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Copyright and the Moral Right: Is an American Marriage Possible?*

*Roberta Rosenthal Kwall***

I. INTRODUCTION

The 1976 Copyright Act (the 1976 Act) embodies the most extensive reforms in the history of our nation's copyright laws.¹ One

* Copyright by Roberta Rosenthal Kwall and *Vanderbilt Law Review*.

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1. 17 U.S.C. §§ 101-810 (1982). Perhaps the most significant reform of the 1976 Act is the adoption of a unitary federal system of copyright protection in lieu of the prior system under which federal law protected published works and state common law governed unpublished works. See Diamond, *Preemption of State Law*, 25 BULL. COPYRIGHT SOC'Y 204 (1978). Compare 17 U.S.C. § 301 (1982) ("Preemption with respect to other laws") with Copyright Act of 1909, 17 U.S.C. § 2 (repealed 1976), reprinted in 17 U.S.C.A. app. (1977) (preserves common-law rights and remedies of a copyright proprietor of an unpublished work). See *infra* note 374. For a detailed discussion of the application of § 301 of the 1976 Act in the context of state protection for moral rights, see *infra* notes 292-398 and accompanying text.

In addition to the preemption provision codified in § 301, the 1976 Act made other sweeping changes. For example, § 302 provides that the duration of copyright protection for most forms of works consists of the life of the author plus an additional 50 year period following the author's death, thus replacing a term of protection that consisted of 28 years

proposed reform that is noticeably absent from the statutory scheme, however, is the explicit adoption of protections for the *personal* rights of creators² with respect to their works. Instead, the 1976 Act continues this country's tradition of safeguarding only the *pecuniary* rights of a copyright owner. By assuring the copyright owner the exclusive rights to reproduce and distribute the original work, to prepare derivative works, and to perform and display publicly certain types of copyrighted works, the 1976 Act³ focuses on the inherent economic value of a copyright. Consequently, the primary objective of our copyright law is to ensure the copyright owner's receipt of all financial rewards to which he is entitled, under the 1976 Act, by virtue of ownership.

Because copyright law protects works that are the product of the creator's mind, heart, and soul,⁴ a degree of protection in addition to that which guarantees financial returns is warranted. The 1976 Act does not purport to protect the creator, but rather the copyright owner.⁵ Nevertheless, a creator, regardless of whether he

from initial publication (or in some instances from registration) plus an additional 28 year renewal term. Compare 17 U.S.C. § 24 (repealed 1976) with 17 U.S.C. § 302 (1982). See *infra* text accompanying notes 373-74. The 1976 Act relaxed the notice formalities, the registration requirement, and the effect of the manufacturing clause contained in the 1909 Act. See, e.g., 17 U.S.C. §§ 405(a) (effect of omission of copyright notice), 407(d) (effect of failure to register a work upon demand by the Register of Copyright), 601 (manufacture, importation, and public distribution of certain copies) (1982); see also Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499 (1967) (discussion of 1976 Act changes). For a more detailed discussion of these and other changes mandated by the 1976 Act, see Latman, *A Glimpse at the New Copyright Act*, 24 BULL. COPYRIGHT SOC'Y 77 (1976). See also Katz, *Copyright Preemption Under the Copyright Act of 1976: The Case of Droit de Suite*, 47 GEO. WASH. L. REV. 200, 200-01 (1978) (noting importance of the 1976 Act for visual artists).

2. The term "creators" as used in this Article includes those who produce visual art, literature, music as well as all other categories of artistic works.

3. See 17 U.S.C. § 106 (1982). See *infra* note 140 for text of § 106. See also 17 U.S.C. § 1 (repealed 1976) ("Exclusive rights as to copyrighted works").

4. See 17 U.S.C. § 102 (1982) (copyright protection subsists in original works of authorship fixed in any tangible medium of expression, including literature, music, drama, pantomimes and choreography, visual art, motion pictures, and sound recordings).

5. See, e.g., *id.* § 106 ("the owner of copyright under this title has the exclusive rights to do . . . the following . . .") (emphasis supplied). The creator may transfer his copyright in whole or in part. See *infra* note 192. Section 201 governs ownership of copyright:

§ 201. Ownership of copyright

(a) Initial Ownership.—Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

(b) Works Made for Hire.—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

holds the copyright in his work, has a personal interest in preserving the artistic integrity of his work and compelling recognition for his authorship. In many European and Third World nations personal rights are protected by a legal doctrine commonly known as the moral right.⁶ In this country courts wishing to recognize a creator's personality interests are forced to rely upon other established legal theories such as unfair competition law,⁷ contract law,⁸ defamation,⁹ invasion of privacy,¹⁰ and even copyright law¹¹ to redress grievances implicating moral rights.

(c) Contributions to Collective Works.—Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) Transfer of Ownership.—

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) Involuntary Transfer.—When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title.

17 U.S.C. § 201 (1982)

6. See *infra* notes 16-65 and accompanying text.

The phrase "moral right" is a translation of the French term *droit moral*. One student of the moral right suggested that the English translation does not convey adequately the idea of an "intellectual concept" of "inner meaning," which is inherent in the French term "moral." Therefore, *droit moral* does not refer exclusively to rights inherent in our notion of morality, but also encompasses a right that exists in an entity's ultimate being. Naoum, *Federal Preemption Under the Copyright Act of 1976: Do Moral Rights Survive?* (1984) (unpublished paper in author's file). Perhaps for this reason Dr. Ladas proposed as a more appropriate concept the German term "*urheberpersönlichkeitsrecht*," which translates into "right of the author's personality." 1 S. LADAS, *THE INTERNATIONAL PROTECTION OF ARTISTIC AND LITERARY PROPERTY* § 272 (1938). Despite these criticisms, the term "moral right" is well-accepted among the majority of scholars who write in English. See Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADE-MARK REP. 244 (1978); Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940).

7. See *infra* note 72 and accompanying text.

8. See *infra* notes 73-78 and accompanying text.

9. See *infra* notes 79-81 and accompanying text.

This Article explores the interplay between the 1976 Act and the moral right doctrine. The Article recognizes that the content of any federal scheme adopted in this country for protecting a creator's personal rights will be influenced greatly by the 1976 Act.¹²

Part II of this Article defines the moral right generally and compares the express recognition of the moral right in foreign jurisprudence with the *mélange* of alternate legal theories relied upon by American courts. This discussion concludes that the implementation of the moral right doctrine in the United States not only would provide a uniform means of protecting a creator's personal interests, but also would free courts from reliance on legal theories that are not adequate substitutes for the moral right doctrine.

Part III examines the relationship between the 1976 Act and the moral right doctrine, focusing on three distinct inquiries. The first section of this discussion explores the scope of protection for personal rights currently afforded by the copyright law and concludes that existing copyright law is an inadequate substitute for a cohesive moral right doctrine. The second section examines the relevant statutory provisions, the legislative history, and recent judicial interpretations of the 1976 Act to determine the degree of compatibility between the copyright statute and the moral right doctrine. This analysis demonstrates that, although the 1976 Act has a considerable amount of unrealized potential for protecting a creator's personal rights, the Act also contains some significant limitations, resulting from the recognition of interests conflicting with those of creators, that are likely to influence the scope of any moral right doctrine adopted in this county. The last portion of part III discusses whether section 301 of the 1976 Act,¹³ which governs preemption of other laws, precludes the adoption of the moral right doctrine on a state level. Although section 301 does not preempt most forms of state protection for moral rights when such claims are within the framework of substitute legal theories,¹⁴ state statutes that attempt to provide comprehensive protection for

10. See *infra* notes 82-83 and accompanying text.

11. See *infra* notes 126-45 and accompanying text.

12. The adoption of personal right protection may become a reality shortly. At least two states recently have enacted modified moral rights statutes. See *infra* notes 108-25 and accompanying text; see also *infra* note 107 (discussing Congressman Drinan's federal proposal).

13. 17 U.S.C. § 301 (1982).

14. See *supra* text accompanying notes 7-10.

moral rights are vulnerable to preemption. Therefore, the most effective means of safeguarding a creator's personal rights in this country would be the incorporation into the 1976 Act of more provisions governing the special needs of creators distinct from their possible status as copyright owners.¹⁵

This Article concludes with a proposal for amending the 1976 Act so as to implement an "American" version of the moral right doctrine that would balance all the competing interests concerned in extending protection to the personal rights of creators.

II. ANALYTICAL FRAMEWORK FOR THE MORAL RIGHT

A. *Components and Attributes of the Moral Right*

The moral right doctrine generally is said to encompass three major components: the right of disclosure, the right of paternity, and the right of integrity. Some formulations of the moral right doctrine also include the right of withdrawal, the right to prevent excessive criticism, and the right to prevent assaults upon one's personality. For purposes of illustration, these components will be explored briefly in the context of the following hypothetical. A playwright, enthralled with the idea of writing a piece poking fun at the evangelical segment of society, suddenly envisions a story line through which she can communicate her ideas. In one day she outlines the plot and sketches some dialogue so that she will have a rough draft which she can develop further when inspiration strikes again. At this point, the playwright's interest in her work would be protected by an aspect of the moral right doctrine known as the right of disclosure or divulgation. Underlying this component of the moral right is the idea that the creator, as the sole judge of when a work is ready for public dissemination, is the only one who can possess any rights in an uncompleted work. Prior to the time the playwright places her work into circulation, therefore, she retains the same right to determine both the form of her play before it is distributed and the timing of public circulation.¹⁶

15. See *supra* note 5 and accompanying text.

The copyright clause of the Constitution provides the source of congressional authority for enacting amendments to the 1976 Act that could extend protection for the personal rights of creators. See U.S. CONST. art. I, § 8, cl. 8. For a discussion of this issue, see *infra* notes 274-81 and accompanying text.

16. Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 467 (1968) ("Only the author can decide whether his work corresponds to his original conception, at what moment it is completed, and whether it is worthy of him."); see also Diamond, *supra* note 6, at 252-54; Merryman, *The Refrigerator*

Suppose that a few days after the playwright had finished her rough draft, she entered into an agreement with a publisher in which she promised to produce the final publication version of the play within six months. Subsequently, a personal crisis in the playwright's life triggers a deep sense of religious conviction and she no longer wishes to finish the play. In these circumstances her refusal to complete the play would be supported by her right to *refuse* to disclose,¹⁷ a corollary to the right of disclosure. Application of this right would preclude a judgment ordering the playwright to complete the play, although a court might award the publisher damages for breach of contract.¹⁸

Some scholars believe that a second component of the moral right doctrine, known as the right of withdrawal, would allow the playwright in our hypothetical situation to recall all existing copies of her work if, following *actual* publication, she experienced a radical change of the convictions that originally provided the impetus for the play.¹⁹ Other commentators, however, have expressed doubts regarding the viability of the moral right of withdrawal because of the practical inconsistency in assuming that the public will forget works to which it has already been exposed.²⁰

of Bernard Buffet, 27 HASTINGS L.J. 1023, 1028 (1976).

The right of disclosure frequently is intertwined with the right to create. See Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506, 513 (1955). Mr. Roeder notes that the right to create remains one of our basic human rights, although the exercise of certain sovereign powers by the state, such as incarceration, sometimes may result in a curtailment of the right to create. Roeder, *supra* note 6, at 558.

17. Roeder, *supra* note 6, at 560. The copyright statute of the Philippines, for example, provides that an author has the right to make alterations of his work prior to, or to withhold it from, publication. Decree on the Protection of Intellectual Property, No. 49, Nov. 14, 1972, § 34.

18. See Sarraute, *supra* note 16, at 468. Mr. Sarraute noted, however, that in France an artist's lack of inspiration to finish a work does not constitute breach of contract, because failed inspiration is a normal risk foreseen by all parties. The artist will be held liable for breach only upon a showing of bad faith. *Id.* at 468, 480, 485.

A celebrated French case concerning this aspect of the moral right is Lord Eden's action against the American artist James McNeill Whistler, which was prompted by Whistler's alteration of a commissioned portrait of Lady Eden and his refusal to deliver the portrait to Lord and Lady Eden. The French courts ruled that Lord Eden should receive restitution and damages for breach of contract, but that Whistler would not be required to restore or deliver the portrait. *Eden v. Whistler*, 1898 Recueil Périodique et Critique [D.P.] II. 465 (Cour d'appel, Paris); *aff'd*, 1900 D.P. I. 497, (Cass. civ.). For a more detailed discussion of this case, see Merryman, *supra* note 16, at 1024, 1028; Sarraute, *supra* note 16, at 467-68.

19. See Merryman, *supra* note 16, at 1028; Roeder, *supra* note 6, at 561.

20. See Sarraute, *supra* note 16, at 477 (discussing the inadequacy of the 1957 French law recognizing the existence of a right of withdrawal); see also Diamond, *supra* note 6, at 254 (the intervening rights of third parties make enforcement of the right of withdrawal difficult); Strauss, *supra* note 16, at 513 (the decisions in Germany and France do not sup-

To continue the illustration, now assume that the playwright completes her work and subsequently visits a publisher with her manuscript in hand and offers it to the publisher for \$1500. The publisher conditionally agrees to this arrangement, providing the playwright makes certain revisions. When the playwright tenders the revised manuscript to the publisher, the publisher refuses to publish it with the playwright's name, notwithstanding the appearance of the playwright's name on the original manuscript.²¹ In these circumstances the playwright would be protected by another component of the moral right, the right of paternity. As its name suggests, the right of paternity safeguards a creator's right to compel recognition for his work and prevents others from naming anyone else as the creator. Therefore, the playwright would be able to force publication of the work under her name. Additionally, the right of paternity protects a creator in the event that someone falsely attributes to him a work that is not his creation.²²

Two other aspects of the moral right doctrine are the creator's right to prevent excessive criticism and the creator's right to relief from other assaults on his personality.²³ To appreciate fully the theoretical basis for these two rights, one must recall that the moral right doctrine safeguards rights of personality rather than pecuniary rights.²⁴ The creator projects his personality into his work, and thus is entitled to be free from vexatious or malicious criticism²⁵ and from unwanted assaults upon his honor and profes-

port the view of some scholars that a right of withdrawal has been recognized by the courts as a component of the moral right). When the right of withdrawal is recognized, however, it is generally in connection with literary works. See Merryman, *supra* note 16, at 1028; Sarraute, *supra* note 16, at 477. The right of withdrawal is recognized expressly in several countries, including Brazil, Ecuador, Egypt, France, Germany, Guinea, Italy, Ivory Coast, Mali, Portugal, and Senegal. Frequently, foreign statutes require the author to pay indemnification. See *infra* Appendix of this Article.

21. See *Clemens v. Press Publishing Co.*, 67 Misc. 183, 122 N.Y.S. 206 (1910) (court held that author had right to receive payment for story in similar circumstances, notwithstanding publisher's refusal to publish story with author's name); see also *infra* note 78.

22. Merryman, *supra* note 16, at 1027; Strauss, *supra* note 16, at 508. Mr. Diamond notes that the right of paternity also guarantees that the use of a creator's work will appear under an appropriate pseudonym or even anonymously, when the creator wishes to preserve his privacy. Diamond, *supra* note 6, at 254-55.

23. Diamond, *supra* note 6, at 255.

24. Merryman, *supra* note 16, at 1025; see *supra* note 6 and accompanying text. One scholar has defined the term "personality" in the context of the moral right as "the outward representation of one's most innermost self." Katz, *The Doctrine of Moral Right and American Copyright Law—A Proposal*, 24 S. CAL. L. REV. 375, 401 (1951). Mr. Katz further observed that any "unwarranted interference with an author's work is an invasion of his personality." *Id.* at 402.

25. The right against excessive criticism does not prohibit reasonable criticism regard-

sional standing.²⁶ By virtue of the prohibition against attacks on the creator's personality, the creator also is protected against misuse of his name and work. In the context of our hypothetical situation, such misuse would occur if an antireligious organization claimed that the playwright subscribed to antireligious views solely by virtue of her authorship of the play.²⁷

In the hypothetical situation, now suppose the playwright enters into an agreement with a movie producer authorizing the producer to write a screenplay based upon her play. The final version of the screenplay, however, distorts considerably the playwright's theme and mutilates her story line. The component of the moral right doctrine that would grant relief to the playwright in this situation is called the right of integrity.²⁸ This right lies at the heart of the moral right doctrine.²⁹ In our hypothetical case the adaptation process naturally would require certain modifications in the playwright's manuscript,³⁰ but the right of integrity prevents those who make such alterations from destroying the spirit and character of the author's work. Although adaptations of a work from one medium to another present the most obvious potential for violations of a creator's right of integrity, in reality, any modification of a work can be problematic from an integrity standpoint.³¹ Any dis-

less of how severely the work is condemned. Instead, it protects the creator against criticism whose sole object is to abuse or vex the author. See Roeder, *supra* note 6, at 572; Strauss, *supra* note 16, at 513-14. In France the creator is protected by special legislation recognizing his right to a published reply to the criticism. Roeder, *supra* note 6, at 572.

26. The prohibition against attacks on the creator's personality encompasses any act that may damage the creator's honor, reputation, and professional standing. See Roeder, *supra* note 6, at 573; Strauss, *supra* note 16, at 514. According to Mr. Strauss a tort or violation of a provision in a publishing agreement allegedly constitutes a violation of this right. *Id.*

27. Other examples of misuse include the use of a creator's artwork, without his consent, for commercial advertising and the unauthorized use of an author's general statements in a scientific book that he endorses a particular commercial product by virtue of those statements. See Strauss, *supra* note 16, at 514 & n.37.

28. Of course, the playwright also might proceed under breach of contract theory. *But see infra* notes 33, 73-78.

If a creator's name is attached to a distorted version of his work, a false attribution also will result. In such circumstances, the right of integrity meshes with the right of paternity. See Diamond, *supra* note 6, at 258; *infra* note 72.

29. Mr. Roeder observed the following regarding the right of integrity:

This aspect of the moral right—often deemed to constitute the whole doctrine—is at once the oldest and best known. It is certainly the most dramatic aspect and the one, because of its survival in the creator even after assignment of the copyright, most sharply differentiated from the exploitive right.

Roeder, *supra* note 6, at 565 (footnote omitted).

30. See *id.* at 571; Sarraute, *supra* note 16, at 481.

31. Works can be modified without being adapted to a different medium. In fact, cus-

tortion that misrepresents an artist's expression constitutes a violation of the creator's right of integrity.³²

There is, however, one rather incongruous aspect of the right of integrity. If the artist in our hypothetical situation was a painter rather than a playwright, the right of integrity probably would not allow her to prevent the destruction of one of her paintings by its owner. Perhaps the underlying rationale for this exception is that a work which has been destroyed completely cannot reflect adversely upon the creator's honor or reputation.³³ Nevertheless, some commentators have criticized the destruction exception on the ground that it negates the creator's right of paternity and frustrates the public's interest in enjoying the artist's work.³⁴

To summarize, the moral right doctrine encompasses several discrete components.³⁵ All nations that have adopted the moral

tom and usage frequently necessitate certain types of modifications. For example, editors of compilations alter a writer's text to insure a composite viewpoint, and textbook editors make alterations in subsequent editions to incorporate new techniques and discoveries. See Roeder, *supra* note 6, at 570-72 (discussing these and other examples). Mr. Roeder noted, however, that the power to alter must be reasonably exercised so as to preserve the "intrinsic esthetic quality of the work." *Id.* at 571. Consider, for example, the plight of the French artist Bernard Buffet, who decorated a refrigerator by painting a composition consisting of six panels covering the front, top, and sides of the refrigerator. Buffet considered the six panels to be one painting, and thus signed only one of the panels before auctioning the refrigerator. Subsequently, the catalogue of another auction featured a painting described as a Buffet painting on metal. An investigation revealed that this painting was one of the panels of the auctioned refrigerator. The French court entered an order preventing the separate sale of the panel. *Buffet v. Fersing*, 1962, Cours d'appel, Paris, Dalloz, *Jurisprudence* [D. Jur.] 570.

32. See Diamond, *supra* note 6, at 257; Merryman, *supra* note 16, at 1027.

The *Buffet* decision demonstrates another important point about the right of integrity: the right cannot always be vindicated in an action by the creator for breach of contract because the creator may not have a direct contractual relationship with the alleged wrongful perpetrator. Diamond, *supra* note 6, at 257, 261. Mr. Diamond commented, though, that many cases in the United States that could be predicated on a right of integrity theory are brought under breach of contract. *Id.* at 258; see *infra* notes 73-77 and accompanying text.

33. See Diamond, *supra* note 6, at 257-58; Roeder, *supra* note 6, at 569. Of course, a different result might obtain if the work is destroyed in a manner that subjects the creator to shame or embarrassment. See Amarnick, *American Recognition of the Moral Right: Issues and Options*, 29 COPYRIGHT L. SYM. (ASCAP) 31, 56-57 (1983); Diamond, *supra* note 6, at 258.

34. See, e.g., Amarnick *supra* note 33, at 57; Merryman, *supra* note 16, at 1035; see also *infra* text accompanying notes 399-402.

35. Dr. Ladas defined the moral right expansively to include the right to control publication of a work; the right to be credited with one's name on one's work and to prevent false attribution; the right to prohibit all unauthorized modifications; the right against abusive criticism; and the right to safeguard one's honor and professional standing. See 1 S. LADAS, *supra* note 6, § 273.

In contrast, Mr. Strauss believes that judicial enforcement of the moral right rarely extends beyond recognition for the right of paternity and the right to prevent modifications

right doctrine statutorily include at least some of the above protections, but the contours of the doctrine vary among the adhering countries.³⁶ Although a detailed analysis of the doctrine's application in foreign jurisprudence is beyond the scope of this Article,³⁷ a few general observations are in order.

The 1971 revision of the Berne Convention for the Protection of Literary and Artistic Works contains a moral rights provision, Article 6^{bis}, which recognizes the right of paternity and a limited right of integrity.³⁸ The right of integrity is violated only by a dis-

which are prejudicial to the author's honor or reputation. Strauss, *supra* note 16, at 535. He observed:

The other rights claimed by some writers to be components of the moral right . . . either have been protected on principles other than the moral right or have not been the subject of litigation. Thus, the right to create a work or to refuse to do so is merely a matter of denying specific performance of a contract to create and deliver a work; and the author is none the less liable for breach of contract. The right to publish a work usually is considered a property right rather than a component of the moral right. Where the author refuses to fulfill his obligation under a publishing contract, an interpretation of the contract by the court is necessary to settle the question. The right to prevent "excessive" criticism, and the right to prevent any other attack on the author's "special" personality are enforced under the law of defamation, libel or slander, or on some other tort principle unconnected with the copyright law. The right to withdraw a work from circulation apparently has not been litigated in connection with the moral right.

Id. at 536. At least one commentator has criticized Strauss for his attempts "to deprecate the actual extent of protection provided by the [moral] right in civil law countries" and "to find functional equivalents . . . in our law". Merryman, *supra* note 16, at 1037.

36. See Stevenson, *Moral Right and the Common Law: A Proposal*, 6 COPYRIGHT L. SYMP. (ASCAP) 89, 107 (1955) (noted the "surprisingly little uniformity of either theory or content" that exists with respect to application of the moral right doctrine in foreign jurisprudence); see also *infra* notes 55-65 and accompanying text.

37. See *infra* Appendix of this Article for applicable moral rights protections in selected countries.

38. The Berne Convention was signed initially in 1886 and thus is the oldest multilateral treaty governing copyright protection. Berne Convention for the Protection of Literary and Artistic Property, Sept. 9, 1886, 123 L.N.T.S. 233, reprinted in 3, COPYRIGHT LAWS AND TREATIES OF THE WORLD (UNESCO 1982) [hereinafter cited as Berne Union]. The last of multiple revisions of the Convention took place in Paris in 1971. Each revision is reprinted in the UNESCO volume. Currently, 76 nations adhere to the Berne Convention. See 4 M. NIMMER, NIMMER ON COPYRIGHT app. 22 (1984). The United States, the Soviet Union, and the People's Republic of China are among the nations that have never joined the Berne Convention. Nevertheless, because the treaty provides that its protections are extended to the nationals of any country as long as a work is published initially in a member country, or is published simultaneously in a member and nonmember country, American authors frequently have been able to secure copyright protection under the Berne Convention by simultaneously publishing their works in the United States and in Canada, which is a member of the Union. See Berne Union, *supra*, as revised in Paris on July 24, 1971, art. 3(1)(b); Comment, *The Author's Expression: The Necessity for U.S. Protection Through Statute and Multilateral Treaty*, 9 SYR. J. INT'L L. & COM. 137, 151-52 (1982).

The moral right doctrine was incorporated initially into the Berne Convention during

tortion, alteration, or mutilation of the creator's work that is prejudicial to his honor or reputation.³⁹ Both of these rights are independent of the creator's economic rights, and continue to exist following the creator's transfer of his economic rights. Despite the general recognition that Article 6^{bis} affords the moral right doctrine, the treaty contemplates that the specific legislation of the respective Union members will govern substantive applications of the right.⁴⁰ Some signatories to the Berne Convention are far more

its third revision in 1928. The original Article 6^{bis} provided:

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

(2) The determination of the conditions under which these rights shall be exercised is reserved for the national legislation of the countries of the Union. The means of redress for safeguarding these rights shall be regulated by the legislation of the country where protection is claimed.

Berne Union, *supra*, as revised in Rome on June 2, 1928, art. 6^{bis}. Professor Nimmer observed that some interest groups in the United States regard the Berne Convention's protection for moral rights as the chief barrier to our accession to the Union. Nimmer, *supra* note 1, at 518.

The current Article 6^{bis} is somewhat broader than the 1928 provision:

(1) Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

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

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Berne Union, *supra*, as revised in Paris on July 24, 1971, art. 6^{bis}. Notably, the United States is a member of the Universal Copyright Convention (UCC), which is the second major multilateral copyright treaty. The UCC, however, embodies only limited aspects of the moral right in the sole context of allowing member nations to enact legislation providing for compulsory translation licenses. UCC art. V, discussed in Diamond, *supra* note 6, at 247. For a discussion of the UCC, see Comment *supra*, at 153-56.

39. Some scholars have criticized the limited scope of the right of integrity sanctioned by the Berne Convention on the ground that a creator should be protected against any alteration of his work that is contrary to the creator's interests or style—regardless of whether such alteration is prejudicial to his honor or reputation. See Michaélidès-Nouaros, *Protection of the Author's Moral Interests After His Death as a Cultural Postulate*, 15 COPYRIGHT 35, 37 (1979), quoted in Amarnick, *supra* note 33, at 45.

Article 6^{bis} does not mention the right to disclose or publish because this right was regarded as too controversial to be included. Stevenson, *supra* note 36, at 108.

40. See Berne Union, *supra* note 38, art. 6^{bis}(3) (reprinted *supra* note 38); see also Nimmer, *supra* note 1, at 522.

protective of a creator's moral rights than are others. France, for example, awards the greatest protection, while Germany and Italy follow closely behind.⁴¹ Several nations that are not members of the Berne Convention provide extensive protection for moral rights as part of their copyright laws. Ecuador, for example, protects an author's rights of paternity, disclosure, integrity, and withdrawal.⁴²

No discussion of the moral right doctrine would be complete without addressing how foreign jurisprudence treats three issues that arise in connection with the doctrine's application: alienability of the right, its duration, and its exercise after the creator's death. Although countries that have adopted the moral right do not endorse a uniform position with respect to these matters, neither inalienability nor perpetual duration are critical to the moral right's existence.⁴³

Some scholars have argued that moral rights should not be alienable because they protect personal attributes such as personality, honor, and reputation.⁴⁴ France and numerous other countries expressly adhere to this position,⁴⁵ and so, theoretically, in

41. Diamond, *supra* note 6, at 247. The moral right doctrine evolved initially in France, where it was nurtured by the judiciary. Surprisingly, the French legislature did not codify the doctrine until 1957. Law No. 57-298 on Literary and Artistic Property, 1957 Journal Officiel [J.O.] 2723, arts. 6, 19, 32, *reprinted in* 3 COPYRIGHT LAWS AND TREATIES OF THE WORLD (UNESCO 1982); *see* Diamond, *supra* note 6, at 245. For a thoughtful discussion of the doctrine's development and application in France, *see* Sarraute, *supra* note 16.

42. Ecuador Law on Copyright, No. 610, Aug. 13, 1976, arts. 17, 18, *reprinted in* 1 COPYRIGHT LAWS AND TREATIES OF THE WORLD (UNESCO 1982). Other nonmember nations offering protection for various components of the moral right include Bangladesh, Colombia, El Salvador, Haiti, Panama, and Peru. *See infra* Appendix. One commentator has remarked that the level of protection afforded by many developing countries contrasts sharply with that provided by our post-industrial society. *See* Comment, *supra* note 38, at 156-57.

43. Stevenson, *supra* note 36, at 109.

44. *See* Katz, *supra* note 24, at 407-09; Nimmer, *supra* note 1, at 523 (citing GAVIN, LE DROIT MORAL DE L'AUTEUR § 255 (1960)); Strauss, *supra* note 16, at 515.

45. French Law No. 57-298 on Literary and Artistic Property, Mar. 11, 1957, art. 6 provides that the moral right is "perpetuel, inaliénable et imprescriptible." Other countries in which the right is inalienable include: Brazil, Law on the Rights of Authors, No. 5988, Dec. 14, 1973, art. 28; Chile, Law on Copyright, No. 17.336, Aug. 28, 1970, amended Oct. 18, 1972, arts. 15, 16 (inalienable but transmissible to surviving spouse and author's heirs); Colombia, Law on Copyright, No. 86, Dec. 26, 1946, arts. 48, 49; Ecuador, Law on Copyright, No. 610, July 30, 1976, art. 18; Guinea, Law No. 043/APN/CP Adopting Provisions on Copyright and Neighboring Rights, Aug. 9, 1980, art. 3(a); Italy, Law for the Protection of Copyright, No. 633, Apr. 22, 1941, amended Jan. 8, 1979, arts. 22, 142; Japan, Copyright Law, No. 48, May 6, 1970, amended by Law No. 49, May 18, 1978, art. 59; Portugal, Decree-Law No. 46980, Apr. 27, 1966, art. 57; and Senegal, Law on the Protection of Copyright, No. 73-52, Dec. 4, 1973, art. 3(a): collectively *reprinted in* 1-2 COPYRIGHT LAWS AND TREATIES OF THE WORLD (UNESCO 1982).

Article 6^{bis} of the Berne Convention does not take a position on alienability. *See supra* note 38 for text of Article 6^{bis}. *See also* Nimmer, *supra* note 1, at 524 (suggesting that in

those countries a creator cannot waive or assign his moral rights. Nevertheless, in adjudicating the validity of waivers as a defense in actions for alleged right of integrity violations, the French judiciary tends to enforce contracts allowing reasonable alterations that do not distort the spirit of the creator's work, particularly with respect to adaptations and contributions to collective works.⁴⁶ Indeed, this inclination on the part of French courts, which always have exhibited the utmost regard for the personal rights of creators,⁴⁷ illustrates the inherent infeasibility of a truly inalienable moral right. The interests of creators in safeguarding their reputations and professional standing must be balanced against the interests of those who perform adaptations in maintaining creative liberty.⁴⁸

The United States balances these interests somewhat differently than those countries that recognize the moral right. Whereas countries that have adopted the moral right generally will not interpret contracts which do not address moral rights as implying a

adopting the original Article 6^{bis} the Conference intended that the matter of inalienability of moral rights would remain within the province of each signatory).

46. See Amarnick, *supra* note 33, at 47-48 ("in spite of the seemingly comprehensive protection offered by the statute, a French lawyer advises authors who want to be certain of controlling adaptations of their works that they must bargain for those rights with the producer"); Merryman, *supra* note 16, at 1044-45 (noting that a waiver of the right by the artist is not enforceable against him, but the artist's consent to reasonable modifications of his work is effective); Sarraute, *supra* note 16, at 481-82; Stevenson, *supra* note 36, at 112; Strauss, *supra* note 16, at 516-17, 537.

The seminal French case on this subject, *Bernstein v. Matador et Pathé Cinéma*, D.H. 1933.533, D.A. 1933, 104, held that a covenant allowing all changes necessary for adapting a play to a movie was valid, notwithstanding the author's "inalienable" moral right. For a discussion of this and other French cases, see Sarraute, *supra* note 16, at 481-82; Strauss, *supra* note 16, at 516-17.

France has enacted special rules governing moral rights in the motion picture industry, which were intended to eliminate work stoppages caused by disagreements among the director, authors, and scorers of a movie. The efficacy of these laws, however, appears questionable. See Sarraute, *supra* note 16, at 473-76.

47. See *supra* note 41 and accompanying text.

48. See Sarraute, *supra* note 16, at 481; Comment, *Protection of Artistic Integrity*, 90 HARV. L. REV. 473, 479 (1976) (noting that an inalienable moral right to prevent unacceptable modifications might result in less investment in and distribution of artistic works, thereby reducing public access). The fears on the part of the American motion picture and television industries that United States adoption of the moral right doctrine would enable a creator to enforce component rights, notwithstanding a prior assignment for valuable consideration, have inspired great opposition to our accession to the Berne Convention. Although such fears are understandable, the basis for them is diminished by the failure of Article 6^{bis} to incorporate the requirement of inalienability, and by the practice of countries such as France, where the moral right supposedly is inalienable, to respect the interests of those who adapt creative works. See Amarnick, *supra* note 33, at 46-49; Nimmer, *supra* note 1, at 523-24; see also *supra* note 46 and accompanying text.

tacit waiver of the creator's rights,⁴⁹ the opposite is true in the United States. Although courts in the United States rely on equitable principles to protect a creator against excessive mutilation of his work, in general the creator has the burden of extracting an agreement regarding modifications from the purchaser. Even when the creator has secured such an agreement, the danger exists that the contract will not bind subsequent purchasers.⁵⁰ Waivers of the right of paternity are viewed favorably in this country, as evidenced by the traditional rule that a creator is not entitled to credit, absent a contractual provision to the contrary.⁵¹

Article 6^{bis} of the Berne Convention does not address the alienability issue,⁵² but it does address a second important issue concerning the moral right—duration. The 1971 Conference amended Article 6^{bis} to include a provision calling for the recognition of a creator's moral rights following his death for a *minimum* period consisting of the duration of his copyright.⁵³ Article 6^{bis}(2) does afford each member some latitude in this respect, however, by providing that those countries whose laws do not protect all of the moral rights set forth in Article 6^{bis}(1) on a posthumous basis may allow some of these rights to cease following the creator's death.⁵⁴

49. Strauss, *supra* note 16, at 516, 537.

50. See *Preminger v. Columbia Pictures Corp.*, 49 Misc. 2d 363, 267 N.Y.S.2d 594 (although contract between owner of motion picture and motion picture company gave owner right to perform final cutting and editing, owner did not have such rights with respect to television showings licensed by company, absent a specific contractual provision, especially when owner was aware of industry practice of cutting a film for television commercials), *aff'd mem.*, 25 A.D.2d 830, 269 N.Y.S.2d 913, *aff'd mem.*, 18 N.Y.2d 659, 219 N.E.2d 431, 273 N.Y.S.2d 80 (1966); Merryman, *supra* note 16, at 1045 (criticizing the United States rule for failing to protect adequately the creator); see also *infra* notes 73-77 and accompanying text (detailed discussion of American law on this point).

51. See *Diamond*, *supra* note 6, at 255; see also 2 M. NIMMER, *supra* note 38, § 8.21[E], at 8-270, 8-270.5 (also noting some recent developments countering this position); see also *infra* notes 72 & 78. Mr. Strauss noted that although "moral right countries" generally do not sanction tacit waivers, the paternity right is presumed to be waived with respect to collective works such as newspapers and encyclopedias. Strauss, *supra* note 16, at 537.

52. See *supra* note 45.

53. Berne Union, *supra* note 38, art. 6^{bis}(2). See *supra* note 38 for text of Article 6^{bis}. Prior to 1971 the text of Article 6^{bis} made no mention of the moral right's duration, thereby allowing each signatory to regulate the matter individually under subsection two of the Article. See *supra* note 38.

54. Berne Union, *supra* note 38, art. 6^{bis}(2). Commentators have suggested that this minimum time period exception constitutes a concession to those countries possessing the Anglo-Saxon tradition in which the moral right is effectuated primarily under common-law doctrines that have no application once the injured party has died. Amarnick, *supra* note 33, at 58; WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 41 (1978).

Some writers have distinguished "positive" components of the moral right from "nega-

Countries that recognize the moral right can be divided into two groups with respect to the question of the right's duration. The first group, which includes West Germany⁵⁵ and the Netherlands,⁵⁶ follows the approach advocated by the Berne Convention and simultaneously terminates a creator's moral rights and copyright. The second group adheres to the French view that moral rights are perpetual.⁵⁷ In France a creator's moral or personality rights always have been regarded as a separate body of protections, rather than as a component of the creator's pecuniary rights.⁵⁸ Thus, in French theory no logical inconsistency results from protecting a creator's moral rights in perpetuity, despite the limited duration of his copyright.⁵⁹

Two justifications support the survival of moral rights subsequent to the creator's death. First, focusing solely on the interests of the creator, any mutilation or modification of his work that would be detrimental to his reputation during his lifetime is equally, if not more, injurious after his death, when he can no longer defend the integrity of his work.⁶⁰ Second, focusing on society's interest in preserving its cultural heritage, when a creator's work is altered after his death, society is the ultimate victim for it

“positive” components with respect to the issue of posthumous exercise of the right. Thus, “positive” aspects such as the right to create, disclose, modify, and withdraw die with the creator. “Negative” components, however, such as the right to prevent others from making detrimental changes do not require a personal act on the part of the author, and therefore, can be transmitted to the author's heirs. See Strauss, *supra* note 16, at 517-18.

55. Act dealing with Copyright and Related Rights, No. 5 of Sept. 9, 1965, art. 64, *Bundesgesetzblatt*, Teil I (amended Mar. 2, 1974), reprinted in *COPYRIGHT LAWS AND TREATIES OF THE WORLD* (UNESCO 1982).

56. Law Concerning the New Regulation of Copyright, No. 308 of Sept. 23, 1912, art. 25, *Staatsblad Voor het Koninkrijk der Nederlanden* (amended Oct. 27, 1972), reprinted in *COPYRIGHT LAWS AND TREATIES OF THE WORLD* (UNESCO 1982).

57. France, Law No. 57-298 on Literary and Artistic Property, Mar. 11, 1957, art. 6, *Journal Officiel de la République Française*, reprinted in *COPYRIGHT LAWS AND TREATIES OF THE WORLD* (UNESCO 1982). Countries that have adopted this approach include: Ecuador, Law No. 610 on Copyright, No. 149 of Aug. 13, 1976, art. 18, *Registro Oficial*; Guinea, Law No. 043/APN/CP Adopting Provisions on Copyright, Aug. 9, 1980, art. 3(a); Ivory Coast, Law No. 78-634 on the Protection of Intellectual Works, July 28, 1978, art. 22, *Journal Officiel de la République de Côte d'Ivoire*; and Senegal, Law No. 73-52 on the Protection of Copyright, No. 4333 of Dec. 4, 1973, art. 3(a), *Journal Officiel de la République du Sénégal*; collectively reprinted in *COPYRIGHT LAWS AND TREATIES OF THE WORLD* (UNESCO 1982).

58. See Diamond, *supra* note 6, at 247 (in France an author can obtain protection for his moral rights even if he has not secured protection for his pecuniary rights).

59. In France copyright protection exists for 50 years after the death of the author. France, Law No. 57-298 on Literary and Artistic Property, Mar. 11, 1957, art. 21, J.O., reprinted in *COPYRIGHT LAWS AND TREATIES OF THE WORLD* (UNESCO 1982).

60. See, e.g., Amarnick, *supra* note 33, at 59; Katz, *supra* note 24, at 405.

can no longer benefit from the creator's original contribution.⁶¹ Adoption of these rationales helps to answer the related question concerning power of enforcement of a creator's moral rights following his death.⁶² In many countries moral rights are treated as any other form of property, and therefore, vest in the spouse and next of kin upon the creator's death.⁶³ This approach, influenced by the first justification, recognizes a creator's family and descendants as the appropriate guardians of his reputation.⁶⁴ Some countries, however, cognizant of society's interest in maintaining its cultural heritage, provide more extensive protection by entrusting a deceased creator's moral rights to an official body designated to protect the nation's creative works.⁶⁵

61. See, e.g., Diamond, *supra* note 6, at 249; Katz, *supra* note 24, at 405; Roeder, *supra* note 6, at 575.

62. One commentator has suggested that in the United States "it should be made mandatory for the author to file with the Copyright Office a written appointment of the heirs of his moral rights." Stevenson, *supra* note 36, at 115.

63. See, e.g., Chile, Law No. 17,336 on Copyright, Aug. 28, 1970, arts. 15, 16, *Diario Oficial* (amended Oct. 18, 1972); France, Law No. 57-298 on Literary and Artistic Property, Mar. 11, 1957, art. 6, J.O.; collectively reprinted in *COPYRIGHT LAWS AND TREATIES OF THE WORLD* (UNESCO 1982).

64. See Roeder, *supra* note 6, at 575. Professor Roeder also noted that although the creator's honor and reputation cannot be injured by an unauthorized alteration of his work following his death, his family and descendants may suffer some injury and thus should have a remedy. *Id.* In this regard, Katz observed that because the descendants of the creator are able to enjoy works which the creator left to benefit them, they have a corresponding duty to preserve these creations in the form desired by the deceased. Katz, *supra* note 24, at 425.

65. The circumstances under which such a public body can exercise a deceased author's moral rights vary. See, e.g., Brazil, Law No. 5988 on the Rights of Authors and Other Provisions, Dec. 14, 1973, arts. 25(1), (2), *Diario Oficial* (on death of author, moral rights pass to his heirs, but state safeguards the identify or authenticity of works that have fallen into the public domain); Italy, Law No. 633 for the Protection of Copyright and Other Rights Connected with the Exercise Thereof, Apr. 22, 1941, art. 23, *Gazzetta Ufficiale delle Leggi e dei Decreti* (amended Jan. 8, 1979) (deceased author's moral rights may be asserted by certain close relatives, or if the public interest should so require, by the Minister for Public Culture); Lebanon, Decree No. 2385 Providing Regulation of Commercial and Industrial Property Rights in Syria and Lebanon, Jan. 17, 1924, art. 163, *Bulletin Officiel des Actes Administratifs du Haut Commissariat de la République Française en Syrie et au Liban* (amended Jan. 31, 1946) (in case author dies leaving no heirs, the Director of the Protection Office is authorized to enforce and exercise the moral rights); Portugal, Decree-Law No. 46980 (Copyright Code), No. 99 of Apr. 27, 1966, art. 57, *Diario do Governo* (moral rights are exercised by the author's heirs until the works fall into the public domain, and thereafter by the state); collectively reprinted in *COPYRIGHT LAWS AND TREATIES OF THE WORLD* (UNESCO 1982).

In France a deceased author's right of disclosure may be exercised by the following parties in the following order: (1) the author's executors; (2) descendants; (3) spouse; (4) other heirs; and (5) general legatees. France, Law No. 57-298 on Literary and Artistic Property, Mar. 11, 1957, art. 19, J.O., reprinted in *COPYRIGHT LAWS AND TREATIES OF THE WORLD*

B. *The American Response: Noncopyright Alternatives*

Despite the well-entrenched, if not perfectly uniform, position that the moral right enjoys in many European and Third World nations,⁶⁶ creators in the United States are unable to benefit from express applications of the doctrine. Standing alone, this fact is neither a tribute to nor an indictment of our legal system.⁶⁷ The critical inquiry is whether our failure to embrace the doctrine has resulted in inadequate protections for the important interests at stake. The overwhelming number of commentators who have stud-

(UNESCO 1982). French courts can exercise a deceased author's moral right if no heirs exist. *Id.* art. 20. Moreover, the National Literary Fund, created by statute in 1946, is empowered to protect the integrity of a deceased author's literary works that have fallen into the public domain, regardless of their country of origin. *Id.* To date, however, the Fund has been denied standing to enforce a deceased author's right of integrity if the decedent's heirs are still alive. See *Caisse nationale des Lettres c. Soc. d'Éditions et de Diffusion artistiques*, Trib. gr. inst., 16 Apr. 1964, 1964 D.P. I 746 (Fund denied standing to bring an action seeking confiscation of abridged and distorted version of Victor Hugo's *Les Misérables* on ground that the author's right of integrity is of a personal nature, and therefore, only Hugo's living heirs could bring such an action). See generally Sarraute, *supra* note 16, at 483-84 (brief discussion of the French law on this subject).

66. See *supra* notes 41-43 and accompanying text; see also *infra* Appendix.

67. Some commentators have speculated on the reasons for our country's reluctance to adopt the moral right doctrine. Mr. Katz, outraged by our failure to adopt the doctrine, largely blames the judicial and legislative willingness to abdicate responsibility. See Katz, *supra* note 24, at 410-20. Professor Merryman, on the other hand, is not surprised by the "underdeveloped state" of American law on this subject, given that American art only recently has achieved international recognition, and that the law requires time to respond to social and cultural changes. See Merryman, *supra* note 16, at 1042; see also Roeder, *supra* note 6, at 557 ("Busy with the economic exploitation of her vast natural wealth, America has, perhaps, neglected the arts; in any event American legal doctrine has done so . . .").

In addition, the American concept of copyright law is rooted in the Anglo-Saxon tradition, and therefore, is greatly influenced by common-law notions of property. Consequently, the economic aspects of copyright easily predominated over the author's personality interests. See Francione, *The California Art Preservation Act and Federal Preemption by the 1976 Copyright Act—Equivalence and Actual Conflict*, 18 CAL. W.L. REV. 189, 193 (1982); Comment, *supra* note 38, at 141; Comment, *Copyright: Moral Right—A Proposal*, 43 FORDHAM L. REV. 793, 803-08 (1975) (discussing "evolution of the English-American concept of copyright"). Interestingly, England, whose membership in the Berne Convention requires it to recognize the moral right, has failed to adopt the doctrine in an explicit, systematic fashion. Goldstein, *Adaptation Rights and Moral Rights in the United Kingdom, the United States and the Federal Republic of Germany*, INT'L REV. OF INDUSTRIAL PROP. & COPYRIGHT L. 43, 46-50 (1983). English copyright law, like American, was predicated on the idea that authors and printers are entitled to secure economic rewards from the publication of works. *Id.* at 46. Protection for a creator's personal rights was not part of the common-law tradition. England's position on the moral right recently was scrutinized in a government report which concluded that "the occasion of a new Copyright Act presents a good opportunity to clarify the position and to bring all the provisions necessary to meet the Paris Act together in a single statute." Reform of the Law Relating to Copyright, Designs and Performer's Protection, A Consultative Document 58 (Cmd. 8302 H.M.S.O. 1981), quoted in Goldstein, *supra*, at 49.

ied this question have concluded that the scope of protection in America for the personal rights of creators is insufficient.⁶⁸ The criticism is not surprising given that patchwork measures rarely approximate the degree of protection afforded by a cohesive legal theory whose exclusive objective is the specific protection of precise interests.⁶⁹

The principal doctrines that American courts have relied upon to protect a creator's moral rights include unfair competition, breach of contract, defamation, and invasion of privacy.⁷⁰ The increasingly liberal applications of unfair competition law generally and section 43(a) of the Lanham Act⁷¹ in particular have popularized these doctrines as vehicles for redressing alleged violations of interests protected elsewhere by the rights of integrity and paternity.⁷²

68. See, e.g., Amarnick, *supra* note 33, at 60-81 (discussing the right of integrity); Diamond, *supra* note 6, at 280-81; Kringsman, *Section 43(a) of the Lanham Act as a Defender of Artists' "Moral Rights,"* 73 TRADE-MARK REP. 251, 270-72 (1983); Merryman, *supra* note 16, at 1037-39; Roeder, *supra* note 6, at 575-78; Comment, *supra* note 38, at 144, 150. *Contra* Strauss, *supra* note 16, at 521-38. *But cf.* Treece, *American Law Analogues of the Author's "Moral Right,"* 16 AM. J. COMP. L. 487 (1968-69) (concluding that although doctrine of common-law copyright offers American creators protection equal to that of their French counterparts during the period of creation, the American analogues offer less protection after a work is made public) (the 1976 Act has substantially preempted state common-law copyright protection for works fixed in a tangible medium; see *supra* note 1; *infra* note 375).

69. Cf. Kwall, *Is Independence Day Dawning for the Right of Publicity?*, 17 U.C.D. L. REV. 191, 206 n.68 (1983) (illustrating the right of publicity's superiority over more established legal theories in protecting against unauthorized exploitation of an individual's name and likeness).

70. See *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 340 n.5 (S.D.N.Y. 1968); 2 M. NIMMER, *supra* note 38, § 8.21[B], at 8-248; see also *infra* notes 126-46 and accompanying text.

71. 15 U.S.C. § 1125(a) (1982). Section 43(a), which creates a federal cause of action against misrepresentation, provides in pertinent part:

Any person who shall . . . use in connection with any goods or services . . . any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or representation.

Id. § 43(a).

72. The right of paternity was at issue in *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981), in which the court upheld the plaintiff actor's § 43(a) claim on the ground that the defendant film distributor removed plaintiff's name from the film credits and advertising materials and substituted the name of another actor. The court determined that the defendant's conduct constituted express *reverse* palming off, which occurs when a wrongdoer removes the name of a trademark on another party's goods and sells such goods under a different name. The court cited precedents establishing § 43(a)'s application to a broad scope of deceptive practices and thus rejected the defendant's argument that § 43(a) is an inappropriate basis for relief because its protections do not extend to claims that a movie contains false information. *Id.* at 605.

Courts rely upon express contractual provisions for granting

Professor Nimmer suggests that *Montoro* may be used as support for the argument that any author may claim a violation of § 43(a) if his name is eliminated from his published work. 3 M. NIMMER, *supra* note 38, § 8.21[E], at 8-267, -269; *see also* Follett v. Arbor House Publishing Co., 497 F. Supp. 304, 311 (S.D.N.Y. 1980) (attributions of authorship that misrepresent the contribution of the person designated as author violate § 43(a)). *Montoro* can be regarded as a rejection of the traditional rule that a creator is not entitled to credit for his work absent a contrary contractual provision. *Cf.* Vargas v. Esquire, 164 F.2d 522, 526-27 (7th Cir. 1947) (in suit by artist to enjoin defendant's reproduction of artist's pictures without his signature, court held that no unfair competition established because artist contractually relinquished all of his rights with respect to his pictures); Harris v. Twentieth Century-Fox Film Corp., 43 F. Supp. 119 (S.D.N.Y. 1942) (plaintiff writer not entitled to screen credit for her story because she did not retain any rights in her agreement with the defendant producer), *rev'd on other grounds*, 139 F.2d 571 (2d Cir. 1943).

In some false attribution cases the right of paternity becomes intertwined with the right of integrity. *See supra* note 28 and accompanying text. Section 43(a) also has been used as a basis for relief in these circumstances. In Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 (2d Cir. 1976), the Second Circuit determined that the plaintiffs, a group of British writers and performers known as "Monty Python," stated a cause of action under § 43(a) of the Lanham Act based on the defendant network's broadcasting of a program truthfully designated as having been written and performed by the plaintiffs but which had been edited, without plaintiffs' consent, into a mutilated and distorted form that substantially departed from the original work. *Id.* at 23-25. The court noted that a cause of action seeking redress for deformation of an artist's work "finds its roots in the continental concept of *droit moral*, or moral right." *Id.* at 24. In a concurring opinion, Judge Gurfein objected to the majority's use of the Lanham Act to vindicate a creator's right of integrity, given that statute's concern with misdescription of origin. He observed that as long "as it is made clear that the ABC version is not approved by the Monty Python group, there is no misdescription of origin." *Id.* at 26-27 (Gurfein, J., concurring); *see infra* notes 84-89 and accompanying text.

Other decisions have suggested that § 43(a) may be used to protect a creator's integrity and paternity interests in the modification context. *See, e.g.,* Jaeger v. American Int'l Pictures, Inc., 330 F. Supp. 274 (S.D.N.Y. 1971) (in denying the defendant film distributor's motion to dismiss complaint, the court noted that plaintiff author/director arguably had a claim under § 43(a) on the ground that defendant represented that plaintiff was the author/director of an allegedly mutilated and garbled version of plaintiff's film); Geisel v. Poynter Prods., Inc., 295 F. Supp. 331, 351-55 (S.D.N.Y. 1968) (in action by plaintiff artist/author against defendants for using his pen name in connection with advertising and sales of dolls based on his drawings, the court held that defendants violated § 43(a) because they created a false impression that the plaintiff designed or authorized the dolls); *see also* Autry v. Republic Prod., Inc., 213 F.2d 667 (9th Cir.) (court left undecided whether Lanham Act would be violated by a producer's mutilation of a motion picture, rendering it substantially different from original), *cert. denied*, 348 U.S. 858 (1954).

State unfair competition law provides another avenue for relief in false attribution cases. *See, e.g.,* Granz v. Harris, 198 F.2d 585, 588 (2d Cir. 1952) (defendant's sale of abbreviated records made from plaintiff's master discs constitutes unfair competition if defendant described recordings as presented by the plaintiff); *Jaeger*, 330 F. Supp. at 278; *Geisel*, 295 F. Supp. at 354 n.15; Prouty v. NBC, Inc., 26 F. Supp. 265 (D. Mass. 1939) (in denying defendant's motion to dismiss in action by plaintiff, author of novel "Stella Dallas," against radio broadcasting company for misappropriating name of book and using personality of Stella Dallas in skits, court stated that plaintiff would be entitled to relief on theory of unfair competition if she showed that defendant appropriated her plot, characters, and literary production resulting in injury to her reputation and deception of the public); Shaw v.

relief to creators for violations of their integrity interests.⁷³ In addition, many courts articulate a willingness to interpret ambiguous contracts to vindicate a creator's interests.⁷⁴ In an extremely

Time-Life Records, 38 N.Y.2d 201, 341 N.E.2d 817, 379 N.Y.S.2d 390 (1975) (affirming denial of defendant's summary judgment motion in action by band leader Shaw against record company for advertising records that it produced as "Artie Shaw versions" of Swing Era classics); *cf.* Drummond v. Altemus, 60 F. 338 (E.D. Pa. 1894) (court temporarily enjoined defendant from selling a book incorporating incorrectly copied fragments of plaintiff's lectures under a title suggesting that book contained entire lecture series in plaintiff's words; unfair competition not discussed specifically, but court did mention prevention of fraud upon purchasers as an incidental basis for relief). See *infra* notes 345-64 and accompanying text for a discussion regarding the extent to which the 1976 Act preempts state unfair competition actions. See generally Bonner v. Westbound Records, Inc., 49 Ill. App. 3d 543, 364 N.E.2d 570 (1977) (plaintiff singing group established likelihood of success on the merits with respect to their claim under Illinois Deceptive Trade Practice Act based on defendant's use of plaintiff's name on an album containing plaintiff's original recordings in an unfinished form, altered by the insertion of additional material by other artists).

73. See, e.g., Zim v. Western Publishing Co., 573 F.2d 1318 (5th Cir. 1978) (publisher breached contract with author by publishing revised version of author's book under circumstances violative of their agreement); Manners v. Famous Players-Lasky Corp., 262 F. 811 (S.D.N.Y. 1919) (court enjoined production of motion picture on ground that defendant movie producer changed sequence of play during adaption process, thereby violating contractual provision that "[n]o alterations, eliminations, or additions to be made in the play without the approval of the author"); Packard v. Fox Film Corp., 207 A.D. 311, 202 N.Y.S. 164 (1923) (use of work falsely attributed to author and unauthorized use of author's name in connection with his story under a different title violate contract); Royle v. Dillingham, 53 Misc. 383, 104 N.Y.S. 783 (1907) (unequivocal clause in contract prohibiting changes, alterations and additions to play without the author's consent afforded playwright protection against unauthorized changes and modifications); see also Granz v. Harris, 198 F.2d 585, 588 (2d Cir. 1952) (contractual provision requiring appropriate attribution of authorship carries an implied duty not to make changes that convert the required attribution into a false representation; thus a court determined that defendant's sale of abbreviated records from plaintiff's master discs was a breach of contract).

74. See, e.g., Curwood v. Affiliate Distribs., Inc., 283 F. 219, 222-23 (S.D.N.Y. 1922) (court held that a renowned author's sale of motion picture rights for one of his stories did not include author's permission to allow purchaser to attach author's name to any picture purchaser wished to produce); Stevens v. NBC, 148 U.S.P.Q. (BNA) 755, 758 (Cal. Super. Ct. 1966) (when contract between plaintiff author and defendant broadcasting company did not contain a grant of rights to make changes in film for purpose of television exhibition, court enjoined defendant from inserting commercials that would "alter, adversely affect or emasculate the artistic or pictorial quality of [the film] so as to destroy or distort materially or substantially the mood, effect, or continuity of [the film]"); see also Edgar Rice Burroughs, Inc. v. Metro-Goldwyn-Mayer, Inc., 205 Cal. App. 2d 441, 447-48, 23 Cal. Rptr. 14, 18 (1962) (in interpreting a contract between a writer and movie company that allowed the movie company to remake the first photoplay as long as there were no "material changes" or "departures" from the story, court observed that changes are not material "as long as the locus of the play, the order of sequence, the development of the plot, and the theme, thought and main action of the story are preserved"); Seroff v. Simon & Schuster, Inc., 6 Misc. 2d 383, 162 N.Y.S.2d 770 (1957) (in action brought by author against publisher for libel based on defendant's sale of right to publish translation of plaintiff's book which resulted in a distorted translation, court observed that publisher has duty to select an appropriate foreign purchaser and translator when author granted publisher translation rights).

favorable decision for creators, *Gilliam v. American Broadcasting Companies, Inc.*,⁷⁵ the Second Circuit held that extensive unauthorized editing of a work protected by common-law copyright constitutes copyright infringement at least in the absence of a governing contractual provision.⁷⁶ In general, however, if the contract in question does not address modification rights, American courts will protect a creator only against excessive mutilation of his work.⁷⁷

75. 538 F.2d 14 (2d Cir. 1976).

76. The following facts gave rise to the litigation in *Gilliam*: Monty Python, a British group of writers and performers, had an agreement with British Broadcasting Corporation (BBC) under which BBC was authorized to license the transmission of recordings of the group's performances in overseas territories. Time-Life Films acquired from BBC the rights to distribute the Monty Python series in the United States. The agreement between BBC and Monty Python's scriptwriters gave BBC final authority to make changes prior to recording, although the scriptwriters retained optimum control over the editing process. The agreement did not, however, authorize BBC to alter a program once it had been recorded. Further, the scriptwriters retained all other rights in the scripts subject to the terms of the agreement.

Although the agreement between Monty Python's scriptwriters and BBC did not authorize editing of the programs for insertion of television commercials, Time-Life was authorized by BBC to perform such editing. Subsequently, ABC acquired from Time-Life the right to broadcast two 90 minute specials containing Monty Python programs. Monty Python was "appalled" at the "mutilation" and extensive deletions that had resulted from Time-Life's editing of one program (24 out of 90 minutes had been omitted) and sought to enjoin further broadcasts. ABC argued that the contracts between Monty Python and BBC permitted editing of the programs for television in the United States, reasoning that although Monty Python's scriptwriters had the right to participate in the editing process prior to recording of the programs, BBC had unrestricted authority after that point, which it could, in turn, assign to others. The court determined, however, that "[s]ince the scriptwriters' agreement explicitly retains for the group all rights not granted by the contract, omission of any terms concerning alterations in the program after recording must be read as reserving to appellants [scriptwriters] exclusive authority for such revisions." *Id.* at 22. Thus, because BBC could not convey greater rights than it owned, its permission to allow Time-Life to edit was a "nullity." *Id.* at 21; see *infra* notes 126-32 and accompanying text. See *supra* note 72 for a discussion of the unfair competition aspect of this decision.

77. In *McGuire v. United Artists Television Prods., Inc.*, 254 F. Supp. 270 (S.D. Cal. 1966), the court held that a writer who had been granted an undetermined measure of "creative control" over his script still did not have the right to prevent his assignee from deleting portions for the insertion of television commercials because their contract did not contain such a specific prohibition. See also *Stevens v. National Broadcasting Co.*, 148 U.S.P.Q. (BNA) 755 (Cal. Super. Ct. 1966) (when court found no specific grant of rights by a movie producer to a television broadcasting company allowing the company to edit the movie for television broadcasting, court only enjoined editing that would constitute a severe emasculation or material distortion); *Preminger v. Columbia Pictures Corp.*, 49 Misc. 2d 363, 267 N.Y.S.2d 594, *aff'd per curiam*, 25 A.D.2d 830, 269 N.Y.S.2d 913 (although plaintiff movie owner retained the right to final cutting and editing with respect to the movie, such protection did not extend to television exhibitions; thus, editing rights for television were governed by prevailing industry custom absent a specific contractual provision), *aff'd mem.*, 18 N.Y.2d 659, 219 N.E.2d 431, 273 N.Y.S.2d 80 (1966). Both *Stevens* and *Preminger* reject the view that a producer has a common-law right to have his movie shown on television as he produced it, especially if his contract requires that his name appear on the television screen

American creators thus fare less successfully in modification challenges than their counterparts in moral right countries. As discussed earlier, foreign courts that maintain an inalienable moral right will uphold contractual provisions allowing reasonable alterations of a creator's work in certain contexts, but they will refrain from holding that a creator tacitly has waived his right of integrity by signing an agreement silent on modification rights.⁷⁸

The law of defamation offers creators an avenue for relief if their works are disseminated to the public in such a manner as to injure their professional reputations. The injury might take the form of the publication of a mutilated version of the creator's work under the creator's name,⁷⁹ or a false attribution of authorship

credits. See the dissenting opinion of Judge Rabin in the *Preminger* case, 25 A.D.2d 830, 834, 269 N.Y.S.2d 913, 918 (Rabin, J., dissenting), *aff'd mem.*, 18 N.Y.2d 659, 219 N.E.2d 431, 273 N.Y.S.2d 80 (1966).

Of course, American courts will enforce contracts in which a creator clearly waives or assigns his right to make changes, even when such changes amount to a distortion of his original work. See, e.g., *Jones v. American Law Book Co.*, 125 A.D. 519, 109 N.Y.S. 706 (1908) (when contract between plaintiff writer and defendant book company clearly provided that any articles prepared by plaintiff were subject to defendant's editorial changes, defendant cannot be compelled to attribute authorship to plaintiff); *Seroff v. Simon & Schuster, Inc.*, 6 Misc. 2d 383, 162 N.Y.S.2d 770 (1957) (in libel action by author against his publisher based on distorted translation of plaintiff's book, court held publisher not liable given author's grant of translation and foreign publication rights to publisher, and publisher's subsequent sale of rights to independent foreign contractor). Mr. Strauss suggests that even in France, an author's express contractual waiver of the moral right usually is upheld. Strauss, *supra* note 16, at 516 (discussing French authority). *But see Merryman, supra* note 16, at 1044 (suggesting that an artist's waiver of the right of integrity is not enforceable against him); *supra* note 46 and accompanying text.

78. See *supra* notes 45-50 and accompanying text.

Waivers of the paternity right also can arise in contract cases, but the traditional American rule is that a creator has no right to compel recognition for his work absent a specific contractual provision. *Clemens v. Press Publishing Co.*, 67 Misc. 183, 122 N.Y.S. 206 (1910). See *supra* note 51 and accompanying text and note 72 for a discussion of cases adhering to the traditional view and the Ninth Circuit's implicit rejection of this approach in *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981).

The principles of contract law also may be applied to actions concerning a creator's refusal to disclose. See *supra* notes 17-18 and accompanying text. According to a black letter rule of American contract law, personal service contracts are not specifically enforceable. RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (1981); 5 A. CORBIN, CONTRACTS § 1204 (1964); see, e.g., *In re Noonan*, 17 B.R. 793 (S.D.N.Y. 1982) (contract between singer and recording company); *American Broadcasting Co. v. Wolf*, 52 N.Y.2d 394, 420 N.E.2d 363 (1981) (contract between television network and sportscaster); *DeRivafinoli v. Corsetti*, 4 Paige 264 (N.Y. Ch. 1833) (singing contract); see also *Treece, supra* note 69, at 490.

79. See, e.g., *Edison v. Viva Int'l, Ltd.*, 70 A.D.2d 379, 421 N.Y.S.2d 203 (1979) (action for libel may be sustained by virtue of publication of author's article in substantially different form and content); *Locke v. Benton & Bowles, Inc.*, 253 A.D. 369, 2 N.Y.S.2d 150 (1938) (false statements interpolated by radio commentator in broadcasting script whose authorship was attributed to plaintiff could be actionable).

with respect to a work of poor quality with which the creator was not associated.⁸⁰ The key to any successful defamation action, however, is the creator's showing that the unauthorized acts exposed him to contempt or public ridicule, thus injuring his professional standing.⁸¹ Alternatively, a creator whose works have been published without his authorization or who is the victim of a false attribution⁸² may seek to redress his injuries by suing for invasion of privacy.⁸³

Although the substitute theories discussed in this section afford creators varying levels of protection for their moral rights, American creators typically are at a relative disadvantage compared to creators in moral right countries. The major difficulty facing American creators is the additional burden of molding moral rights claims into other recognized causes of action. Given that all of the substitute theories are supported by a theoretical basis different from that of the moral right doctrine, a successful claim may require elements of proof which are not applicable directly to a moral rights claim. The moral right doctrine is concerned with the creator's personality rights and society's interest in preserving the

80. See, e.g., *Clevenger v. Baker, Voorhis & Co.*, 8 N.Y.2d 187, 168 N.E.2d 643 (1960) (editorship of compilation with numerous inaccuracies falsely attributed to plaintiff); *Ben-Oliel v. Press Publishing Co.*, 251 N.Y. 250, 167 N.E. 432 (1929) (publication of article under plaintiff's name containing false information with respect to plaintiff's area of expertise).

81. Cf. *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 357 (S.D.N.Y. 1968) (defamation claim not established when defendants exercised great care, skill, and judgment in manufacturing dolls based on plaintiff's drawings, thereby causing no injury to plaintiff's professional reputation).

Professor Nimmer suggests that the law of defamation, as well as disparagement and slander of title, may safeguard, to some extent, a creator's right to prevent excessive criticism. Nimmer, *supra* note 1, at 522; see *supra* notes 23-25 and accompanying text.

82. See, e.g., *Zim v. Western Publishing Co.*, 573 F.2d 1318 (5th Cir. 1978) (author stated cause of action for invasion of privacy by alleging that publisher published unauthorized revisions of his works); *Giesecking v. Urania Records*, 17 Misc. 2d 1034, 155 N.Y.S.2d 171 (1956) (plaintiff stated a cause of action under New York's statutory right of privacy by alleging that defendant record company made reproductions of plaintiff's piano performance and sold them as plaintiff's original recordings without his consent).

83. In addition, a creator may seek recovery for the unauthorized appropriation of his name under a right of publicity theory. See Comment, *Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrines*, 60 Geo. L.J. 1539, 1545-47 (1972). Although the right of publicity is an offshoot of the right of privacy, the theoretical basis of each doctrine differs. Historically, the right of privacy has served as a means of compensating an individual for injured feelings caused by the defendant's conduct. The typical right of a publicity plaintiff, however, is not objecting to the *fact* of the exploitation, but rather to the *loss of financial gain* associated with the unauthorized appropriation. For a discussion of the development and application of the right of publicity generally, see Kwall, *supra* note 69, at 191.

integrity of its culture.⁸⁴ These interests are not the exclusive, or even the primary, focus of any of the substitute theories, all of which developed in response to completely different social concerns. Unfair competition law, as evidenced by its traditional elements of competition, passing off of one's goods or services as those of another, and likelihood of confusion,⁸⁵ seeks to protect economic rights and, to a lesser extent, to prevent consumer deception.⁸⁶ Similar societal concerns underlie section 43(a) of the Lanham Act,⁸⁷ through which Congress intended to vindicate a producer's economic interests by proscribing false representations.⁸⁸ Given the significantly different objectives behind the moral right doctrine, on the one hand, and unfair competition law and section 43(a) of the Lanham Act on the other, any protection that a creator may receive for his personality rights under either of these substitute theories merely is fortuitous.⁸⁹

84. See *supra* notes 16-35 & 60-61 and accompanying text.

85. See, e.g., *American Washboard Co. v. Saginaw Mfg. Co.*, 103 F. 281 (6th Cir. 1900). For a history of unfair competition law generally, see Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289 (1940). Some modern courts do not require an unfair competition plaintiff to prove competition and passing off, see *Hirsch v. S.C. Johnson & Son*, 90 Wis. 2d 379, 399, 280 N.W.2d 129, 138 (1979), but a plaintiff still must prove likelihood of confusion to prevail under an unfair competition theory.

86. In *American Washboard Co. v. Saginaw Mfg. Co.*, 103 F. 281 (6th Cir. 1900), the court observed:

[T]he private right of action in . . . [unfair competition] cases is not based upon fraud or imposition upon the public, but is maintained solely for the protection of the property rights of complainant. It is true that in these cases it is an important factor that the public are deceived, but it is only where this deception induces the public to buy the goods as those of complainant that a private right of action arises.

Id. at 285.

87. 15 U.S.C. § 1125(a) (1982) (see *supra* note 71 for text).

88. See, e.g., *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981); *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649 (3d Cir. 1954). Courts now generally hold that a § 43(a) plaintiff need not prove palming off and that § 43(a) is applicable to a wide range of deceptive practices. See *Smith v. Montoro*, 648 F.2d 602, 604-05; see also *supra* note 72.

89. The use of unfair competition law and § 43(a) of the Lanham Act to vindicate a creator's moral rights has been criticized by numerous authorities. See, e.g., *Gilliam v. American Broadcasting Co.*, 538 F.2d 14, 26-27 (2d Cir. 1976) (Gurfein, J., concurring); *Roeder*, *supra* note 6, at 567-68; Annual Review Committee, *The Thirtieth Year of Administration of the Lanham Trademark Act of 1946*, 67 TRADE-MARK REP. 471, 564-68 (1977); see also Comment, *Monty Python and the Lanham Act: In Search of the Moral Right*, 30 RUTGERS L. REV. 452, 476 (1977) (noting limited utility of Lanham Act in protecting an artist's moral rights because it applies only in the narrow context of a distorted work that is misrepresented as the product of the original artist). But see Comment, *The Monty Python Litigation—Of Moral Right and the Lanham Act*, 125 U. PA. L. REV. 611, 624-25 (1977) (approving *Gilliam's* extension of § 43(a) of the Lanham Act to redress situations in which an extensively edited work is attributed to its original author) [hereinafter cited as Comment, *Moral Right and the Lanham Act*].

Defamation and invasion of privacy doctrines are of limited utility in protecting a creator's moral rights. The personality rights safeguarded by the moral right doctrine encompass more than protection for a creator's professional reputation or relief for injured feelings.⁹⁰ In addition, courts that invoke either defamation or privacy theories frequently adhere to technical rules and requirements that narrow the application of these doctrines in situations concerning moral rights.⁹¹

To the extent that unfair competition law and § 43(a) are concerned with preventing public deception, *see supra* note 86, they share some theoretical common ground with that aspect of the moral right doctrine that is concerned with preserving accurately society's cultural integrity. Indeed, the accuracy of the preservation process is threatened when the public is deceived as to the identity of a creator by a false attribution or by the ultimate form of a creation through distortion or mutilation.

90. *See* Comment, *supra* note 83, at 1549-50 (noting that a creator seeks to protect not only his reputation but also his work); Comment, *Moral Right and the Lanham Act*, *supra* note 89, at 617 (differentiating interests protected by libel and the moral right: "[t]he personality of the artist, as opposed to his exploitable reputation, and the act of creation, as opposed to the mercenary appurtenances to that act, are the concerns of moral right."). Compare *supra* notes 16-36 and accompanying text with notes 79-83 and accompanying text. Similarly the right of publicity's primary objectives are distinct from the rationale underlying the moral right. The right of publicity is concerned with preventing unjust enrichment, guaranteeing an individual his just financial rewards for the fruits of his labors, and providing appropriate economic incentives so creators will be encouraged to produce works and thus benefit society. *See supra* note 83.

91. Libel *per quod*, which requires resort to extrinsic facts to ascertain the defamatory meaning, and slander must fall into special categories if the plaintiff is to avoid proof of special damages supported by specific proof and pecuniary loss. One such category includes defamations that affect the plaintiff in his business, trade, or profession. W. PROSSER & W. KEETON, *HANDBOOK OF THE LAW OF TORTS* § 112 (5th ed. 1984). Courts, however, exercise their discretion in deciding whether a particular type of defamation satisfies this exception, and thus have required proof of special damages in libel actions in which the plaintiffs alleged damage to their professional reputations. *See, e.g., Harris v. Twentieth Century-Fox Film Corp.*, 43 F. Supp. 119 (S.D.N.Y. 1942) (court dismissed plaintiff's cause of action for libel resulting from defendant's crediting her with "story research" rather than creative writing for failure to plead special damages).

The use of libel to vindicate a creator's moral rights is problematic for other reasons as well. Traditionally, courts will not grant injunctive relief to restrain a personal libel, thereby denying the creator his most effective remedy. *See Shostakovich v. Twentieth Century-Fox Film Corp.*, 196 Misc. 67, 69-70, 80 N.Y.S.2d 575, 577-78 (1948) (court noted traditional rule, but stated that it would grant injunctive relief in a proper case), *aff'd*, 275 A.D. 692, 87 N.Y.S.2d 430 (1949); Roeder, *supra* note 6, at 567. In addition, a libel cause of action will be of no avail to a creator who believes the integrity of his work has been impaired but who cannot show damage to his professional standing. *See supra* note 81 and accompanying text. A creator also must be "sufficiently well-known to have a reputation before he can be libeled." Diamond, *supra* note 6, at 265. Finally, as Mr. Roeder observed, "[t]he conception of libel would have to be strained beyond the breaking point in order to protect creators of non-literary works, and to prevent deformation of works after the death of the creator." Roeder, *supra* note 6, at 567; *see also* RESTATEMENT (SECOND) OF TORTS § 560 (1977) ("One who publishes defamatory matter concerning a deceased person is not liable either to the estate of the person or to his descendants or relatives.").

Even contract law, which is the purported basis for decision in many cases concerning the integrity and paternity components of the moral right doctrine,⁹² cannot function as an adequate substitute. In addition to the limitations presented by the privity re-

Invasion of privacy also is of limited assistance to creators seeking redress for violations of their moral rights. The scope of the common-law right of privacy varies from state to state. For example, although traditionally the right of privacy has been regarded as a personal right that terminates upon the death of the individual, some courts have allowed recovery in invasion of privacy actions by the relatives of a decedent when the appropriation was for commercial purposes. *See Bazemore v. Savannah Hosp.*, 171 Ga. 257, 155 S.E. 194 (1930); Kwall, *supra* note 69, at 208-09. This disparity is relevant to the extent that invasion of privacy is viewed as a substitute for moral right interests, which generally can be exercised by a deceased creator's representatives and relatives. *See supra* notes 60-65 and accompanying text. In some jurisdictions, the right of privacy is statutory. *See N.Y. CIVIL RIGHTS LAW* §§ 50-51 (McKinney 1976 & Supp. 1982); *OKLA. STAT. ANN.* tit. 21 §§ 839.1, 839.2 (West 1983); *VA. CODE* §§ 8.01-40 (Repl. 1984), 18.2-216.1 (1982). These statutes provide relief to an individual whose name or likeness has been appropriated for commercial purposes, and thus resemble a right of publicity cause of action. *See supra* notes 83 & 90. In applying the New York privacy statute, one court has denied a creator protection for his paternity interest on the ground that the statute does not protect an artist's distribution of his work under a pseudonym. *See Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 356 (S.D.N.Y. 1968) (court held that the name "Dr. Seuss" is an assumed name or pseudonym rather than a surname and thus not protectable under statute). The New York statute also contains the following exception that has proved fatal to several invasion of privacy actions based on moral right violations:

[N]othing contained in this act shall be so construed as to prevent any person . . . from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.

N.Y. CIVIL RIGHTS LAW § 51 (McKinney 1976 & Supp. 1982); *see, e.g.*, *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69 (S.D.N.Y. 1982) (defendant music publisher acquired right to use plaintiff artist's name and likeness, under statutory exception, by virtue of plaintiff's disposition of musical compositions to defendant); *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 356-57 (S.D.N.Y. 1968) (exception to statute satisfied when defendants held the copyright in cartoons featuring characters created by plaintiff, which defendants used as models for toy dolls); *Shaw v. Time-Life Records*, 38 N.Y.2d 201, 379 N.Y.S.2d 390 (1975) (statute not applicable when plaintiff placed his musical arrangements in the public domain and defendant copied them, truthfully stating they had been created by plaintiff); *see also infra* text accompanying note 99. One commentator has remarked that such statutory exceptions are indicative of a failure to recognize the moral right's fundamental premise that "certain rights stemming from the paternity and integrity interest survive the grant of the right to use the work." Comment, *Moral Right and the Lanham Act*, *supra* note 89, at 619.

The right of publicity also is problematic as an adequate moral right substitute. Aside from the drawbacks stemming from the theoretical differences discussed earlier, *see supra* note 90, the right of publicity is an evolving doctrine whose scope presently is undetermined. Courts currently are grappling with questions regarding the proprietors of the right, its descendibility, and its interaction with the first amendment. The descendibility issue, in particular, has been litigated heavily during the past few years, but little uniformity has resulted. *See Kwall, supra* note 69, at 191.

92. *See Diamond, supra* note 6, at 261.

quirement⁹³ and the judiciary's general reluctance to afford extensive protections for creators absent express contractual provisions,⁹⁴ relatively unknown creators face a disparity of bargaining power that frequently results in a loss of valuable protections.⁹⁵

*Shostakovich v. Twentieth Century-Fox Film Corp.*⁹⁶ illustrates the unhappy plight of creators who cannot fit their moral rights cause of action into any of the alternate theories discussed above. In *Shostakovich* several prominent Russian composers sought injunctive relief against the defendant's use of their music in a film that, in the plaintiffs' view, had an anti-Soviet theme. In addition to the use of plaintiffs' music, which was in the public domain, the defendant used the plaintiffs' names on the credit lines. The *Shostakovich* plaintiffs based their right to relief on four grounds: (1) New York's statutory right of privacy;⁹⁷ (2) defamation; (3) the deliberate infliction of an injury without just cause; and (4) violation of moral rights.⁹⁸ With respect to the privacy claim, the court observed that "lack of copyright protection has long been held to permit others to use the names of authors in copying, publishing or compiling their works."⁹⁹ As for the defamation claim, the court reasoned that the music's public domain status precluded any implication that the plaintiffs had approved of or endorsed the film, and thus the court refused to sustain plaintiffs' claim for libel.¹⁰⁰ The court treated the plaintiffs' claim for the infliction of wilful injury in conjunction with their moral rights claim. Although the court paid lip service to the moral right doctrine by noting that "conceivably under the doctrine of Moral Right the court could in a proper case, prevent the use of a composition or work, in the public domain, in such manner as would be violative of the author's rights,"¹⁰¹ the court nevertheless declined the opportunity to vindicate the plaintiffs' interests. In refusing to grant plaintiffs their requested relief, the court emphasized that the plaintiffs made no allegations of distortion and no "clear show-

93. See *supra* note 32.

94. See *supra* notes 77-78 and accompanying text.

95. See Amarnick, *supra* note 33, at 71-72.

96. 196 Misc. 67, 80 N.Y.S.2d 575 (1948), *aff'd*, 275 A.D. 692, 87 N.Y.S.2d 430 (1949).

97. N.Y. CIVIL RIGHTS LAW § 51 (McKinney 1948).

98. *Shostakovich v. Twentieth Century-Fox Film Corp.*, 196 Misc. 67, 69, 80 N.Y.S.2d 575, 577 (1948), *aff'd*, 275 A.D. 692, 87 N.Y.S.2d 430 (1949).

99. *Id.*, at 67, 80 N.Y.S.2d at 577; see also *supra* note 91.

100. *Id.*, at 70, 80 N.Y.S.2d at 578.

101. *Id.*

ing of the infliction of a wilfull injury."¹⁰² Yet, an injury resulting from an inappropriate contextual use of a creator's work is actionable under the moral right doctrine, as evidenced by the French decision granting the plaintiffs in *Shostakovich* their requested relief.¹⁰³ A reading of the American *Shostakovich* opinion suggests, however, that the court's discomfort with the moral right doctrine and the difficulty of its application provided the primary impetus for denying the plaintiffs' moral rights claims.¹⁰⁴

An even more fundamental drawback resulting from the judiciary's reliance on alternate theories rather than a cohesive framework to vindicate moral rights interests is the danger that the competing interests will not receive appropriate attention. Although the moral right doctrine seeks to protect the interests of creators and the public in general, entrepreneurs such as publishers, motion picture producers, broadcasters, and record manufacturers have valid interests that may be opposed diametrically to the right's existence and application.¹⁰⁵ The appropriate balancing of competing interests in a given case depends not only upon the type of creation at issue but also upon its intended use.¹⁰⁶ The adoption of a

102. *Id.*, at 70-71, 80 N.Y.S.2d at 578-79.

103. The American and French cases were litigated simultaneously. The French court held that there was "undoubtedly a moral damage" and ordered the film seized. *Soc. Le Chant du Monde v. Soc. Fox Europe*, Jan. 13, 1953, Cours d'appel, Paris, Dallez, *Jurisprudence*, [D. Jur.] 16, 80; see Strauss, *supra* note 16, at 534-35 n.56; cf. *Rich v. RCA Corp.*, 390 F. Supp. 530 (S.D.N.Y. 1975) (plaintiff singer obtained preliminary injunctive relief against defendant's use of a current photograph of plaintiff on a newly released album containing songs previously recorded by plaintiff on ground that such deceptive packaging violates § 43(a) of the Lanham Act and is likely to deceive consumers).

104. In support of this rationale, the court observed:

The application of the doctrine presents much difficulty . . . [T]here arises the question of the norm by which use of such work is to be tested to determine whether or not the author's moral right as an author has been violated. Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be? In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined.

Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 70-71, 80 N.Y.S.2d 575, 578-79 (1948), *aff'd*, 275 A.D. 692, 87 N.Y.S.2d 430 (1949).

105. See Roeder, *supra* note 6, at 577; *supra* note 48 and accompanying text.

106. Ms. Amarnick distinguished the following three categories of transfers of a creator's work: (1) sales of a work, such as fine art, intended primarily for the passive possession and enjoyment of the buyer; (2) sales of a work intended to be used actively, and perhaps transformed into another medium, by the purchaser; and (3) sales of a work for distribution in its original medium, such as the sale of the rights to reprint a book in a paperback edition. Amarnick, *supra* note 33, at 40-45. Ms. Amarnick also noted that the drafting of an American moral rights statute "must proceed on the premise that a different balance of interests must be struck in some types of uses and not others and that the protection of the

comprehensive moral right doctrine would provide the necessary framework within which these interests could be balanced effectively.

Although no comprehensive protection for a creator's moral rights currently exists in the United States,¹⁰⁷ California and New York recently have enacted statutes affording visual artists protection for certain aspects of their moral rights. The California Art Preservation Act, which became effective on January 1, 1980, prohibits the intentional "physical defacement, mutilation, alteration or destruction of a work of fine art" by any person except the creating artist who owns and possesses the work.¹⁰⁸ An artist may

integrity of an artwork may not be defined in the same way for all types of uses." *Id.* at 40. See *infra* text accompanying notes 398-411 for a proposal that attempts to balance the competing interests at stake.

107. Numerous attempts have been made to amend our Copyright Act by incorporating a moral rights provision, but none have met with success. For a discussion of these efforts, see Amarnick, *supra* note 33, at 77-80; Katz, *supra* note 24, at 419. The most recent proposal is a bill introduced by Congressman Drinan that would incorporate in § 113 of the 1976 Act, which defines the "scope of exclusive rights in pictorial, graphic and sculptural works," a right to "claim authorship of such work and to object to any distortion, mutilation or other alteration thereof, and to enforce any other limitation recorded in the Copyright Office that would prevent prejudice to the author's honor and reputation." DRINON, VISUAL ARTISTS MORAL RIGHTS AMENDMENT, H.R. REP. No. 288, 96th Cong., 1st Sess. 440 (1979). The right contemplated by this proposal would exist independently of copyright protection, although the duration of the protection would be the same for both rights. Moreover, a deceased artist's legal representatives would be able to exercise his rights for 50 years following his death. *Id.*; see also Amarnick, *supra* note 33, at 81. As of this writing, Congress has not taken any action with respect to this proposal.

108. CAL. CIV. CODE § 987(c)(1) (West 1983). Section 987 provides in its entirety:

(a) The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against such alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.

(b) As used in this section:

(1) "Artist" means the individual or individuals who create a work of fine art.

(2) "Fine art" means an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser.

(3) "Person" means an individual, partnership, corporation, association or other group, however organized.

(4) "Frame" means to prepare, or cause to be prepared, a work of fine art for display in a manner customarily considered to be appropriate for a work of fine art in the particular medium.

(5) "Restore" means to return, or cause to be returned, a deteriorated or damaged work of fine art as nearly as is feasible to its original state or condition, in accordance with prevailing standards.

(6) "Conserve" means to preserve, or cause to be preserved, a work of fine art by retarding or preventing deterioration or damage through appropriate treatment in accordance with prevailing standards in order to maintain the structural integrity to the

waive these protections, but only by "an instrument in writing ex-

fullest extent possible in an unchanging state.

(7) "Commercial use" means fine art created under a work-for-hire arrangement for use in advertising, magazines, newspapers, or other print and electronic media.

(c) (1) No person, except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art.

(2) In addition to the prohibitions contained in paragraph (1), no person who frames, conserves, or restores a work of fine art shall commit, or authorize the commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art by any act constituting gross negligence. For purposes of this section, the term "gross negligence" shall mean the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art.

(d) The artist shall retain at all times the right to claim authorship, or, for just and valid reason, to disclaim authorship of his or her work of fine art.

(e) To effectuate the rights created by this section, the artist may commence an action to recover or obtain any of the following:

(1) Injunctive relief.

(2) Actual damages.

(3) Punitive damages. In the event that punitive damages are awarded, the court shall, in its discretion, select an organization or organizations engaged in charitable or educational activities involving the fine arts in California to receive such damages.

(4) Reasonable attorneys' and expert witness fees.

(5) Any other relief which the court deems proper.

(f) In determining whether a work of fine art is of recognized quality, the trier of fact shall rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art.

(g) The rights and duties under this section:

(1) Shall, with respect to the artist, or if any artist is deceased, his heir, legatee, or personal representative, exist until the 50th anniversary of the death of such artist.

(2) Shall exist in addition to any other rights and duties which may now or in the future be applicable.

(3) Except as provided in paragraph (1) of subdivision (h), may not be waived except by an instrument in writing expressly so providing which is signed by the artist.

(h) (1) If a work of fine art cannot be removed from a building without substantial physical defacement, mutilation, alteration, or destruction of such work, the rights and duties created under this section, unless expressly reserved by an instrument in writing signed by the owner of such building and properly recorded, shall be deemed waived. Such instrument, if properly recorded, shall be binding on subsequent owners of such building.

(2) If the owner of a building wishes to remove a work of fine art which is a part of such building but which can be removed from the building without substantial harm to such fine art, and in the course of or after removal, the owner intends to cause or allow the fine art to suffer physical defacement, mutilation, alteration, or destruction, the rights and duties created under this section shall apply unless the owner has diligently attempted without success to notify the artist, or, if the artist is deceased, his heir, legatee, or personal representative, in writing of his intended action affecting the work of fine art, or unless he did provide notice and that person failed within 90 days either to remove the work or to pay for its removal. If such work is removed at the expense of the artist, his heir, legatee, or personal representative, title to such fine art shall pass to that person.

(3) Nothing in this subdivision shall affect the rights of authorship created in sub-

pressly so providing which is signed by the artist."¹⁰⁹ The Act contains a three year statute of limitations that runs from the occurrence of the act in question,¹¹⁰ and the artist's rights may be exercised by his heir, legatee, or personal representative for fifty years after his death.¹¹¹ Remedies under the Act include injunctive relief,¹¹² actual damages,¹¹³ punitive damages,¹¹⁴ reasonable attorneys' and expert witness fees,¹¹⁵ and any other relief that a court may deem appropriate.¹¹⁶ The statute's protection against destruction is particularly interesting given the reluctance of foreign jurisprudence to extend similarly the right of integrity.¹¹⁷ Nevertheless, the Act embodies a significant limitation with respect to protecting creators' integrity interests in that it is applicable only to works of "fine art"¹¹⁸ which have not been prepared under contract for commercial use by the purchaser.¹¹⁹ Moreover, the destructive act complained of must be intentional.¹²⁰

division (d) of this section.

(i) No action may be maintained to enforce any liability under this section unless brought within three years of the act complained of or one year after discovery of such act, whichever is longer.

(j) This section shall become operative on January 1, 1980, and shall apply to claims based on proscribed acts occurring on or after that date to works of fine art whenever created.

(k) If any provision of this section or the application thereof to any person or circumstance is held invalid for any reason, such invalidity shall not affect any other provisions or applications of this section which can be effected without the invalid provision or application, and to this end the provisions of this section are severable.

CAL. CIV. CODE § 987 (West Supp. 1983).

109. *Id.* § 987(g)(3).

110. *Id.* § 987(i). The statute provides an alternative of one year after discovery of the complained of act if this period is longer than three years after the act's occurrence.

111. *Id.* § 987(g)(1).

112. *Id.* § 987(e)(1).

113. *Id.* § 987(e)(2).

114. *Id.* § 987(e)(3).

115. *Id.* § 987(e)(4).

116. *Id.* § 987(e)(5). For a detailed discussion of this statute, see 2 M. NIMMER, *supra* note 38, § 8.21[C][2], at 8-255, 8-261.

117. See *supra* notes 34-35 and accompanying text; cf. *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S.2d 813 (1949) (artist may not object to the destruction of his work once it has been sold unconditionally).

118. "Fine art" is defined in the California statute as "an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality, but shall not include work prepared under contract for commercial use by its purchaser." CAL. CIV. CODE § 987(b)(2) (West Supp. 1983).

119. *Id.*

120. *Id.* § 987(c)(1). An unintentional act, however, will give rise to a cause of action if it is the result of gross negligence by a person who frames, conserves, or restores a work of fine art, or who authorizes the commission of such an act. *Id.* § 987(c)(2).

The New York statute, the Artists' Authorship Rights Act, is similar to the California Art Preservation Act.¹²¹ Under the New

121. N.Y. ARTS & CULTURE LAW § 14.51 (McKinney 1984) (Artists' Authorship Rights Act) provides:

Whenever used in this article, except where the context clearly requires otherwise, the terms listed below shall have the following meanings:

1. "Artist" means the creator of a work of fine art;
2. "Conservation" means acts taken to correct deterioration and alteration and acts taken to prevent, stop or retard deterioration;
3. "Person" means an individual, partnership, corporation, association or other group, however organized;
4. "Reproduction" means a copy, in any medium, of a work of fine art, that is displayed or published under circumstances that, reasonably construed, evinces an intent that it be taken as a representation of a work of fine art as created by the artist;
5. "Work of fine art" means any original work of visual or graphic art of any medium which includes, but is not limited to, the following: painting; drawing; print; photographic print or sculpture of a limited edition of no more than three hundred copies; provided however, that "work of fine art" shall not include sequential imagery such as that in motion pictures.

N.Y. ARTS & CULTURE LAW § 14.53 (McKinney 1984) provides:

1. Except as limited by section 14.57 of this article, the artist shall retain at all times the right to claim authorship or, for just and valid reason, to disclaim authorship of his or her work of fine art. The right to claim authorship shall include the right of the artist to have his or her name appear on or in connection with the work of fine art as the artist. The right to disclaim authorship shall include the right of the artist to prevent his or her name from appearing on or in connection with the work of fine art as the artist. Just and valid reason for disclaiming authorship shall include that the work of fine art has been altered, defaced, mutilated or modified other than by the artist, without the artist's consent, and damage to the artist's reputation is reasonably likely to result or has resulted therefrom.

2. The rights created by this section shall exist in addition to any other rights and duties which may now or in the future be applicable.

N.Y. ARTS & CULTURE LAW § 14.57 (McKinney 1984) provides:

1. Alteration, defacement, mutilation or modification of a work of fine art resulting from the passage of time or the inherent nature of the materials will not by itself create a violation of section 14.53 of this article or a right to disclaim authorship under subdivision one of section 14.55 of this article; provided such alteration, defacement, mutilation or modification was not the result of gross negligence in maintaining or protecting the work of fine art.

2. In the case of a reproduction, a change that is an ordinary result of the medium of reproduction does not by itself create a violation of section 14.53 of this article or a right to disclaim authorship under subdivision one of section 14.55 of this article.

3. Conservation shall not constitute an alteration, defacement, mutilation or modification within the meaning of this article, unless the conservation work can be shown to be negligent.

4. This article shall not apply to work prepared under contract for advertising or trade use unless the contract so provides.

5. The provisions of this article shall apply only to works of fine art knowingly displayed in a place accessible to the public, published or reproduced in this state.

N.Y. ARTS & CULTURE LAW § 14.59 (McKinney 1984) provides:

1. An artist aggrieved under section two hundred twenty-eight-n or section two hundred twenty-eight-o of this article shall have a cause of action for legal and injunc-

York law, effective January 1, 1984, no person other than the artist or someone acting under his authority can display publicly or publish a work of fine art or a reproduction thereof "in an altered, defaced, mutilated or modified form if the work is displayed, published or reproduced as being the work of the artist . . . and damage to the artist's reputation is reasonably likely to result therefrom."¹²² The New York statute guarantees the artist the right to compel recognition for his work of fine art as well as the right to disclaim authorship, and provides that a "[j]ust and valid reason for disclaiming authorship shall include that the work of fine art has been altered, defaced, mutilated or modified other than by the artist, without the artist's consent, and damage to the artist's reputation is reasonably likely to result or has resulted therefrom."¹²³ Any artist who is aggrieved under the statute has a cause of action for legal and injunctive relief.¹²⁴ Certain limitations are contained in the statute, however, including a qualified exemption for works prepared for advertising or trade use and the statute's narrowed applicability "only to works of fine art knowingly displayed in a place accessible to the public, published or reproduced" in New York state.¹²⁵

Although both the California and New York statutes represent a positive step for the protection of some moral rights for some creators, much more extensive legislation is needed in the United States so that creators of all categories can obtain a broader range of protections. The following part examines the extent to which such protections are compatible with our present copyright statute.

tive relief.

2. No action may be maintained to enforce any liability under this article unless brought within three years of the act complained of or one year after the constructive discovery of such act, whichever is longer.

122. *Id.* § 14.53. The New York statute clearly prohibits the public display of mutilated reproductions of fine art. It is unclear whether the California Art Preservation Act protects a reproduction from mutilation or destruction, given that statute's definition of "fine art." See CAL. CIV. CODE § 987(b)(2) (West 1983); 2 M. NIMMER, *supra* note 38, § 8.21[C][2], at 8-257 n.34.3.

123. N.Y. ARTS & CULTURE LAW § 14.55(1) (McKinney 1984). Unlike the California law, the New York statute does not appear to prohibit destruction of works of fine art. *Cf.* CAL. CIV. CODE § 987(c)(1) (West 1983).

124. N.Y. ARTS & CULTURE LAW § 14.59(1) (McKinney 1984).

125. *Id.* § 14.57(5). For a more detailed discussion of this statute, see Comment, *The New York Artists' Authorship Rights Act: Increased Protection and Enhanced Status for Visual Artists*, 70 CORNELL L. REV. 158 (1984). See *infra* notes 368-97 for a discussion of whether state statutes protecting moral rights pose preemption problems under § 301 of the 1976 Act, 17 U.S.C. § 301 (1976).

III. THE COPYRIGHT — MORAL RIGHT INTERFACE

A. *Copyright Law as a Limited Substitute for the Moral Right*

Courts and commentators have posited copyright law as a substitute theory for the moral right doctrine, but like the other alternatives discussed above, traditional copyright law is of limited utility in vindicating all of the interests protected by moral rights. The court in *Gilliam v. American Broadcasting Companies, Inc.*¹²⁶ applied the 1909 Copyright Act¹²⁷ in a novel fashion to grant relief to the plaintiffs, a group of British writers and performers whose scripts had been edited extensively after they were produced into British television programs but prior to their broadcast on defendant's American television network. The court ultimately concluded that the defendant, a remote sublicensee of the British Broadcasting Corporation (BBC), committed copyright infringement as a result of the extensive editing because the contract between the plaintiffs and BBC did not grant specifically to BBC the right to edit the programs once they had been recorded. BBC, therefore, could not grant rights that it did not possess to benefit its sublicensee.¹²⁸ Critical to the court's ruling was its finding that the group had retained a common-law copyright in their original, unpublished scripts upon which BBC based the recorded television programs.¹²⁹ Analogizing the situation to one in which a user licensed to create certain derivative works from a copyrighted script exceeds the media or time restrictions of his license in the production of a derivative work, the court held that the extensive editing exceeded the scope of any license that BBC was entitled to grant.

The peculiar fact situation in *Gilliam* arguably militates against the decision's application in a broad range of copyright cases concerning aspects of the moral right.¹³⁰ In *Gilliam* the court

126. 538 F.2d 14 (2d Cir. 1976); see *supra* notes 75-76 and accompanying text.

127. 17 U.S.C. §§ 1-216 (repealed 1976).

128. *Gilliam v. American Broadcasting Companies, Inc.*, 538 F.2d 14, 21 (2d Cir. 1976).

129. *Id.* at 19 n.3.

130. See *Diamond*, *supra* note 6, at 264. Professor Nimmer has accused the court of begging the question as to whether copyright ownership includes the right to prohibit mutilating revisions in the work:

"[W]here, as in *Gilliam*, the defendant is clearly authorized to reproduce and/or perform, is he nevertheless an infringer if he makes unauthorized changes in the work, and if so, what right has he infringed? Although the *Gilliam* court is not explicit on this point, it apparently reasoned that absent an express authorization to make changes, the license to reproduce and/or perform is limited to reproduction and/or performance in the form in which the authors wrote the work, so that a material departure from such form goes beyond the terms of the license, and hence results in an infringement of

relied heavily upon the agreement between the plaintiffs and BBC which provided that all rights which were not granted to BBC were retained by the plaintiffs.¹³¹ Thus, *Gilliam's* ultimate moral right significance may be that in the face of a silent contract, an artist will not be held to have granted his licensee the right to perform extensive editing.¹³²

At least one court has approved expressly *Gilliam's* copyright infringement holding. In *WGN Continental Broadcasting Co. v. United Video, Inc.*,¹³³ WGN, an independent television broadcasting company, sought injunctive relief against a telecommunications common carrier for removing teletext material encoded in the vertical blanking intervals of the television signal of the plaintiff's copyrighted evening news program prior to retransmitting the program.¹³⁴ The Seventh Circuit determined that WGN's news program copyright included the teletext in the vertical blanking intervals. Therefore, the defendant's deletion of the teletext from its retransmission was "an alteration of a copyrighted work and hence an infringement under familiar principles."¹³⁵ Curiously, the court failed to discuss any of the "familiar principles," but relied exclu-

the reproduction and/or performance rights. This, then, relies upon finding an implied condition which precludes exercising the rights granted if material changes are made in the work. A less strained approach which could achieve the same result would be to find that a grant of certain rights (*e.g.*, reproduction and/or performance rights) does not in itself constitute a grant of one of the other rights conferred upon an author, namely the adaptation right.

2 M. NIMMER, *supra* note 38, § 8.21[C][1], at 8-251, 8-252 (footnote omitted).

131. *See supra* note 76. One commentator has argued that this contract reliance on the part of the court was misplaced because "the reservation clause was limited to plaintiff's scripts," and therefore, did not apply to the recorded programs. Comment, *Moral Right and the Lanham Act*, *supra* note 89, at 630.

132. *See* Comment, *Moral Right and the Lanham Act*, *supra* note 89, at 631. The *Gilliam* court observed that the sublicensee had deleted approximately 27% of the original program prior to broadcast. *Gilliam v. American Broadcasting Co.*, 538 F.2d 14, 19 (2d Cir. 1976); *see also infra* text preceding and accompanying notes 155-56.

133. 693 F.2d 622 (7th Cir. 1982).

134. The *WGN* court defined vertical blanking interval as:

Each picture that flashes on a television screen is generated by an electron gun behind the screen that moves rapidly back and forth from the top to the bottom of the screen. When the gun reaches the bottom it shuts off and returns to the top of the screen to begin again. The interval in which the gun is shut off—an interval too brief for the viewer to be aware of—is the vertical blanking interval.

Id. at 623. Although traditionally these intervals have been used to carry signals that instruct the television set how to set up the next picture on the screen, they can also be used to carry information on the bottom of the television screen such as subtitles for deaf people, news bulletins, or weather reports. *Id.* at 623-24.

135. *Id.* at 625.

sively on *Gilliam* as support for this assertion.¹³⁶ A careful reading of *WGN* suggests that the court believed that the defendant's liability for deleting the teletext was mandated by the spirit of section 111 of the 1976 Act, which governs secondary transmissions.¹³⁷ The court was handicapped, however, by the defendant's status as an intermediate carrier,¹³⁸ given the express statutory prohibition against cable system deletions and alterations in a "secondary transmission to the public."¹³⁹ *Gilliam*, therefore, provided the *WGN* court with useful language in support of its desired position. Although *WGN* did not arise in a moral rights context, surely the *WGN* court's validation of the *Gilliam* rationale could be used ad-

136. Quoting *Gilliam*, the *WGN* court stated:

A copyright licensee who "makes an unauthorized use of the underlying work by publishing it in a truncated version" is an infringer—any "unauthorized editing of the underlying work, if proven, would constitute an infringement of the copyright in that work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright."

WGN Continental Broadcasting Co. v. United Video, Inc., 693 F.2d at 625 (quoting *Gilliam v. American Broadcasting Companies, Inc.*, 538 F.2d 14, 20 (2d Cir. 1976)).

137. 17 U.S.C. § 111 (1982) ("Limitations on exclusive rights: Secondary transmissions").

138. The *WGN* defendant did not retransmit *WGN*'s signal directly to the public, but instead transmitted the signal to cable systems, which in turn, transmitted the signal to respective subscribers. *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d at 625.

139. 17 U.S.C. § 111(c)(3) (1982) (emphasis supplied). Section 111(c)(3) provides, in pertinent part:

[T]he secondary transmission to the public by a cable system . . . is actionable as an act of infringement . . . if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter . . . is in any way willfully altered by the cable system through changes, deletions, or additions

Id., (emphasis supplied).

Section 111(a)(3) of the 1976 Act exempts from liability a secondary transmission by any carrier "who has no direct or indirect control over the content or selection of the primary transmission . . . and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others" *Id.*

In interpreting the statutory copyright sections, the *WGN* court concluded that the defendant was not immune from the prohibition in § 111(c)(3) on the ground that it was an intermediate carrier rather than a cable system that transmits signals directly to the public. The court reasoned that the passive carrier exemption in § 111(a)(3) "would be superfluous" if intermediate carriers such as the defendant "could never be infringers anyway because they do not transmit directly to the public." *WGN Continental Broadcasting Co., v. United Video, Inc.*, 693 F.2d 622, 625 (7th Cir. 1982). Otherwise, intermediate carriers such as the defendant "could mutilate to [their] heart[s] content the broadcast signal" and copyright proprietors would be left without any viable recourse. *Id.* at 625. Thus, given the express prohibition contained in § 111(c)(3) and the defendant's failure to qualify as a passive carrier under § 111(a)(3) by virtue of its intentional deletions, the court was not willing to interpret § 111(c)(3) narrowly to absolve the defendant from liability.

vantageously by creators who have retained some of the exclusive rights embodied in their copyrights and who are seeking to use the copyright laws to protect aspects of their moral rights.¹⁴⁰

On the whole, copyright law cannot function as an adequate moral right substitute. The copyright law's overriding concern for the copyright owner rather than the creator is a significant disadvantage for creators whose moral right interests conflict with the pecuniary interests of the copyright owners of their works.¹⁴¹ Moreover, copyright law fails to protect explicitly most interests safeguarded by the moral right doctrine. A recent case in point is *Wolfe v. United Artists Music Co.*,¹⁴² an action by a song writer against his music publisher predicated, in part, on an alleged copyright infringement resulting from the defendants' erroneous designations of authorship credit and copyright ownership with respect to some of the plaintiff's songs. In granting the defendants' motion to dismiss the complaint for lack of federal subject matter jurisdiction, the court concluded that the copyright claims did not "arise under" the 1976 Act for purposes of conferring federal jurisdiction.¹⁴³ According to the court, the critical inquiry is "whether misdesignation of ownership (or authorship) is an infringement of copyright."¹⁴⁴ Holding that it is not "an infringement to remove a credit to authorship in publishing a work pursuant to an otherwise valid licensing agreement," the court observed that the plaintiff's cause of action against the defendants was based on contract

140. Section 106 of the 1976 Act provides that the copyright owner has the "exclusive rights to do and to authorize any of the following":

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
- (4) in the case of literary, musical, dramatic and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1982). Each of these rights can be separately transferred and owned. See *infra* note 191; see also *infra* notes 182-89 and accompanying text.

141. See *infra* notes 382-84, 396 & 398-408 and accompanying text, and text preceding note 392; see also *supra* note 5 and accompanying text.

142. 583 F. Supp. 52 (E.D. Pa. 1983).

143. No. 80 Civ. 6957 (S.D.N.Y. 1983) (available July 21, 1983, on LEXIS, Genfed library, Dist file).

144. *Id.*

rather than copyright law.¹⁴⁵ The implicit rationale of the *Wolfe* decision is that the 1976 Act does not incorporate the moral right of paternity.

The economic interests protected by the copyright laws are intertwined substantially with the personal interests that are the focus of the moral right doctrine.¹⁴⁶ Indeed, if the moral right doctrine were to become a part of our jurisprudence in the future, its scope would be influenced significantly by the 1976 Act. The relationship between the 1976 Act and the moral right doctrine must be examined, therefore, to assess any future development of the doctrine in the United States.

B. *The 1976 Copyright Act*

The 1976 Act contains only one provision that explicitly recognizes, in a limited context, an interest protected elsewhere by the moral right doctrine. Section 115 allows the reproduction in phonorecords of a musical composition that has been reproduced in phonorecords and distributed previously, provided the copyright owner is notified and receives a specified royalty.¹⁴⁷ Section 115(a)(2) stipulates that a compulsory license includes the privilege of making a musical arrangement of the work that conforms to the style of the concerned performance, as long as the arrangement does not "change the basic melody or fundamental character of the work."¹⁴⁸ The legislative history for section 115(a)(2) reveals that

145. *Id.*; see also *Stepdesign, Inc. v. Research Media, Inc.*, 442 F. Supp. 32, 33 (S.D.N.Y. 1977) (alleged copyright infringement claim, based in part on failure to credit plaintiff, dismissed for lack of federal jurisdiction).

146. As one commentator has observed:

[P]rotection of the artist's personal interest in preventing the distorted presentation of his work appears to be a necessary incident of the protection, currently afforded by the copyright laws, to the artist's economic interest in the commercial exploitation of his work. As the Second Circuit correctly perceived, the economic incentive for the creation and dissemination of artistic work which is furnished by copyright protection is threatened to the extent that the artist is unable to control the manner in which his work is displayed to the public upon which he is financially dependent. In this sense, then, an artist's "moral right" protects both his personal interest in preserving his own artistic integrity and his economic interest in maintaining his artistic reputation and thereby the long-run marketability of his work. It therefore seems that vindication of this moral right, although not directly achievable under the copyright laws, is consistent with the policies and objectives sought to be advanced by those laws

Comment, *supra* note 48, at 477 (footnotes omitted) (emphasis in original) (discussing Second Circuit's opinion in *Gilliam v. American Broadcasting Companies, Inc.*, 538 F.2d 14 (2d Cir. 1976)); see also *infra* text preceding and accompanying note 201.

147. 17 U.S.C. § 115 (1982).

148. 17 U.S.C. § 115(a)(2) provides:

the provision "is intended to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted, or travestied."¹⁴⁹ To date, no pertinent litigation has arisen with respect to section 115(a)(2), and therefore, no content has been given to that provision's prohibition of changes in the "basic melody or fundamental character of the work."

1. The Act's Potential for Safeguarding Moral Rights

Although the 1976 Act does not recognize explicitly any aspects of the moral right doctrine other than that which is incorporated in section 115, it does contain several provisions that could have a significant effect upon the scope of a moral right doctrine in this country. As the following discussion demonstrates, some of these provisions have a sizable potential for vindicating the personal rights of creators. One of the most important provisions in this regard is section 106(2), which grants to the copyright owner the exclusive right to prepare and to authorize the preparation of "derivative works based upon the copyrighted work."¹⁵⁰ Section 101 defines a "derivative work" as one that "represent[s] an original work of authorship" but is "based upon one or more preexisting works."¹⁵¹

A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

149. H.R. REP. No. 1476, 94th Cong., 2d Sess. 109, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5724.

150. 17 U.S.C. § 106(2) (1982).

151. *Id.* § 101. The "preexisting work" must be included within the general subject matter of copyright delineated in § 102, regardless of whether it is or ever was copyrighted. H.R. REP. No. 1476, *supra* note 149, at 5671. Section 102 provides in pertinent part:

(a) Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works; and
- (7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or dis-

A creator can prevent unauthorized alterations and modifications of his work by invoking section 106(2), for such actions presumably would result in an unauthorized derivative work.¹⁵² In this situation the effect of section 106(2) is most obvious because there is no dispositive contractual arrangement between the creator and the entity making the unauthorized alterations. In addition, however, the copyright proprietor's exclusive rights relating to the preparation of derivative works raises a fascinating issue concerning a creator's paternity and integrity interests in authorized derivative works. For purposes of illustration, return to the previously discussed scenarios featuring our unfortunate, hypothetical playwright. The playwright authorizes a motion picture company to produce a movie based on her work, but has retained all other rights in her play. In the playwright's opinion, however, the motion picture company's final product, which is publicized as "based upon" her play, is a substantial distortion of her original theme and story line.¹⁵³ Does the playwright have any recourse in this situation under section 106(2) of the 1976 Act?

The playwright could rely upon the *Gilliam* rationale by asserting that the movie company has violated the scope of their agreement. Specifically, she could argue that in the agreement, she assigned to the company her right under section 106(2) to prepare a derivative work based upon her play, and to use her name in

covery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Id. § 102(a).

Section 101 defines a derivative work as:

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

Id. § 101.

Section 103 governs copyrights in derivative works. Essentially, § 103 provides that a copyright in a derivative work covers only the original material added by the adapter. The copyright for the derivative work, therefore, does not affect the copyright or public domain status of the preexisting material. Moreover, protection for a derivative work that employs preexisting copyrighted material does not "extend to any part of the work in which such material has been used unlawfully." *Id.* § 103(a).

152. See 2 M. NIMMER, *supra* note 38, § 8.21[D], at 8-261 (arguing that the right to prevent alterations of a creator's work "would seem to be precisely 'equivalent' " to the right in § 106(2)); see also *infra* text accompanying note 389. Even if a creator has assigned all of his copyrights in a particular work, he probably can bring an infringement action as a "beneficial owner." See *supra* notes 182-89 and accompanying text.

153. See *supra* note 28 and preceding text and note 140 and accompanying text.

connection therewith, but that the company violated this agreement because the movie ultimately produced was so extensively altered that it was not "based upon" her play within the meaning of section 106(2). Of course, the situations in *Gilliam* and our hypothetical case are not identical. In *Gilliam* a licensee of the creators authorized the defendants to reproduce the work, but due to the contractual agreement between the licensee and the creators, the licensee could not have authorized the defendants to perform the type of editing at issue. In our hypothetical case, the playwright authorized the movie company to prepare a derivative work, which authorization in itself necessitates a certain number of changes.¹⁵⁴ Although *Gilliam* does not hold explicitly that copyright ownership includes the right to prohibit mutilating changes in a work, the *Gilliam* opinion relied upon the existence of an implied condition of assignment that would preclude the defendants from exercising the reproduction and performance rights which they were granted if they made material changes in the work.¹⁵⁵ Similarly, when the right to prepare a derivative work is at issue, the *Gilliam* rationale supports an inferred condition that the right cannot be exercised if the changes which are made constitute mutilation and the derivative work is billed as "based upon" the creator's underlying work. Hence, the performance of such alterations and resulting false attribution constitute an infringement under section 106(2), just as the performance of the unauthorized editing in *Gilliam* violated the rights granted to the defendants in that case.¹⁵⁶

154. Arguably if the movie company had made too many changes in the play, the playwright would have no action for copyright infringement because the movie version then would not be "based upon" the playwright's work. In our hypothetical case, however, the movie company is advertising the movie as "based upon" the play, and this assertion alone should enable the playwright to claim an infringement under § 106(2).

155. See *supra* note 130 (Professor Nimmer's remarks).

156. This false attribution interpretation of *Gilliam* comports with the court's analogy to situations concerning a licensee's failure to adhere to media and time restrictions in the production of a derivative work based upon a preexisting work. See *supra* text following note 129. The *Gilliam* court observed:

The rationale for finding infringement when a licensee exceeds time or media restrictions on his license—the need to allow the proprietor of the underlying copyright to control the method in which his work is presented to the public—applies equally to the situation in which a licensee makes an unauthorized use of the underlying work by publishing it in a truncated version. Whether intended to allow greater economic exploitation of the work, as in the media and time cases, or to ensure that the copyright proprietor retains a veto power over revisions desired for the derivative work, the ability of the copyright holder to control his work remains paramount in our copyright law. We find, therefore, that unauthorized editing of the underlying work, if proven, would constitute an infringement of the copyright in that work similar to any other use of a

The ultimate success of the *Gilliam* argument depends upon the interpretation of the phrase "derivative works based upon the copyrighted work" as it is used in section 106(2).¹⁵⁷ Although the phrase "based upon" may, at first glance, appear self-explanatory, application of the phrase in this context is difficult because it requires a determination of the degree of creative liberty that is properly exercisable by one who transforms a preexisting work into another medium.¹⁵⁸ No court has had occasion to interpret section 106(2) in this particular context, but decisions exist in which the import of the phrase "based upon" was explored in analogous circumstances.¹⁵⁹ At least one court, in determining whether a defendant's movie was "based upon" a particular book in the context of plaintiffs' allegation that the movie infringed the book, invoked the "substantial similarity" test used by the courts in deciding copyright infringement actions.¹⁶⁰ The court ultimately concluded, as a matter of law, that the film was not "based upon" the book because a reasonable jury could not find that the two works were "substantially similar beyond the level of generalized ideas or themes."¹⁶¹

work that exceeded the license granted by the proprietor of the copyright.

Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14, 21 (2d Cir. 1976).

157. 17 U.S.C. § 106(2) (1982) (emphasis supplied). A similar phrase appears in the definition of a "derivative work" in § 101. *Id.* § 101. ("A 'derivative work' is a work based upon one or more preexisting works . . .").

158. Transformation liberties apparently are allowed even in countries that have adopted the moral right. *See supra* note 46 and accompanying text.

159. Professor Nimmer observed that contracts for the sale or license of an author's work that contain an express provision entitling the author to credit usually refer "to such credit in connection with any production based upon the author's work." 2 M. NIMMER, *supra* note 38, § 8.21[E], at 8-270.3, .4 (emphasis supplied).

160. *See* *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 623 (2d Cir. 1982), *aff'g*, 519 F. Supp. 388 (S.D.N.Y. 1981); *see also infra* notes 169-79 and accompanying text.

161. 683 F.2d at 624. The facts of the plaintiffs' infringement claim were rather complicated. The heirs of the author of the book in question brought an action against the movie company with whom the author's licensee had entered into an agreement nearly 50 years earlier. That agreement granted the movie company the rights to create and write an original story using the character Tarzan that the author had developed in prior books, and to produce a photoplay "based" on the movie company's original story. The agreement also provided that the movie company had the right to remake this photoplay and to "produce additional photoplays based on said story" but that all subsequent productions had to be "based substantially upon the same story" as the company used in connection with the first photoplay. *Id.* at 615. Further, the movie company agreed that any subsequent remakes or additional photoplays would contain "no material changes or material departures from the story used in connection with said photoplay." *Id.*; *see* *Edgar Rice Burroughs, Inc. v. Metro-Goldwyn-Mayer, Inc.*, 23 Cal. Rptr. 14, 205 Cal. App. 441 (1962) (action brought by author's licensee claiming that a remake of the first photoplay violated this agreement).

The *Burroughs* plaintiffs had terminated the copyright interest of the author's original

Some courts facing contractual disputes apart from copyright infringement claims have gravitated toward different standards for determining whether a particular derivative work is "based upon" a preexisting work.¹⁶² In distinguishing the copyright "substantial similarity" standard from that employed in a contract claim alleging that the defendants based their television series on a material element of the plaintiff's program, one court remarked that the similarities probably would not have to be as "pronounced" under the contract standard as under the copyright standard.¹⁶³ In another action, *Weitzenkorn v. Lesser*,¹⁶⁴ the court determined that the similarities between the plaintiff's story and the defendant's movie were sufficient to state a contract claim, but that no substantial similarity existed between the "protectible portions" of plaintiff's story and the defendant's movie for purposes of a com-

licensee pursuant to § 304(c) of the 1976 Act. See *infra* notes 190-99 and accompanying text. Thus, the party with whom the defendant movie company had contracted had lost the underlying copyright interest in the author's works. The plaintiffs, therefore, were arguing that the defendant's new remake of the first photoplay, if it was a faithful remake of the original film, infringed one of the author's hooks given the plaintiffs' exercise of their termination rights. The movie company, however, argued that its rights under the original agreement were not subject to the plaintiffs' termination because its original film was not "based upon" any of the author's copyrighted works, but instead on the movie company's original story. 683 F.2d at 618. After comparing the original film to the book to determine whether the original film was, in fact, based on the hook and applying the "substantial similarity" test, the court rejected the plaintiffs' argument.

162. Professor Nimmer endorsed the "substantial similarity" test to construe the phrase "based upon" even in contractual disputes not concerning copyright infringement claims:

[A]bsent any expressed intent to the contrary the phrase "based upon" should reasonably be construed to set up a copyright infringement standard of similarity. That is, if the final production so departs from the author's work that even if there had been no grant of rights by the author the resulting production would not constitute a copyright infringement for lack of substantial similarity, then the production should not be regarded as "based upon" the author's work.

2 M. NIMMER, *supra* note 38, § 8.21[E], at 8-270.4 (footnotes omitted).

163. See *Fink v. Goodson-Todman Enters., Ltd.*, 9 Cal. App. 3d 996, 1008, 88 Cal. Rptr. 679, 689 (1970). The court suggested that different standards are appropriate for contract and copyright infringement claims because "the gauge on the contract counts is keyed to the pleaded language." *Id.* at 1008, 88 Cal. Rptr. at 688. Commenting further upon the significance of the different standards, the *Fink* court remarked: "'Based upon' does seem to be something a little different than having substantial similarity to a material element or qualitatively important part. The varying level of creation is clearly recognized." *Id.*, 88 Cal. Rptr. at 689; see also *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 353 (S.D.N.Y. 1968) (court analogized phrase "based on" or the word "based" to phrases such as "derived from," "suggested by," or "inspired by"); cf. *Hospital for Sick Children v. Melody Fare Dinner Theater*, 516 F. Supp. 67, 73 (E.D. Va. 1980) ("[t]he use of words such as 'based on' or 'derived from' may be sufficient to negate any false designation or description that may otherwise be present").

164. 40 Cal. 2d 778, 256 P.2d 947 (1953).

mon-law copyright claim.¹⁶⁵

One could argue that the rationale of the cases interpreting the phrase "based upon" in the context of contractual disputes suggests that a derivative work could still be "based upon" a pre-existing work within the meaning of section 106(2) even if the two works would not be regarded as substantially similar for copyright infringement purposes. Perhaps a more stringent standard for copyright infringement is justifiable given that a defendant in a copyright infringement action allegedly is guilty of theft of the plaintiff's property whereas our hypothetical motion picture company changed the playwright's story only "for the purpose of adding to the interest and profit of the story."¹⁶⁶ Relying on this distinction, one judge has posited the following standard:

[H]as the story been so far departed from in the play that it cannot reasonably be said to be based upon the plaintiff's story, having due regard for the rights of the plaintiff to credit for his achievement in producing the story, and the right of the public not to be deceived by reason of credit falsely given to an author.¹⁶⁷

165. The *Wietzenkorn* court observed:

The charge of breach of contract, however, is dependent upon the allegation that the motion picture "is patterned upon and copies and uses" Weitzenkorn's composition. If, as a matter of law, there is no similarity whatsoever between the productions, the . . . [contract] count does not state a cause of action. However, although there is no similarity between protectible portions of Weitzenkorn's composition and the defendant's production, similarity may exist because of the combination of characters, locale, and myth. It is conceivable, even though improbable, that Weitzenkorn might be able to introduce evidence tending to show that the parties entered into an express contract whereby Lesser and Lesser Productions agreed to pay for her production regardless of its protectibility and no matter how slight or commonplace the portion which they used. Such evidence, together with comparison of the productions, would present questions of fact for the jury as to the terms of the contract, access, similarity, and copying. Under these circumstances, the facts pleaded in the . . . [contract] count are sufficient to state a cause of action and the demurrer to it was improperly sustained.

Id. at 792, 256 P.2d at 957-58 (emphasis supplied); *see also* *Whitfield v. Lear*, 582 F. Supp. 1186, 1191 (E.D.N.Y. 1984) (in resolving breach of implied contract action based on defendants' use of plaintiff's ideas, court invoked a more flexible standard than the copyright requirement of "substantial similarity"); *Minnear v. Tors*, 266 Cal. App. 2d 495, 505, 72 Cal. Rptr. 287, 294 (1968) (although no substantial similarity between protectible portions of plaintiff's pilot film and defendants film for purposes of sustaining common-law copyright count, court held that enough similarities existed for a jury to infer that plaintiff's "ideas and format were the inspiration for" defendant's work for implied contract count); *cf.* *Weitzenkorn v. Lesser*, 40 Cal. 2d 778, 798-99, 256 P.2d 947, 961-62 (1953) (Carter, J., dissenting) (objecting to majority's standard as "too strict a test for determining the issue of similarity between the two productions").

166. *Paramount Prods., Inc. v. Smith*, 91 F.2d 863, 868 (9th Cir. 1937) (Wilbur, J., dissenting) (action by writer against movie company for breach of contract based on defendant's failure to credit plaintiff with authorship of story).

167. *Id.*

This standard would permit more creative liberties on the part of the adapter than would be tolerated if courts used a "substantial similarity" test.¹⁶⁸

On balance, however, the "substantial similarity" test is the more appropriate standard to judge whether a derivative work is "based upon" a preexisting work within the meaning of section 106(2). In providing that the copyright owner has the exclusive right to prepare or authorize the preparation of any derivative works based upon the copyrighted work, Congress, in section 106(2), contemplated that the preparation of an unauthorized derivative work constitutes copyright infringement.¹⁶⁹ Although the legislative history discloses no specific guidelines for determining when an unauthorized derivative work infringes the original work,¹⁷⁰ most courts would invoke the "substantial similarity" test to determine infringement.¹⁷¹ Therefore, if our playwright had

168. *But see id.* (in rephrasing this standard, dissenting judge remarked that the film and the plaintiff's story must be compared to determine "whether or not there is *so strong a resemblance* between the two that the plaintiff was entitled to have the public informed through the screen production of the story that he was the author of the play . . .") (emphasis supplied).

169. *See supra* text accompanying note 150.

170. The House Report provides: "[T]o constitute a violation of section 106(2), the infringing work must incorporate a portion of the copyrighted work in some form; for example, a detailed commentary on a work or a programmatic musical composition inspired by a novel would not normally constitute infringements under this clause." H.R. REP. NO. 1476, *supra* note 149, at 5675.

171. *See* 3 M. NIMMER, *supra* note 38, § 13.03[A], at 13-17 ("Just as copying is an essential element of infringement, so substantial similarity between the plaintiff's and defendant's works is an essential element of copying."). A detailed discussion of the "substantial similarity" test is outside the scope of this Article. *See id.* § 13.03, at 13-17 to -54 for a comprehensive treatment of this issue.

Professor Goldstein has argued that some cases alleging derivative rights infringements actually concern the appropriation of noncopyrightable elements such as titles and character names, and therefore, should be decided on the basis of unfair competition law rather than copyright law. In highlighting this distinction between derivative rights and unfair competition law, he observed:

Unfair competition law's comparative advantages in resolving issues that might otherwise be resolved through an extended application of copyright's idea-expression distinction stem from the fact that, unlike copyright, which is concerned with expressive content, unfair competition is tailored to the capacity of information—symbols, titles and aggregates of ideas—to command public acceptance in the marketplace. Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC. 209, 224 (1983). Therefore, in deciding derivative rights infringement cases, courts should determine initially whether a derivative right actually is at issue "purposefully ignor[ing] uncopyrightable elements such as titles and character names, and ask[ing] whether, absent these elements, the accused work sufficiently tracks the underlying work to infringe." *Id.* at 226. Only after this analysis discloses "some expressive similarities" should courts "ask whether these similarities are sufficiently substantial for the copyright infringement claim to

never entered into an agreement with the movie company, the playwright would have an action for copyright infringement under section 106(2), perhaps with a corresponding right to compel recognition for her work,¹⁷² assuming she could prove that the movie company's product was substantially similar to her own. Logically, courts should apply the same standard in the converse situation presented by the hypothetical case. If the movie company's product can satisfy the "substantial similarity" test, the playwright should not be able to rely successfully on *Gilliam* to support her claim under section 106(2).¹⁷³ The alterations of the play would not be sufficiently extreme to warrant a holding that the movie company had exceeded its derivative rights assignment. If, however, the movie is not substantially similar to the play, the playwright should prevail, even if it is possible that the movie satisfies the looser "based upon" standard sometimes invoked in contract cases.¹⁷⁴

Application of the "substantial similarity" test, however, is extremely problematic, particularly in the context of adaptations.¹⁷⁵ One popular method for determining substantial similarity is the "ordinary observation or impression" test.¹⁷⁶ This test requires the ordinary observer to perceive a substantial similarity between the two works in question, "so that the alleged copy comes so near to

succeed." *Id.*

172. Although the 1976 Act does not specifically provide for a plaintiff's right to compel recognition for his work, a court could enjoin the defendant's use of the plaintiff's work without an appropriate attribution. This remedy is consistent with the language of § 502(a), which provides: "Any court having jurisdiction . . . may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a) (1982) (emphasis supplied).

173. See *supra* text preceding and accompanying notes 155-56.

174. According to Professor Nimmer, "a work will be considered a derivative work only if it would be considered an infringing work if the material which it has derived from a preexisting work had been taken without the consent of a copyright proprietor of such preexisting work." 1 M. NIMMER, *supra* note 38, § 3.01, at 3-3. In other words, "[a] work is not derivative unless it has *substantially* copied from a prior work." *Id.*; see also *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 34 (2d Cir. 1982) (emphasis in original) (derivative works entitled to registration even though they would infringe the original copyrighted work if created without the permission of copyright owner of underlying work).

175. Professor Nimmer remarked that "the determination of the extent of similarity which will constitute a *substantial* and hence infringing similarity presents one of the most difficult questions in copyright law, and one which is the least susceptible of helpful generalizations." 3 M. NIMMER, *supra* note 38, § 13.03[A], at 13-18 (emphasis in original); see also *id.*, § 13.03[E], at 13-44, -45 (discussing problem in context of transformations of a work into a different medium).

176. See *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 356 (N.D. Ga. 1979); 3 M. NIMMER, *supra* note 38, § 13.03[E], at 13-40.

the original as to give the audience the idea created by the original."¹⁷⁷ The use of this test with respect to derivative and preexisting works requires caution, however, because the technical requirements of a different medium usually necessitate certain changes, which could lull an ordinary observer into believing that no substantial similarity exists.¹⁷⁸ In commenting on this problem, one court noted the importance of educating the trier of fact with respect to any differences that are mandated by the adaptation process so as to preserve the creator's valuable rights under section 106(2).¹⁷⁹

Although section 106(2) does not mention moral rights, the foregoing analysis illustrates how section 106(2) can be utilized by a creator to protect certain aspects of his moral rights, assuming that he has retained some copyright in his work.¹⁸⁰ In our hypothetical situation, if the movie company had exceeded the scope of its rights under section 106(2) by virtue of its distorted use of the playwright's underlying work, the company would be liable to the playwright assuming she had retained all of her other rights under the copyright laws.¹⁸¹ Suppose, however, that the playwright had transferred to the movie company her other rights in her work, including her right to authorize all derivative works.¹⁸² In this situation would the playwright be able to safeguard her personal interest in preventing an unwarranted mutilation of her work by the movie company?

Section 501(b) of the 1976 Act provides that the "legal or beneficial owner of an exclusive right under a copyright is entitled . . .

177. *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 356 (N.D. Ga. 1979).

178. *See Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 618-19 n.12 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); 3 M. NIMMER, *supra* note 38, § 13.03[E], at 13-45.

179. *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 618-19 n.12 (7th Cir. 1982). According to Professor Nimmer, a creator's loss may be greater when his work is appropriated, without his permission, into a different medium "for here his work is made available to a new untapped market whereas if the infringing work were in the original medium, it would only attract the same persons who already had had an opportunity to purchase the plaintiff's work." 3 M. NIMMER, *supra* note 38, § 13.03[E], at 13-45; *see also* Comment, *Courting the Artist with Copyright: The 1976 Copyright Act*, 24 WAYNE L. REV. 1685, 1697-98 (1978) (discussing importance of derivative rights protection for relatively unknown artists whose works of fine art are most susceptible to being reduced in value to "junk art" by derivatives).

180. *See supra* note 5 and accompanying text.

181. *See supra* note 140 and accompanying text, text preceding and accompanying note 155; *infra* note 192.

182. *See* 17 U.S.C. § 106(2) (1982).

to institute an action for any infringement of that particular right committed while he or she is the owner of it.”¹⁸³ Although section 501(b) does not define the term “beneficial owner,” the legislative history states that a “‘beneficial owner’ for this purpose would include, for example, an author who had parted with legal title to the copyright in exchange for percentage royalties based on sales or license fees.”¹⁸⁴ Consistent with this interpretation, courts have allowed creators, who have assigned copyrights in their works in exchange for royalties, to maintain infringement actions, regardless of whether the legal owners of the copyrights also are parties to the actions.¹⁸⁵ At least one court, however, has held that the term “beneficial owner” is not so broad to allow an exclusive sales distributor for products with copyrighted designs to maintain an infringement action under section 501(b).¹⁸⁶ Consequently, the court rejected the plaintiff distributor’s argument that it had standing because “it receives an economic benefit from the copyright and suffers loss from its infringement.”¹⁸⁷

183. *Id.* § 501(b) (emphasis supplied). That section provides in full:

The legal or beneficial owner of an exclusive right under a copyright is entitled subject to the requirements of sections 205(d) [Recordation as Prerequisite to Infringement Suit] and 411 [Registration as Prerequisite to Infringement Suit], to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

Id.

184. H.R. REP. NO. 1476, *supra* note 149, at 5775.

185. *See, e.g., Cortner v. Israel*, 732 F.2d 267, 271 (2d Cir. 1984) (authors of musical work who assigned the copyrights in their work to their own corporate vehicle in exchange for payment of specified royalties have standing to sue for infringement of their beneficial interest in their copyrights under both the 1909 and 1976 Copyright Acts); *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69, 74 (S.D.N.Y. 1982) (singer Barry Manilow’s transfer of certain copyrights in his songs, in whole or in part, to music corporation, of which he is the sole shareholder, in exchange for percentage royalty payments based on sales or license fees did not preclude his action for copyright infringement given his status as a beneficial owner of the copyright under § 501(b)).

In *Cortner v. Israel*, 732 F.2d 267, 271 (2d Cir. 1984), the court noted that § 501(b) of the 1976 Act “merely codified the case law that had developed under the 1909 Act with respect to the beneficial owner’s standing to sue.” *See, e.g., Topolos v. Caldewey*, 698 F.2d 991 (9th Cir. 1983). *But see Kriger v. MacFadden Publications*, 43 F. Supp. 170 (S.D.N.Y. 1941) (beneficial owner of copyright must join legal owner to maintain infringement action).

186. *Comptoir de l’Industrie Textile de France v. Fiorucci, Inc.*, 204 U.S.P.Q. (BNA) 557 (S.D.N.Y. 1979).

187. *Id.* at 558-59. The court also remarked that “to carry plaintiffs’ contention to its logical conclusion would be to provide a basis for standing to any wholesaler or retailer in

This analysis of section 501(b) suggests that even creators who no longer own the copyrights in their works can maintain infringement actions to protect aspects of their moral rights by using section 106(2), assuming they have transferred their copyright interests in exchange for a share of royalties. Most creators presumably would not transfer these valuable rights absent some type of royalty arrangement. Nevertheless, a strong argument can be made that all creators who have transferred their copyrights should be deemed beneficial owners within the meaning of section 501(b), regardless of whether their transfer agreements contemplate royalties. Although no court has had the opportunity to review this issue, a grant of standing to all creators is consistent with the legislative history, which speaks of an author who parts with legal title in exchange for royalties merely *as an example* of a "beneficial owner."¹⁸⁸

On the other hand, one can argue that a creator who retains no economic ties to his copyrighted work should not receive the protections afforded by the statute, which exist to safeguard economic rights. This argument, however, ignores the application of the termination provisions of the 1976 Act, under which all creators retain a potential economic interest in their works. In fact,

the chain of title who has an economic interest in the goods." *Id.* at 559.

188. See *supra* text accompanying note 184.

Comptoir de l'Industrie Textile de France v. Fiorucci, Inc., 204 U.S.P.Q. (BNA) 557 (S.D.N.Y. 1979), does not militate against a grant of standing to all creators under § 501(b). Certainly the creator of the copyrighted work cannot be compared to an exclusive distributor or any other party "in the chain of title who has an economic interest in the goods." *Id.* at 559; see *supra* notes 186-87 and accompanying text. Under § 201(a) of the 1976 Act, copyright in a protected work "vests initially in the author or authors of the work." 17 U.S.C. § 201(a) (1982). The plaintiff distributor in *Fiorucci* never owned the copyrights in the product in question and, unlike the creator, could not exercise the termination rights provided in the statute. See *infra* notes 189-201 and accompanying text.

The district court in *Swarovski Am. Ltd. v. Silver Deer Ltd.*, 537 F. Supp. 1201 (D. Col. 1982), construing the joinder provisions that also appear in § 501(b), see *supra* note 183, stated:

[S]ince the Copyright Act's joinder provision was intended to supplement the federal rules, I will assume that the term "interest" contained in § 501(b) has the same meaning as in rule 19(a) [Persons to be Joined if Feasible], namely "a legally protected, not merely a financial interest or interest of convenience."

537 F. Supp. at 1206 (quoting 3A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 19.07-1[2], at 19-129 (2d ed. 1979)) (emphasis supplied). Given that the joinder provisions appear in the same section of the copyright statute as that which authorizes a "beneficial owner" to institute an infringement action, it is not unreasonable to construe the type of interest that one must possess to qualify as a "beneficial owner" in accordance with the type of interest required for joinder.

the termination provisions codified in section 203,¹⁸⁹ which govern

189. 17 U.S.C. § 203 provides:

(a) Conditions for Termination.—In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by one author, termination of the grant may be effected by that author or, if the author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest. In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, the termination interest of any such author may be exercised as a unit by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow or her widower and his or her children or grandchildren as follows:

(A) the widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest;

(B) the author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them;

(C) the rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.

(4) The termination shall be effected by serving an advance notice in writing, signed by the number and proportion of owners of termination interests required under clauses (1) and (2) of this subsection, or by their duly authorized agents, upon the grantee or the grantee's successor in title.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulations.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(b) Effect of Termination.—Upon the effective date of termination, all rights

all copyrights executed on or after the effective date of the 1976 Act, and section 304(c),¹⁹⁰ the comparable provision for subsisting

under this title that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests under clauses (1) and (2) of subsection (a), including those owners who did not join in signing the notice of termination under clause (4) of subsection (a), but with the following limitations:

(1) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(2) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of subsection (a). The rights vest in the author, authors, and other persons named in, and in the proportionate shares provided by, clauses (1) and (2) of subsection (a).

(3) Subject to the provisions of clause (4) of this subsection, a further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under clause (2) of this subsection, as are required to terminate the grant under clauses (1) and (2) of subsection (a). Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under clause (2) of this subsection, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this clause.

(4) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the persons provided by clause (3) of this subsection and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of subsection (a).

(5) Termination of a grant under this section affects only those rights covered by the grants that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(6) Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the term of copyright provided by this title.

17 U.S.C. § 203 (1982).

190. 17 U.S.C. § 304(c) provides:

(c) Termination of transfers and licenses covering extended renewal term.—In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by the second proviso of subsection (a) of this section, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who executed it. In the case of a grant executed by one or more of the authors of the work, termination of the grant may be effected, to the extent of a particular author's share in the ownership of the renewal copyright, by the author

copyrights, have been hailed as a departure from our copyright tra-

who executed it or, if such author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow or her widower and his or her children or grandchildren as follows:

(A) the widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest;

(B) the author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them;

(C) the rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.

(4) The termination shall be effected by serving an advance notice in writing upon the grantee or the grantee's successor in title. In the case of a grant executed by a person or persons other than the author, the notice shall be signed by all of those entitled to terminate the grant under clause (1) of this subsection, or by their duly authorized agents. In the case of a grant executed by one or more of the authors of the work, the notice as to any one author's share shall be signed by that author or his or her duly authorized agent or, if that author is dead, by the number and proportion of the owners of his or her termination interest required under clauses (1) and (2) of this subsection, or by their duly authorized agents.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(6) In the case of a grant executed by a person or persons other than the author, all rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to all of those entitled to terminate the grant under clause (1) of this subsection. In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to that author or, if that author is dead, to the persons owning his or her termination interest under clause (2) of this subsection, including those owners who did not join in signing the notice of termination under clause (4) of this subsection. In all cases the reversion of rights is subject to the following limitations:

dition of subordinating the author's interests to those of the publisher.¹⁹¹ Section 203 provides that an author, except an author of a

(A) A derivative work prepared under the authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(B) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of this subsection.

(C) Where the author's rights revert to two or more persons under clause (2) of this subsection, they shall vest in those persons in the proportionate shares provided by that clause. In such a case, and subject to the provisions of subclause (D) of this clause, a further grant, or agreement to make a further grant, of a particular author's share with respect to any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under this clause, as are required to terminate the grant under clause (2) of this subsection. Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under this subclause, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this subclause.

(D) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons provided by the first sentence of clause (6) of this subsection, or between the persons provided by subclause (C) of this clause, and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.

(E) Termination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(F) Unless and until termination is effected under this subsection, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

Id. § 304(c).

191. See *Mills Music, Inc. v. Snyder*, 53 U.S.L.W. 4035, 4042-43 (U.S. Jan. 8, 1985) (No. 83-1153) (White, J., dissenting). See generally Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 490 (1977) (in commenting on 1976 Act, the Register of Copyrights noted "a shift in the philosophical base on which the copyright law of the United States rests," which "mark[s] a break with a two-hundred-year-old tradition that has identified copyright more closely with the publisher than with the author").

Another victory for creators is codified in 17 U.S.C. § 201(d)(2), which "contains the first explicit statutory recognition of the principle of divisibility of copyright in our law." H.R. REP. NO. 1476, *supra* note 149, at 5739. Section 201(d)(2) provides:

Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by

work made for hire,¹⁹² may terminate any grant of a copyright or any right under a copyright "at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant,"¹⁹³ provided he complies with the stipulated notice requirements.¹⁹⁴ If an author is dead, his termination interest may be exercised by his spouse and his children or grandchildren in accordance with the terms of the termination statute.¹⁹⁵ The legislative history for this provision discloses an intent to safeguard authors against unremunerative transfers.¹⁹⁶ Similarly, section 304(c) details the circumstances in which a transfer or license of a 1909 Act copyright may be terminated by the author or those entitled to exercise his interest if he is dead. Section 304(c) closely tracks section 203.¹⁹⁷ According to the legislative history, the arguments for granting rights of termination under section 304 are even stronger than they are under section 203 because section 304(b) also creates a new property right by adding nineteen years "to the duration of any renewed copyright whose second term started during the twenty-eight years immediately preceding the effective date of the Act."¹⁹⁸ Thus, the author, as "the funda-

this title.

17 U.S.C. § 201(d)(2) (1982). According to the legislative history, this provision "means that any of the exclusive rights that go to make up a copyright, including those enumerated in section 106 and any subdivision of them, can be transferred and owned separately." H.R. REP. NO. 1476, *supra* note 149, at 5739; *see Ringer, supra*, at 490-94 (brief summary of the pro-author changes wrought by the 1976 Act); *see also supra* note 5 and accompanying text.

192. 17 U.S.C. § 203(a) (1982); *see also infra* notes 206-18 and accompanying text.

193. 17 U.S.C. § 203(a)(3) (1982). Alternatively, if the grant covers the right of publication of the work, the "period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier." *Id.*

194. *See id.* § 203(a)(4).

195. *See id.* § 203(a)(2). Termination rights are nonwaivable. *See id.* § 203(a)(5).

196. The House Report states:

A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited. Section 203 reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved.

H.R. REP. NO. 1476, *supra* note 149, at 5740.

197. A few differences, however, exist between § 203 and § 304(c). For example, § 203 applies only to grants executed by the author whereas § 304(c) also applies to grants executed by those of the author's beneficiaries who could claim a copyright renewal under the 1909 Act. *See* 17 U.S.C. § 24 (1970) (repealed 1976). For a discussion of this distinction and other differences, *see* H.R. REP. NO. 1476, *supra* note 149, at 5756-58.

198. H.R. REP. NO. 1476, *supra* note 149, at 5659, 5755-56. Under § 24 of the 1909 Act, copyright protection began on the date of publication or the date of registration in unpublished form and continued for a 28 year period. Subsequently, the creator could renew the

mental beneficiary of copyright under the Constitution," should have an opportunity to share in this new property right.¹⁹⁹

The foregoing analysis suggests that even an author who has transferred his copyright interest without a royalty arrangement retains some economic and beneficial interest in the copyright. One commentator has suggested that section 203 might allow an author to terminate his copyright grant if the transferee has violated any of the creator's moral rights.²⁰⁰ Although this position is consistent with the legislative history's emphasis on the creator's economic needs, no court yet has linked personal rights with the additional economic safeguards offered to creators by these provisions. Courts easily could make this correlation in an appropriate case, however, given that a creator's economic interests in his work can be threatened by violations of his personal rights that impair the work's marketability.²⁰¹

copyright for an additional 28 year period, for a total of 56 years of protection. See 17 U.S.C. § 24 (1970) (repealed 1976). Section 304(b) of the 1976 Act adds an additional 19 years to the duration of renewed copyrights by providing:

[t]he duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date copyright was originally secured.

17 U.S.C. § 304(b) (1982).

199. H.R. REP. No. 1476, *supra* note 149, at 5756; see also U.S. CONST. art. I, § 8, cl. 8.

200. Comment, *supra* note 67, at 810. Presumably, the moral right argument could be made for the termination of subsisting copyrights as provided in § 304(c). Moreover, assuming that a creator's personal rights survive his death, see *infra* notes 267-80 and accompanying text, a right of termination would apply not only to the author, but also to anyone entitled to exercise the author's termination interest under the relevant statutory provisions. See 17 U.S.C. §§ 203(a)(2), 304(c)(2) (1982).

201. See *supra* note 146 and accompanying text.

Recently, the Second Circuit relied on the legislative history in deciding another novel question concerning the application of § 304(c). In *Harry Fox Agency, Inc. v. Mills Music, Inc.*, 720 F.2d 733 (2d Cir. 1983), *rev'd sub nom. Mills Music, Inc., v. Snyder*, 53 U.S.L.W. 4035 (U.S. Jan. 8, 1985) (No. 83-1153), the court interpreted the derivative works exception to § 304(c), which is codified in § 304(c)(6)(A). The derivative works provision allows the grantee to continue using derivative works prepared under authority of the grant before its termination:

A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

17 U.S.C. § 304(c)(6)(A) (1982).

The specific question before the court in *Harry Fox* was whether a middleman music publishing company, as the grantee of the original creator, could share in mechanical royalties from derivative works in the form of sound recordings that were prepared by recording companies under license from the middleman, prior to the termination of the grant, and

The 1976 Act has significant potential for vindicating moral rights. A creator's rights of integrity and paternity can be safeguarded when authorized adapters make mutilating changes in his work, and the resulting product is designated as "based upon" the creator's underlying work.²⁰² Moreover, if another party uses a creator's preexisting work to create a derivative work without permission, the creator can maintain an action for copyright infringement and thus preserve his right of integrity.²⁰³ To the extent courts broadly interpret the term "beneficial owner" in section 501(b) to include *all* creators, regardless of the terms of their copyright transfers,²⁰⁴ the copyright statute would preclude a creator's transfer of these protections.²⁰⁵ Finally, potential judicial application of the 1976 Act's termination provisions to safeguard a creator's personal rights would afford creators an extremely broad scope of protection for their moral rights.²⁰⁶

sold subsequent to the termination. *Harry Fox Agency, Inc. v. Mills Music, Inc.*, 720 F.2d 733, 734, 740 (2d Cir. 1983). Noting that the derivative works exception was intended to protect the owners of the derivative works because of their creative efforts, *id.* at 741-42, and that the purpose of the termination provisions of § 304(c) was to protect the interests of the creators of the underlying works, *id.* at 743, the court declined to accept the music publisher's argument regarding its entitlement to the royalties. In reversing the Second Circuit, the Supreme Court recognized § 304's purpose in benefiting authors, but nevertheless found the derivative works exception sufficiently broad to support the music publisher's right to royalties. See *Mills Music, Inc. v. Snyder*, 53 U.S.L.W. 4035, 4038-41 (U.S. Jan. 8, 1985) (No. 83-1153).

202. See *supra* text accompanying notes 22 & 28, and text preceding and accompanying notes 155-56 & 173-74.

203. See *supra* note 152 and accompanying text. The infringement action also may enable a creator to enforce his right of paternity by compelling recognition for his work. See *supra* text preceding note 22 and note 172 and accompanying text.

204. See *supra* notes 183-89 and accompanying text.

205. Cf. *supra* notes 45-51 and accompanying text. Of course, the incorporation of the "substantial similarity" standard in adjudicating whether a derivative work is "based upon" a preexisting work, see *supra* notes 169-79, would allow the adapter some leeway in altering the preexisting work, thus precluding total inalienability of personal interests. This incorporation would result in a much fairer balancing of the diametrically opposed interests of the creators of the preexisting works and the creators of the derivative works. See *supra* notes 46-48 and accompanying text; *infra* notes 404-05 and accompanying text.

206. See *supra* notes 190-201 and accompanying text. This potential termination protection is limited by the statutory time frame for the exercise of the termination rights. See *supra* note 194 and accompanying text; see also 17 U.S.C. §§ 203(a)(3), 304(c)(3) (1982); cf. Comment, *supra* note 83, at 1558 ("[d]elaying of the moral right amounts to denial of it").

Additionally, the 1976 Act has positive implications for a creator's right of disclosure. See *infra* notes 369-75 and accompanying text.

2. The Act's Potential for Circumscribing Moral Rights

Although certain provisions of the 1976 Act have the potential for assisting creators seeking to vindicate aspects of their moral rights, the statute contains other provisions that pose both impediments to and limitations upon the enforcement of creators' personal interests. One such limitation is the "work for hire" doctrine, which prevents a creator from exercising his right to compel recognition for his work in certain situations. Section 201(b) of the 1976 Act provides that in the case of a work made for hire, the employer is considered the author and copyright owner unless the parties expressly agree otherwise in writing.²⁰⁷ The statute sets forth two alternative definitions of a "work made for hire":

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire²⁰⁸

This provision, which adopted one of the basic tenets of copyright law in this country,²⁰⁹ rejected the proposals of motion picture

207. 17 U.S.C. § 201(b) provides:

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

17 U.S.C. § 201(b) (1982).

208. *Id.* § 101. The second definition of a "work made for hire" provides in full:

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, table, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

Id.

209. Section 26 of the 1909 Copyright Act provided that "the word 'author' shall include an employer in the case of works made for hire." 17 U.S.C. § 26 (1970) (repealed (1976)). The doctrine did not operate as a matter of law, but was "based on the presumed mutual intent of the parties." *May v. Morganelli-Heumann & Assocs.*, 618 F.2d 1363, 1368

screenwriters and composers who sought an amendment that would have given the employer the right to use the employee's work as needed for business purposes while allowing the employee to retain all rights in the work as long as he refrained from authorizing competing uses.²¹⁰ The legislative history states that although such a change "might theoretically improve the bargaining position of screenwriters and others as a group, the practical benefits that individual authors would receive are highly conjectural."²¹¹ Faced with this perceived uncertainty, Congress refused to depart from the well-established presumption that "initial ownership rights vest in the employer for hire."²¹²

In construing the first component of the "work for hire" definition, whether a work was prepared by an employee within the scope of his employment, courts have focused on whether the employer served as the impetus for the work by insisting upon and funding its creation.²¹³ The second component of the definition concerning specially ordered or commissioned works represents a "carefully balanced compromise" as to "those works written on special order or commission that should be considered as 'works

(9th Cir. 1980). Professor Nimmer has observed that § 26 created a presumption of copyright in the employer that may be rebutted "only by a preponderance of evidence of a contrary agreement as between the parties." *Id.* at 1369 (quoting § 5.03[D] of an older edition of M. NIMMER, *supra* note 38). In *May* the court concluded that extrinsic evidence such as prevailing custom and usage may be considered when determining whether the parties intended to alter this presumption of the "work for hire" doctrine. 618 F.2d at 1369.

210. H.R. REP. No. 1476, *supra* note 149, at 5737. This proposal was similar to the "shop right" doctrine of patent law. *See, e.g., United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 188-89 (1933) ("Since the servant uses his master's time, facilities and materials to attain a concrete result, the latter is in equity entitled to use that which embodies his own property and to duplicate it as often as he may find occasion to employ similar appliances in his business. But the employer in such a case has no equity to demand a conveyance of the invention, which is the original conception of the employee alone, in which the employer had no part.").

211. H.R. REP. No. 1476, *supra* note 149, at 5737.

212. *Id.* The legislative history states that to exchange this presumption "for the uncertainties of the shop right doctrine would not only be of dubious value to employers and employees alike, but might also reopen a number of other issues." *Id.; cf. 17 U.S.C. § 201(c)* (1982) ("Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. . .").

213. *See, e.g., Gopman v. Edgar*, No. 81 Civ. 1681 (N.D. Ill. May 12, 1981) (when plaintiff real estate attorney prepared a disclosure document for use in promoting investments in a limited partnership of which he was the general partner and defendant subsequently employed plaintiff to draft documents, including a similar disclosure document, court held that alterations made by plaintiff in adapting initial document to defendant's needs did not provide a sufficient basis for defendant's claim that plaintiff created second document as part of his employment for defendant).

made for hire,' and those that should not."²¹⁴ Moreover, a specially commissioned work that may qualify as a "work made for hire" does not attain this status automatically; the parties also must expressly agree in a signed written instrument that the work will be considered a "work made for hire."²¹⁵ Courts have construed this second component of the "work for hire" definition very strictly to comport with the expressed legislative intent. For example, courts have observed that neither architectural plans²¹⁶ nor a fabric design produced by an independent contractor²¹⁷ fit into the category of specially commissioned works that may qualify as "works made for hire." Similarly, most works of fine art do not qualify as "works made for hire."²¹⁸ Therefore, the negative effect that the "work for

214. H.R. REP. No. 1476, *supra* note 149, at 5737. The legislative history further provides:

The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered 'works made for hire' under certain circumstances.

Of these, one of the most important categories is that of "instructional texts." This term is given its own definition in the bill: "a literary, pictorial, or graphic work prepared for publication with the purpose of use in systematic instructional activities." The concept is intended to include what might be loosely called "textbook material," whether or not in book form or prepared in the form of text matter. The basic characteristic of "instructional texts" is the purpose of their preparation for "use in systematic instructional activities," and they are to be distinguished from works prepared for use by a general readership.

Id.

215. See *supra* text accompanying note 208. Once a work is classified as a "work made for hire," however, the employer or person for whom the work is prepared will own the copyright unless the parties expressly agree otherwise in a signed written instrument. 17 U.S.C. § 201(b) (1982); see *Arthur Retlaw & Assocs., Inc. v. Travenol Laboratories, Inc.*, 582 F. Supp. 1010, 1014 (N.D. Ill. 1984) (neither an oral "understanding" nor a letter signed by only one party satisfies "statute's requirement that the agreement be a written instrument signed by both parties"); cf. *Black v. Pizzatime Theatres*, No. C-83-20049-WAI (N.D. Cal. Aug. 15, 1983) ("employer's material breach of the employment contract would give rise to a claim to rescind the contract including the implied right to authorship").

216. See, e.g., *May v. Morganelli-Heumann & Assocs.*, 618 F.2d 1363, 1368 n.4 (9th Cir. 1980); *Meltzer v. Zoller*, 520 F. Supp. 847, 855 (D.N.J. 1981).

217. *Mister B Textiles, Inc. v. Woodcrest Fabrics, Inc.*, 523 F. Supp. 21, 24-25 (S.D.N.Y. 1981) (court apparently agreed with the defendant's argument that an independent contractor who produced a fabric design for another party would be the "author" and copyright proprietor of the work, but concluded that plaintiff had a sufficient co-ownership interest to maintain suit).

218. Section 101 includes, however, pictorial illustrations as an example of "supplementary works" that fit within the category of specially commissioned works potentially qualifying as "works made for hire." See *supra* note 208; cf. *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28, 31 (2d Cir. 1939) ("If . . . [an artist] is solicited by a patron to execute a commission for pay, the presumption should be indulged that the patron desires to control the publication of copies and that the artist consents that he may, unless by the terms of the contract, express or implicit, the artist has reserved the copyright to himself.").

hire" doctrine may have upon a creator's right to compel recognition for his work is reduced by the doctrine's exclusion of all specially ordered or commissioned works that are not enumerated specifically in the statutory definition.²¹⁹

Section 202 of the 1976 Act provides that the ownership of a copyright is "distinct from ownership of any material object in which the work is embodied."²²⁰ Therefore, the transfer of ownership of any material object in which the copyrighted work is fixed does not convey any copyrights in the work.²²¹ The common law indulged in a presumption that authors transferred their common-law literary property rights upon the sale of their works, unless such rights were specifically preserved.²²² Section 202 of the 1976 Act, when coupled with section 204(a), which requires a signed written instrument to transfer any copyright ownership interest, reverses this presumption.²²³ Therefore, section 202 is properly viewed as beneficial to creators.²²⁴

219. See *supra* note 208 and accompanying text. The statutory requirement of an express written agreement that a specially commissioned work shall be considered a "work made for hire" also lessens the effect of the doctrine on a creator's paternity rights. See *supra* text accompanying note 215.

220. 17 U.S.C. § 202 (1982). Section 202 provides:

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

Id.

221. *Id.* The legislative history for section 202 provides:

The principle restated in section 202 is a fundamental and important one: that copyright ownership and ownership of a material object in which the copyrighted work is embodied are entirely separate things. Thus, transfer of a material object does not of itself carry any rights under the copyright, and this includes transfer of the copy or phonorecord—the original manuscript, the photographic negative, the unique painting or statue, the master tape recording, etc.—in which the work was first fixed. Conversely, transfer of a copyright does not necessarily require the conveyance of any material object.

H.R. REP. NO. 1476, *supra* note 149, at 5739-40.

222. See, e.g., *Pushman v. New York Graphic Soc'y, Inc.*, 287 N.Y. 302, 39 N.E.2d 249 (1942).

223. See H.R. REP. NO. 1476, *supra* note 149, at 5740. 17 U.S.C. § 204(a) provides: "A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." 17 U.S.C. § 204(a) (1982); see also *id.* § 301 ("Preemption with respect to other laws"); *infra* notes 291-319 and accompanying text.

224. See *Ringer*, *supra* note 191, at 492-93.

Nevertheless, from the standpoint of moral rights, the advantages of section 202 are reduced by the operation of section 109 of the 1976 Act, which delineates the effect of transferring a particular copy or phonorecord.²²⁵ Section 109(a) codifies the "first sale doctrine" and provides that the owner of a lawfully made copy is entitled to "sell or otherwise dispose" of the copy without the permission of the copyright owner.²²⁶ Thus, section 109(a) is a limitation upon the copyright owner's exclusive right under section 106(3) "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership . . ."²²⁷ The copyright owner's exclusive right to sell a copy of his copyrighted work extends only to his first sale of the copy, after which time he retains no control over subsequent sales.²²⁸ As one court has observed, "[t]he first sale thus extinguishes the copyright holder's ability to control the course of copies placed in the stream of commerce."²²⁹

225. 17 U.S.C. § 109 provides:

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

(b) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

(c) The privileges prescribed by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan or otherwise, without acquiring ownership of it.

17 U.S.C. § 109 (1982). Section 101 of the 1976 Act defines a "copy" to include the first fixation of the work:

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. *The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.*

Id. § 101 (emphasis supplied); *cf. supra* note 122.

226. *Id.* § 109(a); *cf.* 17 U.S.C. § 27 (1964) (repealed (1970)) ("nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained").

227. 17 U.S.C. § 106(3) (1982).

228. *See American Int'l Pictures, Inc. v. Foreman*, 576 F.2d 661, 664 (5th Cir. 1978). Moreover, "[e]ven if the copyright holder places restrictions on the purchaser in a first sale . . . the buyer's disregard of the restrictions on resale does not make the buyer or the person who buys in the secondary market liable for infringement." *Id.*

229. *Id.*; *see also Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 568 F. Supp. 494, 498 (W.D. Pa. 1983) (plaintiff motion picture producers and distributors who sold video

Another consequence of section 109(a) is that it eliminates a creator's right of withdrawal upon the initial sale of a copy of his work.²³⁰ Perhaps this consequence is not terribly significant given the well-deserved criticisms of this aspect of the moral right doctrine.²³¹ More troubling, however, is the legislative history's suggestion that the copyright owner cannot prevent the owner of a lawfully made copy of his work from destroying the copy.²³² Although those countries that have adopted the moral right doctrine generally do not recognize a creator's right to prevent the destruction of a copy of his work by its owner,²³³ this lack of recognition is difficult to reconcile with the doctrine's concern for the personal interests of a creator in his work and for the public's interest in preserving its cultural integrity.²³⁴

The interaction of sections 109(a) and 106(2) raises a related question regarding the scope of rights properly exercisable by the owner of a lawfully made copy of a work. May a copy owner mutilate his copy or make alterations? Although section 109 does not specifically address this issue, the copyright proprietor's exclusive right to prepare derivative works under section 106(2) should prevent alterations that constitute the creation of a derivative work, at least in those instances in which the copy owner is not the copyright proprietor.²³⁵ The issue remains whether a "mutilation" should be regarded as an alteration or a destruction for section 106(2) purposes. Creators who retain copyrights in their works will argue that any mutilating act short of complete destruction constitutes an alteration rather than a destruction of the work, and thus violates the exclusive right to create derivative works. This position is completely consistent with the argument presented earlier that a mutilation of a creator's work resulting in a new work which is not "substantially similar" to the creator's original work, combined with an attribution of authorship to the original creator, is an infringement of section 106(2).²³⁶ Thus, when an owner of a law-

cassette copies of their copyrighted motion pictures to defendants waived their exclusive distribution rights).

230. See *supra* text accompanying note 19.

231. See *supra* note 20 and accompanying text.

232. H.R. REP. No. 1476, *supra* note 149, at 5693.

233. See *supra* note 34 and accompanying text.

234. See *supra* text accompanying note 35. The California Art Preservation Act prohibits the destruction of a work of fine art. See *supra* notes 108-17 and accompanying text and note 123; see also *infra* notes 399-402 and accompanying text.

235. See *supra* note 152 and accompanying text.

236. See *supra* text preceding and accompanying notes 155-56 & 173-74.

fully made copy of a creator's work makes mutilating changes in the work but still represents it as the work of the creator, the copy owner should be viewed as an infringer of the creator's right to prepare a derivative work. Of course, if a creator's work is mutilated beyond recognition but not attributed to him, the creator's rights under section 106(2) have not been infringed. In such a situation, the creator probably cannot protect against the mutilation under the copyright law.

Section 109 contains another limitation on creators' moral rights. Section 109(b) provides that the owner of a lawfully made copy²³⁷ may, without the authorization of the copyright owner, "display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located."²³⁸ This provision places a limitation upon a copyright owner's exclusive right to display his work publicly.²³⁹ Section 109(b) is problematic, however, because it leaves no recourse for a creator who objects to the context in which the copy owner is displaying his work.²⁴⁰ Thus, a deeply religious artist whose work is displayed in an exhibit with an atheistic theme has no remedy under the statute.²⁴¹

Returning to our hypothetical playwright, let us now compen-

237. Section 109(c) provides that ownership of the copy rather than mere possession is a prerequisite to exercising the privileges provided in § 109(a) and § 109(b). *See supra* note 225; *see also* Shuptrine v. Brown, No. 81-5628 (6th Cir. Mar. 14, 1983) ("[a] necessary element of a 'first sale' is the transfer of legal title"); *Schuchart & Assocs. v. Solo Serve Corp.*, 220 U.S.P.Q. (BNA) 170, 183 (W.D. Tex. 1983).

238. 17 U.S.C. § 109(b) (1982).

239. *Id.*; *see also id.* § 106(5). The legislative history for § 109(b) discloses that the committee's intention in incorporating § 109(b) was "to preserve the traditional privilege of the owner of a copy to display it directly, but to place reasonable restrictions on the ability to display it indirectly in such a way that the copyright owner's market for reproduction and distribution of copies would be affected." H.R. REP. NO. 1476, *supra* note 149, at 5694.

240. *See supra* notes 96-104 and accompanying text; *cf. Shostakovich v. Twentieth Century-Fox Film Corp.*, 196 Misc. 67, 80 N.Y.S.2d 575 (1948), *aff'd*, 275 A.D. 692, 87 N.Y.S.2d 430 (1949).

241. The legislative history for § 109(b) provides that "[t]he exclusive right of public display granted by section 106(5) would not apply where the owner of a copy wishes to show it directly to the public, as in a gallery or display case, or indirectly, as through an opaque projector." H.R. REP. NO. 1476, *supra* note 149, at 5693. 17 U.S.C. § 101 defines the "display" of a work as "to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, . . . [showing] individual images nonsequentially." 17 U.S.C. § 101 (1982).

Although this discussion focuses on the potential conflicts between creators as copyright proprietors and owners of lawfully made copies, similar conflicts can occur when a creator assigns his copyrights and the copyright proprietor wishes to display or reproduce the creator's work in an objectionable manner. For a discussion of these issues, see *infra* part III, section C and part IV.

sate her for difficulties with the movie company by assuming that her play was an instant success and that the subsequent screenplay was a satisfactory treatment which afforded her even more national recognition. Her happiness, however, only lasts until she learns that a repertory company is performing a musical production of her play consisting of original songs and dance routines interspersed throughout a script which is remarkably similar to her own. The musical production uses backdrops similar to the major settings in her play and features the same characters, whose names have been altered in such a way as to "conjure up" those of the original characters.²⁴² Outraged by what she believes to be an inferior performance and a perversion of her original theme, she sues the repertory company for copyright infringement.

In this hypothetical situation, section 106(2) could protect not only the playwright's copyright interests, but also her personal interests in her work.²⁴³ Indeed, because she never authorized the repertory company's production, its musical adaptation arguably is a derivative work, and the new production constitutes a violation of the playwright's exclusive right to authorize the preparation of derivative works based upon her copyrighted work.²⁴⁴ If she is granted relief on this ground, her interest in preserving the integrity of her work also will be vindicated. Nevertheless, there is another limitation on the protection of moral rights in the 1976 Act. Section 107 provides that the "fair use of a copyrighted work . . . for purposes such as criticism [or] comment . . . is not an infringement of copyright."²⁴⁵ Therefore, if the playwright's copyright is

242. See *infra* notes 259-61 and accompanying text; cf. *Metro-Goldwyn-Mayer v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351 (N.D. Ga. 1979) (musical production alleged to infringe *Gone with the Wind*).

243. See *Nimmer*, *supra* note 1, at 521.

244. See *supra* notes 152 & 169-72 and accompanying text.

245. 17 U.S.C. § 107 provides in full:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- 2) the nature of the copyrighted work;
- 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- 4) the effect of the use upon the potential market for or value of the copyrighted work.

not infringed because the musical company's use of her work qualifies as a fair use, presumably any coextensive protection for her personal rights in the work will be lost.²⁴⁶

On balance, this result is justifiable. The reasons underlying the incorporation of the fair use doctrine into the copyright law's protections for a creator's economic rights are equally compelling in the context of protections for a creator's personal rights. The limited monopoly the copyright law confers upon an author is the means by which Congress achieves its ultimate goal of enhancing the public welfare by promoting the "useful arts."²⁴⁷ As the Supreme Court recently observed, Congress, in defining the scope of this limited monopoly, must balance carefully authors' interests "in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand"²⁴⁸ As a result of this balance, certain forms of expression which infringe the exclusive rights granted to creators under the statute are proscribed.²⁴⁹ Arguably, such restrictions, if literally applied, actually could inhibit creativity²⁵⁰ and create a potential conflict between the copyright law and an element of the first amendment's guarantee of free expression. Section 107 of the 1976 Act provides a safeguard for this situation,²⁵¹ and to the extent that protection

17 U.S.C. § 107 (1982).

246. See *infra* notes 258-67 and accompanying text.

247. U.S. CONST. art. I, § 8, cl. 8. In *Sony Corp. v. Universal City Studios*, 104 S. Ct. 774 (1984), the Supreme Court observed: "The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved." *Id.* at 782; see also *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

248. *Sony Corp. v. Universal City Studios*, 104 S. Ct. 774, 782 (1984).

249. *Nimmer, Does Copyright Abridge the First Amendment Guarantee of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1189-90 (1970) (emphasizing that copyright law protects the "expression of ideas" rather than "ideas *per se*"); see also *supra* notes 140 & 151; 17 U.S.C. § 102(b) (1982) (providing that copyright protection does not extend to any idea).

250. See *Iowa State Univ. Research Found., Inc. v. American Broadcasting Co.*, 621 F.2d 57, 60 (2d Cir. 1980) (doctrine of fair use created to avoid rigid application of the copyright laws when that application would defeat the law's original purpose of fostering creativity); see also *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983).

251. An interesting question outside the scope of this Article is whether the first amendment concerns are subsumed completely under the "fair use" doctrine or whether the first amendment constitutes a special defense to a charge of copyright infringement. Compare *Triangle Publications, Inc. v. Knight Ridder Newspapers, Inc.*, 445 F. Supp. 875 (S.D. Fla. 1978), *aff'd*, 626 F.2d 1171 (5th Cir. 1980) (lower court maintaining that defenses are separate, holding that defendant's television display of plaintiff's copyrighted magazine cover was not "fair use" but was protected by the first amendment—Fifth Circuit did not

for a creator's personal interests will result in similar restrictions on creativity and on free expression, such protection also must be circumscribed by section 107. Thus, section 107 has the potential for limiting significantly the scope of the moral right doctrine in our country.²⁵²

Section 107, which codifies well-established fair use doctrine created by the judiciary,²⁵³ posits four factors to be considered by courts in determining whether a particular use of a copyrighted work is a fair use and thus not an infringement:²⁵⁴ (1) the purpose of the use; (2) the nature of the copyrighted work; (3) the amount used in relation to the entire copyrighted work; and (4) the effect of the use upon the value of the copyrighted work.²⁵⁵ Congress did not intend these factors to be exhaustive, but only to restate the preexisting law by focusing on the criteria most frequently used by the courts for determining a fair use.²⁵⁶ The legislative history states, however, that "since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."²⁵⁷

Applying the fair use doctrine to the hypothetical playwright's case, the playwright's cause of action for infringement of both economic and personal interests may fail if the court views the musical production as a spoof or parody of her original work. The fair

reach first amendment issue, but affirmed decision on ground that "fair use" was a valid defense) *with Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957 (D.N.H. 1978) (court accepts premise that application of the "fair use" doctrine will resolve conflicts between the first amendment and the copyright laws); *see also infra* note 262. To the extent the first amendment does function as an independent defense to copyright infringement, it also would be applicable to alleged violations of a creator's personal interests. *See infra* text accompanying note 252 and notes 258-67 and accompanying text; *see also* Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970) (analysis of the conflicting interests secured by copyright law and the first amendment).

252. The precise interplay between the first amendment and the fostering creativity rationales of the fair use doctrine may be outlined definitively by the Supreme Court when it decides the case of *Harper & Row, Publishers, Inc. v. Nation Enters.*, *cert. granted*, 52 U.S.L.W. 3860 (U.S. May 29, 1984) (No. 83-1625). *See infra* notes 258-67 and accompanying text.

253. *See* H.R. REP. No. 1476, *supra* note 149, at 5678.

254. Professor Nimmer has observed that the issue of "fair use" arises when it is established "that the defendant has copied sufficiently from the plaintiff so as to cross the line of substantial similarity." In these circumstances, "[t]he result must necessarily constitute an infringement unless the defendant is rendered immune from liability because the particular use which he has made of the plaintiff's material is a 'fair use.'" 3 M. NIMMER, *supra* note 38, § 13.05, at 13-64 (1982).

255. 17 U.S.C. § 107 (1982); *see supra* note 245.

256. H.R. REP. No. 1476, *supra* note 149, at 5679.

257. *Id.*

use doctrine often is at issue in cases concerning parodies because many parodies "involve the type of original critical comment" that section 107 is intended to protect.²⁵⁸ In *Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions, Inc.*,²⁵⁹ a case concerning a musical production's alleged infringement of *Gone with the Wind*, the court adopted a strict standard for the type of parody eligible for fair use protection. Although the court accepted the premise that a parody mimics the protected work "for comic effect or ridicule," the court also required that the parody "make some critical comment or statement about the original work which reflects the original perspective of the parodist — thereby giving the parody social value beyond its entertainment function."²⁶⁰ After examining the defendant's musical production from the standpoint of the four fair use factors, the court concluded that the defendant's production was a derivative work rather than a critical commentary of either the film or the novel *Gone with the Wind*, and therefore was a copyright infringement. The court also held that to the degree the production could be characterized as a parody, it was not a fair use because the defendants used more of the original copyrighted work than is permissible under the fair use doctrine and the musical was likely to harm the potential market for the original work.²⁶¹

As *Showcase Atlanta* suggests, even if the alleged infringing work initially qualifies as a legitimate protected form of expression, it still may not constitute a fair use of the original copyrighted work if it incorporates more material than is permissible or has an adverse effect upon the potential market for the original work.²⁶²

258. *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 357 (N.D. Ga. 1979).

259. *Id.*

260. *Id.*; cf. *Elsmere Music, Inc. v. NBC*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd per curiam*, 623 F.2d 252, 253 n.1 (2d Cir. 1980) (Second Circuit stated that a parody is "entitled at least to 'conjure up' the original" and that "[e]ven more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for a humorous effect or commentary."). *But see Groucho Marx Prods., Inc. v. Day and Night Co.*, 523 F. Supp. 485 (S.D.N.Y. 1981), *rev'd on other grounds*, 689 F.2d 317 (2d Cir. 1982) (district court concluded that the defendants' production of a play featuring performers simulating the Marx Brothers' unique style, appearance, and mannerisms did not qualify as a parody because it simply duplicated the original, rather than building upon it by adding its own creative elements).

261. *Metro-Goldwyn-Mayer v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 356-61 (N.D. Ga. 1979).

262. *Id.* at 361. Professor Nimmer suggested that the incorporation of such other factors into the fair use analysis requires that fair use be viewed separately from the limitation on copyright mandated by the First Amendment:

In applying the "fair use" doctrine, courts typically balance the four factors to determine whether a particular use of a work constitutes a fair use.²⁶³ Nevertheless, the fair use doctrine affords a significant degree of protection to works, such as parody and satire,²⁶⁴ that use the copyrighted work "for purposes such as criticism, comment, [or] news reporting."²⁶⁵

Our deep rooted tradition of free speech stemming from the first amendment's mandate²⁶⁶ requires the same balance of interests when a creator alleges violations of his personal, rather than pecuniary, rights. The musical production in the hypothetical case that arguably mutilates the playwright's theme presents a potential conflict between moral rights and free speech concerns. The same potential conflict exists when a film critic illustrates his television review of a movie with a series of excerpts from the film that, in the screenplay writer's estimation, distorts the movie. Important social policies underlying section 107 may compel a creator's acceptance of perceived mutilations, unwarranted criticisms, and even objectionable contextual uses²⁶⁷ of his work. The doctrine of fair use thus limits the scope of moral rights in the United States.

The policies of public access to information, enhanced creativ-

I would suggest that a grave danger to copyright may lie in the failure to distinguish between the statutory privilege known as fair use and an emerging constitutional limitation on copyright contained in the first amendment. The scope and extent of fair use falls within no discretion of the Congress. The limitations of the first amendment are imposed upon Congress itself. Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied. The first amendment privilege, when appropriate, may be invoked despite the fact that the marketability of the copies work is thereby impaired.

Nimmer, *supra* note 249, at 1200-01 (footnote omitted); *see also supra* note 251.

263. *See, e.g., Roy Export Co. Establishment v. CBS*, 503 F. Supp. 1137, 1143-47 (S.D.N.Y. 1980) (defendant's use of six Charlie Chaplin films to which plaintiffs held the exclusive rights not a fair use because the films were created for commercial gain, the defendant's use was qualitatively great, and there was evidence of bad faith), *aff'd*, 672 F.2d 1095 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982).

264. A satire illuminates and ridicules the vices or failures of an individual or institution, usually for the purpose of promoting change. *See Dallas Cowboys Cheerleaders v. Pussycat Cinema*, 467 F. Supp. 366, 376 (S.D.N.Y.), *aff'd*, 604 F.2d 200 (2d Cir. 1979). A satire differs from a parody in that a satire uses the protected work as a vehicle for ridiculing a larger concern while a parody may ridicule only the original work itself.

265. 17 U.S.C. § 107 (1982); *see supra* note 245.

266. The first amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

267. *See supra* notes 96-104 and accompanying text; *cf. Shostakovich v. Twentieth Century-Fox Film Corp.*, 196 Misc. 67, 80 N.Y.S.2d 575 (1948) (court noted defendant's incidental use of plaintiff's music), *aff'd*, 275 A.D. 692, 87 N.Y.S.2d 430 (1949).

ity, and the free flow of ideas supporting section 107²⁶⁸ also bear upon the interesting question of the appropriate duration for moral rights protection. As discussed in part I, two approaches to duration exist in those countries that have adopted the moral right doctrine. Some countries terminate a creator's moral rights at the expiration of his copyright, while other countries endorse perpetual moral rights.²⁶⁹ Perpetual protection for moral rights may be inconsistent with our guarantee of free speech. In discussing why the common-law concept of perpetual copyright is inconsistent with the policies underlying the first amendment, Professor Nimmer suggested that the speech interest in expressions rather than ideas should be given less weight than the copyright interest in encouraging creativity, except when dealing with copyright protection "beyond the life expectancy of the author's children and grandchildren."²⁷⁰ Years after the author's death, the balance between speech and copyright shifts and the "real, if relatively slight, speech interest in expression remains constant, while the copyright interest in encouraging creativity largely vanishes."²⁷¹ Similar reasoning arguably applies to perpetual protection for a creator's moral rights. Indeed, protection for both the economic and personal rights of creators can be justified as making society the ultimate beneficiary by enhancing creativity, and therefore, once the benefits that society obtains from extended copyright protection are sufficiently diminished, the free speech concerns should prevail. This analogy would be compelling if encouraging creativity was society's only interest in extending protection for a creator's moral rights. Protection for creators' personal rights, however, also enables society to preserve the integrity of its cultural heritage.²⁷² The public's right to enjoy the fruits of a creator's labors in original form and to learn cultural history from such creations has no time limit. This rationale, therefore, strongly favors perpetual protection for moral rights.²⁷³

Despite society's interest in preserving its cultural heritage, perpetual protection for moral rights should not be sanctioned in the United States. The copyright clause of the Constitution only authorizes Congress to "promote the progress of . . . useful arts,

268. See *supra* text accompanying notes 248-51.

269. See *supra* notes 55-61 and accompanying text.

270. Nimmer, *supra* note 249, at 1193.

271. *Id.*

272. See *supra* text accompanying note 61.

273. See Diamond, *supra* note 6, at 249.

by securing for *limited times* to authors . . . the exclusive right to their respective writings."²⁷⁴ Congress derives its authority to protect creators' personal rights from this clause, and therefore, any protection must be limited in its duration by virtue of the constitutional mandate. Although the question whether it is constitutional for Congress to protect moral rights in conjunction with copyrights has received little attention,²⁷⁵ the courts have addressed the scope of congressional power under the copyright clause in other contexts. In *Mitchell Brothers Film Group v. Cinema Adult Theater*²⁷⁶ the court emphasized that the Constitution grants Congress the authority to make any law that is "necessary and proper" for the exercise of any of its Article I powers, which includes the copyright power, and courts, therefore, have a limited role in determining whether Congress has exceeded its Article I powers.²⁷⁷ In making this judgment, "the courts will not find that Congress has exceeded its power so long as the means adopted by Congress for achieving a constitutional end are 'appropriate' and 'plainly adapted' to achieving that end."²⁷⁸ The court in *Mitchell Brothers* relied on this reasoning to sustain its position that the protection of all writings, including those whose content may be obscene, "is a constitutionally permissible means of promoting science and the useful arts."²⁷⁹ Similarly, Congress has the power to protect moral rights so long as it concurrently fosters the constitutional goal of promoting the useful arts. Two important rationales for protecting moral rights, the encouragement of creativity and the preservation of our cultural heritage, both promote the useful arts.²⁸⁰ These objectives, therefore, enable Congress to legislate moral rights under its grant of authority from the copyright clause. An important caveat, however, is that any moral rights legislation must be limited in duration to comply with the language of the copyright clause.²⁸¹

274. U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

275. See A. LATMAN & R. GORMAN, COPYRIGHT FOR THE EIGHTIES 383 (1981) (raising issue in context of Congressman Drinan's proposal).

276. 604 F.2d 852 (5th Cir. 1979).

277. *Id.* at 860; see also U.S. CONST. art. I, § 8, cl. 18.

278. *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)), *cert. denied*, 445 U.S. 917 (1980).

279. *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 858-60 (5th Cir. 1979); see also Phillips, *Copyright in Obscene Works: Some British and American Problems*, 6 ANGLO-AM. L. REV. 133, 164-66 (1977).

280. See *supra* text accompanying note 273.

281. Presumably, a time limitation for moral rights protection also would be appropri-

If the United States recognized explicitly a variation of the moral right doctrine, the limitations discussed in this section undoubtedly would influence its scope. A creator whose work is considered a "work made for hire" probably could not compel recognition for his work, given the well-entrenched position that the "work for hire" doctrine occupies in our copyright law.²⁸² The operation of the "first sale doctrine" codified in section 109(a)²⁸³ might preclude a creator who also is the copyright owner from withdrawing his work once he has placed it in the stream of commerce.²⁸⁴ Similarly, a creator cannot prevent either the destruction of a copy of his work by the legal owner,²⁸⁵ or mutilations by the owner that amount to more than "alterations," unless the owner of the work also attributes authorship of the mutilated version to the creator.²⁸⁶ Section 109(b)'s limitation upon a copyright owner's exclusive right to display a work publicly also is a problem for those creators who object to the context in which their works are displayed by the rightful owners.²⁸⁷ The fair use doctrine embodied in section 107 represents a particularly significant limitation upon moral rights protection in this country.²⁸⁸ Of course, such a limitation is justifiable as a "necessary concomitant" of living in a democratic society.²⁸⁹ Equally important is the time limit for protection imposed by the copyright clause of the Constitution.²⁹⁰

Notwithstanding the limitations that the existing copyright law places upon any proposed moral rights protection, the federal statutory framework could accommodate explicit recognition for an American variation of the moral right doctrine. The specific content of such protection will be discussed more fully in the final

ate in the event the individual states were to afford such protection. *See supra* notes 108-25 and accompanying text; *infra* note 375 and accompanying text. Given the clear mandate of the copyright clause and the relationship between moral rights and copyrights, the states should not be allowed to sanction perpetual protection when such a result could not be achieved under federal law. *See generally infra* notes 291-397 and accompanying text; *cf.* Nimmer, *supra* note 249, at 1193-94 (in discussing whether common-law copyright is unconstitutional, Nimmer observed that "it is open to the state courts to construe their respective laws of common law copyright in such manner as to bring them within the limitations of the first amendment").

282. *See supra* notes 207-19 and accompanying text.

283. 17 U.S.C. § 109(a) (1982); *see supra* notes 226-29 and accompanying text.

284. *See supra* notes 230-31 and accompanying text.

285. *See supra* notes 232-34 and accompanying text.

286. *See supra* notes 235-36 and accompanying text and text following note 236.

287. *See supra* notes 237-41 and accompanying text.

288. *See supra* notes 242-67 and accompanying text.

289. Nimmer, *supra* note 249, at 1187.

290. *See supra* notes 274-81 and accompanying text.

part of this Article, but first, the possibility of protection for moral rights on a state, rather than a federal, level must be explored.

C. *The 1976 Act and Preemption of State Protection for Moral Rights*

Section 301 of the 1976 Act²⁹¹ governs the compatibility between federal copyright law and protection for moral rights on a state level. This provision sets forth a two-part test for determining whether a particular state law is preempted by the 1976 Act. The first prong of the preemption test focuses on the nature of the work protected by the state law. Specifically, preemption will not occur if the state law does not pertain to "works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright."²⁹² The states, in other words, are free

291. 17 U.S.C. § 301 (1982). The legislative history terms this provision "one of the bedrock provisions of the bill," because it adopts a single system of federal statutory protection, thereby eliminating the prior dual system of "common law copyright" for unpublished works and federal protection for published works. H. R. REP. No. 1476, *supra* note 149, at 5745; *see supra* note 1; *infra* note 374. Section 301 provides in full:

(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 work under the common law or statutes of any State.

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

(1) Subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) Any cause of action arising from undertakings commenced before January 1, 1978; or

(3) Activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other federal statute.

17 U.S.C. § 301 (1982).

292. *See* 17 U.S.C. § 301(a), (b)(1) (1982). Sections 102 and 103 of the 1976 Act specify the subject matter of the copyright law. *See supra* note 151 for text of § 102. Section 103

to regulate all works that are not protected by the copyright law because of their nature or form of expression.²⁹³ The second prong of the preemption test emphasizes the nature of the rights that the state law attempts to safeguard. If the state seeks to protect rights that are "not equivalent to any of the exclusive rights within the general scope of copyright," the state's law will not be preempted by section 301.²⁹⁴ Preemption of a state law will occur only if both prongs of the test in section 301 are satisfied.²⁹⁵ Therefore, if a state law grants "equivalent rights" to a work that does not come within the scope of federal copyright law, no preemption will result.²⁹⁶ Similarly, a state may protect federally copyrightable works as long as such protection does not encompass rights equivalent to 1976 Act protections.

Although Congress purported to enact an unambiguous statutory mandate concerning the issue of preemption,²⁹⁷ application of section 301 can be exceedingly difficult.²⁹⁸ In the specific context of

provides that "[t]he subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully." 17 U.S.C. § 103 (1982); *see also supra* note 151.

293. *See infra* notes 300-09 and accompanying text.

294. *See* 17 U.S.C. § 301(a), (b)(3) (1982). Section 106 of the 1976 Act details the rights protected by the copyright statute. *See supra* note 140 for text of § 106; *see also infra* notes 310-96 and accompanying text.

295. *See* Schuchart & Assocs., Professional Eng'rs, Inc. v. Solo Serve Corp., 540 F. Supp. 928 (W.D. Tex. 1982); 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-9.

296. 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-22; *see infra* text accompanying notes 306-10.

297. The legislative history states that "section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection." H.R. REP. No. 1476, *supra* note 149, at 5745-46.

Prior to the adoption of the 1976 Act, common law protected unpublished works. *See supra* note 291; 17 U.S.C. § 2 (1970) (repealed 1976) ("Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."). This dual system of protection was entirely consistent with the Supreme Court's 1973 ruling in *Goldstein v. California*, 412 U.S. 546 (1973), that the states did not relinquish to the federal government exclusive control of the power to grant copyrights. In *Goldstein* the Court upheld a California statute outlawing "record piracy," thus rejecting the petitioner's contentions that the statute in question exceeded the state's powers under the Constitution and conflicted with the federal copyright law. *See infra* note 367 and accompanying text for a discussion of the conflict aspect of preemption. The adoption of § 301 has eliminated, for all practical purposes, the significance of the states' concurrent copyright powers. *See* 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-6.

298. *See* 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-8.

the moral right doctrine, the primary difficulty lies in interpreting the term "equivalent" as it pertains to those rights that states cannot protect by the second prong of the preemption test.²⁹⁹ The determination under the first prong of the test, whether a particular work comes within "the scope of the Federal copyright law,"³⁰⁰ is a far less complicated inquiry. If a work consists of copyrightable subject matter,³⁰¹ preemption will result under this prong unless the work is not a "work of authorship" that has been "fixed in a tangible medium of expression."³⁰² According to the definitional section of the 1976 Act, a work is "fixed in a tangible medium of expression" when, "by or under the authority of the author," it is embodied in a copy or phonorecord that is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."³⁰³ Examples of works that are not "fixed" within the meaning of the statute include choreography, extemporaneous speeches, and improvised dramatic sketches or musical compositions which have never been recorded or written down.³⁰⁴

299. See Francione, *supra* note 67, at 202. ("The issues surrounding the equivalence of state and federal rights are amongst the most difficult raised by the copyright law revision.").

300. H.R. REP. NO. 1476, *supra* note 149, at 5746.

301. See *supra* note 292 and accompanying text.

302. See 17 U.S.C. § 301(a), (b)(1) (1982).

303. *Id.* § 101. Section 101 also provides: "A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission." *Id.* According to Professor Nimmer, "Congress' copyright power extends only to an author's 'writings,' and a 'writing' in the constitutional sense probably requires that the work be fixed in a tangible medium of expression." 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-23 (footnotes omitted).

304. H.R. REP. NO. 1476, *supra* note 149, at 5741. The statute thus permits common-law copyright protection with respect to such works, because "unfixed works are not included in the specified 'subject matter of copyright.'" *Id.* If, however, a work does fit within one of the categories of copyrightable subject matter as specified in § 102 and § 103, and constitutes a work of authorship fixed in a tangible form, it probably cannot receive protection under state law "even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain." *Id.*; see also *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 919 n.15 (2d Cir. 1980); 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-22, 1-22.1.

A complicated question, however, arises as to the appropriate preemption resolution in those instances in which the 1976 Act omits protection for a certain category of works that nevertheless falls within the subject matter of copyright. For example, is state protection for recipes proscribed by § 102(b)'s mandate that "copyright protection for an original work of authorship does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such works"? 17 U.S.C. § 102(b) (1982). Alternatively, can the states protect a rock group whose sound recording is the subject of an unauthorized public performance on the ground that § 114 of the 1976 Act does not offer sound recordings pro-

The first prong of the test set forth in section 301 will be satisfied for the vast majority of creations that could be subjects of alleged moral rights violations. Most creations today are fixed within the broad meaning of the 1976 Act, and most works whose moral rights are worth infringing can satisfy the low standard of originality required for works of authorship. Nevertheless, a genre of visual art recently has evolved that is not confined by the canvas and instead interacts directly with the viewer and the exhibition space.³⁰⁵ Two interesting works illustrative of this category are "Crucifixion," by Chris Burden, in which the artist is crucified onto a Volkswagen, and "Seedbed," by Vito Acconci, in which the artist sits under a wooden ramp covering the gallery floor and masturbates for eight hours a day for a two week period during which time he voices his sexual fantasies about the audience through a loudspeaker.³⁰⁶ State protection for such works clearly would be allowable under section 301 because neither of these works is fixed within the meaning of the 1976 Act. For example, no preemption problem would exist with respect to a state law prohibiting the unauthorized photographing of such creations.³⁰⁷ Although the right protected by such a state law is "equivalent" to the right of reproduction granted the copyright owner by section 106(1),³⁰⁸ the subject matter at issue is not a work of authorship "fixed in a tangible medium of expression."³⁰⁹ Similarly, a state could allow a creator such as Chris Burden or Vito Acconci to bring an action against one who photographs his work but fails to attribute the original work to the artist or alters the photograph in such a way as to misrepresent the nature of the original work. State laws that vindicate the rights of paternity and integrity in such circumstances would survive federal preemption under the first prong of section 301's test because the original works are not considered fixed under the

tection against such activity? *Id.* § 114. For a discussion of these issues, see Goldstein, *Pre-empted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 *UCLA L. REV.* 1107, 1110-23 (1977); see also Comment, *Federal Copyright Protection and State Trade Secret Protection: The Case for Partial Preemption*, 33 *AM. U.L. REV.* 667 (1984).

305. See D. DAVIS, *ARTCULTURE: ESSAYS ON THE POST-MODERN* 33 (1977).

306. Mitchell, *Body Art: A Legal Policy Analysis*, 1 *LAW, ETHICS, AND THE VISUAL ARTS* 3-162, 3-168, 3-170 (J. Merryman, ed. 1979).

307. Of course, if either of these creations were photographed or filmed while the artist was in the "creation process," the resulting picture or movie could acquire copyright protection as a derivative work under § 103(a), assuming the artist consented to such use.

308. 17 U.S.C. § 106(1) (1982) (granting copyright owner the exclusive right to reproduce the copyrighted work).

309. *Id.* § 301(a), (h)(1).

1976 Act.

The application of the second prong of the preemption test necessitates a determination whether a particular state law creates rights that are "equivalent" to any of the following five rights protected by section 106 of the 1976 Act: reproduction, adaptation, distribution, public performance, and display.³¹⁰ The 1976 Act does not define the term "equivalent," but the legislative history indicates that a state cause of action will not be preempted if it contains elements that are "different in kind" from copyright infringement.³¹¹ In applying this standard, several courts have followed Professor Nimmer's suggestion that an "equivalent" right "is one which is infringed by the mere act of reproduction, performance, distribution or display."³¹² Essentially, this approach requires an analysis of the state law in question to determine what acts will constitute an infringement. If the exercise of one or more of the five rights protected by federal copyright law is all that is necessary to constitute an infringement of the state law, preemption will occur.³¹³ If, however, other elements also are required to infringe

310. *Id.* § 106; see *supra* note 140 for text of § 106.

311. H.R. REP. NO. 1476, *supra* note 149, at 5748.

Section 301(a) states that "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 . . . are governed exclusively by this title." Further, that subsection provides that "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(a) (1982). According to the legislative history, § 301(b) is the "obverse" of § 301(a) in that it broadly delineates, "without necessarily being exhaustive, some of the principal areas of protection that preemption would not prevent the States from protecting." H.R. REP. NO. 1476, *supra* note 149, at 5747. One of the specified areas available for state protection are "activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106." 17 U.S.C. § 301(b)(3) (1982). See *supra* note 291 for full text of § 301.

312. 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-11, 1-12; see e.g., *Crow v. Wainwright*, 720 F.2d 1224 (11th Cir. 1983) (action for sale of "bootleg" eight-track tapes under a state law prohibiting dealing in stolen property preempted); *Uncle Jam Records v. Warner Bros.*, COPYRIGHT L. REP. (CCH) ¶ 25,580 (S.D.N.Y. Sept. 22, 1983) (plaintiff's claims for conversion of the material embodiment of a phonorecord and unjust enrichment not preempted); *Ipec, Inc. v. Magenta Films, Ltd.*, No. 81 Civ. 3341 (S.D.N.Y. Apr. 24, 1982) (misappropriation aspect of unfair competition doctrine preempted); *Schuchart & Assocs., Professional Eng'rs, Inc. v. Solo Serve Corp.*, 540 F. Supp. 928, 943-48 (W.D. Tex. 1982) (misappropriation aspect of unfair competition doctrine preempted; cause of action for unjust enrichment not preempted); *Harper & Row Publishers, Inc. v. Nation Enter.*, 501 F. Supp. 848, 852-54 (S.D.N.Y. 1980) (claims for conversion and tortious interference with contract preempted), *rev'd on other grounds*, 723 F.2d 195 (2d Cir. 1983), *cert. granted*, 52 U.S.L.W. 3860 (U.S. May 29, 1984) (No. 83-1625).

313. 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-11, 1-12.

For example, in *Crow v. Wainwright*, 720 F.2d 1224 (11th Cir. 1983), the court had to determine whether a defendant's conviction for selling "bootleg" eight-track tapes in violation of a state statute prohibiting dealing in stolen property was preempted by the 1976 Act.

the state law, no preemption will result.³¹⁴

Applying the elements test, the court concluded that the elements of the crime—wrongful distribution of a copyrighted work—were the same under either the state law or the 1976 Act, and thus held that the state law cause of action was preempted. The court reached this conclusion despite the additional state requirement of scienter, which is not an element of copyright infringement. The court apparently believed, however, that this distinction did not differentiate significantly the necessary elements of the respective causes of action. See also *infra* notes 350-56 and accompanying text.

Professor Nimmer also noted that a state law will not be saved from preemption just because it is either “broader or narrower than its federal counterpart.” 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-11, 1-12. He observed:

It is irrelevant that certain reproductions, performances, distributions, or displays would not be regarded as infringing under the Copyright Act, but would violate the state created right, or would infringe under the Copyright Act, and not under the state created right. If under state law the act of reproduction, performance, distribution or display, no matter whether the law includes all such acts or only some, will *in itself* infringe the state created right, then such right is preempted.

Id. (footnotes omitted) (emphasis in original). The legislative history supports this position: “The preemption of rights under State law is complete with respect to any work coming within the scope of the bill, even though the scope of exclusive rights given the work under the bill is narrower than the scope of common law rights in the work might have been.” H.R. REP. NO. 1476, *supra* note 149, at 5747.

314. Courts have upheld state laws over copyright preemption claims in a variety of contexts. In *Schuchart & Assocs., Professional Eng’rs, Inc. v. Solo Serve Corp.*, 540 F. Supp. 928 (W.D. Tex. 1982), the court concluded that an action by plaintiff architectural and engineering firms for unjust enrichment based on defendants’ unauthorized use of plaintiffs’ copyrighted architectural and mechanical drawings was not preempted. In so ruling, the court observed:

The rights Plaintiffs seek to enforce in their action for quantum meruit are not equivalent to the exclusive rights of the Copyright Act. By their action for unjust enrichment, Plaintiffs seek to recover the value of the architectural and mechanical services rendered to Defendants by Defendants’ acceptance and use of Plaintiffs’ drawings and specifications. The rights Plaintiffs seek to enforce are fundamentally different in kind from the exclusive rights in copyrighted works to reproduce a copyrighted work, to prepare a derivative work or to distribute copies of copyrighted work. Plaintiffs seek not to enforce their rights to copy and distribute their plans and drawings. Nor do Plaintiffs seek to recover damages analogous to the actual damages provided by § 504(b). Rather, Plaintiffs seek to recover under quantum meruit theory the value of the services rendered by Defendants’ use of the plans and specifications prepared by Plaintiffs. Thus, both the rights Plaintiffs seek to enforce and the measure of damages under the unjust enrichment theory differ from those under copyright law. Section 301 has not preempted Plaintiffs’ cause of action for unjust enrichment.

Id. at 945 (footnote omitted); see also *Uncle Jam Records v. Warner Bros.*, COPYRIGHT L. REP. (CCH) ¶ 25,580 (S.D.N.Y. Sept. 22, 1983) (unjust enrichment not preempted); *Werlin v. Reader’s Digest Ass’n*, 528 F. Supp. 451, 465-67 (S.D.N.Y. 1981) (“elements of a quasi-contract claim are significantly different from those of a federal copyright claim” and “the rights that the doctrine of quasi contract seeks to protect are qualitatively different from those that federal copyright law endeavors to preserve”). *Contra* 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-21 (“a state law cause of action for unjust enrichment or quasi contract should be . . . preempted insofar as it applies to copyright subject matter”).

Similarly, in *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672, 684 (S.D.N.Y. 1979), the court noted that an action under New York’s Penal Law, providing that a person is guilty of theft of services when he obtains telecommunications services with intent to

A second approach to the "equivalency" dilemma focuses on the interests protected by the state law at issue. Specifically, a state law will be preempted if its *only* objective is to protect the creator's economic interest in his work.³¹⁵ This standard will yield a different result than a pure "elements" test³¹⁶ when applied to those state laws purporting to confer more than economic benefits, but which are capable of being infringed merely by the performance of one or more of the rights safeguarded by the copyright statute.³¹⁷ The application of an "elements" test to state laws will result in preemption, whereas these laws may be preserved using an "objectives" standard.

On balance, however, a standard focusing solely on the respective objectives of a particular state law and the federal copyright law is not satisfactory. An "objectives" standard could undermine significantly the thrust of section 301, for in many cases it would not be especially difficult for the proponents of the state law to identify relevant objectives of a noneconomic nature.³¹⁸ An "objec-

avoid payment, arguably is not preempted because the New York cause of action, unlike the copyright law, includes the element of intent to avoid payment. A state law prohibiting "blind bidding" of motion pictures also survived preemption in *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 441-48 (S.D. Ohio 1980), *aff'd in part and remanded in part on other grounds*, 679 F.2d 656 (6th Cir. 1982). In so holding the court rejected the argument advanced by the plaintiff motion picture producers and distributors that the Ohio law was preempted because its compulsory trade screening requirement compels a performance under the 1976 Act. The court was persuaded by the state law's limited effect on the performance right and its remedial effect on the prior inequitable marketing system for films. *Id.* at 447-48; *see also* notes 320-64 and accompanying text; *cf.* *Associated Film Distrib. Corp. v. Thornburgh*, 683 F.2d 808, 816-17 (3d Cir. 1982) (appellate court concluded that lower court had erred in holding that a Pennsylvania law prohibiting blind bidding was preempted in the context of a summary judgment motion).

315. *See, e.g.*, Francione, *supra* note 67, at 207-08 (discussing "objectives" test in the context of the moral right doctrine); Katz, *supra* note 1, at 211 ("non-equivalent rights are those rights which do more than merely provide an economic reward for writers or artists to encourage their respective endeavors").

316. *See supra* notes 312-14 and accompanying text.

317. Consider, for example, that aspect of the California Art Preservation Act that grants to the artist the right to prevent "alterations" of his work. CAL. CIV. CODE § 987(c)(1) (West 1982); *see supra* note 108 and accompanying text. This right would be "equivalent" to the right "to prepare derivative works based upon the copyrighted work" even though the California statute purports to protect an artist's personal, rather than economic, interests. *See supra* notes 152-81 & 235-36 and accompanying text; *infra* notes 385-93 and accompanying text; *see also* 3 M. NIMMER, *supra* note 38, § 8.21[D], at 8-261 (concluding that under California Art Preservation Act, "the right to prevent an 'alteration' which does not amount to a 'defacement' or 'mutilation' would appear to be subject to federal preemption, and is, therefore, invalid under state law").

318. The Florida law at issue in *Crow v. Wainwright*, 720 F.2d 1224 (11th Cir. 1983), which prohibited dealing in stolen property, certainly would be justified by social policies other than protecting a plaintiff's economic interests. Had the "objectives" standard been

tives" standard also is considerably murkier than an "elements" test and may require courts to engage in unwelcomed speculation when the objectives of a given state law are not clearly defined. Although it may seem somewhat unsettling to deemphasize the goals and origins of a given cause of action in a preemption determination, this discomfort should be mitigated by the recognition that a significant difference in objectives generally will be manifested by a difference in the elements necessary to support the state cause of action.³¹⁹

Moral rights presently are protected to a limited extent by the states through alternate legal theories.³²⁰ If a creator's moral rights cause of action simultaneously fits the framework for another legal theory, the elements of the moral rights claim will be coextensive with those of the substitute legal theory.³²¹ In this context, application of the pure "elements" test to these substitute causes of action is the most feasible means of determining preemption of moral rights claims.³²² Nevertheless, the question whether states can protect moral rights through a discrete moral rights statute similar to that which exists in California³²³ and New York³²⁴ demands a different mode of analysis. In these states the moral right doctrine possesses its own statutory framework that would have to be measured directly against the protections of the 1976 Act. Because of the special relationship between moral rights and copyrights,³²⁵ the relevant inquiry for equivalency in this context is the extent to which a creator can protect adequately, or is precluded from protecting, his moral rights under the 1976 Act.³²⁶ In other

invoked by the court, a finding of no preemption might have resulted. *See supra* note 313; *see also* Francione, *supra* note 67, at 208; Goldstein, *supra* note 304, at 1113.

319. *See supra* notes 84-95 and accompanying text; *infra* notes 339 & 364 and accompanying text.

320. *See supra* notes 70-95 and accompanying text.

321. *See supra* text preceding note 84 and notes 84-95 and accompanying text.

322. *See infra* notes 334-64 and accompanying text. Of course, to the extent that state protection for *any* rights conflicts with the objectives of the federal copyright law, preemption also would result. *See infra* note 367 and accompanying text.

323. CAL. CIV. CODE § 987 (West 1982); *see supra* notes 108-20 and accompanying text.

324. N.Y. ARTS & CULTURE LAW § 14.52-59 (McKinney 1984); *see supra* notes 121-25 and accompanying text.

325. *See supra* notes 146-290 and accompanying text.

326. This equivalency analysis presumes that a work of authorship "fixed in a tangible medium of expression" which comes "within the subject matter of copyright" is at issue. *See* 17 U.S.C. § 301(a), (b)(1) (1982). A state can regulate freely works that are not so classified, regardless of whether it is protecting rights equivalent to those provided in the 1976 Act. *See supra* notes 292-93, 295-96 & 300-09 and accompanying text and text following note 309.

words, any aspect of a state moral rights statute that protects rights which also could be vindicated by the 1976 Act should be preempted.³²⁷ Similarly, preemption should result if the state statute seeks to protect moral rights interests that conflict with the interests protected by the federal copyright law.³²⁸ Analysis under this inquiry essentially parallels that of the prior sections concerning the 1976 Act's potential for vindicating and circumscribing moral rights.³²⁹

As originally drafted, section 301(b)(3) provided specific examples of "nonequivalent" rights that the states could continue to protect under common law or statute.³³⁰ The stipulated rights were "breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation,"³³¹ but the legislative history clearly states that the list was intended to be illustrative rather than exhaustive.³³² The version of the bill that was enacted did not contain any such examples, although this absence was not a result of a rejection of the foregoing examples but rather of a controversy generated by the subsequent inclusion of "misappropriation" in the House version of the bill.³³³

327. Conversely, no preemption should occur if state law guarantees creators rights that are not safeguarded by federal copyright law.

328. See *infra* note 367 and accompanying text. Compare Professor Nimmer's remarks as to why the copyright law preempts the California Resale Royalties Act, CAL. CIV. CODE § 986 (West 1977), which grants to visual artists the right to receive royalty payments every time their works are resold:

The California Resale Royalties Act does not in any way limit reproduction, performance or display of works of authorship, but it precisely inhibits the privilege to distribute certain works of authorship. . . . From a slightly different perspective, it may be said that the federal policy contained in the "first sale" doctrine, which permits uninhibited resale of a work of art following its initial sale, may not be countered by a contrary state law, even though the state law's inhibition is by way of royalty rather than prohibition.

2 M. NIMMER, *supra* note 38, § 8.22[B]; see also Katz, *supra* note 1, at 219-22 (state protection for resale royalty rights is preempted because such rights are completely economic in nature). But see *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir.) (California Resale Royalties Act not preempted by 1909 Copyright Act), *cert. denied*, 449 U.S. 983 (1980).

329. See *supra* notes 150-290 and accompanying text; *infra* notes 368-97 and accompanying text.

330. See H.R. REP. NO. 1476, *supra* note 149, at 5659, 5747-48.

331. H.R. REP. NO. 4347, 89th Cong., 2d Sess. 24064 (1966).

332. H.R. REP. NO. 1476, *supra* note 149, at 5747-48.

333. See 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-14.3; Diamond, *supra* note 1, at 212. The Department of Justice vigorously objected to the inclusion of "misappropriation" in the enumerated examples of nonpreempted rights, and after a series of ambiguous exchanges the bill was passed in an amended version that deleted all of the proposed examples. See 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-14.3 to -16 (provides a history of this

The majority of courts and commentators correctly maintain that defamation and privacy actions are not preempted under section 301.³³⁴ The predicates of these causes of action are, respectively, injury to one's professional reputation³³⁵ and injury to one's feelings.³³⁶ Although a moral rights claim concerning rights safeguarded by the 1976 Act certainly can appear in the guise of these causes of action,³³⁷ the "essence" of defamation and privacy torts is not in the rights protected under the copyright law.³³⁸ The special

aspect of the statute); see also *infra* notes 348-62 and accompanying text.

334. See, e.g., *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 444 (S.D. Ohio 1980) (state laws of privacy and defamation not preempted), *aff'd in part and remanded in part on other grounds*, 679 F.2d 656 (6th Cir. 1982). The legislative history states:

The evolving common law rights of "privacy," "publicity," and trade secrets, and the general laws of defamation and fraud, would remain unaffected as long as the causes of action contain elements, such as an invasion of personal rights or a breach of trust of confidentiality, that are different in kind from copyright infringement.

H.R. REP. NO. 1476, *supra* note 149, at 5747-58; see also 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-14.1 to .2; Jorgensen & McIntyre-Cecil, *The Evolution of the Preemption Doctrine and Its Effect on Common Law Remedies*, 19 IDAHO L. REV. 85, 105-06 (1983); Katz, *supra* note 1, at 216-17. *But see* *Najarian v. Tobias*, COPYRIGHT L. REP. (CCH) ¶ 25,595 (D. Mass. Oct. 20, 1983) (state law claim for damage to business reputation preempted on ground that it arose "wholly from the alleged copyright infringement actions").

335. See *supra* notes 79-81 & 91 and accompanying text.

336. See *supra* notes 82-83 & 91 and accompanying text.

337. The publication of a mutilated version of the creator's work under the creator's name arguably is a violation of the adaptation right, see *supra* notes 155-56 and accompanying text, but the resulting injury to the creator's professional standing also can give rise to a defamation action. See *supra* note 79 and accompanying text. Similarly, the publication of a creator's work without his authorization violates the right of reproduction, but the creator may seek to redress his injured feelings through an action based on invasion of privacy. See *supra* note 82 and accompanying text.

338. See 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-14.1 to .2.

As noted above, the legislative history also suggests that the copyright law would not preempt right of publicity actions. See *supra* note 334. Most courts that have addressed this issue in the context of both the 1909 and 1976 Acts have concluded that the copyright laws do not preempt protection for the right of publicity. See, e.g., *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 289 (2d Cir. 1981) (Mansfield, J., dissenting) (approving district court's conclusion); *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1201 (S.D.N.Y. 1983); *Apigram Publishing Co. v. Factors Etc., Inc.*, No. 78-525, slip op. (N.D. Ohio July 30, 1980); *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 846 (S.D.N.Y. 1975) (1909 Act does not preempt a state-based right of publicity). *But see* *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 840-41 (6th Cir. 1983) (Kennedy, J., dissenting) (suggesting possibility of preemption).

The right of publicity should survive preemption under § 301 because the attributes protected by the right of publicity do not constitute "works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 301 (1982). According to Professor Nimmer, an individual's name or likeness "does not become a work of authorship simply because it is embodied in a copyright work such as a photograph." 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-14.2 n.49. For a different perspective on this issue, see Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673

elements of proof required by these common-law torts thus preclude preemption under a pure "elements" test.³³⁹ The same result would occur for moral rights violations based on breach of contract claims³⁴⁰ because the contractual promise supplies the additional element of proof that negates preemption.³⁴¹ Indeed, the legislative history of the 1976 Act provides that "[n]othing in the bill derogates from the rights of parties to contract with each other and to sue for breaches of contract."³⁴²

When a moral rights claim is adjudicated under an unfair competition cause of action, the question of preemption becomes somewhat more complicated. Moral rights claims in the form of an action under section 43(a) of the Lanham Act³⁴³ are saved automatically from preemption by virtue of section 301(d)'s caveat that "[n]othing in this title annuls or limits any rights or remedies under any other Federal statute."³⁴⁴ Claims based on state unfair competition laws also survive preemption to the extent they concern deceptive trade practices such as passing off and false representation, even though the subject matters at issue are within the scope of the 1976 Act.³⁴⁵ These state unfair competition causes of

(1981) (arguing that to the extent the interests protected by the right of publicity also are protected under the 1976 Act, preemption is appropriate).

339. See *supra* note 91 and accompanying text. The same result would occur under the "objectives" standard, see *supra* notes 315-19 and accompanying text, given that these common-law causes of action also are supported by different theoretical bases from that of copyright law. See *supra* notes 84-95 & 247-48 and accompanying text.

340. See *supra* notes 73-77 & 92-95 and accompanying text.

341. See, e.g., 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-13; Jorgensen & McIntyre-Cecil, *supra* note 334, at 106; cf. *Smith v. Weinstein*, 578 F. Supp. 1297, 1307 (S.D.N.Y. 1984) ("To the extent plaintiff rests his contract claim not on breach of the terms of the contract but on [defendant's] . . . having copied his property . . . it is of course preempted.").

342. H.R. REP. No. 1476, *supra* note 149, at 5748.

343. 15 U.S.C. § 1125(a) (1982); see *supra* notes 71-72 and accompanying text.

344. 17 U.S.C. § 301(d) (1982).

345. See *supra* text accompanying notes 330-31. The legislative history notes that this example was originally included in § 301(b)(3) "to distinguish between those causes of action known as 'unfair competition' that the copyright statute is not intended to preempt and those that it is." H.R. REP. No. 1476, *supra* note 149, at 5659, 5748. Specifically, "[s]ection 301 is not intended to preempt common law protection in cases involving activities such as false labeling, fraudulent representation, and passing off even where the subject matter involved comes within the scope of the copyright statute." *Id.*

Although all the examples originally provided in § 301(b)(3) ultimately were deleted, see *supra* note 333 and accompanying text, courts tend to follow this approach in construing § 301's application to unfair competition actions. See, e.g., *Warner Bros., Inc. v. American Broadcasting Companies, Inc.*, 720 F.2d 231, 247 (2d Cir. 1983) ("to the extent that plaintiffs are relying on state unfair competition law to allege a tort of 'passing off,' they are not asserting rights equivalent to those protected by copyright and therefore do not encounter

action require the element of deception, which is not an element for copyright infringement.³⁴⁶ For example, no preemption would occur in an unfair competition action by an artist against a poster manufacturing company for falsely advertising posters produced by the company as "originals" of the artist.³⁴⁷

A problem exists, however, with those unfair competition actions that are based on misappropriation rather than consumer deception.³⁴⁸ The controversy generated by the inclusion of misappropriation as a nonequivalent right prompted the deletion of all of the examples originally contained in section 301(b)(3), and the legislative history is unclear as to whether Congress intended this deletion to alter the previously existing state law of misappropriation.³⁴⁹ Given this murky state of affairs, many courts have adopted the approach suggested by Professor Nimmer and have found a misappropriation cause of action preempted when the conduct that constitutes misappropriation does not "require any element other than the mere act of reproduction, distribution, performance or display."³⁵⁰ In applying this test courts frequently

preemption"); *DC Comics, Inc. v. Filmation Assocs.*, 486 F. Supp. 1273, 1278 (S.D.N.Y. 1980) (New York's unfair competition law saved from preemption because, by requiring a showing of misappropriation of economic value and a likelihood of public confusion, it protects a right not equivalent to those granted under the 1976 Act).

346. See *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672, 684 n.12 (S.D.N.Y. 1979); 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-13 to -14; see also *supra* notes 85-86 and accompanying text.

347. Cf. *Shaw v. Time-Life Records*, 38 N.Y.2d 201, 341 N.E.2d 817, 379 N.Y.S.2d 390 (1975) (action by band leader Shaw against record company for advertising records that it produced as "Artie Shaw Versions" of Swing Era Classics).

348. One of the seminal cases establishing misappropriation as an aspect of unfair competition is *Metropolitan Opera Ass'n, v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 796, 101 N.Y.S.2d 483, 492 (1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951). In *Metropolitan Opera* the court prohibited the sale of unauthorized phonograph records made from opera performances on the radio and candidly eliminated unfair competition's deception and competition elements. Instead, the court protected the original producer's investment against a misappropriation by another for a commercial advantage.

349. See *supra* note 333 and accompanying text; see also *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672, 684 n.12 (S.D.N.Y. 1979).

350. 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-17; see also *supra* notes 312-14 and accompanying text. Of course, if the unfair competition action does not concern misappropriation of a "work of authorship," no preemption will result. *Id.*; see, e.g., *Whitfield v. Lear*, 582 F. Supp. 1186, 1189 (E.D.N.Y. 1984) (unfair competition claims based on misappropriation of plaintiff's noncopyrightable ideas not preempted); see *supra* note 326; see also H.R. REP. NO. 1476, *supra* note 149, at 5748 ("state law should have the flexibility to afford a remedy . . . against a consistent pattern of unauthorized appropriation by a competitor of the facts . . . constituting 'hot' news"). *Contra Smith v. Weinstein*, 578 F. Supp. 1297, 1307 (S.D.N.Y. 1984) ("To the extent that plaintiff relies on unfair competition to recover profits defendants derived from the use of his ideas, he is stating a claim based on rights equivalent to those protected by copyright.").

have adopted a strict standard for which additional elements will negate preemption. Thus, in *Rand McNally v. Fleet Management Systems*³⁵¹ the court held that the additional element of commercial immorality required for a misappropriation claim was insufficient to allow the plaintiff's state law claim of misappropriation to escape preemption.³⁵² Similarly, in *Schuchart & Associates, Professional Engineers v. Solo Serve Corp.*³⁵³ the plaintiffs' unfair competition claim alleged misappropriation of their architectural and engineering drawings and specifications. The *Schuchart* court held, however, that the additional element of the defendants' use of the materials in competition with the plaintiffs to their commercial detriment did not render the rights under the state law "different in kind" from the rights under the federal law.³⁵⁴ Therefore, the plaintiffs' state law claim simply was an attempt to enforce rights "equivalent" to the federal copyright law's right to reproduce and distribute and was preempted.³⁵⁵

Application of the "elements" test to misappropriation claims requires a determination whether the elements required to prove the defendant's conduct under the state law establish rights protected by the state law that are different from rights protected by the federal copyright law. As the cases discussed above illustrate, additional elements such as commercial immorality or competitive use are not sufficient to show a different right or to avoid a finding of preemption.³⁵⁶ Assuming, then, that the plaintiff's work constitutes "a work of authorship" fixed "in a tangible medium of expression" within "the subject matter of copyright,"³⁵⁷ it is difficult to conceive of a misappropriation claim that would escape preemp-

351. COPYRIGHT L. REP. (CCH) ¶ 25,624 (N.D. Ill. Dec. 31, 1983).

352. *Id.* Professor Nimmer appears to agree with this strict standard. See 1 M. NIMMER, *supra* note 38, § 1.01[B], at 1-21 (arguing that New York's unfair competition law's requirements of "unfairness and an unjustifiable attempt to profit from another's expenditure of time" does not automatically satisfy the "elements" test so as to escape preemption).

353. 540 F. Supp. 928 (W.D. Tex. 1982).

354. *Id.* at 944.

355. *Id.*; see also *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 919 (2d Cir. 1980) (unfair competition claim seeking protection against copying is based on an "equivalent" right); *Ipec, Inc. v. Magenta Films, Ltd.*, No. 81 Civ. 3341, slip op. (S.D.N.Y. Apr. 24, 1982) (plaintiffs unfair competition claim based on defendant's unauthorized exhibition of a copyrighted film to which plaintiff claimed an exclusive license asserts an "equivalent" right); *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672, 684 (S.D.N.Y. 1979) (alleged misappropriation claim concerning the right to exhibit audiovisual works for a profit equivalent to copyright law's performance right).

356. See *supra* notes 351-55 and accompanying text.

357. 17 U.S.C. § 301(a) (1982).

tion because it is based on a nonequivalent right.³⁵⁸

Section 301 is likely to have a wide preemptive scope in actions alleging moral rights violations under a misappropriation theory. In *Suid v. Newsweek Magazine*,³⁵⁹ for example, the plaintiff author brought an action against a magazine publisher in which he alleged unfair competition because of an article's use of material resembling passages in his book.³⁶⁰ Specifically, the plaintiff alleged that the magazine's copying without giving him proper attribution damaged him monetarily and that this failure to attribute constituted an additional element that enabled the state claim to protect nonequivalent rights.³⁶¹ The court rejected this argument, however, finding that there was no such thing as a common-law action for failure to attribute, and, therefore, a nonexistent doctrine could not supply the additional element needed to preclude preemption.³⁶² Nevertheless, section 301's preemptive effect on unfair competition actions seeking to protect a creator's integrity oraternity interests will be negated in those actions that also include the additional element of consumer deception.³⁶³ In fact, this element has been present in many of the decisions vindicating moral rights interests under an unfair competition theory.³⁶⁴

Having determined that states normally may continue to redress moral rights violations by using substitute state law claims without running afoul of the equivalency prong of the preemption test, the issue of preemption of a state statute providing direct,

358. Significantly, all the examples of nonpreempted misappropriation actions provided in the legislative history concerned works not subject to copyright protection rather than actions based on nonequivalent rights. See H.R. REP. No. 1476, *supra* note 149, at 5747-48; cf. *Sargent v. American Greetings Corp.*, 588 F. Supp. 912 (N.D. Ohio 1984) (plaintiff's claim for breach of confidential relationship and misappropriation not preempted); *Warrington Assocs. v. Real-Time Eng'g Syst.*, 522 F. Supp. 367, 369 (N.D. Ill. 1981) (copyright statute does not preempt cause of action for trade secret misappropriation).

359. 503 F. Supp. 146 (D.D.C. 1980).

360. The author also alleged copyright infringement, but the court found that some of the material used by the defendant was not subject to copyright protection and the copyrighted material that was used was justified by the fair use doctrine. *Id.* at 147-48; see also *supra* notes 251-67 and accompanying text.

361. 503 F. Supp. at 149.

362. *Id.*

363. See *supra* notes 345-47 and accompanying text.

364. See cases cited *supra* note 72 (discussing applications of state unfair competition law to cases concerning false attributions). The doctrine of misappropriation also is similar to the copyright law in that it focuses on economic rights, in contrast to traditional unfair competition, which is concerned with preventing public deception as well. See *supra* note 86 and accompanying text and notes 89 & 348. This distinction provides another example of how the theoretical justifications for an action influence the necessary elements of proof. See *supra* note 319 and accompanying text.

comprehensive protection for moral rights still must be addressed.³⁶⁵ Claims under a moral rights statute cannot escape preemption simply because they also fortuitously include elements that allow them to be sustained in the guise of alternative state theories.³⁶⁶ Instead, the rights safeguarded by a state's comprehensive moral rights law must be compared directly to those rights that are protected by the 1976 Act. If the state scheme protects only rights that a creator also could protect under the 1976 Act and covers works that are protected under that Act, the state law will be preempted. Those portions of the state law that conflict with the protections granted by the 1976 Act also will be preempted.³⁶⁷ The moral right doctrine encompasses three major components: the right of disclosure, the right of paternity, and the right of integrity.³⁶⁸ The relevant question, then, is the extent to

365. Although a specific examination of the potential for preemption of the New York and California statutes will not be attempted here, such a determination can be made in accordance with the proposed analysis. *See supra* notes 108-25 and accompanying text; *see also* 2 M. NIMMER, *supra* note 38, § 8.21[C], at 8-260 to -261 (brief discussion of whether the California Art Preservation Act is preempted by the federal copyright law); Francione, *supra* note 67, at 201-07.

The following preemption analysis is framed in terms of state protection for moral rights by statute, but the analysis also can be applied to assess preemption of common-law protections.

366. *See supra* notes 321-29 and accompanying text.

367. This aspect of the preemption analysis stems from a basis independent of § 301. Beginning with the Supreme Court's decision in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), courts have held state forms of protection that "[clash] with the objectives of the federal patent [or copyright] laws" preempted. *Id.* at 231; *see, e.g.*, *Goldstein v. California*, 412 U.S. 546 (1973) (state statute prohibiting "record piracy" not preempted); *Morseburg v. Balyon*, 621 F.2d 972, 976-78 (9th Cir.) (California Resale Royalties Act not preempted under 1909 Copyright Act), *cert. denied*, 449 U.S. 983 (1980); *Schuchart & Assocs., Professional Eng'rs v. Solo Serve Corp.*, 540 F. Supp. 928, 946-49 (W.D. Tex. 1982) (plaintiffs' action for unjust enrichment based on defendants' unauthorized use of their architectural and mechanical drawings not preempted); *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 441-42 (S.D. Ohio 1980) (state statute prohibiting "blind hiding" of motion pictures not preempted), *aff'd in part and remanded in part on other grounds*, 697 F.2d 656 (6th Cir. 1982). According to one court, the necessary showing of conflict "can require no more than a mechanical demonstration of potential conflict between federal and state law to no less than a showing of substantial frustration of an important purpose of the federal law by the challenged state law." *Morseburg v. Balyon*, 621 F.2d at 976.

368. *See supra* text preceding note 16 and notes 16-36 and accompanying text. These three components will be the focus of the preemption discussion, but the 1976 Act's potential for preempting a state-created right of withdrawal for works within the scope of copyright protection should not be overlooked. *See supra* notes 19-20 and accompanying text. The federal scheme would preclude a creator from withdrawing his works once he has assigned the copyrights, unless he exercised his termination rights in accordance with the statute. *See supra* notes 190-200 and accompanying text. In addition, the "first-sale" doctrine eliminates a creator's right of withdrawal upon the first sale of his work. *See supra* notes 226-31 and accompanying text. Thus, state protection for the right of withdrawal would

which state protection for each of these rights would survive preemption under section 301.

Any state-created protection for a creator's right of disclosure would be redundant of the protections offered by the 1976 Act, and thus would be preempted to the extent the disclosure protection applies to works within the scope of copyright protection.³⁶⁹ Section 201(a) of the 1976 Act provides that the copyright "in a work protected under this title vests initially in the author or authors of the work."³⁷⁰ Further, a work is "created" under the copyright law "when it is fixed in a copy or phonorecord for the first time."³⁷¹ Under the statute, therefore, the creator is the only one who can possess any rights in the uncompleted work and retains exclusively the right to decide upon the timing of disclosure.³⁷² A significant limitation imposed upon the author's right of disclosure, however, is the limited period of time for which copyright protection lasts. Section 302(a) provides that copyright protection in a work created after January 1, 1978, "subsists from its creation and . . . endures for a term consisting of the life of the author and fifty years after the author's death."³⁷³ Thus, all of a creator's works fall into the public domain fifty years after his death, and his heirs cannot pre-

"[stand] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), and therefore, be preempted. See *Katz*, *supra* note 1, at 219 (arguing that preemption of the withdrawal right is warranted because "a right of this magnitude would consequently disrupt the commercial processes by which artistic expression is distributed").

369. See *supra* notes 300-09 and accompanying text and text following note 310; see also *supra* note 326.

370. 17 U.S.C. § 201(a) (1982). An exception exists, of course, in the case of a "work made for hire." *Id.* § 201(h). See *supra* notes 207-19 and accompanying text; see also *infra* text accompanying notes 377-78. A state law granting the creator a right of disclosure for works made for hire would be in conflict with the federal policy embodied in the 1976 Act and, therefore, would be preempted. See *supra* note 366 and accompanying text.

371. 17 U.S.C. § 101 (1982). Section 101 also provides that "where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work." *Id.*

372. See *Treece*, *supra* note 68, at 502; see also *supra* text preceding and accompanying note 16. Professor *Treece* has observed:

[A] sculptor will be protected by the federal statute from the time he first forms his clay into some remote precursor of a future finished work, and a playwright who creates a final version of a play by agonizing revisions of a series of drafts will find protection under the federal statute . . . for the first draft and the last, even though the first draft is a poor thing that he would never consent to publish.

Treece, *supra* note 68, at 502.

373. 17 U.S.C. § 302(a) (1982); see also *id.* §§ 303 (providing minimum period of statutory protection for unpublished works created before January 1, 1978), 304 (duration of subsisting copyrights); *supra* notes 199-200 and accompanying text.

vent their disclosure at that time.³⁷⁴ Any state law that attempted to guarantee a creator a perpetual right of disclosure clearly would undermine the "limited time" and "public domain" concepts critical to the federal scheme³⁷⁵ and therefore would be preempted.³⁷⁶

With the exception of the "work for hire" doctrine, nothing in the 1976 Act specifically bears upon a creator's right of paternity.³⁷⁷ The "work for hire" doctrine precludes an employed creator from exercising a right to compel recognition for a work made under the scope of his employment.³⁷⁸ In all other situations a state-created right to compel recognition for one's work would not violate *directly* the 1976 Act. Moreover, because the 1976 Act does not protect specifically a creator's rights to compel recognition for his work and to prevent the designation of anyone else as the creator,³⁷⁹ such state-created rights technically are not equivalent to those specified in the 1976 Act. Although a creator may be able to compel recognition for his work in conjunction with his injunctive relief in a successful copyright infringement action, this remedy would be available solely because of the scope of discretion afforded courts in fashioning injunctions under section 502 of the 1976 Act, rather than under a specific statutory dictate.³⁸⁰ Nevertheless, state protection for the right of paternity may clash with the federal copyright scheme in instances in which the owner of a lawfully made copy of a work who is not the creator wishes to display the work publicly under section 109(b).³⁸¹ The 1976 Act does not require the owner of the copy to attribute authorship of the displayed work to the creator, and a state law that would condition any public display upon such attribution probably would conflict

374. See Treece, *supra* note 68, at 502. Prior to the adoption of the 1976 Act, unpublished works were protected in perpetuity under the common law; *cf.* Chamberlain v. Feldman, 300 N.Y. 135, 89 N.E.2d 863 (1949) (literary heirs of Mark Twain enjoined publication of one of his stories many years after Twain's death). As a result of § 301, "[c]ommon law copyright protection for works coming within the scope of the statute . . . [was] abrogated, and the concept of publication . . . [lost] its all-embracing importance as a dividing line between common law and statutory protection and between both of these forms of legal protection and the public domain." H.R. REP. NO. 1476, *supra* note 149, at 5745. The legislative history cites the elimination of perpetual protection for unpublished works as one of the arguments justifying the elimination of the prior dual system of protection. *Id.* at 5745-46.

375. See Treece, *supra* note 68, at 502.

376. See *supra* note 367 and accompanying text.

377. See 17 U.S.C. § 201(b) (1982).

378. See *supra* notes 207-19 and accompanying text.

379. See *supra* text accompanying note 22.

380. See *supra* note 172 and accompanying text and text accompanying note 204.

381. See *supra* notes 237-39 and accompanying text.

with the spirit of section 109(b) and would be preempted. Further, because the copyright statute protects the copyright owner rather than the creator, a similar potential for conflict exists with respect to the copyright owner's exclusive rights of performance and display.³⁸² These rights may allow the copyright owner to perform and display a creator's works without identifying the creator. Arguably, a state-created right of paternity could "inhibit" the copyright owner's rights to display and perform the work.³⁸³ Although such protection for a creator's paternity interests surely is appropriate, protections must be enacted at the federal level to avoid any pre-emption problems.³⁸⁴

The right of paternity meshes with the right of integrity when a creator's name is attached to an altered or mutilated version of his work.³⁸⁵ A creator who is also the copyright owner can obtain relief under section 106(2) of the 1976 Act for attributed mutilated adaptations even if the creator initially assigned the adaptation right to the person performing the mutilation.³⁸⁶ Moreover, even if the creator has assigned all of his copyrights in exchange for royalties, he still can bring an infringement action as the "beneficial owner."³⁸⁷ Carrying this argument to its logical conclusion, therefore, state laws affording a right of integrity to creators confronted with attributed mutilated adaptations seek to vindicate rights equivalent to 1976 Act protections and, therefore, would be preempted. Moreover, any state protection prohibiting mutilation or alteration potentially could vitiate the application of the fair use doctrine, which would permit certain alterations with attributions in appropriate circumstances.³⁸⁸

This same analysis applies to state protection prohibiting the performance of modifications and mutilations of a creator's work without an attribution of authorship. A creator who is the copyright owner can prevent alterations and modifications of his work

382. 17 U.S.C. § 106(4)-(5) (1982).

383. See 2 M. NIMMER, *supra* note 38, § 8.22[B], at 8-272.5 ("If a state law creates a right which inhibits the reproduction, performance, distribution or display of a 'work of authorship,' it is a right 'equivalent' to copyright, and therefore preempted, even if the state-created right is either broader or narrower than the comparable right under the Copyright Act.")

384. Cf. *id.* at 8-272.5 to .8 (suggesting that only federal protection for resale royalties is appropriate because a comparable state-created right "inhibits" the right of distribution).

385. See *supra* note 28.

386. See *supra* notes 153-80 and accompanying text.

387. See *supra* notes 183-85 and accompanying text.

388. See *supra* notes 266-67 and accompanying text.

under his exclusive right "to prepare derivative works based upon the copyrighted work" specified in section 106(2).³⁸⁹ If the creator has assigned his copyrights, he still can sue as a "beneficial owner." Therefore, a state law that sought to protect a creator's right of integrity against unattributed mutilations would offer a right equivalent to a 1976 Act right and be preempted. The 1976 Act, however, does not safeguard a creator-copyright owner's right to prevent destruction of his work or mutilations that would alter his work beyond recognition. In this context, a state prohibition against both destruction and egregious mutilations would not appear to be equivalent to any rights protected under the 1976 Act. Nevertheless, a preemption problem may exist even with these limited state protections, if lawfully made copies of a creator's work that are owned by other individuals are at issue. The legislative history apparently sanctions an owner's right to destroy his lawfully made copy,³⁹⁰ and therefore, states probably cannot prohibit an owner from destroying a creator's work or, arguably, from performing mutilations that either amount to a destruction of the work or so alter its character that the original work is beyond recognition.³⁹¹ This aspect of the preemption problem is compounded in the case of a creator who assigns the copyrights in his work to the owner of a lawfully made copy. Once again, the owner of the copy arguably has the right to destroy the work. In addition, however, the owner also gains the right to alter the work because of the creator's assignment of the right to prepare derivative works. Under the federal scheme, a creator in this situation will be precluded from taking immediate action against the owner-copyright proprietor who objectionably alters the creator's work in the course of preparing a derivative work, unless the owner also attributes some form of authorship of the altered work to the creator. Of course, the creator faced with this dilemma long after his copyright assignment could exercise his termination rights if he acted within the statutory time limits.³⁹² In any event, state protection for the creator's right of integrity in these circumstances will be preempted as a result of a potential conflict with the federal scheme.³⁹³

389. See *supra* note 152 and accompanying text.

390. See *supra* text accompanying note 232.

391. See *supra* notes 235-36 and accompanying text and text following note 237.

392. See *supra* notes 200-01 & 206 and accompanying text.

393. See Francione, *supra* note 67, at 214-17. The author provides several interesting hypotheticals illustrating this conflict. *Id.* at 216-17.

Finally, a creator's right of integrity can be violated by contextual displays or performances of his work that he finds objectionable. State protection for creators in these circumstances also is problematic for such protection could conflict with appropriate applications of the fair use doctrine,³⁹⁴ the right of an owner to display his lawfully made copy of the creator's work under section 109(b),³⁹⁵ and, if the creator has assigned his copyrights, the right to perform or display the work guaranteed to the copyright owner under section 106 of the 1976 Act.³⁹⁶

This preemption analysis illustrates the difficult situations that could arise as a result of state protection for various aspects of the moral right doctrine as applied to works within the scope of the 1976 Act. State protection of most moral rights is inappropriate either because such protection would vindicate rights "equivalent" to those protected by the 1976 Act or would conflict with the overall federal scheme of copyright protection. Ironically, states may continue to protect moral rights through substitute legal theories without risking preemption, while a state's comprehensive moral rights statute probably would be vulnerable to preemption in many significant respects. Nevertheless, this preemption analysis bolsters the argument that federal safeguards would provide the most extensive form of protection for creators' personal rights. Comprehensive federal protection for moral rights also comports with the portion of the legislative history for section 301 that emphasizes the need for national uniformity and avoidance of "enforcing an author's rights under the different laws and in the separate courts of the various States."³⁹⁷

IV. CONCLUSION

This Article has demonstrated that an American marriage between copyright and moral right is a promising prospect. Specific federal recognition for the personal rights of creators would foster creativity, protect our cultural heritage, and obviate the need for reliance on alternate theories that currently provide only partial protection for moral rights. The copyright clause empowers Congress to incorporate into the copyright statute protections for moral rights that last for a limited period of time.³⁹⁸ Although the

394. See *supra* notes 242-67 and accompanying text.

395. See *supra* notes 237-41 and accompanying text.

396. See 17 U.S.C. § 106(4)-(5) (1982).

397. H.R. REP. No. 1476, *supra* note 149, at 5745.

398. See *supra* notes 274-81 and accompanying text. Many countries that have

1976 Act currently fails to recognize explicitly a creator's moral rights, it nevertheless contains more than a skeletal structure of protections for personal interests. The copyright statute also contains, however, several provisions that could limit significantly the scope of any moral right doctrine adopted in this country. Therefore, the integration of the moral right doctrine into our copyright statute will necessitate balancing the interests of creators, copyright proprietors, owners of copyrighted works, and the public.

A balancing approach clearly is the most appropriate means of protecting adequately the interests of all concerned parties. Certainly creators have much to gain by the explicit adoption of the moral right doctrine, as they have a compelling interest in safeguarding the form of their works and demanding proper attribution. Nevertheless, we must consider the loss that would be suffered, if we were to adopt a moral right doctrine, by producers and publishers, whose interests are opposed diametrically to those of creators. These entities have a legitimate economic interest in making reasonable modifications to the works of creators to suit their particular needs. Any proposed statutory scheme, therefore, must weigh carefully all of the competing interests and strive for a feasible and equitable balance.

The 1976 Act easily could accommodate express recognition for a creator's paternity interests. Creators, regardless of whether they hold the copyrights in their works, should have the right to compel recognition for their work and to prevent others from being designated falsely as the creator. The rights of copyright owners and owners of particular copies should be subordinated to those of creators in this respect, because requiring these parties to credit the creator causes a minimal degree of intrusion to their pecuniary interests. Therefore, incorporating a right of paternity into the 1976 Act would foster creativity without unduly burdening the financial incentive underlying the present copyright scheme.

The extent to which the 1976 Act should protect a creator's right of integrity raises issues that cannot be resolved as readily as those concerning the right of paternity. Although express recognition for a creator's right of integrity could be incorporated into the 1976 Act without any difficulty, the scope of this right is problematic in several respects. One issue that requires further attention

adopted the moral right doctrine simultaneously terminate protection for a creator's moral rights and copyrights. *See supra* text accompanying notes 55-56. This approach certainly would be feasible in the United States.

by Congress is whether the owner of a lawfully made copy of a work should be allowed to destroy it. Perhaps the strongest argument that favors permitting destruction is the deep seated Western notion that a property owner should be able to do as he pleases with his personal property. Yet, property ownership does not necessarily entail unlimited authority.³⁹⁹ Thus, an owner of a lawfully made copy who is not the copyright proprietor presumably does not have the right to alter the work because such conduct is tantamount to preparing a "derivative work based upon the copyrighted work."⁴⁰⁰ Similarly, even when a creator assigns his copyrights in his work to the copy owner, the assignment is subject to the termination provisions in the 1976 Act.⁴⁰¹ The effect of these provisions would be significantly reduced if the owner-copyright proprietor is allowed to destroy the material object embodying the work. A balancing of the competing interests at issue demonstrates the need for prohibiting destruction by a copy owner. Society's interests in fostering creativity and preserving its cultural heritage weigh heavily in favor of the creator's right to prevent destruction by the copy owner. Thus, a creator's right of integrity should be defined to enable him to prevent the destruction of his work in all reasonable circumstances.⁴⁰² If the 1976 Act incorporated "reasonableness" as

399. For example, an owner of real property does not necessarily have the right to exclude others from his premises. *See, e.g., State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971) (landowner-employer of migrant farm workers not entitled to prevent a legal aid attorney and social worker from entering his property to provide services to the workers); *see also Pennsylvania Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (application of New York City's Landmark Preservation Law).

In the context of personal property, ownership of a *causa mortis* gift theoretically is transferred to the donee at the time of delivery, but because such a gift may be revoked at any time before the donor's death, the donee may not destroy the gift. *See generally Lumberg v. Commonwealth Bank*, 295 Mich. 566, 568, 295 N.W. 266, 267-68 (1940) ("A gift *causa mortis* does not vest absolute title in the donee in praesenti but remains subject to recall by the donor, . . . and rights thereto remain changeable during the lifetime of the donor.").

400. 17 U.S.C. § 106(2) (1982); *see supra* note 152 and accompanying text and note 317.

401. 17 U.S.C. §§ 203, 304(c) (1982); *see supra* notes 190-202 and accompanying text.

402. Sometimes the assertion of this right will not be reasonable. If, for example, a creator's artwork is incorporated into the structure of a building that is scheduled to be demolished, it would not be feasible for the creator to expect that the building should not be destroyed so that his artwork will be preserved. *Cf. CAL. CIV. CODE* § 987(h)(1) (West 1982) (unless expressly reserved, artist's rights under California Art Preservation Act waived when work cannot be removed from a building without physical defacement of work).

Prohibiting destruction of a creator's work will be most beneficial to creators of visual art, as opposed to creators of literary or musical works. *Cf. infra* text accompanying and following note 407.

the governing standard, courts would have the discretion to apply the statutory mandate in appropriate circumstances.

Under the 1976 Act a creator who holds the copyrights in his work presently can prevent violations of his integrity interests that constitute an infringement of his exclusive right to prepare derivative works under section 106(2).⁴⁰³ Therefore, this aspect of the right of integrity could be recognized expressly in the statute quite easily. The problematic issue stemming from the recognition of the integrity right is the extent to which a copyright proprietor who is not the creator can alter the work in the course of exercising his exclusive right to prepare a derivative work. The balancing analysis employed in this Article suggests an approach that could be adopted to protect adequately the competing interests. First, a right of integrity violation would occur when the copyright owner mutilates the creator's work and attributes some form of authorship to the creator. In these circumstances, the copyright owner would have exceeded the scope of his license,⁴⁰⁴ and no valid interest would be served by allowing the owner to use the creator's name in a manner that impunes the creator's reputation. If, however, the copyright proprietor mutilates the copy without an accompanying attribution of authorship, and the resulting work is not "substantially similar" to the original work, a court should not construe the statute to sustain an integrity violation.⁴⁰⁵ Courts should recognize that the "resulting work" is not a "derivative" work at all, but a new work. The creator's interest, therefore, is only slightly affected by a proprietor mutilation. In the case of less extreme alterations, the copyright owner still could alter a creator's work in an objectionable manner while exercising his rights to prepare derivative works. A creator should have some means of protecting his integrity interests in these situations. One feasible solution is to allow the creator an *immediate* termination of the copyright owner's interests upon a showing that the alterations will prejudice the creator's honor and reputation.⁴⁰⁶ Again, courts would have the ultimate responsibility for determining whether a creator has met his burden of proving prejudicial effect.

The question of whether moral rights should be alienable is extremely problematic. On the one hand, an inalienable moral

403. See *supra* notes 152 & 389 and accompanying text.

404. See *supra* text preceding and accompanying notes 155-56.

405. See *supra* text preceding note 155.

406. See *supra* note 40 and accompanying text; cf. *supra* note 200 and accompanying text.

right may force producers and publishers to negotiate with fewer creators, resulting in a diminished level of artistic creativity. Ultimately, the public might suffer due to reduced access to creative works.⁴⁰⁷ On the other hand, a freely alienable moral right deserves the very interests that the right seeks to protect because producers and publishers usually enjoy a superior bargaining position⁴⁰⁸ and will always secure releases of a creator's moral rights during the initial contract negotiations. Perhaps the 1976 Act should adopt the approach of those countries that maintain an inalienable moral right but enforce contracts allowing for reasonable alterations of a creator's work that do not distort the spirit of the work.⁴⁰⁹ Courts would have the discretion to determine the reasonableness of any given alteration.⁴¹⁰

In the case of visual art, however, any *permanent* alteration of the original copy in which the copyrighted work is embodied should be treated as a destruction of the work, and defined as a violation of the creator's integrity interest.⁴¹¹ Although any such exception is contrary to the present statutory scheme in which the copyright owner acquires an unlimited right to prepare derivative works, a visual art exception is a necessary addition to the statute if creators of visual art are to be given any significant protections for their integrity interests. Indeed, once a piece of visual art is permanently altered, the creator may never be able to recapture the work in its original form. In the case of most visual art, society's interest in preserving its cultural heritage and the creator's interest in preserving his work outweigh both the copy owner's interest in exercising his property rights and society's limited interest in fostering the copyright owner's creativity at the expense of the original artist's work.

The creator's right to prevent objectionable contextual uses of his work arises in connection with a copy owner's rights to display a copyrighted work under section 109(b) and with the public's rights safeguarded by the fair use doctrine. A balancing analysis similar to the one applied to objectionable alterations is applicable

407. See *supra* text accompanying notes 47-48 and *supra* note 48.

408. See *supra* text accompanying note 95.

409. See *supra* notes 45-48 and accompanying text.

410. Even if the 1976 Act were to adopt such an approach, the work for hire doctrine still could thwart the interests of creators to the extent that producers and publishers choose to deal with creators as employees rather than independent contractors. See *supra* notes 207-19 and accompanying text.

411. Cf. CAL. CIV. CODE § 987(c)(1) (West 1982).

to the problem of objectionable contextual uses. Therefore, a creator who can prove that an owner's display of his work will prejudice his honor and reputation should be able to enjoin the display. Similarly, a creator's objections to the use of his work, contextual or otherwise, should be considered when a party uses the fair use doctrine as a defense to an alleged moral rights violation. In fact, the authority for considering a creator's personal rights in a fair use determination already exists to the extent that the four delineated factors are not intended to be exclusive.⁴¹² A specific addition to section 107 that calls for consideration of a creator's objections to any proposed use certainly would comport with the present statutory framework and balance the effected interests.

The task of drafting specific amendments incorporating the foregoing proposals is left to those far more experienced in such matters. This Article, however, has demonstrated not only the necessary limitations upon an American version of a moral right doctrine, but also the facility with which stronger personal rights protections could be incorporated into our copyright law. Most importantly, this Article has attempted to illustrate this country's need for more effective protections for the personal rights of creators. Let us toast the proposed union — American style — of copyright and moral right.

412. See *supra* notes 254-57 and accompanying text.

APPENDIX

The following moral right protections exist in the copyright laws of the countries designated below:

- Argentina** author has inalienable right to require mention of name or pseudonym and no assignee of copyright can alter the title, form, or contents of work (Law No. 11,723 on Copyright, Sept. 28, 1933, as amended up to June 25, 1976, arts. 51, 52);
- Austria** author has rights of paternity and integrity (Copyright Act, Apr. 9, 1936, as amended up to July 2, 1980, arts. 19-21);
- Bangladesh* moral rights, including the rights of paternity and integrity, recognized (Copyright Ordinance, Feb. 27, 1967, and Copyright (Amendment) Act, July 25, 1974, § 62);
- Belgium** no specific moral rights provision, but Belgian nationals may claim the benefits of the Berne Convention whenever its provisions are more favorable than those of the Belgian copyright law (Law on Copyright, Mar. 22, 1886, as amended up to Mar. 11, 1958);
- Brazil** author has rights of paternity, integrity, and withdrawal (Law on the Rights of Authors and Other Provisions, No. 5988, Dec. 14, 1973, arts. 25-28);
- Bulgaria** author has inalienable right of paternity, the right of disclosure, and the right of integrity (Law on Copyright, Nov. 16, 1951, as amended up to Apr. 28, 1972, arts. 3, 4);
- Canada** author has rights of paternity and integrity, even after assignment of copyright (Act Respecting Copyright, June 4, 1921, as amended up to Dec. 23, 1971, § 12(7));
- Chile** author is exclusive owner of all moral rights, including the rights of paternity and integrity (Law on Intellectual Property, No. 17336, Aug. 28, 1970, as amended up to Oct. 18, 1972, Regulations under Law No. 17336 on Intellectual Property, No. 1122, May 17, 1971, art. 14);
- Colombia* rights of paternity and integrity recognized (Law No. 86 on Copyright, Dec. 26, 1946, art. 49);

- Costa Rica**right of integrity recognized (Decree No. 40, June 27, 1896, as amended up to May 25, 1948, arts. 19, 28);
- Cuba*author has right of paternity, right to defend integrity, and right to authorize disclosure (Law on Copyright, No. 14, Dec. 28, 1977, art. 4(a) - (ch));
- Cyprus**moral rights include rights of paternity and integrity (Copyright Law No. 59, Dec. 3, 1976, amended Oct. 29, 1977, § 7(4));
- Czechoslovakia** .inalienable rights of paternity, integrity, and disclosure recognized (Copyright Law concerning Literary, Scientific and Artistic Works, No. 35, Mar. 25, 1965, arts. 8(1), 12(1)(a), (1)(b), (2), & 14(1));
- Ecuador*moral rights include inalienable rights of paternity, disclosure, integrity, and withdrawal (Law on Copyright, No. 610, Aug. 13, 1976, arts. 17-18);
- Egypt**author has rights of disclosure, paternity, integrity, and in certain instances, withdrawal upon payment of equitable indemnity (Law relating to the Protection of Copyright, No. 354, June 24, 1954, arts. 5, 7, 9, 42);
- El Salvador*moral rights include rights of disclosure, paternity, withdrawal, and integrity (Copyright Law (Decree No. 376), Sept. 6, 1963, art. 5);
- France**author has inalienable right of paternity, right of disclosure, and right of withdrawal upon payment of indemnity (Law No. 57-298 on Literary and Artistic Property, Mar. 11, 1957, arts. 6, 19, 32);
- Germany**author has rights of disclosure, paternity, integrity, and the right to revoke a license upon payment of indemnity if the work no longer reflects his views (Act dealing with Copyright and Related Rights, Sept. 9, 1965, as amended up to Mar. 2, 1974, arts. 12-14, 42, 46(4));
- Guinea**moral rights include rights of disclosure, paternity, and withdrawal upon payment of indemnity (Law No. 043/APN/CP Adopting Provisions on Copyright and Neighboring Rights, Aug. 9, 1980, arts. 3(a), 23);

- Haiti* rights of paternity and integrity recognized (Decree Relating to Copyright in Literary, Scientific and Artistic Works, Jan. 9, 1968, arts. 4, 19, 20, 46);
- Italy** moral rights include rights of paternity, integrity, and withdrawal subject to payment of indemnity (Law for Protection of Copyright and Other Rights Connected with the Exercise Thereof, No. 633, Apr. 22, 1941, as amended up to Jan. 8, 1979, arts. 20, 142);
- Ivory Coast** provides for rights of disclosure, paternity, integrity, and withdrawal subject to payment of indemnity notwithstanding assignment (Law on the Protection of Intellectual Works, No. 78-634, July 28, 1978, arts. 22, 27);
- Japan** moral rights include rights of disclosure, paternity, and integrity (Copyright Law, No. 48, May 6, 1970, amended by Law No. 49, May 18, 1978, arts. 17-20, 59);
- Lebanon** moral rights include rights of paternity and integrity (Decree No. 2385, Jan. 17, 1924, as amended up to Jan. 31, 1946, arts. 145, 146, 152, 168);
- Libya** moral rights include rights of paternity and integrity (Law on the Protection of Copyright, No. 9, 1968, art. 9);
- Mali** moral rights include rights of paternity, integrity, and withdrawal upon payment of indemnification notwithstanding assignment (Ordinance Concerning Literary and Artistic Property, No. 77-96 CMLN, July 12, 1977, arts. 30, 77);
- Morocco** moral rights include inalienable rights of disclosure, paternity, and integrity (Dahir [Act] relating to Protection of Literary and Artistic Works, No. 1-69-135, July 29, 1970, art. 2);
- Netherlands** moral rights include rights of paternity and integrity (Law Concerning New Regulation of Copyright, Sept. 23, 1912, as amended up to Oct. 27, 1972, art. 25);
- Panama* moral rights, including right of integrity and paternity, recognized (Administrative Code, pt. V, Aug. 22, 1916, arts. 1901, 1904);

- Peru* moral rights include rights of disclosure, paternity, and integrity (Copyright Law No. 13,714, Sept. 1, 1916, arts. 32-34);
- Phillipines** moral rights include rights of paternity, integrity, and disclosure (Decree on the Protection of Intellectual Property, No. 49, Nov. 14, 1972, § 34);
- Portugal** author has rights of paternity, integrity, and withdrawal upon payment of indemnity (Decree-Law No. 46,980, Apr. 27, 1966, arts. 55, 58);
- Senegal** moral rights consist of rights of disclosure, paternity, integrity, and withdrawal (Law on the Protection of Copyright, No. 73-52, Dec. 4, 1973, arts. 3(a), 22);
- Thailand** author has right of integrity (Copyright Act, B.E. 2521 (1978), § 15);
- Tunisia** author has rights of paternity and integrity (Law Relating to Literary and Artistic Property, No. 66-12, Feb. 14, 1966, as amended up to Jan. 4, 1967, art. 7).

* Indicates that the designated country is a member of the Berne Convention. The foregoing data is from information available in World Intellectual Property Organization, Copyright Law Survey (1981).