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## Decontextualization of Musical Works: Should the Doctrine of Moral Rights be Extended?

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### Cover Page Footnote

I would like to thank Professor Benjamin Zipursky for his assistance and encouragement and the members of the Fordham Intellectual Property, Media & Entertainment Law Journal who contributed to the completion of this Note

## NOTES

# Decontextualization of Musical Works: Should the Doctrine of Moral Rights be Extended?

Sarah C. Anderson\*

### INTRODUCTION

The doctrine of moral rights protects the non-pecuniary interests of an artist in his or her work. The doctrine evolved from a “societal concern about individual author’s and artist’s personality and reputation investments as they are exhibited through their creative work.”<sup>1</sup> Civil law countries such as France have broad moral rights doctrines whereas the United States places emphasis on the economic concerns of artists. Thus, for a significant part of the history of the United States, the federal legislature and courts were reluctant to recognize the doctrine of moral rights.<sup>2</sup> For various reasons, the United States eventually changed to provide some moral rights for artists, particularly those who created works of visual art. Some scholars, however, suggest that moral rights should be extended to protect musicians against violations of their moral rights. This Note discusses the specific

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<sup>1</sup> Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 *IND. INT’L & COMP. L. REV.* 423, 426 (1999).

<sup>2</sup> See generally SHELDON W. HALPERN, *THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND MORAL RIGHT: CASES AND MATERIALS ON THE PROTECTION OF PERSONALITY INTERESTS*, 635–637 (2d ed. 1993).

argument that musicians should be protected from the decontextualization of their musical works.<sup>3</sup>

Decontextualization is the use of an artist's work in a context with which the artist disapproves, thereby altering the integrity of the work.<sup>4</sup> In addition to arguing for such an extension, at least one scholar, Rajan Desai,<sup>5</sup> has proposed a moral rights scheme that he argues should be implemented to protect musicians against violations of their moral rights via decontextualization. Although it may be true that musicians should be afforded greater control over their work, this Note asserts that the arguments in favor of protecting musicians against the decontextualization of their musical works via moral rights are fatally flawed.

Part I of this Note outlines the fundamentals of moral rights doctrine, focusing specifically on France as an example. Also included in Part I is a discussion of the development of limited protections of moral rights in the United States, including certain provisions of copyright law, the Lanham Act, the Berne Convention and the Visual Artists Rights Act of 1990 ("VARA").<sup>6</sup> Part I also discusses unique aspects of the music industry that are pertinent to an analysis of moral rights and music.

Part II explores the debate over the extension of moral rights to protect against decontextualization of musical works. Opinions from cases such as *Shostakovich et al. v. Twentieth Century-Fox Film Corp.*<sup>7</sup> and *Franconero v. Universal Music Corp.*<sup>8</sup> illustrate the reluctance of courts in the United States to extend the doctrine of moral rights to provide such protection. The arguments used by proponents of the extension are provided, and Desai's proposed moral rights scheme is also presented in detail in Part II.

Part III discusses the flaws in Desai's specific proposal as well as the various weaknesses in scholars' arguments for the extension

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<sup>3</sup> See Rajan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. L.J. 1 (2001).

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> 80 N.Y.S.2d 575 (1948).

<sup>8</sup> No. 02CV1963, 2003 WL 22990060 (S.D.N.Y. Dec. 19, 2003).

of moral rights. Proponents often rely on legislation such as VARA in formulating arguments for the extension of moral rights. Part III thus thoroughly examines VARA, concluding that, were the legislation to apply to musical works, it would not protect musicians from the decontextualization of their creations.

This Note rejects arguments in favor of extending the doctrine of moral rights to protect against the decontextualization of musical works. In a legal system historically disinclined to recognize the doctrine of moral rights, the adoption of such an extension seems unlikely. Until proponents of the extension suggest a workable moral rights scheme and provide more persuasive arguments, the doctrine of moral rights should not be extended to protect musicians against the decontextualization of their musical works.

It should be noted that this discussion is limited to a very specific issue. The pertinent question is whether proponents set forth valid arguments for the extension of moral rights to protect against the *decontextualization* of musical works. Thus, various issues are set aside and questions remain unanswered in order to facilitate a detailed exploration of the arguments dealing specifically with the decontextualization of musical works.

## I. MORAL RIGHTS DOCTRINE, PROTECTIONS OF ARTISTS IN THE UNITED STATES AND ASPECTS OF THE MUSIC INDUSTRY

### A. *Moral Rights Doctrine*

Moral rights doctrine seeks to protect the non-pecuniary interests of an artist in his or her work.<sup>9</sup> France is considered the leader in the field of moral rights doctrine, and the term “moral right” is a rough translation of the French term “*droits moral*.”<sup>10</sup> The doctrine of moral rights “spring[s] from a belief that an artist in the process of creation injects his spirit into the work and that

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<sup>9</sup> See Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1, 3 (1980).

<sup>10</sup> See Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 41–42 (1998).

the artist's personality, as well as the integrity of the work, should therefore be protected and preserved."<sup>11</sup> The moral right is thus attached to the artist, rather than the work, and thus "remains vested in the artist even after the object itself has been transferred."<sup>12</sup>

A highly developed moral rights doctrine generally includes five separate rights, which include the rights of attribution, integrity, disclosure, withdrawal, and resale royalties.<sup>13</sup> For the purposes of this discussion, only the rights of attribution and integrity require further treatment.

The right of attribution ensures that an artist's name will be properly associated with his or her work.<sup>14</sup> This is the least controversial of the rights protected by the doctrine,<sup>15</sup> and actually includes three separate rights: 1.) the right to be recognized as the creator of the work or to use a pseudonym or remain anonymous, 2.) the right to prevent the artist's work from being attributed to someone else and 3.) the right to prevent the artist's name "from being used on works which he did not in fact create."<sup>16</sup>

The right of integrity is "considered by virtually all scholars to be the most essential part of *droit moral*."<sup>17</sup> This right generally allows the author to prevent changes that would deform or mutilate his work, even after he has transferred the work to another owner.<sup>18</sup> An example of such mutilation would be the extensive editing of a film to the extent that the end product no longer accurately reflected the work of the creator.<sup>19</sup> In some countries, such as France, the right of integrity also allows the artist to prevent the use of his work in a context that would change the

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<sup>11</sup> Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995).

<sup>12</sup> DaSilva, *supra* note 9, at 12.

<sup>13</sup> See Liemer, *supra* note 10, at 46–47.

<sup>14</sup> See *id.* at 47.

<sup>15</sup> See DaSilva, *supra* note 9, at 28.

<sup>16</sup> *Id.* at 26.

<sup>17</sup> *Id.* at 31.

<sup>18</sup> See Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995).

<sup>19</sup> See generally Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 (2d Cir. 1976).

meaning of the work or harm the artist's reputation.<sup>20</sup> The right of integrity, however, has not traditionally been applied to protect the artist from complete destruction of his work.<sup>21</sup> Professor Susan P. Liemer has noted that "[w]hile losing the work entirely may seem the ultimate blow to the artist, the underlying idea is the artist's creative efforts and personal expressions cannot be misrepresented by something that does not exist."<sup>22</sup>

### B. *Protection of Moral Rights in the United States*

In France, "moral rights are independent from and superior to any pecuniary interest in a work of art."<sup>23</sup> In contrast, the law of the United States "seeks to protect primarily the author's pecuniary and exploitative interests."<sup>24</sup> This is the principal reason that the United States was reluctant to recognize an artist's moral rights and still does not have a broad moral rights doctrine. Before the United States became a signatory to the Berne Convention, courts refused to recognize the doctrine of moral rights.<sup>25</sup> In certain cases, however, courts would protect an artist's moral rights by applying United States copyright law as well as the Lanham Act.<sup>26</sup> After signing on to the Berne Convention, which many scholars

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<sup>20</sup> See *Soc. Le Chant de Monde v. Soc. Fox Europe et Soc. Fox Americaine Twentieth Century*, Judgment of Jan. 13, 1954, 1 Gax. Pal. 191 [1954] D.A. 16, 80 (Cour d'Appel Paris) (granting an injunction enjoining Twentieth Century Fox from further use of plaintiffs-composers' music in a film because the context of the music created an implication that the composers were disloyal to their government).

<sup>21</sup> See Liemer, *supra* note 10, at 51.

<sup>22</sup> *Id.*

<sup>23</sup> DaSilva, *supra* note 9, at 4.

<sup>24</sup> *Id.* at 3.

<sup>25</sup> See *Gilliam v. American Broadcasting Companies, Inc.*, 538 F.2d 14, 24 (2nd Cir. 1976) ("American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors."), *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 576 (1940) ("[T]he claim of this plaintiff that an artist retains in his work after it has been unconditionally sold, where such rights are related to the protection of his artistic reputation, is not supported by the decisions of our courts."), *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575, 579 (Sup. Ct. 1948), *aff'd*, 275 App. Div. 695, 87 N.Y.S.2d 430 (1st Dept. 1949) ("In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined.").

<sup>26</sup> *Gilliam*, 538 F.2d at 24–25.

argue was done only to ease international criticism, Congress amended the Copyright law to include greater moral rights protection for the visual arts. Thus, although artists in the United States are not protected by a sweeping moral rights doctrine, such as that adopted in France, they are not completely without redress in the case of a violation of their moral rights. This section discusses the development of such protections within the United States. Specifically, this section first explores moral rights protections provided in Copyright law, then Section 43(a) of the Lanham Act, the Berne Convention and finally VARA, an amendment to the Copyright law enacted after the United States became a signatory to the Berne Convention.

### 1. Copyright

United States copyright law provides some protection of an artist's moral rights. Regarding the specific issue of protecting musicians' works, copyright provides what would be categorized as a protection of the right of integrity of a musical work when it is being performed, or covered, by another artist via a compulsory mechanical license.<sup>27</sup> Under United States law, the owner of the copyright in a musical work would be protected from the deformation or mutilation, but not the decontextualization, of the work.<sup>28</sup> This limited protection is illustrated by the language used in the copyright legislation:

A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work . . . .<sup>29</sup>

This provision demonstrates the balancing of the interests of the artists in protecting the integrity of their work with the interests of other artists in using the work as their own artistic and learning

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<sup>27</sup> See Desai, *supra* note 3, at 5–6.

<sup>28</sup> See 17 U.S.C.A. § 115(a)(2) (2000).

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



tool.<sup>30</sup> In this narrow area of compulsory mechanical licenses, the copyright law “works to further the goal of developing musicians through cover music while still protecting the artist and song through moral rights.”<sup>31</sup>

## 2. Section 43(a) of the Lanham Act

Courts will sometimes apply Section 43(a) of the Lanham Act in a way which provides protection of an artist’s moral rights.<sup>32</sup> Most often, courts interpret the Lanham Act to provide for the moral right of attribution so that an artist receives proper recognition for his or her work.<sup>33</sup> The Lanham Act creates a cause of action for an artist when another person uses the artist’s work in interstate commerce, in a way which “misrepresents the nature, characteristics, qualities, or geographic origin . . .” of the work.<sup>34</sup>

Some courts have interpreted the Lanham Act as providing more than just the moral right of attribution, but also the right of integrity. For example, in *Gilliam v. American Broadcasting Companies, Inc.*,<sup>35</sup> the Court of Appeals for the Second Circuit determined that the extreme editing of a film by a broadcast company constituted a violation of the Lanham Act.<sup>36</sup> The court noted that “the edited version . . . impaired the integrity of [the] work and represented to the public as the product of appellants what was actually a mere caricature of their talents. We believe that a valid cause of action for such distortion exists . . . .”<sup>37</sup>

It should be noted, however, that an artist’s redress for violations of moral rights under the Lanham Act are limited in that they must satisfy three requirements in order to have a viable claim under Section 43(a). These requirements are: 1.) that the goods or services “in question must be involved in interstate commerce,” 2.)

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<sup>30</sup> See Desai, *supra* note 3, at 6.

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

<sup>32</sup> See Natalie C. Suhl, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203, 1218 (2002).

<sup>33</sup> *See id.*

<sup>34</sup> 15 U.S.C.A. § 1125(a)(1)(B) (2000).

<sup>35</sup> *See* 538 F.2d 14 (2d Cir. 1976).

<sup>36</sup> *See id.* at 25.

<sup>37</sup> *Id.*

that the claimant must prove that they have standing to sue under the Lanham Act, which is achieved by demonstrating “either a competitive or commercial injury, which maintains a causal link to misleading information” and 3.) that the claimant have “a genuine interest protected by the act.”<sup>38</sup> The artist’s protection is also limited by the purpose of the Lanham Act, which is to prevent consumer deception.<sup>39</sup> Due to this limited purpose, the artist is only protected “where overt mutilations occur to the extent that the character of the work is changed so as to present a false designation of origin.”<sup>40</sup> Thus, even if an artist’s work is deformed, if the public is not confused in regards to its origin, the artist would not have a claim under the Lanham Act.<sup>41</sup>

### 3. The Berne Convention

In 1988, the United States signed on to the Berne Convention.<sup>42</sup> The United States debated becoming a signatory for nearly 100 years due primarily to the Berne Convention’s inclusion of Article 6bis, which requires protection of the moral rights of attribution and integrity.<sup>43</sup> Article 6bis states:

Independent 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>44</sup>

Once the United States joined the Berne Convention, Congress passed the Berne Convention Implementation Act of 1988.<sup>45</sup> The Implementation Act stated that the United States would adhere to

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<sup>38</sup> Suhl, *supra* note 32, at 1219.

<sup>39</sup> *See id.* at 1227.

<sup>40</sup> *Id.* at 1228.

<sup>41</sup> *See id.*

<sup>42</sup> *See id.* at 1212.

<sup>43</sup> *See* H.R. Rep. 101–514, H.R. Rep. No. 514, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6915, 6917 (1990).

<sup>44</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 21886, art. 6bis, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 41 (1986).

<sup>45</sup> Pub. L. No. 100–568, 102 Stat. 2853 (1988).

the Berne Convention in the most limited sense, noting that American law already provided adequate protection for the rights included in Article 6bis of the Berne Convention.<sup>46</sup> For example, laws dealing with unfair competition, copyright, contract, defamation, and privacy were noted as sufficient protections of an artist's moral rights in their work.<sup>47</sup>

After signing on to the Berne Convention, Congress also inserted a limiting provision into the United States Copyright law, which stated:

Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.<sup>48</sup>

Some argue that the United States thus “joined the Berne Convention to ease international criticism, while bowing to domestic pressure by avoiding direct protection of Moral Rights through a recycled argument of indirect protection.”<sup>49</sup>

#### 4. The Visual Artists Rights Act of 1990

In 1990, Congress enacted the Visual Artists Rights Act (“VARA”), an amendment to United State Copyright law.<sup>50</sup> VARA creates moral rights for limited categories of work.<sup>51</sup> Musical works are excluded from the works protected by the amendment.<sup>52</sup> If an artistic work does fall within the definition of

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<sup>46</sup> *Id.*

<sup>47</sup> See Suhl, *supra* note 32, at 1213.

<sup>48</sup> 17 U.S.C.A. § 104(c).

<sup>49</sup> Suhl, *supra* note 32, at 1213.

<sup>50</sup> Pub. L. No. 101-650 (tit. VI), 104 Stat. 5089, 5128-33 (1990).

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

<sup>52</sup> *Id.* § 602. Section 101 of title 17, United States Code, is amended by inserting after the paragraph defining “widow” the following:

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

“a work of visual art,” the artist is granted the moral rights of attribution and integrity; and in the case of a work of “recognized stature,” the right to prevent destruction of the work.<sup>53</sup> VARA also states that the rights provided in the amendment may not be transferred but may be waived via a written “instrument signed by the author.”<sup>54</sup>

Under VARA’s grant of the right of attribution, the author of a work of visual art has the rights to claim authorship of the work,<sup>55</sup> prevent the use of his name on art which he did not create,<sup>56</sup> and prevent the use of his name on his work in the event that it has been distorted, mutilated, or modified in a way “which would be prejudicial to his . . . honor or reputation.”<sup>57</sup> VARA’s protection of the right of integrity grants the visual artist 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.”<sup>58</sup> The right of integrity also gives the artist the right to “prevent any destruction of a work of recognized stature.”<sup>59</sup> Recovery for the violation of such rights is limited in several ways, including when the modification is the result of the passing of

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

A work of visual art does not include—

- (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio-visual 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.

*Id.*

<sup>53</sup> *Id.* § 603 (2000).

<sup>54</sup> *Id.* (2000).

<sup>55</sup> *See* 17 USCA § 106A(a)(1)(A) (2000).

<sup>56</sup> *See id.* § 106A(a)(1)(B) (2000).

<sup>57</sup> *Id.* § 106A(a)(2) (2000).

<sup>58</sup> *Id.* § 106A(a)(3)(A) (2000). This section also states that any “intentional distortion, mutilation, or modification of that work is a violation of that right.”

<sup>59</sup> *Id.* § 106A(a)(3)(B) (2000). This section also states that any “intentional or grossly negligent destruction of that work is a violation of that right.”

time, the nature of the materials, or the conservation or public presentation of the work.<sup>60</sup> Finally, the rights protected by VARA belong only to the creator of the work of visual art, whether or not that artist is the copyright owner.<sup>61</sup>

Some states have passed statutes that provide artists with moral rights protections.<sup>62</sup> Like VARA, state statutes remain unavailable to musicians because protections are limited to the fine arts.<sup>63</sup> Musicians may try to rely on state common law and seek moral rights protection under state unfair competition laws, contract law, defamation, or privacy.<sup>64</sup> However, such laws seem unlikely to protect a musician as adequately as a sculptor would be protected by statutes, such as VARA, which explicitly recognize the rights of attribution and integrity.<sup>65</sup>

State and Federal moral rights legislation is thus very limited, especially when compared the law of *droit moral* in France. Applying moral rights doctrine only to the fine arts, or the narrower category of visual arts, “is far more limited than the French law, which applies to virtually all art forms, and which contains no restrictions based on the prominence of the artist or the work.”<sup>66</sup>

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<sup>60</sup> See *id.* § 106A(c) (2000).

<sup>61</sup> See *id.* § 106A(b) (2000).

<sup>62</sup> See Desai, *supra* note 3, at 16.

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> See *id.* Desai states:

For state unfair competition remedies, one could theoretically obtain protection if their name is misappropriated, but this is still tied to contract law, and any remedy under contract law depends on the contract. Violations under state unfair competition law does not present a claim of moral rights in and of itself. Defamation presents an option for artists, but relates to harming an author’s character, and though similar to the right of integrity, it does not cover destruction of the work itself, which results in much less extensive protection than the moral right of integrity. Lastly, an artist could attempt to seek protection under invasion of privacy, but like defamation, such an action still ties to use of the author’s name and not the work. Like defamation, such privacy claims would not provide extensive protection as a substitute for moral rights or a “quasi form of moral rights.

*Id.*

<sup>66</sup> DaSilva, *supra* note 9, at 49.

### C. *Aspects of the Music Industry*

In order to draw any conclusions as to whether moral rights doctrine in the United States should be extended to afford greater protection for musicians, particularly protection against the decontextualization of musical works, an exploration of certain unique aspects of the music industry is required. Music licensing, performance rights societies, and the presence of unequal bargaining power in negotiations for recording contracts are especially pertinent to this discussion.

United States copyright law regulates music licenses, which include “print licenses, types of mechanical licenses, types of synchronization licenses, performance licenses, and dramatic performance and adaptation rights.”<sup>67</sup> Only mechanical, synchronization, and performance licenses warrant further discussion. Mechanical licenses permit “reproduction of music in forms that use a mechanical device to play sound, such as records or compact disks.”<sup>68</sup> As mentioned previously, copyright provisions regulating compulsory mechanical licenses provide a form of moral rights protection for the right of integrity.<sup>69</sup> Synchronization (“synch”) licenses allow the “licensee to use . . . a musical work in an audiovisual work, such as a motion picture or television show.”<sup>70</sup> Finally, a performance license “allows one to perform a musical work publicly, and such a license is based on the copyright owner’s exclusive right to perform the musical work.”<sup>71</sup>

A problem arises in the area of performance licenses and public performance of a musician’s work—it is impossible for musicians to police all public performances of their work to ensure “their economic interest in the performance right.”<sup>72</sup> Performance rights societies help resolve this problem by policing public places and

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<sup>67</sup> Desai, *supra* note 3, at 4–5.

<sup>68</sup> *Id.* at 5.

<sup>69</sup> See *supra* Part I(B)(2).

<sup>70</sup> Desai, *supra* note 3, at 9.

<sup>71</sup> *Id.* at 7.

<sup>72</sup> *Id.*

ensuring that artists receive payment for the use of their work.<sup>73</sup> The owner of a music copyright, in joining a performance right society, gives the society the authority to sublicense the copyrighted work.<sup>74</sup> Scholar Rajan Desai explains, generally, the relationship between the music copyright holder, the performance rights society, and the licensees, stating:

A person or entity that desires to obtain a performance license from a performing rights society can pay an annual fee for a blanket license that allows the licensee to perform one or more titles in the society's music catalog. A per program license is also available to television stations seeking a license from a performing rights society. After receiving payment, a performing rights society distributes royalties to the music writer and publisher.

. . . .

Performing rights groups like ASCAP monitor the use of songs in their catalog and have authorization from members to bring suit against infringers.<sup>75</sup>

It is thus generally considered in the artist's best interest to join a performance rights society, and many record labels require artists to do so.<sup>76</sup>

The final important aspect of the music industry for this discussion is the process of negotiating recording contracts and the inequality of bargaining power inherent in the industry. Musicians, particularly new artists, often find that they retain little control over their work once they have signed a contract.<sup>77</sup> Popular music contracts traditionally transfer to the publisher all

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<sup>73</sup> See *id.* (noting that "performance rights societies include the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc. formerly known as the Society of European Stage Authors and Composers. These groups license use of musical works, police their use, and distribute royalties based on use of these works.").

<sup>74</sup> *Id.* at 9.

<sup>75</sup> *Id.*

<sup>76</sup> See *id.* at 7-9.

<sup>77</sup> *Id.* at 19.

rights in copyright.<sup>78</sup> Also, if a record company merges with or is sold to another company, the contract with the original company can be assigned to the new company.<sup>79</sup> This means that “musicians may find themselves in contracts with new record companies that may not treat their music properly.”<sup>80</sup> A musician’s interest in how his or her music is used is thus often ignored, especially when the musician is a new artist because “only the most well-known artists are able to procure by contract those rights which the law has not yet seen fit to protect.”<sup>81</sup>

## II. DEBATING THE EXTENSION OF MORAL RIGHTS TO PROTECT AGAINST DECONTEXTUALIZATION OF MUSICAL WORKS

Many scholars argue that the United States should adopt a more comprehensive moral rights scheme,<sup>82</sup> such as the *droit moral* in France, and that moral rights protections for musicians are especially lacking.<sup>83</sup> The narrower issue, for the purposes of this discussion, is whether moral rights protection should be extended to musical works in such a manner as would forbid use by a non-composer, in certain contexts, with which the original composer does not agree. Put differently, should the United States extend moral rights doctrine to protect a musician from the decontextualization of his or her work?

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<sup>78</sup> *Id.* at 18.

<sup>79</sup> *Id.* at 19.

<sup>80</sup> *Id.*

<sup>81</sup> DaSilva, *supra* note 9, at 56; *see also* Desai, *supra* note 3, at 20–21 (noting that “newer artists tend to sign contracts that allow record companies to license [synch] rights without their consent, whereas established artists can negotiate a requirement for their consent in synch licenses.”).

<sup>82</sup> *See, eg.*, Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985); Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988); Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795 (2001); Roberta Rosenthal Kwall, “*Autho-Stories: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*,” 75 S. CAL. L. REV. 1 (2001).

<sup>83</sup> *See, eg.*, Desai, *supra* note 3; Patrick G. Zabatta, *Moral Rights and Musical Works: Are Composers Getting Berned?*, 43 SYRACUSE L. REV. 1095 (1992).



Part A of this section explores the reluctance of legislatures and court to expand the doctrine of moral rights. Part B introduces the arguments in favor of extending moral rights to protect against the decontextualization of musical works. Finally, Part C sets forth scholar Rajan Desai's proposed moral rights scheme.

*A. Shostakovich and Franconero: Exploring the Reluctance to Expand Moral Rights Doctrine*

Legislatures and courts in the United States refuse to extend moral rights doctrine to grant musicians a moral rights claim. Scholars such as DaSilva argue that *droit moral*, as it exists in France, may not be adopted in the United States “without a complete overhaul of our copyright law and its implicit conception of the relationship between artists and society.”<sup>84</sup> In addition, DaSilva argues that “[w]e may find, too, that the moral rights doctrine is not worth the ideological transformation which it might require.”<sup>85</sup> Courts that have dealt with the issue of decontextualization in the United States apparently agree with such arguments.

The case that best illustrates the position of American courts on this issue is *Shostakovich v. Twentieth Century-Fox Film Corp.*<sup>86</sup> In that case, the New York Supreme Court for New York County dismissed a claim by four Soviet Russian composers who sought to enjoin the use of their music, which was in the public domain and thus enjoyed no copyright protection.<sup>87</sup> Twentieth Century-Fox produced a picture entitled “The Iron Curtain”, a film of 87 minutes which had an anti-Soviet theme.<sup>88</sup> The film reproduced plaintiffs' music for a total time of 45 minutes.<sup>89</sup> The composers argued that the use of their music indicated their approval of the

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<sup>84</sup> DaSilva, *supra* note 9, at 57.

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

<sup>86</sup> *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575 (Sup. Ct. 1948), *aff'd*, 275 App. Div. 695, 87 N.Y.S.2d 430 (1st Dept. 1949).

<sup>87</sup> *See id.* at 576..

<sup>88</sup> *See id.* at 576–78.

<sup>89</sup> *See id.* at 576.

themes contained therein and thus falsely implied that they were disloyal to their country.<sup>90</sup>

The court rejected these arguments, first stating that “[t]he use of the music can best be described as incidental, background matter.”<sup>91</sup> The court noted that the arguments set forth in the claim inevitably led to the doctrine of moral rights.<sup>92</sup> The application of the doctrine, said the court, presented much difficulty, especially in a case in which there was “no charge of distortion of the compositions nor any claim that they have not been faithfully reproduced.”<sup>93</sup> The court noted that the state of the law was unclear as to the norm by which the work should be tested and the proper remedy to be granted.<sup>94</sup> In considering the test that should be applied, the court asked, “Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be?”<sup>95</sup>

*Shostakovich* is an example of the attempted use of the right of integrity to remedy an injury to the artist’s reputation.<sup>96</sup> It may be that composers such as those involved in the case should have some means of protection from this sort of harm.<sup>97</sup> However, DaSilva notes that, even in France, “the broad extension of [the moral right of integrity] to achieve that purpose is of questionable legal basis, [because] scholars still question whether protection of the artist’s reputation—as opposed to protection of the work itself—is an appropriate application of [*droit moral*].”<sup>98</sup>

A more recent example of an American court refusing to extend moral rights doctrine to protect against the decontextualization of a musical work is *Franconero v. Universal Music Corp.*<sup>99</sup> Franconero was a famous singer in the 1950s and 1960s and the defendants, UMG, were free to license Franconero’s

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<sup>90</sup> See *id.* at 578.

<sup>91</sup> *Id.* at 576.

<sup>92</sup> See *id.* at 578.

<sup>93</sup> *Id.*

<sup>94</sup> See *id.* at 578–79.

<sup>95</sup> *Id.* at 579.

<sup>96</sup> DaSilva, *supra* note 9, at 3.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> 70 U.S.P.Q.2D 1398 (S.D.N.Y., Dec. 18, 2003).

music because there were no “contractual restrictions to the contrary.”<sup>100</sup> In the 1990s, UMG issued synch licenses for Franconero’s music to be used in the films “Jawbreaker” and “Postcards from America.”<sup>101</sup> Both films contained scenes of homosexuality, suicide, prostitution and rape, which Franconero found objectionable.<sup>102</sup> The objection to the use of her music in such films could very likely be attributed to the fact that, in 1974, Franconero was raped and tortured, and after these events she suffered from mental anguish, developed drug dependencies and also attempted suicide on more than one occasion.<sup>103</sup>

In *Franconero*, since the defendants had contractual rights to issue synch licenses, the plaintiff had to rely on non-contract theories such as tort law, state civil rights law, and foreign moral rights arguments.<sup>104</sup> The court noted that “[t]hese buckshot claims suffer from the common and obvious fatal flaw that UMG had the contractual right to issue the synch licenses that it issued.”<sup>105</sup> The court dismissed the moral rights claims, holding that United States law did not recognize moral rights with respect to musical performances, and the court refused to rely on principles of international law.<sup>106</sup> Also noted was the plaintiff’s concession that the songs were not altered or deformed, arguing instead that the use of the songs in the films “was enough to distort them and subject UMG to a moral rights claim.”<sup>107</sup> The court stated, “Recognition of such a claim would subject everyone who issues a synch license to potential liability under foreign law or would grant veto power over licenses to those, like [Franconero], who have transferred their rights without reservation.”<sup>108</sup> Thus, the decision left Franconero without a remedy.

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<sup>100</sup> *Id.* at \*4–5.

<sup>101</sup> *See id.* at \*2.

<sup>102</sup> *See id.* at \*2–3.

<sup>103</sup> *See id.* at \*2.

<sup>104</sup> *See id.* at \*5.

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

<sup>106</sup> *See id.* at \*6.

<sup>107</sup> *Id.* at \*7.

<sup>108</sup> *Id.*

*B. Advocating for the Extension of Moral Rights to Protect Against the Decontextualization of Musical Works*

Cases such as *Shostakovich* and *Franconero* illustrate decisions that lead to “the common contention that American law has not evolved doctrines which adequately protect the artist’s rights of personality in his or her own work.”<sup>109</sup> Proponents of the extension of moral rights doctrine to protect against decontextualization of a musical work utilize a variety of arguments and often argue that the United States should look to France as a model because French law considers decontextualization adverse to the artist’s “reputation and honor, thereby impairing her legally protected integrity interest.”<sup>110</sup> This belief is illustrated by the fact that when Shostakovich brought an identical claim in France, he succeeded and received an injunction enjoining Twentieth Century-Fox from further use of his music.<sup>111</sup> The French court found “that the production company infringed upon the artists’ rights of integrity when it injected the music into an unintended context.”<sup>112</sup>

Proponents of the extension also argue that the general theories underlying the moral right doctrine support its application to musical works. One of such theories is that art plays an important role in, and is valuable to, society. The social value of art is illustrated by various statements made by Representatives in support of the enactment of VARA.<sup>113</sup> Representative Markey, for example, stated that “[a]rtists in this country play a very important role in capturing the essence of culture and recording it for future generations. It is often through art that we are able to see truths, both beautiful and ugly.”<sup>114</sup> Recognition of the importance of

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<sup>109</sup> DaSilva, *supra* note 9, at 2.

<sup>110</sup> Francesca Garson, *Before that Artist Came Along, It was Just a Bridge: The Visual Artists Rights Act and the Removal of Site-Specific Artwork*, 11 CORNELL J.L. & PUB. POL’Y 203, 212 (2001).

<sup>111</sup> See *Soc. Le Chant de Monde v. Soc. Fox Europe et Soc. Fox Americaine Twentieth Century*, Judgment of Jan. 13, 1953(1953) 1 Gaz. Pal. 191 (1954) D.A. 16, 80 (cour d’Appel Paris).

<sup>112</sup> Garson, *supra* note 110, at 212.

<sup>113</sup> See generally H.R. Rep.

<sup>114</sup> H.R. Rep., *supra* note 43, at 6916 (citing 135 Cong. Rec. E2227 (daily ed. June 20, 1989)(statement of Representative Markey).

artwork leads to the conclusion that a moral rights doctrine is beneficial because it results “in a climate of artistic worth and honor that encourages the author in the arduous act of creation.”<sup>115</sup> Thus, the argument goes, the societal value of art requires that artists be encouraged to create, which may be achieved by developing a moral rights doctrine.<sup>116</sup>

Those who believe musicians should also enjoy moral rights in their work argue that music is also highly valued by society and should thus be protected.<sup>117</sup> Desai argues that “music can inspire and deeply affect people’s lives,” and when a “song is played and used out of context, such use desecrates the song, musician, and listeners.”<sup>118</sup> Inherent in this line of argument is the idea that there is no reason to protect only the visual arts and that musicians should also be protected by legislation such as VARA.<sup>119</sup> Proponents of this type of extension argue that, although protection of pecuniary interests may encourage musicians to create new works, providing musicians with additional moral rights protections would be more effective.<sup>120</sup> Russell J. DaSilva notes that the failure of the federal government to create such moral rights for musicians may establish “a legal notion of intellectual property which puts the rights of the copyright proprietor above the rights of the artistic creator. By ignoring moral rights, federal law creates a fundamentally ‘amoral’ copyright.”<sup>121</sup>

Finally, some argue that moral rights protections against decontextualization are necessary for musicians in particular due to certain unique aspects of the music industry, which leave musicians vulnerable to violations of their moral rights.<sup>122</sup> Musicians may often find their interests ignored once they have signed a recording contract.<sup>123</sup> With regards to decontextualization, however, the most pertinent aspects of the

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<sup>115</sup> *Id.* at 6915.

<sup>116</sup> *See* Liemer, *supra* note 10, at 3.

<sup>117</sup> *See* Desai, *supra* note 3, at 3.

<sup>118</sup> *Id.*

<sup>119</sup> *See id.* at 20.

<sup>120</sup> *See id.*

<sup>121</sup> DaSilva, *supra* note 9, at 6.

<sup>122</sup> *See generally* Desai, *supra* note 2.

<sup>123</sup> *See supra* Part I(C).

music industry are performance rights societies and their ability to issue synch licenses.<sup>124</sup>

Although performance rights societies protect musicians in that they ensure that artists will receive royalty payments for the use of their songs, it is argued that such organizations “fail to protect use of musical works outside the context of their meaning, and in providing blanket licenses, may affect the interest of musicians negatively.”<sup>125</sup> Desai notes that “any musician would be wise to join a performance rights society, but in doing so, the musician allows another entity to decide in what context the public performance of his or her song occurs.”<sup>126</sup> Thus, artists may find their music incorporated into visual works or being performed in contexts which the artist does “not feel articulate the artistic vision of their creation.”<sup>127</sup> An extension of moral rights, it is said, would alleviate such problems.

### C. Rajan Desai’s Proposed Moral Rights Scheme

Desai argues for an extension of moral rights doctrine to protect musicians against decontextualization of their musical works and proposes a moral rights scheme that could be implemented in the U.S.<sup>128</sup> The first aspect of Desai’s scheme involves the amending of the United States copyright code to require artist consent for synch licenses.<sup>129</sup> Desai notes that this right could be waived in a contract, but that the mere codification of the right would “make the artist more comfortable with contract negotiations and provide more control for the artist over his or her work.”<sup>130</sup> This prong of Desai’s scheme deals exclusively with the relationship between the artist and the record company.

The second prong of Desai’s proposed moral rights scheme addresses the issue of musicians losing control of how their music is used via performance licenses issued by performance rights

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

<sup>125</sup> Desai, *supra* note 3, at 8.

<sup>126</sup> *Id.* at 21.

<sup>127</sup> *Id.*

<sup>128</sup> *See id.* at 21–23.

<sup>129</sup> *See id.* at 21.

<sup>130</sup> *Id.*

societies.<sup>131</sup> Desai suggests that musicians be given a cause of action based on the moral right of integrity in order to control how their music is used and prevent the use of their music in a context that they find objectionable.<sup>132</sup> Desai explains that the moral rights action would rarely be used,<sup>133</sup> but that the cause of action should exist so that if an artist finds that one of his songs is being used in a way that is offensive to him, he could prevent further use of the song in that particular manner.<sup>134</sup> Under Desai's scheme, the artist would have a claim against the licensor-performance rights society as well as the licensee.<sup>135</sup> Desai notes that the proper remedy would be an injunction because "one cannot expect the licensor and licensee to sense the artistic vision of a musician and know the appropriate context for performance of a song. . ."<sup>136</sup> The initial remedy would thus be an injunction, and if the use of the song persisted, the musician could then seek damages.<sup>137</sup> The final aspect of this prong of Desai's proposed moral rights scheme is that "a waiver provision could exist to allow an artist to forego any future moral rights, and give liberty to performance rights societies and the artist."<sup>138</sup> Desai thus allows for the waiver of both of his proposed solutions.

Desai uses Bruce Springsteen's song "Born in the U.S.A." to illustrate how this proposed moral rights scheme would work in application.<sup>139</sup> The song is meant to be critical of the United States government in telling the story of a "disillusioned Vietnam War Veteran,"<sup>140</sup> but Desai states that the song, if misunderstood, could

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<sup>131</sup> *See id.* One may question why, in order to retain control over how their music is used, a musician would not simply forgo becoming a member of a performance rights society such as ASCAP or BMI. However, Desai explains that "These groups provide a valuable service of monitoring use of songs and providing economic returns. A musician would act foolishly by not enrolling in one of these groups, and likely, a record company would act foolishly if it allowed an artist on its label to not join one of these groups." *Id.*

<sup>132</sup> *See id.* at 22.

<sup>133</sup> *See id.* This is so, Desai states, ". . .because an artist cannot be expected to extensively police use of his or her musical works." *Id.*

<sup>134</sup> *See id.*

<sup>135</sup> *See id.*

<sup>136</sup> *Id.*

<sup>137</sup> *See id.*

<sup>138</sup> *Id.*

<sup>139</sup> *See generally* Desai, *supra* note 3.

<sup>140</sup> *Id.* at 22.

be used in stadiums to incite feelings of patriotism.<sup>141</sup> Under Desai's model, "[i]f Springsteen could show that his song has been used outside the context of his artistic vision for it, and the use has offended his integrity, . . . [he could] get an injunction against the particular licensor and licensee for the specific use in question."<sup>142</sup>

### III. UNWORKABLE PROPOSALS AND FLAWED ARGUMENTS: PROONENTS FAIL TO MAKE A STRONG CASE FOR EXTENSION

The argument that musicians deserve greater control over their work is compelling because granting such artists protection and control will likely encourage them to create new works. However, the proposals set forth and the arguments relied upon by proponents of moral rights protections against the decontextualization of musical works are fatally flawed. In particular, the specific flaws in Desai's proposed moral right scheme and the mistaken reliance on VARA, utilized by many proponents of the extension of moral rights, are discussed below. Unless stronger arguments are made and more workable standards suggested, moral rights should not be extended to protect musicians against the decontextualization of their work.

#### *A. Desai's Problematic Moral Rights Scheme*

Although Desai seeks a solution that would ideally result in additional control for musicians over their work, his proposal does not set forth a workable standard for the protection against decontextualization of musical works. First, Desai's scheme is far too broad and fails to address a standard that should be applied by courts if a moral rights cause of action were, in fact, created. Desai states that a court should grant an injunction if an artist can show a violation of integrity or that his "song has been used outside the context of his artistic vision for it."<sup>143</sup> Such a statement completely neglects, however, any explanation of how a court would

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<sup>141</sup> *See id.*

<sup>142</sup> *See id.* at 22–23.

<sup>143</sup> *Id.* at 22.



determine whether there had been such a violation of the artist's vision for his work. This was a fundamental objection of the American court that dismissed *Shostakovich*, asking whether the standard should be "good taste, artistic worth, political beliefs, moral concepts" or some other standard.<sup>144</sup> Interestingly, Desai never refers to *Shostakovich*.<sup>145</sup>

*Shostakovich* and *Franconero* illustrate the wide array of cases that could fall within the protection of Desai's broad moral rights scheme. In *Shostakovich*, the plaintiffs argued that the use of their music implied something false about their political beliefs, *i.e.*, that they were disloyal to their government. In *Franconero*, however, the plaintiff did not seem to argue that the use of her music created any false implications about her. Rather, Franconero simply found the use of her work in such a context "objectionable." Should a court grant an injunction simply because the artist does not agree, generally, with the use of their work in a certain context? Or should an artist be required to show that the decontextualization had the same effect as making a false statement about him, bringing his claim closer to one of defamation? If so, would the false implication be grounded on the subjective<sup>146</sup> belief of the artist? Or would the standard be whether a reasonable person would believe that the use of a musical work created the implication asserted by the artist? Such questions demonstrate that there is a huge rift in Desai's proposed scheme. Desai leaps from creating a cause of action to describing the remedy without explaining what, exactly, an artist should have to show in order to prove that his moral rights had been violated by the decontextualization of his work.

The second major flaw in Desai's proposed scheme is that he allows for the waiver, via contract, of both of the rights his scheme

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<sup>144</sup> *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575, 579 (Sup. Ct. 1948), *aff'd*, 275 App. Div. 695, 87 N.Y.S.2d 430 (1st Dept. 1949).

<sup>145</sup> In fact, Desai states that "[h]ypothetically, an artist could find their song used in a certain scene in a movie they do not want their song used in." Desai, *supra* note 3, at 21. And yet this is exactly what happened in *Shostakovich*.

<sup>146</sup> DaSilva notes, "[T]he right of integrity, in the end, is based on artistically subjective judgments which are inappropriate to judicial examination, for French courts, like American courts, are reluctant to pass judgment on literary or artistic merit." DaSilva, *supra* note 9, at 37.

creates—the right of the artist to require that he give consent before a license is issued for the use of his work, and the moral right of an artist to stop an individual from using his work in a manner which the artist finds objectionable. Before proposing his moral rights scheme, however, Desai notes that “many new musicians sign whatever agreement they get in order to ensure some recording deal.”<sup>147</sup> Desai argues that the codification of the first right and the development of a cause of action for the second would give the artist more comfort in the negotiating process. Although this may be true, it still seems unlikely that the artist seeking a contract with a recording company, given the customs of the recording industry previously mentioned, would refuse to waive the right. Thus, by providing for a waiver, Desai takes away the rights that he attempts to give the artist via the proposed moral rights scheme.

Desai appears to approve of the very liberal doctrine of *droit moral* in France, and is thus inconsistent in proposing a scheme that allows for waiver of his consent requirements and moral rights claim. After all, *droit moral*, “is deemed by statute to be ‘personal, perpetual, inalienable, and unassignable’ and at least in theory, it cannot be abandoned by the author by contract or will.”<sup>148</sup> Even VARA, which allows for the waiver of the moral rights granted to visual artists, would not allow for the type of waiver granted by Desai’s moral rights scheme. The waiver permitted by VARA “applies only to the specific person to whom the waiver is made,”<sup>149</sup> and cannot be transferred to a third party.<sup>150</sup> In addition, the written instrument by which the artist waives his moral rights “must specifically identify the work and the uses of the work to which the waiver applies”, and the waiver will “apply only to that work and those uses.”<sup>151</sup> Thus, VARA does not permit blanket waivers.

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<sup>147</sup> Desai, *supra* note 3, at 18.

<sup>148</sup> *Id.* at 4–5 (quoting Loi du 11 mars 1957 Sur La Propriété Littéraire Artistique, [1957] J.O., translated in UNESCO, Copyright Laws and Treaties of the World (1976), Article 6.

<sup>149</sup> H.R. Rep. 101–514, H.R. Rep. No. 514, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.A.N. 6915, 6928–29 (1990).

<sup>150</sup> *See id.* at 6929.

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

If VARA were extended to protect musicians, Desai's proposed process of contracting to waive moral rights would not be permitted. VARA does not provide for blanket waivers and requires an artist to waive his or her rights in a written instrument for each licensee. Desai, however, mistakenly suggests that an artist could contract with performance rights societies to give them freedom in issuing licenses. Desai also suggests that an artist who did not waive his rights could have a cause of action against the performance rights society as well as the licensee. If VARA applied to musicians, however, the artist could not sign a blanket waiver with the performance rights society, who would then transfer the waiver to the licensees. The waiver aspects of Desai's proposed scheme are thus unlikely to be adopted by the legislature or courts. More importantly, the allowance of waivers run contrary to Desai's liberal stance on moral rights in that the waivers are highly likely to be used in the music industry and therefore negate any protection that Desai attempts to create for musicians.

*B. Proponents Mistakenly Rely on VARA*

Desai and other scholars who argue for the extension of moral rights to protect against the decontextualization of musical works make a grave mistake in basing their arguments on VARA. They argue that music is just as valuable as the visual arts and also deserves protection under federal legislation. This reasoning does not support the argument that musicians should be protected against decontextualization because it is not clear that the decontextualization, or relocation, of a work of visual art would constitute a violation of an artist's rights under VARA.<sup>152</sup> This section of the discussion should not necessarily be read to support the protections and limitations set forth in VARA. It merely seeks to illustrate that proponents of extending VARA to protect musicians wrongly assume that the extension would provide for protection against decontextualization of musical works.

The legislative history of VARA, particularly the House Report of the Committee on the Judiciary, suggests that the decontextualization of an artist's work, thereby implying a false

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<sup>152</sup> See *id.* at 6928–29.

fact about the artist, would not be a violation of the amendment. The report states:

[T]he best approach to construing the term ‘honor or reputation’ . . . is to focus on the artistic or professional honor or reputation of the individual as embodied in the work that is protected. The standard used is not analogous to that of a defamation case, where the general character of the plaintiff is at issue. In a suit for a violation of the rights accorded under [VARA], any evidence with regard to the latter is irrelevant.<sup>153</sup>

This statement suggests that even if VARA protected musicians, it would not protect an artist asserting a claim such as that asserted by the plaintiffs in *Shostakovich*. The plaintiffs there would not be able to rely on the argument that the use of their music in “The Iron Curtain” implied that they were disloyal to the Soviet government. This is because the argument is very similar to a defamation claim, asserting that the falsity implied via the context of the music harmed the artists’ reputations. This type of evidence seems to be exactly what the Committee on the Judiciary classified as irrelevant.

The reasons given for limiting the scope of VARA also indicate that the statute was not intended to protect a visual artist from the decontextualization or relocation of his or her work, and therefore would not, contrary to what proponents of the extension suggest, protect musicians against decontextualization of their work. Congress limited the works of visual art covered by the amendment to originals, *i.e.*, “works created in single copies or in limited editions.”<sup>154</sup> The reasons for limiting the scope of the amendment were primarily based on the “critical factual and legal differences in the way visual arts and audiovisual works are created and disseminated.”<sup>155</sup>

The Committee on the Judiciary specifically mentioned differences such as the fact that works of visual art created in single copies or limited editions “are generally not physically

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<sup>153</sup> *Id.* at 6925.

<sup>154</sup> *Id.* at 6919.

<sup>155</sup> *Id.*

transformed to suit the purposes of different markets. Further, when an original of a work of visual art is modified or destroyed, it cannot be replaced. This is not the case when one copy of a work produced in potentially unlimited copies is altered.”<sup>156</sup> It seems undeniable that such language intends only to protect the integrity of the work itself from distortion or mutilation, rather than the artist from the harm of having his or her work used in a manner which the artist finds objectionable.

Finally, the language of the amendment itself suggests that it would not protect an artist against the decontextualization of his or her work of visual art, and thus, if extended, would not do so for musicians. Within the VARA is a list of exceptions to what will be considered a violation of the right of integrity. Most importantly, the list of exceptions states that the modification of a work that is the result of “the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification . . . unless the modification is caused by gross negligence.”<sup>157</sup> This suggests that once an individual or entity has permission to display a work of visual art, they are given liberty in choose how to do so, so long as that presentation does not include a physical modification or distortion of the work. By analogy, it seems that the decontextualization of musical would not be protected if VARA were extended. That is, once a license is granted to use a musical work, the licensee would have the freedom to choose how to present the work so long as such a presentation of the work did not substantially change or distort the music, for example the melody or lyrics. Thus, if Congress amended VARA to protect musicians, it seems the amendment would not prevent the decontextualization of a musical work. This is yet another flaw in the arguments used by proponents of such an extension.

Few courts have had to address whether the relocation of a work of visual art, or the changing of its surroundings, would be a violation of the rights established by VARA when the work itself is not damaged. It seems, however, that courts are unlikely to

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<sup>156</sup> *Id.*

<sup>157</sup> 17 USCA § 106A(c)(2).

apply VARA to works that have not suffered a physical mutilation or distortion. *Phillips v. Pembroke Real Estate, Inc.*<sup>158</sup> serves as an excellent example. In that case, a sculptor had created sculptures to be presented in a park. He sought an injunction, under VARA, preventing the owners of the park from relocating one of his sculptures.<sup>159</sup> The sculptor argued that his work was “site-specific” and that the location of the sculpture was a “constituent element of the work.”<sup>160</sup> Plaintiff argued that the relocating of sculpture would thus destroy the work. The sculptor offered an alternative argument that the park as a whole was a work of visual art and thus could not be modified. The court rejected the argument that the park would constitute a work of visual art under VARA.<sup>161</sup> The court also rejected the argument that the sculptor’s “site-specific” work was protected by VARA because the plain language of the statute excludes the right to the “placement or public presentation” of a work of visual art.<sup>162</sup> The court noted that the VARA provision excluding public presentation “has been interpreted to exclude from VARA’s protection ‘site-specific’ works, works that would be modified if they were moved.”<sup>163</sup>

Although only a limited number of courts have addressed the issue of whether VARA protects the relocation of “site-specific” work, it seems unlikely that courts will interpret the amendment to protect against this kind of decontextualization. This is yet another example of the inherent flaws in the argument that VARA should be extended to protect musicians and grant a right to prevent the

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<sup>158</sup> 288 F.Supp.2d 89 (D. Mass. 2003).

<sup>159</sup> *See id.* at 92.

<sup>160</sup> *Id.* at 95.

<sup>161</sup> *See id.* at 99.

<sup>162</sup> *See id.* at 100.

<sup>163</sup> *Id.* at 99 (citing *Board of Managers of Soho Int’l Arts Condo. v. City of New York*, 2003 WL 21403333, \*10 (S.D.N.Y. 2003) (stating that the point of VARA “is not . . . to preserve a work of visual art where it is, but rather to preserve the work as it is”). It should be noted, however, that the *Phillips* court held that, under “broader protections of state law, Plaintiff has demonstrated a likelihood of success in showing that he has the right to prevent the alteration of his site-specific sculptures that would result from moving them to another location. There is no provision in the written contract between the artist and the purchaser waiving this right.” *Id.* at 92–93. Such a holding suggests that proponents of the extension of moral rights to protect against the decontextualization of musical works might find more success in basing their arguments on state law rather than VARA.

decontextualization of musical works. The legislative history, language, and judicial interpretation of the amendment suggest that such a right does not currently exist for visual artists, and thus would not exist for musicians if the statute were extended.

#### CONCLUSION

Consideration of the development of moral rights protections in the United States reveals that the extension of moral rights doctrine seems unlikely. If it is possible to convince the legislature and courts to extend the law to protect musicians more adequately, only the strongest arguments for extension will do so. Thus far, proponents have not implemented arguments of the requisite strength for the extension of moral rights to protect against decontextualization of musical works. Moral rights doctrine is unlikely to be, and should not be, extended until workable moral rights schemes and compelling arguments are presented.