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HOW WE LOST OUR MORAL RIGHTS AND THE DOOR CLOSED ON NON-ECONOMIC VALUES IN COPYRIGHT

SUSAN P. LIEMER

ABSTRACT

The Visual Artists Rights Act (“VARA”) is a piece of modern legislation preceded by a rich history, with a significant gap. As early as the 1400’s, patents were offered as economic incentive to develop new processes in the trades and applied arts. By the 1700’s, the Statute of Anne became the first statute to protect the literary work of individual creators. The Engravers’ Act of 1735 soon followed, expanding this protection to include the first works of visual art and providing the precursor to the modern right of integrity. *Millar v. Taylor* was the landmark case that alluded to moral rights protection and found copyright existed at common law; however, it was replaced by statutory copyright in *Donaldson v. Beckett*. From then on, only the statute could prescribe protection. This effectively closed the door on moral rights protection in the United States, because the *Donaldson* interpretation provided the groundwork for interpretation of the first United States copyright statute. Until VARA, the United States copyright law focused on economic protection, disregarding most other values. This article traces moral rights through the early intellectual property law history, discusses the importance of the rights granted, and argues that VARA is most useful if jurists and legislators become aware of the history and the legislation itself.

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HOW WE LOST OUR MORAL RIGHTS AND THE DOOR CLOSED ON NON-ECONOMIC VALUES IN COPYRIGHT

SUSAN P. LIEMER*

INTRODUCTION

In 1997, a sculptor named Jan Martin won a lawsuit against the City of Indianapolis¹ using a little-known federal statute called the Visual Artists Rights Act (“VARA”).² The court found the City violated certain rights that the statute granted to Mr. Martin,³ when bulldozers destroyed his sculpture⁴ in the name of urban development.⁵ During the damages phase of the lawsuit, the court refused to award to Mr. Martin the enhanced damages available under the statute,⁶ because, after all, the City had been unaware of the statute.⁷ The Seventh Circuit had no problem affirming the District Court.⁸ How is it possible that ignorance of the law was a valid excuse?

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¹ *Martin v. City of Indianapolis*, 982 F. Supp. 625 (S.D. Ind. 1997) [hereinafter *Martin I*]; 4 F. Supp. 2d 808 (S.D. Ind. 1998) [hereinafter *Martin II*]; 28 F. Supp. 2d 1098 (S.D. Ind. 1998) [hereinafter *Martin III*], *aff’d*, 192 F.3d 608 (7th Cir. 1999) [hereinafter *Martin IV*].

² Visual Artists Right Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506 (2000)).

³ *Martin I*, 982 F. Supp. at 638 (“Martin has proved all five elements of his claim under VARA . . .”). The specific right at issue in *Martin*, the right of integrity, is described *infra* pp. 4–5.

⁴ *Martin I*, 982 F. Supp. at 629 (“[O]n or about July 20, 1995, Symphony #1 was demolished by Jordan Demolition [Company].”).

⁵ *Id.* at 628 (explaining the City acquired the land on which the sculpture stood “in accordance with its Urban Renewal Development Plan”).

⁶ *Martin II*, 4 F. Supp. 2d at 811 (“Martin cannot recover enhanced statutory damages . . . for willful infringement.”). Damages in VARA suits are the same as those for copyright infringement, found in 17 U.S.C. §§ 504(c), 505 (2000). A successful plaintiff may choose either actual or statutory damages. 17 U.S.C. § 504(c)(1). Statutory damages may range from \$500 to \$20,000, and if a violation is “willful,” the court may increase damages to a maximum of \$100,000. 17 U.S.C. § 504(c)(1), (2).

⁷ *Martin II*, 4 F. Supp. 2d at 811 (“Martin has not produced evidence showing that the City had knowledge or reason to know that Martin’s interest . . . was protected . . .”); *Martin IV*, 192 F.3d at 614 (“As far as we can tell from the record, those VARA rights were unknown to the City.”). In *Martin III*, the court at least gave some more analytical reasoning, applying copyright requirements to moral rights damages, without citing any authority for doing so. *Martin III*, 28 F. Supp. 2d at 1102 (“the maxim ‘ignorance of the law is no defense’ has no application in the realm of enhanced statutory damages for copyright infringement.”).

⁸ *Martin IV*, 192 F.3d at 614.

In spite of the City’s conduct resulting in the intentional destruction of the sculpture, we do not believe . . . , particularly *given the fact that the issue of VARA rights had not been raised until this suit*, that the City’s conduct was ‘willful’ . . . so as to entitle the plaintiff to enhanced damages.
Id. (emphasis added). Nonetheless, the court awarded Martin \$131,252.55 in attorney’s fees and costs, *Martin III*, 28 F. Supp. 2d at 1107, after stating that the statutory damages it did

Answering this question requires taking a broad view of United States intellectual property law, including a look back at some details in its history. While others have studied fully the history of Anglo-American copyright,⁹ the paucity of references in the histories to the type of rights granted by VARA is remarkable. And so I have retraced that history, analyzing how the type of rights VARA provides fit into it.

In Part I of this article, to provide the necessary background information, I explain briefly the rights granted by VARA. Then in Part II, I look back at a time in history when intellectual property itself and Anglo-American intellectual property law concepts were first developing into their modern forms. I argue that at that time the door was open to allow for the development of both non-economic interests, including those protected by VARA, and economic interests, such as those protected by copyright. That was a time when both sets of interests seemed to sit more easily side-by-side and even intertwine in the minds and opinions of the common law judges. Intellectual property law concepts were at an early evolutionary stage, and ideas that could evolve into both VARA rights and copyright swirled around in the same primordial soup of Anglo-American intellectual property law. There were many potential threads of intellectual property law developing at that time, and I focus my analysis specifically on how the potential for moral rights' development was a part of that history.

In Part III, I identify the specific moment when the door to that development closed, profoundly impacting the evolution of American intellectual property law for over 200 years. This historic turn of events so effectively cut off the development of an entire line of legal doctrine protecting non-economic intellectual property interests, that it was easy for a federal court in the 1990's to excuse a defendant's ignorance of its feeble re-emergence. And so I suggest in Part IV that judicial education about this history could make the federal judiciary more comfortable with VARA and its values and more adept at applying it well. In addition, as a new evolution takes place in American intellectual property law today, and many different concepts swirl in the mix of laws that are considered and tried, there is an important opportunity to make sure moral rights are not lost again.

I. SO YOU'VE NEVER HEARD OF VARA?

The law that the court excused the City of Indianapolis for not knowing was the Visual Artists Rights Act of 1990, or VARA.¹⁰ It grants to an "author of a work of visual art"¹¹ the rights of attribution and integrity.¹² The term "author" is used here in the broad copyright sense of the word, to include an author or an artist.¹³ A "work of visual

award "[did] not cover the loss," and that it was hoping to deter other municipalities from "wantonly destroying works of art." *Martin II*, 4 F. Supp. 2d at 812.

⁹ See *infra* note 68.

¹⁰ 17 U.S.C. § 106A (2000).

¹¹ § 106A(a).

¹² *Id.*

¹³ The copyright statute does not define "author," only "works of authorship." 17 U.S.C. § 102(a) (2000). On the meaning of "author," see Michael Birnhack, *The Dead Sea Scrolls Case: Who Is An Author*, 2001 E.I.P.R. 23(3), 128, 131–32 (discussing the definition of an "author"); James D.A. Boyle, *The Search for An Author: Shakespeare and the Framers*, 37 AM. U.L. REV. 625, 629–30 (1988)

art,” however, has a very narrow, specific definition:

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.¹⁴

So the types of visual art for which VARA gives protection are what were traditionally known as the “fine arts,”¹⁵ i.e., painting, sculpture, art prints, and, more recently, art photography. These works of art are one-of-a-kind or very limited edition pieces, valued for their uniqueness.¹⁶

The law also limits the meaning of a “work of visual art” by clarifying what it is not:

A work of visual art does not include—

(A)(i) any poster, map, globe, chart, technical drawing, diagram, model,¹⁷ applied art, motion picture or other audiovisual work, book, magazine,

(analyzing how “the author is different than other workers”); Sharon Connelly, *Authorship, Ownership, and Control: Balancing the Economic and Artistic Issues Raised by the Martha Graham Copyright Case*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 837, 839, 863–64 (2005); Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1072–74 (2003) [hereinafter Ginsburg, *Authorship in Comparative Copyright*]; Marci A. Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference*, 47 J. COPYRIGHT SOC’Y U.S.A. 317, 326 (2000) [hereinafter Hamilton, *Deference*] (arguing the Supreme Court has rejected “an author-centered vision of the copyright law”); Peter Jaszi, *Towards a Theory of Copyright: The Metamorphosis of “Authorship,”* 1991 DUKE L.J. 455, 468–71 (1991) (examining how the law received concepts of authorship from its cultural context); Roberta Rosenthal Kwall, *“Author-Stories:” Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 4 (2001) [hereinafter Kwall, *“Author-Stories”*] (“[T]he author’s voice is one that has been submerged in the development of copyright law”); David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 7–13 (2001).

¹⁴ 17 U.S.C. § 101 (2000).

¹⁵ See Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 839 n.140 (2005) (asserting “art is oppositionally defined in law and elsewhere with binary notions such as high art versus low art, art versus craft, art versus entertainment, and fine art versus popular art”); Pete Singer, *The Three Stooges Latest Act: Attempting to Define the Scope of Protection the First Amendment Provides to Works of Art Depicting Celebrities*, 27 DAYTON L. REV. 313, 330–31 (2002) (listing qualities of fine art, as opposed to popular art, which the California Supreme Court examined).

¹⁶ See *United States v. Int’l Harvester Co.*, 23 C.C.P.A. 55, 59 (1935) (considering trial testimony asserting that “Fine arts is something that is determined very often by the scarcity of the subject, or the future appreciation of it.”); Christopher J. Robinson, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1936 (2000) (“Fine art is unique among the arts in one important sense. A disproportionate percentage of the value of a work of fine art is in the physical object created, rather than the exploitation of derivatives or copies.”).

¹⁷ *But see* *Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526, 533 (2001) (finding clay model for bronze sculpture was a work of visual art in its own right).

newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; . . .¹⁸

This negative definition prevents VARA from protecting purely commercial or mass-produced works.¹⁹

Thus, VARA applies to the creators of paintings, sculptures, limited edition prints, and exhibition photographs.²⁰ The City of Indianapolis apparently did not know there was a special law for sculptors and their ilk before it sent in the bulldozers.

What VARA grants to these creators are the right of attribution²¹ and the right of integrity.²² The right of attribution allows an artist to put his name on his own work²³ and to prevent his name from being put someone else's work.²⁴ The right of attribution also allows an artist to prevent the use of his name on his work if the work has been modified or distorted in a way that would be "prejudicial to his or her honor or reputation."²⁵ Thus, VARA allows the artist to maintain control over which works will be attributed to him and which will not, giving him some control over his reputation as an artist.²⁶

¹⁸ 17 U.S.C. § 101.

¹⁹ See *Silberman v. Innovation Luggage, Inc.*, 2003 WL 1787123, at *5 (S.D.N.Y. Mar. 31, 2003) ("[T]here is no indication that in passing VARA Congress meant to penalize purchasers of mass-produced posters who treated them with less than the respect due to original works of art.")

²⁰ Cf. Kwall, "Author-Stories," *supra* note 13, at 30 (arguing that "[b]y limiting its protections to only certain categories of visual art, VARA . . . privileges the voices of certain authors over others"); Sheldon W. Halpern, *Of Moral Right and Moral Righteousness*, 1 MARQ. INTELL. PROP. L. REV. 65, 80 (1997) (asserting VARA conflicts with the egalitarian tradition of copyright law).

²¹ 17 U.S.C. § 106A(a)(1), (2) (2000).

²² 17 U.S.C. § 106A(a)(3).

²³ 17 U.S.C. § 106A(a)(1)(a) ("[T]he author of a work of visual art—shall have the right—to claim authorship of that work . . ."); see also Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(a)*, 377 WASH. L. REV. 985, 995 (2002) [hereinafter Kwall, *Attribution*] ("The objective of the right of attribution is to insure that the creator of a work receives recognition as the author.")

²⁴ 17 U.S.C. § 106A(a)(1)(b) ("[T]he author of a work of visual art—shall have the right—. . . to prevent the use of his or her name as the author of any work of visual art which he or she did not create."); see also Kwall, *Attribution*, *supra* note 23, at 985 ("[P]eople should not receive attribution for something that is not their creation.")

²⁵ 17 U.S.C. § 106A(a)(2).

²⁶ See Kwall, *Attribution*, *supra* note 23, at 994 ("[F]or many creators, some qualities, such as professional reputation and artistic dignity, are more important than money . . ."); Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 47–49 (1998) [hereinafter Liemer, *Primer*]. But see Kwall, "Author-Stories," *supra* note 13, at 25 (distinguishing between an author's dignity and an author's reputation).

On securing reputation protection via trademark law, see Jane C. Ginsburg, *The Author's Name as a Trademark: A Perverse Perspective on the Moral Right of Paternity?*, 23 CARDOZO ARTS & ENT. L.J. 379 (2005); Randolph Stuart Sergeant, *Building Reputational Capital: The Right of Attribution Under Section 43 of the Lanham Act*, 19 COLUM.-VLA J.L. & ARTS 45 (1994–95).

On the recent abridgement of the right of attribution outside the scope of VARA, in *Dastar Corp v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), see Marshall Leaffer, *Life After Eldred: The Supreme Court and the Future of Copyright*, 30 WM. MITCHELL L. REV. 1597, 1613–15 (2004); Tyler T. Ochoa, *Rights of Attribution, Section 43(a) of the Lanham Act, and the Copyright Public Domain*, 24

Likewise, the right of integrity allows an artist to prevent someone else from modifying his work without permission,²⁷ again if it would “be prejudicial to his or her honor or reputation.”²⁸ And the right of integrity allows an artist to prevent outright destruction of the work,²⁹ provided it is a work of “recognized stature.”³⁰ In this way, VARA allows the artist to maintain aesthetic control of the physical work, which in turn gives him some additional control over his reputation as an artist.³¹ It was ignorance of this last right enumerated in the statute, an artist’s right to prevent destruction of his art, for which the Seventh Circuit was quick to excuse the City of Indianapolis.

Note that VARA grants these rights to artists, and these rights are personal to the individual artist,³² lasting for a lifetime.³³ These rights do not follow the ownership of the physical work of art, nor do they follow the ownership of the copyright.³⁴ Both the artwork and the copyright can be held in other hands; the right of attribution and the right of integrity will still lie with the artist.³⁵

WHITTIER L. REV. 911, 926 (2003).

²⁷ 17 U.S.C. § 106A(a)(3)(a) (2000); see Thomas P. Heide, *The Moral Right of Integrity and the Global Information Infrastructure: Time for a New Approach?*, 2 U.C. DAVIS J. INT’L L. & POL’Y 211, 229–51 (1996) (providing an overview of the right of integrity in the United States, United Kingdom, Germany, and France).

²⁸ 17 U.S.C. § 106A(a)(3)(a).

²⁹ 17 U.S.C. § 106A(a)(3)(b). *But see* Cort v. St. Paul Fire & Marine Ins. Cos., 311 F.3d 979, 986 (2002) (finding a mural covered with white sealant was not destroyed, “it simply disappeared”); English v. BFC & R E. 11th Street LLC, 1997 WL 746444, at *16 (S.D.N.Y. 1997) (holding total obstruction of murals that does not touch them neither modifies nor destroys them). Traditionally, the right of integrity in other countries did not protect against destruction, only modification. LaCasse et Welcome c. Abbe Quenard, CA Paris, 1934 D.P.II 385; Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81–82 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1824 (1996) (“Destruction is seen as less harmful than the continued display of deformed or mutilated work that misrepresents the artist . . .”).

³⁰ 17 U.S.C. § 106A(a)(3)(b); Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 325 (S.D.N.Y. 1994) (“[T]he recognized stature requirement is best viewed as a gate-keeping mechanism—protection is afforded only to those works of art that art experts, the art community, or society in general views as possessing stature.”), *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995); *Martin IV*, 192 F.3d at 612 (“‘Recognized stature’ is a necessary finding under VARA in order to protect a work of visual art from destruction.”); Pollara v. Seymour, 206 F. Supp. 2d 333, 337 (2002) (finding no recognized stature for hand-painted portable mural used as backdrop to exhibit booth, because artist had no intention to preserve it for later display); see also Robinson, *supra* note 16, at 1963–66 (arguing the recognized stature requirement should be dropped).

³¹ See Liemer, *Primer*, *supra* note 26, at 50–52.

³² 17 U.S.C. § 106A(b) (“Only the author of a work of visual art has the rights conferred by subsection (a) in that work . . .”); see also Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 114 (1998) (suggesting art may be a surrogate of the artist’s self); Kwall, “*Author-Stories*,” *supra* note 13, at 23 (stating “this doctrine is concerned with protecting the author’s personal dignity and the human spirit reflected in her artistic creations.”). See generally Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 298–99 (2003) (analyzing both intrinsic and instrumental values behind moral rights).

³³ 17 U.S.C. § 106A(d) (2000) (“[T]he rights conferred by subsection (a) shall endure for a term consisting of the life of the author.”).

³⁴ 17 U.S.C. § 106A(b) (granting the right of attribution and integrity “whether or not the author is the copyright owner”).

³⁵ See Robinson, *supra* note 16, at 1939 (explaining these rights “acknowledge that an artist has . . . a creative persona that is injected into the work of art at creation and which remains a part of the work despite his physical relinquishment of the object to others”); Shaw v. Rizzoli Int’l Publ’ns, Inc., 1999

Congress passed VARA in 1990. Fifteen years have come and gone, and only about as many cases have been decided under this federal statute. Artists themselves often do not know about this law,³⁶ waive their rights,³⁷ or find it too costly to assert their rights in federal court.³⁸ Most VARA plaintiffs have lost in court, which may further discourage others from filing lawsuits under VARA.³⁹

Congress passed VARA to help United States law comply with the Berne Convention.⁴⁰ This intellectual property treaty was over one hundred years old and had over one hundred other signatories before the United States signed it.⁴¹ The Berne Convention does require signatory nations to grant artists the right of attribution and the right of integrity.⁴² Despite VARA, the sufficiency of United States compliance with the Berne Convention is at least questionable.⁴³

WL 160084, at *7 (S.D.N.Y. 1999) (stating “economic harm is not the type of injury protected by VARA”).

³⁶ See U.S. COPYRIGHT OFFICE, EXECUTIVE SUMMARY, WAIVER OF MORAL RIGHTS IN VISUAL ARTWORK, (Oct. 24, 1996), <http://www.copyright.gov/reports/exsum.html> (last visited Nov. 5, 2005) (acknowledging “the low level of VARA awareness”); RayMing Chang, *Revisiting the Visual Artists Rights Act of 1990: A Follow-up Survey About Awareness and Waiver*, 13 TEX. INTELL. PROP. L.J. 129, 144 (2005) (reporting little change in artists’ awareness of VARA between 1995 and 2003).

³⁷ *Id.* (reporting 40% of over 1,000 artists answering a written survey “said waiver clauses were part of contracts for commissioned works”); Chang, *supra* note 36, at 144–45 (reporting a small increase in artists’ awareness of VARA waivers from 1995 to 2003).

³⁸ *Id.* (reporting “[s]everal comments remarked that the law was unenforceable, largely because enforcement is too costly”).

³⁹ The statute has, however, generated much scholarship. See Robinson, *supra* note 16, at 1939 n.22 (“Moral rights . . . are a favorite of academics, and articles on the subject far outnumber the cases in which moral rights are invoked.”).

⁴⁰ Compare Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised July 24, 1971, 828 U.N.T.S. 221 [hereinafter *Berne Convention*], and Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988), with Visual Artists Right Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506 (2000)).

As I wrote previously, “[t]he impetus . . . to join the Berne Convention has been explained in terms of ensuring protection of American artists, particularly writers, in the global marketplace . . . as well as sustained efforts by interested members of the arts community.” Liemer, *Primer*, *supra* note 26, at 46 n.34 (citing Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 374 n.11, 398–401 (1995); Edward J. Damich, *Moral Rights Protection and Resale Royalties for Visual Art in the United States: Development and Current Status*, 12 CARDOZO ARTS & ENT. L.J. 387, 407 (1994)); see also Cambra E. Stern, *A Matter of Life or Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights*, 51 UCLA L. REV. 849, 857 (2004) (explaining the impetus to join the Berne Convention was the United States’ “copyright-based industries” wanting more protection for their products in international markets).

⁴¹ United States Department of State, Office of the Legal Adviser, Treaty Affairs, Treaties in Force, 357–58, Jan. 1, 2000, http://www.state.gov/www/global/legal_affairs/tif_01d.pdf.

⁴² *Berne Convention*, *supra* note 40, at Art. 6 bis, 1.

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

Id.

⁴³ See William Belanger, *U.S. Compliance with the Berne Convention*, 3 GEO. MASON L. REV. 373, 398–401 (1995); Janet Fries & Michael J. Remington, *Beware of Mutant Copyright: Justice Scalia Issues a Warning in the Dastar Decision*, I.P.L. & BUS., Sept. 2003, at 70; Kwall, *Attribution*, *supra* note 23, at 1025 (“our legal system has failed to protect the attribution interest in an independent, and doctrinally

When Congress debated the adoption of VARA,⁴⁴ media attention focused on Ted Turner's efforts to ensure he could add color to the old, black and white films in his collection.⁴⁵ When the VARA bill passed, it was tacked onto a lengthy bill authorizing eighty-five new federal judges and other court reform.⁴⁶ Upon codification, it simply was inserted between existing, unrelated sections of the federal copyright law.⁴⁷ The court in *Martin v. City of Indianapolis* referred to VARA as "a stepchild of our copyright laws"⁴⁸

And so, it is not surprising that a defendant in a VARA lawsuit might not have heard, before reading the Complaint, about this statute and the special rights it grants to creators of visual art. It remains surprising, however, that a defendant could argue successfully in a federal Court of Appeals that ignorance of this law was sufficient to excuse statutorily-prescribed damages.

The Anglophone world generally refers to VARA rights as artists' "moral rights," translating loosely from the French term *droit moral*.⁴⁹ "In this context, 'moral' is not the opposite of immoral or even amoral. The term simply conveys an element of ethics or societal interest."⁵⁰ In addition to the right of attribution (*le droit à la paternité*⁵¹) and

honest, manner"); Teresa Laky, *Dastar Corp. v. Twentieth Century Fox Film Corp.: Widening the Gap Between United States Intellectual Property Law and Berne Convention Requirements*, 14 SETON HALL J. SPORTS & ENT. L. 441 (2004); Ochoa, *supra* note 26, at 924–27 (doubting *Dastar* meets Berne Convention moral rights requirements); Ruth L. Okediji, *Through the Years: The Supreme Court and the Copyright Clause*, 30 WM. MITCHELL L. REV. 1633, 1649–50 (2004) (referring to the United States' "already weak compliance scheme for the protection of moral rights under the Berne Convention"); Leaffer, *supra* note 26, at 1615 (asserting even the United States' minimalist compliance with Berne has recently been undermined); Natalie C. Suhl, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203 (2002); David S. Welkowitz, *The Supreme Court and Trademark Law in the New Millennium*, 30 WM. MITCHELL L. REV. 1659, 1696 n.209 (questioning "whether the United States is adhering to its obligations under the Berne Convention").

⁴⁴ See Sherman, *supra* note 40, at 401–09 (providing an overview of VARA's legislative history).

⁴⁵ See Janine V. McNally, *Congressional Limits on Technological Alterations to Film: The Public Interest and the Artists' Moral Right*, 5 HIGH TECH. L.J. 129 (1990); Don Shannon, *Panel Weighs Moral Rights' of Film Alteration*, L.A. TIMES, Oct. 25, 1989, at 1 (reporting Senate sub-committee hearings on moral rights). For a French court's perspective on adding color to black-and-white movies, see *Huston c. La Cinq*, Cass. 1e civ., May 28, 1991, J.C.P. 1991, II, 21731 (a French court enjoining the showing of Ted Turner's colorized version of John Huston's movie, the *Asphalt Jungle*).

⁴⁶ Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990); see also Kwall, "Author-Stories," *supra* note 13, at 27 n.112 (describing relevant party politics).

⁴⁷ The main provisions of VARA are in 17 U.S.C. § 106A, which was inserted between § 106 (granting the traditional bundle of rights known as copyright: the exclusive right to reproduce, distribute, perform, display, and make derivative works from a copyrighted work) and § 107 (codifying the long-standing fair use exception).

⁴⁸ *Martin IV*, 192 F.3d at 611; see also Cort, 311 F.3d at 985 (stating "American law has resisted recognizing moral rights").

⁴⁹ See Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y U.S.A. 1, 2 n.7 (1980) (citing Dominique Giocanti, *Moral Rights: Authors' Protection and Business Needs*, 10 J. INT'L L. & ECON. 627, 627 n.1 (1975)). France has long been considered the leader in this area of the law. *Id.*; Sherman, *supra* note 40, at 389 n.92; Benjamin Davidson, *Lost in Translation: Distinguishing Between French and Anglo-American Natural Rights in Literary Property, and How Dastar Proves That the Difference Still Matters*, 38 CORNELL INT'L L.J. 583 (2005).

⁵⁰ See Liemer, *Primer*, *supra* note 26, at 42 (citing RANDOM HOUSE UNABRIDGED DICTIONARY 1249

the right of integrity (*le droit au respect de l'oeuvre*⁵²), which are the most commonly recognized moral rights, some countries recognize the right of disclosure⁵³ (*le droit de divulgation*⁵⁴), the right of withdrawal⁵⁵ (*le droit de retrait ou de repentir*⁵⁶), and resale royalty rights⁵⁷ (*le droit de suite*⁵⁸). There are many other ways in which moral rights are more expansive in other countries, including the duration,⁵⁹ a lack of waivers,⁶⁰ the types of work protected,⁶¹ and applicability to works for hire,⁶² i.e., works made for an employer.⁶³

So the question remains, if artists' moral rights are well-established, mainstream

(2d ed. 1993) (defining "moral" as "of, pertaining to, or concerned with the principle or rules of right conduct . . . ethical"); Rebecca J. Morton, *Carter v. Helmsley-Spear, Inc.: A Fair Test of the Visual Artists Rights Act?*, 28 CONN. L. REV. 875, 912 (1996) ("Traditional moral rights theory . . . presupposes a broad societal interest in the creation of fine art." (citation omitted)); Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 3 n.6 (1985) [hereinafter Kwall, *Marriage*].

⁵¹ See, e.g., Law No. 57-298 of Mar. 11, 1957, J.O., Mar. 14, 1957, 2723 B.L.D. 197, art. 6 (France) [hereinafter Law No. 57-298]. The French term used to be translated directly into English as "the right of paternity," but the gender-neutral term "right of attribution" is now used more frequently. The French term may, however, more closely capture the nature of the relationship between art and artist. See Liemer, *Primer*, *supra* note 26, at 43, n.15 (comparing artist's view of harm to his art to harm to a loved one).

⁵² See, e.g., Law No. 57-298, art. 6.

⁵³ See Liemer, *Primer*, *supra* note 26, at 52–54.

⁵⁴ See, e.g., Law No. 57-298, art. 56. See *infra* p. 25, on the similarity between Anglo-American copyright law's right to decide when to publish and the French *droit de divulgation*; see also Heide, *supra* note 27, at 245–52 (examining the French *droit de divulgation*).

⁵⁵ See generally Liemer, *Primer*, *supra* note 26, at 54–55;

⁵⁶ See, e.g., Law No. 57-298, art. 32.

⁵⁷ See generally LILIANE DE PIERREDON-FAWCETT, *THE DROIT DE SUITE IN LITERARY AND ARTISTIC PROPERTY, A COMPARATIVE STUDY* (1991); Liemer, *Primer*, *supra* note 26, at 55–56; Michael B. Reddy, *The Droit de Suite: Why American Fine Artists Should Have the Right to a Resale Royalty*, 15 LOY. L.A. ENT. L. REV. 509 (1995).

⁵⁸ See, e.g., California Art Preservation Act, Cal. Civ. Code § 987 (2005); Law No. 57-298, art. 42.

⁵⁹ In France, for example, moral rights are perpetual. Law No. 57-298, art. 6. Heirs are assumed to be carrying out the wishes of the artist, not imposing their own decisions. See RALPH E. LERNER & JUDITH BRESSLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* 948 (2d ed. 1998); see also Stern, *supra* note 40, at 868–69 (analyzing current problems arising from differing durations for moral rights in federal and state legislation in the United States).

⁶⁰ For example, moral rights are not waivable in France, Law No. 57-298, art. 6, or in Germany, Law of Sept. 9, 1965, v. 4.7.1965 (BGB1. I S.2098).

⁶¹ See, e.g., Soc. Le Chant de Monde c. Soc. Fox Europe et Soc. Fox Americaine Twentieth Century, CA Paris, Jan. 13, 1953, Gaz. Pal. 1953, 2, pan. jurispr., 191 (France) (granting moral rights protection to classical music composer Shostakovich).

⁶² By definition in the United States, a "work for hire" is not a "work of visual art," 17 U.S.C. § 101, and so it is not protected by VARA. See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 85–89 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1824 (1996) (analyzing "work for hire" in a VARA context); *Martin I*, 982 F. Supp. 625 at 36 (also analyzing "work for hire" in a VARA context); Marina Santilla, *United States' Moral Rights Developments in European Perspective*, 1 MARQ. INTELL. PROP. L. REV. 89, 99 (1997) (reviewing effect of no work for hire doctrine on European moral rights).

⁶³ 17 U.S.C. § 101 (defining a work for hire as "a work prepared by an employee within the scope of his or her employment"); see also *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740–41 (1989) (defining "scope of employment" for artists by applying the common law of agency).

law in some other countries,⁶⁴ why is VARA so tenuous in the United States as to make a federal court reluctant to apply it? How did we lose our moral rights? Did we ever have them to begin with?

II. MORAL RIGHTS' ANCESTOR STOOD ON AN EARLIER EVOLUTIONARY BRANCH OF THE LAW

A. *Early Monopoly*

The story⁶⁵ of intellectual property law⁶⁶ in the common law countries generally starts in 1476,⁶⁷ with the introduction of printing in England, by William Caxton.⁶⁸ The King issued “letters of patent,” allowing monopolies for a fixed number of years, to individuals who could bring to England and develop new processes in the trades and applied arts.⁶⁹ Printing was one of those trades.

⁶⁴ See Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 364 (1998) (“[M]oral rights in France and continental Europe have evolved to protect not only an artist’s personal right in the overall integrity of his work, but . . . have protected Europe’s cultural property.”); SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS, THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 26 (2001) (asserting “European nations have consistently granted a higher level of protection to authors and artists than American laws have”).

⁶⁵ On the use of narratives to help the judiciary broaden its perspective on moral rights in our intellectual property law, see generally Kwall, “*Author-Stories*,” *supra* note 13.

⁶⁶ On the broader, contemporaneous development of visual artists as individuals with interests distinct from those of their patrons, see Evelyn Lincoln, *Invention and Authorship in Early Modern Italian Visual Culture*, 52 DEPAUL L. REV. 1093 (2003); Suhl, *supra* note 43, at 1206; Swack, *supra* note 64, at 368–69 (crediting Michelangelo as the first artist with enough clout to demand creative control similar to artists’ moral rights). And on the analogous development for writers, see MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 16–20 (1993) [hereinafter ROSE, COPYRIGHT].

⁶⁷ See *Memorandum*, 4 Burr. 2411, 2413–17, 98 Eng. Rep. 262, 264–266 (K.B. 1774) (providing a brief history of printing in England); *Donaldson v. Beckett*, 2 Bro. P.C. 129, 135, 1 Eng. Rep. 837, 840 (H.L. 1774) (“In 1471, Caxton, a mercer of London, brought the art [of printing] into this kingdom.”).

⁶⁸ For a traditional (and colorfully worded) history of English copyright law, see AUGUSTINE BIRRELL, THE LAW AND HISTORY OF COPYRIGHT IN BOOKS (1899). For more recent versions, see *inter alia*, LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968) (a more recently written version); HARRY RANSOM, THE FIRST COPYRIGHT STATUTE (1956); ROSE, COPYRIGHT, *supra* note 68. And for a comprehensive review of the relevant primary materials, critical of traditional accounts, see ROMAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN THE EIGHTEENTH-CENTURY BRITAIN (1695–1775) (2004).

⁶⁹ See *Memorandum*, 4 Burr. at 2415, 98 Eng. Rep. at 265 (reporting on Caxton’s secretive acquisition of printing skills and their transmission to England); RANSOM, *supra* note 68, at 22 (reporting inducements for European printers to move to England); see also Harry Hillman Chartrand, *Copyright C.P.U.: Creators, Proprietors, and Users*, 30 J. ARTS MGMT., L. & SOC’Y 209, 212 (2000) (“[T]he year William Caxton introduced the printing press in England, . . . a licensing law requir[ed] printers to inscribe their name, location and titles of works they wanted to print on a register. If approved for publication, the Crown granted a *copye* to the printer. The rights flowing from this *copye* . . . were held by the printer”); *Proceedings in the Lords on the Question of Literary Property* (Feb. 4–22, 1774), in XVIII COBBETT’S PARLIAMENTARY HISTORY OF ENGLAND 950, 993–994 (1813) (De Grey, Lord C.J.) [hereinafter COBBETT’S PARL. HIST.], <http://www.copyrighthistory.com/donaldson.html> (last visited Nov. 5, 2005) (“The manner in which the copy-right was held was a kind of copyhold tenure, in which the

In the book printing and selling business, the monopoly came to vest in the Stationers Company in London, the printers' guild.⁷⁰ Only members of the Stationers Company could print and sell books,⁷¹ and they were required to register each publication with the Company.⁷² Without the means of production,⁷³ authors usually were forced to sell their manuscripts to members of the Company and forgo any direct future benefits.⁷⁴ The Stationers received the economic benefits of a monopoly,⁷⁵ and the government was able to control the market and exercise pre-publication censorship.⁷⁶ The Stationers also received some political protection because, by design, they were prevented from publishing material that might displease the regime and thus endanger themselves.⁷⁷ By 1644, the poet John Milton was arguing publicly against the renewal of pre-publication censorship laws.⁷⁸ Milton advocated on behalf of both authors⁷⁹ and society,⁸⁰ and challenged the booksellers' motives.⁸¹

Although there was no explicit law at this time protecting moral rights (or economic

owner has a title by custom only, at the will and pleasure of the lord.”).

⁷⁰ See DEAZLEY, *supra* note 68, at 2 n.4 (stating the “relationship between the state and the Stationers began in 1557 when the Stationers’ Company received its charter from Philip and Mary, for the purpose of providing the monarchy with a method of controlling . . . printing”); RANSOM, *supra* note 68, at 29 (stating Queen Mary chartered the Company as a means to regulate the press).

⁷¹ See VAIDHYANATHAN, *supra* note 64, at 37 (calling this arrangement “a sweet deal for the publishers”).

⁷² There were two main exceptions to this monopoly: (1) the royal prerogative, by which the monarch directly controlled the printing of government documents, such as the laws and calendars, and (2) the copyrights held by Oxford and Cambridge Universities. See BIRRELL, *supra* note 68, at 55, 143.

⁷³ See Chartrand, *supra* note 69, at 212 (explaining that booksellers owned a “capital-intensive and technically demanding piece of equipment,” there were many more authors than booksellers, and so booksellers easily controlled the marketplace).

⁷⁴ *Id.* (reporting the norm was “a single up-front payment extinguishing all future economic and/or moral claims of the [author] to the fruit of his or her efforts”).

⁷⁵ See BIRRELL, *supra* note 68, at 55 (describing “the printers or booksellers, who from the beginning of things were alert to make a little money out of their calling”); Chartrand, *supra* note 69, at 216 (explaining “the stationers themselves steadfastly remained, what they had always been, eminently practical men; and they consistently protected their monopoly”); L. Ray Patterson, *Copyright and “the Exclusive Right” of Authors*, 1 J. INTEL. PROP. 1, 9 (1993) (stating “[t]he stationers . . . insisted on a quid pro quo”); RANSOM, *supra* note 68, at 10 (noting the Stationers Company’s “shrewd service to official regulation”).

⁷⁶ See Chartrand, *supra* note 69, at 213 (describing how the interests of the government and the booksellers coincided); DEAZLEY, *supra* note 68, at 2 (describing “a mutually beneficial association which provided the monarch and the government of the day with an effective means to monitor and censor the press, and the stationers with a statutory protection securing the reproduction of their copies.”); Kwall, “*Author-Stories*,” *supra* note 13, at 17 n.63 (“Licensing also facilitated government censorship.”). The relationship continued to develop via a series of Star Chamber decrees, Interregnum ordinances, and a series of licensing acts. See DEAZLEY, *supra* note 68, at 2 n.4; Chartrand, *supra* note 69, at 213–15; RANSOM, *supra* note 68, at 33–36, 61–62, 66–73.

⁷⁷ See BIRRELL, *supra* note 68, at 54 (reminding us that “to peddle new ideas in print has at all periods of man’s history exposed the pedler to pains and penalties of divers kinds”).

⁷⁸ JOHN MILTON, AEROPAGITICA, *A Speech for the Liberty of Unlicensed Printing, To the Parliament of England* (1644), reprinted in 32 GREAT BOOKS OF THE WESTERN WORLD 381 (1952). Milton himself flouted authority and published this speech as a pamphlet, without a license. *Id.* at vi.

⁷⁹ *Id.* at 398 (arguing that censorship was “a dishonour and derogation to the author”).

⁸⁰ *Id.* at 399 (arguing that censorship disparaged the intelligence of the public).

⁸¹ *Id.* at 412 (stating the booksellers acted “under pretence” and “with glosing colours” when supporting the licensing acts).

interests of authors, for that matter), in practice there was some protection for the integrity and accurate attribution of literary works.⁸² If the censors had approved a book, printing and selling a modified version of it would have had its risks. Once a bookseller had the censors' approval and an exclusive license to print a book, he had good reason to protect his investment and no economic incentive to incur further risk.⁸³ Since this system discouraged modifications, the integrity of the works received some protection. If works were not modified, then authors' names would not be attached to works which were not actually quite what they had written. Thus, licensing also would have protected the aspect of the right of attribution that prevents an author's name from being on work he did not create.⁸⁴

In addition to the effects of censorship and licensing, there may have been a type of "honor among thieves."⁸⁵ If each guild member respected the other members' titles, his own titles would be protected in turn. Misattribution or modification of a work would thwart the registration system upon which the monopoly relied, because then something other than the registered work⁸⁶ would be competing in the marketplace. To the extent this dynamic protected moral rights, the impetus was the protection of the economic value of the works registered to guild members, not protection of authors' creativity.

Indeed, the general displeasure of authors with lack of control over their own creations suggests that respect for moral rights within the guild was less than absolute. The writer Daniel Defoe complained publicly about "press piracy" and the lack of respect for authors' interests.⁸⁷ The philosopher John Locke expressed his frustration with booksellers who held copyrights in ancient works, stating they "claim the text to be theirs, and so will not suffer fairer or more correct editions than any they print here, or with new comments to be imported . . ." ⁸⁸ Preventing competing versions of books in this context of censorship and absolute monopoly, with no works allowed into the public domain, created stasis in the available texts, not necessarily a good result for authors' creativity or incomes.

When the Licensing Act of 1662⁸⁹ expired in 1695, the convenient relationship between the monarchy and the printers came to an end.⁹⁰ Locke had undertaken serious

⁸² See VAIDHYANATHAN, *supra* note 64, at 37 (stating that authors "could be assured that their works would not be . . . misrepresented in the market").

⁸³ *But see* RANSOM, *supra* note 68, at 70–71 (indicating there were many unregistered publications at this time).

⁸⁴ See 17 U.S.C. § 106A(1)(B) (2000) (granting an artist the right to prevent the use of his name on a work he did not create); 17 U.S.C. § 106A(2) (granting an artist the right to prevent the use of his name on a work "in the event of a distortion, mutilation, or other modification of the work").

⁸⁵ See Chartrand, *supra* note 69, at 218 (referring to the "ethical" practices of the guild concerning moral rights).

⁸⁶ See *supra* note 71.

⁸⁷ See DEAZLEY, *supra* note 68, at 31–32.

⁸⁸ John Locke, *A Letter from Locke to Clarke, Oates*, Jan. 2 (1692–93), *reprinted in* Hideaki Shirata, *The Origin of Two American Copyright Theories: A Case of the Reception of English Law*, 30 J. ARTS MGMT., L., & SOC'Y 193, 206, App. A; *see also* DEAZLEY, *supra* note 68, at 3–4.

⁸⁹ An Act for preventing the frequent Abuses in printing seditious, treasonable and unlicensed Books and Pamphlets, and for regulating of Printing and Printing Presses (Licensing Act), 14 Car. 2, c. 33 (1662) (Eng.).

⁹⁰ See DEAZLEY, *supra* note 68, at 1–2; Chartrand, *supra* note 69, at 216; RANSOM, *supra* note 68, at 89–90.

advocacy behind the scenes⁹¹ to help ensure the demise of licensing. As pre-publication licensing of printed material ended,⁹² the door was left open to develop new concepts of this type of property and the rights to it.⁹³ The early alignment of aspects of moral rights with the booksellers' interests, however, did not bode well for moral rights' development.⁹⁴

B. The Statute of Anne

In the common law countries, the Statute of Anne⁹⁵ receives credit as the earliest statute of any kind protecting the rights of individual creators.⁹⁶ It is generally considered the origin of modern Anglo-American copyright protection.⁹⁷ It gave authors a property right, for a limited time period, in the work they created.⁹⁸ The author of a book printed on April 10, 1710, who had not yet transferred the copyright, received statutory copyright protection for twenty-one years.⁹⁹ For new works, the author received statutory copyright protection for fourteen years.¹⁰⁰ An author who was still

⁹¹ See Shirata, *supra* note 88, at 195 (explaining “John Locke contributed much toward its repeal, writing to peers in the House of Lords and strongly condemning . . . the monopolies of the Stationers’ company”); DEAZLEY, *supra* note 68, at 2–3, 9–10. The many ways in which John Locke’s broader, philosophical work influenced intellectual property concepts are beyond the scope of this article. See generally Carys J. Craig, *Locke, Labour and Limiting the Author’s Right: A Warning Against a Lockean Approach to Copyright Law*, 28 QUEEN’S L.J. 1, 8–21 (2002) (reviewing Locke’s fruits-of-labor theory and its use underlying copyright law).

⁹² See Chartrand, *supra* note 69, at 216 (“Government control was henceforth limited to post-publication libel law.”).

⁹³ See DEAZLEY, *supra* note 68, at 5.

⁹⁴ See *infra* pp. 23, 26, 30–31.

⁹⁵ An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies (Statute of Anne), 8 Ann., c. 19 (1710) (Eng.), <http://www.copyrighthistory.com>.

⁹⁶ See BIRRELL, *supra* note 68, at 19, 68 (referring to “the first copyright statute anywhere to be found—the 8th of Good Queen Anne” and “the . . . statute of Queen Anne, which . . . has the honour of being the first copyright statute at law to be found in the *Corpus Juris* of any State, either of the ancient or modern times”); ROSE, COPYRIGHT, *supra* note 66, at 4 (referring to “the world’s first copyright statute”).

⁹⁷ See, e.g., *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 647 (1943) (“Anglo-American copyright legislation begins in 1709 with the Statute of 8 Anne, c. 19.”); RANSOM, *supra* note 68, at 106 (stating the statute “opened the period of modern copyright law”).

⁹⁸ 8 Ann., c. 19, s. 1.

⁹⁹ *Id.*

[F]rom and after the Tenth Day of *April*, One thousand seven hundred and ten, the Author of any Book or Books already Printed, who hath not Transferred to any other the Copy or Copies of such Book or Books, Share or Shares thereof, or the Bookseller or Booksellers, Printer or Printers, or other Person or Persons, who hath or have Purchased or Acquired the Copy or Copies of any Book or Books, in order to Print or Reprint the same, shall have the sole Right and Liberty of Printing such Book and Books for the Term of One and twenty Years, to Commence from the said Tenth Day of *April*, and no longer.

Id.

¹⁰⁰ *Id.*

[T]he Author of any Book or Books already Composed and not Printed and Published, or that shall hereafter be Composed, and his Assignee, or Assigns, shall have the sole Liberty of

alive after fourteen years received a second fourteen-year term of statutory copyright protection.¹⁰¹

The Statute of Anne applied only to creators of literature, i.e., writers.¹⁰² Nonetheless, it is an important stepping stone in conceptualizing the rights and property of these particular creators,¹⁰³ and hence the rights of all artists.¹⁰⁴ Instead of the earlier monopolies that encouraged booksellers to disseminate already-written works, the statute encouraged authors to create new works.¹⁰⁵ Its stated goal was “the Encouragement of Learned Men to Compose and Write useful Books.”¹⁰⁶ The political and legislative history of the statute shows continued efforts by the booksellers to hold onto their lucrative monopolies.¹⁰⁷ Meanwhile, authors sought more than the small sum they could earn from the initial sale of a manuscript to a bookseller.¹⁰⁸ Despite the competition between the economic interests of authors and booksellers, it was actually the higher aspiration to increase learning and knowledge that won the day in Parliament.¹⁰⁹ At its inception, this first modern copyright statute concerned more than the purely economic interests of the owners of particular property rights. “This element of the public interest, overlooked or perhaps ignored in other historical tales of the origin of copyright, once lay at its very core.”¹¹⁰

Printing and Reprinting such Book and Books for the Term of fourteen Years, to Commence from the Day of the First Publishing the same, and no longer.

Id.

¹⁰¹ *Id.* (“[A]fter the Expiration of the said Term of Fourteen Years, the sole Right of Printing or Disposing of Copies shall return to the Authors thereof, if they are then Living, for another Term of Fourteen Years.”).

¹⁰² *Id.*

¹⁰³ See Chartrand, *supra* note 69, at 218 (stating “it was the first law to formally recognize a [c]reator’s rights”).

¹⁰⁴ In some countries today, intellectual property rights, both copyright and moral rights, are the same for writers and artists in other media. See, e.g., Soc. Le Chant de Monde, Gaz. Pal. 1953, 2, pan. jurispr., 191 (granting moral rights protection to classical music composer Shostakovich).

¹⁰⁵ See Ginsburg, *Authorship in Comparative Copyright*, *supra* note 13, at 1064.

¹⁰⁶ 8 Ann., c. 19, pmbl.

¹⁰⁷ See DEAZLEY, *supra* note 68, at 32–50. The recent history of United States copyright law reveals a similar dynamic. See Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, 5 OCCASIONAL PAPERS IN INTELL. PROP. 347 (from Cardozo School of Law (1999) (suggesting the lobbying of particular industries creates copyright legislation, not “legislative deliberation over the public good”); Kwall, “*Author-Stories*,” *supra* note 13, at 6–7 (calling for a legislative approach more inclusive of artists’ voices).

¹⁰⁸ See BIRRELL, *supra* note 68, at 197 (“Indifference to the money honestly produced by the sale of books has never been a general characteristic of the British author, who for the most part has always taken whatever he could get.”). But see DEAZLEY, *supra* note 70, at 31–32 (asserting Daniel Defoe was the first to argue for the rights of authors by suggesting a greater societal benefit).

¹⁰⁹ See DEAZLEY, *supra* note 68, at 46 (“[The legislators] secured the continued production of useful books through the striking of a culturally significant societal bargain, a trade-off involving, not the bookseller and censorial state, but the author, the bookseller and the reading public.”). Three hundred years later, the exact same dynamic won the day for VARA. Robinson, *supra* note 16, at 1936 (“VARA recognizes a public interest in the encouragement of artists to work Appealing to the public interest . . . helped ensure the passage of the legislation by invoking a higher social good”); see also Cal. Civ. Code § 987(a) (1982 & Supp. 2005) (“[T]here is also a public interest in preserving the integrity of cultural and artistic creations.”).

¹¹⁰ See DEAZLEY, *supra* note 68, at 226; see also GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST 28–29 (2002).

A judiciary more attuned to this public interest element of intellectual property protection might well be more adept at applying VARA to contemporary disputes, because at its core VARA aims to protect societal interests¹¹¹ in art by encouraging artists to create,¹¹² just as the Statute of Anne aimed to encourage authors to write.¹¹³ Yet after the passage of the Statute of Anne in 1709, the economic interests of individual litigants took center stage in intellectual property law and seem to have never left.¹¹⁴

C. *The Engravers' Act*

In the middle part of the eighteenth century, the London booksellers were busy running to the equity courts for injunctions against rival booksellers,¹¹⁵ and authors of literary works had a protective statute on the books that had not yet been interpreted by the law courts.¹¹⁶ During this time period, the engravers, who created and printed illustrations for books and for separate sale, lobbied for and received their own protective statute.¹¹⁷ William Hogarth, a well-known artist in his time, is generally credited with being savvy about the business side of his career, leading his fellow artists in the push for legislation, anticipating lines of contrary arguments, and persuading his friends in Parliament to pass the legislation.¹¹⁸ The Engravers' Act of 1735 was the first statute to cover any works of visual art.¹¹⁹ Using the basic conceptual framework of the Statute of

¹¹¹ See Ong, *supra* note 32, at 301–04 (analyzing different types of societal and authorial interests addressed by moral rights).

¹¹² See John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 345–55 (1989) [hereinafter Merryman, *Public Interest*] (explaining that people value cultural property for aesthetic, political, religious, and utilitarian reasons); John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L. J. 1023, 1041 (1976) (“We are interested in protecting the work of art for public reasons, and the moral right of the artist is in part a method of providing for private enforcement of this public interest.”); 133 CONG. REC. S11, 502 (daily ed. Aug. 6, 1987) (statement of Sen. Kennedy) (“In our country, as in every other country and civilization, artists are the recorders, and preservers of the national spirit. The creative arts are an expression of the character of the Nation—they mirror its accomplishments, warn of its failings, and anticipate its future.”).

¹¹³ 8 Ann., c. 19, pmbl.

¹¹⁴ The shift in focus in our intellectual property law was so complete for so long that almost three hundred years later, when VARA was passed, it was characterized as “one of the most extraordinary realignments of private property rights ever adopted by Congress.” JOHN HENRY MERRYMAN & ALBERT E. ELSSEN, *LAW, ETHICS, AND THE VISUAL ARTS* 283–84 (3d ed. 1998).

¹¹⁵ See *infra* pp. 20–21.

¹¹⁶ 8 Ann., c. 19.

¹¹⁷ An Act for the Encouragement of the Arts of designing, engraving and etching historical and other Prints, by vesting the Properties thereof in the Inventors and engravers, during the Time therein mentioned (Engravers' Act), 8 Geo. 2, c. 13 (1735) (Eng.).

¹¹⁸ See DEAZLEY, *supra* note 68, at 88–94 (providing a detailed legislative history); Mark Rose, *Technology and Copyright in 1735: The Engravers' Act*, 21 THE INFO. SOC'Y 63, 64 (2005) [hereinafter Rose, *Engravers*] (referring to Hogarth as “the force behind the bill,” as well as its primary beneficiary); SIMON STOKES, *ART AND COPYRIGHT* 23 (2003) (referring to Hogarth as “the force behind the Act”); JENNIFER S. UGLOW, *HOGARTH: A LIFE AND A WORLD* 268–71 (1997) (describing Hogarth's legislative involvement, in a popular bibliography).

¹¹⁹ See Rose, *Engravers*, *supra* note 118, at 63 (referring to “the world's second piece of copyright legislation”); STOKES, *supra* note 118, at 23 (referring to “the first statute to give legislative protection to artistic works”).

Anne,¹²⁰ the Engravers' Act gave "every person who shall invent and design, engrave, etch, or work in Mezzotinto or Chiaro Oscuro" a fourteen-year monopoly in printing that work.¹²¹ The Engravers' Act brought intellectual property status and protection to non-text printed works, and it was successful in decreasing the number of pirated copies.¹²² The act was amended in 1767, to be "more effectual,"¹²³ and again a year later.¹²⁴

Although the Engravers' Act did not directly label anything "moral rights" as we know the term today, it showed a much greater understanding of the creative process than the Statute of Anne had.¹²⁵ The preamble began by stating: "divers persons have by their own genius, industry, pains, and expence, invented and engraved, or worked in Mezzotinto, or Chiaro Oscuro, . . ." ¹²⁶ The words "genius" and "invented" acknowledged the creative spark of the artist and the mental work involved. Words like "industry," "pains," "engraved," and "worked in" spoke more of the manual work involved and described the process of creating a print. Where the Statute of Anne referred only to the authors of a finished product, a book,¹²⁷ the preamble of the Engravers' Act referred to people who had exercised industry, taken pains, and worked in a particular medium, emphasizing the process they had undertaken.¹²⁸ Putting this acknowledgment in the preamble showed that protecting this process was the whole point of the statute.

Lest any contemporary doubt that purpose, the preamble continued: "print-sellers and other persons have of late, without the consent of the inventors, designers, and proprietors of such prints, frequently taken the liberty of copying, engraving, and publishing . . . base copies of such works . . . to the very great prejudice . . . of the inventors, designers, and proprietors thereof."¹²⁹ The concern for "base" copies, i.e., poor quality copies, that were made "to the very great prejudice" of the original artists was very similar to the current concern for the right of attribution and the right of integrity protected by today's moral rights laws. For example, VARA gives a visual artist "the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation."¹³⁰ Prejudice to the artist, caused by distorting the original work, is a harm protected against by both the Engravers' Act and

¹²⁰ See DEAZLEY, *supra* note 68, at 92.

¹²¹ 8 Geo. 2, c. 13, s. 1.

¹²² See DEAZLEY, *supra* note 68, at 89, 91–92 (contrasting the amount of pirating of specific works by engraver William Hogarth before and after passage of the statute).

¹²³ An Act to amend and render more effectual an Act made in the eighth Year of the reign of King George the Second, for Encouragement of the Arts of Designing, Engraving and Etching, Historical and other Prints; and for the vesting in, and securing to Jane Hogarth, Widow, the Property in certain Prints, 6 Geo. 3, c. 38 (1767) (Eng.); see also Rose, *Engravers'*, *supra* note 118, at 65 (describing the addition of protection for engravers who used designs originally created by other painters and printers); STOKES, *supra* note 118, at 24 (describing extension of copyright protection to those who engraved others' designs).

¹²⁴ 17 Geo. 3, c. 57 (1777) (Eng.); see also Rose, *Engravers'*, *supra* note 118, at 65 (describing a new requirement to seek permission before using another's design).

¹²⁵ See Rose, *Engravers'*, *supra* note 118, at 63 (calling the differences in the acts "instructive").

¹²⁶ 8 Geo. 2, c. 13, pmbl.

¹²⁷ 8 Ann., c. 19, s. 1.

¹²⁸ 8 Geo.2, c. 13, pmbl.

¹²⁹ *Id.*

¹³⁰ 17 U.S.C. § 106A(a)(2) (2000).

VARA.

The Engravers' Act preamble also included references to the economic concerns of the engravers, and these economic references were comfortably intertwined with the references to the creative process. The preamble stated that the engravers had created their works "in hopes to have reaped the sole benefit of their labours,"¹³¹ and that the poor quality copies were made to their "detriment."¹³² This language suggested that more than just artistic reputations were at stake. In context, the engravers' desire to "reap the sole benefit" would have meant the economic benefit. Because the "detriment" caused by poor quality rip-offs was listed separately from the "prejudice" they caused, it likely meant detriment to the engravers' incomes. Indeed, there is evidence¹³³ that Hogarth really *was* highly agitated by poor quality copies that distorted his creations and sold for less than his prints,¹³⁴ harming both his reputation and his income.

Including the economic and creative concerns together in the preamble showed that at this early stage of development, the English intellectual property law easily accommodated both sets of interests. One long-winded, eighteenth-century preamble could address aspects of both copyright and moral rights. Back in 1735, the possibility existed for this preamble to become a precursor of later Anglo-American arts legislation.

In addition, the text of the statute gave the print engravers protection against copying "in the whole or in part, by varying, adding to or diminishing from the main Design."¹³⁵ At that time, many disputes between booksellers and authors centered on whether an abridged or annotated version of a book violated copyright,¹³⁶ because the Statute of Anne only referred to a "book,"¹³⁷ i.e., the whole entity. The engravers had this matter settled in their statute. Printing a version of an illustration that had something changed, taken away or added to it, without permission, would have violated the statute. Given the limited technology of the time, this limited prohibition against publishing modified prints probably did cover all potential modification abuses, at least within the same medium.

Protecting against this type of copying in particular showed a greater understanding of the creative process than the protection afforded books at that time. For example, Hogarth often created engravings of busy scenes, with famous people in caricature.¹³⁸ The statute prohibited printing a copy of only part of a print, a copy "diminishing from the main design."¹³⁹ After passage of the statute, a rival could not choose one figure from Hogarth's scene and copy it in a new print. The statute also prohibited "adding to . . . the

¹³¹ 8 Geo. 2, c. 13, pmbl.

¹³² *Id.*

¹³³ Hogarth et al., The Case of Designers, Engravers, Etchers, Stated In a Letter to a Member of Parliament (1735) [hereinafter *Engravers Letter*], reprinted in Rose, *Engravers*, *supra* note 120, at 66 n.4; DEAZLEY, *supra* note 68, at 89.

¹³⁴ See Rose, *Engravers*, *supra* note 118, at 64 (describing the printsellers' practice of making cheap copies for high volume sales).

¹³⁵ 8 Geo.2, c. 13, s. 1.

¹³⁶ See DEAZLEY, *supra* note 68, at 79–85 (exploring the relationship between the Statute of Anne and "the altered text").

¹³⁷ 8 Ann., c. 19, s. 1.

¹³⁸ See UGLOW, *supra* note 118, at 268.

¹³⁹ 8 Geo. 2, c. 13, s. 1.

main design,”¹⁴⁰ i.e., printing a copy to which new images had been added. Hogarth’s rival, for example, could not copy the busy scene, add a caricature of the king to the scene, and engrave it as a new print.

Finally, the statute prohibited printing a copy “varying . . . the main design,”¹⁴¹ varying the original in some way. Presumably, this “varying” was something other than “adding to” or “diminishing from” the original design. The items in the short list of prohibited activities are separated by commas and the disjunctive “or,”¹⁴² suggesting each item was a different prohibited activity. If so, following the same example, a rival could not copy Hogarth’s scene, distort the proportions of the figures or change where they were located in the scene, and print the result.

The Engravers’ Act, then, implicitly acknowledged the uniqueness of the parts of the whole in a work of visual art, as well as the uniqueness of their arrangement or relationship to each other. These are aspects of visual art we now call “design elements” and “composition.” These aspects of design are inherent in the creative process and the resulting work. Recognizing and respecting the creative process in this way was a huge leap forward in the development of intellectual property law, yet, for the most part, it has been overlooked.¹⁴³ In addition, the insightful language of this early statute was no accident. Hogarth, the prime impetus for the legislation,¹⁴⁴ understood well every aspect of being an artist. He preferred to handle every step himself, both in terms of his art and his business.¹⁴⁵

Granting these visual artists, the engravers, some control over the publication of modified versions of their work gave them much the same type of control now provided for by the right of integrity.¹⁴⁶ “[V]arying, adding to or diminishing from the main design”¹⁴⁷ would certainly fall under the “intentional distortion . . . or other modification” now prohibited by VARA.¹⁴⁸

Viewed from another angle, this statutory provision also appears to be the first to protect against unauthorized creation of some types of derivative works, a protection that has continued and expanded in the law over the centuries and exists in a broader form today.¹⁴⁹ A “derivative work,” as the term implies, is a new work derived from a previously existing one. Reprinting just one or just a few design elements from a larger

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See DEAZLEY, *supra* note 68, at 94 (suggesting a “silent revolution” took place with passage of the Engravers’ Act).

¹⁴⁴ See *supra* note 120 and accompanying text.

¹⁴⁵ See Rose, *Engravers*, *supra* note 118, at 64 (explaining that for many of his most famous works, Hogarth was the “inventor, painter, engraver, and publisher,” which was not common practice at that time); Stokes, *supra* note 118, at 23–24 (attributing the Act’s coverage of original designs to the fact Hogarth was both designer and engraver of his works).

¹⁴⁶ 17 U.S.C. § 106A(a)(3)(a) (2000).

¹⁴⁷ 8 Geo. 2, c. 13, s. 1.

¹⁴⁸ 17 U.S.C. § 106A(a)(3)(a).

¹⁴⁹ See 17 U.S.C. § 101 (“A derivative work is a work based upon one or more preexisting works, such as a[n] . . . abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations or other modifications, . . . is a derivative work.”); 17 U.S.C. § 106(2) (granting the copyright owner the exclusive right to prepare derivative works).

work would be creating a derivative work. Likewise, adding one or more design elements to an existing work to create a new work would also create a derivative work. The Engravers' Act protected against these types of unauthorized derivative works, by prohibiting copying "by varying, adding to, or diminishing from" the original design. Again, protection from this type of copying showed a greater understanding of the creative process, with its implication that creating the elements of a design and the composition of the design were integral parts of how visual artists worked and worth protecting. Again, given the technology of the time, the enumerated types of derivative works likely covered all the possible ways to create derivative works within the medium.

Analyzing this first statutory protection for visual art shows the close relationship between moral rights' protection of the integrity of a work and copyright's protection against unauthorized derivative works. Often, modifying a work of visual or performing art will create a derivative work. Thus, an unauthorized process (protected against by the artist's right of integrity in the work) may lead to an unauthorized result (protected against by the copyright owner's exclusive right in derivative works). Future refinements to the language of the Engravers' Act and more experience with it might conceivably have led the law in the direction of either our current moral rights provision or our current copyright provision, i.e., either towards the right of integrity or the exclusive right to create derivative works—or both. In the days of proto intellectual property law, the possibility remained for the evolutionary tree to develop either or both branches. At that moment in time, the door still remained open for the development of moral rights concepts in the Anglo-American law.

Of course, it is striking (no pun intended) that the Engravers' Act actually contained the word "design."¹⁵⁰ This inclusion was no accident, as evidenced by the legislative history of the Act.¹⁵¹ The laments of the engravers¹⁵² were not unlike the previously-heard grievances of literary artists,¹⁵³ but the language relevant to the engravers' artistic complaints survived a much speedier¹⁵⁴ and less contentious legislative process.

The statute also made clear that anyone who bought original engraving plates from an engraver was purchasing both the plates and the right to reprint more copies using the plates.¹⁵⁵ In this way, the Engravers' Act provided a clearer delineation than the Statute of Anne did between owning the physical object itself and having the right to make copies, the copyright.¹⁵⁶

This delineation has remained in the law to the present day.¹⁵⁷ Although moral rights were not involved in this particular distinction, this first-ever statute concerning

¹⁵⁰ 8 Geo. 2, c. 13, s. 1.

¹⁵¹ See Rose, *Engravers'*, *supra* note 118, at 65 (suggesting in 1735 the word "design" still carried connotations from the Italian Renaissance word "*disegno*," which distinguished between artists and craftsmen, i.e., between intellectual work and manual work).

¹⁵² See *id.* at 64–65; DEAZLEY, *supra* note 68, at 88–91.

¹⁵³ See MILTON, *supra* note 78; Locke, *supra* note 88; DEAZLEY, *supra* note 68, at 31–32 (discussing Defoe's complaints).

¹⁵⁴ See RANSOM, *supra* note 68, at 6–7 (summarizing the Statute of Anne as "the consummation of more than two hundred years of slow changes").

¹⁵⁵ 8 Geo. 2, c. 13, s. 2.

¹⁵⁶ See DEAZLEY, *supra* note 68, at 93 ("[H]ere the legislature tried to account for, and give recognition to, the convergence of two types of property in the one form.").

¹⁵⁷ 17 U.S.C. § 202 (2000) ("Ownership of a copyright . . . is distinct from ownership of any material

visual art made it clear that there were separate tangible and intangible property rights in the engravers' work. Once this concept was accepted, the possibility at least was opened for other intangible rights to develop¹⁵⁸ and for those rights to remain separate from ownership of the physical object. Moral rights, of course, are intangible rights held by the artist,¹⁵⁹ no matter who owns the physical object,¹⁶⁰ so this broader conceptual clarification of separate tangible and intangible rights in art seems another useful precursor to moral rights' development.¹⁶¹

Thus, just as specific modern concepts for Anglo-American intellectual property law were starting to take shape, the Engravers' Act accounted for some of the realities of the creative process, showing that economic and non-economic concerns swam in the same primordial soup of intellectual property law ideas. It may simply have been an historical accident that there were savvy artists among the engravers and that engraving was the artistic field most closely related to writing literature, which already had statutory protection. If so, it is an accident that began the gradual extension of legal protection from literature to the other arts.¹⁶² Unfortunately, thanks to another fluke of history, that protection eventually was limited to economic interests, as moral rights were lopped off the family tree.

object in which the work is embodied.”).

¹⁵⁸ The engravers also gave early articulation to the idea-expression dichotomy, as they anticipated and fully addressed concerns about two artists depicting the same subject. See DEAZLEY, *supra* note 68, at 91 (exploring how the engravers reassured Parliament that each artist's way of depicting a common subject would be as unique as his handwriting, so all subject matter would remain free to depict); Rose, *Engravers'*, *supra* note 118, at 65 (“Everyone has undoubtedly an equal Right to every Subject, and . . . without directly copying the Design of the other, equally makes use of his own Skill . . .”) (quoting *Engravers Letter*, *supra* note 133). On the idea-expression dichotomy, see, e.g., 17 U.S.C. § 102(b) (2000) (“In no case does copyright protection . . . extend to any idea, . . . regardless of the form in which it is . . . embodied . . .”); *Baker v. Selden*, 101 U.S. 99, 104–05 (1880) (finding copyright protects a written statement, not its subject matter); Lisa Michelle Weinstein, *Ancient Works, Modern Dilemmas: The Dead Sea Scroll Copyright Case*, 43 AM. U.L. REV. 1637, 1662–65 (1994) (explaining various aspects of the idea-expression dichotomy).

¹⁵⁹ See, e.g., 17 U.S.C. § 106A(b) (“Only the author of a work . . . has the rights” of attribution and integrity).

¹⁶⁰ See, e.g., 17 U.S.C. § 106A(e)(2) (“Ownership of the rights [of attribution and integrity] . . . is distinct from ownership of any copy of that work, or of a copyright . . . in that work.”).

¹⁶¹ Although moral rights generally are referred to as intellectual property rights, they are really only quasi-property rights, more like rights arising from the creation of property that are personal rights of the artist. See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1824 (1996) (“The rights spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist's personality . . . should therefore be protected . . .”); Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE. L.J. 1532, 1541–42 (explaining the personality aspect of art acknowledged by Hegel and Kant); Liemer, *Primer*, *supra* note 26, at 43 (analyzing artists' vulnerability to a unique, personal harm); Swack, *supra* note 64, at 370–71 (tracing the philosophical underpinnings of artists' rights as rights of personality).

¹⁶² By 1842, copyright protection for writers, engravers, and other categories of visual and performing artists were merged in the British copyright law. Copyright Act, 1842, 5 & 6 Vict., c. 45 (Eng.). In the United States, copyright protection was extended to different types of creative work as the years proceeded. See, e.g., Okediji, *supra* note 43, at 1647–49 (reviewing nineteenth-century and early twentieth-century judicial and legislative extensions of copyright to cover new technologies and additional types of creative works).

D. Early Copyright Cases

The earliest English copyright cases under the Statute of Anne¹⁶³ were Court of Chancery cases, where the judges sat in equity and the plaintiffs applied for injunctive relief.¹⁶⁴ In many of these cases, after a complaint was filed, the defendants did not file answers and simply curtailed their behavior.¹⁶⁵ When injunctions were granted, the defendants generally did not pursue matters further.¹⁶⁶

Pressing ahead on a case to try the underlying substantive law issues would have required bringing a new case in a court of law (as opposed to the Chancellor's court of equity), taking up more time and money. Defendants in early English copyright disputes interpreted the Court of Chancery's decisions as an indicator of the likely outcome in law courts¹⁶⁷ and decided it was not worth the extra time and expense to pursue the legal issues.¹⁶⁸ In addition, plaintiffs historically sought relief in a court of equity when they saw no real remedy for their problem at law.¹⁶⁹ In the half century following the passage of the Statute of Anne, this would have been an accurate read of the situation. There was no easily-discernible, helpful remedy in a law court for alleged copyright infringement, in part due to ambiguities in the statute¹⁷⁰ and in part due to a lack of precedents to guide potential litigants. It was generally assumed that trying to calculate

¹⁶³ 8 Ann., c. 19.

¹⁶⁴ See BIRRELL, *supra* note 68, at 101 (noting the booksellers' sudden affinity for the Court of Chancery); DEAZLEY, *supra* note 68, at 51 ("In the three decades following the passing of the Statute of Anne those litigants seeking to rely upon the statute to protect their property did so before the Court of Chancery."); see also *Donaldson v. Beckett*, 2 Bro. P.C. 129, 138, 1 Eng. Rep. 837, 842 (H.L. 1774) (listing some of the more well-known, at the time, of these Chancery Court cases, along with names of the authors and disputed works); *Millar v. Taylor*, 4 Burr. 2303, 2325–31, 2352–54, 2378–80, 98 Eng. Rep. 201, 213–16, 228, 241–42 (K.B. 1769) (reviewing many of the earlier injunction cases); COBBETT'S PARL. HIST., *supra* note 69, at 989 (De Grey, Lord C.J.) ("The causes which have come before the court of Chancery since the statute, I find to be 17 in number.").

¹⁶⁵ See DEAZLEY, *supra* note 68, at 51.

¹⁶⁶ See *id.* at 57–85.

¹⁶⁷ But see COBBETT'S PARL. HIST., *supra* note 69, at 996 (reporting Lord Camden's 1774 statement in the House of Lords that over the years the Chancellors, including himself, only issued the injunctions to avoid irreparable harm while a legal issue remained in dispute).

¹⁶⁸ "Few bills against pirates of books are ever brought to a hearing. If the defendant acquiesces under the injunction, it is seldom worth the plaintiff's while to proceed for an account; the sale of the edition being stopped." *Millar*, 4 Burr. at 2324, 98 Eng. Rep. at 213 (Willes, J).

¹⁶⁹ See Hon. H. Brent McKnight, *How Shall We Then Reason? The Historical Setting of Equity*, 45 MERCER L. REV. 919, 930 (1994) (explaining a root cause of this course of relief was the Chancellor's ability to slightly vary the available writs, as early as the thirteenth century, when only Parliament could create a new writ); David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 556–57 (1986) (describing injunctions sought from the Chancellor when no remedy existed at common law, as early as the fourteenth century).

¹⁷⁰ See DEAZLEY, *supra* note 68, at 61–62, 164 ("It was and remains a poorly drafted piece of legislation."); BIRRELL, *supra* note 68, at 68 (describing "the unfortunately conceived and unhappily expressed statute").

damages under the Statute of Anne would be a difficult, potentially futile exercise.¹⁷¹ Also, plaintiffs likely perceived a law suit to be risky because the statute allowed a defendant to “plead the general issue,”¹⁷² “give the special matter in evidence,”¹⁷³ and recover costs if successful.¹⁷⁴ In addition, there was a major legal issue for which there was no definitive answer: whether a common law copyright ever existed pre-dating the statute, and, if so, whether it reverted back into effect once the statutory time period had run.¹⁷⁵

Thus, for half a century after passage of the Statute of Anne, the cases show efforts by booksellers to quickly and inexpensively prevent others from encroaching on their already-established, profitable monopolies.¹⁷⁶ “The encouragement of learned men to compose and write useful books”¹⁷⁷ for the greater social good, on which passage of the statute had depended, was not the litigants’ focus. While at first glance it may seem curious that authors did not rush to the law courts to assert their new-found rights, this dynamic is not unlike the reluctance of artists today to assert their new-found rights under VARA.¹⁷⁸ In addition, authors still did not control the means of production and had limited clout in the market place.

E. Millar v. Taylor

Finally, in 1769, the English Court of King’s Bench considered the copyright case of *Millar v. Taylor*,¹⁷⁹ applying the Statute of Anne¹⁸⁰ head on for the first time.¹⁸¹ *Millar v. Taylor* concerned the rights of an author, as previously, in the lay sense of the word “author,” a writer of literature.¹⁸² One of the attorneys who argued skillfully for the

¹⁷¹ See *Millar*, 4 Burr. at 2318, 98 Eng. Rep. at 209 (Willes, J.) (“For, by common law, a bookseller can recover no more costs than he can prove damage: but it is impossible for him to prove the truth . . . ; because a thousand counterfeit copies may be dispersed into as many different hands all over the kingdom, and he not be able to prove the sale of ten.”); RANSOM, *supra* note 68, at 105 (stating the “penalties were judged not to be worth the expense or risks of a trial at common law”).

¹⁷² 8 Ann., c. 19, s. 8.

¹⁷³ *Id.*

¹⁷⁴ *Id.*; see also RANSOM, *supra* note 68, at 103–04.

¹⁷⁵ One case did bring this issue squarely before a court of law, but when the judges learned the parties on both sides had a friendly agreement to just get the issue settled and no real dispute with each other, the court refused to issue a decision based on their collusion. *Tonson v. Collins*, 1 Black. W. 301, 96 Eng. Rep. 169 (K.B. 1761); *Tonson v. Collins*, 1 Black. W. 329, 98 Eng. Rep. 181 (K.B. 1762); see also *BIRRELL*, *supra* note 68, at 109–10; *VAIDHYANATHAN*, *supra* note 64, at 42.

¹⁷⁶ See *DEAZLEY*, *supra* note 68, at 62 (“[T]here can be no doubt that the route through Chancery was perceived to be considerably more expedient than following an infringer at common law.”).

¹⁷⁷ 8 Ann., c. 19, pmbl.

¹⁷⁸ See *supra* notes 36–39 and accompanying text.

¹⁷⁹ *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).

¹⁸⁰ 8 Ann., c. 19.

¹⁸¹ *Millar*, 4 Burr. at 2303, 98 Eng. Rep. at 201 (“This case was a revival of the old and often-litigated question concerning literary property: and it was the first determination which the question ever received, in this Court of King’s Bench.”).

¹⁸² *Cf.* 17 U.S.C. § 102(a) (2000) (defining a “work of authorship” as: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures

plaintiff was William Blackstone,¹⁸³ and this was exactly the time period when the four volumes of Blackstone's *Commentaries*¹⁸⁴ were being carried around the colonies in the saddle bags of American lawyers.¹⁸⁵ In 1769 the American colonies had not yet declared their independence, and an English case like *Millar* would have been considered applicable precedent in the colonies. Because of trade disruptions during the American Revolution, *Millar* was the last English copyright decision American lawyers and jurists had access to until the war was over.¹⁸⁶ And so, what the justices in *Millar* had to say about the rights of literary creators sheds some light on what could have happened later in England and the United States, but did not.

Millar was a dispute about a book called *The Seasons*, written by James Thomson.¹⁸⁷ The author published the book in London from 1727 to 1729.¹⁸⁸ The jury found that Andrew Millar purchased the book in 1729, "for a valuable and full consideration . . . to him and his heirs and assigns for ever,"¹⁸⁹ and both Millar and the jury seem to have assumed the "common law copyright" was part of the deal.¹⁹⁰ Millar registered the book in the registry of the Company of Stationers, the method at that time by which London printers and booksellers still gave notice of their copyright in a book.¹⁹¹ The author, Thomson, died in 1748. Then in 1763, Robert Taylor began publishing and selling copies of the book.¹⁹² Since the Statute of Anne only provided copyright protection for a maximum of twenty-eight years,¹⁹³ Millar's statutory copyright protection, which started in 1729 when he purchased the book from the author, would have run out by 1763, thirty-four years later.

The main questions before the Court were whether any common law copyright existed before the passage of the statute, whether the statute pre-empted and totally extinguished any such common law copyright, or whether a common law copyright pre-existing the statute remained after the statutory copyright term.¹⁹⁴ The lawyers for each

and other audiovisual works; (7) sound recordings; and (8) architectural works.").

¹⁸³ *Millar*, 4 Burr. at 2303, 98 Eng. Rep. at 201 (listing "the second [argument], by Mr. Blackstone, for the plaintiff").

¹⁸⁴ SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765–1769). Blackstone covers copyright in his Commentaries. SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, 9th ed., 405–07 (1783) (updated edition incorporating *Millar* and later *Donaldson* decisions) (facsimile ed. 1978).

¹⁸⁵ See, e.g., Christopher L. Eisgruber, *John Marshall's Judicial Rhetoric*, 1996 SUP. CT. REV. 439, 443 (explaining the importance to the growth of American law of the Commentaries being both well-organized and compact enough to fit in saddle bags).

¹⁸⁶ Between 1773 and 1783 the United States was at war with Great Britain and there was no trade between the two B including in law books and legal decisions. Accordingly, the last major copyright decision of the British courts current in legal circles of what was becoming the United States was *Millar v. Taylor*.

Chartrand, *supra* note 69, at 223.

¹⁸⁷ *Millar*, 4 Burr. at 2305–06, 98 Eng. Rep. at 203.

¹⁸⁸ *Id.* at 2306, 98 Eng. Rep. at 203.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 2308, 98 Eng. Rep. at 204.

¹⁹³ See *supra* notes 100, 101 and accompanying text.

¹⁹⁴ The justices did not word the issues exactly the same way. For example, Justice Willes listed two issues, *Millar*, 4 Burr. at 2311, 98 Eng. Rep. at 206, while Justice Aston listed three issues *id.*, at

side of course presented the arguments they believed best aided their clients' interests;¹⁹⁵ they were not necessarily crafting lofty pronouncements for the sake of posterity. For the individual litigants, the question of whether there was any remaining copyright to be claimed doubtless was a simple economic question: whoever owned the copyright would derive economic benefit from it. The author himself was dead, and his heirs were not parties in the case.

The plaintiff was simply a bookseller who wanted to maintain his monopoly, as the booksellers had always done. He had purchased the book from the author, and he would have argued for the common law copyright and reversion to it once the statutory time period had run. The defendant wanted to sell the book now that the statutory time period for copyright had run, so he would have argued that the statute totally extinguished any previous copyright, i.e., no copyright at all remained after twenty-eight years. The defendant, a competing bookseller, ended up taking the side of the argument previously belonging to authors and the reading public, the side the Statute of Anne was supposed to protect. And so the defendant had the statutory argument to make, while the plaintiff had the common law argument.

While deciding this issue, the justices' analyses flowed in many directions. They drew on a wide variety of sources¹⁹⁶ including common law,¹⁹⁷ John Locke's natural law ideas,¹⁹⁸ related civil law concepts,¹⁹⁹ and moral concerns.²⁰⁰ They described and interpreted what was, in effect, the legislative history of the Statute of Anne.²⁰¹ They analyzed whether there was any common law copyright to begin with, and, if so, what it protected.²⁰² During this analysis they went back to basics, examining what "property" was²⁰³ and what it meant to have a right in property.²⁰⁴

2336, 98 Eng. Rep. at 219.

¹⁹⁵ Blackstone himself made money by assigning to booksellers the copyright in his Commentaries, BIRRELL, *supra* note 68, at 131 n.1, so he likely had a personal interest in the outcome of the case, too. As a very prominent author, Blackstone actually could make more money selling perpetual copyrights in the different editions of his work than he could make selling limited, twenty-eight year copyrights, so it is not surprising he argued on the side of the plaintiff, for the common law copyright.

¹⁹⁶ See, e.g., *Millar*, 4 Burr. at 2354, 98 Eng. Rep. at 228 (Aston, J.) (basing his conclusions "upon every principle of reason, natural justice, morality and common law").

¹⁹⁷ See, e.g., *id.* at 2343, 98 Eng. Rep. at 223 (Aston, J.) (citing DODDRIDGE, THE ENGLISH LAWYER 154–61 (1631) (stating the common law "is founded on the law of nature and reason" and "derived from . . . natural and moral philosophy, from the civil and canon law, from logic, from the use, custom and conversation among men")).

¹⁹⁸ See, e.g., *id.* at 207 (Willes, J.) (referring to Milton's 1644 speech supporting copyright and asserting "this copyright could, at that time, stand upon no other foundation, than *natural justice* and common law") (emphasis added); *id.* at 2355, 98 Eng. Rep. at 229 (Yates, J.) (asserting English personal property law "had its grand foundation in natural law"); see also Craig, *supra* note 91, at 8–21.

¹⁹⁹ See *Millar*, 4 Burr. at 2344, 98 Eng. Rep. at 223 (Aston, J.) (drawing from "the civil and canon law," and quoting Justinian); see generally Edward D. Re, *The Roman Contribution to the Common Law*, 29 FORDHAM L. REV. 447 (1960–61); see also *infra* pp. 25–26.

²⁰⁰ *Millar*, 4 Burr. at 2342, 98 Eng. Rep. at 222 (Aston, J.) (referring to "moral rectitude" and "[t]he law of nature and truth, and the light of reason"); *id.* at 2399, 98 Eng. Rep. at 253 (Lord Mansfield, C.J.) (referring to "moral justice and fitness").

²⁰¹ See *id.* at 2317, 2332–33, 98 Eng. Rep. at 209, 217.

²⁰² See, e.g., *id.* at 2341–42, 2358–66, 98 Eng. Rep. at 221–22, 230–35.

²⁰³ See, e.g., *id.* at 2338–40, 2355–57, 98 Eng. Rep. 220–21, 229–30.

²⁰⁴ Many law students in the United States start their first-year property law course by reading *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. Sup. Ct. 1805), the case discussing whether a hunter

The modern sense of rights in intellectual property were still very much in development, and concepts now found separated in copyright law's protection of economic interests and moral rights' protection of creative interests often sit side-by-side in the *Millar* justices' analysis, sometimes in the same sentence.²⁰⁵ For example, in Justice Aston's final sentence of his opinion, words sit side-by-side that point to the economic interests of copyright and the creative interests of moral rights: "And I hope the learned and industrious will be permitted from henceforth, not only to reap the fame, but the profits of their ingenious labours, without interruption; to the honour and advantage of themselves and their families."²⁰⁶ Protecting both "fame" and "profits" were easily coordinated legal goals in this eighteenth-century English jurist's mind; so was protecting both "honour" and "advantage." His understanding of the nature of intellectual property expanded to include and value all these concepts. Today, while "fame" and "honor" are values VARA recognizes,²⁰⁷ "profits" and "advantage" belong squarely to the traditional economic focus of copyright law.²⁰⁸

In the lone dissent, Justice Yates focused on the intangible, incorporeal nature of the property that the rights would attach to, and he homed in on something that still seems to be a sticky point in the law:²⁰⁹ "[T]he fallacy lies in the equivocal use of the word 'property,' which sometimes denotes the right of the person; . . . sometimes, the object itself. Here, the question is upon the object itself, not the person."²¹⁰ He likely was pointing to the difference between owning the book and owning the copyright, extending the distinction between tangible and intangible rights in intellectual property that the Engravers' Act had first clarified.²¹¹ Because these judges did not strictly distinguish aspects of copyright from moral rights, it is possible "the right of person" referred to rights we would now separate into the two categories. Justice Yates did

pursuing a wild fox can have a property right in it. *Pierson* was decided in New York only twenty-five years after *Millar*, and readers will see similar modes of analysis and expressions in the two cases.

²⁰⁵ The flowery language and complex syntax of eighteenth-century jurists do not always make for quick reading. Any proponents of plain English in the law who feel pessimistic about their success need only read a page of eighteenth-century English legal prose to realize what a long way the plain English movement has come.

²⁰⁶ *Millar*, 4 Burr. at 2354, 98 Eng. Rep. at 229.

²⁰⁷ VARA gives a visual artist "the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her *honor or reputation*," 17 U.S.C. § 106A(a)(2) (2000) (emphasis added), and the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her *honor or reputation*," 17 U.S.C. § 106A(a)(3)(A) (emphasis added).

²⁰⁸ See Jimmy A. Frazier, *On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law*, 70 TUL. L. REV. 313, 317 (1995) (criticizing the focus on economic rights of United States copyright law and copyright scholars and offering a sociologically-based alternative).

²⁰⁹ See generally Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1 (2005); Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29 (2005).

²¹⁰ *Millar*, 4 Burr. at 2362, 98 Eng. Rep. at 233; see also Kwall, "Author-Stories," *supra* note 13, at 16 ("History shows that delineating the exact nature of the author's interest always has been problematic . . . [W]orks of authorship are like other forms of property in that they have the potential for commodification, but they differ from more tangible types of property . . . because they also entail important personal interests.").

²¹¹ See *supra* p. 18–19.

acknowledge a “moral obligation” behind basic property law concepts,²¹² but he refused to extend it to intellectual property absent specific statutory protection.²¹³ His dissent is important, because it previews the law’s future evolution.

Lord Mansfield, voting with the majority, had the final word. His opinion went the furthest towards the concepts now protected as moral rights. First, he hinted at the right of attribution: “It is just, that another should not use [an author’s] . . . name, without his consent.”²¹⁴ And then, Lord Mansfield described well some of the harms that moral rights protect against:

He is no more master of the use of his own name. He has no control over the correctness of his own work. He can not prevent additions. He can not retract errors. He can not amend; or cancel a faulty edition. Any one may print, pirate, and perpetuate the imperfections, the disgrace and against the will of the author; may propagate sentiments under his name, which he disapproves, repents and is ashamed of.²¹⁵

What Lord Mansfield described was essentially a lack of the rights of attribution,²¹⁶ integrity,²¹⁷ and disclosure,²¹⁸ and its effect on the honor and reputation of a writer.²¹⁹ He described these harms in the context of his reasoning in favor of the perpetual common law copyright, on the side of the monopolistic booksellers, because he felt if the statute put an end to all copyright after twenty-eight years, authors would suffer the enumerated harms.²²⁰

Many lawyers in the United States learned in school that Blackstone’s *Commentaries* brought the common law to the American colonies and early states,²²¹ and so he was a champion of the common law, yet Blackstone and his contemporaries in English legal circles knew and were influenced by civil law.²²² Although the law of ancient Rome, did not address intellectual property per se,²²³ it did recognize plagiarism.²²⁴ This concept of literary theft was an early kernel, from which the Roman

²¹² *Millar*, 4 Burr. at 2365, 98 Eng. Rep. at 235.

²¹³ *Id.* at 2395, 98 Eng. Rep. at 250.

²¹⁴ *Id.* at 2398, 98 Eng. Rep. at 252; *cord*, 17 U.S.C. § 106A(a)(1).

²¹⁵ *Millar*, 4 Burr. at 2398, 98 Eng. Rep. at 252. As one scholar points out, however, Lord Mansfield’s articulation of authors’ personal rights was never actually applied to any future case. Swack, *supra* note 64, at 381.

²¹⁶ *See supra* p. 4.

²¹⁷ *See supra* p. 4–5.

²¹⁸ *See supra* p. 8, n.54.

²¹⁹ *See supra* pp. 4–5 and accompanying footnotes.

²²⁰ *Millar*, 4 Burr. at 2399, 98 Eng. Rep. 253.

²²¹ 1–4 WILLIAM BLACKSTONE, COMMENTARIES; *see* STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 295 (5th ed. 2003) (asserting only the Bible had more influence on the history of American institutions).

²²² *See Re, supra* note 199, at 452 (stating “Sir William Blackstone, in his opening Vinerian lecture at Oxford, on the 25th of October, 1758, commended the study of civil law.”).

²²³ *See* RICHARD ROGERS BOWKER, COPYRIGHT AND ITS HISTORY 8 (1912) (identifying a few brief mentions of literary property in ancient Rome). For a comprehensive review of the law of ancient Rome, *see* RUSS VERSTEEG, LAW IN THE ANCIENT WORLD 269–367 (2002).

²²⁴ *See* RANSOM, *supra* note 68, at 19 n.4 (citing studies about literary property in ancient Rome); Swack, *supra* note 64, at 366–67 (analyzing concepts of authors’ relationship to their work in ancient

law's progeny, the civil law of Europe,²²⁵ began developing intellectual property concepts, as the need arose.²²⁶ Indeed, moral rights concepts developed in the civil law shortly after this time period, in the early nineteenth century.²²⁷ So the justices in *Millar* drew from a primordial soup of legal ideas that included, in part, ideas that several decades later would develop into artists' moral rights in France.²²⁸ The familiarity with civil law concepts that many eighteenth-century English lawyers and jurists shared²²⁹ may explain some of the ease with which they bandied back and forth concepts that today seem more rigidly embedded in either the civil law or the common law intellectual property scheme. As Professor Edward Re reminds us: "It is idle to suppose that such knowledge . . . was not used; especially in the solution of those problems for which the ancient customs made no provision."²³⁰

In England in 1769, a law suit brought by an owner of a literary creation, claiming a right in the creation after statutory copyright protection expired, was one such problem for which no specific provision had been previously made. The eighteenth-century English jurists had a knowledge of civil law concepts that most United States jurists today cannot claim, and they used this knowledge, along with other sources, while solving this novel issue for which they had no precedent: whether a perpetual common law copyright existed before the Statute of Anne and survived after the statutory term of protection had run.

The outcome of the case was that a common law copyright was found to exist.²³¹ And this common law copyright was found to have pre-existed the time-limiting statute

Rome).

²²⁵ See VAIDHYANATHAN, *supra* note 64, at 41 (noting that when the British relied on the common law, "the rest of Renaissance Europe was busy adopting the rediscovered Roman legal code").

²²⁶ For an overview of the development of copyright and moral rights law in France, see Chartrand, *supra* note 69, at 230–33; DAVIES, *supra* note 110, at 129–77.

²²⁷ A French court referred to the right of attribution as early as 1837. See Raymond Sarrauté, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 478 (1968) (quoting D. Repertoire de Jurisprudence V, Prop. Lit. et Art. no. 194).

²²⁸ See Swack, *supra* note 64, at 370, 373–74 (tracing the emergence of the *droit moral* in France).

²²⁹ See generally Re, *supra* note 199.

²³⁰ Re, *supra* note 199, at 469 (quoting JENKS, A SHORT HISTORY OF ENGLISH LAW 20 (2d ed. rev. 1922)). Professor Re describes much earlier use of Roman law concepts to fill in where there was a paucity of English common law precedent. Re, *supra* note 199, at 471–75 (describing the borrowing of Roman law form and substance in Henry de Bracton's *Tractatus de Legibus et Consuetudinibus Angliae* (1258)); see also VERSTEEG, *supra* note 223, at 269 (crediting Roman law with "a significant influence in English law").

²³¹ As one scholar summarizes *Millar*:

The decision, handed down by Lord Mansfield's court, represents no less than a triumph of creative historical revisionism and legal advocacy. Notwithstanding the reality of the *Statute of Anne*, and its immediate legal progeny, the history of the first four decades of lawful book publishing in Britain had been carefully re-crafted. The London monopolists had picked a number of disparate legal-historical threads, bound them together within a compelling ontological framework, and created a new, altogether different, coherent form. The perpetual common law right had literally been written, talked and argued into existence.

DEAZLEY, *supra* note 68, at 178–79; see also BIRRELL, *supra* note 68, at 112 ("A special jury verdict was recorded in which the jury were made to repeat upon oath the cock-and-bull story of how long before Queen Anne perpetual copyrights had been made the subject of family settlements for the provision of Mrs. Bookseller and her babes.").

and to be perpetual.²³² The overall question had been whether copyright's existence was limited by the statute; the statute supported author's economic rights, gave those rights for only a limited time, and did not mention any aspect of moral rights. So the arguments in favor of perpetual protection for literary works ended up being arguments for the booksellers. Once again, in the twisting history of Anglo-American intellectual property law, moral rights ended up on the side of the booksellers, helping to protect their economic interests in maintaining their monopolies, rather than helping authors to protect their personal interests in their works. The defendant, a rival bookseller, was just trying to wrestle from a monopolistic bookseller a limited time period during which he could capitalize on a work. When he lost, the old-line booksellers won. And moral rights related arguments became firmly embedded in the booksellers' camp, strange bedfellows indeed—and, eventually, fateful ones.

Interestingly, all the *Millar* justices agreed that an author owned the copyright in his work before it was published.²³³ This same principle is reflected in current American copyright law²³⁴ and the French *droit de divulgation*.²³⁵ Both these rights give an author full control of a work before it is published, including the right to decide when, or even if, he will part with his creation. And both these rights apply in the modern law to “authors” in the United States copyright sense of the word, i.e., to literary, visual, and performing artists.²³⁶ Although providing copyright upon creation focuses on economic control²³⁷ and the *droit de divulgation* is concerned with creative control,²³⁸ they provide similar support for artistic decisions.²³⁹ Perhaps this right is consistent in the two intellectual property law schemes because it was such a well-accepted concept before the English judges cut off the other moral rights for authors, allowing for its continuation, reinforcement, and eventual extension to the visual and performing artists.

III. HOW *DONALDSON* LOPPED OFF THE BRANCH

²³² While the notion of a perpetual intellectual property right may seem unusual to Americans, in France artists' moral rights are perpetual. Law No. 57-298, art. 6.

²³³ *Millar v. Taylor*, 4 Burr. 2303, 2331, 2340, 2355, 2396, 98 Eng. Rep. 201, 221, 216, 229, 251 (K.B. 1769).

²³⁴ See 17 U.S.C. § 201(a) (2000) (“Copyright in a work . . . vests initially in the author . . . of the work.”); 17 U.S.C. § 302(a) (“Copyright in a work . . . subsists from its creation . . .”). Under earlier copyright statutes, a United States author had full control over when or even whether to publish a work, see An Act to amend and consolidate the Acts respecting Copyright, ch. 320, § 2, Pub. L. No. 60-349 (Mar. 4, 1909) (“[N]othing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, . . . to prevent the copying, publication, or use of such unpublished work without his consent, . . .”), although copyright itself did not exist before the formalities of publication and notice, *id.* at § 9 (“[A]ny person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; . . .”).

²³⁵ Law No. 57-298, art. 56; see also *Eden C. Whistler*, CA Paris, 1898 D.P. II 465, *aff'd*, 1900 D.P. I 497 (Cour de Cassation) (holding that the artist could refuse to deliver a commissioned portrait even after exhibiting it).

²³⁶ 17 U.S.C. § 102(a).

²³⁷ See, e.g., 17 U.S.C. § 106(3) (providing the right to, *inter alia*, sell, rent, or lease a copyright).

²³⁸ Law No. 57-298, art. 56.

²³⁹ Each law, of course, also provides the artist with some economic control of the work.

A. Donaldson v. Beckett

The second seminal case brought under the Statute of Anne was *Donaldson v. Becket*, in 1774.²⁴⁰ Like its predecessor, this case also was not decided in a vacuum.²⁴¹ The attorneys for each side had been involved in earlier copyright cases, including *Tonson v. Collins* and *Millar v. Taylor*.²⁴² William Blackstone, who had been one of the attorneys in *Millar*, was now on the bench,²⁴³ and some of the other judges had been involved in the earlier cases, too.²⁴⁴

The facts in *Donaldson* have a familiar ring. In January 1729, the author, James Thomson, sold to a bookseller, Andrew Millar (yes, the same Thomson and the same Millar), the copyright in two works, a tragedy entitled *Sophonisba* and a soon-to-be popular poem entitled *Spring*.²⁴⁵ In July 1729, Mr. Thomson sold the copyright to several other poems to bookseller John Millan.²⁴⁶ Among these were poems entitled *Summer*, *Autumn*, *Winter*, and “*A Poem Sacred to the Memory of Sir Isaac Newton*.”²⁴⁷ Then in June 1738, Millan sold his rights in these works to Millar.²⁴⁸

Interestingly, along with the books, the transaction included “the several plates of the prints of the seasons, and the plate of the print of Sir Isaac Newton’s monument ; all which prints had been usually bound up with the poems.”²⁴⁹ Thus, works of visual art were part of the transaction that underlay the dispute. They were not specifically mentioned in the reasoning of the case, however, and the Engravers’ Act²⁵⁰ was not applied.²⁵¹

²⁴⁰ There are three main reports of this case:

(1) *Donaldsons v. Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (K.B. 1774) (inserted at the end of Burrow’s report of *Millar*);

(2) *Donaldson v. Beckett*, 2 Bro. P.C. 129, 1 Eng. Rep. 837 (H.L. 1774); and

(3) COBBETT’S PARL. HIST., *supra* note 69, at 954.

These reports differ in terms of the aspects of the case and the details they include.

²⁴¹ See *Tonson v. Collins*, 1 Black. W. 301, 96 Eng. Rep. 169; *Millar*, 4 Burr. 2303, 98 Eng. Rep. 201; BIRRELL, *supra* note 68, at 121 (Indeed, “this was no lawyer’s question. The question of literary property was discussed everywhere and by everybody.”); RANSOM, *supra* note 68, at 4 (suggesting that “[b]ecause Englishmen attached great significance to written things, early copyright in England followed a course of experience almost as wide as national life”).

²⁴² See DEAZLEY, *supra* note 68, at 195.

²⁴³ *Donaldson*, 2 Bro. P.C. at 145, 1 Eng. Rep. at 847 (listing the justices and how they voted on the case); *Donaldsons*, 4 Burr. at 2411, 98 Eng. Rep. at 259 (“Mr. Justice Ashurst delivered the opinion of Mr. Justice Blackstone[,] who was absent, being confined to his room with the gout . . .”).

²⁴⁴ *Donaldsons*, 4 Burr. at 2417, 98 Eng. Rep. at 262. Lord Mansfield, the Chief Justice, recused himself from the case, since he had already made his decision on the central legal issue known in *Millar*. *Id.* (“It was notorious, that Lord Mansfield adhered to his opinion But it being very unusual (from reasons of delicacy) for a peer to support his own judgment, upon an appeal to the House of Lords, he did not speak.”).

²⁴⁵ *Donaldson*, 2 Bro. P.C. at 129, 1 Eng. Rep. at 837.

²⁴⁶ *Id.* at 129, 1 Eng. Rep. at 838.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ 8 Geo. 2, c. 13.

²⁵¹ In a select recitation of the history of the main issue, one of the attorneys did make a passing reference to the 1767 statutory amendment giving protection to Hogarth’s widow. COBBETT’S PARL. HIST., *supra* note 69, at 962 (referring to, without citing, 6 Geo. 3, c. 38).

Mr. Millar died in June 1768, and in January 1769, his executors auctioned off the copyrights in the Thomson poems. Thomas Becket and the other respondents in *Donaldson* were the highest bidders.²⁵²

Meanwhile, in 1768, Alexander Donaldson printed a volume of poems by James Thomson, entitled *The Seasons* (containing much the same underlying work as the publication that was still in dispute in the *Millar* case), which included several of the poems for which Millar had owned the copyright.²⁵³ Donaldson was one of many Scottish booksellers who over the years challenged the London booksellers' efforts to maintain their monopoly.²⁵⁴ He reasoned that if the poet sold the copyright in his new works in 1729, according to the Statute of Anne, the copyright would expire fully twenty-eight years later in 1757.²⁵⁵ And so in 1768, Donaldson felt free to print and sell the poems.²⁵⁶

As was the routine,²⁵⁷ Becket and the other auction winners first sought an injunction against Donaldson in the Chancery Court, in 1777.²⁵⁸ The Chancellor ordered a perpetual injunction and an accounting of how much Donaldson owed Becket for the sold copies, but Donaldson responded by appealing to the law courts.²⁵⁹

The main legal issue squarely before the court in *Donaldson* was the same main issue as in *Millar*: was there a common law copyright that existed before the Statute of Anne and that continued to exist after the statutory copyright term ended?²⁶⁰ In other words, was there any type of copyright in the poems that Thomson transferred to Millar and Millan, that continued to exist for more than twenty-eight years, so that Millar's estate included these copyrights upon his death, or did Becket and the others spend their money at auction on something that did not exist?

The *Donaldson* case was a close call,²⁶¹ and it seems to look in two directions conceptually. In this watershed case of statutory interpretation, there were still references to "natural rights"²⁶² and lingering mentions of principles dating back to

²⁵² *Donaldson*, 2 Bro. P.C. at 130, 1 Eng. Rep. at 838.

²⁵³ *Id.*

²⁵⁴ See ROSE, COPYRIGHT, *supra* note 66, at 5 (stating the Scottish booksellers sought "an independent role for themselves as reprinters of popular titles").

²⁵⁵ *Donaldson*, 2 Bro. P.C. at 130–31, 1 Eng. Rep. at 838–39.

²⁵⁶ It does not require a great leap of imagination to suspect Donaldson perceived a window of opportunity for making some money, when he learned Millar had died while his case still lingered in court, without a final decision on the existence of the common law copyright.

²⁵⁷ See *supra* pp. 20–21.

²⁵⁸ *Donaldson*, 2 Bro. P.C. at 130, 1 Eng. Rep. at 838; COBBETT'S PARL. HIST., *supra* note 69, at 955 n.*.

²⁵⁹ *Donaldsons*, 4 Burr. at 2408, 98 Eng. Rep. at 257; *Donaldson*, 2 Bro. P.C. at 132, 1 Eng. Rep. at 839; COBBETT'S PARL. HIST., *supra* note 69, at 955 n.* (all listing the five separate, but overlapping issues in the case).

²⁶⁰ *Donaldsons*, 4 Burr. at 2408, 98 Eng. Rep. at 257–58; *Donaldson*, 2 Bro. P.C. at 144–45, 1 Eng. Rep. at 846–47; COBBETT'S PARL. HIST., *supra* note 69, at 970–71.

²⁶¹ The decision was close on the key issue, with a vote of 6 to 5 to deny the existence of the common law copyright. See BIRRELL, *supra* note 68, at 126–27 (listing each vote); DEAZLEY, *supra* note 68, at 199–205 (charting each judge's vote as reported in contemporaneous accounts and suggesting conflicting reports); cf. ROSE, COPYRIGHT, *supra* note 66, at 154–58 (suggesting the clerks may have counted wrong, switching the direction of the slim margin).

²⁶² See, e.g., COBBETT'S PARL. HIST., *supra* note 69, at 980–81 (Aston, J.) (arguing "in favour of literary property from the natural rights of the subject" and voting for the perpetual common law copyright).

ancient Rome.²⁶³ There was also a subtle shift, however, in the tone and emphasis, particularly in the reports of the opinions of the justices who voted with the narrow majority.²⁶⁴ They articulated their ideas with language that sounds more familiar in modern copyright law. For example, a few of the justices referred to books as “what was now termed literary property,”²⁶⁵ showing an awareness that consensus was solidifying around new nomenclature for evolving concepts. Chief Justice De Grey was well aware he was working on changing the status quo, stating that the question before them could “be fairly treated as a new question” and referring to “this new species of property.”²⁶⁶ He also rejected relying upon principles of “moral fitness.”²⁶⁷

In *Donaldson*, there was greater concern for the fair assignment of economic benefits to the author,²⁶⁸ as opposed to allowing economic control to vest early on and remain with a publisher forever. But, repeating language from *Millar*, even where the decision encourages an author to “become the guardian of his own fame,”²⁶⁹ evoking the “honor and reputation” protected by moral rights,²⁷⁰ the goal is that “learned and industrious men will be enabled to reap not only the fame, but the profits of their labours”²⁷¹ The acknowledged result is “the honour and advantage of themselves and their families.”²⁷² So, even while the case focused more on economics, in late eighteenth-century England, both honor and economic advantage were still commended in the same breath by some of the jurists.

Donaldson stands for the proposition that “[t]he statute of Anne was not declaratory of the common law, but introductive of a new law, to give learned men a property which they had not before.”²⁷³ So all that the booksellers Millar and Millan received from the poet Thomson was a twenty-eight year copyright, and nothing remained after that to auction off. And so *Donaldson* arrives at the opposite answer from *Millar*, and it is

²⁶³ Although the Solicitor General made a reference to Grotius (a Renaissance Dutch jurist) citing Paulus (a Roman lawyer), COBBETT’S PARL. HIST., *supra* note 69, at 964, Justice Aston stated that “[i]t was not necessary . . . to advert either to the Grecians or Romans to discover the principles of the common law of England.” *Id.* at 980. Lord Littleton also “traced the origin of the arts and sciences from Greece to Rome, . . . and at last seated them in Great Britain.” *Id.* at 1002.

²⁶⁴ The reports summarize a great deal of the justices’ oral opinions, and it is entirely possible that the details which were printed were selected subjectively after the fact, when the outcome of the case was known, and so slanted a bit towards the outcome.

²⁶⁵ COBBETT’S PARL. HIST., *supra* note 69, at 982, 985, 988 (Perrott, J.) (referring to “what was now termed literary property”), (Adams, J.) (referring to “what was now termed literary property”), (De Grey, Lord C.J.) (referring to “some interest in right of authorship . . . ; which is termed literary property”).

²⁶⁶ *Id.* at 990.

²⁶⁷ *Id.*; see also *id.* at 998 (Lord Camden) (rejecting arguments about “moral fitness”).

²⁶⁸ For example:

It will continue to be the ingratitude of mankind, that they who teach wisdom by the surest means, shall generally live poor and unregarded; as if they were born only for the public, and had no interest in their own well-being, but were to be lighted up like tapers, and waste themselves for the benefit of others.

Donaldson v. Beckett, 2 Bro. P.C. 129, 143, 1 Eng. Rep. 837, 845–46 (H.L. 1774).

²⁶⁹ *Id.* at 142, 1 Eng. Rep. at 845.

²⁷⁰ See *supra* pp. 4–5.

²⁷¹ *Donaldson*, 2 Bro. P.C. at 144, 1 Eng. Rep. at 845.

²⁷² *Id.*

²⁷³ *Id.* at 140, 1 Eng. Rep. at 843.

Donaldson that sticks.²⁷⁴

Donaldson is said to be the case that wiped out moral rights in Anglo-American law.²⁷⁵ Yet the way in which it so profoundly influenced the future of Anglo-American intellectual property law²⁷⁶ was pretty tangential to the focus of the decision. The justices were not voting directly about moral rights or any kind of dispute between moral rights per se and economic rights. They focused on the historic dispute in England between booksellers and authors, while also showing a growing understanding of the public's interest.²⁷⁷

Donaldson shut the door on moral rights simply by settling the dispute in favor of statutory copyright. By a one vote margin, *Donaldson* declared that there was no copyright at common law and copyright was only a creature of statute.²⁷⁸ If protection for literary property came from the statute only, that protection was limited to the terms of the statute.²⁷⁹ The Statute of Anne had no provisions for moral rights. It created a temporary monopoly, giving authors an opportunity, beyond the first sale of a manuscript, by which they could benefit economically. Authors could sell a fourteen-year copyright,²⁸⁰ and then sell a fourteen-year renewal copyright.²⁸¹ The first ever copyright statute simply did not account for non-economic values, beyond the hortatory language in the preamble acknowledging the public's interest,²⁸² because its focus was wresting control of literary property away from the booksellers. It was a *legislative* act that set the direction for the development of intellectual property law in *common law* countries.²⁸³ And it was the *Donaldson* decision, applying the statute head on for the second time, that closed the door on the development of moral rights in Anglo-American jurisprudence for over 200 years.²⁸⁴

²⁷⁴ *Id.* at 145, 1 Eng. Rep. at 847; see also BOWKER, *supra* note 223, at 26 (“This construction by the Lords, in the case of *Donaldson v. Becket*, of the Statute of Anne, has practically ‘laid down the law’ for England and America ever since.”).

²⁷⁵ See Chartrand, *supra* note 69, at 221 (explaining the guild previously had recognized the moral rights of authors and *Donaldson* “effectively eliminated [moral rights] from the Anglo-American copyright tradition.”).

²⁷⁶ See *id.* at 220 (asserting “[i]t is this decision that established the basic concept of Anglo-American copyright”).

²⁷⁷ See COBBETT’S PARL. HIST., *supra* note 69, at 999 (Lord Camden) (“Why did we enter into society at all, but to enlighten on another’s minds, and improve our faculties for the common welfare of the species?”). The same three sets of interests continue to vie for attention in the copyright scheme in the United States today. See Okediji, *supra* note 43, at 1640–41.

²⁷⁸ *Donaldson*, 2 Bro. P.C. at 145, 1 Eng. Rep. at 847.

²⁷⁹ *Id.*

²⁸⁰ 8 Ann., c. 19, s. 1.

²⁸¹ *Id.* at s. 2.

²⁸² *Id.* at pmb.

²⁸³ See Liemer, *Primer*, *supra* note 26, at 41 n.4 (noting in some civil *code* countries the opposite dynamic occurred and moral rights began via *judicial* opinions).

²⁸⁴ By way of contrast, after the French Revolution, intellectual property law in France moved forward in a very different way. See Chartrand, *supra* note 69, at 231–32. By the 1830’s, French judges began affirming artists’ moral rights; Sarrauté, *supra* note 227, at 478. *But see* DAVID SAUNDERS, *AUTHORSHIP AND COPYRIGHT* 75–105 (1992) (suggesting the law was every bit as muddy and not inevitable in its course for many years on the other side of the English Channel). The French legislature, however, waited until 1957 to codify these rights. See DAVIES, *supra* note 110, at 150–55 (outlining the legislative history in France).

Taking a very broad view, this history is not surprising. It follows the general progression of legal history in the West, from royal decree and customary local usage, to Enlightenment ideals and natural law concepts, to positive law's growth of statutory and regulatory law. The fluke of history here is that moral rights ended up on the side of the pro-monopolistic booksellers and not on the side of the authors and the public.²⁸⁵ In *Donaldson*, just as in *Millar*, two booksellers squared off in court. And again, arguments on one side had the statute to rely on, a statute without moral rights provisions, while arguments favoring booksellers' perpetual monopolies could rely on just about everything else, including early moral rights concepts. Of course the irony is that moral rights provide important protections for both authors²⁸⁶ and the public²⁸⁷ (protections that could prove helpful still in disputes with our modern-day "booksellers"²⁸⁸), yet did not end up on the side of the case aligned with the interests of authors and the public. On the other side of the Atlantic, despite the delay caused by the American Revolution,²⁸⁹ *Donaldson's* strict statutory interpretation and its lack of moral rights considerations took hold in the United States.²⁹⁰

B. *The New United States*

There were many influences, both practical and philosophical, on copyright law in the nascent United States,²⁹¹ and a thorough discussion of them lies beyond the scope of this article. In brief, statutory copyright law, including the Statute of Anne, was known in the American colonies²⁹² and in the early states.²⁹³ Most of the early state statutes were permutations of the Statute of Anne, with two or three dominant strains.²⁹⁴ In

²⁸⁵ See Chartrand, *supra* note 69, at 221 (stating guild-recognized moral rights were eliminated along with common law copyright).

²⁸⁶ See Richard Serra, *Suppression and Liberty: The Tilted Arc Controversy*, 19 CARDOZO ARTS & ENT. L.J. 39, 39–46 (2001) (explaining how lack of legal protection before VARA resulted in forced dismantling of his federally commissioned sculpture); Grace Glueck, *Bank Cuts up a Noguchi Sculpture and Stores It*, N.Y. TIMES, Apr. 19, 1980, at A1 (reporting no protection for integrity of a sculpture, a decade before VARA); Diane Rose, *Calder's "Pittsburgh" A Violated and Immobile Mobile*, ARTNEWS, Jan. 1978, at 39 (reporting county airport officials relocated mobile sculpture, made it immobile, and repainted it, to prevent drivers from rubbernecking).

²⁸⁷ See Merryman, *Public Interest*, *supra* note 112, at 363.

²⁸⁸ See *infra* p. 36.

²⁸⁹ See Chartrand, *supra* note 69, at 223 (indicating there was a lack of trade in law books during the Revolutionary War).

²⁹⁰ See *infra* p. 34. Perhaps it is because of the delay, however, that the concept of a common law copyright, potentially applicable to matters not covered by statute, remains in play in the United States to this day. See *infra* note 324.

²⁹¹ See, e.g., Chartrand, *supra* note 69, at 223–29 (examining competing influences on the new nation's copyright law); Shirata, *supra* note 88, at 199–203 (describing the mixing—and mixing up—of natural rights law, common law, and regulatory control).

²⁹² See Shirata, *supra* note 88, at 196 (reporting a Massachusetts law in 1672 that concerned copyright and then no other indigenous statutes until 1780).

²⁹³ See DAVIES, *supra* note 110, at 76–77 n.1 (listing and describing the state statutes); Shirata, *supra* note 88, at 196–202 (including a chart of the title and date of each state's legislation); Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 649–51 (1943) (reviewing the state statutes).

²⁹⁴ See Shirata, *supra* note 88, at 200 (mapping the level of influence of the Statute of Anne in the

addition, the Framers knew the history of the Stationers Company's monopoly and the *Millar* and *Donaldson* precedents.²⁹⁵

Drafting the Constitution, authority for a federal statute was accounted for in the Copyright Clause: "Congress shall have the Power . . . To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . ." ²⁹⁶ Exercising this power, Congress enacted²⁹⁷ the first United States copyright statute in 1790.²⁹⁸ Its ancestry in to the Statute of Anne was obvious.²⁹⁹

Its title started by stating it was an "Act for the Encouragement of Learning,"³⁰⁰ just as the Statute of Anne's title did.³⁰¹ The 1790 statute's title explained the method for encouraging this learning: "by securing the copies of maps, charts, and books, to the authors and proprietors of such copies . . ." ³⁰² The Statute of Anne's method had been "by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies."³⁰³

The differences in the new statute were obvious, too, even in the wording of the title. More types of works were covered, with the inclusion of maps and charts.³⁰⁴ Instead of "Authors or Purchasers,"³⁰⁵ the 1790 statute's title refers to "authors and proprietors,"³⁰⁶ and then "authors," "proprietors," and "persons . . . who hath legally acquired the copyright" appear in the text itself.³⁰⁷ This shift in language reflects the fact that the 1790 statute did not have to wrestle monopolistic control away from a long-standing guild. The historical context of the Statute of Anne had forced Parliament to emphasize the interests of authors and the reading public.³⁰⁸ The new United States, however, was not worried about putting too much market power in the hands of "proprietors." Indeed, its leaders were anxious to build indigenous industries and an economic infrastructure.³⁰⁹

The public's interest was certainly an important part of United States copyright law from its beginning. The goal, however, was not learning to just generally enlighten the

thirteen states); *Fisher*, 318 U.S. at 648 ("In this country the copyright laws enacted by the original thirteen states prior to 1789 were based largely upon the Statute of Anne.").

²⁹⁵ See Chartrand, *supra* note 69, at 223–30; VAIDHYANATHAN, *supra* note 64, at 44 (stating James Madison and Noah Webster were "mindful" of copyright history when working on copyright law).

²⁹⁶ U.S. CONST. art I, § 8, cl. 8; see also BOWKER, *supra* note 223, at 7 (stating the constitutional grant to Congress followed England's post-*Donaldson* approach to copyright).

²⁹⁷ See H.R. Bill 43, 1st Cong., 2d Sess. (1790); see also THORVALD SOLBERG, COPYRIGHT IN CONGRESS 1789–1904, *Copyright Office Bulletin No. 8*, 29, 114–23 (1905) (listing the precursor bills and petitions to Congress, committee charges, committee reports, etc.).

²⁹⁸ Act for the Encouragement of Learning, Act of May 31, ch. 15, 1 Stat. 124 (1790).

²⁹⁹ See, e.g., *Fisher*, 318 U.S. at 650 ("As might have been expected, this Act reflected its historical antecedents."); BOWKER, *supra* note 223, at 24 (referring to the Statute of Anne as "the foundation of the present copyright system of . . . America").

³⁰⁰ 1 Stat. 124, title.

³⁰¹ 8 Ann., c. 19, title.

³⁰² 1 Stat. 124, title.

³⁰³ 8 Ann., c. 19, title.

³⁰⁴ 1 Stat. 124, title.

³⁰⁵ 8 Ann., c. 19, title.

³⁰⁶ 1 Stat. 124, title.

³⁰⁷ *Id.* at s. 1.

³⁰⁸ See *supra* p. 9–11.

³⁰⁹ See DAVIES, *supra* note 110, at 28 (stating the underlying philosophy was that "encouragement of individual effort by personal gain [was] the best way to advance public welfare").

mind (except for in political matters)³¹⁰ or to create art for art's sake. The leaders of the day understood the need to build a national identity, to encourage a unique American culture—culture in the broad sense of the term, that is, not necessarily culture in any elevating sense. And so intellectual property that supported industry was the focus.

Nonetheless, the first Congress worked within practical legal concepts with which it was familiar. The Copyright Act of 1790 granted a fourteen-year monopoly,³¹¹ and allowed a renewal for a second fourteen years,³¹² just as the Statute of Anne had. Even without a local history that included the Stationers Company, the old guild's requirement of recording the copyright in a register³¹³ and depositing a copy of the work³¹⁴ remained.

Perhaps even more important than the outlines of the Statute of Anne that survived eighty years, an Atlantic crossing, and the Revolutionary War, is the fact that the case law interpreting it survived, too. Despite the provision for copyright in the Constitution, copyright law quickly became a matter of statutory analysis,³¹⁵ following in the footsteps of *Donaldson*,³¹⁶ rather than an area for constitutional analysis.³¹⁷ The first copyright case decided by the United States Supreme Court, *Wheaton v. Peters*,³¹⁸ set the tone, by relying on statutory interpretation.³¹⁹ For those matters not covered by the new statute but already covered by the common law, particularly for pre-publication copyright issues, cases in the United States continued to refer to *Donaldson* to find a common law copyright.³²⁰ With the focus on statutory interpretation, and no mention of moral rights

³¹⁰ President George Washington, *Speech of the President of the United States to both Houses of Congress*, 1st Cong., 2d Sess. (Jan. 8, 1790), reprinted in SOLBERG, *supra* note 297, at 115–16 (advocating the “promotion of science and literature” to teach “the people themselves to know and to value their own rights”).

³¹¹ 1 Stat. 124, s. 1.

³¹² *Id.*

³¹³ *Id.* at s. 3. The federal District Court clerk was assigned the recording task at first. *Id.* Now the task falls to the Copyright Office in the Library of Congress. 17 U.S.C. § 408(a) (2000).

³¹⁴ 1 Stat. 124, s. 4. The depository was originally in the Secretary of State's office, *id.*, and now it is in the Copyright Office of the Library of Congress. 17 U.S.C. § 407(b) (2000).

³¹⁵ See Hamilton, *Deference*, *supra* note 13, at 323–25.

³¹⁶ See Shirata, *supra* note 88, at 203 (stating that the United States Supreme Court's first copyright case “was along the lines of traditional English theory established in *Donaldson*”).

³¹⁷ See Hamilton, *Deference*, *supra* note 13, at 321 (tallying sixty-one United States Supreme Court copyright cases interpreting the statute and only five interpreting the Copyright Clause).

³¹⁸ *Wheaton v. Peters*, 33 U.S. 591, 667–68 (1834).

³¹⁹ See Shirata, *supra* note 88, at 203 (explaining how *Wheaton* “adopted a strict literal construction of the statute”); Chartrand, *supra* note 69, at 226 (concluding “the Court also rejected what later became known as the ‘moral’ rights of authors”); see also *Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284, 291 (1907) (“In this country it is well settled that property in copyright is the creation of the federal statute passed in the exercise of the power vested in Congress” by the Copyright Clause.).

³²⁰ Even in the recent, major case of *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the parties argued a fine point about common law copyright, but the Court declined to jump into that fray. *Id.* at 196 n.3. Other federal and state cases through two centuries have cited *Donaldson* as authority on the existence of a pre-publication common law copyright. See, e.g., *Crowe v. Aiken*, 6 F. Cas. 904, 905–06 (N.D. Ill. 1870) (citing both *Millar* and *Donaldson* to find a pre-publication common law copyright); *Capitol Records, Inc. v. Naxos of Am., Inc.*, 830 N.E.2d 250, 255 (N.Y. 2005) (finding common law copyright protection for musical recordings, extending since the time of *Donaldson*); see also 17 U.S.C. § 301(b) (2000) (stating the federal copyright statute does not limit any existing common law rights for matters not covered by the statute).

in the statute until 1991, moral rights simply did not develop in the United States.

Very little of the Engravers' Act crossed the Atlantic or had much impact on United States copyright law.³²¹ In the United Kingdom, protection for engravers and a gradually expanding list of visual artists was not merged into the main copyright statute until 1842,³²² too late to directly influence the United States law. Engravings did receive copyright protection in the United States starting in 1802,³²³ mostly by amending the 1790 statute to cover engravings.³²⁴ The 1802 amending statute borrows the Engravers' Act's prohibition against copying "in the whole or in part, by varying, adding to, [or] diminishing from the main design,"³²⁵ but it lacks the bold preamble of the Engravers' Act, with its clear concern for the artists' creative interests.³²⁶ The early intellectual property law in the United States did not develop protection for these creative interests.³²⁷ The focus remained on the Statute of Anne and the 1790 statute. Conditions favored the continual development of copyright's economic protection,³²⁸ while the moral rights evolutionary branch did not emerge in the United States for another 200 years.

IV. CONCLUSION: EVOLUTION CONTINUES

Until VARA, the strong economic focus of United States copyright law allowed for little legal recognition of other values.³²⁹ Over the years, in a smattering of cases here and there, judges have recognized that there are other values inherent in intellectual property and worthy of protection, even when they had no statutory or case precedent

³²¹ I could not find a single case in the United States that referred to the Engravers' Act, and I had to contact the Library of Congress to obtain a copy of the statute's text. By way of contrast, more than 1,000 federal and state cases refer to the Statute of Anne, and its text is easily available. See DAVIES, *supra* note 110, at App. 1, 371–76; DEAZLEY, *supra* note 68, at App. 1, 233–38; RANSOM, *supra* note 70, at 109–17; <http://www.copyrighthistory.com/anne.html> (last visited Nov. 5, 2005).

³²² Copyright Act, 1842, 5 & 6 Vict., c. 45 (Eng.).

³²³ Act of April 29, 1802, ch. 36, 6 Stat. 171 (1802); see also VAIDHYANATHAN, *supra* note 64, at 45.

³²⁴ 6 Stat. 171.

³²⁵ *Id.*

³²⁶ 8 Geo. 2, c. 13, pmb1.

³²⁷ See, e.g., 143 Kilty's English Statutes 122 (1811) (listing 8 Geo. 2, c. 13, among the English statutes not applicable in Maryland).

³²⁸ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (limiting authors' protection in favor of "progress of . . . useful arts") (citation omitted); Kwall, "Author-Stories," *supra* note 13, at 20 ("[T]he United States' capitalist culture and its classical utilitarian tradition also contributed to the development of a copyright doctrine more concerned with commodification than the creation process."); Suhl, *supra* note 43, at 1214–15 (describing the commodification of intellectual property in the United States and the law's market-dominated culture); VAIDHYANATHAN, *supra* note 64, at 20 (asserting copyright has evolved "into one part of a matrix of commercial legal protections"). The economic focus has been so pervasive, a system similar to negotiable instruments has even been recommended to protect creative works. See Julie Levy, *Creative Works as Negotiable Instruments: A Compromise Between Moral Rights Protection and the Need for Transferability in the United States*, 5 VAND. J. ENT. L. & PRAC. 27, 30 (2003).

³²⁹ See Swack, *supra* note 64, at 362 (reporting that "in the United States, the artist or copyright owner is granted . . . 'economically exploitable rights,' meant both to 'encourage artists to create' and to 'enrich society at the least cost to consumers.'").

authority on which to rely.³³⁰ For the most part, however, values protected by moral rights have been foreclosed from recognition.³³¹ The door was closed so tightly for so long, that even after limited moral rights were on the books,³³² a federal court could partially excuse a municipality's ignorance of those rights and total destruction of a protected work of art.³³³

Of course, those who do not know history are doomed to repeat it.³³⁴ So it is particularly important for jurists and legislators to understand this history now, as conditions and issues parallel to those in the eighteenth century confront our intellectual property law. Once again, new technology allows copying and distributing with an ease and at a pace previously unimaginable.³³⁵ Once again the law is struggling to catch up to the new technology, as those who create works and those who distribute the works vie for economic benefits, while the public's interest remains the third party in the debates. And once again, those who create works seek protection for their personal interest in their work and the creative process. In England, it took a couple of hundred years for the necessary legal concepts to develop and mature into settled law that could account for the new technology of printing, and in that historical process cut the important values were lost, values protected by moral rights.

In our internet age, given the accelerated rate of technological change,³³⁶ the

³³⁰ See, e.g., *Clemens v. Belford, Clark & Co.*, 14 F. 728, 731 (N.D. Ill. 1883) (considering the author's reputation when stating in dicta, "no person has the right to hold another out to the world as the author of literary matter which he never wrote"); *Clemens v. Press Publ'g Co.*, 122 N.Y.S. 206, 207–08 (N.Y. App. Term 1910) (Seabury, J., concurring) ("While an author may . . . sell his literary productions, yet the purchaser . . . cannot make as free a use of them as he could for the [barrel of] pork which he purchases."); *Granz v. Harris*, 198 F.2d 585, 589 (2d Cir. 1953) (Frank, J., concurring) ("[I]t is an actionable wrong to hold out the artist as author of a version which substantially departs from the original."); *Gilliam v. ABC, Inc.*, 538 F.2d 14, 25 (2d Cir. 1976) (stretching Lanham Act and contract interpretation to cover unauthorized modification of broadcast Monty Python sketches).

³³¹ See, e.g., *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813, 194 Misc. 570 (N.Y. Sup. 1949) (holding no moral rights protection for permanently walled-over fresco); *Serra v. U.S. Gen. Servs. Admin.*, 664 F. Supp. 798 (S.D.N.Y. 1987), *dismissed in part*, 667 F. Supp. 1042 (S.D.N.Y. 1987), *aff'd*, 847 F.2d 1045 (2d Cir. 1988) (holding no moral rights protection, pre-VARA, for controversial public sculpture, now dismantled and stored); *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575, 578–89 (N.Y. Spec. Term 1948), *aff'd*, 87 N.Y.S.2d 430 (1949) (holding no moral rights protection for music); *Choe v. Fordham Univ. Sch. of Law*, 920 F. Supp. 44, 49 (S.D.N.Y. 1995), *aff'd*, 81 F.3d 319 (2d Cir. 1996) (holding no VARA protection for written work, including a law review article); *Pavia v. 1120 Ave. of the Americas Assocs.*, 901 F. Supp. 620, 628–29 (S.D.N.Y. 1995) (holding no right of integrity for work modified before passage of VARA and still on display after passage of VARA); *Kaplan v. Lily of Fr.*, No. 95-Civ-1046, 1996 U.S. Dist. LEXIS 7640 (S.D.N.Y. June 4, 1996) (holding no moral rights protection for a photograph); *Lee v. A.R.T. Co.*, 125 F.3d 580, 582–83 (7th Cir. 1997); *Gegenhuber v. Hystopolis Prods., No.*, 92-C-1055, 1992 WL 168836, (N.D. Ill. July 13, 1992) (holding no VARA right of attribution for puppets, costumes, sets, or the "creation, design, and direction" of a puppet show); *Flack v. Friends of Queen Catherine Inc.*, 139 F. Supp. 2d 526, 535 (2001) (finding that asking someone else to finish artist's sculpture did not violate right of integrity under VARA); *Silberman v. Innovation Luggage, Inc.*, 2003 WL 1787123, at *5 (S.D.N.Y. Mar. 31, 2003) (holding no VARA protection for reproductions of a photograph, i.e., no VARA protection for the original image).

³³² 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506; see *supra* pp. 2–4.

³³³ See *supra* note 8 and accompanying text.

³³⁴ GEORGE SANTAYANA, 1 THE LIFE OF REASON: INTRODUCTION AND REASON AND COMMON SENSE 284 (1905).

³³⁵ See Chartrand, *supra* note 69, at 233 (comparing the printing press to digitization).

³³⁶ See ALVIN TOFFLER, FUTURE SHOCK 11–14 (1970).

necessary legal concepts are likely to develop in a more abbreviated time frame. Because internet technology encourages a global perspective, perhaps as we look forward our common-law jurists may gain better appreciation for moral rights protection, already well-developed in other countries, by taking a look back at our own law's early development.

With VARA, moral rights are once again an ingredient in the genetic mix of our intellectual property law's evolution. They should not be delegated again to an evolutionary branch that leads to extinction. Moral rights law should continue to have a place on the main evolutionary branch, to protect important, non-economic values inherent in the creative process and all creative work.

