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Author

Tang, Xiyin

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MORALESQUE RIGHTS

Xiyin Tang

Moral rights, in the past considered retrograde, overly romanticized, and outdated for an age of machine-made, factory-produced art, is poised for a resurgence. Amid growing concerns of mass displacement of human creators and a world awash in AI-generated slop, moral rights rhetoric—appeals to an artist’s attribution right, for example—is already on the rise. Nor should this be surprising. Moral rights, which emphasizes the rights of the individual artist rather than that other villainous figure of copyright law—the rightsholder—would appear to be the last stand of human values against the encroachment of environmental-destruction-by-data-center, art-by-algorithm, Gilded Age-era corporate wealth accumulation, rule not by democracy but by market valuation, and mass labor displacement. This Essay predicts that even without further revisions to the 1976 Copyright Act—even without a single new moral rights law on the books—what this Essay calls moral-esque rights, whether couched in trademark, unfair competition, and trade secret claims, or else through private ordering, will come to protect works of art far beyond the narrow category of “fine art” that the 1976 Act expressly recognizes.

INTRODUCTION

The title of this Essay might be baffling, because the 1976 Copyright Act (the “1976 Act”) did not contain a moral rights provision.¹ That is, the 1976 Act did not provide copyright owners the ability to protest mutilations or distortions of their work, and the ability to seek attribution or prevent misattributions thereof.² But, for as long as there have been artists, there has been an interest in moral rights—certainly in Continental Europe, but also within the United States.³ Thus the title of this Essay might also be misleading, because moral rights is at once far older than, and far younger than, the 1976 Act.

This short Essay cannot, of course, survey the entire storied trajectory of the artist’s moral right. But what it will aim to do is to provide some brief thoughts on the past, the present, and the future of moral rights law in the United States.⁴ It will argue that moral rights, occasionally in the past considered retrograde, overly romanticized, and outdated for an age of machine-made, factory-

¹ As John Merryman, an influential proponent of moral rights, noted in a law review article published contemporaneously with the passage of the 1976 Copyright Act, the drafters had considered—but declined—to include an artist’s moral right in the Act. John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1037-38 (1976). The 1909 Act expressly rejected a moral right. See H.R. REP. NO. 2222, 60th Cong. 2d Sess. 7 (1909) (“The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any *natural right* that the author has in his writings...” (emphasis added)). The drafters of the 1976 Act followed stead, by reinforcing “the principle of unlimited alienability of copyright,” preventing post-transfer prohibitions on, for example, the destruction of an artwork. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 21, 123 (1976).

² These rights are commonly referred to as the rights of integrity, paternity, and divulgation. See Merryman, *supra* note 1, at 1027-28.

³ On Continental moral rights doctrine, see 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).

⁴ Thus the reader is invited to begin, and end, the 50-year time line at whichever point she fancies. One might, for example, choose to begin the time line at 1989, the year in which the Copyright Act was revised to include a limited moral rights provision, see *infra* Part I, and end it in 2039.

produced art, is in fact poised for a resurgence.⁵ Amid growing concerns of mass displacement of human creators and a world awash in AI-generated “slop,”⁶ moral rights rhetoric—appeals to an artist’s attribution right, for example—is already on the rise.⁷ Nor should this be surprising. Moral rights, which emphasizes the rights of the individual artist rather than that other villainous figure of copyright law—the *rightsholder*⁸—would appear to be the last stand of human values against the encroachment of environmental-destruction-by-data-center, art-by-algorithm, Gilded Age-era corporate wealth accumulation, rule not by democracy but by market valuation, and mass labor displacement. This Essay predicts that even without further revisions to the 1976 Act—even without a single new moral rights law on the books—what this Essay calls moral-*esque* rights, whether couched in trademark, unfair competition, or even trade secret claims, or else given life through private ordering, will come to protect works of art far beyond the narrow category of “fine art” that the 1976 Act expressly recognizes.

This Essay begins by briefly surveying protection of moral rights in the United States leading up to the 1990 revision to the 1976 Act, which introduced a limited federal moral right for fine artists. It then argues that that revision, the Visual Artists Rights Act (“VARA”), was largely a failure, facing resistance at the courts and mass waivers through private ordering. But VARA’s shortcomings, and its many critics, did not, in fact, portend the death knell for moral rights rhetoric in the United States. As the final part of this Essay predicts, the rise of artificial intelligence and perfected machine-made art will only retrench, rather than abolish, moral rights rhetoric.

I. 50(ISH) YEARS OF MORAL RIGHTS?

⁵ See Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265 (2009) (arguing that moral rights laws fail to acknowledge the “profound artistic importance of modifying, even destroying works of art” and “question[ing] the romantic assumptions about authorship and meaning embedded in moral rights law”); Thomas J. Davis, Jr., *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 HOFSTRA L. REV. 317, 342 (1989) (arguing that the pre-1990 moral rights statutes’ “concern with the integrity of reputation of artists has created statutory scheme that subordinate the public’s interest in its cultural heritage to the interests and control of the individual artist without adequate justification or safeguard”).

⁶ See, e.g., Benjamin Hoffman, *First Came ‘Spam.’ Now, With A.I., We’ve Got ‘Slop’*, THE NEW YORK TIMES, <https://www.nytimes.com/2024/06/11/style/ai-search-slop.html> (June 11, 2024); Katrin Bennhold, *A.I. Slop Is Here*, THE NEW YORK TIMES, <https://www.nytimes.com/2025/10/09/world/artificial-intelligence-slop.html> (Oct. 9, 2025); Joshua Rothman, *A.I. Is Coming for Culture*, THE NEW YORKER, <https://www.newyorker.com/magazine/2025/09/01/ai-is-coming-for-culture> (Aug. 25, 2025) (referring to “A.I. slop”); Kyle Chayka, *The Year in Slop*, THE NEW YORKER, <https://www.newyorker.com/culture/infinite-scroll/the-year-in-ai-slop> (Dec. 17, 2025) (“‘Slop,’ the term of (not) art for content churned out with A.I., became ubiquitous in 2025”).

⁷ See *infra* Part III.

⁸ Some commentators argue that extending copyright protections will largely redound to the benefit of large rightsholders, to the detriment of individual creators, competition, and innovation generally. See Michael Carrier & Derek Slater, *Worried About AI Monopoly? Embrace Copyright’s Limits*, LAWFARE (Oct. 27, 2025, 10:28 AM), <https://www.lawfaremedia.org/article/worried-about-ai-monopoly--embrace-copyright-s-limits>; Timothy Wu, *Copyright’s Communications Policy*, 103 MICH. L. REV. 278, 279 (2004) (describing the role of copyright doctrine in “regulating competition among rival disseminators” an “setting the conditions for competition” between these entities); Jessica D. Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 11 (2010) (“American copyright law tilts, and has always tilted, the playing field in distributor’s favor”).

Years before the first and only U.S. federal moral rights law was introduced,⁹ commentators, courts, and legislators have been interested in moral rights. When we talk about “moral rights,” we are generally referring to one or more of the following: the right of integrity (which protects an artwork from mutilation, or, in certain instances, outright destruction), the right of attribution (the right to claim authorship over a work, as well as the right to prohibit the use of her name in connection with works she did not create), and the right of divulgation (the right to determine how and when to reveal a work to the public).¹⁰

While U.S. copyright law has unapologetically declared its allegiance to incentivizing artists through economic rewards, moral rights theory is, instead, grounded in personhood or natural rights arguments.¹¹ As Roberta Kwall, one of the early proponents of moral rights protections in the United States put it, “[o]n a theoretical level, moral rights focus on inspirational motivations and the intrinsic dimension of creativity; attribution and integrity rights are protected because they are regarded as integral components of a work’s meaning and message as conceived by the original author.”¹² Importantly, the moral right, like other dignitarian rights, are, as other proponents of the right have emphasized, the “rights of *authors*, which is to say that only those human beings who *actually create* the work in question qualify,” rather than the “corporate entities and employers” who hire them.¹³ Thus, any expansion of copyright law into the moral rights arena does not fit comfortably within the political economy tale of copyright as a “one-way ratchet” in favor of corporate interests.¹⁴

As previously noted, the 1976 Act, like its predecessor, the 1909 Copyright Act, specifically eschewed moral rights protections.¹⁵ Nonetheless, a panoply of states had enacted laws that embodied one or more of the central tenets of an author’s moral right.¹⁶ Some of the state statutory language

⁹ Visual Rights Act of 1990, Pub.L. No. 101-650, 104 Stat. 5128 (codified as 17 U.S.C. § 106A).

¹⁰ See 3 GOLDSTEIN ON COPYRIGHT §§ 17.23-24.3 (2005) (describing the right of integrity, the right of attribution (also known as the “right of paternity”), and the right of divulgation (also known as the “right of disclosure”) as fundamental aspects of the artist’s moral rights); Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(a)*, 77 WASH. L. REV. 985, 986 (2002).

¹¹ See Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 2 (1985).

¹² Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1946, 1972 (2006).

¹³ Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 359 (2006); see also Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 10-11 (1997) (arguing that the American approach of vesting copyright ownership in employers “directly conflicts with the underlying theory of moral rights,” which seeks to safeguard the “artistic integrity of [the artist’s] work” and “society’s interest in preserving its cultural heritage”).

¹⁴ JESSICA LITMAN, DIGITAL COPYRIGHT 64 (2001); see Greg Lastowka, *Innovative Copyright*, 109 MICH. L. REV. 1011, 1025 (2011) (arguing that expansions in copyright duration and scope are most plausibly attributable to “industries that stand to benefit from broader copyright protections [succeeding] in convincing legislators to expand the power and scope of copyright”).

¹⁵ See *supra* note 1.

¹⁶ See, e.g., Cal.Civ.Code § 987 (West 2025); Conn.Gen.Stat. § 42-116t (West 2025); La.Rev.Stat. § 2154 (West 2024); Me.Rev.Stat. tit. 27, § 303 (West 2025); Mass.Gen.Laws Ann. ch. 231, § 85S (West 2025); N.J.Stat. Ann. § 24:24A-4 (West 1993); N.Y. Arts & Cult.Aff. § 14.03 (McKinney 2025); R.I.Gen.Laws § 5-62-3 (West 2025); 73 Pa.Stat. § 2101 (West 2025); N.M.Stat. Ann. § 13-4B-3 (West 2025); Nev.Rev.Stat. Ann. §§ 597.730-40 (West 2025). For overviews of the pre-1990 state moral rights legislation, see RALPH E. LERNER & JUDITH A. BRESLER, ART

proved to be notable harbingers of similar language in the federal law, such as California’s statute prohibiting the mutilation, alteration, or destruction of works of “recognized quality” that would harm an artist’s reputation.¹⁷ Several cases dating back as far as the 1930s, too, used unfair competition or breach of contract principles to prevent distortions or mutilations of works that injured an artist’s reputation.¹⁸

In perhaps the most well-known example involving a “garbled” version of Monty Python, the Second Circuit affirmed a judgment in favor of the writers based on breach of contract and the Lanham Act, but took pains to point out that such causes of action were mere stand-ins for the long-unavailable moral right available in the United States.¹⁹ To the appellate court, the “economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law” seemed irreconcilable with the “inability of artists to obtain relief for mutilation or misrepresentation of their work to the public,” and so courts ought to work some relief by other means, whether sounding in trademark or contract.²⁰ And, as the last Part of this Essay will discuss, modern-day courts are finding other means of fashioning relief that go beyond the oft-used tools of contract or Lanham Act claims.

Federal statutory redress came decades after courts took matters into their own hands—and only for some authors. Moreover, in many ways, that federal law, the Visual Artists Rights Act of 1990, was the product of a forced hand. Decades before the enactment of VARA, the United States had contemplated—but declined—joining the world’s largest copyright treaty, the Berne Convention.²¹ The delay in doing so was attributable, in large part, to our resistance to moral rights.²²

LAW 1266-73 (3rd ed. 2005); Brian T. McCartney, *“Creepings” and “Glimmers” of the Moral Rights of Artists in American Copyright Law*, 6 UCLA ENT. L. REV. 35, 55-70 (1998).

¹⁷ Cal.Civ.Code § 987(b)(2) (West 2025). *Cf.* *Canilao v. City Com. Invs., LLC.*, 613 F.Supp.3d 1236, 1253 (N.D. Cal. 2022) (describing how both VARA and the California Arts Preservation Act (“CAPA”) protect “the artist’s reputation” and “[t]he right of integrity [asserted under CAPA] appears to be equivalent, if not identical, as the right of integrity contained in the VARA”).

¹⁸ *See* *Autry v. Republic Prods.*, 213 F.2d 667, 669-70 (9th Cir. 1954) (recognizing that the “cutting,” “editing,” “emasculating,” or “doctoring” of works of art might support a claim in unfair competition or under the Lanham Act); *Granz v. Harris*, 198 F.2d 585, 587-88 (2nd Cir. 1952) (defendant breached a contractual obligation to sell records labeled “Presented by Norman Granz” by selling an abbreviated record with eight minutes of Granz’s jazz performance cut out, as editing the work made the “Presented by Norman Granz” label a false representation); *Jaeger v. American Intern. Pictures, Inc.*, 330 F.Supp. 274, 278 (S.D.N.Y. 1971) (noting that, even in the absence of a “square counterpart” to Continental moral rights in American law, an artist “may yet be able to prove a charge of unfair competition or otherwise tortious misbehavior” if the artist’s work is distributed in such a way that “severely garbles, distorts, or mutilates his work”); *Prouty v. Nat’l Broad. Co.*, 26 F.Supp. 265, 265-66 (D. Mass. 1939) (denying a motion to dismiss on an unfair competition theory where defendant broadcasted programs “of inferior artistic and commercial quality” based on plaintiff’s characters, as the portrayal of the characters could “injure the reputation of the work and of the author” and “amount to a deception upon the public”).

¹⁹ *Gilliam v. Am. Broad. Companies, Inc.*, 538 F.2d 14, 24-25 (2nd Cir. 1976).

²⁰ *Id.* at 24.

²¹ *See* Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940) (describing “[a]gitation” to revise U.S. copyright law to make the U.S. eligible for Berne membership beginning in the 1930s, including multiple failed bills in the House and Senate); Peter Decherney, *Auteurism on Trial: Moral Rights and Films on Television*, 2011 WIS. L. REV. 273, 281 (2011) (“Throughout the 1930s, Congress wavered about whether or not to join the Berne Convention”).

²² *See* Roeder, *supra* note 21 at 557-58 (observing the “violent” opposition to joining the Berne Convention during the 1930s, especially by “motion picture producers and other large exploiters of creative works,” and noting that

Thus the enactment of VARA is as much a political economy story as any other copyright tale: the motion picture and recorded music industries wanted accession to Berne, and the question was how the U.S. could protect property rights globally while holding out, as much as they could, on the dignitarian authorial rights that had long been a cornerstone of Continental copyright at home.²³ The answer, then, was to relegate moral rights to a cloistered region of artistic production—the fine arts, or, per statute, paintings, drawings, prints, sculptures, and photographs existing in numbered editions of under 200.²⁴

Most obviously, VARA drew criticism for everything it did not do. As scholars like Paul Goldstein pointed out, relegating moral rights protection to the fine arts likely fell well short of Berne standards.²⁵ Moreover, a single federal scheme for moral rights threatened to preempt the patchwork landscape of common law and state statutory protection.²⁶ Further still, VARA only included the right of integrity and right of paternity, leaving out that third pillar of moral rights protection, the right of divulgation—a fact that proved pivotal in a high-profile dispute between the artist Christopher Buchel and the Massachusetts Museum of Contemporary Art involving an unfinished sculpture.²⁷ And finally, even within VARA’s confines, artists did not, as I explain in the following Part, fare much better.

II. THE FAILURE OF VARA

In the thirty-five years following VARA’s enactment, only eighty-four issued judicial opinions adjudicated VARA claims, amounting to an average of fewer than three decisions a year.²⁸ Of those, an overwhelming majority—71.4%—dismissed the VARA claims.²⁹ The reasons for dismissals vary. Some of the dismissals were more procedural in nature, based in the expiration of the statute of limitations,³⁰ lack of jurisdiction,³¹ or failure to show that the work was created after the date of

“one of the main objections [was] the inclusion of Article 6 *bis* which, to a limited extent, incorporates the moral rights doctrine”).

²³ See Decherney, *supra* note 21 at 317 (“The studios and the [Motion Picture Association of America] decided [in the 1980s] that the international treaty might offer a new weapon in the fight against global film and video piracy, and they thought this could be achieved without adopting moral rights in the United States”).

²⁴ See 17 U.S.C. § 101 (defining works of “visual art”).

²⁵ Paul Goldstein, *Copyright on A Clean Slate*, 48 HOUS. L. REV. 691, 699 (2011); see also Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 996 (1990).

²⁶ For discussion of preemption of state law, see 3 NIMMER ON COPYRIGHT §§ 8D.06(F)(1)-(3) and Kwall, *supra* note 13 at 44. For discussion of preemption of common law, see Mary LaFrance, *When You Wish Upon Dastar*, 23 CARDOZO ARTS & ENT. L.J. 197, 230 (2005); David A. Gerber, *Copyright Reigns—Supreme: Notes on Dastar Corp. v. Twentieth Century Fox Film Corp.*, 93 TRADEMARK REP. 1029,1032 (2003).

²⁷ *Massachusetts Museum Of Contemp. Art Found., Inc. v. Buchel*, 593 F.3d 38, 62 (1st Cir. 2010) (no cause of action under VARA for showing a sculpture in its unfinished state, because VARA explicitly does not include the right of divulgation).

²⁸ For a full list of judicial opinions and their outcomes, please e-mail me at tangx@law.ucla.edu.

²⁹ See *id.*

³⁰ See *Foss v. E. States Exposition*, 149 F.4th 102 (1st Cir. 2025); *Dos Santos v. Assurant, Inc.*, 625 F.Supp.3d 121 (S.D.N.Y. 2022); *Hunter v. Squirrel Hill Assocs., L.P.*, 413 F.Supp.2d 517 (E.D. Pa. 2005).

³¹ See *Bogar v. Szeles*, No. 2:23-CV-09189-AB-SSC, 2024 WL 4406788 (C.D. Cal. May 6, 2024) (subject matter jurisdiction); *Baird v. Town of Normal*, No. 1:19-CV-1141, 2020 WL 234622 (C.D. Ill. Jan. 15, 2020) (ripeness).

VARA's enactment (in a particularly interesting case involving Jeff Koons' appropriation of an artist's erotic photographs for his *Made in Heaven* series).³²

The more concerning cases, however, were the ones that chipped away at VARA's scope, ultimately neutering the statute. In *Phillips v. Pembroke Real Estate, Inc.*, the First Circuit held that VARA did not protect site-specific works of art at all, or those works for which the location of the art is an integral part of the work.³³ The court based its holding on the so-called "public presentation exception" of VARA,³⁴ which states that "[t]he modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work" does not constitute a mutilation or distortion of the work.³⁵ In so holding, the appellate court overturned the district court's decision, which had held that the plaintiff-sculptor's work *was* protectable under VARA, but that relocation of the sculpture to a different area did not constitute a cognizable mutilation or modification.³⁶

The First Circuit's substantially broader holding thus strips moral rights protection from the very type of art that had formed the origin story for VARA's passage. That is, the removal of the famed sculptor Richard Serra's site-specific sculpture *Tilted Arc* from its location in downtown Manhattan allegedly prompted Senator Ted Kennedy to sponsor the bill that would eventually become VARA.³⁷ In denying site-specific art any form of moral rights protection at all, *Phillips* goes farther than just holding that removals of such sculptures are permissible under VARA—it permits all mutilations or modifications to the work itself.³⁸ Such precedent is even more problematic given that site-specific art has become the very exemplar of postmodern sculptural practice.³⁹

Even in the minority of cases where the artist won its VARA claim, courts somehow managed to misunderstand the very purpose and spirit of moral rights protection. *Castillo v. G&M Realty L.P.* is emblematic of the United States' seeming unwavering commitment to the economic nature of artistic rights above all else.⁴⁰ There, a group of aerosol artists sought to enjoin the destruction of their works under VARA, arguing that their art site 5Pointz constituted a work of recognized stature.⁴¹ While the district court agreed that some of the paintings at 5Pointz *had* achieved

³² *Hayden v. Koons*, No. 21-CV-10249 (TMR), 2025 WL 605009 (S.D.N.Y. Feb. 25, 2025).

³³ 459 F.3d 128, 129 (1st Cir. 2006).

³⁴ *Id.* at 143.

³⁵ 17 U.S.C. § 106A(c)(2).

³⁶ *Phillips v. Pembroke Real Est., Inc.*, 288 F. Supp. 2d 89, 100 (D. Mass. 2003).

³⁷ See Douglas C. McGill, *U.S. Bill on Artist's Rights Is Debated*, THE NEW YORK TIMES, <https://www.nytimes.com/1986/11/19/arts/us-bill-on-artist-s-rights-is-debated.html> (Nov. 19, 1986).

³⁸ Note that subsequent cases have both questioned this broad holding while simultaneously, arguably, going broader—denying copyright protection completely to artworks that contain natural elements, such as flowers. See *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 304-307 (7th Cir. 2011).

³⁹ See Rosalind E. Krauss, *Sculpture in the Expanded Field*, in THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS, at 277 (1985) (on the postmodern, site-specific art of Robert Morris, Robert Smithson, Michael Heizer, Richard Serra, Walter De Maria, Robert Irwin, Sol LeWitt, Bruce Nauman, and others as rupturing from modernist sculpture's siteless abstraction).

⁴⁰ 950 F.3d 155 (2nd Cir. 2020).

⁴¹ *Id.* at 163.

recognized stature, it declined to provide injunctive relief, holding instead that monetary damages were sufficient.⁴² But the holding misapprehends the very *point* of the right to prevent destruction, and, indeed, the point of moral rights overall—which is that some injuries, including the destruction of art, cannot be remediated with economic rewards.⁴³

Indeed, another aspect of VARA at once explains the paucity of litigation as it prefigures the ill fit between U.S. copyright’s economic model and moral rights’ dignitarian precepts. Unlike in Continental countries, where the moral right is both nonassignable and nonwaivable, VARA made moral rights nonassignable but waivable.⁴⁴ In this way, rights that are generally considered inalienable from the creator were made perfectly alienable in its U.S. iteration.⁴⁵ Unsurprisingly, following VARA’s enactment, moral rights waivers became standard fare in contracts, further neutralizing its practical impact.⁴⁶

And yet, notwithstanding VARA’s muted impact, the final Part of this Essay predicts that moral rights, far from retreating quietly into the night, is in fact due for a resurgence.

III. THE FUTURE OF MORAL-*ESQUE* RIGHTS

In the 2000s, well before the AI takeover, well before the NFT boom-and-bust cycle and the pandemic-induced art market frenzy—that is, back when the very notion of art as commerce was still a provocation—moral rights’ critics asked what future there might be for the law in a sea of factory-produced art.⁴⁷ And indeed, as discussed above, for a while it appeared that moral rights would all but languish in the United States.⁴⁸

⁴² See *id.*

⁴³ See Damich, *supra* note 25 at 971 (on how monetary remedies are “ill-suited to moral rights,” as moral rights seek to prevent “injury to honor and reputation” rather than strictly economic harms).

⁴⁴ See 17 U.S.C. § 106A(e) (“The [rights of attribution and integrity] 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.”). Cf. Netanel, *supra* note 3 at 2, 48 (describing how Continental moral rights doctrine “regards literary and artistic works as inalienable extensions of the author’s personality” and noting that “German and French authors’ rights doctrine is said to begin with the basic premise that an author’s bond with his work is inseverable, thus making moral rights nonassignable and nonwaivable”)

⁴⁵ See Dane S. Ciolino, *Moral Rights and Real Obligations: A Property-Law Framework for the Protection of Authors’ Moral Rights*, 69 TUL. L. REV. 935, 944, 947 (1995) (describing inalienability as “a corollary of the personal nature of moral rights” and noting that, while the Berne Convention does not *require* inalienability, “many countries adhering to the Berne Convention recognize inalienable moral rights”); Rigamonti, *supra* note 13 at 355 (describing the inalienability of moral rights as the “orthodox theory”); *but see* Kwall, *supra* note 11 at 12-13 (noting that inalienability is not “critical to the moral right’s existence” and describing how French courts, “which always have exhibited the utmost regard for the personal rights of creators,” have enforced contracts to allow certain limited waivers of moral rights).

⁴⁶ See Megan M. Carpenter, *Drawing a Line in the Sand: Copyright Law and New Museums*, 13 VAND. J. ENT. & TECH. L. 463, 490 (2011) (describing how museums’ seeking moral rights waivers before displaying VARA-protected works has “become the norm, not the exception”). This standard practice was at least partially foreseen at the time of VARA’s enactment. See Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 301 (2004) (“[Before passing VARA], Congress anticipated that the requirements of specific waivers might in the long run simply enhance lawyers’ and word processors’ employment opportunities”).

⁴⁷ See Adler, *supra* note 5 at 296-98.

⁴⁸ See also Paul Goldstein, *Copyright’s Commons*, 29 COLUM. J.L. & ARTS 1, 7 (2005).

It only took a technological leap that was nothing short of a revolution⁴⁹ to resurrect an interest in moral rights rhetoric. The very same art world that had been in thrall of the readymade is now returning to figuration, to the handmade, to the artist's hand and to labor-based practices.⁵⁰ Nor should this surprise us. As the art historian Hal Foster pointed out in an essay published just months before generative AI began dominating headlines, postmodern art's fetishization of the factory made object was itself a reaction to the dominance of modernist painting; decades after postmodernism's reigning run, "there is a new insistence on the aesthetic, even a return to the beautiful."⁵¹

That insistence is now, arguably, exigency. Empirical studies have found that consumers generally prefer works thought to be authored by a human rather than by a computer.⁵² Accordingly, scholars have predicted that the rise of AI-generated art will in fact place an even-greater premium on works authored by humans.⁵³ These preferences de facto cannot be disentangled from moral and ethical concerns, what Jacob Noti-Victor calls consumer "process preferences" for human-authored content.⁵⁴ Noti-Victor, in turn, proposes a web of private ordering and FTC enforcement, as well as enforcement through existing copyright, trademark, and right of publicity law, to address such consumer preferences.⁵⁵

Others wrestling with the thorny issue of regulating AI-generated works take a more authorial-focused lens. Katrina Geddes, for example, notes that LLMs can create near-perfect imitations of existing artists' works, violating both the artist's personality and economic interests.⁵⁶ Like other scholars for whom the advancement of generative AI tools seems to have resurrected interest in the attribution right, Geddes proposes "an AI-specific attribution right that would require the disclosure of copyrighted training data in model metadata."⁵⁷

Indeed, there are signs that attribution rights are already factoring in heavily in privately-negotiated deals for training. Perplexity has recently signed a string of retrieval augmented

⁴⁹ On technological leaps not merely in degree but in kind, see Xiyin Tang, *Creativity as Data and the Copyright-Privacy Interface* (working draft on file with author).

⁵⁰ See my earlier empirical findings on this point, Xiyin Tang, *Art After Warhol*, 71 UCLA L. REV. 870, 938 (2024).

⁵¹ Hal Foster, *The Anti-Aesthetic at Forty*, ARTFORUM (Sept. 2023), https://www.artforum.com/features/hal-foster-on-the-anti-aesthetic_-252932 [<https://perma.cc/X58M-N5WP>].

⁵² See, e.g., Ulrich Kirk, Martin Skov, Oliver Hulme, Mark S. Christensen & Semir Zeki, *Modulation of Aesthetic Value by Semantic Context: An fMRI Study*, 44 NEUROIMAGE 1125 (2009); Cinzia Di Dio et al., *Art Made by Artificial Intelligence: The Effect of Authorship on Aesthetic Judgments*, PSYCH. AESTHETICS CREATIVITY & ARTS, Aug. 2023, at 1; Joseph J. Avery & W. Michael Schuster, *AI Artists on the Stand: Bias Against Artificial Intelligence-Generated Works in Copyright Law*, 15 U.C. IRVINE L. REV. 393, 396 (2025).

⁵³ See Dan L. Burk, *Cheap Creativity and What It Will Do*, 57 GA. L. REV. 1669, 1682-88 (2023); Jacob Noti-Victor, *Regulating Hidden AI Authorship*, 111 VA. L. REV. 139, 164-73 (2025).

⁵⁴ Noti-Victor, *supra* note 53, at 166.

⁵⁵ See *id.* at 190-91.

⁵⁶ Kat Geddes, *The New Art Forgers*, 58 ARIZ. ST. L.J. ____ (forthcoming 2026), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5561522, at 41.

⁵⁷ *Id.* at 77-80; see also Zachary L. Catanzaro, *Beyond Incentives: Copyright in the Age of Algorithmic Production*, 13 NYU J. INTELL. PROP. & ENT. L. 1, 53-54 (2023) (arguing that, as artificial intelligence tools undercut the traditional incentives rationale of IP protections, the attribution right and other moral rights "may provide a legal framework better suited to preserving the value of human creativity itself in the age of generative AI").

generation⁵⁸ agreements with authors, which includes not just a sizable per-retrieval payment any time an author's work is reproduced in the RAG process, but also, notably, requirements to appropriately attribute the author, replete with links on where to purchase the original human-authored work.⁵⁹

Thus, whether cloaked in the language of contract or trademark, whether consumer or artist facing, whether given life through private ordering, common law, or sui generis legislative reform, such proposals all fall under what I will venture to call moral-*esque* rights. First, and most obviously, the right of attribution is a cornerstone of moral rights doctrine, alongside the right of integrity.⁶⁰ Second, they are moral-*esque* because well before the enactment of the only moral rights law on the books in the United States, courts were using trademark and contract law to vindicate authors' moral rights.⁶¹ Indeed, Congress itself had suggested that VARA, acting alongside trademark and other common law precedent, would be more than sufficient to comply with Berne requirements.⁶² Third, while proponents of, say, a sui generis attribution right, or expanded consumer protection laws to regulate truthful disclosure in AI authorship, do not explicitly call such proposals moral rights, scholars have long pointed to the kinship between moral rights and trademark laws. While most moral rights rhetoric is framed in terms of the protection of the artist rather than the consumer, the right could also be understood as a form of trademark law, protecting consumers in an art market that values authenticity above all else.⁶³ Finally, concerns about the takeover of human artistic creation with AI-generated slop are almost always justified through moral rhetoric, even if the proposed solutions diverge into other legal territory.⁶⁴

There are signs, moreover, that courts might be toying with other moral-*esque* remedies, beyond the well-trod path of trademark, its related cousin unfair competition, and breach of contract claims. Consider a recent opinion holding that a single copy of the Wu-Tang Clan album *Once Upon a Time in Shaolin* constituted a protected trade secret under the federal Defend Trade Secrets Act.⁶⁵ The acclaimed musical group had “intended for the Album to be a ‘historically unique musical

⁵⁸ See U.S. Copyright Office, *Copyright and Artificial, Part 3: Generative AI Training*, at 30-31 (2025), available at <https://www.copyright.gov/ai/> (describing how RAG reproduces copyrighted works by copying works into a retrieval database, or by retrieving works from an external source (e.g. an Internet search) after being prompted by a user).

⁵⁹ Perplexity deals TK.

⁶⁰ See *supra* note 10 and accompanying text.

⁶¹ See *supra* notes 18-20 and accompanying text.

⁶² See H.R. REP. NO. 609, 100th Cong. 2d Sess., at 38 (1988) (noting the adequacy of existing law during the passage of the Berne Convention Implementation Act of 1988); see also Damich, *supra* note 25 at 945-46; Kwall, *supra* note 13 at 3.

⁶³ See Xiyin Tang, *The Artist as Brand: Toward a Trademark Conception of Moral Rights*, 122 YALE L.J. 218 (2012) (on the renewed importance of moral rights in a speculative art market); see also 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) (on authorship as trademark in the literary context); Laura A. Heymann, *The Birth of the Authonym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377 (2005) (same).

⁶⁴ See Noti-Victor, *supra* note 53 at 190-209; Geddes, *supra* note 56 at 47-76; Rigamonti, *supra* note 13 at 381-92.

⁶⁵ *PleasrDAO v. Shkreli*, No. 24-CV-4126 (PKC) (MMH), 2025 WL 2733345, at *11 (E.D.N.Y. Sept. 25, 2025)

compilation’ and ‘a protest to what they saw as the devaluation of music in the digital era.’”⁶⁶ When the original buyer of the album, the disgraced pharmaceutical executive Martin Shkreli, revealed that he had engaged in unauthorized copying and distribution of the album, the new purchaser sued, alleging, *inter alia*, violations of the Defend Trade Secrets Act (DTSA).⁶⁷ The court held that a musical album could constitute a trade secret where there were stringent restrictions on duplication and public distribution of the album—“[i]n other words, the secret and exclusive nature of the Album is a large part of its intrinsic value.”⁶⁸

The application of trade secret law to artistic works existing in a single copy—e.g., artistic works for which the secret and exclusive nature of the work constitutes the very crux of its protectability as a secret—marks a potentially potent, and new, form of moral-*esque* law. For one, moral rights, unlike copyright law more generally, protect unique works, not copies. This is so in the bare language of VARA itself, which limits protection to either a single work *or* works existing in limited editions of 200 or under.⁶⁹ That is, the limited, exclusive nature of the work *is* the sum and substance of VARA protection. Secondly, where courts have, as the previous Part discussed, refused to apply copyright and moral rights protections to entire categories of works such as land art, moral-*esque* protections may step in to fill the gap. This is all the more so, as more and more artists such as James Turrell and Michael Heizer embark on mass-scale land art projects for which the very *crux* of the work is both experience-based and shrouded in secrecy.⁷⁰ Notably, *Shkreli* emphasized the fact that the Wu-Tang Clan album was not released to the *general public*; rather, “[t]he independent economic value of the Album comes from Plaintiff’s ability to exploit its exclusivity to create an ‘experience’ that its competitors cannot, rather than from a public commercial release or from traditional forms of music distribution.”⁷¹ Large-scale, experience-based artworks such as Turrell’s *Roden Crater*, Heizer’s *City*, and Walter de Maria’s *Lightning Field* are likewise cordoned off from the general public, and, unlike traditional museums or galleries, accept an extremely limited number of invited visitors a year.⁷² Thirdly, limiting works that qualify as a trade secret under the DTSA to

⁶⁶ *Id.* at *2.

⁶⁷ *Id.* at *1-*2.

⁶⁸ *Id.* at *9.

⁶⁹ 17 U.S.C. § 101.

⁷⁰ See Wil S. Hylton, *The Light Fantastic*, SMITHSONIAN MAGAZINE, <https://www.smithsonianmag.com/arts-culture/james-turrell-visionary-artwork-arizona-desert-180977452/> (May 2021) (describing how “only a small fraction of [James Turrell’s Roden Crater] will be visible on the surface” and visitors will enjoy a “whole ecosystem of services”); Alexa Hazel, *Roden Center*, THE POINT, <https://thepointmag.com/criticism/roden-crater/> (Dec. 19, 2021) (identifying James Turrell as an artist with “an interest in perception, place and atmosphere, not object but aesthetic experience”); William Van Meter, *I Ventured to Michael Heizer’s Remote Land Art Masterwork—And Left Transformed*, ARTNET, <https://news.artnet.com/art-world/michael-heizers-city-2564168> (Nov. 6, 2024) (on Michael Heizer’s *City*, which limits access, bans photography, and one visitor describes as “an awe-inspiring, soul-cleansing, liberating, transcendental experience” greater than the sculpture itself); Karla Lagunas, *Empires of Dirt: Michael Heizer’s City*, SOUTHWEST CONTEMPORARY, <https://southwestcontemporary.com/empires-of-dirt-michael-heizers-city/> (Sept. 5, 2025) (“Experiencing [*City*] physically is something else entirely. You don’t see it. You are inside it”).

⁷¹ *PleasantDAO*, 2025 WL 2733345, at *10.

⁷² See *City, 1970-2022*, TRIPLE AUGHT FOUNDATION, <https://www.tripleaughtfoundation.org/> (last visited Nov. 25, 2025) (“Triple Aught Foundation, the 501(c)(3) that oversees and operates Michael Heizer’s *City*, has complete

those that exist in single or limited-edition copies, and which contain express limitations on reproduction, avoids concerns that trade secret law may be stepping into the ambit of copyright law, as the latter regulates reproductions, rather than originals.⁷³

Finally, and most obviously, *Shkrelī* expands the scope of moral-*esque* protection beyond the fine arts, to encompass other types of expressive works that were left out of VARA's ambit. Almost a century ago, the cultural theorist Walter Benjamin had predicted that the advent of technological reproduction—photography, namely—would displace a work's so-called “cult value,” in which works were largely hidden from public view as an offering to the gods.⁷⁴ As Benjamin wrote:

Artistic production begins with ceremonial objects destined to serve in a cult. One may assume that what mattered was their existence, not their being on view. The elk portrayed by the man of the Stone Age on the walls of his cave was an instrument of magic. He did expose it to his fellow men, but in the main it was meant for the spirits. Today the cult value would seem to demand that the work of art remain hidden. Certain statues of gods are accessible only to the priest in the cella; certain Madonnas

discretion as to the acceptance of any visitor request. City is located on private property and only invited guests are permitted on the property. All other visitors will be denied access to the property. Invited guests must advise Triple Aught Foundation of any medical conditions. The sculpture City is a registered work, protected by federal copyright law. Triple Aught Foundation has a strict copyright enforcement policy regarding unauthorized photographing or filming of the work. No unauthorized reproductions, public display or distribution of copies of the work, in whole or in part are permitted. Anyone violating this policy will be immediately asked to leave.”); Katie White, *Why Walter De Maria's 'The Lightning Field' Remains a Striking Work of Land Art*, ARTNET (Jun. 4, 2024) (“Treks to [Walter de Maria's] The Lightning Field are often described as pilgrimages—and for good reason. The installation is, according to De Maria's wishes, meant to be experienced in isolation. Only six people are allowed to visit the work at a time and reservations are extremely limited. In his lifetime De Maria kept the work's precise location secret. Even now, the location remains obtuse.”); Lorena Muñoz-Alonso, *Got \$6,500 To Splash? Visit James Turrell's Roden Center*, ARTNET (Feb. 24, 2015) (noting that the artist James Turrell allowed only “serious patrons of the arts” who pledged at least \$5,000 each to visit his land art masterpiece).

⁷³ See Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 329 (2018) (on how copyright's protection against unauthorized reproductions is “unnecessary” for visual artists, as “the norm of authenticity, which forms the foundation of the art market . . . leads the market to value (in most cases) unique, original works, not copies”); Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 51 DUKE L.J. 1598, 1606 (1992) (on how certain types of architectural projects—*i.e.* “one-time, high-profile projects”—do not depend on copyright protection, as the value of the creator's work does not come from the ability to prevent unauthorized reproductions from being made); John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 113-14 (1993) (“Of course artists can claim a copyright in their works, as authors do, and that gives them control over reproductions. . . . But, although making and selling multiple copies of the same work is a productive way of exploiting case sculptures and “fine prints,” it is less valuable for unique works”).

⁷⁴ Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS: ESSAYS AND REFLECTIONS, available at <https://web.mit.edu/allanmc/www/benjamin.pdf> (Hannah Arendt ed., 1969) at 7. See also Stefan Bechtold & Christopher Jon Sprigman, *Intellectual Property and the Manufacture of Aura*, 36 HARV. J.L. & TECH. 291, 294-95 (2023) (discussing Benjamin's idea of “aura”—the “halo of preciousness” that marks [an art object] as authentic—and examining how “auratic experience” is produced even for works which are “promiscuously reproduced,” designed for mass consumer consumption, and disconnected from any particular original copy).

remain covered nearly all year round; certain sculptures on medieval cathedrals are invisible to the spectator on ground level.⁷⁵

AI is not just the apotheosis of Benjamin's perfectly-reproducible art—a world without originals—it is also, perhaps, art's apocalypse.⁷⁶ One might thus be tempted to say that the correct advancement on Benjamin's world without originals is, simply, a world without art. But I predict here quite the opposite, a return, instead, to cult value. With the proliferation of deepfakes, AR/VR good enough that one need never leave her couch, manic-pixie-dream-girls reminiscent of that dystopian film (a favorite of Sam Altman's), *Her*,⁷⁷ would it be so *wrong* to seek solace in ritual, in the sacred, in the spiritual—or, at least, in some private-equity-backed version thereof, through the purchasing of one-of-a-kind “experiences”⁷⁸ and \$7,000 tickets (only for serious “patrons of the arts,” naturally⁷⁹) to commune with the “total artwork so idealized by the Romantics”?⁸⁰ But why let the fine artists have all the fun, when musical acts, writers, filmmakers, and more can capitalize on the return of the cult? Moral-*esque* rights thus will pave the way for a new era of experience-based art.

CONCLUSION

Moral rights rhetoric is resurgent, today more than ever, because it poses, perhaps, the last great stand between art and its perfect commodification. As Mark Rose put it, moral rights navigates

⁷⁵ *Id.*

⁷⁶ *Id.* at 6.

⁷⁷ Julie Miller, *Tracing OpenAI CEO Sam Altman's Love for Scarlett Johansson's AI Romance Her*, VANITY FAIR, https://www.vanityfair.com/hollywood/story/chat-gpt-open-ai-scarlett-johansson-her?srsltid=AfmBOopEWFj3K8G6nJ_FcCFCZoqLR8GyVLE_dCkacrXK913XHMBqZHxx (May 21, 2024).

⁷⁸ See, e.g., *The Wizard of Oz at Sphere*, SPHERE, https://www.thesphere.com/shows/wizard-of-oz-experience?utm_source=search&utm_medium=paid&utm_campaign=WOZ2025&gad_source=1&gad_campaignid=22937126792&gbraid=0AAAApVd2ozd9nv0zRdZ8Hu1_NRBokdih&gclid=CjwKCAiA55rJBhByEiwAFkY1QC-tr-qHxCIBWUDDjYf6elCoUioqLrdkbcqr3cggeLwViNjfrbqPfhOCuJgQAvD_BwE&gclsrc=aw.ds (advertising a screening of *The Wizard of Oz* at the Las Vegas Sphere as an “immersive experience”); IRIS, <https://www.restaurantiris.no/the-expedition> (last visited Nov. 28, 2025) (describing Iris, a restaurant housed in a floating art exhibition off the coast of a remote Norwegian village, as “expedition dining”—an “experience [which is] quite literally, a journey”); Foster Kamer, *Dance Music Is Booming Again. What's Different This Time? A Lot.*, THE NEW YORK TIMES, <https://www.nytimes.com/2025/05/11/arts/music/dance-music-boom-nightlife.html> (May 14, 2025) (on the revitalized fervor for in-person D.J. sets playing dance and electronic music arranged live in response to the audience, which one nightclub co-owner described as “a collective experience on the dance floor” designed to be “purposeful and intentional”). In what may be no surprise given the multi-million dollar purchase of the album, the owners of *Once Upon a Time in Shaolin* indicated “grand but loosely articulated ambitions to make the album more available to the public, perhaps through listening parties or gallery-style exhibitions,” while “honor[ing] the Wu-Tang Clan’s wishes to protect [the album’s] value and exclusivity.” Ben Sisario, *Meet the New Owners of the Wu-Tang Clan's One-of-a-Kind Album*, THE NEW YORK TIMES, <https://www.nytimes.com/2021/10/20/arts/music/wu-tang-clan-once-upon-a-time-in-shaolin.html> (Oct. 20, 2021).

⁷⁹ See *supra* note 72.

⁸⁰ Matthieu Jacquet, *Into the light with James Turrell*, ART BASEL, <https://www.artbasel.com/stories/james-turrell-american-artist-light-numero-gagosian-le-bourget-arizona-roden?lang=en> (Jan. 30, 2025)

that “gap between creativity and commerce, between the notion that copyright is grounded in personhood and the need for a property law to regulate trade in vendible works.”⁸¹

To be sure, I have previously critiqued personhood justifications for creativity as incomplete, obscuring other important lenses through which we may understand IP rights—most notably, as a form of labor law that mediates, allocates, and should work to correct disparate bargaining power between intermediary firms and individual authors.⁸² And also to be sure, I remain skeptical (as one might have surmised from the previous Part) that art can ever be separated from its commodity value.⁸³ But, in refusing to let the gap between art and commerce close once and for all, moral rights—or moral-*esque* rights—stand for something irreplaceable. For, in that gap, there is hope.

⁸¹ Mark Rose, *Copyright and Its Metaphors*, 50 UCLA L. REV. 1, 9 (2002).

⁸² See Xiyin Tang, *Intellectual Property Law as Labor Policy*, 100 N.Y.U. L. REV. 62, 71-72, 91-93 (2025).

⁸³ See Tang, *supra* note 63 at 220-22.