Vermeer v. Pollock: A Case for the Expansion of Moral Rights in the United States

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Vermeer v. Pollock:
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United States

Nicoline A. van de Haterd

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1. This article will discuss the protection of moral rights under copyright law in both the Netherlands and the United States. In doing so, a comparison will be drawn between the level of protection provided in both countries. The title of this article is a nudge to that comparison by referencing two of the most well-renowned and influential artists of both countries. Johannes Vermeer (1632-1675) was one of the most influential Dutch painters during the Golden Age. Jackson Pollock (1912-1956) was an American painter and a major figure in the abstract expressionist movement.

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Imagine you are a sculptor and you created a sculpture to put on display in your front yard. One day your neighbor, who is an art director at a museum, knocks on your door. He saw the sculpture in your front yard, and he tells you that he likes your work of art and wants to buy it to display in the museum. Excited about the opportunity to exhibit your work, you agree. However, a week later you stop by the museum to look at your work and notice that the plaque on the wall does not list you as the maker of the work. Instead, the sculptor is listed as “Unknown.”

Under American copyright law, is there anything you can do? What if the museum lists you as the sculptor of the work, but decides to modify your sculpture by painting it red? Is there anything you can do? The answer to both questions is yes. Namely, as the author of a work, aside from copyright protection for infringement, you as the maker of a certain type of work receive protection in the form of “moral rights.” Moral rights are rights that protect the integrity of the author’s work from modifications, in addition to providing the author with the right to be recognized as the creator of the work. The former is also referred to as the “right of integrity,” while the latter is commonly known as the “right of attribution.”

But what if you are not a sculptor, and are instead an architect—you design a building and once the building is built, the owner decides to change the façade of the building and seeks to implement further modifications. Can you, as the creator of the building, now act? Under United States copyright law the answer is no, as moral rights protection is not extended to architectural works. Additionally, other forms of art, such as films or musical compositions, are also not granted moral rights protection in the United States. Conversely, under Dutch law any copyrightable work is granted moral rights protection.

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3. Id. at 325.
4. Id. For a further discussion on moral rights see infra Section II-B.
6. Id.
7. See Articles 1, 10 and 25 Auteurswet [Copyright Act] (Neth.).
A. History of Dutch Copyright Law

For as small as the country is, the Netherlands has played a significant role in the history of art in Continental Europe. While Dutch art started to make a name in Europe as early as the Fifteenth and Sixteenth Centuries, it really flourished during the Seventeenth Century, also known as the Dutch Golden Age. During the Golden Age, the Netherlands experienced an enormous growth in trade, science, and the arts. Between five and ten million works of art had been produced in the Netherlands during this period, although less than one percent actually survived. After the Eighty Years’ War with Spain ended in 1648, the country “emerged as a vital new political, economic, and cultural force.” The sudden growth in the production of art is often attributed to the economic growth the country experienced during this time period. In addition, while art was initially seen as a luxury only affordable to the elite, during the Seventeenth Century art became part of the common Dutch household.

Following the Golden Age and the growth of Dutch art and the Dutch art market, the need to recognize the efforts of creators grew. In 1803, the Dutch enacted their first national legislation, through the Boekenwet van 1803, to protect the publisher, not the author, against unlawfully made copies of the printed work. A similar law had already been in force in the northern parts of the Netherlands since 1796. The Boekenwet was soon followed by the first national law governing copyright protection in general, the Dutch Copyright Act of 1817. In 1881, a newer version of the Dutch Copyright Act

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10. Id.
11. Id.
12. Id.
13. Id.
16. Id. at 862, 864 (The Province of Holland revised its original decree of 1795 into the law of 1796, providing the province with its first definitive “Book law.” The law was mainly focused on the book trade and sought to provide the publisher with the right to protect original works to which he held the “copyright”).
17. Id. at 1264; see also id. at 1266 (Although expectations were high, when it came to the execution of the law, the northern parts of the Netherlands treated it primarily as before,
came into force.\textsuperscript{18} However, in 1912, an updated copyright law, the Copyright Act of 1912, was enacted based on the Berne Convention\textsuperscript{19} of 1886.\textsuperscript{20} This act is still the law in the Netherlands today, although in the past decades, the law was amended to take modern changes and technologies into account.\textsuperscript{21} In 2008, because the Copyright Act of 1912 had gone through several amendments, the Dutch legislature decided to remove any reference to its original enactment date and now the Act is simply referred to as the “Copyright Act.”\textsuperscript{22}

The Netherlands has a rich art history. From as early as the Fifteenth Century with Hieronymus Bosch, to the Dutch masters of the Golden Age—Rembrandt van Rijn, Jan Steen and Johannes Vermeer, and more modern artists such as Vincent van Gogh and Piet Mondriaan—the country continuously has been on the forefront of the development of art and recognizing the rights of authors. An important aspect of copyright and the recognition of author’s rights are moral rights. While moral rights protection in Europe in general is broader than in the United States,\textsuperscript{23} the Netherlands provides for a good middle ground between the countries. As will become evident throughout this article, the Netherlands affords for a broader level of moral rights protection than the United States by providing moral rights protection for more types of art than just “fine art.” Furthermore, the Netherlands’ moral rights protection is not as broad as some countries’, such as France’s or Germany’s. Therefore, considering the Dutch’s centuries-old leading role in the creation of art and its moderate approach to the protection of authors’ rights, the Netherlands forms an excellent point of reference to change the way the United States views and protects moral rights of integrity and attribution.

B. United States Copyright Office Notice

On January 23, 2017, the United States Copyright Office issued a notice in which it requested comments from the public on how

\textsuperscript{18} D.W.F. \textsc{Verkade}, \textsc{T&C IE}, \textsc{Commentaar op Aanteurstwet} [Commentary on the exordium to the Dutch Copyright Act] para. 1 (2017) (Neth.).

\textsuperscript{19} See discussion \textit{infra} at Section II-B-1.

\textsuperscript{20} \textsc{Verkade}, \textit{supra} note 18.

\textsuperscript{21} \textit{Id.} at para. 1, 3.

\textsuperscript{22} \textit{Id.} at para. 1.

\textsuperscript{23} \textsc{Loren & Miller}, \textit{supra} note 2, at 323.
existing United States laws protect the moral rights of authors. The Copyright Office's request is part of a public study that reviews the current state of U.S. law recognizing and protecting the moral rights of attribution and integrity. As part of its study, the Copyright Office "will review existing law on the moral rights of attribution and integrity, including provisions from Title 17 of the United States Code as well as other federal and state laws," and determine whether any additional protection would be advisable. To support the Office's research and to provide thorough assistance to Congress, the Copyright Office has enlisted the public for input on several questions.

In 2014, as part of a review of U.S. copyright law, members of the Subcommittees on Courts, Intellectual Property and the Internet, of the House Judiciary Committee, held a hearing in which they expressed an interest in evaluating the status of protection of moral rights of authors in the United States as part of its review of U.S. copyright law in general. In particular, the Chairman of the House Judiciary Committee noted that the focus should be on whether the current law sufficiently protects the moral rights of authors, or whether more explicit protection is required. At the end of the two-year copyright review hearings process, it was recommended that the United States Copyright Office conduct a study on the current status of moral rights protection laws in the United States and whether any changes would be necessary and appropriate.

In preparation for this study, the Copyright Office co-hosted a symposium on moral rights in April 2016 to hear views about current issues in this area and to serve as the start of the Copyright Office's public study. Discussions included the history of moral rights, the value of moral rights for authors, protection under the current law, and considerations for the digital age. Participants varied from academic scholars to professional artists, musicians, and performers. The right of attribution was identified by many participants as important for authors from both an economic and

25. Id.
26. Id.
27. Id.
28. Id. at 7871.
29. Id.
30. Id.
31. Id. at 7871, 7874.
32. Id. at 7874.
33. Id.
personal perspective. However, opinions varied as to the sufficiency of protection under the current law. Several participants found the existing law to be limited, strict, and under-inclusive, while other participants found the current patchwork of laws to provide adequate protection. Another point of focus was moral rights protection and litigation in foreign countries.

The Copyright Office’s notice sought public comments on a variety of topics, including the effectiveness of the Digital Millennium Copyright Act (DMCA) and Visual Artists Rights Act (VARA) in the promotion and protection of moral rights in the United States, whether any improvements should be made to the DMCA or VARA, and how foreign countries approach the protection of moral rights and if they can be implemented in the United States.

C. Scope of Article

The premise of this article is that the moral rights of authors in the United States are currently not sufficiently protected and that additional protection is necessary by implementing aspects of moral rights protection from the Netherlands. Compared to the United States, Europe has traditionally offered a broader scope of protection of moral rights of authors and artists. However, within Europe, the scope of protection of moral rights varies as the European Union has not harmonized its laws regarding moral rights protection. This means that apart from the minimum requirements set out by the Berne Convention, every country has its own legislation regarding the recognition and protection of moral rights for authors.

The Netherlands provides for a good middle ground in the recognition and protection of moral rights. Through the Auteurswet, the Netherlands provides for a broader scope of protection than the United States, but is not as unlimited as, for instance, France.

This article will focus on three elements of a notice by the United States Copyright Office regarding the protection of moral rights in

34. Id.
35. Id.
36. Id.
37. Id. at 7874-75; see also Study on the Moral Rights of Attribution and Integrity, COPYRIGHT.GOV, https://www.copyright.gov/policy/moralrights/ (last visited Feb. 11, 2017).
38. See generally 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.02 at 1-2 (2018).
40. See discussion infra Section II-B-i.
41. Auteurswet [Copyright Act] 1912 (Neth.).
42. See discussion infra Section IV.
the United States: the effectiveness of the VARA and DMCA in the promotion and protection of moral rights in the United States; how moral rights are protected in the Netherlands; and improvements that should be made to existing U.S. law by looking at how Dutch law can be implemented in the United States. In particular, this article will advocate that existing U.S. law governing the protection of moral rights should be extended, using the Netherlands as a reference.

The article will begin by briefly explaining copyright, moral rights, and the types of moral rights. Second, there will be an explanation of existing copyright and moral rights law in the United States by discussing the VARA and DMCA. Third, the article will discuss how moral rights are protected in the Netherlands. Fourth, the article will look at cases and examples from the two “main” areas of copyright law, and will discuss how such cases are handled in the United States compared to the Netherlands. Fifth, following the comparison between both systems, the article will discuss proposed changes to existing United States law.

II. COPYRIGHT AND MORAL RIGHTS

A. What is a Copyright?

The United States Constitution specifically affords protection to the creators of the sciences and arts in the form of copyrights and patents.\textsuperscript{43} Copyright law protects works of authorship.\textsuperscript{44} Ownership of a copyright vests originally in the author, or authors, of the work.\textsuperscript{45} Protection arises automatically when three criteria are met: the work must be original, fixed in a tangible medium of expression, and must consist of “expressions” rather than ideas.\textsuperscript{46} Once an original work of authorship is fixed in a tangible medium of expression, a copyright exists.\textsuperscript{47} The Copyright Act considers a broad range of works of authorship, including literary works, musical works, dramatic works, pictorial, graphic and sculptural works, motion pictures, sound recordings, and architectural works.\textsuperscript{48} However, copyright protection for an original work of authorship is not

\textsuperscript{43} U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).
\textsuperscript{44} CRAIG ALLEN NARD ET AL., THE LAW OF INTELLECTUAL PROPERTY 435 (4th ed. 2014).
\textsuperscript{45} 17 U.S.C. § 201 (2012); see also LOREN & MILLER, supra note 2, at 364.
\textsuperscript{46} 17 U.S.C. § 102 (1990); see also NARD ET AL., supra note 44, at 135.
\textsuperscript{47} LOREN & MILLER, supra note 2, at 364.
extended to abstract things such as ideas, procedures, processes, systems, concepts, or methods of operation, regardless of how it is described or explained in the work.\textsuperscript{49} In addition, a copyright requires no registration, notice, or distribution of copies of the work in order to obtain the rights granted by the federal Copyright Act.\textsuperscript{50} This protection only applies to works created on or after January 1, 1978, the effective date of the Copyright Act.\textsuperscript{51} Prior to the enactment of the Copyright Act of 1978, there were cumbersome requirements on authors to register their copyright, provide notice of copyright upon initial publication, and renew to prevent the work from entering the public domain, depending on whether the work was protected by common law copyright or statutory copyright, and published or unpublished.\textsuperscript{52}

The copyright holder is granted a bundle of rights along with the copyright. Under the Copyright Act, the copyright holder is granted exclusive rights to exclude others from reproducing the copyrighted work, to create derivative works based on the copyrighted work, to distribute copies of the copyrighted work to the public, and to publicly perform or display the copyrighted work.\textsuperscript{53}

\textbf{B. What are Moral Rights?}

Moral rights are rights that provide the creator of a work with the right to protect the artistic integrity of their work.\textsuperscript{54} Rather than viewing copyright as a property right, copyright is viewed as a way to protect expressive content as an extension of the creator, by providing the creator with the right to control that expression.\textsuperscript{55} The term “moral rights” comes from the French phrase droit moral, and refers to a certain set of non-economic rights that are considered to be personal to the author.\textsuperscript{56} Moral rights should be distinguished from the economic rights granted in § 106, and the personal property rights of the owner of a particular copy of the work.\textsuperscript{57} Moral rights are personal to the author. Furthermore, pursuant to § 106A(e)(1), moral rights cannot be transferred, although they can be waived.\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{49} Id.
\item \textsuperscript{50} LOREN & MILLER, supra note 2, at 364.
\item \textsuperscript{51} 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16 at 1 (2018).
\item \textsuperscript{52} Id. at 2-5.
\item \textsuperscript{53} 17 U.S.C. § 106 (2002); see also LOREN & MILLER, supra note 2, at 321.
\item \textsuperscript{54} LOREN & MILLER, supra note 2, at 323.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Study on the Moral Rights of Attribution and Integrity, supra note 24, at 7870.
\item \textsuperscript{57} LOREN & MILLER, supra note 2, at 426.
\item \textsuperscript{58} 17 U.S.C. § 106A(e)(1) (1990); see also LOREN & MILLER, supra note 2, at 426.
\end{itemize}
Many European countries have based their copyright law on this rationale, granting copyright protection for moral rights, such as the right to protect the integrity of the expression from modification and the right of attribution, which gives the creator the right to be recognized as the creator of a work.\(^{59}\) Protection of moral rights in the United States is limited to "works of visual art" as defined in §101, which is more limited than European copyright law, and are granted to authors pursuant to §106A.\(^{60}\)

1. **The Berne Convention**

In 1887, to combat the undue complexity and uneven protection of copyright on artistic and literary works created by bilateral agreements, several countries ratified the Berne Convention for the Protection of Literary and Artistic Works of 1886.\(^{61}\) The Berne Convention was created with the idea that the contracting countries would not discriminate between domestic authors and authors of other contracting countries regarding the level of protection they enjoyed for their artistic and literary works.\(^{62}\) In addition, the objective was to harmonize copyright laws between the contracting states, while at the same time allowing matters like enforcement and protection of copyrights to remain a matter of national law.\(^{63}\) The Berne Convention has been revised numerous times since its creation in 1886.\(^{64}\) Initially, the Convention did not contain a provision on moral rights.\(^{65}\) However, in 1928, following the Conference of Rome, the Convention was revised and Article 6bis on moral rights was included.\(^{66}\)

Article 6bis provides that, apart from the economic rights provided to the author of an artistic or literary work, the author also

\(^{59}\) Loren & Miller, supra note 2, at 323.

\(^{60}\) 17 U.S.C. §§ 101, 106A (2012); Loren & Miller, supra note 2, at 323; see also infra Section III-A discussion of the Visual Artists Rights Act of 1990 and the Act's scope of application.

\(^{61}\) Tritton et al., supra note 39, at 468-69 (Originally, contracting parties included countries such as Belgium, France, Germany, Italy, Luxembourg, Monaco, the Netherlands, Norway, Spain and Sweden); see also WIPO-Administered Treaties, Contracting Parties Berne Convention, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited Apr. 7, 2018) (Throughout the years numerous countries all over the world have ratified or acceded to the Berne Convention, such as Japan, Afghanistan, Jordan, Canada, India, Nigeria, South-Africa and the United States).

\(^{62}\) Tritton et al., supra note 39, at 469.

\(^{63}\) Id.

\(^{64}\) Id.

\(^{65}\) Id.

\(^{66}\) Id.
enjoys certain moral rights.\textsuperscript{67} The author has the right to claim authorship of the work; object to any distortion, mutilation, or other modification of his work; or any other derogatory action in relation to his work that will be prejudicial to the author’s honor and reputation.\textsuperscript{68} Essentially, Article 6bis recognizes two main moral rights: the right of attribution and the right of integrity.\textsuperscript{69} Notably, the right of integrity, “to object to any distortion, mutilation, or other modification,” does not extend to the level of protection of some countries where the right of integrity includes the right to object to the outright destruction of the work.\textsuperscript{70} “[T]here can be no distortion when the work itself has been” destroyed.\textsuperscript{71} Further, Article 6bis of the Berne Convention provides that moral rights can be enforced after the author’s death by those responsible for administration of the copyright, which is left to the national legislation of the contracting countries.\textsuperscript{72}

III. MORAL RIGHTS IN THE UNITED STATES

Unlike many other countries, the United States has not adopted broad moral rights provisions as part of its federal copyright statute, the Copyright Act.\textsuperscript{73} Rather, the protection of moral rights in the United States is comprised of a combination of federal and state statutes and common law.\textsuperscript{74} Even within this limited body of legislation, protection of moral rights is further narrowed, as the United States only recognizes protection of moral rights for the visual arts such as paintings, sculptures, and photographs.\textsuperscript{75} Both federal and state laws solely provide protection for a very limited scope within the visual arts, and do not apply to any other copyrightable subject matter.\textsuperscript{76} In contrast, most of Continental Europe has a broader form of moral rights protection, providing protection for a broad range of works of authorship, including, for instance, literary, musical, and graphic works.\textsuperscript{77} The difference between moral rights protection in

\textsuperscript{68} Id.; see also TRITTON ET AL., supra note 39, at 474.
\textsuperscript{69} 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01 at 3 (2018).
\textsuperscript{70} Id.
\textsuperscript{71} NIMMER & NIMMER, supra note 38, at 8.
\textsuperscript{72} TRITTON ET AL., supra note 39, at 474.
\textsuperscript{73} Study on the Moral Rights of Attribution and Integrity, supra note 24, at 7871.
\textsuperscript{74} Id.
\textsuperscript{75} NIMMER & NIMMER, supra note 38, at 2; see also 17 U.S.C. §§ 101, 106A (2012).
\textsuperscript{76} NIMMER & NIMMER, supra note 38, at 2.
\textsuperscript{77} Id. at 1-2.
the United States and Continental Europe is striking, especially since Congress amended the Copyright Act in 1988 to comply with the Berne Convention.\textsuperscript{78} What is notably important is that in the United States, moral rights do exist, yet do not rise to the level of protection as set forth by Article 6bis of the Berne Convention.\textsuperscript{79} This section will focus on United States federal law protecting moral rights. In particular, this section will discuss the protection of moral rights under both the Visual Artists Rights Act (VARA) and the Digital Millennium Copyright Act (DMCA).

A. Visual Artists Rights Act (VARA)

In 1990, Congress passed the Visual Artists Rights Act, codified in § 106A of the Copyright Act.\textsuperscript{80} Section 106A provides for an additional set of rights to the author of a work of visual art, often referred to as the moral rights of attribution and integrity. As mentioned previously, the United States’ protection of moral rights is very narrow.\textsuperscript{81} In fact, the definition of a “work of visual art” is extremely detailed and defined as “a painting, drawing, print, or sculpture, existing in a single copy, [or] in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.”\textsuperscript{82} Further, the definition specifically excludes an extensive list of works from the definition, such as posters, models, applied art, motion pictures, books, merchandising items or advertising, and many other works.\textsuperscript{83}

For the select group of works that do qualify as a work of visual art, § 106A grants the authors of such works the rights of attribution and integrity. The right of attribution includes the right of the author to “claim authorship to that work, and . . . to prevent the use of his or her name as the author of any work of visual art which he or she did not create.”\textsuperscript{84} In addition, the author has the right to “prevent the use of his or her name as the author of the work of

\textsuperscript{78} Id. at 3. While the difference in moral rights protection between Continental Europe and the United States is interesting considering the fact that both are signatories to the Berne Convention, this in and of itself constitutes a discussion for a law review article and therefore is not within the scope of this article.

\textsuperscript{79} Id. at 9.

\textsuperscript{80} LOREN & MILLER, supra note 2.

\textsuperscript{81} Id.

\textsuperscript{82} NIMMER & NIMMER, supra note 38, at 2; see also 17 U.S.C. §§ 101, 106A (2012).

\textsuperscript{83} 17 U.S.C. § 101 (2012) (defining a “work of visual art”).

\textsuperscript{84} Id.

\textsuperscript{85} Id. § 106A.

\textsuperscript{86} Id. § 106A(a)(1).
visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.”

The right of integrity is more narrowly defined. Under VARA, the author has the right “to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right.” Additionally, an author has the right “to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.” From reading § 106A of the Copyright Act, it is clear that the protection of moral rights in the United States is very limited in its scope.

B. Digital Millennium Copyright Act (DMCA)

Beside the Berne Convention, the United States has joined two additional international treaties that provide for the protection of moral rights: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). While the WCT incorporated Article 6bis of the Berne Convention, Article 5 of the WPPT expanded the obligations of contracting parties towards recognizing the moral rights of attribution and integrity for performers of live performances and performances fixed in phonograms. In order to comply with its obligations under both treaties, the United States enacted the Digital Millennium Copyright Act (DMCA).

The enactment of the DMCA led to the addition of Chapter 12 to Title 17, entitled “Copyright Protection and Management Systems” and contains § 1202, which provides protection for copyright management information.

Section 1202 prohibits knowingly and intentionally providing false copyright management information, or the distribution or import of false copyright management information. Additionally, the provision also prohibits the removal or alteration of copyright management information.

87. Id. § 106A(a)(2).
88. LOREN & MILLER, supra note 2.
90. Id. § 106A(a)(3)(B).
91. Study on the Moral Rights of Attribution and Integrity, supra note 24, at 7872.
92. Id.
94. Study on the Moral Rights of Attribution and Integrity, supra note 24, at 7872-73.
management information. While facilitating the administration of the economic rights of an author or right holder, the copyright management information protections provided by § 1202 may also have implications on the protection and enforcement of an author or right holder’s moral rights. When it comes to moral rights protection, of particular interest is the second prohibition on removal or alteration of copyright management information.

The DMCA’s definition of copyright management information entails any of the forms of information listed in § 1202(c) that are “conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form,” such as “the name of, and other identifying information about, the author of a work.” Therefore, § 1202 makes it an offense to intentionally remove or alter any mention of the author’s name of the work, essentially providing for the protection of the moral right of attribution. By including the author’s name in the scope of protection under § 1202, it seems to suggest that United States copyright law recognizes a right of attribution not just for authors of “works of visual art” under VARA, but for authors of all works. However, the reality appears a little more complicated, with the majority of courts recognizing § 1202 as protection against any removal of an author’s attribution, but with a minority only recognizing protection against removal for attribution that is digital or part of an automated copyright protection or management system.

IV. MORAL RIGHTS IN THE NETHERLANDS: THE DUTCH COPYRIGHT ACT

As the above discussion on the Berne Convention has shown, moral rights in Europe are not harmonized. The language of Article 6bis provides the signatory countries with a broad level of discretion regarding the implementation of moral rights in their respective countries. This level of freedom has, even within Europe, led to differences in the national approaches of moral rights protection.

96. Id. § 1202(b)(1).
97. Study on the Moral Rights of Attribution and Integrity, supra note 24, at 7873.
99. See id. § 1202(b)(1), (c)(2) (1999).
100. See, e.g., Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, supra note 67, art. 6bis(3) (stating that “the means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed”).
The Netherlands acceded to the Berne Convention in October 1912. A month earlier, the Netherlands enacted the Auteurswet, the Dutch Copyright Act. In line with Article 6bis of the Berne Convention, Article 25 of the Dutch Copyright Act provides for the protection of persoonlijkheidsrechten, or moral rights. Article 25(1)(a) sets forth the right of attribution, providing the author with the right to object to making the work public without any mention of his name or reference to indicate that the author created the work, unless his objection is unreasonable. This includes the right to object to any publication of the work under a different name than that of the original author, as well as changes to the title of the work itself or any reference of the author on the work.

The right of integrity under Dutch Copyright law consists of two aspects. First, it provides the author with the right to object to any modification to the work, unless such modification is reasonable. Second, the author always has the right to object to any distortion, mutilation, or any other form of deterioration of the work which could negatively impact the honor or name of the author, or value in its position as the author of the work. Therefore, even if distortion or mutilation of the work can be proved, the author must also show that his name, honor, or reputation as an artist has been negatively impacted because of the distortion or mutilation of his work. While under Dutch law, the author has to show a detrimental impact, this extra requirement is not present under either French or German law. In the end, the distinction between whether a change to the work is a modification or distortion is a subjective one. However, in 2004, the Dutch Supreme Court in Jelles held that “mutilation or any other form of deterioration” does not include the actual total destruction of the work. Yet in

103. WIPO-Administered Treaties, Contracting Parties Berne Convention, supra note 61.
104. See exordium to the Auteurswet [Copyright Act] 1912 (Neth.).
105. Article 25 Auteurswet [Copyright Act] (Neth.).
106. Article 25(1)(a) Auteurswet.
107. Article 25(1)(b) Auteurswet.
108. Article 25(1)(c) Auteurswet.
111. See Article L121-1 Code de la propriété intellectuelle (1992) (Fr.); see also Section 14 Enstellung des Werkes, Urheberrechtsgesetz (1965) (Ger.).
112. VERKADE, supra note 110.
113. Id.; see also HR 6 februari 2004, ECLI:NL:PHR:2004:AN7830 (Jelles/De Gemeente Zwolle) (Neth.), at para. 4.5.
France, the author can object to the destruction of his work. More surprisingly perhaps is that under § 106A(3)(B) of VARA, an author also has the right to object to the destruction of a work of recognized stature.

Moral rights under Dutch law are non-transferable. Even after the original author transfers his or her copyright, the moral rights remain with the original author. In other words, when the author parts with their copyright, moral rights are not included. In addition, moral rights in the Netherlands are not perpetual—they are not automatically passed on to heirs after the author’s death. However, the author can elect to have his rights pass on through testament. Furthermore, an author can waive his or her rights away by contract. Contrastingly, while in France moral rights are also considered non-alienable, they are considered to be perpetual, in that the rights pass on to the heirs of the author, are imprescriptible, and cannot be waived. In Germany, moral rights are inheritable, but not transferable, unless transferred in execution of a testamentary disposition or to co-heirs as part of the partition of an estate.

V. COMPARISON – CASE STUDIES

To show the difference in treatment of moral rights of authors in the United States versus the Netherlands, two separate examples will be discussed. The first example will discuss moral rights protection in the context of visual arts, more specifically architecture. The second example will discuss moral rights in the context of musical compositions.

115. 17 U.S.C. § 106A(3)(B) (2012) (subject to the limitations set out in id. § 113(d)).
116. VERKADE, supra note 110, at para. 1a.
117. Article 25(1) Auteurswet.
118. VERKADE, supra note 110, at para. 1a.
119. Id. at para. 6.
120. Article 25(2), (4) Auteurswet.
121. VERKADE, supra note 110, at para. 1b (Under Dutch contract law the author is able to transfer his rights under Article 25 to another contracting party.).
122. Article L121-1 Code de la propriété intellectuelle (Fr.); see also Lucas, supra note 114.
123. See Section 28-29 Enstellung des Werkes, Urheberrechtsgesetz (Ger.).
A. Visual Arts – Architecture

In 1820, Naturalis Institute was established as the Rijksmuseum van Natuurlijke Historie, in Leiden, the Netherlands. The initial focus of the institute was on scientific research and building a collection, rather than exhibitions. In 1986, the decision was made to turn the institute in a museum for the public, and the government made a former Seventeenth Century Pesthuis, or Plague House, available for this purpose. Soon the decision was made to build a new building across from the Pesthuis and connect the two with a walking bridge. In 1998, the Nationaal Natuurhistorisch Museum Naturalis was built, pursuant to the design of architect Fons Verheijen.

Fifteen years later, it became evident that the building could not cope with the increased number of visitors. The decision was made to expand and restructure the building. On April 24, 2013, through a European bidding process, the project was eventually awarded to Neutelings Riedijk Architecten (NRA), even though the original architect Verheijen also participated. NRA’s design included building a new structure, which would function as the museum, and using the old building as a depot and research facility. NRA’s plan would no longer include the Pesthuis as part of the museum. Additionally, NRA’s plan also included the destruction of the walking bridge, as it would no longer serve any purpose, and the destruction of the Darwin House, an office building on the property of Naturalis. After learning about NRA’s plan, Verheijen objected to NRA’s design on the grounds that it infringed his moral rights.

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126. Id.
127. Pesthuis, WIKIPEDIA, https://nl.wikipedia.org/wiki/Pesthuis#cite_note-1 (last visited Apr. 7, 2018) (Plague houses were created in the Sixteenth and Seventeenth centuries in the Netherlands to isolate people with the plague from the general population in Dutch cities).
130. Id.; see also Verheijen/Stichting Naturalis Biodiversity Center, 25 januari 2017, at 2.16.
133. Id.; see also Leenders, supra note 129.
rights as the original architect pursuant to Article 25(1)(c) and (d) of the Dutch Copyright Act.135

The case went to trial, and the lower court in the Hague decided in favor of Verheijen.136 In January 2017, the court concluded in an interlocutory judgment that Naturalis with the proposed remodeling infringed Verheijen’s droit au respect—his moral right to object to any modification or mutilation of his work.137 The court reasoned that, as for the destruction of the Darwin House, Verheijen did not have a claim under Article 25, pursuant to the decision in Jelles, in which an architect cannot prevent the destruction of a building by relying on Article 25, nor can he prove that Naturalis had misused their authority in deciding on demolition.138

While the court did not find an infringement of moral rights regarding the new addition to the museum, it did find that the proposed remodeling of the museum, the modifications to the building itself, went to the core of the architect’s design, qualifying it as a “distortion, mutilation, or any other form of deterioration of the work” under Article 15(1)(d) of the Dutch Copyright Act.139 The court continued by stating that this “mutilation or deterioration” to the work negatively impacts the name and honor of the architect.140 Verheijen had sufficiently proved such negative impact by arguing that the Naturalis building is the most important building in his oeuvre, because in a short period of time it had already received over three million visitors, and that it is the only building in which the Naturalis welcomes visitors, making it the embodiment of the museum.141

However, Verheijen, at the same time, reluctantly saw the remodeling of the museum proceed and claimed in a subsequent summary proceeding that his work was still being deteriorated.142 On March 7, 2017, the court ordered Naturalis to immediately cease the remodeling and building procedures, awaiting the court’s final ruling in the underlying proceeding.143 Eventually, the parties settled on March 20, 2017, with Verheijen waiving his moral rights

135. Id. at 2.18, 3.2.9; see also Leenders, supra note 129.
136. Verheijen/Stichting Naturalis Biodiversity Center, 25 januari 2017, at 5; see also Leenders, supra note 129.
137. Verheijen/Stichting Naturalis Biodiversity Center, 25 januari 2017, at 4.32; see also Leenders, supra note 129.
139. Id. at 4.17-18.
140. Id. at 4.16.
141. Id. at 4.19.
143. Id. at 4.19, 5.
after receiving 1.5 million EUR for an architecture foundation to be founded by Verheijen, litigation costs, attorney’s fees, and a compensation to Verheijen himself.144

Although in the end, the architect in *Naturalis* chose to waive his moral rights, a case like this would likely never arise in the United States. While architectural works enjoy copyright protection,145 architectural works do not fall within the limited scope of moral rights protection provided by VARA.146 This means that as an architect in the United States, if the party you designed a building for wants to make modifications to your original design of the building, they are free to do so. Apart from the visual works of art that are provided moral rights protection, other copyrighted work is generally treated as part of a business deal. Once that deal has been concluded, the work is finished and you have no rights or say in what happens to the work. And that is exactly what the analogy to the *Naturalis* case reflects: in the United States, your rights end once the business deal concludes.147

B. Non-visual Arts – Musical Compositions

Apart from architectural works being excluded from the scope of application of VARA, there are several other types of works that are excluded, such as musical compositions. Back in the 1990s, in the heyday of music genres such as Euro-house, moral rights protection in the Netherlands provided the widow of composer Carl Orff with the right to object to a house-version of part of her late husband’s musical composition *Carmina Burana*.148 In 1936, German composer Carl Orff composed *Carmina Burana*, of which *O Fortuna* is the first movement.149 In 1982, Orff passed away.150 Under German law, the moral rights passed to his widow, who subsequently transferred the rights to Schott, one of the plaintiffs, in addition to

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146. *Id.* § 101 (While VARA provides a definition of “architectural work,” it does not include architectural works in its definition of “work of visual art,” therefore excluding it from moral rights protection).
147. Note that there is a difference between an architectural work and a work that is part of a building. *See, e.g.*, Cohen v. G & M Realty L.P., No. 13-CV-05612, 2018 WL 851374, at *1 (E.D.N.Y. Feb. 12, 2018) (finding that the property owner’s destruction by whitewashing the works of a group of graffiti street artists on buildings denied the artists the opportunity to remove their work and violated their rights under VARA).
149. *Id.* at 1(a).
150. *Id.* at 1(b).
granting her the right to participate in the lawsuit on her behalf.151 Stichting Stemra152 held the reproduction rights to the works of Orff in the Netherlands.153 Defendants in this case, Indisc Nederland BV and Red Bullet International BV, both marketed CDs in the Netherlands containing the song *O Fortuna*, respectively performed by Apotheosis and Fortuna.154 One was a house version of Orff’s *O Fortuna*, the other a disco/pop version, ranking third and first in the Dutch National Top 40.155

On February 14, 1992, Stemra notified the entire Dutch music industry, including Red Bullet and Indisc, that further production and distribution of unauthorized adaptations of the work *Carmina Burana, O Fortuna* by Orff were forbidden, as the right-holders to the original work never gave permission nor were willing to do so after the fact.156 While Indisc refused to cease the sale of *O Fortuna* by Apotheosis, Red Bullet filed suit against Stemra, seeking to have Stemra nullify the notice that was issued to the Dutch music industry regarding Orff’s work.157 Stemra counter argued that Red Bullet marketed a modified and mutilated version of Orff’s *O Fortuna* without Stemra’s permission.158 Schott joined, arguing Red Bullet violated Orff’s moral rights.159

More specifically, in relation to moral rights, both argued that Red Bullet’s version included a modification of Orff’s composition, to which the court agreed.160 After listening to Orff’s original composition and Red Bullet’s version, the court concluded that there were parts of Orff’s composition left out, such as the introduction, but that several elements were added, such as a disco-rhythm and horse whinnying.161 The court considered this to be a modification of Orff’s work.162 Taking into account the nature and extent of these modifications, it was reasonable of Schott to make a moral rights objection.163

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151. *Id.*
152. Now known as Bumra/Stemra, and is a Dutch organization for the interests of composers, poets, and music-publishers in the field of copyright. See also STICHTING BUMRA/STEMRA, https://www.bumastemra.nl/ (last visited Apr. 7, 2018).
153. See Musikverlag B. Schott’s Söhne/Indisc Nederland, 24 februari 1992, at 1(c).
154. *Id.* at 1(d)-(e).
155. *Id.*
156. *Id.* at 1(g).
157. *Id.* at 1(h), 3.
158. *Id.* at 6.
159. *Id.* at 8.
160. *Id.* at 12.
161. *Id.*
162. *Id.*
163. *Id.*
Denying Red Bullet’s request, the court concluded that Stemra was justified in forbidding the further sale of the unauthorized modifications of *O Fortuna* by Orff, including the one by Red Bullet.\footnote{164} Regarding Indisc, the court found that Apotheosis’s version of *O Fortuna* was not a parody, but rather a total, albeit altered copy of the work by Orff.\footnote{165}

The *O Fortuna* case is again an example of a case that would not arise in the United States in the context of moral rights protection. While United States law provides copyright protection for the infringement of copyright, a composer such as Carl Orff cannot after the sale of the copyrighted work prevent any modification or mutilation of his work. This again shows that the United States’ moral rights protection is too narrow, and its arbitrary distinction even between the visual arts can have a severe impact on authors of works other than a painting or sculpture. Does United States copyright law really promote the advancement of the fine arts and sciences, as purported in the United States Constitution, when only a very select group of authors has the ability to prevent any modification or mutilation to their oeuvre?

VI. RECOMMENDATIONS TO THE UNITED STATES COPYRIGHT OFFICE

As the examples above have shown, moral rights protection in the United States is very limited in scope. The scope of protection offered by VARA is too narrow and arbitrarily protects certain types of art, while DMCA’s scope of protection, if any, remains uncertain. In the United States, copyright law was enacted to promote the advancement of the arts and sciences.\footnote{166} As such, one of the primary goals of copyright law is to protect the rights of all authors, provided that the work satisfies all requirements for protection.\footnote{167} Neither the United States Constitution nor the Copyright Act make a distinction between the types of work that are offered copyright protection.\footnote{168} In addition, neither state that such protection should be

\footnote{164} Id. at 15-16. 
\footnote{165} Id. at 20. 
\footnote{166} U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”). 
\footnote{167} See generally id.; see also 17 U.S.C. § 102. Provided that the author’s work is original, fixed in a tangible medium of expression, and consists of expressions rather than ideas, the author is granted automatic copyright protection. See 17 U.S.C. § 102. 
afforded to visual artists only, let alone a select group of visual artists.\footnote{169 Id.} Yet, when it comes to moral rights protection, an arbitrary distinction is made between copyrightable works.\footnote{170 See generally 17 U.S.C. § 106A (“[T]he author of a work of visual art”).} After looking into the current scope of moral rights protection in the United States, moral rights protection in the Netherlands, and applying the laws to two factual scenarios, the United States Copyright Office should expand copyright protection.

First, the United States Copyright Office should lobby for the expansion of the moral rights of integrity and attribution to all copyrightable works. A first step would include broadening § 101’s definition of “work of visual art” to include forms of visual art other than paintings, drawings, prints, and sculptures. Examples of visual arts that should be granted protection, and therefore included in the definition, are works of architecture, photography, illustrations, and motion pictures. By broadening the definition, the moral rights granted in § 106A will cover a wider variety of visual arts, not just the classic visual arts. This recommendation is further supported by the Coalition of Visual Artists (CVA),\footnote{171 The Coalition of Visual Artists encompasses various organizations, including: American Photographic Artists, the Graphic Artists Guild, the North American Nature Photography Association, and Professional Photographers of America. THE COALITION OF VISUAL ARTISTS, STUDY ON THE MORAL RIGHTS OF ATTRIBUTION AND INTEGRITY 26 (2017).} who in their initial comments to the Copyright Office’s request, advocate that the rights granted in § 106A should apply to all works of visual art, not just “fine art.”\footnote{172 Id. at 13.} Specifically, the CVA found that VARA insufficiently protects commercial photography, illustrations, and other visual works.\footnote{173 Id.} The CVA also argues that original images produced by artists of commercial art – any art, design, illustration and photography created for advertising, publication, and other commercial purposes – are no different in artistic merit than the “fine art” protected by VARA, and in fact reach a much wider audience than most “fine art.”\footnote{174 Id. at 3.} The Artists Rights Society (ARS) echoes this proposition, stating that the current class of works of visual art is too narrow and excludes a wide variety of art such as conceptual art, recorded performance art, digital art, large print editions, illustrations, and most photography.\footnote{175 ARTISTS RIGHTS SOCIETY, COMMENTS OF ARTISTS RIGHTS SOCIETY (2017).} The ARS concluded that moral rights protection would be significantly more effective if it would apply to all pictorial, graphical, and sculptural works.\footnote{176 Id.}
However, the expansion of moral rights protection should not stop there. Broadening the scope of VARA will still leave out other forms of copyrightable works of art, namely works of art that are not visual, such as musical compositions and literature. There does not seem to be any reasoning behind this hierarchy of art: “It’s not clear to us why someone who is not the author of a work of visual art does not have [the right of attribution].”\(^{177}\) While such types of works are offered protection through copyright infringement to a certain extent, a composer would not have any ability to seek protection for infringement once his rights are sold or assigned. The sale or assignment of copyrights is treated as a business deal and once the deal is concluded, you as the original creator of the work have no further say in what happens to it. But moral rights on the other hand, remain with the author of a copyrightable work, even after sale, unless the author expressly waives his rights.\(^{178}\) That is exactly what makes moral rights protection valuable to artists. Therefore, a second recommendation would be to ensure moral rights protection is provided to authors of non-visual art as well. Every type of artist should be offered the equal opportunity to allege the infringement of his right of attribution or integrity, to protect his connection to the work and prevent any prejudice to his honor and reputation as an artist.

By expanding and clarifying the scope of protection of moral rights to the types of work covered, the uncertainty that currently exists under the DMCA will also be resolved. Since § 1202 of the DMCA makes it an offense to intentionally remove or alter the copyright management information of a work, including any mention of the author’s name, it suggests that United States Copyright law recognizes a right of attribution outside the scope of VARA.\(^{179}\) A simple clarification of works deserving of moral rights protection would resolve this uncertainty. Subsequently, a third recommendation would be for the DMCA to start actively recognizing the right of attribution for works covered under the DMCA. Additionally, it has become more common to remove copyright management information, often including the author’s name, from digitized works.\(^{180}\) The Coalition of Visual Artists argues that while § 1202 protection might work for digitized music and film, it seems to be

\(^{177}\) Kernochan Center for Law, Media and the Arts, Columbia Law School, Comments of the Kernochan Center for Law, Media and the Arts, Columbia Law School 6 (2017).


\(^{179}\) See supra Section III-B.

\(^{180}\) The Coalition of Visual Artists, supra note 171, at 13-14.
completely disregarded by search engines, internet pirates, or the
general public.\textsuperscript{181} The Coalition further argues that there are vari-
ous additional ways attribution may be provided for a work; it can
be visible or shown with the image, but it can also be included in
the metadata or a digital watermark of the work.\textsuperscript{182}

While moral rights protection in the United States should be ex-
tended to encompass all copyrightable works, but like in the Neth-
erlands, this protection should \textit{not} be perpetual. Perpetual moral
rights protection, as in France, is not only burdensome, but also un-
fair by essentially allowing heirs of an author to make a claim under
the right of attribution or integrity for eternity. Therefore, moral
rights protection in the United States should only apply to works
that are \textit{not} in the public domain, effectively granting moral rights
protection for the term of a copyright. This is also supported by the
American Association of Law Libraries (AALL), who in its initial
response to the Copyright Office’s request, in the context of literary
works, argued that moral rights protections should not apply to
works in the public domain.\textsuperscript{183} The AALL believes that a robust
public domain will enable authors to create new works and that new
moral rights protections would add additional requirements for au-
thors who want to republish or make derivative works based on
works in the public domain.\textsuperscript{184} If different regimes of rights expire
at different times, this would create tremendous confusion for po-
tential authors, and potentially even discourage innovative compi-
lations or derivative works from multiple public domain works be-
cause the requirement to attribute will be burdensome.\textsuperscript{185} The
AALL in its comments further refers to Ralph Oman, Register of
Copyrights, who stated that “a federal statute enacted under the
Copyright clause that purports to grant a moral right of integrity
for certain works in perpetuity would be clearly unconstitu-
tional.”\textsuperscript{186} Furthermore, in the context of trademarks, the United
States Supreme Court held in \textit{Dastar Corporation v. Twentieth Cen-
tury Fox} that requiring attribution for a television program would
lead to a perpetual patent and copyright, and accordingly deemed

\begin{itemize}
\item \textsuperscript{181} \textit{Id.} at 14.
\item \textsuperscript{182} \textit{Id.}
\item \textsuperscript{183} \textsc{The American Association of Law Libraries, Study on the Moral Rights of
Attribution and Integrity} 1 (2017). \textit{Cf. Artists Rights Society, supra} note 175 \textit{(arguing
that the protection offered by VARA should preferably be perpetual, if not at the very least
co-terminus with the copyright term).}
\item \textsuperscript{184} \textsc{The American Association of Law Libraries, supra} note 183.
\item \textsuperscript{185} \textit{Id.}
\item \textsuperscript{186} \textit{Id.} (citing \textit{Film Integrity Act of 1987: Hearing on H.R. 2409, Subcomm. On Courts,
Civil Liberties, and the Admin. of Justice}, H. Comm. on the Judiciary, 90th CONG. 42-44
(1988)).
\end{itemize}
Therefore, if moral rights were recognized in United States law in general, for the term of a copyright, many uncertainties accompanying existing United States law will be eliminated.

VII. CONCLUSION

Thus, the current laws in the United States do not sufficiently protect the moral rights of authors. Both VARA and the DMCA are not effective in providing protections for authors, if any at all. The law is both too narrow and uncertain to provide full coherent protection. As such, it is recommended that the United States Copyright Office looks to the Netherlands as a reference and implements aspects of Dutch law by expanding the category of “works of visual art” under VARA, and by expanding moral rights protection to non-visual works of art in order to provide for a better recognition and protection of moral rights for all authors in the United States.

187. Dastar Corp. v. Twentieth Century Fox, 539 U.S. 23, 37 (2003); see also THE AMERICAN ASSOCIATION OF LAW LIBRARIES, supra note 183.