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UNITED STATES' MORAL RIGHTS DEVELOPMENTS IN EUROPEAN PERSPECTIVE

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I. INTRODUCTION

It is a particular pleasure for me, as a European, to comment on Professor Roberta Rosenthal Kwall's article *How Fine Art Fares Post VARA*.[1] Ever since the United States joined the Berne Convention and enacted the Visual Artists Rights Act ("VARA"), European observers have speculated over whether this was the beginning of the development of the moral rights model in the United States or only a symbolic gesture to enhance the status of the United States in the international arena without meaningful consequences for American law.[2]

In a 1985 article, Kwall forcefully raised the question whether an American marriage between copyright and moral rights was feasible.[3] VARA's enactment and its subsequent judicial application call into question, a decade later, whether marriage is the appropriate metaphor to describe the opening of the American copyright tradition to the continental moral rights model that VARA was meant to represent. Kwall's article reports her doubts as to whether VARA will be able to make a real difference in the American copyright system — doubts she bases upon the issues that have been litigated under VARA and upon the empirical research presented in the 1996 Final Report on what is

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1. Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1 (1997) [hereinafter Kwall, *How Fine Art Fares*].

2. Accounts, within American literature, reporting the ironic development that United States' "copyright culture is moving, ubiquitously, though quietly and incrementally away from the Berne Convention's directive" may also reinforce prior and more general concerns in the international community. Marci A. Hamilton, *Appropriation Art and The Imminent Decline in Authorial Control Over Copyrighted Works*, 42 J. COPYRIGHT SOC'Y 93, 98 (1994).

3. *See* Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is An American Marriage Possible?*, 38 VAND. L. REV. 1 (1985) [hereinafter Kwall, *An American Marriage*].

often considered to be the Act's most troubling provision (and the supposed major point of departure from the European moral right tradition), namely the ability of the author to waive moral rights.[4]

The following remarks are mainly focused upon similarities and discrepancies between VARA and European law. It is intended that such a comparison will help illuminate the issues Kwall raised in her lead article herein.

II. THE INTERESTS SERVED BY MORAL RIGHTS DOCTRINE

Kwall's policy suggestions rest on the assumption, stated in her previous work as well as in her most recent article,[5] that moral rights protection is intended to serve only the creator's personality interests.[6] Those interests are conceived as fundamentally different from the "economic" or commercial interests that are protected by copyright law, trademark law, and the right of publicity doctrine, which were the principal bodies of law governing the interests of artists prior to VARA's enactment.

In a recent article analyzing, with a comparative approach, the functions that moral rights might perform, I argued that moral rights doctrine can serve to protect, not just personality interests of the artists, but also interests of a distinctly commercial or reputational character. In addition, I argued that the doctrine of moral rights can serve to protect the interests, both pecuniary and nonpecuniary, not just of the individual artist, but of the other owners of the artist's work and of the public at large as well.[7] I believe that greater attention to the mixed interests served by the moral rights doctrine would improve our understanding of the conflicts to which they give rise and offer specific insights for future statutory developments. Therefore, my views, as expressed below (although, perhaps, less conventionally than Kwall's) may differ from Kwall's interpretive and policy suggestions.

III. PREEMPTION

Kwall's proposals aim toward reinforcing moral rights protection in

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4. *See generally,* Kwall, *How Fine Art Fares, supra* note 1.

5. Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis,* 70 IND. L.J. 47, 59 (1994); Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA,* 1 MARQ. INTELL. PROP. L. REV. 1, 1 (1997) [hereinafter Kwall, *How Fine Art Fares*].

6. Kwall, *How Fine Art Fares, supra* note 5, at 1.

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

the United States by unifying the developing bodies of state moral rights laws with federal protection. It is towards these ends that Kwall argues for a strong view of federal preemption.[8]

I do not believe I can add much to the thorough analysis of federal copyright preemption that leads Kwall to advocate a unified system of protection. However, regarding the implications for international accountability of the United States, it seems that a flexible construction of the preemption provisions, following the insight that federal law supplements but does not completely displace state law rights, will prove to be a more effective methodology to protect artists' rights — something Kwall clearly advocates.[9]

Preemption raises issues that are not only of a domestic character, as discussions of the implementation of the Berne Convention in the American federal context have exemplified.[10] The "complexity" of the ragged U.S. regulation in the moral rights field appears, if possible, even more befuddling and frustrating when seen from an international prospective.[11] Therefore, from an international law perspective, there seem to be even stronger arguments to support Kwall's view of federal preemption. On the other hand, the question of preemption is ultimately tied to the scope of moral rights protection within the United States, especially if it is true that VARA's hasty enactment may ultimately amount to a closed door to any further development of moral rights in the form of federal legislation expressly embodying the Berne convention's prescriptions.[12] This is particularly true of reputational interests which, as noted above, are arguably a very important part of moral rights.

Section 43 of the Lanham Act[13] may be the best alternative that advocates of moral rights can hope for on the federal level as far as general protection of reputational interests is concerned. Yet, as American courts have acknowledged, the application of trademark law to art is "a

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8. *See* Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 29-45 (1997) [hereinafter Kwall, *How Fine Art Fares*].

9. *Id.* at 44-45.

10. *See Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L.& ARTS 513, 555 (1986). *See generally* Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries,* 19 COLUM.-VLA J.L. & ARTS 229, 239-42 (1995).

11. *See* Jane C. Ginsburg, *Federalism and Intellectual Property* 15 (unpublished manuscript); *see also* Jane C. Ginsburg, *Federalism and Intellectual Property*, 139 R.I.D.A. 18 (1989).

12. Paul Goldstein, *Copyright*, 55 LAW AND CONTEMP. PROBS. 79, 90 (1992).

13. 15 U.S.C. § 1125 (1994).

rarely-visited area of the law."[14] Rather, protection of reputational interests in the United States, beyond the relatively narrow confines of trademark law, has traditionally resided in the state common law rather than in United States federal statutory law. Consequently, the stronger policy favoring a unified federal system of moral rights, as advocated by Kwall, could limit the availability and the scope of artist's moral rights, lessening the sum total of moral rights protection in the United States.[15]

In addition to this generalized critique of Kwall's position on moral rights, and setting aside VARA's ambiguity on the preemption issue, some of Kwall's interpretive suggestions, such as her discussion of improper display or posthumous protection of artworks, rely on the unverified assumption that federal law should supply the exclusive measure of the interests that are to be protected.[16] But why should this be so in the area of moral rights? Compelling reasons are not spelled out in Kwall's article.

Moreover, the application of federal law advocated by Kwall stands on two debatable assumptions: first, that artists retain their copyright in order to protect the integrity of their works through exercise of the adaptation right; and, second, as we may further infer from her discussion of the "objective" standards for preemption analysis,[17] that moral rights protection is supposed to serve only the creator's personal rights in her works. These are assumptions that are not convincingly established in Kwall's work.

IV. MORAL RIGHTS DOCTRINE AND VARA

There are some noticeable differences between the scope of the rights afforded by VARA and those rights afforded artists under European formulations of the moral rights doctrine. Beyond general observations based on the black letter law of the European regime, it is worth looking at the operational rules that have been developed to bridge the gaps in the general formulations that are typical of European moral rights legislation.

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14. *See, e.g.*, Romm Art Creations Ltd. v. Simcha Int'l, Inc., 786 F. Supp. 1126, 1129, 22 U.S.P.Q.2d (BNA) 1801, 1801 (E.D.N.Y. 1992) (case involving "the interaction of the Lanham Act with the marketing and sale of limited editions and fine art posters").

15. *See, e.g.*, John Henry Merryman, *The Moral Right of Maurice Utrillo*, 43 AM. J. COMP. L. 445, 446, 453 (1995).

16. Kwall, *How Fine Art Fares*, *supra* note 8, at 29. These are areas where federal law clearly would be more restrictive than state common law.

17. *Id.* at 31-32.

A. The Right of Integrity

I begin with the right of integrity. While the issues raised by the confused wording in VARA, and thoroughly discussed by Kwall, "will occupy Courts for years to come,"[18] it is worth recalling that often there is also significant debate within individual European countries about the precise interpretation to be given existing statutory and decisional law concerning artist's moral rights, particularly because the specific rights of visual artists are not singled out in the European copyright laws, except for the following provisions: a clear and earlier default rule of statutory copyright allocation on behalf of artists; the *droit de suite* (resale royalties) provisions; and special rules for architects' moral rights and for photographic works.[19] Thus, similar ambiguities also arise in specific European countries as case law of recent years well exemplifies.[20]

B. The Right of Disclosure

The right of disclosure does not exist under VARA's formulation, nor has the statute been interpreted as implying an artist's "right to complete" the work when the commissioning party refuses to permit the artist to finish and disclose the work.[21] At the same time, American courts also have not followed the insight that an incomplete work may be considered an impairment of the artist's right of integrity.[22]

In contrast, European courts dealing with the issue of artists' rights to disclose completed works can find, in the statutory provision of the

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18. *See* Pavia v. 1120 Ave. of the Americas Assocs., 901 F. Supp. 620, 626, 36 U.S.P.Q.2d (BNA) 1622, 1626-27 (S.D.N.Y. 1995) (citing Charkes Ossola, *Law for Art's Sake*, THE RECORDER, Jan. 8, 1991, at 6).

19. *See, e.g.*, Adolf Dietz, *The Artist's Right of Integrity Under Copyright Law - A Comparative Approach*, 25 INT'L REV. INDUS. PROP. & COPYRIGHT 177, 183 (1994); Jane C. Ginsburg, *Droit D'Auteur et Propriete De l' Exemplaire D' Une oeuvre D'Art: Etude De Droit Compare*, 3 R.I.D.C. 811, 816-21 (1994).

20. *See, e.g.*, Dietz, *supra* note 19, at 187-90; Quentin Byrne-Sutton, *The Owner Of A Work Of Visual Art and The Artist: Potential Conflict Of Interests*, *in* INTERESTS IN GOODS 281, 287-300 (Norman Palmer & Ewan McKendrick eds. 1993).

21. In the words of Judge Edelstein, VARA "does not mandate creation. Nothing in the statute compels defendants to allow plaintiffs to engage in further creation." Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 329, 33 U.S.P.Q.2d (BNA) 1225, 1241 (S.D.N.Y. 1994), *rev'd*, 71 F.3d 77, 37 U.S.P.Q.2d (BNA) 1020 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1824 (1996). *But see* Ann Landi, *The Landlord, the Installation, the Artists, and their Lawyers*, ARTNEWS, May 1995, at 127 (reporting strong criticism of of the failure to protect an author's creation).

22. *See infra* notes 67-68 and accompanying text.

right of disclosure, a strong bias in favor of the artists' prerogatives.[23] However, when conflicts arise related to commissioned artwork, courts face hard choices in reconciling the artist's right and the alleged contractual terms which might justify a different outcome on behalf of the commissioning party.[24] Ultimately, the express formulation of the artist's right of disclosure in the civil law tradition allows solutions that are most favorable to control by the author but there also is growing sensitivity to balancing these conflicting interests.[25]

C. The Right of Withdrawal

I have argued elsewhere[26] that a right of withdrawal for paintings or sculpture would yield few serious benefits, while offering substantial scope for artists to behave opportunistically or eccentrically. Following this assumption, the United States' statutory solution arguably does not discriminate against visual artists. In civil law jurisdictions, in the few cases in which the issue has arisen, courts have denied the right to withdraw to visual artists, in contrast to the other moral rights. Consequently, the operational rule in the continental tradition and the statutory solution under VARA are analogous.[27]

V. VARA'S APPLICATION OF FAIR USE DOCTRINE TO MORAL RIGHTS

From a comparative prospective, the statutory provision that circumscribes the scope of moral rights through the fair use doctrine deserves deeper exploration. VARA's application of the fair use doctrine

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23. There are well known French precedents dealing with the question. *See, e.g.*, F. Pollaud-Dulian, *Moral Rights in France, Through Recent Case Law*, 145 R.I.D.A. 127, 161-71 (1990); Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 206-13 (1995).

24. *See, e.g.*, Judgment of Jan. 8, 1980, Cass. civ. 1re, 1980 d. Jur. 89, note Edelman, 1980 J.C.P. II No. 19336, note Lindon, April 1980 R.I.D.A. 152, note Francon, on remand, Versailles, July 8, 1981, Oct. 1981 R.I.D.A. 201, 1982 D.I.R. 45, obs. Colombet, aff'd, Judgment of Mar. 16, 1983, Cass civ. 1re, July 1983 R.I.D.A. 80, 1983 D.I.R. 432 (the French Court of Cassation upheld the trial judge's decision entitling the sculptor to continue the construction of the monumental sculpture that the Renault motor company had commissioned but subsequently refused to allow the artist' to carry on to completion. Though contract's terms might have entitled the commissioning party to change its mind, the Court interpreted the contract restrictively stating that, once the choice to undertake the work had been made, in the absence of *force majeure*, it had to be completed on behalf of the artist).

25. *See* Dietz, *supra* note 19, at 187-94; Byrne-Sutton, *supra* note 20, at 288-96.

26. *See* Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 139-41 (1997).

27. *Id.*

to moral rights offers an excellent example of the need to qualify the conventional account of moral rights and fair use as the mutually exclusive emblems identifying the two cultures of copyright confronting each other in the international arena.[28]

In fact, VARA's fair use limitation, underestimated by American commentators,[29] has found a better reception among European copyright scholars, according to whom the American solution might indeed provide a possible model to be transplanted in the Berne Convention provisions on moral rights or as part of the future regulation of moral rights within the European community.[30]

As demonstrated by some of the cases discussed in Kwall's article, short of the fair use doctrine, common law courts would find themselves in a conceptual conundrum in applying moral rights notions to visual works.

Though fair use analysis has been mainly — with a few exceptions — related to non-VARA works or to state moral rights law (involving, for example, disreputable reproductions of artistic works),[31] the related discussion does have some relevance in the broader speculation about VARA's prospective influence. Issues raised by parody, by innovative use of a prior work in the creation of a new work, and art commentary cases offer examples.[32]

To this extent there is some ambiguity in Kwall's concerns whether the author's moral rights protection is consistent with the policy underlying fair use provisions. Kwall seems to think that state protection for creators whose works are displayed in a context that is objection-

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28. *See* Paul Goldstein, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 168 (1994); Anne Moebes, *Negotiating International Copyright Protection: The United States and European Community Positions*, 14 LOY. L.A. INT'L & COMP. L.J. 301, 320 (1992).

29. *See generally* Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J.L. & ARTS 477 (1990); Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95 (1997); Peter H. Karlen, *What Is Wrong With VARA: A Critique of Federal Moral Rights*, 15 HASTINGS COMM. & ENT. L.J. 905, 914-15 (1993).

30. Adolf Dietz, *The Artist's Right of Integrity Under Copyright Law - A Comparative Approach*, 25 INT'L REV. INDUS. PROP. & COPYRIGHT 177, 187 (1994); Gerald Dworkin, *Moral Rights in English Law - The Shape of Rights to Come*, 9 EUR. INTELL. PROP. REV. 329, 334 (1986) (advocating legislation widening the fair dealing defense in the UK revision of moral rights law).

31. *See* Wojnarowicz v. American Family Ass'n., 745 F. Supp. 130, 134, 17 U.S.P.Q.2d (BNA) 1337, 1340 (S.D.N.Y. 1990).

32. *See generally* Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73 (1996).

able to the author would be preempted on the ground that such protection could conflict with appropriate applications of the fair use doctrine. This conclusion is not necessarily persuasive. The situations Kwall has in mind require the courts to balance the conflicting interests involved. Fair use analysis is arguably already what courts employ to guide this balancing. I do not mean to imply that the issue is unproblematic, but only that, if sensibly applied, the fair use doctrine does not necessarily "cut the first author out of the picture,"[33] nor does it necessarily challenge the conventional policy underlying fair use in the American copyright model, as "an appropriate means by which courts could balance the competing interests ... and the First Amendment."[34]

VI. THE WORK MADE FOR HIRE EXCLUSION

The employed or hired author's exclusion from moral right protection is a seemingly fundamental difference between civil law and common law jurisdictions. In principle, European moral right laws grant moral rights to the "author" (*i.e.*, the actual creator) of a work, without making exceptions for work made for hire. The work made for hire concept in United States' copyright law effectively pulls together a bundle of issues which European based systems resolve by other means without employing an explicit work made for hire doctrine. These include rules of presumed transfers of exploitation rights, statutory limitations on moral rights, and judicially tailored rules for commissioned works or works created in an employment relationship. Therefore, in situations corresponding to those analyzed by American courts under the work made for hire label, we can arguably find, in the laws and the practice of civil law jurisdictions, solutions that take into consideration the special character of the works or the contractual terms and parties relationship.[35] On the other hand, there are areas in which the differences between the results reached in common law and civil law systems are conspicuous and suggest the persistence of a divergent conceptual approach to artist's rights, for example, the treatment of films.[36]

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33. Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control Over Copyrighted Works*, 42 J. COPYRIGHT SOC'Y 93, 110 (1994).

34. Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 58 n.54 (1994).

35. *See* Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 220-25 (1995); Thomas K. Dreier, *Authorship and New Technologies from the Viewpoint of Civil Law Traditions*, 26 INT'L REV. INDUS. PROP. & COPYRIGHT L. 989, 991, 994-99 (1995); Gunnar Karnell, *Employment for Hire—A Non-Legislative Approach*, 33 J. COPYRIGHT SOC'Y 100 (1985).

36. Adolf Dietz, *The Concept of Author Under the Berne Convention*, 155 R.I.D.A. 2,

Therefore, the dividing line between the United States and civil law jurisdictions is that authorship status generally cannot be accorded to a person other than the actual creator in Europe.[37]

A. Copyright Ownership, Moral Rights, and the Work Made for Hire Doctrine

The ruling in *Community for Creative Non-Violence v. Reid*,[38] prior to VARA, was interpreted as a meaningful judicial approach to a restrictive application of the work made for hire doctrine for copyright ownership purposes in the field of visual art. Kwall's discussion of *Carter v. Helmsley-Spear*,[39] which focuses on whether copyright ownership is "probative of independent contractor status" and, thus, not covered by VARA's work made for hire exclusion, may be read as an effort to recast the *Reid* ruling rationale in the moral rights context.[40]

To articulate Kwall's reasoning and push the issue further let us consider the reality of commissioned works. Work made for hire in general is work that is subject to substantial control by the person who commissions the work. Even when the artist has contractually retained her copyright, one can still argue that the fact that a work is made for hire may constitute a waiver of moral rights in recognition by the artist and by the employer or commissioning party that the latter's need for flexibility in the use of the work exceeds the artist's subjective and reputational interests.

To be sure, in *Carter* the work made for hire's policy of total control of copyrightable works by the employer/commissioning party was carried out on behalf of the owner of the building, regardless of the artists' copyright ownership. Moreover, the work had not been commissioned by the building's owner, but rather by a former tenant. In this respect, the decision should perhaps have been based exclusively on landlord tenant law, and focused on whether the tenant was operating within the legitimate confines of the lease, rather than on copyright doctrines. Though arguable, the court's ruling had the advantage of avoiding potentially unpleasant consequences, because permanent art decreases the value of the building, and especially so when, as in the *Carter* case,

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28-41 (1993).

37. *See generally id.* at 3-57.

38. 490 U.S. 730, 10 U.S.P.Q.2d (BNA) 1985 (1989).

39. 71 F.3d 77, 37 U.S.P.Q.2d (BNA) 1020 (2d Cir. 1995), *rev'g* 861 F. Supp. 303, 328, 33 U.S.P.Q.2d (BNA) 1225, 1240 (S.D.N.Y. 1994), *cert. denied*, 116 S. Ct. 1824 (1996).

40. Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 5-12 (1997) [hereinafter Kwall, *How Fine Art Fares*].

the building owner's consent is disputable.[41]

The *Carter* situation — although, as suggested in prior commentary, it may not have been the case the drafters had in mind when VARA was enacted[42] — has prompted interesting discussion of the implications of the work made for hire in the context of moral rights.[43] It also shows how pervasive the work made for hire doctrine can be, having been extended to protect the building owner rather than either the commissioning party or the copyright owner.

On the other hand, where American courts mold the work made for hire test and its application according to their own preference — *Reid* and *Carter* are good examples of the latter approach in the context, respectively, of copyright ownership and moral rights — courts in civil law jurisdictions, where the law does not make exceptions for an artist working for hire, turn to construction of contractual terms and factual analysis to place limits on the artist's moral rights claim.[44]

Kwall's proposal to "amend VARA by eliminating the express exclusion of work made for hire from coverage"[45] subject to limitations in certain instances, implies that the American courts will have to fall back on a "reasonableness" test. This approach, which doesn't make the work made for hire determination the ultimate inquiry but instead focuses on the balance of the conflicting interests involved, replicates the mode of analysis employed under the fair use doctrine, though expressly tailored to situations conventionally regarded under the work made for hire doctrine.

Kwall's policy proposal suggests some further comparative remarks based on her observation that "had [an analogous] approach been invoked in *Carter*, the analysis and perhaps even the outcome would have been different."[46] The amendment to VARA that she recommends is more or less what courts lacking the work made for hire doctrine do in

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41. *See* Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 328, 33 U.S.P.Q.2d (BNA) 1225, 1240 (S.D.N.Y. 1994), *rev'd*, 71 F.3d 77, 37 U.S.P.Q.2d (BNA) 1020 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1824 (1996).

42. *See* Ann Landi, *The Landlord, the Installation, the Artists, and their Lawyers*, ARTNEWS, May 1995, at 127 (Stephen E. Weil, an authority on art law, urges the application of landlord-tenant law under circumstances similar to *Carter*).

43. *See, e.g.*, Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 134-35 & n.39 (1997).

44. *See, e.g.*, Adolf Dietz, *The Artist's Right of Integrity Under Copyright Law - A Comparative Approach*, 25 INT'L REV. INDUS. PROP. & COPYRIGHT 177, 187-94 (1994).

45. Kwall, *How Fine Art Fares*, *supra* note 33, at 10.

46. *Id.* at 12.

civil law jurisdictions[47] when claims related to the artist's integrity rights are at stake. European courts dealing with the rights of freedom of action enjoyed by owners of artworks or architecture juxtapositioned against the artist's moral rights reach conclusions that appear quite similar to the outcome in *Carter v. Helmsley-Spear*, which is criticized by Kwall.[48]

B. The Work Made for Hire Exception to the Right of Attribution

The work made for hire doctrine identifies one of the several areas in which the difference of approach between those jurisdictions that make the right of attribution waivable (like the United States and England) and those which do not (like typical civil law jurisdictions) stands out conspicuously.

Though in the *Carter* case, given the particular terms of the contract, the artist's right of attribution was not an issue, it remains true that the work made for hire exception to the right of attribution raises the conceptual dilemma in which common law countries with a work made for hire doctrine find themselves when compared to those systems which do not have that doctrine.[49] Recognizing the right of attribution whenever the association of the employee artist with the work may be important for the artist, without damaging the employer's economic interests, would therefore be a most significant change for recasting a work made for hire doctrine in the context of moral rights.

VII. THE INTERESTS PROTECTED BY THE RIGHT OF INTEGRITY

Kwall's point of view is clearly stated: "Moral rights protect an author's personal rather than economic interests."[50] However, as I said at the outset of this comment, I believe that reputational externalities are an important justification for the right of integrity and that this view finds substantial support in European case law as well as in the Euro-

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47. *See generally* Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control Over Copyrighted Works*, 42 J. COPYRIGHT SOC'Y 93, 110 (1994); Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 58-62 (1994).

48. *See, e.g.*, Dietz, *supra* note 44, at 189; and P. Bernt Hugenholtz, *Chronicle of the Netherlands: Dutch Copyright Law 1990-1995*, 169 R.I.D.A. 129, 183-84 (1996).

49. *See* Vargas v. Esquire, Inc., 164 F.2d 522, 75 U.S.P.Q (BNA) 304 (7th Cir. 1947) (often cited case, pre-VARA, that serves as an example).

50. Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 14 (1997) [hereinafter Kwall, *How Fine Art Fares*].

pean copyright literature.[51] With this general observation in mind, we can more accurately comment on some results that Kwall reaches following the conventional account for moral rights.

A. Destruction of Works of "Recognized Stature"

European writers have generally applauded the "pioneer role" played by the United States in expressly acknowledging "the right to prevent destruction" on behalf of artists[52] — a right that remains quite controversial in Europe. Nevertheless, VARA's formulation of the artist's right may in practice be little different from the right of integrity as construed in most civil law countries, where in general that right arguably provides no protection against complete destruction of the work.[53] (An exception is the Swiss law of author's rights, whose 1992 revision requires that an owner of a work of art, before destroying it, must offer to sell the work to its artist for the value of the materials it contains.)[54] In particular, given that VARA limits the artist's right against destruction to works of "recognized" stature, the right may be largely empty because rarely would the owner of a work of recognized stature have an incentive to destroy it.

At any rate, the case law discussed in Kwall's account of litigated issues (*Lubner v. Los Angeles*[55] and the district court's decision in *Carter*,[56] in particular) supports a construction of the provision as aiming to prevent from destruction — not due to simple negligence — "art work whose loss would be socially significant."[57] In other words, decisional law emphasizes that VARA, as suggested in doctrinal commentary,[58] is — title notwithstanding — consistent with the American copyright tradition: more work-centered than author-centered.

Beyond these general observations, treatment of rights regarding

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51. *See generally* Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis,* 26 J. Legal Stud. 95, 99 n.19 (1997).

52. Adolf Dietz, *The Artist's Right of Integrity Under Copyright Law - A Comparative Approach,* 25 INT'L REV. INDUS. PROP. & COPYRIGHT 177, 191 (1994).

53. Hansmann & Santilli, *supra* note 51, at 111.

54. Swiss Federal Act on Copyright and Neighboring Rights of October 9, 1992 (RS 231.1), sec. 15.

55. 53 Cal. Rptr. 2d 24 (Ct. App. 1996).

56. Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 329, 33 U.S.P.Q.2d (BNA) 1225, 1241 (S.D.N.Y. 1994), *rev'd,* 71 F.3d 77, 37 U.S.P.Q.2d (BNA) 1020 (2d Cir. 1995), *cert. denied,* 116 S. Ct. 1824 (1996).

57. *See* Kwall, *How Fine Art Fares, supra* note 50, at 14.

58. Jane C. Ginsburg, *Droit D'Auteur et Propriete De l' Exemplaire D' une Oeuvre D'art: Etude De Droit Compare,* 3 R.I.D.C. 811, 814 (1994).

the destruction of works of art illustrates some of the conflicting interests affected by the right of integrity. Site-specific art creates particular opportunities for conflicts between the artist's right of integrity and the interests of the public at large (as exemplified by the *Serra*[59]-type cases) or of the owners of buildings (as the *Carter* ruling exemplifies).[60]

To the extent that site-specific art raises issues that may fit into the hypothetical of prejudicial display of art, in civil law jurisdictions related conflicts are dealt with in the general framework of the integrity right.[61] In sum, as suggested by an American commentator,[62] the removal of works designed for a particular environment might, under VARA, be regarded as (symbolic) destruction of the work. The same problem may, as we will see, most likely be discussed under the broader right of integrity's concept of *droit moral* countries.

B. The Display of Modified Art

Kwall states that "VARA claims arise from improper alterations rather than improper displays."[63] Given the broader, tort-like right of integrity, which, under the Berne Convention as well as in most European legal formulations, entitles the author to object to any "other derogatory action,"[64] civil law jurisdictions have sometimes allowed visual artists to prevent display of their work under conditions that cause conspicuous and unreasonable injury to the artist's reputation.

With few exceptions, the control over display that artists have been given under the right of integrity has been quite restricted and generally handled with a balancing of interests:[65] the benefits to the current owner of the disputed use versus the cost that the use imposes on the artist and others.

To the extent that the interpretation of VARA (or the Act's preemption provision) allows any flexibility at all, similar results may be achieved by American courts. In United States law, an implicit application of this kind of rough efficiency calculus can be found in the doctrine of fair use, discussed above, which limits both copyright and moral

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59. Serra v. U.S. Gen. Servs. Admin., 847 F.2d 1045, 1047 (2d Cir. 1988).

60. Hansmann & Santilli, *supra* note 51, at 108 n.39.

61. *See generally* Dietz, *supra* note 52, at 192.

62. *See, e.g.*, Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J.L. & ARTS 477 (1990).

63. *See* Kwall, *How Fine Art Fares*, *supra* note 50, at 28.

64. *See generally* Dietz, *supra* note 52.

65. *See generally* Hansmann & Santilli, *supra* note 51, at 117-18 & n.66.

rights in ways that cannot easily be resolved by voluntary transactions: for example, where parodies of artworks are involved, or uses of the work for purposes of criticism or commentary.[66]

C. The Right to Complete a Work

As already mentioned in discussing the right of disclosure, American courts have ruled out the possibility that the integrity right may be expanded to include the right to complete a work.[67] In European jurisdictions the broader formulation of the right of integrity, typical of most European laws, has allowed courts to sometimes reach the opposite conclusion. An excellent example is the *Dubuffet* case in which the French court argued that the unjustified refusal to allow the artist to complete the sculpture would also violate the integrity right.[68]

VIII. POSTHUMOUS PROTECTION

Under VARA, the artist and only the artist is given the right to enforce the rights of integrity and attribution, with the consequence that the duration of the rights is limited to the artist's life. It is possible, however, that the Act does not preempt state statutory rights that extend beyond the life of the artist.[69] Moreover, the suggestion in the Final Report that moral rights and copyright be made coterminous would bring United States law closer, in principle, to the approach taken in European law (for example, in Germany).[70] Consequently, the question of the governance of moral rights after the artist's death is still open and calls for closer attention.[71]

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66. Provided that the misleading character of the artist's work presentation is given due weight in the fair use analysis; for example, the *Wojnarowicz* court's application of the fair use doctrine has been criticized in this respect. *See, e.g.,* Ginsburg, *supra* note 53, at 157-58 n.25.

67. *See* Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 329, 33 U.S.P.Q.2d (BNA) 1225, 1241 (S.D.N.Y. 1994) (Judge Edelstein takes a clear standing that refusing to permit an artist to finish the work does not constitute "distortion, mutilation, or other modification" under 17 U.S.C. 106A(a)(3)(A) (1994)), *rev'd,* 71 F.3d 77, 37 U.S.P.Q.2d (BNA) 1020 (2d Cir. 1995), *cert. denied,* 116 S. Ct. 1824 (1996).

68. Andre Francon and Jane C. Ginsburg, *Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work,* 9 COLUM.-VLA J.L. & ARTS 381, 391 (1985).

69. Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA,* 1 MARQ. INTELL. PROP. L. REV. 1, 33 (1997) [hereinafter Kwall, *How Fine Art Fares*].

70. *See* Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries,* 19 COLUM.-VLA J.L. & ARTS 199, 213-19 (1995).

71. *See* John Henry Merryman, *The Moral Right of Maurice Utrillo,* 43 AM. J. COMP. L. 445, 453-54 (1995) (recent discussion on this topic).

The shortcomings of the American response to the descendability question for moral rights can be appreciated in such cases as the controversial treatment of David Smith's painted sculptures, a number of which were stripped at the initiative of Clement Greenberg, after the artist's death, when rights under VARA (which had not yet been enacted) would have expired.[72] Under European law, absent an artist's specific designation, the right of integrity is generally passed on to the artist's heirs, either in perpetuity or for the 70 years following the artist's death[73] (although the question of misuse of the rights or failure to act remains unsettled[74]).

As it is, both systems have flaws. A workable alternative has been suggested in the United States. California legislation gives enforcement powers to a public authority.[75] This is, in fact, very similar to Italian law, which gives the government rights of enforcement that co-exist with those of the artist's heirs after his death.[76] In any event, the solution is likely to be influenced, from the domestic and arguably from the international perspective, by the discussion of two pending legislative proposals concerning rights of publicity and the extension of the basic United States' copyright term of protection.[77] On different grounds, those proposals are in fact closely related to the issues touched upon by Kwall. Pertaining to the artist's rights, the ongoing discussion of descendability with reference to the right of publicity[78] focuses on preemption. On the other hand, the copyright term's proposal is generally related to arguable efforts of improving an artists' position as well.[79]

IX. DOES VARA EFFECTUATE AN UNCONSTITUTIONAL

72. Since Greenberg was a trustee of Smith's estate, there may have been nobody able and willing to bring suit posthumously in any event. *See* Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 103 n.27 (1997).

73. *See generally* Dietz, *supra* note 70, at 213-19.

74. *See, e.g.*, Merryman, *supra* note 71, at 451-52.

75. The California Art Preservation Act, CAL. CIV. CODE §§ 987(a) (West 1982 & Supp. 1995).

76. *See* Dietz, *supra* note 70, at 215.

77. *See* J.H. Reichman, *The Duration of Copyright and the Limits of Cultural Policy*, 14 CARDOZO ARTS & ENT. L.J. 625 (1996); Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655 (1996); William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread From Authors*, 14 CARDOZO ARTS & ENT. L.J. 661 (1996).

78. *See generally* Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 81-85 (1994).

79. *See* Reichman, *supra* note 77, at 648.

TAKING?

VARA — and moral rights in general — have often been characterized as "special class legislation"[80] seeking to establish "an extraordinary realignment of private property rights."[81] Thus, it is no surprise that in VARA's judicial testing (for example, *Carter v. Helmsley-Spear*[82] and *Pavia v. 1120 Avenue of the Americas Associates*[83]) the issue whether VARA's passage did in fact alter the set of prior ownership expectations has received significant attention. Moreover, if Kwall's projection is right, the question is likely to continue to bring VARA's constitutionality into question in the future. Kwall's work focuses heavily upon this issue. Her detailed account provides courts with persuasive feedback on takings law and the factors typical of a takings analysis that might be applied by analogy to intangible property.

On the merits, the suggestion that the temporary nature of VARA's restrictions be given due weight among the arguments in favor of VARA's constitutionality can be questioned. Does that mean that had perpetuity been the legislative choice — as it is in some European moral rights laws[84] — it might not be justified under the public interest test? How would this reasoning affect state moral rights legislation adopting different rules of duration?

Finally, even if VARA's language can be interpreted to make violations of the right of attribution that occurred prior to the statute's effective date actionable, I doubt that a takings claim could be sustained for such applications of the statute, so long as violation of the right of attribution threatens continuing harm for the artist.

In general terms, the takings question appears to be a pervasive issue behind the ongoing debate in contemporary American intellectual property discourse about the rights-setting for copyright property, and as such it is an important factor to consider in comparison with the civil law tradition. An excellent example can be found in a recent writing where the persuasiveness and the normative force of "the takings model" for American culture has been bluntly opposed to the Euro-

80. *See* Stephen L. Carter, *Owning What Doesn't Exist,* 13 HARV. J.L. & PUB. POLICY 99, 101 (1990).

81. George C. Smith, *Let the Buyer of Art Beware: Artists' Moral Rights Trump Owners' Property Rights Under the Visual Artists Rights Act,* THE RECORDER, Jan. 10, 1991, at 4.

82. 71 F.3d 77, 37 U.S.P.Q.2d (BNA) 1020 (2d Cir. 1995), *rev'g* 861 F. Supp. 303, 328, 33 U.S.P.Q.2d (BNA) 1225, 1240 (S.D.N.Y. 1994), *cert. denied,* 116 S. Ct. 1824 (1996).

83. 901 F. Supp. 620, 36 U.S.P.Q.2d (BNA) 1622 (S.D.N.Y. 1995).

84. *See* Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries,* 19 COLUM.-VLA J.L. & ARTS 199, 213-17 (1995).

pean "moral rights model." As the writer put it: a model which would sacrifice authorial control in the public's interest while granting the author proper remuneration is more congenial than a model under which authors retain the right of permission while releasing the right to remuneration.[85]

X. THE WAIVER ISSUE AND THE 1996 FINAL REPORT OF THE REGISTER OF COPYRIGHTS

Kwall analyzes the Final Report of the Register of Copyrights without offering much comment on it. To the extent she draws conclusions from it, she seems to believe that the Report reinforces her view — which is the commonly held view — that waivability seriously undermines the strength of moral rights protection.

In Europe, much attention was drawn to the waivability issue when the 1988 UK moral rights legislation introduced a general scheme of waivability, anticipating the approach to waivability subsequently adopted by United States' law. The UK legislation received largely negative comments. Although the Berne Convention does not insist that moral rights in general be made inalienable, it had generally been interpreted to require inalienability.

In fact, all jurisdictions that recognize the right of integrity — including the UK and the U.S. — place some restrictions on the artist's ability to alienate that right, and all legal regimes that recognize the rights of integrity and attribution make those rights nonassignable to parties other than the current owner of the copyright to the work.[86] Discussing the problem from a comparative perspective, I argued in previous work that there are a variety of justifications for permitting partial but not full waivability, and I noted further that the efficiency of waivability versus inalienability is closely related to the issue of a broader or a narrower interpretation of the integrity right.

Under VARA's default rule, moral rights are presumed to be retained unless specifically waived by the artist. The Report's survey, however, points squarely to the fact that artists in the United States do not routinely waive their moral rights, as many expect they would. How should these results be interpreted? VARA's waiver provision did not affect the customary practice of selling art works through oral

85. Marci A. Hamilton, *Appropriation Art and The Imminent Decline in Authorial Control Over Copyrighted Works*, 42 J. COPYRIGHT SOC'Y 93, 122-23 (1994).

86. Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 124-28 (1997).

agreements. This is no surprise, considering that oral agreements continue to be a conventional feature of the international art market in every jurisdiction, even those where copyright contracts related to specific categories of works (such as publishing contracts and audiovisual works contracts) are statutorily regulated with the intent to provide a pro-author set of mandatory or default rules.[87] It follows that those who are concerned with artists' "reluctance to enforce their rights for fear of retaliation" should perhaps focus their concern, not on explicit waivers (which remain relatively uncommon), but on *de facto* waivers (which is to say, the tendency of artists, even when they retain their moral rights, to fail to enforce them). This problem of *de facto* waiver is an issue that must be confronted, not only by the United States, but also by those jurisdictions (France is the prominent example) which make moral rights completely inalienable, due to the fact that the inalienability rule of continental moral rights law does not mean that an artist cannot consent to acts that would violate her moral rights, but that she cannot enter into an enforceable agreement to not change her mind and seek a judicial remedy for the violation.[88]

Another piece of interesting information, provided by the Report, is the increasingly sharp distinction between oral agreements employed for the sale of movable art and contracts for works incorporated into buildings or commissions for installed art pieces. The latter contracts are written and often contain a waiver clause. In this respect, the issues raised by the *Carter* case and the *Serra* case have probably affected the contractual practice: the waiver is employed to signal how the parties to the contract view their own relationship. This is significant especially considering that commissions for major works, installed works, and works incorporated into buildings raise the difficult question of work made for hire under VARA.

XI. THE *DROIT DE SUITE*

Kwall's commentary does not address an artist's resale rights

87. *See generally* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 61-78 (1994); F. Pollaud-Dulian, *Moral Rights in France, Through Recent Case Law*, 145 R.I.D.A. 127 (1990); and Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 213-19 (1995).

88. As matter of fact, a faithful description of the "'operational rule' in the European moral rights systems, shows that the categorical language of statutory inalienability- even in France- is better described in terms of 'partial waivability.'" ALAIN STROWEL, DROIT D'AUTEUR ET COPYRIGHT: DIVERGENCES ET CONVERGENCES 497-98 (1993).

(commonly referred to as the *droit de suite* in the moral rights systems). Her elected approach is consistent with existing discourse where a strong distinction is sometimes drawn between the *droit de suite* and moral rights, the former being said to be distinctly economic in character and, thus, fundamentally different from the latter. I have argued elsewhere, in contrast, that the most compelling arguments for the *droit de suite* derive from the same reputational concerns that provide a convincing justification for recognizing artist's moral rights. For this reason, the *droit de suite* can be seen as a supportive complement to artist's moral rights.[89]

Today the *droit de suite* is perhaps the most contentious issue between the United States regime and the European systems related to visual art.[90] Currently, the European Community [91] and the United States are moving in opposite directions on this issue,[92] though remaining watchful of the consequences of their respective choices. Indeed, when VARA was passed, Congress required, together with the Final Report on which Kwall's article focuses, a study on resale royalty rights. That Report, which was issued earlier, in 1992, is quite controversial for its negative conclusion.[93] But it is arguably a source that deserves some attention in assessing how fine art fares post-VARA.

89. Henry Hansmann & Marina Santilli, *Resale Royalties for Works of Art: A Comparative Legal and Economic Analysis* (Nov. 1996) (unpublished manuscript, on file with the *Marquette Intellectual Property Law Review*).

90. *See, e.g.*, John Henry Merryman, *The Wrath Of Robert Rauschenberg*, 41 AM. J. COMP. L. 103 (1993); Lee D. Neumann, *The Berne Convention and Droit de Suite Legislation in the United States - Domestic and International Consequences of Federal Incorporation of State Law for Treaty Implementation*, 16 COLUM.-VLA J.L. & ARTS 157 (1992).

91. *European Union Update: Directive Proposed On Artists' Resale Rights ('Droit de Suite')*, COMMON MKT. REP. (CCH) ¶ 270 (Mar. 1996); Pierre-Yves Gautier, *The "Single Market" for Works of Art*, 144 R.I.D.A. 13 (1990).

92. U.S. Copyright Office Report Executive Summary, *Droit de Suite: The Artist's Resale Royalty* (1992).

93. *See generally* Michael B. Reddy, *The Droit De Suite: Why American Fine Artists Should Have The Right To A Resale Royalty*, 15 LOY. L.A. ENT. L.J. 509, 511, 525-32 (1995).