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DROIT D'AUTEUR VERSUS THE ECONOMICS OF COPYRIGHT: IMPLICATIONS FOR AMERICAN LAW OF ACCESSION TO THE BERNE CONVENTION*

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INTRODUCTION

The Berne Convention, the premier international copyright treaty, was first signed in 1886.1 The impetus for the treaty came from

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European, and especially French authors, who saw pirated versions of their works appear again and again in foreign countries without the author's permission and without compensation for the author. Article 1 of the treaty, retained in all subsequent versions, explicitly states, "The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works." Ten nations signed the treaty in 1886 at Berne. The members of the Berne Union have revised or amended the Convention seven times, most recently at Paris in 1971. Eighty-five nations have ratified or acceded to some version or versions of the treaty.

With each revision, the Berne Union has increased the level of protection for authors required of member states. With few exceptions, the treaty requires that member nations grant the same rights to authors of other member nations as they do to their own nationals. Thus, membership in the Berne Union provides a nation's authors and artists with great protection in other member countries.

For many years the United States resisted pressure to join the Berne Union, mostly because copyright protection in this country fell below the minimum level required in the Berne Convention in several key respects. First, the Berne Convention does not allow member nations to make copyright protection contingent upon any formality. This provision of the treaty created perhaps the greatest obstacle to the United States' adherence to the Berne Convention: Congressional reluctance to give up the mandatory registration and notice provisions


3. See Paris Revision of 1971, supra note 1, art. 1.

4. 2 PAUL GOLDSTEIN, COPYRIGHT § 16.7 (1989). The ten countries were Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland, and Tunisia. Bogsch, supra note 2, at 19.

5. GOLDSTEIN, supra note 4, § 16.7; see also Bogsch, supra note 2, at 19-25.

6. See 4 NIMMER, supra note 1, app. 22 (providing a list of all member countries and the status of their ratification).

7. GOLDSTEIN, supra note 4, § 16.7.

8. Id.

that had been a salient feature of American copyright law since 1909. In addition, many argued that American copyright law did not adequately protect the applied arts, as the Berne Convention also requires. Finally, experts on copyright law disagreed as to whether American law protected authors' moral rights in their works, which the Berne Convention explicitly requires.

Moral rights pertain to an author's right to claim and control his or her own work, rather than any right to be compensated. Article 6bis of the Berne Convention describes the rights protected as, "the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." The treaty requires that these rights be unalienable from the author, regardless of whether he or she retains ownership of the work in question. This is in contrast to economic rights, which adhere in the work, not the author, and which pass to the owner upon transfer.

Several revisions of the Berne Convention have increased the minimum protection of moral rights required of member nations, although thus far the choice of means for ensuring this protection has been left to the individual member nations.

The concept of unalienable, noneconomic rights in artistic works is foreign to American copyright law, and indeed to Anglo-American property law in general. In 1976, when Congress revised the American copyright statute for the first time in nearly seventy years, there were three schools of thought about American copyright law and the minimum protection of moral rights required under the Berne Convention. Some argued that changes in American law were necessary in order to conform to the Berne Convention, and desirable. Others argued that such change was necessary to comply with the Berne Con-

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10. See infra notes 163-66 and accompanying text.
11. Id.
12. Paris Revision of 1971, supra note 1, art. 6bis. For a discussion of the controversy over whether U.S. protection of moral rights is adequate to meet the Berne Convention minimum requirements, see infra notes 182-220 and accompanying text.
14. Id.
15. Id.
16. Id.
17. Id. para. 3.
18. See infra notes 169-75 and accompanying text.
vention, but undesirable, and that the United States should not adhere to the Berne Convention. 19 A third group argued that no change in American protection for moral rights was necessary in order to adhere to the Berne Convention. 20 In the end, Congress chose not to revise the copyright law to comply with the Berne Convention.

By 1987, however, the advantages of membership in the Berne Union had become too extensive to ignore, and Congress decided to accede to the Berne Convention. 21 In the Berne Convention Implementation Act of 1988 ("BCIA"), 22 Congress altered the copyright statutes in several respects. First, Congress did away with the mandatory notice and registration systems, making both procedures optional. 23 In addition, Congress clarified the extent to which American copyright law protected applied art. 24 After a debate similar to that which ensued in 1976, Congress chose not to amend American copyright law in order to provide greater protection for authors' moral rights. 25 The BCIA also explicitly stated that the Berne Convention was not self-executing in the United States, and that rights provided under federal or state law "shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto." 26 Thus, although many legal experts argued that change in American copyright law's treatment of moral rights was both desirable in and of itself and necessary for accession to the Berne Union, 27 the United States joined the Berne Union without providing any increased protection of moral rights.

This Article will contrast the treatment of authors' moral rights in the United States with the approaches taken in France and by the Berne Convention. Protection of moral rights is clearly controversial.

19. See infra notes 169-75 and accompanying text.
20. See infra notes 169-75 and accompanying text.
25. Id. sec. 3(b)(2) (codified at 17 U.S.C. § 101 (Historical and Revision Notes) (1988)).
26. Id. sec. 4(3) (codified at 17 U.S.C. § 104(c) (1988)).
27. See, e.g., Oman, supra note 21, at 71.
in the United States, yet such protection is a central feature of copyright law on the European continent, especially in France. This essential difference may become increasingly problematic for the United States as the Berne Convention moves toward uniformity of protection in its member countries, and toward greater protection for moral rights. This Article will focus in particular on the social and historical sources of this difference between American and French law. Section I will describe the development of copyright law in France, with its dual systems of economic and moral rights. Section II will briefly trace the history of the Berne Convention, focusing primarily on the Convention's growing concern with moral rights. Section III will discuss the history of Anglo-American copyright law, with its dual concerns of remuneration for authors and public access to works. Section IV will discuss the sections of current American copyright law that afford some protection for moral rights. Section IV will also briefly discuss the Visual Artists Rights Act of 1990, recently passed by Congress, and argue that recognition of a rationale for noneconomic rights in artistic works represents a significant change in American law, which may be incompatible with existing copyright law. The Article concludes that, given trends in the Berne Convention, the United States must move toward a different approach to copyright, with increased emphasis on the rights of authors.

I. FRENCH COPYRIGHT LAW

French law recognizes two categories of rights in artistic works: pecuniary rights (droits patrimoniaux) and moral rights (droit moral). Other nations on the European continent recognize moral rights as well. Recognition of moral rights is a relatively recent phenomenon in French law, but this approach has led to a copyright system that is much more protective of authors than is the Anglo-American system.

Prior to the French Revolution, copyright law in France was concerned primarily with pecuniary rights. From the advent of the printing press, only the sovereign could grant any rights in artistic works,
and most often granted only an exclusive license to print a given work for a limited time. 32 This system continued until the early eighteenth century. The printing companies profited from their monopoly licenses, and the sovereign was able to exercise effective censorship by granting licenses to print only works of which it approved. 33

From the early eighteenth century on, French legal scholars debated the existence of an author’s perpetual right to some interest in his or her work. 34 Modern scholars disagree about the original source of this concern, 35 but it did lead to an amendment to the licensing statute. 36 In 1777, French law recognized an author’s “privilege” to publish and receive the price of his or her work as distinct from a printer’s right to recover his or her costs. 37

On August 4, 1789, soon after the French Revolution, the Constituent Assembly abolished both authors’ and printers’ privileges. 38 While the Assembly wanted to avoid establishing any system similar to that of the ancien régime, it did recognize the importance of protecting artistic endeavors. 39 The Constituent Assembly passed two decrees concerning authors’ rights. The first, in 1791, established guidelines for relations between authors and theaters. 40 In a statement urging support for this decree, one member of the Constituent Assembly argued, “The most sacred, the most unassailable, and . . . the most personal of all properties is the work which is the fruit of a writer’s mind; however, it is property of an entirely different nature.” 41 The second decree, passed in 1793, provided authors with a right of reproduction. 42 With a few minor modifications, these two decrees were the basis of French copyright law until the codification of that law in 1957. 43

Thus, the statutory origins of French copyright law were not concerned with moral rights. While some pre-revolutionary French legal

32. DaSilva, supra note 13, at 8.
34. DaSilva, supra note 13, at 8-9.
35. See Chesnais, supra note 31, at 326-27 (arguing that the advocacy of authors’ rights came from provincial publishers, who were disadvantaged by the privilege system vis-à-vis Parisian publishers). But see DaSilva, supra note 13, at 8-9 (arguing that these discussions of authors’ rights stemmed from early natural law thought).
37. Id.
38. Id.
39. Id.
40. Id.
41. Id. (citing Moniteur Universel of 15 January 1791 (statement of Le Chapelier)).
42. Id. at 327.
43. Id. See also DaSilva, supra note 13, at 11.
scholars may have advocated a form of moral rights, the ancien régime's licensing scheme was not substantially different in form or purpose from the system in force in England at this time.\textsuperscript{44} Moreover, even after the French Revolution, the two decrees upon which copyright was based explicitly granted only pecuniary rights. Statutory authority was not the source of the droit moral doctrine.

Instead, protection of moral rights developed in French judicial decisions.\textsuperscript{45} These decisions, in turn, were informed by a lengthy scholarly debate about the nature of moral rights. Modern scholars divide this debate into three periods: 1793-1878, 1878-1902, and 1902-1957.\textsuperscript{46} During each phase, scholarly notions of the origins and nature of moral rights influenced French judicial decisions, leading to the gradual recognition of these rights.

During the first period, scholars debated whether the droit moral was a temporary property right or a part of a perpetual right of personality.\textsuperscript{47} Under the influence of early writings of Karl Marx, the personality approach eventually became dominant.\textsuperscript{48} By 1880, acceptance of these ideas led the French courts to recognize the rights of divulgation, paternity, and respect for works created under the guise of the personality approach.\textsuperscript{49}

During the second period, the personality approach completely eclipsed the property approach, and scholars began to focus more narrowly on the scope of the moral right.\textsuperscript{50} One school of thought held that the rights in any artistic work were a single, inseparable whole, and that all such rights were ultimately derived from the act of creating a work.\textsuperscript{51} The other approach viewed authors’ rights as falling into two separate categories: personal (moral) and pecuniary.\textsuperscript{52}

During the third period, the dual approach prevailed. This is the

\textsuperscript{44.} See infra notes 129-47 and accompanying text for a discussion of early English copyright law.
\textsuperscript{45.} DaSilva, supra note 13, at 9.
\textsuperscript{46.} Id.; Rosen, supra note 13, at 157.
\textsuperscript{47.} The French legal and philosophical scholar Gastambide viewed the moral right as a property right, while the philosopher Renouard viewed it as deriving from the right of personality. DaSilva, supra note 13, at 9-10.
\textsuperscript{48.} Id. at 10.
\textsuperscript{49.} Id.
\textsuperscript{50.} Id.
\textsuperscript{51.} Id. at 10-11. Underlying this notion was a respect for artists and the creative process. The emphasis on the rights of the author, as opposed to the betterment of society, as the primary justification for copyright protection at least partly explains the major differences between the French and Anglo-American approaches.
\textsuperscript{52.} Id. at 10.
current view of authors' rights in France. This view of the author's moral right as personal and distinct from his or her pecuniary rights has been very important in shaping modern French judicially created copyright law. In 1957, the French parliament passed a copyright act ("1957 Law") that remains in force today. This law codified the approach to moral rights that had developed via judicial decisions since the French Revolution. The modern French system provides extensive protection of an author's moral rights.

Because French law views moral rights as personal, these rights adhere in the author, not the work, and cannot be transferred or waived. An author must meet two conditions in order to claim his or her moral rights under French law: the claimant of such moral rights must be a natural person who is, in fact, the author of the work. Thus, the actual author retains the moral rights even in the case of a work for hire. This approach mirrors that taken in judicial decisions prior to the 1957 codification. While the various moral rights (discussed individually below) are protected to different degrees, the 1957 Law affords at least some protection to each of them.

The right to release a work (droit de divulgation) gives an author complete control over his or her work until the author chooses to disclose it. French courts have interpreted this right quite literally. In one case, an artist who had all but finished 800 paintings, and had delivered them to a dealer and received payment, was nevertheless able to rescind the contract and recover the paintings from the dealer's heirs upon repayment of his fee. The author must exercise this right

53. Id. at 11.
55. Chenais, supra note 31, at 333-36; DaSilva, supra note 13, at 11-16.
56. DaSilva, supra note 13, at 12.
57. Id. The natural person requirement had presented difficulties in cases of collective or collaborative works, especially cinematographic works. The 1957 Law created special rules for moral rights in cinematographic works, limiting the authors of such works to those who "realize the intellectual creation of the work," . . . the author of the script, the author of the adaptation, the author of the dialogue, the composer of the music, and the director." Id. at 13-14.
58. Id.
59. Id.
60. Id. at 19.
in good faith, and cannot refuse to release the work merely as a ploy to receive an increased fee. This right is personal and, therefore, belongs to the author even if he or she has transferred all of the pecuniary rights in a work. This right is also discretionary: neither a creditor nor a spouse can release any work over the objections of a living author. Finally, the droit de divulgation is exclusive, which means that any work transferred by an author can be exploited only to the extent the author's grant specifically authorizes the exploitation. Any contract will be interpreted in the author's favor; any method of disclosure not explicitly mentioned in the contract is forbidden. The right is perpetual and passes to the author's heirs. Yet, concern that heirs may abuse the droit de divulgation has led French courts to hold that an heir can only exercise the right to "effectuat[e] the wishes of the deceased and not to serve his own interests." The 1957 Law gives courts wide latitude in cases of abuse of the droit de divulgation by the heir.

Thus, the right to release the work provides an author with substantial control over the treatment of his or her work, even after the work has been transferred. However, the right makes the most sense in the context of a work created by a single author. An exception for cinematographic works indicates how cumbersome the droit de divulgation can become in connection with a joint work.

Even after an author has released a work to the public, he or she retains the right to withdraw or modify the work (droit de retrait ou de

Raymond Sarraute, Current Theory on the Moral Right of Authors and Artists Under French Law, 16 A.M. J. Comp. L. 465, 469-70 (1968)). While an American court would be unlikely to order specific performance if an artist refused to create a work, it is equally unlikely that rescission would be allowed at so late a stage. See DaSilva, supra note 13, at 18.

63. DaSilva, supra note 13, at 20.
64. Id. at 20-21. The 1957 Law clarified the point that the author retains the droit de divulgation upon marriage despite the fact that all works produced during a marriage are community property under French matrimonial and divorce law. See id. (citing ALAIN LE TARNEC, MANUEL DE LA PROPRIETE LITTERAIRE ET ARTISTIQUE 28-29 (1966)).
65. DaSilva, supra note 13, at 21.
66. Id.
67. Id. at 14.
68. Id. at 15 (citing Raymond Sarraute, Current Theory on the Moral Right of Authors and Artists Under French Law, 16 A.M. J. COMP. L. 465, 465 (1968)).
69. The 1957 Law provides, "In a case of manifest abuse of the right to exercise or not to exercise the droit de divulgation on the part of the deceased author's representatives, as provided for in the preceding article, the civil court may order any appropriate measure." 1957 Law, supra note 54, art. 20, ¶ 1, quoted in DaSilva, supra note 13, at 15 n.106.
70. DaSilva, supra note 13, at 22.
Because there is less support in the pre-1957 judicial decisions for the existence of the *droit de retrait ou de repentir*, its scope is less clear than that of the *droit de divulgation*. Perhaps this reflects logistical difficulties; particularly with works in multiple copies, once release or publication has occurred, withdrawing a work may be physically impossible, regardless of any ostensible right an author may have to withdraw it. Still, this right is codified in the 1957 Law, although it is subject to more limitations than any other moral right. The *droit de retrait ou de repentir* is limited by a requirement of advance indemnification of the transferee and by a requirement that the prior transferee be offered right of first refusal if the artist chooses to re-release a modified work. Finally, most courts have held that this right does not survive the author, on the theory that exercise of this right requires the author's volition.

The third moral right, the right of authorship or *droit à la paternité*, really provides the author with three rights: the right to be recognized as the author of a work, or to remain anonymous; the right not to have his or her work attributed to another; and the right not to have his or her name used in connection with a work created by another. The right of recognition applies to one-of-a-kind works, all copies of a work, any publicity materials produced in connection with a work, any quotation, and all collaborators involved in a collective work. The right of proper attribution also applies to a wide variety of works. Finally, the right to prevent wrongful attribution applies in two distinct types of cases. The author can prevent use of his or her name in connection with a mutilated version of his or her work, or in

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71. *Id.* at 23.
72. The law states:
   Notwithstanding the transfer of his right of exploitation, the author, even subsequent to the publication of his work, enjoys a right of modification or withdrawal vis-à-vis the transferee. Nonetheless, he may not exercise the right unless he agrees to indemnify the transferee in advance for any prejudice which such modification or withdrawal may cause him.
74. *Id.* at 23-24.
75. *Id.* at 26; Roeder, *supra* note 13, at 561-65.
77. DaSilva, *supra* note 13, at 27.
connection with the advertising of any product or cause. The droit à la paternité is perpetual, and cannot be waived. Because much of what the droit à la paternité protects is covered under personality and publicity tort law in common law systems, this right is less controversial than most of the other moral rights.

Many consider the last category of moral rights, the right of integrity or droit au respect de l'oeuvre, the most important of all moral rights. This right gives the author control over the disposition of his or her work even after sale or transfer, allowing the author to prevent alteration, distortion, or mutilation of the work. Because the droit au respect de l'oeuvre allows the author to prevent the owner of a work from using or disposing of it in certain ways, this right leads to the greatest conflict between the author's rights and property interests. The Bernard Buffet case provides an illustration of this conflict. Buffet had painted designs on all sides of a refrigerator. The owner of the refrigerator wanted to sell each panel of the appliance as a separate work. Buffet brought suit to enjoin the owner's action, arguing that the refrigerator was a single, indivisible work. The court found for Buffet, based on his right of integrity. French courts have also allowed authors or their heirs to assert rights of integrity in cases of reputational harm, even when the works in question have passed into the public domain. Thus, the right of integrity appears to have broad application. This right, too, is perpetual.

Some difficulties have arisen in application of the droit au respect in certain circumstances. It is not clear whether the right of integrity

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78. Id. at 27-28. Some authors have argued that this third category of paternity rights is not a species of copyright, but is rather a right of personality, unconnected with art or copyright. Id. at 29 (citing GERARD GAVIN, LE DROIT MORAL DE L'AUTEUR DANS LA JURISPRUDENCE ET LA LÉGISLATION FRANÇAISES 55 (1960); William Strauss, The Moral Right of the Author, 4 AM. J. COMP. L. 506, 508 n.5 (1955)).
79. DaSilva, supra note 13, at 4; Roeder, supra note 13, at 564.
80. DaSilva, supra note 13, at 16.
81. See, e.g., id. at 31 (citing Raymond Sarraute, Current Theory on the Moral Right of Authors and Artists Under French Law, 16 AM. J. COMP. L. 465, 480 (1968)).
82. Id. at 31; Roeder, supra note 13, at 568-70.
84. DaSilva, supra note 13, at 32. In one case, the court allowed the granddaughter of Henri Rousseau to enjoin the use of her grandfather's paintings as window displays in a Paris department store. The court found that such use violated Rousseau's moral rights by damaging his reputation as an artist. Judgment of Mar. 13, 1973 (Bernard-Rousseau c. Société des Galeries Lafayette), Trib. gr. inst. 3e, Paris, Le Semaine Juridique [J.C.P.] No. 224, discussed in DaSilva, supra note 13, at 32.
85. DaSilva, supra note 13, at 14.
allows an author to prevent a transferee from completely destroying a work. Some courts have held that the right of integrity does not give an artist the right to prevent destruction of a work, since such destruction does not lead the public to believe that the artist is the author of a work not his or her own. Other courts have reached the opposite conclusion and have held that a transferee has no right to completely destroy a work.

Another especially troubling problem is the application of the droit au respect in the context of derivative works. Since some changes are inevitable when adapting a work from one medium to another, courts have had difficulty determining where the adapter's rights end and actionable distortion or mutilation begins. If the author of the original work authorizes the adaptation of the work by contract, with no explicit restrictions, French courts will uphold the contract, but impose on the adapter a duty to act in good faith so as not to distort the "spirit of the original work." In cases of adaptation without an unlimited authorization from the original author, French courts have applied a general rule: the original author must accept all changes that the transfer in medium requires, and the adapter must transfer the spirit and substance of the work. Finally, if the contract of adaptation requires that the original author approve all changes, courts have held that the author cannot "unreasonably withhold his consent."

Overall, the French system of moral rights, which has influenced the development of article 6bis of the Berne Convention, is highly protective of authors. Because moral rights are personal, the artist retains a significant interest in and control over his or her work even after transfer. The rights are perpetual and thereby operate to prevent a work from ever passing completely into the public domain. No work is ever completely available for all uses the public sees fit. Finally, the nature of the moral rights, particularly the droit au respect, alters the nature of ownership of a work of art. Such ownership is incomplete by definition and, therefore, is unlike ownership of any other property. This partial retention of rights by the artist, and especially by his or her heirs, is antithetical to Anglo-American property law, with its emphasis on transfer and alienability, and is not a part of American copy-
right tradition. Yet, by joining the Berne Convention, the United States has joined an international community that does recognize moral rights as necessary and desirable. In fact, the Berne Convention has come to reflect the French view of moral rights.

II. THE BERNE CONVENTION

The original text of the Berne Convention, signed at Berne, Switzerland in 1886, was primarily the result of efforts by and on behalf of authors and artists. The treaty followed nearly thirty years of meetings about authors' rights sponsored by various nations and groups. While even this first version was extremely protective of authors' rights, the nations that most favored authors (the droit d'auteur countries), such as France, made some concessions in order to reach agreement with some of the other nations, most notably Great Britain. For example, while both Germany and France favored a treaty that required a uniform set of copyright principles to be enacted in all member states, they settled for a requirement of national treatment. National treatment means that a nation will grant all the rights available under its domestic law to works by authors who are nationals of other Berne Union countries. This approach allowed nations to sign or accede to the treaty without requiring automatic changes in domestic law.

There were some disagreements about the subject matter of copyright and the scope of the right of reproduction as well. The tension between the droit d'auteur countries and Great Britain was to continue throughout the development of the treaty. Still, the initial treaty did contain some substantive provisions. First, in Article 1, the drafters explicitly stated that the Berne Union had been formed to protect

91. For a concise discussion of the history of the Berne Convention, see Burger, supra note 21, at 8-50. For an extensive discussion of the development of the treaty, see STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY (1938).

92. For a complete description of the international conferences that led up to the Berne Convention, see Burger, supra note 21, at 11-16.

93. Id. at 12-14.

94. Id.

95. Id. at 9-10.

96. Id. at 12-13.

97. The French delegation advocated extending protection to photographic works. This proposal failed. Id. at 13. In addition, a proposal allowing reproduction of certain works in instructional materials without the author's consent passed over French objections. Id. at 13-14. The French opposed even this limitation on the author's right to control his or her work. Id.
the rights of authors, as opposed to copyright owners generally.98 Second, as discussed above, the treaty espoused the national treatment principle.99 Third, the treaty required no formalities, but allowed member countries to set up their own systems of prerequisite formalities if they so chose.100 Fourth, the treaty set no minimum term of protection, and, in an exception to national treatment, the term of protection in the work's country of origin set the term of protection in all Union countries.101 Fifth, the section describing points of attachment set out the rules for a work to receive protection under the treaty.102 Sixth, the drafters provided an extensive, but not exclusive, list of the types of works protected under the Convention.103 Finally, the treaty required member nations to grant the exclusive right of translation to authors for a ten year term.104 The other rights were left to national treatment.105 Thus, the initial version of the Berne Convention did not provide a long list of exclusive rights. It did lay the groundwork for the increased protection provided by the revisions that followed.

Over the next thirty years, the members of the Berne Union revised the Convention several times.106 With each revision, the Union increased protection for authors, increased the minimum protection required of member nations, and moved toward uniformity of protection among the member nations.107 During this period, the delegations from France and the other droit d'auteur nations continued to press for some recognition of moral rights in the Berne Convention.108

98. Id. at 16 (citing EDWARD W. PLOMAN & L. CLARK HAMILTON, COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 49 (1980)).
99. Id. at 16.
100. Id. at 17.
101. Id.
102. Id. A complete discussion of points of attachment is beyond the scope of this Article. This section of the treaty discussed the way nationality was assigned to a certain work. For example, an author who was not a national of a country belonging to the Berne Union could receive protection under the treaty if he or she first published the work in question in a nation belonging to the Berne Union. Id.
103. Id. at 18. The original version of the Berne Convention applied to "books, pamphlets, and all other writings; dramatic or dramatico-musical works, musical compositions with or without words; works of design, painting, sculpture, and engraving; lithographs, illustrations, maps; plans, sketches, and three-dimensional works relative to geography, topography, architecture, or science in general." Id. (quoting Berne Convention of 1886, supra note 1, art. 4).
104. Burger, supra note 21, at 18. The translation right was the only exclusive right provided by the first version of the treaty. Id.
105. Id. at 19.
106. See supra notes 1, 5.
107. See supra note 1. For a complete discussion of the important aspects of the early revisions of the Berne Convention, see Burger, supra note 21.
108. See Burger, supra note 21.
The Berne Union explicitly addressed the issue of moral rights for the first time at the revision conference held at Rome in 1928. By this time, there were thirty-six nations in the Berne Union, making the amendment process much more difficult. The Rome Revision of 1928 added two new exclusive rights. First, the Convention now required protection of the broadcast right, defined as “the exclusive right of authorizing the communication of [authors’] works to the public by radio-communication.” Second, the Rome Revision of 1928 recognized the author’s moral right (droit moral) for the first time. The moral right as phrased in the Rome Revision of 1928 had two elements: “the right to claim authorship of the work,” and “the right to object to any distortion, mutilation, or other modification of the said work which would be prejudicial to [the author’s] honour or reputation.” The moral right endured only during the author’s lifetime, and the method of protection of the right was a matter for each member nation’s domestic legislation. The moral right introduced in the Rome Revision of 1928 was quite limited. Over the course of the next several revisions and amendments of the Berne Convention, however, this right grew in scope and importance.

The Brussels Revision of 1948 increased Convention protection of authors’ rights considerably. With respect to the author’s moral right, the revision made two important changes. First, it required that

109. Id. at 27 (citing Stephen P. Ladas, The International Protection of Literary and Artistic Property 97 (1938)). In part for this reason, the Italian delegation’s proposal to make the life plus 50 year term mandatory failed; the term of protection remained a matter of national treatment. The delegates did add oral works, with an exclusion allowed for political works, to the list of works protected. Id. (citing Ladas, supra, at 96).

110. Id. at 28 (quoting Rome Revision of 1928, supra note 1, art. 11bis, para. 1). This right was subject to domestic limitations, such as compulsory licensing schemes. Rome Revision of 1928, supra note 1, para. 2.

111. Rome Revision of 1928, supra note 1, art. 6bis.

112. Id. para. 1.

113. Id.

114. Id. See also Stewart, supra note 31, at 94-95.

115. First, the life plus 50 year term of protection became mandatory. Brussels Revision of 1948, supra note 1, art. 7 paras. 1, 2. Second, works of applied art were added to the list of protected works. Id. art. 2, paras. 1, 2. Third, the revision increased the scope of several of the exclusive rights: the broadcasting right, the right of adaptation, the recording right, the cinematographic right, and the moral right. Id. arts. 6bis, 11bis & 12-14. Fourth, the Brussels Revision added the exclusive rights of public performance. Id. art. 11. Finally, this revision added the droit de suite. Id. art. 14. This right gives the author of a work “an interest in any sale of the work subsequent to the first disposal of the work by the author.” Id. The droit de suite was a matter for national treatment, and subject to reciprocity, rather than a required minimum. Id. art. 14. For a summary of the Brussels Revision of 1948, see Stewart, supra note 31, at 95-101; Burger, supra note 21, at 29-38.
member nations recognize the moral right throughout the entire copyright term (life of the author plus fifty years), if domestic legislation so allowed.116 Because this provision did not compel member nations to change their domestic law to provide a full term of moral rights, it did not in fact increase the minimum protection of moral rights. Still, it did signal a desire on the part of most countries in the Berne Union to extend the duration of the moral right.117 Second, the revision for the first time incorporated the droit de suite, which may also reflect the growing influence of the droit moral approach.118 The most recent revision bears out this interpretation.

The Berne Union held another revision conference at Stockholm in 1967. This conference produced two documents: a general revision of the Convention and an additional protocol concerning developing countries.119 The general revisions were finally accepted with few changes in 1971 at Paris; the protocol was never ratified.120

The version of the Berne Convention currently in force, to which the United States has acceded,121 is the Paris Revision of 1971.122 The Berne Union changed the treaty in several significant ways at this time.123

Most importantly for the purposes of this analysis, the Paris Revision of 1971 adopted the suggestion, first made at Brussels, to extend the minimum term of protection of moral rights to match that of the economic rights: life of the author plus fifty years.124 The revision granted an exception for those nations "whose legislation, at the moment of their ratification of or accession to [the Convention], does not provide for the protection after the death of the author of all the

116. Brussels Revision of 1948, supra note 1, art. 6bis, para. 1.
117. Burger, supra note 21, at 32.
118. See infra notes 124-26 and accompanying text.
120. STEWART, supra note 31, at 101.
121. BCIA, supra note 22. See supra notes 20-25 and accompanying text.
123. This version contains a revision of the Stockholm protocol on Third World nations attached as an appendix to the Convention. Paris Revision of 1971, supra note 1, at app. The appendix provides developing nations with the right to set up certain compulsory license schemes that the Convention would otherwise not allow. Id. The revision also contains a new definition of published works, various provisions increasing the minimum terms of protection required for works of applied arts and cinematographic and photographic works, a change in the requirements for protection of works by authors from non-Union nations, protection for choreographic works not fixed in a tangible medium of expression, and a new right—reproduction. Id. art. 3, para. 3; art. 7, paras. 2, 4; para. 8; art. 2, para. 1; art. 9, para. 7.
124. Id. art. 6bis, para. 2.
[moral] rights." The exception allowed nations that protect moral rights through the common law to remain in compliance.

Overall, three trends in the development of the Berne Convention indicate potential problems for the United States in connection with moral rights. First, the protection for authors provided under the Berne Convention has increased over its history. Second, minimum rights have increased. Each revision has moved toward more, and more uniform, protection. Finally, protection for moral rights has increased with each revision since the rights were added in 1928. While some of the improvements in moral rights protection have been symbolic rather than substantive, the Berne Union clearly takes these rights seriously. This, coupled with the trend toward uniform protection, indicates that the United States must move to protect these rights as well.

Anglo-American copyright law, however, developed out of a different tradition. As discussed below, protection for moral rights in the United States has thus far fallen far short of the standards set in the countries.

III. ANGLO-AMERICAN COPYRIGHT LAW

A. English Copyright Law

American copyright law grew out of the copyright law of England, which developed very differently from that of the continent. In England, publishers, not authors, provided the initial impetus for copyright protection. With the invention of the printing press, piracy became a serious threat to both publishers and booksellers. Printing required a substantial investment on the part of the publishers and they needed to recoup this investment through sales. Piracy cut deeply into their profits. In order to protect this interest, many European nations, including England, set up licensing schemes during

125. Id.
126. For a discussion of the moral rights provision in the Paris Revision, see STEWART, supra note 31, at 108; Burger, supra note 21, at 46.
127. See supra notes 110-18, 124-26 and accompanying text.
128. See 1 NIMMER, supra note 1, § 1; Oman, supra note 21, at 109-10.
130. STEWART, supra note 31, at 15. The pirates could produce for less than the legitimate publishers by copying them after they appeared in print, thereby saving the cost of purchasing the author's manuscript. Burger, supra note 21, at 3 (citing Richard P. Adel-
the sixteenth century that provided monopoly rights of reproduction and distribution in certain works for limited times.\textsuperscript{131} The remedies for infringement of these rights were fines, and seizure and confiscation of the infringing materials.\textsuperscript{132}

The licensing schemes in England, however, were not designed to benefit authors. One prominent nineteenth-century scholar stated of the licensing systems, "[W]hatever benefit they may have been to authors, . . . their primary and chief object was the regulation of the press for political and ecclesiastical purposes."\textsuperscript{133} Even these rights were granted only in the face of a threat to the publishing industry, which could arguably have led to a decline in the number of works available. Nothing in the licensing acts provided for authors' rights, except secondarily through the monopoly granted to publishers.\textsuperscript{134} Some version of this exclusive licensing system prevailed in England until 1694 when the last licensing act expired.\textsuperscript{135} Sixteen years later, England enacted a copyright statute.\textsuperscript{136}

The Statute of Anne,\textsuperscript{137} the first English copyright statute, reflected the same fairly narrow economic concerns as did the licensing acts.\textsuperscript{138} Enacted in 1710, the Statute of Anne provided the owners of copyright in works already published with exclusive rights of publication and distribution for twenty-one years.\textsuperscript{139} The statute granted the same exclusive rights to authors of works not yet published, but for only fourteen years.\textsuperscript{140} In either case, the works belonged to the author for an additional fourteen-year term if the author survived the first term.\textsuperscript{141} The remedies provided were similar to those available under the licensing acts: confiscation and destruction of the infringing

\textsuperscript{131} EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 57 (Rothman Reprints 1972) (1879); STEWART, supra note 31, at 15-16.

\textsuperscript{132} DRONE, supra note 131, at 57.

\textsuperscript{133} Id. at 55.

\textsuperscript{134} Authors may have indirectly benefitted from the printers' monopoly created by the licensing schemes because only the legitimate publishers, who paid for authors' manuscripts, could now publish. This may have led to increased economic benefit, at least to those authors who were paid royalties based on the number of copies of their works sold.

\textsuperscript{135} DRONE, supra note 131, at 68.

\textsuperscript{136} Id. at 69.

\textsuperscript{137} 8 Anne, ch. 19 (1710).

\textsuperscript{138} Burger, supra note 21, at 6.

\textsuperscript{139} DRONE, supra note 131, at 69-70.

\textsuperscript{140} Id.

\textsuperscript{141} Id.
materials, with small money damages.\textsuperscript{142} Compared to modern copyright statutes, the Statute of Anne was quite limited, but it did represent the first mention of authors' rights in connection with copyright.\textsuperscript{143} Still, the Statute of Anne recognized in authors only those rights that the licensing acts had recognized in publishers—pecuniary rights.

Gradually, English copyright law extended the term of protection granted and the subject matter for protection.\textsuperscript{144} In addition, certain formal requirements were added as prerequisites for protection.\textsuperscript{145} These alterations to the Statute of Anne were consolidated in the Copyright Act of 1911.\textsuperscript{146} The economic rationale that supported the licensing acts remained the primary justification for English copyright protection.\textsuperscript{147}

\textbf{B. American Copyright Law}

Copyright law in America before the American Revolution was concerned only with the protection of commercial rights and did not differ significantly from that of England.\textsuperscript{148} Even after the revolution, copyright law in the United States developed similarly to that of England. The Constitution conferred upon Congress the power to grant rights to authors and scientists: "The Congress shall have power . . . to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."\textsuperscript{149} One year after the Constitution was ratified, in 1790, Congress passed the first American copyright statute.\textsuperscript{150}

This statute was very similar to the English copyright statutes of the time in important respects, retaining "the distinction between common law rights in unpublished works and statutory rights in published works, registration and deposit provisions, the same two-tier term of copyright, the remedies for infringement and the lack of any provisions dealing with the moral right of authors."\textsuperscript{151} In addition,
This first copyright Act extended no protection to foreign authors.\textsuperscript{152} This lack of protection allowed American readers access to cheap, pirated versions of European works, but also left works by American authors open to pirating in Europe.\textsuperscript{153} Eventually, as American literature developed and demand for some American works increased abroad, the cost of piracy became too great to ignore.\textsuperscript{154} The Copyright Law of 1891\textsuperscript{155} extended copyright protection to works by foreign authors manufactured in the United States.\textsuperscript{156} Until the passage of the Copyright Act of 1976,\textsuperscript{157} the requirement of American manufacture for protection of foreign works remained in all American copyright statutes.\textsuperscript{158}

In 1909, after several years of debate and compromise, Congress passed a new copyright statute.\textsuperscript{159} While the Berne Convention had been in existence since 1886 and many scholars and practitioners advocated conforming the new law to the treaty's requirements, the 1909 Act fell far short of this goal. First, the new law retained the formalities of notice, registration, and deposit;\textsuperscript{160} the Berlin Revision of 1908 had abolished formalities.\textsuperscript{161} Second, the Act did not comply with the Berne Convention's national-treatment principle, in that works in English by foreign authors were only protected if they were manufactured in the United States.\textsuperscript{162} Other changes, not affecting international copyright, included extension of the renewal term from fourteen to twenty-eight years,\textsuperscript{163} which made the maximum term possible fifty-six years;\textsuperscript{164} allowing for statutory copyright of unpublished works designed for performance;\textsuperscript{165} and certain evidentiary presumptions associated with registration.\textsuperscript{166} The Act retained the two-tier system of

\begin{itemize}
  \item \textsuperscript{152} Id.
  \item \textsuperscript{153} Id.
  \item \textsuperscript{154} Id. at 25. \textit{See also} Barbara Ringer, \textit{Two Hundred Years of American Copyright Law} 124, in \textit{Two Hundred Years of English & American Patent, Trademark & Copyright Law} (Bicentenary Symposium of the A.B.A. 1976).
  \item \textsuperscript{155} Ch. 565, 26 Stat. 1106 (1891) (repealed).
  \item \textsuperscript{156} Stewart, supra note 31, at 25-26; Ringer, supra note 154, at 127.
  \item \textsuperscript{158} Stewart, supra note 31, at 26.
  \item \textsuperscript{159} Copyright Act of 1909, Pub. L. No. 16-349, 35 Stat. 1075 [hereinafter Copyright Act of 1909].
  \item \textsuperscript{160} Id. secs. 10, 11, & 13, 35 Stat. 1075, 1078.
  \item \textsuperscript{161} Berlin Revision of 1908, supra note 1. \textit{See} Burger, supra note 21, at 23.
  \item \textsuperscript{162} Copyright Act of 1909, supra note 159, sec. 25, 35 Stat. 1078.
  \item \textsuperscript{163} Id. sec. 23, 35 Stat. 1080.
  \item \textsuperscript{164} Id.
  \item \textsuperscript{165} Id. sec. 5, 35 Stat. 1076.
  \item \textsuperscript{166} Id.
\end{itemize}
copyright, with perpetual common law protection for unpublished works and limited statutory protection for published works.167

Overall, the 1909 Act did not really represent a move towards the approach taken by the Berne Convention. The Act retained most of the barriers to Berne Union membership. Nonetheless, with minor amendments, the 1909 Act remained in force for over sixty-five years.

The next major revision of American copyright law came in 1976.168 Congress authorized the revision in 1955 and a long process of study, reports, and debate followed.169 Again, many argued that United States law should be brought into compliance with the Berne Convention.170 By this time, the treaty had been revised to include the required protection of moral rights171 and to extend protection to certain applied arts.172 Thus, in order to conform to the Berne Convention standards, Congress would have needed to make three significant changes in American copyright law: extend protection to certain applied arts, provide some protection for moral rights, and dispense with required formalities. Ultimately, Congress made none of these changes,173 although the Copyright Act of 1976174 altered the law substantially in areas that did not affect international copyright.175

Thus, even in the mid-1970's, Congress was unwilling to make

167. Id.
170. See generally Oman, supra note 21.
171. For a discussion of the development of the moral rights provisions of the Berne Convention, see supra notes 108-27 and accompanying text.
172. See Burger, supra note 21, at 31-32.
175. The 1976 Act abolished common law copyright in unpublished works; all "original works of authorship fixed in a tangible medium of expression" were henceforth protected by statute. 17 U.S.C. § 102 (1988). A single term of life of the author plus 50 years replaced the renewal system. Id. § 302. A provision allowing authors to terminate transfers was added. Id. § 304. The 1976 Act explicitly recognized the defense of fair use to an infringement action. Id. § 107. Courts had long recognized this defense, which was not mentioned in the 1909 Act. For a complete discussion of the differences between the 1909 and 1976 Copyright Acts, see Litman, supra note 169.
the changes in American copyright law necessary to conform to the Berne Convention standards. The formalities were the most tenacious features of the old law.\textsuperscript{176} There was considerable opposition to protecting moral rights, as well.\textsuperscript{177} These concerns kept the United States out of the Berne Union for another twelve years. Instead, the United States relied for international copyright protection on the Universal Copyright Convention.\textsuperscript{178}

Finally, in 1988, the benefits of adherence to the Berne Convention became too substantial to ignore. Congress passed the Berne Convention Implementation Act ("BCIA"), which purported to revise American copyright law in accordance with the requirements of the Berne Convention.\textsuperscript{179} The BCIA deleted all provisions of the 1976 Copyright Act that made protection contingent upon compliance with formalities,\textsuperscript{180} but added no provision protecting moral rights. Rather, the BCIA explicitly stated that it did not expand or contract protection of authors' moral rights.\textsuperscript{181} The drafters of the BCIA took the position that state common law protection of moral rights complied with the Berne Convention requirements,\textsuperscript{182} despite disagree-

\begin{itemize}
\item \textsuperscript{176} Oman, \textit{supra} note 21, at 81-89.
\item \textsuperscript{177} Id. at 93-95.
\item \textsuperscript{178} July 24, 1971, 943 U.N.T.S. 178. The Universal Copyright Convention, an international copyright treaty designed to provide some protection abroad for works by American authors and by others from non-Berne countries, is beyond the scope of this Article.
\item \textsuperscript{179} BCIA, \textit{supra} note 22, sec. 2(3), 102 Stat. 2853 (codified at 17 U.S.C. § 101 (Historical and Revision Notes) (1988)).
\item \textsuperscript{180} Id. sec. 7, 102 Stat. 2857-59 (codified at 17 U.S.C. §§ 401-412 (1988)).
\item \textsuperscript{181} Id. sec. 3(b), 102 Stat. 2853 (codified at 17 U.S.C. § 101 (Historical and Revision Notes) (1988)). The section reads:
\begin{quote}
The provisions of the Berne Convention, the adherence of the United States thereto, and the 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 modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.
\end{quote}
ment on this issue among experts. 183

Congress increased federal protection of moral rights in October, 1990, when both houses passed the Visual Artists Rights Act of 1990. 184 This Act provides authors of certain works of visual art with rights of integrity and paternity. 185 These rights are retained by the artist, unless he or she expressly waives them, even if copyright in the work is transferred. 186 Unlike economic rights, these moral rights cannot be transferred. 187 One section of the Act deals specifically with the problems of works of visual art incorporated into buildings. 188 Overall, the Act appears to provide visual artists with many, if not all, of the rights contemplated by article 6bis of the Berne Convention.

As discussed below, however, the Visual Artists Rights Act presents significant problems, both in the scope of its coverage and in its incompatibility with the rest of American copyright law. This incompatibility results from the American view of the underlying purposes of copyright law. The Copyright Clause of the Constitution

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185. See id. sec. 603, 104 Stat. 5128. The Act states:

[T]he author of a work of visual art . . . shall have the right to claim authorship of that work, and . . . to prevent the use of his or her name as the author of any work of visual art which he or she did not create; . . . to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; . . . to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, . . . [and the right] to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

Id. (to be codified at 17 U.S.C. § 106A).

186. See id. (to be codified at 11 U.S.C. § 106A(b), (e)(1)-(2)).

187. See id. (to be codified at 11 U.S.C. § 106A(e)(1)).

188. See id. sec. 604, 104 Stat. 5130 (to be codified at 17 U.S.C. § 113(d)). For works installed prior to the effective date of the Act, and for works installed pursuant to an express contract signed by the owner of the building and the artist that the work may be subject to destruction or modification by removal from the building, the right of integrity shall not apply. Id. For works installed after the effective date of the Act, and not pursuant to an express contract as described above, and where the work may be removable without destruction, the building owner must make a good faith effort to contact the artist. Id. A good faith effort will be presumed if the owner attempts to contact the artist by registered mail. Id.
indicates that the primary concern of American copyright law is the public interest, the promotion of science and the useful arts. The concept of moral rights developed out of French copyright law. As discussed below, the emphasis of French copyright law is quite different.

IV. THE FUTURE OF MORAL RIGHTS IN THE BERNE CONVENTION AND THE UNITED STATES

A. Sources Cited in the Legislative History of the BCIA

As discussed above, Congress concluded that the protection of moral rights available under federal and state copyright law in 1988 complied adequately with the requirements of article 6bis of the Berne Convention. The BCIA explicitly states that no new rights were created by virtue of the United States' adherence to the Berne Convention. Yet, both before and since the passage of the BCIA, scholars have debated whether the United States is in fact complying with the minimum provisions for the protection of moral rights that the Berne Convention requires. This Section will examine the provisions of American law cited by Congress as complying with article 6bis in 1988, and the new Visual Artists Rights Act. Ultimately, this Section will argue that current protection of moral rights under American law may be inadequate now, and certainly raises concerns for the future, given the dual trends in the Berne Convention towards uniform minimum rights and in favor of increased protection for moral rights.

One source of protection cited by Congress is state moral rights statutes. However, there are several problems with these statutes in terms of compliance with the Berne Convention. First, these statutes, like the Visual Artists Rights Act, protect moral rights only in visual works. Second, many of these statutes provide that moral rights

190. See supra notes 179-83 and accompanying text.
191. See supra notes 179-83 and accompanying text.
193. See supra note 179.
terminate upon the death of the author.\textsuperscript{195} Third, most state moral rights statutes provide that the rights are completely waivable, thereby defeating the purpose of moral rights, to protect the author, who may be in a weak bargaining position.\textsuperscript{196} Finally, because most states have no such statute, an artist from a nation belonging to the Berne Union who distributes his or her work in a state without such a statute cannot bring a claim for violation of moral rights. Thus, while these statutes do provide a modicum of protection for moral rights, taken alone they cannot be said to fulfill the United States' obligation of minimum protection under the Berne Convention.

Congress cited several sources as protective of the right of integrity. First among these is section 43(a) of the Lanham Act,\textsuperscript{197} concerning false designation of origin, which was construed as protective of this right.\textsuperscript{198} However, while this section may provide a cause of action to an artist whose name is falsely affixed to the work of another, nothing in this statute necessarily provides relief to an author whose work is mutilated. While some courts have recognized false designation and unfair competition claims by audiovisual artists whose works have been severely edited,\textsuperscript{199} the language of section 43(a) does not mention artistic works, and does not require this result.\textsuperscript{200}

\textsuperscript{195} Damich I, \textit{supra} note 29, at 294.

\textsuperscript{196} Id.


\textsuperscript{198} House Report on Implementation Act, \textit{supra} note 182, at 34. Lanham Act § 43(a) provides:

\begin{quote}
Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation 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 or 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.
\end{quote}


\textsuperscript{200} \textit{See} Lanham Act, \textit{supra} note 197.
state a claim for false designation of origin.\(^{201}\) Yet, his or her right of integrity has been violated. At best, then, section 43(a) of the Lanham Act offers only partial protection for the right of integrity.

Congress' suggestion that an author's exclusive right to authorize derivative works protects the right of integrity is also flawed.\(^{202}\) While an author may retain the right to authorize derivative works, either by retaining the work or by transferring the work with an express reservation of this right, the right is not personal and automatically retained by the author.\(^{203}\) This does not satisfy the requirements of article 6bis, which states that the author must retain his or her moral rights "even after the transfer of [economic] rights."\(^{204}\) An American artist seeking to protect his or her right of integrity through use of the right to authorize derivative works must *expressly* retain the latter right by contract. Thus, a new author, in a relatively weak bargaining position, may well be unable to retain this right. Yet, arguably, it is new authors who need this protection most of all. The approach taken in the Berne Convention requires that this right be *automatically* retained by the author. The derivative-works right, too, provides at best partial protection for the right of integrity.

Article 6bis of the Berne Convention also requires that member nations protect an author's right "to claim authorship of the work."\(^{205}\) This right corresponds to the French *droit à la paternité*.\(^{206}\) Congress cited state contract and unfair competition law and section 43(a) of the Lanham Act as providing adequate protection for this moral right.\(^{207}\)

First, none of these sources provides adequate relief to an author whose name is omitted from his or her work. State unfair competition law does not address this concern. Rather, this law is concerned with consumer protection and false marketing techniques. An author could secure the right to demand attribution by an express term in a contract. Reliance on contract law is misplaced to fulfill the Berne Convention requirements because article 6bis contemplates that an author will retain his or her moral rights upon transfer of a work without any affirmative action.\(^{208}\)

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201. *Id.*
204. Paris Revision of 1971, *supra* note 1, art. 6bis, para. 1.
205. *Id.*
206. Damich II, *supra* note 183, at 656. For a discussion of the protection of the *droit à la paternité* under French law, see *supra* notes 75-80 and accompanying text.
208. Paris Revision of 1971, *supra* note 1, art. 6bis.
The problem here is similar to that discussed above, in connection with derivative works. In order for this right to be meaningful to all authors, even unknown ones, the author must retain the right automatically. The notion of article 6bis is that the author has these rights and need not possess or exercise any economic leverage to retain them. Finally, reliance on state common law presents the same problems as does reliance on state moral rights statutes: they do not provide uniform protection. Thus, none of the sources cited protects the right of proper attribution.

Congress is on stronger ground in citing section 43(a) of the Lanham Act as protecting an author's right not to have another's work attributed to him or her, and the right not to have his or her work attributed to another. In these cases, the author could state a claim for false designation of origin: the mislabelling of the work would be likely to cause confusion. Current American law may well provide for this aspect of the droit à la paternité.

Thus, the sources of protection of moral rights cited by Congress in support of its view that American law already conforms to the Berne Convention are probably inadequate. The passage of moral rights statutes in some states indicates that interest in protecting these rights is growing. Yet the concepts that underlie moral rights are foreign to the American legal tradition, and attempts to legislate recognition of these rights can lead to difficulties.


Congress took a huge step toward recognition of moral rights when it passed the Visual Artists Rights Act of 1990. A closer look at the Visual Artists Rights Act, however, reveals significant problems. First, the Act applies only to visual artists, narrowly defined; authors of other works must still rely on the patchwork of

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209. While a survey of state unfair competition law is beyond the scope of this Article, states provide a variety of statutory and common law causes of action for unfair competition, and there is no reason to assume that each state would interpret its provisions as protective of the droit à la paternité.
211. See supra note 193.
212. See supra notes 184-88 and accompanying text.
213. The Act defines a work of visual art as:
   (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or, fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculp-
other sources for protection of their moral rights. Thus, the Act does little to bring the United States into compliance with the minimum requirements of article 6bis.

Second, the description of the rights provided is very vague. While such language may convey a specific meaning in droit moral countries, with a tradition of natural rights, it seems incompletely grafted onto the otherwise specific and technical copyright Act. The different styles in the two sections reflects the difference between moral and economic rights. The 1976 Act, concerned with securing pecuniary rights for the copyright owner, describes the various rights—reproduction, authorization of derivative works, distribution, performance, and display—so that each party will know what his or her rights are. In contrast, moral rights seek to protect much more impalpable interests, and cannot be discussed in precise, technical language. The very concept of moral rights is drawn from a natural law tradition, in which language like that of the Visual Artists Rights Act is meaningful. Merely adding such language to a statute designed to protect fundamentally different rights will lead to more confusion than protection.

Third, while the duration of the rights provided meets the requirements of article 6bis, it does so only because of an exception in that article specifically included to keep nations that protect moral rights under common law in compliance. Section 603(d)(2) provides that moral rights in works created before the effective date of the Act "shall be coextensive with . . . the rights conferred by section 106" (i.e., life of the author plus fifty years). Yet, the duration of moral rights in a work created after the effective date of the Act is the

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214. See supra note 182 for a listing of other sources of protection of moral rights in American law. See supra notes 194-211 and accompanying text for a discussion of the inadequacy of the protection afforded by these provisions.

215. See supra note 185 for the text of the statute describing the rights provided.

216. Section 603 of the Visual Artists Rights Act will be codified at 17 U.S.C. § 106A, immediately following § 106, which describes the other exclusive rights of the copyright owner. If one reads the two sections in this sequence, the contrast between the two different approaches is quite jarring. Compare Visual Artists Rights Act, sec. 603, 104 Stat. 5128-30 with 17 U.S.C. § 106 (1988).

217. Burger, supra note 21, at 46; Stewart, supra note 31, at 108.

life of the author only.219 The moral rights provision of the Berne Convention states, "[T]hose countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained."220 Arguably, because the United States did not protect all moral rights for the life of the author plus fifty years when it acceded to the treaty, it is free to enact new moral rights provisions with terms shorter than life plus fifty years. This approach, however, is not consistent with the trend toward making moral rights coequal with economic rights. The disparity between the duration of the two categories of rights, along with the limited coverage of the 1990 statute, indicates a reluctance to provide full recognition to moral rights.

This reluctance, in turn, stems from the Anglo-American view of copyright and intellectual property. While the Copyright Act allows the author to transfer and/or retain any of the exclusive rights provided under the Act,221 the moral right provided in the Visual Artists Rights Act belongs either to the author or to no one.222 This aspect of the moral right is foreign to Anglo-American property law, in which free alienability is a crucial concept. In addition, the droit moral developed out of a copyright tradition that focused primarily on the rights and interests of authors, and that was only secondarily concerned with the public interest.223 It is difficult, if not impossible, to graft the natural law concept of moral rights onto existing American copyright law, with its emphasis on remuneration and free alienability. Recognition and protection of moral rights is incompatible with this primarily economic approach to copyright.

CONCLUSION

Ultimately, American copyright law will have to change. If American law currently provides the minimum protection for moral rights required by article 6bis of the Berne Convention, it does so only barely. Meanwhile, each revision of the Berne Convention since the introduction of moral rights has increased protection for these

219. Id. (to be codified at 17 U.S.C. § 106A(d)(1)).
220. Paris Revision of 1971, supra note 1, art. 6bis, para. 2.
222. See supra note 185 and accompanying text. The only other right retained by the author in the 1976 Act is the right to terminate transfers. 17 U.S.C. § 203 (1988).
223. See supra notes 29-90 and accompanying text.
rights. The Berne Convention is also moving toward greater uniformity of protection among all member nations by raising the minimum standard of protection required in a variety of areas. Given these trends, the current protection of moral rights under American law will not be adequate for compliance with the Berne Convention in the long run.

The passage of state statutes protecting moral rights of visual artists, and the Visual Artists Rights Act, even given its serious flaws, are steps in the right direction. Similar statutes protecting the moral rights of artists in other media are also necessary, however. What really must change is the view underlying American copyright law that intellectual property is completely analogous to real and personal property. Some scholars have argued that the lack of protection of moral rights in the United States reflects the low value Americans place on art itself. Real recognition of authors' moral rights requires acknowledgement that an artist's product is different from that of a manufacturer in a fundamental way, which, in turn, requires that a society place a high value on art. If this is correct, perhaps the current interest in moral rights on the part of scholars and legislatures indicates that change is underway. If such change continues, the United States may eventually provide the protection of moral rights that its avowed commitment to the Berne Convention requires.

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224. See supra notes 91-127 and accompanying text.
225. See supra notes 91-127 and accompanying text.
226. See, e.g., DaSilva, supra note 13, at 6.