

II. ART AND THE LAW: SUPPRESSION AND LIBERTY

HAVE MORAL RIGHTS COME OF (DIGITAL) AGE IN THE UNITED STATES?

JANE C. GINSBURG*

Introduction: Putting Moral Rights on the Copyright Agenda

More than any other contemporary American legal scholar, Professor Merryman has drawn attention to the moral rights claims of artists. Anything written in the field in the United States since 1976 owes inspiration to *The Refrigerator of Bernard Buffet*¹ (“*The Refrigerator*”) Professor Merryman’s seminal article in the 1976 *Hastings Law Journal*. I feel this particularly acutely since I became interested in the issue as a law student, in 1978. It looked like a hopeful time, for Professor Merryman had shown the way, and the Second Circuit, in the then-recently decided *Monty Python* case,² seemed to be paying heed. The 1976 Copyright Act had just become effective, and seemed to offer authors the prospect of protecting integrity rights through the derivative works right,³ which authors would retain, thanks to the new statutory recognition of divisible copyright.⁴ Things seemed to be looking up in U.S. moral rights doctrine, but it didn’t take long for expectations to deflate, largely for the legal cultural objections foreseen in Professor Merryman’s article.

In titling this Essay “*Have Moral Rights Come of (Digital) Age in the United States?*” I am suggesting that another watershed looms. What statutes and case law have not yet achieved, perhaps digital media (and supporting legislation) will. Before addressing how digital media, with the help of the Digital Millennium Copyright Act (“DMCA”),⁵ may secure the rights of integrity and of attribu-

* Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia University School of Law. Thanks for research assistance to Allison Engel, J.D. Columbia 2000.

¹ See John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 *HASTINGS L.J.* 1023 (1976).

² *Gilliam v. ABC*, 538 F.2d 14 (2d Cir. 1976).

³ See 17 U.S.C. § 106(2) (1994).

⁴ See *id.* § 201(d)(2) (stating exclusive rights may be subdivided and transferred separately); § 204(a) (providing transfer of exclusive rights requires a signed writing). Or, so I argued, in a little-cited student note, *An Author’s Artistic Reputation Under the Copyright Act of 1976*, 92 *HARV. L. REV.* 1490 (1979).

⁵ Specifically, 17 U.S.C.A. §§ 1201-1202 (2000).

tion, I propose to review a few moments (or non-moments) in the positive law of U.S. moral rights, between *The Refrigerator* and the DMCA. Finally, I will consider whether alternative solutions, made possible by digital networks, in fact do, or should, substitute for protecting the work against unauthorized alterations.

Developments Since "The Refrigerator"

The first major event in moral rights since *The Refrigerator* and the 1976 Act, formalizing U.S. adherence to the Berne Convention, turned out to be a non-event. In the 1988 Berne Convention Implementation Act,⁶ we declined to implement article 6*bis*, on the ground that a patchwork of federal and state claims formed a rough equivalent to the article 6*bis* guarantees of the rights of integrity and of attribution.⁷ As the television advertisement acknowledged, "[we were] lying."⁸ Indeed, Professor Merryman had already discredited the "moral rights equivalents" argument in his analysis in *The Refrigerator*.⁹ But the Berne Convention has no provision against scoff laws, and we made sure that the Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS Accord"), which does supply such provisions, excluded article 6*bis*.¹⁰

The next event, the enactment in 1990 of the Visual Artists Rights Act ("VARA"),¹¹ turned out to be a partial event in the uneasy history of moral rights in United States copyright. By granting authors of "works of visual art" a (waivable) right to prevent their mutilation or destruction, Congress gave artists a remedy against the kind of conduct involved in *The Refrigerator* case itself.¹² There, an art dealer dismantled the panels of a refrigerator that Bernard Buffet had decorated, although Buffet had intended the panels to remain assembled.¹³ VARA affords artists whose works fall within

⁶ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, (1988) [hereinafter Berne Implementation Act].

⁷ See Report accompanying the Berne Convention Implementation Act of 1988, H.R. REP. NO. 100-609, 100th Cong. 2d sess. at 37-39 (1988) [hereinafter H.R. Rep. No. 100-609].

⁸ See, e.g., Jube Shiver, Jr., *Both Agency, Car Maker Benefit from Soft Sell; It's No Lie: Isuzu TV Ads Get Attention*, L.A. TIMES, Nov. 10, 1986, Part 4 at 1 (discussing a television advertising campaign featuring "Joe Isuzu," whose extravagant claims about the car's performance were accompanied by subtitles warning: "He's lying.>").

⁹ See Merryman, *supra* note 1, at 1037-39.

¹⁰ Marrakesh Agreement Establishing the World Trade Organizations, Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Results of the Uruguay Round vol. 31, 33 I.L.M. 1197 (1994).

¹¹ See 17 U.S.C. § 106A (1994).

¹² The right to prevent destruction of works of visual art only applies if the work is of recognized stature under the act. See *id.* § 106A(a)(3)(B).

¹³ See Merryman, *supra* note 1, at 1023.

the rather restrictive definition of “works of visual art”¹⁴ a kind of private Landmarks law to preserve their works. But real moral rights do more than that; they protect not only against alteration of the original physical object, but also against distortion of representations of the art image. Consider two French examples of successful invocation of the right of integrity: mass market reproductions of Millet’s painting *L’Angelus*, that altered the light and added haberdashery to the female figures; and a department store window dressing that altered the colors and images of works by the Douanier Rousseau.¹⁵ In both of these cases, the alterations distorted *copies* of the original images; neither the publishers in the Millet case, nor the Galeries Lafayette in the Rousseau case, slashed the original canvasses. But VARA would reach only the slasher.¹⁶ VARA’s restriction to physical originals also makes that statute a very feeble measure for enforcing attribution rights: a “work of visual arts” excludes mass market multiples, and VARA attribution (as well as integrity) rights apply only to “works of visual art.”¹⁷ Thus, there is no VARA right to compel attribution for one’s artwork if the artist’s name has been left off anything more than the original or a signed and numbered, limited edition of 200. No other provisions of the Copyright Act entitle artists to name recognition either.¹⁸

Moral Rights for the “Digital Millennium?”

Or, perhaps more accurately, before 1998, nothing else in the Copyright Act could be construed to afford attribution rights.¹⁹ The DMCA may contain the seeds of a more general attribution right: with sufficient ingenuity and effort, these seeds might be made to germinate. The seeds may be found in the section 1202 provision on “Copyright Management Information.”²⁰ This provi-

¹⁴ See 17 U.S.C. § 101.

¹⁵ Both examples are drawn from *The Refrigerator*. See Merryman, *supra* note 1, at 1029-30.

¹⁶ See 17 U.S.C. § 106A(c)(3) (stating integrity rights do not apply to reproductions). On the other hand, some state moral rights statutes protect images of art works, as well as physical originals, against distortion and attribution back to the artist. See, e.g., *Wojnarowicz v. American Family Assn.*, 745 F. Supp. 130 (S.D.N.Y. 1990) (construing N.Y. Artists’ Authorship Rights Act, N.Y. CULTURAL AFFAIRS LAW § 14.03(1)).

¹⁷ 17 U.S.C. § 106A(c)(3).

¹⁸ See generally, 17 U.S.C.A. §§ 101 *et. seq.*

¹⁹ Case law under the Lanham Act, 15 U.S.C. § 105 *et. seq.* (1994), points toward a right to prevent *misattribution*, but still no affirmative right to compel credit in the absence of any attribution. See *Johnson v. Jones*, 149 F.3d 494 (6th Cir. 1998) (involving a Lanham Act claim against an architect who had substituted his name for another’s on architectural plans).

²⁰ 17 U.S.C.A. § 1202.

sion was introduced as part of legislation implementing the 1996 WIPO Copyright Treaty.²¹ Section 1202 prohibits knowingly providing false copyright management information, with the intent to facilitate or conceal infringement.²² The provision also prohibits knowingly or intentionally altering or removing copyright management information, knowing (or having reasonable grounds to know) that the alteration or removal will facilitate or conceal infringement.²³ The final section defines copyright management information; it includes: the name of the author; the name of the copyright owner; and the “terms and conditions for use of the work.”²⁴ Inclusion of the author’s name in protected copyright management information suggests that the copyright law finally affords authors of all works, not just “works of visual art,” a right to recognition of their authorial status. Unfortunately, as we shall see, the situation is a little more complicated.

Section 1202 was designed to promote the dissemination of copyrighted works by facilitating the grant or license of rights under copyright, particularly through electronic contracting.²⁵ Because accurate and reliable information about the work is essential to its lawful distribution (particularly online), section 1202 identifies that information and protects it against falsification, removal or alteration.²⁶ There are, however, some respects in which section 1202 ensures the desired reliability and accuracy, but only imperfectly. Moreover, the text does not fulfill all U.S. obligations under article 12 of the WIPO treaty. Article 12 requires contracting parties to prohibit, *inter alia*, unauthorized removal or alteration of electronic rights management information when the actor knows or has reasonable grounds to know that the removal or alteration, “will induce, enable, facilitate or conceal an infringement of *any right covered by this Treaty or by the Berne Convention . . .*”²⁷ The rights covered by the Berne Convention are not only those found within the United States Copyright Act. Article 6*bis* of the Berne Convention declares authors’ rights “to claim authorship of the

²¹ See The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860, 2863-2875 (1998).

²² See 17 U.S.C.A. § 1202(a).

²³ See *id.* § 1202(b).

²⁴ *Id.* § 1202(c).

²⁵ See Conference Report accompanying the WIPO Treaties Implementation Act of 1998, Pub. Law No. 105-796, 105th Congress, 2d. Sess. at 64-65 (1998).

²⁶ See 17 U.S.C.A. § 1202(b)(c).

²⁷ World Intellectual Property Organization Copyright Treaty, Apr. 12, 1997, art. 12, S. TREATY DOC. NO. 105-17 (1998) (emphasis added).

work”²⁸ As mentioned earlier, when the United States adhered to the Berne Convention, Congress announced its position that it was not necessary to incorporate the article 6*bis* right of attribution into the body of the Copyright Act, because other provisions of U.S. law, federal and state, adequately assured that right.²⁹ This means that misidentifying the author of a copyrighted work violates some legal norms in the United States, *but it is not copyright infringement*. Thus, section 1202 falls short of the WIPO treaty requirement, because section 1202 concerns only copyright management information whose removal or alteration facilitates or conceals copyright infringement. Removal or alteration of copyright management information identifying the author of the work would violate the WIPO norm, but since it is not copyright infringement even willfully to miscredit the author, there would be no violation of section 1202 unless it could be shown that miscrediting authorship induces infringement.³⁰

There is another way in which section 1202 falls short of generalizing a right of attribution to Berne levels. The DMCA does recognize the importance of and public benefit to authorship credit, as section 1202(c)’s definition of copyright management information includes “the name of, and other identifying information about, the author of a work.”³¹ But, section 1202 does not *oblige* the rights owner to attach copyright management information to distributions of the work. At most, section 1202 instructs the rights owner who does choose to attach copyright management information, that the information should include the name of the author.³² And, it is not clear that a copyright owner must include all the information listed in section 1202 as “Copyright Management Information,” or instead, if he may choose among it. If the latter, then authors have no guarantee that statutory protection of copyright management information will protect their names.

Section 1202 may also be relevant to the right of integrity.

²⁸ Berne Convention for the Protection of Literary and Artistic Works of September 1886, art. 6*bis*. (*revised at Paris July 24, 1971*) [hereinafter Berne Convention].

²⁹ See H.R. Rep. No. 100-609, *supra* note 7.

³⁰ Arguably, improper authorship credit could complicate or defeat title searching and rights clearance, leading some users to infringe in frustration, but this seems rather attenuated (particularly if other licensing information is not tampered with).

³¹ 17 U.S.C.A. § 1202(c).

³² The definition of copyright management information appears to give the rights owner the option of including some, but not all, of the listed elements. *See id.* (stating “the term ‘copyright management information’ means *any* of the following information”) (emphasis added). But, the definition also empowers the Copyright Office to “prescribe” other information by regulation. *See id.* § 1202(c)(8). Thus, the Copyright Office might make inclusion of the author’s name a mandatory ingredient of copyright management information.

Copyright management information may help ensure that the work, as distributed, is the same as the work was at the time it was first publicly released by the author. It is increasingly important, especially with digital media, to be able to ensure the authenticity of the work. This interest complements the Berne Convention's article 6*bis* right of the author to ensure the integrity of her work against alterations that damage her reputation.³³ Unauthorized alterations to a work's contents threaten the credibility both of the document and of the author's reputation. Section 1202 affords authors and copyright owners some means to protect the content of their work against alteration or falsification, but these means may not respond sufficiently to the significant threats to the integrity of a work's content that digital media pose.

The statute offers the elements of an argument that the dissemination of an altered work with copyright management information that described the work before alteration constitutes the provision/dissemination of false or altered copyright information. This is because copyright management information can be intentionally "altered" in two ways: directly, by changing the text of the information; and indirectly, by changing the work to which the information applies, so that the information no longer accurately describes the work. But, even if the information is deemed "altered," section 1202 further requires that the alteration promote infringement before a violation will be found.³⁴ Arguably, the alteration does promote infringement, at least if the copyright owner did not consent, because the alteration may result in the creation of a "derivative work," and the exclusive right to create derivative works resides with the copyright owner.³⁵

The success of this argument depends in part on whether the alterations will be deemed to produce a derivative work. Some courts have conditioned the finding of an infringing derivative work upon proof of a substantial authorship contribution to changes to a preexisting work.³⁶ But, while the alterations to a work may not be so substantial as to yield a derivative work, they may well be more than sufficient to compromise the work's authenticity. More importantly, where the right of integrity is concerned, when the author and the copyright owner are not the same person,

³³ See Berne Convention, *supra* note 28.

³⁴ See 17 U.S.C.A. § 1202(b).

³⁵ A copyright owner has the exclusive rights "to do and authorize any of the following: . . . (2) prepare derivative works based upon the copyrighted work . . ." 17 U.S.C. § 106(2).

³⁶ See, e.g., *Lee v. Deck the Walls, Inc.*, 925 F.Supp. 576 (N.D. Ill. 1996), *aff'd sub nom. Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997).

any alteration undertaken or approved by the copyright owner, however massive, will not promote copyright infringement, although it certainly can undermine the integrity and authenticity of the work.³⁷ The integrity right interest in ensuring the authenticity of digital documents thus may be disserved by the law's linkage of a violation of copyright management information to copyright infringement.

To some extent, the Copyright Office may fill in the gaps in the copyright management information scheme. Section 1202(c)(8)'s definition of copyright management information provides a residual category of "[s]uch other information as the Register of Copyrights may prescribe by regulation"³⁸ For example, while the statute lists "the name of, and other identifying information about, the author of a work,"³⁹ the statute does not clarify whether the creator of a work made for hire also should receive authorship credit.⁴⁰ The Copyright Office regulations should interpret copyright management information consistently with the WIPO Copyright Treaty and the Berne Convention's article 6*bis* right of attribution, by providing that not only must the statutory "author" receive authorship credit, but the contributors to a work made for hire should as well. With respect to a work's integrity, Copyright Office regulations might help ensure authenticity by requiring that the copyright management information include a statement that the work made available to the public corresponds in content and form (the latter, where relevant) to the work as created. The regulation might further provide that any subsequent alterations to the work must either be disclosed (if they are authorized) or prohibited. It is not clear, however, that the Copyright Office may, by regulation, *compel* the inclusion of this information.

If section 1202(c) shows itself to be an insufficient source of attribution and integrity rights for the digital age, section 1201(b)'s protections against distribution of devices designed to circumvent technological measures protecting a right of the copyright owner may prove more fruitful.⁴¹ In the digital environment, given the ease with which a work may be altered, publishers and other copyright owners have an interest akin to authors' in ensuring a work's authenticity. For now, not just publishers have the means to copy,

³⁷ I thank Professor Litman for this observation.

³⁸ 17 U.S.C.A. § 1202(c)(8).

³⁹ *Id.* § 1202(c)(2).

⁴⁰ *Cf.* §1202(c)(5) (requiring that the information identify the screenwriter, performers, and director of an audiovisual work; audiovisual works can be works made for hire under § 101).

⁴¹ *See id.* § 1201(b)(1).

change, and massively re-disseminate a work, almost anybody can. So publishers, like authors, have an interest in assuring users that the copy they consult is the “real thing.” In part, digital watermarking can reveal if an alteration has occurred,⁴² and section 1202 may cover watermarking, but, as we have seen, perhaps not to the full extent the authenticity interest would require. If, on the other hand, users were unable to alter the work in the first place, the integrity or authenticity right might be better secured. Here is where section 1201(b) may be of use. Suppose the copyright owner (who might even be an author) made the work available with a technological measure that permitted copying, but not altering, the work. That measure “protects a right of the copyright owner” under section 1201(b), because it protects the derivative works right. Section 1201(b) does not prohibit direct acts of circumvention, so that an adept user might circumvent that technological measure in order to be able to alter the work. In that case, only a copyright infringement claim would lie. But, if the user required a circumvention device or service to elude the technological measure, section 1201(b) should help the author/copyright owner, because section 1201(b) makes it unlawful to offer or distribute such devices or services.⁴³ This may mean, in practice, that if authors and copyright owners employ technological measures to protect their integrity/authenticity interests, it may become difficult for others to strip those measures away in order to distort the work.

The DMCA’s anticircumvention provisions have attracted considerable criticism. The prevailing rhetoric in academe and in the press tends to portray those who seek to protect their works against unauthorized copying (never mind alteration) as Goliath copyright owners who strain to preserve their mastodontic business models against the happy hacking Davids who only want free speech on the Net.⁴⁴ (This often means that they want other people’s speech to be free to them.)⁴⁵ Authors seem to get lost in this rhetoric, and the outcry for compensation and artistic integrity has yet to be

⁴² See Dean S. Marks & Bruce H. Turnbull, Technical Protection Measures: The Intersection of Technology, Law and Commercial Licenses, Workshop on Implementation Issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonographs Treaty (WPPT), Dec. 6-7, 1999, Geneva, 20-21 (explaining how watermarks digitally convey copy protection information).

⁴³ See 17 U.S.C.A. § 1201(b)(1).

⁴⁴ See Sam Allis, *Battle Brews on Rights to Web Content: Those Who Think Material Should Be Free Are at Odds with Owners*, *Current Law*, BOSTON GLOBE, Mar. 26, 2000, at A1.

⁴⁵ James Gleick, *I’ll Take the Money, Thanks*, N.Y. TIMES, Aug. 4, 1996, at 16, Sec. 6, (stating “Information wants to be free” means “I want information to be free.”).

heard.⁴⁶

More significantly, and more provocatively, even if the DMCA can give authors an integrity right through protection against circumvention of technological measures that prevent alteration of works, is this a good idea? *Should* authors be able to compel preservation of authentic copies of their works on the Net? Or is that a kind of censorship fairly decried by Internet copyright bashers? Perhaps it should be enough to ensure that, if a work has been altered, the fact and nature of the alteration are disclosed. So long as the real thing remains publicly available, the public may consult it, and the author's reputation remains intact. This is not a new idea. As Professor Merryman wrote in *The Refrigerator*, one of the publishers of the distorted images of Millet's *L'Angelus* contended—unsuccessfully—that the public could compare the published version against the original in the Louvre.⁴⁷ Some problems with that kind of argument have concerned the relative inaccessibility of undistorted versions. As the *Monty Python* court observed, a disclosure at the beginning of the television program that it has been cut without permission does nothing to alert those who tune in late.⁴⁸ (Nor, one might add, will members of the U.S. public see the uncut version, unless they travel to England.) But in the digital environment things are different. The undistorted original could be only a mouse click away. Professor Jessica Litman has suggested that anyone who alters a work should include a digital link back to the real thing, so that members of the public may compare it immediately and judge for themselves.⁴⁹ Of course, this is not a true integrity right; it is a full disclosure right. Therefore, the question with which I conclude is: If moral rights have come of digital age, should their realization be achieved by conveying more information about the copy, or by controlling the copy itself?"

⁴⁶ Although, some rumblings finally are being reported, see Eric Boehlert, *Artists to Napster: Drop Dead*, at http://www.salon.com/ent/feature/2000/03/24/napster_artists/index.html (last visited Mar. 24, 2000).

⁴⁷ See Merryman, *supra* note 1, at 1029, n. 19.

⁴⁸ See *Gilliam v. ABC*, 538 F.2d 14 at 25, n. 13 (2d Cir. 1976).

⁴⁹ See Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 47 (1996).

THE LINE BETWEEN WORK AND FRAMEWORK, TEXT AND CONTEXT

JUSTIN HUGHES*

I. INTRODUCTION

It is a great pleasure to be at a symposium honoring John Henry Merryman. Like so many people who work in intellectual property, I have consistently found Professor Merryman's work to be full of admirable ideas and expressions. Jane Ginsburg and I share a few things in common, one being that we have both worked in France and count in that minority of Americans who are, yes, francophiles. So it is wonderful for me—and for Jane, I'm sure—to read Professor Merryman's work, not just because of its sophisticated presentation of French law and legal theories, but because he quotes French without translation. He belongs to that lovely, more worldly school whose members found it acceptable, indeed proper, to assume your audience could read French.

I also have to admire Professor Merryman on another stylistic front. In the few law review articles I have written, I have always struggled to avoid titles with colons. Scholarly works too often have some snazzy phrase, then COLON, then a nuts and bolts description of what the work is really about. This is because editors resist allowing authors to use snazzy but uninformative titles and because authors, for good reason, resist titles that inform but bore. Now, the first article of Professor Merryman's I ever cited is his piece called *The Refrigerator of Bernard Buffet*.¹ Isn't that great? Some editor would have made most of us add a colon - "*The Refrigerator of Bernard Buffet—COLON—moral rights, art markets, and the state of American law.*" As I was looking at that article again, I thought we all ought to commit ourselves to finding titles like that—succinct, thoughtful, maybe provocative, but neither silly nor unduly punctuated.²

* Attorney-Advisor, U. S. Patent and Trademark Office (USPTO), U. S. Department of Commerce, and Adjunct Professor, Benjamin N. Cardozo School of Law. The views expressed here are my own and do not represent any official position of the USPTO or the United States Government. My thanks to Jane Ginsburg, Nancy Perloff, Marie Dangeard and Michael Govan for their thoughts on these topics and to Justin Cassell and Mike O'Shaughnessy, for their help with material for this talk.

¹ See John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976) [hereinafter *The Refrigerator*].

² Other simple, but meaningful titles from Professor Merryman include John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985) [hereinafter *The*

In *The Refrigerator*, Professor Merryman noted that the moral right of the artist is “still comparatively young even in the nation of its origin” and that it probably “ha[d] not reached anything like its full development.”³ In the quarter century since he made that remark, the fabric of moral rights in the United States has changed from gossamer to patchwork.⁴ When the United States adhered to the Berne Convention in 1986,⁵ Congress concluded that U.S. law provided artists with the moral rights of integrity and attribution. One of today’s panelists called that a lie. Being from the government, I would not say that. Let us just say that Congress’s conclusion that then-American law provided moral rights might be called heroic.⁶ (And it was a conclusion that many of us shared.)⁷

Since the mid-1980s, the United States has increasingly embraced moral rights—first in state laws,⁸ then the Visual Artists’ Rights Act [hereinafter referred to as “VARA”]⁹ and, most recently, certain provisions of the Digital Millennium Copyright Act [hereinafter referred to as “DMCA”].¹⁰ I agree completely with Professor

Elgin Marbles]; John Henry Merryman, *The Wrath of Robert Rauschenberg*, 40 J. COPYRIGHT SOC’Y OF THE U.S.A. 241 (1992) [hereinafter *The Wrath*]; John Henry Merryman, *The Nation and the Object*, 3 INT’L J. CULTURAL PROP. 61 (1994); John Henry Merryman, *The Moral Right of Maurice Utrillo*, 43 AM. J. COMP. L. 445 (1995).

³ *The Refrigerator*, *supra* note 1, at 1026.

⁴ One commentator recently described it as the “creepings” and “glimmers” of moral rights. See Brian T. McCartney, “Creepings” and “Glimmers” of the Moral Rights of Artists in American Copyright Law, 6 UCLA ENT. L. REV. 35 (1998); see also Judge Posner’s comments in *Ty, Inc. v. GMA Accessories*, 132 F.3d 1167, 1173 (7th Cir. 1997) *infra* note 54.

⁵ See Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, S. TREATY DOC. NO. 99-27, 99th Cong., 2d Sess. 37, 828 U.N.T.S. 221 (1986) [hereinafter *Berne Convention*].

⁶ See, e.g., *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S. 2d 813 (Sup. Ct. 1949) (concluding that there were no moral rights in the United States); see also *Vargas v. Esquire, Inc.*, 164 F.2d 522 (7th Cir. 1947) (same).

⁷ Congress’s optimism has been shared by many of us not in elected office. See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (discussing how moral rights-like protection might be provided under a compendium of common law causes of action); see also Roberta Kwall, *Copyright and the Moral Right: Is An American Marriage Possible?*, 38 VAND. L. REV. 1 (1985) (describing possible causes of action, although finding some deficient); Comment, *Toward Artistic Integrity: Implementing Moral Rights Through Extension of Existing American Legal Doctrines*, 60 GEO. L.J. 1539 (1972); Melvin Nimmer, *Implications of the Prospective Revision of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 522 (1967) (concluding that then U.S. law complied with a narrow interpretation of Article 6bis); Martin Roeder, *The Doctrine of Moral Rights: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 578 (1940) (arguing that American common law already provided moral rights-like protections).

⁸ See CAL. CIV. CODE §987 *et. seq.* (West 1982) (California Art Preservation Act); see also MASS. GEN. LAWS ANN. ch. 231, § 85S (2000).

⁹ See 17 U.S.C. §106A *et. seq.* (1990).

¹⁰ See 17 U.S.C. §101 *et. seq.* (1995). Another sign of the changing attitude in the United States is U.S. support for the establishment of moral rights for audiovisual performers as a matter of international law. The U.S. proposal to the World Intellectual Property Organization for a new treaty in this area includes moral rights protection. See *Standing Committee on Copyright and Related Rights*, available at http://www.wipo.int/eng/meetings/1999/sccr_99/index_3.htm (last visited Feb. 8, 2001) (providing Article 5, entitled “Moral

Ginsburg's analysis that the copyright management information provisions of the DMCA effectively create a right of attribution in the Internet environment. There is some irony there, for sure, since the main proponents of copyright management information were corporate interests that are not always the champions of artists, writers, or performers.

With all these additions to American law, it is fair to say that the question of moral rights has to be considered on a case-by-case basis. In some areas, we have statutorily established moral rights. In other areas, we have not and must rely on traditional causes of action. Interestingly, this is similar to the comparative European and American approaches to legal protection of privacy. While the Europeans have opted for an over-arching approach to data privacy, Americans approach the problem piecemeal. We have a statutory right of privacy in our video rental records,¹¹ but not our dental records. Our young children's on-line privacy is statutorily protected,¹² but not our teenage children's. In both situations—moral rights and privacy rights—Americans are willing to legislate specific solutions to specific problems, while Europeans are more comfortable legislating broad principles whose ultimate effect is less known. (In our country, when there is no general law in a new area of concern, litigants will try creatively to apply traditional causes of action to the issue. To the degree that they are successful—and many have been on both moral rights and privacy issues—they strengthen the argument that no further legislation is needed.)

When people speak of moral rights, they are usually talking about the two core rights—a right of attribution and a right of integrity. The right of attribution has some shadier cousins—the right of anonymity, the right of pseudonymity, and the right of divulgence,¹³ which are not expressly mentioned in the Berne Con-

Rights of Performers" of Chapter II, entitled "Rights of Performers" on the Protection of Audiovisual Performances submitted by the United States of America at the WIPO Conference on November 16 to 20, 1999). In diplomatic consultations leading up to a December 2000 diplomatic conference held to write such a treaty, the United States has consistently and strongly reiterated its support for the establishment of such rights. Contrast this proactive advocacy of moral rights to the United States' slow embrace of the Berne Convention and its moral rights provisions. See *Diplomatic Conference On The Protection Of Audiovisual Performances*, available at <http://www.wipo.int/eng/document/iavp/index.htm> (last visited Feb. 5, 2001) (providing the Amendment to Article 5 of the Basic Proposal for the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conference proposed by the Delegation of the United States of America at the WIPO conference on December 12, 2000).

¹¹ See 18 U.S.C. §2710 (2000).

¹² See 15 U.S.C. §§6501-6506 (1998).

¹³ The lesser known right of divulgence empowers the creator to determine when a

vention, but are generally considered part of the bundle of moral rights. Similarly, a right to prevent destruction of a work is sometimes included in the constellation of moral rights. Such a right “of preservation” can be understood as part of the right of integrity, although this is not expressly provided in the Berne Convention.¹⁴

But today we are honored with the presence of an esteemed artist whose best-known run-in with the law concerned a different kind of argument about artists’ rights. Most people here know the story of Mr. Serra’s efforts in the 1980s to keep *Tilted Arc* in its site—Federal Plaza in New York.¹⁵ Mr. Serra’s struggle was not a typical battle about the right of integrity. The right of integrity is usually understood as a right about the *work* or the *text*. For example, in 1976, the Monty Python troupe managed to beat ABC’s ef-

work is complete and ready to be seen by the public—and, at least in the literary area, to withdraw the work from its owner on the payment of an indemnity. See *The Refrigerator*, *supra* note 1, at 1028 (providing a clear discussion of the right of divulgation by Professor John H. Merryman). Some might also argue that the *droit de suite* is a kind of moral right, but if so, it is a curious one—an economic right built on top of, and without regard to, older property/economic rights. See *The Wrath*, *supra* note 2 (in which Professor Merryman sets forth one of the best arguments for and against the *droit de suite*); see also Martin Fletcher & Dalya Alberge, *European Levy May Drive Art Overseas*, THE LONDON TIMES, Feb. 16, 2000, at 11 (explaining that the European Union has recently moved toward a Directive on *droit de suite* to harmonize E.U. law in this area.)

¹⁴ Article 6bis of the Berne Convention would allow the artist “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.” Berne Convention, *supra* note 5, at 5. Destruction could be a “derogatory action in relation to” the work that could prejudice the artist’s reputation—simply by showing her works are not worth preserving or, for example, by making it harder to mount retrospectives of her work.

¹⁵ When the sculpture was installed in 1981 in Federal Plaza in New York, it immediately generated controversy. In 1985, the General Services Administration concluded that the sculpture should be relocated. Mr. Serra’s judicial appeal on First Amendment and due process grounds failed. On March 15, 1989, wrecking crews came and *Tilted Arc* literally disappeared into the night. See generally *Serra v. General Services Administration*, 847 F.2d 1045 (2d Cir. 1988); see also generally CLARA WEYERGRAF-SERRA and MARTHA BUSKIRK, THE DESTRUCTION OF TILTED ARC (1997); PBS: *Culture Shock: Flashpoints: Visual Arts: Richard Serra’s Tilted Arc*, available at http://tiltedarc_at.html (last visited Feb. 8, 2001). The experience of *Tilted Arc* is not unique. See Richard Holt, *Watch This Space Change*, available at <http://www.newcastle.edu.au/department/fad/fi/perip/holt.htm> (last visited Feb. 8, 2001) (describing a similar story concerning a sculpture nicknamed *Yellow Peril*, which was removed from City Square in Melbourne, Australia). For myself, a more disturbing story is that of Athena Tacha’s 1986 sculpture, *Marianthe*, built at the Fort Meyers campus of the University of South Florida. Campus officials decided to tear down *Marianthe*, a brick labyrinth sculpture, not on the grounds that it was disliked, but on the grounds that it had deteriorated and could not be repaired. Since the University was contractually obliged to “keep the sculpture in good condition and repair,” it seems like Ms. Tacha would have had a strong contract claim arising from the sculpture’s destruction. See *Marianthe, University of South Florida, Fort Myers*, available at <http://www.oberlin.edu/~art/athena/marian.html> (last visited Feb. 8, 2001) (providing a photo of the sculpture); see also Athena Tacha, *Marianthe is Destroyed*, available at <http://www.oberlin.edu/~atacha/destroyed.html> (last visited Feb. 8, 2001) (providing the artist’s report on the destruction).

forts to bowdlerize their recorded comedy performances,¹⁶ just as others had stopped artless editing of their films in the past.¹⁷ But those cases were about the work, the text. In the face of proposals to relocate *Tilted Arc*, Mr. Serra's claim that his sculpture should remain in Federal Plaza was a claim about the *framework* or the *context*.

In the spirit of John Merryman's own explorations of the possible "full development" of moral rights in the United States, it is worthwhile to wonder—could the law ever develop to protect a claim like Mr. Serra's? May a creator claim to control the social and physical context in which her work appears *after* it is released into the world? Should a creator have any rights to the preservation of the framework, the context, in which her art appears? There are some European cases which seem to recognize some degree of such "framework control."¹⁸ This may not seem like such a radical claim for the artist and the aesthete who believe that there is no real boundary between the work and framework.

But for the rest of us—even those of us who appreciate that work and framework are often inextricably linked—it seems like a bold and generally untenable proposition. My own view is that "framework control" takes artists' rights too far. Advocating such rights is both morally questionable and politically stupid precisely because it undermines efforts to gain stronger acceptance for the traditional core of moral rights. As a general proposition, recognizing the artist's claim to control the framework of her art *after* she has introduced that art into the world would burden too many other social interests. I will talk a little bit about why that is so, then, to contradict my view on the general situation, I will talk about two specific areas of intellectual property law where there seem to be such rights to control the framework. Finally, I will describe an interesting new problem with the Internet—involving a

¹⁶ See *Gilliam v. ABC*, 538 F.2d 14 (2d Cir. 1976) (enjoining television station from the use of edited Monty Python skits).

¹⁷ See *Stevens v. NBC*, 148 U.S.P.Q. 755 (Cal. Sup. Ct. 1966) (enjoining the broadcast of an edited version of *A Place in the Sun*); see also *Autry v. Republic Productions*, 213 F.2d 667 (9th Cir. 1954) (holding that sufficiently severe editing of film could undermine artist's work); *Carroll v. Paramount Pictures*, 3 F.R.D. 95 (S.D.N.Y. 1942) (Lanham Act used by producer to stop distribution); *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981) (finding violation of §43(a) of Lanham Act for "reverse passing off" where actor who appeared in the film, *Convey Buddies*, had his name replaced); *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952) (finding that sale of abbreviated jazz recordings without producer's permission constituted breach of contract and/or tort of unfair competition).

¹⁸ I am thinking particularly of Shostakovich's successful objection in France to the inclusion of his music in an "anti-Soviet" film, although he did not allege that the music proper had been distorted. See T.G.I. Paris, le ch., Jan. 13, 1953, D. Jur. 16, 80, note Shostakovich; see also Kwall, *supra* note 7, at 28.

piece of software, which raises a variety of difficult questions about the copyright law, moral rights, the First Amendment, works and frameworks.

II. THE INTUITIVE LINE BETWEEN WORK AND FRAMEWORK

When told that there is no real boundary between work and framework, most of us may *understand* this notion that work and framework are inextricably linked but we do not *feel* it. Instead, most of us feel an almost metaphysical distinction between a work and its context. In this sense, aesthetics may be like physics—we can know about string theory and Einsteinian four-dimensional space while still very much feeling like the world is a comfortably solid, three-dimensional affair. That is not surprising. Historical judgments—at least those not backed up by years in archives—are dangerous undertakings, but I am going to try one here. That judgment is that *more* creativity nowadays is put into art works that are intended to be relatively context-free.

For centuries, most western art was religious and this religious art was typically context-dependent. Much religious art was produced for specific locations, such as the apse of a particular cathedral or the altar of a particular parish church. Most of the rest was intended for churches of a thematically-consistent, contemplative ambiance.¹⁹ Secular portraiture marked a more context-independent art form. Leonardo certainly believed that the *Mona Lisa* was context-independent, as he carted her from chateau to chateau. More broadly, the portrait artist knew that such works would be moved from place to place—often because a noble family had only one set of household furnishings to take with them as they moved among residences.

Lithography and the rise of printmaking marked yet another degree of context-independence. The artist now knew she was making multiple prints of a particular image that would find their way into a variety of settings. Photography is a related wave of context-independence. Not only is the photographer aware of the extensive (possibly mass) reproduction of his images, but the power of great photographers like Martin Chambi, Diane Arbus, or

¹⁹ Art was often reproduced or mass-produced for smaller churches. In the spirit of Professor Merryman, we might quote Flaubert's characterization of the art and furnishings in a French country church complete with "enfin une copie de la *Sainte Famille*, envoi du ministre de l'Intérieur, dominant le maître-autel entre quatre chandeliers. . ." GUSTAVE FLAUBERT, *MADAME BOVARY* 104 (Jean-Claude Lattes ed., 1995) (1857) ("[A]t the end, a copied painting '*The Holy Family*—presented by the Minister of the Interior' dominated the main altar, between four candlesticks." GUSTAVE FLAUBERT, *MADAME BOVARY* 62 (Lowell Bair, trans., Bantam Books 1972) (1857))).

Gilberte Brassai, is to draw us into a world far from the viewing context and encapsulated in the “window” of the photograph. All of these framed works—paintings, prints, photographs—have a clear boundary between themselves and their world. Denys Riout notes, “[t]he frame served also to isolate the tableau and to avoid all interaction with the exterior world.”²⁰ The frame even provides temporal isolation: one of the regulars at Gertrude Stein’s turn of the century Paris salon noted that the surest way he could tell when the works of the new radical artists—Picasso, Matisse, Cezanne—were finished was when they were framed.²¹

In the twentieth century, audiovisual works marked a further degree of context-independence because the films were delivered everywhere, simultaneously. A director might *expect* that his work would be shown in a darkened theater of certain proportions—and theaters have a consistency of ambiance not unlike churches. (For many of us, they are *like* churches—places to which we go reverently.) But when films are shown on television, the objections are usually about the integrity of the *work*—the speed of the frames, panning and scanning, colorization—not about how bad the *context* is. Surely watching a film while eating airline food in an economy class seat is a very bad context.

I am willing to go further and say that the Internet and the works it carries are another phase of context-independence. When the work is put on the Internet, whether it belongs to a commercial web designer, a photographer, or a visual artist, there is, in effect, an implied license to view the work in any imaginable context. Such context may be a dull gray-beige PC, a hip translucent purple IMac, a noisy and chaotic dorm room, or a parish priest’s rectory office. All of these social and artistic developments have given rise to a popular belief that a work, by itself, embodies meaning.

The popular belief that there is a strong boundary between work and framework is apparent in the provisions of the VARA. While the VARA secures a right of attribution and a right of integrity to an artist working in the plastic arts, that right is lost under section 113 when “a work of visual art has been incorporated in or made part of a building in such a way that removing the work from

²⁰ DENYS RIOUT, *QU’EST-CE QUE L’ART MODERNE?* 342 (Editions Gallimard 2000) [“Le cadre servait ainsi à isoler le tableau et à éviter toute interférence avec le monde extérieur.”].

²¹ See GERTRUDE STEIN, *THE AUTOBIOGRAPHY OF ALICE B. TOKAS* 15 (The Bodley Head 1933) (Penguin Books 1966) (“Of course you can tell it is a finished picture, he used to explain to the other American painters who came and looked dubiously, you can tell because it has a frame, now whoever heard of anybody framing a canvas if the picture isn’t finished.”).

the building will cause the destruction, distortion, mutilation, or other modification of the work” and the author has consented to the installation.²²

Section 113 makes it clear that if removal of a work of art is possible, the owner of a building must give the artist an opportunity to remove it without its destruction or mutilation.²³ In other words, VARA envisions a clear trade-off—scuttle the context, scrap the framework—if that is what must be done to preserve the work. The right of integrity is decidedly not a right *in situ*.

Given the disparity in relative bargaining power, it can be argued that this provision of the VARA merely forces artists to sign agreements waiving their rights to stop destruction of installed art. But it might also inspire artists to choose materials and formats that lend themselves to removal from a building in the event that the building will be torn down, such as removable panels for frescos.²⁴ An artist who believes her work has meaning separate from its context might gravitate toward such technical solutions, while an artist who believes her work only has meaning *in situ* would not.

In another provision, the VARA implicitly addresses and rejects the *argument* that the artist should have some control over the framework. Section 106A(c)(2) provides that “[t]he modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or modification . . . unless the modification is caused by gross negligence.”²⁵

One may think of this as the “museum curator defense,” but I also find this language interesting from a work/framework perspective. It says, yes, it is possible to argue that lighting and placement “distort” a work, but we are not buying it.

The VARA makes a judgment that accords with Professor Merzman’s own views. Express focus on the framework and the context of a work is more familiar in discussions of cultural property

²² Simple consent is appropriate for a work that was installed before VARA. Proper consent for a work installed after the effective date of VARA is, “in a written instrument . . . that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal.” 17 U.S.C. § 113(d)(1)(B) (1995).

²³ See, e.g., 17 U.S.C. § 113(d)(2) (1995); CAL. CIV. CODE §987 (West 1996) (envisioning the same trade-off); *Botello v. Shell Oil Co.*, 229 Cal. App. 3d 1130 (Cal. App. 2d) (1991) (discussing evidence presented by plaintiff that mural could be removed from building and, therefore, was protected under statute).

²⁴ Consider for example, Jackson Pollack’s decision, largely influenced by Marcel Duchamp, to paint his *Mural* commission from Peggy Guggenheim on stretched canvas rather than directly onto the wall of the Guggenheim apartment. See THOMAS CROW, MODERN ART IN THE COMMON CULTURE 43 (Yale University Press 2d ed. 1998) (1996).

²⁵ 17 U.S.C. §106A (1990).

and “cultural nationalism”²⁶ than in discussions of moral rights of artists. Professor Merryman has noted that this “notion of preservation of context can be pressed to the point of exaggeration.”²⁷ If one believes that all or most of the meaning of a work of art depends on it remaining in context, then most of the content of the world’s great artistic treasures sitting in the world’s great museums suffer from decontextualization and loss of meaning.²⁸ This is a rather surreal image—throng of people milling their way through the galleries of art museums looking at thousands of pieces rendered mute and meaningless because they are no longer in context. No wonder people stare and tilt their heads like puppies listening to distant, inaudible sounds.²⁹

Clearly the throngs of people visiting the Metropolitan Museum of Art and the curators who bring the works into the museums do not believe this. Most of us believe that *most* artworks convey *most* of their meaning in and of themselves. In light of how culture has developed, it is no wonder we think that way.

This reasoning denies neither that there may be context-dependent art nor that such context-dependent art is important. The point is only that we have come to believe generally that artworks carry most of their meaning within themselves. We can create environments that bring out and complement those meanings—much as the right wine will complement flavors inherent in certain foods.

This distinction between work and framework means that there is a difference between removing a work from its context and dismembering an integrated artwork into constituent pieces, as was done with Buffet’s refrigerator. Recognizing that we tend to draw such a line between work and context, some artists have argued that the framework is part of the work and therefore the “work” must be understood expansively. For example, in *English v. BFC&R East 11th Street LLC*,³⁰ plaintiffs trying to avail themselves of the VARA claimed that a sculpture garden itself constituted an integrated artwork, rather than a grouping of five independent artworks. They argued that the entire site was “a large environmental sculpture encompassing the entire site and composed of

²⁶ See *The Elgin Marbles*, *supra* note 2, at 1911-16; see also John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 356-59 (1989) [hereinafter *The Public Interest*].

²⁷ *The Public Interest*, *supra* note 26, at 357.

²⁸ See *id.*

²⁹ So the next time someone looking at art says he does not “get it,” do not think of this as the confession of a heathen. Think of him as a very astute, albeit perhaps unconscious, contextualist who senses that when art is shorn of its context, there’s nothing left to “get.”

³⁰ No. 97 Civ. 7446 (HB), 1997 U.S. Dist. LEXIS 19137 (S.D.N.Y. Dec. 3, 1997).

thematically interrelated paintings, murals, and individual sculptures of concrete, stone, wood and metal, and plants.”³¹

This kind of “integrated work” argument is neither new nor outlandish. In 1955, Fernand Léger, who created the sets for the premiere of the opera *Bolivar*, tried to prevent a subsequent production of the opera in which the director cut one of the opera’s scenes and therefore one of Léger’s sets was removed from the production. He claimed that the opera was a complex work of which Léger was a co-author, as designer of the original sets.³² The *Léger* court found that the “work” was the opera proper—the libretto plus music—and that the costumes and sets were ancillary—that is framework.

The perspective that I am advocating may be more contingent, more a passing fancy than I admit. Michael Govan makes a plausible case that the things we now consider “works” separated from their original contexts may someday be viewed as “fragments,” no longer whole works precisely because they have been taken from their intended contexts. My intuitions tell me that Rodin’s *Gates of Hell*, the *Venus de Milo*, and all the Medieval sculptures in our museums which were crafted for a “frame” are artworks, rather than fragments.³³ But Michael may have the better argument one hundred years from now. Law libraries are full of court opinions and law review articles that now seem quaint (and wrong). Even today the integrated work argument is strong. Although a court found that Léger’s sets were part of the framework of *Bolivar*, what if the *Bolivar* librettist had argued that the opera could not be staged with Léger’s sets because they were part of the “work?”

There is no question that the installation art or *in situ* art movement has challenged the idea of art autonomous of its context and insisted on art that must be experienced in its intended place in order to be understood and appreciated.³⁴ If this idea of framework control for permanent works ever gains traction, let me suggest that it will do so with a very different, arguably more pedestrian, kind of installation art than *Tilted Arc*. An artist like Frederick Hart whose *Ex nihilo* sculpture dominates the main entrance to the National Cathedral in Washington has very clear and extensive expectations of the environment in which his art will be exper-

³¹ *Id.* at 1.

³² See *Léger v. Réunion des Théâtres Lyriques Nationaux*, Cass. 1^è civ., La Seine, Oct. 15, 1954, *Revue Internationale du Droit d’Auteur*, 1955, vol. 6, p. 146.

³³ UMBERTO ECO, *ART AND BEAUTY IN THE MIDDLE AGES* 40 (Yale University Press 1986) (1959).

³⁴ See RIOUT, *supra* note 20, at 342-48; see also CROW, *supra* note 24, at 131-50.

ience. Many artists were commissioned to create works for particular locations in the Cesar Pelli-designed terminal at Reagan National Airport in Washington; all of the artists planned and executed their works with knowledge of what the building would do and, therefore, the experiential framework in which the works would be on public display. Not surprisingly, many of these works have travel, flight, or distant-land themes. We can understand the legitimate concern of any of these artists that their works remain in the intended context.

But if one were a legal strategist seeking a test case for such concerns, the *Tilted Arc* controversy might not have been one's first choice—precisely because Richard Serra did not want his sculpture to integrate into Federal Plaza. Serra did not want *Tilted Arc* to relate to its surroundings in the simple sense of the examples given just above. Art historian Thomas Crowe has insightfully described Serra's intentions:

[H]e has been concerned to frustrate any search for links between the piece of sculpture and the given character of its setting, thus achieving a precise and unrelieved *non*-relation to the site, as the only means by which sculpture can be salvaged as a meaningful activity. Otherwise sculpture falls into. . .the intolerable position of 'being subordinated to/accommodated to/adapted to/subservient to/required to/useful to. . .' something other than itself.³⁵

Crow sees *Tilted Arc* as both intentionally *not* relating to its environment and as loudly announcing—and demanding attention for—its status as a stranger: “[t]he overbearing scale and intrusive placement of a *Tilted Arc* was planned to enforce the same concentrated attention in a passing non-committal audience as that habitually exercised by informed gallery visitors.”³⁶ In short, Serra's reasoning was that *Tilted Arc* had claim to its place in order to force people to pay attention to *Tilted Arc*'s message, which was separate from and not dependent on its environment. *Tilted Arc* could only be called context-dependent in the sense that it was context-resistant. This is hardly the most sympathetic fact pattern to build the case that an artist's work should stay in the framework for which it was created.

³⁵ CROW, *supra* note 24, at 146 (quoting Richard Serra, *Introduction* to CLARA WEYERGRAF-SERRA and MARTHA BUSKIRK, *THE DESTRUCTION OF TILTED ARC* (1997)).

³⁶ *Id.* Similarly, the ironic placement of Claes Oldenberg's “monumental” sculptures might make them bad candidates for framework control. See, e.g., JEAN-MARC POINSOT, *QUAND L'OEUVRE A LIEU: L'ART EXPOSE ET SES RECITS AUTORISES* 90-91 (Institut d'art contemporain & Art ed. 1999) (discussing Oldenberg's *Lipstick* and other sculptures).

III. DERIVATIVE WORK MEETS FRAMEWORK

Having expressed concern about “framework control,” let us consider a few places where it arguably exists. One of the places where the legal system may be considered to create some framework control is through the right to control derivative works. After all, the right to control derivative works often does not implicate the *intra-work* right of integrity. When the copyright owner of *Gone With the Wind* controls whether there will be a sequel called *Scarlet*, the issue is not maintaining the quality of the original work.³⁷ A pair of *fin de siecle* cases arguably brings the section 106(2) derivative right into the battle for control of context.

The more recent case concerned Annie Lee, an artist whose works are reproduced in note cards and small lithographs.³⁸ In the late 1990s, she discovered that copies of her works were being bought at retail by A.R.T. Company. The company was mounting her works on ceramic tiles and covering the art with a transparent epoxy resin—I presume to make them waterproof.³⁹ Ms. Lee objected and sued the company. In a very real sense, this case was about an artist’s work being presented in a different context—literally a new framework for Ms. Lee’s image.⁴⁰

Writing for the Seventh Circuit, Judge Easterbrook concluded that Ms. Lee had no right to stop these ceramic tiles once she sold copies of her images to the public.⁴¹ The law defines a “derivative work” as “a work consisting of editorial revision, annotations, elaborations, or other modifications that, as a whole, represents an original work of authorship.”⁴² The court concluded that the ceramic tile was not an “original work of authorship” and, therefore was not a derivative work.⁴³ The derivative work argument made it easy for the court to recognize the statutory right of a person who buys an authorized copy of a work to do whatever he or she wants with that copy. The court recognized that “the choice or frame or glazing affects the impression the art conveys, and many artists specify frames . . . in detail” but found that this concern for context could not be cabined into the right to make derivative works.⁴⁴

³⁷ Of course, it can be argued that the subsequent work “contaminates” or somehow “corrupts” the original work, but people seem to have no problem in common discourse distinguishing the quality of an original from its descendants.

³⁸ See *Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997).

³⁹ See *id.* at 580.

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² 17 U.S.C. §101 (1995).

⁴³ See *Lee*, 125 F.3d 583.

⁴⁴ *Lee*, 125 F.3d at 581.

Yet on the same operative facts, courts poised on the edge of civilization—that is California—have taken a different view. In *Mirage Editions v. Albuquerque A.R.T. Co.*,⁴⁵ the defendant had taken artwork from pages of a commemorative book of Patrick Nagel's art and mounted each image on a ceramic tile with a protective plastic film over the image and exposed tile surface.⁴⁶ In *Munoz v. Albuquerque A.R.T.*,⁴⁷ the same defendant engaged in the same mounting activities vis-a-vis notecards carrying the Alaska-themed art of artist Rie Munoz.⁴⁸ In both cases, the courts found that mounting an artwork to a ceramic tile produced a new work in which the original artwork had been "recast [], transform[ed], or adapt[ed]."⁴⁹ In the 1993 *Munoz* case, the district court expressly recognized that while variations in traditional means of framing art do not create derivative works, the ceramic tiles did create derivative works because they permanently bound the art to a new medium.⁵⁰ (The Seventh Circuit believed that this difference between permanent fixation and temporary fixation was too thin a reed on which to build a legal distinction.)

The legal pigeonholes used in these cases are not as interesting to me as the conflicting impulses that animate the discussion. On one hand, Professor Patry is certainly right that after it is mounted on a ceramic tile, the artistic image is still the same as when it left the artist's studio.⁵¹ On the other hand, it is certainly easy to imagine that the artist could object to her art being presented in such a wholly new context. It is quite a leap from note cards sent to friends to ceramic tiles mounted in shower stalls. The comparison by both courts to the framing and displaying of a painting was required to parse out the legal definition of "derivative work." However, this focus misses the point. The two courts did not reach different conclusions because there are different techniques for framing painting in California and Chicago.⁵² *Perhaps they reached different results because one sought to protect an artist's*

⁴⁵ 856 F.2d 1341 (9th Cir. 1988).

⁴⁶ See *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1342 (9th Cir. 1988). The artworks were single pages taken from *NAGEL: The Art of Patrick Nagel*. See *id.* Nagel is, of course, best known for appearing in *Playboy*. See *id.*

⁴⁷ 829 F. Supp. 309 (D. Alaska 1993), *aff'd without published opinion*, 38 F.3d 1218 (9th Cir. 1994).

⁴⁸ See *id.* at 310-11.

⁴⁹ *Id.* at 314; *Mirage Editions*, 856 F.2d at 1343-44.

⁵⁰ See *Munoz*, 829 F. Supp. at 314.

⁵¹ See William F. Patry, *Copyright Law and Practice* 823-24 (1994) (disapproving of the decision in *Mirage Editions* on this basis).

⁵² In California, perhaps, people use more plexiglass (earthquakes) with stronger UV protection (endless summer).

right of integrity through whatever tools were available and the other court was not as solicitous of that artist's concerns and may, in fact, have been more concerned with the downstream uses—often creative— of the art.

Judge Easterbrook was very clear that he was unwilling to see the derivative work right as a “back door [for] an extraordinarily broad version of authors’ moral rights”⁵³—almost a counterpoise for the recognition twice in the same year by his colleague, Judge Posner, that moral rights have real resonance in American law.⁵⁴ The disagreement between these two courts has never been resolved and the derivative work right may yet have power to give a creator some control over context and framework.

IV. WORK WITHIN A WORK

Another area where “framework” control arguably exists is with reproducible works, including literary, audiovisual, and musical creations. An example of a reproducible work is a “work” that appears within a larger work. I am thinking in particular of copyrighted characters and by some extension, possibly the right of publicity.

In the early 1990s, artist Jeff Koons suffered a series of legal defeats stemming from his incorporation of copyrighted works into his own three-dimensional sculptures.⁵⁵ One court stated, “Koons [wa]s part of a contemporary, artistic movement which takes images from popular culture and ‘re-contextualizes’ them in a work of art in an effort to convey a certain message or idea to the viewer.”⁵⁶ In the case of this sculpture, *Wild Boy and Puppy*, Koons juxtaposed a three-dimensional “Odie” dog character from the *Garfield* cartoon against a stuffed doll and a “butterfly-bee.”⁵⁷ The artist was using protected images for his own communicative mes-

⁵³ See *Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1997). Perhaps to assuage this concern, Ms. Lee had “disclaimed any contention that the sale of her works on tile ha[d] damaged her honor or reputation.” *Id.* at 583.

⁵⁴ Such recognition was noted in dicta which did not determine the results of the case at issue. See *Seshardi v. Kasraian*, 130 F.3d 798, 803-4 (7th Cir. 1997) (“There are glimmers of the moral-rights doctrine in contemporary American copyright law”); see also *Ty, Inc. v. GMA Accessories*, 132 F.3d 1167, 1173 (7th Cir. 1997) (stating that preliminary injunction “draws additional sustenance from the doctrine of ‘moral rights,’ . . . a doctrine that is creeping into American copyright law.”). But see Pierre Leval, *Commentary: Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1129 (1990) (arguing against development of moral rights in copyright law and that “[i]f we want to create such rights for the protection of artists, we should draft them carefully as a separate body of law, and appropriately define what is an artist and what is a work of art.”)

⁵⁵ See *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), *cert. denied*, 113 S.Ct. 365 (1992); see also *United Features Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993); *Campbell v. Koons*, 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. Apr. 1, 1993).

⁵⁶ *United Features Syndicate*, 817 F. Supp. at 372.

⁵⁷ See *id.* at 385.

sage, but admitted to the courts that he was not parodying the images.

Under copyright law, Koons would be liable for the simple reproduction of Odie's image even if the context had been a pirated *Garfield* cartoon. But the case is interesting for a discussion of "work" and "framework" because the value to Koons in using "Odie"—perhaps most of the "meaning"—was that his audience was seeing a familiar image in an unfamiliar (and unpermitted) milieu. His audience confronted an image with a familiar personality having familiar characteristics cultivated in one forum: the newspaper cartoon strip. That protected work was suddenly being thrown into a different context. The "recontextualization" of Odie failed as part of Koons's defense in court.

The "Odie" situation is a relatively pure text-in-new-context situation precisely because Koons did not attempt to give Odie new characteristics or traits. A more mixed situation is described in the 1978 case of *Disney v. Air Pirates*.⁵⁸ At issue in the case was "an 'underground' comic book which had placed several well-known Disney cartoon characters in incongruous settings where they engaged in activities clearly antithetical to the Mickey Mouse canon of scrubbed faces, bright smiles, and happy endings."⁵⁹ This is a "mixed" example because although the works (the Disney characters) were "placed . . . in incongruous settings," there were also changes made in the characters themselves because they were portrayed "as *active members* of a free thinking, promiscuous, drug ingesting counterculture."⁶⁰ Honest and ethical Mickey Mouse was portrayed as having a new personality, not simply being thrown into a very un-Disney situation.

The "work within a work" situation might encompass the right of publicity, although the connection may not be immediately clear. Valuable personas like Brad Pitt, Madonna, and Prince usually become valuable through their appearances in controlled public displays—environments that are often copyrighted works—films, television programs, sports broadcasts, CDs, and music videos. In a sense, these copyrighted works establish a sort of "framework" for the persona being protected. To the degree that we allow celebrities to control their images, we often prevent *not* an alteration of the image, but simply its insertion into a new and unauthorized context.

⁵⁸ 581 F.2d 751 (9th Cir. 1978).

⁵⁹ *Id.* at 753 (quoting Note, *Parody, Copyrights and the First Amendment*, 10 U.S.F. L. REV. 564, 571, 582 (1976)).

⁶⁰ *Id.* (emphasis added).

V. THE PROBLEM OF *THIRD VOICE*

The Internet offers a new medium in which works seem very unattached to any context. Yet even here, there are some interesting issues related to work and framework. Indeed, one legal dispute that has arisen in cyberspace literally concerns “framing,” when person A’s web page is presented to Internet users by person B with a “frame” around it that includes person B’s own materials. So, the *New York Times* might discover its on-line “cyberlaw” article available on, say, Matt Drudge’s “Internet news” site with a frame that says “for the most up to date Internet news, always come to mattdrudge.com.” The technology of the Internet permits such “framing.” Most of the disputes that have arisen concern commercial ventures and “framing” where a company takes a competitor’s content (the “work”) and puts it in its own frame, often with advertisements.

It is, however, easy to imagine that these disputes could involve the work of artists who suddenly find their photography or graphic art filtered through someone else’s “frame” on the Internet. A new technological development called the *Third Voice* raises the question of whether creators should be free from undue criticism on the Internet, particularly criticism that could take the form of contextual material supplied directly with the creator’s on-line graphic art or literary work—in short, a negative *context* forced upon a work.

As configured in early 2000, *Third Voice* was essentially an HTML application that creates a digital overlay on websites, allowing visitors to add comments, annotations, and criticisms that pop up like balloons or “electronic Post-It Notes” on the web page. Opponents of *Third Voice* were concerned about “webmasters’ rights to control the integrity of their websites” for whom *Third Voice* is “a digital spray can that tags websites with online graffiti.”⁶¹

These digital Post-Its are only visible to people using *Third Voice* software. The original, underlying website is not corrupted for those not using *Third Voice*. In other words, a web page is “transported” and reproduced in the *Third Voice* environment—a context not chosen by the website creator. Imagine a graphic artist

⁶¹ Ryan Bigge, *Window Dressing*, SHIFT, Mar. 2000, at 34. More generally, all disputes about unauthorized “framing” of websites by other websites are just that: disputes about the “framework” in which a work is presented. Typically, these involve commercial entity A presenting the content—news stories, databases, etc.—of commercial entity B with a “frame” around A’s content so that B can take credit for the content or present advertising in conjunction with the content, etc. See, e.g., *Futuredontics, Inc. v. Applied Anagramics, Inc.*, 1998 U.S. Dist LEXIS 2265, 45 U.S.P.Q.2d (BNA) 2005 (C.D. Cal. 1998).

who has put her images on the Internet and discovers, to her chagrin, that her art transported into the *Third Voice* environment has many unpleasant criticisms *directly attached to the visual images*. The “integrity” of the underlying work is not disturbed, but the condition under which it is viewed is nothing like what the artist would have imagined.

The Third Voice technology is itself changing, but this generation of the system raises a host of interesting problems for copyright, First Amendment, and our notions of unfair competition. This technology and similar applications have the potential to generate some commentary in the field of moral rights as well.

VI. CONCLUSION

Art is a particularly vexing subject because legal scholars are always searching for descriptive generalizations about the world on which to hang legal rules and distinctions. But artists, particularly the self-conscious visual artists of the late 20th and early 21st century, break conventions with gleeful intent. As sure as scholars or judges will make one generalization, a school of artists will start behaving in ways that turn that generalization on its head.

Professor Merryman wrote in his essay *Thinking about the Elgin Marbles*, “[l]ife seems brighter when feelings and thoughts lead in the same direction.”⁶² He is surely right. But life may be more interesting when our thoughts lead in different directions, not to mention when our thoughts and feelings are sometimes on divergent paths.

POSTSCRIPT

The essay above tracks fairly closely the comments I made at the Merryman symposium on April 6, 2000. A few things are new here—the *Léger* case, Michael Govan’s ideas, Thomas Crow’s notions on *Tilted Arc*—but they are exemplary of points made in the April 6 presentation. This postscript addresses some different thoughts.

At the symposium, Mr. Serra said it is a good thing that Michelangelo’s Sistine Chapel paintings are not in the United States because, since they are firmly affixed to the chapel ceiling, they would not be protected under the VARA. That is true according to VARA law, but it misses the point. Great works of art and their frameworks can be protected by mechanisms that do not depend

⁶² *The Elgin Marbles*, *supra* note 2, at 1921.

wholly on the will and whim of the individual artist. Recognizing a strong boundary between work and context will not always result in the artist's interests versus those of everyone else. There are real listeners' interests or audience interests⁶³ "in seeing, or preserving the opportunity to see, the work as the artist intended it, undistorted, and 'unimproved' by the unilateral actions of others."⁶⁴ Historic preservation laws are an example. Acquisition policies of museums are a non-legal, "social market" mechanism for work/framework preservation. Public attention of the same sort that toppled *Tilted Arc* can preserve some works in context. A work which becomes synonymous with a location—such as Joseph Borovsky's *Ballerina Clown* is in Venice, California, or Martin Puryear's *That Profile* may eventually be at the entrance to the new Getty Museum⁶⁵—begins to approach the status of a "monument." Then, if anything, it is *defended* by a public almost always comfortable with the familiar.

Mr. Serra might respond, as he has said publicly, that art is not democratic and that art should challenge and confront people with perspectives that they would rather avoid. In intellectual property terms, a system that depends on popular will to keep works *in situ* is likely to encourage familiar, happy, and Disneyesque work and discourage confrontational art that pushes the envelope. Perhaps. But our system is hardly one that relies exclusively on popular will. The will of philanthropic patrons more than popular will determined that a Dubuffet occupy One Chase Manhattan Plaza, a Henry Moore fountain be showcased in Lincoln Center, and a Calder hug the corner of 57th Street and Madison Avenue in front of the IBM building. Perhaps people are more comfortable with commemorative art than with manifestations of abstract alienation, but *in situ* art can *confront* people and become very popular. Maya Lin's Vietnam Memorial may be the best example.

⁶³ See Justin Hughes, *Recoding Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 987 (1999).

⁶⁴ *Id.*

⁶⁵ See Jonathan Borovsky's *Ballerina Clown*, available at <http://www.usc.edu/isd/archives/la/pubart/sculptures/clown.html> (last visited Feb. 8, 2001) (displaying an image of the *Ballerina Clown*); see also Clayton Campbell Gallery, available at pubart/sculptures/clown.html (last visited Feb. 8, 2001) (displaying an image of the *Ballerina Clown*); see also Clayton Campbell Gallery, available at <http://www.claytoncampbell.com/writings1.html> (last visited Feb. 8, 2001) (providing Clayton Campbell's interview with Frank Gehry, where Mr. Gehry notes how the sculpture is treated as representative of the Venice area); Martin Puryear, *Getty Trust Announces Installation of New Sculpture*, ARTSCOPE NEWS (Nov. 18, 1999) available at <http://www.artscope.net/NEWS/news111899-3.html> (last visited Feb. 8, 2001) (discussing *That Profile*).

Still, an artist who wants to “confront” people ought to be prepared for the results of the confrontation. As one commentator wrote, “[t]he public, fed up with the irrelevance of contemporary art, not to mention its manifest hostility toward them, finally rebelled and the work ‘*Tilted Arc*’ was quite properly removed.”⁶⁶ Art may not be democratic, but we struggle for a democratic social discourse. If “fine art” wants to participate in that discourse, it cannot expect to do so from a completely privileged position. One hundred and twenty-two people out of the one hundred and eighty people who testified at the *Tilted Arc* hearing wanted to keep the sculpture. It appears that fifty-eight opponents were mainly people who used the plaza daily—a fact that, in a democratic, interest-group driven society, presaged the result.⁶⁷

Clearly Mr. Serra feels that the government made a commitment to permanently display *Tilted Arc* in Federal Plaza. I have not examined the evidence in his case, so I do not know the power of this contract claim. I *am* sure that the GSA, as a patron of the arts, performed an injustice to Mr. Serra by not better anticipating the kind of reaction engendered by *Tilted Arc*. The critic Cyril Connolly wrote in *The Unquiet Grave*, “[p]atiently and obstinately, the artist must convince the State that, in the long run, it will be judged by its art and that, if the State is to replace the private patron, then it must imitate and even surpass that patron’s tolerance, humility, and liberality.”⁶⁸ I do not think of the Medicis as having been particularly tolerant or humble, but the GSA was also a very un-ideal patron in Connolly’s sense. Professor Hamilton’s remarks may point in the right direction: perhaps in a democracy, “the State” cannot be these things. Perhaps by definition, it cannot make a deal like the deal Richard Serra believed that he had.

To extend the point—even if Mr. Serra’s contract claim were sound, even if the government had made such a promise, would it be reasonable for Mr. Serra to expect *Tilted Arc* to be there forever? I do not think so. As discussed above, the intention behind *Tilted Arc* was very different from site-specific work like Raymond Kaskey’s *Portlandia* that adorns Portland, Oregon’s Public Service Building or Daniel Chester French’s sculpture of Abraham Lincoln in the Lincoln Memorial. The intention behind *Tilted Arc* was also very different from the temporary installation art of someone like

⁶⁶ YAWN, *Artist Sucks* (Nov. 24, 1989), available at http://www.thing.de/projekte/7:9%23/y_Artist_Sucks.html (last visited Feb. 8, 2001).

⁶⁷ *But see* CROW, *supra* note 24, at 148-49 (calling the petitions for the sculpture’s removal “unrepresentative”).

⁶⁸ CYRIL CONNOLLY, *THE UNQUIET GRAVE* 55 (Persea Books 1999) (1944).

Gordon Matta-Clark or Christo. The artist who claims a right to permanently occupy and dominate a major public plaza with an abstract sculpture that does not even pretend to relate to its environment says what to future artists? He either expects society to keep building major public plazas or he expects his art to remain more important and more relevant than that of future artists. In philosophical terms, this raises a problem of "justice among generations." As Professor Merryman reminded us, such a claim sounds a bit like Ozymandias, "king of kings," who expected a giant statue of himself to endure through the ages.⁶⁹ In Shelley's poem, we do not know whether wind or earthquake or war or revolution toppled Ozymandias's image, but we know that it was bound to fall.⁷⁰

⁶⁹ See John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 348 (1989).

⁷⁰ See PERCY BYSSHE SHELLEY, *Ozymandias*, in THE COMPLETE POEMS OF PERCY BYSSHE SHELLEY 589 (1994) ("[t]wo vast and trunk less legs of stone" and "[h]alf sunk, a shattered visage . . . Nothing beside remains.").

THE *TILTED ARC* CONTROVERSY

RICHARD SERRA*

I am going to speak about the saga that I went through about fifteen years ago dealing with the commissioning of *Tilted Arc*¹ and the subsequent removal by the government of the same work. The United States Government destroyed *Tilted Arc* on March 15, 1989. Exercising its proprietary rights, authorities at the General Services Administration ("GSA")² ordered the destruction of the same public sculpture that their own agency had commissioned ten years earlier.³

This final desecration of *Tilted Arc* followed after five years of misrepresentations, false promises, and show trials in the media and in the courtroom.⁴ In the end, these deceptions not only al-

* Artist, New York City and Cape Breton, Nova Scotia.

¹ See Grace Glueck, *Serra Work Stirs Downtown Protest*, N.Y. TIMES, Sept. 25, 1981, at C24 (noting that *Tilted Arc* was a 120 feet long, 12 feet high curving wall sculpture installed at 26 Federal Plaza in New York City, in July 1981).

² The General Services Administration ("GSA") is a federal agency granted with broad authority over the acquisition, maintenance and disposal of federal property. Its mission is to "provide policy leadership and expert solutions in services, space, and products, at the best value, to enable Federal employees to accomplish their missions." *GSA Strategic Plan*, available at <http://159.142.162.71/Portal/pub.jsp?OID=113973> (last visited Mar. 21, 2001).

In 1979, the GSA paid Serra \$175,000 for his sculpture, *Tilted Arc*, which was to be displayed at 26 Federal Plaza. See *Serra v. U.S. General Services Admin.*, 664 F.Supp. 798 (S.D.N.Y. 1987) [hereinafter *Serra I*]. After *Tilted Arc* was created and placed at the Plaza, the agency received many complaints requesting its removal. Serra filed a complaint naming as defendants the GSA, the GSA Administrator, the GSA's Commissioner of Public Building Service, William Diamond as the GSA Regional Administrator for the region including New York, and Dwight Ink, another GSA administrator. Serra claimed that he had a contractual right to have *Tilted Arc* remain at the Plaza, that relocation would violate his rights under copyright and trademark laws, and he also claimed violation of his First and Fifth Amendment rights. The Court held it lacked jurisdiction to hear the contract, copyright and trademark claims. The Court dismissed the actions against the defendants in the personal capacities. See also *Serra v. U.S. General Services Admin.*, 667 F. Supp. 1042 (S.D.N.Y. 1987) [hereinafter *Serra II*]. Defendants filed a motion to dismiss the remaining claims due to sovereign immunity and lack of subject matter jurisdiction. The contract, copyright, trademark, and constitutional claims were dismissed. See *Serra v. U.S. General Services Admin.*, 847 F.2d 1045 (2d Cir. 1988) [hereinafter *Serra III*]. Serra appealed only the rejection of his free expression and due process claims. The Court of Appeals held that Serra, the artist, had relinquished his free speech rights in his sculpture when he sold it to the government. See generally *id.* The Court also held that to the extent that the government's decision may have been motivated by the sculpture's lack of aesthetic appeal, the decision was permissible, and the relocation decision did not violate due process. See generally *id.*

³ See *Serra III*, 847 F.2d at 1047. *Tilted Arc* was installed in Federal Plaza under the Art-in-Architecture program of the GSA, pursuant to which "one half of one percent of the construction cost of federal buildings is reserved for the funding of art works by living American artists." *Id.*

⁴ See Douglas C. McGill, *Office Workers and Artists Debate Fate of Sculpture*, N.Y. TIMES, Mar. 7, 1985, at B1 (discussing merits of Serra's case); see also Margot Hornblower, *New*

lowed the government to destroy *Tilted Arc*, but also established a precedent for the priority of property rights over free expression and the moral rights of artists. Such a precedent tests the ability of the Berne Convention laws to protect the rights of artists in their works.⁵ After an exhaustive analysis of the treaty, my attorneys concluded that the Berne Convention laws, as abridged by the United States Congress,⁶ were inadequate to protect my work. In 1988, I was permanently denied by the federal courts, any say in the fate of the sculpture.⁷ Thereafter, William Diamond, the original administrator of the GSA and the man most responsible for the campaign against *Tilted Arc*,⁸ acted immediately to have the sculpture removed from 26 Federal Plaza in Manhattan.

Although permanency is implicit in the commission of any site-specific work, I explicitly raised the issue several times with different representatives of the GSA. Before accepting the commission, I felt it crucial for the issue of permanency to be fully understood. I accepted the commission only after I had been assured repeatedly that my work would be, as stated in the GSA manual, incorporated as an "integral part of the total architectural design."⁹ I was told that the GSA did not want to have it any other way. In 1981, as soon as the final location of the sculpture was agreed upon, *Tilted Arc* was installed and anchored into the existing steel and concrete substructure of the Plaza.¹⁰

In 1985, William Diamond, a new regional administrator of the GSA and a Reagan appointee, appeared on the scene.¹¹

Yorkers, Artists Tilt Over 'Arc'; GSA Hears Whether a Sculpture Should Stay, WASH. POST, Mar. 7, 1985, at D1 (detailing the hearing, including quotes from Serra's testimony); Alan G. Artner, *Debate Rages: Can Public Art be Recalled*, CHI. TRIBUNE, Mar. 8, 1985, at C1.

⁵ The Berne Convention was adopted by the United States Congress in 1988. It was effected by an international committee of nations to protect the rights of authors in their literary and artistic works. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention].

⁶ See Berne Convention Implementation Act of 1988, H.R. REP. NO. 609, 100th Cong., 2d Sess., at 40 (1988) [hereinafter Berne Convention Implementation Act]. The Berne Convention for the Protection of Literary and Artistic Works was concluded in 1986. The Convention seeks to protect the rights of authors in their artistic and literary works, including writings, musical arrangements, and scientific designs. The Convention has since been modernized through multiple revisions.

⁷ See *Serra III*, 847 F.2d at 1047.

⁸ William Diamond, the regional administrator of the GSA, had circulated a petition demanding the removal of *Tilted Arc* in 1984. The petition obtained nearly 4,000 signatures. See Richard Serra, *The Case of Tilted Arc*, available at http://www.arts.arizona.edu/are476/files/tilted_arc.html (last visited Feb. 19, 2001).

⁹ MANUAL FOR THE UNITED STATES GENERAL SERVICES ADMINISTRATION (on file with GSA).

¹⁰ *Tilted Arc* was completed and installed at Federal Plaza in 1981. See *Serra III*, 847 F.2d at 1047.

¹¹ See *id.*

Through flyers, posters and personal letters of invitation, Diamond announced that a GSA hearing would be held at the Court of International Trade on March 6, 1985.¹² The letters that Diamond sent out stated that the purpose of the hearings was to decide whether or not the artwork known as *Tilted Arc*, located on the East Plaza of the Jacob K. Javits Federal Building in Manhattan, should be relocated to "increase public use of the Plaza."¹³

The announcement elicited a tremendous response, much of which was in favor of *Tilted Arc*, particularly from the art community.¹⁴ Eventually, the hearing had to be extended to three days to accommodate the more than 180 people who petitioned to speak.¹⁵ At the hearing, 122 people spoke in favor of retaining the sculpture, and fifty-eight in favor of relocation.¹⁶ Those facts have subsequently been distorted over and over again not only by the GSA administration, but by pundits from the press as well.¹⁷ This continues to cause me aggravation. However, there is nothing I can do about it.

My sculpture had been approved, commissioned and installed under a Democratic administration. A Republican administration decided that it should be destroyed.¹⁸ The governmental decree to remove, and thereby destroy *Tilted Arc*, was the direct outcome of a cynical Republican cultural policy that supports art only as commodity. Relocation would in fact transform *Tilted Arc* into an exchange commodity in that it would annihilate the site-specific aspect of the work. My sculpture would become exactly what it was not intended to be: a mobile, marketable product.

Doubtless, to some people, *Tilted Arc* was an eyesore. However, the same may be said about any other work of art. There will always be viewers who will react negatively to any given work. Peo-

¹² See *Serra II*, 667 F. Supp. 1042, 1053 (S.D.N.Y. 1987).

¹³ *Id.*

¹⁴ See, e.g., Michael Brenson, *The Case in Favor of a Controversial Sculpture*, N.Y. TIMES, May 19, 1985, §2 at 1 (stating that "[*Tilted Arc*] gives an incoherent, intractable space a focus and sense of possibility it did not have before.>").

¹⁵ See *Serra III*, 847 F.2d at 1047 (giving a brief discussion of the hearing and the result).

¹⁶ See *id.*; see also Richard Serra, *Tilted Arc*, available at <http://www.pbs.org/wgbh/cultureshock/flashpoints/visualarts/tiltedarc.html> (last visited Feb. 18, 2001).

¹⁷ See, e.g., Grace Glueck, *Downtown Protest*, *supra* note 1, at C24 (citing a petition circulated by employees of the Department of Housing and Urban Development calling "[*Tilted Arc*] the wrong work of art in the wrong place," and another petition circulated by the Environmental Protection Agency referring to the art as a "graffiti catcher"); see also Susan Heller Anderson and David W. Dunlap, *'Arc' Under Scrutiny*, N.Y. TIMES, Dec. 29, 1984, §1 at 25 (stating that "if letters and petitions are any guide. . . *Tilted Arc* does not have too many fans in the neighborhood.>").

¹⁸ The GSA commissioned Serra in 1979, while the Democratic Carter Administration was in power. Whereas, the decision to remove *Tilted Arc* was made while the Republican Reagan Administration was in power.

ple are entitled to their opinions, but prejudice, even if shared by a majority, ought not be a reason to decide the fate of a work of art. In this case, however, a majority of those who spoke at the public hearing favored retaining *Tilted Arc* at its original site.¹⁹

Lacking majority support for its relocation scheme, the GSA looked for help from the National Endowment for the Arts (“NEA”).²⁰ The GSA completely ignored the outcome of the hearing and asked the NEA to establish a “relocation review panel” to evaluate the suitability of alternative sites for *Tilted Arc*.²¹ The NEA assembled a distinguished seven-member panel of artists, architects and legislators to consider the matter.²² The panel met in New York City on December 15, 1987, and visited the Federal Plaza to see *Tilted Arc in situ*. At that time, I presented the panel with my arguments about the importance of the work’s site-specificity, which I asserted, precluded the possibility of relocation.²³ I reiterated my position that to remove the work would be to destroy it.

In its recommendation to the GSA, the NEA panel concurred with my definition of site-specificity and stated:

[W]e have been presented with a statement by the artist about the site-specific nature of his *Tilted Arc* sculpture. Our visit to the Federal Plaza to review the actual relationship of the work to its site led us to conclude that there was merit in the artist’s statement that relocation of the work would destroy it.²⁴

The panel further recommended that the GSA discontinue its

¹⁹ See Richard Serra, *Tilted Arc* (1981), at <http://www.geocities.com/sotto/square/1371/serra.html> (last visited Feb. 1, 2001) (discussing Serra’s career, with particular emphasis on the *Tilted Arc* controversy).

²⁰ The National Endowment for the Arts (“NEA”) was created by Congress, and established in 1965 as an independent agency of the federal government.

The NEA’s mission is to serve the public good by nurturing human creativity, supporting community spirit, and fostering appreciation of the excellence and diversity of our nation’s artistic accomplishments. [It carries] out that mission through grantmaking; leadership initiatives; partnerships with state arts agencies, regional arts organizations, other federal agencies and the private sector; research; and public information.

Learn About the NEA: *Guide to the NEA: Overview*, available at <http://arts.endow.gov/learn/NEAGuide/Overview.html> (last visited on Apr. 3, 2001).

²¹ See *Serra I*, 664 F.Supp. 798, 801 (S.D.N.Y. 1987) (restating the underlying facts); see also *Serra II*, 667 F. Supp. 1042, 1047 (S.D.N.Y. 1987) (stating that the NEA was selected to “search for a suitable location for the sculpture with the aid of the artist. . .”).

²² See *Serra II*, 667 F. Supp. at 1054 (describing criteria established for composition of relocation panel).

²³ See *Serra III*, 847 F.2d 1045, 1048 (2d Cir. 1988) (stating that Serra and his attorney met with Dwight Ink, Acting Administrator of the GSA, to “personally articulate his concern about site-specificity”); see also *Serra II*, 667 F. Supp. at 1045 (stating Serra’s general “site-specific” argument that the location of the sculpture was a fundamental part of its nature and that removal would render it devoid of all meaning).

²⁴ THE DESTRUCTION OF *Tilted Arc*: Documents 189 (Clara Weyergraf-Serra and Martha Buskirk, eds., 1991).

search for alternative sites for *Tilted Arc*.²⁵ However, the GSA ignored the NEA panel's recommendation, just as it had ignored the outcome of the earlier public hearing.²⁶ With this repugnant and cynical decision, the government showed a total disregard for any processes and institutions that do not affirm its policies. It became clear to me that the GSA was not willing to respect my assertion of the importance of site-specificity, even though it was endorsed by the NEA panel's report. Thus, I took my case to court.²⁷

My case, brought against the United States Government in December 1986, addressed both the terms of my contract with the GSA and what I took to be an abridgement of my constitutional rights.²⁸ This suit attempted to prevent the government from removing or relocating *Tilted Arc* and sought to recover damages for breach of contract, trademark violations, copyright infringement and violation of my First and Fifth Amendment rights.²⁹

In a decision handed down on August 31, 1987, Judge Milton Pollack of the United States District Court, dismissed all claims, disallowing the copyright issues and the contract claim as being outside the Court's jurisdiction, and striking down the constitutional questions for lack of merit.³⁰ An appeal was filed in the United States Court of Appeals on December 15, 1987, calling for a reversal of the decision regarding the constitutional issues.³¹ My attorneys contended that insufficient weight had been given to the fact that *Tilted Arc* was created for one site and one site only, and that to remove the work would destroy it.³² In addition, they argued that the proposed relocation of *Tilted Arc* would violate my right to free expression.³³ They argued that once a medium of expression, be it writing, film, theater, painting or sculpture, is publicly installed or displayed, First Amendment rights attach, which prohibit the government from removing the expression on the basis of its content.³⁴

Cited as a precedent was the case of *Board of Education v. Pico*.³⁵ In this case, the Board of Education had ordered the removal of nine books from school library shelves that were deemed "anti-

²⁵ See *id.* at 189-90.

²⁶ See *id.* at 257-73.

²⁷ See *Serra I*, 664 F. Supp. at 798.

²⁸ See *id.* at 801.

²⁹ See *id.*

³⁰ See *Serra II*, 667 F. Supp. 1042, 1042 (S.D.N.Y. 1987).

³¹ See *Serra III*, 847 F.2d 1045, 1045 (2d Cir. 1988).

³² See THE DESTRUCTION OF *Tilted Arc*. Documents, *supra* note 24, at 228-30.

³³ See *id.* at 233-34.

³⁴ See *id.* at 233-36.

³⁵ 457 U.S. 853 (1982).

American, anti-Christian, anti-Semitic, or just plain filthy.”³⁶ Holding that the books could not be removed simply because the Board disliked their contents, the Supreme Court found for the plaintiff on appeal.³⁷ Applying this principle to the *Tilted Arc* situation, my attorneys noted that dislike was the only reason cited for removal of the sculpture. Following this logic they concluded:

[I]f the issue here were only removal of *Tilted Arc* the authorities we have cited would preclude this result. . . . [B]ut this result is put beyond question we submit, when we recall that to remove *Tilted Arc* is to destroy it. It is no overstatement to say that we [are dealing] with conduct akin to book burning.³⁸

United States District Attorney, Rudolph Giuliani, responded with a brief for the defendants—the GSA.³⁹ The government argued against the applicability of both the First Amendment free speech clause, and the Fifth Amendment due process clause to this case.⁴⁰ And in a remarkable and unabashedly authoritarian rebuttal, the government summarized its opinion as follows:

As a threshold matter, Serra sold his ‘speech’ to the government. . . . As such, his ‘speech’ became government property in 1981, when he received full payment for his work. An owner’s ‘[p]roperty rights in a physical thing have been described as the rights “to possess, use and dispose of it”.’⁴¹

This rather incredible statement by the government affirms its commitment to private property rights over the interests of art and free expression. It means that if the government owns a book, it can burn it. If the government has bought your speech, it can mutilate, modify, censor or even destroy it. The right of property supercedes all other rights, including the rights of freedom of speech, freedom of expression, and the protection of one’s creative works.

The Court of Appeals upheld the government’s position.⁴² Judge Jon O. Newman dismissed my appeal on May 27, 1988.⁴³ He upheld the decision of the lower courts on both the questions of free expression and due process. Judge Newman held that:

³⁶ *Id.* at 857.

³⁷ *See id.* at 872.

³⁸ Reply Brief for Defendants (on file with the GSA).

³⁹ *See THE DESTRUCTION OF Tilted Arc: Documents*, *supra* note 24 at 239-45.

⁴⁰ *See Serra II*, 667 F. Supp. at 1056; *see also Serra III*, 847 F.2d at 1049.

⁴¹ *THE DESTRUCTION OF Tilted Arc: Documents*, *supra* note 24, at 240.

⁴² *See Serra III*, 847 F.2d at 1045.

⁴³ *See id.*

[T]he First Amendment has only limited application in a case like the present one where the artistic expression belongs to the government rather than a private individual. In this case, the speaker is the United States Government. *Tilted Arc* is entirely owned by the government and is displayed on government property. Serra relinquished his own speech rights in the sculpture when he voluntarily sold it to GSA. . . .⁴⁴

If I had known that the government would claim *Tilted Arc* as its own speech and destroy it, I would never have accepted the commission in the first place. *Tilted Arc* was never intended to, nor did it speak for, the United States Government.

A key issue in this case, as in all First Amendment cases, was the right of the defendant to curtail free speech on the basis of dislike of the content. The Court stated that aesthetic dislike *is* sufficient reason to destroy a work of art.

To the extent that the GSA's decision may have been motivated by the sculpture's lack of aesthetic appeal, the decision was entirely permissible. . . . [The] GSA, which is charged with providing office space for federal employees, may remove from its buildings artworks that it decides are aesthetically unsuitable for particular locations.⁴⁵

Yet on this very issue, Supreme Court Justice Oliver Wendell Holmes cautioned over eighty years ago, that:

It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits. At the one extreme some works. . . would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their authors spoke.⁴⁶

Justice Holmes's warning should extend to all government officials, whether they are judges or administrators of governmental agencies.

Regarding the Fifth Amendment issue of the denial of my right to due process in the *Tilted Arc* hearing, the Court dismissed my claim.⁴⁷ The Court ruled that:

Accepting Serra's factual allegations as true for the pur-

⁴⁴ *Id.* at 1048-49.

⁴⁵ *Id.* at 1051.

⁴⁶ *Bleistein v. Donaldson Lithographing*, 188 U.S. 239, 251 (1903) (holding that judges should not use their own opinion of aesthetic value to determine copyrightability).

⁴⁷ *See Serra III*, 847 F.2d at 1052.

poses of this appeal, we conclude that his due process claim fails as a matter of law. . . . Serra was not constitutionally entitled to a hearing before the sculpture could be removed. The lengthy and comprehensive hearing that was provided was therefore a gratuitous benefit to Serra. Even if Diamond was not entirely impartial, Serra received more process than what was due.⁴⁸

This legal ruling continues the cynicism and farce of this kangaroo court.

In the end, I was left with a decision by the United States Court of Appeals that protected a federal agency, the GSA, and exonerated a federal official, Diamond, even if he was, “not entirely impartial.”⁴⁹ The Court’s decision merely rubberstamped the official’s duplicity and conduct. In the same sentence the Court dismissed my due process claim, saying that I had received, “more process than what was due.”⁵⁰ This cynical decision by the appeals court needs to be challenged—not only by my own denunciation—but by others. I had no further protection under the law.

In a sense, Judge Newman was correct when he said that my lawsuit was, “[a]n invitation for the courts to announce a new rule. . . that an artist retains a constitutional right to have permanently displayed at the intended site a work of art that he has sold to a government agency.”⁵¹ The new rule that I am asking for is for moral rights legislation. Such coverage now exists in virtually every other civilized country in the world.⁵² In the United States, this new rule would acknowledge a relationship between an artist and his or her work even after the work has been sold, and no matter to whom.

In the United States, property rights are afforded protection, but moral rights are not.⁵³ Until 1988, the United States adamantly refused to join the Berne Copyright Convention of 1986.⁵⁴ It was the first multilateral copyright treaty, now ratified by seventy-eight countries.⁵⁵ The United States’s refusal was based on the fact that

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 1051.

⁵² See Berne Convention, *supra* note 5; see also Ralph Oman, *The United States and the Berne Union: An Extended Courtship*, 3 J.L. & TECH 71, 93 (1988) (noting that while many European States have adopted moral rights into their copyright laws pursuant to Article 6bis of the Berne Convention, the United States has not).

⁵³ For example, Title 17 of the United States Code does not provide for the protection of Moral Rights. See generally 17 U.S.C. (2000).

⁵⁴ The United States ratified the Berne Convention with the exception of Article 6bis in the Berne Implementation Act. See Berne Convention Implementation Act, *supra* note 6.

⁵⁵ See, e.g., *Surge in Treaty Adherence Shows Growing Importance of Intellectual Property*, Jan. 31, 2000, at <http://www.wipo.int/pressroom/en/updates/2000/upd82.htm> (last visited

the Berne Convention grants moral rights to authors.⁵⁶ Such a policy was, and still is, incompatible with United States copyright law, which recognizes only economic rights. Massachusetts,⁵⁷ California,⁵⁸ and New York⁵⁹ have enacted moral rights statutes on the state level, but federal copyright laws, which are wholly economic in their motivation, tend to prevail.

Indeed, the recent pressure on the United States to agree, at least in part, to the terms of the Berne Convention came only as a result of a dramatic increase in the international piracy of American records and films. In September 1986, Senator Edward Kennedy introduced a bill called the Visual Artists Rights Amendment.⁶⁰ This bill attempted to amend federal copyright laws to incorporate some aspects of the international moral rights protection. Kennedy's bill would prohibit the intentional distor-

Feb. 2, 2001) (noting that "the number of contracting parties to the Berne Convention went from 50 in 1970 to 84 in 1990 and to 142 on Dec. 31, 1999.").

⁵⁶ See Request for Comments on the Waiver of Moral Rights in Visual Artworks, 60 Fed. Reg. 27329 (May 23, 1994) (noting that in this request for speakers, the copyright office sought to solicit comments on the United States's decision not to adopt Article 6*bis* of the Berne Convention that requires countries to provide protection of the moral rights of artists). "Federal and State, statutory and common, [laws] were sufficient to meet the requirements of the Berne Convention. . . [and that] Congress. . . therefore did not include any substantive moral rights provisions in the Berne Convention Implementation Act." H.R. REP. NO. 514, 101st Cong., 2d Sess., at 7-8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6918.

⁵⁷ See generally MASS. GEN. LAWS ANN. Ch. 231 §85S (West 2000) (declaring visual artists interest in protecting their work against "intentional physical defacement, mutilation, alteration or destruction." However, the rights under this section are deemed waived in situations where works are removed from a building. Rights of artists in such a case must be expressly reserved in writing).

⁵⁸ See generally CAL. CIV. CODE §987 (West 1999). California's statute declares that:

[t]he physical alteration or destruction of fine art which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine arts against any alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.

Id.

⁵⁹ See generally N.Y. ARTS & CULT. AFF. LAW §14.03 (McKinney 2000). New York's statute forbids any person other than:

[t]he artist or a person acting with the artist's consent. . . [to] knowingly display in a place accessible to the public. . . an altered, defaced, mutilated or modified form if the work is displayed. . . as being the work of the artist, or under circumstances which it would reasonably be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result therefrom.

Id.

⁶⁰ See *The Visual Artists Rights Amendment of 1986: Hearing on S. 2796 Before the Senate Subcomm. on Patents, Copyright & Trademarks of the Comm. on the Judiciary*, 99th Cong. 12-13 (1986) (amending the copyright law to secure rights of artists of sculptured works in preventing the mutilation of such works) [hereinafter VARA Amendment]; see also Visual Artists Rights Amendment of 1990, 17 U.S.C. 106A (2000) [hereinafter VARA]. Section 106A(a)(3)(A) specifically provides that authors have the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation." *Id.*

tion, mutilation or destruction of works of art after they had been sold.⁶¹ The Amendment would also empower artists to claim authorship, to receive royalties on subsequent sales, and to disclaim their authorship if the work is distorted. This legislation would allow an artist (or his heirs) to sue in order to reverse or to redress the alterations of any artwork.⁶²

Such moral rights legislation would have prevented Clement Greenberg and the executors of the Estate of David Smith from authorizing the stripping of paint from several of Smith's later sculptures so that they would resemble his earlier—and more marketable—unpainted sculptures.⁶³ Such moral rights legislation would have prevented a Japanese bank in New York from removing and destroying a marvelous Isamu Noguchi simply because the bank president did not like it.⁶⁴ And such moral rights legislation would have prevented the United States Government from destroying *Tilted Arc*.

If Senator Kennedy's moral rights bill was enacted, it would be legal acknowledgement that art can be something other than a mere commercial product. The bill makes clear that the basic economic protection now offered by United States copyright law is insufficient.⁶⁵ The bill recognizes that moral rights are independent from the work as property and that they supersede—or at least coincide with—any pecuniary interest in the work.⁶⁶ Moreover, the bill acknowledges that granting moral rights protection serves society's interest in maintaining the integrity of its artworks and in promoting accurate information about authorship and art. And most importantly, under the proposed bill, the destruction or mutilation of a work of art would be a federal crime.⁶⁷

On March 1, 1989, the Berne Convention Implementation Act was signed into law by President Reagan.⁶⁸ When I learned on

⁶¹ See generally VARA Amendment, *supra* note 60.

⁶² See *id.*

⁶³ "In 1965, as an executor of [sculptor] David Smith's estate, [Clement Greenberg] took it upon himself both to remove layers of primer from Smith's huge steel sculptures and to allow the fierce winters of Smith's upstate New York home to strip paint from finished pieces. Greenberg has always thought Smith's work looked better unpainted." Christine Temin, *The Life of America's Art Dictator*, BOSTON GLOBE, Apr. 3, 1998, at D14.

⁶⁴ A 1,600 pound metal sculpture entitled *Shinto*, created by Isamu Noguchi, was removed by the Bank of Tokyo Trust Company from its offices in New York in 1990. The artist was never notified of its removal and mutilation before being placed in storage. See William Grimes, *Is It Art or Merely a Safety Hazard?*, N.Y. TIMES, May 11, 1994, at C13.

⁶⁵ See Visual Rights Amendment of 1986, S. 2796, 99th Cong. 2nd Sess. (1986) (Edward Kennedy) (stating that this bill "incorporates the moral rights of artists to complement the basic economic rights already provided by the copyright statutes.").

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ Berne Convention Implementation Act, *supra* note 6.

March 13, 1989, that the government had started to dismantle *Tilted Arc*, I went before the United States District Court seeking a stay of the destruction so that my lawyers would have time to study the applicability of the Berne Convention to my case.

I expected, as would be the case in any other country that became signatories of the treaty, to be protected by the moral rights clause. This clause gives an artist the right, even after a work has been sold, to object to "any distortion, mutilation or other modification. . . prejudicial to his honor or reputation."⁶⁹ I learned, however, that for my case (and other cases like it), the treaty ratified by Congress is a virtually meaningless piece of paper because it excludes the key moral rights clause.⁷⁰ Those responsible for the censorship of the treaty are the powerful lobbies of magazines, newspapers, art book publishers, and probable political hacks.

Fearful of losing economic control over authors, and faced with the probability of numerous copyright suits, these lobbies pressured Congress into stating that the moral rights clause must not be enforced in the United States. The result of this omission is that publishers can continue to crop photographs; magazine and book publishers can continue to mutilate manuscripts; and black and white films will continue to be colorized. It also means that the federal government can continue to destroy art.

Subsequent to arguing my case, the Visual Artists Rights Act ("VARA"), a version of the Kennedy bill was passed in 1990.⁷¹ The GSA, once again in its repugnant notion of the law, immediately amended their contracts with artists so that the protection guaranteed by federal moral rights legislation would not apply.

⁶⁹ Berne Convention, *supra* note 5, at Article 6*bis*.

⁷⁰ See Berne Convention Implementation Act, *supra* note 6 (omitting to add any section comparable to Article 6*bis* of the Berne Convention Treaty).

⁷¹ VARA, *supra* note 60.

