

## MORAL RIGHTS AND DIGITAL ART: REVITALIZING THE VISUAL ARTISTS' RIGHTS ACT?

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*The author's rights that protect blocks of marble and oil-smearred canvases will prove impossible to enforce for all but the most conservative forms of digital art . . .*<sup>1</sup>

### I. INTRODUCTION

Moral rights protect an artist's personal honor and reputation in the art market and preserve the work of art as the artist intended for future generations.<sup>2</sup> By protecting the artist's vision of her work of art and ensuring proper attribution, moral rights rely on a traditional conception of art as unique and enduring. Digital art, in contrast, often relies on the qualities of accessibility and transience made possible by digital media. Many digital artists embrace the ease of copying and modifying and expect that, once released via a Web site, e-mail, or CD-ROM, their art will become part of the digital culture that other artists will incorporate into their works of art.<sup>3</sup> Furthermore, these artists presume that their art will become obsolete as the technology that supports it changes.<sup>4</sup> In such a culture, it seems unlikely that digital artists will seek moral rights.

Nevertheless, some digital artists are selling their art in ways that mimic traditional art market practices. Such artists may seek moral rights to protect the value of their art in the market. If collectors cannot rely on proper attribution and some degree of permanence, digital art will have little value in the marketplace. Also, digital artists, even those artists who reject the art market, may seek moral rights to require proper

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1. Jon Ippolito, *Intellectual Property or Intellectual Paucity?*, ARTBYTE, Aug.–Sept. 1998, at 19, 19 [hereinafter Ippolito, *Intellectual Property*], available at <http://www.three.org/ippolito/home.html> (follow “print publications” hyperlink, then follow “Intellectual Property or Intellectual Poverty?” hyperlink).

2. LEONARD D. DUBOFF, CHRISTY O. KING & MICHAEL D. MURRAY, *THE DESKBOOK OF ART LAW S-9* (2nd ed. 2004); JOHN HENRY MERRYMAN & ALBERT E. ELSER, *LAW, ETHICS AND THE VISUAL ARTS* 309 (4th ed. 2002).

3. See LEV MANOVICH, *AVANT-GARDE AS SOFTWARE* 8 (1999), <http://www.uoc.edu/artnodes/eng/art/manovich1002/manovich1002.pdf> [hereinafter MANOVICH, *AVANT-GARDE*]. “The new avant-garde is no longer concerned with seeing or representing the world in new ways but rather with accessing and using in new ways previously accumulated media. In this respect new media is post-media or meta-media, as it uses old media as its primary material.” *Id.*

4. See Ippolito, *Intellectual Property*, *supra* note 1, at 19.

credit for their art.<sup>5</sup> The right of attribution asserts the artist's personal connection to her work of art.<sup>6</sup> Finally, digital artists may seek moral rights to preserve their art for future generations. Although most artists do not consider preservation issues until later in their careers, digital artists may still seek to recreate their previous works of art for retrospective exhibitions.<sup>7</sup> This Note will explain how digital artists can gain moral rights protection for their art.

Although courts have not yet considered the issue of moral rights protection for digital art, the rapid expansion of the use of digital media demands an investigation of this issue. In the United States, the Visual Artists' Rights Act (VARA) provides moral rights protection for a narrow category of works of visual art.<sup>8</sup> While some digital art may be entitled to moral rights protection under this statute, digital art generally does not fit neatly within the definition of a work of visual art established by VARA. To address this shortcoming, VARA must adapt to include visual art created using new technologies.<sup>9</sup> In Part II, this Note will discuss current digital art practices and explain moral rights protection under VARA. In Part III, this Note will examine the possibility of moral rights protection for digital art under VARA. In Part IV, this Note will offer suggestions to digital artists who desire moral rights protection for their art, acknowledging that VARA may not be the only option for moral rights protection.

## II. BACKGROUND

### A. Digital Art

#### 1. What is Digital Art?

Digital art is art that uses digital technology as its medium or as a tool for its creation.<sup>10</sup> In the 1960s and 1970s, artists began to use

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5. See *id.* Ippolito, recognizing that digital artists seek credit for their art, urges artists to reject the right of attribution. *Id.*

6. DUBOFF, KING & MURRAY, *supra* note 2, at S-13; see MERRYMAN & ELSÉN, *supra* note 2, at 309.

7. Similarly, installation and site-specific artists accept the temporary nature of their work although they often document their works of art in photographs. See MIWON KWON, ONE PLACE AFTER ANOTHER: SITE-SPECIFIC ART AND LOCATIONAL IDENTITY 33-38 (2002). Many established site-specific artists, recognizing the historical value of the art, now seek to recreate works of art for retrospectives or to preserve existing works of art despite the ephemeral nature of the materials. *Id.*

8. 17 U.S.C. § 1064 (2000). Accordingly, this Note will consider only digital art that is primarily visual art.

9. Robert H. Thornburg, Note, *The Presumption Against Implied Transfer of Electronic Rights in Licenses Under Section 201(c) of the 1976 Copyright Act: A New Right for the Bundle?*, 2002 U. ILL. J.L. TECH. & POL'Y 235, 250 (2002) (considering the possibility that moral rights could provide additional protection for copyrighted works in new media).

10. CHRISTIANE PAUL, DIGITAL ART 8 (2003) [hereinafter PAUL, DIGITAL ART]. Digital technology relies on a system of discrete numeric and symbolic values; in contrast, analog technology relies on a system of continuous values. Digital, WIKIPEDIA: THE FREE ENCYCLOPEDIA (May 13,

computers as tools to create or alter images.<sup>11</sup> Early computer art, often created by programmers and researchers rather than artists, mimicked traditional drawings and paintings.<sup>12</sup> Artists were attracted to the ability to manipulate color, scale, and texture easily.<sup>13</sup> In 1966, Experiments in Art and Technology (EAT), a collective, was formed to facilitate collaborations between artists and engineers.<sup>14</sup> EAT attracted well-known artists such as Andy Warhol, Robert Rauschenberg, and John Cage.<sup>15</sup>

Today, artists use digital technologies as tools to create works that can exist solely in digital form or can be realized in physical form.<sup>16</sup> Artists use digital tools in place of or in addition to traditional methods to create drawings, photographs, and sculptures.<sup>17</sup> For example, artists use digital imaging to alter photographs and create new images.<sup>18</sup> Digital imaging allows the artist to morph images by blending one image into another or to juxtapose a variety of images and elements.<sup>19</sup> The artist also can print the digital photographs and images to create physical photographs and prints.<sup>20</sup> Similarly, sculptors use modeling software in the production of physical and virtual sculptures.<sup>21</sup> Software can assist sculptors in the initial design of a sculpture, which will be realized as a physical object.<sup>22</sup> Digital technologies permit the artist to create a digital object that can be printed or formed into a final tangible work.

Artists also may present digital art in the form of an installation.<sup>23</sup> Digital art installations use customized software or data but rely on physical objects for presentation.<sup>24</sup> The digital components of the

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2006), <http://en.wikipedia.org/wiki/Digital>. The computer is the basic tool for digital technology. MICHAEL RUSH, *NEW MEDIA IN LATE 20TH CENTURY ART* 170 (1999).

11. Julie Mehta, *Programming Digital Art*, ART BUS. NEWS, Dec. 2003, at 42, 42 (2003).

12. RUSH, *supra* note 10, at 172. "Computer art" is a term used since the 1970s. PAUL, *DIGITAL ART*, *supra* note 10, at 7. "New media art" has been used since the 1990s as an umbrella term for digital art, video art, and sound art. *Id.* Specific terms for subsets of digital art, such as software art, Internet art, and browser art, are also in current use. *See generally id.*

13. Christiane Paul, *Renderings of Digital Art*, 35 LEONARDO 471, 472 (2002) [hereinafter Paul, *Renderings*].

14. PAUL, *DIGITAL ART*, *supra* note 10, at 16.

15. *Id.*

16. *Id.* at 8.

17. *Id.*

18. *Id.* at 29–31.

19. *Id.*

20. *Id.* at 28.

21. *Id.* at 60.

22. *Id.*

23. *See id.* at 124.

24. *Id.* For example, Nancy Paterson's *Stock Market Skirt* (1998) visualizes stock market data from a Web site by raising or lowering a dress skirt hanging from a mannequin form in response to real-time changes in stock prices. *Id.* at 183; Nancy Paterson, *Stock Market Skirt*, <http://www.vacuumwoman.com/MediaWorks/Stock/stockimages.html> (last visited May 23, 2006). Another example is Ken Feingold's *Sinking Feeling* (2001), which used software and algorithms mimicking language processing and personality to give the illusion of a conversation with a humanoid head. PAUL, *DIGITAL ART*, *supra* note 10, at 147–48; Ken Feingold, *Online Catalog*, [http://www.kenfeingold.com/catalog\\_html](http://www.kenfeingold.com/catalog_html) (follow "Sinking Feeling" hyperlink) (last visited May 23, 2006).

installation are embedded within or are connected to the physical components.<sup>25</sup> These installations may appeal to viewers and collectors who cannot imagine a meaningful aesthetic experience on their home computers.<sup>26</sup> Digital art installations, as physical objects, thus satisfy the traditional concept of the art object while employing new technologies.

Finally, artists can create works of art that exist solely in a digital medium. Art that uses digital technology as its medium is “work [that] exclusively uses the digital platform from production to presentation, and . . . exhibits and explores that platform’s inherent possibilities.”<sup>27</sup> Artists who create art in a digital medium often seek to employ the specific characteristics of the medium, such as collaboration and customization.<sup>28</sup> The digital medium encourages participation in the appearance of digital art by allowing the viewer to navigate, assemble, or contribute to the work of art.<sup>29</sup> The digital medium also encourages customization because it permits real-time changes in data and visualization.<sup>30</sup> Digital images escape traditional fixation; they exist as information in a computer that can be easily manipulated.<sup>31</sup>

Software art and Internet art are two forms of art in a digital medium. Software art generally refers to artist-written code that runs on a local computer with or without live network data.<sup>32</sup> Internet art uses the World Wide Web, e-mail, instant messaging, text-based environments, and desktop videoconferencing to explore new forms of communication and visualization.<sup>33</sup> Artists use software to create “visual

25. See sources cited *supra* note 24.

26. See Mehta, *supra* note 11, at 43. See also Jon Ippolito, *Does the Art World Really “Get” the Internet?*, ARTBYTE, Mar.–Apr. 2000, at 24, 24–25, available at <http://www.three.org/ippolito/home.html> (follow “Print Publications” hyperlink, then follow “Does the Art World Really ‘Get’ the Internet?” hyperlink) (discussing the differences between digital art in museums and digital art on home computers); Tom Vanderbilt, *The King of Digital Art*, WIRED, Sept. 2005, at 148, 148 (“Whether Americans are ready to hang screens on their wall that don’t get HBO remains to be seen . . .”).

27. PAUL, DIGITAL ART, *supra* note 10, at 67. But see Lev Manovich, *New Media from Borges to HTML*, in THE NEW MEDIA READER 13, 16–17 (Noah Wardrip-Fruin & Nick Montfort eds., 2003) [hereinafter Manovich, *New Media*] (questioning the existence of the new media classification); Lev Manovich, *Post-Media Aesthetics* (2001), [http://www.manovich.net/DOCS/Post\\_media\\_aesthetics1.doc](http://www.manovich.net/DOCS/Post_media_aesthetics1.doc) [hereinafter Manovich, *Post-Media Aesthetics*] (arguing that digital technologies destroy the traditional concept of medium and invalidate the practice of classifying art by medium).

28. Paul, *Renderings*, *supra* note 13, at 472.

29. *Id.* Artist Mark Napier described user collaboration in relation to his art:

My works are not objects but interfaces. The users become collaborators in the artwork, upsetting the conventions of ownership and authority. By interacting with the work, the visitors shape the piece, causing it to change and evolve, often in unpredictable ways. The user is an integral part of the design. Technology provides the interface through which the user engages in the aesthetic process. The artwork is not a thing, it is a process, an interface, an invitation to participate in a creative act.

Bitforms, Mark Napier: Statement, [http://www.bitforms.com/statement\\_napier.html](http://www.bitforms.com/statement_napier.html) [hereinafter Bitforms, Napier Statement] (last visited May 23, 2006).

30. Paul, *Renderings*, *supra* note 13, at 472.

31. RUSH, *supra* note 10, at 170.

32. PAUL, DIGITAL ART, *supra* note 10, at 124. For examples of software art, see Runme.org, <http://www.runme.org> (last visited May 23, 2006).

33. PAUL, DIGITAL ART, *supra* note 10, at 112; Jon Ippolito, *Ten Myths of Internet Art*, 35 LEONARDO 485, 486 (2002) [hereinafter Ippolito, *Ten Myths*]. For example, browser art, such as

results” from computer code and to visualize data contained in databases or available on the Internet.<sup>34</sup> Artist Mark Napier described his art: “Many of my pieces appropriate the text, images and data that make up the web. The software/artwork uses this information as raw material to create an aesthetic experience.”<sup>35</sup> Napier strives to make his work accessible to all viewers by making it available on the Internet<sup>36</sup>, illustrating the Internet’s effectiveness as a mechanism for distributing digital art to a wide audience.

## 2. *The Digital Art Market*

Despite uncertainty in the sale, display, and conservation of digital art, the mainstream art community’s interest in digital art is increasing. Galleries are selling digital art, museums are showing it, and collectors are buying and commissioning it.<sup>37</sup> In the 1990s, the artistic community began to struggle with issues specific to the sale and display of digital art. Galleries did not need to modify existing sales practices to sell digital art installations, as galleries were already in the business of selling installations in other media.<sup>38</sup> More generally, though, art in digital form has required new sales and display practices. Computers as delivery mechanisms for digital art, often in the form of Web sites and CD-ROMs, do not fall easily within traditional sales or display models.<sup>39</sup>

Today, galleries sell digital art in limited editions, a strategy previously used to sell photographs, prints, and, more recently, film and video art.<sup>40</sup> When buying a limited edition DVD or CD-ROM, the

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Andruid Kerne’s *CollageMachine* (1997), challenges the system of pre-designed Web sites by allowing Internet users to create collages of text and images from various Web sites. PAUL, DIGITAL ART, *supra* note 10, at 118–19. See generally Andruid Kerne, *Collage Machine: Interest-Driven Browsing Through Streaming Collage*, in PROCEEDINGS: CAST01 // LIVING IN MIXED REALITIES 241, 241–44 (Monika Fleischmann & Wolfgang Strauss eds., 2001), available at [http://netzspannung.org/version1/extensions/cast01-proceedings/pdf/cast01\\_proceedings.pdf](http://netzspannung.org/version1/extensions/cast01-proceedings/pdf/cast01_proceedings.pdf) (proceedings published as special issue of NETZSPANNUNG.ORG/JOURNAL) (describing the functionality of *CollageMachine*).

34. PAUL, DIGITAL ART, *supra* note 10, at 124; Ewan Steel, *An Exploration of the Visual Mind of a Software Artist*, in READ\_ME: SOFTWARE ART & CULTURES 315, 320 (Olga Goriunova & Alexei Shulgin eds., 2004), available at <http://art.runme.org/1107794916-5974-0/steel.pdf>; see PAUL, DIGITAL ART, *supra* note 10, at 174–89.

35. Bitforms, Napier Statement, *supra* note 29.

36. Carly Berwick, *The New New-Media Blitz*, 100 ARTNEWS 112, 113 (2001), available at [http://www.artnewsonline.com/pastarticle.cfm?art\\_id=894](http://www.artnewsonline.com/pastarticle.cfm?art_id=894).

37. Manovich, *New Media*, *supra* note 27, at 14; Berwick, *supra* note 36, at 113; Rhizome.org, Rhizome Commissions Program, <http://www.rhizome.org/commissions/2005.rhiz> (last visited May 23, 2006) [hereinafter Rhizome Commissions].

38. See PAUL, DIGITAL ART, *supra* note 10, at 24. Two examples of such digital art installations are Leo Villareal’s light tube installations and Daniel Rozin’s *Wooden Mirror* (1999). See Mehta, *supra* note 11, at 68. Leo Villareal’s light tube installations, sold through Sandra Gering Gallery in New York, contain LEDs that the artist manipulated using custom software to alter the pattern and rhythm of colors. *Id.*; Sandra Gering Gallery, Leo Villareal, [http://www.geringgallery.com/2004/leo\\_villareal.html](http://www.geringgallery.com/2004/leo_villareal.html) (last visited May 23, 2006). Daniel Rozin’s *Wooden Mirror*, offered by Bitforms in New York, contains a hidden computer that makes the wooden surfaces of the “mirror” appear to reflect the viewer’s movements. Mehta, *supra* note 11, at 67; Bitforms, Daniel Rozin, [http://www.bitforms.com/artist\\_rozin.html](http://www.bitforms.com/artist_rozin.html) (last visited May 23, 2006).

39. Mehta, *supra* note 11, at 66; see PAUL, DIGITAL ART, *supra* note 10, at 23.

40. Mehta, *supra* note 11, at 67.

collector receives the DVD or CD-ROM with the artist's signature, a certificate of authenticity, and a backup copy.<sup>41</sup> One gallery offered a limited edition of shares to an interactive Internet project.<sup>42</sup> Collectors who purchased a share received a CD-ROM with the software.<sup>43</sup> Limited edition sales are effective because, although it is possible to make copies of the work of art, the unauthorized copies have no resale value.<sup>44</sup> Some galleries even use encryption to protect digital art against unauthorized copying.<sup>45</sup>

Artists and galleries also use alternative methods to sell digital art, such as sales of shares to artist collectives, sales of downloadable editions, and pay-per-view sales.<sup>46</sup> Steve Dietz, director of New Media Initiatives at the Walker Art Center, supports shares to artist collectives as a viable alternative to traditional collecting.<sup>47</sup> The corporate model has been successful for several artists' groups.<sup>48</sup> Moreover, sales of downloadable editions on the Internet expand the potential market for sales of digital art to collectors who do not frequent traditional galleries, as both artists and galleries can offer downloadable digital art on their Web sites.<sup>49</sup> The pay-per-view model has been less successful, however, and many digital artists reject such a limitation on access to their work.<sup>50</sup>

Many digital artists distribute their art freely to keep it out of the mainstream art world altogether.<sup>51</sup> Jon Ippolito, curator at the Guggenheim Museum, observed, "Many of the artists who engaged in the Internet early on claim they did so as a reaction against the greed-

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41. *Id.* For example, Feigen Contemporary in New York offers DVDs by Jeremy Blake, whose looping digital animations appear to create a moving painting. *Id.* at 68. The gallery suggests projecting the DVD images onto a wall with an LCD projector to simulate a large painting. Feigen Contemporary, Jeremy Blake, [http://www.feigencontemporary.com/artists/jeremy\\_blake](http://www.feigencontemporary.com/artists/jeremy_blake) (last visited May 23, 2006).

42. Mehta, *supra* note 11, at 67-68. Bitforms sold a limited edition of fifty signed shares to Mark Napier's *The Waiting Room* (2002), an interactive Internet project, for \$1000 each. *Id.*; Bitforms, Mark Napier: Waiting Room, [http://www.bitforms.com/artist\\_napier4.html](http://www.bitforms.com/artist_napier4.html) (last visited May 23, 2006) [hereinafter Bitforms, Waiting Room]. However, recently Bitforms launched a Web site to sell unlimited-edition software art. See Software ART Space, <http://www.softwareartspace.com> (last visited May 23, 2006).

43. Bitforms, Waiting Room, *supra* note 42.

44. Mehta, *supra* note 11, at 67.

45. *Id.*

46. Berwick, *supra* note 36, at 116.

47. *Id.*

48. Steve Dietz, *The Path More or Less Taken*, CAMERAWORK, Spring/Summer 2005, at 10, 10, available at <http://www.yproductions.com/writing/archives/000707.html>. Etoy.CORPORATION and RTMark have had success with this model to fund their projects. *Id.* See generally Etoy.CORPORATION, <http://www.eto.com> (last visited May 23, 2006); RTMark, The Mutual Fund Model, <http://www.rtmark.com/legacy/mutfunddesc.html> (last visited May 23, 2006).

49. Berwick, *supra* note 36, at 116. By April 2001, artist John Simon had sold eighty-four downloadable editions of *Every Icon* (1997) for twenty dollars each. *Id.* To view *Every Icon*, see Numeral, Every Icon, <http://www.numeral.com/everyicon.html> (last visited May 23, 2006). Collectors can purchase downloadable editions of *Every Icon* from Amazon.com. Amazon: Every Icon, <http://www.amazon.com> (search "Amazon.com" for "Every Icon"; then follow "Every Icon" hyperlink) (last visited May 23, 2006).

50. Berwick, *supra* note 36, at 116.

51. Ippolito, *Ten Myths*, *supra* note 33, at 487.

and profit-driven art market of the 1980s.”<sup>52</sup> Ippolito identified the Internet as a gift economy because the online ethic is that information should be free.<sup>53</sup> It is clear, then, that the model an artist chooses for the sale or distribution of her art will reflect the artist’s philosophy on the creation and distribution of digital art.

### 3. *Conservation of Digital Art*

Rapidly changing technologies pose a serious threat to the conservation and display of digital art. Changes in software and hardware have led to the perception that digital art is inherently ephemeral.<sup>54</sup> Once the software or hardware on which the digital art is based becomes obsolete, the art will no longer exist in any perceptible form.

Museums and arts organizations have responded to the need for conservation, which is essential to the collection, sale, and historical value of digital art.<sup>55</sup> Although traditional art collecting by museums focuses on acquisition, digital art collecting by museums focuses on preservation.<sup>56</sup> Ippolito suggests that museums can be “incubator[s] for living, changing artworks” that museums can adapt when their supporting technologies become obsolete.<sup>57</sup>

For artist John Simon, the Guggenheim Museum’s ownership of his work, *Unfolding Object* (2002), provides a rare possibility for his work to avoid obsolescence.<sup>58</sup> As Simon said, “If the museum buys the art work and values it as part of its permanent collection, there will be an economic incentive to keep the code running. The museum is the archival storage for my code. Isn’t that what a museum does for art anyway?”<sup>59</sup> Some museums thus have accepted their important role in the conservation of digital art.

Digital art has been problematic for museums not only because of obsolescence, but also because it does not fit within the traditional display model. When a museum acquires a work of digital art, it receives the code and the right to exhibit the work of art.<sup>60</sup> Some museums display digital art on screens or monitors in their galleries.<sup>61</sup> In addition, many museums, including the San Francisco Museum of Modern Art, the

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52. Berwick, *supra* note 36, at 113.

53. *Id.*

54. PAUL, DIGITAL ART, *supra* note 10, at 25.

55. *See id.*

56. *See* Matthew Mirapaul, *Getting Tangible Dollars for an Intangible Creation*, N.Y. TIMES, Feb. 18, 2002, at E2.

57. Jon Ippolito, *The Museum of the Future: A Contradiction in Terms?*, ARTBYTE, June–July 1998, at 18, 18–19, available at [http://www.three.org/ippolito/writing/wri\\_cross\\_museum.html](http://www.three.org/ippolito/writing/wri_cross_museum.html).

58. Mirapaul, *supra* note 56, at E2. To view *Unfolding Object*, see Solomon R. Guggenheim Museum, *Unfolding Object*, <http://unfoldingobject.guggenheim.org> (last visited May 23, 2006).

59. Mirapaul, *supra* note 56, at E2.

60. *Id.*

61. Berwick, *supra* note 36, at 116.

Walker Art Center, and the Whitney Museum of American Art, display digital art on their Web sites.<sup>62</sup>

Generally, curators, collectors, and artists are able to conserve digital art through five different methods: documentation, storage, emulation, migration, and reinterpretation. Documentation merely describes the work of digital art.<sup>63</sup> Storage requires upgrading the hardware and software on which the work of art is based.<sup>64</sup> Emulation allows the original software or equipment to interact with new software or equipment using emulation software that renders the original comprehensible to the new software or equipment.<sup>65</sup> Migration transfers the work of digital art from an obsolete format to a contemporary format.<sup>66</sup> Reinterpretation recreates the work using current technologies.<sup>67</sup> An artist's choice of conservation method will depend on the aspects of the work of art that the artist would like to preserve.

Several museums and arts organizations developed projects to preserve digital art. The Guggenheim Museum's Variable Media Network seeks input from artists and curators about how digital works should be displayed and preserved.<sup>68</sup> Artists can submit a questionnaire to specify their preferred conservation methods for each work of art.<sup>69</sup> Similarly, Rhizome.org, an online archive of digital art, asks artists who submit their work to complete a questionnaire detailing preferred and acceptable conservation methods for their works of art.<sup>70</sup> Rhizome.org requires an artist's permission for conservation and also allows an artist to refuse conservation.<sup>71</sup>

Museums and arts organizations also have recognized that the success of individual conservation efforts depends on standardization.<sup>72</sup> Standardization requires cooperation among institutions, national and international organizations, and governments.<sup>73</sup> One standardization project, Archiving the Avant-Garde, joins the conservation efforts of the Berkeley Art Museum, the Guggenheim Museum, Rhizome.org, the Franklin Furnace Archive, and the Cleveland Performance Art

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62. PAUL, DIGITAL ART, *supra* note 10, at 24–25. See generally San Francisco Museum of Modern Art, E.space, [http://www.sfmoma.org/espace/espace\\_overview.html](http://www.sfmoma.org/espace/espace_overview.html) (last visited May 23, 2006); Walker Art Center, Gallery 9, <http://gallery9.walkerart.org> (last visited May 23, 2006); Whitney Museum of American Art, ARTPORT, <http://artport.whitney.org> (last visited May 23, 2006).

63. Rhizome.org, Rhizome ArtBase Management Policy (Sept. 23, 2002), <http://www.rhizome.org/artbase/policy.htm> [hereinafter Rhizome.org, ArtBase Policy].

64. Berwick, *supra* note 36, at 115.

65. PAUL, DIGITAL ART, *supra* note 10, at 25; Berwick, *supra* note 36, at 115; RICHARD RINEHART, PRESERVING THE RHIZOME ARTBASE (2002), <http://www.rhizome.org/artbase/report.htm>.

66. Rhizome.org, ArtBase Policy, *supra* note 63.

67. Berwick, *supra* note 36, at 115.

68. *Id.*; Variable Media Network, <http://www.variablemedia.net/e/welcome.html> (follow “tools” hyperlink; then follow “questionnaire” hyperlink) (last visited May 23, 2006).

69. Variable Media Network, *supra* note 68.

70. Rhizome.org, ArtBase Policy, *supra* note 63.

71. *Id.*

72. PAUL, DIGITAL ART, *supra* note 10, at 25.

73. *Id.*



Archive.<sup>74</sup> Standards for the preservation of traditional forms of art, such as photography and printmaking, already exist<sup>75</sup> and may influence other efforts to preserve digital art.

## B. Moral Rights

### 1. What Are Moral Rights?

Moral rights are the rights of an artist to assert control over a work of art even after it has been sold. Although moral rights generally are viewed as protecting only the artist's interests, they also serve the artist's patrons and the general public. First, moral rights protect the artist's personality and reputation.<sup>76</sup> By granting the artist enduring rights to a work of art, moral rights defend the bond between the artist and the work, a bond that endures after sale.<sup>77</sup> Second, by protecting the artist's reputation, moral rights benefit not only the artist, but also collectors of the artist's work.<sup>78</sup> An artist's reputation has a direct impact on the overall value of that artist's work. Third, moral rights safeguard cultural property for future generations.<sup>79</sup> Preservation, informed by moral rights, allows others to see the work as the artist intended.<sup>80</sup>

The concept of moral rights encompasses several rights. The right of attribution is the artist's right to associate her name with her work.<sup>81</sup> The right of integrity is the artist's right to prevent the distortion or misrepresentation of her work.<sup>82</sup> The right of integrity can protect both the physical and conceptual integrity of a work of art.<sup>83</sup> The right of disclosure is the artist's right to determine when her work is complete.<sup>84</sup> The right of withdrawal is the artist's right to remove her work from

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74. Kendra Mayfield, *How to Preserve Digital Art*, WIRED NEWS, July 23, 2002, <http://www.wired.com/news/culture/0,1284,53712,00.html>; Archiving the Avant-Garde, [http://www.bampfa.berkeley.edu/about\\_bampfa/avantgarde.html](http://www.bampfa.berkeley.edu/about_bampfa/avantgarde.html) (last visited May 23, 2006).

75. Mayfield, *supra* note 74.

76. MERRYMAN & ELSEN, *supra* note 2, at 309.

77. DUBOFF, KING & MURRAY, *supra* note 2, at S-3; Nadia Walravens, *La protection de l'oeuvre d'art et le droit moral de l'artiste [Protection of Works of Art and Artists' Moral Rights]*, 197 REVUE INTERNATIONALE DU DROIT D'AUTEUR [RIDA] 3, 4 (2003) (Fr.).

78. MERRYMAN & ELSEN, *supra* note 2, at 309.

79. *See id.* at 310.

80. John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1041 (1976).

81. DUBOFF, KING & MURRAY, *supra* note 2, at S-13; *see* 17 U.S.C. § 106A (2000); Code de la Propriété Intellectuelle [CPI] art. L121-1 (Fr.), *available at* [http://www.legifrance.gouv.fr/html/codes\\_traduits/cpiatext.htm](http://www.legifrance.gouv.fr/html/codes_traduits/cpiatext.htm) (last visited May 23, 2006); MERRYMAN & ELSEN, *supra* note 2, at 309.

82. DUBOFF, KING & MURRAY, *supra* note 2, at S-23; *see* 17 U.S.C. § 106A; CPI art. L121-1 (Fr.); MERRYMAN & ELSEN, *supra* note 2, at 308-09.

83. Walravens, *supra* note 77, at 44. *See* CPI art. L121-1 (Fr.).

84. DUBOFF, KING & MURRAY, *supra* note 2, at S-6; *see* CPI art. L121-2 (Fr.); MERRYMAN & ELSEN, *supra* note 2, at 308-09.

publication and compensate the owner.<sup>85</sup> A jurisdiction may recognize one or more of these rights.

Moral rights have the longest history under the French civil law tradition.<sup>86</sup> Under French law, both moral rights and economic rights, including copyright, are part of an artist's inherent rights.<sup>87</sup> *Droit d'auteur*, or author's rights, is the umbrella term for moral and economic rights.<sup>88</sup> French moral rights are perpetual, inalienable, and non-waivable.<sup>89</sup> After the artist's death, moral rights descend to the artist's heirs, who must exercise those rights in accordance with the artist's intent.<sup>90</sup>

French courts recognized moral rights even before their codification in the Law of March 11, 1957.<sup>91</sup> The judicial origins of moral rights in French law are unusual because civil law generally develops from legislative and executive action.<sup>92</sup> The development of moral rights in France corresponds to the rise of French art in the nineteenth and early twentieth centuries.<sup>93</sup> For example, in 1911, French courts considered a case involving the painter J.F. Millet.<sup>94</sup> Millet's son was able to prevent reproductions of his father's painting, *The Angelus*, on grounds that the reproductions distorted the work of art.<sup>95</sup> In addition to the right of integrity, late nineteenth and early twentieth century French cases recognized the rights of attribution, disclosure, and withdrawal.<sup>96</sup> The Law of March 11, 1957 codified these moral rights, which exist today in the Intellectual Property Code.<sup>97</sup>

The rights of attribution and integrity also are codified in the Berne Convention, which establishes minimum standards for the protection of copyrighted works in member countries.<sup>98</sup> The United States joined the Berne Convention in 1988 despite the lack of moral rights protection under U.S. copyright law.<sup>99</sup> In 1990, Congress enacted VARA to harmonize U.S. law on moral rights with the requirements of the Berne Convention.<sup>100</sup> The moral rights granted by VARA are analogous to the rights protected by the Berne Convention.<sup>101</sup>

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85. DUBOFF, KING & MURRAY, *supra* note 2, at S-11; MERRYMAN & ELSEEN, *supra* note 2, at 308-09; see CPI art. L121-4 (Fr.).

86. See DUBOFF, KING & MURRAY, *supra* note 2, at S-54.

87. MERRYMAN & ELSEEN, *supra* note 2, at 305-06.

88. *Id.*

89. CPI art. L121-1 to -4 (Fr.); DUBOFF, KING & MURRAY, *supra* note 2, at S-35.

90. DUBOFF, KING & MURRAY, *supra* note 2, at S-35.

91. *Id.* at S-2; Merryman, *supra* note 80, at 1026.

92. Merryman, *supra* note 80, at 1026; see DUBOFF, KING & MURRAY, *supra* note 2, at S-4.

93. See Merryman, *supra* note 80, at 1042.

94. *Id.* at 1029.

95. *Id.* The court found that the reproductions changed the lighting of the painting and added elements such as a scarf or bonnet to the people depicted in the painting. *Id.*

96. See *id.* at 1023-35.

97. CPI art. L121-1 to -4 (Fr.).

98. DUBOFF, KING & MURRAY, *supra* note 2, at S-1.

99. MERRYMAN & ELSEEN, *supra* note 2, at 356.

100. See H.R. REP. NO. 101-514, at 10 (1990).

101. *Id.* at 5.

## 2. *The Visual Artists' Rights Act*

VARA grants moral rights to artists only for works of visual art.<sup>102</sup> A two-prong test determines whether a work of art is eligible for moral rights protection. The positive prong defines a work of visual art and the negative prong lists exclusions from moral rights protection. VARA defines a work of visual art as a painting, drawing, print, or sculpture in a single copy or a limited number of signed and numbered copies, or a still photograph created for exhibition in a single copy or a limited number of signed and numbered copies.<sup>103</sup> VARA restricts a work of visual art to a single copy or a limited edition of fewer than two hundred copies.<sup>104</sup>

VARA further limits protection by excluding certain types of art. The negative prong of the definition of a work of visual art lists the exclusions:

A work of visual art does not include—

- (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;
- (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
- (iii) any portion or part of any item described in clause (i) or (ii);
- (B) any work made for hire; or
- (C) any work not subject to copyright protection under this title.<sup>105</sup>

By enacting these exclusions, Congress hoped to limit moral rights protection to works of fine art sold as such.<sup>106</sup> For example, Congress excluded audiovisual works because they are generally collaborative works to which the authors do not retain economic rights.<sup>107</sup> The House Report further noted the differences between the sale and distribution of audiovisual works and the sale of fine art.<sup>108</sup> Although VARA excludes many types of art from its definition of a work of visual art, Congress asked courts to consider the standards of the artistic community in determining whether a work of art is a work of visual art:

The courts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition. Artists may work in a variety of media, and use any number of materials in creating their works. Therefore, whether a particular work falls

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102. 17 U.S.C. § 106A (2000).

103. *Id.* § 101.

104. *Id.*

105. *Id.*

106. See H.R. REP. NO. 101-514, at 9.

107. *Id.* This concern also is present in the positive prong, under which “a still photographic image” can be a work of visual art only if produced “for exhibition purposes.” *Id.*

108. *Id.*

within the definition should not depend on the medium or materials used.<sup>109</sup>

Thus, in cases of ambiguity, courts should look to the standards of the artistic community to determine whether a work of art is entitled to protection.

Congress also considered the standards of the artistic community when drafting the definition of a work of visual art. Under the positive prong, the concepts of limited editions, numbering, and marking are familiar to the artistic community.<sup>110</sup> Under the negative prong, the limitation found in subparagraph (A)(iii) does not exclude common artistic practices such as collage.<sup>111</sup> Even if an artist created a collage from excluded elements, which would not be protected separately, VARA would protect the collage as a whole if it met the other requirements of the definition.<sup>112</sup>

For works of visual art, VARA provides for the rights of attribution and integrity. Unlike French moral rights, moral rights under VARA exist only for the life of the artist and may be waived.<sup>113</sup> The right of attribution under VARA gives an artist the right to require the association of her name with her work and prevent the association of her name with work that is not her own or that has been distorted, mutilated, or modified.<sup>114</sup> The right of integrity under VARA gives an artist the right to prevent any intentional distortion, mutilation, or modification of her work that is harmful to her honor or reputation.<sup>115</sup> However, VARA also includes the right to prevent destruction of a work, which is an aspect of the right of integrity that is not required under the Berne Convention.<sup>116</sup> VARA protects only works of recognized stature against destruction.<sup>117</sup> In determining whether a work of visual art is of recognized stature, courts consider the reputation of the work of art in the artistic community.<sup>118</sup>

In addition to the strict definition of a work of visual art, VARA limits moral rights protection by numerous exceptions. Modifications to a work of visual art that result from time or the nature of materials are not violations of the right of integrity; neither are modifications that result from conservation or public presentation, unless the modification

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109. *Id.* at 11.

110. *Id.* at 12–13. Standard artistic practice also involves breaking the original molds or otherwise destroying the originals from which copies could be made. *Id.* at 13. Moreover, state fraud laws may prohibit artists from adding copies to a limited edition. *Id.* The practice of destroying the original would not be effective for digital art because a new perfect copy can be made from any existing copy.

111. *Id.* at 13–14.

112. *See id.*

113. 17 U.S.C. § 106A(d)–(e) (2000).

114. *Id.* § 106A(a).

115. *Id.*

116. *Id.* Justin Hughes, *The Line Between Work and Framework, Text and Context*, 19 CARDOZO ARTS & ENT. L.J. 19, 22 (2001).

117. 17 U.S.C. § 106A(a)(3)(B).

118. *Carter v. Helmsley-Spear, Inc.* (*Carter I*), 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *aff'd in part, rev'd in part, vacated*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996).

is caused by gross negligence.<sup>119</sup> This exception incorporates the standards of the artistic community by exempting proper display and conservation practices.<sup>120</sup> VARA also limits protection for works of art that are attached to buildings, distinguishing between removable and non-removable works but limiting the right of integrity for both.<sup>121</sup>

### III. ANALYSIS

To receive protection under VARA, a work of digital art must satisfy the positive and negative prongs of the definition of a work of visual art. Courts also may rely on the standards of the artistic community to determine moral rights protection under VARA. Under the standards of the artistic community, courts would find that many works of digital art satisfy the statutory definition. In many cases, an artist's philosophy on the creation and distribution of her art may be the determinative factor.

#### A. *Standards of the Artistic Community*

Courts often apply the standards of the artistic community to determine whether a work of art is a work of visual art. In an early VARA case, the court considered whether a large-scale sculpture, consisting of recycled materials attached to the ceilings, walls, and floor of a building lobby, was a work of visual art.<sup>122</sup> The defendant argued that the sculpture was applied art because some of its elements were two- and three-dimensional decorative works.<sup>123</sup> The court rejected this argument, finding that a work of visual art can incorporate elements that would be excluded on their own.<sup>124</sup> The court noted that Congress did not intend to exclude common artistic practices, such as collage, from protection under VARA.<sup>125</sup>

In another case, a court used the standards of the artistic community to define the type of "model" that is excluded from protection under VARA.<sup>126</sup> A sculptor claimed a violation of her right of integrity when another artist was permitted to re-sculpt a damaged portion of the

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119. 17 U.S.C. § 106A(c).

120. See H.R. REP. NO. 101-514, at 17 (1990). "Under subsection (c)(2), galleries and museums continue to have normal discretion to light, frame, and place works of art." *Id.*

121. 17 U.S.C. § 113(d). Non-removable works are works of visual art that cannot be detached from a building without causing the destruction, mutilation, distortion, or other modification of the work of visual art. *Id.* § 113(d)(1). Removable works are works of visual art that can be detached from a building without causing the destruction, mutilation, distortion, or other modification of the work of visual art. *Id.* § 113(d)(2).

122. *Carter v. Helmsley-Spear, Inc. (Carter II)*, 71 F.3d 77, 80 (2d Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996).

123. *Id.* at 85.

124. *Id.*

125. *Id.*

126. *Flack v. Friends of Queen Catherine, Inc.*, 139 F. Supp. 2d 526, 533 (S.D.N.Y. 2001).

sculptor's model.<sup>127</sup> The defendants argued that the model was excluded from protection as a "model" under the definition of a work of visual art.<sup>128</sup> To clarify the term "model," which the court thought was ambiguous in the statute, the court looked to the standards of the artistic community.<sup>129</sup> According to those standards, a sculptor's model was similar to a painter's preliminary sketches or a photographer's negatives, both of which would be protected by VARA.<sup>130</sup> The court determined that VARA protected the model because the artistic community considered the sculptor's model a work of visual art.<sup>131</sup>

Courts also have considered the standards of the artistic community in determining whether a work of art is a work of recognized stature. The test for recognized stature is "(1) that the visual art in question has 'stature,' i.e. is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society."<sup>132</sup> One court permitted an artist to present letters, newspaper and magazine articles, and an exhibition program in support of the recognized stature of his sculpture.<sup>133</sup> This evidence, which showed that the sculpture was newsworthy in the artistic community, was sufficient to prove recognized stature.<sup>134</sup>

Similarly, another court determined that a sculpture was not a work of recognized stature when the artist was unable to provide testimony or writings on the artistic merits of his sculpture.<sup>135</sup> The artist did not provide any evidence of public display or review by the artistic community.<sup>136</sup> The court concluded that newspaper articles about another sculpture by the same artist were not sufficient to show that the sculpture at issue was of recognized stature.<sup>137</sup> Although the articles established the artist's reputation as a local artist, they did not establish the recognized stature of the sculpture at issue.<sup>138</sup>

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127. *Id.* at 530–31.

128. *Id.* at 532.

129. *Id.* at 533–34.

130. *Id.* at 534.

131. *Id.* at 533–34.

132. *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999) (citing *Carter I*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994)).

133. *Id.*

134. *Id.* at 612–13.

135. *Scott v. Dixon*, 309 F. Supp. 2d 395, 397–98 (E.D.N.Y. 2004).

136. *Id.* at 398.

137. *Id.*

138. *Id.* at 400. An artist may establish recognized stature through his own status as an artist only if the artist has widely recognized international renown. *Id.* The court gave Picasso as an example. *Id.*

## B. Digital Art Under VARA

### I. Type of Art

#### a. Positive Prong of the Definition

Because courts generally rely on the standards of the artistic community to resolve ambiguous issues of moral rights protection under VARA, courts would consider protection for digital art under those same standards. Under the positive prong of the definition of a work of visual art, the work of art must be a painting, drawing, print, sculpture, or “still photographic image created for exhibition purposes only.”<sup>139</sup> According to discussions of digital art in the artistic community, artists can create drawings, paintings, photographs, and sculptures using digital media. Digital technologies serve as tools to create the painting, drawing, or photographic image that exists in digital form rather than in a traditional physical form.<sup>140</sup> Furthermore, artists can combine digital elements with physical elements to create digital art installations that are akin to sculpture.<sup>141</sup> In general, then, digital art can be described in terms of traditional paintings, drawings, prints, photographs, or sculptures.

Works of digital art are similar to photographs, which also can be easily reproduced. VARA protects a narrow category of photographs: “still photographic images produced for exhibition purposes only.”<sup>142</sup> For example, photographs produced for magazines and newspapers are not protected by VARA.<sup>143</sup> Congress recognized the inherent reproducibility of photographs by noting that the numbering and signing requirements are particularly important for photographs as notice of moral rights protection.<sup>144</sup> Many digital artists who sell their art in the traditional and online art markets already adhere to these requirements.<sup>145</sup>

In accordance with Congress’s desire to limit VARA to fine art, courts focus on the exhibition purposes requirement for photographs. One court determined that photographic prints produced as studies for use in another artist’s project did not satisfy the exhibition purposes requirement.<sup>146</sup> The photographer in that case sought proper attribution for the artist’s use of the photographs.<sup>147</sup> The photographer snapped the photographs for the artist and gave her the prints and negatives.<sup>148</sup> The

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139. 17 U.S.C. § 101 (2000).

140. *See supra* Part II.A.1.

141. *Id.*

142. 17 U.S.C. § 101; H.R. REP. NO. 101-514, at 11 (1990).

143. H.R. REP. NO. 101-514, at 11–12. Photographs produced for magazines and newspapers are not created for exhibition purposes only and are often works for hire. *Id.*

144. *See id.* at 13.

145. Mehta, *supra* note 11, at 43.

146. Lilley v. Stout, 384 F. Supp. 2d 83, 88 (D.D.C. 2005).

147. *Id.* at 84–85.

148. *Id.*

court said that a photograph must satisfy four conditions under VARA: (1) still photographic image, (2) intent to display, (3) uniqueness, and (4) signing.<sup>149</sup> The intent to display must exist when the photograph is produced, not when the photographer snaps the image.<sup>150</sup> Although the court recognized moral rights protection for preliminary works, in this case the photographer did not produce the photographic prints for display in their own right.<sup>151</sup>

Similarly, courts would consider whether a work of digital art was produced for exhibition purposes only. First, adherence to the norms of the art market is an indicator that the artist intended the work of art for exhibition purposes. To guarantee uniqueness, digital artists create one-of-a-kind installations that incorporate digital technologies or sell their works of art in limited editions.<sup>152</sup> Second, permission to use or modify the work of art does not defeat the exhibition purposes requirement. Digital artists often make their works of art available on Web sites, which allow artists to widely distribute their works of art for display.<sup>153</sup> When artists display their art on Web sites, they choose to encourage or discourage certain characteristics of the digital medium, such as the ease of copying and modification.<sup>154</sup> Display is the primary purpose of Web site distribution, but some artists also donate their art to the digital culture by refusing to add protection measures. Thus, despite the possibility for modification and use by other artists, digital art can satisfy the exhibition purposes requirement.

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149. *Id.* at 86.

150. *Id.* at 87.

151. *Id.* at 88.

152. *See supra* Part II.A.1–2.

153. PAUL, DIGITAL ART, *supra* note 10, at 112; Berwick, *supra* note 36, at 113.

154. Paul, *Renderings*, *supra* note 13, at 472.



### b. Negative Prong of the Definition

The negative prong of VARA's definition of a work of visual art provides for several exclusions. First, VARA excludes motion pictures and audiovisual works from protection.<sup>155</sup> VARA was intended to protect only fine art and only visual art.<sup>156</sup> Congress distinguished the production and distribution methods of motion pictures and audiovisual works from fine art.<sup>157</sup> Motion pictures and audiovisual works are produced in multiple copies and licensed for wide distribution, whereas works of fine art exist in single copies or limited editions.<sup>158</sup> Congress reinforced the exclusion of motion pictures and audiovisual works by limiting moral rights protection for photographs to any "still photographic image produced for exhibition purposes only."<sup>159</sup>

The exclusion of motion pictures and audiovisual works poses the largest barrier to moral rights protection for digital art. Moving images and sound are common elements in digital art. Artists who avoid these elements and fall within analogies to traditional fine art media will avoid this barrier. However, without a change to the statute, the exclusion of motion pictures and audiovisual works will severely limit the availability of moral rights protection for much digital art under VARA.

Second, functional objects, such as posters, maps, globes, charts, technical drawings, diagrams, models, applied art, and advertising items do not receive moral rights protection under VARA.<sup>160</sup> For example, a court determined that computer drawings that served as designs for a trophy were not works of visual art protected by VARA.<sup>161</sup> The court held that VARA excludes technical drawings, and the designer did not intend to display the drawings as standalone works of art.<sup>162</sup> The court further concluded that the drawings were not protected as preliminary drawings for a sculpture because the trophy was a model rather than a sculpture.<sup>163</sup>

Advertising materials have been particularly problematic for artists. In one case, an artist claimed a violation of his moral rights under VARA when a storeowner altered posters of the artist's photograph without crediting the artist for the original photograph.<sup>164</sup> The court dismissed the claims because the storeowner altered mass-produced posters of the artist's photograph, not the original work of art.<sup>165</sup> In so ruling, the court

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155. 17 U.S.C. § 101 (2000).

156. *See id.*; H.R. REP. NO. 101-514, at 9 (1990).

157. H.R. REP. NO. 101-514, at 9.

158. *Id.*

159. *See* 17 U.S.C. § 101.

160. *Id.*

161. *NASCAR v. Scharle*, 356 F. Supp. 2d 515, 529 (E.D. Pa. 2005).

162. *Id.*

163. *Id.*

164. *Silberman v. Innovation Luggage, Inc.*, No. 01 Civ. 7109 (GEL), 2003 U.S. Dist. LEXIS 5420, at \*5-10 (S.D.N.Y. Mar. 31, 2003).

165. *Id.* at \*14-15.

relied on the exclusion of posters from protection under VARA.<sup>166</sup> Similarly, another court dismissed an artist's VARA claims for the unauthorized use of his work of art in a store's advertising brochures.<sup>167</sup> The court relied on the exclusion of posters and advertising items from protection under VARA, finding that VARA did not give the artist any right to prevent unauthorized reproductions.<sup>168</sup>

The exclusion of functional items creates a barrier to moral rights protection for all artists but does not pose special problems for digital art. Artists who create models and drawings for functional objects will not receive moral rights protection unless they intended to display the models or drawings as standalone works of art.<sup>169</sup> This exclusion applies to models or drawings that artists create with computers or with traditional media. Furthermore, digital artists, like other artists, seek to prevent the commercial appropriation of their art in functional objects.<sup>170</sup> Although VARA does not grant such protection, generally artists can prevent unauthorized use of their works of art through copyright law.<sup>171</sup> Digital art also may benefit from the additional protections of the Digital Millennium Copyright Act (DMCA).<sup>172</sup>

Third, VARA excludes books, magazines, newspapers, periodicals, and electronic or similar publications.<sup>173</sup> This exclusion could block moral rights protection for text-based art such as software poetry.<sup>174</sup> The difference between a visual and a literary work of digital art may be difficult to perceive in some cases, but courts could look to the opinions of the artistic community to aid the determination. If the primary purpose of the work of art is visual rather than literary, VARA would apply.

Finally, VARA excludes databases and information services from protection.<sup>175</sup> This exclusion does not pose much of a difficulty for digital art. The work of art is the visualization of data, not data storage or management.<sup>176</sup> However, some digital artists may attempt to portray the

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166. *Id.*

167. *Berrios Nogueras v. Home Depot*, 330 F. Supp. 2d 48, 49–51 (D.P.R. 2004).

168. *Id.*

169. *NASCAR v. Scharle*, 356 F. Supp. 2d 515, 529 (E.D. Pa. 2005).

170. Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257, 274–75 (1996).

171. 17 U.S.C. § 106 (2000).

172. *Id.* §§ 1201–1202; see Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9, 11–13 (2001).

173. 17 U.S.C. § 101.

174. See Janez Strehovec, *The Software Language Art*, in READ\_ME: SOFTWARE ART & CULTURES 269, 269 (Olga Goriunova & Alexei Shulgin eds., 2004), available at <http://art.runme.org/1107798130-7289-0/strehovec.pdf>. “Digital poetry is actually software poetry, that is to say it is poetry generated by very special programming and scripting languages and their modifications (‘poetry patches’), for example Perl, Java script, Flash, Shockwave, Director etc.” *Id.* For an example of a Flash-based poem, see Claire Dinsmore, *The Dazzle as a Question*, <http://www.studiocleo.com/projects/dazzle/index.html> (last visited May 23, 2006).

175. 17 U.S.C. § 101.

176. See PAUL, DIGITAL ART, *supra* note 10, at 174–89. For another example of database art, see Ben Fry, *Anemone*, <http://acg.media.mit.edu/people/fry/anemone/applet> (last visited May 23, 2006).

impact of databases and information on culture.<sup>177</sup> As data visualization projects become more prevalent and utilitarian, the exclusion of maps, charts, and diagrams could apply.<sup>178</sup>

## 2. *Limited Editions*

Digital art also can satisfy the second condition of the positive prong, that the work be a single copy or part of a limited edition. Although a work of digital art is a copy rather than an “original” work, VARA permits copies in a limited edition of two hundred or fewer copies that the artist consecutively numbers and signs or marks.<sup>179</sup> By refusing to limit moral rights protection to works of art that exist only in a single copy, Congress recognized the common artistic practice of releasing art in limited editions.<sup>180</sup> Congress set a maximum number of copies eligible for moral rights protection in accordance with the norms of the artistic community.<sup>181</sup> Similarly, many digital artists choose to sell their works of art in the form of CD-ROMs, DVDs, photographs, or prints in limited editions.<sup>182</sup> The artist signs and authenticates each copy of the limited edition work of art, mimicking the limited edition practices used in the sale of art in traditional media.<sup>183</sup>

Furthermore, digital art can fulfill the statutory requirement of a limited edition even though additional copies may temporarily reside on the computer of the person who owns the limited edition copy. Provisions relating to computer programs are instructive in this regard. Under copyright law, a “new copy or adaptation . . . created as an essential step in the utilization of the computer program in conjunction with a machine . . . that . . . is used in no other manner” is not a copy for the purposes of copyright infringement.<sup>184</sup> Moreover, copyright law also permits new copies or adaptations for archival purposes.<sup>185</sup> By analogy, similarly temporary or archival copies of digital art would not be copies for VARA purposes.

Thus, if the artist releases the work of art in a limited edition in accordance with the standards of the artistic community, courts should not deny moral rights protection because illegal copying might occur. Artists can ensure a limited number of copies through copy protection

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177. PAUL, DIGITAL ART, *supra* note 10, at 178.

178. *See id.* at 189. Paul predicts that dynamic visualizations of data will become common in e-mail and online chat environments, and thus, more utilitarian. *See id.*

179. 17 U.S.C. § 101. *Contra* DUBOFF, KING & MURRAY, *supra* note 2, at 52 (“Computer artists may never obtain the protections of VARA because their ‘original’ works most likely are digitalized files on the artist’s own hard drive, and any manifestation of the work that can be seen and enjoyed by the public—whether uploaded to a website or downloaded to a viewer’s computer or transferred to a client by hard media or electronic transmission—is going to be a copy of the original work.”).

180. H.R. REP. NO. 101-514, at 9, 12–13 (1990).

181. *Id.*

182. *See generally* Mehta, *supra* note 11.

183. *See id.* at 43.

184. 17 U.S.C. § 117(a)(1).

185. *Id.*

measures, including encryption and password protection. The DMCA, which prohibits the circumvention of technological protection measures, supplies the enforcement mechanisms to prevent unauthorized copying.<sup>186</sup>

Professor Ginsburg has analyzed such enforcement of moral rights through the copyright management provisions of the DMCA.<sup>187</sup> First, she identified protection of the right of attribution in the copyright management provision of the DMCA.<sup>188</sup> This provision prohibits alteration of copyright management information that identifies the artist as the author of the work of art.<sup>189</sup> Second, Professor Ginsburg identified protection of the right of integrity.<sup>190</sup> By requiring accurate copyright management information, the DMCA could help to ensure that the distributed work of art is the same as the work of art released by the artist.<sup>191</sup> The DMCA prohibits changing the text of copyright management information and using original copyright management information to identify an altered work of art if it promotes infringement.<sup>192</sup>

As Professor Ginsburg discussed, the DMCA provides an alternative means of moral rights protection for digital art.<sup>193</sup> However, moral rights protection under the DMCA has its own limitations. Protection of the right of attribution is limited to removal or alteration that assists or hides copyright infringement.<sup>194</sup> Protection of the right of integrity similarly is limited to alterations that promote copyright infringement.<sup>195</sup> Moreover, the DMCA does not protect a work of art against alterations to create derivative works when the copyright owner makes the alterations.<sup>196</sup> If the artist is not the copyright owner, she will not be able to prevent such alterations under the DMCA.<sup>197</sup>

### 3. Other Limitations

#### a. Works Made for Hire

VARA also excludes works made for hire.<sup>198</sup> Congress excluded motion pictures and audiovisual works from VARA primarily because

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186. *Id.* § 1201.

187. Ginsburg, *supra* note 172, at 11–13.

188. *Id.* at 11–12; *see* 17 U.S.C. § 1202.

189. Ginsburg, *supra* note 172, at 12. Copyright management information includes the author's name or other identifying information. *Id.* at 13; *see* 17 U.S.C. § 1202.

190. Ginsburg, *supra* note 172, at 13–14.

191. *Id.* at 14.

192. *Id.*

193. *Id.* at 11–12.

194. *Id.* at 13.

195. *Id.* at 14.

196. *Id.* at 14–15.

197. *Id.*

198. 17 U.S.C. § 101 (2000).

the artists do not retain economic rights to those collaborative works.<sup>199</sup> Under copyright law, a work made for hire includes “work prepared by an employee within the scope of his or her employment, or . . . work specially ordered or commissioned for use as a contribution to a collective work . . . as a supplemental work, [or] as a compilation.”<sup>200</sup>

Courts look to agency law to determine whether an artist is an employee.<sup>201</sup> In one case, the Supreme Court determined that an artist was an independent contractor even though the hiring organization had some control over the design and production of the sculpture.<sup>202</sup> The nonprofit organization that commissioned the artist to create the sculpture sought copyright ownership of the sculpture.<sup>203</sup> First, the Court found that the sculpture did not fall within the categories of a commissioned work made for hire.<sup>204</sup> Second, the Court determined that the artist was not an employee.<sup>205</sup> The Court identified a list of factors from agency law under which the artist was an independent contractor.<sup>206</sup> The Court considered the artist’s skill, the artist’s use of his own tools and studio, the short retention period, the artist’s freedom in setting work times and hours, and the artist’s discretion in hiring and paying assistants.<sup>207</sup> Moreover, the organization did not create sculptures, could not assign additional duties, did not pay taxes or benefits for the artist, and paid the artist upon completion of the sculpture.<sup>208</sup>

Another court, considering whether a sculpture was a work made for hire in the context of VARA claims, relied on the factors identified by the Supreme Court.<sup>209</sup> The court found that the determination of employee status was a fact-specific analysis.<sup>210</sup> Payment of health and insurance benefits, vacation time, and payroll and social security taxes by the company indicated that the artists were employees rather than independent contractors.<sup>211</sup> The court also considered the artists’ skill and discretion, the duration of the relationship, and the scope of the relationship.<sup>212</sup>

The exclusion of works made for hire from VARA’s definition of a work of visual art is not a barrier to moral rights protection for digital art. Digital art often is commissioned, so questions about works made

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199. H.R. REP. NO. 101-514, at 9 (1990).

200. 17 U.S.C. § 101; *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 738 (1989).

201. *Reid*, 490 U.S. at 751–52.

202. *Id.* at 753.

203. *Id.* at 735.

204. *Id.* at 738.

205. *Id.* at 752.

206. *Id.* at 751–53.

207. *Id.*

208. *Id.* at 753.

209. *Carter II*, 71 F.3d 77, 87 (2d Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996).

210. *Id.*

211. *Id.* at 86–87.

212. *Id.* at 86.

for hire will arise.<sup>213</sup> Courts, however, will be able to settle these questions according to the existing legal framework.

#### b. Uncopyrightable Works

To receive moral rights protection under VARA, a work of visual art must satisfy the requirements of copyrightability.<sup>214</sup> A copyrightable work is an original work of authorship that is fixed in a tangible medium.<sup>215</sup> First, works of digital art are “works of authorship,” but the collaborative and interactive models of authorship in digital media demand a change in the traditional concept of authorship.<sup>216</sup> Interactive digital art questions traditional authorship by allowing the viewer or user to control the appearance or development of the work of art.<sup>217</sup> Despite the users’ input, the artist remains the author of the framework for the work of art. Unless the users appropriate the interactive or collaborative work of art to create a new work of art, the artist will remain the author of the work of art.<sup>218</sup>

Second, digital art meets the requirement of originality. The requirement of originality is not a stringent one: “All that is needed . . . is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’”<sup>219</sup> Even digital art that combines pre-existing elements would meet the low threshold requirement of originality because collages and creative arrangements or compilations may be copyrighted.<sup>220</sup>

Digital art differs from the digitized images that courts have held cannot be copyrighted. Digitized art is art in traditional media converted to digital form. Considering the copyrightability of digitized images of public domain works of art, one court determined that a change in media did not satisfy the originality requirement.<sup>221</sup> The mere conversion of art created in traditional media to a digital medium was not entitled to copyright protection simply by virtue of technical skill or “sweat of the brow.”<sup>222</sup> The court noted that, in fact, the purpose of digitization was to exactly *reproduce* the original work of art in digital form.<sup>223</sup> In contrast, digital artists use digital technologies to *create* new works of art; they do

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213. See, e.g., Rhizome Commissions, *supra* note 37.

214. 17 U.S.C. § 101 (2000).

215. *Id.* § 102.

216. Chon, *supra* note 170, at 265–66.

217. *Id.* at 264; Paul, *Renderings*, *supra* note 13, at 472.

218. *But see* Chon, *supra* note 170, at 274–75 (advocating a concept of joint authorship that is adapted to digital culture). Chon notes that although vestiges of traditional authorship would lead many artists to seek moral rights and copyright protections for digital art, joint authorship for users who interact with or collaborate on a work of art would encourage creativity and dissemination. *Id.*

219. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102–03 (2d Cir. 1951).

220. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991) (selecting or arranging uncopyrightable elements in an original way satisfies the requirement of originality).

221. *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 196 (S.D.N.Y. 1999).

222. *Id.* at 197.

223. *Id.*

not merely reproduce existing works of art in a different medium. Original works of digital art or original selections and arrangements of uncopyrightable elements thus can be copyrighted.<sup>224</sup>

Finally, digital art meets the requirement of fixation in a tangible medium. Copyright law requires a “tangible medium of expression, now known or later developed, from which [works of authorship] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>225</sup> Digital art in the form of prints, photographs, and installations is within the scope of this definition. Digital art in a digital medium, perceived with the aid of a computer or other device, also falls within the scope of a tangible medium.<sup>226</sup> Thus, digital art meets the requirements of copyrightability.

### c. Limitations on Moral Rights Protection

Even if VARA protects a work of digital art, the limitations on moral rights would narrow the scope of protection. First, VARA would not protect digital art against obsolescence because the statute does not protect against modifications resulting from time or the nature of the materials.<sup>227</sup> Second, VARA would not protect digital art against changes resulting from the use of current technologies to view the work of art because VARA does not provide protection against modifications resulting from public presentation.<sup>228</sup> Conservation initiatives by museums and arts organizations attempt to fill these gaps in protection. Conservation initiatives often ask artists to specify what types of conservation methods, if any, are acceptable.<sup>229</sup> By signing agreements with the institutions that will preserve the work of art, artists thus can control the appearance of their art for future viewers without relying on VARA.

## IV. RECOMMENDATION

Digital artists who seek moral rights protection must take steps to ensure that their works of art fall within VARA’s definition of a work of visual art. The digital artists who would probably seek moral rights under VARA are the artists who sell their art through the traditional or online art markets. Many of these artists would be willing to conform to the requirements of VARA to protect their reputations in the market. In addition, the large number of digital artists whose art does not fall

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224. See *Feist*, 499 U.S. at 348–51.

225. 17 U.S.C. § 102(a) (2000).

226. See *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1111–12 (9th Cir. 1998) (finding that computer files which described audiovisual displays were in a tangible medium); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996) (finding software and data were “fixed in a tangible medium of expression”).

227. 17 U.S.C. § 106A(c)(1).

228. *Id.* § 106A(c)(2).

229. See *supra* Part II.A.3.

within the scope of VARA could seek protection under the DMCA. Furthermore, both groups of artists could gain assistance from museums and arts organizations to preserve their art.

First, to receive protection under VARA, artists should avoid the use of sound, film, and video elements. The exclusion of audiovisual works and motion pictures from VARA is a barrier to protection for many types of digital art. Although Congress may not have foreseen the direction of digital art when it drafted VARA, Congress made no exception for film and video art that, at the time, was already integrated into established gallery and museum practices. Thus, it is unlikely that Congress will amend VARA to include film, video, or audiovisual work despite Congress's concern with the differences between fine art and other creative works.<sup>230</sup> The size of the audience, the distribution methods, and the number of copies distinguish film and video art from television and motion pictures.<sup>231</sup> These factors became important to distinguish fine art from mass culture as artists began to use mass reproduction methods to create fine art.<sup>232</sup> Because Congress did not defer to these factors for film and video art, digital artists should not rely on VARA for the protection of film, video, or audiovisual art.

Second, digital artists must limit the distribution of their art. The use of limited editions as employed in the art market for the sale of photographs, prints, and film and video art is crucial to demonstrate that the work of art is unique.<sup>233</sup> The use of copy protection measures will prevent unauthorized copying and ensure that limited edition works of art remain limited to the number of permitted copies.<sup>234</sup>

Digital artists who use film, video, and sound elements or who do not limit their art to limited editions might receive moral rights protection under the DMCA. As Professor Ginsburg suggests, artists could use the DMCA to enforce limited rights of attribution and integrity.<sup>235</sup> The DMCA protects attribution when alteration of the copyright management information assists or hides copyright infringement and protects integrity when the alteration promotes copyright infringement.<sup>236</sup> Thus, protection under the DMCA is limited because assertion of these rights must be related to copyright infringement.<sup>237</sup>

Finally, digital artists should rely on museums and arts organizations that have already developed programs to preserve digital art according to the artist's intent.<sup>238</sup> Although many digital artists are not concerned

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230. See H.R. REP. NO. 101-514, at 9 (1990).

231. Manovich, *Post-Media Aesthetics*, *supra* note 27, at 2.

232. *Id.* at 2-3.

233. See H.R. REP. NO. 101-514, at 12 (quoting Professor Jane C. Ginsburg).

234. See generally 17 U.S.C. § 1201 (2000).

235. Ginsburg, *supra* note 172, at 11-15.

236. *Id.* at 13-14.

237. *Id.*

238. See *supra* Part II.A.3.



about the preservation of their art, they may reconsider the issue of preservation later as more established artists.<sup>239</sup> Conservation initiatives by museums and arts organizations serve an important historic role in preserving and documenting today's digital art.

## V. CONCLUSION

To receive moral rights protection under VARA, digital artists must acquiesce to a traditional conception of the art object as unique and enduring. Moral rights are important to digital artists who sell their art in limited editions through the art market to protect the reputation of the artists. Changes to the work of art or a lack of attribution could harm the value of the work and the artist's reputation, on which the artist relies to attract new buyers.

For digital artists who reject the limitations of VARA, the DMCA provides an alternative, but limited, means of moral rights protection. Many digital artists understand their art to be ephemeral cultural artifacts of the digital and information culture, to be borrowed, modified, or incorporated into new works of art as long as existing technology supports them. Although these artists would reject the right of integrity, many of them would seek to enforce the right of attribution. Moral rights thus have a role in protecting digital art, but artists must choose to claim them.

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239. See KWON, *supra* note 7, at 33.