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Creative Destruction: Copyright's Fair Use Doctrine and the Moral Right of Integrity

Cathay Y. N. Smith*

Abstract

This Paper explores the role of copyright's fair use doctrine as a limit on the moral right of integrity. The moral right of integrity gives an author the right to prevent any distortion, modification, or mutilation of their work that prejudices their honor or reputation. Actions that have been found to violate an author's moral right of integrity include, for instance, altering a mural by painting clothing over nude figures, selling separated panels of a single work of art, and displaying sculptures with holiday ribbons. At the same time, copyright's fair use doctrine allows follow-on creators to transform original works by altering the original work with new expression, meaning, or message. While the federal Visual Artists Rights Act of 1990 (VARA) includes language explicitly making the right of integrity "[s]ubject to" copyright's fair use doctrine under § 107, there have been no decisions in the United States interpreting how the doctrine might apply to a moral right of integrity claim. The lack of

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case law interpreting how courts might balance an author's moral right of integrity with the public's rights to expression is particularly troubling in light of the ongoing discussion to expand moral rights in the United States. If moral rights are to be expanded, most interest- or industry-groups and commentators agree that those rights must be subject to fair use. However, without any guidance from courts, and with commentators and legislative history doubting the compatibility of fair use with the right of integrity, how can the United States expand moral rights with the assumption that fair use would provide the proper balance between authors' rights and the public's rights? This Paper illustrates different contexts in visual art where a follow-on creator distorts, mutilates, or modifies an author's work in order to make an artistic, social, or political statement, and how the doctrine of fair use might limit the moral right of integrity in those contexts. It argues that copyright's fair use doctrine can serve as a limitation on an author's moral right of integrity and illustrates how the four fair use factors in § 107 may be used to balance the author's right of integrity with the public's rights to find fair use where a follow-on creator modifies, distorts, or mutilates an author's work to transform the work and give the work new meaning.

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I. INTRODUCTION

The standoff appeared overnight.¹ A sculpture of a slight girl facing the famed Wall Street *Charging Bull* sculpture.² Her hands on her hips, her ponytail flowing in the breeze, her eyes staring fearlessly at the *Charging Bull*.³ The girl's face is slightly upturned in defiance or pride or, more practically, to fully face the *Charging Bull*, which is a few feet taller than the girl.⁴ The *Fearless Girl*, as she was called, immediately became a cause célèbre.⁵ Many embraced her and the message she displayed: of gender equality and “the power of women in leadership.”⁶ Others criticized her as being a publicity stunt for the financial firm that commissioned her creation and one that reinforced “corporate feminism” instead of true gender equality.⁷ One person who objected to the standoff between *Fearless Girl* and *Charging Bull* was the artist who created the *Charging Bull* sculpture almost thirty years ago, Arturo Di Modica.⁸ Through his attorney, Di Modica claimed that *Fearless Girl* violated his intellectual property rights, including his moral right of integrity in *Charging Bull*.⁹ He claimed that *Fearless Girl* changed the positive message of *Charging Bull* from one of optimism and showing “the strength and power of the American people”¹⁰ after the 1987 stock market crash, to a negative message connoting antifeminism and suppression of gender equality.¹¹ But

1. See Sandra E. Garcia, ‘*Fearless Girl*’ Statue Finds a New Home: At the New York Stock Exchange, N.Y. TIMES (Dec. 10, 2018), <https://www.nytimes.com/2018/12/10/nyregion/fearless-girl-statue-stock-exchange.html>.

2. See Cara Marsh Sheffler, *The ‘Fearless Girl’ Statue Sums Up What’s Wrong with Feminism Today*, GUARDIAN (Mar. 14, 2017), <https://www.theguardian.com/commentisfree/2017/mar/14/fearless-girl-statue-whats-wrong-feminism-today>.

3. See Garcia, *supra* note 1.

4. See Sarah Cascone, *From ‘Charging Bull’ to the Bull Market: ‘Fearless Girl’ Heads to the New York Stock Exchange*, ARTNET NEWS (Apr. 19, 2018), <https://news.artnet.com/art-world/fearless-girl-new-york-stock-exchange-1269851>.

5. See Garcia, *supra* note 1.

6. See Garcia, *supra* note 1.

7. Sheffler, *supra* note 2.

8. ‘*Charging Bull*’ Sculptor Says New York’s ‘*Fearless Girl*’ Statue Violates His Rights, GUARDIAN (Apr. 11, 2017), <https://www.theguardian.com/us-news/2017/apr/12/charging-bull-new-york-fearless-girl-statue-copyright-claim>.

9. *Id.*

10. Harrison Jacobs, *Millions of People from all over the World have Visited this New York Statue – Here’s Why*, BUSINESS INSIDER (Dec. 14, 2017), <https://www.businessinsider.com/what-is-wall-street-charging-bull-new-york-city-2017-12>.

11. James Barron, *Wounded by ‘Fearless Girl,’ Creator of ‘Charging Bull’ Wants Her to Move*,

what rights does an artist have to preserve the message in his art? This Paper examines the role of copyright's fair use doctrine¹² as a limit on an author's moral right of integrity.¹³

The moral right of integrity gives an author the right to prevent or object to any distortion, mutilation, modification, or derogatory action to an author's work that would prejudice the author's honor or reputation.¹⁴ Authors retain their moral rights in their works even if they no longer retain the physical copy of the work or the copyright to the work.¹⁵ Actions that violate an author's moral right of integrity outside of the United States include, for instance, using a film character for promotional purposes "contrary to the spirit of the [film],"¹⁶ "present[ing] a fictional work as a biographical work,"¹⁷ altering a mural by painting clothing on nude figures,¹⁸ separately selling panels of a single work of art,¹⁹ and tying and displaying holiday ribbons on sculptures.²⁰ In the United States, the only federal law that explicitly grants authors the moral right of integrity is the federal Visual Artists Rights Act of 1990 (VARA), which gives authors the right "to prevent the intentional distortion, mutilation, or other modification" of their single-copy or limited-edition

N.Y. TIMES (Apr. 12, 2017), https://www.nytimes.com/2017/04/12/nyregion/charging-bull-sculpture-wall-street-fearless-girl.html?_r=0.

12. See Copyright Act of 1976, 17 U.S.C. § 107 (2012).

13. See *id.* § 106A(a)(3)(A).

14. Berne Convention for the Protection of Literary and Artistic Works, art. 6bis(1), Sept. 9, 1886, 123 L.N.T.S. 233, revised at Paris July 24, 1971, 25 U.S.T. 1341, 1161 U.N.T.S. 3 [hereinafter Berne Convention] (entered into force in U.S. Mar. 1, 1989).

15. Edward J. Damich, *The Right of Personality: A Common-law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 4 (1988) (distinguishing moral rights from other property protections on the basis "that works of art are expressions of the creative personality of the author, and insofar as these works continue to embody the author's personality, acts done to them that impair his or her ability accurately to reflect the authors personality should be actionable").

16. Maree Sainsbury, *Parody, Satire, Honour and Reputation: The Interplay Between Economic and Moral Rights*, 18 AIPJ 149, 159 (2007) (discussing Cour d'appel [CA] [regional court of appeal], Paris, com., Sept. 8, 2004, No. 04/09673, where director and producer of *The Fifth Element* successfully sued an advertising company for using a character from the film in an advertisement for Vodafone Live).

17. *Id.* (citing Cour d'appel [CA] [regional court of appeal], Paris, com., May 29, 2002).

18. John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1038 n.56 (1976) (discussing Reichsgericht [RG] [court of last resort for civil and criminal matters] June 8, 1912, 79 ENTSCHIEDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN [RGZ] 397 (Ger.)).

19. *Id.* at 1023 (citing Cour d'appel [CA] [regional court of appeal], Paris, May 30. D. Jur 1962 570).

20. *Snow v. The Eaton Centre Ltd.* (1982), 70 C.P.R. (2d) 105 (Can. Ont. H.C.J.).

works of visual art²¹ that would prejudice their “honor or reputation.”²² Unlike most other nations’ moral rights legislation, VARA explicitly includes language making the right of integrity “[s]ubject to” copyright law’s § 107 fair use provision.²³ However, no court in the United States has decided a fair use defense to a moral rights claim, and a number of commentators have expressed doubt about the compatibility of fair use with moral rights.²⁴

This Paper argues that the moral right of integrity should be limited by fair use. Specifically, this Paper examines different contexts where follow-on creators distort, mutilate, or modify an author’s work to give the work new meaning or to express a political, social, or artistic message. Where the social benefit of these transformative secondary uses and the free expression of follow-on creators outweigh the harm to the author’s honor or reputation, fair use should excuse the follow-on creators from liability arising under the moral right of integrity.²⁵ In the United States, these contexts may extend to instances where a follow-on creator uses an author’s limited-edition work of visual art.²⁶ In limited instances, fair use may even extend to the distortion, mutilation, or modification of an author’s original work of visual art.²⁷

The purpose of this Paper is not to recommend a new defense to moral rights.²⁸ As noted above, the text of VARA already explicitly recognizes a fair use defense.²⁹ This Paper is also not setting out to fix fair use or to advo-

21. Copyright Act of 1976, 17 U.S.C. § 101 (2012) (“A ‘work of visual art’ is a . . . a painting, drawing, print, or sculpture, existing in a single copy [or] in a limited edition of 200 copies or fewer . . .”).

22. Visual Artists Rights Act of 1990, 17 U.S.C. § 106A(a)(3)(A) (2012).

23. *Id.* § 106A(a).

24. *See infra* Section II.B.

25. *See infra* Part V; *see also* *Blanch v. Koons*, 467 F.3d 244, 156–57 (2d Cir. 2006) (citing *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612–13 (2d Cir. 2006)) (finding that the second factor, “nature of the copyrighted work,” of the four-factor fair use determination applied with less force where one artist uses another artist’s work in a transformative manner to comment on her image’s social and aesthetic meaning rather than to exploit its creative virtues).

26. *See* Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 83–85, 122–23 (1996) (arguing that an artist’s work mutilating a hypothetical limited-edition Mona Lisa by adding a mustache to it could be protected by fair use as a parody).

27. *See, e.g.*, Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 281–82 (2009) (discussing an art critic who found that the mutilation of an original work had “become essential to the work”).

28. *See infra* Part II.

29. *See* Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2012).

cate for an expansion of moral rights, nor is it meant to critique courts' applications or misapplications of the fair use factors under § 107 in copyright infringement claims.³⁰ Instead, this Paper contemplates how the defense of fair use—as it is currently interpreted and applied in copyright infringement claims—should limit an author's moral right of integrity claim without having to restrict the scope of fair use to give the moral right of integrity meaning.³¹ While the analysis in this Paper will help clarify application of fair use to integrity claims and, hopefully, encourage litigants and courts to look more closely at fair use as a plausible defense in moral rights litigation, its purpose extends further.³² The analysis in this Paper will also help inform ongoing discussions on the expansion of moral rights in the United States and that expansion's potential implications on free expression.³³ As explained below, the U.S. Copyright Office recently undertook a study to explore the possible expansion of moral rights, and the creative industry raised First Amendment concerns in response to possible expansion of moral rights in the United States.³⁴ Indeed, if the United States were to expand the coverage of moral rights to include literary texts, musical works, or other mass-produced items like other civil- and common-law countries currently do, understanding fair use and how it balances authors' rights of integrity with follow-on creators' and the public's rights to expression is important to ensure that expression is not chilled.

Part II of this Paper offers a brief introduction to the moral right of integrity, its applications in visual arts cases in the United States under VARA, and the ongoing pressure to expand its scope and subject matter in the United States.³⁵ Part III discusses fair use and addresses arguments that fair use is incompatible with the moral right of integrity.³⁶ Part IV analyzes different instances that could violate the moral right of integrity, and how fair use would apply in each context.³⁷ To help illustrate the flexibility of fair use, these contexts include, for instance, where a defendant distorts, mutilates, or modifies

30. See *infra* Parts III–IV.

31. See *infra* Part IV.

32. See *infra* Parts IV–V.

33. See *infra* Section II.B.

34. See *infra* Section II.B; Study on the Moral Rights of Attribution and Integrity, 82 Fed. Reg. 7870 (Jan. 23, 2017) [hereinafter Moral Rights Study].

35. See *infra* Part II.

36. See *infra* Part III.

37. See *infra* Part IV.

the meaning of an author's work without physically altering the work;³⁸ where a defendant distorts, mutilates, or modifies an author's work by physically—but temporarily or impermanently—altering the work;³⁹ and where a defendant permanently distorts, mutilates, or modifies the physical copy of an author's work in order to make an artistic, social, or political statement.⁴⁰ This Paper concludes that recognizing a fair use limitation to right of integrity claims is important to ensure free expression is not stifled under the pretext of protecting an author's honor or reputation.⁴¹

II. THE MORAL RIGHT OF INTEGRITY

Moral rights protect an author's personality, honor, and soul in their work.⁴² Moral rights are often described as non-economic rights, which are independent from the copyright or property right in a work; in other words, an author retains their moral rights to their work even after transferring the work or copyright in the work to another person.⁴³ Moral rights originated in nineteenth-century Europe, but have since been adopted by many civil- and common-law countries to protect authors' rights of integrity and attribution to their expressive works.⁴⁴ Moral rights legislation typically protects the moral rights

38. See *infra* Section IV.A.

39. See *infra* Section IV.B.

40. See *infra* Section IV.C.

41. See *infra* Part V.

42. See Sonya G. Bonneau, *Honor and Destruction: The Conflicted Object in Moral Rights Law*, 87 ST. JOHN'S L. REV. 47, 49 (2013).

43. See *id.* at 52 (describing moral rights theory and stating, "moral rights are non-economic, inalienable rights that transcend the economic formalities of sale"); Berne Convention, *supra* note 14, 25 U.S.T. 1341, 1161 U.N.T.S. 3 ("Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation[,], or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.").

44. See, e.g., Copyright, Designs and Patents Act 1988, c. 4, §§ 80(1), 80(2)(b) (Eng.) ("The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right . . . not to have his work subjected to derogatory treatment. . . . [T]he treatment of a work is derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director"); Copyright Act, R.S.C., 1985, c. C-42, ss. 14.1(1), 28.2 (Can.) ("The author of a work has . . . the right to the integrity of the work "The author's . . . right to the integrity of a work . . . is infringed only if the work . . . is, to the prejudice of its author's . . . honour or reputation, (a) distorted, mutilated or otherwise modified"); *Copyright Act 1968* (Cth) pt IX div 4 s 195A1-AK (Austl.) ("The author of a work has a right of integrity of authorship in respect of the work. The author's right is the right not to have the work subjected to derogatory treatment. . . . [D]erogatory treatment . . . means: (a) the doing, in relation to the work, of anything that

of authors of literary, dramatic, artistic, musical, and audio-visual works.⁴⁵ These moral rights generally grant authors control over their works by giving them the right of attribution, the right of disclosure and withdrawal, and the right of integrity.⁴⁶ The right of attribution grants authors the right to claim authorship of their work and the right to publish their work anonymously or pseudonymously.⁴⁷ The right of disclosure and withdrawal grants authors the sole discretion to decide when their work is released to the public and whether to remove their work from the public.⁴⁸ Finally, the right of integrity gives an author the right to prevent the alteration, distortion, or mutilation of their work, even after the author transfers or sells the work or copyright to the work.⁴⁹ This Paper focuses on the moral right of integrity.

The moral right of integrity is concerned with preserving the dignity and personhood of the author.⁵⁰ Commentators tend to justify the moral right of integrity by presenting work as an expression of an author's personality or an "expression of his innermost being,"⁵¹ because "an artist in the process of creation injects his spirit into the work."⁵² Therefore, when another person distorts, mutilates, or misrepresents the work, they "mistreat[] an expression of the artist's personality, affects his artistic identity, personality, and honor."⁵³ As Henry Hansmann and Marina Santilli explained, the physical alteration of an artist's work, or the prejudicial display of their work, can cause "personal anguish [to] the artist," because "an artist may identify with his works as with

results in a material distortion of, the mutilation of, or a material alteration to, the work that is prejudicial to the author's honour or reputation . . . [I]n relation to an artistic work, [derogatory treatment] means . . . an exhibition in public of the work that is prejudicial to the author's honour or reputation because of the manner or place in which the exhibition occurs . . .").

45. See *supra* note 44.

46. Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 356 (2006). Some countries further recognize an author's moral right to have access to the original work, to compel the completion of a work, and to prevent their work from being associated with undesirable products or institutions. See U.S. COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 14 (2019). These are much more limited and are sometimes considered an "extension" of moral rights. *Id.* at 14 n. 51.

47. Rigamonti, *supra* note 46, at 364.

48. *Id.* at 362.

49. See *id.* at 364.

50. See Yonover, *supra* note 26, at 112.

51. JOHN MERRYMAN ET AL., LAW, ETHICS, AND THE VISUAL ARTS 423 (5th ed. 2007) [hereinafter MERRYMAN ET AL.].

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

53. Merryman, *supra* note 18, at 1027.

his children: prize them for their present character and not want that character changed. Or he may be trying to communicate something to others, whether they want to receive the message or not.”⁵⁴ Roberta Kwall explains that the right of integrity functions “to safeguard the author’s meaning and message, and thus [is] designed to increase an author’s ability to safeguard the integrity of her texts.”⁵⁵ Some commentators believe that “mistreat[ing] the work of art is to mistreat the artist”; they view the moral right of integrity as a right of personhood for the artist.⁵⁶ Others see moral rights as a way to preserve significant works for the public, finding “the moral right of the artist . . . [as] a method of providing for private enforcement of this public interest.”⁵⁷ More view moral rights as an anti-defamation law to protect artists’ reputation and honor; as Joseph Sax explained, “‘One of the primary misconceptions regarding the French concept of *droit moral* is the assumption that it seeks to protect the public interest by preserving artworks for posterity.’ It does not.”⁵⁸

There are various ways in which an author’s right to integrity may be violated. For instance, the French artist Bernard Buffet painted a composition on a refrigerator, covering all six panels of the refrigerator with art, including the front, top, and sides of the refrigerator.⁵⁹ The art consisted of a plate of food, a fish, a pedestal tray, and a vase with foliage in Buffet’s signature expressionist style.⁶⁰ A Paris gallery exhibited Buffet’s refrigerator and other refrigerators decorated by famous artists in its *Nobility of Every Day Objects* exhibition in 1958.⁶¹ The artist considered the six panels to be one single work

54. Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 102 (1997).

55. ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 6 (1999).

56. MERRYMAN ET AL., *supra* note 51, at 423.

57. Merryman, *supra* note 18, at 1041.

58. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* 22 (1999); *see also* Cathay Y. N. Smith, *Community Rights to Public Art*, 90 ST. JOHN’S L. REV. 369, 407 (2016) (“Moral rights—or *droit moral*—protect an artist’s personality, integrity, and reputation in her art. Moral rights are rights that belong to the artist, so they do not protect the public’s interest in the art.”).

59. Merryman, *supra* note 18, at 1023.

60. John Henry Merryman, *The Refrigerator of Bernard Buffet*, 12 STAN. L. 5, 5 (1977), https://www-cdn.law.stanford.edu/wp-content/uploads/2015/07/Stanford_Lawyer_issue-19_1977-SPRING-VOL12-NO1_front.pdf (picturing and describing a painting of a refrigerator by Bernard Buffet).

61. *Paris ‘Frige’ is Worth a Fortune*, ALAMY, <https://www.alamy.com/jun-26-1958-paris-frige-is-worth-a-fortune-a-paris-gallery-is-now-image69352322.html> (showing image of Bernard Buffet’s refrigerator at a Paris gallery in “Nobility of Every Day Objects” in 1958).

of art and signed only one of the panels before auctioning the refrigerator at a charity auction.⁶² Six months after the auction, one of the painted panels appeared in the auction catalogue for another sale.⁶³ The separated panel, which was listed for sale independently from the rest of the work, was titled *Still Life with Fruits* by Bernard Buffet and described as “a painting on metal.”⁶⁴ After discovering the impending sale of the work, Buffet brought a right of integrity action against the owner of the refrigerator to prevent him from separately selling the single panel.⁶⁵ Buffet argued that to separate one panel of the work, and to treat it as a separate and independent work, distorted and misrepresented his artistic intention and violated his right to integrity in his work.⁶⁶ The French court agreed.⁶⁷ The court allowed the owner of the refrigerator to keep and enjoy the work or transfer the entire composition, but the court enjoined the owner from separating the work and disposing of it piece-by-piece.⁶⁸

In Germany, the owner of a house commissioned an artist to create a mural on his wall.⁶⁹ The mural included nude figures.⁷⁰ The owner of the house was offended by the nudity and hired another artist to paint clothing onto the nudes.⁷¹ The original artist complained that this violated his moral right of integrity in his art and sued the owner.⁷² The German court agreed with the artist.⁷³ Another case in Germany involved a defendant who added customized frames to artworks, which extended the patterns of the artworks onto the frames.⁷⁴ The court in that case held that this violated the artist’s right of integrity.⁷⁵ In Sweden, the Stockholm District Court found an artist’s moral

62. Merryman, *supra* note 18, at 1023.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 1027.

67. *Id.* at 1023.

68. *Id.* at 1023 n.1, 1027.

69. *Id.* at 1038 n.56 (discussing Reichsgericht [RG] [court of last resort for civil and criminal matters] June 8, 1912, 79 ENTSCHIEDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN [RGZ] 397 (Ger.)).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. Rigamonti, *supra* note 46, at 365–66 (discussing Bundesgerichtshof [BGH] [Federal Court of Justice], 150 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 32 (F.R.G.)).

75. *Id.* at 366.

right of integrity to be violated when his work was exhibited next to highly pornographic photographs.⁷⁶ This placement, the court found, modified the context of the author's work and "prejudiced the author's reputation or individuality."⁷⁷ In France, a court held that a defendant's unauthorized use of Jean Lurçat's, a French tapestry artist, works for advertising violated his moral right of integrity.⁷⁸

In Belgium, Johan Deckmyn, from the Flemish nationalist political party Vlaams Belang, created copies of a calendar to hand out to party supporters.⁷⁹ The cover of the calendar was based on the cover of the *Spike and Suzy* comic "De Wilde Weldoener," but with a xenophobic message.⁸⁰ Specifically, Deckmyn replaced the main character with an image of the mayor of Ghent throwing money into a crowd and replaced the crowd in the background with characters wearing headscarves collecting the money.⁸¹ The heirs of Willy Vandersteen, the author of *Spike and Suzy*, sued Deckmyn for copyright infringement and violation of the moral right of integrity.⁸² The Civil Court of the Court of First Instance in Brussels enjoined Deckmyn from distributing the infringing calendars.⁸³

In Canada, the artist of *Flight Stop*—a hanging sculpture consisting of sixty flying geese—sued the owner of the work for displaying the work with

76. Jonas Brown-Pedersen, *The Inadequacy of UK Moral Rights Protection: A Comparative Study on the Waivability of Rights and Recontextualisation of Works in Copyright and Droit D'auteurs Systems*, 3 LSE L. REV. 115, 127 (2018).

77. *Id.*

78. Rigamonti, *supra* note 46, at 366; Cour d'appel [CA] [regional court of appeal] Paris, 4e ch., June 6, 1978, 99. RIDA 1979, 165 (Fr.).

79. Magdalena Jozwiak, *No Laughing Matter: The Right to Parody in EU Copyright Law* (Case Deckmyn v. Vandersteen, C-201/13,) EUROPEAN L. BLOG (Sept. 25, 2014), <http://europeanlawblog.eu/2014/09/25/no-laughing-matter-the-right-to-parody-in-eu-copyright-law-case-deckmyn-v-vandersteen-c-20113/>.

80. *Id.*

81. *Id.*; Alain Strowel, 'Parody' Becomes a Concept of EU Law: Something to Applaud or to Fear?, IPDIGIT (Nov. 2, 2014), <http://www.ipdigit.eu/2014/11/parody-becomes-a-concept-of-eu-law-something-to-applaud-or-to-fear/>.

82. Jozwiak, *supra* note 79.

83. *Id.* The Court of Appeal in Brussels referred questions of interpreting the defense of parody to the European Court of Justice. *Id.* In September 2014, the European Court of Justice did not explicitly address whether the facts of this case would fall under a parody defense, but did caution that the application of the parody defense "must strike a fair balance between, on the one hand, the interests and rights of [authors and artists] . . . and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody." C-201/13, *Deckmyn v. Vandersteen*, 2014, E.C.J. 27, http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=157281&occ=first&dir=&cid=198445.

red holiday ribbons around the geese's necks.⁸⁴ The artist, Michael Snow, felt that the addition of the ribbons "jarred the harmony of his naturalistic composition, altered its basic character and purpose, and ultimately affected his artistic reputation."⁸⁵ In addition to the artist's own statement that the ribbons prejudiced his honor and reputation, experts testified that the red ribbons on Snow's sculpture made "a mockery of its intended purpose" and transformed the work "into a 'kitschy' sentimental display, resembling a Christmas bauble."⁸⁶ Snow sued Eaton Centre, and the Canadian court ordered the Centre to remove the red ribbons.⁸⁷

These cases represent the potential strength of the moral right of integrity to authors and visual artists, allowing authors and artists to preserve the meaning and message in their works.⁸⁸ In its most expansive form, the moral right of integrity allows an author, or their heirs, to not only reject actual physical modifications of the author's work, but also contextual modifications of the author's work that places the work into a context different from what the author intended—even if the modification leaves the work physically untouched and intact.⁸⁹ In the United States, however, authors' moral rights of integrity are limited to those granted under VARA.⁹⁰

84. Sophie Eastwood, *Snow v. The Eaton Centre Ltd.* (1982) 70 C.P.R. (2d) 105, UNIV. CAMBRIDGE: CTR. FOR INTELL. PROP. & INFO. L. (July 2015), <https://www.cipil.law.cam.ac.uk/virtual-museum/snow-v-eaton-centre-ltd-1982-70-cpr-2d-105>.

85. *Id.*

86. *Id.*

87. *Id.*; *Snow v. The Eaton Centre Ltd.* (1982) 70 C.P.R. (2d) 105 (Can. Ont. H.C.J.).

88. *See supra* notes 59–87 and accompanying text.

89. Rigamonti, *supra* note 46, at 365 ("[T]he general rule is that any and all substantive modifications are prohibited. This prohibition . . . applies to contextual modifications that leave the substance of the work intact, but that change the appearance or perception of the work by putting it into a context that differs from the one originally intended or envisioned by the author.").

90. *See supra* notes 21–23 and accompanying text. Certain states, including California and New York, have legislated state moral rights. *See* California Art Preservation Act, CAL. CIV. CODE § 987 (West 2012); Artists' Authorship Rights Act, N.Y. ARTS & CULT. AFF. § 14.03 (McKinney 2012). For instance, the California Art Preservation Act prevents the public display of works of fine art that have been physically defaced, mutilated, altered, or destroyed. *See* 2 NIMMER ON COPYRIGHT § 8.07; CIV. CODE § 987. New York's Artists' Authorship Rights Act prohibits the unauthorized public display, publication or reproduction of a work of fine art "in an altered, defaced, mutilated or modified form." *See* 2 NIMMER ON COPYRIGHT § 8.08. This Article will not address state law rights.

A. *The Moral Right of Integrity Under VARA*

In the United States, VARA is the only federal law explicitly protecting the moral rights of authors.⁹¹ Authors' rights under VARA are narrower than its counterparts in other common- or civil-law jurisdictions such as Europe, Australia, and Canada.⁹² For one, VARA only grants to authors the right of attribution, the right of integrity, and the right to prevent the destruction of works of recognized stature.⁹³ VARA only protects the moral rights of authors that create one type of work: works of visual art.⁹⁴ This excludes other works of authorship, such as literary, dramatic, musical, and audio-visual works.⁹⁵ VARA also limits its protection to single copies or limited-edition copies of visual art works; specifically, it defines "work[s] of visual art" as paintings, drawings, prints, sculptures, or still photographic images produced for exhibition purposes, "existing in a single copy, in a limited edition of 200 copies

91. See U.S. COPYRIGHT OFFICE, *supra* note 46, at 59–60. Other federal laws that could protect moral rights of authors include § 43(a) of the Lanham Act, which had been asserted against defendants who failed to "properly credit an author or edit[ed] an author's work without permission 'into a form that departs substantially from the original work.'" *Id.* at 40 (footnote omitted). These potential claims under § 43(a) were significantly narrowed, but not completely foreclosed, by the U.S. Supreme Court's decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). See generally U.S. COPYRIGHT OFFICE, *supra* note 46, at 40–58. Section 1202 of the Digital Millennium Copyright Act also provides some moral rights protection by prohibiting the removal, alteration, or falsification of certain copyright management information, such as the author. 17 U.S.C. § 1202 (2012). Finally, copyright's derivative works rights also grant authors the right to prevent the unauthorized modification of their copyrighted works. *Id.* § 106(2).

92. See *infra* notes 235–38; see also U.S. COPYRIGHTS OFFICE, *supra* note 46, at 11–12.

93. 17 U.S.C. § 106A. Courts sometimes consider the right to prevent the destruction of works of recognized stature as a standalone right separate from the right of integrity. See *Carter v. Helmsley Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) ("In some jurisdictions the integrity right also protects artwork from destruction." (emphasis added)) Others consider it an add-on right to the right of integrity. See *id.* This Paper separates the right to prevent destruction of a work of recognized stature from the right of integrity. See *infra* Part IV. Destruction is not the same as distortion, mutilation, modification, because the total destruction of a work does not prejudice the honor or reputation of an artist. See *Carter*, 71 F.3d at 81–82 ("[D]estruction is seen as less harmful than the continued display of deformed or mutilated work that misrepresents the artist and destruction may proceed."). Indeed, once the work is destroyed, it is no longer on public display in a way that may be contrary to the author's intent, and the distortion, mutilation, or modification cannot be attributed to the author. See *supra* note 54 and accompanying text (explaining that the physical alteration or prejudicial display of an artist's work can cause them anguish). While the destruction of a work may disadvantage the artist because their work no longer exists, it does not cause the artist to be viewed in a different or negative light. See *Carter*, 71 F.3d at 81–82.

94. 17 U.S.C. § 106A(a).

95. See U.S. COPYRIGHT OFFICE, *supra* note 46, at 61–62.

or fewer that are signed and consecutively numbered.”⁹⁶

Once an author’s work qualifies as a work of visual art under VARA’s moral right of integrity, that author has the right “to prevent any intentional distortion, mutilation, or other modification” of their work that would prejudice their “honor or reputation.”⁹⁷ In other words, the moral right of integrity that VARA grants to authors is subject to certain exceptions.⁹⁸ For one, authors can affirmatively waive their moral right of integrity.⁹⁹ Any modifications of the work due to “the passage of time or the inherent nature of the materials” or as a “result of conservation . . . of the work” are also an exception to an artist’s right of integrity.¹⁰⁰ Finally, under what is commonly referred to as the public presentation exception, VARA excuses from a violation of the right of integrity any modification of the work that “is the result of . . . the public presentation, including lighting and placement, of the work.”¹⁰¹

The most common cases to arise under VARA are violations of an artist’s right to prevent the “destruction of a work of recognized stature.”¹⁰² In those cases, authors have had varying degrees of success with their assertion that their moral rights were violated by the destruction of their work of recognized stature.¹⁰³ For one, many works of visual art are excluded from VARA’s definition of a work of visual art.¹⁰⁴ For instance, works of applied art are excluded from VARA’s definition of visual art.¹⁰⁵ Therefore, a school bus transformed into a mobile replica of a sixteenth-century Spanish galleon was excluded from VARA’s protection because it was considered applied art and not a “work of visual art.”¹⁰⁶ Works made for hire are also excluded from VARA’s protection, such as a large “walk-through sculpture” created and installed in the lobby of a mixed-use building by employees at the direction of

96. 17 U.S.C. § 101.

97. *Id.* § 106A(a)(3)(A).

98. *Id.*

99. 17 U.S.C. § 106A(a)(3) (“[T]he author of a work of visual art . . . shall have the right to prevent any intentional distortion, mutilation, or other modification of the work”); *id.* § 106A(e) (“The rights conferred by subsection (a) may . . . be waived”).

100. *Id.* § 106A(c)(1)–(2).

101. *Id.* § 106A(c)(2).

102. *See id.* § 106A(a)(3)(B).

103. *See infra* notes 104–09 and accompanying text.

104. *See* 17 U.S.C. § 101 (defining “work of visual art”).

105. *Id.*

106. *Cheffins v. Stewart*, 825 F.3d 588, 595 (9th Cir. 2016).

their employer.¹⁰⁷ One court even excluded site-specific art from VARA's protection.¹⁰⁸ This meant that, because a group of sculptures and stoneworks were integrated into their surroundings, they were site-specific art that were not protected by VARA.¹⁰⁹ On the other hand, some artists have successfully asserted a violation of their moral right to prevent the destruction of their works of recognized stature.¹¹⁰ For instance, just recently, the 5Pointz street artists succeeded in their VARA claim against a real estate developer who whitewashed and destroyed their art on the walls of the 5Pointz warehouse.¹¹¹ Similarly, an artist was successful in his VARA claim against the City of Indianapolis when the City destroyed the artist's sculpture without providing the artist with prior notice.¹¹²

There have been fewer published decisions under the right of integrity in the United States. In *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel*, the artist Christoph Büchel asserted a claim under VARA for violation of his right of integrity against the Massachusetts Museum of Contemporary Art (MASS MoCA) arising out of a failed partnership between the parties.¹¹³ The artist and MASS MoCA entered into an agreement to create and display Büchel's sculptural work, *Training Ground for Democracy*.¹¹⁴ MASS MoCA funded the art, it went over budget, and then Büchel refused to continue the work because of artistic differences between him and the museum.¹¹⁵ According to the artist, MASS MoCA continued to work on Büchel's project without his approval.¹¹⁶ Then, instead of destroying the work, MASS MoCA covered it under a tarp and invited audiences to walk past the covered work to attend its *Made at MASS MoCA* exhibit.¹¹⁷ Büchel sued MASS

107. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 80, 88 (2d Cir. 1995).

108. *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 143 (1st Cir. 2006) (rejecting the argument that removal of the sculptures and stoneworks are excepted under the public presentation and finding, instead, that site specific art is not covered under VARA).

109. *Id.*

110. *See infra* notes 111–12 and accompanying text.

111. *Cohen v. G & M Realty L.P.*, 320 F. Supp. 3d 421, 427–28 (E.D.N.Y. 2018).

112. *Martin v. City of Indianapolis*, 4 F. Supp. 2d 808, 811 (S.D. Ind. 1998).

113. *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 41–42 (1st Cir. 2010).

114. *Id.* at 41.

115. *Id.* at 43–45.

116. *Id.* at 45.

117. *Id.* at 46.

MoCA for violating his right of integrity for continuing to work on his sculptural work without his approval, for displaying his work in an incomplete state, and for displaying his sculptural work covered with a tarp.¹¹⁸ The court disagreed that displaying Büchel's incomplete work and his work covered by a tarp violated his right of integrity, even though the court surmised that MASS MoCA's intent was to criticize Büchel.¹¹⁹ The court, however, denied MASS MoCA's motion for summary judgment on the issue of whether MASS MoCA violated Büchel's right of integrity by modifying *Training Ground* over Büchel's objections in a manner that harmed his honor or reputation.¹²⁰

Many right of integrity cases never get decided on their merits when they are dismissed on the ground that the author's work does not meet VARA's narrow definition of a work of visual art.¹²¹ In *Lilley v. Stout*, for instance, photographer Gary Lilley asserted a claim under VARA for violation of his right of integrity against Renee Stout for Stout's use of Lilley's photos in her art.¹²² Lilley took several photos of a red room for Stout to use "as studies for paintings [Stout] planned to create."¹²³ Stout used six of Lilley's photographs to create her work titled *Red Room at Five*.¹²⁴ The work consisted of the six photographs "selected and arranged by [Stout] and placed in a binder with a red cover and illustration."¹²⁵ After the personal relationship between Lilley and Stout soured, Lilley sued Stout for violating his moral rights of integrity and attribution.¹²⁶ Without ruling on whether Stout's use of Lilley's photographs in Stout's art violated Lilley's moral rights in his photos, the court found that the photographs were not covered under VARA.¹²⁷ Specifically, because Lilley's photographs were not produced for exhibition purposes, they did not qualify under VARA's definition of a work of visual art.¹²⁸

Similarly, in *Kelley v. Chicago Park District*, artist Chapman Kelley lost

118. *Id.*

119. *Id.* at 62.

120. *Id.* at 65.

121. *See id.* at 53 (acknowledging that courts do not discuss the rights that VARA guarantees because the cases are usually resolved on "threshold questions" like "whether the artist's work is a work of visual art").

122. 384 F. Supp. 2d 83, 84–85 (D.D.C. 2005).

123. *Id.* at 84 (alteration in original).

124. *Id.* at 85.

125. *Id.* (alteration in original).

126. *Id.*

127. *Id.* at 89.

128. *Id.* at 88.

his right of integrity action against the Chicago Park District because his *Wildflower Works* did not qualify as a work of visual art.¹²⁹ Kelley was nationally recognized for his paintings of landscapes and flowers.¹³⁰ He designed a living art piece for the Chicago Park District's Grant Park titled *Wildflower Works*, which included "48 and 60 species of self-sustaining wildflowers native to the region[,] . . . selected for various aesthetic, environmental, and cultural reasons."¹³¹ "Kelley designed the initial placement of the wildflowers so they would blossom sequentially, changing colors throughout the growing season and increasing in brightness towards the center of each ellipse."¹³² Twenty years later, in order to make room for the development of a new Millennium Park, the Chicago Park District made changes to Grant Park and reconfigured *Wildflower Works* by decreasing its size by more than half and changing the shape of the flower beds from elliptical to rectangle.¹³³ Kelley sued the Park District for violating his moral right of integrity under VARA because the Park District's reconfiguration of *Wildflower Works* was "an intentional 'distortion, mutilation, or other modification' of his work and was 'prejudicial to his . . . honor or reputation.'"¹³⁴ Without addressing whether the Park District's reconfiguration violated Kelley's right of integrity, or deciding whether Kelley's *Wildflower Works* constituted a "painting or sculpture" covered by VARA, the court held that *Wildflower Works* was not a "work of visual art."¹³⁵ Specifically, works that are "not subject to copyright protection" are excluded from the definition of a work of visual art, and the court found *Wildflower Works* to not be subject to copyright protection because it was neither authored (by a human) nor fixed in a tangible medium.¹³⁶

B. *The Pressure to Expand the Moral Right of Integrity in the United States*

While VARA currently only applies to single-copy or limited-edition works of visual art and explicitly excludes certain expressive works from its

129. 635 F.3d 290, 306 (7th Cir. 2011).

130. *Id.* at 291.

131. *Id.* at 293.

132. *Id.* at 293.

133. *Id.* at 294–95.

134. *Id.* at 295.

135. *Id.* at 302–06.

136. *Id.* at 298–99, 304–06. Under the definition of a "work of visual art," works that are not subject to copyright protection are excluded. *Id.*

subject matter, there has been consistent pressure for the United States to consider expanding and broadening its protection of moral rights of authors.¹³⁷ Most recently, in response to the Register of Copyrights', Maria Pallante, recommendation, the Ranking Member of the House Judiciary Committee requested the U.S. Copyright Office to undertake a public study of moral rights to determine whether current laws are sufficient to protect the moral rights of creators.¹³⁸ In January 2017, the U.S. Copyright Office commenced a formal study on moral rights, and sought public comment in a notice of inquiry to assess U.S. law's recognition and protection of the moral rights of integrity and attribution for authors.¹³⁹ In its notice of inquiry, the U.S. Copyright Office sought comment from the public on whether U.S. copyright law should consider additional moral rights protection and whether VARA has been effective in promoting and protecting the moral rights of authors of visual works.¹⁴⁰ The U.S. Copyright Office further sought input from the public on whether "stronger protections for . . . the right of integrity implicate the First Amendment," and "[i]f so, how should they be reconciled."¹⁴¹

In response, many interested individuals and interest- and industry-groups filed comments expressing concerns with an expanded moral rights and its effect on the United State's long standing recognition of a strong right to free expression.¹⁴² For instance, the American Association of Law Libraries expressed the concern that expanding moral rights in the United States could undermine fair use: "Many uses favored by the fair use doctrine, such as satire and parody, would be undermined if moral rights protections . . . prevented uses the author regards as derogatory."¹⁴³ Similarly the Association of American Publishers (AAP) expressed concern with how an author's right of integ-

137. See, e.g., Symposium, *AUTHORS, ATTRIBUTION, and INTEGRITY: Examining Moral Rights in the United States*, 8 GEO. MASON J. INT'L COM. L. 1, 2 (2016); KWALL, *supra* note 55, at 147–65.

138. Moral Rights Study, *supra* note 34, at 7871. The U.S. Copyright Office published its final report in April 2019 that concluded "that there is no need for the creation of a blanket moral rights statute at this time." U.S. COPYRIGHT OFFICE, *supra* note 46.

139. Moral Rights Study, *supra* note 34, at 7875.

140. *Id.*

141. *Id.*

142. See *infra* notes 143–47; see also U.S. COPYRIGHT OFFICE, *supra* note 46, at 9.

143. Letter from Emily Feltren, Am. Ass. of L. Libr, to Karyn Temple Clagget, Acting Register of Copyrights, U.S. Copyright Office (Mar. 29, 2017) (on file with regulations.gov), <https://www.regulations.gov/document?D=COLC-2017-0003-0021>.

rity would interfere with long-standing fair use and First Amendment precedent.¹⁴⁴ Citing the Eleventh Circuit case *SunTrust Bank v. Houghton Mifflin Co.* as an example, the AAP considered whether Alice Randall's parody *The Wind Done Gone*, which criticized Margaret Mitchell's classic *Gone With the Wind*'s "romantic, idealized portrait of the antebellum South during and after Civil War," would be excused under fair use had Mitchell's estate brought a right of integrity claim against Randall.¹⁴⁵ Finally, the Authors Alliance stressed the importance of recognizing a statutory recognition of fair use to a right of integrity.¹⁴⁶ Specifically,

If Congress granted . . . integrity rights to authors, this would implicate First Amendment rights, interests, and values unless the . . . integrity rights were carefully cabined through limitations and exceptions. Among the limitations and exceptions that could mitigate or avoid conflict with [the] First Amendment . . . would be a statutory recognition of fair use as a limitation on the rights, as currently recognized in VARA. A follow-on creator who parodied a well-known popular song, such as the 2 Live Crew parody of Roy Orbison's *Pretty Woman*, should, for example, be able to avoid liability for violating . . . integrity rights by raising a fair use defense. Critically, . . . integrity rights should not constrain the ability of others to speak *about* an author or a work.¹⁴⁷

Some commenters believe that it would be easy to reconcile the First Amendment and right of integrity under fair use.¹⁴⁸ As the American Society of Journalists and Authors stated,

Thousands, perhaps hundreds of thousands of times, U.S. courts have reconciled the First Amendment and challenges to the assignment of

144. Letter from Allan Robert Adler, Ass. of Am. Publishers, to Karyn Temple Clagett, Acting Register of Copyrights, U.S. Copyrights Office (Mar. 30, 2017) (on file with regulations.gov), <https://www.regulations.gov/document?D=COLC-2017-0003-0032>.

145. *Id.* at 8–9.

146. Letter from Pamela Samuelson, President, Brianna Schofield, Executive Director, Authors Alliance, to Karyn Temple Clagett, Acting Register of Copyrights and Director 5 (May 30, 2017) (on file with regulations.gov), <https://www.regulations.gov/document?D=COLC-2017-0003-0028>.

147. *Id.* (emphasis in original) (footnote omitted).

148. See *infra* notes 149–51 and accompanying text; see also U.S. COPYRIGHTS OFFICE, *supra* note 46, at 9.

economic rights and thorny questions of ‘fair use.’ . . .

We have no reason to anticipate that our courts would have any difficulty integrating protections for the moral rights of authors with the First Amendment.¹⁴⁹

Similarly, the Kernochan Center for Law, Media and the Arts expressed confidence that “concerns about First Amendment rights” relating to an expansion of authors’ right of integrity “can be addressed by the established fair use doctrine.”¹⁵⁰ Specifically, the Kernochan Center stated in its reply comments:

[T]he right of integrity is not inherently in tension with free expression. . . . For example, if altering a work is found ‘fair’ because the change gives the work ‘new meaning or message,’ as the Second Circuit found in some art appropriation cases, the first author’s ‘honor or reputation’ remain unscathed precisely because the point is that the new message is *not* the first author’s message. To the extent the new message casts the original message in an unflattering light, that consequence would be no more actionable than would be the fallout from an unkind book review.¹⁵¹

Others, such as the Electronic Frontier Foundation (EFF), expressed uncertainty over whether and how fair use could limit the moral right of integrity.¹⁵² As EFF stated, “The integrity claim in particular contemplates an inherently transformative use that is unlikely to usurp the market for the original; most such uses are likely fair. Creating a new right could cause

149. Letter from Sherry Beck Paprocki, President, Salley Shannon, past President and Advocacy Chair, American Society of Journalists and Authors, to U.S. Copyright Office 5 (Mar. 30, 2017) (on file with regulations.gov), <https://www.regulations.gov/document?D=COLC-2017-0003-0040>.

150. Letter from June M. Beck, Executive Director, Jance C. Ginsburg, Faculty Director, Phillippa S. Leonard, Deputy Director, Kernochan Ctr. for Law., Media and the Arts Columbia Law Sch., to U.S. Copyright Office 9 (Mar. 31, 2017) (on file with regulations.gov), <https://www.regulations.gov/document?D=COLC-2017-0003-0042>.

151. Letter from June M. Beck, Executive Director, Jance C. Ginsburg, Faculty Director, Phillippa S. Leonard, Deputy Director, Kernochan Ctr. for Law., Media and the Arts Columbia Law Sch., to U.S. Copyright Office 11 (May 16, 2017) (on file with regulations.gov), <https://www.regulations.gov/document?D=COLC-2017-0003-0054> (footnote omitted).

152. Letter from Kit Walsh & Mitch Stoltz, Electronic Frontier Foundation, to U.S. Copyright Office (Mar. 30, 2017) (on file with regulations.gov), <https://www.regulations.gov/document?D=COLC-2017-0003-0035>.

courts to restrict the scope of fair use to give the integrity right meaning.”¹⁵³ The Motion Picture Association of America expressed similar concerns about the moral right of integrity’s potential to chill expression.¹⁵⁴ Specifically, it stressed:

[I]t is far from clear how . . . a [fair use] defense would operate in practice. Do proponents mean that if a use of the work itself is fair under traditional copyright fair use analysis, then there is also a complete defense to a moral rights claim? . . . Would the analysis be conducted using the familiar four factors set forth in § 107? How would they even apply to a potential moral rights violation? . . . The vast degree of uncertainty surrounding these questions risks chilling speech.¹⁵⁵

Wendy Gordon warned:

[T]he . . . expanded right of ‘integrity’ poses [a danger] to the fair use doctrine and the liberty it provides for criticism and parody. The “integrity” right aims to preserve the feelings of an artist, but . . . those feelings—the distress at seeing one’s work disparaged and altered in a way that emphasizes its potential flaws—is *not something that copyright law is permitted to take into consideration*.¹⁵⁶

Many of these concerns raised by interest groups regarding expansion of moral rights were focused on the potential for moral rights expansion to implicate the First Amendment by chilling expression and discouraging creation

153. *Id.* at 3.

154. Letter from Benjamin S. Scheffner, Senior Vice President & Associate General Counsel, Motion Picture Association of America, Inc., to U.S. Copyright Office (May 15, 2017) (on file with regulations.gov), <https://www.regulations.gov/document?D=COLC-2017-0003-0056>.

155. *Id.* at 9.

156. Letter from Wendy J. Gordon, to U.S. Copyright Office 2–3 (Mar. 31, 2017) (on file with regulations.gov), <https://www.regulations.gov/document?D=COLC-2017-0003-0043>. Gordon continued on to cite *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994):

This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectable derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.

of secondary or follow-on works.¹⁵⁷ Many of those comments focused on the need for any expanded moral rights to be limited by the fair use doctrine, similar to VARA.¹⁵⁸ Some even point to VARA's explicit statutory recognition of fair use as guidance on the limitation that an expanded moral rights statute should include. Others expressed doubt that fair use could be compatible with the moral right of integrity. Even commenters that were not concerned with an expanded right of integrity's implications on expression relied on the fact that courts, through the fair use doctrine, could balance an author's right of integrity with a follow-on creator's free expression right. In fact, in its final report published in April 2019, the United States Copyright Office admitted:

[M]ore explicit protections for the right[] of integrity . . . in the United States may create tensions with the fair use doctrine

. . . .

[However,] any tensions between potential statutory moral rights protections and the fair use doctrine can be overcome through proper calibration of any statutory framework.¹⁵⁹

However, even though VARA is explicitly limited by fair use, there have been no court decisions involving a fair use defense to a right of integrity claim and no direction on how fair use would interact with a violation of integrity rights.¹⁶⁰ As the United States continues to consider or discuss expanding moral rights to cover, for instance, additional subject matter works such

157. See U.S. COPYRIGHT OFFICE, *supra* note 46, at 28 (“[C]ommenters asked that the [U.S. Copyrights] Office consider the possibility that a right of integrity would impose an additional legal chilling effect on those publishers, authors, and scholars who critique the work of another author in a way that may damage the initial author’s reputation.”); e.g., Walsh & Stoltz, *supra* note 152, at 3; Scheffner, *supra* note 154, at 9.

158. See U.S. COPYRIGHT OFFICE, *supra* note 46, at 32 (“Some [commenters] noted that applying fair use to moral rights protections, as is the case with moral rights afforded under VARA, would keep a statutory right of attribution or integrity from impinging on uses that courts should deem fair.”); e.g., Feltren, *supra* note 143, at 2.

159. U.S. COPYRIGHTS OFFICE, *supra* note 46, at 30, 32.

160. *But see* U.S. COPYRIGHT OFFICE, *supra* note 46, at 102 (some commenters described *Dr. Seuss Enterprises v. Penguin Books USA, Inc.* and *Suntrust Bank v. Houghton Mifflin Co.* “as seeking damages for infringements of economic rights as a ‘backdoor’ way of enforcing otherwise unenforceable moral rights . . . [that] illustrate the interaction between moral rights/derivative works claims and fair use”).

as literary, dramatic, artistic, musical, and audio-visual works, or reproductions and mass-produced works, the question of how fair use might limit the moral right of integrity must be resolved.¹⁶¹ In light of the ongoing discussion about expanding moral rights in the United States, the accompanying concern with its implications on free expression, and the current lack of any U.S. court decision on a fair use defense to a moral rights claim, the analysis in this Paper contributes to this important and timely discussion.

III. FAIR USE

VARA begins with the limitation “[s]ubject to section 107,” which creates a fair use defense to VARA claims.¹⁶² In spite of this specific fair use limitation in VARA, no court has yet adjudicated a fair use defense to a moral rights claim.¹⁶³ Owing its origins to Justice Story’s opinion in *Folsom v. Marsh* in the mid-nineteenth century,¹⁶⁴ § 107 of the Copyright Act sets forth four factors for a court to weigh to determine whether a defendant’s unauthorized use of the plaintiff’s work is fair:

- (1) the purpose and character of the [defendant’s] use[;] . . . (2) the nature of the [plaintiff’s] work; (3) the amount and substantiality of the portion [defendant] used in relation to the [plaintiff’s] work as a whole; and (4) the effect of the [defendant’s] upon the potential market for or value of the [plaintiff’s] work.¹⁶⁵

Courts have balanced, weighed, and applied those four factors in a number of infringement cases to excuse, for instance, defendants who copied authors’ works for parody or criticism,¹⁶⁶ used authors’ expressions to communicate new messages,¹⁶⁷ and adapted authors’ works for purposes of creating new

161. See *infra* Part III; see also U.S. COPYRIGHT OFFICE, *supra* note 46, at 63 (discouraging the expansion of artworks, such as musical works and sound recordings, protected under VARA because the expansion “would contradict the purpose of VARA”).

162. 17 U.S.C. § 106A (2012).

163. See *infra* Section III.B.

164. *Folsom v. Marsh*, 9 F. Cas. 342, 344, 348 (C.C.D. Mass. 1841).

165. 17 U.S.C. § 107.

166. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–94 (1994); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264–65, 1267–68 (11th Cir. 2001); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 112–17 (2d Cir. 1998).

167. See, e.g., *Mattel Inc. v. Walking Mountain Prod.’s*, 353 F.3d 792, 806 (9th Cir. 2003); *Mattel, Inc. v. Pitt*, 229 F. Supp. 2d 315, 321–25 (S.D.N.Y. 2002).

artistic expression.¹⁶⁸

A. *Transformative Use as Fair Use*

Under the first factor of fair use—the purpose and character of the use—courts look at whether the defendant’s follow-on work transformed the original.¹⁶⁹ Where a defendant’s follow-on work transforms the original by “add[ing] something new, with a further purpose or different character, altering the first with new expression, meaning, or message,” the defendant’s use is often considered fair.¹⁷⁰ For instance, in *Blanch v. Koons*, artist Jeff Koons created his *Easyfun-Ethereal* series of paintings by culling images from advertisements, scanning them, and digitally superimposing the advertising “images against backgrounds of pastoral landscapes.”¹⁷¹ He then copied the resulting collages with paint on billboard-sized, ten feet by fourteen feet canvasses.¹⁷² One such image, *Niagara*, consisted of four pairs of women’s legs and feet hanging from the top of the work; two pairs of feet were bare and the other two were wearing slip-on heeled sandals.¹⁷³ The legs were superimposed over a pastoral image highlighted with pastries, including a plate of donuts, a tray of Danish pastries, and a large chocolate fudge brownie topped with ice cream.¹⁷⁴ Koons testified that, through *Niagara*,

[H]e intended to “comment on the ways in which some of our most basic appetites—for food, play, and sex—are mediated by popular images. By re-contextualizing these fragments as I do, I try to compel the viewer to break out of the conventional way of experiencing a particular appetite as mediated by mass media.”¹⁷⁵

One of the pair of legs Koons included in *Niagara* came from a photograph

168. See, e.g., *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006).

169. See, e.g., *Cambell*, 510 U.S. at 578–94.

170. *Campbell*, 510 U.S. at 579; see, e.g., Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 740 (2011) (“[R]ecent decisions that unequivocally characterize the defendant’s use as transformative almost universally find fair use.”). See generally Clark D. Asay, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. (forthcoming 2020).

171. 467 F.3d at 247.

172. *Id.*

173. *Id.* at 247, 261.

174. *Id.* at 247.

175. *Id.* (footnote omitted).

Koons scanned from *Allure* magazine.¹⁷⁶ The image Koons copied, *Silk Sandals by Gucci*, was a photo taken by Andrea Blanch, an accomplished professional fashion photographer, of a pair of legs resting on a man's lap.¹⁷⁷ Koons made minor adjustments to the legs, and included them as the second pair of legs from the left, forming the focal image of *Niagara*.¹⁷⁸ Koons did not seek permission from Blanch; Blanch sued Koons for copyright infringement, and Koons raised the defense of fair use.¹⁷⁹ In its analysis of the first fair use factor, the purpose and character of Koons's use, the court found Koons's use of Blanch's photograph to be transformative because of "[t]he sharply different objectives that Koons had in using, and Blanch had in creating, 'Silk Sandals'";¹⁸⁰ because Koons's use of Blanch's photograph was the "'raw material' . . . in the furtherance of distinct creative or communicative objectives";¹⁸¹ and because Koons's work "adds something new, with a further purpose of different character, altering the first with new expression, meaning, or message."¹⁸² The court ultimately found Koons's use to be fair.¹⁸³

In *Mattel, Inc. v. Walking Mountain Productions*, the photographer Thomas Forsythe developed a series of photographs entitled *Food Chain Barbie*, which depicted nude Barbie dolls endangered by everyday kitchen appliances, such as a malt machine, a fondue pot, and a casserole dish in a lit oven.¹⁸⁴ Forsythe described his work as "an attempt to 'critique . . . the objectification of women associated with [Barbie], and . . . [to] lambast . . . the conventional beauty myth and the societal acceptance of women as objects because this is what Barbie embodies.'"¹⁸⁵ Mattel sued Forsythe for infringing its copyright in Barbie.¹⁸⁶ The court found Forsythe's photographs to be parodies that "transform Barbie's meaning" from "the ideal American woman" and "symbol of American girlhood" that Mattel had established, to a message about "Barbie's [harmful] influence on gender roles and the position

176. *Id.* at 247–48.

177. *Id.* at 248.

178. *Id.*

179. *Id.* at 248–49.

180. *Id.* at 252.

181. *Id.* at 253.

182. *Id.*

183. *Id.* at 259.

184. 353 F.3d 792, 796 (9th Cir. 2003).

185. *Id.* (alterations in original).

186. *Id.* at 797.

of women in society.”¹⁸⁷ The court found Forsythe’s use to be fair.¹⁸⁸

Similarly, in *Cariou v. Prince*, famous appropriation artist Richard Prince took several photographs from Patrick Cariou’s portrait and landscape photography book, *Yes Rasta*, altered those photos and incorporated them into Prince’s series of works titled *Canal Zone*.¹⁸⁹ Cariou sued Prince for copyright infringement of Cariou’s *Yes Rasta* photographs.¹⁹⁰ The court found twenty-five of Prince’s works to be transformative because they “manifest an entirely different aesthetic from Cariou’s photographs. Where Cariou’s serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince’s crude and jarring works, on the other hand, are hectic and provocative.”¹⁹¹ Therefore, according to the court, Prince’s follow-on works in *Canal Zone* exhibit “a different character, give Cariou’s photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou’s.”¹⁹² “Prince . . . ‘add[ed] something new’ and presented images with a fundamentally different aesthetic.”¹⁹³ The court found Prince’s twenty-five transformative works to be fair use of Cariou’s photographs.¹⁹⁴

Even as fair use decisions in copyright infringement cases have increased over the past decades, which has provided follow-on creators with greater clarity and predictability in determining fair use,¹⁹⁵ the applicability of fair use in moral rights cases has largely been overlooked. The lack of case law interpreting how courts might balance an author’s moral right of integrity with the public’s rights to expression is particularly troubling in light of the ongoing pressure to expand moral rights in the United States.¹⁹⁶ If moral rights are to be expanded, most interest- or industry-groups and commentators agree that those rights must be subject to fair use.¹⁹⁷ However, without any guidance

187. *Id.* at 802.

188. *Id.* at 816.

189. 714 F.3d 694, 698 (2d Cir. 2013).

190. *Id.*

191. *Id.* at 706.

192. *Id.* at 708.

193. *Id.* (alteration in original).

194. *Id.* at 712.

195. See Matthew Sag, *Predicting Fair Use*, 73 OHIO STATE L.J. 47, 48–49 (2012); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2540–42 (2009).

196. See *supra* Section II.B.

197. See, e.g., Sag, *supra* note 195, at 50 (“Almost no one doubts that the fair use doctrine is, or should be, very important . . .”).

from courts and, as discussed below, with commentators and legislative history doubting the compatibility of fair use with the right of integrity, how can the United States expand moral rights with the assumption that fair use would provide the proper balance between authors' rights and the public's rights?¹⁹⁸

B. Fair Use and Its (In)Compatibility with the Right of Integrity

At first glance, the moral right of integrity that VARA grants to authors seems incompatible with fair use. If the right of integrity is the right to “safeguard the author’s meaning and message” in an author’s work, then any use of the author’s work to parody, satirize, criticize, or transform would necessarily alter the author’s meaning and message in the work and harm the author’s honor and reputation.¹⁹⁹ But, it is precisely the alteration of the meaning or message of an author’s work that would give rise to a fair use defense. Indeed, transforming the meaning or message of an author’s work to express a new meaning or message is the “very type of activity that the fair use doctrine intends to protect for the enrichment of society.”²⁰⁰

As a preliminary matter, the seeming incompatibility between the moral right of integrity and fair use is familiar in other areas of copyright law.²⁰¹ A prime example is the seeming incompatibility between fair use and an author’s exclusive right under copyright law to create derivatives.²⁰² Specifically, under copyright law, an author has the exclusive right to prepare derivative works based on their copyrighted work.²⁰³ “A ‘derivative work’ is a work based upon one or more preexisting works . . . in which a work may be recast, transformed, or adapted.”²⁰⁴ Derivative works are often created by transforming underlying works into new works, such as producing a motion picture based on a book, or writing a sequel to a story or song.²⁰⁵ However, if the transformation of an underlying work creates a derivative, but transformation of the underlying work also weighs in favor of fair use, then at what point

198. See *infra* Section III.B.

199. Kwall, *supra* note 55, at 6–7; see also U.S. Copyrights Office, *supra* note 46, at 30–31 (“[T]he moral right of integrity protects an author’s work against any ‘derogatory action’ that is damaging to the author’s honor or reputation.”).

200. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

201. See Edward Lee, *Fair Use Avoidance in Music Cases*, 59 B.C. L. REV. 1873, 1881 (2018).

202. *Id.*

203. 17 U.S.C. § 106(2) (2012).

204. *Id.* § 101.

205. *Id.*

does the transformation of an author's original work transition from being an infringement of a copyright owner's exclusive right to create derivatives to a permissible fair use of the copyright owner's work?²⁰⁶

Courts and scholars have addressed this conflict between fair use and a copyright owner's derivative rights. For instance, in *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, the court explicitly addressed the "potential source of confusion in our copyright jurisprudence over the use of the term 'transformative.'"²⁰⁷ After noting that the definition of a derivative work included any form which a work may be transformed, the court noted that "[a]lthough derivative works that are subject to the author's copyright transform an original work into a new mode of presentation, such works—unlike works of fair use—take expression for purposes that are not 'transformative.'"²⁰⁸ In *Ty, Inc. v. Publications International Ltd.*, the court described the transformative use for purposes of fair use as "complementary" copying, and infringing derivative use as "substitutional" copying.²⁰⁹ The court explained:

[C]opying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work, is not fair use.²¹⁰

R. Anthony Reese analyzed the tension between transformativeness and the

206. See, e.g., Lee, *supra* note 201, at 1881 ("[If [a]n unauthorized derivative work would be infringing, but an unauthorized transformative work could be a fair use[,] . . . how is transforming a work into a derivative work different from using a work to create a transformative work under fair use?"); 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT 12:34–35 (3d ed. Supp. 2011) ("On principle, the rule [of transformative use] threatens to undermine the balance that Congress struck in section 106(2)'s derivative rights provision to give copyright owners exclusive control over transformative works to the extent that these works borrow copyrightable expression from the copyrighted work.").

207. 150 F.3d 132, 143 (2d Cir. 1998).

208. *Id.*

209. 292 F.3d 512, 517–18 (7th Cir. 2002).

210. *Id.* at 517, 519 (citation omitted) (finding that "photographs of Beanie Babies are conceded to be derivative works, for which there may be a separate demand that Ty may one day seek to exploit, and so someone who without a license from Ty sold photographs of Beanie Babies would be an infringer of Ty's sculptural copyrights"); see also R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 475–76 (2008) (discussing *Ty, Inc. v. Publications Int'l Ltd.*).

derivative work right and found that “courts clearly do not view the preparation of a derivative work as necessarily transformative, such that the preparation of a derivative work is necessarily more likely (given the favored status of transformative uses) to constitute fair use.”²¹¹ Similarly, Neil Weinstock Netanel studied appellate and district court fair use decisions between 1995 and 2010 and found the following:

[W]hat matters for determining whether a use is transformative is whether the use is for a different purpose than that for which the copyrighted work was created. It can help if the defendant modifies or adds news expressive form or content as well, but different expressive purpose, not new expressive content, is almost always the key.²¹²

Matthew Sag explained how a transformative work differed from a derivative:

[T]he assessment of transformativeness is not merely a question of the degree of difference between two works; rather, it requires a judgment of the motivation and meaning of those differences. . . . [For instance], the novel *Pride and Prejudice and Zombies*, which combines Jane Austen’s original work with scenes involving zombies, cannibalism, and ninjas, would be considered a transformative parody of the original In contrast, a more traditional sequel would merely be an infringing derivative work.²¹³

In spite of this conflict, courts have managed to balance authors’ derivative rights with follow-on creators’ rights to expression under fair use numerous times in the past. Therefore, if the incompatibility between an author’s exclusive right to prepare derivatives and fair use can be resolved in an acceptable manner on a case-by-case basis by the courts, then so too can the seeming incompatibility between the moral right of integrity and fair use, as detailed in Part III above.²¹⁴

Additionally, fair use and how it interacts with the right of integrity under VARA presents unique issues in light of VARA’s limited protection of single

211. Reese, *supra* note 210, at 494.

212. Netanel, *supra* note 170, at 747.

213. Sag, *supra* note 195, at 56.

214. See discussion *supra* Section III.B.

or limited-edition works.²¹⁵ The mutilation of an original work to create new message or meaning could mean the permanent mutilation or distortion of the work.²¹⁶ Indeed, commentators have questioned the compatibility of fair use with VARA's moral right of integrity precisely because of this concern. For instance, Jane Ginsburg questioned, "What is 'fair' about mutilating an original (or one of a limited edition)? What public policy does it advance; what public benefit does it secure? . . . [W]hat social need is there to destroy the original?"²¹⁷ Similarly, Peter Karlen opined that fair use has a limited role in moral rights:

A use may infringe upon an artist's moral rights even though it falls into a fair use exception. In part, this is because § 107, which codifies the fair use doctrine, sets forth considerations often having little to do with moral rights. The use or misuse of a work for purposes such as news reporting, scholarship, criticism, review, or classroom teaching . . . should not necessarily nullify a moral rights violation.²¹⁸

Dane Ciolino argued that "federal moral rights and the fair use doctrine are manifestly incompatible for a number of doctrinal and practical reasons."²¹⁹ According to Ciolino, these reasons include that VARA governs the relationship between artist and personal property and not "nonrivalrous uses of intangible copyrighted works," that VARA governs personal rights that deserve greater respect, and that the § 107 factors do not work when applied to use of tangible property.²²⁰ One commenter pointed out that the language of § 107, which uses the words "including such use by reproduction in *copies*,"²²¹ seems inconsistent with the fair use of a single-copy or limited-edition work.²²² Ra-

215. 17 U.S.C. § 101 (2012).

216. See discussion *infra* Section IV.A.

217. *Visual Artists' Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice of the H. Comm. on the Judiciary House of Rep.'s*, 101st Cong. 93 (1989) (statement of Jane Ginsburg, Associate Professor of Law, Columbia University School of Law).

218. Peter H. Karlen, *What's Wrong with VARA: A Critique of Federal Moral Rights*, 15 HASTINGS COMM. & ENT. L.J. 905, 912–13 (1993).

219. Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 37 (1997).

220. *Id.*

221. 17 U.S.C. § 107 (2012) (emphasis added).

222. Thank you to James Gibson for pointing this out.

chel Buker described the inclusion of a fair use defense in VARA as “befuddling,” finding it “unclear just how fair use applies to moral rights.”²²³ Finally, Amy Adler remarked:

I doubt a court would extend the [fair use] provisions very far in the case of a permanent alteration of a unique work of art. The fair use concept seems to depend on copying. The original remains intact. Permanently defacing someone’s work to create a new one seems far more troubling than market damages caused by unauthorized copies.²²⁴

In fact, the legislative history of VARA showed that there was some doubt over whether and how fair use could apply to a moral rights claim:

The Committee does not want to preclude fair use claims in this context. However, it recognizes that it is unlikely that such claims will be appropriate given the limited number of works covered by the Act, and given that the modification of a single copy or limited edition of a work of visual art has different implications for the fair use doctrine than does an act involving a work reproduced in potentially unlimited copies.²²⁵

While these concerns are certainly legitimate, and it may appear cavalier to allow the permanent mutilation of an original work of art in the name of free expression, the right of integrity does not only apply to instances where an original work is permanently mutilated. In its most expansive form, the right of integrity protects against the decontextualization of a work, such as placing *Fearless Girl* in front of *Charging Bull*, in addition to the physical mutilation of the work.²²⁶ Indeed, VARA explicitly protects against the distortion, modification, *and* mutilation of a work that prejudices an author’s

223. Rachel Buker, *On Art Attacks: At the Confluence of Shock, Appropriation, and the Law*, 14 J. MARSHALL REV. INTELL. PROP. L. 393, 403 (2015).

224. Adler, *supra* note 27, at 281 n.99.

225. H.R. REP. NO. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6932. However, it is worthy to note that this statement occurred three years before the U.S. Supreme Court’s decision in *Campbell v. Acuff-Rose Music, Inc.*, which found that the more transformative the follow-on work, the more likely the follow-on work would be considered fair use. 510 U.S. 569, 578–79 (1994).

226. *See supra* notes 1–11 and accompanying text. *But see infra* note 229.

honor and reputation.²²⁷ For instance, Sergio Munoz Sarmiento believes that the right of integrity could have a more expansive application; he highlights the fact that VARA's wording fails to explicitly limit the definition of mutilation to *physical* alterations.²²⁸ And even though VARA's public presentation exception has been interpreted to excuse decontextualization of works from violating an author's right of integrity,²²⁹ that exception may not excuse all decontextualizations now or in the future. Indeed, if VARA is most concerned with protecting an author's honor and reputation, damage to an author's honor and reputation could occur through decontextualization, temporary and impermanent modification, and physical mutilation of their work. Furthermore, as discussed below, the line between decontextualization excused under the public presentation exception and decontextualization not excused under the public presentation exception can be easily blurred.²³⁰ The line between permanent mutilation and impermanent mutilation is similarly thin.²³¹ For instance, if spraying paint on a concrete sculpture prejudices the sculpture's honor and reputation, does it matter whether the paint may or may not be removable? If—under the public presentation exception—VARA excuses a shopping mall from tying red ribbons on sculptures of geese because the ribbons are impermanent, does it make a difference if the mall owners never remove the red ribbons? As I explore below, some actions by follow-on creators that may fall under VARA's public presentation exception might be more appropriately analyzed under fair use.²³² There are contexts where a

227. 17 U.S.C. § 106A(a)(3)(A) (2012).

228. Isaac Kaplan, *Fearless Girl Face-off Poses a New Question: Does the Law Protect an Artist's Message?*, ARTSY (Apr. 13, 2017), <https://www.artsy.net/article/artsy-editorial-fearless-girl-face-off-poses-new-question-law-protect-artists-message>.

229. See, e.g., *id.* (quoting Amy Adler, "Under moral rights in this country, while you can sue for someone actually physically changing a sculpture, changing a sculpture by placing another sculpture near it is simply not actionable We don't want to let artists start suing curators because they don't like who their work is displayed next to."); Annemarie Bridy, *Fearless Girl Meets Charging Bull: Copyright and the Regulation of Intertextuality*, 9 U.C. IRVINE L. REV. 293, 326 (2019) (stating that the public presentation exception to VARA's right of integrity "does not give artists the right to prevent so-called contextual modifications—defined as those that 'leave the substance of the work intact, but change the appearance or perception of the work by putting it into a context that differs from the one originally intended or envisioned by the author'").

230. See discussion *infra* Section IV.A.

231. See discussion *infra* Section IV.B.

232. See discussion *infra* Sections IV.A–B.

follow-on creator can only express an important message or meaning by distorting the original or limited-edition work.²³³

Moreover, even though VARA explicitly makes the moral right of integrity “[s]ubject to section 107[’s]” fair use provision,²³⁴ other common law countries that protect the moral rights of authors do not provide an explicit defense of fair use (or fair dealing)²³⁵ to moral rights claims.²³⁶ This does not mean, however, that fair use is incompatible with the moral right of integrity or that courts in those countries do not consider whether the defendant’s use is fair in moral rights litigation.²³⁷ For instance, certain countries, such as Australia, provide a defense to defendants where the violation of moral rights is “reasonable in all the circumstances.”²³⁸ At present, there are no cases confirming whether courts would find the distortion, mutilation, or modification of a work for purpose of parody, satire, or criticism to be “reasonable in all the circumstances.”²³⁹ Furthermore, in *Deckmyn v. Vandersteen*, mentioned above, the Belgium Court of Appeals considered whether the follow-on work in that case would be excused under the parody exception under Belgian law.²⁴⁰ In light of this important question, the court sent the question to the European Court of Justice to consider whether parody is a defense under European Union law, and if so, what constitutes a parody.²⁴¹ This seems to signal a willingness to consider parody as a defense to moral rights.

Finally, in spite of the explicit reference to fair use as a defense to VARA

233. See discussion *infra* Section IV.C.

234. 17 U.S.C. § 106A(a) (2012).

235. See, e.g., *supra* note 44. Common law nations such as Canada, Australia, the United Kingdom, and New Zealand apply the defense of fair dealing to copyright claims. See *id.* Fair dealing has been described as a narrower defense that is only applicable to a set of enumerated purposes, such as parody or satire. Giuseppina D’Agostino, *Healing Fair Dealing? A Comparative Copyright Analysis of Canada’s Fair Dealing to U.K. Fair Dealing and U.S. Fair Use*, 53 MCGILL L.J. 309, 318 (2008). The U.S. applies the defense of fair use to copyright claims, which is more flexible and can apply to any purpose. *Id.* But see Ariel Katz, *Debunking the Fair Use vs. Fair Dealing Myth: Have We Had Fair Use All Along*, LAWARXIV PAPERS (July 2, 2018), <https://osf.io/preprints/lawarxiv/26vjt>.

236. See Sainsbury, *supra* note 16, at 149.

237. E.g., *Copyright Act 1968* (Cth) pt IX div 6 s 195AS (Austl.); see also D’Agostino, *supra* note 235, at 338–39 (describing U.K. copyright law as involving a three-step test a defendant must overcome in copyright litigation).

238. *Copyright Act 1968* (Cth) pt IX div 6 s 195AS.

239. *Id.*

240. See *supra* text accompanying notes 79–83.

241. See *supra* note 83.

claims, no court in the United States has found a fair use defense in this context.²⁴² This lack of case law, however, could be attributable to multiple reasons other than its incompatibility. First, VARA has only been enforceable since 1990 and covers a limited subject matter: works of visual art.²⁴³ This means that there is still relatively little litigation over VARA claims²⁴⁴ and much fewer court decisions on VARA claims compared to copyright infringement claims.²⁴⁵ Additionally, while some defendants in VARA claims have asserted fair use as an affirmative defense to right of integrity claims, courts often dispose of VARA claims on other grounds, such as the public presentation exception,²⁴⁶ or they interpret VARA to exclude protection of certain works.²⁴⁷ For instance, in *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel*, Büchel claimed, among other things, that the museum's covering of his unfinished work and allowing visitors to see his work displayed covered with a tarp violated his right of integrity.²⁴⁸ In response to Büchel's claim, MASS MoCA asserted a number of affirmative defenses—one of which was fair use.²⁴⁹ In that case, however, the court disposed of Büchel's claim under the public presentation exception, stating that “the mere covering of the artwork by the Museum, its host, cannot reasonably be deemed an intentional act of distortion or modification of Büchel's creation.”²⁵⁰ Because of this ruling, the court never analyzed the merits of the parties' dispute; nor did the court analyze the museum's actions under the factors of fair use.²⁵¹

242. See *supra* Section II.B.

243. 17 U.S.C. § 106A (2012).

244. See Bonneau, *supra* note 46, at 100 n.257 (“[C]ase law of this nature is undeveloped.”).

245. See Christopher A. Cotropia & James Gibson, *Copyright's Topography: An Empirical Study of Copyright Litigation*, 92 TEX. L. REV. 1981, 1997–98 (2014) (comparing copyright infringement claims under 17 U.S.C. § 106 to other copyright actions, including VARA claims, and finding claims for unauthorized reproduction of work under § 106(1) were the most common while claims under VARA were the most rare).

246. See *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 46–47 (1st Cir. 2010).

247. See, e.g., *Cheffins v. Stewart*, 825 F.3d 588, 595 (9th Cir. 2016) (finding a mobile replica of a sixteenth-century Spanish galleon, created from an old school bus, to be applied art excluded from the definition of visual art under VARA); *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 142–43 (1st Cir. 2006) (holding that VARA does not protect site-specific art).

248. *Büchel*, 459 F.3d at 42.

249. Plaintiff's Reply to Defendant's Counterclaims *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 565 F. Supp. 2d 245 (D. Mass. July 12, 2017) (No. 3:07-cv-30089).

250. *Büchel*, 593 F.3d at 61.

251. *Id.* at 65.

Furthermore, where it relates specifically to follow-on creators modifying an original artist's work for the sake of expression, another reason there are no published decisions on fair use in right of integrity claims might be because social norms resolve many of those disputes.²⁵² For instance, in 2009, street artist Banksy mutilated a 1985 work by street artist King Robbo on the Regents Canal in London.²⁵³ Banksy mutilated Robbo's work by painting an image of a workman wall-papering over Robbo's artwork.²⁵⁴ In response, Robbo changed the image of Banksy's work to look like the workman was painting the tag "King Robbo."²⁵⁵ Banksy changed the image again, and Robbo responded by painting over the work with a cartoon character leaning against a tombstone that said "R.I.P. Banksy's Career."²⁵⁶ Famous feuds between street artists, such as the feud between Banksy and Robbo, are examples of artists relying on social norms instead of moral rights litigation to resolve their disputes.²⁵⁷ Some artists even welcome other artists' use of their works for the sake of encouraging and creating expression.²⁵⁸ For instance, in 1953, Robert Rauschenberg took an original Willem de Kooning work of art and erased it.²⁵⁹ This resulted in "a sheet of paper bearing the faint, ghostly shadow of its former markings," which Rauschenberg titled *Erased de Kooning Drawing* and exhibited.²⁶⁰ While this action, if it occurred today and de Kooning were alive, would certainly violate de Kooning's moral right of integrity, de Kooning—in fact—gifted Rauschenberg the work to erase.²⁶¹ When de Kooning finally understood and relented to Rauschenberg's artistic intent, de Kooning did not just gift Rauschenberg any work, he specifically

252. See *infra* text accompanying notes 253–62.

253. Cathay Y. N. Smith, *Street Art: An Analysis Under U.S. Intellectual Property Law and Intellectual Property's "Negative Space" Theory*, 24 DEPAUL J. ART, TECH. & INTELL. PROP. L. 259, 279 (2014).

254. *Id.*

255. *Id.* at 279–80.

256. *Id.* at 280. See also *The Banksy vs Robbo War in Pictures*, TWISTED SIFTER (Jan. 12, 2012), <https://twistedifter.com/2012/01/banksy-vs-robbo-war-in-pictures/>.

257. See Smith, *supra* note 253, at 279 ("The ultimate offense in street art is writing over someone else's work. When this rule is not observed, street artists often take to the streets to punish each other for failure to follow normative street art rules, resulting in street art 'feuds.'").

258. Robert Rauschenberg, *Erased de Kooning Drawing, 1953*, SFMOMA, <https://www.sfmoma.org/artwork/98.298/> (last visited Mar. 4, 2019).

259. *Id.*

260. Adler, *supra* note 27, at 283.

261. Abigail Cain, *Why Robert Rauschenberg Erased a De Kooning*, ARTSY (July 14, 2017, 2:47 PM), <https://www.artsy.net/article/artsy-editorial-robert-rauschenberg-erased-de-kooning>.

went through his portfolio to find “something [he would] miss.”²⁶²

In spite of its seeming incompatibility, the lack of any case law or international equivalents, this Paper argues that fair use can and should be used to limit authors’ integrity claims in the United States.²⁶³ This determination can be made by creatively analyzing and balancing the four factors under § 107, similar to the analysis of fair use in copyright infringement claims.²⁶⁴ In light of the ongoing pressure to expand moral rights in the U.S., it is important to understand how fair use can and should balance the interests of authors’ rights to the integrity in their works with the interests of the public in having access to new expression.²⁶⁵

IV. FAIR USE AND THE DISTORTION, MUTILATION, OR OTHER MODIFICATION OF WORKS

The moral right of integrity gives authors the right “to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation.”²⁶⁶ This Part analyzes three different contexts that could violate an author’s right of integrity. The first involves instances where the follow-on creator distorts, mutilates, or modifies the meaning of an author’s work without physically altering the work, such as where the placement of a piece of art interacts with, decontextualizes, or clearly comments upon an author’s original work.²⁶⁷ This decontextualization could be temporary or permanent.²⁶⁸ The second context is where a follow-on creator distorts, mutilates, or modifies an artist’s work by physically—but temporarily or impermanently—altering the work,²⁶⁹ such as placing ribbons on a sculpture²⁷⁰ or partially covering a piece of art with tarp or curtains.²⁷¹ The final context involves a follow-on creator who permanently distorts, mutilates, or modifies a physical copy of an artist’s work in order to make an

262. *Id.*

263. See discussion *infra* Part IV.

264. See discussion *infra* Part IV.

265. See Samuelson, *supra* note 195, at 2540 for a description of the strength of the fair use doctrine as balancing interests of copyright owners with interests of subsequent authors and the public.

266. 17 U.S.C. § 106A(a)(3)(A) (2012).

267. See discussion *infra* Section IV.A.

268. See discussion *infra* Section IV.A.

269. See discussion *infra* Section IV.B.

270. See *infra* notes 343–46 and accompanying text.

271. See *infra* notes 333–40 and accompanying text.

artistic, social, or political statement, such as erasing a painting, drawing clown faces on serious portraits, or spray-painting derogatory language on a sculpture.²⁷² This permanent distortion could be of a single-copy work or a limited-edition work.²⁷³ This Part examines how copyright's fair use doctrine can flexibly serve as a limitation to integrity rights under those three contexts and interprets how the four fair use factors in § 107 may be used to balance the author's right of integrity with the public's rights to find fair use where a follow-on creator modifies, distorts, or mutilates an author's work to transform the work and give the work new meaning.

A. Decontextualization

The first context that could violate the moral right of integrity, under an expansive view of moral rights, involves the distortion, mutilation, or modification of the context or meaning of an author's work. In this category, the follow-on creator does nothing to physically alter the author's work, but through some permanent or temporary action, distorts, modifies, or mutilates the context or original meaning of the author's work, thereby prejudicing the artist's honor and reputation.²⁷⁴ A recent example of this scenario involved the dispute between artist Arturo Di Modica, creator of the *Charging Bull* sculpture on Wall Street, and Kristen Visbal's *Fearless Girl* sculpture.²⁷⁵

On December 16, 1989, New York financial operators arrived at the New York Stock Exchange to find a 7,700 pound, eleven foot tall, sixteen foot long bronze sculpture of a charging bull installed across the street.²⁷⁶ Di Modica had installed the *Charging Bull* street art guerilla-style, under cover of night.²⁷⁷ The *Charging Bull* represented "optimism and strength amid adversity" at a time when the U.S. stock market was experiencing a crash.²⁷⁸ In response to its immediate popularity, instead of removing or destroying

272. See *infra* Section IV.C.

273. 17 U.S.C. § 101 (2012).

274. See, e.g., *supra* notes 1–7 and accompanying text.

275. Tom McCarthy, *Fearless Girl v Charging Bull: New York's Biggest Public Art Controversy in Years*, GUARDIAN (Apr. 14, 2017), <https://www.theguardian.com/us-news/2017/apr/14/fearless-girl-statue-women-new-york-bull>.

276. Tiziano Thomas Dossena, *A New York Story: How the Charging Bull "Chose" Wall Street*, BRIDGE PUGLIA USA (Feb. 2018), http://www.bridgepugliausa.it/articolo.asp?id_sez=2&id_cat=37&id_art=3483&lingua=en.

277. McCarthy, *supra* note 275.

278. *Id.*

Charging Bull, the New York City Department of Parks and Recreation temporarily installed it on the cobblestone-paved square of Bowling Green where it remains today.²⁷⁹ On March 7, 2017,²⁸⁰ almost twenty-eight years later, State Street Global Advisors installed artist Kristen Visbal’s sculpture, *Fearless Girl*, twenty feet away from *Charging Bull*.²⁸¹ The *Fearless Girl* weighed 250 pounds and stood about four feet tall; she stood defiant and straight, hands on her hips, feet planted on the ground, her ponytail and skirt seemed to billow in the wind.²⁸² She faced *Charging Bull* head on.²⁸³ *Fearless Girl* intended to send a message about gender diversity and equality and to “[k]now the power of women in leadership” at a time when the media was heightening its focus and scrutiny on gender inequality on Wall Street.²⁸⁴ Di Modica claimed that *Fearless Girl* “was an insult to his work,” and that “[s]he’s there attacking the bull.”²⁸⁵ The placement of *Fearless Girl*—standing defiantly and facing *Charging Bull* head-on—certainly “subverted the bull’s meaning,” which was to promote “freedom in the world, peace, strength, power[,] and love.”²⁸⁶ Indeed, even though *Fearless Girl* did not physically alter Di Modica’s work, it clearly interacted with it, and certainly reinterpreted *Charging Bull*’s original positive and uplifting message showing “the strength and power of the American people”²⁸⁷ by casting a menacing light onto the sculpture and transforming it “into a negative force and a threat” connoting antifeminism and disempowerment of women.²⁸⁸

Under the current interpretation of VARA, the installation of *Fearless Girl* and her deliberate interaction with *Charging Bull* is not likely to support a cause of action for violating Di Modica’s right of integrity.²⁸⁹ In the United

279. Dossena, *supra* note 276.

280. Lisa Marie Segarra, *The Fearless Girl Statue Won’t Be Staring Down The Charging Bull Anymore. But She’ll Be Close By*, TIME (Apr. 19, 2018), <https://time.com/5191243/fearless-girl-statue-location-moving/>.

281. Lawrence Arboleda, *‘Fearless Girl’ Stands Defiant To Wall Street’s Charging Bull For Women’s Day*, INQUISITR (Mar. 8, 2017), <https://www.inquisitr.com/4042690/sculpture-fearless-girl-now-stands-in-defiance-to-wall-street-charging-bull/>.

282. *See* Garcia, *supra* note 1.

283. *See* Arboleda, *supra* note 281.

284. *See* Garcia, *supra* note 1.

285. Barron, *supra* note 11.

286. *Id.*

287. Dossena, *supra* note 276.

288. Barron, *supra* note 11.

289. Bridy, *supra* note 229, at 327; Emma Barraclough, *Raging Bull and Fearless Girl – Moral Rights in Copyright*, WIPO MAGAZINE (Apr. 2018), https://www.wipo.int/wipo_magazine/en/

States, the public presentation exception in VARA exempts from a right of integrity violation “[t]he modification of a work of visual art which is the result . . . of the public presentation, including lighting and placement, of the work.”²⁹⁰ Specifically, modification because of public presentation “is not a destruction, distortion, mutilation, or other modification . . . unless the modification is caused by gross negligence.”²⁹¹ Not all scholars agree that the public presentation exception will exempt non-physical alterations of a work; as Sergio Munoz Sarmiento points out, the statute’s wording does not explicitly limit the definition of mutilation to physical alterations.²⁹² However, based on past case law and legislative history, the mere presentation of another’s work next to the author’s work may be exempt from VARA under its public presentation exception.²⁹³ This exception, for instance, allows museums to exercise their curatorial discretion to place works next to each other—to allow the works to interact with each other—in order to exhibit a specific message or meaning, even if that message could harm an artist’s honor or reputation.²⁹⁴ This exception also permitted a property developer to erect a building to completely obstruct a mural in *English v. BFC & R East 11th Street LLC*.²⁹⁵ Indeed, Annemarie Bridy explores the dispute between *Charging Bull* and *Fearless Girl* and finds Di Modica’s claim under VARA to be “bull.”²⁹⁶ “To the extent that Fearless Girl’s presence in Bowling Green Park modifies the meaning of Charging Bull for either DiModica himself or members of the public, that modification in no way violates DiModica’s right of integrity under VARA” given VARA’s focus on physical alterations and given VARA’s public presentation exception.²⁹⁷ Amy Adler further explained, “We don’t want to let artists start suing curators because they don’t like who their work is displayed next to.”²⁹⁸ More importantly, “A policy that would allow one artist

2018/02/article_0003.html (“[T]here is general agreement that VARA would not protect the Charging Bull sculpture from having its Fearless Girl rival placed nearby.”).

290. 17 U.S.C. § 106A(c)(2) (2012).

291. *Id.*

292. See Kaplan, *supra* note 228.

293. See *supra* notes 246–51 and accompanying text.

294. See *id.*

295. *English v. BFC & R E. 11th St. LLC*, No. 97 Civ. 7446(HB), 1997 WL 746444, at *6 (S.D.N.Y. Dec. 3, 1997).

296. Bridy, *supra* note 229, at 327.

297. *Id.*

298. See Kaplan, *supra* note 228 (quoting Amy Adler).

to stop another artist's work would be a mistake[;] . . . [a]ll public art is ideally in dialogue with the space it exists in. And that includes other sculptures."²⁹⁹

That being said, as discussed above, under a more expansive interpretation of the moral right of integrity, decontextualization of an author's work that causes prejudice to that author's honor and reputation could be considered a distortion, modification, or mutilation of the author's work and could support a cause of action for violating the author's right of integrity.³⁰⁰ For instance, in the Stockholm District Court decision mentioned above, the court found an author's right of integrity to be violated where his work was exhibited next to highly pornographic photos.³⁰¹ If the United States were to expand the scope of VARA to mirror countries that hold this more expansive view of moral rights, this type of decontextualization of works could give rise to a right of integrity claim.³⁰²

Additionally, there could be instances where it is difficult to draw the line between decontextualization due to public presentation and decontextualization due to other actionable modifications of works.³⁰³ As Merryman explains:

It seems undeniable that an exhibition can be stacked, whether deliberately or not, so as to misrepresent the artist's work. This could adversely affect the artist's reputation and thus arguably impair his moral right. But to ask a court to intervene is to suggest something close to, if not indistinguishable from, censorship. Just as one would be reluctant to suggest judicial suppressing or "editing" of a book that, in the selection of paintings illustrated and in the text, misrepresented a painter's work, so one ought to avoid similar suppression or "editing" of an exhibition. Yet if one agrees with this argument, how is it possible to support a right of integrity at all? Is there a convenient line to be drawn between the kinds of mistreatment of the artist's work that ought to be legally prevented and other kinds for which, in

299. *Id.* (quoting Amy Adler).

300. *See supra* text accompanying notes 226–27.

301. Brown-Pedersen, *supra* note 76, at 127.

302. *See* Birdy, *supra* note 229, at 333 (highlighting that U.S. copyright law is geared toward promoting commerce, whereas other international systems have more expansive views on protecting an artist's power over their work).

303. *See* Merryman, *supra* note 18, at 1033–34.

order to protect freedom of expression or other overriding social interests, no such legal remedy is available? The instinctive response is that there is such a line, at least in the sense that most cases fall clearly into one or the other category, but experience leads us to expect that there will be difficult cases, just as there are difficult cases wherever legal lines must be drawn.³⁰⁴

Take the *Charging Bull* and *Fearless Girl* dispute as an example.³⁰⁵ What if the *Fearless Girl* was not placed twenty feet away from the *Charging Bull*; imagine if *Fearless Girl* was, instead, placed a mere one foot away from the *Charging Bull*, allowing the *Charging Bull* to tower over the Girl? Or, imagine if *Fearless Girl* was a mere one foot away from *Charging Bull*, raising one hand high in front of her that physically touches the Bull's nose to seemingly hold back or halt the Bull's forward charge. Or, imagine if Visbal had created *Fearless Girl* to fit atop *Charging Bull*, so that she appears to be riding and taming the Bull. All of these scenarios would distort and modify *Charging Bull*, change the message of *Charging Bull*, and prejudice Di Modica's honor or reputation—but would all of these scenarios be excused under VARA's public presentation exception? Do we draw the line at "physical" interaction? In other words, as long as *Fearless Girl* sculpture does not physically interact with the *Charging Bull*, is it excused under public presentation? So, the scenario of *Fearless Girl* riding *Charging Bull* would not be excused under the public presentation exception, but placing the Girl one foot away from the Bull, allowing the Bull to seemingly tower over the Girl but not make any physical contact, would be excused.³⁰⁶ However, if we draw the line at physical interaction, does that mean that the scenario of the Girl touching the Bull's nose would also not be excused under the public presentation exception merely because her hand physically interacts with the Bull? What if her hand is a mere one inch away from the Bull, making it appear like she is touching him when, upon closer inspection, there is a one inch gap? Drawing the line at physical interaction can seem arbitrary, especially if the purpose of the right of integrity is to safeguard an author's honor and reputation. An author's honor and reputation can be prejudiced in all of the actions above, even where the interaction with another piece of art is not physical.

What seems clearer, however, is that all of the scenarios imagined above

304. *Id.*

305. *See supra* text accompanying notes 276–88.

306. *Id.*

could support a defense of fair use. Fair use guarantees breathing space within the confines of copyright³⁰⁷ and, as VARA explicitly states, also provides breathing space within the confines of moral rights.³⁰⁸ As Annemarie Bridy explained: “Without fair use, ‘unfaithful continuations’ and other antagonistic intertexts would be subject to veto by authors whose aesthetics skew monologic.”³⁰⁹ The four factors, illustrated in § 107, to determine whether fair use excuses a follow-on creator’s work are,

- (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- and (4) the effect of the use upon the potential market for or value of the copyrighted work.³¹⁰

Under all of the *Charging Bull* versus *Fearless Girl* scenarios discussed above, the first factor—purpose and character of the use—would weigh in favor of fair use. In all of the scenarios above, *Fearless Girl*’s interaction and reinterpretation or recontextualization of the *Charging Bull* alters the meaning and message of the Bull.³¹¹ They change the Bull’s message from one of optimism on Wall Street to a message criticizing the gender gap on Wall Street and proclaiming the strength of women.³¹² Like Randall’s book *The Wind Done Gone*, which transformed the message and meaning in Mitchell’s *Gone With the Wind* in *Suntrust v. Houghton Mifflin*,³¹³ so too does *Fearless Girl* transform the message and meaning in *Charging Bull*.³¹⁴ Indeed, altering the meaning of an original work, transforming the meaning or message of that work so it expresses a new meaning or message, is the “very type of activity

307. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

308. *See* 17 U.S.C. § 106A.

309. Bridy, *supra* note 229, at 317.

310. 17 U.S.C. § 107.

311. *See* Bridy, *supra* note 229, at 332 (highlighting that *Fearless Girl*’s placement next to *Charging Bull* was both “critical and transformative,” and explaining that, from a fair use point of view, “*Fearless Girl* was created to symbolically contest the culture of masculine corporate power that *Charging Bull* can be read to represent”).

312. *See* Kaplan, *supra* note 228.

313. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264–65 (11th Cir. 2001).

314. *See* Kaplan, *supra* note 228.

that the fair use doctrine intends to protect for the enrichment of society.”³¹⁵

The second factor of fair use looks at the nature of the copyrighted work, specifically examining “whether the work is expressive or creative . . . or more factual, with a greater leeway being allowed to a claim of fair use where the work is factual or informational.”³¹⁶ Courts in the past have acknowledged that sculptural works, such as Di Modica’s *Charging Bull*, are expressive and creative in nature.³¹⁷ However, the creative nature of an author’s work is given limited weight in fair use analysis where the follow-on work uses “the original ‘in a transformative manner to comment on [a work’s] social and aesthetic meaning rather than to exploit its creative virtues.’”³¹⁸ Because *Fearless Girl* comments on Di Modica’s “social and aesthetic meaning” rather than “exploit its creative virtues,” the creative and expressive nature of *Charging Bull* would be given limited weight.³¹⁹

Similarly, the third factor—amount and substantiality used—would also be given less weight because of *Fearless Girl*’s use of *Charging Bull* to express a new message and meaning.³²⁰ Indeed, in order to express the message for female equality on Wall Street, it was necessary to use the entire *Charging Bull* sculpture to get that message across.³²¹

Finally, the fourth factor of fair use is “the effect of the use upon the potential market for or value of the . . . work,” which examines “whether unrestricted and widespread conduct of the sort engaged in . . . would result in a substantially adverse impact on the potential market.”³²² Here, it is possible

315. Leval, *supra* note 200, at 1111 (1990). While *Fearless Girl* was created by an artist and highlights the gender gap in Wall Street, it may also be considered an advertisement expressing pure commercial speech. See Kaplan, *supra* note 228. Specifically, the work promotes SSGA’s exchange-traded fund, SHE. *Id.* As Di Modica’s attorney pointed out: “If an artist had put the girl there just for its message, it would be a different situation. But those aren’t the facts.” *Id.* This Paper puts that commercial argument aside to focus specifically on the transformative message and meaning of *Fearless Girl*.

316. *Gaylord v. United States*, 595 F.3d 1364, 1374 (Fed. Cir. 2010).

317. See, e.g., *id.*

318. *Id.* (quoting *Blanch v. Koons*, 467 F.3d 244, 257 (2d Cir. 2006)).

319. See *id.*

320. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“[T]he more transformative the new work, the less will be the significance of the other factors . . . that may weigh against a finding of fair use.”).

321. See Bridy, *supra* note 229, at 305 (“*Charging Bull* is a ‘necessary element’ to State Street’s politically engaged art project . . . [w]ithout *Charging Bull* as an interlocuter, *Fearless Girl* is just a statue of a little girl standing with her chin in the air and her hands on her hips.”).

322. *Gaylord*, 595 F.3d at 1375.

that the appreciation or even the market for Di Modica's *Charging Bull* may decrease due to *Fearless Girl*'s negative message.³²³ This type of market harm, however, "like a scathing theater review" may "kill[] demand for the original," but is not the type of market harm considered under fair use.³²⁴ Indeed, even though *Fearless Girl* may disparage *Charging Bull* or Di Modica, such "[b]iting criticism that [merely suppresses] demand" is not "a harm cognizable under the Copyright Act."³²⁵

While decontextualization of an author's work may not be a violation of the author's right of integrity under VARA in light of its public presentation exception, this may not always be the case if we expand moral rights.³²⁶ Additionally, the line between what is excused activity under the public presentation exception and what is not excused activity under the exception can also be a bit arbitrary.³²⁷ In situations where the public presentation exception may not clearly apply and a follow-on creator decontextualizes an author's work by distorting, mutilating, or modifying it to give the work new meaning or message, courts, litigants, and authors should consider whether the fair use doctrine may limit the follow-on creator's liability under the moral right of integrity.

B. *Temporary or Impermanent Distortion, Mutilation, or Modification*

The second context that may violate the moral right of integrity, under an expansive view of moral rights, involves the temporary or impermanent physical distortion, mutilation, or modification of an author's work. Unlike the first category, where the defendant does not physically alter the artist's work, this category involves the defendant physically—but temporarily—distorting, mutilating, or modifying the artist's work.³²⁸ Even though the distortion may

323. See Bridy, *supra* note 229, at 305.

324. *Campbell*, 510 U.S. at 591–92.

325. *Id.* at 592 (alterations in original) (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

326. See *supra* notes 152–56 and accompanying text.

327. See discussion in *supra* Section IV.A.

328. See, e.g., *Eastwood*, *supra* note 84.

be temporary, the damage to the artist's honor and reputation may be permanent.³²⁹ This circumstance was presented in *MASS MoCA v. Büchel*³³⁰ and *Snow v. Eaton Centre Ltd.*³³¹ Neither alteration was permanent, but both artists claimed that their honor and reputation were damaged.³³²

In *MASS MoCA v. Büchel*, the artist Büchel asserted a claim under VARA for violation of his right of integrity against MASS MoCA when MASS MoCA displayed the artist's incomplete sculptural work covered with a tarp.³³³ The artist and MASS MoCA entered into an agreement to create and display Büchel's sculptural work, *Training Ground for Democracy*.³³⁴ MASS MoCA funded the art, it went over budget, and the artist refused to continue the work because of artistic differences.³³⁵ Instead of destroying the work, MASS MoCA covered it with a tarp and invited audiences to walk past the covered work to attend its *Made at MASS MoCA* exhibit, which was an exhibit focusing on the collaboration between artists and museums.³³⁶ The court in *MASS MoCA* held that displaying Büchel's unfinished work covered under a tarp was not an intentional act of distortion or modification of Büchel's creation.³³⁷ The court admitted that MASS MoCA was not "necessarily acting with pure intentions when it created 'Made at MASS MoCA' in close proximity to the tarped 'Training Ground.'" ³³⁸ Indeed, the court surmised that the museum was likely using the covered art to criticize Büchel and to communicate its anger at the artist by "juxtaposing his unfinished work with the successful artistic collaborations depicted in its new exhibition."³³⁹ The court interpreted MASS MoCA's act to be "intended to highlight, rather than hide, the failed collaboration."³⁴⁰ However, the court found the museum's action

329. *See id.* (explaining that three art experts testified that the owner decorating Snow's geese with Christmas ribbons "ma[de] a mockery of [the work's] intended purpose by distorting its appearance, transforming it into a 'kitschy' sentimental display, resembling a Christmas bauble," which prejudiced "Snow's artistic honour and reputation").

330. *Büchel*, 593 F.3d at 45.

331. *Snow v. The Eaton Centre Ltd.* (1982) 70 C.P.R. (2d) 105 (Can. Ont. H.C.J.).

332. *Büchel*, 593 F.3d at 46; *see Eastwood, supra* note 84.

333. *Büchel*, 593 F.3d at 46.

334. *Id.* at 43.

335. *Id.* at 44–45.

336. *Id.* at 45.

337. *Id.* at 61.

338. *Id.*

339. *Id.* at 62.

340. *Id.*

not to violate the right of integrity, because the right does not protect the artist “from disparaging commentary about his behavior.”³⁴¹ It only protects from the “intentional act of distortion or modification” of the artist’s work.³⁴²

In the Canadian case *Snow v. Eaton Centre*, the artist of *Flight Stop*—a sculpture consisting of sixty flying/hanging geese—sued the owner of the work for displaying the work with red holiday ribbons around the geese’s necks.³⁴³ The artist, Michael Snow, felt that the addition of the ribbons “jarred the harmony of his naturalistic composition, altered its basic character and purpose, and ultimately affected his artistic reputation.”³⁴⁴ He sued Eaton Centre, and the court ordered the Centre to remove the red ribbons.³⁴⁵ In addition to the artist’s own statement that the ribbons prejudiced his honor and reputation, the court relied on the artist’s experts that testified to the harm to Snow’s reputation, including that the red ribbons made “a mockery of its intended purposes” and transformed the work “into a ‘kitschy’ sentimental display, resembling a Christmas bauble.”³⁴⁶

In the U.S., however, Eaton Centre’s actions might be excused under the public presentation exception.³⁴⁷ Specifically, the House Report on the hearings on VARA stated:

Under subsection (c)(2), galleries and museums continue to have normal discretion to light, frame, and place works of art. However, conduct that goes beyond presentation of a work to physical modification of it is actionable. For example, Representative Markey described the actions of two Australian entrepreneurs who cut Picasso’s “Trois Femmes” into hundreds of pieces and sold them as “original Picasso pieces.” This is clearly not a presentation question. On the other hand, the Committee believes that the presentation exclusion would operate to protect a Canadian shopping center that temporarily bedecked a sculpture of geese in flight with ribbons at Christmas

341. *Id.*

342. *Id.*

343. *See* *Snow v. The Eaton Centre Ltd.* (1982) 70 C.P.R. (2d) 105 (Can. Ont. H.C.J.); Eastwood, *supra* note 84.

344. *See* Eastwood, *supra* note 84.

345. *Snow*, 70 C.P.R. (2d) 105; *see* Eastwood, *supra* note 84.

346. *See* Eastwood, *supra* note 84.

347. 17 U.S.C. § 106A(c)(2) (2012).

time.³⁴⁸

Based on the court's decision in *MASS MoCA*³⁴⁹ and the House Report's statement on the facts in *Snow*,³⁵⁰ it seems that the *temporary* distortion, modification, or mutilation of art—such as partially covering it with a tarp or tying red ribbons on it—would not violate the right to integrity under VARA.³⁵¹ However, VARA does not use the words permanent or temporary or draw a line between those differences in the statute.³⁵² Indeed, it is interesting to consider why the temporary or impermanent distortion of a piece of work would be excused from VARA even though it may cause permanent damage to an artist's honor and reputation. For instance, would the same exact activities—placing a tarp over the work or tying ribbons on art pieces—violate VARA had they been semi-permanent? What if MASS MoCA decided to exhibit Büchel's work covered with a tarp for many years or as a permanent exhibition? What if the mall in Eaton Centre decided to never take the red ribbons off of Snow's geese sculptures? VARA does not use the words permanent or temporary in the statute, and it seems arbitrary for a violation of the right of integrity to rest upon whether the mutilation was permanent or impermanent. Indeed, how long must a mutilation occur for it to be permanent and, therefore, actionable? What types of distortions are, in fact, permanent? Is Agata Oleksiak's yarn bombing of Charging Bull in a pink and purple cozy knit permanent?³⁵³ Could an artist not succeed under a VARA claim against a third party who sprays paint on a concrete sculpture because there are now chemicals that can effectively remove spray paint from concrete? Instead of drawing an arbitrary line between permanent and impermanent mutilation of works, perhaps these activities could be appropriately examined under fair use.

For instance, in *MASS MoCA v. Büchel*, the Museum's covering and exhibiting of Büchel's unfinished sculpture in a *Made at MASS MoCA* exhibit could be considered fair use.³⁵⁴ As a preliminary matter, covering the work

348. H.R. REP. NO. 101-514, *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921 (footnotes omitted).

349. *See supra* text accompanying notes 333–42.

350. H.R. REP. NO. 101-514.

351. *See discussion supra* notes 332–50; 17 U.S.C. § 106A.

352. *See generally* 17 U.S.C. § 106A.

353. *See* Malia Wollan, *Graffiti's Cozy, Feminine Side*, N.Y. TIMES (May 18, 2011), <https://www.nytimes.com/2011/05/19/fashion/creating-graffiti-with-yarn.html>.

354. *See* *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 45–46 (1st Cir. 2010).

and exhibiting it in an exhibition focusing on the Museum's successful and failed collaboration with artists seems to transform the meaning of the work to create a new message.³⁵⁵ According to the Museum's website:

Made at MASS MoCA [was] a documentary project exploring the issues raised in the course of complex collaborative projects between artists and institutions. The exhibition examines some of the many ways in which MASS MoCA has worked with a wide range of visual and performing artists over more than a decade. In addition to serving as a presenter—the conventional role of museums—MASS MoCA is also a fabricator of large-scale works, a host of extended artist residencies, and a collaborator and co-producer. The exhibition looks at the implications of those roles and relationships and how they are relevant to the making and distribution of art today.

Made at MASS MoCA gives visitors insight into how major works of art take shape and what it means to describe MASS MoCA as an open platform for research and development in the arts.³⁵⁶

The court in *MASS MoCA* acknowledged:

MASS MoCA was not necessarily acting with pure intentions when it created “Made at MASS MoCA” in close proximity to the tarped “Training Ground.” It might be a fair inference that the Museum was deliberately communicating its anger with Büchel by juxtaposing his unfinished work with the successful artistic collaborations depicted in its new exhibition.³⁵⁷

Assume that the MASS MoCA exhibit was intended to exhibit both successful and failed collaborations with artists by partially covering Büchel's work with a tarp and juxtaposing his unfinished work with the MASS MoCA's other successful collaborations,³⁵⁸ MASS MoCA has certainly transformed

355. *Id.*

356. *Made at MASS MoCA*, MASS MoCA, <https://massmoca.org/event/made-mass-moca/> (last visited Mar. 4, 2019).

357. *Büchel*, 593 F.3d at 61–62.

358. See *id.* at 62.

Büchel's work to express a new purpose, message, and meaning. As a non-profit museum³⁵⁹ whose mission is to educate the public,³⁶⁰ the Museum's use of Büchel's work would further be considered to be of a noncommercial nature.³⁶¹ Under the second factor of fair use, while Büchel's work is highly expressive and creative, we know that this does not necessarily tilt the fair use analysis where the follow-on creator uses the work in a transformative manner to comment on the social and aesthetic meaning of the work.³⁶²

The third factor of fair use, the amount and substantiality of the portion used, might also weigh in favor of fair use.³⁶³ While Büchel's entire work was partially covered under the tarp during the exhibition, portions of his work were actually viewable, creating "a conceptual peep show."³⁶⁴ Furthermore, where the follow-on creator uses the original work in order to comment upon the work, courts recognize that the follow-on creator needs to use enough of the original in order to get their message across.³⁶⁵ Finally, the fourth factor, market harm, is debatable.³⁶⁶ Exhibiting Büchel's work covered under a tarp might cause harm to the future market of Büchel's works, either due to the disparaging commentary about Büchel's behavior or due to viewers gaining "an inaccurate sense of his art" and judging "his work on the basis of this experience."³⁶⁷ The former harm resulting from disparaging commentary about Büchel's behavior is not harm that is nor should be considered under fair use.³⁶⁸ Indeed, museums should be able to use an artist's work to criticize the artist's behavior just as they can use words to criticize the artist; if this causes museums to be wary of partnering with Büchel in the future, that harm

359. *FAQs*, MASS MOCA, <https://massmoca.org/visit/faq-frequently-asked-questions/> (last visited Oct. 8, 2019).

360. *Education*, MASS MOCA, <https://massmoca.org/education/> (last visited Oct. 8, 2019).

361. *See* 17 U.S.C. § 107(1) (2012).

362. *See supra* notes 316–19 and accompanying text.

363. *Measuring Fair Use: The Four Factors*, STAN. UNIV. LIBRARIES, <https://fairuse.stanford.edu/overview/fair-use/four-factors/> (last visited Oct. 8, 2019) ("The less you take, the more likely that your copying will be excused as fair use.").

364. *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 61 (1st Cir. 2010).

365. *See Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003) ("The general standard . . . is clear enough: the fair use copier must copy no more than is reasonably necessary [not strictly necessary—room must be allowed for judgment, and judges must not police criticism with a heavy hand] to enable him to pursue an aim that the law recognizes as proper . . .").

366. *See* 17 U.S.C. § 107(4).

367. *Büchel*, 593 F.3d at 60.

368. *See id.* at 62.

to Büchel is not the type of market harm that fair use considers.³⁶⁹ On the other hand, even though this fourth fair use factor is most concerned with the potential market for, or value of, the work used (here, Büchel's *Training Ground*), the harm to Büchel's future market due to viewers gaining an inaccurate sense of this art is potentially the type of market harm that fair use should consider when dealing with a right of integrity claim.³⁷⁰ Weighing the four factors of the fair use inquiry seems to support a finding of fair use in this case.

Putting aside whether the beribboned geese actually harmed the artist's honor and reputation, it is harder to find fair use in the facts of *Snow v. Eaton Centre*.³⁷¹ As a preliminary matter, what artistic, social, political, or expressive message is the shopping center trying to send by tying red ribbons around Snow's geese sculptures?³⁷² In mid-1982, the marketing director for Eaton Centre, a shopping mall, began planning its decoration in anticipation of the Christmas shopping season.³⁷³ Part of the decoration involved tying large red ribbons on the necks of the sixty geese sculptures and creating an advertising campaign, including posters, shopping bags, banners, centered on the beribboned geese.³⁷⁴ Instead of using Snow's sculptures to express an artistic message, the Eaton Centre's purpose for using Snow's sculptures was commercial—to promote the shopping center and the holiday shopping season.³⁷⁵ The Eaton Centre did not transform the meaning of Snow's sculptures to send an artistic, political, or social message, and its commercial purpose likely

369. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (“[b]iting criticism [that merely] suppresses demand” is not a cognizable harm under the Copyright Act (alterations in original) (quoting *Fisher v. Dees*, 794 F.2d 431, 438 (9th Cir. 1986))); *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1154 (C.D. Cal. 2010) (“In many cases, the most effective tool of ridiculing a public figure . . . is through that person's own creations. This is particularly true where a person's fame derives from that person's expressive works, as the case often is with artists, musicians, authors, and the like. The First Amendment demands that these public figures be open to ridicule, just as their works should be.”).

370. See Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 432 (2009) (“[A]rt is uniquely vulnerable to financial diminution through denigration or mutilation, because each art piece is a powerful advertisement for all the artist's works. Similarly, unauthorized modification of a work can impair the artist's stature, diluting the perceived esteem of her entire body of creative output.”).

371. See *Snow v. The Eaton Centre Ltd.* (1982) 70 C.P.R. (2d) 105 (Can. Ont. H.C.J.).

372. See generally *supra* note 84.

373. See generally Eastwood, *supra* note 84.

374. *Id.*

375. *Id.*

weighs against fair use under the first fair use factor.³⁷⁶ The second³⁷⁷ and third³⁷⁸ factors of § 107 also weigh against a finding of fair use due to the Eaton Centre's use of all of Snow's sixty geese sculptures and the highly expressive nature of Snow's work.³⁷⁹ Based on the facts of this case, the last factor is equipoised.³⁸⁰ While certain art experts testified that the red ribbons made "a mockery of [the work's] intended purpose by distorting its appearance, transforming it into a 'kitschy' sentimental display, resembling a Christmas bauble," another expert testified that the red ribbons around the geese presented a "'joyful Christmas statement,' and that his favourable opinion of Snow was not in any way affected on seeing the work."³⁸¹ Balancing the factors in this case would likely find that the Eaton Centre's distortion and display of Snow's sculptural work was not fair.

While current interpretations of the right of integrity seem to exclude from its reach temporary or impermanent mutilations of works, this exclusion has the potential to be arbitrary, especially where there is a thin line between temporary versus permanent mutilations of works, and where the impermanent mutilation of an author's work can cause the same prejudice to an author's honor and reputation as the permanent mutilation of the author's work. Furthermore, under an expanded moral rights legislation, where moral rights might apply to works other than single or limited-edition works of visual art, the line between permanent mutilation and impermanent mutilation would no longer hold.³⁸² Instead of drawing an artificial line between permanent versus impermanent mutilations, perhaps some of these circumstances may be better examined under the doctrine of fair use, excusing a follow-on creator where the follow-on work uses the author's work to express a new artistic, social, or

376. *Id.*; see *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) ("The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. '[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.'" (alteration in original) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984))).

377. 17 U.S.C. § 107(2) (2012) (stating the second factor as "the nature of the copyrighted work").

378. *Id.* § 107(3) (stating the third factor as "the amount and substantiality of the portion used in relation to the copyrighted work as a whole").

379. See Eastwood, *supra* note 84.

380. 17 U.S.C. § 107(4) (stating the fourth factor as "the effect of the use upon the potential market for or value of the copyrighted work").

381. See Eastwood, *supra* note 84.

382. See *supra* Section II.B. For instance, how does one distinguish between a "permanent" versus an "impermanent" mutilation of a song? Or a text? Or a movie?

political message.

C. *Permanent Mutilation of Original or Limited-Edition Works*

The most difficult case to make for fair use is in the context of a follow-on creator who permanently distorts, mutilates, or modifies an original or limited-edition copy of an artist's work in order to make an artistic, social, or political statement. For the reasons discussed in Section II.A, it is difficult to imagine a situation where the destruction of an original work, or a limited-edition work, could be excused under fair use. However, there are important social and political messages that can only be expressed through the mutilation of an original or limited-edition work.³⁸³ In fact, as Amy Adler explained, "there is an artistic value in modifying, defacing[,] and even destroying unique works of art."³⁸⁴

An example of mutilating an original work in order to send a political or social message is the "creative destruction" of colonialist or racist monuments.³⁸⁵ Instead of removing racist monuments in New Orleans, which may signal a repudiation of America's racist past but may also effectively erase America's racist history, Adler advocates for the creative destruction of racist monuments, in other words "to 'create' a new work by vandalizing the monument."³⁸⁶ An example of creative destruction occurred when vandals defaced a racist Civil War-era sculpture in New Orleans with anti-racist graffiti.³⁸⁷ The same concept of creative destruction can also apply to contemporary works. A recent example involved conceptual artist Sam Durant who created a sculpture, *Scaffold*, which was erected in the Walker Art Center's sculpture garden in Minneapolis in 2016.³⁸⁸ *Scaffold* was an unpainted wood-and-metal sculpture, more than fifty-feet tall, that included

383. See, e.g., Adler, *supra* note 27, at 287 ("The interest in destruction is so pervasive in contemporary art that, in 2002, French critic Bruno Latour declared: 'Art has become a synonym for the destruction of art.' In fact, . . . the defining feature of contemporary art has been its at-tack on the coherence of 'art' as a category. In this light, physical attacks against art objects can be understood as particularly valuable forms of expression. Moral rights law therefore rests on a vision of art at odds with contemporary art practice. The law obstructs rather than enables the creation of art.").

384. *Id.* at 279.

385. See *id.* at 280.

386. *Id.*

387. *Id.*

388. Sheila Dickinson, 'A Seed of Healing and Change': Native Americans Respond to Sam Durant's 'Scaffold', ARTNEWS (June 5, 2017), <http://www.artnews.com/2017/06/05/a-seed-of-healing->

stairways allowing visitors to climb to reach a platform.³⁸⁹ The purpose of *Scaffold* was to bring awareness to the dark history of Minnesota, where the largest mass execution occurred in U.S. history when thirty-eight Dakota Sioux men were hanged in 1862.³⁹⁰ While Durant's intention was to bring awareness to "the racial dimension of the criminal justice system in the United States,"³⁹¹ *Scaffold* deeply offended the local Native American communities "because of the unique context and history of trauma that the surrounding land inscribed on it and the form of the scaffold."³⁹² This portrayal of genocide by a non-Native American artist prompted overwhelming outcry and backlash, "fueled not only by anger about cultural appropriation of murder but also by another unfortunate resonance: the current suicide rate among Native American teenagers is the highest of any population in the United States."³⁹³ Durant, the Walker Art Center, and Dakota Tribal leaders considered various outcomes for *Scaffold*, which included dismantling it, burning it, or burying it.³⁹⁴ As a commentator acknowledged, "Disposing of artworks and burning them is a pretty strong statement."³⁹⁵ Regardless of opinions criticizing the destruction of *Scaffold* as censorship, or applauding the destruction as culturally sensitive, it is indisputable that the controversy and dialogue surrounding the destruction of Durant's sculpture led to more awareness and education about the United States' past injustices and racial genocide than did Durant's sculpture itself.³⁹⁶ Ultimately, Durant acknowledged that "the ways in which this process unfolded allowed me to transform *Scaffold* with the help of the Dakota

and-change-native-americans-respond-to-sam-durants-scaffold/.

389. Andrea K. Scott, *Does An Offensive Sculpture Deserve to be Burned?*, NEW YORKER (June 3, 2017), <https://www.newyorker.com/culture/cultural-comment/does-an-offensive-sculpture-deserve-to-be-burned>.

390. *Id.*

391. Sam Durant, *A Statement From Sam Durant (5.29.17)*, WALKER NEWS (May 29, 2017), <https://walkerart.org/magazine/a-statement-from-sam-durant-05-29-17>.

392. Olga Viso, *Why Taking Down Sam Durant's Scaffold Was the Right Thing to Do*, ART NEWSPAPER (Aug. 30, 2017), <https://www.theartnewspaper.com/comment/why-taking-down-sam-durants-scaffold-was-the-right-thing-to-do>.

393. Scott, *supra* note 389; see also Hilarie M. Sheets, *Dakota People Are Debating Whether to Burn 'Scaffold' Fragments*, N.Y. TIMES (June 5, 2017), https://www.nytimes.com/2017/06/05/arts/design/dakota-people-are-debating-whether-to-burn-scaffold-fragments.html?_r=0&module=inline ("Native American groups denounced the insensitivity of the piece in recalling what they regarded as an act of genocide . . .").

394. Sheets, *supra* note 393.

395. *Id.*

396. See Dickinson, *supra* note 388.

(and the media) into something that will have a far greater impact in society and be closer to my original intentions than if the work had remained as it was constructed in the sculpture garden.”³⁹⁷ The parties came to an agreement to dismantle *Scaffold* and to bury the dismantled wood in a secret location in Minnesota.³⁹⁸

In addition to sending a political or social message through the mutilation of works, artists have also used the mutilation of works to send artistic messages or have created new meaning with their mutilation and follow-on creations. For instance, in 2003, artists Jake and Dinos Chapman shocked the world when they purchased and destroyed a rare and revered series of limited-edition prints by Francisco Goya.³⁹⁹ The prints were Goya’s *Disasters of War*, consisting of eighty etchings printed from the artist’s plates.⁴⁰⁰ The *Disasters of War* etchings were inspired by Napoleon’s invasion of Spain and were “hailed as the ultimate antiwar statement in art.”⁴⁰¹ They were so significant that they inspired Pablo Picasso to create his antiwar painting, *Guernica*.⁴⁰² The Chapman brothers systematically went through all eighty of the first-rate, mint-condition etchings and superimposed colorful clown heads and puppies on all of the heads of the agonized victims of war.⁴⁰³ The Chapmans titled their new collection *Insult to Injury*, whose message was to “proclaim the inadequacy of art as protest.”⁴⁰⁴ Jonathan Jones, an art critic for *The Guardian*, described them as “brilliant and profound . . . [s]omehow, they do not destroy, but find something new in the Disasters of War[;] . . . [t]hey are given life, personality, by some very acute drawing, and so it’s not a collision but a collaboration, an assimilation, as they really do seem to belong in the pictures.”⁴⁰⁵

The Chapmans brothers’ series, *One Day You Will No Longer Be Loved*,

397. Viso, *supra* note 392.

398. Sheila M. Eldred, *Dakota Plan to Bury, Not Burn, ‘Scaffold’ Sculpture*, N.Y. TIMES (Sept. 1, 2017), <https://www.nytimes.com/2017/09/01/arts/design/dakota-plan-to-bury-not-burn-scaffold-sculpture.html>.

399. Jonathan Jones, *Look What We Did*, GUARDIAN (Mar. 31, 2003), <https://www.theguardian.com/culture/2003/mar/31/artsfeatures.turnerprize2003>.

400. *Id.*

401. Alan Riding, *Goya Probably Would Not Be Amused*, N.Y. TIMES (Apr. 6, 2003), <https://www.nytimes.com/2003/04/06/weekinreview/goya-probably-would-not-be-amused.html>.

402. *Id.*

403. Jones, *supra* note 399.

404. Riding, *supra* note 401.

405. Jones, *supra* note 399.

was less shocking but equally destructive.⁴⁰⁶ For this collection, the Chapmans purchased nineteenth century portraits “by unknown artists of unknown subjects” and altered them.⁴⁰⁷ The purpose of their follow-on work was to “highlight[] society’s attitude to the past as irrelevant and not worth remembering. The work is disturbing both because of the sitters decaying face and because an apparent old master has been defaced. The work reflects the brothers continuing concern with the human preoccupation with mortality”⁴⁰⁸

An earlier, but equally shocking, act of creative destruction was Robert Rauschenberg’s *Erased de Kooning Drawing*.⁴⁰⁹ In 1953, Rauschenberg took a drawing by Willem de Kooning and slowly erased it.⁴¹⁰ It took Rauschenberg two months to erase it,⁴¹¹ resulting in a “sheet of paper bearing the faint, ghostly shadow of its former markings.”⁴¹² He then labeled it, matted it, and framed the work, inscribing below the now-obliterated de Kooning drawing: *Erased de Kooning Drawing*, Robert Rauschenberg, 1953.⁴¹³ The result was a new piece of work whose fame eventually surpassed many of de Kooning’s own works.⁴¹⁴ To Rauschenberg, it was important that the erased work was an original work by a significant artist, because the work “depend[ed] on the fact that he violated not a reproduction of work but an original, and not just any original, but an original by Willem de Kooning.”⁴¹⁵ This was the only way Rauschenberg could express his message by performing a literal act of iconoclasm, by expanding what art could be.⁴¹⁶ Erasing the best work of the past expressed the message “that new art might be about its own failure to achieve greatness, its impotent rebellion against the heroic past[,] . . . art that . . . [is] about ‘its own destruction.’”⁴¹⁷

406. *One Day You Will No Longer Be Loved (That It Should Come to This) III*, ART FUND, <https://www.artfund.org/supporting-museums/art-weve-helped-buy/artwork/11735/one-day-you-will-no-longer-be-loved-that-it-should-come-to-this-iii> (last visited Mar. 3, 2019).

407. *Id.*

408. *Id.*

409. Adler, *supra* note 27, at 283.

410. *Id.*

411. Cain, *supra* note 261.

412. Adler, *supra* note 27, at 283.

413. *Robert Rauschenberg, Erased de Kooning Drawing, 1953*, *supra* note 258.

414. Greg Allen, *Erased De Kooning Drawing is Bigger Than It Used to Be*, GREG.ORG (Jan. 11, 2012), <https://greg.org/archive/2012/01/11/erased-de-kooning-drawing-is-bigger-than-it-used-to-be.html>.

415. Adler, *supra* note 27, at 283.

416. *Id.*

417. *Id.*

These examples support follow-on creators who create new meaning and artistic expression through the use of another's work, where that new meaning can only be expressed through the use of an original or limited-edition work. Under a fair use analysis, these follow-on creators transformed the originals by giving them new meaning and by expressing a new message through their transformations. The original works—sculptures and paintings—were expressive and creative, but the nature of the original works is less important where the follow-on creator transforms the original work to express a new meaning or purpose. Similarly, even though the follow-on creators in all of the examples above used the entireties of the authors' original works, that use was necessary to express their artistic, social, or political messages.⁴¹⁸ The final factor of fair use is a more difficult analysis.⁴¹⁹ The permanent mutilation, modification, or distortion of the author's original work certainly seems like it would harm the market for the author's work because the original work no longer exists, but that does not seem to be a consideration for the fair use doctrine⁴²⁰ or the moral right of integrity.⁴²¹ As a preliminary matter, by the time the work is distorted by the follow-on creator, the physical work usually no longer belongs to the author, so the author has no market rights to their original work of art.⁴²² The author retains their right to create reproductions of their original work, and the distortion of the original work might in fact increase rather than decrease the market value of the author's reproductions because the original is no longer available.⁴²³ Similarly, the transformative works described in this context are not generally attributed to the original author. Transformed works are, instead, clearly attributed to the follow-on creator.⁴²⁴ For instance, the Chapman brothers renamed their transformed works

418. See Yonover, *supra* note 26, at 118 (“[P]arody of a visual art . . . may necessitate a more total appropriation than a parody of . . . a song or a play.”).

419. See 17 U.S.C. § 107(4) (2012) (“[T]he effect of the use upon the potential market for or value of the copyrighted work . . .”).

420. See *generally id.* § 107.

421. See *generally id.* § 106A(a)(3)(A) (2012).

422. See, e.g., Cain, *supra* note 261 (discussing how Willem de Kooning gave Rauschenberg a drawing, which Rauschenberg then erased and entitled *Erased de Kooning*); Jones, *supra* note 399 (explaining that the Chapmans purchased a rare limited-edition series of Goya's *Disasters of War* and subsequently painted onto it).

423. See Adler, *supra* note 27, at 284 (“Destroying art can be a valuable way of making art. . . . Destruction is not simply an occasionally valuable thing, but rather, a central quality of ‘art’ itself.”).

424. See *supra* notes 399–417 and accompanying text.

and attributed those works to themselves,⁴²⁵ and Rauschenberg inscribed his own name below *Erased de Kooning*.⁴²⁶ This means that viewers of the follow-on creators' works will not gain an inaccurate sense of the original author's work or judge the author's work on the basis of the transformative uses.⁴²⁷

Some may argue that, if we were to apply fair use in right of integrity cases, then what is to stop anyone who destroys or mutilates a work from claiming that their mutilation, modification, or distortion was fair use? For instance, what would prevent the developer in *Cohen v. G & M Realty L.P.* from claiming that his intent in white-washing the street art on the 5Pointz warehouse was to give the street art new purpose, message, or meaning?⁴²⁸ Courts have faced similar questions numerous times in the past in infringement and fair use disputes, and have made case-by-case determinations on when follow-on creators actually transform copyrighted works to give them new meanings and messages, and when they do not.⁴²⁹ There is no reason that courts would have difficulty making the same determinations for integrity claims as they have in countless infringement claims in the past.⁴³⁰ Furthermore, courts do not rely solely on a follow-on creator's intent to transform; they examine the follow-on work to determine whether the work expresses a meaningfully-different message or purpose than the original. An example of this is the case of *Rogers v. Koons*.⁴³¹ Koons testified that his use of Roger's photograph of a couple holding a string of puppies was intended as

social criticism . . . to support that proposition that . . . the mass production of commodities and media images has caused a deterioration in the quality of society, and this artistic tradition of which he is a member proposes through incorporating these images into works of art to comment critically both on the incorporated object and the political and economic system that created it.⁴³²

425. Jones, *supra* note 399.

426. Robert Rauschenberg, *Erased de Kooning Drawing, 1953*, *supra* note 258.

427. See Adler, *supra* note 27, at 282 (describing one critic's focus on the *Chapman brothers*' "act of shocking deviance").

428. 320 F. Supp. 3d 421, 434–35 (E.D.N.Y. 2018).

429. See discussion *supra* Section III.A.

430. See discussion *supra* Section III.A.

431. 960 F.2d 301 (2d Cir. 1992).

432. *Id.* at 309.

The court nevertheless found that Koons's expression in his sculptural work, *String of Puppies*, did not transform the meaning, message, or purpose of Rogers' original photo and was not fair use.⁴³³

Take, as another example, one of the first moral right of integrity cases mentioned in this Paper—the case in Germany where a homeowner, uncomfortable with the nudes in a mural on his wall, hired an artist to paint clothing on the nudes.⁴³⁴ Painting clothing on nudes is not likely to be considered transformative for fair use for the same reason the sanitized version of a film was not considered transformative for fair use in *Clean Flicks of Colorado, LLCs v. Soderbergh*.⁴³⁵ Specifically,

Bleeping certain words in the film's dialogue or using a black bar or blurring to obscure some nudity in certain frames might . . . not really add any new purpose, character, expression, meaning[,] or message to the film, or might only add the message . . . that the movie contains some content that some people find objectionable.⁴³⁶

Similarly, an owner's attempt to sell a separated panel from Bernard Buffet's compilation work on the refrigerator,⁴³⁷ and the Chicago Park District's downsizing of Chapman Kelley's *Wildflower Works*,⁴³⁸ are also not likely to be considered transformative uses for fair use. In the Bernard Buffet case, the separation and attempt by the owner of the work to sell the refrigerator panels piece-by-piece was clearly motivated by profit. There was no artistic, social, or political message to send by selling a section of a work, and the separated panel did not serve a new purpose or send a new meaning or message by being separated from the rest. Indeed, this act is similar to cutting up and selling pieces of a Picasso painting, which VARA's legislative history indicates

433. *Id.* at 312.

434. *See* Merryman, *supra* note 18, at 1027 n.56 (discussing Reichsgericht [RG] [court of last resort for civil and criminal matters] June 8, 1912, 79 ENTSCHIEDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN [RGZ] 397 (Ger.)).

435. 433 F. Supp. 2d 1236, 1240–43 (D. Colo. 2006).

436. Reese, *supra* note 210, at 470 (discussing *Clean Flicks*, 433 F. Supp. 2d at 1238); *see also* Disney Enterprises, Inc. v. VidAngel, Inc., 869 F.3d 848, 861 (9th Cir. 2017) (“VidAngel’s service does not add anything to Plaintiff’s works. It simply omits portions that viewers find objectionable, and transmits them for the same intrinsic entertainment value as the originals. . . . Although removing objectionable content may permit a viewer to enjoy a film, this does not necessarily add something new or change the expression, meaning, or message of the film.” (internal quotations omitted)).

437. *See supra* note 18 and accompanying text.

438. *See* Kelley v. Chi. Park Dist., 635 F.3d 290, 294 (7th Cir. 2011).

would clearly violate an author's right of integrity,⁴³⁹ and it would create no new message or meaning. Similarly, Chicago Park District's downsizing of Kelley's *Wildflower Works* was motivated purely by the need to redevelop Grant Park to make space for the new Millennium Park.⁴⁴⁰ The smaller-sized garden did not send a new message, meaning, or purpose.

Even the case of *Deckmyn v. Vandersteen*, where the follow-on creator modified and distorted the cover of a famous comic to send a critical political message, may not be considered transformative for the purpose of fair use.⁴⁴¹ Courts are generally more inclined to find transformative use and, therefore, fair use where the follow-on work is a parody of the original rather than a satire that "merely uses [the original work] to get attention or to avoid the drudgery in working up something fresh."⁴⁴² Indeed, the *Deckmyn* case seems analogous to the facts in *Dr. Seuss Enterprises v. Penguin Books*. In *Dr. Seuss Enterprises*, a follow-on creator used the look, feel, and characters from *The Cat In the Hat* to create *The Cat Not In The Hat!*, a "rhyming summary of highlights from the O.J. Simpson double murder trial."⁴⁴³ In that case, the court found the follow-on creator's work to be satire instead of parody and was therefore not transformative for the purpose of fair use.⁴⁴⁴

Some may argue that recognizing fair use to moral right of integrity claims invites the destruction of great works of art.⁴⁴⁵ Take, for instance, the opening scenario in Joseph Sax's *Playing Darts with a Rembrandt*, where "[a]n eccentric American collector who, for a Saturday evening's amusement, invited his friends to play darts using his Rembrandt portrait as the target."⁴⁴⁶ Recognizing a fair use limitation to the right of integrity is not likely to encourage this type of behavior. As a preliminary matter, VARA only protects moral rights of authors who are currently living.⁴⁴⁷ This would mean that great works of art by deceased masters would not be protected under VARA in the

439. See *supra* note 348 and accompanying text.

440. *Kelley*, 635 F.3d at 294.

441. See *supra* text accompanying notes 79–83.

442. *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997).

443. *Id.* at 1396.

444. *Id.* at 1400–01.

445. See discussion *supra* Section II.B.

446. SAX, *supra* note 58, at 1.

447. 17 U.S.C. § 106A(d)(1) (2012).

first place.⁴⁴⁸ Second, the destruction of another's property is still a crime.⁴⁴⁹ Just because liability under moral rights may be limited by fair use does not mean it is protected from criminal or civil liability for destruction of property. For instance, in 1986, self-proclaimed artist Gerard Jan van Bladeren took a box cutter and slashed Barnett Newman's American Abstract Expressionist masterpiece, *Who's Afraid of Red, Yellow and Blue III*, hanging in the Stedelijk Museum in Amsterdam.⁴⁵⁰ Bladeren claimed that Newman's painting was "a kind of cultural provocation" that "called for a reaction and got one."⁴⁵¹ In spite of his claimed artistic gesture, Bladeren served five months in jail and three months on parole for his destruction.⁴⁵² Similarly, in 2014, Miami artist Maximo Caminero picked up one of artist Ai Weiwei's Chinese urns at the Perez Art Museum Miami and smashed it.⁴⁵³ Caminero claimed that he smashed the vase as a "spontaneous protest."⁴⁵⁴ Specifically, he saw Ai Weiwei's photos behind the vases featuring Weiwei dropping and destroying an ancient Chinese vase "as a provocation by Weiwei to join him in an act of performance protest."⁴⁵⁵ Putting aside the analysis of whether this act of destruction would be considered fair use, Caminero's act was certainly a crime (and civil tort) for which he was arrested.⁴⁵⁶ Finally, fair use is not likely to encourage owners of original or limited-edition works to destroy their own valuable properties or works of art. Owners of valuable works would be deterred from mutilating, distorting, or modifying their own property by the economic consequences of those actions. Unless they feel strongly the need to send a new and important artistic, political, or social message through the mutilation of their valuable property, most owners of valuable works tend to want to preserve their works and the economic values in their works rather than

448. *Id.*

449. *E.g.*, CAL. PENAL CODE § 594(a) (West 2019).

450. Carol Vogel, *Dutch Vandal Slashes Museums' Confidence*, N.Y. TIMES (Nov. 27, 1997), <https://www.nytimes.com/1997/11/27/arts/dutch-vandal-slashes-museums-confidence.html>.

451. *The Many Deaths of a Painting*, 99% INVISIBLE (Mar. 26, 2019), <https://99percentinvisible.org/episode/the-many-deaths-of-a-painting/>.

452. Vogel, *supra* note 450. Bladeren struck again in 1997 when he slashed another one of Newman's works, *Cathedra*, which was worth \$12 million. *Id.*

453. Krishnadev Calamur, *In Act of Protest, Ai Weiwei Vase Is Destroyed At Miami Museum*, NPR (Feb. 18, 2014), <https://www.npr.org/sections/thetwo-way/2014/02/18/279050608/in-act-of-protest-ai-weiwei-vase-in-destroyed-at-miami-museum>.

454. *Id.*

455. *Id.*

456. *Id.* (stating that Caminero was "charged with criminal mischief").

commit waste.⁴⁵⁷

V. CONCLUSION

The moral right of integrity protects an author's right to prevent any distortion, modification, or mutilation of their work that prejudices their honor and reputation.⁴⁵⁸ At the same time, fair use allows follow-on creators to transform the meaning or message of an author's work to express a new meaning or message, and "the public has moral entitlements to reuse and alter . . . cultural artifacts made by others."⁴⁵⁹ Even though the text of VARA explicitly includes language subjecting the moral right of integrity to copyright's fair use limitation, there have been no cases in the United States applying § 107's fair use factors to balance an author's interest with the public's moral entitlement.⁴⁶⁰ The lack of case law interpreting how courts might balance an author's moral right of integrity with follow-on creators' and the public's rights to expression is particularly troubling in light of the ongoing discussion to expand moral rights in the United States. If moral rights are to be expanded, most interest groups, industry groups, and commentators agree that those rights must be subject to fair use.⁴⁶¹ However, without any guidance from courts, and with commentators and legislative history doubting the compatibility of fair use with the right of integrity, how can the United States expand moral rights with the assumption that fair use would provide the balance between authors' rights and the public's rights? This Paper examines past integrity cases to envision how fair use could be interpreted and applied to these various cases and contexts.⁴⁶² Courts need not restrict the scope of fair use to give the moral right of integrity meaning. It is clear from the analysis in this Paper that copyright's fair use doctrine is flexible enough to serve as a limitation on an author's moral right of integrity, and the four fair use factors may be used to balance the author's rights with the public's rights to find fair use where a follow-on creator modifies, distorts, or mutilates an author's work

457. *But cf.* Edward J. Damich, *supra* note 15, at 9 (discussing a French case where an artist "slashed and th[rew] away some of his paintings," then someone found and restored the paintings and put them up for auction; when the artist learned about the sale, "he demanded that the paintings be destroyed").

458. *See* 17 U.S.C. § 106A(a)(3)(A) (2012).

459. Gordon, *supra* note 156, at 1.

460. *See supra* Part II.

461. *See supra* Section II.B.

462. *See supra* Part III.

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to transform the work and give the work new meaning or to express a political, social, or artistic message.

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