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NOTE

LITERARY CREATION AND AMERICAN COPYRIGHT LAW: AUTHORS' WISHES HARDLY RESTING IN PEACE

INTRODUCTION

We owe respect to the living; to the dead we owe only truth.¹

This ominous statement is particularly applicable to the issue of this Note, American copyright law. It is this country's lack of respect for the deceased author of literature and the historical belief that protection of works of literature should extend no further than is necessary to compensate the author, that create a harrowing plight for today's authors.² This note will explore American copyright doctrine from an often neglected vantage point—that of the deceased author.³ The following illustrations are indicative of how the wishes and intentions of literary authors are sacrificed under the present system of copyright protection. Recent years have witnessed a movement towards extending protection to other facets of artistic crea-

1. *La Critique de L'Oedepie, Lettre Première* in *Oeuvres Complètes de Voltaire* 15 n.1 (Louis Moland ed., 1877) (editor's note).

2. This Note will not use the term "author" as broadly as it is defined in the Constitution or the Copyright Act but, rather, will limit it to authors of literature. This is necessary in light of the fact that several other "authors," such as film and visual artists, receive far more protection than do literary artists. This inconsistency will be discussed in further detail herein.

3. In essence, this is but another Note advocating the adoption of some form of moral rights into the American system of copyright law. In writing this Note from the vantage point of the deceased author, although my hope is to further illustrate the system's dire need for reform. Not to concede my position from the outset, there certainly is an argument against the need for legislatively extending protection where the author is alive and able to adequately police his work as he so wishes. It is after his death, however, where the need for protection comes to the fore. It is then that the author's wishes become subject to the whims of those who survive him and are too often sacrificed in the name of scholarship or economic interest. I was originally motivated to research this issue after reading about the plight of John Cheever's family in the summer of 1991. Their plight is fully discussed *infra* notes 18-23 and accompanying text.

tion, such as works by visual⁴ and film artists.⁵ This Note will similarly propose greater protection for authors of literature, for without such, their legacies will likely die with them.

I. ILLUSTRATIONS OF INFRINGEMENTS ON LITERARY ESTATES

A. *The Institutional Executor*

On January 26, 1956, renowned author, H.L. Mencken, passed away leaving behind a vast literary estate.⁶ On January 26, 1981, the Enoch Pratt Free Library of Baltimore, in marking the twenty-fifth anniversary of Mencken's death, unveiled the second installation of his private works which included a litany of letters, documents, and diaries.⁷ Mencken's last will and testament had named the Enoch Pratt Library executor and principal beneficiary of his literary estate.⁸ In addition to his last will and testament, though, Mencken left behind an explicit, written request that access to the aforementioned works be limited to students and serious scholars.⁹ Nevertheless, on October 4, 1985, the Attorney General of Maryland declared¹⁰ that the Enoch Pratt Library was not restricted from publishing these works.¹¹

4. Visual Artists Rights Act of 1990, Pub.L. No. 101-650, 104 Stat. 5089 (1990) (codified at 17 U.S.C. § 106A (Supp. III 1992)). This legislation, signed into law by President Bush on December 1, 1990, accords certain rights of attribution and integrity to the works of visual artists. Attribution and integrity are two facets of moral rights which will be discussed further herein. See *Comments Sought on Waiver of Moral Rights by Artists*, 44 Pat., Trademark & Copyright J. (BNA) No. 1085, at 128 (June 11, 1992) [hereinafter *Comments Sought On Waiver*] (reviewing the impact of the visual art legislation one year after it became effective).

5. Legislation was introduced in August, 1992, amending the Lanham Act to protect the moral rights of film artists. Entitled the "Film Disclosure Act," it would require that each public exhibition of a materially altered copy of a film and all relevant advertising include labels disclosing the nature of the alterations and any objections on the part of the artistic authors. *Legislation, Lanham Act*, 44 Pat., Trademark & Copyright J. (BNA) No. 1094, at 400 (Aug. 20, 1992).

6. Jonathan Yardley, *Respecting H.L. Mencken's Wishes*, WASH. POST., Oct. 14, 1985, at B2 (final ed.).

7. *Id.*

8. *Id.*

9. *Id.*

10. 70 Op. Att'y Gen. 213 (1985).

11. Yardley, *supra* note 6, at B2. In his will, executed in 1954, Mencken named the Enoch Pratt Free Library as executor and principal beneficiary of his literary estate. *Id.*; 70 Op. Att'y Gen. Md. 213 (1985). He also dictated that the storehouse of his work be divided into three sections, each to be opened ten years apart on a specified date in the years 1971, 1981, 1991. Yardley, *supra* note 6, at B2. The conflict arose with regard to the 1981 section. *Id.* Mencken not only provided for this section of work in his will but also stipulated in a very lengthy memorandum, written after his will, that access to his diaries and letters were to be

B. *The Blood Relative Literary Executor*

Early in 1992, fans, friends, and family of John Ronald Reuel Tolkien, Oxford professor and creator of the immensely popular Middle Earth series of children's fantasy books, celebrated the centenary of the author's birth.¹² Apparently, the publishing business and those with an interest in Tolkien's estate seized upon this opportunity to celebrate not only the spirit of this great author but also the spirit of capitalism.¹³ Since Tolkien's death in 1973, his son Christopher has served as literary executor, charged with overseeing the world of Middle Earth his father had created.¹⁴

Throughout his life, Tolkien insisted that there be no illustrations accompanying the text of his books.¹⁵ For instance, the original reader's report that accompanied Tolkien's *THE HOBBIT* stated the author's adamant position.¹⁶ Despite this well known wish, his son/literary executor chose to include illustrations in the entire Middle Earth series that were reprinted to commemorate the one hundredth anniversary of Tolkien's birth.¹⁷

A few years earlier, a fierce three year legal battle began between Academy Chicago Publishers and the estate of Pulitzer Prize winning American author John Cheever.¹⁸ Cheever died in 1982 at the age of 70, leaving his widow Mary as literary executor.¹⁹ Mary was bestowed with control over all publishing decisions of his estate; hence, when approached by what she thought was a small university

limited to students and serious scholars. *Id.* The Attorney General's opinion focused on the fact that such a memorandum, not duly executed, had no legal effect against a valid will. 70 Op. Att'y Gen. 212 (1985).

12. Joseph Connolly, *The Arts: Striking Gold in Middle Earth*, *THE DAILY TELEGRAPH*, Oct. 7, 1991, at 121. J.R.R. Tolkien was born in 1892 and served as a professor of Anglo-Saxon and later of English Language and Literature at Oxford University from 1925 to 1959. *Id.* His Middle Earth series consists of *THE HOBBIT* (1937), *THE LORD OF THE RINGS* (1954-1955), and *SILMARILION* (published posthumously 1977).

13. Connolly, *supra* note 11, at 121. This profiteering has come in the form of posters, literary companions, calendars, picture books and analyses—all a part of the massive marketing push towards the Tolkien centennial. *Id.*

14. *Id.*

15. *Id.*

16. "This book, with the help of maps, does not need any illustrations it is good and should appeal to all children between the ages of five and nine." *Id.* It is interesting to note that the cover illustrations on *THE HOBBIT* and *THE LORD OF THE RINGS* were painted and copyrighted by J.R.R. Tolkien himself.

17. *Id.*

18. Jonathan Yardley, *John Cheever and the Unforgotten Wish*, *WASH. POST*, Aug. 8, 1988, at C5.

19. *Id.*

press with the idea of publishing a limited collection of some of Cheever's works, she was understandably interested.²⁰ Problems arose when Academy began reviewing the Cheever collection and found what they believed to be a gold mine consisting of close to seventy of the author's earlier stories.²¹ Mary knew of her husband's view that much of this work was immature and that he had not wanted "his literary reputation sullied by their collected publication."²² However, when Mary tried to limit Academy's use of Cheever's material to protect her husband's wishes and artistic integrity, lawsuits soon followed.²³

C. *After the Appointed Executor*

In the early months of 1950, while confined to his death bed in a London hospital, George Orwell, the author of such classics as *ANIMAL FARM* (1949) and *1984* (1954), requested that no biography of his life follow him.²⁴ For thirty years, his wife Sonia guarded his work with a vengeance, warding off all would-be biographers, adapters and film-makers.²⁵ Yet, in the eleven years that have elapsed since her death, two biographies of Orwell have emerged based on the author's personal papers and published works.²⁶

The foregoing illustrations are indicative of the frightening

20. *Id.*

21. *Id.*

22. *Cheever v. Academy Chicago Publishers*, 690 F. Supp. 281, 284 (S.D.N.Y. 1988); see also Yardley, *supra* note 18 and accompanying text.

23. Initially, Academy sued Mary Cheever and the estate for alleged breach of a publishing contract in Illinois state court. *Academy Chicago Publishers v. Cheever*, 558 N.E.2d 349 (Ill. App. Ct. 1990). Soon thereafter, Mary Cheever and the estate sued in New York federal district court for a preliminary injunction against the publication of Academy's compilation of Cheever's work. *Cheever*, 690 F. Supp. at 281.

24. Peter Lewis, *Whose Life Was It Anyway?*, *THE TIMES*, October 19, 1991.

25. *Id.* Sonia Brownell was the third woman George Orwell proposed to in the five years following his first wife's death. *Id.* After initially declining, Brownell agreed to marry Orwell following a scene in which Orwell reportedly begged her from his deathbed. *Id.* At no time during their brief marriage was Orwell able to leave his bed. *Id.* Despite these rather auspicious circumstances, Brownell met the challenge of serving as literary executor wholeheartedly and served Orwell's wishes undauntedly. *Id.*

26. Michael Sheldon's *ORWELL* (1991) is the latest published biography while Brian Crick's *GEORGE ORWELL: A LIFE* was published in 1980. Crick's account of Orwell's life was originally undertaken with Sonia Orwell's consent. Hilary Spurling, *A Victim of Her Own Loyalty: Sonia Orwell Has Paid Dearly for Remaining True to Her Husband's Wishes After His Death*, *THE DAILY TELEGRAPH*, Oct. 12, 1991, at 102. However, after viewing a rough draft Sonia became outraged at the depiction of Orwell and, as literary executor, brought suit to prevent the publication of the biography. *Id.* She lost this legal battle just a few months after she lost her life to cancer at the age of sixty-two. *Id.*

trend in America today of the widespread neglect of authors' express wishes and intentions for the disposition of their literary estates.²⁷ A study of this dilemma must begin with an understanding of the historical²⁸ and contemporary²⁹ nature of literary property. Next, the theory behind literary property must be examined in the context of the American laws which provide for the protection and disposition of literary works.³⁰ Such an examination will focus upon the laws of wills, intestacy and gifts, and American copyright law. Throughout this Note, the characteristics of the American system will be compared to those of other systems, particularly France's concept of *droit moral* and those characteristics embodied in the Berne Convention. Only after the foregoing is fully examined can this note then outline a suggested two-step solution to the problems facing literary authors. The initial step will be theoretical in nature, challenging the way America thinks about literary property,³¹ while the second step will outline what must be done on a legislative level.³²

II. THE NATURE OF LITERARY PROPERTY: A HISTORICAL PERSPECTIVE

Before surveying the rights afforded to deceased authors, it is worth noting the historical treatment of literary property.

The law of literary property evolved not only from the creative impulse of man, but also from the inhibitions and prohibitions with which writing has ever been involved. From creation for pleasure and aesthetic enjoyment came the notion in acquisitive societies of payment and profit. From autocracy and despotism came prohibition and censorship. All of these commingled to give rise slowly to law governing literary property.³³

Moreover, this historical analysis begins in ancient Rome.³⁴ The Roman libraries, both public and private, fostered the revival of learning.³⁵ Society's wealthy individuals profited from this resurgent

27. Please note that George Orwell and J.R.R. Tolkien are not American authors, and no American lawsuits have been filed involving their estates. They are merely used to illustrate the type of predicaments that face authors under the American system of copyright law.

28. See discussion *infra* part II.

29. See discussion *infra* parts III.A, III.B.

30. See discussion *infra* part III.C.

31. See discussion *infra* part IV.

32. See discussion *infra* part V.

33. PHILIP WITTENBERG, *THE PROTECTION OF LITERARY PROPERTY* 3 (1978).

34. *Id.* at 4.

35. *Id.*

interest in literature by having their educated slaves produce copies of original works.³⁶ In many cases thousands of such copies were produced and distributed throughout the Roman provinces.³⁷ The law at this time, however, did not treat literary creations as property and, as a result, those wealthy persons able to produce copies of literature were able to reap the profits from their dissemination.³⁸ The only profit the author could hope for would be from the sale of the original manuscript.³⁹ As a result, the author was unable to control the quality or accuracy of the copies made or the dissemination of the copies thereafter.⁴⁰

For the next several centuries the Church controlled much of the reproduction of literature.⁴¹ During this period, there were virtually no lay writers and no original works being produced.⁴² However, with the arrival of the twelfth and thirteenth centuries, the great universities appeared, revitalizing the demand for learning.⁴³ Despite this enormous rebirth in intellectualism, the concept of property remained the physical paper, not the literary expression.⁴⁴

Jean Francis Marmontel illustrated the frustration that authors suffered because of this system in his account of an interview with a bookseller in Liege who had made quite a substantial profit from the selling of copies of his writings.⁴⁵ When the author visited Liege, the bookseller called upon him in order to thank him for the services he rendered to the community.⁴⁶ Marmontel, however, wanted more than just praise.⁴⁷ In anger, he cried, " 'what, sir, . . . you steal the fruit of my labor, and come and boast of it to me?' "⁴⁸ The bookseller was amazed, for he had never thought of an author's right to

36. *Id.*

37. *Id.*

38. *Id.* The reasoning was that "[s]ince men had property in things, the publisher owned the parchment and the slaves, the profits went to him." *Id.* at 5.

39. *See id.* at 4-5.

40. *See id.* at 5.

41. *Id.*

42. *Id.*

43. *Id.* at 5-6.

44. *Id.* at 6. One reason for the retention of this conceptualization of literature was that "[T]here were not enough writers or readers, nor was there a sufficient demand for books, nor any system of distribution of sufficient magnitude in existence to bring about a concept of property in literature." *Id.*

45. JEAN F. MARMONTEL, MEMOIRS OF MARMONTEL 307 (Brigit Patmore trans., 1930) (1904); *id.* at 6.

46. *Id.*

47. *Id.*

48. *Id.*

share in the proceeds from the sales of copies of his intellectual creation.⁴⁹ Marmontel was but one of the many European authors at this time who became increasingly unwilling to have his work copied without remuneration.⁵⁰ Thus, the desire for some kind of property protection for authors and their creations was born.⁵¹

The "invention of the printing press and the revival of learning brought about the gradual march toward" the recognition of literature as property.⁵² As a result, on April 10, 1710, England's Statute of Anne⁵³ became effective which, for the first time, explicitly granted protection to literary authors.⁵⁴ The language of this legislation gave legal recognition to "[t]he notion that the author had always had a common law right in his property. . . . With that recognition came the realization by the writer that he had something which was his and which he could rightfully, as proprietor, sell."⁵⁵

The struggles in England which had led Parliament to pass the Statute of Anne served as an example for the young colonies in America.⁵⁶ The founding fathers, such as James Madison, were cognizant of the problems potentially facing authors in the New World.⁵⁷ Under the Articles of Confederation, however, Congress did not have the power to protect literary property.⁵⁸ Therefore, several leaders, including Madison, petitioned Congress to recommend that the states enact statutes to protect literary property.⁵⁹ Due in large part to the lobbying efforts of Noah Webster,⁶⁰ twelve of the original states passed such legislation.⁶¹

49. *Id.*

50. WITTENBERG, *supra* note 33, at 7.

51. *Id.* at 7.

52. *Id.* at 37; see MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW §1.2 (1989).

53. 8 Anne, ch. 19 (1710), reprinted in RALPH S. BROWN & ROBERT C. DENICOLA, 1991 STATUTORY AND CASE SUPPLEMENT TO CASES ON COPYRIGHT, at 215 (5th ed. 1991) [hereinafter BROWN & DENICOLA].

54. *Id.*; see also LEAFFER, *supra* note 52, §1.2. The purpose of this legislation was stated to be, "the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." BROWN & DENICOLA, *supra* note 53, at 215.

55. WITTENBERG, *supra* note 33, at 29.

56. In fact, the Statute of Anne "became the general model for copyright law in the United States." LEAFFER, *supra* note 52, § 1.2.

57. WITTENBERG, *supra* note 33, at 32.

58. *Id.*

59. *Id.*

60. Desiring to protect his SPELLING BOOK (1783), Noah Webster traveled through the states during 1783-1785 in order to lobby the various state legislatures to adopt laws which offered copyright protection for authors. WITTENBERG, *supra* note 33, at 32.

61. *Id.* at 33. There were some variations in the stated purposes of these laws among the

Soon thereafter, the Federal Constitution was adopted in which a specific provision for copyright was included. This provision furnished protection for artists by granting Congress the power to provide authors and inventors with the exclusive right to their original work.⁶² The first Congress immediately acted upon its delegated power by passing this nation's first copyright law, the Act of May 31, 1790.⁶³ Although narrow in scope and application, this legislation initiated the evolution of copyright law in America.

One of the first major indications that literary authors had won their centuries old struggle for legal recognition came in the case of *Wheaton v. Peters*.⁶⁴ In holding that common-law copyright in published works did not exist in the United States, the Court "assumed that a property right in literature had arisen under the common law through the practices of authors and booksellers, and that such copyright had been confirmed by statute."⁶⁵ From this modest beginning, American copyright law has since expanded.⁶⁶

The idea that an author is granted rights in the product of his intellectual creation comports with the United States' long history of respect for private property.⁶⁷ A question arises, however, as to the nature and extent of the legal rights recognized. The American concept of property and property law has generally been "directed at

states. For instance, the legislation passed in New York was described as "[a]n act to promote literature." *Id.* The New Hampshire legislation was somewhat more specific. *Id.* It was described as "[a]n act for the encouragement of literature and genius, and for securing to authors the exclusive right and benefit of publishing their literary productions for twenty years." *Id.*

62. U.S. CONST. art. I, §8, cls. 1, 8. This section of the Constitution provides, in pertinent part: "The Congress shall have Power . . . [t]o promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ."

63. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (1790). This first endeavor by Congress to afford some copyright protection only applied to copies of maps, charts, and books. See Laura Lee Van Velzen, Note, *Injecting a Dose of Duty into the Doctrine of Droit Moral*, 74 IOWA L. REV. 629 n.4 (1989).

64. 33 U.S. (8 Pet.) 591 (1834).

65. *Id.*; see WITTENBERG, *supra* note 33, at 34-35.

66. The most recent major revision of the American copyright law occurred in 1976. Copyright Act of 1976, Pub. L. No. 94-533, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-914 (1988, Supp. 1 1991 & Supp. III 1992)). The Berne Convention Implementation Act and the Visual Artists Rights Act, to be discussed at detail herein, amended the 1976 Copyright Act.

67. As one commentator verbalized it, "[i]n the United States there is greater respect for the private ownership, use and disposal of private property than perhaps anywhere else in the world." George Goldberg, *Commentary: The Illusion Of 'Moral Right' In American Law*, 43 BROOK. L. REV. 1043, 1044 (1976).

the nature of property rather than the character of its owner."⁶⁸ Therefore, in theory, literary property should not be treated any differently than tangible forms of property in America.⁶⁹ Although copyright law protects a literary author's economic interests, it does not extend to his personal or moral rights.⁷⁰

As a result, a system has developed by which authors of literature are given monetary incentives to produce work that assumingly will be socially beneficial. As stated by the Supreme Court:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.⁷¹

Herein, though, lies a very important inconsistency in American jurisprudence and copyright thinking. We are told that copyright law serves to financially reward the artist for his work and serves as an incentive to future artistic endeavors.⁷² This theory of economic motivation is undoubtedly derived from capitalist principles.⁷³ Yet, while advancing such capitalist interests, the copyright laws also serve to limit the author's individual freedom to control the dissemination and integrity of his work. In fact, the artist is told that the "public interest" mandates different treatment for intellectual property.⁷⁴ As a result, as opposed to tangible property which can be held in private without much debate, intellectual property and artistic creation is deemed too important to the public at large to allow such

68. *Id.*

69. *Id.* This concept dates back well into the 19th century. In *Parton v. Prang*, 18 F. Cas. 1273 (C.C.D. Mass. 1872) (No. 10,784), the court held that "[p]ersonal property is transferable by sale and delivery, and there is no distinction in that respect, independent of statute, between literary property and property of any other description." *Parton*, 18 F. Cas. at 1278.

70. Goldberg, *supra* note 67, at 1043. The copyright code clearly fails to provide literary authors anything other than economic rights. European nations, on the other hand, acknowledge the existence of a bond between author and work which requires the protection of moral rights. *See id.* at 1050-1052. These ideas will be discussed further herein.

71. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

72. Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532 (1989). This is a very interesting and provocative article challenging the theoretical bases behind America's distinction between tangible and intellectual property.

73. *Id.* at 1532-33.

74. *Id.* at 1533.

private use.⁷⁵

The issue of private use and the idea that progress may rely upon standing on the shoulders of a giant raise the related issue of "fair use."⁷⁶ The purpose of this Note, though, is not to take issue with the doctrine of "fair use" but to merely propose recognition and extension of an author's right to do with his work that which he so pleases. The moral rights which would enable an author such freedom are not necessarily antagonistic to the doctrine of "fair use." In fact, a limited right of "fair use" is necessary, appropriate and, if not overly broad, ultimately beneficial to the literary author.⁷⁷

By sacrificing the autonomy of the "giant," American copyright law effectively "attempts to impose socialist ideals upon a capitalist framework."⁷⁸ Why should such a dichotomy exist between the treatment of intellectual property and real property? Professor Lacey, more pointedly, asks, "[i]f the reasons intellectual property should be shared with others are so compelling, why do they not apply with equal force to other forms of private property?"⁷⁹ Surely, the majority of Americans would look suspiciously, if not with hostility, upon any attempt to appropriate their private property for society's use. Why then, do we readily accept such restrictions upon the creators of literary property? There is no way to easily rectify this inconsistency without seriously questioning the historical view this country has had of literary property.⁸⁰

75. *Id.* On this point, Professor Lacey notes the oft-quoted aphorism in support of a duty upon artists to share their work with the public: "a dwarf standing on the shoulders of a giant can see further than the giant himself." *Id.* This might seem like an appealing notion to those who advance a "socialist" view of copyright, but I must concur with contemporary rock and roll icon, Michael Stipe, when he proclaimed that, "standing on the shoulders of giants, leaves me cold." REM, *King Of Birds*, on DOCUMENT (IRS 1987).

76. "Fair Use" is the idea that portions of an author's work can be used without permission or remuneration. 17 U.S.C. § 107 (1988). For example, limited passages from literary works are allowed to be taken for the purposes of commentary and critique. *Id.* The four factors relied upon to determine whether a use is a fair use are: (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.

Id.

77. "Fair Use" is an interesting, expansive and frequently written about topic. For the sake of time and clarity, the doctrine of "fair use" will not be focused on in this Note. For a general discussion of the fair use doctrine, see 3 DAVID NIMMER & MELVILLE B. NIMMER, *NIMMER ON COPYRIGHT* § 13.05 (1992).

78. Lacey, *supra* note 72, at 1532.

79. *Id.* at 1535.

80. The preceding section has outlined the historical treatment of literary property in

III. THE NATURE OF LITERARY PROPERTY UNDER THE PRESENT SYSTEM

A. *The Berne Convention*

The aforementioned inconsistency between the treatment of literary property and tangible property has been rectified to some extent. The ever expanding global market of the past several decades spawned a need for uniformity in the copyright field and thus, necessitated a change in the policy of the United States regarding copyright law. This need for uniformity resulted in a push for the United States to join the Berne Convention,⁸¹ the world's oldest international copyright treaty.⁸² The Berne Convention sets forth the minimum rights a member nation must provide for its authors.⁸³ Allowing each member nation the flexibility to draft their own moral rights legislation can be considered an advantage.⁸⁴ Such flexibility, however, can be a disadvantage when it results in a piecemeal approach to copyright protection.⁸⁵

The two major roadblocks which had prevented the United States from joining Berne were its cumbersome notice requirements system⁸⁶ and its failure to acknowledge moral rights.⁸⁷ After several years of hearings and debate,⁸⁸ Congress succumbed and, in 1988,

this country. The following sections will compare and contrast the American view with those of foreign nations, particularly those of Europe.

81. Berne Convention for the Protection of Literary and Artistic Works, 331 U.N.T.S. 217 (1886) [hereinafter Berne]. The Berne Treaty was originally signed in 1886 and has thereafter been revised on numerous occasions with the most recent being in Paris in 1971. 4 DAVID NIMMER & MELVILLE B. NIMMER, *NIMMER ON COPYRIGHT*, app. 27 (1992).

82. *Reagan Signs Bill Making U.S. Copyright Act Compatible with Berne Copyright Convention*, 5 Int'l Trade Rep. (BNA) No. 44, at 1487 (Nov. 9, 1988).

83. Van Velzen, *supra* note 63, at 635.

84. *Id.* at 636.

85. *Id.* This, in effect, is what has occurred in the United States. See discussion *infra* part III.B.

86. Prior to the 1976 Act, the notice requirements for copyrighted material were extremely stringent. Copyright Act of 1909, ch. 320, § 1, 18, 35 Stat. 1079, 1088 (1909). The Copyright Act of 1976 reformed this process somewhat, lessening the requirements and providing cures for faulty notice. See 17 U.S.C. §§ 401, 405 (1988).

87. The concept of moral rights or *droit moral* comes from the European view that literature and art in general have qualities beyond those of mere property. Martin Roeder, *The Doctrine of Moral Rights: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 556-57 (1940). It is the idea that an artistic creation is an extension of the artist's self and thus worthy of protection against uses that compromise the integrity of the art or the artist. *Id.* As noted herein, the United States historically acknowledged only an author's economic rights.

88. S. Rep. No. 352, 100th Cong., 2d Sess. 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3706, 3710 [hereinafter S. Rep. No. 352].

approved recognition of Berne.⁸⁹ As a result, Congress was charged with the duty to conform American law with the provisions of the Berne Convention. Since Berne does not require copyright notice provisions, Congress simply amended section 401 of the 1976 Copyright Act from requiring notice to making notice optional.⁹⁰ Instead of providing that notice "shall" be made, the new statute provides that notice "may" be given.⁹¹

On the issue of moral rights, however, Congress displayed some fancy footwork. The Berne Convention explicitly provides protection for an author's moral rights. Section 6^{bis} of Berne states:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.⁹²

This clause, in effect, recognizes and provides protection for the moral rights of paternity and integrity.⁹³ The moral right of paternity prevents someone from claiming authorship of another's work,⁹⁴ while the right of integrity prevents the alteration, distortion, or mutilation of the artist's work.⁹⁵

As has been discussed herein, the United States had not recognized any rights of authors other than those dealing with purely economic interests. Therefore, Congress could not simply amend an existing law to create these rights. Furthermore, Congress chose not to create new legislation to comport with this section of Berne. Rather, section 2(3) of the Berne Convention Implementation Act stipulated that the amendments made by the Copyright Act, together with the law as it presently existed, satisfied America's obligations under Ar-

89. Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C.).

90. Deborah Ross, Comment, *The United States Joins the Berne Convention: New Obligations for Authors' Moral Rights?*, 68 N.C.L. REV. 363, 366 n.31 (1990). See Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853, 2857 (1988) (codified at 17 U.S.C. § 401(a) (1988)). It is still advisable to give notice for it provides the copyright owner with certain evidentiary advantages. 17 U.S.C. § 401(d) (1988).

91. *Id.*

92. Berne, *supra* note 81, art. 6^{bis}.

93. *Id.* Although Berne does not explicitly provide for the right of disclosure, it has been acknowledged as a moral right under many European common law systems. Ross, *supra* note 90, at 377.

94. Van Velzen, *supra* note 63, at 630.

95. *Id.*

ticle 6^{bis} and that no further rights or interests were created or acknowledged for that purpose.⁹⁶ Thus, in effect, Congress was stating that the legal means to enforce the moral rights provided for in Berne were present all along in the auspices of unfair competition law, the Lanham Act, the Copyright Act, and state legislation.⁹⁷

B. *How Congress Avoided The True Issues*

Congress' claim that the existing American law, such as the Copyright Act, the Lanham Act, various state statutes and common law principles, is sufficient to safeguard what would be considered moral rights under the Berne Convention is hardly true.⁹⁸ Instead of confronting the true issue and addressing the historical treatment of the nature of intellectual property, Congress chose to avoid the theoretical bases altogether and simply proclaim that the practical aspects of this law would change.

1. The Moral Right Of Integrity

The artist, pursuant to a right of integrity, has the ability to prevent his work from being displayed in an altered, distorted, or mutilated form.⁹⁹ Proponents of Congress' action cited section 106(2) of the Copyright Act as providing adequate protection for an artist's integrity.¹⁰⁰ However, section 106(2) pertains to derivative works and, arguably, the right of integrity is not truly addressed.¹⁰¹

96. S. Rep. No. 352, *supra* note 88, reprinted in 1988 U.S.C.C.A.N at 3715.

97. See Van Velzen, *supra* note 63, at 636. Congress' intent to rely upon the pre-existing legal apparatus is inscribed in section 104(c) of the Copyright Act. This section provides, in part:

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.

17 U.S.C. § 104(c) (1988).

98. "[I]t is an exaggeration to conclude that moral rights are sufficiently protected in the U.S. by citing a few cases confined to a few states." Edward J. Damich, *Moral Rights in the United States and Article 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA. J.L. & ARTS 655 (1986).

99. Van Velzen, *supra* note 63, at 630.

100. Damich, *supra* note 98, at 659. This section provides, in part, that the owner of the copyright has the exclusive right "to prepare derivative works based upon the copyrighted work . . ." 17 U.S.C. § 106(2) (1988).

101. Damich, *supra* note 98, at 659. Section 101 states, in pertinent part:

A "derivative work" is a work based upon one or more preexisting works, such as a

From a definitional viewpoint, "derivative work" does not include the right to make all changes, but rather only those changes resulting in a *bona fide* adaptation and, therefore, changes that result in distortion or mutilation would not be included.¹⁰² Even if it could be argued that the Copyright Act suggested a right to make all changes, "the non-existence in U.S. copyright law of a clear distinction between economic and moral rights renders the inquiry futile."¹⁰³

Hence, it is extremely difficult to establish a violation of one's right of integrity under the present system. The concept is still quite foreign in contrast to the American idea of property ownership.¹⁰⁴ The majority of cases dealing with the right of integrity have involved the editing of television or motion picture programs and have held, without much exception, that an author of a work is not entitled to any right to integrity in such work.¹⁰⁵

The sole notable exception was the Second Circuit's decision in *Gilliam v. American Broadcasting Companies*.¹⁰⁶ This case involved the editing and manipulation of the author's television program, *Monty Python's Flying Circus*¹⁰⁷. ABC obtained the program from the British Broadcasting Corporation and aired a ninety minute episode, not as it was produced, but rather full of commercials and edits which in the eyes of the author ruined the entire piece.¹⁰⁸ The net-

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

17 U.S.C. § 101 (1988). Subdivision 2 of section 106 provides that the owner of a copyright has the exclusive rights "to prepare derivative works based upon the copyrighted work. . . ." *Id.* § 106(2).

102. See Damich, *supra* note 98, at 659.

103. *Id.* For example, under section 106, the right to make a derivative work is transferable. See 17 U.S.C. §§ 106, 201(d)(2) (providing for the transfer of ownership of any of the exclusive rights comprised in a copyright). If so, and if the right to integrity is encompassed by this section, is the author's right to integrity transferred along with it? This would defeat the purpose of the right of integrity, which is to allow the author, exclusive of economic rights, the ability to retain the integrity of the work even upon transfer. *Id.*

104. Ross, *supra* note 90, at 377.

105. See *Preminger v. Columbia Pictures Corp.*, 49 Misc. 2d. 363, 267 N.Y.S.2d 594 (1966); *Vargas v. Esquire, Inc.*, 164 F.2d 522 (7th Cir. 1947).

106. 538 F.2d 14 (2d Cir. 1976).

107. *Id.* at 17.

108. *Id.* at 18. The Court concedes that the insertion of twenty-four minutes of commercials into the ninety minute show and the deletion of several words and scenes which made certain skits incomprehensible were beyond the network's scope of proper editing and violative of the author's rights. *Id.* at 25.

work included a disclaimer regarding the editing process but the Court nonetheless held their conduct a violation of the artistic integrity of the work and doubted that "a few words could erase the indelible impression that is made by a television broadcast, especially since the viewer has no means of comparing the truncated version with the complete work in order to determine for himself the talents of plaintiff."¹⁰⁹

Although *Gilliam* may have seemed to be a step towards acknowledgment of the right of integrity, widespread acceptance has not followed. One reason for this, on the copyright level, is that the case dealt with the transfer of performance rights, not the right to produce derivative works.¹¹⁰ The question then arises, if the right to make a derivative work is transferred, and if the right to make changes is a part of that right, then what, if any, right of integrity is left with the author?¹¹¹ Since the American system fails to acknowledge the existence of two distinct aspects of a derivative work, the transferable economic right and the retained moral right, this question is likely to go unresolved.¹¹² Note that Congress' cold statement that Berne's moral rights would now be encompassed in existing law, without anything else, does nothing to alleviate this problem.¹¹³

The Lanham Act¹¹⁴ similarly fails to provide any adequate protection of an author's integrity. Contrary to those who argue that § 43 of the Lanham Act¹¹⁵ is an effective tool for an author's rights, the *Gilliam* court seems to have recognized otherwise.¹¹⁶ The misdescription of the origin element of § 43 is inherently fraud-based and would rely a great deal upon a right of attribution. However, there is no recognized right of attribution or paternity in this country, and thus "the potentiality of the Lanham Act to protect the right of in-

109. *Id.* at 25 n.13.

110. One could then argue that the only sensible reading of *Gilliam* suggests that the transfer of the right to perform does not imply the transfer of the adaptation right, the right to make derivative works. Damich, *supra* note 98, at 660.

111. *Id.*

112. *Id.*

113. *See id.* at 659-61.

114. Trademark (Lanham) Act of 1946, ch. 540, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051-1127 (1988, Supp. II 1991, Supp. III 1992)).

115. 15 U.S.C. § 1125 (1988).

116. "[T]he Lanham Act does not deal with artistic integrity. It only goes to misdescription of origin and the like." *Gilliam*, 538 F.2d 14, 27 (2d. Cir. 1976) (Gurfein, J., concurring). Therefore, the *Gilliam* decision was not based upon Copyright law nor integrity claims but rather on the Lanham Act right against false designation of origin.

tegrity is significantly weakened."¹¹⁷ In contrast, article 6^{bis} of Berne allows the author a cause of action when any modification is made which, arguably, is prejudicial to his honor or reputation.¹¹⁸ This broad rule would, most surely, eliminate some of the unfairness that the American policy breeds. Furthermore, the handful of perfunctory state statutes dealing with the right of integrity does not apply to literary authors.¹¹⁹ The California and New York statutes fail to remedy the essential evil that Berne recognizes and addresses. The Berne mentality is that "[a]ny act that modifies the work, whether public or not, is injury to the author's personality and thus his dignity as a human being."¹²⁰ It is only a system with such a high standard for artistic integrity that could adequately protect the interests of authors in America. It must be noted, however, that the Berne Convention's concept of integrity would serve only as a stepping stone to more expansive regulation. Berne explicitly deferred to the member nations on the question of whether integrity rights vanish upon the death of the author.¹²¹

In an effort to truly satisfy the needs of all authors, the basic theoretical premise upon which Berne was developed must be

117. Damich, *supra* note 98, at 660.

118. Berne, *supra* note 81, at art. 6^{bis}. Professor Damich has interpreted the inclusion of the term "honor" to imply that any modification, even if it served to strengthen or enhance the author's reputation, would be cause for a lawsuit. Damich, *supra* note 98, at 661.

119. The only two states to establish any coherent statutory policy with regards to authors' rights have been New York and California. N.Y. ARTS & CUL. AFF. LAW § 14.03 (McKINNEY 1992); CAL. CIV. CODE § 987 (1992). However, neither statute effectively addresses the right of integrity. New York, for instance, does not distinguish between the right against modification and that against destruction. Edward J. Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733, 1736 (1984). Moreover, the New York statute fails to expressly provide for the duration of the rights it addresses. Absent such express durational provision, "it is reasonable to conclude that at least the right of integrity does not survive the artist. . . ." *Id.* Thus, the author with whom we are concerned, one who predeceases his work, receives no assurances under this statute. Furthermore, although California's statute appears broader than New York's, neither state provides protection for literature. The California Code limits protection to works of 'fine art', which is defined as "an original painting, sculpture, or drawing, or an original work of art in glass, of recognized quality. . . ." CAL. CIV. CODE § 987(b)(2) (West 1993). Likewise, New York defines artist as the creator of a work of fine art and fine art is defined as a painting, sculpture, drawing, or work of graphic art. N.Y. ARTS & CUL. AFF. § 11.01(a) (McKinney 1992).

120. Damich, *supra* note 119, at 1742.

121. The Berne Convention provides, in part:

[T]hose countries whose legislation . . . 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 . . . death, cease to be maintained.

Berne, *supra* note 81, art. 6^{bis}(2); see also discussion *infra* parts V.A, V.B (delving deeper into the questions of duration and waiver).

adopted in this country. Otherwise, the wishes of authors, be it the use of their works for the basis of biographies,¹²² or their insistence on having their work un-illustrated,¹²³ will continue to go wholly disregarded and forgotten by the legal system after their deaths.

2. The Moral Right Of Paternity

The rights surrounding authorship of a piece of work constitute the right of paternity.¹²⁴ Most commentators believe it entails the right to have the work attributed to the author, the right to prevent others from falsely claiming authorship, and the right to prevent others from attributing to an author a work he did not create.¹²⁵ Although American courts have recently been more receptive to paternity-like claims, much like the right of integrity paternity has not been, in any real sense, explicitly accepted under American law.¹²⁶

Under American law, the first type of paternity is the right of the author to have the work attributed to himself or herself.¹²⁷ Authors have the ability to contract away their right to paternity. However, the right of paternity is not guaranteed unless expressly provided for by contract.¹²⁸ Even if these contracts were implied by the courts, respected copyright scholar Melville Nimmer observes:

For the purposes of article 6^{bis} it is arguable that it is no right at all, since a right dependent upon the voluntary agreement of individual contracting parties (express or inferred from custom and usage) hardly satisfies the Convention requirement of obligatory recognition.¹²⁹

122. See discussion *supra* part I.C (regarding George Orwell).

123. See discussion *supra* part I.B (regarding J.R.R. Tolkien).

124. See Ross, *supra* note 90, at 368; see also Edward J. Damich, *The Right of Personality: A Common — Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 14 n.54 (1988).

125. Ross, *supra* note 90, at 368; see also Edward J. Damich, *The Right of Personality: A Common — Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 14 n.54 (1988).

126. “[T]here is no clear-cut, uniform legal basis on which an author can rely to have his name placed on his work or in its close context, much less on a freely made copy or excerpt of that work, where it is simply omitted.” Paul Geller, *Comments on Possible U.S. Compliance with Article 6^{bis} of the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 672 (1986).

127. Ross, *supra* note 90, at 368.

128. See, e.g., *Vargas v. Esquire, Inc.*, 164 F.2d 522 (7th Cir. 1947) (holding that the magazine could claim authorship of photographs since the author did not expressly contract for attribution); *Harris v. Twentieth Century-Fox Film Corp.*, 43 F. Supp. 119 (S.D.N.Y. 1942) (denying the author the right to complain about credit given where all rights were transferred pursuant to an expressed contract).

129. Damich, *supra* note 98, at 657 (quoting Melville B. Nimmer, *Implications of the*

Furthermore, any claim that the right of attribution is protected by section 43 of the Lanham Act is unrealistic.¹³⁰ Thus, the mandatory recognition of a right of attribution proposed by Berne is not satisfied under American law in any respect.

The second type of paternity is the right to prevent others from falsely claiming authorship of another's work.¹³¹ This right, however, is upheld only to the extent that the legitimate author suffers economic harm.¹³² On the other hand, under Berne, the right of paternity protects the author regardless of any financial injury.¹³³ The ideology behind Berne is that the personal bond between the author and his work is as worthy of protection as any economic interest.¹³⁴ Although there is some indication that American courts will acknowledge a right to prevent false claims of authorship, it is not nearly as extensive as that provided for by Berne.¹³⁵

As for the third type of paternity, prohibiting identification of the author as creator of another's work, American law appears to provide adequate causes of action.¹³⁶ For instance, in *Follett v. New American Library*,¹³⁷ the defendant attempted to attribute authorship of a book to the plaintiff when, in actuality, the plaintiff merely performed an editing function.¹³⁸ The court, finding in favor of Fol-

Prospective Revisions of the Berne Convention and the United States Copyright Law, 19 STAN L. REV. 499, 520 (1967)).

130. Damich, *supra* note 98, at 658. Section 43(a) of the Lanham Act pertains to false designation of origin, false or misleading descriptions of fact or false or misleading representations of fact which are likely to cause confusion. 15 U.S.C. § 1125 (1988). This section does not expressly refer to the removal of a true designation of origin. The only authority for such a view is dictum in *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981). In fact, in *PIC Design v. Sterling Precision*, a federal court held that "[t]he pertinent section of the Lanham Act makes actionable the application of a 'false designation of origin,' not the removal of a true designation." *PIC Design*, 231 F. Supp. 106, 115 (S.D.N.Y. 1964); see also Damich, *supra* note 98, at 658.

131. Damich, *supra* note 98, at 658.

132. See, e.g., *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981) (holding that the substitution of one actor's name in place of another in the credits section of a film was improper because the named actor would be unjustly enriched by claiming credit for the work of another).

133. Ross, *supra* note 90, at 368.

134. *Id.*

135. *Id.*

136. Damich, *supra* note 98, at 658. The Lanham Act, libel laws and the right of publicity laws are noted as potentially providing adequate protection for claims of false attribution of authorship. *Id.*

137. 497 F. Supp. 304 (S.D.N.Y. 1980).

138. At the time Ken Follett edited the book at issue, he was virtually unknown. See *id.* at 306-07. However, when the book was to be distributed in the United States several years later, Follett had by then published several popular books and established himself as a best

lett, held that the Lanham Act was designed to "protect the public and the artist from misrepresentations of the artist's contribution to a finished work."¹³⁹

Analogously, courts have recently upheld the rights of artists where, through the use of visual or sound imitations, sponsorship of a product could be implied.¹⁴⁰ In *Allen v. National Video, Inc.*,¹⁴¹ the defendant placed an advertisement which pictured a Woody Allen look-alike standing next to a display of Allen's movies in the defendant's video rental store.¹⁴² The court found a likelihood that readers of the advertisement would believe the look-alike was Allen or at least, appeared with Allen's consent or endorsement.¹⁴³ Therefore, the court held that section 43 of the Lanham Act was violated.¹⁴⁴

In *Midler v. Ford Motor Co.*,¹⁴⁵ the defendant, Ford Motor Company, had wanted the plaintiff, Bette Midler, to sing one of her songs for a commercial, but she refused.¹⁴⁶ Nonetheless, Ford obtained a sound-alike to perform the song and Midler sued.¹⁴⁷ Midler, however, did not rely upon section 43 of the Lanham Act or a right to publicity claim;¹⁴⁸ instead, she argued that she had a common law property right in her vocal identity.¹⁴⁹ The court ultimately held "that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California."¹⁵⁰

selling author. *Id.* at 307-08. In a deft marketing move, the defendant chose to retitle the book, and attribute authorship to Follett. *Id.* at 308. Follett then sued for false attribution of authorship. *Id.* at 305.

139. *Id.* at 313.

140. See, e.g., *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Allen v. National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985).

141. 610 F. Supp. 612 (S.D.N.Y. 1985).

142. *Allen*, 610 F. Supp. at 618-19.

143. *Id.* at 632.

144. *Id.*

145. 849 F.2d 460 (9th Cir. 1988).

146. *Midler*, 849 F.2d at 461.

147. *Id.* at 461-62.

148. "The right of publicity is the right of a person to control the commercial use of his or her identity." J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY*, § 1.1[B][2] at 1-4.1 (1991). This right developed from the common law right of privacy, and today, the two terms stand for distinct rights. *Id.* at 1-5. Publicity protects 'famous people' from having their identity used without remuneration. *Id.* On the other hand, privacy deals with the ordinary persons right to be left alone. *Id.*

149. The court agreed, stating that "[t]he singer manifests herself in the song. To impersonate her voice is to pirate her identity." *Id.* at 463.

150. *Id.*

There is case law, however, that explicitly rejects an author's claim of the right against false attribution.¹⁵¹ In *Geisel v. Poynter Products*,¹⁵² Theodore Seuss Geisel (a.k.a. Dr. Seuss) sued the manufacturer of a doll which was based upon a cartoon which he had sold to the company.¹⁵³ The court held that Geisel had no recourse for injury to honor or reputation as long as his name was accurately represented.¹⁵⁴ The court in *Geisel* found dispositive the fact that the defendant had correctly labeled the dolls as created by Dr. Seuss, thus mitigating any confusion and foreclosing reliance upon the Lanham Act.¹⁵⁵ Furthermore, Geisel failed to make a valid claim based upon a right of privacy since Dr. Seuss was an assumed name.¹⁵⁶ Accordingly, Geisel was foreclosed any recovery.¹⁵⁷

The discussion of the paternity right against false attribution illustrates the problem with the present system. Although the rights may be present, couched in one pre-existing cause of action or another, without an explicit statutory provision, courts will continue to reach contradictory conclusions. In general, it is apparent that the Copyright Act, the Lanham Act, and case law do not fully serve to protect an author's right of paternity. The porous argument that the legal hardware exists to cope with these problems is erroneous. Even where there appears to be valid causes of action, the plaintiff must sift through the sands of American jurisprudence to find the appropriate one.¹⁵⁸ Presently, an author cannot "uniformly rely on copyright or trademark law, nor on state-based contractual theories, to have parties using his works, whether pursuant to statute or his as-

151. See, e.g., *Geisel v. Poynter Products*, 295 F.Supp. 331 (S.D.N.Y. 1968).

152. 295 F. Supp. 331 (S.D.N.Y. 1968).

153. *Id.* at 333.

154. *Id.* at 355.

155. *Id.* at 353.

156. *Id.* at 355-56.

157. *Id.* at 356-357. Note that there are commentators that argue, despite *Geisel*, that most instances of this form of paternity will be protected by the Lanham Act, libel laws, or the right of publicity laws. See Damich, *supra* note 98, at 658.

158. The venerable Professor Melville Nimmer has stated that:

the time honored judicial practice of distilling new wine in old bottles has resulted in an increasing accretion of case law which in some degree accords the substance of moral rights either under copyright, or under other conventional and respectable labels such as unfair competition, defamation, invasion of privacy or breach of contract. It may not be said that this development has brought to American authors moral rights protection in the full bloom of its European counterpart.

Damich, *supra* note 119, at 4 n.12 (quoting NIMMER & NIMMER, *supra* note 77, § 8.21[B] (1985)).

signee's authorization, enjoined to give him credit for authorship."¹⁵⁹ What this country needs is a comprehensive and clear policy on the right of paternity, exclusive of the inherent economic rights. Unless such a policy is adopted, literary authors will continue to suffer. This is especially true for those who leave their work behind, subject to the ravages of misguided executors and an uninterested system of intellectual property law.

C. *The Reality of the Present System*

Despite Congress' claims regarding the protection of moral rights discussed heretofore, the authors we are concerned with do not have many effective alternatives to choose from in order to protect themselves against literary grave robbing under the present system. In fact, the common law seems to have provided only three: the law of wills, the law of gifts, and testamentary law.¹⁶⁰

1. Wills

As with all other forms of property, literary property can be provided for post mortem in a common will.¹⁶¹ Most often, the will stipulates a literary executor who is given the duty of supervising the literary estate.¹⁶² Much like with any other property, the author leaves an explicit set of terms and conditions for the executor to follow with regards to the disposition of the literary property. Authors though, are given no assurance that their hand-picked literary executor will abide by their wishes. There is also the further potential problem that even if the chosen literary executor is loyal, his successor in interest may not be so.

For example, J.R.R. Tolkien's son, Christopher, served as literary executor to the author's estate.¹⁶³ Despite their close relationship and the fact that Christopher clearly knew of his father's adamant position against illustration of his work, he nonetheless had new editions illustrated for the commemoration of Tolkien's centennial.¹⁶⁴ At face value, this may seem the economically sensible thing for an executor to do. In fact, it may have made the new editions more

159. Geller, *supra* note 126, at 673.

160. In none of the aforementioned areas is the concept of moral rights embedded.

161. 96 C.J.S. *Wills* § 787(c) (1957).

162. *See, e.g.*, In re Estate of Kallman, 425 N.Y.S.2d 938 (S.Ct. 1980); Johnson v. Zimmerman, 102 N.Y.S.2d 868 (Mun. Ct. 1951); In re Bartlett's Estate, 101 N.Y.S.2d 675 (Sup. Ct. 1950).

163. *See* discussion *supra* part I.B.

164. *Id.*

understandable, profitable, and aesthetically pleasing. Unfortunately, though, the character and integrity of Tolkien's wishes and work were inevitably ignored.

Another example of the potential uncertainty which follows the appointment of a literary executor surfaced in the works of George Orwell.¹⁶⁵ In that case, Sonia Orwell acted as the perfect literary executor for thirty years, zealously supervising and protecting Orwell's wishes.¹⁶⁶ Unfortunately, when she passed away, the successor in interest did not inherit her morals and scruples.¹⁶⁷ As a result, in the past decade, against Orwell's final wishes, two biographies have been published detailing his life and his work.¹⁶⁸

Hence, it is apparent that artistic integrity and personal wishes can easily be lost in the transfer of a literary estate via a will. In such a case, dispute resolution is left to the law of wills which, much like copyright law, lends no special recognition to moral rights.¹⁶⁹

2. Intestacy

Although it is less common today than earlier in the century, people still die without leaving wills. Moreover, an author may die without providing for the literary segment of his estate in a will. As a result, interested parties fight within the bounds of the state's intestacy statutes while the original intent of the deceased author is virtually ignored. The laws of intestacy, which vary from state to state, categorically fail to differentiate between literary property and any other kind of property.¹⁷⁰ Thus, the wishes of the author, written or otherwise, are often wholly ignored while the estate is split into its proportional shares. It then rests upon the executor's scruples to consider whether to honor the author's wishes.¹⁷¹

165. See discussion *supra* part I.C.

166. *Id.*

167. *Id.*

168. *Id.* These biographies were based upon Orwell's public and private papers. Orwell did not want these works used for such a purpose; however, his wishes were flatly ignored by the successors to his hand picked literary executor. In a sense, Orwell's artistic personality was left open to invasion and expropriation by persons Orwell never even knew. *Id.* On the other hand, one can argue that these private writings satiate the public's need to know the true Orwell. For a detailed analysis of this issue see discussion *infra* part V.B.3.

169. Oddly, the right to renew a copyright cannot be passed down by a will, but the Copyright Act does provide for such rights to be vested in the author's widow and/or issue. See 17 U.S.C. § 304(c)(2) (1988).

170. See Goldberg, *supra* note 67, at 1044-45 (discussing the common law treatment of literary property in America).

171. Similarly, Ernest Hemingway failed to specify the disposition of his correspondences in his will but had written a note requesting that they not be published. His wife/

3. Gift or Bequest To An Institution

Another possible alternative for the author who possesses substantial forethought is for him to provide access to all or part of his literary estate to a learning institution such as a university or a library. In effect, the institution would serve as executor or joint executor over the works given.¹⁷² This arrangement could be arranged by will or as an outright gift with a clear and concise stipulation as to the author's terms.¹⁷³

However, problems can arise with this scenario if the institution decides to vary from the terms of its agreement. Although such an institution would seem like the ideal intellectual sanctuary, it too is subject to the dictates of money and profit. The idea of learning institutions keeping and controlling the dissemination of literature also gives rise to the question posed by many—shouldn't such a learning institution be obligated to publicly disclose this scholarship?¹⁷⁴ Noted civil libertarian, Professor Alan Dershowitz of Harvard, commenting on the Halberstadt case, stated that he believes that it is tragic that there are rules that discourage the publication of serious and important scholarship.¹⁷⁵ This is but a further example of the strain between the rights and wishes of the author and the wishes of the public for the free flow of information.¹⁷⁶

Essentially, despite testamentary laws and the laws of gift inter vivos, American law must be transformed to provide better protec-

executor, however, managed to surmount her scruples and publish them nonetheless. She felt that the light it would shed upon such a major literary figure outweighed her husband's explicit request. Edwin McDowell, *Paper on Thomas Wolfe Stirrs Debate on Scholarship vs. Privacy*, N.Y. TIMES, Apr. 6, 1981, at C11. *But see* Yardley, *supra* note 18 (detailing the scruples which the Cheever estate displayed by not allowing collection and republication of his early works despite there being no such stipulation in written form).

172. *See* discussion *supra* part I.A. (regarding the literary estate of H.L. Mencken and the estate's executor, the Enoch Pratt Free Library of Baltimore).

173. There are three requirements for a gift inter vivos: (1) intent of the donor to make such a gift; (2) delivery of the property involved; and (3) acceptance by the donee. *In the Matter of the Estate of Kallman*, 103 Misc.2d 339, 425 N.Y.S.2d 938 (1980). Problems arose in the *Kallman* case because of the difficulty ascertaining the literary executor's donative intent. The case involved the poetry of W.H. Auden. *Id.*

174. McDowell, *supra* note 171. This article chronicles the plight of John Halberstadt, a Ph.D. candidate, who, before being allowed access to the works of Thomas Wolfe that were housed in the Houghton Library, had to agree that such use was solely for the preparation of his dissertation, that such dissertation would remain at Yale, and that neither it, nor any derivative thereof, would ever be published. Halberstadt, however, published an article based on his research and was subsequently barred from the library.

175. *Id.*

176. *See* discussion *infra* part V.B.3. (delving more deeply into this important conflict).

tion for the intentions of deceased authors. Our system should not advocate that the only true way for an author to prevent exposure of his works is to burn them before he passes on.¹⁷⁷

IV. THE SOLUTION: A THEORETICAL STEP

In order for an author of a literary work to rest in peace, fully assured that his work will survive him or not survive him, as per his wishes, certain rights must attach to literary work at the moment of creation. Under American copyright law, economic rights in an author's original work attach once the work is "fixed in any tangible medium of expression."¹⁷⁸ However, as discussed herein,¹⁷⁹ moral rights for literary authors are not provided for by American law. Rather, an author must sift through the sands of a vast desert of legal jurisprudence in search of the appropriate cause of action.¹⁸⁰ It is unlikely that any of the remedies proposed by Congress truly provide protection comparable to that of Berne.

Moral rights exist traditionally in the majority of educated societies, and most certainly exist in the hearts and minds of the artists themselves. Without explicit federal legislation, artists may never totally attain these rights which, to many artists, are more dear than economic success.¹⁸¹

Such explicit legislation providing protection for the moral rights of literary authors is necessary.¹⁸² Congress, however, should not ordain new legislation without first embracing a new theoretical basis of intellectual property. For if it were to simply declare a shift in the law without re-examining and reformulating its policy treatment of literary creations, then Congress would, in essence, be advocating a face-lift of the system without offering any substantial underlying change. This new view of intellectual property must acknowledge the true nature of literary creation. "Although one cannot physically possess or occupy ideas, property in ideas is justified

177. Although the whole system of last testaments is designed to honor and execute the wishes of the dead, this is not always the case. Accordingly, the only alternative would be to destroy that which an author desired to remain private. See Yardley, *supra* note 18, at C5.

178. 17 U.S.C. § 102(a) (1988).

179. See discussion *supra* part III.B.

180. See discussion *supra* part III.B.

181. Van Velzen, *supra* note 63, at 645 (quoting Note, *Fine Art: Protection of Artist and Art*, 1 ENT. & SPORTS L.J. 99, 121 (1984)).

182. Legislation such as that governing visual artists should be used as a model for protection of literary artists. See 17 U.S.C. § 106A (Supp. III 1992).

because people 'have the right to enjoy the fruits of their labor, even when the labors are intellectual.'"¹⁸³ This enjoyment should not be solely economic in nature; rather, this system must also safeguard an author's right to treat his work as he pleases.¹⁸⁴ Therefore, a concession must be made that literature is more than just a piece of property.

When an artist creates . . . he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use. There are possibilities of injury to the creator other than merely economic ones¹⁸⁵

Thus, American law should explicitly adopt the notion that artistic work is part of an artist's identity¹⁸⁶ and that the two should never be completely separated.¹⁸⁷ In essence, the artist never truly gives up his interest in the work of art to the subsequent property holder. If an artist's work is part of his personality, it necessarily follows that the work should not be altered, mutilated or destroyed without the author's consent.¹⁸⁸ Although this personhood theory may seem a bit foreign to many, it is not as radical as it may first

183. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 301 (1988) (quoting Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 413 (1983)).

184. This must be so, whether it means destruction, non-publication or limited publication.

185. Roeder, *supra* note 87, at 557; see also Van Velzen, *supra* note 63, at 629. "The philosophical recognition that a work of art is the expression of the author's personality has been traced to Immanuel Kant, who in his essay, *Was ist ein Buch?*, distinguished between the ownership of the material component of the artwork and the idea embodied in it." Damich, *supra* note 119, at 26.

186. Lacey, *supra* note 72, at 1542. This is referred to as the personhood theory. It is important to note, though, that there are other theories of intellectual property, such as the natural theory and artificial theory. *Id.* at 1541.

187. It is notable that:

[a] comparison of the protection accorded the creative personality in French and American law, however, reveals that although personal rights results have been obtained in some situations and personality rights have been recognized, the instances of extension of such rights hardly provide a sure basis for substantial protection of the interests concerned.

Damich, *supra* note 119, at 35. Nevertheless, the reasoning behind much of the American case law "points to a general right of personality, extant but rarely identified as such in American law, which can be drawn upon in the time-honored tradition of the common law to provide the basis for the substantial protection of the moral rights of authors." *Id.* at 4.

188. "The personhood theory of intellectual property thus supports not only the idea of copyright in artistic products, but also the idea of moral rights." Lacey, *supra* note 72, at 1542.

appear. In fact, the concept of a personhood right does not have to be at odds with the Copyright Acts' respect and protection for the economic rights of authors. For instance, in France, it is understood that by engaging in the process of creation, the author not only projects his personality into the work but also creates a work which has a commercially exploitable economic value.¹⁸⁹ An acceptance of both of these doctrines would best exemplify this country's foundational tenet of respect for private property. The "American Dream" has not only stood for the amount of economic opportunity available in this country but also for the idea that, once earned, one should have control over the benefits derived therefrom.¹⁹⁰ For instance, a furniture maker has the choice or opportunity to sell, destroy, alter or keep his furniture for his private use. The same prerogatives should be given to the creators of literature.

Yet, as discussed earlier, the American system does not believe that the literary author has such rights.¹⁹¹ Rather, the literary author is expected to produce for the benefit of society, a society which frowns upon any attempted private use or control over the article produced.¹⁹² Professor Lacey clearly recognizes this inconsistency and postulates that we should be hostile towards extending such socialist tendencies to our tangible property.¹⁹³ Why, then, have we done so with literary property? It clearly is not inconsistent with the American scheme of things to provide literary authors some degree of private property rights over their creations. In fact, it seems to be the American way.¹⁹⁴

Once there is recognition of the fact that literature is a product of the artist's personality deserving of protection rather than a mere "object," we can then proceed to define these rights and incorporate them into appropriate legislation.

189. Damich, *supra* note 119, at 28. In France, there is some balance between the economic "property" rights of authors and the personality rights bond which exists between author and creation. *Id.* at 26. Most often, the personality rights will take precedence. However, the right of personality theory "never achieved the exclusive dominance that it enjoyed in Germany." *Id.*

190. This is applicable to the economic benefits as well as the intangible benefits of control over the dissemination of the article at issue.

191. See Damich, *supra* note 119, at 35.

192. *Id.*

193. Lacey, *supra* note 72, at 1536.

194. However, it is ironic that the United States has been so slow to recognize these rights. Even China has adopted moral rights for literary works, as well as oral works, fine art and dramatic and choreographic works. *China's First Copyright Law Protects Moral and "Economic" Rights*, 41 Pat., Trademark & Copyright J. (BNA) No. 1005, at 37 (Nov. 8, 1990).

V. THE SOLUTION: THE LEGISLATIVE STEP

Once Congress recognizes and embraces a new theory of intellectual property, one which recognizes both an economic and moral dimension, we can then define precisely what rights are needed to provide adequate support to literary authors. In order to develop such a system of rights best suited for the United States, we must critically examine the two presently prevailing doctrines: the doctrine of moral rights espoused in the Berne Convention¹⁹⁵ and France's doctrine of *droit moral*. In addition, it would be instructive to refer to Congress' relatively recent enactment of legislation providing limited moral rights to the works of visual artists.¹⁹⁶ The resulting system of rights for literary authors should be uniquely American in character.

A. Which Moral Rights Are Desirable?

The concept of moral rights or *droit moral* arose from the philosophy of individualism which accompanied the French Revolution.¹⁹⁷ The development of this doctrine, which began in nineteenth century France, was the direct result of case law.¹⁹⁸ The three basic components of this theory of moral rights are the rights of paternity, integrity and disclosure.¹⁹⁹ As discussed previously, the Berne Convention only recognizes the rights of paternity and integrity.²⁰⁰ Similarly, in passing the Visual Artists Rights Act of 1990, Congress took an affirmative step towards explicitly protecting an artist's rights of paternity and integrity.²⁰¹ This protection, extends only to works of visual art, and not to books, magazines, newspapers and

195. See discussion *supra* part III.A.

196. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified in scattered sections of 17 U.S.C.).

197. Van Velzen, *supra* note 63, at 632.

198. Damich, *supra* note 119, at 7. This is so despite the statutory orientation of the French code system. Professor Damich proposes that substantial moral rights protections can be achieved in the United States much the same way—judicially. *Id.* As discussed previously, Congress also feels that moral rights should be developed via judicial doctrine. See discussion *supra* parts III.A, III.B. I, though, respectfully disagree. If we were to sit back and allow the judiciary to move at its usual "snails pace" we would be doing nothing more than watching this "time honored [and time, effort and resource wasting] judicial practice of distilling new wine in old bottles . . ." *Id.* at 4 n.12; see also *supra* note 140 and accompanying text.

199. Van Velzen, *supra* note 63, at 630-31.

200. Berne, *supra* note 81, art. 6^{bis}; see discussion *supra* part III.A. The right of disclosure has been acknowledged as a moral right under many European civil law systems but was not included in Berne. Van Velzen, *supra* note 63, at 636, 633-36.

201. See Pub. L. No. 101-650, 104 Stat. 5128 (codified as amended at 17 U.S.C. § 106A (Supp. III 1992)); see also *Comments Sought on Waiver, supra* note 4, at 128.

periodicals.²⁰² There are several potential reasons why literary works were excluded from this act. "For one thing, the physical damage to a work of art is easier to determine than possible intangible damage to a literary work. Additionally, the powerful publishing, motion picture, and broadcasting industries oppose extending moral rights beyond artwork."²⁰³

Congress believed that these moral rights of integrity and pater- nity did not need to be explicitly provided for all authors since ade- quate causes of action already existed in American jurisprudence.²⁰⁴ As discussed earlier, the existing laws do not provide sufficient pro- tection of these rights.²⁰⁵ Therefore, in order to adequately provide protection for literary authors' moral rights, explicit legislation must be enacted.

1. Disclosure

Although not provided for in the Berne Convention, the moral right of disclosure is the first issue that must be explicitly provided for in American legislation. This right would allow an artist to deter- mine both the form and the timing of the work's display.²⁰⁶ The drafters of Berne likely omitted the right of disclosure because of the belief that the topic was too controversial to include.²⁰⁷

The continental view of *droit moral* asserts that the need for a right of disclosure is closely entwined with the protection of the au- thor's reputation.²⁰⁸ In order to fully protect his reputation, the au- thor is charged with the ability to control the form and manner of public disclosure of his work. "If the author has the right to deter- mine how his personality as expressed in the work is to be revealed, it follows that he has the right to control its disclosure to the pub-

202. A "work of visual art" is defined as:

(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 sculp- tures 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.

17 U.S.C. § 101 (1988).

203. Lacey, *supra* note 72, at 1552 n.95.

204. See discussion *supra* parts III.B.1, III.B.2.

205. *Id.*

206. Van Velzen, *supra* note 63, at 630.

207. *Id.* at 636 n.59.

208. *Id.* at 633-34.

lic."²⁰⁹ This, though, lends itself to the problem of reconciling the personal right of disclosure and the ownership of the material object.²¹⁰

In the United States, this tension between moral right of disclosure and ownership of the material object would likely arise in the context of the Copyright Acts' provisions governing "works made for hire."²¹¹ Pursuant to section 201(b) of the Copyright Act, the employer or person for whom the work was prepared is considered the author of the work and owner of all the rights comprised in the copyright.²¹² Therefore, if a right of disclosure were afforded to the author of the work, then there would be the problem of identifying who the owner was for moral rights purposes and when the work was considered completed for those purposes. Obviously, the doctrine of disclosure is meant to provide this right to the actual creator of the work.²¹³ Nonetheless, this is an issue which would have to be addressed in any proposed legislation. Perhaps, it would be possible to create an exception to the present "work made for hire" provisions allowing the actual author to retain the moral rights in his work unless the author explicitly contracted to the contrary.²¹⁴

Furthermore, the right of disclosure raises the issue of a corresponding right of retraction. If the author deems it necessary, this

209. Damich, *supra* note 119, at 8.

210. *Id.* at 9. To illustrate this conflict, Professor Damich cites the French case of *Camoïn v. Carco* in which a painter had slashed and thrown away some of his works with which he was dissatisfied. Thereafter, the defendant found these works, restored them, and put them up for auction. In holding in favor of the artist's right to decide whether or not his work should be disclosed to the public, the Court of Paris stated that, "although whoever gathers up the pieces becomes the indisputable owner of them through possession, this ownership is limited to the physical quality of the fragments, and does not deprive the painter of the moral right which he always retains over his work." *Id.* (quoting Sarraute, *Current Theory on the Moral Rights of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 468 (1968)).

211. A "work made for hire" is defined as:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire .

...

17 U.S.C. § 101 (1988).

212. 17 U.S.C. § 201(b) (1988).

213. Damich, *supra* note 119 at 8.

214. See discussion *infra* parts V.B.1, V.B.2 (addressing the issues of transfer and waiver of moral rights).

right would give him the option to withdraw his work entirely from the public eye or to modify it to reflect his current state of mind.²¹⁵ French law explicitly recognizes the author's right to continuously monitor the presentation of his idea to the public after it enters the public sphere.²¹⁶ This right, however, is subject to significant limitations, and many believe that it is effectively "dead letter" law.²¹⁷ Clearly, if the right of retraction conflicts with individual contractual and property rights in France, a nation much more open to the concept of moral rights, then surely the right of retraction is similarly at odds with American law. Therefore, it is not wise to propose a broad right of retraction.²¹⁸ Nonetheless, the author should not be foreclosed from preventing the distribution of new editions or subsequent compilations of his work.²¹⁹

The right of disclosure is the boon which will enable literary authors to rest in peace. The right to control the dissemination and use of one's work is as essential as the right to reap an economic gain therefrom. The existence of such a right would clearly diminish the likelihood of invidious behavior on the part of executors and self-interested third parties. A moral right of disclosure will ensure the wishes of those authors who express, prior to their deaths, their desires regarding the disposition and dissemination of their works. Such a moral right, inherent in the bond between author and literary work, would provide such protection absent any explicit testamentary provisions. Therefore, under such legislation, the debacles involving John Cheever,²²⁰ H.L. Mencken,²²¹ and George Orwell²²²

215. Damich, *supra* note 119 at 23-24. In American law, there is no authority supporting a right to compel retraction of the physical object. *But see* 17 U.S.C. § 203 (1988) (governing terminations of transfers and licenses granted by the author). In the case of an unqualified transfer of copyright, however, the author does have the ability to prevent the exercise of those rights once the period of termination specified in section 304 lapses. 17 U.S.C. § 304(c) (1988); Damich, *supra* note 119 at 40.

216. *Id.*

217. *Id.* at 25. Professor Damich observes that "[t]he right of retraction is a good example in French law of a logical extension of the concept of the creative personality which is, nevertheless, given a restricted scope because of its conflict with other rights." *Id.* For instance, the right of retraction, much more so than the other moral rights discussed herein, can directly impair contractual obligations and property rights. *Id.* at 24.

218. Professor Lacey maintains that the right of retraction should not be so broad as to allow an author the right to confiscate all old editions of her work. Lacey, *supra* note 72, at 1595.

219. *Id.* This, in essence, was the wish of John Cheever—that his earlier works would not be republished collectively. *See* discussion *supra* part I.B.

220. *See* discussion *supra* part I.B. John Cheever's intent not to have his earlier works republished in a compilation was very clear. Pursuant to a moral right of disclosure, there

would likely be avoided.

2. Integrity

As discussed previously, the right of integrity allows the artist to prevent his work from being displayed in an altered, distorted, or mutilated form.²²³ Moreover, the right of integrity is considered:

a logical implication from the right of disclosure, for, if the author has the sole right to decide whether or not his personality as projected into a work of art will be disclosed to the public, he must necessarily have the right to ensure that the work is a true representation of his creative personality, even after it has been disclosed.²²⁴

The idea that an author should have the ability to control the representation of his work not only derives from the personhood theory²²⁵ but also appeals to a common sense understanding of what is just and deserved. Even though such a right may seem more necessary for painters, sculptors and visual artists, whose work takes on a visually perceptible form, the right is no less essential for literary authors.²²⁶

Once it is decided that an explicit right of integrity is desirable for the United States, the scope of this right must be questioned. The Berne Convention provides for a right of integrity where the alteration, distortion, or mutilation results in prejudice to the author's honor or reputation.²²⁷ Accordingly, if such alteration, distortion, or mutilation does not adversely affect the author's honor or reputation, no integrity right will be breached. This rule, however, presumes that the bottom line in each author's mind is the promotion and maintenance of his reputation. This is not always the

would be a legal basis to prevent any action antagonistic to this wish.

221. See discussion *supra* part I.A. Disclosure provisions set out by Mencken prior to his death could not have been any more explicit. The recognition of a moral right of disclosure would result in his wishes being fulfilled despite the lack of such instructions in his will.

222. See discussion *supra* part I.C. The private diaries and unpublished works of Orwell were supposed to be just that—private. A moral right of disclosure would surely satisfy his wishes of privacy.

223. See discussion *supra* part III.B.1.

224. Damich, *supra* note 119, at 15.

225. See *supra* notes 182-87 and accompanying text.

226. For example, it is painfully clear that the integrity of Tolkien's work was significantly altered when illustrated contrary to his explicit wishes. See discussion *supra* part I.B.

227. Berne, *supra* note 81, art. 6^{bis}; see also Van Velzen, *supra* note 63, at 635; see also *supra* note 109 and accompanying text (for a discussion of another potential meaning of article 6^{bis}).

case.²²⁸ Nonetheless, Congress adopted such a view when they passed such legislation governing visual artists.²²⁹

The French theory of moral rights, on the other hand, considers any unauthorized alteration, distortion, or mutilation of an author's work violative of his right of integrity regardless of the effect on his reputation.²³⁰ Therefore, even an alteration that advances the author's reputation would be considered a breach of his moral right of integrity. This type of protection is necessary for literary authors. Illustrative of this point is the situation involving the estate of J.R.R. Tolkien.²³¹ By choosing to illustrate his father's work, Tolkien's literary executor/son was making the work more interesting and marketable and thus, improving his father's reputation.²³² Nevertheless, he was flatly ignoring the explicit wishes of his father that his work never be illustrated.²³³ Despite the economic gain and potential benefit to his reputation, it would seem that Tolkien would have preferred

228. For instance, artists are continually taking chances in order to push the boundaries of their respective fields. This innovation is quite often risky to the artists' reputation but is attempted nonetheless. A recent example of this in the literary field surrounds Brett Easton Ellis' novel *AMERICAN PSYCHO*. The book, originally to be published by America's largest publishing house, Simon & Schuster, and scheduled for release in late 1990, was described by the author as "a critique of Eighties morals and mores." John Heilpern, *Dressed to Kill and Bound For The Best-seller List*, *THE INDEPENDENT*, Nov. 25, 1990, at 11. However, as the publication date neared, many people, including some at Simon & Schuster, became disenchanted with the tastefulness of this so-called 'critique'. *Id.* In particular, several women's groups voiced their objections to the lurid descriptions of violence against woman committed by the book's main character, a yuppie with a vengeance. *Id.*; see also James Brady, *Always In Good Taste*, *ADVERTISING AGE*, Dec. 3, 1990, at 32. As a result, Mr. Ellis' book was dropped by Simon & Schuster just weeks prior to its scheduled release. Brady, *supra*, at 11. Fortunately for the author, the book was quickly picked up by Vintage books, a division of Random House. *Id.* Subsequently, the book was released amid a flurry of negative publicity, however, Vintage did scrap plans for a publicity tour and eliminated all advertising. Marilyn Gardner, *Monsters and Their Keepers*, *THE CHRISTIAN SCIENCE MONITOR*, Mar. 19, 1991, at 13. When the hoopla surrounding his novel began, Mr. Ellis stated, "I had no idea the book would provoke the reception it's gotten, and I still don't quite get it." *Id.* Nonetheless, Mr. Ellis did take quite a risk by standing up for the integrity of his work against critics in both the publishing world and political world. The impact this will have on Mr. Ellis' professional reputation is not yet known.

229. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified in scattered sections of 17 U.S.C. (Supp. III 1992)). This provision of the Visual Artists Rights Act provides that an author of a work of visual art has the right: "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 . . ." *Id.* (emphasis added).

230. Van Velzen, *supra* note 63, at 635-36.

231. See *supra* notes 12-15 and accompanying text.

232. *Id.*

233. *Id.*

compliance with his wishes.

In the absence of testamentary provisions, an author's wishes can be honored only by affirmative recognition of the moral right of integrity. If the author's very soul is embodied in the work he produces, the integrity of his work must be explicitly protected regardless of any effect on his honor or reputation.

3. Paternity

Finally, literary authors must be explicitly provided the moral right of paternity. Generally, the right of paternity is considered to entail the right to have the work attributed to the author, the right to prevent others from falsely claiming authorship of the author's work, and the right to prevent others from attributing to the author a work he did not create.²³⁴ Commentators have called the right of paternity the least controversial of all the moral rights of authors.²³⁵ Therefore, it is not surprising that this right has gained more judicial acceptance in the United States than either the right of disclosure or the right of integrity.²³⁶

Personal rights, however, are "concerned with the relationship between author and work, rather than with the author's name or reputation in isolation from his work."²³⁷ Therefore, from a personhood theory²³⁸ perspective, the right against false attribution should not be considered part of the moral right of paternity.²³⁹ Nevertheless, even if not considered an element of the right of paternity, the right against false attribution certainly is desirable. This right would still be protected via the Lanham Act and case law.²⁴⁰

Congress, in adopting the Visual Artists Rights Act, acknowledged two of the elements of a right of paternity.²⁴¹ Interestingly,

234. Ross, *supra* note 90, at 368; see discussion *supra* part III.B.2.

235. Damich, *supra* note 119, at 14.

236. See discussion *supra* part III.B.2.

237. Damich, *supra* note 119, at 13.

238. See *supra* notes 184-9 and accompanying text.

239. *Id.*; but see *id.* at 14 n.54 (citing DaSilva who adheres to the idea that the right of paternity is comprised of three independent rights, including the right against false attribution).

240. See discussion *supra* part III.B.2 (focusing on the cases of Ken Follett, Woody Allen, and Bette Midler).

241. The Visual Artists Rights Act of 1990 provides that an author of a work of visual art has 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. Pub. L. No. 101-650, § 603, 104 Stat. 5128 (codified as amended at 17 U.S.C. § 106A(a)(1) (Supp. III 1992)).

the right against false attribution was explicitly provided for in this legislation despite the presence of the Lanham Act and case law.²⁴² Furthermore, the right to prevent others from falsely claiming authorship of the author's work was not explicitly provided for in this legislation.²⁴³ As for literary authors, any legislation governing the right of paternity should be limited to the right to have their work properly attributed to themselves and to prevent others from falsely claiming authorship of their work. The right against false attribution, which truly is not in comport with the personhood theory, need not be included for it will be properly protected through the Lanham Act and case law.²⁴⁴

B. *Concerns in Adopting Moral Rights*

In explicitly adopting legislation providing literary authors with the moral rights of integrity, paternity, and disclosure, there arise several concerns regarding the general scope of these rights. These concerns and proposed solutions will be discussed below.

1. Duration of Moral Rights

The question of how long these rights will last is particularly important with respect to deceased, literary authors, with whom we have been concerned. At first glance, the personhood theory seems to dictate that moral rights would expire at the death of the author.²⁴⁵ Nonetheless, most European nations' moral rights protection last beyond the life of the author.²⁴⁶ One potential resolution to this apparent contradiction is to consider that "personal rights do not pass to the heirs to be exercised according to their self-interest; they are still [attached to the author's person] in the sense that they continue to vindicate his memory and his work, but power to enforce these rights are in his heirs."²⁴⁷ Accordingly, post mortem moral rights do not conflict with the personhood theory.²⁴⁸

242. 17 U.S.C. § 106A(a)(1)(B) (Supp. III 1988). This is ironic in light of the fact that Congress expressly refused to create new legislation providing for moral rights on the grounds that the existing laws provided adequate protection. See discussion *supra* part III.A.

243. See *id.*

244. See 15 U.S.C. § 1125 (1988) (Lanham Act provision); see also notes 136-150 and accompanying text.

245. Damich, *supra* note 119, at 93.

246. For instance, moral rights under French law are perpetual, while in Germany they expire seventy years after the author's death. Lacey, *supra* note 72, at 1550 n.90.

247. Damich, *supra* note 119, at 93.

248. But see Lacey, *supra* note 72, at 1594. Professor Lacey believes the bond between artist and work is broken upon death and that this bond cannot be mended by distinguishing

Under French law, moral rights last in perpetuity.²⁴⁹ This is likely due to the way in which moral rights and economic rights are viewed in that country. The French take a dualist approach to these rights, providing separate and distinct durational periods for each right.²⁵⁰ Thus, economic rights expire fifty years after the author's death while the author's moral rights are perpetual.²⁵¹ On the other hand, under German law, there has been an assimilation between economic and moral rights.²⁵² Thus, in Germany, both the author's moral rights and economic rights expire seventy years after the author's death.²⁵³

Likewise, the Berne Convention has tied the duration of moral rights to the duration of the author's copyright by providing that the moral rights last at least as long as the economic rights.²⁵⁴ However, Congress chose to limit the duration of moral rights provided for visual artists.²⁵⁵ The only exception is for those works not transferred from the author but created before the effective date of this legislation.²⁵⁶ Those works are afforded moral rights protection for as long as the work's economic rights last.²⁵⁷

Congress could confront the duration issue by providing that moral rights will continue beyond an author's death.²⁵⁸ The United States should consider adopting an assimilationist theory of literary

the moral right itself from the exercise of that right. *Id.* at 1594 n.265.

249. See *supra* note 222 and accompanying text.

250. Damich, *supra* note 119, at 32.

251. *Id.*

252. *Id.*

253. *Id.*; see also Lacey, *supra* note 72, at 1550 n.90.

254. Lacey, *supra* note 72, at 1550 n.91. However, Berne also states that those "countries whose legislation at the time of ratification of the Act does not provide for moral rights after death may provide for the expiration of these rights." *Id.*

255. 17 U.S.C. § 106A(d) (1988). This section provides, in part:

(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.

Id.

256. 17 U.S.C. § 106A(d)(2) (Supp. III 1992).

257. 17 U.S.C. §§ 302-04 (1988).

258. SEE STEPHEN P. LADAS, I THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 601 (1938) (stating that "[w]hen the author dies, his moral rights should not disappear with him").

property which would tie together the durational periods of economic and moral rights, similar to the Berne Convention and the practices of some European nations.²⁵⁹ One proponent of perpetual moral rights advances the idea that protection should be entrusted to institutions, such as academies and associations of artists and writers, on the grounds that they are "the natural guardians of the culture in each country."²⁶⁰ However, as indicated at the outset of this Note, these institutions often fail to honor the wishes of deceased authors.²⁶¹ Literary executors cannot always be trusted with an author's true wishes. Thus, during the duration of the moral rights of literary authors, any citizen should have standing to challenge an executor's conduct which may compromise the artist's moral rights.²⁶²

In order to implement an assimilationist approach, this country should follow the example of the Berne Convention and various European nations and provide moral rights protection for a period equivalent to that which is given to economic rights.²⁶³ Only then can authors such as J.R.R. Tolkien, H.L. Mencken, George Orwell, and John Cheever be assured that their works will be used after their death only in accordance with their wishes.

2. Waiver/Transfer of Moral Rights

Another concern which must be addressed regarding the moral rights of literary authors is the issue of waiver. French law considers an artist's moral rights not only perpetual but also inalienable.²⁶⁴ It is thought that allowing for the waiver of such personal rights would be equivalent to allowing the author to commit "moral suicide."²⁶⁵ This sentiment is in accord with the personhood theory.²⁶⁶ However,

259. *Id.* at 578.

260. *Id.* at 602.

261. See discussion *supra* part I.C.

262. LADAS, *supra* note 258, at 601. This concept is not so novel. In fact, the International Committee on Intellectual Cooperation considered this several decades ago, on the basis that "the works of authors belong to humanity, and that any one has an interest in seeing them respected." *Id.* at 601 n.69.

263. For works created after January 1, 1978, the copyright duration is the life of the author plus fifty years. 17 U.S.C. § 302(a) (1988).

264. Van Velzen, *supra* note 63, at 633. In addition to France, a creator theoretically cannot waive his moral rights in Brazil, Chile, Colombia, Equador, Guinea, Italy, Japan, Portugal or Senegal. *Id.* at 633 n.40. By stating that authors have moral rights "even after the transfer of said rights", the Berne Convention took the position that moral rights are not waivable or assignable. Berne, *supra* note 81, art. 6^{bis}; see also LADAS, *supra* note 258, at 600-01.

265. Damich, *supra* note 119, at 90-91.

266. Lacey, *supra* note 72, at 1594 n.266. Professor Lacey deftly illustrates this point by

the French interpretation of "inalienable" rights is not as absolute as that term may suggest. In France, for example, contracts have been enforced which, to some extent, limited the author's control over adaptations.²⁶⁷

Indeed, "[t]he notion of inalienable rights of the human personality is not unknown to American law."²⁶⁸ Illustrative of this point are American courts' reluctance to enforce some personal services contracts, contracts in restraint of employment, contracts which prove to be unconstitutional, and elements of contracts which are unconscionable.²⁶⁹ Furthermore, an aspect of inalienability appears in the Copyright Act itself.²⁷⁰ However, the Visual Artists Rights Act states that moral rights "may be waived if the author expressly agrees to such waiver in a written instrument signed by the author."²⁷¹ This waiver, however, raises the concern that authors will be forced to surrender their moral rights in an effort to earn enough money to live.

Nevertheless, it is quite possible that the United States could adopt a stance acknowledging a relative inalienability of moral rights in light of the fact that personhood rights are not absolutely inalienable and that American law has, in certain circumstances where individual rights were paramount, limited the right to contract.²⁷² Pursuant to such a relative inalienability, "[t]he only kind of contract indisputably unenforceable under personal rights theory would be contracts containing blanket waivers in advance."²⁷³ Relative inalienability would seem to be adequate protection for a susceptible author from any unequal bargaining power. Questions of unequal bargaining power could be resolved on a case by case basis.²⁷⁴

stating that "[i]f the artist and her work are considered an inseparable unit, then the artist cannot sell the moral rights to her work just as she cannot sell herself into slavery." *Id.*

267. Damich, *supra* note 119, at 91.

268. *Id.*

269. *Id.* at 91-92.

270. The Copyright Act provides the author with the right to revoke the transfer of a copyright and further provides that "[t]ermination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant." 17 U.S.C. § 203(a)(3) (1988); Damich, *supra* note 119, at 91. This section on waiver presumes that authors do not have the bargaining power that would enable them to exploit their works to their fullest potential.

271. 17 U.S.C. § 106A(e)(1)(a) (1988).

272. Damich, *supra* note 119, at 92.

273. *Id.*

274. Ideally, case law would develop which would be particularly sympathetic to the struggling author.

3. Public Use/Public Need To Know

Opponents of expansive moral rights in the United States also argue that it would result in a detriment to society at large.²⁷⁵ This derives from the historical view in this country that the purpose of copyright is to provide an economic incentive to produce works which will ultimately advance public welfare.²⁷⁶ Unfortunately, nowhere in that thinking were authors' moral rights addressed.

In ideal situations, both the concerns of the artist and the interests of the community are strengthened by the moral rights doctrine. When it prevents a buyer from altering a statue or rewriting an original novel, almost everyone benefits. But the two interests do not always coincide.²⁷⁷

These interests not only rarely coincide but also are few and far between. Therefore, a balance must be struck between community interests and the interests of authors. Admittedly, where there is good reason to believe that the health or safety interests of society are at issue, the interests of society should override those of the author.²⁷⁸

A legitimate concern of the opponents of expansive moral rights is that it would result in important works of art never being fully appreciated by the public. This seems to be the issue concerning the barring of John Halberstadt, the Ph.D. candidate, from Harvard's Houghton Library.²⁷⁹ Harvard law professor Alan Dershowitz, in commenting on the case, left no doubt on which side of the debate he stood when he stated that, "this is a typical case of whistle-blowing versus the protection of private interests. . . . It's a tragedy there are still rules that would discourage or prevent the publication of a major piece of scholarship."²⁸⁰ Professor Dershowitz makes a legitimate point. In fact, there have been numerous instances in which, had the author's wishes been followed to the word, the world would have been deprived of great artistic works. For instance, noted existentialist Franz Kafka asked his editor to destroy all of his unpublished

275. Lacey, *supra* note 72, at 1592-3.

276. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

277. Lacey, *supra* note 72, at 1593.

278. *Id.* at 1595.

279. See *supra* note 153 and accompanying text. Halberstadt was barred from the library for publishing a paper on Thomas Wolfe after he had agreed not to do so in exchange for permission to use the collection of Wolfe's works housed in the library. *Id.*

280. McDowell, *supra* note 153, at 11.

works upon his death.²⁸¹ If his editor had done so, the world would have been deprived of "work which is widely acknowledged as being highly influential in modern Western literature."²⁸² Likewise, one can argue that the opinion of the Maryland Attorney General in allowing the Enoch Pratt Library to publish H.L. Mencken's diaries and letters, despite the author's wishes to the contrary, served to benefit society as a whole.²⁸³ Similarly, access to Orwell's personal papers may seem to be in the public interest, especially if it were to result in a more accurate biography of the author's life.²⁸⁴

Nonetheless, the result in each of these cases indicates utter disregard for the explicit wishes of the now deceased authors. The authors' wishes however, should be deemed paramount, barring a valid health or safety concern. It is arguable that authors are motivated to produce works not only through economic incentive but also by the notion that they will have control over the dissemination and use of such work. Moral rights provides the author with such protection by bonding the author with his work. This bond should not be broken absent serious and legitimate societal concerns. Any other approach would "impose socialist ideals upon a capitalist framework."²⁸⁵

CONCLUSION

The United States should re-examine and re-evaluate its historical treatment of literary creations. The current law does not penetrate the core problem—what happens when someone, whether it be a publisher, biographer or even a literary executor, ignores the wishes of the author violating the author's wishes and compromising the author's artistic integrity? Under the present system, such an individual can often justify his actions through contract or property law.

Once Congress acknowledges the idea that an indelible bond exists between author and his work, it can then begin to outline the moral rights which attach thereto. The Berne Convention and France's doctrine of *droit moral* are good models to examine. The rights of integrity, paternity and disclosure must all be adopted to the extent discussed herein.

The proposed legislation for literary authors would provide ade-

281. Lacey, *supra* note 72, at 1594 n.263.

282. *Id.*

283. See discussion *supra* part I.A.

284. See discussion *supra* part I.C.

285. See Lacey, *supra* note 72, at 1532.

quate protection for the author's wishes, either written or verbal. Undoubtedly, such an enactment would have an impact upon the avenues through which authors leave their literary property after death. Some may say that this is a stifling of the free flow of information, but the better argument is that it serves to strengthen this country's fundamental right of individual liberty. If Congress fails to take appropriate action, deceased literary authors will continue to be defenseless to the posthumous fiasco permitted under the present system.

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