NOTES

CAN THE AUSTRALIAN MODEL BE APPLIED TO U.S. MORAL RIGHTS LEGISLATION?

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I. INTRODUCTION

Authors'[1] rights, which are the core of copyright, are protected on either a fundamentally moral or economic basis; the emphasis in the protection of these rights depends upon a society's value and perception of creative works.[2] In common law Anglo-American countries, these rights have developed since the eighteenth century[3] in line with principles of traditional property, wherein creative works are treated as tangible objects of ownership whose value is based on their social utility and dictated by the marketplace.[4]

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1 As used in this Note, the terms "author," "creator," and "artist" refer, interchangeably, to creators of literary, dramatic, musical, artistic, and film works—the authors covered by Article 6bis of the 1928 Rome Convention of the Berne Convention. Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221. [hereinafter Berne Convention].

2 As used herein, "work," refers to works as defined by Berne:

> The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

Id. art. 2(1).

3 *See* Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), *available at* http://www.yale.edu/lawweb/avalon/eurodocs/anne_1710.htm ("An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies . . . . [F]or the encouragement of learned men to compose and write useful books . . . .").

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

This utilitarian, public interest approach appears to sharply contrast the artists' interest approach of civil law nations of continental Europe, where creative works are viewed as "inseverable" extensions of their authors' personalities and which, thus, must be regarded in terms of certain moral rights and human dignity.[5] Common law countries, including the United States, however, have gradually incorporated a certain amount of moral rights protection into their copyright systems,[6] and some, most notably Australia, have significantly and expressly expanded the protection of moral rights.[7] Regardless of whether the current level of U.S. protection of authors' moral rights complies with governing international standards, more explicit statutory protection of these rights would not necessarily supplant the United States' public interest basis for protecting creative works.[8]

Following its accession to the Berne Convention ("Berne Convention" or "Berne") in 1988, the United States enacted the Visual Artists' Recording Act (VARA) in 1990, which grants a moral rights cause of action to *visual* artists, aiming to protect these artists' personal interests while promoting the public interest in creative works.[9] The federal codification of moral rights as to all *authors* would ensure U.S. compliance with Berne, and, in a world where most nations expressly protect authors' moral rights, such codification would promote continued efficient and effective global trade.

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[5] *Id.* at 6; Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601, 602 (2001). *See also* MAREE SAINSBURY, MORAL RIGHTS AND THEIR APPLICATION IN AUSTRALIA 12–14 (2003) (citing the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR], which describes the nature of moral rights as fundamental human rights, wherein "everyone" has the right to freely participate in the community culture, and the protection of "moral and material interests" stemming from one's production as author).

[6] *See, e.g.,* Melville Nimmer & Monroe E. Price, *Moral Rights and Beyond: Considerations for the College Art Association*, *in* 3V OCCASIONAL PAPERS IN INTELLECTUAL PROPERTY FROM BENJAMIN N. CARDOZO SCHOOL OF LAW 9, 9–11 (1999); Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229 (1995); Gunlicks, *supra* note 5, at 618; Netanel, *supra* note 4, at 23–26. R

[7] Jane Ginsburg, *The Right to Claim Authorship*, 41 HOUS. L. REV. 263, 294 (2004) [hereinafter Ginsburg, *Authorship*] (Australia's law, as compared to the laws of the United Kingdom, New Zealand, and Canada, "appears to be both the most highly elaborated and the most balanced in its approach to the interest of creators and exploiters.").

[8] Gunlicks, *supra* note 5, at 605. R

[9] Netanel, *supra* note 4, at 45. *See* discussion *infra* Part VIII.C. R

Berne and the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS") are the foundation of the international convergence of copyright laws.[10] Berne's moral rights provision, however, is considered "minimalist," as it only recognizes two specific moral rights, the right of attribution and the right of integrity,[11] and was adopted as a compromise which did not require express moral rights provisions to be included in national copyright laws.[12] In 1988, sixty years after Berne adopted its moral rights provision, the United States finally acceded to Berne.[13] Like most other common law nations, the United States had various laws and established causes of action outside the Copyright Act which at least indirectly protected artists' moral rights to attribution of authorship and integrity.[14] Thus, the United States determined that, in order for it to guarantee authors the degree of protection Berne required, further statutory recognition of moral rights was unnecessary.[15] Shortly after its accession to Berne and prior to TRIPS negotiations, the United States, apparently in an effort to bring itself into compliance with Berne, enacted VARA, but it has not shown any intent of exploring further statutory protection for authors' moral rights.[16]

This note will discuss the United States' current international obligations to protect authors' moral rights, and it will trace recent developments in the United States' treatment of moral rights as these indicate, perhaps, a shift in U.S. attitude, or, at least, the

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10 SAINSBURY, *supra* note 5, at 31; Adolf Dietz, *ALAI Congress: Antwerp 1993, the Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 200 (1995). R

11 Dietz, *supra* note 10, at 200. R

12 Dworkin, *supra* note 6, at 232 (citing Sam Ricketson, *Moral Rights and the Droit de Suite: International Conditions and Australian Obligations*, 1 ENT. L. REV. 78, 79 (1990)). R

13 The United States joined Berne to gain credibility in the global marketplace, in international trade negotiations, especially with nations where piracy is not uncommon, and in the development of international trade policy, to assure a high level of protection for U.S. copyright holders. *See* S. REP. NO. 100-352 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3707–11.

14 S. REP. NO. 100-352, *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3707–11.

15 *See, e.g.,* Dworkin, *supra* note 6, at 232–36; Gunlicks, *supra* note 5. *See also* Berne Convention Implementation Act of 1988, Pub. L. No. 100–568, §§ 2(2)–2(3), 3(b), (102 Stat. 2853) 2853 (1988); S. REP. NO. 100-352, *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3714–15. R

16 Edward J. Damich, *Moral Rights Protection and Resale Royalties for Visual Art in the United States: Development and Current Status*, 12 CARDOZO ARTS & ENT. L.J. 387, 388–89 (1994) [hereinafter Damich, *Moral Rights Protection*]. *See also*, *e.g.*, Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 404–11 (2006).

weakening of U.S. resistance to the recognition of moral rights. In the current international environment, where recognition of moral rights is the norm,[17] the United States must codify its currently scattered, analogue protection of moral rights, in order to continue to participate in global trade. Part II distinguishes authors' moral and economic rights. Part III discusses the evolution of authors' rights in common law nations. Part IV explores the relationship between moral rights and the common law tradition. Part V examines the current international level of moral rights recognition, vis-à-vis the prevailing international agreements, Berne and TRIPS, and Part VI discusses the state of moral rights protection in the United States, in light of its international obligations. Part VII looks at the reasons the United States is suspicious of implementing stronger moral rights protection, and Part VIII highlights various analogue protections of moral rights in the United States and Australia. Part IX describes why these measures are not sufficient and moves toward the proposal, via analysis of recent moral rights legislation in Australia (Part X), that similar legislation in the United States could reconcile U.S. concerns about stronger moral rights protection with its international obligations to protect moral rights. On a practical level, this sort of protection of authors' rights would give American artists an avenue to show violation of their rights, without necessarily disrupting our balance of public and private interests.[18] It is not clear, however, whether such protection for artists would comport with the traditionally American cultural and economic concepts of an "author" and his relationship to his work.[19]

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[17] Moral rights recognition in international copyright law is widespread and global; the global status of moral rights is evidenced by two key international documents. The U.D.H.R. carries considerable international authority as forty-eight United Nations Member States voted in its favor in 1948, none voted against it, and eight abstained. SAINSBURY, *supra* note 5, at 12–13. The Berne Convention, the internationally recognized source of international copyright law, also recognizes moral rights. Berne, *supra* note 1, art. 6bis. *See* discussion *infra* Part V. R R

[18] *See* SAINSBURY, *supra* note 5, at 16. R

[19] *See* Lawrence Adam Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights,* 82 NW. U. L. REV. 1011, 1021–22, 1025–28 (1988) (suggesting that the limited monopoly granted to protect the economic interests of U.S. authors only provides economic incentives for innovation, which facilitates cultural development and serves a greater public interest, rather than acknowledging an inherent link between authors and their works); Thomas J. Davis, Jr., *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 HOFSTRA L. REV. 317, 361–62 (1989) (suggesting that, since the framing of the Constitution, art in the United States has been

II. Distinguishing Moral and Economic Rights

Authors' rights, as they emerged in civil law nations following the French Revolution, include a moral component, which recognizes authors' property rights in their artistic, musical, or literary creations.[20] Based on moral rights theory, these sorts of creations, unlike more utilitarian forms of property, are representative of their creators' unique personalities and thus are deserving of special protection.[21] In this context, authors' rights may be considered human rights, and the moral rights component of authors' rights allows an author to prevent mutilation of his work and claim authorship in his work, where reasonable.[22] It also protects an author's distinct personal interests in his work, which are separate from his copyright interests.[23] As with human rights, moral rights are of the economic and social variety; as such, they ensure that individuals can fully enjoy their civil and political human rights.[24] The Universal Declaration on Human Rights ("UDHR"), a strong

property— the exploitability of which has driven our cultural development—and that greater rights to artists could supplant competition in favor of artists, but not art).

[20] Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis 49 (1998).

[21] *Id.*; Sainsbury, *supra* note 5, at 14. *See* Parliament of Australia, Parliamentary Library, 1996–97 Bills Digest 160: Copyright Amendment Bill 1997, *available at* http://www.aph.gov.au/library/pubs/bd/1996-97/97bd160.htm [hereinafter Bills Digest 160]. In the Proceedings of the 101st U.S. Congress surrounding the passage of the Copyright Amendments Act of 1990, whose Title III incorporated VARA, Representative Markey distinguished the nature of useful and creative works and stated that such distinction justified additional protection of the latter. 136 Cong. Rec. H8266-02, H8271 (1990) (statement of Rep. Markey). R

> There is an unfortunate problem, however, in that too often a work is treated simply as a physical piece of property, rather than as an intellectual work, like a novel. But artworks are intellectual expression, not just physical property. . . . A work of art is not a utilitarian object like a toaster. It is an intellectual work like a song, a novel or a poem. We must not permit the connection between the artist and his or her work to be severed the first time the work is sold.

Id.

[22] Gervais, *supra* note 20, at 49. *See also* Sainsbury, *supra* note 5, at 12–13. R

[23] Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. Legal Stud. 95, 95. *See also* Gervais, *supra* note 20, at 49; Copyright Amendment (Moral Rights) Bill, 1999 (Austl.) (Revised Explanatory Memorandum at 1); Copyright Law Review Committee, Report on Moral Rights, pt. III, paras. 59–60 (Jan. 1988) [hereinafter CLRC 1988 Report] (citing A. Stromholm, *Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint*, 14 Int'l Rev. of Indus. Prop. & Copyright L. 1, 14 (1983) (Stromholm suggests that one basis for moral rights is linked to respect for the inviolability of individuals and respect for intellectual creativity.)). R

[24] Sainsbury, *supra* note 5, at 12–13. R

international moral, albeit not legally binding, authority[25] which aims to outline a "standard of Achievement for all peoples and nations . . . to promote respect for these rights . . . and to secure their universal and effective recognition"[26] establishes moral rights as fundamental human rights.[27] By stating that authors are entitled to the recognition of moral, as well as material, interests in their works, the UDHR recognizes both the economic and moral components of creative works and brings them under the umbrella of fundamental human rights.[28]

The economic, or material, component of authors' rights, on the other hand, is limited to the author's pecuniary interests in the work and enables him to allow others to use his work; protection of this is available to authors in civil as well as common law countries.[29] In common law countries, copyright emerged as essentially an economic concept, as an equitable protection of authors' and publishers' interests, recognizing the value of authorship in statutorily protected works.[30] Thus, a copyright system which focuses on economic rights would consider a mutilation of a creative work only in terms of how much such alteration would reduce the monetary value of the work of art, rather than how it might reduce the artist's reputation.[31]

As moral rights are so closely connected to one's personality, countries that recognize moral rights usually make them inalienable;[32] they remain with the author, allowing him to retain some control over the work, even when pecuniary rights are transferred.[33] An author, though he holds moral rights in a work, does not necessarily own the copyright in that work.[34] In this way, and

25 *See generally supra* note 15. R

26 SAINSBURY, *supra* note 5, at 13 n.65 (quoting UDHR, *supra* note 5). R

27 GERVAIS, *supra* note 20, at 49; SAINSBURY, *supra* note 5, at 13. R

28 "'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'" SAINSBURY, *supra* note 5, at 13 (quoting UDHR., *supra* note 5). R

29 PAUL GOLDSTEIN, INTERNATIONAL INTELLECTUAL PROPERTY LAW 275 (2001) [hereinafter GOLDSTEIN, INTELLECTUAL PROPERTY LAW]. BILLS DIGEST 160, *supra* note 21 ("An interchangeable term in copyright discussions for economic rights is material rights."); GERVAIS, *supra* note 20, at 49. R R

30 GERVAIS, *supra* note 20, at 49. R

31 BILLS DIGEST 160, *supra* note 21. R

32 Hansmann & Santilli, *supra* note 23, at 96. R

33 SAINSBURY, *supra* note 5, at 24; Netanel, *supra* note 4, at 24–25. R

34 *See* AUSTRALIAN COPYRIGHT COUNCIL, INFORMATION SHEET, MORAL RIGHTS, G043 (June 2006), *available at* http://www.copyright.org.au/G043.pdf [hereinafter ACC INFOSHEET G043].

under a theory of absolute property ownership, the concept of moral rights would seem to conflict with the rights of owners and users of property which is protected by moral rights.[35] It is possible for an author's moral rights to continue to exist, however, even alongside the legitimate economic interests of owners and users of the creative property.[36]

For example, even as notions of essential natural rights to absolute, comprehensive control over one's property swept France at the end of the nineteenth century, moral rights emerged alongside such extreme theories of property.[37] Now, modern conceptions of property ownership, as a set of negative rights which prevent others from using property in specific ways, widely recognize the rights to own and enjoy one's property.[38] Modern property theory, however, as indicated by laws governing, e.g., nuisance, negligence, and trespass, acknowledges that these rights are subject to limitations which ensure that one's enjoyment of his property does not cause harm to others.[39] Likewise, moral rights, which ensure that copyright owners' use of creative property does not violate the integrity and reputation of a work's author, can coexist with modern property rights and economic property interests.[40]

III. The Evolution of Copyright & Protection of Authors' Rights in Common Law Countries

The principles underlying both civil and common law copyright regimes were aimed at promoting public interest and were grounded in the Lockean natural rights theory that a property right automatically arises out of one's labors.[41] By the end of the nine-

35 SAINSBURY, *supra* note 5, at 24–26. R
36 *Id.*; Dworkin, *supra* note 6, at 263. R
37 SAINSBURY, *supra* note 5, at 25–26. R
38 *Id.* at 26–27.
39 *Id.* at 26.
40 *Id.* at 26–27.
41 Locke's natural rights theory of property awards one's mental and/or physical labor in producing an object simply because the creator exerted the effort to create the object. Natural rights theory conceptualizes products of the mind as, necessarily, subjects with a perpetual property right in their creator, independent of statutory grants. These natural rights exist only by virtue of an author's efforts. The artistic works—the original expressions of an author's ideas—are products of his mental labor; therefore, the author has the right to hold these objects as his property. Since these creative works are property, they must be alienable, as are other forms of property. In an Anglo-American, utilitarian system of copyright, however, the declining emphasis on natural rights theory is related to the point, in the transfer of a creative work, at which an author's natural rights are realized,

teenth century, however, jurists in the civil law nations on the European continent became disillusioned with the characterization of literary and artistic property as analogous to any other form of property, and many of them rejected the tempering of the authors' rights by the public interest.[42] As the distinction between inalienable personality and alienable property affected their theories, copyright, as a property right, emerged in these countries as an extension of personality right; as such, it encompasses both economic/alienable and personal/inalienable components.[43] Thus, under the civil law approach of continental Europe, authors and their personal or moral rights are never separated, even if economic rights have been transferred.[44]

In Anglo-American doctrine, on the other hand, Locke's theory ultimately has had limited impact on copyright law, which developed around the utilitarian purposes of the public welfare and the creation of balanced incentives to venture into new markets.[45]

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and how the realization of these rights is balanced against public interest. *See* Netanel, *supra* note 4, at 814. **R**

42 *Id.* at 14–16.

43 In the late nineteenth century, this distinction, which is based on authors' personal connection to their works, developed in Continental legal discourse from the writings of, among other legal scholars, Kant, Kohler, and Hegel. Kant, reflecting the notion which emerged from the Romantic Movement of an author as not a mere artisan, but as superior within society and as one who wrote only for himself, characterized a creative work as an extension of an author's inner self, not as a separate, external object. Thus, an author's right in his work is inherent in his personhood; he can only grant others the right to use his work. Under Kant's theory, the title to the work itself and the corresponding rights cannot be transferred. SAINSBURY, *supra* note 5, at 4–5; Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 26–27 (1988) [hereinafter Damich, *Right of Personality*]; Netanel, *supra* note 4, at 16–19. Kohler and Hegel, on the other hand, recognized that works of art were external formulations of expression that transformed inalienable mental ability into alienable property. In effect, this "dualist" theory of authors' rights viewed an author's economic interests as parallel to, but legally and conceptually separate from, the author's personal interests (e.g., in having his work attributed to him and in controlling how it is publicly presented). The aspects of the work that related to the work as an expression of the author's personality were perceived as superior to the property/economic aspects of the work. *See* Damich, *Right of Personality* supra note 43, at 27–8; Netanel, *supra* note 4, at 19–22. The combination of these theories profoundly shaped the Continental copyright law definition of the inalienable and alienable elements of creative works. Netanel, *supra* note 4, at 16–17, 20. **R** **R** **R** **R**

44 Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 6 (1988).

45 PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 141 (2003).

> United States copyright law has been molded principally by classical utilitarianism and, to a lesser extent, by Lockean natural right theory. . . . Recent Su-

Since the first copyright statute, the Statute of Anne, the common law Anglo-American tradition has emphasized the public welfare purpose of the copyright.[46] Indeed, the public welfare interest is clearly articulated in the Copyright Clause of the U.S. Constitution.[47] Moreover, in an 1834 decision, the United States Supreme Court expressly severed natural law, or any independent strain of natural law based in copyright, from copyright and recognized that copyright exists only insofar as federal statutory law provides.[48] Underscoring the scope of copyright protection in common law nations, statutes, since the Statute of Anne, have wholly replaced common law copyright and its supporting natural property right principles.[49] U.S. copyright owners' only rights, from the point at

> preme Court opinions have reiterated that rewarding the author is a secondary consideration of copyright law and that the author has no natural right to such a reward.

Netanel, *supra* note 4, at 8–10. **R**

46 *See* Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), *available at* www.yale.edu/lawweb/avalon/eurodocs/anne_1710.htm.

47 U.S. CONST. art. I, § 8, cl. 8 ("[*t*]*o promote the Progress of Science and useful Arts*, by securing for limited times to authors and inventors the exclusive right to their respective Writings and discoveries") (emphasis added). *See also* Jane Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 992, 999–1000 (1990) [hereinafter, Ginsburg, *Literary Property*].

48 Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657 (1834) (holding that an author's natural rights to the product of his work were realized at the time of the transfer/sale and publication of his work, at which point any natural rights were assigned or extinguished; thus, the author's natural rights in his work were limited to the scope of the federal copyright statute. *See also* Netanel, *supra* note 4, at 13; Benjamin Davidson, Note, *Lost in Translation: Distinguishing Between French and Anglo American Natural Rights in Literary Property, and How* Dastar *Proves that the Difference Still Matters*, 38 CORNELL INT'L L.J. 583, 600, 610 (2005). **R**

49 Burger, *supra* note 44, at 5–6; Davidson, *supra* note 48, at 596. The notion that an author's rights in his creative work are limited by statute is further emphasized, in the United States, by 17 U.S.C. § 301, which expressly restricts the protection of all "fixed" (thus, published as well as unpublished) works to the "equivalent" statutory rights. Section 301 states: **R**

> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and 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, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301 (2000). *See* Damich, *Right of Personality*, supra note 43, at 49–50. *See also* 17 U.S.C. § 102(a) (2000) (In order to be protected, a work must be "fixed in any tangible medium of expression."). **R**

which a work is "fixed," are statutory.[50] Furthermore, the Statute of Anne, in clearly distinguishing authors' rights from those of proprietors or publishers (to whom an author's rights are *completely* transferable), laid the groundwork for the persistent Anglo-American copyright distinction between authors and copyright owners.[51] Thus, compared to a natural rights based system of copyright, which places authors at the center, the Anglo-American system focuses on the owner of the copyright and his statutory rights.[52]

IV. Common Law Conflicts with Moral Rights

Under the utilitarian, common law notion of creative works as commodities that advance public welfare, the Anglo-American tradition of copyright values the alienability of authors' rights.[53] The alienability of these rights affects the flow of creative works in the marketplace, and as the balance of interests in the United States tipped toward the public interest, and away from artists' moral interests, a conflict between copyright holders' proprietary interests and authors' personal rights emerged.[54] Consequently, the United States became wary of moral rights as a form of "continuing author sovereignty"[55] over their works, which authors could assert on a whim, tipping the balance in the production of creative works from

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50 *See* 17 U.S.C. § 102 (2000).

51 Burger, *supra* note 44, at 6. *See* Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). In the United States, for example, copyright is completely statutory, and statutes explicitly provide for the protection of copyright "owners," not "authors." *See* 17 U.S.C. §§ 106–106A (2000) (exclusive rights are granted to the "owner of copyright" and rights to attribution and integrity only to "certain authors."). **R**

52 Burger, *supra* note 44, at 7. **R**

53 Netanel, *supra* note 4, at 8–11. **R**

54 Undoubtedly, contributing to the limited moral rights protection under U.S. law (and perhaps to the view that American protections of authors' non-economic rights are sufficient) is the view by some that moral rights are simply not desirable in the American legal system. Professor Robert Gorman declares:

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

Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 Wash. & Lee L. Rev. 795, 805, 811–14 (2001) (quoting Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 Nova L. Rev. 421, 422 (1990)). *See* Gunlicks, *supra* note 5, at 604–05. **R**

55 Netanel, *supra* note 4, at 7. **R**

social to artists' welfare.[56] Arguably, however, the public, as well as the artist, has an interest in seeing artists' moral rights protected. The public has an interest in seeing the work in its authentic form, in accordance with the artists' intent.[57] Regardless, the United States fears that moral rights protection would turn creative works into liabilities by giving authors a means to unreasonably burden free trade and restrict the free market flow of socially beneficial material. This perspective has affected American compliance with its obligations under Berne.[58]

V. The Current State of International Moral Rights Recognition Under Berne and TRIPS

Berne, originally drafted in 1886, is now considered the "premier multilateral copyright agreement."[59] Though its approach to moral rights protection is "minimalist,"[60] it affords authors greater protection than any other international copyright convention.[61] Indeed, Berne's Article 6bis provision on moral rights, adopted in 1928, which protects the moral rights to attribution and integrity, is the most internationally recognized expression of authors' moral interests in creative works.[62] Further, because Berne members are

56 *Id.*; Julie Levy, Note, *Creative Works as Negotiable Instruments: A Compromise Between Moral Rights Protection and the Need for Transferability in the United States*, 5 Vand. J. Ent. L. & Prac. 27, 29 (2003).

57 Nimmer & Price, *supra* note 6, at 11. *See supra* note 54; *See also infra* note 79 and accompanying text. **R**

58 *Id.*

59 Davidson, *supra* note 48, at 587. *See also*, *e.g.,* S. Rep. No. 100-352 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3707; 132 Cong. Rec. H3079-02 (1988) (statement of Rep. Kastemeier). **R**

60 Sainsbury, *supra* note 5, at 18 (Berne Article 6bis represents a compromise between civil law and common law nations whose concepts of moral rights were diverse.). **R**

61 "The Berne Convention . . . is the highest internationally recognized standard for the protection of works of authorship of all kinds." S. Rep. No. 100-352, *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3707. *See* Berne Convention, *supra* note 1, art. 1 ("The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works."); Dietz, *supra* note 10, at 200. *See also* Australian Government Department of Communications, Information Technology, and the Arts, Guide to the Copyright Amendment (Moral Rights) Act 2000—Fact Sheet [hereinafter DCITA Fact Sheet] (on file with author). **R** **R**

62 *See* Sainsbury, *supra* note 5, at 16–18 ("The enactment of the moral right signified the first time that the Berne Union recognized a personal element in copyright, an important element which already existed in laws of most continental European . . . countries."); Dietz, *supra* note 10, at 200. These rights, enacted at Rome in 1928, were strengthened at the Brussels Revision Conference in 1948 and at Stockholm in 1967. Burger, *supra* note 44, at 28, 32, 46. Further, according to Berne: **R** **R** **R**

obligated to grant national treatment to other members, each member nation must protect literary and artistic works originating in other member nations on the same substantive minimum terms it applies to the works of its own nationals.[63]

Under Berne, not every modification to an author's work is an actionable violation of the right of integrity; this right is only violated if a work is modified in a way that prejudices the author's honor or reputation.[64] Berne does not expressly restrict the transfer of moral rights, though it implies that these rights are transferable separately from economic rights.[65] Although they need not be perpetual, under Berne, moral rights must belong to the author for at least the duration of the copyright.[66] Parties to Berne must enforce the minimum moral rights to attribution and integrity, but Berne grants nations flexibility in creating legislation to safeguard these rights.[67] Many Berne nations prohibit waivers of moral rights, some nations allow the rights to be waived entirely or in part, and some nations do not address the waiver issue.[68] Waivers are not explicitly addressed by Berne.[69] Furthermore, Berne does not prohibit the work-made-for-hire doctrine, which in the United States acts as an automatic waiver of all an author's rights.[70] Fi-

> [I]ndependently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right [e.g., of attribution] to claim authorship of the work and [e.g., of integrity] to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation. The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights . . . .

Berne Convention, *supra* note 1, art 6bis. **R**

[63] S. REP. NO. 100-352, *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3707. *See* GOLDSTEIN, INTELLECTUAL PROPERTY LAW, *supra* note 29, at 20–21. **R**

[64] Berne Convention, *supra* note 1, art. 6bis(1); SAINSBURY, *supra* note 5, at 55–56; **R** Gunlicks, *supra* note 5, at 630–31. **R**

[65] Berne Convention, *supra* note 1, art. 6bis (The author retains his moral rights "independently . . . and even after the transfer of the [economic] rights."). GERVAIS, *supra* note 20, at 73; Gunlicks, *supra* note 5, at 652–53. **R** **R**

[66] Berne Convention, *supra* note 1, art. 6bis. GERVAIS, *supra* note 20, at 73; Burger, *supra* note 44, at 46. **R** **R**

[67] Berne Convention, *supra* note 1, art. 6bis(3) ("Means of redress for safeguarding the rights granted by this article shall be governed by the legislation of the country where protection is claimed."). **R**

[68] Gunlicks, *supra* note 5, at 651. **R**

[69] Berne Convention, *supra* note 1, art. 6bis; Dworkin, *supra* note 6, at 261; Gunlicks, *supra* note 5, at 652. **R** **R**

[70] 17 U.S.C. §§ 101, 201(b) (2000) ("work for hire" definition); Gunlicks, *supra* note 5, at 652. **R**

nally, Berne does not impinge upon member states' copyright priorities by prescribing that signatories, when interpreting their own laws, grant supremacy to authors' moral rights over their economic rights.[71]

The Uruguay Round of Multilateral Trade Negotiations, which launched in 1986, resulted in TRIPS, the sole means of enforcing the Berne Convention[72]. Prior to TRIPS, Berne's efficacy was limited due to the lack of any enforcement mechanism and effective international dispute resolution processes.[73] TRIPS establishes specific minimum standards pertaining to intellectual property rights and obligates all World Trade Organization ("WTO") member nations to provide a certain degree of protection of these rights, including procedures related to the administration of rights and a dispute resolution process, under their respective domestic laws.[74] The TRIPS Council, comprised of representatives of each WTO member nation, reviews TRIPS members' legislation and monitors their compliance with their TRIPS obligations.[75]

Article 9 of TRIPS subjects the Berne Convention to the WTO dispute settlement mechanism.[76] Except for Article 6bis and "rights derived from" 6bis, every element of Berne was incorporated into TRIPS Article 9 and thus became enforceable under the WTO.[77] Thus, WTO enforcement does not apply to any moral rights provided by Berne under Article 6bis. The United States pushed for this omission of moral rights from TRIPS, allegedly based initially on the lack of relation of moral rights to trade.[78] That proved to be a false distinction; eventually, the United States admitted its desire to prevent the possibility of the strengthening of

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71 Berne Convention, *supra* note 1, art. 6bis; Gunlicks, *supra* note 5, at 655–56. **R**

72 Gunlicks, *supra* note 5, at 655–56; Davidson, *supra* note 48, at 613. **R**

73 GOLDSTEIN, INTELLECTUAL PROPERTY LAW, *supra* note 29, at 111. Without these, and because many nations including the United States objected to specific Berne standards and thus refused to join the convention, Berne did not truly establish universal international minimum standards of intellectual property protection until TRIPS emerged. *See id.* at 96. **R**

74 *Id.* at 97.

75 *Id*. at 103–04.

76 GERVAIS, *supra* note 20, at 72. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9, Apr. 15, 1999, 33 I.L.M. 1197 [hereinafter TRIPS]. **R**

77 "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom." TRIPS, *supra* note 76, art. 9(1).

78 GERVAIS, *supra* note 20, at 72. **R**

moral rights.[79] As a result of the absence of Berne Article 6bis from TRIPS, Berne signatories, including the United States, are obligated to protect moral rights, but a claim for violation of these rights may not be enforced before a WTO dispute settlement panel.[80]

VI. The State of U.S. International Moral Rights Obligations

When the United States signed onto Berne in 1988, it did so through the Berne Convention Implementation Act ("BCIA"), which states that Berne's provisions are not self-executing, may not be enforced in an action pursuant to the provisions themselves, and "do not expand or reduce" the rights of authors in the United States.[81] Presently, the United States is the last common law copy-

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79 *Id.* The legislative history surrounding the United States' implementation of Berne clearly shows that the United States' concerns in joining Berne were related to moral rights and to the effect of these rights upon trade. The United States feared that incorporating moral rights into U.S. law might affect the "balance of rights between American authors and proprietors," and, when the Berne Convention Implementation Act ("BCIA") was introduced to the Senate, it was with the desire to "prevent disruptive moral rights concepts from creeping into U.S. law. . . . U.S. implementing legislation should be neutral on the issue of moral rights." 134 Cong. Rec. S14549-01 (1988) (statement of Sen. Hatch). *See* S. Rep. No. 100–352, *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3715.

80 TRIPS members shall not have "rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of the Convention or of the rights derived therefrom." Gervais, *supra* note 20, at 71. **R**

81 According to the BCIA,

> [t]he Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto . . . are not self-executing under the Constitution and laws of the United States. (2) The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law. (3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose. . . . The provisions of the Berne Convention, the adherence of the U.S. thereto, and satisfaction of the U.S. obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law—(1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.

Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, §§ 2–3, (102 Stat. 2853) 2853–54 (1988). Further, because Berne's provisions are not self-executing, these provisions are not directly enforceable in U.S. courts. The rights they provide exist only to the extent provided by U.S. law, which means that foreign authors cannot, in the United

right system without specific moral rights legislation.[82] With the minor exception of VARA, which applies to a very specific group of authors, neither the U.S. Copyright Act nor the common law recognizes authors' express rights of attribution or integrity.[83] While moral rights and the interests of the author are the foundation of civil nations' copyright law[84], common law nations, most notably Canada, the United Kingdom, and, most recently, Australia, have also incorporated specific statutory moral rights provisions into their copyright systems.[85] In all these TRIPS-member nations which have established statutory moral rights protections, authors' moral rights would be protected regardless of the exclusion of Berne Article 6bis from TRIPS Article 9. Because TRIPS is the sole means of enforcing Berne, however, the United States, without statutory moral rights (except VARA), can continue to avoid protecting moral rights and implementing legislation without risk of liability.[86] This does not change the fact that the United States is not in compliance with its Berne obligations to protect authors' moral rights in its domestic laws.[87] Moreover, the United States' refusal to adopt moral rights protection denies American

States, assert broader rights than U.S. authors can assert under U.S. law. 134 CONG. REC. S14549-01 (1988) (statement of Sen. Deconcini).

[82] Gunlicks, *supra* note 5, at 667. **R**

[83] 17 U.S.C. § 106A; Gunlicks, *supra* note 5, at 617. *See* 3 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 17:201 (3d ed. 2005) [hereinafter GOLDSTEIN, COPYRIGHT]. **R**

[84] Gunlicks, *supra* note 5, at 604. **R**

[85] In 1931, Canada enacted moral rights legislation which closely followed the language of Article 6bis. Dworkin, *supra* note 6, at 243. The United Kingdom in 1988, and Australia in 2000 and 2004, have implemented moral rights provisions. Gunlicks, *supra* note 5, at 666–67. *See also* GOLDSTEIN, INTELLECTUAL PROPERTY LAW, *supra* note 29, at 295; Ginsburg, *Authorship*, *supra* note 7, at 287–96. *See generally* Australian Copyright Act, 1968 (Moral Rights) Amendment 2000 (Austl.). **R R R R**

[86] Davidson, *supra* note 48, at 613. *See also* Ginsburg, *Authorship*, *supra* note 7, at 281; Gunlicks, *supra* note 5, at 667–68. **R R**

[87] GERVAIS, *supra* note 20, at 72 n. 69; Ginsburg, *Authorship*, *supra* note 7, at 281; Gunlicks, *supra* note 5, at 605, 608–09. *See* Berne Convention, *supra* note 1, art. 6bis. In fact, during Senate Proceedings on October 5, 1988, Senator Hatch further revealed U.S. priorities in adhering to Berne. Citing the United States' strong financial interests in protecting its works from piracy as a reason for joining Berne, the Senator then explained that existing U.S. law satisfies the United States' Article 6bis obligations, even as he acknowledged, relying upon substantial case law, that our judicial system consistently reinforces that moral rights are outside U.S. law. 134 CONG. REC. S14549-01 (1988) (statement of Sen. Hatch). U.S. interests, in signing onto Berne, focused upon enhancing U.S. credibility in the global marketplace, combating piracy of U.S. works, and increasing U.S. leverage in global trade policy formulation. These articulations of U.S. reasons for joining Berne shed light on the United States' treatment of its moral rights obligations under Berne. The United States' cursory dealing with Berne's requisite moral rights reflects that moral rights **R R R**

authors the highest international standard of copyright protection.[88]

VII. Why Is the United States So Concerned About Adopting Moral Rights Legislation?

A natural outgrowth of the common law emphasis on alienability of creative works,[89] the maintenance of the "delicate balance" of interests and rights between authors and copyright owners/proprietors, was a chief legislative concern surrounding the BCIA in 1988.[90] The resulting implementation, with its neutral effect on the status of moral rights in U.S. copyright law,[91] reflected the successful lobbying efforts of publishers, motion picture distributors, and other commercial exploiters of authors' works.[92] These

were more or less an obstacle to the U.S.'s securing the primary benefits of Berne. *See also* S. Rep. No. 100-352 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3707-10.

88 Gunlicks, *supra* note 5, at 663. As acknowledged by Congress at the time of Berne's implementation, Berne affords authors the highest internationally recognized standard of moral rights protection. By failing to effectively adhere to its obligations under Berne, the United States continues to deny its own authors the high level of protection other Berne members afford their authors. *See*, *e.g.*, S. Rep. No. 100-352, *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3707–10. **R**

89 *See* discussion *supra* Part IV.

90 During congressional debates surrounding the BCIA, Senator Leahy stated that when he introduced the bill to his colleagues, he opted for a "minimalist approach" to moral rights, not wanting "to disrupt the assumptions now governing relations among creators, publishers, distributors, and consumers of copyrighted works." 134 Cong. Rec. S14549-01 (1988) (statement of Sen. Leahy). Also during these proceedings, Senator Hatch said that these moral rights, if enforced, would have a major effect on existing "copyright relationships" in the United States. 134 Cong. Rec. S14549-01 (1988) (statement of Sen. Hatch). *See also* S. Rep. No. 100-352, *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3715. The House Proceedings reflected a similar focus on the preservation of the balance of statutory rights and public interest. 134 Cong. Rec. H3079-02 (1988) (statement of Rep. Kastemeier).

91 *See* 134 Cong. Rec. H3079-02 (1988) (statement of Rep. Kastemeier).

92 Lee, *supra* note 54, at 805. The Magazine Publishers' Association, which originally opposed Berne due to moral rights concerns, helped craft the legislative compromise which resulted in the BCIA. 134 Cong. Rec. S14549-01 (1988) (statement of Sen. Hatch). Echoing the sentiments of Senator Hatch, the publishers approved of the broadening of copyright protection abroad, but they feared the vesting of rights of attribution and integrity in news writers would bring a "bonanza" of "aggrieved reporters' lawsuits." With this in mind, *Time* assembled a coalition of "publishing heavyweights", including the Magazine Publishers' Association, McGraw-Hill, Inc., and Dow Jones & Co. to lobby against Berne. **R**

> Even beyond the world of magazines and newspapers, the coalition says signing Berne could unleash legal tornadoes wherever works are copyrighted. It sees the moral-rights concept as a giant wild-card that will let contentious artists press all sorts of unprecedented grievances. Lyricists could sue radio stations for not crediting them when their songs go on the air. Film makers could sue

groups stood to suffer great economic devastation as a result of anything that might burden their abilities to edit, reproduce and distribute creative product (in the form of films, articles, magazines, etc.), and they had the power and resources to make their needs heard.[93] Also, industries which deal largely with the creation of derivative works, such as the motion picture industry, fear that the recognition of moral rights could subject, e.g., filmmakers, to an onslaught of legislation where screenwriters, authors, or novelists claim that alterations to a work exceed those which are necessary to transfer the underlying work from, e.g., book to cinema.[94]

The United States' fears of adopting moral rights legislation seem to reflect a U.S. notion that it would have to adopt a system just like that of the French,[95] the most expansive system of recognition of moral rights in the world today.[96] The French system protects moral rights in a "personalistic" way, where the right of respect for an author's name, authorship and work, and his subjec-

> TV stations if they object to the commercials that run with their movies. A professor who writes a textbook chapter could sue the publisher over the way the entire book turns out.

133 CONG. REC. E4622-01 (1987) (statement of Sen. Morrison, citing Michael W. Miller, *Pressing Issue: Publishers Mobilize to Foil Revision of Copyright Law*, WALL ST. J., Nov. 3, 1987, at 25.).

[93] 133 CONG. REC. E4622-01 (1987) (statement of Sen. Morrison). Representative Berman, speaking at the House Proceedings on the BCIA, expressed concern for screenwriters and directors who lack bargaining power to resist film studios' coercions to contractually waive protections of their films from material alterations. Thus, as contracts do not adequately and universally protect these rights, he saw a need for a statutory approach, but he was concerned about not "kill[ing] the goose that lays the golden egg." He implied that moral rights legislation is possible, as long as it strikes a proper balance. Moral rights could restrict the distribution and production of films, and filmmakers, having taken the financial risk in getting films made, should be able to exploit the films in every market. Furthermore, the entire creative community and global "filmviewing public" benefits from the production of American films. 134 CONG. REC. H3079-02 (1988) (statement of Rep. Berman).

[94] Even when a filmmaker wants to be faithful to the underlying work, some changes are required in the transferring of mediums (e.g., from print to film); determining which changes are technically required and which ones are made at the filmmakers' discretion requires great subjectivity. Thus, filmmakers (and other creators of derivative works) are uncomfortable with the idea of moral rights legislation, as it could allow authors to make claims even as to alterations demanded by a change of medium. Nimmer & Price, *supra* note 6, at 11. **R**

[95] Gunlicks, *supra* note 5, at 609. *See also* Lee, *supra* note 54, at 805 (citing Orrin G. Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171, 175 (1989)). **R**

[96] Dietz, *supra* note 10, at 222. **R**

tivity as to any alterations to his work, are nearly absolute and not subject to any condition.[97] The Berne convention is silent as to the issue of alienability of moral rights and it certainly does not require the level of protection recognized in France.[98] Some common law nations, such as Australia, as discussed *infra*, that have adopted legislation to protect moral rights, have adopted the more moderate approach condoned by Berne. For example, in France, there is a presumption that an author's integrity rights are violated by *any* modification, not just mutilation or distortion, to his work.[99] Berne and other common law countries, including Australia, however, require that an author claiming an integrity violation show prejudice to his honor or reputation before he may object to an act done to his work.[100]

Moreover, even in France and Germany, the "birthplace of moral rights", moral rights, though they burden a transferee's free use of a work and create an unbreakable link between the author and work, are limited in their "absoluteness" by good faith and the interests of transferees, publishers, and the public.[101] Indeed, even French courts have acknowledged that the inalienability of moral rights must yield to commercial practicality and particular situations.[102]

As will be discussed in the following parts, moral rights "analogues" in the United States and Australia provide extremely weak

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[97] *Id.*; Ginsburg, *Literary Property*, *supra* note 47, at 996 (indicating that French and American—thus civil and common law—systems of copyright had similar underpinnings until personalistic concepts arose in the French system). **R**

[98] *See* Berne Convention, *supra* note 1, art. 6bis; CLRC 1988 REPORT, *supra* note 23, pt. III, at paras. 37–42. **R**

[99] SAINSBURY, *supra* note 5, at 55–56; Damich, *Right of Personality*, *supra* note 43, at 40. Berne Convention, *supra* note 1, art. 6bis. **R** **R**

[100] SAINSBURY, *supra* note 5, at 55–56; Damich, *Right of Personality*, *supra* note 43, at 40. Berne Convention, *supra* note 1, art. 6bis. **R** **R**

[101] Gunlicks, *supra* note 5, at 608. Members of the public in France and Germany have the absolute right to use the work as they wish in private. In addition, French law affords users various exceptions, e.g., criticism and academic uses, to the right of integrity. Also, French and German laws allow a few exceptions to authors'/employees' moral rights as to works made for hire. *See id*. at 649–53; Netanel, *supra* note 4, at 24. **R** **R**

[102] *See* CLRC 1988 REPORT, *supra* note 23, pt. III, at paras. 39–42. **R**

> The shifting standards by which the right of integrity is applied to adaptations or collaborative works may, for example, be explained on the basis of implied waivers. One seminal example is the case of *Bernstein v. Matador et Pathe Cinema* where a covenant allowing all changes necessary for adapting a play to a movie was held valid, notwithstanding the author's inalienable moral right.

Id.

protections of authors' moral rights compared to the specific statutory causes of action granted to authors in continental nations,[103] but continental moral rights seem to be, indeed, a much greater burden on alienability than the current U.S. protections.[104] It is possible, however, for a common law nation to adopt legislation which protects authors' rights and honors Berne, without restricting the alienability of goods; as such, extreme, French-style protections are not necessary.[105]

VIII. Moral Rights "Analogues" in the United States and Australia

As a signatory to Berne, the United States is obligated to statutorily protect authors' moral rights of integrity and attribution.[106] Title 17 of the U.S. Copyright Act grants authors economic incentives to produce creative works by granting them a bundle of copyrights that protect their creativity, but only as far as the works, treated as profit-making tools, have economic value.[107] Rather than legislate to protect moral rights, however, the United States still claims (as Australia did prior to enacting 2000 and 2004 legislation which incorporated moral rights into the Australian Copyright Act[108]) that its scattered common law and legislative provisions adequately protect authors' moral rights as set out in Berne.[109] (The

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[103] *See* discussion of moral rights analogues *infra* Part VIII *et. seq*. *See* Netanel, *supra* note 4, at 25. **R**

[104] *See* Netanel, *supra* note 4, at 26. **R**

[105] *See* CLRC 1988 Report, *supra* note 23, pt. III, at para. 42. **R**

[106] Berne Convention, *supra* note 1, art. 6bis. **R**

[107] Levy, *supra* note 56, at 27. **R**

[108] *See* discussion *infra* Parts IX, X.A–B. In addition, the Australian Copyright Act granted to creators of certain types of creative works limited negative rights to control the manner in which copyright owners use the works, thus providing some degree of protection of the integrity in the work. Copyright Amendment (Moral Rights) Act 2000 (Austl.).

[109] In 1988, Congress saw no need to modify U.S. law in order to comply with Berne. Even while acknowledging that Article 6bis moral rights were not provided in U.S. statutes and that claims for relief under moral rights doctrine had been rejected by state and federal courts, Congress stated:

> However, protection is provided under existing U.S. law for the rights of authors listed in Article 6bis . . . . This existing U.S. law includes various provisions of the Copyright Act and Lanham Act, various state statutes, and common law principles such as libel, defamation, misrepresentation, and unfair competition, which have been applied by courts to redress authors' invocation of the right to claim authorship or the right to object to distortion.

S. Rep. No. 100-352 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3714–15. Even the Director General of the World International Property Organization, Dr. Arpad Bogsch, stated in 1987 that it was unnecessary for the United States to enact moral rights legislation

analogue protections of moral rights in the forthcoming discussion continue to exist in Australia, even as moral rights are now statutorily protected there.) Indeed, an examination of U.S. law reveals that the moral rights of attribution and integrity are "well-recognized within the fabric of U.S. law."[110] In addition, since joining Berne, the United States seems to be moving from a purely economic approach to copyright towards an approach that at least tacitly acknowledges moral rights, but the U.S. patchwork of moral rights protections does not fully satisfy Berne obligations.[111]

At the core of moral rights are the rights of integrity and attribution.[112] The former preserves the elements of the author's per-

in order to comply with Art. 6bis. 134 CONG. REC. H3079-02 (1988) (statement of Rep. Moorhead). To date, the United States insists that its patchwork of federal and state causes of actions and common law doctrines combine to provide the minimum moral rights safeguards required by Berne. Monica E. Antezana, Note, *The European Union Internet Copyright Directive as Even More Than it Envisions: Toward a Supra EU Harmonization of Copyright Policy and Theory* , 26 B.C. INT'L & COMP. L. REV. 415, 427 (2003). *See* Davidson, *supra* note 48, at 614; Dworkin, *supra* note 6, at 232–33. **R**

110 Gunlicks, *supra* note 5, at 618. *See* 134 CONG. REC. H3079-02 (1988) (statement of Rep. Coble) ("As the House report points out, the committee recognizes that protection of the rights of paternity and integrity in this country have gradually been increasing."). Furthermore, Professor Damich, examining the recognition of a general right of "creative personality" (which is closely linked to moral rights in that both recognize creative works as extensions of the author's personality) in American case law, vis-à-vis courts' reliance on the Copyright Act of 1976, rights of privacy and publicity, unfair competition, the Lanham Act, defamation, and contract, finds that the ad hoc results of American law could lay the groundwork for systemic protection of personality rights in the United States. *See* Damich, *Right of Personality*, supra note 43, at 3–5, 35–71. **R**

> It can be said that American law recognizes (1) the principle of the right of personality; (2) the principle that the personality can extend to objects external to the human body, and (3) the principle that the unique configuration of the economic rights of copyright is based in part on the personal aspect of artistic creativity.

Id. at 86.

111 Antezana, *supra* note 109, at 427, 434. **R**

112 Nimmer & Price, *supra* note 6, at 10; Gunlicks, *supra* note 5, at 608 (In addition to the moral rights of integrity and paternity/attribution, France and Germany, the "birthplace of moral rights," protect the right of disclosure/publication, and withdrawal/retraction.). *See* Davidson, *supra* note 48, at 605. Although Berne does not specifically protect the moral rights to publish and retract, these are, effectively, protected in U.S. law. The right to publish, or to control when and how the work is first made public, has been protected under copyright statutes since 1790; and it has been explicitly incorporated into the 1976 Copyright Act, which protects a work from the point at which it is fixed in a tangible medium of expression. Also under the Copyright Act, an author can exercise a limited right to retract, or to halt public dissemination of a work pre- or post-publication by voiding a contract without cause after thirty-five years. The author can also exercise a right of retraction prior to publication, under contract law, if she chooses not to transfer a work. **R** **R**

sonality as they are manifested in his work.[113] The denigration or alteration of the work in a manner which affects the author's honor and reputation[114] thus affects his professional integrity and marketability.[115] An author's right of attribution also protects his reputation, in that it enables him to control his recognition as the author of his works—he can choose to be accredited, to remain anonymous or use a pseudonym, and to prevent false attributions of authorship.[116]

A. *Moral Rights Analogues: Contract*

American and Australian authors who wish to protect their moral rights can do so through express contractual terms[117]. If these rights are expressly preserved in a contract at the point of transfer of a copyright, American authors can make a claim of infringement based on a contractual breach.[118] Where a contract is silent as to alterations to the works, courts will look to industry trade and custom, and they may also imply the transferee's obligation not to make substantial alterations.[119] Similarly, where an author does not preserve his right to claim authorship in a contract, courts may also look to industry custom.[120] If he does preserve the right to claim authorship, he has an actionable breach of contract claim where a substantially altered work is sold with his name on it, as this will harm his reputation.[121]

See GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:201; Gunlicks, *supra* note 5, at 608, 611–12, 648. *See also* 17 U.S.C. §§ 102, 106. R

113 Gunlicks, *supra* note 5, at 630–31. R

114 Berne Convention, *supra* note 1, art. 6bis; Gunlicks, *supra* note 5, at 608. R

115 Gunlicks, *supra* note 5, at 630. R

116 *Id.* at 620; Berne Convention, *supra* note 1, art. 6bis. "Reputation is critical to a person who follows a vocation dependent on commissions from a variety of clients. Success breeds success, but only if the first success is known to potential clients." Ginsburg, *Authorship*, supra note 7, at 265 (citing Prior v. Sheldon (2000) 48 I.P.R. 301 ¶ 87 (Austl.)). R R

117 SAINSBURY, *supra* note 5, at 70. R

118 GOLDSTEIN, COPYRIGHT, *supra* note 83, §§ 17:205–06; Dworkin, *supra* note 6, at 233; Gunlicks, *supra* note 5, at 620. R R

119 GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:206; Gunlicks, *supra* note 5, at 638 (noting that "'even if the contract with the artist expressly authorizes reasonable modifications . . . it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original.'" (citing Granz v. Harris, 198 F.2d 585, 588 (2d Cir. 1952)). R

120 GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:214; Gunlicks, *supra* note 5, at 621. R

121 Gunlicks, *supra* note 5, at 637–38. Furthermore, because the right to claim authorship is not expressly protected under the U.S. Copyright Act, it is not a right the author can transfer; even if he transfers a work in its entirety and does not expressly preserve his right to claim authorship, the transfer of this right may not be implied. Finally, a contemporary trend of implying a covenant of fair dealing into publication contracts may signal courts' R

Relying on contractual implications may not always serve an author's moral rights interests, however. Where the right to alter is expressed in the contract, courts may be extremely deferential to the agreement and will give great latitude to the party to whom the alteration rights were granted, at the expense of the author's reputation.[122] Even if an author contractually reserves his integrity rights, however, certain changes required in the transferring of the work to another, approved medium may be reasonable without the author's consent.[123] Or, a court may imply that a defendant was authorized to make necessary alterations as per industry standards related to a particular type of contract (for example, for a contract regarding the transfer of a work from one medium to another), regardless of how these alterations prejudice the author.[124]

B. *Moral Rights Analogues: The U.S. Copyright Act*

Beyond contractual remedies, American copyright owners may look to the Copyright Act to prevent, albeit indirectly, violations of their integrity and attribution right, but only insofar as the Copyright Act "recognizes" these rights. As these statutory rights are transferable, however, they belong to the *copyright owner*, who is authorized to make use of the work, and who is *not necessarily the author*.[125] Thus, to the extent that the Copyright Act even protects an author's integrity rights, when a copyright is transferred in its entirety, the author can no longer enforce these rights against the transferee/owner, e.g. publisher; all violations of copyright, once it has been transferred, infringe upon the rights of the transferee/owner, not the author.[126] The American distinction between *copyright owners and authors*, and the limited protection the Copy-

willingness to imply a covenant to attribute authorship. Unless an American author expressly contracts to publish his work anonymously or under a pseudonym, however, the true attribution of the work will probably only incur liability if the use of the author's true name is unreasonable. GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:214; Gunlicks, *supra* note 5, at 627. R R

122 SAINSBURY, *supra* note 5, at 74–75. R

123 Gunlicks, *supra* note 5, at 635. R

124 *Id.*

125 *See* 17 U.S.C. § 106 (2000); Jill R. Applebaum, *The Visual Artists Rights Act of 1990: An Analysis Based on the French Droit Moral*, 8 AM. U. J. INT'L L. & POL'Y 191, 197 (1992).

126 *See* 17 U.S.C. § 106.

right Act grants to authors vis-à-vis publishers is highlighted by the works-for-hire provision.[127]

The only provisions of the Copyright Act which indirectly protect an author's right to attribution, albeit only for as long as the author remains the copyright owner as to these rights, are those granting him the exclusive right to reproduce his work and to create derivative works.[128] The exclusive right to create a derivative work, however, effectively protects the copyright owner, who may or may not be the work's author, against distortion and violation of the integrity of the work.[129] Even if a copyright owner grants the right to make a derivative work, the owner may have an infringement claim if the derivative does not appropriately express the substance of the original[130] or if it exceeds the permission he granted in transferring this right.[131] The Fair Use doctrine, contained in section 107, also protects the integrity of a work, albeit not through a positive cause of action granted to the copyright owner, but by allowing the copyright owner to negate a fair use *defense* to an infringement claim.[132] Furthermore, the right of integrity in non-dramatic musical works is protected under section 115, which denies a compulsory license to make and distribute phonorecords where the licensee's arrangement of the underlying work changes its fundamental character.[133]

[127] This provision gives the employer status of author and copyright owner as to a work made by an employee within the scope of employment. It underscores the fact that, in some situations, where there is no express contractual provision, an author may not have any right at all to attribution of authorship in his work. 17 U.S.C. § 101 ("work for hire" definition). *See* GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:213. **R**

[128] Derivative works are original works of authorship that recast or transform a preexisting work. *See* 17 U.S.C. §§ 101, 106(1)–(2) ("derivative work" definition). These rights are protected, however, only while the author retains these exclusive section 106 rights in his work; as soon as he transfers these rights, they belong to the copyright owner, not the author. §§ 101, 106(1)–(2); GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:212. **R**

[129] 17 U.S.C. §§ 101, 106(2); GOLDSTEIN COPYRIGHT, *supra* note 83, § 17:207; Gunlicks, *supra* note 5, at 631, 633. **R** **R**

[130] Gunlicks, *supra* note 5, at 633. *See* 17 U.S.C. § 101; Applebaum, *supra* note 125, at 197. **R**

[131] Gunlicks, *supra* note 5, at 633. **R**

[132] *See* 17 U.S.C. § 107 (2000). The remedial measure granted to the copyright owner here is only a rebuttal to an infringer's defense, and if the unauthorized use of the copyrighted work falls within the fair use exception, the copyright owner will not prevail on an infringement claim. *See* Gunlicks, *supra* note 5, at 632–34. **R**

[133] 17 U.S.C. § 115(a)(2) (2000).

C. *Moral Rights Analogues: VARA, the Only Statutory Moral Rights Protection in the United States*

Although Congress, according to the legislative history surrounding the BCIA,[134] believed U.S. law adequately protected moral rights in accordance with Berne obligations, it enacted VARA, the first and only federal regulation which expressly incorporates moral rights, albeit as to a specific group of authors, into the U.S. Copyright Act.[135] The enactment of VARA could be viewed as an indication that parallel protection for all authors' personal interests can fit into U.S. law and culture.[136]

Enacted in 1990, possibly as a good faith effort by the United States to comply with its Berne obligations,[137] VARA grants authors of works of fine art in single or limited editions[138] statutory rights of attribution and integrity.[139] One of the most significant elements of VARA is that the right of attribution is enforceable without the author having to assert his right.[140] Because VARA rights are not transferable and are only waivable by a specific, advertent waiver, which must be obtained by the buyer, VARA was a

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134 *See supra* notes 81, 109 and accompanying text. R

135 17 U.S.C. § 106A; Dworkin, *supra* note 6, at 259; Lee, *supra* note 54, at 805. A few states, including California and New York, have enacted fine art statutes that protect, in varying scope and degree, artists' rights of integrity in works of fine art. GOLDSTEIN, COPYRIGHT, *supra* note 83, §§ 17:211–12. R

136 *See generally* Applebaum, *supra* note 125. R

137 Dworkin, *supra* note 6, at 259. R

138 17 U.S.C. § 101 (A "work of visual art" is a painting, drawing, print or sculpture or a still photographic image produced for exhibition purposes only, where there is at least one original and no more than 200 signed and numbered copies.).

139 According to Title 17:

> (a) Rights of Attribution and Integrity.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art— (1) shall have the right—(A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create; (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and (3) subject to the limitations set forth in section 113(d), shall have the right—(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

17 U.S.C. § 106A.

140 Ginsburg, *Authorship*, *supra* note 7, at 300. R

pioneering piece of U.S. legislation.[141] It demonstrates a sincere effort to honor Berne obligations and shows a clear intent for VARA rights to remain vested in the author regardless of who owns the work itself.[142]

Furthermore, it is precisely some of the limits of VARA's application that allow it to protect artists' moral rights in a manner that fits comfortably within the U.S. landscape of authors'/private and copyright owners'/public interests, suggesting that some form of statutory moral rights protection can exist in the United States. For example, by limiting protected works of art to visual works, more specifically, to what is generally perceived as "art" (VARA excludes items of mass production—films, literary and musical works, television shows, crafts, reproductions in excess of 200 limited edition copies, and works made for hire), VARA effectively safeguards large exploiters from artists' moral rights claims.[143] This means, however, that while the public interest in alienability of creative works is not overwhelmed by a sweeping grant of artists' rights, such distinctions, especially combined with some of VARA's other restrictions (limiting protection to works "of recognized stature" or to cases of prejudice to an author's reputation) may elicit discriminatory treatment of artists or disincentivize certain types of creation.[144] In addition, as VARA's protections are not available to reproductions, artists may only exert moral rights when their original works (or one of a limited edition of 200 works) are actually affected.[145] Thus, arguably, creativity and cultural development are encouraged by VARA's limitation.[146] A balance is struck wherein original creators can maintain rights in their original works and other creators may improve upon these without fear of challenge by the original artists; the subsequent creators may, in turn, protect their rights of attribution and integrity in their newly-created works.[147] Finally, a case may be made that the "life of the

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141 *See id.*; Applebaum, *supra* note 125, at 208–09; Dietz, *supra* note 10, at 224; Dworkin, *supra* note 6, at 261; Gunlicks, *supra* note 5, at 645. **R**

142 17 U.S.C. § 106A(b) ("Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner . . . ."). *See* Dworkin, *supra* note 6, at 261–62; Gunlicks, *supra* note 5, at 644–45. **R**

143 *See* 17 U.S.C. § 101 (definition of "work of visual art"); Applebaum, *supra* note 125, at 202–04, 211. Of course, by the same token, VARA thus limits the extent of moral rights protection conferred upon an author. **R**

144 *See* Applebaum, *supra* note 125, at 204–11. **R**

145 *See* 17 U.S.C.§ 106A; Applebaum, *supra* note 125, at 214–16. **R**

146 *See* Applebaum, *supra* note 125, at 215–16. **R**

147 *Id.*

author" term of VARA's moral rights encourages the general public interest because it does not unduly impede cultural development by restricting future derivative works.[148] The balance between the public interest in the promotion of ideas and culture, on the one hand, and art preservation and the protection of original works and their artists' integrity, on the other, tips slightly in favor of the public interest, however—as soon as the artist dies, the owners of his work may do with it anything they wish.[149] A term of protection of moral rights which outlasts the artist but does not last in perpetuity, e.g., for a term consistent with the period of copyright, might strike a more reasonable balance between the general welfare and artists' and the original works' integrity.[150]

Unfortunately, and aside from the limited group of authors whose moral rights it protects, VARA, in practice, has not actually produced the kind of moral rights protection prescribed by Article 6bis.[151]

D. *Moral Rights Analogues: Consumer-Oriented & Common Law Causes of Action*

If an American author's moral rights are not protected by contract, VARA, or the other provisions of the Copyright Act discussed above, he must try to fit his claim into a recognizable cause of action within U.S. common law or other statutes.[152] These causes of action are available even if the author has transferred the copyright in its entirety.[153] In order to bring a federal cause of action for unfair competition under section 43(a) of the Lanham Act,

[148] *See id.* at 219–20; 17 U.S.C. §106A(d).

[149] Applebaum, *supra* note 125, at 219–20. **R**

[150] *Id.* at 222.

[151] VARA fails to grant artists the duration of moral rights protection granted by Berne Art 6bis(2), which grants moral rights protection for at least the duration of copyright protection. VARA only grants lifetime rights to artists. Edward J. Damich, *A Comparison of State and Federal Moral Rights Protection: Are Artists Better Off After VARA?*, 15 HASTINGS COMM. & ENT. L.J. 953, 965 (1993) [hereinafter Damich, *State and Federal Moral Rights*]. *See* 17 U.S.C. §106A(d). *See generally* Susan P. Liemer, *How We Lost Our Moral Right and the Door Closed on Non-Economic Values in Copyright*, 5 J. MARSHALL REV. INTELL. PROP. L. 1 (2005).

[152] *See* Lee, *supra* note 54, at 810–11. There is no common law *copyright*, however. *See infra* notes 48–49 and accompanying text. *See generally* Dworkin, *supra* note 6; Gunlicks, *supra* note 5. **R** **R** **R**

[153] *See* GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:203; Gunlicks, *supra* note 5, at 637–38. **R**

a plaintiff must be protecting a reasonable commercial interest[154] that might be damaged by a false or misleading representation of origin or fact.[155] Thus, by protecting the author against injury to his reputation due to public presentations of mutilated versions of the work, the Lanham Act allows an author to protect his interest in the integrity of his work. Likewise, Australian authors may rely on common law and federal statutes that protect consumers and aim at unfair competition.[156]

These consumer-oriented causes of action, however, are limited in how they can protect an author's moral rights.[157] For one thing, these claims ultimately turn on how the defendants' actions affect the consumer and the public, not the author.[158] Second, the questionable conduct must be of a commercial character, and it must be misleading or deceptive.[159] Finally, in order to succeed on these claims and prove that his commercial interest suffered as a

[154] In bringing a section 43(a) claim, an author's name and reputation almost always qualify as a "reasonable commercial interest." Lanham Act § 43(a), 15 U.S.C.A. § 1125(a) (1946), Gunlicks, *supra* note 5, at 623–24. R

[155] *See* Lanham Act § 43(a); GOLDSTEIN, COPYRIGHT, *supra* note 83, § 209. *See* Gunlicks, *supra* note 5, at 635–37. R R

[156] *See* Trade Practices Act, 1974, pt. V (Austl.).

[157] Until the landmark 2003 *Dastar Corp.* decision, which held that "origin of goods" in section 43(a)(1)(A) of the Lanham Act does not refer to the "author of any idea, concept, or communication embodied in those goods," section 43(a) provided a great opportunity for relief against a failure to attribute authorship and misattribution of authorship (to someone other than the author). GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:215–17. *See* Dastar v. Twentieth Century Fox Film Corp., 539 U.S. 23, 66 U.S.P.Q.2d 1641 (2003). Section 43(a)(1)(B) of the Lanham Act, which deals with the quality or characteristics of goods, however, is still available to authors whose works have not been attributed to them. Lanham Act § 43(a)(1)(A)–(B); GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:216–17. Where a work has been falsely attributed to an author, *Dastar* does not apply, and an author so affected still has a strong claim of actionable misrepresentation under section 43 of the Lanham Act as well as under state and federal unfair competition laws. The unfair competition passing-off doctrine consists of representing that another's works/goods are one's own. Gunlicks, *supra* note 5, at 622. R R R

[158] Lanham Act § 43(a); SAINSBURY, *supra* note 5, at 75–78. Intended beneficiaries of these causes of action are consumers, not authors. Ginsburg, *Authorship*, supra note 7, at 283. Part V of the Australian Trade Practices Act encompasses unfair practices and is titled "*Consumer* Protection" (emphasis added). Trade Practices Act, 1974, pt. V (Austl.). R R

[159] Even if the action happens in a commercial context, American courts tend to prefer parties to be in competition. Ginsburg, *Authorship*, *supra* note 7, at 278. Under the Australian Trade Practices Act 1974 as well as in a passing-off action, a plaintiff must show that defendants' conduct was misleading and deceptive; a passing-off action requires the author to show misrepresentation. Thus, an author may have difficulty establishing a claim based on a failure to attribute; where there has been no attribution at all, the public has merely been uninformed, not misinformed. Similarly, if a defendant alters the work and makes it clear to the public that his use is unauthorized, there cannot be misrepresentation. Thus, R

result of defendants' misleading the public, an author must also establish that he had a reputation—his commercial interest which was affected by defendants' actions—in the marketplace.[160] This limits these causes of action to a specific group of authors who have established reputations.[161] Furthermore, if the distortion is removed, an author's Lanham claim is diminished.[162]

State common law provides American authors with several causes of action for reputation-affecting distortions of their works. Besides common law unfair competition claims[163], defamation and invasion of rights of privacy and publicity are available to protect the author's reputation and thus, his integrity.[164] Similarly, an Australian author whose public reputation has been negatively affected due to a statement, vis-à-vis a false attribution or alteration to his work, may establish a claim under the laws of defamation.[165] The integrity of an author's own work or reputation may be affected if he is associated with another's work or if another's work is falsely attributed to him. Such common law claims, however, depend largely on the reputation and public perception of the author, and on the public perception of the producer of the work in question.[166]

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an author's claim fails. SAINSBURY, *supra* note 5, at 75–80 (citing Trade Practices Act, 1974, pt. V, § 52 (Austl.)). **R**

160 Lanham Act § 43(a); SAINSBURY, *supra* note 5, at 79–80. *See* Trade Practices Act, 1974, pt. V (Austl.). **R**

161 SAINSBURY, *supra* note 5, at 79. **R**

162 Damich, *Moral Rights Protection*, *supra* note 16, at 398. **R**

163 Lanham Act § 43(a); Gunlicks, *supra* note 5, at 622. **R**

164 GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:210–11; Gunlicks, *supra* note 5, at 637–38. **R**

165 Where there has been a failure to attribute, however, no statement has been made; an author will therefore have difficulty establishing that his or her reputation was detrimentally affected and will be unable to protect his or her moral rights by way of a defamation claim. In establishing that a non-attribution or attribution of his or her work to another was defamatory, an author bears the burden of proving that the public reached conclusions about the non or mis-attribution which damaged his or her reputation. *See* SAINSBURY, *supra* note 5, at 80–82. **R**

166 An author's best chance of protecting his moral right of attribution on a defamatory claim might be where the author is wrongly attributed to another author's work and that work is inferior to the works upon which the complaining author has built his reputation. *See* SAINSBURY, *supra* note 5, at 82. An author may protect his moral right of integrity on a defamation claim if he can establish that the alterations to the work are likely to make the public think less of him, and thus damage his reputation. In order for such a claim to succeed, the public must understand, through the defendant's improper publication, that the altered work is that of the plaintiff. For the alterations to be defamatory, the public must be unaware that the alterations are not the author's or authorized by the author, otherwise, the damage to the author's reputation is less likely, and the author's possibility of protecting his right to integrity on a defamation claim is limited. Id. at 85. If the altera- **R**

IX. THE NEED FOR CHANGE IN THE UNITED STATES AND AUSTRALIA

The above analogue protections of moral rights represent the extent of the United States' protection of authors' personal interests in their works, and clearly fall short of specific, statutory causes of action for moral rights violations. The current patchwork of moral rights protections in the United States is similar to the protection Australia granted or continues to grant to its authors, *independent of* the recent Australian legislation. Prior to 2000 and 2004 copyright amendments in Australia, as is the present case in the United States, the rights of attribution and integrity were specific and limited in federal statutory copyright (which, in Australia, is entirely contained in the federal Copyright Act 1968).[167] Australia's copyright legislation affords authors similar *economic* rights to those granted in the United States.[168] Because the United States

tions could detrimentally affect an author's reputation, and the copyright owner presents the work as the plaintiff's own, then the author may make a successful claim of defamation. *Id.* at 83.

167 In the United States, express moral rights protection is limited to VARA. *See supra* notes 134–151 and accompanying text; 17 U.S.C. § 106A. Prior to 2000, the only moral rights provision in Australian copyright law was section 190's prohibition against false attribution of authorship, which provided that "(a) person (in this subsection referred to as 'the offender') is by virtue of this section, under a duty to the author of a work not to: insert or affix another person's name in or on the work, in such a way as to imply that the other person is the author of the work." CITE. Other paragraphs deal with the publishing, sale, hire, offer for sale, exhibition, distribution and reproduction of works carrying an unauthorized attribution. Under the Act, section 194 conferred a right of action for damages and injunction, in respect of an unauthorized attribution. Beyond these provisions, there was no enactment in Australia of moral rights. Michael Blakeney & Fiona MacMillan, *Bringing Copyright into the Digital Age*, 5 E-LAW/MURDOCH U. ELECTRONIC J.L., 1 (1998), http://www.murdoch.edu.au/elaw/issues/v5n1/blake51.html (last visited Feb. 22, 2007).

168 Australian copyright owners are granted a bundle of exclusive statutory, economic rights that closely parallel those granted to American authors in section 106 of the U.S. Copyright Act. AUSTRALIAN COPYRIGHT COUNCIL, INFORMATION SHEET, AN INTRODUCTION TO COPYRIGHT IN AUSTRALIA, G10 (July 2005), *available at* http://www.copyright.org.au/G010.pdf [hereinafter ACC INFOSHEET G10]. Depending on whether a work is a literary, dramatic, artistic or musical work or a sound recording, film or broadcast, the creator has the right to reproduce, publish, and distribute the works, as well as, to certain types of works, to perform or display the work publicly and make adaptations, rebroadcast, and to transmit the work via any form of technology. *See id. See also* 17 U.S.C. § 106 (2000). Any combination of these rights may be assigned or licensed in writing; thus the copyright owner of a work is not necessarily its author. ACC INFOSHEET G10, *supra* note 167. These copyrights subsist in works from the moment of the works' creation in a recorded medium; they need not be formally registered in order to be enforced by a court. *Id. See also* 17 U.S.C. § 102. Performers have part ownership of copyright in audio recordings of their live performances, as well as rights, separate from the copyright and moral rights in the material being performed, to control the recording and communication of their performances.

must incorporate moral rights into its copyright statutes in order to comply with Berne and the international trade landscape, and because of the similar common law legal and copyright traditions in the United States and Australia, it is worthwhile to examine the recent Australian legislation which exemplifies the incorporation of moral rights into a common law statutory framework.[169]

X. The Path to Moral Rights Legislation in Australia—Could the United States Walk the Same Path?

When the issue of legislative protection of authors' moral rights was first officially addressed in the 1988 Australian Copyright Law Review Committee ("CLRC") Report, the controversial finding of the five to four majority, after five years' consideration, stated that Australia need not enact specific moral rights legislation in order to comply with Berne Article 6bis.[170] Although the report acknowledged that certain alterations to works are inappropriate and may be morally unjust,[171] the majority was especially con-

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Australian Copyright Council, Information Sheet, Performers' Rights, G22 (Feb. 2005), *available at* http://www.copyright.org.au/G022.pdf [hereinafter ACC Infosheet G22]. For specific purposes, certain parties, namely academics and the media, can use copyright material without permission. Fair dealing provides enumerated defenses against a claim of infringement of copyright holders' exclusive rights. Copyright Act, 1968, §§ 176–78A, 182A (Austl.). *See also* 17 U.S.C. § 107 (2000). Although the general rule of the Australian Copyright Act is that the person responsible for creating the work is the first owner of copyright, in certain situations, there are exceptions. Like the work-for-hire doctrine of the United States, an employer in Australia is the first owner of copyright when an employee, within the scope of his employment, creates a work for the employer. ACC infosheet G10, *supra* note 168. Generally, as mentioned above, copyrighted material is protected for seventy years from the end of the creator's life or the end of the year in which the material was first published. Australian Copyright Council, Information Sheet, Duration of Copyright, G23 (Sept. 2005), *available at* http://www.copyright.org.au/G023.pdf [hereinafter ACC Infosheet G23].

169 *See* Ginsburg, *Authorship*, *supra* note 7, at 287–88. **R**

170 The report was produced upon the suggestion of the Australian Attorney General. "The Copyright Law Review Committee was established in 1983 to consider and report to the Attorney-General on specific copyright matters referred to it from time to time." CLRC 1988 Report, *supra* note 23 (Preface); Dworkin, *supra* note 6, at 238–39. *See also* CLRC 1988 report, *supra* note 23, pt. II, paras. 10–11 (majority cites support for its recommendation); Copyright Amendment (Moral Rights) Bill, 1999, Bills Digest No. 99 (Parliament of the Commonwealth of Australia, House of Representatives, introduced Dec. 7, 1999) (on file with author) [hereinafter Bills Digest No. 99]; Blakeney & MacMillan, *supra* note 167. **R R R**

171 CLRC 1988 Report, *supra* note 23, pt. I, paras. 29–30. The United States' recognition of moral rights analogues shows that this sense of moral inappropriateness underlies our legal/copyright culture as well. *See also supra* note 110. **R R**

cerned with the practical problems of implementing moral rights legislation, especially with regard to potentially frivolous claims, as well as the reasonableness standard by which alterations would be judged in an author's claim of an integrity violation.[172] Overall, however, they believed that only a small section of the community was interested in and might be affected by the legislation, potentially causing industrial and social disruption disproportionate to its potential public benefit.[173] These concerns echo the United States' fears that moral rights legislation would upset the "delicate balance of interests" between copyright owners and authors.[174]

In Australia, the responses to these concerns on moral rights legislation ultimately supported the groundbreaking Copyright Amendment (Moral Rights) Act 2000.[175] Why did Australia finally decide to implement moral rights legislation? In 1988, the CLRC minority recognized the international trends in favor of moral rights, the demands of a significant portion of the copyright community, the fairness and equity of protecting moral rights, technological trends, Australia's Berne obligations, as well as developments in the United Kingdom and Canada, which demonstrate that the copyright of authors is incomplete where economic rights are without their "necessary complement"—rights which preserve the author's personality.[176] Nearly twenty years after the CLRC minority outlined these bases in favor of moral rights legislation in Australia, in direct response to that nation's concerns regarding such legislation (as expressed by the CLRC majority), it is impressive to note that these bases also address points of U.S. hesitation regarding moral rights legislation.[177] Does Australia's legis-

172 CLRC 1988 REPORT, *supra* note 23, pt. I, paras. 14–16. *See id.*, pt. I, at paras. 22–23. R

173 *Id.* pt. II, at paras. 16, 26–28.

174 *See supra* notes 89–94 and accompanying discussion. R

175 *See* Copyright Amendment Bill, 1997, BILLS DIGEST, EXPLANATORY MEMORANDUM (Parliament of the Commonwealth of Australia, House of Representatives, June 18, 1997), *available at* http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=107&TABLE=OLDEMS&TARGET=; Blakeney and MacMillan, *supra* note 167.

176 *See* CLRC 1988 REPORT, *supra* note 23, pt. III, paras. 2, 45–46. Professors Blakeney and MacMillan echoed the concerns of the 1988 CLRC minority that the urgent need for modification of Australian law in 1997 arose from the need to respond to technological change, shifts in the international copyright regime, inadequacies in protection, and the longstanding, underlying pressure for Australian copyright law, as it is based on English principles, to harmonize its copyright principles with those of continental Europe. The 1997 Copyright Amendment Bill laid the groundwork for the 2000 amendment. Blakeney & MacMillan, *supra* note 167. R

177 *See supra* notes 171–76 and accompanying discussion. Of course, there is an "overwhelming international trend towards providing direct moral rights protection in legisla-

lative solution suggest the possibility that the balance of copyright owners' and authors' interests that has caused the United States so much hesitation regarding statutory moral rights might not be disrupted by moral rights legislation?[178]

Following wrangling of various stakeholders' interests, a broad compromise emerged in Australia through proposed Copyright Amendment Bills.[179] Copyright authorities clearly recognized that Australia's piecemeal protection of moral rights, as provided by ar-

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tion specifically designed for the purpose, rather than relying on indirect protection to protect the rights of integrity and attribution." SAINSBURY, *supra* note 5, at 16. The United States acknowledges, perhaps tacitly, to the extent of VARA and the various analogues through which the United States sometimes protects personal elements of creative works, the fairness and equity connected to the protection of moral rights. *See supra* discussion, Part VIII and accompanying notes. Of course, the United States and Australia have the same obligations under Berne. *See* discussion *supra* Part VI and accompanying notes. R

178 *See supra* note 174. In 1994, an Australian working group established by the federal government to explore effective moral rights legislation advocated Australian moral rights legislation in its Discussion Paper, PROPOSED MORAL RIGHTS LEGISLATION FOR COPYRIGHT CREATORS. SAINSBURY, *supra* note 5, at 33. This paper presumed to represent the common consensus as to the need for strong legal protection for creators' moral rights. Press Release, Parliament of Australia Minister for Justice, Duncan Kerr, MP & Michael Lee, MP, Moral Rights for Copyright Creators (June 21, 1994), http://parlinfoweb.aph.gov.au/piweb//view_document.aspx?TABLE=PRESSREL&ID=1176 (last visited Feb. 22, 2007). R R

> The Ministers [Duncan Kerr, Minister for Justice, and Michael Lee, Minister for Communications and the Arts] emphasized that the [legislative] scheme [outlined in the 1994 Discussion Paper] is intended to provide a workable balance between the needs of copyright creators . . . industries which invest in copyright, and . . . the community in having ready access to and use of copyright materials.

Id. Investors and broadcasters were concerned that proposed legislative provisions would not preserve rights of literary criticism, journalism and parody. CASLON ANALYTICS, INTELLECTUAL PROPERTY GUIDE: MORAL RIGHTS, http://www.caslon.com.au/ipguide17.htm (last visited Feb. 22, 2007).

179 CASLON ANALYTICS, *supra* note 178. The Copyright Amendment Bill 1997 introduced to Parliament was largely based on the 1994 Discussion Paper, PROPOSED MORAL RIGHTS LEGISLATION FOR COPYRIGHT CREATORS. *See* SAINSBURY, *supra* note 5; Blakeney & MacMillan, *supra* note 167. After this Bill was passed by the House of Representatives and reviewed by a Senate committee, however, the Federal Government withdrew for further consideration the moral rights provisions, particularly those relating to waiver of rights, from the 1997 Bill. SAINSBURY, *supra* note 5, at 33. Finally, following the withdrawal of moral rights from the Copyright Amendment Bill 1997, the Australian Parliament reviewed the Copyright Amendment (Moral Rights) Bill 1999 and passed the Copyright Amendment (Moral Rights) Act 2000. DCITA FACT SHEET, *supra* note 61. The Copyright Amendment Bill 1999 differed from the 1997 bill, most significantly, in that the 1999 bill included screenwriters as authors of films and provided for co-authorship agreements, which allow screenwriters, directors and producers to jointly exercise integrity rights. *See* BILLS DIGEST NO. 99, *supra* note 170. R R R R R

eas of law other than copyright, did not adequately enable authors to assert their moral rights or provide the protection required by Berne.[180] They saw the need for specific legislation.[181] The Copyright Amendment (Moral Rights) Act 2000 reflected extensive consultation with industry interest groups and enacted such specific moral rights legislation as to creators of literary, artistic and dramatic works, computer programs, and films, largely with the purpose of complying with Berne Article 6bis.[182]

A. *The Current State of Statutory Moral Rights in Australia*

The 2000 and 2004 Australian amendments grew out of a legal and copyright landscape very similar to that of the United States, as well as out of a set of concerns regarding the implementation of moral rights legislation which mirrored those of the United States. The end result, legislation which finally grants to creators the express statutory right to attribution, the right not to be falsely attributed, and the right of integrity,[183] gives Australian authors the protection to which they are entitled as citizens of a Berne member nation, without causing a shift in a balance of cultural or legal interests.[184] There may be hope for the United States, and an examination of the specific provisions of the Australian legislation is valuable in this assessment.

As part of the U.S. Free Trade Agreement Implementation Act of 2004 ("USFTAIA"), the statutory Australian copyright term was extended from fifty to seventy years from the author's death or from the year in which the material was first published.[185] Moral

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180 BILLS DIGEST NO. 99, *supra* note 170; BILLS DIGEST 160, supra note 21 (regarding "copyright authorities"); Blakeney & MacMillan, *supra* note 167. R R

181 Copyright Amendment (Moral Rights) Bill, 1999 (Austl.); BILLS DIGEST NO. 99, *supra* note 170; Blakeney & MacMillan, *supra* note 167. R

182 Copyright Amendment (Moral Rights) Bill, 1999 (Austl.) (Revised Explanatory Memorandum) *supra* note 23; Dean Ellinson & Eliezer Symonds, *Australian Legislative Protection of Copyright Authors' Honour*, 25 MELB. U. L. REV. 623, 652 (2001). *See also* BILLS DIGEST NO. 99, *supra* note 170. R

183 ACC INFOSHEET G043, *supra* note 34. R

184 As part of the U.S. Free Trade Agreement Implementation Act (2004), the same moral rights were granted to performers whose performances of musical, dramatic or literary works were live or captured on sound recordings. U.S. Free Trade Agreement Implementation Act, 2004, No. 120, 100–112 (Austl.), *available at* http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm (last visited Jan. 30, 2006) [hereinafter USFTAIA].

185 *See generally id*. The substantive amendments that effectuate the Australia-United States Free Trade Agreement ("AUSFTA"), many of which involve changes to the Australia Copyright Act 1968, are found in USFTAIA. The Australian government had actually committed itself to accede to the WIPO Performances and Phonograms Treaty ("WPPT"),

rights granted in 2000 and 2004 to performers and creators of creative works and films generally last for the same duration as copyright protection, thus, moral rights are protected for seventy years beyond the creator's or performer's life.[186]

Now, authors in Australia have the benefit of a statutory scheme that protects their moral rights in their creations separately from their economic rights, but the question is, how does this affect an author's relationship to his work? Like the economic rights of the copyright owner described above, moral rights arise automatically when a copyright work is created and they do not need to be asserted for a creator to reap their benefits.[187] Unlike the economic rights of copyright, moral rights cannot be assigned, transferred or sold.[188] An Australian author can, however, consent in writing to acts or omissions in relation to false or non-attribution or an otherwise "derogatory" treatment of specified works.[189] At the time the consent is given, the relevant work may exist, be of a par-

prior to negotiating AUSFTA. Although the United States is also a signatory to WPPT, it has not enacted any legislation protecting performers' rights; U.S. law is still similar to Australian law, pre-USFTAIA. AUSTRALIAN COPYRIGHT COUNCIL, INFORMATION SHEET, FREE TRADE AGREEMENT AMENDMENTS, G85 (Feb. 2005), *available at* http://www.copyright.org.au/G085.pdf [hereinafter ACC INFOSHEET G85].

186 Under § 195AM of the Copyright Amendment (Moral Rights) Act, 2000, authors' moral rights except "[a]n author's right of integrity of authorship in respect of a cinematograph film," continue for the duration of copyright protection, which was fifty years beyond the life of the creator, under the 2000 Act. Copyright Amendment (Moral Rights) Act, 2000, § 195AM (Austl.). In 2004, the USFTAIA made amendments, related to the copyright term extension, to the Copyright Act 1968, extending the period of copyright, and thus moral rights, another twenty years beyond the creator's life. USFTAIA, *supra* note 184.

187 Moral rights apply to literary material, artistic works (including paintings, drawings, architecture, sculpture, maps, photographs), musical works, dramatic works, computer programs, films, and sound recordings. ACC INFOSHEET G043, *supra* note 34, at 2. Copyright Amendment (Moral Rights) Act, 2000, §195AZE (Austl). R

188 ACC INFOSHEET G043, *supra* note 34, at 1, 3. R

189 *Id.* at 3–4 (Unless an author has consented in writing not to be identified or it is reasonable in all the circumstances not to identify the author, he must be attributed in the manner that would make anyone receiving, seeing or hearing the work aware of his name when the work is reproduced, published, publicly exhibited (artistic works or film), communicated (via internet, digital transmission, or fax), or adapted (translated, adapted from a literary to dramatic work or arranged).); Copyright Amendment (Moral Rights) Act, 2000, Div. 2, §§ 194, 195, 195AA, 195AB, 195AS, 195AW, 195AWA (Austl.). "Derogatory" treatment, as protected against by the right of integrity, includes mutilating, distorting or materially altering the work, or destroying or exhibiting the work in public. To infringe on the creator's moral rights, the alteration must go beyond making him upset; it must objectively prejudice his honor or reputation. Copyright Amendment (Moral Rights) Act, 2000, Div. 4, §§ 195AI, AJ, AK, AL (Austl.).

ticular description and not yet in existence, or it may be in progress.[190]

An employee may grant blanket consent to his employer in relation to any or all acts or omissions which might otherwise constitute an infringement of moral rights, and as to all works created or to be created in the course of employment.[191] With moral rights, though, Australian creators of works made in the scope of employment now have the possibility of retaining stronger rights in those works than they would have had under a copyright-only regime, wherein the employer was deemed the creator and copyright-holder of the works and there were no moral rights for the employee-creator to retain.[192]

Furthermore, an alleged moral rights infringer may establish a reasonableness defense for the failure to attribute or for derogatory treatment of the work, but not for a false attribution.[193] In considering whether derogatory treatment or a failure to attribute was reasonable in the circumstances, courts look to various factors, based on the facts of each case.[194] In addition, certain treatments of moveable artistic works, buildings, and architectural drawings, including good faith efforts to restore or preserve a work, will not infringe the creator's moral rights of integrity in the work.[195]

B. *The Net Australian Result*

The current Australian system of moral rights protection brings Australia into compliance with its international obligations under Berne and acknowledges creators' personal rights in their works while allowing reasonable restriction of these rights dependent upon the use of the works. While continental European

[190] Copyright Amendment (Moral Rights) Act, 2000, Div. 6, §§ 195AW(3), 195AWA(3)(b) (Austl.).

[191] Copyright Amendment (Moral Rights) Act, 2000, Div. 6, §§ 195AW(3), 195AWA(3)(b) (Austl.). *See also* DCITA FACT SHEET, *supra* note 61. **R**

[192] The Copyright Act, in contrast to the consent provisions of the Copyright Amendment (Moral Rights) 2000, made the employer the creator of a work produced in the course of employment, unless otherwise agreed upon. DCITA FACT SHEET, *supra* note 61. **R**

[193] Copyright Amendment (Moral Rights) Act, 2000, §§ 195AP, 195AR, 195AS (Austl.)

[194] In a reasonableness test of moral rights infringement, courts generally consider the nature of the work, the purpose, manner and context for which the work is used, industry custom and practice, whether the work was created in the course of employment or under a service contract, whether the treatment was required by law, and the views of the authors, if there were two or more. For specific criteria of the reasonableness test, see Copyright Amendment (Moral Rights) Act, 2000, §§ 195AR, AS (Austl).

[195] Copyright Amendment (Moral Rights) Act, 2000, Div. 6, §195AT (Austl).

moral rights are inalienable and cannot be sold or waived, the United States strongly resists that inalienability, and Australia has struck a compromise with an "equivocal position" with regard to alienability and a balancing of interests.[196] Effectively, while arguing that existing causes of action protect rights of attribution and integrity guaranteed by Berne, Australia statutorily created these rights and made them more or less alienable, thus extending existing protection while bringing Australia into compliance with its international obligations.[197]

XI. Conclusion: The Status of "Authors" in the United States is Not Inconsistent with Stronger, Berne-Compliant Moral Rights Protection, and the United States Can and Should Adopt the Australian Model of Systematic Moral Rights Protection Immediately

Moral rights, on the one hand, emphasize an author's unique attachment to his creative work and endeavor to protect his personality and personal expression, as these are manifested in his creation.[198] Copyright, on the other hand, focuses on the property rights of the party who seeks to use the creative work, whether or not this is the original author.[199] As intellectual property rights and the protection of creative works emerged in the United States, in statutes and from the Constitution, the greater public or cultural benefits derived from progress and innovation have always taken priority over the enrichment and protection of creative individuals.[200] Thus, in the United States, as between the *users* of creative works (copyright owners) and the *creators* of these works (artists), the bulk of authority to determine the use of creative works has always been placed in the hands of the users—who are viewed as the parties who will facilitate progress and cultural development—in line with the Framers' intent.[201] From the United States' perspective, giving creators too much power, in the form of greater moral rights, will hamstring growth and the greater good.

In order to reasonably incorporate moral rights into its statutory scheme and cultural landscape, the United States, however,

196 Caslon Analytics, *supra* note 178. **R**
197 *Id.*
198 *See, e.g., supra* Part II.
199 *Id.*
200 Davis, *supra* note 19, at 322–23. **R**
201 Beyer, *supra* note 19, at 1015–16. **R**

need not embrace the civil law world's romantic notion of the artist as heroic creator, whose moral rights are founded in natural rights theory.[202] It follows that as long as the proper balance is struck between the creators and the users of creative works, the American emphasis on cultural progress may coexist with artists' rights. Where the benefit of cultural innovation (on which side copyright owners'/users' interests lie) does not outweigh the cultural cost of such development (on which side authors' interests lie), the United States should feel comfortable protecting authors' moral rights in the integrity and preservation of their work, and allow the balance to tip against the public interest in progress.[203] Thus, a system which simultaneously contemplates creators' rights and the greater cultural good could comport with the U.S. balance of artists' moral rights as to the integrity of their works and the use of creative works to improve public welfare.

On a practical level, in common law Anglo-American copyright systems such as the United States and Australia, where non-economic moral rights are secondary to economic rights, public welfare, and the free flow of copyright commodities, there is justifiable concern that granting creators extensive rights over the personal character of their works would frustrate these primary goals.[204] Indeed, the power that moral rights laws grant to authors is not disproportionate to the potential loss of reputation caused by violations of integrity/attribution to work. Furthermore, the restraint on property rights is consistent with modern conceptions of property ownership; this notion is not uniquely related to moral rights. Finally, the foundations of moral rights, the recognition of the importance of a creator's integrity, reputation, and credit for his work, are not foreign concepts in the U.S. cultural, legal, or copyright landscape. The international consensus and U.S. treaty obligations under Berne demand protection of these.

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[202] *See supra* notes 41–43 and accompanying discussion. *See also* Beyer, *supra* note 19, at 1023. **R**

[203] For example, in order to evaluate the merit of alterations to creative works in terms of the public good, rather than categorically deferring to artists' expectations to not have their works altered, Beyer suggests consideration of the following: (1) Does the work which might be altered already occupy a venerated position in the culture?; (2) Would the alteration fundamentally transform the work and destroy its essence?; (3) Would the alteration be permanent and irreversible? Beyer, *supra* note 19, at 1036. **R**

[204] *See, e.g.*, GERVAIS, *supra* note 20, at 9; Nimmer & Price, *supra* note 6, at 11. *See generally* Netanel, *supra* note 4. **R** **R**

By enacting moral rights legislation, based on that of Australia, to protect the rights of integrity and attribution the United States could accommodate the above concerns, while maintaining its prized status quo balance of copyright owners' and authors' interests. The protections of the proposed moral rights legislation would have to apply to the original, individual authors of works, even as to works-made-for-hire, not to "copyright owners," who are the sole beneficiaries of current U.S. copyright legislation. These protections would last for the duration of copyright, and, as they recognize the author's personal rights to his work, they would not be transferable. But, in order to maintain a balance of interests, such protections could be waived, where a specific written waiver reflected the exact circumstances of the waiver. Safety valves such as statutory allowances for consent, the specific constraints of a reasonableness defense, and other exceptions found in the Australian moral rights legislation, function as checks on the extent of authors' sovereignty over their works and acknowledge that there are circumstances which require the alteration of a work or the omission of attribution. Thus, a balance between moral and economic rights suitable for the U.S. legal and social framework is conceivable. This balance would not only facilitate the flow of goods, but would also ensure that creative commodities are being put to their most efficient uses and would, at last, afford U.S. authors the high degree of copyright protection they deserve under Berne.