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COMMENT

The United States Joins the Berne Convention: New Obligations for Authors' Moral Rights?

On October 31, 1988, President Ronald Reagan signed the Berne Convention Implementation Act (BCIA), the enabling legislation for United States adherence to the Berne Convention for the Protection of Literary and Artistic Works (Berne). The Berne Convention has been in existence for more than 100 years, but it was not until recently that the United States seriously considered becoming a member, though many scholars and copyright attorneys have advocated membership. Some commentators have hesitated to advocate membership because several aspects of American copyright law were incompatible with Berne. One area of incompatibility that Congress saw as an obstacle to United States adherence to Berne is "Article 6bis" of the Convention, which guaran-


4. See Ad Hoc Report, supra note 2, in Adherence Hearings, supra note 2, at 430-32; see also Nimmer, supra note 3, at 500-47 (focusing on the 1967 revision to the Copyright Act and the possibilities for making American law compatible with Berne).

5. Berne, supra note 2, art. 6bis.
tees the author of a work certain "moral rights" separate from ownership of the work and the economic rights of the copyright. The United States joined Berne without making any change in domestic law regarding moral rights, based on Congress' conclusion that American law already provided moral rights to both domestic and foreign authors. In reaching this conclusion, however, Congress failed to recognize the distinction between economic and moral rights; as a result, the United States claims full adherence to Berne but lacks the legal structure to support the full array of rights provided by the Convention.

After presenting a brief history of Berne, this Comment will explain why the United States joined Berne and what it hopes to derive from membership. Berne membership brings with it certain obligations, in particular the promise that each member nation will protect authors' rights to paternity and integrity in their works. This Comment will expose the deficiencies of United States moral rights protection by showing that American law focuses on economic injury to authors while largely ignoring offenses to the author's honor and reputation.

This Comment will demonstrate further the inability of American law to meet Berne's standards and will propose legislation that will guarantee authors' moral rights and protect the integrity of their works.

Berne originally was signed in 1886 after two conferences that created an international copyright treaty. The idea of forming an international copyright treaty found simultaneous support from the governments and the artists of several nations.

6. Article 6bis was added to Berne during the Rome Convention of 1928. DuBoff, Winter, Flacks & Keplinger, supra note 3, at 205 & n.15. It provides:

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.

Berne, supra note 2, art. 6bis.

The concept of moral rights is foreign to American copyright law. "Under the U.S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the author's labors." Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties and Administrative Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 1343 (1987), 2d Sess. 1343 (1988) [hereinafter BCIA Hearings]. Moral rights protect the honor and reputation of the individual creator, sometimes at the expense of the copyright owner and the public. See Comment, An Artist's Personal Rights in His Creative Works: Beyond the Human Cannonball and the Flying Circus, 9 PAC. L.J. 855, 860 (1978). Based on the fundamental rights of paternity (the right to claim or disclaim authorship of a work) and integrity (the right to object to mutilation or distortion of a work) an artist conceivably could prevent the owner of a work from hanging it upside down.

Moral rights are not defined so clearly as the economic and property rights most American copyright owners enjoy. Under American copyright law, the copyright owner possesses certain exclusive rights to reproduce a work and create derivative works for profit. 17 U.S.C. § 106(1)-(2) (1982). As a property owner, the owner of a work can change its color or even destroy the work. The moral right to object to certain use of a work, however, could trump both economic and property rights in the work. As the creator, the author would retain some stake in its presentation, since the author's honor and reputation would be judged by the work.


8. See infra notes 24-29 and accompanying text.

9. Berne, supra note 2, art. 6bis.

10. See infra text accompanying notes 68-158.

11. See infra text accompanying notes 174-81.

12. Bogsch, The First Hundred Years of the Berne Convention for the Protection of Literary and
eral European and Latin American countries. These nations wanted to prevent the increasing international piracy of their authors' works. Prior to Berne, each country protected its own authors through domestic copyright law, but each country also considered it perfectly acceptable for its citizens to use works created in other countries as they wished.

In the early 1880s, several countries recognized that the disadvantages of forgoing protection for the works of domestic authors far outweighed the advantages of pirating foreign authors' works. This shift in attitude resulted from the increased activities of domestic authors and their demands for reciprocal protection abroad, the governments' desire for international respectability, and pressures from merchants who sought the trade benefits from the production of internationally marketable goods. Thus, from government and the literary and artistic communities, Berne was born. Twelve nations signed the first convention, which assured a minimum standard of protection for the authors of signatory nations. The cardinal principles of Berne, from the first convention through all of its revisions, have remained unchanged.

Berne is a union for the protection of copyright, and the member nations are to act as a cooperative unit. Berne nations adhere to the rule of national treatment, which provides that "authors should enjoy in other countries the same protection for their works as those countries accord to their own authors." Berne is administered by the World Intellectual Property Organization (WIPO) and has been ratified by seventy-seven countries.

After World War II, when the United States sought membership to an
ternational copyright treaty free from many of the obligations of Berne, it helped form the Universal Copyright Convention (UCC).24 Over time the United States found the protections of the UCC inadequate to meet all of its international copyright needs.25 In addition, the United States wanted to expand its influence in international copyright matters. One major disadvantage of the UCC is that it is administered by the United Nations Educational Scientific and Cultural Organization (UNESCO), from which the United States withdrew in 1984, thereby relinquishing voting status on all UCC issues.26 The United States' Membership in Berne would increase the number of countries with which the United States enjoys copyright reciprocity.27 Further, it is the United States' goal to include an intellectual property provision within the General Agreements on Tariffs and Trade (GATT),28 and the Berne model would be the most widely accepted backdoor for such a plan.29

When the United States considered joining the Berne Convention, several areas of United States copyright law were recognized as incompatible with the treaty language.30 In order to make adherence to the treaty possible, Congress amended certain domestic copyright law provisions to achieve compliance with Berne.31 Other provisions of domestic law were left untouched, however.32 The

24. The Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2732, T.I.A.S. No. 3324, 753 U.N.T.S. 368, revised, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, 943 U.N.T.S. 178. The UCC gives the copyright owner the protection only of the country in which the copyright was obtained; therefore, an author must comply with the formalities of each country in which protection is sought. Id. art. II(1), 25 U.S.T. at 1345, T.I.A.S. No. 7868, 943 U.N.T.S. at 195.

25. Since World War II, there has been a huge expansion in the number of copyrighted works produced in the United States. Although once a net importer and exploiter of copyrighted works, the United States is currently a net exporter ($1.5 billion in 1987) of copyrighted works. S. REP., supra note 2, at 3707 (figures on import and export compiled by the International Trade Commission). The United States reportedly lost between $43 billion and $61 billion due to piracy and inadequate protection of American works in 1986. Id. (figures compiled by the International Trade Commission). As a result of these losses, the United States wants to ensure a minimum standard of protection in a maximum number of countries. Id.

26. Id. at 3709. Although the United States left UNESCO for political reasons unrelated to the UCC, it must suffer the consequences of its withdrawal by giving up all rights associated with the organization. Because Berne is administered by WIPO, which deals only with intellectual property issues, the United States' participation in WIPO can be more focused than is possible in UNESCO.

27. Id. The United States has added 24 nations to its list of copyright partners by joining Berne. Id. at 3708.


29. S. REP. NO. 352, 100th Cong., 2d Sess. 4, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 3706, 3710. Another advantage of adherence to Berne is that it will eliminate what is referred to as the "back-door" to Berne. Id. at 3708. Berne extends copyright protection to the works of authors from non-Berne countries if the works are published simultaneously in a Berne country. Id. (citing Berne, supra note 2, art. 3(1)). Many American authors published simultaneously in Canada, a Berne country, to gain the protections of the treaty, but this process is expensive. Id. There is also the risk that Berne countries that provide this "back-door" protection will retaliate against the United States for not protecting works by their authors. Berne allows this type of retaliation when reciprocity is not forthcoming from non-Berne countries. Berne, supra note 2, art. 6(1).

30. See AD HOC REPORT, supra note 2, in ADHERENCE HEARINGS, supra note 2, at 430-32.

31. See Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified at 17 U.S.C.A. §§ 101, 104, 116, 116A, 205, 301, 401-08, 411, 501, 504, 801 (West Supp. 1989)). Most significantly, the BCIA amends domestic copyright law with respect to notice of copyright, registration of copyright for Berne works that are not of American origin, and remedies for infringement actions. Because Berne rejects formalities as prerequisites to copyright protection, see Berne, supra note 2, art. 5(2), the United States was forced to amend both the notice and registration
moral rights provision of Article 6bis was one protection not incorporated into American law. Indeed, Congress expressly stated in the BCIA that, "[t]he provisions of the Berne Convention . . . do not expand or reduce any right of an author of a work . . . to claim authorship of the work; or . . . to object to any distortion, mutilation, or other modification of . . . the work, that would prejudice the author's honor or reputation." 33

To garner the greatest support for the BCIA and for adherence to Berne, Congress adopted a "minimalist" approach to compliance, 34 which meant that Congress amended as little domestic law as possible to claim compliance with Berne. 35 No serious attempt was made to incorporate moral rights into domestic law both for reasons of political expediency and because the concept of moral rights is foreign to American property and copyright law. The goal of American property and copyright law is to protect financial interests in a work. 36 Moral rights, on the other hand, protect the author's honor and reputation as embodied by the work and hence have been termed "rights of personality." 37

provisions of the Copyright Code. Both notice and registration were required to receive protection under American law, but under the BCIA those seeking United States copyright protection are no longer required to affix the copyright symbol, copyright owner's name, and date of publication. Berne Convention Implementation Act, Pub. L. No. 100-568, § 7(a)(2), 102 Stat. 2853, 2857 (1988) (codified at 17 U.S.C.A. § 401(a) (West Supp. 1989)). The BCIA also eliminates the requirement of registering works of Berne-nation origin with the Copyright Office. Id. § 9(b)(1)(B) (codified at 17 U.S.C.A. § 411 (West Supp. 1989)). With the same stroke of the pen, however, Congress increased the incentive for registering works by doubling statutory damages for registered works. Id. § 10(b) (codified at 17 U.S.C.A. § 504(c) (West Supp. 1989)).

32. Two aspects of American copyright law that were changed before Berne adherence are the duration of copyright protection and the manufacturing clause. The United States amended the maximum term of copyright protection in 1976, extending it from 56 years (a 28 year term plus one renewal term) to the life of the author plus 50 years. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2572 (codified at 17 U.S.C. § 302 (1982)). On July 1, 1986, the manufacturing clause (formerly section 106 of the Copyright Code) expired. See 17 U.S.C. § 106 (1982) (expired July 1, 1986). This section required that English-language books and periodicals seeking American copyright protection be printed from plates made or photoengraved in the United States or Canada. The manufacturing clause was viewed as a prohibited formality to copyright protection. Nimmer, supra note 3, at 510.


34. See 134 CONG. REC. S14,552 (daily ed. Oct. 5, 1988) (statement of Sen. Leahy) (encouraging colleagues to make only those changes necessary to comply with Berne).

35. Because Berne allows each member nation to devise its own method for the protection of authors' moral rights, the United States could claim that such rights are provided for in American statutes other than copyright law. See Berne, supra note 2, art. 6bis(3) ("The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed."). Most countries that recognize moral rights have not adopted the entire spectrum of possible protections, and each country implements its moral rights laws differently. Merryman, The Refrigerator of Bernard Buffet, 27 HASTINGS L.J. 1023, 1025 & n.6 (1976). France gives its creators more protection than any other country, with Italy, Germany, Spain, and several Latin American countries falling somewhat behind. Id. Even Berne, the only international treaty that guarantees moral rights, has limited its requirements in this area to the rights of paternity and integrity. See Berne, supra note 2, art. 6bis.


37. Merryman, supra note 35, at 1025. The rights of personality include the rights of identity, name, reputation, occupation or profession, integrity, and privacy. Id. France and Italy see these rights as a group of specific protections; Germany views them as a general category of rights. Id. at 1025-26 n.6.
The two types of moral rights that Berne specifically protects—rights of paternity and rights of integrity—can be divided into three subcategories for a more detailed examination. The rights of paternity include the right of the author to attribution (or anonymity) as the creator of her work, the right to prevent others from falsely claiming authorship of a work, and the right to prevent others from attributing to an author a work she did not create.38 A French case that enforced an author's right to be attributed as the creator of a work provides an illustration of the first type of the rights of paternity. Guille v. Colmant39 involved a contract between the French painter Guille and an art dealer who required Guille to produce his paintings pseudonymously. The French court held that an artist could not be deprived of the use of his real name by the terms of a contract.40 Guille stands for the proposition that the right to be known as the author of a work cannot be transferred away; the right is unique to the creator.41 In the United States, by contrast, the author's right of attribution is not guaranteed unless expressly stated in a contract.42

The second type of right of paternity—the right to prevent others from falsely claiming authorship of a work—allows authors to enjoin acts of misrepresentation and unfair competition.43 This right is recognized in the United States but is based on the protection of an author's right to derive economic benefit from her work.44 In Smith v. Montoro45 the United States Court of Appeals for the Ninth Circuit held that the substitution of one actor's name for that of another in a film's credits was improper because the named actor would be unjustly enriched by claiming credit for the work of another.46 Under Berne, however, the right of paternity should protect the true actor regardless of any financial injury, because Berne protects an author's honor as well as his reputation.47

The third type of right of paternity enables authors to prevent the use of their names in association with works they did not create and do not endorse. An illustrative case arose when a toymaker manufactured dolls based on characters created by Dr. Seuss and labeled them as such.48 Seuss sued in federal district court to have his name disassociated from the dolls. The court recognized no cause of action for injury to Seuss' honor or reputation so long as his name was represented accurately.49

The other type of moral rights protection specified by Berne—rights of in-
tegrity—prevents others from distorting, mutilating, or modifying a work in a manner that would injure the author's honor and reputation. One of the starkest examples of a violation of the right of integrity involved the dismemberment and piece-by-piece sale of a work (a painted refrigerator) created by the French artist Bernard Buffet. A French court enjoined the separation and individual sale of the panels. The artist DeChirico, however, lost a right-of-integrity action in Italy. DeChirico sought to enjoin a retrospective of his works that he claimed would injure his reputation due to its emphasis on his early works. DeChirico lost because this aspect of the right to integrity was not covered in the Italian statute. These two cases represent the extremes of possible interpretations of the right to integrity.

This brief explanation of the moral rights protections that Berne is intended to provide sets the stage for this Comment's discussion of the United States' determination that domestic law adequately protects moral rights in this country. When the United States seriously began to consider joining Berne, legislators had divergent understandings of which aspects of domestic copyright law required amendment for compliance with Berne. One of the primary difficulties Congress had with the idea of recognizing the moral rights of authors was that under Berne these rights are to be independent of the economic rights of the copyright owner and the owner's property rights in the work itself. It was difficult for legislators to conceive of a third interest in a work that the United States would have to regulate without derogating the rights of either the owner of the work or the owner of the copyright. In the political debate that ensued, constituencies on both sides of the moral rights debate seemed to believe that by granting authors moral rights, someone else would lose rights in the work.

The decision against incorporating moral rights into domestic copyright law reflects the United States' primary concern with the economic rights attached to a work and not its "personality." The United States' copyright statute grants the copyright owner the exclusive rights to reproduce the work, prepare derivative works, distribute copies of the work, perform the work, and display the work. Nowhere does the statute guarantee the author the right to paternity—to have her name associated with a work—or the right to integrity—

50. Berne, supra note 2, art. 6bis(1). This right is recognized to varying degrees among Berne countries. See Merryman, supra note 35, at 1029.
52. Cour d'appel Paris, D. Jur. at 571; see Merryman, supra note 35, at 1023.
53. See Merryman, supra note 35, at 1032.
54. Id.
55. For an overview of the legislative proposals offered to amend domestic law to comply with Berne, see Note, supra note 2, at 483-92.
56. See Berne, supra note 2, art. 6bis(1).
57. See AD HOC REPORT, supra note 2, in ADHEREINCE HEARINGS, supra note 2, at 374 (statement of Edward A. Merlis of the National Cable Television Association). The National Cable Television Association claimed that moral rights beyond economic rights are "extremely suspicious" and might inhibit editing that would be necessary to meet community standards for programming. Id. According to the Cable Association, moral rights law would be "needless protection for private interest at the public's expense." Id.
58. See generally Merryman, supra note 35, at 1025 (rights of personality defined).
to prevent distortion or mutilation of the work. Nonetheless, the Congress concluded that these rights exist elsewhere in American law.

Congress justified its decision not to provide explicitly for moral rights in the BCIA by concluding that Berne is not a self-executing treaty and observing that other Berne nations do not grant their authors the full protections offered by article 6bis. At Roundtable Discussions held in Geneva with copyright ministers from Switzerland, Hungary, Austria, Spain, Israel, Sweden, Finland, Germany, and France, as well as WIPO, a House panel was informed that the actual implementation of article 6bis in some other Berne nations does not differ significantly from the protection afforded by American law.

For example, Jean-Alexis Ziegler, Secretary General of the International Confederation of Societies of Authors and Composers in France, remarked that moral rights are not separate from economic rights in theory, but in practice they are alienable and may be contracted away or assigned to a third party, specifically in the situation of an employment contract in which an employee would relinquish the rights to a work as a condition of employment. Perhaps the most significant factor in the United States' decision not to enact any specific moral rights legislation, however, was that no one at the Roundtable suggested that the United States amend its law. Thus, the United States exercised its discretion by enacting the BCIA and joining Berne without any change in

60. See 2 M. NIMMER & D. NIMMER, supra note 2, § 8.21[C]-[E]. The right to paternity in the United States is particularly difficult to identify, because there are situations in which an author never has any rights to his work and they vest directly in his employer. See 17 U.S.C. § 201(b) (1982) (employer or other person for whom the work was prepared is considered the author unless otherwise agreed; such person or employer owns all of the rights comprised in the copyright).

61. AD HOC REPORT, supra note 2, in ADHERENCE HEARINGS, supra note 2, at 458. The Ad Hoc Group concluded that state law and federal case law could fill the gaps in current federal legislative protection of moral rights. Id. at 460.


63. BCIA Hearings, supra note 6, at 1154. (Roundtable Discussions at the end of all of the hearings of the subcommittee). After Israel joined Berne, an Israeli poet sued in an Israeli court for protection of his moral rights, claiming that some of his works prepared for a musical production were distorted in the final show. Id. at 1138-39. The poet recovered for infringement of his economic rights in the work but recovered nothing for the moral rights because, at the time, Israel did not protect the right of integrity of the author. Id. It should be mentioned that the judge in this case criticized the Israeli government for failing to enact legislation to comply with the moral rights aspects of Berne. Id. But, because the treaty is not self-executing in Israel, the judge could apply only domestic law and not the treaty itself. In 1981 Israel enacted moral rights legislation. Id.

64. Id. at 1154.

65. Id. This comment could be interpreted to encompass at least the second paragraph of the work-for-hire provisions in American copyright law, which provides:

"work made for hire" is—

(1) a work prepared by an employee within the scope of his or her employment; or
(2) a work specially ordered or commissioned for use as a contribution to a collective work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire . . . .


66. See BCIA Hearings, supra note 6, at 1159 (comments of Professor Verkade).
American law in favor of authors' moral rights.\textsuperscript{67}

When Congress rejected additional legislation regarding moral rights, it mentioned several areas of domestic law that currently protect these rights. These areas include the section of the Copyright Act on derivative works;\textsuperscript{68} parts of the Lanham Act;\textsuperscript{69} common-law principles of defamation, misrepresentation, unfair competition, and contracts;\textsuperscript{70} the right of privacy;\textsuperscript{71} and several

\textsuperscript{67} Before the Roundtable Discussions, Representative Kastenmeier introduced a bill that would have added the rights of paternity and integrity to American copyright law. This bill was withdrawn during the 100th Congress. See Note, supra note 2, at 489 (citing H.R. 1623, 100th Cong., 1st Sess., § 7 (1987)).

\textsuperscript{68} 17 U.S.C. § 106(2) (1982). Section 106 of the Copyright Act guarantees copyright owners certain exclusive rights in their copyrighted works, in particular the right “to prepare derivative works based upon the copyrighted work.” \textit{Id.} A derivative work is based on the underlying work but is presented in a form distinctive enough to possess its own creative qualities. \textit{Id.} § 101. The problem with using section 106 to protect moral rights is that it offers no shield against alterations made directly to the underlying work.

\textsuperscript{69} 15 U.S.C.A. § 1125(a) (West. Supp. 1989). Section 43(a) of the Lanham Act prevents false designations of origin and false descriptions of goods. It provides:

\begin{quote}
Any 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 or origin, false or misleading description of fact, or false or misleading representation of fact, which—
\begin{enumerate}
\item 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, or
\item in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.
\end{enumerate}
\end{quote}

\textit{Id.}

Section 43(a) of the Lanham Act has been used most successfully to protect those whose names have been associated falsely with a work. See, e.g., Follett v. New Am. Library, Inc., 497 F. Supp. 304, 313 (S.D.N.Y. 1980) (discussed infra note 113). Section 43(a) also has been used to protect authors whose work has been credited to another. See, e.g., Smith v. Montoro, 648 F.2d 602, 607 (9th Cir. 1981) (discussed infra text accompanying notes 101-03). Finally, this section of the Lanham Act has been used to enjoin the presentation of a film that had been edited without the author's consent. See Gilliam v. American Broadcasting Cos., 538 F.2d 14, 24 (2d Cir. 1976) (discussed infra notes 125-35 and accompanying text).

\textsuperscript{70} See infra notes 82-110 and accompanying text. Each of these actions has its own set of essential elements. These elements frequently have little to do with an author's right of personality. For instance, defamation and misrepresentation require that the information presented to the public be untruthful. See, e.g., Lewis v. Time, Inc., 710 F.2d 549, 553 (9th Cir. 1983) (falsity of statement is an essential element of defamation); Rod Baxter Imports, Inc. v. Saab-Scania of Am., Inc., 489 F. Supp. 245, 247 (D. Minn. 1980) (falsity of statement is an essential element of misrepresentation). The right of integrity, however, allows the author to disassociate his name from a work, regardless of whether it was presented truthfully. See Comment, supra note 6, at 871-73. A common-law unfair competition claim requires an author to prove lost profits. \textit{Id.} at 867-71. A contract claim is valid only if the parties considered moral rights issues prior to contracting. \textit{Id.} at 863-67.

\textsuperscript{71} Two theories emanating from the right of privacy will be examined for the purposes of this Comment: “false light” and the right of publicity. The false light theory involves exposing certain distinctive characteristics of an author's work in a distorted manner. See Big Seven Music Corp. v. Lennon, 554 F.2d 504, 512 (2d Cir. 1977) (music company distributed uncut, “fuzzy” recording of John Lennon's songs). The right of publicity stems from an author's right to derive profits from his work and to prevent others (including the media) from presenting the work to the public without the author's consent. See Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575 (1977) (“Much of [a performance's] economic value lies in the right of exclusive control over the publicity given to [the] performance . . . . ”); infra notes 144-52 and accompanying text.
state statutes. This Comment will compare the protections provided by each of these areas of the law to the guarantees of the rights of paternity and integrity.

Of the rights of paternity, the right of attribution as the author of a work is the least recognized in the United States. No federal statute protects the right of an author to be known as the creator of her own work. American case law gives an author no right of attribution unless provided for specifically in a contract. In Suid v. Newsweek Magazine the plaintiff alleged that Newsweek had copied from his book without attribution to him. The Federal District Court for the District of Columbia ruled for Newsweek, stating: "Plaintiff does not cite, and this court has been unable to locate, any case recognizing a common-law action for failure to attribute or misappropriation without attribution." Thus, an author can contract to have his name attributed to a work, but without a written obligation to the contrary, the copyright owner enjoys exclusive control over attribution of the work.

Vargas v. Esquire, Inc. was an action by a photographer to enjoin the use of certain photographs that Esquire used for a yearly calendar because Esquire had ceased to publish the photographer's name with the photographs. The photographer's contract gave Esquire exclusive control over the photographs and copyright. The court held for Esquire stating: "Plaintiff by plain and unambiguous language completely divested himself of every vestige of ownership." Without a contractual reservation of his rights, the court refused to find for the photographer on any other theory of law.

In the United States contracts are enforced according to their explicit terms. Authors who enter into contracts are treated no differently from other

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72. Eight states currently have statutes that protect the rights of artists to varying degrees. E.g., CAL. CIV. CODE § 986 (West Supp. 1989); LA. REV. STAT. ANN. §§ 1:2151-56 (West 1987); ME. REV. STAT. ANN. tit. 27, § 33 (1988); MASS. GEN. LAWS ANN. ch. 231, § 85S (West 1986); N.J. STAT. ANN. §§ 2A:24A-1 to -8 (West 1987); N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney Supp. 1989); PA. STAT. ANN. tit. 73, §§ 2101-10 (Purdon Supp. 1985); R.I. GEN. LAWS § 5.62-2 to -6 (1987). The effectiveness of these statutes depends on several factors, including citizenship of the author, purchaser of the work, and location of the work at the time of the alleged moral rights violation. See infra notes 159-60 and accompanying text.

73. See Vargas v. Esquire, Inc., 164 F.2d 522, 526-27 (7th Cir. 1947); Harris v. Twentieth Century Fox Film Corp., 43 F. Supp. 119, 121 (S.D.N.Y. 1942), rev'd on other grounds, 139 F.2d 571 (2d Cir. 1943).

75. Id. at 149.
76. Vargas, 164 F.2d at 525.
77. 164 F.2d 522 (7th Cir. 1947).
78. Id. at 523.
79. Id. at 525.
80. Id.
81. The Vargas court concluded:

What plaintiff in reality seeks is a change in the law of this country to conform to that of certain other countries. We need not stop to inquire whether such a change, if desirable, is a matter for the legislative or judicial branch of the government; in any event, we are not disposed to make any new law in this respect. It is... difficult to discern how there could be any pirating or unlawful taking of property... in view of the rights... conferred on the defendant.

Id. at 526-27.
82. Id. at 525; see also Goldberg, Commentary: The Illusion of "Moral Right" in American
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capable adults. If an author does not provide expressly for the right of attribution in his contract, a court will view this silence as a “grant by the author of all that was not expressly retained rather than a retention by the author of all that was not expressly granted.”

If an author explicitly contracted away the right to attribution, however, she will not be able to make a claim for false attribution. Contracting away the right of attribution occurs most frequently in the context of works made for hire. Assuming that moral rights are alienable, if an author enters into a work-for-hire employment relationship, she immediately is divested of authorship rights in her work; those rights are transferred to her employer.

One commentator has suggested that the work-for-hire arrangement defeats the doctrine of moral rights:

[T]aking authorship of a work too readily from its creator-in-fact will often run counter to the personal link between the individual creator and the created work which underlies the [moral rights] notions of . . . credit and integrity, to say nothing of the U.S.’s own historical objectives and policies of promoting science and the useful arts through reward to actual creators, as articulated in the Constitution.

Other commentators point to the bargaining disadvantages of authors who are unaware of their rights or are so eager to sell their work that they are willing to contract away all of their rights. One writer has suggested that contracts that deny authors the right of attribution should be considered void as against public

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Law, 43 BrooklyL Rev. 1043, 1045 (1977) (observing that courts have enforced authors’ contracts according to their terms).

83. Goldberg, supra note 82, at 1044.
84. Id. at 1046.
85. See Vargas, 164 F.2d at 526.
86. See supra text accompanying notes 82-85.
87. “In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.” 17 U.S.C. § 201(b) (1982).

the right to claim authorship of one’s own works under the Berne Convention is an academic one if the legal and practical effects of our own copyright laws undermine that right. . . . The question is not whether the Berne Convention explicitly requires changes in our work for hire doctrine; it obviously does not. Instead, the question ought to be whether the rights proclaimed by Berne are protected by U.S. copyright law.

Id.

Senator Cochran insisted on and received the assurances of Senators Leahy and DeConcini that new work-for-hire legislation will be considered in the next session of Congress. Id. at S14,561-63. Senator Cochran has introduced legislation that would amend the work-for-hire doctrine. See S. 1223, 100th Cong., 2d Sess., 134 Cong. Rec. S14,561-62 (1988).
89. See Comment, Toward Artistic Integrity: Implementing Moral Rights Through Extension of Existing American Legal Doctrines, 60 Geo. L.J. 1539, 1560 (1972) [hereinafter Comment, Artistic Integrity]; Comment, supra note 6, at 864 (citing J.B. Lippincott v. Lasner, 430 F. Supp. 993, 995-96 (S.D.N.Y. 1977)).
policy or as adhesion contracts.\textsuperscript{90} Other options for contractual interpretations in favor of authors might balance unequal bargaining power with the reliance interests of authors or rely on custom and usage in the trade.\textsuperscript{91} These theories are the exceptions rather than the rule, however, and authors should not rely on their application by the courts.

Authors have tried to find an implied contract right to paternity stemming from common law unfair competition, but have met with little success.\textsuperscript{92} A recent case from the United States Court of Appeals for the Second Circuit implied a covenant of fair dealing in a contract, which might be extrapolated to an authorship claim.\textsuperscript{93} In \textit{Zilg v. Prentice Hall}\textsuperscript{94} plaintiff claimed that the publisher was obligated to use its best efforts to promote his book. The court held that the contract implied only a good faith promise to promote the book, but that this promise implied an effort to sell the book after initial promotion.\textsuperscript{95} The situation in \textit{Zilg}, however, should be distinguished from the situation in which an author claims that there is an implied contractual term granting her a right to attribution; there is no implied contract right to claim authorship of a work.\textsuperscript{96} Consequently, authors always should provide specifically for rights of attribution, because courts are not likely to imply additional terms.

American law concerning unfair competition—both common-law claims and suits under section 43(a) of the Lanham Act—appears to protect the sec-

\textsuperscript{90} Comment, \textit{Artistic Integrity}, supra note 89, at 1560. Adhesion contracts, generally held to be void as against public policy, allow no bargaining power between the parties; instead, the party who desires the goods or services must accept all of the conditions of the contract or decline the goods or services. See Patterson, \textit{The Delivery of a Life Insurance Policy}, 33 Harv. L. Rev. 198, 222 (1919).

\textsuperscript{91} Comment, supra note 6, at 864. Custom and usage in the trade can also work against an author given the history of disregard for authors' rights after the sale of a work. See e.g., \textit{Preminger v. Columbia Pictures Corp.}, 49 Misc. 2d 363, 267 N.Y.S.2d 594 (N.Y. Sup. Ct.), aff'd, 25 A.D. 830, 269 N.Y.S.2d 913, aff'd, 18 N.Y.2d 659, 219 N.E.2d 431, 273 N.Y.S.2d 80 (1966). In \textit{Preminger}, Otto Preminger retained rights to final edits in his contract with Columbia, but the court viewed cuts for commercials as a practice in the trade that Preminger should have anticipated. \textit{Id.} at 371, 267 N.Y.S.2d at 603.

\textsuperscript{92} See \textit{Granz v. Harris}, 198 F.2d 585, 588-89 (2d Cir. 1952). This case involved the granting of an involuntary contract for the sale of phonograph records that defendant manufactured and sold at a different r.p.m. without plaintiff's credit line. See also \textit{Nimmer}, supra note 3, at 521 (noting that in the absence of a contractual right, some courts will protect an author under a theory of unfair competition).

\textsuperscript{93} \textit{Zilg v. Prentice Hall}, 717 F.2d 671, 680 (2d Cir. 1983) ("We think the promise to publish must be given some content and that it implies a good faith effort . . . to give the book a reasonable chance of achieving market success."). \textit{Id.}, cert. denied, 466 U.S. 938 (1984). The Ad Hoc Working Group saw this as a positive sign for authors. \textit{Ad Hoc Report}, supra note 2, in \textit{Adherence Hearings}, supra note 2, at 463 & n.19. One commentator pointed out, however, that this interpretation of a contract is far from uniform and does not obligate courts to grant recognition of authorship. \textit{Damich, Moral Rights in the United States and Article 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention}, 10 Colum.-Vla J.L. & Arts 635, 657 (1986).

\textsuperscript{94} 717 F.2d 671 (2d Cir. 1983), cert. denied, 466 U.S. 938 (1984).

\textsuperscript{95} \textit{Id.} at 679-80.

\textsuperscript{96} Good faith is an implied term in all contracts. See U.C.C. § 1-203 (1977). No such term exists for attribution.

\textsuperscript{97} To recover for unfair competition under the common law, a plaintiff must prove lost revenues, loss of business reputation, or other economic injury. Comment, supra note 6, at 870-71.

\textsuperscript{98} 15 U.S.C.A. § 1125(a) (West Supp. 1989). The Act prevents false designations of origins and false descriptions of goods. All that is required for a Lanham Act suit is that the work affects
ond type of paternity right: the right to prevent false attribution of a work. Under these laws, an author is protected only if his name is omitted and another's name is substituted. There appears to be no relief under these laws solely for lack of attribution.

In Smith v. Montoro the court refused to dismiss an actor's Lanham Act claim based on the improper removal of his name and the substitution of another's name in film credits and advertisements. Plaintiff argued that his contract assured him star billing and that substitution of another actor's name deprived him of the benefits that follow from recognition as a performer. The court held that the plaintiff's claim should not have been dismissed, based on the theory that he should benefit from his efforts.

Although American unfair competition law affords some remedy in the case of substituted attribution, it only protects authors from economic injury. The theory of unfair competition is that a person should not reap economic benefits from falsely "passing off" her work as that of another. Such damages would be difficult to prove for an unknown author or for one involved in a collaborative venture. In addition, the emphasis on misappropriation of profits seems antithetical to the concept of moral rights. An author protected by moral right should be able to enjoin the misrepresentation of a work regardless of whether she suffered any lost profits.

A third type of authorship right differs somewhat from omission or substitution of attribution, but also derives from the idea of protecting the honor and reputation of the author. In this third situation, the author wants to prevent the use of his name on works that he did not create. This right is protected by interstate commerce and that there is a likelihood of public confusion about the authorship of the work. F.E.L. Publications v. National Conference of Catholic Bishops, 466 F. Supp. 1034, 1044 (N.D. Ill. 1978), cert. denied, 459 U.S. 859 (1982), appeal dismissed, 739 F.2d 284 (7th Cir. 1984). In F.E.L. Publications a publisher of religious music sued the National Conference of Catholic Bishops for unauthorized duplications of "pirated" songbooks of which the bishops claimed authorship. Id. at 1045. The publisher prevailed. Id. at 1046.

99. Berne protects against both the omission and the substitution of attribution by guaranteeing the "rights to claim authorship of a work." Berne, supra note 2, art. 6bis. The United States, however, protects only against the substitution of attribution. The practice of withholding an author's name and substituting the name of another is known as "reverse palming off." See PIC Design Corp. v. Sterling Precision Corp., 231 F. Supp. 106, 113 (S.D.N.Y. 1964) (misappropriation and renaming of plaintiff's copyrighted catalog). Commentators have suggested that this theory might be extended to a pure omission of attribution situation under a theory of "implied reverse passing off," but this theory has not been adopted by any court. E.g., 2 M. NIMMER & D. NIMMER, supra note 2, § 8.21[E]; cf. Smith v. Montoro, 648 F.2d 602, 605 (9th Cir. 1981) (referring to the theory but not applying it to the facts of the case).

100. Damich, supra note 93, at 656-57. Damich also points out that the tort of misrepresentation does not protect an author from the omission of his name, at least without the simultaneous substitution of another's name. Id. at 658.

101. 648 F.2d 602 (9th Cir. 1981).

102. Id. at 603.

103. Id. at 608.

104. Comment, supra note 6, at 868.

105. See Fisher v. Star Co., 231 N.Y. 414, 428, 132 N.E. 133, 137, cert. denied, 257 U.S. 654 (1921); see also Smith, 648 F.2d at 607 (substituting true author's name with that of another is "wrongful because it involves an attempt to misappropriate or profit from another's talent or workmanship" (emphasis added)).

the common-law claims of misrepresentation, defamation, and privacy, and by section 43(a) of the Lanham Act. Even under these laws, however, unless the author contracted otherwise, she may not object to the use of her name, if the use represents her authorship truthfully or accurately represents that the work is "based on" or "derived from" the author's work. 107

A case illustrative of an author's objection to the use of his name and work in a context that the author found undesirable for his reputation involved the use of Dmitry Shostakovich's music in a film that the composer considered anticomunist. 108 The court denied Shostakovich's claim, reasoning that the film company had not misrepresented the origin of his music. 109 One commentator has interpreted this holding to mean that "[t]he mere fact that the work is published within a context which the artist finds objectionable does not constitute legal grounds for objection." 110

The second situation in which the United States provides no protection for the use of an author's name involves the creation of a derivative work by another who gives credit or attributes his ideas to the original author. Not all credit is flattering or positive in the eyes of the author, and frequently the author would prefer not to be associated with the other work. In Geisel v. Poynter Products, Inc. 111 Dr. Seuss sued Poynter Products for copying the design of some of his characters to create dolls. The court granted no relief for a claim that objected to Poynter's disclosure that the inspiration for the dolls came from Dr. Seuss' drawings. 112 Therefore, as long as the attribution is true and does not mislead the public, an author cannot object to the association of his name with the work of another, regardless of the original author's disdain for the subsequent work. 113

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109. Id. at 70, 80 N.Y.S.2d at 578.
112. Id. at 353.
113. In the United States, when authorship is not represented truthfully, the author has claims for invasion of privacy and for violation of section 43(a) of the Lanham Act. These causes of action do not guarantee that the author's name will be deleted from the work, but that her involvement with the work will be described accurately. See Zim v. Western Publishing Co., 573 F.2d 1318, 1324 (5th Cir. 1978) (privacy claim); Follett v. New Am. Library, Inc., 497 F. Supp. 304, 311 (S.D.N.Y. 1980) (Lanham Act claim). In Zim a publisher breached its agreement with the author of several science and nature books by publishing a revision of the author's works under the author's name, despite his disapproval. Zim, 573 F.2d at 1325-26. The court ruled for the author, analogizing the unauthorized use of the author's name to "'public disclosure of private facts.'" Id. at 1327 (citation omitted). In Follett writer Ken Follett won a Lanham Act suit against a publisher for the wrongful use of his name in association with a book that he translated. The court held that the publisher must represent that Follett translated rather than wrote the book, explaining that this was an "accommodation . . . essential to assure that the public will not be misled." Follett, 497 F. Supp. at 313.

In one case, not involving an author's name, protection was granted for the title of a film based on the concepts of honor and reputation. Brandon v. Regents of Univ. of Cal., 441 F. Supp. 1086 (D. Mass. 1977). The Brandon court held that a film title . . . is entitled to judicial protection under the common law doctrine of unfair
Authors objecting to the use of their names in association with a work also may have a cause of action under the false light theory of privacy, which is based on the misappropriation of the unique personal characteristics of the author and the unflattering exposure of these characteristics to the public.\textsuperscript{114} False light damages are based more on injury to personal reputation than on pecuniary harm.\textsuperscript{115} Although this theory has provided a remedy for false attribution claims,\textsuperscript{116} it is helpful only to well-known authors.\textsuperscript{117}

The right of integrity—the right to object to the distortion or mutilation of a work—has proven even more difficult for United States authors to achieve than the right of paternity. The right of integrity implies that after the author sells a work and transfers copyright, the owner may keep and enjoy the work, but may not take it apart piece by piece.\textsuperscript{118} The right of integrity is foreign to the American concept of property ownership; in the United States, when one owns an object, she may use it as she wishes.

In \textit{Crimi v. Rutgers Presbyterian Church}\textsuperscript{119} an artist unconditionally sold a fresco to a church, but when the congregation objected to the bare-chested depiction of Jesus Christ, the church painted over the work.\textsuperscript{120} The artist objected and sued for restoration of the work. The court ruled that the painting no longer belonged to the artist and that he had no cause of action in the absence of any writing reserving his rights in the fresco.\textsuperscript{121} The court also reiterated the holding of an earlier artist contract decision that "[t]he conception of 'moral rights' of authors so fully recognized and developed in the civil law countries has not yet received acceptance in the law of the United States. No such right is referred to by legislation, court decision or writers."\textsuperscript{122}

The same result was reached in \textit{Preminger v. Columbia Pictures Corp.},\textsuperscript{123} in which Otto Preminger sued to enjoin cuts made in his films for television view-
ing. In Preminger's contract with Columbia, he specifically retained the right to approve all final cuts and edits of the film. When Preminger sued to enjoin further cuts and edits to insert commercials, however, the court held that Preminger should have anticipated this type of editing when he licensed the film for television. Evidently Preminger never had the right to object to cuts for the insertion of commercials.

In 1976 the United States Court of Appeals for the Second Circuit ruled in favor of the author in Gilliam v. American Broadcasting Cos., a case very similar to Preminger. The British comedy troupe, Monty Python's Flying Circus, through an agreement with the British Broadcasting Company, contracted with the American Broadcasting Company (ABC) to have several of its programs broadcast on American television. There was no explicit agreement between Monty Python and ABC on editorial control or commercial spots, but the troupe "assumed that ABC would broadcast each of the Monty Python programs 'in its entirety.'" ABC showed the first of these programs, devoting twenty-four minutes of the ninety-minute broadcast to commercials. Monty Python was "appalled" at the discontinuity and mutilation of the program and sued to enjoin the broadcast of the second program. The district court granted Monty Python's motion for a preliminary injunction, holding that "the plaintiffs have established an impairment of the integrity of their work' which 'caused the film or program . . . to lose its iconoclastic verve.'"

The second circuit affirmed, holding that ABC's publishing of the programs in a truncated version, if proven, exceeded the purpose of its license and constituted an unauthorized use of the underlying work. The court declared that there is no "implied consent to edit" and eliminated the burden on the author to retain alteration rights specifically. The court also refused to accept the dissent's argument that running a disclaimer during the titles would disassociate the troupe adequately from the edited version. Gilliam opened the door to other claims against the distortion or mutilation of works, but it still refused to recognize that American law is in any way designed to protect the author's moral rights.

Unfortunately, Gilliam will not help authors in all situations of mutilation or destruction. It still does not help the author who explicitly contracts away copyright of a work. One commentator believes that it will not provide a cause

124. Id. at 371, 267 N.Y.S.2d at 603.
125. 538 F.2d 14 (2d Cir. 1976).
126. Id. at 18.
127. Id.
128. Id.
129. Id.
130. Id. at 20.
131. Id. at 21.
132. Id. at 23.
133. "We are doubtful that a few words could erase the indelible impression that is made by a television broadcast, especially since the viewer has no means of comparing the truncated version with the complete work in order to determine for himself the talents of plaintiffs." Id. at 25 n.13.
134. See id. at 24.
of action in the case of the total destruction of a work, because there is no false
description or designation involved when no one has access to the work.\(^{135}\)

In *Serra v. General Services Administration*\(^{136}\) the artist encountered an al-
leged violation of his right to integrity that touched on several areas of American
law, but found relief in none of them. Richard Serra created a sculpture titled
"Tilted Arc," which the General Services Administration (GSA) purchased for
its Art in Public Places program. The sculpture drew the objections of several
federal workers, who claimed that it obstructed their regular use of Federal
Plaza. In 1985, after three days of public hearings, GSA decided to relocate the
work to a more appropriate spot. Serra claimed that Federal Plaza was the only
appropriate spot for the sculpture because his work is "site specific."\(^{137}\) Serra
retained the copyright in his work, so the case was not a battle between the
economic and the moral rights interests in the work.\(^{138}\) Rather, the case pitted
the display right of the work's owners against the artist's right to prevent the
display of his work in a manner that he believed would distort its meaning. The
*Serra* court not only ruled for the owner, but also failed even to recognize a
cause of action in the artist.\(^{139}\) Given the reaction of the court to Serra's claim,
it is evident that the *Gilliam* holding has not yet had a pervasive impact on
American courts in extending the right of integrity in a work beyond the eco-

demic benefit that the author might derive from the work.

Another frequently cited source of American protection of the right of in-
tegrity is found in section 106(2) of the Copyright Act,\(^{140}\) which concerns the
copyright owner's exclusive right to create derivative works from the original.\(^{141}\)
It is true that section 106(2) prevents others from altering an author's work in a
certain sense, but it may cover only adaptations of the original and not distor-
tions or mutilations of the work itself.\(^{142}\) In addition the author is not necessar-
ily protected by section 106(2), which protects the "copyright owner," because
the author may have transferred the copyright. Any transfer of the copyright is
a transfer of the right to create derivative works, and there is no separate right of
integrity retained by the author under section 106(2).\(^{143}\)

\(^{135}\) Merryman, *supra* note 35, at 1035.


\(^{137}\) *Id.* at 1045. "Site specific" is an artistic term that means that the work is specially designed
for a location so as to be integrated into the surroundings. Moving the work, under Serra's theory,
would be tantamount to destroying it. *Id.* at 1046.

\(^{138}\) *Id.*

\(^{139}\) *Id.* at 1047-52.


\(^{141}\) The definition of a derivative work is "a translation, musical arrangement, dramatization,
fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensa-
tion, or any other form in which a work may be recast, transformed, or adapted ... [including] ... editorial revisions, annotations, or other modifications." *Id.*

\(^{142}\) 1 M. NIMMER & D. NIMMER, *supra* note 2, § 3.21[C][3]. Nimmer implies that the defini-
tion of "derivative work" in the Copyright Act may not and should not embrace all changes, but
only those changes that result in bona fide adaptations. Changes that are distortions or mutilations
of a work, therefore, would not be included. See Damich, *supra* note 93, at 659-60.

\(^{143}\) 1 M. NIMMER & D. NIMMER, *supra* note 2, § 3.21 [C][3]; see Geller, *Comments on Possible
U.S. Compliance with Article 6bis of the Berne Convention*, 10 Colum.-Vla J.L. & Arts 665, 673
(1986).
One right frequently cited by those who believe that the United States guarantees adequate moral rights protections for authors is the right to publicity based on the constitutional right to privacy. In Zacchini v. Scripps-Howard Broadcasting Co. defendant news station gave plaintiff credit for his work and did not misrepresent the content of the work or its authorship. Defendant did not distort, mutilate, or modify plaintiff’s work or injure his honor or reputation; in fact, plaintiff’s honor and reputation might have been enhanced by the publicity. Plaintiff Zacchini was a “human cannonball,” and defendant filmed his act without his consent and broadcast it on the local news. Despite the broadcaster's privilege “to include in its newscast matters of public interest,” Mr. Zacchini prevailed. The court held that, unlike other publicity cases, “this case . . . involved not the appropriation of an entertainer’s reputation to enhance that attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.” The Court’s message was that, because defendant broadcast Zacchini’s performance, the public would not have to pay to see the show, and Zacchini would not be able to earn a living. The right of the individual prevailed over the right of the public based on the belief that ultimately the public would benefit more by encouraging individuals to pursue their unique talents. But as with several of the legal protections mentioned above, it seems as though the theory behind the right of publicity is to protect the author’s economic interest in a work, not the integrity of the work.

The final area of law that Congress claims will satisfy the United States’ obligation to protect moral rights under Berne is statutory protections granted to artists by individual states. Currently eight states have some form of art or artist protection statute to guarantee certain rights to paternity, integrity, or resale royalties. These statutes were enacted to protect and preserve certain rights for artists.

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146. Id. at 564.
147. Id. at 569.
148. Id. at 566.
149. Id. at 576.
150. Id. at 575-76.
151. Id. at 576 (“The [publicity] protection provides an economic incentive for [plaintiff] to make the investment required to produce a performance of interest to the public.”). The dissent criticized this recognition of individual rights over public rights and claimed the first amendment rights of the defendant were overly compromised in the majority's decision. Id. at 581 (Stevens, J., dissenting).
152. The Court implied that it was willing to protect Zacchini's human cannonball performance only insofar as he could earn a living from it. The Court recognized no nonfinancial interest in the performance. See id. at 575-76.
155. Resale royalty rights, or droit de suite, are granted only under the California statute. See CAL. CIV. CODE § 986 (West Supp. 1989). They entitle the artist to a certain commission on all resales of a work. Berne includes a section on droit de suite, which acknowledges that such a right
rights of the artist after the sale of a work. The degree of statutory protection varies from state to state, but the common goals are to protect the reputation of the artist by restricting the ability of others to alter or deface his work and to assure that the author receives credit for his work.

There are problems with the proposition that these eight state statutes contribute to American adherence to Berne. Since these statutes apply only to works bought, sold, or owned in states or produced by resident citizens, significant jurisdictional difficulties can arise. State law may be preempted by federal law, in personam jurisdiction may be difficult to establish, and foreigners might find the inconsistency of protection among the states confusing and frustrating. These practical situations illustrate the limited and inconsistent protection for moral rights that state statutes provide. Ironically, one commentator has noted that these statutes are the only real moral rights protection in the United States, for if there were a unified system of moral rights, there would have been


157. Before the passage of the Pennsylvania law, artist Alexander Calder had no cause of action against the Pittsburgh airport for repainting his mobile which was displayed in the terminal. Id. at 143-44. The mobile was originally black and white, but was repainted yellow and green to complement the decor of the terminal. Id. at 144 n.35. Pennsylvania law now provides that "[n]o 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." PA. STAT. ANN. tit. 73, § 2104(a) (Purdon Supp. 1988). Section 2104 extends the same protection against acts of "gross negligence." Id. § 2104(b).

158. For a more detailed examination of the provisions of these statutes, see Note, supra note 156.

159. Professor Nimmer expressed concern that these state laws might be preempted by federal copyright law. 2 M. NIMMER & D. NIMMER, supra note 2, § 8.21[C][2]. The primary reason these state laws are not preempted, however, is that the rights they protect are not "equivalent" to any rights protected by federal law. Id. (noting that the federal right to produce derivative works may overlap with some of the state protections, but that the overlap would be minimal). Section 301(b)(3) of the Copyright Code specifies that "[n]othing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright . . . ." 17 U.S.C. § 301(b)(3) (1982).

Congress made a special effort to stress in the BCIA that federal preemption under section 301 will not change with American adherence to Berne. Berne Convention Implementation Act, Pub. L. No. 100-568, § 6, 102 Stat. 2853, 2857 (1988). A preemption problem could arise only if Congress amends the Copyright Code to include moral rights.

160. State statutes protecting moral rights are valid within the jurisdiction of the states, but what if a work purchased in a moral rights state is taken out of the state and destroyed elsewhere? Does the state in which the purchase occurred have jurisdiction over the purchaser? See Note, supra note 156, at 141. Each state would have to apply its own long arm statute to such situations and rely on facts to establish the defendant's "minimum contacts" with the forum in the context of "fair play and substantial justice." Id. at 146 (citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Alternatively, the state might use the "balancing test," considering the plaintiff's and defendant's interest in the jurisdiction. Id. at 148 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)). This option might be extremely difficult for a foreigner who is not considered a citizen of the forum state, and a foreigner who sold a work abroad might not have a valid claim. Regardless of the state, however, if the purchaser is from out of state and is unaware that by purchasing a work of art he is consenting to the jurisdiction of that state, it may be a violation of due process to exert jurisdiction over him. Id. at 153.
no reason for the states to enact special statutes.\textsuperscript{161}

The noncompliance of other member nations with Berne's moral rights provisions was the United States' major justification for relying on existing domestic laws and failing to enact new legislation specifically to protect moral rights.\textsuperscript{162} This rationale ignores any obligation that the United States might have, or wish to have, as a world leader in intellectual property protection if it wants to encourage other nations to join Berne or extend Berne protections to the General Agreements on Tariffs and Trade.\textsuperscript{163} This rationale also ignores the potential benefits the United States and its citizens might derive from moral rights protection.

These benefits potentially supplied by strict adherence to Berne moral rights provisions can be divided into five categories: international relations, economic equity, social recognition of authors, cultural and intellectual enhancement, and individual rights.

In the area of international relations, moral rights is an integral part of Berne, and several Berne members who take moral rights seriously eventually might see the United States as avoiding its responsibilities under the treaty. The United States can claim that it grants more moral rights protection than other Berne nations,\textsuperscript{164} but the United States must realize that those other nations are not viewed as world leaders. The United States sets the standard for business practices for the Western world; it would be unrealistic to expect other nations to accept fully the United States commitment to Berne without domestic legislation that ensures compliance with all aspects of the treaty.

Moral rights protection also may provide economic benefits to the United States. One of the reasons that the United States has rejected a more comprehensive system of moral rights protections is the claim that moral rights will upset existing business practices and economic relationships.\textsuperscript{165} Businesses have relied on the bedrock principles of contract and property law for years and see moral rights as a threat to the established order.\textsuperscript{166} These apprehensions, while understandable if taken to the extreme, appear unfounded in light of other countries' experiences with moral rights.\textsuperscript{167}

\begin{enumerate}
\item \textsuperscript{161} Damich, \textit{supra} note 93, at 660.
\item \textsuperscript{162} See \textit{supra} note 35. France, the mother of moral rights, is on one end of the spectrum of protections for authors and artists. Other Berne nations, such as Australia, Ireland, Liechtenstein, and South Africa, "do not grant the right to claim authorship," however. \textit{AD HOC REPORT, supra} note 2, in \textit{ADHERENCE HEARINGS, supra} note 2, at 461. The degree to which Berne members protect the right to integrity also varies, from total absence of statutory protection to detailed provisions. \textit{Id.} at 465.
\item \textsuperscript{163} See \textit{supra} text accompanying notes 28-29.
\item \textsuperscript{164} See \textit{supra} notes 68-72, 162-63 and accompanying text.
\item \textsuperscript{165} \textit{BCIA Hearings, supra} note 6, at 82.
\item \textsuperscript{166} \textit{Id.} at 82-86. The publishing industry in particular fears that American courts will draw on European court decisions to allow writers to object to any editing of their work. The cable television industry also has reservations about additional moral rights protections. \textit{See Adherence Hearings, supra} note 2, at 374 (statement of Edward A. Merlis of the National Cable Television Association).
\item \textsuperscript{167} France has the most developed moral rights law in the world, Merryman, \textit{supra} note 35, at 1042, and still maintains an active film and publishing industry. European moral rights laws, and presumably any American counterpart, do not go so far as to alter the political economies of their nations so that industry is infirm. The German representative at the Roundtable Discussions at-
One of the economic advantages of moral rights legislation is that it will protect unknown and less affluent artists, who are not aware that they can contract to protect their rights or who are reluctant to negotiate for protection for fear of losing a sale. Moral rights legislation can prevent the exploitation of authors' talents for others' economic gain.

Moral rights legislation can also expand the social importance of the American author. A list of great Americans compiled by the average citizen probably would not mention many authors or artists. European moral rights evolved in part due to the social influence of artists and writers. Perhaps moral rights will have a reverse effect in the United States, and by giving authors additional rights they will receive additional respect from society.

Moral rights also can heighten cultural and intellectual awareness in the United States. The right to paternity and integrity can be viewed as methods of maintaining an unadulterated historical record of American ingenuity. When we do not know who the author is or what a work looked like in its original form, part of our perception of history is distorted. A firm reference point for further thought and understanding about our culture can be lost forever. Protection and preservation of creative works adds depth to the American experience.

The final reason why the United States should protect moral rights is that these rights represent the type of individuality and freedom on which this country is based. Moral rights encompass freedom of speech and freedom of the press. When a creator sells a work, the buyer purchases the tangible form but not the essence of the work. If the purchaser misrepresents or alters the work, however, it is as if the author never had the freedom to create it originally.

Legislation that would extend moral rights protection to artists has been introduced in both houses of Congress. This Comment suggests more comprehensive legislation, which combined with amendments to the work-for-hire
doctrine, would make the United States' adherence to Berne less self-serving and more in line with the true spirit of the Convention.

PROPOSED AMENDMENT TO 17 U.S.C. § 106, FOR THE PROTECTION OF AUTHORSHIP AND INTEGRITY IN LITERARY, ARTISTIC, DRAMATIC AND MUSICAL WORKS

(A) Purpose
To provide American authors and the authors of nations that are members of the Berne Convention for the Protection of Literary and Artistic works the right to claim authorship of their works and the right to object to the distortion, mutilation, or alteration of their works that would prejudice their honor or reputation even after transfer of the work. These rights shall exist independent of copyright protection and will continue for the life of the author plus fifty years.

(B) Definitions
(1) Author—creator or creators of artistic, literary, dramatic and musical works.
(2) Authorship—the right to claim attribution; the right to prevent false attribution; the right to prevent the use of an author's name in a manner that will be injurious to the author's honor or reputation.
(3) Distortion—alteration of a work that severely misrepresents its physical and artistic attributes.
(4) Mutilation—the dismemberment or destruction of a work.
(5) Other Alteration—significant changes to a work to which the author has not consented.
(6) Transfer—sale, lease, or gift of the work or its copyright.

(C) Alienability of Rights
The author of a literary, artistic, dramatic, or musical work shall be immediately, upon completion of the work, vested with the right to claim authorship and to object to distortion, mutilation, or other alteration of the work. These rights may be contracted away pursuant to negotiations between the author and the transferee. If these rights are not mentioned in a contract signed by the author, they are presumed to rest with the author. This includes works made for hire.

(D) Preemption
This statute preempts state laws that provide lesser protection for author's rights but does not prevent states from enacting more stringent protection for authors.

(E) Federal Artistic and Literary Advisory Panel
There shall be created a federal panel, comprised of representatives from the Copyright Office, private industry, academia, the creative arts, and the

173. See supra notes 87-88.
174. This definition is intended to encompass all of the categories of protected works in section 102 of the Copyright Act: literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures, and sound recordings. See 17 U.S.C. § 102 (1982).
175. This term is identical to that of the current copyright law. See 17 U.S.C. § 302(a) (1982).
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legal profession, to advise the Copyright Office in promulgating regulations pursuant to this section with particular attention to acceptable contract provisions for the rights protected under this law.\textsuperscript{176}

(F) Remedies
Remedies may be injunctive, monetary, or both. The author need not suffer financial harm to sue for an injunction.

The goal of the proposed amendment is to establish a moral rights scheme in the United States that mirrors the protections of Berne. Section A is not as general in nature as article 6bis of Berne, however, because each significant new term is defined in section B to provide some guidelines for implementation of the statute.

The use of qualifying terms such as "severely" and "significantly" to describe prohibited forms of alteration of a work should convey the understanding that this statute will not support frivolous claims. These terms should also allay the fears of publishers, art conservators, and others who are committed to presenting a work to the public in its best possible light.

The definition that likely will incur the most opposition is the inclusion of works made for hire among the works that may not be misrepresented or distorted without the author's consent (section C). The application of the work-for-hire doctrine has been the topic of a long history of debate.\textsuperscript{177} The Supreme Court recently issued a definitive interpretation of the work-for-hire section of the Copyright Code.\textsuperscript{178} Under United States copyright law, employees ultimately have no rights to works they create in the scope of employment. Those who employ creative employees would prefer that the law remain unchanged, because their economic interest in their employees' creative work could be threatened by direct negotiations over the right of attribution or alteration of a work.

The proposed legislation requires negotiation between employers and employees, as well as authors and purchasers of their work, over moral rights, but is not intended or expected to provoke profound changes in their relationships. The purpose of the amendment is to inform creators of their rights and provide an opportunity for them to negotiate for the protections they desire. This amendment does not intend to make all employees independent contractors, but it should entitle them to claim credit for the work they have done.

Requiring contract negotiations on specific moral rights issues also should benefit the independent author, who may be so intent on making a sale that he

\textsuperscript{176} The panel will serve as an advisory group on important moral rights issues upon the request of Congress or the Copyright Office.


\textsuperscript{178} See Community for Creative Non-Violence v. Reid, 109 S. Ct. 2166, 2174-78 (1989). The Court held that the status of an author as an employee or independent contractor should be determined under the principles of agency law. \textit{Id.} at 2178. Once status is determined, a court can apply the provisions of section 101 of the copyright statute, which denies employees any rights to their works and requires a signed contract for independent contractors to relinquish their rights. 17 U.S.C. § 101 (1982) (definition of "work-made-for-hire").
forgets that his reputation depends on the continued physical integrity of the work and his right to attribution. This amendment merely shifts the burden to the buyer to obtain consent from the author before altering or misrepresenting the work. The buyer can obtain all rights to a work under this amendment, if the author consents.

The amendment allows states to enact more stringent moral rights legislation than the federal government. California’s statute already exceeds the protections of this statute in some respects. By creating a minimum standard of moral rights protection, while leaving room for states to expand on this protection, the United States can comply with Berne and experiment with other moral rights concepts.

Section E, the advisory panel, provides a safety valve for the legislation. Many in the publishing, entertainment, and business world fear that any type of moral rights legislation will upset business relationships and bring on frivolous lawsuits. This section is intended to assure prudent and effective implementation of the law by seeking input from various members of the copyright community in the regulatory process.

Section F of the proposed legislation reinforces the concept that moral rights are not always quantifiable in dollar terms. By allowing authors to sue for injunctions without money damages, the United States will recognize the value of the right of personality without attaching a dollar figure to its worth.

Despite all the virtues of federal moral rights protection, it seems unlikely that Congress will add moral rights to domestic law. In addition to organized opposition to moral rights specifically, there is, in 1989, a cloud of suspicion surrounding the arts in general. Since New Yorkers finally tore down “Tilted Arc,” one suspects that they will not embrace federal legislation that would preserve similar works. The public does not support all art and might object to a law that protects all artists.

Congress also has been suspicious of the arts recently. The National Endowment for the Arts (NEA) funded two controversial exhibits in 1988-89 that Congress and members of the public found objectionable. The House of Representatives’ reaction to the funding of these projects was to withdraw the cost of the exhibits from NEA’s budget for 1990. Although the budget cut expressed Congress’ disapproval of only two exhibits funded by the NEA, a recent amend-

179. See CAL. CIV. CODE § 986 (West Supp. 1989). The California statute gives artists resale royalty rights, the right to receive a percentage of the profits of subsequent sales of their works. Id. While this economic right is not part of the proposed legislation, it is not the purpose of this legislation to preempt the California law or dissuade other states from enacting similar legislation.

180. See supra notes 136-39 and accompanying text.

181. For some interesting comments on public reactions to public art, see Is the Public (and Are the Artists) Ready for Public Art?, Raleigh News & Observer, Aug. 28, 1988, at 3E, col. 1.


ment passed by the Senate would prohibit federal funding of any work that is considered "obscene or indecent." Based on this Congressional activity it can be inferred that, if Congress believes that it justifiably can control the works that it purchases, there would be little support for legislation that restricts any purchaser of a creative work from presenting it in a manner she considers appropriate, regardless of the rights of the author.

The legislation proposed above attempts to set a moderate course for protecting authors' rights and encourages dialogue among the various constituencies interested in creative works. Congress should recognize the value of offering greater protections to authors and consider moral rights legislation a positive addition to American law.

DEBORAH ROSS

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The Serrano exhibit was sponsored by the Southeastern Center for Contemporary Art (SECCA). The North Carolina legislature responded to SECCA's exhibit of the work by denying state funds for the Awards in the Visual Arts Program. Act of Aug. 10, 1989, ch. 752, 1989 N.C. Sess. Laws 18. Ironically, the North Carolina legislature has no history of funding this program.