Moral Rights and the Spirit of Creativity: A Comparison Between Common Law and Civil Law Through Photographic Works

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Some of the rare moments of joy during the COVID-19 pandemic have come from the arts. Musicians assembling virtually from faraway places to perform in tune, dancers practicing in their living rooms, the movies we took refuge in, the hobbies we took up: these experiences managed to not only ease the pain just a little, but also help creators and audiences alike make sense of a new reality as well as our changed selves. Whereas Intellectual Property law, especially in the common law tradition, is chiefly preoccupied with providing incentives to creators, it can sometime forget that there is such a thing as creating art for art's sake: to express one's personality, to satisfy a Dionysian spirit that eschews rationality.[1]

Moral rights capture the idea that creativity is an innate drive, and that creators have intangible interests in their works such as honor and reputation.[2] Having one's name associated with one's work (protected by the right of attribution), is a source of pride and satisfaction, and, incidentally, has important economic repercussions; reputation, which often equates to commercial value, cannot be built in anonymity.[3] An artwork's distortion (protected by the right of integrity) would also damage an artist's standing and

[1] Roberta Kwall, *The Soul of Creativity: Forging A Moral Rights Law for the United States*, 11–22 (Stanford University Press 2010) (discussing the 'intrinsic dimension of human creativity').
[2] United States Copyright Office, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, 34, https://www.copyright.gov/policy/moralrights/full-report.pdf (accessed 10 Sept. 2019).
[3] *Id.*, 34–35.

misrepresent the connection between her and the work.[4] Artworks are an 'extension of the artist's personality . . . To mistreat the work of art is to mistreat the artist.'[5]

Yet moral rights are not absolute; concessions are made based both on reasonableness and on the exigencies of the market.[6] Nor are they treated equally, even within the civil law tradition where they originated.[7] These jurisdictions evaluate commercial needs in different ways, resulting in varying restraints on moral rights. Such evaluations are connected both to the level of creativity in the work and to its purpose.

The United States, a common law jurisdiction, became a signatory of the Berne Convention in 1989[8] and at the time was deemed to be in compliance with Art. 6bis through a patchwork of federal and state laws approximating the rights of integrity and attribution.[9] But even after passing the Visual Artists Rights Act (VARA), the only federal

[4] *Id*., 34–35.
[5] John H. Merryman & Albert E. Elsen, *Law, Ethics, and the Visual Arts*, 145 (2d ed. 1987).
[6] Cyrill P. Rigamonti, *Deconstructing Moral Rights*, Harv. Int. L. J., Vol. 47 n. 2, Summer 2006, 354, 367 ('Relying on the standard rights approach to moral rights instead of focusing on the concrete rules that courts apply in practice creates the triple risk of overestimating the actual scope of moral rights in civil law countries.').
[7] *See* Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 Colum. VLA J.L. & Arts 220 (1994) ('[T]he legal situation in the individual [civil law] countries is far from being uniform.'). Moral rights are not regulated at the European level, with no future plans for harmonization. *See* European Commission, *Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights*, SEC (2004) 995, 16 (19 July 2004).
[8] *See* United States Copyright Office, *supra* note 2, at 7. The other two widely recognized "moral rights" are the right of disclosure—the right to decide when to publish one's work; and the right of withdrawal—the right to correct or withdraw one's work after publication. *See* Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, The American Journal of Comparative Law, Vol. 55, No. 1 (Winter, 2007), 70-71. This essay will focus on the right of attribution and the right of integrity, since the right of withdrawal and the right of disclosure are not included in art 6bis of the Berne convention and create no obligation in US legislation.
[9] *See* Paul Goldstein & P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice*, 337 (4th ed.). See also *Berne Convention for the Protection of Literary and Artistic Works, Art 6bis (1)*, https://wipolex.wipo.int/en/text/283693 (accessed 2 Sept. 2021). ('Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.').

legislation explicitly addressing moral rights, they have continued to sit uneasily within the US framework.[10] Despite a latent understanding that artists have some "personal rights" worthy of protection,[11] moral rights struggle to find their own intrinsic justification in the context of US copyright law's utilitarianism.[12] Such uneasy coexistence often raises doubts over whether the US is actually in compliance with Art. 6bis of the Berne Convention.[13]

In this essay, I look at legal determinations with respect to moral rights in two civil law countries, Germany and Italy, and in a common law jurisdiction, the United States. I specifically focus on photographic works because of their ubiquity and the significant commercial interests involved. I come to the conclusion that, by failing to ground moral rights in a work's level of creativity, the US system lacks internal coherence, producing incongruous outcomes. I argue that future efforts towards harmonization of moral rights

[10] *See* 17 U.S.C. § 106A(a). *See* United States Copyright Office, *supra* note 2, at 7 ('[T]his patchwork [of moral rights legislation] has been narrowly interpreted over the years in ways that could undermine the important rights of individual authors and artists.').

[11] American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors. Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent. Thus courts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as contract law, or the tort of unfair competition. Although such decisions are clothed in terms of proprietary right in one's creation, they also properly vindicate the author's personal right to prevent the presentation of his work to the public in a distorted form.

Terry Gilliam v. American Broadcasting Companies, Inc. 538 F.2d 14 (2d Cir. 1976).

[12] Kwall, *supra* note 1, at 25 ('Thus, in light of the utilitarian and Lockean underpinnings of copyright law in the United States, the prevailing law and policies de-emphasize the intrinsic process of creation in favor of a narrative favoring dissemination, commodification, and economic reward.').

[13] *See* Kwall, *supra* note 1, at 37 ("[T]here is the stark reality that we may not be in compliance with our obligations under the Berne Convention").

should use the level of creativity in the work as a guiding principle to determine whether and to what extent protections apply.

The Pendulum of Creativity

Civil Law: Italy and Germany

In order to make a comparison between the three jurisdictions, I will use two photographs: the portrait of Barack Obama by Mannie Garcia owned by the Associated Press and used by Shepard Fairey to make the *Obama Hope Poster*, and David LaChapelle's work *Aristocrats*, an S&M-inspired photo published in Vogue in 2002 alleged to be infringed upon by Rihanna's music video *S&M*. Both copyright infringement lawsuits were ultimately settled out of court.[14]

Both the German and Italian legal systems create three categories of photographs. At the top of the pyramid in terms of rights granted stand "photographic works" (*Lichtbildwerk* in German, *opera fotografica* in Italian), on a lower level are "simple photographs" (*Lichtbilder* and *fotografie semplici*); and at the lowest level, "mere reproductions" (*Reproduktionsfotografie* and *fotografie di mera documentazione*). In both jurisdictions, photographic works must evidence the author's artistic contribution beyond mere technical expertise. Some of the factors courts look at are the author's choices with respect to the distribution of light and shadows, the angle and distance from the subject, the choice of proportion and perspective, and timing.[15] Photographic works are treated

[14] See *Fairey v. Associated Press*, No. 09-1123 (S.D.N.Y. dismissed Mar. 16, 2011). The photo can be viewed at https://www.npr.org/templates/story/story.php?storyId=101184444. *See LaChapelle v. Fenty*, 812 F. Supp. 2d 434 (S.D.N.Y. 2011). The *Aristocrats* can be viewed here: https://www.artsy.net/artwork/david-lachapelle-aristocrats.
[15] *See* Urheberrechtsgesetz – UrhG § 2. https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0018 (accessed 10 Sept. 2021); *Troades* (The Trojan Women) OLG Hamburg, Urteil vom 29.06.1995 - Aktenzeichen 3 U 302/94; *Disposizioni sul diritto di autore*, Section I, Art. 2 http://www.interlex.it/testi/l41_633.htm (accessed 10 Sept.

on par with all other artworks such as literary, pictorial, musical, and pantomimic works, and are granted full economic and moral rights for seventy years after the author's death.[16]

In Italy, simple photographs require 'some personal activity on the part of the photographer,' and reproducing natural or social life, including photographs of figurative artworks.[17] This category possess only "neighboring rights," which exclude moral rights but grant the exclusive rights of reproduction and distribution for twenty years from production, provided that the photograph contains the name of the photographer or commissioner, and the date and year of production.[18] If these formalities are not satisfied, there is no infringement in case the work is copied.[19] If the formalities have been fulfilled and the infringer has altered the work's data, a quasi-right against misattribution is granted.[20] If the work has been commissioned or the objects in the photograph belong to the commissioner and the photographer has received fair compensation, the rights to the work are automatically assigned to the commissioner.[21] Furthermore, the photographer

2021); Tribunale di Milano, Sentenza n. 10279, 15 September 2015 http://www.gambinomayola.it/doc/Tribunale_Milano_15_settembre_2015_n_10279.pdf (accessed 10 Sept. 2021). While I may refer to German and Italian law in this essay as "copyright law" for practical reasons, the exact translation of the Italian *Diritto d'Autore* and the German *Urheberrecht* is "Author's Rights."

[16] *See* UrhG§ 2; *Disposizioni sul diritto di autore*, Section I, Art. 2.

[17] Art. 87, l, dir. aut. http://www.interlex.it/testi/l41_633.htm#87; M. Fabiani, *Diritto D'autore e Diritti Degli Artisti Interpreti o Esecutori*, 86 (Milan, 2004).

[18] *See Disposizioni sul diritto di autore*, Artt. 87–88, l, dir. aut. http://www.interlex.it/testi/l41_633.htm#87 and http://www.interlex.it/testi/l41_633.htm#88.*See* Art. 92, l, dir. aut. http://www.interlex.it/testi/l41_633.htm#92. *See* Art. 90, l, dir. aut. http://www.interlex.it/testi/l41_633.htm#90. If the photograph represents an artistic work, its author must also be named.

[19] *See* Artt. 91, 98, http://www.interlex.it/testi/l41_633.htm.

[20] Tribunale di Milano, Sentenza 7 novembre 2016 n.12188. *See also,* Studio Legale Dandi, *Utilizzo consentito di foto senza nome dell'Autore*, 23 May 2017, https://www.dandi.media/2017/05/utilizzo-consentito-foto-senza-nome (accessed 5 Sept. 2021).

[21] *See* Art. 88, l, dir. aut. http://www.interlex.it/testi/l41_633.htm#88.

cedes the rights to the work when handing over the negative or digital photograph.[22] An example of the distinction between a "simple photograph" and a "photographic work" concerns a photograph of the Catania Cathedral, adorned for the feast of Saint Agata, taken at the moment the fireworks exploded.[23] The author's choice of timing prevented the image from being the simple documentation of an event, and gave it the necessary originality to be an *opera fotografica*.[24]

In Germany, "simple photographs" must only contain 'a minimum level of personal intellectual achievement short of intellectual creativity.'[25] Under § 72, they benefit from full copyright protection (including moral rights),[26] lasting fifty years from release or publication.[27] In practice, because of the low threshold of creativity in the work, the protection only extends to exact or almost exact copies.[28] A case illustrating how German courts distinguish a "photographic work" from a "simple photograph" concerns an experienced theater photographer who caught, with much preparation, a moment during

[22] *See* Art. 89, l, dir. aut. http://www.interlex.it/testi/l41_633.htm#89. Exclusive rights are only granted if the photograph contains the name of the photographer or commissioner, and the date and year of production. If these requirement are not satisfied, there is no infringement in case the work is copied. See Artt. 90, 91 l, dir. aut. http://www.interlex.it/testi/l41_633.htm#90. If the photograph represents an artistic work, its author must also be named.

[23] Tribunale di Catania, sentenza 11 September 2001, in *Il Foro Italiano*, Vol. 125, No. 4 (APRILE 2002), pp. 1235/1236-1241/1242. *See also* Sonia Rosini, *Come si riconosce la "fotografia artistica" dalla "fotografia semplice" per poter applicare la normativa sul diritto di autore?* ALTALEX, (April 24, 2004), http://www.altalex.com/index.php?idnot=41245 (accessed 7 Sept. 2021).

[24] Tribunale di Catania, sentenza 11 September 2001, in *Il Foro Italiano*, Vol. 125, No. 4 (APRILE 2002), pp. 1235/1236-1241/1242.

[25] *Museumsfotos* (Museum Photographs), 2019 GRUR 284, para. 1 b. https://openjur.de/u/2135129.html (accessed 3 Sept. 2021).

[26] Michael Gruenberger & Adolf Dietz, *International Copyright Law and Practice* GER § 3 (2019).

[27] If the photograph is not released or communicated to the public, rights expire fifty years after production. UrhG§ 72.

[28] *Troades* (The Trojan Women) OLG Hamburg, Urteil vom 29.06.1995 - Aktenzeichen 3 U 302/94 ("§ 72 UrhG also limits the material scope of protection. The scope of protection is limited to identical or almost identical reproductions"). For this reason, the right of integrity is not really implicated, since a modified or distorted reproduction of an original § 72 work would simply be a new work.

the rehearsal of the play *The Trojan Women* in a photograph representing an actress with a crown in her hands in an anguished expression.[29] The question presented was whether the photograph was a "photographic work" under § 2 UrhG or a "simple photograph" under § 72 UrhG.[30] The court explained that the threshold of individuality contained in a photograph need not be high.[31] It can be achieved through the choice of perspective, balancing of light and shadows, sharpness of the image, contrast, and timing.[32] In this case, the court remarked that, even though the creative elements contained in the picture—the actress's expression and grasping of the crown—came from the play and the actress's performance, and the lighting was a result of stage direction, the choice of the moment conferred the photograph the requisite level of creativity.[33]

In Italy "mere reproductions" are a fairly limited category of reproductions of 'writings, documents, technical designs, material objects, and similar.'[34] Photographs of material objects are elevated to "simple photographs" if they have an additional function, such as advertising or editorial.[35] In Germany mere reproductions are excluded from protection since no *new* photograph is made.[36] This category is limited to scans and faithful reproductions. As in Italy, photos of pre-existing, two-dimensional artworks like paintings—even if in the public domain—likely fall under § 72 because they require the

[29] *Id.* The preparation included attending various rehearsals, erecting a scaffold from which to take the photographs, and taking several pictures under from different perspective and under different lighting conditions.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Art. 87, l, dir. aut. http://www.interlex.it/testi/l41_633.htm#87.
[35] Cassazione civile, sez. I, 21 June 2000, n. 8425 (ruling that photographs of hospital goods for a catalogue were simple photographs and not mere reproductions because they had a commercial purpose).
[36] *See* Gruenberger & Dietz, *supra* note 26.

photographer to make creative choices about the location, distance, angle, and exposure.[37]

In light of the above, the main difference between the jurisdictions' standards are that a German *Reproduktionsfotografie* (which, as a reminder, could be the photograph of a public domain statue) despite being comparable, in terms of level of creativity, to a *fotografia semplice* in Italy, benefits from full economic rights, including the right of attribution under any circumstance, and a fifty-year term of protection from date of publication.

Common Law: The US[38]

As mentioned, VARA includes a right of integrity and a right of attribution, but only for a limited scope of visual artworks.[39] These are works generally considered of "fine art" ('a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author').[40] With regard to photographs, only 'a still photographic image produced for exhibition purposes' in single copy or in a limited edition of 200 signed by the author is considered a work of visual art.[41] Works made for hire and advertising or promotional items are excluded.[42] Courts have read these definitions broadly, rejecting claims that involved commissioned

[37] *Museumsfotos* (Museum Photographs), 2019 GRUR 284, para. 28.
[38] It is generally acknowledged that § 43(a) the Lanham act and the right to prepare and authorize derivative works under § 106(2) of the Copyright Act offer authors rights roughly equivalent to moral rights. I will not be discussing these statutes in this essay due to lack of space andbecause, based on case law, their effectiveness as in protecting moral rights has waned over the years. For an in-depth a on these laws and their shortcomings, see United States Copyright Office, *supra* note 2, at 40–59, and 100–103.
[39] *See* 17 U.S.C. § 106A(a).
[40] 17 U.S. Code § 101. Definitions.
[41] *Id.*
[42] *Id.*

art,[43] and banners created for political purposes regardless of any creativity inherent the work.[44] Furthermore, most photographs would be precluded protection by the exceptions in § 106A(c)(3), which apply to works used in 'any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine**,** newspaper, periodical, data base, electronic information service, electronic publication, or . . . advertising or promotional material.'[45] Since § 106A(c)(3) does not mention whether the "use" must be the plaintiff's or the defendant's, courts have further narrowed the rights in VARA by applying the exception to the defendant's use.[46] In practice, by making an infringing use in any of the mediums listed in § 106A(c)(3), a defendant's use negates the plaintiff's rights.

In 1998, with the proliferation of digital works and the resulting ease of infringement, and in order to comply with the new obligations regarding rights management information created by the WIPO Copyright Treaty,[47] Congress passed the Digital Millennium Copyright Act (DMCA).[48] § 1202(b) prohibits removal or alternation of Copyright Management Information (CMI) that will 'induce, enable, facilitate, or conceal'

[43] *See Carter v. Helmsley-Spear, Inc.* ("Carter II"), 71 F.3d 77, 87–88 (2d Cir. 1995) (dismissing VARA claim because the plaintiffs were directed under contract to design the sculpture at issue and received a weekly salary). *See also* definition of "work made for hire" in 17 U.S.C. § 101, which includes 'a work specially ordered or commissioned for use as [nine categories of works] if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.'
[44] *See Pollara v. Seymour*, 344 F.3d 265, 269–71 (2d Cir. 2003).
[45] 17 U.S.C. § 106A(c)(3).
[46] *See e.g.*, *Martin v. Walt Disney Internet Grp*., No. 09CV1601-MMA (POR), 2010 U.S. Dist. LEXIS 65036, at *15-17 (S.D. Cal. June 30, 2010) (dismissing attribution claim because the defendants used the photograph in a magazine). *see also Berrios Nogueras v. Home Depot,* 330 F. Supp. 2d 48, 51 (D.P.R. 2004) (dismissing VARA claims for the unauthorized reproduction of a photograph on posters and other promotional materials).
[47] United States Copyright Office, *supra* note 2, at 85.
[48] Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, 122 Stat. 2860, 2872–74 (1998) (codified as amended at 17 U.S.C.§ 1202).

copyright infringement.[49] CMI includes the title of the work, the author, copyright owner, and in certain instances the writer, performer, and director of a work.[50] The result is that the rights holder acquires a quasi-moral right of attribution.[51] Whereas initially the courts read the DMCA as applying only to digital works in light of the goals of the legislation, in more recent times, considering that the statute's language poses no such limitations, they have included analog works.[52] §1202(b) contains the requirement of an intent to 'induce, enable, facilitate, or conceal infringement' that is hard to prove in practice, limiting the statute's applicability when mental state cannot be proven.[53] Furthermore, since only the "copyright owner" has the authority to remove CMI, an author non-rights holder would not be able to enforce a right of attribution under the statute.[54] Lastly, § 1202 does not apply when the CMI was not there in the first place.[55]

A Comparative Analysis

LaChapelle's *Aristocrats* is highly stylized, far from the non-protectable mere reproduction of an existing reality. Assuming that LaChapelle generated the concept, arranged the composition, chose the angles and elicited the subjects' expressions, the photograph would show the necessary creativity and personal contribution in order to qualify as photographic works under Art. 2 in Italy and UrhG § 2(2) in Germany. LaChapelle could assert, in both countries, economic and moral rights.

[49] 17 U.S.C.§ 1202. *See also* Kwall, *supra* note 1, at 26.
[50] 17 U.S.C.§ 1202(c).
[51] *See* Kwall, *supra* note 1, at 26 ('The net effect of these provisions is the preservation of the names of authors and other artists in connection with their works.').
[52] United States Copyright Office, *supra* note 2, at 87–90.
[53] 17 U.S.C.§ 1202(a); United States Copyright Office, *supra* note 2, at 93.
[54] 17 U.S.C.§ 1202(b); United States Copyright Office, *supra* note 2, at 100.
[55] United States Copyright Office, *supra* note 2, at 90

Under VARA, LaChapelle's photograph would not be an eligible work of visual art for two reasons: (1) the work, despite being offered in galleries, was not produced in a limited edition of maximum 200 copies;[56] and (2) it was printed in a magazine, falling under one of the exceptions in § 106A(c)(3). Depending on the contractual provisions between the parties, a defendant may also argue that the photograph was a work made for hire. Assuming for a moment that LaChapelle's work *was* a fine art photograph under VARA, in the specific case of LaChapelle's copyright infringement lawsuit against Rihanna, the defendant's use was in a music video ('an audiovisual work') an exception under § 106A(c)(3), invalidating LaChapelle's hypothetical moral rights claim.[57]

With respect to Mannie Garcia's picture of Obama, unlike in VARA, where the rights belong to the artist, a DMCA claim would be brought by the owner of the picture, in this case the Associated Press.[58] In a copyright infringement and not a DMCA claim, the first question arising in court would be the validity of the copyright. The photograph contains many non-protectable elements, such as Obama's expression, face, the shape of his head, and pose, yet the work would still likely be subject to a valid copyright under US law's standards of originality; it still involves authorial choices in terms of angles, distance and proportions, and timing.[59] Nonetheless, in an infringement claim, because

[56] Here, for example https://www.artsy.net/artwork/david-lachapelle-aristocrats.
[57] *See* note 46 above and accompanying text.
[58] 17 U.S. Code § 1202.
[59] The current originality standard comes from the Supreme Court case, *Feist Publications, Inc. v. Rural Telephone Service Co*. It requires that the work be independently created by the author, and that it possess at least some minimal degree of creativity. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). It should not be assumed that all photographs achieve this standard. In the case of a library attempting to assert a copyright over photographic transparencies of works in the public domain, the court found that there was no creative spark, as the main objective was to reproduce the original as closely as possible. *See Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 Supp. 2d 191, 197. Even photographs of well-known Chinese dishes were deemed to lack the requisite originality. *See Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542, 546 (S.D.N.Y. 2001). Minimally creative photographic

of the number of non-protectable elements, the plaintiff could assert rights only against an exact or almost exact copy.[60] In a claim under the DMCA for CMI alteration, this validity analysis would not come into play, because the only requirements are that the CMI be intentionally altered, removed of falsified.[61] Then, if the Associated Press' copyright infringement claim against Fairey for the *Hope Poster* had proceeded, we could imagine that it would have failed due to the original's lack of protectable elements, since Fairey did not make and exact copy.[62] A hypothetical DMCA claim, on the other hand, may not have failed, irrespective of the substantial changes Fairey made to the photograph in the *Hope Poster*.

Under Italian law, whether Mannie Garcia's portrait of Obama would be an Art. 2 *opera fotografica* or an Art. 92 *fotografia semplice* would likely be a close call. A recent case concerning a famous photograph portraying the judges Falcone and Borsellino leaning towards each other in a jovial and conspirational manner at a press conference would suggest a finding of a *fotografia semplice* for Obama's portrait. Even though the photographer had the skill to capture a particular moment and expression on the subjects' faces, and timing is relevant in ascertaining the author's contribution,[63] the court

works, may be entitled only to a "thin" copyright, which protects only against identical copies. *See* Justin Hughes, *The Photographer's Copyright - Photograph as Art, Photograph as Database*, 25 Harv. J. Law & Tec 330. I do not discuss the standard of originality in US copyright law in depth because my argument is actually that it is not taken into account in moral rights' determinations.

[60] *See* Hughes, *supra* note 59, at 378 ('The nature of this thin copyright may mean that the photograph is effectively protected from slavish, reprographic copying, but has little protection against unauthorized copying of most elements in a derivative work.').

[61] 17 U.S. Code § 1202(a) and (b)(1).

[62] *See* Hughes, *supra* note 59, at 377 ('[A]lthough the Garcia photograph is probably copyrighted, Fairey did not copy any protectable elements from the Garcia photograph.').

[63] Tribunale di Catania, sentenza 11 September 2001, in *Il Foro Italiano*, Vol. 125, No. 4 (Aprile 2002), pp. 1235/1236-1241/1242.

determined that the photo's value lay mainly in its subjects.[64] Garcia's picture is similar to the portrait of the two judges; it shows Barack Obama and George Clooney side by side during a conference, with an inscrutable expression, both looking right of camera. In Italy, as in the judges' portrait, the only valuable elements would likely be considered to be Clooney and Obama, making this an Art. 92 "simple photograph."

A "simple photograph" in Italy receives protections similar to those in the DMCA but for three differences: (1) if the CMI were to simply be removed and not altered, unlike in the US, the defendant would not be liable for infringement of the attribution right;[65] (2) in Italy, there would be no ambiguity as to whether an analog photograph was protected from misattribution;[66] (3) in Italy, a defendant is required to prove intentional removal of the data (i.e. awareness that it was there in the first place), but not knowledge that the removal or alteration will 'induce, enable, facilitate, or conceal copyright infringement.'[67]

Under German Law, if we compare Garcia's photo to that of the actress in the "Trojan Women" case, it would arguably be considered an UrhG § 2(2) "photographic work". In both cases, the photographer made no contribution to the setting or to the subjects, their only original choice being the moment they took the photo. Any lack of attribution or misattribution would therefore be actionable under German law. An

[64] *See* Sonia Rosini, *Come si riconosce la "fotografia artistica" dalla "fotografia semplice" per poter applicare la normativa sul diritto di autore?* ALTALEX, (April 24, 2004), http://www.altalex.com/index.php?idnot=41245.*See* Tribunale di Roma, n. 14758 pubbl. il 12/09/2019; Ilaria Gargiulo, *Rome court rules that iconic photograph of judges Falcone and Borsellino is not a photographic artwork* (Nov. 15, 2019) http://ipkitten.blogspot.com/2019/11/guest-post-rome-court-rules-that-iconic.html (accessed 2 Sept. 2021).

[65] *See* Tribunale ordinario di Milano, Sentenza 25 maggio 2016, n. 6557; Tribunale di Milano, Sentenza 7 novembre 2016 n.12188.

[66] Italian law does not mention any difference between analog and digital versions. *See* Artt. 87–92 l. d. Aut., http://www.interlex.it/testi/l41_633.htm.

[67] *See* United States Copyright Office, *supra* note 2, at 93–95; 17 U.S.C. § 1202.

important difference to note is that, in Germany, Garcia would be the injured party; in Italy and the US, the rights of the owner, the Associated Press, would have been violated.

Some Conclusions

As shown by the example of LaChapelle's *Aristocrats*, photographers have little to no recourse for moral rights violations under VARA. This is concerning in an era where Non Fungible Tokens ("NFTs") are making waves in the art market[68] and, due to the pandemic, much fruition of fine art has migrated to digital spaces.[69] In this legal vacuum, blockchain technology may represent an increasingly viable solution by certifying an artwork's origin, but this should not be a substitute for adapting existing legal frameworks to current times. As this essay shows, the US legal framework produces results that are both over and under-inclusive: under the DMCA, digital photographs that may be "mere reproductions," containing CMI that has been removed for the purpose of infringement, confer stronger attribution rights to the work's owner (not necessarily the author) than VARA does to a fine arts photographer whose work is exhibited in galleries. Furthermore, many of the elements of infringement under VARA or § 1202 of the DMCA have little to do with the contents of the work itself; what counts are the number of copies of the work, the medium chosen by the defendant for the infringement, whether the work contained CMI, and the defendant's intent in removing the CMI. This approach undermines traditional theories of moral rights by disregarding the author's contribution to the work.

[68] Christophe Spaenjers, *Will NFTs Disrupt The Art Market?*, https://www.hec.edu/en/knowledge/instants/will-nfts-disrupt-art-market (accessed 1 Sept. 2021).

[69] *See, e.g.,* Howard Halle, *New York galleries are creating online viewing rooms to exhibit art*, https://www.timeout.com/newyork/news/new-york-galleries-are-creating-online-viewing-rooms-to-exhibit-art-031920 (accessed 1 Sept 2021).

The issue with current US moral rights protections is not their weakness *per se*, but that they do not pursue one goal in a cohesive manner.[70] By providing the example of the civil law approach, this essay does not suggest that it should be replicated within the US system. Instead, it illustrates how it is possible to draw lines in the context of moral rights based on creativity and originality in a way that safeguards commercial interests. For example, by creating a separate category for minimally creative "simple photographs," Italian law automatically excludes most stock photography from moral rights protection. By sanctioning only the misattribution of simple photographs rather than the removal of data under§ 1202 of the DMCA, one could argue that Italian law is even too market-friendly. Regardless, in civil law, the rationale underlying these provisions and their interpretation by the courts is based on the degree of the relationship between author and work. This essay suggests that changes in US moral rights law or attempts to harmonize it should be guided by coherent principles that take into account the relationship between author and work, and develop ways to balance this relationship with external interests.

[70] '[T]he problem with the United States "patchwork" is not so much that the sources of law are diverse; rather, it is that they are not harmonized. In other words, they do not work together effectively to exploit their differences for the achievement of a common goal—the adequate protection of the "moral" interests of American authors and artists across the country.' Mira T. Sundara Rajan, *The Public Interest Case For American Moral Rights: A Response To The Symposium "Authors, Attribution, And Integrity: Examining Moral Rights In The United States*", 313, 344 Geo. Mason J. Int'l Com. L. Vol. 8:3.

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