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Cover Page Footnote
Hugh Hansen; Kevin Galbraith; Michael Hartmere; Daniel Branower; parents; grandfather

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Natalie C. Suhl*

INTRODUCTION

The American market is an irresistible magnet for creators from around the globe. Whether a creator's medium is the written word, oil paints, performance, or music, she wants to profit from the large U.S. market. In recent years the Internet has significantly increased entry points into the U.S. market. The lack of strong protection for authors in the American legal tradition, however, presents significant reasons for a creator to avoid entering the U.S. market.[1]

Although Continentals[2] and Americans share a similar early history of revolutionary independence, fundamental differences in these revolutions established divergent legal traditions.[3] In France, the overthrow of the landed gentry from below led to the creation of a new standard for the elite.[4] Intellectual and creative prowess

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[1] *See infra* Part III.

[2] France will be the prototype for Continentals in this Comment.

[3] *See* ALEXIS DE TOQUEVILLE, THE OLD REGIME AND THE FRENCH REVOLUTION 138 (Stuart Gilbert trans., Anchor Books 1st ed. 1955) (de Toqueville notes that in English/Anglo society men of letters, historically played a pivotal role in public life. In contrast, the men of letters in France, the intellectuals, did not hold any recognized place in French society until the late eighteenth century. "In a nation teeming with officials none of the men of letters held posts of any kind, none was invested with authority.").

[4] *See id*. at 146-47. "Our men of letters did not merely impart their revolutionary ideas to the French nation; they also shaped the national temperament and outlook on life. . . . The result was that our writers ended up by giving the French man the instincts, the turn of mind, the tastes, and even the eccentricities characteristic of the literary man. And when the time came for action, these literary propensities were imported into the political [legal] arena."

replaced acreage as the basis of power in the new regime.[5] In contrast, the American Revolution was not a revolution from below, but rather an overthrow of an external governing authority by those already in power. The power base in the United States was multifaceted; it did not derive from one element such as the educational elite or landed gentry, rather the government and individuals gained power by meeting the diverse needs of a dynamic and socially mobile society.[6] American social construction served to help expand commercial interests as the country prospered, capitalizing upon its social and physical resources.[7] In contrast to the Continent, artistic pursuits were not perceived as adding any value to the country's well being, and thus were afforded minimal legal protection.[8]

Part II of this note presents an overview of the Moral Rights doctrine and discusses the historical and theoretical development of the doctrine[9] in Europe and under the Berne Convention. Part III examines the regimes by which U.S. law protects Moral Rights and supposedly complies with the Berne Convention. Part IV concludes

[5] *See id*.

[6] "In America most of the rich men were formerly poor; most of those who now enjoy leisure were absorbed in business during their youth; the consequences of this is that when they might have had a taste for study, they had no time for it, and when the time is at their disposal, they have no longer the inclination." 1 ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 52 (Phillips Bradley trans., Vintage Books 1st ed. 1990).

[7] "In democratic countries, where money does not lead those who possess it to political power, but often removes them from it, the rich do not know how to spend their leisure. They are driven into active life by the disquietude and the greatness of their desires, by the extent of their resources, and by the taste for what is extraordinary, which is almost always felt by those who rise, by whatever means, above the crowd. Trade is the only road open to them. In democracies nothing is greater or more brilliant than commerce. . . . Those who live in the midst of democratic fluctuations have always before their eyes the image of chance; and they end by liking all undertakings in which chance plays a part. They are therefore all led to engage in commerce, not only for the sake of profit it holds out to them, but for the love of the constant excitement occasioned by that pursuit." 2 ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 155-56 (Phillips Bradley trans., Vintage Books 1st ed. 1990).

[8] "Primary instruction is within the reach of everybody; superior instruction is scarcely to be obtained by any. . . . There is no class, then, in America, in which the taste for intellectual pleasure is transmitted with hereditary fortune and leisure and by which the labors of intellect are held in honor." *See* 1 DE TOQUEVILLE, *supra* note 6, at 52.

[9] *See infra* note 12.

that it is questionable if the U.S. is meeting its Moral Rights obligations as a signatory to the Berne Convention.

II. BACKGROUND

A. Brief Overview

During the creation of a work an author maintains a connection to the work; essentially, the creation is part of the author's personality until the work becomes subject to public judgment.[10] The Moral Rights of an author[11] protect the connection between the creative work and the author's vested interest in the work both during and after its creation.[12] A work becomes subject to public judgment once it enters the public domain, which occurs when the work is put up for display or is published.[13] In the public domain the work is subject to the process of transactions.[14] Although at this point the artist no longer possesses the work, the Moral Rights doctrine provides the author with a bundle of vested rights that nonetheless remain.[15]

In the most expansive form, Moral Rights provide the author with the right to: 1) (attribution) have her name associated with all her creations and no others; 2) (integrity) prevent mutilation, distortion or alteration of the art; 3) (disclosure) choose if and when his work will be revealed to the public; 4) (retraction or withdrawal) withdraw

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[10] *See* Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 365-66 (1998).

[11] In this note 'author' refers to the creator of an artistic medium in any medium.

[12] Many authoritative articles exist on the subject of Moral Rights. *See* Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L.REV. 1 (1997); Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J.L. & ARTS 477 (1990).

[13] *See* Swack, *supra* note 10, at 365.

[14] *See id*. (the work becomes the subject of transactions as it is bought and sold within the commercial market; therefore, the author gives up control over the work's physical nature).

[15] *See id*. at 365-66.

his work once revealed.[16] The scope of Moral Rights protection, however, varies among legal regimes.[17]

B. General History

1. Impact of the Renaissance

Until the middle of the Renaissance, the Catholic Church and wealthy patrons overarched artists' creativity in Europe and England.[18] As the Church's influence decreased, artistic innovation and expression burgeoned.[19] The expansion of artists' creativity fostered the momentum for the assertion of artists' personal rights.[20] Michelangelo, capitalizing upon his outstanding reputation, first demanded the bundle of rights that now fall under the umbrella of Moral Rights.[21] In a sculpture commissioned for a chapel in St. Peter's Cathedral, Michelangelo, first asserting his right of attribution, secretly chiseled his name into the sculpture after hearing of the sculpture being falsely attributed to his patron.[22] Later, Michelangelo asserted his right of disclosure while finishing the ceiling of the Sistine chapel, by refusing Pope Julius II access to the unfinished murals.[23]

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[16] *See id*.

[17] *See generally* Adolf Dietz, *The Moral Rights of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199 (1995) (discussing the scope of Moral Rights in Europe); Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229 (1995) (presenting the scope of Moral Rights in England and the United States).

[18] *See* Swack, *supra* note 10, at 367 (citing Harold C. Streibich, *The Moral Right of Ownership to Intellectual Property: Part I – From the Beginning to the Age of Printing*, 6 MEM. ST. U. L. REV. 1, 5 (1975)).

[19] *See id*.

[20] *See id*.

[21] *See id*.

[22] *See* GIORGIO VASARI, THE LIVES OF THE PAINTERS, SCULPTORS AND ARCHITECTS (AB Hinds ed. 1927).

[23] *See id*.

The vision behind the right of integrity can also be attributed to Michelangelo.[24] Under the patronage system, the artist executed the patron's idea.[25] Michelangelo realized that artists' integrity would be perpetually violated until they were able to exercise creative control over their works.[26] Although fulfilling lucrative commissions, Michelangelo leveraged his reputation by creating paintings to satisfy his own creative instincts, knowing that his reputation would afford him a buyer.[27] Michelangelo fundamentally redefined the patron-artist relationship by transforming the artist into the one determining subject, style, and price.[28]

2. Invocation of Official Authors' Rights

In the eighteenth century French authors adopted a natural law conception of rights in their creations, protesting the royal printing privileges.[29] The French Revolution provided the impetus for statutory recognition of the natural law theory of copyright, which replaced the royal printing monopoly.[30] The Revolutionary Laws of January 13-19, 1791, codified inherent, exclusive rights of authors in their works.[31]

Respect for the natural law basis of authors' rights began to diminish in the 1880s.[32] Societal shifts created a disconnect between

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[24] *See* Swack, *supra* note 10, at 369.

[25] *See id*.

[26] *See id*.

[27] *See id*.

[28] *See id*.

[29] *See* Boudewijn Bouckaert, *What is Property?*, 13 HARV. J.L. & PUB. POL'Y 775, 791 (1990) ("The notion of artistic property appeared in France during the Eighteenth Century with in the context of the struggle of authors against the system of royal privileges. Such privileges were mostly granted by the king to publishing companies in Paris. Authors claimed the right to sell their manuscripts to editors of their choice or even to edit and print documents themselves. . . . This property right implied the right to sell their products to whomever they wanted. These claims reflected the general aversion among Eighteenth Century intellectuals to the royal control on intellectual production.").

[30] *See* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 1886-1986, at 5-6 (1987).

[31] *See id*.

[32] *See id*.

the public and intellectuals.[33] In addition, many rejected the natural law analogy, asserting that it diminished the presence of individual personality within a work.[34] To reinvigorate the respect for and basis of author's rights, French jurists turned to the theories of inalienable personality and alienable property, delineated in the writings of the German philosophers Kant and Hegel.[35]

3. Influence of the Germans upon Modern Moral Rights

An author's creation, according to Kant, is a manifestation of the individual's will.[36] The rights that an author maintains in his works according to Kant, then, are personality rather than property rights.[37] In Kant's worldview, a bright line exists between the tangible material elements of an author's work and the expression inherent within the work; essentially, the inherent personal expression dominates the material component of the work.[38] In contrast to property, which is a means of exchanging value, an author's creation is a means of exchanging thought.[39] Within Kant's theory rests the notion that personality rights are a derivative of every man's inalienable right to express and communicate his ideas.[40] Hegel asserts that the development of personality occurs through the "externalization of its will," thereby allowing property to be deemed an expression of self.[41]

In the late nineteenth century three German philosophers built upon the theories of Kant and Hegel, creating the theoretical basis for

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[33] *See* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 26 (1994).

[34] *See id.* at 16.

[35] *See id.* at 17-20.

[36] *See* Swack, *supra* note 10, at 371-72 (quoting *Was is ein Buch*, where Kant states that an author's vision is an action, an exertion of the [artist's] will, rather than an external thing).

[37] *See id*.

[38] *See id*.

[39] *See id*.

[40] *See id*.

[41] *See* Swack, *supra* note 10, at 371.

the modern doctrine of Moral Rights.[42] Karl Gareis, a Kantian, reinvigorated the concept of personality rights toward the latter half of the nineteenth century. Personality rights, according to Gareis, were comprised of the personality itself.[43]

Otto Friedrick von Gierke, elaborating upon Kantian philosophy, asserted that personality rights were separate, distinct, and superior to author's rights.[44] Personality rights protect the author and all concrete manifestations of the author's will, while author's rights concern only the economic exploitation of the artistic property.[45] Therefore, in von Gierke's worldview, aspects of a creative work expressing the artist's personality should dominate the financial interests of the work.

John Kohler, a follower of Hegel, developed the dualist theory of authors' rights at the start of the twentieth century.[46] The dualist theory asserts that artists maintain both personality and economic interests in their works; however, each area is protected under separate bundles of legal rights.[47] Through the creative process an artist transmits a piece of herself into the work, thereby also allowing her to economically exploit the monetary value created by this manifestation of the artist's personality.[48] Kohler, in accord with von Gierke, emphasized that an artistic work is predominantly a reflection of the artist and that the personality rights, therefore, must take precedence over the economic components.[49]

Modern French copyright law, in particular, the French *droit d'auteur* in article 2 of the French Act, is a reflection of the dualist theory.[50] Under the French Act the author receives exclusive rights

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[42] *See id*.

[43] *See id*.

[44] *See* Barbara Friedman, *From Deontology to Dialogue: The Cultural Consequences of Copyrig*ht, 13 CARDOZO ARTS & ENT. L.J. 157, 167 (1994).

[45] *See id*.

[46] *See* Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 841-42 (1990).

[47] *See id*.

[48] *See id*.

[49] *See id*.

[50] *See* Loi du 11 Mars 1957 Sur la Propriete Litteraire et Artistique, arts. 26-28, 1957 J.O. 2733, 1957 D.L. 102 (Fr.) [hereinafter French Act] (translated in UNESCO, 1

in his or her creation, which are divided into economic and Moral Rights.[51] The split of *droit d'auteur* can be deemed dualist due to the differing status accorded to economic and Moral Rights.[52] Economic rights are of a limited duration and are assignable.[53] In contrast, Moral Rights are infinite in duration, imprescriptible, and inalienable.[54] The power of moral over economic rights, however, is not weaker because of this split.[55] In reality, and in contrast to the U.S., Moral Rights exert an inextricable force upon the economic nature of a work, restricting the extent of ownership in an intellectual work by someone other than the author.[56]

4. Initial Applications of Moral Rights

The French courts were the first to accept Moral Rights as a valid legal term of art.[57] In 1878 a prominent French jurist, Andre Morillot, invoked the phrase Moral Rights in the case of *Cinquin c. Lecocq* before the *Cour de Cassation*, France's highest court.[58] The issue in *Cinquin c. Lecocq* was whether or not property rights of a copyright were community property between spouses.[59] Despite answering the question affirmatively, the court allowed the artist-husband to "retain his right to change the works or even 'suppress' them."[60]

The concept of author's rights upon which Morillot based his idea is rooted in the dualist system of protection espoused by Hegel and developed by Kohler.[61] Morillot's invocation of Moral Rights

COPYRIGHT LAWS AND TREATISES OF THE WORLD (1987)).

[51] *See* Netanel, *supra* note 33, at 23.

[52] *See id*.

[53] *See* French Act, *supra* note 50, art. 30.

[54] *See* French Act, *supra* note 50, art. 6., para. 2.

[55] *See* Netanel, *supra* note 33, at 23.

[56] *See id*.

[57] *See* Swack, *supra* note 10, at 372.

[58] *See* Judgment de 25 Juin 1902 (Cinquin C. Lecocq), Civ., 1903 Recueil Periodique Siery [D.P.] 1.5.

[59] *See* William Strauss, *Moral Rights of the Author*, 4 AM. J. COMP. L. 506, 513 n.31 (1955).

[60] *See id*.

[61] *See* Edward Damich, *The Right of Personality: A Common Law Basis for the*

provided the author "complete personal sovereignty," while opposing "all publication against the will of the author, all publication under a name other than the true creator, and all vicious and inexact reproduction."[62] Further, Morillot's system granted the right of economic exploitation exclusively to the author.[63]

Following this initial acknowledgement of Moral Rights in *Cinquin c. Lecocq*, the French Bar argued over whether to adopt Kant's monist system in lieu of Hegel's dualist system, under which *Cinquin c. Lecocq* was argued.[64] Under the Monists' system authors' rights are non-specific personality rights.[65] In contrast, Dualists perceived authors' rights as two distinct rights: the right to economically exploit one's creative property and the acknowledgment that an author's work is a direct manifestation of his or her personality.[66] The French jurists chose Dualism, as the two elements provided a clearer, more tangible legal test.[67] Dualism provided the French courts with a means of resolving disputes regarding authors' rights by a transparent inductive process.[68] Other European systems chose to guard authors' rights through a more opaque deductive process.[69]

*5. Article 6*bis *of The Berne Convention*

The Moral Rights provision of article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works (hereinafter "Article 6*bis*") was adopted at the Rome Convention of 1928.[70] Article 6*bis* encompasses both the right of attribution and

Protection of the Moral Rights of Authors, 23 GA. L. REV. 1, 29 (1988).

[62] *See id*.

[63] *See id*.

[64] *See* Swack, *supra* note 10, at 373.

[65] *See id*.

[66] *See id*.

[67] *See* Damich, *supra* note 61, at 31.

[68] *See id*.

[69] The German legal system follows the Kantian monist view of authors' rights. The deontelogical influenced German legal regime chose to philosophically justify a general personality right and the derivative rights through a deductive process in contrast to the French system, which affirmatively protects authors' rights. *See id* at 30-31.

[70] *See* International Union for the Protection of Literary and Artistic Works,

the right of integrity.[71] The right of attribution defined by Article 6*bis* as "the right to claim authorship of the work."[72] This broad wording encompasses the right to have a work published anonymously or under a pseudonym, to prevent false attribution, and the right to prevent the author's name from being applied to the work of another person.[73] Specifically, Article 6*bis* states:

> 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 another derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.[74]

Technically, then, all signatories of the Berne Convention must recognize artists' Moral Rights.

The United States would not join the Berne Convention for approximately a century. In 1988, however, the United States became a signatory of the Berne Convention, on a conditional basis, through the Berne Implementation Act.[75] Congress did not include new provisions recognizing moral Moral Rights in the Berne Implementation Act. Rather, Congress asserted that American law

Proceedings of the Conference Held at Rome from May 7 to June 2 1928, Vol. 1 at 106-07, Vol. 2 at 173-82, 200-04 (Pierre Tisseyre trans., 1929) [hereinafter Rome Conference].

[71] *See* RICKETSON, *supra* note 30, at 455, 467-69.

[72] *See id*.

[73] *See* Final Report on the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, 10 COL.-VLA J.L. & ARTS 514 (1986).

[74] *See* RICKETSON, *supra* note 30, at 455 (citing the first section of article 6*bis* of the Paris Act of the Berne Convention).

[75] The Berne Implementation Act [hereinafter "the Act"] dictates the execution of the Berne Convention, and holds that the domestic law will overarch US obligations under the Berne Convention. Pub. L. No. 100-568, § 2(1), (2) 102 Stat. 2853 (1988). In particular, § 3(b) of the Act clearly rejects Moral Rights:

> The provisions of the Berne Convention, the adherence of the US thereto, and the satisfaction of US obligations there under, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or common law—to claim authorship of the work; or to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.

already protected authors' Moral Rights adequately through the areas of unfair competition, copyright, contract, defamation, and privacy.[76] In addition, American federal courts refuse to allow Article 6*bis* to provide a cause of action for Moral Rights violations.[77] Thus, the U.S. joined the Berne Convention to ease international criticism, while bowing to domestic pressure by avoiding direct protection of Moral Rights through a recycled argument of indirect protection.[78]

III. MORAL RIGHTS PROTECTION IN THE UNITED STATES

A. Background

Copyright law in the U.S. is a reflection of a utilitarian tradition.[79] In contrast, Continental copyright law is a derivative of natural rights and German idealism.[80] Social utility is the driving force behind American copyright law.[81] In the tradition of American utilitarian

[76] Existing and parallel American laws, according to the House of Representatives, already provided protection for Moral Rights:

> There is a composite of laws in this country that provides the kind of protection envisioned by Article 6*bis*. Federal laws include 17 U.S.C. §106, relating to derivative works; 17 U.S.C. §115(a)(2), relating to distortions of musical works used under the compulsory license respecting sound recording; 17 U.S.C §203, relating to termination of transfers and licenses; and section 43(a) of the Lanham Act, relating to false designations of origin and false descriptions. State and local laws include those relating to publicity, contractual violations, fraud and misrepresentation, unfair competition, defamation, and invasion of privacy. In addition, eight states have recently enacted specific statutes protecting the right of integrity and paternity in certain works of art. Finally, some courts have recognized the equivalent of such rights. *See* H.R. REP. NO. 609, 100th Cong., 2d Sess. 32-34 (1988).

[77] *See* Choe v. Fordham University School of Law, 920 F. Supp. 44, 49 (S.D.N.Y. 1995) (holding that the "Convention itself, as adopted, does not create federal common law action for violation of author's moral rights (citing to MELVILLE & DAVID NIMMER, NIMMER ON COPYRIGHT section 8D.02[D], 8d-15-30 (1994)).

[78] *See* Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 569 (1940).

[79] *See* Netanel, *supra* note 33, at 9 n.29.

[80] *See* discussion *supra* Part II.

[81] *See* Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 429 (1984) ("the limited monopoly . . . should be granted to authors or to inventors in order to give the public appropriate access to their work product").

liberalism, authors' rights are deemed to be "monopoly privileges" and are granted only to advance the public welfare by providing incentive for creativity, the product of which will be widely available.[82] Specifically, the United States Constitution states that: "Congress shall have the Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and inventors the exclusive Right to their respective Writings and Discoveries."[83] As a result, copyright law in the U.S. functions as a tool for the public interest rather than a guaranteed right arising out of creation.[84]

The level and type of protection afforded to creative works by U.S. law is a reflection of its market-dominated political economy.[85] In Continental legal systems, intellectual and creative works are manifestations of the culture.[86] Conversely, the same works in the United States are another commodity for the market.[87] The social utility of a creative work is not measured by its contribution to society or its novelty; rather, the social utility of the work and its value to the author derives primarily from the price that the public is willing to pay for the work.[88] The greatest proponent of the free market, Adam Smith, praised the monopoly for authors under the Statute of Anne. Smith asserted that: "[I]f the book be a valuable one the demand for it in [the copyright period] will probably be a considerable addition to the [the author's] fortune. But if it is of no value the advantage he can reap for it will be very small."[89] Until recently, then, American copyright sought solely to maximize economic incentives for production and reduce incentives such as

[82] *See id*.

[83] U.S. CONST. art I., § 8, cl. 8. This section of the U.S. constitution is often referred to as the Copyright Clause or the Intellectual Property Clause.

[84] The conception of copyright as a means of serving the public good is clearly articulated in the enabling clause of the United States Constitution art. I., § 8, cl. 8.

[85] *See* Netanel, *supra* note 33, at 11. "The Utilitarian model of economic incentive to stimulate author production and publisher dissemination presupposes a private-property based milieu in which authors' and publishers' rewards are determined in the marketplace."

[86] *See* RICKETSON, *supra* note 30, at 5-6.

[87] *See* Netanel, *supra* note 33, at 12.

[88] *See id*.

[89] *See* Netanel, *supra* note 33, at 13 quoting Adam Smith, Lecture on Jurisprudence 83 (R.L. Meek, D.D. Raphael, P.G. Stein eds., Glasgow ed. 1978).

prestige and creative desire; more specifically, American copyright law sought market efficiency not protection of authors' rights.[90] Moral Rights are not being explicitly protected for the author; rather, Moral Rights are being protected for the benefit of the market. In light of this tradition, it is evident why Moral Rights conflict with the market-dominated culture of U.S. law.

B. VARA

Two years after signing onto the Berne Convention, Congress softened its prohibition of explicit Moral Rights protection. In 1994 Congress codified the Visual Artists Rights Act (hereinafter "VARA"),[91] which grants a bundle of Moral Rights to a limited group of visual artists.[92] Unfortunately, though, VARA narrowly defines "work of visual art," and therefore is invoked only in very limited circumstances.[93]

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[90] *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325, 327-28 (1989) (stating that works will be created "only if the difference between expected revenues and the cost of making copies equals or exceeds the cost of expression").

[91] Visual Artists Rights Act [hereinafter VARA], Pub. L. No. 101-650, tit. VI, 104 Stat. 5128 (1990)) (codified in part in 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506 (1994)).

[92] VARA states that creative artists:

> (1) shall have the right (A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create; (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and (3) subject to the limitations set forth in section 113(d), shall have the right—(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

See 17 U.S.C. § 106A.

[93] To date, limited VARA claims are on record. *See* English v. BFC & R East 11th Street LLC, No. 97 Civ. 7446, 1997 WL 746444 (S.D.N.Y. Dec. 3. 1997), *aff'd*, 198 F.3d 233 (2d. Cir. 1999); Carter v. Helmsley-Spear, Inc., 71 F.3d 77 (2d Cir. 1995); Pavia v. 1120 Avenue of the Americas Associates, 901 F. Supp. 620 (S.D.N.Y. 1995).

C. Section 43(a) of the Lanham Act

1. Definitions and Origins

The Lanham Act serves to combat false advertising and the inappropriate use of trademarks.[94] The purpose of the Lanham Act is to aid consumers by preventing a marketplace of unfair competition.[95]

Section 43(a) of the Lanham Act (hereinafter "§ 43(a)") prohibits the utilization of incorrect statements in regards to the origin, description, or patronage of a product.[96] Essentially § 43(a) intervenes against action that could lead to consumer confusion.[97] Section 43(a) serves the consumer by guarding against misinformation streaming into the market, allowing the consumer to benefit from the market's natural, spontaneous order.[98] The first to benefit from § 43(a), however, are players and producers in the marketplace.[99] A competitor, for example, may sue under § 43(a) to

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[94] *See* 15 U.S.C. §§ 1051-1127 (1988 & Supp. V 1993), amended by Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (amending §§ 1052 and 1127).

[95] *See* Diana Elzey Pinover, *The Rights of Authors, Artists, and Performers Under Section 43(a) of the Lanham Act*, 83 TRADEMARK REP. 38, 45 (1993) (referring to 15 U.S.C. § 1127 (1988 & Supp. V 1993), amended by Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994)).

[96] 15 USC § 1125(a) (1992). It states:

> Any person who, on or in connection with any goods or services or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which – 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 by another person, or 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 by any person who believes that he or she is or is likely to be damaged by such an act.

[97] *See* Randolph Stuart Sergent, *Building Reputational Capital: The Right of Attribution under Section 43 of the Lanham Act*, 19 COLUM.-VLA J.L. & ARTS 45 (1995).

[98] *See id*.

[99] *See id*.

prevent false advertising by the defendant.[100] Therefore, although consumers are the ultimate beneficiaries of § 43(a), producers of goods and services in the marketplace are generally the first parties to invoke § 43(a).[101] In recent years, authors have invoked § 43(a) to protect their rights of attribution and integrity.[102]

2. Reverse Passing Off: Right of Attribution under § 43(a)

Section 43(a) of the Lanham Act, as stated above, regulates two types of activities: 1) false advertising; and 2) the "passing off" of goods under a competitor's trademark.[103] Courts invoke the phrase "passing off" in three distinct situations: 1) trademark infringement without intent to defraud, but where consumers were likely to be confused; 2) trademark infringement with intent to defraud and confuse buyers; and 3) substitution of one brand of goods when another brand is ordered.[104] Overall, though, the main issue concerns whether or not the consumer will confuse the two products.

Section 43(a) is also invoked in many federal circuits to combat practices that are the economic equivalent of "passing off." Essentially, § 43(a) protects the market from misinformation that could distort its natural, spontaneous order.[105] Included in these acts would be "reverse passing off," which occurs when the party at fault

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[100] *See id*.

[101] *Compare* Colligan v. Activities Club of New York, Ltd., 442 F.2d 686, 692 (2d Cir. 1971) ("Congress' purpose in enacting §43(a) was to create a special and limited unfair competition remedy, virtually without regard for the interests of consumers generally."), *cert. denied*, 404 U.S. 1004 (1971) *with* Sergent, *supra* note 97, at 46 n.5 ("When a court expands the Lanham's Act's scope by providing new definitions of 'unfair' practices, the ultimate interests of consumers should be the baseline against which to measure whether a producer should be given a 'right' under § 43(a). Producers are often 'harmed' by legitimate competition, and if the sole focus of the Lanham Act causes of action is upon the producer, the Lanham Act can easily become a tool for reducing or eliminating competition, to the consumer's ultimate detriment.").

[102] *See* Pinover, *supra* note 95, at 38; *see also* Marie v. Driscoll, *The "New" 43(a)*, 79 TRADEMARK REP. 238 (1989).

[103] *See* discussion *supra* Part III(c)(i).

[104] *See* J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 25.01(1), at 25-3 (1994).

[105] *See* Smith v. Montoro, 648 F.2d 602, 605 (9th Cir. 1981).

sells another party's creation or product as his or her own.[106] Reverse passing off takes shape in two different forms. Implied reverse passing off occurs when the defendant removes the source name of a product and sells it in a generic form.[107] Express reverse passing off takes place when the defendant removes another's name or trademark and then proceeds to sell the product under his or her own chosen name or mark.[108]

Courts often interpret the prohibition against "reverse passing off" in § 43(a) as providing authors with a legitimate right to seek proper credit for their work.[109] Two justifications exist for this contention: 1) if authors do not receive proper credit, consumer confusion will result because the consumer will be unaware of the true source of the work; and 2) without proper credit, the author's reputation would not be enhanced commensurate with the creation.[110] It is supposed, then, that the author will likely be denied future opportunities if her reputation does not accurately reflect her work.

Authors seek remedy under reverse passing off for claims regarding their right of attribution under the Lanham Act. The 1981 Ninth Circuit decision of *Smith v. Montoro* is the leading case on this issue.[111] Case law following *Smith* provides authors and other creators with the right of attribution. Although the right of attribution is a type of reverse passing off claim, it is not conceptually interchangeable with a standard reverse passing off case dealing with a manufactured product or a trademark.[112] Right of attribution claims are more complex, encompassing claims exceeding the creator's physical product.[113] A creator asserts the right of

[106] *See id*.
[107] *See id*.
[108] *See id*.
[109] *See* Sergent, *supra* note 97, at 46.
[110] *See id*.
[111] *See* 648 F.2d 602 (9th Cir. 1981) (holding that an actor maintained standing to sue a distributor under § 43(a) because the distributor credited the actor's work to someone else in the credits).
[112] *See* MCCARTHY, *supra* note 104, § 25.01(4)(b), at 25-10.
[113] *See* Sergent, *supra* note 97, at 51-52

attribution when he or she should receive credit for the defendant's products.[114]

3. Demonstrating a Successful § 43(a) Claim

A successful claim for the right of attribution under section 43(a) must satisfy three requirements. First, to gain jurisdiction, the goods and services in question must be involved in interstate commerce.[115] Second, one must successfully prove standing to sue under the Lanham Act.[116] Standing is achieved when the plaintiff proves either a competitive or commercial injury, which maintains a causal link to misleading information. Third, the plaintiff must have a genuine interest protected by the act.[117]

4. Protected Interests of a § 43(a) Right of Attribution Claim

An author's claim for the right of attribution under § 43(a) cannot be solely based upon a false designation of authorship; rather, the central claim must be based upon a claim of actual confusion.[118]

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[114] *See id*.

[115] *See* Sims v. Blanchris, Inc., 648 F. Supp. 480 (S.D.N.Y. 1986) (plaintiff denied standing as defendant never entered goods into an interstate stream of commerce).

[116] *See* MCCARTHY, *supra* note 104, § 27.03(3)(a) (stating that "although both the pre- and post-1988 versions of section 43(a) give standing to 'any person who believes that he is or is likely to be damaged,' courts have not given this provision its full literal scope . . . although most courts now agree that direct competition with the wrongdoer is not necessary.").

[117] *See* Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1108 (9th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993).

[118] *See* Lamothe v. Atlantic Recording Corp., 847 F.2d 1403, 1407 (9th Cir. 1988) (Only one of three songwriters was given proper credit. The Ninth Circuit held that "[had] the defendants decided to attribute authorship to a fictitious person . . . this would be a 'false' designation of origin. It seems to us no less false to attribute authorship to only one of several co-authors.").

5. Protected Interests v. Industry Custom

The standard for determining when an interest is protected under § 43(a) is not clearly defined by the courts.[119] As § 43(a) claims are designed to remedy false attribution, courts generally ignore substantive law and industry custom when deciding claims under this section.[120] For instance, where an editor designated herself the principal author in accordance with industry custom, a court still found it misleading.[121]

D. Limitation of Right of Attribution Claims

The remedies invoked under § 43(a) must correlate with the overall purpose of the Lanham Act.[122] As noted above, reverse passing off cases require that the harm is the product of: 1) the original creator's loss of future earning potential because the creation is being sold under another name, and 2) consumer confusion arising from the inability to decipher the correct origin of the product.[123]

1. Likelihood of Confusion

A likelihood of confusion exists where the plaintiff is likely to assume that the creation in question originated with the defendant, when the plaintiff can actually claim a right of attribution.[124] A two-

[119] *See* Sergent, *supra* note 97, at 58.

[120] *See id.* (asserting that the "rationale for ignoring other substantive law or industry custom is that §43(a) focuses upon false representations, rather than vindication of property rights.").

[121] *See* Follett v. New American Library, Inc., 497 F. Supp. 304 (S.D.N.Y. 1980) (holding that industry practices were not pertinent to the case because even if the industry practices were to grant attribution rights to the editor, it would still violate the Lanham Act if original author's contribution was misrepresented).

[122] *See* Sergent, *supra* note 97, at 62 (referring to Soltex Polymer Corp. v. Fortex Indus., 832 F.2d 1325, 1329 (2d Cir. 1987)).

[123] *See Smith*, 648 F.2d at 607.

[124] "[A] likelihood of confusion should always exist whenever the plaintiff can show a right of attribution for the defendant's product and consumers do not know that the plaintiff

prong test is utilized to determine if a valid right of attribution claim exists: 1) a comparison of the two products should be made by the court, to determine whether or not the defendant is actually selling the plaintiff's product[125]; and 2) If the court makes an affirmative finding in part one, then it should determine if consumers are confused about the source of the product.[126] Significantly, however, the sophistication of the consumer will be taken into account in order to determine if the consumer actually knew of the source.[127]

2. Actual Confusion

Actual confusion is shown by a lost future opportunity.[128] The plaintiff, then, in a reverse passing off case, must show that he or she lost future opportunities that would have been available if correct and sufficient recognition was given for the creation.[129] If, however, that cannot be proved, then actual consumer confusion must be proved.[130] In a reverse passing off case, actual consumer confusion occurs when the consumers actually believed the defendant to be the originator of the creation in question.[131]

E. Right of Integrity

1. Defined

The Right of Integrity involves the mutilation of an artist's work, which is defined as substantially changing a creation without the

created the products that the defendant is selling." *See* Sergent, *supra* note 97, at 63.

[125] *See id*.

[126] *See id.* at 63-64.

[127] *See* Rosenfeld v. W.B. Saunders, 728 F. Supp. 236, (S.D.N.Y. 1990) (holding that the sophisticated nature of the buyers, medical professionals, allowed them to be informed that medical treatises are a compilation of prior works. Therefore, the court found that there was not a likelihood of actual confusion).

[128] *See* Sergent, *supra* note 97, at 65.

[129] *See id*.

[130] *See id*.

[131] *See id*.

author's permission.[132] Injury occurs because the author is given credit for a work that does not include his final authorization.[133]

2. Continental Protection of Integrity

The Right of Integrity is the central component of Moral Rights protection in France.[134] Negatively, the right provides the author with entitlement to prevent any public presentation of the work that threatens his or her reputation.[135] The French case involving the artist Bernard Buffet is often cited as an example of the French Court's respect for and acknowledgement of the negative rights inherent in the Right of Integrity.[136] Another legitimate invocation of the negative right associated with the Right of Integrity is to combat an adaptation that does not truthfully represent the work.[137] An additional invocation of the negative right is justified when a public display of a work is detrimental to the work's overall conceptual view.[138] The leading case regarding this third invocation concerned the music of Dmitri Shostakovich in an anti-Soviet film without Shostakovich's permission.[139] Only a French court found in favor of the musician.[140] The French case *Dubuffet c. Renault* exemplifies the

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[132] *See* Roeder, *supra* note 78, at 566.

[133] *See* Pinover, *supra* note 95, at 45.

[134] *See* Codified in Article 6 of *Loi du 11 mars 1957 Sur la Propiete Litteraire et Artsitique, arts.26-28, 1957 J.O. 2733, 1957 D.L. 102 (Fr.)*, stating that "the author shall enjoy . . . respect for his name, his authorship, and his work."

[135] *See* Netanel, *supra* note 33, at 38.

[136] *See* Judgment of May 30, 1962 (Fersing v. Buffet), Cour de Cassation, 1965 G.P. 126 (Buffet had painted designs on a refrigerator, which the owner sought to dismantle and sell as individual pieces. Buffet sued to prevent the refrigerator's dismantling and asserted that the refrigerator was an artistic whole. The *cour de cassation* ruled that the public display of Buffet's work in the mutilated form would violate the artist's personal right in regards to his creation, but that the separate pieces could be kept in the owners home.). *See generally* John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976).

[137] *See* Bernard Rousseau v. Galeries Lafayette, Judgment of Mar. 13, 1973, Trib. Gr. Inst. 1974 J.C.P., No. 48, at 224; *see also* Damich, *supra* note 61, at 22.

[138] *See* Damich, *supra* note 61, at 23.

[139] *See* Shostakovich v. Twentieth Century-Fox Film Corp., 87 N.Y.S. 2d 430 (1st Dep't 1949) (New York court rejected claim that the unauthorized use of the musician's pieces in a film about soviet espionage in Canada, falsely imbued disloyalty to his country).

[140] *See* Soc. Le Chant de Monde v. Soc. Fox Europe et Soc. Fox Americain Twentieth Century, Judgement of Jan. 13, 1953, 1953 G.P. 191.

positive right of integrity; more specifically, when an author can demand public presentation of a work.[141] In this case the artist was commissioned to design a sculpture for Renault, but the company defaulted due to financial problems. The *Cour de Cassation* ordered Renault to finish the sculpture, implicitly asserting that the artist was entitled to the preservation of his creation, which in this case meant its presentation in tangible form.[142] The author in France, and in many other Continental regimes, maintains a personal connection with his or her creation that extends beyond the author's reputation interests; essentially, the author is allowed to intervene whenever he or she feels that a modification to a given work may affect the public's judgment of the author.[143]

3. Gilliam v. ABC*: Where It Started*

Under § 43(a), an author may assert his or her right of integrity when his or her work is altered without permission.[144] The leading case regarding this issue is *Gilliam v. American Broadcasting Co.*,[145] which held that ABC's broadcasting of a highly edited version of Monty Python skits violated § 43(a). In *Gilliam*, the court found that ABC's unauthorized editing substantially changed the skits, allowing the public to associate the new skits as Monty Python's original creation.[146] Essentially, the court asserted that the presentation of the

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[141] *See* Judgment of Mar. 23, 1977, Trib. Gr. Inst., 1977 R.I.D.A. 191 obs. Desbois (Fr.), *aff'd*, Judgment of June 2, 1978, 1980 G.P. 580 note Franck, *rev'd*, Judgment of Jan. 8, 1980, Cass. Civ. 1re, 1980 J.C.P. II no. 1933 note Lindon.

[142] *See* Netanel, supra note 33, at 39. *See generally* Andre Francon & Jane Ginsburg, *Authors Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work*, 9 COLUM.-VLA J.L. & ARTS 381 (1985).

[143] *See* Netanel, *supra* note 33, at 39 (referring to *Delorme v. Catena-France*, *Judgment December 12, 1988, Cours d/appel, P.I.B.D. III, NO. 454, at 231*, 10 EUROPEAN INTELL. PROP. REV. D-182 (1989) where a company logo that the designer created was modified without his authorization, the court granted the right of integrity to the designer, even though the changes only consisted in the positioning of the logo)).

[144] "This statute . . . has been . . . invoked to prevent misrepresentations that may injure plaintiff's business or personal reputation, even where no registered trademark is concerned." *See* Gilliam v. American Broadcasting Corp., 538 F.2d 14, 24 (2d Cir. 1976).

[145] *See id*.

[146] *See id*.

mutilated Monty Python skit violated the right of the artist to have the work attributed to him in the form in which he created it.[147]

4. Gilliam *Applied*

While *Gilliam* is a landmark on the map of integrity protection in the U.S., it is an anomaly.[148] The *Gilliam* holding is problematic as precedent because the facts are so unique and represent a clear case of mutilation; therefore, many courts who are not inclined to protect the right to integrity will distinguish the facts of *Gilliam*.[149]

In the music industry, § 43(a), as applied in *Gilliam*, is invoked to protect the older recordings of musicians from being altered and then presented to the public as new albums without permission.[150] One case, *Benson v. Paul Winley Record Sales Corp.*,[151] involves the remixing of an older artist's album, where the new version included sexually explicit lyrics and an erotically renamed cover [152] Although the defendant created the derivative works and owned copyright in the old album, the Southern District of New York still found that such unorthodox alterations violated § 43(a).[153] Like *Gilliam*, though, this case is overt and extreme.

[147] *See id*. (court held that "to deform [the author's] work is to present [an author] to the public as the creator of a work not his own, and thus makes him subject to criticism for work he has not done.").

[148] *Gilliam* has yet to be followed.

[149] *See generally* Leigh v. Warner Bros., Inc., 212 F.3d 1210 (11th Cir. 2000); Marvullo v. Gruner & Jahr, 105 F. Supp. 2d 225 (S.D.N.Y. 2000).

[150] *See* Raphael Winick, *Intellectual Property, Defamation and the Digital Alteration of Visual Images*, 21 COLUM.-VLA J.L. & ARTS 143, 172 (1997).

[151] 452 F. Supp. 516 (S.D.N.Y. 1978) (Defendants remixed one of plaintiff's older recording sessions and marketed the material as "George Benson, Erotic Moods." Record jacket featured "X-Rated LP" caption, and sexually suggestive moaning was added to one selection.).

[152] *See id.*

[153] *See id*.

5. The Limits of Gilliam *as Precedent for Integrity Protection*

Although *Gilliam* does represent a standard for protecting the right to integrity via the Lanham Act, it does not necessarily provide a true remedy because of the onerous standard required for a successful claim. To successfully bring a Lanham Act claim for damages, the plaintiff must prove either actual consumer confusion or deception in addition to the violation of integrity, where the defendant's actions were not intentionally deceptive.[154] Although this standard was easily met by the facts of *Gilliam*, it is rare to find a case where the facts will present an irrefutable claim of consumer confusion.

Gilliam and its descendants represent an expansive reading of § 43(a) asserting that that the Lanham Act's purpose is not only to protect the public and artist from misrepresentations, but also to enforce the author's "personal right" to reject public viewings of his or her work in a mutilated or distorted form.[155] Many courts, however, view this interpretation of the Lanham Act as an illicit substitute, or 'back-door,' for Moral Rights protection.[156] In fact, the majority of recent cases regarding this issue reject the broad interpretation of § 43(a) championed in *Gilliam*.

6. Why Gilliam *Is Likely to Stand Alone*

In the 1995 Southern District of New York case of *Choe v. Fordham University School of Law*,[157] the court also struck down the plaintiff's claim for Moral Rights relief under § 43(a).[158] The plaintiff submitted a comment to the Fordham International Law

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[154] *See* George Basch Co. v. Blue Coral Inc., 968 F.2d 1532, 1537 (2d Cir. 1992).

[155] *See Gilliam*, 538 F.2d at 24.

[156] *See* Judge Gurfein's concurrence in *Gilliam*, asserting that section 43(a) should not be invoked as a moral rights substitute because "the Lanham Act does not deal with artistic integrity. It only goes to misdescription of origin and the like." Although not dissenting from Judge Lumbard's application of section 43(a) to the facts of *Gilliam* in the majority opinion, Judge Gurfein stated that it would have been more prudent to invoke available contractual and copyright remedies. *See Gilliam*, 538 F.2d at 26-27.

[157] 920 F. Supp. 44 (S.D.N.Y. 1995).

[158] *See id*.

Journal, and claimed that the printed version represented a mutilated form of his comment due to the editorial changes.[159] The court did not overrule *Gilliam*; rather, it distinguished it and emphasized that in this case the plaintiff did not provide evidence to support a claim that the changes sufficiently changed the meaning of the piece so as to provide the reader with a different meaning of Choe's work.[160] Of greater significance, however, is that the court explicitly struck down the validity of an Article 6*bis* claim for Moral Rights due to lack of federal jurisdiction.[161] The *Choe* decision, thus, is representative of the rejection by American courts of the explicit Moral Rights protection offered under Article 6*bis* and a reliance upon the weak protection afforded under the Berne Implementation Act.[162] Furthermore, the attitude exhibited by the *Choe* court indicates that the overt protection of Moral Rights in *Gilliam* is not likely to be emulated in other decisions.[163]

7. Comparative Weakness of Integrity Protection

The weaknesses and limits of author's integrity protection under U.S. law relative to Continental law is highlighted by a case involving Turner Entertainment's colorization of the black and white film, *Asphalt Jungle*.[164] The heirs of the film's director protested the colorization of the film.[165] Under U.S. law, colorization creates a derivative work conditioned upon the will of the copyright owner's exclusive derivative right.[166] In this case, though, the heirs did not maintain a successful cause of action for U.S. courts, particularly because standard film contracts force the director to sign away all

[159] *See id*. at 45.
[160] *See id*. at 48.
[161] *See id*. at 49.
[162] *See id*.
[163] *See id*. ("Whatever language there may be in . . . Gilliam to suggest a federal common law claim for deprivation of an author's "moral rights" is dictum, and has not generated any claim in this Circuit for almost 20 years.).
[164] See Judgment of May 28, 1991, Cass. Civ. 1re, 149 r.i.d.a. 197 (1991); *see also* Ginsburg & Sirinelli, *Auteur, Creation et Adaptation en Droit International Prive et Droit Iterne Francais. Reflexions a Partir de l'Affaire Huston*, 150 R.I.D.A. 2 (1991).
[165] *See* Judgment of May 28, 1991, *supra* note 164.
[166] *See* Netanel, *supra* note 33, at 44.

rights to the producer.[167] The director's heirs, though, filed suit in France to prevent a French television station from broadcasting the colorized version, asserting that it would violate the director's Right of Integrity.[168] In its analysis, the *Cour de Cassation* refused to apply U.S. Copyright law, and ruled under French law that the director's creative contribution to a film makes him or her the author.[169] Under French law, therefore, the director as author maintains his Moral Right of Integrity even after the industry's standard assignment of rights.[170]

The discrepancy between the outcomes in the *Asphalt Jungle* case under U.S. and French law illustrates that U.S. copyright law is dominated by economic interests, consistent with U.S. legal tradition.[171] While successful causes of action for Moral Rights protection under § 43(a) do exist in the cases discussed earlier, those represent specific causes of action that fall nicely under the rubric of unfair competition.[172] Moral Rights are not being explicitly protected; rather, Moral Rights are being protected for the benefit of the market and not the author. As the *Asphalt Jungle* case demonstrates, the United States does not afford an author a clear or consistent means of creative protection.

CONCLUSION

Moral Rights protection is limited in the United States, where the only viable course of action for non-visual authors is through the Lanham Act. Regarding both the Right of Attribution and the Right of Integrity, the Lanham Act provides only limited protection. The prevention of consumer deception in the market, not the overt protection of an author's creativity, is the purpose of the Lanham

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[167] *See id*.

[168] *See id*.

[169] *See* Judgment of May 28, 1991, *supra* note 164.

[170] *See* Netanel, *supra* note 33, at n.225 (stating that "Even under French law . . . the director's exploitation rights are presumptively transferred to the producer. But the director maintains certain moral rights despite the transfer.").

[171] *See* Netanel, *supra* note 33, at 28.

[172] *See id*.

Act. Thus, authors garner protection only where overt mutilations occur to the extent that the character of the work is changed so as to present a false designation of origin. Mutilation of a work, therefore, which does not confuse the public's view of its origin, would not be actionable under the Lanham Act. As the *Asphalt Jungle* case exemplifies, this protection is quite limited relative to that afforded by other Berne Convention member countries.

Is the United States really meeting its obligations under the Berne Convention, particularly in regards to Article 6*bis*? To truly comply with the Berne Convention, it may be necessary for U.S. law to depart from its utilitarian, market-driven tradition, and to affirmatively provide protection to authors in a manner consistent with that provided by other member countries of the Berne Convention.