The Artist As Brand:Toward a Trademark Conception of Moral Rights

*Abstract:*The Visual Artists Rights Act of 1990 controversially recognized artists' "moral rights" by protecting their work from alteration or destruction and by preventing the use of an artist's name on a work he did not create. While moral rights are criticized as antithetical to the traditional economic framework of American intellectual property law, Professors Hansmann and Santilli have suggested that moral rights can be justified economically by vindicating an *artist's* economic interests. This Paper, however, argues that VARAalso benefits both the purchasing and viewing *public*, especially in an era of factory-made, assistant-produced, industrially-fabricated "object-like" art works. Specifically, moral rights, like trademark law, can reduce search costs, ensure truthful source identification, and increase efficiency in the art market. This comparison between trademark law and moral rights shows that the interests protected by VARA are neither unique nor unprecedented in American law, and highly economic in character. Thus, this Paperhopes to reframe the dialogue surrounding moral rights, shifting it away from the classic "personhood" or "anti-commodification" arguments that have undergirded the rhetoric up to this day.

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INTRODUCTION

The Armory Show, the self-described "leading international contemporary and modern art fair and one of the most important annual art events in New York," comes to town once a year.[1] When it does, Piers 92 and 94 (where it takes place) are transformed into a sort of art bazaar—replete with buyers, sellers, tastemakers, and those generally hoping to see and be seen.[2] There are fabulous parties, art world celebrities, and six-digit art objects for sale.[3] It is, in short, the New York art world's version of New York Fashion Week—just one of many parallels between art and the luxury goods market that I hope to make in this Paper.[4] It is also another example of the type of money-driven spectacle that some art critics have denounced as somehow commodifying what should resist commodification, as denigrating via real market value something that should hold itself aloft such petty realities as the economy, capitalism, and commodity fetishism.[5] We respond to such idealism with compassion and sympathy—the idea of the starving artist in pursuit of some greater truth, after all, has captivated the collective

[1] THE ARMORY SHOW, http://www.thearmoryshow.com/ (last visited Dec. 26, 2011).
[2] *See* David Rimanelli, *Furry Friends*, ARTFORUM DIARY (Mar. 13, 2005), http://artforum.com/diary/id=8565 (describing the scene for the 2005 Armory Show preview gala "for which ticket-holders had paid as much as $1,000 a head" and which featured "big-ticket early birds" including "MoMA chair Ronald Lauder and his wife Jo Carole, Henry and Marie-Josee Kravis, Rosa de la Cruz, Isaac Mizrahi, Patti Cisneros, Donald Marron, and Kathy Fuld").
[3] *See, e.g.*, *2011 Armory Show Wrap-Up*, THE ARMORY SHOW (Mar. 14, 2011), http://www.thearmoryshow.com/press_releases/2011-03-14.html (highlighting notable sales, including a Kool Aid drawing by David Hammons for $325,000, and an Antony Gormley sculpture for $125,000).
[4] I should note that the observation that art has become increasingly like luxury goods itself is not a novel one. For example, Professor Amy Adler, in her article *Against Moral Rights*, 97 CAL. L. REV. 263 (2009), has made this same observation. However, as one may guess from the title, the parallel has lead her to suggest the abolition of moral rights, rather than the importance of it.
[5] *See* Helen Molesworth, *In Memory of Static: Klara Liden*, ARTFORUM, Mar. 2011, at 214, 223 ("In [Liden's] work, I sense a tacit acknowledgment that the jig is up, that being an artist is just another way of getting by, a coping strategy for living under late capitalism.").

imagination even before the oft-circulated tale of Van Gogh, his poverty, his posthumous fame, and that bloody ear (a perfect emblem of artistic madness and misunderstood genius).[6]

So here's a modern-day anecdote that might shatter such idealistic optimism. During the 2011 Armory Show, a hot British artist, whom I will simply call "X", came to town. When he arrived in New York, he ordered his assistant to fill a cardboard box with brown clothes. "What kind of brown clothes?" the assistant and a friend had asked. "Any brown clothes," was the response. The assistant and his friend ran around the city's thrift shops for a few hours collecting brown clothes of all sorts—tops, sweaters, pants, hats. The total came up to around 15 dollars. They loaded the clothes into a cardboard box. They delivered the box to X. A few hours later, the "art piece" was sold for $40,000.

This story was relayed to me via the same assistant's friend who had collected the clothes, and yet I've almost resisted using it because of its hearsay (and heretic) character. These are the secret goings-on of the art world behind closed doors, after all. But lore or not, the anecdote is powerful, for it manages to sum up a number of head-shaking, difficult issues with the contemporary art world. The blasphemous idea that the artist didn't even lay a hand on the finished product, the unfair mark-up of art that took neither skill or extensive labor to make, the pure object-ness of modern art that might even put Duchamp and his urinal[7] to shame, and the lack of comprehensibility behind it all—what greater *truth* was ArtistX getting at with his box of

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[6] *See* Adam Gopnik, *Van Gogh's Ear and Modern Painting*, THE NEW YORKER, Jan. 4, 2010, *available* at http://www.newyorker.com/reporting/2010/01/04/100104fa_fact_gopnik ("When, after van Gogh's suicide, in 1890, his fame grew, and the story of the severed ear began to circulate, it became a talisman of modern painting. Before that moment, modernism in the popular imagination was a sophisticated recreation; afterward, it was a substitute religion, an inspiring story of sacrifices made and sainthood attained by artists willing to lose their sanity, and their ears, on its behalf.").

[7] In 1917, the French artist Marcel Duchamp infamously presented a manufactured urinal in the museum setting, thus making the "readymade" (i.e. pre-made every day items) "art." *See generally* HAL FOSTER ET AL.,ART SINCE 1900: MODERNISM, ANTIMODERNISM, POSTMODERNISM 129 (2005) (detailing how Duchamp chose a urinal, rotated it ninety degrees, put it on a pedestal, and put it on exhibition in 1917).

brown clothes, really? After a while, one begins to suspect that perhaps there *is* no greater truth to this at all, that the only truth is the artist having a laugh at everyone else's expense.

These issues are important because they have in some way either pervaded or been evaded by the dialogue about artists' moral rights, which has long existed in Europe but which the United States only signed into law two decades ago. Perhaps because the law was onlyreluctantly signed to bring the States into compliance with the Berne Convention (indeed, the United States resisted joining the Berne Convention because of opposition to granting artists moral rights),[8]The Visual Artists Rights Act of 1990[9], or VARA, has subsequently been denounced as "doctrinally inconsistent with U.S. copyright and property law," as threatening "economic investment in the arts and thus constrict[ing] artistic creativity," and as "limit[ing] editorial freedom and giv[ing] artists broad grants of power over purely aesthetic matters."[10] The legal debate surrounding VARA, which protects only "visual art," has tended to go one of two ways: either art is somehow sacred and special, a manifestation of the innermost expression of an artist's soul, and so we need moral rights to express our societal belief in it as such, or art is a pure commodity object (much like luxury goods), and so we should rid ourselves of a special class of protection for it.[11]

ThisPaperwill argue, on the other hand, that it is *precisely because* art today has becomea pure commodity object (like luxury goods) that we *need* moral rights to protect the artist's economic interest in it. It argues, in effect, that mere copyright protection for visual art is *not*

[8]*See* Adolf Dietz, *The Artist's Right of Integrity under Copyright Law—a Comparative Approach*, 25 I.I.C. 177, 179 (1994).
[9] 17 U.S.C. § 106A (2006).
[10]JOHN HENRY MERRYMAN ET AL., LAW, ETHICS, AND THE VISUAL ARTS 438 (Fifth Ed. 2007).
[11]*Cf.* Amy Adler, *supra* note4, at 265-66 (questioning "the most basic premise of moral rights law: that law should treat visual art as a uniquely prized category that merits exceptions"); *with* Carter v. Hemlsely-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995) (noting that moral rights "spring from a belief that an artist in the process of creation injects his spirit into the work").

enough, cloaking "fine art" objects[12] with a class of protection far less than the wide plethora of legal remedies a trademark holder has under trademark law. Instead, an examination of the typical rights and remedies a trademark holder has under trademark law will show that the so-called "moral" rights conferred upon a visual artist is a) neither unique nor unprecedented in American (intellectual or otherwise) property lawand b) highly economic in character. In doing so, I hope to update the (what I argue to be false, or at least outdated) justifications behind moral rights for the contemporary era of artist "factories" and assistant-made (rather than artist-made) products, freeing moral rights arguments from the classic personhood and/or anti-commodification arguments that have undergirded it up to this day.[13]In *this* economic analysis, I shift the dialogue from arguing for what an *author's* pecuniary interests may be[14] to a broader focus on protecting the art market and its buyers via truthful source indication, drawing out parallels between trademark law's protection of consumers. As I will explain, the need to ensure accurate identification and proper display of an artist's work to both the buying and viewing public has become even more dire in the age of what art historian Martha Buskirk calls the "contingent object"—or, art objects that are easily fabricated based off of an artist's plans (thus, reproduced), and also highly context sensitive.Part I will examine the new, post-1960s contingent, industrial art object and of the artist as brand, as someone who carefully crafts a corporate image much like trademark holders do with their name brand. Part II will examine the parallels between trademark law and moral rights under VARA. Part III will discuss the

[12] I use "fine art" interchangeably with "visual art," which is the only class of art subject to VARA's protection. "Visual art" is defined as "a painting, drawing, print, or sculpture, existing in a single copy, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author." 17 U.S.C. § 101 (2006).
[13]*See, e.g.*, THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 243 & 277 (classifying moral rights as a personhood interest that may be "inappropriate for treatment as property").
[14] Professors Henry Hansmann and Marina Santilli's article, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95 (1997), did just that.

inadequacy of a pure copyright regime for fine arts given the new state of the contingent art object.

I want to make clear that this Paperin no way attempts to argue that this current trend of art-as-commodity-object, or artist-as-businessman, is preferable to a world in which theinspiredartist sets out to connote some greater meaning, or truth. In fact, in many ways I think (and others would likely agree) that this development is lamentable. But that's a different paper, for a different world that is not our own, a paper for the idealist rather than for the realist. In this Paper, I remain only the latter. And now: about Damien Hirst's $100 million dollar skull….

PART I: A BRIEF MORAL RIGHTS PRIMER

A. The Berne Convention and the Visual Artists Rights Act of 1990

The Convention for the Protection of Literary and Artistic Works, or the Berne Convention, is often referred to as the "world's most important copyright convention."[15] While the multilateral treaty was signed at Berne, Switzerland on September 9, 1886, the United States refused to ratify the treaty for about a century, partly becausewe were mainly concerned with *importing* copyrighted goods, rather than exporting our own.[16]However, by the mid-1980s, "losses to U.S. copyright proprietors from piracy abroad had mounted into the billions of dollars" as the United States became one of the principal exporters of copyrighted goods in the world.[17] With that, our attitude toward the Berne Convention—and securing foreign compliance for our

[15]H.R. Rep. No. 101-735, at 6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6937.
[16] David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States*, 55 LAW AND CONTEMP. PROBS. 211, 214 (1992).
[17]*Id.* at 215.

intellectual property goods abroad—began to change.Finally, In 1988, after almost 100 years of debate, the United States joined the Convention.[18]

Specifically, Congress had acknowledged that "[w]hile the Convention is the premier international copyright convention, consensus over United States adherence was slow to develop in large part because of debate over the requirements of Article 6bis. The principal question was whether that article required the United States to enact new laws protecting moral rights."[19] A debate ensued over whether a patchwork of existing federal and state, both statutory and common, laws were sufficient to comply with the moral rights requirements of Berne.[20] Though Congress first decided yes,the enactment of the Visual Artists Rights Act two years later signaled an attempt to create a unified federal system of moral rights laws adhering to the basic requirements of Berne, though it is by no means as comprehensive as many other European systems.[21]

The American moral rights regime as enacted under VARA applies only to works of "visual art," defined as "a painting, drawing print, or sculpture, existing in a single copy, or in a limited edition of 200 copies or fewer."[22]The Act encompasses three major rights: the right of integrity, or, "to prevent the distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation,"[23] the right of attribution—that is, for an artist "to claim authorship of that work" and "to prevent the use of his or her name as the author of any work of visual art which he or she did not create" (including the use of his or her name as

[18] H.R. Rep. No. 101-514, at 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6917.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 10 (noting that the Act "brings U.S. law into greater harmony with laws of other Berne countries," in additional to serving "another important Berne objective—that of harmonizing national copyright laws"). France, which has the most comprehensive moral rights regime, grants a host of additional moral rights to not just visual artists, but, for example, to authors as well. *See* Hansmann & Santilli, *supra* note 14, at 135.
[22] 17 U.S.C. § 106(A) (2006).
[23] 17 U.S.C. § 106(A)(a)(3)(A) (2006).

the author of the work in the event of a distortion, mutilation, or other modification)[24] and lastly, for those works "of recognized stature," to prevent "any intentional or grossly negligent destruction" of the work."[25]These rights persist only for the life of the artist, and, perhaps most significantly,they are waivable.[26]But VARA creates an opt-out, rather than an opt-in, system. That is—if artists are truly as disempowered as common lore would have us believe, an opt-out system places the burden on the buyer, not the artist, to contract around these rights.

This Paperwill not focus on the right of destruction. For one, the right is slightly anomalous, applyingonly to "works of recognized stature."[27] Further, courts have interpreted the requirement to mean not only that the artisthimself is renowned, but that the specific artwork subject to litigation has also acquired "recognized stature" status.[28]This object-specific (rather than artist-specific) focus thus bears more resemblance tohistorical landmark preservationthan trademark law. However, I point out that the right to prevent destruction could be economically justified on its own terms by applying the real property principle of waste.[29]But because the focus of this Paperis on the signaling effects of an artist's name (as brand or trademark), I will leave a full economic discussion of what happens when the work ceases to exist at all—as in the case of destruction—for another day.

[24] 17 U.S.C. § 106(A)(a)(1) & 17 U.S.C. § 106(A)(a)(2).
[25] 17 U.S.C. § 106(A)(a)(3)(B).
[26] 17 U.S.C. § 106(A)(d) & 17 U.S.C. § 106(A)(e)(1).
[27] 17 U.S.C. § 106(A)(a)(1) & 17 U.S.C. § 106(A)(a)(2).
[28] Scott v. Dixon, 309 F.Supp.2d 395, 400 (E.D.N.Y. 2004).
[29] Specifically, the doctrine of "waste" in real property law suggests that a property owner's decision-making—especially in the short run—might be defective, and therefore collective intervention is needed in order to prevent waste of culturally valuable goods in the long run. *See* Eyerman v. Mercantile Trust Co., 524 S.W.2d 210 (Mo. Ct. App. 1975);JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES (1999); Lior J. Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 796 (2005) ("Concern about wasting valuable resources is, by far, the most commonly voiced justification for restricting an owner's ability to destroy her property. In cases where a living person seeks to destroy her property, the courts express concern about the diminution of resources available to society as a whole….In all circumstances, however, the court is concerned about the negative externalities that would result from respecting property owners' right to destroy.").

I will also point out that while examining the parallels between trademark law and moral rights law, I have left out discussions of fair use,[30] which both trademark and moral rights are subject to, and which constitutes a limitation on a rightholder's monopoly power.[31]While there have been a number of successful fair use defenses employed in trademark infringement actions, there has been no litigation asserting a fair use defense on the VARA front.[32] Consequently, and because fair use is determined on a case-by-case basis, it is difficult to tell how courts would apply the four factors of fair use: transformativeness, nature of the copyrighted work, amount used, and effect on the market for the copyrighted work, in the moral rights context. VARA's legislative history, at least, suggests that while Congress fully intended the fair use provisions to apply, they nonetheless note that

> it is unlikely that such claims will be appropriate given the limited number of works covered by the Act, and given that the modification of a single copy or limited edition of a work of visual art has different implications for the fair use doctrine than does an act involving a work reproduced in potentially unlimited copies.[33]

[30] Fair use is often cited as one of the built-in First Amendment protections in copyright law. *See* Eldred v. Ashcroft, 537 U.S. 186, 190 (2003).
[31]*See* 17 U.S.C. § 106(A)(a) (2006). For VARA, "fair use" includes use for criticism, commentary, news reporting, and teaching purposes, all of which would not constitute an infringement of an artist's moral right. 17 U.S.C. § 107 (2006). In trademark law, fair use includes "a nominative or descriptive fair use…including use in connection with…identifying and parodying, criticizing, or commenting upon the famous mark owner," as well as all forms of news reporting and any noncommercial use. 15 U.S.C. § 1125(3) (2006).
[32] For examples of successful fair use defenses to trademark infringement, see*Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007); and*Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002).
[33] H.R. Rep. No. 101-514, at 21(1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6919.

However, there have been significantly transformative uses made of an original, single copy art work in the past: for example, in 1953, the famous artist Robert Rauschenberg painted over a work given to him by his friend Willem de Kooning (another iconic artist). The resulting work, *Erased de Kooning Drawing*, has become a hallmark of modern artthat brings up important questions about authority, meaning-making, and authorial touch.[34] I suggest that in evaluating a fair use claim under VARA, courts should look at transformativeness as the most significant factor,[35] but should also examine whether it was necessary for the defendant to use *this specific* single or limited edition work, and the artistic message behind doing so.Regardless, this is a fascinating field of VARA that will undoubtedly garner more attention as case law develops.

B. Scholarly Response

Much of the subsequent legal scholarship surrounding VARA has been pointedly negative.[36] Many have denounced the Act as patently flouting U.S. copyright doctrine, which has traditionally recognized only economic, not personal, rights.[37] Conversely, the *justifications* for moral rights are centered on the idea that art is somehow special, or sacred, and that only those who do not understand the elevated aspirations of an artist would deign to mutilate, destroy, or

[34]*See* 2 HAL FOSTER ET AL.,ART SINCE 1900: MODERNISM, ANTIMODERNISM, POSTMODERNISM 368 (2005).
[35]*See generally* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (arguing that fair use cases should turn primarily on whether a use is transformative).
[36]*See, e.g.*, Adler, *supra* note 5; Stephen L. Carter, *Owning What Doesn't Exist*, 13 HARV. J.L. & PUB. POL'Y 99, 100-101 (1990); Note, *Moral Rights: Well-Intentioned Protection and its Unintended Consequences*, 90 TEXAS L. REV. 443 (2011) (arguing that the right of integrity will actually *harm* artists and the public interest in art).
[37]*See, e.g.*, Gilliam v. American Broadcasting Companies, 538 F.2d 14, 24 (2d Cir. 1976); Justin Hughes, Symposium, *American Moral Rights and Fixing the Dastar "Gap*, 2007 UTAH L. REV. 659 (2007); Roberta Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L. J. 47, 59-60 (1994); Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 67-68 (2007).

alter the work.[38]This, in turn, has lead others, like Professor Stephen Carter, to point out that the moral right is "elitist and despotic," for it attempts to regulate property owners from acting in "uncultured" ways.[39]Yet, as Professor Carter argues, "you cannot legislate culture."[40]

However, Professors Henry Hansmann and Marina Santilli offer a different argument in *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*. Specifically, their 1997 article is the first and only significant economic analysis of United States moral rights doctrine. It recognized, for example, that moral rights created divided property rights, or a servitude in chattels, in contravention of the law's general prohibition on such.[41]However, this exception, the authors argue, protects important pecuniary interests: namely, that of preventing negative reputational externalities to both the author ("alteration of works that an artist has already sold can, by damaging his reputation, lower the prices he can charge for other work that he sells subsequently") and other owners of his work ("damage to one of the artist's works, in effect, imposes external costs on the artist's other works").[42] The authors also point out that minimizing negative reputational externalities are important "[g]iven this strong connection between the value of a work of art and the identity of the artist who created it."[43] But their article does not go far enough in explaining why this is so, partly because they do not attempt an economic analysis of the contemporary art market.

Part II of this Paper will examine why it is precisely now, in an era of factory-made, industrially-fabricated, assistant-produced artworks, that moral rights are increasingly akin to

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[38]*See* MERRYMAN,*supra* note 10, at 423;Roberta R. Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1986 (2006); Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U.L. Rev. 1519, 1523 (2011) (arguing for a "stronger version of moral rights protection" that will "allow authors to realize their creative potential and contribute to social development").
[39] Carter, *supra* note 36, at 100 & 101.
[40]*Id.* at 101.
[41] Meaning that the author's VARA rights runs with the chattel (the artwork). Hansmann & Santilli, *supra* note 14, at 101.
[42]*Id.* at 104-105.
[43]*Id.* at 109.

trademark law—a connection that Hansmann and Santilli allude to in passing when they suggest that the desire for an artist to control his work—even after it has left his hands—"is analogous to a franchise."[44]But they do not expand upon this connection. As we will see below, an artist's name, like the signaling mechanism of a franchise bearing the name "McDonald's," will serve as a ready indicator of quality and status to the mass public.[45]

PART II: THE CONTINGENT ART OBJECT AND THE ARTIST AS BRAND

"The capitalist order today is an immense cosmos into which the individual is born.…It forces the individual insofar as he is involved in the system of market relationships, to conform to capitalistic rules of action."[46]

As Max Weber had noted almost a century ago, the extent to which any individual can think himself outside the economic order is dubious. Art, of course, is no different. By focusing on the contemporary art market, I do not mean to imply that pre-modern artists were innocent of this form of (what I call) branding.Authenticity (i.e. was this work made by X artist or an imposter?) has been and will likely always be the sole differentiator between a highly-priced work and a (nearly) worthless one—hence the insurmountably valuable judgment of art

[44]*Id.* at 105.
[45] Others have made this connection in the literary context, between an author's name and trademark law. For example, Professor Laura Heymann suggests that we respect an author's choice of pseudonym as essentially a branding choice, thus turning the "author function" into a "trademark function." Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377 (2005). This raises an interesting question of whether courts would resolve a VARA claim for an artist who has changed his name and creates under a pseudonym. However, this has yet to be litigated, but Professor Heymann's article at least suggests that they should. *See also* Jane C. Ginsburg, *The Author's Name as a Trademark: A Perverse Perspective on the Moral Right of "Paternity"*?, 23 CARDOZO ARTS & ENT. L.J. 379 (2005) (noting that an "author's name functions like a trademark," and therefore that the attribution right for literary works properly derives from trademark law).
[46]MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 14 (Talcott Parsons trans., CreateSpace 2010) (1930).

authenticators, whose very job it is to differentiate between the "real" and the "fake".[47]The allure of the authentic has oftentimes been attributed to a highly Enlightenment-centric, pre-postmodern brand of thinking.[48] But if the critic Walter Benjamin's famous proclamation that the desire for the original will soon be made worthless in the face of mechanical reproducibility has come true,[49] it has only held true for other forms of artistic production: photography, music, film—in which the proliferation of identical copies means that asking for the "original" makes no sense.[50] The same does not apply for fine art, the only class of art VARA protects.[51] In this Part, I will discuss why a trademark model for thinking about moral rights is especially apt under the changed conditions of the contemporary art market (where often times, the artist's signature *is* the art) and the new artist-as-businessman model.

A. Contemporary Art and the Cult of the Authentic

The cult of the "authentic"—the yearning to have *this* work be stamped with the artist's name, ensuring it an "original" touched by the artist himself—has *more* import in the modern age of celebrity culture and name-brand obsession than at any other moment in art (or consumer)

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[47]*See* David Grann, *The Mark of a Masterpiece*, NEW YORKER, July 12, 2010, *available at* http://www.newyorker.com/reporting/2010/07/12/100712fa_fact_grann ("Kemp, a leading scholar of Leonardo [da Vinci], also authenticates works of art—a rare, mysterious, and often bitterly contested skill. His opinions carry the weight of history; they can help a painting become part of the world's cultural heritage and be exhibited in museums for centuries, or cause it to be tossed into the trash. His judgment can also transform a previously worthless object into something worth tens of millions of dollars.").

[48]*See, e.g.*, Douglas Crimp, *On the Museum's Ruins*, *in*THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE(Hal Foster ed., 7th ed. 1991) (1983), at _, 43 (on postmodernism and how modernism's "[n]otions of originality, authenticity and presence…are undermined.").

[49] Benjamin writes, "To an ever-increasing degree, the work reproduced becomes the reproduction of a work designed for reproducibility." One can see how well this prediction bodes true for audio works, film, and photography. Walter Benjamin, *The Work of Art in the Age of Its Technological Reproducibility (Second Version)*, *in* THE WORK OF ART IN THE AGE OF TECHNOLOGICAL REPRODUCIBILITY AND OTHER WRITINGS ON MEDIA 19, 24 (Michael W. Jennings et al. eds., 2008).

[50]*Id.* at 24.

[51] 17 U.S.C. § 106(A) (2006).

history. When arguing *against* the uniqueness of the artist's hand, many like to evoke the original father of the death of the artist—Andy Warhol. Professor Amy Adler points out that not only did Warhol make "art into a consumer product" with his Brillo boxes and Campbell's soup cans, but that he was also prone to purposefully claiming that his assistants created many of his works.[52]

Yet Warhol's "factory-made" soup cans, now being sold for millions of dollars, highlights the uncomfortable gap between the so-called "postmodern" art's dedication to ordinary object-ness and their very unordinary price tags; thus, Warhol's soup cans are *like* consumer products and yet *not like* consumer products. The differentiating factor between the Campbell's you buy in the supermarket and the Campbell's you buy from Warhol's "factory" is none other than the Warhol stamp promising authenticity—that this is a "real Warhol." In fact, that is the *only* differentiating factor. The "artist's hand" may have been erased in the production of the object, but only to resurface ever-more-markedly in the stamp bearing his signature. Or, as art historian Isabelle Graw emphasizes, though artists today might employ a staff of assistants, the work nonetheless "bear[s] the mark of the *artist's own* studio/factory/enterprise."[53] Thus, "the artist's signature remains intact, and this is the place where the promise of originality essential for art is upheld."[54]

For example, while Graw too points out that Warhol's statements (this time, that "Brigid Polk actually painted his pictures") "can be read as a provocative break with the principle of 'authorship'," such disclamations of the artist's connection with a work can cause wide-spread alarm amongst buyers.[55] With regard to his statement above, "Warhol's German collectors in

[52] Adler, *supra* note 4, at 296.
[53] ISABELLE GRAW, HIGH PRICE 25 (2009).
[54] *Id.*
[55] *Id.* at 186.

particular were immediately alarmed and feared for the authenticity of their paintings. Warhol was obliged to issue an official declaration correcting this claim in order to avoid works being returned."[56]

The art world's obsession with the artist's stamp of authenticity,[57] in some way meant to reflect the personality or intent of the artist,is thus no different from that of luxury cars and Louis Vuitton handbags (one need merely think of the certificates of authenticity issued by luxury goods makers, neatly packaged within every $2,000 bag, and, ironically, oft counterfeited[58]). Hence, trademark law works vigilantly to protect these indicia of high-class consumer culture from dilution, passing off, and counterfeiting—all of which could harm the "uniqueness" of the original (its "arresting uniqueness," "singularity," "identity," together constituting a mark's "selling power").[59]For the same reasons that a trademarked item's "selling power" stems from the promise of its singularity, art's peculiarly high value "derives from a range of factors: singularity, arthistorical verdict, artist's reputation, promise of originality, prospect of duration, claim to autonomy, intellectual acumen."[60]As we will see, modern artists are keenly responsive to these factors controlling the high price of art objects, and consciously manipulate them to their benefit in creating a global artistic "brand."

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[56]*Id.*

[57] Even the proto-modernist Auguste Rodin had taken this view of authenticity as merely the granting of authority to produce and then sell a sculpture with his name on it: "He recognized as authentic only those bronze casts he had authorized. All others he condemned as counterfeit." Rosalind Krauss, *Introductory Note to* Sincerely Yours, *in* THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS 171, 171 (1985).

[58] For example, eBay's refusal to require its sellers to include certificates of authenticity with the sale of luxury items contributed to the Tribunal de Commerce of Paris' ultimate finding that it had not done enough to combat counterfeit sales. Christian Dior Couture/ eBay Inc., eBay International AG, Tribunal de Commerce [Commercial Court] Paris, June 30, 2008, l'ere chambre B, *available at*http://www.legalis.net/jurisprudence-decision.php3?id_article=2354.

[59] Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA LAW REV. 621, 681 (quoting Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 830 (1927)).

[60] GRAW, *supra* note 53, at28.

B. The Artist As Brand: From Reputational Externalities to Consumer Confusion

What does the contemporary artwork's "promise of originality" mean? It might no longer mean newness, artistic merit, skill, or bold, artistic gestures ala the Abstract Expressionism of the '50s,[61] but it now arises *sui generis* from the very existence of the artist's signature itself. That's the simple answer. The truth of it, however, is that behind that one signature lies an entire realm of carefully-plotted, well-played maneuvers most often manifested in the body of an artist's work. These maneuvers are responsible for crafting a deliberate public image, the success or failure of such being reflected directly in the market price for his work. An artist's desire to control one's work via a resistance to curatorial dictates, or, worse, mutilation at the hands of an avaricious buyer, both of which are at the heart of the moral right of integrity, is not unique to artists—"[t]his desire for control 'is an assertion of autonomy,' an attempt to engage in self-identity creation, whether by individuals or by firms, and a resistance to definition by others."[62] But reputation, which has been formulated in the moral rights scholarship as a deeply personal connection between the artist and work, can now be reformulated as an artist's strategic choices on how best to efficiently trade on his goodwill (a term used in trademark law to denote favorable public regard[63]), much like trademark owners do.[64]Professor Laura Heymann points out that reputationcan also serve as *user* signal, "traded or borrowed based on economically

[61] As has been well-documented, postmodernism killed that off. For the definitive primer on postmodern art and culture, see FREDERIC JAMESON, POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM (1991).
[62] Laura Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C.L. REV. 1341, 1358 (2011) [hereinafter Heymann, *Law of Reputation*].
[63] This could be due to a number of factors—clever advertising, good quality, mass marketing. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 (1995) ("If the trademark owner succeeds in creating a favorable image for its trademark in the marketplace, the mark itself can become a significant factor in stimulating sales. This ability of a mark to generate good will through advertising has also gained recognition under the law of trademarks.").
[64] In Professors Hansmann and Santilli's economic justification for moral rights, they suggest that "an artist may identify with his works as with his children: prize them for their present character and not want that character changed." The artist would then experience "subjective personal anguish" from "seeing his work abused." *Supra* note 14 at 102.

motivated transactions in which the transfer of reputational value is, in large part, the point of the agreement," as is the case with luxury goods, which "are typically purchased not simply because of the higher quality of those goods but also to indicate to others that the purchaser is a person of means who can afford high-quality or high-status goods."[65]

Others have long noted the inextricable link between an artist's reputation or identity and the value of his artwork.[66]Professors Landes and Posner, for example, have suggested trademark redress—a "passing off" action—for "confusingly similar copies of original works, unless they carry a clear disclaimer of authenticity," because they "violate the original artist's trademark in his instantly recognizable style."[67] I'd like to tweak for a moment how we might think of an artist's "recognizable style." In the modern moment, style might be referred to as *stylized*—a fabricated construction, a deliberate posing by the artist to actively engage in*publicidentity-making*.[68] That is, we must shift how we think about style from some "authentic," "real" manifestation of an artist's inner being[69] to a carefully-plotted, deliberate construction that can be said to be made up of *only* specific objects that the artist has placed into the stream of commerce with his "brand" affixed. This shift is important for it subtly alters the dialogue supporting moral rights from one of religious reverence for the artist's "original meaning"[70] or "original creation"to a concern for dilution or misrepresentation of the artist's brand-construction via modification, distortion, or mutilation.Further, as we will see below, the modern artist may not

[65] Heymann, *Law of Reputation*, *supra* note 62, at 1362.
[66]*See, e.g.*, Gladys Engel Lang & Kurt Lang, *Recognition and Renown: The Survival of Artistic Reputation*, 94 AM. J. SOC. 79, 105 (1988) (recognizing that "the name attached to a work of art functions much like a brand label"); Hansmann & Santilli, *supra* note 1, at 104 ("In particular, alteration of works that an artist has already sold can, by damaging his reputation, lower the prices he an charge for other work that he sells subsequently.").
[67]WILLIAM M. LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 259 (2003). This remedy, however, is rife with problems. *See infra* notes 143-155 and accompanying text.
[68] This is so because postmodernism has called into question the extent to which "a unique personality and individuality…can be expected to generate its own unique vision of the world." That is, we can no longer believe in the unmistakability or uniqueness of a style. JAMESON, *supra* note 26, at 114.
[69]MERRYMAN, *supra* note 10, at 423.
[70]*See* Roberta R. Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1986 (2006).

work in a particular, instantly-recognizable style: rather, his canon may be heterogeneous, requiring us to read each new work against his entire oeuvre for a richer understanding of what the specific object means.

While prior scholars have noted the importance of both reputational externalities to the artist's goodwill and the public's right not to be "defrauded" in the buying of artworks,[71]these ideas nonetheless presume some "analogy between the work and its maker."[72] That is, the prior literature has assumed that to be labeled a "Warhol," for example, the artist must've in some sense *created* it, rather than "signed off" on it. As Professors Hansmann and Santilli see it, to merely *sign* a work one *did not* actually "create" or "make" would be a deception to the public writ large.[73] But certainly, Duchamp's signing off on a urinal (which he did not make) and then calling it art has both erased the belief that an artist must have "created" the work he now touts as *his*as it has propelled forth a whole new slew of ordinary objects placed in museum halls, serving as the "work" of an artist. That, certainly, has been the point of thisPaper's Introduction on Artist X's "creation" of the box of brown clothes, lovingly compiled by his assistants from hand-me-downs purchased at the Salvation Army. And to use an even earlier example, the popularproto-modernist sculptor Auguste Rodin was famously known to have had little hand in the actual creation of his sculptures: "[m]uch of it was done in foundries to which Rodin never went while the production was in progress; he never worked on or retouched the waxes from

[71]*See, e.g.*, Hansmann & Santilli, *supra* note 14, at 107.
[72] Rosalind Krauss, *Introduction*, *in*THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS 1, 3 (1985).
[73]*See* Hansmann & Santilli, *supra* note 14, at 107 ("The right of integrity might to some extent serve to protect the public in this regard [that is, not being misled about the work]. But this is perhaps best seen as an incidental and not a primary function of the right of integrity, because the doctrine does not give the public any protection when the artist himself participates in the deception.") &*id.* at 107 n.37 ("For example, both De Chirico and Dali were said to have signed—presumably for compensation—paintings actually created by other artists.").

which the final bronzes were cast."[74] And, perhaps most blasphemously, Rodin had granted the French nation the right to make posthumous editions of his work from his estate's plasters.[75]

All these examples should not much bother us if we consider the artist's name merely as source-identifying or "authenticating" rather than indicative of authorial touch, and reputation as commercial goodwill rather than personal cache.[76]

1. The Contingent Art Object

Art historian Martha Buskirk, too, points out that moral rights, or these so-called "personality"rights, "have, if anything, *gained* in significance for works from which traditional markers of touch or presence have been excluded."[77] Buskirk traces the rise of what she terms the contemporary "contingent art object" from the 1960s to its modern-day dominance—that is, art objects that are made from industrial materials, easily fabricated and reproduced, and highly context-dependent. In the new art world of the contingent object, "[a]dherence to external conventions that limit and control the production of otherwise inherently reproducible works is essential in order for such works to be collected in the context of a system based on the importance of originality and rarity."[78] To give just one telling example: in 1989, the Ace Gallery in Los Angeles wanted to borrow a piece by Donald Judd and another by Carl Andre from Italian collector Giuseppe Panza for an upcoming exhibit on minimalist art. The two pieces were on display in Panza's villa in Varese, Italy. But "[r]ather than shipping the two large-scale

[74] Rosalind Krauss, *Modernist Myths*, *in* THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS 151, 153 (1985).
[75] *Id.* at 151.
[76] These concepts will be fleshed out more fully in Section II.C, *infra.*
[77] MARTHA BUSKIRK, THE CONTINGENT OBJECT OF CONTEMPORARY ART 49 (2002).
[78] *Id.* at 4.

works from Italy, Panza authorized the gallery to refabricate the pieces in Los Angeles. Neither artist was consulted, and both publicly disavowed the copies exhibited under their name once they found out about the Los Angeles versions."[79]

As we will see later in Section II.B, such an instance is highly problematic because it has now increased the number of Donald Judds and Carl Andres on the market, decreasing the scarcity effect. And yet this instance is indicative of the problems plaguing the new "contingent" art object, for which "mechanical reproduction is at the core," and by which "original works of art [are] made through processes in which duplication of the work is controlled not through inherent limits on production (most commonly, the skill or touch of the artist) but by external limits."[80] Think of this as the shift from a Renaissance painting, labored over by an artist's paintbrush and bearing the distinctive brushstrokes of his hand, with what in the prior example of the Judd work is simply "an uninterrupted row of largely identical five-foot-high galvanized iron plates."[81] The former could in rare instances be copied by a master imposter—the latter, whether in an unauthorized reproduction or the authorized "original", has *always* been a product of industrial fabrication. Without the internal limits, only through an external legal measure like VARA's right of attribution may the artist control the work's fabrication, re-fabrication, and subsequent presentation under his name.

There is yet another reason the artist's name and reputation matters more now in the contemporary art market than it has in the pre-modern era. In the age of Duchampian readymade objects (shovels, urinals) presented as art,*context* matters—that is, it is important that each object bearing the artist's name directly signify a deliberate artistic *choice*—"[p]resentation under an artist's name ensures not only that a range of different forms of expression will be read as works,

[79]*Id.* at 2-3.
[80]*Id.* at 12.
[81]*Id.*

but that heterogeneity within that series of works will be read as a decision that itself carries meaning."[82] It is precisely the contingent object read *against* the entire *series* of an artist's work that illuminates—"an earlier approach to the work of art looked to the object itself for evidence about its aesthetic. For many contemporary forms, however, understanding of how a work of art was realized includes far more than a knowledge of artistic materials and their properties."[83] Rather than assuming a stylistic unity—as Landes and Posner have done[84]—the contingent art object may be just one in a highly heterogeneous body of works that could include, to use the example of the artist Hans Haacke, "materials as various as water evaporating and condensing in an acrylic cube, suspended fabric blown by air currents from a fan, chickens hatching on a farm in New Jersey, turtles set free in the south of France, and many versions of information systems."[85]

C. Authorship, Brand-building, and the Creation of Goodwill

Because we cannot believe in the *sincerity* of modern-day (or, ifyou prefer, "postmodern") artistic creation, it makes no sense to speak of moral rights as somehow closely guarding an artist's "spiritual, non-economic and personal nature",[86] for we cannot assume some real, one-to-one correlation between the artist and his work (or, as Professor Merryman puts it, a belief that "[t]o mistreat the work is to mistreat the artist"[87]). Instead, we look to the deliberate

[82] BUSKIRK, *supra* note 77, at 10.
[83] *Id.* at 15.
[84] *See supra* note 67 and accompanying text.
[85] BUSKIRK, *supra* note 77, at 129.
[86] Carter v. Hemlsely-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995).
[87] MERRYMAN,*supra* note 10, at 423.

control that an artist exerts over his body of work as building up a (instantly-recognizable, international) brand for himself.

1. Damien Hirst: A Case Study

Artist Damien Hirst is perhaps most famous for his $100-million dollar, diamond-encrusted skull, which went on sale at London's White Cube gallery in 2007, to much media hubbub. While some derision was inevitable, other critics were quick to pick up the brilliance of such a maneuver. The *Times* points out that Hirst, having "made his name by pickling sharks, cows, sheep and the like," and thus "having created his brand, he found he could sell almost anything."[88]In fact, that "Hirst is quite frank about what he doesn't do"—for example, it is well known that "[h]e doesn't paint his triumphantly vacuous spot paintings"—should not surprise anyone in the new artist-as-factory model.[89] Like name-brand fashion designers whoemploy a host of capable young designers toiling in anonymity behind the scenes, the "House of Hirst," so to speak, relies for its appeal on marketing—as one critic notes, "[h]is undeniable genius consists in getting people to buy [the paintings he didn't even paint]."[90]

Yet Hirst, for all his bravado, and like other mega-celebrity artists of his age, including Jeff Koons and Richard Prince, istrading off of a brand that had been built off the goodwillgenerated from a collection of hisearlier works. Art historian Isabelle Graw uses the term "symbolic relevance" to denote each artists' uncanny ability, at the beginning of their

[88] Alan Riding, *Alas, Poor Art Market: A Multimillion-Dollar Head Case*, June 13, 2007, N.Y. TIMES, http://www.nytimes.com/2007/06/13/arts/design/13skul.html.
[89] Germaine Greer, *Note to Robert Hughes: Bob, Dear, Damien Hirst is Just One of Many Artists You Don't Get*,Sept. 21, 2008, THE GUARDIAN UK, http://www.guardian.co.uk/artanddesign/2008/sep/22/1.
[90] *Id.*

careers, to tap into some specific condition of consumer capitalism.[91]In arguing *for* brand-building, I am not arguing for *all* lack of artistic meaning—rather, some initial meaning-making must be necessary, some iota of uniqueness that will first propel the artist to stardom. Koons, for example, with his early Banality series of 1988, "evoked an idealist belief in the redemptive function of art, only to render it absurd once and for all."[92]Likewise, Richard Prince made a name for himself in the late '70s with his re-photographed advertisements of "watches, pens, necklaces, or living rooms" which "further heighten[ed] the intended appeal of these items by means of an aesthetic procedure that intensifies the glow of the original image."[93] Both examples show that "the market value of an artwork can refer to a symbolic relevance attributed to an artist at some earlier moment just as, conversely, symbolic value once attributed extends to future works, amounting to a long-term credit."[94] Replace "symbolic value" with the term "goodwill," and what you have is a classic trademark argument in which the trademark-holder, having shored up his reputation via early successes, can now depend on his mark for future profit (that the artist might now employ assistants to do the bulk of his work should upset no one—consider trademark licensing or franchising schemes). And finally, in what is an all-too-witting acknowledgment of the business of art, California artist Dan Flavin issues graph paper certificates for all his works, "which validate[s] the authenticity of the work with both the artist's signature and the imprint of a New York corporate seal in the name of Dan Flavin, Ltd."[95] Flavin's use of his name as both artistic authority and corporation is both self-consciously tongue-in-cheek yet necessary in the world of the contingent object: the "certificates played an important role in the marketability of pieces where the physical object was made from off-the-

[91]GRAW, *supra* note 53, at 49.
[92]*Id.* at 53.
[93]*Id.* at 49.
[94]*Id.* at 55.
[95]BUSKIRK, *supra* note 77, at 53.

shelf elements" (Flavin's pieces frequently consist of everyday household objects like fluorescent light tubes), guaranteeing that *this* light tube is not just any old light tube—it is a Flavin "original".[96]

Returning to Hirst, while it's true that at the time of the diamond skull's creation, "[t]he 'Hirst brand' was simply too established, essentially guaranteeing symbolic relevance,"[97] the creation of the skull *itself* was both a brilliant PR move in the ultimate construction of the Hirst brand as signaling irreverent excess and purposeful de-skilling, and symbolically relevant, a nodding wink to the vanities of the art world in which, indeed, "the price tag is the art."[98]

PART III: COMPARING MORAL RIGHTS AND TRADEMARK LAW

So what does this all have to do with moral rights?As has already been noted, we must begin by shifting our current conception of moral rights as somehow protecting a unique set of artists' interests unlike, and loftier than,any other (the term "moral," unfortunately, does not help).[99]In fact, a brief comparison between moral rights law and trademark law will garner many more parallels than dissimilarities.I find this comparison significant for a few reasons: the most obvious being that trademark is meant to regulate consumer goods—precisely what I am arguing art objects are today. Secondly, and perhaps more significantly, part of the opposition to moral rights stems from the belief that these rights are somehow unique compared to traditional copyright and trademark law—as many commentators never fail to point out, American intellectual property law seeks to vindicate the economic, rather than the personal, interests of

[96] *Id.* at 56.
[97] GRAW, *supra* note 53,at 40.
[98] Riding, *supra* note 88.
[99] For a brief discussion of the "assumption embedded in moral rights law…that works of visual art deserve special treatment in the law because they are especially valuable and unlike other object," see Adler, *supra* note 4, at 269.

authors.[100]My argument is that moral rights, much like trademark law (which I use to encompass trade dress,[101] as well), can instead regulate a set of distinctly economic rights—both by decreasing search costs for art buyers and the art-viewing public, and by giving artists an incentive to create without having other actors unfairly reap the benefits of their goodwill (which, in turn, incentivizes the creation of a consistent, quality body of work).[102]I will now look at three unique trademark principles in turn and discuss their relevance to moral rights: the abrogation of the "first sale doctrine," the Lanham Act's prohibition against source confusion (or "passing off"), and, lastly, the principles of dilution and tarnishment for famous brands.

A. Trademark's Abrogation of the "First Sale Doctrine"

Americans get very protective of their property. I mean protective to encompass the right to alter it, sell it, destroy it, transfer it—in short, the belief that because you now own it, you should be able to do whatever you'd like with it. Thus, the annoying idea that a trademark holder might be able to control how an owner disposes of his propertywas formally done away with by the Supreme Court in the 1924 case *Prestonettes, Inc. v. Coty*[103], which established what is now known as the "first sale doctrine". There, the Court held that the defendant, who had

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[100]*See, e.g.*, Gilliam v. American Broadcasting Companies, 538 F.2d 14, 24 (2d Cir. 1976); Justin Hughes, Symposium, *American Moral Rights and Fixing the Dastar "Gap*, 2007 UTAH L. REV. 659 (2007); "Roberta Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L. J. 47, 59-60 (1994).

[101] Also actionable under Section 43(a), "trade dress" is "a category that originally included only the packaging, or "dressing," of a product, but…has been expanded by many…to encompass the design of a product." Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 209 (2000) (also explaining that trade dress "constitutes a 'symbol' or 'device' for purposes of the relevant [Lanham Act] sections").

[102] The economic justifications for trademark law are numerous. *See, e.g.*, Nicholas Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523 (1988); Ralph H. Folsom & Larry L Teply, *Trademarked Generic Words*, 89 Yale L.J. 1323 (1980); William P. Kratzke, *Normative Economic Analysis of Trademark Law*, 21 MEM. ST. U. L. REV. 199 (1991); William M. Landes & Richard Posner, *Trademark Law: An Economic Perspective*, 30 J. LAW & ECON. 265 (1997).

[103] 264 U.S. 359 (1924).

originally purchased plaintiff's perfumes, "had a right to compound or change what it bought, to divide either the original or the modified product, and to sell it so divided."[104]Since then, sellers in the "aftermarket" for goods (redistributors, for example) have invoked the doctrine, sometimes successfully, against a trademark owner's infringementclaims.[105]

But this defense is not absolute. Courts have relied on both a likelihood of confusion to purchasers*and observers* in finding *against* the defendant and *for* trademark infringement. For example, in *Rolex Watch, U.S.A., Inc. v. Michel Co.*[106],the court found that a defendant who sold used Rolex watches with "reconditioned" or "customized" non-Rolex parts, in retaining the original "Rolex" trademark, was "deceptive and misleading…and likely to cause confusion to subsequent or downstream purchasers, as well as to persons observing the product."[107]*Rolex* was just one of several cases holding that a substantial alteration of the original product may no longer be sold with the original trademark.[108]

That a trademark owner has the right to enjoin use of its trademark in connection with a substantial alteration of its original product is highly similar to an artist's right to prevent the distortion, mutilation, or modification of his work that would subsequently be prejudicial to his honor or reputation, and the use of his name in connection therewith.The phrase"*prejudicial to an artist's honor or reputation*" *may* seem tainted with traditional "moral rights" rhetoric, but it need not be so: as discussed in Part I, an artist *trades* in his reputation—for example, that he is a "high art" artist and has sold valuable pieces before (coincidentally, Hirst's claim for why he can

[104]*Id.* at 368.
[105]*See, e.g.*, Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC, 562 F.3d 1067 (10th Cir. 2009); Sebastian International, Inc. v. Longs Drug Stores Corp., 53 F.3d 1073 (9th Cir. 1995); Alexander Binzel Corp. v. Nu-Tecsys Corp., 785 F. Supp. 719 (N.D.Ill. 1992); Scarves by Vera, Inc. v. Am. Handbags, Inc., 188 F. Supp. 255 (S.D.N.Y. 1960).
[106] 179 F.3d 704 (9th Cir. 1999).
[107]*Id.* at 707.
[108]*See* Rolex Watch USA, Inc. v. Meece, 158 F.3d 816 (5th Cir. 1998) (Rolex watches "enhanced" with non-Rolex parts infringed on trademark); Bulova Watch Co. v. Allerton Co., 328 F.2d 20 (7th Cir. 1964) (re-fitting Bulova movements and dials into non-Bulova diamond-decorated cases results in a new product).

get away with selling art objects that are "pure kitsch"[109])—it is what informs our understanding of new work that might otherwise remain contextless and inexplicable, and it is *also* what art buyers and sellers are implicitly trading off of when they sell (to return to the introduction) a box of brown clothes for a 5-digit price. That is—the box of brown clothes is not valuable*on its own*, but only *becomes* valuable in light of the fact that it is "an X original" (and, likewise, that it is "an Xoriginal" is only significant because of the entire body of work that X has produced before this moment in time that has rendered him an art world superstar).

So, then, what if the owner of an artwork decides to cut it up into six pieces and then sell the pieces separately? In what is perhaps the most famous case invoked in support of moral rights law, the French artist Bernard Buffet painted a refrigerator and sold it at a charity auction."Six months later the catalog for another auction included a 'Still Life and Fruits' by Bernard Buffet, illustrated and described as a painting on metal. Inspection showed that the painting was one of the panels decorating the front of the refrigerator."[110] Apparently, the owner of the refrigerator had cut it up into six pieces and attempted to sell them separately, "evidently to increase its resale value."[111]This would no doubt be a "substantial" alteration that the first sale doctrine does not protect, both because it would create a likelihood of confusion to the purchaser of "Still Life and Fruits" and to any observer who might see the work displayed (indeed, the problem of observer confusion for the fine arts is even more dire than that for commodity goods because any observation of the latter is likely incidental, whileworks of fine art are often purposefully displayed at gallery shows, loaned to museums, and the like).

[109]DAMIEN HIRST, NEW RELIGION 7 (2005).
[110]*See* John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1023 (1975-1976).
[111]*Id.*

Further, the use of the Buffet name creates significant free-rider problems. As the Ninth Circuit explains in another first sale case (in which the defendant had purchased Volkswagen badges and subsequently affixed them to marquee labels):

> [Defendant] contends that in "first sale" cases the element of free-riding present in other post-purchase confusion cases disappears because the producer has paid the price asked by the trademark owner for the "ride." This contention misses the point. When a producer purchases a trademarked product, that producer is not purchasing the trademark. Rather, the producer is purchasing a product that has been trademarked. If a producer profits from a trademark because of post-purchase confusion about the product's origin, the producer is, to that degree, a free-rider.[112]

Likewise, the owner who is hoping to "increase resale value" in its cut-up Buffet panels is making an implicit free-rider assumption: that he can do so because the Buffet name is valuable, *and not* because he means to create some newer, better work.While this case may strike some as unusual, it is, unfortunately, not unique. Others have cut up, for example, paintings by the French painter Henri de Toulouse-Lautrec(into not just six, but *ten*, pieces) and Picasso's *Trois Femmes*, purchased for $10,000, subsequently cut into 500 one-inch squares, and sold off for $100 a piece—creating a hearty $40,000 profit.[113] The clever "entrepreneur" even remarked, "If this thing takes off, we may buy other masters as well and give them the chop."[114]

[112] Au-Tomotive Gold, Inc. v. Volkswagen of America, Inc., 603 F.3d 1133, 1138 (9th Cir. 2010).
[113] *See* MERRYMAN, *supra* note 10, at 439.
[114] *Id.*

Further, the practice of cutting up art and selling the pieces is especially problematic because it decreases the scarcity value of the Buffet brand, in both the quantity/price trade-off sense ("as supply is reduced for substitutable goods, the market price for those goods increases") and the "possibility that works of art are a form of 'collectable' good whose value to its owner derives in significant part simply from its scarcity."[115]Inundating the market with piece-meal art in larger quantity than the original presents obvious problems for fine artists in particular, who may wish to limit the number of goods placed in the market.

B. Source Identification andSource Confusion

In the prior Section's discussion of the first sale doctrine, I have glossed over the "likelihood of confusion" standard that is necessary to prove trademark infringement in a 43(a) Lanham Act claim.[116]The standard, which charges the infringer with causing confusion, mistake, or deception with regard to "the affiliation, connection, or association of such person with another person, as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person,"[117] serves a helpful way to re-frame the dialogue regarding authorial intent from one of personal interests[118] to economic ones.

That is, the very *idea* of a discernable "authorial intent" worth protecting has come into some assault within postmodern art circles. Commentators have argued that it makes *no sense* to speak of "intent" as if there were a single author who controlled the end product (opting instead

[115] Hansmann & Santilli, *supra* note 14, at 111 n.49.
[116] 15 U.S.C. § 1125(a).
[117]*Id.*
[118]*See, e.g.*, Roberta Kwall, *Fame*, 73 IND. L.J. 1 (1997) (arguing that both "the right of publicity and moral rights seek to protect the integrity of texts by rejecting fluidity of interpretation by the public in favor of the author's interpretation").

for a world with multiple authors or the author-as-construct),[119]and further, that authorial intent is impossible to determine,[120]so a work should just exist *ab initio*, as if divorced from the author.[121] The latter conceptually makes sense (sure, authors are all building off what came before so in that sense there is no "single" author of a work, and sure, once the work has left the artist's hands, it can and probably should be open to all sorts of interpretations), yet provides an easy target against moral rights law and its assumed correlation between artist and work. If we sever the connection altogether, then an artist certainly does not possess any more right to control the (I have deliberately avoided using the possessive) work than, for example, a museum curator or a clever critic who has figured out a way to alter the work so as to make it more profitable.[122]

Yet the critique also makes sense if we consider the "author" not as the ultimate creator but as serving a source-identifying function: when we *say* "this is a Warhol," we mean to conjure up all sorts of associations with the Warhol brand—not least of which is that it is extremely high in price, but also that it may be, for example, purposefully de-skilled, playful, or irreverent. All these associations are part of the deliberate choices Warhol has made in putting into the stream of commerce, and hence, into the public eye, a specific body of work.Artist name as source-

[119] The classic text is Roland Barthes, *The Death of the Author*, *in* IMAGE-MUSIC-TEXT 142, 146 (Stephen Heath trans., 1977), in which Barthes argues the only power of the post-modern author is to "mix writings"; *see also*Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"* (arguing that authorship is a socially-constructed category reliant on the Romantic notion of an inspired genius), 1991 DUKE L.J. 455; Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author,'* 17 EIGHTEENTH-CENTURY STUD. 425, 428-30 (1983-1984) (same).

[120]*See* Adler, *supra* note 4, at 278 ("The belief—that we can discern, let alone police, artistic intention, that it is necessarily relevant to the meaning of a work—is premised on naïve theories of interpretation.").

[121] Nabakov, for example, had proclaimed in the Afterword to *Lolita* that it "is childish to study a work of fiction in order to gain information…about the author." VLADIMIR NABAKOV, LOLITA 334 (Knopf 1992) (1955).

[122] As is the case of famous modernist critic Clement Greenberg and his "stripping" of David Smith sculptures that actually rendered them more valuable than the painted ones. *See* Sarah Hamill, *Polychrome in the Sixties: David Smith and Anthony Caro*, ANGLO-AMERICAN EXCHANGE IN POSTWAR SCULPTURE, 1945-1975, at 91, 93 (2011), http://www.getty.edu/museum/symposia/pdfs_stark/stark_online_archival_144dpi.pdf(citing Rosalind Krauss, *Changing the Work of David Smith*, 62 ART IN AM. 30 (Sept.-Oct. 1974)). However, it doesn't much matter if Greenberg created more market value, for the sculpture may no longer accurately be branded a David Smith. Smith implicitly evokes this concept of misrepresentation in an angry letter to *ARTnews*: "Since my sculpture *17h's*…during the process of sale and resale, has suffered a willful act of vandalism….I renounce it as my original work and brand it as a ruin. My name cannot be attributed to it, and I shall exercise my legal rights against anyone making this representation." MERRYMAN, *supra* note 10, at 441.

identifying function makes sense in a contemporary art market in which it is well-known that frequently, assistants are the ones actually "making" or "creating" the art.[123] The artist himself performs the legitimating function, as a fashion designer would place his trademark on a host of items actually designed by a team of assistants, of merely *signing off on the work*, and thus *making it*"a Warhol." Yet to label it a "Warhol" when the artist himself *did not willfully sign off on this specific modified or mutilated object*is misleading, for now the artist is neither the "origin" of the product (i.e. coming from the Warhol "factory") *nor* professes to sponsor or approve it in any way. This not only imposes negative externalities (by increasing search costs) on the art consumer, but also allows another party to reap the financial rewards associated with the famous Warhol name.[124]

To return to Buffet's refrigerator, the labeling of one of the refrigerator panels as "Still Life and Fruits by Bernard Buffet" is misleading, for Buffet was neither, to borrow the Supreme Court's definition of "origin" in the 2003 Lanham Act case *Dastar Corp. v. Twentieth Century Fox Film Corp.*,"the producer of the tangible product sold in the marketplace," nor had he "commissioned or assumed responsibility for ('stood behind') production of the physical product."[125]He created a refrigerator. By dicing it up into six parts, the owner has subsequently created six new works (he, and not Buffet, is now the new producer or "source"), and should not be permitted to unfairly profit off of the Bernard Buffet name in selling them.[126]

[123]*See supra* note 53 and accompanying text.
[124]*Cf.* Qualitex Co. v. Jacobson Products Co., 514 U.S. 159, 163-164 (1995) (stating trademark's goals as reducing consumer search costs and insuring "a producer that it…will reap the financial, reputation-related rewards associated with a desirable product").
[125] Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 32-33 (2003).
[126] It should be noted too that Buffet was an early example of the artist-as-businessman, as art critics in his day called him the "Rembrandt of the stock market speculators." GRAW, *supra* note 53, at 194.

C. Famous Artists, Famous Brands: A Brief Note on Dilution

Throughout this piece, I have mentioned a trademark owner's right to prevent "dilution" of his brand in passing. In this Section, I shall discuss briefly the rights of dilution by blurring and dilution by tarnishment, which apply only to famous marks.[127] The former, as defined by the Lanham Act, prevents the association between the defendant's mark and a famous mark that would impair the *distinctiveness* of the famous mark, while the latter prohibits the association between the defendant's mark and a famous mark that would harm the *reputation* of the famous mark. While the only provision of VARA requiring an artist to first prove his own "fame" is the right of destruction (and there, he must prove the "recognized stature" of a specific *work*, not his general fame), the dilution right provides an interesting framework for understanding the right of attribution and the right of integrity's requirement that any distortion or modification be *prejudicial* to the artist's honor or reputation.

First, this requirement suggests that the right of integrity standing on its own—that is, a modified work that does *not* include the artist's name—nonetheless requires an association between the modified, unmarked work and the artist. Otherwise, if no association arises, it would be impossible for any harm to the artist's reputation to occur. Thus it's likely that the right of integrity would apply only in cases where a "dilution by blurring" occurs—that is, where the unmarked work would impair the distinctiveness of a famous mark. This would apply more to artists painting in distinctive styles that would arise to the level of trade dress protection than for artists who have more heterogeneous, eclectic oeuvres.[128] Artists with more "instantly-

[127] 15 U.S.C. § 1125 (2006).
[128] *See supra* notes 82-85 and accompanying text.

recognizable"[129] styles, therefore, are far more likely to evoke associations between an unmarked work that nonetheless retains much of the artist's distinct style and the artist's name.

Second, some might object that the phrase "prejudicial to the artist's honor or reputation" is strongly tinged with personhood rhetoric. But it need not be so. When a famous artist polices his mark, he is doing more than protecting his own reputation. He is also protecting other owners of his work by ensuring that the brand they own stays unique and untarnished—in effect, the artist acts as the "least-cost-avoider"in policing the mark against dilution, exemptingowners who have an economic interest in protecting the value of their work from needing to do so themselves.[130] Likewise, for an up-and-coming artist, he protects buyers' investment in his work, even if his work has not yet acquired distinctiveness (trademark law refers to this as "secondary meaning"[131]).That is, while dilution by blurring may not be possible because there is no "distinctiveness" to impair, a dilution by tarnishment-type injury could nonetheless occur if the modification is likely to harm the artist's reputation. The more untarnished a young artist's reputation stays, the more likely it is that the goodwill accrued early on in his career can be converted to a longer-term cash-out for the artist *and* earlier buyers of his work.[132]

[129]*Supra* note 67 and accompanying text.
[130]Thank you to Shaun Mahaffy for this point. *See also supra* note 42 and accompanying text. Of course, it is possible that the artist's *own* actions might have a deleterious effect on an owner of his work. A recent lawsuit brought by a collector of photographer William Egglesten's works alleges that Eggleston has diluted the resale value of the collector's works by issuing new large-scale prints of them. *NY Collector Sues Photographer Over Large Images*, THE WALL ST. J., Apr. 5, 2012, http://online.wsj.com/article/APd127f6bf40654a248888b37c17ad371b.html?KEYWORDS=collector+sues. However, I note here that VARA serves as an interesting external check on an artist's own dilutive actions—if Egglesten were to issue more than 200 prints of a specific photograph, he would lose his VARA rights.
[131]*See infra* note 148 and accompanying text.
[132]*See supra* notes 63-94 and accompanying text.

PART IV: WHO'S AFRAID OF MORAL RIGHTS?

Yet some might object that just because there's a connection between art and commerce, moral rights protecting artists and those protecting brands, doesn't necessarily warrant an unprecedented expansion of American intellectual property law. In this Part, I tie up some loose ends by asking whether we can achieve for fine arts what moral rights hopes to do with either a traditional copyright regime or a trademark regime, and then wrap up with the broad question of the public interest—that tricky morass that copyright law has long been said to benefit.[133]

A. Are There Alternatives?

A question frequently asked of moral rights law is—why is *art* (meaning fine art, and not "the arts" as it could potentially refer to film, music, and books) special?[134] What is so *special* about *art* that warrants its protection? We could answer this question with lofty statements about the importance of art to our heritage, our culture, and society as a whole—and in many ways, we've done just that.[135]But this is a debatable point. At any rate, the extent to which the vulgarities and materialist excesses of the contemporary art market, as I've outlined above, have destroyed that notion is also up for debate. A better question to ask would be whether there was something lacking in the way of protection for the fine arts in a traditional intellectual property regime. I think that there is.

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[133] The "copyright clause" in the Constitution empowers Congress to "promote the Progress of Science…by securing for limited Times to Authors…the exclusive Right to their…Writings." U.S. CONST. art. I, sec. 8, cl. 8.
[134]*See* Adler, *supra* note 4, at 295.
[135]*See* H.R. Rep. No. 101-514, at 6-7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6916-17 (VARA's legislative history extolling the merits of art for society).

1. Copyright and Its Limitations

As Professors Hansmann and Santilli point out, "copyright is more useful to authors of literary works than it is to visual artists as a means of controlling the way in which their work is presented to the public."[136] Further, "that copyright covers principally reproductions" means that the fine artist has "much less control over the uses made of his original painting or sculpture once that object is sold by the artist," despite the fact that "painters, sculptors, and other visual artists can retain copyright in their works even after they have sold the original."[137]

Indeed, it seems to me that the unique position visual artists find themselves in is the high premium placed on the *original itself* that is simply not analogous to that of literature, film, or music. The justifications and critiques of the copyright regime have often been predicated on solving the problem of a high first copy cost with little to zero costs in reproduction—thus both the logic in creating an "artificial" property right in a non-rivalrous good (many could be listening to the same MP3 of a song at a time—my listening to this copy does not prohibit your listening to the exact same copy) and the inevitable resulting inefficiencies (the marginal cost of making an identical copy second to the first is 0 or slightly over 0, yet you are paying far above this marginal cost for your second copy so that the right holder can recoup costs in his first copy).[138]Hence the protracted debates about how much copyright protection is "enough"

[136] Hansmann & Santilli, *supra* note 14, at 114.
[137] *Id.*
[138] *See* NEIL NETANEL, COPYRIGHT'S PARADOX 84-86 (2008).

protection to incentivize the creation of that first copy—how many copies should the owner be allowed to profit from so that he may create at all?[139]

Visual artists cannot hope to benefit much, if at all, from this regime.[140] Almost all the market value for their work resides within that first "original" copy—this is what creates what I have termed "the cult of the authentic" that has rendered Benjamin's prediction of a world without fetishism for the original simply untrue for the fine arts (though there may be, of course, possibilities for creating prints, and, if this is a truly popular work, perhaps mugs, tote bags, postcards, and the like).This renders an art object at once more similar to a luxury good (it *is* rivalrous—once I own this Hirst, you may not own the same Hirst) as it is even*more* covetable for its scarcity (this is the *only* diamond skull that is out there, while Prada may have made at least 5,000 of their Spring '11 bags).

Given the inadequacy of a traditional copyright regime governing subsequent *copies* rather than the original itself, then, it seems that moral rights, or a regime according the artist more control over the original, serves as an adequate solution for the uniqueness of the fine art object.[141]That is, we are shifting the incentive mechanism from a promise of control over the copies to a promise of control over the original—which is, really, the only copy that matters the fine artist.

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[139]*See* Eldred v. Ashcroft, 537 U.S. 186, 248 (2003) (Breyer, J., dissenting) (stating that the Copyright Term Extension Act and the royalties it will generate "may be higher than necessary to evoke creation of the relevant work").

[140]*See* H.R. Rep. No. 101-514, at 10 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6919 ("Motion pictures and other audiovisual works are generally produced and exploited in multiple copies. They are leased for theatrical and non-theatrical exhibition, licensed for broadcasting, shown on airplanes, and sold as videocassettes. Each market has its own commercial and technological configuration that affects how the work will appear when presented. In contrast, the works of visual art covered by H.R. 2690 are limited to originals: works created in single copies or in limited editions. They are generally not physically transformed to suit the purposes of different markets.").

[141] Professors Hansmann and Santilli have also suggested, interestingly, that a significant alteration of a work may result in a violation of the "derivative works" right. *See supra* note 14, at 114-116. Landes and Posner have also made this comparison between the integrity right and the derivative works right—see LANDES & POSNER, *supra* note 67, at 279.

2. Why Not Just Use Traditional Trademark Law?

As noted throughout this Paper, numerous scholars have suggested trademark redress for artists.[142] However, courts do not seem especially hospitable to this argument. Professor Merryman states that there is no known

> case in which the Lanham Act has been used to provide moral right protection to a work of visual art. The closest approach is *Visual Artists and Galleries Association v. Various John Does*, 80 Civ. 4487 (S.D.N.Y. 1980)…There, Picasso's signature appeared on T-shirts without authorization of the artist's heir, and an action was brought to enjoin the manufacture, distribution, or sale under § 43(a) of the Lanham Act.[143]

However, as the case involves the literal use of Picasso's name *as* a trademark on a non-art product, it does little to redress alterations or modifications of original*artwork.*[144]The question remains whether an *actual* Picasso that had merely been cut up into several pieces would still qualify under a 43(a) action.

Further, there are other significant reasons that 43(a) is an inadequate solution to the problems VARA address. For one, the Lanham Act requires that the name be used in commerce in connection with the sale of goods or services, so it would likely not cover situations where a

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[142]*See* Hansmann & Santilli, *supra* note 14, at 116 ("Further expansive interpretation of trademark law might be sufficient to give artists the same type of reputational protection afforded by the right of integrity"). *See also* LANDES & POSNER, *supra* note 67, at 276 ("Attribution rights are closely related to rights against fraud and trademark infringement, so that much of what they seek to prevent is already forbidden."). However, *Dastar* may have eviscerated at least some attribution claims, *see infra* notes 152 -155 and accompanying text.

[143]MERRYMAN, *supra* note 10, at 438.

[144] Interestingly, here we see a 43(a) claim being brought after the artist's death, whereas a VARA claim could only be brought while an artist is still alive.

gallery (like in the Carl Andre and Donald Judd examples[145]) displays an unauthorized work of art. This was the approach the court took in*Wojnarowciz v. American Family Association*[146], which involved the unauthorized reproduction of an artist's work in a series of pamphlets. The district court held that "[b]ecause the pamphlet was not employed in the 'advertising or promotion' of goods or services, plaintiff has failed to satisfy a prerequisite to invocation of the Lanham Act."[147]

Secondly, both trade dress and personal names (in this case, the name of the artist) require secondary meaning—that is—acquireddistinctiveness, in order to be actionable as a trademark under 43(a).[148] For artists who are not yet established, this creates large barriers in bringing a 43(a) claim, which is unfortunate because up-and-coming artists have a special interest in protecting the integrity of their works and name in order to establish symbolic value early on.[149] Further, the requirement that an artist acquire distinctiveness in his "trade dress" would induce an artist to paint in a consistent, repetitive style—while many of the most famous artists today work in largely heterogeneous styles across a wide variety of media.[150]

The interest in trademark law as a potential remedy for "moral rights"-type violations (misattribution, modification, etc.) has gained more ground since the 2003 Supreme Court decision *Dastar v. Twentieth Century Fox*[151], in which the defendant repackaged plaintiff's TV series and sold it as its own. The plaintiff sued under the Lanham Act (since VARA only applies to fine artists), but the Court ruled that because the series' copyright had expired, the work was

[145]*Supra* note 79 and accompanying text.
[146] 745 F. Supp. 130 (S.D.N.Y. 1990).
[147]*Id.* at 142.
[148]*See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION§ 14 (1995).
[149]*See supra* notes 63-94 and accompanying text.
[150]*See supra* note 85 and accompanying text.
[151] 539 U.S. 23 (2003).

now effectively in the public domain and anyone was free to use it as they pleased.[152] The decision has been roundly criticized because the Court conflates copyright and trademark rights for authors—if an author does not have a right to the former, he does not have a right to the latter, either.[153] The decision is vastly interesting in relation to VARA, which at once applies only to physical works of art, yet specifically *disaggregates* copyright and moral rights, ensuring the author some degree of control even if he has transferred his copyright with the work.[154] While *Dastar* does not mention moral rights or VARA, the implication is at least that we are unlikely to see an expansion of moral rights-type protections for works outside that of visual art, specifically because the Court has at least eviscerated a portion of possible section 43(a) claims for authors.[155]

B. A Last Word about the Broad "Public Interest"

The economic incentive behind copyrightlies in the beliefthat "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors."[156] Thus, it is at least arguable that if a modification of copyright does *not* advance "the Progress of Science," that modification is unconstitutional.[157] Likewise, VARA's legislative

[152]*Id.* at 33-34.
[153]*See* Ginsburg, *supra* note 45, at 380; Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 268 (2004).
[154]17 U.S.C. § 106(A)(e)(2) (2006).
[155] However, in other situations where an author is likely to prevail on his copyright claim, he could have an additional cause of action under 43(a), as well. This approach has been used in *Gilliam v. American Broadcasting Companies, Inc.*, 538 F.2d 14 (2d Cir. 1976), the court applied the Lanham Act to a significant modification of a Monty Python work.
[156]*Mazer v. Stein*, 347 U.S. 201, 219 (1954).
[157]*See* Eldred v. Ashcroft, 537 U.S. 186, 211-212 (2003) (petitioners arguing that the Copyright Term Extension Act does not promote the progress of Science because it does not incentivize the creation of new works).

history is highly concerned with elucidating the important public benefits according moral rights to artists will garner.Congress writes,

> 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 and replaced with a purely profit motivation. The Visual Artists Rights Act mitigates against this and protects our historical legacy.[158]

This Paper, however, has argued that a "pure profit motivation"—in clever branding, advertising, and general celebrity-type antics prone to the contemporary art world today[159]—is all that's left, and moral rights the inadvertent, inaptly-named law to protect those economic interests. The prior statement, however, needs a caveat. I don't mean to imply that *all* artists are modeling themselves in the Hirst, Koons, or Prince fashion. But those who do not—the so-called "artist's artists"—admired for their formal rigor, their (to the extent you can believe it) romantic beliefs, and their, best of all, death in near-obscurity[160]—will benefit little, if at all, from moral rights, since the right only persists for the duration of an artist's life. "Artist's artists," like the post-conceptualist sculptor Paul Thek, will often be "rediscovered" and launched into art world

[158] H.R. Rep. No. 101-514, at 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6916.
[159] Jeff Koons, for example, quite literally made advertising his mode of art-making by launching an advertising campaign in different international art magazines, where he posed "in them as a slightly perverse-looking teacher." GRAW, *supra* note 22, at 53.
[160] *See id.* at 82 (noting that for the artist's artist, "[a]ny commercial success he enjoys will most likely be posthumous).

favor post-death, when galleries and museums scramble to hold "long-overdue" retrospectives of their work.[161]

Yet perhaps what is most interesting about the comparisons between moral rights law and trademark law is that the latter has a distinctly public function: rather than incentivize *creators*, trademark law means to protect *consumers*, or, the buying public, by ensuring accurate source-identification and reducing search costs. Further, the *viewing* public also benefits from accurate source-identification, as they must read each work, intact and as the artist intended it, against the whole of an artist's oeuvre. The benefit to the public, however, is necessarily predicated on the individual viewer's encounter with the work, rather than a shared sense of community ethos—this Paper has thrown into doubt whether we can expect art to serve a broader social function that consist of "common reference points or icons…widely shared in social communication."[162] Whether the often obscure contemporary art objects of today will resonate as Picasso or Rembrandt did in their day is a topic for a different paper. I only mean to suggest that the industrial processes with which the contingent art object is made relies on the artist to perform quality control measures, for which "signing off" on the finished product is key. In the event that a *poor* fabrication is made off an artist's original plans—as was the case with the reconstruction of Carl Andre's 1969 piece *Fall*,[163] in which the bend in the steel curved less dramatically than Andre had intended—VARA would allow the artist to prevent use of his name in connection with the work. However, as Andre's *Fall* fabrication was made well before VARA's enactment, the artist could do nothing to prevent its showing at the Ace Gallery in Los Angeles. His only

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[161] *See Paul Thek: Diver, a Retrospective*, WHITNEY MUSEUM OF AMERICAN ART, http://whitney.org/Exhibitions/PaulThek (last visited December 29, 2011) (noting that the Whitney's 2010-2011 show is Thek's first retrospective in the U.S.); *see also* Peter Schjeldahl, *Out-There Man*, THE NEW YORKER, Nov. 1, 2010, at 116 ("He died, of AIDs, in 1988, at the age of fifty-four; he is too little known, and his rediscovery promises to have a galvanizing effect on young artists.").

[162] Hansmann & Santilli, *supra* note 14, at 106.

[163] *See supra* note 79 and accompanying text.

recourse was to disavow connection of his name with the piece after the fact. "After finding out about the refabrication from a review, Andre insisted in a letter to *Art in America* that 'No such 'refabrication' of [his] work has been authorized by [him] and any such 'refabrication' is a gross falsification of my work.'"[164]However, the damage had already been done. For visitors to the Ace Gallery, their encounter with the Andre piece had necessarily been what I might venture to call a "false" one—a different fabrication of the piece, with the dramatic curves Andre had intended, would have produced the desired engagement with the object. Though to some, a lesser or sharper curve seems trivial, it is precisely minimalist art's focus on the object as experience—the object's ability to confront the viewer with its specific shape and materiality as the viewer moves around the piece—that constitutes its power.[165]

Lastly, that trademark law has *also* been acknowledged to incentivize *producers* by facilitating investment in goodwill[166] may serve a more traditional "socially beneficial" artistic function—that is, true to copyright's dictate, by populating the *pool* of available art—by encouraging artists to develop symbolic value early on in their careers.[167]Hirst, with his $100 million diamond skull, might not have been trying to "excel," might've aimed instead for a rather *low* standard of excellence.[168] But that might have been precisely the point. Whether meant as a serious offer or a satirical message, Hirst's grotesque gesture has accurately captured "the

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[164]BUSKIRK, *supra* note 77, at 45.

[165] Michael Fried, in his famous article on minimalist sculpture, discusses this fact: "Literalist [Fried's term for minimalist art] sensibility is theatrical because, to begin with, it is concerned with the actual circumstances in which the beholder encounters literalist work…[Robert] Morris [a minimalist artist] believes that this awareness is heightened by 'the strength of the constant, known shape, the gestalt,' against which the appearance of the piece from different points of view is constantly being compared." Michael Fried, *Art and Objecthood, in* ART AND OBJECTHOOD: ESSAYS AND REVIEWS 148, 153 (1998).

[166] Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or* Fait Accompli?, 54 EMORY L. J. 462, 466 (2005).

[167]*See* discussion *supra* notes 63- 94 and accompanying text.

[168]*Cf.* H.R. Rep. No. 101-514, at 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6917 ("America's growing artist community leads the world in its diversity, its innovative spirit, and its high standard of excellence") (quoting *The Visual Artists Rights Act of 1989; Hearings on H.R. 2690 Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justie of the House Committee on the Judiciary*, 101st Cong., 1st Sess. (1989) (statement of Arnold Lehman, Director of the Baltimore Museum of Art)).

essence of [our] culture and record[ed] it for future generations." As it turns out, "it is often through art," indeed, "that we are able to see truths, both beautiful and ugly."[169]

CONCLUSION

Part of the reason that the myth of Van Gogh's ear, and, similarly, that of the romantic modernist painter (even Jackson Pollock, that art world superstar, was still the lone wolf, chugging whisky and splashing paint wildly about on his floor-laid canvases), has persisted through the ages is because it's a story we want to believe in, and, subsequently, live vicariously through. We see brazen action-painting like Pollock's as risk-taking—"we rely on them to make up for our own timidity, on their courage to dignify our caution."[170] And while we may "all make our wagers," the "artist does more. He bets his *life*."[171]

And so it is. If the stakes of the game have changed since high modernism—if it is now "cool" to be economically successful instead of worthy of derision[172]—so, too, have the times. Warhol may have been the first artist to successfully capitalize and foreshadow the power of modern media and consumer culture for the artist-as-businessman model,[173] but he is just one of many post-modern artists who now look to the conditions of the market as talisman and guide, rather than creating from the spontaneous, inspired depths of their own tortured soul.In some ways, this may make sense. Isn't art on some level always reflective of the times we live in? If this is the case, I do not know how the dialogue surrounding moral rights may be justified in the

[169] *Id.* at 6916.
[170] Gopnik, *supra* note 6.
[171] *Id.*
[172] *See* GRAW, *supra* note 53, at 95-100.
[173] It is well-known, of course, that Warhol was a commercial illustrator before he launched his art career. *See* 2 HAL FOSTER ET AL.,*supra* note 34, at 486.

future. In fact, the pendulum may just swing back again at some later date, in which art once again becomes lofty, and thus a special subset of rights somehow justifiable of its own accord. For now, I propose that moral rights is probably no more nor less than trademark law—that great engine of consumer culture, beating ceaselessly on in the name of commerce, capitalism, and yes, even culture.