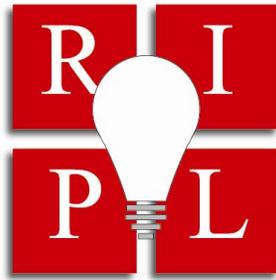


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



A BATTLE BETWEEN MORAL RIGHTS AND FREEDOM OF EXPRESSION: HOW WOULD  
MORAL RIGHTS EMPOWER THE "CHARGING BULL" AGAINST THE "FEARLESS GIRL"?

TZU-I LEE

ABSTRACT

The Fearless Girl statue that stands in front of the iconic Charging Bull sculpture in Manhattan's Financial District has drawn attention since an investment company first installed her for International Women's Day in 2017. The Fearless Girl alters the context and meaning of the Charging Bull to a symbol of gender oppression in the workplace and provokes tensions between copyright and freedom of speech. The Fearless Girl also leads to a scene where a small girl funded by Wall Street is standing up a large bull created by an artist with his own money. This comment discusses how artists can rely on "moral rights" in preventing their works from intentional distortions like the Fearless Girl case under the Visual Artists Rights Act (VARA). With the reputational externalities and the freedom of expression theories, this comment proposes that VARA should extend to protect against objectionable contextual modification of a work of art. The clear global trend is towards greater recognition of artist's moral rights for a broad range of protection. The protection against objectionable contextual modification also reveals unequal power relations and empowers artists in the complexities of cultural production and consumption under globalization. The contextual protection is valuable for the artist and the public interest.

Copyright © 2018 The John Marshall Law School



*Cite as Tzu-I Lee, A Battle Between Moral Rights and Freedom of Expression: How  
Would Moral Rights Empower the "Charging Bull" Against the "Fearless Girl"?, 17 J.  
MARSHALL REV. INTELL. PROP. L. 672 (2018).*

A BATTLE BETWEEN MORAL RIGHTS AND FREEDOM OF EXPRESSION: HOW  
WOULD MORAL RIGHTS EMPOWER THE "CHARGING BULL" AGAINST THE  
"FEARLESS GIRL"?

TZU-I LEE

I. INTRODUCTION.....	673
II. BACKGROUND OF MORAL RIGHTS.....	674
A. Art and Artists' Rights: Freedom of Expression, Copyright, and Moral Rights .....	675
B. A Historical Development of Moral Rights .....	676
III. ANALYSIS .....	679
A. The Bull qualifies for protections under VARA.....	681
B. An economic analysis of moral rights: the reputational externalities potentially benefit both individual artists and the industry.....	682
C. A socio-artistic analysis of moral rights: the freedom of artistic expression and its limits .....	684
IV. PROPOSAL.....	686
A. Offering substantial bargaining powers to artists.....	687
B. Revealing the power relation behind the scene .....	688
V. CONCLUSION.....	689

## A BATTLE BETWEEN MORAL RIGHTS AND FREEDOM OF EXPRESSION: HOW WOULD MORAL RIGHTS EMPOWER THE "CHARGING BULL" AGAINST THE "FEARLESS GIRL"?

TZU-I LEE\*

### I. INTRODUCTION

On March 7, 2017, opposite the "Charging Bull" statue (the Bull) in New York's financial district, arrived "Fearless Girl," a 4-foot-tall statue bravely facing down the 11-foot beast.<sup>1</sup> The "Fearless Girl" (Fearless Girl) embodies the frustration around the obstacles female executives face rising into leadership positions on Wall Street.<sup>2</sup> Alongside Fearless Girl, a plaque read: "[k]now the power of women in leadership. SHE makes a difference."<sup>3</sup> "SHE" refers both to the girl and the stock market ticker symbol of State Street Global Advisors (State Street) which commissioned Fearless Girl.<sup>4</sup>

Before Fearless Girl arrived, the Bull was a hopeful symbol of resilience and a booming economy.<sup>5</sup> Charging toward a tiny girl, it becomes a stand-in for the gendered

---

\* © Tzu-I Lee 2018. J.D. candidate, May 2019, The John Marshall Law School. Many thanks to Professor Maureen Collins, Professor Patty Gerstenblith, Professor Roberta Kwall, John Marshall's Writing Resource Center advisors, my family and friends for their support and encouragement. Special thanks to Susan Hu, who inspired me to write this comment.

<sup>1</sup> James Barron, *Wounded by 'Fearless Girl,' Creator of 'Charging Bull' Wants Her to Move*, N.Y. TIMES (Apr. 12, 2017), <https://www.nytimes.com/2017/04/12/nyregion/charging-bull-sculpture-wall-street-fearless-girl.html>.

<sup>2</sup> Fearless Girl statue has been standing on Wall Street since she was first put up for International Women's Day, March 8, 2017, as an advertisement for an investment fund comprised of gender diverse companies. Although originally installed only temporarily, Kristen Visbal's Fearless Girl sculpture has received much attention. In the wake of popular demand, Fearless Girl's tenure is to be extended by almost a year. On April 19, 2018, New York Mayor Bill de Blasio announced Fearless Girl is relocating outside of the New York Stock Exchange, facing the building by the end of 2018. Renae Merle, *'Fearless Girl' Sets Off a Storm of Debate Over 'Charging Bull' Meaning*, WASH. POST (Apr. 20, 2017), <https://www.mercurynews.com/2017/04/20/fearless-girl-sets-off-a-storm-of-debate/>; Aric Jenkins, *'Fearless Girl' Is Moving to the New York Stock Exchange*, FORTUNE (Apr. 19, 2018), <http://fortune.com/2018/04/19/fearless-girl-statue-moved-nyse/>.

<sup>3</sup> Fearless Girl was commissioned by State Street. Fearless Girl was intended to "celebrate the importance of having greater gender diversity in corporate boards and in company leadership positions." The plaque was removed on April 2, the same date the Fearless Girl statue's permit was set to expire. The investment firm claimed that the decision to pull up the plaque had nothing to do with the controversy or Di Modica's claims. Rather, the switch took place after Fearless Girl was inducted into the New York City Department of Transportation's public art project, allowing it to stay with the Bull through February 2018. Jen Wiczner, *Why the Fearless Girl Statue's Controversial 'SHE' Plaque Was Removed*, FORTUNE (Apr. 17, 2017), <http://fortune.com/2017/04/17/fearless-girl-statue-nyc-plaque-she-nasdaq/>.

<sup>4</sup> *Id.*

<sup>5</sup> After the stock market crashed in 1987, the artist Arturo Di Modica created the Charging Bull sculpture that symbolized the resilience of American people and the promise of a booming economy. On December 15, 1989, Di Modica installed the Bull outside of the Stock Market Exchange without a permit, at the foot of a Christmas tree. It quickly became a tourist attraction. The New York Stock Exchange removed the Bull the next day. Right after its removal, the Bull was installed at a permanent home, Bowling Green. CHARGING BULL, <http://chargingbull.com/Chargingbull.html>. (last visited Sep. 24, 2017). Associated Press, *'Charging Bull' Sculptor Says New York's 'Fearless Girl'*

forces that work against women's success in the workplace.<sup>6</sup> The creator of the Bull, Arturo Di Modica, asserted that Fearless Girl has turned his work into a symbol of male chauvinism and demanded that Fearless Girl be removed.<sup>7</sup> Fearless Girl also has led to an interesting situation where a small girl funded by Wall Street is standing up to a large bull created by an artist with his own money.<sup>8</sup>

Rather than copyright infringement, Di Modica may have a better claim of moral rights. Congress enacted the Visual Artists Rights Act ("VARA") in 1990,<sup>9</sup> which allows artists to prevent any intentional distortion, mutilation, or other modification of their works that would be prejudicial to artists' reputation—"moral rights."<sup>10</sup> While artistic expression is generally regarded as speech,<sup>11</sup> artists have moral rights in their artistic works that are not pecuniary.<sup>12</sup>

This Comment explores the notion of moral rights in the context of Fearless Girl and proposes that moral rights under VARA should be extended to protect against objectionable contextual modification of a work of art. Part I of this Comment addresses issues raised by Fearless Girl. Part II provides an overview of moral rights and related concepts like freedom of artistic expression, and copyright. Part III argues that the artist's rights should be protected by moral rights under the reputational externalities and the freedom of expression theories. Part IV proposes that the protection extends to objectionable contextual modification. The contextual protection encompasses the artist's economic interests and includes public interest because it reveals power structures behind the scenes.

## II. BACKGROUND OF MORAL RIGHTS

Moral rights include the rights of attribution, integrity, disclosure, resale royalty, withdrawal, and protection from excessive criticism.<sup>13</sup> The notion of artists' moral rights has won a large degree of acceptance in Europe and other countries.<sup>14</sup> Common law countries like the United States have been reluctant to recognize moral rights in artwork because the inherent continuing moral rights would conflict with the property rights of artwork owners.<sup>15</sup>

---

*Statue Violates His Rights*, THE GUARDIAN (Apr. 11, 2017), <https://www.theguardian.com/us-news/2017/apr/12/charging-bull-new-york-fearless-girl-statue-copyright-claim>.

<sup>6</sup> Christina Cauterucci, *The Charging Bull Sculptor Is Right. Fearless Girl Should Go*. SLATE (Apr. 12, 2017), <http://www.slate.com/news-and-politics/2018/01/trumps-cop-takes-homeless-fetus-anecdote-handily-synthesizes-the-gop-stance-on-women-and-babies.html>.

<sup>7</sup> Merle, *supra* note 2. Di Modica had not yet filed suit at the time this Comment was submitted.

<sup>8</sup> Karl McDonald, *The Girl vs the Bull: Behind the "Artist's Copyright" Row Gripping New York*, iNEWS (Apr. 13, 2017) <https://inews.co.uk/essentials/culture/arts/girl-vs-bull-whats-behind-row-gripping-new-york/>.

<sup>9</sup> Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213, 233 (2006).

<sup>10</sup> Brian A. Lee, *Making Sense of "Moral Rights" in Intellectual Property*, 84 TEMP. L. REV. 71, 87 (2011).

<sup>11</sup> PATTY GERSTENBLITH, ART, CULTURAL, HERITAGE AND THE LAW, 25 (3d ed. 2012).

<sup>12</sup> *Id.* at 169.

<sup>13</sup> *Id.*

<sup>14</sup> GERSTENBLITH, *supra* note 11, at 169.

<sup>15</sup> *Id.*

Under the utilitarian tradition of the United States, some scholars have tried to associate moral rights with *persona* and a right of autonomy of expression.<sup>16</sup> However, in practice, the United States courts have struggled to address moral rights for artworks, and VARA has been criticized as inadequate to protect moral rights.<sup>17</sup> This Comment focuses on VARA's failure to provide any remedy when works are used in a context found objectionable by their artists.<sup>18</sup>

#### *A. Art and Artists' Rights: Freedom of Expression, Copyright, and Moral Rights*

In the legal context, art involves issues including free speech, copyright, and artists' rights.<sup>19</sup> Different areas of law treat art differently: customs law favors fine arts over industrial or mechanical arts; copyright law favors original works over derivative works.<sup>20</sup> Generally, the legislative history of the Copyright Act and the practice of the Copyright Office shows that works of art were original, tangible expressions of an author's ideas.<sup>21</sup> There are three perspectives of moral rights.

Firstly, the protection of speech is fundamental not only to create a more intelligent public, but also to fulfill both personal and group autonomy.<sup>22</sup> The freedom of artistic expression perspective recognizes the place of free expression "in the evolution, definition, and proclamation of individual and group identity."<sup>23</sup> Many scholars agree that free speech applies to art because art is communicative and

---

<sup>16</sup> Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1 (1994); Roberta R. Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-first Century*, U. ILL. L. REV. 151 (2001); Leslie K. Treiger-Bar-Am, *The Moral Right of Integrity: A Freedom of Expression*, NEW DIRECTIONS IN COPYRIGHT 150 (Fiona Macmillan ed., 2006).

<sup>17</sup> For example, VARA only applies to a very narrow category of visual art, specifically excludes protection for reproductions of works, and fails to define terms like "prejudice, honor, or recognized stature." ROBERTA R. KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 28 (2009).

<sup>18</sup> One of the main problems is widespread ignorance of VARA's existence. *Id.*

<sup>19</sup> Art also involves historic preservation, commercial sales, fiduciary obligations, tax issues and international law. GERSTENBLITH, *supra* note 11, at 3.

<sup>20</sup> *Id.* at 14. See *Brancusi v. United States*, No. T. D. 43063, 1928 Cust. Ct. LEXIS 3 (Nov. 26, 1928) (concluding that the polished metal sculpture which prompted a dispute concerning art in 1928 between an artist and the government of United States was a stylized and beautiful work of art).

<sup>21</sup> *Mazer v. Stein*, 347 U.S. 201, 214 (1954).

<sup>22</sup> GERSTENBLITH, *supra* note 11, at 25; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 787 (2d ed. 1988).

<sup>23</sup> As the Supreme Court once concluded, the constitutional right of free expression is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

*Cohen v. California*, 403 U.S. 15, 17 (1971).

contributes to a culture of self-directed individuals and others, particularly in public spaces.<sup>24</sup>

A second perspective originates from the idea of copyright.<sup>25</sup> The Constitution empowered legislation “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>26</sup> The purpose of copyright is to enhance the benefits which the public derives from the creative efforts of artists and authors.<sup>27</sup> The conventional justification for copyright law is that it transforms what would be a public good—the ability to copy an author’s work—into a private good, and in so doing creates stronger incentives for authors to create new works.<sup>28</sup> Copyright law provides authors of works protection against any harm arising from alteration of their works.<sup>29</sup>

Third, moral rights associated with the term “art” include two concepts.<sup>30</sup> First, the authenticity of artworks in the sense of assuring that they are, in fact, the work of the individual to whom they are ascribed.<sup>31</sup> There is a strong connection between the value of a work of art and the identity of its creator, so both the artist and the other owners of the artist’s work have a special interest in protecting the “integrity” of the artist’s work as a whole.<sup>32</sup> The knowledge of the artist’s name and the reputation of the artist is based on the entire body of the artist’s work.<sup>33</sup> Moral rights are integral to the artwork itself and come from the notion that an artist’s own personality is bound up in the work.<sup>34</sup>

### *B. A Historical Development of Moral Rights*

Moral rights gained international acceptance in 1928 when the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) recognized the rights of attribution and integrity.<sup>35</sup>

---

<sup>24</sup> Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 170 (2012); Netanel, *supra* note 16, at 54; Treiger-Bar-Am, *supra* note 16, at 147.

<sup>25</sup> *Mazer*, 347 U.S. at 219 – 220.

<sup>26</sup> U.S. CONST. art. I, § 8, cl.8.

<sup>27</sup> *Mazer*, 347 U.S. at 219.

<sup>28</sup> Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 112 (1997).

<sup>29</sup> *Id.* at 113.

<sup>30</sup> *Id.* at 109.

<sup>31</sup> *Id.*

<sup>32</sup> The connection sometimes refers to “textual integrity.” An author’s ability to safeguard the integrity of the author’s texts is explained as a fundamental component of authorship morality. KWALL, *supra* note 17, at 9. In general, European law, particularly French law, often refers moral rights as being aimed at protecting the “personality” of the artist. Hansmann and Santilli argued that moral rights exist not only to protect the artist from the nonpecuniary subjective harm of abusing her work but also to protect the artist’s reputation. From the public’s point of view, an artist’s work is an important component of his “personality” upon which the reputation and personality become one and the same. Hansmann & Santilli, *supra* note 28, at 109 – 110.

<sup>33</sup> Hansmann & Santilli, *supra* note 28, at 109 – 110.

<sup>34</sup> GERSTENBLITH, *supra* note 11, at 169.

<sup>35</sup> Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 804 (2001); WIPO, *Berne Convention for the Protection of Literary and Artistic Works*, [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](http://www.wipo.int/treaties/en/text.jsp?file_id=283698). (last visited Oct. 4, 2017).

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.<sup>36</sup>

Moral rights recognize that creators of artistic works have certain personal rights that transcend the mere protection of economic or property rights.<sup>37</sup> These rights are akin to fundamental human rights or personal civil rights grounded in the artist's personality, and the artist's identity in the artistic work.<sup>38</sup> Civil law countries in Europe have embraced this approach, particularly in France, from which the modern notion of moral rights ("*droit moral*") originates.<sup>39</sup> In civil law countries, the right of integrity applies not only to paintings, sculptures, and other visual arts but also to literary works.<sup>40</sup> By contrast, in the United States, federal and state legislation recently recognized moral rights only in the visual arts.<sup>41</sup>

The current copyright laws in France, Germany, and Italy contain provisions dedicated to the protection of disclosure, attribution, integrity, and withdrawal.<sup>42</sup> The disclosure right provides that only the author<sup>43</sup> can determine when the work is complete and when it is ready for publication and public review.<sup>44</sup> The right of attribution ensures that, once a work is published, the author will receive attribution as its creator.<sup>45</sup> The right of integrity, which focuses most on the personality interest of the author, protects against significant alteration of the work or any derogatory use of it that is contrary to the author's intentions.<sup>46</sup>

Unlike the European approach, which relies on personality theories, the United States views artistic works within the tradition of property interest.<sup>47</sup> Utilitarianism

---

<sup>36</sup> BERNE CONVENTION, art. 6(1).

<sup>37</sup> Bird & Ponte, *supra* note 9, at 217. See also Lee, *supra* note 35, at 800.

<sup>38</sup> Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 42 (1998).

<sup>39</sup> Bird & Ponte, *supra* note 9, at 219, 222.

<sup>40</sup> Hansmann & Santilli, *supra* note 28, at 100.

<sup>41</sup> *Id.*

<sup>42</sup> Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 359 (2006).

<sup>43</sup> Unlike in the United States, moral rights in Europe have focused on the protection of authorship and have been classified as personality rights including literary and artistic works. Therefore, this Comment uses the words "author" and "artist" interchangeably, but "author" is used particularly in the European context.

<sup>44</sup> Lee, *supra* note 35, at 801 – 802.

<sup>45</sup> *Id.* at 802.

<sup>46</sup> *Id.* For example, in 1962, a refrigerator was painted by the French artist Bernard Buffet and contributed by him to a charity auction. The purchaser of the refrigerator proceeded to cut it into six panels that he intended to sell separately to increase its resale value. Buffet sued the purchaser of the refrigerator to prevent the selling of his dismembered work. The court found in favor of Buffet based on his right of integrity. Hansmann & Santilli, *supra* note 28, at 99 – 100.

<sup>47</sup> Bird & Ponte, *supra* note 9, at 247. Unlike the protection in France, Germany and Italy, the similar protection was not available under American law prior to recent state and federal enactments. For instance, a massive mobile created by Alexander Calder was purchased at an exhibition by a private collector and then donated to the Pittsburgh airport. The airport repainted the black and white sculpture in green and gold, which represented the colors of Allegheny County, altered the orientation of the sculpture's elements, and soldered them to prevent movement, all over Calder's protest. Calder sought to have the work restored to its original state but was unsuccessful. Two years

is the predominant copyright theory in the United States as an economic incentive to create.<sup>48</sup> Doctrines like fair use and public domain provide public rights to use artistic works at the expense of the individual interests of the creator.<sup>49</sup>

Even though the Berne Convention has been adopted by many countries since 1928, the United States for many years declined to join the Berne Convention.<sup>50</sup> The United States had a long-maintained opposition to the Berne Convention and moral rights.<sup>51</sup> Some opponents of moral rights argue that moral rights would negatively impact economic interests, placing a chilling effect on investment in creative and artistic works.<sup>52</sup> Some suggest that moral rights could lead to a private system of censorship based upon the “aesthetic veto” of the creator, which would detrimentally affect public access and free expression.<sup>53</sup>

However, the Berne Convention had become the international standard for the protection of creative works, and the United States found itself isolated from worldwide copyright development, risking important international safeguards in favor of its own intellectual property laws and losing its future influence.<sup>54</sup> The United States adopted the Berne Convention in 1988<sup>55</sup> and Congress enacted VARA in 1990.<sup>56</sup>

VARA does not provide United States artists with the same level of protection as European countries.<sup>57</sup> VARA restricts moral rights by creating limited categories of

after Calder’s death, the airport agreed to restore the mobile as Calder had desired. Hansmann & Santilli, *supra* note 28, at 100.

<sup>48</sup> KWALL, *supra* note 17, at 23.

<sup>49</sup> Bird & Ponte, *supra* note 9, at 247 – 248.

<sup>50</sup> The United States’ rejection of the Berne Convention was mainly because the United States did not want to change its own national laws, especially to apply moral rights. The United States negotiated bilateral copyright treaties and joined less stringent conventions like the Universal Copyright Convention which contained no moral rights. *Id.* at 248.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Bird & Ponte, *supra* note 9, at 249.

<sup>54</sup> *Id.*

<sup>55</sup> In 1976, the United States first sought to approach Berne membership by adopting regulations like the extension of the duration of copyright. The 1976 Copyright Act seemed to provide an implicit right of integrity, but it was not an accurate reflection of moral rights because the copyright holder was often not the actual creator of the work (specifically music work in the provision), and the creator still lost all of her discretion and control over her musical work when required to license away her creation. Finally, the United States adopted the Berne Convention in 1988 after congressional debates in the 1980s over joining the Berne Convention. *Id.* at 250 – 251. *See also* Monica E. Antezana, *The European Union Internet Copyright Directive as Even More than It Envisions: Toward a Supra-EU Harmonization of Copyright Policy and Theory*, 26 B.C. INT’L & COMP. L. REV. 415, 425-26 (2003).

<sup>56</sup> Before VARA, fourteen states and Puerto Rico enacted some type of moral rights protections. Lacking uniformity and sufficient state participation, state moral rights laws were hobbled by territorial limits of jurisdiction over creative works. Although these laws have their weaknesses, these statutes at least afford protections not available to artists on a federal level prior to VARA. Bird & Ponte, *supra* note 9, at 255 – 256. After VARA, state provisions would be deemed preempted by VARA; at least one district court has already held that the New York moral rights statute was preempted. KWALL, *supra* note 17, at 30.

<sup>57</sup> Bird and Ponte asserted that VARA has three distinct shortcomings: (1) VARA only protects a specific type of art; (2) VARA only protects certain types of art; and (3) even if a work meets the VARA definition of “visual artist” and “visual art,” a number of exceptions may still prevent the artist from protection. Bird & Ponte, *supra* note 9, at 257. VARA covers only the visual fine arts, like paintings and sculptures, either in their original form or in limited numbered and signed editions of 200 or

protected creative works.<sup>58</sup> Artists' rights are alienable by written contracts waiving their rights<sup>59</sup> and also are subject to fair use.<sup>60</sup> Very few artists have won monetary damages under VARA, largely because the creative works either were not within the narrow categories of visual fine arts, involved moral rights not contained in VARA, or failed to meet other VARA requirements.<sup>61</sup>

Ordinary artists face the imbalance of bargaining power that results in a loss of valuable protections.<sup>62</sup> The purpose of moral rights laws is to balance the bargaining power between the artists and those who use their works.<sup>63</sup> This Comment proposes that moral rights can reveal the complex power structures behind the scenes. VARA undervalues moral rights.

### III. ANALYSIS

This Comment focuses on moral rights and argues that VARA does not sufficiently protect Di Modic<sup>64</sup> and other artists' right of integrity against objectionable contextual

---

fewer. To avoid the intentional or grossly negligent destruction of a protected work, an artist must show the work achieved "recognized stature." 17 U.S.C. § 101 (2017); 17 U.S.C. § 106A(a)(3)(B).

<sup>58</sup> 17 U.S.C. § 101. A "work of visual art" is

(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.

<sup>59</sup> 17 U.S.C. § 106A(e)(1). The codified provision on transfer and waiver states as follows: the rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.

<sup>60</sup> 17 U.S.C. § 107. The codified provision on fair use states as following:

[n]otwithstanding the provisions of sections 106 and 106A [17 U.S.C. §§ 106 & 106A], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

<sup>61</sup> Bird & Ponte, *supra* note 9, at 260, n. 334, 335.

<sup>62</sup> KWALL, *supra* note 17, at 33.

<sup>63</sup> *Id.*

<sup>64</sup> There are other possible legal theories for Di Modica including unauthorized derivative work or defamation. However, those theories would be of no avail to artists who believe the integrity of their work has been impaired but who cannot show damage to their professional reputation. A

modification.<sup>65</sup> VARA applies narrowly only to “works of visual art.”<sup>66</sup> The author of a “work of visual art” is granted the rights of attribution, and the right to prevent intentional distortion, mutilation, or modification of the work that would be prejudicial to the author’s reputation.<sup>67</sup> However, this right to prevent destruction of the work is for a still-narrower class of works of “recognized stature.”<sup>68</sup>

Those limitations derived from fears that moral rights would detrimentally impact economic interests in the industry<sup>69</sup> and could lead to censorship, which could detrimentally affect public access and free expression.<sup>70</sup> By contrast, this Part argues that extending integrity right protection would be consistent with the theory of economic interests and free expression.

---

“derivative work” under section 106(2) of the Copyright Act is a work “based upon one or more preexisting works.” 17 U.S.C. § 106(2) (2017). The provision can provide limited recognition of integrity interests when an artist’s preexisting work is used to create a derivative work without permission, and the modified work violates the artist’s textual integrity. Under this theory, whether Fearless Girl is a derivative work would be the main issue. The focus would shift to the derivative work instead of the integrity of the original work. On the other hand, the law of defamation may be a cause of action for Di Modica if Fearless Girl is disseminated to the public to injure Di Modica’s professional reputation. However, Di Modica must show Fearless Girl is unauthorized by him and exposes him to contempt or public ridicule and therefore injures his professional standing. Di Modica also must show that he is a sufficiently well-known artist to have a reputation. Due to the page limitation, this Comment focuses on moral rights and does not discuss “derivative work” further.

<sup>65</sup> Kwall proposed that protection should extend not only to actual modifications but also to objectionable contextual displays, performances, and transmissions. KWALL, *supra* note 17, at 156.

<sup>66</sup> 17 U.S.C. § 106A. CRAIG A. NARD ET AL., *THE LAW OF INTELLECTUAL PROPERTY* 679 (2013).

<sup>67</sup> 17 U.S.C. § 106A(a)(2).

<sup>68</sup> 17 U.S.C. § 106A(a)(3)(A) and (B). The provision provides that the author of a work of visual art shall have the right

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

<sup>69</sup> Those restriction were particularly troubled by the right of withdrawal and the right to object to the context in which an artist’s work was presented. They argued that recognition of the moral rights of artists would ultimately discourage the dissemination of creative works to the public. Economically, if authors retain inalienable personal rights in their creations, buyers would pay less for the works because they are restricted to purchasing a truncated bundle of property rights in those works. This reduced remuneration would not only injure artists but would also have the aggregate effect of reducing incentives for artists to create, thus reducing the availability of creative works to the public. Therefore “moral rights” could tremendously destabilize the entertainment industries. Carl H. Settlemyer III, *Between Thought and Possession: Artists’ “Moral Rights” and Public Access to Creative Works*, 81 GEO. L.J. 2291, 2309 (1993). See also Bird & Ponte, *supra* note 9, at 248.

<sup>70</sup> Critics argued that moral rights’ advocates are taking a position of cultural conservatism, inhibited expression, and unnecessary deference to creators’ intentions. Such a broad “aesthetic veto” would be placed in the hands of the artist, and therefore it means that moral rights could be used as “a charter for private censorship.” The results would conflict with the purposes and functioning of the American copyright system. Accordingly, these adverse consequences ought to be guarded against even if that would sacrifice artists’ noneconomic interests to the brutalities of the marketplace and the continued appearance that the United States is less than enthusiastic about adherence to the Convention. Settlemyer III, *supra* note 69, at 2310. See also Bird & Ponte, *supra* note 9, at 248–249.

*A. The Bull qualifies for protections under VARA*

VARA defines a work of visual art as “a painting drawing, print, or sculpture, existing in a single copy” or in a limited edition of 200 copies or fewer.<sup>71</sup> A work of visual art does not include any work made for hire.<sup>72</sup> The Bull is a sculpture and one of an edition of five.<sup>73</sup> The Bull is not a work made for hire because Di Modica spent \$300,000 of his own money to create the Bull in 1989.<sup>74</sup> Although the Bull was installed in 1989, before VARA’s enactment, if Di Modica owns the copyright and has not waived his rights, he could invoke VARA as a legal basis for his claim. “Recognized stature” is necessary for VARA protection from destruction.<sup>75</sup> A work is of recognized stature if it is recognized as meritorious by art experts, members of the art community, or a cross-section of society.<sup>76</sup> Newspaper articles can serve as evidence to establish recognized stature.<sup>77</sup> The Bull has become a tourist destination in the Financial District.<sup>78</sup> In 2004, New York City Parks Commissioner stated that the Bull, together with the Statue of Liberty, was perhaps the most recognized statue in the city.<sup>79</sup> Therefore, the Bull would likely qualify as having recognized stature and is probably protected.

Fearless Girl alters the context and meaning of the Bull, modifying the Bull’s representation to a symbol of gender oppression in the workplace.<sup>80</sup> In most cases, the modification and distortion application under VARA appears narrowed to physical alteration. However, the protection of objectionable contextual modification is reasonable under reputational externalities and freedom of expression.

---

<sup>71</sup> 17 U.S.C. § 101, *supra* note 58.

<sup>72</sup> *Id.* The provision states as follows: a work of visual art does not include (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; (iii) any portion or part of any item described in clause (i) or (ii); (B) any work made for hire; or (C) any work not subject to copyright protection under this title.

A “work of the U.S. Government” is a work prepared by an officer or employee of the U.S. Government as part of that person’s official duties.

<sup>73</sup> Don Singleton, *Rock Solid*, N.Y. TIMES (May 3, 1998), <http://www.nydailynews.com/archives/news/rock-solid-article-1.789714>. In 2010, a similar Bull sculpture called the Bund Bull was installed in Shanghai. James T. Areddy, *Shanghai Stampede: A Bull on the Bund*, WALL ST. J. (Apr. 19, 2010), <https://blogs.wsj.com/chinarealtime/2010/04/19/shanghai-stampede-a-bull-on-the-bund/>.

<sup>74</sup> Robert D. McFadden, *SoHo Gift to Wall St.: A 3 1/2-Ton Bronze Bull*, N.Y. TIMES (Dec. 16, 1989), <http://www.nytimes.com/1989/12/16/nyregion/soho-gift-to-wall-st-a-3-1-2-ton-bronze-bull.html>. *See also* Merle, *supra* note 2.

<sup>75</sup> 17 U.S.C. § 106A(a)(3)(B) (2017), *supra* note 68.

<sup>76</sup> *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999) (holding that statements in newspaper were admissible to establish the recognized stature).

<sup>77</sup> *Id.* at 613.

<sup>78</sup> David W. Dunlap, *The Bronze Bull Is for Sale, but There Are a Few Conditions*, N.Y. TIMES (Dec. 21, 2004), <https://query.nytimes.com/gst/fullpage.html?res=9B03E2DD1330F932A15751C1A9629C8B63>.

<sup>79</sup> *Id.*

<sup>80</sup> Cauterucci, *supra* note 6.

*B. An economic analysis of moral rights: the reputational externalities potentially benefit both individual artists and the industry*

Unlike the United States, the integrity right applies to both physical and contextual modifications that are objectionable in many civil law countries.<sup>81</sup> As externalities are the main concern of economic analyses in law, an economic explanation for the integrity right would logically give artists the right to prevent alterations of their works and would promote efficiency by limiting undesirable externalities.<sup>82</sup>

Like a franchise, each of an artist's works is an advertisement for all of the others.<sup>83</sup> The artist may try to communicate with others or may wish to establish a personal reputation so that the artist's works would be more marketable.<sup>84</sup> Alteration of an artist's work after completion or prejudicial display of the work can harm all the works under the artist's name.

If granting artists a right of integrity in their artwork even after selling the works is an economically reasonable exception to property law's "general prohibition on servitudes in chattels," that must be because current owners "can seriously affect the interests of the artists who created those works or of other persons."<sup>85</sup> As each work advertises every other, the harm that a subsequent owner does to one of an artist's works decreases market demand for that artist's future work.<sup>86</sup> The decrease in the price at which artists could sell future work would diminish the artist's potential economic interests and the artist's incentive for producing new works.<sup>87</sup> Diminishing the artist's reputation by altering one of the artist's existing works also lowers the value that collectors could obtain by selling the artist's other existing works.<sup>88</sup>

Given the assumption that artists are always the best judges of what effect alterations will have on their reputation, artists can decide what changes to prevent or allow.<sup>89</sup> The integrity right would maximize the aggregate market value of artists' artworks by elevating their reputations.<sup>90</sup> Therefore, protecting the pecuniary interests of both the artist and owners of the artist's works would also allow artists to prevent alterations by owners after artists sell the artworks. If an artwork's market value depends largely on artistic "reputation" and if reputation is an accurate proxy

---

<sup>81</sup> In Italy, a musician known for his stance on the environment successfully relied on the integrity right to prevent an assignee of the copyright in his songs from selling cassettes containing those songs in conjunction with environmentally harmful detergent. Hansmann & Santilli, *supra* note 28, at 114.

<sup>82</sup> "Externality" is the consequence or side effect of one's economic activity, causing another to benefit without paying or to suffer without compensation. *Externality*, BLACK'S LAW DICTIONARY (10th ed. 2009). See also Hansmann & Santilli, *supra* note 28, at 120.

<sup>83</sup> Artists, like franchisors, commonly impose strong quality standards on individual franchisees or works to protect their interest derived from their reputation. The right of integrity may serve to support the value of works by the artists. Hansmann & Santilli, *supra* note 28, at 105.

<sup>84</sup> *Id.* at 103.

<sup>85</sup> *Id.* at 102.

<sup>86</sup> *Id.* at 105.

<sup>87</sup> Lee, *supra* note 10, at 83.

<sup>88</sup> Hansmann & Santilli, *supra* note 28, at 105. Current American laws give artists no right to permit the alterations of their own works that owners would like even after selling them. Given the assumption that artists are always the best judges of what effect alterations will have on their reputation, artists could decide what changes to prevent or allow.

<sup>89</sup> Lee, *supra* note 10, at 84.

<sup>90</sup> *Id.*

for intrinsic artistic excellence, a price set by an artist's reputation might be "fair."<sup>91</sup> It is reasonable to protect an artist's work from "market failure"<sup>92</sup> in this way.

Although VARA appears to cover only physical interferences with physical works, VARA's term "other modification" could also have the effect of preventing intentional distortion.<sup>93</sup> Fearless Girl's alteration of the Bull's message and context should be recognized as an "other modification" under the reputation externalities theory.

In *Carter v. Helmsley Spear*, the court defined "honor" as "good name or public esteem" and "reputation" as "the condition of being regarded as worthy or meritorious."<sup>94</sup> The requirement of intent to modify is also necessary while the artist's interest may be prejudiced if the act was intentional.<sup>95</sup>

Fearless Girl intentionally modify the Bull's message. Fearless Girl was created in the same material—bronze—as the Bull and installed in front of the Bull rather than other locations.<sup>96</sup> An ordinary person would see Fearless Girl and the Bull as a unified set of artworks based on their similar material and the environment where they are both installed. Fearless Girl established her powerful symbol of "fearlessness" and female empowerment by transforming the Bull into a symbol of gendered forces oppressing women in the financial industry.<sup>97</sup> Fearless Girl was commissioned to go with the Bull and "aimed for the same patina as Charging Bull."<sup>98</sup> Even though Fearless Girl does not physically "modify" the Bull, it produces negative reputational externalities to the artist and his other works when the public views the Bull as an oppressing force charging against women.<sup>99</sup>

---

<sup>91</sup> *Id.* at 85.

<sup>92</sup> *Id.*

<sup>93</sup> 17 U.S.C. § 106A(a)(3)(A). The Act provides that 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, and any intentional distortion, mutilation, or modification of that work is a violation of that right." See also *Hearing on HR 2690*, 118 (Statement of Arnold L Lehman) "[i]nterpretation of this term ['distortion'] might be so extended as to apply to the manner of installation or framing of an art work in an exhibition setting, or even the color of the wall upon which the work is placed in a museum exhibition space."

<sup>94</sup> *Carter v. Helmsley-Spear, Inc.*, 852 F. Supp. 228 (S.D.N.Y. 1994) (holding that the artists of sculptures commissioned and designed specifically for the lobby of a building were entitled to a presumption of irreparable harm because they had established a prima facie case of copyright infringement and the building owner intended to dismantle the artwork) (this decision was reversed because the work was a work made for hire and not protected by VARA).

<sup>95</sup> 17 U.S.C. § 106A(a)(3)(A) and (B), *supra* note 68.

<sup>96</sup> Erin Arvedlund, *Wall Street's 'Fearless Girl' speaks, via sculptor Kristen Visbal*, THE INQUIRER (MAY 23, 2017) [http://www.philly.com/philly/business/personal\\_finance/Fearless-Girl-Speak-Sculptor-Kristen-Visbal-to-Raise-Funds-For-Girls-Inc-of-Delaware-Speak-May-18.html](http://www.philly.com/philly/business/personal_finance/Fearless-Girl-Speak-Sculptor-Kristen-Visbal-to-Raise-Funds-For-Girls-Inc-of-Delaware-Speak-May-18.html).

<sup>97</sup> Cauterucci, *supra* note 6.

<sup>98</sup> Arvedlund, *supra* note 96.

<sup>99</sup> While VARA seems to provide moral rights protection for visual artists, the site-specific art argument is not the concern here because the court had found that site-specific art is not protected. *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 143 (1d Cir. 2006) (finding that site-specific art could be removed from a park because VARA did not apply to site-specific art at all).

*C. A socio-artistic analysis of moral rights: the freedom of artistic expression and its limits*

Another concern against moral rights in the United States is that moral rights could harm free speech because of the “aesthetic veto” power of the artist.<sup>100</sup> The right of integrity rests consistently with the doctrine of freedom of expression and this doctrine also posts limitations on those rights.<sup>101</sup>

Unlike the protection of reputation, the right of integrity protects not how others perceive the artist, but the artist’s intrinsic autonomy of expression.<sup>102</sup> Reputation is extrinsic, and the right protects the artist in the eyes of the community, specifically regarding the admiration and recognition the artist receives.<sup>103</sup> The right of integrity is more intrinsic to the person and the autonomy of individual expression.<sup>104</sup> Scholars have argued that the integrity right is centrally justified on the authorship norm<sup>105</sup>—a right “to exercise continuing control over self-expression”<sup>106</sup>—and promotes “author sovereignty and control over the process of creating and communicating intellectual works.”<sup>107</sup>

Three central freedom of expression rationales justify the right of integrity: autonomy, truth, and democracy.<sup>108</sup> Under the autonomy rationale, freedom of expression supports the artist’s choice and control over expression.<sup>109</sup> Under the truth rationale, freedom of expression allows for competition in the marketplace of ideas so that the truth will emerge.<sup>110</sup> Under the democracy rationale, freedom of expression permits the circulation of ideas which fosters an educated governing electorate composed of the artist’s audience.<sup>111</sup> With freedom of expression, the individual right of the artist is also in the public interest.<sup>112</sup>

The First Amendment of the United States Constitution has been interpreted to protect a speaker’s choice and control over expression against distortion.<sup>113</sup> A speaker

<sup>100</sup> Bird & Ponte, *supra* note 9, at 249.

<sup>101</sup> KWALL, *supra* note 17, at 53 – 67. Treiger-Bar-Am, *supra* note 16, at 155 – 158.

<sup>102</sup> Treiger-Bar-Am, *supra* note 16, at 127.

<sup>103</sup> *Id.* at 131.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 143.

<sup>106</sup> Treiger-Bar-Am, *supra* note 16, at 143.

<sup>107</sup> *Id.* at 143 – 144.

<sup>108</sup> The three freedom of expression rationales derive from the integrity rationales. Each integrity right rationale focuses on different analytic elements of author, text, and reader. There are three basic items in the artistic situation: the artist, the art the artist creates, and the audience that experiences the work. The authors’ rights rationale centers on the author. The chief concern of the marketplace rationale is lending support for the integrity of text. The cultural heritage rationale centers on the reader, arguing for the protection of artwork for the sake of the reading and viewing public’s tradition. Treiger-Bar-Am, *supra* note 16, at 145 – 146.

<sup>109</sup> *Id.* at 146.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Treiger-Bar-Am, *supra* note 16, at 146.

<sup>113</sup> *W. Va. State Bd. of Edu. v. Barnette*, 319 U.S. 624, 642 (1943) (finding unconstitutional a state regulation requiring children in public schools to salute the American flag; the individual’s right to autonomy was safeguarded against the state’s compulsion to declare a belief or what is not in one’s mind); *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that a newspaper could not be compelled by state law to print a political figure’s reply to a press critique).

has the autonomy to choose the content of his or her message; a speaker may also decide what not to say.<sup>114</sup> This principle supports the protection of the integrity right against distortion of expression, under which the artist (or the artworks) is forced to say something against the will of the artist.<sup>115</sup>

Moreover, contextual distortion potentially alters an artist's expression compelling the artist to speak.<sup>116</sup> A lack of attribution does not justify compelling a speaker's message.<sup>117</sup> Compelling the author to disavow a message forces the speech where the author has the right not to speak under the First Amendment.<sup>118</sup> The opportunity for the primary author to disavow the modification should not be considered a sufficient remedy.<sup>119</sup>

Fearless Girl alters the Bull's message of the resilience of the American economy and suggests instead a barrier or an obstacle that oppresses females in the workplace (or indeed in any place).<sup>120</sup> The Bull "no longer carries a positive, optimistic message," according to Di Modica's lawyer, but Fearless Girl has changed the bull from a symbol of resilience to something more threatening.<sup>121</sup> The implication of male chauvinism violates Di Modica's autonomy of expression on his work—the Bull—and compels Di Modica's work to say something against his will.<sup>122</sup> Therefore, Fearless Girl distorts Di Modica's expression.

While the artist's expression should be protected, the modifier's freedom of expression must be protected under the same doctrine.<sup>123</sup> Furthermore, modifications are permitted where the primary work has become a public forum.<sup>124</sup> The constitutional scrutiny of restrictions on expression in the public forum is strict.<sup>125</sup> The Bull is located in a small public park in the Financial District in New York City.<sup>126</sup> The firm that commissioned Fearless Girl could raise the public forum defense to modification. Because Fearless Girl's artistic expression occurs in a public forum, the modification would be allowed.

Therefore, Di Modica's autonomy of expression would ultimately be limited and balanced against Fearless Girl's own autonomy. In other words, the expansion of integrity right protection on objectionable contextual modification would be inherently balanced under the existing framework of freedom of expression.

---

<sup>114</sup> *Hurley v. Irish-American Gay*, 515 U.S. 557, 573, 577 (1995) (finding that the parade organizer's right of free speech was violated by the application of the Massachusetts statute to force the parade organizer to include a group in the parade who espoused beliefs with which the parade organizer did not agree).

<sup>115</sup> *Treiger-Bar-Am*, *supra* note 16, at 150.

<sup>116</sup> However, the attribution and identification need not necessarily be present for distortion to be found. *Id.* at 153.

<sup>117</sup> *Id.*

<sup>118</sup> *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 98 – 99 (1980) (Powell, J., concurring).

<sup>119</sup> *Treiger-Bar-Am*, *supra* note 16, at 154.

<sup>120</sup> *McDonald*, *supra* note 8.

<sup>121</sup> *Id.*

<sup>122</sup> *Cauterucci*, *supra* note 6.

<sup>123</sup> *Treiger-Bar-Am*, *supra* note 16, at 156.

<sup>124</sup> *Id.*

<sup>125</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

<sup>126</sup> Tom McCarthy, *Fearless Girl v Charging Bull: New York's Biggest Public Art Controversy in Years*, THE GUARDIAN (Apr. 12, 2017), <https://www.theguardian.com/us-news/2017/apr/14/fearless-girl-statue-women-new-york-bull>.

## IV. PROPOSAL

For all the reasons above, VARA should extend the integrity right to protect against objectionable contextual modification because context matters. This perspective is focused on the surrounding context of a work or message to determine the meaning of that work or message.<sup>127</sup> Context matters because the market value of an artwork depends largely on its artistic “reputation” and because the contextual distortion potentially harms the artist’s freedom of expression.<sup>128</sup> This contextual approach encourages appreciation of the aesthetic value of objects, while enhancing people’s understanding; it is this which demands distinctive protection for artworks.<sup>129</sup>

The integrity right should be extended to protection against objectionable contextual modification even with the challenges of the postmodernist deconstructions of the author’s right.<sup>130</sup> Postmodernism critiques the author as a fiction.<sup>131</sup> Postmodernism presents three challenges: (1) creativity does not exist in isolation;<sup>132</sup> (2) artists’ rights create a monopoly on presentation of meaning;<sup>133</sup> and (3) an artist’s intent does not always control the artwork’s meaning.<sup>134</sup>

Postmodernism’s destruction of authors’ rights sounds reasonable, especially in the globalized information era where meanings and contexts are impossible to be fixed because of the fluid nature of information and social relations.<sup>135</sup> However, it is exactly

<sup>127</sup> “Context” in legal theory refers to “[t]he surrounding text of a word or passage, used to determine the meaning of that word or passage,” and it also refers to “[s]etting or environment.” *Context*, BLACK’S LAW DICTIONARY (10th ed. 2009).

<sup>128</sup> Lee, *supra* note 10, at 85. Treiger-Bar-Am, *supra* note 16, at 153.

<sup>129</sup> The contextual approach has played an important role especially in the art and cultural heritage area. Art objects are “examples of a human creative ability that transcend the limitations of time and place to speak to us about the ‘human’ condition; representing the highest point of human achievement, they are regarded as testaments to the greatness of their individual creators.” On the other hand, cultural objects are valued “as the authentic works of a distinct collectivity, as integral to the harmonious life of an ahistorical community and incomprehensible outside of ‘cultural context’—the defining features of authentic artifacts.” Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CANADIAN J.L. & JURIS. 249, 257-258 (1993). Even though “context” may be interpreted relatively narrowly in the archaeological area, this Comment adopts the concept and extends it to the setting and surrounding of the message of the work.

<sup>130</sup> This theory can be traced to French philosophers Michel Foucault’s “What is an Author” and Roland Barthes’ “Death of the Author.” Treiger-Bar-Am, *supra* note 16, at 139.

<sup>131</sup> *Id.*

<sup>132</sup> Postmodernism argues that the creative process is inter-relational and intertextual. Every work is copied, and nothing is original so that no author should enjoy protection of expression. *Id.* at 140.

<sup>133</sup> Postmodernism also criticizes that the integrity right allows the authorship function to act as a creation of meanings in the control of an individual producer rather than readers. The meaning is created by readers and thus a proliferation of meanings is possible. Foucault questioned that the author is “the ideological figure by which one marks the manner in which we fear the proliferation of meaning.” *Id.* at 141.

<sup>134</sup> An author’s intent is rejected refusing to fix a meaning to it. The literary criticism was developed by extending the role of the text itself as the source of the work’s meaning, and then the role of the reader (or audience, viewer). Treiger-Bar-Am, *supra* note 16, at 142.

<sup>135</sup> Spanish sociologist Manuel Castells proposed that the way people create meaning in their lives through collective action are irreducible sources of social dynamics—that must be understood as both discrete and inter-related entities. “The emergence of the space of flows actually expresses the disarticulation of place-based societies and cultures from the organizations of power and production

the fragmentation and de-contextuality that blurs our perceptions to true power relations in the real world. It would be wrong to assume that the case at issue is merely a battle between the Bull and the Fearless Girl. Rather, it is, in fact, a three-way battle between Di Modica—the author of the Bull, Kristen Visbal—the creator of Fearless Girl, and State Street Global Advisors—the investment management firm behind Fearless Girl.

#### *A. Offering substantial bargaining powers to artists*

One of the original purposes of moral rights laws is to “alter the bargaining power between the authors and artists and those who use their works.”<sup>136</sup> The integrity right is further identified with “truth-in-marketing legislation”: as with trademarks, the public is entitled to be told the truth about a work’s authorship and to see the work in its intended form.<sup>137</sup> In practice, artists face a disparity of bargaining power that frequently results in a loss of valuable protections.<sup>138</sup> The main provisions of VARA that have weakened the bargaining power of artists are the work-made-for-hire exclusion and the provisions permitting artists to waive the right.<sup>139</sup> Artwork created by an employee within the scope of employment is denied VARA protection.<sup>140</sup>

Though VARA has offered protection against actual distortion, a disparity in bargaining power may still exist.<sup>141</sup> Even artists who realize the consequence of agreements lack the bargaining power to protect the rights.<sup>142</sup> Allowing waivers exacerbates the disparity of bargaining power between artists and those with whom they contract.<sup>143</sup> Artists, who typically have little bargaining strength, will often be forced to waive their moral rights.<sup>144</sup> Even when artists are not forced to waive their moral rights, they will have to choose between personal benefits that come from an

---

that continue to dominate society without submitting to its control.” MANUEL CASTELLS, *THE INFORMATIONAL CITY: INFORMATION TECHNOLOGY, ECONOMIC RESTRUCTURING, AND THE URBAN REGIONAL PROCESS* 349 (1989).

<sup>136</sup> KWALL, *supra* note 17, at 33.

<sup>137</sup> As moral rights are analyzed by marketplace norms, moral rights are identified as affording a bargaining chip to artists, who are often in a weak negotiation position. Treiger-Bar-Am, *supra* note 16, at 144.

<sup>138</sup> KWALL, *supra* note 17, at 33.

<sup>139</sup> Most European countries do not have a work-made-for-hire exclusion. Although the American approach of presuming initial ownership in the employer arguably can be justified when economic rights such as copyrights are at issue, there is no reason why an employee author must lose her personal rights to her creation. Such a result directly conflicts with the underlying theory of moral rights, which safeguards both artists’ interest in preserving the artistic integrity of their works as well as society’s interest in preserving its cultural heritage. Moreover, the work-made-for-hire exclusion can have a tremendous impact in practice, since the Copyright Office has recognized that such works-made-for-hire “may account for a number of major art works, including major commissions, installed works and works incorporated into buildings.” Roberta R. Kwall, *How Fine Art Fares Post Vara*, 1 MARQ. INTELL. PROP. L. REV. 1, 11 (1997).

<sup>140</sup> *Carter*, 852 F. Supp. 228, 321 – 322 (S.D.N.Y. 1994).

<sup>141</sup> KWALL, *supra* note 17, at 157.

<sup>142</sup> Wallace Collins, *Bankruptcy: An Extreme Remedy for Unfair Contracts*, available at <http://wallacecollins.com/9.html> (last visited Nov. 11, 2017).

<sup>143</sup> KWALL, *supra* note 17, at 157.

<sup>144</sup> James J. Mastroianni, *Work Made for Hire Exception to the Visual Artists Rights Act of 1990 (Vara): Carter v. Helmsley-Spear, Inc.*, 4 JEFFREY S. MOORAD SPORTS L.J. 417, 452 (1997).

employee relationship, and protection of their works under VARA.<sup>145</sup> Offering protection against objectionable contextual modification could provide more substantial bargaining power to the artist.

Here, although this Comment argues moral rights protection mainly for Di Modica—the author of the Bull, Fearless Girl could theoretically also have the same rights at the same standard to conduct an equal dialogue.<sup>146</sup> However, Visbal’s Fearless Girl statue was commissioned by the investment management firm State Street.<sup>147</sup>

Lacking extensive information about the contract between Visbal and State Street, we cannot say anything definitive. Fearless Girl is probably not protected by moral rights under VARA because Visbal’s Fearless Girl statue probably is a work-made-for-hire.<sup>148</sup> Since Visbal has been put on the front line of the controversy, it would be unfair if Visbal cannot defend the meaning and symbolism of Fearless Girl.

### *B. Revealing the power relation behind the scene*

Assuming Fearless Girl is a work-made-for-hire and State Street is the owner of Fearless Girl, Visbal cannot have a legal debate with Di Modica under the same legal framework without moral rights protection.<sup>149</sup> In fact, State Street “was looking for a female artist to create a sculpture of a little girl with her fists on her hips.”<sup>150</sup> Visbal was commissioned to create the statue “aim[ing] for the same patina as Charging Bull” and intentionally installed in front of the Bull.<sup>151</sup> However, State Street has hidden behind Fearless Girl since she first stirred the public art controversy. State Street has made this controversy a battle between two artists’ works.<sup>152</sup>

Fearless Girl is a product of the cultural and political economy in a sense that she is selling a message of women’s empowerment to stand up against powerful capitalism

---

<sup>145</sup> *Id.*

<sup>146</sup> On May 29, 2017, artist Alex Gardega put his work “Pissing Pug” at Fearless Girl’s feet. He meant to make a point on behalf of sculptor Di Modica. The artist removed the statue after a few hours because “people were kicking it,” and broke the pug’s leg. The artist has since fixed the damage. No matter what the Pissing Pug was unsuccessfully trying to do, Fearless Girl could have had the same moral right to make a claim against the Pissing Pug if Fearless Girl had one. Danielle Wiener-Bronner, *‘Fearless Girl’ Joined Briefly by ‘Peeing Pug’ Statue*, CNN (May 30, 2017), <http://money.cnn.com/2017/05/30/news/fearless-girl-urinating-dog/index.html>.

<sup>147</sup> Merle, *supra* note 2.

<sup>148</sup> A work “made for hire” can also be a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, translation, supplementary work, compilation, instructional text, test, answer material for a test, or as an atlas, if the parties expressly agree in a written agreement that the work shall be a work made for hire. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 738 (1989) (holding that a sculpture was not a work made for hire under copyright law where a skilled sculptor was hired only for one specific task for a limited time and worked in his own studio with his materials; the hiring party’s right to control was not determinative).

<sup>149</sup> VARA does not provide protection to a work-made-for-hire. 17 U.S.C. § 101.

<sup>150</sup> Arvedlund, *supra* note 96.

<sup>151</sup> *Id.*

<sup>152</sup> Merle, *supra* note 2.

and the evils of corporate America.<sup>153</sup> Fearless Girl provokes debates because the production of an artwork is no longer merely a creation of the artist's artistic expression. Only when we start to become concerned with the Bull's original contextual message can we reveal this triangle of unequal power hidden in the complexities of cultural production and consumption under globalization.

Even though Fearless Girl does not physically modify the Bull, it turns the Bull into a force oppressing women and harms Di Modica's original "good name or public esteem."<sup>154</sup> Ironically, the firm behind Fearless Girl was probably one of the ones oppressing women.<sup>155</sup> In other words, the "fearlessness" that Fearless Girl symbolizes is a cultural product commissioned by a global investment firm and created to capitalize on the context of the preexisting Bull statue. What Fearless Girl sells is the propaganda of gender empowerment and equal protection in a capitalist regime.

It is reasonable that VARA should extend its protections to objectionable contextual modifications because it would offer artists substantial bargaining powers and advance potential public interests by revealing the unequal power relations.

## V. CONCLUSION

The Fearless Girl has raised the question whether moral rights under VARA should extend to protect against objectionable contextual modification. VARA should extend the protection based on two reasons: (1) the clear global trend is towards greater recognition of artists' moral rights for a broad range of protection;<sup>156</sup> and (2) the contextual protection is valuable for the artist and the public interest.

The analysis of "reputational externalities" and the freedom of artistic expression suggests a balance between an author's right of integrity and the freedom of expression by all authors.<sup>157</sup> The protection against objectionable contextual modifications reveals unequal power relations and empowers artists in the complexities of cultural production and consumption under globalization. VARA should recognize that artists' integrity rights must be restored and defended, and the protection against objectionable contextual modifications is critical to this.

---

<sup>153</sup> Sarah Cascone, *'Fearless Girl' Will Stay on Wall Street, and Not Everyone Is Happy*, ARTNET (Mar. 27, 2017), <https://news.artnet.com/exhibitions/fearless-girl-wall-street-art-installation-extended-904112>.

<sup>154</sup> *Carter*, 852 F. Supp. 228, 323 (S.D.N.Y. 1994).

<sup>155</sup> An ironic twist was that the firm behind Fearless Girl would eventually pay a \$5 million settlement to more than 300 high-level female employees who, the U.S. Department of Labor found, were paid less than their male coworkers. See Matt Stevens, *Firm Behind 'Fearless Girl' Statue Underpaid Women, U.S. Says*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/business/fearless-girl-settlement.html>.

<sup>156</sup> Bird & Ponte, *supra* note 9, at 282.

<sup>157</sup> KWALL, *supra* note 17, at 43.