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Moral Rights of Composers: The Protection of Attribution and Integrity Available to Musicians in the European Union and the United States

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Cover Page Footnote

Owner of Petrik Law Firm, New York; LL.M., Fordham University School of Law; LL.B., University of Ljubljana Law Faculty. My sincere thanks to Professor Pablo Palazzi for his helpful observations in preparing this Article and the editors and staff of the IPLJ for their hard work.

Moral Rights of Composers: The Protection of Attribution and Integrity Available to Musicians in the European Union and the United States

Tanja Makovec Petrik*

The purpose of this paper is to illustrate the approaches taken in the European Union and the United States to protect moral rights of musicians, specifically the right of integrity, and to give a sense of a possible future trend in the development of this issue. Currently, the United States protects an author's right of integrity through other legal frameworks, like contract law or defamation, but does not expressly recognize moral rights. This paper proposes that the United States adopt a middle ground approach, like that taken by the United Kingdom, and provide limited, but explicit, moral rights protection to musical composers.

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INTRODUCTION

Creativity as expressed through art is a special virtue. Apart from its important meaning for society,¹ creativity also represents an intimate realization of an author's personality and individuality.² The importance of protecting creativity has different meanings depending on the perspective taken. From the artist's point of view, it stimulates his work; from a legal point of view, it forms the foundation for the special status of the creation.

¹ Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities Under the U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213, 219 (2006) ("The supremacy of the creator's personhood is essential for promoting a climate of intellectual creativity in society.") (citing Gregory M. Duhl, *Old Lyrics, Knock-off Videos, and Copycat Comic Books: The Fourth Fair Use Factor in U.S. Copyright Law*, 54 SYRACUSE L. REV. 665, 705 (2004)); Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1533 (1989); Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 43-44 (1998).

² See Bird & Ponte, *supra* note 1, at 218 (referencing Monica E. Anteza, Note, *The European Union Internet Copyright Directive as Even More than it Envisions: Toward a Supra-EU Harmonization of Copyright Policy and Theory*, 26 B.C. INT'L & COMP. L. REV. 415, 421 (2003)); see also Duhl, *supra* note 1, at 706; Lacey, *supra* note 1, at 1548-49.

Civil law countries typically advance the issue of protection of an artist's creativity through a dualistic approach.³ These countries recognize both the artist's economic or property interests and his moral or personal rights within the same copyright protection.⁴ Conversely, common law countries approach the issue from a monistic perspective, affording artists copyright protection for their economic and property interests, while leaving moral rights protection at "the mercy of" other legal institutions.⁵ Thus, the European legal system, with the exception of the United Kingdom,⁶ includes moral rights as part of its statutory copyright law, whereas the legal system in the United States attempts to afford similar protection through defamation, unfair competition, privacy, right to publicity and other bodies of law, but it does not recognize moral rights as such.

When discussing moral rights one should first distinguish between moral rights as a set of rules and moral rights as a concept that protects an artist's relationship to his work.⁷ To examine whether the United States as a common law country in fact needs to adopt the civil system's moral rights regime, this paper will look at the level of protection currently available in the United States and investigate if artists' rights can be enhanced and adequately protected without introducing the new concept of moral rights.

The paper is divided into three parts. Part I introduces the nature of moral rights, including what musicians seek to have protected by them and the incentives of this protection. Part II examines the current status of moral rights protection internationally, and specifically focuses on the distinctions between the different approaches taken in the European Union and

³ See J. Carlos Fernández-Molina & Eduardo Peis, *The Moral Rights of Authors in the Age of Digital Information*, 52 J. AM. SOC'Y FOR INFO. SCI. & TECH. 109, 112 (2001). Countries taking a dualistic approach include: France, Belgium, Greece, Italy, Spain, and Portugal; those taking a monistic approach include: Germany, Austria, Czech Republic, Finland, the Netherlands, Norway, and Sweden.

⁴ *Id.*

⁵ Bird & Ponte, *supra* note 1, at 213–14.

⁶ It should be noted that my focus on the European system excludes the United Kingdom because it is a common law country.

⁷ See generally Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353 (2006) (recognizing this approach).

in the United States. This section also highlights the “philosophy” and tradition behind both approaches. Part III consists of a comparative analysis of the *Shostakovich* case as litigated in the United States and in France, as well as two cases involving American musician Tom Waits, one litigated in the United States, and the other in Spain. The paper concludes by foreshadowing an increase in American artists litigating overseas to protect the rights that current U.S. law fails to adequately recognize.

I. THE NATURE OF MORAL RIGHTS

Moral rights are distinct from the economic rights associated with a particular copyrighted work. Moral rights provide protection to the author based on the intimate link between his work and himself as the creator.⁸ These rights are understood to be an extension of the author’s personhood.⁹

In this respect, moral rights afford the work a status that treats it as a special category of property. Under a moral rights regime, the author retains a degree of control over his work even if he commercially exploits the creation by transferring his economic interests to a third party. This means that, for instance, a composer can invoke his moral rights to ensure that he is always recognized as the author, or to prevent distortion or mutilation of the piece even if he transferred his economic rights to a third person or entity.¹⁰ Therefore, in certain cases, moral rights defend artists’ rights against the contract or property interests of third parties.¹¹

⁸ Jean-Luc Piotraut, *An Authors’ Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 595 (2006) (citing Register of Copyrights, Report on the General Revision of the U.S. Copyright Law (1961)).

⁹ *See id.* at 596–97. Moral rights are distinguishable from personality rights in that they relate to an outer object (art work) as opposed to being solely inherent in an author’s individuality. Another distinction is the fact that moral rights can be attributed to legal entities.

¹⁰ Patrick G. Zabatta, Note, *Moral Rights and Musical Works: Are Composers Getting Berned?*, 43 SYRACUSE L. REV. 1095, 1096–97 (1992).

¹¹ Piotraut, *supra* note 8, at 595. This tension between the property interests of third parties and artists’ moral rights is a significant drawback in common law countries.

The four protections encompassed within the notion of moral rights are: the right of disclosure, the right of withdrawal, the right of attribution, and the right to integrity.¹² The right of disclosure¹³ (divulcation) allows an author to determine the circumstances whereby his work will be presented to the public.¹⁴ It is based on the presumption that only the author knows when the work is “complete and therefore ready to be published or reviewed by the public.”¹⁵ The right of withdrawal (retraction) provides the author with the option of removing his works from the public and refusing to create additional works.¹⁶ The right of attribution (paternity) protects the ability of the author to claim authorship of his work.¹⁷ The right of integrity ensures respect for the author’s work, so that it cannot be mutilated, distorted, altered, or destroyed.¹⁸ It also prohibits presenting a work in a “derogatory manner contrary to the intentions of the creator.”¹⁹

In the United States, judges have created what purport to be the equivalents of these four rights: “a right to disclose or first publish a work, a right of modification or withdrawal of a work . . . a right to prevent excessive criticism of a work, and a right against false

¹² Bird & Ponte, *supra* note 1, at 221. Additional moral rights protections exist such as the protection from misattribution, the right to anonymous or pseudonymous status, the right to prevent excessive criticism, and the right to additional royalties for the subsequent resale of works.

¹³ Bird & Ponte, *supra* note 1, at 222 (citing Natalie C. Suhl, Note, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1203, 1206 (2002) (“Michelangelo asserted his right of disclosure while finishing the ceiling of the Sistine chapel, by refusing Pope Julius II access to the unfinished murals.”)).

¹⁴ See Piotraut, *supra* note 8, at 597.

¹⁵ Bird & Ponte, *supra* note 1, at 220.

¹⁶ See Piotraut, *supra* note 8, at 597; see also Bird & Ponte, *supra* note 1, at 220–21.

¹⁷ See Piotraut, *supra* note 8, at 597.

¹⁸ See *id.*; see also Liemer, *supra* note 1, at 50–51; Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 *IND. INT’L & COMP. L. REV.* 423, 449 (1999).

¹⁹ Bird & Ponte, *supra* note 1, at 221 (citing Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 *VAND. L. REV.* 1, 5, 8–9 (1985)); Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 *WASH. & LEE L. REV.* 795, 802 (2001); Brandon G. Williams, Note, *James Brown v. In-Frin-JR: How Moral Rights Can Steal the Groove*, 17 *ARIZ. J. INT’L & COMP. L.* 651, 657–58 (2000); see also Lacey, *supra* note 1, at 1549.

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attribution.”²⁰ But these judicially-created expansions of copyrights do not provide the same protections as a regime that explicitly recognizes moral rights.

II. INTERNATIONAL PERSPECTIVE AND THE DIFFERENCE BETWEEN THE APPROACHES TAKEN IN THE EUROPEAN UNION AND THE UNITED STATES TO PROTECT MORAL RIGHTS

A. *International Perspective*

Internationally, relevant moral rights provisions are detailed in article 6bis of the Berne Convention and article 5 of the WIPO Performances and Phonograms Treaty (“WPPT”).²¹ Completed in 1986, the Berne Convention for the Protection of Literary and Artistic Works²² is an international agreement that governs copyright issues. Its moral rights provision was added in 1928 and “is universally understood as codifying the moral rights of attribution and integrity.”²³ Furthermore, it expressly provides that moral rights are independent of “economic rights.” Article 6bis reads:

²⁰ Piotraut, *supra* note 8, at 597–98 (citing Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229, 230 (1995)).

²¹ The Universal Copyright Convention of 1952 does not contain a moral rights provision. Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, revised July 24, 1971, 25 U.S.T. 1341. The TRIPS Agreement of 1994 excludes moral rights from its enforcement. Although Article 9(1) of the TRIPS Agreement establishes a general obligation to comply with article 6bis (“members shall comply with Articles 1 through 21 . . .”), it excludes article 6bis from its enforcement mechanisms (“members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that [Berne] Convention or the rights derived therefrom.”). Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), art. 9 (1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 81. The WIPO Copyright Treaty incorporates compliance with articles 1 to 21 of the Berne Convention, but does not contain any additional provisions of moral rights. WIPO Copyright Treaty, art. 1 (4), Dec. 20, 1996, 36 I.L.M. 76.

²² Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 6bis, , Pub. L. No. 100-568, 102 Stat. 2853 (1886) [hereinafter *The Berne Convention*].

²³ Rigamonti, *supra* note 7, at 356.

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.²⁴

This section of the Berne Convention indicates that “these moral rights should last as long as the protections of economic rights in signatory nations, or, at a minimum, until the death of the creator of the artistic work.”²⁵ Thus, the Convention leaves the implementation of moral rights protection to the individual signatory nations.²⁶

The 1996 WIPO Performances and Phonograms Treaty²⁷ (“WPPT”) follows the language of the Berne Convention in the context of music and other performances and protects the rights of attribution and integrity of performers including musicians, singers, and producers of sound recordings.²⁸ Article 5(1) reads:

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,

²⁴ The Berne Convention, *supra* note 22, at art. 6bis, section 2.

²⁵ Bird & Ponte, *supra* note 1, at 224–25 (referencing The Berne Convention, art. 6bis, section 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.

Id.

²⁶ The Berne Convention, *supra* note 22, at art. 6bis, section 3 (“The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.”).

²⁷ World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 (1997) [hereinafter WPPT].

²⁸ Bird & Ponte, *supra* note 1, at 226.

have the right to claim to be identified as the performer of his performances, except where omission is dictated by the 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.²⁹

The vague language used in both international provisions (a modification that is “prejudicial to his honor or reputation”) allows for different interpretations of moral rights. This ambiguity is precisely why the application of moral rights protection throughout the world calls for a universal agreement on the appropriate scope of moral rights protection.

B. *The European Approach*

Despite the continuous efforts of legal unification throughout the European Union and, for the most part, a successfully harmonized copyright law, moral rights in the European Union remain “un-harmonized.”³⁰ Moral rights in the European context are “generally conceptualized as inalienable rights of authors in their work.”³¹ In order to qualify as a moral right, three legal characteristics must be recognized:

First, moral rights are rights of *authors*, which is to say that only those human beings who *actually create* the work in question qualify as owners of moral rights. Therefore, corporate entities and employers who hire third parties to create works for them do not qualify as authors. . . . Second, moral rights are rights in *copyrightable works*, which is why moral rights law is considered an integral part

²⁹ WPPT, *supra* note 27, ch. II., art. 5 (1).

³⁰ See Council Directive 93/98/EEC, art.21, 1993 O.J. L 290 9-13 (“Whereas it is useful to make clear that the harmonization brought about by this Directive does not apply to moral rights”).

³¹ Rigamonti, *supra* note 7, at 359 (citing John Henry Merryman, *The Moral Right of Maurice Utrillo*, 43 AM. J. COMP. L. 445, 446 (1995); Neil Netanel, *Alienability, Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 2 (1994)).

of copyright law—the body of law governing rights in works of authorship. This is also the reason why France, Germany, and Italy decided to protect moral rights by modifying their copyright acts as opposed to enacting new non-copyright statutes or inserting them into pre-existing statutes outside copyright, such as their civil codes. . . . Third, moral rights are *inalienable* in the sense that they can be neither transferred to third parties nor relinquished altogether. They are personal to the author.³²

Regarding inalienability, although authors cannot assign or waive their moral rights (in contrast to copyrights), they can agree not to enforce them, which is in fact quite common.³³ Inalienability allows authors to bring claims against parties to whom they have transferred their copyright, leading some scholars to argue that it is the characteristic of moral rights that “interferes with the principle of freedom of contract.”³⁴

French and Spanish copyright law both follow this concept of inalienability. The French Intellectual Property Code provides that “[a]n author shall enjoy the rights to respect for his name, his authorship and his work This right shall attach to his person It shall be perpetual, inalienable and imprescriptible.”³⁵ With regard to the right of integrity, the French Code further provides that “[d]estruction of the master copy of such version shall be prohibited Any change made to that version by adding, deleting or modifying any element thereof shall require the agreement of the persons.”³⁶

³² *Id.* at 359–62. *See also* ANDRE LUCAS & HENRI-JACQUES LUCAS, *TRAITE DE LA PROPRIETE LITTERAIRE ET ARTISTIQUES* 307 (2d ed. 2001); ARTHUR MILLER & MICHAEL H. DAVIS, *INTELLECTUAL PROPERTY* 425 (3d ed. 2000); William W. Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 174 (Stephen R. Munzer ed., 2001).

³³ *See id.* *But see* Bird & Ponte, *supra* note 1, at 229 (“French Courts have allowed some limited waivers in contracts if the courts viewed those waivers as reasonable and not substantive alternations or distortions of the creative work. Blanket waivers on future changes or uses of a creative work, however, are unenforceable.”).

³⁴ Rigamonti, *supra* note 7, at 361.

³⁵ Code de la Propriété Intellectuelle [C. Propriété Intellectuelle] art. L.121-1 (Fr.), available at <http://www.wipo.int/wipolex/en/details.jsp?id=5563> (English translation).

³⁶ *Id.* at art L. 121-5.

Applying the French approach, a composer may object to the use of his music in a film, television broadcast, or live performance. A musician or composer “[m]ay seek to block the exploitation of her work through digital sampling of pieces of that work into another song.”³⁷ Musicians and composers may also “try to stop the downloading of their music from online media services.”³⁸

French copyright law influenced Spain’s copyright law. Under Spanish Intellectual Property Law, the author has an indispensable and inalienable right to demand recognition of his authorship of the work, demand respect for the integrity of the work, and prevent any distortion, modification, alteration, or attack of the work, which might prejudice his legitimate interest or undermine the work’s reputation.³⁹

C. *The American Approach*

The United States does not recognize the notion of moral rights as such, but rather seeks “to promote the public good through granting economic incentives for creative endeavors.”⁴⁰ The United States purports to enforce what is sought to be protected by moral rights through other principles and institutes (bodies of law) such as defamation, misrepresentation, unfair competition, right to privacy, right to publicity, and other civil causes of action.⁴¹

However, there is a widely held belief that United States copyright legislation does not comply with article 6bis of the Berne Convention.⁴² When the United States joined the Berne Convention in 1988 it made it clear that no expansion of moral rights was intended by the United States’ accession to the treaty.⁴³

³⁷ Bird & Ponte, *supra* note 1, at 230.

³⁸ *Id.*

³⁹ Intellectual Property Law art. 14 (B.O.E. 1996, 1/1996) (Spain). *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=126674 (English translation).

⁴⁰ Bird & Ponte, *supra* note 1, at 247.

⁴¹ Henry L. Self III, *Moral Rights and Musicians in the United States*, in 2003-2004 ENTERTAINMENT, PUBLISHING & THE ARTS HANDBOOK 165, 168 (2003).

⁴² *See* Bird & Ponte, *supra* note 1, at 252.

⁴³ *See* Zabatta, *supra* note 10, at 1098-99.

The Berne Convention Implementation Act of 1988⁴⁴ expressly stipulated that the Convention is not self-executing.⁴⁵ By doing so, the United States maintained its position that what are understood as “moral rights” elsewhere are adequately protected in the United States by other principles of law.

Some states, however, did take it upon themselves to provide some moral rights protection. Puerto Rico and fourteen states enacted legislation providing limited protection for the rights of integrity and attribution, among other rights.⁴⁶ However, in many cases, the protection was limited. For example, only Puerto Rico’s moral rights laws protected musical works.⁴⁷

Federal law came to recognize moral rights in the Visual Artists Rights Act of 1990 (“VARA”).⁴⁸ In addition to largely preempting state law and offering less generous moral rights,⁴⁹ VARA offers protection only to works of visual art.⁵⁰ Thus, the statutory provision relating to the rights of attribution and integrity in the United States is expressly limited to visual artists.⁵¹ All other works, such as musical compositions, must rely on other legal concepts.

1. Protection for Musical Works

United States Copyright Law does implicitly guarantee a certain level of integrity to a composition through compulsory licensing.⁵² Title 17, Section 115 of the United States Code, concerning the exclusive rights in nondramatic musical works, allows a third person to acquire a compulsory license from a

⁴⁴ See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

⁴⁵ *Id.* § 2(1).

⁴⁶ See Bird & Ponte, *supra* note 1, at 254.

⁴⁷ See *id.* at 255.

⁴⁸ See Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128; see also 17 U.S.C. § 106A (2010).

⁴⁹ See Bird & Ponte, *supra* note 1, at 259–60 (“Under VARA, artists’ rights are alienable by written contract provided that the waiver identifies the work and its agreed-upon uses.”).

⁵⁰ See Bird & Ponte, *supra* note 1, at 258.

⁵¹ See Piotraut, *supra* note 8, at 600.

⁵² 17 U.S.C. § 115 (2010).

copyright owner which permits the third party to sing, perform or record an original composition, referred to as a “cover song.”⁵³ There is no requirement that the new version be identical to the previous work, as the compulsory license includes the privilege of rearranging the work, creating the recording artist’s own interpretation of the original. Nevertheless, there are limits to the modifications allowed, namely that the new version cannot “change the basic melody or fundamental character of the work.”⁵⁴ Therefore, a licensee is prohibited from drastically altering the work “and must cover the work in a way that remains faithful to the copyright owner’s original creation.”⁵⁵

Factually for several reasons, the right of integrity within the compulsory licensing regime does not afford much protection to musicians. First, it is very limited in scope in terms of prohibiting modifications.⁵⁶ Compulsory mechanical licenses protect against only a “fundamental change”; compulsory performance licenses protect against unauthorized performances and are not concerned with the artistic integrity of the musical work.⁵⁷ Second, compulsory licenses are an inaccurate reflection of the moral rights doctrine because they protect the copyright owners and not the authors, but the copyright owner is often not the actual creator.⁵⁸ Furthermore, “the creator still loses all of her discretion and control over her musical work when required to license away her creation.”⁵⁹ Because composers “cannot invoke its protection . . . songwriters must still rely on the patchwork of pseudo-moral rights protection . . . to vindicate their rights of attribution and integrity.”⁶⁰

⁵³ *Id.* at § 115(a)(2). See also Bird & Ponte, *supra* note 1, at 250.

⁵⁴ 17 U.S.C. § 115(a)(2) (2010).

⁵⁵ Rajan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. L.J. 1, 5–6 (2001) (citing CRAIG JOYCE ET AL., COPYRIGHT LAW 207, 178 (5th ed. 2000)).

⁵⁶ See Desai, *supra* note 55, at 8.

⁵⁷ See *id.*

⁵⁸ See Bird & Ponte, *supra* note 1, at 250.

⁵⁹ *Id.*

⁶⁰ Zabatta, *supra* note 10, at 1101.

While not expressly grounding its holding in the moral rights doctrine, the Second Circuit in *Gilliam v. American Broadcasting Company*⁶¹ alluded to the concept of moral rights.⁶² In *Gilliam*, American Broadcasting Company (ABC) obtained a license from the British Broadcasting Company (BBC) to broadcast a popular British show, Monty Python.⁶³ However, before broadcasting, ABC shortened and edited the show to accommodate commercials, prompting Monty Python to seek an injunction.⁶⁴

The court held that “American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.”⁶⁵ So, Monty Python was not able to claim a violation of its moral rights. However, Monty Python did succeed in its claim based in trademark law, not copyright law. The court held that Monty Python had successfully made out a claim under section 43(a) of the Lanham Act regarding misappropriation of an author’s work that creates a false impression of the product’s origin.⁶⁶ The Lanham Act, section 43(a) provides: “Any person who shall affix, apply, annex or use . . . a false designation of origin, or any false description of representation . . . shall be liable for civil action.”⁶⁷

Although section 43 governs false and misleading advertising and can provide a composer with protection against the impermissible alterations of his works, like the protection provided by the right of integrity, it cannot be used to create a moral right for works that fall outside of the Act.⁶⁸ Ultimately, the decision illustrates that other legal concepts and provisions can be used to protect what the moral right of integrity seeks to protect, but only to a limited and restricted extent.⁶⁹

⁶¹ 538 F.2d 14 (2d Cir. 1976).

⁶² *Id.* at 24–25. *See also* Piotraut, *supra* note 8, at 605.

⁶³ *See* Piotraut, *supra* note 8, at 605.

⁶⁴ *See id.*

⁶⁵ *Gilliam*, 538 F.2d at 24.

⁶⁶ *See* Piotraut, *supra* note 8, at 604–05.

⁶⁷ 15 U.S.C. § 1125(a) (2006).

⁶⁸ Suhl, *supra* note 13, at 1225–28.

⁶⁹ *See* Piotraut, *supra* note 8, at 604–05.

Similarly, the Ninth Circuit quasi-recognized the right of attribution in *Lamothe v. Atlantic Recording Corporation*.⁷⁰ Plaintiffs brought a claim under the Lanham Act, asserting the failure to attribute authorship for two of their songs.⁷¹ The facts of the case showed that Lamothe, Jones, and Crosby coauthored two songs, and after the band split up, Crosby joined another group and licensed both songs.⁷² The licenses for the songs attributed authorship of the music and lyrics to Crosby, and omitted the credit due to Lamothe and Jones.⁷³ The court acknowledged artists' "legitimate interest in protecting their work from being falsely designated" and thus accorded protection to Lamothe and Jones under the Lanham Act.⁷⁴ The court stated plainly that the defendants violated the Lanham Act by "depriv[ing] Lamothe and Jones of recognition and profits from the release of the two songs that were their due."⁷⁵

Similarly, in *Franconero v. Universal Music Corporation*,⁷⁶ Mrs. Francis, a renowned singer in 1950s and 1960s, claimed that the defendant's actions violated her moral rights.⁷⁷ In the 1990s, Universal Music Corporation (UMC) licensed⁷⁸ synchronization rights allowing Francis' music to be used in a film that featured scenes of homosexuality, suicide, prostitution, and rape.⁷⁹ Among other claims, Francis asserted a moral rights claim for improper licensing of her songs.⁸⁰ Considering that Francis had been raped and tortured, the context in which her songs were licensed was especially objectionable.⁸¹ Nevertheless, in its analysis the court

⁷⁰ 847 F.2d 1403 (9th Cir. 1988).

⁷¹ *See id.*

⁷² *See id.* at 1405 (stating that the band coauthored the songs entitled "Scene of the Crime" and "I'm Insane").

⁷³ *See id.*

⁷⁴ *Id.* at 1406.

⁷⁵ *Id.* at 1407.

⁷⁶ No. 02CV1963, 2003 WL 22990060 (S.D.N.Y. Dec. 19, 2003).

⁷⁷ *See id.* at *1.

⁷⁸ Mrs. Francis transferred the rights in her music to UMC, with Francis receiving royalties from UMC's licensing of such music.

⁷⁹ *Franconero*, 2003 WL 22990060, at *1 (stating that UMC allowed the music to be used in the films "Jawbreaker" and "Postcards from America").

⁸⁰ *See id.* at *2.

⁸¹ In 1974, Francis was raped and tortured. *See id.* at *1.

dismissed the moral rights claim reiterating that “United States law does not recognize moral rights with respect to vocal performances, and only recognizes moral rights claims as to visual arts that have been altered or deformed.”⁸² Mrs. Francis’ claims might have been better founded if, for example, she had asserted infringement of her privacy or publicity rights or even defamation.

Despite the availability of limited legal alternatives, composers are further disadvantaged by VARA’s narrow scope. Specifically, restrictive interpretations of VARA affect the use of alternative legal measures by those artists who are unprotected by VARA, namely musical composers.⁸³

[I]t appears that these authors are negatively affected by the existence of moral rights statutes that exclude them because their exclusion invites the argument that since Congress intended to limit moral rights protection to a small subset of authors and works, it must have intended *not* to provide such protection to authors and works not covered by the statute.⁸⁴

In *Dastar Corporation v. Twentieth Century Fox Film Corporation*, Justice Scalia stated that recognizing a cause of action for misrepresentation of authorship in section 43(a) of the Lanham Act would render the limitations of VARA superfluous,⁸⁵ and “[a] statutory interpretation that renders another statute superfluous is of course to be avoided.”⁸⁶

⁸² *Franconero*, 2003 WL 22990060, at *2.

⁸³ *See Rigamonti, supra* note 7, at 407–12.

⁸⁴ *Id.* at 407 (emphasis added). This understanding is illustrated in *Lee v A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997) (“It would not be sound to use § 106(2) to provide artists with exclusive rights deliberately omitted from [VARA].”).

⁸⁸ *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 35 (2003).

⁸⁵ *Id.*

⁸⁶ *Id.*

III. COMPARATIVE ANALYSIS OF THE RIGHT OF INTEGRITY OF MUSICIANS

A. *Shostakovich Case*

Shostakovich v. Twentieth Century Fox Film Corp.,⁸⁷ which was litigated in the United States in 1948 and again in France in 1953, best illustrates the differences between the American and French treatments of the right to integrity. In this case, Russian composers⁸⁸ objected to the use of their music in a movie⁸⁹ which they believed had an anti-Soviet theme.⁹⁰

In the United States, the court held that the composers had not been libeled through the film's use of their compositions or attributions and denied the motion to enjoin the use of plaintiffs' public domain musical compositions and their names in the movie.⁹¹ The court described the use of the music as an incidental, background matter and declared, "the music . . . is in the public domain and enjoys no copyright protection . . ."⁹² In its reasoning, the court made a reference to the doctrine of moral rights and acknowledged that "under the doctrine of Moral Right the court could . . . prevent the use of a composition or work, in the public domain, in such a manner as would be violative of the author's rights."⁹³ However, the court concluded that "[i]n the present state of our law the very existence of [this] right is not clear."⁹⁴

⁸⁷ 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948), *aff'd*, 275 A.D. 692, 87 N.Y.S.2d 430 (N.Y. App. Div. 1949).

⁸⁸ These four composers were Dmitry Shostakovich, Aram Khachaturian, Serge Prokofiev, and Nikolai Myaskovsky.

⁸⁹ THE IRON CURTAIN (Twentieth Century Fox Film Corp. 1948).

⁹⁰ *See Shostakovich*, 80 N.Y.S.2d at 578.

⁹¹ *See id.* at 579.

⁹² *Id.* at 577. The court furthermore denied protection based on the Civil Rights Law, saying that uncopyrighted material is not protected from an invasion of the right of privacy. The court also denied the libel claim by saying there is no necessary implication that they had given consent to the use of their music because the music is in the public domain. "In the absence of such implication the existence of libel is not shown." *See id.* at 577-78.

⁹³ *Id.*

⁹⁴ *Id.* at 578-79.

In addition, the court alluded to the delicate balance between the public interest and the interest of authors when a work is in the public domain, and questioned what standards should be used to determine whether authors' moral rights have been violated under those circumstances.⁹⁵ Ultimately, the court found no right to artistic integrity under United States law. Interestingly, the same facts were litigated in France and resulted in an attribution of moral rights. In *Soc. Le Chant de Monde v. Soc. Fox Europe et Soc.*, the court found "moral damage" and expressly acknowledged the composers' moral rights by granting the artists' claim.⁹⁶

B. Moral Rights Reasoning in Claims of Voice Misappropriation and False Endorsement

Similarly, two related cases involving voice misappropriation and imitation were litigated in the United States in 1993 and then in Spain in 2005. Both suits involved singer Tom Waits, who is popularly known to disfavor using art for commercial purposes.⁹⁷

In *Waits v. Frito-Lay, Inc.*,⁹⁸ the Ninth Circuit affirmed an award of damages to Tom Waits based on voice misappropriation.⁹⁹ When Frito-Lay introduced a new Doritos product, its advertising agency found inspiration in Waits' 1976 song "Step Right Up." The commercial written by the agency mimicked the feel of Waits' song. In fact, the agency hired a professional musician who had been performing Waits' songs for over ten years and had developed an imitation of Waits' voice.¹⁰⁰ More than two hundred and fifty radio stations located in sixty-one markets nationwide broadcast the advertisement over the course of two months in 1988.¹⁰¹ Upon hearing the commercial, Waits

⁹⁵ See *id.* ("Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be?").

⁹⁶ Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Jan. 13, 1953, Gaz. Pal. 1953, 2, 191 (Fr.).

⁹⁷ See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097 (9th Cir. 1992).

⁹⁸ *Id.* at 1093.

⁹⁹ See *id.* at 1096, 1112. The court held that Waits' separate Lanham Act claim was legally sufficient, but vacated damages on the claim because they were duplicative. See *id.* at 1112.

¹⁰⁰ *Id.* at 1097.

¹⁰¹ See *id.*

believed that anyone who heard the ad would assume he was endorsing the company.¹⁰²

Waits sued the advertising agency and Frito-Lay, bringing claims for both voice misappropriation under California state law and false endorsement under the Lanham Act.¹⁰³ At the trial level, the jury “found that the defendants had violated Waits’ right of publicity by broadcasting a commercial which featured a deliberate imitation of Waits’ voice.”¹⁰⁴ In reviewing the case, the Court of Appeals for the Ninth Circuit considered Waits’ cause of action as “contain[ing] elements, such as an invasion of personal rights . . . that are different in kind from copyright infringement”¹⁰⁵ and stated that Waits’ right to control the use of his identity as embodied in his voice had been invaded.¹⁰⁶ Using reasoning closely resembling the notion of moral rights, the court continued, stating “[w]hat is put forward as protectable here is more personal than any work of authorship . . . A voice is as distinctive and personal as a face.”¹⁰⁷

It is important to note that at issue in *Waits* was imitation as an infringement of voice. Unlike musical compositions, voice (by itself) is not copyrightable.¹⁰⁸ Instead, Waits was awarded damages for “injury to his peace, happiness and feelings” as well as for “his goodwill, professional standing and future publicity value.”¹⁰⁹ The court’s reasoning and the jury’s determinations indicate a desire to recognize and enforce the interests protected by moral rights, as opposed to focusing entirely on economic rights.

¹⁰² *Id.* at 1098.

¹⁰³ *Id.* at 1096, 1098.

¹⁰⁴ *See id.* at 1098.

¹⁰⁵ *Id.* at 1100 (citing H.R. REP. NO. 94-1476, at 87 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5748).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (citing *Midler v. Ford Motor Co.*, 849 F.2d 460, 462–63 (9th Cir. 1988)); *see also* *Lahr v. Adell Chem. Co.*, 300 F.2d 256, 259 (1st Cir. 1962) (holding that imitation of unique voice could be actionable as unfair competition).

¹⁰⁸ *See Waits*, 978 F.2d at 1100. Voice as such cannot be the subject of a copyright infringement suit because it is not copyrightable; recording of a voice is. However, voice can be recognized as a distinct mark/attribution, which makes it more of a trademark issue, and can be the subject of an infringement suit.

¹⁰⁹ *Id.* at 1103.

The second part of Waits' claim was brought under the Lanham Act.¹¹⁰ Here, Waits' claim was premised on "the theory that by using an imitation of his distinctive voice in an admitted parody of [his] song, the defendants misrepresented his association with and endorsement" of the Frito-Lay chips.¹¹¹ The court referenced cases of false endorsement claims brought by plaintiffs for the unauthorized imitation of their distinctive attributes, where those attributes amounted to an unregistered commercial trademark, and ruled in Waits' favor.¹¹²

C. *Separate Awards for Moral Rights and Copyright Claims*

In a comparable case brought by Waits in 2005, the Spanish court went a step further by expressly recognizing a violation of Waits' copyright and moral rights. The suit involved a commercial for Volkswagen-Audi which was musically arranged like the Waits song and featured a Tom Waits vocal impersonator.¹¹³ A Barcelona court determined that Volkswagen-Audi and its production company "were liable not only for copyright infringement, but also for violations of Waits' right of integrity for adapting his music and vocal stylings in [their] commercial."¹¹⁴ The Court "protected Waits' 'personality and reputation' as well as his copyright . . . [and] granted damages of 30,000 Euros for [his] moral rights claim and 36,000 Euros for [his] music publisher's copyright infringement claims."¹¹⁵

By distinguishing Waits' rights from the copyrights held by his publisher, it is evident that the court regarded Waits' moral rights as separate and inalienable, distinguishing Waits' rights from the

¹¹⁰ Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2006). The act prohibits the use of false designations of origin, false descriptions, and false representations in the advertising and sale of goods and services.

¹¹¹ *Waits*, 978 F.2d at 1106.

¹¹² *Id.* at 1110.

¹¹³ S.A.P., Nov. 17, 2005 (No. 256/2004) (Spain), available at http://www.interiuris.com/blog/wp-content/uploads/WLES_07-15-2008_03_21.pdf.

¹¹⁴ Lucille M. Ponte, *Preserving Creativity from Endless Digital Exploitation: Has the Time Come for the New Concept of Copyright Dilution?* 15 B.U. J. SCI. & TECH. L. 34, 66 (2009).

¹¹⁵ *Id.* (citing *Tom Waits Wins Landmark Spanish Legal Judgment*, PR NEWSWIRE (Jan. 19, 2006), <http://www2.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/01-19-2006/0004263323&EDATE &EDATE>).

copyright of his publisher. The Court of Appeals agreed with the trial court's determination that the song used in the commercial was in fact a substantially similar¹¹⁶ imitation of Waits' song, therefore infringing the "moral" interests Waits had in the song.

In addition to his moral rights and copyright claims, Waits also sued under Spain's Unfair Competition Law.¹¹⁷ The Spanish Court of Appeals explained the complementary nature of intellectual property and unfair competition law in Spain.¹¹⁸ As both laws protect different interests, an accumulation of claims is permitted. In Spain, unfair competition law protects competition in the market, while the copyright act protects the interests of rights holders. The court, therefore, dismisses claims of unfair competition when the affected parties are only the actors and copyright holders.¹¹⁹ As the only interests implicated in Waits' cases were those of the actor, Waits, the court dismissed the unfair competition claim.¹²⁰

D. Similar Court Conclusions Reached on Different Grounds

Thus, although on different grounds, both the American and Spanish courts seem to have, in effect, reached a similar conclusion. Based on the relationship Waits has to his work and because his songs can be seen as a unique personification of himself, they were accorded protection in both courts. Nevertheless, the threshold for protection articulated in the United States case appears to be higher than the one expressed in the Spanish case. In *Waits v. Frito-Lay*, in order for a defendant to be found liable for voice misappropriation, the imitation has to be so good that "people who were familiar with the plaintiff's voice who heard the commercial believed the plaintiff performed it."¹²¹ The voice that reminds an audience of or sounds like a plaintiff is not

¹¹⁶ See *Lamothé v. Atlantic Recording Corp.*, 847 F.2d 1403, 1405 n.1 (9th Cir. 1988). In *Lamothé*, the Ninth Circuit stated that it does not express any opinion as to whether the Lanham Act incorporates a "substantial similarity" requirement.

¹¹⁷ S.A.P., Nov. 17, 2005 (No. 256/2004) (Spain), available at http://www.interiuris.com/blog/wp-content/uploads/WLES_07-15-2008_03_21.pdf.

¹¹⁸ See generally *id.*

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1101 (9th Cir. 1992).

enough for liability.¹²² Alternatively, in *Waits v. Volkswagen-Audi*, the court granted damages for Waits' moral rights claim that Volkswagen-Audi adapted his "music and vocal stylings."¹²³ The opinion suggests that it likely would be sufficient to find that people were reminded of Waits without having to believe that it was Waits himself. This perfectly corresponds to the wording of the Spanish intellectual property law's definition of the right to integrity regarding modifications, assigning liability for any use "that is liable to prejudice his legitimate interest or threaten his reputation."¹²⁴

Furthermore, it seems that in practice, the gap in the theoretical framework between both systems would be even narrower if the alleged infringer was authorized to use the work under copyright law.¹²⁵ Most common law courts have recognized that if a contract between the author and his licensee or assignee is silent as to the possible modification or other alteration of the work, "the assignee or licensee of a copyright may not modify the work to the point where the publication of the modified work would harm the author's reputation, as that would amount to libel."¹²⁶ Therefore, U.S. courts have used contract and defamation laws to, in essence, create a default rule protecting the moral right of integrity by prohibiting substantive modifications without prior authorization.¹²⁷

Moreover, decisions from the United States suggest that there are limits even to express contractual provisions which allow for modifications. As early as 1952 the court explained:

Whether the work is copyrighted or not, the established rule is that, even if the contract with the artist expressly authorizes reasonable modifications (e.g., where a novel or stage play is sold for adaptation as a movie), it is an actionable wrong to

¹²² *See id.*

¹²³ *See* Ponte, *supra* note 114, at 66.

¹²⁴ Spain's Intellectual Property Law, *supra* note 40, at 5.

¹²⁵ *See* Rigamonti, *supra* note 7, at 367.

¹²⁶ *Id.* at 389.

¹²⁷ *See id.*

hold out the artist as author of a version which substantially departs from the original.¹²⁸

Hypothetically, if a licensee substantively modified Waits' song in the Volkswagen commercial, under the European concept of moral rights as being inalienable and protecting the authors, the courts would easily accord Waits his moral rights protection. But even in the United States, the laws of contract and defamation might protect Waits' interests regardless of the existence of a provision allowing for modification.¹²⁹

Practical application of the general prohibition of modifications as contained in the right of integrity often results in a collision with the rights of third persons in the work of art in question. European courts generally do not mechanically apply the rule prohibiting modifications. These courts rely instead on a pragmatic ad hoc balancing of conflicting interests.¹³⁰ Some European courts, as well as American courts, limit author's integrity rights when minor changes are made, especially when the changes are made to present the work in another medium.¹³¹

E. United Kingdom as an Incentive and a Model for the United States

The United Kingdom has long been reluctant to adopt broad moral rights protection.¹³² In 1988, the United Kingdom adopted the Copyright, Designs, and Patents Act ("CDPA").¹³³ In 2006, The Performances (Moral Rights) Regulations¹³⁴ amended the CDPA and expanded moral rights to cover performances by

¹²⁸ *Id.* at 390 (quoting *Granz v. Harris*, 198 F.2d 585, 589 (2d Cir. 1952)).

¹²⁹ This represents the core tension in the common law system, the balance between the author's rights and the rights of third parties, particularly copyright holders.

¹³⁰ See Rigamonti, *supra* note 7, at 366.

¹³¹ See Piotraut, *supra* note 8, at 606.

¹³² Bird & Ponte, *supra* note 1, at 234.

¹³³ Copyright, Designs, and Patents Act, 1988, c. 48, § 182D (U.K.), available at <http://www.legislation.gov.uk/ukpga/1988/48/contents>. See also Bird & Ponte, *supra* note 1, at 276.

¹³⁴ Performances (Moral Rights, etc.) Regulations, 2006, S.I. 2006/18, art. 5 (U.K.), available at <http://www.opsi.gov.uk/si/si2006/20060018.htm>.

granting performers the rights of attribution and integrity, although they were limited in scope.¹³⁵

The 2006 amendments apply to sound recordings or performances offered over the Internet through legitimate music and video downloading services.¹³⁶ The use of the Internet raises interesting cross-border challenges for the United States regarding the recognition of moral rights. Legal actions can be brought against the United States recording and media industries in United Kingdom courts by British and European Union performers against the United States recording and media industries for violations of moral rights involving online distribution of songs, music videos, and sound tracks in films and television programs.¹³⁷

Although the United Kingdom's protection of moral rights does not rise to the level of Continental European protection, it represents a possible step taken by a common law country. Considering the expanding presence of the Internet, particularly for the music industry, this step should be taken by the United States.

¹³⁵ Bird & Ponte, *supra* note 1, at 262–66. There are many exceptions to the right of attribution and the right of integrity.

The right of attribution for performers does not apply when it is not 'reasonably practicable' to identify the performer . . . and in cases of 'news reporting, incidental inclusion of a performance or recording' and governmental proceedings and inquiries . . . The integrity right does not apply to anything done to avoid illegal activity or to comply with a legal duty avoid illegal activity. . . . [I]t does not apply to decisions made involving the British Broadcasting Corporation where avoiding inclusion offends good taste or decency, implicates the encouragement of criminal acts, possibly leads to disorder, or maybe even offends public feelings . . . Furthermore, under this regulation, the performer or his successor may, at any time, waive in writing moral rights. The waiver may be partial or complete, may relate to existing or future performances, or may be expressed as subject to later revocation.

Id.

¹³⁶ Performances (Moral Rights, etc.) Regulations, 2006, S.I. 2006/18, 182D (1A) (United Kingdom), *available at* <http://www.legislation.gov.uk/ukpga/1988/48/section/182D>. *See also* Bird & Ponte, *supra* note 1, at 262.

¹³⁷ *See* Bird & Ponte, *supra* note 1, at 262.

CONCLUSION

Can the same level of protection as is accorded in jurisdictions recognizing moral rights be achieved through other legal concepts and institutes deployed in the United States? Probably not. Even if the courts come to realize that artists' control over their works needs to be protected, the existing legal concepts are not sufficient. It is important to realize that the lack of adequate protection of moral rights in the United States will continue to force American artists to seek the assistance of foreign courts and vindicate their rights in countries that more closely abide to international treaties.¹³⁸ It is possible that the United States will face pressure to extend moral rights protections to musical works given the proliferation of online music services accessible worldwide.¹³⁹ Globalization and the expansion of the Internet, with its dissemination of downloadable music, might soon make moral rights of composers a necessity in the United States.

This paper focused on the recognition of moral rights protection for musical compositions. Other important considerations arise in the context of other works and the question, deserving further analysis, is whether all works should be entitled to moral rights protection, and if so, to what extent.¹⁴⁰

¹³⁸ See Bird & Ponte, *supra* note 1, at 233.

¹³⁹ See *id.* at 230.

¹⁴⁰ There is a strong claim that computer programs, databases, and other functional works are not appropriate for moral rights protection. See Piotraut, *supra* note 8, at 596 (referencing MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 6, 369 (th ed. 2005)). Moreover, "the substantive level of protection depends on the concrete rules that courts use to adjudicate moral rights claims, not on the analytical framework that is used to conceptualize, rationalize, or justify these rules." Rigamonti, *supra* note 7, at 367.