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INTRODUCTION

Modern copyright law is facing an unprecedented challenge. The combined and interrelated forces of technological progress and globalization have created a communications revolution whose end and ultimate direction are impossible to predict. These forces will require national governments to work ever closer to ensure that the rights of authors, publishers, and the public are adequately protected and that the incentive to create and distribute works of authorship is not harmed by unauthorized reproduction and use of these works.[1]

The United States has recognized this challenge. Over the past 30 years, it has worked aggressively to bring its laws into greater conformity with those of other nations in order to secure for American authors the highest level of international protection.[2]

Unfortunately, the path to greater international cooperation in the future is blocked by a philosophical divide between the United States and continental Europe.[3] The United States is the most

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[1] *See* Copyright Treaty, Geneva, Dec. 20, 1996, preamble, 36 I.L.M. 65, 68 (1997) ("Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments.").

[2] *See* 3 MELVILLE B. & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.01 (1998) (stating that the motivation behind increased protections for foreign works was to benefit American authors by keeping U.S. law in line with the laws of its "principle trading partners"). The United States has progressively adjusted its law over the past 30 years to increase protections for foreign authors in America in the hope and expectation that this would lead to greater protection for American works abroad. *Id.* In furtherance of this aim the U.S. has acceded to the Geneva Copyright Treaty. *Id*.

[3] *See* Stig Strömholm, *Copyright: National and International Development, in* 14 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 2, 3-22 (1990) [hereinafter

significant adherent of the "Common Law" system of copyright protection derived from the common law and copyright statutes of the United Kingdom.[4] The other major branch of copyright law is the "Continental" system of copyright protection, which evolved primarily in France and Germany.[5] Most other nations in the world have systems similar to those of America, France, or Germany.[6] Despite increasing harmony between these systems, the American and Continental approaches to copyright law still lack the requisite consensus to guarantee effective and certain global protection of copyrightable works in the twenty-first century.

The central cause of the disagreement between the Common Law and Continental systems revolves around the question of why copyright law exists. The French and German position is that the purpose of copyright law is to safeguard the author's interests.[7] The United States maintains that the reason for copyright law is to serve the public interest.[8]

In its essence, however, this distinction between public and private interests is esoteric. The United States Constitution provides that Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . ."[9] (*hereinafter* "Copyright Clause."). Thus, the primary constitutional purpose for the copyright power is the public interest.[10] But the Constitution also grants the author a

"Strömholm I"].

[4] Also known as the "Anglo-American" system. *See id.* Most Common Law systems in the world are based on British law. *Id. See, e.g.*, Brad Sherman, *From the Non-original to the Ab-original*, *in* OF AUTHORS AND ORIGINS 128 (Brad Sherman & Alain Strowel eds., 1994) (using the term "Anglo-Australian").

[5] Also known as the "civil law," or the "Romano-Germanic" system. Other civil law systems tend to follow the French and German models. *See* Strömholm I, *supra* note 3, at 3-22. Although different in many ways, the French and German approaches to copyright law are very similar, especially when compared to the Common Law perspective. Stig Strömholm, *Copyright: Comparison of Laws*, *in* XIV INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 3, 3-95 (1990) [hereinafter "Strömholm II"].

[6] *See* Strömholm I, *supra* note 3, at 3-22.

[7] *See, e.g.*, Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, *in* OF AUTHORS AND ORIGINS, *supra* note 4, at 131-32.

[8] *See id.*

[9] U.S. CONST. art I, § 8.

[10] *Id.* ("To promote the progress of Science and useful Arts . . . "). *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 545 (1985) ("copyright is intended

fundamental, exclusive right to control his work.[11] Consequently, the Copyright Clause serves a dual purpose: to protect the interest of the public *and* protect the interests of authors.

Thus, the goal of copyright law is to protect the public interest by protecting the author's interests. As stated by James Madison, the framer of the Constitution's Copyright Clause, "the public good fully coincides . . . with the claims of individuals."[12] Indeed, the Supreme Court has held on numerous occasions that the primary purpose of copyright law is to protect the rights of the individual author in order to safeguard the motivation to create works of authorship.[13] The only Constitutional limitation on the author's right is that it be limited in time.

American, French and German law are in agreement that copyright law should protect the author's interests. Accordingly, all three systems have similar provisions regarding the basic rights of authors,[14] and all recognize that the authors' interests must be balanced with those of the public to ensure the greatest economic and social benefit.

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to increase and not to impede the harvest of knowledge"); Goldstein v. California, 412 U.S. 546, 555 (1973) ("The objective is to promote the progress of science and the arts"); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the [Copyright Clause] is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare.").

[11] U.S. CONST. art I, § 8 ("by securing . . . to Authors . . . the exclusive right . . . ."). This is the only individual fundamental right contained in the original text of the Constitution.

[12] THE FEDERALIST NO. 43 (James Madison).

[13] *See Harper & Row*, 471 U.S. at 546 (the Copyright Act "'is intended to motivate the creative activity of authors and inventors by the provision of a special reward'" (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984))). *See also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of [U.S.] copyright law is to secure a fair return for an 'author's' creative labor."); *Goldstein*, 412 U.S. at 559, 565 (the "very objective" of the copyright is "to induce new artistic creations": the copyright statutes are meant to insure that authors receive "adequate protection to encourage further artistic and creative effort."); American Tobacco Co. v. Werckmeister, 207 U.S. 284, 298-99 (1907) (the "copyright is an exclusive right . . . for the benefit of the author or his assigns" and the Copyright Act "must be read in the light of the intention of Congress to protect this intangible right as a reward of the inventive genius that has produced the work"); Holmes v. Hurst, 174 U.S. 82, 86 (1898) (copyright is "[t]he right of an author to control the publication of his works"); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1883) (it should not "be supposed that the framers of the Constitution did not understand the nature of copyright and the objects to which it was commonly applied, for copyright, as the exclusive right of a man to the production of his own genius or intellect" was a recognized right at the time).

[14] *See* Strömholm II, *supra* note 5, at 3-53, 71-96.

Despite the Euro-American consensus on the importance of authors' rights, one glaring exception to the general harmony between American and Continental copyright law remains. This exception concerns the recognition of an author's moral rights. The French and German systems regard moral rights as the heart and soul of copyright law. To the Europeans, moral rights symbolize the author-oriented nature of their copyright systems. Theoretically, under the European system, the very basis of copyright law is an author's moral right.[15]

American copyright law, on the other hand, recognizes no moral rights *per se*.[16] Rather, the notion of "moral rights" is generally unsettling to the average American lawyer.[17] Americans tend to fear moral rights because of the broad, subjective and undefined nature of the word "moral,"[18] and the fear that recognition of these rights might unreasonably tip the balance of interests between authors and the public in favor of the authors.[19] The concern is that this tipping of the scales might lead to hypersensitive authors making unreasonable demands upon publishers, thereby preventing

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[15] *See* ADOLF DIETZ, DAS DROIT MORAL DES URHEBERS IM NEUEN FRANZÖSISCHEN UND DEUTSCHEN URHEBERRECHT 38-39 (1968).

> "Moral rights" can also be defined as "personal rights," i.e., the author's interests in his work. The general term "moral right" can be equated to the term "natural right." Originally, copyright was also considered a natural right in the common law, before courts considered the natural right to be superseded by statute.

Id.

[16] *See* Gilliam v. American Broad. Co., 538 F.2d 14, 24 (2d Cir. 1976) ("American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation."). *See also* Granz v. Harris, 198 F.2d 585 (2d Cir. 1952); Vargas v. Esquire, 164 F.2d 522 (7th Cir. 1947).

[17] *See, e.g.*, 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 136 (1994) ("unfortunately named moral rights"); Granz, 198 F.2d at 590 (Frank, J., concurring) (it smacks of "something not legal, something meta-legal").

[18] "Moral" pertains to character, conscience and "general principles of right conduct" instead of positive law. BLACK'S LAW DICTIONARY 1008 (6th ed. 1990). There is a fear that "wherever the judicial power is allowed to encroach too far on the widely extended domain of moral duties, it is in danger of becoming inconsistent and unjust." Prince Albert v. Strange, 64 Eng. Rep. 293, 309 (V.Ch. 1849). The failure to maintain the distinction between morality and law would open the door "to the most injurious and arbitrary invasions of the rights of individuals by the ruling power." *Id.*

[19] *See* WILLIAM R. CORNISH, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARK AND ALLIED RIGHTS 310 (1989) (Common law representatives have long feared that the recognition of moral rights would cause publishers, employers and the public to be "held to ransom as infringers of moral rights at a time when it would be difficult and expensive to rectify the wrong. It was this overbearing potential in foreign laws which had for long fuelled the common law antagonism towards them.").

the publication of socially beneficial material.

This American fear, however, is not justified given the practical application of moral rights in the Continental systems. In France and Germany, moral rights are clearly defined and limited. They protect concrete rights of the author — they are not a broad amorphous right of action for him to claim whenever his ego feels slighted. In the practical sense, moral rights protect an author against an unreasonable use of his work. American law has long recognized the need to prevent unreasonable exploitation by invoking an unwritten unfair use doctrine to prevent uses of a work that would stymie an author's creative drive.[20]

Accordingly, moral rights do not contradict the public interest and are compatible with American law. Moreover, by acceding to the Berne Convention (hereinafter "Berne") in 1988, the United States legally obligated itself to enforce the moral rights of authors.[21] Berne provides "the highest internationally recognized standards" for copyright protection."[22] By acceding to Berne, the United States agreed to enforce moral rights in American courts. In spite of this legal obligation to guarantee a minimum of moral rights protection, to this day the United States refuses to officially recognize moral rights, and the enforcement of those rights in American courts remains questionable.[23]

As the pace of globalization increases, moral rights loom on the horizon as a divisive issue. The majority of countries in the world recognize moral rights.[24] The American misperception of moral rights and refusal to effectively implement them — despite a legally binding obligation to do so — continues to be a significant barrier to further international agreement on the basic protections of copyright law and continues to hinder the expansion of copyright protection throughout the globe. Prior to 1988, the absence of the United States from Berne caused other governments

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[20] *See infra* notes 36-306 and accompanying text.

[21] Berne Convention for the Protection of Literary and Artistic Works (Sept. 9, 1886, revised in 1908, 1928, 1948, 1967, 1971), 25 U.S.T. 1341 [hereinafter "Berne"].

[22] *See* Orrin G. Hatch, *Better Late Than Never: Implementation Of The 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171, 171 (1989) (quoting Remarks of President Ronald Reagan on Signing the Berne Convention Implementation Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1405 (Oct. 31, 1988)).

[23] *See infra* notes 358-81 and accompanying text.

[24] *See, e.g.*, Strömholm I, *supra* note 3, at 26.

to resist American efforts to increase international protection.[25] The United States' accession to Berne was motivated in part by an American desire to enhance its "political credibility" and improve its bargaining position internationally.[26] By not adhering to Berne in full, and by ignoring rights recognized in most other nations, the United States continues to leave the door open for other nations to refuse American initiatives to improve international protection for American authors.

Ultimately, moral rights could prove to be an effective means of combating future threats to the rights of American authors.[27] Effective moral rights protections in the United States and abroad will serve to protect American works of authorship from challenges caused by technological innovation that do not fall within the traditional scope of copyright law.

The United States must reconsider and change its stance on moral rights. It has made great efforts to change from a system that largely ignored the rights of foreigners, to one that grants them broad rights.[28] Moral rights are the last significant — but most symbolic — gap between the basic rights offered to authors by American law and the rights enjoyed by authors in most other countries. In short, it is in the United States' interest to close this gap in order to "secure the highest available level" of protection for American authors in the global marketplace.[29]

This article will demonstrate that moral rights are entirely compatible with the Anglo-American approach to copyright law and that it is in the public interest of the United States to implement effective moral rights protections in conformity with the Berne Convention. Part I will discuss the basic moral rights recognized by Continental law and the United States' obligation to

[25] *See* Hatch, *supra* note 22, at 178 ("[T]he conspicuous absence of the United States amongst the Convention's signatory states provided some foreign states with an excuse to avoid stronger bilateral protections.").

[26] *See id.* at 179.

[27] *See infra* notes 399-406 and accompanying text.

[28] *See* Hatch, *supra* note 22, at 172-81. As stated by Secretary of Commerce C. William Verity during the hearings on joining Berne: "Nobody could match us in our disdain for the rights of foreign authors." *Id.* at 173.

[29] *See id.* at 171 (The motivation behind joining Berne was to "secure the highest available level of international copyright protection of U.S. artists, authors, and copyright holders.") (quoting Remarks of President Ronald Reagan on Signing the Berne Convention Implementation Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1405 (Oct. 31, 1988)).

protect these rights under international law. Part II will discuss the longstanding and nearly absolute protection of the moral right to publish under American common and statutory law, and will demonstrate that there is little variation between American, French, and German protections for the author's right to control the publication of his work. Part III will briefly discuss the international safeguards for the moral rights of attribution and integrity, and will demonstrate that American law applies an unfair use doctrine that prevents the unreasonable substitution or omission of an author's name and the unreasonable distortion or alteration of his work, regardless of the traditional view that United States law does not recognize moral rights. Parts IV, V, VI, and VII examine the protections offered by American and Continental law to the rights of attribution, integrity, and retraction, and demonstrate that these rights enjoy significant protection under United States law that does not differ substantially in practical application from the protection of those rights under Continental law. Part VIII demonstrates the inherent harmony between United States law and moral rights. Part IX demonstrates that it is clearly in the United States' interest to implement moral rights based on the considerations that (i) the United States is in breach of its legal obligations under the Berne Convention; (ii) the United States could implement moral rights with little or no disruption to either the current copyright system or the economic exploitation of the work; (iii) American authors deserve equal protection under United States law; (iv) the modern challenges to copyright law and authors' rights are unprecedented; and (v) that those challenges can only be met on the international level, which is only possible if the major copyright producing and consuming nations agree on the most fundamental rights of an author in his works.

I. MORAL RIGHTS IN GENERAL

A. Introduction

Modern moral rights are the result of transnational legal developments in Europe throughout the past century.[30] Moral

[30] *See* 1 STIG STRÖMHOLM, LE DROIT MORAL DE L'AUTEUR EN DROIT ALLEMAND, FRANÇAIS ET SCANDINAVE (1966) [hereinafter "Strömholm III"].

rights protect the product of an author's genius and labor from harmful intrusions by publishers, i.e., those who make the author's work-product public. Moral rights gained widespread international acceptance during the 1920's to the extent that sufficient support existed to add them to the minimum rights of Berne at the Rome revision conference in 1928.[31]

B. Moral Rights Under the Berne Convention

France and Germany are the birthplace of moral rights. French and German law recognize four basic moral rights: (i) The right to publish — the right to decide whether, when, how and by whom the work will be made public; (ii) the right of attribution — the right to receive credit for a published work in the fashion that the author wishes; (iii) the right of integrity — the right to prevent or be compensated for any actions that mutilate, damage, or materially alter the substance of the author's original work and that do harm to the author's honor or reputation; and, (iv) the right to retract — the right to prevent a public dissemination of the work prior to or after publication, provided the author meets certain conditions.[32]

Berne explicitly protects only two of the four moral rights recognized by French and German law: the right of attribution and the right of integrity. Insufficient international agreement prevented the inclusion of the right to publish and the right to retract among Berne's moral rights.[33]

C. The United States' Obligations and Interest in Protecting Moral Rights

As a party to Berne, the United States must comply with the minimum rights of the treaty. Among these minimum rights are the rights of attribution and integrity, and thus American law must

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[31] *See id.*

[32] *See* DIETZ, *supra* note 15, at 32. The "right to modify" is considered a moral right by some, but generally is not included among the moral rights. "With few exceptions . . . legislatures and courts have . . . refused to admit a [right to modify] as claimed by some copyright lawyers." Strömholm II, *supra* note 5, at 65.

[33] *See* Strömholm III, *supra* note 30, at 382-403.

enforce them.[34]

Considering the American interest in achieving greater harmony in international copyright law, an appraisal of American protections for all four moral rights recognized by Continental law is useful in determining the compatibility of moral rights to American law.[35] For example, although it does not recognize them as "moral" rights, American copyright law already explicitly protects the right to publish and the right to retract.

II. THE RIGHT TO PUBLISH

An author has complete control over his work until he decides to publish it. This right to publish is one of the fundamental tenets of Common Law copyright law and the oldest recognized moral right. It is the gateway right for copyright protection as well as moral rights protection.

A. United States Law

1. Common Law

British common law first protected the right to publish in 1732.[36] The American common law right to publish flowed directly from this precedent. As stated by Justice Story, "the adjudications of the Courts of the United States and of England are in entire harmony upon this branch of the law."[37]

In *Wheaton v. Peters*, the Supreme Court held "[t]hat an author, at common law, has a property in his manuscript . . . cannot be doubted."[38] Under the common law right to publish, "the property of the author . . . in his intellectual creation [was] absolute until he

[34] But the U.S. can deny these rights to American authors because the country of origin retains the right to apply domestic law to its citizens and residents. *See* Berne, *supra* note 21, at art. 5(2).

[35] Much of the resistance to moral rights at the time was based on the belief that the United States would be required to adopt rights identical to those in France. Hatch, *supra* note 22, at 181, 185-86.

[36] *See* Millar v. Taylor, 98 Eng. Rep. 201 (K.B. 1769).

[37] 2 JOSEPH STORY, EQUITY JURISPRUDENCE § 943 (11th ed. 1873).

[38] 33 U.S. 591, 656 (1834).

voluntarily part[ed] with the same."[39] The author could only relinquish this right by contract or some unequivocal act that indicated his intent to part with his right to publish.[40] Otherwise, the author had the absolute right to determine whether, "when, where, by whom, and in what form" the work would be published.[41] In short, under American common law "the author [had] a property" in his expression and "the copyright thereof exclusively belong[ed] to him."[42] No law could "compel an author to publish" and "[n]o one [could] determine this essential matter of publication but the author."[43]

This common law right was recognized by federal and state courts and was applied generously. Courts enforced the right specifically for literature,[44] plays,[45] and letters.[46] In general, it applied to "'[e]very new and innocent product of mental labor . . . embodied in writing, or some other material form."[47] Thus, as long as the expression could be discerned from the material form, the right to publish would be protected. It was enforceable against innocent third parties;[48] it was perpetual and enforceable by heirs;[49] and, unlike statutory copyright, it applied to foreigners as

[39] *Harper & Row*, 471 U.S. at 551 (quoting *American Tobacco*, 207 U.S. at 299).

[40] *See* Palmer v. De Witt, 47 N.Y. 532, 543 (1872). An unconditional sale of a painting with no reservation of copyright would constitute a transfer of the right to publish; Pushman v. New York Graphic Soc., 39 N.E.2d 249, 251 (1942). A "de facto publication or performance or dissemination *may* tip the balance of equities" against the author; *Harper & Row*, 471 U.S. at 551 (emphasis added).

[41] *See Palmer*, 47 N.Y. at 536.

[42] Folsom v. Marsh, 9 Fed. Cas. 342, 346 (C.C.D. Mass. 1841) (No. 4,901).

[43] Bartlett v. Crittenden, 2 Fed. Cas. 967, 968 (C.C.D. Ohio 1849) (No. 1,076).

[44] *See, e.g.*, Chamberlain v. Feldman, 89 N.E.2d 863 (1949); Rees v. Peltzer, 75 Ill. 475 (Cir. Ct. 1874).

[45] *See, e.g.*, *Palmer*, 47 N.Y. at 543; Tompkins v. Halleck, 133 Mass. 32 (1882).

[46] *See, e.g.*, *Folsom*, 9 Fed. Cas. at 346 (addressees of letters do have the right to publish them "upon such occasions, as require, or justify, the publication or public use of them; but this right is strictly limited to such occasions." This exception might, for example, have been invoked by the Clinton Administration to justify the release of private letters from Kathleen Willey); Denis v. Leclerc, 1 Mart. (o.s.) 297 (Orleans 1811); Grigsby v. Breckenridge, 2 Bush (Ky.) 480 (Ky. App. 1867).

[47] *Palmer*, 47 N.Y. at 537.

[48] *See Chamberlain*, 89 N.E.2d at 863 (holding that Mark Twain's heirs could prevent publication of an unpublished short story by a third party who had no knowledge of any restriction on the work). *See also Folsom*, 9 Fed. Cas. at 346 ("*A fortiori*, third persons, standing in no privity with either party, are not entitled to publish" an unpublished work.).

[49] *See Chamberlain*, 89 N.E.2d at 863.

well as citizens.[50]

2. Statutory Law

Since the passage of the first copyright act in 1790, the right to publish has enjoyed indirect or direct protection under the copyright statutes.[51] As early as 1841, in *Folsom v. Marsh*, Justice Story concluded that the laws of 1790 and 1831 gave "by implication to the author, or legal proprietor of any manuscript whatever, the sole right to print and publish the same . . . ."[52] Arguably, they gave the author this right explicitly.[53] The Copyright Act of 1870 also provided that violators were liable for damages, and that courts had equitable power to prevent unauthorized publication.[54] In contrast to its predecessors, the Copyright Act of 1909 provided no direct protection, but stipulated that nothing in the Act interfered with the common law right to publish.[55]

In 1976 the right to publish was incorporated explicitly into the subject matter of the new Copyright Act in order to conform American law to Berne.[56] As a result, the Copyright Act now

[50] *See Palmer*, 47 N.Y. 532, 538 (1872) ("That which is regarded and protected as property by the law of the owner's domicile, as well as by the laws of this State, must be equally within the protection of the law, whether the owner be a citizen or alien.") (citing JOSEPH STORY, CONFLICT OF LAWS §§ 376, 379, 380 (7th ed. 1872).

[51] The Copyright Acts of 1790 and 1831 both had sections providing that any person printing or publishing a manuscript without the consent of the author or the assignee "shall be liable" for all damages caused by such a publication. Copyright Act of 1790, ch. 15, § 6, 1 Stat. 124, 125 (1790); Copyright Act of 1831, ch. 16, § 9, 4 Stat. 436, 438 (1831). Moreover, the Act of 1831 provided that the federal courts "empowered to grant injunctions to prevent the violation of the rights of authors" were also empowered "according to the principles of equity, to restrain" any non-consensual publication of a manuscript. Ch. 16, § 9, 4 Stat. at 438.

[52] 9 Fed. Cas. at 347.

[53] The provisions that violators "shall be liable," and that federal courts have the same powers to enforce the right to publish as they do the copyright, speak in favor of such an interpretation. No mention is made of the right to publish as a separate common law right in the Copyright Acts of 1790 and 1831.

[54] *See* VII ROYAL CROWN CASES 134 (Robert Campbell ed., 1901).

[55] *See* Copyright Act of 1909, ch. 320, § 2, 35 Stat. 1075, 1076 (1909) ("Nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefore.").

[56] *See* 17 U.S.C. § 102(a) (1997) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated,

protects a work entirely from the moment of its creation.[57] An involuntary transfer of an unpublished work can occur only after a voluntary declaration of bankruptcy.[58] And the right to publish is protected regardless of the nationality of the author.[59] Moreover, the traditional right to publish was strengthened by the Copyright Act's requirement that a voluntary transfer of copyright be made in writing.[60] However, the Copyright Act's inclusion of the right to publish did place one significant limitation on the traditional right — while the common law right to publish was perpetual, the statutory right is limited to seventy years after the death of the author.[61]

Thus, in general, the inclusion of the right to publish into the Copyright Act has not significantly affected the extent of protection that was afforded under the common law. The main distinction is that the "fair use" exception did not specifically apply to the right to publish before its incorporation into the Act,[62] although similar considerations could "tip the balance of equities in favor of a prepublication use."[63]

But even though fair use now applies to the right to publish, "it has never been seriously disputed that 'the fact that the [author's] work is unpublished . . . is a factor tending to negate the defense of fair use.'"[64] Thus, in *Harper & Row v. Nation Enterprises* (hereinafter "*Harper & Row*"), the Supreme Court held that the use of excerpts from an unpublished work infringed the author's right

either directly or with the aid of a machine or device."). *See also id.* § 101 ("A work is created when it is fixed . . . for the first time."). Every version of a work is protected, no matter how incomplete, as long as it is able to be perceived.

[57] *See Harper & Row*, 471 U.S. at 544. "Creation" means fixation in a "copy" for the first time: a "copy" is a material object from which the expression can be communicated. A work does not have to be finished for creation to occur: every fixed portion of the work constitutes the work at that time. And every version "constitutes a separate work." 17 U.S.C. § 101. Unlike under the Copyright Act of 1909, formalities such as registration are no longer required to pursue a claim for infringement. *Id.* § 408(a).

[58] *See id.* § 201(e).

[59] *See* 17 U.S.C. § 104.

[60] *See id.* § 204(a). Prior to the Copyright Act of 1976 the common law right to publish could be transferred orally.

[61] *See id.* §§ 302, 303. Thus, the Berne Convention had a limiting effect in this area of American copyright law.

[62] *See Harper & Row*, 471 U.S. at 550-51. *See also infra* note 74.

[63] *Harper & Row*, 471 U.S. at 551. *See also supra* note 40 and accompanying text.

[64] *Harper & Row*, 471 U.S. at 551. The Court's use of the word "tending" demonstrates that it did not hold that unauthorized publication automatically negates fair use. *See also infra* notes 74-78 and accompanying text.

to publish despite the strong public interest in obtaining the information.[65] Although the Court indicated that it might have found for the author regardless, based on the importance of the material taken from the work,[66] the Court emphasized the special nature of the right to publish, stating that: "Under ordinary circumstances, the author's right to control the first public appearance of his . . . expression will outweigh a claim of fair use."[67] The Court thereby recognized the author's interests in creative control.[68] Under the Court's rationale, copyright and the right to publish are not to be weighed equally: "Because the potential damage to the author . . . is substantial, the balance of equities in evaluating . . . fair use inevitably shifts."[69] The right to publish "encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work."[70]

In *Salinger v. Random House* (hereinafter "*Salinger*"), the Second Circuit followed the Supreme Court's reasoning in *Harper & Row* by placing special emphasis on the fact that letters cited without permission in a biography of J.D. Salinger were unpublished.[71] The court went on to hold that both direct quotes and close paraphrases of Salinger's expressions violated his right to publish.[72] Furthermore, the court stated that *Harper & Row* "conveys the idea that [unpublished] works normally enjoy complete protection against copying any protected expression."[73]

In 1992 Congress amended the fair use provision of the Copyright Act — "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon

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[65] *See* 471 U.S. at 556 ("substantial public import").

[66] *See id.* at 569.

[67] *Id.* at 555. This "right to control" weighs against uses that might be allowed under post-publication copyright, such as use in a review or news account. *Id.* at 564.

[68] *See id.* at 554-55. *See also id.* at 564 ("A use that so clearly infringes the copyright holder's interests in confidentiality and creative control is difficult to categorize as 'fair.'").

[69] *Id.* at 553. *See also id.* at 552-55. The legislative materials also supported this conclusion. *Id.*

[70] *Id.* at 564.

[71] *See* 811 F.2d 90, 96 (2d Cir. 1987). The fact that the biography was unauthorized did not help.

[72] *See id.* at 97-98. The paraphrases were used with the intent to copy Salinger's manner of expression.

[73] *Id.* at 97.

consideration of all [four of the fair use factors]."[74] Though the intent of this amendment was to limit the broad scope of the right to publish, its effect will likely be limited. In essence, the amendment changes nothing with regard to the fair use determination for unpublished works. Neither the Supreme Court, nor the Second Circuit, based its decision solely on the fact that the works were unpublished.[75] Both courts applied the entire fair use test; thus, other factors weighed heavily in their decisions.[76] The unpublished nature of the works weighed heavily in the author's favor, but it was not determinative: it was simply an element to be considered in applying the fair use test.[77] Congress' amendment changes neither the importance of the right to publish to the author, nor the fact that the equities involved in a fair use determination differ for the right to publish and the post-publication copyright.[78]

B. Continental Law

Article 19 of the French copyright law grants the author the sole right to publish his work.[79] This right ensures the French author's liberty to control the manner and conditions of publication and to avoid any non-consensual publication.[80] Therefore, the right to publish is dependent on the author's consent,[81] which must be express or at least able to be implied from the circumstances.[82]

Under French law, authors maintain a host of rights. For example, creditors are prohibited from seizing an unpublished

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[74] Pub. L. No. 102-492, 106 Stat. 3145 (codified at 17 U.S.C. § 107 (1997)). The factors in § 107 to be considered in finding fair use are: 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used; and 4) the effect of the use upon the potential market for or value of the copyrighted work. *Id*.

[75] *See Harper & Row*, 471 U.S. at 551 (1985) ("tending to negate the defense of fair use"); *Salinger*, 811 F.2d at 97 (2d Cir. 1987) ("normally enjoy complete protection").

[76] *See Harper & Row*, 471 U.S. at 560-69; *Salinger*, 811 F.2d at 96-98.

[77] *See Harper & Row*, 471 U.S. at 564 ("The fact that a work is unpublished is a critical element in its 'nature,'" the second fair use factor.).

[78] *See supra* notes 37-43, 62-77 and accompanying text.

[79] Law No. 57-298 of Mar. 11, 1957, J.O., Mar. 14, 1957, p. 2723, art. 19. ("The author has the sole right to make his work public." [L'auteur a seul le droit de divulguer sont oeuvre.]).

[80] *See* ALAIN STROWEL, DROIT D'AUTEUR ET COPYRIGHT 495, n. 52 (1993).

[81] *See* DIETZ, *supra* note 15, at 60. *Cf. supra* note 39 and accompanying text.

[82] *See* DIETZ, *supra* note 15, at 60. *Cf. supra* note 40 and accompanying text.

work without the author's consent,[83] and public lectures do not in and of themselves constitute publication.[84] The author also has a strong interest in protecting his right to review and correct his work.[85] An abandonment of a work does not permit a third party to publish it.[86]

Unlike its American cousin, French copyright law allows an author to refuse to deliver his work to a purchaser despite contractual obligations, though the author will be liable for restitution and damages.[87] Furthermore, the moment of delivery is not determined by actual delivery of the work, but by the author's decision that the work is completed.[88]

In Germany, Article 12 of the copyright law protects the right to publish.[89] Article 6 of the German law reinforces the notion that a publication can occur only with the author's consent.[90] The provision that an author can determine "how" his work will be

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[83] *See* Vergne v. Créanciers Vergne, Cour royale de Bordeaux, S. Jur. 1828-30, 2, 5. *Cf. supra* note 58 and accompanying text.

[84] *See* Marle v. Lacordaire, Cour royale de Lyon, July 17, 1845, D. 1845, 2, 128; S. 1845, 2, 469. *Cf. supra* note 40 and accompanying text.

[85] *See Lacordaire*, D. 1845, 2, 128; S. 1845, 2, 469. *Cf. supra* note 68 and accompanying text.

[86] *See* DIETZ, *supra* note 15, at 59, *citing* Camoin, Trib. civ., Seine, Nov. 15, 1927, D. 1928, 2, 89; Paris, Mar. 6, 1931, D. 1931, 2, 88. *Cf. supra* note 48 and accompanying text.

[87] *See* DIETZ, *supra* note 15, at 58, *citing* Whistler, Trib. civ., Seine, Mar. 20, 1895 & Paris, Dec. 2, 1897, D. 1898, 2, 565; Cass. civ., Mar. 14, 1900, D. 1900, 1, 497 (holding that artist who contracted to paint a portrait could withhold the portrait from the purchaser). The same result could possibly occur in an American court, but under a theory of contract law instead of copyright. Considering the personal nature of an unpublished work, a court might be inclined to award damages instead of specific performance.

[88] *See* Vollard v. Rouault, Trib. civ., Seine, Sept. 10, 1946, D. 1947, 98; Cour d'Appel Paris, Mar. 19, 1947, D. 1949, 20. *See also* P. v. Consorts Rouault, Cour d'Appel Orléans, Mar. 17, 1965, J.C.P. 1965, 14186. Such a result would be unlikely in an American court.

[89] *See* German Federal Republic Copyright Statute [hereafter "FRG"] art. 12 (*translated in* COPYRIGHT LAWS AND TREATIES OF THE WORLD (1966) (Official German text published in "Bundesgesetzblatt," v. 9.9.1965 (BGBl. I S.1273))

> (1) The author shall have the right to determine whether and how his work is to be disseminated; (2) The right of publicly communicating the contents of his work or a description thereof is reserved to the author, provided that neither the work, nor its essence, nor a description thereof has previously been publicly disseminated with his consent.

Id.

[90] *See* FRG, *supra* note 89, art. 6(1).

published corresponds to the author's right to determine the conditions of publication in the United States: "whether[,] . . . when, where and in what form first to publish a work."[91]

German copyright law basically grants the author an absolute right to control the first publication of his work. No one can publish the work or a description thereof without the author's consent.[92] However, this consent can also be implied — a communication to a broad public audience can constitute a consensual publication.[93]

III. THE RIGHTS OF ATTRIBUTION AND INTEGRITY: THE BERNE CONVENTION RIGHTS

There are certain concerns that are inherently tied to the author's right to control the publication and reproduction of his creation: namely, the author's interest in receiving title to and credit for the product of his labors, and his interest in preventing damage to that product.

A. The Berne Convention

Article 6*bis* of Berne protects the "most well-established and almost universally accepted"[94] moral rights of attribution and integrity:

> 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.[95]

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[91] *Harper & Row*, 471 U.S. at 564. *Cf.* Law No. 57-298 of Mar. 11, 1957, J.O., Mar. 14, 1957, p. 2723, art. 19.

[92] *See* FRG, *supra* note 89, art. 12(2). *Cf. supra* note 39 and accompanying text.

[93] *See* DIETZ, *supra* note 15, at 61. *Cf. supra* note 40 and accompanying text.

[94] Strömholm II, *supra* note 5, at 44.

[95] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, at art. 6*bis*(1), reprinted in World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) 177

Article 6*bis* does not require uniformity of implementation of moral rights: "[t]he means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed."[96]

The attribution right empowers the author "to claim recognition of authorship wherever and whenever a protected work is made accessible to the public."[97] The integrity right gives the author the right to "object to any distortion, mutilation or other modification of . . . the said work, which would be prejudicial to his honor or reputation."[98] This conditioning of a violation on prejudice to the honor or reputation of the author was done at the insistence of the Common Law Berne members.[99] The question of damage to the honor or reputation of the author is open to different interpretations and applications.[100] In addition, the right of integrity does not prohibit the complete destruction of a work by its owner.[101]

B. American Protection of Moral Rights: An Equitable Rule of Reason.

1. No Express Rights

No provision of the Copyright Act, other statute, or the common law grants the author an express right of attribution or integrity.[102]

(1978).

[96] Berne, *supra* note 95, at art. 6*bis*(3).

[97] Strömholm II, *supra* note 5, at 44.

[98] Berne, *supra* note 95, at art. 6*bis*(1).

[99] *See* STROWEL, *supra* note 80, at 508. This formula had a greater resemblance to the familiar common law concepts of defamation and unfair competition. *Id.* The original proposal used the term "moral interests." *Id.*

[100] *See* WILHELM NORDEMANN, ET AL., INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS LAW 87-88 (1990).

[101] *See infra* notes 295-97, 302-04 and accompanying text.

[102] With the exception of visual works of art. *See infra* notes 260-93 and accompanying text.

2. "Well-Recognized" Rights

At the core, "there is no question that [the rights of attribution and integrity are] well-recognized within the fabric of U.S. law."[103] The moral rights contained in and required by Berne's Article 6*bis* are equivalent to rights long recognized by the common law as inherent elements of the author's interests in his work.[104] Although the appellation "moral rights" is a stranger to American courts, the rights of attribution and integrity have received continuous, albeit limited, protection under the common law and statutory law. These equivalent rights attach at the moment of creation and generally protect the author's work from uses that exceed his reasonable consent. The failure to attribute or a severe alteration can injure the author by denying him credit for, or changing, the substance of his creation.

3. Equivalent Rights: The Unfair Use Doctrine.

Thus, American law provides a number of alternative means of protecting an author's interests in attribution and integrity. These alternatives derive from an equitable rule of reason. An agreement to publish, or a transfer of the copyright, implies that the work will be used in a reasonable manner. In every contract "there exists an implied covenant of good faith and fair dealing," and a party must refrain from actions that harm or destroy the rights of the other party.[105] An "author's consent to a reasonable use of his copyrighted works has always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science and the useful arts . . . ."[106] This implied reasonable use was applied to support the common law policy of fair use.[107] But it also means that an unreasonable, unfair use of the work implicitly violates the author's consent to the use of his work. This "'equitable rule of reason' . . . 'permits courts to avoid rigid application of the copyright statute when . . . it would stifle

[103] 3 NIMMER, *supra* note 2, at § 8D.02(D)(1).

[104] *See infra* notes 115-224 and accompanying text.

[105] *See* Kirke La Shelle Co. v. Paul Armstrong Co., 188 N.E. 163, 167 (1933). *See also* Manners v. Morosco, 252 U.S. 317, 327 (1920) (Clarke and Pitney, JJ., dissenting).

[106] *Harper & Row*, 471 U.S. at 549 (1985) (citing HORACE G. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).

[107] *See id.* at 549.

the very creativity which that law is designed to foster.'"[108]

In concordance with this unfair use doctrine, American law generally protects an author's moral rights unless he expressly consents to waive them. Uses of the work that exceed the reasonable author's consent and that could affect his creative drive are treated as infringements of the author's rights. Thus, no reasonable expectation of moral rights contradicts the public interest. In fact, the public shares an interest in knowing the true source of a work and in receiving the work in unadulterated form.

Accordingly, market practices also generally respect moral rights. There are few incentives for publishers to violate an author's interests in attribution and integrity. The publisher has a strong incentive to use the author's name and work faithfully. The publisher's product is the author's work. The publisher has an interest in using the author's name in connection with the product. The public wants to know the source of a work and purchases many works according to their source.[109] Intentionally misattributing the work or altering its integrity to an extent that it could damage the author's reputation would: (i) undermine the economic value of the author's work; (ii) undermine the value of future works by that author; (iii) dissuade other authors from contracting with the publisher; and, (iv) injure the publisher's reputation in the eyes of the public, should the substitution or mutilation become public knowledge.[110] In short, a reasonable publisher recognizes that he cannot make an unreasonable use of the author's work.

4. Pre-Publication Protection

Courts recognize that an author has an exclusive right to property in his work.[111] The author's property right is "absolute until he voluntarily parts with" it.[112] This right includes the right to determine "whether . . . when, where, by whom, and in what

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[108] *Id.* at 550.

[109] *See* Smith v. Montoro, 648 F.2d 602, 607 (9th Cir. 1981).

[110] *See, e.g., id.*

[111] *See, e.g.*, *Palmer*, 47 N.Y. at 537 ("Its basis is property"); *Folsom*, 9 Fed. Cas. at 346.

[112] *American Tobacco*, 207 U.S. at 299.

form" the work will be published.[113] The Supreme Court confirmed this interpretation in 1985.[114] Thus, the protection of moral rights under American law is absolute prior to publication.

5. Post-Publication Protection

United States law has consistently protected various aspects of the author's rights to attribution and integrity after publication. The Copyright Act indirectly protects aspects of the author's attribution and integrity rights. In addition, an author can pursue a number of common law and statutory claims outside of the Copyright Act that prevent an unfair use of the author's work.

IV. THE RIGHT OF ATTRIBUTION

The right of attribution entails three interrelated rights: (i) the right to claim recognition as the author of a work; (ii) the right to use an alternative attribution — to remain anonymous or to use a pseudonym; and, (iii) the right to prevent a false attribution, i.e., to prevent others from inaccurately describing the author's contribution to a certain work.

A. The Right to Claim Authorship

1. United States Law

American law protects the right to claim authorship in a number of ways, starting with the Copyright Act. A major purpose of copyright is to prevent another person from misappropriating the author's work. If another person takes the author's work and claims it as his own, he is violating the author's copyright.

After a transfer of the copyright, the author usually maintains his right to claim attribution. First, the author can preserve his right by contract. A contract clause providing for attribution will be

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[113] *Palmer*, 47 N.Y. at 536.

[114] *See Harper & Row*, 471 U.S. at 564 (holding that an author has the right to determine "whether . . . when, where, and in what form first to publish a work").

enforced by courts.[115] Such a provision will be extended to cover "any production *based upon* the author's work."[116]

Second, even if a contract is silent regarding attribution, a right to claim authorship can be implied. The failure to attribute can constitute a breach of contract, because attribution "necessarily affects [the author's] reputation and standing, and thus impairs or increases his future earning capacity":[117] the author's reputation is his "stock in trade" and the failure to attribute can cause him "irreparable injury."[118] A contractual obligation to provide attribution can also be inferred by the "custom and usage" of the industry in question.[119] If an implied right to claim authorship is found, the author is entitled to injunctive relief or damages.[120]

A contract is usually interpreted according to its terms. Under the Copyright Act, an author has certain rights which he can transfer individually or collectively. The right to claim authorship is not among those rights. The author has no statutory right to attribution. Conversely, the transferee gains no contractual right to claim authorship absent an express provision, even if the author transfers the work in its entirety. No inference can be made that the author transfers the right to attribution automatically when he transfers the copyright.[121] To do so would contradict the purpose of the Copyright Clause and constitute unfair competition.[122]

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[115] *See, e.g.*, Granz v. Harris, 198 F.2d 585, 588 (2d Cir. 1952); Paramount Prods., Inc. v. Smith, 91 F.2d 863 (9th Cir. 1937), *cert. denied* 302 U.S. 749 (1937).

[116] 3 NIMMER, *supra* note 2, at § 8D.03(A)(3).

[117] Clemens v. Press Publ'g Co., 122 N.Y.S. 206, 208 (Sup. Ct. App. Term. 1910) (finding the terms of the contract implied that attribution was an element of the contract). *See also Granz*, 198 F.2d at 588 (holding that harm to an author's reputation warrants relief).

[118] *See* Poe v. Michael Todd Co., 151 F. Supp. 801, 803 (S.D.N.Y. 1957) (finding sufficient showing by author to grant a trial under contract law for a screen play where the exact terms of the contract were uncertain).

[119] *See* Geisel v. Poynter Prods., Inc., 295 F. Supp. 331, 337-38 (S.D.N.Y. 1968). *See also Poe*, 151 F. Supp. at 802.

[120] *See, e.g.*, *Granz*, 198 F.2d at 588 (holding injunctive relief appropriate since harm is irreparable and damages are difficult to prove); *Poe*, 151 F. Supp. at 802 (ruling damages trial appropriate where plaintiff filed too late for injunctive relief but damage to his reputation could constitute an irreparable injury).

[121] The copyright is originally the author's. It is a right to the use of the author's work. Even if the author transfers all use-rights to the publisher, the work is still originally the author's product. Just as a distributor who purchases goods wholesale for resale, the publisher has no automatic right to remove the "label of origin" from the author's product. Only an express contractual waiver would suffice for such a finding.

[122] Not receiving recognition would stymie the author's incentive to create. *See, e.g.*,

Thus, even if an author has no right under the Copyright Act or contract law, he still maintains a right to pursue a common law or statutory claim for unfair competition. The Copyright Act does not pre-empt claims under the theory of unfair competition.[123] Unfair competition has two forms: passing-off and reverse passing-off. Passing off consists of selling goods as those of another in a manner that would actually or likely deceive the public.[124] Reverse passing-off occurs when one sells the goods of another as one's own in a manner that would actually or likely deceive the public.

In *International News Service v. Associated Press* the Supreme Court held that reverse passing-off constituted "misappropriation," and therefore unfair competition.[125] Although "unfair competition" implies competition between two similar products, the "invocation of equity rests more vitally upon the unfairness" of the product's representation.[126] Using a particular author's name on the packaging and advertising for a work will almost always indicate to the public that it is that author's work.[127] Replacing the author's name will mislead the public that another author produced the work.

The crux of the issue in misappropriation cases — similar to the standard applied in copyright cases — is "whether the defendant's activities are likely to destroy the incentives for plaintiff and others in its position to engage in the relevant productive or creative activities."[128] Thus, in *Smith v. Montoro* (hereinafter "*Smith*"), the Ninth Circuit granted an actor relief under section 43(a) of the Lanham Act.[129] Section 43(a) is the "federal counterpart to state

Poe, 151 F. Supp. at 803 (finding irreparable injury would occur for failure to credit); *Clemens*, 122 N.Y.S. at 208 (stating that attribution "necessarily affects [the author's] reputation and standing, and thus impairs or increases his future earning capacity").

123 *See* International News Serv. v. Associated Press, 248 U.S. 215, 234-45 (1918) [hereinafter "INS"].

124 *See, e.g.*, *id.*; Gardella v. Log Cabin Prod., Co., 89 F.2d 891, 896 (2d Cir. 1937).

125 248 U.S. at 242. *See also id.* at 247 ("The ordinary case [is passing-off,] but the same evil may follow from the opposite falsehood . . . [T]he principle that condemns the one condemns the other.") (Holmes, J., dissenting); ROGER E. SCHECHTER, UNFAIR TRADE PRACTICES AND INTELLECTUAL PROPERTY 123 (2d ed. 1993).

126 *See* Vogue Co. v. Thompson-Hudson Co., 300 F. 509, 512 (6th Cir. 1924).

127 *See* Yameta Co. v. Capitol Records, Inc., 279 F. Supp. 582, 587 (S.D.N.Y. 1968) (advertising and selling records that gave impression that Jimi Hendrix was the primary performer misled the public).

128 SCHECHTER, *supra* note 125, at 123. *See also Harper & Row*, 471 U.S. at 541-52.

129 648 F.2d at 607 (Section 43(a) is codified at 15 U.S.C. § 1125(a) (1997)).

[common law] unfair competition laws."[130] In *Smith* an actor sued the defendant for removing and replacing his name in credits and advertisements for a film in which the actor had starred.[131] The court found a violation of § 43(a) for "a false designation of origin" or false "representation."[132] The court reasoned that "being accurately credited" was of "critical" importance to the livelihoods of actors.[133] This reasoning would be equally or even more compelling and applicable to the primary authors — director, screenwriter, score-composer, producer — of motion pictures and to the authors of other types of works.[134]

The Lanham Act grants an author the right to "ensure that his or her name is associated with a work when the work is used."[135] Section 43(a) "may be used to prevent 'the misappropriation of credit properly belonging to the original creator.'"[136] The "misappropriation is of the artistic talent required to create the work, not the manufacturing talent required" to publish the work.[137] A Section 43(a) claim is "separate and distinct from a claim of copyright infringement."[138] As a result, the right still applies to works in the public domain, and is theoretically perpetual.

Section 43(a) does not require that the parties be in competition with each other: "any person who believes that he or she is or is likely to be damaged" by a misrepresentation of origin or false advertisement can invoke the section.[139] But the cause of action

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[130] Waiver of Moral Rights in Visual Artworks, Final Report of the Register of Copyrights, March 1, 1996, at 71.

[131] *See* Smith v. Montoro, 648 F.2d at 602.

[132] *See id.* at 603. The Ninth Circuit found the defendant's actions constituted "reverse passing off" — "the unauthorized removal or obliteration of the original trademark . . . before the resale of such goods." 3 NIMMER, *supra* note 2, at § 8D.03(A)(2).

[133] Smith v. Montoro, 648 F.2d at 607.

[134] *See* 3 NIMMER, *supra* note 2, at § 8D.03(A)(2). The California Business and Professions Code provides a remedy based on the principle formulated by the Ninth Circuit in Smith v. Montoro. *See also* Meta-Film Assocs., Inc. v. MCA, Inc., 586 F. Supp. 1346 (C.D. Cal. 1984).

[135] Waldman Publ'g Corp. v. Landoll, Inc., 43 F.3d 775, 781 (2d Cir. 1994).

[136] *Id.* (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 5, comment c; 2 NIMMER, *supra* note 2, at § 8.21(E)).

[137] *Id.*

[138] *Id.*

[139] 15 U.S.C. 1125(a) (1997) (Section 43(a) reads:

> Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device, or any

must be based on more than a plaintiff's subjective belief. In order to proceed the author must have a commercial interest, which is usually defined as a "reasonable interest to be protected."[140] Because his name and reputation are of "critical importance" and "his stock in trade," the author will almost always have a reasonable commercial interest.[141]

Thus, the author has extensive rights to claim authorship of his work. Federal law grants him the copyright and the right to make a claim under the Lanham Act for misappropriation of his work. Under state law, the author can pursue contract-based rights or a common law unfair competition claim. Only an express contractual waiver should suffice to deny a right to claim authorship: if the author divests himself completely "by plain and unambiguous language . . . of every vestige of title and ownership of the [work], as well as the right to [its] possession, control and use," he also divests himself of the right to claim authorship.[142]

2. Continental Law

Both French and German law contain similar provisions protecting an author's right of attribution. French law requires that

> combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services , or commercial activities, or
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
> — shall be liable in a civil action . . . .

Id.

[140] *See* Smith v. Montoro, 648 F.2d at 605 (quoting New West Corp. v. NYM Co. of Cal., Inc., 595 F.2d 1194, 1198 (9th Cir. 1979).

[141] *See supra* notes 118 & 133 and accompanying text.

[142] *Vargas*, 164 F.2d at 525 (finding against plaintiff where he transferred all rights in the work and agreed specifically that the use of certain designations derived from his name and used in connection with his work belonged to the defendant). *See also* Harris v. Twentieth Century Fox Film Corp., 43 F. Supp. 119 (S.D.N.Y. 1942) (holding against author where she retained no rights of property in the work and knew that she would not receive attribution before the contract was signed). Express waivers are permissible under Berne.

the author's name appear on every copy of the work.[143] German copyright law provides that the "author shall have the right of recognition of his authorship of the work" and that the author determines "whether the work is to bear an author's designation and what designation is to be used."[144] Both laws also require that the author must receive recognition every time his work is quoted.[145]

French law contains further and stricter attribution requirements. All advertisements and publicity materials related to a work must give the author credit.[146] Even if he contracts to use a pseudonym or remain anonymous, the author can demand recognition under his own name at any time and is entitled to damages if the demand is ignored.[147]

These provisions are not, however, without their limitations. In Germany, when the author has not expressly contracted to protect the right to attribution, the right can be limited under certain circumstances — the author is precluded from claiming authorship if the custom and usage of the industry, good faith, or the nature of an employment relationship weigh against attribution.[148]

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[143] *See, e.g.*, DIETZ, *supra* note 15, at 116-26; Russel J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1, 27 (1980). Article 6 of the French law provides: "the author enjoys the right of respect for his name, for his authorship, and for his work." ["L'auteur jouit du droit au respect de son nom, de sa qualite et de son oeuvre."] Law No. 57-298 of Mar. 11, 1957, J.O., Mar. 14, 1957, p. 2723, art. 6. The distinction between name and authorship is somewhat unclear. DIETZ, *supra* note 15, at 117. The author has the right "to demand that the work is published under his name or chosen designation." Johnny Hess, Trib. civ., Seine, Feb. 2, 1950, G.P. 1950, 1, 367, *cited in* DIETZ, *supra* note 15, at 123. *Cf. supra* note 135 and accompanying text.

[144] FRG, *supra* note 89, art. 13. This right was recognized by courts prior to the implementation of the law. Landesgericht Hamburg, 26.2.1958, DdA 1959, 135, Bundesgerichtshof, 19.10.1962, GRUR 1963, 40. Architektenurteil, Reichsgericht, 8.4.1925, RGZ 110, 393. But generally, there is little case law in Germany on this right. The statute adopted the prevailing opinion of German theorists. DIETZ, *supra* note 15, at 117, 122. *Cf. supra* note 135 and accompanying text.

[145] *See* DIETZ, *supra* note 15, at 121-22; FRG, *supra* note 89, art. 63. There are a few exceptions. *See infra* note 309 and accompanying text.

[146] *See* Trib. civ., Seine, Feb. 20, 1922, G.P. 1922, 2, 282. In the U.S., the Lanham Act would protect against replacing the author's name with another, but the result in a case of pure deletion of the name would be uncertain. *See supra* notes 115-142, *infra* note 376 and accompanying text.

[147] *See* DIETZ, *supra* note 15, at 120. Guille c. Colmant, CA, Paris, G.P., 1, 17.

[148] *See* DIETZ, *supra* note 15, at 121. *See infra* notes 325-328 and accompanying text.

French law tempers the author's right by limiting his means of redress. In general, French law gives a broad right to sue, but a limited right to recover. Often, the author is entitled only to damages for a failure to attribute.[149] For example, in the case of *Johnny Hess*, the author's name was replaced with that of another in film credits.[150] The court granted damages even though the author had transferred his complete interests in the song, but the court refused to enjoin the film.[151] In *Louiguy*, the author received only one franc in damages. The court found that the failure to attribute damaged only the author's moral interests and did not damage his earnings capacity because he was already internationally famous and successful.[152] In short, French law limits damages for a failure to attribute absent an economic injury.

B. Right of Alternative Attribution: The Right to Remain Unknown.

1. United States Law

The Copyright Act takes for granted that an author can publish his work under an alternative designation,[153] but the author does not have any express right to use a pseudonym or remain anonymous.

If the author maintains the copyright, he can control the manner in which the work is published, including the attribution used on the work. Furthermore, the author can guarantee alternative attribution by an express contract provision.

Moreover, courts will recognize an author's rights to use a particular pseudonym. Under common law and statutory unfair competition, he can prevent anyone else from using his established

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[149] *See* DIETZ, *supra* note 15, at 123-24.

[150] *See* Johnny Hess, Trib. civ., Seine, Feb. 2, 1950, G.P. 1950, 1, 367, *cited in* DIETZ, *supra* note 15, at 123. *Cf. supra* note 131 and accompanying text.

[151] *Cf.* Smith v. Montoro, 648 F.2d at 602 (the Ninth Circuit came to a similar result). *See supra* notes 131-135 and accompanying text.

[152] Trib. gr. inst. Seine, , Jan. 12, 1960, RIDA No. XXXI, 101 (1961), Paris, Mar. 14, 1962, Ann. 1962, 277, *cited in* DIETZ, *supra* note 15, at 123.

[153] *See* 17 U.S.C. § 302(c) (determining duration of copyright for "Anonymous Works, Pseudonymous Works, and Works Made for Hire"). The Copyright Act of 1909 also had such a provision. Ch. 320, § 23, 35 Stat. 1075, 1080 (1909).

pseudonym for a work: (i) he did not create; or, (ii) which "substantially departs" from the original work; or, (iii) where there is a "tendency to deceive the public."[154] An author is also entitled to continue using an established pen name after he ends an employment relationship with an employer.[155]

Whether an author can prevent a transferee from using his real name against his wishes, however, is uncertain in the absence of a contractual provision. The U.S. usually follows a rule of truthful attribution, i.e., an accurate description of an author's connection to a work.[156] Using the author's real name is a true attribution. Absent an express provision, only an unreasonable use of the author's true name will incur liability unless the author has recourse to another cause of action.[157]

2. Continental Law

French law does not expressly protect the right to alternative attribution, however the provisions of Articles 6 and 11 of the French Copyright law make it clear that the author has a right to use a pseudonym or remain anonymous.[158] The German law protects the right expressly.[159] Both laws prevent the publisher from revealing the author's true identity, against his will, on the work or any copy.[160]

Unlike French law, the German law binds the author to the terms of the contract if an author expressly contracts to use an alternative

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[154] *See, e.g.*, *Geisel*, 295 F. Supp. at 354; Clemens v. Belford, Clark & Co., 14 F. 728, 731 (N.D. Ill. 1883); Munroe v. Tousey, 13 N.Y.S. 79, 80 (Sup. Ct. 1891).

[155] *See* Landa v. Greenberg, 24 T.L.R. 441(1908).

[156] *See, e.g.*, *Geisel*, 295 F. Supp. 331. *See also* NIMMER, *supra* note 2, at § 8D.03(B)(2).

[157] If a court found that an author reasonably expected to remain unknown and that the revelation of his identity would stymie his creative drive, it might be inclined to rule for him. The author might also be able to pursue an action for invasion of privacy. For example, the New York Civil Rights Law prevents the use of a person's name, portrait or picture for advertising purposes without the person's written consent. If the author had never used his real name, he would be protected, but the case would be less certain if he had used his real name in connection with another work. N.Y. CIV. RIGHTS LAW § 51 (1992). *See infra* note 173 discussing the right to privacy.

[158] *See* DIETZ, *supra* note 15, at 116-19.

[159] *See* FRG, *supra* note 89, art. 13.

[160] *See* DIETZ, *supra* note 15, at 119.

attribution.[161] An exception applies to this scenario if the author must prove his authorship in response to attacks on it,[162] or if the work enjoys unforeseeable success.[163] Absent any express provision, the law will imply the right of an author to use his real name instead of an alternative attribution whenever he wishes to do so.[164]

Thus, despite differences in form with respect to their American counterpart, the right of the author to prevent revelation of his true identity by third persons in France and Germany will similarly depend on the individual circumstances.[165]

C. Right to Prevent False Attribution

1. United States Law

American law grants the author extensive rights to prevent false attribution. An author can prevent the attribution to him of a work: (i) that he did not create; (ii) which departs substantially from his original work; or, (iii) which inaccurately describes the author's connection to the work.[166]

Originally, the common law enforced these protections as independent, authors' rights and "incidentally, to prevent fraud upon the purchasers."[167] An author was protected "against having any literary matter published as his work which is not actually his creation."[168] This included situations where the author actually created a portion of the work, but the entire work was falsely

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[161] *See id.* at 121.

[162] For example, if someone questions his authorship of a work or someone else claims to be the author. *See id.*

[163] *See id.*

[164] *See id.*

[165] For example, the degree to which the author defends himself against revelations of his true identity will influence any determination. *See id.* If an author defends himself vigilantly against revelation, he will win; if he placidly tolerates revelation and then protests, he will lose. *See id. Cf. supra* note 157 and accompanying text.

[166] *See Granz*, 198 F.2d at 588; *Geisel*, 295 F. Supp. at 354.

[167] Drummond v. Altemus, 60 F. 338, 339 (C.C.E.D. Pa. 1894).

[168] *Id.* at 338 ("That such right exists is too well settled, upon reason and authority."). *See also Clemens*, 14 F. at 731 (finding an author "may restrain another from the publication of literary matter purporting to have been written by him, but which, in fact, was never so written"); Lord Byron v. Johnston, 35 Eng. Rep. 851 (Ch. 1816).

attributed to the author.[169] In such scenarios, the right was independent of copyright: it was enforceable whether or not the author still held a copyright in the work.[170]

During the twentieth century, these independent author's rights were absorbed by the common law of unfair competition.[171] False attribution is the classic case of falsely passing-off goods as those of another. Accordingly, the author can pursue an unfair competition claim under the Lanham Act Section 43(a), or under state law for the misrepresentation of the work's origin when the attribution is absolutely false, inaccurately describes his role, or the work is substantially altered.[172] In addition, the author can pursue a state law tort claim for defamation or invasion of privacy.[173]

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[169] *See Drummond*, 60 F. at 338-39; *Lord Byron*, 35 Eng. Rep. At 851. Both cases involved works containing some material created by the respective author, but designated as being completely by that author.

[170] *See, e.g.*, *Drummond*, 60 F. at 338-39; *Clemens*, 14 F. at 730-31.

[171] *See, e.g.*, *Granz*, 198 F.2d 588; *Yameta*, 279 F. Supp. at 585; Samuelson v. Producer's Distrib. Co., 1 Ch. 201 (1931).

[172] *See Geisel*, 295 F. Supp. at 353; *Yameta*, 279 F. Supp. at 585 (finding a violation of the Lanham Act where packaging and advertising gave the false impression that Jimi Hendrix was the primary artist, when in fact he only provided background accompaniment). *See infra* notes 205-07 and accompanying text.

[173] When an infringing work is of inferior quality and therefore threatens the author's reputation, he can sue for defamation. *See, e.g.*, Clevenger v. Baker Voorhis & Co., 168 N.E.2d 643 (1960), appeal denied 174 N.E.2d 609 (1961); Ben-Oliel v. Press Publ'g Co., 167 N.E. 432 (1929).

The author might also invoke a tort claim for invasion of privacy. *See, e.g.*, Follet v. Arbor House Publ'g Co., 497 F. Supp. 304 (S.D.N.Y. 1980); Eliot v. Jones, 120 N.Y.S. 989 (Sup. Ct. 1910), *aff'd* 125 N.Y.S. 1119 (1st Dep't 1910). The right to privacy incorporates four torts: 1) an intrusion upon a person's solitude, 2) a publication placing person in a false light, 3) a public disclosure of private facts, and 4) appropriation of a person's name or likeness. SCHECHTER, *supra* note 125, at 125.

For false attribution to a work he did not create, an author can make a claim under the "false light" theory, based on a "misappropriation of the unique personal characteristics of the author and the unflattering exposure of these characteristics to the public." Deborah Ross, Comment, *The United States Joins the Berne Convention: New Obligations for Moral Rights?*, 68 N.C. L. REV. 363, 377 (1990). Two cases involving garbled or mimicked presentations of musicians' works found violations based generally on this theory. Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988) (using a double to mimic Bette Midler's voice in Ford's television advertisements); Big Seven Music Corp. v. Lennon, 554 F.2d 504, 512 (2d Cir. 1977) (record company sold "fuzzy" copies of John Lennon's works). Such a finding entitles the author to an injunction. *See Midler*, 849 F.2d at 460.

When a person is misrepresented as the author of a work to which he has a connection but that he did not personally create, he can base his claim on the "public disclosure of private facts" theory of invasion of privacy. Zim v. West Publ'g Co., 573 F.2d 1318, 1326-27 (5th Cir. 1978). In *Zim* the publisher of science books originally

2. Continental Law

Both French and German copyright law grant an author the right to prevent the use of his name in connection with a substantially altered work.[174] However, neither country's law protects the right to prevent attribution for a work the author did not create. This right is protected by the more general "law of personality," similar in some respects to the common law right to privacy.[175]

V. THE RIGHT OF INTEGRITY

The right of integrity is often considered the most essential element of moral rights.[176] The right of integrity protects two interrelated concerns: 1) the author's interest in preserving the integrity of his work, and 2) the author's interest in preserving his reputation — a major factor in the marketability of his works.[177] Berne recognizes this dichotomous purpose by granting the author the right to 1) "object to any distortion, mutilation or other modification of . . . the . . . work," that 2) "would be prejudicial to his honor or reputation."[178] Thus, Berne's right of integrity

authored by Zim published and sold a revision of the books naming Zim as the author without first obtaining the author's consent. The elements of "public disclosure of private facts" are: 1) publication of private information (i.e., the plaintiff's name), and 2) a reasonable person would object to such publication.

Finally, an author could rely on the "right to publicity." The right to publicity "protects against the unauthorized commercial use of a person's name, likeness or other personal attributes in a way that causes commercial damage to the plaintiff." SCHECHTER, *supra* note 125, at 125. Actionable causes have included: 1) the imitation of a performer's voice, *Midler*, 849 F.2d at 460; 2) the use of celebrity doubles, Allen v. National Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985); and 3) the unauthorized appropriation and broadcast of a circus performer's act, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (filming and broadcast of human cannonball's act without his consent could harm his ability to earn a living).

[174] *See* DaSilva, *supra* note 143, at 28. *See also* DIETZ, *supra* note 15, at 99, 116-126.

[175] *See* DIETZ, *supra* note 15, at 117-19. Continental lawyers consider that this right protects the author *qua* author instead of protecting his work of authorship. The American and Continental systems are both premised on protecting authors' specific interests in their works. Copyright law does not apply to general questions of honor, privacy or reputation.

[176] *See* STROWEL, *supra* note 99, at 479.

[177] *See* DIETZ, *supra* note 15, at 111. An author's expression — the work — is a reflection of the author's personality — his experiences, education, and personal and professional integrity. A mutilation or malevolent alteration of the work will reflect poorly on the author. *See, e.g.*, *supra* notes 205-24 and accompanying text.

[178] Berne, *supra* note 95, at art. 6*bis*(1).

requires an alteration to be sufficiently substantial to prejudice the author's honor or reputation to be actionable.

A. United States Law

American copyright law recognizes no right of integrity *per se*. But the Copyright Act, the Common Law, and Section 43 (a) of the Lanham Act provide a number of protections for the right of integrity.

1. The Copyright Act

a. Prohibition of Copying

For 250 years, the prohibition of copying another's work has also served to protect the integrity of a work in Common Law copyright systems. In addition to protecting the whole work, the Copyright Act protects against any unauthorized use of a substantial part of the work.

American courts have traditionally followed British precedent that any use of a "substantial part of the work" constitutes copyright infringement.[179] Citing numerous British cases, Justice Story held in 1841 that:

[179] *See* Cooper v. Stevens, 1 Ch. 567 (1895). Beginning in the mid-eighteenth century, British courts distinguished between valid abridgements of a work and alterations that infringed the copyright. *See, e.g.*, Gyles v. Wilcox, 22 Eng. Rep. 586 (Ch. 1740); Bell v. Walker, 28 Eng. Rep. 1235 (Ch. 1785); Butterworth v. Robinson, 31 Eng. Rep. 817 (Ch. 1801). A "true and proper abridgement" existed when an author invested his own labor, skill, judgment, and expression to convey the sense of another author's work without using the substance of the other's work. VII R.C. CASES, *supra* note 54, at 94. An infringing use was found when an author made only a "colourable abridgement," meaning he copied the substance of another's work rather than investing a high degree of labor, skill, and judgment to create a new work. VII R.C. CASES, *supra* note 54, at 94. A use that communicated "the same knowledge" as the original work was "an actionable violation of literary property." *See Folsom*, 9 Fed. Cas. at 348 (quoting Roworth v. Wilkes, 170 Eng. Rep 889 (1894). The intent of the abridger was immaterial: "it is enough, that the publication . . . is in substance a copy, whereby a work vested in another is prejudiced." *Id.* Thus, the quality of the material used, not the quantity, was the key factor. In *Cooper v. Stevens*, the Court of Chancery found a single illustration from a book of designs a "substantial part of the work" and held the defendant liable for using it. 1 Ch. 567 (1895).

> It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance. If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy *pro tanto*. The entirety of the copyright is the property of the author; and it is no defence, that another person has appropriated a part, and not the whole, of any property.[180]

In short, the quantity taken does not determine the outcome.[181] More important is the quality, the "value of the materials taken[] and the importance of it to the sale of the original work."[182] For example, a "reviewer may . . . cite largely from the original work . . . for the purposes of fair and reasonable criticism" but not "to supersede the use of the original work."[183] And a fair abridgement is not the "facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work."[184] It "must be [a] real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon."[185]

These rules on abridgments are now incorporated into the fair use exception of the Copyright Act.[186] But the level of protection is essentially the same: "a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement."[187] In order "to negate fair use one need only show

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[180] *Folsom*, 9 Fed. Cas. at 348.

[181] *See id.*

[182] *Id.*

[183] *Id.* at 344-45.

[184] *Id.* at 345.

[185] *Id.*

[186] *See* 17 U.S.C. § 107 (1997). *See also Harper & Row*, 471 U.S. at 550 ("As [*Folsom v. Marsh*] illustrates, the fair use doctrine has always precluded a use that 'supersede[s] the use of the original.'"). *See supra* note 74.

[187] *Harper & Row*, 471 U.S. at 568 (citing Senate Report). The fair use test is more complex than the factors weighed in the earlier abridgement cases. The fair use factors are: 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used; and 4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107 (1997). The major emphasis of fair use is on the effect of the use on the market value of the original work. *Harper & Row*, 471 U.S. at 566. *Cf. supra* notes 180-185 and accompanying text.

that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.'"[188] If someone appropriates the author's labors for profit, he will normally affect the market value of the author's work. Moreover, the potential impact on the market for derivative works must also be considered.[189]

b. Derivative Works

Section 106(2) of the Copyright Act grants the copyright owner the sole right to produce "derivative works based upon the copyrighted work."[190] A derivative work is "based upon one or more preexisting works . . . [that] may be recast, transformed, or adapted[; a] work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship."[191]

When someone has the right to make a derivative work, he must "give appropriate expression to the theme, thought, and main action", i.e., substance of the original.[192] The copyright for the authorized derivative work extends only to "the novel additions made to the underlying [original] work and the derivative work does not affect the 'force or validity' of the copyright" in the original work.[193] As a result, a party that has rights to adapt a derivative work cannot exceed the permission granted by the author or owner of the original copyright when it makes the derivative work.[194]

An unauthorized derivative work is a copyright infringement if it "incorporate[s] a portion of the copyrighted work in some

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[188] *Harper & Row*, 471 U.S. at 568 (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)).

[189] *See id.*

[190] 17 U.S.C. § 106(2) (1997).

[191] 17 U.S.C. § 101 (1997).

[192] Curwood v. Affiliated Distribs., Inc., 283 F. 219, 222-23 (S.D.N.Y. 1922) ("elaboration of a story means something other than that [the storyline] should be discarded, and its title and authorship applied to a wholly dissimilar tale").

[193] *Gilliam*, 538 F.2d at 20.

[194] *See id.* For example, if a "copyright owner of an underlying work limits his consent for its use in a derivative work to a given medium (e.g. opera), the copyright owner of the derivative work may not exploit such derivative work in a different medium (e.g. motion pictures) to the extent the derivative work incorporates protectible material from the underlying work." *Id.* at 20 n.4.

form . . . ."[195] Thus, a person who prepares a work incorporating any portions of the original work without the copyright owner's consent infringes on the copyright "whether or not prejudicial to the author's reputation."[196]

c. Conclusion

The provisions of the Copyright Act regarding fair use and derivative works prevent a violation of the right of integrity. Any unauthorized use of a key portion or of the substance of a work will be an infringement of the copyright in that work, unless such infringement falls under fair use or another specific exception.

These provisions effectively protect the author's right to integrity versus third parties. With regard to the rights of the author *vis-à-vis* his publisher, however, the right to integrity provided by the Copyright Act is limited. The publisher is authorized to make use of the original work. Because the rights in Section 106 are divisible, the author can enforce his right to integrity against a publisher who prepares an unauthorized derivative work.[197] In the case of an absolute transfer of copyright, however, an infringing derivative work would infringe the copyright owner's, rather than the author's, right. The author's right to prevent non-consensual alterations after a transfer or licensing of the copyright would depend largely on the language of the contract or on alternative common law and statutory causes of action.

2. The Predominance of Contract Law

Under the traditional rule, an author has no right to prevent alteration if he did not reserve the right to integrity at the time of contracting, i.e.,: the author's "so-called 'moral right' is controlled by the law of contract."[198] Thus, if the author contractually grants

[195] H.R. REP. NO. 94-1476, *reprinted in* 17 U.S.C. at 909 (1994).

[196] *See* Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, 10 COLUM.-VLA J.L. & ARTS 513, 554 (1986).

[197] Prior to 1976 the copyright was not divisible. HORACE G. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 46-47 (1944). This principle weakened the author's control over the uses of his work.

[198] Edison v. Viva Int'l, Ltd., 421 N.Y.S.2d 203, 206 (1st Dep't. 1979). *See also* Seroff

a transferee or licensee the right to make changes to his work, he cannot later hinder such alterations;[199] the author can, however, expressly reserve the right to prevent changes.[200] But minimal changes to modernize the work[201] or which are necessary to present the work in another, author-approved, medium might be permitted without the author's consent.[202] For example, a film producer did not have the right to enjoin Columbia from inserting commercials into the television versions of his films, although the contract reserved to him the right to approve all final edits.[203]

This traditional rule is not, however, absolute. Where a contract is silent regarding alterations, "the parties will be deemed to have adopted the custom prevailing in the [particular] trade or industry."[204] Thus, unreasonable changes that are not required by the medium in which the work is presented or that exceed industry practices are not preempted by the contract.

3. Unfair Competition

Consequently, a publisher does not have the right to make changes that unreasonably alter the substance of a work. When "the use being made of her literary production [is] such as to injure the reputation of the work and of the author" and amounts to a deception of the public, the author can make a claim under unfair competition.[205] When the publisher uses the author's name to sell

v. Simon & Schuster, Inc., 162 N.Y.S.2d 770, 775 (Sup. Ct. 1957), *aff'd*, 210 N.Y.S.2d 479 (1st Dep't 1960), *appeal denied*, 21 N.Y.S.2d 1000 (1st Dep't 1961); Crimi v. Rutgers Presbyterian Church, 89 N.Y.S.2d 813, 819 (Sup. Ct. 1949) ("The time for the artist to have reserved any rights was when he and his attorney participated in the drawing of the contract with the church.").

[199] *See, e.g.*, *Seroff*, 162 N.Y.S.2d at 770; Dreiser v. Paramount Publix Corp., 22 COPYRIGHT OFF. BULL. 106 (Sup. Ct. 1938); Jones v. Am. Law Book Co., 109 N.Y.S. 706 (1st Dep't 1908).

[200] *See, e.g.*, Manners v. Famous Players-Lasky Corp., 262 F. 811 (S.D.N.Y. 1919); Royle v. Dillingham, 104 N.Y.S. 783 (Sup. Ct. 1907); Rey v. Lafferty, 990 F.2d 1379, 1392 n.10 (1st Cir. 1993), *cert. denied*, 510 U.S. 828, (1993) (an author may insure "'quality control and high standards in the exploitation' of her creative work") (quoting Clifford Ross Co. v. Nelvana, Ltd., 710 F. Supp. 517, 520 (S.D.N.Y. 1989)).

[201] *See* Edgar Rice Burroughs, Inc. v. Metro-Goldwyn-Mayer, Inc., 23 Cal. Rptr. 14 (Ct. App. 1962). *See also* NIMMER, *supra* note 2, at § 8D.04(A)(1).

[202] *See* NIMMER, *supra* note 2, at § 8D.04(A)(1). *See also Manners*, 262 F. at 811.

[203] *See* Preminger v. Columbia Pictures Corp., 267 N.Y.S.2d 594 (Sup. Ct. 1966), *aff'd* 269 N.Y.S.2d 913 (1st Dep't 1966), *aff'd* 219 N.E.2d 431 (1966).

[204] *Id.* at 598.

[205] Prouty v. NBC, 26 F. Supp. 265, 266 (D. Mass. 1939).

a "garbled version" of a work that "substantially departs from the original," he is giving the false impression that he is actually selling the author's work and is guilty of unfair competition.[206] The unfair competition will usually be evident and automatic, since the use of the author's name will almost always deceive the public that it is the author's work.[207] The result is that the question in an unfair competition case ultimately comes down to the standard for the right of integrity under Berne: whether a use is injurious to the work and reputation of the author.[208]

Thus, in a case where commercials would "so alter, adversely affect or emasculate the artistic or pictorial quality of [a] motion picture so as to destroy or distort materially or substantially the mood, effect, or continuity of [the] motion picture as produced and directed by" the author, a court will issue an injunction to prevent the broadcast of the film on television.[209] The broadcaster "must give primary consideration" to these concerns, even if no contractual relationship exists between the author and the broadcaster and the author no longer holds the copyright for the film.[210]

In line with the common law application of unfair competition, and consistent with the underlying purpose of Section 43(a), the Lanham Act grants an author a right to protect his interest in the integrity of his work.[211] In *Gilliam v. ABC*, the Second Circuit determined that Section 43(a) applies when a work crediting an author has been altered "into a form that departs substantially from the original work" without the author's consent.[212] Furthermore, the court found that Monty Python had a viable claim for the

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[206] *See Granz*, 198 F.2d at 589 (Frank, J., concurring).

[207] *See Yameta*, 279 F. Supp. at 587 (holding that advertising and selling records that gave impression that Jimi Hendrix was the primary performer misled the public).

[208] *See Prouty*, 26 F. Supp. at 266. *See supra* note 178 and accompanying text.

[209] Stevens v. NBC, 148 U.S.P.Q. 755, 758 (Cal. 1966).

[210] *See id.*

[211] *See Gilliam*, 538 F.2d at 24 (the court based its decision on the many cases protecting an author's business or personal reputation where the representation of a product "creates a false impression of the product's origin" under both the Lanham Act and other causes of action). *See supra* note 139 for the text of the Lanham Act § 43(a) (prohibiting an act that will "deceive as to . . . origin, sponsorship, or approval," or that "misrepresents the nature" of, the goods). *See supra* notes 128-130, 205-207 and accompanying text.

[212] 538 F.2d at 24-25 ("an allegation that a defendant has presented to the public a 'garbled,' distorted version of plaintiff's work seeks to redress the very rights sought to be protected by the Lanham Act . . .").

"mutilation" of its work.[213] The court reasoned that authors must be able to prevent "the mutilation or misrepresentation of their work," because to hold otherwise would contradict "the economic incentive . . . that serves as the foundation of American copyright law."[214] Under Section 43(a), an author can "vindicate [his] personal right to prevent the presentation of his work to the public in a distorted form."[215]

On the other hand, *Gilliam* implies that the sale of a substantially altered work without the author's name generally will not give rise to a claim of unfair competition, since it would not be harmful to the reputation and honor of the author. Such a sale could, however, violate the terms of the publishing contract, expressly or implicitly.[216] But if the public recognizes the work as that of the author, in spite of the omission of the author's name, the public actually will be deceived that it is his work and the publisher could be held liable for defamation or invasion of privacy.[217]

4. Other Claims

Under certain circumstances, the author can sue for defamation when his work has been altered, even if he has transferred the copyright. For example, in the 1832 case *Archbold v. Sweet*, a publisher issued a revised edition of an author's work under the author's name without his consent.[218] In holding the publisher liable for defamation, the court reasoned that the new edition contained substantial and incorrect alterations that injured the author's reputation.[219] Like their English counterparts, American courts have also recognized an author's right to a defamation claim for a materially altered work injurious to his reputation.[220]

Moreover, if a contract provides that an author's name shall be used in connection with the work, the sale of a substantially altered

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213 *See id.* at 24.

214 *Id.*

215 *Id.*

216 *See supra* notes 115-22 and accompanying text.

217 Actual confusion is required for defamation. *Gardella*, 89 F.2d at 896. A libel occurs when a reasonable person recognizes that the plaintiff is the subject of the defamation. *See supra* notes 173-380 and accompanying text.

218 174 Eng. Rep. 55 (N.P. 1832).

219 *See id.* at 57.

220 *See, e.g.*, *Edison* , 421 N.Y.S.2d at 207.

work will constitute a breach of contract:[221] "the established rule is that, even if the contract with the artist expressly authorizes reasonable modifications . . . it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original."[222] The harm to the plaintiff's reputation and the difficulty in determining damages can also warrant injunctive relief.[223] Although copyright law entitles the copyright holder to publish the work without attribution, he will be liable to the author for a breach of contract if he omits the author's name.[224]

B. Continental Law

1. General

Under French and German copyright law, the right of integrity is tempered by practical economic concerns. The laws in both countries require an author to accept reasonable, good faith alterations necessitated by the medium in which the work is presented. In essence, only unauthorized and unreasonable changes to the substance of the work will incur liability. Thus, the degree of protection is similar to the degree provided by American law.[225]

a. France

The right of integrity in France is protected by Article 6 of the copyright law which states that, "the author enjoys the right of respect for . . . his authorship and his work."[226] This right applies

[221] *See Granz*, 198 F.2d at 588 (holding that sale of records where one-fourth of the work was deleted, constituted breach of contract); Packard v. Fox Film Corp., 202 N.Y.S. 164 (1st Dep't 1923) (finding that the unauthorized alteration of the title "was a distinct damage to the plaintiff").

[222] *Granz*, 198 F.2d at 589 (Frank, J., concurring).

[223] *See id.* at 588.

[224] *See Clemens*, 122 N.Y.S. at 206 (Sup. Ct. 1910).

[225] *See supra* notes 179-189, 192-205, 219, 222 and accompanying text.

[226] Law No. 57-298 of Mar. 11, 1957, J.O., Mar. 14, 1957, p. 2723, art. 6 ("L'auteur jouit du droit au respect . . . de sa qualite et de son oeuvre."). Article 47, requiring theater owners to respect the author's work, and Article 56, requiring a book publisher to receive consent of the author for alterations, also apply. *See* DIETZ, *supra* note 15, at 91.

to publishers, owners of original works, and the general public.[227] Furthermore, the French law applies different standards to the reproduction or presentation of original works and the adaptation of derivative works.[228]

i. Use of Original Works

French law generally obligates publishers to reproduce and present original works faithfully and strictly, including the title and any prefaces or introductions. But French law also takes the interests of publishers into account.[229] The publisher can make changes required by the medium of reproduction.[230] A contract between the author and the publisher must be interpreted in good faith.[231] And an author cannot make unreasonable demands based solely on his moral right.[232]

In cases of controversy, the court interprets the meaning and scope of a contract.[233] An author has the right to decide when to sue for a violation of the integrity right, but the court makes the final determination whether or not a violation has occurred — the burden is on the plaintiff to prove a violation of the right.[234]

Furthermore, substantial editing of, or additions to, a work will cause liability but will not usually entitle the author to have the work confiscated or have its distribution enjoined.[235] A publisher

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[227] *See* DIETZ, *supra* note 15, at 92.

[228] *See id.* at 99.

[229] *See id.*

[230] *See id.*

[231] *See id*. *See infra* text accompanying note 232.

[232] *See* Lichtenstein v. KS Visions, Cass. civ. 1re, Mar. 19, 1996, 1996 Bull. Civ. I, No. 137. In *Lichtenstein*, a contract determined that the work should be tailored to the custom and usage of the medium. The author created a work substantially longer than specified and refused to shorten the work based on her moral right to integrity. The publisher made a good faith effort to market the work, but could not. The court then held that the author could not demand specific performance of the contract.

[233] *See id.*

[234] *See* Collet & Bartoli v. Blaise, Cass. civ. 1re, Jan. 17, 1995, 1995 Bull. Civ. I, No. 39. Thus, although the right to integrity is technically a subjective right, i.e., the author-subject has the right to decide if his integrity is impinged, the final determination is an objective evaluation made by the court.

[235] *See* DIETZ, *supra* note 15, at 102. In *Blanchar*, the producer cut large portions of a film for commercial reasons. The court awarded damages to the director, screenwriter and composer of the film for a violation of the right of integrity. In *Prévert & Carné*, the court awarded damages to the director and screenwriter on the same grounds, but refused

also has the express right to make corrections for grammatical errors and to edit passages offending public morals.[236] If the author refuses to allow such changes, the publisher can withdraw from the contract.[237]

ii. Creation of Derivative Works

The French law grants greater flexibility for derivative works. By its nature, a derivative work requires independent creative effort by the adapter and requires an alteration of an original work.[238] Thus, the technological nature of the medium and the creative rights of the adapter should be evaluated when judging alterations.[239] Changes that are necessary to the adaptation will be allowed as long as the substance of the work is not harmed.[240]

The courts must seek a fair balancing of interests between the contracting parties when ruling on the propriety of a derivative work.[241] Courts will evaluate changes to the work objectively, not solely on the subjective opinion of the author, even when a contract provides that the underlying nature of the original work cannot be altered.[242] Thus, as long as a motion picture adaptation of a book maintains the essential substance of the book, the addition, e.g., of a happy ending, will not violate the right of integrity.[243] The author's contractual consent to changes will usually be enforced — only malicious changes will cause an injury

to enjoin and confiscate the film. In *Charlie Chaplin*, the court found that the unauthorized addition of a musical score to the film "The Kid" breached the right of integrity and awarded damages. *Id.*

[236] *See id.*

[237] *See id.*

[238] *See* Bernstein v. Société Pathé-cinéma, Trib. civ., Seine, July 26, 1933, D.H. 1933, 533. *See also* DIETZ, *supra* note 15, at 101.

[239] *See* DIETZ, *supra* note 15, at 105-06.

[240] *See id.*

[241] *See* Richepin v. Rivers, Trib. civ. de la Seine, Apr. 12, 1937, G.P. 1937, 2, 243.

[242] *See* Le don d'Adéle (Barillet v. Société Burgus Films), Trib. civ. de Bordeaux, Jan. 15, 1951, G.P. 1951, 1, 372; Le Lieutenant de Gibraltar (Frondaie v. Compagnie Indust. Et Commerciale Cinématographique), Trib. civ. de la Seine, Jan. 12, 1955, RIDA No. VIII, 104 (1955) (detailing criteria designed to evaluate the propriety of changes: 1) faithfulness to the underlying plot; 2) faithfulness to the flow of the plot; 3) faithfulness to the author's basic idea; 4) faithfulness to the psychological elements of the work; and, 5) changes required by medium of exploitation). *See also* DIETZ, *supra* note 15, at 105.

[243] *See* DIETZ, *supra* note 15, at 101.

to the author's reputation and trigger liability.[244] But where the author reserves extensive rights of control, he can void the contract when alterations exceed his consent.[245]

iii. Conclusion

Thus, there is no absolute principle determining the outcome of integrity cases in French law. Reduced to its essence, French law makes an equitable evaluation of the facts and balances the interests of authors, publishers, and the public on a case-by-case basis.[246]

b. Germany

German copyright law has a number of provisions regarding the integrity of the work. Section 14 of the German law provides the author with the general right to prevent "any distortion or any other mutilation of [the] work which would prejudice [the author's] lawful intellectual or personal interests in the work."[247] The statute also stipulates that a licensee may not alter a work, its title, or the designation of the author in the absence of the author's consent.[248] But the German law also provides that the author is bound by good faith to accept necessary alterations.[249] The law makes no distinction between original and derivative works, thereby indicating that any alterations made necessary by the authorized use of the work are allowed.

The terms used in the German provisions on the right to integrity — "justified interests," "consent," "good faith," "necessary

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[244] *See* Bernstein v. Société Pathé-cinéma, Trib. civ., Seine, July 26, 1933, D.H. 1933, 533. *Cf.* note 220 and accompanying text.

[245] *See* Richepin v. Rivers, Trib. civ. de la Seine, Apr. 12, 1937, G.P. 1937, 2, 243. Under American contract law, an author could rescind the contract if the publisher failed to perform essential conditions of the contract. *See also* BALL, *supra* note 197, at 591 (noting that under U.S. contract law, an author could rescind the contract if the publisher failed to perform essential conditions of the contract).

[246] *See* DIETZ, *supra* note 15, at 115. And the remedy available to the author might be limited even when a violation is found. *See also supra* notes 149-152 and accompanying text.

[247] FRG, *supra* note 89, art. 14.

[248] *See id.* art. 39(1).

[249] *See id.* art. 39(2).

alterations," "interests of others" — clarify that the author's right to integrity is limited. And the custom and usage of the respective industry must also be taken into account.[250] German courts determine whether a violation has occurred by objectively balancing the interests and evaluating the particular circumstances on a case-by-case basis[251] — the "author's interests should be weighed against possibly opposing equally justified interests."[252]

2. Motion Pictures and Public Performances

Both Continental systems contain special provisions for public performances and motion pictures. In France, for example, theater directors are strictly required to present a work faithfully, but they have a certain degree of their own artistic and creative freedom when presenting the work.[253] German law grants performers the right to prohibit any distortion or alteration of their performances that would injure their honor or reputation as performers, but requires that they take the interests of the other performers into account.[254]

With regard to motion pictures, moral rights essentially prevent only unauthorized, unreasonable changes, and thus, these protections would not seem to differ significantly from their counterparts for motion pictures in the United States.[255] French and German law consider the director, the screenwriter, and the score-composer of a film the authors of the picture.[256] Under French law, they can exercise their moral rights individually or collectively, but they cannot exercise a right against each other to

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[250] *See* STROWEL, *supra* note 80, at 534 (citing EUGEN ULMER, URHEBER-UND VERLAGSRECHT, at 210, 218 (6th ed. 1987).

[251] *See id.* (citing ULMER, *supra* note 250, at 216). *See also* Strömholm II, *supra* note 5, at 60.

[252] Strömholm II, *supra* note 5, at 60.

[253] *See* DIETZ, *supra* note 15, at 100. But when an entire scene is cut from an opera, a court will award minimal compensation to the set designer. *See* Léger v. Réunion des Théatres Lyriques Nationaux, Trib. civ. de la Seine, Oct. 15, 1954, RIDA No. VI, 146 (1955).

[254] *See* FRG, *supra* note 89, art. 83(1), (2) ("If a work is performed by a group of performers, each one in the exercise of this right must take into account the legitimate interests of the others.").

[255] *See supra* notes 205-15 and accompanying text.

[256] *See* Law No. 57-298 of Mar. 11, 1957, J.O., Mar. 14, 1957, p. 2723, art. 14.

prevent the completion of the film.[257] The "anarchic exercise" of moral rights by individuals does not comport with the nature of a film as a collaboration.[258] German law also restrains the authors' rights for motion pictures — they can protest only gross distortion or injury to their work and must take the interests of other contributors as well as of the producer into account.[259] Thus, Continental laws balance the interests of the parties involved when determining a violation of the right to integrity for movies.

VI. SPECIAL PROTECTION OF VISUAL ART

A. United States Law

1. Visual Artists Rights Act

In spite of the widespread American opposition to moral rights, in 1990 Congress passed the Visual Artists Rights Act (hereinafter "VARA").[260] VARA grants the right of attribution, the right of integrity and a limited right to prevent destruction with respect to works of "visual art."[261] The duration of these rights is limited to the life of the author.[262] Under VARA, "visual art" means a painting, drawing, print or sculpture existing in at least one original and at most two hundred signed and numbered copies.[263] The same applies to still photographs produced solely for the purpose of exhibition.[264] Numerous other works are excluded specifically from VARA's reach.[265] VARA applies only to works 1) whose

[257] *See* DIETZ, *supra* note 15, at 102, *citing* the case of Prévert & Grimault, Cour cass. civ., Apr. 13, 1959, D. 1959, 225.

[258] *See* DIETZ, *supra* note 15, at 104.

[259] *See* FRG, *supra* note 89, art. 93.

[260] Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified at 17 U.S.C. § 106A (1997)).

[261] *See id.* § 106A(a).

[262] *See id.* § 106A(d).

[263] *See* 17 U.S.C. § 101 (1997).

[264] *See id.*

[265] *See id.* ("A work of visual art does not include — (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container.").

title was not transferred prior to, or 2) that were created after, June 21, 1991, the date that VARA entered into force.[266] Works that were altered before VARA took effect are excluded from its protections also.[267]

The rights provided by VARA exist independently of the exclusive rights of Copyright Act Section 106.[268] Not only does VARA allow the author to assert the right "to claim authorship."[269] It also grants the author the right to "to prevent the use of his or her name" on a work the author did not create[270] or in the event of a "distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation . . . ."[271] The Act does not provide a right to remain anonymous or use a pseudonym.[272]

With regards to integrity, an author can personally prevent "any intentional distortion, mutilation, or other modification of [the] work which would be prejudicial to his or her honor or reputation . . . ."[273] He also has the right to prevent the destruction of "a work of recognized stature" incorporated into a building, whether or not the destruction injures the author's honor or reputation.[274] These rights to prevent alteration or destruction are, however, limited by Section 113(d) of the Copyright Act.[275] Furthermore, destruction of a work must be intentional or grossly

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[266] *See* Visual Artists Rights Act, Pub. L. No. 101-650, tit. VI, § 610 (declaring VARA to become effective 6 months after passage). *See also* Waiver, *supra* note 130, at 112.

[267] *See id. See also* Pavia v. 1120 Avenue of the Ams. Assocs., 901 F. Supp. 620, 626 (S.D.N.Y. 1995).

[268] *See* 17 U.S.C. § 106A(e)(2)(1997).

[269] *Id.* § 106A(a)(1)(A).

[270] *Id.* § 106A(a)(1)(B).

[271] *Id.* § 106A(a)(2).

[272] *See* Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 947, 960 (1990).

[273] 17 U.S.C. § 106A(a)(3)(A).

[274] *Id.* at §§ 106A(a)(3)(B), 113(d)(1).

[275] *See* 17 U.S.C. § 113(d)(1)(B) (in the case of works that cannot be removed from a building without violating the provisions regarding integrity and destruction, the author can consent to a "violation" of the integrity right). Absent a signed, written consent, the removal of works installed after the passage of VARA violates § 106(A)(a). *See* Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994), *rev'd and vacated in part and aff'd in part by* 71 F.3d 77 (2d Cir. 1995). For works that can be removed without altering or destroying the work, the owner of the building can remove the work if he made a diligent, good faith effort to notify the author 90 days prior to the removal in order to allow the author to remove or pay for the removal of the work. 17 U.S.C. § 113(d)(2).

negligent to be actionable.[276]

The rights contained in VARA are personal to the author and may not be transferred.[277] The rights can, however, be waived by the author in a signed, written instrument.[278] The instrument must specifically identify the work and the uses of that work that are to be covered by the waiver.[279] A mere transfer in ownership of the work does not constitute a waiver of the author's rights.[280] Thus, unless waived, the author's VARA rights remain vested in the work no matter how often ownership is transferred.

A broad limitation of the scope of the act results from the exclusion of "works made for hire". As with the copyright, the rights rest with the employer.[281]

VARA generally adopts the remedies of the Copyright Act with the exception of criminal penalties.[282] Besides criminal claims, the Copyright Act permits claims for injunctions,[283] impoundment or disposal of infringing articles,[284] actual damages,[285] lost profits,[286] and costs and attorney's fees.[287]

2. State Statutes

Ten American states have also passed moral rights legislation for visual arts prior to the passage of VARA. These statutes can be categorized into three models: the preservation model, the moral rights model, and the public works model.[288] All of the statutes

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[276] *See* 17 U.S.C. § 106A(a)(3)(B).
[277] *See id.* § 106A(a)(e)(1).
[278] *See id.*
[279] *See id.*
[280] *See id.* § 106A(a)(e)(2).
[281] *See id.* § 101.
[282] *See* 17 U.S.C. § 501(a).
[283] *See id.* § 502.
[284] *See id.* § 503.
[285] *See id.* § 504(a).
[286] *See id.*
[287] *See id.* § 505.
[288] The preservation model protects an author's rights of attribution and integrity and prohibits the destruction of artistic works under certain circumstances. California, Connecticut, Massachusetts, and Pennsylvania have the preservation model. *See* Waiver, *supra* note 130, at 11-14. In 1979, California enacted the first moral rights legislation in the United States by passing the California Art Preservation Act to serve "the dual purpose of protecting the artist's reputation and of protecting the public interest in

cover only fine art or "visual or graphic works."[289]

VARA preempts state law causes of action based on a violation of rights equivalent to those of VARA, if the violation occurred after the passage of VARA.[290] Works not covered by, and rights not granted by VARA, "are not preempted, even when they relate to works covered by [VARA,]"[291] and the state laws remain effective for violations committed before VARA went into effect. Preemption determinations are made on a case-by-case basis.[292] As one court stated, the preemption issue "will occupy courts for years to come."[293]

B. Continental Law

As in the United States, Continental law first applied the moral right of integrity to works of visual art.[294] The German decision of *Felseiland mit Sirenen* (hereinafter "*Sirenen*"), decided in 1912, ushered in the general acceptance of the right of integrity in Europe.[295] In *Sirenen*, a house owner altered a fresco that he had commissioned from a painter. The court held this alteration to be a violation of the right of integrity. But the court also indicated that it

preserving the integrity of cultural and artistic creations." *Id.* at 12 (quoting 1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 163 (1987). The statutes in the other three states are similar to that of California. *Id.* at 12-14. Under each statute, the artist has a limited right to prevent destruction of his work. *Id.*

The moral rights model protects an author's rights of attribution and integrity to varying degrees. Louisiana, Maine, New Jersey, New York and Rhode Island follow this model. *Id.* at 14-16.

Finally, the public works model gives limited attribution and integrity rights for works displayed in public buildings. New Mexico's Art in Public Buildings Act is one such example of this model. *Id.* at 16-17.

[289] *See id.* at 11-16.

[290] *See* 17 U.S.C. § 301(f) (1997).

[291] H.R. REP. NO. 101-514, at 21 (1990).

[292] *See id.* The lack of case law for VARA makes the determination of what rights are preempted by it all the more difficult. *Id.* The Final Report of the Register of Copyrights expects that a number of state laws will remain effective since they confer rights not covered by VARA. *Id.* For example, rights of integrity that do not require a showing of "prejudice to honor or reputation" will likely not be preempted. *Id.*

[293] *Pavia*, 901 F. Supp. at 626 (quoting Charles Ossola, *Law for Art's Sake*, THE RECORDER, Jan. 8, 1991, at 6).

[294] *See supra* notes 260-87 and accompanying text (discussing VARA).

[295] *See Felseiland mit Sirenen*, RG (8.6.1912), RGZ 79, 397. *See also* DIETZ, *supra* note 15, at 112. The sphere of influence of this opinion encompassed France. *See id.* at note 284.

would have allowed the alteration to stand if no chance existed that the work would be seen by the public. Moreover, it held in dicta that complete destruction of a work would not infringe an author's moral right.[296] The German copyright law of 1965 adopted a similar position on destruction, but the elastic nature of the regulation indicates that an author can act against "willful" destruction of his work.[297] Owners might be required to inform the artist of their intention to destroy the work and allow the author a chance to remove it.[298]

French law also forbids the alteration of an original work of art by an owner, although the interests of the owner will be taken into account. Thus, when frescos are painted onto an owner's private property without the knowledge of the owner and he disapproves of the work, he may have the right to remove or obliterate the work without any notification to the artist.[299] In general, however, an owner cannot remove or alter an immovable artwork attached to his premises without the consent of the author, especially if the public has access to the work.[300] But if the artwork is not created for a specific location, it can be sold and removed without the author's permission.[301] After a movable piece of art has been made public, any mutilation will entitle the author to damages.[302] But the author cannot demand a return of the work, and damages might be minimal.[303] Finally, the absolute destruction of a work of art will not infringe the right of integrity, because the author's reputation will not be damaged by an exposure of his damaged

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[296] *See* DIETZ, *supra* note 15, at 111-12.

[297] *See id.* at 112. *Cf. supra* note 276 and accompanying text.

[298] *See* DIETZ, *supra* note 15, at 112. *Cf. supra* note 275 and accompanying text.

[299] *See* DIETZ, *supra* note 15, at 113, *citing* Fresques de Juvisy, Trib. civ. de Versailles, June 23, 1932, D.H. 1932, 487 & Paris, Apr. 27, 1934, D.H. 1934, 385. That the defendant was a Catholic bishop might have swayed the court to be more lenient.

[300] *See* DIETZ, *supra* note 15, at 114 (citing Les Compagnons de l'Art mural). *See also* Sudre v. Commune de Baixas, Conseil de Préfecture de Montpellier, Dec. 9, 1937, G.P. 1937, 1, 347. *Cf. supra* note 275 and accompanying text.

[301] *See* Baldaccini c. Ville de Lyon, Trib. civ. de Lyon, Apr. 28, 1997, RIDA No. 173, 373 (1997).

[302] *See* Fersing v. Buffet, Cass. civ. 1re, July 6, 1965, J.C.P. 1965, 14339. Whether the court held that the mutilation violated the right *per se*, or only that "the owner cannot sell the work without respecting its integrity," is not entirely clear in the decision.

[303] In *Buffet*, the artist received one centime compensation, less than one U.S. cent, though it must be added that he did not request more. Buffet, Cass. civ. 1re, July 6, 1965, J.C.P. 1965, 14339.

work to the public or third persons.[304]

VII. THE RIGHT TO RETRACT

A. United States Law

The Copyright Act grants a limited right of retraction by allowing the author the right to void a contract without cause after thirty-five years.[305] And under contract law, the author could refuse to transfer the work prior to publication. A court might or might not award specific performance — it would depend on the facts of the case.[306]

B. Continental Law

Both French and German law allow an author limited rights to refuse to deliver a work prior to, or to retract a work after, publication. But the publisher has rights to recoup any losses that the author incurs by his retraction.[307]

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[304] *See* DIETZ, *supra* note 15, at 111. Such a conclusion can also be drawn from *Buffet*, depending how one interprets the decision. *See supra* text accompanying note 302.

[305] *See* 17 U.S.C. § 203 (1997).

[306] Courts are loathe to enforce specific performance against a party's will when the party has a strong personal interest in the object of the contract. The law is reluctant to deprive an author of his work against his will in almost all cases; only a voluntary bankruptcy will justify a taking of the property. 17 U.S.C. § 201(e). Similar considerations might prove persuasive in this context as well. For example, should the court refuse to order specific performance, the author would be required to pay damages.

[307] In France, the author enjoys an unlimited right to retract, provided that he compensates third parties for their incurred losses. The author must also offer the work to the original user under the original conditions should he decide to publish the work at a later date. 1 Strömholm III, *supra* note 30, at 539.

Germany has two provisions: one that applies only to publishing contracts, and one of general application. The general provision allows an author to revoke a license provided that he compensates the licensee in advance for the costs incurred prior to revocation. But it requires the author to demonstrate that the work no longer represents his opinion so that he can "no longer be expected to agree to the exploitation of the work." FRG, *supra* note 89, art. 42. The right cannot be waived and can be invoked by the author's testamentary successor, provided the author was prevented from invoking the right during her lifetime. Strömholm II, *supra* note 5, at 65. The specific publishing provision grants the right to retract up until the beginning of reproduction, should unforeseeable events occur that would have prevented a reasonable author from entering

VIII. COMPATIBILITY OF MORAL RIGHTS AND AMERICAN LAW

A. Limited Practical Application of Continental Moral Rights

An examination of the manner in which France and Germany apply moral rights demonstrates that moral rights are not inherently anathema to American law. The absoluteness of moral rights and their "overbearing potential" are limited by the public interest: "copyright in a capitalist economy must place the greatest importance on the transferability and usefulness of the work."[308] The Continental systems balance the "moral" interests of the author with the interests of publishers and the public to achieve results that do not differ greatly from American enforcement of "moral rights." Ergo, individual moral rights are essentially compatible with the basic principles of American copyright law.

B. Public Rights: Exceptions to Moral Rights

An examination of the exceptions to moral rights that French and German law allow further demonstrates that moral rights are limited by the public interest and compatible with American copyright law.

1. Private Use

In both France and Germany, members of the public have the absolute right to use the work as they wish in private. Moral rights protection vests only when a person makes a public use of the work.[309]

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a publishing contract. The author still must compensate the publisher for all expenses and is liable for damages if he publishes the same manuscript elsewhere within a year. *Id* at 64.

[308] H. HUBMANN, URHEBER-UND VERLAGSRECHT 27 (6th ed. 1987) ("*Das Urheberrecht in einer kapitalistischen Wirtschaft muß daher vor allem der Verkehrsfähigkeit und Nutzbarkeit des Werkes Rechnung tragen*").

[309] Only in cases of private use does the French law make an explicit exception allowing a work to be used without attribution. Law No. 57-298 of Mar. 11, 1957, J.O., Mar. 14, 1957, p. 2723, art. 41(1) & (2). Private alteration of works is also permitted, unless the altered work is made public or altered for purposes of publication. *Id.*; DIETZ, *supra* note 15, at 110. German law provides that authorship does not have to be

2. Fair Use

a. Attribution

Berne requires that fair uses of a work give credit to the source.[310] Both French and German law require that any public use of the author's work give credit to the author.[311] American law makes no such requirement for fair use. But fair-use practice usually respects the right. Any substantial unauthorized use under whatever attribution would usually violate the copyright in the work.[312] A public use of the author's work with a false attribution would usually constitute reverse passing off.[313]

b. Integrity

With respect to the right of integrity, French law provides a number of fair-use exceptions. A work can be analyzed and quoted in various forms of abridgement such as criticism, review, academic presentations, as well as parody.[314]

The German law's chapter making exceptions to copyright provides that fair uses under copyright must respect the right of integrity; however, mere extracts, as well as necessary, good faith alterations are permitted.[315]

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acknowledged in cases of private use, free public presentations, and in a limited number of other cases. FRG, *supra* note 89, art. 63; DIETZ, *supra* note 15, at 121-22. The law also allows alterations for personal use, except when the altered work is actually or intended to be displayed publicly. DIETZ, *supra* note 15, at 110, 92-94. Altered original works of art must be kept absolutely private. *See supra* notes 295-296 and accompanying text.

[310] *See* Berne, *supra* note 21, at arts. 10(3), 10*bis*(1).

[311] *See supra* note 145 and accompanying text.

[312] *See supra* notes 179-89 and accompanying text.

[313] *See supra* notes 115-42 and accompanying text.

[314] *See* DIETZ, *supra* note 15, at 110, 92-94; Société Microfor v. Le Monde, Cass. ass. plén., Oct. 30, 1987, J.O. No. 8, October 1987, ("Chambres Civiles") 7.

[315] *See* FRG, *supra* note 89, art. 62(1), (2).

C. Waiver

Berne does not expressly allow or prohibit waivers of moral rights.[316] "[O]n the whole, [it] hardly touches on the law of contracts."[317] Thus, there is wide variation between Berne member states regarding waivers.[318] While many states prohibit any waiver of moral rights, a number of countries have no specific provisions.[319] Only Canada allows moral rights to be waived in whole or in part, while the United Kingdom allows specific waivers.[320] Moreover, a number of countries, including France and Germany, allow limited implied waivers to the rights of attribution and integrity.[321]

In American law, VARA allows a waiver, but it must be specific and in writing.[322] For all other works, a licensing agreement or transfer of the copyright can act as an implied waiver of the rights of attribution and integrity, but the contractee must execute the contract in good faith and give reasonable respect to the name, reputation, and work of the author.[323] An express waiver will be enforced.[324]

D. Works-Made-for-Hire

France and Germany do not generally apply the work-made-for-hire doctrine to moral rights. Only for computer programs created in the scope of employment does the work-made-for-hire doctrine apply categorically.[325] But the laws do allow a number of specific exceptions to moral rights for works-made-for-hire.

For example, the moral rights of the employee are waived in favor of the employer in certain circumstances. In France, moral

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316 *See* Berne, *supra* note 95, at art. 6*bis*. *See also* Waiver, *supra* note 130, at 52.

317 NORDEMANN, *supra* note 100, at 87.

318 *See* Waiver, *supra* note 130, at 26-56.

319 *See id.* France, for example, prohibits waivers. *Id.*

320 *See id.* at 33-35, 47-51.

321 *See id.* at 54. *See supra* notes 148, 161, 165, 230-59 and accompanying text.

322 *See supra* note 278 and accompanying text.

323 *See supra* notes 115-142, 179-224 and accompanying text.

324 *See supra* notes 142, 198-203 and accompanying text.

325 *See* Council Directive No. 91/250, art. 2, 1991 O.J. (L 122) 42. Under Article 2 of the directive, the employer is considered the author and thus possesses all rights to the work.

rights automatically belong to the employer for many works made for hire.[326] In Germany, the employer can reserve some moral rights for the work by contract. And in some instances, German law implies the consent of the employee to a waiver.[327] Works prepared in the normal course of business for the normal business purposes of the employer are treated like works-made-for-hire in the United States.[328] And for motion pictures, German law deems the primary authors "to have granted to the producer the exclusive right to utilize" the work "in every known manner" and they can protest only gross distortions of their contributions.[329]

In the United States, the work-made-for-hire doctrine acts as an automatic waiver of the copyright, the VARA rights and most of the "moral rights" equivalents.[330] The employer is considered the author and thus possesses all of the author's rights.[331] Berne does not prohibit the application of the work-made-for-hire doctrine. Before the French copyright law of 1957, French courts applied the work-made-for-hire doctrine in a similar fashion to its application

[326] An express contractual transfer of copyright ownership from employee to employer is legitimate. STROWEL, *supra* note 80, at 325-27. A transfer can be implied when the work is performed in the scope of employment and is related directly to the employer's business purpose. *Id.* at 326. And a contractual provision that the copyright for all works created by the employee is transferred to the employer can be valid as long as it is restricted to works foreseeable in the course of employment. Bossard v. Rénault, Cass. civ. 1re, Feb. 4, 1986, 1986 Bull. Civ. I, No. 12; STROWEL, *supra* note 80, at 327-28 (*citing* Cour de Lyon, Nov. 28, 1991, G.P., Apr. 15-16, 1992, 34). A contract without such a restriction might be valid, but runs the risk of being invalidated as a "global transfer" of the rights, which is forbidden by Article 33 of the French law. *Id.* at 328.

Moreover, the French provisions on collective works provide that the "natural or legal person" under whose name a work appears is the owner of all the author's rights. Law No. 57-298 of Mar. 11, 1957, J.O., Mar. 14, 1957, p. 2723, art. 13 *("L'oeuvre collective est, sauf preuve contraire, la propriete de la personne physique ou morale sous le nom de laquelle elle est divulguee."*). Provided that that person is responsible for the creation of the work, exercises a strong degree of control over its creation, and it is impossible to distinguish and attribute the individual contributions. *Id.* at art. 9. These are comparable to the factors American courts consider to determine if a work is made for hire. *See, e.g.*, Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

[327] *See supra* notes 148, 161 and accompanying text.

[328] *See* FRG, *supra* note 89, art. 43. Some commentators believe that this can occur only under an express contract clause, but courts have held that a transfer is implied by the employment contract. STROWEL, *supra* note 80, at 359.

[329] FRG, *supra* note 89, arts. 89. *See also id.* art. 93.

[330] *See supra* note 288 and accompanying text. *See also Poe*, 151 F. Supp. at 801. Because some of the equivalent rights are personal to the author, uses of a work that prejudice the author's honor or reputation or which somehow pose unfair competition — which is unlikely but possible in an employment relationship — would remain actionable.

[331] *See* 17 U.S.C. §§ 101, 102 (1997).

in the United States.[332]

E. Transfer

Berne determines that the "author shall have" the rights of attribution and integrity "[i]ndependently of the author's economic rights, and even after the transfer of the said rights . . . ."[333] The German law follows this principle inherently, by providing that none of the rights to a work is ever really transferred.[334] The French law provides that the moral rights are "inalienable and imprescriptible."[335] The American VARA also provides that the moral rights cannot be transferred.[336]

American law contains no provision regarding the transfer of moral rights for non-VARA works. Before the property is transferred, the rights remain with the author. After the transfer of the copyright, the owner of the copyright owns the aspects of the rights covered by copyright law. The author maintains the rights of action outside of copyright law, unless an express or implied waiver applies.

F. Duration

French and German law provide different periods of duration for moral rights. German law provides equal duration of seventy years after the death of the author for both moral rights and the copyright.[337] France provides that the moral rights are perpetual.[338] Upon the author's death the rights pass to the heirs or can be transferred to another by will.[339] The French government also has a right to make a post-mortem claim.[340] Besides France,

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[332] *See* DaSilva, *supra* note 143, at 28-29 n.195 and accompanying text.

[333] Berne, *supra* note 95, at art. 6*bis*(1).

[334] *See* FRG, *supra* note 89, art. 29. The Germans employ a compulsory licensing system to achieve what other copyright laws achieve by transfer or license after the fact.

[335] Law No. 57-298 of Mar. 11, 1957, J.O., Mar. 14, 1957, p. 2723, art. 6 ("Ce droit est . . . inalienable et imprescriptible.").

[336] *See* 17 U.S.C. § 106A(e)(1).

[337] *See* FRG, *supra* note 89, art. 64.

[338] *See* Law No. 57-298 of Mar. 11, 1957, J.O., Mar. 14, 1957, p. 2723, art. 6.

[339] *See id.*

[340] *See* Law No. 57-298 of Mar. 11, 1957, J.O., Mar. 14, 1957, p. 2723, art. 20. *See also* ADOLF DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY 185 (1978)

the only European Union states granting perpetual moral rights protection are Denmark, Italy and Portugal.[341] Although these perpetuity provisions aim to confirm the supremacy of moral rights,[342] the ultimate concern behind them is "safeguarding . . . the national cultural heritage in the public interest."[343] In his study on the possible harmonization of European copyright law, Professor Dietz concluded that a perpetual moral right "should be rejected as a copyright solution. The questions involved ought to be dealt with outside the field of copyright and within the framework of a . . . protection of ancient monuments."[344]

Few countries provide that moral rights are perpetual.[345] Article 6*bis* of Berne does not prescribe that moral rights are perpetual. No international consensus ever emerged to make moral rights protection in Berne perpetual. Article 6*bis* states only that they must last as long as the copyright. And it allows the rights to expire at the death of the author if the national law was such at the time of "ratification or accession."[346]

Moreover, notwithstanding the theoretical perpetuity of moral rights, French courts have shown a reluctance to enforce them after the expiration of the copyright. In 1997, the Cour de Cassation rejected an appeal by the attorney-general of the Paris Court of Appeals and held that a painter who copied the work and signature of the nineteenth century artist, Toulouse-Lautrec, for sale did not violate Toulouse-Lautrec's moral rights by copying the signature.[347] In cases where unaffiliated parties brought suit to

(hereinafter "EUROPEAN COMMUNITY"). *See infra* note 347 and accompanying text.

[341] *See* INTELLECTUAL PROPERTY LAWS OF EUROPE 101-07, 147-55, 269-76, 355-59 (George Metaxas-Maranghidis ed., 1995). *See also* EUROPEAN COMMUNITY, *supra* note 340, at 181-83. All other member states provide that the rights expire at the death of the author or with the economic rights. INTELLECTUAL PROPERTY LAWS OF EUROPE, at 41-51; EUROPEAN COMMUNITY, *supra* note 340, at 183-184.

[342] *See supra* notes 353-57 and accompanying text.

[343] EUROPEAN COMMUNITY, *supra* note 340, at 183.

[344] *Id.* at 188-89.

[345] *See* Strömholm II, *supra* note 5, at 94. Of those countries having perpetual protection, most are in Latin America or traditionally within the French sphere of influence.

[346] Ratification or accession could occur when a state either joins Berne or a state already party to Berne ratifies any of the Rome, Brussels, Stockholm or Paris Acts amending Berne. This grandfather clause was a concession to Common Law states during the negotiations over the inclusion of Article 6*bis* in Berne. STROWEL, *supra* note 80, at 509.

[347] *See* Le Procureur Général près la Cour d'Appel de Paris v. Sxxxx, Cass. crim., June 11, 1997, No. 96-80.388, (Lexis, France Library, Prive file, Biblio). It was no

protect a work after it had fallen into the public domain, the suits were dismissed for lack of standing because the consumers suffered no direct injury.[348]

In the United States, the rights enforceable under the Copyright Act last as long as the copyright: seventy years after the death of the author.[349] Only a few of the non-copyright causes of action available to American authors expire at death.[350] But a suit for unfair competition under common law or Section 43(a) of the Lanham Act could be brought at any time when anyone attempted to pass off goods that would confuse the public and would affect a concrete interest of "any person who believes that he or she is or is likely to be damaged . . . ."[351] This standard is roughly similar to that employed by the Cour de Cassation for works in the public domain.[352]

G. Supremacy of Moral Rights in Theory

Both French and German law rank the author's "moral" interests above his "economic" interests. The overriding objective of the French and German copyright laws is to enforce the author's moral rights. Thus, German law provides that a work is inalienable — copyright to a work can only be licensed, not transferred.[353] And when interpreting the law, German courts must take into account the consideration that the author's moral interests predominate.[354]

The "primacy of moral rights" under French law manifests itself in three ways: (i) special rules of contract that favor the author in relation to publishers; (ii) the restriction on the property rights of publishers and the public in favor of the author; and, (iii) the exclusion of unpublished works from marital property and the right

violation to copy the signature of a painter whose work had fallen into the public domain because there was no risk of confusion where "copie" was stamped on the back and the format of the canvases differed.

[348] *See* DIETZ, *supra* note 15, at 106-07 (although one of the suits involved one of the most prized books in French literature, "les Misérables," by Victor Hugo).

[349] *See* 17 U.S.C. § 302(a) (1999).

[350] For example, all the rights under tort law would expire.

[351] 15 U.S.C. § 1125(a).

[352] *Cf. supra* note 348 and accompanying text.

[353] *See* FRG, *supra* note 89, art. 29.

[354] *See* DIETZ, *supra* note 15, at 38-39 (citing the official government report on the passage of the law, *Amtliche Begründung*, at 29, right column).

of authors to maintain control of the moral rights during and after marriage.[355]

Unlike French and German law, however, Berne fortunately does not require or infer that a member state grant supremacy to moral rights. Such a condition would directly contradict the stated objective of the United States Constitution that copyright is protected in the public interest. Still, American law (i) provides special rules of contract that favor an author, (ii) restricts the property rights of others to an author's work, and (iii) favors unpublished works over other forms of property.[356] Thus, American law grants special rights similar in principle to Continental law that confirm that "the individual author is the fountainhead of copyright."[357]

IX. THE UNITED STATES' INTEREST IN IMPLEMENTING MORAL RIGHTS

A. Compliance with the Berne Convention

American law provides significant protections to the interests safeguarded by Berne's rights of attribution and integrity. There are some considerations, however, that lead to the conclusion that equivalent rights in the United States do not comply with the letter

[355] *See* STROWEL, *supra* note 80, at 495.

[356] The Copyright Act's provision on transfer prevents any governmental entity from seizing a copyright. 17 U.S.C. § 201(e) (1997) ("When an individual author's ownership of a copyright, or of any of the exclusive rights . . . has not previously been transferred . . ."). The restriction does not apply to the proceeds from the copyright. *See* BALL, *supra* note 197, at 61. This provision was passed to "reaffirm the basic principle that the individual author is the fountainhead of copyright, and that his copyright cannot be taken away from him involuntarily." Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, ch. I at 8-9; ch. XII at 8-9 (drafted. 1975). "The purpose of this subsection is to reaffirm the basic principle that the United States copyright of an individual author shall be secured to that author, and cannot be taken away by any involuntary transfer." H.R. REP. NO. 94-1476 (1976), *reprinted in* 17 U.S.C. § 960. The Senate report also supports this position. 1 PATRY, *supra* note 17, at 144. Only a voluntary declaration of bankruptcy allows an "involuntary" transfer. 17 U.S.C. § 201(e); H.R. REP. NO. 94-1476, *reprinted in* 17 U.S.C. at 960. Moreover, most of the equivalent rights are enforceable independently during and after a marriage.

[357] *See* Second Supplementary Report, *supra* note 356, ch. I at 8-9; ch. XII at 8-9.

of Berne, nor with the object and purpose of Article 6*bis*.[358]

The major contradiction between American law and Berne is that the author has no legally recognizable, enforceable moral rights — American law does not recognize moral rights. As a result, there is a considerable possibility that an author attempting to protect his interests in attribution and integrity will be denied a cause of action. Berne requires that authors "shall have" the rights of attribution and integrity. Although Berne allows member states the choice of how to "safeguard" the rights, it does not allow them not to recognize these rights.[359] How can one safeguard rights that do not exist? If there is no recognized right, there is no recognized remedy.

American law grants an author a number of possible causes of action that equate to moral rights. But the author has no express *rights* of attribution and integrity under statutory or common law.[360] Furthermore, the author carries the burden of securing his own moral rights — it is up to him to prove that he even has an alternative right before he can seek a vindication of his "moral rights."

Article 6*bis* provides an author clear and enforceable rights of attribution and integrity. In order to prevent these rights from being directly enforceable, however, Congress stated expressly in the Berne Convention Implementation Act (hereinafter "BCIA") that Berne was non-self-executing.[361] Furthermore, both the BCIA and Berne became effective on March 1, 1989.[362] The confluence of the effective dates for Berne and the BCIA ensured that the later-in-time rule would not cause the treaty to override the

[358] *See* NIMMER, *supra* note 2, at § 8D.02(D)(1) (U.S. moral rights protection "apparently fails to accord the full-fledged protection contemplated by Article 6*bis*").

[359] Prior to the U.S. accession to Berne, a congressional delegation met in Europe with international copyright experts. These experts assured the U.S., "it is not necessary for the [U.S.] to enact statutory provisions on moral rights in order to comply with Article 6*bis* [of Berne]. These requirements can be fulfilled . . . also by the common law and other statutes." H.R. REP. NO. 101-514 (1990). These experts did not pass judgment, however, on whether American equivalent rights actually complied with the convention.

[360] With the exception of the VARA rights. *See supra* notes 261 and accompanying text.

[361] Berne Convention Implementation Act of 1988 ("BCIA"), Pub. L. No. 100-568, 102 Stat. 2853, § 2(1) (1988) (codified as 17 U.S.C. §§ 101, 104, 116, 116A, 205, 301, 401-408, 411, 501, 504, 801 (1997)). One third of the BCIA seeks to ensure that the treaty remains non-self-executing. NIMMER, *supra* note 2, at § 1.12(A).

[362] *See* BCIA, *supra* note 361, § 13(a).

BCIA.[363] The greatest motivation behind these provisions was to prevent a direct application of moral rights in American courts.[364] Thereby, Congress clearly indicated its intent to avoid implementation of moral rights. This lack of legislative recognition of moral rights has been influential in courts denying relief for moral rights infringement.[365]

In addition, currently available causes of action and their likelihood of success are difficult to assess. Some causes of action are under copyright law, some are not.[366] Some of the potential claims arise under federal law, some under state law.[367] Some arise under common law, some under statutory law.[368] All this requires courts to look at the same issues from a potentially wide array of legal perspectives. For those claims arising under federal law, a plaintiff has recourse to a federal court.[369] Should federal claims in a case be dismissed, the federal court will no longer have jurisdiction and the plaintiff will have to reinitiate the case in state court. As aliens, however, foreign authors would still have recourse to federal court, which would then be required to hear state law claims in a federal forum.[370] All of these considerations place a significant burden on the plaintiff, the defendant, and the administration of justice.

A further complicating factor is the effect a transfer of copyright has on the moral rights. Berne requires that the moral rights exist independently of the copyright.[371] Moral rights can be waived expressly and certain limited waivers can be implied.[372] But the possibility that an author might not be allowed to pursue a right of attribution and integrity simply because he transferred his copyright violates Berne's requirement that these rights be

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[363] *See* S. REP. NO. 100-352, at 28 (1988). This raises the question of why Congress would go to such tactical trouble to circumvent the later-in-time rule. The later-in-time rule would only be determinative if Berne were in actuality self-executing in spite of the conclusions of the President and the Congress that it is not.

[364] *See* NIMMER, *supra* note 2, at § 1.12(A).

[365] *See* Paramount Pictures v. Video Broad. Sys., Inc., 724 F. Supp. 808, 819 (D. Kan. 1989). *See also* Dana L. Burton, Comment, *Artists' Moral Rights: Controversy and the Visual Artists Rights Act*, 48 SMU L. REV. 639, 646 (1995).

[366] *See supra* notes 103-293 and accompanying text.

[367] *See id.*

[368] *See id.*

[369] *See* U.S. CONST. art. III, § 2.

[370] *See id.*

[371] *See* Berne, *supra* note 95, at art. 6*bis*(1).

[372] *See supra* notes 316-23 and accompanying text.

independent of each other.[373] It also contradicts the Copyright Act's rule empowering the author to determine which rights to transfer in an assignment of copyright.[374]

Additionally, the effectiveness and interpretation of the equivalent rights vary from court to court. With regard to the right of attribution, for example, the Second and Ninth Circuits — the most important circuits for copyright law — apply different standards under Section 43(a) of the Lanham Act, albeit with similar results.[375] Whether a complete omission of an author's name violates the right of attribution will depend on the court.[376]

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[373] The right of attribution is generally protected in spite of a copyright transfer, except in cases of express waiver. However, there is no express rule, thus clouding the issue and making a result less certain. And the right to integrity is subject to a transfer under certain circumstances.

[374] *See* 17 U.S.C. § 201 (a), (d).

[375] The Second Circuit applies the "substantial similarity" standard of the Copyright Act to determine when a misattribution occurs. Waldman Publ'g Corp. v. Landoll, Inc., 43 F.3d 775, 781-82 (2d Cir. 1994). "[C]opying is generally established by showing (a) that the defendant had access to the copyrighted work and (b) the substantial similarity of protectible material in the two works." Kregos v. Associated Press, 3 F.3d 656, 662 (2d Cir. 1993), *cert. denied* 510 U.S. 1112 (1994). A misattribution occurs if a work is substantially similar to the author's original work and does not credit the author. *See Waldman*, 43 F.3d at 782-83.

The Ninth Circuit applies a "bodily appropriation" standard. Cleary v. News Corp., 30 F.3d 1255, 1261 (9th Cir. 1994). The Ninth Circuit has held that a mere substantial similarity between works is insufficient to create the requisite consumer confusion that is the crux of a Lanham Act inquiry. *Id.* Thus, a work must "'use . . . substantially the entire'" contents of the author's work for a misattribution to be actionable. *Id.* (citing Harper House, Inc. v. Thomas Nelson, Inc., 889 F.2d 197, 205 (9th Cir. 1989)). Unfortunately, the Court did not clarify the distinction between substantial similarity and a substantial use of the entire content of a work. In its opinion, the Court stated that "slight modifications of a product might cause customer confusion, while products which are merely generally similar will not." *Id.* at 1261. This finding conforms to the requirement of substantial similarity that only substantial, not general, similarities between works pose a violation of an author's right. The Supreme Court applied the bodily appropriation standard in *INS v. Associated Press*, but stated that the "rewriting" of an article would satisfy the standard, which also resembles the test for substantial similarity. 248 U.S. 215, 243 (1918) ("bodily appropriation . . . with or without rewriting"). Finally, in *Cleary*, the Ninth Circuit gave great weight to a case involving a patentable lathe. 30 F.3d at 1261 (citing Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys., Inc., 7 F.3d 1434, 1437 (9th Cir. 1993)). Because of the inherent differences between patentable and copyrightable works, the standards for one cannot be applied directly to the other. Patent and copyright law are similar: they are both forms of intellectual property and are protected by the Constitution. U.S. CONST. art. I, § 8. But the "Constitution differentiates 'authors' and their 'writings' from 'inventors' and their 'discoveries.'" Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976) (*en banc*), *cert. denied* 429 U.S. 857 (1976).

[376] The holding in Smith v. Montoro applies concretely only to cases of misattribution.

For the right of integrity, only the First Circuit has held that Section 43(a) of the Lanham Act protects the integrity of the work. No other circuit has ruled on the question. How federal and state courts would rule under common law unfair competition is also uncertain, given the sparse precedent on the issue. Moreover, courts require varying degrees of proof for finding consumer confusion in Section 43(a) and common law unfair competition cases.[377]

Finally, the results of potential tort claims are also uncertain. Even a less well-known artist can qualify as a public figure.[378] Thus, a showing of malice might be required for a claim of defamation.[379] In addition, the usefulness of an invasion of privacy claim is also limited.[380]

Amidst this potential confusion a plaintiff quite possibly will be denied a cause of action for a violation of his rights of attribution or integrity. A denial of a right will not violate Berne if the plaintiff is an American.[381] But a failure to vindicate a right of

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648 F.2d 602, 607 (9th Cir. 1981). The Smith v. Montoro court's discussion of reverse passing off indicates that it would make no distinction between a work marked falsely and one not marked at all. *See id*. at 605-06. Subsequent decisions support this opinion. *See, e.g., Waldman*, 43 F.3d at 782 ("It would constitute a false designation of origin to publish without attribution to its author a work that is original enough to deserve copyright protection."); *Cleary*, 30 F.3d at 1261 ("'Implied' reverse passing off occurs when the wrongdoer simply removes or otherwise obliterates the name of the . . . source" and sells the product). Although this is the most reasonable conclusion under the Lanham Act, it is not the only conclusion. *See* 3 NIMMER, *supra* note 2, at § 8D.03(A)(2).

[377] Two Southern District of New York decisions made within ten months of each other demonstrate the difficulty caused by courts' variation. In *Geisel*, the court required "proof of injury to plaintiff or of actual deception of a portion of the buying public" and denied the claim. 295 F. Supp. at 353. In *Yameta*, the court found a demonstration of a "likelihood of consumer deception" sufficient to grant relief. 279 F. Supp. at 587. Other courts have denied a right absent proof of actual confusion. Apple Corps Ltd. v. A.D.P.R., Inc., 843 F. Supp. 342, 346 (M.D. Tenn. 1993).

[378] *See* Wojnarowicz v. American Family Ass'n, 745 F. Supp. 130, 148 (S.D.N.Y. 1990); Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1294 (D.C. Cir. 1980).

[379] *See Wojnarowicz*, 745 F. Supp. at 148. Knowledge of the statement's falsity or a reckless disregard as to the truth of the statement qualifies as malice. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[380] In some states the rights are statutory while in others they derive from the common law. *See New York Times*, 376 U.S. at 254. Not all states recognize all of these torts. SCHECHTER, *supra* note 125, at 125. A false light claim is probably helpful only to well-known authors. Ross, *supra* note 173, at 377. Depending on the circumstances, well-known authors would therefore be limited to unflattering exposure claims. Success under a "public disclosure of private facts" theory only guarantees that the author's involvement be described truthfully, not that his name be deleted. *Zim*, 573 F.2d at 1324.

[381] *See supra* note 34.

attribution or integrity will violate the treaty if the work first appeared in another Berne member-state. Whether or not Article 6*bis* is self-executing, the United States has agreed to enforce it and a failure to do so violates its obligations under Berne.

B. Ease of Implementation

The ease with which moral rights could be implemented is another reason for the United States to implement moral rights. Although the American equivalent rights have significant potential gaps, their underlying principle is the same as that which underlies Article 6*bis* — an author has interests in attribution and integrity and the right to prevent an unreasonable use of his work. These equivalent rights provide tangible and significant protection for the rights of attribution and integrity.

A close examination of the means by which France and Germany regulate moral rights also supports the conclusion that American implementation of moral rights would hardly disturb the current state of American law. Though the rights are framed in broad terms, France and Germany place limits on the author's exercise of moral rights. Continental law also essentially prevents those uses that are unreasonable.[382]

Implementation of moral rights in America will not affect the current limits that the law currently places on the author's interests in attribution and integrity. For example, the work-made-for-hire doctrine will remain intact; which is particularly meaningful for the motion picture industry, traditionally one of the staunchest opponents of moral rights.[383] In addition, the industry will not be required to adopt the Continental policy of designating the director as the primary copyright holder, nor will it have to grant significant new rights to directors, actors, authors, etc.[384] Many of these rights

[382] The definition of reasonableness will differ somewhat from country to country and from system to system. But such distinctions go to the enforcement, and not the recognition, of moral rights.

[383] *See, e.g.*, Hatch, *supra* note 22, at 176, 184.

[384] This is exemplified by the new European Union directive on copyright law that grants producers the right to control the publication of a motion picture, although authors, actors, and directors are the primary rights holders under the laws of most E.U. member states. *See* Council Directive 01/29, art. 3 (c), 2001 O.J. (L 167) 10, 16.

are already guaranteed contractually,[385] or statutorily by the California Business and Professions Code.[386]

Furthermore, moral rights will remain subject to contract law.[387] Express waivers of moral rights will still be enforceable.[388] Waivers can be implied when such an implication would be reasonable under the circumstances.[389] As with VARA and as required by Berne, the law will have to ensure the independence of the moral rights from the copyright, but such a provision will not change the current state of American law dramatically.[390]

With regard to damages and duration, the United States can still limit damages for non-economic injuries or for non-commercial uses of a work by a defendant.[391] In addition, the United States will not be required to implement perpetual moral rights;[392] only a

[385] For example, by the recent agreement between the Writers Guild of America and motion picture and television producers that guarantees extensive attribution rights to authors. *See* WRITERS GUILD OF AMERICA, SCREEN CREDITS MANUAL, III. GUILD POLICY ON CREDITS (2001), *available at* http://wga.org/credits/Manual/screen3.html (last visited Aug. 2, 2001).

[386] *See supra* note 134 and accompanying text.

[387] The only limitation is that they remain independent of the copyright.

[388] *See supra* notes 316-20 and accompanying text.

[389] *See supra* notes 316-23 and accompanying text.

[390] Many of the equivalent rights are already independent of a copyright transfer. The right of attribution is usually protected absent an express waiver. The largest impact would be on the right to integrity, where certain causes of action are currently subject to a transfer of copyright. However, absent a waiver, providing for the independence of moral rights and copyright will only require publishers not to make unreasonable changes to a work. Good faith changes required by the medium of exploitation will still be allowed.

[391] These issues go to the redress of the moral rights, not their recognition. *See, e.g.*, Merchant v. Lymon, 828 F. Supp. 1048, 1059-60 (S.D.N.Y. 1993) (finding no right to recover absent an economic loss). French law, for example, also limits recovery for injuries whose economic impact is minimal. *Supra* note 152 and accompanying text. But where marketability depends on reputation, being credited with a work constitutes a protectible interest reasonably subject to legal protection. NIMMER, *supra* note 2, at § 8D.03(A)(4).

"Commercial injury" implies that the violation occurs "in connection with the sale of goods or services . . . ." *Wojnarowicz*, 745 F. Supp. at 142. Under current law, a plaintiff will only have standing under Section 43(a) if he can show a "potential for a commercial or competitive injury." Berni v. International Gourmet Rests. of Am., 838 F.2d 642, 648 (2d Cir. 1988). In F.E.L. Publ'ns, Ltd. v. Catholic Bishop of Chicago, Catholic churches in Chicago copied hymns without the permission of the copyright owners. 506 F. Supp. 1127, 1138 (N.D. Ill. 1981), *cert denied*, 459 U.S. 859, *appeal dismissed*, 739 F.2d 1093 (7th Cir. 1984), *reh'g*, 754 F.2d 216 (7th Cir. 1985). The court found no violation of § 43(a) because the copies did not enter into commerce. *Id.*

[392] *See supra* notes 337-52 and accompanying text.

minority of countries grant perpetual protection to moral rights.[393]

Once the United States incorporates the protection of the author's interests of attribution and integrity into the Copyright Act, all of the moral rights recognized by the French and German copyright laws will be included in the American statute.[394] The Congress and the courts have followed an expansive policy for copyright law since the first law was implemented in 1790. Congress has always adopted the policy of including all possible exclusive rights related to copyright law in the Copyright Act. Adding rights of attribution and integrity to the author's rights of the Act would place all of the author's basic interests currently recognized within or without of copyright law under the Copyright Act's jurisdiction.

C. Equal Treatment for American Authors in America

Recognizing moral rights will also benefit American authors. Foreign authors already have some greater rights than Americans under the Copyright Act.[395] And Berne places obligations on American courts to enforce moral rights for foreigners. American courts must enforce foreigners' moral rights or the United States will be in breach of the treaty. A foreign author can walk into an American court and demand moral rights protection — a failure to recognize this protection would violate the Convention in spite of Article 6*bis* being non-self-executing.[396]

Thus, American authors have less protection in the United States than foreign authors do. This seems odd given that the reason the United States increased the rights of foreigners and joined Berne was to increase the rights of American authors.[397] The adoption of moral rights will finally "secure the highest available level of international copyright protection of American artists, authors, and

[393] *See supra* note 345 and accompanying text.

[394] The rights to publish and retract are already statutorily protected. *Supra* notes 30-34 and accompanying text.

[395] For example, in 1994 the U.S. resurrected copyright protection for foreign works that had been in the public domain, but had been published within the past seventy-five years. No such resurrection occurred for works of American origin. NIMMER, *supra* note 2, at § 9.01.

[396] Even if Article 6*bis* is not self-executing under American law, the obligation to adhere to the treaty remains.

[397] *See supra* note 2 and accompanying text.

copyright holders" at home and abroad.[398]

D. Future Challenges to Copyright Protection

Computers and the Internet are creating a parallel, metaphysical world with no legal, physical, territorial, or cultural boundaries.[399] This progress provides limitless possibilities for violations of copyright and moral rights. Violations of copyright and the right to publish have already occurred.[400] A violation of the author's rights can occur before the author or transferee even has an opportunity to publish the work in its original, physical form.[401]

The piracy of software on the Internet is a serious problem that costs authors millions of dollars a year.[402] And music piracy has exploded causing tremendous controversy in the music industry and becoming a matter of intense litigation.[403] The potential piracy of other works is impossible to gauge.

The potential threat to an author's "moral rights" has also increased significantly. Modern technology has transcended fixation. Fixation has always been an inherent quality of copyrightable expression: a work cannot generally be perceived and marketed if it is not fixed, i.e., if it does not have physical form.[404] But computer technology has freed expression from form. The author's expression is no longer trapped and tangible; it is fluid and malleable in cyber-space. These changes make it possible for anyone — not just publishers — to reproduce a work

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[398] *See supra* note 29 and accompanying text.

[399] *See* Janet Reno v. A.C.L.U., 521 U.S. 844, 890 (1997) (O'Connor, J., dissenting).

[400] *See, e.g.*, Doreen Carvajal, *Children's Book Casts a Spell Over Adults*, N.Y. TIMES, Apr. 1, 1999, at B1; Neil Strauss, *Expert to Help Devise Format for Delivering Music on Net*, N.Y. TIMES, Mar. 1, 1999, at C1; Jon Pareles, *Trying to Get in Tune with the Digital Age*, N.Y. TIMES, Feb. 1999, at C1.

[401] For example, the availability on the Internet of "American Pie 2" before its release. *See* Bernard Warner, *Why Pay to See 'American Pie 2' When It's Free Online*, REUTERS, Aug. 2, 2001 *available at* www.reuters.com (last visited Aug. 2, 2001). Another example is that the biography of François Mitterrand appeared on the Internet during publication and distribution of the actual book.

[402] *See* Paul Taylor, *Software Pirates Boom on the Internet: Intellectual Property Businesses May Be Losing $1 Billion a Year Through Illegal Copying*, FIN. TIMES, Feb. 2, 1999, at 6.

[403] For example, the ongoing controversy and litigation over napster.com.

[404] *See* 17 U.S.C. § 102 (1997) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .").

with a false attribution or without any attribution. Additionally, these changes greatly simplify the ability to cut and paste a work thereby increasing the potential for violations of the work's integrity.[405] Finally, technological advancement makes possible the creation of performances generated entirely by computer. This threat is greatest for the motion picture industry and actors. It will be possible to make an entire original film using an actor's image, voice, and artistic expressions without the consent of actors or producers whose success is tied to the actors they employ.[406]

E. Interest in International Cooperation

The global nature of the Internet will make international protection of works of authorship more important than ever. International and national historical experiences have shown that authors in one state are threatened by insufficient or non-existent copyright protection in other states.[407]

Members of Berne recently addressed some of these concerns by adopting the "Copyright Treaty."[408] The Copyright Treaty provides that authors have the "exclusive right of authorizing any communication to the public of their works" on the Internet or by any other "wire or wireless means."[409] The treaty also grants authors an exclusive right to distribute their works by "sale or

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[405] The "facile use of . . . scissors" is easier than ever before. *Folsom*, 9 Fed. Cas. at 344-45; *see supra* note 184 and accompanying text.

[406] *See* Bernd Graff, *Das Binäre im Auge des Feindes*, SUEDDEUTSCHE ZEITUNG, July 10, 2001 *available at* www.sueddeutsche.de (last visited Aug. 2, 2001) (*describing* the technological capability to digitally copy actors' faces, bodies and movements); Lisa Guernsey, *Software Called Capable of Copying Any Human Voice*, N.Y. TIMES, July 31, 2001 *available at* www.nyt.com (last visited Aug. 2, 2001). This development might require a limited expansion of moral rights. Such a law would protect the author's physical expressions contained in his or her works, and would thus be compatible with copyright law.

[407] The Constitution included copyright among the federal powers to ensure efficient national protection. *See* THE FEDERALIST NO. 43 (James Madison). The experiences in nineteenth century Europe — particularly in the politically fractured Germany — demonstrated the dangers of differing and inadequate levels of enforcement. JAMES KENT, COMMENTARIES ON AMERICAN LAW 376-78 n.d (1896) (Oliver W. Holmes, Jr. & John M. Gould eds.) ("The case of Germany shows how important it was [in the U.S.] that the law of copyright should rest on the broad basis of federal jurisdiction.").

[408] *See* Copyright Treaty, supra *note* 1, preamble ("Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works . . . .").

[409] *Id.* art. 8. *See also id.* art. 4.

other transfer of ownership."[410] It does not interfere with national contract regulations after the first sale or transfer.[411] The treaty does not include a specific moral rights provision but stipulates that all parties "shall comply with Articles 1 to 21" of Berne.[412] Both the United States and the European Union have signed the Copyright Treaty, which will go into effect as soon as thirty states have acceded to it.[413]

The challenge remains, however, to extend effective copyright regulation for all means of public communication to those nations not guaranteeing sufficient enforcement. This includes bringing those nations not party to Berne into the international copyright community and improving enforcement in nations not providing efficient enforcement.[414]

Similarly, American authors' interests in attribution and integrity will be violated abroad. These interests are protected by Berne. It will be in the American interest to work for effective international protection of moral rights and for increasing the global reach of Berne. The greatest incentive for authors to create will be if all their creative interests are protected worldwide. Additionally it will provide the greatest profit to authors and their assigns and ensure the greatest progress for science and the useful arts.

The current American stance on moral rights prevents the most effective global protection of authors' interests. The largest market in the world provides no moral rights to American authors. Foreign authors possess the right, but assessing the legal landscape in order to determine a course of action is a near impossible task for foreign authors. This hardship alone will likely cause controversy. As well, the possibility that a foreign author will be denied relief only increases the risk of confrontation. The lack of a recognition of moral rights will make it more difficult to reach agreement with other nations on international issues of copyright, because it will cause them to question the sincerity of American

410 *Id*. art. 6(1).
411 *See id.* art. 6(2).
412 *See id*. art. 1(4).
413 *See* GUIDE TO THE UNITED STATES TREATIES IN FORCE: CURRENT TREATY ACTION SUPPLEMENT (Igor I. Kavass ed., 2000).
414 For example, copyright enforcement in China. *See* Mark A. Groombridge, *The Political Economy of Intellectual Property Rights Protection in the People's Republic of China, in* INTELLECTUAL PROPERTY RIGHTS IN EMERGING MARKETS, 11-46 (Clarisa Long ed., 2000).

efforts to provide the highest degree of international protection possible to authors everywhere.

The United States is the last major Common Law copyright system that has not implemented statutory moral rights or is not in the process of doing so. Among the factors that convinced the United States it could join Berne without implementing moral rights was the lack of statutory moral rights protection in the United Kingdom and Australia.[415] But in 1988, the same year that the United States acceded to Berne, the United Kingdom implemented a new copyright act with moral rights provisions to comply with Berne.[416] And Australia implemented moral rights in 2000.[417] Other important common law states have implemented moral rights protections.[418] Moreover, citing the lack of protection in other states as a reason to refuse the implementation of moral rights is not a legal argument, but a political one.[419]

The United States attempted to dampen the international impact of moral rights in the TRIPs annex to the WTO convention.[420] Article 9(1) of TRIPs provides that TRIPs incorporates Berne in its entirety but for Article 6*bis*. Although TRIPs offers greater and more effective protections of copyright than Berne, it will not change any international obligations to enforce moral rights.[421] More than 130 states are party to Berne, including all major producers and consumers of copyrighted works.[422] Unless all member-states agree to abolish the treaty, it will remain important for copyright law.

Even if TRIPs should push Berne aside as the prominent copyright treaty, it will not push aside the issue of moral rights.

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[415] *See* Final Report, *supra* note 196, 548-49.

[416] *See* Copyright, Designs and Patent Act 1988, *reprinted in* 3 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1988).

[417] *See* Copyright Amendment (Moral Rights) Act 2000 (Austl.).

[418] Canada implemented moral rights in 1985. Waiver, *supra* note 130, at 33-55. India implemented moral rights in 1994. Shondeep Banerji, *The Indian Intellectual Property Rights Regime and the TRIPs Agreement*, *in* INTELLECTUAL PROPERTY RIGHTS IN EMERGING MARKETS, *supra* note 414, at 51.

[419] The United States would still be in violation of its legal obligations under Berne, regardless of the laws of other countries.

[420] *See* Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments — Result of the Uruguay Round, Vol. 31, 33 I.L.M. 81 (1994).

[421] *See* NIMMER, *supra* note 2, at § 18.06 ("TRIPs cannot serve as the basis for releasing Members from their antecedent treaty obligations.").

[422] *See* U.S. DEP'T OF STATE, TREATIES IN FORCE 355-56 (1999).

The laws of France, Germany, and most nations of the world are predicated on the notion that copyright law serves to protect the interests of the individual author and these laws hold moral rights to be the most important interests an author has. Moral rights will always remain fundamentally important. Any attempt to diminish their importance will be met with resistance by European Union member states and many others. And overreaching attempts to extinguish the impact of moral rights will be met with anger and bitterness.

Finally, it is in public interest of the United States to protect authors' rights of attribution and integrity on a global scale. Such protection will guarantee authors the international recognition and respect they deserve as well as increase their marketability. Unreasonable designations or uses of their works will only harm authors' success and their incentive to create.

In addition, the United States should even consider expanding the scope of moral rights by lobbying for a right to prevent unauthorized use of an author's means of expression — face, voice, gestures — subject to fair use and other exceptions. An inclusion of such a right in Berne or TRIPs would protect globally against computer-generated theft of an author's image and expression.[423]

X. CONCLUSION

The challenges of the future can only be met by eliminating the conflicts of the past. It is in the best interest of the American public and American authors to implement moral rights. As the world's largest producer of works of authorship, the United States has a powerful national interest in providing the greatest degree of international protection possible for these works.[424] No one stands to gain as much from a strong international recognition of authors' rights as American authors.[425] Moral rights are the last remaining

[423] *See supra* note 406. Such rights are protected in American law by unfair competition, privacy, and perhaps under the copyright act. Assessing such rights in foreign jurisdictions will be a cumbersome task and the likelihood of success will be difficult to gauge. Having a clear international rule of law on the issue would simplify enforcement.

[424] *See, e.g.*, Hatch, *supra* note 22.

[425] Individual and corporate American authors will depend increasingly on the level of

barrier to international consensus on the most basic rights of authors. The official recognition of moral rights would be a small but highly significant step towards reaching international closure on the basic principles and rights that copyright law entails and in achieving the "highest available level of international copyright protection" for American authors.[426]

The conflict over moral rights results from misperception and misunderstanding. Moral rights are not an amorphous bundle of rights that allow an over-sensitive author to interfere with the profitable public use of his work. They are a specific set of rights that protect fundamental interests of an author in relation to his work. American law recognizes these interests and their importance for the author's creative drive. The Copyright Act already incorporates the right to publish and the right to retract. As well, many of the protections for attribution and integrity in American law already achieve results similar to the level of protection in France and Germany.[427]

The United States and Europe are tantalizingly close to reaching full agreement on the basic rights of an author. Both systems are based on the author's fundamental right to control his work and its uses. Both systems recognize the interests of the public and publishers in the use of a work and balance the interests of all three groups to achieve effective regulation. And both systems limit moral rights in the public interest but require a reasonable use of an author's work to protect the work from unfair uses.

No compelling reason exists to continue the controversy over moral rights and to resist a greater consensus between the European and American copyright systems. Moral rights and the public interest do not stand in opposition to one another: the fundamental interests of authors and the public good are in complete harmony.[428]

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international protection to assure they receive adequate compensation and respect for their works.

[426] Hatch, *supra* note 22, at 171 (quoting Remarks of President Ronald Reagan on Signing the Berne Convention Implementation Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1405 (Oct. 31, 1988)).

[427] French and German law go beyond the minimum requirements of Berne, but the United States can limit its protection to the standards imposed by Berne.

[428] *See* THE FEDERALIST NO. 43 (James Madison) ("The public good fully coincides . . . with the claims of individuals.").