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AUTHORS' AND ARTISTS' RIGHTS IN THE UNITED STATES: A LEGAL FICTION

In a very real sense the greatness of a nation is measured by the respect which it accords the creative work of its people. And a large measure of that respect is reflected in the attitudes of the Government toward the arts, attitudes which inevitably are embodied in the laws of the land. If the Congress fails to enact positive, effective statutes to protect the rights of artists, the United States, with all its wealth, power, and achievements, will be judged, at best, a second rate civilization.¹

I. INTRODUCTION

In a recent best-selling novel,² the protagonist, a serious novelist, sold a manuscript to a profit-hungry publisher. To enhance the marketability of the work, the publisher created a book cover that would lead prospective readers to believe that the book detailed events leading up to and surrounding a mysterious, catastrophic accident. Although accidents did, in fact, play a part in the novel, the publisher well knew that the book would tell the reader nothing of the event shown on the cover. The novelist did not learn of this distortion of his creation until the book was about to be publicly distributed, and then his reaction was one of horror.³

This story illustrates how a publisher's editorial and marketing techniques can create a book cover that distorts its content, and suggests a fundamental fact of life for most American authors and artists: that, where the publisher distorts a work in such a manner, the creator is without recourse. The possibilities for such unpleasant exploitation, however, far exceed this scenario. The artistic creator, generally at the mercy of his or her publisher or other commercial distributor, may see unauthorized changes made in his work⁴ or may

³. Id. at 339-40: "[I]t called for your cheap but immediate attention; it got it . . . . [H]e could imagine people buying the book in droves. He sat feeling disgusted at the people he imagined buying the book . . . ."
⁴. See text accompanying notes 51-53, 102-116 infra.
be the victim of an improper attribution of authorship. Commercial
distributors may also attribute to the artist work of quality inferior
to that by which he is known, with resulting damage to the artist’s
personal integrity.

In Europe, an author victimized by his publisher in such a way
may well be able to seek judicial help to protect his work under the
document of “moral rights.” The moral rights doctrine, followed in
the courts of nations adhering to the Berne Convention, may be
summarized as the right of an author or artist to have his work attributed to him in the form in which he created it. Some legal com-
mentators maintain that American common law theories and ex-
isting federal statutes already amount to a satisfactory equivalent of
moral rights, without adoption of the Berne Convention concept.
This note demonstrates, however, that the American patchwork ap-
proach is in many respects inferior to the protections guaranteed by
moral rights legislation. Absent contractual protection, courts generally do not recognize or enforce any semblance of moral rights; and
even American copyright law does not ensure that the integrity of one’s creation will be preserved.10

After briefly examining the concept of moral rights11 and surveying the common law’s treatment of artistic creators’ rights,12 this
note examines federal and state statutory approaches,13 focusing on the application, or misapplication, of section 43(a) of the Lanham
Trademarks Act,14 California’s Art Preservation Act,15 and a pro-

5. See text accompanying notes 32-54, 79-83 infra.
6. See text accompanying notes 83-93, 97-154 infra.
done, July 24, 1971, art. 6bis [hereinafter cited as Berne Convention]. For a list of nations
signing or acceding to the Berne Convention, see 4 M. NIMMER, COPYRIGHT app. 22 (1978)
(revised to 1980).
(1955); Treece, American Law Analogues of the Author’s “Moral Right,” 16 AM. J. COMP.
L. 487, 505-06 (1968). But see, e.g., Diamond, Legal Protection for the “Moral Rights” of
Authors and Other Creators, 68 TRADEMARK REP. 244, 280-81 (1978). For a comparison of
French moral rights with American law, see Sarraute, Current Theory on the Moral Right of
Authors and Artists under French Law, 16 AM. J. COMP. L. 465, 484-86 (1968); Merryman,
10. Comment, Toward Artistic Integrity: Implementing Moral Right Through Exten-
sion of Existing American Legal Doctrines, 60 GEO. L.J. 1539, 1541 (1972).
11. See text accompanying notes 18-26 infra.
12. See text accompanying notes 27-58 infra.
13. See text accompanying notes 59-200 infra.
15. CAL. CIV. CODE § 987 (West Supp. 1981); see text accompanying notes 180-194
posed federal copyright amendment. Finally, a proposal is offered that addresses the heart of the controversy—contract bargaining between author and publisher—and suggests a new approach for courts faced with esoteric issues involving art and artistic creation.

II. MORAL RIGHTS AND THE BERNE CONVENTION

The European concept of moral rights (or droit moral) is generally understood as a bundle of rights attaching to the artist, author, composer, performer, musician, or producer and his or her creation. Even after the work is published, exhibited or performed, and becomes the subject of commercial transactions and the property of another, the artistic creator retains these rights over his or her work.

The benefits of moral rights inure essentially to the artistic creator, rather than to the creation itself, and protect that part of his personality embodied in his creation, and his reputation as an artist that attaches to his work. Unlike copyright, they are not intended to recognize and safeguard the artistic creator's economic interest in that work.

The Berne Copyright Convention section on moral rights states that:

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

Although member nations differ in their respective approaches and procedures for enforcing moral rights, they uniformly sub-

infra.

17. See text accompanying notes 200-203 infra.
19. For the sake of brevity, these will be referred to collectively as artistic creators.
20. See Berne Convention, supra note 7, art. 6bis, para. 1.
21. Roeder, supra note 18, at 557.
22. Berne Convention, supra note 7, art. 6bis, para. 1.
23. In France, for example, a nation considered sensitive to artistic interests, one's moral rights ("droit moral") are said to be perpetual, unbarrable and inalienable. Rights of paternity preempt tacit waivers embodied in contracts between an author and his publisher, and courts can invalidate a commercial contract which is found to infringe on an author's right of integrity. Sarraute, supra note 9, at 485-86.

The moral rights statute in the Netherlands is less rigid than its French counterpart. As
scribe to the basic components: integrity and paternity rights. The right to paternity encompasses the right of authorship, including the right to be known to the public as the creator of a work, the right to the protection of anonymity or a pseudonym, the right to preclude others from crediting another as the author, and the right to prevent others from falsely attributing to an artist work he has not created. The second essential aspect, the right to integrity, includes the right to prevent another's unauthorized modification of the work, the right to object to destruction of the work, and the right to make desired changes.

III. COMMON LAW APPROACHES TO AUTHORS' RIGHTS IN THE UNITED STATES

American courts have experimented with several common law theories in an effort to vindicate the personal rights of artistic creators. The common law affords the artistic creator only limited protection of rights of paternity and integrity. Because of an inherently inferior bargaining position (vis-à-vis the publisher), the nature of the injury alleged (non-economic), and the remedy sought (usually injunctive), common law principles leave the unknown and developing artistic creator in a hopelessly vulnerable situation.

While the United States is not a signatory to the Berne Convention, and American courts in general have traditionally disavowed one writer pointed out: 

\[\text{[T]he Dutch law establishes a right of paternity ... and a right of integrity, except that the author may not object to a modification if its nature is 'such that it would be unreasonable to object to it.' Also, although the author retains his moral rights even after a transfer of the copyright, there is a provision for waiver 'when modifications are to be made to the work or its name.'} \]

Diamond, supra note 9, at 277 (footnotes omitted) (quoting CL & TW, Netherlands, Copyright Statute, Article 25).

German copyright statutes afford inclusive statutory protection of one's paternity interest, see Strauss, supra note 9, at 509, and provide that the assignee of a copyright usually cannot modify the work, its title, or the author statement, without the author's consent. See id. at 510.

Unlike the French system, in which duration of one's moral rights is perpetual, German moral rights protection expires with the copyright. Treece, supra note 9, at 505.

24. See note 23 supra.
25. Strauss, supra note 9, at 506-09.
26. Diamond, supra note 9, at 245. Subsidiary rights of the moral rights doctrine, which have not been uniformly accepted by moral rights jurisdictions, and therefore, will not be discussed in this note, include: "(1) the right to create a work; (2) the right to publish a work; (3) the right to withdraw a published work from sale; (4) the right to prevent 'excessive' [vexatious] criticism of a work; and (5) the right to prevent any other violation of the author's personality." Strauss, supra note 9, at 511 (footnote omitted); see id. at 511-14.
27. See Diamond, supra note 9, at 261.
28. See Roeder, supra note 18, at 567.
29. A major obstacle to United States membership in the Berne Convention is the ab-
the doctrine of moral rights per se, the courts have, in isolated cases, exhibited sensitivity toward the artists' interests without mentioning the concept of droit moral. In Clemens v. Belford, Clark & Co., the court said in dictum that an author may prevent matter not written by him from being attributed to him, regardless of the absence of injury to his reputation. The court, however, refused to enjoin a publisher from publishing the plaintiff author's sketches under his pseudonym "Mark Twain." They had been previously published without copyright and under the same pseudonym. The court held that since the publisher would have had the right to publish the works under the author's known real name, no greater protection was due the author's equally well-known pseudonym. In interesting dictum, however, the court recognized paternity rights even for the unknown author, stating:

So to an author of acquired reputation, and, perhaps, a person who has not obtained any standing before the public as a writer, may restrain another from the publication of literary matter purporting to have been written by him, but which, in fact, was never so writ-
ten. In other words, no person has the right to hold another out to the world as the author of literary matter which he never wrote . . . .

In *Clemens v. Press Publishing Co.* the plaintiff author sold publication rights to a story containing his name. When the defendant would publish the story only anonymously, the plaintiff sought to enjoin the unattributed publication. In holding for the plaintiff, the court stated:

Even the matter-of-fact attitude of the law does not require us to consider the sale of the rights to a literary production in the same way that we would consider the sale of a barrel of pork. Contracts are to be so construed as to give effect to the intention of the parties . . . . If the intent of the parties was that the defendant should purchase the rights to the literary property and publish it, the author is entitled not only to be paid for his work, but to have it published in the manner in which he wrote it. The purchaser cannot garble it or put it out under another name than the author's; nor can he omit altogether the name of the author, unless his contract with the latter permits him so to do.

Certain editing and marketing practices by commercial distributors of artistic creators' work have been held actionable under theories of libel and slander. For example, in *Ben-Oliel v. Press Publishing Co.*, the plaintiff, a celebrated writer on life in Palestine, sued the defendant for publishing an article about Hebrew marriage customs that erroneously was purported to have been written by plaintiff. In holding that the complaint stated a cause of action in libel, the court noted that attribution of the article to the plaintiff would present her to the public as a fraud and would injure her reputation.

While other authors have sought protection under similar theories, tort law generally is inadequate in the area of author's rights. The major problem is that the injunctive relief normally sought by authors is infrequently available under libel and slander. Further-

35. *Id.* at 731.
37. *Id.* at 183-84, 122 N.Y.S. at 207-08.
40. *Id.* at 255-56, 167 N.E. at 434.
41. *See Roeder, supra* note 18, at 567; *Comment, supra* note 10, at 1555.
more, the elements of this tort are restrictive in that the plaintiff must possess an existing reputation.\textsuperscript{42}

There are similar obstacles to success on a privacy claim. Privacy, in tort law, generally can be summarized as a right to protection against use of one's name or likeness for commercial purposes without consent.\textsuperscript{43} By requiring the existence of a known reputation in order to bring a privacy action, however, the unknown creator is denied protection of his integrity and paternity interests.\textsuperscript{44} Another drawback to such an action is that courts have construed it as a private action: It may not be assigned\textsuperscript{45} and will not survive the death of the person whose right was violated.\textsuperscript{46} Therefore, if a work passes to heirs or is assigned or sold, the holder cannot rely on a privacy action to prevent mutilation. Unlike some European moral right statutes,\textsuperscript{47} the privacy theory fails to assure the artistic creator that the protection will continue after his or her death.

American courts have more frequently relied on contract law than any other theory to determine the extent of protection for artistic creators.\textsuperscript{48} Courts have traditionally provided no more or less protection than that which the artists obtained through their own bargaining with commercial distributors, or that which can be inferred from the contract terms.\textsuperscript{49} Freedom-of-contract principles have been

\textsuperscript{42} See Diamond, supra note 9, at 265.


\textsuperscript{44} "These authors find themselves in an uneviable position—unable to protect their work because they have not developed reputations, and unable to develop reputations because they cannot protect their work." Comment, supra note 10, at 1550.


\textsuperscript{46} Maritote v. Desilu Prods., Inc., 345 F.2d 418 (7th Cir.), cert. denied, 382 U.S. 83 (1965).

\textsuperscript{47} In France, the duration of moral rights protection is presumably perpetual. In Germany, it expires 50 years after the death of the author. In Switzerland and the United Kingdom, however, it terminates with the artistic creator's death. Diamond, supra note 9, at 277; Treece, supra note 9, at 505.


\textsuperscript{49} The artistic creator's "so-called 'moral right' is controlled by the law of contract." Edison v. Viva Int'l Ltd., 70 A.D.2d 379, 384, 421 N.Y.S.2d 203, 206 (1979) (citation
applied with as much force to artistic works as to any commercial product; hence the key problem becomes the unknown and developing author's inability, because of his inferior bargaining position to reserve in the contract any meaningful rights.

The case of *Granz v. Harris* demonstrates one court's unusually broad construction of contract terms to impose duties on a record company not to market creative work that was subjected to unauthorized changes. The plaintiff, a well-known jazz producer, sold record masters to the defendant under a contract that required use of the credit line "Presented by Norman Granz" in distribution of records cut from the masters. The defendant made unauthorized cuts in the plaintiff's recordings and represented these abbreviated versions as the plaintiff's work. The court stated that the contractual duty of the defendant to use the legend "Presented by Norman Granz" carried with it "by implication, without the necessity of an express prohibition, the duty not to sell records which make the required legend a false representation." The court stated that while ordinarily the defendant could present records made from plaintiff's masters without informing the public of plaintiff's connection with the product, in this particular case the defendant's sale of the abridged recordings was a breach of contract.

The plaintiff in *Granz* was probably able to obtain such a credit-attribution clause because of the strong bargaining position his renown afforded him. Other creators, however, unable to bind a publisher by contract to provide credit for their work, have found the courts unreceptive to claims that a right of correct attribution has been violated. Where contracts contain a broad grant of rights or control to a publisher and no express clause concerning credit, courts take a most restrictive view of the author's paternity rights. The cases indicate that the contract between the author and his publisher is the sole "repository of all that American law recognizes in the way of paternity rights." In light of the inferior bargaining position of

50. See cases cited note 48 supra.
51. 198 F.2d 585 (2d Cir. 1952).
52. Id. at 588.
53. Id.
54. E.g., Vargas v. Esquire, Inc., 164 F.2d 522, 525-26 (7th Cir. 1947); Harris v. Twentieth Century Fox Film Corp., 43 F. Supp. 119, 121 (S.D.N.Y. 1942).
55. E.g., Vargas v. Esquire, Inc., 164 F.2d 522, 525 (7th Cir. 1947); Harris v. Twentieth Century Fox Film Corp., 43 F. Supp. 119, 121 (S.D.N.Y. 1942).
56. Treece, supra note 9, at 494-95 (footnote omitted); accord, Harris v. Twentieth Cen-
most artists, this is discouraging for the artistic community.\textsuperscript{57}

The common law provides, at best, unpredictable and inconsistent bases for recognizing and enforcing what can be considered integrity and paternity rights. Whether protection will be afforded by the law may depend upon each court's perception of the role of artists in, and their contribution to, society. If a particular court believes that artistic creations have a value beyond their function as commodities and that artists deserve status somewhat above that of commercial manufacturers, it may seek to advance the interests of the artistic community through creative interpretation of common law doctrine. If, on the other hand, a court views the value of artistic work no differently than that of a mere "barrel of pork,"\textsuperscript{58} the artistic creator can expect no greater protection than that provided by the terms of the contract.

IV. Statutory Approaches to Authors' Rights

A federal statutory approach to the protection of authors' and artists' rights would seem to have the distinct advantage of lending uniformity and certainty to a field clouded by unworkable common law theories. Two bodies of federal statutory law are indeed applied by the courts in this area: the Lanham Act,\textsuperscript{59} which is the federal trademarks act, and the Copyright Act.\textsuperscript{60} It is clear, however, that Congress did not intend these statutes to vindicate moral rights;

\begin{quote}
57. See text accompanying notes 48, 55 supra. Typically, one of the clauses in a literary-purchase agreement between an author and a motion picture producer would provide as follows:

\begin{quote}
Author agrees that Producer shall have the unlimited right to vary, change, alter, modify, add to and/or delete from the Property, and to rearrange and/or transpose the Property and change the sequence thereof and the characters and descriptions of the characters contained in the Property, and to use a portion or portions of the Property or the characters, plots or theme thereof in conjunction with any other literary, dramatic or other material of any kind. Author hereby waives the benefits of any provision of law known as the "droit moral" or any similar law in any country of the world and agrees not to institute, support, maintain or permit any action or lawsuit on the ground that any motion picture or other version of the Property produced or exhibited by Producer, its assignees or licensees, in any way constitutes an infringement of any of the Author's droit moral or is in any way a defamation or mutilation of the Property or any part thereof or contains unauthorized variations, alterations, modifications, changes or translations.
\end{quote}

\textsuperscript{60} 17 U.S.C. §§ 101-810 (Supp. III 1979).
\end{quote}
hence the protection they offer authors and artists can and does fall short of that needed to protect the paternity and integrity interests recognized under the European system.61

Although the Copyright Act specifically covers artistic property,62 it is inadequate to protect an author’s or artist’s personal rights.63 Copyright protection extends only to the economic exploitation of an artistic creation; the moral rights regime, however, shields the creative personality from wrongful interference.64 A further problem is the statutory requirement that the author retain his copyright when selling his work to another in order to receive copyright protection.65 Many authors contract away their copyright with all other rights when selling their work to a publisher.66 Thus, it is not surprising that American copyright law has been characterized as “an owner’s statute and not an author’s statute.”67 It has also been criticized for offering little significant protection for artistic creations that are not destined for commercial reproduction, such as sculpture or other forms of original fine art.68

Recently, courts seem to have responded to the inadequacies of common law principles and the copyright statute by turning to section 43(a) of the Lanham Act69 as a shield for artistic creators against alleged injurious editorial practices. This statute has been applied generally, although not exclusively, to protect rights of attribution of authorship. The relevant portion of the act provides:

Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for

61. See text accompanying notes 64-179 infra.
64. When an artist creates, be he an author, a painter, a sculptor, an architect or a musician, 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 ones; these the copyright statute does not protect. Roeder, supra note 18, at 557 (citation omitted).
66. Under the Berne Convention, rights of integrity and paternity transcend copyright ownership and transfer. Berne Convention, supra note 7, art. 6bis.
67. Comment, supra note 10, at 484-86. “From a theoretical perspective, however, original art works do not fit properly into copyright categories, and copyright remains primarily a legal device to protect reproductive rights.” Fishman, The Emergence of Art Law, 26 CLEV. ST. L. REV. 481, 494 (1977).
goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or representation.70

One court perhaps best assessed the application of this section as follows:

Despite its broad language and arguably catholic scope, courts have agreed that this section does not have unlimited application to all deceptive trade practices or to all claims of unfair competition. . . . Instead, it "is directed only against a certain kind of advertising—false representation of goods or service[s] in interstate commerce." . . .

In attempting to define what kinds of false advertising are within the Act, courts have established very few firm guidelines.71

The court then went on to note that court decisions "recognize that the Act proscribes sales diversions caused by false advertising of defendant's goods, and that those diversions can be equally harmful to competitors regardless of whether the misrepresentations falsely describe defendant's products in isolation or falsely connect its products with plaintiff's products."72 Indeed, many courts have broadly interpreted the statute to provide a remedy for deceptive misdescription of one's own product that would deprive a competitor of his market share.73 For cases of false attribution of authorship or muti-

70. Id.


72. Id. at 408. Courts have not uniformly construed the elements, scope, remedies and standing for a section 43(a) claim due to its general language. For example, on the question of standing, section 43(a) designates two classes of persons who can sue: (1) "any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated"; and (2) "any person who believes that he is or is likely to be damaged by the use of any such false description or representation." 15 U.S.C. § 1125(a) (1976). The open-ended language of the second class of plaintiffs seems to have led to some discrepancy among courts in their interpretation of standing under this section. See Germain, Unfair Trade Practices Under Section 43(a) of the Lanham Act: You've Come a Long Way, Baby—Too Far, Maybe?, 64 TRADEMARK REP. 193, 201-05 (1974). Part of the problem is that courts seem to have disregarded these elements when applying section 43(a) to artistic creators' rights, resulting in a haphazard approach. See, e.g., Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976).

73. See, e.g., Maternally Yours, Inc. v. Your Maternity Shop Inc., 234 F.2d 539, 562 (2d Cir. 1956); L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649, 650-51 (3d Cir. 1954); Skil Corp. v. Rockwell Int'l Corp., 375 F. Supp. 777, 782-83 (N.D. Ill. 1974); Gold
lation to fall within the purview of section 43(a), however, courts have adopted an unprecedented and unprincipled reading of the statute.\(^7\)

In *Autry v. Republic Products, Inc.*,\(^7\) one of the earliest cases dealing with this application of section 43(a), the plaintiff, a famous actor, sought to enjoin a film producer, who had the contractual right to edit plaintiff's films, from cutting seven minutes of his screen performance and injecting advertising into the television version of one of the plaintiff's films. The trial court's inquiry went no further than the contract terms and held that the defendant had the right to cut, edit and revise the film in any manner, to any length and for any purpose.\(^6\) The court of appeals upheld the defendant's right to make the seven-minute cut, but disapproved of the lower court's granting of carte blanche editing rights.\(^7\)

The plaintiff argued that, regardless of his consent to editing by the defendant, the alteration of the film (which rendered it substantially different from the product that plaintiff had produced) and the attribution of the work to the plaintiff violated the Lanham Act. In rejecting this claim, the court concluded that the Lanham Act does not apply where the plaintiff contractually consented to the very sort of editing he later finds objectionable.\(^7\)

Twenty years later, in *Landon v. Twentieth Century Fox Film Corp.*,\(^7\) a court was again presented with an alleged Lanham Act violation. The plaintiff, the author of a serious novel, sold the work to a film producer for use in a television movie. The contract gave the defendant the right to change, adapt, and substantially alter the work, and imposed a corresponding duty on the defendant to give the plaintiff appropriate credit for her contribution to the material upon which the movie had been based. The plaintiff claimed that her work and reputation were damaged by the defendant's attributing to her a television version which made light of her serious novel by the insertion of dubbed audience laughter and other changes. The television

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\(^{74}\) See notes 155-179 infra and accompanying text.

\(^{75}\) 104 F. Supp. 918 (S.D. Cal. 1952), aff'd, 213 F.2d 667 (9th Cir. 1954).

\(^{76}\) Id. at 920-21.

\(^{77}\) 213 F.2d 667, 669 (9th Cir. 1954), aff'd, 104 F. Supp. 818 (S.D. Cal. 1952).

\(^{78}\) Id. at 669-70; accord, Gilliam v. American Broadcasting Cos., 538 F.2d 14, 27 (2d Cir. 1976) (Gurfein, J., concurring).

series was advertised as "based on" her book. The court refused to
enjoin this attribution since, despite substantial revision of the theme
of the story, the representation that the story was based on the book
was exactly what plaintiff had bargained for in her contract with the
defendant. Alluding to the Lanham Act, the court, in dicta, noted
that "plaintiff would have a valid claim against defendants if they
had falsely attributed authorship of the series to her."80 The con-
tract terms, however, precluded any such action under the facts of
the case because the plaintiff contracted to require the defendant to
credit her.81

These two cases demonstrate the traditional reluctance to recog-
nize the existence of certain rights in the author beyond those spelled
out in a contract. Even the broad language of section 43(a) proved
inadequate, in these cases, to free the court from a contractual anal-
ysis. Several celebrated recording artists, however, have successfully
vindicated their rights of attribution under Lanham Act claims, pre-
cluding their former recording companies from falsely designating
old recordings as recent creations of the artists.82

In Benson v. Paul Winley Record Sales Corp.,83 an internation-
ally renowned jazz guitarist obtained an injunction restraining de-
fendants from manufacturing and promoting as plaintiff's new mate-
rial a jazz album containing altered recordings made by him several
years earlier, when he was still an unknown member of a studio
band.84 The defendant record producer owned all rights to the mate-
rial recorded by a jazz group to which Benson had belonged ten
years before; but unlike his later solo material which brought him
stardom, Benson had had no control over the musical style, contents,
or production of this older recording.85 The defendant re-mixed an
old recording to accent Benson's guitar track and over-dubbed sexually
suggestive moaning of a woman on one selection. The album

80. Id. at 459 (emphasis added).
81. Id.
82. This is not to imply that the courts' construction of the Lanham Act is more sympa-
thetic to recording artists than to other artistic creators. The cases in which recording artists
succeeded under section 43(a) dealt primarily, if not solely, with claims of false designation of
authorship, rather than claims of unconsented-to modification and mutilation. Furthermore,
the defendants in the recording artists' cases, see cases cited note 94 infra, had no contractual
right to use the respective artists' names in the manner complained of by the plaintiffs,
whereas editing rights were indeed specified in the contract in the Autry case. See text accom-
panying notes 83-101 infra.
84. Id.
85. Id. at 517.
jacket displayed a recent photograph of Benson and his name in bold letters. In addition, the front cover was captioned "x-rated L.P." \(^{86}\)

The court found that the use of Benson’s name and picture on the album and in advertisements created the false impression that he was responsible for the album’s contents. \(^{87}\) Both the recent photograph and promotional claims of “new material” deceptively portrayed the album as a current release. The court held that in failing to state on the album cover the age of the material and the fact that Benson was a mere studio player on the selections, the defendant’s jacket design and advertising constituted false representations in violation of section 43(a). \(^{88}\) Moreover, the court found that the defendant’s misrepresentations would cause irreparable harm to Benson’s artistic reputation and professional stature. Consumers would be induced to buy the album, expecting to experience the unique style that had led to Benson’s fame. \(^{89}\) Instead, the inferior style and content of defendant’s production would disappoint them and discourage them from buying Benson’s future releases.

In order to obtain injunctive relief in a section 43(a) action, the court held that plaintiff need only show a “likelihood of consumer deception,” \(^{90}\) and concluded that the defendant’s representations would more than likely mislead consumers. \(^{91}\) In fact, the court found the deception so extreme that the remedy of ordering explanatory labels on each album cover was rejected as inadequate protection of Benson’s reputation. \(^{92}\) The court’s injunction restrained defendants from manufacturing and selling the album. \(^{93}\)

There have been other cases where the courts have construed section 43(a) to protect artists in similar situations. \(^{94}\) It is advantageous to the aggrieved artist, who ideally seeks equitable relief (where the harm is to his artistic personality and not his pocketbook), to show only the likelihood of, rather than actual, consumer deception or confusion to obtain an injunction. \(^{95}\) In Benson, the

86. Id.
87. Id. at 518.
88. Id.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id.
plaintiff apparently met this standard without furnishing even outside testimony as to consumer confusion.  

Not every court will fashion as extreme a remedy as did the Benson court. In CBS Inc. v. Gusto Records, Inc., a similar case decided prior to Benson, the court declined to enjoin the sale of an album bearing a current likeness of Charlie Rich, a nationally known country music singer, but containing songs just as they had been recorded by Rich ten to fifteen years before his success. The court instead ordered that a decal be affixed to each album to clarify its contents.  Whether an explanatory label or legend is sufficient to protect an author from false or inaccurate attribution has been a controversial issue.  

Considering the likelihood of irreparable harm to the plaintiff in Benson resulting from the defendant's deception, would the court in that case have ordered the removal of albums from the market if the defendant had already begun distribution? Or would the remedy have been tempered by evidence of the defendant's substantial investment in his product? Under certain moral right statutes this problem is dealt with by permitting the author to withdraw the work from publication if he compensates the publisher; whether such a balancing of interests can or will be achieved under the Lanham Act is yet to be seen. 

In Gilliam v. American Broadcasting Companies, a 1976 case involving a group of British comedy writers and performers (collectively known as "Monty Python"), the Second Circuit Court of Appeals all but equated Lanham Act protection with the concept.

96. But see Yameta Co. v. Capitol Records, Inc., 279 F. Supp. 582, 587 (S.D.N.Y.), rev'd per curiam on other grounds, 393 F.2d 91 (2d Cir. 1968). In Yameta, plaintiff had submitted affidavits of a retail record dealer that asserted that the album produced and sold by defendant had confused his customers. This case suggests, therefore, that a court may very well demand greater proof by the plaintiff, in order to succeed under section 43(a), than that required by the court in Benson.  


98. Id. at 449. The Benson court distinguished CBS on the ground that Rich made a major contribution to the older work, while Benson's contribution was grossly misrepresented. This greater deception required a stronger remedial approach. See 452 F. Supp. at 518.  


101. See, e.g., Strauss, supra note 9, at 513 nn.30-31 (discussing copyright laws of Germany and Italy and case law in France).  

102. 538 F.2d 14 (2d Cir. 1976).
of moral rights. This group of British artists, known for their unique comedy style, had originally contracted with the British Broadcasting Company (BBC) to televise certain performances.\textsuperscript{103} Under the contract, the BBC was expressly precluded from arbitrarily editing or tampering with scripts prior to broadcasting. The contract, however, contained no express prohibition against alteration of a completed taped show.\textsuperscript{104} The BBC sold the rights to several of the taped programs to Time-Life Films, which subsequently sold them to the defendant, the American Broadcasting Company, for national telecast in the United States.\textsuperscript{105} The defendant edited out thirty minutes of the original ninety minutes of material. The plaintiffs claimed that the alterations constituted mutilation and sought a preliminary injunction ten days before the scheduled broadcast.\textsuperscript{106}

While the trial court refused to enjoin the telecast, it did order defendant to disclaim, on the air, plaintiffs’ responsibility for the televised version.\textsuperscript{107} On appeal, the court held that the edited version impaired plaintiffs’ creative integrity and publicly represented as the plaintiffs’ creation what was actually “a mere caricature of their talents.”\textsuperscript{108} A preliminary injunction issued to prevent future broadcasts.\textsuperscript{109}

Although the court’s reasoning primarily involved principles of copyright and contract law,\textsuperscript{110} the majority also held, alternatively, that the plaintiff was likely to prevail under section 43(a)\textsuperscript{111} and that defendant’s editing constituted a violation of section 43(a).\textsuperscript{112} The court also held that within the Lanham Act context an artist retained his right to artistic integrity in his creation even absent the protection of a trademark or the reservation of a property right.\textsuperscript{113}

The court reasoned that section 43(a) was enacted to prevent misrepresentations that could injure one’s business or personal reputation, and concluded that the network’s television broadcast created

\begin{thebibliography}{113}
\bibitem{103} Id. at 17.
\bibitem{104} Id. at 17 n.2.
\bibitem{105} Id. at 17-18.
\bibitem{106} Id. at 18.
\bibitem{107} Id.
\bibitem{108} Id. at 25.
\bibitem{109} Id. at 26.
\bibitem{110} The court recognized that the plaintiffs, as holders of an uncontested copyright in the original script, could enforce the contract provisions limiting the right of the BBC to edit material against subsequent purchasers of broadcast rights. Id. at 19-21.
\bibitem{111} Id. at 24-25.
\bibitem{112} Id. at 24.
\bibitem{113} Id.
\end{thebibliography}
a false impression that the plaintiff was the creator of an edited version which sharply deviated from the original work, thus subjecting him "to criticism for work he had not done." The court stated that the artist alone, rather than his commercial distributor, suffers the consequences of the mutilation in that the public can judge his or her work only on the basis of the altered (edited) version. In such cases, the court concluded, the plaintiff seeks "to redress the very rights sought to be protected by" section 43(a).

Judge Gurfein concurred as to the ultimate result on the contract and copyright rationales, but disagreed with the majority's application of section 43(a):

So far as the Lanham Act is concerned, it is not a substitute for droit moral which authors in Europe enjoy. If the licensee may, by contract, distort the recorded work, the Lanham Act does not come into play. If the licensee has no such right by contract, there will be a violation in breach of contract. ... The vice complained of is that the truncated version is not what the plaintiffs wrote. But the Lanham Act does not deal with artistic integrity. It only goes to misdescription of origin and the like.

Judge Gurfein also criticized the remedy of enjoining future broadcasts of the program. In his view, a disclaimer indicating the plaintiffs' disapproval of the edited version would sufficiently cure any misdescription of origin. With such a disclaimer, "there is no conceivable violation of the Lanham Act. If plaintiffs complain that their artistic integrity is still compromised by the distorted version, their claim does not lie under the Lanham Act, which does not protect the copyrighted work itself but protects only against the misdescription or mislabelling."

This concurring opinion points up the view of prior case law, under which the contract remains the repository of all rights of integrity that the artistic creator seeks to preserve. Judge Gurfein asserted that relief under the Lanham Act will not be available if the contract provides a publisher with the right to edit an author's work: "[I]f the [copyright] licensee may, by contract, distort the recorded

114. *Id.* at 24 (quoting Roeder, *supra* note 18, at 569); *see id.* at 24-25.
115. *Id.* at 24.
116. *Id.* at 24-25.
117. *Id.* at 27 (Gurfein, J., concurring) (citations omitted).
118. *Id.* (Gurfein, J., concurring).
119. *Id.* (Gurfein, J., concurring).
120. *See text accompanying notes 60-67 supra.*
work, the Lanham Act does not come into play.”  

The Monty Python case has received mixed reactions from commentators. This appears to be the first case in which the Lanham Act was applied both to prevent misrepresentation of authorship and to protect the creative work from mutilation and distortion by the publisher. Perhaps the most valuable legacy of the Monty Python decision is the majority’s recognition of a distinction between an author’s property right in a work and any personal rights attached to that same creation, and of the need for greater protection for the latter interest.

The case that has taken the Lanham Act furthest in this area of the law, Follett v. New American Library, Inc., concerned a famous novelist who sought to prevent his former publisher from attributing authorship to him of a book he claimed he merely edited. When Ken Follett was relatively unknown, he had contracted with a British publishing company to rewrite an English translation of a French journalistic piece dealing with a famous French robbery. Follett was to receive £850 for his services. Realizing the extent of his involvement in the reconstruction of the story, however, Follett demanded a by-line and insisted on a copyright for the rewrite; the defendant later claimed that this evidenced Follett’s authorship. After negotiations with the British publisher, Follett withdrew his demand for the copyright and instead agreed to the following attribution which appeared on the title page: “Rene Louis Maurice with

121. 538 F.2d at 27 (Gurfein, J., concurring). Even the majority’s reasoning was based on the evidence of the contract restrictions bargained for by the plaintiffs. The court stated that the licensee’s privilege to adopt the original work to his style or standards for presentation “does not extend to the degree of editing that occurred here especially in light of contractual provisions that limited the right to edit [plaintiffs’] material.” Id. at 23 (emphasis added).


123. This note will later examine the wisdom of construing the Lanham Act in this manner and the reliability of this statute in the area of moral rights. See text accompanying notes 155-179 infra.

124. As the Gilliam court stated: “Although such decisions are clothed in terms of proprietary rights in one’s creation, they also properly vindicate the author’s personal right to prevent the presentation of his work to the public in a distorted form.” 538 F.2d at 24.

125. Id. at 23.


127. Id. at 306.

128. Id. at 307.
Ken Follett.  The name preceding Follett's was a collective pseudonym for the French journalists who wrote the original story. The pseudonym alone appeared on the book's cover.

Eventually, the book was sold to the defendant, an American company, which had at one time published some of Follett's earlier work. By this time, Follett had developed a world-wide reputation as the author of such bestsellers as *Triple* and *Eye of the Needle*. The defendant changed the title of the British publisher's book and displayed Follett's name on the cover in bold print. In small print appeared: "with Rene Louis Maurice." Only Follett's name appeared on the spine. While the defendant was planning to promote this book, Follett's present publisher was preparing to market his latest novel, which was conceived and written solely by him. Follett and his present publisher brought an action, on Lanham Act and other grounds, to enjoin defendant from representing that Follett was the author of the book.

There was conflicting evidence as to plaintiff's contribution, his desire for credit, and the distinction between the concepts of authorship and editorship (the former being attributable in the publishing industry, but not the latter). The court made a factual determination that although Follett had been hired to edit, his contribution was that of an author. It also concluded that Follett's rewrite of the French story was stylistically inferior to his own bestsellers. The court dismissed all of the plaintiff's claims except for the al-

129. *Id.*
130. *Id.*
131. *Id.* at 308.
132. *Id.* at 307.
133. *Id.* at 308. The attribution read: "by the author of TRIPLE and EYE OF THE NEEDLE . . . KEN FOLLETT . . ." *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. In addition to his claim under section 43(a) of the Lanham Act, Follett brought actions for breach of contract, copyright infringement and for violations under the New York Civil Rights Law. *Id.* at 310-11.
138. *Id.* at 311.
139. *Id.* at 309.
140. *Id.*
141. The court held that Follett had no contract rights because the original compromise about using his name on the title page in the form "Rene Louis Maurice with Ken Follett" did not constitute a binding agreement among the parties to restrict the defendant's right to display Follett's name on the cover. Follett's copyright claim was also denied based on the finding that he held no copyright in the published work. The court also held that without a copyright, Follett could not challenge any alleged defect in the chain of title in the manuscript's copy-
leged violation of section 43(a) of the Lanham Act, and concluded that any rights Follett held as to proper attribution of authorship were "co-extensive with his right under the Lanham Act." The issue, therefore, was ultimately whether designation of Follett as principal author of defendant's book constituted a false representation actionable under section 43(a).

The court stated that the purpose of section 43(a) was to provide a statutory cause of action for false description or advertisement of goods to any person likely to be injured by such practices. In order to obtain injunctive relief, the injured party need only show "a likelihood of confusion or tendency to mislead." The court concluded that section 43(a) provided that where a description of goods is unambiguous, relief can be granted based on the court's own findings of falsity, without considering evidence of consumer reaction to such goods. The court found that the defendant's display of Follett's name on the cover unambiguously represented that he was the principal author.

The court then proceeded to consider the falsity of the defendant's designation. Its factual analysis led to the conclusion that although Follett's "contribution bears certain indicia of authorship," reflecting his unique writing style, the text failed to display any of the "special creative attributes which are associated with his authorship." Therefore, the court stated, the attribution of Follett as principal author was "literally false."

The court compared Follett's case to that of the plaintiff in Benson, where the paternity aspect of the creator's rights, had come under the protection of section 43(a). On this authority, the court unabashedly pronounced that the Lanham Act was designed not only to protect the public from deception, but also to shield the "author's personal right" to the integrity of his work and proper attribution of

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right between the British publisher and the defendant. Finally, the court concluded that without a copyright, Follett retained no right under the New York Civil Rights Law to restrict the use of his name to indicate his authorship. 497 F. Supp. at 309-11.

142. Id. at 311.
143. Id. at 312.
144. Id.
145. Id.
146. Id.
147. Id.
148. Id.
149. Id. Before drawing this conclusion, the court conceded that "the concept of authorship is elusive and inexact." Id.
150. See text accompanying notes 83-93 supra.
authorship. In fashioning a remedy, the court weighed the public interest in not being misled as to authorship against the commercial interests of the defendant. As a result of this balancing, the court ordered that the defendant give attribution to “Rene Louis Maurice with Ken Follett” in that order, and to indicate on the cover and jacket that the work was nonfiction.

In holding that section 43(a) was designed to vindicate the personal rights of authors and artists, the Follett decision expands even the Gilliam majority’s broad interpretation of the Lanham Act’s protective boundaries. The Gilliam decision was based predominantly on principles of copyright and contract law. That the Monty Python group held a copyright and obtained certain contractual rights from the broadcasting companies evinced retention of much control over their work. In contrast, however, Follett held no copyright, reserved no contract rights, and had initially expressed a desire to obtain the very same degree of credit he was later to disclaim. The court, therefore, recognized and enforced Follett’s personal authorship rights under section 43(a) independent of any contract or property rights. Although the decision in Follett was a victory for artistic creators, the relation of the court’s use of section 43(a) to prior Lanham Act case law is troublesome.

Analysis of the Application of Section 43(a)

The language of the Lanham Act, case law, and commentary concerning section 43(a) raise troubling questions about the Gilliam and Follett courts’ interpretations of Lanham Act protection in the area of authors’ and artists’ rights. Their construction of the statute should be viewed as unreliable authority offering artistic creators at best only uncertain protection.

While section 43(a) contains no statement of purpose, the intent of the Lanham Act clearly states that the statute is designed “to protect persons engaged in commerce against unfair competition.” Some courts have held that the parties must be commercial competitors before a claim under the Lanham Act even arises.

151. 497 F. Supp. at 313 (emphasis added).
152. Id.
153. See text accompanying note 111 supra.
154. See text accompanying note 111 supra.
156. E.g., Colligan v. Activities Club of New York, Ltd., 422 F.2d 686 (2d Cir.), cert.
Authors and artists in situations similar to George Benson\textsuperscript{157} and Ken Follett\textsuperscript{158} would be impeded neither by this requirement nor by case law interpreting the standing requirement under section 43(a), because these disputes are, in fact, with commercial competitors. Specifically, these “competitors” are former publishers and producers seeking to capitalize on the artists’ recently acquired fame. A problem arises, however, when an author seeks to bring an action under section 43(a) against his present and only publisher where the parties would be characterized not as commercial competitors but, in effect, as partners.\textsuperscript{159} There seems to be no logical way, consistent with the language and intent of the statute, to extend Lanham Act protection to authors and artists involved in disputes with their current distributors.

Under the Lanham Act, protection should extend, if at all, to the author or artist whose name has acquired public recognition.\textsuperscript{160} Cases generally hold that in order to succeed under section 43(a), plaintiff’s “mark” must have attained a secondary meaning: in other

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In \textit{Booth v. Colgate-Palmolive Co.}, 362 F. Supp. 343 (S.D.N.Y. 1973), a cause of action under section 43(a) was dismissed because no showing of competition between plaintiff and defendant was made. In this case, one of the actions brought by plaintiff, a famous actress, was under section 43(a) against advertisers for imitating her voice (as she had used it in a television comedy series) on the defendant's television commercials. Plaintiff claimed that because the commercials were anonymous and did not use her name or likeness or in any way identify her as the source of the voice, her rights under the Lanham Act were violated. The court rejected this claim and held for defendants. One of the grounds for the court’s decision was the absence of a relationship of commercial competition between plaintiff and defendants. \textit{Id.} at 348-49. \textit{Contra}, \textit{National Lampoon, Inc. v. American Broadcasting Cos.}, 376 F. Supp. 733, 746 (S.D.N.Y. 1974) (citation omitted): “Standing to sue exists in anyone who ‘is or is likely to be damaged’ by the defendant’s use of the disputed mark, and the parties need not be direct competitors.”; \textit{Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.}, 467 F. Supp. 366, 374 (S.D.N.Y. 1979). At best, this issue concerning the commercial competition requirement for a section 43(a) action is unsettled.

\textsuperscript{157} See notes 83-93 \textit{supra} and accompanying text.

\textsuperscript{158} See notes 126-154 \textit{supra} and accompanying text.

\textsuperscript{159} “Once the creator of a work contracts away his right to edit, he has in effect, brought in a partner in control of the quality of his work, and ultimately, his reputation.” \textit{The Thirtieth Year Report}, \textit{supra} note 99, at 567.

words, distinctiveness as an indication of a source of creation.\textsuperscript{161} For "‘[u]nless the public has come to know a particular mark as indicating a particular source of origin, a finding of the requisite falsity would be anomalous since there would be no standard against which to measure such falsity.'"\textsuperscript{162} The unknown and developing author, therefore, will most likely be foreclosed from section 43(a) protection.

Furthermore, when the Lanham Act is applied as the court did in Follett, there is a potential for misconstruction of the proof-of-falsity requirement. The Follett court held that:

> In order to determine whether a description or representation is false, a court should first assess the meaning of particular representations and then determine whether the claims made are false. . . . Where a description concerning goods is unambiguous, the court can grant relief based on its own findings of falsity \textit{without resort to evidence of the reaction of consumers of the goods}.'\textsuperscript{163}

Prior case law, however, demonstrates a more stringent standard of falsity in order for a section 43(a) plaintiff to prevail. In most cases it is for the plaintiff, not the court, to establish falsity.\textsuperscript{164} Not only must the plaintiff prove public deception, but he also must establish that the deception is material.\textsuperscript{165} Many authors may face greater difficulty in establishing falsity than did Ken Follett, especially in the case of an unknown artistic creator where courts are without standards by which to measure falsity.

The Follett court also probably erred in choosing to conduct its own analysis of the deception issue. As one commentator has stated: "The public's reaction to an advertisement will be the starting point in any discussion of the likelihood of deception. . . . If an advertisement is designed to impress . . . customers . . . the [reaction] of

\textsuperscript{161} See cases cited note 160 supra.


\textsuperscript{163} 497 F. Supp. at 312 (emphasis added).


[that group] will be determinative.\textsuperscript{166} The reaction of the court is "at best not determinative and at worst irrelevant."\textsuperscript{167} The Follett court did not refer, much less defer, to testimony by Ken Follett readers in its attempt to determine even a tendency to deceive. Furthermore, it was probably also improper for the court to substitute its own judgment for that of the reading public to determine the concept of authorship.\textsuperscript{168}

Some Lanham Act case law shows that truth in representation of a product constitutes a complete defense to a claim under section 43(a).\textsuperscript{169} This raises the question of whether an explanatory label or disclaimer would immunize a publisher or commercial distributor from a section 43(a) action. Although such labelling may technically restore truth to the representation of authorship by qualifying the credit statement of the creative work, there remain administrative problems in assuring the effectiveness of the disclaimer. Furthermore, as suggested in Gilliam, even where the author's name appears with the edited work in a manner intended to dissociate it from the finished product, the disclaimer provides insufficient protection for the artist's moral rights in the work.\textsuperscript{170}


\textsuperscript{167} American Brands, Inc. v. R.J. Reynolds Tobacco Co., 413 F. Supp. 1352, 1357 (S.D.N.Y. 1976). Even though section 43(a) gives a right of action to any person who "believes" that he is or is likely to be damaged by defendant's practices, one writer described the evidentiary situation of a plaintiff under this section as follows:

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  \item If such a plaintiff is to prevail, it seems equally apparent that he must be prepared to make a strong factual showing on the following points, leaving as little as possible to the realm of the "self-evident," or to the assumption, rationalization or judicial notice:
  \begin{enumerate}
    \item that the defendant's advertisement is in fact false;
    \item that it actually deceives a substantial segment of its audience;
    \item that such deception is material, in the sense that it is likely to make a difference in the purchasing decision;
    \item that the particular plaintiff has been or is likely to be injured as the result of the foregoing, either by direct diversion of sales from himself to the falsely advertising competitor, or by lessening of the good will which his own product enjoys with the buying public.
  \end{enumerate}
\end{itemize}

Well, supra note 165, at 536-37. Whichever of the above-mentioned elements were cited by the Follett court, they had been established mostly through judicial notice. See 497 F. Supp. at 312-13.

\textsuperscript{168} See Sarraute, supra note 9, at 482. Even the court in Follett discussed the complexity of the issue of authorship. 497 F. Supp. at 309, 312.

\textsuperscript{169} E.g., Smith v. Chanel, Inc., 402 F.2d 562 (9th Cir. 1968); Societe Comptoir de L'Industrie Cotonniere Etablissements Boussac v. Alexander's Dep't Stores, Inc., 299 F.2d 33 (2d Cir. 1962).

\textsuperscript{170} The Gilliam majority indicated, for example, that a disclaimer would not overcome
Another major weakness of section 43(a), which is also shared by theories previously applied to the area of authors’ and artists’ rights, is that it offers no protection to an artistic creator against a waiver or conveyance of contract rights; such a waiver or conveyance would permit limitless modification or even attribution of credit. A final criticism of unfair-competition approaches, such as that embodied in section 43(a) of the Lanham Act, is that they are best suited to protect pecuniary interests, rather than the personal rights of artistic creators. The success of an unfair-competition action hinges upon the “fortuitous fact that to present a deformed work to the public may economically injure the creator by depriving him of his market.” As long as there is no commercial injury, an aggrieved artistic creator remains without protection under a theory of unfair competition. In general, therefore, courts that seek to enforce artistic creators’ rights through section 43(a) are going beyond the appropriate scope of the statute, and one commentator has concluded that “[t]he Act’s efficacy in protecting artists is restricted . . . inasmuch as the Act is inapplicable if a copyright owner conveys all or part of his right under a contract permitting alterations.”

One positive aspect of the application of section 43(a), however, has been the availability of remedies. The text of section 43(a) is silent as to remedies except for the general language that the violator “shall be liable to a civil action.” Case law indicates that a lesser standard of proof of consumer confusion and deception is re-
quired for injunctive relief than for an award of damages.\textsuperscript{177} Furthermore, the plaintiff need not prove a defendant's intent to deceive.\textsuperscript{178} This aspect of Lanham Act case law proves most advantageous to the author or artist who seeks injunctive remedies over damages in order to protect his non-pecuniary interests of paternity and integrity. This one positive point, however, is overshadowed by numerous weaknesses of section 43(a) in the area of authors' and artists' rights. In the final analysis, perhaps the most significant aspects of Lanham Act case law as applied to artistic creators are the courts' implicit recognition of moral rights and the growing realization that federal statutory law is the best means of protection.\textsuperscript{179}

\textbf{Recent Legislative Developments}

Two major legislative developments—one in California,\textsuperscript{180} the other federal—have recently appeared. On the federal level, Congressman Barney Frank (D-Mass.) re-introduced a bill initially proposed by his predecessor, Robert F. Drinan, which would amend the Copyright Act.\textsuperscript{182} The bill has not been passed, however, and similar legislation introduced in earlier sessions of Congress died in committee.

California's Art Preservation Act\textsuperscript{184} prohibits anyone but the

\textsuperscript{179} Accord, Treece, \textit{supra} note 9, at 501.
\textsuperscript{180} CAL. CIV. CODE § 987 (West Supp. 1981).
\textsuperscript{182} Id. The bill provides as follows:
Independently of the author's copyright in a pictorial, graphic, or sculptural work, the author or the author's legal representative shall have the right, during the life of the author and fifty years after the author's death, to claim authorship of such work and to object to any distortion, mutilation, or other alteration thereof, and to enforce any other limitation recorded in the Copyright Office that would prevent prejudice to the author's honor or reputation.
\textit{Id.}
\textsuperscript{184} CAL. CIV. CODE § 987 (West Supp. 1981). The statute provides:
(a) The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against such alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.
(b) As used in this section:
(1) "Artist" means the individual or individuals who create a work of fine art.
(2) "Fine art" means an original painting, sculpture, or drawing of recognized qual-
artist from intentionally defacing, altering or destroying an art work

ity, but shall not include work prepared under contract for commercial use by its purchaser.

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

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

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

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

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

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

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

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

(1) Injunctive relief.
(2) Actual damages.
(3) Punitive damages. In the event that punitive damages are awarded, the court shall, in its discretion, select an organization or organizations engaged in charitable or educational activities involving the fine arts in California to receive such damages.
(4) Reasonable attorneys' and expert witness fees.
(5) Any other relief which the court deems proper.

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

(g) The rights and duties created under this section:

(1) Shall, with respect to the artist, or if any artist is deceased, his heir, legatee, or personal representative, exist until the 50th anniversary of the death of such artist.
(2) Shall exist in addition to any other rights and duties which may now or in the future be applicable.

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

(h)(1) If a work of fine art cannot be removed from a building without substantial physical defacement, mutilation, alteration, or destruction of such work, the rights and duties created under this section, unless expressly reserved by an instrument in writing signed by the owner of such building and properly recorded, shall be deemed waived. Such instrument, if properly recorded, shall be binding on subsequent own-
of “recognized quality.” The California act, however, while bearing some similarity to moral rights principles, can be seen as both “broader and more restrictive” than the European concept. It differs significantly from the Berne Convention’s Article 6bis in its legal approach. Instead of proclaiming a collection of “inalienable and imprescriptible rights,” the statute makes certain conduct actionable within the State of California by an artist or an artist’s heirs. Furthermore, the act affords the artist a broad range of remedies, including injunctive relief, actual damages, punitive damages, reasonable attorney and expert witness fees, and any other relief that the court deems proper.

ers of such building.

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

(3) Nothing in this subdivision shall affect the rights of authorship created in subdivision (d) of this section.

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

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

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

Id.

185. Id. § 987(c)(1)-(c)(2); see id. § 987(b)(1).
186. Weil, The ‘Moral Right’ Comes to California, ARTNEWS, Dec. 1979, at 89. As Mr. Weil further points out:

It goes well beyond the French law, for example, by including the destruction of a work of art among the acts that are prohibited. (The French theorize that, while an altered or mutilated artwork can be prejudicial to the honor or reputation of an artist, a work that has ceased to exist cannot.) On the other hand, the protection it offers is neither inalienable—the act specifically provides that an artist may sign an instrument waiving his rights—nor perpetual. The rights granted run only for the lifetime of the artist and for 50 years thereafter.

Id. at 89 (emphasis in original).

187. See text accompanying note 22 supra.
188. Weil, supra note 186, at 89.
Although the scope of this note precludes an exhaustive critique of this legislation, there are several drawbacks, some of which are worth noting. For example, the act requires that the art work be of "recognized quality."\footnote{190} The unknown and developing artist, therefore, will have difficulty establishing this element because of his obscurity. Another problem is that the statute explicitly covers only original paintings, sculptures and drawings.\footnote{191} Other art forms are therefore excluded, and their creators, along with unknown artists, must still look elsewhere for protection.\footnote{192}

The California act is unclear in the area of paternity rights of the artist. Under the act, even after sale of a work of fine art, the creator of such work retains the right "for just and valid reason" to disclaim authorship of the work.\footnote{193} It remains unclear, however, whether the artist has a right to prevent the use of his name as creator in connection with the display or other exploitation of his work. Finally, because the act fails to specify what constitutes such "just and valid reason," it is unclear whether the artist has a right to disclaim authorship because he finds the display of his work personally offensive, even though his creation has not been defaced, altered, mutilated or destroyed. Despite these criticisms, the California statute amounts to a bold recognition of the rights of artistic creators. Supplemented with an effective enforcement scheme, it can serve as a springboard for even broader moral rights legislation in other jurisdictions.\footnote{194}

The proposed federal copyright amendment would append a moral rights provision to the current statutory scheme.\footnote{195} Unlike the conduct-oriented California act,\footnote{196} the amendment followed the general scheme of the Copyright Act, as well as the Berne Convention, in that it creates broad rights of paternity and integrity.\footnote{197}

The major criticism of the bill is its lack of clarity and refinement.\footnote{198} Providing the artist with a right merely to "object" may be

\footnote{190. Id. § 987(b)(2), (f).
191. Id. § 987(b)(2).
192. The aggrieved artist also has the burden of showing that the defendant acted intentionally, id. § 987(c)(1), or with gross negligence, id. § 987(c)(2).
193. Id. § 987(d).
194. See Weil, supra note 186, at 91.
195. See note 182 supra.
an insufficient remedy under many circumstances. Furthermore, the bill fails to define the duties and liabilities of those who purchase the sort of art works covered by the proposal. Despite its shortcomings, this bill is to be commended for recognizing moral rights explicitly. It does not, however, go far enough to provide courts with needed guidance for enforcing those rights.

V. PROPOSAL

In the area of authors' and artists' rights, the center of controversy is the contract. As discussed earlier, many courts have recognized only those rights that the author himself has preserved through bargaining with his publisher. In discussing paternity rights in the United States, one scholar remarked: "It is fair to say that the right does not exist in the U.S. unless written into an enforceable contract. . . ." With respect to integrity rights, the same writer commented that the contract remains "the best assurance that an author can obtain against the use of his work by another in a way he finds offensive." Because contract principles, including the fundamental freedom-of-contract dogma, pervade American commerce, moral rights legislation should not be patterned precisely on the copyright-like scheme found in the European statutes.

Due to the inherently inferior bargaining position of many authors, their integrity and paternity rights are usually conveyed, along with other rights, by contract to the publisher. Three major reasons for this inferior bargaining position are: (1) the author is negotiating (frequently without an attorney) with a commercial giant; (2) the author is selling a commodity whose value is frequently not assessable until after exploitation; and (3) the unknown author has no established reputation to use as a bargaining chip. An author generally must reserve explicitly the right to claim paternity. It follows that without a right to receive credit, an author will usually have no right to prevent alterations of his work.

In order to protect integrity and paternity rights adequately,
federal legislation would be required to regulate the positions of the author and publisher at the time of the contract. Such legislation should include a rule of contract interpretation whereby the right to receive credit is presumed to be reserved. Indeed, some European countries provide that in the absence of an agreement to the contrary, alienation of one of the author's rights of utilization does not by itself imply the transfer of other rights, which do not necessarily depend on the right that is transferred. Under such a statute, an artistic creator must specifically sell his right to be credited for his works; there would be no conveyance of a "right to publish without giving credit" since it would not be a right necessarily transferred with a mere right to publish.

Arguably, since a simple waiver of this right would effectively frustrate the letter and spirit of the statute, it should provide that any absolute waiver or modification of this right should be void if contrary to public policy. The validity of a waiver must depend on the public interest. For example, where the waiver's sole purpose is deception of the public—as in ghost-writing contracts—the waiver should be void and the true artistic creator should be able to assert his rights of paternity. On the other hand, if the object of the waiver is not deception of the public—as when articles are written for compilations (and the views expressed in the entire compilation and not those of the individual author are essential) and the public realizes that the whole is a collection of anonymous authors' works—a waiver should be deemed valid. Alternatively, similar protection could be offered by legislation imposing an implied negative covenant. For example, when an author conveys to the publisher the right to use his name, a corresponding duty should be imposed not to omit it.

These contract-law proposals are far from radical. Courts have interfered with the freedom to contract in other cases where one party enjoys a disproportionate bargaining advantage and uses it to the unreasonable detriment of both the weaker party and the general public welfare. In *Henningson v. Bloomfield Motors, Inc.*, the

206. See Ringer, *supra* note 204, at 214 (discussing Italian law).
207. A statutory provision like this would have prevented the defendant in *Vargas v. Esquire, Inc.*, 164 F.2d 522, from publishing plaintiff's drawings without attribution. See note 30 *supra*.
court discussed the elusive concept of "public policy":

Public policy is a term not easily defined. Its significance varies as the habits and needs of a people may vary. It is not static and the field of application is an ever increasing one. A contract, or a particular provision therein, valid in one era, may be wholly opposed to the public policy of another.\textsuperscript{212}

Recognition of the distinct role of artistic creators in society, and of the need for protection beyond contract, copyright, and trademark principles, finds expression in several areas. A number of courts have strained common law doctrine\textsuperscript{213} and, more recently, statutory law in an effort to enforce some semblance of moral rights.\textsuperscript{214} The recent California statute represents an articulation of the state's "public interest in preserving the integrity of cultural and artistic creations."\textsuperscript{215} Finally, federal funding for the arts, which has increased in recent years, is persuasive evidence of a national public concern for protecting artistic creators and preserving their work.\textsuperscript{216} In light of this developing public policy, it makes sense for courts to invalidate any contractual provisions that represent a studied effort to frustrate that protection. One possible approach would be modeled on the \textit{Uniform Commercial Code} and common law doctrines of unconscionability.\textsuperscript{217} If a court finds, for example, that a contract clause is contrary to public policy because it absolutely waives the artistic creator's paternity or integrity rights, the court may refuse enforcement.

Issues of artistic integrity require the kind of refined evaluation that is beyond the grasp of judicial analysis.\textsuperscript{218} Even the issue of attribution of authorship can become complex, although it has been

\begin{footnotes}
\item[211] 32 N.J. 358, 161 A.2d 69 (1960).
\item[212] \textit{Id.} at 403, 161 A.2d at 94-95 (citation omitted).
\item[213] See cases cited note 29 supra.
\item[214] See text accompanying notes 69-154 supra.
\item[215] Cal. Civ. Code § 987(a); see note 180 supra.
\item[218] See Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 71, 80 N.Y.S.2d 575, 579 (Sup. Ct. 1948); Sarraute, supra note 9, at 482.
\end{footnotes}
said that the essence of paternity rights is easily enforceable because it requires only a "determination of whether the author's name appears on the work." The Follett case shows that paternity rights are not so easily guaranteed. Determining the degree of authorship and proper designations of credit can be an arduous task. Moreover, the economic implications of such a decision for the interested parties may be staggering. Because of the significance and complexity of paternity- and integrity-rights issues, courts should be required to submit these issues to an expert panel for review and recommendation. Such a panel would consist of representatives from the publishing industry, literary guilds, academia and professional critics of the arts and literature. The panel could, for example, make a refined evaluation of whether a waiver provision in a contract violates public policy (and, therefore, should not be enforced by the court) or is fair and reasonable under the circumstances. Findings and recommendations by the panel would be admissible but not binding upon the court. This procedure, which furnishes the judge or jury with the opinion of an expert panel, has been applied in the area of medical malpractice litigation, which also frequently presents esoteric issues for judicial consideration.

VI. CONCLUSION

The preceding discussion has demonstrated the inadequacies of existing legal theories and statutes in providing needed protection to authors and artists. Present law tends to help those who can help themselves—the commercially successful artistic creators who have acquired formidable bargaining power. The law fails to protect the unknown and developing artistic creator who is the source of tomorrow's cultural achievements. The confusion of common law doctrine and existing statutes indicates an appreciation of the need for protection, but a failure to analyze and understand thoroughly the foreseeable problems facing the artistic creator in American society. Only federal legislation in this area will lend uniformity and predictability. To be effective, however, a federal statute must offer more

220. For example, in the entertainment industry "the credit clauses of an agreement are often considered of greater importance than the provisions for monetary compensation." Berman & Rosenthal, supra note 57, at 156.
221. Cf. id. (motion picture industry uses arbitration panels to resolve issues of screen credit).
than a mere proclamation of moral rights; such legislation should focus specifically on the bargaining positions of parties to contracts. If public policy recognizes art and literature as cornerstones of civilized society, this policy must be articulated and furthered through enactment of legislation protecting artistic creators; and freedom-of-contract policies must yield to this recognition.

 Neil G. Kenduck