

SUBSTANTIALLY MODIFYING THE VISUAL ARTISTS RIGHTS
ACT: A COPYRIGHT PROPOSAL FOR INTERPRETING
THE ACT'S PREJUDICIAL MODIFICATION CLAUSE

Richard J. Hawkins^{*}

After years of petitioning by artists and art enthusiasts, the passage of the Visual Artists Rights Act of 1990 finally conferred upon U.S. artists certain moral rights long enjoyed by their European counterparts: the personal, non-economic rights that artists hold in their works. Specifically, the Act forbids the destruction of works that are “of recognized stature” and modifications of works if such modification would be “prejudicial to [the artist’s] honor or reputation.” The Act, judicial opinions, and academic commentaries, however, have not defined the meaning of the prejudicial modification clause. This Comment suggests that the adoption of a “substantial modification” standard, drawing from the copyright doctrine of “substantial similarity,” provides a useful framework for objectively determining prejudicial modification.

Under the proposed substantial modification standard, only quantitative or qualitative modifications that are sufficiently significant would be considered prejudicial to the artist. In conducting a substantial modification analysis, a decisionmaker would evaluate the quantitative component of a modification, including the amount, duration, and observability of the modification, as well as the qualitative component of a modification, including changes to the expression or feeling conveyed by a work. Modifications that are merely quantitative in nature would be considered presumptively non-prejudicial unless the plaintiff could show that the quantitative change alone resulted in prejudice. A plaintiff’s showing of any qualitative modification, on the other hand, would result in a rebuttable presumption in favor of prejudice. The proposed standard organizes the Act’s patchwork of protections and exceptions into a cohesive whole, provides a framework for efficient adjudication by litigants, judges, and juries, and conforms with the legislative history of the Act, the current U.S. copyright regime, and the traditional moral rights doctrine.

^{*} Comments Editor, UCLA Law Review, Volume 55. J.D., UCLA School of Law, 2008; B.A., Brigham Young University, 2004. I would like to thank Professor David R. Ginsburg for advising and mentoring me throughout the drafting process; the UCLA Law Review editors and staff for their helpful editing; and my wife, Betsey Gimbel Hawkins, for her suggestions, encouragement, and patience.

INTRODUCTION.....	1438
I. THE INCORPORATION OF EUROPEAN MORAL RIGHTS INTO U.S. LAW	1440
A. An Overview of Moral Rights	1441
B. The Berne Convention	1443
C. The Visual Artists Rights Act of 1990.....	1445
II. AMBIGUOUS MEANING OF PREJUDICIAL MODIFICATION.....	1448
III. PROPOSED RULE: AN OBJECTIVE DETERMINATION OF SUBSTANTIAL MODIFICATION	1450
A. Subjective Prejudice vs. Objective Prejudice	1451
1. Subjective Approach	1451
2. Objective Approach	1452
B. Substantiality	1455
1. Substantial Similarity Under Copyright Law	1456
2. Substantial Modification Under the Act.....	1457
IV. BENEFITS OF A SUBSTANTIAL MODIFICATION STANDARD.....	1462
A. Positive Framework.....	1463
B. Normative Framework.....	1466
C. Consistency.....	1469
1. The Act's Legislative History	1470
2. U.S. Copyright Law	1470
3. Traditional Moral Rights Doctrine	1471
V. COSTS OF THE SUBSTANTIAL MODIFICATION STANDARD.....	1473
A. Eroded Protection	1473
B. Judging Art.....	1473
C. Borderline Cases	1475
CONCLUSION	1476

INTRODUCTION

The challenge of balancing an artist's creative rights in a work against an art owner's property rights in a particular piece first emerged when the role of artist transformed from dependent medieval laborer to independent Renaissance scientist.¹ Since that time, countries around the world have struggled to define legal regimes that adequately protect both artists' and owners' interests.² In recent years, the United States has attempted to strike the proper balance by enacting the Visual Artists Rights Act of 1990³ (the Act or VARA). Through the Act, Congress formally extended to visual

1. See W.W. Kowalski, *A Comparative Law Analysis of the Retained Rights of Artists*, 38 VAND. J. TRANSNAT'L L. 1141, 1143-45 (2005).

2. See generally ELIZABETH ADENEY, *THE MORAL RIGHTS OF AUTHORS AND PERFORMERS* (2006).

3. See Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered sections of 17 U.S.C.).

artists certain moral rights: personal, non-economic rights in a work.⁴ Most significantly, the Act extended the right of integrity, designed to allow artists to prevent (or be compensated for) modification to or destruction of their works of visual art.⁵ To be actionable under the Act, destruction must be of works that are “of recognized stature,”⁶ and modifications must be “prejudicial to [the artist’s] honor or reputation.”⁷

Exactly what constitutes a work of recognized stature or a prejudicial modification, however, is unclear from the Act’s text. While significant judicial and academic attention has been devoted to understanding the “recognized stature” requirement for actionable destruction,⁸ the contours of the Act’s prejudicial modification clause have been largely unexplored in practice and overlooked academically. This Comment attempts to fill this void by suggesting a mechanism for interpreting and applying the Act’s prejudicial modification clause.

Part I summarizes the European origins of artists’ moral rights and the internationalization of these rights through the Berne Convention for the Protection of Literary and Artistic Work⁹ (Berne Convention). Part I then reviews Congress’ implementation of the Berne Convention’s moral rights provision first through reliance on existing legal doctrines, such as copyright, trademark, defamation, and the right of publicity, and later through adoption of the Act.

Part II examines problems associated with interpreting the prejudicial modification clause, as the Act does not define the term “prejudice.” The lack of a statutory definition is problematic because some courts, domestically and internationally, have interpreted prejudicial modification to constitute a subjective harm to artists, while others have interpreted it as an objective

4. See BLACK’S LAW DICTIONARY 1030 (8th ed. 2004) (“The right of an author or artist, based on natural-law principles, to guarantee the integrity of a creation despite any copyright or property-law right of its owner. Moral rights include rights of (1) attribution (also termed ‘paternity’): the right to be given credit and to claim credit for a work, and to deny credit if the work is changed; (2) integrity: the right to ensure that the work is not changed without the artist’s consent; (3) publication: the right not to reveal a work before its creator is satisfied with it; and (4) retraction: the right to renounce a work and withdraw it from sale or display. Moral rights are recognized by law in much of Europe, but very little in the United States.”).

5. 17 U.S.C. § 106A(a)(3) (2000).

6. 17 U.S.C. § 106A(a)(3)(B).

7. 17 U.S.C. § 106A(a)(3)(A).

8. See, e.g., *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999); *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004); *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995). See generally Christopher J. Robinson, Note, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 *FORDHAM L. REV.* 1935 (2000).

9. Sept. 9, 1886, *last revised* July 24, 1971, 828 U.N.T.S. 221 [hereinafter *Berne Convention*].

harm. Under a subjective standard, any modification could be interpreted as prejudicial by the artist, and an artist's mere allegation of prejudice would be sufficient to meet the Act's requirements. Under an objective standard, only some modifications are prejudicial, and an artist's allegation of prejudice must be objectively reasonable to be actionable. This ambiguity creates uncertainty with regard to how the Act should be interpreted and applied by U.S. courts.

After reviewing the Act's construction and its legislative history, Part III finds that an objective standard is the appropriate standard by which to evaluate prejudice under the Act. Moreover, Part III proposes the adoption of a substantial modification standard, drawing from the copyright doctrine of substantial similarity, as a useful framework for objectively determining prejudicial modification. Under the proposed substantial modification standard, only quantitative or qualitative modifications that are sufficiently significant would be considered prejudicial to the artist. In conducting a substantial modification analysis, a decisionmaker would evaluate the quantitative component of a modification, including the amount, duration, and observability of the modification, and the qualitative component of a modification, including changes to the expression or feeling conveyed by a work. Modifications that are merely quantitative in nature would be considered presumptively non-prejudicial, unless the plaintiff could show that the quantitative change alone resulted in prejudice. A plaintiff's showing of any qualitative modification, on the other hand, would result in a rebuttable presumption in favor of prejudice.

Part IV explores the benefits of the proposed standard. This standard organizes the Act's patchwork of protections and exceptions into a cohesive whole, provides a framework for efficient adjudication by litigants, judges, and juries, and conforms with the legislative history of the Act, the current U.S. copyright regime, and the traditional moral rights doctrine. In Part V, these benefits are weighed against the costs of implementing and applying the proposed standard. This Comment concludes that the minimal costs of implementation and application are tolerable in light of the significant benefits offered by the proposed substantial modification standard.

I. THE INCORPORATION OF EUROPEAN MORAL RIGHTS INTO U.S. LAW

Many legal systems around the world have recognized that "works of the mind have two aspects: the economic aspect, which treats the work as a good

in commerce, and the personal aspect, which treats the work as an expression of the author's personality."¹⁰ Copyright, trademark, and other related legal doctrines have developed to protect the economic component of artistic creation.¹¹ The doctrine of moral rights emerged to protect the personal component of artistic creation,¹² because with each creation the artist "projects into the world part of his personality and subjects it to the ravages of public use."¹³ Like the legal doctrines protecting artists' economic rights, moral rights serve to promote the creation of artistic works.¹⁴ The conveyance of moral rights accomplishes this aim by protecting the artist's control over the creative process, because "[i]f artists feel more secure about the treatment they as creators and their creations will receive, they are more likely to create."¹⁵

A. An Overview of Moral Rights

Moral rights can include the individual rights of attribution, integrity, disclosure, withdrawal, and resale royalties, with each right interpreted and applied differently by each country recognizing the doctrine.¹⁶ Of these rights, the two most important and widely recognized are the rights of attribution and integrity.¹⁷

The right of attribution protects an artist's right to have (or not to have) her name associated with a particular work of art.¹⁸ It also protects the artist

10. 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, 949 (1990).

11. 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).

12. See Damich, *supra* note 10, at 949.

13. Roeder, *supra* note 11, at 557.

14. See U.S. CONST. art. I, § 8, cl. 8 (giving Congress power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

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

16. See *id.* at 45–47. See generally ADENEY, *supra* note 2.

17. See Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 12 (1997); Liemer, *supra* note 15, at 46. The lesser rights include the rights of disclosure, withdrawal, and resale royalty. Under the right of disclosure, an artist determines when a work of art is complete and controls the work's disclosure to the public. See generally *id.* at 52–54. The right of withdrawal, on the other hand, protects the artist's right to withdraw a completed work from the public view. See generally *id.* at 54–55. Finally, the resale royalty right entitles an artist to collect a portion of the profits earned from the sale of the work by subsequent owners. See generally *id.* at 55–56. These rights vary significantly from country to country. See Kimberly Y.W. Holst, *A Case of Bad Credit?: The United States and the Protection of Moral Rights in Intellectual Property Law*, 3 BUFF. INTELL. PROP. L.J. 105, 115 (2006).

18. See generally Liemer, *supra* note 15, at 47–49.

from non-attribution or misattribution, a personal harm with consequences to the artist's emotional and mental well-being, professional development, and reputation.¹⁹ A common example of misattribution is a newspaper mistakenly crediting another for an actor's performance in a play.²⁰

The right of integrity enables an artist to prevent the modification and/or destruction of his work. Its prohibition on modification protects an artist's reputation, ensuring that the art "always authentically expresses his vision or concept."²¹ As a result of this assurance, the right of integrity also promotes creativity.²² An oft-cited example of a violation of the right of integrity is the Pittsburgh airport's decision to repaint a black and white mobile by Alexander Calder in the county's official green and gold colors, and to solder its moving components still.²³

In some countries, the right of integrity protects artistic works from destruction,²⁴ though traditionally the right against destruction has not been protected.²⁵ The policy reasons for protecting art from destruction do not relate to protecting the artist's reputation or promoting creativity because an "artist's creative efforts and personal expressions cannot be misrepresented by something that does not exist. . . . And it cannot affect her artistic reputation, either positively or negatively, if no one can experience it."²⁶ Some countries, however, have chosen to prohibit destruction in an attempt to protect the public interest in preserving those nations' artistic heritage.²⁷ A famous example is the destruction of French artist Bernard Buffet's *Refrigerator*, a painting on six panels of a refrigerator.²⁸ After Buffet auctioned off *Refrigerator* for charity, the new owner disfigured the art by disassembling

19. See generally *id.* at 47–48; Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95 (1997) (arguing that the personal harms of misattribution, modification, and destruction can result in harmful externalities to owners of the artist's other works and to members of the public at large).

20. See Liemer, *supra* note 15, at 48.

21. Damich, *supra* note 10, at 949. See generally Liemer, *supra* note 15, at 50–52. The right of integrity is sometimes referred to as the right of respect. See, e.g., Cotter, *supra* note 17, at 11.

22. See Liemer, *supra* note 15, at 51 ("The society that recognizes this right recognizes the value of all creative efforts and uses it to encourage more."); see also Kowalski, *supra* note 1, at 1154 ("A society benefits if its legal system promotes artistic creativity. For the common and individual good, the law must therefore create legal instruments that will stimulate art desired by society. Artists' rights are therefore justified by the good consequences of their legal recognition . . .").

23. See Hansmann & Santilli, *supra* note 19, at 100.

24. See ADENEY, *supra* note 2, at 499.

25. Liemer, *supra* note 15, at 51.

26. *Id.*

27. See generally John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989).

28. John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1023 (1976).

the refrigerator and selling a severed panel of the original within the year.²⁹ At Buffett's request, a court enjoined the sale as a violation of his moral rights.³⁰

The tradition of protecting moral rights emerged during the Renaissance and formalized in nineteenth century European case law.³¹ The formalization of Europe's moral rights protection during this period arose as an outgrowth of artistic and literary expression in Europe,³² and reflected the higher societal value that these countries place on artistic creation and cultural patrimony.³³ In contrast to Europe's development of moral rights "to a fine degree" by the beginning of the twentieth century stood the United States' "scant recognition . . . [of] the legal problems raised by artistic creativeness."³⁴ The United States generally avoided expanding artists' legal rights and, instead, relied on existing legal doctrines such as copyright to offer minimal protection for artists' creative rights.³⁵ The divergence in the European and U.S. approaches to moral rights may be due to the United States' focus on exploiting its natural wealth rather than its cultural wealth.³⁶ Others have argued that the divergence is due to basic differences in philosophical approaches to property rights.³⁷

B. The Berne Convention

The Berne Convention³⁸ was first established on September 9, 1886 with the purpose of unifying national intellectual property rights legislation

29. *Id.*

30. *Id.*

31. See generally Kowalski, *supra* note 1, at 1144–46. For a history of the development of moral rights in France and Germany, see ADENEY, *supra* note 2, at 43–68.

32. See, e.g., Roeder, *supra* note 11, at 555.

33. See Liemer, *supra* note 15, at 42.

34. Roeder, *supra* note 11, at 554.

35. See *id.*

36. See, e.g., *id.* at 557.

37. See Kowalski, *supra* note 1, at 1146–47 ("Two approaches to Lockean theory gave rise to two different legal systems: copyright and *droit d'auteur*. The first system considers the creator's connection to his creation to be a result of creative work that reflects the creator's personality and requires physical and intellectual effort. Therefore, copyright is a general category that recognizes both the property and personal rights of the creator. In the *droit d'auteur* system, the artist's personality is of foremost importance and is the essence of the relationship between the artist and his work. The relationship is not based on the end result—i.e., the work of art—but on the materialization of the artist's personality in his creation.")

38. *Supra* note 9.

around the world.³⁹ At the Rome Convention in 1928, a revision of the Berne Convention resulted in the inclusion article 6bis,⁴⁰ providing for an artist's right of attribution and integrity:

Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right 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.⁴¹

Though proponents of moral rights consistently and forcefully advocate for the revision of U.S. copyright law to facilitate the United States' accession to the Berne Convention, vocal opponents—primarily in the motion picture industry—objected.⁴² As a result of these objections, the United States did not accede to the Berne Convention until March 1, 1989.⁴³ Accession marked the country's first formal recognition of an artist's moral rights independent of his economic rights.⁴⁴

The United States' accession to the Berne Convention occurred via the Berne Convention Implementation Act, an act that did not add new moral rights provisions to U.S. law.⁴⁵ At the time of accession, legislators felt that existing federal laws, such as copyright and trademark laws, and state laws, including defamation and right to publicity, were sufficiently protective of artists' moral rights to comply with the Berne Convention.⁴⁶ Congress

39. MICHAEL A. EPSTEIN, *MODERN INTELLECTUAL PROPERTY* 4–63 (3d ed. 1995). The multilateral agreement is administered by the World Intellectual Property Organization, an agency affiliated with the United Nations. *Id.*

40. SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986*, at 102 (1987).

41. Berne Convention, *supra* note 9, at art. 6bis.

42. H.R. REP. NO. 101-514, at 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6917.

43. See Damich, *supra* note 10, at 945.

44. See *id.*

45. See Pub. L. No. 100-568, § 3(b), 102 Stat. 2853 (1988) (“The provisions of Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law—to claim authorship of the work; or to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.”).

46. Some members of the U.S. House of Representatives, at the time, felt that existing legal doctrines provided sufficient protections to artists such that the United States could comply with the Berne Convention without implementing new laws:

[T]here is a composite of laws in this country that provides the kind of protection envisioned by Article 6bis. Federal laws include 17 U.S.C. § 106, relating to derivative works, 17 U.S.C. § 115(a)(2), relating to distortions of musical works used under the compulsory license respecting sound recordings; 17 U.S.C. § 203, relating to termination of transfers and licenses, and section 43(a) of the Lanham Act, relating to false designations of origin and false descriptions. State and local laws include those relating to publicity,

defended this position by pointing to other Berne Convention member countries' "flexibility" and "nonliteral compliance" with article 6bis.⁴⁷ For years, however, advocates of moral rights disagreed with Congress' assessment of the existing legal landscape and believed that U.S. law did not adequately fulfill the Convention's obligations or the nation's duty to its artists.⁴⁸

C. The Visual Artists Rights Act of 1990

Responding to public discontent regarding the United States' minimal compliance with the Berne Convention and an increased recognition of moral rights under state laws,⁴⁹ Congress passed the Visual Artists Rights Act of 1990⁵⁰ into law on October 27, 1990.⁵¹ Through its provisions, the Act was intended to protect the "honor and reputations of visual artists" and "to protect the works of art themselves" as important treasures of the nation's artistic heritage.⁵²

The Act confers two moral rights upon the artists⁵³ of qualifying works of visual art: the right of attribution and the right of integrity. The Act's right of attribution includes three types of attribution. First, the Act gives an artist the right to claim authorship in a work that he created.⁵⁴ Furthermore, an artist may disclaim authorship in a work that he did not create.⁵⁵ Finally, an

contractual violations, fraud and misrepresentation, unfair competition, defamation, and invasion of privacy. In addition, eight states have recently enacted specific statutes protecting the rights of integrity and paternity in certain works of art. Finally, some courts have recognized the equivalent of such rights.

H.R. Rep. No. 609, 100th Cong., 2d Sess. 32-34 (1988).

47. Damich, *supra* note 10, at 945-46.

48. See *id.* at 946. These criticisms continue today. See, e.g., Holst, *supra* note 17, at 131-33 (arguing that it is questionable whether the United States is fulfilling its obligations under the Berne Convention).

49. See Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 375-76 (1995). Prior to the Act's passage into law, the rights of attribution and integrity were protected in eleven states. See Edward J. Damich, *A Comparison of State and Federal Moral Rights Protection: Are Artists Better Off After VARA?*, 15 HASTINGS COMM. & ENT. L.J. 953, 954 n.4 (1993).

50. Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered sections of 17 U.S.C.).

51. See *id.*; Damich, *supra* note 10, at 946.

52. See 136 CONG. REC. H3111, H3113 (daily ed. Jun. 5, 1990) (statement of Rep. Kastenmeier).

53. The Visual Arts Rights Act of 1990 (VARA) uses the term "authors" instead of more colloquial terms such as "artist" to integrate more fully its provisions with the rest of the Copyright Act.

54. See 17 U.S.C. § 106A(a)(1)(A) (2000).

55. 17 U.S.C. § 106A(a)(1)(B).

artist may prevent the use of his name in works that have been distorted, mutilated, or modified in a manner prejudicial to his honor or reputation.⁵⁶

The Act's right of integrity allows artists to restrain modification or destruction of their works, and to claim damages for modification or destruction that does occur. Under the Act, an individual may be prevented from (or held liable for) destroying a work of visual art if the work is of "recognized stature" and the act of destruction is "intentional or grossly negligent."⁵⁷ The term "recognized stature" was not defined in the Act, but subsequent litigation has produced a workable definition of the term. A work is considered to be of recognized stature if it is viewed as meritorious and the stature is recognized by art experts, members of the artistic community, or by society at large.⁵⁸

With regard to modification, an artist can prevent or hold liable anyone who distorts, mutilates, or otherwise modifies their work if the act was intentional and the modification is prejudicial to his or her honor or reputation.⁵⁹ The Act does not define what types of modification might be prejudicial, and the few court cases dealing with modifications under the Act have not produced a workable legal standard for determining prejudice.

The protections offered by the Act are limited to the creator of a qualifying "work of visual art," a statutorily defined subset of the "pictorial, graphic, and sculptural works" protected elsewhere in the Copyright Act.⁶⁰ Under the Act, the term "works of visual art" includes only original or limited edition⁶¹ paintings, prints, drawings, sculptures, and exhibition

56. 17 U.S.C. § 106A(a)(2).

57. 17 U.S.C. § 106A(a)(3)(B).

58. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp 303, 325 (S.D.N.Y. 1994), *rev'd*, 71 F.3d 77 (2d Cir. 1995).

59. 17 U.S.C. § 106A(a)(3)(A). This Comment considers distortions and mutilations both to be types of modifications. This conclusion is based on the Act's use of the terms "otherwise modifies" and "other modifications." *But see* Peter H. Karlen, *What's Wrong With VARA: A Critique of Federal Moral Rights*, 15 HASTINGS COMM. & ENT. L.J. 905, 919 (asking "who can draw the line between 'modification' and 'distortion' or 'mutilation'?).

60. "Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17 U.S.C. § 101.

61. To qualify under the Act, a protected work may exist in a limited edition of 200 or fewer copies if they are signed and consecutively numbered by the author. Protected sculptures may exist in editions of 200 or fewer pieces if they are consecutively numbered by the author, and bear the author's signature or other identifying mark. *Id.*

photographs.⁶² To promote the policies of the Copyright Act and to appease special interests, the Act specifically excludes many categories of works from its protection.⁶³ The Act's detailed list suggests that the drafters were meticulous in their care to offer the Act's protections to a very narrow and fixed body of artistic works.⁶⁴

Certain enumerated modifications are immune from the Act's penalties. First, modifications to reproductions, depictions, or portrayals of works of visual art do not constitute a violation of the artist's statutory rights.⁶⁵ Modifications to works made for hire are also excepted from the Act's protections.⁶⁶

Second, conservation efforts do not constitute modifications within the meaning of the Act, unless the conservation act is performed in a grossly negligent manner.⁶⁷ A preservationist, therefore, is free to restore works of visual art without fear of litigation, so long as he is not grossly negligent in doing so.

Similarly, modifications due to the public presentation of the work, such as the work's lighting and placement, do not violate the artist's rights unless the modification is caused by gross negligence.⁶⁸ This clause assuaged some critics' fears that artists could sue if they disliked the minor presentational choices made by art owners, dealers, and curators on a daily basis.⁶⁹ As

62. To qualify, a still photographic image must have been produced by the author for exhibition purposes only. *Id.*

63. The Act specifically excludes "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" as well as "any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container." *Id.*

64. To qualify for protection, the relevant work must have been created after June 1, 1990. For works created prior to enactment, the artist must not have transferred title as of the Act's effective date. 17 U.S.C. § 106A(d); Judicial Improvements Act of 1990, Pub. L. 101-650 § 610, 104 Stat. 5089, 5132. The right to bring a cause of action under the Act is personal to the author or co-authors and cannot be transferred. 17 U.S.C. § 106A(e)(1). The right, however, may be waived by an artist or co-artist if the express written waiver is signed by the author and if it specifically identifies the work and its intended uses. *Id.* The rights conferred terminate upon the death of the author or the last surviving co-author. 17 U.S.C. § 106A(d)(1).

65. 17 U.S.C. § 106A(e)(3).

66. *See id.*; 17 U.S.C. § 101 (definition of "work of visual art").

67. 17 U.S.C. § 106A(e)(2).

68. *Id.*

69. "[P]eople will raise the objection—may a museum frame a picture in a certain way or locate it in a certain way? Will this not give rise to litigation? And this question I will address to others, because we already see litigation as a highly litigious society, we know that, and even in current times artists are offended by locations of their work and by changes in their works and so forth—with sculpture and everything else." *Visual Artists Rights Act of 1987: Hearing on H.R. 3221 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 100th Cong. 41 (1988) [hereinafter *Hearing on H.R. 3221*] (Statement of Rep. Kastenmeier).

currently stated, the exemption does not cover modifications due to grossly negligent presentation, but it is unclear what may constitute gross negligence in the presentation of a work. Though the plain meaning of the statute suggests otherwise, it is possible that this provision was poorly drafted and that the legislature only meant for liability to attach to negligent acts of conservation, and not to acts of presentation.

A fourth category of modification, that which results from “the passage of time or the inherent nature of the materials,” is also exempted, regardless of the modifier’s state of mind.⁷⁰ The owners of rusted sculptures and sun-faded drawings would, therefore, be exempt under the Act, even if they intentionally allowed the damage to occur.

Finally, the Act incorporates the copyright defense of fair use.⁷¹ Under the fair use exception, unauthorized modification of a work would be permissible if it were for the purpose of criticism, comment, news reporting, teaching, research, and parody.⁷²

II. AMBIGUOUS MEANING OF PREJUDICIAL MODIFICATION

Under the Act, a modification to a work of visual art is only actionable by an artist if it “would be prejudicial to his or her honor or reputation.”⁷³ The provision’s language seems to demonstrate not only Congress’ desire to conform to the literal text of the Berne Convention, but also signifies Congress’ commitment to protecting the artist’s personal, non-economic interests.⁷⁴ The prejudicial modification provision’s broad language, however, provides little insight into which modifications might be considered prejudicial and, therefore, actionable under the Act, and those which might be considered nonprejudicial and nonactionable.⁷⁵ The terms

70. 17 U.S.C. § 106A(c)(1).

71. 17 U.S.C. § 106A(a).

72. 17 U.S.C. § 107. See generally Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79 (1996).

73. 17 U.S.C. § 106A(a)(3)(A).

74. ADENEY, *supra* note 2, at 494.

75. See *id.* at 494 (“The words have, surprisingly, not been considered ambiguous or vague by US courts.”). Debates over ambiguous terms in the Act plagued earlier versions of the law. Compare *Visual Artists Rights Act of 1987: Hearing on S. 1619 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 100th Cong. 110 (1987) [hereinafter *Hearing on S. 1619*] (statement of Henry Hopkins, Director, Frederick R. Weisman Foundation of Art) (“I feel that even the stronger language—and I understand it has been changed to be stronger—is still so open to interpretation that an artist’s life savings could easily be consumed in attorney’s fees trying to prove a point. . . . The language needs to be as tight as possible, with little room for interpretation.”), with *id.* at 62 (response of Ralph Oman, U.S. Register of Copyrights to Senator Grassley’s questions) (commenting on a previous version of VARA that did not include the term “prejudicial” and finding

“prejudicial,” “honor,” and “reputation” are defined in neither VARA itself nor in the Copyright Act generally.⁷⁶

Legislatures around the world have struggled to interpret the language of the Berne Convention, and courts have then, in turn, struggled to interpret those legislatures' implementation statutes.⁷⁷ In the United States, only one court has attempted to construe the plain meaning of the Act's prejudicial modification provision, finding that prejudice, honor, and reputation “have readily understood meanings.”⁷⁸ Relying on the definitions ascribed by *Webster's Third New International Dictionary*, the court in *Carter v. Helmsley-Spear, Inc.* defined prejudice as “injury or damage due to some judgment of another.”⁷⁹ Honor, to the court, referred to the artist's “good name or public esteem,” and reputation was “the condition of being regarded as worthy or meritorious.”⁸⁰

The plain meanings ascribed by the *Carter* court to these terms, however, would prove difficult to apply by other courts because these proffered definitions do not explain whether prejudice is a subjective injury (one merely perceived by the artist) or an objective injury (one not only perceived by the artist but one objectively reasonable as well). A finding, per the court's instruction, of injury or damage “due to some judgment of another” could be determined from the subjective perspective of the artist or from the objective perspective of a disinterested third party. Honor, referring to the artist's “good name or public esteem,” has in other countries been interpreted to implicate the artist's “personal integrity and how a person considers he or she is perceived.”⁸¹ This emphasis on the personal right of the artist and his or her self-perception suggests the appropriateness of

that the language of the bill was “sufficiently clear to allow courts to develop clear standards without an unusual amount of litigation”). In other areas of the world, such as the United Kingdom, the terms “honour” and “reputation” in moral rights legislation have “not received extensive discussion.” ADENEY, *supra* note 2, at 407.

76. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 323 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995).

77. Kowalski, *supra* note 1 at 1164–65 (“We have to make a choice between two approaches to this right: first, a restricted approach which protects only from interferences which the artist believes changes his artistic intent and is thus derogatory to him as an artist and therefore forbidden by law; or second, an expansive approach which aims to prevent any interference, protects the artist's rights, and benefits society.”).

78. *Carter*, 861 F. Supp. at 323.

79. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabr., 1971) (1788)).

80. *Id.*

81. ADENEY, *supra* note 2, at 584 (quoting Austl. Attorney Gen. Dep't, Proposed Moral Rights Legislation for Copyright Creators 45 (Discussion Paper, 1994)).

a subjective inquiry into whether a modification is prejudicial.⁸² Examination of the effect of a modification on an artist's reputation or "the condition of being regarded as worthy or meritorious," on the other hand, leads to the opposite conclusion. Reputation suggests an objective determination of prejudice "taking into account third-party perceptions of the author."⁸³

Thus, though the *Carter* court's proposed plain meaning definitions of prejudice, honor, and reputation appear to be commonly understood, their meanings seem to conflict in application, with both subjective and objective determinations of harm being viable interpretations. Because the text of the Act suggests divergent standards by which harm to the artist can be evaluated, the Act is inherently ambiguous.⁸⁴

III. PROPOSED RULE: AN OBJECTIVE DETERMINATION OF SUBSTANTIAL MODIFICATION

Given these possible definitions of prejudice and their divergent meanings, it is necessary to look beyond the plain meaning of the Act and to determine whether Congress intended for prejudice from modification to be analyzed under a subjective or an objective standard.⁸⁵ Furthermore, if Congress intended the inquiry to be an objective analysis, the proper application of the Act would require a framework whereby objective determinations of prejudice could be made. Currently, none exists. This Comment argues that prejudice under the Act should be objectively determined, and that substantial modification analysis should be employed in a new and useful framework for evaluating the prejudice caused by a modification.

82. *But see id.* at 584–85 ("Moral rights, as they have come to us from Europe, express community concepts of how authors should be treated, concepts that have, over time, become entrenched in law. The right of integrity expresses and upholds agreed concepts of authorial dignity and of the respect due to authors through their works. Any interpretation of 'honour' in Australia should likewise express community standards and should not be predicated on particular authorial reactions, real or imputed.")

83. ADENEY, *supra* note 2, at 584.

84. See 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION 11–12 (6th ed. 2000) ("Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses.")

85. *Cf. id.* at 25 ("When a question arises concerning applicability of a statute a decision can be reached only by applying some kind of a criterion. For the interpretation of statutes, 'intent of the legislature' is the criterion that is most often recited.")

A. Subjective Prejudice vs. Objective Prejudice

Of the two cases dealing with modifications under the Act, one has adopted a subjective standard for determining prejudice and the other has adopted an objective standard. In evaluating both standards and their application domestically and abroad, it is likely that Congress intended for prejudice to be determined objectively, and the results of such a determination are preferable.

1. Subjective Approach

In *Pavia v. 1120 Avenue of the Americas Associates*,⁸⁶ the court determined that an artist's "allegations that alteration . . . has prejudiced his honor and reputation are sufficient"⁸⁷ to show prejudice. Under the court's articulated subjective standard, an artist must merely allege prejudice to sustain an action under the Act. Not surprisingly, artists tend to prefer this interpretation. During the Act's congressional hearings, art enthusiasts testified that all modifications were prejudicial to artists, that prejudice was a subjective harm, and that an artist's perception of harm should be absolute.⁸⁸

This strictly subjective approach has been statutorily adopted in Canada, where prejudice can be presumed by the mere occurrence of modification. According to the Canadian statute, "[i]n the case of a painting, sculpture or engraving, the prejudice . . . shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work."⁸⁹ The legislature included this decidedly pro-artist provision out of fear that proving prejudice would be a burden too heavy for artists to bear.⁹⁰ At least one Canadian court has extended the concept and automatically presumed prejudice even in a case not involving the modification of paintings, sculptures, or engravings.⁹¹

86. 901 F. Supp. 620 (S.D.N.Y. 1995).

87. *Id.* at 628.

88. See, e.g., *Moral Rights in Our Copyright Laws, Hearings on S. 1198 and S. 1253 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 101st Cong. 142 (1989) [hereinafter *Hearings on S. 1198 and S. 1253*] (Linda Cawley, on behalf of Peter H. Karlen, Attorney) ("I think that just by mutilation or destruction of a work you are able to prove damage to reputation . . .").

89. Copyright Act, R.S.C., ch. C-42, § 28.2(2) (1985).

90. ADENEY, *supra* note 2, at 336.

91. In *Boudreau v. Lin*, [1997] 150 D.L.R. (4th) 324, a professor plagiarized his student's work in violation of the student's moral rights, and the Ontario Court found that though "[t]here [was] no evidence . . . that the infringement of the plaintiff's moral rights has caused any loss to the plaintiff's reputation," damages were an appropriate remedy. *Id.* at 337. The case "suggests either that

Adopting a subjective standard can be an enticing position for courts to take when interpreting the Act. First, a subjective standard may comply with the plain meaning of the Act if the exceptions explicitly listed in the Act constitute the only modifications that would not be prejudicial to an artist's honor or reputation. A subjective standard also promotes the Act's purpose of protecting artists' personal, non-economic interests by putting a thumb on the scale in favor of aggrieved artists.⁹² In addition, a strictly subjective interpretation would function to deter undesirable modifications. Affording artists the absolute discretion to determine which modifications are prejudicial provides a compelling incentive for owners of works of visual arts to avoid modifications of any kind for fear of litigation.⁹³ Moreover, a subjective standard would likely result in easier decisionmaking by litigants during settlement negotiations, by judges during adjudication, and by juries during deliberations. In all three situations, an artist's claim of prejudice would be determinative. Finally, there are some vague indications in the legislative history that at least one legislator may have intended for a subjective approach to be adopted.⁹⁴

2. Objective Approach

On the other hand, a court could employ an objective standard in determining which modifications are prejudicial. That is, a court could determine that prejudice to the artist could be found only when the subjective judgment of the artist is objectively reasonable. This approach was adopted in *Carter v. Helmsley-Spear, Inc.*,⁹⁵ wherein the court found that the plaintiff's allegations of prejudice were supported by expert testimony given during the

propensity to harm constituted [a] sufficient detriment or that Canadian courts are willing to award damages based on subjectively perceived harm." ADENEY, *supra* note 2, at 336.

92. See 17 U.S.C. § 106A(a) (2000).

93. See Ameet Sachdev, *Artist Battles to Hide a Work: Fight Over Restoration Highlights Tensions Between Creators and Owners Over Control*, CHI. TRIB., Oct. 21, 2007, § 5, at 1 ("Artists are becoming more aggressive about protecting their intellectual-property rights to prevent owners from exploiting their name to make copies or other derivative works."). *But see Hearing on S. 1619, supra* note 75, at 79 (response of Jenny Holzer, an artist, to Senator Grassley's questions concerning S. 1619) ("Artists as a group are neither wealthy nor litigious.").

94. According to the House Report accompanying the Act, "[a]ny distortion of [a work of visual art] is automatically a distortion of the artist's reputation and cheats the public of an accurate account of the culture of our time." H.R. REP. NO. 101-514, at 6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6916. This language does not indicate, however, whether this type of automatic distortion would be prejudicial to the author within the meaning of the Act.

95. 861 F. Supp. 303 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995).

trial phase.⁹⁶ In other words, the *Carter* court suggested that the plaintiff's subjective allegation of prejudice may need to be objectively reasonable to sustain an action under the Act.

This objective approach to interpreting "prejudice" is similar to that adopted in Germany, where the relevant moral rights statute confers upon artists "the right to prohibit a distortion or other impairment that would endanger his legitimate intellectual or personal interests in the work."⁹⁷ Unlike the Canadian statute, the German statute suggests that some artists' interests may be "illegitimate or unjustified and not worthy of protection."⁹⁸ German courts, therefore, make an objective determination, balancing the artist's legitimate interest in preservation against the property owner's interest in utilizing his property rights.⁹⁹

Though courts domestically and internationally have adopted both subjective and objective standards, it is more likely that Congress intended prejudicial modification to be discerned under an objective standard. The text of the Act states that an artist can seek injunctive relief or damages for "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."¹⁰⁰ The text, by employing a limiting clause, makes clear that an individual accused of modifying a work of visual art will be held liable only for prejudicial modifications, suggesting that some modifications are not prejudicial.¹⁰¹

Under a subjective standard—wherein any modification may be prejudicial if so alleged—the limiting text of the Act would be rendered meaningless. This interpretation would violate a basic canon of statutory construction based on the text's intrinsic evidence of legislative intent: "It is an elementary rule of construction that effect must be given, if possible, to

96. *Id.* at 323 ("Testimony adduced at trial supports plaintiffs' contention that their honor and reputation would be damaged if the Work is distorted, modified, or mutilated.")

97. See Urheberrechtsgesetz [UrhG] [Copyright Act], Sept. 9, 1965, BGBl. I at 1273, § 14 (F.R.G.).

98. ADENEY, *supra* note 2, at 247.

99. The United Kingdom, with language similar to VARA, has taken an approach similar to that adopted by Germany. In the U.K., artists have the right to prohibit "derogatory treatment" if such treatment "amounts to distortion or mutilation of the work, or is otherwise prejudicial to the honour or reputation of the author." See Copyright, Designs and Patents Act, 1988, c. 48, § 80(1), (2)(b). Courts interpreting the U.K. statute have suggested the application of an objective reasonableness test to determine what might constitute actionable prejudice. See, e.g., *Tidy v. Trustees of the Natural History Museum*, (1995) 39 I.P.R. 501, 504 (Ch.).

100. 17 U.S.C. § 101 (2000).

101. But see Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983) ("[F]or every canon one might bring to bear on a point there is an equal and opposite canon, so that the outcome of the interpretive process depends on the choice between paired opposites . . .").

every word, clause and sentence of a statute.”¹⁰² Even if the limiting text refers to the Act’s explicit exceptions, the wording would still be rendered redundant. An interpretation of the Act that renders the limiting words of the modification clause redundant also cannot be a preferred interpretation.¹⁰³ An objective standard, however, allows for some modifications to be nonprejudicial, preserving the meaning of each word in the prejudicial modification clause.¹⁰⁴

The legislative history also suggests that Congress intended for the Act to apply as narrowly as possible.¹⁰⁵ The Act was designed to “cover[] a very narrow category of works”¹⁰⁶ and was intended to “be regarded as an initial, extremely tentative step toward a federal regime for moral rights.”¹⁰⁷ Earlier drafts “established a virtual per se standard” of protection, but the “Committee believe[d] that a per se standard [was] inappropriate. It therefore endor[s] the Subcommittee’s decision at markup to delete [the per se] language and to use the “honor and reputation” standard of the Berne Convention with regard to all covered works.”¹⁰⁸

Moreover, the overarching purpose of the Act weighs in favor of applying an objective standard. The Act was intended to facilitate the

102. See 2A SINGER, *supra* note 84, at 190–92 (“No clause sentence or word [of a statute] shall be construed as superfluous, void or insignificant if the construction can be found which will give force to and preserve all the words of the statute.”).

103. But see Posner, *supra* note 101, at 811 (“Most canons of statutory construction go wrong not because they misconceive the nature of judicial interpretation or of the legislative or political process but because they impute omniscience to Congress. Omniscience is always an unrealistic assumption, and particularly so when one is dealing with the legislative process.”).

104. One might argue that a subjective standard allows for some modifications to be nonprejudicial, namely those that the author does not find to be so. Given the legislative history reducing the application of the Act to limited circumstances, this interpretation of the limiting text seems less reflective of Congressional intent. See *infra* text accompanying notes 104–115, 222.

105. See *Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 37–38 (1990) [hereinafter *Hearing on H.R. 2690*] (implying that statutory wording suggesting an absolutist standard wherein any modification is per se prejudicial is unintended); 2A SINGER, *supra* note 84, 428–29 (“Successive drafts of a bill may be helpful in construing a statute if the meaning of the statute is unclear.”). But see Patrick O. Gudridge, 37 U. MIAMI L. REV. 493, 499–500 (1983) (discussing problems associated with relying on legislative history for statutory interpretation); Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 301 (2003) (“It is commonly understood that VARA was intended to address more than just objective harms to the artist’s reputation, an area already actionable under pre-existing defamation laws, and contemplated allowing an artist to bring an action against changes made to his work which prejudiced his ‘honor.’”).

106. 136 Cong. Rec. H3111, H3115 (daily ed. Jun. 5, 1990) (statement of Rep. Fish).

107. Editors, *The 101st Congress: A Review of Amendments to the Copyright Act*, 37 J. COPYRIGHT SOC’Y 462, 466 (1990).

108. H.R. REP. NO. 101-514, at 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6925.

balancing of "many competing interests."¹⁰⁹ An objective standard requires those interests to be balanced against each other, giving each party's rights equal weight. A subjective standard, on the other hand, would always presume a violation of the artist's rights, therefore giving more weight to the artist's interests than to the property owner's interests.¹¹⁰

Finally, previous versions of the bill rejected the notion that subjective allegations would be sufficient to sustain an action under the Act.¹¹¹ Like the Canadian statute, earlier versions of the Act included a "deeming" provision, wherein "the destruction, distortion, mutilation, or other modification of a work of recognized stature *shall* constitute prejudice to the honor and reputation of the author of that work."¹¹² This deeming provision would have shifted the burden of proving prejudice away from the plaintiff.¹¹³ Congress, however, removed the deeming provision from the final version of the Act. The removal of the deeming provision again suggests that Congress did not intend that all modifications prejudice an artist or constitute an actionable claim.¹¹⁴ Rather, Congress believed that "[t]he formulation for determining whether harm to honor or reputation exists must of necessity be *flexible*."¹¹⁵ Only an objective standard could result in flexible decisionmaking.

B. Substantiality

Because it is probable that the legislature intended that prejudice be determined objectively, it is also necessary to suggest a method whereby such a determination can be made. This Comment recommends that an objective determination of prejudice be made by utilizing a substantial modification analysis based on the substantial similarity approach to determining copyright infringement.

109. 136 Cong. Rec. H3111-02, H3114 (daily ed. June 5, 1990) (statement of Rep. Kastenmeier).

110. Some argue, however, that a subjective standard would lead to unpredictable results. See, e.g., George C. Smith, *Artistic License Takes on a New Meaning*, LEGAL TIMES, Dec. 17, 1990, at 24 ("Given the peculiar sensitivities and eccentricities of many artists, owners will be hard-pressed to predict what actions may offend this subjective standard.").

111. 2 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 1041-42 (1994).

112. Visual Artists Rights Act, H.R. 2690, 101st Cong. § 3 (1989) (emphasis added) (as introduced by Rep. Kastenmeier).

113. ADENEY, *supra* note 2, at 495.

114. See generally 2A SINGER, *supra* note 84, at 431-33 ("Legislative history can also consider part of a statute that never came into existence. For example where the language under question was rejected by the legislature and thus not contained in the statute it provides an indication that the legislature did not want the issue considered.").

115. See H.R. REP. NO. 101-514, at 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6925 (emphasis added).

1. Substantial Similarity Under Copyright Law

Legally speaking, not all violations are created equal. Rather, courts often apply the legal maxim of *de minimis non curat lex*: Loosely, “[t]he law does not concern itself with trifles.”¹¹⁶ In the copyright context, courts have applied the doctrine to three categories of cases.¹¹⁷ First, a *de minimis* infringement can be a technical copyright violation for which the law does not punish the offender because the violation is too miniscule and trivial.¹¹⁸ Second, a *de minimis* analysis is relevant to applying the fair use doctrine, as one prong of fair use analysis examines the “amount . . . [and] observability” of the copying.¹¹⁹ If the amount and observability of the copying borders on being *de minimis*, the factor would weigh in favor of allowing the use. Finally, *de minimis* copying “represents simply the converse of substantial similarity.”¹²⁰

To be actionable under copyright law, an allegedly infringing work and a copyrighted one must be substantially similar in a “matter that constitutes a substantial portion of plaintiff’s work.”¹²¹ For two works to be substantially similar, the copying must be “quantitatively and qualitatively sufficient to support the legal conclusion that infringement . . . has occurred.”¹²² In distinguishing between the quantitative and qualitative components, courts have found:

The qualitative component concerns the copying of expression The quantitative component generally concerns the amount of the copyrighted work that is copied In cases involving visual works . . . the quantitative component of substantial similarity also concerns the observability of the copied work—the length of time the copied work is observable in the allegedly infringing work and such factors as focus, lighting, camera angles, and prominence.¹²³

116. BLACK’S LAW DICTIONARY 464 (8th ed. 2004). See generally Andrew Inesi, *A Theory of De Minimis and a Proposal for Its Application in Copyright*, 21 BERKELEY TECH. L.J. 945 (2006).

117. See *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74–75 (2d Cir. 1997).

118. An oft-cited example of this type of trivial violation is a New Yorker cartoon photocopied and displayed on a home refrigerator. Technically, the refrigerator owner is in violation of the law because only the copyright holder has the rights to reproduce and display the work, but the violation is so trivial that the court will dismiss such cases. *Id.* at 74.

119. *Ringgold*, 126 F.3d at 75.

120. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.01[G], at 8-29.

121. 4 NIMMER & NIMMER, *supra* note 120, § 13.03[A][2][a], at 13-54.

122. *Ringgold*, 126 F.3d at 75.

123. *Id.*

Based on the quantitative and qualitative components, the trier of fact must conclude whether an average lay observer would find that the original and infringing work are similar enough to constitute substantial similarity.¹²⁴

Courts have devised “no easy rule of thumb” to delineate between cases of insubstantial and substantial similarity.¹²⁵ Sometimes a quantitatively small modification can result in the copying of qualitatively important expression, leading a trier of fact to conclude that a violation has occurred.¹²⁶ Likewise, a quantitatively large amount of copying may relate only to “nonessential matters,” leading a trier of fact to the opposite conclusion.¹²⁷ Instead, the decision requires a value judgment on the part of the decisionmaker, as “[t]he trier must ultimately determine the importance of that material that is common to both parties’ work.”¹²⁸

2. Substantial Modification Under the Act

With a few minor adjustments, the copyright concept of substantial similarity can be applied by analogy to the Act in the form of a substantial modification standard. Applying a substantial modification standard to the Act provides a useful analytical framework for making objective determinations of the prejudicial effect of modification.¹²⁹

Under the proposed standard, an artist would be prejudiced only by substantial modifications that are “quantitatively and qualitatively sufficient to support the legal conclusion that infringement . . . has occurred.”¹³⁰ The

124. See 4 NIMMER & NIMMER, *supra* note 120, § 13.03[E], at 13-93. This construction is derived from the Ninth Circuit’s construction of substantial similarity. See, e.g., *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 18 (9th Cir. 1933) (“The question really involved in such comparison is to ascertain the effect of the alleged infringing play upon the public, that is, upon the average reasonable man. If an ordinary person who has recently read the story sits through the presentation of the picture, if there had been literary piracy of the story, he should detect that fact without any aid or suggestion or critical analysis by others. The reaction of the public to the matter should be spontaneous and immediate.”).

125. 4 NIMMER & NIMMER, *supra* note 120, § 13.03[A][2][a], at 13-54.

126. *Id.* § 13.03[A][2][a], at 13-55 (“The quantitative relation of the similar material to the total material contained in plaintiff’s work is certainly of importance. However, even if the similar material is quantitatively small, if it is qualitatively important, the trier of fact may properly find substantial similarity.”).

127. *Id.* § 13.03[A][2][a], at 13-56.

128. *Id.* § 13.03[A][2][a], at 13-56 to 57.

129. Others have argued that the concept of substantial similarity should be extended within copyright law. See, e.g., Brett I. Kaplicer, Note, *Rap Music and De Minimis Copying: Applying the Sandoval and Ringgold Approach to Digital Samples*, 18 CARDOZO ARTS & ENT. L.J. 227 (2000); Howard Root, Note, *Copyright Infringement of Computer Programs: A Modification of the Substantial Similarity Test*, 68 MINN. L. REV. 1264, 1288 (1984).

130. *Ringgold*, 126 F.3d at 75.

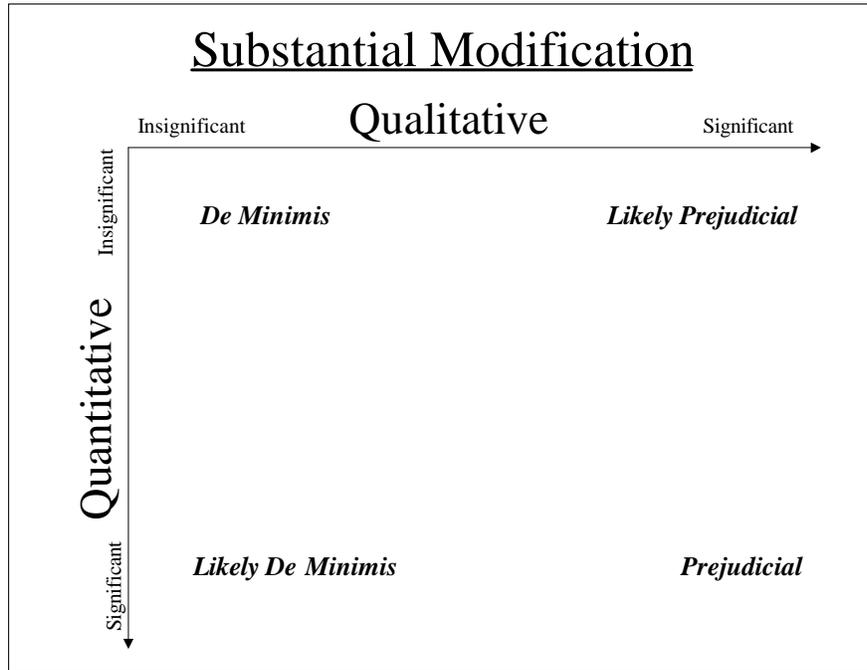
quantitative component of a substantial modification analysis would concern the amount of the work modified and the observability of the modification, including the duration of the modification and its prominence.¹³¹ The qualitative component would concern the modification of the artist's expression that is intrinsic to the work itself. The determination of whether the quantitative and qualitative nature of the modifications arises to an actionable level would be determined from the perspective of an average lay observer, with or without the aid of expert testimony.

This Comment proposes that where modifications are only quantitative in nature, a presumption against prejudice should arise. In these situations, the burden would rest on the plaintiff to prove that the quantitative modification alone was sufficient to prejudice the artist's honor or reputation. If the plaintiff cannot meet this burden, the merely quantitative modification would be considered nonprejudicial.

If an artist could show that any portion of the quantitative modification had a qualitative effect, a presumption in favor of prejudice would arise. The defendant could rebut the presumption by proving that the qualitative modification of the work was not prejudicial to the plaintiff. If the defendant could not rebut the presumption, the qualitative modification would be considered a substantial modification, prejudicial to the artist, and in violation of the artist's right to integrity under the Act. Graphically, the proposed application of the substantial modification rule for determining prejudice appears in Figure 1.

131. *Id.*

FIGURE 1: PROPOSED FRAMEWORK FOR SUBSTANTIAL MODIFICATION



Application of the substantial modification standard can be seen in the following four examples. In 1991, Peter and Candida Dixon asked artist Linda Scott to create a forty-foot long, ten-foot tall, and 6,000 pound steel sculpture of a flying swan.¹³² Scott delivered and installed the sculpture in the family's private backyard the following year.¹³³ As the Dixons prepared to sell their home in 1999, they hired construction company Rambo, Inc. to remove the sculpture.¹³⁴ For three years after its removal, the sculpture sat in Rambo's outdoor storage facility and the steel became bent, buckled, and incapable of repair without introducing a large welding seam into the sculpture.¹³⁵ In court, Scott argued that the Dixons destroyed her sculpture, but the court concluded that the work was not of recognized stature because the work had never been seen by the artistic community or the public.¹³⁶

132. Scott v. Dixon, 309 F. Supp. 2d 395, 396–97 (E.D.N.Y. 2004).
 133. *Id.* at 397.
 134. *Id.* at 398.
 135. *Id.* at 399.
 136. *See id.* at 400–01.

As a result of this finding, the work's destruction "was not protected by the section of VARA sued upon."¹³⁷

Had Scott sued under the prejudicial modification provision of the Act, a course that the court intimated would be the correct choice in these circumstances, neither she, the Dixons, the judge, the experts, nor the jury would have had an analytical framework for determining whether the bend, buckle, and welding seam in the sculpture were prejudicial within the meaning of the Act. Under the proposed substantial modification statute, however, this modification would likely have been deemed quantitatively and qualitatively significant. Quantitatively, the large dent and buckled steel was a highly noticeable modification, and, in light of its irreparability, a permanent modification. Qualitatively, either alternative of the bent and buckled steel or the repaired steel with a large welding seam would likely be considered qualitatively significant. If Scott's flying swan constituted an attempt to express naturalism, grace, and fluidity, an awkward dent or unnatural seam would detract from Scott's intended meaning. The modification, therefore, was both quantitatively and qualitatively significant. Under the proposed standard, a presumption would have arisen that the modification was prejudicial to Scott because it affected the qualitative nature of the work. The Dixons would have had the opportunity to rebut the presumption, but it is unlikely that they would have been successful in their attempt, as an ordinary lay observer would likely conclude upon visual inspection that the modification was substantial. Applying the substantial modification standard in *Scott* would have resulted in a sensible analysis and an arguably correct decision.

At the other end of the spectrum lie quantitatively and qualitatively insignificant modifications, which the proposed standard suggests are insubstantial modifications and, therefore, de minimis violations of the Act. An appropriate example of this type of modification is an alteration of a work for public presentation. Assume, for example, that a museum chose to light a sculpture from above instead of from below as the artist intended. Quantitatively, the sculpture has not been modified at all in a technical sense by the display. Any minimal alteration that might be imputed from the museum's choice would be temporary, though observable. On balance, the statue's placement would constitute a quantitatively insignificant modification. Given that the museum did not quantitatively alter the sculpture at all, it would be difficult to argue that the painting's qualitative nature changed, because the change was extrinsic to the work itself.

137. *Id.* at 401.

Had the artist intended for the sculpture's lighting to embody his expression or convey a particular meaning, he could have made the lighting an intrinsic component of the sculpture by incorporating the lighting into the sculpture itself, or through prior agreement with the museum. As the modification to the lighting of the work was quantitatively and qualitatively insignificant, the museum's choice would be considered an insignificant modification, not prejudicial to the artist, and not actionable under the Act.

The quantitative and qualitative components of the modification may also work in opposite directions. Take, for example, the experience of collage artist Jenny Holzer, who created an art installation composed of truisms in the lobby of a Wall Street bank.¹³⁸ The bank removed one truism which read: "It's not good to live on credit" and stored the offensive paper in a janitor's closet.¹³⁹ Had the modification occurred after the Act's passage, Holzer may have brought suit. Yet, it is unclear under the Act's plain meaning whether the bank's removal of one truism from among many would constitute prejudice. Under a substantial modification analysis, the bank's modification would be prejudicial under the Act. The removal of the truism among many could be considered quantitatively insignificant: Relative to the whole, only a miniscule, and likely unobservable, portion was removed. Moreover, the removal was not permanent because the truism could easily have been removed from the closet and replaced. Qualitatively, however, the bank's act was significant. By removing the phrase "It's not good to live on credit," the modification, if noticed by the viewer, could be interpreted as suggesting that the artist did not necessarily believe that the phrase "It's not good to live on credit" is true or that the artist did not believe that it was a truism comparable to the others still displayed. Because the bank's modification changed the work's intrinsic meaning, it is qualitatively significant. Given the preference that this rule gives to qualitative changes, a presumption would arise that the modification violated the artist's rights. The bank would either have to rebut this presumption or face liability.

Modifications can also be quantitatively significant and qualitatively insignificant. In 1999, the city of Concord, California declared the "Spirit Poles," a series of 91 poles lining several blocks of Concord Avenue, a public safety threat.¹⁴⁰ Wind caused the poles, ranging in height from 8 to 50 feet,

138. Georgia Dullea, *Metropolitan Diary*, N.Y. TIMES, Mar. 30, 1983, at C2.

139. Fiona Maddocks, *The Words on the Street*, EVENING STANDARD, Mar. 28, 2006, at 37.

140. Truong Phuoc Khanh, *Scorn Unbending for Poles*, CONTRA COSTA TIMES, Apr. 15, 1999, at A1.

to sway dangerously.¹⁴¹ The poles' undulations caused city officials to fear the installation's structural collapse.¹⁴² When the city removed the poles in 2000, the artist sued for violation of his moral rights, and the city settled the suit for \$75,000.¹⁴³

Suppose, however, that rather than remove the poles altogether, the city merely stabilized the poles with permanent internal reinforcements. Under the plain meaning of the Act, that modification would constitute a violation of the artist's rights. The reinforcement was not an act of conservation, there is no explicit public safety exception to the Act, and no other exception to the Act as written would cover this type of modification. The city would either have to remove and to store the installation or face liability. Under the proposed application of the substantial modification standard, this type of public safety modification would constitute a quantitatively significant modification because, though the internal reinforcement would not be observable to viewers on the street below, the modification would permanently alter the artist's work. This public safety modification, however, is qualitatively insignificant. It did not change the artist's expression because the artist was not trying to make a dangerous statement.¹⁴⁴ In cases such as this scenario where a modification is quantitatively significant but qualitatively insignificant, a *de minimis* defense would apply and the city's modification would not constitute an actionable modification under the Act.

These four examples show that the proposed substantial modification standard would be adaptable to a wide variety of circumstances. In each situation, the standard allows the decisionmaker flexibility in deciding prejudice in an objective manner.

IV. BENEFITS OF A SUBSTANTIAL MODIFICATION STANDARD

In addition to the flexibility that the substantial modification standard offers in determining prejudice, the standard is beneficial in other respects: The standard provides both a positive and normative framework for understanding and applying the right of integrity, and is also consistent with

141. Sonia Krishnan, *Concord Spikes Infamous Spirit Poles*, *CONTRA COSTA TIMES*, Dec. 5, 2001, at A3.

142. *Id.*

143. The creator of the Spirit Poles sued under the California Art Preservation Act, a state moral rights statute that predated VARA, *id.*, but this scenario is helpful to analyze the practical application of the Act.

144. For examples of when a public safety modification would be considered a qualitative modification, see *infra* Part IV.B.

the Act's legislative history, existing U.S. copyright law, and international interpretations of the moral rights doctrine.

A. Positive Framework

The substantial modification standard provides a positive framework for understanding and applying the Act. At first sight, the Act appears to grant a right, but the exercise of that right is eroded through the Act's many exceptions. Viewing the Act through the lens of a substantial modification analysis, however, organizes and unites the Act into a cohesive whole. Though the Act does grant protection from modification, the Act explicitly excludes certain modifications that have no qualitative component. Given that the Act recognizes that other modifications may be nonprejudicial and still not fall within the Act's explicit exceptions, it is consistent to conclude that these nonprejudicial modifications should also be non-qualitative in character.

One common theme uniting the exceptions to the Act's protections is that the explicitly excepted modifications can be perceived as strictly quantitative in character, suggesting that the Act's drafters recognized that quantitative modifications that do not change the artist's qualitative expression do not necessarily violate the artist's integrity right. This can be seen in the following exceptions: public presentation, time and materials, conservation, work-for-hire, and fair use.

First, the public presentation exception allows owners of art to modify works for their public presentation.¹⁴⁵ As discussed above, a work's lighting, positioning, framing, or disassembly for storage constitute quantitative modifications of the work but generally do not constitute qualitative modifications.¹⁴⁶ Rather, these modifications are typically anticipated by an artist and are extrinsic to the artist's expression in the underlying work. Because the modification does not reach the qualitative aspect of the work, Congress likely meant it not to be a violation of the Act.

This exception, however, is a general rule, and some acts of public presentation should indeed be considered violations of an artist's right of integrity. The facts of *Pavia*, for example, are illustrative. In *Pavia*, the Hilton Hotel corporation commissioned artist Philip Pavia to complete a sculpture for one of its New York City hotel lobbies.¹⁴⁷ Pavia subsequently

145. 17 U.S.C. § 106A(c)(2) (2000).

146. *See id.*

147. *Pavia v. 1120 Ave. of the Ams. Assocs.*, 901 F. Supp. 620, 623 (S.D.N.Y. 1995).

sculpted and installed “The Ides of March,” which consisted of four bronze diamonds, three large forms standing upright and one small form lying on its side.¹⁴⁸ Many years later, the hotel disassembled the sculpture and conveyed the pieces to the Hippodrome Garage, which displayed two of the four forms in its lobby area.¹⁴⁹ The sculptor sued, but the court found that the defendants’ acts did not violate the artist’s rights because the modification took place prior to the Act’s enactment date.¹⁵⁰ Had the modification taken place after the enactment date, however, it is unlikely that the court would have excused the hotel’s modification under the public presentation exception, even though the situation could technically be construed as such in a literal sense. Because the modification changed the meaning and the context of Pavia’s original expression, the court would likely have viewed the presentation as either a prejudicial modification or a grossly negligent public presentation.¹⁵¹ Thus, the general approach to applying the public presentation exception is consistent with the proposed substantial modification standard, and both approaches provide extra protection against modifications that are qualitative in nature.

The Act’s second exception—modification due to the passage of time or the inherent nature of the work’s materials¹⁵²—also illustrates the point that the Act deems quantitative modifications to be less prejudicial than qualitative modifications. In *Flack v. Friends of Queen Catherine Inc.*,¹⁵³ an artist’s plaster molds were left outdoors by the sculpture owner causing weather damage, but the court found that the time and nature exception applied.¹⁵⁴ Though the weather-damaged sculpture may have significantly changed quantitatively, the qualitative nature of the sculpture had not been altered as a result of the weathering. The artist chose to express herself in that medium, knowing that the inherent nature of the material could result in change with the passage of time. Allowing a known and natural process to occur, therefore, does not change the artist’s expression. Unless the deterioration results in the art’s destruction, this

148. *Id.* at 624.

149. *Id.*

150. *Id.* at 628–29.

151. Edward J. Damich, *A Comparison of State and Federal Moral Rights Protection: Are Artists Better Off After VARA?*, 15 HASTINGS COMM. & ENT. L.J. 953, 961 (1993) (“The right of integrity uses the word ‘distort,’ and the wording of the public presentation exception to the right implies that grossly negligent public presentation may violate the right of integrity.”) (quoting 17 U.S.C. § 106(A)(a)(3)(A) (2000)).

152. 17 U.S.C. § 106A(c)(1).

153. 139 F. Supp. 2d 526 (S.D.N.Y. 2001).

154. *See id.* at 534.

type of significant quantitative modification is not actionable under the Act because it lacks a more prejudicial qualitative change.

Third, the Act's conservation exception¹⁵⁵ also illustrates the Act's tolerance for extensive quantitative modifications to works of art. Under this exception, a qualified conservationist could completely and permanently repaint a piece for restorative purposes without running afoul of the Act. Liability would be imposed, however, if the conservationist were grossly negligent in restoring the painting. The requirement for gross negligence suggests that liability should be imposed when the conservation attempt constituted more than just a quantitative change, but a qualitative alteration of the painting as well.¹⁵⁶ This type of qualitative change recently was alleged by sculptor Yaacov Agam.¹⁵⁷ His 43-foot stainless steel column, located in downtown Chicago, was designed to add a "splash of color" to a stark building by creating a "symphony of colors that appears to change and move as the viewer passes it."¹⁵⁸ He claimed that a faulty restoration changed the sculpture's colors and that the restored sculpture's unveiling in 2008 would constitute an "abuse of the artist, and an abuse of the public."¹⁵⁹ If the sculpture qualified for protection under the Act, a court could find that the restoration was grossly negligent in light of the artist's expressed dissatisfaction because restoring the colors correctly would be critical to a competent restoration. Under the substantial modification standard, a similar finding would likely result. Given that the sculpture's color was central to the artist's expression, the qualitative change caused by the unsatisfactory restoration would prejudice the artist.

The definition of "work of visual art" excludes works made for hire,¹⁶⁰ vitiating the rights of artists who create works as employees.¹⁶¹ One factor relevant to determining whether an artist is an employee is whether "the

155. 17 U.S.C. § 106A(c)(2).

156. It is conceivable that a conservationist could be grossly negligently in restoring portions of a painting that need no restoration, thereby limiting the effects to the quantitative sphere. Such a modification, however, would be costly and, therefore, likely rare. It would also be contrary to industry practice. According to one conservationist, "[l]ess is best You do the minimal amount to stabilize it and make it healthy again." Charles A. Twardy, *The Fine Art of Painting Restoration: Art Conservators Cure Ills That Often Could Be Prevented*, THE STATE (S.C.), Jan. 17, 1988, at F1. Moreover, a court may deem modifications due to over-restoration to be simple negligence, not invoking VARA.

157. See Sachdev, *supra* note 93.

158. *Id.*

159. *Id.*

160. 17 U.S.C. § 106A(c)(3).

161. See *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 316–17 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995).

hiring party [has the] right to control the manner and means by which the product is accomplished.”¹⁶² This test suggests that if a hiring party has the right to control the manner and means of creation, it ultimately has the right to control the expression embodied in the work. As a result, the hiring party’s decision to modify a work made for hire may result in a quantitatively significant change, but the modification would never alter the artist’s expression because the work never embodied the artist’s expression in the first place. Thus, the Act’s work made for hire exception and the substantial modification standard are consistent.

Finally, the Act also recognizes an exception for fair use.¹⁶³ Under this exception, a work could be modified without authorization from the artist if it were for the purpose of criticism, comment, news reporting, teaching, research, or parody.¹⁶⁴ During the Act’s legislative hearings and since its enactment, many have noted the incompatibility of the moral rights and fair use doctrines.¹⁶⁵ The Copyright Office, however, testified at the legislative hearings that its “preliminary assessment [was] that there isn’t any significant conflict between the fair use doctrine and the copyright law and the proposed rights of integrity and attribution.”¹⁶⁶ Thus, Congress and the resultant Act recognized that a quantitatively significant change does not automatically result in liability to the modifier. Rather, the Act will tolerate quantitatively extensive modifications and even qualitatively extensive modifications if the purpose is deemed beneficial under the Copyright Act.

B. Normative Framework

In addition to providing a positive framework for unifying the Act’s components and understanding its past interpretation, the substantial modification standard can also be utilized to balance the interests of artists and property owners in situations that have not yet been litigated. A substantial modification standard would provide a normative framework that would result in quicker settlements, more summary adjudications, and more thoughtful jury verdicts. Moreover, adopting a standard analogous to substantial similarity would provide artists with a vast body of case law to which

162. *Id.* at 316 (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989)).

163. See 17 U.S.C. § 106A(a).

164. 17 U.S.C. § 107.

165. See, e.g., Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33 (1997).

166. *Hearing on H.R. 2690, supra* note 105, at 77 (statement of Dorothy Schraeder). The Copyright Office did not elaborate as to why it found no significant conflict. See *id.* at 62–68.

they could analogize.¹⁶⁷ Finally, the substantial modification standard would help address conflicts between artists and property owners in situations not anticipated by Congress at the time of the Act's drafting.

In situations that have not yet been litigated, the proposed rule would offer a predictive tool that could speed up the litigation process by increasing the amount of information available to parties litigating under the prejudicial modification clause. If litigants are able to assess the quantitative and qualitative components of the modifications, understand the burden of proof and rebuttal, and predict the likelihood of success on the merits, disputes will be settled more quickly and with greater accuracy. Judges, too, would be able to dispose of more cases at the summary judgment phase of litigation because "substantial similarity" and the de minimis defense are not generally considered to concern issues of material fact.¹⁶⁸

Importing an existing doctrine from copyright law is also beneficial because copyright law, unlike the Act, has a well-formed body of case law to which litigants and judges can analogize. For a variety of reasons, few cases have been litigated under the Act.¹⁶⁹ The statutory text precludes litigation in many instances: a work may not qualify as a work of visual art,¹⁷⁰ a modification may be explicitly exempted,¹⁷¹ or a destroyed work may not qualify as being of "recognized stature."¹⁷² Furthermore, judges have been reluctant to extend the Act or interpret its provisions broadly.¹⁷³ Also, the necessary knowledge, high costs, and great uncertainty related to litigating a claim preclude some artists from filing suit.¹⁷⁴ At least one commentator has even suggested that artists are by nature less litigious than other occupational groups.¹⁷⁵ Given that few cases are brought, it is unlikely that artists will bring a sufficient number of cases to adequately define and test the contours

167. A Westlaw search for federal cases including the terms "substantial similarity" and "copyright" returned 1,783 federal and state cases (search run on May 11, 2008).

168. See Julie D. Cromer, *Harry Potter and the Three-Second Crime: Are We Vanishing the De Minimis Defense From Copyright Law?*, 36 N.M. L. REV. 261, 273 (2006).

169. See Patricia Alexander, Comment, *Moral Rights in the VARA Era*, 36 ARIZ. ST. L.J. 1471, 1473 (2004).

170. See 17 U.S.C. §§ 101, 106A(a) (2000).

171. See 17 U.S.C. § 106A(c).

172. See 17 U.S.C. § 106A(a)(3)(B).

173. Alexander, *supra* note 169.

174. See *id.* at 1474 ("[N]o question as to interpretation of VARA is really settled.").

175. See *Hearing on S. 1619, supra* note 75, at 79 (response of Jenny Holzer, artist, to Sen. Grassley's questions concerning S. 1619) ("Artists as a group are neither wealthy nor litigious.").

of the Act's provisions. Many cases, however, are settled without resorting to litigation, so a workable standard is still necessary and beneficial.¹⁷⁶

For these reasons, the importation of a standard from copyright law is desirable. By analogy, individuals can compare the quantitative and qualitative aspects of infringing modifications under the Act with the qualitative and quantitative aspects of infringing copying under the Copyright Act. This comparison will aid litigants, judges, and academics in understanding the Act and aid in decisionmaking during the course of litigation.

At the time of the Act's drafting, Congress could not possibly have anticipated each situation in which the Act might be applied. The Act, for example, does not address site-specific art, wherein one of the components of the work is its physical location.¹⁷⁷ It was not until 2006 that the Second Circuit interpreted the Act as not covering site-specific art within its definition of works of visual art.¹⁷⁸ As a result, site-specific artists have no recourse when their art is removed from the landscape for which it was designed.

It is also unclear whether the Act protects other forms of art. Art that is intentionally dangerous to the public safety, for example, is clearly protected by the explicit statutory language of the Act because such modifications would not be necessary for presentation or conservation, and would not constitute modification for fair use or due to time or the nature of the materials. Congress, however, likely did not intend for non-qualitative modifications that make the art safer for public display, such as the "Waving Poles" example described above, to be considered prejudicial to the artist's honor or reputation.

Suppose, however, that the sculptor of "Waving Poles" intended the public art installation to "respond to and reflect changes in air circulation and light."¹⁷⁹ Where the artist intended the movement to constitute an expressive element of the piece, the reinforcement modification would represent a qualitatively significant modification, resulting in a violation of the artist's rights. Without the substantial modification standard, it is unclear whether the city could modify the sculpture without incurring liability. In the face of such uncertainty, it is likely that the city would

176. See *Hearings on S. 1198 and S. 1253*, *supra* note 88, at 140–41 (statement of Linda Cawley, on behalf of Peter H. Karlen, Att'y) (suggesting that the majority of cases under the California Art Preservation Act settle "immediately upon the lawyers for the users learning of this act").

177. *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 134 (1st Cir. 2006).

178. *Id.* at 143.

179. Cathy Curtis, *Irvine's Public-Art Program Has Problems Growing Up*, L.A. TIMES, Mar. 12, 1990, at 3.

have removed and permanently stored the sculpture under the protection of the Act's public presentation exception.

The proposed standard would also solve the problem of the right against destruction. Under the Act, an owner may destroy a work that is not of recognized stature. It has been argued that this right against destruction is flawed because it does not consider the prejudice to the artist's honor or reputation that may result from the destruction of a work not of recognized stature.¹⁸⁰ The prejudicial modification standard would solve this problem: Unless rebutted, quantitative and qualitative modifications that essentially destroy a work would be found to be in violation of the Act.

In addition, the proposed standard solves the paradoxical problem of the kindergarten teacher who modifies his student's artwork.¹⁸¹ Critics of the Act have argued that such a modification would violate the child's rights under the Act and has the potential to result in litigation. Under the proposed standard, however, such a modification would give rise to a presumption of a violation only if it affected the qualitative components of the student's works. The kindergarten teacher could easily rebut the presumption given the context of the modification, the setting in which the modification took place, and the relationship of the plaintiff and defendant.

The substantial modification standard has both positive and normative aspects. Modifications to works made for hire or due to time or the inherent nature of the elements are qualitatively insignificant modifications under the proposed standard. The destruction of a work of art that is not of recognized stature (and, therefore, not protected by the Act's destruction provision), on the other hand, would likely always be considered qualitatively significant, and, therefore, a prejudicial modification. Finally, modifications for public presentation, public safety, and conservation could be either qualitatively significant or insignificant, depending on the facts and circumstances at hand.

C. Consistency

The proposed standard is also consistent with the Act's legislative history, current U.S. copyright law, and the traditional moral rights doctrine as articulated in the U.S. This consistency suggests that adopting and implementing a substantial modification standard would be appropriate and feasible.

180. See Karlen, *supra* note 59, at 915–16.

181. Patricia Klein Lerner, *Painter Goes to the Mat Over Changes in His Artwork Rights: Brian Ura is Using a California Law That Allows a Visual Artist to Collect Damages and Attorneys' Fees From Someone Who Alters, Mutilates or Destroys One of His Artworks*, L.A. TIMES, Mar. 8, 1990, at B10.

1. The Act's Legislative History

The proposed substantial modification rule is consistent with the legislative history of the Act. Earlier drafts of the Act included a clause forbidding “significant or substantial distortion, mutilation, or other alteration” of an artistic work.¹⁸² These words were replaced with a prohibition on “a distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation.”¹⁸³ The legislative hearings provide no substantive information as to why the wording was changed, but it is likely that the wording was changed merely to conform to the wording of the Berne Convention.¹⁸⁴ Like the “substantial mutilation” provision of earlier drafts, the prejudicial modification provision acts as a gate-keeping mechanism similar to the function performed by the recognized stature provision relating to destruction.¹⁸⁵

2. U.S. Copyright Law

It should come as no surprise that the prohibitions and exceptions found in the Act suggest that prejudice is more likely to result from modifications that are qualitative, rather than quantitative, in nature. Under U.S. copyright law, similar precedent placing a greater emphasis on qualitative copying than quantitative copying can also be found. In *Feist Publications, Inc. v. Rural Telephone Service Co.*,¹⁸⁶ the U.S. Supreme Court held that a successful copyright infringement claim must involve the “copying of constituent elements of the work that are original.”¹⁸⁷ Originality, the Court reaffirmed, requires both independent creation and a “modicum of creativity.”¹⁸⁸ Thus, though a regional telephone book publisher’s direct copying of a local telephone book’s listings was quantitatively extensive, the court held that no copyright violation occurred because the telephone numbers were facts, lacking the qualitative prerequisite of a “modicum of creativity.”¹⁸⁹

182. Visual Artists Rights Act, H.R. 3221, 100th Cong. (1987) (introduced by Rep. Markey); Visual Artists Rights Act, S. 1619, 100th Cong. (1987) (introduced by Sen. Kennedy).

183. 17 U.S.C. § 106A(a)(2).

184. ADENEY, *supra* note 2, at 494.

185. See *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 324 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995); Robinson, *supra* note 8.

186. 499 U.S. 340 (1991).

187. *Id.* at 361.

188. *Id.* at 362.

189. *Id.* at 361.

Similarly, the submission of the quantitative to the qualitative in copyright law is also evident in fair use analysis. Under the fair use doctrine, a copyrighted work may be used by others without permission if: (1) the new work's character and purpose, (2) the nature of original work, (3) the amount and substantiality of the portion used, and (4) the new work's effect on the original work's market, on balance, weigh in favor of allowing the use.¹⁹⁰ Under the third prong, a new work may copy only enough to conjure up the original, unless additional copying is justified in light of the work's character and minimal market effect on the original.¹⁹¹ Thus, if the qualitative character of the use is sufficiently justified, extensive copying carries little, if any, weight in fair use analysis.¹⁹²

Under fair use analysis, a quantitatively insignificant amount of copying for a permissible purpose may still constitute infringement if a qualitatively significant element of the underlying work is copied. In *Harper & Row Publishers, Inc. v. Nation Enterprises*,¹⁹³ the Supreme Court determined that *The Nation's* quoting of President Gerald Ford's memoirs, though quantitatively insignificant, constituted the "heart" of the Ford manuscript.¹⁹⁴ Because the qualitative nature of the copying was significant, the Court concluded that the use was not a fair use and overturned the lower court's decision.¹⁹⁵ Justice O'Connor wrote that "[i]n view of the expressive value of the excerpts and their key role in the infringing work, we cannot agree with the Second Circuit that the 'magazine took a meager, indeed an infinitesimal amount of Ford's original language.'"¹⁹⁶

3. Traditional Moral Rights Doctrine

The substantial modification standard is also consistent with traditional understandings of the moral rights doctrine. Under the French moral rights statute, "[t]he author enjoys the right to respect for his . . . work."¹⁹⁷ The French act deviates from the Berne Convention in that there is no express requirement of prejudice to the author's honor or reputation. Despite the act's wording, however, French legislators did not intend for the artist's

190. 17 U.S.C. § 107 (2000).

191. See *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997).

192. See *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 116 (2d Cir. 1998).

193. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

194. *Id.* at 561.

195. See *id.* at 569.

196. *Id.* at 566 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195 at 209 (2d Cir. 1983)).

197. C. Propriété Intellectuelle [C.P.I.], art L 121-1.

right to integrity to be absolute. Instead, the French legislature delegated to courts the responsibility of interpreting the limitations on the right, if any.¹⁹⁸ As a result, French courts have concluded that “the owner has a general obligation to respect the shape and form of the work—and courts permit only minor or necessary modifications.”¹⁹⁹

In some cases, modification to a work has not been interpreted as an infringement “if the spirit of the work remains essentially untouched.”²⁰⁰ Compare, for example, the modifications of two architectural structures protected by the French moral rights laws. In the first, the building owner modified an interior space that the building’s architect intended to remain empty.²⁰¹ Despite the undisputed factual modification, the court ruled that the architect’s integrity right had not been violated because the modifications were economically necessary, generally unobservable, and not significantly harmful to the overall design.²⁰² Another French court reached the opposite conclusion in a separate case.²⁰³ There, the court found that unauthorized changes to the Lille town council auditorium “had disfigured [the architect’s] work by destroying the harmony of the original ensemble he had designed and that none of Lille town council’s alleged technical imperatives could be substantiated”²⁰⁴ Though the courts’ treatment of modifications to architecture may differ from their treatment of modifications of other artwork due to the functional nature of a building,²⁰⁵ at least one French court conducted a similar analysis in relation to a modified musical work.²⁰⁶

These French courts’ approaches to the right of integrity concord with the proposed substantial modification standard. In the first case, the modification was quantitatively insignificant because of its unobtrusiveness. Moreover, the modification was qualitatively insignificant because it did not harm the architect’s overall design. Thus, the modification would be considered insubstantial. In the second case, the modifications affected the quality of the architect’s design and would, therefore, be considered a

198. ADENEY, *supra* note 2, at 182–83.

199. Kowalski, *supra* note 1, at 1166 (emphasis added).

200. ADENEY, *supra* note 2, at 184.

201. Kowalski, *supra* note 1, at 1169.

202. *Id.* at 1170.

203. *See id.*

204. *Id.* (quoting Première chambre civile [Cass. Le civ.], Dec. 1, 1987, 136 R.I.D.A. 1988, 137).

205. *See id.*

206. *See* ADENEY, *supra* note 2, at 184–85 (“In one case of this kind it was held that the use of a song called ‘*Les petits bistros*’ (‘Little bistros’) in a documentary devoted to Parisian bistros (an act that could have led to a finding of infringement since the song had not been created for this purpose) did not violate the spirit of the work, or of the singer’s performance, and therefore did not violate the *droit moral*.”).

substantial modification. Thus, the proposed standard is consistent with traditional applications of the moral rights doctrine in France.

V. COSTS OF THE SUBSTANTIAL MODIFICATION STANDARD

Despite the numerous benefits of adopting a substantial modification standard, the approach would result in some unavoidable costs. Critics might interpret the standard to constitute an unwarranted erosion of federal protections for artists, a license for judges to act as art critics, and a semantic trap in borderline cases.

A. Eroded Protection

The protections for artists under the Act are already slim.²⁰⁷ Few works qualify for protection. Moreover, many modifications to qualifying works fall within the Act's many exceptions. Some might argue that adopting the substantial modification standard would further undermine the protections offered to artists and diminish their contributions to society. This could lead to an increase in the number or amount of modifications made by art owners, and a decrease in the artists' creativity or propensity to create.²⁰⁸ This is not necessarily an accurate characterization of the impact that the proposed standard will have on artists. By setting a familiar standard, artists will have more information and certainty with respect to their decision to pursue litigation, which could avoid litigation altogether or result in more efficient and profitable settlement negotiations, both working to the advantage of artists.

B. Judging Art

When art intersects with law, critics often raise the concern that judges and juries are ill equipped and untrained to act as art critics.²⁰⁹ This contention,

207. See Sherman, *supra* note 49, at 409 ("VARA protects only a small, narrowly defined class of works and is emphatically intended to apply to the wide spectrum of original works of authorship which are otherwise subject to copyright protection . . .").

208. This criticism of the substantial similarity test has been noted in proposals seeking to extend the doctrine. See Root, *supra* note 129, at 1288–89 ("Application of the present forms of the substantial similarity test to computer programs may also lead to overprotection of the copyright owner's interests to the detriment of innovation.").

209. See Matthew C. Lucas, *The De Minimis Dilemma: A Bedeviling Problem of Definitions and a New Proposal for a Notice Rule*, 4 J. TECH. L. & POL'Y 2, 31 (1999) (arguing that the substantial similarity analysis "thrusts the judge into the role of a film or art critic. Under the extensive determinations required in a [substantial similarity] analysis, a judge must take notice not only of the similarities between two works (possibly occurring in different mediums), but also a copy's

however, is endemic in any field of law that intersects with the arts. Judges and juries have long been cautioned against and criticized for acting as art critics in other areas of the law, including obscenity, copyright, trademark, and free speech.²¹⁰ Under a substantial modification regime, judges and juries would be required to judge whether or not a modification changed an artist's expression. Such a determination, however, would not place a value on the expression conveyed or demonstrate a preference for certain types of expression. Rather, the substantial modification standard merely requires a determination of whether expression exists. Moreover, the determination could be aided by the testimony of experts in the field.²¹¹

The introduction of experts into litigation, however, is also controversial and problematic. The paradox of expert testimony is well known, especially with regard to juries: At trial, a jury must credit one expert above another, yet experts testify because juries are deemed incapable of understanding the subject matter.²¹² Non-experts who witness a "battle of the experts" must, therefore, rely on "proxies like appearance, demeanor, and language to determine an expert's reliability."²¹³ This decisionmaking method can sometimes lead to incorrect results.²¹⁴ The potential for an expert problem was noted during the Act's legislative hearings, when testimony showed that each expert "is subject to challenge by other experts in the field so that one does not know in advance what the status of a particular work may be"²¹⁵

'prominence' within an infringing work. The judge must determine the effect of lighting and placement on a work of art. The question arises: Should a court undertake such analysis which may be highly subjective and affected by one's tastes and preferences—to determine the validity of a defendant's de minimis defense?").

210. See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

211. See S. 1198, 101st Cong., 1st Sess., 135 Cong. Rec. S6811-13 (daily ed. June 16, 1989) (concluding in an earlier version of the Act that, in making a determination of "recognized stature, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art . . . and other persons involved with the creation, appreciation, history, or marketing of works of recognized stature.").

212. See Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 54 (1901) ("[H]ow can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all.").

213. Edward K. Cheng, *Same Old, Same Old: Scientific Evidence Past and Present*, 104 MICH. L. REV. 1387, 1391 (2006) (reviewing TAL GOLAN, *LAW OF MEN AND LAWS OF NATURE* (2004)).

214. See *id.* (discussing an 1859 jury trial wherein a jury was incorrectly led to believe that a test for poison was valid and a 1985 bench trial wherein a judge was incorrectly led to believe that spermicides cause birth defects).

215. *Hearing on H.R. 3221, supra* note 69, at 95 (statement of R. Frederick Woolworth).

C. Borderline Cases

Finally, the standard might be difficult to apply in borderline cases. Critics will contend that objective determinations are merely subjective determinations in the aggregate. Thus, deciphering quantitative modifications from qualitative modifications, as well as distinguishing between significant and insignificant modifications, is itself a subjective and inconsistent determination. This quagmire is evident in Congress' interpretation of the Canadian case of *Snow v. Eaton Centre Ltd.*²¹⁶ An artist sued a shopping center to enjoin its modification of "Flight Stop," the artist's sculpture of sixty flying geese.²¹⁷ The shopping center had bought the sculpture and, as part of a seasonal Christmas display, placed red bows around the geese's necks without the artist's knowledge or consent.²¹⁸ The artist sued under Canada's copyright act, which grants an artist the right to restrain distortions, mutilations, or other modifications of his work that would be "prejudicial to [his] honour or reputation."²¹⁹ Snow claimed that "his naturalistic composition [was] made to look ridiculous by the addition of ribbons and suggest[ed] it [was] not unlike dangling earrings from the Venus de Milo."²²⁰ The court agreed and found the shopping center to be in violation of the Canadian copyright act.²²¹

Under the proposed substantial modification standard, the shopping center's actions would have been in violation of the artist's rights. Some might interpret the addition of the artificial Christmas ribbons as interfering with his naturalistic composition, changing his expression, and, therefore, prejudicing his honor or reputation. The drafters of the Act, however, felt that this particular modification was insufficient to inflict prejudice.²²² These members of Congress likely felt that the addition of the bows was a quantitatively insignificant modification. Though observable by the public, the addition of the bows was a temporary modification. Qualitatively, the modification could be interpreted as a minimal invasion because the bows did not change the underlying meaning of the work anymore than if the shopping center had illuminated the display with green and red lights. Given

216. [1982] 70 C.P.R. (2d) 105 (Can.).

217. *Id.* at 106.

218. *Id.*

219. Copyright Act, R.S.C., ch. C-42, § 14.4 (1985).

220. [1982] 70 C.P.R. (2d) at 106.

221. *See id.*

222. H.R. Rep. 101-514, at 6927 ("[T]he committee believes that the presentation exclusion would operate to protect a Canadian shopping center that temporarily bedecked a sculpture of geese in flight with ribbons at Christmas time.").

that the harm was both quantitatively and qualitatively insignificant in these individuals' opinions, the addition of bows to the sculpture would not result in prejudice to the artist. Thus, the same modification can result in divergent decisions, depending on how the objectively-subjective decisionmaker frames the modification.

This criticism, however, can be raised against the Copyright Act in general. Though Congress did not provide a test for copyright infringement, “[c]ourts did not universally express . . . the need or desire for some kind of bright-line test for copyright infringement. As Judge Learned Hand commented, ‘The test for infringement of a copyright is of necessity vague. Decisions must . . . inevitably be *ad hoc* . . . [O]ne cannot say how far an imitator must depart from an undeviating reproduction to escape infringement.’”²²³

CONCLUSION

“That the individual shall have full protection in person and in property is a principle as old as the common law;” Louis Brandeis and Samuel Warren wrote in 1890, “but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society.”²²⁴ The enactment of the Visual Artists Rights Act in 1990 marks one recent attempt to recognize new rights—moral rights—in an attempt to meet the demands of a creative society. Yet, nearly twenty years later, the “exact nature and extent” of the protections offered under the Act is still unclear because so few cases have been litigated since the Act’s enactment. Specifically, the nature and extent of the prejudicial modification provision is especially ambiguous because the Act fails to define the terms relevant to understanding the provision.

This Comment examined the Act’s protection against violations of an artist’s integrity and attempted to define anew the right against modification, finding that only objectively prejudicial modifications should be actionable. Because Congress did not propose a means by which prejudice could be determined, the adoption of the substantial similarity standard from copyright law is a sensible solution to the problem. Under the

223. Cromer, *supra* note 168, at 268.

224. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

proposed substantial modification standard, only modification of a work whose quantitative and qualitative components are substantially modified should be deemed to violate the Act. The adoption of this standard clarifies the current ambiguity, unifies the Act, fulfills congressional intent, and integrates the foreign moral rights doctrine into the Copyright Act in a familiar and understandable manner. This interpretation of prejudice would provide flexibility in determinations, would result in more desirable judgments and settlements, and would offer a measure of exactness and certainty to the extent and nature of VARA's provisions.