

Facing the Music: Moral Intellectual Property Rights as a Solution to Artist Outrage about Music Torture

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NOTE

FACING THE MUSIC: MORAL INTELLECTUAL PROPERTY RIGHTS AS A SOLUTION TO ARTIST OUTRAGE ABOUT MUSIC TORTURE

Anna J. Mitran[†]

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INTRODUCTION

The image is familiar. Half a dozen prisoners in orange jumpsuits kneel in a small fenced-in gravel yard, hunched over as if they had been punched in the stomach. Their hands are tied in front of them, and they wear heavy goggles, medical masks, and silencing headphones. Two men in camouflage stand over the prisoners, their presence unacknowledged by the men on the ground. This photograph,¹ one of the few taken

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¹ See Shane T. McCoy, *DUPLICATE: USA – Military – Guantanamo Bay Detainees*, CORBIS IMAGES (Jan. 11, 2002), <http://www.corbisimages.com/stock->

inside Guantanamo Bay's Camp X-Ray, provides a glimpse into the U.S. government's interrogation practices there. The headphones and goggles deprive prisoners of sight and sound as an interrogation technique.² The sensory manipulations do not stop there, though—detainees at Guantanamo Bay and other detention centers are subjected to music torture, the practice of blaring loud music for an extended period to wear down a detainee's defenses in preparation for interrogation.³

Although the issue of music torture has only recently come into the public eye,⁴ such practices are not new. As early as the 1950s, national security agencies in the United States, Canada, and the United Kingdom began funding research into acoustical interrogation techniques.⁵ Some of these techniques were included in a 1963 U.S. interrogation manual called KUBARK.⁶ Although the KUBARK manual did not explicitly advocate for music torture in the form it is used today, it recognized that sensory deprivation or "persistent manipulation" of the interrogatees' environments could induce "regression," which would render interrogatees more cooperative towards their interrogators, whom they would suddenly perceive as "fatherly."⁷ Incessant, deafening music could serve as a "persistent manipulation" of environment that would induce regression.

photo/rights-managed/42-16825137/duplicate-usa-military-guantanamo-bay-detainees?popup=1 [http://perma.cc/RTE4-QCQF].

² See CENT. INTELLIGENCE AGENCY, *Kubark Counterintelligence Interrogation 87-90* (1963) [hereinafter *KUBARK*] ("The deprivation of stimuli induces regression by depriving the subject's mind of contact with an outer world and thus forcing it in upon itself. At the same time, the calculated provision of stimuli during interrogation tends to make the regressed subject view the interrogator as a father figure. The result, normally, is a strengthening of the subject's tendencies toward compliance.").

³ See Andy Worthington, *A History of Music Torture in the "War on Terror,"* HUFFINGTON POST BLOG (Jan. 15, 2009, 5:12 AM), http://www.huffingtonpost.com/andy-worthington/a-history-of-music-tortur_b_151109.html [http://perma.cc/8EU9-BPVF].

⁴ See Adam Zagorin & Michael Duffy, *Inside the Interrogation of Detainee 063*, TIME MAG., June 20, 2005, at 26, 26-33. The Zagorin article brought Guantanamo Bay interrogation practices squarely into public view by covering a detainee's detailed daily log of his experiences. Notably, the log reported the use of Christina Aguilera's music during interrogation preparation.

⁵ Suzanne G. Cusick, "You Are in a Place that is Out of the World . . .": Music in the Detention Camps of the "Global War on Terror," 2 J. SOC'Y FOR AM. MUSIC 1, 3 (2008).

⁶ See *KUBARK*, *supra* note 2, at 76-78, 87-90.

⁷ *Id.*

Perhaps because even the KUBARK manual recognized that the “regression” process could be dangerous,⁸ many believe that the U.S. government banned the interrogation techniques in the KUBARK manual following the Vietnam War.⁹ However, numerous scholars have found evidence that these techniques continued to be taught to U.S. personnel in Georgia and Latin America, as well as in the Special Forces training curriculum.¹⁰ KUBARK interrogation techniques, including “noise stress” methods, may have been brought to Guantanamo early in the war on global terror and from there they disseminated to the expansive network of U.S. prisons in Iraq and Afghanistan.¹¹

Prisoners released from U.S. detention facilities like Guantanamo Bay are required to sign nondisclosure agreements, and some even receive warnings that if they disclose the conditions of their imprisonment, they may be redetained for an indefinite period.¹² As such, it is difficult to get a complete picture of the interrogation practices employed at U.S. detention centers. However, scattered first-hand accounts have emerged. One of these accounts comes from Moazzam Begg, a former prisoner who was detained in Bagram prison in 2002.¹³ Begg noted that newly arrived detainees were held for several days inside plywood “isolation rooms” that measured approximately six feet by six feet.¹⁴ These prisoners were stripped naked and subjected to constant, loud music, including songs by the Bee Gees, Marilyn Manson, and Eminem.¹⁵ Even outside the hot, dark, plywood boxes, the music could be heard in the long-term prisoner pens at a level nearly as loud as that in dance clubs.¹⁶ Begg remembers that it was “almost impossible to sleep.”¹⁷

Begg is far from the only former detainee to come forward with reports of music torture. Indeed, piecing together reports from various sources, one publication was able to identify the

⁸ *Id.* at 78 (“Severe techniques of regression are best employed in the presence of a psychiatrist, to insure full reversal later.”).

⁹ Cusick, *supra* note 5, at 3.

¹⁰ *Id.*

¹¹ Jane Mayer, *The Experiment*, NEW YORKER, July 11, 2005, at 65.

¹² Cusick, *supra* note 5, at 5.

¹³ See generally MOAZZAM BEGG WITH VICTORIA BRITAIN, ENEMY COMBATANT: MY IMPRISONMENT AT GUANTÁNAMO, BAGRAM, AND KANDAHAR (2006).

¹⁴ *Id.* at 170; Cusick, *supra* note 5, at 6–7.

¹⁵ BEGG, *supra* note 13, at 170; Cusick, *supra* note 5, at 6–7.

¹⁶ Cusick, *supra* note 5, at 7.

¹⁷ *Id.*

“top ten” songs most frequently played at Guantanamo Bay.¹⁸ Music and sound torture is widespread in these detention facilities because it is effective. Research suggests that “either sensory deprivation or sensory overload could be an extremely quick way of breaking down a human being’s psychological ability to orient him- or herself in reality, distinguish the hallucinatory from the real, or resist interrogation.”¹⁹ One former prisoner, Donald Vance, said that music torture made him suicidal.²⁰ “It sort of removes you from you,” Vance described.²¹ “You can no longer formulate your own thoughts when you’re in an environment like that.”²² Ruhai Ahmed, another prisoner, said, “You’re in agony It makes you feel like you are going mad.”²³ Begg noted that many of his peers were “ready to tell the Americans anything they wanted, whether it was true or not.”²⁴

In late 2014, further evidence of the pervasiveness of music torture surfaced when the U.S. Senate Select Committee on Intelligence publicly released an edited version of its extensive report of CIA torture techniques following the September 11 attacks.²⁵ In the 525 publicly released pages, the committee mentioned music torture seventeen times.²⁶ The report described loud rock music being used in CIA interrogation facilities for sleep deprivation, sensory deprivation, and to increase prisoners’ “sense of hopelessness.”²⁷ Additionally, the report noted that the CIA also sometimes used specific music “to sig-

¹⁸ Martyn McLaughlin, *Rock Legends Want to Silence Guantanamo’s Torture Tunes*, SCOTSMAN (Dec. 10, 2008, 9:17 PM), <http://www.scotsman.com/news/rock-legends-want-to-silence-guantanamo-s-torture-tunes-1-1151076#> [<http://perma.cc/9AHL-22U7>] (identifying “Enter Sandman” by Metallica, “Bodies” by Drowning Pool, “Shoot to Thrill” by AC/DC, “Hell’s Bells” by AC/DC, “I Love You” from the *Barney and Friends* children’s television show, “Born in the USA” by Bruce Springsteen, “We Are the Champions” by Queen, “Babylon” by David Gray, “White America” by Eminem, and “Sesame Street” from the *Sesame Street* children’s television show as Guantanamo’s Top Ten).

¹⁹ Cusick, *supra* note 5, at 4.

²⁰ *Musicians Don’t Want Tunes Used for Torture*, ASSOCIATED PRESS (Dec. 9, 2008, 5:48 PM), <http://www.today.com/id/28144557#.VEqQYYvF9Uo> [<http://perma.cc/2FJE-USQV>] [hereinafter *Tunes for Torture*].

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Cusick, *supra* note 5, at 7.

²⁵ See S. SELECT COMM. ON INTELLIGENCE, COMM. STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION & INTERROGATION PROGRAM (2012).

²⁶ See *id.*

²⁷ *Id.* at 29.

nal to a detainee that another interrogation was about to begin.”²⁸

As soon as music torture came into the public eye,²⁹ musicians began expressing their disapproval. Trent Reznor of Nine Inch Nails has been an outspoken opponent of music torture, writing, “It’s difficult for me to imagine anything more profoundly insulting, demeaning and enraging than discovering music you’ve put your heart and soul into creating has been used for purposes of torture.”³⁰ In 2008, Tom Morello (formerly of Rage Against the Machine) and Massive Attack launched a campaign against music torture that involved holding moments of silence during their concerts on tour.³¹ Morello stated, “The fact that music I helped create was used in crimes against humanity sickens me—we need to end torture and close Guantanamo now.”³²

Not every artist objects to her music being used for interrogation purposes, however. James Hetfield of Metallica purportedly remarked, “If the Iraqis aren’t used to freedom, then I’m glad to be part of their exposure.”³³ Stevie Benton of Drowning Pool is also supportive.³⁴ These proponents are likely in the minority, though. In 2009, a coalition of musicians including Trent Reznor, Tom Morello, Pearl Jam, R.E.M., Jackson Browne, Rise Against, Rosanne Cash, Billy Bragg, and the Roots joined the National Campaign to Close Guantanamo.³⁵ Collectively, they endorsed a Freedom of Information Act request for government records of the music used during interrogations.³⁶

Although artists may be outraged, there is unfortunately very little that they can do to prevent Guantanamo Bay from

²⁸ *Id.* at 429.

²⁹ *See supra* note 4.

³⁰ John Tehranian, *Guantanamo’s Greatest Hits: The Semiotics of Sound and the Protection of Performer Rights Under the Lanham Act*, 16 VAND. J. ENT. & TECH. L. 11, 20 (2013).

³¹ *Tunes for Torture*, *supra* note 20. Christopher Cerf, writer of the *Sesame Street* theme, also agrees with Morello, remarking, “I wouldn’t want my music to be a party to that.” *Id.*

³² Sam Stein, *Music Stars Demand Records on Bush Administration’s Use of Music for Torture*, HUFFINGTON POST (Mar. 18, 2010, 5:12 AM), http://www.huffingtonpost.com/2009/10/21/music-stars-demand-record_n_329476.html [<http://perma.cc/W5ZA-FE5Z>].

³³ Lane DeGregory, *Iraq ‘n’ Roll*, TAMPA BAY TIMES (Nov. 21, 2004) http://www.sptimes.com/2004/11/21/Floridian/Iraq_n_roll.shtml [<http://perma.cc/X52V-FCYM>].

³⁴ *Tunes for Torture*, *supra* note 20.

³⁵ Stein, *supra* note 32.

³⁶ *Id.*

using their music under the United States' current intellectual property system. Part I of this Note explores the applicability of various spheres of intellectual property, including copyright, trademark, and publicity protections, and ultimately concludes that none of these fields appropriately protects artists in the music torture context. Part II of this Note describes an alluring alternative that would give artists relief from unwanted uses of their music—moral intellectual property. Part III examines how moral intellectual property protections could fit into the scheme of existing U.S. intellectual property law.

I

CURRENT U.S. INTELLECTUAL PROPERTY LAW IS NOT A SOLUTION

A. Copyright Protection

Technically, a musical composer could likely bring a copyright infringement claim against the U.S. government to enjoin its use of the composer's song in the interrogation context. Musical composers have an exclusive right to public performance of their works,³⁷ where "public performance" is defined as a performance "or display . . . at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."³⁸ In an interrogation scenario similar to the one described by Begg, then, where interrogators blasted music so that it could be heard by many prisoners in different cells,³⁹ the government has likely engaged in a public performance and has therefore infringed on the composer's copyright.⁴⁰

Even so, copyright law does not provide near-perfect protection for artists against use of their music in music torture. First, mere performers have no copyright infringement rights in this scenario. Creators of sound recordings, unlike creators of musical compositions, enjoy exclusive rights to public performance only in the limited context of digital audio transmissions.⁴¹ Today, hired writers pen a number of the "Top Forty"

³⁷ 17 U.S.C. § 106(4) (2012).

³⁸ *Id.* § 101.

³⁹ See *supra* notes 13–17 and accompanying text.

⁴⁰ Note, however, that if the music were only able to be heard by one prisoner at a time, there would likely be no public performance because such a performance would be neither "open to the public" nor performed for "a substantial number of persons." 17 U.S.C. § 101. In that scenario, there would be no copyright infringement, and the composer would have no remedy.

⁴¹ 17 U.S.C. § 106(6).

hits.⁴² The Top Forty artists, with whom these works are widely associated, have no right under copyright law to enjoin a public performance. Second, any copyright suit against a U.S. military installation in a foreign country would run up against complicated jurisdictional issues.⁴³ While jurisdictional issues are not an insurmountable barrier to a successful copyright suit, the increased cost of litigation may be prohibitively expensive for some artists.

Finally, most copyright-owning musical artists in the United States have blanket licensing agreements with the American Society of Composers, Authors and Publishers (ASCAP); Broadcast Music, Inc. (BMI); or the Society of European Stage Authors and Composers (SESAC).⁴⁴ Artists transfer their copyright or public performance right to these blanket-licensing organizations, and the organizations provide consumers access to their vast catalogues of music in exchange for a fee, out of which the organizations compensate the artists.⁴⁵ These organizations must license public performance rights for their members' work to anyone willing to pay the rates.⁴⁶ As such, artists that take advantage of these organizations' services could not choose to deny public performance rights for use in Guantanamo Bay if the United States were willing to pay the licensing fee. Of course, artists could choose not to register their works with ASCAP, BMI, or SESAC, but these organizations are nearly ubiquitous in the music industry, and failure to register would vastly, perhaps prohibitively, increase artists' transaction costs.⁴⁷

Ultimately, then, copyright protection does not provide musicians with adequate protection against unwanted employment of their music in music torture. Noncomposers and

⁴² See John Seabrook, *Is Pop Music Fake?*, NEW YORKER (Mar. 21, 2012), <http://www.newyorker.com/culture/culture-desk/is-pop-music-fake> [http://perma.cc/CU9J-UYK5].

⁴³ See Tehranian, *supra* note 30, at 22 n.66 for a detailed discussion of the jurisdictional barriers potential litigants would face in bringing a copyright suit against Guantanamo Bay.

⁴⁴ ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 588 n.31 (6th ed. 2012).

⁴⁵ *Id.*

⁴⁶ See Hannah Karp & Brent Kendall, *Justice Department to Review Music-Fee System*, WALL ST. J. (June 4, 2014, 12:09 AM), <http://online.wsj.com/articles/justice-department-to-review-music-fee-system-1401854888> [http://perma.cc/922V-U4NP].

⁴⁷ See *id.* (predicting that withdrawing from licensing agreements with ASCAP or BMI would be complicated and labor intensive); MERGES, MENELL & LEMLEY, *supra* note 44, at 588 n.31 (noting that ASCAP, BMI, or SESAC typically handle blanket licenses).

members of blanket-licensing organizations are left exposed. Infringement cases can only go forward in the face of complex jurisdictional issues and only if the torture amounted to a public performance.

B. Protection Under the Lanham Act

Especially in cases where artists cannot boast a valid copyright, some courts have used trademark law⁴⁸ to protect an artist from unwanted uses of her work. For example, in *Gilliam v. American Broadcasting Companies, Inc.*, the Second Circuit held that the Monty Python Comedy Troupe could successfully enjoin ABC from broadcasting truncated and content-edited Monty Python episodes under the Lanham Act.⁴⁹

While sympathetic judges may sometimes stretch the Lanham Act to provide protections for artists, trademark law is, at its root, ill suited to protect the integrity of artists' works. Trademark law grew out of a desire to prevent unfair deception to commercial consumers and prohibit unfair competition between retailers.⁵⁰ At best, the doctrine is an "imperfect fit" to protect artists from unwanted public performances of their works.⁵¹

Perhaps because the Lanham Act was not originally intended to provide protection for artistic works, decisions applying the Lanham Act in that context have been "incongruous and unpredictable."⁵² To succeed on a Lanham Act claim for performance protection under 15 U.S.C. § 1125(a), plaintiffs must show that (1) the performance at issue constituted a protectable, source-identifying mark, and (2) the defendant's activities created a likelihood of consumer confusion as to sponsorship or endorsement.⁵³ Courts have not been uniform in applying either element. For example, in *Oliveira v. Frito-Lay, Inc.*, the Second Circuit refused to hold that Astrud Gilberto's signature performance of "The Girl from Ipanema" was a protectable mark.⁵⁴ Gilberto was therefore without Lanham Act protection against a Lay's potato chips advertisement that used the song without authorization.⁵⁵ However, in *Waits v.*

⁴⁸ Federal trademark law is codified in the Lanham Act, 15 U.S.C. §§ 1051–1127 (2012). Individual states may also provide trademark protections.

⁴⁹ 538 F.2d 14, 25–26 (2d Cir. 1976).

⁵⁰ MERGES, MENELL & LEMLEY, *supra* note 44, at 765.

⁵¹ Tehranian, *supra* note 30, at 27.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 251 F.3d 56, 62 (2d Cir. 2001).

⁵⁵ *Id.* at 63.

Frito-Lay, Inc., the Ninth Circuit found that Tom Waits's raspy vocal style constituted a protectable mark, and that a sound-alike singer in a Doritos chips commercial created a likelihood of consumer confusion as to Tom Waits's endorsement.⁵⁶ These decisions contradict one another—how could a mere imitation of an artist's singing style more strongly invoke an artist's endorsement in the minds of consumers than a famous, signature performance by the artist herself?⁵⁷

Some of the discontinuity in Lanham Act decisions likely stems from the tension between the instinct to grant artists protections on one hand and the fear of disrupting the existing intellectual property system on the other. Granting expansive artist protections under the Lanham Act “would be profoundly disruptive to commerce.”⁵⁸ Artists already protected under the Copyright Act would try to assert additional rights under the Lanham Act, and “[i]mmense unforeseen liabilities might accrue, upsetting reasonable commercial expectations.”⁵⁹ Further, artists would likely try to protect otherwise copyrightable works under trademark law so that they might skirt the constitutionally mandated copyright duration limitations.⁶⁰ As much as it may be tempting to stretch existing Lanham Act provisions to protect artists' rights to choose how their works

⁵⁶ 978 F.2d 1093, 1110–11 (9th Cir. 1992).

⁵⁷ Grappling with the contradiction presented by these two cases, the court in *Henley v. DeVore* held that

the distinction between *Waits* and *Oliveira* is that in *Waits*, the defendants imitated Waits's voice in a manner leading consumers to believe that Waits was actually singing and endorsing their product, whereas in *Oliveira*, the defendants simply used a recording of a prior musical performance. . . . [T]he mere use of the celebrity's prior performance does not present the same sort of confusion [as is created by a sound-alike singer].

733 F. Supp. 2d 1144, 1167 (C.D. Cal. 2010). The court did not consider, however, that consumers might believe that if a performer grants permission to use her recording in a commercial, that performer is endorsing the product. Further, even the best sound-alike singers cannot do perfect imitations, and consumers might well recognize the vocal discrepancy. It is equally logical, then, to assume that a signature performance would invoke endorsement more than a sound-alike performance in the minds of consumers. Likely, the *Waits* and *Oliveira* decisions are simply at odds.

⁵⁸ *Oliveira*, 251 F.3d at 63.

⁵⁹ *Id.*

⁶⁰ See U.S. CONST. art. I, § 8, cl. 8 (giving Congress the power to grant copyrights only for “limited Times”); see also *Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003) (holding that a copyright duration limitation of life of the author plus seventy years is constitutional).

are used, a better solution is to grant artists protections under a provision better tailored to that purpose.⁶¹

C. Right to Publicity

The state law right to publicity should be briefly mentioned. Although it is inapplicable in the music torture context (it generally applies only when an artist's name, image, or voice is used in advertising or commerce), musicians sometimes use the right to publicity to prevent their works from being used in ways the artists find displeasing.⁶² Critics have argued that, like trademark protection, right to publicity protection is ill-suited to protect artists from unwanted uses of their works, and they warn that undue expansion of the publicity right could undermine the intellectual property balance.⁶³ Further, an expansive right to publicity could run into sticky preemption issues with the Lanham Act.⁶⁴ Accordingly, like trademark protection, the right to publicity is inadequate to protect artists' rights.

II

AN ALLURING ALTERNATIVE: MORAL INTELLECTUAL PROPERTY RIGHTS

A. An Introduction to Moral Intellectual Property

In the United States, the intellectual property system protects authors' economic rights almost exclusively, neglecting moral or personality rights. U.S. copyright law seeks to incentivize artistic creation for the purposes of enriching the Ameri-

⁶¹ It is worth noting that while this discussion focused on claims for trademark infringement under 15 U.S.C. § 1125(a), it is also conceivable that in the music torture context, an artist would bring a claim under 15 U.S.C. § 1125(c), alleging dilution by tarnishment. This artist would allege that the use of his music for torture purposes "harms the reputation" of his famous mark. 15 U.S.C. § 1125(c)(2)(C) (2012). Such a claim, though, would likely fail for two reasons. First, to state a claim for dilution by tarnishment, a plaintiff must demonstrate "likelihood of damage to its reputation." *Newsboys v. Warner Bros. Records, Inc.*, No. 3:12-cv-0678, 2013 WL 3524615, at *5 (M.D. Tenn. July 11, 2013). Because information about music torture is classified by the United States government, it is unlikely that a plaintiff could demonstrate a reasonable likelihood of reputational damage. Second, "noncommercial use" of a mark is not considered trademark dilution. 15 U.S.C. § 1125(c)(3)(C). Likely, the government's use of music for interrogation would be deemed a noncommercial use.

⁶² See, e.g., *Oliveira*, 251 F.3d at 57–58, 63–64 (finding that Gilberto stated a claim for a right to publicity violation under New York law when Frito-Lay used her signature performance of "The Girl from Ipanema" in an advertisement).

⁶³ See Arlen W. Langvardt, *The Troubling Implications of a Right of Publicity "Wheel" Spun Out of Control*, 45 U. KAN. L. REV. 329, 422 (1997).

⁶⁴ *Id.* at 387.

can public.⁶⁵ As Chief Justice Charles Evan Hughes put it, “The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors.”⁶⁶

Elsewhere in the world, however, the theoretical underpinnings of intellectual property rights are not solely utilitarian. These countries, France and Germany for example, award moral intellectual property rights.⁶⁷ Moral intellectual property rights stem from the idea that when an artist creates an artwork, he puts a piece of himself into that work such that any subsequent harm to it would also harm the artist.⁶⁸ As Simon Marion, a renowned sixteenth-century French lawyer argued, as “the heavens and the earth belong to [God], because they are the work of his word . . . [s]o the author of a book is its complete master, and as such can dispose of it as he chooses.”⁶⁹ Such an idea is compatible with Georg Wilhelm Friedrich Hegel’s famous personhood perspective of property,⁷⁰ which posits that artistic creations are bound up with the creator’s personhood in such a way that the artwork is valuable to the artist’s sense of self.

Moral intellectual property schemes can vest authors with a number of different rights. At the heart of the bundle of moral rights are the rights of attribution and integrity.⁷¹ The right of attribution, also known as the right of paternity, is an author’s right to control where and how her name is affixed to her work (or not affixed if she wishes to remain anonymous).⁷² The right of attribution recognizes that when an artist expresses herself artistically, she puts herself in a uniquely vulnerable position.⁷³ Attribution rights help protect the artist, making sure her name is “attributed to all her work and her

⁶⁵ MERGES, MENELL & LEMLEY, *supra* note 44, at 436.

⁶⁶ Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

⁶⁷ See Susan P. Liemer, *Understanding Artists’ Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 44 & n.23 (1998) (citing French and German laws prohibiting artists from waiving moral rights).

⁶⁸ Cassandra Spangler, Comment, *The Integrity Right of an MP3: How the Introduction of Moral Rights into U.S. Law Can Help Combat Illegal Peer-to-Peer Music File Sharing*, 39 SETON HALL L. REV. 1299, 1301 (2009).

⁶⁹ See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 284 (1970).

⁷⁰ See generally GEORG WILHELM FRIEDRICH HEGEL, HEGEL’S PHILOSOPHY OF RIGHT (Thom Brooks ed., 2012) (arguing that a person becomes a real self only by engaging in a relationship with external property).

⁷¹ Spangler, *supra* note 68, at 1302.

⁷² *Id.*

⁷³ Liemer, *supra* note 67, at 47.

work only.”⁷⁴ The right of integrity, by contrast, protects an artist’s right to prevent others from altering his work without his permission.⁷⁵ This protects the artist’s reputation by ensuring that his name is not attached to something he did not create.⁷⁶ It is not clear whether the right of integrity prevents a purchaser from destroying a work entirely.⁷⁷

Moral intellectual property schemes may also protect other artist rights. For example, a bundle of moral intellectual property rights may include the right of disclosure, which is the right to decide when a work is released to the public.⁷⁸ Moral intellectual property schemes may also protect the right of withdrawal—the right to determine if a work should be recalled because it no longer reflects the views of the artist.⁷⁹ Further, moral schemes can provide for resale royalties to artists, as well as prohibit excessive criticism or personal attacks on the author.⁸⁰ In their purest form, moral intellectual rights are also perpetual, nonwaivable, and nontransferable.⁸¹

Moral intellectual property protection is historically a continental-European phenomenon.⁸² The French legal system awards the strongest existing protection for moral rights, perhaps because moral protection developed in France as early as the nineteenth century.⁸³ Known as “droit moral,” France’s moral rights doctrine protects artists’ rights of attribution, integrity, and disclosure.⁸⁴ Additionally, droit moral rights are perpetual and inalienable.⁸⁵ Germany and Italy also provide expansive moral rights protection.⁸⁶ In fact, as of 2003, eighty-one countries around the world, including Canada and Mexico, recognized some form of moral protection for artists.⁸⁷

Moral rights laws can provide powerful protection for artists. For example, in 1953, a French court enjoined Twentieth Century Fox from screening its anti-Soviet film *The Iron Curtain* after Russian composer Dmitry Shostakovich sued the film dis-

⁷⁴ *Id.* at 49.

⁷⁵ Spangler, *supra* note 68, at 1302.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 1302–03.

⁸¹ *Id.* at 1303–04.

⁸² *Id.* at 1305.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 87–88 (1996).

⁸⁷ Spangler, *supra* note 68, at 1305.

tributor for infringing upon his moral rights by using his music in the movie.⁸⁸ The court determined that Shostakovich suffered moral damage because the presence of his music in the film falsely indicated to consumers that Shostakovich endorsed and approved of the anti-Russian themes espoused in the film.⁸⁹ Conversely, when Shostakovich brought suit in the United States under the same facts, the court afforded him no relief.⁹⁰

B. Moral Intellectual Property in the United States

The copyright scheme in the United States is modeled closely after the English Statute of Anne.⁹¹ The Statute of Anne, passed by Parliament in 1710, awarded authors monopolies over their works for a period of fourteen years for the utilitarian purpose of encouraging authors to create works for the public benefit.⁹² After the Revolutionary War, many of the newly created American states adopted copyright statutes similar to the Statute of Anne, but there were problems enforcing these statutes across state lines.⁹³ To promote uniformity, the Constitution granted Congress the power to create patents and copyrights.⁹⁴ The first Congress passed the Copyright Act of 1790, which, like the Statute of Anne, granted authors of books, maps, and charts a fourteen-year monopoly on their works.⁹⁵ Since that time, American jurisprudence has emphasized the Statute of Anne's utilitarian rationale for copyright protection.⁹⁶

There are a number of reasons that moral protections for artists did not subsequently develop in the United States. Perhaps because the United States is a young country, its early culture focused more on industry, trade, and economic devel-

⁸⁸ See Yonover, *supra* note 86, at 89 & n.48; see also *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575, 576–77 (Sup. Ct. 1948), *aff'd*, 87 N.Y.S.2d 430 (App. Div. 1949) (mem.) (reciting the same facts in a parallel case brought in New York).

⁸⁹ See Yonover, *supra* note 86, at 89.

⁹⁰ *Shostakovich*, 80 N.Y.S.2d at 579.

⁹¹ MERGES, MENELL & LEMLEY, *supra* note 44, at 431.

⁹² *Id.* at 431–32; Act for the Encouragement of Learning (Statute of Anne) 1710, 8 Ann., c. 19 (Gr. Brit.); see Yonover, *supra* note 86, at 86 n.34.

⁹³ MERGES, MENELL & LEMLEY, *supra* note 44, at 432.

⁹⁴ See U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have 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.”).

⁹⁵ Act of May 31, 1790, ch. 15, 1 Stat. 124; 8 Ann., c. 19; MERGES, MENELL & LEMLEY, *supra* note 44, at 432.

⁹⁶ See *supra* notes 65–66 and accompanying text.

opment than on art.⁹⁷ “While European culture was marked with the works of great authors and artists, the culture of the United States was filled with names like Ford, Carnegie, and Rockefeller who were leaders in industry.”⁹⁸ Consistent with this culture, utilitarian rationales for copyright protection eclipsed moral ones.⁹⁹ Additionally, Americans value First Amendment free speech and expression highly, and some moral protections tend to prioritize artists’ reputation and integrity over free expression.¹⁰⁰ France, Germany, and Italy, the countries that provide the most stringent moral rights laws, lack speech protections analogous to the First Amendment.¹⁰¹

Things began to change in the late 1980s, when the United States became a signatory of the Berne Convention.¹⁰² The Berne Convention is an international copyright agreement that was first ratified in 1886 and, as of 2007, had been signed by no fewer than 163 countries.¹⁰³ The United States delayed signing the Berne Convention in part because the agreement requires signatories to provide the moral rights of integrity and attribution to their artists.¹⁰⁴ However, facing pressure to extend protection for U.S. intellectual property abroad, the United States officially joined the Berne Convention in 1989.¹⁰⁵

To bring the United States into compliance with the Berne Convention, Congress needed to make a number of changes to U.S. copyright law.¹⁰⁶ The Visual Artists’ Rights Act of 1990 (VARA)¹⁰⁷ brought the United States into greater compliance

⁹⁷ Spangler, *supra* note 68, at 1306.

⁹⁸ 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, 122 (2006).

⁹⁹ See Spangler, *supra* note 68, at 1307 (“U.S. law developed appropriately with this historical focus on industry and lack of artistic tradition, providing more protection for property rights and less protection for the arts.” (footnote omitted)); Yonover, *supra* note 86, at 91.

¹⁰⁰ Yonover, *supra* note 86, at 92–93.

¹⁰¹ *Id.*

¹⁰² Spangler, *supra* note 68, at 1307.

¹⁰³ *Id.*

¹⁰⁴ See *id.*; see also S. REP. NO. 100-352, at 9 (1988) (“Article 6bis of the Berne Convention requires that member States recognize, independently of the author’s economic rights, that ‘the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.’”).

¹⁰⁵ See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified as amended in scattered sections of 17 U.S.C.); MERGES, MENELL & LEMLEY, *supra* note 44, at 433.

¹⁰⁶ See generally Berne Convention Implementation Act of 1988.

¹⁰⁷ 17 U.S.C. § 106A (2012).

with the Convention's moral rights requirements. Although VARA applies only to "work[s] of visual art"—the definition of which excludes technical drawings, audiovisual works, promotional materials, and works made for hire—it provides visual artists with attribution and integrity rights.¹⁰⁸ Artists have the right, therefore, to decide when their names attach to their visual works and to prevent subsequent alteration or mutilation of these pieces.¹⁰⁹ Additionally, works of a "recognized stature" cannot be destroyed over the artist's objection.¹¹⁰ Works created after June 1, 1991, receive protection during the author's lifetime.¹¹¹ VARA rights are waivable, but not transferrable.¹¹²

Additionally, several states have VARA-like moral rights statutes. At the time VARA was enacted, eleven states had moral rights statutes: California, Connecticut, Illinois, Louisiana, Maine, Massachusetts, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island.¹¹³ These statutes offer varying degrees of moral rights protection.¹¹⁴ However, like VARA, these statutes apply only to visual works, and VARA may or may not preempt them.¹¹⁵

VARA was a positive step towards Berne compliance, but "[i]t is doubtful . . . that [the] collection of protections [under VARA and other United States law] fully discharged U.S. obligations under the Berne Convention."¹¹⁶ VARA rights, after all, apply to only a small class of artists.¹¹⁷ Congress, however, believes that United States law, even pre-VARA, sufficiently protects artists' rights to integrity and attribution under the Berne Convention. In the Senate report accompanying passage of the Berne Convention Implementation Act of 1988, Congress opined that Berne was satisfied because

existing U.S. law includes various provisions of the Copyright Act and Lanham Act, various state statutes, and common law principles such as libel, defamation, misrepresentation, and unfair competition, which have been applied by courts to

¹⁰⁸ *Id.* §§ 101, 106A(a); MERGES, MENELL & LEMLEY, *supra* note 44, at 595.

¹⁰⁹ 17 U.S.C. § 106A(a).

¹¹⁰ *Id.* § 106A(a)(3)(B).

¹¹¹ *Id.* § 106A(d)(1); MERGES, MENELL & LEMLEY, *supra* note 44, at 595.

¹¹² 17 U.S.C. § 106A(e)(1).

¹¹³ Yonover, *supra* note 86, at 95–96.

¹¹⁴ *Id.* at 96–97.

¹¹⁵ Spangler, *supra* note 68, at 1308–09.

¹¹⁶ MERGES, MENELL & LEMLEY, *supra* note 44, at 594 n.33.

¹¹⁷ *Id.* at 594–95.

redress authors' invocation of the right to claim authorship or the right to object to distortion.¹¹⁸

This is illogical. As we have seen, the Copyright Act and the Lanham Act provide incomplete moral rights protections.¹¹⁹ State moral rights statutes, where they exist, cover only visual artists.¹²⁰ Further, common-law principles afford next to no protection. Moral rights are an invention of civil law, and they are not contemplated by the economically motivated common-law scheme.¹²¹ “[M]oral rights did not exist at common law, so it is nonsensical to argue they are protected by common-law causes of action.”¹²²

The United States, then, is likely out of compliance with the terms of the Berne Convention. The U.S. government fails to provide moral intellectual property rights to many of its artists—for example, in the case of music torture. The obvious solution to both of these problems is for Congress to provide all artists—not just visual artists, but musicians, filmmakers, and performers alike—with moral intellectual property rights.

III

IMPLEMENTING EXPANDED MORAL INTELLECTUAL PROPERTY RIGHTS IN THE UNITED STATES

A. The Scope

In the United States, “[t]he economic interests protected by the copyright laws are intertwined substantially with the personal interests that are the focus of the moral right doctrine.”¹²³ Indeed, federal copyright law would likely preempt most state-granted moral rights protections.¹²⁴ This makes intuitive sense—the personality interests inherent in moral rights protections are at odds with the economic concerns that dominate United States copyright legislation. Rather than fighting against copyright law, then, U.S. legislators should incorporate moral intellectual property law into the Copyright

118 S. REP. NO. 100-352, at 9–10 (1988).

119 See *supra* subparts I.A–B.

120 See *supra* note 115 and accompanying text.

121 See Spangler, *supra* note 68, at 1310–11.

122 *Id.* at 1311.

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

124 See *id.* at 91 (“State protection of most moral rights is inappropriate either because such protection would vindicate rights ‘equivalent’ to those protected by the 1976 [Copyright] Act or would conflict with the overall federal scheme of copyright protection. . . . [F]ederal safeguards would provide the most extensive form of protection for creators’ personal rights.”).

Act, just as they incorporated VARA. This approach not only skirts preemption concerns but also ensures that the balance of intellectual property law in the United States is not unduly upset. Just as expanding Lanham Act protections to protect artists would destabilize the U.S. intellectual property scheme,¹²⁵ creating a moral intellectual property statute separate from the Copyright Act could weaken copyright law and upset consumer expectations. The solution, then, is to incorporate moral rights protections into existing copyright law.

Congress derives its power to protect copyrights from the Constitution, which grants Congress the power to “promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.”¹²⁶ Accordingly, “Congress has the power to protect moral rights so long as it concurrently fosters the constitutional goal of promoting the useful arts.”¹²⁷ Courts have been quite liberal in interpreting Congress’s power under the Copyright Clause—in *Mitchell Brothers Film Group v. Cinema Adult Theater*, for example, the Fifth Circuit ruled that even protection of obscene writings furthers the constitutional end of promoting the useful arts.¹²⁸ Protecting moral rights would serve the twin goals of safeguarding the country’s cultural heritage by ensuring that the country’s artworks are not altered or destroyed, and encouraging creativity by incentivizing artists through increased protections for their works.¹²⁹ Because moral rights therefore promote the progress of the useful arts in two ways, Congress likely has constitutional authority to incorporate moral rights into the Copyright Act.

Categorizing moral rights as a subset of copyright law places inherent limitations on the potential scope of moral rights protection. For example, the copyright clause authorizes Congress to grant copyright protections only for “limited Times.”¹³⁰ Therefore, in contrast to the scheme in France,¹³¹ moral rights in the United States could not be perpetual.¹³² Furthermore, a perpetual moral intellectual property rights system would run counter to the popular American belief that the appropriate copyright duration should strike a balance be-

125 See *supra* notes 58–61 and accompanying text.

126 U.S. CONST. art. I, § 8, cl. 8.

127 Kwall, *supra* note 123, at 70.

128 604 F.2d 852, 860 (5th Cir. 1979).

129 See Kwall, *supra* note 123, at 70.

130 U.S. CONST. art. I, § 8, cl. 8.

131 See *supra* note 85 and accompanying text.

132 See Kwall, *supra* note 123, at 70.

tween incentivizing artistic creation and enriching the public domain.¹³³ Congress most recently determined that the lifetime of the author plus seventy years was the duration that best achieved this balance,¹³⁴ the likely rationale being that parents are incentivized to provide for the descendants they know during those descendants' lifetimes, but have less incentive to provide for family members they will not live long enough to meet.¹³⁵ A shorter duration would decrease artistic incentives, but a longer duration would be detrimental to the public domain. Congress could determine that moral rights should be protected for a similar time period—relatives that knew the artist would be the most likely to be offended if the artist's reputation were injured, and would likely be able to make attribution and integrity determinations that would comport with the artist's wishes. More distant relatives would have less interest in the artist's moral rights, so would not need moral rights protections. However, Congress might also choose to protect works only during the lifetime of the author, as it did in VARA.¹³⁶

A U.S. moral rights statute would likely provide more limited protection than some of the moral rights schemes abroad. Sometimes included in the bundle of moral intellectual property rights is the right to resale profits.¹³⁷ In the United States, however, the "first sale" doctrine establishes that once a copyrighted work is sold, the buyer has exclusive domain to keep or resell the work.¹³⁸ Recent Supreme Court decisions indicate that the first sale doctrine is a highly valued part of the American copyright scheme.¹³⁹ Likely, then, the right to resale profits would be excluded in U.S. moral intellectual property law.

¹³³ See MERGES, MENELL & LEMLEY, *supra* note 44, at 529.

¹³⁴ See *id.* at 528.

¹³⁵ See 144 CONG. REC. S12,377 (daily ed. Oct. 12, 1998) (statement of Sen. Orrin Hatch) (stating the need to extend the duration of copyright "to provide adequate protection for American creators and their heirs" because of "the effect of demographic trends, such as increasing longevity and the trend toward rearing children later in life"); see also WORLD INTELLECTUAL PROP. ORG., GUIDE TO THE BERNE CONVENTION § 7.4 (1978) (stating that the duration of copyright for the Berne Convention was chosen not by chance but because "most countries have felt it fair and right that the average lifetime of an author and his direct descendants should be covered").

¹³⁶ See *supra* note 111 and accompanying text.

¹³⁷ See *supra* note 80 and accompanying text.

¹³⁸ Spangler, *supra* note 68, at 1314.

¹³⁹ See *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363–71 (2013) (holding that the first sale doctrine allows foreign-printed textbooks to be privately imported and sold in the United States, despite the copyright holder's nonimportation right under 17 U.S.C. § 602(a)(2)).

Similarly, moral intellectual property rights sometimes include a prohibition against excessive criticism or attacks on the artist's personality.¹⁴⁰ In the United States, however, such a prohibition could violate a critic's First Amendment rights.¹⁴¹ Likely, then, the prohibition against excessive criticism would also be excluded from the U.S. moral intellectual property scheme.

Taking these exclusions into account, the bundle of moral rights in the United States would likely include the right to attribution and the right to integrity. These two moral rights are commonly awarded abroad and form the backbone of moral intellectual property.¹⁴² They are also the two rights that the Berne Convention requires¹⁴³ and those that the United States has already awarded visual artists under VARA.¹⁴⁴ Disclosure and withdrawal rights could also potentially be included in the bundle of U.S. moral intellectual property rights, but their inclusion would be somewhat more disruptive to consumer expectations. It would certainly fly in the face of today's business conventions if artists suddenly had the power to repossess art they had previously sold to consumers. Such a right would disrupt the economic incentives of current U.S. copyright law and would likely be much more difficult for Congress to push through. However, there is some precedent for U.S. legislation allowing conditional transfer of copyrighted works. Under § 203 of the Copyright Act,¹⁴⁵ if an artist transfers her copyright by contract, she has an inalienable right to terminate that contract during a five-year window that starts thirty-five years after the contract's execution.¹⁴⁶ This right does not serve an economic purpose—a contractual copyright transfer is less valuable if it can be summarily terminated after thirty-five years. However, the right to terminate transfer is an enduring part of the Copyright Act, suggesting that moral withdrawal rights may not be an impossible addition to the U.S. copyright scheme.

Unlike the rights afforded visual artists in VARA, U.S. moral intellectual property rights should be inalienable and unwaivable. "[A] freely alienable moral right disserves the very

¹⁴⁰ See *supra* note 80 and accompanying text.

¹⁴¹ See John T. Cross, *Reconciling the "Moral Rights" of Authors with the First Amendment Right of Free Speech*, 1 AKRON INTELL. PROP. J. 185, 190–91 (2007).

¹⁴² See *supra* note 71 and accompanying text.

¹⁴³ See *supra* note 104 and accompanying text.

¹⁴⁴ See *supra* note 108 and accompanying text.

¹⁴⁵ 17 U.S.C. § 203 (2012).

¹⁴⁶ *Id.* § 203(a)(3).

interests that the right seeks to protect because producers and publishers usually enjoy a superior bargaining position and will always secure releases of a creator's moral rights during the initial contract negotiations."¹⁴⁷ However, a completely inalienable moral right hinders the freedom of negotiations, which could result in fewer contracts and fewer artistic creations to enrich the public domain.¹⁴⁸ To address this problem, France, which awards its artists unwaivable and inalienable moral rights, "tends to enforce contracts allowing reasonable alterations that do not distort the spirit of the creator's work, particularly with respect to adaptations and contributions to collective works."¹⁴⁹ U.S. courts should also adopt this flexible approach to inalienability, which would maximize artistic creation while protecting artists' personality rights.

So, Congress should pass a VARA-like amendment to the Copyright Act that provides the unwaivable and inalienable moral intellectual property rights of attribution and integrity (and perhaps withdrawal and disclosure) to all artists, visual and otherwise, for some limited period of time. It sounds straightforward, but there are still a few wrinkles. First, critics argue that the expansion of intellectual property rights in the United States would disrupt the flow of commerce, especially by undercutting blanket licensing music organizations such as ASCAP and BMI.¹⁵⁰ This is true enough—even setting aside withdrawal rights, the attribution right complicates the blanket-licensing process. Once artists may choose whether or not to affix their names to their works for each placement, and once artists start to deny individual placements because consumers would falsely assume artist endorsement,¹⁵¹ the blanket-licensing regime begins to falter. However, in the United States' economically motivated intellectual property system, it would be exceedingly difficult to introduce a moral rights regime without making certain economic changes. Some alterations are warranted if they protect artists' important personality interests. That is, "it is unclear just why economic rights, and doc-

¹⁴⁷ Kwall, *supra* note 123, at 95 (footnote omitted).

¹⁴⁸ *Id.* at 94–95.

¹⁴⁹ *Id.* at 13.

¹⁵⁰ Tehranian, *supra* note 30, at 34–35.

¹⁵¹ Artists gain this latter right as part of their right to attribution. In the *Shostakovich* case, for example, a French court determined that a false attribution of artist endorsement damaged the artist's moral rights. See notes 88–90 and accompanying text.

trines protecting them, ought to be prioritized above other rights.”¹⁵²

Both traditional copyright and moral intellectual property rights necessarily limit free speech—artists cannot express themselves through art if that expression would encroach on another’s intellectual property—so a brief discussion of the First Amendment is warranted. Likely, though, free speech concerns would not be a major barrier to implementing a moral intellectual property system in the United States. “Courts . . . have been fairly uniform in rejecting First Amendment defenses in copyright cases,”¹⁵³ and “the Supreme Court is convinced that copyright law is constitutional.”¹⁵⁴ Moral rights do not seem to pose more of a First Amendment problem than does traditional copyright. Indeed, a recent analysis by Professor John T. Cross demonstrates that almost all state and federal moral rights protections currently in force satisfy First Amendment requirements, with very few exceptions.¹⁵⁵

Parody doctrine poses another potential problem. A parody is an artwork that seeks to comment upon or criticize an existing work by mimicking it.¹⁵⁶ Parody is a defense to copyright infringement if, on balance, the four statutory factors laid out in Section 107 of the Copyright Act support a finding of fair use.¹⁵⁷ Although the parody defense is an important part of the U.S. copyright scheme, it is fundamentally at odds with the purpose of moral intellectual property rights—namely, to protect the “honor or reputation” of artists and their works.¹⁵⁸ Consider the song at issue in the seminal parody case *Campbell v. Acuff-Rose Music, Inc.*¹⁵⁹ Defendant 2 Live Crew created a musical parody of the popular 1964 Roy Orbison song “Oh, Pretty Woman,” substituting Orbison’s “predictable” lyrics with crass and “shocking” ones.¹⁶⁰ 2 Live Crew argued that the parody should be considered fair use because it served as a social commentary and was “clearly intended to ridicule the

¹⁵² Spangler, *supra* note 68, at 1315.

¹⁵³ Yonover, *supra* note 86, at 115.

¹⁵⁴ Cross, *supra* note 141, at 272.

¹⁵⁵ *See id.* at 273.

¹⁵⁶ *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579–80 (1994).

¹⁵⁷ *Id.* The four fair use factors are (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the proportion used, and (4) the effect of the use on the potential market for or value of the copyrighted work. 17 U.S.C. § 107 (2012).

¹⁵⁸ Yonover, *supra* note 86, at 100.

¹⁵⁹ *Campbell*, 510 U.S. at 572.

¹⁶⁰ *Id.* at 572–73.

white-bread original.”¹⁶¹ The Supreme Court did not disagree, and it remanded the case for a fair use analysis.¹⁶² The Court was unwilling to dismiss the parody defense in part because the 2 Live Crew song had arguable social value.¹⁶³ However, the parody, by its very nature, poked fun at the original work, and this might have seriously injured Roy Orbison’s reputation. If Orbison had enjoyed moral intellectual property rights, he might have been able to enjoin 2 Live Crew from distributing its song, despite the fact that it may have been socially useful.¹⁶⁴

How, then, can we prevent moral intellectual property rights from unduly curtailing socially useful artistic parodies? One solution is to shift the burden of proof to moral rights holders, allowing parodists the presumption of fair use.¹⁶⁵ This burden shifting would make little difference in the “easiest” cases—parodies that obviously benefited society would succeed on the fair use defense, and those that injured the artist’s reputation without offering societal utility would fail.¹⁶⁶ However, in more difficult cases, doubts would be “resolved in favor of the parodist,” which would result in “more art rather than less.”¹⁶⁷ This solution elegantly balances artistic encouragement against the sanctity of the fair use doctrine, and no language in section 107 prevents courts from engaging in burden shifting.¹⁶⁸ For moral rights claims where defendants assert the parody defense, then, judges (or legislators) should shift the burden to plaintiffs to show lack of fair use.

B. Beneficial Applications of Moral Intellectual Property Rights in the United States: Music Torture and Beyond

If the United States implemented the moral intellectual property scheme described above, musicians would be able to prevent the United States from using their works for torture. It

¹⁶¹ *Id.* at 582.

¹⁶² *Id.* at 594.

¹⁶³ *Campbell*, 510 U.S. at 579 (“Suffice it to say now that parody has an obvious claim to transformative value Like less ostensibly humorous forms of criticism, it can provide social benefit”).

¹⁶⁴ Likely, Orbison would sue under his right to integrity, which aims to protect artists’ reputations by ensuring that their names are not attached to artworks that have been altered by third parties. See *supra* notes 75–76 and accompanying text.

¹⁶⁵ Yonover, *supra* note 86, at 116.

¹⁶⁶ *Id.* at 120.

¹⁶⁷ *Id.* at 120–21.

¹⁶⁸ *Id.* at 116.

is clear that if artists were awarded withdrawal rights, disgruntled musicians could choose to withdraw their musical works from prisons engaged in music torture. Even without withdrawal rights, though, artists would likely succeed in enjoining the United States from using their music under the right to attribution. In the *Shostakovich* case, a French court determined that a composer had been morally injured because the presence of his music in a movie falsely indicated to consumers that he had endorsed the anti-Russian themes in the film.¹⁶⁹ Because the audience partially attributed the film to the composer, the composer had the right to remove his music from the film (and enjoin the current version of the film from playing).¹⁷⁰ In the same way, Guantanamo prisoners—or fans who read about music torture in the news—could assume that the use of specific music at Guantanamo Bay suggested musician endorsement of the torture practices there. As a result, disapproving musicians could likely succeed on a moral-rights infringement action under the right to attribution.

Furthermore, context can often alter the meaning of musical lyrics, which raises right-to-integrity questions. For example, take Bruce Springsteen's "Born in the U.S.A.," a Guantanamo Bay favorite.¹⁷¹ Originally written about the Vietnam War, "the song presents a poignant critique of social inequalities and our tragic failure to properly honor those who serve and sacrifice for their country."¹⁷² When it plays at Guantanamo Bay, however, "the song's seemingly jingoistic, anthemic chorus takes center stage. Context transforms the tune . . . into a patriotic paean that aurally demarcates the insider-outsider . . . divide separating soldiers and detainees."¹⁷³ Similarly, when music torturers use Britney Spears' ". . . Baby One More Time," the lyric "hit me, baby, one more time" transforms from a sexual advance into a twisted plea for violence.¹⁷⁴ Because context may sometimes transform the

¹⁶⁹ See *supra* notes 88–89 and accompanying text.

¹⁷⁰ See Yonover, *supra* note 86, at 89.

¹⁷¹ See McLaughlin, *supra* note 18; Tehranian, *supra* note 30, at 19.

¹⁷² Tehranian, *supra* note 30, at 21.

¹⁷³ *Id.* at 22.

¹⁷⁴ Andy Worthington, *A History of Music Torture in the "War on Terror,"* HUFFINGTON POST BLOG (Jan. 15, 2009, 5:12 AM), http://www.huffingtonpost.com/andy-worthington/a-history-of-music-tortur_b_151109.html [<http://perma.cc/8EU9-BPVF>]. The lyrics "when I'm not with you I lose my mind" and "Boy, you got me blinded" are also particularly poignant. Note that although cleverly twisted lyrics may be particularly distressing to musicians, they may not have much effect on the prisoners. As Guantanamo Prisoner Ruhah Ahmed explained, music "makes you feel like you are going mad. You lose the plot and it's very scary to

meaning of a musical work, some musicians may have right-to-integrity claims against the United States for playing their songs for torture purposes.

Whether an artist uses the attribution, integrity, or withdrawal right to frame her claim, though, she is likely to succeed because the unauthorized use of one's music for torture purposes is an affront to the personality theories upon which the moral rights system is built.¹⁷⁵ If artists consider their work to be a part of themselves, it must cause significant internal discomfort to have that work involved in inflicting pain upon others, especially if music torture is something with which the artist philosophically disagrees.¹⁷⁶ Of course, not every musician opposes the United States using music for homeland security purposes.¹⁷⁷ This means that there will always be music available for music torture and ensures that such pragmatic concerns would not weigh on the minds of legal decision makers when granting artists moral relief. Moral rights, in short, are a neat solution to the music torture problem.

The introduction of moral rights into U.S. intellectual property law could also help solve a number of other problems musicians face under the current intellectual property scheme. For example, when political campaigns use music at campaign rallies, the musicians often protest if they do not support the candidate in question.¹⁷⁸ Just as in the music torture scenario, musicians do not have many legal avenues available if they wish to distance their music from an ideologically repugnant political candidate. Copyright protection is next to useless at political rallies, because "the copyright holder to the musical composition at issue has invariably agreed to a blanket performance-license regime that enables venues to play the musical composition without regard to who is using the venue and for what purpose."¹⁷⁹ Other intellectual property theories tend to be ill fitting,¹⁸⁰ leaving artists without rights. In *Henley v. DeVore*, for example, Charles DeVore, an assemblyman who was seeking the Republican nomination for one of California's

think that you might go crazy because of all the music, because of the loud noise, and because after a while you don't hear the lyrics at all, all you hear is heavy banging." *Id.*

¹⁷⁵ See *supra* note 70 and accompanying text.

¹⁷⁶ Trent Reznor's quote at text accompanying note 30, *supra*, nicely elucidates this feeling.

¹⁷⁷ See *supra* notes 33-34 and accompanying text.

¹⁷⁸ For a number of high-profile examples of this phenomenon, see Tehranian, *supra* note 30, at 12-14.

¹⁷⁹ *Id.* at 14.

¹⁸⁰ See *supra* Subparts I.B-C.

senate seats, produced a YouTube campaign video using the music from the Don Henley song “All She Wants to Do Is Dance.”¹⁸¹ DeVore personally rewrote the lyrics to the song (its new title was “All She Wants to Do Is Tax”) and had them sung over a karaoke track of the original.¹⁸² Henley, a prominent musician and former member of the Eagles, sued under a number of different theories including copyright and Lanham Act false endorsement.¹⁸³ However, Henley was ultimately unsuccessful, in part because he did not hold the copyright to the song (although the songwriter managed to recover).¹⁸⁴ Further, because Henley’s voice had a different sonic quality from that of the DeVore singer, he did not succeed on his false endorsement claim.¹⁸⁵ “The real injury to Henley, if there was one, was not the idea of consumer confusion as to sponsorship or affiliation; it was the semiotic recasting of his songs into something he never intended them to be.”¹⁸⁶ Although Henley failed to recover, armed with withdrawal, attribution, and integrity rights, Henley could have prevented DeVore from appropriating his music in a way that Henley considered repugnant.

The introduction of expansive moral intellectual property into the U.S. copyright scheme could even help combat online music piracy.¹⁸⁷ One theory is that yesterday’s major record companies caused a “commodification” of music by greedily raising prices while decreasing music quality and artist royalty payments, which caused consumers to become resentful.¹⁸⁸ These angry consumers did not feel guilty about stealing music when it became available online, in part because they felt labels had been “stealing” from artists and consumers for years.¹⁸⁹ Moral rights, which stem from the belief that music is not merely a commodity, but an extension of the artist’s personhood, could help to “restore the value placed on music and help consumers decide once again that it is worth paying for.”¹⁹⁰

¹⁸¹ 733 F. Supp. 2d 1144, 1147–48 (C.D. Cal. 2010). DeVore actually appropriated two of Henley’s songs for his campaign. For simplicity’s sake, the analysis here considers only one.

¹⁸² *Id.* at 1149.

¹⁸³ *Id.* at 1147, 1149.

¹⁸⁴ *Id.* at 1148.

¹⁸⁵ *Id.* at 1168. See Tehranian, *supra* note 30, at 26–28.

¹⁸⁶ Tehranian, *supra* note 30, at 27.

¹⁸⁷ See Spangler, *supra* note 68, at 1322.

¹⁸⁸ *Id.* at 1318–20.

¹⁸⁹ *Id.* at 1320–21.

¹⁹⁰ *Id.* at 1322.

CONCLUSION

The process of creating art is a deeply personal one—it requires the artist to put a piece of her soul into her work, so that the work might one day touch the soul of an observer. Music torture, by contrast, is impersonal, dehumanizing, and isolating. It is easy to see why artists should be upset when their carefully crafted music abets violent acts. But while we might understand artists' concerns about music torture, the current intellectual property system affords artists little to no relief. The expansion of moral rights in the United States is a promising solution.

The United States is a young nation, and as such, its economic development has historically been a dominant focus.¹⁹¹ Established European countries, by contrast, have been able to expend more energy on art creation and artists' rights, especially in the realm of moral intellectual property. Today, though, the United States is becoming more of a global artistic competitor. Artists such as Edward Hopper, Georgia O'Keefe, and Andy Warhol have assumed prominent roles on the worldwide stage.¹⁹² It is time for the United States to improve its artistic protections, or risk falling behind. With expanded moral intellectual property rights, the United States can boost its status as an artistic powerhouse and protect the sanctity of its artists.

¹⁹¹ Yonover, *supra* note 86, at 86.

¹⁹² *Id.* at 91–92.