

AUTHORS IN DISGUISE: WHY THE VISUAL ARTISTS RIGHTS ACT GOT IT WRONG

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I. INTRODUCTION

In the civil law tradition, moral rights protection is justified on the ground that a work of creative authorship reveals the author's individual process of creativity and artistic autonomy. Thus, given the infusion of "self" that occurs by virtue of the authorship process, an author should be entitled to claim certain personal guarantees such as the right of attribution and the right of integrity, which allow an author to prevent modifications to her work that are inconsistent with her artistic vision. Some critics are troubled, however, by the very concept of moral rights. Beginning in the late 1970s, literary critics such as Roland Barthes and Michel Foucault raised academic awareness of the purported fallacy that authorship entails an exclusive focus on the individual Romantic author.¹ This postmodern view of authorship essentially sees works of authorship as the product of individual or collective borrowing from the social fabric rather than the essence of any single person's creativity. Arguably this view is inconsistent with the theoretical predicate of moral rights.

Undoubtedly, authors freely borrow from the landscape of existing cultural production in creating their works.² This reality is as true today as it was historically.³ Despite the fact that all authors owe a debt to the past, the authorship

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¹ ROLAND BARTHES, *The Death of the Author*, in IMAGE, MUSIC, TEXT 142 (Stephen Heath trans., 1977); MICHEL FOUCAULT, *What Is an Author?*, in TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141 (Josué V. Harari ed., 1979). For further discussion of this trend in literary criticism and its impact on copyright law, see Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 29–35 (Martha Woodmansee & Peter Jaszi eds., 1994).

² For this reason, Lior Zemer has suggested that "the public" should be regarded as a joint author of all copyrightable works. See LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT 2 (2007).

³ See generally Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author,'* 17 EIGHTEENTH-CENTURY STUD. 425, 441–45 (1984) (engaging in a historical discussion of authorship).

construct as we know it today embodies the idea of “crafting” a work so that it embodies the author’s personal stamp of autonomy. Notwithstanding the borrowing inherent in the authorship process, it is still the “author” who, on an individual or joint basis, “composes” the creative package. Postmodern scholars advocate a reconfiguration of the authorship construct in order to achieve a more balanced copyright law. Alternatively, I suggest that such a reconfiguration is unnecessary as long as we carefully formulate law that weighs the boundaries of this construct.⁴

Thus, an author may borrow liberally in crafting her work, but the final product nonetheless can reflect a “meaning” and “message” personal to the author and reflective of the author’s autonomy. Moral rights protection exists to recognize authorship autonomy by safeguarding the author’s meaning and message. The concepts of a work’s “meaning” and “message” as used in this Article are related in that they are dependent upon the author’s subjective vision rather than the vision of the author’s audience. These terms nonetheless embrace somewhat distinct ideas. The author’s “meaning” personifies what the work stands for on a level personal to the author; whereas the author’s “message” represents what the author is intending to communicate externally on a more universal level. A work’s “meaning” therefore exemplifies the idea of “why I as the author got involved in doing this work and what I see in it.” In contrast, a work’s “message” embodies the notion of “what I as author expect others to see in it, and what I hope they’ll take from it.”⁵

Let’s unbundle these concepts with an example. In my office hangs an exquisite colorful print called *Bereshit Micrography* by Leon Azoulay. The print contains the complete book of Genesis executed in Hebrew microcalligraphy and depicts the creation, Noah’s ark and a rainbow, and other images from the book of Genesis. Although I cannot say with certainty what the meaning of this work is for the author, one could posit that he created this edition of 350 prints as a testament to the mysteries of divine creation. Azoulay grew up in the ancient town of Tsfat, Israel, the birthplace of Jewish mysticism known as Kabbalah.⁶ His biography indicates that this environment inspired him to search for a means of expressing his passion for both painting and the Bible.⁷ Azoulay’s personal meaning essentially

⁴ Cf. Margaret Ann Wilkinson, *The Public Interest in Moral Rights Protection*, 2006 MICH. ST. L. REV. 193, 206 (noting that regardless of the divergent views surrounding the appeal of copyright as a romantic notion or as a utilitarian concept, “the founding of copyright upon identification of the work with the author has functioned as a necessary concept”).

⁵ I am indebted to Wendy Gordon for her insights with respect to framing this distinction. Charles Beitz recognized a similar distinction between a creator’s interest in preserving a work’s communicative content (an idea comparable to the term “message”) and the creator’s “desire to transfigure a world experienced as lacking in meaning or value” (illustrating the notion of “meaning” as used in this text). Charles R. Beitz, *The Moral Rights of Creators of Artistic and Literary Works*, 13 J. POL. PHIL. 330, 340-342 (2005).

⁶ See <http://www.leon-gallery.co.il/about.phtml> (last visited Nov. 28, 2007).

⁷ *Id.*

can be viewed as including whatever qualities he believes the work intrinsically embodies. The message of the print, on the other hand, is the narrative the author seeks to communicate to his audience. The author's message likely will include his own personal meaning, but it might also extend beyond it. For example, hypothetically speaking, Azoulay's microcalligraphy of Genesis may have intended to communicate that unless man controls his evil tendencies, suffering will occur as it did in the Garden of Eden. Thus, as used in this Article, the "message" of a work is whatever the author is seeking to communicate to her audience.

When a work of authorship manifests a meaning and message specific to the author, moral rights safeguard the author's original conceptions. Charles Beitz, a professor of politics at Princeton, has observed that even if a creator's work lacks a clear "propositional content" because she is simply attempting to "produce an interesting object for interpretation," the argument for moral rights protection remains strong because "the creator might reasonably believe that preservation of the work in its original form is necessary for the success of the aim."⁸ Attribution is a vital, and perhaps the most widely endorsed, component of moral rights. An author's choice of attribution is very much part of a work's meaning and message; as such, it plays a central role in communicating the essence of an author's work to her audience. As will be discussed more fully below, even anonymous or pseudonymous works can be seen as reflecting a branding choice that is a fundamental part of the author's meaning and message. When the author's attribution of choice is omitted without permission of the author, the original work is somehow incomplete. Attribution thus functions as a significant and widely acknowledged means of safeguarding the overall integrity of an author's text. In discussing the right of attribution, Susan Liemer observed that the "goal is to protect the personal association between the artist and her art" because even if two works look similar, they arise out of distinct minds, bodies, creative efforts, and processes.⁹

The moral right of integrity also represents a foundational authorship value. Objectionable distortions, modifications, or presentations of an author's work damage authorship dignity because the author's external embodiment of her meaning and message no longer represents her intrinsic creative process. The resulting damage is particularly acute when the modified work is linked to the author through specific attribution or widespread public recognition.¹⁰

Most copyrighted works are produced outside the framework of an individual author whose identity is known to the public. Works created outside the traditional authorship trope include those produced by authors who write anonymously or under a pseudonym, works for hire, and even collective works. The relationship

⁸ Beitz, *supra* note 5, at 341.

⁹ Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 49 (1998).

¹⁰ See Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1974-75 (2006).

between moral rights and works created by these “authors in disguise” is problematic because if the primary objective of moral rights is to safeguard the meaning and message of an author’s work, it would seem as though the true author’s identity should be publicly known. Yet, for the types of works discussed in this Article, this knowledge may not be readily available. This Article explores these difficulties as a general matter, with particular focus on the failure of the Visual Artists Rights Act of 1990 (VARA) to incorporate explicit protection for anonymous and pseudonymous works and its exclusion of works made for hire from the scope of its coverage.¹¹ VARA is the primary federal codification of moral rights in the United States, and thus its provisions represent the most significant embodiment of the doctrine in this country. I argue that in light of the theoretical predicate for moral rights, VARA’s exclusions are misguided.

II. ANONYMITY AND PSEUDONYMITY

Recent legal scholarship has evaluated the practices of anonymity and pseudonymity from the perspective of consumer deception. Most of the scholarship on this topic treats this issue with a focus on literary genres in the context of attribution. Laura Heymann has proposed “a doctrine of moral rights for readers,”¹² and invokes the concept of an “authornym” as a branding choice offered by the author to the consuming public in the form of the author’s trademark.¹³ She does not see appropriate “authornymic attribution” as grounded in authorial “justice,” but rather as a method of preserving organizational integrity so that reader responses will be informed and consumer confusion minimized with respect to creative works.¹⁴

Writing primarily in the context of employment law, Catherine Fisk also has documented the branding function of attribution as a trademark. For example, she observed that “readers of Nancy Drew novels expect them to be authored by ‘Carolyn Keene’ even though she does not exist and the books were written by a number of different people according to specifications established by the publisher.”¹⁵ Greg Lastowka also calls for recognition of the trademark function of authorship and has recommended that attribution interests be regulated to prohibit “deceptive misattributions of authorship that result in consumer harms.”¹⁶ Henry Hansmann and Marina Santilli offer another perspective. They posit that pseudonymous works present “at most a modest fraud on the public” because the

¹¹ See 17 U.S.C. § 101 (2006) (defining “work of visual art”). The moral rights issues raised by collective works are outside the scope of this Article.

¹² Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1446 (2005).

¹³ *Id.* at 1381.

¹⁴ *Id.* at 1446.

¹⁵ Catherine L. Fisk, *Credit Where It’s Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 63 (2006).

¹⁶ Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1241 (2005).

use of this practice does not deceive the public as much as it does deny them the information of the real author's identity that they might otherwise like.¹⁷ In their view, this argument applies with even greater force to anonymous works because here there is "no offsetting concern that the public will be deceived into believing that there is some person other than the true author who has written the work in question."¹⁸

Despite the appeal of treating attribution and even integrity interests within the framework of trademark law, I suggest that trademark law is not analytically consistent with the theoretical basis for moral rights protection. Trademark law is concerned with preventing consumer confusion, a concept totally unrelated to the authorship interests encompassed by moral rights. Whether consumers are confused by a particular party's actions with respect to a work of authorship is a completely separate inquiry from whether a party has, through misattribution or other modifications, distorted the meaning and message of an author's work. Thus, in contemplating the difficulties presented by anonymous and pseudonymous works, the starting point is not determining whether the public is deceived by the attributions but rather ascertaining exactly whose meaning and message the work at issue reflects.¹⁹

Although VARA does not include specifically the negative rights of anonymity or pseudonymity,²⁰ these rights do comport with the Berne

¹⁷ Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 131 (1997).

¹⁸ *Id.* at 132.

¹⁹ In this regard, ghostwriting presents some strong parallels to works written anonymously or under a pseudonym. The scenarios in which ghostwriting occurs are quite varied and can range from situations in which the ghostwriter is doing virtually all of the creative work to those in which the final product is far more representative of the message of the named author than that of the ghost writer. A more extensive analysis of ghostwriting is beyond the scope of this Article, however, because VARA does not address ghostwriters.

²⁰ The House Report states that the right of attribution contained in 17 U.S.C. § 106A(a)(1) extends "to the right to publish anonymously or under a pseudonym." H.R. REP. NO. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6924. The authority cited for this proposition is the FINAL REPORT OF THE AD HOC WORKING GROUP ON U.S. ADHERENCE TO THE BERNE CONVENTION, *reprinted in* 10 COLUM.-VLA J.L. & ARTS 513, 550 (1986). This report does not, however, establish that VARA covers anonymous and pseudonymous works. It simply mentions that Article 6bis of the Berne Convention encompasses this right, citing as support the WORLD INTELLECTUAL PROPERTY ORGANIZATION [WIPO], GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 41 (1978). *See infra* note 21 and accompanying text. In fact, VARA explicitly requires that works be signed in certain instances. *See* 17 U.S.C. § 101 (2006) (defining "work of visual art"). The legislative history on the signature requirement is muddled, but it has been suggested that the real reason for the signature requirement was to meet "unreasonable demands by the book publishing industry, which was determined to eliminate even the most implausible hypothetical scenario for liability."

Convention.²¹ David Nimmer has observed that although the language of Berne on this point is “sparse,” the semi-official guide published by the World Intellectual Property Organization (WIPO) recognizes this aspect of the right of attribution as being within the scope of the Convention.²² There is good reason for this view in that an author’s decision to create anonymously or under a pseudonym can be viewed as a branding choice that is a fundamental part of the author’s meaning and message. Hansmann and Santilli have observed that an “artist may have good reasons to exist in the public’s mind as two different artists” and this analysis, in their view, applies “even more strongly to works published anonymously.”²³ I suggest that more often than not, the reasons underlying an anonymous or pseudonymous attribution choice relate to how the author understands both the personal meaning of her work and her intended, externalized message.²⁴

A compelling example of this phenomenon is Laura Heymann’s observation that in certain instances, an author may choose to subordinate her own identity to the “broader purpose of the text.” For example, a Holocaust survivor may favor anonymity because she wishes her poem or painting to represent the voice of all of the victims.²⁵ Heymann catalogues other motivations for authors and artists to select various expressive identities, which include gender morphing, and the masking of particular cultural, racial, or ethnic identification.²⁶ Such authors are experimenting with different modes of authorship to, in effect, reflect a personal meaning and facilitate the communication of a particular message to their readers.

WILLIAM PATRY, *The Visual Artists Rights Act of 1990*, in PATRY ON COPYRIGHT § 16:14 (2006).

²¹ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Paris on July 24, 1971 and amended on Sept. 28, 1979, S. TREATY DOC. NO. 99-27 (1986).

²² David Nimmer, *The Moral Imperative Against Academic Plagiarism (Without a Moral Right Against Reverse Passing Off)*, 54 DEPAUL L. REV. 1, 15 (2004). Countries vary in their approach to whether moral rights extend to anonymous or pseudonymous works. For example, the United Kingdom grants the moral right of pseudonymity but not anonymity. ELIZABETH ADENEY, *The United Kingdom: The Rights and Their Application*, in THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS § 14.32, at 397 (2006) [hereinafter THE MORAL RIGHTS]. In contrast, Germany’s statute has been interpreted to allow protection for both. See ADENEY, *Moral Rights in Germany*, in THE MORAL RIGHTS, *supra*, § 9.72, at 238.

²³ Hansmann & Santilli, *supra* note 17, at 131–32.

²⁴ *But see* Wilkinson, *supra* note 4, at 229–30 (arguing that the right of attribution should incorporate the right to maintain a pseudonym because this approach vindicates the public’s interest in “the authority of the information,” but the opposite is true regarding the right of anonymity).

²⁵ See Heymann, *supra* note 12, at 1406.

²⁶ *Id.* at 1398–1401.

In this regard, consider the facts in *McIntyre v. Ohio Elections Commission*.²⁷ The defendant in this case distributed leaflets opposing a proposed school tax levy with the attribution “Concerned Parents and Tax Payers.”²⁸ Heymann observes that what motivated McIntyre, the defendant, to use this designation was “not the fear of retribution but a deliberate construction of identity, a desire to have the viewpoints in her handbill attributable to an identity other than her ‘true’ identity.”²⁹ In fact, she posits that in *McIntyre*, the defendant may have been motivated to take advantage of a perceived audience tendency to give more weight to joint authorship than to an individual writer.³⁰ Catherine Fisk provides another telling example when she discusses the practice of newspaper writers electing a byline strike as a means of publicly protesting “objectionable workplace policies.”³¹ Fisk maintains that in such instances, the reporters are hoping that the absence of their bylines will alert readers to their complaints.³² As these examples pointedly show, an author’s choice to write either anonymously or under a pseudonym can be understood as a component of the work’s essential meaning for the author and its intended message to the public.

VARA, of course, covers only visual art.³³ Paintings, drawings, sculptures and other works within the scope of VARA are at first blush typically not regarded as the sort of works created anonymously or under a pseudonym. Although a couple of state moral rights statutes explicitly cover an author’s right to receive credit under a pseudonym, no case law exists on this point.³⁴ Still, the above analysis applies to visual art in much the same way as to literary and other works. For example, a visual artist might choose to create under a pseudonym to mask her true identity in order to convey a particular message through her work.³⁵ With respect to anonymity, recall the Holocaust survivor example discussed earlier who paints anonymously to give a voice to all of the victims.³⁶ Also, visual artists may fail to sign their works intentionally so as not to deface the visual integrity of their works. These decisions should be construed as deliberate branding choices and covered within the framework of VARA. In sum, the practices of anonymity and pseudonymity can be reconciled with moral rights protection for the author on the

²⁷ 514 U.S. 334, 357 (1995) (holding unconstitutional a state law prohibiting any individual from distributing material designed to promote or defeat a political issue unless the author’s name and address were listed).

²⁸ *Id.* at 337.

²⁹ Heymann, *supra* note 12, at 1430.

³⁰ *Id.*

³¹ Fisk, *supra* note 15, at 92–93; *see also* David Nimmer, *supra* note 22, at 73 (noting that with respect to scholars, it is “[f]ar more threatening . . . to vest exclusive attribution in the employers” than to divest economic rights under the work-for-hire doctrine).

³² Fisk, *supra* note 15, at 93.

³³ *See* 17 U.S.C. § 106A(a) (2006).

³⁴ *See* MASS. GEN. LAWS ch. 231, § 85S (2006); N.M. STAT. ANN. § 13-4B-3 (West 2006). Prior to VARA’s enactment, eleven states had moral rights legislation.

³⁵ *See* Heymann discussion, *supra* note 12 and accompanying text.

³⁶ *See supra* note 25 and accompanying text.

ground that these attribution designations function as part of the author's personal meaning and intended message. Therefore, VARA should be amended in this respect to include explicit protection for works that are anonymous and pseudonymous.

III. WORKS FOR HIRE

The practice of hiring someone to create a work of authorship for which no attribution credit will be given has had a long and distinguished history in the United States in the form of the work-for-hire doctrine. This doctrine operates to vest authorship status in the employer of the author or, in certain instances, in the party who commissions the work. Work for hire is the only aspect of our copyright law that conflicts with an explicit right of attribution for all authors. Although variations of this doctrine appear in other countries such as the Netherlands and Russia, the United States, for the most part, is unique in its explicit embrace of this position.³⁷ According to Adolf Dietz, the work-for-hire doctrine as applied “takes

³⁷ For a discussion of the doctrine's theoretical application in the Netherlands, see Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1088–90 (2003) [hereinafter Ginsburg, *The Concept of Authorship*]. Interestingly, Russian copyright law also has a work-for-hire doctrine. See *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998); see also Australian Copyright Act, 1968, § 35(6), available at http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/ (last visited Nov. 28, 2007) (providing that the employer of an author will own the copyright in certain instances).

In contrast, French law does not recognize the work-for-hire doctrine except with regard to computer programs, a position that also is shared by some other countries. See, e.g., Jane C. Ginsburg, *Reforms and Innovations Regarding Authors' and Performers' Rights in France: Commentary on the Law of July 3, 1985*, 10 COLUM.-VLA J.L. & ARTS 83, 88–89 (1985); Council Directive 91/250, art. 2.1, Legal Protection of Computer Programs, 1991 O.J. (L 122) 42. In addition, French law has special provisions for collective works that resemble the operation of works made for hire. See 1-FRA INTERNATIONAL COPYRIGHT LAW & PRACTICE § 4[1](b)(ii)(C) (Paul Edward Geller & Melville B. Nimmer eds., 18th ed. 2006). Interestingly, Jane Ginsburg cites French sources from the early to middle nineteenth century supporting a broader view of “author” as including “not only those who themselves created a literary work, but also those who have had the work composed by others, and who undertake to pay for its composition.” See Ginsburg, *The Concept of Authorship*, *supra*, at 1088–90.

The civil law tradition typified by the French perspective regarding works for hire does, however, look to other means to achieve a comparable result in certain situations. Such means “include rules of presumed transfers of exploitation rights, statutory limitations on moral rights, and judicially tailored rules for commissioned works or works created in an employment relationship.” Marina Santilli, *United States' Moral Rights Developments in European Perspective*, 1 MARQ. INTELL. PROP. L. REV. 89, 96–99 (1997) (providing a comprehensive discussion of these issues). By way of comparison, the British Copyright Act provides that “[w]here a . . . work is made by an employee . . . his employer is the first owner of any copyright in the work subject to any agreement to the contrary.” Copyright, Designs and Patents Act, 1988, c. 48, § 11(2) (Eng.). According to this provision, only

away with one stroke of the pen the constitutional guarantee for the initial and true author.”³⁸ The work-for-hire doctrine perhaps can be justified when it operates to divest an author of copyright ownership given the economic quid pro quo she receives. On the other hand, by allowing an author to relinquish her authorship status and all that such status entails, the work-for-hire doctrine arguably undermines authorship dignity in a fundamental way.³⁹

A. *History and Statutory Operation of the Work-for-Hire Doctrine*

From the outset, the approach underlying the work-for-hire doctrine in the United States was very focused on economic realities. Significantly, the work-for-hire doctrine originally was codified as a default rule invoked to determine copyright ownership in the absence of a contractual stipulation on this point.⁴⁰ With respect to works for hire, the employer is regarded as the author in a legal sense, as compared to the creator of a work, whom Judge Learned Hand once termed “the ‘author’ in the colloquial sense.”⁴¹ Thus, the work-for-hire doctrine fails to distinguish between colloquial authorship of a work and legal ownership of the copyright in which the creative work is embodied. This is a significant distinction because the autonomy concepts of “meaning” and “message” that provide the theoretical grounding for moral rights apply to “authors” as that term is understood colloquially rather than legally.⁴² Regardless of whether an author transfers any or all of her copyrights, the creative work continually manifests the colloquial author’s subjective meaning and intended message. As discussed above, the author’s artistic autonomy is tied to the accurate presentation and attribution of this object, despite the transfer of the object itself or the copyrights to the work. In her study of the norms of attribution, Catherine Fisk stated that “[t]o most employees most of the time, what matters is not that you own your . . . copyright, but that you can truthfully claim to be the . . . author of it.”⁴³ By simply positing

ownership rather than authorship is attributed to the employer. *Id.* Nevertheless, sections 79(3) and 82(1) of the British Act essentially negate this distinction by diminishing the attribution and integrity rights of employed authors. *Id.* §§ 79(3), 82(1)(a). Germany lacks a direct work-for-hire doctrine, but article 43 of the Copyright Law presumes a transfer of rights from employed authors to their employers. Urheberrechtsgesetz [UrhG] [Copyright Law], Sept. 9, 1965, BGBI. I. at 1273, art. 43, (F.R.G.).

³⁸ Email from Adolf Dietz, Honorary Professor of Copyright Law, University of Passau, Germany to author (July 18, 2005) (on file with author).

³⁹ See Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1, 68 (2003) (“If American law had recognized moral rights as French law does, it might have been more difficult to imagine how the corporation could acquire all the rights to the employee’s works.”).

⁴⁰ See *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 634 (2d Cir. 2004) (discussing both the 1909 and 1976 Copyright Acts).

⁴¹ *Shapiro, Bernstein & Co. v. Bryan*, 123 F.2d 697, 699 (2d Cir. 1941).

⁴² See *supra* notes 5–10 and accompanying text.

⁴³ Fisk, *supra* note 15, at 54.

that the employer becomes the author, the work-for-hire doctrine gives no consideration to the consequences of deeming the employer to be the physical source of the creation.

The work-for-hire doctrine has been in place in the United States, at least in theory, for over a century.⁴⁴ The 1909 Copyright Act failed to include a definition of “work made for hire” but stipulated that “the word ‘author’ shall include an employer in the case of works made for hire.”⁴⁵ The 1976 Act attempted to create more certainty in work-for-hire determinations to preclude employees from claiming an after-the-fact copyright interest in such works.⁴⁶ Section 201(b) of the 1976 Act specifically embraces the work-for-hire doctrine by providing that:

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.⁴⁷

Further, the 1976 Act invokes a two-pronged definition of a “work made for hire” as “a work prepared by an employee within the scope of his or her employment; or a work specially ordered or commissioned” for specified types of uses.⁴⁸ To satisfy the specially commissioned prong of the definition, the parties also must

⁴⁴ For a comprehensive analysis of the history of the work-for-hire doctrine in the 19th and early 20th centuries, see Fisk, *supra* note 39, at 6.

⁴⁵ 17 U.S.C. § 26 (repealed 1976). Under judicial interpretations of the 1909 Act, the work-for-hire doctrine vested copyright ownership in the person at whose “instance and expense” the work was created, regardless of whether the work was created by an employee or an independent contractor. *See* *Brattleboro Publ’g Co. v. Winmill Publ’g Corp.*, 369 F.2d 565, 567–68 (2d Cir. 1966) (employee); *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965) (independent contractor). Although the 1909 Act’s work-for-hire doctrine initially was confined to works made by traditional “employees” in the scope of their employment, the doctrine later was expanded to include independent contractors. *See, e.g.,* *Forward v. Thorogood*, 985 F.2d 604, 606 (1st Cir. 1993) (citing *Murray v. Gelderman*, 566 F.2d 1307, 1310 (5th Cir. 1978)); *Brattleboro*, 369 F.2d at 567–68).

⁴⁶ Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 889–95 (1987) (stating that “[t]he keynote of the [1976 Copyright] statute’s ownership provisions is a commitment to facilitation of transfer and exploitation of copyrights by removing uncertainties over copyright ownership”); *see also* *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) (noting that “Congress’ paramount goal in revising the 1976 Act” was to enhance “predictability and certainty of copyright ownership”).

⁴⁷ 17 U.S.C. § 201(b) (2006).

⁴⁸ *Id.* § 101.

“expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”⁴⁹

The legislative history accompanying the codification of the work-for-hire doctrine under both the 1909 and 1976 Acts does not reveal an explicit appreciation for the personal rights of authors as distinct from their ownership interests. Additionally, the history does not specifically address the implications of vesting authorship, as opposed to ownership, rights in an employer.⁵⁰ In fact, the language of section 201(b) suggests that a signed written agreement can transfer copyright ownership, but not authorship status, to the hired party—the colloquial author—with respect to works made for hire.⁵¹

It would have been reasonable to expect the text and history of VARA to recognize the distinction between ownership and authorship. Yet, VARA excludes works made for hire from the scope of the statute’s coverage.⁵² Specifically, in the context of visual art, this exclusion can have a tremendous impact in practice because works made for hire “may account for a number of major art works, including major commissions, installed works, and works incorporated into buildings.”⁵³

B. Work-for-Hire Cases Implicating Moral Rights Issues

For the most part, the work-for-hire case law similarly fails to consider the distinction between authorship and ownership because ownership of the

⁴⁹ *Id.* See *Compaq Computer Corp. v. Ergonome Inc.*, 210 F. Supp. 2d 839, 842–43 (S.D. Tex. 2001) (summarizing the split among the circuits on the question of the appropriate timing of the execution of the written agreement in 17 U.S.C. § 101(2)).

⁵⁰ *But see* Fisk, *supra* note 39, at 64 (noting, in the context of the legislative history of the 1909 Act, some sensitivity to the distinction between authorship and copyright ownership on the part of Robert Underwood Johnson, Secretary of the American Authors’ Copyright League); *id.* at 68 (observing that one of the drafters of the 1909 Act “worried that employer ownership might allow a firm to alter and degrade a work after its creation and injure the reputation of the individual employee who was known to have been its creator”).

⁵¹ See Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 600 (1987) (“A signed writing can, at most, have the effect of rebutting the presumption that the employer is the copyright owner.”).

⁵² For a discussion of the legislative history of VARA, see Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 4 (1997).

⁵³ See REGISTER OF COPYRIGHTS, WAIVER OF MORAL RIGHTS IN VISUAL ART WORKS xv (1996). In addition, the following six state moral right statutes exclude works made for hire from their statutory protections: California, Connecticut, Massachusetts, Nevada, New Mexico, and New York. See CAL. CIV. CODE §§ 987, 989 (West 2006); CONN. GEN. STAT. § 42-116t (2005); MASS. GEN. LAWS ch. 231, § 85S (2006); NEV. REV. STAT. § 597.720 to .760 (2006); N.M. STAT. § 13-4B-3 (West 2006); N.Y. ARTS & CULT. AFF. LAW § 11(C) (McKinney 2002). See *supra* note 34.

copyrighted property typically is what is at issue in work-for-hire disputes.⁵⁴ Between 1978, the effective year of the 1976 Act, and today, the specially commissioned prong of the work-for-hire doctrine⁵⁵ has been the subject of roughly thirty-five cases. The employee prong⁵⁶ has given rise to nearly double this number since 1989, when the Supreme Court provided guidelines for determining whether an individual should be considered an employee or an independent contractor.⁵⁷ Taken together, these decisions total roughly one hundred cases, but only a handful involve facts that could even potentially give rise to attribution or other textual integrity violations. Moreover, only a small number of these decisions involve works potentially within the scope of VARA.⁵⁸ Despite the lack of precedent on this point, it is instructive to examine a couple of key decisions because they demonstrate how the operation of the work-for-hire doctrine has the potential to conflict with the authorship autonomy interests that form the basis of moral rights protection.

In *Community for Creative Non-Violence v. Reid*, a nonprofit organization, the Community for Creative Non-Violence (CCNV), sued James Earl Reid, an artist whom it had commissioned to sculpt a homeless family for a Christmastime

⁵⁴ It is important to note, however, that under the current copyright statute, the determination that a work is one for hire affects issues other than just copyright ownership. For example, when a work for hire has been licensed, the license is not subject to termination under sections 203 and 304 of the Act. 17 U.S.C. §§ 203(a) & 304(c) (2006). The original rationale underlying the termination provisions was to provide additional benefits to authors. In *Marvel Characters, Inc. v. Simon*, the court noted that because the statutory author of a work-for-hire historically was an employer-publisher, this rationale is not as directly applicable since “an employer-publisher does not face the same potential unequal bargaining position as an individual author.” 310 F.3d 280, 291 (2d Cir. 2002). Also, the employer of a work-for-hire can exercise the renewal right under § 304(a), while the colloquial author or her statutory successors cannot. 17 U.S.C. §304(a) (2006). The number of years copyright protection subsists also varies between ordinary works and works-for-hire pursuant to sections 302(a) and (c). According to section 302(a), copyright protection in general lasts for the life of the author plus seventy years. *Id.* § 302(a). Section 302(c) provides that in the case of works made for hire (as well as anonymous and pseudonymous works), protection lasts “for a term of 95 years from the year of its first publication, or a term of 120 years from the year of [the work’s] creation, whichever expires first.” *Id.* § 302(c). To the extent all of these provisions are concerned with the economic value of the author’s copyright rather than the dignity interests of authors, their continued application with respect to works for hire is not problematic from the standpoint of moral rights.

⁵⁵ 17 U.S.C. § 101. *See also infra* note 76.

⁵⁶ *Id.* § 101. *See also infra* note 91.

⁵⁷ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989). *See also* Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 *CARDOZO ARTS & ENT. L.J.* 81, 151 (1998) (noting that the “employee” prong “has remained the battleground for work-for-hire disputes—so much so that 1909 law and 1976 law cases look much the same”).

⁵⁸ *See infra* note 91.

pageant.⁵⁹ Reid wanted to cast the piece in bronze so that it would be more durable, but CCNV rejected this idea due to time and financial constraints.⁶⁰ Ultimately, Reid suggested that he cast the sculpture in a synthetic substance that would be more economical but still durable, a compromise accepted by CCNV.⁶¹ No written agreement was signed and no mention was made of the copyright.⁶² During the creation process, members of CCNV visited Reid to discuss the project.⁶³ After the completion of the statue, it was displayed for about a month and then returned to Reid's studio for minor repairs.⁶⁴ Upon hearing of CCNV's plans to take the sculpture on a major tour, Reid refused to return the sculpture because he believed the sculpture could not withstand such an ambitious tour. Reid urged CCNV to cast the statute in bronze or create a master mold, but CCNV declined to spend additional sums of money on the sculpture.⁶⁵ Reid then refused to return the sculpture and filed a certificate of copyright registration in his own name.⁶⁶ He proposed to take the sculpture on a more modest tour than the one contemplated by CCNV.⁶⁷ Then, CCNV filed a competing certificate of copyright registration and instituted a lawsuit, seeking the sculpture's return and a declaration of copyright ownership.⁶⁸ The Supreme Court held that Reid was an independent contractor rather than an employee of CCNV, and therefore, ownership of the copyright did not belong to CCNV pursuant to the work-for-hire doctrine.⁶⁹

The *Reid* Court concluded that the general common law of agency should govern whether an individual is an employee under the work-for-hire definition, with the focus on whether a hiring party has the "right to control the manner and means by which the product is accomplished."⁷⁰ To decide whether an agency relationship exists, courts should balance a variety of factors derived from the

⁵⁹ 490 U.S. 730, 733–36 (1989).

⁶⁰ *Id.* at 733.

⁶¹ *Id.* at 733–34.

⁶² *Id.* at 734.

⁶³ *Id.*

⁶⁴ *Id.* at 735.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ According to the Court's analysis, the level of CCNV's participation in the project was not sufficiently high to merit its being designated as the legal author for purposes of the work-for-hire doctrine. The overall consideration, according to the Court, is whether the hiring party has the "right to control the manner and means by which the product is accomplished." *Id.* at 750–51. In applying the *Reid* factors, the Court concluded that Reid was an independent contractor given his level of skill; the use of his own tools and studio; his discretion in hiring assistants; the relatively short period of time in which he was retained by CCNV; the payment to Reid upon the completion of the job; CCNV's lack of being in the sculpting business; and CCNV's failure to pay taxes or provide any other employee benefits to Reid. *Id.* at 752–53.

⁷⁰ *Id.* at 750–51.

common law as outlined by the Restatement of Agency.⁷¹ A review of these factors reveals that the Restatement's emphasis is on "the relationship between the person performing the work and the person paying him to perform the work."⁷² The courts should consider

the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; . . . the method of payment; the hired party's role in hiring and paying assistants; . . . whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.⁷³

These factors are largely irrelevant when evaluating a situation involving a potential work made for hire in the context of a violation of authorship autonomy. In these instances, the focus should be on whether the work itself conveys the colloquial author's meaning and intended message, and if so, whether misattributions or presentations of the work by the hiring party or anyone else distort these communicative qualities.⁷⁴

⁷¹ See RESTATEMENT (SECOND) OF AGENCY §220 (2) (1958).

⁷² *MacLean Assocs. v. Wm. M. Mercer-Meidinger-Hansen, Inc.*, 952 F.2d 769, 777–78 (3d Cir. 1991).

⁷³ *Reid*, 490 U.S. at 751–52.

⁷⁴ Of course "the right to control the manner and means by which the product is accomplished" does bear on whose meaning and message the work conveys. *Id.* at 751. Still, of all the more specific *Reid* factors enumerated by the Supreme Court, only the skill required of the hired party and perhaps "the extent of the hired party's discretion over when and how long to work" may have a bearing on whether the work reflects the meaning and message of the hired party. *Id.*

As a general matter, a major problem with the application of the *Reid* factors is that that a court may readily manipulate them if inclined toward a particular result. See *Kwall*, *supra* note 52, at 9–10 (noting that the court in *Carter v. Helmsley-Spear* "may have reached the result it did because it was troubled by the prospect of allowing the work to remain in a lobby for a long period of time when the original agreement was entered into by a net lessee of the building, rather than by the building's owner"). In *Martha Graham School & Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004), the court manipulated the *Reid* factors, particularly the exercise of creative control, to arrive at a desired result. See *infra* note 87 and accompanying text. In that case, had the dances not been classified as works for hire, the copyrights to them would have passed under Graham's will to her long-time companion rather than to the Martha Graham Center of Contemporary Dance. *Martha Graham*, 380 F.3d at 631.

Although the *Reid* factors are designed to determine whether an individual is an employee as opposed to an independent contractor, the employee prong of the work-for-hire definition also requires that the work in question be created by an employee "within the scope of his or her employment." 17 U.S.C. § 101 (2006) (emphasis added). In applying this prong of the work-for-hire definition, courts typically invoke a three-part test derived from the common law of agency. These factors require a court to determine whether the

Reid did not involve an application of the specially commissioned prong, for which the relevant categories of covered works are limited to those specified in the statute. Although in theory, some of the designated categories in this prong of the work-for-hire definition could include works covered under VARA, the Report of the Register of Copyrights clearly indicates that the works of artists were not among those contemplated by the statutory definition.⁷⁵ Moreover, in practice, the specially commissioned work-for-hire cases yield little relevant information on how to approach a work-for-hire and moral rights conflict because many of these

work in question: (1) is “of the kind” the author is “employed to perform;” (2) “occurs substantially within authorized work hours;” and (3) is “actuated, *at least in part*, by a purpose to serve the employer.” *See, e.g.*, *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 186 (2d Cir. 2004) (emphasis added). Here again, these factors are analyzed from the standpoint of determining the nature of the relationship between the hiring and hired parties. With respect to moral rights, however, the question should revolve around the nature of the relationship between the author and her work. Moreover, even the scope of the employment test as articulated bears some recognition that an employee performing a task within the scope of her employment nonetheless can be producing a highly creative work that reflects the colloquial author’s meaning and intended message. The third part of the test asks whether the creation of the work was “actuated, *at least in part*, by a purpose to serve the employer.” *Id.* (emphasis added). It would be rare for a truly creative work to be created for the sole benefit of the employer, as the creation process itself inevitably affords the author with a degree of internal satisfaction. *Cf. Favela v. Fritz Cos.*, No. CV 92-2450 DT, 1993 WL 651875, at *6 (C.D. Cal. Sept. 20, 1993) (holding that computer programs were created within the scope of employment because they were created “for the sole benefit” of employer); *Sterpetti v. E-Brands Acquisition, LLC*, No. 6:04-CV-1843-ORL-3DA, 2006 WL 1046949, at *8 (M.D. Fla. Apr. 20, 2006) (holding that employee’s work was “appreciably motivated” to serve employer’s business, and therefore was completed within the scope of employment).

⁷⁵ *See infra* note 118 and accompanying text. Even apart from the interface between the work-for-hire doctrine and VARA, a meaning and message analysis also may be relevant for some of the commissioned categories that are not within the scope of VARA, such as parts of motion pictures or other audiovisual works. *Cf. Michael P. Matesky II, Note, Whose Song Is It Anyway? When are Sound Recordings Used in Audiovisual Works Subject to Termination Rights and When are They Works Made for Hire?*, 5 VA. SPORTS & ENT. L.J. 63, 88-96 (2005) (advocating that when sound recordings are commissioned for “the primary purpose” of being used in audiovisual works, they should qualify as works made for hire). Justin Hughes has discussed the “intentionality” of the commissioning party as “a measure of whether the patron’s intentions imbue and control the artistic endeavor” with respect to commissioned works. *See Hughes, supra* note 57, at 153. His discussion of relevant “personhood” interests reinforces the view that in certain instances, it is appropriate to evaluate a specially commissioned work from the standpoint of whose meaning and message the work reflects—that of the author or that of the hiring party. Nonetheless, several of the categories in the specially commissioned prong such as instructional texts, supplementary works, tests, or answer materials for tests encompass works for which it would be difficult, if not impossible, to approach the conflict from the perspective of determining the source of a work’s meaning and message. *See* 17 U.S.C. § 101 (2006).

decisions focus on compliance with the provision's additional requirement of a written instrument signed by both parties stipulating that the work is one for hire.⁷⁶

Although the facts of *Reid* did not involve an express moral rights violation, they certainly raise the potential for such a claim. Specifically, CCNV, as the commissioning party, owned the sculpture at issue but did not own the copyright. As a legal matter, *copyright* ownership and authorship remained in Reid because the work did not satisfy the requirements of the Court's work-for-hire test.⁷⁷ Therefore, the case resulted in ownership of the artwork in one party and the copyright to the artwork in another.⁷⁸ Under such a scenario, moral rights issues can arise when the owner of the artwork fails to attribute authorship or desires to take some action that will modify, or perhaps even destroy, the work's meaning and message as conceived by the original author. Thus, CCNV's desire to take the sculpture on a tour that would have been too ambitious for the work could have been the basis for a right of integrity claim by Reid had the law in the United States allowed for this cause of action.⁷⁹ With respect to the governing law, however, CCNV presumably had the right to take the sculpture on a tour, even if that tour would damage or destroy the work.⁸⁰ Further, the law at that time would

⁷⁶ Hughes, *supra* note 57, at 150. I tracked thirty-three federal cases that applied the "specially commissioned" prong of the Copyright Act of 1976. Nineteen of these cases were decided solely on the presence or absence of a clearly written work-for-hire agreement. None of the courts sought to determine whose meaning and message the work reflected. *See also supra* note 55 and accompanying text.

⁷⁷ *Reid*, 490 U.S. at 751–53.

⁷⁸ Towards the end of its opinion, the Court indicated that perhaps CCNV might be considered a joint author of the sculpture if the district court subsequently found on remand that the parties prepared the work so as to comply with the statutory requirements for joint authorship. *Id.* at 753; *see* 17 U.S.C. § 101 (2006) (defining a "joint work"). On remand following the Supreme Court's opinion, the district court determined that Reid should be recognized as the sole author of the sculpture and that he has sole ownership rights under section 106 regarding all three-dimensional reproductions of the sculpture. *Cnty. for Creative Non-Violence v. Reid*, No. 86-1507(TPJ), 1991 WL 415523, at *1 (D.D.C. Jan. 7, 1991). The court also ruled that CCNV is the sole owner of the original copy of the sculpture, and that both parties are co-owners of all section 106 rights respecting two-dimensional reproductions of the sculpture. *Id.*

⁷⁹ The sculpture at issue in *Reid* was created prior to the effective date of VARA, and therefore not subject to the statute. *See* 17 U.S.C. § 106A(d)(2) (2006). Further, note that VARA only prevents destruction of works that are "of recognized stature." *Id.* § 106A(a)(3)(B). The "recognized stature" caveat regarding destruction is not present in the prohibition involving mutilation. *Id.* § 106A(a)(3)(A). One problem with this aspect of VARA is that neither the statute nor the legislative history provides any guidance for determining when a work qualifies as being "of recognized stature." *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 324–25 (S.D.N.Y. 1994), *aff'd in part*, 71 F.3d 77 (2d Cir. 1995).

⁸⁰ According to the appellate court, "Co-ownership (or even sole ownership) of the copyright does not appear to carry with it a right to stop or limit CCNV's tour or to gain possession of the unique work of art." *Cnty. for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988).

not have required CCNV to attribute authorship of the work to Reid, although on remand, the district court ordered that any two-dimensional reproductions of the sculpture must credit Reid as the author.⁸¹

These issues would not have been resolved any more satisfactorily had the Court concluded that the sculpture was a work for hire. If the Court had held that CCNV owned the copyright, CCNV also could have taken actions with respect to the sculpture that would have obliterated the meaning and message of Reid's work. For example, as the copyright owner, CCNV would have been able to reproduce the work but would not be required to attribute authorship. CCNV also would be able to modify or even destroy the work, actions that surely would affect the work's meaning and message as determined by Reid.

The only case to examine directly VARA's exclusion of works made for hire from the definition of "visual art" is *Carter v. Helmsley-Spear, Inc.*⁸² In *Carter*, the Second Circuit concluded that the plaintiffs' "walk-through sculpture,"⁸³ which occupied the majority of the lobby of the defendants' building, was a work made for hire.⁸⁴ This determination precluded the application of VARA to the plaintiffs' lawsuit seeking to enjoin the defendants from removing, modifying, or destroying the art work.⁸⁵ *Carter* would have been an ideal fact situation to determine the relationship between copyright ownership and authorship as defined by the work-for-hire doctrine because it involved a situation in which the artists enjoyed substantial creative control over the work.⁸⁶ Thus, the real issue presented in

⁸¹ *Reid*, 1991 WL 415523, at *1.

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

⁸³ *Id.* at 80.

⁸⁴ *Id.* at 87–88.

⁸⁵ In applying the *Reid* factors, the district court concluded that the plaintiffs were independent contractors. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 317–21 (S.D.N.Y. 1994), *aff'd in part*, 71 F.3d 77 (2d Cir. 1995); *see supra* notes 69–74 and accompanying text. One factor of particular interest was the plaintiffs' ownership of the copyright to the work, which the district court concluded was a "plus factor" indicating their independent contractor status. *Carter*, 861 F. Supp. at 321–22. In contrast, the Second Circuit rejected the district court's view and "put off for another day deciding whether copyright ownership is probative of independent contractor status." *Carter*, 71 F.3d at 87.

⁸⁶ The Second Circuit apparently felt the need to defend its work-for-hire conclusion against the strong showing of artistic freedom enjoyed by the plaintiffs:

Again, we emphasize that despite the conclusion reached we do not intend to marginalize factors such as artistic freedom and skill, making them peripheral to the status inquiry. The fact that artists will always be retained for creative purposes cannot serve to minimize this factor of the *Reid* test, even though it will usually favor VARA protection.

Id. The Second Circuit essentially predicated its holding that the sculpture was a work-for-hire on the combination of the existence of payroll formalities, the possibility of additional projects assigned to the plaintiffs, the defendants' furnishing the plaintiffs with needed

Carter was if and how an author's moral rights should be applied in a situation in which the author is technically employed by another entity but nonetheless engaged in a highly creative enterprise over which she has maintained substantial creative control.⁸⁷

IV. REVISITING VARA

The foregoing discussion demonstrates that the work-for-hire doctrine is concerned with authorship in the legal sense, which essentially implicates the question of copyright ownership. The incompatibility between the work-for-hire doctrine and the concept of authorship autonomy supporting moral rights fails to capture the attention of the courts, and VARA has perpetuated this problem. Some commentators explain this result by positing that perhaps no conflict exists because when works made for hire are at issue, the work's tangible expression essentially is controlled by the employer or commissioning party.⁸⁸ As such, no autonomy violation realistically occurs because the work in question does not reflect the physical author's meaning and intended message but rather is more reflective of the hiring party's intentions and control over the artistic endeavor.⁸⁹ Henry Hansmann and Marina Santilli even suggest that the work-for-hire doctrine "constitutes a waiver of moral rights, in recognition by the artist and the commissioning party that the latter's need for flexibility in the use of the work exceeds the artist's subjective and reputational interests."⁹⁰

supplies, and the need for the plaintiffs to obtain the defendants' consent to hire assistants. *Id.* at 88.

⁸⁷ More recently, the court in *Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance*, 380 F.3d 624 (2d Cir. 2004), relied on the analysis in *Carter* in concluding that some of Martha Graham's dances were works for hire despite the high degree of artistic freedom and creative control enjoyed by the famous choreographer. *Id.* at 642. According to the court, "[t]he fact that Graham was extremely talented understandably explains the Center's disinclination to exercise control over the details of her work, but does not preclude the sort of employee relationship that results in a work for hire." *Id.* See *supra* note 74. Although choreographed works such as dances are not within the scope of VARA, they still can manifest equal degrees of creativity as the visual art covered by the statute.

⁸⁸ See Hughes, *supra* note 57, at 156 ("As much as the patron intervenes—or can intervene—in the process of intellectual production, the artist may feel that *less* of their personalities are involved in the creation.") (emphasis added); Hansmann & Santilli, *supra* note 17, at 134 ("Work for hire, in general, is work that is subject to substantial control by the person who commissions the work [and] as such, it has less connection with the personality of its creator.").

⁸⁹ See Hughes, *supra* note 57, at 154–57 (discussing cases in which the patron is a sufficient cause for the creation and exhibits control over the artistic direction); Hansmann & Santilli, *supra* note 17, at 134 ("[T]he interests of the artist that are protected by moral rights doctrine are less in evidence in work for hire than they are in other forms of creative work.").

⁹⁰ Hansmann & Santilli, *supra* note 17, at 134.

These assumptions do not necessarily reflect the realities of the process of human creation in employment situations. Therefore, they do not furnish a basis upon which to justify the work-for-hire doctrine's trumping an author's attribution and integrity interests without concern for violating the colloquial author's autonomy and dignity interests. Receipt of a monetary benefit, even pursuant to an employment relationship, does not necessarily destroy the author's desire for attribution and for the preservation of the meaning and intended message of her work. The norms of authorship which underscore moral rights operate at a level distinct from the economically focused inquiry mandated by the work-for-hire analysis. No inconsistency exists between the hiring party retaining the economic rights and the hired party retaining moral rights in cases where the hired party is responsible for the meaning and intended message of a work.

Thus, in order to determine if and how moral rights and the work-for-hire doctrine should co-exist, it is important to examine the extent to which a particular author "for hire" imbues the work with her own subjective meaning and intended message reflective of her dignity as an author, as opposed to merely executing orders dictated from the hiring party. The majority of work-for-hire cases decided under the employee prong of the statutory definition involve quasi-functional copyrightable material, such as computer programs, that cannot convey an author's meaning and message as these terms are used in this Article.⁹¹ Nevertheless, the facts giving rise to *Carter v. Helmsley-Spear, Inc.*⁹² and *Community for Creative Non-Violence v. Reid*⁹³ illustrate how theoretically, one can be an employee for purposes of a work-for-hire analysis but still produce a work that manifests the colloquial author's meaning and intended message rather than that of the hiring

⁹¹ Of the nearly seventy cases applying the "employee" prong of the work-for-hire doctrine post *Reid*, only a couple of them arguably involve VARA subject matter. *See, e.g.*, *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996), *see supra* notes 82–86 and accompanying text; *Marco v. Accent Publ'g Co.*, 969 F.2d 1547 (3d Cir. 1992); *Marshburn v. United States*, 20 Cl. Ct. 706 (1990) (involving a painted mural in the employee cafeteria). For example, in *Marco v. Accent Publishing Company*, the parties disputed ownership of highly creative photographs taken for a trade journal. 969 F.2d at 1548–49. Although the court did not discuss whether the photographs were within the scope of VARA, they would seem to be barred from coverage on the ground they were not taken "for exhibition purposes only." *See* 17 U.S.C. § 101 (definition of a "work of visual art"). *See also* *Hansmann & Santilli*, *supra* note 17, at 108–09 (positing that the right of integrity should be extended to work for which the "the artist's name is considered informative or useful in assessing the work," and where "the reputation of the artist is . . . based on the entire body of work [the artist] has created"); Greg R. Vetter, *The Collaborative Integrity of Open-Source Software*, 2004 UTAH L. REV. 563, 662–669 (questioning the application of conventional moral rights with respect to software).

⁹² 71 F.3d 77 (1995). *See supra* notes 82–86 and accompanying text.

⁹³ 490 U.S. 730 (1989). *See supra* notes 58–69 and accompanying text. Of course, the Court held that *Reid* was an independent contractor rather than an employee, but the overall facts illustrate the point made in the text. *Id.* at 752–53.

party.⁹⁴ Both of these cases involved subject matter potentially within the scope of VARA, even though the statute was not applicable in either case for different reasons.⁹⁵

To embrace both the theoretical basis for moral rights and the certainty Congress sought by crafting the work-for-hire provision,⁹⁶ any works eligible for moral rights protection should not be made to automatically forfeit this protection just because they are created for hire. In this regard, VARA's exclusion of works made for hire is problematic. A much better approach would be to provide that authors of works otherwise subject to moral rights protection retain their rights as colloquial authors, even if their works were created for hire, absent compelling reasons for divesting them of their rights.⁹⁷ One situation supporting no moral rights in a particular work-for-hire scenario is where the work in question was created under the hiring party's direction or control to such a degree that it does not represent the colloquial author's meaning and intended message. In determining whose meaning and intended message the work at issue reflects, courts should focus on the narratives of the hiring party and the colloquial author,⁹⁸ as well as the evidence pertaining to the work's creation and the exercise of artistic discretion and control. In applying this analysis to the facts of *Carter v. Helmsley-Spear, Inc.*, for example, the Second Circuit's discussion clearly reveals that the plaintiff artists "had complete artistic freedom with respect to every aspect of the sculpture's creation" and enjoyed the "right to control the manner and means" of executing the sculpture.⁹⁹

Industry norms steeped in public policy also may effectively preclude applying attribution and other integrity interests in limited situations. VARA already attempts to incorporate industry norms into its scheme, particularly with respect to the installation of art as part of buildings. For example, section 113(d)(1) states that a building owner is not liable under VARA for the destruction of artwork within the scope of VARA that has been incorporated into a building if the removal of the artwork will cause its destruction or modification, and the author consented to the work's installation prior to the effective date of VARA.¹⁰⁰ Alternatively, if the work was installed after VARA, no liability on the part of the building owner will result if the author and the building owner signed a written instrument specifying "that [the] installation of the work may subject the work to

⁹⁴ See *supra* notes 69–74 and accompanying text.

⁹⁵ See *supra* notes 79, 82–87 and accompanying text.

⁹⁶ See *supra* note 46 and accompanying text.

⁹⁷ Cf. Nancy Kim, *Martha Graham, Professor Miller and the "Work for Hire" Doctrine: Undoing the Judicial Bind Created by the Legislature*, 13 J. INTEL. PROP. L. 337, 364 (2006) (recommending reversing the statutory presumption so that a written instrument signed by both parties is required for works to be deemed created for hire).

⁹⁸ In *Phillips v. Pembroke Real Estate Inc.*, the court took note of the artist's narrative emphasizing that his "inherent reverence for natural beauty in this ecologically ravaged world" influences all of his artistic decisions. 459 F.3d 128, 130 (1st Cir. 2006).

⁹⁹ 71 F.3d 77, 86 (2d Cir. 1995).

¹⁰⁰ 17 U.S.C. § 113(d)(1) (2006).

destruction, distortion, mutilation, or other modification, by reason of its removal.”¹⁰¹ Further, for works which can be removed from a building without causing their destruction or modification, VARA applies unless the building owner has made a “diligent, good faith attempt” to notify the author of the intended removal but was unsuccessful in notifying the author, or has provided written notice to the author and the author failed to remove the work within ninety days of receiving notice.¹⁰²

Although VARA expressly incorporates viable industry standards with respect to art that has been installed in buildings, both the text of VARA and the legislative history are silent with respect to site-specific art.¹⁰³ This genre of art is “conceived and created in relation to the particular conditions of a specific site” and therefore meaningful only when it is displayed in the particular location for which it was created.¹⁰⁴ Yet, even absent specific directives, courts have been sensitive to industry norms in applying the statute in this context. A recent federal appellate court held that VARA does not apply to site-specific art.¹⁰⁵ This opinion thus displayed sensitivity to the norms of realty, particularly the real property policy disfavoring restrictions on land, especially those that are unrecorded.¹⁰⁶ More generally, the Register of Copyrights has manifested sensitivity to industry norms in its recommendations with respect to VARA’s operation, particularly regarding the statute’s provision that its protections can be waived.¹⁰⁷ As part of a

¹⁰¹ *Id.* § 113 (d)(1)(B).

¹⁰² *Id.* § 113(d)(2).

¹⁰³ *Phillips*, 459 F.3d at 143.

¹⁰⁴ *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1047 (2d Cir. 1988) (quoting sculptor Richard Serra). In *Serra*, a pre-VARA case, the court held that the sculptor of the site-specific work had relinquished his free speech rights in his work when he sold it to the government. *Id.* at 1049. Therefore, the government’s removal of the sculpture from Manhattan’s Federal Plaza and its subsequent relocation did not violate Serra’s First Amendment rights. *Id.* See also Justin Hughes, *The Line Between Work and Framework, Text and Context*, 19 CARDOZO ARTS & ENT. L.J. 19, 23 (2001) (“[R]ecognizing the artist’s claim to control the framework of her art *after* she has introduced that art into the world would burden too many other social interests.”).

¹⁰⁵ *Phillips*, 459 F.3d at 143. In so holding, the court rejected the district court’s conclusion that VARA applies to site-specific art, but its removal is permitted by VARA’s public presentation exception. *Id.* at 131. This exception provides that modifications of works that are the result of conservation or public presentation, including lighting and placement, are not actionable unless they are the result of gross negligence. See 17 U.S.C. § 106A(c)(2) (2006).

¹⁰⁶ *Phillips*, 459 F.3d at 142.

¹⁰⁷ Section 106A(e)(1) provides that although an author’s VARA rights cannot be transferred, they can be waived “if the author expressly agrees to such waiver in a written instrument signed by the author.” 17 U.S.C. § 106A(e)(1). For a detailed discussion of the study and findings of the Copyright Office, see Kwall, *supra* note 52, at 52. See also RayMing Chang, *Revisiting the Visual Artists Rights Act of 1990: A Follow-up Survey about Awareness and Waiver*, 13 TEX. INTELL. PROP. L.J. 129, 144 (2005) (discussing

comprehensive series of recommendations, the Register advocated that the current waiver provision be retained for all installed works regardless of whether they are incorporated into buildings.¹⁰⁸

The approach advocated in this Article suggests looking to whether, in any given instance, the colloquial author of a particular work for hire should retain the rights of authorship for purposes of VARA's protections. The colloquial author should be denied authorship rights under VARA only when "compelling circumstances" exist.¹⁰⁹ Although in such instances there may be an implied waiver of moral rights, it is important to keep in mind that an author's moral rights may be subject to limitations even in jurisdictions with the strongest moral rights protections.¹¹⁰

V. REVISITING THE WORK-FOR-HIRE DOCTRINE

The themes explored in this Article suggest the desirability of making the work-for-hire doctrine more compatible with authorship autonomy interests apart from its interface with VARA. One possible reform is to revisit section 201(b)'s provision that the employer of a work made for hire "is considered the author for purposes of this title."¹¹¹ Recall that given the work-for-hire's history as a doctrine primarily concerned with copyright ownership rather than colloquial authorship, the legislative history reveals virtually no attention to the relationship between authorship autonomy and transferring authorship status.¹¹² If this provision is examined from a fresh perspective, one that is grounded in a complete view of human creativity rather than focused only on economic rationales for protecting works of authorship, it becomes clear that little justification exists for converting the employer or commissioning party into the "author" without a more complete understanding of what rights authorship entails.

One way to make the copyright statute more sensitive to attribution and integrity interests would be to vest the employer of a work for hire with "copyright ownership" rather than "authorship status," and to retain the caveat that this result

results of a 2003 survey of 379 respondents, 308 of whom identified themselves as visual artists).

¹⁰⁸ See Kwall, *supra* note 52, at 50–51.

¹⁰⁹ Cf. Justin Hughes, *American Moral Rights and Fixing the Dastar "Gap,"* 2007 UTAH L. REV. 659, 700 n.225; Rebecca Tushnet, *Naming Rights: Attribution and Law,* 2007 UTAH L. REV. 787, 807.

¹¹⁰ In France, for example, an author is precluded from "preventing any 'adaptation of a computer program' that complies with 'the rights he has transferred' and from 'exercising his right to retract or correct.'" See 1 INTERNATIONAL COPYRIGHT LAW & PRACTICE, FRA § 7[2](a) (Paul Edward Geller & Melville B. Nimmer eds., 18th ed. 2006) (quoting Intellectual Property Code art. L. 121-7 (Fr.)). In addition, French courts have given priority to urban planning demands over authors' moral rights claims respecting architectural works. *Id.* § 7[2](b).

¹¹¹ 17 U.S.C. § 201(b) (2006).

¹¹² See *supra* note 50 and accompanying text.

can be countered with a signed written instrument stating that the employee owns the copyright in the work.¹¹³ This approach would allow any colloquial author to retain her authorship status while providing for a means of transferring ownership of the copyright in appropriate instances. It would also provide needed clarification in the application of the work-for-hire doctrine.

Of course, to the extent copyright law does not otherwise incorporate adequate protections for authors' moral rights, this approach may not ultimately prove adequate to safeguard the interests of authors who infuse their highly creative works of authorship with their personal meaning and intended message. In other words, if the law fails to recognize separately the personal rights attaching to authorship, as opposed to copyright ownership, simply allowing an author to retain her authorship status may still do little to ameliorate the fundamental lack of recognition for authorship autonomy.¹¹⁴

Another possible reform in connection with the work-for-hire doctrine is to limit its application so that works that strongly manifest the colloquial author's personal meaning and intended message are outside of its scope, thus preventing such authors from being vulnerable to losing their authorship status. Some support already exists for the idea that the work-for-hire doctrine should be applied cautiously to certain works of authorship. For example, in *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, the court declined to apply the work-for-hire doctrine to books, articles, and recordings that were created by the founder of a church.¹¹⁵ Instead, it observed that works motivated by the founder's "own desire for self-expression or religious instruction of the public [were] not 'works for hire.'"¹¹⁶ There is also recognition for this viewpoint in the Report of the Register of Copyrights on the 1976 Act's revision of the work-for-hire doctrine.¹¹⁷ In discussing the categories of "commissioned works" stipulated in the specially commissioned prong of the work-for-hire definition, the Report stated:

The addition of portraits to the list of commissioned works that can be made into 'works made for hire' by agreement of the parties is difficult to justify. Artists and photographers are among the most vulnerable and poorly protected of all the beneficiaries of the copyright law, and it seems clear that, like serious composers and choreographers,

¹¹³ See *supra* note 51 and accompanying text.

¹¹⁴ See *supra* note 37 (discussing the British distinction between authorship and copyright ownership with respect to works created by employees).

¹¹⁵ 206 F.3d 1322, 1324 (9th Cir. 2000).

¹¹⁶ *Id.* at 1326.

¹¹⁷ See REGISTER OF COPYRIGHTS, SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1975 REVISION BILL, ch. XI, at 12–13 (1975) [hereinafter REGISTER OF COPYRIGHTS REPORT].

they were not intended to be treated as ‘employees’ under the carefully negotiated definition in section 101.¹¹⁸

This passage displays sensitivity to the perspective that works of a certain nature should not be within the scope of this part of the definition of works made for hire.

The most developed support for this approach exists in the form of the “teacher” exception. In *Weinstein v. University of Illinois*, the Seventh Circuit emphasized the tradition under which professors retain the copyrights in their scholarly articles and other intellectual property, despite copyright law’s potential “to make every academic article a ‘work for hire’ and therefore vest exclusive control in universities rather than scholars.”¹¹⁹ Prior to the 1976 Act, the existence of a “teacher” exception to the work-for-hire doctrine had been suggested by at least one court,¹²⁰ but its continued existence following the enactment of the 1976 Copyright Act is disputed among scholars¹²¹ and unclear according to judicial precedent.¹²² Within the past several years, the Second Circuit has affirmed the existence of the teacher exception but refused to apply it because the case involved work product such as tests, quizzes, and homework problems.¹²³ In so holding, the

¹¹⁸ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 747 n.13 (1989) (quoting REGISTER OF COPYRIGHTS REPORT, *supra* note 117, at 12–13).

¹¹⁹ 811 F.2d 1091, 1094 (7th Cir. 1987).

¹²⁰ *See Williams v. Weisser*, 78 Cal. Rptr. 542, 545 (Cal. Ct. App. 1969) (holding that common law copyright in professor’s lectures belongs to the faculty member rather than the university, absent evidence of an assignment).

¹²¹ Some commentators believe that even if cases such as *Williams v. Weisser* supported the existence of a “teacher” exception under the 1909 Act, the 1976 Act abolished such an exception. Other scholars dispute this conclusion. For a comprehensive list of commentaries on each side, see Roberta Rosenthal Kwall, *Copyright Issues in Online Courses: Ownership, Authorship and Conflict*, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 12 (2001). *See also* Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1161 (2000) (providing an in-depth discussion of the controversy surrounding the application of the work-for-hire doctrine to academic work product).

¹²² *See Hays v. Sony Corp. of Am.*, 847 F.2d 412, 416–17 (7th Cir. 1988) (indicating, without explicitly deciding, that the teacher exception should be retained based on policy considerations and the absence of an express Congressional intent to alter the law).

¹²³ In *Shaul v. Cherry Valley-Springfield Central School District*, a high school math teacher brought a civil rights suit based on an unauthorized search of his classroom and removal of work product such as tests, quizzes, and homework problems. 363 F.3d 177, 179–81 (2d Cir. 2004). The court concluded that the plaintiff did not have a possessory interest in these teaching materials given that they constituted works made for hire. *Id.* at 185–86. *Shaul’s* analysis is unique, however, in that it addressed the “teacher” exception as a matter distinct from the application of the employee prong of the work-for-hire definition. By separately validating the “‘academic tradition’ [that grants] authors ownership of their own scholarly work,” *Shaul* provides direct support for the application of the “teacher” exception in appropriate situations. *Id.* at 186.

The cases also recognize the relevance of school or district policies regarding ownership of copyrightable material in resolving work-for-hire disputes. *See infra* note

court distinguished the subject matter involved in that case from published articles authored by university professors.¹²⁴ More recently, however, a district court in Illinois, in a case involving course materials prepared by a medical school professor, reaffirmed the teacher exception and indicated it may not be limited to faculty publications.¹²⁵

Strong policy reasons support a liberal application of the “teacher” exception, especially in the context of scholarly works of authorship produced in the university setting.¹²⁶ Even if academic authors desire widespread dissemination of their work to enhance their professional reputations, this motive does not displace the large internal investment that often motivates scholarly writing and other comparable endeavors.¹²⁷ Nor does this motive detract from the reality that such scholarly works can evidence a meaning and intended message of fundamental importance to the author. Thus, a liberal application of the “teacher” exception in this respect facilitates the author’s ability to safeguard the meaning and intended

125; see also Elizabeth Townsend, *Legal and Policy Responses to the Disappearing “Teacher Exception,” or Copyright Ownership in the 21st Century University*, 4 MINN. INTEL. PROP. REV. 209, 210 (2003) (providing a comprehensive examination of the teacher exception and noting that the current trend is to resort to individual university copyright policies). Recall that section 201(b) provides that the work-for-hire doctrine vests the hiring party with authorship status and ownership of the copyright “unless the parties have expressly agreed otherwise in a written instrument signed by them.” 17 U.S.C. § 201(b) (2006). See *supra* note 41 and accompanying text; see also Dreyfuss, *supra* note 51, at 599–600 (noting that policies announced in faculty handbooks favoring copyright retention in faculty “are unlikely to be considered signed writings within the meaning” of section 201(b)). Although these policies are relevant to work-for-hire discussions, they do not necessarily address moral rights concerns given the absence of moral rights protections available in this country to works other than certain forms of visual art.

¹²⁴ The court stated that the “‘academic tradition’ granting authors ownership of their own scholarly work is not pertinent to teaching materials that were never explicitly prepared for publication.” *Shaul*, 363 F.3d at 186. I would augment the court’s reliance on publication status as a relevant factor in applying the “teacher” exception by additionally considering whether an author in an academic setting invests his work with a fundamental, personal meaning and intended externalized message.

¹²⁵ *Bosch v. Ball-Kell*, No. 03-1408, 2006 WL 2548053, at *7 (C.D. Ill. Aug 31, 2006). The plaintiff in this case brought a copyright infringement suit against the defendant professor and a former university administrator based on their unauthorized copying and distribution of her pathology course materials. *Id.* at *1–3. The court denied the defendants’ summary judgment motion on the ground that the court could not find that the plaintiff lacked ownership of the teaching materials in light of both its reading of the teacher exception to the work-for-hire doctrine and the history of the University’s copyright policy. *Id.* at *4–8.

¹²⁶ See Roberta Rosenthal Kwall, *Moral Rights for University Employees and Students: Can Educational Institutions Do Better Than the U.S. Copyright Law?*, 27 J.C. & U.L. 53, 79 (2000).

¹²⁷ See Nimmer, *supra* note 22, at 75 (noting that the “entire incentive” for the creation of scholarly articles is “to advance the frontiers of human knowledge and . . . to win their authors recognition”).

message of her work by allowing her to maintain authorship status and to retain ownership of the copyrights to her work.¹²⁸

Just as some academic work product should not be treated as works made for hire because they embody a particular type of investment by the author, the same is true for certain other works of authorship.¹²⁹ For example, the reasons supporting the “teacher” exception for scholarly works also support a work-for-hire exception with respect to highly original works manifesting substantial creativity on the part of the colloquial author, even if the work is determined to be created by an employee rather than an independent contractor. Both an academic’s scholarly work and other highly original works manifesting a substantial amount of creativity can embody an author’s own particular meaning and intended message.¹³⁰ In determining whether the work-for-hire doctrine should apply to such highly creative work, courts should consider explicitly the degree to which the work personifies an author’s particular meaning and intended message. The colloquial author’s narrative can provide important evidence on this score just as it can operate in the context of the work-for-hire and VARA determinations discussed earlier.¹³¹

VI. CONCLUSION

The moral rights of attribution and integrity are designed to allow an author to safeguard the personal meaning and intended externalized message of her creative work. For works produced by “authors in disguise,” such as those that are anonymous, pseudonymous, or works made for hire, it is essential to consider whether and how moral rights protection can be applied. VARA failed to embrace this challenge by simply excluding such works from the scope of its protection.

The realities of works made for hire demand a nuanced analytical approach that is more in keeping with the theoretical predicate of moral rights. An author’s decision to create anonymously or under a pseudonym should be understood as a deliberate branding choice integral to the work’s personal meaning to the author and its intended externalized message. With respect to how moral rights should apply to works made for hire, the relevant issue is whether the work in question conveys the meaning and message of the colloquial author or the hiring party. In resolving particular situations, I suggest an approach that takes into account the narratives of both the hiring party and the colloquial author, as well as relevant

¹²⁸ For these reasons, I have argued elsewhere that universities have special responsibilities to safeguard the moral rights of authors operating within their creative environments. See Kwall, *supra* note 126, at 79.

¹²⁹ Cf. Kim, *supra* note 97, at 341 (advocating a “particularized” work-for-hire analysis that focuses on the parties’ intent in determining copyright ownership).

¹³⁰ The question of how to determine what constitutes a “highly original work” manifesting “substantial creativity” is beyond the scope of this Article. For an exploration of this issue, see Roberta Rosenthal Kwall, *Originality in Context*, 44 HOUS. L. REV. 871 (2007).

¹³¹ See *supra* notes 98–99 and accompanying text.

evidence regarding the exercise of artistic discretion and control. Industry norms reflecting compelling public policies should also be factored into the analysis where relevant. This approach is indeed very modest and can be adopted without changing VARA's substance and structure significantly. A more global question, raised but left to another time for deeper exploration, is whether the work-for-hire doctrine itself should be reformulated to exclude highly original works manifesting substantial creativity.