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I. Introduction

Although many artists build their careers by offending or challenging mainstream culture and live happily as outsiders, these and all artists still strive to protect their reputations and the integrity of their works. Whether the work is a harmless landscapes of Thomas Kinkade, or a titillating pornographic photograph of David Wojnarowicz that a recent biographer described as “so resolutely ugly that it too shone with a sort of defiant beauty,”¹ it is not public approval these artists seek, but merely the right to control the way in which they, and their works, are represented to the public.

The importance of protecting the moral rights of artists has long been recognized by European law, but the United States has not embraced the value of artists’ rights in the same way. Copyright law in the United States is founded on the goal of “promot[ing] the Progress of Science and useful Arts,” explicitly stated in the Constitution. At base, the exclusive rights granted to authors and creators are intended to protect the natural right of man to the fruits of his labor. Simultaneously, the rights are constitutionally proscribed to “limited times” in order to incentivize the creation and production of new works, and distribution of those works to the public.

Although this theoretical foundation may seem dominated by utilitarian and economic considerations, America’s musicians, filmmakers, photographers, sculptors, and painters are

crucial players in the scheme of the copyright framework, despite the fact that their contributions may not be clearly quantifiable, or contribute to job creation or economic growth. The value these creators add to our cultural narrative is clearly deserving of protection. But creating a mechanism that properly recognizes and protects the intangible, invaluable, inextricable connection between artists’ morality and identity and their works is clearly challenging, and perhaps inconsistent with the incentive-based theory upon which the U.S. intellectual property protection system has been built.

Today, U.S. copyright law recognizes moral rights for visual works that fall within narrow categories due to the enactment of the Visual Artists Rights Act of 1990 (VARA). Before the enactment of VARA, artists whose works or reputation were damaged relied on trademark, defamation, or state level artist rights acts for recourse. David Wojnarowicz was one such artist who sued the American Family Association (AFA), an anti-pornography group, who denounced federal funding for “offensive” art, and challenged the contemporary perspective toward public arts funding at the National Endowment of the Arts. Wojnarowicz successfully argued that the AFA had misrepresented his art in violation of the New York Artists Rights Act. Although the court recognized his moral rights were violated, it denied his trademark and defamation claims, and held that the AFA did not infringe Wojnarowicz’ exclusive rights under copyright law, because AFA’s distorted publication of the artist’s works was a fair use. Shortly after the landmark case, he died of AIDS-related complications on July 22, 1992.

Even after VARA was enacted and preempted state laws recognizing moral rights, the

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law has rarely provided a successful cause of action for artists invoking its protection.\(^4\) The current limitations and relative weakness of moral rights in the U.S. indicate that VARA should be amended, or that moral rights should be recognized through other means.

While copyright jurisprudence in the U.S. has been slow and hesitant to embrace the concept of artist’s moral rights protected by VARA under section 106A, courts have been more enthusiastic about expanding the application of the fair use doctrine to account for new developments in the subject matter of copyrighted material and the way in which works are distributed or utilized. In July 2013, the Commerce Department referred to the fair use doctrine as “a fundamental linchpin of the U.S. copyright system.”\(^5\) The doctrine provides an important means of balancing “the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand.”\(^6\) Most recently, the fair use doctrine has played an important role in providing a basis by which courts can allow new consumer behaviors, business models, and technological innovations in the digital environment.\(^7\) The doctrine has also received recent congressional attention in a hearing entitled, “The Scope of Fair Use,” which evidenced that like the courts, Congress now recognizes that the fair use doctrine is an important tool through which copyright law can adapt to new technologies, consumer


\(^7\) See e.g., Kelly v. Arriba Soft Corp., 336 F.3d 811, 815-16 (9th Cir. 2003); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1163-68 (9th Cir. 2007).
behaviors, and societal values not contemplated in the 1976 Act.  

Although the concept of artists’ moral rights is hardly a new development, the challenge presented by how to properly recognize this value in copyright law is still fresh. Given its fact-intensive nature, the fair use doctrine is highly adaptable and could be a framework within which courts could more meaningfully consider the moral rights of artists.

This paper will discuss the Wojnarowicz litigation and its important discussion of the nexus of artists’ moral rights, the freedom of expression, and fair use, the Visual Artists Rights Act and its current scope, and how the fair use doctrine could be reoriented and utilized to enable courts to more comprehensively recognize moral rights for artists today.

II.   Wojnarowicz v. American Family Association

David Wojnarowicz was an artist who incorporated sexually explicit images into his work in order to raise awareness of the AIDS epidemic and to shape community attitudes towards sexuality.  

His work was included in an exhibition entitled “Tongues of Flame,” which was funded by the National Endowment for the Arts (NEA). The works in the exhibit consisted of groups of images that were intended to convey composite messages about AIDS, homophobia, racial intolerance, and spirituality. The artist owned copyright in all his works, and in the reproductions of the work that appear in the exhibit catalog.

The American Family Association (AFA), an anti-pornography political action group

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10 Id. at 132 (“A professional artist, plaintiff earns his living by selling his art works, many of which are assertedly directed at bringing attention to the devastation wrought upon the homosexual community by the AIDS epidemic. Plaintiff attempts through his work to expose what he views as the failure of the United States government and public to confront the AIDS epidemic in any meaningful way.”).
purportedly advancing Judeo-Christian ethics and decency in American society, were engaged in a campaign against the NEA for funding artwork AFA found “offensive” and “blasphemous.” As part of this campaign, AFA distributed a pamphlet, which publicized NEA-funded exhibitions in a negative light. The pamphlet included fourteen fragments of Wojnarowicz’ works, taken from the exhibition catalogue without the artist’s permission. Eleven of the images explicitly depict sexual acts, and the other three portray Christ with a hypodermic needle inserted in his arm, and ambiguous scenes which plaintiff represents as respectively depicting an African purification ritual and two men dancing together. The images were reproduced in fragmented form, altered to highlight their offensive characteristics, and devoid of artistic context. AFA mailed its pamphlet entitled “Your Tax Dollars Helped Pay For These ‘Works of Art.’” to 523 members of Congress, 3,230 Christian leaders, 947 Christian radio stations and 1,578 newspapers, and included the warning: “Caution—Contains Extremely Offensive Material.”

Wojnarowicz’s sued the AFA claiming violations of the Lanham Act and the New York Artists’ Authorship Rights Act of 1990 (NYAARA);12 the Lanham Act, trademark, and commercial speech aspects of the case will not be discussed here. The New York act prohibits the display or publication of an artwork that has been altered, defaced, mutilated, or modified, if damage to the artist’s reputation is reasonably likely to result from the display or publication.

Although the Court found that the AFA’s use of photocopied images in the pamphlet was a fair use, and thus exempt from liability under the Copyright Act, the Court held that Wojnorawicz was entitled to an injunction based on a violation of the New York Artists’ Authorship Rights Act.13 The court found that the Act was “qualitatively different than federal copyright law in both its aim and its elements,” so was not preempted. The Court found that

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AFA’s distribution of a photocopy of the artists works violated the Act, because the “unfaithful reproductions . . . [were] publicly displayed as to damage the reputation of the author of the original.”

An expert established that there was a reasonable likelihood that defendants' actions jeopardized the monetary value of plaintiff's works and impaired plaintiff's professional and personal reputation. By only displaying the parts of Wojnarowicz’s work that included homosexual or explicit religious imagery, museums unfamiliar with the artists work would hesitate to include it in exhibitions. In turn, this “self-censorship” would have an adverse impact on the value of the artists work for galleries, as well as the reputation of his work to corporate and other potential buyers. The Court found that AFA had acted with actual malice, stating that “the public display of an altered artwork, falsely attributed to the original artist . . . is not the type of speech or activity that demands protection, because such deception serves no socially useful purpose.” Despite finding in favor of the artist under the artist’s rights claim, the Court only awarded nominal damages ($1) because he could not prove actual damages.

Additionally, the Wojnarowicz court found that AFA’s use of the artists work was a fair use. Under the first factor of the fair use analysis regarding the purpose and character of the use, the Court found that a “reasonable person could find the distortion [of the artist’s work in the pamphlet] to be the product of mere carelessness,” rather than one of intended defamation or bad faith. Under the same factor, the Court found that the exhibition in which the work appeared was publicly funded by the NEA, and thus the pamphlet could be classified as “an essay expressing a certain point of view on the [federal funding] issue,” which was “highly significant to the scope

14 Wojnarowicz, 745 F. Supp. at 137 (quoting Damich, A Comparative Critique, 84 Colum. L. Rev. at 1740).
15 Wojnarowicz, at 144 (quoting Maxtone–Graham v. Burtchuell, 803 F.2d 1253, 1262 (2d Cir.1986)).
of fair use” since the funding could be classified as “an issue of public concern.”\textsuperscript{16} The Court also found that the use did not harm the market for Wojnarowicz’s works.

As such, this case represents a formal recognition of moral rights for artists, given the Court’s grant of an injunction and award of nominal damages under NYAARA. And, the Court’s discussions of misleading or distorted uses of works, the First Amendment implications of critique, and the market effect of misrepresentation likely informed post-VARA jurisprudence. However, the influence of the controversial Wojnarowicz case on the forward progress of moral rights recognition is debatable, since the court weighed the fair use argument against the assertion of moral rights, and found that despite constituting a violation of the artist’s moral rights, federal copyright law allowed the AFA’s transformative use under the fair use doctrine.

Nonetheless, the issues addressed by the Court in its discussion of the interplay between the rights protected under NYAARA and by the fair use doctrine arguably had significant implications on the interpretation of federally recognized artists’ moral rights under VARA.

III. Moral Rights in American Copyright Law and The Visual Artists Rights Act

The moral rights of artists have been conceptualized throughout the history of art, and have been formally recognized in many legal systems. For example, in Europe, an artist can claim an actionable offense based on the wrongful reproduction or harm to the integrity of a work, and has “the exclusive right to control the reproduction and the performance or exhibition of [her] creation.”\textsuperscript{17} In America, \textit{Gilliam v. American Broadcasting Company}\textsuperscript{18} arguably set the high water mark for artists’ moral rights back in 1976. In \textit{Gilliam}, the Court stated that "[t]o

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\item Id. at 143 ( the pamphlet is entitled to great protection because the appropriateness of such funding must remain open to vigorous challenge and those who accept federal funds must also accept the right of others to protest such expenditures).
\item 538 F.2d 14 (2nd Cir. 1976).
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deform an artist's work is to present him to the public as the creator of a work not his own, and thus makes him subject to criticism for work he has not done." The *Gilliam* Court noted that it is the creative artist that "suffers the consequences of the mutilation, for the public will have only the final product by which to evaluate the work."\(^{19}\) The rationale the Court advanced for finding in favor of the authors was "the need to allow the proprietor of the underlying copyright to control the method in which his work is presented to the public."\(^{20}\) Several courts followed *Gilliam*’s rationale,\(^ {21}\) and others relied on *Gilliam* to protect moral rights indirectly through copyright law’s economic interest provisions or contract principles.\(^ {22}\) Despite the various bases on which each court relied, at least in dicta, each decision relied on the right of artistic control and integrity.\(^ {23}\)

Despite this indication that moral rights were gaining strength in the 1970s and 80s, the United States was reluctant to adopt moral rights laws, but was moved to enact the Visual Artists Rights Act of 1990 after it became an adherent of the Berne Convention. Generally under copyright law in the United States, once an author has transferred ownership of his copyright, the transferee is entitled to reproduce and adapt the work, and can authorize others to do so. The author, having been compensated for the transfer, can no longer control the uses of his work by

\(^{19}\) Id. at 24[16] (quoting Martin Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 569 (1940)).

\(^{20}\) Id. at 20–21.

\(^{21}\) See *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622, 8 Media L. Rep. (BNA) 2170, 216 U.S.P.Q. 97 (7th Cir. 1982); *National Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533, 207 U.S.P.Q. 1005 (W.D. Tex. 1980) (finding "an author should have control over the context and manner in which his or her work is presented").


\(^{23}\) See, e.g., Robert Lind, et al., *3 Entertainment Law 3d*, § 20:42 Copyright Law – *Gilliam* and its progeny (2012) ("[t]he Salinger court was inclined to protect via copyright law those aspects of the artist's work closely tied to the concept of integrity, the “accuracy and vividness” of the author's expression. However, the court also suggested that distortion through copying of “minimal amounts” of expressive content may be subject only to the sanction of literary and public criticism.").
the copyright owner. However, under the moral rights provision, the author’s (or artist’s) connection to the work is (allegedly) treated as more than economic. Thanks to VARA, section 106A of the Copyright Act provides authors with rights of attribution, integrity, and disclosure.24 This section does begin to address some of the moral rights issues other countries more comprehensively recognize. But, it has been widely criticized by artists’ rights groups25 because it only applies to visual arts, does not apply to works for hire,26 and only allows authors to make claims in limited circumstances. Artists can bring an action for false attribution of a piece, to prevent “intentional distortion, mutilation, or other modification that would be prejudicial to his or her honor or reputation” and to prevent “any destruction of a work of recognized stature”;27 the provision generally does not transcend the physical embodiment of the work itself.

Although the United States does purport to protect the moral rights of artists through VARA, courts have been reluctant to embrace these rights,28 and have interpreted the “other modification” provision to pertain only to physical damage, removal, or destruction of works, which translates into a violation of an economic or contract-based interest. For example, in Seshadri v. Kasraian, Judge Posner acknowledged in dicta that “there are glimmers of the moral-rights doctrine in contemporary American copyright law,” but distinguished U.S. provisions from those in Europe, further indicating that the American concept of moral rights is still closely tied to economic, contract or property-based rights.29 The court in Rey v. Lafferty employed

24 17 U.S.C. § 106A.
25 See, e.g., Copyright Information, Artists Rights Society (2013), http://www.arsny.com/other.html#Moral (referring to VARA as a “flawed moral rights measure”);
27 § 106A Rights of Certain Authors to Attribution and Integrity.
28 See, e.g., Lee v. A.R.T. Co., 125 F.3d 580 (7th Cir. 1997) (using VARA to limit the extent of moral rights, even though the Ninth Circuit had protected the artist under very similar facts in Mirage Editions before VARA was enacted).
29 130 F.3d 798, 803-04[7] (7th Cir. 1997) (Posner, C.J., joined by Judge Bauer and Judge Evans) (citing Lee v. A.R.T. Co., 125 F.3d 580, 582-83 (7th Cir. 1997); Weinstein v. University of Illinois, 811 F.2d 1091, 1095 n.3; WGN Continental Broadcasting Co. v. United Video, Inc., 693 F.2d 622, 625 (7th Cir. 1982); Carter v.
contract law rather than recognize a moral right, though the issue regarding the quality of licensed depictions of the artist’s work surely implicated moral rights. In *Ty, Inc. v. GMA Accessories, Inc.*, Judge Posner granted more credence to moral rights in American law, stating the award of a preliminary injunction to remedy copyright infringement by a Beanie Baby competitor “draws additional sustenance from the doctrine of 'moral right,' the right of the creator of intellectual property to the preservation of the integrity of his work-a doctrine that is creeping into American copyright law.”

Several states have enacted statutes that resemble VARA. Most state statutes protect the right of integrity by providing relief based on the physical or other alteration or destruction of fine art that is detrimental to the artist’s reputation. Several states provide an analog right to Europe-recognized right of paternity, and Massachusetts’s and California’s statutes go furthest to provide moral rights for artists by stating “there is also a public interest in preserving the integrity of cultural and artistic creations.” Courts have, in some cases, been more willing to

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30 30 Rey v. Lafferty 990 F.2d 1379 (1st Cir. 1993) (stating “under copyright law, while a licensor has no 'moral right' to the quality of licensed depictions, she may insist, contractually, on approval provisions to assure quality control and high standards in the exploitation of her creative work”).
31 132 F.3d 1167 (7th Cir. 1997) (Posner, C.J., with Judge Bauer and Judge Flaum).
33 See CAPA, CONN. GEN. STAT. ANN., ICAA, LAARA, MAPS.
34 See, e.g., ICAA (allowing art dealers to display or use the artwork ”only if notice is given to users or viewers that the work of fine art is the work of the artist”); MAPS (providing the artist with the right at all times to claim or disclaim authorship of her work of fine art); MAPA (providing the artist with the right to claim or disclaim authorship of her work of fine art); Nevada (Granting the artist the right to have her name associated or disassociated with her work protects the right of paternity).
35 CAPA at § 987(a); MAPA at § 85S(a).
recognize moral rights beyond the physical work in interpreting these provisions.\textsuperscript{36} However, some states have interpreted the statutes narrowly.\textsuperscript{37} These statutes are a clear indication that many states would go further than VARA to protect the moral rights of artists, however the more-limited VARA preempts most of these state statutes.\textsuperscript{38}

Had Wojnarowicz brought his case against AFA under NYAARA after the enactment of VARA, his claim would mostly likely have been preempted.\textsuperscript{39} If he had based his argument on section 106A, the court would probably have found that a misrepresentation without physical damage to the work did not entitle him to relief. Further, because Wojnarowicz could not prove actual damages, the court would not have been able to rely on economic copyright principles to recognize moral rights in any way.

Although moral rights may be “creeping” back into our jurisprudence, courts are largely reluctant to push toward greater adoption of integrity principles. Is there any remedy for artists whose work has not been physically harmed, but has been misrepresented, and whose reputation is at stake? There may be a solution: Fair use.

\textbf{IV. Protection of Moral Rights Through the Fair Use Doctrine}

The fair use doctrine has undergone great development throughout its history, and its invocation and application has been informed by the changing nature of information use and

\textsuperscript{37} In Morita \textit{v. Omni Publications Int’l, Ltd.}, 741 F. Supp. 1107 (S.D.N.Y. 1990) (finding that the placing of Morita’s anti-nuclear artistic concept in Omni’s pronuclear context did not amount to a mutilation or alteration under New York’s AARA).
\textsuperscript{38} See, \textit{e.g.}, Board of Managers of SOHO International Arts Condominium \textit{v. City of New York}, WL 21403333 (S.D.N.Y 2003) (AARA preempted by VARA).
\textsuperscript{39} Wojnarowicz explicitly states that VARA’s passage “would arguably preempt state laws such as” AARA. \textit{Wojnarowicz \textit{v. Am. Fam. Assoc.}} 745 F.Supp. at 136 n. 12.
dissemination, as well as changes in user activities. Today, fair use claims are largely evaluated based on whether the transformative use of the work trumps the commercial purpose and economic impact of the work. Additionally, some fair use analyses have included a consideration of good (or bad) faith regarding the use, since "the propriety of the defendant's conduct" is also relevant to the "character" of the use inquiry. Finally, “[t]he [fair use] factors enumerated [in the Copyright Act] .. . are not meant to be exclusive,” and can include additional considerations, dependent on the facts of each case. As such, the fair use doctrine seems poised to supplement moral rights claims of artists by providing the framework to analyze and balance the economic and integrity interests of artists, as well as the First Amendment interests of users.

Freedom of expression is an important right that is highly valued in American law and culture. However, actions or expressions that are offensive, and conducted with actual malice should not benefit from the broad protections of the First Amendment. The fair use doctrine includes freedom of speech considerations by protecting uses of works for purposes of debate, comment, and criticism on issues of public concern. The Wojnarowicz Court stated, “[c]riticism and comment are uses expressly recognized by the fair use provision of the Copyright Act and

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40 For example, libraries and institutional information users like universities were among the lobbying groups who fought hardest to codify Fair Use in the 1976 Act.
41 See, e.g., Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) (finding home recording of television programming for private, noncommercial uses was a fair use, and in the interest of consumers who need to time-shift content).
42 See, e.g., Campbell v. Rose Acuff (held although use was commercial, parody is a transformative use that caters to a different audience and purpose); Bill Graham Archives v. Dorling Kindersley Ltd (held transformative nature of use outweighed any harm to the market for the value of the original); Harper & Row v. Nation (held because purpose and character of use was primarily commercial, it was not good faith news reporting and was not a fair use).
43 3 Nimmer § 13.05[A], at 13-72.
47 Wojnarowicz.
are the “most universally recognized in connection with” the defense of fair use.”  However, for cases like Wojnarowicz, where the deceptive use “serves no socially useful purpose,” the fair use protection should not be available.  

In Maxtone-Graham, the Second Circuit set the bar for analyzing fair use claims where the use implicates moral rights. The test looks to the intent of the user, as well as the effect on the public. It states, “only where the distortions [are] so deliberate, and so misrepresentative of the original work that no person could find them to be the product of mere carelessness would we incline toward rejecting a fair use claim.” Instead of employing a reasonable person standard, and relying on ambiguous determinations of bad faith, courts should expand the fair use analysis to include a factor informed by the constitutional malice standard. This standard directs courts to consider the veracity and intent of the statements as applied to artists who are like public figures in assuming the risk of public criticism or attention. Additionally, the malice standard requires proof of deliberate falsehoods (setting a high bar that favors finding fair use), and serves the public good by promoting useful discourse.

By including a greater consideration of defamation, false light and similar claims in the fair use analysis, courts could more satisfactorily address cases where works are used in an intentionally or knowingly false or misleading manner, and traditional tort claims fall short. This expansion of the fair use doctrine in the context of moral rights has not been addressed head on, but the Second Circuit recently stated, “[o]ur observation that the fair use doctrine encompasses

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48 Wojnarowicz, at 143 (citing 3 Nimmer on Copyright, Sec. 13.05[B], at 13–90.1 (1989)).
49 Wojnarowicz, at 140.
50 Id. at 143 (quoting Maxtone–Graham v. Burtchaell, 803 F.2d 1253, 1261 (2d Cir. 1986)).
51 Only a few courts have found that infringing actions constituted bad faith. See Harper & Row, 471 U.S. at 562-63, 105 S. Ct. 2218 (purloined manuscript); NXIVM Corp., 364 F.3d at 478 (breach of confidentiality agreement); Rogers, 960 F.2d at 309 (tearing off of copyright mark); Weissmann v. Freeman, 868 F.2d 1313, 1324 (2d Cir.1989) (“total deletion of the original author's name and substitution of the copier's”).
all claims of First Amendment in the copyright field ... never has been repudiated,”53 and the
Wojnarowicz court stated, “where vital First Amendment concerns are implicated, as here, that
breadth expands and accords greater protection to what might otherwise constitute an
infringement.” Despite this resistance to including First Amendment considerations in the fair
use analysis, the fair use doctrine has undergone significant change throughout its existence, and
in today’s information age where anyone can distort, alter, and falsely portray an artist’s work
with the touch a button, courts may have to reconsider their stances on the convergence of the
First Amendment, moral rights, and copyright law.

In addition to expanding the purpose and character fair use factor to more fully account
for damage to reputation caused by deliberate false representation, the market effect factor of the
traditional fair use analysis should be utilized to connect economic harm with damage to an
artists moral rights. American courts have demonstrated that they are much more comfortable
relying on contract or economic principles to justify moral rights-esque claims, since payment or
performance as recognition of value are easier to explain and justify than the value of non-
property, intellectual attributes which bond the artist to his work.54 For these reasons, using a
fair use analysis which allows courts to look to the market effect of the alteration or
misrepresentation of the artists’ work may make recognizing moral rights more appealing to
courts. This may also be because, foundationaly, the “copyright system creates private property
in creative works so that the market can simultaneously provide economic incentives for authors

law has developed over hundreds of years for a very different purpose and with rules and consequences that
are incompatible with the droit moral.”); see also Salinger v. Random House.
and disseminate authored works,” so using economic principles to determine when those goals conflict makes sense.55

The market effect factor of the fair use analysis has been considered to be the “single most important element of fair use” by some courts.56 Actual damages need not be proven under this factor, but courts require “a preponderance of the evidence that some meaningful likelihood of future harm exists.”57 Although it is difficult to prove the effect a use will have on an artist’s potential market, and a copyright violation does not occur even where a bad review decreases demand for the work,58 uses that are misleading and create economic damage, or uses that unjustly benefit the defendant, weigh against a finding of fair use.59 Scholars have previously advocated for an economic view of fair use, and some argue that fair use should be granted only when there is a market failure; where the work cannot be licensed, there is an imbalance of interests, the use would unfairly harm the author, and would not benefit the public.60 This or a similar approach to analyzing the market impact factor in fair use would help courts recognize that economics are tied to moral rights.

The commercial success of an artist is inextricably linked to their reputation, and payment for a work in some ways validates both the artist’s personal bond with the work and the artist’s property interest in the creation. In Salinger, the Court found that the use, publication of an extraction from a previously unpublished body of Salinger’s works, would damage the potential market for the works. Additionally, the Court was inclined to protect the aspects of the

59 Wojnarowicz, 745 F. Supp. at 146.
artist's work closely tied to the concept of integrity, finding that sacrificing the “accuracy and vividness” of the author's expression by allowing use of his unpublished works by others would violate the author’s moral rights.61

In *Blanch v. Koons*,62 famed artist Jeff Koons created a collage painting, in which he copied, but altered the appearance of, part of a copyrighted photograph taken by fashion photographer Andrea Blanch. The Court deemed this a fair use. Koons reported that his net compensation attributable to the work was $126,877, and his net gain for the whole series was $2 million, while Blanch licensed her image for $750. Blanch did not claim that the potential market for her work was harmed by Koons’ use. However, she did claim infringement by violation of her exclusive rights under section 106, including the right to display the work, which courts have interpreted as implicating moral rights by misrepresenting the work or displaying it in a context or manner that modifies or distorts the original.63 Also, there was no market failure here; Blanch had licensed the work to a magazine previously, and likely would license the work to Koons. As one scholar stated, “[f]air use is one label courts use when they approve a user's departure from the market,”64 but how can courts really approve this use? Allowing artists to free ride in this way, the Court implies that there is no value in the artistic contribution Blanch made. Even if the potential market harm of a use is not immediately clear, demoralizing authors in this way will decrease the production of valuable works, and thus will not serve the purpose of the Copyright Act.65

Today’s art market is characterized by artists making millions through mass-appeal

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62 467 F.3d 244 (2006).
63 *See, e.g., Wojnarowicz*, 745 F. Supp. at 137 (quoting Damich, A Comparative Critique, 84 Colum. L. Rev. at 1740).
64 *See supra* note 50, Gordon, at 1614.
65 *See id.* at 1601.
pieces (giant balloon animals and crystal-encrusted skulls), while other artists watch their works sell at auction from private owners for exorbitant profits, without seeing a penny (Chuck Close and others). The gross failure of the system to recognize artists’ economic rights indicates the need for change. In response to these issues, entities like ARS and VAGA have been imploring moral rights provisions in their argument that artists are owed royalties for the use of their images in auction catalog illustrations, and artists are suing auction houses for resale royalties.66 The California Resale Royalties Act is the first recognition of droit de suite, or resale royalty right, legislation in the United States, although similar provisions are common in Europe. Although the right does not explicitly implicate moral rights, it establishes an ongoing connection with a work that is not severed by one economic transaction or physical separation from the work; as such, droit de suite in some ways recognizes the unique personal connection between an artist and a work that droit moral does. The district court found that the CRRA was unconstitutional,67 but appeals of the issue are likely. The next decision could provide an opportunity for the court to recognize the connection between artists’ economic interests and moral rights through fair use.

Finally, the fair uses analysis at its heart applies an equitable rule of reason,68 which considers all circumstances of the case, weighs each factor, and asks whether the use at issue furthers the interests of the Copyright Act to “reward[] the individual author in order to benefit the public.”69 Fair use exists to allow creators to build on the work of others, and to promote

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important areas of intellectual activity to spur creation and innovation. Courts tend to favor granting fair use for uses that provide the public with access to important information.\textsuperscript{70} However, there is “no public interest in false facts”\textsuperscript{71} and uses that distort works or mislead viewers should not be awarded fair use protection, since in these cases copyright law’s goal of “promoting the Progress of Science and useful Arts” would be better served by preventing the use than by allowing it.\textsuperscript{72} Additionally, the legislative history of the Copyright Act indicates Congress’ intent to apply VARA with reference to fair use\textsuperscript{73} and resale royalties,\textsuperscript{74} and to use VARA to protect and preserve artists in order to “serve an important public interest.”\textsuperscript{75} When applying the overall public interest consideration to a fair use analysis, courts should give greater weight to the moral rights implicated by the use.

V. Conclusion

The enactment of VARA and state recognition of artists’ moral rights represent movement toward a more comprehensive recognition of artists’ rights of integrity in the U.S. Despite this progress, VARA’s preemptive of most state statutes, the limited protections it affords, and the reluctance of courts to invoke it indicate the need for amendment or an alternate doctrine through which artists may seek relief. By including a consideration of moral rights in

\textsuperscript{71} Guylyn Cummins and Valerie E. Alter, Can Intentional or Knowingly Reckless Misuse of Copyrighted Material Be Considered “Fair Use”?, 26 Comm. L. 10, 13 (2009).
\textsuperscript{72} See Blanch v. Koons, 467 F.3d 244, 251, 80 U.S.P.Q.2d 1545 (2d Cir. 2006).
\textsuperscript{74} H.R. Rep. No. 514, 1990 U.S.C.C.A.N. 6915, 6932–33 (Section 8(b) of the bill directs the Copyright Office, in consultation with the National Endowment for the Arts, to study the feasibility of implementing a system that provides authors with a share of the profits from any resale of their works, or any similar system).
the fair use analysis through the purpose and economic impact factors, courts can recognize moral rights in a context that is more flexible than VARA. Additionally, this analysis could include some of the same considerations that courts have previously invoked in moral rights cases, which are not included under VARA on its face. In addition to bringing America closer to Berne compliance, recognizing moral rights for artists will benefit the public by valuing artists as culturally and economically valuable, which in turn promotes artistic and creative development, and serves the purpose of the Copyright Act.76

Clearly, the art world has still not fully resolved the issues posed in Wojnarowicz. It is still unclear how explicit art implicates funding, display, and endorsement by America’s cultural institutions, and how fair use applies to misleading or distorted uses of fine art. In 2010 the National Portrait Gallery, bowing to pressure from the Catholic League and some congressmen, removed an excerpt from Wojnarowicz’s short silent film, “Fire in My Belly,” from a show because it contained an eleven-second scene of ants crawling over a crucifix.77 This evidences the current need to strengthen protection for moral rights to better fight removal of works, and to provide institutions with tools to fight censorship. It is not clear whether the Catholic League employed tactics similar to those used by AFA against Wojnarowicz, but it is clear that the same issues that sparked the 1990 litigation are still prevalent today. In the words of Wojnarowicz, "[b]ottom line, if people don't say what they believe, those ideas and feelings get lost. If they are lost often enough, those ideas and feelings never return."78 It is necessary to continue to promote

this type of creative freedom, and to defend artistic expression from the chilling effects of misleading and distorted representations of artists’ works. Providing moral rights protection through an expanded fair use analysis may provide a solution.