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Copyright: Moral Right—A Proposal

Cover Page Footnote

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COPYRIGHT: MORAL RIGHT—A PROPOSAL

I. INTRODUCTION

A revision of the present copyright act in the United States has been under study since 1955. Recently, the Senate passed a bill "[f]or the general revisions of the Copyright Law"¹ This bill must now be coordinated with the version passed by the House in 1967.² The proposed copyright legislation will make significant changes in the protection to be given to works such as cable television,³ "coin-operated phonorecord players,"⁴ and phonograph records.⁵ In addition, the proposed Act expressly adopts the doctrine of fair use and provides criteria for its application,⁶ while another provision lengthens the term of the copyright from the present term of twenty-eight years, renewable for an additional twenty-eight years upon application,⁷ to a term of life of the author plus fifty years.⁸ Moreover, the proposed legislation abolishes common law copyright, thereby extending the availability of statutory copyright protection to works, published or unpublished, which are not in the public domain.⁹ The proposed legislation also offers considerably more latitude in the technical notice¹⁰ and registration¹¹ requirements than does the current statute.

The proposed statute, however, like the present one, does not adopt an overall theoretical approach to the concept of copyright.¹² Specifically, the proposed statute does not incorporate the so-called "moral right" doctrine.

1. S. 1361, 93d Cong., 2d Sess. tit. I (1974) [hereinafter cited by section as S. 1361].

2. H.R. 2512, 90th Cong., 1st Sess. (1967).

3. S. 1361 § 111.

4. *Id.* § 116.

5. *Id.* § 102(a)(7). Phonorecords, originally not protected under the present copyright statute, 17 U.S.C. §§ 1 et seq. (1970), gained temporary protection against unauthorized duplication in Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified at 17 U.S.C. §§ 1, 5, 19, 20, 26, 101 (Supp. I, 1971)).

6. S. 1361 § 107. "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." *Id.*

7. 17 U.S.C. § 24 (1970).

8. S. 1361 § 302.

9. *Id.* § 301. "Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings." *Id.* § 102. See also *id.* § 101 ("fixed" works defined).

10. Compare 17 U.S.C. § 21 (1970) with S. 1361 § 405.

11. Compare 17 U.S.C. § 13 (1970) with S. 1361 § 408. But see *id.* §§ 411-12.

12. "[T]he copyright law of the United States is not based on any particular theory which could serve as a basis for the understanding of the rights involved in the concept of author's rights" F. Kase, *Copyright Thought in Continental Europe: Its Development, Legal Theories and Philosophy* 2 (1967) [hereinafter cited as *Copyright Thought*].

Under this doctrine, copyright may be characterized as a two-fold source of protection; it protects "the *property rights* which are objects of commerce . . . and the *moral right* which is inalienably attached to the person of the author"¹³

Ultimately, the decision expressly to adopt a moral right doctrine in the federal legislation must be based upon a thorough review of policy regarding United States copyright law.¹⁴ This Comment will focus on one controlling factor in such a review: the accuracy of the familiar characterization of United States copyright law as the sole source of all of the author's rights in his published work. If it can be determined that neither history nor logic precludes the express recognition of the moral right doctrine in the United States, a major argument against such recognition will have disappeared.

This Comment will not discuss whether the moral right theory is necessary to protect the author in the first instance; indeed an author appears to have some protection in the United States without an express recognition of the moral right doctrine.¹⁵ The question presented is whether the express adoption of such a doctrine in the federal legislation would provide a more uniform and systematic form of protection to authors than the protection now available through judicial enforcement of related doctrines in the courts.¹⁶ This Comment will briefly analyze such forms of protection and will present suggestions as to statutory provisions which could provide uniform protection on the federal level in place of the present state-by-state common law protection.

II. THE "NATURE" OF COPYRIGHT

It has been said that copyright is an author's right to regulate the reproduction of the creations of his intellect.¹⁷ Various theories have been advanced as the basis of this right,¹⁸ and it is somewhat ironic that some of the world's greatest thinkers,¹⁹ protected in their writings by the very copyright they were trying to define, could not develop a "workable, unifying concept of copyright."²⁰

13. Strauss, *The Moral Right of the Author*, Study No. 4 of Copyright Law Revision, 86th Cong., 1st Sess. 109, 115 (Comm. Print 1960) (emphasis added) [hereinafter cited as Study No. 4].

14. In such a review the interests not only of authors but also of publishers and users must be taken into account. See, e.g., Cambridge Research Institute, *Omnibus Copyright Revision 5* (1973); Patterson, *Copyright and the Public Interest*, in *Copyright: Current Viewpoints on History, Laws and Legislation* 43, 47 (A. Kent & H. Lancour eds. 1972) [hereinafter cited as *Current Viewpoints*]. See also Chafee, *Reflections on the Law of Copyright*, 45 *Colum. L. Rev.* 503, 516 (1945) [hereinafter cited as Chafee].

15. Study No. 4 at 141-42.

16. See notes 166-211 *infra* and accompanying text.

17. Copyright Law Revision, *Report of the Register of Copyrights to the House Comm. on the Judiciary*, 87th Cong., 1st Sess. at 3 (Comm. Print 1961) [hereinafter cited as *Register's Report*].

18. See *Copyright Thought* 5-14; 1 S. Ladas, *The International Protection of Literary and Artistic Property* 1-12 (1938) [hereinafter cited as Ladas].

19. See notes 29-32, 34-37 *infra* and accompanying text. See also note 122 *infra*.

20. M. Ebenstein, *Introduction to S. Rothenberg, Copyright Law* at xix-xx (1956).

Under one of these theories, copyright is considered an economic interest,²¹ and is called property.²² As has been noted under this theory:

Nothing can with greater propriety be called a man's property than the fruit of his brains. The property in any article or substance accruing to him by reason of his own mechanical labor is never denied him : the labor of his mind is no less arduous and consequently no less worthy of the protection of the law.²³

By virtue of his copyright, the copyright proprietor, whether author, publisher, or any person, is assured of some protection of his economic interest when he releases copies of the work to the public.²⁴

The theory of copyright as property is not easily molded into the traditional concept of property: *e.g.*, it is not possessory, and it is not perpetual.²⁵ As will be detailed below,²⁶ this legal fiction of copyright as property was developed in England largely by the printers and publishers who had, at that time, a greater interest than the author in copyright protection. Moreover, copyright is not property in the material product created—the physical manuscript, the printed book, the score, etc.²⁷—since others may possess the product and may use it for their own satisfaction. The property right of the copyright owner is the right to reproduce the work.²⁸

Another theory of copyright—that it is intellectual property, or an author's interest in his creation—developed primarily from the philosophy of John Locke.²⁹ This theory was based on the natural law.³⁰ Under this theory it was argued:

21. Copyright Thought 3-4.

22. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 19-20 (1908) (Holmes, J., concurring); 17 U.S.C. § 27 (1970); Register's Report 3; R. Bowker, *Copyright* 3 (1912); H. Howell, *The Copyright Law* 156 (1942).

23. W. Copinger, *Law of Copyright* 3 (6th ed. F. James 1927) [hereinafter cited as Copinger]; see *id.* at 1, 7.

24. This Comment will not discuss the complex issues regarding publication of works, which under the present copyright statute, 17 U.S.C. §§ 1 et seq. (1970) as amended in part (Supp. I, 1971), is the dividing point between perpetual common law copyright protection and limited statutory protection. See generally Nimmer, *Copyright Publication*, 56 *Colum. L. Rev.* 185 (1956).

25. Even countries which recognize in copyright broader rights than those conferred under a property theory alone limit the property rights in an intellectual work to a term of years, usually the life of the author plus fifty years. *E.g.*, the designated provisions of the copyright laws of the following countries, dated as of the most recent amended text, found in 1&2 UNESCO, *Copyright Laws and Treaties of the World* (1971) [hereinafter cited by country or treaty as *Copyright Laws of the World*]: Argen., art. 5 (1968); Aus., § 60 (1953); Belg., art. 2 (1958); Can., § 5 (1952); Czech., § 33 (1965); Den., § 43 (1961); Fin., § 43 (1961); Fr., art. 21 (1957); Greece, arts. 1, 2 (1920); Italy, art. 25 (1941); Korea, art. 30 (1957); Mex., art. 23 (1958); Neth., art. 37 (1912); N.Z., § 8 (1962); Nor., § 40 (1961); Pakistan, § 18 (1962); Port., art. 25 (1966); Rom., art. 6 (1956); Switz., art. 36 (1922); Tur., art. 27 (1951); U.A.R., art. 20 (1954); Venez., art. 25 (1962); Yugo., art. 80 (1968).

26. See Part IV *infra*.

27. P. Wittenberg, *The Protection of Literary Property* 40 (1968) [hereinafter cited as Wittenberg]; see S. 1361 § 202.

28. See Register's Report 3.

29. See J. Locke, *Treatise of Civil Government* §§ 27, 173 (Liberal Arts Press ed. 1952).

30. This concept of the natural right has been accepted by the Universal Declaration of

It is just, that an author should reap the pecuniary profits of his own ingenuity and labour.³¹ It is just, that another should not use his name, without his consent. It is fit that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; in whose honesty he will confide, not to foist in additions: with other reasonings of the same effect.³²

However, the problems raised by a consideration of rights in literary works, solely in terms of property or intellectual property, were highlighted by an American judge who stated:

Even the matter-of-fact attitude of the law does not require us to consider the sale of the rights to a literary production in the same way that we would consider the sale of a barrel of pork.³³

A related concept of copyright, characterizing the author's right to his creation as a personal right, developed from the philosophy of Kant.³⁴ As one observer has stated, "the work of a great man is in and of itself the manifestation of a personality, and the personality signifies the work."³⁵ It was from this theory that the concept of the moral right developed³⁶ and it remains an important factor in the evolution of recent copyright legislation in many countries of the world.³⁷

Copyright as the owner's monopoly over the created work is, to some extent, an element of each of the theories already advanced.³⁸ The proprietor of the copyright has the power to prohibit or to regulate use of most copyrightable works.³⁹ However, under many copyright statutes and treaties,

Human Rights art. 27(2) (1948) as the basis of its discussion of author's rights. Earlier, in its original 1886 text the Berne Copyright Convention used the natural right theory as its theoretical basis. Copyright Thought 9.

31. "[E]very man has a property in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property." J. Locke, *Treatise of Civil Government* § 25 (Liberal Arts Press ed. 1952).

32. *Millar v. Taylor*, 98 Eng. Rep. 201, 252 (K.B. 1769) (footnote added); see notes 124-27 *infra* and accompanying text.

33. *Clemens v. Press Publishing Co.*, 67 Misc. 183, 122 N.Y.S. 206 (App. T. 1910) (contract for sale of a literary work).

34. I. Kant, *The Philosophy of Law* 129-31 (1887 ed.). For Kant's analysis of the nature of a personal right, see *id.* at 100-01.

35. 1 R. Callmann, *Unfair Competition, Trademarks and Monopolies* § 3.3, at 87 (3d ed. 1967).

36. See Copyright Thought 11; text accompanying notes 46-59 *infra*.

37. See note 47 *infra*.

38. For example, under the property theory, see text accompanying notes 21-28 *supra*, copyright originated in England as a monopoly of various licensed printers. This monopoly was protected by royal edict, court decree, and private regulation by the Company of Stationers of London. The first official copyright statute, the Statute of Anne, was in part a reaction against this concept of copyright as monopoly. See Part IV *infra*.

39. See generally Harrison, *Introduction*, in *Current Viewpoints* 1-2, *supra* note 14; Patterson, *Copyright and the Public Interest*, in *Current Viewpoints* 43-49.

compulsory licensing of certain copyrighted materials is the norm,⁴⁰ and the fact that the term of a copyright is limited⁴¹—at least in terms of any economic interest in the work—implies that the monopoly itself is limited.⁴²

Traditionally, the United States has taken a pragmatic rather than a conceptual approach to copyright.⁴³ In its efforts to promote the "Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . .,"⁴⁴ this country has frequently ignored an important aspect of copyright; namely, that "[c]opyright can most usefully be viewed as a legal concept—a series of ideas formulated and directed to a common end."⁴⁵

III. THE DOCTRINE OF THE MORAL RIGHT AND ITS PLACE IN INTERNATIONAL COPYRIGHT LAW

The moral right doctrine, recognized in the major international copyright union⁴⁶ and by more than sixty-three countries throughout the world,⁴⁷ comprises the personal rights which belong to an author as author.

40. E.g., the following provisions of the convention and statutes found in 1&2 Copyright Laws of the World: Berne Copyright Convention, arts. 11 bis, para. 2, and 13, para. 2 (Brussels 1948); Can., § 13 (1952) (see §§ 14-16); Fin., arts. 22-23 (1961); Ger., art. 61 (1965) (see art. 49); Hung., arts. 22-23 (1970); Ire., § 13 (1963); Italy, arts. 52, 79 (1941); Mex., arts. 33-35 (1963); Nor., §§ 20-21 (1961); Pakistan, §§ 36-37 (1962); Rom., art. 30 (1956); Swed., §§ 22-23 (1960); Switz., arts. 17-19 (1955); Tur., arts. 43-44 (1951); U.S.S.R., § 8 (1928). For a detailed analysis of the compulsory license provision in the United States copyright statute, 17 U.S.C. §§ 1(e), 101(e) (1970), see Henn, *The Compulsory License Provisions of the United States Copyright Law*, Study No. 5 of Copyright Law Revision, 86th Cong., 1st Sess. (Comm. Print 1960). See also S. 1361 §§ 110, 115.

41. See Study No. 4 at 115.

42. Current Viewpoints 44. Although it is historically significant, see note 38 *supra*, at the present time this theory is not a prevalent one, and presents few of the dangers frequently associated with monopoly. Register's Report 5-6.

43. See note 12 *supra* and accompanying text. As the brief historical survey of the development of Anglo-American copyright law will indicate, see Part IV *infra*, copyright law has been influenced primarily by political and economic forces, and reflects only in minor ways attempts to develop a conceptual approach to copyright which would integrate the varying interests of the author, publisher and user of a copyrighted work. See generally note 14 *supra* and accompanying text.

44. U.S. Const. art. 1, § 8, cl. 8.

45. L. Patterson, *Copyright in Historical Perspective* 222 (1968) [hereinafter cited as *Historical Perspective*].

46. Berne Copyright Convention (Rome 1928), in 2 *Copyright Laws of the World*, Item E-1; see text accompanying notes 60-75 *infra*.

47. E.g., copyright statutes found in 1&2 *Copyright Laws of the World*: Argen., art. 52 (1968) (see art. 83); Aus., §§ 19-21, 57, 68 (1953); Belg., art. 8 (1958); Braz., arts. 667, 1357 (1916); Bulg., §§ 3-4 (1951); Can., § 12(7) (1952); Czech., §§ 12, 14 (1965); Den., § 3 (1961); Egypt, art. 9 (1954); Ethiopia, arts. 1647, 1665, 1671, 1674 para. 2 (1960); Fin., art. 3 (1961) (see arts. 26, 51-52); Ger., arts. 13-14 (1965); Greece, art. 15 (1920); Hung., arts. 8-11 (1970); Italy, art. 20 (1941) (see arts. 21-24, 48, 63); Korea, arts. 14, 16 (1957); Mex., art. 2 (1956) (see art. 32); Neth., art. 17 bis (1912); Nor., §§ 3, 48 (1961); Pol., art. 52 (1952); Port., art. 55 (1966) (see arts. 211-14); Rom., art. 3 para. 2 and 4 (1956); Swed., § 3 (1960); Tur., arts. 14-17 (1951); U.A.R., art. 9 (1954); Uru., art. 12 (1937) (see art. 37); Venez., arts. 20-21 (1962); Yugo., art. 29 (1968) (see arts. 97, 100).

The moral right may be characterized as fundamentally a personal right of the author to protection of his *artistic* reputation.⁴⁸ In its simplest form, it protects the person in his role as author.

A common statutory expression of the moral right doctrine can be found in the French copyright statute of 1957, which incorporated the theory as it had been developed in the French courts throughout the latter part of the 19th century and the first half of the twentieth century:⁴⁹

The author of an intellectual work⁵⁰ shall, by the mere fact of its creation, enjoy an exclusive incorporeal property right in the work, effective against all persons.

This right includes attributes of an intellectual and moral nature as well as attributes of an economic nature, as determined by this law.⁵¹

Although in some countries the doctrine contains a number of rights not universally accepted by those countries which have adopted the moral right,⁵² two rights are universally recognized. The Berne Copyright Convention⁵³ incorporated these rights, which are, respectively, the paternity right and the right to the integrity of the work:

Independently of the author's copyright, and even after the transfer of the said copyright, the author shall have the right . . . to claim authorship of the work, and to object [to] any distortion, mutilation or other alteration thereof⁵⁴

48. See text accompanying note 54 *infra*.

49. See Study No. 4 at 115; Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 *Am. J. Comp. L.* 465 (1968).

50. The term "intellectual work" encompasses the subject matter protected under the statute. C. Civ. art. 543(3) (57e ed. *Petits Code Dalloz* 1958), in 1 *Copyright Laws of the World: Fr.*, art. 3 (1957). Other statutes and treaties use the term "literary and artistic works" to describe the same general material. See, e.g., *Berne Copyright Convention*, in 2 *Copyright Laws of the World*, *passim*. In the proposed United States copyright statute, the term "works of authorship" is used, followed by a list of categories included in such a term. S. 1361 § 102(a).

51. C. Civ. art. 543(1) (57e ed. *Petits Code Dalloz* 1958) (footnote added), in 1 *Copyright Laws of the World: Fr.*, art. 1 (1957). For a similar reading see the following provisions of the statutes found in 1&2 *Copyright Laws of the World: Hung.*, art. 7 (1970); *Korea*, art. 7 (1957); *Port.*, art. 5 (1966); *Venez.*, art. 5 (1962); *Yugo.*, art. 27 (1968).

52. For example, in France a contract to create and deliver a work is subject to the author's moral right, so that he will not be required to specifically perform, though he may be liable for breach of contract. Study No. 4 at 120.

The author also often has the right to determine if and when he will publish his work. See, e.g., the following provisions of the statutes found in 1&2 *Copyright Laws of the World: Fr.*, art. 19 (1957); *Ger.*, art. 12 (1965); *Hung.*, art. 8 (1970); *Korea*, art. 15 (1957); *Port.*, art. 61 (1966); *Rom.*, art. 3 para. 1 (1956); *Tur.*, art. 14 (1951); *Venez.*, art. 18 (1962). Under present United States law, 17 U.S.C. §§ 1 et seq. (1970), the author has this right before publication under common law copyright. Under the proposed copyright legislation, S. 1361 § 106(1), he has this right before publication under the statute.

In some countries the author has a limited right to withdraw his work from publication. E.g., the following provisions of the statutes found in 1&2 *Copyright Laws of the World: Fr.*, art. 32 (1957); *Ger.*, art. 41 (1965); *Hung.*, art. 11 (1970); *Port.*, art. 58 (1966); *Uru.*, art. 13 (1937). But see *Braz.*, art. 1359 (1916); *Korea*, art. 53 (1957).

53. See text accompanying notes 60-75 *infra*.

54. *Berne Copyright Convention* art. 6 bis (Brussels 1948), in 2 *Copyright Laws of the World*.

By virtue of the paternity right,⁵⁵ an author may rightfully insist on being publicly known as creator of his published work;⁵⁶ as a corollary, he may also prevent the use of another person's name as the author of his work. In addition he may prohibit the use of his name on a work which is not his own, or on a work of his own which has been distorted, altered, or otherwise changed without his consent.⁵⁷

The right to the integrity of the work⁵⁸ permits the author to prohibit or to maintain control over any alterations, additions, deletions or changes in content, style, format, etc. of his work. The right is usually limited, however, either by statute or by the courts, when the author's work is used in different media.⁵⁹

The moral right doctrine realized its full significance when it was adopted by the Berne Copyright Convention.⁶⁰ Although the United States has remained outside of this union, more than sixty-three countries have joined the convention,⁶¹ which has been hailed as a major advance in "the cloudy history of men of letters."⁶² The Convention was a result of the efforts in

55. E.g., the provisions of the statutes found in 1&2 Copyright Laws of the World: Aus., §§ 19-20 (1936); Braz., art. 667 (1916); Bulg., § 3 (1951); Czech., § 12 (1965); Ger., art. 13 (1965); Hung., art. 9 (1970); Korea, art. 14 (1957); Mex., art. 2 para. I (1963); Rom., art. 3 para. 2 (1956); Tur., art. 15 (1951); Uru., art. 12 para. 1 (1937); Venez., art. 20 (1962).

56. This aspect of the paternity right is not rigidly applied in situations where it is common practice to omit the name of the author; e.g., many news stories, encyclopedic works, and some writings done in employment-for-hire situations. See materials cited in note 57 *infra*. For some United States decisions dealing with a similar subject matter, see note 208 *infra*.

57. Study No. 4 at 116; see Katz, *The Doctrine of Moral Right and American Copyright Law—A Proposal*, 24 S. Cal. L. Rev. 375 (1951); Marvin, *The Author's Status in the United Kingdom and France: Common Law and the Moral Right Doctrine*, 20 Int'l & Comp. L.Q. 675 (1971); Monta, *The Concept of "Copyright" Versus the "Droit D'Auteur"*, 32 S. Cal. L. Rev. 177 (1959); Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 Harv. L. Rev. 554 (1940); Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 Am. J. Comp. L. 465 (1968); Treece, *American Law Analogues of the Author's "Moral Right"*, 16 Am. J. Comp. L. 487 (1968).

58. E.g., the following provisions of the statutes found in 1&2 Copyright Laws of the World: Aus., § 21 (1936); Belg., art. 8 (1958); Braz., art. 1357 (1916); Bulg., § 4 (1951); Czech., § 14 (1965); Ger., art. 14 (1965); Korea, art. 16 (1957); Mex., art. 2 para. II (1956); Rom., art. 3 para. 4 (1956); Tur., art. 16 (1951); Uru., art. 12 para. 2 (1937); Venez., art. 21 (1962). See sources cited in note 57 *supra*.

59. E.g., the following provisions of the statutes found in 1&2 Copyright Laws of the World: Ger., arts. 39 para. 2, para. 3 (1965); Italy, art. 47 (1941); Port., art. 127 (1966). For a brief discussion of judicial interpretation in this area, see Study No. 4 at 118.

60. Berne Copyright Convention (Rome 1928), in 2 Copyright Laws of the World, Item E-1; see note 65 *infra*.

61. Berne Copyright Convention, in 2 Copyright Laws of the World, Items A-2, B-2, C-2, D-2, E-2, and G-2. Statements such as the one by the court in *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 340 n.5 (S.D.N.Y. 1968), that the doctrine is "recognized by the civil law of many European and Latin American countries," pass over the significant fact that the individual countries have also joined a "worldwide literary commonwealth," Wittenberg 95, and thereby significantly strengthened their individual policies.

62. A. Birrell, *The Law and History of Copyright in Books* 30 (1899) [hereinafter cited as Birrell]; R. Bowker, *Copyright* ix (1912); R. Whale, *Copyright* 198 (1972).

France by the *Association Littéraire et Artistique Internationale* from 1882-85 to replace the bilateral and multilateral copyright treaties then in existence.⁶³ In its simplest form, the Berne Convention protects unpublished works of citizens or domiciliaries of member nations and works first published in a member state.⁶⁴

As revised,⁶⁵ the Berne Convention offers wide-ranging protection to authors.⁶⁶ Authors of literary, artistic or scientific works⁶⁷ have the exclusive right of authorizing translations of the works,⁶⁸ the radio-diffusion or any form of "wireless diffusion of signs, sounds or images,"⁶⁹ "public recitation of their works,"⁷⁰ "adaptations, arrangements and other alterations of their works,"⁷¹ and "cinematographic adaptation and reproduction . . . and the distribution [and] public presentation and performance of the works."⁷² Authors of dramatic, dramatico-musical or musical works have the exclusive right of authorizing the public presentation, performance and distribution of such presentation or performance of their works.⁷³

The significance of these particular provisions is that, unlike the United States' law, the author who contracts to sell any one of these divisible⁷⁴

63. Wittenberg, *supra* note 27, at 94.

64. *Id.*

65. Originally enacted on Sept. 9, 1886, the convention was revised in Berlin (1908), Rome (1928), and Brussels (1948). The most recent revision, prepared in Stockholm (1967), is not yet in effect. See Berne Copyright Convention, in 2 Copyright Laws of the World, Items G-1 and G-2.

66. "This protection shall operate for the benefit of the author and his legal representatives and assignees." Berne Copyright Convention art. 2 para. 4 (Brussels 1948), in 2 Copyright Laws of the World. The proposed United States copyright statute states: "Copyright in work protected under this title vests initially in the author or authors of the work." S. 1361 § 201(a).

67. See note 50 *supra*.

68. Berne Copyright Convention art. 8 (Brussels 1948), in 2 Copyright Laws of the World, Item F-1.

69. Berne Copyright Convention art. 11 bis, para. 1 (Brussels 1948). Although this right is subject to conditions imposed by member countries, such as compulsory licensing, see note 40 *supra*, these conditions "shall not in any circumstances be prejudicial to the moral right of the author, nor to his right to obtain just remuneration . . ." *Id.* para. 2.

70. *Id.* art. 11 ter.

71. *Id.* art. 12.

72. *Id.* art. 14 para. 1.

73. *Id.* art. 11 para. 1. Under the proposed United States Copyright Statute, "the owner of copyright . . . has the exclusive rights to do and to authorize" various uses of the copyrighted work. S. 1361 § 106; see text accompanying note 147 *infra*. Though the listed uses do not appear to be presented in as much detail as that provided by the Berne Convention, the rights contained in the proposed copyright statute appear to parallel generally those listed in the text accompanying notes 68-73 *supra*.

74. The theory of indivisibility of copyright, a "technical refinement, grafted onto" the present United States copyright law, Kaminstein, *Divisibility of Copyrights*, Study No. 11 of Copyright Law Revision, 86th Cong., 2d Sess. 1 (Comm. Print 1960), basically requires that an assignor of copyright transfer all rights in the copy to the assignee, the assignor retaining nothing. For a detailed discussion of the serious problems arising from this theory, see Kaminstein *supra*. The proposed United States Copyright Statute incorporates the concept of divisibility of copyright. S. 1361 § 201(d)(2).

rights reserves the others, absent express agreement to the contrary.⁷⁵

The United States has consistently refused to join the union, maintaining that the convention "contained provisions at variance with our basic philosophy of copyright,"⁷⁶ and that the convention is in conflict "with principles of American Copyright law."⁷⁷ It is clear, however, that the United States' opposition to the convention was and continues to be a question, not of principle, but of the conflict between special interest groups within the United States.⁷⁸ In 1926, after several years of discussion and meetings with representatives of almost every faction in the business of communications, a bill was introduced in the House of Representatives⁷⁹ for a general revision of the United States copyright law. Among the provisions of the proposed statute were some which would have made United States copyright law consistent with that of the Berne Convention, thus enabling the United States to join that international union by separate Senate ratification. The House passed this bill in 1931,⁸⁰ but a Senate debate on the bill was blocked by an

75. See notes 202-03 *infra* and accompanying text.

76. Committee on Foreign Relations, *The Universal Copyright Convention of 1952*, S. Exec. Rep. No. 5, 83d Cong., 2d Sess. 1 (1954) [hereinafter cited as Exec. Rep. No. 5]. Among these provisions were art. 4 para. 2, which provided that all enumerated rights reside in the author without any formalities, such as notice and registration, and art. 18, which would have required that the United States recognize some copyrights retroactively, i.e., after they had entered the public domain in this country.

In addition, the manufacturing clause in 17 U.S.C. § 16 (1970), which "bars copyright to all books or periodicals in the English language which are not printed from type set within the limits of the United States," Exec. Rep. No. 5 at 12, would have conflicted with the policy of the Berne Convention that all works first published in any member nation be afforded protection. See text at note 64 *supra*. Although the United States has not accepted the burden of this policy, it has accepted the advantages. Thus, authors or publishers may obtain Berne Convention protection simply by mailing their works to Canada, a Berne country, on the same day on which the work was published in the United States. See R. Whale, *Copyright 175* (1972); 100 Cong. Rec. 8951 (1954) (remarks of Senator Hickenlooper). Canada, under the Berne Additional Protocol of 1914, gave notice of restrictions on copyright protection against the United States, partly because of this course of conduct. Berne Additional Protocol (1914), in 2 *Copyright Laws of the World*, Item D-3. Though Holland also has questioned whether such protection should be given to the United States, the ploy continues to work reasonably well and one is reminded of the remarks, spoken in a similar context, of an English commentator: "The publishers of America were like Ephraim [a wild ass that trampleth down the corn alone] . . . After all, the American publishers only did . . . what most publishers would do but for the law." Birrell 35-36.

77. Exec. Rep. No. 5 at 3 (emphasis added); 100 Cong. Rec. 8951 (1954) (remarks of Senator Hickenlooper).

78. "It may be said in general that the major controversies [surrounding the attempt from 1922-40 to gain United States adherence to the Berne Convention] were rooted in the conflicting interests of the various author and publisher groups on the one hand, and the users of copyright material—such as broadcasters, motion picture producers, and record manufacturers—on the other hand." Goldman, *The History of U.S.A. Copyright Law Revision from 1901 to 1954*, Study No. 1 of Copyright Law Revision, 86th Cong., 1st Sess. ix, 11 (Comm. Print 1960) [hereinafter cited as Study No. 1].

79. H.R. 10434, 69th Cong., 1st Sess. (1926).

80. H.R. 12549, 71st Cong., 3d Sess. (1931).

unrelated filibuster, and the session ended without a vote.⁸¹ For various reasons this proposed legislation, which had come so close to becoming law, was not revived in subsequent years.⁸²

When it became apparent that the United States would not join the Berne Convention in the foreseeable future, the Universal Copyright Convention⁸³ was created as a compromise. Adopted by the United States in 1954,⁸⁴ the convention provided significantly less protection to authors than did the independent, but predominating,⁸⁵ Berne Convention.⁸⁶ The reason for its development was clear: "The convention has obviously been drafted to facilitate its acceptance by the United States with a minimum of changes in our domestic law."⁸⁷

Significantly, the Universal Copyright Convention does not recognize or protect the author's moral rights. As one observer has stated: "[T]he Berne Convention provides protection for authors, while Universal Copyright Convention protects works."⁸⁸

The United States has failed to recognize expressly the moral right not only in the legislature but also in the courts.⁸⁹ The current United States position

81. Study No. 1 at 6-7.

82. *Id.* at 7. The Senate Foreign Relations Committee on several occasions voted favorably for ratification of the Berne Convention, and the full Senate at least once voted to ratify the convention. 79 Cong. Rec. 6032 (1935). In each case, however, the report or vote was deferred until the outcome of the ongoing legislative actions. See Study No. 1 at 8-9, 11.

83. 2 Copyright Laws of the World.

84. 100 Cong. Rec. 8953 (1954).

85. In effect the Universal Copyright Convention is a treaty between the members of the Berne Union and the United States. The Universal Convention comes into operation among its signatories only in the absence of any other copyright treaty or convention between the parties. Universal Copyright Convention arts. XVII-XIX, in 2 Copyright Laws of the World; see Exec. Rep. No. 5 at 8. For all practical purposes, then, since the United States is one of the most significant holdouts from the Berne Convention, the Universal Convention is operative principally when the United States is a party; in most other cases, the Berne Convention controls.

86. The Universal Copyright Convention operates on the "principle of national treatment, i.e., the protection afforded to literary, scientific and artistic works of nationals of contracting states must be no less effective than that granted to works of nationals of the state in which protection is sought." Exec. Rep. No. 5 at 8. Compare this with the protection provided by the Berne Convention, which requires the member countries to protect a work according to the same standards applied by the country from which the work originated. See R. Whale, Copyright 174 (1972).

87. Exec. Rep. No. 5 at 8.

88. Nasri, *The Factual—International Copyright*, in *Current Viewpoints* 7, 9. The existence of the Universal Copyright Convention, then, is a statement that in a field of such international significance as copyright there should be international dialogue which includes all of the major countries of the world. The Convention, however, adds little to the substance of agreement which already existed in the Berne Convention, and arguably is a factor which delays true international agreement regarding protection of all the rights associated with the creation of an intellectual work.

89. E.g., *Granz v. Harris*, 198 F.2d 585, 590 (2d Cir. 1952) (Frank, J., concurring); *Vargas v. Esquire, Inc.*, 164 F.2d 522, 526 (7th Cir. 1947); *Jaeger v. American Int'l Pictures, Inc.*, 330 F. Supp. 274, 276 (S.D.N.Y. 1971); *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 391 n.5

towards the moral right doctrine—a significant factor in its refusal to join with the majority of countries in the world in a comprehensive copyright scheme⁹⁰—is based on an over-broad interpretation of the purpose of the original copyright statute as construed in several major English cases in the latter part of the eighteenth century.⁹¹ If, at that time, the term “copyright” was intended to include every possible right that the author could have in his work, the current United States position is historically sound. If, however, the term was originally intended to include nothing more than the right to print and sell the work that was the subject of the copyright, and other rights, such as those contained in the moral right, were not considered or were excluded, then no historical reason exists for the United States’ current position.

IV. EVOLUTION OF THE ENGLISH-AMERICAN CONCEPT OF COPYRIGHT

The English-American understanding of copyright,⁹² which has remained fixed since approximately 1774, was developed primarily in the 300 year period following 1476 when the first printing press began its operations in England.⁹³ Three groups played highly significant roles in this development: the Crown, principally in the guise of the Court of the Star Chamber;⁹⁴ the Company of Stationers of London;⁹⁵ and the independent publishers.⁹⁶

As early as 1483 the English Crown became involved in the regulation of copying when it encouraged the importation of foreign books.⁹⁷ In later years it issued printers’ licenses⁹⁸ and “letters patent,”⁹⁹ established the Court of the

(S.D.N.Y. 1968); *Chesler v. Avon Book Div.*, 76 Misc. 2d 1048, 1051, 352 N.Y.S.2d 552, 555 (Sup. Ct. 1973); *Seroff v. Simon & Schuster, Inc.*, 6 Misc. 2d 383, 387, 162 N.Y.S.2d 770, 774 (Sup. Ct. 1957), *aff’d mem.*, 12 App. Div. 2d 475, 210 N.Y.S.2d 479 (1st Dep’t 1960). But see *Shostakovich v. Twentieth Century Fox Film Corp.*, 196 Misc. 67, 70-71, 80 N.Y.S.2d 575, 578-79 (Sup. Ct. 1948), *aff’d mem.*, 275 App. Div. 692, 87 N.Y.S.2d 430 (1st Dep’t 1949), which suggests that in a proper situation the court might grant a remedy under the moral right theory.

90. Study No. 1 at 11.

91. See notes 124-30 *infra*.

92. The term “copy” was the word commonly used to describe a book or manuscript; hence, the term copyright. See note 106 *infra*.

93. *Wittenberg* 10.

94. See notes 97-102 *infra* and accompanying text.

95. See notes 103-18 *infra* and accompanying text; 1-5 E. Arber, *A Transcript of the Registers of the Company of Stationers of London (Private Printing 1875-94)* [hereinafter cited as *Arber*].

96. See notes 119-30 *infra* and accompanying text. It should not be surprising that the author is not included as a prominent force during this period. Living authors did begin to assert their rights in the last part of the 17th century, but, as will be seen, their desire for protection was overshadowed by the enthusiasm—and guile—of the publishers and booksellers, “a most excellent and deserving body of tradesmen not in the least likely to give birth to lofty thoughts about the universal rights of authors all the world over” *Birrell* 27.

97. *Wittenberg* 11.

98. Some scholars have argued that these represented the first form of copyright protection. *Copinger* 5. But see *Copyright Thought* 5.

99. These were usually granted “to a particular bookseller in respect of a particular book . . .

Star Chamber¹⁰⁰ and chartered the Stationers' Company. The Court of the Star Chamber was concerned more with controlling heresy than with the regulation of printing.¹⁰¹ It attempted to achieve this goal by strict surveillance over the nascent publishing industry. Such a policy did not augur well for the author:

Its proceedings, so far as reported, and so far as such reports exist, may be searched in vain for any trace of author's copyright. Heresy, libel, infringement of letters patent and of the rights of the king's printer, and of other licensees, examples of all these are to be found, but of the author in pursuit of his rights as an author, the oracle is dumb.¹⁰²

The Court of Star Chamber saw the Company of Stationers as a convenient method of insuring the success of its censorship policies.¹⁰³ After the Star Chamber's abolition, the policies of the Company developed independently, and ultimately became the foundation for the statutory concept of copyright which has lasted to the present day.¹⁰⁴ The methods of the Stationers' Company have been frequently analyzed:

First, they kept register books wherein . . . all new publications and reprints had to be entered at the date of publication; and

Secondly, such entries were, by usage of the Company, exclusively made in the name or names of members of the Company.

Thirdly, by virtue of such entry, the bookseller, in whose name the entry was made became (in the opinion of the Stationers' Company) the owner, or proprietor, of such book or copy (as they called it), and ought to have the sole printing thereof, presumably for ever.¹⁰⁵

Such ownership represented a private copyright,¹⁰⁶ a "private affair"¹⁰⁷ of the

for a term of years—seven, fourteen, twenty-one, or the like. In fact, it was a monopoly . . .” Birrell 57.

100. Among its other functions, the Court of the Star Chamber issued a series of strict prohibitions against any “seditious, schismatical, or offensive Bookes or Pamphlets.” Star Chamber Decree of July 11, 1637, in 4 Arber 529.

101. Wittenberg 12-14.

102. Birrell 59. The author had little hope of protection from the Crown, and in fact “was much more likely to have his ears cropped off than his purse filled.” Wittenberg 22; see Star Chamber Decree of July 11, 1637, in 4 Arber 528-36; Birrell 64-65; Wittenberg 17, 20-21.

103. Copinger 5; see B. Bugbee, *Genesis of American Patent and Copyright Law* 50 (1967) [hereinafter cited as Bugbee].

104. See Historical Perspective 5.

105. Birrell 73. In these early days of printing, a high proportion of manuscripts represented the works of ancient scholars. See generally Wittenberg 5. Arguably, this factor represented an additional reason for the author's powerlessness: these ancient authors, who contributed so much to the welfare of the printers, were in no position to assert their rights, having been dead for onwards of 1000 years.

106. The term “copyright” was first used by the Stationers to refer to “the books they have entered in their own names in the register book of their own Company.” Birrell 100.

107. “The Stationers' Company granted the copyright, and since it was developed by and limited to company members, it functioned in accordance with their self-interest.” Historical Perspective 5.

organized publishers created for one purpose only, namely, publishing. Under this system the author had few, if any, rights,¹⁰⁸ as noted emphatically by one contemporary author:

A Meere Stationer is he that imagines he was borne altogether for himselfe, and exercizeth his Mystery without any respect to the glory of GOD, or the publike advantage. . . . He would halfe thinke, that all our Universityes and Schooles of Learning, were erected to no other end, but to breed Schollers to study for the enriching of the Company of Stationers.

He makes no scruple to put out the right Authors Name, and insert another in the second edition of a Booke If he get any written Coppy . . . into his powre, likely to be vendible, whether the Author be willing or no, he will publish it; And it shall be contrived and named alsoe, according to his owne pleasure: which is the reason, so many good Bookes come forth imperfect, and with foolish titles.¹⁰⁹

In the latter part of the 17th century Parliament withdrew its formal support of the Company of Stationers. Fearing the loss of their property in the manuscripts, but unable to find any common law protection of their rights,¹¹⁰ the Company sought statutory copyright protection based on "a concept created not by the common law, but by a special group for a special purpose, under special conditions."¹¹¹ The result was the Statute of Anne.¹¹²

Generally considered the "first copyright statute at law to be found in the *Corpus Juris* of any State, either of ancient or modern times,"¹¹³ the statute has been criticized as a "perfidious measure, 'rigged with curses dark,'"¹¹⁴ and as a law based not on a "thoughtful review of policy" but on an attempt by desperate publishers to use every "tactical advantage" to secure the protection of their monopoly.¹¹⁵

Principally, the statute extended the right to hold a copyright to all persons, rather than only to company members.¹¹⁶ The law also extended for twenty-one years the copyrights in books already published,¹¹⁷ but limited the term of copyright in newly published works to fourteen years and provided for an

108. Bugbee 51; B. Kaplan, *An Unhurried View of Copyright 5* (1967) [hereinafter cited as Kaplan]; *Historical Perspective* 8; Wittenberg 13.

109. G. Wither, *The Scholler's Purgatory* (c. 1625), in 4 Arber 17-18; Birrell 86-88.

110. Before the Statute of Anne common law rights in copy had not developed to any significant extent because printing and publishing had been so strictly regulated by edict and decree. See notes 101-03 *supra* and accompanying text; Birrell 129.

111. *Historical Perspective* 10.

112. 8 Anne c. 19 (1709). It should be noted that the publishers were not the sole pressure group which affected the terms of the statute. There was significant adverse reaction among the independent printers, authors and members of parliament to the perpetual monopoly of the publishers in their manuscripts, and this hostility was evident in the final statute. See text accompanying notes 116-18 *infra*. See also note 38 *supra*.

113. Birrell 68. But see *Historical Perspective* 12, 143.

114. Birrell 19.

115. Kaplan 7-8.

116. 8 Anne c. 19, § 1 (1709).

117. *Id.*

identical renewal term exclusively in the author's name.¹¹⁸ At the end of the original twenty-one year period provided for in the statute for copyright in books already published, independent publishers began printing from manuscripts which had belonged to members of the Company of Stationers. The Company brought numerous suits against publishers who printed such "public domain" works.¹¹⁹ Unable to rely on the statute, the Company members argued that they were the legitimate assignees of the authors' natural and perpetual rights¹²⁰ in their works. Both the courts¹²¹ and authors¹²² took these arguments seriously. Thus, litigation between publishers regarding the meaning of the copyright in the Statute of Anne turned upon, not the publishers' right to print and sell copies of a work, but instead the nature and extent of the author's natural rights.¹²³ In the two principal publisher cases during this period the question of the extent of such rights was resolved.

In *Millar v. Taylor*,¹²⁴ which involved a suit to enjoin publication of a work for which statutory protection had expired, the judges were presented with two broad questions:

1st. Whether the copy of a book, or literary composition, belongs to the author, by the common law:

2d. Whether the common law-right of authors to the copies of their own works is taken away by 8 Ann. c. 19.¹²⁵

118. *Id.* § 11. At least one commentator has argued that but for this last provision, the statute gave the author nothing more than it gave to any other person able to obtain a copyright: "The radical change in the statute . . . was not that it gave authors the right to acquire a copyright—a prerogative until then limited to members of the Stationers' Company—but that it gave that right to all persons." *Historical Perspective* 145.

119. *Historical Perspective* 161.

120. See *Webb v. Rose* (unreported 1732), interpreted in *Tonson v. Collins*, 96 Eng. Rep. 180, 184 (K.B. 1761). See also *Forrester v. Waller* (unreported 1741), interpreted in *Millar v. Taylor*, 98 Eng. Rep. 201, 216 (K.B. 1769).

121. "[I]t might be dangerous to determine that the author has a perpetual property in his books, for such a property would give him not only a right to publish, but to suppress too." *Osborne v. Donaldson*, 28 Eng. Rep. 924 (Ch. 1765) (Lord Chancellor).

122. "There seems (said he,) to be in authours a stronger right of property than that by occupancy; a metaphysical right, a right, as it were, of creation, which should from its nature be perpetual; but the consent of nations is against it; . . . for were it to be perpetual, no book, however useful, could be universally diffused amongst mankind, should the proprietor take it into his head to restrain its circulation. No book could have the advantage of being edited with notes, however necessary to its elucidation, should the proprietor perversely oppose it. For the general good of the world, therefore, whatever valuable work has once been created by an authour, and issued out by him, should be understood as no longer in his power, but as belonging to the public; at the same time the authour is entitled to an adequate award. This he should have by an exclusive right to his work for a considerable number of years." J. Boswell, *Life of Samuel Johnson* 467-68 (Mod. Lib. ed. 1931); see *Birrell* 122.

123. Thus, however much the Statute of Anne was to be called the first statutory recognition of the author's right in his copy, the statute was "shaped by events and forces directed by persons concerned with copyright only as a means to an end for themselves and not for the author." *Historical Perspective* 14. In the end, the statute, purportedly "giving a greater protection to copyright, had the unexpected result of curtailing it . . ." Copinger 10.

124. 98 Eng. Rep. 201 (K.B. 1769).

125. *Id.* at 206 (Willes, J.).

In his opinion Judge Mansfield held that the author had a natural and perpetual right in his copy, regardless of statute.¹²⁶ Thus, the booksellers and publishers achieved in the courts what they had been unable to achieve in Parliament: a reaffirmation of their perpetual monopoly in their manuscripts. The Statute of Anne, however, had as one of its purposes the limitation of this monopoly to a definite term.¹²⁷ Therefore, when the same factual situation was presented to the court again in *Donaldson v. Beckett*¹²⁸ a small majority of the judges held that the author's perpetual common law right of first printing and publication of his works was limited to a term of years by the Statute of Anne.¹²⁹ Thus, "a majority of one . . . imputed to the statute of Anne the murderous effect of destroying the very property it sought to protect."¹³⁰

It has generally been argued that the decision in *Donaldson*, like that in *Millar*, was based on the understanding that the term "copyright" "embrace[d] all the rights to be had in connection with published works, either by the author or publisher."¹³¹ However, while *Millar* addressed itself to the question of the author's right in the "copy of a book,"¹³² *Donaldson* dealt merely with the author's "sole right of first printing and publishing the same for sale."¹³³ Since the question was not raised in *Donaldson* as to whether this latter right constituted the author's entire interest in the copy, the court apparently did not decide this matter.¹³⁴ In its landmark copyright decision, *Wheaton v. Peters*,¹³⁵ the United States Supreme Court relied on *Donaldson* in holding that the United States copyright statute was the sole source of federal copyright protection for published works.¹³⁶ Thus, the policy established in the 1774 decision has lasted until the present day.

126. See text accompanying note 32 supra.

127. See note 38 supra.

128. 1 Eng. Rep. 837 (H.L. 1774), summarized in 98 Eng. Rep. 257-62. The judges of the King's Bench were asked by the House of Lords for their opinions on the effect of the Statute of Anne on the common law of copyright. *Id.* at 257.

129. 98 Eng. Rep. at 257.

130. Birrell 128. Remarkably, Judge Mansfield, the principal author of *Millar*, was eligible to sit on the case, but did not attend. 98 Eng. Rep. at 262.

131. Historical Perspective 151.

132. 98 Eng. Rep. at 206 (Willes, J.); see text at note 125 supra. Arguably, the court was speaking of all the author's rights in the creation which is called a copy or manuscript.

133. *Donaldson v. Beckett*, 1 Eng. Rep. 837 (H.L. 1774). The words of Judge Mansfield in *Millar*, see text accompanying note 32 supra, are evocative of the broad rights contained in the moral right theory, while the judges in *Donaldson* appeared more concerned with the issue of first printing and publishing. 98 Eng. Rep. at 257-58.

134. Such a distinction becomes "a point of considerable importance, because it was this case which implemented the Statute of Anne. If the House of Lords did hold that the Statute of Anne abrogated all of the author's common-law rights, this issue properly became a closed matter. If it did not so hold, the question of the author's common-law rights, other than that of publishing and vending his works, at least remained an open issue, to be decided in a proper case." Historical Perspective 175. But see Copinger 4; R. Whale, Copyright 11 (1972).

135. 33 U.S. (8 Pet.) 591 (1834); see 1 M. Nimmer, Copyright § 47.31 (1974).

136. "That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy, endeavors to

The question remains, however, whether the interpretation of these two decisions is a correct definition of present policy. The *Donaldson* decision was a reaction to years of maneuvering and pressure by organized publishers who had become accustomed to the privileges of a perpetual and exclusive monopoly. Moreover, it was a response to the publishers' victory in *Millar*, in which the Statute of Anne was broadened to include regulation and protection not merely of the right to print and vend a manuscript, but also of the right to exercise total and exclusive control over the manuscript after publication. *Donaldson* declared that the statute limited the former right. However, this is not equivalent to the commonly stated argument that the statute had been deemed to embody the entire spectrum of the author's rights. Such a *latios hos* argument, though understandable, is historically unsound. The entire history of copyright development in England is one of the publishers' interests in the manuscript. Except for isolated incidents, the interests of the author were not a factor in the development of a body of law which is commonly called the author's principal source of protection.

V. PROTECTION OF THE AUTHOR'S RIGHTS IN THE UNITED STATES

Because rights in intellectual creations are today necessarily of national and international, rather than local, concern,¹³⁷ these rights would appear to require federal rather than state protection. The United States has traditionally limited statutory copyright protection to the created work itself. The rights embodied in this protection have generally been termed property rights.¹³⁸ The author's personal rights in his intellectual creation have been protected, when recognized, primarily by the states, under statute or common law.¹³⁹ Under state law, an author who is not protected by a theory of moral right might find protection for the right to his artistic reputation under such common law theories as libel, unfair competition, privacy, or contract. Such state remedies do not provide a uniform base upon which the author can depend for the protection of both his personal and property rights in his creation. The proposed copyright statute¹⁴⁰ must be examined to determine whether the entire "bundle of rights"¹⁴¹ which compose the author's interest in his work—the property right commonly termed copyright and personal rights—are included, expressly or impliedly, in its terms. In terms of such total rights of the author, a continuation in the proposed statute of the present dual system of both state and federal protection would have a deleterious effect, since protection of the author's personal rights in the United States realize a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world." *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 657 (1834).

137. Chafee 517.

138. See note 22 *supra*.

139. See text accompanying notes 166-211 *infra*.

140. S. 1361; see text accompanying notes 1-11 *supra* and notes 143-64 *infra*.

141. Cf. *Standard Oil Co. v. Clark*, 163 F.2d 917, 939 (2d Cir. 1947) (Frank, J., concurring), cert. denied, 333 U.S. 873 (1948); *Rohmer v. Commissioner*, 153 F.2d 61, 63 (2d Cir.), cert. denied, 328 U.S. 62 (1946).

would remain inconsistent, uncertain, and somewhat inadequate, leaving United States' copyright policies outside the main stream of international copyright law.¹⁴² Additions to the proposed copyright statute to achieve an express recognition of the moral right will be suggested below. Such additions will promote uniform and systematic protection of authors in a unified copyright scheme without radical alteration of the practical application of copyright law, and without overburdening the federal courts. At the same time, such additions would represent a significant step toward a closer union between the United States and the members of the Berne Convention.

The proposed copyright statute, like the present one,¹⁴³ primarily protects "works of authorship."¹⁴⁴ Under the proposed statute copyright will attach to a work at the time it is "fixed" in a tangible medium of expression."¹⁴⁵ Copyright "vests initially in the author,"¹⁴⁶ who has various exclusive rights. For example, he may reproduce copies of the work, prepare derivative works based on the copyrighted work, sell copies of the work to the public, and perform the work in public if it is capable of performance.¹⁴⁷ Such rights are economic in nature, and do not include any personal rights, since the subject matter of copyright protection is the work rather than the copyright owner.¹⁴⁸ The various limitations in later sections of the proposed statute on these exclusive rights contain no mention of the author's personal rights. One section of the bill¹⁴⁹ specifies the conditions under which a work is subject to "fair use."¹⁵⁰ Although the factors listed include a consideration of "the nature of the copyrighted work,"¹⁵¹ and "the effect of the use upon the potential . . . value of the copyrighted work,"¹⁵² these appear to have been included in order to balance the economic interests of the copyright owner and the social interests of the user,¹⁵³ rather than to protect the integrity of the work.

Another section, which provides that "the owner of a particular copy or phonorecord" may sell or otherwise dispose of such property,¹⁵⁴ is not contrary to the moral right doctrine; the right to dispose of the actual property embodying the copyrighted work is not inconsistent with the author's right to the integrity of the work.¹⁵⁵ The bill also provides for certain limited

142. See notes 60-82 *supra* and accompanying text.

143. See 17 U.S.C. § 5 (1970).

144. S. 1361 § 102; see text accompanying note 88 *supra*.

145. S. 1361 § 101. This occurs "when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.*

146. *Id.* § 201(a).

147. *Id.* § 106.

148. See text accompanying note 144 *supra*.

149. S. 1361 § 107.

150. See A. Latman, *Fair Use of Copyrighted Works*, Study No. 14 of Copyright Law Revision, 86th Cong., 2d Sess. 1 (Comm. Print 1960) [hereinafter cited as Study No. 14].

151. S. 1361 § 107(2).

152. *Id.* § 107(4).

153. Study No. 14 at 7-14.

154. S. 1361 § 109(a).

155. See Study No. 4 at 134-35.

situations in which the copyrighted work may be used without the copyright owner's consent,¹⁵⁶ while an additional section provides that one who has an exclusive right "to reproduce a copyrighted pictorial, graphic, or sculptural work [may use that] work in or on any kind of article."¹⁵⁷ The provisions present potential danger to the author's right to the integrity of the work, and in moral right countries such provisions would be subject to a moral right.

The section covering compulsory licenses for making and distributing phonorecords¹⁵⁸ contains an interesting statement:

A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, *but the arrangement shall not change the basic melody or fundamental character of the work . . . except with the express consent of the copyright owner.*¹⁵⁹

This appears to be some recognition of the integrity of the work,¹⁶⁰ but it should be noted that the person who controls such use is the copyright owner, who may not be—and often is not—the author.

Under the proposed statute, even after transfer of all or part of his copyright,¹⁶¹ the author maintains a limited control over the rights transferred: the author or other owners of a "termination interest,"¹⁶² *i.e.*, the right to terminate transfers of copyright and licenses granted by the author, may terminate the grant of the copyright "at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant . . ." ¹⁶³ Upon termination, all rights in the work which were included in the grant revert to the author or other persons with termination interests.¹⁶⁴ Although this section does not provide for express personal rights, the author by implication may terminate his grant of copyright within the designated period if he believes the copyright transferee has acted in violation of such personal rights.

No provision in the proposed statute appears to be in conflict with the moral right theory; it is clear, however, that such theory is not incorporated into the bill, and the protection afforded under such a theory is left to other sources:

156. E.g., "performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution . . ." S. 1361 § 110(1); "performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature . . . in the course of services at a place of worship or other religious assembly . . ." *Id.* § 110(3). Under certain conditions a copyright owner may object to performances of "nondramatic literary or musical work," even where proceeds of the performance are used for various utilitarian purposes. *Id.* § 110(4)(B).

157. *Id.* § 113(a).

158. *Id.* § 115.

159. *Id.* § 115(a)(2) (emphasis added).

160. See text accompanying notes 58-59 *supra*.

161. See S. 1361 § 201(d)(1); note 74 *supra*.

162. S. 1361 § 203(a)(1).

163. *Id.* § 203(a)(3).

164. *Id.* § 203(b).

Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to:

(3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.¹⁶⁵

Such rights and remedies do exist, to some extent, under state common law or statute. As one study of the nature and meaning of the moral right has concluded:

Without using the label "moral right" or designations of the components of the moral right, the courts in the United States arrive at much the same results as do European courts. Substantially the same personal rights are upheld, although often under different principles.¹⁶⁶

The reason American courts feel compelled to apply legal principles different from those applied by most Berne Convention countries in order to protect the same rights is not readily apparent.¹⁶⁷ Nonetheless, it has been said:

[T]he doctrine of moral right is not part of the law in the United States . . . except insofar as parts of that doctrine exist in our law as specific rights—such as copyright, libel, privacy and unfair competition.¹⁶⁸

Each of these "specific rights,"¹⁶⁹ to which can be added contract rights,¹⁷⁰ will be examined for the purpose of determining how the rights contained in the moral right are protected.

Copyright law protects the author's personal rights only incidentally, if at all. Where a copyright infringement violates a personal right and a property

165. *Id.* § 301(b).

166. Study No. 4 at 141. See also Treece, *American Law Analogues of the Author's "Moral Right,"* 16 *Am. J. Comp. L.* 487, 493-94 (1968).

167. In a humorous analogy, Roscoe Pound related the story of how Tom Sawyer followed the approved method of digging a ditch by using a case-knife. Soon realizing that the small knife was not adequate for the task, Tom continually asked Huck Finn for a case-knife, but did not continue work until Huck had handed him a pickax, which is what Tom had really been asking for. Dean Pound suggested that Tom was on the way to becoming an expert in the law: "When legislation or tradition prescribed case-knives for tasks for which pickaxes were better adapted, it seemed better to our forefathers, after a little vain effort with case-knives, to adhere to principle—but use the pickax. They granted that law ought not change. Changes in law were full of danger. But, on the other hand, it was highly inconvenient to use case-knives. And so the law has always managed to get a pickax in its hands, though it steadfastly demanded a case-knife, and to wield it in the virtuous belief that it was using the approved instrument." R. Pound, *The Spirit of the Common Law* 167 (1921).

168. *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 340 n.5 (S.D.N.Y. 1968) (citations omitted); see *Seroff v. Simon & Schuster, Inc.*, 6 Misc. 2d 383, 387, 162 N.Y.S.2d 770, 774 (Sup. Ct. 1957), *aff'd mem.*, 12 App. Div. 2d 475, 210 N.Y.S.2d 479 (1st Dep't 1960).

169. For a discussion of copyrights see text accompanying notes 171-72 *infra*.

170. See text accompanying notes 198-211 *infra*.

right of the copyright holder, the federal copyright statute¹⁷¹ will vindicate both rights; but the personal right will not be protected absent infringement.¹⁷²

Under the moral right doctrine, false imputation of authorship is a violation of the paternity right.¹⁷³ In various state courts, such conduct has been considered actionable under the theory of libel. Under this theory false imputation of authorship has been held to be libelous *per se*,¹⁷⁴ not requiring proof of special damages.¹⁷⁵ The tort of defamation, however, is not totally suitable for the protection of an author's interest in the proper use of his name; its proof requirements often do not speak to the author's interest in the protection of his artistic reputation. For example, though his name was falsely imputed to another's work, an author may be unable to prove his claim if the defendant's conduct is termed a slander, since it would be necessary to allege and prove special damages.¹⁷⁶ One dissenting judge observed the basic paradox of attempting to use the theory of libel to protect an author's personal right:

[The plaintiff] alleges no special damage. If, therefore, he can sustain the [libel] count in his complaint, it must be because the article is libelous *per se*. Mere falsity in a writing . . . does not constitute a libel. It must go further and tend to disgrace the person written about, or bring him into ridicule or contempt. . . . We cannot find in the article anything tending in anywise to injure the plaintiff's reputation, except perhaps as a skillful writer of fiction, but no case has yet gone so far as to hold that it is libelous *per se* to attribute to a writer an inelegant literary style.¹⁷⁷

Courts have also attempted to protect the author's personal right to the proper use of his name by applying the amorphous theory¹⁷⁸ of unfair

171. 17 U.S.C. §§ 1 et seq. (1970).

172. See, e.g., *Neyland v. Home Pattern Co.*, 65 F.2d 363, 364 (2d Cir.) (L. Hand, J.), cert. denied, 290 U.S. 661 (1933) (an act which is an actionable infringement may not violate a statutory right of privacy); *Harms, Inc. v. Tops Music Enterprises, Inc.*, 160 F. Supp. 77, 81 (S.D. Cal. 1958) (unauthorized copying of a copyrighted work is an infringement, but copying alone is not unfair competition).

173. See text accompanying notes 55-57 *supra*.

174. *Gershwin v. Ethical Publishing Co.*, 166 Misc. 39, 1 N.Y.S.2d 904 (N.Y. City Ct. 1937); see *Carroll v. Paramount Pictures, Inc.*, 3 F.R.D. 95 (S.D.N.Y. 1942).

175. *Ben-Oliel v. Press Publishing Co.*, 251 N.Y. 250, 255, 167 N.E. 432, 434 (1929); *D'Altomonte v. New York Herald Co.*, 154 App. Div. 453, 139 N.Y.S. 200 (1st Dep't), modified in part & aff'd mem., 208 N.Y. 596, 102 N.E. 1101 (1913) (false attribution of authorship); see *Clevenger v. Baker Voorhis & Co.*, 8 N.Y.2d 187, 168 N.E.2d 643, 203 N.Y.S.2d 812 (1960) (misrepresentation to reader as to authorship); *Archbold v. Sweet*, 172 Eng. Rep. 947, 174 Eng. Rep. 55 (Nisi Prius 1832).

176. *Locke v. Gibbons*, 164 Misc. 877, 299 N.Y.S. 188 (Sup. Ct. 1937), aff'd mem., 253 App. Div. 887, 2 N.Y.S.2d 1015 (1st Dep't 1938) (news broadcast falsely attributed to plaintiff held to be a slander, requiring allegation of special damages, which plaintiff had failed to allege).

177. *D'Altomonte v. New York Herald Co.*, 154 App. Div. 453, 456, 139 N.Y.S. 200, 203 (1st Dep't) (Scott, J., dissenting), modified in part & aff'd mem., 208 N.Y. 596, 102 N.E. 1101 (1913).

178. See 1 R. Callmann, *The Law of Unfair Competition, Trademarks and Monopolies* § 4.1, at 110-11 (3d ed. 1967) [hereinafter cited as Callmann]. But see *id.* § 4.3, at 135 & n.9.

competition,¹⁷⁹ described as

a reaffirmation of the rule of fair play. It aims to effect honesty among competitors by outlawing all attempts to trade on another's reputation—it gives the crop to the sower and not to the trespasser.¹⁸⁰

Under this theory the courts have frequently exercised their common law equitable powers¹⁸¹ or have relied on statute¹⁸² to protect the author's personal interest.¹⁸³ However, the traditional approach to unfair competition¹⁸⁴ is not flexible enough to protect the author's rights in every situation where they deserve protection,¹⁸⁵ and a less rigid application of the theory¹⁸⁶ might cause it to become even more poorly defined.¹⁸⁷

179. See *id.* §§ 6.2(f), 15.1(b).

180. *Bard-Parker Co. v. Crescent Mfg. Co.*, 174 Misc. 356, 360, 20 N.Y.S.2d 759, 763 (Sup. Ct. 1940), criticized in 1 Callmann § 4.3, at 131.

181. Though usually the theory has been applied to commercial dealings between competitors, it has been argued that "courts are not confined in the exercise of their equitable powers to preventing unfair competition among the manufacturers of and dealers in goods." *Fisher v. Star Co.*, 231 N.Y. 414, 427, 132 N.E. 133, 137, cert. denied, 257 U.S. 654 (1921); accord, *Prouty v. NBC*, 26 F. Supp. 265 (D. Mass. 1939); cf. *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952). See generally, Kaldodner & Vance, *The Relation Between Federal & State Protection of Literary & Artistic Property*, 72 Harv. L. Rev. 1079 (1959).

182. E.g., *Jaeger v. American Int'l Pictures, Inc.*, 330 F. Supp. 274 (S.D.N.Y. 1971).

183. The theory of unfair competition as it is applied to literary property has been explained as follows: "Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because someone has used it before, even if it took labor and genius to make it. If a given person is to be prohibited from making the use of words that his neighbors are free to make some other ground [than property] must be found. One such ground is vaguely expressed in the phrase unfair trade. This means that the words are repeated by a competitor in business in such a way as to convey a misrepresentation that materially injures the person who first used them, by appropriating credit of some kind which the first user has earned." *International News Serv. v. Associated Press*, 248 U.S. 215, 246-47 (1918) (Holmes, J., concurring).

184. See 1 Callmann §§ 4-8.

185. See, e.g., *Harms, Inc. v. Tops Music Enterprises, Inc.*, 160 F. Supp. 77, 83 (S.D. Cal. 1958) (plaintiff must allege misrepresentation or deception); *Continental Cas. Co. v. Beardsley*, 151 F. Supp. 28, 44 (S.D.N.Y. 1957), modified, 253 F.2d 702 (2d Cir.), cert. denied, 358 U.S. 816 (1958) ("When only appropriation of another's efforts is involved, and the other elements are not present [deception, interference with contractual relations], the New York courts refuse to find unfair competition.").

186. See 1 Callmann § 4.1, at 113.

187. *Prouty v. NBC*, 26 F. Supp. 265 (D. Mass. 1939); *De Bekker v. Frederick A. Stokes Co.*, 168 App. Div. 452, 455, 153 N.Y.S. 1066, 1068 (2d Dep't 1915), modified per curiam, 172 App. Div. 960, 157 N.Y.S. 576 (2d Dep't), aff'd mem., 219 N.Y. 573, 114 N.E. 1064 (1916) ("What consequences embarrassing to the plaintiff might ensue is not apparent, but it is just to abide by the truth."); *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 792, 101 N.Y.S.2d 483, 489 (Sup. Ct. 1950), aff'd mem., 279 App. Div. 632, 107 N.Y.S.2d 795 (1st Dep't 1951) ("The statement of a sufficient cause of action in unfair competition . . . is therefore dependent more upon the facts set forth and less upon technical requirements than in most causes of action."); see *Gieseking v. Urania Records, Inc.*, 17 Misc. 2d 1034, 155 N.Y.S.2d 171 (Sup. Ct. 1956). Compare *Metropolitan Opera Ass'n*, supra, with *Continental Cas. Co. v.*

Where a claim for unfair competition involves a contract between the parties to the suit, the courts, after interpreting the contract,¹⁸⁸ will also consider whether defendant's use of plaintiff's name, work, or characters which were the subject matter of the contract was proper, whether the subject matter has gained a "secondary meaning" and was unique, and whether the author's name, work or characters were well-known before the contract between the parties was made.¹⁸⁹ However, unfair competition is not a certain protector of an author's moral rights; it involves "different relationships" than the law of copyright,¹⁹⁰ which generally is considered to involve protection of the economic interest solely, and it appears equally out of place as a significant protector of personal rights in the same intellectual works.

Because false attribution of authorship appears to be somewhat akin to invasion of privacy,¹⁹¹ this theory has become accepted as an occasional alternative method of protecting the author's rights.¹⁹² In New York, for example, where invasion of privacy is statutory,¹⁹³ an author may be afforded protection under the terms of the statute. In order to be protected an author must show that defendant's unauthorized use of author's name was for trade purposes,¹⁹⁴ rather than for purposes of news.¹⁹⁵ Similarly, if plaintiff's

Beardsley, 151 F. Supp. 28, 44 (S.D.N.Y. 1957), modified, 253 F.2d 702 (2d Cir.), cert. denied, 358 U.S. 816 (1958).

188. *Fisher v. Star Co.*, 231 N.Y. 414, 432, 132 N.E. 133, 139, cert. denied, 257 U.S. 654 (1921); *De Bekker v. Frederick A. Stokes Co.*, 168 App. Div. 452, 455, 153 N.Y.S. 1066, 1068 (2d Dep't 1915), modified per curiam, 172 App. Div. 960, 157 N.Y.S. 576 (2d Dep't), aff'd mem., 219 N.Y. 573, 114 N.E. 1064 (1916); see text accompanying notes 198-211 *infra*.

189. Compare *Fisher v. Star Co.*, 231 N.Y. 414, 132 N.E. 133, cert. denied, 257 U.S. 654 (1921) (plaintiff, whose Mutt & Jeff cartoons had acquired a secondary meaning and who was already well-known at time of making contract with defendant publisher, sustained unfair competition suit) with *Susy Prods., Inc. v. Greeman*, 140 N.Y.S.2d 904 (Sup. Ct. 1955) (plaintiff company could not sustain unfair competition action against defendant artist because subject matter of contract was not unique and had not gained secondary meaning). But see *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 792, 101 N.Y.S.2d 483, 489 (Sup. Ct. 1950), aff'd mem., 279 App. Div. 632, 107 N.Y.S.2d 795 (1st Dep't 1951).

190. 1 Callmann § 17.2(a), at 562.

191. See *Kerby v. Hal Roach Studios, Inc.*, 53 Cal. App. 2d 207, 127 P.2d 577 (2d Dist. 1942), which is an example, not of false use of an author's name, but of a use of a person's name which would be actionable by anyone whose name was used in a sensational writing.

192. See text accompanying note 168 *supra*. But see 1 Callmann § 3.3, at 79: "The right of personality . . . is similar in nature but broader in scope than the right of privacy." (footnote omitted). See also *id.* at 87 & n.24.

193. "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor." N.Y. Civ. Rights Law § 50 (McKinney 1948). The injured party may bring civil suit against the offender. *Id.* § 51.

194. See *Neyland v. Home Pattern Co.*, 65 F.2d 363 (2d Cir.), cert. denied, 290 U.S. 661 (1933); *Giesekeing v. Urania Records, Inc.*, 17 Misc. 2d 1034, 155 N.Y.S.2d 171 (Sup. Ct. 1956); *Elliot v. Jones*, 66 Misc. 95, 120 N.Y.S. 989 (Sup. Ct.), aff'd mem., 140 App. Div. 911, 125 N.Y.S. 1119 (1st Dep't 1910).

195. *D'Altomonte v. New York Herald Co.*, 154 App. Div. 453, 139 N.Y.S. 200 (1st Dep't), modified in part and aff'd, 208 N.Y. 596, 102 N.E. 1101 (1913).

pseudonym is falsely attributed to a work, no action under the statute will lie, since a pseudonym is "not a protectible 'name' within the meaning" of the statute.¹⁹⁶ The right of privacy, then, is not co-extensive with the personal rights of the author, and is not as comprehensive as a moral right theory would be.¹⁹⁷

In situations where the parties have contracted for the sale or use of literary or artistic works, courts have often based their grant or denial of relief, analogous to the moral right, solely on the express terms of the contract, without reference to the other theories already discussed.¹⁹⁸ Often, however, though purporting to rely on the contract, the courts will imply terms in order to achieve a just and fair result.¹⁹⁹ Thus, for example, while the normal rule appears to be that an author who sells or licenses his work has no inherent right to be credited as author, absent a specific provision in the contract,²⁰⁰ court created exceptions do exist,²⁰¹ and often the courts determine intent

196. *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 356 (S.D.N.Y. 1968).

197. See 1 Callmann § 3.3, at 54-56.

198. *Granz v. Harris*, 198 F.2d 585, 588 (2d Cir. 1952); *Vargas v. Esquire, Inc.*, 164 F.2d 522, 525 (7th Cir. 1947); *Lake v. Universal Pictures Co.*, 95 F. Supp. 768 (S.D. Cal. 1950); *Harris v. Twentieth Century Fox Film Corp.*, 43 F. Supp. 119 (S.D.N.Y. 1942), *rev'd in part* on other grounds, 139 F.2d 571 (2d Cir. 1943); *Packard v. Fox Film Corp.*, 207 App. Div. 311, 313, 202 N.Y.S. 164, 165 (1st Dep't 1923); *Jones v. American Law Book Co.*, 125 App. Div. 519, 521, 109 N.Y.S. 706, 710 (1st Dep't 1908); *Preminger v. Columbia Pictures Corp.*, 49 Misc. 2d 363, 367, 267 N.Y.S.2d 594, 599 (Sup. Ct.), *aff'd mem.*, 25 App. Div. 2d 830, 269 N.Y.S.2d 913 (1st Dep't), *aff'd mem.*, 18 N.Y.2d 659, 219 N.E.2d 431, 273 N.Y.S.2d 80 (1966); *Royle v. Dillingham*, 53 Misc. 383, 385, 104 N.Y.S. 783, 784 (Sup. Ct. 1907).

199. *Curwood v. Affiliated Distributions, Inc.*, 283 F. 219, 222-23 (S.D.N.Y. 1922); *Fisher v. Star Co.*, 231 N.Y. 414, 432, 132 N.E. 133, 139, *cert. denied*, 257 U.S. 654 (1921); *De Bekker v. Frederick A. Stokes Co.*, 168 App. Div. 452, 455, 153 N.Y.S. 1066, 1068 (2d Dep't 1915), *modified per curiam*, 172 App. Div. 960, 157 N.Y.S. 576 (2d Dep't), *aff'd mem.*, 219 N.Y. 573, 114 N.E. 1064 (1916); *Chesler v. Avon Book Div.*, 76 Misc. 2d 1048, 1051, 352 N.Y.S.2d 552, 555-56 (Sup. Ct. 1973); see *Preminger v. Columbia Pictures Corp.*, 25 App. Div. 2d 830, 834, 269 N.Y.S.2d 913, 918 (1st Dep't) (Rabin, J., *dissenting*), *aff'd mem.*, 18 N.Y.2d 659, 219 N.E.2d 431, 273 N.Y.S.2d 80 (1966).

200. *Vargas v. Esquire, Inc.*, 164 F.2d 522 (7th Cir. 1947); *Mallory v. Mackaye*, 86 F. 122 (C.C.S.D.N.Y. 1898), *modified*, 92 F. 749 (2d Cir. 1899); *Morton v. Raphael*, 334 Ill. App. 399, 79 N.E.2d 522 (1948); *De Bekker v. Frederick A. Stokes Co.*, 168 App. Div. 452, 455, 153 N.Y.S. 1066, 1068 (2d Dep't 1915), *modified per curiam*, 172 App. Div. 960, 157 N.Y.S. 576 (2d Dep't), *aff'd mem.*, 219 N.Y. 573, 114 N.E. 1064 (1916). An author may expressly agree in the contract that his name will not be used. *Swift v. Collegian Press, Inc.*, 131 F.2d 900 (2d Cir. 1942); *Harris v. Twentieth Century Fox Film Corp.*, 43 F. Supp. 119 (S.D.N.Y. 1942), *rev'd in part* on other grounds, 139 F.2d 571 (2d Cir. 1943).

Under the proposed copyright statute, a writer commissioned to contribute to a collective work, e.g., part of a motion picture, may be considered the author unless the parties "expressly agree in a written instrument signed by them that the work shall be considered a work made for hire," in which case the employer shall be considered author. S. 1361 § 101; see *id.* § 201(b). This section deals with who may be credited as author, rather than whether the author must be credited for the writing.

201. E.g., *Curwood v. Affiliated Distributions, Inc.*, 283 F. 219, 223 (S.D.N.Y. 1922) (evidence indicated that author did not consent to "sell his birthright [his name on the book] for a proverbial mess of pottage"); *De Bekker v. Frederick A. Stokes Co.*, 168 App. Div. 452, 153 N.Y.S. 1066 (2d Dep't 1915), *modified per curiam*, 172 App. Div. 960, 157 N.Y.S. 576 (2d

according to their standard of justice. Such determinations have occasionally achieved results that are quite harsh for the author, however. Where plaintiff signed a contract with a magazine whereby the latter obtained all rights²⁰² in the plaintiff's paintings, the court determined that the author lost all rights, claims and interest in the subject matter of the contract.²⁰³ The decision demonstrates the consequences of the failure to distinguish between an author's or artist's property rights and his personal rights in the work.²⁰⁴ The fact that an author has agreed to dispose of his property rights of itself should carry with it no implication that he has also agreed to surrender his personal rights.²⁰⁵

In situations where the work which was the subject matter of a contract has been altered, mutilated, or distorted, whether in its use in the same Dep't), aff'd mem., 219 N.Y. 573, 114 N.E. 1064 (1916); *Clemens v. Press Publishing Co.*, 67 Misc. 183, 122 N.Y.S. 206 (App. T. 1910).

One area in which the traditional rule that the author need not be credited continues to be applied is in encyclopedic works. E.g., *De Bekker v. Frederick A. Stokes Co.*, supra at 456, 153 N.Y.S. at 1069 (Jenks, J., concurring); *Jones v. American Law Book Co.*, 125 App. Div. 519, 521, 109 N.Y.S. 706, 709-10 (1st Dep't 1908).

202. One court stated its understanding of what occurs when the contract transfers "all rights:" the purchasing party obtained " 'dramatic, movie, television, skywriting on Mars, anything you want to say . . . everything.' " *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 341 (S.D.N.Y. 1968).

203. *Vargas v. Esquire, Inc.*, 164 F.2d 522, 525 (7th Cir. 1947).

204. Upon publication authors have no exclusive property in their published works except when they have secured and protected that right in compliance with United States copyright law. See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834).

The precise concepts used should be carefully noted: what is being spoken of is the author's (i) property in (ii) his work. Regarding (i), for example, the Wheaton Court frequently spoke of copyright in terms of "property in his manuscript," "exclusive property in the future publication of the work," and "perpetual property." *Wheaton v. Peters*, supra at 657. It is submitted that the established doctrine that the only rights which the author has in his published work must rest on a statutory basis does not automatically limit or exclude whatever personal rights the author might have in the work, as explained in notes 92 to 136 supra and accompanying text.

Regarding (ii), even after sale of a copyrighted work the purchaser obtains no copyright on the characters in the work. *Warner Bros. Pictures, Inc. v. CBS, Inc.*, 102 F. Supp. 141 (S.D. Cal. 1951), modified, 216 F.2d 945, 950 (9th Cir. 1954), cert. denied, 348 U.S. 971 (1955) (sale of original "Sam Spade" story did not deprive author of right to develop and sell other "Sam Spade" stories). If such a right continues in the author despite the sale of his property, why can not the personal rights embodied in the moral right also continue?

205. Strauss in Study No. 4 at 130-31, argues that Vargas was an aberration, and represented the exception to the rule that American courts provide adequate protection to authors through use of common law theories analogous to the moral right theory. It is submitted, however, that Vargas is a logical, though unfortunate, result of the patchwork system of protection provided by United States courts. If, as is frequently stated, an author or artist who sells his work normally intends that his name appear on the work so that he will "enjoy whatever reputation the learning or brilliancy of the work might give him, although he retained no right of future publication," *Jones v. American Law Book Co.*, 125 App. Div. 519, 521, 109 N.Y.S. 706, 710 (1st Dep't 1908), then it is submitted that this right should be expressly recognized, rather than be determined solely under the law of contract or under one of the tort theories previously discussed.

medium²⁰⁶ or in its adaptation to a different medium, the courts also try to protect the author according to their sense of justice, though they claim to rely on contract²⁰⁷ or, alternatively, on the "custom prevailing in the trade or industry."²⁰⁸ Of course, where defendant's treatment of the author's work is a clear violation of the contract, the contract alone will provide the required protection.²⁰⁹ However, regarding use of the work in different media, the general rule has been stated in this manner:

It is obvious that a spoken play cannot be literally reproduced on the screen. . . . Therefore an alteration, elimination, or addition, which is faithfully consistent with the plan and sequence of the play, cannot be held to be an alteration, elimination, or addition prohibited under [the contract] without the consent of the author.²¹⁰

Ironically, questions regarding the adaptations of works to different media represent one area in which decisions in the United States appear most like decisions in moral right countries such as France, since the moral right doctrine accepts the reality that use of intellectual works in different media requires an allowance for some alteration and adaptation.²¹¹

It is submitted that such spotty protections as are afforded under the common law and statutory theories discussed above could suitably and properly be supplanted by a uniform federal policy which would be incorporated in the proposed copyright statute. Such an express recognition of what had previously been a collection of common law theories would not be unprecedented; on the contrary, examples abound of both statutory and judicial acceptance of special theories of law which had evolved from more generic areas; for example, unfair competition,²¹² strict liability,²¹³ products liability,²¹⁴ etc. The current copyright statute itself contains an example of such evolution: until 1971 phonorecords were not protected under the statute and could not be copyrighted; when the need for such protection became acute, phonorecords were incorporated into the statute, temporarily at first, and then permanently.²¹⁵

206. *Chesler v. Avon Book Div.*, 76 Misc. 2d 1048, 352 N.Y.S.2d 552 (Sup. Ct. 1973).

207. *Id.*, 352 N.Y.S.2d at 552; *Preminger v. Columbia Pictures Corp.*, 49 Misc. 2d 363, 367, 267 N.Y.S.2d 594, 599 (Sup. Ct.), *aff'd mem.*, 25 App. Div. 2d 830, 269 N.Y.S.2d 913 (1st Dep't), *aff'd mem.*, 18 N.Y.2d 659, 219 N.E.2d 431, 273 N.Y.S.2d 80 (1966); see *Royle v. Dillingham*, 53 Misc. 383, 385, 104 N.Y.S. 783, 784 (Sup. Ct. 1907).

208. *Preminger v. Columbia Pictures Corp.*, 49 Misc. 2d 363, 366, 267 N.Y.S.2d 594, 598 (Sup. Ct.), *aff'd mem.*, 25 App. Div. 2d 830, 269 N.Y.S.2d 913 (1st Dep't), *aff'd mem.*, 18 N.Y.2d 659, 219 N.E.2d 431, 273 N.Y.S.2d 80 (1966).

209. *Packard v. Fox Film Corp.*, 207 App. Div. 311, 202 N.Y.S. 164 (1st Dep't 1923) (use of author's title on a work not written by the author, and use of the author's work under different title, both in clear violation of the contract).

210. *Manners v. Famous Players-Lasky Corp.*, 262 F. 811, 813 (S.D.N.Y. 1919) (the alteration in issue was held substantial and so was prohibited under contract).

211. See Study No. 4 at 118-19.

212. See H. Nims, *Unfair Competition and Trade Marks* § 1, at 1 (4th ed. 1947); *id.* § 2.

213. See W. Prosser, *Torts* § 75, at 492-94 (4th ed. 1971).

214. See *id.* § 95, at 641-43.

215. See note 5 *supra*.

VI. CONCLUSION—AND A PROPOSAL

One purpose of this Comment has been to indicate that no historical reason exists why the doctrine of the moral right could not be incorporated by a similar method as that used for phonorecords.

Specifically, the proposed statute could be amended to include a definition of the term "the personal rights of the author,"²¹⁶ which definition would provide the setting for a broadened statement on the exclusive rights in copyrighted works.²¹⁷ These rights would then consist of both personal and economic rights; while the economic rights would be subject to the limitations in the proposed statute, the personal rights would generally control over any of the permitted uses by non-copyright owners listed in such limiting provisions.²¹⁸ The personal rights, namely, the paternity right and the right to the integrity of the work, would remain in the author even after sale of any or all of his economic interests.²¹⁹ The pre-emption provision in the proposed statute would be extended to include those personal rights of the author protected under statute,²²⁰ and the duration of copyright provision would be

216. The italicized portions in the following footnotes represent suggested changes to S. 1361. E.g.,

§ 101. Definitions.

"Personal Rights of the Author" includes those rights set forth in this title which are essentially personal in nature and which remain in the author even after sale or other transfer of ownership, in whole or in part, of the copyright.

217. § 106. Exclusive Rights in Copyrighted Works.

(a) *The author of a work under this title shall, by the mere fact of its creation, enjoy an exclusive incorporeal property right in the work, effective against all persons. This right includes attributes of a personal nature as well as attributes of an economic nature, as determined by this title.*

(b) *Subject to subsection (a) of this section and sections 107 through 117, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:*

. . . .
(c) *To the extent applicable sections 107 through 117 shall be subject to the personal rights of the author.*

218. See note 217 supra.

219. § 201. Ownership of Copyright.

(d) *Transfer of Ownership.—Subject to clause (3) of this subsection*

(1)

(2)

(3) *Independently of the author's copyright, and even after transfer of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation, or other alteration thereof which would be prejudicial to the author's honor or reputation.*

220. § 301. Pre-emption with respect to other laws.

(a) *On and after the effective date of this title, all rights under this title in the nature of copyright in works that come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, and in the nature of the personal rights of the author, are governed exclusively by this title. Thereafter, no person is entitled to copyright, literary property rights, or personal rights in intellectual property, or any equivalent legal or equitable right in any such work under the common law or statutes of any State.*

expanded to include a term of protection for the author's personal rights identical to that provided for the protection of his economic interests.²²¹ Adoption of such proposals would tend to bring about a more consistent foundation under Federal laws for *all* of the author's interests in his work.

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221. § 302. Duration of copyright:

(a) In General.—*Both* copyright in a work created on or after *the effective date of this title* and *the personal rights of the author* subsist from the creation of the work and, except as provided by the following subsections, *endure* for a term consisting of the life of the author and fifty years after his death.

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