
PROTECTING MORAL RIGHTS IN THE UNITED STATES AND THE UNITED KINGDOM: CHALLENGES AND OPPORTUNITIES UNDER THE U.K.'S NEW PERFORMANCES REGULATIONS

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INTRODUCTION

Tensions have traditionally existed between civil and common law nations over the nature of the legal protections provided for creative works.¹ Civil law nations typically take a dualistic approach, asserting that a creator's legal rights involve two distinct elements: one based in

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Note: The author's names are listed alphabetically and each author has contributed equally to this article. All errors and omissions are the authors' own.

¹ Robert J. Sherman, Note, *The Visual Artists Right Act of 1990: American Artists Burned Again*, 17 *CARDOZO L. REV.* 373, 379-80, 388-90 (1995). See Monica E. Antezana, *The European Union Internet Copyright Directive as Even More than It Envisions: Toward a Supra-EU Harmonization of Copyright Policy and Theory*, Note, 26 *B.C. INT'L & COMP. L. REV.* 415, 431-34 (2003). See also Alexander A. Caviedes, *International Copyright Law: Should the European Union Dictate Its Development?*, 16 *B.U. INT'L L.J.* 165, 199-200 (1998). See generally Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 *DUKE L.J.* 1532, 1538-44 (1989).

property or economic rights; the other in moral or personal rights.² Common law nations generally apply a monist legal perspective in which moral rights are not separately recognized but are rolled into the general protections afforded a creator's property or economic rights under copyright.³ The civil law dualistic approach, and its protection of a creator's moral rights, is favored in the provisions of major international agreements, such as the Berne Convention,⁴ and the World Intellectual Property Organization's ("WIPO's") Performances and Phonograms Treaty ("WPPT"),⁵ as well as the Universal Declaration of Human Rights.⁶ Despite their accession to such international obligations, the United Kingdom and the United States have clung steadfastly to the monist legal perspective that provides very limited moral rights protections and, moreover, largely reserves those protections for the creations of fine artists,

² Antezana, *supra* note 1, at 421-22; Gregory M. Duhl, *Old Lyrics, Knock-off Videos, and Copycat Comic Books: The Fourth Fair Use Factor in U.S. Copyright Law*, 54 SYRACUSE L. REV. 665, 705-06 (2004); Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 2-3 (1985); Jonathan Stuart Pink, Report, *Moral Rights: A Copyright Conflict Between the United States and Canada*, 1 SW. J. L. & TRADE AM. 171, 192 (1994); Sherman, *supra* note 1, at 379-80, 388-89. See Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 IND. INT'L & COMP. L. REV. 423, 448 (1999); Brandon G. Williams, Note, *James Brown v. IN-FRIN-JR: How Moral Rights Can Steal the Groove*, 17 ARIZ. J. INT'L & COMP. L. 651, 657-58 (2000). See generally Lacey, *supra* note 1, at 1548-51; Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41 (1998) (providing useful review of the main components of moral rights); Betsy Rosenblatt, *Moral Rights Basics*, Mar. 1998, available at <http://cyber.law.harvard.edu/property/library/moralprimer.html> (offering basic review of moral rights in U.S. context). For further discussion, see *infra* text accompanying notes 36-46.

³ Pink, *supra* note 2, at 192. See Duhl, *supra* note 2, at 705-06; Sherman, *supra* note 1, at 380, 389; Williams, *supra* note 2, at 656-57. See generally Michael W. Carroll, *Whose Ownership Is It Anyway?: How We Came to View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405 (2004) (considering the historical evolution of music as form of property protected under copyright laws). For further discussion, see *infra* Parts III-IV.

⁴ Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, Sept. 9, 1886, 102 Stat. 2853, 828 U.N.T.S. 221 (revised at Brussels June 26, 1948). For further discussion, see *infra* text accompanying notes 75-82.

⁵ World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 ILM 76 (1997) [hereinafter WPPT]. For further discussion, see *infra* text accompanying notes 83-88.

⁶ "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." Universal Declaration of Human Rights, G.A. Res. 217A, at 76, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). See Sherman, *supra* note 1, at 383. The U.S. voted in favor of the Declaration, which was passed in 1948. *Id.*

leaving American composers and musicians to vindicate their moral rights in European Union courts.⁷

In earlier times, these conflicting approaches were allowed to operate quietly within each respective nation's borders.⁸ However, the explosive growth of the Internet and online services and technological tools that allow users to access and manipulate creative works directly has resulted in growing international pressures on the U.K. and the U.S. to move toward greater recognition of, and respect for, moral rights, including for musical works.⁹ In accordance with these aforementioned international

⁷ See *infra* text accompanying notes 121-27. In 2006, singer/songwriter Tom Waits brought successful actions, based in moral rights, in Spanish and German courts against adaptations of his music and the use of vocal impersonations in TV commercials for Volkswagen-Audi and GM. *Tom Waits Wins Landmark Spanish Legal Judgment*, PR NEWSWIRE, Jan. 19, 2006, available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/01-19-2006/0004263323&EDATE>. In a ground-breaking decision, the Spanish court vindicated the protection of moral rights and established that Waits' voice was a creative work, awarding damages for both copyright infringement and moral rights violations. *Id.* In 1992, country blues musician Marc Cohn prosecuted an action in U.K. courts against Shut Up and Dance Records, which had sampled the melody from his hit song, "Walking in Memphis," in the hit hip-hop song, "Raving, I'm Raving," a song that reached number two on the British pop charts. ZEROGcs.co.uk, Copyright Information, <http://www.zero-g.co.uk/index.cfm?articleid=39> (last visited Oct. 19, 2006); Everyhit.com, RECORD-BREAKERS AND TRIVIA, <http://www.everyhit.com/record6.html> (last visited Oct. 19, 2006). Under the concept of moral rights the U.K. courts required the company to stop making any further copies of the recording. The court further required that all the firm's profits be donated to charity under Cohn's right of integrity. ZEROGcs.co.uk, *supra*.

⁸ See Thomas P. Heide, *The Moral Right of Integrity and the Global Information Infrastructure: Time for a New Approach*, 2 U.C. DAVIS J. INT'L L. & POL'Y 211, 214 (1996). In commenting on moral rights, the author noted that:

Before the digital age, different approaches to the [moral] right, largely corresponding to the division between civil and common law countries, did not cause significant problems in practice. Consumers were limited in what they could do with hard-copy goods, and as between authors and intermediaries, contractual practice more or less addressed the situation. Now, however, the possibilities of borderless exploitation of works, the endless ways of using digital work, and the changes in how works are created, raise controversy about the difference in approaches.

Id. For further discussion, see *infra* text accompanying note 41.

⁹ See Heide, *supra* note 8, at 214-15; Pink, *supra* note 2, at 172-73. Heide notes that:

The integration of various devices, such as musical instruments, video recorders, telephones and facsimiles, with computers is increasingly becoming possible.

Similarly, software has become easier to use, making it possible to create high-quality, virtually flawless reproductions, and to adapt and modify content to an increasing extent. The end-user is virtually unrestrained in how she can use digitized information. She is no longer limited by the constraints of the tangible world. For example, sampling makes it possible to modify a work, mix different

agreements, other common law nations, such as Canada,¹⁰ Australia,¹¹ and New Zealand,¹² have already adopted broader statutory schemes granting moral rights for creative works, including moral rights for music.¹³

Last year, the U.K. took the first tentative steps toward the protection of moral rights in music through the adoption of performance regulations that went into effect on February 1, 2006.¹⁴ So far, the U.S. has persisted in failing to fulfill completely its international obligations, but now the U.S. faces mounting pressure in the borderless online world to follow the lead of other common law nations in safeguarding the moral rights of

works or performances, or use small pieces of the content to create or “compose” a completely new work, perhaps a multimedia product.

Four main trends are thus ascertainable in computer hardware and software: power and speed, portability, integration capability and user friendliness. With these advancements, computers today are placing the benefits of the digital age within a hand’s reach of more and more people who before had little knowledge of information technology. It is not surprising that there is a great demand for content with which to interact. And with the ability to “get into” a work by dissecting and/or interacting with all or part of the work as never before possible, the user can also combine different types of works, provided they are capable of being digitized. As a result, increased cross-breeding of types of works occurs and this means the [moral] right, as traditionally understood, is more likely to be infringed.

Heide, *supra* note 8, at 217-18 (citations omitted). For further discussion, see *infra* text accompanying note 41.

¹⁰ Copyright Act, R.S.C., ch. C-42 § 14.1, 14.2 (1985), available at <http://laws.justice.gc.ca/en/C-42/230491.html#rid-230512>; see also CANADIAN INTELLECTUAL PROPERTY OFFICE, A GUIDE TO COPYRIGHTS: COPYRIGHTS (Apr. 2005), available at http://strategis.ic.gc.ca/sc_mrksv/cipo/cp/copy_gd_protect-e.html [hereinafter CIPO GUIDE]; Pink, *supra* note 2, at 187; CASLON ANALYTICS, NOTE – MORAL RIGHTS CASES (May 2006), available at <http://www.caslon.com.au/mrcasesnote4.htm>. For further discussion, see *infra* text accompanying notes 368-69.

¹¹ Copyright Amendment (Moral Rights) Act 2000 (Austl.), available at [http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/EB1A1A9EEC038ABFCA256F72000B5F61/\\$file/159of2000.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/EB1A1A9EEC038ABFCA256F72000B5F61/$file/159of2000.pdf). See CASLON ANALYTICS, NOTE – MORAL RIGHTS CASES, AUSTRALIA (Nov. 2006), available at <http://www.caslon.com.au/mrcasesnote5.htm>. CASLON ANALYTICS, INTELLECTUAL PROPERTY GUIDE – AUSTRALIA (Dec. 2004), available at <http://www.caslon.com.au/ipguide3.htm> [hereinafter AUSTRALIA IP GUIDE]. The Amendment came into effect in December 2000 following a spirited debate over moral rights, the publication of two Copyright Law Review Committee reports (one in 1998 and another in 1999), and a 1994 government discussion paper. Artists supported the amendment, while the broadcast and media industries opposed its passage. See *id.* For further discussion, see *infra* text accompanying notes 385-86.

¹² Copyright Act 1994, § 94 (N.Z.), available at http://www.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=1030924443&hitsperheading=on&infobase=pal_statutes.nfo&record={15019}&softpage=DOC.

¹³ See *supra* text accompanying notes 10-12.

¹⁴ The Performances (Moral Rights, etc.) Regulations 2006, S.I. 2006/18 (U.K.), available at http://www.opsi.gov.uk/si/si2006/uksi_20060018_en.pdf.

musicians and composers.¹⁵ This article considers the challenges and opportunities these new U.K. regulations present for increased U.S. recognition of moral rights for music.

Part I of this article provides a historical overview of the concept of moral rights that highlights the tug-of-war between property rights and personal rights in protecting creative endeavors.¹⁶ Parts II-IV consider the approaches taken by three different nations, France, the U.K. and the U.S., with respect to moral rights protections.¹⁷ In the context of the growth of online media access and services, Part V reviews the new U.K. Performances Regulations and examines the potential impact of the U.K. moral rights regulations on online and digital music practices in the U.S.¹⁸ This paper concludes with proposals aimed at harmonizing U.S. law to meet the moral rights challenges of the global online world.¹⁹

I. AN HISTORICAL OVERVIEW OF MORAL RIGHTS

The moral rights doctrine is premised on the idea that creators of artistic works have certain personal rights that transcend the mere protection of economic or property rights.²⁰ The creation of an artistic work is not merely a product that can be bought or sold but, rather, is a direct embodiment of the author's personality, identity, and even her "creative soul."²¹ These rights, akin to fundamental human rights or personal civil

¹⁵ See *supra* text accompanying note 9. See generally Rajan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. L.J. 1 (2001) (calling for U.S. to follow lead of foreign nations and provide moral rights for musical performances); Patrick G. Zabatta, *Moral Rights And Musical Works: Are Composers Getting Berned?*, 43 SYRACUSE L. REV. 1095 (1992) (proposing revisions to U.S. copyright law to protect composers' moral rights as specified under Berne Convention).

¹⁶ See *infra* text accompanying notes 20-93.

¹⁷ See *infra* text accompanying notes 94-341.

¹⁸ See *infra* text accompanying notes 342-435.

¹⁹ See *infra* text accompanying notes 436-74.

²⁰ Antezana, *supra* note 1, at 421-22; Duhl, *supra* note 2, at 705-06; Lacey, *supra* note 1, at 1541-42, 1548-49; Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 800-01 (2001); Peeler, *supra* note 2, at 448; Pink, *supra* note 2, at 192-93; Sherman, *supra* note 1, at 379, 388-89. The term "creator" may be applied to a broad range of artists, including painters, sculptors, writers, musicians, composers, filmmakers, playwrights, and photographers. See Pink, *supra* note 2, at 187. However, under personality theory, moral rights only extend to natural persons, not corporations, institutions or organizations. Antezana, *supra* note 1, at 421; Pink, *supra* note 2, at 183, 187. See *supra* notes 10-11 and accompanying text.

²¹ Lee, *supra* note 20, at 801. See Antezana, *supra* note 1, at 422; Duhl, *supra* note 2, at 706; Liemer, *supra* note 2, at 43. Noted Victorian Author, poet, artist and art critic John Ruskin wrote, "[a]ll great art is the work of the whole living creature, body and soul, and chiefly of the soul." Liemer, *supra* note 2, at 43 n.13 (quoting JOHN

rights,²² are grounded in the author's essential personhood and project that personhood into an artistic or creative work.²³ Therefore, the artistic person cannot ever be separated fully or distinctly from her creative works.²⁴

Intellectual property theorists derived this personhood approach from the philosophies of Immanuel Kant and Georg Wilhelm Friedrich Hegel,²⁵ who viewed private property rights as the "embodiment of personality,"²⁶ particularly when the property interest involved an artistic endeavor.²⁷ Relative to creative works, the writings of Kant and Hegel supported the notion that private property rights are of paramount importance if they promote self-expression and human development.²⁸ In particular, Hegel discussed the dualistic approach to intellectual property as comprised of both moral and economic rights.²⁹

RUSKIN, *THE STONES OF VENICE*, ch. 4, § xxi (Thomas Y. Crowell & Co. 1851)). Quoting the famed poet William Butler Yeats, one cannot "separate the dancer from the dance," under personality theory. Geri J. Yonover, *Artistic Parody: The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 *CARDOZO ARTS & ENT. L.J.* 79, 86 (1996) (quoting WILLIAM BUTLER YEATS, *THE TOWER, AMONG SCHOOL CHILDREN*, stanza 8 (1928)); Williams, *supra* note 2, at 657. *See also* Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 *RUTGERS L.J.* 347, 402-03 (1993).

²² Liemer, *supra* note 2, at 42. *See supra* text accompanying note 6.

²³ Benjamin Davidson, Note, *Lost in Translation: Distinguishing Between French and Anglo-American Natural Rights in Literary Property, and How Dastar Proves that the Difference Still Matters*, 38 *CORNELL INT'L L.J.* 583, 585-86 (2005). *See also* Daniel J. Gervais, *The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 929, 934 (2002).

²⁴ *See* Antezana, *supra* note 1, at 421; Duhl, *supra* note 2, at 706; Lacey, *supra* note 1, at 1548-49.

²⁵ Duhl, *supra* note 2, at 705; Lacey, *supra* note 1, at 1541-42; Chris Johnstone, *Underground Appeal: A Sample of the Chronic Questions In Copyright Law Pertaining to the Transformative Use of Digital Music in a Civil Society*, 77 *S. CAL. L. REV.* 397, 431 (2004).

²⁶ Lacey, *supra* note 1, at 1541. According to Professor Lacey:

Intellectual property theorists, following Hegel's and Kant's thoughts on the subject, contend that the personhood theory of property is especially true when the property is a work of art. They argue that works of art are created through a person's mental labor and thus embody more of her individual essence of being than works created through routine physical labor. Since artistic works are part of an artist's very identity, she never should be completely separated from the work. The personhood theory of intellectual property thus supports not only the idea of copyright in artistic products, but also the idea of moral rights. (footnotes omitted)

Id. at 1541-42.

²⁷ Duhl, *supra* note 2, at 705-06; Lacey, *supra* note 1, at 1541-42.

²⁸ Duhl, *supra* note 2, at 705. *See also* Johnstone, *supra* note 25, at 431.

²⁹ Lacey, *supra* note 1, at 1541-42; Peeler, *supra* note 2, at 448.

Following these earlier philosophical values, intellectual property theorists asserted that copyright law should serve to protect the moral rights of the creator over the economic interests of copyright owners or the public interest.³⁰ The supremacy of the creator's personhood, the theorists argue, is essential for promoting a climate of intellectual creativity in society.³¹ Self-expression and personal fulfillment, rather than money, become the primary incentive for creative activities.³² Civil law societies in Europe readily embraced this personality approach,³³ especially in France, where national power was often viewed through the lens of the society's artistic and intellectual achievements.³⁴

³⁰ Antezana, *supra* note 1, at 422; Duhl, *supra* note 2, at 705.

³¹ Duhl, *supra* note 2, at 705; Lacey, *supra* note 1, at 1533; Liemer, *supra* note 2, at 43-44.

³² Lacey, *supra* note 1, at 1573-74. Some personality theorists contend that creators would not give up control over their creative works in exchange for pecuniary gain. See Duhl, *supra* note 2, at 707. Professor Lacey asserts that because most artists cannot afford to live on their creative endeavors alone, financial incentives are not the primary motives for the creative process. Lacey, *supra* note 1, at 1571-72. See K. J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 357-58 (1999) (contending that economic incentives are not key to creative process since black artists often produced creative works with no economic compensation as slaves and little legal protection under racially discriminatory copyright laws).

Fame and recognition from peers may be more important than money. Lacey, *supra* note 1, at 1573-74. See Carroll, *supra* note 3, at 1427-28, 1432-33. In fact, in ancient Greek and Roman times, fame and honor were highly prized in artistic endeavors, while artistry in exchange for money was looked down upon. *Id.* In addition, Greeks and Romans viewed music as inspired by the cosmos and a force of nature, not property. *Id.* at 1422, 1433. In medieval Europe, the Catholic Church adopted this notion, viewing music as divine in origin and intended only to glorify God. *Id.* at 1436.

Professor Lacey further states that many artists create as a method of self-exploration. She quotes novelist Joan Didion who said, "I write entirely to find out what I'm thinking, what I'm looking at, what I see and what it means. What I want and what I fear." Lacey, *supra* note 1, at 1574 (quoting Joan Didion, *Why I Write*, in *THE WRITER ON HER WORK* 15, 20 (J. Steinberg ed. 1980)).

³³ Antezana, *supra* note 1, at 421; Duhl, *supra* note 2, at 705. See *supra* text accompanying note 2.

³⁴ Peeler, *supra* note 2, at 454-55. According to Professor Peeler:

The French see literature and art as the epitome of their society. This explains, in part, the development of the doctrine of moral rights. For the French, culture had been a national symbol of power, a weapon through which they historically exerted dominance around the world. It is probably no exaggeration to say that from the French perspective in modern times, they have continued to exert a cultural domination in the arts. Consequently, it is no surprise that the French conception of intellectual property embraced the concerns of artists. In the nineteenth century, the French had begun to hold artists as the individual purveyors of their nation's cultural heritage. [footnotes omitted]

Professor Liemer helps to explain the personality underpinnings of moral rights as follows:

The unique relationship between an artist, the creative process, and the resultant art makes an artist unusually vulnerable to certain personal harms. The art an artist produces is, in a sense, an extension of herself. The artists' connection to her art is much more personal and simply qualitatively different from the relationship of most other people to other objects and activities.

When an artist creates, she produces something that allows others a glimpse into her individual human consciousness. The medium may be clay or choreography, the message may be silly or serious, but the mental process is surprisingly similar. The artist allows herself to take a very personal risk, opening up something of her view of the world to others and showing others what is going on in her head, whether emotional, intellectual, or spiritual. That view is available for others to experience, over and over again, potentially forever.

....

Moral rights seek to protect the artist's creative process by protecting the artist's control over that process and the finished work of art. If artists feel more secure about the treatment they as creators and their creations will receive, they are more likely to create. Recognizing moral rights is one way a society can encourage artists to create.³⁵

Moral rights stand on their own, in addition to, and independent of, copyright ownership rights and protections.³⁶ Under the doctrine of moral rights, the creator of a work can retain a measure of control over her work, regardless of whether or not the creator conveyed away her property rights under copyright.³⁷

At its core, four basic protections arise from the moral rights doctrine. First, the right of disclosure (or divulgation) holds that only the creator of the work knows when the work is complete and therefore ready to be published or reviewed by the public.³⁸ The corollary to that right is the right of retraction (or withdrawal), which permits artists to withdraw their

Id.

³⁵ Liemer, *supra* note 2, at 43-44.

³⁶ Duhl, *supra* note 2, at 706; Liemer, *supra* note 2, at 44. See Kwall, *supra* note 2, at 2-3; Lacey, *supra* note 1, at 1548-49; Peeler, *supra* note 2, at 440; Williams, *supra* note 2, at 657.

³⁷ Lacey, *supra* note 1, at 1548-49; Liemer, *supra* note 2, at 44-45. See also Kwall, *supra* note 2, at 2-3, 37.

³⁸ Nicole Griffin Farrell, Note and Comment, *Frankly we do Give a . . . Darn! Hollywood's Battle Against Unauthorized Editing of Motion Pictures: The "Cleanflicks" Case*, 2003 UTAH L. REV. 1041, 1047-48 (2003); Kwall, *supra* note 2, at 5; Lacey, *supra* note 1, at 1549; Liemer, *supra* note 2, at 52-54; Peeler, *supra* note 2, at 447; Williams, *supra* note 2, at 657. See *infra* notes 66-67 and accompanying text.

work from public display or sale and refuse to create additional works.³⁹ Third, the right of attribution (also known as the right of paternity) grants only the author the right to be attributed as the creator of the work.⁴⁰ Fourth, the right of integrity permits the creator to halt the alteration, distortion or destruction of the work and prohibit presentation of a work in a derogatory manner contrary to the intentions of the creator.⁴¹

More specific moral rights protections exist within these broad categories. For example, the protection from misattribution, closely related to the right of attribution, allows artists to prevent themselves from being misattributed to works they did not create.⁴² This right also allows artists to demand anonymous or pseudonymous status toward creation of their works.⁴³ Another moral right allows creators to prevent excessive criticism of an artwork or other unwarranted attacks on their personality⁴⁴ that are made “solely for the purpose of vexation.”⁴⁵ Finally, a follow-up right exists for fine artists to receive additional royalties for the subsequent resale of their creative works.⁴⁶

The history of moral rights originates from ancient Greek⁴⁷ and Roman⁴⁸ times when moral rights existed without fully-formed notions of proprietary rights to creative works, especially with regard to musical creations.⁴⁹ In Greece, playwrights, poets, and philosophers received attribution for their written works but not for music, which was considered a force of nature or the cosmos.⁵⁰ Roman law recognized that the failure to designate the actual author as the originator of his own work constituted thievery.⁵¹

³⁹ Karen Y. Crabbs, *The Future of Authors' and Artists' Moral Rights in America*, 26 BEVERLY HILLS B. ASS'N J. 167, 169-170 (1992); Kwall, *supra* note 2, at 6; Lacey, *supra* note 1, at 1549; Liemer, *supra* note 2, at 54-55; Williams, *supra* note 2, at 657.

⁴⁰ Kwall, *supra* note 2, at 5, 37-38; Lacey, *supra* note 1, at 1549; Lee, *supra* note 20, at 802; Liemer, *supra* note 2, at 47-49; Peeler, *supra* note 2, at 449; Williams, *supra* note 2, at 657-58.

⁴¹ Kwall, *supra* note 2, at 5, 8-9, 38-39; Lacey, *supra* note 1, at 1549; Lee, *supra* note 20, at 802; Liemer, *supra* note 2, at 50-52; Peeler, *supra* note 2, at 448-49; Williams, *supra* note 2, at 658. *See infra* notes 71-74 and accompanying text.

⁴² Kwall, *supra* note 2, at 7; Liemer, *supra* note 2, at 48-49.

⁴³ Lee, *supra* note 20, at 802.

⁴⁴ Crabbs, *supra* note 39, at 170; Kwall, *supra* note 2, at 7.

⁴⁵ Crabbs, *supra* note 39, at 170; Kwall, *supra* note 2, at 7.

⁴⁶ Lacey, *supra* note 1, at 1552 n.101; Liemer, *supra* note 2, at 55-56.

⁴⁷ *See* Carroll, *supra* note 3, at 1419-33.

⁴⁸ Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 366 (1998).

⁴⁹ *See* Carroll, *supra* note 3, at 1419-33; Swack, *supra* note 48, at 366.

⁵⁰ Carroll, *supra* note 3, at 1427-28.

⁵¹ Swack, *supra* note 48, at 366.

During the Middle Ages, the Catholic Church exerted great control over artistic efforts, especially music.⁵² As medieval cities grew, however, guilds developed in order to protect the interests of artists, including musicians, and the emerging guilds provided the foundation for some recognition of the pecuniary interests of creative people.⁵³ For example, the guilds in different towns sought to stop competition from traveling musicians or troubadours by controlling who could perform within the city's walls—a nascent attempt to exercise control over musical commerce.⁵⁴

During the Renaissance, artists once under the creative control of the Catholic Church and wealthy patrons sought further protection for their artistic creativity and expression.⁵⁵ For example, Michelangelo asserted the moral right of attribution by secretly chiseling his name into a sculpture that had been falsely attributed to his patron.⁵⁶ Later, he asserted the right of disclosure by denying Pope Julius II access to the unfinished murals of the Sistine Chapel.⁵⁷ After Julius II bribed Michelangelo's assistants to gain access, the artist physically barred the Pope's entrance, declaring that he would be finished when he satiated his creative sense.⁵⁸ Implicit in this action is the moral right of disclosure, where the customer pays for a finished product but the artist alone decides when that product is finished.⁵⁹

Modern notions of moral rights (“*droit moral*”) originated in France.⁶⁰ In 1793, in the wake of the French revolution, France adopted its first copyright law, modeled after the British and American copyright schemes.⁶¹ As a reaction against the tight control the monarchy had held over creative endeavors, however, judicial interpretations of the French statutes were initially influenced by the public fervor for “the genius of

⁵² Carroll, *supra* note 3, at 1436-38; Swack, *supra* note 48, at 367-70.

⁵³ See Carroll, *supra* note 3, at 1443-44, 1446-48.

⁵⁴ *Id.*

⁵⁵ Carroll, *supra* note 3, at 1436-38; Swack, *supra* note 48, at 367-70.

⁵⁶ Natalie C. Suhl, Note, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203, 1206 (2002).

⁵⁷ *Id.*

⁵⁸ Swack, *supra* note 48, at 369.

⁵⁹ *Id.* Although a noble pronouncement, Michelangelo failed to keep the Pope from viewing his creation. Pope Julius II opened the Sistine Chapel to viewers when the paintings were only partially complete. *Id.* at 369 n.57. See *infra* notes 64-67 and accompanying text.

⁶⁰ Zabatta, *supra* note 15, at 1104 (“France is considered the birthplace of the moral rights concept”). See generally Peeler, *supra* note 2 (providing historical overview of French judicial development of moral rights in the absence of statutory mandates).

⁶¹ Peeler, *supra* note 2, at 429.

the individual citizens”⁶² and, later, by the spirited writings and debates of prominent French intellectuals and literary figures favoring safeguards centered on the creator in artistic endeavors.⁶³

In 1828, France’s highest court announced the right of disclosure (“*droit de divulgation*”) in a dispute between the creditors and the widow and heir of Vergne, a well-known composer and author.⁶⁴ Vergne had performed several compositions in a national competition, but he died before publishing the compositions, and the creditors sought to seize the compositions to pay off an earlier debt.⁶⁵ France’s highest court determined that the creditors could not seize the unpublished manuscripts because Vergne’s heir had exercised Vergne’s moral right not to disclose his unpublished works.⁶⁶ Subsequently, in a separate and widely-publicized dispute between James McNeill Whistler and Lord Eden, French

⁶² *Id.* at 429-30 (quoting Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1156 (1990)). Professor Lacey indicates that European nations more readily accept the “exalted artist” model. She writes that:

European and American intellectuals view the artist as a special kind of human, almost magical in her ability to create beautiful works of art. J. G. Holland captured this view: “Artists are nearest God. Into their souls he breathes his life, and from their hand it comes in fair articulate forms to bless the world.” This concept is the explanation for the extraordinary protection that European “moral rights” give the artist.

Lacey, *supra* note 1, at 1562 (footnotes omitted). See Yonover, *supra* note 21, at 87-88 (noting that civil law countries, such as France, Italy, and Germany, embraced “eighteenth century romantic notions of authorship”).

⁶³ Peeler, *supra* note 2, at 449-51. Such luminaries as Victor Hugo, Honore de Balzac and Alphonse de Lamartine crusaded for strong intellectual property rights for artists, expressing:

[C]oncerns about how the law balanced the conflicts between private rights and the public interest. All three believed that society should have no superior interest in creative property over the private interests of the author. Condemning those who advocated the public interest, they argued that the public domain was not only in violation of the property rights naturally due to authors as a consequence of their labor, but was also inconsistent with principles of individual liberty.

Id. at 451.

⁶⁴ *Widow Vergne v. Creditors of Mr. Vergne*, Cour d’appel [CA] [regional court of appeal] Paris, 1^e ch., Jan. 11, 1828, S. Jur. II 1828, 5. See also W. W. Kowalski, *International Legal Dimensions of Art and Cultural Property: A Comparative Law Analysis of the Retained Rights of Artists*, 38 VAND. J. TRANSNAT’L L. 1141, 1148 (2005) (discussing *Widow Vergne v. Creditors of Mr. Vergne*).

⁶⁵ Peeler, *supra* note 2, at 447-48.

⁶⁶ Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601, 615 (2001); Kowalski, *supra* note 64, at 1148-49; Peeler, *supra* note 2, at 447-48.

courts used this same right of disclosure as the basis for upholding Whistler's refusal to deliver his portrait painting of Lady Eden.⁶⁷

Shortly thereafter, in 1836, a French court of appeal decided a dispute between a composer and a director of musical concerts, resulting in the earliest recognition of the right of attribution ("*droit de la paternité*").⁶⁸ In *Masson de Puitneuf v. Musard*, a concert director purchased rights to the plaintiff's music but inserted a fake name, rather than the composer's name, on the billing.⁶⁹ The French court held that in order to constitute proper credit, accurate attribution must be given to the composer of the musical works.⁷⁰

In 1845, a French trial court recognized the concept of the right of integrity ("*droit au respect de l'oeuvre*") when it blocked a publisher from altering an author's work, even though the author, Marquam, had sold all of his legal rights in that work to that publisher.⁷¹ Marquam had written children's books on history and geography from which the publisher, Lehuby, sought to delete about fifty pages in order to make the texts more marketable to the Catholic Church.⁷² Marquam moved to stop the deletions, which he claimed harmed his authorial reputation.⁷³ The trial court determined that the deletions altered or mutilated the original work and damaged the creator's standing and, therefore, halted the publisher's revisions.⁷⁴

The moral rights concept received international recognition in 1928 with the addition of Article 6bis to the Berne Convention ("the Convention").⁷⁵ Further amended in 1948, Article 6bis provides for both the rights of attribution and integrity.⁷⁶ The Convention indicates that these

⁶⁷ *Eden c. Whistler*, CA Paris, 1898 D.P. II 465, *aff'd* 1900 D.P. I 497. However, Whistler was required to pay restitution and damages to Lord Eden for breach of his commission contract. Kwall, *supra* note 2, at 6 n.18; Yonover, *supra* note 21, at 89.

⁶⁸ Kowalski, *supra* note 64, at 1148 (citing *Masson de Puitneuf v. Musard*, Cour d'appel [CA] [regional court of appeal] Paris, le ch., Aug. 8, 1836, D. Repertoire de Jurisprudence Prop. Lit. Et Art., no. 194 (Fr.)); Peeler, *supra* note 2, at 449 (citing 1836 Recueil Dalloz-Sirey, 242-43 (Lois et decisions diverse)).

⁶⁹ *See id.*

⁷⁰ *Id.*

⁷¹ *Marquam v. Lehuby*, Tribunal de commerce [Trib. De Com.] Paris, Aug. 22, 1845, S. Jur. II 1845, 459. *See also* Kowalski, *supra* note 64, at 1148-49 (citing *Marquam v. Lehuby*); Peeler, *supra* note 2, at 448-49 (citing *Marquam v. Lehuby*). Professor Peeler also notes a subsequent case in which a publisher was prevented from altering the text of an author's work under the right of integrity. Peeler, *supra* note 2, at 449.

⁷² *See id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Berne Convention for the Protection of Literary and Artistic Works, *supra* note 4, art. 6bis. The article was further amended in 1948 at Brussels.

⁷⁶ *Id.* As to moral rights, Article 6bis(1) of the Berne Convention states that:

moral rights should last as long as the protection of economic rights in signatory nations, or, at a minimum, until the death of the creator of the artistic work.⁷⁷ The Convention leaves the implementation of moral rights protection to the individual signatory nations.⁷⁸ By adopting this approach, variations in moral rights protection have emerged,⁷⁹ particularly in the protection of additional moral rights beyond integrity and dis-

Independently of the author's copyright, and even after transfer of the said copyright, the author shall have the right, during his lifetime, to claim authorship of the work and to object to any distortion, mutilation, or other alteration thereof, or any other action in relation to the said work which would be prejudicial [sic] to his honour or reputation.

Id.

⁷⁷ Section 2 of Article 6bis provides that:

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

Id. For example, Germany and the Netherlands terminate moral rights simultaneously with the expiration of rights to copyright. Kwall, *supra* note 2, at 15. *See infra* notes 105, 330 and accompanying text.

⁷⁸ Paragraph (3) of Article 6bis, as revised in 1948, reads: "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 Convention for the Protection of Literary and Artistic Works, *supra* note 4, art. 6bis. *See infra* notes 301-09 and accompanying text.

⁷⁹ *See generally* Heide, *supra* note 8, at 230-52 (reviewing different approaches to right of integrity in U.S., U.K., Germany and France); Kwall, *supra* note 2, at 10-16 (considering U.S. and EU approaches to moral rights under Berne Convention); Pink, *supra* note 2, at 175-81, 185-94 (comparing U.S. and Canadian approaches to moral rights under Berne Convention); Sherman, *supra* note 1, at 373-89 (addressing main moral rights differences between civil law and common law nations).

closure,⁸⁰ in the duration of a creator's moral rights,⁸¹ and in the ability of the creator to waive those rights.⁸²

The 1996 WIPO Performances and Phonograms Treaty ("WPPT")⁸³ tracks the earlier language of the Berne Convention in the context of music and other performances and protects the moral rights of performers, including musicians, singers, and producers of sound recordings.⁸⁴ Similar to the Convention, the WPPT provides for the moral rights of attribution and integrity.⁸⁵ Additionally, like the Convention, the WPPT provides similar periods of protection⁸⁶ and leaves the implementation of

⁸⁰ France, Germany and Italy provide the greatest moral rights protection. Kwall, *supra* note 2, at 11-12. Japan, Mexico, Morocco, the Netherlands, Nigeria and Brazil also offer extensive safeguards for moral rights. Antezana, *supra* note 1, at 432. Even some nations that are not signatories to the Berne Convention provide moral rights protections, such as Bangladesh, Colombia, Ecuador, El Salvador, Haiti, and Panama. Kwall, *supra* note 2, at 12 n.42.

⁸¹ Kwall, *supra* note 2, at 12, 14-15; Liemer, *supra* note 2, at 45; Sherman, *supra* note 1, at 385-86. France provides perpetual protection, while Germany and the Netherlands provide for moral rights to end with the expiration of copyright. Kwall, *supra* note 2, at 15. What limited moral rights the U.S. and the U.K. offer do not reflect the length of copyright protections, but end when the creator dies. Sherman, *supra* note 1, at 385-86.

⁸² Kwall, *supra* note 2, at 12-14; Liemer, *supra* note 2, at 44-45. See *supra* note 78 and accompanying text.

⁸³ WPPT, *supra* note 5. The U.K. signed the agreement February 13, 1997; the U.S. ratified the treaty by diplomatic conference on September 14, 1999, and the agreement came into force on May 20, 2002. For a list of contracting parties, see WIPO, Contracting Parties, available at http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20 (last visited Oct. 25, 2006).

⁸⁴ WPPT, *supra* note 5, ch. I, art. 2 (a), (d). See WIPO, Summary of the WIPO Performances and Phonograms Treaty (WPPT) (1996), available at http://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html (last visited Oct. 25, 2006) [hereinafter WPPT Summary].

⁸⁵ As to moral rights, the WPPT reads as follows:

Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.

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

⁸⁶ *Id.* ch. II, art. 5(2). The relevant paragraph reads:

The rights granted to a performer in accordance with paragraph (1) 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 Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

its provisions to member states.⁸⁷ Each Contracting Party, however, is required to adopt enforcement procedures that allow musical performers to bring appropriate legal actions under the terms of the WPPT.⁸⁸

Despite broad acceptance today of the Berne Convention and the WPPT, the absence of universal agreement on the appropriate scope of moral rights protection seriously challenges the enforcement of moral rights.⁸⁹ French law provides the broadest moral rights protection,⁹⁰ while U.S. law provides the narrowest,⁹¹ with moral rights protection in the U.K. falling somewhere between these two systems.⁹² The next section considers modern day French moral rights protection and recent cases—often at odds with common law decisions—interpreting these rights.⁹³

II. CONTEMPORARY MORAL RIGHTS IN FRANCE

It is generally undisputed that France has offered the most advanced protection of moral rights, including the rights of disclosure, retraction, attribution, integrity, and resale royalties, as well as protections against misattribution, excessive criticism, and attacks on the creator's personality.⁹⁴ Although originally created through judicial decisions,⁹⁵ France's

Id.

⁸⁷ *Id.* ch. II, art. 5(3). The provision on national implementation reads, "The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed." *Id.*

⁸⁸ *Id.* ch. IV, art. 23. The enforcement provision states:

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

Id. See WPPT Summary, *supra* note 84.

⁸⁹ Lee, *supra* note 20, at 801 n.31. See generally Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199 (1995). See *supra* notes 71-77 and accompanying text.

⁹⁰ Kwall, *supra* note 2, at 12; Lee, *supra* note 20, at 803 ("France is the undisputed champion of authors' moral rights. . .").

⁹¹ See *infra* notes 301-09 and accompanying text.

⁹² See Céline M. Guillou, *The Reverse Engineering of Computer Software in Europe and the United States: A Comparative Approach*, 22 COLUM.-VLA J.L. & ARTS 533, 547 (1998) ("The copyright law of the United Kingdom is such that today it is halfway between the system prevailing in the United States and those of certain [European Union] Member States predicated upon a moral rights structure.").

⁹³ See *infra* notes 121-133 and accompanying text.

⁹⁴ Kwall, *supra* note 2, at 12; Lee, *supra* note 20, at 803-04; Liemer, *supra* note 2, at 46 n.30; Susan P. Liemer, *How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright*, 5 J. MARSHALL REV. INTELL. PROP. L. 1, 7-8

intellectual property code explicitly codifies moral rights.⁹⁶ Curiously, however, despite signing the Berne Convention in 1887,⁹⁷ France did not adopt moral rights laws until 1957.⁹⁸ Nevertheless, French moral rights apply to a broad range of artistic endeavors, referred to as “works of the mind,”⁹⁹ including musical compositions and dramatic musical works.¹⁰⁰

French moral rights are incorporeal to the creative work¹⁰¹ and attach to individual creators, not corporations.¹⁰² In France, moral rights are

(2005); Swack, *supra* note 48, at 364 n.24; Zabatta, *supra* note 15, at 1104. *See supra* notes 38-41 and accompanying text.

⁹⁵ *See supra* notes 62-74 and accompanying text.

⁹⁶ CÓDIGO DE LA PROPIEDAD INTELECTUAL, ch. I, arts. L121-1 to -9, available at http://195.83.177.9/upl/pdf/code_35.pdf (last visited Oct. 26, 2006) [hereinafter C. PROP. INTELL.].

⁹⁷ *See* WIPO, Contracting Parties to the Berne Convention, available at http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15.

⁹⁸ Kwall, *supra* note 2, at 12 n.41; Vera Zlatarski, “Moral” Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States, 23 COLUM. –VLA J. L. & ARTS 201 (1999).

⁹⁹ C. PROP. INTELL., *supra* note 96, ch. II, art. L112-1 (“The provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose.”). *See* Heide, *supra* note 8, at 245.

¹⁰⁰ C. PROP. INTELL., *supra* note 96, ch. I, art. L112-2. The provision states:

The following, in particular, shall be considered works of the mind within the meaning of this Code:

- 1°. books, pamphlets and other literary, artistic and scientific writings;
- 2°. lectures, addresses, sermons, pleadings and other works of such nature;
- 3°. dramatic or dramatico-musical works;
- 4°. choreographic works, circus acts and feats and dumb-show works, the acting form of which is set down in writing or in other manner;
- 5°. musical compositions with or without words;
- 6°. cinematographic works and other works consisting of sequences of moving images, with or without sound, together referred to as audiovisual works;
- 7°. works of drawing, painting, architecture, sculpture, engraving and lithography;
- 8°. graphical and typographical works;
- 9°. photographic works and works produced by techniques analogous to photography;
- 10°. works of applied art;
- 11°. illustrations, geographical maps;
- 12°. plans, sketches and three-dimensional works relative to geography, topography, architecture and science;
- 13°. software, including the preparatory design material;
- 14°. creations of the seasonal industries of dress and articles of fashion.

Id.

¹⁰¹ *Id.* ch. I, art. L111-1 (“The author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons.”). *See* Heide, *supra* note 8, at 246.

¹⁰² C. PROP. INTELL., *supra* note 96, ch. I, art. L121-1 (“An author shall enjoy the right to respect for his name, his authorship and his work. This right shall attach to his person.”). *See* Liemer, *supra* note 2, at 44; *supra* note 2 and accompanying text;

considered perpetual,¹⁰³ unlike other nations, which terminate moral rights upon the death of the author.¹⁰⁴ Consequently, in France, the creator's heirs may exercise the deceased's rights after her death.¹⁰⁵ The French intellectual property code indicates that moral rights are inalienable, but French courts have allowed some limited waivers in contracts if the courts view those waivers as reasonable and not substantive alterations or distortions of the creative work.¹⁰⁶ Blanket waivers on future changes or uses of a creative work, however, are unenforceable.¹⁰⁷

In contemporary French cases, the courts have safeguarded moral rights for paintings,¹⁰⁸ music,¹⁰⁹ books,¹¹⁰ plays,¹¹¹ and films.¹¹² Yet these

Antezana, *supra* note 1, at 421 (“[O]nly individuals can be ‘creators;’ companies and organizations *per se* cannot be ‘creators’ because they lack the (essential) ‘person’ in ‘personality.’”). See also Pink *supra* note 2, at 182-83 (discussing Canada’s “natural person” approach to moral rights).

¹⁰³ C. PROP. INTELL., *supra* note 96, ch. I, art. L121-1 (“[Moral rights] shall be perpetual, inalienable and imprescriptible.”). See Kwall, *supra* note 2, at 15; Lee, *supra* note 20; Liemer, *supra* note 94, at 8 n.59; Netanel, *supra* note 21, at 381.

¹⁰⁴ See *infra* notes 328-30 and accompanying text.

¹⁰⁵ C. PROP. INTELL., *supra* note 96, ch. I, art. L121-1 (“It may be transmitted *mortis causa* to the heirs of the author. Exercise may be conferred on another person under the provisions of a will.”). For example, in 1988, the French courts upheld the objections of the heir of the creator of the *Tin Tin* comic book series when the characters were placed in situations that “corrupt[ed] the ethic” of the original series. Heide, *supra* note 8, at 246 n.207. More recently, in April 2006, the estate of surrealist painter Joan Miro objected to Google for copying Miro’s style on its home page in its attempt to honor him on his birthday. Caslon Analytics, Moral Rights Cases and Controversies Note: Online, <http://www.caslon.com.au/mrcasesnote6.htm> (last visited October 25, 2006). The family’s representative indicated that the purported tribute violated Miro’s copyright and moral rights. *Id.* Google denied any violation of Miro’s rights, but removed the Miro-like elements from its logo. *Id.* A family spokesperson said that the family members “were very upset about it . . . A lot of the problems could have been alleviated if Google had informed the family first. But I’m not saying the family would have agreed to it.” *Id.*

¹⁰⁶ Heide, *supra* note 8, at 247; Kwall, *supra* note 2, at 12-13. Some examples are adaptations of materials to another medium, inclusions in collective works, or corrections of spelling or punctuation errors from earlier editions. Heide, *supra* note 8, at 247.

¹⁰⁷ Heide, *supra* note 8, at 247; Sherman, *supra* note 1, at 378.

¹⁰⁸ One prominent case involved painter Bernard Buffet who had created a singular work painting the six panels on a refrigerator. Heide, *supra* note 8, at 251-52; Yonover, *supra* note 21, at 88-89. Buffet later learned that one of the panels had been removed from the painting and was being sold at auction. He succeeded in enjoining the sale of the individual panel separated from the entirety of the creative work based on his right of integrity. Heide, *supra* note 8, at 251-52; Yonover, *supra* note 21, at 88-89. In another instance, the French courts decided that a department store’s display of reproductions of Rousseau’s paintings violated the painter’s moral rights. Heide, *supra* note 8, at 251 n.248.

¹⁰⁹ See *infra* notes 121-27 and accompanying text.

moral rights are not unbounded; a creator may not abuse the exercise of moral rights, and the courts determine the reasonableness of the creator's claims.¹¹³ Similar to fair use,¹¹⁴ the French code also makes explicit exceptions to moral rights violations for numerous uses of creative works, including press releases, news broadcasts, parodies, conversions to electronic databases, private performances in the home, and educational, scientific, political, and informational works or speeches.¹¹⁵

Applying the French approach to the online music context, musicians and composers may seek to safeguard their works under French moral rights, regardless of who possesses the copyright. In the contemporary setting, a composer might object to the use of his music in a film, television broadcast or live performance.¹¹⁶ A musician may seek to block the exploitation of her work through digital sampling of pieces of that work into another song.¹¹⁷ Musicians and composers may likewise try to stop the downloading of their music from online media services because of concerns about violations of their moral rights, including later manipulation of their work by end-users.¹¹⁸ French law provides broad protections for musical works, but the United States has tried to steer clear of protecting moral rights, especially for musical works.¹¹⁹ With online music services accessible worldwide, there may be increasing pressure on the U.S. to afford moral rights protections for musical works, or music cre-

¹¹⁰ In 1987, the French courts found that a positive preface inserted into a literary work contravened the right of integrity. Heide, *supra* note 8, at 246 n.205. In 2004, the French appeals court imposed a nominal fine on the publisher of a sequel to Victor Hugo's *Les Misérables*. CASLON ANALYTICS- MORAL RIGHTS CASES, OVERVIEW (May 2006), available at <http://www.caslon.com.au/mrcasesnote.htm> (last visited March 2, 2007).

¹¹¹ In a 1992 dispute, the French court found a violation of Irish poet and playwright Samuel Beckett's right of integrity when a director, in contradiction to Beckett's stage directions, cast two women rather than two men in *Waiting for Godot*. CASLON ANALYTICS- MORAL RIGHTS CASES, HIGHLIGHTS (May 2006), available at <http://www.caslon.com.au/mrcasesnote.htm> (last visited March 2, 2007). See Heide, *supra* note 8, at 245 n.200.

¹¹² Charlie Chaplin, in 1959, successfully argued in a French court that the insertion of music to accompany his silent film, *The Kid*, violated his moral rights. CASLON ANALYTICS, MORAL RIGHTS CASES, LANDMARKS (May 2006), available at <http://www.caslon.com.au/mrcasesnote7.htm> (last visited March 2, 2007).

¹¹³ Heide, *supra* note 8, at 247-48.

¹¹⁴ See *infra* notes 387-89 and accompanying text.

¹¹⁵ C. PROP. INTELL., *supra* note 96, ch. II, art. L122-5. See Heide, *supra* note 8, at 248; *infra* notes 387-89 and accompanying text.

¹¹⁶ See *supra* note 7 and accompanying text.

¹¹⁷ See *infra* notes 412-435 and accompanying text.

¹¹⁸ See *infra* note 403 and accompanying text.

¹¹⁹ See *infra* notes 121-25, 307-09 and accompanying text.

ators may seek the assistance of foreign courts to protect their moral rights.¹²⁰

Two French cases illustrate the efforts of U.S. artists to protect their moral rights in foreign courts, highlighting key differences between the French and American approaches. In 1948, composer Dmitry Shostakovich and others sought injunctive relief against Twentieth Century-Fox for its use of their public domain musical compositions in the anti-Soviet film *The Iron Curtain*.¹²¹ Their complaint rested on several legal grounds, including defamation and violation of their moral rights.¹²² Shostakovich and the other plaintiffs believed that the use of their music and attributions to their compositions in the film and promotional materials falsely represented their approval of the anti-Soviet film and disloyalty to their Russian homeland.¹²³ The U.S. court held that the composers had not been libeled through the use of their compositions or attributions to their background music in the film.¹²⁴ More importantly, the court struck down the composers' moral rights claims by questioning the existence of moral rights in the U.S. and contending that the court lacked adequate standards of review of such rights.¹²⁵

¹²⁰ See *supra* note 7 and accompanying text. See *infra* notes 121-25, 128-33, 228-33 and accompanying text.

¹²¹ *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575 (N.Y. Spec. Term 1948), *aff'd*, 87 N.Y.S.2d 430 (1949). See Yonover, *supra* note 21, at 89; Williams, *supra* note 2, at 669.

¹²² *Shostakovich*, 80 N.Y.S.2d at 577.

¹²³ *Id.* at 578.

¹²⁴ *Id.* at 578-79. After viewing the film, the court determined that there was no explicit or implicit indication of the plaintiffs' approval of the film; therefore no libel existed.

¹²⁵ *Id.* at 578. The U.S. court stated:

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 a manner as would be violative of the author's rights. The application of the doctrine presents much difficulty however. With reference to that which is in the public domain there arises a conflict between the moral right and the well-established rights of others to use such works (*Clemens v. Belford, Clark & Co.*, *supra*). So, too, there arises the question of the norm by which the 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. Quite obviously therefore, in the absence of any clear showing of the infliction of a willful injury or of any invasion of a moral right, this court should not consider granting the drastic relief asked on either theory.

Id. Unlike other artistic works, moral rights for musical works are not explicitly protected under U.S. statutory laws. See *infra* notes 322-41 and accompanying text.

At the same time, the plaintiff composers sought relief in the French courts.¹²⁶ Based on precedent, the French court arrived at the opposite outcome. The 1953 French decision allowed the film to be seized in France on grounds that the composers had suffered “moral damage.”¹²⁷

In a more recent case, the heirs of American director John Huston sought to block colorization of their deceased father’s film *The Asphalt Jungle*.¹²⁸ During his lifetime, Huston had been an outspoken critic of colorizing classic films.¹²⁹ In a 1948 contract, Huston assigned his copyright in the film to the producers under the predominant studio system, but the contract was silent on moral rights.¹³⁰ In 1986, Turner Entertainment gained the rights to colorize the film from MGM-Loews.¹³¹ Turner then licensed a colorized copy to La Cinq, a French television station, for broadcast in France.¹³² In 1988, Huston’s heirs filed an action in France

¹²⁶ Kwall, *supra* note 2, at 28 (citing *Soc. Le Chant du Monde v. Soc. Fox Europe*, Jan. 13, 1953, Cours d’appel, Paris, Dallez, *Jurisprudence*, [D. Jur.] 16); Williams, *supra* note 2, at 669; Yonover, *supra* note 21, at 89 (citing *Soc. Le Chant du Monde v. Soc. Fox Europe*, [1953] *Recueil Dalloz* [D. Jur.] 16, 80 (Cour d’appel, Paris)).

¹²⁷ Yonover, *supra* note 21, at 89 (citing *Soc. Le Chant du Monde v. Soc. Fox Europe*, [1953] *Recueil Dalloz* [D. Jur.] 16, 80 (Cour d’appel, Paris); Williams, *supra* note 2, at 669).

¹²⁸ See Brandi L. Holland, *Moral Rights Protection in the United States and the Effect of the Family Entertainment and Copyright Act of 2005 on U.S. International Obligations*, 39 *VAND. J. TRANSNAT’L L.* 217, 241-42 (2006); CASLON ANALYTICS-MORAL RIGHTS CASES, COLORIZATIONS AND CIRCUSES (May 2006), available at <http://www.caslon.com.au/mrcasesnote2.htm> (last visited March 2, 2007); Heide, *supra* note 8, at 245 n.198; Yonover, *supra* note 21, at 89-90; Zabatta, *supra* note 15, at 1104-05. Similarly, in 1996, American director Fred Zinneman sought to block the Italian broadcast of a colorized version of Zinneman’s 1944 film *The Seventh Cross*. CASLON ANALYTICS-MORAL RIGHTS CASES, COLORIZATIONS AND CIRCUSES. The colorized version was aired on Italian TV in 1996 and 1997. *Id.* Eventually, in 2005, Zinneman’s heir prevailed in Italian courts on the right of integrity, stopping further broadcasts, and requiring the Italian TV network to pay damages and destroy its colorized copies. *Id.* During his life, Zinneman had been an advocate for moral rights. *Id.*

¹²⁹ See CASLON ANALYTICS-MORAL RIGHTS CASES, OVERVIEW, *supra* note 110. Huston is quoted as saying that the colorization of his film was “not color, it’s like pouring 40 tablespoons of sugar water over a roast.” *Id.* See Williams, *supra* note 2, at 659 (Huston was purportedly “distracted” after viewing colorized version of film). See *supra* note 128 and accompanying text.

¹³⁰ Holland, *supra* note 128, at 242; Natalie C. Suhl, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?* 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1203, 1226-27 (2002); Zabatta, *supra* note 15, at 1104-05 n.62.

¹³¹ Zabatta, *supra* note 15, at 1104 n.62.

¹³² *Id.*

to block the broadcast of the film, in line with their father's artistic vision.¹³³

During the French legal action, Congress, in 1988, provided for limited preservation rights for some types of classic films.¹³⁴ However, in 1990, Congress enacted statutory moral rights for visual artists that specifically excluded films from moral rights protection,¹³⁵ bowing to powerful interests in the media and entertainment industries.¹³⁶

Stymied in the U.S., the Huston family continued with its French case. The heirs won at the trial court level, but a subsequent French appeals court overturned the decision, indicating that colorized copies did not harm moral rights because the original copy had not been colorized.¹³⁷ The French Supreme Court, however, overruled the appellate decision, finding that the colorization of Huston's film violated his moral right of integrity as one of its creators.¹³⁸ After remanding the decision, the French courts ultimately blocked the broadcast of the duplicate colorized version, assessing fines of \$74,000 against Turner Entertainment and \$37,000 against La Cinq.¹³⁹ This decision was affirmed in 1994.¹⁴⁰

These two cases illustrate the common problem facing creative persons in the United States: the lack of adequate protection of moral rights in the U.S. Therefore, American artists often must seek to vindicate their moral rights in other nations that more closely abide by the terms of the Berne Convention and other international instruments.

Clearly, in France, moral rights are protected for a wide range of "works of the mind,"¹⁴¹ including musical works. The creator or her heirs may exercise moral rights so long as there are no abuses of rights or exempted uses. Despite the fears of common law nations that moral rights cases will overrun the courts, only a handful of such cases have been brought in French courts. Utilizing standards of reasonableness, the French courts are preventing abuses of moral rights or allowing for limited and specific waivers of moral rights.

¹³³ See *supra* notes 128-29 and accompanying text.

¹³⁴ See Zabatta, *supra* note 15, at 1104 n.61.

¹³⁵ See *infra* notes 326-41 and accompanying text.

¹³⁶ Sherman, *supra* note 1, at 410.

¹³⁷ Heide, *supra* note 8, at 245 n.198 (citing Judgment of May 28, 1991 (Huston v. Turner Ent.), Cass. Civ. 1re, 149 *Revue Internationale du Droit d'Auteur* [R. Int'l D.A.] 197 (1991) (Fr.)); Yonover, *supra* note 21, at 90.

¹³⁸ CASLON ANALYTICS- MORAL RIGHTS CASES, COLORIZATIONS AND CIRCUSES, *supra* note 128; Heide, *supra* note 8, at 245 n.198; Suhl, *supra* note 130, at 1227; Yonover, *supra* note 21, at 89-90; Zabatta, *supra* note 15, at 1104-05.

¹³⁹ CASLON ANALYTICS- MORAL RIGHTS CASES, COLORIZATIONS AND CIRCUSES, *supra* note 128; Yonover, *supra* note 21, at 89; *Shostakovich*, 80 N.Y.S.2d, *supra* note 125 and accompanying text.

¹⁴⁰ CASLON ANALYTICS- MORAL RIGHTS CASES, COLORIZATIONS AND CIRCUSES, *supra* note 128.

¹⁴¹ See *C. PROP. INTELL.*, *supra* note 99 and accompanying text.

While France stands on one end of the moral rights continuum, the U.S. is squarely on the opposite side by seeking to avoid and limit the protection of moral rights. The U.K. seeks a middle ground. Its approach is addressed in the next section.

III. MORAL RIGHTS IN THE UNITED KINGDOM

Moral rights in the U.K. did not develop as readily as their French counterparts, likely due to differences between the early legal systems in the U.K. and France. The 1709 Statute of Anne was the first codified copyright law that established an author's ownership of a creation for a fixed term.¹⁴² The Statute of Anne granted an author a renewable fourteen-year exclusive right to print future works.¹⁴³ Although the Statute broke the grip of a copyright monopoly held by the Stationer's Company,¹⁴⁴ the protections it offered seem limited by modern standards. For example, the Statute was thought not to protect musical compositions.¹⁴⁵ In addition, it required authors to register their copyrights with the Stationer's Company, the very organization that held and abused a copyright monopoly under the previous system.¹⁴⁶

Even at this early stage of copyright law, the emphasis remained oriented toward publishers' rights to print books rather than authors' rights to maintain the integrity of their work.¹⁴⁷ Under the Statute of Anne regime, the printers and booksellers comprising the Stationer's Company thrived and enjoyed the benefits of the copyright protection of the works they published.¹⁴⁸ Early cases interpreting the Statute revealed little interest in protecting artistic integrity and, by implication, moral rights. In *Burnett v. Chetwood*,¹⁴⁹ the court considered an unauthorized translation of a copyrighted work not to be an improper reprinting of that work, ultimately concluding that translation amounted to new contribution.¹⁵⁰

¹⁴² The Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), available at <http://www.copyrighthistory.com/anne.html>. See also Holland, *supra* note 128, at 223.

¹⁴³ Holland, *supra* note 128, at 223.

¹⁴⁴ *Id.* at 222 ("The Stationer's Company comprised a group of printers who often utilized their legal powers to censor publications.").

¹⁴⁵ Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright, and Cultural Context*, 84 N.C. L. REV. 547, 557 n.35 (2006).

¹⁴⁶ Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 629 (2006) (citing The Statute of Anne, *supra* note 142, § II).

¹⁴⁷ Paul Goldstein, *Adaptation Rights and Moral Rights in the United Kingdom, the United States and the Federal Republic of Germany*, 14 INT'L REV. INDUS. PROP. & COPYRIGHT L. 43, 46 (1983).

¹⁴⁸ Stadler, *supra* note 146, at 629.

¹⁴⁹ (1720) 35 Eng. Rep. 1008 (Ch.).

¹⁵⁰ *Id.* at 1009 ("[A] translation might not be the same with the reprinting the original, on account that the translator has bestowed his care and pains upon it, and so not within the prohibition of the act . . .").

In *Gyles v. Wilcox*,¹⁵¹ the court declared that an unauthorized abridgement of a published work does not constitute a copyright infringement of the author.¹⁵² Placed within the language of moral rights, early courts simply denied authors the right to control the adaptation of their published works by others. This prerogative remained the law until the passage of the Act of 1911, which recognized the author's possession of various derivative rights in his work, including the right to control translations,¹⁵³ cinematic developments,¹⁵⁴ and dramatizations¹⁵⁵ of his work. Moral rights first received formal legal protection in 1928 when the United Kingdom adopted Article 6bis of the Berne Convention.¹⁵⁶ Although the right of disclosure appeared well-established by then,¹⁵⁷ protection of the right of attribution developed more broadly,¹⁵⁸ albeit not with complete acceptance. For example, courts acknowledged that an artist could possess the right of attribution even though that right may not have been explicitly expressed by an agreement,¹⁵⁹ but when an author did not retain copyright in her work the attributive right disappeared unless specifically preserved by contract.¹⁶⁰ In *Eothen Films Ltd. v. Industrial and Commercial Education Macmillan Ltd.*,¹⁶¹ the defendants allegedly published a brochure stating that the "basic concept" of the film produced by the plaintiff's film company was "devised by the defendants."¹⁶² During an ordinary motion session, the plaintiffs, without notice, requested that the court restrain the defendants from representing that the film was the defendants'.¹⁶³ The defendants requested one week to respond, and the plaintiffs sought an injunction to prevent distribution of the brochures during that week, which the court granted.¹⁶⁴ The Court

¹⁵¹ (1740) 26 Eng. Rep. 489 (Ch.).

¹⁵² *Id.* at 490.

¹⁵³ Goldstein, *supra* note 147, at 47 (citing 1 & 2 Geo. 5, c. 46, § 1(2)(a) (1911)).

¹⁵⁴ *Id.* (citing 1 & 2 Geo. 5, c. 46, § 1(2)(d) (1911)).

¹⁵⁵ *Id.* (citing 1 & 2 Geo. 5, c. 45, § 1(2)(c) (1911)).

¹⁵⁶ Sheila J. McCartney, *Moral Rights Under the United Kingdom's Copyright, Designs and Patents Act of 1988*, 15 COLUM.-VLA J.L. & ARTS 205, 210 (1991).

¹⁵⁷ Stadler, *supra* note 146, at 632 n.137 (citing Reade v. Conquest, (1861) 142 Eng. Rep. 297, 302-03 (C.P.) ("[B]y the common law copyright or protection exists in favour of works of literature, art, or science, to this limited extent only, that, while they remain unpublished, no person can pirate them, but that, after publication, they are by common law unprotected." (citations omitted))).

¹⁵⁸ See generally McCartney, *supra* note 156, at 211-15 (describing artists' successful efforts to protect moral rights in the United Kingdom).

¹⁵⁹ See, e.g., *Miller v. Cecil Film, Ltd.*, (1937) 2 All. E.R. 464.

¹⁶⁰ McCartney, *supra* note 156, at 211.

¹⁶¹ [1966] F.S.R. 356 (A.C.).

¹⁶² *Id.* at 358.

¹⁶³ *Id.* at 356.

¹⁶⁴ *Id.* at 357.

of Appeal concluded that the trial judge improperly granted an *ex parte* injunction to the plaintiff.¹⁶⁵

Although overturning the trial court's *ex parte* injunction may have been prudent given the lack of notice, the short time, and the scant record, the law cited by the Court of Appeal proved troubling. The Court of Appeal stated that even though the attribution in the brochure was a false one, the plaintiff could not prevail unless there was "clear *prima facie* evidence of actual malice in the sense of a wrongful intention to injure the plaintiffs."¹⁶⁶ This standard could create a difficult burden for any artist seeking to defend her moral rights. Not only must the artist show the misattribution, she also must prove that the misattribution was accompanied by an intent to injure.

Similarly, an earlier case, *Gilbert v. Boosey and Co.*,¹⁶⁷ involved W.S. Gilbert (of Gilbert and Sullivan fame), who authored *The Brigands*, a three-act comic opera first performed in 1889.¹⁶⁸ Gilbert assigned his copyright and his right of representation in *The Brigands* to the Booseys.¹⁶⁹ The Booseys later produced the opera with a libretto including two songs that were attributed to Gilbert even though he had not written them.¹⁷⁰ Gilbert considered the two misattributed songs inferior to what he would have written, and he thought they were likely to damage his reputation as an author.¹⁷¹ Consequently, Gilbert sued to enjoin the use of the libretto with the two songs.¹⁷² The court rejected Gilbert's demand for an interim injunction, reasoning that where the author had not "bound [the copyright assignee's] hand and foot not . . . to alter the piece in any way,"¹⁷³ an injunction could only be granted when the defendant injured the plaintiff's reputation or acted in bad faith.¹⁷⁴ The songs were not "scandalous or indecent,"¹⁷⁵ so the court concluded that Gilbert did not suffer any present or likely future substantial injury.¹⁷⁶

¹⁶⁵ *Id.* at 358.

¹⁶⁶ *Id.* (quotation marks omitted).

¹⁶⁷ 87 L.T. 355 (1889).

¹⁶⁸ Charles A. Marvin, *The Author's Status in the United Kingdom and France: Common Law and the Moral Right Doctrine*, 20 INT'L & COMP. L.Q. 675, 700 (1971). The head of Boosey and Co. asked Gilbert to adapt *Les Brigands* "for copyright purposes only," and he did so "very hurriedly and imperfectly." W. S. Gilbert, Letter to the Editor, LONDON TIMES, Sept. 16, 1889, at 6. In this letter Gilbert accounts his strong displeasure with Boosey and Co.'s efforts to adapt *The Brigands* without his consultation. *Id.*

¹⁶⁹ Marvin, *supra* note 168, at 700.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ McCartney, *supra* note 156, at 215 (quoting Gilbert, 87 L.T. at 356).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

Gilbert responded to the court's decision in a letter to *The London Times*,¹⁷⁷ arguing in a fashion prescient of moral rights disputes today:

[I]n common honesty I think I am entitled to ask that I shall not be made to shine with the lustre of another man's intellect. No man is bound to have his fortune made for him against his will, and I believe I am justified in asking that a song which is not my song shall not be put forward on the public stage as my song, even though Lord Justice Cotton is not satisfied that there is anything in the substitution of their song which can in any way cast discredit on Mr. Gilbert or on his reputation, both dramatic and otherwise.¹⁷⁸

Gilbert, although no lawyer, appeared to grasp well the court's emphasis on economic interests over artistic ones. He further commented:

If a grocer buys a tin of Colman's mustard, and, having adulterated it with a mustard that is not Colman's, nevertheless sells it across the counter as Colman's, the majesty of the law is outraged, and the thunderbolts of the Courts of Chancery are not invoked in vain. This is a situation which the Courts of Chancery can grasp; it appeals to them as a mercantile outrage concerning which there can be no two opinions. The Courts of Chancery have invariably shown themselves hopelessly unable to apply this simple principle to works written for the stage.¹⁷⁹

Misattribution, which is very similar to the moral right of attribution, was not prohibited by legislation until enactment of the Copyright Act of 1956.¹⁸⁰ Under section 43 of the Act, artists could prevent both false attributions of a work and false representations that a work was an adaptation of another's creation.¹⁸¹ The Act also prohibited public performances and broadcasts of falsely attributed works.¹⁸²

During this post-Act period, artists enjoyed some latitude in protecting rights of integrity. Successful actions included a damage award arising from a magazine's revision of an article on jade without the author's consent,¹⁸³ a judgment against a publisher who issued an error-laden update of a criminal law treatise without the author's consent,¹⁸⁴ and an injunction preventing a publisher from using a vulgar dust jacket for an author's book, thereby implying that the book was of a similar offensive quality.¹⁸⁵

¹⁷⁷ W. S. Gilbert, *Letter to the Editor*, LONDON TIMES, Nov. 8, 1889, at 10.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Copyright Act of 1956, 4 & 5 Eliz. 2, c. 74, § 43(1) (Eng.) [hereinafter Copyright Act]. See also Elaine B. Gin, *International Copyright Law: Beyond the WIPO & TRIPS Debate*, 86 J. PAT. & TRADEMARK OFF. SOC'Y 763, 768-69 (2004) (noting similarity).

¹⁸¹ McCartney, *supra* note 156, at 215.

¹⁸² *Id.* (citing Copyright Act, *supra* note 180, §§ 43(2)(b), (2)(d), (3)).

¹⁸³ Joseph v. National Magazine Co., 1 L.R. Ch. 14 (1959), 3 All E.R. 52 (1958).

¹⁸⁴ Archbold v. Sweet, 172 Eng. Rep. 947, 174 Eng. Rep. 55 (K.B.1832).

¹⁸⁵ Moseley v. Stanley Paul & Co. (1917-23) Macg. Cop. Cas. 341 (Ch. 1922) (Eng.).

One exception to this trend was *Preston v. Raphael Tuck & Sons*,¹⁸⁶ where the copyright owner of two drawings sliced off decorative borders and changed the background pattern and colors.¹⁸⁷ The copyright owner then published these modified versions as pictures in a calendar, prompting the original artist to seek an injunction halting the sale of the altered drawings.¹⁸⁸ The court concluded that the plaintiff failed to show that the public continued to view the pictures as the plaintiff's unaltered works.¹⁸⁹

As moral rights laws gained strength on an international level, legislators in the United Kingdom sought to keep pace. In 1967, participants revised the Berne Convention to protect certain moral rights after the death of the author, extending the protections until the economic rights in the work expired.¹⁹⁰ In 1977, as a result of the findings of the influential Whitford Committee Report, the British Government expressed uncertainty as to whether contemporary U.K. law—or any previous U.K. law—fully satisfied the obligations of the Berne Convention and questioned whether moral rights were actually protected in the United Kingdom.¹⁹¹ In 1988, the United Kingdom recognized moral rights independently when it passed the Copyright, Designs and Patents Act (“CDPA”).¹⁹²

The CDPA recognizes four moral rights: (1) The right to be identified as a director or author (right of attribution); (2) the right to object to derogatory intent (right of integrity); (3) the right not to be falsely attributed to a work (right of attribution); and (4) the right to privacy of certain photographs or films.¹⁹³ The CDPA, however, is not without limitations. Far from considering moral rights “inalienable,” the CDPA allowed authors to waive their moral rights.¹⁹⁴ The CDPA also “allows for informal waiver under general contract or estoppel law.”¹⁹⁵ Moreover, the

¹⁸⁶ 1 L.R. Ch. 667 (1926).

¹⁸⁷ *Id.* at 668.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 674.

¹⁹⁰ McCartney, *supra* note 156, at 219.

¹⁹¹ *Id.*

¹⁹² Jennifer B. Pfeffer, *The Costs and Legal Impracticalities Facing Implementation of the European Union's Droit de Suite Directive in the United Kingdom*, 24 Nw. J. INT'L L. & BUS. 533, 552 (2004).

¹⁹³ Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229, 246 (1995) (citing Copyright, Designs and Patents Act of 1988, c. 48, §§ 77-89, 94-95 [hereinafter CDPA]).

¹⁹⁴ Pfeffer, *supra* note 192, at 552.

¹⁹⁵ Dworkin, *supra* note 193, at 257 (citing CDPA § 87(4)).

law—like most moral rights codes—denies moral rights to authors of computer programs.¹⁹⁶

The CDPA also segregates moral rights from umbrella damage provisions. Sections 96-100 of the CDPA discuss remedies for infringement of traditional copyright,¹⁹⁷ including section 97(2), which allows the court to award an open-ended “additional damages” amount according to the flagrancy of the infringement and the benefit to the defendant “as the justice of the case may require.”¹⁹⁸ The CDPA discusses moral rights in section 103, a separate provision with no reference to section 97(2)’s additional damages. Thus, the CDPA arguably denies moral rights plaintiffs the open-ended benefits of section 97(2).¹⁹⁹

The CDPA also limits the meaning of the word “treatment,” defining the term as any addition, deletion, alteration, or adaptation of the work.²⁰⁰ This definition, limited to internal treatment of the work, apparently denies claims that contextual treatment of a work can impinge upon an artist’s moral rights.²⁰¹ The context of an artist’s presentation can be critical to its message. One author posits for consideration Bruce Springsteen’s iconic song, “Born in the U.S.A.,” which powerfully depicts a Vietnam veteran returning home to a country that cares little about him, his experiences, or his hopes for an economically viable future.²⁰² Then-President Ronald Reagan used Springsteen’s song, without modification, as a patriotic American anthem.²⁰³ The song was not altered, but the altered context skewed the song’s message in a fashion unintended by the author. The significance of context was made clear when Springsteen protested this use of his work.²⁰⁴ The CDPA would not let artists like Springsteen protect his work from such misuse.

The CDPA apparently was not enacted with enthusiasm but was done so, according to one author, “reluctantly.”²⁰⁵ The U.K. government apparently was compelled to do so in order to ratify the then-current ver-

¹⁹⁶ Michael S. Mensik, *Software Localization: Hidden Issues That Arise When Software Is Translated Abroad*, 8 COMPUTER LAW, 1, 5 (1991) (citing CDPA §§ 79(2), 81(2)).

¹⁹⁷ CDPA, *supra* note 193, § 96-100. See also Mary Wong Wai San, *Additional Damages for Copyright Infringement*, 2 SING. J. INT’L & COMP. L. 117 (1998) (discussing this issue).

¹⁹⁸ *Id.* § 97(2).

¹⁹⁹ See Wong, *supra* note 197, at 128.

²⁰⁰ CDPA, *supra* note 193, § 80(2)(a).

²⁰¹ See Ian Eagles & Louise Longdin, *Technological Creativity and Moral Rights: A Comparative Perspective*, 12 INT’L J.L. & INFO. TECH. 209, 234 n.122 (2004).

²⁰² Desai, *supra* note 15, at 1-2. See BRUCE SPRINGSTEEN, *Born in the U.S.A.*, on BORN IN THE U.S.A. (Columbia Records 1984).

²⁰³ Desai, *supra* note 15, at 2.

²⁰⁴ *Id.*

²⁰⁵ Peter Groves, *Moral Rights in the U.K. and Beyond*, CAN. BUS. & CURRENT AFF., Apr. 2003, at 3.

sion of the Berne Convention, a prerequisite for membership in the European Union.²⁰⁶ The CDPA drafters seemingly lacked real conviction that moral rights were worth protecting. According to one author, the debates in the House of Commons and the House of Lords suggest that the drafters were more concerned with protecting the economic interests of interest groups instead of the moral rights of artists.²⁰⁷ The numerous exceptions and limitations of the CDPA lead at least one author to conclude, “[i]t is apparent that the United Kingdom desired to appease the requirements of an international treaty while making sure the rights have as little effect as possible.”²⁰⁸

Perhaps recognizing this legislative ambivalence, English courts interpreting moral rights cases subsequent to the enactment of the CDPA have been reluctant to interpret it broadly.²⁰⁹ In *Tidy v. Trustees of the Natural History Museum*,²¹⁰ a recognized cartoonist agreed to draft a series of dinosaur cartoons to be presented at an exhibition by the Natural History Museum.²¹¹ The museum, in coordination with a publisher and without authorization from the plaintiff, published these cartoons in a book, *The Natural History Museum Book of Dinosaurs*.²¹² The reproductions of the cartoons in the book were accurate but reduced to approximately one-seventh the original size.²¹³ The plaintiff sued the museum and the publisher, claiming that they committed copyright infringement and engaged in derogatory treatment of the cartoons in violation of section 80 of the CDPA.²¹⁴

Once the defendants conceded the copyright infringement claim, the court was left only with the moral rights issue, for which the plaintiff had requested that the court grant summary judgment in his favor.²¹⁵ The plaintiff did not claim that the defendants mutilated the cartoons because

²⁰⁶ Pfeffer, *supra* note 192, at 552.

²⁰⁷ Dworkin, *supra* note 193, at 257-58 (citations omitted).

²⁰⁸ Pfeffer, *supra* note 192 at 552.

²⁰⁹ Catherine Seville, *Peter Pan's Rights: "To Die Will be an Awfully Big Adventure"*, 51 J. COPYRIGHT SOC'Y U.S.A. 1, 18 (2003) (citing *Tidy v. Trustees of the Natural History Museum*, 39 I.P.R. 501 (Ch. 1995) and *Pasterfield v. Denham*, [1999] F.S.R. 168 (Plymouth County Ct.)). See also Pfeffer, *supra* note 192, at 552 (“In the fifteen years since the United Kingdom allowed for moral rights, there has been only one case involving them, and the case falls well short of providing a ringing endorsement of this novelty in U.K. copyrights law” (internal quotation marks omitted)).

²¹⁰ 39 I.P.R. 501 (Ch. 1998).

²¹¹ *Id.* at 501-502.

²¹² *Id.* at 502.

²¹³ *Id.* The original cartoons measured 420 x 297 millimeters; the book cartoons measured 67 x 42 mm. *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

they were printed exactly as drawn.²¹⁶ Rather, the plaintiff argued that the defendants' significant reduction of the cartoons obscured some of the details of the drawings and made it difficult to read the captions.²¹⁷

The court applied section 80 of the CDPA, which grants authors the right not to have their work subjected to "derogatory treatment," defining the phrase as a "distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director."²¹⁸ The plaintiff argued that the court, in "just looking at the reproduction in the book," should find that it was a distortion of the plaintiff's work, and, as such, hold that no trial was necessary.²¹⁹ The shrunken work, the plaintiff argued, had a significantly reduced "visual impact" compared to the artist's original work, which constituted a distortion that violated the CDPA.²²⁰ Ultimately, the court was "far from satisfied" that, under the statute, a smaller-sized reproduction in any way distorted the original or that it somehow prejudiced the honor or reputation of the cartoonist.²²¹ The court noted that it could not determine whether the reproduction was prejudicial without evidence establishing the effect of the reproduction in the minds of others and without cross-examination of witnesses testifying to that effect.²²² Although the artist made the assertion that a distortion or mutilation occurred, the court was not satisfied that the artist's view was one reasonably held under an "objective test of reasonableness."²²³ The court concluded that "[i]t seems to [the court] that there is a possible defence . . . on the grounds that in fact the reputation of the plaintiff would not be harmed one whit in the mind of any reasonable person looking at the reproduction of which he complains."²²⁴ In the end, the court dismissed the plaintiff's application for summary judgment.²²⁵

The plaintiff in *Tidy* arguably presents a "weak" evidentiary case for moral rights protection. The publisher did not disparage, disfigure or misattribute the cartoons; rather, the publisher simply shrunk the images to a fraction of their moral size. In addition, the plaintiff could not benefit from the "halo effect" of a successful copyright infringement claim to support its moral rights claim because the defendant had already conceded that copyright infringement occurred. This forced the court to define explicitly the moral rights limits in the CDPA.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* (citing CDPA, *supra* note 193, c. 48, § 80).

²¹⁹ *Id.* at 503.

²²⁰ *Id.* at 504.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 505.

²²⁵ *Id.*

The plaintiff in *Tidy* argued that the shrunken cartoons themselves showed that the artwork was mutilated. The plaintiff's characterization implies that the focus of moral rights is to defend the integrity of the artist's expression. Under this view, the purpose of moral rights is to grant the author the right to maintain the integrity of her creation however she defines that integrity. Applying this reasoning to *Tidy*, publishing the shrunken cartoons constituted a derogatory distortion of the work and violated the CDPA.

Certainly, such an interpretation of the CDPA is possible. "Derogatory treatment" is defined as treatment that "amounts to distortion or mutilation of the work or is otherwise prejudicial."²²⁶ The statute uses "or" rather than "and," suggesting that the plain text could be interpreted to mean that a distortion of the work without the separate categories of mutilation or prejudice violates the CDPA.²²⁷

For example, in *Morrison Leahy Music Ltd. v. Lightbond Ltd.*,²²⁸ the plaintiffs, including famous artist George Michael, sought an injunction to stop the defendant from selling a "medley" containing samples of five Michael compilations.²²⁹ The defendant owned a license to the songs, and Michael challenged the remix under section 80 of the CDPA.²³⁰ The court concluded that the defendant's license agreement contained a clause reserving moral rights in the works, and, consequently, the defendant's license did not authorize the remix.²³¹ Relying on conflicting affidavits, the court concluded that a triable issue of fact existed as to whether the defendant's sampling of Michael's songs into a medley amounted to a distortion or mutilation under section 80(2).²³² The Morrison Court did not require that the plaintiffs show prejudice in order to prove their moral rights claim. Like *Morrison*, the Tidy Court interpreted section 80 to allow claims of distortion without showing prejudice. Unlike *Morrison*, however, the Tidy Court found in favor of the defendant.²³³

The same language in section 80(2) may be susceptible to a more restrictive interpretation. The phrase "or is otherwise prejudicial" might infer that either distortion or mutilation are actions that have a prejudicial impact. Thus, for an act to be considered a "derogatory treatment," the plaintiff must show a prejudicial effect. For example, in *Pasterfield v.*

²²⁶ Copyright, Designs and Patents Act of 1988, c.48 § 80(2)(b).

²²⁷ See, e.g., *Morrison Leahy Music Ltd. v. Lightbond Ltd.*, [1993] ENT. & MEDIA L.REP. 144 (Ch.) (Eng.).

²²⁸ *Id.*

²²⁹ *Morrison Leahy Music* owned the copyright to the songs. *Id.* at 145-146, 149.

²³⁰ *Id.* at 146.

²³¹ *Id.* at 148.

²³² *Id.* at 151.

²³³ See LESLIE KIM TREIGER-BAR-AM, THE MORAL RIGHT OF INTEGRITY: A FREEDOM OF EXPRESSION 2 n. 2 (2004), available at <http://www.oiprc.ox.ac.uk/EJWP0804.pdf> (stating that *Tidy* required "distortion or prejudice, but not both").

Denham,²³⁴ the Plymouth City Council commissioned plaintiffs to design two leaflets and a brochure to promote the Plymouth Dome, a tourist attraction owned and operated by the council.²³⁵ The drawings included a detailed cut-away depiction of the Plymouth dome and its contents.²³⁶ To the plaintiffs' chagrin, a modified version of the plaintiffs' design was also used in a leaflet five years later, which identified defendant Denham as having "designed and produced" the leaflet.²³⁷

Among other claims, the plaintiffs challenged the defendant's use of their cut-away drawing on moral rights grounds.²³⁸ The defendant Denham cut out the background behind the dome and removed extraneous wording.²³⁹ He then drew back pavement and figures in the foreground as well as a tree-lined backdrop.²⁴⁰ Denham also changed the background coloring from green to yellow and reproduced the roof in a darker brown color.²⁴¹

The plaintiffs presented an expert, a former principal of the Plymouth College of Art and Design, who testified that Denham's changes reduced the "vibrancy and excitement" of the original and added to the appearance that the drawing was unfinished.²⁴² The expert concluded that "these changes do not accurately reflect the original author's drawing and do not improve the work, thereby leading to derogatory treatment."²⁴³

After chiding the expert for appearing not to notice certain other modified details in the drawings, the court interpreted section 80(2) of the CDPA.²⁴⁴ The existence of the word "otherwise" in the statute meant to the court that the word "prejudicial" governed the earlier words "distortion or mutilation" of the work.²⁴⁵ As the court noted, "[i]f this were not the case, any deletion from a work could be said to render it imperfect and thus a mutilation."²⁴⁶

The court concluded that Denham's variations did not constitute a derogatory impact on the plaintiff's honor and reputation under the CDPA.²⁴⁷ The court reasoned that "[i]t is not sufficient that the author is

²³⁴ *Pasterfield v. Denham*, [1999] F.S.R. 168 (Plymouth County Ct.) (Eng.).

²³⁵ *Id.* at 170.

²³⁶ *Id.* at 171.

²³⁷ *Id.* at 170.

²³⁸ Other modifications made by the defendants were not challenged under the CDPA, because their creation predated the Act, which came into force on August 1, 1989. *Id.* at 170-171.

²³⁹ *Id.* at 178.

²⁴⁰ *Pasterfield*, [1999] F.S.R. at 178.

²⁴¹ *Id.*

²⁴² *Id.* at 180.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 181.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 178.

himself aggrieved.” Apparently, the court found it relevant that Denham’s reproduction tried to “keep faith” with the original.²⁴⁸ In comparing the changes made in this case to a unauthorized colorization of a movie, the court stated that “[t]hey do not come anywhere near . . . the gross differences between a black and white film and a colorized version[.]”²⁴⁹ The differences in the Plymouth Dome drawings were merely peripheral; consequently, there was no prejudice, and the court dismissed the plaintiffs’ moral rights claim.²⁵⁰

The *Pasterfield* case contains a number of troubling issues and perhaps reveals judicial hostility towards moral rights acts. The court forcefully attacked the expert’s report, making much of the fact that the report did not identify every change.²⁵¹ The court critiqued the expert’s reference to Denham’s “Designed and Produced by Denham Design” addition because the court considered the phrase not part of the original plaintiffs’ drawing.²⁵² Finally, the expert drew fire for failing to mention the term “honor or reputation” in his report.²⁵³ Based upon these critiques the court called the expert’s report “seriously flawed.”²⁵⁴

Although the report is not reproduced in the opinion, the court’s aggressive posture towards the expert’s report seems far from warranted. The mere fact the expert did not discuss every modification does not necessarily invalidate the numerous changes cited. Also, it was certainly reasonable for the expert to include the “Designed and Produced by Denham Design” attribution as part of the drawing because the attribution was printed next to the illustrations and clearly references them. Additionally, it appears unreasonable that the court should critique the expert for failing to utter the magic words “honor and reputation” in his report. The expert’s report was quite specific, commenting that the changes reduced the “vibrancy and excitement” of the original, “did not accurately reflect the author’s rendering, and did not improve on the work.”²⁵⁵ The expert concluded that the work was subjected to derogatory treatment.²⁵⁶ The court’s criticism of the experts report for lack of specificity in failing to mention the words “honor and reputation” are unjustified.²⁵⁷ Finally, it appears that the court did not treat the changes seriously. The court brusquely dismissed the defendant’s changes as simi-

²⁴⁸ *Id.* at 181.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 182-183.

²⁵¹ *Id.* at 181. The judge seemed to chide the expert’s attention to detail, noting it was “surprising” that the expert “did not appear to have noticed” other modified details in the leaflet. *Id.*

²⁵² *Id.* at 182.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 180.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 182.

lar to “the subject of a Spot the Difference competition in a child’s comic.”²⁵⁸

Further, the court’s language appears to place a difficult burden in front of any artist who attempts to assert moral rights. The court explicitly states that an author’s aggrievement is insufficient for a moral rights claim and that the plaintiff must establish a distortion or mutilation that prejudices the artist’s honor and reputation.²⁵⁹ Taking a more extreme position than the mixed objective/subject standard articulated in *Tidy*, the *Pasterfield* court removes any role for the artist’s subjective perceptions. A troubling inference from this conclusion is that the court, not the artist, knows better how to evaluate the aesthetics of the artist’s creation.

Finally, one wonders at the significance of the court mentioning in passing that Denham tried to keep true to the original and that he was successful in doing so. This might imply that the defendant’s intent is relevant in determining whether the plaintiff can assert her moral rights. In other words, if the defendant believed he was retaining some semblance of the original art that he did not create, then it might mitigate against finding a moral rights injury. Defendants should not be able to assert a good faith defense in a moral rights action.

Another ambiguous issue is whose belief—the artist’s, the court’s, or a third party’s—would determine whether a distortion or mutilation of the work occurred. Returning to *Tidy v. Trustees of the Natural History Museum*, the plaintiff sought to establish that the cartoonist’s own perception influenced whether an actionable mutilation or distortion occurred.²⁶⁰ In support of his argument, the plaintiff presented an Ontario case, *Snow v. Eaton Centre, Ltd.*,²⁶¹ in which the court interpreted a comparable Canadian moral rights provision and stated that the determination of prejudice involved a “subjective element or judgment on the part of the author so long as it is reasonably arrived at.”²⁶² The *Tidy* court construed this phrase as permitting the judge to determine first whether the artist’s view is reasonably held before examining the artist’s subjective judgment.²⁶³ On its surface, the standard might require the court to conduct a dual subjective-objective inquiry, but in practice the examination subordinates the artist’s interpretation to the court’s, whose objective interpretation in essence serves as a hurdle that must be surmounted before inquiring into the artist’s subjective judgment of the treatment of his art. This construction risks placing judges in the role of

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Tidy*, 39 I.P.R. at 504.

²⁶¹ *Snow v. Eaton Centre, Ltd.*, (1982) 70 C.P.R. 2d 105 (Ont. High Ct. Just.).

²⁶² *Tidy*, 39 I.P.R. at 504 (quoting *Snow*, 70 C.P.R. 2d at 106).

²⁶³ *Tidy*, 39 I.P.R. at 504.

making aesthetic evaluations of artwork in context, a role for which judges may be ill-equipped to perform.²⁶⁴

In *Tidy*, the court stated it could not reach an ultimate conclusion regarding prejudice because it was resolving a motion for summary judgment before trial.²⁶⁵ The court hinted, however, that the objective person might be “any reasonable person looking at the reproduction,” expressed through “evidence relating to the effect of reproduction of his reputation in the minds of other people.”²⁶⁶ Who the “other people” are makes a difference; if “other people” means that anyone from the population who observes the artwork can serve as the gatekeeper of the objective element, showing prejudice may be virtually impossible. Given the widespread commercialism and challenge of understanding art in modern media,²⁶⁷ citizens untrained in the interpretation or explanation of art in context may be hard-pressed to make the connection that a modification of a work prejudices the non-consenting artist. By contrast, the objective opinion of art experts, art connoisseurs, and followers of an artist’s work may better represent the relevant objective opinion necessary (assuming that an objective opinion should even be necessary) to establish prejudice of moral rights. *Tidy*, unfortunately, leaves no indication that objectivity should require knowledge of the field.

The current state of moral rights in the United Kingdom leaves issues unresolved, the primary mystery being how courts establish to what extent an artist’s judgment about derogatory treatment of his work is relevant in determining whether a breach of moral rights exists. On one pole lies the *Pasterfield* case, where the perceptions of the artist seemed to carry little if any work. Near the center lies the *Tidy* case, which appears to endorse (though not necessarily apply) a mixed subjective-objective standard whereby the perceptions of both the artist and the public are considered, with the court acting as a check on the artist to ensure that the artist’s beliefs are reasonable. On the other extreme lies the practice of French courts, largely unaccepted in the United Kingdom, where the subjective perception of the artist plays an important role.

Also, courts must resolve whether an artist must show prejudice to establish that a defendant’s treatment of her work was derogatory. The *Morrison Leahy Music* case did not require prejudice, but *Tidy* required distortion or prejudice, and *Pasterfield* required proof of prejudice.²⁶⁸ Ultimately, if the courts do decide that prejudice is required, a clear statement should be made as to how severe the prejudice must be and in what form must the prejudice manifest in order to constitute an infringement of moral rights.

²⁶⁴ See generally TREIGER-BAR-AM, *supra* note 221, at 4.

²⁶⁵ *Tidy*, 39 I.P.R. at 504.

²⁶⁶ *Id.* at 504-505.

²⁶⁷ See generally Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805 (2005).

²⁶⁸ See TREIGER-BAR-AM, *supra* note 233, at 2 n.2.

IV. CONTEMPORARY MORAL RIGHTS IN THE UNITED STATES

Drawing on Anglo-Saxon jurisprudence, the U.S. viewed creative works within the confines of traditional property interests and not personality theories.²⁶⁹ The U.S. observes a utilitarian approach to creative works, seeking to promote the public good through granting economic incentives for creative endeavors.²⁷⁰ Creative people do not possess rights that are inherent to their creativity; rather, the rights creators receive to their works derive from statutory provisions.²⁷¹ The focus then becomes on the work, not the creator, and the achievement of economic goals and market efficiency for the works.²⁷²

While civil law nations, such as France, expanded moral rights protections through judicial interpretations, the U.S. focused on the adoption of statutory law to safeguard creative rights.²⁷³

Under the limited monopoly of U.S. copyright, statutory law became the vehicle for balancing the economic incentives for individuals to create while allowing public access to creative materials at a reasonable cost.²⁷⁴ Codified doctrines such as fair use and public domain provide increased public rights to use creative works at the expense of the individual inter-

²⁶⁹ Liemer, *supra* note 2, at 35-36; Zabatta, *supra* note 15, at 1107-08. See Pink, *supra* note 2, at 192; Duhl, *supra* note 2, at 705-06; Sherman, *supra* note 1, at 380, 389; Williams, *supra* note 2, at 656-57. See generally Carroll, *supra* note 3 and accompanying text.

²⁷⁰ Antezana, *supra* note 1, at 424, 432-33; Holland, *supra* note 128, at 230; Sherman, *supra* note 1, at 389-90. But see Lacey, *supra* note 1, at 1557-72 (arguing that creators are not primarily motivated by money, but by the desire to create). See Duhl, *supra* note 2, at 705; Lacey, *supra* note 1, at 1533, 1548; Liemer, *supra* note 2, at 43-44 and text accompanying note 31.

²⁷¹ Holland, *supra* note 128, at 230. Ms. Holland asserted that:

The driving force behind the U.S. copyright law, however, is a utilitarian motivation. The United States grants artists' rights to advance the public welfare by providing incentive for creativity and innovation. In continental Europe, the driving motivation of copyright law is a derivative of natural rights belonging to the artist. Due to the explicit utilitarian view of the U.S. Constitution, the U.S. view on copyright protection derives from economics. Furthermore, the United States does not value an artist's creative work by its contribution to society or its overall social utility. Perceived value directly relates to the price that the public is willing to pay for the work. Thus, the United States does not protect moral rights as an artist's natural right; rather, artists' rights, which the United States protects, are for the benefit of the U.S. economy. The United States has been reluctant to recognize a true moral right. In fact, where the United States has enacted pieces of the moral right, they have significantly limited its definition.

Id. at 230 (footnotes omitted).

²⁷² Antezana, *supra* note 1, at 432-33; Zabatta, *supra* note 15, at 1107-08.

²⁷³ Liemer, *supra* note 2, at 34.

²⁷⁴ Holland, *supra* note 128, at 230.

ests of the creator.²⁷⁵ Therefore, the focus of U.S. law is on the public dissemination of creative works, not the protection of the artist's personality.

Earlier in its history, the U.S. was mainly an importer of intellectual property and saw no need to participate in international copyright conventions.²⁷⁶ Throughout the years, the U.S. consistently rejected efforts to become a member of the Berne Convention because the U.S. did not want to change its own national laws, especially as they applied to moral rights.²⁷⁷ The U.S. opted instead to negotiate bilateral copyright treaties²⁷⁸ and to join the less stringent, Universal Copyright Convention (UCC) which contained no moral rights language.²⁷⁹

The U.S. maintains a long-standing opposition to the Berne Convention and moral rights, arguably derived from a combination of factors. Some critics of moral rights suggest that adopting the Berne Convention would negatively impact economic interests, placing a chilling effect on investment in creative works.²⁸⁰ Consequently, this chilling effect would decrease investment in the arts and entertainment industries, leading to fewer creative works in the public forum.²⁸¹ A second notion suggests

²⁷⁵ Duhl, *supra* note 2, at 706-07; Lacey, *supra* note 1, at 1544-45, 1555-57; Yonover, *supra* note 21, at 92-93; 103-04. See *infra* notes 387-88 and accompanying text.

²⁷⁶ Antezana, *supra* note 1, at 423, 434 (noting that the U.S. was considered a safe harbor for literary piracy, especially of best-selling British works); Sherman, *supra* note 1, at 397; Zabatta, *supra* note 15, at 1106.

²⁷⁷ Antezana, *supra* note 1, at 420; Holland, *supra* note 128, at 228, 230. Registration formalities and the length of time for copyright protection also played a role in the U.S. refusal to sign up for the Convention. Antezana, *supra* note 1, at 424. In 1935, the Senate took up the ratification of the Convention but halted its efforts when it recognized that substantial changes would need to be made to then current U.S. copyright laws in order for compliance. *Id.*; Sherman, *supra* note 1, at 398.

²⁷⁸ Antezana, *supra* note 1, at 424 (commenting that these treaties are "piecemeal" efforts). See Caviedes, *supra* note 1, at 181-83 (criticizing U.S. use of bilateral treaties because they reduce strength of international conventions and promote confusing and unfair intellectual property schemes that encourage piracy).

²⁷⁹ Antezana, *supra* note 1, at 424-25; Caviedes, *supra* note 1, at 172-73; Sherman, *supra* note 1, at 399-400; Zabatta, *supra* note 15, at 1105-06. Administered by UNESCO, the UCC sought to draw more nations into adopting international copyright protections. Antezana, *supra* note 1, at 424-25; Caviedes, *supra* note 1, at 172-73; Sherman, *supra* note 1, at 400. The UCC lost its importance when subsequent revisions to the Berne Convention trumped its protections and prevented member states from repudiating the Convention if they joined the UCC. Caviedes, *supra* note 1, at 173.

²⁸⁰ Carl H. Settlemeyer III, *Between Thought and Possession: Artists' "Moral Rights" and Public Access to Creative Works*, 81 GEO. L. J. 2291, 2309-10 (1993) (citing Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Causation*, 14 NOVA L. REV. 421, 423-24 (1990)).

²⁸¹ *Id.*

that moral rights could lead to a private system of censorship based upon the “aesthetic veto” of the creator and which would detrimentally affect public access and free expression.²⁸² Other commentators argue that U.S. laws are products of the lobbying efforts of the powerful media and entertainment industries who seek to maximize their own economic dominance over disadvantaged creative individuals.²⁸³

Over time, however, the U.S. became an important intellectual property exporter and grew concerned about protecting its economic interests in foreign nations.²⁸⁴ The protections of the Berne Convention soon outpaced the UCC provisions and the Convention became the international standard for the protection of creative works.²⁸⁵ As a result, the U.S. found itself isolated from worldwide copyright development, risking important international safeguards in favor of its own intellectual property laws and losing out on its ability to influence future international norms.²⁸⁶ Finally, in 1976, the U.S. undertook the first major revisions to

²⁸² *Id.*

²⁸³ See Sherman, *supra* note 1, at 398, 400-01. See *infra* note 153-55 and accompanying text.

²⁸⁴ Antezana, *supra* note 1, at 426, 434; Caviedes, *supra* note 1, at 173; Sherman, *supra* note 1, at 398-99. Addressing concerns about the need for greater harmonization of international intellectual property safeguards, Mr. Caviedes noted that:

[I]ndustrialized nations’ fear of losing valuable assets to developing nations for lack of better protection of their intellectual property. In an interdependent international economy, producers in the more developed nations faced substantial losses through weak foreign protection of their intellectual property rights. Two results of weak international intellectual property protection are the distortion of trade in legitimate goods and an increase of pirated and/or counterfeited goods. The international community has responded to these undesirable results either by taking unilateral measures or by making bilateral agreements, or a combination of both.

Increasing trade deficits throughout the 1980s motivated the U.S. to search for explanations. A primary cause was found to be an insufficient level of intellectual property protection that reduced the competitiveness of U.S. businesses internationally and the U.S. documented increased losses due to piracy of intellectual property in international trade.

Caviedes, *supra* note 1, at 179 (footnotes omitted). See President Reagan’s Statement, 1988-1989 BOOK II PUB. PAPERS 1417, 1417-18 (October 31, 1988) (citing trade balance concerns and multi-billion dollar losses for entertainment, software and computer industries as motivating factors in signing onto membership in Berne Convention).

²⁸⁵ Caviedes, *supra* note 1, at 173; Zabatta, *supra* note 15, at 1106-07.

²⁸⁶ Sherman, *supra* note 1, at 397, 400-01. Copyright expert David Nimmer indicated that “[f]or most of its two centuries the United States [was] a copyright island, its jurisprudence having evolved in isolation from developments elsewhere.” *Id.* Therefore, by joining, the United States was able to gain a substantial amount of protection for its intellectual property exports, and at the same time it would finally become a Berne ‘insider.’ In this new position, the United States would be better able

its copyright laws since 1909, seeking to inch closer to Berne membership by adopting regulations like the extension of the duration of copyright.²⁸⁷

The 1976 Copyright Act retained the back-handed application of the right of integrity in the Act's compulsory licensing provisions.²⁸⁸ Under Section 115, a third party may acquire a compulsory license from a copyright owner to sing, perform, or record an original musical composition, referred to as a "cover song."²⁸⁹ The copyright holder may not reject the license request provided that the cover song performance or recording does not change the original song's "basic melody or fundamental character."²⁹⁰ While this section seems to provide an implicit right of integrity,²⁹¹ it is not an accurate reflection of moral rights doctrine because the copyright holder is often not the actual creator of the music, and the creator still loses all of her discretion and control over her musical work when required to license away her creation.²⁹²

to play a role in shaping the future of international copyright protection law while protecting its rapidly growing copyright-based industries." Sherman, *supra* note 1, at 400-01 (footnotes omitted).

²⁸⁷ Antezana, *supra* note 1, at 425-26; Sherman, *supra* note 1, at 397, 401-02.

²⁸⁸ 17 U.S.C. §115 (2000). This type of licensing is often referred to as a "mechanical license." See Kenneth M. Achenbach, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J. L. & TECH. 187, 207-08 (2004); Johnstone, *supra* note 25, at 425. Under this 1909 provision, Congress sought to avoid a monopoly in the distribution of music between the Aeolian Company, a maker of player piano rolls, and national music publishers through exclusive dealings contracts and to promote healthy industry competition for musical works. Achenbach, *supra* note 288, at 207-08; Randy S. Kravis, Comment, *Does A Song By Any Other Name Still Sound As Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM. U.L. REV. 231, 272 (1993).

²⁸⁹ 17 U.S.C. § 115(a)(1) (2000). See Kwall, *supra* note 2, at 38-39; Zabatta, *supra* note 15, at 1114-15.

²⁹⁰ 17 U.S.C. § 115(a)(2) (2000). This section states:

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.

Id.

²⁹¹ Johnstone, *supra* note 25, at 431; Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 296 (1996). See generally Desai, *supra* note 15, at 1, 6, 11, 20.

²⁹² See Greene, *supra* note 32, at 369-70; Neela Kartha, Comment, *Digital Sampling and Copyright Law in a Social Context: No More Color-Blindness!!*, 14 U. MIAMI ENT. & SPORTS L. REV. 218, 224 (1996-1997) (contending that copyright law is racially-biased by permitting white appropriation of innovative black music, such as rap and jazz, through compulsory licensing of cover songs). See *supra* notes 36-46 and accompanying text.

In the wake of the updated copyright laws and criticism from other Berne nations, Congress embarked on a spirited debate in the 1980s over joining the Berne Convention.²⁹³ One of the main stumbling blocks to joining the Berne Convention remained the adoption of moral rights protections.²⁹⁴ In a self-serving move, the U.S. finally adopted the Berne Convention in 1988 in hopes of reaping the economic benefits while sidestepping its obligations to defend moral rights.²⁹⁵ Under the Berne Convention Implementation Act (BCIA),²⁹⁶ Congress determined that the Convention would not be self-executing but, instead, would require specific legislative enactments.²⁹⁷ By taking this approach, Congress could avoid formally establishing moral rights obligations.²⁹⁸ The BCIA explicitly waived off the rights of attribution and integrity²⁹⁹ and prevented artists from bringing legal actions in the U.S. to defend their moral rights under the provisions of the Convention.³⁰⁰

²⁹³ Antezana, *supra* note 1, at 426, 429; Holland, *supra* note 128, at 231; Settlemyer, *supra* note 280, at 2306; Sherman, *supra* note 1, at 401-03.

²⁹⁴ Antezana, *supra* note 1, at 425-26; Sherman, *supra* note 1, at 397, 403.

²⁹⁵ Antezana, *supra* note 1, at 426-27; Holland, *supra* note 128, at 231; Settlemyer, *supra* note 280, at 2307-08; Sherman, *supra* note 1, at 405-06.

²⁹⁶ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 [hereinafter BCIA]. Original proposals for the BCIA contained moral rights provisions, but were struck from the final act based on political concerns that the Act would not pass with such clauses. See 134 CONG. REC. 10320-10326, 10323 [hereinafter Kastenmeier Statement]; Zabatta, *supra* note 15, at 1109-10.

²⁹⁷ Kastenmeier Statement, *supra* note 296, at 10323. See Holland, *supra* note 128, at 231.

²⁹⁸ Kastenmeier Statement, *supra* note 296, at 10323. Sen. Kastenmeier stated that, “[w]hile we do not add a moral rights provision to the law, we also do not intend to freeze current law or to preempt it.” *Id.* See Holland, *supra* note 128, at 231.

²⁹⁹ See BCIA, Pub. L. No. 100-568, 102 Stat. 2853 §3(b)(1-2). The Act states that in construing the Berne Convention the following:

(b) Certain Rights Not Affected. – [T]he adherence of the United States to the Berne Convention, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work. . .

(1) to claim authorship of the work; or

(2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author’s honor or reputation.

Id.

³⁰⁰ BCIA, Pub. L. No. 100-568, 102 Stat. 2853. The BCIA indicates as follows:

(c) Effect of Berne Convention.—No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention or the adherence of the United States thereto.

Congress argued that it would take a “minimalist approach” to moral rights³⁰¹ and did not enact statutory provisions to implement Article 6bis.³⁰² Congress asserted that there was no need to change U.S. laws because creators could seek adequate relief for moral rights under existing federal and state laws and tort theories³⁰³—a rather disingenuous claim considering the United States’s rejection of the Convention for over a century could be traced back precisely to the need to change U.S. laws.³⁰⁴ Observing that other Berne signatories were not in full compliance with the Convention and that Berne’s enforcement mechanisms had never been used against such outliers, the U.S. decided that it could similarly pick and choose which provisions to adhere to under the Convention.³⁰⁵

Despite congressional claims of adequate moral rights protections, U.S. courts consistently rejected claims based upon moral rights doctrine before U.S. accession to the Convention.³⁰⁶ Even after the BCIA,

Id. See, e.g., Choe v. Fordham University School of Law, 920 F. Supp. 44 (S.D.N.Y. 1995) (dismissing right of integrity case concerning publication of mutilated law review article, court found no cause of action for moral rights in federal courts based on Article 6bis of Berne Convention). *See* Sherman, *supra* note 1, at 405-06.

³⁰¹ Kastenmeier Statement, *supra* note 296, at 10323. Sen. Kastenmeier contended that “[a]lmost everyone agrees that any legislation should employ the minimalist approach. Legislative efforts to perfect this or that feature of our copyright law, unnecessary to secure Berne membership, can and should be deferred [sic] for another day.” *Id. See* Antezana, *supra* note 1, at 426-27; Holland, *supra* note 128, at 231; Zabatta, *supra* note 15, at 1109.

³⁰² *See* Antezana, *supra* note 1, at 426-27; Holland, *supra* note 128, at 231;

³⁰³ Kastenmeier Statement, *supra* note 296, at 10323. Sen. Kastenmeier baldly asserted that “[m]ost observers agree that current law, including the Lanham Act and laws relating to defamation, privacy, publicity, and unfair competition, contains the basic elements of moral rights sufficient to comply with Berne.” *Id. But see* Antezana, *supra* note 1, at 427 (indicating that many experts find that the U.S. does not provide adequate moral rights safeguards, but offers only “a motley group of federal regulations and state common laws”); Liemer, *supra* note 2, at 6 (stating that U.S. compliance with Berne is “questionable”); Settlemeyer, *supra* note 280, at 2307-08 (asserting that most commentators do not believe that existing U.S. laws and common law doctrines comply with either the letter or spirit of the Berne convention); Zabatta, *supra* note 15, at 1110-11 (noting that BCIA was viewed as “circumventing the spirit of the Convention”).

³⁰⁴ *See supra* notes 277, 280-83, 294-95 and accompanying text.

³⁰⁵ Antezana, *supra* note 1, at 427; Zabatta, *supra* note 15, at 1110.

³⁰⁶ Sherman, *supra* note 1, at 392, 394. *See, e.g.,* Gilliam v. Am. Broad. Cos., Inc., 538 F.2d 14, 23-25 (2d Cir. 1976) (finding for Monty Python creators against improper editing or mutilation of their series in contract, but explicitly rejecting recognition of moral rights under copyright); Grantz v. Harris, 198 F.2d 585 (2d Cir. 1952) (holding in absence of contractual right, artist not required to receive proper attribution for his work); Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947) (holding in absence of contractual provision, artist may not demand right of attribution for drawings

numerous court decisions explicitly stated that U.S. laws did not recognize moral rights.³⁰⁷ Efforts to address moral rights issues through statutes, such as the Lanham Act,³⁰⁸ and alternative legal theories, such as defamation, unfair competition, and invasion of privacy, were often shot

appearing in magazine); *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813 (Sup. Ct. 1949) (holding in absence of contractual right, church allowed to paint over artist's mural without his consent, rejecting any moral rights claim). See *supra* notes 121-127 and accompanying text.

³⁰⁷ *Seshardi v. Kasraian*, 130 F.3d 798 (7th Cir. 1997) (rejecting endorsement of moral right of paternity under copyright law in dispute over publication of applied physics academic article); *Choe v. Fordham Univ. Law School*, 920 F. Supp. 44, 49 (S.D.N.Y. 1995) (claiming there are no federal statutory or common law protections for moral rights in mutilated law review article); *Rey v. Lafferty*, 990 F.2d 1379 (1st Cir. 1993) (indicating no moral rights protection under copyright law for allegedly unauthorized Curious George books and videos); *Serra v. U. S. Gen. Servs. Admin.*, 667 F. Supp. 1042 (S.D.N.Y. 1987) (dismissing sculptor's bid to stop GSA's removal and eventual destruction of sculpture "Tilted Arc"), *aff'd* 847 F.2d 1045 (2d Cir. 1988). See *infra* notes 335-41 and accompanying text.

³⁰⁸ Courts have handed down inconsistent decisions on Lanham Act protections for moral rights claims, suggesting that moral rights claims do not fit neatly into the Act's provisions. See, e.g., *Dastar v. Twentieth Century Fox*, 539 U.S. 23, 37 (2003) (determining that Lanham Act does not apply to misattribution or uncredited copying of a creative work); *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210 (11th Cir. 2000) (finding use of film and promotional materials modeled after famous photograph of "Bird Girl" statue not actionable under moral rights or Lanham Act); *Batiste v. Island Records, Inc.*, 179 F.3d 217 (5th Cir. 1999) (claiming mutilation of song "*Funky Soul*" not actionable under Lanham Act); *Boosey & Hawkes Music Publ'rs, Ltd. v. Walt Disney Co.*, 934 F. Supp. 119 (S.D.N.Y. 1996) (finding Lanham Act does not provide moral rights protection for alleged lack of proper attribution and mutilation of Stravinsky's *Rite of Spring*, a public domain musical composition, contained in *Fantasia* video release); *Halicki v. United Artists*, 812 F.2d 1213 (9th Cir. 1987) (finding that film producer lacked standing and, in dicta, refusing to apply moral rights to Lanham Act claims as in *Gilliam*); *Gilliam*, 538 F.2d at 26-27 (Gurfein, J., concurring). In addressing Lanham Act protections in a concurrence in *Gilliam*, Judge Gurfein indicated that the act does not protect the right of attribution or integrity. *Id.* at 27. He wrote, "[s]o far as the Lanham Act is concerned, it is not a substitute for droit moral which authors in Europe enjoy. If the licensee may, by contract distort the recorded work, the Lanham Act does not come into play. . . [and] does not deal with artistic integrity." *Id.* See generally Michael Landau, *Dastar v. Twentieth Century Fox: The Need for Stronger Protection of Attribution Rights in the United States*, 61 N.Y.U. ANN. SURV. AM. L. 273 (2005) (criticizing *Dastar* case as incorrectly abolishing trademark attribution rights). But see *Gilliam*, 538 F.2d at 24-25 (determining, in dicta, that cause of action under Lanham Act should be recognized for defendant's presentation of 'garbled' and "distorted" version of plaintiff's comedy series); *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981) (holding actor's demand for proper credit or attribution in film credits and promotional materials is actionable under Lanham Act).

down in the courts, blocking meaningful judicial recognition and protection of moral rights.³⁰⁹

While earlier federal law continued to ignore moral rights, fourteen states and Puerto Rico enacted some type of moral rights protections.³¹⁰

³⁰⁹ Kwall, *supra* note 2, at 25-27; Liemer, *supra* note 2, at 48-49; Lacey, *supra* note 1, at 1552; Sherman, *supra* note 1, at 392-93; Zabatta, *supra* note 15, at 1123-24. Prof. Kwall stated that:

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. 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.

Even contract law, which is the purported basis for decision in many cases concerning the integrity and paternity components of the moral right doctrine, cannot function as an adequate substitute. In addition to the limitations presented by the privity requirement and the judiciary's general reluctance to afford extensive protections for creators absent express contractual provisions, relatively unknown creators face a disparity of bargaining power that frequently results in a loss of valuable protections.

Kwall, *supra* note 2, at 25-27 (footnotes omitted). In addition, Prof. Sherman noted that:

Notwithstanding the tangential effects of selected sections of the current Copyright Act, as well as the alternative, but incomplete, legal analogues to moral rights laws, there are many examples of American artists who have had no legal recourse to prevent their work from being altered or destroyed by their owners.

Some recent and notable pre-VARA examples of the treatment of works of art as mere chattel include the destruction of a sculpture by noted artist Isamu Noguchi, the rather bizarre alteration of a Calder mobile, and the sale of individual panels of a multipanel work by James Rosenquist as separate works. In each of these cases, the artist had no legal recourse.

Sherman, *supra* note 1, at 393-94 (footnotes omitted). See Heide, *supra* note 8, at 251-52; Yonover, *supra* note 21, at 88-89 and text accompanying note 108. See generally Zabatta, *supra* note 15, at 1111-24 (discussing lack of compliance with Berne Convention based on inadequacies of federal and state laws, and common law theories to protect rights of attribution and integrity).

³¹⁰ See, e.g., CAL. CIV. CODE §§ 980-990 (West 2006); ART PRESERVATION AND ARTISTS' RIGHTS, CONN. GEN. STAT. § 42-116s (2006); CONSIGNMENT OF ART ACT, 815 ILL. COMP. STAT. §§ 320/1-8 (2005); ARTISTS' AUTHORSHIP RIGHTS ACT, LA. REV. STAT. 51:2151-56 (2006); ME. REV. STAT. ANN. tit. 27 § 303(1)-(5) (2005); MASS. GEN. LAWS ANN. ch. 231, § 85S (West 2006); NEV. REV. STAT. ANN. § 597.720-760 (LexisNexis 2006); ARTISTS' RIGHTS ACT, N.J. STAT. ANN. § 2A:24A1-8 (West 2006); ARTISTS' CONSIGNMENT ACT, N.M. STAT. ANN. §§ 56-11-1 to -3 (West 2006); FINE ART IN PUBLIC BUILDINGS, N.M. STAT. ANN. §§ 13-4B-1 to B-3 (West 2006); N.Y. ARTS & CULT. AFF. LAW §§ 11.01-14, 13.01-13.19 (LexisNexis 2006); FINE ARTS PRESERVATION ACT, 73 PA. CONS. STAT. §§ 2101-10 (2005); WORKS OF ART - ARTISTS' RIGHTS, R.I. GEN. LAWS §§ 5-62-2 to -12 (2006); S.D. CODIFIED LAWS § 1-22-16 (2006); PERCENT-FOR-ART ACT, UTAH CODE ANN. § 9-6-409 (2006); P.R. LAWS ANN. tit. 31, §§ 1401-1401h (2004).

Most state laws include the right of integrity and attribution, and others also grant the right of resale royalties.³¹¹ The California and New York statutes cover only fine or visual arts and are considered models for other similar state laws.³¹² For example, some states expressly include film and videotape,³¹³ while others specifically exclude such works.³¹⁴ Some states protect only public art,³¹⁵ but others extend protection to both public and private art.³¹⁶ Except for Puerto Rico, no state moral rights laws protect musical works.³¹⁷ State statutes vary not only on what artistic works are covered but also on issues of moral rights duration, waivers, and remedies.³¹⁸ Lacking uniformity and sufficient state participation, state moral

³¹¹ See generally Heide, *supra* note 8, at 233-35 (reviewing key differences between state moral rights statutes); Brian T. McCartney, "Creepings" and "Glimmers" of the Moral Rights of Artists in American Copyright Law, 6 UCLA ENT. L. REV. 35, 55-71 (1998) (providing state-by-state summary of moral rights laws). Puerto Rico provides the broadest moral rights protections to the widest range of creative works. Under sections 1401 and 1401(a) of the Puerto Rico statute reads as follows:

The author or beneficiary of a literary, scientific, artistic and/or musical work has the right to benefit from it, and the exclusive prerogatives to attribute to him/herself or retract its authorship, dispose of his/her work, authorize its publication and protect its integrity, in accordance with the special laws in effect on the matter. . . .

Moral law allows whoever creates a work, to enjoy the benefits of its authorship, as established in § 1401 of this title.

P.R. LAWS ANN. tit 31, §§ 1401-1401(a).

³¹² Patricia Alexander, *Moral Rights in the VARA Era*, 36 ARIZ. ST. L.J. 1471, 1474-75 (2004); Zabatta, *supra* note 15, at 1119. New York law considers fine art to be "a painting, sculpture, drawing, or work of graphic art, and print, but not multiples." N.Y. ARTS & CULT. AFF. LAW § 11.01(9). The California statute defines "fine art" more broadly than New York:

[A]ny work of visual art, including but not limited to, a drawing, painting, sculpture, mosaic, or photograph, a work of calligraphy, work of graphic art (including an etching, lithograph, offset print, silk screen, or a work of graphic art of like nature), crafts (including crafts in clay, textile, fiber, wood, metal, plastic, and like materials), or mixed media (including a collage, assemblage, or any combination of the foregoing art media).

CAL. CIV. CODE §982 (d)(1).

³¹³ See, e.g., CONSIGNMENT OF ART ACT, 815 ILL. COMP. STAT. 320/1(7)(a); MASS. GEN. LAWS ANN. ch. 231, § 85S(b); FINE ART IN PUBLIC BUILDINGS, N.M. STAT. ANN. § 13-4B-2(B).

³¹⁴ See, e.g., ARTISTS' AUTHORSHIP RIGHTS ACT, LA. REV. STAT. § 51:2152(7); ME. REV. STAT. ANN. tit. 27, § 303(1)(D); ARTISTS' RIGHTS ACT, N.J. STAT. § 2A:24A-3(e).

³¹⁵ See, e.g., S.D. CODIFIED LAWS §1-22-16; PERCENT-FOR-ART ACT, UTAH CODE ANN. § 9-6-409.

³¹⁶ See, e.g., CAL. CIV. CODE §§ 980-990; N.Y. ARTS & CULT. AFF. LAW §§ 11.01-14.

³¹⁷ See *supra* note 311 and accompanying text.

³¹⁸ See *id.*

rights laws are further hobbled by the territorial limits of their jurisdiction over creative works,³¹⁹ lacking the reach needed to deal with cross-border and online artists' rights issues.³²⁰ Although these laws have their weaknesses, these statutes at least afford protections not available to artists on a federal level at this time.

Congress soon undercut these state moral rights laws by amending the copyright laws through the enactment of the Visual Artists Rights Act (VARA)³²¹ in 1990. VARA largely pre-empts state laws³²² and offers less generous moral rights protections than earlier state statutes.³²³

³¹⁹ Holland, *supra* note 128, at 240.

³²⁰ Heide, *supra* note 8, at 235.

³²¹ 17 U.S.C. § 106A (2005). *See generally* Liemer, *supra* note 2, at 2-5; Sherman, *supra* note 1, at 407-23 (each article provides overview of VARA provisions).

³²² Heide, *supra* note 8, at 233; McCartney, *supra* note 311, at 55-56; Zabatta, *supra* note 15, at 1119. VARA contains an explicit pre-emption clause that indicates that:

On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990 [17 USC § 106A note], all legal or equitable rights that are equivalent to any of the rights conferred by section 106A [17 USC § 106A] with respect to works of visual art to which the rights conferred by section 106A [17 USC § 106A] apply are governed exclusively by section 106A [17 USC § 106A] and section 113(d) [17 USC § 113(d)] and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990 [17 USC § 106A note];

(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A [17 USC § 106A] with respect to works of visual art; or

(C) activities violating legal or equitable rights which extend beyond the life of the author.

17 U.S.C. § 301(f)(1) (2005). *See* *Gegenhuber v. Hystopolis Production Inc.*, 1992 U.S. Dist. LEXIS 10156 (N.D. Ill. July 13, 1992) (granting remand after original state action was removed to federal court based on pre-emption of moral rights under VARA); *Bd. of Mgrs. of Soho Int'l Arts Condo*, 2003 U.S. Dist. LEXIS 10221 (S.D.N.Y. Jun. 17, 2003) (finding action to protect wall mural under N.Y. moral rights law pre-empted by VARA); *Lubner v. City of Los Angeles*, 53 Cal. Rptr. 2d 24 (Cal. Ct. App. 1996) (holding VARA pre-empts claim of damage to reputation due to destruction of paintings under California Art Preservation Act). *But see* *Phillips v. Pembroke Real Estate Inc.*, 288 F. Supp. 2d 89 (D. Mass. 2003) (holding VARA does not pre-empt broader provisions of state moral rights laws which would cover action concerning sculpture park).

³²³ For example, VARA does not allow the exercise of any post-mortem moral rights, 17 U.S.C. § 106A(d)(2), while most state laws allow for heirs to exercise the right, sometimes up to 50 years after the creator's death. *See, e.g., CAL. CIV. CODE*

While the federal law explicitly recognizes moral rights, VARA does not provide U.S. artists with the same level of protection as their European colleagues.³²⁴ Eric B. Hiatt concludes:

Despite Congress's recognition of these federally-created moral rights, these specific moral rights are still inferior to those recognized by the United States' European counterparts. While the enactment of VARA suggests that America is on its way to recognizing the moral right of creative artists, VARA has three distinct shortcomings. First, VARA only protects a specific type of artist. Second, VARA only protects certain types of art. Finally, even if a work meets the VARA definitions of "visual artist" and "visual art," a number of exceptions may still prevent the artist from protection. One of the many exceptions concerns works "made for hire"—the definition of a visual art in the Act excludes a "work made for hire." The relevant part of the Copyright Act defines a work made for hire as "a work prepared by an employee within the scope of his or her employment." This exception will effectively exclude most of the professionals who are seeking to have their work protected. Another exception is that VARA's right of integrity does not extend to complete destruction except for works of "recognized stature." Even setting aside an artists' economic interests, most artists, whether they are successful or not, presumably would prefer not to have their work destroyed, even after selling the work. In addition, society is probably better off by preserving creative works, even for display. Lastly, rights under VARA only endure for the life of the artist.³²⁵

The Act severely restricts moral rights by creating limited categories of protected creative works.

§987(c)(2), (g)(1) (West 2006); CONN. GEN. STAT. §42-116s (4)(d) (2006); 31 P.R. LAWS ANN. §1401(c) (2004). Some state laws also recognize more than the rights of attribution and integrity, such as the right of withdrawal (*see, e.g.*, 31 P.R. LAWS ANN. §1401) and the right of resale royalties (*see, e.g.*, CAL. CIV. CODE §986(7)(b)(2)). In addition, state laws often protect reproductions while VARA applies only to originals. *See, e.g.*, CAL. CIV. CODE §982(d)(3); LA. REV. STAT. 51:2152(5); N.Y. ARTS & CULT. AFF. LAW §11.01(16). *See supra* note 311 and accompanying text.

³²⁴ Eric B. Hiatt, Note and Comment, *The "Dirt" On Digital "Sanitizing": Droit Moral, Artistic Integrity and The Directors Guild of America v. Cleanflicks Et Al.*, 30 RUTGERS COMPUTER & TECH. L.J. 375, 395-96 (2004); Holland, *supra* note 128, at 234-35. Congress contended that VARA was not necessary to comply with the Berne Convention, but merely brought "U.S. law into greater harmony with laws of other Berne countries." H.R.REP. NO. 101-514, at 7-8, 10 (1990). Representative Robert Kastenmeier, then Chairman of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice, commented that, "[w]hile this title is not necessary for this country's adherence to the Berne Convention . . . it certainly strengthens our commitment to that convention." 136 Cong. Rec. H13313 (daily ed. Oct. 27, 1990) (statement of Rep. Kastenmeier).

³²⁵ Holland, *supra* note 128, at 234-35 (footnotes omitted).

VARA covers only the visual fine arts, such as paintings, drawings, prints, and sculptures, either in their original form or in limited numbered and signed editions of 200 or fewer.³²⁶ The Act does not apply to musical works, and expressly excludes a broad range of visual works, including posters, maps, motion pictures, books, and other periodicals, promotional and marketing materials, and any employee works made for hire.³²⁷ The U.S. Copyright Office offers a Visual Arts Registry that allows visual artists to record their work,³²⁸ but VARA safeguards only the rights of integrity and attribution (including misattribution)³²⁹ during the life of

³²⁶ 17 U.S.C. §101 (2006). The Act states,

A “work of visual art” is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

Id.

³²⁷ *Id.* The exclusions under VARA include:

(A) (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

Id. Congress has also further chipped away at the moral rights of film directors by allowing at home use of censorship tools that edit out offensive language and scenes from videos. *See generally* Hiatt, *supra* note 324, at 394-95 (calling for inclusion of motion pictures under VARA’s moral rights provisions); Holland, *supra* note 128, at 252 (contending that U.S. should withdraw from Berne or accept sanctions for passage of private film censorship under the Family Movie Act of 2005).

³²⁸ Visual Arts Registry, 37 C.F.R. 201.25 (2000), *available at* <http://www.copyright.gov/title37/201/37cfr201-25.html> (last visited March 6, 2007).

³²⁹ 17 U.S.C. § 106A(a). The moral rights sections provides for:

(a) Rights of attribution and integrity. Subject to section 107 [17 USC § 107] and independent of the exclusive rights provided in section 106 [17 USC § 106], the author of a work of visual art—

(1) shall have the right—

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other

the creator with no post-mortem rights for heirs to exercise.³³⁰ An artist can only avoid the intentional or grossly negligent destruction of a protected work if she can show that the work had previously achieved “recognized stature.”³³¹ Under VARA, artists’ rights are alienable by written contract provided that the waiver identifies the work and its agreed-upon

modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d) [17 USC § 113(d)], shall have the right—

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

Id. See *supra* notes 103, 105 and 198 and accompanying text.

³³⁰ 17 U.S.C. §§ 106A(d)(1)-(2). Unlike the perpetual protections of France, VARA limits the duration of these limited moral rights safeguards as follows:

(d) Duration of rights.

(1) With respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.

(2) With respect to works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106 [17 USC § 106].

(3) In the case of a joint work prepared by two or more authors, the rights conferred by subsection (a) shall endure for a term consisting of the life of the last surviving author.

(4) All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.

Id. See *supra* notes 103, 105 and 198 and accompanying text.

³³¹ 17 U.S.C. § 106A(a)(3)(b).

uses.³³² In addition, the statute's truncated moral rights are subject to fair use principles, including parody.³³³

Since the enactment of VARA, only one artist has won any monetary damages under the Act,³³⁴ and only one artist has prevailed on the right to attribution.³³⁵ The rest of the cases have been unsuccessful,³³⁶ largely because the creative works were not within the narrow categories of vis-

³³² 17 U.S.C. § 106A(e)(1). See generally Sherman *supra* note 1, at 416-29 (discussing various waiver provisions in detail and proposes uniform waiver clauses under VARA). See *supra* notes 106-107 and accompanying text. In enacting VARA, Congress recognized that waivers presented concerns about the weak bargaining position of artists in the commercial realm. Alexander, *supra* note 312, at 1490-91; RayMing Chang, *Revisiting the Visual Artists Rights Act of 1990: A Follow-up Survey About Awareness and Waiver*, 13 TEX. INTELL. PROP. L.J. 129, 132 (2005). Congress required the U.S. Copyright Office to undertake a study of waivers in 1995, which found that an overall lack of awareness of the law in the arts community and a review of the issue of waivers as "inconclusive." Alexander, *supra* note 312, at 1490-91; Chang, *supra*, at 132. The report found that less than 50% of the respondents were aware of VARA. Alexander, *supra* note 312, at 1491. The 1995 report suggested that Congress subsequently reexamine the impact of moral rights waivers. Chang, *supra* note 332, at 132. Congress never revisited the VARA waiver issues since the results of the 1995 survey. *Id.* at 138.

³³³ Holland, *supra* note 128, at 235-36. The codified provision on fair use states that:

Notwithstanding the provisions of sections 106 and 106A [17 USC §§ 106 and 106A], 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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (2005). See *infra* notes 387-91 and accompanying text.

³³⁴ *Martin v. City of Indianapolis*, 4 F. Supp. 2d 808 (S.D. Ind. 1998) (awarding artist \$20,000 in statutory damages and \$131,252.55 in attorney's fees, costs and expenses for City's destruction of stainless steel sculpture in urban renewal project), *aff'd* 192 F.3d 608 (7th Cir. 1999). See Chang, *supra* note 332, at 141-43 (considering anecdotal reports of additional VARA settlements and threats of litigation).

³³⁵ *Grauer v. Deutsch*, 2002 U.S. Dist. LEXIS 19233 (S.D.N.Y. 2002) (holding photographer needed to provide attribution to photographic assistant in public exhibit of photographs).

ual fine arts,³³⁷ involved moral rights not contained in the Act,³³⁸ or failed to meet other VARA requirements.³³⁹ Indeed, VARA has been heavily criticized as inadequate to protect moral rights or to comply with the minimum requirements of the Berne Convention.³⁴⁰ In addition, reports show that few artists are even aware of VARA or its requirements.³⁴¹

Clearly, the U.S. has stumbled in attempting to comply with moral rights obligations for creative works under the Berne Convention. In fact, the U.S. has failed to address moral rights for musical works under the terms of both the Convention and the WPPT. Interestingly, while the U.S. continues to avoid the enactment of moral rights for musical works, the United Kingdom recently put into effect moral rights regulations for musical performances. These U.K. regulations may help serve as a guide

³³⁶ Alexander, *supra* note 312, at 1477-94; Chang, *supra* note 332, at 132; McCartney, *supra* note 311, at 50-55.

³³⁷ Pollara v. Seymour, 344 F.3d 265 (2d Cir. 2003) (finding banner as promotional material not protected under VARA provisions); Lee v. A.R.T. Co., 125 F.3d 580 (7th Cir. 1997) (holding artist's lithographs and note cards mounted on tiles without her consent not visual work of art under VARA); Carter v. Helmsley Spear, Inc., 71 F.3d 77 (2d Cir. 1995) (holding sculpture as made for hire work is not protected under VARA), *cert. denied* 517 U.S. 1208 (1996); Lilley v. Stout, 384 F. Supp. 2d 83 (D.D.C. 2005) (holding photograph does not qualify for VARA protection as it was not produced solely for exhibition purposes); Berrios Nogueras v. Home Depot, Inc., 330 F. Supp. 2d 48 (D.P.R. 2004) (holding right of integrity and attribution not violated as work appeared in VARA-exempted promotional materials); Phillips v. Pembroke Real Estate Inc., 288 F. Supp. 2d 89, 99 (D.Mass. 2003) (holding park not considered a visual work of art under VARA); Silberman v. Innovation Luggage, 2003 U.S. Dist. LEXIS 5420 (S.D.N.Y. 2003) (finding reproductions of photograph, not signed originals, used in promotional materials not protected under VARA); Peker v. Masters Collection, 96 F. Supp. 2d 216 (E.D.N.Y. 2000) (finding posters outside of VARA protections); Kaplan v. Lily of France, 1996 U.S. Dist. LEXIS 7640 (S.D.N.Y. 1996) (finding complaint about materially-altered photograph in advertising campaign as not under VARA coverage).

³³⁸ Flack v. Friends of Queen Catherine Inc., 139 F. Supp. 2d 526 (S.D.N.Y. 2001) (holding sculptor may not halt completion and display of poorly repaired mold of statue head as not moral right protected under VARA).

³³⁹ Hunter v. Squirrel Hill Assoc., 413 F. Supp. 2d 517 (E.D. Pa. 2005) (finding artist met all requirements of VARA for damaged mural but failed to bring action within three-year statute of limitations); English v. BFC & R East 11th Street, 1997 U.S. Dist. LEXIS 19137 (S.D. N.Y. 1997) (finding sculptures and murals in community garden not protected under VARA because artwork had been illegally put on property), *aff'd* 198 F.3d 233 (2d Cir. 1999).

³⁴⁰ Antezana, *supra* note 1, at 430; Hiatt, *supra* note 324, at 395.

³⁴¹ Alexander, *supra* note 312, at 1490-91; Chang, *supra* note 332, at 132 and accompanying text; Liemer, *supra* note 2, at 6. A subsequent online survey in 2003 that replicated the earlier 1995 survey found only a slightly higher recognition of moral rights amongst artists. Chang, *supra* note 332, at 144-45.

for future U.S. efforts as well as challenges to existing U.S. law, especially regarding online digital music services.

V. POTENTIAL CHALLENGES AND OPPORTUNITIES FOR U.S. LAW

The U.K.'s enactments of its new performance regulations present both cross-border challenges and opportunities for the U.S. regarding the recognition of moral rights for musical works. These transnational issues arise primarily from the application of the U.K. regulations to sound recordings of performances offered over the Internet through legitimate music and video downloading services, such as iTunes and Napster.³⁴² British and other EU performers may now be able to bring legal challenges in U.K. courts against members of the U.S. recording and media services industries based on moral rights violations of their musical works involving the online distribution of songs and music videos as well as soundtracks in films and TV programs. This section will consider the different concerns arising from these potential legal actions and offer recommendations for the U.S. to recognize and protect moral rights for music.

A. *The United Kingdom's Performances (Moral Rights) Regulations of 2006*

The latest installment of moral rights law in the United Kingdom involves the passage of The Performances (Moral Rights, etc) Regulations 2006.³⁴³ These regulations amend the 1988 CDPA by extending to performers similar moral rights already granted to authors, directors, and other artists. First, the regulations give performers the right to be identified as the performer, commonly known as the right to attribution.³⁴⁴

³⁴² With its dedicated U.K. site, iTunes is the top provider for British music online followed by Napster. Yinka Adegoke, *Coca-Cola to close British music download site*, REUTERS, Jun. 20, 2006, available at http://today.reuters.com/stocks/QuoteCompanyNewsArticle.aspx?view=CN&storyID=2006-06-20T191909Z_01_N20444860_RTRIDST_0_MEDIA-MYCOKEMUSIC.XML&rpc=66 (last visited July 5, 2006). As of November 2005, marketing figures indicated that iTunes possesses about 54% of this online market due in large part to the popularity of its iPod devices. *Id.* Currently, iTunes offers not only music downloads but also short films, music videos, and TV programs which also feature musical works. Press Release, Apple Computer Inc., iTunes Music Store Downloads Top One Billion Songs (Feb. 23, 2006), available at <http://www.apple.com/pr/library/2006/feb/23itms.html> (last visited March 6, 2007). More than a billion songs have been downloaded from iTunes with the one billionth song legally downloaded from iTunes being the British band Coldplay's song, "*Speed of Sound*." *Id.*

³⁴³ Performances (Moral Rights, etc.) Regulations, 2006, S.I. 2006/18 (U.K.), available at <http://www.opsi.gov.uk/si/si2006/20060018.htm> (last visited March 6, 2007).

³⁴⁴ *Id.* Provision 205C states:

- (1) Whenever a person—
 - (a) produces or puts on a qualifying performance that is given in public,

Whenever an artist's qualifying performance is presented, broadcasted or communicated in public, or issued to the public in form of copies, the performer has the right to be identified as the performer of that performance.³⁴⁵ Legal experts in the U.K. have indicated that the issuing of public copies would include the sale of physical formats of the live performance, such as CDs, but also digital downloads off the Internet.³⁴⁶

A performance constitutes a "qualifying performance" if the performance is given by either a qualifying individual or performed in a qualifying country.³⁴⁷ A qualifying individual is someone who is a citizen, resident, or subject of a qualifying country.³⁴⁸ A qualifying country is any nation that is a member of the European Economic Community, the United Kingdom, or any nation that has a reciprocal agreement providing protection specified by government order.³⁴⁹ The regulations do not apply to audiovisual performances but would cover other performances, such as a soundtrack of a film separately released as an audio recording.³⁵⁰

Attribution rights for a qualifying performance vary according to circumstance. In a public performance, the artist's right to be identified must be realized either by including his name in any program accompanying the performance or in some other manner notifying a person seeing or hearing the performance.³⁵¹ In a broadcast performance or sound recording communicated to the public, the artist must be identified in a manner which likely notifies a person seeing or hearing the broadcast.³⁵² In a sound recording issued to the public, the artist must be identified in or on each copy or, if that is not appropriate, in some other manner likely

(b) broadcasts live a qualifying performance,

(c) communicates to the public the sound recording of a qualifying performance, or

(d) issues to the public copies of such recording, the performer has the right to be identified as such.

Id.

³⁴⁵ *Id.*

³⁴⁶ MAYER, BROWN, ROWE & MAW, *NEW MORAL RIGHTS FOR PERFORMERS* (2005), available at <http://www.mayerbrownrowe.com/publications/article.asp?id=2462&nid=6> (last visited March 6, 2007).

³⁴⁷ MCCORMICKS SOLICITORS, *CREATION OF NEW MORAL RIGHTS* (2006), available at http://www.mccormicks-solicitors.com/articles/get_pdf_data.php?id=89 (last visited March 6, 2007).

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*; *Moral Rights of Paternity and Integrity*, *MANAGING INTEL. PROP.*, Apr. 1, 2006, available at 2006 WLNR 11757289; *CREATION OF NEW MORAL RIGHTS*, *supra* note 347.

³⁵¹ Performances (Moral Rights, etc.) Regulations, 2006, S.I. 2006/18, § 205C(2)(a) (U.K.).

³⁵² *Id.* §§ 205C(2)(b)-(c).

to bring his identity to the notice of a person acquiring a copy of the performance.³⁵³ Alternatively, the performer and the person producing, broadcasting, or communicating the performance may circumvent these requirements through a mutually agreed upon identification scheme.³⁵⁴

The regulations separately address performances by groups.³⁵⁵ In the case of a public performance, broadcast performance, or a sound recording communicated to the public, only the group must be identified.³⁵⁶ In the case of a sound recording issued to the public, only the group must be identified if it is not reasonably practicable to identify each group member.³⁵⁷

The regulations do not protect all performers, but rather only those performers who assert their attribution rights in writing directly, through a representative or on assignment.³⁵⁸ The right may be asserted generally or toward a specified performance.³⁵⁹ The regulations require courts, when considering remedies for infringement of the attribution right, to “take into account any delay in asserting the right.”³⁶⁰ This accounts for the situation where a producer has invested heavily in preparing for a performance before the author chooses to assert her moral right to attribution.³⁶¹

Numerous exceptions apply. The right of attribution for performers does not apply when it is not “reasonably practicable” to identify the performer, when the performance involves advertising goods or services, or involves reporting current events.³⁶² The regulations also do not apply in cases of “news reporting, incidental inclusion of a performance or recording,” and governmental proceedings or inquiries.³⁶³

The second right granted by the regulations is the right to object to derogatory treatment, also known as the right of integrity. This right applies to qualifying live performances and recorded performances

³⁵³ *Id.* § 205C(2)(d).

³⁵⁴ *Id.* § 205C(2).

³⁵⁵ A group is defined as “two or more performers who have a particular name by which they may be identified collectively.” *Id.* § 205C(4).

³⁵⁶ *Id.* § 205C(3).

³⁵⁷ *Id.*

³⁵⁸ *Id.* § 205D.

³⁵⁹ *Id.* §205D(2).

³⁶⁰ *Id.* § 205D(4). The assertion requirements and the consideration of delay are similar to the requirements imposed by the CDPA. See Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright Law*, 41 HOUS. L. REV. 263, 290-91 (2004).

³⁶¹ Cf. Dworkin, *supra* note 193, at 256 (discussing similar language in the CDPA).

³⁶² Performances (Moral Rights, etc.) Regulations, 2006, S.I. 2006/18, §§ 205E(1)-(4) (U.K.); see CREATION OF NEW MORAL RIGHTS, *supra* note 347.

³⁶³ *Id.* §205E(5); see CREATION OF NEW MORAL RIGHTS, *supra* note 347; see also *supra* note 115 and accompanying text; *supra* notes 387-391 and accompanying text.

played in public or communicated to the public,³⁶⁴ which would include physical copies as well as copies downloaded off the Internet.³⁶⁵ The performer may object to any distortion, mutilation, or other modification of the performance that prejudices the reputation of the performer.³⁶⁶ The integrity right does not apply to current events reporting or modifications made through routine editorial or production practice.³⁶⁷ Additionally, the integrity right does not apply to anything done to avoid illegal activity or to comply with a legal duty.³⁶⁸ Finally, the integrity right does not apply to decisions made involving the British Broadcasting Corporation where avoiding inclusion offends good taste or decency, implicates the encouragement of criminal acts, possibly leads to disorder, or maybe even offends public feelings.³⁶⁹ In cases addressed in this paragraph where the performer is likely to be identifiable, these exceptions will apply only if there is a clear and prominent indication that the modifications were made without the performer's consent.³⁷⁰

Performers' may assert their moral rights against both the direct infringer and anyone who possesses, sells, or distributes the infringing material.³⁷¹ The rights last as long as the performer's property rights in the performance, which is fifty years from the end of the calendar year during which the performance was made or released.³⁷² The rights are not assignable by the performer,³⁷³ but, upon the performer's death, the moral rights may pass to and may be enforced by the recipient of the rights.³⁷⁴ Under this regulation, the performer or his successor may, at any time, waive in writing moral rights.³⁷⁵ The waiver may be partial or complete, may relate to existing or future performances, or may be expressed as subject to later revocation.³⁷⁶ Remedies under the regulation are considered to be a breach of statutory duty and the court may

³⁶⁴ Performances (Moral Rights, etc.) Regulations, 2006, S.I. 2006/18, §§ 205E(1)-(4) § 205F(1) (U.K.).

³⁶⁵ *See id.* § 205C.

³⁶⁶ *New Moral Rights for Performers*, *supra* note 346.

³⁶⁷ Performances (Moral Rights, etc.) Regulations, 2006, S.I. 2006/18, §§ 205G(2)-(3) (U.K.); *see supra* note 115 and accompanying text; *see also supra* notes 387-391 and accompanying text.

³⁶⁸ Performances (Moral Rights, etc.) Regulations, 2006, S.I. 2006/18, §§ 205G(4)(a)-(b) (U.K.).

³⁶⁹ *Id.* § 205G(4)(c).

³⁷⁰ *Id.* § 205G(6).

³⁷¹ *Id.* § 205H.

³⁷² CREATION OF NEW MORAL RIGHTS, *supra* note 347.

³⁷³ Performances (Moral Rights, etc.) Regulations, 2006, S.I. 2006/18, § 205L (U.K.).

³⁷⁴ *Id.* § 205M.

³⁷⁵ *Id.* § 205J.

³⁷⁶ *Id.* § 205J(3).

issue an injunction prohibiting the infringing act unless a disclaimer is present.³⁷⁷ The regulations came into force on February 1, 2006.³⁷⁸

The issuance of these new regulations probably does not reflect a Parliamentary shift in thinking in favor of moral rights. The purpose of enacting these regulations was simply to bring the United Kingdom into compliance with the WIPO Performers and Phonograms Treaty so it can be ratified.³⁷⁹ Interested groups have offered mixed responses to the regulations. For example, the Musicians Union has objected to various aspects of the regulations, including the cost effectiveness of enforcement and the likelihood that artists will be asked to sign a waiver.³⁸⁰ The British Copyright Council, in its response to government draft regulations, argued that imposing the requirement of assertion upon a performer is an unnecessary additional burden for the artist.³⁸¹ How U.K. courts will interpret the regulations, and what challenges face the United States as a result of the new regulations, remain to be seen. However, the regulations do pose some potential concerns related to the use and downloading of recorded British music performances in the borderless online world.

A. Possible Challenges to Existing U.S. Law

In light of globally-accessible downloading web sites, the U.S. will face three main concerns regarding the U.K.'s implementation of its performance regulations. First, the U.K.'s regulations erode U.S. claims that the recognition of moral rights is incompatible with common law traditions, especially as to musical works. Second, the performance regulations may result in challenges to the U.S. doctrine of fair use in the British courts. Finally, U.S. approaches to digital sampling practices may yield new claims of moral rights violations in the U.K.

Generally, the U.S. has fought off its obligations to comply fully with the moral rights provisions of the Berne Convention and WPPT, claiming in part that moral rights are inconsistent with common law values and traditions.³⁸² The limited protections of VARA explicitly exclude musical works, allowing only economic rights to be protected through copyright,³⁸³ without any meaningful basis for the differing treatment.³⁸⁴ While Australia, Canada, and New Zealand already recognize moral

³⁷⁷ *Id.* § 205N.

³⁷⁸ Performances (Moral Rights, etc.) Regulations, 2006, S.I. 2006/18 (U.K.).

³⁷⁹ *Id.* See also WIPO Performances and Phonograms Treaty, adopted Dec. 20, 1996, 36 I.L.M. 76 (1997).

³⁸⁰ *Moral Rights for Performers*, UNION NEWS (Musicians Union, London, Eng.), Feb. 29, 2006, www.musiciansunion.org.uk/scripts/get.php?file=__MUM05.union_news.pdf (last visited Aug. 14, 2006).

³⁸¹ British Copyright Council, Response to DTI Copyright Directorate's Consultation Paper on Implementation in the UK of the WIPO Performances and Phonograms Treaty Obligations on Performers Moral Rights (1999), www.britishcopyright.org/pdfs/policy/1999_001.pdf.

³⁸² See *supra* notes 3, 10-12 and accompanying text.

³⁸³ See *supra* note 3 and accompanying text.

rights for musical works,³⁸⁵ the U.K. has now fallen into line with prevailing moral rights duties through its enactment of performance regulations that safeguard the right of attribution and integrity in musical works.³⁸⁶ It becomes increasingly difficult for the U.S. to continue to assert that moral rights are incongruent with common law systems when the birthplace of common law traditions has come to accept some aspects of moral rights, even for musical works. Moreover, the U.S. doctrine of fair use³⁸⁷ may come under fire in U.K. court challenges, especially as to the issue of musical parodies. Under the concept of fair use, U.S. courts have traditionally allowed artists to lampoon the music and lyrics of popular songs without fear of liability for copyright infringement.³⁸⁸

³⁸⁴ Desai, *supra* note 15, at 20. Attorney Desai stated that musical performances should be accorded moral rights. *Id.* at 19-20. In favoring moral rights for music, he indicated that:

[F]irst of all, America, by not providing moral rights to musical works and other works, may fail to meet conditions of the Berne Convention, which it has now ratified. America should look to countries like France for leadership on this issue. Furthermore, why should only visual artists get moral rights protection through federal and state laws? Music also contributes greatly to society, by connecting with people in the same manner as visual art. Like visual art, music affects people and improves their quality of life. Lastly, while protecting economic concerns does give artists incentives to create, so would protecting their artistic integrity in a reliable manner. Music can provide meaning and depth for creators and fans just like other art, and music deserves moral rights protection in the music licensing scheme.

Id. (footnotes omitted).

³⁸⁵ See *supra* notes 10-12 and accompanying text.

³⁸⁶ See *supra* notes 344, 351-70 and accompanying text.

³⁸⁷ 17 U.S.C. § 107 (2000). The copyright code's fair use provision states that: Notwithstanding the provisions of sections 106 and 106A [17 U.S.C. §§ 106 and 106A], 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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

³⁸⁸ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding that 2 Live Crew's parody of Roy Orbison's classic song, *Pretty Woman*, was fair use

Clearly, many musical artists would be offended by—and try to block—parodies of their work under moral rights because the essence of parody is to criticize, ridicule or insult an earlier work.³⁸⁹ The French approach to moral rights allows for musical parodies,³⁹⁰ but the U.K. performance regulations do not offer such parodies a specific exemption.³⁹¹

The Supreme Court's *Campbell* decision illuminates the U.S. fair use doctrine in a musical parody. In that case, a rap group, 2 Live Crew, sought permission to use portions of the melody and lyrics from classic 1964 song, "*Oh Pretty Woman*," written by Roy Orbison and William Dees, who had assigned their copyright to Acuff-Rose Music, Inc.³⁹² The group expressed its willingness to pay a fee for use of the musical work, and give credit for its ownership and authorship to Orbison, Dees, and Acuff-Rose.³⁹³ The group sent a copy of lyrics and the recorded song to Acuff-Rose, which refused to give permission for its use.³⁹⁴ Despite the rejection, 2 Live Crew released the song anyway, selling 250,000 copies.³⁹⁵ Acuff-Rose sued the group and its recording company, Luke Skywalker Records, for copyright infringement.³⁹⁶

The district court found for 2 Live Crew, determining that the commercial nature of the song did not bar the fair use defense because the rap

despite substantial copying of distinctive guitar riff and revision of song's lyrics); *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) (finding fair use in copying six of the thirty-eight bars of 1950s song, *When Sunny Gets Blue* for parody entitled *When Sonny Sniffs Glue*); *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981) (holding that cabaret show's song *Cunnilingus Champion of Company C* was not parody of *Boogie Woogie Bugle Boy of Company C* and, therefore, not fair use); *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 482 F. Supp. 741 (1980) (holding that parody of *I Love New York* jingle in song, *I Love Sodom*, in a Saturday Night Live skit is fair use).

³⁸⁹ Heide, *supra* note 8, at 225; Yonover, *supra* note 21, at 103-04. As Prof. Yonover noted:

Parody, by its very nature, smacks of irreverence. Whether it involves a send-up of a work protected by traditional copyright law, or one protected additionally by the new moral rights provisions of state or federal law, a parody is almost always quasi-revolutionary in concept, and rarely is it a loving, respectful, or deferential use of the underlying work. . . . Indeed, the authors of a leading copyright casebook note that a licensed parody is oxymoronic. To obtain permission from an artist who may assert personal, moral rights would seem to be virtually impossible. Further, we may well wonder how parody could function effectively as commentary and critique if the authority to satirize, criticize, ridicule, or jibe is given. Permission connotes approval - few parodists wish that blessing, and few artists whose moral rights of integrity are at risk would wish that curse.

Yonover, *supra* note 21, at 103-04 (footnotes omitted).

³⁹⁰ See *supra* note 115 and accompanying text.

³⁹¹ See *supra* notes 365-66 and accompanying text.

³⁹² *Campbell*, 510 U.S. at 572.

³⁹³ *Id.*

³⁹⁴ *Id.* at 572-573.

³⁹⁵ *Id.* at 573.

³⁹⁶ *Id.*

version was intended as a parody.³⁹⁷ The appeals court overturned the lower court, indicating that since the song parody was done for profit it could not come within fair use.³⁹⁸ In addition, the Court of Appeals stated that the use of the heart of the song (its well-known guitar riff and title) involved excessive and unfair copying of the original song.³⁹⁹ In overturning the Court of Appeals, the Supreme Court determined that parody comes within the fair use defense to copyright infringement, even if done for profit.⁴⁰⁰ In addition, the use of the key guitar riff and the title, “*Oh Pretty Woman*,” was not excessive copying but, rather, helped the public recognize the rap version as a parody of the original.⁴⁰¹

In addressing 2 Live Crew’s parody of Orbison’s hit song, the Court found that the crude parody was an example of a protected transformative application under fair use:

While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew’s song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author’s choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.⁴⁰²

By slightly revising the facts of the *Campbell* case, one can quickly see how musical parodies, offered through Internet music services, may give rise to court challenges under the new U.K. regulations. Hypothetically, using an altered version of the facts in *Campbell*, imagine the original creators of the song, Orbison and Dees, are now British citizens (or qualifying EU citizens) who wrote and recorded the song after the regulations took effect in February 2006. Orbison and Dees then assigns their copyright to the work to Acuff-Rose. Next, the rap group 2 Live Crew records a parody of the 2006 hit song, which becomes accessible in the U.K. through either a U.S. or U.K. online music site. The creators, although not the copyright holders, could use the new U.K. regulations to

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 573-74.

³⁹⁹ *Id.* at 574.

⁴⁰⁰ *Id.* at 583-84. The Court noted: “[t]he threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use.” *Id.* at 582 (footnote omitted).

⁴⁰¹ *Id.* at 588-89.

⁴⁰² *Id.* at 583 (footnote omitted).

bring an action based on the right of integrity in the U.K. courts. They could claim that the parody is derogatory treatment of their work and detrimental to their reputations as musical composers. The musical duo could then seek damages and injunctive relief, such as blocking access to the offending parody or removing the parodic song—and any music or concert videos or soundtracks containing the parody—from U.K. music downloading sites. Therefore, the new regulations could pose a chilling effect on musical parodies in the U.S. involving the musical works of British composers and musicians.⁴⁰³

Additionally, the British citizens (or qualifying EU citizens) might subsequently seek to enforce their U.K. outcome in the U.S. courts. Previously, in the wake of a French court's decree, the U.S. courts considered the removal of objectionable materials and the blocking of foreign citizens' access to a U.S. website.⁴⁰⁴ In the U.S. case, Yahoo! sought a declaratory judgment blocking the enforcement of a prior French decree that required Yahoo! to block French citizens' access to the online sale of Nazi memorabilia on Yahoo.com's U.S. auction website.⁴⁰⁵ Further, French courts forced Yahoo! to refuse access through its search engine to U.S. websites that deny the existence of the Holocaust.⁴⁰⁶ After the French decree, Yahoo! claimed that it voluntarily agreed to take down the offending material from Yahoo.com's French auction site and to place a disclaimer on its French auction site acknowledging that such materials violate the French criminal code.⁴⁰⁷

By initially granting declaratory relief, the U.S. district court did not require Yahoo! to block the access of French citizens through its search engine to U.S. websites containing the Nazi merchandise for sale or challenging the existence of the Holocaust.⁴⁰⁸ The district court balanced the concerns of international comity against First Amendment free speech rights, determining that free speech rights outweighed comity interests.⁴⁰⁹

⁴⁰³ See Heide, *supra* note 8, at 225; Yonover, *supra* note 21, at 104. Attorney Heide warns that the dangers of an artist's "aesthetic veto" as particularly challenging in a digitized and borderless online environment. Heide, *supra* note 8, at 214-15, 225.

⁴⁰⁴ Yahoo! v. La Ligue CONTRE LE RACISME ET L'ANTISEMITISME, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), *rev'd en banc*, 433 F.3d 1199 (9th Cir. 2006), *cert. denied*, 126 S. Ct. 2332 (2006).

⁴⁰⁵ Yahoo!, 169 F. Supp. 2d at 1183-84.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* at 1185.

⁴⁰⁸ *Id.* at 1184-86, 1194.

⁴⁰⁹ *Id.* at 1192-93. The district court wrote:

The French order's content and viewpoint-based regulation of the web pages and auction site on Yahoo.com, while entitled to great deference as an articulation of French law, clearly would be inconsistent with the First Amendment if mandated by a court in the United States. What makes this case uniquely challenging is that the Internet in effect allows one to speak in more than one place at the same time. Although France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates

However, on appeal, the Ninth Circuit reversed based on issues of ripeness and remanded the case.⁴¹⁰ In dicta, however, the Ninth Circuit strongly questioned the extraterritorial reach of the First Amendment to French citizens over the Internet and whether blocking the access of only French citizens presented any repugnancy to existing public policy.⁴¹¹

the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders.

Id. at 1192.

⁴¹⁰ *Yahoo!*, 433 F.3d at 1223-24. On the issue of ripeness, the appeals court stated: First Amendment issues arising out of international Internet use are new, important and difficult. We should not rush to decide such issues based on an inadequate, incomplete or unclear record. We should proceed carefully, with awareness of the limitations of our judicial competence, in this undeveloped area of the law. Precisely because of the novelty, importance and difficulty of the First Amendment issues Yahoo! seeks to litigate, we should scrupulously observe the prudential limitations on the exercise of our power. Yahoo! wants a decision providing broad First Amendment protection for speech and speech-related activities on the Internet that might violate the laws or offend the sensibilities of other countries. As currently framed, however, Yahoo!'s suit comes perilously close to a request for a forbidden advisory opinion.

. . . .

It is possible that because of Yahoo!'s voluntary change of policy it has now complied "in large measure" with the French court's orders. It is also possible that Yahoo! has not yet complied "in large measure." If further compliance is required, Yahoo! will have to impose further restrictions on access by French users. The necessary consequence of such further restrictions on French users may or may not be that Yahoo! will have to impose restrictions on access by American users. Until we know whether further restrictions on access by French, and possibly American, users are required, we cannot decide whether or to what degree the First Amendment might be violated by enforcement of the French court's orders, and whether such enforcement would be repugnant to California public policy. . . .

Id.

⁴¹¹ *Id.* at 1221-23. In heavily criticizing the dissenters, the appellate majority stated:

The dissent is able to conclude that the French court's interim orders are facially unconstitutional only by ignoring what they say. The dissent appears to assume that the orders, on their face, require Yahoo! to block access by United States users. . . .

. . . .

If it were true that the French court's orders by their terms require Yahoo! to block access by users in the United States, this would be a different and much easier case. In that event, we would be inclined to agree with the dissent. *See, e.g., Sarl Louis Feraud Int'l v. Viewfinder Inc.*, No. 04 Civ. 9760, 406 F. Supp. 2d 274, 2005 U.S. Dist. LEXIS 22242 (S.D.N.Y. Sept. 29, 2005) (holding unenforceable as contrary to the First Amendment a French damage judgment based on photographs posted on the Internet freely accessible to American viewers). But this is not the case. The French court's orders, by their terms, require only that Yahoo! restrict access by users in France. The boundary line between what is permitted and not permitted is somewhat uncertain for users in France. But there

Therefore, in cases of parodies, it is unclear how the U.S. courts would rule in light of the need to weigh these novel issues in determining the proper course of action. Yet based on the appeals court's dicta, at a minimum, the U.K. could mandate the removal of parodic songs from U.K. web sites and the blocking of web site access of U.K. citizens to offending U.K. and U.S. web sites.

However, in relation to the hypothetical situation, both the appellate and district courts in *Yahoo!* send clear messages that the moral rights of musical performers would not be adequately protected in the U.S., notwithstanding the country's claimed "minimalist approach" under the Berne Convention. Also, the *Yahoo!* decisions demonstrate that the U.S. fails to provide adequate enforcement procedures for moral rights as required of member nations of the WPPT. Furthermore, such decisions create a double-standard whereby the moral rights of U.S. musicians are protected in U.K. and E.U. courts without similar treatment afforded to U.K. and E.U. musical performers in U.S. courts, possibly making the U.S. a target for more international criticism by.

Thirdly, the practice of digital sampling has been the subject of extensive copyright litigation in the U.S. and could lead to future actions in the U.K. based on moral rights. Digital sampling technologies allow an online user, another musician, or sound engineer to easily access, record, and distort a library of digital sounds and music before incorporating these snippets into new songs or soundtracks.⁴¹² U.S. judicial decisions have struggled in their handling of digital sampling disputes, failing to reach any consensus on the proper mechanism for reviewing and protect-

is no uncertainty about whether the orders apply to access by users in the United States. They do not. They say nothing whatsoever about restricting access by users in the United States.

....

If the only consequence of compliance with the French court's orders is to restrict access by Internet users in France, Yahoo!'s only argument is that the First Amendment has extraterritorial effect. The dissent fails to acknowledge that this is inescapably a central part of Yahoo!'s argument, let alone acknowledge that it may be Yahoo!'s *only* argument.

Id.

⁴¹² David S. Blessing, *Who Speaks Latin Anymore?: Translating De Minimis Use for Application to Music Copyright Infringement and Sampling*, 45 WM. & MARY L. REV. 2399, 2403-04 (2003-2004); Rebecca Morris, Note, *When is a CD Factory Not Like a Dance Hall?: The Difficulty of Establishing Third-Party Liability for Infringing Digital Music Samples*, 18 CARDOZO ARTS & ENT. L. J. 257, 262-64 (2000). Digital sampling is viewed as 'indispensable' to the production process in the music industry. Szymanski, *supra* note 291, at 278. See generally Blessing, *supra* note 412, at 2403-04 (providing details on the digital sampling process, including computer sound analysis, alteration, and playback); Ronald Gaither, *The Chillin' Effect of Section 506: The Battle over Digital Sampling in Rap Music*, 3 VAND. J. ENT. L. & PRAC. 195, 198-99 (2001) (examines three main steps in digital sampling process).

ing economic rights in instances of digital sampling.⁴¹³ In digital sampling cases, the U.S. courts have utilized divergent legal tests with opposite outcomes with findings of liability and *per se* infringement in some cases⁴¹⁴ to exceptions to liability under fair use⁴¹⁵ and *de minimis*⁴¹⁶ in other disputes.

Under a moral rights regime, composers and musicians would be in a strong position to challenge the use of digital samples as distortions or mutilations of their work under the right of integrity.⁴¹⁷ Depending on the circumstances, creators could also contend that the manipulated samples have been placed in objectionable contexts that harm their reputations in the marketplace.⁴¹⁸ In addition, music samplers may have failed to properly attribute their original creators for the digital snippets in a

⁴¹³ See generally Blessing, *supra* note 412, at 2410-19 (addressing diverse court tests in digital sampling decisions); Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Substantive Statutory Reform*, 43 A.B.L.J. 515, 519, 531-46 (2006) (criticizing judicial inconsistency in resolving digital sampling disputes and proposing addressing digital sampling issues in revised copyright code); Szymanski, *supra* note 291, at 298-322 (offers comprehensive review of Supreme Court and federal court opinions on digital sampling); Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179, 188-92 (2002) (critiquing digital sampling cases, particularly as to allowance of abusive looping of digital samples).

⁴¹⁴ See, e.g., *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390 (2004) (finding three note sampling of sound recording as *per se* infringement); *Grand Upright Music, Ltd. v. Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991) (holding *per se* infringement of sampling of three words and music from song and recommending criminal infringement charges). See Ponte, *supra* note 413, at 519, 534, 541-43.

⁴¹⁵ See *supra* note 388-404 and accompanying text. See Ponte, *supra* note 413, at 519, 527.

⁴¹⁶ In some digital sampling cases, courts have found the copying of musical works to be too trivial or insubstantial to warrant copyright infringement. Blessing, *supra* note 412, at 2408, 2410-11; Ponte, *supra* note 413, at 519, 535; Wilson, *supra* note 413, at 186. See generally Brett I. Kaplicer, *Rap Music and De Minimis Copying: Applying the Ringold and Sandoval Approach to Digital Samples*, 18 CARDOZO ARTS & ENT. L. J. 227 (2000) (proposing use of *de minimis* instead of *per se* infringement in processing digital sampling conflicts). See, e.g., *Newton v. Diamond*, 349 F.3d 591, 592 (9th Cir. 2003), *aff'd* 204 F. Supp. 2d 1244, *reh'g denied*, 2004 U.S. App. LEXIS 23398 (9th Cir. 2004) (en banc), *cert. denied*, 125 S. Ct. 2905 (2005) (copying of three notes with background note from musical score *de minimis* despite looping of sample more than 40 times in new song); *Jarvis v. A&M Records*, 827 F. Supp. 282, 292 (D. N.J. 1993) (finding substantial copying and therefore no exemption under *de minimis* use).

⁴¹⁷ Desai, *supra* note 15, at 6, 11, 20. See Zabatta, *supra* note 15, at 1126. *But cf.* Williams, *supra* note 2 (criticizing right of integrity and supports economic rights focus of U.S. copyright laws in digital sampling cases).

⁴¹⁸ See *supra* notes 202-04 and accompanying text; Zabatta, *supra* note 15, at 1125-26 (discussing objections of composer Carl Perkins to use of his song, "Honey Don't,"

song or soundtrack.⁴¹⁹ Aside from parody, French copyright law does not recognize a *de minimis* exception⁴²⁰ for mutilation or distortion as regards moral rights nor do the U.K. regulations.⁴²¹

Updating the earlier concerns of the *Shostakovich* case, the *Newton* court⁴²² examined the digital sampling of three notes from a musical composition, *Choir*.⁴²³ The creator of *Choir*, James Newton, a renowned jazz flutist and Guggenheim fellow,⁴²⁴ owned the copyright to the musical score and EMC Records held the copyright to the sound recording.⁴²⁵ The pitch of the original sound sample, licensed from EMC Records, was

as background music to scene involving rape of a child); *infra* notes 419-435 and accompanying text.

⁴¹⁹ In the early days of digital sampling it was common for samplers not to properly recognize the authors or creators of their swiped samples. Renee Graham, *Will Ruling on Samples Chill Rap?*, THE BOSTON GLOBE, Sep. 14, 2004, at 1-2, available at <http://www.boston.com> (last visited May 9, 2005); Susan J. Latham, Note, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling - A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 123 (2003). Latham notes:

In the nascent stages of sampling, as artists were feeding off samples of the distinctive sounds of prior works, the prevalent attitude was “catch me if you can” and many hip-hop recordings were being released without any attempt to license either the sound recording or the musical composition from which the sample was derived.

Latham, *supra* note 419, at 123.

⁴²⁰ C. PROP. INTELL., *supra* note 96, ch. I, art. L122-5. See Heide, *supra* note 8, at 248.

⁴²¹ Performances (Moral Rights, etc.) Regulations, 2006, S.I. 2006/18.

⁴²² *Newton*, 349 F.3d at 591. See Latham, *supra* note 419 at 127-137 (offers critical assessment of district court’s and appellate court’s *Newton* opinions); Lucille M. Ponte, *Too Few Notes? Digital Sampling and Fragmented Literal Similarity in Newton v. Diamond*, 38 BUS. L. REV. 141 (2005) (examining critically *Newton* district and appellate court decisions).

⁴²³ *Choir* was one movement in the musical work, *The Change Suite*. *Newton v. Diamond*, 204 F. Supp. 2d 1246 (C.D. Cal. 2002). Newton’s musical score consisted of “a ‘C’ note played on the flute while the performer sings a ‘C,’” ascends one-half step to “D-flat,” and descends again to the ‘C.’” *Id.* The score also contained the notation that its tempo should be played ‘*senza misura*’ (without measure) and ‘*largo*’ (slowly, broadly) while the musician sings into the flute and fingers the notes. *Newton*, 349 F.3d at 593. See Teresa Wiltz, *The Flute Case That Fell Apart, Ruling on Sampling Has Composers Rattled*, WASH. POST, Aug. 22, 2002, at C01, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A47321002Aug21¬Found=true> (last visited Jan. 19, 2005).

⁴²⁴ Newton is a Senior Professor of Music at California State University in Los Angeles and the Director of Music Programming and Research of the Luckman Fine Arts Complex, and the Artistic Director and Conductor for the Luckman Jazz orchestra. <http://www.meetthecomposer.org/newton.html> (last visited Jan. 19, 2005).

⁴²⁵ *Newton*, 349 F.3d at 593. Prof. Newton previously sold his rights to the sound recording to ECM Records for a flat \$5,000.00 fee. *Id.* at 592.

manipulated and then looped or repeated over 40 times in the Beastie Boys' rap song, *Pass the Mic*.⁴²⁶

Newton had publicly contended that he objected to the insertion of his work into a rap song, in part, implicitly relying on moral rights grounds.⁴²⁷ The composer asserted that the Beastie Boys' sampling of an altered portion of his music into their rap song, originally inspired by his memory of four female singers in a rural Arkansas church,⁴²⁸ ran contrary to his Christian beliefs.⁴²⁹ In addition, he could have argued that the manipulation of the pitch of his music and the repetitive looping of the sample distorted or altered his original work and hurt his reputation in the jazz world.

The song with the looped samples was featured on the Beastie Boys' 1992 song, *Pass the Mic*.⁴³⁰ The sample from *Choir* was also contained in two remixes, *Dub the Mic* and *Pass the Mic (Pt. 2, Skills to Pay the Bills)*.⁴³¹ The rap song was also featured in a 2000 concert DVD as well as an episode of *Beavis & Butt-head*.⁴³² The group attributed the sample to Newton,⁴³³ but had not sought his copyright approval for the use of the underlying composition.⁴³⁴ The court ultimately determined that the rap group did not need to separately license the underlying composition of the looped sample because the three notes were de minimis and not actionable copyright infringement.⁴³⁵

Under moral rights provisions of the UK regulations, if Newton had met the requirements of citizenship and timing issues, he could have

⁴²⁶ *Id.* at 593-94.

⁴²⁷ See Molly Sheridan, When Stealing is Not a Crime: James Newton vs. the Beastie Boys, <http://www.newmusicbox.org/news.nmbx?id=3804> (last visited Oct. 12, 2006) (quoting Newton as saying that he would have never granted a license for his work to the Beastie Boys as this was contrary to his religious beliefs).

⁴²⁸ *Newton*, 349 F.3d at 592.

⁴²⁹ Sheridan, *supra* note 427. In a public response to the court's decision, Newton stated that:

This decision is extremely troubling. It ignores my twenty-three years of international recognition, and my freedom of cultural expression by insisting that my work fit within a European paradigm to be protected. Beastie Boys have stolen my musical expression and now vindictively seek to punish me financially for trying to protect a work that celebrates God's place in the African-American struggle for freedom in this country.

Meet the Composer, <http://www.meetthecomposer.org/newton.html> (last visited Oct. 12, 2006).

⁴³⁰ *Newton*, 349 F.3d at 593.

⁴³¹ *Id.*

⁴³² Wiltz, *supra* note 423, at C01.

⁴³³ Eight years after the hit rap song, a student in passing asked Newton about his work with the Beastie Boys on *Pass the Mic*. *Id.* The group properly attributed Newton on the sample in its liner notes. Meet the Composer, *supra* note 429.

⁴³⁴ *Newton*, 349 F.3d at 593.

⁴³⁵ *Id.* at 598.

argued his right of integrity based both on the context of the sample and the manipulation of the original sample. If successful under moral rights claims, he could have sought both damages and equitable relief for the song, remixes, concert video, and TV soundtrack; all of which might be accessible and downloadable in the U.K., through U.K. and/or U.S. online media services. If a British (or EU) citizen-composer had faced a similar fact pattern, the creator could bring an action under the new U.K. regulations that went beyond the mere economic interests of musical performers.

In addition, it may be more difficult for U.S. courts not to enforce U.K. (or EU) moral rights decisions in digital sampling cases because these sampling cases often take the form of disputes over musical parodies rather than First Amendment rights. Looking at the *Newton* case, the *de minimis* defense under copyright may not be sufficient to outweigh the concerns of international comity as well as U.S. moral rights obligations under the Berne Convention and the WPPT. Furthermore, in cases in which U.S. courts have found *per se* infringement in digital sampling, the cases appear to be consistent with U.K. outcomes that protect the moral rights of musical performers from samplers.

While the U.K. regulations pose some challenges to existing U.S. law, they also present some opportunities for the U.S. to draw closer to international perspectives on intellectual property. Rather than continuing to avoid its international obligations, the U.S. could learn from the U.K. and France to adopt meaningful protection of the rights of attribution and integrity. The next section discusses alternatives and provides options for greater harmonization between the U.S. and international approaches to moral rights.

C. Will U.S. Law Be Harmonized with the Growing International Acceptance of Moral Rights Protection for Music and Performances?

United States moral rights law continues to exist “out of step” with international standards. France, and many other civil law nations, have long protected moral rights.⁴³⁶ Common law nations such as Canada, Australia, and New Zealand already protect moral rights for music.⁴³⁷ Even the United Kingdom, traditionally reluctant to adopt broad moral rights protections, as discussed, adopted the CDPA in 1988 and recently expanded moral rights to cover performances.⁴³⁸ This leaves the United States behind and makes the absence of significant moral rights protection glaring. In spite of these widening differences, Congress persists in its view that current U.S. law is consistent with the moral rights obligation of the Berne Convention.⁴³⁹ Not surprisingly, commentators have ques-

⁴³⁶ See *supra* notes 2, 60-74 and accompanying text.

⁴³⁷ See *supra* notes 10-13 and accompanying text.

⁴³⁸ See *supra* Part V.A.

⁴³⁹ See *supra* notes 304-08 and accompanying text.

tioned this optimistic conclusion, especially when applied to musical works.⁴⁴⁰

The most obvious solution to harmonize U.S. law with international protection of music is to amend VARA to apply to musical works or, alternatively, to enact a separate provision directed toward musicians and performers. However, this suggestion may not be realistic. Moral rights bills have been unsuccessfully introduced in Congress numerous times since 1979.⁴⁴¹ In fact, VARA itself was tacked onto a key bill authorizing new federal judgeships that received passage in the waning hours of the 101st Congress without significant Congressional debate.⁴⁴² Such a surreptitious passage, criticized by at least one legislative staffer at the time,⁴⁴³ presents the possibility that the coat-tailing effect of VARA on an important piece of legislation caused its passage rather than an affirmation of its merits by a majority of Congress.

Furthermore, there is little evidence that Congress intended VARA to be a first step in offering broader moral rights protections to artists. Although the issue of moral rights has been a popular topic of discussion among academics,⁴⁴⁴ Congress' inactivity on the moral rights issue for the past sixteen years supports this conclusion. More likely, Congress enacted VARA simply to comply with (or to create the appearance of compliance with) the Berne Convention.⁴⁴⁵ Taking into account the

⁴⁴⁰ E.g., Holland, *supra* note 128, at 250 (noting U.S. law "directly conflicts with the stated obligations under the Berne Convention that an 'author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification' thereof."); Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1212 (2005) ("The current status of United States compliance with Berne is . . . unclear."); Zabatta, *supra* note 15, at 1128-29 ("It . . . appears that the moral rights protection available to composers in the United States is inadequate to meet the guaranteed level of protection contemplated by the Berne Convention.").

⁴⁴¹ Christopher J. Robinson, Note, *The "Recognized Stature" Standard in the Visual Artists Right Act*, 68 FORDHAM L. REV. 1935, 1941 n.36 (2000) (citing H.R. Rep. No. 101-514, at 8 (1990), as reprinted in 1990 U.S.C.C.A.N. 6915, 6918 n.13).

⁴⁴² *Id.* at 1935.

⁴⁴³ George C. Smith, chief minority counsel for the Senate Judiciary Subcommittee on Technology and the Law, commented that, "[w]ithout so much as a word of debate or discussion, the Artists Act (sic) became law. The lack of debate is unfortunate because the new statute constitutes one of the most extraordinary realignments of private property rights ever adopted by Congress." *Id.* at 1935-1936 n.6 (citing JOHN HENRY MERRYMAN & ALBERT E. ELSEN, *LAW, ETHICS AND THE VISUAL ARTS* 283-84 (3d ed. 1998)).

⁴⁴⁴ Robinson, *supra* note 441, at 1939 n.22 ("Moral rights, not surprisingly, are a favorite of academics, and articles on the subject far outnumber the cases in which moral rights are invoked.").

⁴⁴⁵ Lastowka, *supra* note 440, at 1211 ("VARA is generally recognized as an effort on the part of the United States to come into greater compliance with 'moral rights' treaty obligations pursuant to the Berne Convention for the Protection of Literary and Artistic Works.").

numerous times that moral rights legislation has failed, it is doubtful that meaningful Congressional support exists for an amendment of VARA in the near future.

Also, even if such support existed, an amendment to VARA might not significantly protect copyright owners. VARA has numerous shortcomings that would make any protections to musicians and performers limited, such as VARA's lack of post-mortem rights.⁴⁴⁶ Congressman Edward J. Markey, in testifying before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice, recounted his concerned reaction to two Australian entrepreneurs who purchased a Pablo Picasso print, sliced it into five-hundred separate one-inch by one-inch pieces, and sold each piece separately for \$135.⁴⁴⁷ Interestingly, given Pablo Picasso's death in 1973, VARA would not be able to stop similar knife-wielding entrepreneurs in the United States.⁴⁴⁸ Similarly, any musical work authored by an artist now deceased would receive no protection under VARA.

In addition, VARA requires that for any work to receive moral rights protection it must have previously acquired "recognized stature."⁴⁴⁹ To establish recognized stature, a plaintiff must first show that the visual art in question has "stature" (i.e. it is viewed as meritorious) and then show that the work's stature is recognized by art experts.⁴⁵⁰ Such a standard risks denying relief to works disliked or misunderstood by conventional measures, but that may still prove to be important and valuable works. One wonders whether Richard Serra's *Titled Arc*, a controversial 1980s steel sculpture that bifurcated a plaza between two New York City buildings,⁴⁵¹ would have possessed "recognized stature," given the widespread public criticism of the piece even though art experts lauded the work's

⁴⁴⁶ See *supra* note 330 and accompanying text.

⁴⁴⁷ *Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong., 1st Sess. 37 (1989) (statement of Representative Edward J. Markey). The newspaper advertising of the two Australian Entrepreneurs stated, "[y]es, your very own beautiful framed Picasso piece, in the most original and exciting offer . . . and you can own a piece of the work yourself." *Id.*

⁴⁴⁸ As one of the entrepreneurs speculated, "[i]f this thing takes off, we may buy other masters as well and give them the chop." *Id.*

⁴⁴⁹ 17 U.S.C. § 106A(a)(3)(B) (2000).

⁴⁵⁰ *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994) ("In making this showing, plaintiffs generally, but not inevitably, will need to call expert witnesses to testify before the trier of fact."), *aff'd in part, rev'd in part, and vacated in part*, 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996).

⁴⁵¹ See generally *Serra v. United States Gen. Servs. Admin.*, 667 F. Supp. 1042 (S.D.N.Y. 1987) (dismissing artist's complaint challenging government decision to relocate sculpture in a plaza adjoining a government office building), *aff'd*, 847 F.2d 1045 (2d Cir. 1988); *Richard Serra, The Tilted Arc Controversy*, 19 CARDOZO ARTS & ENT. L.J. 39 (2001) (describing the dispute from the artist's perspective).

importance. Determination of recognized stature may simply become a battle of the experts, subject to a judge's evaluation of artistic merit to determine coverage under VARA.⁴⁵²

Music, especially controversial or unpopular works outside of mainstream culture, would still be vulnerable to judicial expulsion from VARA. For example, in *Parks v. LaFace Records*,⁴⁵³ civil rights figure Rosa Parks challenged rap group OutKast's song that used her name as a title. Parks claimed that the song violated her trademark⁴⁵⁴ and her right to publicity.⁴⁵⁵ The court, faced with determining whether OutKast used her name as the title for artistic purposes or commercial advantage,⁴⁵⁶ had to evaluate the content of the song.⁴⁵⁷ Using a "rap dictionary" and a translation of the lyrics supplied by Parks' attorneys, the court concluded that the song was not about Parks, her strength, or the civil rights movement, but rather a boasting of OutKast's musical skill.⁴⁵⁸ As one commentator insightfully noted, however, the judge in the *Parks* case never considered the nature of rap as an art form wielding "stylistic conventions such as semantic inversion, feigned simplicity, and covert parody, consistent with black linguistic tradition based in the desire to conceal meaning from white listeners."⁴⁵⁹ The *Parks* case is thus an example of when law appears to "operate in a vacuum," separate from a larger and more complex cultural and normative context.⁴⁶⁰ If a song's artistic context in a controversial genre can be discounted in a traditional trademark dispute, it is possible that similar controversial works are also vulnerable in moral rights cases under VARA.

An alternative to expanding VARA is to apply or incorporate international moral rights cases and standards toward musicians into U.S. law

⁴⁵² See, e.g., *English v. BFC & R East 11th Street LLC*, No. 97 Civ. 7446 (HB), 1997 WL 746444, at *6 (S.D.N.Y. Dec. 3, 1997) (evaluating dueling experts in VARA dispute), *aff'd*, 198 F.3d 233 (2d. Cir. 1999).

⁴⁵³ 329 F.3d 437 (6th Cir. 2003).

⁴⁵⁴ *Id.* at 446-59.

⁴⁵⁵ *Id.* at 459-61.

⁴⁵⁶ See *id.* at 448. The court, among other approaches, applied the "artistic relevance" test. *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989). Under *Rogers*, "a title will be protected unless it has 'no artistic relevance' to the underlying work or, if there is artistic relevance, the title 'explicitly misleads as to the source or the content of the work.'" *Parks*, 329 F.3d at 448 (citing *Rogers*, 875 F.2d at 999).

⁴⁵⁷ Farley, *supra* note 267, at 829.

⁴⁵⁸ *Parks*, 329 F.3d at 453 ("We believe that reasonable persons could conclude that there is no relationship of any kind between Rosa Parks' name and the content of the song—a song that is nothing more and nothing less than a paean announcing the triumph of superior people in the entertainment business over inferior people in that business.").

⁴⁵⁹ Farley, *supra* note 267, at 852 (citing RICHARD SHUSTERMAN, PRAGMATIST AESTHETICS: LIVING BEAUTY, RETHINKING ART 203 (1992)).

⁴⁶⁰ *Id.*

through precedent. Like the expansion of VARA, however, this solution might also prove problematic. As previously mentioned, the United States has resisted full compliance with moral rights requirements established in the WPPT and the Berne Convention.⁴⁶¹ Unlike other nations, the United States does not readily rely on international analogues to interpret American statutes.⁴⁶² Although a majority in *Lawrence v. Texas*⁴⁶³ referenced a case from the European Court of Human Rights in its decision,⁴⁶⁴ which overruled *Bowers v. Hardwick*,⁴⁶⁵ and a majority cited the UN Convention on the Rights of a Child to render unconstitutional imposing the death penalty on individuals who committed crimes while under the age of 18,⁴⁶⁶ a significant reluctance exists in both Congress and the Judiciary to rely on international agreements in domestic disputes. Two members of the House of Representatives even introduced a resolution in Congress stating that U.S. courts, in almost all cases, should not rely on foreign authorities.⁴⁶⁷ This phenomenon of eschewing foreign law is particularly true in intellectual property cases.⁴⁶⁸ This reluctance would be especially difficult to overcome with regard to the Berne Convention, which U.S. courts have concluded does not provide a separate copyright claim outside of the rights already provided by U.S. law.⁴⁶⁹ In sum, U.S. courts have not developed any overarching principles determining when international authorities are relevant for deciding domestic disputes, leaving litigants defending musical or performance moral rights little protection.⁴⁷⁰

⁴⁶¹ See *supra* notes 76-82 and accompanying text.

⁴⁶² See, e.g., Edward Lee, *The New Canon: Using or Misusing Foreign Law to Decide Domestic Intellectual Property Claims*, 46 HARV. INT'L L.J. 1 (2005) (discussing this issue in the context of intellectual property law).

⁴⁶³ 539 U.S. 558 (2003). In *Lawrence*, the Court held that a Texas statute criminalizing certain intimate homosexual activity was unconstitutional as applied. *Id.* at 578.

⁴⁶⁴ *Id.* at 573, 576.

⁴⁶⁵ 478 U.S. 186 (1986).

⁴⁶⁶ *Roper v. Simmons*, 543 U.S. 551, 577 (2005) (“In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”).

⁴⁶⁷ Reaffirmation of American Independence Resolution, H.R. Res. 568, 108th Cong. (2004).

⁴⁶⁸ Lee, *supra* note 462, at 4.

⁴⁶⁹ E.g., *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 90 (2d Cir. 1998); *Rodriguez v. Casa Salsa Restaurant*, 260 F. Supp. 2d 413, 422 (D.P.R. 2003); *Hoopla Sports and Entertainment, Inc. v. Nike, Inc.*, 947 F. Supp. 347, 355 (N.D. Ill. 1996) (“The Berne Convention does not create a separate copyright cause of action.”).

⁴⁷⁰ Lee, *supra* note 462, at 5. See also *id.* at 13-14 (“Currently, the whole question of what relevance, if any, foreign law should have in domestic IP cases is glaringly undertheorized.”).

Finally, another avenue for protection may lay in analogizing moral rights protection, and the associated proof requirements, to an entirely new area of intellectual property law—copyright dilution. This area would draw from principles currently used for trademark dilution. Trademark dilution is comprised of two forms: dilution by blurring and dilution by tarnishment.⁴⁷¹ Trademark blurring occurs when a consumer brand, such as Dogiva Dog Food, weakens the brand equity of an established brand, such as Godiva Chocolates, by weakening the connection between the brand name and the product category in the minds of consumers.⁴⁷² Dilution by blurring in a copyright context could be useful in instances involving the right of attribution in musical works. Trademark dilution by tarnishment occurs when a company's mark has become associated with a defendant's use of a mark that links the plaintiff's mark with unwholesome or shoddy products.⁴⁷³ Tarnishment could be reworked for musical creations to address the right of integrity.

The new concept of copyright dilution, like moral rights, could protect creators from harm arising from contextual treatment. Whereas trademark dilution protects the equity of a brand, moral rights under a copyright dilution scheme could help defend the integrity and attribution of an artistic work, including music. Both brands and artistic works are creative expressions, the main difference being that brands inherently further a commercial purpose while a painting or musical expression can generate commercial value, but is not inherently commercial in nature. Like trademark dilution, moral rights claimants could show copyright dilution of their work through expert testimony and surveys of the relevant public. Viewing moral rights as a 'copyright dilution' of artistic works aligns moral rights as a recognizable sister claim of established doctrine instead of a rogue cause of action engendering suspicion and misunderstanding.⁴⁷⁴

⁴⁷¹ See G. FERRERA, ET. AL, *CYBERLAW, TEXTS AND CASES* 66-67 (2d ed. 2004).

⁴⁷² *Id.* at 67. See generally Thomas R. Lee, *Demystifying Dilution*, 84 B.U. L. REV. 859 (2004).

⁴⁷³ FERRERA, *supra* note 471, at 66-67.

⁴⁷⁴ See, e.g., Alexander, *supra* note 312, at 1491 ("It might seem that some courts are inherently suspicious of artists' moral rights claims. Perhaps they are confusing 'moral rights' with the commonly used meaning of 'moral,' having to do with one's values."); Ian Eagles & Louise Longdin, *Technological Creativity and Moral Rights: A Comparative Perspective*, 12 INT'L J.L. & INFO. TECH. 209, 221 (2004) ("[I]t is the fear that software creators will use any moral rights that they are awarded to disrupt the orderly development of, and investment in, technology markets or renegotiate economic rights which they have ceded away (or which by virtue of their employment they never had) which has fuelled the hostility and suspicion with which copyright owners and their financial backers tend to approach such rights.").

CONCLUSION

In both national laws and international agreement, the clear global trend is towards greater recognition of moral rights for a broad range of creative works, including music. The U.S. has long sought to buck this trend, accepting the generous economic benefits of international agreements without undertaking the associated moral rights obligations. With the increased acceptance of moral rights for creative works, including music, in common law nations, such as the U.K.'s new Performances Regulation, the U.S. has both challenges and opportunities on the international moral rights front. With the explosive growth of the Internet and media downloading services, the globalization of intellectual property continues to move forward. The U.S. has several options and should choose one soon if it does not wish to become further isolated from the majority of countries on this matter. Rather than viewing moral rights protections as an obstacle, the U.S. should recognize that the further adoption of moral rights for creative works, such as music, offers an opportunity for the country to once again become a dominant player in the formulation of international intellectual property rights.