RE-RECORDING THE RECORD: THE CASE FOR A STRONGER MORAL RIGHT OF INTEGRITY IN THE UNITED STATES

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In the United States, musical artists have limited legal recourse over transferring ownership of their music to third parties, even when such transfers may harm the artist's reputation or the integrity of the work. Even the most prominent musicians, like Taylor Swift, must operate within an industry structure that normalizes the transfer of rights and, thus, control of their creative works. This occurs because U.S. law ties artists' rights almost exclusively to economic ownership of their work unless they specifically bargain to keep their moral rights. However, most other countries have comprehensive moral rights frameworks where all artists can protect their work from prejudicial treatment, even after transferring ownership.

This Note argues that the current state of U.S. copyright law inadequately protects the moral rights of musical artists, particularly regarding the right of integrity, and that this gap in protections leaves artists vulnerable to the alteration or use of their works in ways that could harm their artistic reputation. Accordingly, this Note proposes that Congress enact a federal right of integrity to ensure that artists retain meaningful control over how their works are used and represented. However, this right should have key limitations to balance industry interests, including that it should be waivable, subject to fair use, and otherwise narrowly tailored. The proposed legislation would bring U.S. law more in line with international standards while preserving the music industry's ability to function effectively through a contractual licensing regime.

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INTRODUCTION

Before Taylor Swift achieved global fame and billionaire status for her musical abilities, she was a fifteen-year-old girl writing songs and playing guitar in her bedroom.[1] While performing at local venues in Nashville, she caught the attention of Scott Borchetta and in 2005, became one of the first artists to sign with his newly established record label, Big Machine Records ("Big Machine").[2] Under the support of Big Machine, Swift grew her career exponentially and, in 2014, was first dubbed "The Music Industry."[3] When Swift's deal with Big Machine expired in 2018, she signed a new contract with Republic Records and Universal Music Group ("Universal").[4] This agreement included a commitment from Universal that ensured she owned her master recordings.[5] Despite that new deal, Big Machine Records still owned the masters to her first six albums.[6]

Swift initially maintained a positive relationship with Borchetta and Big Machine Records after her departure.[7] However, that changed dramatically when she learned that Big Machine sold her masters to Ithaca Holdings, a company then owned by Scooter Braun.[8] Swift had anticipated that Borchetta would sell her masters, but she felt blindsided by the sale to Braun.[9] Braun had managed celebrities like Kanye West and Justin Bieber, who had publicly ridiculed, humiliated, and feuded with Swift for years under Braun's management.[10] Swift explained: "Any time Scott Borchetta has heard the words 'Scooter Braun' escape my lips, it was when I was either crying or trying not to."[11] Swift further articulated her disappointment,

1. *See* Kelsey Barnes, *Songbook: An Era-by-Era Breakdown of Taylor Swift's Journey from Country Starlet to Pop Phenomenon*, GRAMMY AWARDS (Apr. 19, 2024, 5:32 PM), https://www.grammy.com/news/taylor-swift-albums-eras-tortured-poets-department [https://perma.cc/ZM8Z-UN64].

2. *See* Amber O'Conner, *Taylor Swift's Journey to Fame After She Was Discovered in Bluebird Cafe as a Teenager*, MIRROR (Sept. 3, 2024, 3:32 PM), https://www.mirror.co.uk/3am/celebrity-news/taylor-swifts-journey-fame-after-33585354 [https://perma.cc/8REU-MFAB].

3. Devin Leonard, *Taylor Swift Is the Music Industry*, BLOOMBERG BUSINESSWEEK, Nov. 17–Nov. 23, 2014.

4. Brittany Spanos, *Taylor Swift Signs with Republic Records and UMG, Her First New Home in 13 Years*, ROLLING STONE (Nov. 19, 2018), https://www.rollingstone.com/music/music-news/taylor-swift-record-deal-republic-records-umg-757711/ [https://perma.cc/4WSQ-RWQH].

5. *Id.*

6. *Id.*

7. *See* Taylor Swift (@taylorswift), INSTAGRAM (Nov. 19, 2018), https://www.instagram.com/taylorswift/p/BqXgDJBlz7d/?hl=en&img_index=4 [https://perma.cc/RL9F-QE86].

8. Taylor Swift (@Taylorswift), TUMBLR (June 30, 2019), https://taylorswift.tumblr.com/post/185958366550/for-years-i-asked-pleaded-for-a-chance-to-own-my [https://perma.cc/35CG-2Y7B].

9. *See id.*

10. *See* Lisette Voytko-Best, *Here's Why Taylor Swift Hates Scooter Braun So Much*, FORBES (June 29, 2021, 10:23 AM), https://www.forbes.com/sites/lisettevoytko/2019/07/01/heres-why-taylor-swift-hates-scooter-braun-so-much/ [https://perma.cc/J4HB-BEA3].

11. Swift, *supra* note 8.

stating, "[t]his is what happens when you sign a deal at fifteen to someone for whom the term 'loyalty' is clearly just a contractual concept."[12]

Instead of negotiating with Braun, someone Swift considered a "bully,"[13] she decided to re-record her masters.[14] Swift has successfully re-released four of her six albums and achieved remarkable commercial success through the re-releases.[15] Swift's re-recordings have diminished the financial value of her first six masters, and she has successfully distanced herself from the works.[16] Swift's creative solution enabled her to minimize Braun's control of and profits from her work.[17]

Although Swift's response was generally effective for her situation, current U.S. copyright law offers few reliable mechanisms for other musical artists to protect their creative works from uses that may damage their reputation once they have transferred the economic rights to those works.[18] This problem is much broader than just Swift's situation.[19] Other artists also experience similar issues when others license their music, and then it is used in ways they do not want to be associated with.[20] For example, once the copyright ownership is transferred, someone may use an artist's music without their permission in a movie scene that fundamentally contradicts their values, during campaign rallies for political candidates they do not support, or by sampling their song in a new work that misrepresents the message of the original work.[21]

Enacting new federal moral rights legislation protections could alleviate this issue.[22] Recognized moral rights, such as the right to object to derogatory treatment of one's work, are narrower in the United States compared to most countries in the European Union, as well as common-law countries like Australia, Canada, and the United Kingdom.[23] In the United

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12. *Id.*

13. *Id.*

14. *Id.* The re-recorded works, branded as "Taylor's Version," included the original tracks and new material that was not part of the initial releases. *See* Sophie Caldwell, *What Exactly Does "Taylor's Version" Mean?: Here's What to Know*, TODAY (Nov. 10, 2023, 10:55 AM), https://www.today.com/popculture/music/taylors-version-meaning-swift-rerecording-albums-rcna98513 [https://perma.cc/BUA7-Z4UD].

15. *See* Caldwell, *supra* note 14.

16. Brett Milano, *Taylor's Version of Copyright*, HARV. L. TODAY (Apr. 3, 2024), https://hls.harvard.edu/today/how-taylor-swift-changed-the-copyright-game-by-remaking-her-own-music/ [https://perma.cc/N4F2-RYHS].

17. *See id.*; *see also* Swift, *supra* note 8.

18. *See infra* Part II.A.

19. *See infra* Part I.C.

20. *See infra* Part I.C.

21. *See infra* Part I.C.

22. *See* Tuneen E. Chisolm, *In Lieu of Moral Rights for IP-Wronged Music Vocalists: Personhood Theory, Moral Rights, and the WPPT Revisited*, 92 ST. JOHN'S L. REV. 453, 457 (2018).

23. *See* Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U. L. REV. 1519, 1523–25 (2011). *See generally* Tanja Makovec Petrik, *Moral Rights of Composers: The Protection of Attribution and Integrity Available to Musicians in the European Union and the United States*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 359 (2012). Civil law countries typically have inalienable moral rights protections, whereas common-law countries tend to have more limited

States, moral rights are only explicitly available for visual art.[24] Nonvisual artists can attempt to protect their rights using other legislation, but those laws are typically tied to ownership of work and combined with economic rights.[25]

This Note argues that the current state of U.S. copyright law inadequately protects the moral rights of musical artists, particularly in terms of the right of integrity**,** and that this gap in protection leaves artists, like Swift, vulnerable to the alteration or use of their works in ways that could harm their artistic reputation.[26] Accordingly, this Note argues that the United States should enact a federal right of integrity to ensure that artists retain meaningful control over how their works are used and represented. However, to balance corporate interests, this right should have limitations to its scope. Most importantly, a federal right of integrity should be waivable and subject to fair use.[27] Part I provides an overview of the purposes of U.S. copyright law and discusses the fundamentals of copyright in the music industry. Part I further explores the concept of moral rights law and compares U.S. moral rights protections for sampling, public performances, and synchronization licenses with those of other countries. Next, Part II first examines the adequacy of current U.S. moral rights protections by evaluating their alignment with international standards. Subsequently, Part II explores the potential impact of federal legislation on these protections. Finally, Part III argues that the United States should enact a federal moral right of integrity and suggests ways to narrow the law to address opponents' concerns.

I. COPYRIGHT AND MORAL RIGHTS IN THE MUSIC INDUSTRY

Moral rights are an aspect of copyright law that protect the personal, noneconomic interests of creators.[28] Unlike most countries, the United States does not use federal legislation to protect the moral rights of nonvisual artists, including musicians, singers, or songwriters.[29] Instead, creators can attempt to protect their moral rights through other means, but that may be difficult in an industry where relinquishing the economic rights to work is standard practice.[30] Part I.A provides an overview of copyright law as it applies to the music industry. Part I.B introduces the concept of moral rights law. Finally,

provisions. *See* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 361 (2006).

24. Lucille M. Ponte, *Preserving Creativity from Endless Digital Exploitation: Has the Time Come for the New Concept of Copyright Dilution?*, 15 B.U. J. SCI. & TECH. L. 34, 39 (2009).

25. *See* Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1, 31–32 (1988).

26. *See infra* Part III.A.

27. *See infra* Part III.

28. *See* Rigamonti, *supra* note 23, at 353, 355.

29. *See* U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 3 (2019), https://www.copyright.gov/policy/moralrights/full-report.pdf [https://perma.cc/Z7H3-FX6F].

30. *See infra* Part I.C.

Part I.C compares the protections for the moral right of integrity for U.S. artists with the stronger protections available in other countries.

A. Foundations of U.S. Copyright Law in the Music Industry

Understanding the objectives of American copyright law and how copyright operates within the music industry is crucial to comprehending the current framework for moral rights that artists have in this industry.[31] Part I.A.1 briefly introduces the goals of copyright law. Next, Part I.A.2 provides background on the types of works protected by copyright law in the music industry and outlines the typical authors and owners of those works, focusing on Taylor Swift as an illustrative example.

1. The Constitutional Origins and Objectives of U.S. Copyright Law

Copyright law in the United States is derived from Article 1, Section 8, Clause 8 of the U.S. Constitution, which states that Congress has the power "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."[32] From this clause, the federal government has the power to create copyright legislation that incentivizes creation.[33] The U.S. Supreme Court has interpreted the clause to mean that copyright law's "ultimate aim is . . . to stimulate artistic creativity for the general public good."[34] The Copyright Act of 1976[35] (the "Copyright Act" or "Act") was crafted around this theory.[36] The U.S. Copyright Office states that the primary purpose of the Act is to foster the creation of works for the public welfare, while also noting an important secondary purpose: to reward creators for their contributions.[37] As is relevant below, one method to improve the public's access to works is to ensure that creators receive worthwhile incentives to create and publicly share their work.[38] One way the Act gives creators incentives is through granting authors protections known as "exclusive rights" in the work, which include the right to distribute the work, the right to prepare derivative works, and the right to publicly

31. *See* Chisolm, *supra* note 22, at 454 (explaining how U.S. copyright law attempts to increase access to creative works to improve society in exchange for economic benefit to copyright owners, not authors, which creates "inequitable results for music performers").

32. U.S. CONST. art. I, § 8, cl. 8.

33. *See* Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1751 (2012).

34. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

35. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of the U.S. Code). The 1976 Act took effect on January 1, 1978. *See id.*

36. *See id.*

37. U.S. COPYRIGHT OFF., GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, at 1 (1977), https://www.govinfo.gov/content/pkg/GOVPUB-LC3-PURL-gpo66970/pdf/GOVPUB-LC3-PURL-gpo66970.pdf [https://perma.cc/B3D9-KZ7P].

38. *See* Fromer, *supra* note 33, at 1751.

perform the work.[39] Generally, the authors of a work are the initial owners of these rights, but authors may choose to transfer their ownership.[40]

2. Authorship Versus Ownership in Musical Works and Sound Recordings

In the realm of music, copyright law bifurcates the works that receive protection into two distinct groups: the composition of the musical work ("musical work") and the master sound recording ("sound recording").[41] Though related, musical works and sound recordings are separately protected and are often "created, owned, and managed by different entities."[42] Because owners of works are generally the ones who receive protections under the Copyright Act, understanding the differences between these two categories of works and who owns what is key to understanding the issues faced by Swift and many other artists.[43]

The musical work copyright includes "the notes and lyrics of the song as they appear on sheet music."[44] Swift and other songwriters, lyricists, and composers commonly are the authors of musical works and may also own the rights to their musical works.[45] However, depending on the contractual agreement, the rights in the musical work can be divided in many different ways; for instance, they could be transferred to a publishing company or shared between the artist and the publisher.[46]

In contrast, sound recordings "are works that result from the fixation of a series of musical . . . sounds."[47] Sound recordings are often referred to as an artist's "master" recordings and are what one hears on the radio or streaming services like Spotify.[48] Since sound recordings are primarily created through record deals, record labels, rather than songwriters or vocalists, usually own sound recordings.[49] However, in some cases, it may be unclear whether the

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39. 17 U.S.C. § 106.

40. *Id.* § 201(a), (d). If there are multiple authors, they are co-owners. *Id.* § 201(a).

41. *See id.* § 102(a); *see also* Williams v. Gaye, 895 F.3d 1106, 1121 (9th Cir. 2018) ("[S]ound recordings and musical compositions are separate works with their own distinct copyrights." (quoting Erickson v. Blake, 839 F. Supp. 2d 1132, 1135 n.3 (D. Or. 2012))).

42. U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE 18 (2015), https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf [https://perma.cc/TV6U-WGPD].

43. *See* Becca E. Davis, *Moral Rights for Musical Compositions in the United States: It's Not Just Fair, It's an Obligation*, 40 HASTINGS COMMC'NS & ENT. L.J. 69, 83 (2018).

44. Recording Indus. Ass'n of Am. v. Libr. of Cong., 608 F.3d 861, 863 (D.C. Cir. 2010).

45. *See* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 284 (10th ed. 2019).

46. *Id.* at 285. In the United States, rights typically do not extend to vocalists, as they rarely receive authorship status. *See* Chisolm, *supra* note 22, at 462. Swift has encouraged new artists to write their own music for this very reason. *See* BBC Radio, *Taylor Swift Talks Music, Politics and Life with Radio 1's Clara Amfo*, YOUTUBE (Sept. 13, 2019), https://www.youtube.com/watch?app=desktop&v=2AUUnLixsFQ [https://perma.cc/WSS3-AKRB].

47. 17 U.S.C. § 101.

48. *See* LARRY WAYTE, PAY FOR PLAY: HOW THE MUSIC INDUSTRY WORKS, WHERE THE MONEY GOES, AND WHY 265 (2023).

49. *See* Chisolm, *supra* note 22, at 465. Most artists attempt to obtain record contracts from labels because being signed to a label expands an artist's chance of success, thanks to

record label was the author of the sound recording or if the label only received ownership from a transfer from the artist.[50]

A common issue within copyright is the uncertainty in determining the author of a work because of the concept of "work made for hire."[51] If a work is specially commissioned or made by an employee acting in the scope of their employment, it is considered a work made for hire, and the employer or commissioner is the author, not the creator of the work.[52] Most recording contracts include a provision that labels the artist's sound recordings as a work made for hire.[53] However, contractual language alone is not dispositive in determining whether the work qualifies as a work made for hire.[54] Instead, in *Community for Creative Non-violence v. Reid*,[55] the Supreme Court argued that a multifactor balancing test should be applied to determine whether the work is a work made for hire.[56] Since no single factor is dispositive, courts reserve the right to determine whether a work is a work made for hire, and they do so by examining all relevant factors that are specific to those artist-label relationships.[57] Since most rights in the Copyright Act are reserved for owners, and ownership first lies with authorship, knowing the authorship status of works is helpful.[58]

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the increased financial support, exposure, and relationships. *See* PASSMAN, *supra* note 45, at 77.

50. *See* Mark H. Jaffe, *Defusing the Time Bomb Once Again—Determining Authorship in a Sound Recording*, 53 J. COPYRIGHT SOC'Y U.S.A. 139, 150–54 (2005–2006) (summarizing differing viewpoints presented to the House Judiciary Committee on who should be considered the author of a sound recording).

51. *See id.* at 152. This issue is especially relevant for sound recordings because the making of recordings includes contributions from many different parties. *See id.* at 140.

52. *See* 17 U.S.C. § 201(b).

53. *See* Jaffe, *supra* note 50, at 151; *see also U.S. Copyright Office and Sound Recordings As Work Made for Hire: Hearing Before the Subcomm. on Cts. & Intell. Prop. of the Comm. on the Judiciary, H.R.*, 106th Cong. 214–17 (2000) (statement of Jay Cooper, Sheryl Crow's attorney). Jay Cooper testified that it is almost impossible to negotiate the "work for hire" language out of a recording contract. *Id.*

54. *See* Urbont v. Sony Music Ent., 831 F.3d 80, 89–90 (2d Cir. 2016) (discussing different factors to consider whether a work was made for hire); *see also* Waite v. UMG Recordings, Inc., No. 19-CV-01091, 2023 WL 1069690, at *10 (S.D.N.Y. Jan. 27) (highlighting the importance of a case-by-case analysis for work for hire status in sound recordings), *appeal dismissed*, No. 23-195 (2d Cir. Mar. 31, 2023).

55. 490 U.S. 730 (1989).

56. *Id.* at 751–52. The court listed the following factors as relevant to determine an employee relationship:

> [1] the skill required; [2] the source of the instrumentalities and tools; [3] the location of the work; [4] the duration of the relationship between the parties; [5] whether the hiring party has the right to assign additional projects to the hired party; [6] the extent of the hired party's discretion over when and how long to work; [7] the method of payment; [8] the hired party's role in hiring and paying assistants; [9] whether the work is part of the regular business of the hiring party; [10] whether the hiring party is in business; [11] the provision of employee benefits; and [12] the tax treatment of the hired party.

Id. (citations omitted) (citing RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958)).

57. *See id.* at 752.

58. *See supra* note 43 and accompanying text; *see also* 17 U.S.C. § 201(a).

It is also important to note that once copyright ownership is transferred from the author, the new owner generally assumes control over any subsequent transfers of the rights.[59] For example, Swift's first deal with Big Machine Records included the transfer of her ownership rights of her masters, which allowed Big Machine the right to transfer the masters to a third party like Braun without Swift's permission.[60] Although not every situation is as hostile as Swift's, it is not uncommon in the music industry for third parties to gain control of an artist's masters by buying them from record companies.[61]

Further, a transfer of rights does not necessarily entail a complete transfer of ownership.[62] Artists may also license some parts of their copyright by contracting with third parties to allow them to use the copyrighted work in certain ways for a specific period.[63] In the music industry, copyright owners commonly license some of their exclusive rights to collect revenue.[64]

B. Moral Rights

As artists navigate the complexities of copyright ownership and licensing, the concept of moral rights is key to understanding how they maintain control over the integrity of their works, even after they transfer ownership.[65] Part I.B.1 introduces moral rights, provides context on international standards, and outlines the history of the United States's recognition of these rights. Part I.B.2 then examines the U.S. patchwork of protections used to justify adherence to international standards.

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59. *See* § 201(d); *see also Author(s) of the Musical Works*, COPYRIGHT.GOV, https://www.copyright.gov/eco/gram-pa/author.html [https://perma.cc/QB7T-MZV8] (last visited Apr. 2, 2025).

60. *See* Constance Grady, *Why Taylor Swift Is Rerecording All Her Old Songs*, VOX (Aug. 10, 2023, 10:45 AM), https://www.vox.com/culture/22278732/taylor-swift-re-recording-1989-speak-now-enchanted-mine-master-rights-scooter-braun [https://perma.cc/BMN2-TVCT].

61. *See* Rajan Desai, Note, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. L.J. 1, 19 (2001) ("[R]ecord companies can assign recording contracts to another company, due to such situations as mergers or sales, which means that musicians can find themselves in contracts with new record companies that may not treat their music properly."). In fact, there has been a rise in private equity firms buying masters, like Swift's, from record labels. *See* Kate Kelly, Joe Coscarelli & Ben Sisario, *How Taylor Swift Dragged Private Equity into Her Fight over Music Rights*, N.Y. TIMES (Nov. 24, 2019), https://www.nytimes.com/2019/11/24/business/taylor-swift-carlyle-scooter-braun.html [https://perma.cc/WMJ8-3F9D]. After Big Machine transferred Swift's masters to Ithaca Holdings, Shamrock Holdings, a private equity firm, bought the rights to the works. *See* Milano, *supra* note 16.

62. *See* 17 U.S.C. § 201(d)(1).

63. *See* WAYTE, *supra* note 48, at 233.

64. *See id.*

65. *See* Chisolm, *supra* note 22, at 456–57.

1. History of Moral Rights Under International and U.S. Law

Moral rights are the personal rights of artists to protect their noneconomic interests in their works.[66] The underlying principle of moral rights is that an author's creations are an extension of their identity, and thus, their personal interests in those works deserve protection.[67] However, like economic rights, moral rights incentivize the creation of works by ensuring that artists retain control over both their creative process and the final product, providing them with the assurance that their work will not be distorted or misrepresented.[68]

Many countries recognize these rights by adhering to the Berne Convention for the Protection of Literary and Artistic Works[69] ("Berne" or the "Berne Convention"), an international treaty governing copyright law.[70] Article 6bis of Berne outlines a standard for moral rights stating:

> 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.[71]

This provision encompasses the legal rights of attribution and integrity.[72] The right of attribution ensures that artists are recognized as the authors of their works, preventing others from falsely claiming authorship.[73] The right of integrity, under Berne, allows artists to object to any changes or derogatory treatment of their works that could harm their reputation.[74] Although, the right of attribution focuses on recognizing and crediting the artist, the right of integrity is concerned with preserving the original form of the work and preventing harmful treatment.[75]

To comply with Berne, countries must adhere to the minimum requirements of Article 6bis, but because Berne does not impose specific structures to enforce moral rights, the instantiation of these protections vary globally.[76] Many countries, including France and Germany, adopted moral rights legislation distinct from economic copyright protections and extended

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66. Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 410 (2009).

67. *See id.*

68. Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 44 (1998).

69. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (revised at Paris, July 24, 1971).

70. *See* Chisolm, *supra* note 22, at 474.

71. Berne Convention for the Protection of Literary and Artistic Works, *supra* note 69, art. 6bis(1).

72. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 11.

73. *See* Bird, *supra* note 66, at 411.

74. *See id.* at 410–11. In the United States, however, the explicit right of integrity does not apply to derogatory action toward a work, but instead only to distortions, mutilations, or modifications. *See* 17 U.S.C. § 106A.

75. *See* § 106A.

76. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 15.

protections beyond the rights of attribution and integrity mandated by the Berne Convention.[77] In contrast, moral rights in the United States are more limited and more commonly intertwined with economic laws.[78]

In 1988, the United States joined the Berne Convention without enacting a federal moral rights statute because Congress declared that the United States already protected the moral rights outlined in Berne through existing patchwork protections, including a combination of state laws, trademark law, provisions in the Copyright Act, and contract law.[79] Since joining Berne, the United States has established some federal moral rights protections through the Visual Artists Rights Act of 1990[80] (VARA).[81] However, VARA only provides visual artists with statutory protection for their moral rights, so many artists, including those in the music industry, still must rely on a patchwork of protections to exercise these rights.[82] This Note examines the effectiveness of the patchwork of protections for the moral right of integrity in the music industry.[83]

2. Patchwork Protections for Artistic Integrity

During congressional subcommittee hearings, witnesses testified that although the Copyright Act lacks explicit provisions for moral rights, U.S. law remains compatible with Article 6bis because of the protections already offered by a combination of existing federal and state laws.[84] At the core of these protections are state privacy and publicity rights, § 43(a) of the Lanham Act[85] ("Lanham"), several rights protections outlined in the Copyright Act,

77. *See* Bird, *supra* note 66, at 414.

78. *See id.*; U.S COPYRIGHT OFF., *supra* note 29, at 3–4.

79. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.); *see also* U.S. COPYRIGHT OFF., *supra* note 29, at 23–25.

80. Pub. L. No. 101-650, 104 Stat. 5128 (codified as amended in scattered titles and sections of the U.S. Code); *see also* 17 U.S.C. § 106A.

81. *See* U.S COPYRIGHT OFF., *supra* note 29, at 7. Additionally in 1988, Congress enacted § 1202 as part of the Digital Millennium Copyright Act, Pub. L. No. 105-304, § 1202, 122 Stat. 2860, 2872–74 (1998) (codified as amended at 17 U.S.C. § 1202). This provision makes it illegal to knowingly remove or alter any copyright management information from a work, including the author's name or title, without authorization. § 1202(b). Although § 1202 does not explicitly enforce moral rights like VARA, it provides a mechanism for recognizing authorship and attribution. *See id.*

82. *See* Ponte, *supra* note 24, at 46–50; *see also* Desai, *supra* note 61, at 15. Visual art is limited to include paintings, drawings, prints, sculptures, or photographs produced only for exhibition purposes that exist in one copy or a limited edition under 200 copies. 17 U.S.C. §§ 101, 106A. The rationale behind this statute is that work produced in single or limited editions, such as paintings or sculptures, has a more personal connection to the artist since they are more unique in nature. *See* H.R. REP. NO. 101-514, at 12 (1990).

83. *See infra* Part I.C.

84. *See Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcomm. on Cts., C.L. & the Admin. of Just. of the H. Comm. on the Judiciary*, 100th Cong. 230, 244, 692 (1987–1988); *see also* H.R. REP. NO. 100-609, at 33–34 (1988).

85. 15 U.S.C. §§ 1051–1127, 1141; *id.* § 1125(a).

and the protections afforded by contract law.[86] This part discusses each of these patchwork protections and their scope with regard to moral rights.

a. State Protections: Publicity Rights

To demonstrate compliance with Berne, experts pointed to state privacy and publicity laws, which provide authors with legal recourse to prevent unauthorized commercial exploitation of their identities.[87] These can help prevent an artist's name from being associated with their work after someone else has altered the work.[88] Publicity laws help protect an artist's moral rights by preventing unauthorized use of their name, image, or likeness, thereby preserving their reputation, integrity, and personal connection to their work.[89] These laws vary by state, but to prevail on a publicity claim in California, a state with a robust right of publicity, a plaintiff must show: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of the plaintiff's name or likeness to defendant's advantage commercially or otherwise; (3) lack of consent; and (4) resulting injury."[90]

There are other relevant state laws that artists can utilize to attempt to preserve their moral rights.[91] These include defamation, fraud, misrepresentation, unfair competition, and other state moral rights laws.[92] Defamation, although one of the earliest legal avenues for artists to defend themselves, poses significant challenges as a method of enforcing moral rights.[93] There have been very few successful defamation cases to protect moral rights due to the high standards required, including the need to demonstrate actual malice for public figures.[94] Furthermore, causes of action for fraud, misrepresentation, and unfair competition typically do not differ significantly from protections offered under the Lanham Act.[95] Finally, although some states have their own versions of moral rights laws, these are all limited to fine art, similar to federal law.[96]

b. Trademark Law: § 43(a) of the Lanham Act

The Lanham Act primarily governs trademarks and unfair competition in the United States, but it also has implications for moral rights through its provisions on false endorsement and false advertising.[97] Section 43(a)(1)

86. *See* H.R. REP. NO. 100-609, at 34 (1988).
87. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 110–12.
88. *See id.*
89. *See id.* at 113.
90. Browne v. McCain, 611 F. Supp. 2d 1062, 1069 (C.D. Cal 2009) (quoting White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992)).
91. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 107.
92. *See id.* Similar to copyright protections, these laws vary among states. *See id.*
93. *See id.* at 108–10.
94. *See id.*
95. *See id.* at 119; *see also infra* Part I.B.2.b (discussing the Lanham Act in more detail).
96. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 122.
97. *See id.* at 41.

allows legal claims when there are "false designation[s] of origin, false or misleading description[s] of fact, or false or misleading representation[s] of fact" that are likely to "cause confusion."[98] This protects against unauthorized uses of an individual's name or likeness that could mislead consumers into believing the individual has endorsed a product or service.[99]

For instance, in *Gilliam v. American Broadcasting Co.*,[100] American Broadcasting Company (ABC) had aired edited versions of the plaintiffs' *Monty Python* series that "omitted the climax of the skits to which [plaintiffs'] rare brand of humor was leading and at other times deleted essential elements in the schematic development of a story line."[101] The U.S. Court of Appeals for the Second Circuit held that this could mislead consumers to believe that the plaintiffs were falsely endorsing ABC's version of the skits.[102] In this case, the Lanham Act protected the plaintiffs from the use of their work by another party in a way that could harm their reputation, thereby reinforcing the principles of the right to integrity.[103]

However, for the Lanham Act to apply, the work must be altered by someone other than the author.[104] In *Choe v. Fordham University School of Law*,[105] a law student filed a Lanham claim against the law school for publishing an earlier rough draft of his comment, which contained grammatical errors, because he was worried it would harm the integrity of the work.[106] There, the court held that Lanham did not apply because the student admitted to have technically authored the published rough draft, unlike in *Gilliam*, where the plaintiffs demonstrated that the defendants had physically modified the original work.[107]

Additionally, even when the defendant has altered the work, for Lanham protections to apply, the altered version must mislead consumers into believing that the original author, not the defendant, made the alterations.[108] In *Henley v. DeVore*,[109] the plaintiffs, Don Henley and other songwriters, held copyrights for the songs "The Boys of Summer" and "All She Wants to Do Is Dance."[110] Defendants Charles DeVore, a U.S. Senate candidate, and his campaign staff member created altered versions of these songs, changing the lyrics to "The Hope of November" and "All She Wants to Do Is Tax" to mock politicians President Barack Obama and Speaker Nancy Pelosi.[111] The plaintiffs asserted a Lanham claim and argued that the audience would

98. 15 U.S.C. § 1125(a).
99. *See id.*
100. 538 F.2d 14 (2d Cir. 1976).
101. *Id.* at 25.
102. *See id.* at 19.
103. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 42.
104. *See id.*
105. 920 F. Supp. 44 (S.D.N.Y. 1995), *aff'd*, 81 F.3d 319 (2d Cir. 1996).
106. *See id.* at 47.
107. *Id.* at 48.
108. *See* 15 U.S.C. § 1125(a).
109. 733 F. Supp. 2d 1144 (C.D. Cal. 2010).
110. *Id.* at 1147.
111. *See id.* at 1148.

mistakenly believe that the plaintiffs endorsed or approved the altered videos.[112] However, the court determined that the key question was not whether the audience would reasonably believe Henley endorsed the videos, but whether they would believe Henley performed the music in the videos, and because it was clear that someone else edited them, the Lanham claim was unsuccessful.[113].

Further, the Supreme Court curtailed the scope of moral rights protections offered by the Lanham Act in *Dastar Corp. v. Twentieth Century Fox Film*.[114] In the opinion, Justice Antonin Scalia specifically cautioned against using trademark law to obtain moral rights protections that copyright law does not provide, and he described such an endeavor as potentially leading to "a species of mutant copyright law that restricts the public's federal right to 'copy and to use' expired copyrights."[115] Some lower courts have interpreted the *Dastar* decision broadly and have prohibited Lanham claims for violations of integrity in expressive works.[116]

c. Copyright Act Protections

Congress also relied on sections of the Copyright Act to protect authors' moral rights.[117] Witnesses argued that three provisions in the Copyright Act aided in protecting moral rights: § 115(a)(2) (restrictions on compulsory mechanical licenses right), § 203 (termination of transfers), and § 106(2) (authors' exclusive right to create and authorize derivative works).[118]

Under the compulsory licensing provision in § 115(a)(2), a third party may obtain a required license from a copyright owner to sing, perform, or record an original musical composition as a cover song.[119] The copyright owner is obligated to provide the license as long as the cover song performance or recording does "not change the basic melody or fundamental character" of the original song.[120] Of the protections, § 115(a)(2) has been identified as the "sole explicit recognition of moral rights in the entire Copyright Act," as it explicitly attempts to uphold the integrity of the original version a song.[121]

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112. *Id.* at 1166–67.
113. *See id.* at 1168–69.
114. 539 U.S. 23 (2003).
115. *Id.* at 34.
116. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 45–46. (first citing Kent v. Universal Studios, Inc., No. 08-cv-02704, 2008 WL 11338293, at *10 (C.D. Cal. Aug. 15, 2008) (holding that the term "origin" in § 43(a) "exclude[s] the identification of the authors of communicative works"); then citing Atrium Grp. de Ediciones Publicaciones, S.L. v. Harry N. Abrams, Inc., 565 F. Supp. 2d 505, 512–13 (S.D.N.Y. 2008); and then citing Weidner v. Carroll, No. 06-CV-782, 2007 WL 2893637, at *4 (S.D. Ill. Sept. 28, 2007)). However, the Copyright Office also notes that other courts interpreted *Dastar* more narrowly and have allowed claims to proceed. *See id.*
117. *See* H.R. REP. NO. 100-609, at 34 (1988).
118. *See id.*; 17 U.S.C. §§ 115(a)(2), 203, 106(2).
119. *See* § 115(a)(2); *see also* WAYTE, *supra* note 48, at 410–11.
120. § 115(a)(2).
121. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 104 (quoting 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.04[F] (3d ed. 2017)).

However, the scope of § 115(a)(2) is limited because it only applies to changes in "fundamental character" and only some types of works.[122]

Secondly, the termination right in § 203 allows eligible artists, whose works are not classified as works made for hire, to terminate the transfer of copyrights, thus regaining ownership in their work.[123] Under this provision, authors can reclaim their work thirty-five years after a transfer if they provide proper notice and follow the filing requirements.[124] Artists may use this provision as a method of protecting the integrity of their work by regaining authority to decide how it is used, even after an original transfer of ownership.[125]

Finally, § 106(2) grants copyright owners the exclusive right to create and authorize derivative works or new creations that are based on preexisting works.[126] This provision helps protect the right of integrity by enabling owners to maintain control over how their work is adapted or altered and allows them to reject alterations they find harmful to their reputation.[127] Although the Lanham claim in *Henley* was unsuccessful, the court granted relief to the plaintiff regarding a copyright infringement claim under § 106(2).[128] The court held that the defendants' distortion of one of Henley's songs infringed upon his derivative work right.[129]

d. Contractual Protections

Finally, contracts are an integral part of the moral rights patchwork of protections in the United States.[130] By outlining how parties will use a work, contracts provide a method for authors and creators to negotiate the inclusion of the right of integrity.[131] Authors can negotiate to protect against the uses of their work they find most harmful rather than accepting broad protections against all potential alterations to their work.[132] For example, in the music industry, songwriter agreements may have rights of approval or creative control clauses.[133] These types of contractual provisions give artists the flexibility to decide how their work can be used, considering that different

122. *See id.* at 105; *see also* Petrik, *supra* note 23, at 369–70.
123. *See* § 203.
124. *See id.*
125. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 106. However, even after successfully invoking a termination of transfer, artists still have no authority over derivative works created before the termination. *See* § 203.
126. § 106(2).
127. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 102.
128. *See* Henley v. Devore, 733 F. Supp. 2d 1144, 1150 (C.D. Cal. 2010).
129. *See id.* at 1164, 1169.
130. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 129; *cf.* Ginsburg & Kernochan, *supra* note 25, at 33 (explaining that creators who are not even authors may use contracts "for some measure of control" over their work if they have enough bargaining power).
131. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 130–31.
132. *See* National Music Publishers' Association, Reply Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 6 (May 15, 2017).
133. *See id.*; *see also* PASSMAN, *supra* note 45, at 293–95. Artists can use creative control clauses to require publishers to get an artist's approval before they make changes in the music, add foreign lyrics, change the title, or grant sync licenses. *See id.*

artists may have different sensitivities.[134] For example, one artist might find a particular use of their work offensive, whereas another artist might have no issue with the same use.[135]

C. Navigating Moral Rights Through Practice in Music

Although there are various avenues for nonvisual artists to protect their moral rights in the United States, they may still encounter barriers.[136] Part I.C explores the challenges American artists in the music industry face when seeking to assert moral rights protections and compares the available remedies in the United States with those in other countries. Part I.C.1 demonstrates the tension between economic and moral rights in the context of digital sampling. Part I.C.2 examines how synchronization licenses can impact an artist's moral rights, particularly when their music is recontextualized in audiovisual works, such as films or television shows. Finally, Part I.C.3 considers the potential conflicts between public performance licenses and an artist's moral rights.

1. Digital Sampling

Sampling, which occurs when an artist incorporates portions of an existing sound recording into a new song, may put the original artist's right of integrity at risk.[137] Rap and electronic artists frequently use samples in their music, which is permissible when they secure the proper licenses.[138] In fact, record labels will not release recordings involving sampling without "assurances that the samples have been cleared" from both the record company that owns the sampled recording and the owner of the sampled musical composition.[139] In practice, sampling demonstrates that when ownership of musical compositions lies with parties other than the original author, the work can be legally licensed and used in ways that may potentially harm the author's reputation.[140]

This was the case in *Fahmy v. Jay-Z*,[141] where the plaintiffs, heirs of an Egyptian composer who wrote the song "Khosara," argued that a use of their ancestor's work violated his moral rights.[142] The defendants had obtained

134. *See* National Music Publishers' Association, *supra* note 132, at 6.
135. *See id.*
136. *See infra* Parts I.C.1–3.
137. *See* WAYTE, *supra* note 48, at 400–01.
138. *See* Aurele Danoff, Note, *The Moral Rights Act of 2007: Finding the Melody in the Music*, 1 J. BUS. ENTREPRENEURSHIP & L. 181, 206 (2007). Sampling music may also be permissible without a license if the use is de minimis or a fair use. *See* Campbell v. Acuff Rose Music, Inc., 510 U.S. 569, 577 (1994) (discussing sampling as fair use); *see also* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 886 (9th Cir. 2016) (discussing the de minimis exception for sound recordings); Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004) (discussing the de minimis exception for musical works).
139. *See* Danoff, *supra* note 138, at 206.
140. *See* Desai, *supra* note 61, at 13.
141. 908 F.3d 383 (9th Cir. 2018).
142. *Id.* at 385–86.

all necessary licensing rights to the song, including the right to create derivative works.[143] Consequently, Jay-Z legally sampled "Khosara" in his track "Big Pimpin'."[144] The plaintiffs argued that, despite having valid licenses, the use infringed on the moral rights associated with the work because the context of the sampled song was vulgar and offensive, which they claimed was prejudicial to the reputation of the composer.[145] However, their claim was unsuccessful not only because equivalent moral rights were not recognized under U.S. law, but also because the defendants had obtained the necessary economic rights to legally sample the song.[146] The *Fahmy* case encapsulates the complex tension between legal transfers of economic rights and moral rights in the United States.[147]

Alternately, in Australia, where there is a federal statute granting moral rights to authors, the plaintiff in *Perez v Fernandez*,[148] known as "Pitbull," or "Mr. 305," was successful in asserting an integrity infringement claim.[149] The defendant, Jaime Fernandez, a DJ, removed some words from Pitbull's song "Bon, Bon" and remixed it to include the defendant's stage name, "DJ Suave."[150] Jani McCutcheon explained how the court's opinion highlighted that the defendant's grievances stemmed from a canceled tour planned with Pitbull and a "sense of entitlement to leverage off [Pitbull's] reputation."[151] The court found that even though Pitbull could not show actual damages, there was an infringement on his moral right of integrity because the defendant's conduct was prejudicial to Pitbull's honor and reputation.[152]

2. Synchronization Licenses

Synchronization licenses are also an area where authors can lose control over their work, once they transfer the ownership of their economic rights.[153] Synchronization licenses permit the licensee to use a musical work in an audiovisual project, like a movie, television show, or advertisement.[154] Artists have brought forward claims when their music was used in films and advertisements in ways they found upsetting; they also argued that this usage decontextualized the purpose of the work, violating their right to integrity.[155]

143. *See id.* at 389.
144. *See id.*
145. *See id.* at 385.
146. *See id.*
147. *See id.*
148. [2012] FCA 2 (Austl.).
149. *See* Jani McCutcheon, *Perez v Fernandez: Australia's First Decision on the Moral Right of Integrity*, 23 AUSTL. INTELL. PROP. J. 174, 174 (2013).
150. *Id.* The remix included the line "Mr. 305 and I am putting it down with DJ Suave," which is a reference to Pitbull and Mr. Fernandez. *Id.*
151. *See id.* at 175.
152. *See id.*
153. *See* Desai, *supra* note 61, at 9.
154. *See* WAYTE, *supra* note 48, at 278.
155. *See* Ponte, *supra* note 24, at 68–69.

For instance, in *Shostakovich v. Twentieth Century-Fox Film Corp.*,[156] Russian composer Dmitri Shostakovich, along with other composers, filed lawsuits in New York state to prevent the use of their public domain music in the Cold War film *The Iron Curtain.*[157] They argued that the film's use of their compositions as background music falsely implied their endorsement of the film's negative depiction of the Soviet Union, thus tarnishing their reputations and portraying them as disloyal to Russia.[158] The New York court system dismissed their defamation and moral rights claims, stating that such moral rights were not clear and lacked a basis for legal action.[159] Alternatively, when a publishing house brought the same suit in France, the court held that the film's use violated the composers' moral rights and ordered that the film's distribution be prohibited.[160]

3. Public Performances Licenses

Further, the current licensing regime for public performances of musical works and sound recordings leads artists to lose control of the uses of their works.[161] Music copyright owners have the exclusive right to publicly perform their work.[162] If public venues want to play music, they need performance licenses for both the musical work and for the digital audio transmission of sound recordings.[163] To obtain licenses for the musical works, venues typically contact performing rights organizations (PRO).[164] PROs manage the rights of songwriters and musicians regarding the public performance of their music, and they help artists by licensing their songs for various performances.[165] Virtually all owners of musical works relinquish control of their work to PROs because they simplify the public performance licensing process.[166] Once authors grant PROs the authority to license their work to third parties, they forfeit the ability to block performances they may

156. 80 N.Y.S.2d 576 (Sup. Ct. 1948), *aff'd*, 87 N.Y.S.2d 430 (App. Div. 1949).

157. *Id.* at 576. When a work is in the public domain, it is no longer protected by copyright, so no one has rights in the work and cannot assert infringement claims. *See* WAYTE, *supra* note 48, at 211.

158. *Shostakovich*, 80 N.Y.S.2d at 578.

159. *Id.* at 578–79.

160. *See* Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 28 (1985) (citing Soc. Le Chant du Monde v. Soc. Fox Eur., Cours d'appel, Paris, Jan. 13, 1953, Dalloz, *Jurisprudence*, [D. Jur.] 16, 80).

161. *See* Rigamonti, *supra* note 23, at 368–69.

162. *See* WAYTE, *supra* note 48, at 237; *see also* 17 U.S.C. § 106(4).

163. *See* WAYTE, *supra* note 48, at 237, 250–51, 278. Thus, both the owners of musical works and the sound recording must permit the licenses. *See id.*

164. *See id.* at 250–51.

165. *See* Desai, *supra* note 61, at 8.

166. *See id.* One benefit is that PROs ensure that artists are compensated whenever their music is performed publicly. *See id.* This streamlines the licensing process, relieving artists from the burden of negotiating individual agreements to be compensated for the public performance of their works. *See id.* Additionally, PROs provide an avenue to monitor public performances of an artist's work and have authority to bring action against those who violate the rights of public performance without the proper licenses. *See id.*

find offensive or degrading, potentially compromising the artistic integrity of the work.[167]

Rajan Desai uses Bruce Springsteen's song "Born in the U.S.A." to exemplify this issue.[168] Although the song critiques the Vietnam War, many have interpreted it as a patriotic anthem.[169] For example, President Ronald Reagan played it during his 1984 reelection campaign, and Springsteen publicly condemned this use.[170] However, President Reagan was not the only one who misinterpreted the song's message; Chrysler also sought to obtain a synchronization license to the song for a patriotic car commercial, but Springsteen, who likely had some ownership rights in the work, refused.[171] Nonetheless, President Reagan and many others likely were legally permitted to play the song at events because the venues had obtained the necessary licensing from PROs, despite decontextualizing the song.[172]

Alternatively, Helene Fischer received relief when the German nationalist party Die Heimat, formally known as the National Democratic Party of Germany (NPD), played a song that Fischer vocally performed but did not write.[173] Fischer argued that the use would lead the public to believe she supported the NPD campaign, thereby infringing on her moral rights.[174] The moral rights statute in Germany states that the "author has the right to prohibit the distortion or any other derogatory treatment of his work which is capable of prejudicing his legitimate intellectual or personal interests in the work."[175] This statute gives courts the ability to assert moral rights protections, even when the work was simply played in a harmful context.[176] The court's analysis centered on whether playing the song constituted derogatory treatment because there was no physical distortion to the song or recording.[177] Ultimately, the court ruled in favor of Fischer, stating that falsely endorsing a political party severely undermines the artist's personal interests.[178]

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167. *See id.*
168. *See* Desai, *supra* note 61, at 1–2.
169. *See id.* at 2.
170. *See id.*
171. *See id.*
172. *See id.* at 2–3. This demonstrates that although Springsteen can prevent some licenses that decontextualize the meaning of his work and misrepresent the song, like the one needed for the Chrysler commercial, he has limited legal recourse to prevent public performances because of PROs. *See id.*
173. *See* Stefan Michel, *You Can't Always Get What You Want?: A Comparative Analysis of the Legal Means to Oppose the Use of Campaign Music*, 18 J. MARSHALL REV. INTELL. PROP. L. 169, 190–91 (2018) (discussing a case decided in Germany on March 18, 2015).
174. *See id.* at 189–90.
175. Gesetz über Urheberrecht und verwandte Schutzrechte [UrhG] [Urheber-rechtsgesetz] [Copyright Act], Sept. 9, 1965, BGBl I at 1273, § 14 (Ger.), https://www.gesetze-im-internet.de/urhg/__14.html [https://perma.cc/9839-CN82]. German moral rights law also covers artists who do not write their own music in § 75 UrhG. *See* Michel, *supra* note 173, at 188.
176. *See* Michel, *supra* note 173, at 189–91.
177. *See id.* at 189–90.
178. *See id.* at 191.

II. REEVALUATING THE MORAL RIGHT OF INTEGRITY: CURRENT COMPLIANCE AND EFFECTS OF FEDERAL LEGISLATION

The examples discussed in Part I.C raise concerns about potential gaps in U.S. moral rights protections, particularly regarding the right of integrity for musicians who have transferred economic rights and control over their works.[179] This issue is relevant to both musical works and sound recordings, as industry licensing regimes in the United States limit artist control over the uses of both types of work.[180] Part II examines the sufficiency of current moral rights protections and discusses whether and how an explicit moral rights statute could be applied to solve any inadequacy. Part II.A analyzes whether the existing U.S. patchwork protections align with Article 6bis of the Berne Convention. Subsequently, Part II.B evaluates the harms and benefits of enacting a federally recognized right of integrity, highlighting potential effects on the music industry. Finally, Part II.C explores potential frameworks for a more substantial right of integrity that the United States could adopt.

A. Gaps in Patchwork Protections' Adherence to the Berne Convention

As discussed in Part I.B.2, most of the witnesses before Congress argued that U.S. law adequately complies with Article 6bis of the Berne Convention.[181] Notably, Dr. Árpád Bogsch, the director general of the World Intellectual Property Organization, which administers Berne, affirmed that the United States did not need to enact new moral rights legislation to meet its obligations under the treaty requirements.[182] Witnesses argued that the broad array of protections gives authors plenty of ways to assert copyright claims.[183] Further, Berne allows countries to implement the rights granted in any manner that aligns with their own legal systems.[184] The Copyright Office argues that the flexibility of Berne's implementation allows for the merger of economic and moral rights.[185] However, there is also an argument

179. *See supra* Part I.C.

180. *See supra* note 163 and accompanying text.

181. *See* H.R. REP. NO. 100-609, at 33–34 (1988); *see also supra* notes 84–86 and accompanying text.

182. *See Berne Convention Implementation Act of 1987*, *supra* note 84, at 282 ("I believe that in the United States the common law and such statutes . . . contain the necessary law to fulfill any obligation for the United States under Article 6*bis*."); *see also* H.R. REP. NO. 100-609, at 37 (1988) (citing Letter from Arpad Bogsch, Dir. Gen., World Intell. Prop. Org., to Irwin Karp, Esq. (June 16, 1987)).

183. *Berne Convention Implementation Act of 1987*, *supra* note 84, at 47, 205, 264, 309.

184. *See* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 69, art. 6bis(3) ("The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.").

185. U.S. COPYRIGHT OFF., *supra* note 29, at 103.

that the United States does not uphold Article 6bis, even despite the flexible standards.[186]

One criticism of the patchwork protections is that they emphasize the rights of owners rather than the rights of authors,[187] contrary to Berne's extension of moral rights to "authors."[188] For example, the U.S. Copyright Act primarily protects owners rather than authors.[189] The derivative work rights outlined in § 106(2) only allow copyright owners to control derivative works.[190] Thus, signing a record deal and transferring derivative works rights typically means artists also transfer a significant portion of their patchwork moral rights protections.[191] Similarly, the compulsory license provision suggests a right of integrity, but the right also resides with the copyright holder, who is often not the original creator of the music.[192] Additionally, even if the creator retains the copyright, they lose discretion and control over the work when they are obligated to license it to a third party or when they allow organizations, like PROs, to control further licenses.[193]

Alternatively, the termination of transfer provision under the Act is geared toward authors rather than owners.[194] This provision allows authors to potentially reclaim other integrity-protecting rights under the Copyright Act, such as the derivative work right, but only after thirty-five years have elapsed since the original transfer.[195] However, although legislators created this provision to protect authors with unequal bargaining power, "daunting intricacies of the scheme make it difficult for authors to take advantage of their rights."[196] Finally, even if an author successfully regains ownership through this provision, they cannot assert infringement claims on derivative works that were legally created and authorized before the transfer's termination, severely limiting their ability to control their works' integrity.[197]

Publicity rights offer relief to some authors who do not have ownership over their works, but these rights are also limited because they are often preempted by copyright law.[198] This means that if a publicity claim involves an image used in a copyrightable work, and the rights to that work are legally owned or licensed by the party using the image, the publicity claim will likely

186. *See* Petrik, *supra* note 23, at 368 (citing Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213, 252 (2006)).

187. *See* Chisolm, *supra* note 22, at 454.

188. *See* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 69, art. 6bis.

189. *See* Chisolm, *supra* note 22, at 454; *see also supra* note 43 and accompanying text.

190. *See* 17 U.S.C. § 106(2).

191. *See* Ginsburg & Kernochan, *supra* note 25, at 31–32. This is also the case when songwriters transfer their musical work rights to publishing companies. *See id.*

192. *See* Ponte, *supra* note 24, at 64.

193. *Id.*

194. *See* 17 U.S.C. § 203.

195. *See id.* § 203(a)(3).

196. Molly Van Houweling, *Author Versus Owners*, 54 HOUS. L. REV. 371, 383 (2016).

197. *See* § 203(b)(1).

198. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 113–14.

fail.[199] For example, in *Laws v. Sony Music Entertainment, Inc.*,[200] the plaintiff asserted a publicity claim against the defendants for using a sample of her recorded performance without her permission.[201] However, the claim failed because the defendants had legally licensed the sound recording rights from the plaintiff's past label.[202] The U.S. Court of Appeals for the Ninth Circuit elaborated, noting that "the right of publicity is not a license to limit the copyright holder's rights merely because one disagrees with decisions to license the copyright."[203]

However, the Lanham Act may provide protections for authors, which are distinct from and not preempted by economic ownership.[204] For example, in *Lamothe v. Atlantic Recording Corp.*,[205] two plaintiffs were bandmates with the defendants, and they all shared authorship of the musical works that they collaboratively created.[206] The defendants left the band, joined another group, and licensed the musical works to a record label, which then further licensed the works to other parties without attributing authorship to the plaintiffs.[207] In this case, the plaintiffs were successful in their Lanham claim, despite the proper licensing, because it "deprived [the plaintiffs] of recognition" for their work.[208]

Nonetheless, there are challenges regarding the applicability of the Lanham Act and its ability to support the United States' compliance with the Berne Convention.[209] First, the *Dastar* opinion noted that moral rights in VARA were "carefully limit[ed] and focus[ed],"[210] which insinuates that the Court is hesitant to understand the Lanham Act as a separate vehicle for moral rights protection.[211] Even if courts interpret *Dastar* more narrowly and do not regard the decision as abrogating protections for moral rights, there remain additional limitations.[212] The Lanham Act only protects works in cases where (1) there is consumer confusion and (2) there is an alteration of the work made by someone other than the original author.[213] First, the requirement of consumer confusion may conflict with Article 6bis, as moral rights are intended to exist independently of economic considerations,

199. *See id.* This stems from the notion that the right of publicity is freely alienable. *See* Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 186 (2012).
200. 448 F.3d 1134 (9th Cir. 2006).
201. *See id.* at 1135–36.
202. *See id.* at 1136, 1141.
203. *Id.* at 1145.
204. *See* Petrik, *supra* note 23, at 372.
205. 847 F.2d 1403 (9th Cir. 1988).
206. *See id.* at 1405.
207. *See id.*
208. *Id.* at 1407.
209. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 49.
210. Dastar Corp. v. Twentieth Century Fox Film, 539 U.S. 23, 24 (2003).
211. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 44–45.
212. *See supra* Part I.B.2.b.
213. *See* Davis, *supra* note 43, at 94.

whereas economic harm is linked to consumer confusion.[214] Furthermore, the requirement of an actual alteration or modification by someone other than the author for protection may be unduly restrictive in comparison to Article 6bis, which protects against "distortion, mutilation or other modification of, or other derogatory action in relation to, the said work."[215] Other countries, as illustrated by Fischer's case in Germany, interpret the phrase "derogatory action" more broadly, considering it capable of addressing a wider range of issues than the actual alterations required for a Lanham claim.[216]

Another concern regarding compliance with Article 6bis is the flexibility with which moral rights can be alienated through contractual agreements.[217] As demonstrated in Part I.C, the majority of moral rights protections are extinguished when an author transfers ownership of their work to a record company or publisher, or when they assign partial control to PROs.[218] This seems to contradict the notion in Article 6bis that authors should have rights, "even after the transfer of the [economic] rights."[219] However, Professors Jane C. Ginsburg and John M. Kernochan argue that the alienability of patchwork protections that protect rights akin to moral rights do not violate Article 6bis because "[t]he treaty's specification of the independence of the rights . . . from economic rights simply ensures that a grant of economic rights does not, of itself, entail a ceding of moral rights."[220] Nonetheless, if interpreted as Professors Ginsburg and Kernochan suggest, the issue of waiver may render moral rights under the patchwork protections largely symbolic, even if there is technical compliance with Berne.[221]

B. The Impact of Recognizing a Federal Right of Integrity

Regardless of the question surrounding the United States' current compliance with Berne, there is also an inquiry regarding the sufficiency of moral rights protections under U.S. law.[222] The existing patchwork protections system is viewed by some as offering artists more flexible and

214. *See* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 69, art. 6bis; *see also* Chance Johnson, Note, *The Decontextualization of Music in Political Settings: An Argument for Moral Rights for Musical Works*, 80 OHIO ST. L.J. 619, 636 (2019).

215. *See* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 69, art. 6bis.

216. *See* Michel, *supra* note 173, at 190–91; *see also* Gesetz über Urheberrecht und verwandte Schutzrechte [UrhG] [Urheber- rechtsgesetz] [Copyright Act], Sept. 9, 1965, BGBl I at 1273, § 14 (Ger.), https://www.gesetze-im-internet.de/urhg/__14.html [https://perma.cc/9839-CN82]; *Copyright Act 1968* (Cth) s 195AJ (Austl.); *supra* note 160 and accompanying text.

217. *See* Ginsburg & Kernochan, *supra* note 25, at 31–32.

218. *See supra* Part I.C.

219. *See* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 69, art. 6bis.

220. Ginsburg & Kernochan, *supra* note 25, at 32.

221. *See id.*; *see also* Michel, *supra* note 173, at 195.

222. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 37.

robust protection for the right of integrity than a blanket statute would.[223] Further, there are concerns that federal legislation regarding moral rights would conflict with other aspects of U.S. law, potentially creating inconsistencies or limitations in protecting authors' personal rights.[224] Part II.B.1 analyzes the potential harms to the industry, authors, and the public if the United States were to establish a federal right of integrity for authors. Part II.B.2 then examines the opposing viewpoint and considers whether federal legislation might be preferable and beneficial to artists, specifically in industries like the music industry, where transfer of rights is commonplace.

1. Concerns Regarding a Federal Right of Integrity

Expanding moral rights beyond current protections could be harmful to the music industry.[225] This concern arises from the potential negative impact a broad statute could have on business relationships, disrupting the unique practices within each industry.[226] Additionally, the music industry, like many other creative fields, often involves multiple authors or creators contributing to a work, raising questions about who would be able to exercise these rights and how financial interests could be affected for other authors and copyright owners.[227] Lastly, there are concerns about whether U.S. legal concepts like fair use and First Amendment protections would remain intact if moral rights legislation were enacted.[228]

First, many creators and businesses have structured their operations around the current patchwork protections, and changing the system could disrupt these relationships and the "carefully developed schema of contracts."[229] Supporters of maintaining the patchwork regime argue that it enables business practices to continue without confusion and would prevent any adverse effects on these industry practices.[230] These supporters also worry that if an author retains substantial control over how their work is used or modified, it could deter parties that often fund artistic creation, such as record labels, from financing or promoting the work due to additional perceived risks.[231] The National Music Publishers' Association summarized this point,

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223. Computer & Communications Industry Association, Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 2 (Mar. 30, 2017) ("In some cases, U.S. law provides more substantial protection than other Berne Convention adherents."); *see also* National Music Publishers' Association, *supra* note 132, at 6 ("Songwriters gain much more through contractual bargaining—either directly or through industry-wide agreements—than they would through a one size fits all statutory solution.").

224. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 28–32.

225. *See supra* note 223 and accompanying text.

226. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 36–37.

227. *See infra* notes 237–39 and accompanying text.

228. *See infra* notes 240–55 and accompanying text.

229. U.S. COPYRIGHT OFF., *supra* note 29, at 38.

230. *See id.* at 38–39; *see also Berne Convention Implementation Act of 1987*, *supra* note 84, at 37–39, 243–44, 671–74 (statements from Kenneth W. Dam, Vice President, IBM Corporation, and Paul Goldstein, Professor of Law, Stanford Law School).

231. *See* National Music Publishers' Association, *supra* note 132, at 6.

stating that the "music industry cannot afford to adopt a one-size-fits-all statute that would endanger marketplace uncertainty, trigger unnecessary and counterproductive litigation, and disincentivize further investment in the music industry."[232]

Moreover, another reason to avoid expansive moral rights legislation is the inherent diversity among creative industries and categories of works.[233] The Copyright Office argues that effective moral rights protections cannot adopt a blanket approach.[234] Different artistic fields have unique practices, expectations, and business models that may not align with a blanket moral rights law.[235] Market negotiations may be a preferable way to protect the right of integrity while still respecting any unique industry practices.[236] For example, the creation and distribution of sound recordings are different from those of visual art because sound recordings often involve collaboration among multiple contributors, including producers and sound engineers, who may not be recognized as authors under a rigid moral rights framework.[237] However, if there was an expansive moral rights framework, a sound engineer may be considered an author and could then prohibit a band from transferring their music by convincing a court that the transfer would harm their reputation.[238] Consequently, a uniform approach could inadvertently stifle creativity or impose unnecessary burdens on certain industries.[239]

Further, federal legislation aimed at expanding or enforcing moral rights may not comply with established copyright law and constitutional principles, like fair use and the First Amendment.[240] First, fair use allows others to use copyrighted work without permission when the benefits of the unauthorized use outweigh the copyright owner's personal interests in the work.[241] The purpose of fair use is to promote creativity and the free exchange of ideas by allowing limited use of copyrighted material without permission from the copyright holder.[242] Courts typically consider whether a use is fair on a

232. *See id.*
233. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 36–37.
234. *See id.*
235. *See id.*
236. *See* National Music Publishers' Association, *supra* note 132, at 4–6.
237. *See* Chisolm, *supra* note 22, at 463; *see also* Recording Industry Association of America, Inc., Reply Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 2 (May 15, 2017) ("[R]ecord labels' agreements with third parties generally include attribution requirements. Such contractual provisions are preferable to government mandates that would presumably apply identical rules to all classes of creative works, rather than treating sound recordings (which typically involve numerous creative contributors) differently than photographs or novels or videogames.").
238. *Cf.* Motion Picture Association of America, Inc., Reply Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 3 (May 15, 2017) (warning of the "prospect of having the distribution of a motion picture in which they have invested several hundred million dollars to bring to the screen, enjoined at the request of one of its creative contributors who convinces a court" of a moral rights violation).
239. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 36.
240. *See id.* at 28.
241. *See id.* at 30.
242. *See* Campbell v. Acuff Rose Music, Inc., 510 U.S. 569, 577 (1994).

case-by-case basis and examine four statutory factors to determine whether the use of work is protected.[243] These statutory factors include:

> (1) the purpose and character of the use; . . . (2) the nature of the copyrighted work; (3) the amount or 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 the value of the copyrighted work.[244]

Campbell v. Acuff-Rose Music, Inc.[245] demonstrated how fair use can be at odds with moral rights protections.[246] In *Campbell*, the rap group, 2 Live Crew, created a parody of Roy Orbison's song "Oh, Pretty Woman" without permission from the copyright holder, Acuff-Rose Music, Inc., despite initially offering to credit the original authors and pay royalties.[247] The U.S. Supreme Court ruled that 2 Live Crew's parody was fair use of Roy Orbison's song, emphasizing that the parody constituted a new creative work targeting the original for humorous effect, regardless of the original creator's objections.[248] *Campbell* demonstrates the fair use doctrine's role in protecting secondary users' right to free expression, while also highlighting how fair use can permit uses of work that the original author might disapprove of, and in some cases even harm their reputation.[249] This suggests that explicit moral rights provisions could conflict with fair use, stifling adaptations and creativity that rely on existing works and the public's access to creative content.[250]

If fair use is understood to limit the applicability of moral rights, it may also be unclear how courts would evaluate fair use factors in terms of moral rights.[251] Most problematic in this evaluation would be the fourth factor, which requires analysis of "the effect of the use upon the potential market for or value of the copyrighted work."[252] This factor may be incompatible with

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243. *See id.*; *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

244. 17 U.S.C. § 107. When analyzing the first factor, courts generally consider if the new purpose of the work is "transformative." *See Campbell*, 510 U.S. at 569; *see also Harper*, 471 U.S. at 562.

245. 510 U.S. 569 (1994).

246. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 31–32.

247. *See Campbell*, 510 U.S at 572–73.

248. *See id.* at 594. Similarly, in *Henley v. DeVore*, the defendants argued that their changes to Henley's songs constituted fair use because they were parodying the song. Henley v. DeVore, 733 F. Supp. 2d 1144, 1156 (C.D. Cal. 2010). The court, however, ruled that the alterations were not a parody of the work but rather satire, as they mocked something other than the song itself. *See id.* at 1158. *Devore* noted that "[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's . . . imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing." *See id.* at 1152 (quoting *Campbell*, 510 U.S at 580).

249. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 30–32.

250. *See id.*; *see also* Danoff, *supra* note 138, at 190; *cf.* Cathay Y.N. Smith, *Creative Destruction: Copyright's Fair Use Doctrine and the Moral Right of Integrity*, 47 PEPP. L. REV. 601, 628–32 (2020) (comparing fair use's compatibility with the moral rights of integrity under VARA).

251. *See* Motion Picture Association of America, *supra* note 238, at 9 (questioning how a fair use defense would apply in practice).

252. 17 U.S.C. § 107(4).

moral rights since they are typically personal to an author separate from economic value.[253]

Similarly, there is concern that individuals could use the right of integrity to prevent the use of their works for purposes prejudicial to their reputation, even though the First Amendment may protect those uses.[254] For example, stakeholders warned that a right of integrity could create an additional legal effect on publishers, writers, and scholars who offer a critical analysis of another author's work in a manner that could harm the original author's reputation.[255] Overall, stakeholders are apprehensive that expansive moral rights protections could encroach on other rights.[256]

2. Benefits of a Federal Right of Integrity

Alternatively, federal legislation establishing a right of integrity could benefit musical artists and other creators in weaker bargaining positions by making the right of integrity presumed, or even mandatory, rather than something they must bargain for when transferring their rights.[257] Further, protecting integrity could motivate creators, especially those driven by self-expression, to produce new works while also safeguarding creative investors by preventing harmful alterations to works.[258] In turn, this would promote copyright's purpose to provide the public with creative work.[259]

Under the current system, creators who transfer their rights typically must protect their moral rights through contractual negotiations.[260] However, these negotiations often involve the waiver of these rights in exchange for benefits like financial compensation.[261] This puts artists, especially those who are uninformed or in weaker bargaining positions, at a disadvantage when negotiating with powerful entities like record labels or publishers.[262] A law granting an expansive right of integrity could level the playing field by ensuring these rights are automatically recognized, rather than requiring authors to negotiate for them in every contract.[263] This would be particularly helpful in the music industry, where artists often lack the leverage to secure

253. *See* Motion Picture Association of America, *supra* note 238, at 9 n.29.

254. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 28–29.

255. *See* Association of American Publishers, Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 9 (Mar. 30, 2017) (noting that "moral rights would pose significant hurdles" to scholars who "criticize[] another's work"); *see also* Library Copyright Alliance, Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 3 (Mar. 30, 2017) (stating that additional moral rights "would chill criticism").

256. *See* Library Copyright Alliance, *supra* note 255, at 3–4.

257. *See infra* notes 260–64 and accompanying text.

258. *See infra* notes 270–77 and accompanying text.

259. *See infra* note 277 and accompanying text.

260. *See supra* Part II.A.

261. *See* Henry Hansmann & Martina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 126 (1997); *see also* Johnson, *supra* note 214, at 644–45.

262. *See* Kwall, *supra* note 160, at 26–27.

263. *See id.*; *see also* Johnson, *supra* note 214, at 644–45.

strong moral rights protections.[264] However, even with a federal right of integrity, transferees may attempt to offset potential risks, like an author blocking subsequent licenses or transfers, by agreeing to a lower purchase price for the work or introducing other measures to compensate for the perceived cost of the author's moral right of integrity.[265]

Still, a federal law would provide more consistent and robust protections than the current system, where even moral rights negotiated in initial contracts often do not extend to subsequent transfers or licenses.[266] This creates a significant problem for artists who frequently assign their rights or allow entities like PROs to license their rights.[267] For example, even if an artist negotiates a clause protecting their right of integrity with an initial party, that protection typically does not carry over when the work is sold or licensed to a third party.[268] A federal moral rights law would ensure that such protections are enforceable even in subsequent transfers, offering greater security for artists after the original deal.[269]

More broadly, protecting integrity would provide authors with greater incentives to create new works, as they would have confidence that their creations would not be subject to harmful alterations.[270] This is especially relevant for authors for whom financial gain is not a primary motivator.[271] Such authors are often driven by the desire to express themselves, share their work with others, and gain reputational benefits in return.[272] Without assurance that their recognition as the creators of their works will be honored and that their creations will remain intact, their motivation to create could decrease.[273]

Moreover, stronger protections could benefit larger companies, such as record labels, even though moral rights do not directly protect their interests.[274] These stakeholders can still gain from the added protections, as

264. *See* WAYTE, *supra* note 48, at 127–28; *see also* Johnson, *supra* note 214, at 644–45.

265. *See* Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 432 (1999) (observing that people "contract against the background of law that defines what is, and what is not, open for them to do or refrain from doing").

266. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 134. *See generally supra* Part II.A (providing insight into why patchwork protections beyond contracts would be severely limited when a third party, who has subsequently acquired the economic rights to a work, infringes upon the integrity interests of the original creator).

267. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 134.

268. *See id. But see* Recording Industry Association of America, *supra* note 237, at 2 (explaining that record labels routinely license the attribution rights of the original author when they sublease to third parties).

269. *See* Chisolm, *supra* note 22, at 457.

270. *See* Fromer, *supra* note 33, at 1747.

271. *See id.* at 1747, 1770 (arguing that moral rights offer "expressive incentives" that "can bolster the utilitarian inducement" to create works).

272. *See id.* at 1770; *see also* Authors Alliance, Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 3–4 (Mar. 30, 2017).

273. *See* Authors Alliance, *supra* note 272 at 4 ("Without some reassurance that their desire for recognition as authors of their works will be respected and that their works will be available in non-mutilated form, their incentives to create may well diminish.").

274. *See* Hansmann & Santilli, *supra* note 261, at 105.

harmful alterations to a work can ultimately undermine their interests in a work's commercialization.[275] Violations of moral rights can diminish the value of the work, which in turn reduces the value of their investment in its creation, publication, and distribution.[276] Given that these entities play a significant role in the availability of art, protecting their interests, along with the interests of creators, is crucial in fostering the creation of works for the public.[277]

C. Suggested Components of a Federal Right of Integrity

If moral rights are expanded, there are several ways to frame the right, each potentially broadening or limiting its scope.[278] Building on the concerns in Part II.B about expanding moral rights,[279] Part II.C explores how a federal framework could address these challenges while balancing the interests of creators, industries, and the public. First, Part II.C.1 presents a proposed moral rights bill introduced in Congress, analyzing the rationale underlying its statutory language and exploring alternative formulations. Then, Part II.C.2 considers different viewpoints on who should benefit from the right and discusses whether the right should be waivable or transferable. Lastly, Part II.C.3 explores how to frame the standard of review and how relief could be provided.

1. A Starting Point: The Kastenmeier Bill

When Congress was meeting to discuss changes to current legislation to comply with Berne, the Kastenmeier bill introduced a moral rights provision.[280] The provision relevant to integrity reads:

> Independently of the copyright in a work other than a work made for hire, and even after a transfer of copyright ownership, the author of the work . . . shall have the right . . . to object to any distortion, mutilation, or other alteration of the work that would prejudice the author's honor or reputation. The rights conferred by this section shall be referred to in this title as moral rights.[281]

Although stakeholders on both sides of the aisle—advocates for strong moral rights and opponents of explicit moral rights legislation—emphatically rejected the bill, it provides a starting point to formulate such a provision in the United States.[282] Opponents of this provision shared some of the same

275. *See id.*
276. *See id.*
277. *See id.* at 105–07.
278. *See infra* Parts II.C.1–3.
279. *See supra* Part II.B.
280. *See* Ginsburg & Kernochan, *supra* note 25, at 28–29 (citing H.R. 1623, 100th Cong. (1987)).
281. *Id.*
282. *Id.* at 29 ("[The provision] satisfied neither proponents nor opponents of moral rights.").

concerns discussed in Part II.B.1 and believed the bill was too vague, the scope was too broad, and it could encourage excessive litigation.[283]

Alternatively, proponents of strong moral rights argued that the provision was too weak and that an ideal law should align more closely with Article 6bis by using the phrase "derogatory action" in addition to "distortion, mutilation, or other modification."[284] The rationale is that if the statute only included protections for "distortion[s], mutilation[s], and modification[s]" that insinuates that there needs to be some sort of tangible change to the work, whereas the phrase "derogatory action" could be interpreted to give protection to uses that decontextualize or misrepresent a work without physically altering it.[285] Many countries already recognize this broader word choice, including common-law jurisdictions like Australia and the United Kingdom.[286]

2. Beneficiaries, Transfer, and Waiver

The suggested provision specifies that the rights would apply in instances "other than a work made for hire," which likely means that both creators working for an employer and the employer themselves would be precluded from the rights.[287] However, work-made-for-hire status is commonly determined by courts based on the specific nature of the employment relationship, making it a case-by-case issue.[288] This ambiguity could present challenges and inconsistencies in the extension of moral rights to industries like music, where there is ongoing debate over whether sound recordings are considered works made for hire, and thus whether they would be eligible to receive moral rights protections.[289]

Some suggest the moral right should exist for creators, regardless of their authorship status since they have the personal connection to the work.[290] However, defining the right in terms of creators could create complications, as it may lead to a debate over who qualifies as a creator, similar to debates about who is an author.[291] Also, allowing any creator to assert moral rights

283. *See id.*; *see also supra* Part II.B.1.

284. *See* Berne Convention for the Protection of Literary and Artistic Works, *supra* note 69, art. 6bis; *see also* Ginsburg & Kernochan, *supra* note 25, at 29 (noting that the bill "did not accurately track the language of Article 6*bis* as to the right of integrity"); Johnson, *supra* note 214, at 648.

285. *See* Johnson, *supra* note 214, at 641, 648.

286. *See Copyright Act 1968* (Cth) s 195AJ (Austl.); *see also* Copyright, Designs and Patents Act 1988, c. 48 §§ 80–83 (UK). *But see* Michel, *supra* note 173, at 184–86 (discussing that although the United Kingdom's moral right of integrity includes the phrase "derogatory treatment," the statute requires some change to the work itself, meaning minor modifications like sampling would be covered, but playing a song in an "undesired environment" would not be covered).

287. *See* Ginsburg & Kernochan, *supra* note 25, at 28–29, 32–33 (citing H.R. 1623, 100th Cong. (1987)); *see also* 17 U.S.C. § 201(b).

288. *See supra* notes 51–57 and accompanying text.

289. *See supra* notes 51–57 and accompanying text.

290. *See* Ginsburg & Kernochan, *supra* note 25, at 32–33.

291. *See supra* notes 51–57 and accompanying text.

could stifle economic transfers and significantly disrupt the financial dynamics of large-scale creative projects.[292] Further, some argue that creators who are employees are already incentivized to create based on their benefits received through their employment contracts.[293]

Likewise, there is also the question of whether employers, who are considered authors under work made for hire, should receive rights in the work they have others create.[294] Some countries, like Japan and South Korea, give employers the moral rights for work their employees create for them.[295] Alternatively, countries like France and Switzerland prohibit corporations, who are often considered authors in the United States under the work-made-for-hire doctrine, from receiving moral rights.[296] The argument is that when the author is a corporate entity, they do not have the same personal, creative connection to the work as the original creator.[297]

Moreover, there are differing viewpoints regarding the extent to which rights can be alienated.[298] France treats these rights as neither waivable nor transferable, ensuring that they remain with the author.[299] This means an artist can consent to actions that would violate their right of integrity, but they cannot legally agree to waive this right permanently or prevent themselves from seeking a legal remedy in the future.[300] Alternatively, in Canada and the United Kingdom, the author may explicitly waive the rights, but they are nontransferable.[301] This means authors can reject the rights, but cannot sell or give them to anyone else.[302] In the United Kingdom, for example, rights can only be waived in writing, which means that they are "presumed to be retained."[303] The question of waiver returns to the issue that waivable rights may become meaningless in industries with significant power imbalances during negotiations.[304] However, this concern could be overstated, as empirical research submitted to the Copyright Office suggests that authors may be reluctant to waive their rights because people tend to prioritize moral rights and include them in contracts more when they already

292. *See supra* notes 237–39 and accompanying text.
293. *See* Ponte, *supra* note 24, at 97–98.
294. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 17.
295. *See id.* at 16–17.
296. *See id.* at 17 n.64 (explaining how, in France and Switzerland, corporate entities can never become the authors of work, even in cases where they commissioned the work).
297. *See* Mira T. Sundara Rajan, Reply Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 7 (May 15, 2017).
298. *See* Hansmann & Santilli, *supra* note 261, at 124.
299. *See id.* at 126.
300. *See id.*
301. *See* Copyright Act, R.S.C. 1985, c C-42, s 14.1(2)–(4) (Can.); *see also* Copyright, Designs and Patents Act 1988, c. 48 §§ 87(4), 94 (UK).
302. *See* Hansmann & Santilli, *supra* note 261, at 125.
303. *Id.* at 128.
304. *See id.* ("[I]f an artist is free to waive his moral rights, then purchasers of his work will always insist that a contract of sale include such a waiver, and such a term will simply become a standard form in contracting.").

possess these rights and are "negotiating to sell (trade them away) rather than to buy (obtain them)."[305]

3. Scope of Rights and Remedies

Stakeholders propose that plaintiffs should bear the burden of proof for moral rights claims and that an objective standard is necessary to avoid overreach by authors who may object to lawful adaptations of their work.[306] Similar to how defamation and other state rights are assessed, the evaluation of prejudice should consider whether the alteration negatively affects the author's reputation and honor, rather than merely whether the author dislikes the change.[307] This would be considered a "reasonableness" limitation, similar to those found in countries like Australia and Canada.[308] The Authors Alliance suggests modeling this standard after Australia's, which considers factors including the nature of the work, the context in which it is used, industry practices, and, in the case of multiple authors, their views about the treatment when determining whether an author has a reasonable claim.[309] Australia's analysis also addresses concerns similar to those raised by the United States' work for hire legislation, examining whether an employee-employer relationship exists and, if so, considering the relevant contractual agreement to determine whether a moral rights claim is justified.[310]

Finally, there are debates regarding damages.[311] The Authors Alliance advocates for only injunctive relief, not statutory or actual damages, because moral rights are not financial.[312] This could mean a total bar of a transfer or

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305. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 137 (citing Christopher Buccafusco & Christopher Jon Sprigman, Joint Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 1 (May 28, 2017)). The study found that artists place greater value on an affirmative waiver, explicitly giving up rights they are granted, than on a waiver by noninclusion, which means not negotiating for the inclusion of rights that are not otherwise granted. *See id.* This is akin to the waiver approach taken by VARA, which allows a waiver if it is in writing and clearly indicates which rights are being waived. *See* 17 U.S.C. § 106A(e).

306. *See* Authors Alliance, *supra* note 272 at 6; *see also* Future of Music Coalition Reply Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 8 (Mar. 30, 2017); Kernochan Center for Law, Media and the Arts, Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017, Notice of Inquiry at 4–5, 14 (Mar. 30, 2017).

307. *See* Kernochan Center for Law, Media and the Arts, *supra* note 306, at 5 (citing SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND ¶ 10.46 (2d ed. 2006)).

308. *See Copyright Act 1968* (Cth) ss 195AR-AS (Austl.); *see also* Copyright Act, R.S.C. 1985, c C-42, s 14.1(1) (Can.).

309. Authors Alliance, *supra* note 272, at 6; *see also Copyright Act 1968* (Cth) s 195AS(2) (Austl.). Professor Ginsburg similarly suggested a reasonableness standard like Australia's for the right of attribution. Jane C. Ginsburg, *The Most Moral of Rights: The Right to be Recognized as the Author of One's Work*, 8 GEO. MASON. J. INT'L COM. L. 44, 78 (2016).

310. *See Copyright Act 1968* (Cth) s 195AS(2)(g) (Austl.).

311. *See infra* notes 312–15 and accompanying text.

312. Authors Alliance, *supra* note 272, at 7 (quoting Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945,

use, prohibition from further uses, or, in some cases, a public apology.[313] A more limited remedy could involve permitting the infringing use or act to occur, provided that the infringer includes a disclaimer explicitly stating the author's objection and detailing the modifications made to the original work.[314] Alternatively, some argue for statutory or actual damages for infringement because it would incentivize compliance.[315] In fact, VARA, although narrow in terms of what types of works are protected, takes a broad approach on damages, offering authors the same remedies available in the rest of the Copyright Act, including both statutory or actual damages.[316]

III. ADVOCATING FOR A LIMITED MORAL RIGHT OF INTEGRITY

In Part III, this Note argues that Congress should enact a limited federal right of integrity to improve protections for artists' moral rights. First, Part III.A analyzes why current protections are more performative than substantive in practice and outlines a suggested federal right of integrity. Next, Part III.B details the rationale behind enacting a stronger moral right of integrity and explains how to narrow the applicability of the right to avoid overreach. Finally, Part III.C examines how the proposed federal legislation aims to balance protecting artists' reputations with preserving First Amendment rights and fair use, ensuring that the law does not overly restrict public discourse or free expression.

A. Bridging the Divide Between Copyright and Integrity

Even though the United States's current moral rights protections are structured to align with broader legal and business standards, their practical application frequently results in these protections being more symbolic than substantive.[317] Although Article 6bis emphasizes the protection of authors' moral rights, U.S. protections primarily help copyright owners and assert deference to owners' economic rights over authors' moral rights.[318] After removing the patchwork of protections constrained by economic copyright

2006 (2006) (arguing that "a damage remedy should be eschewed except in the following instances: where a clear showing of economic harm exists as a result of the attribution violation; where the violation is entirely in the past and future injunctive relief therefore is meaningless; or, where exceptionally willful violations are involved" (citations omitted)).

313. *See id.*; *see also Copyright Act 1968* (Cth) s 195AZA (Austl.) (suggesting a public apology can be a sufficient remedy).

314. *See* Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 2006 (2006) (recommending a "narrowly tailored right of integrity designed to vindicate the author's right to *inform the public* about the original nature of her artistic message and the meaning of her work").

315. *See* Kernochan Center for Law, Media and the Arts, *supra* note 306, at 5; *see also* Johnson, *supra* note 214, at 648. Johnson also suggests punitive damages in instances of decontextualization. *See id.*

316. *See* 17 U.S.C. §§ 501, 504(c).

317. *See supra* notes 217–21 and accompanying text.

318. *See supra* notes 190–93, 217–21 and accompanying text.

ownership, only the Lanham Act remains; however, the scope of the Act is not only limited to physical changes to a work, but also unreliable following *Dastar*.[319] Additionally, the presumed waiver of moral rights upon the transfer of economic rights contradicts the notion in Article 6bis that moral rights endure even after the transfer of economic rights, highlighting a key inconsistency in the U.S. approach.[320]

This disparity becomes evident when examining the case of Helene Fischer, who asserted a moral rights claim in Germany.[321] Though successful in Germany, Fischer would have faced significant challenges when seeking relief under U.S. law.[322] Fischer, as a vocalist, was able to protect her moral rights even though she only sang on the sound recording.[323] In contrast, U.S. vocalists, who typically do not own either the musical work or sound recording of the songs they perform, would not be able to use any of the protections akin to integrity from the Copyright Act, despite their personal and creative contributions to the work.[324] Additionally, in the United States, the venue that played Fischer's song at a political event would likely have legally obtained a license through a PRO, making them an authorized user of the work and thereby preempting any state-level publicity claims.[325] Furthermore, a Lanham Act claim would not apply in Fischer's case because the song was not physically altered; rather, it was played at an event that she believed harmed her reputation.[326] In the United States, Fischer's only option likely would have been to proactively contract to prevent her work from being used in a political campaign she did not support.[327] However, to do so, she would have needed sufficient bargaining power.[328] This case illustrates a gap in U.S. law where artists, especially performers without ownership rights, may encounter significant challenges in protecting their moral rights.

To increase compliance with Berne and adequately protect artists' rights, a right of integrity should be designed for copyrightable works.[329] This can be drafted using legislation in other common-law countries like the United Kingdom, Australia, and Canada, the language of Berne, and the discussions surrounding the issues Congress had with the Kastenmeier bill.[330] An ideal

319. *See supra* notes 204–16 and accompanying text.
320. *See supra* notes 217–21 and accompanying text.
321. *See supra* note 178 and accompanying text.
322. *See supra* note 178 and accompanying text.
323. *See supra* note 173 and accompanying text.
324. *See* Chisolm, *supra* note 22, at 453, 463.
325. *See supra* notes 163–67, 198–99 and accompanying text.
326. *See supra* notes 176–77, 213–16 and accompanying text.
327. *See supra* note 260 and accompanying text.
328. *See* Chisolm, *supra* note 22, at 453, 463 (explaining that with bargaining power, recording artists may require consent for some uses of work, but usually the label has complete control).
329. *See* ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 150–53 (2010); *see also* Johnson, *supra* note 214, at 643.
330. *See* Copyright, Designs and Patents Act 1988, c. 48 §§ 80–94 (UK); *see also Copyright Act 1968* (Cth) s 195AJ (Austl.); Copyright Act, R.S.C. 1985, c C-42, s 14.1(1) (Can.); Berne Convention for the Protection of Literary and Artistic Works, *supra* note 69,

bill would state: "*Independently of economic rights, and even after a transfer of copyright ownership, an author shall have the right to object to any intentional distortion, mutilation, modification, or derogatory action of the work which would be prejudicial to their honor or reputation.*"[331]

The statute should also outline limitations to the right to alleviate concerns about potential negative impacts on business practices and the risk of excessive litigation. These restrictions would make the bill more feasible for Congress to pass, considering its general reluctance to make changes.[332] For instance, the right should exclude works made for hire, and authors should typically be limited to injunctive relief.[333] Also, there should be a reasonableness standard, similar to Australia's law, to assess whether an infringement has occurred.[334] Further, the rights should be nontransferable but may remain waivable if there is explicit agreement.[335] Finally, the right should be limited by fair use, like the rest of copyright law.[336] Although some suggested limitations may narrow the effectiveness of moral rights protections compared to countries like France, they help balance the promotion of artists' moral rights with the public's interest in access to creative works, aligning with the goals of American copyright law.[337]

B. Protecting Artist Integrity While Addressing Industry and Public Interests

To address the limitations of current moral rights protections in the United States, Part III.B explores how the proposed legislation can balance the interests of artists, the industry, and the public. This section offers a rationale for the proposed language and limitations, aiming to create a more effective framework for protecting artists' integrity without unduly burdening the entertainment industry or limiting public access to creative works. Part III.B.1 explores how including the phrase "derogatory action" in the law would give artists a cause of action for uses of their work that harm their integrity but do not physically change the work. Next, Part III.B.2 examines the rationale for granting moral rights to authors, rather than to creators, and considers the exclusion of works made for hire from these protections. Part III.B.3 advocates for a reasonable person standard to define the scope of moral rights, ensuring these rights are not overly broad. Further, Part III.B.4 recommends making the right of integrity waivable but not transferable,

art. 6bis; Ginsburg & Kernochan, *supra* note 25, at 28–29 (citing H.R. 1623, 100th Cong. (1987)).

331. *See supra* note 330 and accompanying text. The proposed statute's language was influenced by the language in the Berne Convention, previous moral rights proposals in the United States, and moral rights legislation in Australia, Canada, and the United Kingdom.

332. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 39 (noting the minimalist approach of Congress toward moral rights reform); *see also infra* Part III.B.

333. *See infra* Parts III.B.2, III.B.4.

334. *See infra* Part III.B.3.

335. *See infra* Part III.B.5.

336. *See infra* Part III.C.

337. *See infra* Part III.B.

offering a balance between protecting moral rights and accommodating business concerns in the music and entertainment industries. Finally, Part III.B.5 proposes limiting relief to injunctive remedies to protect the integrity of moral rights without turning them into financial tools.

1. Derogatory Action

Incorporating the phrase "derogatory action" into the statute would provide courts with greater discretion to hear integrity cases involving works that are not physically altered but are used in ways that decontextualize or misrepresent their meaning.[338] This approach mirrors wording in Article 6bis and is similar to Australia's statute.[339] Without this inclusion, courts will likely interpret the statute narrowly, similar to how they currently interpret VARA, which protects for any "distortion, mutilation, or other modification," but does not address other derogatory actions.[340] Without including "derogatory action," the concerns of artists like Springsteen, Fischer, Shostakovich, and Swift would likely be ineligible for protection because their work was not tangibly modified, even if the treatment of the work was prejudicial to their honor or reputation.[341] The term "derogatory action" should be interpreted to encompass instances where a work is used in ways that misrepresent or distort its meaning, such as in decontextualized advertisements or political uses that contradict the original intent or message of the song.[342] This phrase is essential because even if a work is not physically altered, an artist's right to integrity can be compromised when their work is used in ways that misrepresent its meaning, distort its message, or link it to ideas, causes, or values the artist does not support.[343] Although the inclusion of "derogatory action" is broader than the original proposed statute and the only explicitly passed U.S. legislation, VARA, the rest of the suggested framework will narrow the applicability of the integrity right to prevent it from becoming too expansive.[344]

2. Rights for Authors, Not Employers

The decision to include "author" in the proposed legislation, rather than "creator," is intended to reduce concerns that could arise from including

338. *See* Johnson, *supra* note 214, at 643.

339. Berne Convention for the Protection of Literary and Artistic Works, *supra* note 69, art. 6bis; *see also Copyright Act 1968* (Cth) s 195AJ (Austl.).

340. *See* 17 U.S.C. § 106A; *see also* Johnson, *supra* note 214, at 641. For example, in *Kerson v. Vermont Law School Inc.*, 79 F.4th 257 (2d Cir. 2023), the court held that covering murals with acoustic panels did not violate VARA as it did not physically alter the murals and stated that "'modifications' clearly include certain alterations to the work itself, such as an additional brush stroke, erasure of content, or reorganization of a movable component." *Kerson*, 79 F.4th at 267.

341. *See supra* Part I.C.3. Similarly, these artists would be unsuccessful asserting Lanham claims because they also require there to be a physical alteration to a work by someone other than the author. *See supra* notes 104–07 and accompanying text.

342. *See* Johnson, *supra* note 214, at 643.

343. *See id.* at 648.

344. *See* § 106A.

creators.[345] This restricts the eligibility to assert integrity rights to individuals recognized as authors under U.S. copyright law, ensuring that only those with sufficient control over the creation of their work are entitled to these protections. The rationale is that the more creative control an individual has, the more personal and damaging a violation of their right of integrity would be to their reputation and work. Similarly, the exclusion of protections for works made for hire limits corporate entities, such as record labels, from asserting a right of integrity, even though they are considered authors under U.S. law, because doing so would conflict with the personal nature of moral rights.[346]

In practice, if there is a dispute over whether a work is for hire or the plaintiff qualifies as an author, defendants could challenge the plaintiff's standing to assert a claim. In such cases, courts would first need to determine authorship by applying the factors from *Reid* for work-made-for-hire determinations.[347] Only after resolving the authorship issue would the court proceed to analyze whether there was a violation of the moral right of integrity. This could complicate or delay the process for some, like vocalists, who are less likely to be considered authors, but would ensure rights protections are not too broad.[348]

3. Objective Scope

Further, the new legislation should use an objective reasonable person standard, modeled after Australia's standard, to limit the scope of the right.[349] This standard would serve to ensure that moral rights protections are not applied in a manner that unduly impedes other lawful uses of a work.[350] Firstly, industry standards are one factor to determine reasonableness as acknowledged by Australian courts and should be a consideration for U.S. law as well.[351] This could help to ease the concerns of the Copyright Office that a blanket statute would take a one-size-fits-all approach.[352] Instead, courts would have to consider what is custom in the industry of the work that is the subject of the claim. Parties can submit evidence of industry norms or even use expert witnesses to show what is expected in their respective fields and whether a use is a violation of the right. Secondly, when there are multiple authors, the Australian reasonableness standard also considers each author's views about the treatment of the work.[353] This means that courts would need to assess whether it is reasonable to block the transfer or use of a work based on one coauthor's argument that it violates their integrity rights,

345. *See supra* notes 290–93 and accompanying text.
346. *See supra* notes 296–97 and accompanying text.
347. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 731 (1989); *see also supra* note 56 and accompanying text.
348. *See supra* note 46 and accompanying text.
349. *See supra* notes 308–10 and accompanying text.
350. *See supra* notes 306–10 and accompanying text.
351. *Copyright Act 1968* (Cth) s 195AS(2) (Austl.).
352. *See supra* note 232 and accompanying text.
353. *Copyright Act 1968* (Cth) s 195AS(2) (Austl.).

considering the circumstances of the claim.[354] For instance, it would likely be more challenging for a musician like a drummer, who contributed only to a single song on an album, to prove that a particular use of or change to the album would harm their reputation. Similarly, it would be more difficult for such a coauthor to be recognized as an "author" of the work in the first place, given their relatively limited creative input and control over the final product.[355] In these cases, courts would need to carefully weigh the relative contributions of each coauthor and the reasonableness of their claim before determining whether the alleged moral rights violation justifies blocking the use or alteration of the work.[356] Finally, uses of work that the First Amendment and fair use would currently protect would limit this standard, so the integrity right would not infringe on lawful uses and adaptations of work that contribute to the public interest.[357]

Under this standard, the author should have the burden to show how the "distortion, mutilation, modification, or derogatory action" harmed their "honor or reputation."[358] In cases like *Henley*, where there is a clear physical alteration to the work, the plaintiff would just have to show how the change harmed their reputation or honor.[359] This could be demonstrated by presenting statements from fans inquiring whether the plaintiff agrees with the modifications and endorses the use of their music in a manner that mocks politicians.

Alternatively, in a situation like Taylor Swift's, she would have to show that the transfer of her masters to Scooter Braun was derogatory and was prejudicial to her honor or reputation. One potential argument that Swift could attempt to make is that a transfer of her masters to Braun, someone who has publicly ridiculed her, would ruin her reputation and lead the public to not take her, or her music, seriously.[360] She could bolster this argument by noting that the sound recordings for albums, like *Reputation*, convey a message of independence from the patriarchy within the music industry and that transferring the rights to Braun would compromise the essence of her work. Evidence of her argument could include public statements made by Braun, the public reactions to the news of the transfer, evidence of changes in her business relationships due to the transfer, and she could even play the recordings of the work to demonstrate the alleged message.[361] If the court finds this argument reasonable and grounded in objective considerations, rather than Swift's subjective feelings, she may succeed in her claim.

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354. *See supra* notes 237–38 and accompanying text.
355. *See supra* note 237 and accompanying text.
356. *See supra* note 239 and accompanying text.
357. *See infra* Part III.C (discussing the fair use limitation further).
358. *See supra* note 306 and accompanying text.
359. *See supra* notes 109–11 and accompanying text.
360. *See* Swift, *supra* note 8.
361. However, evidence of financial losses would likely be less essential, and even if the plaintiff could demonstrate such losses, it would be challenging for courts to directly attribute them to the alleged infringement. *See* Perez v Fernandez [2012] FCA 2 (Austl.) (demonstrating it is not necessary to show actual damages to prevail on the moral right of integrity in Australia).

Swift's case, if successful, would likely represent the outer limits of what could be considered an integrity infringement under the proposed legislation. However, decontextualization cases, such as those discussed in Part I.C involving Shostakovich, Springsteen, and Fahmy, more closely align with the types of infringements that other countries have recognized as violations of the right of integrity. Therefore, similar cases would be more likely to fall within the scope of protections under this law.

4. Explicit Waiver

Arguably, the most significant limitation of the proposed legislation is that authors may waive the right of integrity. Ensuring that the right of integrity is waivable, but not transferable, will help to balance the interests of stakeholders who rely on current business practices and address opponents' concerns about broad encroachment on industry practices. First, moral rights should not be transferable because that would undermine the personal nature of the work and could lead to segmentation in ownership of rights, complicating subsequent uses.[362] However, making the right waivable addresses concerns about the interruptions to business practices and freedom to contract that could arise if the United States took an approach like France.[363] Although waivable rights may not provide the most comprehensive solution, they still represent an improvement over the current system, and inalienable rights would likely be viewed as "too extreme" an approach for the United States.[364]

A primary criticism of waivable rights is their potential ineffectiveness in industries where there is significant unequal bargaining power.[365] To mitigate this concern, any waiver should be explicitly documented in writing, clearly identifying the specific rights being relinquished, similar to the framework established by VARA.[366] In a worst-case scenario, industry purchasers could incorporate a default contract provision waiving integrity rights; however, if this were to become the case, it would merely mirror the current protections where the ability to waive is presumed.[367] Even if waiving rights becomes the industry standard, creators who value their rights more—such as those motivated by artistic expression rather than financial gain—might still seek alternative negotiations or accept lower compensation in order to retain their rights.[368] Additionally, the psychological effects of selling versus retaining rights suggest that even waivable rights could help

362. *See* Hansmann & Santilli, *supra* note 261, at 125–26.

363. *See supra* notes 229–32, 299 and accompanying text.

364. *See* Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 300 (2004).

365. *See supra* note 304 and accompanying text.

366. 17 U.S.C. § 106A(e); *see also* Hansmann & Santilli, *supra* note 261, at 129 ("The requirement of an explicit waiver in writing alerts the artist to the possibility of retaining the rights if he wishes or of insisting on greater compensation if he agrees to the waiver.").

367. *See* Ginsburg, *supra* note 364, at 300; *see also supra* note 304 and accompanying text.

368. *See supra* note 305 and accompanying text.

mitigate some of the potential harms to artists' reputations.[369] Overall, if the United States were to presume integrity rights for authors, and the rights could only be waived with specificity, authors would have more leverage to control the rights, as opposed to the current system.

Further, a waivable right to integrity respects the position of opponents of moral rights, who argue that market negotiations are the most appropriate venue for addressing these concerns.[370] The proposed legislation would allow market negotiations to continue, but it would ensure that artists are fully informed about their moral rights and are explicitly aware of the consequences if they choose to waive those rights. This flexibility helps ensure that industry players who fund the creation and publication of works are not unduly restricted while also allowing authors to protect their right to integrity more easily. In turn, it incentivizes creation by providing authors assurance that their work cannot be distorted in ways that would harm their reputation, fostering both artistic expression and the ongoing flow of creative projects in the marketplace for the public to enjoy.[371]

5. Injunctive Relief

Generally, under this proposed law, plaintiffs' relief should be limited to injunctive relief, rather than actual or statutory damages, with the losing party responsible for attorneys' fees. However, in cases where an injunction would be ineffective, like situations involving past infringements that cannot be reversed, the court should have the discretion to award actual damages, or statutory damages when proving actual damages is difficult.[372] Limiting the relief to injunctive remedies may prevent moral rights from becoming too expansive and attempts to keep the right distinct from financial interests.[373] However, plaintiffs could technically still pursue their economic interests under this scheme by negotiating with the defendant after the injunction is issued and licensing the use that the court has deemed to be infringing.[374] In such a case, the author would essentially be waiving their moral rights, effectively placing a monetary value on their significance.[375] Therefore, this solution may not always perfectly align with the core purpose of moral rights, but it functions within the proposed framework that allows for the waiver of those rights.[376]

A potential disadvantage of restricting relief to injunctive remedies is that it could make the right of integrity inaccessible to authors with limited resources or authors who are unable to pursue other legal claims that might entitle them to compensation for the use of their work. However, this issue

369. *See supra* note 305 and accompanying text.
370. *See supra* notes 233–36 and accompanying text.
371. *See supra* note 68 and accompanying text.
372. *See supra* notes 312–13 and accompanying text.
373. *See supra* notes 312–13 and accompanying text.
374. *See* WAYTE, *supra* note 48, at 403.
375. *See supra* note 300 and accompanying text.
376. *See supra* Part III.B.4.

can be mitigated by requiring the losing party to cover the prevailing party's attorney's fees.[377] This would also help prevent frivolous litigation because plaintiffs would only have the incentives to pursue claims when they genuinely seek injunctive relief and believe they have a strong case for infringement.

Further, it is important to note that this provision does not bar economic rights holders from financial recovery. In many cases, when someone infringes on the integrity right, damages for actual harm can be awarded under the current patchwork protections.[378] If the author also owns their work, they can assert both the relevant copyright infringement claim and moral rights claim.[379] If they do not have ownership but can assert viable claims under the Lanham Act or state laws, these claims could also be used to seek compensation for the infringing use of the work.[380] If those options are not available to the artist, but there is a valid right of integrity claim hurting the work's value, the author can only assert a moral rights claim for an injunction. However, the economic rights holder would be incentivized to assert a claim for infringement if there is a relevant economic patchwork protection.

C. Fair Use and First Amendment Concerns

Those in opposition to these rights also point to the incompatibility with recognized U.S. laws like fair use and the First Amendment.[381] Although these doctrines are complex, they are compatible with the right to integrity, and courts already consider the same principles embedded in moral rights when determining whether a use is fair.[382] Moreover, the right of integrity would be limited by these doctrines, thereby preventing undue interference with the public's interest in free speech and in the availability of creative works.

First, the proposed right will not apply to uses protected by fair use, so it will not unduly restrict the exceptions already present in copyright law. The right is already compatible with fair use since it targets only modifications that harm an author's honor or reputation, rather than prohibiting broad alterations, some of which are considered fair and beneficial to the public.[383] Courts' distinction between parody and satire when analyzing fair use

377. Fee shifting is already accepted in copyright law under 17 U.S.C. § 505. In fact, in *McGaughey v. Twentieth Century Fox Film Corp.*, 12 F.3d 62 (5th Cir. 1994), the court stated that awarding of attorney's fees is "the rule rather than the exception and [they] should be awarded routinely." *McGaughey*, 12 F.3d at 65 (quoting Micromanipulator Co. v. Bough, 779 F.2d 255, 259 (5th Cir. 1985)).

378. *See supra* Part I.B.

379. *See supra* Part I.B.2.c.

380. *See supra* notes 198–208 and accompanying text.

381. *See supra* notes 240–56 and accompanying text.

382. *See infra* notes 384–90 and accompanying text.

383. *See supra* Part III.A.

illustrates how their current understanding of fair use is compatible with the integrity right.[384]

Although some types of work that the Court has protected under fair use, like parody, may technically harm an original creator's reputation,[385] that is not the reputational harm the proposed integrity right is trying to prevent. Parody, by definition, engages with the original work in a way that still acknowledges and accurately reflects its underlying meaning, often using humor or criticism to comment or shed light on the work itself or its creator.[386] Alternatively, satire, which often uses a work to mock or criticize something entirely separate from the original work itself, presents a greater risk to the problematic reputational harm and is something courts have already recognized is generally outside the scope of fair use.[387] By detaching the work from its original meaning and associating it with something else, satire can mislead the audience about the artist's values or beliefs, potentially damaging their reputation, which is the core issue that the proposed right of integrity is aimed to protect.[388] Although satirical uses are not the only types of uses that could infringe upon the proposed integrity right, courts' distinction between satire and parody demonstrates that fair use already incorporates principles similar to those underlying the integrity right in its analysis. Thus, it is reasonable to assume that allowing fair use to limit the right of integrity would not unduly burden the right, nor make it obsolete.

Further, the fourth fair use factor, which considers market harm of using a copyrighted work, is neither solely economic nor incompatible with the objectives of moral rights protection.[389] First, reputational harm can lead to negative economic consequences for the original author, thereby indicating a use is not fair. For instance, if a politician with whom an artist holds ideological differences uses the artist's music when campaigning, there is a risk that the audience may erroneously infer the artist's endorsement of the politician's views. Such a misinterpretation could result in a loss of the artist's fan base or a misalignment between the artist's public persona and their work's intended message. The shift in public perception is the reputational harm that the right of integrity attempts to prevent, and a side effect may be a shift in the economic market for an artist's work. Alternatively, an alleged infringer might argue that their use of the work significantly contributes to the public's market for creative works, which may also weigh in favor of fair use under this factor.[390] Both considerations highlight ways to reconcile the market harm fair use factor when analyzing a fair use defense in the context of moral rights.

384. *See supra* note 248 and accompanying text.
385. *See supra* notes 246–50 and accompanying text.
386. *See supra* note 248 and accompanying text.
387. *See supra* note 248 and accompanying text.
388. *See supra* note 248 and accompanying text.
389. *See* 17 U.S.C. § 107(4); *see also supra* notes 251–53 and accompanying text.
390. *See* Google LLC v. Oracle Am. Inc., 141 S. Ct. 1183, 1206 (2021) ("[W]e must take into account the public benefits the copying will likely produce.").

Moreover, the proposed moral rights will not conflict with free speech protections under the First Amendment, as the proposed structure of the right of integrity respects constitutional principles. The Supreme Court has insinuated that no inconsistency exists between the Copyright Act and the First Amendment.[391] This is because copyright law already employs frameworks such as the distinction between uncopyrightable facts and ideas versus copyrightable expressions, as well as the fair use exception, to provide robust safeguards for free speech.[392] Since the proposed right of integrity is restrained by all the relevant existing copyright law principles, like fair use, free speech concerns should be minimal.[393] Overall, the proposed integrity right is narrow, intended to simply prevent prejudicial uses of copyrightable expression, not limit free speech or fair uses of copyrightable work.

CONCLUSION

Although the United States may technically meet the minimal international standards, the current patchwork approach to moral rights is ineffective. It functions more as a token rather than a genuine commitment to their enforcement. The regime leaves many artists with few means to protect prejudicial uses of their work after their economic rights are transferred. A narrow and waivable federal right of integrity would offer meaningful protection for moral rights in the United States, bringing the country's regime closer to the intention of international standards while preserving flexibility for parties to negotiate their rights. This legislation should strike a balance between the needs of authors and those funding the creation of works, as both contributions are essential to fulfilling copyright's fundamental purpose of promoting the creation of works for the public good.

391. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985).
392. *See* U.S. COPYRIGHT OFF., *supra* note 29, at 28.
393. *See id.* (citing Eldred v. Ashcroft, 537 U.S. 186, 219–20 (2003)).