supra* text accompanying notes 211 to 214.

287. *Id.*

over, Congress protected the author's investment by providing her a property interest in her work, much like the commodification cases discussed above.[288] Congress's primary purpose in giving the author the right to control disclosure was not to restrict speech, but to protect the author's proprietary interest in her copyright. Therefore, the disclosure right is a content neutral law that should be analyzed under the *O'Brien* test.

A similar analysis applies to Louisiana's display right. On the surface, the law is content-based, as it imposes liability only on those who speak by using the author's work,[289] not those who speak by other means. However, the purpose of the law is to protect reputation, not to limit speech.[290] The Louisiana law is in some ways similar to the flag burning laws at issue in *Texas v. Johnson*[291] and *United States v. Eichman*,[292] where the Court applied the content-neutral analysis to a law that barred only speech with a certain content.

By contrast, the remaining two moral rights – attribution and dissociation – involve statutes that are content based. Both rights focus exclusively on statements concerning the authorship of works. Both impose liability based on the viewpoint expressed in those statements. In other words, the infringer is liable for saying that *X* is the author of a particular work, but not liable if he states that *Y* is the author. Similarly, in cases where the infringer has said nothing about authorship, he can avoid liability only by making a particular statement; namely, that the author is the source of the work. Although these statements may involve completely non-controversial assertions of fact, the state and federal laws governing attribution and dissociation draw distinctions based on the content of the speech at issue.

Nor are attribution and dissociation laws saved by the line of cases which allows a valid content-neutral purpose to redeem a content based law. In all of the cases where the Supreme Court has employed this argument, the legislature could demonstrate a government interest *unrelated to the suppression of speech*, such as protecting privacy[293] or limiting crime.[294] Government regulates speech in these cases to control

288. *See supra* text accompanying notes 263 to 270.

289. Display of another's work will not always qualify as "speech." Of course, if display of the work is not speech, the First Amendment is not an issue.

290. The statute states that no person may display a work if damage to the artist's reputation is reasonably likely to result. La. Rev. Stat. Ann. § 51:2153(3).

291. 491 U.S. 397 (1989).

292. 496 U.S. 310 (1990).

293. Hill v. Colorado, 530 U.S. 703 (2000).

294. Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).

the secondary effects of the manner in which the speech is presented, not the speech itself. In the case of attribution and dissociation, by contrast, government wants to limit the particular message, regardless of the context or way in which it is made.

The commodification variant also offers no help. At first glance, the commodification cases appear to have promise. Moral rights do bear some of the hallmarks of property, just like the rights at issue in the commodification cases. Most moral rights are exclusive to the author.[295] They relate to a specific "thing": a particular work. If attribution and dissociation rights represent laws designed to protect the author's property interest, they could be evaluated as content-neutral laws.

However, the analogy to the commodification cases is not convincing. Considering attribution first, the right to be named as the author of your own work could be considered a property right.[296] However, any such right is not of the same *genre* as that involved in *Zacchini* or *San Francisco Arts*. In those cases, the laws gave one person the right to control the elements of speech itself. In an attribution case, by contrast, the infringer's speech does not *use* any of the words or symbols "owned" by the author. The infringer has not named the author, but instead used the name of *someone else*, or in the case of non-attribution, no name at all. As the author cannot claim that the infringer has used her name or anything else she owns, the attribution law cannot be justified as a way to protect any property interest the author may have.

In a dissociation case, the infringer has used the rightholder's name. However, the dissociation right is also different from the property rights at issue in the commodification cases. The dissociation right does not really give the rightholder any property interest in her name. It only gives the right to prevent use of her name in one relatively narrow context, namely, in connection with works that someone *else* prepared. Anyone remains free to use the rightholder's name in other contexts, such as in news reporting. The law in *Zacchini*, by contrast, prevented the defendant from using the tape of the performance for any purpose that threatened the value of the performance. Therefore, the dissociation right – which is not connected with any particular work and does not afford the rightholder ownership of her name for most purposes – cannot

295. *See, e.g.*, 17 U.S.C. § 106A(e) (moral rights cannot be transferred, although they may be waived); Cal. Civ. Code § 987(d) (2006) ("artist shall retain at all times" certain rights); Conn. Gen. Stat. § 42-116t (d) (2004) (rights non-waivable).

296. Property is often analogized to a bundle of sticks, with each stick representing a particular right in a *res*. The right to be named as creator of a certain work can be viewed as one of these sticks. Even if the author conveys most of the sticks to another, it is certainly possible to allow him to retain the stick representing attribution.

be considered a law protecting a property right. As neither the attribution nor the dissociation right is analogous to the rights involved in *Zacchini* and *San Francisco Arts*, the rights must be considered content-based, and the *O'Brien* analysis will not apply.

Of the various moral rights, only the rights to prevent destruction, preserve integrity, and control public disclosure involve content-neutral laws. The following subsections explore how the *O'Brien* test applies to these laws. The different considerations relevant to these three rights call for a separate discussion of each.

b. Destruction

Under the *O'Brien* analysis, a statute creating a destruction right would be valid if it (1) lies within the constitutional power of government, (2) furthers an important or substantial interest, (3) involves an interest that is unrelated to the suppression of speech, and (4) imposes an incidental burden on speech that is no greater than necessary.[297] The first step has nothing to do with the First Amendment.[298] A statute that lies without a legislature's jurisdiction is invalid regardless of whether it satisfies the remaining parts of the test – indeed, regardless of whether the activity it regulates is even speech. The first part of the test involves questions of Congress's legislative authority under Article I or other provisions granting legislative powers; or in the case of state laws, preemption. Some of these issues have already been addressed, and no further discussion of the first part of the test would be useful, either here or with respect to the integrity or disclosure rights. Accordingly, the analysis will focus only on the last three parts of the test.

The second and third parts of the analysis can be considered together. Here, it is necessary to consider the purpose or purposes of the legislation. The *O'Brien* test looks for an "important or substantial" interest. Although the interest need not be compelling, the test requires a stronger interest than government would be required to demonstrate in ordinary rational basis analysis.[299] Moreover, at a minimum the government's purpose must be something other than the regulation of speech.

The legislative history for VARA lists two distinct reasons justi-

297. *See supra* note 272.

298. *Accord* Smolla, *supra* note 234, at § 9:8 (first step is "superfluous").

299. *See* Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994), where the Court found the "must-carry" provision of the Cable Television Consumer Protection and Competition Act to be content neutral. The Court stated that a degree of higher scrutiny than rational basis was required. *Id.* at 640. *See also* Smolla, *supra* note 234, at 3:2.

fying a right to prevent destruction of works. The first purpose of a destruction law is to preserve works of art for future enjoyment.[300] The second is to encourage additional artistic creation by allowing the author to continue to garner the reputational benefit that flows from her earlier work.[301] To the extent that the notoriety from prior works is an incentive to produce future works, ensuring the continued existence of prior works adds to the total amount of art.

That legislative history alludes to, but does not elaborate on, a crucial feature of cases involving the destruction right that distinguishes them from garden-variety free speech disputes. In a typical free speech case, only one party – the defendant – is speaking. By contrast, a destruction case involves *a clash between two speakers*: the infringer and the author. When government seeks to preserve art, it is actually attempting to ensure that the author's speech remains available to society.[302] Preserving the author's speech requires placing limits on the speech of the infringer, because the infringer's speech threatens to supplant that of the author. This clash between two different speakers directly affects the analysis of government interest, as it calls for a solution that ensures that both bodies of speech remain available.[303]

Viewed in this light, the two interests cited in the legislative history are "important or substantial" under *O'Brien*. The First Amendment itself makes it clear that there is a strong societal interest in ensuring that speech remains available to potential listeners, an interest that supports preservation of art.[304] Government likewise has an interest in encourag-

300. *Legislative History*, *supra* note 38, at 6926.

301. *Id.* at 6924.

302. Others have recognized this feature of the destruction right. *See* Strahilevitz, *supra* note 11, at 829; Michael Spence, *Intellectual Property and the Problem of Parody*, 114 (Oct.) L.Q.R. 594, 609 (1998); Konrad, *supra* note 11, at 1606-07; Ong, *supra* note 11, at 302.

303. Professor Ong takes this argument one step further, introducing a third speaker into the calculus. He argues that the very existence of moral rights laws sends a message to society that art should be respected. Ong, *supra* note 11, at 311. In other words, government is also speaking when it protects art. Although fascinating and intuitively correct, the argument adds little to the First Amendment discussion. Most government regulation sends a message. But the First Amendment requires government to allow people to speak, *especially* when government wants to send a competing message. First Amendment law already accommodates government's message to some extent; not as speech in its own right, but as part of the government "interest" in regulating private speech.

304. In *Whitney v. California*, Justice Brandeis indicated that the prevailing purpose of the First Amendment is enlightenment. 274 U.S. 357, 375 (1927) (Brandeis, J. concurring). Professor Meiklejohn similarly listed "education" as a core value of the amendment. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 257. One author argues that the message conveyed by "creative" speech, such as that of the author, is more valuable than the message created by destruction of another's speech. Strahilevitz, *supra* note 11, at 828-29. Although creative speech may in face be more valuable, it is by no means clear that the First Amendment allows for this sort of value balancing.

ing more speech, which allows it to provide incentives for additional authorial creation.

Moreover, neither interest involves the suppression of expression. To the contrary, the preservation interest aims to *maximize* the amount of expression by ensuring that the author's voice, as expressed in her work, continues to be available to society.[305] The destruction right exists in part because of the way in which art communicates. The spoken word is fleeting in nature. The message is conveyed at the instant the speaker speaks. Paintings, sculpture, films, sound recordings, and books generally have a much longer communicative life. All of these works may continue to communicate as long as they exist, for every time someone new encounters them, an additional communication may take place. The law of free speech, which evolved in large part in situations involving short-lived speech such as marches, oral communication, and news articles, has not had to consider the question of "preserving" speech, as the speech involved in most cases was time-sensitive. Nevertheless, there is no reason why the First Amendment cannot recognize government's interest in preserving speech that continues to communicate for a long period of time. This government interest in increasing the public discourse easily satisfies *O'Brien*'s requirement of an important or substantial interest unrelated to the suppression of expression.[306]

Finally, the right of destruction does not restrict speech more than is necessary. First, any effect on speech is relatively minor. The infringer may be barred from speaking in one particular way: the symbolic speech represented by destroying the work. But in most cases that narrow restriction will have little impact on the infringer's ability to deliver his message. Regardless of what message the infringer wishes to convey, there are other means of getting across the same idea. If the goal of destruction is to criticize the art or the author, the infringer may convey that criticism through words and reproductions of the work.[307] Indeed,

305. *Accord* Spence, *supra* note 302, at 609.

306. Nothing in *Texas v. Johnson*, 491 U.S. 397 (1989) is to the contrary. The Court in that case admittedly held that the state interest in preserving the flag as a symbol of unity was directly related to the suppression of speech. *Id.* at 410. A key feature of that case, however, was the Court's observation that an interest in preserving unity through a flag is impaired "only when the person's treatment of the flag communicates some message." *Id. See also* United States v. Eichman, 496 U.S. 310, 314 (1990). Accidental or other non-expressive destruction of a flag does not affect government's interest in preserving unity. In the case of preserving art, by contrast, any destruction of a work impairs government's preservation-related goals, regardless of whether it is intended as speech. Government regulates destruction not because it is speech, but merely because it destroys art.

307. A reproduction of the work for purposes of criticism or commentary is likely to qualify as fair use under 17 U.S.C. § 107.

because these other means leave the original work intact for the public to evaluate, they may be a more effective means of conveying the critical message. If the goal of the destruction is to criticize not the author but instead the owner of the work, there will also be myriad other ways to deliver the message. All of these alternate methods are legal under moral rights law.[308]

Second, the limited effect on the infringer's ability to convey his message is the only practical way of achieving government's twin aims. There are other ways for government to enhance an author's reputation and encourage artistic production, such as government funding and recognition programs. However, it is by no means clear that any of these alternatives are as effective as the right to prevent destruction. And with respect to the other aim – preserving art and the author's message – there is truly no other way to accomplish that end. Unless government imposes some legal consequences on those who destroy art, there is no way to prevent the loss to society and to culture that results from that destruction.[309] Therefore, because the destruction right is the only effective way to accomplish the important goals of enhancing reputation and preserving art, it does not restrict speech more than necessary. The destruction rights that exist in VARA and state law accordingly comply with the First Amendment as valid content-neutral laws.

c. Integrity

Much of the analysis set out above for the destruction right applies with equal force to the integrity right. Both rights serve similar purposes. The integrity right helps to protect the author's reputation (thereby providing a continued incentive to produce), and preserves the underlying work in its intact form for the benefit of society. As stated in the legislative history to VARA:

> The Visual Artists Rights Act is of the utmost importance to professional artists who build their future on the integrity and authenticity of . . . [art] in public and private collections and to the public for preserving its cultural legacy . . . Any distortion of such works is automatically a distortion of the artists' reputation and cheats the public of an

308. Of course, other laws may come into play, especially when a critic conveys inaccurate information. A demonstrably false statement about an artist's work might be grounds for a successful defamation suit.

309. Several moral rights laws limit the impact on speech by limiting the destruction right to famous or well-known works. *See, e.g.*, 17 U.S.C. § 106A(a)(3)(B) ("work of recognized stature); N. M. Stat. Ann. § 13-4B-2(C) ("recognized quality"); 73 Penn. Stat. § 2102 ("recognized quality"). Society's interest in preservation is arguably the greatest where well-known works are involved.

> accurate account of the culture of our time . . . Artists . . . must sustain a belief in the importance of their work if they are to do their best. If there exists the real possibility that the fruits of this effort will be destroyed after a mere ten to twenty years the incentive to excel is diminished . . .[310]

Although these interests are not identical to those underlying the destruction right, they are equally important and substantial. Like destruction cases, integrity cases involve a clash between speakers, where the infringer's speech threatens to erase that of the author. Government is attempting to preserve the integrity of the author's speech, which of necessity requires some restriction on the infringer.[311] Likewise, these interests are completely unrelated to suppressing speech. Government's goal is not to limit the infringer's message, only the way that message is delivered. An integrity right may likewise increase the total amount of speech by requiring a critic to create his own work. Finally, the integrity right does not limit speech any more than is needed to accomplish government's goals. The infringer may still express his criticism of the art by means other than physically defacing an original. Again, because these other means of expression leave the original available for comparison, they may actually prove more effective at delivering the infringer's message.

There is, however, a twist. Just as the integrity right involved additional considerations relevant to the issue of whether the law is content neutral, it also exhibits certain features that complicate the *O'Brien* analysis. In this regard, it is useful to divide integrity laws into two categories. The first, exemplified by VARA, prevents alterations only of original, physical copies produced by the author. In this category, the arguments set out above apply in full, and the laws should be found to

310. H.R. Rep. No. 101-514, 101st Cong., 2nd Sess. 6915, 6916 (1990) (*quoting* statement of Weltzin B. Blix). California cited a third rationale for integrity protection when it enacted its landmark California Art Preservation Act of 1979. In addition to the interest in preserving authorial reputation and the integrity of existing works, the statute indicates that the integrity right protects the "artist's personality." Cal. Civ. Code § 987(a).

311. *Accord* Konrad, *supra* note 11, at 1607; Fujita, *supra* note 15, at *50. One federal district court, dealing with the integrity right provided by Massachusetts law, suggested that government has a *compelling* interest in preserving the integrity of art. Phillips v. Pembroke Real Estate, Inc., 288 F.S.2d 89, 104 (D. Mass. 2003). As the ensuing analysis will demonstrate, it is unnecessary to conclude that the government interest satisfies this more rigorous standard. Arguably, government's interest in preserving art is reflected not only in the destruction and integrity rights, but also in the right of attribution. A viewer will in many cases understand a work more fully if he knows who the author is. The attribution right ensures that the author's name stays connected to her work, and thereby helps to preserve the maximum communicative value of that work.

comply with the First Amendment.[312]

The second category of integrity laws comprises those few state laws that extend the integrity right beyond originals to copies or derivative works that present the same basic expression as the original, but in an altered or distorted way.[313] Here, application of the *O'Brien* analysis is more difficult. The most significant problem posed by this second category of integrity laws is that the purported goals served by the right are less persuasive. When a work is reproduced, the original remains intact. And if the original remains available, society has not been deprived of that cultural asset. By the same token, if the original is still available for the public to see, the public is still fully able to evaluate the author's reputation based on the author's actual artistic product.

Notwithstanding these differences, an integrity right that extends to reproductions should be found to serve an important and substantial government interest. A key feature of all of these laws is that they allow the author to recover for an alteration or modification only when that change is *attributed to the author*.[314] To borrow a term from trademark law, these statutes prevent the infringer from "passing off" the altered work as a work of the author. That sort of passing off directly implicates the government's twin aims of preserving the authorial message and protecting the author's reputation. The reputational interest is obvious: if the public thinks that the altered works are produced by the author, they will judge the author's reputation based on inaccurate information.[315] The preservational interest is more subtle. To understand it, one must understand why government is interested in preserving art at all. The goal is not merely to preserve art for its own sake. Government also wants to preserve art because art provides insight into the general culture of a given period. If inaccurate copies are held out as examples of a certain author's work, or as exemplars of a particular artistic period or *genre*, the public's perception of the culture is distorted or diluted. As

312. The only potential complications arise in those few states where an author suing for violation of the integrity right need not demonstrate harm to the author's reputation. *See supra* note 124. Application of the *O'Brien* analysis is slightly more difficult in these states, as the laws only further the government interest in preservation, not the interest in protecting reputation. Nevertheless, even these laws should be held valid. The interest in preserving works of art for later enjoyment is itself a sufficiently important and substantial interest to justify the extremely minor limit on speech posed by a moral right of integrity.

313. La. R.S. §§ 51:2153(2) & (3) (2005); 27 Maine R.S. § 303(2) (2005); Nev. Rev. Stat. Ann. § 597.740(1) (2005); N.J. Stat. § 2A:24A-4 (2005); N.Y. CLS Art & Cult. Aff. § 14.03(1) (2005).

314. *Id.*

315. In this vein, it is also interesting to note that all of the state laws cited in *supra* note 313 condition recovery on proof that the alteration is likely to damage the author's reputation.

the legislative history of VARA indicates, mutilation of a work of art, when attributed to the author, "cheats the public of an accurate account of the culture of our time."[316] Government's interest in preserving an accurate cultural snapshot, coupled with its interest in ensuring that the author's reputation is based on fact, qualify as important and substantial interests even in cases where the art is distorted in the process of reproduction.

Similarly, government's interest in preventing distorted reproductions is unrelated to the suppression of speech. Government is not trying to limit speech criticizing the art or the author. It is only insisting that that speech be accurate. An infringer is free, within the bounds of copyright's fair use doctrine, to produce a distorted copy. The law asks only that he not deceive the public into thinking that the author produced that work. That rule ensures the altered copy will be judged by its own merits, and as the work of the infringer.

Finally, an integrity right that extends to reproductions does not restrict speech more than necessary. Once it is recognized that distorted copies pose a threat to government's interests in authorial reputation and preserving culture, the most direct way to deal with the threat is to regulate the copies themselves. The infringer remains free to comment in any way that does not involve a reproduction of the work.[317] By limiting the integrity right to situations where the altered work is attributed to the author, the integrity laws affect only speech that poses a threat, not any other speech.[318] Therefore, all the integrity rights currently in force in the United States are valid under the First Amendment, regardless of whether they cover only originals or extend to reproductions.

d. Disclosure

Because the § 106 right of disclosure is presumptively valid under the rationale of *Harper & Row* and *Eldred*, it is technically not necessary to discuss whether the disclosure right can be justified as a content neutral law.[319] There is nevertheless much to be gained from

316. *Legislative History*, *supra* note 38, at 6916.

317. *Cf.* Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), which confirms that there will usually be many ways to express an idea without copying.

318. One author has suggested that an author's reputation could be preserved simply by requiring the infringer to disclose any changes made to the original. Konrad, *supra* note 11, at 1618-1620. Such a remedy would preserve the infringer's right to express himself by adapting the author's work. The suggestion does have some appeal. However, as the author himself recognizes, it does not obviate the free speech question, but merely converts the issue from one of suppressed speech to one of coerced speech.

319. *See supra* text accompanying notes 211 to 214.

applying the content neutral test to the disclosure right, as that right presents certain interesting issues. In addition to the question of whether a disclosure law is content neutral, the disclosure right presents unique questions when applying the *O'Brien* test.

Assuming that a particular act of disclosure is speech,[320] § 106 does regulate that speech in a content neutral fashion.[321] Therefore, the first step in the *O'Brien* analysis is to identify Congress's interest in creating a disclosure right. The relevant interests here are not necessarily the same as those underlying the destruction and integrity rights. The primary interest in regulating disclosure involves the economic and reputational incentives created by copyright. By giving the copyright owner control over when (or even whether) a work is disseminated to the public, § 106 allows an author to maximize the profits she can earn from that work. The greater the profits, the classic argument continues, the greater the incentive to produce art. The desire to encourage more authorship is unquestionably an important and substantial goal. That desire undergirds the entire Copyright Act.[322] It is confirmed by the Constitution itself;[323] a fact that should carry significant weight in a First Amendment analysis. Similarly, the goal of encouraging authorship is not related to the suppression of speech. Congress provides copyrights to encourage authors to write more, not to force society as a whole to say less. Finally, the right does not restrict speech more than necessary. The effect on the infringer's speech is minimal. Although others are barred from speaking in a way that involves public use of the author's words or symbols, they are free to convey their message in any other way. Therefore, even if the disclosure right is not automatically valid under *Harper & Row* and *Eldred*, it should easily pass the *O'Brien* test and survive a First Amendment challenge as a content-neutral law.

320. As text accompanying *supra* note 164 indicates, because many acts of disclosure will not qualify as speech, those acts receive no First Amendment protection.

321. *See supra* text accompanying note 169.

322. Eldred v. Ashcroft, 537 U.S. 186, 212 (2003).

323. The Constitution gives Congress the power to enact copyright laws to further the progress of knowledge. U.S. CONST. Art. I, § 8. Generally, it is assumed that the best way to encourage the progress of knowledge is to encourage the greatest *quantity* of works. Maximizing quantity, without any concern for quality, may or may not be the best way of furthering knowledge. Indeed, government may actually do a better job of furthering knowledge by regulating what works are available, as it does in elementary education. Nevertheless, the notion of "more is better" certainly has support in some corners of classic political philosophy. For example, it is fully consistent with Hegelian dialectic, in which competing ideas continually clash, with the better idea emerging victorious.

e. The Louisiana Display Right

As noted above, Louisiana's display right is preempted to the extent it deals with altered works, or situations where lighting or some other aspect of display modifies the appearance of the work.[324] However, the right remains available in situations where the infringer uses an unaltered original or faithful copy. Because the Louisiana display right regulates display in a content-neutral fashion, it is subject to the *O'Brien* analysis.

The Louisiana provision fails the *O'Brien* test. The state's interest in enacting the law is apparent on the face of the statute, as it explicitly deals with protecting an artist's reputation.[325] On the surface, this interest may seem analogous to the interest in protecting an author's economic position that underlies the § 106 disclosure right. But there is a crucial difference. An infringer can interfere with an author's economic interests by purely non-expressive conduct. Interfering with reputation, by contrast, occurs only when the infringer engages in conduct that sends a message. As a result, the state's interest in protecting reputation is, in effect, an interest related to the suppression of First Amendment speech. The flag burning case of *Texas v. Johnson*[326] is similar. In that case, the Court noted that Texas's purported interest in preserving unity was not unrelated to the suppression of speech because the only acts that could affect that unity were those with a "communicative impact."[327] Similarly, because only speech can harm reputation, Louisiana's interest in protecting reputation is an interest directly related to the suppression of speech, and the law fails the first element of the *O'Brien* test.

The discussion to this point has demonstrated that the moral rights of destruction, integrity, and disclosure are valid content-neutral laws regulating speech. The same conclusion obtains regardless of whether the rights are created by federal or state law. As these three rights are the moral rights most often invoked in actual litigation,[328] the First Amendment will not be a significant factor in the majority of moral rights disputes that are likely to arise. Nevertheless, three moral rights remain. The Louisiana display right fails the content-neutral test, even

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324. *See supra* text accompanying note 140.

325. The statute makes display actionable only when "damage to the artist's reputation is reasonably likely to result therefrom." La. R.S. § 51:2153(3).

326. 491 U.S. 397 (1989).

327. *Id.* at 411.

328. For example, the vast majority of the VARA cases cited *supra* in note 75 deal with alterations to a work.

though it is arguably a content-neutral law. And because the laws establishing the moral rights of attribution and dissociation are not content neutral, the arguments of this section do not apply. It is therefore necessary to determine whether these laws fit within any of the other special free speech categories, or whether they must be evaluated under the compelling interest standard.

C. Commercial Speech

For much of United States history, speech involving advertising or incident to a commercial transaction received little or no First Amendment protection.[329] Since *Bigelow v. Virginia* in 1975,[330] however, it is clear that commercial speech is protected. Nevertheless, the standard that applies to such speech is less demanding than the compelling interest standard. Although commercial speech does lie under the umbrella of First Amendment protection, there are many situations in which government may freely limit it or bar it entirely.

1. The Law Governing Commercial Speech

a. Commercial Speech Defined

The logical starting point in any discussion of commercial speech is to identify exactly what speech is "commercial." Defining commercial speech has proven to be one of the thornier issues in this area of First Amendment law. It is clear that unadorned advertising is commercial speech.[331] Beyond that, however, the Supreme Court has provided little guidance on this important threshold issue.[332] One of the few cases to analyze the question in depth is *Bolger v. Young Drug Products Corp.*,[333] which involved "informational pamphlets" about condom use prepared and distributed by a company that manufactured condoms. The Court concluded that the pamphlets were commercial speech, even though they included some general medical information. The Court considered three

329. In 1942, the Supreme Court actually held that the First Amendment provided no protection for commercial speech. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

330. 421 U.S. 809 (1975).

331. 4 Ronald D. Rotunda and John E. Nowak, Treatise on Constitutional Law, §§ 19.1 to 20.61, §20.26, West Group (3rd ed. 1999).

332. The Supreme Court's lack of guidance on this issue is sharply criticized in Joel Anderson, *What's Wrong with this Picture? Dead or Alive: Protecting Actors in the Age of Virtual Reanimation*, 23 Loy. L.A. Ent. L. Rev. 155, 177-180 (2005).

333. 463 U.S. 60 (1983).

factors in arriving at this conclusion: whether the speech was a form of advertisement, whether it referred to a particular product, and whether the speaker had an economic motivation.[334] As all three of these factors were present in *Bolger*, the Court found the pamphlet to be commercial speech.[335] Any analysis of whether speech is commercial, then, should begin with *Bolger*.

b. The Commercial Speech Standard

Once a court finds that particular speech is commercial, it applies a test that is in some respects easier to satisfy than the compelling interest standard. The Supreme Court established the current test for laws that restrict commercial speech in *Central Hudson Gas v. Public Service Commission*,[336] and significantly refined it in *44 Liquormart, Inc. v. Rhode Island*[337] and *Lorillard Tobacco Co. v. Reilly*.[338] Under the *Central Hudson* test, a court first determines whether the speech proposes lawful activity, and whether it is accurate. If the speech proposes an illegal transaction or deceives listeners, the First Amendment places no limits on government's power to bar or otherwise regulate it.[339] This initial step in the analysis demarks a clear distinction between commercial speech and other types of speech. Government cannot regulate political speech, news reporting, or casual conversation merely because it is false or misleading.[340] If commercial speech is false, by contrast, government may automatically ban it.

If the speech is true and involves lawful activity, government may regulate it only by a law that satisfies the three *Central Hudson* factors. First, government must have a substantial interest. Although *Central Hudson* makes this part of the test sound similar to the "important and substantial interest" component of the *O'Brien* test for content neutral legislation,[341] *44 Liquormart* and *Lorillard* indicate that the standard

334. *Id.* at 66-67.

335. *Id.* at 67.

336. 447 U.S. 557 (1980).

337. 517 U.S. 484 (1996).

338. 533 U.S. 525 (2001).

339. Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990). This plurality opinion distinguishes between speech that is inherently misleading, which can be completely barred, and that which merely has the potential to mislead, where government must show a substantial interest supporting the regulation.

340. Defamation is admittedly an exception to this rule. Assuming that government meets the special test applicable to defamatory speech, it can regulate it without showing any interest whatsoever. The law of defamation is discussed *infra* at text accompanying notes 359 to 365.

341. This portion of the *O'Brien* test is discussed *supra* at text accompanying notes 273 to 275.

is actually closer to the compelling interest test, especially when government seeks completely to ban truthful speech.[342] Second, the regulation must directly advance that interest. Finally, the regulation must be proportional; *i.e.*, it may not regulate speech more than is necessary to advance the government's interest. This third step also closely resembles the final step in the *O'Brien* analysis.

As in ordinary speech, issues of coerced speech also arise in the commercial speech context. For example, state and federal laws often require a party to disclose information to another as part of a pending or proposed transaction.[343] For "ordinary" speech, courts apply the same standard to coerced speech that they apply to restrictions on speech.[344] In commercial speech cases, by contrast, a different, *sui generis*, standard may apply to coerced speech. When a law requires a party to disclose accurate factual information (as opposed to a controversial viewpoint) to potential buyers or sellers, or as part of a commercial transaction, courts apply the test set out in *Zauderer v. Office of Disciplinary Counsel*.[345] Under this analysis, the state can order disclosure of facts in a commercial situation as long as disclosure is reasonably related to the state's interest.[346]

For purposes of this article, the most important facet of the commercial speech analysis is government's virtually unfettered authority to insist that commercial communications be accurate. Thus, government can automatically bar false commercial speech without having to demonstrate any heightened interest, and can order truthful disclosures of additional relevant information in connection with a commercial transac-

342. Smolla, *supra* note 234, at § 20:9 contains an excellent discussion of the impact of these later cases.

343. For example, the FDIC's "Regulation Z" mandates certain disclosures in connection with home mortgage financing. Other laws mandate a list of ingredients in foodstuffs, as well as an indication of place of origin for certain manufactured goods.

344. *See* State v. Lundquist, 262 Md. 534, 537 (Md. 1971) (First Amendment analysis includes consideration of whether the law is sufficiently narrow to protect a sufficiently valid government interest).

345. 471 U.S. 626 (1985). *See also* Hurley v. Irish-American Gay, Lesbian, and Bisexual Group, 515 U.S. 557 (1995), which makes it clear that government cannot mandate messages with which the group disagrees.

346. *Zauderer*, 471 U.S. at 651. The Second Circuit recently explained the rationale for this lower standard:

> Commercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the "marketplace of ideas."

National Electrical Manufacturers Ass'n v. Sorrell, 272 F.3d 104, 113-14 (2nd Cir. 2001).

tion. This ability to regulate veracity proves especially important in an analysis of moral rights.

2. Applying the Standard

a. Moral Rights as Commercial Speech

Moral rights claims often arise in a commercial setting. However, as this article has already demonstrated that the destruction, integrity, and disclosure rights satisfy the First Amendment under different legal theories, the only moral rights claims that need to be considered are those asserting the rights of attribution, dissociation, and the Louisiana display right. This section will discuss when acts violating those rights qualify as commercial speech, and if so, whether the governing laws pass the *Central Hudson* test.

Most attribution and dissociation cases are likely to involve commercial speech. These two moral rights deal with statements as to authorship of a work. Statements concerning authorship are particularly likely to occur when a work is being offered for sale, as knowledge of the author is an important determinant of value. Thus, a statement made by an art gallery owner to a potential buyer of a painting is clearly commercial speech. Although statements about the author of a work may not qualify as advertising in the lay sense of the word, they are akin to statements about the quality of an ordinary good under § 43 of the Lanham Act. If statements on a product's label about the alcohol content are commercial speech,[347] certainly a statement about the origin is too. In both cases, the statement provides a potential purchaser with information that may guide the purchaser's decision.

But other cases are less clear-cut. What if a buyer purchases a painting or sculpture online, and only learns the source when he reads the invoice in the product packaging? Although that statement is made in connection with a commercial transaction, it cannot influence the transaction.[348] Similarly, what if that painting hangs in a museum, where viewers will not see the indication of authorship until after they have paid for admission? What if the museum charges no admission? In these cases, the statement of authorship is not part of any commercial transaction. Nor does the statement relate solely to the speaker's or listeners' commercial interests. Although an indication of authorship could

347. Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

348. Unless, of course, the statement somehow gives the buyer the right to cancel the sale.

have economic consequences in some cases – by making some viewers more or less likely to buy other works from the author – that indirect economic effect is not enough to make the speech commercial. If it was enough, then a newspaper report, or even private gossip, about a person in business would be commercial speech, as it might affect the future demand for that person's products. In the situations posed above, the better conclusion is that the statements of authorship are educational, not commercial. Therefore, although no such case has yet arisen under VARA, a significant number of claims of attribution or dissociation may well involve non-commercial speech.

Similar observations apply to the Louisiana display right. An infringer is likely to display or publish a work when he is offering that work for sale. But there are also many situations where a work is displayed in a non-commercial context. Thus, the commercial speech analysis will apply in some, but not all, cases arising under the display right.

In most respects, the moral rights of attribution, dissociation, and display present the same basic questions for purposes of the First Amendment. However, the attribution and display rights present additional wrinkles. The most logical approach is to analyze the simplest case of commercial dissociation first, and build upon that reasoning when dealing with commercial attribution and display.

b. Dissociation

The First Amendment is no bar to recovery in cases where a rightholder sues for dissociation in a commercial context. False or misleading commercial speech is not protected by the First Amendment.[349] And a dissociation claim always involves false speech.[350] The

349. Central Hudson Gas v. Public Service Commission 447 U.S. 557, 593 (1980).

350. As discussed above in *supra* note 141, the moral rights statutes of several states can be read broadly to create an additional moral right of "disavowal," a right not to be acknowledged as the author even of your own work. It is highly unlikely that this right actually exists. But if it does, it would present serious free speech concerns. Like an ordinary dissociation claim, liability turns on the content of the speech. However, unlike the typical dissociation dispute, the challenged statement is not false. Nor does government have any significant interest in preventing truthful claims of authorship. Therefore, a law allowing the author to prevent the statement cannot be justified even under the commercial speech standard.

At first glance, the "commodification" analysis set out above, *see supra* at text accompanying notes 263 to 270, might seem useful for the disavowal right. Like the rights in *Zacchini* and *San Francisco Arts*, the moral right of disavowal is arguably a form of property right. However, the commodification analysis cannot save a disavowal right. There are two key differences between disavowal and the rights at issue in *Zacchini* and *San Francisco Arts*. First, neither the right of publicity in *Zacchini* nor the special trademark law in *San Francisco Arts* completely barred report-

rightholder is demanding that her name not be attached to a work that is not "hers," whether because she did not create it, or because her original effort has been altered or defaced to a significant extent. Therefore, to the extent it regulates false attribution in a commercial setting, the dissociation right would be constitutional under the First Amendment.[351]

c. Attribution

The right of attribution is in some ways a mirror image of the dissociation right. Whereas the dissociation right allows the rightholder to *prevent* use of her name on works she did *not* create, the attribution right allows the true author to *demand* use of her name on works she *did* create. Notwithstanding this close logical relation, from a commercial speech perspective the attribution right presents certain problems that do not arise in connection with the dissociation right.

Given that the First Amendment does not limit government's power to regulate false commercial speech, applying a moral right of attribution presents no free speech concerns in commercial cases of "misattribution", where the defendant has falsely attributed the author's work to another. The analysis for misattribution is identical to that for dissociation, set out above. However, not all attribution cases fit this mold. An attribution case can involve either misattribution or "non-attribution," where the infringer presents the work without any representation, by words or acts, as to who is the author. Although courts are sometimes reluctant to allow recovery in non-attribution cases,[352] VARA and the state moral rights statutes as written allow recovery even in cases where there is no statement about authorship. In a non-attribution case,

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ing or other discussion. It simply limited one particular way of discussing the subject. The Court considered this feature important in both cases. *Zacchini*, 433 U.S. at 574; *San Francisco Arts*, 483 U.S. at 536. A right of disavowal, by contrast, would completely stifle the authorial message, preventing anyone from expressing the idea in any way.

Second, the Court in *Zacchini* noted that the right of publicity does not deprive the public of information, but merely controls who gets to convey that information. *Zacchini*, 433 U.S. at 573. In the case of disavowal, if third parties are not allowed to speak, the public will never be exposed to the idea, as the author herself will certainly not divulge it. For these reasons, if a right of disavowal exists, it almost certainly violates the First Amendment.

351. The same arguments would apply to the right of integrity, reinforcing the earlier conclusion that that right is constitutional. Moral rights laws allow recovery for violation of the integrity right only when the violation affects the author's reputation. An alteration will affect reputation only when it is wrongly attributed to the author. Therefore, to the extent that an integrity right violation involves commercial speech – a situation that would admittedly seem somewhat rare – allowing recovery for violation of the integrity right can be justified as a regulation of false commercial speech.

352. *See, e.g.*, Morita v. Omni Publications International, Ltd., 741 F. Supp. 1107 (S.D.N.Y. 1990) (no recovery under Lanham Act for non-attribution).

however, the speaker has said nothing that is false. To the contrary, the moral rights law would force him to stop remaining silent, and to make a statement correctly attributing the author. Non-attribution cases therefore present two additional concerns: the lack of a false statement, and the problem of coerced speech.

However, these concerns do not affect the constitutionality of the attribution right in cases involving commercial speech. A right of attribution requires a person in possession of the work to disclose only a simple, accurate fact: the name of the author of the work. Thus, as long as the coerced statement is made in connection with a commercial transaction, the Supreme Court's opinion in *Zauderer* suggests that government can compel it. *Zauderer* allows government to force parties engaged in commercial speech to disclose accurate information provided it can demonstrate that disclosure is rationally related to a state interest.[353] Government has two interests in requiring disclosure of authorship. The first is its interest in providing key information to potential buyers. The second is ensuring that the real author receives appropriate credit for the work she has produced. Both of these interests are substantial, especially given the importance of reputation in the world of authorship.[354] A law coercing attribution directly advances these interests by requiring disclosure.[355] Government can accordingly force the party to disclose authorship.[356]

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353. *Zauderer*, 471 U.S. at 651.

354. Government's interest in ensuring that the author receives credit may appear less significant when an anonymous work is involved. In these cases, the author was initially not interested in receiving credit. Nevertheless, government may be interested in the author receiving credit even if the author is not interested.

355. *Zauderer* does not require that mandatory disclosure be "necessary" to accomplish government's goals. Even if it did, the right of attribution would satisfy the standard. Although there could conceivably be other ways to advance government's interest – for example, a statement by government about authorship – these alternative means are not as effective. Given that the defendant in a moral rights dispute will typically be the person who owns or controls the work, a statement by that person, and connected to the work, is the only realistic way to ensure that the public makes the connection between the author and the work.

356. One appellate court decision does admittedly suggest to the contrary. In *International Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67 (2nd Cir. 1996), the court held that it violated the First Amendment for a state to require dairy manufacturers to disclose whether the cows that provided milk used in the manufacturers' products had been treated with recombinant bovine growth hormone. The court noted that *Zauderer* and the other leading cases upholding disclosure requirements all involved situations where the information was necessary to prevent deception or protect human health. *Amestoy*, 92 F.3d at 74. As the evidence showed that bovine hormone had no effect on human health, the court found the only reason for requiring disclosure was consumer "interest" in how the cows had been treated. That interest, the court found, was not sufficiently substantial to satisfy the First Amendment. *Id.*

Amestoy, however, does not really conflict with the argument in the text. The court in that case ap-

d. The Louisiana Display Right

The Louisiana display right, by contrast, cannot be sustained as valid commercial speech. Recall that because of preemption, that right applies only when the infringer uses an unaltered original or faithful copy. Use of an unadulterated version of the work cannot be deemed a false statement. Nor does government have a sufficient interest to regulate that speech under the *Central Hudson* test.[357] An infringer should not be liable for making truthful statements about an author merely because those statements occur in connection with a commercial display of the work. The Louisiana display right accordingly does not qualify as a valid regulation even when the display would qualify as commercial speech.

In summary, some moral rights laws can be applied consistently with the First Amendment when the speech in question is commercial. The rights of attribution and dissociation are categorically valid as applied to commercial speech. However, the Louisiana display right gains nothing from the commercial speech analysis. Unless another free speech argument applies to the display right – as well as non-commercial attribution and dissociation cases – these moral rights would be judged by the compelling interest standard, under which their constitutionality would be in serious doubt.

D. Defamatory Speech

Before conceding that the compelling interest standard applies, it is useful to explore one more branch of free speech law. The law of defamation exhibits some close parallels to the moral rights of attribution, dissociation, and display. Like defamation law, these rights are designed to protect an author's reputation.[358] Because the special standard

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pears to read the Supreme Court precedent too narrowly. Although *Zauderer* and the other leading Supreme Court cases do all involve deception or health concerns, the cases nowhere suggest that these are the only concerns that might justify disclosure. Instead, they suggest that government will have a substantial interest whenever it tries to prevent some harm that listeners might suffer from incomplete information. The problem in *Amestoy* was that the state could demonstrate no harm other than failure to satisfy consumer curiosity. By contrast, lack of information about the author of a work is harmful to both potential purchasers (because such information can influence a purchasing decision) and to the authors themselves.

357. Central Hudson Gas v. Public Service Commission, 447 US 557 (1980).

358. The analogy is admittedly imperfect. Moral rights law focus on an author's reputation as an author. The concept of reputation in defamation law is significantly broader, alluding to all aspects of a person's character. As stated in the legislative history to VARA:

> the best approach to construing the term "honor or reputation" in H.R. 2690 is to focus on the artistic or professional honor or reputation of the individual as embodied in the

the Supreme Court uses in defamation cases does not turn on whether the defamatory speech is commercial, that area of free speech law may prove useful in analyzing claims of attribution, dissociation, and display that do not involve commercial speech.

1. The Standard for Defamatory Speech

The following, although greatly simplified, is the gist of the analysis used in defamation cases. First, the plaintiff must prove that the statement in question is false and directly concerns her. Although the common law made truth an affirmative defense to a defamation claim, the Supreme Court has established that the First Amendment requires plaintiff to prove falsity as an element of her case.[359]

The second step is to determine whether the plaintiff is a public or private figure. If the plaintiff is a public figure,[360] she must demonstrate that the defendant acted with "actual malice." The term actual malice is somewhat misdescriptive. Unlike the general tort-law concept of malice, "actual malice" in the First Amendment context means that defendant either knew his statement was false or acted with reckless disregard of the truth.[361] Absent a showing of actual malice, the public fig-

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work that is protected. The standard used is not analogous to that of a defamation case, where the general character of the plaintiff is at issue.

Legislative History, *supra* note 38, at 6925. Nevertheless both laws do deal generally with how a person is perceived by others. Speech that affects that perception should accordingly receive similar First Amendment protection.

359. Whether plaintiff must prove falsity depends upon her status as a public or private figure. New York Times v. Sullivan, 376 U.S. 254, 280 (1964) (public official plaintiff bears burden of proving defamatory statement was made with actual malice). *See also* Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986) (private figure plaintiff bears burden of proving falsity if the statement involves a matter of public interest); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985) (private plaintiff suing over issue of no public interest may not have the burden of proving truth to recover actual damages, but does have the burden of proving actual malice to recover punitive damages). Statements of pure opinion do not constitute defamation. However, statements of opinion that assert knowledge of an underlying fact may be defamatory if the underlying facts are false. Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

360. The first cases that established the standard for public figures involved public officials, or people running for office. However, in *Curtis Pub. Co. v. Butts* and *Associate Press v. Walker*, 388 U.S. 130 (1967), the Court extended the same rules to public figures. Determining who is a public official (not all government officials are included) or who is a public figure – or "limited purpose public figure" – involves a complex, convoluted, and not completely satisfactory analysis. Thankfully, the analysis in this article need not broach that issue.

361. *Griffin v. Delta Democrat Times Publ'g Co.*, 815 So. 2d 1246, 1250 (Miss. Ct. App. 2002), contains a good discussion of the different meanings of malice. The court distinguished traditional common law malice, which is ill-will or anger, from constitutional malice, which is knowledge of falsity or reckless disregard for the truth.

ure plaintiff cannot recover.[362] This standard can be difficult to satisfy, as plaintiff is often hard-pressed to find evidence to show that defendant knew the statement was false.

If plaintiff is a private figure, the actual malice standard is not constitutionally required as a condition to liability.[363] Speech involving private figures is generally less crucial to a well-informed society, and as a result receives slightly less protection. A state may allow[364] a private figure to recover upon a showing that defendant acted negligently in making the false statement.[365] Negligence, which is measured by an objective standard, is easier to demonstrate than malice, which requires a subjective inquiry.

Interestingly, nothing in this analysis considers whether government has any interest in silencing the defamatory speech in the particular case. This lack of a government interest element in the defamation test suggests one of two things. It may be that government always has a constitutionally sufficient interest in regulating false speech that harms a person's reputation. On the other hand, defamation may be an exception to the general law of free speech, akin to the special cases of obscenity and speech that poses a clear and present danger.

2. Application of the Standard

a. Moral Rights Violations as Defamatory Speech

The standard described above evolved in defamation cases.[366]

362. *Curtis*, 388 U.S. at 155.

363. Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974) (actual malice standard not required by the First Amendment for private figures).

364. Defamation is a state-law claim. Therefore, the Supreme Court precedent dealing with defamation technically merely limit on how generous a state can be in allowing recovery for defamation. However, the First Amendment protections represent a floor, not a ceiling. A state is free to choose, either as a matter of policy or because of the free speech protections of its own constitution, to use the actual malice standard even in cases brought by private figures.

365. However, if the statement involves a matter of public concern, recovery of punitive or presumed damages is possible only of the plaintiff demonstrates actual malice. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985). Because moral rights statutes do not provide for enhanced damages, this limitation is not relevant to the current discussion.

366. Some of the leading cases involving defamation are *New York Times v. Sullivan*, 376 U.S. 254 (1964) (public official plaintiff has burden of proving actual malice to recover in libel suit); *Dun & Bradstreet*, 472 U.S. 749 (private figures must show actual malice to recover punitive damages); *Gertz*, 418 U.S. 323 (actual malice standard not required by the First Amendment for private figures to recover on defamation claim); *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986) (plaintiff, even if private figure, bears burden of proving falsity if the statement involves a matter of public interest).

However, it is not limited to such cases. Other Supreme Court cases make it clear that the same malice standard applies in "false light" privacy cases[367] as well as cases involving the publication of embarrassing private facts.[368] Although these are technically separate and distinct torts, there is a thread that binds them. The torts of defamation, false light privacy, and disclosure of private facts are all concerned with protecting the victim's reputation or good name. The malice standard is actually the standard that applies to laws governing speech that harms an individual's reputation.[369]

Viewed from this perspective, there are parallels between these reputational torts and moral rights. As demonstrated in Part I.A, all of the moral rights help protect an author's professional reputation.[370] Although different rights deal with different threats to that reputation, all of the rights give the author some control over the way her authorship is perceived by the public. Given this focus on reputation, it is tempting to conclude that the malice standard applies to attribution and dissociation cases. However, there are some important differences between the traditional torts and the moral rights that may render the standard inapposite.

At the outset, it is clear that the defamation standard cannot be applied to cases arising under Louisiana's display right. This statute affords a cause of action when an infringer displays or publishes an accurate version of the author's work that the author would rather remain out of the public eye.[371] In these situations, the infringer has made no false or misleading statement. Instead, the Louisiana law imposes liability when the infringer discloses negative, but *accurate*, works of the author.[372] Because the defamation standard applies only when the defendant makes a false statement,[373] it is inapplicable to the Louisiana display right.

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367. Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988).

368. Time, Inc. v. Firestone, 424 U.S. 448, 481 (1976).

369. New York Times Co. v. Sullivan, 376 U.S. 254, 261 (1964)

370. VARA also talks in terms of the author's "honor." 17 U.S.C. § 106A(a)(2) & (3)(A). However, courts have not given that term any independent significance, instead equating it to reputation.

371. La. Rev. Stat. § 51:2153(3) (2005).

372. La. R.S. § 51:2153(3) covers all harmful displays that are attributed to the author, without consideration of whether the display is accurate. As discussed *supra* at text accompanying note 142, however, the law would be preempted by VARA to the extent that it regulated inaccurate representations that the author created the modified work.

373. Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986) (private figure plaintiff must prove falsity to recover for defamatory statement involving a matter of public interest).

b. Dissociation Cases Involving Non-Commercial Speech

The right of dissociation is designed to protect the rightholder's reputation. If someone else's works are falsely attributed to the rightholder, the rightholder's reputation as an author may suffer.[374] False statements of authorship are sufficiently akin to defamatory statements to qualify for the same free speech analysis. Admittedly, the Supreme Court cases dealing with defamation and the other reputational torts typically involve statements about a person. Dissociation, by contrast, involves a statement "about" a particular work. Nevertheless, the essence of the dissociation claim is a statement that a particular person – the rightholder – is responsible for a work. Because an author's reputation is defined primarily through her work, the defamation analogy is clear. A statement that wrongfully associates an artist with a work she did not produce is defamatory, as it may harm her reputation.

Applying the First Amendment standard, a rightholder suing for wrongful attribution in a non-commercial setting could prevail only if she can demonstrate that the speaker acted with the required malice. The precise showing of malice required would turn on whether the rightholder is a public figure.[375] If so, the rightholder would have to demonstrate that the speaker knew that she was not the author, or acted with reckless disregard for the truth in asserting that she was the author. If the rightholder is not a public figure and the work is not of public interest, she need only demonstrate that the speaker acted negligently.

Whether a rightholder can actually meet that standard turns on the particular facts of the case. However, it is safe to say that in many cases the rightholder will have little difficulty satisfying the malice standard. Unlike the statements involved in many defamation and false light cases, the issue of whether a particular person created a certain work is often an objective, easily verifiable fact. Many painters, sculptors, filmmakers, and other authors attach their names to the work. If an infringer ignores that indication of authorship and instead names the rightholder as author, the infringer has at the very least recklessly disregarded the truth. Even if no name is attached to the work, the rightholder should usually be able to demonstrate malice. Unless the *rightholder's* name is attached to the work, the infringer can attribute that work to the rightholder only if he has some other reason to believe that the rightholder created the work.

374. Admittedly, the dissociation right under some state laws does not require the author to prove harm to reputation. However, that provision merely reflects the view that the author is the best judge of how her art may affect her reputation.

375. *Philadelphia Newspapers*, 475 U.S. 767 (plaintiff, even if private figure, bears burden of proving falsity if the statement involves a matter of public interest).

Without some reason to think that the rightholder is connected with the work, a statement that the rightholder is the author would be reckless, at best. In both of these cases, it would not be difficult for the rightholder to demonstrate that the infringer acted with malice in representing that the work was produced by the rightholder.

On the other hand, there are likely to be numerous cases in which a false statement of authorship does not involve the requisite malice. Particularly troubling in this regard are anonymous and pseudonymous works. It is conceivable that an infringer could make an honest mistake concerning authorship of an anonymous work. Of course, a statement is not honest unless it is based on something. In the case of an anonymous or pseudonymous work, however, the infringer may have determined authorship by evaluating the style of the work itself. As long as that evaluation was based on some resemblance, it would be difficult for the rightholder to show that there was no factual basis for the statement. Given the amorphous nature of artistic style, it may even be difficult for a private figure rightholder to demonstrate that the determination of authorship was negligent.

Another problematic situation is a work originally created by the rightholder, but altered by another. At some point, the alterations will be significant enough that it is no longer accurate to attribute the work to the rightholder. But where this magical border lies is anyone's guess. If the infringer does not realize that changes have occurred, or in good faith determines that the changes are not enough to require a change in authorial designation, the rightholder will not be able to demonstrate knowing falsity or reckless disregard, and may not be able to establish negligence. Unless the rightholder can bring an integrity claim for the fact of alteration itself,[376] the First Amendment may bar recovery in these cases.

Overall, most dissociation cases involving non-commercial statements of authorship will involve facts that satisfy the malice standard. In many cases, the infringer will have purposefully lied about the work. In others, the true author is so clear that a statement attributing the work to the rightholder will involve an intentional lie or reckless disregard of the truth. The main cases in which a rightholder will have trouble satisfying the malice standard are certain cases involving altered, anonymous, and pseudonymous works.

376. Of course, the integrity claim may involve a different defendant. The party who altered the work may or may not be the party who is making the statement of authorship.

c. Attribution Cases Involving Non-Commercial Speech

The earlier discussion of commercial speech revealed that from a free speech perspective, the attribution right is far more complicated than the dissociation right. One arrives at a similar conclusion when applying the defamation standard. Although the analysis ultimately leads to the conclusion that most authors can recover when an infringer in a non-commercial setting fails to give proper authorial credit, reaching that conclusion requires dealing with several difficult intermediate issues.

First, the analogy between the reputational torts and the right of attribution is more attenuated than the analogy between those torts and dissociation. The right of attribution certainly protects the author's reputation. But it does not "protect" that reputation in the same way as the torts of defamation, false light privacy, or publication of private facts – or, for that matter, like the dissociation right. In all of these other situations, the defendant has actually named the plaintiff. Indeed, unless she can show that people know defendant is discussing the plaintiff, plaintiff cannot recover under any of these claims. The heart of an attribution claim, by contrast, is that the author has *not* been named. Although the statement of authorship may affect the author, it is no way about the author, but instead about someone else.[377]

This difference between the right of attribution and the other reputational rights may be very important as a matter of tort law and policy. But that does not mean it is a difference of constitutional dimension. Although the common law of torts may, for good reason, limit the reputational torts to situations where the defendant has actually named the plaintiff,[378] nothing in the First Amendment requires that same limitation. Congress and the state legislatures have elected to create an attribution right, a right that applies when an infringer gives credit to someone else without naming the proper author. The only question is whether that right is constitutional. And the constitutional malice standard is capable of dealing with all speech that negatively affects an individual's reputation, regardless of whether that speech explicitly identifies

377. Attribution is also slightly different than the other claims insofar as it focuses more on the future than on the present. Defamation and similar torts, as well as dissociation, focus mainly on harm to current reputation. Attribution, by contrast, seeks to preserve the author's ability to enhance her reputation in the future, by ensuring she is credited for the work she produces. Although interesting, this difference is not one of constitutional dimension.

378. One policy reason limiting defamation to cases where the plaintiff is named is to prevent a flood of litigation. Imagine a world in which a person could sue merely because someone else failed to say something good about him.

the person who is harmed. A defamatory statement or a wrongful attribution negatively affects an author's reputation by introducing new and incorrect facts into the set of data society uses to establish the author's reputation. Attributing the author's work to someone else also distorts that data set, but in a different way; namely, by omitting facts that the author intended society to consider. In either case, however, the net result is the same. In both dissociation and attribution cases, society thinks less of the rightholder or author because of the infringer's acts. Because both types of statements harm reputation, both should be subject to the same First Amendment strictures.

With this hurdle cleared, applying the malice standard to the right of attribution involves the same basic considerations as apply to the dissociation right. Statements of authorship will in many cases concern objective, non-controversial facts. As long as the author can demonstrate that defendant intentionally lied or recklessly ignored the truth – or in the case of a private figure plaintiff, acted negligently – she should satisfy the constitutional standard. Again, the most significant problems are likely to arise in cases of altered, anonymous, and pseudonymous works.

On the other hand, some noncommercial attribution cases also present a second wrinkle. The discussion to this point has focused on misattribution. But many attribution laws also allow recovery in cases of complete non-attribution. In non-attribution cases, the infringer has said nothing.[379] This lack of any statement is crucial as a matter of free speech law. As a threshold matter, the malice standard allows an author to recover only on a showing that the infringer has made a false statement. Silence is not a lie, at least absent circumstances showing that others are proceeding under a false assumption as to the truth. Moreover, it is nonsensical to speak of an author proving that the infringer knew or had reason to know a statement was false in a case where the infringer has neither said nor implied anything. Because of this lack of a statement, the malice standard does not apply. A non-commercial case

379. Anonymous and pseudonymous works might at first glance seem to present a special issue in a non-attribution case. It is one thing to attribute a work to a particular author when there is no reason to think that that author produced it. It is quite another to say that the infringer should have known that a particular author produced a certain anonymous work, and the infringer failed to afford proper credit. But on closer inspection, the obstacle facing the author is basically no greater in a non-attribution case than in a misattribution case. The key to a case of misattribution is that defendant attributed the work to a third party. Unless defendant had a reason to think that statement was true, this statement was made with constitutional malice. The author can recover simply by showing that the statement was false; she need not show that the defendant should have known that *she* actually prepared the work.

of non-attribution must be governed by the compelling interest standard.

Other than the situation of non-attribution, however, non-commercial claims of attribution and dissociation will be governed by the malice standard. Such claims will not categorically be constitutional. Instead, whether such claims violate the infringers' First Amendment rights requires a case-by-case determination of whether the infringer has acted with the required level of constitutional malice. Although it is safe to predict that many authors will be able to meet that requirement, the actual percentage of claims that fail depends on which authors elect to sue, and under what circumstances.

E. The Compelling Interest Standard

Although the compelling interest test is the starting point in a First Amendment analysis, there are a number of other standards that apply in certain categories of free speech cases. Sections B, C, and D of this Part III discuss three of these special standards and demonstrate how they can be applied to most of the existing moral rights. The net result of this analysis is that virtually all of the moral rights currently in force in the United States can be justified as valid content-neutral regulations, restrictions on commercial speech, or laws protecting authors' reputations. Only two narrow moral rights – the Louisiana display right, and the right, in a non-commercial setting, to coerce a statement from an infringer that gives the author credit for her work – cannot be sustained under any of these alternate theories. In these narrow categories, the compelling interest standard must apply.

A claim of non-attribution involves the special question of coerced speech. The infringer has made no representation concerning origin. The author wants to compel such a statement, not to cure any lingering misperceptions, but merely to ensure that the public knows all the facts. Unlike the case of commercial speech, however, no special standard applies to forced non-commercial speech, even when that speech involves nothing more than uncontested statements of fact. Laws that coerce speech must meet the compelling interest standard, just like laws that limit speech. [380] Government cannot force me to declare that I am five foot eleven inches tall in my stocking feet unless it can demonstrate a compelling interest to make me do so, and that the requirement is narrowly tailored to meet that governmental interest.

380. Riley v. National Federation of the Blind, 487 U.S. 781 (1988) (the right not to speak applies even to pure statements of fact).

A law requiring attribution serves no compelling interest.[381] This is not to say that government is uninterested in ensuring that authors receive proper credit. Indeed, government has an important and substantial interest in the question of credit.[382] But "compelling" is a much higher standard; a standard that government rarely satisfies. In order to demonstrate a compelling interest, government must at a bare minimum demonstrate a real threat to public health, safety, or order. Even if one could stretch the notion of health and safety to matters such as cultural health, a failure to attribute authorship presents no grave threat to culture. The speaker's silence does not create the risk of serious cultural harm. It merely fails to provide society with a piece of information it might deem useful. Any harm to society or cultural is marginal rather than catastrophic. As much as we might wish to the contrary, government cannot force people to educate others, at least outside the commercial context.

Second, even in the unlikely event that ensuring proper credit was deemed a compelling interest, a law requiring attribution is not narrowly tailored to achieve that goal. There are several other ways that government could help ensure that an author received credit for her work. The author is always free to claim that credit by herself. Government could assist the author by providing funds for the publication of authorship claims, or make its own official statements of authorship. Although none of these options is as effective as requiring a statement from the person in possession of the work, from a First Amendment perspective they are preferable because they do not force anyone to speak against his will.

For many of the same reasons, the Louisiana display right does not satisfy the requirement of a compelling interest. Government does have a general interest in protecting reputation. However, its primary interest is in protecting that reputation from the taint caused by erroneous information. The Louisiana law, by contrast, protects reputation from the *truth*.[383] Government's interest in protecting reputation is diminished significantly when government tries to squelch truthful, but unpleasant, facts about a person.[384] Because the state cannot demon-

381. Whether moral rights in general serve a compelling government interest is subject to some debate. However, this article need not address that broader question. The issue here is whether the narrow right to coerce attribution in non-attribution cases serves a compelling interest.

382. Therefore, as discussed *supra* at text accompanying notes 353 to 356, a law that requires disclosure of authorship in a commercial setting presents no First Amendment problems.

383. As discussed *supra* at text accompanying note 140, to the extent that the Louisiana law deals with a *distorted* display, it is preempted by VARA.

384. The Louisiana law could in the alternative be analogized to a right of privacy. But the

strate that its law serves a compelling interest, it violates the First Amendment if that law is used to impose liability on someone who publishes an accurate version of an artist's work.[385]

In conclusion, allowing recovery for non-attribution in cases of noncommercial speech, or under the Louisiana display right, would be facially inconsistent with the First Amendment. An infringer sued for violating either of these rights should therefore prevail by invoking the First Amendment as a defense to such a claim. An author who wants to prevent display of her work, or ensure that she is properly attributed for her work, must look elsewhere for such a right. At present, the only legal option is to include a provision in the contract for sale of the work, an option that is both infeasible as a practical matter, and of doubtful legal effect.[386]

IV. A RECAP OF THE MAIN CONCLUSIONS

For purposes of exposition, this article organized the discussion on a "test-by-test" basis, moving from one of the various free speech tests to the other. In some respects, a right-by-right analysis might have been more useful. However, because many of the rights require application of more than one test, depending on the circumstances, a right-by-right analysis would have been convoluted. Nevertheless, at this juncture the reader might appreciate a brief recap of the main arguments that apply to each right. Taking the rights in alphabetical order, these arguments are:

A. *Attribution.*

Cases involving the right of attribution (traditionally called the right of "paternity") invariably involve speech.[387] Moreover, federal and state attribution laws regulate speech based on its content.[388] On the other hand, many if not most attribution disputes will involve commercial speech.[389] In cases involving commercial speech, government can prevent a party speaking about a work of art from making false statements about who is the author of that work. Government can even compel a

compelling interest test also applies to privacy rights. Keeping authorial information secret is not a compelling interest.

385. Of course, the author may be able to recover under the Copyright law, at least if the work has not been sold to another.

386. For example, there is significant doubt as to whether such a provision could bind third parties.

387. *See supra* text accompanying notes 152 to 154.

388. *See supra* text accompanying notes 293 to 296.

389. *See supra* text accompanying notes 347 to 348.

party to state who is the author of a work being bought or sold, regardless of whether the speaker has otherwise said anything about authorship.[390]

Attribution cases involving non-commercial speech are more difficult. In these cases, courts should apply the standard applicable to defamation cases, as attribution similarly affects an author's reputation. Provided that the author can demonstrate constitutional malice – a showing that varies depending on the notoriety of the author and the work – the author can recover for a misattribution of authorship even in a non-commercial context.[391] However, in a non-commercial case of non-attribution – that is, where the speaker has said nothing, and the author wants to force him to speak – the First Amendment bars recovery.[392] This situation of noncommercial non-attribution is one of only two cases where the First Amendment will completely negate the moral right.

B. Destruction.

Laws giving an author the right to prevent destruction of her work involve content-neutral regulation of speech.[393] Under the analysis that applies to content-neutral laws, the destruction right is clearly constitutional. Destruction laws serve two important government goals: the goal of encouraging artistic production by guaranteeing that the author's reputation is accurate, and the goal of preserving works of art for society.[394] Destruction laws accomplish these goals without unduly restricting speech. A person who wants to criticize art or an author has a number of other ways to deliver that message.[395]

C. Disclosure.

The Copyright Act provides a *de facto* right of disclosure in § 106. Because this right is a traditional part of copyright, it is presumptively constitutional under the rationale of the recent Supreme Court decisions dealing with copyright and the First Amendment.[396] Moreover, even without that precedent the right of disclosure would be valid because it is a content-neutral regulation of speech that serves the important govern-

390. *See supra* text accompanying notes 353 to 356.
391. *See supra* text accompanying notes 377 to 378.
392. *See supra* text accompanying note 379.
393. *See supra* text accompanying notes 276 to 281.
394. *See supra* text accompanying notes 300 to 306.
395. *See supra* text accompanying notes 307 to 309.
396. *See supra* text accompanying notes 211 to 214.

ment interest of encouraging cultural production and effects a fairly limited restriction on speech.[397]

D. Dissociation.

The right of dissociation is the right not to be associated with a work that one did not create. As it, like the right of attribution, deals with statements concerning authorship, it stands to reason that the analysis of this right follows the same general outline as the analysis of the attribution right. In cases where a party wrongly attributes authorship in a commercial context, the dissociation right is categorically valid as a restriction on the truthfulness of commercial speech.[398] In cases that do not involve commercial speech, the rightholder will be required to demonstrate constitutional malice.[399] However, a rightholder should ordinarily be able to demonstrate constitutional malice, unless the speaker had some reason to state that the rightholder prepared the work in question.

E. Integrity.

A good deal of the discussion of free speech and moral rights focuses on laws giving an author the right to prevent alteration or mutilation of her work. Once it is recognized that integrity laws involve content-neutral regulation of speech,[400] however, it is easy to conclude that they are constitutional. The analysis is similar to that applicable to the destruction right, although with some nuances. Like destruction laws, integrity laws serve two important government goals: the goal of encouraging artistic production by guaranteeing that the author's reputation is accurate, and the goal of preserving for society the integrity of (and therefore the author's message in) works of art.[401] Those same arguments apply regardless of whether a particular integrity law protects only originals (like VARA), or also extends to reproductions and derivative works.[402] In the case of a reproduction, integrity laws ensure not that an original work remains available, but that the message the author intended to deliver through that work is accurately perceived. Moreover, integrity laws accomplish this goal without restricting speech too greatly. A person who wants to criticize art or an author has a number of

397. *See supra* text accompanying notes 319 to 323.
398. *See supra* text accompanying notes 349 to 351.
399. *See supra* text accompanying notes 374 to 375.
400. *See supra* text accompanying notes 282 to 285.
401. *See supra* text accompanying note 296.
402. *See supra* text accompanying notes 314 to 316.

other ways to deliver that message.[403]

F. Louisiana Display Right.

To date, no cases have arisen under the *sui generis* provision of Louisiana law giving an author the right to police display or publication of her work, in situations where that display would harm her reputation. Because display of *altered* originals is already covered by VARA, the Louisiana law is preempted in those cases. However, the right is not preempted in cases involving unaltered originals or reproductions. Although not preempted, the Louisiana law is categorically unconstitutional under the First Amendment. Even though the statute regulates speech in a content-neutral fashion, it fails the *O'Brien* test for content-neutral regulation.[404] For similar reasons, the statute cannot be applied even in cases involving commercial speech. Nor do the defamation cases offer any help. Although the infringer's speech does harm the author's reputation, the speech is true.[405] Because none of the specialized categories of speech law apply, and because the display right serves no compelling government interest, it is categorically unconstitutional.

VI. CONCLUSION

All laws that regulate the world of art and literature raise serious free speech issues. The past few years have witnessed a renewed debate over whether copyright is consistent with the First Amendment. Although the Supreme Court is convinced that copyright law is constitutional, a significant segment of the academic community remains skeptical. Regardless of whether copyright serves a useful purpose, it places limits on speech.

Overlooked in the debate over copyright and the First Amendment is a separate, but equally important question. Like copyright, moral rights laws limit speech. Moreover, they limit speech in ways different than traditional copyright. There is no guarantee that the arguments about why copyright complies with the First Amendment will apply to the moral rights provided in both state and federal law. The different nature of moral rights calls for a different free speech analysis.

This article provided that analysis. It demonstrated that the First Amendment to the United States Constitution will rarely prevent an author from recovering against someone who infringes one of her moral

403. *See supra* text accompanying notes 316 to 318.
404. *See supra* text accompanying notes 325 to 327.
405. *See* supra text accompanying notes 372 to 373.

rights. The argument involves a number of different steps. Many moral rights infringements do not involve acts that constitute speech, and therefore receive no First Amendment protection. Even when a moral rights infringement does involve speech, several of the moral rights categorically comply with the requirements of the First Amendment, either because they are valid content-neutral laws, or because they regulate the veracity of commercial speech. The remaining cases call for a case-by-case approach. However, provided the author can demonstrate constitutional malice – a showing that will ordinarily not be that difficult to make, given the nature of moral rights violations – she can recover for non-commercial violations of the attribution and dissociation rights without running afoul of the First Amendment. The only situations in which the First Amendment absolutely bars recovery is the case where the author seeks to coerce another to acknowledge that she created a work, in a situation where such speech does not qualify as commercial speech, and cases under the Louisiana display right.

Thus, through a combination of several different lines of free speech doctrine, it is possible to demonstrate that most of the moral rights currently in force in the United States satisfy the requirements of the First Amendment. Of course, the free speech issues are only one small part of the controversy surrounding moral rights legislation in the United States. Even if all moral rights were unequivocally consistent with free speech, there are certain policy reasons to resist expanding the scope of moral rights protection. However, supporters of strong moral rights laws can take heart from the conclusions of this article. As long as moral rights laws are carefully crafted, they can be enforced without violating the First Amendment. Putting the free speech issues to one side is useful insofar as it allows the debate concerning the proper scope of moral rights to focus on the merits or demerits of moral rights themselves, not on one hot-button issue such as free speech. In this regard, the author hopes that this paper will help the debate concerning moral rights focus on the real policy issue.