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## Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas

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# Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas

## **Cover Page Footnote**

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# Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas

Jacqueline D. Lipton, Ph.D.\*

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## ABSTRACT

In recent years, several scholars have revisited the question of moral rights protections for creators of copyright works in the United States. Their scholarship has focused on defining a moral rights agenda that comports with American constitutional values,

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as well as being practically suited to current copyright business practices. Much of this scholarship has prioritized a right of attribution over other moral rights, such as the right of integrity. This Article evaluates some of these recent moral rights models in light of a sample of comments made by American supernatural fiction authors about their works. The Author questions whether the moral rights models advocated in modern discourse effectively fill the gaps between authors' stated interests and the protections currently available under copyright law. The Author also questions the extent to which authors' rights should be elevated above others' rights to enjoy and adapt their works.

## INTRODUCTION

The word *create* . . . derives from the Latin verb *creo*, which means “to give birth to.” . . . The concept that an author “gives birth” to her artistic creations provides the foundation for the insurmountable connection between an author and her work.<sup>1</sup>

The United States has had a checkered history with moral rights legislation. As a signatory to the Berne Convention,<sup>2</sup> the United States is obliged to protect certain moral rights of authors of copyrighted works.<sup>3</sup> However, since signing the Convention, it is unclear whether the United States has complied with those obligations.<sup>4</sup> The government has maintained that existing

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<sup>1</sup> ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 13–14 (2010).

<sup>2</sup> Berne Convention for the Protection of Literary and Artistic Works, *revised at Paris* July 24, 1971, 331 U.N.T.S. 217 [hereinafter Berne Convention], available at [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html).

<sup>3</sup> *Id.* art. 6*bis*; MARSHALL LEAFFER, *UNDERSTANDING COPYRIGHT LAW* 389 (5th ed., 2010) (describing the moral rights set out in the Berne Convention as the right of integrity—the right not to have a work mutilated or distorted—and the right of paternity—the right of the author to be acknowledged as the author of the work).

<sup>4</sup> Berne Convention, *supra* note 2, art. 6*bis*(1) (“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

copyright, trademark, contract, defamation, privacy, and unfair competition laws,<sup>5</sup> supplemented by provisions of the Visual Artists' Rights Act ("VARA"),<sup>6</sup> sufficiently comply with Article 6bis—the moral rights provision.<sup>7</sup> However, a number of commentators maintain that the United States is not in compliance with the Article.<sup>8</sup> In recent years, copyright scholars have renewed the debate about the need for moral rights protections in the United

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modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”)

<sup>5</sup> LEAFFER, *supra* note 3, at 390 (“Although American copyright law has never adopted an integrated version of the moral right, some case law has come very close to achieving the same result in protecting certain aspects of the author’s integrity and paternity rights. The leading case is *Gilliam v. American Broadcasting Cos., Inc.*, where plaintiff’s right to prevent distortion of his work was protected under both the copyright and unfair competition laws . . . . In addition to copyright and unfair competition laws, American authors have turned to contract, defamation, and privacy laws to protect other aspects of their artistic personality and reputation.” *Gilliam v. Am. Broad. Cos., Inc.*, 538 F.2d 14 (2d Cir. 1976)).

<sup>6</sup> Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128.

<sup>7</sup> LEAFFER, *supra* note 3, at 380 (“Congress justified its decision not to adopt specific moral rights legislation, claiming that the United States already gives *de facto* recognition to moral rights when the entirety of American law is considered. But serious doubts lingered about whether U.S. obligations under Berne had really been met, without specific recognition of moral rights. The proponents of specific legislation quickly prevailed. Congress responded by passing the Visual Artists Rights Act of 1990 (‘VARA’).”).

<sup>8</sup> KWALL, *supra* note 1, at 37 (“[T]here is the stark reality that [the United States] may not be in compliance with our [moral rights] obligations under the Berne Convention.”); LEAFFER, *supra* note 3, at 387 (noting that the United States has arguably not yet fulfilled its obligations under Article 6bis of the Berne Convention); *see also id.* at 393 (“Ironically, VARA falls short of conforming to the requirements of the Berne Convention. Most significantly, VARA specifies that protection lasts no longer than the life of [the] author whereas Berne requires that moral rights should be protected at least for the term of the related economic rights—which in the United States is the life of the author plus 70 years.”); Margaret Ann Wilkinson & Natasha Gerolami, *The Author as Agent of Information Policy: The Relationship Between Economic and Moral Rights in Copyright*, 26 GOV’T INFO. Q. 321, 327–30 (2009) (“The United States, which is now a signatory to the *Berne Convention* and leading proponent of strong foreign and international intellectual property protection, still does not have significant moral rights provisions in its copyright legislation. . . . [M]any believe that American law does not provide moral rights protection sufficient to satisfy the *Berne Convention* . . . despite the . . . passage of the limited *Visual Artists’ Rights Act* (1990).”).

States, and have considered what such protections might look like in practice.<sup>9</sup>

There are a number of reasons for the renewed interest in moral rights in recent years. In particular, as noted by Professor Neil Netanel, digital technologies allow authors to relatively easily express their preferences for uses of their works online.<sup>10</sup> This has already occurred in the copyright context, particularly under the Creative Commons License scheme.<sup>11</sup> Creative Commons licenses enable authors to market their work with the freedoms they intend to bestow on subsequent users.<sup>12</sup> Thus, a workable model already exists for authors to express their preferences about moral rights, if a broader moral rights agenda were to be adopted in the United States. Another reason to revisit moral rights, also related to digital technology, is that Internet technologies have rapidly made the world a much smaller place. Perceived disharmonizations in the law can be problematic when creators are now sharing their works online on a global scale.<sup>13</sup>

This Article aims to synthesize some of the more recent digital developments involving copyright works with some of the relevant scholarship on moral rights in the United States. The idea is to evaluate the extent to which some of the newly proposed moral rights models for the United States would address stated concerns of authors particularly with respect to downstream online uses of

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<sup>9</sup> See KWALL, *supra* note 1, at 147–65; NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 215–17 (2008).

<sup>10</sup> NETANEL, *supra* note 9, at 216 (“Digital technology may well ease the burden of compliance [with copyright and moral rights law].”).

<sup>11</sup> *Id.* at 216–17 (noting use of Creative Commons licensing scheme for authors to express preferences in relation to online uses of their works).

<sup>12</sup> LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY, 277 (2008) (“Creative Commons [“CC”] gives authors free tools—legal tools (copyright licenses) and technical tools (metadata and simple marking technology)—to mark their creativity with the freedoms they intend it to carry. So if you’re a teacher, and you want people to share your work, CC gives you a tool to signal this to others. Or if you’re a photographer and don’t mind if others collect your work, but don’t want *Time* magazine to take your work without your permission, then CC would give you a license to signal this.”).

<sup>13</sup> KWALL, *supra* note 1, at 37 (“As of the close of the first decade of the twenty-first century, the United States appears to be rather isolated in its failure to recognize explicitly adequate moral rights.”).

their copyrighted works. Part I examines the nature of moral rights and the checkered history of moral rights protections in the United States. Part II addresses a small sample of comments made by authors of supernatural fiction about downstream uses of their works online. These authorial concerns are not particularly well protected by current copyright laws, and the question arises whether moral rights would provide more appropriate protections. Supernatural fiction authors are chosen for examination because they tend to be very articulate in the blogosphere and often maintain active dialogue with their fans about preferred downstream uses of their works.

Part III introduces some of the newer models for moral rights protections advocated in recent years by American copyright scholars Professors Neil Netanel and Roberta Rosenthal Kwall. It examines the extent to which these models might effectively address some of the authorial concerns identified in Part II. Part IV concludes with some comments about ways in which moral rights and copyright law could be developed in the future to better address some of these authorial concerns. It further questions the extent to which authorial concerns should be allowed to dictate downstream uses of copyright works.

## I. MORAL RIGHTS: NATURE AND SCOPE

### A. *Moral Rights versus Copyrights*

When an artist creates, be he an author, a painter, a sculptor, an architect or a musician, he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use. There are possibilities of injury to the creator other than merely economic ones; these the copyright statute does not protect.<sup>14</sup>

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<sup>14</sup> Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940).

Many commentators have noted that the economic rights protected by copyright law do not grant full protection for the kinds of interests a creator may want to assert in her work.<sup>15</sup> Copyright law is aimed at encouraging the production and dissemination of literary and artistic works by providing sufficient economic incentives to creators of those works.<sup>16</sup> Copyright law prevents the unauthorized copying or dissemination of a protected work, thus preserving the incentives to create.<sup>17</sup> If an author can secure control of the work in the marketplace, she may feel more confident creating and disseminating the work.

However, copyrights do not fully capture the nature of the relationship between an author and her work.<sup>18</sup> For one thing, copyrights are assignable,<sup>19</sup> meaning that an author may not be in a position to control downstream uses of a work post-assignment. In fact, in jurisdictions where moral rights are available, authors will often invoke those rights against a copyright owner: that is, a person to whom the copyright has been assigned.<sup>20</sup>

Further, creators of copyright works engage in their artistic endeavors for reasons other than pecuniary reward. Some authors

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<sup>15</sup> See, e.g., *id.* (“The copyright law, of course, protects the economic exploitation of the fruits of artistic creation; but the economic, exploitive aspect of the problem is only one of its many facets . . . .”); Wilkinson & Gerolami, *supra* note 8, at 321 (“[T]he economic rights of copyright, though identified with an author, do not, in and of themselves, protect the relationship between the author and the text.”).

<sup>16</sup> Wilkinson & Gerolami, *supra* note 8, at 322 (“The stated purpose of copyright has long been taken to be to encourage the production and dissemination of works thereby increasing access to information.”).

<sup>17</sup> See 17 U.S.C. § 106 (2006) (setting out the exclusive rights of copyright holders); Wilkinson & Gerolami, *supra* note 8, at 321 (“The economic rights grant the copyright holders exclusive privilege to make various uses of a work including copying, publishing, performing, translating, and adapting the work.”).

<sup>18</sup> Wilkinson & Gerolami, *supra* note 8, at 321 (“[T]he economic rights of copyright, though identified with an author, do not, in and of themselves, protect the relationship between the author and the text.”).

<sup>19</sup> 17 U.S.C. §§ 201(d), 204; Wilkinson & Gerolami, *supra* note 8, at 322 (“[Copyrights] are transferable and, therefore, the author, at any given time, is not necessarily the rights holder.”).

<sup>20</sup> Wilkinson & Gerolami, *supra* note 8, at 328 (“Moral rights can be invoked by an author to oppose an economic rights holder’s exploitation of the work in a way deemed to harm the reputation of the author.”).



“write for glory and fame,”<sup>21</sup> others for the sake of the purely creative process in and of itself.<sup>22</sup> In the software industry, for example, it has been recognized that motivations such as “intellectual stimulation and enjoyment of the creative process” are drivers of innovation in software coding, often more so than financial rewards or career advancement.<sup>23</sup> Professor Kwall has identified a number of situations where creators are spurred by an intrinsic urge to create rather than by any expectation of financial reward.<sup>24</sup> She cites as examples of this phenomenon: “the cave drawings of prehistoric man, the artistic creations of inmates on death row, and the works of authorship produced by the inhabitants of the Nazi death camps during World War II.”<sup>25</sup>

Given the diverse motivations for creation and the variety of relationships authors have with their creations, a law that focuses purely on the protection of economic rights will miss important elements of the creative process. This was realized towards the beginning of the nineteenth century in Europe.<sup>26</sup> Since that time, moral rights have developed throughout both civil and common law jurisdictions.<sup>27</sup> Moral rights are further reflected in several international treaties.<sup>28</sup> The one notable exception is that moral

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<sup>21</sup> Roeder, *supra* note 14, at 566 (“[A]uthors write for glory and fame as well as for pecuniary advantage . . .”).

<sup>22</sup> KWALL, *supra* note 1, at 11 (“[M]any artists create for the sake of the creative process rather than to generate profits.”).

<sup>23</sup> *Id.* at 11–12 (quoting SUSAN SCAFIDI, WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 117 (2005)).

<sup>24</sup> *Id.* at 20.

<sup>25</sup> *Id.*

<sup>26</sup> Roeder, *supra* note 14, at 555 (“The [moral rights] doctrine has been best expressed and studied in France. As early as the beginning of the nineteenth century cases are found which, emphasizing the criminal statutes against plagiarism, protected the right of the creator to have the form of his work preserved from deformation by subsequent transferees.”); *see also* KWALL, *supra* note 1, at 39 (noting the early development of moral rights in France in the nineteenth century).

<sup>27</sup> KWALL, *supra* note 1, at 37 (noting the existence of substantive moral rights laws in both civil and common law jurisdictions outside the United States).

<sup>28</sup> *See* Berne Convention, *supra* note 2, art. 6*bis*; WIPO Performances and Phonograms Treaty of 1996 art. 5(1), Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997), 36 I.L.M. 76 [hereinafter WIPO Treaty] (“Independently of a performer’s economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the

rights are not included in the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”).<sup>29</sup>

Moral rights can encompass a variety of different elements of the author’s relationship with her work, and the exact scope of the rights differs from jurisdiction to jurisdiction.<sup>30</sup> The relevant international treaties—the Berne Convention, and the World Intellectual Property Organization (“WIPO”) Performances and Phonograms Treaty<sup>31</sup>—focus on two distinct rights: the right of attribution or paternity,<sup>32</sup> and the right of integrity.<sup>33</sup> These rights are the focus of the remainder of this discussion.

However, it is worth noting that some civil jurisdictions maintain a broader array of moral rights. Courts in a number of civil law jurisdictions have recognized additional rights such as the right to refuse to create, the right to create and publish in any form desired, the right to withdraw or destroy the work, the prohibition against excessive criticism, and the prohibition against other injuries to the creator’s personality.<sup>34</sup> Even the more well accepted rights of integrity and attribution vary in nature and scope from jurisdiction to jurisdiction.<sup>35</sup>

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manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.”)

<sup>29</sup> KWALL, *supra* note 1, at 37 (“Although the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) incorporates the Berne Convention and provides for sanctions for noncompliance, the United States insured that Article 6bis was excluded from the ‘rights and obligations’ TRIPs delineates.”).

<sup>30</sup> *Id.* at 38 (“Moral rights . . . remain ‘chiefly a matter of national law.’ Historically, there has been a divergence in moral rights protection between civil and common law traditions, although recently the majority of common law jurisdictions have enacted moral rights protections to some degree.”).

<sup>31</sup> See WIPO Treaty, *supra* note 28.

<sup>32</sup> LEAFFER, *supra* note 3, at 389 (describing the right of paternity as “the right to be acknowledged as an author of the work”).

<sup>33</sup> *Id.* (describing the right of integrity as “the right that the work not be mutilated or distorted”).

<sup>34</sup> Roeder, *supra* note 14, at 556 (summarizing these rights); see also KWALL, *supra* note 1, at 44 (describing the right of disclosure and the right of withdrawal available in some civil law jurisdictions).

<sup>35</sup> KWALL, *supra* note 1, at 42–45 (noting differences of application in the law relating to attribution and integrity in specific cases in France and Germany).

*B. The Rights of Attribution and Integrity*

Article 6*bis*(1) of the Berne Convention obligates signatory countries to protect an author's rights of attribution or paternity, and of 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.<sup>36</sup>

The language protecting the "right to claim authorship of the work" is generally referred to as an *attribution* or *paternity* right.<sup>37</sup> The language pertaining to an author's right to object to distortions, mutilations, modifications and other derogatory actions in relation to a work is generally referred to as the right of *integrity*.<sup>38</sup> All Berne signatories must, at a minimum, protect these rights, although nothing precludes a signatory country from adopting a broader moral rights agenda.<sup>39</sup>

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<sup>36</sup> Berne Convention, *supra* note 2, art. 6*bis*.

<sup>37</sup> LEAFFER, *supra* note 3, at 389.

<sup>38</sup> *Id.*

<sup>39</sup> KWALL, *supra* note 1, at 44 (describing moral rights recognized in European jurisdictions outside of the Berne Convention requirements); LEAFFER, *supra* note 3, at 389 (noting that traditional European formulations of moral rights would generally include the right of disclosure as well as potentially the right of withdrawal, the right of modification and the right to prevent excessive criticism); Roeder, *supra* note 14, at 556 ("The second half of the nineteenth century witnessed a rapid development of the [moral rights] concept. The right to refuse to create, the right of paternity, the right to prevent deformation of the work, all received recognition in civil courts . . . . The various ramifications of the doctrine have been constantly developed in Europe and, in addition to the rights already mentioned, the moral right may now be said to consist of the right to create and publish in any form desired, the creator's right to claim the paternity of his work, the right to prevent every deformation, mutilation or other modification thereof, the right to withdraw and destroy the work, the prohibition against excessive criticism, and the prohibition against all other injuries to the creator's personality.").

The language of Article 6*bis*(1) leaves some questions open even with respect to the rights of attribution and integrity.<sup>40</sup> For example, it is unclear whether the right to “claim authorship” of the work includes the right not to be identified as the author of a work. In a discussion of anonymous authors, pseudonymous authors, ghost writers, and collective works, Professor Kwall notes that: “an author’s decision to write anonymously or under a pseudonym can be viewed as a branding choice that is a fundamental part of the author’s meaning and message.”<sup>41</sup> If the aim of the attribution right is to protect the author’s meaning and message,<sup>42</sup> then one might argue that the author has a right not to be identified as the author of the work—at least in cases where anonymity or pseudonymity is essential to the author’s meaning and message.

It is also unclear from the wording of Article 6*bis*(1) whether destruction of a work by a copyright holder falls within the scope of the right of integrity. The Convention requires that an author should have the right to object to “distortion, mutilation or other modification of, or other derogatory action” in relation to the work.<sup>43</sup> It is unclear whether or not this encompasses destruction of the work, particularly in cases where the destruction does not affect the “honor or reputation” of the author.<sup>44</sup> In fact, many countries with well developed moral rights laws do not protect authors against destruction of a work,<sup>45</sup> although the Swiss law

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<sup>40</sup> KWALL, *supra* note 1, at 89 (noting unclear history of interpretation of the Visual Artists’ Rights Act and the Berne Convention as to whether a right of anonymity or pseudonymity should be protected as part of the right of attribution).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 87 (noting that the primary objective of moral rights might be to safeguard the meaning and message of the author’s work).

<sup>43</sup> Berne Convention, *supra* note 2, art. 6*bis*(1).

<sup>44</sup> KWALL, *supra* note 1, at 44–45 (“Perhaps the underlying rationale for the failure of most countries to prevent destructions of works of art is that a work that has been destroyed completely cannot reflect adversely upon the creator’s honor or reputation. Of course, this explanation is not relevant to those instances where a work is destroyed in a manner that subjects the creator to shame or embarrassment.” (citations omitted)).

<sup>45</sup> *Id.*; Roeder, *supra* note 14, at 569 (“The right to prevent deformation does not include the right to prevent destruction of a created work. The doctrine of moral right finds one social basis in the need of a creator for protection of his honor and reputation. To deform his work is to present him to the public as the creator of a work that is not his

requires an owner of an artwork to offer to sell it back to its creator prior to destroying it.<sup>46</sup>

Other issues left open by Article 6*bis* include the duration of moral rights. Article 6*bis*(2) provides that the rights of attribution and integrity generally must be maintained after the death of the author at least until the expiry of the economic rights in a work.<sup>47</sup> However, there is no further guidance on the appropriate duration of moral rights. It is unclear whether, or to what extent, moral rights should endure after the expiration of copyright in a given work. Professor Kwall has suggested that moral rights protections should not, in fact, endure beyond the original creator's death.<sup>48</sup> This is because of her view that moral rights protect the author's intended "meaning and message" of her work and that no one's judgment about the meaning and message—not even that of the author's descendants—can be substituted for the author's own judgment.<sup>49</sup> She also believes that limiting the duration of moral rights to the term of the original author's life will mitigate free speech concerns, including concerns about maintaining a vibrant public domain of information and ideas.<sup>50</sup> Of course, this approach

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own, and thus make him subject to criticism for work he has not done; the destruction of his work does not have this result.”).

<sup>46</sup> KWALL, *supra* note 1, at 44.

<sup>47</sup> Berne Convention, *supra* note 2, art. 6*bis*(2) (“The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.”).

<sup>48</sup> KWALL, *supra* note 1, at 159 (“[F]rom a theoretical standpoint, moral rights protection should exist for the author's lifetime, but not beyond.”).

<sup>49</sup> *Id.* at 160 (“No one, not even the author's spouse and children, can substitute a personal judgment regarding the substance of the author's meaning and message of her work. Therefore, the author functions as the guardian of the work's original meaning and message during her lifetime.”).

<sup>50</sup> *Id.* (“Moreover, a duration equivalent to the author's life reinforces a vibrant public domain.”); *id.* at 54 (“At the risk of vast oversimplification, the concept of the public domain in intellectual property law entails common ownership by the public as a whole of the property comprising the public domain. This means that each member of the public has a ‘property interest’ and ‘an equal right to adapt and transform the material in question.’”); *see also* JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF*

is not consistent with the requirements of the Berne Convention, as Professor Kwall acknowledges.<sup>51</sup>

It is also unclear from the wording of Article 6*bis* whether the rights of attribution and integrity should be transferable or waivable. Most theorists agree that moral rights are not transferable, unlike copyrights.<sup>52</sup> This is because copyrights are in effect a property or quasi-property right<sup>53</sup> while moral rights are personal rights.<sup>54</sup> However, in effect, allowing waiver of moral rights—which many countries do<sup>55</sup>—is tantamount to allowing a transfer, in the sense that the author agrees to give up a right she could otherwise exercise. Like a transfer, the waiver will generally operate to the benefit of a third party copyright holder who may

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THE MIND 38 (2008) (describing the public domain as “material that is not covered by intellectual property rights”).

<sup>51</sup> See Kwall, *supra* note 1, at 160 (“One possible difficulty with this position, however, is that my recommended period of protection is not consistent with the Berne Convention’s recommendation, the norms in the international community, or with the entirety of VARA.”).

<sup>52</sup> See, e.g., Roeder, *supra* note 14, at 564 (“Moral rights are personal rights; they are not based on any theory of property, for whatever ‘property’ the creator may possess exists in the rights protected by the copyright statute. Moral rights are akin to those rights in tort which protect the individual against injury. They may not, therefore, be assigned . . . .”); Kwall, *supra* note 1, at 50–51 (noting that in Canada moral rights cannot be assigned but they can be waived). *But see* Kwall, *supra* note 1, at 35 (noting that in some civil law countries, such as France, authors’ moral rights are often treated as a special category of property that cannot be waived or transferred); Netanel, *supra* note 9, at 215 (noting that the continental European model of moral rights accords authors *inalienable* rights to control “the timing and manner in which their creative works are disseminated to the public”).

<sup>53</sup> See 17 U.S.C. § 201 (2006) (describing conditions for “ownership” and “transfer” of copyrights).

<sup>54</sup> Roeder, *supra* note 14, at 564 (“Moral rights are personal rights; they are not based on any theory of property . . . .”).

<sup>55</sup> See Kwall, *supra* note 1, at 50–51 (describing the waiver systems adopted in common law jurisdictions such as Australia and Canada); Wilkinson & Gerolami, *supra* note 8, at 329 (“[I]nternationally, there has been a trend which may reflect increasing neglect of moral rights rather than an embracing of these provisions. Even in countries where moral rights provisions exist, such as Canada, moral rights may have suffered erosion. Canada, for example, in its 1988 amendments, introduced a waiver clause to its moral rights legislation. Such a clause may greatly weaken the rights of authors because they may easily be required to waive their rights as a condition of publication . . . .” (citations omitted)).

want to exploit the protected work in a manner inconsistent with the original author's preferences.

Professor Kwall has suggested that ideally moral rights should not be waivable for two reasons. First, because theoretically it makes no sense to waive a right that is intended to preserve authorship dignity,<sup>56</sup> and, second, because allowing waiver of moral rights exacerbates disparities of bargaining power between creators and those with whom they contract.<sup>57</sup>

One final issue which is left ambiguous by the wording of Article 6*bis* is the precise relationship between the two rights contemplated in the Article. The wording seems to indicate that the rights of attribution and integrity are two distinct rights and, indeed, certain elements, like the notion of damage to the author's "honor or reputation" are limited to the right of integrity. However, there is clearly some overlap between the rights. As some scholars have noted, the notion of attribution clearly impacts on a work's meaning and message.<sup>58</sup> Thus, the attribution right often does very similar work to the right of integrity in preserving the author's intended meaning and message.

This was recognized as early as 1910 in the case of *Clemens v. Press Publishing Co.*<sup>59</sup> where Judge Seabury noted the relationship between the right of attribution and the integrity of the author's artistic vision:

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<sup>56</sup> Kwall, *supra* note 1, at 156–57 (“[F]ormal waivers should be inoperative as a general matter. Given that moral rights are designed to recognize inspirational motivations for creativity, any system sanctioning waiver is inconsistent from a theoretical standpoint with the justifications for adopting these protections. In other words, if moral rights protections are intended to redress violations of authorship dignity, they should not be capable of being waived. An author always should be in a position to inform the public that a publicly displayed or distributed version of her work does not comport with her artistic vision . . .”).

<sup>57</sup> *Id.* at 157 (“[A]llowing waiver exacerbates the disparity of bargaining power between authors and those with whom they contract.”).

<sup>58</sup> *Id.* at 89 (“There is good reason for [the] view . . . that an author's decision to write anonymously or under a pseudonym can be viewed as a branding choice that is a fundamental part of the author's meaning and message.”).

<sup>59</sup> 67 Misc. 183 (N.Y. Sup. Ct. 1910). For a discussion of this case, see Roeder, *supra* note 14, at 562–63.

If the intent of the parties was that the defendant should purchase the rights to the literary property and publish it, the author is entitled not only to be paid for his work, but to have it published in the manner in which he wrote it. The purchaser cannot garble it or put it out under another name than the author's; nor can he omit altogether the name of the author, unless his contract with the latter permits him to do so.<sup>60</sup>

Professor Marshall Leaffer similarly recognizes the relationship between the two rights set out in Article *6bis* in noting that the right of attribution encompasses the right “to prevent the use of [the artist’s] name as the author of the work in the event of a distortion, mutilation, or other modification of the work that would be prejudicial to her honor or reputation.”<sup>61</sup> By linking the notion of attribution with that of distortions of the work that are prejudicial to the author’s honor or reputation, Professor Leaffer emphasizes the link between the rights of attribution and integrity.

In summary, it is clear that Article *6bis* contemplates the existence of personal rights in the creator of a copyright work that are separate to copyright and that protect different aspects of the creator’s relationship with the work than copyright. However, the precise interpretation of Article *6bis*, and the way in which signatory countries choose to implement its provisions, varies widely. Resulting divergences in opinion on the nature and scope of the rights of attribution and integrity are important in considering whether and how enhanced moral rights protections might be developed within the United States.

The remainder of this article considers some comments that modern authors have made about the kinds of rights they would like to protect in their works, and some recent moral rights models that have been advocated by scholars in the United States. The aim is to analyze the extent to which these newly advocated moral rights models effectively address recently articulated authorial concerns about protection of aspects of their works. This article

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<sup>60</sup> *Clemens*, 67 Misc. at 184.

<sup>61</sup> LEAFFER, *supra* note 3, at 395.



focuses on authors of popular supernatural fiction as one subset of authors who have been extremely articulate about downstream uses of their work.

## II. WHAT (SUPERNATURAL FICTION) AUTHORS WANT

I do not allow fan fiction. The characters are copyrighted. It upsets me terribly to even think about fan fiction with my characters. I advise my readers to write your own original stories with your own characters. It is absolutely essential that you respect my wishes.<sup>62</sup>

These words by the reigning queen of vampire fiction, Anne Rice,<sup>63</sup> are an interesting example of an author articulating her perceived or preferred rights in relation to her popularly released works. In particular, she voices concerns about fan fiction.<sup>64</sup> Fan fiction involves fans of an original work writing their own prequels, sequels and re-tellings of the original stories from different points of view.<sup>65</sup> More often than not, fan fiction is not authorized by the creator of the original work, although some creators now welcome fan fiction, but may attempt to impose certain restrictions on its later use and dissemination.<sup>66</sup> Despite Rice's words, it is unclear in the United States whether or not fan

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<sup>62</sup> Anne Rice, *Anne Rice Readers Interaction*, ANNERICE.COM: THE OFFICIAL SITE, <http://www.annerice.com/ReaderInteraction-MessagesToFans.html> (last visited Sept. 14, 2009).

<sup>63</sup> Author of *The Vampire Chronicles*: INTERVIEW WITH THE VAMPIRE (1976); THE VAMPIRE LESTAT (1985); THE QUEEN OF THE DAMNED (1988); THE TALE OF THE BODY THIEF (1992); MEMNOCH, THE DEVIL (1995); THE VAMPIRE ARMAND (1998); MERRICK (2000); BLOOD AND GOLD (2001); BLACKWOOD FARM (2002); BLOOD CANTICLE (2003). See Anne Rice, *All Books, In Order*, ANNERICE.COM: THE OFFICIAL SITE, <http://www.annerice.com/Bookshelf-AllBooksInOrder.html> (last visited Jan. 13, 2011).

<sup>64</sup> Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CALIF. L. REV. 597, 598 n.6 (2007) (defining "fan fiction" as "fiction about characters or settings written by fans of the original work, rather than the original creators").

<sup>65</sup> *Id.*

<sup>66</sup> HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 152 (2006) ("In 2000, Lucasfilm offered *Star Wars* fans free Web space ([www.starwars.com](http://www.starwars.com)) and unique content for their sites, but only under the condition that whatever they created would become the studio's intellectual property.").

fiction infringes an original author's copyright.<sup>67</sup> Most likely, the answer to this question will depend on the facts of a given case. It is also unclear under American copyright law whether or not fictional characters can in fact be copyrighted, as asserted by Rice.<sup>68</sup>

Assuming her characters are copyrightable, Rice is probably correct in her assumption that readers who create fan fiction using her characters without her authorization will be infringing her copyright. The question for this discussion is whether copyright really gets to the heart of the interests that Rice is attempting to assert. Even though she frames her concerns in terms of the copyrightability of her characters, copyright is intended to protect economic rights of the author, rather than her personal rights in her work.<sup>69</sup> From Rice's comments, it appears that her concerns are more personal than proprietary. She notes that it "upsets [her] terribly" to think about others creating fan fiction with her characters.<sup>70</sup> This wording suggests more of a personal injury or violation than a concern with proprietary benefits. She is not asserting that her fans are making unjust financial profits by using her characters. In fact, fan fiction is generally not sold commercially in competition with the author of the original work.<sup>71</sup>

Thus, Rice's stated concerns do not appear to be commercial or proprietary in nature. Rather they appear to be personal—the idea

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<sup>67</sup> Steven Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1872 (2009) (noting the debate as to whether fan fiction and online remixing is a copyright infringement or excusable fair use); Dennis Karjala, *Harry Potter, Tanya Grotter, and the Copyright Derivative Work*, 38 ARIZ. ST. L.J. 17, 32–34 (2006) (noting conflicting case law in the Harry Potter lexicon about the extent to which works based on the Harry Potter books are either regarded as copyright infringements or excusable fair uses).

<sup>68</sup> 1-2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12 (Matthew Bender rev. ed. 2010) (noting that there is some uncertainty about whether fictional characters are copyrightable, although the currently prevailing view is that sufficiently well defined characters are copyrightable); Karjala, *supra* note 67, at 24–26 (describing the historical development of American courts' attitudes towards copyrighting fictional characters).

<sup>69</sup> See LEAFFER, *supra* note 3, at 2.

<sup>70</sup> Rice, *Anne Rice Readers Interaction*, *supra* note 62.

<sup>71</sup> Hetcher, *supra* note 67, at 1885 ("Within the fan-fiction community, there is a norm against seeking commercial gain.").

that the fans have violated her personal dignity in some way. Even the way Rice says that it is “absolutely essential that you respect my wishes” suggests an emotive attachment to her work, rather than a pecuniary motivation behind her concerns.<sup>72</sup> The language is that of a creator seeking to protect the artistic integrity of her creation, rather than of a commercial actor seeking to protect her bottom line. Thus, even though her concerns are expressed in copyright language, they contain significant moral rights undertones. It may be that Rice uses copyright language precisely because there is no moral rights protection for fictional works in the United States.<sup>73</sup> Copyright is thus the closest legal right she can assert, short of simply appealing to her fans’ good faith in respecting her wishes.

Rice is not alone in articulating her strong views about fan fiction. Another vampire novelist, Charlaine Harris, creator of the popular Sookie Stackhouse novels,<sup>74</sup> has this to say on her website in response to an author query about fan fiction:

Q. Can I post my cool story about Sookie on this site?

A. No, and I’ll tell you why. No fanfic can appear on this website. Not only does it make me feel strange to have other people use my characters, but there are legal issues to consider.<sup>75</sup>

Harris’s comments differ from Rice’s in several ways, although her concerns about fan fiction seem very similar. Like Rice, Harris

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<sup>72</sup> Rice, *Anne Rice Readers Interaction*, *supra* note 62.

<sup>73</sup> LEAFFER, *supra* note 3, at 393 (“The Visual Artists Rights Act is limited in its subject matter and scope and is essentially confined to the protection of works of fine art. Qualifying works include those that exist in a single copy, such as original paintings, drawings, prints, sculptures, or works existing in signed and consecutively numbered editions of no more than 200 copies.”).

<sup>74</sup> DEAD UNTIL DARK (2001); LIVING DEAD IN DALLAS (2002); CLUB DEAD (2003); DEAD TO THE WORLD (2004); DEAD AS A DOORNAIL (2005); DEFINITELY DEAD (2006); ALL TOGETHER DEAD (2007); FROM DEAD TO WORSE (2008); DEAD AND GONE (2009); DEAD IN THE FAMILY (2010); *see also* Charlaine Harris, *Bibliography: The Sookie Stackhouse aka Southern Vampire Series*, CHARLAINEHARRIS.COM, <http://www.charlaineharris.com/bibliography/bibliog-sookie.html> (last visited Jan. 12, 2011).

<sup>75</sup> Charlaine Harris, *Frequently Asked Questions*, CHARLAINEHARRIS.COM, <http://www.charlaineharris.com/faqs.html> (last visited July 14, 2010).

utilizes emotive language in saying that it makes her “feel strange” to have others use her characters. Unlike Rice, she refers obliquely to “legal issues” without specifying copyright law in particular. Harris also limits her comments to the question whether she herself is prepared to host fan fiction on her own website. Unlike Rice, Harris does not purport to ban fans from writing their own stories, but simply says she would feel strange hosting those stories on her website. It is possible that the legal issues she is referring to relate to contractual agreements with her publishers not to endorse any competing works. Hosting such works on her website may potentially contravene contracts with her publishers, although this is not immediately obvious from her online comments.

Whether or not Harris’s reference to legal issues is intended to imply copyright, trademark or contract law, she is clearly not referring to moral rights as American moral rights law does not cover fictional writings.<sup>76</sup> However, as with Rice’s comments, Harris’s comments do connote concerns generally associated with moral rights. She seeks to protect her own authorial dignity and her emotional investment in characters she has created. Of course Harris, like Rice, has licensed others to use her characters in various media. Harris’s characters and plotlines form the basis of the popular HBO Television Series, *True Blood*.<sup>77</sup> Rice authorized the use of her characters and storylines in a Broadway musical: *LESTAT*.<sup>78</sup> Thus, both authors are sufficiently savvy to utilize copyright law to protect their work in the commercial context even outside the traditional book-publishing arena. Their concern is not with lack of economic control over their works. Their stated concerns to fans have to do with something much more personal than money.

We see the same pattern again and again on creators’ blogs. Another extremely popular vampire author, Stephenie Meyer,

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<sup>76</sup> See LEAFFER, *supra* note 3, at 393 (noting limited cover of VARA to particular sub-categories of the fine arts).

<sup>77</sup> See *Trueblood: About*, HBO, <http://www.hbo.com/true-blood/index.html#/true-blood/about/index.html> (last visited Jan. 24, 2011).

<sup>78</sup> Anne Rice, *LESTAT on Broadway*, ANNERICE.COM: THE OFFICIAL SITE, <http://www.annerice.com/Lestat-TheMusical.html> (last visited Jan. 24, 2011).

creator of the *Twilight* books,<sup>79</sup> has voiced similar concerns, albeit in a somewhat different context. As with Rice and Harris, Meyer has been extremely successful at commercializing her work both through publication of her books and through licensing reproductions in different media—notably movies<sup>80</sup> and graphic novels.<sup>81</sup> However, she, too has had issues with fans making unauthorized use of her work. In Meyer's case, the concern has not been so much with fan fiction as she does not specifically mention fan fiction on her website, although she has made some comments about fan fiction in interviews.<sup>82</sup> In the interview context, she has described being of two minds about fan fiction. On the one hand she is interested in seeing what people come up with,<sup>83</sup> and she confesses to writing her own brand of parody/fiction based on her own published novels.<sup>84</sup> On the other hand, she suggests that fans who are good creative writers should

<sup>79</sup> TWILIGHT (2005); NEW MOON (2006); ECLIPSE (2007); BREAKING DAWN (2008); *see also* Stephenie Meyer, *Twilight Series*, THE OFFICIAL WEBSITE OF STEPHENIE MEYER, <http://www.stepheniemeyer.com/twilightseries.html> (last visited Jan. 24, 2011).

<sup>80</sup> TWILIGHT (Summit Entertainment 2008); NEW MOON (Summit Entertainment 2009); ECLIPSE (Summit Entertainment 2010); *see also* *Box Office/Business for Twilight*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt1099212/business> (last visited Jan. 18, 2010); *Box Office/Business for New Moon*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt1259571/business> (last visited Jan. 18, 2010); *Box Office/Business for Eclipse*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt1099212/business> (last visited Jan. 18, 2010).

<sup>81</sup> I STEPHENIE MEYER & YOUNG KIM, TWILIGHT: THE GRAPHIC NOVEL (2010); *see also* George Gene Gustines, *A World of Words Reinvented in Pictures*, N.Y. TIMES, Feb. 9, 2010, at C1.

<sup>82</sup> Alison Genet, *Stephenie Meyer Talks "Twilight" Fan Fiction & "Breaking Down"* (*Her Own Private FF*), TWIFANS (July 7, 2010, 2:30 PM), <http://www.twifans.com/profiles/blogs/stephenie-meyer-talks-twilight>.

<sup>83</sup> *Id.* ("Fan-fiction has become kind of a mixed thing for me. Like in the beginning I hadn't heard of it and there were some that were . . . I couldn't read the ones that had the characters IN character. It freaked me out. [U]m, but I liked. . . [T]here was one about Harry Potter and Twilight that was hilarious. And then there was one that was about a girl who was starring as Bella in the movie and that was funny. And uh, I hear so many people arguing about fan-fiction.").

<sup>84</sup> *Id.* ("Breaking Down was actually a project for a while. There was a while where you get burned out, we came up with an alternate Breaking Dawn called Breaking Down (laughs). It was awesome! Complete spiraling downward & destruction in Bella Swan[']s life & everyone around her. Charlie became a meth addict.").

develop their own plots and characters that they can own and sell without worrying about infringing other people's copyrights.<sup>85</sup>

However, the one concern she raises on her own website—as well as discussing in interviews<sup>86</sup>—is a situation involving an unpublished and incomplete manuscript that was distributed over the Internet without her authorization. The manuscript was entitled *Midnight Sun* and was a retelling of the original first book—*Twilight*—from another character's perspective.<sup>87</sup> *Twilight* is narrated from the perspective of the series heroine, Bella Swan,<sup>88</sup> while *Midnight Sun* retells the *Twilight* story from the point of view of her love interest, the vampire Edward Cullen.<sup>89</sup>

When she was about half way through the manuscript, she released the draft to certain people involved in the film adaptation of the first book so they could get a better idea of the backstory behind the character of Edward. Subsequently, the manuscript was leaked on the Internet without Meyer's authorization. Meyer was so upset by this unauthorized leak that she gave up work on the book and never completed it,<sup>90</sup> although she did post an "official"

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<sup>85</sup> *Id.* ("As long as the writers of it, move on from it. I think it's sad to spend so much energy on something you can't own. And that makes me a little bit sad because all these talented kids should be, ya know, get your story out from under the bed and get it out there.").

<sup>86</sup> *Id.* ("The whole *Midnight Sun* . . . mess, came about because, when you first get started, you really want people to read your book & give you feedback and no one's ever gonna care, like you don't have to worry about leaks. That's such a crazy idea. With MS you know, I had a readers group and we all read each other's stuff and that's very normal. I saw a lot of feedback, like 'she shouldn't be giving her stuff out,' but 10 years ago before anybody knew that had ever read *Twilight*, did you ever think anyone was gonna care or look for this crap? Absolutely not.").

<sup>87</sup> See *Midnight Sun: Twilight with Edward as the Narrator*, TWILIGHT NEWS SITE (Feb. 21, 2010), <http://twilightnewssite.com/news-twilight-new-moon-eclipse-breaking-dawn/midnight-sun-twilight-with-edward-as-narrator>.

<sup>88</sup> See *id.*

<sup>89</sup> *Id.*

<sup>90</sup> Stephenie Meyer, *Midnight Sun: Edward's Version of Twilight*, STEPHENIEMEYER.COM (Aug. 28, 2008), <http://www.stepheniemeyer.com/midnightsun.html> ("So where does this leave *Midnight Sun*? My first feeling was that there was no way to continue. Writing isn't like math; in math, two plus two always equals four no matter what your mood is like. With writing, the way you feel changes everything. If I tried to write *Midnight Sun* now, in my current frame of mind, James would probably win and all the Cullens would die, which wouldn't dovetail too well with the original story.

version of the incomplete manuscript on her website.<sup>91</sup> Accompanying that post, she had this to say:

I did not want my readers to experience *Midnight Sun* before it was completed, edited and published. I think it is important for everybody to understand that what happened was a huge violation of my rights as an author, not to mention me as a human being. As the author of the Twilight Saga, I control the copyright and it is up to the owner of the copyright to decide when the books should be made public; this is the same for musicians and filmmakers. Just because someone buys a book or movie or song, or gets a download off the Internet, doesn't mean that they own the right to reproduce and distribute it. Unfortunately, with the Internet, it is easy for people to obtain and share items that do not legally belong to them. No matter how this is done, it is still dishonest. This has been a very upsetting experience for me, but I hope it will at least leave my fans with a better understanding of copyright and the importance of artistic control.<sup>92</sup>

As with Anne Rice's post about fan fiction, Meyer here expresses her concerns in the language of copyright, even though she characterizes the harm she has suffered as much more personal than economic in nature. She talks about her rights being violated both as an author and a human being. This connotes concern with a dignitary harm rather than a pecuniary harm. She also talks about the "dishonesty" of the people who posted her manuscript

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In any case, I feel too sad about what has happened to continue working on *Midnight Sun*, and so it is on hold indefinitely.").

<sup>91</sup> *Id.* ("I'd rather my fans not read this version of *Midnight Sun*. It was only an incomplete draft; the writing is messy and flawed and full of mistakes. But how do I comment on this violation without driving more people to look for the illegal posting? It has taken me a while to decide how and if I could respond. But to end the confusion, I've decided to make the draft available here (at the end of this post). This way, my readers don't have to feel they have to make a sacrifice to stay honest. I hope this fragment gives you further insight into Edward's head and adds a new dimension to the Twilight story. That's what inspired me to write it in the first place.").

<sup>92</sup> *Id.*

without her authorization. Dishonesty is not an element of a copyright claim at all. Direct copyright infringement is a strict liability wrong,<sup>93</sup> and the defendant's state of mind—honest or dishonest—is irrelevant. Again, this seems to be more of a personal than an economic issue for Meyer. As with Rice and Harris, Meyer also talks about how “upsetting” the experience has been for her when someone has made an unauthorized non-commercial use of her work.

Unlike the fan fiction situations troubling Rice and Harris, however, Meyer could potentially also suffer economic harm if an early draft of her manuscript is available online and she later commercially publishes an official version. It is conceivable that someone might read the version available online, decide they do not like it, and not bother to buy the final version, when otherwise they may have bought it. Of course, it is equally possible—and probably more likely—that her fans would have been titillated by the online draft into buying the final published version to see what happens next and perhaps to compare the early draft with the final product.

Towards the end of the above quote, Meyer links the idea of fans “understanding copyright law” with the notion of fans understanding “the importance of artistic control.” In actual fact, copyright law tends to have very little to do with artistic control, particularly in circumstances where the original creator has assigned the copyright to a publisher or other distributor. While an author who retains copyright in her work may use it as a tool to protect her artistic integrity, in the absence of moral rights protections, an author who assigns her copyright will be out of luck unless she can convince the assignee to threaten or sue an alleged infringer. This again indicates the mismatch between the aims of copyright law and the kinds of interests authors may seek to protect in relation to their works.

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<sup>93</sup> 17 U.S.C. § 501(a); *see also* Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351 (2002).



## III. EVALUATING NEW MORAL RIGHTS MODELS

A. *American Resistance to Moral Rights*

[C]omprehensive [moral rights] legislation is likely to be ill-advised. It is likely to be impracticable in its application, to be unsettling in its impact upon longstanding contractual and business arrangements, to threaten investment in and public dissemination of the arts, to sharply conflict with fundamental United States legal principles of copyright, contract, property and even constitutional law, and ultimately to stifle much artistic creativity while resulting in only the most speculative incentives to such creativity.<sup>94</sup>

The question for the remainder of this Article is whether a moral rights agenda might help authors protect some of the aspects of their works that are currently not very well protected by copyright law. Several scholars have recently advocated new moral rights models for the United States that would accommodate First Amendment concerns as well as associated concerns about protecting the public domain of information and ideas from over-protection.<sup>95</sup> Before examining these recent moral rights models, it is worth briefly addressing the historical concerns within the United States about moral rights, and the explanations for why the United States has not been more pro-active in developing a moral rights agenda, despite signing the Berne Convention.

The United States has a strong First Amendment tradition which includes preserving works within the public domain for general use. Those opposed to moral rights are concerned about a personal right that might severely limit uses others may make of

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<sup>94</sup> Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 421, 422 (1990).

<sup>95</sup> NETANEL, *supra* note 9, at 216 (“[L]imited moral rights protection would do more than merely assuage authors’ feelings. It would also promote First Amendment values.”); KWALL, *supra* note 1, at 54 (“[I]n developing appropriate moral rights protection for the United States, it is critical to consider how these protections will impact the public domain.”).

existing works, particularly those works in the public domain.<sup>96</sup> There are associated concerns that moral rights could impinge on downstream fair uses of protected works. Fair use is generally regarded in American copyright law as an important protection for free speech.<sup>97</sup> However, if an author asserting a moral right could prevent an otherwise protected fair use—for example, a parody of a work—this would be problematic for the First Amendment balance in copyright law.<sup>98</sup> Professor Ilhyung Lee has noted that VARA—the only specific American moral rights legislation—expressly makes moral rights subject to fair use in order to accommodate these concerns.<sup>99</sup>

Another related concern about moral rights has been raised with respect to the position of the copyright holder where that person is a different person than the original creator. The concern is that it is uncomfortable under American notions of property law for a personal right, such as a moral right, potentially to trump a property or quasi-property right. Professor Lee has evocatively described this concern:

Perhaps most jarring to the American psyche is the idea of an author's moral right taking precedence over another's property right. The notion that an artist may, in the name of the personal interests in the work, prevent the purchaser and holder of title in the work from doing with it what she wishes may

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<sup>96</sup> NETANEL, *supra* note 9, at 215 (“To the extent the European [moral rights] regime gives authors a broad right to prevent creative appropriations of their existing works, it, no less than proprietary copyright, unduly impedes such expression.”); KWALL, *supra* note 1, at 54 (“[I]n developing appropriate moral rights protection for the United States, it is critical to consider how these protections will impact the public domain.”).

<sup>97</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003) (describing the fair use defense in copyright law as an important built-in protection for free speech).

<sup>98</sup> Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 814 (2001) (“Another example of the potential conflict between moral rights and constitutional protections is the author who objects to the alteration or use of her work by another who, in turn, claims that such alteration or use is parody or criticism, permitted under the doctrine of fair use. Here, implementation of the traditional *droit moral* may result in prohibiting actions based on the First Amendment’s right of free expression.”).

<sup>99</sup> *Id.*

run contrary to the American socio-legal culture and border on the heretical.<sup>100</sup>

Professor Lee goes on to suggest that the legislative creation of a moral rights doctrine might, on this basis, even be regarded as an unconstitutional regulatory taking.<sup>101</sup> Other objections to moral rights in the United States relate to the expansion in recent decades of the kinds of subject matter covered by copyright law. While copyright law now covers works such as computer programs and original databases, these works are not the typical subjects of moral rights protections as they have “little or no artistic, personal, or cultural heritage [and] are ill-suited for moral rights protection.”<sup>102</sup> Of course, this concern could be accommodated in a new moral rights agenda by limiting moral rights coverage to more artistic and less functional works.<sup>103</sup>

Professor Marshall Leaffer has also raised more market-oriented concerns about the potential adoption of a moral rights agenda within the United States even in the context of works that have a significant artistic or cultural dimension:

Moral rights protection will inherently clash with the way many works are created in cultural and entertainment industries such as moviemaking, publishing, and broadcasting. These intensely collaborative endeavors are exploited through subsidiary markets. For example, motion pictures are abridged for television, textbooks are revised and translated, and music is synchronized, adapted, and broadcast in a multiplicity of forms. These lucrative derivative markets, which attract significant investment into the entertainment and cultural industries, are regulated by contractual agreement. But an expansive moral rights concept,

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> LEAFFER, *supra* note 3, at 400.

<sup>103</sup> KWALL, *supra* note 1, at 148 (“[M]oral rights should be applicable to works manifesting heightened originality with substantial creativity. If Congress were to follow this approach, it would be appropriate to exclude completely works from coverage that are largely functional and therefore lacking in significant artistic characteristics.”).

presenting a constant threat of legal challenge brought by any one or more collaborators, would tend to undermine the economic expectations and the delicate allocation of rights achieved through private negotiation between authors, users, and labor unions. The result may be less financial support for such collaborative artistic endeavors, ultimately harming the public interest.<sup>104</sup>

Contracting parties will be less certain of their rights where third party creators are able to assert unexpected moral rights in a way that significantly impacts on the performance of the contract. Thus, any moral rights agenda needs to be carefully thought out and implemented within the United States to ensure that major commercial markets are not harmed to the detriment of the economy and the public interest. Of course, thriving entertainment industries also raise First Amendment concerns. Movies, television shows, books and the like are all important forms of expression protected by the First Amendment. They are also forms of commercial property that may be protected by the takings clause.<sup>105</sup> The models of moral rights protection proposed recently by Professors Netanel and Kwall respectively attempt to strike this delicate balance.

#### *B. The Netanel Model*

[T]he law can—and should—give some accommodation to authors' interest in creative control, without excessively burdening creative speakers.<sup>106</sup>

Drawing on the work of Professor Jessica Litman,<sup>107</sup> Professor Netanel has proposed a moral rights agenda for the United States that emphasizes the right of attribution.<sup>108</sup> In particular he focuses on the concern that “those who disseminate a creative appropriation should be required to label it as an unlicensed

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<sup>104</sup> LEAFFER, *supra* note 3, at 387.

<sup>105</sup> See Lee, *supra* note 98, at 814.

<sup>106</sup> NETANEL, *supra* note 9, at 215.

<sup>107</sup> *Id.* (citing JESSICA LITMAN, DIGITAL COPYRIGHT 185 (2001)).

<sup>108</sup> See *id.* (citing LITMAN, *supra* note 107, at 185).

modification of the original work.”<sup>109</sup> In this context, the right of attribution operates in tandem with a *de facto* right of integrity to ensure that creators are not falsely attributed with distortions of their works. Both Professor Litman and Professor Netanel have identified ways in which modern digital technologies can assist authors in protecting a right of attribution.

Professor Litman suggests that a modified version of a work posted online could be required to be accompanied by a citation or hypertext link to an unaltered copy of the author’s original work.<sup>110</sup> Professor Netanel also suggests that if the focus is on the right of attribution, digital technology makes compliance quite simple.<sup>111</sup> The law could merely require copyright management information<sup>112</sup> that is digitally embedded in the original work to be included in a creative appropriation of the work by a downstream user.<sup>113</sup> This is not much of a stretch from what the law already requires under the Digital Millennium Copyright Act (“DMCA”). Currently this legislation prohibits the intentional removal, alteration, or knowing falsification of copyright management information from a protected work.<sup>114</sup>

Professor Netanel further stresses data from the Creative Commons licensing scheme for copyright works,<sup>115</sup> noting that most authors utilizing these digital licenses impose attribution requirements while significantly fewer authors are concerned about the making of unauthorized downstream works.<sup>116</sup> It appears therefore that Creative Commons licenses are already used to protect authors’ attribution rights albeit as part of a contractual licensing scheme for use of a copyright work, rather than under

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<sup>109</sup> *See id.*

<sup>110</sup> *Id.* (citing LITMAN, *supra* note 107, at 185).

<sup>111</sup> *Id.* at 216.

<sup>112</sup> *See* 17 U.S.C. § 1202(c) (2006) (defining copyright management information as including information about the ownership of a work and the terms upon which the work may be used).

<sup>113</sup> *See* NETANEL, *supra* note 9, at 216.

<sup>114</sup> *See* 17 U.S.C. § 1202(a)–(b).

<sup>115</sup> NETANEL, *supra* note 9, at 217 (noting that Creative Commons estimates that “as of February 2005, authors chose licenses requiring attribution some 94 percent of the time and, in contrast, chose licenses prohibiting the making of a derivative work less than one-third of the time”).

<sup>116</sup> *Id.*

separate moral rights legislation. Thus, in today's Creative Commons context, the ability of a creator to protect her attribution right will depend on her not having assigned copyright in the work to someone else.

By focusing on the attribution right, Professor Netanel attempts to strike a balance between First Amendment values and moral rights. If the emphasis is on attribution, rather than integrity, there is much less concern with downstream uses of a copyright work being negatively impacted by moral rights. If downstream users are only required to attribute—and maybe to link back to—the original work, rather than to curtail their activities in any more substantive way, there is much less of a threat to First Amendment values than if downstream users are subject to unexpected claims by authors that might prevent their expressive activities. Of course, copyright holders can still bring infringement actions to prevent unauthorized derivative works in cases where these works are not protected as fair uses.<sup>117</sup>

Professor Netanel also claims to be promoting First Amendment values with his model in the sense that the First Amendment encompasses an author's interest in avoiding forced speech:

[A] requirement that creative appropriators take reasonable steps to accord authorship credit for underlying works and ensure that audiences understand the source of the modified version can help to protect authors' interest in avoiding "forced speech. . . ." [W]hile authors do not have a cognizable speech interest in preventing another from modifying their creative expression or using it in a context that is not to their liking, they do have such an interest in preventing the impression that they endorse a message they find repugnant.<sup>118</sup>

Thus, by preserving downstream users' rights to re-purpose the original author's creation, but by denying them the right to falsely

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<sup>117</sup> See Hetcher, *supra* note 67, at 1888–89 (noting that authors do bring copyright lawsuits and send cease and desist letters to creators of fan fiction).

<sup>118</sup> NETANEL, *supra* note 9, at 216.

attribute the repurposed work, Professor Netanel would argue that an appropriate balance is struck. Professor Netanel garners further support for his focus on the attribution right by considering some of Professor Rebecca Tushnet's work in the context of fan fiction, noting that authorship attribution is an extremely powerful norm in that context.<sup>119</sup> He also cites evidence that documentary filmmakers place significant emphasis on authorship attribution.<sup>120</sup>

In further mitigating the potential negative impact of moral rights law on downstream creative uses of copyright works, Professor Netanel suggests that the attribution right could be enforced under a "reasonableness standard rather than a hard-and-fast rule."<sup>121</sup> A finding of infringement of the attribution right might therefore depend to some extent on context. Thus, the enforcement of the right could be eased in cases of noncommercial use or in cases where the source of a modified work is obvious to its audience, such as in the case of much fan fiction based on, say, a popular television series.<sup>122</sup>

If Professor Netanel is correct in his intuition that the attribution right is more important or acceptable in the United States than the integrity right, it is worth considering the extent to which this argument would address some of the concerns raised in Part II by the supernatural fiction authors. Two of those concerns—those raised by Anne Rice and Charlaine Harris—were focused predominantly on unauthorized fan fiction. Stephenie Meyer, on the other hand, while ambivalent about fan fiction was certainly concerned about the unauthorized online dissemination of her incomplete manuscript for *Midnight Sun*.<sup>123</sup> Would the Netanel approach, if implemented in practice, have addressed these authors' concerns in practice?

The first obvious shortcoming of the Netanel approach in addressing Rice's and Harris's concerns about fan fiction is that

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<sup>119</sup> See *id.* at 217 (citing Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135 (2007)).

<sup>120</sup> See *id.* (citing ASS'N OF INDEP. VIDEO AND FILMMAKERS ET AL., DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE 4–6 (2005)).

<sup>121</sup> *Id.* at 216.

<sup>122</sup> See *id.*

<sup>123</sup> See *supra* note 90–92 and accompanying text.

Professor Netanel does not advocate a moral rights agenda that substantively impacts downstream creative uses of a work. Where an original author's objection is to the actual downstream use—the creation of the fan fiction—as opposed to the lack of attribution or false attribution, the Netanel model would have no application. Moreover, as noted above, Professor Netanel notes that fan fiction communities already have strong attribution norms,<sup>124</sup> suggesting that his model would have little practical impact on the way these communities currently operate. Thus, to the extent that popular fiction authors are unhappy with the way the system currently operates, the Netanel model does not address their concerns at all. Their concerns may be addressed by a broader moral rights agenda that includes a right of integrity,<sup>125</sup> but attribution by itself will not likely help.

None of this is to suggest that authors' interests should necessarily be prioritized over those of their fans. However, it does emphasize the fact that in making choices about adopting a moral rights agenda, and the form of an appropriate moral rights framework, there will always be winners and losers.<sup>126</sup> The Netanel model consciously elevates the creative needs of downstream users—such as fan fiction communities—over those of original authors.

Even in the absence of any moral rights agenda, authors who retain copyright in their works can utilize contractual licenses and the copyright law to control the substance of much fan fiction. While it is unclear whether fan fiction will infringe copyright as an unauthorized derivative work,<sup>127</sup> copyright holders nevertheless

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<sup>124</sup> NETANEL, *supra* note 9, at 217 (citing Tushnet, *supra* note 119, at 135).

<sup>125</sup> LEAFFER, *supra* note 3, at 387 (noting that the right of integrity includes the right to prevent any intentional modification of an original work that would be prejudicial to the artist's honor or reputation).

<sup>126</sup> See, e.g., Roeder, *supra* note 14, at 577 (“The [traditional European] doctrine of moral rights favors the creator and the public against the entrepreneur and the performer.”).

<sup>127</sup> See Hetcher, *supra* note 67, at 1872 (noting the debate as to whether fan fiction and online remixing is a copyright infringement or excusable fair use); Karjala, *supra* note 67, at 32–34 (noting conflicting case law concerning the extent to which works based on the Harry Potter books are either regarded as copyright infringements or excusable fair uses).



can and do make claims for copyright infringement on this basis.<sup>128</sup> Additionally, as noted by Professor Netanel, copyright holders can utilize Creative Commons licenses when they release their works online.<sup>129</sup> These licenses can prohibit the creation of derivative works at the author's option, provided that the author has retained copyright in the work.<sup>130</sup>

A more difficult question arises in attempting to apply the Netanel model to the *Midnight Sun* controversy. In this case, as with the fan fiction situations, attribution per se was not the key to the problem. Stephenie Meyer was simply upset that unauthorized copies of her work—that were attributed to her—were released on the Internet before she was ready for people to read them. This situation implicates the relationship between the rights of attribution and integrity. The problem here for Meyer was the dissemination of her work in a form in which she did not want others to receive it. Unlike the typical concerns about authorial dignity, the *Midnight Sun* situation did not involve a third party revising a work and releasing it under the author's name in a form unapproved by the author. Rather, it involved a third party releasing *the author's own work* in a form unapproved by the author.

As noted in Part I.B., Professor Leaffer has suggested that the right of attribution will typically include the right of an author to prevent the use of her name as the author of a work “in the event of a distortion, mutilation, or other modification of the work that would be prejudicial to her honor or reputation.”<sup>131</sup> While the release of an unauthorized and incomplete early version of a manuscript may be prejudicial to an author's honor or reputation, could it really be described as a “distortion, mutilation, or other modification of the work?” Again, there is a strong argument that the Netanel moral rights model would have no application here.

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<sup>128</sup> See Hetcher, *supra* note 67, at 1888–89 (noting that authors do bring copyright lawsuits against creators of fan fiction).

<sup>129</sup> See NETANEL, *supra* note 9, at 216–17.

<sup>130</sup> *About the Licenses*, CREATIVE COMMONS, <http://creativecommons.org/licenses> (last visited Jan. 6, 2011).

<sup>131</sup> LEAFFER, *supra* note 3, at 395.

Again, this may well be as it should be. An author who has retained copyright in her unpublished manuscript can use copyright law to seek a remedy in situations such as the unauthorized release of the manuscript. However, copyright law and copyright remedies are premised on property rights rather than authorial dignity, so the copyright model is not necessarily the best fit for the perceived harm here. If the author is looking for an apology or some other remedy related to her dignity, she will not find it in copyright law. Of course, there may simply be no remedy that addresses the kind of harm suffered by Meyer in this situation. While an injunction may be available under copyright law, the damage to Meyer's artistic process was already done. She felt that she had been violated as an author to the extent that she could not complete the project. Neither copyright law nor moral rights law may give her any practical comfort at the end of the day.

Of course, this depends on the breadth of one's conception of moral rights. While neither of Berne's Article 6*bis* rights would likely help authors like Meyer in the case of unauthorized distributions of their own work, some of the broader civil moral rights systems might cover this situation. Formulations of moral rights that include the right to withdraw the work from publication might be the kind of right that authors like Meyer would really be seeking in situations like the *Midnight Sun* dilemma.<sup>132</sup>

However, the applicability of a right of withdrawal, even in countries that maintain the right, can be limited in practice and may not cover every situation in which an author desires to withdraw a work from the public. As Professor Kwall has noted, even in countries that maintain a right of withdrawal, the right tends to be rarely exercised in practice.<sup>133</sup> This is because in countries like France, Germany, and Italy,<sup>134</sup> the right to withdraw

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<sup>132</sup> See *id.* at 389 (noting that some formulations of moral rights include the right to withdraw the work from publication); Roeder, *supra* note 14, at 556 (noting that some European countries protect the right to withdraw and destroy the work as amongst the author's moral rights).

<sup>133</sup> See Kwall, *supra* note 1, at 44.

<sup>134</sup> See *id.* (noting that France, Germany, and Italy maintain a right to withdraw a work as part of their moral rights law).

only applies to published works,<sup>135</sup> and only applies in situations where the author can affirmatively establish severe harm as a result of the inability of the work to represent her personal convictions.<sup>136</sup> Thus, under current European formulations of the right to withdraw, the dissemination of an unpublished manuscript that does not cause severe harm to the author by misrepresenting her current “convictions or spirit”<sup>137</sup> would not likely infringe the right.

The fact that the Netanel model does not provide a remedy for any of the authors’ concerns raised in Part II does not of course condemn it as an inappropriate moral rights agenda for the United States. The aim of this discussion has merely been to demonstrate that even the most carefully thought out moral rights models will have to strike a balance somewhere, and cannot address everybody’s concerns. Professor Netanel’s focus—like Professor Litman’s and Professor Tushnet’s—is on encouraging creativity in downstream markets while protecting authorial dignity in the context of attribution. It is a thought-provoking model that may well be worth adopting. However, it would still appear to fall short of the United States’ international obligations under the Berne Convention as it does not include the right of integrity. It would also have to be developed to ensure that it is in compliance with other aspects of Berne, such as the term of the attribution right.<sup>138</sup>

### C. *The Kwall Model*

Societies that care about fostering the creation of works of authorship should take seriously the idea that authors are concerned about safeguarding the textual integrity of their works . . . . [C]ompelling

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<sup>135</sup> See *id.* (“The right of withdrawal is best understood as a means of allowing authors to ‘retract the economic rights that they may have assigned or licensed to a third party in order to enable that third party to exploit the work.’” (quoting Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 362 (2006))).

<sup>136</sup> See *id.*

<sup>137</sup> *Id.* (“[T]he author . . . enjoys the right to determine whether a work should be withdrawn from the public if it no longer reflects the author’s convictions or spirit.”).

<sup>138</sup> See Berne Convention, *supra* note 2, art. 6*bis*(2) (“The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights . . .”).

reasons exist for introducing noneconomic, or inspirationally based, motivations into the dialogue on authors' rights.<sup>139</sup>

Professor Kwall's model for a new moral rights agenda for the United States is significantly broader than Professor Netanel's model. In particular, Professor Kwall rejects the notion that an American moral rights agenda should focus solely on the right of attribution.<sup>140</sup> As Professor Kwall's agenda is fairly broad, she consciously focuses on general themes rather than technical details.<sup>141</sup> Her model would exclude from moral rights coverage works that are largely functional as opposed to highly artistic.<sup>142</sup> This would address concerns about the improper extension of moral rights to works that do not necessarily reflect the personality of the author such as computer software and largely functional databases.<sup>143</sup>

Somewhat consistently with Professor Netanel's approach, Professor Kwall's model would include broad protections for attribution rights and narrower protections for integrity rights.<sup>144</sup> Under the Kwall model, the attribution right would incorporate the right to publish anonymously or pseudonymously and to later

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<sup>139</sup> Kwall, *supra* note 1, at 9.

<sup>140</sup> *See id.* at 144 (“[A]lthough attribution may present a more clear-cut, and easier to administer area than the right of integrity, both are deeply concerned with the author’s dignity and esteem. In order for a right of integrity to be viable in the United States, it will need to balance carefully competing interests and incorporate a large degree of cabining measures.”).

<sup>141</sup> *See id.* at 147 (“The proposal I develop . . . does not attempt to address every possible issue in connection with enhanced moral rights legislation. On the contrary, it explores some general themes and offers guidance with respect to how these themes can impact the mechanics of a new statute.”).

<sup>142</sup> *See id.* at 148 (“[M]oral rights should be applicable to works manifesting heightened originality with substantial creativity. If Congress were to follow this approach, it would be appropriate to exclude completely works from coverage that are largely functional and therefore lacking in significant artistic characteristics.”).

<sup>143</sup> *See* LEAFFER, *supra* note 3, at 400 (“[S]ome works are simply not appropriate for moral rights, such as computer programs, databases, and other functional works. These kinds of works that have little or no artistic, personal, or cultural heritage are ill-suited for moral rights protection.”).

<sup>144</sup> Kwall, *supra* note 1, at 149 (“[A]tribution rights should be defined far more broadly than integrity rights.”).

claim authorship if the author so desired.<sup>145</sup> This is important in Professor Kwall's view because these authorship decisions "represent branding choices that can be a fundamental part of the author's meaning and message."<sup>146</sup>

In terms of remedies, Professor Kwall would prefer that violations of the attribution right be enforced by declaratory relief that governs future distributions of an infringing version of a work.<sup>147</sup> Damages should generally not be an available remedy for an infringement of the attribution right because of the typically noneconomic nature of the injury to the author.<sup>148</sup>

In terms of the right of integrity, Professor Kwall suggests that the right should be narrowly tailored to "vindicate the author's right to *inform the public* about the original nature of her artistic message and the meaning of her work."<sup>149</sup> This could be achieved through a requirement that the downstream modifier of the work provide a disclaimer informing the public of the author's objection to her usage of the work.<sup>150</sup> Of course, as recognized by Professor Kwall, this assumes that the downstream user is not prevented from making the modification to the work under copyright law.<sup>151</sup>

As with the attribution right, remedies under the proposed integrity right should generally be limited to declaratory relief.<sup>152</sup> In the case of the integrity right, the declaratory relief would comprise mandating a disclaimer on a downstream use of the

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<sup>145</sup> *Id.* ("[The] author should have the right to publish a work anonymously or pseudonymously, and to claim authorship at a later point in time should she so desire.").

<sup>146</sup> *Id.* at 150.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* ("In light of the predominant noneconomic nature of the injury, a damage remedy should be eschewed except in the following instances: where a clear showing of economic harm exists as a result of the attribution violation; where the violation is entirely in the past and future injunctive relief therefore is meaningless; or where exceptionally willful violations are involved.").

<sup>149</sup> *Id.* at 151.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* ("[The proposed integrity right] assumes that, absent the proposed right of integrity, the actor would otherwise have the unencumbered right to use the author's work pursuant to copyright law.").

<sup>152</sup> *Id.*

work.<sup>153</sup> Professor Kwall further suggests that in order to obtain relief, an author must establish that her objections to the use of her work are “reasonably credible.”<sup>154</sup>

In terms of waiver, Professor Kwall would prefer that neither the right of attribution nor integrity should be waivable.<sup>155</sup> This is because waiver is inconsistent with the notion that the rights protect authorial dignity,<sup>156</sup> and because allowing waivers exacerbates inequalities of bargaining power that often exist between creators of works and those with whom they contract.<sup>157</sup> Professor Kwall further notes that because of the limited nature of protection for the integrity right under her model, the typical justifications for supporting a waiver provision are not present.<sup>158</sup> In other words, where a downstream user is not prevented from engaging in creative expression, but is only required to issue a disclaimer, that user should not require a waiver of the integrity right. The integrity right does not prevent her from engaging in her downstream creative activity.

Professor Kwall also advocates a system in which moral rights last only for the author’s lifetime.<sup>159</sup> Although this view is inconsistent with the Berne Convention,<sup>160</sup> Professor Kwall

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<sup>153</sup> *Id.* (“As with the attribution right, an author should be entitled to enforce the right of integrity prospectively through declaratory relief mandating a disclaimer. Further, an author should be unable to enjoin a proposed use accompanied by an appropriate disclaimer. For prior objectionable uses lacking a disclaimer, an author should be able to obtain damages in cases involving clear economic harm, willfulness, or where the conduct is entirely past and the possibility of a prospective disclaimer is unrealistic.”).

<sup>154</sup> *Id.* (internal quotation marks omitted).

<sup>155</sup> *Id.* at 156 (“In light of this proposal’s circumscribed protections for moral rights, formal waivers should be inoperative as a general matter.”).

<sup>156</sup> *Id.* at 156–57 (“Given that moral rights are designed to recognize inspirational motivations for creativity, any system sanctioning waiver is inconsistent from a theoretical standpoint with the justifications for adopting these protections. In other words, if moral rights protections are intended to redress violations of authorship dignity, they should not be capable of being waived.”).

<sup>157</sup> *Id.* at 157 (“Moreover, allowing waiver exacerbates the disparity of bargaining power between authors and those with whom they contract.”).

<sup>158</sup> *See id.*

<sup>159</sup> *Id.* at 159 (“[F]rom a theoretical standpoint, moral rights protection should exist for the author’s lifetime, but not beyond.”).

<sup>160</sup> *Id.* at 160 (“[The Berne Convention] provides that the covered rights are to be maintained after the author’s death ‘at least until the expiry of the economic rights.’”).

supports the model on the basis that no one other than the author can “substitute a personal judgment regarding the substance of the author’s meaning and message of her work.”<sup>161</sup> This includes members of the author’s family.<sup>162</sup>

Like Professors Litman and Netanel,<sup>163</sup> Professor Kwall also notes that modern digital technology would be very helpful in implementing and enforcing the rights she proposes.<sup>164</sup> Where compliance with the moral rights focuses on appropriate attribution and disclaimers, this is fairly easily achieved digitally, at least with works in digital formats. As noted by Professor Netanel, copyright management information is routinely incorporated into digital works.<sup>165</sup> Other information—such as the way in which the author wishes to be attributed or the fact that the author objects to a particular downstream treatment of a work—is likewise easily incorporated into a digital work. Taking Professor Kwall’s model a step in the direction of Professor Netanel’s model, one could suggest that any new moral rights legislation should prevent the removal of attribution information or disclaimers.

Returning, then, to our authors of supernatural fiction from Part II, the question arises as to whether Professor Kwall’s model would assist with the concerns raised by the authors in relation to their works. As noted in Part III.B, any moral rights model that focuses purely on attribution will be of little help for the kinds of concerns described in Part II.<sup>166</sup> This is because none of the authors were particularly concerned about attribution. All of the authors had raised some concerns about unauthorized fan fiction, but the concerns had more to do with the existence of the fan fiction than with the lack of attribution of the original work.

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* (“No one, not even the author’s spouse and children, can substitute a personal judgment regarding the substance of the author’s meaning and message of her work.”).

<sup>163</sup> *See supra* Part III.B.

<sup>164</sup> KWALL, *supra* note 1, at 154 (“[I]n many instances digital technology and the Internet offer efficient and inexpensive means of complying with these suggested reforms.”).

<sup>165</sup> NETANEL, *supra* note 9, at 216.

<sup>166</sup> *See supra* Part III.B.

In fact, in her model, Professor Kwall particularly suggests that enforcement of moral rights may generally be relaxed in the case of parodies. In the context of a parody, the source of the material being parodied is obvious from the context, and it is also obvious that the work is unlikely to have been authorized by the original creator.<sup>167</sup> Thus, in Professor Kwall's words, "when works are parodied, an implicit disclaimer essentially exists."<sup>168</sup> While parody does raise separate issues from fan fiction, there are clear parallels. In both cases, the author may object to a downstream expressive activity that makes unauthorized use of her original work. Further, in both cases it is relatively clear from the context: (a) that the author was the creator of the original work upon which the new work is based; and (b) that the author is unlikely to have formally approved creation of the new work. Thus, applying Professor Kwall's thoughts about parody to fan fiction, a new moral rights agenda may not even require attribution or disclaimers in the context of fan fiction.

Whether or not attribution or disclaimers would be required for fan fiction under the Kwall model, the concerns raised by Anne Rice, Charlaine Harris, and to some extent by Stephenie Meyer about fan fiction are not fully addressed by the model. Both Rice and Harris vehemently object to fan fiction—Rice to the point of expressly attempting to ban it.<sup>169</sup> Thus, simply requiring that authors of fan fiction attribute the original source and issue a disclaimer does little to help these authors, particularly given that attribution and disclaimers may effectively be implied in the fan fiction context in any event.

Again, this may well be as it should be. The entire thrust of Professor Kwall's model, as with Professor Netanel's, is to preserve First Amendment values and a vibrant public domain.

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<sup>167</sup> KWALL, *supra* note 1, at 163 ("It is precisely because the public understands that . . . parodies are not authorized that the public is not deceived as to the persona's involvement in parody. Moreover, parody lacks the necessary public linkage between the author and the externalized commodity because it is apparent that the author has not authorized the use.").

<sup>168</sup> *Id.* at 159.

<sup>169</sup> Anne Rice, *Anne's Message to Fans, Anne Rice Readers Interaction*, ANNERICE.COM, <http://www.annerice.com/ReaderInteraction-MessagesToFans.html> ("I do not allow fan fiction. The characters are copyrighted.") (last visited July 14, 2010).



Thus, a moral rights agenda that would effectively ban or severely restrict fan fiction activities is well outside the aims of these models. As noted in Part III.B, it is possible that copyright law may in fact do some of this work in cases where fan fiction is found to be an unauthorized derivative work and not justified under the fair use defense.<sup>170</sup> There are arguments both ways on these questions. A number of commentators suggest that much fan fiction, even if an apparent infringement of the derivative work right,<sup>171</sup> is nevertheless excusable as a fair use,<sup>172</sup> notably in the case of noncommercial fan fiction.<sup>173</sup>

Again, the *Midnight Sun* scenario is potentially more problematic than questions about fan fiction, even under the Kwall model. As noted in Part III.B, Meyer's concern about the unauthorized postings of *Midnight Sun* on the Internet had nothing to do with attribution. She was concerned with her unfinished work being made available to the public before she was ready to share it.<sup>174</sup> Even an integrity right is of little use here because a third party did not distort, modify or mutilate her work, but rather posted it without authority. Interestingly, Meyer's self-imposed remedy consisted of her own disclaimer of sorts:

I'd rather my fans not read this version of *Midnight Sun*. It was only an incomplete draft; the writing is messy and flawed and full of mistakes. But how do I comment on this violation without driving more people to look for the illegal posting? It has taken me a while to decide how and if I could respond. But to end the confusion, I've decided to make the draft available here (at the end of this post). This

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<sup>170</sup> See *supra* Part III.B.

<sup>171</sup> See 17 U.S.C. § 106(2) (2006) (reserving the right to create derivative works as an exclusive right of the copyright holder).

<sup>172</sup> Hetcher, *supra* note 67 (noting that there is a strong argument that much remixing and fan fiction is fair use).

<sup>173</sup> *Id.* at 1907–12 (applying a fair use analysis to typical noncommercial fan fiction and arguing that much noncommercial fan fiction is likely to be fair use).

<sup>174</sup> Stephenie Meyer, *Midnight Sun: Edward's Version of Twilight*, STEPHENIEMEYER.COM (Aug. 28, 2008), <http://www.stepheniemeyer.com/midnightsun.html>.

way, my readers don't have to feel they have to make a sacrifice to stay honest.<sup>175</sup>

She is basically saying that the draft she has released online is not in a form that she wants her fans to read, but she understands that some people will want to read it anyway. She would rather they read her official version so they can “stay honest.”<sup>176</sup> This is somewhat analogous to Professor Kwall's idea of using disclaimers as a remedy for the integrity right. Professor Kwall's disclaimers work similarly by effectively saying that the work in question is not in a form the original creator has authorized.<sup>177</sup> The idea is to maintain the original author's dignitary interests in her work without stifling downstream creativity. Meyer's use of a disclaimer with respect to her own work serves much the same function. It suggests that she has not truly supported release of the work in the form in which she has ultimately released it but she understands the public interest in accessing the work so she is prepared to make that sacrifice. While Professor Kwall's focus is on preserving a vibrant public domain, and Meyer's focus is on supporting her fans who want to read the work, the end result is similar. At the end of the day, more creative work is released for public consumption than would otherwise be the case, but the author's objections to the form of the work are publicly noted.

As with the fan fiction examples, it is possible that Meyer could have used copyright law to obtain injunctions against the unauthorized postings of her incomplete manuscript. However, as noted in Part III.B, the injuries she claims to have suffered have more to do with her own artistic integrity than with concerns about pecuniary advantage.<sup>178</sup> She seems more concerned with the way in which the unauthorized release of the manuscript has interfered with her creative processes than with her ability to actually control the unauthorized distributions. In her response to the unauthorized postings, she opts for *more* distribution of the work by officially reproducing it on her own website, but at the same time she

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *See supra* note 167.

<sup>178</sup> *See supra* Part III.B.

withdraws her earlier promise to her fans to complete the manuscript.

### CONCLUSION

What conclusions might be drawn from the above discussion of recent American moral rights models juxtaposed against comments by supernatural fiction authors about preferred uses of their works? Focusing first on the moral rights models, it seems clear that the new moral rights agendas proposed by Professors Netanel and Kwall are moving away from the notion of compliance with the requirements of the Berne Convention. Professor Netanel's model falls short of Berne obligations by focusing only on the right of attribution and setting aside the right of integrity.<sup>179</sup> Professor Kwall's model, whilst incorporating a right of integrity, includes only a narrow protection for the right based on a requirement of disclaimers placed on unauthorized reworkings of an original work.<sup>180</sup> This may, in fact, be in compliance with Berne, as the Convention says nothing about precisely how moral rights are to be enforced within domestic legal systems.<sup>181</sup> Nevertheless, Professor Kwall's model falls short of Berne compliance in requiring that the suggested moral rights terminate on the death of the original author.<sup>182</sup>

The reasons that both the Netanel model and the Kwall model are more restricted than the Berne requirements have much to do with the need within the United States to incorporate powerful constitutional guarantees such as the right to free speech under the First Amendment and potentially concerns about unauthorized takings.<sup>183</sup> It may be the case that the United States is not in a position to fully comply with its Berne obligations consistently with its own Constitution. This may be a problem in the

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<sup>179</sup> See *supra* Part III.B.

<sup>180</sup> See KWALL, *supra* note 1, at 151 (suggesting that in cases where a work that is still identifiable as the original author's work is repurposed by a second person, that person "should be required to provide a disclaimer adequate to inform the public of the author's objection to the modification or contextual usage").

<sup>181</sup> See generally Berne Convention, *supra* note 2.

<sup>182</sup> KWALL, *supra* note 1, at 160.

<sup>183</sup> See *supra* Part III.A.

international arena going forward. However, in the meantime it may be appropriate for scholars like Professors Netanel and Kwall to advocate moral rights agendas that are limited consistently with constitutional values.

Both the Netanel model and the Kwall model place significant emphasis on the right of attribution as a right that is consistent with constitutional values and a right that is capable of giving effect to powerful conceptions of authorial dignity.<sup>184</sup> Both professors further note the usefulness of modern digital technologies in facilitating compliance with their moral rights agendas.<sup>185</sup> Professor Kwall extends on the attribution right by incorporating a limited right of integrity in her model that is enforceable generally by disclaimer.<sup>186</sup> Again, this is likely consistent with American constitutional values and can take advantage of available digital technologies for effective enforcement.

While likely consistent with constitutional values, neither the Netanel model nor the Kwall model redresses the harms alleged by the supernatural fiction authors discussed in Part II. Again, this may be perfectly appropriate. Both models, in fact, consciously seek to protect fan fiction—and some other expressive uses of protected works<sup>187</sup>—against prohibitive and potentially monopolizing claims by authors.<sup>188</sup> The adoption of a moral rights agenda will always necessitate a careful balancing act between the rights of original authors, those with whom they contract to publish and disseminate their works, and audiences for their works. The kinds of balances sought to be struck by Professors Netanel and Kwall consciously attempt to prioritize downstream creative uses of works against author complaints, except to the extent that the downstream uses harm the author by creating a false impression about the author's intended meaning or message.

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<sup>184</sup> See *supra* Part III.B; Part III.C.

<sup>185</sup> See *supra* Part III.B; Part III.C.

<sup>186</sup> See *supra* Part III.C.

<sup>187</sup> See, e.g., KWALL, *supra* note 1, at 163 (noting the importance of protecting parody from excessive moral rights claims).

<sup>188</sup> *Id.*; NETANEL, *supra* note 9, at 215 (noting concerns that broad European-style moral rights protections could impede downstream uses of protected works).

If this is the accepted aim of a new moral rights agenda, then downstream uses such as fan fiction and parody should not be prohibited by new moral rights laws, although disclaimers may be required in some cases. Of course, none of this speaks to the extent to which copyright law may negatively impact these downstream uses. It is still an open question whether much fan fiction is an infringement of the derivative work right under copyright law or rather may be excused as a fair use. The Netanel and Kwall moral rights models each side-step this issue. Professor Netanel's model simply has no impact on this question because it focuses on attribution, rather than integrity, the latter right being the one typically implicated in the fan fiction context. Professor Kwall's model would only apply the moral right of integrity in cases where the downstream expressive use was not otherwise prohibited by copyright law. In other words, her model assumes the inapplicability of copyright law to a particular use for the right of integrity—and associated disclaimer remedy—to be applicable.<sup>189</sup>

One of the more useful takeaways from this discussion might be that both copyright law and moral rights law require important balancing acts between the interests of multiple stakeholders. Even the most well thought out models will have to prioritize certain interests over others. Thus, in order to preserve First Amendment values in the United States, it may be the case that authors simply lose the ability to control a number of downstream uses of their work. Savvy authors with sufficient bargaining power may choose to impose restrictive copyright license terms on downstream uses of their work. However, not all creators have sufficient bargaining power to protect their interests in this way. Many do not retain copyright in their works. Additionally, in situations where there is no contract—such as the *Midnight Sun* scenario described in Part II—contractual restrictions are irrelevant.

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<sup>189</sup> See KWALL, *supra* note 1, at 151 (noting, for example, with respect to her proposed right of integrity that her proposal “assumes that, absent the proposed right of integrity, the actor would otherwise have the unencumbered right to use the author’s work pursuant to copyright law”).

If one adopts a moral rights agenda based on ideas advocated by Professors Netanel or Kwall, authors are likely to find themselves relying increasingly on copyright and contract law to protect the kinds of interests identified in Part II. There is nothing necessarily wrong with this result as a matter of practice. However, it is useful in debating new moral rights agendas to identify and acknowledge the kinds of interests that are unlikely to be protected by such proposals. Authors may gain some comfort from thinking about alternative methods for protecting interests that are unlikely to be covered by moral rights. Alternatively, authors may over time become more comfortable with the idea of certain kinds of uses of their works, such as fan fiction. Stephenie Meyer may be right in thinking that fan fiction is a good way for new writers to cut their teeth within the fiction medium, while hoping that they ultimately devise their own unique characters and scenarios for their own uses.<sup>190</sup>

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<sup>190</sup> Genet, *supra* note 82 (“As long as the writers of [fan fiction] move on from it. I think it’s sad to spend so much energy on something you can’t own. And that makes me a little bit sad because all these talented kids should be, ya know, get your story out from under the bed [sic] and get it out there.” (quoting Stephenie Meyer)).