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

ABSTRACT. The Visual Artists Rights Act of 1990 (VARA) 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 frequently criticized as antithetical to the traditional economic framework of American intellectual property law, Henry Hansmann and Marina Santilli have suggested that moral rights can be justified economically because they vindicate artists' pecuniary interests. This Note, in contrast, argues that VARA also benefits the purchasing and viewing public, especially in an era of factory-made or assistant-produced 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 sort of rights regime established by VARA is neither unique nor unprecedented in American law, and that it is highly economic in character. Thus, this Note hopes 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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NOTE CONTENTS

INTRODUCTION	220
I. A BRIEF MORAL RIGHTS PRIMER	223
A. The Berne Convention and the Visual Artists Rights Act of 1990	223
B. Scholarly Reactions to the VARA Regime	227
II. THE CONTINGENT ART OBJECT AND THE ARTIST AS BRAND	229
A. Contemporary Art and the Cult of the Authentic	231
B. The Artist as Brand: From “Reputational Externalities” to Consumer Confusion	234
1. Identity as Branding	234
2. The Contingent Art Object	237
C. Authorship, Brand Building, and the Creation of Goodwill	238
III. COMPARING MORAL RIGHTS AND TRADEMARK LAW	241
A. Trademark Law and the Attenuation of the “First Sale Doctrine”	242
B. Source Identification and Source Confusion	245
C. Famous Artists, Famous Brands: A Brief Remark on Dilution	247
IV. WHO’S AFRAID OF MORAL RIGHTS?	249
A. Are There Alternatives?	249
1. Copyright and Its Limitations	250
2. Why Not Just Use Traditional Trademark Law?	251
B. Can Moral Rights Advance the Public Interest?	254
CONCLUSION	256

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, Manhattan’s Piers 92 and 94 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 art objects up for sale at six-digit prices.³ It is, in short, the 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 draw in this Note.⁴ It is also another example of the type of money-driven spectacle that some art critics have denounced as commodifying what should resist commodification. Detractors claim the emphasis on real market value denigrates art, which should hold itself aloft from 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 imagination even before the oft-circulated tale of Vincent van Gogh, his poverty, his posthumous fame, and that bloody ear (a perfect emblem of artistic madness and misunderstood genius).⁶

1. THE ARMORY SHOW, <http://www.thearmoryshow.com> (last visited Sept. 3, 2012).
2. See David Rimaneli, *Furry Friends*, ARTFORUM DIARY (Mar. 13, 2005), <http://artforum.com/diary/id=8565> (describing the scene at 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 “[Museum of Modern Art] chair Ronald Lauder and his wife Jo Carole, Henry and Marie-Josée Kravis, Rosa de la Cruz, Isaac Mizrahi, Patti Cisneros, Donald Marron, and Kathy Fuld”).
3. See, e.g., Press Release, Armory Show, The 2011 Armory Show: Fresher Content, Notable Sales and Record Attendance (Mar. 14, 2011), http://www.thearmoryshow.com/press_releases/2011-03-14.pdf (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 is not a novel one. For example, Amy M. Adler, in her article *Against Moral Rights*, 97 CALIF. L. REV. 263, 298 (2009), has made this same observation. However, as one may guess from her work’s title, the parallel has led her to suggest the abolition of moral rights, rather than to demonstrate their importance. *Id.* at 298-99.
5. See, e.g., Helen Molesworth, *In Memory of Static: Helen Molesworth on the Art of Klara Liden*, ARTFORUM, Mar. 2011, at 214, 223 (“In [contemporary artist Klara 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.”).
6. See Adam Gopnik, *Van Gogh’s Ear: The Christmas Eve that Changed Modern Art*, NEW YORKER, Jan. 4, 2010, http://www.newyorker.com/reporting/2010/01/04/100104fa_fact

So here's a modern-day anecdote that might shatter such idealistic optimism. During the 2011 Armory Show, a popular British artist, whom I will call Artist 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 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 fifteen dollars. They loaded the clothes into a cardboard box. They delivered the box to Artist X. A few hours later, the "art piece" was sold for \$40,000.

This story was relayed to me by the same assistant's friend who had collected the clothes, and yet I have almost resisted using it because of its hearsay (and heretical) character. But lore or not, the anecdote is powerful, for it manages to capture 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 markup of art that took neither skill nor extensive labor to make; the pure object-ness of postmodern art that might even put Duchamp and his urinal⁷ to shame; and the lack of comprehensibility behind it all—what greater truth was Artist X getting at with his box of brown clothes, really? After a while, one begins to suspect that perhaps there *is* no greater truth to contemporary art at all, and 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 have long existed in Europe but which the United States only brought into law two decades ago. The Visual Artists Rights Act of 1990,⁸ or VARA, was only reluctantly passed to bring the United States into compliance with the Berne Convention; indeed, the United States resisted joining that international copyright convention in part because of its opposition to granting artists moral rights.⁹ Perhaps for this reason, VARA—which protects only "visual art"¹⁰—

_gopnik (referring to the legendary story of van Gogh severing his own ear as "a talisman of modern painting" and "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 famously presented a manufactured urinal in the museum setting, thus giving a "readymade" object the status of "art." See 1 HAL FOSTER ET AL., *ART SINCE 1900: MODERNISM, ANTIMODERNISM, POSTMODERNISM, 1900-1944*, at 129 (2004) (detailing how Duchamp chose a urinal, rotated it ninety degrees, placed it on a pedestal, and put it on exhibition in 1917).
8. Pub. L. No. 101-650, 104 Stat. 5128 (codified at 17 U.S.C. § 106A (2006)).
9. See H.R. REP. NO. 101-514, at 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6917 ("While the [Berne] Convention is the premier international copyright convention, consensus over

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.”¹¹ The legal debate surrounding VARA has tended to go one of two ways. Either art is somehow sacred and special, and so we need moral rights to express our societal belief in art as a manifestation of the innermost expression of an artist’s soul; or art is a pure commodity object, much like a luxury good, and so we should rid ourselves of a special class of protection for it.¹²

This Note will argue, on the other hand, that it is *precisely because* art today has become a pure commodity object that we need moral rights to protect the artist’s economic interests. It argues, in effect, that mere copyright protection for visual art is not enough, cloaking “fine art” objects¹³ with a class of protection far less extensive than the wide plethora of legal remedies a trademark holder has under trademark law. Instead, a comparison of moral rights with trademark law will reveal that moral rights are (a) neither unique nor unprecedented in American intellectual property law and (b) highly economic in character. In undertaking this analysis, I hope to update the outdated justifications behind moral rights for the contemporary era of artist “factories” and assistant-made, rather than artist-made, products. This approach frees moral rights justifications from the classic personhood and anti-commodification arguments that have undergirded them up to this day.¹⁴ In

United States adherence was slow to develop in large part because of debate over the requirements of Article 6bis [the moral rights provision].”).

10. 17 U.S.C. § 106A.

11. JOHN HENRY MERRYMAN, ALBERT E. ELSÉN & STEPHEN K. URICE, *LAW, ETHICS, AND THE VISUAL ARTS* 438 (5th ed. 2007).

12. Compare *Carter v. Helmsley-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”), with Adler, *supra* note 4, 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).

13. I use “fine art” interchangeably with “visual art,” which is the only class of art protected by the Visual Artists Rights Act of 1990 (VARA). A work of “visual art” is defined as “a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author,” or “a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.” 17 U.S.C. § 101.

14. See, e.g., THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 277 (2007) (classifying moral rights as personhood interests); *id.* at 243 (arguing that such interests may be “inappropriate for treatment as property”).

this economic analysis, I shift the conversation from *authors'* pecuniary interests¹⁵ to a broader focus on protecting the art market and its buyers via truthful source indication, drawing out parallels with 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 the viewing public has become even more dire in the age of what art historian Martha Buskirk calls the "contingent object" – the category of highly context-sensitive artworks that are easily fabricated based off of an artist's plans.¹⁶

Part I will examine the new, post-1960s industrial art object and the accompanying concept of the artist as brand, or as someone who carefully crafts a corporate image much like trademark holders do with their brand names. I then go on to argue in Part II that the moral rights regime under VARA in fact bears many striking resemblances to trademark law. Finally, the last Part will discuss the 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 Note in no way seeks to argue that this current trend of art-as-commodity-object, or artist-as-businessman, is preferable to a world in which the inspired artist sets out to connote some greater meaning or truth. In many ways I think (and others would likely agree) that this development is lamentable. But that is a different paper, for a different world that is not our own – a paper for the idealist rather than for the realist. In this Note, I remain only the latter.

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,¹⁷ has been referred to as the "world's most important copyright convention."¹⁸ While the multilateral treaty was signed in Berne, Switzerland on September 9, 1886, the United States refused to ratify it for about a century, partly because the United States lacked the incentive to protect its own proprietary interests abroad when it was mainly concerned with

15. See Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95 (1997).

16. See MARTHA BUSKIRK, *THE CONTINGENT OBJECT OF CONTEMPORARY ART* (2003).

17. Sept. 9, 1886, 828 U.N.T.S. 221.

18. H.R. REP. NO. 101-735, at 6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6937.

importing copyrighted goods, rather than exporting its own.¹⁹ 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.²⁰ With that shift, the U.S. attitude toward the Berne Convention—and toward securing foreign compliance for American intellectual property abroad—began to change. Finally, in 1988, after almost one hundred years of debate, the United States joined the Convention.²¹

Specifically, as Congress acknowledged, “[w]hile the Convention is the premier international copyright convention, consensus over United States adherence was slow to develop . . . because of debate over the requirements of Article 6bis [of the Convention]. The principal question was whether that article required the United States to enact new laws protecting moral rights.”²² A debate ensued over whether a patchwork of existing federal and state laws, both statutory and common, were sufficient to comply with the moral rights requirements of Berne.²³ The enactment of the Visual Artists Rights Act 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 European systems.²⁴

The American moral rights regime as enacted under VARA applies only to a work of “visual art,”²⁵ defined as “a painting, drawing, print, or sculpture, existing in a single copy, [or] in a limited edition of 200 copies or fewer,” or “a still photographic image produced for exhibition purposes only, existing in a

19. See David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States*, 55 LAW & CONTEMP. PROBS. 211, 212-14 (1992). Nimmer notes, for example, that a “famous exclamation” of 1820 asked: “In the four quarters of the globe, who reads an American book?” *Id.* at 212 (quoting *United Dictionary Co. v. G. & C. Merriam Co.*, 208 U.S. 260, 264 (1908)). Nimmer characterizes the nineteenth-century United States as a “piracy haven” in which “U.S. publishers busied themselves bootlegging the works of Dickens, Trollope, and Hugo.” *Id.* Indeed, “[e]ven as late as World War II, the United States remained a net importer of copyrighted goods.” *Id.* at 214.

20. *Id.* at 215.

21. H.R. REP. NO. 101-514, at 8 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6917.

22. *Id.*

23. *Id.*

24. *Id.* at 10 (noting that the Act “brings U.S. law into greater harmony with laws of other Berne countries,” in addition 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 not just to visual artists, but also, for example, to literary authors. See Hansmann & Santilli, *supra* note 15, at 135.

25. 17 U.S.C. § 106A (2006).

single copy . . . or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.”²⁶ The Act encompasses three major rights: the right of integrity, or the right “to prevent any intentional distortion, mutilation, or other modification of the work which would be prejudicial to [the artist’s] honor or reputation”;²⁷ the right of attribution, which allows 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”;²⁸ and lastly, for works “of recognized stature,” the right to prevent “any intentional or grossly negligent destruction” of the work.²⁹ These rights persist only for the life of the artist, and, crucially, they can be waived.³⁰ But VARA creates an opt-out, rather than an opt-in, system—meaning that the burden is on the buyer to contract around moral rights, which are in place as the default. This regime is designed to protect artists who are assumed, whether rightly or not, to have less bargaining power and to be less knowledgeable than the wealthy buyers of their work. Congress has stated that artists are in “a relatively weak[er] economic position” and hence would be “better protected under a regime requiring specificity of waivers.”³¹ In other words, the VARA default is an information-forcing mechanism that discourages the presumably better-informed buyer from withholding valuable information from the artist.³²

This Note will not focus on the right against destruction. For one, the right is slightly anomalous, applying only to “work[s] of recognized stature.”³³ Further, courts have interpreted the requirement to mean not only that the artist himself must be renowned, but that the specific artwork subject to litigation must also have acquired “recognized stature” status.³⁴ This object-specific (rather than artist-specific) focus thus bears more resemblance to historical landmark preservation than trademark law. I would point out, however, that the right to prevent destruction could be economically justified

26. *Id.* § 101.

27. *Id.* § 106A(a)(3)(A).

28. *Id.* § 106A(a)(1)-(2). The right of attribution also prevents the use of the artist’s name as the author of the work in the event of a distortion, mutilation, or other modification.

29. *Id.* § 106A(a)(3)(b).

30. *Id.* § 106A(d), 106A(e)(1).

31. H.R. REP. NO. 101-514, at 17 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6928.

32. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 94 (1989).

33. 17 U.S.C. § 106A(a)(3)(b).

34. *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004).

on its own terms by applying the real property principle of waste.³⁵ But because this Note focuses on the signaling effects of an artist's name (as brand or trademark), I will leave a full economic discussion of what happens when an artwork is destroyed for another day.

I will also point out that while examining the parallels between trademark law and moral rights law, I have left out discussion of fair use,³⁶ to which both trademark and moral rights are subject, and which constitutes an important limitation on a right holder's monopoly power.³⁷ While there have been a number of successful fair use defenses employed in trademark infringement actions, I know of no cases in which defendants have asserted a fair use defense under VARA. Consequently, and because fair use is determined on a case-by-case basis, it is difficult to tell how courts would apply the four elements of fair use inquiry³⁸ in the moral rights context. VARA's legislative history, at least, suggests that while Congress fully intended the fair use provisions to apply, it nonetheless felt 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

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35. Specifically, the doctrine of "waste" in real property law suggests that a property owner's decisionmaking—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 9 (1999) (arguing that "owned objects in which a larger community has a legitimate stake because they embody ideas . . . of importance," such as art, should be privately owned, but with "several qualifications" to the "ordinary notion of ownership" so that community interests are preserved); Lior Jacob 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.").
 36. 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, 220 (2003).
 37. See 17 U.S.C. § 106A(a). For VARA, as for standard copyright protection, "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. *Id.* § 107. 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(c)(3) (2006).
 38. 17 U.S.C. § 107 (defining the four elements of fair use inquiry as "(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount . . . used . . . ; and (4) the effect of the use upon the potential market for . . . the copyrighted work").

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.³⁹

However, this is not to say that there have not been transformative uses made of an original, single-copy artwork 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 art that fosters important questions about authority, meaning making, and authorial touch.⁴⁰

I suggest that in evaluating a fair use claim under VARA, courts should look to the character of the use—specifically its transformativeness—as the most significant factor.⁴¹ Courts 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. It is important to keep in mind the possibilities within this fair use exception as we go on to examine the objections that some have had to VARA’s seemingly totalitarian prohibition on modifications.

B. Scholarly Reactions to the VARA Regime

Much of the legal scholarship surrounding VARA since its enactment has been pointedly negative.⁴² Many have denounced the Act as flouting U.S. copyright doctrine, which has traditionally recognized only economic, not personal, rights.⁴³ Conversely, the *justifications* for moral rights in VARA are

39. H.R. REP. NO. 101-514, at 21 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6932.

40. See 2 HAL FOSTER ET AL., *ART SINCE 1900: MODERNISM, ANTIMODERNISM, POSTMODERNISM, 1945 TO THE PRESENT* 368 (2004).

41. See 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).

42. See, e.g., Adler, *supra* note 4; Stephen L. Carter, *Owning What Doesn’t Exist*, 13 HARV. J.L. & PUB. POL’Y 99, 100-101 (1990) (critiquing legislation based on moral rights principles generally); see also Lindsey A. Mills, Note, *Moral Rights: Well-Intentioned Protection and Its Unintended Consequences*, 90 TEX. L. REV. 443 (2011) (arguing that the right of integrity will actually *harm* artists and the public interest in art).

43. See, e.g., *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 24 (2d Cir. 1976); Justin Hughes, *American Moral Rights and Fixing the Dastar “Gap,”* 2007 UTAH L. REV. 659, 662 n.12 (quoting H.R. REP. NO. 100-609, at 17 (1988)) (“Under the U.S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the authors’ labors.”); Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 59-60 (1994); Cyrill

centered on the idea that art is somehow special, or sacred, and that only those who do not understand the soulful aspirations of an artist would deign to mutilate, destroy, or alter the work.⁴⁴ This reasoning, in turn, has led others, like 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.⁴⁵ Yet, as Carter argues, “you cannot legislate culture.”⁴⁶

Henry Hansmann and Marina Santilli, however, offer an outlier argument in *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*.⁴⁷ Their 1997 article is the first and only significant economic analysis of U.S. moral rights doctrine. It recognizes that the moral rights framework creates divided property rights, or a servitude in chattels, in contravention of the law’s general prohibition on such.⁴⁸ This regime, the authors argue, is justified because it protects important pecuniary interests. Namely, it prevents negative reputational externalities—or the depreciation of the value of an artist’s works if one of them is changed in a way that will damage his reputation⁴⁹—affecting both the artist⁵⁰ and other owners of his work.⁵¹ Hansmann and Santilli explain that minimizing negative reputational externalities is important “[g]iven this strong connection between the value of a work of art and the identity of the artist who created it.”⁵² 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.

P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 67-68 (2007).

44. See MERRYMAN ET AL., *supra* note 11, at 423 (“The primary justification for the protection of moral rights is the idea that the work of art is an extension of the artist’s personality, an expression of his innermost being.”); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1986 (2006) (extolling the “intrinsic creative quality that requires the author to infuse herself into her work”); see also 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”).
45. Carter, *supra* note 42, at 100-01.
46. *Id.* at 101.
47. Hansmann & Santilli, *supra* note 15.
48. An author’s VARA rights run with the chattel (the artwork). See *id.* at 101.
49. *Id.* at 104.
50. *Id.* (“[A]lteration 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.”).
51. *Id.* at 105 (“Damage to one of the artist’s works, in effect, imposes external costs on the artist’s other works.”).
52. *Id.* at 109.

Part II of this Note will examine why it is precisely now—in an era of factory-made, industrially fabricated, assistant-produced artwork—that moral rights are increasingly akin to trademark law. Hansmann and Santilli allude to the connection between moral rights and trademark 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,” wherein a company owner wishes to control for consistency across franchises.⁵³ But they do not expand upon this connection. An examination of the contemporary art market reveals, however, that the connection is a crucial one, and it provides a broader economic justification for moral rights than Hansmann and Santilli first elucidated. 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 in the contemporary art market.⁵⁴

II. THE CONTINGENT ART OBJECT AND THE ARTIST AS BRAND

*The capitalistic economy of the present day is an immense cosmos into which the individual is born It forces the individual, in so far as he is involved in the system of market relationships, to conform to capitalistic rules of action.*⁵⁵

As Max Weber noted almost a century ago, the extent to which any individual can think himself outside the economic order is questionable. Art, of course, is no different. By focusing solely on the contemporary art market, I do not mean to imply that premodern artists were innocent of this form of what I call “branding.” Authenticity has been, and will likely always be, the sole differentiator between a highly priced work and a nearly worthless one—hence

53. *Id.* at 105.

54. Others have made a similar connection in the literary context, comparing an author’s name to a trademark. 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 issue has yet to be litigated. 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, 381 (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).

55. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 54 (Talcott Parsons trans., Dover 2003) (1905).

the insurmountably valuable judgment of art authenticators, whose very job it is to differentiate between the “real” and the “fake.”⁵⁶ The allure of the authentic has often been attributed to an outdated, Enlightenment-centric brand of thinking.⁵⁷ 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,⁵⁸ it has only held true for forms of artistic production (photography,⁵⁹ music, film) in which the proliferation of identical copies means that asking for the “original” makes no sense.⁶⁰ The same does not apply to fine art, the only class of art VARA protects.⁶¹ 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, oftentimes, the artist’s signature *is* the art.

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56. See David Grann, *The Mark of a Masterpiece*, NEW YORKER, July 12, 2010, http://www.newyorker.com/reporting/2010/07/12/100712fa_fact_grann (“[An authenticator’s] 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.”).
57. See, e.g., Douglas Crimp, *On the Museum’s Ruins*, in *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* 49, 61 (Hal Foster ed., 1998) (noting how modernism’s “[n]otions of originality, authenticity and presence . . . are undermined” by postmodernism).
58. See 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, Bridgid Doherty & Thomas Y. Levin eds., 2008) (“To an ever-increasing degree, the work reproduced becomes the reproduction of a work designed for reproducibility.”). One can see how well this prediction boded for audio works, film, and photography.
59. I note, however, that VARA *does* protect photographs existing in signed, consecutively numbered, limited-edition copies of two hundred or less. See 17 U.S.C. § 101 (2006) (defining “visual art”). These photographs may well be thought of as “unidentical” copies precisely because each copy is numbered and signed. More interestingly, this limitation on an otherwise infinitely reproducible print aptly summarizes and highlights many of the issues I have addressed throughout this Note: that oftentimes, the artist’s signature (in this case, on each numbered print) *is* the art, and that even an inherently reproducible object could obtain scarcity value merely through external limits on production. In this sense, photography as defined in VARA qualifies perfectly as a contingent art object. See *infra* Subsection II.B.1.
60. Benjamin, *supra* note 58, at 24–25 (“From a photographic plate for example, one can make any number of prints; to ask for the ‘authentic’ print makes no sense.”).
61. 17 U.S.C. § 106A; see also *id.* § 101 (defining “visual art”).

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—perhaps has even *more* import in the modern age of celebrity culture and name-brand obsession than at any other moment in art (or consumer) history. Yet when I say “touched,” I do not mean to imply that collectors today yearn for the physical labor of an artist in his work. In fact, because works of art have become increasingly mechanized in their production, the artist’s brand, or his signature, has replaced the artist’s hand (via brushstroke, for example) as the foremost signifier of a work’s value and meaning. Veteran art dealer Michael Findlay describes this phenomenon as the commoditization of contemporary art, in which works of art, no longer unique entities by nature of their mechanical reproducibility, instead become traded like commodities in which the *strength of the artist’s name alone* determines the value of the work.⁶² A work is not determined to be “good” or “bad” via a critical interpretation of its artistic merit; rather, Findlay writes, “[s]uccessful branding obviates the critical approach: the work of art *must* be good (i.e., worth its considerable price) because the artist’s name is currently fashionable.”⁶³

When arguing *against* the increased importance of the artist in the era of modern art, many like to evoke the original father of the death of the artist, Andy Warhol. Amy Adler, for example, points out that not only did Warhol make “art into a consumer product” with his silkscreened sculptures imitating boxes of Brillo pads and Campbell’s tomato juice, but he was also prone to purposefully claiming that his assistants created many of his works.⁶⁴ Adler uses the example of Warhol’s mechanized production techniques to suggest that the artist’s touch no longer matters, while seemingly missing the distinction between an artist’s *physical* touch and his very valuable stamp of approval: the “touch” of his signature.⁶⁵

62. MICHAEL FINDLAY, *THE VALUE OF ART: MONEY, POWER, BEAUTY* 47 (2012) (“Large, mechanically produced spin paintings signed and presumably inspected by Damien Hirst come, like Starbucks coffee, in three sizes . . . [T]hey are more or less interchangeable and sold as branded items . . . rather than as unique works of art.”).

63. *Id.* at 152.

64. Adler, *supra* note 4, at 296.

65. See *id.* (“In [Warhol’s] Factory, he mass-produced photo-silkscreens that never even touched the romantic hand of the artist. (In modernism, the artist’s touch was the guarantor of his sincerity and presence, investing the canvas with his magic.) Boasting of his lack of connection with his own objects . . . Warhol said: ‘Why don’t you ask my assistant Gerry Malanga some questions? He did a lot of my paintings.’”).

Indeed, Warhol's silkscreened boxes boasting such generic store brands as Campbell's and Brillo, now being sold for millions of dollars, highlight the uncomfortable gap between the dedication to ordinary object-ness embodied in so-called "postmodern" artworks and their very unordinary price tags.⁶⁶ Thus, Warhol's boxes are like consumer products and yet not like consumer products. The differentiating factor between an ordinary Brillo box and the box you buy from Warhol is none other than the Warhol stamp promising authenticity—that this is a "real Warhol."⁶⁷ 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, their works nonetheless "bear the mark of *the artist's own* studio/factory/enterprise."⁶⁸ Thus, "[t]he artist's signature remains intact, and this is the place where the promise of originality essential for art is upheld."⁶⁹

As Graw explains, Warhol's statements—for instance, that his assistant Brigid Polk "actually painted his pictures"—"can be read as a provocative break with the principle of 'authorship.'"⁷⁰ But Graw also points out that such disclamations of the artist's connection with a work can have an economic effect as well, causing widespread alarm amongst buyers.⁷¹ After Warhol suggested Polk's hand, and not his, was behind his work, "Warhol's German collectors in particular were immediately alarmed and feared for the

66. The Brillo boxes are exact reproductions of their grocery store counterparts. See STAFF OF ANDY WARHOL MUSEUM, ANDY WARHOL, 365 TAKES: THE ANDY WARHOL MUSEUM COLLECTION 35 (2004) ("The process involved making wooden replicas of the original boxes, painting them, and then silkscreening the commercial text and imagery. The finished box sculptures were virtually indistinguishable from their cardboard models.").

67. Interestingly, Warhol's Brillo boxes have recently been the subject of an authenticity investigation in which more than one hundred Brillo boxes have now been determined to be mere "copies." The differentiating factor between these downgraded copies and the "real" Warhol Brillo boxes is, according to the Andy Warhol Art Authentication Board, that the copies were not "made by Andy Warhol, to his specifications or under his supervision; and there is no known documentation that Warhol authorised their production." Clemens Bomsdorf & Melanie Gerlis, *Warhol Brillo Boxes Downgraded to "Copies,"* ART NEWSPAPER, Oct. 21, 2010, <http://www.theartnewspaper.com/articles/Warhol-Brillo-boxes-downgraded-to-copies/21573>.

68. ISABELLE GRAW, HIGH PRICE: ART BETWEEN THE MARKET AND CELEBRITY CULTURE 25 (trans. Nicholas Grindell, 2009).

69. *Id.*

70. *Id.* at 186.

71. *Id.*

authenticity of their paintings. Warhol was obliged to issue an official declaration correcting this claim in order to avoid works being returned.⁷²

The art world's obsession with the artist's stamp of authenticity,⁷³ in some way meant to reflect the personality or intent of the artist, is thus no different from consumers' attitudes toward luxury cars and Louis Vuitton handbags. One need only think of the certificates of authenticity issued by luxury goods makers, neatly packaged within every \$2,000 bag, and, ironically, often counterfeited.⁷⁴ 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,” and “identity,” together constituting a mark's “selling power”).⁷⁵ For the same reasons that a trademarked item's “selling power” stems from the promise of its singularity, art's peculiarly high value “derive[s] from a range of factors: singularity, arthistorical verdict, artist's reputation, promise of originality, prospect of duration, claim to autonomy, intellectual acumen.”⁷⁶ 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.”

72. *Id.*

73. Even the nineteenth-century artist Auguste Rodin took 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 E. KRAUSS, *Introductory Note to Sincerely Yours*, in *THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS* 171, 171 (7th prtg. 1991).

74. 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's ultimate finding that it had not done enough to combat counterfeit sales. *Christian Dior Couture/eBay Inc., eBay International AG, Tribunal de commerce [TC] [commerce court] Paris, 1e ch.*, June 30, 2008, *JurisData* 2008-364501 (Fr.).

75. Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 *UCLA L. REV.* 621, 681 (2004) (quoting Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 *HARV. L. REV.* 813, 827, 830-31 (1927)).

76. GRAW, *supra* note 68, at 28.

B. *The Artist as Brand: From “Reputational Externalities”⁷⁷ to Consumer Confusion*

1. *Identity as Branding*

What does the contemporary artwork’s “promise of originality” mean? It might no longer mean novelty, artistic merit, skill, or bold, artistic gestures à la the Abstract Expressionism of the 1950s,⁷⁸ but it now arises *sui generis* from the very existence of the artist’s signature. That is 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 which is reflected directly in the market price for the artist’s work. The desire to control one’s work by resisting curatorial dictates or mutilation at the hands of an avaricious buyer, which is at the heart of the moral right of integrity, is not unique to artists. As Laura Heymann has argued about the importance of reputation construction, “This desire for control ‘is an assertion of autonomy,’ an attempt to engage in self-identity creation, whether by individuals [an average person] or by firms [a corporation], and a resistance to definition by others.”⁷⁹

Moral rights scholarship has traditionally conceived of reputation as a deeply personal connection between the artist and work. But the concept of reputation can now be reformulated to signify an artist’s strategic choices on how best to efficiently trade on his public image,⁸⁰ just as trademark owners trade on their “goodwill” (a term used in trademark law to denote favorable public regard).⁸¹ Heymann points out that reputation can also serve as a *user*

77. This is Hansmann and Santilli’s term for the idea that damaging just one of an artist’s works imposes costs on his other works as well. See *supra* notes 49–52 and accompanying text.

78. As has been well documented, postmodernism killed off these notions. For the definitive primer on postmodern art and culture, see FREDRIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* (1991).

79. Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1358 (2011) (quoting Thomas Gibbons, *Defamation Reconsidered*, 16 O.J.L.S. 587, 589 (1996)).

80. 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.” Hansmann & Santilli, *supra* note 15, at 102. If the work’s character were to change, the artist would then experience “subjective personal anguish” from “seeing his work abused.” *Id.*

81. This goodwill could be due to a number of factors: clever advertising, good quality, or mass marketing. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 (1995) (“If the

signal, “traded or borrowed based on economically 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.”⁸²

Others have long noted the inextricable link between an artist’s reputation or identity and the value of his artwork.⁸³ William Landes and Richard Posner, for example, have suggested trademark redress, in the form of 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.”⁸⁴ I would like to tweak for a moment how we might think of an artist’s “instantly recognizable style.” In the contemporary era, style might be referred to as *stylized*—a fabricated construction, a deliberate posing by the artist to actively engage in public identity-making.⁸⁵ That is, we must shift how we think about style from an authentic, real manifestation of an artist’s inner being⁸⁶ 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”⁸⁷ or “original

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.”).

82. Heymann, *supra* note 79, at 1362.

83. See, e.g., Hansmann & Santilli, *supra* note 15, at 104 (noting that adversely affecting an artist’s reputation can also adversely affect the prices of his works); 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”).

84. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 259 (2003). This remedy, however, is rife with problems. See *infra* Subsection IV.A.2.

85. 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.” Frederic Jameson, *Postmodernism and Consumer Society*, in *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE*, *supra* note 57, at 127, 131. In other words, we can no longer believe in the unmistakability or uniqueness of a style.

86. See MERRYMAN ET AL., *supra* note 11, at 423.

87. See Kwall, *supra* note 44, at 1986.

creation” to a concern for dilution or misrepresentation of the artist’s brand construction via modification, distortion, or mutilation.

While prior scholars have noted the importance of reputational externalities to both the artist’s goodwill and the public’s right not to be defrauded in the buying of artworks,⁸⁸ these ideas nonetheless presume some “analogy between the work and its maker.”⁸⁹ That is, the prior literature has assumed that for a work to be labeled a “Warhol,” for example, the artist must have in some sense *created* it, rather than “signed off” on it. As Hansmann and Santilli see it, to merely sign a work one did not actually “create” or “make” would be a deception of the public writ large.⁹⁰ But certainly, Duchamp’s signing off on a urinal (which he did not make) and then calling it art has erased the belief that an artist must have “created” the work he now touts as *his*. Now we see Artist X’s “creation” of the box of brown clothes, lovingly compiled by his assistants from hand-me-downs purchased at the Salvation Army.⁹¹

All these examples should not 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 cachet. As we will see below, the rise of the “contingent” art object—easily reproducible, mass manufactured, and industrially made—severs the presumed personal connection between author and work.

88. See, e.g., Hansmann & Santilli, *supra* note 15, at 107.

89. ROSALIND E. KRAUSS, *Introduction*, in *THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS*, *supra* note 73, at 1, 3.

90. See Hansmann & Santilli, *supra* note 15, at 107 (“The right of integrity might to some extent serve to protect the public 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”); see also *id.* at 107 n.37 (“For example, both [Giorgio] De Chirico and [Salvador] Dali were said to have signed—presumably for compensation—paintings actually created by other artists.”).

91. I do not mean to suggest, of course, that the phenomenon of merely “signing off” on a work is unique to the contemporary sphere. Even Auguste Rodin was famously known to have had little hand in the actual creation of his sculptures: “Much 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 which the final bronzes were cast.” ROSALIND E. KRAUSS, *The Originality of the Avant-Garde*, in *THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS*, *supra* note 73, at 151, 153. And, perhaps most blasphemously, Rodin had granted the French nation the right to make posthumous editions of his work from his estate’s plasters. *Id.* at 151. However, the practice of signing off on or merely approving a work is certainly more prominent in the contemporary age. See *infra* Section II.C.

2. *The Contingent Art Object*

Art historian Martha Buskirk points out that moral rights, or, as she calls them, “personality” rights, “have, if anything, *gained* in significance for works from which traditional markers of touch or presence have been excluded.”⁹² Buskirk traces the rise, beginning in the 1960s, of what she terms the contemporary “contingent object”⁹³—that is, an art object made from industrial materials, easily fabricated and reproduced, and highly context dependent. In the new art world of the contingent object, Buskirk explains, “[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.”⁹⁴ 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 rather than ship the works from Italy, Panza ordered unauthorized fabrications of the Judd and Andre works instead. When the artists found out about the reproductions, both publicly disclaimed affiliation with the works.⁹⁵ As we will see later in Section III.B, such an incident is highly problematic because it has now increased the number of Donald Judds and Carl Andres on the market, decreasing the scarcity effect and thus threatening to reduce the value of the artists’ other works. 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 increasingly 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.”⁹⁶ Consider the shift from a Renaissance painting, labored over by an artist’s paintbrush and bearing the distinctive brushstrokes of his hand, to Judd’s work from Panza’s villa, which is simply “an uninterrupted row of largely identical five-foot-high galvanized iron plates.”⁹⁷

92. BUSKIRK, *supra* note 16, at 49 (emphasis added).

93. *Id.* at 211-60.

94. *Id.* at 4.

95. *Id.* at 3.

96. *Id.* at 12. Photography, of course, is one of the most obvious categories of work to which this applies. However, because VARA only protects photographs existing in 200 or fewer consecutively numbered, signed prints, it acts as an external check on the *artist’s* own potentially dilutive actions, as well. See *infra* note 149.

97. BUSKIRK, *supra* note 16, at 2.

The former could in rare instances be copied by a master impostor—the latter, whether in an unauthorized reproduction or the authorized “original,” has *always* been a product of industrial fabrication. Without internal checks on reproduction, 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 matter more now in the contemporary art market than they did in the premodern era. In the age of Duchampian ready-made objects (shovels, urinals) presented as art, context matters. That is, it is important that each object bearing the artist’s name directly signifies 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, but that heterogeneity within that series of works will be read as a decision that itself carries meaning.”⁹⁸ It is precisely the contingent object read *against* the entire *series* of an artist’s work that illuminates. Martha Buskirk acutely observed that “[a]n earlier approach to the work of art looked to the object *itself* for evidence about its aesthetic. For many contemporary forms, however, understanding how a work of art was realized includes far more than a knowledge of artistic materials and their properties.”⁹⁹ Indeed, artists’ oeuvres no longer depend on stylistic unity, as Landes and Posner have assumed.¹⁰⁰ The contingent art object may now 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.”¹⁰¹

C. Authorship, Brand Building, and the Creation of Goodwill

Because we cannot believe in the *sincerity* of modern-day (or, if you 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.”¹⁰² This is because we can no longer assume some real, one-to-one correlation between the artist and his work (or, a belief that “[t]o mistreat the

98. *Id.* at 10.

99. *Id.* at 15 (emphasis added).

100. See *supra* note 84 and accompanying text.

101. BUSKIRK, *supra* note 16, at 129.

102. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995).

work of art is to mistreat the artist”¹⁰³). Instead, the deliberate *control* an artist exerts over his body of work in order to create an identifiable brand for himself has replaced personal *connection* as the hallmark of contemporary art-making.

The work of artist Damien Hirst offers an exemplary case study of how the contemporary artist trades on his brand. Hirst is perhaps most famous for his \$100 million 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 New York Times* pointed out that Hirst, having “made his name by pickling sharks, cows, sheep and the like,” and thus “having created his brand,” “found he could sell almost anything.”¹⁰⁴ In fact, anyone familiar with the new artist-as-factory model should not be surprised that Hirst is quite honest about his level of involvement in his own works—or lack thereof. For example, it is well known that “[h]e doesn’t paint his triumphantly vacuous spot paintings.”¹⁰⁵ Like name-brand fashion designers who employ a host of capable young designers toiling in anonymity behind the scenes, the “House of Hirst,” so to speak, relies on marketing for its appeal. As one critic notes, “His undeniable genius consists in getting people to buy [the paintings he didn’t even paint].”¹⁰⁶

Yet for all his bravado, Hirst, like other mega-celebrity artists of his age, including Jeff Koons and Richard Prince, is trading off of a brand built from the “goodwill” generated by a collection of his earlier works. In arguing that brand building and skilled business acumen have taken on increased importance in the art world today, I am not arguing that such artworks lack *all* artistic meaning. Rather, some meaning making is necessary, some iota of uniqueness that will first propel the artist to stardom. Art historian Isabelle Graw uses the term “symbolic relevance” to denote an artist’s uncanny ability, at the beginning of his or her career, to tap into a specific condition of consumer capitalism as a form of artistic commentary.¹⁰⁷ Koons, for example, made his name with his early *Banality* sculpture series of 1988, which “evoked an idealist belief in the redemptive function of art, only to render it absurd once

103. MERRYMAN ET AL., *supra* note 11, at 423.

104. Alan Riding, *Alas, Poor Art Market: A Multimillion-Dollar Head Case*, N.Y. TIMES, June 13, 2007, <http://www.nytimes.com/2007/06/13/arts/design/13skul.html>.

105. Germaine Greer, *Germaine Greer Note to Robert Hughes: Bob, Dear, Damien Hirst Is Just One of Many Artists You Don’t Get*, GUARDIAN, Sept. 21, 2008, <http://www.guardian.co.uk/artanddesign/2008/sep/22/1>.

106. *Id.*

107. GRAW, *supra* note 68, at 49.

and for all.”¹⁰⁸ Similarly, Richard Prince made a name for himself in the late 1970s with his rephotographed 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.”¹⁰⁹ Graw argues that 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.”¹¹⁰ 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[] 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.”¹¹¹ Flavin’s pieces frequently consist of everyday household objects like fluorescent light tubes. Hence, in using his name as both artistic authority and corporation, the certificates are at once self-consciously tongue-in-cheek and necessary in the world of the contingent object. Buskirk points out that the “certificates played an important role in the marketability of pieces where the physical object was made from off-the-shelf elements,” guaranteeing that *this* light tube is not just any old light tube—it is a Flavin original.¹¹²

Returning to Hirst, while it is true that at the time of the diamond skull’s creation “[t]he ‘Hirst brand’ was simply too established, essentially guaranteeing symbolic relevance,”¹¹³ the creation of the skull *itself* fulfilled two functions toward furthering the strength of the brand. First, it was symbolically relevant, a nodding wink to the vanities of the art world in which, indeed, “the price tag is the art.”¹¹⁴ And second, it represented a brilliant public relations move in the ultimate construction of the Hirst brand, now synonymous with irreverent excess and purposeful deskilling.

108. *Id.* at 53.

109. *Id.* at 49.

110. *Id.* at 55.

111. BUSKIRK, *supra* note 16, at 53.

112. *Id.* at 56.

113. GRAW, *supra* note 68, at 40.

114. Riding, *supra* note 104 (quoting British journalist Nick Cohen).

III. COMPARING MORAL RIGHTS AND TRADEMARK LAW

So what does this all have to do with moral rights? As I have already noted, we must begin by challenging our current conception of moral rights as protecting a unique set of artists' interests unlike, and loftier than, any other (although the term "moral," unfortunately, does not help).¹¹⁵ In fact, a brief comparison of moral rights law and trademark law will reveal 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 commentators never fail to point out, American intellectual property law seeks to vindicate the economic, rather than the personal, interests of authors.¹¹⁶ My argument is that moral rights, much like trademark law (which I use to encompass trade dress¹¹⁷ 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).¹¹⁸ I will now examine three unique trademark principles and discuss their relevance to moral rights: the attenuation 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.

115. 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 objects," see Adler, *supra* note 4, at 269.

116. See, e.g., Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976); Kwall, *supra* note 43, at 59-60; see also Hughes, *supra* note 43, at 662 (observing that other commentators frequently discuss intellectual property in terms of economic interests).

117. Actionable under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (2006), "trade dress" is "a category that originally included only the packaging, or 'dressing,' of a product, but . . . has been expanded . . . to encompass the design of a product." Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 209 (2000) (explaining that "trade dress constitutes a 'symbol' or 'device' for [Lanham Act] purposes").

118. The economic justifications for trademark law are numerous. See, e.g., Nicholas S. 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 MEMPHIS ST. U. L. REV. 199 (1991); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987).

A. *Trademark Law and the Attenuation of the “First Sale Doctrine”*

Americans are very protective of their property. I mean the term “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, it is unsurprising that American law disposes of the notion that a trademark holder might be able to control how an owner disposes of his property. That idea was formally done away with by the Supreme Court in the 1924 case *Prestonettes, Inc. v. Coty*,¹¹⁹ which established what is now known as the “first sale doctrine.” There, the Court held that the defendant, who had 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.”¹²⁰ Since then, sellers in the “aftermarket” for goods (redistributors, for example) have invoked the doctrine, sometimes successfully, against trademark owners’ infringement claims.¹²¹

But this defense is not absolute. Courts have held that aftermarket activity *can* constitute trademark infringement, due to a likelihood of confusion on the part of both purchasers and observers of the redistributed product. For example, in *Rolex Watch, U.S.A., Inc. v. Michel Co.*,¹²² the Ninth Circuit affirmed the district court’s finding that the behavior of a defendant who sold used Rolex watches with “reconditioned” or “customized” non-Rolex parts under the Rolex trademark was “deceptive and misleading . . . and likely to cause confusion to subsequent or downstream purchasers, as well as to persons observing the product.”¹²³ *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.¹²⁴

119. 264 U.S. 359 (1924).

120. *Id.* at 368.

121. See, e.g., *Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC*, 562 F.3d 1067 (10th Cir. 2009); *Sebastian Int’l, 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).

122. 179 F.3d 704 (9th Cir. 1999).

123. *Id.* at 707.

124. See also *Rolex Watch USA, Inc. v. Meece*, 158 F.3d 816 (5th Cir. 1998) (holding that Rolex watches “enhanced” with non-Rolex parts infringed on Rolex’s trademark); *Bulova Watch Co. v. Allerton Co.*, 328 F.2d 20 (7th Cir. 1964) (holding that refitting Bulova movements and dials into non-Bulova diamond-decorated cases resulted in a new product).

A trademark owner's right to enjoin use of its trademark in connection with a substantial alteration of its original product is very 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. 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 (which is, in fact, Hirst's explanation for why he can get away with selling art objects that are " clichés"¹²⁵). Reputation is what informs our understanding of new work that might otherwise remain context-less and inexplicable, and it is also what art buyers and sellers are implicitly trading off of when they sell a box of brown clothes for a five-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 Artist X original" (and, likewise, the fact that it is "an Artist X original" is only significant because of the entire body of work that has rendered X 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. A few months later, while flipping through another auction catalog, Buffet came across a piece labeled "*Still Life and Fruits* by Bernard Buffet." The piece was touted as a painting on metal. However, upon closer inspection, Buffet discovered that it was in fact one of the panels of the auctioned-off refrigerator.¹²⁶ Apparently, the owner of the refrigerator had cut it up into six pieces and attempted to sell the fragments separately, "evidently to increase its resale value."¹²⁷ This would no doubt be a "substantial" alteration that the first sale doctrine does not protect, because it would create a likelihood of confusion both 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, while works of fine art are often purposefully displayed at gallery shows, loaned to museums, and the like.

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

125. DAMIEN HIRST, *NEW RELIGION* 7 (2005).

126. See John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 *HASTINGS L.J.* 1023, 1023 (1976).

127. Hansmann & Santilli, *supra* note 15, at 100.

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.¹²⁸

Likewise, the owner who is hoping to increase resale value in his 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, two paintings by the French painter Henri de Toulouse-Lautrec (into ten pieces) and Pablo Picasso’s *Trois Femmes*, which was purchased for \$10,000, subsequently cut into five hundred one-inch squares, and sold off for over \$100 apiece—creating a hearty \$40,000 profit.¹²⁹ The clever “entrepreneur” behind the *Trois Femmes* resale even remarked, “If this thing takes off, we may buy other masters as well and give them the chop.”¹³⁰

Further, the practice of cutting up art and selling the pieces is especially problematic because it decreases the scarcity value of the Buffet brand, with respect to both the inverse quantity/price relationship (increased supply means decreased price) 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.”¹³¹ Inundating the market with piecemeal art in larger quantities than the original presents obvious problems for fine artists in particular, who may wish to limit the number of goods they place in the market.

128. *Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 603 F.3d 1133, 1138 (9th Cir. 2010).

129. See MERRYMAN ET AL., *supra* note 11, at 439.

130. *Id.*

131. Hansmann & Santilli, *supra* note 15, at 111 n.49.

B. Source Identification and Source 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 an action under section 43(a) of the Lanham Act.¹³² The standard requires that an infringer cause confusion, mistake, or deception with regard to "the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."¹³³ The language of "likelihood of confusion" actually serves as a helpful way to reframe the dialogue regarding authorial intent from one of personal interests¹³⁴ to economic ones.

That is, the very idea of a discernable "authorial intent" worth protecting has come under 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,¹³⁵ and further, that authorial intent is impossible to determine,¹³⁶ so that a work should exist *ab initio*, as if divorced from the author.¹³⁷ The notion of lack of authorial intent makes sense. Authors all build on what came before, so in that sense there is no "single" author of a work, and once a work has left the artist's hands, it can and probably should be open to all sorts of interpretations. Yet the "author-as-construct" framework provides an easy weapon against moral rights law and its assumed correlation between artist and work. If we sever the connection altogether, then an artist

132. 15 U.S.C. § 1125(a)(1)(A) (2006).

133. *Id.*

134. See, e.g., Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 19 (1997) (arguing that both the right of publicity and moral rights "seek to protect the integrity of texts by rejecting fluidity of textual interpretation by the public in favor of the author's interpretation").

135. 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 that the only power of the contemporary author is to "mix writings." See also Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 459 (arguing that authorship is a socially constructed category reliant on the Romantic notion of an inspired genius); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUD. 425, 428-30 (1984) (same).

136. See Adler, *supra* note 4, at 277-78 ("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.").

137. Vladimir Nabokov, 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 NABOKOV, *THE ANNOTATED LOLITA* 316 (Alfred Appel ed., 1991) (1958).

certainly does not possess any more right to control the 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.¹³⁸

Yet the critique of authorial intent can also be deployed in favor of moral rights, if one considers the author not acting as the ultimate creator but instead serving a source-identifying function. In other words, 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 the artwork is extremely high in price, but also that it may be, for example, purposefully deskilled, playful, or irreverent. All of these associations emerge from the deliberate choices Warhol has made in putting a specific body of work into the stream of commerce, and hence, into the public eye. The notion of “artist name as source-identifying function” makes sense in a contemporary art market in which assistants are frequently the ones actually “making” or “creating” the art.¹³⁹ Just as a fashion designer would place his trademark on a host of items designed by a team of assistants, so the artist himself performs the legitimating function of merely signing off on the work, and thereby rendering it “a Warhol.” Yet it is misleading to label a work “a Warhol” if it has been modified or mutilated and the artist himself did not willfully sign off on the modification, for now the artist neither is the “origin” of the product (i.e., the mutilated version did not come from the Warhol “factory”) nor professes to sponsor or approve it in any way. A mutilation thus not only allows another party to reap the financial rewards associated with the famous Warhol name, but it also imposes negative externalities on the art consumer by increasing search costs.¹⁴⁰

To return to Buffet’s refrigerator, the labeling of one of the refrigerator panels as “*Still Life and Fruits* by Bernard Buffet” is misleading, because Buffet

138. This is the case of famous modernist critic Clement Greenberg “stripping” the paint from David Smith sculptures, thus actually rendering them more valuable than the painted ones. See Sarah Hamill, *Polychrome in the Sixties: David Smith and Anthony Caro*, in *ANGLO-AMERICAN EXCHANGE IN POSTWAR SCULPTURE, 1945-1975*, at 91, 93 (Rebecca Peabody ed., 2011) (citing Rosalind Krauss, *Changing the Work of David Smith*, 62 *ART IN AM.* 30 (1974)). However, it does not matter much if Greenberg created more market value, for the sculpture may no longer accurately be branded a David Smith. Smith 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 a ruin. My name cannot be attributed to it, and I shall exercise my legal rights against anyone making this representation.” MERRYMAN ET AL., *supra* note 11, at 441.

139. See *supra* note 68 and accompanying text.

140. Cf. *Qualitex Co. v. Jacobson Prod. Co.*, 514 U.S. 159, 163-64 (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”).

neither was—to borrow the Supreme Court’s definition of “origin” in the Lanham Act context—“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.”¹⁴¹ Buffet created a painted refrigerator. By dicing the refrigerator up into six parts, the owner has subsequently created six new works, so that he, and not Buffet, is now the new producer or “source.” Thus the owner should not be permitted to unfairly profit off of the Bernard Buffet name in selling the new works.¹⁴²

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

Throughout this Note, 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 to prevent dilution by blurring and dilution by tarnishment, both of which apply only to famous marks.¹⁴³ 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.¹⁴⁴ The latter, meanwhile, prohibits the association between the defendant’s mark and a famous mark that would harm the reputation of the famous mark.¹⁴⁵ While the only provision of VARA requiring an artist to first prove his own “fame” is the right against 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 shared 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, as applied to 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 is 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

141. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 31-32 (2003).

142. 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 68, at 194 (quoting Clemms Krümmel, *Der Maler Bernard Buffet – Zwischen Verniss und Rehabilitation*, TEXTE ZUR KUNST, Mar. 2002, at 85).

143. 15 U.S.C. § 1125 (2006).

144. *Id.* § 1125(a)(1)(A).

145. *Id.* § 1125(a)(1)(B).

mark. This would apply more to artists painting in distinctive styles that would rise to the level of trade dress protection than for artists who have more heterogeneous, eclectic oeuvres.¹⁴⁶ Artists with more “instantly recognizable”¹⁴⁷ 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 VARA’s use of the phrase “prejudicial to the artist’s honor or reputation” is strongly tinged with personhood rhetoric.¹⁴⁸ 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, exempting owners who have an economic interest in protecting the value of their work from needing to do so themselves.¹⁴⁹ Likewise, in the case of an up-and-coming artist, the artist can protect buyers’ investment in his work, even if his work has not yet acquired distinctiveness (which trademark law refers to as “secondary meaning”).¹⁵⁰ 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 in his career can be converted to a longer-term cash-out for both the artist and earlier buyers of his work.¹⁵¹

It has been my hope throughout this Part to sever moral rights from the strong personhood arguments that seem to untether VARA from the economic goals of American copyright law. In an age in which art has become more

146. See *id.* § 1125(c); *supra* notes 98–101 and accompanying text.

147. LANDES & POSNER, *supra* note 84, at 259 (contemplating the possibility of trademark protection in an artist’s distinctive style); see *supra* note 84 and accompanying text.

148. 17 U.S.C. § 106A (2006).

149. Thanks to Shaun Mahaffy for this point. 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 Eggleston’s works alleges that Eggleston has diluted the resale value of the collector’s works by issuing new large-scale prints of them. See Kelly Crow, *Collector Sues Artist over Photographs*, WALL ST. J., Apr. 5, 2012, <http://online.wsj.com/article/SB10001424052702303299604577324073338603692.html>. However, I note here that VARA serves as an interesting external check on an artist’s own dilutive actions. If Eggleston were to issue more than two hundred prints of a specific photograph, he would lose his VARA rights.

150. See *infra* note 170 and accompanying text.

151. See *supra* Section II.B.

commoditized than ever, VARA's moral rights regime is even more essential, precisely because of its trademark-like ability to protect an artist's brand from subsequent dilution and free riding. By repositioning romantic concepts like authorial reputation, intent, and honor as market concerns (of avoiding post-sale consumer confusion, promoting truthful source identification, and encouraging active mark policing), moral rights can do for art what trademark law has long done for other commodities. Yet some might wonder whether copyright—which has long endowed artists, writers, and filmmakers with a broad, comprehensive set of rights—is already sufficient for accomplishing what VARA does. I take up this question below.

IV. WHO'S AFRAID OF MORAL RIGHTS?

Critics might object that the mere existence of a theoretical connection between art and commerce, or between moral rights and trademark law, does not necessarily warrant an unprecedented expansion of American intellectual property law in the form of the VARA regime. In this Part, I question whether the United States can achieve the goals of VARA within a traditional copyright or trademark regime. I then conclude by considering the broader question of the public interest, which copyright law has long been said to benefit.¹⁵²

A. Are There Alternatives?

A question frequently asked of moral rights law is: what is it about *art* (meaning fine art, and not “the arts,” which could potentially refer to film, music, and books) that warrants special protection?¹⁵³ 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 have done just that.¹⁵⁴ But this is a debatable point, and the extent to which the vulgarities and materialist excesses of the contemporary art market, as outlined above, have destroyed that notion is also up for debate. A better question to ask would be whether the fine arts lack important protections in a traditional intellectual property regime. I believe that they do.

152. 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, § 8, cl. 8. The notion of “Progress” is traditionally linked to the public interest.

153. See Adler, *supra* note 4, at 295.

154. See H.R. REP. NO. 101-514, at 6-7 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6915-17 (extolling the merits of art for society).

1. *Copyright and Its Limitations*

As Hansmann and Santilli point out, “[C]opyright 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.”¹⁵⁵ Because “copyright covers principally reproductions,” 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.”¹⁵⁶ Copyright would likely only protect against *significant* modifications of the sold work (under the derivative works right¹⁵⁷), and it does not protect against the destruction or improper display of that work at all.¹⁵⁸

Indeed, it seems to me that the unique position of visual artists in the intellectual property sphere derives from the high premium placed on the *original itself*. This characteristic of the art market renders it simply not analogous to the markets for 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 no cost in reproduction. Copyright, therefore, must create an “artificial” property right in a non-rivalrous good.¹⁵⁹ However, because the marginal cost of making a copy of the original is zero or slightly greater than zero, there are inevitably inefficiencies because the buyer must pay above marginal cost in order for the seller to recoup the costs of making the original.¹⁶⁰ Hence the protracted debates about how much copyright protection is “enough” 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?¹⁶¹

155. Hansmann & Santilli, *supra* note 15, at 114.

156. *Id.*

157. See *infra* note 164 and accompanying text.

158. See H.R. REP. NO. 101-514, at 9, reprinted in 1990 U.S.C.C.A.N. 6915, 6918-19 (“Under the American copyright system, an artist who transfers a copy of his or her work to another may not, absent a contractual agreement, prevent that person from destroying the copy or collect damages after the fact. Further, with respect to modifications of a work, only an artist who retains the copyright in his or her work is able to invoke title 17 rights in defense of the integrity of that work, and then only where a modification amounts to the creation of a derivative work.”).

159. Non-rivalrous goods can be shared without any loss in value. For instance, many can listen to the same MP3 of a song at once; my listening to this copy does not prohibit your listening to the exact same copy.

160. See NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 84-86 (2008).

161. See *Eldred v. Ashcroft*, 537 U.S. 186, 248 (2003) (Breyer, J., dissenting) (stating that costs to the public imposed by the Copyright Term Extension Act and the royalties it generates “may be higher than necessary to evoke creation of the relevant work”).

Visual artists cannot hope to benefit much, if at all, from this copy-based regime.¹⁶² Almost all the market value for their work resides within the original copy. This distinctive feature of visual art creates what I have termed “the cult of the authentic” that has rendered Benjamin’s prediction of a world without fetishism for the original¹⁶³ simply untrue for the fine arts (though visual art still permits secondary markets for prints, mugs, tote bags, postcards, and the like). This renders an art object similar to a luxury good in that it is rivalrous (once I own this Hirst, you may not own the same Hirst). At the same time, the art object is even more covetable for its scarcity (this is the *only* diamond skull that is out there, while Prada may have made at least five thousand of its Spring 2011 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 problems arising from the uniqueness of the fine art object.¹⁶⁴ That is, the moral rights regime shifts 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 to the fine artist.

2. *Why Not Just Use Traditional Trademark Law?*

As noted throughout this Note, numerous scholars have suggested trademark redress for artists.¹⁶⁵ However, courts do not seem especially

162. See H.R. REP. NO. 101-514, at 9, *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.”).

163. See Benjamin, *supra* note 58.

164. Hansmann and Santilli have also suggested that a significant alteration of a work may result in a violation of the “derivative works” right. See Hansmann & Santilli, *supra* note 15, at 114-16. Landes and Posner have also made this comparison between the integrity right and the derivative works right. See LANDES & POSNER, *supra* note 84, at 279.

165. See Hansmann & Santilli, *supra* note 15, 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 84, 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, the recent case of *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23

hospitable to this argument. John Henry 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.¹⁶⁶

However, as that case involved the literal use of Picasso's name as a trademark on a non-art product, it does little in the way of redress for alterations or modifications of original *artwork*.¹⁶⁷ The question remains whether an actual Picasso painting that has been cut up into several pieces would still qualify under a section 43(a) action.

Further, there are other significant reasons that section 43(a) is an inadequate solution to the problems addressed by VARA. For one, the Lanham Act requires that a name be used in commerce in connection with the sale of goods or services, so it would likely not cover situations where a not-for-profit museum displays an unauthorized work of art. This was the approach the court took in *Wojnarowicz v. American Family Ass'n*,¹⁶⁸ 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."¹⁶⁹

Secondly, both trade dress and personal names (in this case, the name of the artist) require secondary meaning—that is, acquired distinctiveness—in order to be actionable as a trademark under section 43(a).¹⁷⁰ For artists who are not yet established, this creates large barriers to bringing a section 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

(2003), may have eviscerated at least some attribution claims. See *infra* notes 174-177 and accompanying text.

166. MERRYMAN ET AL., *supra* note 11, at 438.

167. Interestingly, here we see a section 43(a) claim being brought after the artist's death, whereas a VARA claim could only be brought while an artist is still alive. See 17 U.S.C. § 106A (2006).

168. 745 F. Supp. 130 (S.D.N.Y. 1990).

169. *Id.* at 142.

170. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 14 (1995).

value early on.¹⁷¹ Further, the requirement that an artist acquire distinctiveness in his trade dress would demand that an artist 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.¹⁷²

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 Corp. v. Twentieth Century Fox Film Corp.*,¹⁷³ in which the defendant repackaged the plaintiff’s television 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’s copyright had expired, the work was now effectively in the public domain and anyone was free to use it as they pleased.¹⁷⁴ The decision has been roundly criticized because the Court conflated copyright and trademark rights for authors by suggesting that if an author does not have a right to the former, he does not have a right to the latter, either.¹⁷⁵ The decision is interesting in relation to VARA, which 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.¹⁷⁶ While *Dastar* does not mention moral rights or VARA, it at least implies that we are unlikely to see an expansion of moral rights-type protections for works outside of visual art, specifically because the Court has eviscerated at least a portion of possible section 43(a) claims for authors.¹⁷⁷

171. See *supra* notes 81-110 and accompanying text.

172. See *supra* note 101 and accompanying text.

173. 539 U.S. 23 (2003).

174. *Id.* at 33-34.

175. See Ginsburg, *supra* note 54, at 380 (“Because there is no general copyright protection of authors’ names, authors had resorted to trademark law to fill the gap [with] a remedy for the false attribution of [an author’s] work to another person . . . on the ground that the conduct constituted ‘reverse passing off.’ . . . But, in *Dastar*, the Supreme Court rejected the application of this text.”); Jane C. Ginsburg, *The Right To Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 268 (2004).

176. 17 U.S.C. § 106A(e)(2) (2006).

177. However, in other situations where an author is likely to prevail on his copyright claim, he could have an additional cause of action under section 43(a), as well. Plaintiffs used this approach in *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976), where the court applied the Lanham Act to a significant modification of a Monty Python work.

B. Can Moral Rights Advance the Public Interest?

The economic incentive behind copyright lies in the belief that “encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors.”¹⁷⁸ Thus, it is at least arguable that if a modification of copyright does *not* advance “the Progress of Science,”¹⁷⁹ that modification is unconstitutional.¹⁸⁰ Likewise, VARA’s legislative history is highly concerned with elucidating the important public benefits that will emerge from according moral rights to artists:

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.¹⁸¹

This Note, however, has argued that a “pure profit motivation”—in clever branding, advertising, and general celebrity-type antics to which the contemporary art world today is prone¹⁸²—is all that’s left, and the moral rights regime is the inadvertent, inaptly named legal system that protects those economic, trademark-like interests.

Yet perhaps what is most interesting about the comparisons between moral rights law and trademark law is that both can serve 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 Note has thrown into

178. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

179. U.S. CONST. art. I, § 8, cl. 8.

180. See *Eldred v. Ashcroft*, 537 U.S. 186, 211-12 (2003) (noting petitioners’ argument that the Copyright Term Extension Act fails to promote the “Progress of Science” because it does not incentivize the creation of new works (quoting U.S. CONST. art. I, § 8, cl. 8)).

181. H.R. REP. NO. 101-514, at 7 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6916.

182. Jeff Koons, for example, 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 68, at 53.

doubt whether we can expect art to serve a broader social function that consists of “common reference points or icons . . . widely shared in social communication.”¹⁸³ Whether the often obscure contemporary art objects of today will resonate the way Picasso or Rembrandt paintings did in their day is a topic for a different article. I only mean to suggest that the industrial processes through which the contingent art object is made rely 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*,¹⁸⁴ 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.¹⁸⁵

Lastly, the fact that trademark law has also been acknowledged to incentivize *producers* by facilitating investment in goodwill¹⁸⁶ may serve a more traditionally socially beneficial artistic function as well. Like copyright law, thinking of art making as brand making may encourage artists to develop a unique, path-making style and garner symbolic value early on in their careers,

183. Hansmann & Santilli, *supra* note 15, at 106.

184. See *supra* note 95 and accompanying text.

185. However, as Andre’s *Fall* was fabricated well before VARA’s enactment, the artist could do nothing to prevent its showing at the Ace Gallery in Los Angeles. His only 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 [his] work.’” BUSKIRK, *supra* note 16, at 45. 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 a slight change in the curvature of a sculpture may seem trivial to some, 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. Michael Fried, in his famous article on minimalist sculpture, discusses this fact:

[Minimalist] sensibility is theatrical because, to begin with, it is concerned with the actual circumstances in which the beholder encounters literalist work [Minimalist artist Robert] Morris 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).

186. Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 *EMORY L.J.* 461, 466 (2005).

in turn propelling forward the Progress of Science via stylistic innovation.¹⁸⁷ Whether meant as a serious offer or a satirical message, Hirst's grotesque gesture of the \$100 million skull has accurately captured "the essence of [our] culture and record[ed] it for future generations,"¹⁸⁸ resulting in a new form of art for the contemporary era. As it turns out, "it is often through art that we are able to see truths, both beautiful and ugly."¹⁸⁹

CONCLUSION

Part of the reason that the myth of van Gogh's ear and of the romantic modernist painter have persisted through the ages is because it is a story we want to believe in, and, subsequently, vicariously experience. Even as recently as the 1950s, Jackson Pollock, that art-world superstar, was still the lone wolf, chugging whiskey and splashing paint wildly about on his floor-laid canvases. We see brazen action painting like Pollock's as risk-taking: "[W]e rely on [artists] to make up for our own timidity, on their courage to dignify our caution."¹⁹⁰ And while we may "all make our wagers," the "artist does more. He bets his life."¹⁹¹

And so it is. If the stakes of the game have changed since high modernism—if it is now "cool" to be economically successful¹⁹²—so, too, have the times. Warhol may have been the first artist to successfully capitalize on and foreshadow the power of modern media and consumer culture for the artist-as-businessman model,¹⁹³ but he is just one of many postmodern artists who now look to the conditions of the market as talisman and guide, rather than creating artworks from the spontaneous, inspired depths of their own tortured souls.¹⁹⁴ In some ways, this may make sense. Isn't art on some level

187. See *supra* Section II.B.

188. H.R. REP. NO. 101-514, at 7 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6917 (quoting 135 CONG. REC. S6811-13 (daily ed. June 16, 1989) (statement of Rep. Markey)).

189. *Id.*

190. Gopnik, *supra* note 6.

191. *Id.*

192. See GRAW, *supra* note 68, at 95-100.

193. It is well known, of course, that Warhol was a commercial illustrator before he launched his art career. See 2 FOSTER ET AL., *supra* note 40, at 486.

194. This statement, however, calls for a caveat. I don't mean to imply that *all* contemporary 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 romantic beliefs, and, best of all, their death in near-obscurety—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-

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 future. In fact, the pendulum may just swing back again at some later date, in which art once again becomes lofty, and moral rights thus become a special subset of rights somehow justifiable of their own accord. For now, I propose that moral rights are probably no more or less than trademark law—that great engine of consumerism, beating ceaselessly on in the name of commerce, capitalism, and yes, even culture.

conceptualist sculptor Paul Thek, will often be “rediscovered” and launched into art world favor posthumously, when galleries and museums scramble to hold “long-overdue” retrospectives of their work. See *Paul Thek: Diver, a Retrospective*, WHITNEY MUSEUM OF AM. ART, <http://whitney.org/Exhibitions/PaulThek> (last visited Sept. 3, 2012) (noting that the Whitney’s 2010-11 show is Thek’s first retrospective in the United States); see also Peter Schjeldahl, *Out-There Man*, 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.”).