2014

# United States Response to Questionnaire Concerning *Moral Rights in the 21st Century*

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**United States Response to**
**Questionnaire Concerning Moral Rights in the 21st Century**

**ALAI 2014 Brussels**

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*Authors' Note*: The U.S. Copyright Act is contained in Title 17 of the United States Code and is available on the Copyright Office website, <http://www.copyright.gov>. Statutory references in this response are to Title 17, unless otherwise indicated.

## Moral Rights

1. *Please describe the origin, the objectives and the underlying philosophy of the moral rights in your country.*

There is no United States statute offering a general recognition of moral rights like those seen in Europe. However, though U.S. law lacks a single statute granting the moral rights detailed in Article 6*bis* of the Berne Convention,[2] several federal and state laws together afford protections comparable in part to these moral rights. Indeed, the U.S. Constitution's Intellectual Property Clause[3] does not foreclose adopting provisions protecting moral rights for authors,[4] and U.S. copyright law grants limited protections for the right of disclosure, the right to respect and integrity, and (to an even more limited extent) the right to claim authorship. For example, the House Report to the Visual Artists Rights Act of 1990 (VARA) indicates that the copyright law amendment was passed to provide fine artists "with the rights of 'attribution' and 'integrity' . . . commonly known as 'moral rights.'"[5] The House Report went on to state that, assuming moral rights encourage the creation of fine art, they "are consistent with the purpose behind the copyright laws and the Constitutional provision they implement: 'To promote the Progress of Science and useful Arts.'"[6]

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[2] Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, Sept. 9, 1886, S. Treaty Doc. No. 99-27 (revised on July 24, 1971, and amended on Sept. 28, 1979) [hereinafter Berne Convention].

[3] U.S. CONST., art. I, § 8, cl. 8.

[4] *See* Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 286–87 (2004).

[5] H.R. Rep. 101–514, p. 6915 (1990).

[6] *Id.*

Though the wholesale adoption of moral rights has not occurred in U.S. copyright law and was a central conflict in the debate over whether the United States should join the Berne Convention,[7] numerous U.S. federal and state statutes create a patchwork of rights that have been said to approximate the moral rights in Article 6*bis*. State laws do a significant amount of general gap-filling,[8] while private ordering augments the process. Federal statutory recognition favors fine artists, such as painters, sculptors, and some photographers.[9]

The legislative history to U.S. adherence to the Berne Convention asserts that the 1976 Copyright Act, coupled with state laws covering moral rights, put the United States largely in compliance with Berne, should the United States choose to join.[10] This perspective was endorsed by the Director-General of the World Intellectual Property Organization.[11] Significantly, the Ad Hoc Working Group on U.S. Adherence to the Berne Convention also concluded that Berne was not self-executing—"the provisions of the Convention, if ratified, need not apply of their own force, but could be made to be effective in the U.S. solely via specific domestic legislation."[12] And thus, in 1988, the United States ratified the Berne Convention, effective March 1, 1989.[13] Any moral rights accorded to authors come from the U.S. federal and state legal landscape, not directly from Article 6*bis* of Berne.[14]

*U.S. Copyright Law*—The 1976 Copyright Act contains three provisions that can be used to protect moral rights, and a fourth provision of unclear scope. Two of the four provisions were passed after the U.S. joined the Berne Convention. First is the exclusive right given to the author to make derivatives of her protected work, found in Section 106(2). Second, the compulsory license for mechanical reproductions of musical works that prohibits a user from "chang[ing] the basic melody or fundamental character of the work,"[15] found in Section 115(a)(2), were included when the 1976 Act was enacted.

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[7] *See, e.g.*, 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.02 ("Congress faced an avalanche of opposition to moral rights, including denunciations of moral rights by some of the bill's most vociferous advocates."); WILLIAM F. PATRY, 5 PATRY ON COPYRIGHT § 16:3 ("The obligation of the United States to provide droit moral and the extent to which U.S. law . . . already satisfied the minimum requirements of Article 6bis were the single most contentious issues surrounding adherence.").

[8] *See* Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 82 (2d Cir. 1995) ("American courts have in varying degrees acknowledged the idea of moral rights, cloaking the concept in the guise of other legal theories, such as copyright, unfair competition, invasion of privacy, defamation, and breach of contract.").

[9] 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.02.

[10] *See* H.R. Rep. No. 609, 100th Cong., 2d Sess. 34–40 (1988); S. Rep. No. 352, 100th Cong., 2d Sess. 9–10 (1988).

[11] *See* June 16, 1987, letter from Dr. Arpad Bogsch to Irwin Karp, *reproduced in* The Berne Convention: Hearings on S. 1301 and S. 1971 before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary Comm., 100th Cong. 2d Sess. 232 (1988).

[12] Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.–V.L.A. J.L. & ARTS 1, 5 (1988).

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

[14] 17 U.S.C. § 104(c).

[15] 17 U.S.C. § 115(a)(2).

Third, Section 1202, which regulates copyright management information and was added through the Digital Millennium Copyright Act (DMCA),[16] might offer a protection akin to a moral right, though that remains uncertain. The scopes of these provisions are discussed in detail below in response to Question 2.

Fourth, in 1990, Congress through VARA, added Section 106A to the U.S. Copyright Act to grant moral rights in works of visual art. VARA evinced Congress's "minimalist approach to enlargement of copyright protections," but did "enhance the U.S.' compliance with Berne."[17] VARA applies only to statutorily recognized works of visual art,[18] granting two primary moral rights. The first is a right to claim authorship and to prevent the author's name from being attributed to a visual work he or she did not create.[19] VARA, however, does not grant a right to be the anonymous or pseudonymous author of a visual work of art. The second moral right is one of integrity; subject to limitations for visual art incorporated into a building, the author of a work of visual art can "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation"[20] and "prevent any destruction of a work of recognized stature."[21]

However, VARA has proven limited in practice.[22] As the Second Circuit Court of Appeals noted in the landmark case of *Carter v. Helmsley-Spear, Inc.*, Congress passed

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[16] Pub. L. 105–304, 112 Stat. 2860 (1998).

[17] Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Protection Act of 1990*, 14 COLUM.–V.L.A. J.L. & ARTS 477, 497 (1990).

[18] Section 101 defines a "work of visual art" as:

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.
>
> A work of visual art does not include–
> (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;
> (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
> (iii) any portion or part of any item described in clause (i) or (ii);
> (B) any work made for hire; or
> (C) any work not subject to copyright protection under this title.

§ 101.

[19] § 106A(a)(1).

[20] § 106A(a)(3)(A).

[21] § 106A(a)(3)(B).

[22] *See generally* David E. Shipley, *The Empty Promise of VARA: The Restrictive Application of a Narrow Statute*, 83 MISS. L.J. 985 (2014). For an earlier discussion, *see* Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1 (1997).

VARA to encourage artists by protecting their works, but "it did not mandate the preservation of art at all costs and without due regard for the rights of others."[23] At issue in *Helmsley-Spear* was whether the owner of a building could remove—and in the process destroy—an art installation that had been commissioned for the lobby of a mixed-use commercial building. The court ruled that the owner could remove the work because the installation was a work made for hire, which took the work of visual art outside of VARA's ambit. Another example of VARA's limitations is *Phillips v. Pembroke Park Real Estate, Inc.*, in which the court held that VARA does not protect site-specific art—i.e., art designed for, and that incorporates portions of, a specific location—from being relocated.[24] Moreover, some works of visual art have not been able to satisfy the "work of recognized stature" requirement for employing VARA to prevent destruction.[25]

*Non-Copyright Laws*—Section 43(a) of the federal Lanham Act,[26] which prohibits false designation of origin, once was considered a powerful source of moral rights. Courts had applied the provision not only to goods or services, as would be expected, but also to provide creators and performers with rights against the misattribution of their works or performances. (Section 43(a) was never a source of affirmative attribution rights.) However, in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, the U.S. Supreme Court ruled that the Lanham Act could not be used to prohibit a work from being copied without attribution.[27] Yet, the Supreme Court in *Dastar* left available a claim under the Lanham Act that can be said to advance a moral right. Under Section 43(a)(1)(B), a claim would exist if, in advertising or promotion, the seller of a product that copies a copyrighted work misrepresents the nature, characteristics or qualities of the work.[28]

Additionally, numerous states offer a variety of protections comparable to moral rights through laws prohibiting defamation and unfair competition and protecting the right of publicity (or, in some jurisdictions, the analogous right of privacy) and works of fine art.[29] Additionally, the National Film Preservation Act prohibits colorization, without labeling disclosures, of select old films.[30]

*Private Ordering*—In recent years, authors have made greater efforts to obtain rights comparable to some moral rights through contractual arrangements. Two notable examples, which will be discussed primarily in response to Question 9, are the inclusion

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[23] Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 80 (2d Cir. 1995).
[24] 459 F.3d 128 (1st Cir. 2006). *But see* Kelley v. Chicago Park Dist., 635 F.3d 290, 306–07 (7th Cir. 2011) (suggesting that some site-specific art could fall within VARA's ambit).
[25] *See, e.g.*, Cohen v. G&M Realty L.P., --- F. Supp. 2d ---, 2013 WL 6172732 (E.D.N.Y. Nov. 20, 2013); Scott v. Dixon, 309 F. Supp. 2d 395 (E.D.N.Y. 2004).
[26] 15 U.S.C. § 43(a).
[27] 539 U.S. 23, 31–38 (2003).
[28] *Id.* at 38. *See also* MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:83 (4th ed.).
[29] Cal. Civil Code § 987; Me. Rev. Stat. Ann. 27, § 303; Mass. Gen. Laws Ann. ch. 231, § 85S; N.Y. Arts and Cultural Affairs Law § 14.03
[30] Pub. L. No. 104–285, October 11, 1996, 110 Stat. 3377. The limitations apply only to films that, on the basis of being "culturally, historically, or aesthetically significant[,]" have been added to the National Film Registry. 2 U.S.C. § 179*I*.

of an attribution right in the default Creative Commons license, and the baseline contractual provisions required by some film and television guilds.

*2. What do the moral rights consist of in your country?*

*2.1 Right of Disclosure:*

An analog to the right of disclosure is one of the six exclusive rights that U.S. copyright law grants to authors.[31] It is referred to as the right of first publication, and is comprehended within the exclusive right under Section 106(3) to distribute copies of the work to the public. Courts have understood the right as an integral part of copyright law's incentive system, and, accordingly, have construed it as a robust right. For example, in finding that a magazine's excerpt of a yet-unpublished autobiography of former President Gerald Ford infringed the book publisher's copyright and was not a fair use, the U.S. Supreme Court elaborated on a copyright holder's "commercially valuable right of first publication", the intrusion upon which weighed against a finding of fair use.[32] This understanding of the first publication right is "particularly weighty because it encompasses three important interests: (i) a privacy interest in whether to make expression public at all; (ii) an editorial interest in ensuring control over the work while it is being groomed for public dissemination; and (iii) an economic interest in capturing the full remunerative potential of initial release to the public."[33]

*2.2 Right to Claim Authorship:*

The right to claim authorship is much more legally diffuse than the right of first publication. The right to claim authorship consists of three separate rights: (1) the right to be credited for one's work; (2) the right to prevent a non-author from being credited; and (3) the right to not be named the author of another's work. (Implicit in the right to be credited is the right to publish anonymously or pseudonymously.) Each is protected, on narrow and limited bases, by different legal regimes.

The Ad Hoc Working Group on U.S. Adherence to the Berne Convention thought that "[g]iven the prevailing practice of attributing authorship, the public policy favoring it, the cataloging practices of libraries, the public interest in identifying authors of works, and the inherent unfairness of withholding recognition of paternity, it is likely that courts will apply the implied covenant of fair dealing or good faith to require identification of authors when there is a direct or indirect contractual nexus."[34] Yet, time has not proven this point. Moreover, some courts have held that a contractual agreement is the only way an author can require that a publisher affix her name to her published work.[35] As the

[31] *See* 17 U.S.C. § 106(1).
[32] Harper & Row Publishers Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985).
[33] *Id.* at 596 n.20 (Brennan, J., dissenting).
[34] Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention (1986), *reprinted in* 10 COLUM.–V.L.A. J.L. & ARTS 513, 552 (1986).
[35] *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.02.

Seventh Circuit Court of Appeals went on to say ten years after the United States joined Berne: "[A]n author who sells or licenses his work, absent an express provision in a contract, does not have an inherent right to be credited as the author of the work."[36] According to treatise writer David Nimmer, this represents the "generally prevailing view."[37]

However, Section 106A grants the author of a work of visual art the right to be credited as the author. (For further discussion, see the response to Question 1.) And Section 1202, the DMCA's provision on copyright management information (CMI) systems, might create an attribution right when an owner affixes the author's name to the CMI. This right, however, has numerous limitations;[38] the provision also has received little attention in copyright litigation. Of course, the surest guarantee is for an author to include in her publishing contract a provision promising that she will be named the author. Numerous private ordering arrangements have arisen to facilitate this, as is discussed in response to Question 9.

The other two rights to claim authorship receive fuller treatment under other laws, but they are not called "moral rights." They arise from laws prohibiting unfair competition, and defamation, and protecting trademark and the right of publicity (or, as it is known in some jurisdictions, right of privacy). "Reverse passing off" in promotional materials or advertising creates a bar against a non-author claiming authorship of a work she did not create,[39] as do defamation law and the right of publicity,[40] as well as claims in the nature of unfair competition.[41]

*2.3 Right to Respect and Integrity:*

The right to respect and integrity is the most cobbled together of the moral rights. There is no broad protection in copyright law, though Section 106(2), the derivative work right, could be called the most general in application. It enables an author, if still the copyright owner, to enjoin a derivative work that distorts the meaning of the copyright work. For example, in *Gilliam v. American Broadcasting Companies, Inc.*, the British comedy group Monty Python persuaded a court to enjoin the television network ABC from re-broadcasting edited versions of Monty Python programs without their

[36] Kennedy v. Nat'l Juvenile Detention Ass'n, 187 F.3d 690, 696 (7th Cir. 1999); *see also* Graham v. James, 144 F.3d 229, 236 (2d Cir. 1998).
[37] 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.03(A)(1).
[38] *See* Jane C. Ginsburg, *Moral Rights in the U.S.: Still in Need of a Guardian ad Litem*, 30 CARDOZO ARTS & ENT. L.J. 73, 74–78 (2012).
[39] *See Dastar* discussion in response to Question 1.
[40] *See, e.g.*, Clevenger v. Baker Voorhis & Co., 8 N.Y.2d 187 (1960) (libel); 14 N.Y.2d 536 (1964) (same); Ben Oliel v. Press Pub. Co., 251 N.Y. 250 (1929) (same); Jaeger v. American Int'l Pictures, Inc., 330 F. Supp. 274, 278 (S.D.N.Y. 1971) (right of privacy); Kerby v. Hal Roach Studios, 53 Cal. App. 2d 207 (Cal. Dist. Ct. App. 1942) (same); Eliot v. Jones, 120 N.Y.S. 989 (Sup. Ct. 1910) (same).
[41] *See, e.g.*, Granz v. Harris, 198 F.2d 585, 589 (2d Cir. 1952); Chamberlain v. Columbia Pictures Corp., 186 F.2d 923, 925 (9th Cir. 1951).

permission.[42] Similarly, a court found that CleanFlicks infringed film copyrights when it edited major motion pictures to remove sex, profanity, and violence.[43]

However, the robustness of the derivative work right as a quasi-right of integrity is significantly limited by copyright law's fair use doctrine, which is discussed in response to Questions 6 and 8. Copyright law also provides a right of integrity for works of visual art and via copyright management information systems when altering the work would affect the CMI. Additionally, as discussed in response to Question 1, the federal trademark law protects the author of a copyrighted work from having that work misrepresented in commercial advertising or promotion.

*2.4 Right to Repent or Withdraw:*

U.S. law has no formal recognition of the right to repent or withdraw outside of those reserved by contract. Moreover, the general climate in copyright law recently has been hostile to such interests. Courts have been more concerned with permitting broader access to works, rescuing them from obscurity. When a work is out of print, its unavailability weighs in favor of fair use. Notably, the judge in the Google Book Search case listed among the "many" benefits of Google's efforts to digitize millions of books and make them available for online search was that "[o]lder books, many of which are out-of-print books that are falling apart buried in library stacks, are being scanned and saved . . . and potential readers will be alerted to their existence."[44]

*2.5 Other Elements:*

U.S. law does not recognize other types of moral rights.

*3. Can the moral rights be transferred or waived in your country?*

Under VARA, moral rights provided by Section 106A for works of visual art may not be transferred, but can be waived "if the author expressly agrees to such waiver in a written instrument signed by the author."[45] About two years after VARA went into effect, the U.S. Copyright Office surveyed visual artists to see how the waiver provision was working in practice.[46] The survey reported that fewer than half of respondents knew that moral rights under VARA could be waived, even though nearly a quarter had been asked to waive those rights. Although more than half of those who reported rejecting a waiver

[42] 538 F.2d 14 (2d Cir. 1976).
[43] CleanFlicks of Colorado, LLC v. Soderbergh, 433 F. Supp. 2d 1236 (D. Colo. 2006) Though the directors prevailed and CleanFlicks was found to have infringed the copyrighted films, it is worth noting that the court did not agree with the plaintiffs that the edited versions constituted derivative works.
[44] Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 288 (S.D.N.Y. 2013).
[45] 17 U.S.C. § 106A(e).
[46] U.S. Copyright Office, Waiver of Moral Rights in Visual Artworks (1996), *available at* http://www.copyright.gov/reports/exsum.html.

request indicated that it "voided the deal," about a third of respondents who dealt with waiver requests "said contracts contained a separate price for the waiver of moral rights."[47]

On the other hand, economic rights that serve as an approximation for moral rights—i.e., the respect and integrity rights protected by Section 106(2) and Section 115(A)(2)—can be transferred by the author.

4. *Which is the term of protection of the moral rights in your country? Is it identical to the term of protection of the economic rights? Can the moral rights be exercised after the death of the author and by whom? Are works in the public domain still somehow protected under moral rights?*

The term of protection for the economic rights under copyright law that approximate moral rights is identical to the term for economic rights: life of the author plus seventy years.[48] For moral rights established by VARA, the term is only the life of the author, but state moral rights laws may fill the post-mortem gap (see below).[49] Additionally, an exception exists for works created before Section 106A took effect and that the author still owned at the time. The term of those rights is identical to the term of economic rights.[50]

Section 106A gives states the authority to offer post-mortem protection of moral rights that are equivalent to the protections provided by VARA.[51] Thus, conceivably a state law could protect a work more than seventy years after an author's death. The source of that protection would be a moral right, though not from VARA. Rather, it would be a state-determined equivalent right (e.g., an attribution right granted to authors and artists). However, the circumstances for such a protection appear to be extremely limited.

5. *Do other types of rights (such as "personality rights", "civil rights", "publicity rights", "portrait rights" or other, depending on the jurisdiction) complement the protection of the moral rights in copyright?*

As discussed in response to Questions 1 and 2, other legal rights play a significant role in creating a patchwork of rights that, together, roughly approximates the moral rights required by Article 6*bis* of the Berne Convention. The right of publicity (or, in some jurisdictions, the analogous right of privacy), trademark laws, unfair competition, and defamation law constitute the core of these complementary legal protections.

[47] *Id.*
[48] § 302.
[49] § 106A(d).
[50] § 106A(d)(2).
[51] § 301(f)(2).

6. *Does the legislation or case law in your country provide sanctions or other mitigating mechanisms for the abusive exercise of the moral rights, in particular by the author and/or his/her heirs?*

There are no such sanctions or mitigating measures for VARA. However, as mentioned above, VARA's ambit is exceptionally narrow. For recognized works of visual art, VARA protects against alteration or destruction of physical originals, not reproduced images. Accordingly, VARA rights do not easily lend themselves to abuse. (This is discussed further is response to Question 8.) VARA also is subject to copyright's fair use doctrine, which further limits the potential for abuse. The same could be said of mechanical reproductions of musical compositions and of copyright management information systems, as discussed in response to Question 1.

The derivative works right, though, is much broader and, therefore, more susceptible to copyright overreach. But fair use, likewise, guards against this. For example, world-renowned photographer Annie Leibovitz did not prevail on a claim of copyright infringement against Paramount Pictures for a movie advertisement that the studio claimed parodied one of Leibovitz's famous photographs.[52] The court found that the derivative work was a fair use even though it disparaged the photographer's recognizable style.

Additionally, U.S. copyright law contains a fee-shifting provision that authorizes judges to award attorney fees and costs to the prevailing party.[53] Judges have broad discretion regarding whether to shift fees in a copyright case;[54] they are not limited to doing so in cases of bad faith, litigation misbehavior, or specious claims.[55] The U.S. Supreme Court has said that, in exercising this discretion, courts are to consider numerous factors, including "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence."[56] Accordingly, courts could use this remedy to sanction and mitigate the abuse of moral rights under VARA or other rights in U.S. copyright that approximate moral rights.

7. *How would a conflict between the exercise of a moral right and of any other proprietary right, such as the right to "material" property on the "carrier" of the work, be solved in your country? (e.g. mention of the name of the author on a building, modification of a utilitarian work, demolition of an artistic work, graffiti on a building,…)?*

[52] Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998).
[53] 17 U.S.C. § 505.
[54] Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994).
[55] *See, e.g.*, *id.*; Balsley v. LFP, Inc., 691 F.3d 747, 772–73 (6th Cir. 2012); JCW Investments, Inc. v. Novelty, Inc., 509 F.3d 339, 342 (7th Cir. 2007).
[56] *Fogerty*, 510 U.S. at 534 n.19.

Whether a property right trumps a moral right under U.S. law depends upon the nature of the property right. For recognized works of visual art, VARA limits the rights that the owner of the physical instantiation of a work would otherwise have to dispose of it as he or she pleases. But, as discussed in response to Question 1, when a VARA work is incorporated into a building or is site specific, VARA's elaborate rules often effectively elevate property rights over moral rights. That is, in part, because the artist may have to pay to remove the work from the building and, in part, because VARA allows an artist to waive the ability to enjoin removal of a work that will cause destruction.[57]

8. *How would a conflict between the exercise of a moral right and the exercise of the right to freedom of expression or other fundamental rights be solved in your country?*

Copyright law's exclusive rights are subject to the fair use doctrine, which the U.S. Supreme Court has indicated embodies copyright law's "built-in First Amendment accommodations."[58] This general limitation applies to an author's control over unlicensed derivative works, as well as the other exclusive rights. Fair use is an "equitable rule of reason"[59] that generally guides judges to consider four non-exclusive factors:

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

If the balance of factors weighs in favor of the unlicensed use, the use is adjudged as fair and, thereby, not an infringement. Accordingly, freedom of expression will trump the derivative work right, after, and only if, a court determines the unlicensed use was a fair use. Examples include using expressive elements of the copyrighted work for parody[60] or commentary.[61]

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[57] 17 U.S.C. § 113(d).
[58] Golan v. Holder, 132 S. Ct. 873, 890 (2012) (quoting Eldred v. Ashcroft, 537 U.S. 186, 219 (2003)); *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985).
[59] Stewart v. Abend, 495 U.S. 207, 236 (1990); Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 448 (1984); H.R. Rep. No. 94–1476, p. 65 (1976).
[60] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).
[61] *See, e.g.*, Twin Peaks Productions, Inc. v. Publications Int'l, Ltd., 996 F.2d 1366, 1375 (9th Cir. 1993) ("Inevitably, some identification of the subject matter of a writing must occur before any useful comment may be made about it, and it is not uncommon for works serving a fair use purpose to give at least a brief indication of the plot. Works of criticism, teaching, and news reporting customarily do so.").

Similarly, VARA is subject to copyright law's fair use doctrine.[62] Thus, to the extent that an expression makes a fair use of a work protected by VARA, the freedom of expression would prevail. However, VARA is about destruction or prejudicial alteration of an original painting, drawing, or sculpture or a limited signed photograph.[63] Thus, cases involving VARA and freedom of expression are very limited (e.g., defacing the statue of a dictator). Because VARA is a sui generis law supporting a public policy interest in art preservation, any claim in destroying the work would need to weigh against each of the other two public interests: speech and art preservation. Accordingly, First Amendment interests will not always win out.

To the extent that a moral right arises from a source other than U.S. federal copyright law, it might not be subject to a fair use defense.[64] Yet, if based on state law, the right for a copyrighted work would only survive federal preemption if not "equivalent" to one of U.S. copyright law's exclusive rights.[65] *Wojnarowicz v. American Family Association* provides such an example.[66] Multimedia artist David Wojnarowicz sued the non-profit American Family Association for, inter alia, copyright infringement and violation of the New York Artists' Authorship Rights Act for publishing and distributing a pamphlet critical of the National Endowment for the Arts (NEA). The NEA had funded some of Wojnarowicz's work, and the pamphlets included unauthorized copies of portions of that work.[67] Though ruling that the copying fell within the fair use exception to the artist's exclusive rights under copyright law, the court enjoined publication of the pamphlet because it violated the New York Artists' Authorship Rights Act,[68] which was not preempted by federal copyright law.[69]

9. *How do authors exercise their moral rights in practice? Do they consider this a matter of importance? How do they want to be acknowledged (which modalities exist for the exercise of the rights of authorship and integrity)? How do they impose respect of their moral rights when they are faced with derivative works? Do licences (in particular via creative commons) commonly provide a prohibition to create derivative works? Are there in your country model contracts per sector (such as the literary, audiovisual, musical, graphic arts or artistic sectors) that are made available by professional organisations or by collective management organisations and that contain clauses regarding the moral rights? If so, which ones?*

[62] 17 U.S.C. § 106A(a).
[63] § 101.
[64] Fair use was codified by the 1976 Copyright Act, but it arose as common law and, presumably, could be adopted by a state court in a non-copyright context.
[65] 17 U.S.C. § 301.
[66] 745 F. Supp. 130 (S.D.N.Y. 1990).
[67] *Id.* at 134.
[68] *Id.* at 149.
[69] *Id.* at 135–36. Though the case preceded passage of VARA, the artist's claim under New York law likely would not be preempted today because it involved a claim for public display of falsely attributed copies, *id.* at 141, for which there is no equivalent right in VARA, *see* § 301(f)(1).

Authors place varying degrees of importance on moral rights. The right to claim authorship appears to be the most-valued moral right among American authors; protecting rights of integrity also receives some attention. However, most efforts to protect these rights are non-statutory and are based largely on private ordering.

Authors go about protecting attribution through contractual arrangement. One example is Creative Commons, part of the "Copyleft" movement, which offers authors various off-the-shelf licenses by which an author can reserve less than the full bundle of exclusive rights to her copyrighted work.[70] The default provision, though, is that the author be credited for the underlying work, regardless of the other unpaid permissions the author attaches to the work; Creative Commons also offers two "no derivatives" licenses that give authors a right that approximates a right of integrity.[71] Another manner is through the baseline protections negotiated by author guilds, particularly in the film and television industry. The Writers' Guild, for example, has a Screen Credits Manual and a TV Credits Manual that detail the process for maintaining "an accurate and equitable system of determining credits"—"one of the most important services the Guild performs for writers."[72] Likewise, the Directors Guild of America's Basic Agreement of 2011, which sets the minimum standards for all contracts that guild members enter into with film and television studios, contains numerous provisions directed at the nature of each director's attribution.[73] The attribution standards for film directors are particularly detailed:

> The Director of the film shall be accorded credit on all positive prints and all videodiscs/videocassettes of the film in size of type not less than fifty percent (50%) of the size in which the title of the motion picture is displayed or of the largest size in which credit is accorded to any other person, whichever is greater. No other credit shall appear on the card which accords credit to the Director of the film. Such credit shall be on the last title card appearing prior to principal photography.[74]

Similarly, once assigned to a television episode, the director's name must appear on the title page of each distributed script[75] and the director of a series pilot must be named and identified if information about the "creator" of the series is included on domestic DVDs or and interactive Web page.[76]

In some instances, authors may be able to individually negotiate contractual provisions through which to exercise a right to integrity. For example, in combination with the Section 106(2) derivative works rights, a contract could reserve to an author

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[70] ABOUT THE LICENSES, CREATIVE COMMONS, http://creativecommons.org/licenses/.
[71] *Id.*
[72] CREDITS, WRITERS GUILD OF AMERICA, WEST, http://www.wga.org/content/default.aspx?id=1029.
[73] DGA Basic Agreement of 2011, *available at* http://www.dga.org/Contracts/~/link.aspx?_id=7D5BFF125CE044E6B049F7E2B1A4FD70&_z=z.
[74] *Id.* at 8–201.
[75] *Id.* at 7–305.
[76] *Id.* at 8–308b.

final approval[77] or could place restrictions on a derivative work (e.g., that the derivative work similarly be free to tertiary derivative adaptation). A similar approach could be taken with copyright management information systems, as discussed in response to Question 2.2. However, such provisions are unusual and largely limited to authors with rare bargaining power.

Litigation also has been used to protect the rights of first publication, integrity, and paternity. As discussed in response to Question 2.1, the right of first publication was at the heart of the Supreme Court's opinion for the copyright owner in *Harper & Row Publishers Inc. v. Nation Enterprises*. And, as discussed in response to Question 2.3, courts have enjoined unauthorized alterations of copyrighted works in egregious cases. Finally, authors also have sued to prevent others from using their work without giving credit. As noted in response to Questions 1 and 2, the Lanham Act used to provide a legal vehicle for enjoining the use of an author's work without attribution when copyright law was inapplicable. This is no longer true, except in the case of misrepresentation in advertising. However, for works still within the term of copyright protection, an unlicensed use will give rise to a prima facie claim of copyright infringement; though no copyright claim can arise solely based on lack of credit, enforcing against an unauthorized exploitation of an exclusive right, such as the right to make copies or to publicly distribute, provides an author with an imperfect legal vehicle for protecting attribution.

*10. Do collective management organisations play a role in the exercise of the moral rights in your country?*

The traditional collective rights organizations, like the American Society of Composers Authors and Publishers, do not. However, as discussed in Question 9, the entertainment guilds, particularly for film and television, play a substantial role in exercising moral rights of attribution.

*11. In your country, is it provided in legislation, case law and/or scholarly literature how the moral rights apply with regard to particular forms of use, such as?*

*11.1 "Artistic Quotation":*

Assuming that "artistic quotation" refers to appropriation art or parody, moral rights do not apply,[78] unless the work qualified separately for VARA as a work of visual art.[79]

[77] Castle Rock Entertainment v. Carol Publ'g Group, Inc., 955 F. Supp. 260, 263 (S.D.N.Y. 1997) (noting that the plaintiff had "highly selective" in licensing uses of the show), *aff'd* 150 F.3d 132 (2d Cir. 1998).

[78] *See, e.g.*, Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013); Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998).

[79] Even then, VARA only protects a limited edition of up to two hundred copies, and only if each is signed and numbered. 17 U.S.C. § 101.

*11.2 User Generated Content:*

Based both on norms against taking credit for the work of another and the patchwork of attribution right protections discussed in response to Question 2.1, creators of user-generated content, even those who think their use fair, often will make it clear that the work does not emanate from or have the approval of the original author.[80]

*11.3 Folklore:*

Moral rights do not apply to folklore, and one scholar has noted that the "[a]pplication of intellectual property laws, whose underlying logic is to facilitate dissemination, is fundamentally inappropriate to prevent sacred indigenous images from circulation and re-use."[81]

*11.4 Orphan Works:*

Though orphan works have been the focus of much recent copyright scholarship, a 2006 Copyright Office report,[82] and some legislative interest, the United States currently has no orphan works legislation. Both orphan works bills proposed in 2006 and 2008 would have mandated that an infringing user of an orphan work give proper attribution to the author of the orphan work if the user wished to avail himself of the bill's limitations on remedies.[83]

*11.5 Cloud Computing:*

We do not understand the question.

*11.6 Alternative (Free) Licensing Schemes:*

As discussed in response to Question 9, the Creative Commons licenses have attribution as a default provision.

*11.7 International Aspects:*

International moral rights can be relevant in copyright litigation filed in U.S. federal courts. For example, in *Monroig v. RMM Records & Video Corp.*, the district court found

[80] This phenomenon can be seen, among other places, on fan fiction websites; YouTube videos with music in the background; and Tumblr pages using unlicensed photographs

[81] Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 4 (1997). *Accord* Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L.J. 37, 73 (2009) (claiming that divulgation and claim of authorship rights could be granted to folklore and other traditional knowledge with "only minor recalibration of the broader IP system").

[82] U.S. Copyright Office, Report on Orphan Works (2006).

[83] Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006); Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008).

that beyond the defendant's infringement of U.S. copyright law, the defendant also was liable for international moral rights violations in sixteen countries and awarded the plaintiff $5 million for the moral rights violations.[84]

*12. The objective of certain moral rights appears to be changing in the digital context. The right of disclosure, which enables authors to decide when their works can be made public, is invoked at times to protect the confidentiality of certain kinds of content or data or their private dimension. The right to claim authorship (paternity) is changing into a right of attribution which places more emphasis on the identification of one contributor among others (for example, on Wikipedia or in free licences) than on recognition of authorship. Lastly, the right of integrity may become a right through which to protect a work's authenticity. Indeed, while modifications to works are more and more widely authorised, authenticity is assuming greater importance, notably through the use of technological measures to guarantee it. In your country, are there any indications in legislation, case law and/or scholarly literature that the moral rights "shift" in a digital environment:*

It is true that some authors have found more opportunity for moral rights in the digital environment, though obtaining those rights come at the expense of the right to any direct payment for the licensed use. As discussed in response to Question 9, for example, many authors have accrued to themselves an attribution right or integrity right by using Creative Commons' licensing system. But, in the process, these same authors have agreed to retain a more limited bundle of exclusive rights. Additionally, as discussed in response to Question 2.2, Section 1202, which was added to U.S. copyright law in response to the advancement of digital technology, might create a limited attribution right when an owner affixes the author's name to the copyright management information.

*12.1 From a divulgation right to a right to the protection of privacy (private life)?*

Generally, privacy law is handled by states, not the federal government. As a provision of U.S. copyright law, the right of first publication is subject to the fair use doctrine, which may cut a broader swath with works that an author never intends to publish.

*12.2 From a right to claim authorship (paternity) to a right to attribution?*

Where the right exists, U.S. law does not treat paternity and attribution as separate rights. As discussed in response to Question 9, attribution is gaining the most ground of any moral right in the digital age. Licensing models like Creative Commons, coupled with the Internet's democratization of authorship, have fostered communities of authors who are willing to trade economic incentives for a right of attribution.

*12.3 From an integrity right to a right to respect the authenticity of the work?*

[84] 196 F.R.D. 214 (D.P.R. 2000).

There does not appear to be significant movement in this direction.

*12.4 Up to acknowledging similar interests and rights akin to moral rights for authors and performing artists, for the benefit of publishers, producers and broadcasters?*

Authors are not the only ones interested in attribution and integrity. These rights indirectly improve the authenticity of a work, and publishers believe that informational benefit is valuable.