THE PRECARIOUS BALANCE: MORAL RIGHTS, PARODY, AND FAIR USE

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Parody is 'the tribute that mediocrity pays to genius.'[1]

Parodies and caricatures are the most penetrating of criticisms.[2]

Art is both evolutionary and revolutionary. Art mutates according to the conscious, or even unconscious, sensibilities of the artist. That which has come before is fodder for artistic creation and is linked inextricably to the present. Art is history; at the same time it derives from history and affects history. In a real sense, the cave paintings of Lascaux and those recently discovered in Chauvet are our artistic ancestors. Lascaux's wooly mammoths relate to Picasso's bulls as the archaic smile on the faces of Hellenic sculpture informs the enigmatic smile of the *Mona Lisa.* "What's past, is prologue."[3] But art, like history, is not static. Changes come slowly or in sudden spurts. Sometimes artistic vision breaks out of the mold and gives us a new way to look at the world. Still other artists refer explicitly to earlier works. They appropriate them and, by adding humor, sarcasm, or comment, send a parodic message to the viewer about what these earlier works now mean to contemporary society.

Society needs the "parent" and the "child": the first artist and the parodist. Because art progresses on the shoulders of prior art, we want to protect the creator of the referent and the referencer. However, the tension between the first artist and the second artist will never disappear. Our goal should be to balance their economic and personal interests very, very carefully so as not to diminish the sum of art which enriches our lives.

When Congress enacted the Visual Artists Rights Act of 1990[4] ("VARA") as a measure subsequent to the United States joining the Berne Convention,[5] it represented the first explicit federal recogni-

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[1] Robert Bernstein, *Parody and Fair Use in Copyright Law,* 31 COPYRIGHT L. SYMP. (ASCAP) 1, 12 (1984) (quoting Oscar Wilde).

[2] *Id.* (quoting Aldous Huxley).

[3] WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1.

[4] Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. VI, 104 Stat. 5128 (1990) (codified in scattered sections of 17 U.S.C.).

[5] Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified at 17 U.S.C. §§ 401, 408, 411-412 (1994)). Article 6^{bis} of the Berne Convention for the Protection of Literary and Artistic Works (Paris Text, 1971) provides:

> (1) Independently of the author's economic rights, and even after the transfer of 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 honor or reputation.
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> (2) The rights granted to the author in accordance with the preceding para-

tion of the continental European notion of protecting an artist's moral rights,[6] specifically the rights of attribution and integrity.[7]

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graph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as last revised* at Paris, July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention], art. 6^{bis}, *translated in* UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, 1 COPYRIGHT LAWS AND TREATIES OF THE WORLD, at Berne Copyright Union—Paris Act, 1971: Item H-1, at 3-4 (Supp. 1971) [hereinafter COPYRIGHT LAWS AND TREATIES OF THE WORLD].

As of 1985, seventy-six nations adhered to the Berne Convention, which was signed initially in 1896 and is the oldest multilateral treaty providing for copyright protection. Roberta R. Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 10 & n.38 (1985). In order to join the Berne Convention, which required member nations to afford moral rights protection, *see* art. $6^{bis}(1)$, the United States had to represent that moral rights were already given some protection by various methods, including the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-810, 18 U.S.C. § 2319 (1994)), which, until VARA, did not afford explicit protection for moral rights. *See* S. REP. NO. 352, 100th Cong., 2d Sess. 9-10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706, 3714-15; *see also* FINAL REPORT OF THE AD HOC WORKING GROUP ON U.S. ADHERENCE TO THE BERNE CONVENTION 35-45, *reproduced in* 10 COLUM.-VLA J.L. & ARTS 513, 547-557 (1986).

6 Several authors have examined the nature and extent of moral rights. *See, e.g.*, Robert A. Jacobs, *Work-For-Hire and the Moral Right Dilemma in the European Community: A U.S. Perspective*, 16 B.C. INT'L & COMP. L. REV. 29 (1993); John M. Kernochan, *Moral Rights in U.S. Theatrical Productions: A Possible Paradigm*, 17 COLUM.-VLA J.L. & ARTS 385 (1993); Brett Sirota, Note, *The Visual Artists Rights Act: Federal Versus State Moral Rights*, 21 HOFSTRA L. REV. 461 (1992); Moana Weir, *Making Sense of Copyright Law Relating to Parody: A Moral Rights Perspective*, 18 MONASH U. L. REV. 194 (1992); Patrick G. Zabatta, Note, *Moral Rights and Musical Works: Are Composers Getting Berned?*, 43 SYRACUSE L. REV. 1095 (1992); Joseph Zuber, *The Visual Artists Rights Act of 1990—What it Does, and What it Preempts*, 23 PAC. L.J. 445 (1992); Otto W. Konrad, *A Federal Recognition of Performance Art of Author Moral Rights*, 48 WASH. & LEE L. REV. 1579 (1991); Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945 (1990); Eric M. Brooks, Comment, *"Tilted" Justice: Site-Specific Art and Moral Rights After U.S. Adherence to the Berne Convention*, 77 CAL. L. REV. 1431 (1989); Lawrence A. Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 NW. U. L. REV. 1011 (1988); Kwall, *supra* note 5; Sydney A. Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244 (1978); John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976); Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968); William Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506 (1955); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554 (1940).

7 17 U.S.C. § 106A (1994) provides in relevant part:

(a) Rights of Attribution and Integrity. Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

(1) shall have the right—

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author

To date, there has been little litigation brought under VARA—none involving parody.[8] Thus, in assessing the proper balance between the protection of an artist's moral rights, the fairness of an alleged infringer's use of the artist's work in parodying that work, and society's interest in providing incentives to create more art, this article is, in one sense, writing on a clean slate. But prior case law focusing on parody and fair use,[9] especially the recent

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of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right—

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

[8] Since the effective date of VARA, June 1, 1991, there have been few reported cases brought under the statute. *See, e.g.*, Pavia v. 1120 Avenue of the Americas Assocs., 901 F. Supp. 620 (S.D.N.Y. 1995) (holding that VARA does not protect an artist whose work was altered before VARA's effective date). In Carter v. Helmsley-Spear, Inc., 852 F. Supp. 228 (S.D.N.Y. 1994), three sculptors sought to prevent building owners from dismantling a large sculptural installation from a lobby of a former Macy's warehouse in Queens, New York. In August 1994, Judge Edelstein granted plaintiffs an injunction that permits them to visit the unfinished work and restricts defendants from removing the sculpture. The ruling was based on plaintiff's claim that defendant's attempted removal would "deface, modify, or mutilate" the work in violation of § 106A(a)(2) and (a)(3). *Carter*, 852 F. Supp. at 232. Recently, the Second Circuit reversed, holding the sculpture to be a work made for hire and therefore not protected under VARA. Carter v. Helmsley-Spear, Inc., 71 F.3d 77 (2d Cir. 1995).

The issues raised in *Carter* are not new. In 1980, the New York branch of The Bank of Tokyo cut up a large sculpture by the noted artist and architect, Isamo Noguchi, and removed it from the bank's Wall Street office without notifying Noguchi. *See* George Glueck, *Bank Cuts Up a Noguchi Sculpture and Stores It*, N.Y. TIMES, Apr. 19, 1980, at A1. This occurred more than a decade before VARA and more than five years before a New York moral rights statute became effective. Thus, Noguchi, unlike the *Carter* sculptors, had no remedy. *See* Edward J. Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733 (1984). However, the New York statute, N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney Supp. 1996), does not protect the artist against destruction of the work. *See* Zuber, *supra* note 6, at 465; *cf.* Crimi v. Rutgers Presbyterian Church, 89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949) (holding that an artist had no remedy when defendant obliterated a church fresco painted by him). *Crimi* was decided well before the enactment of the New York statute.

In a Canadian case brought on similar facts, a sculptor succeeded in preventing the Toronto Eaton Centre from tying Christmas ribbons around the necks of the sixty geese making up his sculpture. Snow v. The Eaton Centre Ltd., 70 C.P.R.2d 105 (Ont. High Ct. 1982). The plaintiff claimed that the ribbons around the geese's necks were similar to dangling earrings on the *Venus de Milo*. *Id.* Canadian copyright law has an express provision for protection of the right to integrity. *See* R.S.C. ch. C-30, §§ 14.1-14.2, 28.1-28.2 (4th Supp. 1989) (Can.). Authors of paintings, sculptures, and engravings do not have to show prejudice to honor or reputation, as do other authors. Rather, the distortion, modification, or mutilation of these works are presumed to cause the requisite harm. *Id.* § 28.2(2). *See generally* LESLEY E. HARRIS, CANADIAN COPYRIGHT LAW (1992).

[9] *See infra* notes 133-41, 143-44, 146-48, and accompanying text.

Supreme Court decision in *Campbell v. Acuff-Rose Music, Inc.*,[10] as well as a significant body of literature that addresses the parody and fair use issue in a non-moral rights context,[11] does inform the discussion herein, which is based on the following hypothetical facts.

Assume that sometime after June 1, 1991,[12] a modern Leonardo da Vinci executed a portrait of Mona Lisa[13] and made a limited edition of 100 lithographs. He numbered them consecutively, 1/100, 2/100, and so on, and signed each one.[14] Leonardo com-

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[10] 114 S. Ct. 1164 (1994).

[11] *See, e.g.*, William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667 (1993); Brian R. Landy, Comment, *The Two Strands of the Fair Use Web: A Theory for Resolving the Dilemma of Music Parody*, 54 OHIO ST. L.J. 227 (1993); E. Kenley Ames, Note, *Beyond* Rogers v. Koons: *A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473 (1993); Richard Posner, *When is Parody Fair Use?*, 21 J. LEGIS. STUD. 67 (1992); Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79 (1991); Steven R. Gordon & Charles J. Sanders, *Strangers in Parodies—Weird Al and the Law of Musical Satire*, 1 FORDHAM ENT. MEDIA & INTELL. PROP. L.F. 11 (1990); Michael A. Chagares, *Parody or Piracy: The Protective Scope of the Fair Use Defense to Copyright Infringement Actions Regarding Parodies*, 12 COLUM.-VLA J.L. & ARTS 229 (1988); Harriette K. Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B.U. L. REV. 923 (1985); Charles C. Goetsch, *Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. NEW ENG. L. REV. 39 (1980); Sheldon N. Light, *Parody, Burlesque, and the Economic Rationale for Copyright*, 11 CONN. L. REV. 615 (1979). For an excellent treatise on the subject, see WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (1985).

[12] Under VARA, to receive federal protection against interference with the right of integrity, a work must be destroyed, distorted, mutilated, or modified after June 1, 1991, the effective date of VARA. VARA § 610(a), 104 Stat. 5132; *see Pavia*, 901 F. Supp. 620.

[13] Leonardo's portrait has been described as enigmatic and mysterious. It is at once a rendition of a particular individual, probably the wife of a Florentine merchant named Giocondo, and an expression of the High Renaissance ideal of woman. The woman's features, her half-smile, and the "sfumato" (hazy) background have intrigued viewers for more than four hundred years, inspiring songwriters (like Nat King Cole, who wrote "Mona Lisa") and other artists, including Marcel Duchamp. The *Mona Lisa* is "the most reproduced . . . image in all art." CAROL STRICKLAND & JOHN BOSWELL, THE ANNOTATED MONA LISA 34 (1992). To some, the portrait "embodies a quality of maternal tenderness which was to Leonardo the essence of womanhood." HORST W. JANSON, HISTORY OF ART 421 (2d ed. 1977). It has been suggested by computer artist Lillian Schwartz that the *Mona Lisa* is actually a self-portrait of Leonardo. *See* Louis Montana, *Commercial Applications of Realist Art: Lillian Schwartz*, 54 AM. ARTIST 60-65 (1990). If this is so, then maybe Duchamp's moustache reveals Leonardo's "secret."

It is conceivable that Leonardo may have used parody in the *Mona Lisa*. Her intriguing smile evokes the "Archaic smile" of Greek figures of the fifth and sixth centuries B.C. *See* JANSON, *supra*, at 421.

[14] Our modern Leonardo's work is protected by VARA because it qualifies as a "work of visual art" as defined in 17 U.S.C. § 101:

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
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> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

plied with all provisions of the relevant copyright statute.[15] Assume also that in July 1991, a contemporary Marcel Duchamp[16] bought one of these lithographs and added a moustache to the face of Mona Lisa, not unlike what Duchamp actually did in 1919. Duchamp then exhibits this picture at a local art gallery, whereupon Leonardo files a complaint in federal district court, alleging, *inter alia,*[17] a violation of VARA.[18] Duchamp answers the complaint in typical fashion: (1) he did not infringe, and (2) even if he did, his use is a fair one,[19] based on parody, which immunizes his al-

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[15] Leonardo's "modern" *Mona Lisa* is protected by copyright, as it qualifies as an "original work . . . of authorship fixed in [a] tangible medium of expression." 17 U.S.C. § 102(a). As a pictorial work created after March 1, 1989, affixation of copyright notice, registration of the work in the copyright office, and recordation as a precondition to suit are discretionary, not mandatory. *See* Berne Convention Implementation Act, *supra* note 5.

[16] Duchamp was one of the founders of the post-World War I self-titled "Dada" artistic movement. Dada allegedly was a random word choice, considered an infantile "all-purpose" word. Dada, in part, stood for anti-art and was a reaction to the senseless destruction caused by the War. Duchamp is probably most remembered for his 1912 *Nude Descending a Staircase, No. 2,* a cubist portrait of a woman's continuous motion as she walks down a flight of stairs. *See* JANSON, *supra* note 13, at 660 & fig. 820. The *Nude* was the most talked about hit of the famous 1913 Armory show in New York, which showed 1,600 modern works. *See* MARCEL JEAN, THE HISTORY OF SURREALIST PAINTING 31 (1960). The Armory Show, exhibiting works of such artists as Duchamp, Matisse, and Picasso, has been called the "most significant art show in American History," because "it burst the bubble of American provincialism." The *New York Times* called the show "pathological." Public officials demanded the closing of the Armory show "to safeguard public morals." STRICKLAND & BOSWELL, *supra* note 13, at 150.

For insight into Duchamp's creative mind, combining both wit and scientific precision, see MARCEL DUCHAMP, THE BRIDE STRIPPED BARE BY HER BACHELORS EVEN (George H. Hamilton trans., 1960). In fact, Duchamp's mathematical precision is not unlike that with which Leonardo planned his paintings. *Mona Lisa* is drawn in the shape of a truncated cone, one example of Leonardo's thinking that "every branch of knowledge dovetails with every other." LIANA BORTOLON, THE LIFE, TIMES AND ART OF LEONARDO 72 (1965).

[17] The claims might include copyright infringement under 17 U.S.C. § 106(1), (2); unfair competition claim under section 43(a) of the Lanham Act, 15 U.S.C. § 1125 (1994); and assorted state claims such as unfair competition, defamation, and misrepresentation.

[18] 17 U.S.C. § 106A (violation of rights of attribution and integrity). Federal question jurisdiction is based on 28 U.S.C. §§ 1331, 1338 (1994).

[19] The moral rights given to visual artists are tempered explicitly by VARA, 17 U.S.C. § 106A. Section 107 delineates fair use:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
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> (2) the nature of the copyrighted work;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

leged infringement. The case of *Leonardo v. Duchamp* may well be one of first impression and illustrates the inherent conflict between moral rights on the one hand and parody on the other, with fair use as the arbiter.

The imaginary juxtaposition of these two artists is not without some logic.[20] Leonardo's renown persists through the centuries not only because of his few but incredibly beautiful paintings, such as *The Last Supper*, the *Mona Lisa*, and *The Virgin of the Rocks*, but because of his encompassing vision of the artist as inventor, scientist, physicist, and architect, which led to innumerable detailed drawings of flying machines, embryos in the womb, human anatomy, and a host of other subjects. His approach to these drawings was scientific and analytical. Leonardo believed that artists should "know not only the rules of perspective but also all laws of nature . . . ."[21] In short, Leonardo tried to bridge the gap between art and craft, between painting and science. Similarly, Duchamp, in his "Ready-Mades," for example, a very slightly embellished bicycle, urinal, or bottlerack, and in his precise, scientific drawings, which are "a sort of mathematics of signs and significations,"[22] attempted, like Leonardo, to bridge the gap between art and science. Thus, in one sense, *L.H.O.O.Q.*[23] (the mustachioed *Mona Lisa*) represents a conscious or subconscious attempt to link Duchamp with Leonardo—art as science, art as both homage and critique, art as parody.

This article will discuss the appropriate resolution of the moral rights issues raised in *Leonardo v. Duchamp*. The discussion in part I focuses on the current state of moral rights protection.[24] Part II focuses on parody[25] and fair use.[26] Part III proposes that fair use, based on a parody that infringes upon an artist's moral

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17 U.S.C. § 107.

20 The artificial placing of two or more chronologically and/or geographically separate individuals who interact in the same place and time is a frequent literary device. *See, e.g.*, E.L. DOCTOROW, RAGTIME (1974) (book involving Henry Ford, Emma Goldman, Harry Houdini, J.P. Morgan, Theodore Dreiser, Sigmund Freud, and Emiliano Zapata); TOM STOPPARD, TRAVESTIES (1974) (play involving Lenin; James Joyce; and Tristan Tzara, a noted and early Dadaist (*Travesties* is itself a parody of OSCAR WILDE, THE IMPORTANCE OF BEING EARNEST (1895)); STEVE MARTIN, PICASSO AT THE LAPIN AGILE (1993) (play in which Picasso and Einstein meet at the noted Parisian bistro).

21 JANSON, *supra* note 13, at 421.

22 JEAN, *supra* note 16, at 36. In Venice, the 1993 Biennale presented a Duchamp retrospective at the Palazzo Grassi, which contained several of his readymades, paintings, and drawings. The germ of this article was formed when I viewed this exhibit.

23 This acronym has several meanings; *see infra* text accompanying notes 125-26.

24 *See infra* notes 32-120 and accompanying text.

25 *See infra* notes 121-33 and accompanying text.

26 *See infra* notes 134-73 and accompanying text.

right of integrity,[27] should be given a wide berth.[28] Put another way, under fair use an artist's moral right of integrity should in most circumstances yield to the right of the parodist. Part III also explores other means of resolving the tension between parody and moral rights, including a per se rule of non-liability, based either on copyright law or First Amendment considerations,[29] a limitation of remedies where the use is determined to be unfair,[30] and the availability of a compulsory license for the parodist.[31] The article concludes that these alternatives will not be as effective as an interpretation of fair use that presumes a parodist's use is fair when section 106A rights of integrity are at stake.

I. MORAL RIGHTS

Until the enactment of VARA,[32] the focus of the 1976 Copyright Act was on protecting the pecuniary rights of copyright owners.[33] However, the European concept of moral rights differs significantly from the English and American copyright models[34] and fits, as a newcomer to our shores, very uneasily into our copyright scheme. Unlike United States copyright law's emphasis on economic rights, the concept of moral rights is based upon the notion that an artist expresses her individualism, her personality, in her art—that, in effect, we cannot "separate the dancer from the dance."[35] Moral rights encompass personality rights[36] that inure to

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27 17 U.S.C. § 106A(a)(3)(A).

28 *See infra* notes 213-45 and accompanying text.

29 *See infra* notes 201-12 and accompanying text.

30 *See infra* notes 195-201 and accompanying text.

31 *See infra* notes 178-94 and accompanying text.

32 17 U.S.C. § 106A.

33 A copyright owner could be the author, an employer, or one who commissions a certain type of work under the provisions of 17 U.S.C. § 101(1) or (2), or someone who now owns the copyright due to transfer of ownership under the provisions of 17 U.S.C. §§ 201-205.

34 United States copyright law was modeled after the Statute of Anne, 8 Anne, ch. 19 (1709). These laws protected the economic, rather than the personal, rights of authors. The pecuniary protection afforded copyright owners by the 1976 Act is the ability to prevent and be compensated for wrongful use of the particular work. Such unpermitted use of the protected work constitutes infringement. Infringement occurs when an unauthorized party violates one or more of the exclusive bundle of rights afforded by section 106, such as the right to reproduce, to make derivative works, to distribute, to display, or to perform. To prove infringement, the copyright owner must prove a valid copyright in the work and copying by defendant.

35 William B. Yeats, *Among School Children, in* THE TOWER 8 (1928).

36 S. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 272 (1938). The author uses the German word "urheberpersonlichkeitsrecht," translated as "right of the author's personality." It is noteworthy that most countries that provide moral rights protection do not recognize a fair use defense. *See* Anne Moebes, *Negotiating International Copyright Protection: The United States and European Positions*, 14 LOY. L.A. INT'L & COMP. L.J. 301, 320 (1992).

the artist as creator, protect the artistic integrity of the artist's creation, and require the recognition of the artist as author/creator.[37]

A. *The European Experience*

In any one country, the bundle of personal moral rights may also include, in addition to the right of integrity, the right of disclosure (the exclusive ability to decide when or if the work should be disseminated publicly), the right of withdrawal (the exclusive ability after publication of the work to recall all existing copies of the work), and the right to prevent excessive criticism where its only purpose is to abuse the author.[38] As of 1981, there were approximately three dozen countries in Asia, Africa, Europe, and South America that recognized one or more of the personal, moral rights of artists.[39] These countries were and are predominantly civil rather than common law jurisdictions. It is in these countries, perhaps especially in France,[40] Italy,[41] and Germany,[42] that the eight-

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[37] Sarraute, *supra* note 6, at 478. The latter right is known as the "right of paternity." *Id.*

[38] Kwall, *supra* note 5, at 5-8. Another right that is both personal and explicitly pecuniary is the "droit de suite," or resale royalty provisions, which require the owner of a work of art, should it be resold, to pay a percentage of the resale price to the artist, even if the artist is no longer the copyright owner. The "droit de suite" is a French concept dating from 1920. *See generally* Elliot C. Alderman, *Resale Royalties in the United States for Fine Visual Artists: An Alien Concept*, 40 J. COPYRIGHT SOC'Y 265 (1993); John H. Merryman, *The Wrath of Robert Rauschenberg*, 40 J. COPYRIGHT SOC'Y 241 (1993); Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report*, 40 J. COPYRIGHT SOC'Y 284 (1993); Carol Sky, *Report of the Register of Copyrights Concerning "Droit de Suite," the Artist's Resale Royalty: A Response*, 40 J. COPYRIGHT SOC'Y 315 (1993). The authors split 2/2 on the advisability of "droit de suite" in this country: Merryman and Alderman against; Perlmutter and Sky believing it worth exploring. A constitutional challenge to California's Resale Royalty Act, CAL. CIV. CODE § 986 (West Supp. 1995), was rejected. *See* Morseburg v. Balyon, 201 U.S.P.Q. (BNA) 518 (C.D. Cal. 1978).

[39] Kwall, *supra* note 5, at 97-100.

[40] Law No. 57-298 on Literary and Artistic Property, Mar. 11, 1957, *as amended* up to July 3, 1985, arts. 6, 19, 32 (Fr.) (the inalienable right of paternity, the right of disclosure, and right of withdrawal when the artist agrees to indemnify the owner of the work), *translated in* 1 COPYRIGHT LAWS AND TREATIES OF THE WORLD, *supra* note 5, at France: Item 1, at 1, 3, 5 (Supp. 1984-86). France is thought to be the foremost exponent of an artist's personal rights, Russell J. Da Silva, *Droit Moral and the Amoral Copyright*, 28 BULL. COPYRIGHT SOC'Y 1, 2 (1980), followed by Germany and Italy. *See* Sydney A. Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244, 247 (1978).

A leading scholar on civil law systems notes:

> The moral right of the artist in French law is entirely judicial in origin. This is in itself remarkable, since one of the most treasured tenets of the conventional wisdom about the civil law is that law is made by legislators and executives, not by judges. The development of the moral right of the artist is merely another example of the extent to which this tattered brocard is inapplicable to France.

JOHN H. MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA AND EAST ASIA (1994); *see* JOHN H. MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 144 (2d ed. 1987); Jack A. Hiller, *The Law-Creative Role of Appellate Courts in The Third World*, *in* ESSAYS ON THIRD WORLD PERSPECTIVES IN JURISPRUDENCE 226-27 & nn.270-77 (M.L. Marisinghe & William E. Conklin eds., 1994).

The statutory data given in this note and notes 41-42 *infra* is gleaned from the World

eenth century romantic notions of authorship took hold—art as an expression of the unique personality of an author who captures and records the very essence of culture.[43] Once artists are regarded in this manner, it is practically inevitable that legal doctrine would appear to protect the personal, if not also the pecuniary, rights of artists.

Several French cases, brought on the basis of a moral rights violation, illustrate how powerful a tool the concept of moral rights is in the hands of the artist. Perhaps the paradigmatic moral rights case is the one involving the painter Bernard Buffet and his refrigerator.[44] Buffet had painted a refrigerator's six sides and regarded the finished piece as one painting, thus signing only one of the panels. After auctioning the refrigerator, Buffet became aware of another auction that offered one of the six painted panels. He sued to prevent this sale, as he regarded the six-panelled work as an indivisible artistic whole. The Paris Court of Appeals agreed, and the Cour de cassation affirmed that this violated Buffet's right

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Intellectual Property Organization Copyright Law Survey, as reported in Kwall, *supra* note 5, at 98-100.

41 Law No. 633 of Apr. 22, 1941 for Protection of Copyright and Other Rights Connected with the Exercise Thereof, *as amended* up to July 29, 1981, arts. 20, 142 (Italy) (rights of paternity, integrity, and withdrawal subject to indemnity), *translated in* 2 COPYRIGHT LAWS AND TREATIES OF THE WORLD, *supra* note 5, at Italy: Item 1, at 3-4 (Supp. 1981-83), 22-23 (Supp. 1979-80). In an illustrative Italian case, De Chirico v. Ente Autonomo "La Biennale" di Venezia, [1951] Diritto de Autori 220, [1951] Temi 568, [1952] 50 Rivista Diritto Commerciale [Riv. Div. Comm.] II. 128 (Tribunal di Venezia) (note by Fioretta), the trial court ruled in favor of artist Giorgio de Chirico's claim that a proposed exhibition of a number of the artist's works in the Biennale misrepresented him by including too many early works and not including enough later works. *See* Merryman, *supra* note 6, at 1032-33 & nn.29-33.

42 Act dealing with Copyright and Related Rights, Sept. 9, 1965, *as amended* up to June 24, 1985, arts. 12-14, 42, 46(4) (F.R.G.) (rights of disclosure, paternity, integrity, to revoke a license, with indemnity, if work no longer reflects artist's views), *translated in* 2 COPYRIGHT LAWS AND TREATIES OF THE WORLD, *supra* note 5, at Germany: Item 1, at 2a, 7-8 (Supp. 1984-1986).

The *Rocky Island with Sirens*, 79 RGZ 397 (BGH 1912), case is typical. By commission, plaintiff painted a mural in the stairway of defendant's home. The homeowner objected to the naked sirens and had them painted with clothing. The court said that the homeowner violated the artist's right against unauthorized changes. *See* Strauss, *supra* note 6, at 510 n.22. The statutory data given in this note and notes 72-73 *infra* is gleaned from the World Intellectual Property Organization Copyright Law Survey, as reported in Kwall, *supra* note 5, at 98-100.

Moral rights are on the march. There is sentiment within the European Community that moral rights should be strengthened, especially in connection with the film industry. *See EC Moral Rights Measures Proposed*, 5 J. PROPRIETARY RTS. 34 (1993). In May 1991, the former U.S.S.R. Supreme Soviet passed a law granting authors and their heirs the right of integrity, among others. *See* Eric J. Schwartz, *Recent Developments in the Copyright Regimes of the Soviet Union and Eastern Europe*, 38 J. COPYRIGHT SOC'Y 123 (1991).

43 *See generally* Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 (1992); Christopher Aide, *A More Comprehensive Soul: Romantic Conceptions of Authorship and the Copyright Doctrine of Moral Right*, 48 U. TORONTO FAC. L. REV. 211 (1990).

44 *See generally* Merryman, *supra* note 6.

of integrity and ordered that there be no separate sale of one panel.[45]

Three other French decisions confirm the commitment of France to moral rights by recognizing the special bond that exists between creator and creation. A late nineteenth-century case involved Whistler's mother's son, James McNeill Whistler. Lord Eden had commissioned a portrait of his wife, which Whistler painted. Whistler then altered and refused to deliver the portrait to Lord and Lady Eden. When Lord Eden sued Whistler, the court held that Eden should receive restitution and damages for Whistler's breach of contract, but that Whistler would be required neither to restore nor to deliver the commissioned portrait.[46] Half a century later, the Russian composer Dimitry Shostakovich met with similar success in French courts. Twentieth Century Fox had distributed a movie, "The Iron Curtain," with a decidedly anti-Soviet theme. (The halcyon days of World War II "friendship" between the United States and the Soviet Union had quickly palled). The picture depicted Soviet espionage in Canada and contained approximately forty-five minutes of music, credited to all individual composers, including Shostakovich. Shostakovich sought to enjoin the use of his name and music in the picture and in any advertising or publicity matter relating to the film, claiming that his moral right as a composer was violated because the use of his music indicated his "approval," "endorsement," and "participation" in an anti-Soviet theme, thereby "false[ly] imput[ing] disloyal[ty]" to his country.[47] The French court ruled in favor of Shostakovich, ordered the film seized, and declared that Shostakovich sustained "moral damage."[48]

In a more recent moral rights case brought in France, the court in 1991 again ruled in favor of an artist's personal rights. In *Huston v. Societé de l'Exploitation de la Cinquieme Châine*,[49] the estate

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[45] Buffet v. Fersing, [1962] Recueil Dalloz [D. Jur.] 570 (Cour d'appel, Paris). *See generally* Merryman, *supra* note 6.

[46] Eden v. Whistler, [1898] Recueil Dalloz [D.P. II] 465 (Cour d'appel, Paris), *aff'd*, 1900 Cass. civ. 1re 489 (Cour de cassation). *See* Merryman, *supra* note 6, at 1024, 1028; Saurraute, *supra* note 6, at 467-68.

[47] These facts are taken from the identical case brought in New York, but the composer was not successful in the New York case. *See* Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948).

[48] Soc. Le Chant du Monde v. Soc. Fox Europe, [1953] Recueil Dalloz [D. Jur.] 16, 80 (Cour d'appel, Paris); *see* Strauss, *supra* note 6, at 534-35 n.56. Strauss, then Attorney Advisor at the Copyright Office, worries about the result in the French Shostakovich case: "To arm a composer with the right to suppress the use of his music in a film because he disproves of the political view expressed in the film, would come close to censorship and would have little, if anything, to do with the protection of his personality." *Id.* at 534.

[49] 1991 Cass. civ. 1re, 149 R.I.D.A. 197 (Cour de cassation). For a thorough history of

of director John Huston sued to enjoin a French television broadcast of a colorized version[50] of Huston's black and white film, *Asphalt Jungle.* Although in the United States colorized films are subject only to the most minimal constraints,[51] the French trial court enjoined the broadcast of Huston's film. On appeal, the Cour d'appel reversed. It noted that although French law permits such relief, American law would not recognize Huston's (who was not the copyright owner) moral rights. The Cour d'appel did, however, require the television station to state Huston's objections and to remind the audience that they could tune their television sets to blot out the color. The next appeal, to the Cour de cassation, was successful. This court reversed the intermediate appellate court and stated that moral rights inure to the benefit of an author, even a foreign one.[52]

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this case, see Paul E. Geller, *French High Court Remands Huston Colorization Case,* 39 J. COPYRIGHT SOC'Y 252 (1992).

[50] Technology permits a computer to scan a black and white film for shades of gray, and then an appropriate color is applied. *See* James T. Duggan & Neil V. Pennella, *The Case for Copyrights in "Colorized" Versions of Public Domain Feature Films,* 34 J. COPYRIGHT SOC'Y 333 (1987). Provided the colorized version indicates authorship, then the colorized film could be granted copyright registration as a derivative work. *See* 37 C.F.R. § 202.3 (1995). "Colorization" is a registered trademark of Colorization, Inc. *See Official Gazette of the United States Patent and Trademark Office,* Nov. 3, 1987, at TM 3.

Colorization, which has been compared to "painting a mustache on the *Mona Lisa,*" *see* Jennifer T. Olson, Note, *Rights in Fine Art Photography: Through a Lens Darkly,* 70 TEX. L. REV. 1489, 1514 & nn.150-51 (1992), is a subject of tremendous controversy in this country. Woody Allen and other filmmakers have testified frequently in Congress that colorization interferes with their right of integrity. *Legal Issues that Arise when Color is Added to Films Originally Produced, Sold and Distributed in Black and White: Hearings Before the Senate Subcomm. on Technology and the Law of the Senate Comm. on the Judiciary,* 100th Cong., 1st Sess. 62 (1987). However, congressional response has been relatively meager. The National Film Preservation Acts of 1988 and 1992 are a very small sop to Woody Allen and others like him. *See infra* note 51.

The colorization debate is a lively one. *See, e.g.,* Craig A. Wagner, Note, *Motion Picture Colorization, Authenticity, and the Elusive Moral Right,* 64 N.Y.U. L. REV. 628 (1989); Beyer, *supra* note 6; Daniel McK. Sessa, Note, *Moral Rights Protections in the Colorization of Black and White Motion Pictures: A Black and White Issue,* 16 HOFSTRA L. REV. 503 (1988); Alberta L. Cook, *Colorization; Actors and Directors: Color Them Mad as Hell,* NAT'L L.J., July 27, 1987, at 10, 11; Roger L. Mayer et al., *Colorization: The Arguments For,* 17 J. ARTS MGMT. & L. No. 3, at 64 (1987); Woody Allen et al., *Colorization: The Arguments Against,* 17 J. ARTS MGMT. & L. No. 3, at 79 (1987).

[51] *See, e.g.,* National Film Preservation Act of 1992, Pub. L. No. 102-307, tit. II, 106 Stat. 267 (1992) (codified at 2 U.S.C. §§ 179-179k (1994)), creating a panel to include up to twenty-five movies per year in a national registry of classic films. *See generally* David A. Honicky, *Film Labelling as a Cure for Colorization [and other Alterations]: A Band-Aid for a Hatchet Job,* 12 CARDOZO ARTS & ENT. L.J. 409 (1994); Warren H. Husband, *Resurrecting Hollywood's Golden Age: Balancing the Rights of Film Owners, Artistic Authors and Consumers,* 13 COLUM.-VLA J.L. & ARTS 327 (1993). The authors agree that currently there is inadequate protection for authors of altered films. One solution was proposed in the Film Disclosure Act of 1993, H.R. 1731, 103d Cong., 1st Sess. (1993), which would have amended the Lanham Act by adding 15 U.S.C. § 1125(c), under which networks or distributors which would have had to comport with certain requirements should they have wished to show a materially altered film.

[52] *See* Jeffrey L. Graubart, *U.S. Moral Rights: Fact or Fiction?,* N.Y.L.J., Aug. 7, 1992, at 5.

The Whistler,[53] Shostakovich,[54] Buffet,[55] and Huston[56] cases (none involving parody) illustrate the extensive moral rights protections afforded artists under French law and are typical of the moral rights approach in those countries that have a much longer history of "droit moral" than the United States. The following sections discuss why moral rights may have bloomed so late in our country. The state of moral rights protection that existed in this country prior and subsequent to VARA is then described.

B. *Moral Rights in the United States*

There are several answers to the question of why the moral rights doctrine took so long to gain a foothold in this country. One theory is that United States copyright law is very much the child of Anglo-Saxon jurisprudence with its emphasis on economic property rights.[57] The American notion of copyright as protective of economic property rights, rather than personal rights, was borne directly from its earlier English counterpart.[58]

Aside from the genealogical explanation for tardy moral rights acceptance in this country, the history and geography of art may also be a factor.[59] In terms of the history of western art, the art capital of the western civilized world over the course of centuries has moved westward—from the classical period in Athens, the neoclassical in Rome, the medieval and gothic art in various continental European cities, the high Renaissance in Florence, and the late nineteenth-century impressionism in Paris. It is only in the twentieth century that New York has become a major art center.[60] This is not to suggest that prior to 1913 America had not seen its share of important visual artists; James Whistler,[61] Thomas Eakins, Mary Cassatt, and Winslow Homer were but a few. But it is only quite recently that American visual artists have achieved international recognition, and that the American public has paid the kind of attention and homage to art previously found in the art centers of Europe. In the last sixty years, such American artists as Robert

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53 *See supra* note 46 and accompanying text.
54 *See supra* note 47 and accompanying text.
55 *See supra* note 45 and accompanying text.
56 *See supra* note 49 and accompanying text.
57 *See supra* note 34.
58 *See* Kwall, *supra* note 5, at 17 n.67.
59 *See* Merryman, *supra* note 6, at 1042.
60 This may find its roots in the Armory Show of 1913, which brought together approximately 1,600 seminal works of art. Critics called it "the most significant art show in American history." STRICKLAND & BOSWELL, *supra* note 13, at 150.
61 For a discussion of the French moral rights case involving Whistler, see *supra* note 46 and accompanying text.

Rauschenberg,[62] Jim Dine, Jasper Johns,[63] Robert Indiana, Roy Lichtenstein, Andy Warhol, Larry Rivers, Georgia O'Keefe, Edward Hopper, and Alexander Calder have established our country as a significant art center, and major art movements such as the "Ash Can School" and "Pop Art" developed and flourished within our borders.[64] Some commentators believe the relative youth of our country and its art may explain why moral rights protection in this country lagged so far behind the international art communities.[65] The artist as hero, icon, celebrity, and media event is a recent phenomenon in this country. It has been suggested, for example, that Chicagoans will not burn down the city over a painting—"Paris maybe, but Americans have never taken culture that seriously."[66]

The delayed birth of moral rights in this country may also be due to the strong values we attach to free expression, as embodied in the First Amendment.[67] In civil law countries, such as France, Germany, and Italy, moral rights have received their greatest reception. These countries have no explicit speech protection analo-

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62 Rauschenberg parodied *Mona Lisa*. *See infra* note 123 and accompanying text.

63 Johns also parodied *Mona Lisa*. *See infra* note 123 and accompanying text.

64 *See* JANSON, *supra* note 13, at 675. George Bellows represents the Ash Can School's emphasis on realistic, gritty scenes. STRICKLAND & BOSWELL, *supra* note 13, at 154-55. Roy Lichtenstein and Andy Warhol ("the Pope of Pop") were Pop Artists who depersonalized art and used consumer items as "art." *Id.* at 174-75. As such, they may represent the artistic progeny of Duchamp.

65 *See* Merryman, *supra* note 6, at 1042; Roeder, *supra* note 6, at 557. Even internationally, the notion of art as reflection of an artist's personality did not achieve recognition until the age of positivism and Freud. *See* Albert Elsen, *Why Do We Care About Art?*, 27 HASTINGS L.J. 951, 954 (1976). Elsen, an art historian, explains:

> [T]he concept of self-expression is historically recent in art, originating in the last century, when pioneering modernists such as the Impressionists took it upon themselves to work from personal experience in individually acquired styles rather than by interpreting the experience of others in academically approved modes. With the development of abstract art early in this century, artists looked for art's sources in the self. They radically changed the conditions of art in order to capture the unique qualities of their private vision, and this change resulted in the creation of the very vocabulary and grammar of their art. Painters such as Kandinsky could look upon their art as creations and as intimate extensions of themselves. Picasso saw his art as a diary. . . . By extension, the modern artist's work, grounded in the self, becomes a tangible manifestation of his personality. In view of their country's early leadership in modern art, it is not surprising that by the mid-19th century French jurists began to recognize and protect this intimate relationship between the artist and the work of art.

Id. at 954-55.

66 Nelson v. Streeter, 16 F.3d 145, 150 (7th Cir. 1994) (Posner, J.). In May 1988, three Chicago aldermen removed a painting of Harold Washington in women's frilly white lingerie from the School of the Art Institute. The student painter filed a civil rights suit that was settled for $95,000. *See* Matt O'Connor, *Suit Ended on Picture of Washington*, CHI. TRIB., Sept. 21, 1994, § 2, at 1.

67 The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

gous to our 200-year experience with an amendment that tops the hierarchy of rights enumerated in the Bill of Rights. Because the moral right of integrity directly affects expression, such as a parody that may injure an artist's honor or reputation, First Amendment concerns may lurk behind our slow acceptance of moral rights. While traditional copyright law also affects expression, relying on fair use to effect the proper balance, it does not protect "honor and reputation" per se, but rather the pecuniary rights of artists. In contrast, "honor and reputation" issues have up until now been subsumed in defamation law with its concomitant constitutional constraints.[68]

1. Moral Rights in the United States before VARA

Prior to our adherence to Berne[69] and subsequent enactment of explicit but limited federal moral rights protection for certain visual arts under section 106A,[70] there were differing views about the extent of quasi-moral rights protection under copyright or other federal or state doctrines. While many commentators have thought that the personal rights of artists were insufficiently protected prior to VARA,[71] at least one observer found that as of 1986 United States law did offer several meaningful equivalents to moral rights protection.[72] However, most of the controversies that arose between artists and defendants resulted in judicial decisions that strain to apply doctrine ill-fitting to the moral right issues raised in those cases.

a. State Law and Moral Rights

In one of the earliest cases directly raising a moral rights claim, *Shostakovich v. Twentieth Century-Fox Film Corp.*,[73] the New

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[68] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); *cf.* Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (holding that the reckless disregard standard is also required for intentional infliction of emotional distress claims brought by public figures). *See generally* Laura Cohen, *Beyond* Silberman v. Georges*: Shielding the Artist from Claims of Libel*, 17 COLUM. HUM. RTS. L. REV. 235 (1986); Leslie K. Trieger, *Protecting Satire Against Libel Claims: A New Reading of the First Amendment's Opinion Privilege*, 98 YALE L.J. 1215 (1989).

[69] Berne Convention, *supra* note 5.

[70] 17 U.S.C. § 106A.

[71] *See* Kwall, *supra* note 5, at 18 & n.68.

[72] *See* FINAL REPORT OF THE AD HOC WORKING GROUP ON U.S. ADHERENCE TO THE BERNE CONVENTION, *supra* note 5, at 547-57; *see also* Sam Ricketson, *U.S. Accession to Berne: An Outsider's Appreciation (Part 2)*, 8 INTELL. PROP. J. 87, 103-04 (1993) (quoting letter from Dr. Arpad Bogsch, Director General, World Intellectual Property Organization, to Irwin Karp, Esq., June 16, 1987).

[73] 80 N.Y.S.2d 575; *see supra* note 47 and accompanying text for a more extended discussion of the case. Other cases denying the validity of moral rights claims include Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947) (holding that the defendant need not attribute authorship), *cert. denied*, 335 U.S. 813 (1948); Crimi v. Rutgers Presbyterian Church,

York court rejected Shostakovich's argument that use of his music in an anti-Soviet movie violated his moral rights such that it falsely imputed to him disloyalty to his country. The court reasoned:

> There is no charge of distortion of the compositions nor any claim that they have not been faithfully reproduced. Conceivably, under the doctrine of Moral Right the court could in a proper case, prevent the use of a composition or work, in the public domain, in such a manner as would be violative of the author's rights. The application of the doctrine presents much difficulty however. With reference to that which is in the public domain there arises a conflict between the moral right and the well established rights of others to use such works. So, too, there arises the question of the norm by which the use of such work is to be tested to determine whether or not the author's moral right as an author has been violated. Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be? In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined.[74]

Still other plaintiffs have sought to cast their moral rights claim in other legal clothes such as contract, but not necessarily with any more success.[75] Other state doctrines relied upon by plaintiffs seeking to vindicate their moral rights include invasion of privacy,[76] defamation,[77] and unfair competition.[78] However, the lack of a uniform approach and the unpredictability of results in these moral rights cases make state law protection problematic. Further, lurking behind any of these state law claims is the possibility of pre-emption under one or more federal laws, especially the Copyright Act.[79]

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89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949) (finding that the defendant could obliterate the plaintiff's fresco).

74 *Shostakovich*, 80 N.Y.S.2d at 578-79 (citation omitted).

75 *See, e.g.*, Edison v. Viva Int'l, Ltd., 421 N.Y.S.2d 203, 205 (N.Y. App. Div. 1979) (plaintiff's moral rights claim was subsumed in his contract right to seek remedy for mutilation of his article and must be dismissed). *But see* Zim v. Western Pub. Co., 573 F.2d 1318 (5th Cir. 1978) (publication of revised version of plaintiff's book violated agreement between author and publisher); Granz v. Harris, 198 F.2d 585, 588 (2d Cir. 1952) (defendant breached contract by selling abbreviated records made from plaintiff's master discs; contract required appropriate attribution of authorship); Packard v. Fox Film Corp., 202 N.Y.S. 164 (N.Y. App. Div. 1923) (stating that false attribution and unauthorized use of author's name constitutes breach of contract).

76 *Zim*, 573 F.2d at 1326; *Geisel*, 295 F. Supp. at 340 n.5.

77 *Edison*, 421 N.Y.S.2d at 207.

78 *Granz*, 198 F.2d at 588; Jaeger v. American Int'l Pictures, Inc., 330 F. Supp. 274, 278 (S.D.N.Y. 1971); *Geisel*, 295 F. Supp. at 354 n.15.

79 17 U.S.C. § 301(a) provides:

In the last decade or so, perhaps as a response to this murky state of moral rights protection, a number of states enacted artist and author rights statutes. The House Report on VARA noted that as of 1990 eleven states had such statutes:[80] California,[81] Connecticut,[82] Illinois,[83] Louisiana,[84] Maine,[85] Massachusetts,[86] New

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> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression . . ., whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

Even without the specific preemption language of § 301, state law moral rights claims could be preempted if (1) Congress has occupied the field in such manner as to foreclose state law, *see* Hines v. Davidowitz, 312 U.S. 52, 67 (1941), or (2) state law conflicts with the objectives of a federal statute. *See* Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Div. Comm'n, 461 U.S. 190, 203-04 (1983).

Intellectual property plaintiffs usually are well aware of the preemption problem, but nevertheless may try to bring claims in state courts for a variety of reasons. *See generally* Ted D. Lee & Ann Livingston, *The Road Less Traveled: State Court Resolution of Patent, Trademark, or Copyright Disputes*, 19 ST. MARY'S L.J. 703 (1988). Plaintiffs may prefer state courts because of different jury pools, decreased litigation costs, greater familiarity with state court, less crowded dockets, and other reasons. *Id.*

The Supreme Court has considered the intellectual property/preemption issue in several cases. *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989) (stating that a state plug molding statute was preempted by the Patent Act); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) (holding that a state trade secret law was not preempted by the Patent Act); Goldstein v. California, 412 U.S. 546 (1973) (holding that a state anti-piracy statute protecting sound records (then not protected under federal copyright law) was not preempted); Sears Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); and Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964) (holding that a state unfair competition law was preempted by the Patent and Copyright Acts). For a discussion of preemption under § 301 of the 1976 Act see Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. REV. 1107 (1977). For a discussion of preemption under the 1909 Act, see MELVILLE B. NIMMER, 1 NIMMER ON COPYRIGHT § 1.01 (1988).

80 H.R. REP. NO. 514, 101st Cong., 2d Sess. 9 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6919. Three other states protect artists' rights. Nevada, NEV. REV. STAT. ANN. § 597.720-.760 (Michie 1994); South Dakota, S.D. CODIFIED LAWS ANN. § 1-22-16 (1992); and Utah, UTAH CODE ANN. § 9-6-409 (1996). Nevada law grants the rights of attribution and integrity, NEV. REV. STAT. ANN. §§ 597.730, .740. South Dakota grants the rights of attribution and integrity to an artist whose work has been acquired by the state. S.D. CODIFIED LAWS ANN. § 1-22-16(1) to -16(3). Utah grants to artists who create art work commissioned by its Arts Development Program the right of attribution and integrity. UTAH CODE ANN. § 9-6-409(2), (5).

81 CAL. CIV. CODE § 987 (West Supp. 1995). The California Art Preservation Act is intended to prevent a person who acquires "fine art" from physically altering or destroying that art. The statute prohibits "any physical defacement, mutilation, alteration, or destruction of a work of fine art" by anyone other than the artist herself who owns and possesses the work. *Id.* § 987(c)(1). The same prohibitions apply to a person who mutilates, alters, or destroys a work of fine art through gross negligence. *Id.* § 987(c)(2).

For a general discussion of the Act, see G.L. Francione, *The California Art Preservation Act and Federal Preemption by the 1976 Copyright Act—Equivalence and Actual Conflict*, 18 CAL. W. L. REV. 189 (1982); John Petrovich, *Artists' Statutory "Droit Moral" in California: A Critical Appraisal*, 15 LOY. L.A. L. REV. 29 (1981).

82 CONN. GEN. STAT. ANN. §§ 42-116s to -116t (West 1992 & Supp. 1996) protects artists from intentional physical defacement or alteration of their fine art by another person.

83 ILL. ANN. STAT. ch. 815, paras. 320/1-320/8 (Smith-Hurd 1993). The Illinois statute

Jersey,[87] New Mexico,[88] New York,[89] Pennsylvania,[90] and Rhode Island.[91] The protections these statutes afford the moral rights of

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does not address explicitly an artist's moral right to ensure the unaltered maintenance of a piece of art. However, the statute does hold an art dealer liable for the "loss of or damage to" a work of fine art while in the dealer's possession. *Id.* para. 320/2 § 2(5). The statute also prohibits an art dealer who accepts fine art on consignment from using or displaying the art or a photograph of the art unless notice is given to persons who use or view the art that the product is the artist's creation. *Id.* para. 320/5 § 5(d).

[84] LA. REV. STAT. ANN. §§ 51:2151-2156 (West 1987) prohibits a person other than the artist or person acting with the artist's consent from displaying, making accessible to the public, or publishing a work of fine art that has been altered, defaced, modified, or mutilated.

[85] ME. REV. STAT. ANN. tit. 27, § 303 (West 1988) provides that no person other than an artist or person authorized by an artist may *knowingly display* in a place accessible to the public *or publish* fine art or a reproduction of fine art that is in an "altered, defaced, mutilated or modified form" if: (1) the work is represented as the work of the artist or could reasonably be regarded as his work, and (2) the artist's reputation is reasonably likely to be damaged as a result of displaying, reproducing, or publishing the art. *Id.* § 303(3) (emphasis added). In addition, if conservation work on a piece of fine art is grossly negligent, the statute will apply. *Id.* § 303(4).

[86] MASS. GEN. LAWS ANN. ch. 231, § 85S (West Supp. 1996). The law's purpose is to prevent the "physical alteration or destruction of fine art" in order to prevent harm to the artist's reputation. Further, the public has an interest in "preserving the integrity of cultural and artistic creations." *Id.* § 85S(a). This statute prohibits anyone other than the artist who owns and possesses the art, or a person authorized by the artist, from intentionally defacing, mutilating, altering, or destroying fine art. Intent includes gross negligence, as well as deliberate action. *Id.* § 85S(c). For a general overview of the Massachusetts Act, see Vance R. Koven, *Observations on the Massachusetts Art Preservation Act*, 71 MASS. L. REV. 101 (1986).

[87] N.J. STAT. ANN. §§ 2A:24A-1 to -8 (West 1987). The "Artists' Rights Act" recognizes that the physical nature of fine art "is of enduring and crucial importance to the artist and the artist's reputation," and that the alteration, defacement, mutilation, or modification of fine art could affect this. Consequently, the statute recognizes that destruction of the integrity of the art causes a loss to the artist and his reputation.

[88] N.M. STAT. ANN. §§ 13-4B-1 to -3 (Michie 1978). The "Fine Art in Public Buildings" Act protects an artist's right of integrity, *id.* § 13-4B-3(A), and attribution, *id.* § 13-4B-3(B), provided the work is "fine art . . . of recognized quality." *Id.* § 13-4B-2(B).

[89] N.Y. ARTS & CULT. AFF. LAW § 14.03. The statute prohibits anyone other than the artist or a person duly authorized by the artist from knowingly displaying in a place accessible to the public or from publishing "a work of fine art or limited edition multiple of not more than three hundred copies by that artist or a reproduction thereof in an altered, defaced, mutilated or modified form." *Id.* § 14.03(1). This prohibition will apply if the work is claimed, or could reasonably be regarded, as being the artist's work and if the artist's reputation is reasonably likely to be damaged by the injurious act. *Id.*

Artists have tried to avail themselves of the Act's protections with not much success. *See, e.g.*, Monta v. Omni Publications Int'l, Ltd., 741 F. Supp. 1107, 1114-15 (S.D.N.Y. 1990) (defendant's placement of plaintiff's sculpture with an anti-nuclear message in a pro-nuclear text is not a mutilation or alteration under the Act); Tracy v. Skate Key, Inc., 697 F. Supp. 748, 751 (S.D.N.Y. 1988) (plaintiff's claim under the New York Act is preempted by the Copyright Act as it "tracks the rights protected by the Copyright Act").

For a general discussion of the New York Act, see Damich, *supra* note 8; Sarah A. Smith, Note, *The New York Artists' Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL L. REV. 158 (1984).

[90] PA. STAT. ANN. tit. 73, §§ 2101-2110 (1993). The "Fine Arts Preservation Act" prohibits a person other than an artist who owns and possesses a work he created from committing or authorizing, in an intentional manner, "any physical defacement, mutilation, alteration or destruction" of fine art. *Id.* § 2104(a). The statute applies only to fine art that is displayed in Pennsylvania in a place that the public can access. *Id.* § 2110(a).

[91] R.I. GEN. LAWS §§ 5-62-2 to -6 (1995) prohibit anyone other than the artist or person

artists vary greatly. New York is probably most protective of an artist's personal rights, while California seems to stress the preservation of art with no provision for affronts to an artist's reputation. The laws of Connecticut, Massachusetts, Pennsylvania, and Rhode Island are of the California model, while Louisiana, Maine, and New Jersey focus, like New York, on the artist's reputation. These varying laws have been described by an artists' rights attorney as a "patchwork of rules which by itself vitiates somewhat the single, unified system of copyright . . . ."[92] However, Congress said that certain statutes, like those discussed above, were sufficient safeguards of the rights of paternity and integrity such that Article 6^{bis} of Berne[93] could be satisfied:

> This existing U.S. law includes various provisions of the Copyright Act and the Lanham Act, *various state statutes*, and common law principles such as libel, defamation, misrepresentation, and unfair competition, which have been applied by the courts to redress authors' invocation of the right to claim authorship or the right to object to distortion.[94]

b. Pre-VARA Protection of Moral Rights under Federal Law

Prior to VARA, federal copyright law offered only minimal and indirect protection of the personal rights of artists. Professor Kwall noted the possibility that sections 115(a)(2), 106(2), 203, 304, and 501(b) of the Copyright Act might be read to protect an artist's moral rights, but to date this has not been the case.[95]

However, another federal statute, the Lanham Act, specifically its unfair competition provision,[96] furnished the basis for the high-water mark of federal moral rights protection pre-VARA. In *Gilliam v. American Broadcasting Companies, Inc.*,[97] the Monty Python com-

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authorized by the artist from knowingly and publicly displaying fine art, or from publishing a reproduction of fine art, in an "altered, defaced, mutilated or modified form," if the work is represented as that of the artist or if the work would reasonably be considered as being that of the artist. *Id.* § 5-62-3.

92 H.R. REP. NO. 514, *supra* note 80, at 9, *reprinted in* 1990 U.S.C.C.A.N. at 6919 (testimony of John Koegel, Esq.).

93 Berne Convention, *supra* note 5.

94 S. REP. NO. 352, *supra* note 5, at 9-10, *reprinted in* 1988 U.S.C.C.A.N. at 3714-15 (emphasis added). *See* H.R. REP. NO. 609, 100th Cong., 2d Sess. 32-40 (1988).

95 Kwall, *supra* note 5, at 38-56.

96 15 U.S.C. § 1125(a) provides in part:

> Any person who, on or in connection with any goods or services . . . uses a false designation of origin . . . or any false or misleading representation . . . and [causes] such goods or services to enter commerce . . . shall be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or representation.

97 538 F.2d 14 (2d Cir. 1976).

edy group sued to enjoin ABC from broadcasting two ninety-minute specials of Monty Python programs. Without Monty Python's permission, ABC had cut twenty-four minutes out of each of the ninety-minute programs. ABC had edited the material to make time for commercial advertising and to eliminate "offensive or obscene matter."[98] Python argued, and both the trial and appellate courts agreed, that broadcasting the Monty Python shows in the truncated ABC version violated the integrity of Python's work and could make Python subject to criticism—the focus of section 1125(a)'s protection.[99]

Section 1125(a) of the Lanham Act, as interpreted creatively by *Gilliam* and other courts,[100] indicates the lengths to which some courts will go to protect an artist's moral rights even in the absence of explicit federal law. Unlike the patchwork of state moral rights, section 1125(a) could provide national uniformity. However, most commentators and a few courts believe the fit between the Lanham Act and *droit moral* is an extremely tenuous one.[101]

2. Moral Rights under VARA

Despite state moral rights statutes,[102] various state law doctrines,[103] and strained reliance on Lanham Act provisions,[104] it was not until June 1, 1991, the effective date of VARA,[105] that copyright law explicitly protected the moral rights of attribution and integrity. Thus, VARA creates the potential for a nationwide, uniform scheme, albeit limited, of moral rights safeguards. Whether Congress enacted VARA to comport with Berne moral rights requirements,[106] or as a supremely political compromise between the arguments tendered by folks in both camps of the colorization de-

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98 *Id.* at 18. ABC deleted such words as "hell" and "damn." *Id.* at 23.

99 *Id.* at 24.

100 *See, e.g.*, Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1110 (9th Cir. 1992) (stating that the Lanham Act provides a remedy to plaintiff in a "sound-alike" suit because of "an economic interest akin to that of a trademark holder in controlling the commercial exploitation of his or her identity"), *cert. denied*, 113 S. Ct. 1047 (1993); Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981) (holding that the substitution of plaintiff's name constitutes "reverse passing off" actionable under § 1125).

101 *See, e.g.*, Halicki v. United Artists, 812 F.2d 1213 (9th Cir. 1987); *Gilliam*, 538 F.2d at 26-27 (Gurfein, J., concurring); Kwall, *supra* note 5, at 24 & n.89. *But see* Diana E. Pinover, *The Rights of Authors, Artists and Performers under Section 43(a) of the Lanham Act*, 83 TRADEMARK REP. 38 (1993).

102 *See supra* notes 80-91 and accompanying text.

103 *See supra* notes 74-78 and accompanying text.

104 *See supra* notes 96-99 and accompanying text.

105 17 U.S.C. § 106A.

106 Recall that Congress had, perhaps disengenuously, stated that moral rights in this country were sufficient to admit the U.S. into Berne. *See supra* note 94. Adherence to Berne was desired to curb international piracy and to make the United States an effective participant in international copyright. *See* Carl H. Settlemyer III, *Between Thought and Pos-*

bate,[107] is not made clear by VARA's dubious legislative history.[108]

To highlight the coverage now afforded by VARA and the unresolved copyright issues created by the addition of these moral rights to what previously was a pecuniary-based protection scheme, let us now return to our imaginary case of *Leonardo v. Duchamp.* The issue is whether VARA offers any redress when Duchamp purchases a single copy of Leonardo's *Mona Lisa* edition of 100 and draws a moustache upon those famous smiling lips. Initially, Leonardo will need to show that the *Mona Lisa* edition is a "work of visual art" protected by VARA. Since the *Mona Lisa* lithographs are a limited edition of under 200 copies, and are signed and numbered by Leonardo, he could satisfy the definitional requirements of section 101(1).[109] However, not only must the protected work be a work of visual art, but the offending work must also be a work of visual art.[110] Duchamp's *L.H.O.O.Q.* is such a work. Because the hypothetical assumes that Leonardo created the *Mona Lisa* after June 1, 1991 and that he is still alive today, the rights afforded by section 106A are in full force and are independent of any of the exclusive rights provided in section 106A.[111]

Leonardo's main claim under VARA is that Duchamp, in adding a moustache to one of Leonardo's lithographs, intentionally distorted, mutilated, or modified the work in a way "prejudicial to his . . . honor or reputation."[112] In short, Duchamp violated Leonardo's right of integrity.[113] In order to succeed on his integrity claim, Leonardo will not have much difficulty showing that Duchamp intentionally distorted, mutilated, or modified his *Mona Lisa.* Duchamp clearly knew what he was doing and intended at least to "modify" the work to accomplish the desired result—"a

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session: Artists' "Moral Rights" and Public Access to Creative Works, 81 GEO. L.J. 2291, 2307 n.71 (1993).

107 *See supra* note 50. The narrow range of works protected by VARA was not unintentional. *See* 17 U.S.C. § 101. *Compare* 136 CONG. REC. H3113 (daily ed. June 5, 1990) (Rep. Kastenmeier stated: "We will continue to consider whether claims arising in the film context meet the same standards as visual artists' claims did.") *with id.* at H3115 (Rep. Fish stated: "[T]his legislation should not be viewed as a precedent for the extension of so-called moral rights into other areas.").

108 *See* George C. Smith, *Let the Buyer of Art Beware; Artists' Moral Rights Trump Owners' Property Rights under the Visual Artists Rights Act,* RECORDER, Jan. 10, 1991, at 4. Smith believes VARA was passed only because it was linked to critical judgeships legislation. *Id.*

109 17 U.S.C. § 101(1). Note that if we had not massaged the facts, Leonardo's portrait might be considered as owned by Signore Giocando as a work for hire, *id.*, and thus not a "work of visual art" protected by VARA. 17 U.S.C. § 101(2)(B); *see Carter,* 71 F.3d 77.

110 *See* 17 U.S.C. § 106A(c)(3).

111 *See id.* § 106A(a).

112 *Id.* § 106A(a)(3)(A).

113 *See id.* § 106A(a)(1)(A).

risqué joke on the Giocanda!"[114]

A more sticky issue arises as to whether Duchamp's parodic modification "would be prejudicial to [Leonardo's] honor or reputation."[115] The fuzziness of the term "prejudicial . . . to honor or reputation" is not made appreciably clearer by VARA's legislative history. The House Report on VARA tells us to focus on "the artistic or professional honor or reputation of the individual as embodied in the work that is protected. . . . [W]hile no per se rule exists, modification of a work of recognized stature will generally establish harm to honor or reputation."[116] But the House Report emphasizes that the standard of harm "is not analogous to that of a defamation case, where the general character of the plaintiff is at issue."[117] Based on this amorphous standard—harm to artistic honor or reputation—it is not very clear what Leonardo would have to show, although Judge Edelstein's recent decision in *Carter v. Helmsley-Spear, Inc.*[118] gives some guidance.

Assuming that Leonardo can show the requisite harm, the only barrier to recovery under the panoply of remedies of the Copyright Act[119] would be the fair use doctrine.[120] As a parodist, Duchamp would attempt to raise this defense. The following sections will discuss the nature of parody and fair use (part II) and the proper resolution of Leonardo's claim against Duchamp (part III).

II. PARODY AND FAIR USE

A. *Parody in the Visual Arts*

The visual arts have seen more than their fair share of parody.

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114 MARCEL DUCHAMP, MARCEL DUCHAMP 289 n.131 (Anne D'Harnocourt & Kynaston McShine eds., 1973).

115 17 U.S.C. § 106A(a)(3)(A).

116 H.R. REP. NO. 514, *supra* note 80, at 15-16, *reprinted in* 1990 U.S.C.C.A.N. at 6925-26.

117 *Id.* at 15, *reprinted in* 1990 U.S.C.A.A.N. at 6925.

118 861 F. Supp. 303 (S.D.N.Y. 1994), *rev'd*, 71 F.3d 77 (2d Cir. 1995). The district court focused upon "good name, public esteem, or reputation in the artistic community" and relied on expert testimony. *Carter*, 861 F. Supp. at 323.

119 These include injunctions, impoundment, damages, and profits or statutory damages, costs, and reasonable attorney's fees. *See* 17 U.S.C. §§ 501-505. Section 501 makes explicit that these remedies are available to authors whose section 106A(a) rights are violated. *See id.* § 501(a). Note that even if Leonardo's actual damages are slight or difficult to quantify, he may elect, alternatively, to seek statutory damages under section 504(c). Recently doubled under section 10 of the Berne Convention Implementation Act of 1988, *supra* note 5, 102 Stat. 2860, the statutory damages generally range from a $500 minimum to a $20,000 maximum. However, the ceiling increases to $100,000 for willful infringements, and the floor decreases to $200 for innocent infringements. On the *Duchamp* facts hypothesized here, Duchamp would probably be found to have infringed willfully. Willfulness could be shown by reckless disregard of Leonardo's copyright; *see* Lauratex Textile Corp. v. Allton Knitting Mills, 519 F. Supp. 730 (S.D.N.Y. 1981), or by Duchamp's infringement; *see* Broadcast Music, Inc. v. Xanthas, Inc., 855 F.2d 233, 236 (5th Cir. 1988).

120 17 U.S.C. § 107; *see infra* notes 137-72 and accompanying text.

The 1919 Duchamp parody of Leonardo's 1506 *Mona Lisa*, which is illustrative of the moral rights/parody dilemma, is one example of "appropriation art."[121] Others range from the ridiculous, which includes *Mad* magazine's *Sports Titillated*, a parody of the swimsuit issue of *Sports Illustrated*; to the sublime, such as Titian's *Venus* (1538), parodied by Manet's *Olympia* (1893), in turn parodied by Mel Ramos in 1974; and the putatively sublime, such as Andy Warhol's 1963 parody of the *Mona Lisa*, entitled *Thirty Are Better Than One*; the 1970 film *M*A*S*H*, containing a parody of Leonardo's *The Last Supper* (ca. 1497); and Larry Rivers's 1970 parody of Manet's *Olympia*, entitled *I Like Olympia in Blackface*. Warhol's parody, which reproduces identical images of the *Mona Lisa* in rows six across and five down, was intended to critique "a consumer society that loves quantity more than quality and [which] can use a popular icon of highbrow art as a mass-produced product."[122] Several other prominent twentieth-century artists also have parodied the *Mona Lisa*: Charles Addams (*Monster Rally 89* (1950)) (a cartoon of Mona Lisa sitting in a movie audience); Robert Rauschenberg (*Mona Lisa* (1958)); Jasper Johns (*Figure 7* (1969)); Tom Wesselman (*Great American Nude #35* (1962)); Philippe Halsman (*Mona Dali; What Dali sees when he looks at Mona Lisa* (1954)); Marisol (*Mona Lisa* (1961-62)); Robert Arneson (*George [Washington] and Mona in the Baths of Coloma* (1976)); Shusaku Arakawa (*Portrait of Mona Lisa* (1971)); and Peter Max (*Mona Lisa* (1991)).[123] More recently, the Museums of Stonybrook, New York, mounted an intriguing exhibit: "Parodies of the American Masters: Rediscovering the Society of American Fakirs, 1891-1914." The Fakirs were a group of art students who painted outrageous parodies, neither kind nor gentle, based on subject matter and titles of such well-known artists as George Bellows, Winslow Homer, and John Singer Sargent. All these paradigmatic parodies[124] (some of which

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121 Appropriationism in art refers to the incorporation into new art works of existing images; collage, montage, and Duchamp's "ready-mades" involve appropriation. *See* Heather J. Meeker, Comment, *The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era*, 10 U. MIAMI ENT. & SPORTS L. REV. 195, 213-16 (1993).

122 LINDA HUTCHEON, A THEORY OF PARODY 47 (1985). *Thirty Are Better Than One* is reproduced in the appendix. As for American art, Grant Woods's *American Gothic* must be one of the top ten targets for parody.

123 JEAN LIPMAN & RICHARD MARSHALL, ART ABOUT ART 28, 58-62 (1978). A recently formed art group, the "Guerrilla Girls," produced a poster of Mona Lisa with a fig leaf covering her mouth to protest censorship and sexism. STRICKLAND & BOSWELL, *supra* note 13, at 194. As of 1952, there were more than five dozen versions of the *Mona Lisa*, *id.* at 34, one of which is reproduced in the appendix.

124 Parody has been a recognized art form for thousands of years. *See* LIPMAN & MARSHALL, *supra* note 123; Leon R. Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130, 1133 (1955). It should be noted that copyright is not the only branch of

are reproduced in the appendix), based on almost universal familiarity with the *Mona Lisa* and other works, send a message to the viewer about artistic creation and the nature of art itself as revolution.

Thus, Duchamp's parody is well-grounded in a long and solid parodic tradition. While the hypothetical case of *Leonardo v. Duchamp* is based on a chronological glitch with a moral rights twist, the "invasion" is much the same as in Duchamp's actual 1919 parody, which is an exact reproduction of the *Mona Lisa* with several zingers. First, Duchamp painted a large black moustache and small goatee—graffiti—on what is undoubtedly one of the most celebrated, if not one of the most beautiful and serene female faces in western art. Second, Duchamp changed the title of the work to the initials *L.H.O.O.Q.*, which serve as a French acronym for "elle a chaud au cul," which translates into something along the lines of "She has a hot ass"[125] or, more daintily, "She has hot pants."[126] *L.H.O.O.Q.* can be pronounced phonetically in English as the single word "look," referring perhaps to the enigmatic countenance of *La Giocanda.* These visual and aural puns are what gives

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intellectual property that involves problems of parody. Trademark parodies are fairly common, and infringement is judged by a "likelihood of confusion" test. *See* 15 U.S.C. § 1114(1) (1994). Representative trademark cases alleging infringement by parody include Anheuser-Busch, Inc. v. Balducci Publications, 28 F.3d 769 (8th Cir. 1994) ("Michelob Oily" parody in defendant's humor magazine *Snicker*), *cert. denied*, 115 S. Ct. 903 (1995); Anheuser-Busch, Inc. v. L&L Wings, Inc., 962 F.2d 316 (4th Cir.) ("King of Beaches" parody of Bud slogan on T-shirt), *cert. denied*, 113 S. Ct. 206 (1992); Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc., 886 F.2d 490 (2d Cir. 1989) (printing "Satire" prominently on "Spy Notes" parody of Cliffs Notes unlikely to cause confusion); Jordache Enter., Inc. v. Hoggwyld, Ltd., 828 F.2d 1482 (10th Cir. 1987) ("Lardashe" parody of Jordache jeans); Shieffelin & Co. v. Jack Co. of Boca, Inc., 850 F. Supp. 232 (S.D.N.Y. 1994) ("Dom Popignon," a popcorn product mark, infringes upon "Dom Perignon" champagne trademark); Nike, Inc. v. "Just Did It" Enters., 799 F. Supp. 894 (N.D. Ill. 1992) (parody of Nike's "Just Do It" slogan); General Elec. Co. v. Alumpa Coal Co., 205 U.S.P.Q. (BNA) 1036 (D. Mass 1979) ("Genital Electric" parody). *See generally* Tammi A. Gauthier, Note, *Fun & Profit: When Commercial Parodies Constitute Copyright or Trademark Infringement*, 21 PEPP. L. REV. 165 (1993); Peter W. Smith, Note, *Trademarks, Parody, and Consumer Confusion: A Workable Lanham Act Infringement Standard*, 12 CARDOZO L. REV. 1525 (1991); Tyrone Tasker, *Parody or Satire as a Defense to Trademark Infringement*, 77 TRADEMARK REP. 216 (1987).

Should a parodist seek trademark protection for her mark, the Lanham Act poses several hurdles. 15 U.S.C. § 1052(d) (1994) provides that no mark can be registered if it is likely to cause confusion, mistake, or deception with a previously registered mark. Further, unlike copyright law, which has no explicit content-based restriction for protection (and courts have rejected reading such a restriction into the copyright act, *see, e.g.*, Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980)), the Lanham Act rejects protection for immoral, deceptive, or scandalous marks. *See* 15 U.S.C. § 1052(a).

125 *See* HORST W. JANSON, HISTORY OF ART 693 (3d ed. 1986).

126 *See* LAWRENCE D. STEEFEL, JR., THE POSITION OF DUCHAMP'S "GLASS" IN THE DEVELOPMENT OF HIS ART 368 n.40 (1977). Such punning is hardly surprising from an artist who made a self-portrait entitled *With My Tongue in My Cheek* (1959).

Duchamp's parody its kick to its viewers and its sting to Leonardo's moral rights as an artist.

B. *Parody and Fair Use*

Parody, by its very nature, smacks of irreverence. Whether it involves a send-up of a work protected by traditional copyright law,[127] or one protected additionally by the new moral rights provisions of state[128] or federal law,[129] a parody is almost always quasi-revolutionary[130] in concept, and rarely is it a loving, respectful, or deferential use of the underlying work. One example of this is, of course, Duchamp's hirsute and bawdy version of Leonardo's *Mona Lisa.* Given the essential, even if subtle, naughtiness of most parodies, it is highly unlikely that any author or author's estate[131] will voluntarily permit the parodist to use the underlying work. This may be especially true when the moral right of integrity, the protection of "honor or reputation,"[132] is at stake. If parody is intended to criticize or mock an author's work, then almost inevitably an artist's "honor or reputation" is on the line.

In parody, imitation is most often *not* the sincerest form of flattery, as numerous examples will illustrate.[133] As the Ninth Circuit noted in *Fisher v. Dees,* "[t]he parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought."[134] It cannot be bought because the original artist fears not only a deleterious economic effect on her work (a hit on the pocketbook, which is protected by traditional copyright law), but also the negative effect on her artistic sensibilities, reputation, and honor (a hit on the psyche, the subject of moral rights protection). Indeed, the authors of a leading copyright casebook note that a licensed parody is oxymoronic.[135] To obtain permis-

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127 17 U.S.C. § 106.

128 *See supra* notes 79-91 and accompanying text.

129 17 U.S.C. § 106A.

130 Parody as revolution is as recent as Chinese political discontent. People wore "dissatisfaction T-shirts," which turned political party propaganda into parody. *See* ORVILLE SCHELL, MANDATE OF HEAVEN 273-74 (1994).

131 The Copyright Act of 1976 affords protection against infringement for the author's life plus fifty years. 17 U.S.C. § 302(a) (for works created after Jan. 1, 1978). Federal moral rights expire with the author's death. 17 U.S.C. § 106A(d).

132 *Id.* § 106A(a)(3)(A).

133 *See, e.g., Acuff-Rose,* 114 S. Ct. 1164; Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied sub nom.* O'Neill v. Walt Disney Prods., 439 U.S. 1132 (1979).

134 Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986) (citations omitted); *see also* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors,* 82 COLUM. L. REV. 1600 (1982).

135 ALAN LATMAN ET AL., COPYRIGHT FOR THE NINETIES 600 n.5 (4th ed. 1993); *cf. Acuff-Rose,* 114 S. Ct. at 1178 (stating that it is "unlike[ly] that creators of imaginative works will license critical review or lampoons of their own productions"); Richard H. Posner, *When Is*

sion from an artist who may assert personal, moral rights would seem to be virtually impossible. Further, we may well wonder how parody could function effectively as commentary and critique if the authority to satirize, criticize, ridicule, or jibe is given. Permission connotes approval—few parodists wish that blessing, and few artists whose moral rights of integrity are at risk would wish that curse.

The chilling effect of this is self-evident. To escape liability for infringement based on an unauthorized use of the underlying work, there are only two avenues open to parodists: silence (not to use the protected work), or reliance on the fair use defense. When an artist's moral rights of honor and reputation are at stake, the parodist may well decide to self-censor, fearing that the current formulation of the fair use doctrine might not sufficiently immunize her. Silence will not, of course, add to society's storehouse of "useful arts" contemplated by the constitutional grant of limited copyright monopoly.[136]

1. Case Law Prior to 1994: Lower Court Decisions

Almost four decades of copyright cases charging parodists with infringement[137] have not resulted in any consistent, predictable,

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Parody Fair Use?, 21 J. LEGAL STUD. 67, 69 (1992) ("The credibility of book reviews . . . would be undermined if a reviewer needed the author's permission to quote from the book."); Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 67 (1981) ("[T]he granting of a license . . . constitutes an official seal of approval, the modern day equivalent of an imprimatur."). The front cover of Ronald Richard Roberts's (pseudonym) *The Ditches of Edison County* (1993) has stamped upon it "unauthorized . . . a parody." It would be hard to imagine that Robert James Waller, the author of *The Bridges of Madison County*, would permit this second author to ridicule his book so barbedly.

136 U.S. CONST. art. I, § 8, cl. 8 provides that copyright protection be for "limited Times."

137 Representative parody/fair use cases since the 1950s include, in chronological order: Loew's, Inc. v. Columbia Broadcasting Sys., Inc., 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom.* Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956) (holding that the Jack Benny "Autolight" parody was not fair use), *aff'd by an equally divided Court*, 356 U.S. 43 (1958); Columbia Pictures Corp. v. National Broadcasting Corp., 137 F. Supp. 348 (S.D. Cal. 1955) (holding that the parody "From Here to Obscurity" was fair use); Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir.) (holding that *Mad* magazine's satirical lyrics sung to twenty-five of Irving Berlin's songs was fair use), *cert. denied*, 379 U.S. 822 (1964); *Air Pirates*, 581 F.2d 751 (holding that bawdy counter-culture depiction of Disney cartoon characters was not fair use); MGM, Inc. v. Showcase Atlanta Coop Prods., 479 F. Supp. 351 (N.D. Ga. 1979) (holding that reenactment of *Gone with the Wind* as a comedy was not fair use); Elsmere Music, Inc. v. National Broadcasting Corp., 482 F. Supp. 741 (S.D.N.Y.) (holding that "I Love Sodom," an eighteen second Saturday Night Live skit, was fair use), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (per curiam); MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981) (holding that the parody song "Cunnilingus Champion of Company C" was not fair use); Pillsbury Co. v. Milky Way Prods., 215 U.S.P.Q. (BNA) 124 (N.D. Ga. 1981) (holding that depiction of Pillsbury characters engaging in sexual intercourse and fellatio, and reproduction of the Pillsbury baking song, was not fair use); Warner Bros., Inc. v. American Broadcasting Cos., 720 F.2d 231 (2d Cir. 1983) (holding that the television show "The Greatest American Hero" did not infringe upon the plaintiff's "Superman" character); *Fisher*, 794 F.2d 432 (holding that the parody song "When Sonny Sniffs Glue" was fair use); Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031 (N.D. Ga.

and coherent application of the fair use doctrine, at least until the Supreme Court's attempt in *Campbell v. Acuff-Rose Music, Inc.*[138] Neither the relative outrageousness of the parody nor the cleverness of the newly titled song seem to be a reliable predictor of whether the use will be deemed a fair one.[139] Additionally, courts have expressed divergent views about fair use, depending upon the focus of the infringing parody. The Sixth Circuit held in *Acuff-Rose* that a "fair" parody cannot be a general social commentary, but must target plaintiff's specific protected work.[140] In contrast, the Second Circuit in *Elsmere* squarely rejected the notion that the challenged parody must poke fun at the original work, rather than using that work as a means to facilitate a more general critique of society.[141]

Still other courts have articulated what has come to be known as the "conjure up test." Recognizing that the very nature of parody requires the audience to make the connection between the original work and the parodying work, some courts concede that a parodist must necessarily use "a substantial enough portion of [the original and fairly well-known work[142]] to evoke recognition," to make both a successful and fair parody.[143] These courts acknowledge, as they should, that the artistic genre itself requires significant use of the protected work. The "joinder of reference and ridicule" is thus the essence of parody.[144]

However, the line between a fair "conjuring up" and an imper-

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1986) (holding that "Garbage Pail Kids" was not fair use); New Line Cinema Corp. v. Bertelsmann Music Group, Inc., 693 F. Supp. 1517 (S.D.N.Y. 1988) (holding that alleged parody of "Freddy Krueger," a character from the movie *A Nightmare on Elm Street*, was not fair use); Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826 (S.D.N.Y. 1990) (holding that a beer company's use of a sound-alike and look-alike rap group in a commercial parody not a viable fair use defense); Eveready Battery Co. v. Adolph Coors Co., 765 F. Supp. 440 (N.D. Ill. 1991) (holding that a defendant's use of a plaintiff's mechanical rabbit beating on a drum was presumed to be fair use); Rogers v. Koons, 960 F.2d 301 (2d Cir.) (holding that a derivative sculpture based on a photo of a man and a woman holding seven puppies was not fair use), *cert. denied*, 113 S. Ct. 365 (1992); Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (6th Cir. 1992) (holding that "Oh Hairy Woman" parody by the Rap group 2 Live Crew was not fair use), *rev'd*, 114 S. Ct. 1164 (reasoning that a commercial parody is not presumptively unfair).

It is not surprising that most of the parody cases emanate from the Ninth and Second Circuits, in which Hollywood and New York are respectively located.

138 114 S. Ct. 1164.

139 *Compare Fisher*, 794 F.2d 432 (holding that "When Sonny Sniffs Glue" is a fair use parody of "When Sunny Gets Blue") *with MCA*, 677 F.2d 180 (holding that "Cunnilingus Champion of Company C" is not a fair use of "The Boogie Woogie Bugle Boy of Company B").

140 *Acuff-Rose*, 972 F.2d at 1436 n.8.

141 *Elsmere Music*, 623 F.2d at 253 n.1.

142 Recognition gives parody its punch.

143 *See Fisher*, 794 F.2d at 435 n.2.

144 *Acuff-Rose*, 114 S. Ct. at 1173.

missible pirated taking is often quite difficult to draw. This lack of a bright-line test is hardly surprising, as the classic definition of parody is "counter song," a song beside another.[145] Thus, for the parodying work to succeed at all it must be sung, painted, written, sculpted, in short, *expressed* in such a way as to be evocative of the underlying work. In other words, to parody, the second artist must always take from the first artist. On the other hand, if the second work amounts to a substantial taking, that is, something considerably more than evoking or conjuring up the original work, the parody/fair use defense generally fails.[146]

As the above discussion indicates, when the Supreme Court decided *Acuff-Rose*,[147] it was writing on its own clean slate,[148] but on a national slate made very rough and murky by inconsistent, confusing, and uneasily reconcilable lower court opinions of the last four decades. The following discussion will present a brief overview of the Supreme Court's *Acuff-Rose* decision, which should facilitate later analysis of the clash between moral rights and parody, as tempered by fair use.

2. Parody and Fair Use in the Supreme Court: *Campbell v. Acuff-Rose Music, Inc.*

Although the judicially crafted doctrine of fair use has been available to defendants at least since 1841[149] and was codified in the 1976 Copyright Act without any substantial change,[150] the Supreme Court did not address fair use until 1984 in *Sony*[151] and again a year later in *Harper & Row*.[152] Neither *Sony* nor *Harper & Row* involved parody. In *Acuff-Rose*, the Supreme Court expanded

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145 WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1064 (1957 ed.). It derives from the Greek, "paroidia," "para" meaning beside, and "oide" meaning song. *Id.*

146 The *Fisher* court describes the delicate balance. *See Fisher*, 794 F.2d at 439 (citing *Walt Disney Prods.*, 581 F.2d 751).

147 114 S. Ct. 1164.

148 The Supreme Court had granted certiorari in Columbia Broadcasting Sys. v. Loews Inc., 353 U.S. 946 (1957), but, due to Justice Douglas's recusal, was equally divided and did not issue a written opinion. 356 U.S. 43 (1958).

149 Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). Justice Story described the defense as an "intricate and embarrassing [question] . . . [where it was not] easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases." *Id.* at 344. But he then proceeded to do so: "[W]e must . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." *Id.* at 348.

150 Congress intended, by statutory enactment, " 'to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.' " *Acuff-Rose*, 114 S. Ct. at 1170 (quoting H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679-80; S. REP. NO. 473, 94th Cong., 2d Sess. 62 (1975)).

151 Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

152 Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985). The Supreme

upon its earlier analyses of fair use and considered the special problems posed by the intersection of parody and fair use. In concluding unanimously[153] that 2 Live Crew's use of Ray Orbison's ballad, "Oh, Pretty Woman," might be fair, the Court alternatively relied upon and distinguished *Sony* and *Harper & Row.*

Sony contained language that significantly impacted the Sixth Circuit's two-to-one decision in *Acuff-Rose,* which found 2 Live Crew's alleged parody to be an unfair use.[154] The *Sony* majority stated that use for "a commercial or profit-making purpose . . . [is] presumptively . . . unfair," while the contrary presumption, that non-commercial use is presumptively fair, would and did benefit Sony.[155] This latter presumption seemed to convince the *Sony* Court of the fairness of the use even though the activity at issue, taping, was merely reproductive.[156]

The presumption of unfairness attached to commercial use was reiterated the very next year by the majority in *Harper & Row,*[157] even in the context of news reporting that exemplifies a transformative and productive work subject to fair use.[158] In *Harper & Row,* defendant *The Nation* magazine had "scooped" parts of former President Ford's memoirs, which were to appear, by agreement, in *Time* magazine. The Court, stressing strongly the right of first publication and the fact that *The Nation* took the heart of Ford's memoirs about Ford's pardon of Nixon, concluded *The Nation's* infringement was not excused as a fair use.[159]

Neither *Harper & Row* nor *Sony* involved parody, albeit a commercial parody. Taken together, however, it would appear that prior to *Acuff-Rose* the Supreme Court meant what it said—if an alleged infringer uses the copyrighted work for commercial purposes the use is presumptively unfair, even if it results in a transformative, productive, or creative work like the news reporting in

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Court also discussed fair use in Stewart v. Abend, 495 U.S. 207, 236-38 (1990), but the treatment was relatively brief and unremarkable for purposes of this article.

153 Justice Kennedy concurred to stress that while he agreed substantially with the Court's fair use analysis, he believed it could still be possible for the district court on remand to find that 2 Live Crew's song was not fair use. *Acuff-Rose,* 114 S. Ct. at 1182 (Kennedy, J., concurring).

154 *Acuff-Rose,* 972 F.2d 1429, *rev'd,* 114 S. Ct. 1164.

155 *Sony,* 464 U.S. at 499.

156 Justice Blackmun, on the other hand, stressed the notion that fair use should generally not apply when the use is reproductive, rather than productive, although he would not suggest "that every productive use is a fair use." *Sony,* 464 U.S. at 479 (Blackmun, J., dissenting).

157 *Harper & Row,* 471 U.S. at 562 ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." (quoting *Sony,* 464 U.S. at 451)).

158 *See* 17 U.S.C. § 107.

159 *Harper & Row,* 471 U.S. at 569.

Harper & Row. Since fair use is an affirmative defense,[160] a commercial-use defendant would thus be hard-pressed to overcome that presumption. *Acuff-Rose* reined in the presumption, at least with regard to parody. Justice Souter, writing for the Court, said that despite its language *Sony* "called for no hard evidentiary presumption."[161] Thus, when the Sixth Circuit elevated this one sentence to a "per se rule," it was both "counter to *Sony* itself [and] . . . to the common-law tradition of fair use adjudication."[162] The commercial nature of the use is but one factor to be added onto the scales with the other non-exclusive section 107 inquiries.[163]

What triggered the Court's apparent softening of what seemed to be inexplicably clear language in *Sony*, which was reiterated in *Harper & Row*? First, Justice Souter noted the transformative nature of 2 Live Crew's song: as a transformative work, the song furthered copyright's goal "to promote science and the arts."[164] Second, Justice Souter appreciated "parody's need for the recognizable sight or sound"[165]—the "conjure up" test.[166] Finally, in assessing the effect of 2 Live Crew's use upon the potential market for the copyrighted song, Justice Souter emphasized that in the case of parody, even a commercial one, it is likely that the second work "will not affect the market for the original in a way cognizable"[167] by the fair use doctrine. This is so because there is "no protectable derivative market for criticism."[168] Since it is not likely that creators will authorize the slings and arrows of criticism, the "potential licensing market" for such is simply not present.

Acuff-Rose, although it is based on "traditional" copyright infringement (property rights), teaches several lessons which are important in resolving the hypothetical *Leonardo v. Duchamp* case based on a moral rights violation. First, *Acuff-Rose* indicates that there are no fixed presumptions with regard to the commercial character of use, at least in the parody situation. Rather, the for-profit character of the use is to be regarded as one ingredient in the fair use recipe. Second, transformative uses, as are both Duchamp's and 2 Live Crew's, serve copyright's goal and "the

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160 The affirmative nature of the defense has been stressed since Justice Story's decision in *Folsom*, 9 F. Cas. 342. *See* PATRY, *supra* note 11, at 22, 477-78.

161 *Acuff-Rose*, 114 S. Ct. at 1174.

162 *Id.*

163 *Id.*

164 *Id.* at 1171.

165 *Id.* at 1176.

166 *Id.*; *see Elsmere Music*, 623 F.2d at 253 n.1; *Fisher*, 794 F.2d at 438-39.

167 114 S. Ct. at 1177; *cf.* 17 U.S.C. § 107(4).

168 *Acuff-Rose*, 114 S. Ct. at 1178 ("People ask . . . for criticism, but they only want praise." (quoting SOMERSET MAUGHAM, OF HUMAN BONDAGE 241 (1992)).

more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[169] Third, the Court gave its seal of approval to the "conjure up" test, articulated heretofore by a few lower courts,[170] which recognizes the special needs of parody as an art form: Mimesis is the sine qua non of parody. Moreover, the nature of parody as criticism requires a sensitive inquiry into the potential market effect.[171] It is one thing to reduce the potential market by disparagement and criticism. This is *not* the negative market effect contemplated by section 107. It is quite another to reduce demand by the substitution effect of the parodying work. In short, defendant can destroy plaintiff's market, but cannot replace it. This would violate section 107(4) and thus would not likely be fair use.

Finally, we are left then with no bright-line test in traditional copyright infringement cases. Each case must be analyzed on its own, and all section 107 factors are to be considered together.[172] In thus eschewing any hard and fast application of the fair use doctrine, the Court sacrificed, of course, a certain degree of predictability and uniformity. But this sacrifice, presumably at the altar of copyright's purpose to foster creativity,[173] may complicate the application of the fair use defense raised in conjunction with a moral rights claim.

Nevertheless, even though *Acuff-Rose* dealt with traditional property rights-based copyright infringement, its lessons for us in the moral rights context have great import, even though I reject an *Acuff-Rose* type solution to the very different problem of a moral rights violation based on parody.

III. Resolving the Moral Rights/Parody Dilemma Through Fair Use

In *Acuff-Rose*, a non-moral rights case, the Supreme Court specifically and even-handedly rejected two proffered and contrary presumptions. The first proposal, from defendant 2 Live Crew, was

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169 *Id.* at 1171.

170 *See supra* note 166 and accompanying text.

171 *Acuff-Rose*, 114 S. Ct. at 1177.

172 *See id.* at 1169 (citing Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110-11 (1990)); Patry & Perlmutter, *supra* note 11, at 685-87.

173 *Id.* at 1170 (citing *Stewart*, 495 U.S. at 236). This emphasis on "creativity" is also found in Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991). In *Feist*, Justice O'Connor, writing for the Court, mentioned originality and authorship numerous times in assessing the copyrightability of telephone white pages. *Id.* at 345-64. Professor Goldstein has noted that Justice O'Connor refers to originality thirteen times. *See* PAUL GOLDSTEIN, COPYRIGHT § 2.2.1 n.11 (Supp. 1993).

to treat parody as presumptively fair use.[174] The second, put forth by Acuff-Rose and adopted by the Sixth Circuit,[175] was to view commercial use as presumptively unfair use, even in the context of parody. While neither presumption succeeded in *Acuff-Rose,* in the moral rights setting involving parody, a parodist's use should be presumed fair. On the one hand section 106A(a) makes explicit that the right of integrity is subject to section 107's fair use defense.[176] On the other hand, Congress has expressed ambivalence about the viability of the fair use defense in the moral rights arena.[177] Given this somewhat schizophrenic situation with respect to fair use in the moral rights context, it might be wise to consider solutions, other than giving a presumption of fair use to the moral rights/parodist defendant, which might balance effectively the rights of the artist and parodist.

A. *Compulsory License*

The relationship between artist and critic can be described as one of worthy adversaries, supportive and empathetic friendship, symbiosis at its finest, or the art world equivalent of a dysfunctional family—a "can't live with 'em/can't live without 'em" conundrum. Although artists may "ask . . . for criticism," even if implicitly so by putting their creations out for public consumption, "they only want praise."[178] Parody is critical and it is rarely kind, gentle, affectionate, or sought for by the artist. In fact, I suspect that if all the art, theater, dance, and book critics, as well as parodists, would vanish from this world, artists worldwide would be dry-eyed. Thus, when moral rights, "honor or reputation," are at risk this monopoly might be used to prevent or chill the critic/parodist.

The concern that artists could use their copyright (including and especially moral rights) to censor parody might be alleviated by establishing a "Parody Licensing Clearance Center" which would be authorized by Congress to provide a license on a percentage of revenue basis to anyone who chooses to parody the pro-

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174 *See Acuff-Rose,* 114 S. Ct. at 1168.

175 *Acuff-Rose,* 972 F.2d at 1435, 1437. The Sixth Circuit "ostensibly [and erroneously] culled" this presumption from *Sony. Acuff-Rose,* 114 S. Ct. at 1173-74 (citing *Sony,* 464 U.S. at 451).

176 17 U.S.C. § 106A(a).

177 H.R. REP. NO. 514, *supra* note 80, at 22, *reprinted in* 1990 U.S.C.C.A.N. at 6932. The stark contrast between explicit statutory language and legislative history may be explained by VARA's somewhat hasty passage in Congress. *See* Smith, *supra* note 108 and text accompanying note 108.

178 SOMERSET MAUGHAM, OF HUMAN BONDAGE 241 (1992), *quoted in Acuff-Rose,* 114 S. Ct. at 1178.

tected work.[179] Compulsory licenses function as "permission to use intellectual property, compelled by the government to accomplish some political or social objective;"[180] for example, to encourage more art. Presumably, in the moral rights context, a compulsory license would afford some monetary incentive to Leonardo without endangering Duchamp any more than by requiring him to pay a royalty.

Compulsory license is rare in copyright law, but no stranger. At one time or another, the 1976 Copyright Act listed six areas covered by compulsory license: cable television transmissions;[181] making and distributing phonorecords;[182] jukebox recording or performing of musical compositions;[183] non-commercial, for example, public broadcasting;[184] satellite retransmissions;[185] and importation and manufacture of digital audio recording devices.[186] At one time the Register of Copyrights suggested that the political compromise between the "protected interests of creators" and the "pressures . . . of newly emergent user industries" might result in more, rather than less use of compulsory license.[187] In one sense, this is true. In reviewing the then-new 1976 Act, Professor Paul Goldstein listed the four areas subject to compulsory license: cable transmissions; phonorecords; jukeboxes; and public broadcasting.[188] Since 1977, two new areas were added: satellite retransmissions and digital audio recording devices.[189] On the other hand, Congress recently has endorsed private, voluntary licensing negotiations and arbitration with reference to government fiat as a last resort.[190]

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179 *See* EDMUND W. KITCH & HARVEY S. PERLMAN, LEGAL REGULATION OF THE COMPETITIVE PROCESS 212-13 (4th rev. ed. 1993). The authors' suggestion did not address the § 106A(a) parody problem, but it works equally well or equally ineffectively in the moral rights context.

180 J.T. MCCARTHY, MCCARTHY'S DESK ENCYCLOPEDIA OF INTELLECTUAL PROPERTY 51-52 (1991).

181 17 U.S.C. § 111(c), (d).

182 *Id.* § 115.

183 *Id.* § 116. Currently, § 116 problems are handled either by a negotiated license, which may include arbitration, *id.* § 116A(b), (c), or by compulsory license under 17 U.S.C. § 116.

184 *Id.* § 118 (determining the royalty fee either by negotiated license or compulsory license; *see id.* § 118(b)(2)).

185 *Id.* § 119(b). After Dec. 31, 1992, the royalty fee is determined by voluntary negotiation or compulsory arbitration. *Id.* § 119(c)(1).

186 *Id.* §§ 1003-1004 (1994).

187 Barbara Ringer, *Copyright and the Future of Authorship*, 101 LIBR. J. 229, 231 (1976).

188 Goldstein, *supra* note 79, at 1127-35.

189 *See supra* notes 185-86; *see also* Michael L. Baroni, *A Pirate's Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65 (1993).

190 *See* 17 U.S.C. §§ 801-803.

Compulsory license for parody seems problematic even in the economic rights context, but seems particularly inappropriate to the moral right of integrity. Compulsory license works best, or at least seems most necessary, when new technology presents issues of copyright infringement not even dreamed of when the 1909 or 1976 copyright laws were enacted. Thus, such uses as satellite transmissions and digital recording devices seem amenable to compulsory license—parody affecting moral rights does not. The 1976 Act compulsory license scheme for making and distributing phonorecords illustrates this point. A compulsory license is *not available* to someone who changes the protected work.[191] Similarly, a compulsory license would not be available to a parodist who infringes upon an artist's moral right of integrity by some fundamental change—which parody always makes—to the protected work. It is not a question of accommodating emerging technology by political compromise.[192] The compulsory license scheme ill-fits the balancing of interests between an artist's moral rights and a parodist's right to "conjure up" and fundamentally change that work to achieve the desired parodic effect.

Two further difficulties arise in connection with a compulsory license scheme. The first relates to the essence of the right of integrity. Designed to protect an artist's honor and reputation, the right would be threatened into extinction if the author is forced to "approve" the parodist's use by compulsory license. The second difficulty relates to the nature of parody which thrives, perhaps, on its iconoclastic and unpermitted status. Compulsory license, though freeing the parodist from liability, takes away from the zing that is the essence of parody: the "civil disobedience"[193] of art. A compulsory license affects negatively the transgressive quality of

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191 17 U.S.C. § 115(a)(2) provides:

> A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, *but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work . . . except with the express consent of the copyright owner.*

Id. (emphasis added).

192 *See* Goldstein, *supra* note 79, at 1128 n.83.

193 John Carlin, Remarks at A.A.L.S. Annual Meeting, Intellectual Property Law Section (Orlando, Fla., Jan. 7, 1994) [hereinafter A.A.L.S. Meeting]. Dr. Carlin is an art historian, former Professor of Art History, sometime curator at the Whitney Museum of American Art, and Director of the Red Hot Organization, New York. In speaking about the history of the appropriation art movement in the visual arts, Dr. Carlin called Duchamp the "King of appropriation." *Id.* In balancing the interests implicated in appropriation art, Carlin proposes, *inter alia*, a model, voluntary license agreement. *See* John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103, 139-41 (1988).

parody.[194] How can you "up the establishment" if the establishment says "right on?"

B. *Limitation of Remedies*

While the first solution, compulsory license, affects the "liability" phase, this second alternative focuses on the "damage" phase; we assume that a parodist has been found liable to the original artist through infringement and a failed fair use defense. As described earlier, the Copyright Act affords to copyright owners, including those who assert moral rights violations, a full range of remedies including injunctions, damages, and profits.[195] One way to accommodate the interests of parodists and first artists is to tinker with the remedy phase.

One model that would preserve an artist's honor and reputation while alleviating the hit on the parodist's purse would permit an injunction, but no money damages or profits. But this would ill-serve our copyright goal to encourage more art. Injunctions are silencers. Permanent injunctions involving works of a derivative nature, such as parody, are frequently blanket. That is, a court will enjoin dissemination of the whole parody, even if it consists of both infringing and non-infringing material, since such are often inextricably intertwined.[196] Thus, parodies would not be seen or heard. Further, it is questionable whether an injunction truly protects artistic honor. Injunctions might issue too late to ameliorate the "dissing"[197] effect of the parody, and pre-publication injunctions are generally disfavored as prior censorship.[198]

A second possibility is to eschew entirely injunctive relief, and award damages and profits to the artist whose right of integrity is sullied. This would seem to work well when it is difficult to separate the infringing from the non-infringing parts of the parodist's work. Where "the proportion [used of plaintiff's work] is so insignificant compared with the injury from stopping [defendant's] use

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194 *Cf.* A.A.L.S. Meeting, *supra* note 193 (remarks of Prof. Peter Jaszi).

195 17 U.S.C. §§ 502, 504; *see supra* note 119.

196 *See* PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 725 n.7 (3d rev. ed. 1993).

197 "Diss" has become an idiomatic expression for disrespect or disparagement. Although it is pure slang, it seems to have been coined by rap musicians as a short and concise verb, "to diss," to express a noun, such as disrespect. *See* Lee Bey, *Kickin' The Ballistics and Resurrecting Old Verbs; New Dictionary Preserves Lively Language of Blacks*, CHI. SUN-TIMES, Aug. 28, 1994, Show Section, at 14; Larry Fiquette, *Do Your Own Thing, Reporters*, ST. LOUIS POST-DISPATCH, June 12, 1994, at 2A.

198 *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1130-35 & n.112 (1990). Note that Judge Leval believes that our copyright law seems "incompatible" with moral rights. *Id.* at 1128.

. . . an injunction would be unconscionable," and plaintiff should recover only money damages.[199] Similarly, in *Acuff-Rose*, the Court urged sensitive inquiry into whether injunctive relief should be awarded "when parodists are found to have gone beyond the bounds of fair use."[200]

It is not clear, however, that the legal remedy of monetary damages, as opposed to the equitable remedy of injunctive relief, will well serve the interests of artist, parodist, and public, at least under the present formulation of the fair use doctrine. Under the existing formulation of fair use, where the parodist has the burden of proof, the second artist may be disinclined to parody, especially when the parody will trample on the first artist's "honor and reputation." Thus, the silencing problem inherent in the injunctive remedy model may still be unsolved in the damages only model. In addition, the damages only model does not give artists asserting moral rights what they really want[201]—freedom from criticism which injures their honor or reputation.

C. *Per Se Rule of Non-Liability*

A per se rule of non-liability is an effective shield for Duchamp, but eviscerates entirely Leonardo's section 106A rights. A right without a remedy is, of course, no right at all. So if Congress enacted a new section 106B, which makes explicit that the remedies afforded by sections 501-505 are not available in actions involving moral rights, it would render section 106A a nullity and, arguably, jeopardize our status as an adherent to Berne.

D. *Moral Rights, Copyright, and the First Amendment*

One author has argued that in the context of moral rights, a First Amendment[202] defense to liability should be established, as moral and First Amendment rights inevitably conflict.[203] Several

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199 Dun v. Lumbermen's Credit Ass'n, 209 U.S. 20, 23-24 (1908). Seventy-six years later, Justice Blackmun recognized the need for a sensitive tailoring of remedies to accommodate "traditional copyright principles." *Sony*, 464 U.S. at 500 (Blackmun, J., dissenting); *see* A.A.L.S. Meeting, *supra* note 193 (remarks of Prof. Marci Hamilton, "Possible Property Models for Art Appropriation").

200 *Acuff-Rose*, 114 S. Ct. at 1171 n.10 (citations omitted).

201 Professor Gordon refers to the "[a]nti-[d]issemination motives" of plaintiffs in parody suits, which have little to do with the economic value of plaintiff's copyright. Gordon, *supra* note 134, at 1632.

202 U.S. CONST. amend. I.

203 *See* Kathryn A. Kelly, *Moral Rights and the First Amendment: Putting Honor Before Free Speech?*, 11 U. MIAMI ENT. & SPORTS L. REV. 211 (1994). The proposed test would vary with the speech at issue, for example, "[v]iolations of . . . integrity would be analyzed under *Central Hudson* . . . ." *Id.* at 249 (citing Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980)); *see also* Beyer, *supra* note 6, at 1070-71.

other authors have recognized the delicate relationship between copyright monopoly and First Amendment freedom of speech.[204] Professor Denicola argues for a limited First Amendment privilege to allow potential users access to protected expression when traditional copyright law does not so permit.[205] Professor Goldstein proposes constitutional tests when copyright protections encroach upon "overtly constitutional areas."[206] A student author opines that "[i]f the *Mona Lisa* were copyrighted and da Vinci sued for infringement, Duchamp's First Amendment defense should clearly prevail."[207]

Courts, however, have been fairly uniform in rejecting First Amendment defenses in copyright cases. In *Air Pirates* (the bawdy, promiscuous Mickey Mouse parody), defendants urged that the "First Amendment should bar liability for their parody because otherwise protected criticism would be discouraged."[208] The Ninth Circuit recognized the possible tension between copyright and First Amendment, but held that the First Amendment argument failed because defendants "could have expressed their theme without copying Disney's protected expression . . . ."[209] Similarly, in *Dallas Cowboys Cheerleaders* (poster of partially nude cheerleaders), the court noted: "The judgment of the constitution is that free expression is enriched by protecting the creations of authors from exploitation by others, and the Copyright Act is the congressional implementation of that judgment. . . . The first amendment is not a license to trammel on legally recognized rights in intellectual property."[210] In 1985, the Supreme Court forestalled further development of any separate First Amendment defense in copyright cases. In *Harper & Row* (*The Nation* magazine's news scoop of

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204 *See, e.g.*, David A. Householder, *The Progress of Knowledge: A Reexamination of the Fundamental Principles of Copyright Law*, 14 LOY. L.A. ENT. L.J. 1, 38-42 (1993); Floyd Abrams, *First Amendment and Copyright*, 35 J. COPYRIGHT SOC'Y 1 (1987); Patricia Krieg, Note, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565, 1584 (1984); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); Paul Goldstein, *Copyright and The First Amendment*, 70 COLUM. L. REV. 983 (1970); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

205 Denicola, *supra* note 204, at 316.

206 Goldstein, *supra* note 204, at 1057.

207 Krieg, *supra* note 204, at 1584.

208 *Walt Disney Prods.*, 581 F.2d at 758.

209 *Id.* at 758-59 (citing Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 577 & n.13 (1977)).

210 Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187-88 (5th Cir. 1979) (citations omitted). *But see* Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 445 F. Supp. 875 (S.D. Fla. 1978), *aff'd on other grounds*, 626 F.2d 1171, 1178 (5th Cir. 1980). In *Triangle*, the district court held defendant's use not to be fair, but privileged nonetheless under the commercial speech prong of the First Amendment.

Time's publication of parts of President Ford's memoirs), the Court found no inherent conflict between the Copyright Act and the First Amendment.[211] Rather, the Court noted:

> In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright . . . .[212]

Having shown that neither compulsory license, remedy tinkering, per se non-liability, nor a separate First Amendment privilege will resolve appropriately the hypothetical *Leonardo v. Duchamp* case, we are left then with fair use—the final barrier to liability both in section 106 and section 106A cases.

E. *Presumptive Fair Use for Parodists Who Violate an Artist's Right of Integrity*

An analysis of the four fair use factors shows that even in cases involving commercial parodies and section 106A(a)(3)(A), Duchamp should be afforded presumptive fair use. In one sense, this conclusion is made possible because *Acuff-Rose* eschewed a presumption of unfairness when the use is commercial,[213] thus levelling the playing field. What I am suggesting then is to tilt this ground. Even though the Court did not treat parody as presumptive fair use in a property-based, traditional copyright suit, this should not foreclose shifting the burden from defendant/parodist in a moral rights case. Previously, fair use has been viewed as an affirmative defense that a defendant, parodist or not, had to plead and prove.[214] Instead, in moral rights cases based on infringement of the right of integrity, the first artist should bear the burden of pleading and proving that a review of the four section 107 factors shows that the parodist's use was unfair. This tinkering with the fair use doctrine to accomplish the desired effect is not foreclosed by section 107. Section 107 represents not the "creation of new law," but rather, "a direction to the courts to continue to develop the common law."[215] Faced with a bundle of new and odd-fitting[216]

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211 *Harper & Row*, 471 U.S. at 560.
212 *Id.*
213 *Acuff-Rose*, 114 S. Ct. at 1174.
214 *Id.* at 1177.
215 Patry & Perlmutter, *supra* note 11, at 674; *see Stewart*, 495 U.S. at 236. The process began with Justice Story in *Folsom*, 9 F. Cas. at 342.

rights, such as the personal right of integrity, courts should be free to tailor the fair use doctrine to the particular case.

1. The Purpose and Character of the Use

Parody, as criticism or comment, is one of the favored purposes specified in section 107. Though parody is not afforded a per se non-infringement status, such productive, transformative material is often treated as fair use, even when it is for-profit.[217] As is often the case, a parody "adds something new, with a further purpose or different character, altering . . . with new expression, meaning, or message" the host work; thus, it furthers "the goal of copyright to promote science and the arts."[218] Because parody relies on recognition of the host work, it necessarily "copies" at least enough of that work to conjure it up for the viewing or listening public. Thus, a parody that comments upon, targets, or criticizes the original work, as *L.H.O.O.Q.* surely does, is the special focus of section 107.

Additionally, it is no longer crucial that Duchamp exhibited *L.H.O.O.Q.* at a local art gallery and sold the painting to an enamored viewer. The presumption of unfairness attached to commercial use, arguably arising from the *Harper & Row*[219] and *Sony*[220] cases, exists no more.[221]

2. The Nature of the Copyrighted Work

Nor is it critical that Duchamp has copied Leonardo's creative expression (rather than a fact-based work). *Acuff-Rose* teaches that "[t]his fact . . . is not much help . . . in separating the fair use sheep from the infringing goats in a parody case, since most parodies almost invariably copy publicly known, expressive works."[222] So, although Leonardo's *Mona Lisa* "falls within the core of . . . copyright's protective purposes,"[223] the *L.H.O.O.Q.*s of this world must conjure up that creative expression. To afford any weight to Leonardo on this score is, for all practical purposes, to destroy parody as a genre.

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216 *See supra* notes 157-59 & 167 and accompanying text.
217 *See, e.g., Acuff-Rose*, 114 S. Ct. 1164 (holding that 2 Live Crew's parody may be fair use); *Fisher*, 794 F.2d at 432; *Eveready Battery Co.*, 765 F. Supp. at 440; *Elsmere Music*, 482 F. Supp. at 741.
218 *Acuff-Rose*, 114 S. Ct. at 1171.
219 *Harper & Row*, 471 U.S. at 539.
220 *Sony*, 464 U.S. at 417.
221 *Acuff-Rose*, 114 S. Ct. at 1174.
222 *Id.* at 1175.
223 *Id.*

3. The Amount and Substantiality of Defendant's Use

Under the proposed scheme, Leonardo would have the burden here, as with the other section 107 factors, to show that both the quantity and quality[224] of Duchamp's use exceeds the boundaries of fairness. This determination is to be made with a view "to the copyrighted work as a whole."[225] Because "the extent of permissible copying varies with the purpose and character of the use,"[226] Duchamp's parody necessarily must evoke the *Mona Lisa* to succeed at all as parody. The problem here, of course, is that unlike 2 Live Crew's less than total use of Roy Orbison's song,[227] Duchamp has taken one hundred percent of Leonardo's work, merely adding some hair to lip and chin and changing the title. Leonardo would have to show then that this use went far beyond the necessity to conjure up his *Mona Lisa.* The conjure up test recognizes that Duchamp must use the "most distinctive or memorable features, which the parodist can be sure the audience will know,"[228] but it might be argued that Duchamp went beyond the pale. On the other hand, the iconographic stature and nature of the *Mona Lisa* as portrait suggests that to parody it at all requires almost an entire appropriation. In fact, virtually all the other artists who have parodied the *Mona Lisa* have used it almost in its entirety.[229] Very few visual artists have been able to conjure up a host work merely by outlining it: for example, Larry Rivers, *Outline of History* (1976) and Shusaku Arakawa, *Next to the Last* (1971) (both reproduced in appendix). Thus, parody of a visual art, which is the only type of work protected under section 106A, may necessitate a more total appropriation than a parody of a non-section 106A work, such as a song or a play. Less than verbatim copying of "I Love New York" or "Oh Pretty Woman" may still result in parody, while visual art parodies may require very substantial, near verbatim, copying.[230]

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224 *Cf. Harper & Row*, 471 U.S. at 564-66, 568.

225 17 U.S.C. § 107(3).

226 *Acuff-Rose*, 114 S. Ct at 1175.

227 *Id.* at 1176-77.

228 *Id.* at 1176; *cf. Cliffs Notes*, 886 F.2d at 494 ("The keystone of parody is imitation.").

229 *See supra* note 123 and accompanying text.

230 Justice Kennedy suggests this conclusion in *Acuff-Rose*, 114 S. Ct. at 1181 (Kennedy, J., concurring). *Cf.* MELVILLE B. NIMMER, 3 NIMMER ON COPYRIGHT § 13.05D, at 13-211 to 225 (1994) ("[T]here may be certain very limited situations wherein copying of even the entire work for a different functional purpose may be regarded as fair use."). Although Nimmer's text refers to use in judicial proceedings, incidental reproduction, and reverse engineering of computer software, it does cite Haberman v. Hustler Magazine, 626 F. Supp. 201 (D. Mass. 1986), where the court held that full reproduction of a fine art postcard was necessary for the purpose of comment.

4. The Effect of Duchamp's Use upon the Potential Market for or Value of the *Mona Lisa*

Although "[t]his last factor is undoubtedly the single most important element of fair use,"[231] the impairment of the marketability of the underlying work is affected differently when the use is parody, rather than another form of use. As both *Fisher* and *Acuff-Rose* note, the economic effect of parody contemplated is not its likelihood of destroying or lessening the market for the original, which any parody as critique may do, but whether the parody has a substitutive effect on the host work.[232] "[P]arody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically," but that is not the harm encompassed by copyright law.[233]

In some ways it is difficult to apply this fourth fair use factor to a right of integrity claim. Section 107(4) focuses upon hits on Leonardo's pocket, not upon attacks on his artistic sensibilities of honor and reputation. Yet, Congress notes that expert testimony can show whether the use in fact affects the honor or reputation of the artist.[234] Presumably this testimony will proffer evidence as to whether damage to reputation is indicated by actual or potential deleterious market effects on the *Mona Lisa.* However, the Supreme Court cautions that when "the second use is transformative [as in parody], market substitution is at least less certain and market harm may not be so readily inferred."[235] Further, Leonardo's market for other permitted derivative parodying works is very limited. There is little or "no derivative market for critical works."[236] As noted earlier, artists are unlikely to authorize criticism or to license disparagement.[237]

To shift the burden of pleading and proof on this factor from Duchamp to Leonardo in a right of integrity case does not seem unfair. This is for several reasons. First, section 106A(a)(3)(A)'s

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231 *Harper & Row*, 471 U.S. at 566 (citations omitted).

232 *See Fisher*, 794 F.2d at 438; *Acuff-Rose*, 114 S. Ct. at 1177-79; *id.* at 1181 (Kennedy, J., concurring).

233 *Acuff-Rose*, 114 S. Ct. at 1178 (citing BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 69 (1967)).

234 H.R. REP. NO. 514, *supra* note 80, at 16, *reprinted in* 1990 U.S.C.C.A.N. at 6926.

235 *Acuff-Rose*, 114 S. Ct. at 1177; *cf.* H.R. REP. NO. 2237, 89th Cong., 2d Sess. 64 (1966); H.R. REP. NO. 83, 90th Cong., 1st Sess. 35 (1967) ("[W]ith *certain exceptions* (*use in parodies* or as evidence in court proceedings . . . .) a use which supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." (emphasis added)); Patry & Perlmutter, *supra* note 11, at 693 (stating that, in most parody cases, the effect on plaintiff's potential market "will tend to favor fair use," since there is little chance the parody will supplant the market for the original).

236 *Acuff-Rose*, 114 S. Ct. at 1178.

237 *See supra* notes 133-34 and accompanying text; *cf.* Strauss, *supra* note 6, at 534.

concept of prejudice to honor or reputation is relatively amorphous. It tracks the language of article 6*bis* of Berne, but in our country honor and reputation issues have arisen mostly in conjunction with defamation law, with outermost limits constrained by the First Amendment.[238] In copyright law, fair use itself is thought to represent the compromise, the "breathing space" between copyright monopoly and First Amendment free expression interests,[239] but the reputational interests in right of integrity cases are not so unlike those in defamation cases where plaintiff does bear the burden of proof.[240]

The second reason that supports the shift of the burden from Duchamp to Leonardo to demonstrate negative market effects relates to access to such proof. "Such proof is peculiarly in the hands of the copyright owner, and consequently he should have the burden of proof."[241] Presumably, Leonardo knows whether prejudice to his honor or reputation has occurred and already has to show reputation damage in conjunction with his section 106A suit. Thus, we would not be imposing a new and difficult burden.

5. The Effect of Burden Shifting

In the easiest copyright (economic rights) cases, for example, where defendant's use is productive (parody), but not for profit, it might make little difference who carries the burden of pleading and proving the four fair use factors. But in harder moral rights cases where the parody that strikes at the artist's right of integrity is a commercial use, or even not-for-profit, the potential censoring effect[242] of section 106A(a)(3)(A) is mitigated by shifting proof of the fair use factors from Duchamp to Leonardo. In "hard" moral

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238 *New York Times*, 376 U.S. 254. Negative opinions, such as most parodies that ridicule original authors or artists, are constitutionally protected. *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

239 *Acuff-Rose*, 114 S. Ct. at 1171; *see supra* notes 203-07 and accompanying text.

240 In defamation cases, plaintiff must proffer evidence "from which harm to reputation could reasonably be inferred or direct evidence of harm to reputation." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 797 (5th ed. 1984).

241 *Cf.* HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 5: 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS 98-100 (Comm. Print 1965) (remarks of Harry N. Rosenfield, counsel for the Ad Hoc Committee of Educational Organizations on Copyright Law Revision). Although Rosenfield's comments were made in the context of nonprofit educational uses, I would argue that it is equally applicable in right of integrity/parody cases.

242 *Cf.* Yen, *supra* note 11, at 107 ("[A]uthors [may] value their copyright rights for nonmonetary reasons . . . [and] authors will consistently refuse to sell others the rights to use their works because money will not be an adequate substitute for any interests harmed by the contemplated use."). Granting authors an "aesthetic veto" has resulted in numerous European decisions in which expression has been prevented. *See* Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 422, 424-27 & nn.3-15 (1990).

rights cases, doubts should be resolved in favor of the parodist;[243] we should have more art rather than less. This solution balances appropriately the three interests served by current copyright law—protection of an artist's personal and proprietary (economic) rights, protection of the parodist's right to create transformative works, and protection of the public's interest in fostering the kind of creativity that promotes science and the arts.[244] That this tinkering with what had been viewed as the affirmative nature of the fair use defense is necessary is due to the attempt to fit a square peg into a round hole—natural, personal, moral rights into an economic rights-based copyright scheme.[245]

CONCLUSION

More art than law.[246]

"Whatever else art is good for, its chief effectiveness lies in propagating more art . . . of all the things art has an impact on, art is the most susceptible and responsive. All art is infested by other art."[247] This is hardly surprising given the nature of the artistic muse. Robert Motherwell, a noted American artist of this century, explained the import of prior art: "Every intelligent painter carries the whole culture of modern painting in his head. It is his real subject, of which everything he paints is both an homage and a

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243 In a non-moral rights claim, doubts would be resolved in favor of the first artist. *See Acuff-Rose*, 114 S. Ct. at 1181 (Kennedy, J., concurring).

244 *Cf.* Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1030 (1994) ("[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works . . . ."); *Acuff Rose*, 114 S. Ct. at 1171 (stating that transformative works are "at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright"); *Harper & Row*, 471 U.S. at 546 (stating that copyright "rewards the individual author in order to benefit the public"); *Sony*, 464 U.S. at 429 (holding that copyright "makes reward to the owner a secondary consideration") (quoting United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948)). That these goals remain the core of copyright is evidenced by § 801's balancing of maximizing the availability of creative works to the public and giving the copyright owner a fair return and the user a fair income. 17 U.S.C. § 801(b)(1)(A), (B).

245 *Cf.* Leval, *supra* note 198, at 1128 ("Our copyright law has developed over hundreds of years for a very different purpose and with rules and inconsequences that are incompatible with the *droit moral*."). Judge Leval authored two important copyright/fair use decisions that did not survive appellate review: New Era Publications Int'l v. Henry Holt & Co., 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989); Salinger v. Random House, Inc., 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987). His fair use article was frequently cited by the Supreme Court in *Acuff-Rose*.

246 The charge given to me by Prof. Sherri Burr, Chairwoman of the A.A.L.S. Art Law program on parody in New Orleans, Jan. 5, 1995. As one of the panelists, I spoke very briefly, but showed four dozen art parody slides, some of which are reproduced with permission in the appendix.

247 LIPMAN & MARSHALL, *supra* note 123, at 9.

critique."[248] Contrary to the advice given by Polonius to his son Laertes, "[n]either a borrower nor a lender be,"[249] many artists have their feet (or paintbrushes, pens, sculpting tools, and pianos, among other things) in both camps. They use ideas, plots, themes, often parodying earlier works, while still other artists feed on this art. In this sense, much art is symbiotic. That legal doctrine which can protect both "host" artist and "parasite" artist, or at least balances carefully the interests of both, best serves the artistic and cultural needs of society and "promote[s] the Progress of Science and [the] useful Arts . . . ."[250] But the balance is a delicate one. Too much protection for the "host" artist can stifle creation of new, transformative works. Too much protection for the second artist might cause our original artist to lose the incentive to create.

Because art begets art, society needs to furnish incentives for artists to create. Copyright is one vehicle by which to accomplish this. But the monopolistic property and moral rights given to authors under sections 106 and 106A of the Copyright Act, even though moderated by fair use, are often in inherent conflict with the ability to create freely and without fear of lawsuits. Courts have, however, endeavored to resolve the conflict by employing, often successfully, the fair use doctrine on a case-by-case basis in traditional, "property" rights cases. Whether there can be similar successful use of the doctrine as an affirmative defense on such an ad hoc basis in the context of moral rights, that is, Leonardo's freedom from an "intentional distortion, mutilation, or . . . modification of [his] . . . work which would be prejudicial to his . . . honor or reputation,"[251] is much more problematic. This is so for several reasons. First, a moral rights violation is fuzzier than a property rights violation. Second, it must be conceded that artists rarely seek out criticism and most endure it grudgingly. This, in turn, raises a third difficulty: artists could use section 106A to chill or prevent art. Since monopoly is the heart of copyright, artists may use the new grant of moral rights to censor. Because of these concerns, this article proposed that when moral rights under section 106A are asserted against a parodist, such as Duchamp in the hypothetical case, a court should presume that the parodist's use is a fair one, even if it is a commercial use. This presumption recognizes the need to protect both da Vinci and Duchamp, but gives

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248 *Id.* at 7.

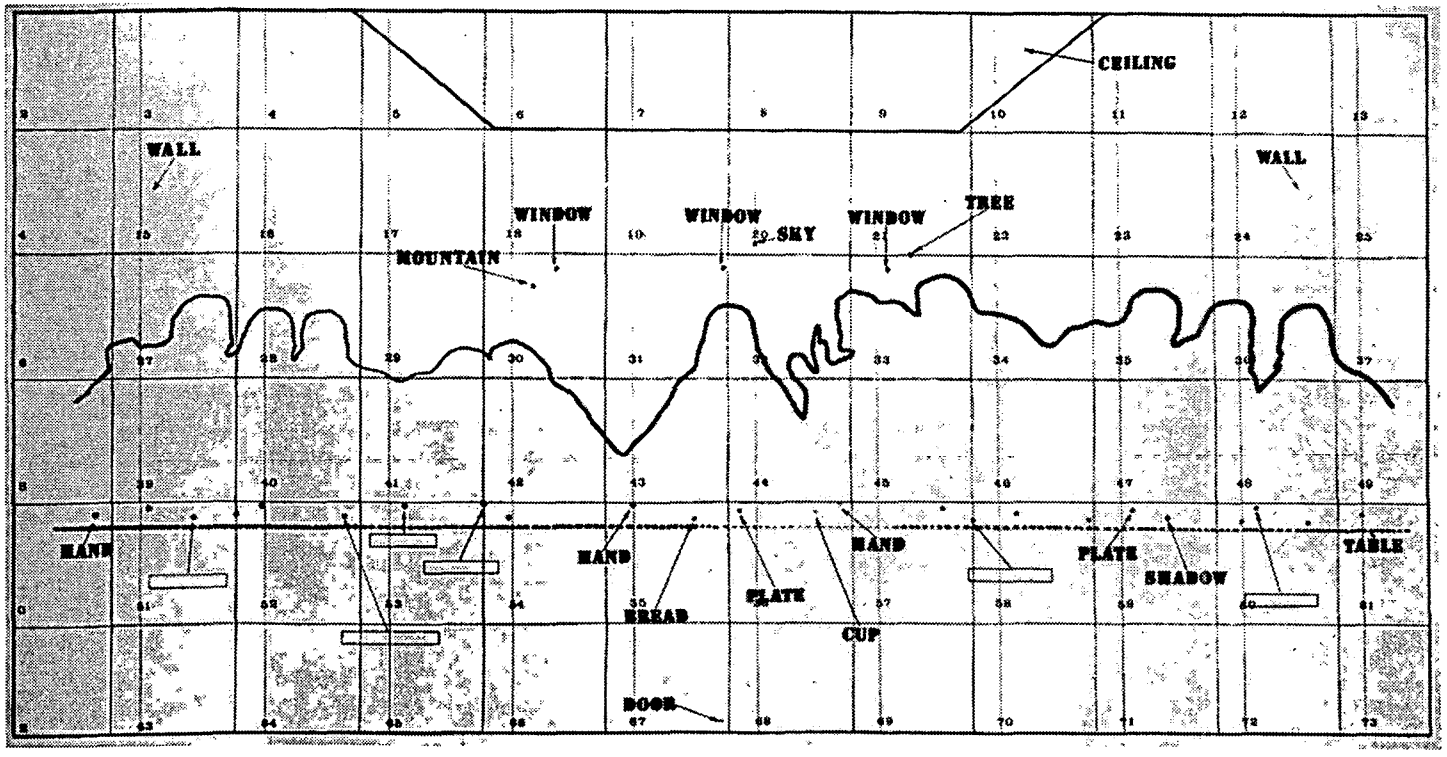
249 WILLIAM SHAKESPEARE, HAMLET act 1, sc. 3.

250 U.S. CONST. art. I, § 8, cl. 8.

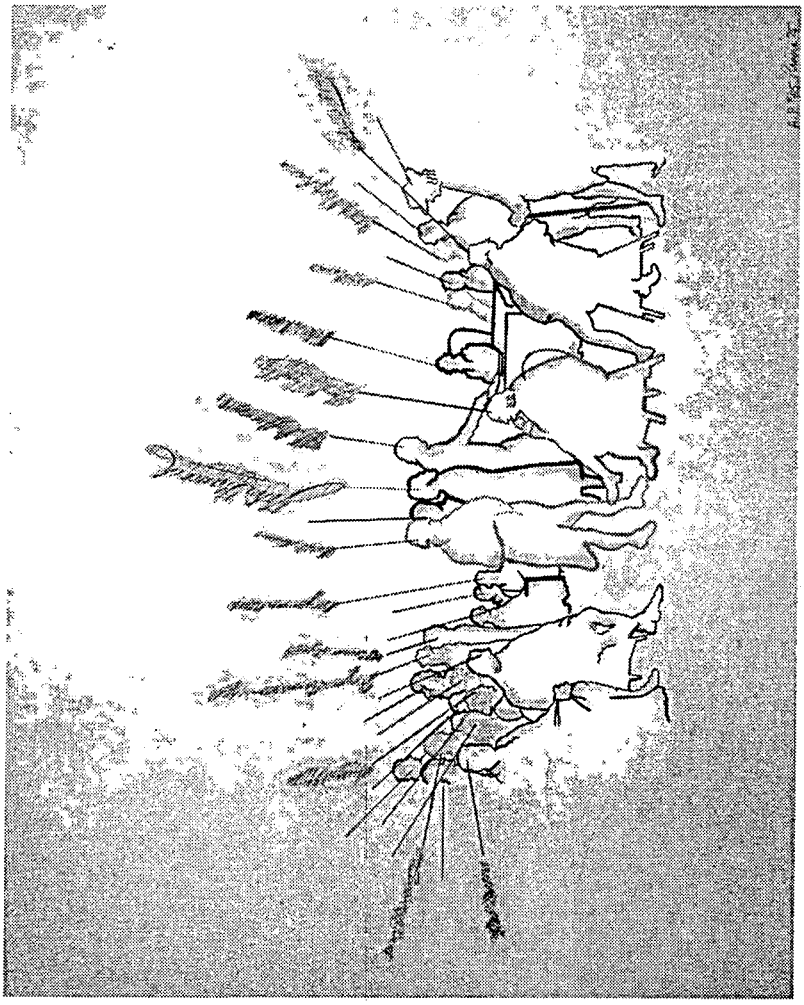
251 17 U.S.C. § 106A(a)(3)(A).

Duchamp, as parodist, the benefit of a fair use presumption in section 106A/right of integrity cases.

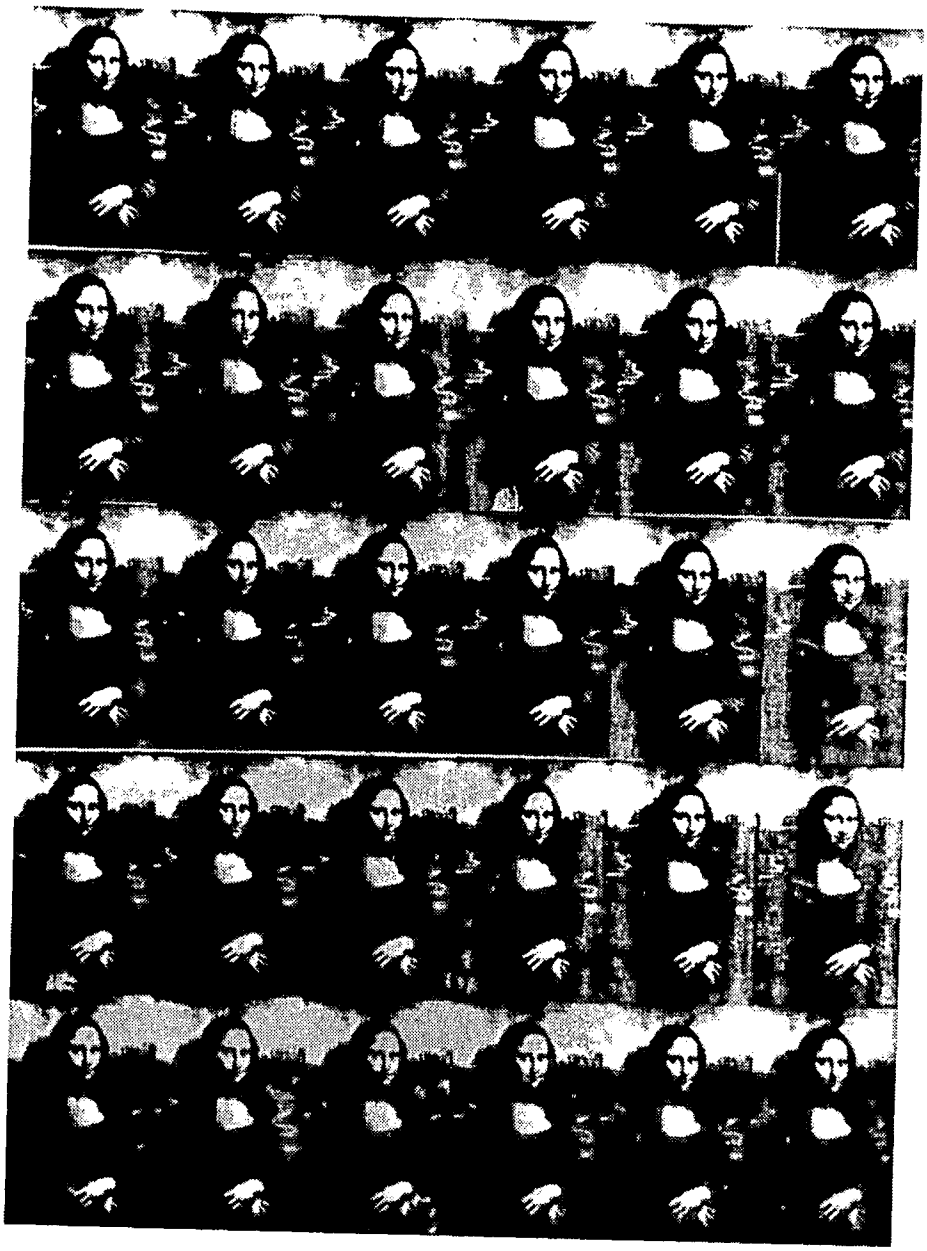
APPENDIX



SHUSAKU ARAKAWA. *Next to the Last.* 1967-71. Serigraph, printed in color, composition: 27 1/4 × 42 5/16″ (69.2 × 107.4 cm). The Museum of Modern Art, New York. Reiss-Cohen Fund. Photograph © 1996 The Museum of Modern Art, New York.



Larry Rivers, *Outline of History*, 1976. © 1996 Larry Rivers/Licensed by VAGA, New York, NY.



ANDY WARHOL, *Thirty Are Better Than One*, 1963. Synthetic polymer paint and silkscreen ink on canvas, 9'2" × 7'10½". Reproduced by permission of The Andy Warhol Foundation, Inc.