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Comment

***201** AUTHORS' MORAL RIGHTS IN THE UNITED STATES AND THE BERNE CONVENTION

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***202** AUTHORS' [FN1] MORAL RIGHTS [FN2] IN THE UNITED STATES AND THE BERNE CONVENTION [FN3]

> The Congress shall have power . . . [to secure] for limited Times to Authors and Investors the exclusive Right to their respective Writings and Discoveries.

U.S. Constitution, article I, section 8, clause 8.

> 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 modifications of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Berne Convention Article 6*bis*(1) [FN4]

> "When *I* use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean - neither more nor less."

Lewis Carroll, *Through the Looking Glass* Chapter 5 (1872).

I. INTRODUCTION

On October 12, 1988 President Reagan signed the Berne Convention Implementation Act of 1988, [FN5] which allowed the United States to join the foremost treaty for the protection of intellectual property. ***203** The Implementation Act was the culmination of over two years of congressional study, and was fervently debated throughout the publishing industries and artistic communities of the United States and Europe. One reason that the United States hesitated to join the one-hundred-year-old treaty is that the Berne Convention explicitly recognizes the existence of authors' moral rights, a concept that this country has never accepted. [FN6] Although the Implementation Act expressly states that the United States' adherence to the Berne Convention does "not expand or reduce the rights of an author of a work, whether claimed under Federal, State, or the common law," [FN7] there is a belief in may quarters that membership in Berne will be a catalyst for change in United States' moral rights laws. [FN8]

The rights of an artist can be classified separately as pecuniary rights or personal rights. [FN9] The artist's economic, or pecuniary, rights in his work are protected by his copyright. [FN10] Personal rights, or so-called moral rights, give the artist the rights to withhold publication, to claim authorship, to prevent the mutilation or distortion of the work, and to be free from excessive criticism. [FN11] Thus, moral rights ***204** enable the artist to control the presentation of his work to the public. [FN12] Moral rights also protect the artist's interest in the quality of his work and his reputation. [FN13] This Comment will concentrate on the artist's right to claim authorship (the right to paternity) and his right to prevent the mutilation or distortion of his work (the right of integrity) [FN14]

The concept of moral rights is expressed in the philosophy of law that looks to the transcendental as its origin - natural law. [FN15] Natural law purports to express a system of rules and principles for the guidance of human behavior which, independently of enacted law, might be discovered by the rational intelligence of man. [FN16] These rules grow out of and conform to man's nature, meaning his whole mental, moral, and physical being. [FN17] "Man inherently strives to be perfect." [FN18] This axiom describes natural law's central historic theme and signifies the rationale for the protection of the artist's moral rights. If an artist is to reach perfection, he must be allowed to control his work. [FN19]

France, Italy, and other European countries influenced by natural law principles expressly recognize an artist's moral rights. [FN20] Natural law gives each man his due, or "that to which each one is ordered according

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to his natural tendencies toward perfection.” [FN21] Giving an ***205** artist his due requires that he be allowed to control the integrity of his creation. [FN22]

Moral rights are distinct from ownership rights in that ownership does not originate from a natural law theory of aesthetics. [FN23] Ownership is a concept that almost all nations protect by means of copyright laws. [FN24] Conversely, moral rights are instruments of natural law. Artists do not want to keep their works; they want to sell them so others may enjoy them. Part of the artist's attempt to accomplish perfection is the creation of others' enjoyment. While the buyer has a property interest in the work he has purchased, [FN25] individual moral rights give the artist an on-going relationship with his work. [FN26] However, a moral rights advocate believes that the artist has the right not to have the work used in an unintended or destructive [FN27] manner. [FN28] For one hundred years there has been a fundamental difference in the recognition of and protection accorded to moral rights in the Berne signatory countries and that given in the United States. The Berne countries have recognized and protected moral rights, while the United States has not.

This Comment examines the debate over the effect, if any, that the United States' joining the Berne Convention will have on the state of moral rights and related causes of action in this country. Its particular focus is how the United States has come to be in compliance with the Berne Convention's requirements without changing any of its substantive laws as they affect moral rights.

II. MORAL RIGHTS AND THE BERNE CONVENTION

The Berne Convention is one of the two [FN29] principal international ***206** agreements that provide protection for intellectual property. [FN30] Each country that is a member of the Convention agrees that its copyright law will conform to the high level of protection required by the Convention. [FN31]

The Berne Convention, created in September 1886, [FN32] was the result of twenty-five years of scholarship and conferences. The proceedings leading to its creation were instituted by representatives of authors and artists, publishers, journalists, governments and academics, who sought to substitute the patchwork of European bilateral copyright agreements with one simple, multilateral treaty protecting the rights of authors. [FN33] The original Convention was designed to achieve five objectives:

> (1) the development of copyright laws for authors in all civilized countries; (2) the elimination over time of basing rights upon reciprocity; (3) the end of discrimination in rights between domestic and foreign authors in all countries; (4) the abolition of formalities [required] for the recognition and protection of copyright in foreign works; and (5) ultimately, the promotion of uniform international legislation for the protection of artistic and literary works. [FN34]

The first Berne Convention was a simple document that accepted two important principles: union and national treatment. Under the union concept, member countries organized themselves into a union for the protection of the rights of artists in their artistic and literary works. In creating the union, the original members envisioned a political and legal undertaking. Members of the Convention would operate as a cooperative unit that would continue in existence regardless of future withdrawals from or accessions to the Convention. ***207** The rule of national treatment provides that authors should enjoy in other signatory nations the same protection for their works as those nations grant to their own artists. [FN35]

Since its creation, the Convention has been revised five times to meet technological developments and changed conditions affecting artists' rights. [FN36] Subsequent texts generally have extended and improved

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rights granted to artists. The Berne Convention has also adapted to many developing countries arriving on the world scene. [FN37]

Article 6*bis* of the Berne Convention 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. [FN38]

These rights that Article 6*bis* sets out recognize the existence of artists' moral rights. [FN39] Although the term "moral rights" often covers more than the rights encompassed by Article 6*bis*, only the rights of integrity and paternity are provided for by the Berne Convention. [FN40] The Convention requires member countries to grant works under its protection the rights outlined by this clause. [FN41]

***208** Since the Berne Convention does not require reciprocity, it is possible for an artist's moral rights to be granted greater protection in another Convention country than in his own country. Even if the artist's own country does not provide for certain moral rights, he will not be deprived of protections under the law of another country that does provide for these rights. It is important to realize that the Berne Convention itself does not provide for every existing moral right. [FN42] Other moral rights are recognized in varying degrees, by the courts and legislation of the member countries. France is the leader in recognizing moral rights. [FN43] The important provision in the French statute states:

> The author shall enjoy the right of respect for his name, his authorship, and his work. This right shall be attached to his person. It shall be perpetual, inalienable, and imprescriptible. It may be transmitted [upon the author's death] to the heirs of the author. The exercise of this right may be conferred on a third party by testamentary provisions. [FN44]

Germany and Italy are probably the two next most loyal followers of the moral rights doctrine. [FN45] The German statute dealing with the right to integrity states: " T he author shall have the right to prohibit any distortion or any other mutilation of his work which would prejudice his lawful intellectual or personal interest in the work." [FN46] In Italy, the artist has the right to oppose "any distortion, mutilation or any other modification thereof capable of prejudicing his honor or reputation." [FN47]

Neither the United States nor Great Britain has a copyright statute expressly recognizing moral rights, though both are now members of the Berne Convention. An important issue arises regarding whether the United States automatically adopted the Convention's provision regarding moral rights. [FN48] In other words, is the Berne Convention a self-executing treaty in the United States?

***209** *III. THE BERNE CONVENTION AS A NON-SELF EXECUTING TREATY*

According to the United States Constitution, treaties are the supreme law of the land. [FN49] Thus, they supersede existing laws that are in conflict. Some treaties are self-executing when they are ratified, and take effect without additional governmental action. Treaties that are not self-executing take effect only after additional governmental action, such as implementing legislation. [FN50]

Whether the Berne Convention is self-executing depends on the constitution and laws of the member country. [FN51] The question is important in determining the United States' obligations under Article 6*bis* of the

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Convention. [FN52] According to the *Guide to the Berne Convention*, [FN53] published by the World Intellectual Property Organization (WIPO), in some countries after ratification "the Convention becomes part of that country's law. If its constitution is apt to confer rights directly, individuals may bring actions based on the Convention itself to enforce them." [FN54]

The WIPO *Guide* notes that other

> countries, such those following the British legal tradition, treat conventions as agreements between nations. Obligations imposed on these nations by the Convention have to be conferred by implementing legislation. It is the legislation, not the Convention itself, that provides the citizens of these member nations the right to sue in their own courts. [FN55]

The Committee on the Judiciary of the House of Representatives ***210** has determined, based upon its review of this guide and the United States Constitution, that the Convention itself is not self-executing in the United States. [FN56] Consequently, the Berne Convention Implementation Act of 1988 was enacted on October 31, 1988. [FN57] Only at this point did the United States officially join the Berne Convention. The treaty became binding on United States citizens as of March 1, 1989. [FN58]

Another important issue the United States considered before joining the Berne Convention is whether the current law of the United States meets the moral rights requirements set out in Article 6*bis* of the Convention. [FN59] As noted above, there is no single federal statute in the United States specifically providing for moral rights. [FN60] Nonetheless, the Committee on the Judiciary of the House of Representatives has determined that existing law enables the United States to adhere to the Berne Convention. [FN61] As a result the Implementation Act is completely neutral toward the issue of whether and how protection of paternity and integrity rights should develop in the future. [FN62] The courts are free to apply common law precedent and existing statutes, and to consider the experience of foreign nations to the same degree as they would if the United States had not joined Berne. [FN63]

***211** Section 3 of the Implementation Act gives direction to the courts on how to interpret United States' adherence to the Berne Convention. [FN64] Subsection (a) describes the correlation between United States domestic law and the Berne Convention's provisions. [FN65] Paragraph (1) states that "the provision of the Berne Convention shall be given effect under title 17, as amended by this Act and any other relevant provisions of federal or state law, including the common law." [FN66] This provision must be read in pari materia with the other provisos. [FN67] Paragraph (2) states that "the provisions of the Berne Convention shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself." [FN68]

Subsection (b) states that United States' membership in the Berne Convention, and the satisfaction of United States' obligations thereunder, do not expand or reduce certain authors' rights. [FN69] These are the moral rights stated in Article 6*bis* of the Berne Convention. [FN70] Thus, the Implementing Act expresses Congress' conclusion that the condition of current United States law is adequate to meet the requirements of Article 6*bis*, and that the implementing act will not effect current United States law regarding moral rights. [FN71]

IV. MORAL RIGHTS PROTECTION IN THE UNITED STATES TODAY

The United States Copyright Act does not recognize moral rights [FN72] in the same sense that the word is used in other Berne countries. It has been announced by the Second Circuit Court of Appeals that "the moral right, as such, is not recognized in this country." [FN73]

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***212** However, moral rights, or what is considered to be the equivalent of moral rights, have been protected by other means, such as causes of action for: 1) breach of contract, 2) libel, 3) invasion of privacy, 4) unfair competition, and 5) copyright infringement. [FN74] The first three causes of action are based on state law, which means that an author's protection of his moral rights may vary depending on where he brings his suit. [FN75] The unfair competition cause of action is based on federal law, so an author will receive uniform treatment throughout the country under this cause of action. [FN76] Additionally, a few states have statutes that protect authors' moral rights to varying degrees. [FN77] Unfortunately, these developments have not brought moral rights the protections received in Europe. [FN78]

A. Contract

An artist in the United States can best procure protection for his moral rights by demanding an appropriate clause during contract negotiations. For example, an artist can insist that no alterations be made in the work without his consent. This would protect his integrity interests. [FN79] However, this requires bargaining power that the artist may not possess. [FN80]

Additionally, if a work cannot be exactly reconstructed in another medium, the user may be allowed, in contradiction of the contract's terms, to make the necessary changes. [FN81] *Manners v. Famous Players Lasky Corporation* [FN82] held that a movie company may make modifications in a play if necessary to bring the play to the screen, although the contract reserved to the writer the right to approve all ***213** changes in the work. [FN83] However, that movie company could not make any material changes in the “focus of the play or the order and sequence of the development of the plot.” [FN84] The changes had to be consistent with the theme of the play. [FN85]

In another case a contract allowed for “elaboration” by the purchaser of the motion picture rights in a novel. [FN86] It was held that the right to elaborate includes the right to add characters, scenery, and action. Subordinate portions of a story could be replaced. [FN87] However, the purchaser must maintain and give proper expression to the story's theme, thought, and main action. [FN88] These two cases adopted a “reasonableness” approach to the integrity of the artist's work. Inferentially, certain changes may be inequitable when adapting a literary work to a motion picture.

This reality, that certain changes must be made when transforming a work from one medium to another, has been consistently recognized by the courts. In one case the producer of a movie authorized its showing on television without expressly forbidding any editing of the movie. The court held that in the absence of a specific contractual provision, the parties will be deemed to have adopted the custom prevailing in the trade. [FN89] Thus, a movie company who had licensed television stations to broadcast the motion picture could make minor cuts for commercial breaks. [FN90]

***214** On the other hand, other cases have held that it is not always necessary for a contract to expressly provide for the right of integrity. In a case involving a musical group, which had sued to stop the use of its name on a record which also included the work of other musicians, the court stated that it is implied at law in contracts for the sale of artistic creations that the user may not materially change the work in the absence of express language. [FN91] In the landmark decision of *Granz v. Harris,* [FN92] the contract required the purchaser of master musical recordings to give a credit-line to their producer on the manufactured records offered for sale. [FN93] However, the purchaser sold shortened version of the producer's recordings. [FN94] The *Granz* court held that the contractual obligation required, by implication, the duty not to sell records that make the required

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credit-line a false representation. The sale of the abbreviated records was therefore a breach of contract. [FN95]

Thus, in the United States authors may secure moral rights in their works against parties with whom they have a contractual relationship, providing they possess adequate bargining power when forming the contract. This requirement obviously may preclude the unknown and untried from enjoying any moral rights in their works. In addition, given the "reasonableness" and "industry standards" approaches that courts have used in interpreting contractual language, the author is advised to use extremely explicit language covering every possible contingency.

B. Tort Law

American courts have been reluctant to announce a moral rights tort doctrine. [FN96] However, critics have pointed out some decisions ***215** that claim to rest on grounds other than tort do so unconvincingly. [FN97] They argue that the court's decision is actually based on the court's feeling that the user of the work owes a duty of care to the creator. [FN98] For example, in *Jaeger v. American Int'l Pictures, Inc.*, decided under the Lanham Act, the court stated that the plaintiff had made a sufficient showing of "tortious behavior" when the defendant distributed a work under the plaintiff's name that severely distorted his work. [FN99]

1. Libel

Another possible means of protecting an artist's moral rights in the United States is a cause of action for libel. [FN100] It has been held that the unauthorized publishing of a work of literature in the name of a well-known author is libel, if the author's reputation is harmed. [FN101] This decision implied that the author must be sufficiently well known to have a reputation that can be injured. In other case the plaintiff was the author of a book about law practice in New York, [FN102] which had been revised by the publisher without the author's supervision. [FN103] The revised edition contained many errors. [FN104] Since a jury could have reasonably found that the title page would mislead the reader to believe that the revised (and inferior) edition had been done by the plaintiff, the facts stated a cause of action for defamation. [FN105]

***216** In *Geisel v. Poynter Products, Inc.* [FN106] the artist brought suit against the purchaser and copyright holder of his cartoon, alleging that the copyright holder's activities injured the artist's reputation. [FN107] The defendant manufactured and sold dolls based on a drawing by the plaintiff, which dolls the plaintiff alleged were "unattractive and of an inferior" quality. [FN108] The plaintiff contended the sale of the dolls with his name held him up to ridicule in his profession as a distinguished artist and author. [FN109] The court acknowledged that if the plaintiff's accusations were true, he had stated a cause of action for defamation. But in this case the court found that the dolls were made with skill by a qualified manufacturer and there was thus no defamation. [FN110]

Many artists, particularly authors and performing artists, are widely enough known to qualify as public figures. [FN111] It is difficult for public figures to state a cause of action for defamation since they must prove that the publication was made with "actual malice," [FN112] an element that is hard to prove. [FN113] In a case involving a cause of action for defamation by an author against a critic of her book, the court held that the author was a public figure. [FN114] It dismissed her complaint because she did not prove that the critic acted with knowledge of the falsity of his review or with reckless disregard for the truth or falsity of the review. [FN115]

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To vindicate his or her moral rights under a libel cause of action, it is most advantageous for United States authors to be well known enough to have protectable reputations, but not quite famous enough ***217** to be public figures with the resulting burden of proving actual malice. It is advisable to bring such an action as soon as possible, since a libel cause of action does not survive the libeled author's death, [FN116] and failing to protect a work in a timely manner might seriously impair its value to the author's heirs.

2. Privacy

Courts recognize the appropriation of an author's name or likeness for the benefit of another to be an invasion of privacy. [FN117] It has been held that the unauthorized publication of a professor's notes with the use of the teacher's name is an invasion of privacy. [FN118] In *Williams v. Weisser*, this conduct amounted to an unauthorized appropriation of the plaintiff's personality. [FN119] In another case, a publisher breached an agreement with an author by publishing a revision of one of the author's works without the author's approval. [FN120] This appropriation of the author's name was held to be an invasion of privacy. [FN121]

Generally, before an author has a cause of action for invasion of privacy against one who appropriates his name, he must prove that the appropriator profited from using the author's name. [FN122] So this gives an author no legal protection from an entrepreneur who appropriates his name or likeness, as long as the entrepreneur's use is generally unsucessful.

C. Unfair Competition

Section 43(a) of the Lanham Act [FN123] has been used to protect ***218** both the integrity and the paternity interests. That section states that:

> any person who shall affix or use in connection with any goods or services which are placed into commerce a false designation of origin, or any false description or representation, shall be liable in a civil action by any person who believes that he is, or is likely to be, damaged by the use of any such false description or representation. [FN124]

The "false designation of origin" language can be applied to protect an author's paternity right, while the possibility of misleading the public through a false description may be used to protect an author's integrity interest. [FN125]

In *Gilliam v. ABC*, [FN126] a television network aired a program that had been edited, without the writers' consent, into a form that varied substantially from the initial work. [FN127] In a suit by the authors to enjoin further broadcasts of any truncated versions of their works, the court held that an allegation that a defendant has presented to the public a "garbled" version of the plaintiff's work attempts to redress the same rights protected under the Lanham Act, and states a cause of action under that statute. [FN128] To deform an author's work and publish ***219** the result under his name is to present him to the public as the creator of a work not his own. [FN129] The Lanham Act is violated by a representation of a product, which creates a false impression of the product's origin. [FN130]

In another case, the court found a cause of action based upon an accusation that the English version of a German film distorted the plaintiff's work. [FN131] Since the defendant attributed the distorted work to the plaintiff, a work with which the plaintiff was not involved, there was arguably a claim under the Lanham Act.

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[FN132]

One useful feature of the Lanham Act is that a contractual relationship between the author and the defendant is not necessary to protect an author's moral rights. [FN133] However, barriers to its use for this purpose are the requirements that the defendant's product be introduced into interstate commerce and that consumers are, or are likely to be, deceived by the false description. Thus, a derogatory action in relation to a work that is not introduced into interstate commerce or that does not confuse the public would not be a basis for an action under this Act.

D. Copyright Infringement

In *Gilliam*, [FN134] the court applied the doctrine of copyright infringement to the unauthorized editing of a script that led to the broadcasting of a distorted version of the work. [FN135] A copyright allows the owner of the underlying copyright to control the way in which the work is presented to the public. [FN136] The holder of a copyright often grants limited rights to a licensee. When a licensee goes beyond time or media restrictions on his license, or makes an unauthorized use of ***220** the underlying work by publishing it in a distorted version, a copyright infringement occurs. [FN137] The court in *Gilliam* found that unauthorized editing of the work by a sublicensee, if proven, would be an infringement of the work's copyright, just as any other use of a work that exceeded the license granted by the copyright's owner. [FN138]

In a recent case, the court held that where a video game licensee created a faster version of the copyrighted game, he altered the plaintiff's copyrighted work to such a degree that a copyright infringement occurred. [FN139] The faster video game was a substantial change of the original work. [FN140] The plaintiff had never authorized this change in his video game. [FN141]

E. State Moral Rights Laws

The recent public debate over moral rights has brought wider recognition of these rights. Increased interest is evidenced by the acts of state legislatures. Several states have now passed statutes expressly protecting various aspects of moral rights. [FN142] The New York moral rights statute is illustrative of the rights and obligations involved. New York's statute is known as the Artists' Authorship Rights Act. [FN143] Section 14.53 prohibits the “unauthorized public display or publishing of a work of fine art or a reproduction thereof in an altered, defaced, mutilated, or modified form.” [FN144] However, this prohibition applies only “if the work is displayed, published, or reproduced ***221** as being the work of the artist, or under circumstances under which it would reasonably be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result therefrom.” [FN145]

While it appears that liability for unauthorized alteration, defacement, mutilation, or modification may be avoided by not identifying the artist, this would only be true if the artist's work was not so popular that people would identify a work as his. [FN146] If a well-known artist would be likely to be identified with the work even without mention of his name, liability might be avoided by an appropriate disclaimer, stating that the changes were made by someone other than the artist. [FN147] However, failure to identify the artist by name could result in the violation of another provision of the Act. [FN148] Section 14.55(1) provides that “the artist shall retain at all times the right to claim authorship.” [FN149] If the artist's name is included, a disclaimer would have to be carefully worded to not violate the right to be identified as the author of one's work. [FN150]

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Section 14.57(1) of the statute further provides that "alteration, defacement, mutilation or modification of a work of fine art resulting from the passage of time or the inherent nature of the materials will not by itself create a violation of the artist's rights." [FN151] However, such defacement or alteration must not be the result of gross negligence. [FN152] There is also no liability if a change is the ordinary result of the medium of reproduction. [FN153] "Conservation does not constitute an alteration or defacement unless the conservation work was shown to be negligent." [FN154] In addition, the act "does not apply to work prepared under contract for advertising or trade use unless the contract so provides." [FN155] Works produced in either a "work for hire" situation or ***222** works made on commission are apparently outside the scope of the Act. [FN156]

Because states have enacted their own separate moral rights legislation, artists of foreign nations will have to look to these various statutes for protection. For example, a French artist might have a cause of action in New York for a distortion of his work, but no cause of action in California. Thus, the foreign artist may well be confused as to the nature and extent of his rights in the United States. Even though by joining the Berne Convention the United States automatically grants the existing moral rights protection in the United States to other members of Berne, this protection is inconsistent from state to state. To fully protect his moral rights in this country the artist may have to bring a number of suits in different state courts. Thus, while moral rights per se are not explicitly acknowledged in American jurisprudence, the net effect of the several available causes of action is to give moral rights a certain limited degree of protection in this country.

V. UNITED STATES MORAL RIGHTS AND BERNE'S MINIMUM REQUIREMENTS

Now that the United States has joined the Berne Convention, a non-self-executing treaty that contains an express recognition of an author's rights of paternity and integrity, [FN157] the question presented is whether the state of moral rights in the United States today meets Berne's minimums. [FN158] Congress' [FN159] official answer is that the state of ***223** moral rights in the United States today does meet Berne's minimum standards for the protection of authors' moral rights. [FN160] Congress adopted the position of the Ad Hoc Working Group on United States Adherence to the Berne Convention: "The protection of moral rights under existing U.S. law is compatible with the Berne Convention." [FN161] In reaching its conclusion, the Ad Hoc Working Group considered the following factors: remedies now available in the United States, [FN162] the lack of uniformity of protection in other Berne countries, the absence of moral rights provisions in the copyright laws of some Berne nations, and the reservation of control over remedies to each member country. [FN163] Many other individuals, industry groups, [FN164] scholars, and lawyers agree that current United States law "now affords sufficient protection for creative artists so as to meet Berne requirements in the moral rights area. Enactment of special moral rights legislation . . . is not necessary, nor desirable." [FN165] Thus, a country can be in compliance with Article 6*bis* of Berne without having statutes that specifically address moral rights. [FN166]

On the other hand, groups such as the Coalition to Preserve the American Copyright Tradition (CPACT) maintain that "fundamental changes in the American copyright system" are required before United States law complies with Berne. [FN167] Motion picture directors ***224** feel that present United States law is not sufficient to protect artists' moral rights in the spirit of Berne. [FN168] Edward J. Damich, an associate professor of law at George Mason University School of Law, in his testimony before Congress, stated that " t here is more and clearer case authority for the non-existence of moral rights as such than there is case authority to the contrary." [FN169]

The disagreement as to whether United States law concerning moral rights today meets Berne minimums is

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threefold: Does United States moral rights law (a) fulfill the spirit of the Berne Convention, (b) meet the literal wording of Article 6*bis* of the Berne Convention, and (c) meet Berne's minimum requirements in the same practical sense that other member countries meet Berne's moral rights minimums? As Ralph Oman, the Register of Copyrights, noted when commenting on proposed implementing legislation to a House subcommittee, "[A] consensus has not been reached about the precise nature of the Berne Convention obligations . . . [and] copyright experts disagree on the extent [that] United States law must be changed" [FN170] to meet the Convention's minimum requirements. The diverse interest groups concerned with the issue of authors' moral rights in the United States largely maintained their opposing stances through the conclusion of the congressional hearings on the Berne Implementation Act. Though most agree that current United States law meets neither the spirit nor the letter of the Berne Convention's requirements, Congress concluded that United States law meets the Berne minimums in the same practical sense that other member countries meet them, and so the United States could properly become a signatory to the Berne Convention.

A. United States Moral Rights and the Spirit of Berne

The Berne Convention is intended to encourage authors to create by protecting the authors' rights. [FN171] As Berne is a product of authors ***225** and artists, [FN172] it is generally a pro-creator, pro-author document. As Sydney Pollack observed, " T he heart of Berne is protection of artists." [FN173] Though its original purpose was to protect authors' rights, it was recognized that any creative activity encouraged by the protection afforded by moral rights would enrich the national cultural heritage of the member nations. [FN174] While the copyright clause of the United States Constitution [FN175] was also written to encourage creative endeavors, it is the product of revolutionaries and statesmen whose concerns were not merely the rights of authors, but the health of an entire nation. The United States Constitution was established "to promote the general Welfare" [FN176] of the nation, not to assist any particular special interest group. Thus, though both Berne and the United States Constitution seek to encourage creative endeavors, the essential purpose of each system for protecting creative works is different.

Each system also takes its implementing authority from different sources. Ralph Oman, the Register of Copyrights, stated that "[t]he concept of moral rights embodied in the Berne Convention was derived from European notions of the natural, inalienable rights of authors." [FN177] On the other hand, Professor L. Ray Patterson submitted ***226** that United States copyright law is based on the theory that copyright is the statutory grant of a monopoly primarily for the benefit of the public." [FN178] This means, as Frank Pierson noted when speaking for the Writer's Guild of America before Congress, that "something created for the common good, as the Constitution mandates, becomes part of our common heritage, and is owned in a sense not only by the copyright owner but by the nation as a whole. It is part of the cultural wealth." [FN179]

The American copyright system really had two parents: the natural law ideals of the Constitution's framers and English copyright system as it was known and practiced by the businessmen of the day. The ideal purpose of copyright, as stated in the Constitution, is to promote the common good. It is widely conceded that the Constitution intends to motivate creative activity through economic incentives [FN180] to authors. After a period prescribed by statute, [FN181] during which time an author is expected to recoup his investment in his work, the work then inures to the public benefit by being readily available to the public. Conversely, English copyright was developed for the benefit of publishers. The English considered copyright to be an economic interest similar to other property interests. [FN182]

Because of this mixed heritage, the United States' grant of a "monopoly for the benefit of the public" has become a property right for the benefit of the copyright owner. United States copyright law, rooted as it is in economics, [FN183] favors neither the creator nor the public-it ***227** favors the copyright owner who is usually the disseminator or exploiter of intellectual property. [FN184] For instance, while the author is initially the copyright owner of a work he creates, he can and usually does sell "all the rights" in his work to a publisher. In hearings before the congressional committee studying whether the United States should join the Berne Convention, Professor L. Ray Patterson described the situation: "We continually speak of copyright as an author's right, but we treat it as a publisher's right, and while Congress enacts copyright legislation in the public interest, courts tend to interpret that legislation in the interest of the copyright proprietor." [FN185] Present copyright law protects the copyright owner's economic rights, not the author's moral rights or the public's right to benefits from creative labors. [FN186] The author is merely an incidental, not a primary, beneficiary of United States copyright law. [FN187]

It is widely believed in the United States that the Berne Convention's natural rights concept of intellectual property is inimical to the statutory and common law copyright jurisprudence that has developed in the United States. The United States's use of economic incentives [FN188] is thought to be incompatible with the existence of moral rights. The issue of moral rights in the United States is an ethical question about the integrity of creative works - not an economic question. No one should profit from the existence of moral rights. [FN189]

The amount of protection for moral rights that a Berne member nation provides its authors is a direct reflection on the values that that society places on the integrity of artistic works. [FN190] Robert W. ***228** Kastenmeier, the chairman of the House subcommittee [FN191] holding hearings on the Berne Implementation Act, said, "The United States has chosen not to join the Berne Union in the past, presumably because we did not want for our society the kind of copyright laws that the Convention requires." [FN192] By not joining Berne for so many years, the United States tacitly admitted that it did not fulfill the moral rights requirements of Berne, nor did it want to.

The Berne Convention is a pro-author document, and Article 6*bis* of the Convention requires that the legislation of member nations protect authors' moral rights. [FN193] Adherence to Berne by a nation that is indifferent to authors' rights logically requires enhancement of that nation's protection of authors. [FN194] But section 3(b) of the Berne Convention Implementation Act of 1988, [FN195] the implementing legislation that allegedly brought United States copyright law into compliance with Berne, expressly states that the status quo will be maintained on moral rights in the United States:

> The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law - (1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation. [FN196]

Further, the Berne Convention Implementation Act does not contain any language similar to that of Article 6*bis*, as did the originally proposed Berne adherence bill. [FN197] Yet the United States' official ***229** position is that its current law adequately protects moral rights so as to comply with Berne's minimum requirements. Not all are taken in by this legerdemain. The Directors Guild of America put it bluntly:

> We are skeptical that the Administration, or the [Motion Picture Association of America], really believes U.S. law currently provides moral rights protection sufficient to satisfy the spirit of Berne . . .

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> [since] they [did] not favor [the language of Representative Kastenmeier's bill]. They [were] not in favor of stating directly what is presumed to be there in the law already. [FN198]

So the United States has come from the position that "moral rights as such are not recognized," [FN199] to the official position that United States law is adequate to protect moral rights in this country - all without changing the letter of the law. A country that treats creative works the same as any other commodity is joining an international convention that ideally [FN200] accords authors and their works a high degree of protection beyond that given to ordinary property - with no change in the substantive law. One congressional witness was "puzzled by the attempts of the proponents of adherence to minimize the differences between U.S. law and the requirements of the language of Article 6*bis*, the moral rights provision." [FN201]

***230** Joining the Berne Convention in fact without joining the treaty in spirit sends a clear message to the world's creative community that nothing has changed in the United States, except that now the copyright holders of pirated United States works will receive even greater economic protection. [FN202] Sydney Pollack observed,

> If we ratify Berne, the heart of which is to find some sort of protection for artists, and all we really do is solidify the financier's point of view - there is something terribly ironic about that, and a bit embarrassing in terms of the moral leadership the United States ought to show to the world community. It shows a contempt for the value of art. [FN203]

B. United States Moral Rights and the Wording of Article 6*bis*.

> 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 modifications of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation. [FN204]

Since it is acknowledged that United States copyright law has never explicitly recognized authors' moral rights, and now that Congress has refused to include language in the Berne adherence implementing legislation that explicitly recognizes moral rights, it is clear that the state of moral rights in the United States does not conform to the literal wording of Article 6*bis*. This was the conclusion of Edward J. Damich, who testified that "A comparison of the language of Article 6*bis* with the protection afforded moral rights in the U.S. leads to the inescapable conclusion that this protection is virtually nonexistent." [FN205] He felt strongly that to ensure that United States moral rights meet Berne's requirements, "any Berne implementation bill ought to contain a moral rights provision that fairly complies with the language of Article 6is.*" [FN206] L. Ray Patterson's testimony* ****231*** *before Congress was in agreement with Damich's: American copyright law treats the rights of the author (who creates the work), and those of the entrepreneur (who distributes the work) as equivalent economic rights (i.e. property). "The moral rights of the author have been ignored, and the rights of the consumer under the fair use doctrine are minimal and continually minimized. Berne deals with all three rights." [FN207]*

The law of the United States does not provide the equivalent of Berne's paternity right. The paternity right gives the author the right to assert that he is the work's creator. This is also known as attribution. [FN208] But there is no clear authority in United States law for this right. [FN209] The Ad Hoc Working Group on United States Adherence to the Berne Convention [FN210] conceded that United States copyright law as embodied in title 17 does not require attribution, nor could it cite a case where this right was judicially implied. The leading case in the area, *Vargas v. Esquire, Inc.* [FN211] stands for the proposition that, except for the few states with statutes to the contrary, [FN212] an author does not have a legal right to be credited as the author of his work.

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"Nevertheless," as Professor Damich observed, "we are supposed to believe that it is likely that courts will imply a covenant of fair dealing which will require attribution." [FN213]

A most egregious example of the fact that United States law does not provide the real equivalent of the moral right of paternity is the case of William A. Smith's Maryland House murals. Under commission ***232** from the State of Maryland, Smith designed and executed a set of mural paintings for the lobby of Maryland House, a building designed by one of Baltimore's leading architects, and owned by the state of Maryland. [FN214] The design and execution of the paintings took Smith over a year to complete and covered more than a thousand square feet of canvas, Smith personally painting every brush stroke. The paintings are in the form of nine panels depicting people and events from Maryland's history. Since the completed panels were installed in 1968 the work has been seen by thousands, has been widely reproduced, and is well known as being Smith's work. The murals have been critically acclaimed and have been called "among the most important historical murals in our nation" and "part of America's best art heritage." [FN215]

In 1986 Maryland authorities, while in the process of altering Maryland House to accommodate a new restaurant concessionaire, permitted the new concessionaire to have some additions made to the largest, central panel of Smith's murals, without consulting Smith. The additions were made by Othmar Carli, the artist hired by the Maryland authorities for the task. [FN216] Carli added canvas panels where doors had been, and a new painting that has been described as "without exception, ill-conceived, very poorly drawn, and amateurishly incompetent - completely out of accord with the original work." [FN217] Carli signed his work, thus violating Smith's paternity right by adding another signature to the painting. Smith's right of paternity was further violated when the York, Pennsylvania *Daily Record* published a detail of the mural painted by Smith and attributed it to Carli. [FN218] Several lawyers have told Smith that United States law provides no redress for these violations. [FN219] Since the mural is owned by the State of Maryland, Smith has no right to remove his name from the altered painting if he wants to.

A fine arts appraiser familiar with the original mural stated that ***233** Carli's work is "a slur on the reputation and professional integrity of the artist who painted the mural," and that "the mural is so corrupted that, in its present state, it is not valid to expose the work as that of William A. Smith, whose signature it bears." [FN220] Previously appraised at $500,000, the altered panel is now worth only $70,000. [FN221] As it stands, any observer can read Smith's name there and, not knowing the work's entire history, attribute it to Smith, much to the injury of his honor and reputation. Clearly, under the actual phrasing of Article 6*bis*, Smith would have had the right to claim authorship of the work. Additionally, according to the World Intellectual Property Organization's *Guide to the Berne Convention*, [FN222] an author may also refuse to have his name applied to a work that is not his. And a person permitted to display a work, as the state of Maryland was here, may not change the work either by deletion or by addition. [FN223]

United States law does not provide the equivalent of Berne's integrity right. [FN224] Ralph Oman, in his extensive testimony before Congress stated that " l egal opinion is divided about the extent to which existing state law or federal trademark law protects against distortion or other alteration prejudicial to the author's reputation. It seems obvious that few, if any, states have settled rules regarding the integrity right." [FN225] An illustration of the United States' laws lack of protection against mutilation of a work and the potential such mutilation has to injure an artist's reputation is the case of Richard Serra's *Titled Arc*. Serra's specialty is creating "site specific" works - sculpture conceived for, dependent upon, and inseparable from its location, so that the surroundings become part of the work and make it impossible to move the work without destroying it. Serra was commissioned by the General Services Administration (GSA) to build a sculpture for Federal Plaza in New York City.

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[FN226] The work, titled *Titled Arc*, was finalized in 1981. Three years later when a GSA administrator sought to have *Titled Arc* removed from the plaza, Serra went to court to enjoin its destruction by removal from the site. The court found that ***234** Serra had no protection under United States copyright law from such destruction. [FN227]

Some experts hold that the United States protects the right of integrity through the derivative works doctrine. The derivative works doctrine states that the holder of the copyright in a work has the exclusive right to create other works based on that work. [FN228] This protects a copyright holder from a strict interpretation of the Copyright Act's reproduction right, [FN229] which might permit another to vary elements of the original work enough to reasonably assert that the second work was not actually a copy. [FN230] But the right to prepare derivative works does not equate with the right of integrity as stated in Article 6*bis*. [FN231] The right to prepare derivative works is an economic right, while “integrity” is the right to control the quality of derivative works, rather than the right to permit the creation of derivative works. [FN232] Thus, since under Article 6*bis* an author's moral rights exist independently of the work's economic rights, even after the transfer of the economic right to create derivatives of a work, an author still retains the right to ensure that such works do not reflect unfavorably on his honor or reputation. Title 17 grants the copyright holder, rather than the author of the original work, the exclusive right to prepare derivative works from works protected by the copyright. In his testimony before Congress, Professor Damich noted that the late University of California law professor, Melville B. Nimmer, thought that distortions and mutilations might not be encompassed in the definition of “derivative works.” [FN233]

The Ad Hoc Group's reliance on section 43(a) of the Lanham Act to protect the right of integrity is misplaced, since section 43(a) is a deception-based cause of action aimed at preventing misrepresentation. [FN234] ***235** Thus, removing any explicit evidence of misrepresentation, such as a signature, would remove any cause of action under the Lanham Act. So the author of a work that has been mutilated would have no cause of action as long as his signature had been removed, or a disclaimer made, even though any observer would instantly recognize the essence of the author's style in the work and attribute it to him anyway. [FN235]

Reputation-based causes of action do not fulfill the requirement of Article 6 *bis* regarding protection of “honor.” [FN236] While most authors will not have a reputation sufficient to support a cause of action for libel or slander, [FN237] most authors have a sense of honor - pride in their work. “The use of ‘honor’ as well as ‘reputation’ in Article 6*bis* of the Berne Convention suggest that regardless of how the public judges a modification, the author can still object to it.” [FN238]

Kenneth W. Dam of IBM Corporation would eviscerate the soul of Article 6*bis* by combining an insistence on a strict interpretation of its language, [FN239] with an illogical statutory definition. He pointed out that “by its own terms, Article 6*bis* applies only to ‘authors' and to those who share in the initial copyright . . . and contains no discussion of ‘works for hire.” [FN240] A work-for-hire is a work prepared by an employee within the scope of his employment, or a product produced at the behest and direction of one other than the creator. [FN241] Under United States copyright law when one creates a work-for-hire, the employer, not the employee, is considered to be the “author” for purposes of copyright ownership. [FN242] Ignoring that this premise does not ***236** recognize the concept of a creator's personal moral right in his creation, Dam concluded that “many of the situations in which 'moral rights' are typically invoked are not touched by Article 6bis.” [FN243] He noted that “since few (if any) of the directors of Hollywood black-and-white movies were ever the copyright owners, the 'colorization’ contorversy would not be affected by Article 6bis.” [FN244] Calling one who commissions a work-for-hire the author of the resulting work may be convenient for the administration of title 17 within the

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United States, but such an expediency should not obscure the reality (and more common usage) that the term “author” refers to the person who conceptualized and executed the work and not to the one who paid for it.

Dam further noted that Article 6bis “does not appear to bar the separate alienability of 'moral rights.”' [FN245] It also does not appear to not bar such alienability, since the provision does not mention alienability at all. Assuming, without support, that moral rights are alienable under Article 6bis, Dam concluded that moral rights would be subsumed under contract law in this country, “as, indeed, they are now.” [FN246] In reality, however, the United States does not recognize moral rights but provides pale substitutes that function adequately only as long as the author retains the copyright in his work.

C. United States Moral Rights Meet Berne Minimum Requirements in the Same Practical Sense That Other Countries Meet Berne Minimums

In reaching its conclusion that current United States law meets the moral rights requirements of Berne, one of the factors that the Ad Hoc Working Group On United States Adherence to the Berne Convention [FN247] took into account was the fact that there are no moral rights provisions in the statutes of several Berne member nations. The United Kingdom, for example, which joined the Convention at its founding, does not have a statutory provision on moral rights. [FN248] ***237** Another consideration was the total lack of uniformity in protection of moral rights among the Berne Convention countries. [FN249] In other words the Group concluded that since no one was following the letter of the law, the United States was not required to do so either. “[T]he totality of United States law provides protection for the rights of paternity and integrity sufficient to comply with 6bis as it is applied by various Bern countries.” [FN250]

It is not certain whether all the Convention members actually meet the minimum requirements of Article 6bis, but whether they do or not, it is clear that no member country has ever challenged another Berne nation with regard to inadequate moral rights protection. [FN251] In his testimony before Congress, the Chairman of the Ad Hoc Working Group on United States Adherence to the Bern Convention, Irwin Karp stated that

> [i]n reality, the moral rights protection under our law today probably is superior to that actually applied in many Berne countries. There is a paucity of cases and very little information to indicate...[that other Berne countries have done as much] to protect moral rights as [has the United States]. [FN252]

No news is good news.

VI. THE FUTURE OF MORAL RIGHTS IN THE UNITED STATES

Only time will tell if the United States' joining the Berne Convention will have any effect on the state of moral rights in this country. ***238** There are circumstances that support logical arguments for both positions - that authors' moral rights in the United States will not change, and that they will.

A. Moral Rights Will Not Change

Some supporters of moral rights think that adherence to Berne may impede the adoption of strict moral rights legislation because “we have done all we are required to do.” [FN253] The official position, that current United States law already meets the minimum requirements of Berne on moral rights, [FN254] indicates reluctance to change United States law on the subject.

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Because the Berne Convention is not self-executing, the mere fact that the United States has now joined the convention should have no effect on copyright law in this country. United States law would have changed only if the implementing legislation changed it. [FN255] As noted above, [FN256] the Berne Implementation Act did not change United States law as it relates to authors' moral rights. Congress expressly stated that any rights in a work eligible for protection under United States copyright law would not be expanded or reduced by virtue of this country's adherence to the Berne Convention. [FN257]

Courts may be less likely to go beyond United States copyright law as it now stands because the implementation act contains no specific moral rights provision. As it is, there is little risk of the courts interpreting our joining Berne as creating any higher moral rights than existed previously. [FN258] Kenneth W. Dam stated that “courts cannot write on a blank slate . . . where Congress clearly expresses its intent.” [FN259] The language of the Berne adherence implementation bill makes it abundantly clear that Congress intends to maintain the status ***239** quo. [FN260]

Another reason that our adherence to Berne should not affect the state of moral rights in this country is found in article 5 of the Berne Convention. Article 5 says that (1) protection in the country of origin is governed by domestic law, and (2) protection other than in the country of origin is governed by the law of the country where protection is sought, and that such protection will be the same as that granted to nationals of that country. [FN261] So, even if joining Berne somehow increased a United States artists rights of paternity and integrity in the world at large, those rights would still remain at the level of United States domestic law for a foreign artist seeking protection within the United States.

B. Moral Rights Will Change

There are also those who hope, or fear, that the United States' admission into the Berne Convention will increase the protection afforded authors' moral rights in the United States. In his statement before Congress, Ralph Oman noted, as an argument against the United States joining Berne, that “adherence to Berne will cost the United States the high price of substantial changes in our law, and potential disruption of established business practices structured upon that law, and will limit future legislative options.” [FN262] The Coalition to Preserve the American Copyright Tradition (CPACT) was opposed to United States adherence to Berne because it believed that adherence would introduce “the European concept of ‘droit moral’ . . . which is inconsistent with the United States tradition of copyright as an economic incentive.” [FN263] CPACT believed that the introduction of moral rights into United States law would “disturb the historical balance among authors, publishers, and the public and upset decades of settled practices, contract conventions, expectations, and risk allocations.” [FN264] Additionally, they believe moral rights would interfere with publishers' first amendment freedoms and restrict the flow of information to the public. [FN265]

***240** Since, in its adherence legislation, Congress took no decisive action regarding moral rights, preferring to state simply that the status quo regarding moral rights would be maintained, the effect might be to absorb fragments of states statutory and common law into the national treaty obligation created by Berne, with entirely unpredictable results. [FN266] Additionally, as Kenneth W. Dam noted when testifying before Congress, “nothing currently stands in the way of ‘moral rights' legislation if Congress wishes to adopt it.” [FN267] Several bills have been proposed to create a right of integrity for visual artists and a director's right to prevent colorization. [FN268] These bills also address the works-for-hire issue. The very words in the implementing legislation that expresses Congress' intent that no changes occur may have opened a back door to admit increased authors'

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moral rights in the United States. By passing legislation that specifically refrains from making moral rights a part of federal copyright law, moral rights remain the province of the states and are not subject to preemption by the federal copyright act. [FN269] Further, since title 17's preemption clause means that the only copyright law in the United States is federal copyright law, moral rights are not considered to be a copyright issue. [FN270] Then the courts and legislatures of fifty different states are ***241** free to go their own ways to change or not change the status of moral rights in their own jurisdictions, and thus there is no way to predict what the state of moral rights will be in this country ten years from now.

David Ladd, speaking before Congress on behalf of CPACT opined that joining Berne, even with the mimimalist approach, [FN271] would change United States law, because the very act of joining, together with the Ad Hoc Group's assertion that current United States law meets the minimum requirements of the Berne Convention, is an implicit acknowledgment that the body of United States law contains moral rights. There is a possibility that some courts will now feel less restrained from expanding the doctrines that make up the “moral rights equivalents” in United States law. [FN272] United States adherence to Berne with legislation that contains only a narrowly prescribed, alienable moral rights provision will ultimately “lead to expanded moral rights protection in the judicial interpretation of United States law.” [FN273] However, even if a court tried to use the language of Article 6*bis* to interpret United States law, the Berne Convention is not particularly ***242** clear as to the extent to which the moral rights granted by Article 6*bis* can be limited by domestic law. The World Intellectual Property Organization's guide to the Berne Convention suggests that member states can choose whether to make moral rights alienable or inalienable. [FN274]

VII. CONCLUSION

The United States has historically lagged behind the rest of the world in protecting authors' moral rights by refusing to explicitly recognize an author's rights of paternity and integrity. Although United States law contains a hodgepodge of causes of action that provide a rough equivalent of the moral rights protected by the Berne Convention, authors never enjoyed the level of protection for their rights that is expressly provided by Article 6*bis* of the Convention. [FN275] Now, after much debate and consideration, one hundred and two years after the Berne Convention's inception, the United States finally enacted a law that enabled it to join the premier treaty for the protection of intellectual property.

Before joining, Congress found that current United States law does provide the level of protection for author's moral rights required by the Berne Convention. It concluded, in the face of voluminous conflicting testimony, that the amalgam of common law causes of action and state and federal statutes regarding intellectual property provide the equivalent of the moral rights embodied in Berne, [FN276] even though the courts have consistently held that these laws do not protect authors' moral rights. [FN277] The enabling legislation explicitly states Congress' intention that United States membership in the Berne Convention is to have no effect whatever on the state of moral rights law in the United States. [FN278] The results of this legislative legerdemain is that the United States recognizes authors' moral rights for purposes of complying with the requirements of an international intellectual property treaty, but does not recognize those same rights for the purpose of actually protecting an author's moral rights. Humpty ***243** Dumpty would be proud. [FN279]

The future of author's moral rights in the United States remains uncertain. [FN280] Congress' intent that the admission of the United States into the Berne Convention would have absolutely no effect on the state of authors' moral rights in the United States was made abundantly clear through the wording and history of the en-

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abling legislation. However, since the enabling act, which is an amendment to the federal copyright law, explicitly declined to address authors' moral rights, the fifty states remain free to deal with authors' moral rights as they see fit, and state law remains the most accessible vehicle for improving authors' moral rights in this country. It is impossible to predict how the courts will rule on future moral rights cases, since they will be faced with interpreting a treaty whose literal meaning clearly conflicts with Congress' interpretation. It can only be said that the United States has finally taken a long-awaited step in this arena of intellectual property. It remains to be seen in which direction that step was taken.

[FN1]. "A person who makes or originates something; creator." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, COLLEGE EDITION 99 (1968). The term "author" as used in the United States Constitution, the Berne Convention, and this Comment refers to people who create things for other than solely utilitarian purposes, such as movie directors, painters, sculptors and other fine artists, writers of books and music, musicians and performing artists. The terms "author" and "artist" are used interchangably throughout this Article.

[FN2]. "Moral rights" will be used in this article to refer to the moral rights of authors, particularly the rights of paternity and integrity. *See infra* text accompanying notes 9-14.

[FN3]. Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1886, revised at Berlin on November 13, 1908, completed at Berlin on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967 (with Protocol regarding developing countries), No. 11850, 828 U.N.T.S. 221 [hereinafter Berne Convention]. *See generally Conference Celebrating the Centenary of the Berne Convention*, 11 COLUM. J.L. & ARTS (1986). The volume contains the papers presented at a conference held in 1986 by the Intellectual Property Law Unit of the Centre for Commercial Law Studies at Queen Mary College in the University of London and the British Literary and Artistic Copyright Assoc.

[FN4]. *"Bis"* signifies an addition to the Convention.

[FN5]. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568 § 3(b), 102 Stat. 2853, 2853-54 (1988), and conversation with Representative Robet W Kastenmeier's office in December of 1988.

[FN6]. The United States does not explicitly recognize authors' moral rights in the Federal Copyright Act, 17 U.S.C. §§ 101-810 (1982 & Supp. V 1987). *See also* 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.21[B] (1988) [hereinafter M. NIMMER]. Some states have recognized certain aspects of moral rights in recent years. *See infra* Part IV E. State Moral Rights Laws. *See generally* Sandison, *The Berne Convention and the Universal Copyright Convention: The American Experience*, 11 COLUM. J.L. & ARTS 89 (1986).

[FN7]. Pub. L. No. 100-568 § 3(b), 102 Stat. 2853, 2853-54 (1988).

[FN8]. *See infra* Part VI. THE FUTURE OF MORAL RIGHTS IN THE U.S. & Part VII. CONCLUSION.

[FN9]. Diamond, *Legal Protection for the "Moral Rights" of Authors and other Creators*, 68 TRADEMARK REP. 244, 244 (1978) [hereinafter Diamond].

[FN10]. *Id.* Copyright is defined as "an intangible, incorporeal right granted by statute to the author or creator of literary or artistic creations, whereby he is invested, for a limited time, with the sole and exclusive privilege of

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multiplying copies of the work and publishing and selling them." BLACK'S LAW DICTIONARY 304 (5th ed. 1979).

> Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying works; (3) dramatic works, including any accompanying music; (4) pantomine and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings.

17 U.S.C. § 102(a) (1982). "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (1982).

[FN11]. Diamond, *supra* note 9, at 244-45. These rights have been more fully defined as follows:

> The right to be known as the author of one's work; to prevent others from being credited as the author of his work; to prevent others from falsely attributing to him the authorship of work which he has not in fact written; to prevent others from making deforming changes in his work; to withdraw a published work from distribution if it no longer represents the views of the author; and to prevent others from using the work or the author's name in such as way as to reflect on his professional standing.

2 M. NIMMER, *supra* note 6, § 8.21[A].

[FN12]. Amarnick, *American Recognition of the Moral Right: Issues and Options*, 29 COPYRIGHT L. SYMP. (ASCAP) 31, 31 (1984) [hereinafter Amarnick].

[FN13]. *Id.* at 31. *See generally* Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. LAW 465 (1968) [hereinafter Sarraute]; STRAUSS *The Moral Right of the Author*, 2 STUDIES ON COPYRIGHT 963 (Fisher ed. 1963).

[FN14]. Diamond, *supra* note 9, at 258. When a work is distorted and presented to the public with the artist's name, the result is the same as false attribution. Thus, the right of integrity overlaps with the right of paternity. *Id.*

[FN15]. Rosen, *Artist' Moral Rights: A European Evolution, An American Revolution*, 2 CARDOZO ARTS & ENT. L.J.. 155, 176 (1983) [hereinafter Rosen].

[FN16]. BLACK'S LAW DICTIONARY 925 (5th ed. 1979).

[FN17]. *Id.*

[FN18]. Rosen, *supra* note 15, at 176.

[FN19]. *Id.*

[FN20]. *Id.*

[FN21]. *Id. See also* W. Luijpen, DUQUESNE STUDIES: PHILOSOPHICAL SERIES 22 87 (1967).

[FN22]. Rosen, *supra* note 15, at 176-77.

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[FN23]. *Id.* at 177.

[FN24]. *Id.*

[FN25]. *Id.* According to Rosen, implicit in the enforcement of moral rights is the recognition that artists do not want to keep their works for themselves. *Id.*

[FN26]. *Id.* Thus, some countries have difficulty accepting the concept of moral rights, since the creator no longer owns the work.

[FN27]. The word "destructive" is used here in regard to the author's self-expression and his reputation.

[FN28]. Rosen, *supra* note 15, at 177. This is the essence of the moral rights concept.

[FN29]. The other major international copyright treaty is the Universal Copyright Convention (UCC). Universal Copyright Convention, September 6, 1952, No. 2937, 216 U.N.T.S. 132. At the end of World War II, the United States and several other American republics perceived a need to develop simplified multilateral copyright relations with members of the Berne Convention. Since joining Berne would have required major changes in United States copyright law, a new multilateral instrument, the UCC, was created by the United Nations Educational Scientific and Cultural Organization (UNESCO) in 1952. Though it is considered to provide copyrights a lower level of protection than Berne, the UCC has eighty adherents. However, it does not recognize authors' moral rights. The United States became a member in 1957. H.R. REP. No. 100-609, 100th Cong., 2nd Sess., pt. III, at 14 (1988) [hereinafter H. REP. No. 100-609].

[FN30]. *Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 100th Cong., 1st & 2nd Sess. 275-81 (1988) [hereinafter *Hearings*] (statement of the National Committee for the Berne Convention, *Why the United States Should Join the Berne Copyright Convention* 2 (July 2, 1987)).

[FN31]. *Id.*

[FN32]. H. REP. No. 100-609, *supra* note 29, at 11. *See supra* note 3.

[FN33]. *Id. See generally Hearings, supra* note 30; Ricketson, *The Birth of the Berne Union*, 11 COLUM. J.L. & ARTS 9 (1986); Plaisant, *Droit de Suite and Droit Moral under the Berne Convention*, 11 COLUM. J.L. & ARTS 157 (1986).

[FN34]. H. REP. No. 100-609, *supra* note 29, at 12.

[FN35]. *Id.*

[FN36]. *Id.* The first revision was the 1908 Berlin Act which prohibited formalities as a condition of the enjoyment and exercise of rights under the Convention. The Berlin Act also expanded the subject matter of copyright under the Convention. The 1928 Rome Act was the first to expressly recognize the "moral rights" of artists. The 1948 Brussels Act established the term of copyright protection for the life of the artist and 50 years post mortem as mandatory. It also added improvements in copyright protection. *Id.* at 12-13.

In the 1967 Stockholm Act, the right of reproduction was expressly recognized. Rules regarding reconciling different national rules of authorship and ownership of movies were also added by this act. Protection was

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given to artist who were residents in a union country, regardless of their citizenship. The 1967 revision established a "Protocol Regarding Developing Countries," which would have allowed these countries to limit rights of translation and reproduction. However, the Act 1967 Act has not come into force because it was superseded by the 1971 Paris Act. The 1971 Paris Act is practically the same as the 1967 Stockholm Act with important revisions made to "Protocol Regarding Developing Countries." *Id.*

[FN37]. *Id.*

[FN38]. Berne Convention, *supra* note 3, Art. 6*bis*.

[FN39]. H. REP. No. 100-609, *supra* note 29, at 33.

[FN40]. *Id. See supra* note 11.

[FN41]. *Id.* In other words, members of the treaty must provide for these minimum moral rights that are granted by Berne. They can also grant greater moral rights protection, as long as Berne's requirements are met.

[FN42]. Rosen, *supra* note 15, at 247. The Berne Convention only recognizes the paternity and integrity interests.

[FN43]. *Id. See generally* Sarraute, *supra* note 13.

[FN44]. UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD 1 [hereinafter UNESCO] (France Copyright Stat. art. 6).

[FN45]. Diamond, *supra* note 9, at 247.

[FN46]. UNESCO, *supra* note 44, at 2a (Germany (Fed. Rep.) Copyright Stat. art. 14).

[FN47]. *Id.* at 3-4 (Italy Copyright Stat art. 20).

[FN48]. H. REP. No. 100-609, *supra* note 29, at 28.

[FN49]. *Id. See* U.S. CONST. art. VI, cl. 2.

[FN50]. H. REP. No. 100-609, *supra* note 29, at 28.

[FN51]. *Id.*

[FN52]. *Id.* Article 36 of the Berne Convention states:

> (1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.

(2) It is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention.

Berne Convention, *supra* note 3, art. 36.

[FN53]. WORLD INTELLECTUAL PROPERTY ORGANIZATION WIPO, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY WORKS (PARIS ACT 1971) [hereinafter WIPO

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GUIDE], *cited in* H. REP. No. 100-609, *supra* note 29, at 29.

[FN54]. WIPO GUIDE, *supra* note 53, § 2.20, at 21, *cited in* H. REP. No. 100-609, *supra* note 29, at 29.

[FN55]. *Id.*

[FN56]. H. REP. No. 100-609, *supra* note 29, at 28-32.

[FN57]. Pub. L. No. 100-568, 102 Stat. 2853 (1988).

[FN58]. The Berne Convention Implementation Act of 1988 states in pertinent part: Sec. 2 DECLARATIONS.

> (1) [The Berne Convention is] not self-executing under the Constitution and laws of the United States.
>
> (2) The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.
>
> (3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.

Pub. L. No. 100-568 § 2, 102 Stat. 2853, 2853 (1988). The words "for the purpose of satisfying such obligations" in § 2(3) is intended to assure United States courts that membership in Berne is not, of itself, a basis for a cause of action. H. REP. No. 100-609, *supra* note 29, at 39.

[FN59]. H. REP. No. 100-609, *supra* note 29, at 33. *See infra* Part V. UNITED STATES MORAL RIGHTS AND BERNE'S MINIMUM REQUIREMENTS.

[FN60]. H. REP. No. 100-609, *supra* note 29, at 37. *See infra* Part IV. MORAL RIGHTS PROTECTION IN THE UNITED STATES TODAY.

[FN61]. H. REP. No. 100-609, *supra* note 29, at 38.

[FN62]. *Id.* at 38-39. The law relating to moral rights is intended to be the same the day before and the day after adherence. *Id.* at 40.

[FN63]. *Id.* at 40.

[FN64]. Pub. L. No. 100-568 § 3, 102 Stat. 2853, 2853-54 (1988). H. REP. No. 100-609, *supra* note 29, at 23.

[FN65]. Pub. L. No. 100-568 § 3(a), 102 Stat. 2853 (1988). *See* H. REP. No. 100-609, *supra* note 29, at 23.

[FN66]. Pub. L. No. 100-568 § 3(a)(1), 102 Stat. 2853 (1988) (referring to Title 17, the United States Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1982 & Supp. V 1987)). *See* H. REP. No. 100-609, *supra* note 29, at 23.

[FN67]. H. REP. No. 100-609, *supra* note 29, at 23.

[FN68]. Pub. L. No. 100-568 § 3(a)(2), 102 Stat. 2853 (1988). *See* H. REP. No. 100-609, *supra* note 29, at 23.

[FN69]. Pub. L. No. 100-568 § 3(b), 102 Stat. 2853, 2853-54 (1988). H. REP. No. 100-609, *supra* note 29, at 23.

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[FN70]. *Id.*

[FN71]. *Id. See infra* Part VI.A. Moral Rights Will Not Change.

[FN72]. 2 M. NIMMER, *supra* note 6, § 8.21[B], at 8-24. *See* 17 U.S.C. §§ 101-810 (1982 & Supp. V 1987).

[FN73]. Miller v. Commissioner, 299 F.2d 706, 709 n.5 (2d Cir. 1962).

[FN74]. *See infra* Part IV. MORAL RIGHTS PROTECTION IN THE UNITED STATES TODAY.

[FN75]. Also, in certain cases, a state court may apply the law of another state under choice of law principles.

[FN76]. Section 43(a) of the Lanham Act has been used to protect both the integrity and the paternity interests. *See* Lanham Act, ch. 540, § 43(a), 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. § 1125(a) (1982)). *See infra* IV.C. Unfair Competition.

[FN77]. *See infra* IV.E. State Moral Rights Laws.

[FN78]. 2 M. NIMMER, *supra* note 6, § 8.21[B], at 8-248.

[FN79]. Amarnick, *supra* note 12, at 64. *See also* Diamond, *supra* note 9, at 261.

[FN80]. Diamond, *supra* note 9, at 261. Most users will probably have more bargaining power than a struggling artist. For example, a movie producer will usually have more financial power than a screenwriter. "In most contracts the producer will insist upon a reasonably free hand, if he intends to reproduce the play in motion pictures." Manners v. Famous Players Lasky Corp., 262 F. 811, 815 (S.D.N.Y. 1919).

[FN81]. Amarnick, *supra* note 12, at 64-65.

[FN82]. 262 F. 811 (S.D.N.Y. 1919).

[FN83]. *Manners*, 262 F. at 815. The contract provided: "No alterations, eliminations, or additions to be made in the play without the approval of the author." *Id.* at 813.

[FN84]. *Id.* at 815. The court stated that in most contracts a movie producer will probably require a free hand to make changes in a play that he buys. *Id.*

[FN85]. *Id.* at 813.

[FN86]. The contract stated:

> This is to ratify our understanding whereby James Oliver Curwood agrees upon payment to him . . . of $1,000 . . . to relinquish all claim or claims he may have or have had in the screen rights to his story Poetic Justice of Ulco San, and grants to you his permission, as far as he is concerned, to produce a feature motion picture of five reels or more from said story; it being understood that you are to select a capable man to elaborate on said story, with addition of characters, etc., however needed.

Curwood v. Affiliated Distrib., 283 F. 219, 221 (S.D.N.Y. 1922).
[FN87]. *Id.* at 222.

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[FN88]. *Id.* Otherwise, the grant of the right to elaborate with no right of approval in the author would be hazardous to a prominent author. *Id.*

[FN89]. Preminger v. Columbia Pictures Corp., 49 Misc. 2d 363, ---, 267 N.Y.S.2d 594, 603 (Sup. Ct. 1966).

[FN90]. *Id.* at ---, 267 N.Y.S.2d at 603. The right to interrupt the broadcasting of a motion picture on television for commercials and to make small cuts to meet time constraint were considered a normal part of the exhibition of motion pictures on television. *Id.* at ---, 267 N.Y.S.2d at 599-600.

[FN91]. Bonner v. Westbound Records, Inc., 49 Ill. App. 3d 543, --- & ---, 364 N.E.2d 570, 573 & 575 (1977). The contract provided:

> All master recordings made hereunder, as well as performances embodied thereon and all phonograph records derived therefrom, together with any property rights therein, whether presently existing or hereafter created, will be the exclusive property of [Westbound] free of any claim whatsoever by Artist or by anyone deriving rights from Artist.

Id. at ---, 364 N.E.2d at 575. The contract did not give the defendant the right to modify the plaintiff's performances by writing and recording new music and words and then adding the new material to the plaintiff's performances. *Id.*

[FN92]. 198 F.2d 585 (2d Cir. 1952).

[FN93]. *Id.* at 586.

[FN94]. *Id.* at 586-87.

[FN95]. *Id.* at 588. An express prohibition was not necessary. *Id.*

[FN96]. Amarnick, *supra* note 12, at 65. *See generally* Gilliam v. ABC, 538 F.2d 14 (2d Cir. 1976); Granz v. Harris, 198 F.2d 585 (2d Cir. 1952); Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947); Geisel v. Poynter Prods., Inc., 295 F. Supp. 331 (S.D.N.Y 1968).

[FN97]. Amarnick, *supra* note 12, at 65.

[FN98]. Diamond, *supra* note 9, at 263.

[FN99]. 330 F. Supp. 274, 278 (S.D.N.Y. 1971). *See infra* notes 131-32 and accompanying text.

[FN100]. Libel is "[a] method of defamation communicated by print, writing, pictures or signs. In its most general sense it is any publication which is injurious to another's reputation." BLACK'S LAW DICTIONARY 824 (5th ed. 1979). Defamation is the invasion of the interest in reputation and good name. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 771 (5th ed. 1984) [hereinafter PROSSER].

[FN101]. Ben-Oliel v. Press Pub. Co., 251 N.Y. 250, ---, 167 N.E. 432, 434 (1929).

[FN102]. Clevenger v. Baker, Voorhis & Co., 8 N.Y.2d 187, 168 N.E.2d 643, 203 N.Y.S.2d 812 (1960).

[FN103]. *Clevenger, Id.* at ___, 168 N.E.2d at 644-45, 203 N.Y.S.2d at 813-14.

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[FN104]. *Id.* at ---, 168 N.E.2d at 646, 203 N.Y.S.2d at 816.

[FN105]. *Id.* at ---, 168 N.E.2d at 645, 203 N.Y.S.2d at 815. The defendants did have the right to state that the plaintiff was the author of the original text, but the purchase of the copyright did not grant a license to defame by impliedly misrepresenting plaintiff as reviser of an annual edition that contained many errors for which the plaintiff was not responsible for. *Id.* at ---, 168 N.E.2d at 645-46, 203 N.Y.S.2d at 816.

[FN106]. 295 F. Supp. 331 (S.D.N.Y. 1968).

[FN107]. *Id.* at 333.

[FN108]. *Id.* The plaintiff was Theodor Seuss Geisel, the world-famous artist and author, better known as Dr. Seuss. Geisel alleged that the defendants manufactured and sold dolls "derived from" cartoons that he prepared for the now defunct *Liberty Magazine*. He averred he had nothing to do with the dolls, which were sold as "Dr. Seuss Creation," and that the dolls were tasteless. *Id.* 333.

[FN109]. *Id.*

[FN110]. *Id.*

[FN111]. Diamond, *supra* note 9, at 265. A "public figure" is a person who has assumed a role of importance in the resolution of public affairs of general importance or concern to the people generally. PROSSER, *supra* note 100, at 806.

[FN112]. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[FN113]. Diamond, *supra* note 9, at 265.

[FN114]. Guitar v. Westinghouse Elec. Corp., 396 F. Supp. 1042, 1054 (S.D.N.Y. 1975). Moral rights are sometimes construed to protect an author from excessive criticism. *See supra* note 11 and accompanying text.

[FN115]. *Id.*

[FN116]. Diamond, *supra* note 9, at 264.

[FN117]. PROSSER, *supra* note 100, at 851.

[FN118]. Williams v. Weisser, 273 Cal. App. 2d 726, ---, 78 Cal. Rptr. 542, 551 (1969).

[FN119]. *Id.* at ---, 78 Cal. Rptr. at 551. Although the professor felt that his notes were sufficient for classroom instruction, he did not think that they were adequate for publishing. The published notes had many omissions. *Id.*

[FN120]. Zim v. Western Publishing Co., 573 F.2d 1318, 1321 (5th Cir. 1978).

[FN121]. *Id.* at 1326-27.

[FN122]. PROSSER, *supra* note 100, at 853.

[FN123]. Ch. 540, § 43(a), 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. § 1125(a) (1982). This section

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has recently been expanded and clarified. The 1989 prospective amendment of section 43(a) (15 U.S.C. § 1125(a)) provides:

(a) 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 of origin, false or misleading description of fact, or false or misleading representation of fact, which -

(1) 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

(2) 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.

Pub. L. No. 100-667, 102 Stat. 3946 (1988).

[FN124]. *Id.*

[FN125]. Diamond, *supra* note 9, at 266.

[FN126]. 538 F.2d 14 (2d Cir. 1976).

[FN127]. The plaintiffs in *Gilliam* were a group of British writers known as "Monty Python." The plaintiffs wrote scripts for British Broadcasting Company (BBC) to be used in a television series. The plaintiffs' agreement with BBC was that while BBC had final authority to make changes, the plaintiffs had ultimate control over the scripts consistent with BBC's authority, and only minor cuts could be made without prior approval by the writers. *Id.* at 17. BBC had the authority under the agreement to license the transmission of recordings of the televised programs in any overseas country. *Id.* Time-Life acquired the rights to distribute the *Monty Python* series in the United States. *Id.* Thereafter, ABC agreed with Time-Life to broadcast two 90-minute special programs. However, during the first broadcast, approximately one-third of the original material was omitted. *Id.* at 18.

[FN128]. *Id.* at 24-25. The court found that the altered version deleted the climax of the skits and essential elements in the schematic development of the story line.

[FN129]. *Id.* at 24. The edited version impaired the integrity of the plaintiff's work and represented to the public as the plaintiffs what was actually a distortion of their talents.

[FN130]. *Id.* This makes him subject to criticism for work he has not created. *Id.*

[FN131]. Jaeger v. American Int'l Pictures, Inc., 330 F. Supp. 274, 281 (S.D.N.Y 1971).

[FN132]. *Id.* at 278. The court stated that the plaintiff was not pleading a contract cause of action; the plaintiff was pleading a variety of tort, an extracontractual right of authors. *Id.* at 279.

[FN133]. Diamond, *supra* note 9, at 267. In *Geisel*, see *supra* text accompanying notes 106-10, there was no direct contractual relationship between the author and the defendant. *Id.*

[FN134]. Gilliam v. ABC, 538 F.2d 14 (2d Cir. 1976). *See supra* notes 126-30 and accompanying text.

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[FN135]. *Id.* at 20-21.

[FN136]. The copyright's owner has the exclusive rights to undertake and to authorize, in relation to the copyrighted work, (1) reproductions of the copyrighted work, (2) preparation of derivative works, (3) distribution of copies to the public, (4) performance of the work, and (5) displaying of the work. 17 U.S.C. § 106 (1982).

[FN137]. *Gilliam*, 538 F.2d at 21. The court stated whether intended to allow greater economic exploitation of the work, as in media and time cases, or to ensure that the copyright owner has a veto power over revisions, the ability of the copyright owner to control his work remains of utmost importance in our copyright law. *Id.*

[FN138]. *Id.*

[FN139]. Midway Mfg. Co. v. Artic Int'l, Inc., 704 F.2d 1009, 1013-14 (7th Cir. 1983).

[FN140]. *Id.* at 1014. The court contrasted the "speeding up" of a video game with playing a record recorded at 33 revolutions per minute at 45 revolutions per minute. *Id.* at 1013. If a discotheque did the latter, it would probably not be an infringement of a record company's copyright in an album. The reasons is that no one would want to hear the record. *Id.* However, alot of people wanted to play the faster video games. *Id.*

[FN141]. *Id.* at 1010-11

[FN142]. Eight states currently have statutes giving some degree of protection to authors' moral rights: CAL. CIV. CODE § 987 (West 1988); LA. REV. STAT. ANN. §§ 51.2151-.2156 (West 1987); ME. REV. STAT. ANN. tit. 27, § 303 (1988); MASS. GEN. LAWS ANN. ch. 231, § 855 (West 1988); N.J. STAT. ANN. §§ 2A:24A-1 (West 1987); N.Y. ARTS & CULT. AFF. LAW §§ 14.51 -.59 (McKinney 1984); PA. STAT. ANN. tit 73. §§ 2101-2110 (Purdon Supp. 1988); R.I. GEN. LAWS §§ 5-62-2 (1987).

[FN143]. N.Y. ARTS & CULT. AFF. LAW art. 14-A (McKinney 1984).

[FN144]. *Id.* § 14.53.

[FN145]. *Id.*

[FN146]. 2 M. NIMMER, *supra* note 6, § 8.21[D], at 8-263.

[FN147]. *Id.*

[FN148]. *Id.*

[FN149]. N.Y. ARTS & CULT. AFF. LAW § 14.55(1) (McKinney 1984). *See* 2 M. NIMMER, *supra* note 6, § 8.21[D], at 8-263.

[FN150]. 2 M. NIMMER, *supra* note 6, § 8.21[D], at 8-263.

[FN151]. N.Y. ARTS & CULT. AFF. LAW § 14.57(1) (McKinney 1984).

[FN152]. *Id.*

[FN153]. *Id.* § 14.57(2).

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[FN154]. *Id.* § 14.57(3).

[FN155]. *Id.* § 14.57(4).

[FN156]. 2 M. NIMMER, *supra* note 6, § 8.21[D], at 8-264 (construing N.Y. ARTS & CULT. AFF. LAW § 14.51(4) (McKinney 1984)).

[FN157]. *See supra* text accompanying note 14.

[FN158]. "The Berne Convention like all other international standards-making bodies, whatever they may be, has as its function establishing minimum standards for member nations to follow. There is nothing that precludes a nation to go beyond those standards in moral rights or any other issue if they wish to do so." *Hearings, supra* note 30, at 180 (statement of Clayton Yeutter, United States Trade Representative).

[FN159]. "Congress and the President are the sole arbiters of the compatibility of U.S. law with Berne." *Hearings, supra* note 30, at 199 & 217 (statement of Irwin Karp, Chairman, Ad Hoc Working Group on United States Adherence to the Berne Convention 5 & 6 (July 23, 1987)).

> Any claim that United States law is incompatible with Berne would have to be decided by the World Court, and only could be made by another Berne country (Berne Art. 33(1)). Moreover, the United States could disavow the Court's jurisdiction on acceding to Berne. United States courts have no power to determine whether or not the amended Copyright Act is compatible with Berne. In any event, they do not have the power to correct any incompatibilities they might perceive, particularly since Berne is not a self-executing treaty.

Id. at 199-200.

[FN160]. The official conclusion that moral rights in the United States meets the minimum requirements of Art. 6*bis* of the Berne Convention was only arrived at after almost two years of investigation, hearings and heated debate in Congress and the copyright and artistic communities. *See supra* text accompanying notes 5 & 6.

[FN161]. *Hearings, supra* note 30, at 198-99 (statement of Irwin Karp, Chairman, Ad Hoc Working Group on U.S. Adherence to the Berne Convention).

[FN162]. *See supra* Part IV. MORAL RIGHTS PROTECTION IN THE UNITED STATES TODAY.

[FN163]. *Hearings, supra* note 30, at 210 (statement of Irwin Karp, Chairman, Ad Hoc Working Group on United States Adherence to the Berne Convention, which included the document "Summary of Conclusions of Ad Hoc Working Group on U.S. Adherence to the Berne Convention"). "The Ad Hoc Working Group was formed at the State Department's suggestion . . . to study the compatibility of the U.S. Copyright Act with the Berne Convention." *Id.* at 196.

[FN164]. Some of the industry groups that agree with the Ad Hoc Working Group's conclusion are the Motion Picture Association of America and the National Committee for the Berne Convention (composed of companies and individuals who create, publish, and otherwise disseminate works protected by the Copyright Act). *Hearing, supra* note 30, at 660 (statement of the National Committee for the Berne Convention 2 (July 2, 1987)).

[FN165]. *Id.* at 241 (statement of the Motion Picture Association of America 6 (Sep. 16, 1987)).

[FN166]. *Id.* at 213-14 (letter from Arpad Bogsch, Director General, World Intellectual Property Association

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(June 16, 1987) (stating that the association agrees with the conclusions of the Ad Hoc Working Group)).

[FN167]. *Id.* at 341 (statement of Coalition to Preserve the American Copyright Tradition 2). *Accord, Id.* at 387 (statement of John Mack Carter on Behalf of the Magazine Publishers Association (Sep. 16, 1987)).

[FN168]. *Hearings, supra* note 30, at 530 (statement of director Sydney Pollack).

[FN169]. *Id.* at 543 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law, Summary (Sep. 30, 1987)).

[FN170]. *Id.* at 65 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services (June 17, 1987)).

[FN171]. *Id.* at 97. The Preamble to the Berne Convention provides in pertinent part, "The countries of the Union, being equally animated by the desire to protect . . . the rights of authors in their literary and artistic works . . . ." WIPO GUIDE, *supra* note 53, at 7.

[FN172]. *See supra* text accompanying note 32-35.

[FN173]. *Hearings, supra* note 30, at 520 (statement of director Sydney Pollack).

[FN174]. It is popularly believed that an artist's desire to create is proportional to the money he might receive for his work.

> Copyright, for its part, constitutes an essential element in the development process. Experience has shown that the enrichment of the national cultural heritage depends directly on the level of protection afforded to literary and artistic works. The higher the level, the greater the encouragement for authors to create; the greater the number of a country's intellectual creations, the higher its renown . . . . [I]n the final analysis, encouragement of intellectual creation is one of the basic prerequisites of all social, economic and cultural development.

Preface to WIPO GUIDE, *supra* note 53.
[FN175]. *See supra* after title.

[FN176]. U.S. CONST. preamble.

[FN177]. *Hearings, supra* note 30, at 83 (statement of Ralph Oman 76 (June 17, 1987)). *Accord id.* at 345-56 (statement of Coalition to Preserve the American Copyright Tradition, citing Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 465 (1968) (the moral right "give[s] legal expression to the intimate bond which exists between a literary or artistic work and author's personality"); and DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artist's Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y U.S. AM. 1, 7-8 (1980) ("French scholars regard the *droit d'auteur* as a natural right, deeply rooted in the principles of the French Revolution from which modern French jurisprudence emerged")).

"The Berne Convention is based on the natural law theory of copyright as an author's property right." *Hearings, supra* note 30, at 106 (statement of L. Ray Patterson, Pope Brock Professor of Law, University of Georgia).

[FN178]. *Hearings, supra* note 30, at 106 (statement of L. Ray Patterson, Pope Brock Professor of Law, Uni-

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versity of Georgia (June 17, 1987)).

[FN179]. *Id.* at 427 (statement of Frank Pierson).

[FN180]. *Id.* at 346 (statement of Coalition to Preserve the American Copyright Tradition 7). *Cf. Id.* at 407 (statement of Sydney Pollack).

[FN181]. Under 17 U.S.C. § 302 (1982), Duration of Copyright, a work is generally protected from the time that the work is fixed in a tangible medimum, for a term consisting of the life of the author and 50 years after the author's death. This is consistent with the period of protection provided by the Berne Convention in article 7. *See supra* note 36.

[FN182]. R. Miller & H. Davis, INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS, AND COPYRIGHT IN A NUTSHELL at 278-79 (1984) [hereinafter NUTSHELL]. By the eighteenth century an important commercial distinction was made between an author's legal rights in an unpublished work, and a publisher's rights in that work after publication. American copyright law perpetuated this distinction by recognizing an author's common law rights prior to publication (basically, a right to prevent publication or disclosure in perpetuity). Upon publication, an author lost all common law rights and was limited to such statutory rights as existed. This distinction was abolished by the Copyright Act of 1976, which granted only statutory rights at the time of fixation of the work in a tangible form. *Id.*

[FN183]. cf. "Surely [the protection of economic rights] is not the whole intention of the Copyright clause. Surely the underlying foundation for that law, like most others in the Constitution, is in the spirit of the individual as well." *Hearings, supra* note 30, at 407-08 (statement of Syndney Pollack).

[FN184]. *See infra* note 207 and accompanying text.

[FN185]. *Hearings, supra* note 30, at 106 (statement of L. Ray Patterson, Pope Brock Professor of Law, University of Georgia (June 17, 1987)).

[FN186]. *Id.*

[FN187]. *Id.* at 103.

[FN188]. *See supra* note 174.

> For the serious artist and author economic incentive is not the issue. The serious artist and author and scientist - those whose creations are the most profound and valuable, that change history, enrich nations, start new businesses - those the Constitution most emphatically addressed - will work at their art or science regardless. [T]he economic benefit of copyright merely frees them to do what the Constitution says it wants them to do.

Hearings, supra note 30, at 426 (statement of Frank Pierson).
[FN189]. *Id.* at 523 (statement of Sydney Pollack).

[FN190]. *Id.* at 520.

[FN191]. House Subcommittee on Courts, Liberties, and the Administration of Justice.

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[FN192]. *Hearings, supra* note 30, at 2 (statement of Representative Kastenmeier).

[FN193]. *Id.* at 144 (statement of Donald J. Quigg, Assistant Secretary and Commissioner of Patents and Trademarks (July, 23, 1987)).

[FN194]. *Id.* at 97 (statement of Ralph Oman, Register of Copyrights).

[FN195]. Pub. L. No. 100-586 § 3(b), 102 Stat. 2853, 2853 (1988).

[FN196]. *Id.*

[FN197]. The relevant portion of H.R. 1623, which was introduced by Reps. Kastenmeier and Moorehead on March 16, 1987, read:

> Moral rights of the author
>
> Independently of the copyright in a work other than a work made for hire, and even after a transfer of copyright ownership, the author of the work or the author's successor in interest shall have right, during the life of the author and fifty years after the author's death -
>
> (1) to claim authorship of the work; and
>
> (2) to object to any distortion, mutilation, or other alteration of the work that would prejudice the author's honor or reputation
>
> The rights conferred by this section shall be referred to in this title as 'moral rights.'

H.R. 1623, 100th Cong., 1st Sess. § 7 (1987), *reprinted in Hearings, supra* note 30, at 938.

[FN198]. *Hearings, supra* note 30, at 423 (statement of the Directors Guild of America 12 (Sep. 30, 1987)). When Representative Robert W. Kastenmeier introduced H.R. 1623 in March 1987, the first in the recent series of bills proposing that the United States join the Berne Convention, it contained specific language that would have established the rights of paternity and integrity. The language essentially repeated the text of the first paragraph of Art. 6*bis* of the Berne Convention. *Id.* at 91 (statement of Representative Patricia Schrader [sic]). *See supra* note 197.

[FN199]. *See supra* text accompanying note 6.

[FN200]. The Berne Convention, by its genesis and wording, is meant to provide the highest protection to authors and their works. That other signatories to the Convention do not reach these standards does not excuse a member from complying with them.

[FN201]. *Hearings, supra* note 30, at 538 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law).

> If we join Berne our laws must be consistent with every reasonable Berne obligation - not because European states would criticize us or take us to the International Court of Justice - but because we, as a people respect our laws, and our own courts will be vigilant to enforce our treaty obligations. And yet, some of the strongest supporters of Berne adherence want the United States to shirk its obligations.

Hearings, supra note 30, at 83-84 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for

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Copyright Services (June 17, 1987)). "Either our law is compatible when we join Berne or we are in breach of our treaty obligations." *Id.* at 84.

[FN202]. Since the United States is a major producer of popular culture in the forms of phonorecords and computer programs, it stands to lose a great deal when copyrighted works are pirated. The Berne Convention has built up a high level of economic protection for author's works. *Hearings, supra* note 30, at 96.

[FN203]. *Hearings, supra* note 30, at 520-21 (statement of Sydney Pollack).

[FN204]. Berne Convention Art. 6*bis*(1).

[FN205]. *Hearings, supra* note 30, at 539 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law).

[FN206]. *Id.*

[FN207]. *Id.* at 106 (statement of L. Ray Patterson, Pope Brock Professor of Law, University of Georgia (June 17, 1987)). "If the United States is to adhere to Berne, it would be wise to amend the Title 17 to accommodate all three interests in a manner compatible with Berne and consistent with the copyright clause of the Constitution." *Id.* Professor Patterson sets out the interests involved in a schematic:

Entrepreneur	Copyright	Economic right	Property
Author	Moral Rights	Personal right	Reputation
Consumer	Fair Use	Political right	Access

Id.

[FN208]. *See supra* text accompanying note 14.

[FN209]. *Hearings, supra* note 30, at 543 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law).

[FN210]. *See supra* note 163.

[FN211]. 164 F.2d 522 (7th Cir. 1947) (Vargas produced distinctive drawings under contract for *Esquire* magazine; after a falling out between the artist and the publisher, *Esquire* continued to publish the drawings, but without Vargas' signature, calling the drawings "Esquire Girls").

[FN212]. *See supra* note 142.

[FN213]. *Hearings, supra* note 30, at 545 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law 2 (Sep. 30, 1987)).

[FN214]. Maryland House is a "highway rest stop" located on the John F. Kennedy Memorial Highway, Interstate 95, near Aberdeen, Maryland. It houses several restaurants and is open 24 hours a day, 365 days a year; approximate 3 million people pass through it each year. *Hearings, supra* note 30, at 447 (statement of William A.

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Smith).

[FN215]. *Hearings, supra* note 30, at 453 (statement of William A. Smith quoting art critic Alexander Eliot).

[FN216]. *Id.* at 455.

[FN217]. *Id.* at 457 (letter from Raymond M. Spiller and Associates, Inc., Fine Art Appraisers to Nina Ozlu, Artist Equity Assoc., Inc. (Aug. 24, 1987)).

[FN218]. *Id.* at 455 (statement of William A. Smith).

[FN219]. *Id.*

[FN220]. *Hearings, supra* note 30, at 457 (letter from Raymond M. Spiller and Associates, Inc., Fine Arts Appraisers to Nina Ozlu, Artists Equity Assoc., Inc. (Aug. 24, 1987)).

[FN221]. *Id.* at 458.

[FN222]. WIPO Guide, *supra* note 53, at 41, ¶ 6*bis*.3.

[FN223]. *Id.* at 42, ¶ 6*bis*.5.

[FN224]. *See generally* Diamond, *supra* note 9, at 256-59, and Rosen, *supra* note 15, at 161-68.

[FN225]. *Hearings, supra* note 30, at 69-70 (statement of Ralph Oman, Register of Copyrights).

[FN226]. Serra's contract specified that the work was to be permanently installed. *Hearings, supra* note 30, at 805-11 (letter from Richard Serra to House Judiciary Committee (Sep. 22, 1987)).

[FN227]. *Id. See* Serra v. United States General Services Admin., 667 F. Supp. 1042 (S.D.N.Y. 1987), *aff'd* 847 F.2d 1045 (2d Cir. 1988). “Titled Arc” was removed from Federal Plaza in March 1989 and sent to the Federal Motor Pool in Brooklyn where it will remain until its fate is decided. N.Y. Post, Mar. 17, 1989, at 13, col. 1.

[FN228]. 17 U.S.C. § 106(2) (1982).

[FN229]. *Id.* § 106(1) (1982).

[FN230]. 17 U.S.C. § 101 (1982) contains a comprehensive definition of “derivative works,” including translations, arrangements, dramatizations, fictionalizations, films, recordings, abridgments, condensations, or any other form in which a work may be recast, transformed, or adapted. NUTSHELL *supra* note 182, at 316.

[FN231]. *Hearings, supra* note 30, at 543 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law, Summary (Sep. 30, 1987)).

[FN232]. *Id.* at 546.

[FN233]. *Id.* (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law 3 (Sep. 30, 1987) (citing 2 M. NIMMER, *supra* note 6, § 8.21[C][2])).

[FN234]. 15 U.S.C. § 1125 (1982).

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[FN235]. *Hearings, supra* note 30, at 547 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law 4 (Sep. 30, 1987)).

[FN236]. *Id.* at 543.

[FN237]. *See supra* Part IV.B. *1. Libel*.

[FN238]. *Hearings, supra* note 30, at 547 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law 4 (Sep. 30, 1987)).

[FN239]. This language was drafted over one hundred years ago, by artists, not legal experts or politicians.

[FN240]. *Id.* at 265 (statement of Kenneth W. Dam, Vice President, IBM Corp. 19 (Sep. 16, 1987)).

[FN241]. 17 U.S.C. § 101 (1982).

[FN242]. Such legislative legerdemain does not fool everyone.

> This is a clever way of getting around the difficulty the Constitution poses for employers; the Constitution says flatly the founding fathers wished to secure to artists and inventors the rights to their creations. By simply saying 'but - if the artist is paid, the employer is the artist,' does not make it so; or do they believe the Pope painted the Sistine Chapel ceiling and Wagner's operas were composed by Mad King Ludwig of Bavaria?

Hearings, supra note 30, at 426 (statement of Frank Pierson).
[FN243]. *Id.*

[FN244]. *Hearings, supra* note 30, at 266 (statement of Kenneth W. Dam, Vice President, IBM Corp. 19 (Sep. 16, 1987)).

[FN245]. *Id.*

[FN246]. *Id.*

[FN247]. *See supra* note 163.

[FN248]. *Hearings, supra* note 30, at 219 (statement of Irwin Karp, Chairman, Ad Hoc Working Group on United States Adherence to the Berne Convention).

[FN249]. *Hearings, supra* note 30, at 219.

Given the lack of uniformity of moral rights protection among other Berne nations, the absence of moral rights provisions in the copyright laws of some Berne nations, and the reservation of control over remedies to each country, the moral rights type of protection afforded by the United States' statutory and common law meets the level of protection required by the Berne Convention.

Id. at 84 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services (June 17, 1987) (citing the Ad Hoc Working Group on U.S. Adherence to the Berne Convention's final report)).
[FN250]. Ad Hoc Working Group Final Report, ch. V., Part E3 (*cited in* Damich, *Moral Rights in the United States and Art. 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. J.L. & ARTS 655 (1986)).

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[FN251]. *Hearings, supra* note 30, at 286 (statement of Peter F. Noaln, Counsel of the Walt Disney Co.).

[FN252]. *Id.* at 219 (statement of Irwin Karp, Chairman, Ad Hoc Working Group on U.S. Adherence to the Berne Convention).

[FN253]. *Id.* at 270 (statement of Kenneth W. Dam, Vice President, IBM Corp. (Sep. 16, 1987)). This fear is as speculative as the notion that adherence will increase moral rights. *Id.*

[FN254]. *See supra* notes 159-60 and accompanying text.

[FN255]. “As a matter of policy, the Dept. of State takes the position that intellectual property treaties should not be self-executing.” *Hearings, supra* note 30, at 169-71 (statement of Allen Wallis, Under Secretary for Economic Affairs). The implementing legislation, the Berne Convention Implementation Act of 1988, does in fact make some changes in United States copyright law in the areas of notice, registration, and recordation.

[FN256]. *See supra* text accompanying note 7.

[FN257]. Pub. L. No. 100-568 § 4(c), 102 Stat. 2853, 2855 (1988).

[FN258]. *Hearings, supra* note 30, at 182 (statement of Malcolm Baldrige, Secretary of Commerce).

[FN259]. *Id.* at 267 (statement of Kenneth W. Dam, Vice President, IBM Corp. 20 (Sep. 16, 1987)).

[FN260]. Pub. L. No. 100-568, 102 Stat. 2853 (1988).

[FN261]. Universal Copyright Convention as revised at Paris on July 24, 1971, art. 5, 25 U.S.T. 1341, T.I.A.S. No. 7868.

[FN262]. *Hearings, supra* note 30, at 82 (statement of Ralph Oman, Register of Copyright and Assistant Librarian for Copyright Services).

[FN263]. *Id.* at 377 (statement of CPACT).

[FN264]. *Id.*

[FN265]. *Id.* The CPACT list of negative effects that would inevitably occur once moral rights invaded the United States goes on.

> The moral right also would: raise serious questions of author identification in collaborative works such as magazines, textbooks and broadcasts; permit second-guessing of split second editorial decisions that are necessary to time sensitive publications or productions; cloud the status of adaptations and revisions; intrude on content judgments if creators objected to the context in which their work is placed; interfere with the editing of films for television; and apply retroactively to existing works, thereby jeopardizing settled expectations and investments.

Id.

[FN266]. *Hearings, supra* note 30, at 83-84 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services).

[FN267]. *Id.* at 270 (statement of Kenneth W. Dam, Vice President, IBM Corp.) Senator Kennedy has intro-

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duced S. 1198 (June 16, 1989) to amend Title 17, U.S.C., and provide certain rights of attribution and integrity to authors of works of visual art. This bill addresses a narrow and specific problem - the mutilation and destruction of works of fine art which are often one of a kind and irreplacible (statement of Edward M. Kennedy).

[FN268]. *Hearings, supra* note 30, at 270 (statement of Kenneth W. Dam, Vice President, IBM Corp.). *See supra* text accompanying note 244.

[FN269]. 17 U.S.C. § 301 (1982).

[FN270]. Compare this line of reasoning to the following:

> But one of the features of the copyright law actually provides some basis for the assurance of moral rights protection in this country. And that is the right, exclusive right of the copyright owner to authorize the preparation of derivative works, and that right is one which gives the author the ability to safeguard himself against uses of the work that he does not want.
>
> *Hearings, supra* note 30, at 193 (statement of Mike Keplinger). Irwin Karp, Chairman of the Ad Hoc Working Group, stated, [I]f someone prepares a mutilated version of an author's work, that is a derivative work. And if one did not have authority to do that, that is infringement, and the author can sue for infringement. So that if a publisher got a license to publish a manuscript and then published a mutilated version without the author's permission, the author could sue him for infringement . . . . It would be a moral right we were protecting even though the label for the remedy was libel, infringement, etc.

Id. at 223. Keplinger's and Karp's statements are accurate only if they are using the terms “copyright owner” and “author” to refer to the same person, that is, an author who has retained the copyright in his work. Once the author parts with the copyright in a work, she can no longer safeguard against uses of the work that offend her, a fact to which some directors of black and white films will testify. Senator Leahy has a similar misunderstanding of the issue. He noted that:

> the Copyright Act by granting the right to prepare derivative works ‘protects authors against any unauthorized distortion, mutilation, or modification regardless of its effect on the author's honor or reputation. Furthermore, other Federal and State statutes, and the common law of torts, including defamation, protect the interests implicated by moral rights.’

Id. at 206 (citing 133 CONG. REC. S7370 (daily ed. May 29, 1987)).

[FN271]. The “minimalist approach” to joining Berne was to change United States law as little as possible in order to conform to Berne minimums. A danger in the minimalist approach is that concepts, definitions, and interpretations of United States laws would be stretched beyond recognition to fit the contours of Berne.

[FN272]. *Hearings, supra* note 30, at 398 (statement of David Ladd).

[FN273]. *Id.* at 83 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services 76 (June 17, 1987)).

[FN274]. *Id.* at 91-92 (statement of Representative Patricia Schroeder, noting that H.R. 1623, which used language similar to Art. 6*bis* took the approach that moral rights are freely alienable, but that other Berne countries maintain that moral rights are inalienable).

[FN275]. *See supra* text accompanying notes 6 & 191-94.

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[FN276]. *See supra* text accompanying notes 157-66.

[FN277]. 2 M. NIMMER, *supra* note 6, § 8.21[B].

[FN278]. *See supra* text accompanying note 196.

[FN279]. *See supra* after title.

[FN280]. *See supra* Part VI. THE FUTURE OF MORAL RIGHTS IN THE UNITED STATES.
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