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A CASE OF BAD CREDIT?: THE UNITED STATES AND THE PROTECTION OF MORAL RIGHTS IN INTELLECTUAL PROPERTY LAW

KIMBERLY Y.W. HOLST†

I. OPENING CREDIT: AN INTRODUCTION

The protection of moral rights is a concept that is truly foreign to the United States. Protection of moral rights developed in Europe and was incorporated in the Berne Convention for the Protection of Literary and Artistic Works (hereinafter, “Berne Convention”). All countries that are party to the Berne Convention are required to provide a minimum level of protection for moral rights. As a party to the Berne Convention, the United States is subject to this requirement. How do moral rights operate and what do they protect? The following analogy illustrates how moral rights protect the rights of the artist.

Edna Tolliver was a U.S. citizen traveling in Europe.1 Edna stopped in small shop to pick up a gift for her niece in the states. She went to the register to make her purchase and handed the clerk her credit card to pay for the purchase. The clerk ran the card through the machine and regrettfully told Ms. Tolliver that her card was declined. Edna was embarrassed and quickly left the store. She contacted her credit card company and learned that several purchases had been made on her credit account. Edna was outraged. Someone else had used her good credit and ruined it. They had embarrassed her by both when her card was declined and with the nature of the purchases that were made on her account. They had also caused her great difficulty in trying to sort out her credit “reputation” among other lending institutions that caught wind of her credit troubles. Edna learned that the rules for protecting cardholder’s reputation were different in every country, despite the fact that most countries were party to a treaty governing credit accounts. Edna was devastated and never recovered from the harm done to her reputation among lenders and her embarrassment from the incident in Europe.

Edna’s credit situation is similar to the problems encountered by authors of intellectual property in the international context. According to

† J.D. Magna Cum Laude, Hamline University School of Law, 2005. This paper was submitted for the A.S.C.A.P. Nathan Burkan Copyright competition; it received first prize in the spring of 2005 at Hamline University School of Law. The author would like to thank Professor Sharon Sandeen for her support and encouragement in completing this work.

1 The names and facts of this hypothetical are fictional.
Article 6bis of the Berne Convention, each party to the treaty must provide the author with "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." The author's "credit" is similar to that of a credit card accountholder's. It is important to the author's livelihood that he gets the credit he deserves for his work, and does not get credit for works that are not his. When the author's credit is damaged, it can destroy the author's ability to sell his future works, and can harm the value of his current work.

The United States became a party to the Berne Convention on March 1, 1989. There is much debate among artists and scholars as to whether the United States is truly in compliance with Article 6bis of the Berne Convention. The Article does not give an explicit statement of how the countries should provide this protection. It is up to each individual country to establish rules that will bring it into compliance with the Berne Convention. This means that determining what rights an artist has in each country is a challenge; therefore protecting those rights becomes particularly challenging.

This paper examines how moral rights are protected in France, a leader in the area of moral rights, and the United States, the difference in

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culture development between Europe and the United States, and whether the United States is in compliance with Article 6bis of the Berne Convention. Section II of this paper will look at the origin of moral rights and how they are defined in France, the Berne Convention, and the United States, and the importance of moral rights in international law. Section III of this paper will examine the cultural and sociological differences between the United States and European countries and how these differences influence the development of moral rights. Section IV studies whether the protection of moral rights in the United States is sufficient to comply with Article 6bis of the Berne Convention.

II. CREDIT HISTORY: AN OVERVIEW OF MORAL RIGHTS

"The primary justification for the protection of moral rights is the idea that the work of art is an extension of the artist's personality, an expression of his innermost being. To mistreat the work of art is to mistreat the artist, to invade his area of privacy, to impair his personality."5 Moral rights are defined by their focus on personal rights over economic rights.6 There is a significant difference in philosophy between those countries who view intellectual property as property tied to the author in a personal manner (countries termed "droit d'auteur" or artist's rights) and those who view intellectual property as simply another form of property (copyright countries).7 Many countries look to France as a model for moral rights.8 This section begins with an overview of the moral rights recognized in France and then moves to the broader international expression of morals rights in the Berne Convention. Next, this section addresses the status of moral rights in the United States. Finally, this section examines the importance of moral rights in the international context.


6 Joseph Zuber, Do Artists Have Moral Rights?, 21 J. ARTS MGMT., L. & SOC'Y 284, 284 (1992). It is said that moral rights "[include] non-property attributes of an intellectual and moral character[,] which give legal expression to the intimate bond [that] exists between a literary or artistic work and its author's personality; it is intended to protect his personality as well as his work." Raymond Sarraute, Current Theory on the Moral Rights of Authors and Artists Under French Law, 16 AM. J. COMP. L. 465, 465 (1968).

7 Michele Battisti, The Future of Copyright Management: European Perspectives, 66th International Federation of Library Associations and Institutions (IFLA) Council and General Conference 2-3 (2000), available at http://www.ifla.org/IV/ifla66/papers/140-184e.htm. In fact, it has been stated that "droit d'auteur" cannot be translated by way of copyright. Id. at 2. See also Sarraute, supra note 6, at 465. In Europe, generally, the droit d'auteur countries are in the south and the copyright countries are in the north. Battisti, at 3.

A. France

France is the model for most countries' moral rights legislation. The moral rights in France developed through decisions that were handed down from the French courts. These decisions were based on principles that existed in France during the Renaissance and from the modern view of moral rights developed in Germany. These historical views gave birth to laws that protect the author's personality that is expressed through her work as a right separate from typical property rights. The courts' decisions were codified in French law in March of 1957.

The following rights are recognized as moral rights or "droit moral." First, the right of attribution. The right of attribution consists of two corollary rights. First, the author has the right to be identified as the author, to use a pseudonym or remain anonymous on any work she actually created. Second, the author has the right to prevent the use of her name on a work that she did not create. The next right is the right of integrity or

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9 BANKI, supra note 8, at v-vi. Although, there is some suggestion that France is no longer "the pure regime of moral right" that it once was. See id. at Some Implications of the 1985 French Law on Author's Right by David Saunders 52. Development of technology and works made in audiovisual form have lead France to take a more economic approach than was traditionally taken under French law. See id.

10 See Ciolino, infra note 29, at 39; Sarraute, supra note 6, at 465; Russell J. DaSilva, Le Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States, 28 BULL. COPYRIGHT SOC'Y 1, 9 (1980). Similar moral rights law can be found in Germany and Italy. See DaSilva, at 23.


12 Id. at 1208-09. German philosophers Kant and Hegel developed a theory of works being tied more closely to an author's personality than normal property rights. Id. See also Thomas F. Cotter, Pragmatism, Economics, and the Droit Moral, 76 N.C. L. REV. 1, 10-15 (1997); DaSilva, supra note 10, at 23.

13 Suhl, supra note 11, at 1206-09; Sarraute, supra note 6, at 465.

14 Sarraute, supra note 6, at 466; DaSilva, supra note 10, at 11.


16 VerSteeg, supra note 15, at 828-30; Henry Hansmann & Marina Santilli, Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis, 26 J. LEGAL STUD. 95, 95-96 (1997); Sarraute, supra note 6, passim. These rights within attribution are also known as the right of paternity or "droit d'la paternite" and the right of disavowal. Zuber, supra note 6, at 284. They have also been stated as the value of signature. Jeffrey L. Graubart, Industry Fails to Rally for Rights, 106 BILLBOARD 8, 8 (1994).


18 Ciolino, infra note 29, at 39-41; Zuber, supra note 6, at 284; VerSteeg, supra note 15, at 828-30.
"droit au respect de l’oeuvre." Under this right the work is protected from being deformed, destroyed, or altered, so as to protect the reputation of the author. Third is the right of the author to decide when to reveal his work to the public or have his work published. This right is known as the right of disclosure or "droit divulgation." Likewise, the author has a right to determine when to withdraw his work from the public or to make modifications to his work. This final right is the right of withdrawal or "droit de retrait ou de repentir."

This body of rights makes up the droit d’auteur in French law. It is important to remember that in this system, the person is protected above the property. Under the French law of droit d’auteur, the author retains the initial rights. In addition, those rights cannot be transferred and are perpetual. This is much greater protection than is required by the Berne Convention, which allow moral rights to expire when the economic rights expire. The importance of moral rights is to prevent the attack on the person to a greater extent than to prevent the attack on the work.

B. Berne Convention

In an effort to harmonize European moral rights laws, the Berne Convention was amended in 1928 at the Rome Convention with the addition of a moral rights provision. This provision was codified as

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19 This is also known as "drole au respect de l’oeuvre" or the "fight of integrity." Zuber, supra note 6, at 284. This right has also been stated as the value of honor, because the right protects the honor and reputation of the artist. Graubart, supra note 16, at 8.

20 Id. This right may also protect the author’s work from excessive criticism and other attack on personality in his work. DaSilva, supra note 10, at 4. Imagine how a law preventing U.S. citizens from criticizing the work of an artist would impact our society. It clearly does not seem to square with our fundamental notions of free speech.

21 VerSteeg, supra note 15, at 828-30; Zuber, supra note 6, at 284.

22 VerSteeg, supra note 15, at 828-30; Zuber, supra note 6, at 284.

23 VerSteeg, supra note 15, at 828-30; Zuber, supra note 6, at 284.

24 VerSteeg, supra note 15, at 828-30; Zuber, supra note 6, at 284.

25 Battisti, supra note 7, at 2.

26 See id.; Eric M. Brooks, "Tilted" Justice: Site-specific Art and Moral Rights After U.S. Adherence to the Berne Convention, 77 CAL. L. REV. 1431, 1434 (1989); Ardito, supra note 15, at 17. France recognizes perpetual moral rights, in Germany the moral rights expire with the artist’s copyright, and in other countries, the moral rights terminate upon the death of the author. Id.

27 Berne Convention, supra note 2, at Art. 6bis(2).


Article 6bis. This article protects the moral rights of integrity and attribution. Article 6bis states:

(1) 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.

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

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

Article 6bis clearly states that the rights of attribution and integrity are to be implemented in the countries that become signatories to the Berne Convention. The article limits the right of integrity to distortions, alterations, or changes in the work that might damage the artist’s reputation. It “does not create an obligation to allow artists to [prevent] the complete destruction of their work because disappearance from the cultural landscape would not necessarily be prejudicial to the author’s honor or reputation.” The right of attribution included in the Berne Convention has been interpreted to include the right to prevent non-attribution, to enjoy non-attribution (pseudonymity or anonymity), to prevent misattribution of her work to another artist, and to prevent misattribution of her name to a work she did not create. The article also makes it clear that if a country allows the economic or copyrights to extend after the author’s death, the moral rights should also be extended to match that period of time. The article leaves to the country implementing the

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31 Berne Convention, supra note 2, at Art. 6bis.
32 Id. Neither Article 6bis nor any other article provides an exception that exempts a country from their duty to protect moral rights if they become a signatory of the Berne Convention.
33 Id. at Art. 6bis(2); Hughes, supra note 17, at 2.
34 Hughes, supra note 17, at 5-6 (emphasis in original).
35 Id. at 5.
36 Berne Convention, supra note 2, at Art. 6bis(2). It is unclear when the protection of
law to determine how these rights should be protected. The article does not differentiate between works of fine art, audio visual works, or any other type of work. The article does not require that countries signing on to the convention must adopt new laws to address these rights. Based on the language of the article, these rights may be protected the countries’ existing laws. The article does not address what should be done in the case of joint authorship, works for hire, or other forms where the work may not be created by a single individual.

The rights protected by the Berne Convention are not as broad as the rights protected under French law. The rights of disclosure and withdrawal are not protected by the Berne Convention. While the Berne Convention lays out the rights to be protected, it does not give clear guidance as to what methods of protection will be acceptable. Only that “[a]ny country party to [the] Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.” This means that the rights to be protected should be uniform among the signatories, however, the means for protecting those rights may vary greatly from country to country.

C. United States

The United States has been slow to recognize moral rights in its legal system. The push toward the recognition of moral rights began in the mid 1970’s when states began enacting their own legislation protecting moral rights. Now a major exporter of copyrighted works and a major world power, United States’ citizens were at a disadvantage when attempting to protect their works abroad because the United States had not acceded to the Berne Convention. This resulted in a push for an adherence to the Berne Convention,

moral rights extends beyond the life of the author. The exception mentioned in the Article suggests that a country codifying moral rights after joining the Berne Convention may only allow one, not both, right to expire upon the author’s death. See Hughes, supra note 17, at 14.

37 Berne Convention, supra note 2, at Art. 6bis(3).
38 At the time Art. 6bis was adopted in 1928; the scope of copyright was limited by the existing forms of art and technology.
39 Berne Convention, supra note 2, at Art. 6bis(3).
40 See id. at Art. 19 The Berne Convention does not preclude countries’ from adopting a law that claims to benefit more than is protected by the convention. Id.
41 Id. at Art. 36.
42 Ciolino, supra note 29, at 43. See also Crimi v. Rutgers Presbyterian Church, 89 N.Y.S.2d 813 (Sup. Ct. 1949) (refusing to recognize the moral right of integrity for a painter’s mural when the church painted over the mural and stating that moral rights were not supported by the decisions of U.S. courts).
43 Ciolino, supra note 29, at 44-45. New York and California were leaders in developing legislation regarding moral rights.
44 Id.; 1 Copyright L. Rep. (CCH) ¶ 6010 (Oct. 1998).
Convention in the mid 1980's. Over one hundred years after the Berne Convention was opened for signatures, the United States became a signatory.

"[P]ublishers and other commercial distributors vigorously opposed any incorporation of these rights into American law." In adhering to the Berne Convention, the United States legislature remained silent on the issue of how the moral rights of paternity and integrity would develop in the future. The United States, relying on its strength as a nation and in its existing laws, joined the Berne Convention without making changes in its protection of moral rights. Instead, the United States maintained that its existing laws were sufficient to bring it within the requirements of Article 6bis. The United States did formally recognize moral rights in visual artworks with its adoption of the Visual Artists Rights Act of 1990, which recognizes the author's rights of attribution and integrity in visual works of art.

The United States cites a number of different methods its legal system utilizes to protect moral rights. The various means of protection mentioned here will be discussed in greater depth in section IV below. The main method that United States asserts protection is through various provisions of the Copyright Act. The Visual Artists Rights Act, mentioned above, protects the moral rights of author's of fine art. It has also been argued that the exclusive right granted to authors under the copyright act to prepare derivative works serves as a method of protecting the author's integrity right, if the work is significantly altered. Provisions of the Copyright Act that address the prohibition on the distortion of musical compositions, the termination of licenses and transfers, and the prohibition in the removal of copyright management information are also ways that moral rights may be protected. The Lanham Act has been suggested as another method of protecting the author's rights of attribution. By using

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45 Ciolino, supra note 29, at 45.
47 Jaszi, supra note 5, at 498.
49 Id.
53 VerSteeg, supra note 15, at 831. Section 106(2) of the copyright act gives the author the exclusive right to "to prepare derivative works based on the copyrighted work." 17 U.S.C. § 106 (2000).
54 Hughes, supra note 17, at 8, 16-17. See also 17 U.S.C. §§ 115, 203, 1202 (2000).
section 43(a) of the Lanham Act, the United States argues that attribution rights are protected through the provisions because they do not allow for the false representation as to the origin of the goods in question. Various state statutes regarding moral rights, existing at the time the United States signed on to the Berne Convention, were another method the United States claimed protection for moral rights. Aside from statutes, the United States claims that case law protects moral rights. Further, state common law governing tort actions for unfair competition and publicity rights, fraud and misrepresentation, defamation, or breach of contract maybe used to protect moral rights in the United States, without having to enact special legislation recognizing these rights.

Evidently, the difference between the protection offered in France and other droit d'auteur countries and the United States and other copyright countries is significant. The Berne Convention attempts to harmonize these differences. However, the Convention does not clearly articulate a method, nor does it require the implementation of specific laws to address protection necessary to comply with Article 6bis.

D. The Importance of Protecting Moral Rights

In light of the different viewpoints surround the protection of moral rights, a question arises as to how important are moral rights in the international context? This section looks at the conflicting views on the importance of protecting moral rights.

1. Why it is important to protect moral rights

Moral rights are effectively an exercise in private censorship by artists. By allowing artists to determine when a work is finished and when it should be released to the public, this censorship gives the artists full control over dissemination of their work. This type of control helps to encourage the production of artistic work by protecting the creator's dominion over the work. An artist's career is centered on her work and her

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57 VerSteeg, supra note 15, at 831; Zuber, supra note 6, at 284.
58 Id. See also H.R. Rep. No. 609, 100th Cong., 2d Sess. 38 (1988). But see Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976) (involving the "mutilation" of a comedy groups television program when it was to be edited for time and content on a U.S. television station. The court did not expressly recognize a moral right in this case.); Suhl, supra note 11, at 1223.
60 Jaszi, supra note 5, at 497.
61 BANKI, supra note 8, at Ginsburg 15-16; Burton Ong, Why Moral Rights Matter:
reputation.62 "Each work of art has the artist's signature on it, literally and figuratively."63 When "creative efforts are encouraged . . . the wider community benefits from the increased availability of artworks."64 Encouraging the production of intellectual property is at the heart of United States intellectual property law.65 The Constitutional grant of exclusive right to an author for his work in order to encourage the "progress" of arts and the United States adherence to the Berne Convention are strong reasons for the United States to provide protection for moral rights.

There are many other arguments advanced as to why moral rights should be protected. In addition encouraging the production of intellectual works, moral rights "[facilitate] a cultural climate in which contributions of the artist are acknowledged."66 It may be important for some artists to know that they will live on through their work because it is valued by our society.67 Furthermore, it may be important for the artist to feel that society is committed to her as an artist.68 These rights may help in capturing the cultural heritage in the community in which the work was created.69 Demonstrating that the United States facilitates a cultural climate where art is valued is another benefit of providing moral rights protection.70 It shows that we are a nation that appreciates and respects art and artists, thus encouraging artists to bring their art to the United States or to create art in the United States.71 In the international context, protecting moral rights in the United States helps to harmonize legal rights and make the dissemination of works from country to country easier.72

\[\text{Recognizing the Intrinsic Value of Integrity Rights, 26 Colum. J.L. \\ \\ \\ \\ \\ Arts 297, 302 (2003).}\]


63 Id.

64 Ong, supra note 61, at 302.

65 U.S. Const. art. I, § 8, cl. 8. "The Congress shall have Power . . . To Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Id.

66 Ong, supra note 61, at 302.

67 BANKI, supra note 8, at Ginsburg 16. It may be important for some authors to know that they will be recognized and that "... immortality through preservation of the work, may be more important than immediate material gain." Id.

68 Id. at Ginsburg 17.

69 Ong, supra note 61, at 302.

70 Id. at 303-04. "[I]ntegrity rights constitute one of the pillars of a civil society sensitive to, and appreciative of, the invaluable cultural contributions made by the artist. They are, in a sense, emblematic of a civil society that affirms the intrinsic worth of such artistic contributions to the cultural landscape." Id. Providing moral rights would improve the status of authors and artists in the United States. Harris, infra note 72, at 97.

71 Id. at 303.

72 See BANKI supra note 8, at Ginsburg 14; Paul D. Paton & Christine J. Prudham, Barriers to Trade or Culture's Last Stand: Copyright Issues Under NAFTA, 27 Can. Rev. of Am. Studies 19 (1997); Hansmann, supra note 16, at 97; Lesley Ellen Harris, Moral Rights
Finally, there is an element of art consumer protection when the moral
inghts of artists are protected. By giving a right of attribution to author’s,
we are giving them another tool which could be used to stop deceptive
labeling or confusion as to who created the work. When purchasing
works of art or literary works, it is often very important to know who
created the work before it is purchased. The right of attribution affords
“the fullest possible public information about who created the work [and]
about the source of the work.” The reverse side of attribution is that it
helps to eliminate deception as to works that are misattributed to an author
or for providing credit to an author who is not getting the credit that he
deserves.

2. Why it may not be as important to protect moral rights

While there are many arguments favoring moral rights protection,
there are a number of reasons why the protection of moral rights may not be
as significant as it seems. Under the current structure of the Berne
Convention, moral rights protection can vary from country to country.
This means that the actual protection available to artists may be different in
each country and understanding the regulations supporting these protections
can be difficult. However, even if the laws were harmonized it may still
be difficult for artists to utilize these rights because the manner in which
works are often produced places artists at the mercy of the person who has
hired them. Many artists are not in the position to create numerous works
that are not commissioned by a particular buyer. This situation places the
person commissioning the work in a stronger bargaining position, as the
artist may not be able continue his work without the money that is paid for
the commissioned work. There is some concern that the differences in
moral rights regulation may cause a barrier to trade because of the many

Laws Must Be Harmonized, 106 BILLBOARD 6 (1994).

Roger L. Zissu, Copyright Luncheon Circle: The Interplay of Copyright and
Trademark Law in the Protection of Character Rights with Observations on Dastar v.
Twentieth Century Fox Film Corp., 51 J. COPYRIGHT SOC’Y U.S.A. 453, 460-61 (2004);
BANKI, supra note 8, at Ginsburg 16.

BANKI, supra note 8, at Ginsburg 16.

Id.

Id.

BANKI, supra note 8, at Ginsburg 16. “The public has at least as much of an interest
in knowing who the author is, as in knowing who the producer of a brand of detergent is.”
Id.

Id.

See Berne Convention for the Protection of Literary and Artistic Work, opened for
signature Sept. 9, 1886, art. 6bis, 828 U.N.T.S. 221.

Harris, supra note 72.

William Kingston, Why Harmonisation is a Trojan Horse, Eur. I.P. Rev. 2004,
26(10), 447-60; Paton, supra note 72.

Id.
different aspects that need to be considered when obtaining protection or making a contract that implicates an author’s moral rights.\textsuperscript{82} Because of the complex nature of these rights, “they are rarely enforced.”\textsuperscript{83} These rights are not enforced because of the costs associated with bringing a lawsuit, lack of awareness of existence of these rights, or because they are waived initially by the author or in negotiations as a bargaining chip.\textsuperscript{84} If these rights are so rarely enforced, how many artists are truly benefiting from their protection?

Another argument against a strong regime of moral rights protection is the possible interference with notions of fair use.\textsuperscript{85} Beneficial works, such as parodies, may not be produced because the creator fears that she would be infringing on the artist’s right of integrity.\textsuperscript{86} Moral rights protection may also discourage investment in the works by “[impeding] the efficient exploitation” of the work.\textsuperscript{87} There is also an inherent conflict between the desire to allow works to become a part of the public domain and retaining protection for the authors’ moral rights.\textsuperscript{88} In order to remedy this inherent conflict the United States and other countries must “make a policy decision about how far reputational interests should extend.”\textsuperscript{89} Further, moral rights protection is not well-suited to certain types of intellectual works such as works made for hire, works with multiple authors, works of technology like software, and works with only the slightest modicum of creativity such as databases.\textsuperscript{90}

Whether one feels that it is or is not important to protect moral rights does not change the fact that the United States, as a signatory to the Berne

\textsuperscript{82} Paton, \textit{supra} note 72.
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} Ciolino, \textit{supra} note 29, at 78-79. Ciolino argues that there is not “utilitarian [or] deontological justification for limiting federal moral rights” under the fair use doctrine. \textit{Id.} Fair use is defined at 17 U.S.C. § 107 (2000). To determine if use is fair the court will consider the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use on the potential market of the copyrighted work. 17 U.S.C. § 107 (2000). \textit{See also} Brooks, \textit{supra} note 26, at 1453-54.
\textsuperscript{86} Ciolino, \textit{supra} note 29, at 78-79. The creation of a parody was considered to be fair use in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
\textsuperscript{87} \textit{Banki, supra} note 8, at \textit{Ginsburg} 16-17; Battisti, \textit{supra} note 7, at 3-4 (for software and databases).
\textsuperscript{88} \textit{See} Dastar v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33-34 (2003). Another interesting problem is created when perpetual rights are allowed. \textit{See} Alan Riding, \textit{Arts Abroad: Victor Hugo Can’t Rest in Peace, As a Sequel Makes Trouble}, N.Y. \textit{Times}, May 29, 2001, § E, at 1 (discussing a case in France where Victor Hugo’s family sought to enjoin the dissemination of a work called Cosette that used the characters from Hugo’s \textit{Les Miserables}).
\textsuperscript{89} Hughes, \textit{supra} note 17, at 45.
\textsuperscript{90} \textit{Id.} at 32-33.
Convention, must provide protection for moral rights in order to comply with their duties under that Convention.

III. DEVELOPING GOOD CREDIT: CULTURAL DEVELOPMENT IN EUROPE AND THE UNITED STATES

Just as the differences between droit d’auteur countries and copyright countries is marked importance, the differences in European and United States culture are significant. Many of the differences can be attributed to the immense age gap between the two areas. While the United States was just assembling its cultural beginnings, Europe was winding up many centuries of cultural development. As a result, the cultural history in Europe is many centuries richer and art and literature play prominent roles in its development. The culture of the United States focused less on art and more on industry and economy. These changes seem to indicate a reason for the stark differences in attitude each area has on the subject of moral rights.

A. Europe

One great distinction between Europe and the United States is the relative age of each area. Europe is comprised of "nations that are old." Throughout its history, European culture can be largely identified by its dedication to the arts. As we scan through the history of the European nations, we see the prominence of arts in the development of European thought and culture. The culture of Europe can be examined from Ancient to Modern times. In examining each period, it is easy to identify the leaders

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91 TERRY G. JORDAN, THE EUROPEAN CULTURE AREA: A SYSTEMATIC GEOGRAPHY 9 (1973). Other factors that Jordan uses to identify the European cultural area include: a well-educated population with high value on the written word throughout its history, a healthy population, a well-fed population, birth and death rates far below the world average, an annual average national income per capita far above the world average, a population that is dominantly urban, an industrially oriented economy, a market-oriented agriculture, and an excellent transportation system with few areas described as remote. Id. Based on this analysis one of the key factors that differentiate the European cultural area from the United States cultural area is the relative ages of the nations.

92 EUROPEAN CULTURE: A CONTEMPORARY COMPANION v-vi (Jonathan Law, ed., 1993). A large part of understanding European culture stems from an understanding of the arts, specifically the arts of painting and sculpting, architecture music, literature, theatre, and cinema. See id. and CULTURE AND BELIEF, infra note 94, at 3-4.

93 See F. MELIAN STAWELL & FRANCIS SYDNEY MARVIN, THE MAKING OF THE WESTERN MIND: A SHORT SURVEY OF EUROPEAN CULTURE 1-4 (1923). By examining the history of Europe from ancient to medieval to renaissance to modern, we can observe the great changes in the styles of art and literature that reflect the changes in European culture, social life, and politics. See id. at ix-xi.
in the fields of art and thought. The artists, philosophers, and authors who created the works in these periods are still credited with their contributions. European literature serves as a national treasure to illustrate the European heritage. This exemplifies the strong sense of importance that Europeans attributed to artists’ rights even in the early stages of European development. Art does not simply symbolize European culture, but also acts as window into the European “state of consciousness.”

The importance of arts and literature in the European culture can be observed in the study of the ancient Hellenic, Hebraic, and Roman cultures dating before 1500 B.C. through the early 400’s B.C. The ancient Greeks were well known for their philosophers and historians. The ancient Hellenic times were well documented through the poetry of Homer, the theatre of Sophocles, and the architecture and art of the Parthenon. The Hebraic and later the Christian cultures had well-developed oral prophecy and were the leaders in developing written works of theology. Literature thrived in ancient Roman culture. Philosophers such as Cicero, Lucretius, and Nero are still studied today.

Poetry, architecture, and philosophy continued to grow and develop in medieval European culture from approximately 450 A.D. to 1500. From this era, we see the likes of Dante and Petrarch emerge. The medieval era also ushered in a bloom of Byzantine art and of art in Italy. It is in this period that we see the artwork of Donatello and Piero Della Francesca. At this time, English literature is also growing and giving rise to Chaucer. Architecture is of great importance as the design and decor of a building

94 See CULTURE AND BELIEF IN EUROPE 1450-1600 x-xi (David Englander et al., eds., 1990). There is some disagreement as to whether the study of the literary and artistic works of this time are truly representative of European culture. Some feel these works are only representative of the members of the European elite. Id.
95 See generally STAWELL & MARVIN, supra note 93, at ix-xi. Although not with complete certainty or without controversy, it is not possible to be absolutely certain of some questions of authorship. It is not possible to be absolutely certain of some questions of authorship as many are attributed to the works commissioned by particular rulers. See id.; CULTURE AND BELIEF, supra note 94, at 3-4.
97 MONACO, infra note 120, at 18. Europeans believe their art to stand for itself; it does not simply symbolize something else. It is believed that “[n]o other object enacts the values of a culture so well as the work of art.” Id.
98 STAWELL, supra note 93, at 337-40.
99 See id. at 337.
100 Id. at 337-39.
101 See id.
102 Id. at 340.
103 Id. at 341-43.
104 Id.
105 Id. at 343.
106 Id.
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could be used to signify power and wealth.\textsuperscript{107}

In the Renaissance, from approximately 1485 to 1700, we see the continued development of art, literature, and architecture.\textsuperscript{108} Some of the great authors and artists that were introduced in this era include: Machiavelli, Marlowe, Shakespeare, Moliere, da Vinci, Michelangelo, and Cervantes.\textsuperscript{109} This was also an era where there was a great awakening in the sciences. The great scientists of this time were Copernicus, Kepler, and Galileo.\textsuperscript{110} We see the beginnings of formal recognition for moral rights in this era. Michelangelo is credited for the development of certain moral rights.\textsuperscript{111}

As we reach the modern age of European history, approximately 1600 to the present, we see the importance of art and science continues to expand. It is also in this period that we see the great bloom of music in European culture.\textsuperscript{112} We see musicians such as Bach, Handel, Haydn, and Beethoven leave their mark.\textsuperscript{113} Writers such as Austen, Byron, and Keats and scientists such as Jenner and Volta also make a strong impression in the culture's history. As we move closer to the present, we continue to welcome the works of artists such Chopin, Nietzsche, Ibsen, and van Gogh, and scientists such as Einstein and Darwin.\textsuperscript{114} In this era, moral rights gained formal recognition in French law.\textsuperscript{115} The recognition began with the decree of January 13-19, 1791 in the theatre context. It related to the ability of authors to authorize or prohibit public performance of their works.\textsuperscript{116} This was followed by the decree of July 19 and August 6, 1793 that gave authors the exclusive rights over publishing their works.\textsuperscript{117} The modern age also brought with it the industrial revolution.\textsuperscript{118} Along with it came increased changes and the political and social landscape of European culture.\textsuperscript{119}

In some respects, the rapid development of industry and technology had the effect of dividing European culture.\textsuperscript{120} The "intellectual terrain"

\textsuperscript{107} See id. at 341.
\textsuperscript{108} Id. at 343-45.
\textsuperscript{109} Id. at 344.
\textsuperscript{110} Id.
\textsuperscript{111} Suhl, supra note 11, at 1206-08.
\textsuperscript{112} Stawell, supra note 93, at 345.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 347.
\textsuperscript{115} Sarraute, supra note 6, at 465.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Stawell, supra note 93, at 300-01.
\textsuperscript{119} See generally id.
\textsuperscript{120} Paul Monaco, Modern European Culture and Consciousness, 1870-1980 10 (1983). A great portion of this divide is attributed to those who had previously viewed
was rough with several concerns. These include the exploitation of science, the use of science in human reproduction or genetic engineering, corporate and governmental use of science for profit or war, and the development of mechanical technologies that could "think" or solve problems better than humans could. These uses of science and technology threatened a society that had thrived off the intellectual and artistic thinking that had developed over many centuries.

The importance of the arts in European culture can still be seen today. Although traditional notions of what defined the culture have been threatened by things such as the market for "cultural objects," the rise of new forms of image communication (such as photography, cinematography, and video), and new media, the culture has risen to the challenge. One way to battle this phenomenon is to separate "high" culture from "pop" or "mass" culture. Those who disagree with this delineation prefer to see the new challenges as a means to allow the works to be appreciated by even larger audiences. It is clear that arts were an important aspect of the development of European culture.

Another influential aspect of cultural development was the physical environment in Europe. The European landscape is littered with mountains, plains, coastal areas, and low hills. The diverse terrain played a large hand in the shaping of its culture. The terrain influenced a person's choice of livelihood, residence, and other similar matters. As a result, Europeans either worked with the land as best they could or in many cases, altered the land to suit their needs. The Europeans have had many centuries to develop their land. This may be a factor in the ability of the Europeans to place more focus on the arts and less on dealing with basic necessities such as developing the land.

Religion played a large role in European cultural development. The science almost as an art form. There were those who believed in a notion of "pure science" and those who supported the "technology that lives off science." Id. See generally CULTURAL AND ETHNIC DIVERSITY: A GUIDE FOR GENETICS PROFESSIONALS (Nancy L. Fisher ed., 1996) (discussing in greater depth how cultural differences influence the development of genetic research or genetic engineering. European and Christian culture in North America are compared and discussed).

Examples of the ways that man altered the land include: terracing, coastline alteration, affect on climate, depletion of natural vegetation or alteration of natural vegetation, deforestation, and soil alteration due to plowing, manuring, and absence of fallen leaves from forest trees.
history of religion throughout Europe is long and fascinating. Multiple
divinities marked the religion of early Indo-European persons. Polytheism also characterized the religion of the Ancient Greeks and Romans. Through a mix of migration, conversion through daily contact, and missionaries, Christianity became the main form of religion in European culture. Roman Catholicism, Eastern Orthodoxy, and Protestantism were the three main types of Christianity that developed. The development of each type of Christianity often brought with it resistance that led to wars and emigration of persons who were persecuted for their beliefs. The strong religious movement gave rise to many important pieces of art and literature including: Sir Thomas More's Utopia and Leonardo da Vinci's "Last Supper."

B. The United States

United States culture developed after European culture had already
developed firm footings based on many centuries of rich cultural history. As a result, the development of culture in the United States varies greatly from the development of culture in Europe. The United States was largely formed by persons who were seeking freedom from religious persecution. Those credited with starting the first settlement in the United States, the Pilgrims and the Puritans, were known for their hard work ethics. The nature of life in the colonies was one where the focus of life was on

130 Id. at 138.
131 Id. It was not only the Greeks and Romans who had a religious history that focused on multiple divinities. "Germanic, Celtic, and Slavic tribes also worshipped multiple divinities." Id.
132 Id. at 140.
133 Id. at 140-44.
134 See CULTURE AND BELIEF, supra note 94, at 161-63.
135 See STAWELL, supra note 93, 343-44.
136 See id., at 345-47. The United States Declaration of Independence in 1776 took place in what many call the modern era of European culture. The connotative meaning of history in the United States becomes a much later time than when discussing history in European culture, which usually necessitates a more distinct reference such as "ancient" or "renaissance" in order to correctly identify what period of European history is being discussed.
137 U.S. Dept. of State, An Outline of American History, http://usinfo.state.gov/products/pubs/histryoth/index.htm [hereinafter American History]. "During the religious upheavals of the 16th century, a body of men and women called Puritans sought to reform the Established Church of England from within. Essentially, they demanded that the rituals and structures associated with Roman Catholicism be replaced by simpler Protestant forms of faith and worship. Their reformist ideas, by destroying the unity of the state church, threatened to divide the people and to undermine royal authority." Id. A radical group of Puritans, called Separatists, emigrated to the New World in 1607. It was this group who set sail on the Mayflower. Id.
138 See generally id.
survival; therefore, artistic development took a back seat in the early stages of American life.\textsuperscript{139} Although education was still important to the early settlers, the relationship between schooling and religion was very close-knit and most lessons were taught from the bible.\textsuperscript{140} This resulted in few lessons that discussed the philosophical and artistic views that were an integral part of education in ancient and medieval European education.\textsuperscript{141}

Arts and literature in the United States were not as prominent in the country's cultural development. As a young country, the United States imported most of its art and literature.\textsuperscript{142} Instead, the early culture in the United States was defined by its focus on industry.\textsuperscript{143} The United States quickly developed as a leader in the areas of trade and manufacturing. The main exports from the United States became tobacco and cotton.\textsuperscript{144} When the nation became industrialized, the focus on business and industry continued to grow.\textsuperscript{145} While European culture was marked with the works of great authors and artists, the culture of the United States was filled with names like Ford, Carnegie, and Rockefeller who were leaders in industry.\textsuperscript{146}

The development of the arts in United States culture was not a defining part of the country's early history.\textsuperscript{147} The cultural activities that filled early American life were activities such as barbecues, dances, housewarmings for newly married couples, and quilting.\textsuperscript{148} The development of arts struggled due to tension between the competing inspirations of European sophistication and domestic originality.\textsuperscript{149} American art that was distinct from European art did not begin to take prominence until the late 1800's and early 1900's.\textsuperscript{150} It was not until this time that distinctly American music was being developed by composers such as Copeland and Gershwin.\textsuperscript{151} At roughly the same time, modern

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\textsuperscript{139} See id.
\textsuperscript{140} Id. Puritan, Quaker, and other small private schools with religious affiliation were an important part of American cultural development. Id.
\textsuperscript{141} See generally STAWELL, supra note 93, 337-41. The importance and influence of religion in European education became more important in the latter part of European history. See id. at 341-45.
\textsuperscript{142} See American History, supra note 137.
\textsuperscript{143} See generally id.
\textsuperscript{144} See generally id.
\textsuperscript{145} See JAMES F. WICKENS, THEMES IN UNITED STATES HISTORY 196-203(1973).
\textsuperscript{146} See American History, supra note 137. In the 1800's when industry was developing at a rapid pace, Carnegie was a leader in the steel industry, Rockefeller was a leader in the oil industry, and Ford was the leader in the automotive industry. Id.
\textsuperscript{147} See generally id.
\textsuperscript{148} Id.
\textsuperscript{149} \textsuperscript{150} Id.
\textsuperscript{149} Id. Puritan, Quaker, and other small private schools with religious affiliation were an important part of American cultural development. Id.
\textsuperscript{150} See generally id.
\textsuperscript{150} See id.
\textsuperscript{151} Id.
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dance developed as an art form.\textsuperscript{152}
Visual art in the United States began its development in the 1820's with the Hudson River School of art, but did not become prominent until later in the century.\textsuperscript{153} Artists such as Winslow Homer and Jackson Pollock created works ranging from portraits of America's rural landscape to abstract expressionism.\textsuperscript{154} Perhaps the most famous American artist, Andy Warhol, depicted pop culture objects in his works beginning in the mid 20\textsuperscript{th} century.\textsuperscript{155} Art could also be observed in the architecture of such architects as Louis Sullivan and Frank Lloyd Wright.\textsuperscript{156}

The development of literature in the form of short stories, novels, and poems took shape in the mid-1800's and continued to develop throughout the 20\textsuperscript{th} century. Authors such as Poe, Twain, Hemingway and poets like Whitman and Dickinson provided the beginnings of American prominence in the area of the literary arts.\textsuperscript{157} Drama was also rich with the writings of playwrights such as Tennessee Williams and Eugene O'Neill.\textsuperscript{158}

Based on the slow development of distinctly American artistic works, it is not surprising that author's rights are not expressly recognized in United States law. It is important to note that the founders of the United States recognized the importance of the arts by including a Constitutional provision allowing for legislation that promotes the progress of the arts.\textsuperscript{159} This provision along with current copyright legislation demonstrates the United States intent to encourage the creation of new artistic and literary works.

While cultural development in the United States did result in the production of significant literary and artistic works, this was not the case until the late 1800's. At this time, arts and literature were a well-established presence in European culture. The difference in age that exists between the United States and Europe is a significant function of the cultural differences that exist between the two areas. Furthermore, art and literature were a fundamental part of early European development, while

\begin{itemize}
\item[\textsuperscript{152}] Id. Modern dance productions were often developed in collaboration with the music of American composers. Id.
\item[\textsuperscript{153}] Id. The delay in artistic productions was due to the changing nature of the cultural landscape. Artists were waiting for the United States to offer subjects that were "unique to itself." Id. The United States presented this unique identity with its westward expansion and the beauty of the frontier. Id.
\item[\textsuperscript{154}] Id. Abstract expression is focused on demonstrating the physical action of painting on a canvas. Id. See also GEORGE BROWN TINDALL, AMERICA: A NARRATIVE HISTORY 976 (1984).
\item[\textsuperscript{155}] Portrait of the USA, supra note 149.
\item[\textsuperscript{156}] Id.
\item[\textsuperscript{157}] Id. See also TINDALL, supra note 154 at 1012.
\item[\textsuperscript{158}] Portrait of the USA, supra note 149.
\item[\textsuperscript{159}] U.S. CONST. art. I, § 8, cl. 8.
\end{itemize}
industry and religion played a fundamental role in United States development. These fundamental differences provide background for the disparity in moral rights protection between many European nations and the United States.

IV.

CREDIT INQUIRY: DOES THE UNITED STATES PROVIDE SUFFICIENT PROTECTION FOR MORAL RIGHTS?

When the United States became a party to the Berne Convention on March 1, 1989, it did not expressly recognize the moral rights required by Article 6bis. The United States’ Congress justified this by stating that, “[e]xisting U.S. law[,] including various provisions of the Copyright Act and Lanham Act, various state statutes, and common law principles such as libel, defamation, misrepresentation, and unfair competition, . . . have been applied by courts to redress authors’ invocation of the right to claim authorship or the right to object to distortion.” Later the United States squarely addressed the issue of moral rights in the context of artistic works by adopting the Visual Artists Rights Act in 1990. Questions arise as to whether these means truly protect the spirit of moral rights law or if its just a case of the United States attempting to squeeze the international agreement into the existing laws without having to alter there current course of action. Even if these methods address the spirit underlying moral rights, do these means provide actual protection of moral rights?

A. Statutes as a Means of Protecting Moral Rights

There are a variety of statutes that the United States argues provide protection for moral rights. The Copyright Act of 1976 provides one avenue of protection. The Lanham Trademark Act is another commonly used argument. There are also a variety of state statutes that have been developed to protect moral rights.

The main statute addressing moral rights in the United States is the Visual Artists Rights Act of 1990 (hereinafter “VARA”). VARA follows the model of rights suggested by the Berne Convention. However, the statute is limited to rights granted to the authors of “a work of visual art.”

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161 Id. (quoting Berne Implementation Act of 1988, Pub. L No. 100-568, 102 Stat. 2853 § 13(a) (1988)); see also Hughes, supra note 17, at 9 (stating that the lack of Congressional action continues a pattern of Congress leaving copyright law to develop in courts).
Under VARA, authors of visual artworks are granted the rights of attribution and integrity stating that the author has the right "to claim authorship of [the] work, and 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;" the author "shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and . . . to prevent any intentional distortion, mutilation, or other modification of [the] work which would be prejudicial to his or her honor or reputation, . . . and to prevent any destruction of a work of recognized stature." The rights belong only to the author of the work, even if he or she is not the holder of the work's copyright. The right lasts for the life of the author and may not be transferred. The rights may be waived if an agreement is signed by the author of the work and the terms of the agreement are very explicit regarding the use of the work and the application of the waiver. While VARA protects the moral rights of author's, its limitation to works of fine art meeting certain specifications means that it does not provide protection for all authors.

VARA is similar to a number of state statutes that were enacted to protect moral rights for artists. California and New York adopted moral rights legislation for artists in the 1970's and 1980's. Between 1985 and 1989, several other states adopted similar statutes. However, there is some question as to whether or not these statutes are preempted by VARA. Since VARA does not fully occupy the field of moral rights, some of the state statutes may survive preemption. Due to the diverse and limited nature of these statutes, they do not effectively provide consistent protection for the moral rights of authors. They must be individually analyzed and only provide protection for authors within the state regulated by the statute.

The Copyright Act may also provide protection of moral rights by its grant of exclusive rights to the copyright holder. The copyright holder "has the exclusive [right] to do and to authorize . . . [the preparation] of derivative works based upon the copyrighted work . . . ." This exclusive

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164 Id.
165 Id.
166 Id.
167 Hughes, supra note 17, at 16.
168 Zuber, supra note 6, at 284.
169 Id. At the time the United States joined the Berne Convention, only eight states had enacted these statutes. VerSteeg, supra note 15, at 833.
170 Zuber, supra note 6, at 284; VerSteeg, supra note 15, at 833.
171 Zuber, supra note 6, at 284; VerSteeg, supra note 15, at 833.
right is arguably akin to the moral right of integrity. Unauthorized alteration or mutation of a work would result in an unauthorized derivative work. However, the right to bring an action for an unauthorized derivative work is retained by the copyright holder. The copyright holder may not be the author if the copyrights in the work were sold, licensed, or transferred. When the copyright is not held by the author, this provision does not effectively protect the author's moral rights.

The copyright holder also "has the exclusive rights to do and authorize . . . [the performance] of the copyrighted work publicly . . . and [the display] of the copyrighted work publicly . . . ." This right is limited to certain types of works. This right is comparable to the rights of disclosure and withdrawal in French law. Protection of these rights is not required in the Berne Convention. Even if it were required, the right is limited to specific works and again, it belongs to the copyright holder who may not necessarily be the author of the work.

The Copyright Act also contains various provisions that have limited potential to protect moral rights. Section 115 is a prohibition on distortion of musical compositions and may be used as a pseudo-right of integrity. The regulations relating to the termination of licenses and transfers in section 203 may have some application for the protection of the right of integrity. A provision of the Digital Millennium Copyright Act (hereinafter "DMCA") regarding the prohibition on the removal or alteration of copyright management information found at section 1202 may be used to protect the right of attribution when the copyright management information contains the name of the author.

Another federal statute that has arguably protected the rights of authors in the United States is section 43(a) of the Lanham Trademark Act. This statute has been used as a "back door" attempt to recognize the

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173 Brooks, supra note 26, at 1451-52.
175 Id. Section 4 is limited to literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audio visual works. Section 5 is limited to literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work. Id.
176 See Berne Convention for the Protection of Literary and Artistic Work, opened for signature Sept. 9, 1886, art. 6bis, 828 U.N.T.S. 221.
179 Hughes, supra note 17, at 16-17 (discussing the possibility of using this section for the protection of the right of attribution, although no case has attempted to obtain protection in this way under section 1202); 17 U.S.C. § 1202 (2000).
moral right of attribution in the United States. Section 43(a)(1)(A) reads, "[a]ny person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person." It has been argued that this statute provides a protection for the right of attribution because it prevents someone from claiming that a work is theirs when it is not. However, this statute does not require that attribution be given, so it does not protect the author's right to be given credit for his work, only that the attribution must not be false.

Section 43(a) falls victim to a number of other concerns in the context of providing protection for moral rights. The underlying justification for the Lanham Act is to protect the consumer. While the application of this statute may result in protection to the producer of a work or product, that is not the main purpose of the act. In order to prevail in a claim brought under section 43(a), one must demonstrate substantial likelihood of consumer confusion or actual consumer confusion. This is an expensive and difficult point for a party to prove. Furthermore, the decision in Dastar v. Twentieth Century Fox Film Corp. seems to have made moral rights protection under section 43(a) unlikely. The impact of this case is discussed in greater depth in Section B.

Section 43(a)(1)(B) may also provide protection when the false or misleading representation occurs in "commercial advertising or promotion" and it "misrepresents the nature, characteristics, qualities, or geographic

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181 Ochoa, supra note 160, at 912. It is argued that if this statute does not protect the right of attribution then the United States is not in compliance with the Berne Convention. Id.
184 See Ginsburg, supra note 183, at 279. It may prevent the "reverse palming off" of a work of joint authorship when one of the authors of that work is not attributed. VerSteeg, supra note 15, at 832. See also Brooks, supra note 26, at 1455 (stating that 43(a) may protect for non-attribution if "the audience connects the work to the artist because of its strong secondary meaning").
187 See generally Suhl, supra note 11, at 1218-19.
origin" of the goods.\textsuperscript{188} This provision falls victim to many of the same problems as Section 43(a)(1)(A). This section is also applicable in limited circumstances. One would need to demonstrate that authorship relates to the nature, character, or quality of the good.\textsuperscript{189} If this is accomplished, the protection is only valid if the misattribution occurred in commercial advertising or promotion.\textsuperscript{190} Even if the protection of moral rights under the Lanham Act exists after the \textit{Dastar} decision, it does not effectively protect the right of attribution because of the limited scope and nature of the protection offered.\textsuperscript{191}

While VARA, the Copyright Act, the Lanham Act, and state statutes may provide some protection for moral rights, the protection is limited in scope and nature. VARA is limited to fine works of art. State statutes are limited to the states where they were enacted and may be preempted by VARA.\textsuperscript{192} Copyright protection belongs to the copyright holder, who may not be the author, and does not give express protection for moral rights. The Lanham Act is also limited as to what is protected. Further, the act is not intended to protect authors, but consumers, and it may not be applicable after the decision in \textit{Dastar}.

\textbf{B. Cases Regarding the Protection of Moral Rights}

A movement toward the protection of moral rights could be seen in a line of cases prior to the United States’ joining of the Berne Convention.\textsuperscript{193} Without explicitly recognizing the droit de divulgation, the courts gave copyright owners almost complete power over their unpublished works by not allowing journalists and the like to quote from unpublished manuscripts under the cover of the fair use doctrine.\textsuperscript{194} Essentially, the courts allowed

\begin{footnotesize}
\begin{enumerate}
\item[189] Ginsburg, \textit{supra} note 183, at 276-78.
\item[190] \textit{Id.} at 278.
\item[191] \textit{See also} 15 U.S.C. § 1125(c) (2000). This section allows recovery for dilution for famous marks. This is arguably a mix of the rights of integrity and attribution, but protection afforded is very limited in nature and does not significantly add to the protection of moral rights.
\item[192] Under preemption doctrine, laws that do not conflict with the Federal law are not preempted. \textit{See} Wojnarowicz v. Am. Family Assoc., 745 F. Supp. 130 (S.D.N.Y. 1990) (finding that New York’s Artists’ Authorship Rights Act did not conflict with the Federal Copyright Act and therefore was not preempted).
\item[193] Jaszi, \textit{supra} note 5, at 499.
\item[194] \textit{Id.} See also Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (denying the application of fair use to quotations from Gerald Ford’s unpublished memoirs in an unauthorized publication); New Era Publications Int’l. v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1989) (denying the application of fair use to the use of unpublished writings of a founder of the Church of Scientology in a critical biography); Salinger v. Random House, 811 F.2d 90 (2d Cir. 1987) (denying the application of fair use in a literary biography of quotations from unpublished letters of J.D. Salinger). The fair use doctrine is found at 17
\end{enumerate}
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the copyright holders to enforce a form of private censorship. However, the rights of disclosure and withdrawal do not need to be protected under the Berne Convention.

The most frequently cited case for the protection of moral rights is Gilliam v. American Broadcasting Co., Inc. This case dealt with American Broadcasting Co.'s (ABC) attempt to edit the authors' work for content and time, so that it could be broadcast in ABC's schedule. The case did not recognize the authors' moral rights. The court did recognize that there is a valid claim under the Lanham Act for falsely representing the "mutilated" work as belonging to the authors. Subsequent decisions agreed with the Gilliam court's view that this editing may constitute infringement of the authors' exclusive right to prepare a derivative work under the Copyright Act. While this case suggested protection for moral rights might be available under existing laws, it did not expressly state that moral rights were protected under United States copyright law or any other law. In addition, Gilliam only suggested that protection might be available to the copyright holder. Once again, this may not necessarily be the author. In addition, the facts of the Gilliam case are unique and show a clear example of mutilation. Other cases can be easily distinguished from Gilliam; therefore, Gilliam does not serve as a strong precedent.

The Supreme Court in Dastar changed the nature of how the term origin was defined in the context of the Lanham Act. The Court expressed concern about construing the term origin in 43(a) to require attribution of uncopyrighted materials. The Court stated that they "d[id] not think that the Lanham Act require[d] [a] search for the source of the Nile and all its tributaries." Therefore, origin does not need to provide attribution to the original source (author) of the goods, but rather the person who produced the goods. The court expressed concern for extending copyright protections under the guise of trademark protection. While a number of

195 Jaszi, supra note 5, at 499.
196 See Berne Convention for the Protection of Literary and Artistic Work, opened for signature Sept. 9, 1886, art. 6bis, 828 U.N.T.S. 221.
197 Gilliam, 538 F.2d at 17-19.
198 Id. at 24.
199 Cotter, supra note 12, at 18.
200 Id.
201 VerSteeg, supra note 15, at 831.
202 Cotter, supra note 12, at 24-25.
203 Suhl, supra note 11, at 1224.
204 Dastar, 539 U.S. at 35.
205 Id. at 35-36.
206 Id. at 37.
207 Id. at 33-34.
scholars have expressed disagreement with the Court’s analysis in Dastar, it still seems unlikely that the Lanham Act will continue to provide protection for the moral right of attribution. The Dastar decision exemplified the paradigm shift that trademark law should be viewed through the “lens of unfair competition, rather than intellectual property.” Dastar may not have eliminated all Lanham Act protection for the right of attribution if a distinction is made between non-attribution and misattribution. Arguably, Dastar is a non-attribution case while the Lanham Act protection described in the Gilliam case was based on misattribution. This variation may be enough to salvage a portion of Lanham Act protection even after Dastar.

Case law in the area of moral rights demonstrates the difficulty in finding valid means to protect moral rights under existing United States law. While early cases developed protection for the rights of disclosure and withdrawal, protection for attribution and integrity have not had the same support from the courts. The Court suggested the importance of these rights in Gilliam, but eliminated a key means of providing protection in Dastar.

C. Other Forms of Protection

The United States argues that other existing law can be used to protect moral rights. These protections include such common law causes of action as “contract law and the tort theories of defamation, invasion of privacy, and unfair competition . . . .” Defamation law may be used to protect the author’s reputation, so it can be likened to the right of integrity. It has also been used in some cases to prevent false attribution. The right of privacy has been used in a manner similar to the right of attribution, in that when a person is attributed with something that she did not author, she is being subjected to unwarranted and undesired publicity that violates her right to privacy. State common law unfair competition doctrine is used in a manner similar to Lanham Act protection described in section A.

Contract protection seems to be the strongest form of state law protection.

208 See Ginsburg, supra note 183, at 279; Zissu, supra note 73, passim.
210 Hughes, supra note 17, at 38.
211 Id.
212 Id. at 38-39.
213 Ciolino, supra note 29, at 44.
214 Id. at n. 55. See also RESTATEMENT (SECOND) OF TORTS § 559 (1977).
215 Ciolino, supra note 29, at n. 55.
216 See Kerby v. Hal Roach Studios, Inc., 127 P.2d 577, 579-80 (Cal. Ct. App. 1942) (finding that an artists’ reputation was threatened by a letter that was circulated and attributed to the artist resulting in an invasion of the artist’s right of privacy).
protection that exists for authors seeking to protect their moral rights. With the United States strong value of freedom of contract, the artist is able to negotiate protection for moral rights when selling or otherwise sharing her work with another in a way that might violate her moral rights.\(^{217}\) There are significant problems with using contract law to protect moral rights. Contracts are private agreements and are afforded a great deal of deference by the courts, which are hesitant to alter deals entered into by private parties.\(^{218}\) "Artists are usually in relatively weak bargaining positions in the United States."\(^{219}\) To carry "adequate weight" in negotiations it is important to form consortia or other unions to build power in the negotiation process.\(^{220}\) Also, congressional recognition of moral rights would greatly enhance artists’ bargaining power.\(^{221}\) The reality is that when it comes to bargaining for moral rights many artists do not feel that the benefits they received are worth the costs involved with obtaining them.\(^{222}\) Even after the implementation of VARA, many artists waived moral rights, which results in increased transaction costs for artists because of the need for the waivers to be in writing.\(^{223}\)

The problem with these other forms of protection is that they are not consistent from state to state. An international author seeking moral right protection in the United States would need to be familiar with all the possible laws in every state that he wishes to disclose his work. This provides for great confusion and inefficiency. The state common laws do not expressly address protection of moral rights. These alternatives under state common law do not provide clear an effective protection for moral rights.

**D. Compliance?**

In becoming a party to Berne Convention, the United States did not immediately amend or add new laws, with exception of VARA. Instead, the United States stated that the Berne Convention was not self-executing and that the existing laws adequately addressed the requirement to protect moral rights under Article 6bis.\(^{224}\) The United States further disclaimed that

\(^{217}\) *See generally, e.g.* Gilliam, 538 F.2d at 17 (the court looked at the provisions of the contract to determine if the authors had given consent to edit the work based on the language of the contract).

\(^{218}\) Battisti, *supra* note 7, at 6.

\(^{219}\) VerSteeg, *supra* note 15, at 843.

\(^{220}\) Battisti, *supra* note 7, at 6. This is already common in the realm of performing arts and for writers. Unions such as the Writers Guild of America and the Dramatists Guild are examples of this type of union.

\(^{221}\) VerSteeg, *supra* note 15, at 843.

\(^{222}\) Ong, *supra* note 61, at 308.

\(^{223}\) *Id.*

\(^{224}\) Ochoa, *supra* note 160, at 925-26. Congress stated that the Berne Convention was
the United States adherence to the Berne Convention did not expand or reduce the right of any author of any work in regards to their right to claim ownership or to object to any distortion, mutilation, or the like that would harm the author's honor or reputation. The United States seemed to be declaring that its adherence to Berne Convention was merely an acknowledgement to the international community that United States was already in compliance with all the requirements of the Berne Convention and becoming a party to the convention was a formality.

In a contradictory action, the United States insisted that Article 6bis be excepted from the Agreement on Trade Related Aspects of Intellectual Property Rights (hereinafter "TRIPS"). TRIPS made the provisions of the Berne Convention enforceable through the dispute resolution measures of the World Trade Organization. It seemed that the main reason the United States fought to keep Article 6bis out of the Berne Convention was because the United States was not in compliance with Article 6bis, and it did not want to be adjudicated and/or sanctioned in relation to this matter. Does this action serve as a clear admission by the United States that it is not in compliance with Article 6bis? The answer is not clear-cut. While TRIPS does not require the enforcement mechanisms to apply to Article 6bis, it does not relieve the obligation to provide moral rights protection. Further, the United States has entered into other treaties, namely the World Intellectual Property Organization (hereinafter, "WIPO") Copyright Treaty and the WIPO Performances and Phonograms Treaty, which both require protection for moral rights.

There was clear opposition by industries in the United States when it joined the Berne Convention. When the United States joined the Berne Convention, it did so under the minimalist view. This view stated that the United States was in compliance with all provisions of the Berne

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only to be implemented pursuant to domestic law and that actions brought under any provisions of the Berne Convention were not actionable on their own. *Id.* at 926.

225 *Id.* at 925.


227 *Id.*

228 *Id.*

229 Hughes, *supra* note 17, at 23. TRIPS can be interpreted to require the obligation to provide Article 6bis protection, while not requiring the enforcement obligations to apply in the moral rights context.

230 *Id.* WIPO Copyright Treaty incorporates Art. 6bis of the Berne Convention and the WIPO Performances and Phonograms Treaty creates an independent set of moral rights for performances. *Id.*

231 Paton, *supra* note 72. "[B]usiness coalitions such as the Intellectual Property Committee, representing such U.S.-based multinationals as IBM, Proctor & Gamble, and Rockwell International, have stressed that any explicit protection of moral rights would be unacceptable to U.S. industry." *Id.*
Convention without having to alter its existing laws.\textsuperscript{232} By adopting this view, the United States was able to appease those industries suffering from rampant international piracy of copyrighted works because it was not a party to the Convention, and those businesses that explicitly disagreed with adherence to Article 6bis.\textsuperscript{233}

Despite the numerous ways in which the United States argues that it protects the moral rights of authors, it seems that the United States does not effectively protect the moral rights of authors in a manner that puts them in compliance with the Berne Convention. The various federal and state statutes do not provide clear and express protection for the rights of integrity and attribution. They are limited in nature and scope of protection. While VARA clearly comports with Article 6bis, it only applies to works of fine art. The exclusive rights in the Copyright Act are only an available avenue of protection when the author retains the copyright in the work. The various other provisions of the Copyright Act that may apply are limited in scope and are not expressly designed for the protection of moral rights. The Lanham Act is primarily aimed at protecting consumers and only provides limited protection for moral rights. In addition, the Lanham Act may not an available means of protection after the Court’s decision in \textit{Dastar}. The case law in the area of moral rights only highlights the inefficiency of United States law in the protection of moral rights. While \textit{Gilliam} is the most frequently cited case in the discussion of moral rights, the Court in that case expressly stated that American law did not recognize express protection of moral rights. Other forms of protection under tort theories of defamation, invasion of privacy, and unfair competition vary from state to state and do not provide clear and effective protection of moral rights. Finally, contract law may be a strong argument for the protection of moral rights; however, artists are typically the weaker party in contract negotiations. Furthermore, contract provisions can also be used to eliminate an artist’s moral rights when Congress has recognized their existence.

\textit{V. Closing Credits: Conclusions}

The protection of moral rights in the United States and France are significantly different. While France strongly favors the rights of artists, the United States focuses on economic values and the protection for the work that was created.\textsuperscript{234} Much of this difference may be attributed to the significant difference in cultural development in the histories of each

\textsuperscript{232} Brooks, \textit{supra} note 26, at 1440-41.

\textsuperscript{233} \textit{Id.} Striking a balance between these differing industries may have been the main reason that the United States finally joined the Berne Convention after holding off for over 100 years. \textit{Id.} Resistance of reform to existing copyright laws may have also caused pause in joining the Berne Convention. Ardito, \textit{supra} note 15.

\textsuperscript{234} Graubart, \textit{supra} note 16, at 9.
country. Art and literary works were a fundamental part of European culture, while United States culture developed around industry and economy.

There are many important reasons to protect moral rights, including encouraging the development of creative works, and fostering an atmosphere that is conducive to the creation of those works. In addition, the harmonization of moral rights would make it easier for artists to share their works from country to country. However, there are significant arguments that state that the protection of moral rights may not be as important. Moral rights may conflict with the idea of fair use, it may discourage investment in creative works, it is not suitable for all works, and when moral rights are protected, they are not often utilized.

The United States provides a number of different methods for the protection of moral rights. However, even taken in aggregate these methods do not provide a clear and effective system of protection for moral rights in all works. Many methods are limited to specific works or situations. Other methods are inconsistent and are not available throughout the United States. In order to be in compliance with Article 6bis, the United States needs to move away from its focus on the economic rights associated with literary and artistic works and develop laws that expressly protect the moral rights of authors.