CONNOISSEURSHIP CORRECTED: PROTECTING THE ARTIST, THE PUBLIC AND THE ROLE OF ART MUSEUMS THROUGH THE AMENDMENT OF VARA

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"In museums people can experience a sense of place and be inspired, one object at a time, to pursue the ideal of objectivity and be led from beauty to justice by a lateral distribution of caring. This is the object of art museums, perhaps even the poetics of art museums. If only one object at a time."[1]

James Cuno, President and Director of the Art Institute of Chicago

"[A]uthenticity stirs the human soul."[2]

Stephen Jay Gould, Harvard Professor of Paleontology

In the summer of 2005, the Metropolitan Museum of Art ("MET") excitedly paid over fifty million dollars for the Stoclet Madonna, a small devotional painting about the size of a piece of office paper (twenty-seven by twenty-one centimeters).[3] It was by far the most expensive piece of artwork the MET ever purchased,[4] due in whole to the fact that it was heralded as a lost work by the famous *quattrocentro* (fourteenth century) Italian painter Duccio di Buoninsegna (active 1278-1318).[5] Although it is now inconspicuously exhibited in the

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1. James Cuno, *The Object of Art Museums, in* WHOSE MUSE?: ART MUSEUMS AND THE PUBLIC TRUST 49, 73 (James Cuno ed., 2004).

2. Philippe de Montebello, *Art Museums, Inspiring Public Trust, in* WHOSE MUSE?: ART MUSEUMS AND THE PUBLIC TRUST 151, 162-63 (James Cuno ed., 2004).

3. Calvin Tomkins, *The Missing Madonna,* THE NEW YORKER, July 11, 2005, http://www.newyorker.com/archive/2005/07/11/050711fa_fact. The name "Stoclet Madonna" is derived from the last private owners of the piece, the Stoclet family. *Id.*

4. *Id.*

5. FREDERICK HARTT, HISTORY OF ITALIAN RENAISSANCE ART: PAINTING, SCULPTURE, ARCHITECTURE 104 (4th ed. 1994).

center of a second-floor gallery housing other early Italian pieces, the Director of the MET, Philippe de Montebello, has deemed this piece "the single most important purchase during my twenty-eight years as director."[6]

Duccio was a highly influential artist in Siena, Italy whose "creative imagination and overall vision" in the production of his major works would be emulated throughout the fourteenth century in Italy.[7] Adding to the value imbued by Duccio's preeminence in Early Renaissance painting, none of his small pieces survive, being either lost or destroyed.[8] At most, six to nine pieces are firmly attributed to Duccio.[9] Thus, any works subsequently attributed to him are not only a discovery,[10] but enormously valuable ones. As such, it would appear laudable that the MET was so determined to acquire the Duccio.[11] A premiere American art museum, the MET's mission is to "collect, preserve, study, exhibit, and stimulate appreciation for and advance knowledge of works of art that collectively represent the broadest spectrum of human achievement at the highest level of quality, all in the service of the public and in accordance with the highest professional standards."[12] The appropriateness of this massively expensive acquisition must be considered in light of the MET's mission and the role and definition of an art museum in our society.

Despite the difficulties in adequately defining the role of an art museum in modern society,[13] the American Association of Museums (AAM) has stated unequivocally that "[t]he commitment to *education* as central to a museum's public service must be clearly expressed in every museum's mission and pivotal to every museum's activities."[14]

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6. Tomkins, *supra* note 3.

7. Diana Norman, *Duccio: The Recovery of a Reputation, in* SIENA FLORENCE & PADUA, ART SOCIETY AND RELIGION 1280-1400: VOL. 1 INTERPRETATIVE ESSAYS 49, 68-71 (Diana Norman ed., 1995).

8. *Id.* at 49.

9. *Id.*

10. Prior to the discovery of the Stoclet Madonna, the "group of works generally attributed to Duccio [was] a relatively small one, amounting to only six to nine panel paintings." *Id.* at 49. Thus, any piece attributed to Duccio would be a "discovery," as it would not be part of the traditionally recognized repertoire.

11. The MET participated in a vigorous battle for the acquisition of the Stoclet Madonna. *See* Tomkins, *supra* note 3.

12. Metropolitan Museum of Art Collections Management Policy, http://www.metmuseum.org/works_of_art/collection_database/collection_management_policy.aspx (last visited Nov. 13, 2009).

13. Jennifer Anglim Kreder, *The Holocaust, Museum Ethics and Legalism*, 18 S. CAL. REV. L. & SOC. JUST. 1, 13 (2008). The author notes that "[i]t is unlikely that one could develop a definition of a museum that would satisfy all interested parties." *Id.*

14. AMERICAN ASSOCIATION OF MUSEUMS, EXCELLENCE AND EQUITY: EDUCATION AND THE PUBLIC DIMENSION OF MUSEUMS 1, 3 (Ellen Cochran Hirzy ed., 1992) (emphasis added); *see also* Kreder, *supra* note 13, at 13 ("The purpose of a museum is most

Indeed, the general public endorses and expects that a museum's role should be predicated on education.[15] This role as the educator both implicitly and explicitly carries with it the expectation that the museum will be "one of the most *trustworthy* sources of *objective* information."[16] Nevertheless, the difficulties of attribution of works of art may at times compromise the museum's position as the provider of objective and trustworthy information.

Assigning authorship to pieces of unsigned or unknown artwork involves an examination of the *provenance* accompanying a work, connoisseurship, or a stylistic evaluation, and in some cases, scientific analysis.[17] Provenance is the documentary "history of the object [that] should be traced beginning with its present location and working backwards as far as possible to its origins."[18] Connoisseurship is a subjective process wherein an art historian or expert makes a "determination of the authorship, date or place of origin of an art object on the basis of close examination and comparison."[19] These techniques are not infallible or dispositive—as the case of the Stoclet Madonna demonstrates.[20]

The surprisingly infirm provenance for the Stoclet Madonna, along with the refusal of the MET to conduct certain scientific analyses of the work, led some scholars to controversially doubt the attribution of the Stoclet Madonna to Duccio.[21] The late Professor James Beck of Columbia University published a book in 2006 which denounced the reckless practice of connoisseurship and explicitly rejected the Stoclet Madonna's attribution.[22] Beck was not alone. Florens Deuchler, a noted Duccio scholar, also rejects the attribution.[23] He places the work within the "orbit" of Duccio, but not by the artist's hand himself.[24] Regardless of which connoisseur may be correct,[25]

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commonly understood to be to educate the public.").

15. Cuno, *supra* note 1, at 18.

16. *Id.* (citing AAM survey conducted with respect to all types of museums) (emphasis added).

17. Raul Jauregui, *Rembrandt Portraits: Economic Negligence in Art Attribution*, 44 UCLA L. REV. 1947, 1960-63 (1997).

18. James Beck, *Connoisseurship: A Lost or a Found Art? The Example of a Michelangelo Attribution: "The Fifth Avenue Cupid,"* 19 ARTIBUS ET HISTORIAE 9, 27 (1998).

19. Gary Schwartz, *Connoisseurship: The Penalty of Ahistoricism*, 9 ARTIBUS ET HISTORIAE 201, 205 n.1 (1988).

20. The Stoclet Madonna has almost no provenance, and connoisseurship has lead to different conclusions as to its authorship. *See* discussion *infra* Part I.

21. *See* JAMES BECK, FROM RAPHAEL TO DUCCIO: CONNOISSEURSHIP IN CRISIS (2006) [hereinafter BECK, FROM RAPHAEL].

22. *See generally id.*

23. Tomkins, *supra* note 3.

24. *Id.*

25. That is to say, either the MET or the scholars who disagree with the MET's

the mere possibility that the MET displays a work unequivocally attributed to Duccio that *may* be incorrect cuts to the core of the educational role of the museum.[26] Thus, this controversy serves as a backdrop to examine the problems that misattribution poses to the study of art history and the mission of art museums, as well as the inadequacies of moral rights under federal law.

Moral rights are the inalienable personal rights of artists that recognize and shield the "embodi[ment] [of] the creative personality of the author"[27] and an "extension of the author's personhood" in artwork.[28] Composed of several individual and separable rights, one of the most important rights is the right of attribution.[29] "The right of attribution protects an artist's right to have (or not to have) her name associated with a particular work of art."[30] Misattribution, or the incorrect attribution of works to an artist, directly impinges upon an artist's right of attribution.[31] As such, museums play a pivotal role in guaranteeing and protecting visual artists' moral rights. An accurate attribution made permanent on a plaque can be a concrete assurance of the right of attribution. If incorrect, however, the same plaque can give tangible form to a permanent violation of moral rights. The controversy surrounding the attribution of the Stoclet Madonna demonstrates just such a quandary.[32]

It becomes clear that the museum's role occupies the intersection of two powerful interests. As discussed, the museum is the quintessential trusted and objective educator for the public, and contemporaneously, the protector and guarantor of the moral rights of artists.

Considering the precarious role of the MET and its confidence in

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attribution may be correct. This Author is admittedly unqualified to offer any opinion or to disagree with either of these preeminent scholars. Further, it should be noted at the outset that this Author does not intend this Note to argue for either an acceptance or rejection of the attribution of the Stoclet Madonna to Duccio.

26. *See* Cuno, *supra* note 1, at 18.

27. Edward J. Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733, 1734 (1984). The recognition of the personal aspect of art helps to explain why works for hire were often excluded from protection under moral rights provisions. It is much less likely that a work executed for hire embodies some personal or intimate aspect of the author's personality.

28. Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 355-56 (2006).

29. Richard J. Hawkins, *Substantially Modifying the Visual Artists Rights Act: A Copyright Proposal for Interpreting the Act's Prejudicial Modification Clause*, 55 UCLA L. REV. 1437, 1441 (2008).

30. *Id.*

31. *Id.* at 1442. Hawkins explains that "[a] common example of misattribution is a newspaper mistakenly crediting another for an actor's performance in a play." *Id.*

32. That is to say that if it is correctly attributed, it will ensure that Duccio's name is properly associated with the piece, and conversely if it is incorrect it will be a permanent violation.

paying the fifty million dollar price tag for the Stoclet Madonna, it would surprise many to learn that the piece is unsigned;[33] was not publicly exhibited until 1901;[34] has no provenance prior to 1901;[35] was originally attributed to an artist active after Duccio; and was only attributed to Duccio after an analysis of a *picture* of the painting, rather than the painting itself.[36] Given these issues, there exists a possibility that the Stoclet Madonna is incorrectly attributed, and thus, the misattribution of the Stoclet Madonna to Duccio violates his moral rights. Although the United States has moral rights legislation, as adopted in the Visual Artist's Rights Act of 1990 ("VARA"),[37] it provides no legal remedy in such a situation.[38]

As will be discussed, VARA falls woefully short of granting meaningful and broad moral rights to artists.[39] Most notably, deceased artists do not benefit from *any* of the protections of VARA.[40] As such, it is imperative that Congress amend VARA to make the right of attribution perpetual and grant community standing to enforce those rights where the artist is deceased. This Note will discuss the legal solutions that the amendment of the VARA could provide to ameliorate the hazards of the aforementioned issues of misattribution, increase the strength of American moral rights legislation, and protect and strengthen the role of museums in American society.[41]

Part I of this Note examines the inherent risks associated with assigning authorship to pieces of art. Although a highly important part of the sale and scholarship of art, this Part discusses the weaknesses of art connoisseurship. Also, this Part considers how those troubled methods of attribution cast considerable uncertainty in the assignation of authorship for the artwork of long-deceased authors. Part II maps the development of both the legal doctrine arising from misattribution and some of the solutions crafted by auction houses in response. This Part discusses the inadequacy and unpredictability of current common law doctrines developed to deal with misattribution.

Part III introduces and explains the philosophical and intellectual underpinnings of moral rights and tracks the development of moral rights legislation in Europe. This Part discusses the inherent personal nature of moral rights and the key distinction between mor-

33. BECK, FROM RAPHAEL, *supra* note 21, at 145.

34. *Id.*

35. *Id.* The painting's first published exhibition was in 1901, where it was attributed to a different, and much less famous artist. *Id.*

36. *Id.*

37. Visual Artists Rights Act, 17 U.S.C. § 106A (2006).

38. *See infra* Part III (discussing the limitations of VARA).

39. *See infra* Part IV.

40. *See infra* Part I.

41. 17 U.S.C. § 106A.

al and economic rights.

Part IV goes on to introduce and explain state preservation statutes and the emergence of moral rights in American law. This Part also discusses the adoption of VARA. This Part explains that VARA's stated goal of protecting the artist's honor and reputation is unattainable in light of its limitations when compared to European models.

Part V of this Note is a call on Congress to amend VARA. This Part posits that the European model of perpetual moral rights is a form of moral rights that should be implemented in American law. This Part goes on to suggest that perpetual moral rights could be combined with examples of community standing, readily available in state cultural preservation statutes throughout the United States, to vastly improve the actual protections VARA affords.

Lastly, Part VI revisits the solutions created by art auction houses to respond to liability for misattribution. This Part discusses how this model could be quickly and easily adapted as a pragmatic method of remedying a suit brought under an amended VARA.

Armed with these examples and their success, Congress could recreate a VARA that could ensure the protection of the moral rights of deceased artists, safeguard the societal position that museums occupy, and ensure that the public is given access to trustworthy and objective information.

I. ATTRIBUTION IN THE ART WORLD

It is often critical to art scholarship to identify authorship for a work of art.[42] Determining authorship may place a work in the overall repertoire of the artist, fleshing out his personal stylistic development.[43] Further, authorship can be pivotal in identifying the time, place, and perhaps impetus of artistic innovation. For example, the

42. *See* Joseph C. Gioconda, *Can Intellectual Property Laws Stem the Rising Tide of Art Forgeries?*, 31 HASTINGS COMM. & ENT. L.J. 47, 52-53 (2009).

43. For example, in 2003 a series of paintings thought to be by Jackson Pollock were discovered, and the battle over their dubious authorship was waged in the *New York Times*. Raymond Liddell, *Connoisseurship & Science Matters*, 28 ART NEW ENGLAND 1, 17-19 (2007). Liddell explained that although "scholars would prefer not to debate complex questions of connoisseurship and authentication in the press, the sensational nature of the 'discovery' and the prominence of the artist, not to mention the astronomical prices that Pollock's work commands in the market, made intense public interest and inquiry inevitable." *Id.* at 17. In this case, the determinative factor turned on a museum's choice of whether to display none, some, or all of the disputed works amongst their collection of firmly attributed works. *Id.* If the museum were to present these works amongst the other Pollock works, this could result in scholars attempting to fit those works into the stylistic trends and analyses of Pollock. While not a major concern if those works are indeed by Pollock, one could see the problem with the converse situation.

illusionistic shelf in the forefront of the Stoclet Madonna could, if the attribution to Duccio is correct, mark a revolution in perspectival style in the early Renaissance.[44]

Although primarily an issue of art scholarship, authorship is also absolutely essential to the business of art and the auction house.[45] Authorship is often dispositive in the assessment of the value of a piece of art, and auction houses will go to great lengths to certify authenticity when possible.[46] Two paintings of similar aesthetic appeal may be radically different in price if one of the paintings gains the "aura" that a famous artist's name provides.[47] Further, the association of a work with a particular artist imbues the "value of authenticity and proximity to the artist's unfettered intent."[48] Nevertheless, the methods of assigning authorship of unsigned works can be subjective, hazardous, and generally problematic.[49]

The Stoclet Madonna, for example, would certainly not have merited the fifty million dollar price tag were it not for the attribution to Duccio.[50] Despite the necessity of attribution, however, misattribu-

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44. BECK, FROM RAPHAEL, *supra* note 21, at 144. "Professor Beck said: 'We are asked to believe that the modest little picture represents a leap into the future of Western painting by establishing a plane in front of Mary and the Child. This feature, a characteristic of Renaissance not Medieval pictures, occurs only a hundred years after the presumptive date of the picture.'" Dalya Alberge, *$50M 'Masterpiece' Is Poor Forgery, Says Art Professor*, TIMES (London), July 6, 2006, at 30 (quoting Professor Beck). However, Keith Christiansen, the MET's curator of European Paintings has taken the opposite stance, stating that this is "the first illusionistic parapet in European art." *Id.*

45. Jauregui, *supra* note 17, at 1950.

46. Authorship provides the "irrational" economic value distinction between works of similar aesthetic appeal. Gioconda, *supra* note 42, at 52.

47. *Id.* The author further elaborates on this ephemeral distinction between works of similar aesthetic appeal:

> [E]conomic valuation in the art world is subjective and largely depends on the "aura" which an artwork has acquired. Regardless of its aesthetics, the perceived authenticity of the art work is at the core of the aura, giving it significant economic value during resale. Thus the difference between an art connoisseur paying $20 million for a genuine Van Gogh or a few thousand dollars if it is later deemed fake, is baffling when the exact same painting is still hanging on the wall. The art world is therefore perhaps the quintessential example of commodity fetishism in late capitalist economies.

Id. at 52-53.

48. Cambra E. Stern, *A Matter of Life or Death: The Visual Artist's Rights Act and the Problem of Postmortem Rights*, 51 UCLA L. REV. 849, 850 (2004).

49. The view that these methods are hazardous and problematic is not universally accepted. *See* Schwartz, *supra* note 19, at 202. Schwartz explains that many connoisseurs believe "that the object itself contains all the information needed to establish its authorship, and that this information can be interpreted properly by the observer who knows what to look for." *Id.*

50. *See* Tomkins, *supra* note 3. The author quotes Nicholas Hall, the international director of the Christie's Old Master Department as saying that "[w]e got [the right to

tion often compromises the goals of art history,[51] injects uncertainty into the business of art,[52] and impinges on artists' right of attribution.[53] Thus, although this exercise is one that is important and perhaps indispensable, it remains highly problematic. The techniques that scholars employ to attribute works, however hazardous, do merit brief discussion.

A. Provenance

In most cases, the most concrete form of evidence for the authenticity and authorship of a piece of artwork is a well-documented history.[54] The provenance of a piece of art is the documented history of a particular work.[55] The MET defines provenance as including the following information:

> [1] the ownership history of the work of art;
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> [2] the countries in which the work of art has been located and when;
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> [3] the exhibition history of the work of art, if any;
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> [4] the publication history of the work of art, if any; [and]
>
> [5] whether any claims to ownership of the work have been made.[56]

The provenance of a work could also include the original documents that accompanied its purchase or commission, as well as inventory histories, guidebooks, published scholarship, exhibition evidence, and various other documents.[57] A firm provenance would demonstrate a complete documented history of the location and ownership of a particular work.

Unfortunately, because of the turbulence of the passage of time and the ceaseless movement of valuable works, many have gaps in their provenance where ownership or location of the work changes

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auction the Stoclet Madonna] by putting a significantly higher valuation on the painting than anyone else—by multiples—based on its being the last Duccio in private hands and its being so impeccably preserved." *Id.*

51. *See* discussion *infra* Part I.A (discussing how misattribution can cause works to be improperly fit into the scholarship on artists).

52. *See* discussion *infra* Part II.

53. *See infra* Part III.

54. *See* Bruce W. Burton, *In Search of John Constable's* The White Horse*: A Case Study in Tortured Provenance and Proposal for a Torrens-Like System of Title Registration for Artwork*, 59 FLA. L. REV. 531, 538-39 (2007).

55. Beck, *supra* note 18, at 27.

56. Metropolitan Museum of Art Collections Management Policy, http://www.metmuseum.org/works_of_art/collection_database/collection_management_policy.aspx (last visited Nov. 13, 2009).

57. Michael Jaffee, *Provenance,* OXFORD ART ONLINE, http://www.oxfordartonline.com:80/subscriber/article/grove/art/T069868.

without any record.[58] The gaps are problematic because they can lead to the loss of information related to a specific work. Consequently, the longer the gap in documentation, the more dubious the provenance of the work. Because immaculately kept records are rare with paintings that are hundreds of years old, it is often necessary to supplement these incomplete records with a careful study of the stylistic elements of the piece.[59]

B. Stylistic Attribution/Connoisseurship

Stylistic analysis, or its uncertain counterpart—connoisseurship—varies in application, but generally focuses on the "composition, drawing, brushwork, modelling, expression, technical or anatomical features . . . which manifest the hand of the maker."[60] A connoisseur is a scholar who becomes so adept at analyzing and appreciating the styles of particular artists, that he or she can supposedly assign authorship by simply studying the work.[61] These experts[62] rely on works that are firmly attributed to a particular artist as the starting point,[63] and then compare particular aspects to the subject work – seeking either points of comparison or contrast.[64]

This approach recognizes that a group or circle of painters in a particular time and place are likely to share similar styles that respond to a localized aesthetic.[65] This analysis is often coupled with an examination of the secondary elements of a work.[66] These ele-

58. *Id.* This article also notes other problems, including looted works with forged provenance and mismatched provenance documents. *Id.*

59. The Duccio example is an instructive example, as it has almost no provenance. BECK, FROM RAPHAEL, *supra* note 21, at 145. "[T]he fact remains that the *Metropolitan Duccio* is a pure attribution . . . , which no documents or other historical evidence from the artist's lifetime confirm. What is more, there is no information about the painting's existence until 1901, six hundred years after the presumptive date of its creation." *Id.*

60. Schwartz, *supra* note 19, at 202.

61. *See generally* Beck, *supra* note 18. One art historian described the process a viewer should follow, writing that the connoisseur should "establish a routine for examining various components, like spontaneity of line, imitation of substance, the sensation of visual depth, clear division between essential and secondary elements." Janos Scholz, *Connoisseurship and the Training of the Eye*, 19 COLLEGE ART J. 226, 228 (1960).

62. There is no doubt that many connoisseurs are, undoubtedly, experts in their field.

63. J. Vakkari, *Giovanni Morelli's "Scientific" Method of Attribution and its Reinterpretations from the 1960's Until the 1990's*, 70 KONSTHISTORISK TIDSKRIFT 46, 47 (2001).

64. *Id.* at 47-48.

65. Jauregui, *supra* note 17, at 1962.

66. *Id.*

ments often treated the same by artists as a result of habit.[67] For example, the artist's "signature may consist of the identical hands and ears that link several portraits."[68] This method of attribution is frequently applied to early Renaissance Italian works, and indeed, to the Stoclet Madonna.[69]

Employing stylistic analysis or connoisseurship to identify authorship is replete with risks.[70] Initially, identifying a work based on analyzing chronological or geographical stylistic trends ignores that artists may purposely emulate works of a different time or place or stylistically innovate independently.[71] Further, the misplacement of a particular work can alter the paradigmatic control-group style.[72] For example, the illusionistic parapet in the Stoclet Madonna could be added as a stylistic signal to the repertoire of Sienese painting in the early fourteenth century. If the attribution to Duccio is incorrect, this could result in a false stylistic element added to the recognized early fourteenth century Sienese painting style. The subsequent recognition of similar elements in other unsigned works could misplace those works, thereby hampering the process of art scholarship in that field.[73]

Another issue that plagues the use of stylistic analysis to identify particular artists is the early Renaissance workshop practice. Workshop painters, often students and followers of the head artist,

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67. *Id.*; *see also* Vakkari, *supra* note 63, at 47.

68. Jauregui, *supra* note 17, at 1962.

69. *Id.*

70. Indeed, the process has endured years of "considerable skepticism" about its "validity." Hal Opperman, *The Thinking Eye, the Mind that Sees: The Art Historian as Connoisseur,* 11 ARTIBUS ET HISTORIAE 9, 9 (1990).

71. Another example from the time Duccio was active is the sculpture of *Daniel* from the Pisa Baptistery in Pisa, Italy by Nicola Pisano (ca. 1260). Here, Frederick Hartt noted that the artist was clearly responding to classical examples, as "[the figure of Daniel] was imitated from a figure on a Roman Hercules sarcophagus." HARTT, *supra* note 5, at 67. There are other characteristics in this example that make the sculpture more identifiable, but this example aptly demonstrates that artists have responded, and will continue to respond, to influences that may not fit the chronological and geographical stylistic categories created by scholars. *See id.* Thus, even though this particular work would be difficult to misplace given its placement in a contemporary church, it illustrates how works could be misattributed as a much earlier work because of the artist's desire to mimic classical styles.

72. A hazard that Schwartz noted, writing that "[t]he disappearance from sight of the entire oeuvres of many documented masters distorts the record, so that the connoisseur's [historical] categories do not correspond to historical reality." Schwartz, *supra* note 19, at 202. He analogizes the situation as "if the sorted contents of a number of containers were dumped on a heap, half the containers were broken, and one then tried to sort the same material into the remaining containers. It may be a valuable, perhaps necessary exercise, but one should not entertain any illusions concerning its truth to historical fact." *Id.*

73. *See id.*

would sometimes render the secondary elements of a work, leaving the most difficult or largest parts to the master.[74] Thus, the identification of a particular signature in the treatment of secondary features may accurately implicate a certain workshop, or a follower or student, but not the master himself.[75] In the case of Duccio, the problem is exacerbated by his extremely prolific workshop.[76]

In addition, there is the inherent issue of the subjectivity of the viewer, or connoisseur.[77] As the controversy over the Stoclet Madonna demonstrates, acclaimed art history academics may reasonably differ over the analysis of a work's stylistic elements.[78] As Lord Evershed noted in a famous English case where the plaintiff was prevented from rescinding a purchase contract for a forged painting:

> [T]he attribution of works of art to particular artists is often a matter of great controversy and increasing difficulty as time goes on . . . . There may turn out to be divergent views on the part of artists and critics of great eminence, and the prevailing view at one date may be quite different from that which prevails at a later date.[79]

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74. For example, a serious debate was waged over whether certain scenes held by various galleries were either the work of Giotto, his workshop, or a combination of both, as based on differences in style on the components of the figures. *See* Dillian Gordon, *A Dossal by Giotto and His Workshop: Some Problems of Attribution, Provenance, and Patronage,* 131 THE BURLINGTON MAG. 524, 527 (1989). There the author settled on a determination that "it seems likely that the design and part of the execution were Giotto's and that the altar-piece was completed by his workshop." *Id.* The scholarly debate focused on this Giotto work demonstrates the difficulty the workshop practice can present to those seeking the individual hand of the artist at work.

75. Such is the case with the Giotto dossal. *See id.*

76. Norman, *supra* note 7, at 49. Thus, the Stoclet Madonna could possibly be a product of one of his students or followers, perhaps even based on an original work by Duccio. *Id.*

77. This problem is intensified because often connoisseurs conduct their stylistic analysis of the work on photographs. Jeffrey Orenstein, *Show Me the Monet: The Suitability of Product Disparagement to Art Experts*, 13 GEO. MASON. L. REV. 905, 906 (2005). Indeed, the MET's Duccio was originally heralded as a Duccio based on the examination of a photograph. *See* BECK, FROM RAPHAEL, *supra* note 21, at 146. In one famous instance, Theodore Stebbins, the preeminent expert on the painter Martin John Heade, was enlisted by Sotheby's to authenticate a Heade work. Orenstein, *supra* note 77, at 905. Stebbins authenticated the work based on a transparency and photos of the work. *Id.* As the auction approached, Stebbins grew uneasy with his attribution. *Id.* Stebbins rushed to Sotheby's, and based on his in-person analysis, convinced Sotheby's to withdraw the work from the auction because he determined it to be inauthentic. *Id.*

78. The curator of the MET's European paintings, Keith Christiansen, wholeheartedly agrees with the attribution to Duccio. Tomkins, *supra* note 3. However, James Beck comes to the opposite conclusion. *See generally* BECK, FROM RAPHAEL, *supra* note 21.

79. Leaf v. Int'l Galleries, (1950) 2 K.B. 86, 94 (Evershed, M.R., separate opinion).

Thus, despite auctioneers' and experts' best wishes or intentions, authorship is inherently fluid,[80] and subject to rapid change. Nevertheless, many have enlisted the help of science to solidify the accuracy of attribution.

C. Scientific Analysis

Scientific methods are sometimes employed to assist in the determination of authorship of unsigned works, particularly older art. Experts may use dendrochronology and radiocarbon dating to date the age of the wood carrier and canvas of a work.[81] These tests are rarely dispositive as they offer only a range of dates during which the work was executed.[82] Thus, despite the indisputable accuracy of these methods, final decisions on assigning authorship often rest on opinion. Liddell explains this dilemma in his article:

> If the date is consistent with the attribution to a specific artist it can be supporting evidence, but, by itself, it proves neither the identity of the artist nor the date of the painting. Skillful forgers routinely strip pigment from old panels of wood or old canvases to repaint them in the style of more important masters of the period.[83]

Because of the limitations of these methods, the relationship between proponents of pure scientific analysis and connoisseurs who must often make the final determination is sometimes bitter.[84] Ultimately, without a valid signature or firm provenance detailing a painting's journey, many paintings remain subject to the caprice of connoisseurs.[85]

While authors have proposed various ways to legally curb the reckless[86] practice of connoisseurship—such as product disparage-

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80. Some argue that connoisseurship embraces, or at least should embrace, the fluidity of art as advancing the goals of art history. *See* Opperman, *supra* note 70, at 12. "[T]he value of the intuitive and hypothetical approach shared by connoisseurship and other forms of scientific inquiry does not lie in their arrival at immutable facts or 'truths,' but rather in their fruitfulness in leading to still other hypotheses, thereby broadening our understanding." *Id.*

81. *See* Liddell, *supra* note 43, at 17-19.

82. *See* Samuel Butt, *Authenticity Disputes in the Art World: Why Courts Should Plead Incompetence*, 28 COLUM. J.L. & ARTS 71, 73 (2004).

83. Liddell, *supra* note 43, at 18.

84. *See id.* at 18-19; *see also* Butt, *supra* note 82, at 73 (noting that the tests "can at least prove the negative – that the artist in question did not create the work . . . however [the testing] cannot be . . . conclusive concerning the positive"). Despite its limitations, some do not see scientific testing as being opposed to connoisseurship, believing that the combination of connoisseurship is properly matched with other analyses, yielding "reliable result[s]." Butt, *supra* note 82, at 73.

85. As Samuel Butt notes, "[a]t best, such [scientific] analyses demonstrate only that materials used are consistent with those known to have been used by an artist and available to her during her lifetime." *Id.*

86. Connoisseurship that does not aim to identify a *specific* author, but rather

ment claims, large international connoisseur organizations, and even statutory immunity for art experts[87]— these solutions are improperly focused. A better solution admits the fundamental weaknesses of connoisseurship and tailors a response to those issues, rather than simply picking who must bear the liability in the event of a mistake, or designating who should serve as the authority on assigning authorship. This preferable solution requires public displays of art to acknowledge any doubts or issues associated with the attribution of a particular work, so as to encourage scholarly debate, and not risk purveying false information to the public. Conceding that connoisseurship is an imperfect science, and applying this to the role of connoisseur would limit their exposure to potential liability. Such a system is not without precedent, as auction houses employ a similar method to avoid liability.[88]

II. ART AUCTIONS AND THE LAW OF ATTRIBUTION

Misattribution is more pragmatically dangerous to buyers, sellers, and the auction houses that accommodate both in the sale of fine art. Faulty attribution can instantly render a multi-million dollar painting worthless.[89] The owner of an acclaimed masterpiece may suddenly find herself the owner of a common antique.[90] Over the last century, as the value of fine art has risen astronomically,[91] con-

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helps in identifying the style and age of a work may not be as reckless, as these designations are not only more likely to be correct in light of their generality, but will also not cause a work to gain astronomical value.

87. Orenstein, *supra* note 77, at 906. Another author suggests creating a system whereby a centralized organization verifies all provenance and attribution. *See, e.g.*, Burton, *supra* note 54.

88. *See infra* Part II.

89. *See, e.g.*, Firestone v. The Union League of Phila., 672 F. Supp. 819 (E.D. Pa. 1987). There plaintiffs purchased a painting that was attributed to Bierstadt for $500,000. *Id.* at 821. A year later an article was published by a noted scholar that claimed that the work was by John Key. *Id.* at 820-21. The value of the painting then plummeted to $50,000, and plaintiffs brought suit seeking rescission and damages. *Id.* at 821.

90. This was the case in a recent suit brought against Christie's auction house in England. Thomson v. Christie Manson & Woods Ltd., (2004) Q.B. 1624. In *Thomson*, a Canadian art collector, Taylor Thomson, paid $3.5 million for porphyry vases with gilt-bronze handles. *See* William Hamilton, *Hot Bids and Cold Sweat*, N.Y. TIMES, June 3, 2004, at F1. The vases were supposedly from Louis XV and were sold by the Marquess of Cholmondeley, who provided impeccable provenance. *Id.* Nevertheless, doubts surfaced about their authenticity, and the owner concluded they were nineteenth century works valued near $55,000. *Id.* Taylor sued Christie's, but his case was overturned on appeal because the court found that Christie's had no reason to doubt their authenticity. *Id.*; *see generally* 1 RALPH E. LERNER & JUDITH BRESSLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS 370-71 (3d ed. 2005) (discussing artwork transactions by auction houses and their liability).

91. *See generally* LERNER & BRESSLER, *supra* note 90, at 321-22 (explaining the

flicts over authenticity and authorship have inevitably entered the judicial arena.[92]

A. Auction House Liability for Misattribution

Perhaps nowhere is the problem of authenticity as prevalent and expensive as it is in auction houses dealing in fine arts.[93] During the early twentieth century, plaintiffs who had purchased misattributed or inauthentic works brought suit against auction houses seeking redress based on fraud and often sought rescission of the purchase contract.[94] These few cases did not create viable doctrine, as "such cases did little to defeat the public perception of an auction house as a mere (and protected) conduit between seller and buyer."[95]

Other suits brought against auction houses for misattribution employed the principles of express and implied warranties under the Uniform Commercial Code (UCC).[96] Pursuant to the UCC, "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."[97] Plaintiffs will often point to the auction house's catalogue listing the works for sale and the statements of auctioneers and sellers[98] as the "affirmation[s] of fact or promise[s]"[99] that the work is indeed authentic and by the hand of the artist identified in the catalogue.[100]

For example, in *Balog v. Center Art Gallery–Hawaii, Inc.*, the Hawaii Federal District Court allowed plaintiffs to prosecute a

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upward growth of the art auction market, and noting that Christie's and Sotheby's now each report gross sales over $1 billion per year).

92. *See* Butt, *supra* note 82, at 74.

93. *See* LERNER & BRESSLER, *supra* note 90, at 259-61 (noting the meteoric rise in auction house sales and commissions).

94. *See id.* at 366; *see also, e.g.*, Pasternack v. Esskay Art Galleries, Inc., 90 F. Supp. 849 (W.D. Ark. 1950) (finding that statements made by seller of jewelry were so essential to the high price paid for the pieces that they were statements of material fact, and thus created a warranty); Plimpton v. Friedberg, 166 A. 295 (N.J. 1933) (holding that seller could be liable if jury determined he knew the paintings sold were worthless, where plaintiff paid $18,000 for paintings worth $500 – $1000).

95. LERNER & BRESLER, *supra* note 90, at 366.

96. *See* William W. Stuart, *Authenticity of Authorship and the Auction Market,* 54 ME. L. REV. 71, 74-77 (2002).

97. UCC § 2-313(1)(a) (2005).

98. Stuart, *supra* note 96, at 74-77. This legal theory was first advanced in a British case, *Jendwine v. Slade*, 170 Eng. Rep. 459 (K.B. 1797), where plaintiff sued an auction house on a warranty theory where the auction house's catalogue listed the work as being by a particular artist. 170 Eng. Rep. at 459. The plaintiff claimed that this catalogue created an express warranty. *See* Stuart, *supra* note 96, at 74.

99. UCC § 2-313(1)(a) (2005).

100. *See* Stuart, *supra* note 96, at 74-75.

breach of express warranty claim against defendants where the defendants had guaranteed the authenticity of works that were in fact forgeries.[101] Thus, *Balog* stands for the proposition that "statements of attribution such as catalogue listings give rise to an express warranty."[102] Cases of this type presented problems for plaintiffs, as under the UCC, a plaintiff must prove that the express warranty was made as a statement of fact and not as a mere opinion.[103] A defendant could argue that the attribution was based on nothing more than the opinion of an expert.[104] Thus, this legal doctrine is inadequate to stem the rising tide of inauthentic or misattributed works being sold in auction houses.

B. Solutions to Misattribution Liability

Responding to the potential for liability premised on cases like *Balog* and others, many auction houses sought to limit their liability by expressly disclaiming all warranties.[105] Auction houses could then attribute works to famous names, reap the benefits of high prices, and, if the attribution turned out to be incorrect, have a valid defense through disclaimer under the UCC.[106] The New York legislature quickly responded in the 1980s by codifying a law that prohibited this maneuver.[107] Also, it blocked sellers from claiming that their attribution was simply an opinion.[108] The statute provided that:

> Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant a certificate of authenticity or any similar written instrument it: (a)

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101. 745 F. Supp. 1556, 1558 (D. Haw. 1990).

102. Stuart, *supra* note 96, at 77. However, UCC § 2-313(2) allows auctioneers to offer a disclaimer as to authenticity of authorship so long as their attribution is merely an affirmation "of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods." UCC § 2-313(2) (2005).

103. *See* Yuzwak v. Dygert, 534 N.Y.S.2d 35, 36 (App. Div. 1988) (noting that in an action for breach of express warrant under the UCC that "[w]hether representations made by a seller are warranties and, therefore, a part of the bargain, or merely expressions of the seller's opinion . . . is almost always a question of fact for a jury's resolution").

104. *See, e.g.*, Levin v. Dalva Bros., Inc., 459 F.3d 68, 77 (1st Cir. 2006) (noting that "[i]f the [UCC] were to apply, then the district court may have been correct to instruct concerning the distinction between opinion and fact," as the defendant claimed his attribution was just an opinion).

105. Stuart, *supra* note 96, at 74.

106. This situation was one of the chief concerns for the enactment of the New York law. *See* Memorandum of the Attorney General of New York Concerning Warranties in the Sale of Fine Arts, *in* FRANKLIN FELDMAN, STEPHEN E. WEIL & SUSAN DUKE BIEDERMAN, 2 ART LAW: RIGHTS AND LIABILITIES OF CREATORS AND COLLECTORS 99, 100-01 (1986); *Levin*, 459 F.3d at 77.

107. *See* N.Y. ARTS & CULT. AFF. LAW § 13.01 (McKinney 1984 & Supp. 2009).

108. *Id.*

> Shall be presumed to be part of the basis of the bargain; and (b) Shall create an express warranty for the material facts stated as of the date of such sale or exchange.[109]

One of the early cases brought under this law made its force clear.[110] In *Dawson v. G. Malina, Inc.*, the plaintiff purchased several Chinese jade and ceramic art pieces from the defendant gallery for over $105,000.[111] After purchasing the works, the plaintiff had the pieces analyzed by experts in London who expressed doubts about authenticity.[112] Shortly thereafter, the plaintiff brought suit under the New York law seeking rescission of the contract.[113] The court framed the issue by analyzing how the gallery authenticated the works, explaining that, "the issue presented here . . . is whether plaintiff Dawson has established by a fair preponderance of the evidence that the representations made by [defendant] were without a reasonable basis in fact . . . [when] these representations were made."[114] Applying the above standard, the court invalidated more than half of the sales, finding that the gallery had not sufficiently corroborated the pieces' provenance.[115] As such, the plaintiff was entitled to a refund of his purchase price.[116] Thus, the New York statute created a method of legal recourse for buyers of inauthentic or misattributed works.

This brief survey of some of the legal developments in art law makes it clear that issues of connoisseurship and attribution are real, and that they have tangible economic consequences.[117] Further, the New York law and laws that followed in other states[118] ultimately forced the auction houses to completely change the way they handled authorship in their catalogues.[119] Auction houses such as Sotheby's began granting limited warranties for set periods of time[120] and

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109. *Id.*

110. At the time of the facts occurring in this case, however, the governing law was contained in the N.Y. GEN. BUS. LAW § 219-b (McKinney 1968) (repealed by L.1983, 876, § 5). The substance of the two statutes are the same however.

111. Dawson v. G. Malina, Inc., 463 F. Supp. 461, 463-64 (S.D.N.Y. 1978).

112. *Id.*

113. *Id.* at 465.

114. *Id.* at 467.

115. *See id.* at 469-72.

116. *Id.* at 472.

117. *See generally* N.Y. ARTS & CULT. AFF. LAW § 13.01 (making sellers liable for misattribution); *see Dawson*, 463 F. Supp. at 472.

118. *See* LERNER & BRESLER, *supra* note 90, at 138; IOWA CODE § 715B.2 -.4 (2003); FLA. STAT. § 686.504 (2003); MICH. COMP. LAWS § 442.321-.325 (2001).

119. *See* discussion *infra* Part VI.

120. Sothebys warranted authorship for five years with respect to works created after 1869 and that the work was authentic (not counterfeit) with respect to works created before 1870. *See* LERNER & BRESLER, *supra* note 90, at 367.

adopted much more rigorous standards for attribution.[121] Those thorough authorship standards will be discussed *infra* as particularly instructive models for museums seeking to remedy suits brought under an amended VARA.

In addition to the economic hazards of connoisseurship, the jurisprudential doctrine born from it, and the resultant effects on auction house practice, misattribution can seriously impinge on the personal rights of artists.

III. MORAL RIGHTS

In a certain sense, the concepts undergirding moral rights can be understood by considering the nineteenth century philosopher Wilhelm Friedrich Hegel's belief that "one cannot alienate or surrender any universal element of one's self."[122] This "personality theory" of intellectual property is premised on the principle that an "idea exists as a manifestation of the creator's self."[123] It would be fitting then, that the greatest protection possible would be granted to these manifestations.

Indeed, much like this philosophical theory of intellectual property, moral rights emerged in European law to recognize and shield art, as it represented the "embodi[ment] [of] the creative personality of the author,"[124] and the "extension of the author's personhood."[125] Moral rights are broadly grouped into several categories. The right of attribution protects the artist's right to have her name correctly associated with a work, to correct misattribution, or conversely, to have her work left anonymous.[126] The right of integrity protects the work itself, allowing the artist to control any subsequent modification or mutilation.[127] The right of disclosure allows the artist alone to deem a work finished.[128] Finally, the right of withdrawal allows an artist to withdraw a work from public display at his choosing.[129] The right of attribution and its implied corollary, misattribution, will be the focus

121. *See infra* Part VI.

122. *See* J. Carolina Chavez, *Copyright's "Elephant in the Room": A Realistic Look at the Role of Moral Rights in Modern American Copyright,* 36 AIPLA Q.J. 125, 133 (2008) (citing Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 338 (1988)).

123. Chavez, *supra* note 122, at 133 n.52.

124. Damich, *supra* note 27, at 1734.

125. Rigamonti, *supra* note 28, at 355-56.

126. *Id.* at 363-65.

127. *Id.* at 365-67.

128. *Id.* at 362-63.

129. *See* Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 54 (1998); *see also* MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT: A TREATISE ON THE LAW LITERARY MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS § 8.21[A], at 8-247 (1987).

of this discussion.

The right of attribution, also referred to as the right of paternity,[130] is premised on the concept that an artist's work is an extension of self.[131] This personal connection between artists and their work makes attribution a critical matter for artists.[132] An author must be able to properly claim or disclaim authorship of a work of art because misattribution can drastically alter the artist's reputation.[133] Like other moral rights, the original concept of the right of attribution did not evaporate with the transfer of the physical work to a buyer of a piece but remained with the artist to enforce against any subsequent owners.[134] As such, the rights are considered "perpetual . . . lasting . . . [and] theoretically forever."[135]

A. The Rise of Moral Rights in Europe

The rise of the individual artist during the Renaissance fostered the early development of moral rights.[136] Artists gained increasing creative license, and this brought with it a recognition of the intimacy of the bond between author and creation.[137] Building on this tradition,[138] moral rights evolved throughout the nineteenth and early twentieth centuries in Europe as a codified alternative to copyright law that sought to shelter and develop the unique rights of artists.[139] French civil law, based on the concept of law as a "set of universally valid precepts, not . . . a mosaic of solutions to particular disputes,"[140] was philosophically suited to begin incorporating laws to protect rights that were "personal, eternal, [and] inalienable."[141]

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130. PAUL GOLDSTEIN & R. ANTHONY REESE, COPYRIGHT, PATENT, & TRADEMARK AND RELATED STATE DOCTRINES 889 (6th ed., Foundation Press 2004) (1973).

131. *See* Liemer, *supra* note 129, at 44, 47.

132. *Id.* at 47-48.

133. Despite its faults, VARA does at least cite the artist's reputation as being of the utmost importance. *See* VARA, 17 U.S.C. § 106A (a)(2) (noting that the artist "shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her *honor or reputation*") (emphasis added).

134. *See* Liemer, *supra* note 129, at 44.

135. *Id.* at 45. Although moral rights last indefinitely, or as long as the art itself does, some countries, like the United States, limit moral rights either to the lifetime of the artist or to the lifetime of the artist plus a defined number of years. *See infra* Part IV.B.

136. Chavez, *supra* note 122, at 132-33.

137. *See id.*

138. *Id.* at 133.

139. *Id.* at 133-34.

140. Patricia Alexander, *Moral Rights in the VARA Era*, 36 ARIZ. ST. L.J. 1471, 1471 (2004) (quoting R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (1968)).

141. Alexander, *supra* note 140, at 1472.

Pioneering the development of moral rights, French law divided the "works of the mind" into two distinct groups: *droits patrimoniaux*—economic rights closely akin to copyrights—and *droits moraux*—roughly translated as moral rights.[142] This separation of rights is referred to as a "dualistic" theory and rests on the concept that moral rights are "chronologically and systematically primordial" due in large part to their "perpetuity."[143] It is this "dualistic" structure that allowed the personal *droit moral* to be completely severable from many of the economic concerns central to other intellectual property laws, such as ownership and the duration of exclusive protection.[144]

This fundamental distinction acknowledges that while the economic structure of copyright law may have durational boundaries necessary and logical for the enforcement and litigation of those economic rights,[145] such restrictions have no bearing on personal rights that do not lessen over time.[146] The infinite duration of moral rights is based on the concept that the rights of the author do not simply evaporate at death or dissolve as a result of the passage of time.[147] Thus, the author could maintain the right to control certain aspects of her work without being the owner of the copyright or the work itself.[148] Free from the economic concerns of copyright law, moral rights were liberated and could be perpetual rights.[149] Thus, the French law recognizes that "the link between the author and his work exists as long as the work is capable of being communicated to

142. Damich, *supra* note 27, at 1734.

143. Adolf Dietz, *Alai Congress: Antwerp 1993: The Moral Rights of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 207 (1995). A separate school of theory, referred to as "monistic or synthetic," conflates the economic and moral, forcing the right to have a definitive duration, as the German and United States models demonstrate. *Id.* at 213 (citing Urheberrechtgesetz [Law on Copyright and Neighboring Rights] Sept. 9, 1965, BGBl. I. at 1273, ch. 4, art. 64(1), *translated as amended in 1993 in* 30 COPYRIGHT (WIPO), German text 1-101, at 5 (June 1994)).

144. *Id.* at 207.

145. *Id.* at 207-08.

146. Damich, *supra* note 27, at 1734; *see also* Chavez, *supra* note 122, at 131; Joan Pattarozzi, *Can the Australian Model Be Applied to U.S. Moral Rights Legislation?*, 15 CARDOZO J. INT'L & COMP. L. 423, 427-29 (2007).

147. Deitz, *supra* note 143, at 213.

148. Thomas J. Davis, Jr., *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 HOFSTRA L. REV. 317, 319 (1989). Thus, an artist could sell the work and lose any economic rights he would have had in that work, yet retain, in perpetuity, the right to paternity (or attribution) over that work. *See* Jill Applebaum, *The Visual Artists Rights Act of 1990: An Analysis Based on the French Droit Moral*, 8 AM. U. J. INT'L L. & POL'Y 183, 192-94 (1992). Thus, the artist could force the owner to properly attribute it to the artist in any display. *Id.*

149. *See* Damich, *supra* note 27, at 1734.

the public . . . [and] the personality of the author lives as long as the work itself exists."[150] In addition to being perpetual, the rights were universally applicable, because *droits moraux* were inalienable and, in most European countries, not waivable either expressly or implicitly.[151]

B. Moral Rights in International Law

European recognition of *droits moraux* eventually lead to their international codification. In 1928, the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") added Article 6*bis*.[152] This article, "which is universally understood as codifying the moral rights of attribution and integrity,"[153] provides that:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.[154]

Akin to the French model discussed *supra,* Article 6*bis* separates moral rights from economic rights, mandating that signatory nations maintain that authors retain the rights after the sale or donation of a work.[155] Article 6*bis* also provides that moral rights must last as long as the economic rights of an author, or alternatively, that they expire at death in countries whose laws at the time of signing did not include the protection of *any* copyright past death of the author.[156]

The express refusal to provide for perpetual moral rights in the Berne Convention is one of the reasons it is considered a "minimalist approach."[157] Unfortunately, the Berne Convention's minimalist approach was a major contributing force in the moral rights movement in state legislatures, all of which followed the limited Berne model.[158] Thus, any Congressional effort to adopt moral rights legislation was disadvantaged from the outset, as the regime of moral rights legisla-

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150. Dietz, *supra* note 143, at 213.

151. Liemer, *supra* note 129, at 44-45 (citing French law, Law No. 57-298 of Mar. 22, 1957, J.O., Mar. 14, 1957, 2723, B.L.D. 197; German Law of Sept. 9, 1965, v.4.7.1965 (BGB1 I S.2098)).

152. Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis* (1), July 14, 1967, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

153. Rigamonti, *supra* note 28, at 356; *see also* MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01[B] (2005); LIONEL BENTLEY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 231 (2d ed. 2004).

154. Berne Convention, *supra* note 152, art. 6*bis*.

155. *Id.* art. 6*bis*(1).

156. *Id.* art. 6*bis*(2).

157. Dietz, *supra* note 143, at 203.

158. *See, e.g.,* MASS. GEN. LAWS ch. 231, § 85(S) (2000).

tion in America that was used as a model for VARA was inadequately narrow.[159]

IV. STATE LEGISLATION AND THE VISUAL ARTISTS RIGHTS ACT

The United States was extremely slow in its accession to the Berne Convention, due in large part to the articles concerning moral rights.[160] The Anglo-American convention of utilitarian copyright law[161] is echoed by our Federal Constitution which expressly mandates that intellectual property law shall serve to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[162] This position unequivocally rejects the notions of natural law embodied in moral rights.[163] This fundamental tension has been the driving force behind Congress' consistent refusal to accede to international treaties containing moral rights provisions.[164] Indeed, "[i]t was widely believed that any hope of U.S. adherence to Berne hinged on finding a way of avoiding the express implementation of Article 6*bis* into U.S. law."[165] Congress' first foray into moral rights legislation and the Berne Convention affirmed this belief and avoided any recognition of moral rights.

A. The Berne Convention and State Moral Rights Law

In 1989, the United States acceded to the Berne Convention, nearly a century after its first adoption.[166] Consistent with Congressional opposition to moral rights, rather than add moral rights law to the copyright code,[167] the 101st Congress claimed that the moral rights of artists and authors were protected up to the levels required by Article 6*bis* under several state laws.[168] The United States de-

159. Dietz, *supra* note 143, at 203.

160. *See* Brett Sirota, *The Visual Artists' Rights Act: Federal Versus State Moral Rights,* 21 HOFSTRA L. REV. 461, 464 (1993).

161. Rigamonti, *supra* note 28, at 354.

162. U.S. CONST. art. I, § 8. Some argue that the Framers' intent also included the advancement of the public interest, as well as serving the utilitarian objectives of promoting development in the sciences and arts. *See* Davis, *supra* note 148, at 322. This conclusion would further support the idea of amending VARA, as the amendments advocated in this Note are largely aimed at benefitting the public's interest.

163. Pattarozzi, *supra* note 146, at 430-31.

164. Chavez, *supra* note 122, at 135.

165. Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229, 240 (1995).

166. Sirota, *supra* note 160, at 465.

167. *Id.*

168. *Id.*; *see also* H.R. REP. NO. 101-514, at 5 (1990). Some writers blamed Congress' failure to pass federal legislation on the matter on their belief that common law doctrines, coupled with state law and the law of contracts, would be sufficient. *See* Stuart,

fended this "dubious conclusion" by pointing to "nonliteral compliance" with Article 6*bis* by some Berne Union members and also to the remarks of the administrative body of the Berne Union, the World Intellectual Property Organization, which supported indulgent reading of the requirements.[169]

The state legislation cited by Congress were statutes that had slowly developed throughout the United States that provided for varying forms of limited moral rights.[170] These statutes were intended to protect the public interest in art by aiding in art preservation.[171] Most of the statutes provide for the right of attribution and the right of integrity, allowing artists to disclaim authorship or to prohibit the mutilation and defacement of their works.[172]

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supra note 96, at 75. Also, during the 1980s there were developing trademark law doctrines that were serving to guard the right of attribution, albeit without using the label of moral rights. *See, e.g.* Gilliam v. Am. Broad. Cos., 538 F.2d 14, 25 (2d Cir. 1976) (holding that extensive editing to the original form of Monty Python shows rose to a level that it violated § 43(a) of the Lanham Act, thus entitling plaintiffs to relief).

169. Hawkins, *supra* note 29, at 1445; *see also* H.R. REP. NO. 101-514, at 7. This distinction is dubious because, as Stuart notes, the state statutes varied in the level of protection afforded, as well as other "shortcomings." Stuart, *supra* note 96, at 317. Dr. Arpad Bogsch, Director General of the World Intellectual Property Organization had written:

> [I]t is not necessary for the United States of America to enact statutory provisions on moral rights in order to comply with Article 6*bis* of the Berne Convention. The requirements . . . can be fulfilled not only by statutory provisions in a copyright statute but also by the common law and other statutes. I believe that in the United States the common law and such statutes (Section 43(a) of the Lanham Act) contain the necessary law to fufill any obligation under Article 6*bis*.

The Berne Convention: Hearings Before the Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary United States Senate on S. 1301 and S. 1971, 100th Cong., 2nd Sess. at 323 (1988) (letter of Arpad Bogsch to Irwin Karp, Chairman of the National Convention, June 16, 1987).

170. *See, e.g.*, CAL. CIV. CODE § 989(a) (West 2009). Those states providing for a right of authorship include: Massachusetts, MASS. GEN. LAWS. ch. 231, § 85S (2009) ("The artist shall retain the right to claim and receive credit under his own name . . . ."); Rhode Island, R.I. GEN. LAWS. § 5-62-4 (2009) ("The artist shall retain at all times the right to claim authorship . . . of his or her work of fine art."); Connecticut, CONN. GEN. STAT. § 42-116t(b) (2007); Maine, ME. REV. STAT. ANN. tit. 27, § 303 (2009); Pennsylvania, 73 PA. CONS. STAT. ANN. § 2103 (2008); New Mexico, N.M. STAT. ANN. § 13-4B-3 (2002); and Louisiana, LA. REV. STAT. ANN. § 51:2154 (2003), which provides most interestingly, that a name *need not be provided,* when the name of the artist "does not appear on or in connection with the work of fine art in such a manner that it can be discovered with reasonable ease." This is perhaps the strongest statutory language opposed to connoisseurship in the United States. *See also* Davis, *supra* note 148, at 317.

171. *See, e.g.*, MASS. GEN. LAWS ch. 231, § 85S(a) ("[T]here is also a public interest in preserving the integrity of cultural and artistic creations."); *see also* Davis, *supra* note 148, at 326.

172. *See* statutes listed *supra* note 170.

Notwithstanding the laudable advance in moral rights in the United States that these statutes provided, none recognized perpetual moral rights.[173] Rather, the statutes can be grouped into two general categories: those that protect the moral rights solely for the life of the artist[174] and those that grant a defined number of years of protection after the death of the artist.[175] Due largely to this limitation, the framework for the expansion of the duration of moral rights cannot be gleaned from an analysis or importation of state law models.

The statutes, with the exception of California,[176] New Mexico,[177] and perhaps New York,[178] also conferred standing only on the artist.[179] In addition to these durational limitations, however, these three exceptions are important because they allow for community standing. This significant feature will be discussed in Part VI. Notwithstanding the existence of these statutes, Congress was poised to draft its own moral rights legislation. As early as the ninety-ninth Congress, between 1985 and 1987, legislators were rallying support to codify moral rights in federal law.[180]

B. The Visual Artist's Rights Act

Amid the state moral rights legislation of the 1980s, pressure mounted to adopt federal law protecting moral rights.[181] While artists and artist organizations argued for more expansive legislation, the United Kingdom overhauled its copyright law to effectuate the

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173. *See* Davis, *supra* note 148, at 325-54 (analyzing at great length all of the state preservation statutes).

174. *See, e.g.*, LA. REV. STAT. ANN. § 51:2154(B) (2003) (providing that only the aggrieved artist may bring an action, which, in practice, limits the protection to the life of the author).

175. *See, e.g.*, CONN. GEN. STAT. § 42-116t(d)(1) (2007) (granting rights for fifty years after the death of the artist).

176. *See* CAL. CIV. CODE § 989(c) (2007) (allowing interested community organizations, once approved, to assert artists' right of integrity).

177. *See* N.M. STAT. § 13-4B-3(E) (2002) (providing that the Attorney General may invoke a deceased artist's moral rights).

178. N.Y. ARTS & CULT. AFF. LAW § 14.08 (2009) (permitting the Attorney General to intervene in certain instances).

179. *See, e.g.*, 73 PA. CONS. STAT. § 2102-03 (2008) (allowing only the original artist to assert the rights conferred under Pennsylvania moral rights law).

180. Stern, *supra* note 48, at 856 n.37.

181. *See id.* at 855-56 (citing *Moral Rights in Our Copyright Laws Hearing on S. 1198 and S.1253 Before the Senate Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 101st Cong. 138 (1990)). Senator Kennedy was the chief proponent of VARA and first proposed a version in the 99th Congress. Stern, *supra* note 48, at 856 n.37. Steven Spielberg and George Lucas also voiced support for the earlier version. *Id.*

addition of moral rights.[182] The United States ultimately responded in 1990 when Congress passed VARA, which provided for the protection of the right of authorship and the right of integrity, with the goal of protecting "the reputations of certain visual artists and the works of art they create."[183]

VARA provided protection for two specific moral rights: the right of attribution and the right of integrity.[184] The right of attribution includes three distinct rights:

> [1] the right to claim authorship of the work;
>
> [2] the right to prevent the use of the author's name as author of a work which he or she did not create; and
>
> [3] the right to prevent the use of the author's name as author of the work if the work has been distorted, mutilated, or modified so as to prejudice the author's honor or reputation.[185]

It is clear from the third right that the artist's "reputation [and] honor" are extremely important aspects of the artist's moral rights under VARA.[186] Because art can be the public manifestation of aspects of the artist's personality, one can understand that an artist might wish to have his name only associated with his own works.[187] Analogously, an artist's reputation could be destroyed or severely damaged if another's work were improperly attributed to her. VARA provides a private right of action against those that might cause such damage.[188] Presumably, an artist can sue a museum displaying a work if that museum either incorrectly attributed it to him, or modified it in such a way as to violate his right of integrity.[189] To assume that every artist enjoyed these protections through VARA would be incorrect.

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182. Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 946 (1990) [hereinafter Damich, *Visual Artists Rights Act*] (citing Copyright, Designs, and Patents Act, 1988, ch. 48, § 12(1)).

183. H.R. REP. NO. 101-514, at 5 (1990).

184. 17 U.S.C. § 106A.

185. Damich, *Visual Artists Rights Act*, *supra* note 182, at 958.

186. H.R. REP. NO. 101-514, at 15-16 (1990).

187. *See* Rigamonti, *supra* note 28, at 355-56 ("The non-economic interests of authors are found worthy of protection because of the presumed intimate bond between authors and their works, which are almost universally understood to be an extension of the author's personhood.").

188. 17 U.S.C. §§ 106A(a)(2), (3)(A).

189. This is similar to what happened in *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995), a premiere VARA case where artists brought suit to prevent the alteration of a building's lobby where their art was installed. *Id.* at 80-81. The suit was dismissed by the trial court, and the Second Circuit affirmed, finding that the work was a "work made for hire" and thus not protected under VARA. *Id.* at 88; *see also* 17 U.S.C. § 101.

Notwithstanding the lofty intentions of VARA, the Act is extremely limited in its scope.[190] The Act only protects "work[s] of visual art," which includes "painting[s], drawing[s], print[s] or sculpture[s], existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."[191] The Act specifically does not cover "any work made for hire . . . any work not subject to copyright protection under this title,"[192] or a number of subsidiary works such as "poster[s], map[s], globe[s], chart[s], technical drawing[s], [and] diagram[s]," et cetera.[193]Thus, only select types of work are covered under VARA.[194]

The Act also provides that all works created on or after the effective date of the Act will enjoy the "rights conferred . . . for a term consisting of the life of the author."[195] Works created before VARA's effective date are also entitled to protection for the life of the author so long as the author still had title to the work when the Act became effective.[196] Subject to these provisions, any work by an artist that was deceased at the time VARA was passed is without any moral rights.[197] These rigid statutory requirements represent one of the greatest limitations on VARA.[198] Pursuant to this section, the Stoclet Madonna,[199] and an overwhelming number of priceless works in the

190. PAUL GOLDSTEIN & R. ANTHONY REESE, COPYRIGHT, PATENT, & TRADEMARK AND RELATED STATE DOCTRINES 889 (2004) ("Although section 106A defines attribution and integrity broadly, to include misattribution as well as nonattribution . . . *it subjects the rights to sweeping limitations.*") (emphasis added); *see, e.g.*, Pollara v. Seymour, 344 F.3d 265 (2d. Cir. 1993) (disallowing VARA protection for a work of art that was on political banner because VARA is inapplicable to advertising or promotion work).

191. 17 U.S.C. § 101.

192. *Id.* § 101(2)(B), (C).

193. *See id.* § 101(2)(A)(i)-(iii).

194. One of the major criticisms is that this does not meet the requirements of the Berne Convention. *See* Damich, *supra* note 27, at 947. The Berne Convention required protection for all literary and artistic works. Art. *6bis*. Not only does VARA not mention literary works, it has a very narrow definition of artistic works. 17 U.S.C. § 101(1). The courts have narrowed the applicability of VARA as well. *See generally* Damich, *supra* note 27.

195. 17 U.S.C. § 106A(d)(1).

196. *Id.* § (d)(2).

197. *See id.* § (d)(1)-(2).

198. Other authors have criticized this limitation. *See generally* Stern, *supra* note 48 (calling for extending the protection to be coextensive with economic copyright: life plus seventy years); Elizabeth Dillinger, *Mutilating Picasso: The Case for Amending the Visual Artist's Rights Act to Provide Protection of Moral Rights After Death*, 75 UMKC L. REV. 897 (2007) (proposing to allow moral rights to last as long as a work is considered valuable). This article, however, does not actually propose a workable standard for amending and remedying suits brought under VARA. *See* Dillinger, *supra*.

199. Duccio died in the fourteenth century.

United States, do not benefit from the protection of VARA.[200] Theoretically, the owner of a invaluable work by a deceased artist which is not covered by VARA is free to do what he wishes with the art—even destroy it.

In addition to the durational limitations imposed on VARA, standing represents a severe problem for those concerned with the moral rights of deceased artists. Despite the stated goals of many "preservation statutes," which claim that the recognition of moral rights benefits the entire community,[201] only the artist is allowed to vindicate those moral rights.[202] Consequently, although the public shares and benefits from the recognition of moral rights, they are completely powerless when the rights of dead artists are infringed. Indeed, this standing limitation has the *de facto* result of limiting moral rights to the life of the person with standing to enforce them.

There would be many benefits to amending VARA to address these specific issues. First, protection could be extended to the works of dead authors, which often have enormous historical and economic value. Second, broadening moral rights could inject legally created accountability into museums' attribution protocol.[203] Responsible attribution can only serve to bolster the objectivity of museums, a quality that is extremely important given their role in education.[204] Lastly, modification could provide the support and breadth VARA requires to become an important law to safeguard the moral rights of all authors, rather than its narrow and rarely litigated form.[205] Undoubtedly the suggestion that VARA could be widened in such a radical way may be met with skepticism. Nevertheless, the elements necessary to amend VARA are available and used throughout the United States.

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200. For example, the Portrait of Joseph Roulin by Vincent Van Gogh, purchased by the New York Museum of Modern Art for over $50 million in 1989, is not entitled to the protection of moral rights. *See* Michael Kimmelman, *How the Modern Got the Van Gogh*, N.Y. TIMES, Oct. 9, 1989, at C13. Because VARA does not protect this piece, the Museum of Modern Art could hang a plaque next to the piece attributing it to any artist it wished (violating Van Gogh's right of attribution), or cut it into smaller pieces to display in different rooms (violating the artist's right of integrity). Although these possibilities are perhaps preposterous, the possibility nonetheless amply demonstrates the inherent weakness in VARA's limitations.

201. For example, section 989(a) of the Civil Code of California provides that one reason for recognizing moral rights is the "public interest in preserving the integrity of cultural and artistic creations." CAL. CIV. CODE § 989(a) (West 2009).

202. *See* 17 U.S.C. § 106A(a).

203. *See infra* Part VI.

204. For a discussion of the museum's role as the objective educator, see Kreder, *supra* note 13, at 13-15.

205. *See* Alexander, *supra* note 133, at 1477-95 (discussing the few substantive VARA cases between its enactment and the article's publication).

V. MODIFICATION: DURATION AND STANDING

The archetypal "orthodoxy"[206] of *droits moraux* provides that moral rights are "perpetual, inalienable, non-seizable, and universal."[207] When the author dies his rights pass to his heirs and to the community, and what once was an intensely personal right becomes one of the community vis-à-vis art preservation.[208] It is this fundamentally "ephemeral"[209] nature of moral rights that brings them into conflict with concepts of property law, which rely on the owners' ability to do what they wish with the property they validly own.[210] Thus, one might expect that any expansion of VARA would certainly exacerbate this confrontation. However, as Joan Pattarozzi argued in her article on adopting amendments to VARA, the confrontation is not without analogous precedent:

> Modern property theory, however, as indicated by laws governing, e.g., nuisance, negligence, and trespass, acknowledges that [the right to own and enjoy one's property is] subject to limitations which ensure that one's enjoyment of his property does not cause harm to others. Likewise, moral rights, which ensure that . . . owners' use of creative property does not violate the integrity and reputation of a work's author, can coexist with modern property rights and economic property interests.[211]

This illustration makes clear that our modern property laws have effectively dealt with a similar confrontation of rights. The solutions balanced the fear of placing too onerous a burden on the property owner, whilst ensuring that the property does not harm others.[212] Thus, enforcing moral rights may implicate the property rights of the owner of such a work, but only to disallow any enjoyment of that property that would harm another's rights.[213]

A. Perpetual Moral Rights in Europe

To find a model of moral rights that provides for perpetual protection, one need only look to the legislative birthplace of *droits moraux* –France. The French Law provides that the right of attribution shall be "perpetual, inalienable, and imprescriptible [and that it] may be transmitted *mortis causa* to the heirs of the author [or to] another

206. *See* Rigamonti, *supra* note 28, at 355.

207. Applebaum, *supra* note 148, at 184.

208. *See id.* at 219-20.

209. Chavez, *supra* note 122, at 134.

210. *See* Pattarozzi, *supra* note 146, at 428-29.

211. *Id.* at 429.

212. *Id.*

213. As will be discussed in Parts V-VI, injunctive or declaratory relief to prevent violations of moral rights would be the only remedy available to one suing under this version of VARA. *See infra* Parts V-VI.

person under the provisions of a will."[214] French law distinguishes between the right, which belongs solely to the artist, and the prerogative to exercise that right.[215] Pursuant to French law, for example, the privilege to exercise the artist's right of attribution survives the artist and passes to her heirs in perpetuity.[216] In addition to France, Spain[217] also has moral rights legislation that provides for perpetual duration of those rights.[218] Through these laws, the artist's personality rights in her work pass to her heirs or to the community.[219] As such, these laws become powerful laws of cultural preservation.[220] Essentially, by vastly extending the persons who may invoke the moral rights laws, French law has "enacted 'a method of providing for private enforcement of th[e] public interest.'"[221]

Unfortunately, the Berne Convention did not require perpetual moral rights in its signatory nations.[222] Thus, Congress could tailor its moral rights legislation, VARA, with strict durational limitations.[223] In its current form, VARA completely ignores its European predecessors by not providing the delineation between economic and personality rights.[224] Without this critical distinction,[225] Congress

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214. Loi du Mars 1957 sur la Propriété Littéraire et Artistique [Law No. 57-298 on Literary and Artistic Property], (1957) O.J., *translated in* U.N. EDUC. SCIENTIFIC, & CULT. ORG. [UNESCO], COPYRIGHT LAWS AND TREATIES OF THE WORLD (1987) [hereinafter French Law].

215. LERNER & BRESSLER, *supra* note 90, at 1256. Certain moral rights, however, do expire at the author's death, such as the right to withdraw a work from publication and the right to make modifications to it. *Id.*

216. French Law, *supra* note 214.

217. Spanish copyright law recognizes the right of paternity as passing "without limitation in time." Law on Intellectual Property, Law No. 22, arts. 14-23 (Supp. 1981-83) *reprinted as amended and consolidated in* Copyright and Neighboring Rights Laws and Treaties (May 1988 insert), 27 COPYRIGHT: MONTHLY REVIEW OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION, Spain Text 1-01 at 4-6 (WIPO trans., 1988) [hereinafter Spanish Law].

218. Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of* Droit Moral *Between France and the United States,* 22 Colum.-VLA J.L. & Arts 361, 404-05 (1998).

219. *See id.*

220. *Id.*

221. *Id.* at 405 (*quoting* John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1041 (1976)).

222. Berne Convention, *supra* note 152, art. 6*bis*(2).

223. *See* 17 U.S.C. § 106A(d).

224. *Compare* Berne Convention, *supra* note 152, art. 6*bis* (2) ("[i]ndependently of the author's economic rights"), *with* VARA, 17 U.S.C. § 106A(b) ("whether or not the author is the copyright owner").

225. Article 6*bis* of the Berne Convention pays lip service to this distinction by providing that moral rights are "independent[] of the author's economic rights," yet mandating minimum protection that mimics economic protection. Berne Convention, *supra* note 152, art. 6*bis* (1).

designed VARA much like it did the general economic laws surrounding copyright and patent, which have detailed and rigid duration.[226] Although marking an important first step in moral rights protection in the United States, it is now time to bring VARA closer to its philosophical and legal foundation, as found in the laws of European countries.

A modification of VARA to make those rights perpetual would mean that Duccio's moral rights, and those of other long dead artists, would still exist. It is clear that the European models demonstrate a clear and coherent form for perpetual rights that could be adopted into American law.[227] To be effective, however, substantive changes such as these would require corollary procedural modifications.

B. Models for Statutory Standing

Creating perpetual moral rights for artists implicitly requires granting standing to others to enforce those rights. While French law passes those rights to the heirs of the artist,[228] this solution is less beneficial where many of the works to be protected are from Europe and are centuries old.[229] Instead, community standing appears to be a preferable solution where interested parties could assert the moral rights of deceased artists and sue for injunctive or declaratory relief. Indeed, community standing is almost implicit in the preservationist goal of moral rights: e.g., when an author dies, the personal right turns into the public's interest of art preservation. Creating this type of community standard has precedent in California law, and a VARA amendment could be modeled by reference to the California art preservation statute.[230]

California adopted section 989 of the California Civil Code in 1982 to protect the "public interest in preserving the integrity of cultural and artistic creations."[231] Although other state statutes pronounce similar goals,[232] California's statute best serves this objective by granting community standing to interested parties to effectively enforce the public's interest. The statute provides that "[a]n organi-

226. VARA is included in the copyright code at 17 U.S.C. §106A, and also contains a strict set of guidelines as the copyright duration statutes. *See, e.g.*, 17 U.S.C. §§ 301-305 (containing most of the copyright duration guidelines).

227. *See* Spanish Law, *supra* note 207; French Law, *supra* note 204.

228. *See* French Law, *supra* note 204, art. 6.

229. One could imagine the difficulty of tracking down the legitimate heirs of Duccio (active 1278-1318) who are alive, reside in the United States, and are willing to be named in a suit without the possibility of a monetary judgment in their favor.

230. *See* CAL. CIV. CODE § 989(c) (West 2009).

231. *Id.* § 989(a).

232. *See, e.g.*, MASS. GEN. LAWS ch. 231, § 85S(a) (2009) ("There is also a public interest in preserving the integrity of cultural and artistic creations.").

zation acting in the public interest may commence an action for injunctive relief to preserve or restore the integrity of a work of fine art."[233] This remarkable addition to the statute makes the critical recognition that enforcement of these moral rights is a significant matter of interest to the public and not just to the artist.[234] The public directly benefits from the accurate attribution of works to artists, and the prevention of posthumous mutilation to works.[235] Therefore, it is essential that the public be enabled to enforce the artists' rights.

Under California law, an organization, after learning of a potential violation of an artist's (even a deceased artist's) right of integrity, may bring suit to enjoin the conduct of a defendant.[236] Thereby, the public is empowered to preserve the artist's moral rights because of their public interest in maintaining "cultural and artistic creations."[237] The public's interest is, much like the artist's interest, one of moral value, not economic value.[238] Unfortunately, there is no published precedent dealing with or interpreting this statute. Thus, the full breadth of its validity is speculative.

This law, however, is not without significant limitations. For example, the California Legislature explicitly limited standing to enforce violations of the right of integrity in cases of "physical defacement, mutilation, alteration, or destruction of a work of fine art."[239] The statute's only shortcoming is in its failure to recognize that the right of attribution to disclaim authorship similarly implicates the public interest to a level that requires a grant of standing to interested groups. Notwithstanding this limitation, California's statute should provide an instructive model for the expansion of VARA.[240]

Congress could follow the working models of European moral rights legislation and amend VARA to provide for perpetual rights for all authors of works of a recognized stature.[241] The right to en-

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233. CAL. CIV. CODE § 989(c). An organization is defined as "a public or private not-for-profit entity or association, in existence at least three years at the time an action is filed pursuant to this section, a major purpose of which is to stage, display, or otherwise present works of art to the public or to promote the interests of the arts or artists." *Id.* § 989(b)(2).

234. *Id.* § 989(c).

235. *See id.* § 989(e).

236. *See id.* § 989(c).

237. *Id.* § 989(a).

238. *Id.* § 989.

239. *Id.* § 989(c) (providing that a public organization may only bring suit in case of violations of section 987(c) of the Civil Code of California, which prohibits violations of the right of integrity, and not authorship).

240. One might also consider the Spanish copyright code which provides that the state may inherit and enforce both the rights of attribution and integrity. *See* Spanish Law, *supra* note 217, arts. 15-16.

241. Protection under VARA is limited to works of a recognized stature according to

force these rights would pass to the community at the death of the author, and the public would "inherit" a right or interest in the diligent preservation of art. Additionally, mimicking the California statute,[242] VARA would provide an avenue for interested groups to vindicate the moral rights of artists in the name of art preservation. Thus, a group of concerned art historians taking issue with the attribution of a piece of work could sue a museum for injunctive relief for displaying a work with the name of a particular artist.

A suit such as this, of course, could present severe problems for a museum that strongly disagrees with the position of the interested group. A situation where the court would be the final arbiter of authorship is no more acceptable than the current connoisseurship problem.[243] Rather, an equitable solution would have to carefully balance the ownership rights of the museum and the moral rights of the author. If the court were to only act as a fact-finder to determine whether the scholarly debate merited action, injunctive relief would be a permissible remedy without judicial determination of authenticity. Essentially, a museum could be prevented from showing a work with an unequivocal attribution to a particular artist when it does not have sufficient evidence to justify that attribution. In response, as will be discussed next, a museum could adopt a more fluid scale of attribution. Such a solution has a history in art law, as art auction houses created just such a system in response to the issues of attribution.

VI. AUCTION HOUSE AUTHORSHIP STANDARDS AS A SOLUTION

As discussed *supra,* auction houses have been exposed to liability because of incidents of incorrect attribution.[244] As a result of this liability associated with misattribution, many of the largest auction houses in New York created a more precise system of attribution.[245]

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17 U.S.C. 106A (a)(3)(b); *see also* Roberta Kwall & Raymond Niro, SL077 ALI-ABA 687, 693-94 (discussing some of the case law surrounding this portion of VARA).

242. CAL. CIV. CODE § 989(c) (West 2007).

243. *See* Butt, *supra* note 82, at 72 ("[C]ourts should not adjudicate disputes that concern authenticity in cases where the court becomes the determinant of the authenticity of a work by application of the relevant laws and legal standards."); Hawkins, *supra* note 29, at 1473 ("When art intersects with law, critics often raise the concern that judges and juries are ill equipped and untrained to act as art critics.").

244. *See supra* Part II.

245. Kai B. Singer, *"Sotheby's Sold Me a Fake!"–Holding Auction Houses Accountable for Authenticating and Attributing Works of Fine Art*, 23 COLUM.-VLA J.L. & ARTS 437, 440 (2000). Although this Note posits the system of authorship developed by the auction houses as protecting the purchaser, others see it as problematic. Singer writes that "Sotheby's and Christie's have thus devised limited warranties which circumvent the rules concerning disclaimers under the New York statute by qualifying their attributions through a system of complicated terminology which serves to limit their liabil-

For example, the Sotheby's catalogue includes a tiered system of authorship.[246] The first level is for works that are definitively attributed, with each tier signifying less strength of authenticity:

> [1] Attributed to [artist] In our opinion, on the basis of style, the work can be ascribed to the named artist, but less certainty as to authorship is expressed than in the preceding category.
>
> [2] Studio of [artist] In our opinion, a work by an unknown hand in the studio of the artist which may or may not have been executed under the artist's direction.
>
> [3] Circle of [artist] In our opinion, a work by an as yet unidentified but distinct hand closely associated with the named artist, but not necessarily his pupil.
>
> [4] Style of . . . Follower of [artist] In our opinion, a work by a painter working in the artist's style contemporary, or nearly contemporary, but not necessarily his pupil.
>
> [5] Manner of [artist] In our opinion, a work in the style of the artist and of a later date.
>
> [6] After [artist] In our opinion, a copy of a known work of the artist.[247]

This scale balances the risk of misattribution between the seller and purchaser, as lower tiers of authorship alert the potential buyer of infirm attribution or provenance. In some cases, these tiers should work to lower the value of a painting and prevent unhappy buyers from claiming that express warranties as to actual authorship were created as to their authenticity.[248] Thus, auction houses have developed and implemented a workable system that balances the dangers of connoisseurship and the importance of assigning authorship.[249] While many museums may use a system similar to this, they do so without oversight or potential liability.[250]

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ity in the event of misattribution." *Id.* at 440-41. Whatever the motivation, the system properly embraces the shifting concept of authorship in visual arts. "[T]he legal standard for attributions must balance the naturally colliding results that emerge when comparing the studio production process with an incompatibly Romantic view of authorship, within a stylistic analysis framework that remains, at best, indeterminate." Jauregui, *supra* note 17, at 1963.

246. This set of guidelines could be supplemented by reference to the standards for cataloguing works of art laid out by the American Art Libraries Society of North America on its website. *Attribution Qualifiers for Artists' Names*, http://www.arlisna.org/organization/sec/cataloging/attribution_qualifiers.pdf (using the Sotheby's model as the basis for a more uniform system of cataloguing works in American museums).

247. *Id.*

248. Under the N.Y. ARTS & CULT. AFF. LAW § 13.01 (McKinney Supp. 2009), these assignations of authorship do create express warranties, but obviously not warranties as to one specific artist.

249. *See* Singer, *supra* note 245, at 439-41.

250. BECK, FROM RAPHAEL, *supra* note 21, at 149.

Currently, a museum may make an express affirmation of authorship where an auction house would be liable for the same.[251] One could imagine the temptation to make a more specific, yet unsupported, attribution where there was absolutely no recourse or liability in the event of an error.[252]

The evolution in authenticity issues wrought and remedied by auction houses is a fairly inexpensive, yet fundamentally enormous change. An attribution system such as this could remedy a successful suit under a modified VARA, where the authorship of a work in a museum or on public display is challenged. A museum facing a judgment under an amended VARA would not be forced to "de-attribute" works, thereby losing the value of its works,[253] but rather simply acknowledge that debate may exist as to the authorship of a work.[254] Further, this law would not require the judge or jury take the role of the expert to render decisions as to authenticity in cases where authenticity might be challenged.[255] Not only would this vindicate the artist's moral rights, it would foster discussion and scholarship on works of dubious attribution.

VII. CONCLUSION

Despite the noted importance in assigning authorship to works of art, connoisseurship has become a scholarly exercise with dangerous results. Although perhaps less dangerous to art scholarship, connoisseurship's subjectivity has helped fuel exponential growth in art prices, as well as serve as the basis for astronomically expensive museum acquisitions. The representative Stoclet Madonna demonstrates the boiling point of these problems, as the connoisseur/museum[256] built the fervor to a $50,000,000.00 price tag.[257] This

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251. *See supra* Part II.A.

252. Beck writes of this temptation as something the viewer should be concerned about. BECK, FROM RAPHAEL, *supra* note 21, at 149. ("Consequently, the public as well as the specialist must be wary of claims about works of art from even distinguished museums. Fund raising considerations lie behind actions and positions offered to the public. The connoisseur should recognize the risk that history itself is manipulated for the sake of '*bella figura*' to please sponsors, trustees, governmental agencies and the general museum visitors.").

253. Obviously a work such as the Stoclet Madonna would be worth much less if it were not attributed to Duccio. *See* discussion *supra* Part I.

254. The museum could simply change their plaques to follow the Sotheby's model of attribution, designating works as "in the style of" or "from the studio of." *See* Sotheby's Glossary of Terms excerpt, *supra* note 246.

255. *See, e.g.*, Leaf v. Int'l Galleries, (1950) 2 K.B. 86, 94. In *Leaf*, the judges ruled as to the authenticity of a painting. *Id.* Also, in *Thomson*, the English court held that Christies' could not have been liable for not doubting the authenticity of a work. Thomson v. Christie Manson & Woods Ltd., (2004) Q.B. 1624.

256. Tomkins, *supra* note 3.

257. *Id.*

problem undermines the socially-anticipated objectivity of the museum as the educator and indulges the connoisseur in a practice that is, at best, an educated guess. The damage, however, is not just to art history scholarship and the museum's role, it is to the artist and her moral rights – alive or dead. A connoisseur's error could affix the name of an artist to a work never touched by the artist's hand.

A survey of European moral rights and its philosophical underpinnings make it clear that the United States' moral rights regime is inadequate.[258] Congressional stubbornness in implementing a meaningful moral rights legislation has left a plethora of invaluable works without any protection. The result is that those works' owners are free to do whatever they wish with those works; whether it be misattributing those works or even destroying them.

These moral rights problems have been unsuccessfully dealt with largely on an ad hoc basis by the courts, and as a result no clear common law solution exists.[259] Amending VARA represents an effective solution to these pressing issues. It is clear from the statutes discussed that workable models exist for amending VARA. State preservation statutes provide novel forms of standing for groups determined to vindicate the rights of deceased artists.[260] In addition, European moral rights legislation demonstrate that perpetual moral rights can coexist with the economic value of works for owners.[261] Indeed, many of the dilemmas posed by this Note involving the right of attribution have been adequately dealt with by auction houses, albeit for different reasons. Thus, despite the United States' begrudging adoption of moral rights, stronger protection is a realizable and reasonable prospect.

Under a new VARA, artist groups could sue for declaratory or injunctive relief to prevent misattribution of a piece of work with questionable authenticity. Thus, this legal remedy would serve to protect the artist, whose name would be associated with the work, the viewer, who could be deceived, and the scholarship of art, which would be forced to squarely address controversy over connoisseurship.

This stronger VARA could encourage museums to properly maintain their essential role as the purveyor of objective and trustworthy knowledge. Further, our fledgling moral rights legislation could become a more powerful legal device, akin to its European brethren.

The end result of these changes would not be decimation of the

258. *See* Rigamonti, *supra* note 28, at 359-62.

259. *See id.* at 381-98 (explaining several different methods common law countries have recognized and enforced moral rights without having express statutory moral rights legislation in place).

260. *See id.* at 405 n.306.

261. *Id.* at 370-72.

value of pieces in museum collections. The practices adopted by auction houses show that more responsible attribution standards have not prevented record prices.[262] Rather, an amended VARA would foster a more responsive system in which the artist's rights to have her name associated with a piece are respected, and the public's cultural interest in art scholarship and the accurate display of artwork are coalesced for the benefit of our society.

262. *See* Stuart, *supra* note 96, at 94 (suggesting that the major auction houses' proper attribution does not prevent profitable sales).

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