AN AUTHORS' RIGHTS-BASED COPYRIGHT LAW: THE FAIRNESS AND MORALITY OF FRENCH AND AMERICAN LAW COMPARED

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I. INTRODUCTION

In 1982, Patrick McCarthy published an essay about the famous French writer, Albert Camus, entitled *Camus: A Critical Study of his Life and Work*. It appeared to be so critical of Camus that Camus' heirs brought a suit against McCarthy's publisher,

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Hamish Hamilton Ltd. Before publishing McCarthy's work, Hamish Hamilton had also been Camus' publisher in the United Kingdom. Although the book contained neither abuse nor libel, the Paris District Court found for Camus' heirs and ordered damages against Hamish Hamilton on the sole ground that the publisher had infringed upon the prominent author's intellectual property rights.[1]

In another case that arose a few years later, the Paris District Court entered a similar judgment in a copyright case against a French publishing company. The Denoël Publishing Company had added, on its own initiative, an unauthorized preface to French version of Michael Moritz' book, *The Little Kingdom: The Private Story of Apple Computer*. Defendant Denoël had been licensed to translate the book and sell it in France. The disputed preface contained only neutral additional information furnished by the chairman of Apple's French subsidiary. Nonetheless, the court held Denoël liable for infringing Moritz' literary and artistic property rights.[2]

These two decisions are not unusual under French case law and have not been criticized by French scholars. Both of them illustrate the remarkably broad protection conferred to authors by French copyright law, particularly when compared to the United States jurisprudence in the same area. This is all the more interesting considering that the actual infringement of the plaintiffs' intellectual property rights was questionable in both cases.

The more recent decision, *Dastar Corp. v. Twentieth Century Fox Film Corp.*,[3] illustrates the very different stance that American and French copyright law take. In *Dastar*, the United States Supreme Court denied a copyright claim made by a film producer, despite clear evidence of original ownership of its work. Twentieth Century Fox Film Corporation, which had been granted exclusive television rights in General Dwight D. Eisenhower's World War II memoirs, *Crusade in Europe*, produced a television series based on the book. After the copyright on the television series had expired, Twentieth Century Fox reacquired the television rights in the book, including the exclusive right to distribute the series on video. A few years later, Dastar released a video set, entitled *World War II Campaigns in Europe*, which was made from Twentieth

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[1] Tribunal de grande instance [T.G.I.][ordinary court of original jurisdiction], Paris, 1e ch., Feb. 15, 1984, REVUE INTERNATIONALE DU DROIT D'AUTEUR [hereinafter R.I.D.A.] 1984, 120, 178. The case was tried in a French court pursuant to a jurisdictional clause contained in the publishing contract.

[2] T.G.I., Paris, 1e ch., Nov. 25, 1987, J.C.P. 1988, I, 21062, note Edelman.

[3] Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).

Century's original television series. Dastar marketed the set as its own product, without mentioning that it had originally been a Twentieth Century Fox product.[4]

The United States Court of Appeals for the Ninth Circuit ruled for Twentieth Century Fox under the unfair competition provisions of the Lanham Act, concluding that Dastar had committed a "bodily appropriation" of its series and had thus engaged in "reverse passing off."[5] The Supreme Court, however, reversed the Ninth Circuit, holding that no false designation of origin was shown with regard to the producer of tangible goods made from a work whose copyright had expired, as this mere absence of information was hardly prejudicial to consumers' interests.

The *Dastar* decision denied protection to a typical component of literary and artistic property rights and many American academics such as Professor Jane Ginsburg have criticized the decision severely.[6] American and French copyright law scholars share the view that French law is more protective of authors' rights than American law. American copyright is said to have a more utilitarian focus, and to be more materialistic than French copyright law.[7] For instance, Russell J. DaSilva notes that "[t]he French *droit d'auteur* (author's right) is a concept far broader than American copyright . . . . While United States copyright seeks to protect primarily the author's pecuniary and exploitative interests, French law purports to protect the author's intellectual and moral interests, as well."[8] For DaSilva, on the whole, authors and artists' rights "receive less respect under the American system than they do in France."[9]

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4 *Id.* at 25-27.

5 Twentieth Century Fox Film Corp. v. Entm't Distrib., 34 F. App'x. 312, at *4 (9th Cir. 2002), *rev'd*, *Dastar*, 539 U.S. 23 (2003). Reverse passing off may occur when a producer misrepresents someone else's goods as his own, which engenders consumer confusion as to source.

6 Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263 (2004) [hereinafter Ginsburg, *The Right to Claim Authorship*]. *See* F. Scott Kieff, *Contrived Conflicts: The Supreme Court Versus the Basics of Intellectual Property Law*, 30 WM. MITCHELL L. REV. 1717, 1725 (2004). Other commentators, however, approved of the Supreme Court's decision. *See, e.g.*, Ruth L. Okediji, *Through the Years: The Supreme Court and the Copyright Clause*, 30 WM. MITCHELL L. REV. 1633, 1636 (2004); Kurt M. Saunders, *A Crusade in the Public Domain: The* Dastar *Decision*, 30 RUTGERS COMPUTER & TECH. L.J. 161, 171-73 (2004); Lynn McLain, *Thoughts On* Dastar *from a Copyright Perspective: A Welcome Step Toward Respite for the Public Domain*, 11 U. BALT. INTELL. PROP. L.J. 71, 72 (2003).

7 *See, e.g.*, Jane C. Ginsburg *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 996 (1990) [hereinafter Ginsburg, *Tale of Two Copyrights*]; Roberta R. Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985).

8 Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1, 3 (1980).

9 *Id.* at 51.

This opinion, that French law is more focused on the protection of authors' rights than is American law, is widely shared by French academics. For example, Professor Linant de Bellefonds wrote that France's *droit d'auteur* protects authors, while "Anglo-Saxon copyright laws . . . pay more particular attention to the exploitation of the work, pushing man into the background."[10] According to another prominent French scholar, Bernard Edelman, in the U.S. copyright system "the author seems to be only a merchant of his work and he keeps a proprietor relationship with it . . . . The [American] copyright system is therefore a purely economic legislation."[11]

In the almost unanimous opinion of the global community of copyright law scholars, therefore, it appears that French law is superior to American law in terms of fairness and morality to authors, given that *fair* usually means just, legitimate, and in conformity with accepted standards, while *moral* means based on a sense of right and wrong according to conscience, or adhering to conventionally accepted standards of conduct. Upon examination, it becomes clear that it is the very concepts of fairness and morality that underpin each country's legislation that drives the more protective character of French law: French *moral rights* lead to the *granting* of numerous rights to authors, while American *fair use* leads to the *limitation* of authors' rights.

I would like to challenge this consensus. It seems to me that on both sides of the Atlantic "there is a widely shared, intuitive sense that creative works deserve protection from unauthorized copying—a sense of what Pamela Samuelson calls 'the essential fairness of copyright law.'"[12] Thus, I aim to demonstrate that French copyright law is not as fair and moral as claimed, and, correspondingly, that U.S. copyright law is not as unfair and immoral (or even amoral) as critics allege. While I do not mean that *more* fairness and morality can be found in American copyright law, I simply intend to question the widely held presumption that French copyright law is more moral than American copyright law, through an assessment of facts and law.

This article critiques the so-called superiority of French copyright law to American copyright law in terms of fairness and morality with regard to three specific issues. First, in Part II of this

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10 XAVIER LINANT DE BELLEFONDS, DROITS D'AUTEUR ET DROITS VOISINS 454 (2002). All translations in this article, other than those from the French Intellectual Property Code, are the author's, unless otherwise indicated.

11 BERNARD EDELMAN, LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 26 (2d ed. 1999) [hereinafter EDELMAN, LA PROPRIÉTÉ].

12 Katie Sykes, *Towards a Public Justification of Copyright*, 61 U. TORONTO FAC. L. REV. 1, 3 (2003) (quoting Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134).

article, I suggest that, as far as justification for copyright protection is concerned, France's *droit d'auteur* and American copyright law are not so different. French law does not morally surpass its American counterpart in terms of the purposes of copyright, the recognition of authors, or the nature of copyright. Next, Part III points out that French and United States legislation is equally fair and moral in terms of access to copyright protection. This is the case in terms of the subject matter of copyright, formalities, and the ownership of copyright. Finally, in Part IV, I demonstrate that the scope of copyright protection in French law is neither fairer nor more moral than its U.S. counterpart. This article especially challenges the idea that the alleged moral superiority of French copyright law must be inferred first from its own particular economic rights regime, and second from the apparently broader protection of authors' moral rights in France.

I believe it is worthwhile to focus on a comparison of French copyright law and American copyright law, despite the ongoing harmonization of intellectual property laws amongst the European Union member states.[13] In fact, although numerous European Union directives have been passed with a view towards harmonizing national copyright law statutes within the European community, myriad differences remain. Moreover, as opposed to the other European countries, French jurisprudence adheres to a more creator-centered approach to copyright law.[14] As a result, France is sometimes "considered to be in the vanguard of protection" of literary and artistic works.[15] This is precisely the view that I intend to challenge in this paper.

II. FAIRNESS AND MORALITY WITH RESPECT TO JUSTIFICATION FOR COPYRIGHT PROTECTION

A. *The Purposes of Copyright*

Whether convincing or not, four theoretical arguments justifying a copyright protection system have been advanced. According to these theories, most existing copyright laws are based upon the following:[16]

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13 *See, e.g.*, Jean-Luc Piotraut, *European National IP Laws Under the EU Umbrella: From National to European Community IP Law*, 2 LOY. U. CHI. INT'L L. REV. 61 (2004) [hereinafter Piotraut, *Under the EU Umbrella*].

14 *See, e.g.*, ANDRÉ BERTRAND, LE DROIT D'AUTEUR ET LES DROITS VOISINS 52 (2d ed. 1999); PATRICK TAFFOREAU, DROIT DE LA PROPRIÉTÉ INTELLECTUELLE: PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE; PROPRIÉTÉ INDUSTRIELLE; DROIT INTERNATIONAL 446 (2004).

15 DaSilva, *supra* note 8, at 2.

16 STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 3-12 (2d ed. 1989).

> (a) The "principle of natural justice," according to which the creator of a work is entitled to the fruits of his labor;
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> (b) The "economic argument," which seeks to provide an incentive to individuals who make creative works available to the public, by giving them a reasonable expectation of recouping their investments and making a reasonable profit;
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> (c) The "cultural argument," under which the public interest may encourage creativity with the view of developing the national culture; and
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> (d) The "social argument," which asserts that social cohesion is made easier through the dissemination of ideas and works to a wide public and through the links forged between social, racial and age groups.

There is no doubt that the American copyright system emphasizes the economic argument. Under the United States Constitution, "[t]he Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."[17] Professor Marshall Leaffer points out that under the American copyright system "the dominant idea is to promote the dissemination of knowledge to enhance public welfare. This goal is to be accomplished through an *economic* incentive in the form of a monopoly right given for limited times" to authors.[18] In *Mazer v. Stein*,[19] the U.S. Supreme Court stated the rationale underlying the constitutional copyright clause as follows: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"

On the other hand, in civil law countries such as France, the more individual-centered *droit d'auteur* system gives special

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17 U.S. CONST. art. I, § 8, cl. 8.

18 MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 6 (4th ed. 2005).

19 Mazer v. Stein, 347 U.S. 201, 219 (1954). *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429.

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Id. In addition, according to 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (2003), "[t]he primary purpose of copyright is not to reward the author, but is rather to secure 'the general benefits derived by the public from the labors of authors'" (quoting New York Times Co. v. Tasini, 533 U.S. 483, 519 (2001) (Stevens, J., dissenting)).

importance to the principles of natural justice:[20] "[C]opyright is deemed a natural right, part of the natural law, a true extension of personality, consisting of economic and moral rights, *i.e.,* the right to forbid uses of a work which would discredit the author directly or through his work."[21] Under this fair and moral view, French copyright law aims to protect the two key interests held by the author: his pecuniary and exploitative interests on the one hand, and his intellectual and moral interests on the other.[22] Thus, only the author should "be able to decide whether and how his work is to be published and to prevent any injury or mutilation of his intellectual offspring."[23]

As a result, the idealistic *droit d'auteur* has been characterized as "sublime."[24] Artistic and literary rights are, for the most part, considered to be a legal acknowledgement of human works. Some critics have gone so far as to call these rights a "resistance tool" that authors can use to *curtail* the forces of the market economy.[25] As an example, a French court denied painter Nicolas de Staël's heirs the right to exploit one of his rough sketches on the grounds that de Staël had a moral right to disclosure.[26] In contrast to the rights granted under the French system, the main legal right protected under U.S. law is a pecuniary right.[27] For this reason, some French scholars attack American copyright law as a mere tool of capitalism.[28] Scholars who hold these views on fairness and morality make no further inquiry into the asserted superiority of French copyright law over its American counterpart.

Nevertheless, the economic principles underpinning American copyright law do not prevent it from being firmly based

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20 Natural justice (or law) relates to a jurisprudential tradition, which requires laws to comply with universal principles of truth and morality (although the precise meaning of those principles is uncertain). *See, e.g.,* W. MICHAEL REISMAN & AARON M. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW 170 (1987).

21 David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. COPYRIGHT SOC'Y 421, 425 (1983). *See* Antonio Ciampi, *Diritto di Autore, Diritto Naturale*, 14 R.I.D.A. 3 (1957). It has also been stated that "[t]he natural law . . . supports a different balancing of interest than does the public benefit theory and supports very long—even perpetual—copyright terms." Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365 (2004).

22 DaSilva, *supra* note 8. *See also* BERTRAND, *supra* note 14, at 257.

23 STEWART, *supra* note 16.

24 Bernard Edelman, *Droit D'auteur. Nature du Droit D'auteur. Principes Généraux*, *in* 1112 JURIS-CLASSEUR PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 3, 7 (2001) [hereinafter Edelman, *Nature du Droit D'auteur*].

25 *Id.* at 8. French law, however, does not prevent creators from transferring their works through the market.

26 Cour d'appel [CA] [regional court of appeals], Paris, 4e ch., Feb. 17, 1988, R.I.D.A., 1989, 142, 325.

27 Rudolf Monta, *The Concept of "Copyright" Versus the "Droit d'auteur,"* 32 S. CAL. L. REV. 177 (1959).

28 *See, e.g.*, Philippe Gaudrat, *Droits des Auteurs. Droits Moraux. Théorie Générale du Droit Moral*, *in* 1210 JURIS-CLASSEUR PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 4 (2001).

on a purpose of justice, with the aim of achieving fair and moral ends: That is why David Ladd is right to state, "[i]n truth, the fundamental claim of copyright is one of justice . . . . American copyright legislation may not fit into the formal philosophical edifice of 'natural law.' It does, nevertheless, express a felt sense of what is right and just."[29] In *Harper & Row, Publishers, Inc. v. National Enterprises*,[30] for instance, the United States Supreme Court acknowledged that "[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors."[31] Fairness to authors was also an argument used to support the passage of the Copyright Term Extension Act of 1998 (CTEA).[32]

The mere assertion that French and American copyright principles are diametrically opposed is open to a prima facie challenge. First, it seems that *both* natural law principles *and* economic policy decisions motivated copyright law development in the United States.[33] Second, as Professor Ginsburg has demonstrated, author-oriented doctrines in French law are actually a late nineteenth century development, a time during which both French copyright scholars and courts took an author-oriented direction.[34] Though different, there is no fundamental, rooted tension between American and French legal heritages vis-à-vis copyright laws. Indeed,

> the principles and goals underlying the revolutionary French

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29 DaSilva, *supra* note 8.

30 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

31 *Id.* at 546. In her article, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989), Wendy J. Gordon expresses the view that "defensible and common sense notions of morality are in accord. Someone who works to produce something of value would seem to deserve a reward for her efforts from those who benefit." *Id.* at 1446.

32 *See* Dallon, *supra* note 21.

33 *See, e.g.*, THE FEDERALIST NO. 43, at 279 (James Madison) (Mod. Lib. ed., 1941) (asserting that "[t]he public good fully coincides in both cases [of patents and copyrights] with the claims of individuals"); Gary Kauffmann, *Exposing the Suspicious Foundation of Society's Primacy in Copyright Law: Five Accidents*, 10 COLUM.-VLA J.L. & ARTS 381, 403-08 (1986) (challenging the idea of a purely society-oriented rationale underlying the constitutional copyright clause); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 559 (1990) (concluding that the proper future construction of U.S. copyright law may depend "on the restoration of its natural law heritage"). *See also* Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY. L. REV. 665, 690-703 (1992); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1199 (1996); ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 4 (1997); Orit Fischman Afori, *Human Rights and Copyright: The Introduction of Natural Law Considerations Into American Copyright Law*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 497 (2004) (suggesting that the usual utilitarian justifications of U.S. copyright law should not be understood as a total exclusion of naturalistic perceptions, so that American copyright law might be based on an alternative kind of constitutional norm, which can be found in the Universal Declaration of Human Rights).

34 Ginsburg, *Tale of Two Copyrights, supra* note 7, at 996.

> copyright regime were far closer to their U.S. counterparts than most comparative law treatments (or most domestic French law discussions) generally acknowledge. The first framers of copyright laws, both in France and in the U.S., sought primarily to encourage the creation of and investment in the production of works furthering national social goals.[35]

Decidedly, authors' personal claims as well as an economic argument underlay both French and American copyright laws.

Since current artistic productions are mostly collective and expensive,[36] the French copyright system, with its excessive focus on the individual artist or author, appears to hamper producers' businesses and, accordingly, to harm modern creation.[37] Some writers have even blamed the likely decline of the French motion picture and entertainment industry,[38] and the ensuing significant job losses, on French copyright laws.[39] If this is the case, the effect of these laws is far from socially fair and moral. [40]

B. *The Recognition of Authors*

Whether copyright is an economic incentive or a reward for the creator's effort, "[a]uthors are the heart of copyright."[41] Thus, "[m]uch of copyright law in the United States and abroad makes sense only if one recognizes the centrality of the author, the human creator of the work."[42] In fact, each member state of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 must acknowledge this concept of author centrality, since article 2, paragraph (6) thereof provides that the internationally agreed legal protection "shall operate for the benefit of the *author* and his successors in title."[43] Both France

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35 *Id.* In addition, BERTRAND, *supra* note 14, at 80, argues that the present goal of French copyright is to encourage creation as well.

36 Such as, for example, audiovisual works.

37 *See* BERTRAND, *supra* note 14, at 53.

38 *Id.* at 50.

39 *Id.* at 45.

40 *See generally* JACQUELINE SEIGNETTE, CHALLENGES TO THE CREATOR DOCTRINE (1994).

41 Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1064 (2003) [hereinafter Ginsburg, *Authorship in Comparative Copyright*].

42 *Id.* at 1068. Derived from the Latin verb "augere," which means "to increase," the English word "author" is defined as "the person who originates or gives existence to anything." Russ VerSteeg, *Defining "Author" for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1356 (1996) (quoting OXFORD UNIVERSAL DICTIONARY 797 (2d ed. 1989)).

43 Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised Sept. 28, 1979, 828 U.N.T.S. 221 [hereinafter Berne Convention] (emphasis added). Moreover, each WTO member "[must] comply with Articles 1 through 21 of the Berne Convention" pursuant to the side agreement on Trade-Related Aspects of Intellectual Property Rights of 1994. The Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TRIPS].

and the United States are parties to the Berne Convention, which is administrated by the World Intellectual Property Organization (WIPO). In France, where copyright is called *droit d'auteur*, meaning "author's right," the statutory protection provided in the *Code de la propriété intellectuelle* (French IP Code) vests initially in the "*author* of a work of the mind."[44]

Notwithstanding a more materialistically-oriented copyright system, authors hold a central place in American copyright law as well.[45] First, the United States Constitution empowers the Congress to "secure[e], for limited Times to *Authors* . . . the exclusive Right to their . . . Writings . . . ."[46] Authors, therefore, are indisputably "the constitutional subjects of copyright . . . ."[47] Second, the 1976 Copyright Act[48] provides that "[c]opyright protection subsists . . . in original works of *authorship* . . . ."[49] The Copyright Act further provides that "[c]opyright in a work . . . vests initially in the *author* or *authors* of the work."[50] Even in the United States, therefore, copyright "does not seek merely to promote the distribution of works to the public. It also aims to foster their creation."[51] Such an incentive to creation necessarily requires that authors be taken into account in terms of both fairness and morality.

Since most contemporary creators can do nothing more than revisit already imagined literary and artistic themes, post-structuralist literary critics, especially Roland Barthes, have called for the "death of the author." Post-structuralist belief is that art should focus more on the destination, *i.e.*, on readers, observers, or audience of the work, than on authors, who have been replaced by writers or "scripters," to use Barthes's neologism.[52] For his part,

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44 C. PROP. INTELL., art. L.111-1, ¶ 1 (emphasis added). *See id.* at art. L.112-1, which states "[t]he provisions of this Code shall protect the rights of authors in all works of the mind . . . ."

All translations from the French Intellectual Property Code are from Legifrance (Sept. 15, 2003), http://www.legifrance.gouv.fr/html/codes_traduits/cpialtext.htm.

45 *See* BERTRAND, *supra* note 14, at 52.

46 U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

47 Ginsburg, *Authorship in Comparative Copyright*, *supra* note 41. Furthermore, the Supreme Court held in *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985), that copyright protection is designed to benefit *authors*.

48 Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2572 (codified as amended at scattered sections of 17 U.S.C.).

49 17 U.S.C. § 102(a) (2006) (emphasis added).

50 *Id.* § 201 (emphasis added).

51 Ginsburg, *Authorship in Comparative Copyright*, *supra* note 41, at 1064.

52 Roland Barthes, *The Death of the Author*, *in* IMAGE, MUSIC, TEXT 142 (1968) (Stephen Heath trans., 1977). *See* Roland Barthes, *From Work to Text*, *in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 73 (J.V. Harari ed., 1979), in which Barthes denies a contemporary writer the right to be regarded as the "father and the owner of the work . . . ." *Id.* Similar anti-author arguments can be found in Jacques Derrida's work, sometimes referred to as "deconstruction" or "deconstructionism." *See* Elton Fukumoto, *The Author Effect After the "Death of the Author": Copyright in a Postmodern*

Michel Foucault argued that the socially constructed Romantic conception of the author-as-genius was destined to vanish because it places creation under a system of constraint.[53] Oddly, these criticisms seem to address the author-oriented French copyright regime more than the society-oriented American one.

Neither French nor United States copyright law requires proof of artistic merit as an element for copyright protection.[54] According to the French IP Code, the rights of authors shall be protected in all works, "whatever their . . . merit or purpose."[55] On this basis, the French Supreme Court of Appeal, called the *Cour de cassation*, granted copyright protection to a dull salad shaker made of plastic, without any artistic claim.[56] American case law similarly holds that artistic merit should not be taken into account by courts in deciding questions of copyrightability.[57] Creators of plastic flowers[58] and of cake-box labels[59] have thus been granted copyright protection in the United States.

Therefore, as Professor Ginsburg notes, "the syllogism 'the romantic author is dead; copyright is about romantic authorship; copyright must be dead, too,' fails."[60] On the contrary, fair and moral ends underpin the legal recognition of authors.[61] Moreover, part of the current copyright critique stresses that real creators are too often despoiled by publishers or producers, so that copyright "is merely a pretext for corporate greed."

Age, 72 WASH. L. REV. 903 (1997).

53 Michel Foucault, *Qu'est-ce qu'un auteur?*, 63 BULL. SOCIÉTÉ FRANÇAISE DE PHILOSOPHIE, PART III 777 (1969). *See* Fukumoto, *supra* note 52.

54 *See* Ginsburg, *Authorship in Comparative Copyright*, *supra* note 41, at 1065 (adding that "authors are not necessarily less creative for being multiple.").

55 C. PROP. INTELL., art. L.112-1.

56 Cour de cassation [Cass. crim.] [highest court of ordinary jurisdiction] May 2, 1961, J.C.P. 1961, 12242, note Aymond. *See* CAROLINE CARREAU, MÉRITE ET DROIT D'AUTEUR (1981).

57 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).

58 Prestige Floral S.A. v. Calif. Artificial Flower Co., 201 F. Supp. 287 (S.D.N.Y. 1962).

59 Kitchens of Sara Lee, Inc. v. Nifty Foods Corp., 266 F.2d 541 (2d Cir. 1959).

60 Ginsburg, *Authorship in Comparative Copyright*, *supra* note 41, at 1065.

61 *See* BERNARD EDELMAN, LE SACRE DE L'AUTEUR 10 (2004), who emphasizes that:

> The status of the author . . . is an accurate gauge of the connection a society keeps, not only with its collective imaginary, but also with individual imaginaries . . . . Thus, as regards rights granted to the author, it is the position of an individual, of an individual's power, which is in question; and that is why the status of the author takes part in the individualization process, which is a western societies' distinguishing feature.

Id. *See also* David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 LAW & CONTEMP. PROBS. 139 (1992). Lange refutes Foucault because:

> Authorship as an artifact of authority is indefensible; it deserves to die. But authorship in the preliminary sense of identifying, merely entre nous, the "person to whom something owes its origin" is not only defensible, but inevitable as well. Indeed I would venture to say it has been an essential requirement of human existence from our earliest beginnings.

Lange, *supra* at 148.

Ultimately, however, this challenge to copyright does not question the vesting of exclusive rights in authors; rather, it deplores the divesting of authors by rapacious exploiters."[62]

Although statutorily recognized, "authors," as a legal term, is not explicitly defined.[63] The question of who is an author in copyright law may still be raised,[64] especially in cases of joint or co-authored works. Thus, when American and French courts decide who is and who is not an "author," the moral basis of their answers can be critiqued.[65]

Generally, American and French case law definitions of an "author" are very similar.[66] The United States Supreme Court has defined an "author" as "'he to whom anything owes its origin; originator; maker; . . .'"[67] and the "one who completes a work . . . ."[68] Similarly, in order to call someone an "author" in France, the *Cour de cassation* requires him to "have personally created the work."[69]

In addition, Unites States copyright law has a requirement called "fixation," pursuant to which "the author is . . . the person who translates an idea into a fixed, tangible expression entitled to copyright protection."[70] Some scholars emphasize[71] that creators may be entitled to copyright protection even though they *themselves* do not fix their idea in a tangible medium of expression.[72] As proof, the 1976 Copyright Act expressly mentions works of authorship that are *not* fixed in any tangible medium of expression as works not legally protected.[73] An author, therefore, may be a communicator of original expression, "either directly

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62 Ginsburg, *Authorship in Comparative Copyright*, *supra* note 41, at 1065.

63 *See* DE BELLEFONDS, *supra* note 10, at 107. *See also* Ginsburg, *Authorship in Comparative Copyright*, *supra* note 41, at 1066 (noting that "[t]he [main] legal systems . . . appear to agree that an author is a human being who exercises subjective judgment in composing the work and who controls its execution."). *Id.*

64 *See* VerSteeg, *supra* note 42.

65 Professor Ginsburg identified six principles defining an author, which she called six principles in search of an author. Ginsburg, *Authorship in Comparative Copyright*, *supra* note 41.

66 However, according to 17 U.S.C. § 201(b) (2006), "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the *author* for purposes of this title . . ." (emphasis added).

67 Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

68 *Id.*

69 *See, e.g.,* Cour de cassation [Cass. 1e civ.] Oct. 17, 2000, Juris-Data, 006400. In addition, pursuant to C. PROP. INTELL., art. L.113-1, "[a]uthorship shall belong, unless proved otherwise, to the person or persons under whose name the work has been disclosed." *Id.*

70 Comm. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989).

71 *See* VerSteeg, *supra* note 42, at 1365.

72 *See* Andrien v. S. Ocean County Chamber of Commerce, 927 F.2d 132 (3d Cir. 1991) (focusing on the statutory option of 17 U.S.C. § 101: fixation can be made "by or under the authority of the author . . . .").

73 17 U.S.C. § 301(b)(1) (stating that those unfixed works are not eligible for federal statutory protection).

(through personal fixation) or indirectly (through authorizing another to fix it)."[74]

The French copyright system reserves authorship for natural persons,[75] which sounds quite fair and moral, and seems to be consistent with the idea of works understood as a true extension of an author's personality. Nonetheless, legal entities may also be granted authorship rights in France. Legal persons have a statutory right in collective works[76] and *sui generis* design protection.[77] In addition, courts have granted authorship rights to legal entities on several occasions.[78]

As far as joint-authorship is concerned, American and French statutory definitions are also very much alike. The 1976 Copyright Act provides that a joint work "is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[79] Even though the French IP Code uses a term for joint work that is different from the American copyright term, calling it a "work of collaboration," the meaning is similar. The statutory definition of a work of collaboration is "a work in the creation of which more than one natural person has participated."[80]

Under American case law, the intent element is critical to prevail on a claim of joint ownership, and the authors' demonstrated intent to create a collaborative work must be clearly proven.[81] French copyright law has an equivalent proof of intent requirement. The French definition of a joint work implies a

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74 VerSteeg, *supra* note 42, at 1365.

75 *See* Cass. 1e civ, Mar. 17, 1982, 42 J.C.P. 1983, 20054, note Plaisant (holding that a legal entity shall *not* be qualified as an author except in the case of a collective work).

76 See C. PROP. INTELL., art. L.113-5, which states that "[a] collective work shall be the property, unless proved otherwise, of the natural *or legal* person under whose name it has been disclosed. The author's rights shall vest in such person." (emphasis added). In addition, *id.* at art. L.113-2 notes that:

> "Collective work" shall mean a work created at the initiative of a natural or legal person who edits it, publishes it and discloses it under his direction and name and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created.

77 *Id.* at art. L.511-9 (providing that "[t]he protection of the design or model . . . is acquired by registration. It is granted to the creator or to his successor-in-title. The *applicant for registration* is, failing proof to the contrary, considered to [sic] the beneficiary of this protection.") (emphasis added).

78 *See, e.g.*, Cass. 1e civ, Dec. 8, 1987, R.I.D.A., 1988, 136, 139 (considering whether a corporation produced a "personal work"); CA, Versailles, 13e ch., Apr. 2, 1991, Juris-Data 047493 (holding that a corporation could not deny authorship of an article); Cass. 1e civ., Dec. 17, 1991, LÉGIPRESSE, 1992, 3, 129 (qualifying a corporation as an author of a photograph).

79 17 U.S.C. § 101 (2006).

80 C. PROP. INTELL., art. L.113-2.

81 *See, e.g.*, Childress v. Taylor, 945 F.2d 500 (1991); Thomson v. Larson, 147 F.3d 195 (1998).

plurality of natural persons working together as authors in a concerted action.[82] As an example, a French court refused to grant copyright in posters and catalogs which included photographs under a claim of "joint work" because plaintiff photographer failed to prove that he had intentionally participated in conceptualizing the overall creation of the works.[83]

Both the American[84] and the French[85] legal systems also require the individual contribution of each author to a joint creation to be independently copyrightable. Under French law, "neither the one who only gave a theme or an idea, nor a simple performer"[86] may actually be called a co-author. Unfortunately, however, French courts hesitate to distinguish between actual joint-authorship and the act of merely proposing a theme or idea that another carries out. The *Cour de cassation* demonstrated this tendency when it found that Renoir had co-authored certain sculptures even though crippling rheumatism had admittedly prevented him from so much as handling the sculptures' raw material.[87] Although his pupil Guino actually sculpted the pieces, Renoir was granted joint-ownership copyright in the works because he had dreamt them up.

C. *The Nature of Copyright*[88]

Copyright is a property right.[89] The copyright protection provided by the United States Constitution is "in the form of a monopoly right given for limited times, and the beneficiary of this monopoly right is the author."[90] This definition also describes the rights granted under French copyright law.[91] Generally speaking,

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82 ANDRÉ LUCAS & HENRI-JACQUES LUCAS, TRAITÉ DE LA PROPRIÉTÉ LTTÉRAIRE ET ARTISTIQUE 160 (2d ed. 2001).

83 CA, Grenoble, 1e ch., June 1, 1992, Juris-Data 042139.

84 *See, e.g.*, Erickson v. Trinity Theatre, Inc., 13 F.3d 1061 (7th Cir. 1994); Ashton-Tate Corp. v. Ross, 916 F.2d 516, 521 (9th Cir. 1990); *Childress*, 945 F.2d at 500; Meltzer v. Zoller, 520 F. Supp. 847 (D.N.J. 1981).

85 *See, e.g.*, Cass. Crim., Jan. 26, 1965, 8 J.C.P. 1965, IV, 30 (denying joint-authorship to a homeowner who had made suggestions to his architect and had provided the architect with a rough pencil sketch that another architect had drawn free of charge); T.G.I., Paris, Dec. 8, 1980, R.I.D.A., 1981, 107, 175 (denying joint-authorship for having merely supplied a rough-draft sketch of a picture).

86 LUCAS & LUCAS, *supra* note 82, at 135.

87 Cass. 1e civ., Nov. 13, 1973, D. 1974, 32, 533, note Colombet. *See* Bernard Edelman, *La main et l'esprit*, 6 D. [1980] 43.

88 *See* REGISTER OF COPYRIGHTS, REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 3-6 (1961); Pierre-Emmanuel Moyse, *La Nature du Droit D'auteur: Droit de Propriété ou Monopole?*, 43 MCGILL L.J. 507 (1998); Laurent Pfister, *La Propriété Littéraire est-elle une Propriété? Controverses sur la Nature du Droit D'auteur au XIXème siècle*, 72 LEGAL HIST. REV. 103-25 (2004).

89 *See, e.g.*, Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

90 LEAFFER, *supra* note 18, at 6.

91 ANDRÉ FRANÇON, LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 5, 59 (1970); JEAN-LUC PIOTRAUT, DROIT DE LA PROPRIÉTÉ INTELLECTUELLE 42-54 (2004) [hereinafter PIOTRAUT,

French copyright allows authors to control the reproduction and performance of their intellectual creations, even after publication of the work, and even though such a work will often have to compete in the market with many others. Legally, copyright represents an ownership claim on intangible property. United States Supreme Court Justice Oliver Wendell Holmes set forth the special attributes of copyright in language that has since become the classic American case law definition:

> The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is *in vacuo*, so to speak. It restraints the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong.[92]

In France, the IP Code provides that the author's right "shall include attributes of an intellectual and moral nature as well as attributes of an economic nature . . . ."[93] Academics have debated the legal character of the *droit d'auteur* based on various interpretations of the terms "attributes of an intellectual and moral nature" and "attributes of an economic nature." Leading copyright law scholars argue that the *droit d'auteur* is a two-fold right, claiming that there is a right of personality as well as a right in property.[94] Other prominent scholars argue that a single right is protected by the *droit d'auteur*; that is, the right of personality.[95] Very few legal scholars have championed a pure property right approach.[96]

Adherents to both a single and two-fold right of personality approach have based their claims on the works of German

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PROPRIÉTÉ INTELLECTUELLE].

92 White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring).

93 C. PROP. INTELL., art. L.111-1.

94 *See, e.g.,* HENRI DESBOIS, LE DROIT D'AUTEUR EN FRANCE 209 (1978); CLAUDE COLOMBET, PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE ET DROITS VOISINS 15 (9th ed. 1999); LUCAS & LUCAS, *supra* note 82, at 40.

95 *See, e.g.,* PIERRE-YVES GAUTIER, PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 35 (5th ed. 2004); EDELMAN, LA PROPRIÉTÉ, *supra* note 11, at 38. Such an idea has been accepted in Germany. *See* 1 OTTO VON GIERKE, DEUTSCHES PRIVATRECHT 708 (1895); URHEBERRECHT: KOMMENTAR 81 (Gerhard Schricker ed. 1987).

96 *See* Jean-Marc Mousseron, Jacques Raynard & Thierry Revet, *De la propriété comme modèle, in* MÉLANGES OFFERTS A ANDRÉ COLOMER 281 (1993); BERTRAND, *supra* note 14, at 76.

thinkers, particularly on those of the great philosopher Immanuel Kant[97] and the legal scholar Josef Kohler.[98] This group describes the act of creating or authoring a work as a formalized intellectual process, linked indissolubly to the author. The right to be protected, therefore, falls squarely under the right of personality, just like honor and privacy do. This sounds fairer and more moral to authors, according to the personality approach, than does an ownership right arising out of a property claim.[99] This alleged moral superiority of the French *droit d'auteur*, however, is open to ready attack. First, *droit d'auteur* as a right of personality is currently under challenge.[100] Second, the alternative property right approach is also driven by considerations of fairness and morality.

The first challenge to the personality right analysis comes from the legal description of the *droit d'auteur*, in the French IP Code which provides: "The author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal *property right* which shall be enforceable against all persons."[101] This clause demonstrates that French copyright supports a legal claim to property.[102] Because the so-called "attributes of an intellectual and moral nature" always occur while the work is being exploited, those personalistic rights should logically be considered a kind of subsidiary easement or servitude, enjoyed by the authors vis-à-vis the copyright assignees.[103]

The personality right analysis can be further challenged in that most of the personality-specific attributes of a work survive the

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97 *See* Paul Edward Geller, *Must Copyright Be Forever Caught Between Marketplace and Authorship Norms?, in* OF AUTHORS AND ORIGINS 158 (Brad Sherman & Alain Strowel eds., 1994):

> Kant . . . observed that authors expressed their own thoughts, though not necessarily their personalities, in their "discourse." For Kant, authors had no property right in such self-expression, that is, no right such as might be claimed in tangible things or land, but they did have some right to control the communication of resulting texts.

Id. at 168.

98 JOSEF KOHLER, URHEBERRECHT AN SCHRIFTWERKEN UND VERLAGSRECHT 137 (1907); JOSEF KOHLER, KUNSTWERKRECHT 22, 140 (1908).

99 *See* Edelman, *Nature du Droit D'auteur*, *supra* note 24. Other French academics, such as Gaudrat, go so far as to characterize the *droit d'auteur* as a human right. Gaudrat, *supra* note 29, at 20; Afori, *Human Rights and Copyright*, *supra* note 33. *But see* Michel Vivant, *Authors' Rights, Human Rights?*, 174 R.I.D.A. 60 (1997).

100 *See, e.g.*, BERTRAND, *supra* note 14, at 76; Mousseron et al., *supra* note 96.

101 C. PROP. INTELL., art L.111-1, ¶ 1 (emphasis added).

102 Though several older judgments of the *Cour de cassation* had denied granting authors' rights through property rights. *See, e.g.,* Cass. req., July 25, 1887, Dalloz périodique, 1888, 1, 5, note Sarrut. More recently, the *Cour de cassation* has held that moral rights in a work may initially vest in a legal entity. *See, e.g.,* Soc. Polygram v. Soc. Image, 161 R.I.D.A. 303 (1994). This certainly seems to challenge the personality right analysis of copyright.

103 Mousseron et al., *supra* note 96.

author's death. For instance, under article L.121-1 of the French IP Code, the author's right of respect for his name, his authorship and his work, "shall be perpetual . . . . It may be transmitted mortis causa to the heirs of the author. Exercise may be conferred on another person under the provisions of a will."[104] It is obvious that such perpetuity hardly fits the personality right analysis. Finally, do not forget that, in French, literary and artistic property[105] is an alternative legal term for *droit d'auteur*.

Turning to the considerations of fairness and morality that underpin the property right approach to copyright, let us keep in mind that protection of an individual's property, as a general premise, is usually considered protection of an individual's liberty:

> Property and liberty are intricately linked. In fact, property, not representative government or majority rule, exemplifies freedom. Property is a sphere in which the individual can be free of government; the historical role of private property as countervailing to the power of the state cannot be overstated. Equally strong is the relationship between strong private property rights and prosperity. If nothing else, the dismal economic failure of socialism has demonstrated what transpires when private ownership of the means of production is abolished.[106]

Locke's labor theory[107] as well as Hegel's personality theory,[108] both of which focus on the individual,[109] support the property right analysis of copyright as serving fair and moral ends. Le Chapelier, the reporter of the 1791 French revolutionary Decree on Playwrights' Copyright, endorsed this view himself when he declared that "[t]he most sacred, the most legitimate, the most unassailable, and, I may say, the most personal of all properties, is the work which is the fruit of a writer's thoughts."[110]

Later, the famous nineteenth-century poet, Lamartine,

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104 C. PROP. INTELL., art. L.121-1.

105 In French, the term for literary and artistic property is "*propriété littéraire et artistique*."

106 Ilana Mercer & N. Stephan Kinsella, *Do Patents and Copyrights Undermine Private Property*, INSIGHT MAGAZINE, May 21, 2001. The main purpose of the article is to criticize intellectual property rights, which, the authors assert, are not "natural" property rights grounded in the common law, but "privileges granted solely by state legislation," which can "give people access to property they don't own." *Id.*

107 *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 305-06 (1698) (stating that every man has a property right in his own body; in the labor of his body; and, by extension, in the fruits of his labor).

108 *See* GEORG W.F. HEGEL, PHILOSOPHY OF RIGHT 41-45 (T.M. Knox trans., 1967) (1827) (asserting that property provides the most favorable conditions to the development of creators' personality).

109 *See* Afori, *supra* note 33; Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

110 Report of Le Chapelier of Jan. 15, 1791, *reprinted in* 7 RÉIMPRESSION DE L'ANCIEN MONITEUR 113, 116-18 (1860). *See* Ginsburg, *Tale of Two Copyrights*, *supra* note 7 (adding that this declaration has been made with respect to unpublished works).

acknowledged "the very nature of this property, entirely personal, entirely *moral*, entirely united with the creator's thought."[111] More recently, Dean Carbonnier, one of the most prominent French civil law scholars in the Twentieth Century, insisted that intangible property is never idle. All intangible property, or "incorporeal property," as said in French, is necessarily based on human activity and evidence the work of the mind (which is the case for patents and copyrights).[112] The American legal concept of copyright as property can be characterized as follows:

> The framers of the Constitution were men to whom the right to hold property was enormously important. They were not far removed from Locke. His ideas pervaded their debates and decision. Property was seen not as opposed to liberty, but indispensable to it; for men with property would be independent of the power of the State, in that rough-and-tumble roiling of opinion and power which marks freedom.[113]

From the above evidence, I can see no superiority of French law over American law in terms of fairness and morality regarding justifications for copyright protection.

III. FAIRNESS AND MORALITY WITH RESPECT TO ACCESS TO COPYRIGHT PROTECTION

A. *The Subject Matter of Copyright*

The United States Constitution empowers Congress to secure the rights of authors in their *writings*.[114] Under the 1976 Copyright Act, copyrightable works are called "works of authorship."[115] Despite this language, it seems that not all writings produced by an author are copyrightable. Under French *droit d'auteur* as well, not every fruit of creative or aesthetic labor is copyrightable, although slight differences can be found between American and French law on this issue.[116]

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111 Alphonse de Lamartine, *On Literary Property, Report to the Chamber of Deputies* (1841) *in* 8 ŒUVRES COMPLÈTES 394, 405 (1842) (emphasis added).

112 3 JEAN CARBONNIER, DROIT CIVIL 388 (19th ed. 2000).

113 Ladd, *supra* note 21.

114 *See* U.S. CONST. art. I, § 8, ¶ 8.

115 *See* 17 U.S.C. § 102(a) (2006).

116 Both United States and French law grant legal protection to the expression of an idea, but not to the idea itself. This American "idea-expression dichotomy," see 17 U.S.C. § 102(b); Baker v. Selden, 101 U.S. 99 (1879), has its French counterpart. The French principle behind the legal requirement of *expression* is that ideas should flow freely. *See* Tribunal civil [Trib. civ.], La Seine, Dec. 19, 1928, Annales de la Propriété Industrielle, Artistique et Littéraire, 1929, 71, 181. *See also* TRIPS, *supra* note 43, at art. 9 ¶ 2.

Under both countries' copyright systems, in order to be copyrightable, an idea must have shape, since copyright protection is only available to the tangible form of an idea. On the other hand, computer programs as well as compilations of data, which by reason of the selection or arrangement of their contents, constitute intellectual creations, are

Neither American nor French law grants copyright protection in several categories of writings and designs. These include, but are not limited to: names and short phrases;[117] "catchwords, catchphrases, mottoes, slogans, or short advertising expressions;"[118] "mere listings of ingredients, as in recipes, labels, or formulas;"[119] government works;[120] and semiconductor chip products.[121]

There are some creative intellectual or aesthetic works that are eligible for copyright protection under French law,[122] but are ineligible for protection under United States copyright law. In particular, only French copyright law protects typeface designs,[123]

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eligible for copyright protection under both U.S. and French law. 17 U.S.C. § 103; TRIPS, *supra* note 43, at art. 10.

117 For U.S. law, see U.S. Copyright Office, Circular No. 1, 3 (July, 2006), *available at* http://www.copyright.gov/circs/circ01.pdf [hereinafter Circular 1]; U.S. Copyright Office, Circular No. 34, 1 (2006), *available at* http://www.copyright.gov/circs/circ34.pdf [hereinafter Circular 34]. Exceptions listed in Circular 34 include "names of products or services[,] names of businesses, organizations, or groups (including the name of a group of performers)[and] names of pseudonyms of individuals (including pen name or stage name) . . . ." For French law, see, *e.g.*, CA, Paris, 1e ch., Jan. 14, 1992, R.I.D.A., 1992, 152, 198 (denying copyright protection for Cajun terms listed in dictionary, since words and expressions are public domain).

118 Circular 34, *supra* note 117, at 1. French courts usually exempt names and short phrases from copyrightable material on the sole ground that they do not fulfill the originality requirement (although they might theoretically be eligible for copyright protection). As an example of a non-copyrightable slogan under French copyright law, see Cass. ch. civ., Dec. 3, 1956, Annales de la Propriété Industrielle, Artistique et Littéraire, 1957, 91, 117.

119 *See* Circular 34, *supra* note 117, at 1 (adding that "[w]hen a recipe or formula is accompanied by explanation or directions, the text directions may be copyrightable, but the recipe or formula itself remains uncopyrightable."). On a similar note, a French court, CA, Paris, May 21, 2002, R.I.D.A., 2003, 195, 257, note Kéréver, refused to confer copyright protection on a Masonic ritual although it had been set down in writing. *See also* T.G.I., Paris, July 10, 1974, D. 1975 somm, 12, 40 (stating that copyright protection is not available for a cooking recipe); T.G.I, Paris, Sept. 30, 1997, R.I.D.A., 1998, 177, 273, note Piredda (same).

120 *See* 17 U.S.C. § 105 ("Copyright protection . . . is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise."). French scholars similarly teach that no copyright protection can be claimed in official or statutory documents, or in decisions of courts. *See, e.g.* LUCAS & LUCAS, *supra* note 82, at 100.

121 Both the U.S. Copyright Office, *see* LEAFFER, *supra* note 18, at 114, and French scholars, such as ALBERT CHAVANNE & JEAN-JACQUES BURST, DROIT DE LA PROPRIÉTÉ INDUSTRIELLE 394 (5th ed. 1998), agree that semiconductor chips are non-copyrightable, utilitarian objects. Accordingly, the United States passed the Semiconductor Chip Protection Act of November 8, 1984, Pub. L. No. 98-620, 98 Stat. 3335, 3347 (1994), which inspired Council Directive 87/54, 1987 O.J. (L 24) 95 (EC). The Directive has been incorporated into French legislation under Law No. 87-890 of November 4, 1987. Moreover, pursuant to section 6, articles 35-38 of TRIPS, *supra* note 43, both the United States and the European Union member states (including France) have to provide *sui generis* protection to the layout-designs (topographies) of integrated circuits.

122 Although perfume fragrances had been protected under French copyright law, see, *e.g.*, CA, Paris, 4e ch. A, Jan. 25, 2006, Rev. Internationale Propriété Industrielle et Artistique, 2005, 113, such a doctrine has just been challenged by the *Cour de cassation*. *See* Cass. 1e civ, June 13, 2006, *available at* http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2006X06X01X00447X018

123 In the United States, typeface designs have been excluded from copyright

industrial designs,[124] and titles of works.[125] Meanwhile, it is well established in American case law that "a copyright in literary material does not secure any right in the title itself."[126] French law holds the opposite view, which was demonstrated by a French court when it granted copyright protection just in the French translation of the title of Emily Brontë's novel, *Wuthering Heights*. The court found that the translation, called *Les hauts de Hurlevent*, had achieved "a brainwave rendering, in a musical, anxious, and approximating manner, the anguishing atmosphere of the original [English] title."[127]

Surely, the moral superiority of French law can hardly be inferred from the above-mentioned examples (*i.e.*, allowing the copyright of typeface designs, industrial designs, and titles of works). Albeit not by copyright, these categories are also fairly well protected in the United States. Unfair competition law provides protection for some of these categories under a theory of "passing off."[128] In addition, protection for these categories is not uniformly granted in France. Although theoretically eligible for copyright protection under French law, many of these creations are denied legal protection by the courts because they lack originality.[129] Finally, in the United States, industrial designs are

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protection. *See* H.R. REP. NO. 94-1476, pt. 2, at 55 (1976); Eltra Corp. v. Ringer, 579 F.2d 294 (4th Cir. 1978). On the other hand, the French Intellectual Property Code specifically provides that "typographical works" are the subject matter of copyright. C. PROP. INTELL., art L.112-2, ¶ 8.

124 Under U.S. law, only three kinds of utilitarian items are eligible for full protection: architectural works, vessel hulls, and computer "mask works" (the latter two by *sui generis* legislation). *See, e.g.,* GORMAN & GINSBURG, COPYRIGHT 383 (6th ed. 2002). Further, useful articles' designs are not copyrightable unless they contain some elements that, physically or conceptually, can be identified as separable from their utilitarian aspects. *See, e.g.,* Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980).

French law, as distinct from U.S. law, has adhered to a "unity of art" doctrine, according to which equal copyright protection has to be conferred on all works, whether they relate to fine art or are useful objects. This has led to a broad-based protection of useful articles under both copyright law and *sui generis* industrial design law. *See* LUCAS & LUCAS, *supra* note 82, at 75. The ongoing harmonization of European design laws may, however, bring about changes in the copyrightability of utilitarian items. *See* JUNG-JOO YOO, L'INFLUENCE DU DROIT COMMUNAUTAIRE DES DESSINS ET MODELES SUR LE DROIT DES DESSINS ET MODELES EN FRANCE (2005).

125 *See* Circular 1, Circular 34, *supra* note 117 (refusing to grant copyright in a title of a work). The French IP Code holds the opposite of American law, and specifies that "[t]he title of a work of the mind shall be protected in the same way as the work itself where it is original in character." C. PROP. INTELL., art. L.1112-4, ¶ 1. Sometimes, however, French courts do in fact refuse such copyright protection reasoning that the title lacks originality.

126 *See, e.g.,* Kirkland v. NBC, 425 F. Supp. 1111 (E.D. Penn. 1976).

127 Tribunal de commerce, La Seine, June 26, 1951, Annales de la Propriété Industrielle, Artistique et Littéraire, 1952, 86, 60.

128 Under *Kirkland*, 425 F. Supp. at 1114, protection of titles "has, in certain limited circumstances, been afforded under the trademark theory, but generally, a title will be safeguarded only under a theory of unfair competition." *Id. See* LEAFFER, *supra* note 18, at 97. Passing off usually occurs when a producer misrepresents his own goods or services as someone else's, which engender consumer confusion as to source.

129 Regarding titles, see *supra* note 128. Regarding typeface designs, see Trib. de com.,

often protected either under design patent law[130] or by *sui generis* vessel hull designs legislation, although these are not substantially useful for a broad range of works.[131] In France, on the other hand, both courts[132] and scholars[133] are beginning to challenge the broad-based protection of useful articles under both copyright law and *sui generis* industrial design law.[134]

In addition to works of authorship, French copyright statutes grant protection to a broad array of creations included under the rubric of literary and artistic copyrights. Databases comprising a substantial investment,[135] published posthumous works,[136] performances of literary or artistic works, variety, circus, or puppet acts,[137] phonographic[138] or video products,[139] as well as broadcast audiovisual programs are all covered under literary and artistic property rights.[140] At first glance, such extended intellectual property rights protection seems quite fair and moral. It appears in stark contrast to the 1976 United States Copyright Act, which

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Marseille, Dec. 5, 1932, Annales de la Propriété Industrielle, Artistique et Littéraire, 1939, 81, 281.

130 Although this way of protecting industrial designs may be criticized, *see, e.g.*, GORMAN & GINSBURG, *supra* note 124, at 195-98; LEAFFER, *supra* note 18, at 123-24, the U.S. Patent Act confers a design patent for a fourteen-year term to "[w]hoever invents any new, original and ornamental design for an article of manufacture . . . ." 35 U.S.C. § 171 (2006).

131 In the wake of the Supreme Court's decision in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), Congress enacted the 1998 Vessel Hull Design Protection Act (VHDPA). The VHDPA provides a ten year term of protection to the designer of a registered original boat-hull. 17 U.S.C. §§ 1301-1305, 1310.

132 *See, e.g.*, CA, Paris, 4e ch., Nov. 22, 1983, D. 1985, Somm. 9, 10, note Burst.

133 *See id.*; GAUTIER, *supra* note 95, at 123-25. Jean-Marc Mousseron & Joanna Schmidt, 43 D. [1993] somm. 375, explain that current French law produces a grotesque interpenetration of copyright and business. Moreover, YOO, *supra* note 126, asserts that such criticism is also getting stronger due to the ongoing harmonization of design laws in the European Union.

134 *See supra* note 124.

135 *See* C. PROP. INTELL., art. L.341-1 *et seq.* (granting an exclusive right for a fifteen-year term to producers of databases when those databases contain a substantial financial, technical, or human investment), enacted pursuant to Council Directive 96/9, 1996 O.J. (L 20) 20 (EC).

136 *See* C. PROP. INTELL., art. L.123-4 (granting an exclusive right for a twenty-five-year term to the owners of a posthumous work who publish or have the work published *after* it passed into the public domain). This provision was passed in order to incorporate Council Directive 93/98 1993 O.J. (L 290) 9 (EEC) (harmonizing the term of protection of copyright and certain related rights into French legislation).

137 *See* C. PROP. INTELL., arts. L.211-4, L.212-1 (granting an exclusive right for a fifty-year term to persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus, or puppet acts).

138 *See id.* at L.211-4, L.213-1 (granting an exclusive right for a fifty-year term to phonogram producers, *i.e.,* the natural or legal persons who took the initiative and responsibility to initially fix the sequence of sounds).

139 *See id.* at L.211-4, L.215-1 (granting an exclusive right for a fifty-year term to videogram producers, *i.e.,* the natural or legal persons who took the initiative and responsibility to initially fix the sequence of images, whether accompanied by sounds or not).

140 *See id.* at L.211-4, L.216-1 (granting an exclusive right for a fifty-year term to audiovisual communication enterprises on their broadcast programs).

specifically excluded a performance right in sound recordings,[141] the unfairness of which has since been noted.[142] In reality, however, those copyright-related rights, which are called "neighboring rights," do not really offer copyright protection. Rather, they provide their holders with a lower level of legal protection than that conferred on copyright owners.[143] Moreover, United States courts have been granting performers enforceable state law property rights in the product of their services for a long time.[144] Finally, the U.S. Copyright Act forbids unauthorized fixation and trafficking in sound recordings and music videos,[145] and also outlaws circumvention of copyright protection systems.[146]

The conditions necessary to grant copyright protection are set forth in the 1976 Copyright Act: "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now . . . or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[147] The two main substantive requirements for copyright protection stemming from this provision are originality and fixation in tangible form.

Originality of works, the "one pervading element,"[148] has been required for copyright protection by French courts as well.[149] This is required despite the fact that the French IP Code only mentions such a condition in the context of *titles*.[150] Under both American and French case law, originality is distinct from novelty.[151]

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141 *See* 17 U.S.C. §§ 106(4), 114(a) (2006). Note, however, that a new exclusive right "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission" was added to the U.S. Copyright Act in 1995. *See infra* note 270 and accompanying text discussing 17 U.S.C. § 106(6).

142 *See, e.g.,* Steven J. D'Onofrio, *In Support of Performance Rights in Sound Recordings*, 29 UCLA L. REV. 168 (1981) (arguing that equity supports a performance right in sound recordings).

143 In addition to the shorter duration of such neighboring rights, the French IP Code specifically states that "[n]eighboring rights shall not prejudice authors' rights. Consequently, no provision in this Title shall be interpreted in such a way as to limit the exercise of copyright by its owners." C. PROP. INTELL., art L.211-1.

144 Waring v. WDAS Broad. Station, Inc., 327 Pa. 433 (1937); Ettore v. Philco Television Broad. Corp., 229 F.2d 481 (3d Cir. 1956); Goldstein v. Calif., 412 U.S. 546 (1973). Such state law protection has not been excluded under section 301 of the 1976 Act. Because unfixed performances are not covered under federal law (*i.e.*, the 1976 Act), state law governing such works is not threatened with federal preemption.

145 See 17 U.S.C. § 1101.

146 *See id.* §§ 1201-1205.

147 *Id.* § 102(a).

148 1 NIMMER ON COPYRIGHT, *supra* note 19, § 2.01.

149 André Lucas & Carine Bernault, *Objet du droit d'auteur. Œuvres protégées. Règles générales, in* 1135 JURIS-CLASSEUR PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 8 (2001). *See, e.g.*, Cour de cassation, Mar. 7, 1986, D. [1986] 31, 405, note Edelman (deciding that originality is required for a computer program to be eligible for copyright).

150 *See* C. PROP. INTELL., art. L.112-4, ¶ 1.

151 See, *e.g.,* under American law, *Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976) (emphasizing that "originality is . . . distinguished from novelty; there must be independent creation, but it need not be invention in the sense of striking uniqueness,

Moreover, both legal systems appear to interpret the originality requirement very similarly despite the differing statutory language of each country's copyright laws. Whereas French law formally defines originality as a *print of the author's personality*,[152] under United States law, "[o]riginality means that the work owes its creation to the author and this in turn means that the work must not consist of actual copying."[153] In practice, French courts actually apply[154] the American principle, under which originality only requires independent creation and a modest quantum of creativity.[155] As a result, decisions on copyrightable subject matter are very similar under French and American law.

For instance, in neither country are "mere listings of ingredients or contents"[156] or "[w]orks consisting entirely of information that is common property and containing no original authorship . . . "[157] generally eligible for copyright protection. The law governing compilations of raw data is particularly similar. In *Feist Publications, Inc. v. Rural Telephone Service Co.*,[158] the United States Supreme Court overturned the long-held "sweat of the brow" doctrine[159] by denying copyright protection to factual information (*i.e.*, phone numbers, addresses, and names listed in alphabetical order) contained in the white pages of a classified telephone directory. Similarly, in *Les publications pour l'expansion industrielle v. Soc. Coprosa*,[160] the *Cour de cassation* denied copyright protection to a simple chart presenting the world's main car

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ingeniousness, or novelty . . . "), and under French law, Cass. 1e civ. Feb. 11, 1997, J.C.P., 1997, 22973, note Daverat (preferring *originality*, as required under copyright law, to *novelty*, as required under industrial property law).

152 Cass.1e civ., June 30, 1988, R.I.D.A., 1998, 178, 237.

153 *Batlin*, 536 F.2d at 490.

154 *See* LUCAS & LUCAS, *supra* note 82, at 80.

155 *See* LEAFFER, *supra* note 18, at 56. In *Batlin*, 536 F.2d at 490, the Second Circuit held that "[t]he test of originality is concededly one with a low threshold in that 'all that is needed . . . is that the "author" contributed something more than a "merely trivial" variation, something recognizably "his own"'" (citing Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951)).

156 Circular 1, *supra* note 117, at 3.

157 *Id.*

158 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

159 The formulation of the "sweat of the brow" doctrine first appeared in Jeweler's Circular Publ'g Co. v. Keystone Publ'g Co.:

> The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are publici juris, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author.

281 F. 83, 88 (2d Cir. 1922).

160 Cass. 1e. civ., May 2, 1989, R.I.D.A., 1990, 143, 290, 309, note Kéréver.

manufacturers, despite "the effort required to gather the items."[161]

Under United States legislation, fixation of works in tangible form is another basic requirement for federal copyright protection. To this end, the Copyright Act provides:

> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" . . . if a fixation of the work is being made simultaneously with its transmission.[162]

By contrast to the statutory fixation requirements under American law, even though the Berne Convention allows its member states to prescribe a fixation requirement,[163] French copyright law does not impose one.[164] This is because in France, an author shall enjoy the legal protection in his work "by the mere fact of its creation."[165] Oral works such as "lectures, addresses, sermons, pleadings,"[166] as well as improvisational speeches or performances are, accordingly, copyrightable in France.[167] In the United States, however, they are not.[168]

Before jumping to the conclusion that these small differences demonstrate the moral supremacy of French copyright law, keep in mind that even in France, fixation is a statutory prerequisite to copyright protection in certain circumstances, such as "choreographic works, circus acts and feats and dumb-show works . . . ."[169] A court granted protection to a magician's act just on this statutory basis, reasoning that it had been *fixed* through an

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161 *Id.*

162 17 U.S.C. § 101 (2006).

163 Under the Berne Convention, "[i]t shall . . . be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form." Berne Convention, *supra* note 43, at art. 2(2).

164 *See, e.g.*, LUCAS & LUCAS, *supra* note 82, at 66; DE BELLEFONDS, *supra* note 10, at 33.

165 C. PROP. INTELL., art. L.111-1, ¶ 1.

166 *Id.* at art. L.112-2, ¶ 2. *See* T.G.I., Paris, 1e ch., R.I.D.A., 1992, 151, 340, note Kéréver (granting copyright protection to Roland Barthes's courses in the Collège de France).

167 Going even further, a hairstyle was once judged copyrightable. *See* CA, Aix-en-Provence, 2e ch., Cahiers droit d'auteur, 1988, 1, 23*; but see* T.G.I., Strasbourg, 1e ch., 23 D. [1990] comm. 185, note Burst (refusing to protect a hairstyle, but on the sole ground of lack of originality).

168 According to Circular 1, *supra* note 117, at 3, materials that are *not* eligible for federal copyright protection include unfixed works such as "improvisational speeches or performances that have not been written or recorded." *Id.*

169 C. PROP. INTELL., art. L.112-2, ¶ 4. Choreographic works and the like are copyrightable, provided that "the acting form of which is set down in writing or in other manner." This fixation requirement makes a rather illogical distinction within the subject matter of French copyright. *Id.*

audiovisual recording.[170] Besides this, most other categories of copyrightable works, such as books, plays, drawings, paintings, photographs, movies, etc., are by definition fixed. As for the remaining categories of works, such as improvisational performances, fixation may theoretically be optional under French law, but it actually appears to be essential to performers in order to have evidence of their works.

Lastly, American and French law treat copyright in immoral works the same. In both countries, courts have found immoral or obscene works, such as pornographic motion pictures,[171] to be copyrightable subject matter.

B. *The Formalities Issue*

Article 5, paragraph (2) of the Berne Convention provides that protection of literary and artistic works "shall not be subject to any formality."[172] In compliance with this provision, the French IP Code therefore states: "The author of a work of the mind shall enjoy in that work, *by the mere fact of its creation*, an exclusive incorporeal property right which shall be enforceable against all persons."[173] This legislative enactment, which appears to be fair and moral, is consistent with the idea that France's *droit d'auteur* is deemed a natural right.[174] Thus, no formality is required for copyright protection.

By the same token, the United States entry into the Berne Convention on March 1, 1989, following the passage of the Berne Convention Implementation Act (BCIA) of 1988,[175] marked a turnaround in the traditional formalism of American copyright law[176] with regard to both notice affixation and copyright registration.[177] Since then, in compliance with Berne, notice of copyright has no longer been a precondition to copyright protection.[178] Notice may, however, be placed at the author's

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170 T.G.I., Paris, 3e ch., Dec. 20, 1996, R.I.D.A., 1997, 173, 351.

171 *See* Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852 (5th Cir. 1979); Cour de cassation, May 6, 1986, R.I.D.A., 1986, 130, 149.

172 Berne Convention, *supra* note 43, at art. 5(2).

173 C. PROP. INTELL., art. L.111-1, ¶ 1 (emphasis added).

174 *See* FRANÇON, *supra* note 91, at 13.

175 Berne Convention Implementation Act of 1988 (BCIA), Pub. L. No. 100-568, 102 Stat. 2853 (1988).

176 *See* LUCAS & LUCAS, *supra* note 82, at 53.

177 For many years, statutory copyright protection in the United States could be lost if the author failed: (i) to give notice of published copies of works, and (ii) to send a prompt deposit after a demand by the Register of Copyrights. 17 U.S.C. §§ 10, 13 (1909). *See, e.g.,* Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1, 8-24 (1988).

178 Professors Gorman and Ginsburg note that such "[a] notice requirement had been a feature of every United States copyright statute since the original Act of 1790." GORMAN & GINSBURG, *supra* note 124, at 383.

discretion, on "publicly distributed copies" ("from which the work can be visually perceived, either directly or with the aid of a machine or device"[179]) or on sound recordings.[180]

The main purpose of notice is actually to inform the public of a claim on copyright. Professor Leaffer may not be sure whether the value of such an informative function of notice outweighs "its unfairness to authors."[181] I see nothing unfair or immoral in a free, simple notice affixation. In addition, pursuant to the present American legislation, notice would mostly be used, in the case of a copyright infringement suit, to deny the weight of "a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages."[182] Public information on copyrighted works is a respectable design, so that the American requirement of a notice affixation could hardly be considered unfair. Moreover, despite the fact that copyright notice has no legal effect in France, it is still affixed on most of the books and sound recordings published in that country, just like on those published in the United States.[183]

Registration has two stated goals under American law: "enriching the resources of the Library of Congress and securing a comprehensive record of copyright claims."[184] Under the French statutory deposit requirement, registration also exists. It is called the *dépôt légal*,[185] and it establishes cultural public records of books in the *Bibliothèque Nationale de France*,[186] of movies in the *Centre National de la Cinématographie*,[187] and of broadcast programs in the *Institut National de l'Audiovisuel*.[188] These mandatory deposit requirements are enforced in the same way in France and in the United States. Parties who do not register are not subject to copyright forfeiture, but instead are subject to a fine.[189]

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179 *See* 17 U.S.C. § 401(a) (2006).

180 *See id.* § 402(b).

181 LEAFFER, *supra* note 18, at 160.

182 *See* 17 U.S.C. § 401(d).

183 According to GORMAN & GINSBURG, *supra* note 124, at 406, despite the abrogation of the notice requirement by the BCIA, notice affixation in the United States is very much alive "[i]n part because it is difficult to break with such a longstanding practice as the use of copyright notice, and in part because Congress and the Copyright Office continue to believe that notice serves useful purposes in warning unauthorized users and in conveying information . . . ." Moreover, article III of the UNESCO-administrated Universal Copyright Convention of 1952 authorizes its Member States to require such a notice affixation. *See* Universal Copyright Convention, art. 3, Sept. 6, 1952, as last revised July 24, 1971, *available at* http://www.unesco.org/culture/laws/copyright/html_eng/page1.shtml

184 GORMAN & GINSBURG, *supra* note 124, at 407.

185 Law No. 92-546 of June 20, 1992, Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], June 23, 1992.

186 *See, e.g.*, PIOTRAUT, PROPRIÉTÉ INTELLECTUELLE, *supra* note 91, at 34-36.

187 *Id.*

188 *Id.*

189 Pursuant to article 7 of the French Law of 1992, the fine can reach up to 75,000

Registration, though necessary to secure comprehensive record of copyright claims in both countries, is not necessary to secure legal protection in either one. Authors need not register their work under present French law, where the author's rights are granted "*by the mere fact of* [the] *creation*" of a work.[190] Similarly under current American law, "the act of registration does not create a copyright; copyright begins when an author fixes his work in a tangible medium of expression."[191] Nonetheless, a valid registration issued by the Copyright Office may be a prerequisite to adjudicating copyright disputes. A plaintiff is required to have a registered copyright in order to bring an infringement suit in a United States court for works originating in the United States.[192] Also, no matter where the works originate from, a validly issued copyright registration is necessary to obtain statutory damages or attorney's fees.[193] In addition, with respect to standing and relief requirements, a properly completed registration provides *prima facie* evidence of the validity of the copyright.[194]

In an effort to eliminate standing and relief requirements based on registration,[195] some critics argue that the registration requirement is an "anachronism"[196] that discriminates, both against U.S. authors,[197] and "against small copyright owners who either do not know of the benefits of prompt registration or do not have the time or money to register within the short grace period provided."[198]

Notwithstanding Berne stipulations, registration in itself can hardly be considered unfair or immoral as long as it is neither expensive nor complicated. These conditions are certainly met in the United States, where the current fees for registration of a basic claim in an original work of authorship are very low.[199] Even in France, registration, though allegedly unacceptable in the field of

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Euros, whereas, pursuant to the United States Copyright Act, the Register of Copyright may impose a maximum fine of $2,500 for willful or repeated refusal to comply with a demand for deposit. 17 U.S.C. § 407(d)(3) (2006).

190 *See* C. PROP. INTELL., art. L.111-1, ¶ 1.

191 LEAFFER, *supra* note 18, at 265.

192 *See* 17 U.S.C. § 411(a) (stating that a plaintiff is not required to have a registered copyright to bring an infringement action for a violation of the rights of attribution and integrity for works of visual art). In compliance with the Berne Convention, a plaintiff is not required to have a registered copyright to bring an infringement action for works originating in other Berne country member states.

193 *See id.* § 412 (providing the copyright owner with a three month grace period to register after the first publication of his work).

194 *See id.* § 410(c).

195 *See* Copyright Reform Act of 1993, H.R. 897, 103d Cong., § 1 (1993).

196 LEAFFER, *supra* note 18, at 275 n.66.

197 *Id.*

198 *Id.*

199 *See* 37 C.F.R. § 201.3 (2006).

copyright, happens to be a precondition to protecting most industrial property rights. Thus, pursuant to the French IP Code, patents,[200] plant patents,[201] integrated circuit layout-designs,[202] trademarks,[203] and industrial designs[204] can only be obtained through registration.[205]

As far as copyright is concerned, the principle of protection without registration is hardly an intrinsic element of this particular French legislation. As a matter of fact, registration had been a constant prerequisite to bringing an infringement suit until the requirement was repealed in 1925.[206] As a result, it has become common practice in France for authors to voluntarily apply for optional registration in a private organization, such as a copyright management society,[207] in order to get testimonial evidence of their work precedence and ownership, to support them against potential plagiarists or unscrupulous contracting partners.[208]

C. *The Ownership of Copyright*

The U.S. Copyright Act and the French IP Code include analogous provisions as to (1) ownership of a copyright as distinct from ownership of a material object,[209] and (2) ownership as initially vesting in authors[210] or joint authors.[211] Moreover, both

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200 *See* C. PROP. INTELL., art. L.611-1, ¶ 1.

201 *See id.* at art. L.623-7.

202 *See id.* at art. L.622-1, ¶ 1.

203 *See id.* at art. L.712-1, ¶ 1.

204 *See id.* at art. L.511-9, ¶ 1. The fact remains, however, that an "unregistered Community design" may be protected throughout the entire territory of the European Union for a period of *three years* from the date on which the design was first made available to the public within the Community. *See* Council Regulation 6/2002, 2002 O.J. (L 3) 1, 4 (EC).

205 The exceptions to the rule that registration is required to obtain industrial property rights are "well-known marks" within the meaning of Article 6*bis* of the Paris Convention. *See* GRAEME B. DINWOODIE ET AL., INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY 198-200 (2001).

206 Under article 6 of the 1793 French decree, if authors failed to deposit two copies of their works in the *Bibliothèque Nationale* (the National Library), they were not permitted to bring suit for infringement. *See, e.g.,* COLOMBET, *supra* note 94, at 32.

207 Registration fees are usually much higher in France than in the United States.

208 *See* PIOTRAUT, PROPRIÉTÉ INTELLECTUELLE, *supra* note 91, at 36; GAUTIER, *supra* note 95, at 215 (mentioning psychological comfort as a secondary purpose for such registration).

209 Section 202 of the United States Copyright Act provides:

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecorded in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property in any material object.

17 U.S.C. § 202 (2006). Concurrently, the French IP Code emphasizes that "[t]he incorporeal property right set out in Article L111-1 shall be independent of any property right in the physical object." C. PROP. INTELL., art. L.111-3, ¶ 1.

210 *See* 17 U.S.C. § 201(a); C. PROP. INTELL., art. L.111-1, ¶ 1.

American and French laws usually require transfers of copyright to be in writing.[212]

However, on first impression, French law seems to be more protective of authors than American law in the case of a work made for hire. Under American law, "the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."[213] In France, on the contrary, a basic principle is that copyright ownership belongs to the author of a work, regardless of a possible contract for hire or of service.[214] I see no unyielding opposition between the two regimes.

Actually, there are various exceptions to the basic principle that ownership belongs to the author, despite a contract for hire, under present French legislation. Under these exceptions, initial ownership is conferred to employers or commissioning parties, despite the fact that they might be legal entities rather natural persons.[215] One example is provided by copyright in computer software, whose regime stems from a statute of 1985.[216] Article

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211 *See* 17 U.S.C. § 201(a); C. PROP. INTELL., art. L.113-3, ¶ 1.

212 *Compare* section 204(a) of the United States Copyright Act ("A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent"), *with* articles L.131-2 and 131-3 of the French IP Code ("[P]erformance, publishing, and audiovisual production contracts" as well as "free performance authorizations" or "[a]ssignment of audiovisual adaptation rights" must be in writing. C. PROP. INTELL., arts. L.131-2, ¶ 1, L.131-3, ¶ 3).

213 17 U.S.C. § 201(b). As Catherine Fisk rightly notes, "[t]o the extent that property rights are justified by the moral superiority of the individual artist, corporate authorship is troubling. But to the extent that intellectual property rights exist to encourage investment in intellectual endeavor, corporate authorship is essential." Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1, 57 (2003). *See* Chau Vo, *Finding a Workable Exception to the Work Made for Hire Presumption of Ownership*, 32 LOY. L.A. L. REV. 611, 614 (1999) (suggesting that "creative employees should, in limited situations, be entitled to rescind contracts of employment and recapture copyrights in works made for hire."). The main exception to this law is the "teacher exception," according to which professors are considered the sole authors and copyright owners of the lecture notes and scholarly works they produce during their academic career. *See, e.g.,* Chanani Sandler, *Copyright Ownership: A Fundamental of "Academic Freedom,"* 12 ALB. L.J. SCI. & TECH. 231 (2001). A similar decision was reached under French case law about lectures given by Barthes in the Collège de France. *See supra* note 166.

214 Pursuant to article L.111-1(3) of the French IP Code, "[t]he existence or conclusion of a contract for hire or of service by the author of a work of the mind shall in no way derogate from the enjoyment of the [exclusive incorporeal property] right . . . ." C. PROP. INTELL., art. L.111-1, ¶ 3. See the leading French case on works for hire, Cass. 1e civ., Dec. 16, 1992, R.I.D.A., 1992, 156, 193, note Sirinelli (emphasizing that absent an express assignment of copyright to the employer, the employee retains the exclusive ownership of his works).

215 There seems to be a contradiction within French law between *authorship* (which is legitimately conferred on authors, although they might be employees) and *ownership* in the case of a contract for hire or of service. *See* BERTRAND, *supra* note 14, at 76.

216 Law No. 85-660 of July 3, 1985, as amended by Law No. 94-361 of May 10, 1994.

L.113-9 of the IP Code currently states:

> Unless otherwise provided by statutory provision or stipulation, the economic rights in the software and its documentation created by one or more employees in the execution of their duties or following the instructions given by their employer shall be the property of the *employer* and he exclusively shall be entitled to exercise them.[217]

Another example can be found in ownership of a *collective work*,[218] defined under French law[219] as

> a work created at the initiative of a natural or legal person who edits it, publishes it and discloses it under his direction and name and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created.[220]

Pursuant to article L.113-5 of the IP Code, "[a] collective work shall be the property, unless proved otherwise, of the natural or legal person under whose name it has been disclosed. The author's rights shall vest in such person."[221]

Additionally, regarding *sui generis* designs, protection is acquired only by registration, and article L.511-9, paragraph 2, provides that "[t]he applicant for registration is, failing proof to the contrary, considered to [sic] the beneficiary of this protection."[222] As a result, in France, employers or commissioning parties apply for such registration with the express aim of being considered the beneficiaries of the *sui generis* designs protection.[223] In such cases, courts have held that intellectual property rights are automatically assigned to employers.[224] This is so because as French law scholars have explained, in the field of industrial property, economic purposes are said to prevail over cultural ones.[225]

The IP Code contains a presumption in favor of employers and contractors, providing that the contract between a producer

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217 C. PROP. INTELL., art. 113-9 (emphasis added).

218 Examples of collective works include issues of a periodical or an encyclopedia.

219 The U.S. Copyright Act defines a collective work as "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. § 101 (2006).

220 C. PROP. INTELL., art. L.113-2, ¶ 3.

221 *Id.* at art. L.113-5.

222 *Id.* at art. L.511-9, ¶ 2. This provision was inserted by Order No. 2001-670 of July 25, 2001, Official Journal of July 28, 2001, art. 1.

223 *See* TAFFOREAU, *supra* note 14, at 503.

224 *See* CA, Paris, 4e ch., Nov. 30, 1961, 10 D. 1962, 163, note P. Greffe.

225 *See, e.g.*, LUCAS & LUCAS, *supra* note 82, at 150-51.

and the author(s) of either an audiovisual work,[226] or a commissioned work used for advertising,[227] "shall imply, unless otherwise stipulated, assignment to the producer of the exploitation rights . . ."[228] in the work. The *Cour de cassation* has gone so far as to decide that unless proven otherwise, a company exploiting *any* type of work is assumed to be the legal owner of such work.[229] Therefore, regarding copyright ownership, this rule leads to results similar to those arising from the American work made for hire regime.

Furthermore, early copyright policy, dating back to the French revolutionary period, appeared to designate the employer, or in certain circumstances, the commissioning party, as the initial owner of the copyright. For instance, in the dictionary at controversy in the *Académie française* case, the *Cour de cassation* and the *Commissaire du Gouvernement* Merlin both held that copyright ownership should initially vest in the publisher, who had had the dictionary written by others at his own expense "because under the tort of infringement only the publisher's interests are harmed by the infringement of the original edition."[230]

Lastly and above all, in cases in France dealing with property other than software, collective works, audiovisual works, or commissioned works used for advertising, authors generally assign their IP rights to employers, producers, or publishers through contracts.[231] Therefore, as in the United States, the copyrights of most works are owned by companies. As such, few distinctions can be drawn between the United States and France in terms of fairness and morality, with respect to access to copyright protection.[232]

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226 C. PROP. INTELL., art. L.132-24.

227 *Id.* at art. L.132-31.

228 *Id.*

229 Cass. 1e civ., Mar. 24, 1993, J.C.P. 1993, 22085, note F. Greffe. *See* GAUTIER, *supra* note 95, at 836-37.

230 Cass. crim., 7 Prairial, an II (1791), 3 Ledru-Rolin, JOURNAL DU PALAIS 293, 300 (1838) *translated in* Ginsburg, *Tale of Two Copyrights*, *supra* note 7, at 1021.

231 Notably through work contracts. *See, e.g.*, DE BELLEFONDS, *supra* note 10, at 112-17; Patrick Tafforeau, *De la possession d'un droit d'auteur par une personne morale*, *in* 4 COMMUNICATION-COMMERCE ÉLECTRONIQUE 9 (2001).

232 However, in the field of patents, one may find more fairness and morality under U.S. law than under French law. In the case of an invention by an employee hired for the specific purpose of inventing, American patents shall be presumptively granted to employee-inventors (so that, absent an employee's assignment of inventions, employers shall only have "shop rights"). *See* 35 U.S.C. § 101 (2006); Banks v. Unisys Corp., 228 F.3d 1357 (Fed. Cir. 2000). Under French law, however, patents shall immediately belong to employers, and inventors shall only enjoy additional remuneration. C. PROP. INTELL., art. L.611-7, ¶ 1.

IV. FAIRNESS AND MORALITY WITH RESPECT TO THE SCOPE OF COPYRIGHT PROTECTION

There is no doubt that infringement is particularly relevant to the scope of copyright protection. But neither an assessment of the similarities between French and American copyright law with respect to infringement, nor an assessment of the remedies available as a result of an infringement, reveal a profound divergence between French and American law in terms of fairness and morality.

Let us first assess their similarities. American and French case law both seem to be based on subjective judicial opinions.[233] For instance, even though the substantial similarity test is a well-established common law rule in the United States,[234] judges have not uniformly applied the test.[235] Similarly, in France, opinions of courts happen to be divided about substantial similarity in copyright infringement cases. The *Bicyclette bleue* case demonstrates this judicial unpredictability. The copyright holder of Margaret Mitchell's book, *Gone with the Wind*, brought an infringement action against Régine Deforges, a French writer, who had published a novel based on Mitchell's famous work. The court, considering the numerous similarities, held that Deforges' publication constituted infringement.[236] This judgment was first reversed by a court of appeals that found that the differences between the French and American works were greater than the similarities.[237] The *Cour de cassation*[238] then overturned the court of appeals, agreeing with the trial court. Finally, another appellate court reversed yet again.[239] Based on the history of this case, it seems that the judge's feeling is all that matters.[240] Professor Lucas deplored such an outcome.[241]

As far as remedies for copyright infringement are concerned, French and American copyright laws have very similar provisions. These include provisions regarding preliminary injunctions,[242] the impounding and destruction of infringing articles,[243] damages and

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233 *See* Carine Bernault, *Droit des auteurs. Contrefaçon et étendue du droit d'auteur*, *in* 1267 JURIS-CLASSEUR PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 10 (2004).

234 Examples of such subjective judicial opinions include the Learned Hand Abstraction Test or the Audience Test. *See, e.g.*, LEAFFER, *supra* note 18, at 383-97.

235 *See* GORMAN & GINSBURG, *supra* note 124, at 463.

236 T.G.I., Paris, Dec. 6, 1989, Cahiers droit d'auteur, 1990, 27, 21.

237 CA, Paris, Nov. 21, 1990, R.I.D.A., 1991, 147, 319.

238 Cass. 1e civ., Feb. 4, 1992, R.I.D.A., 1992, 152, 196.

239 CA, Versailles, Dec. 15, 1993, R.I.D.A., 1994, 160, 255.

240 André Lucas, *Le droit d'auteur et l'interdit*, 663-64 REVUE CRITIQUE 597 (2002).

241 *Id.*

242 *See* 17 U.S.C. § 502 (2006); C. PROP. INTELL., art. L.332-1.

243 *See* 17 U.S.C. § 503; C. PROP. INTELL., art. L.335-6.

profits,[244] and criminal penalties.[245] Generally speaking, the main difference between the copyright laws of France and those of the United States appears to concern *access* to the copyrighted works. Under American law, infringement requires not only substantial similarity between the copyrighted work and the defendant's work, but it also requires proof of copying. Proof may be inferred from the defendant's access to the plaintiff's work.[246] Under French law, on the other hand, courts need not inquire into such proof of copying. Instead, proof of infringement may only be established by actual similarities between the works at bar. The basic French principle at play is that *infringement should be based on similarities rather than differences*.[247] This French legal view can hardly be judged fairer and more moral than the U.S. copyright law perspective.

In order to fully study the fairness and morality of copyright protection under French and American law, it is critical to examine both economic and moral rights.

A. *Economic Rights*

1. Contents of Rights

Within the meaning of French law, economic rights[248] seek to protect the material and financial interests of the author. In light of this aim, a number of exclusive rights are granted to the author for a limited time. The economic right is actually akin to the copyright monopoly granted under American law, especially in terms of the length of protection. Both the European Union countries[249] and the United States[250] have extended the copyright term for most works to life of the author plus seventy years.[251] The

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244 *See* 17 U.S.C. § 504; C. CIV., arts. 1382, 1383. However, *statutory damages*, which are expressly considered under section 504(c) of the United States Copyright Act, are no longer admitted under French law, despite the fact that the French statute of 1793 first provided for them. *See, e.g.*, BERTRAND, *supra* note 14, at 454.

245 Both countries utilize imprisonment and fines. *See* 17 U.S.C. § 506; C. PROP. INTELL., arts. L.335-2 to L.335-10.

246 LEAFFER, *supra* note 18, at 384. *See, e.g.,* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976).

247 *See, e.g.,* GAUTIER, *supra* note 95, at 797; DE BELLEFONDS, *supra* note 10, at 399; PIOTRAUT, PROPRIÉTÉ INTELLECTUELLE, *supra* note 91, at 80; TAFFOREAU, *supra* note 14, at 185. *See also* CA, Paris, Nov. 19, 1985, R.I.D.A., 1986, 129, 155.

248 In French, economic rights are translated as *droits patrimoniaux*.

249 Council Directive 93/98, 1993 O.J. (L 290) 9 (EEC) (harmonizing the term of protection of copyright and certain related rights). This Directive has been incorporated into article L.123-1 of the French IP Code under Law No. 97-283 of March 27, 1997.

250 The U.S. copyright term was extended under the Sonny Bono Copyright Term Extension Act (CTEA) of October 27, 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 302-305).

251 The copyright term for anonymous works, pseudonymous works, and works made for hire (or "collective works" under French law, *see* C. PROP. INTELL., art. L.113-5),

scope of copyright in each country is also similar. Both French and American laws include identical exploitation rights.[252] These are rights of reproduction,[253] adaptation,[254] distribution,[255] public performance,[256] and public display.[257] Differences between the two systems are insignificant.

Since 1995, in the United States, pursuant to the Copyright Act,[258] each owner of a sound recording, especially a performer or a record manufacturer, has been granted the exclusive right "to perform the copyrighted work publicly by means of a digital audio transmission."[259] By comparison, the French IP Code seems to be

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endures for ninety-five years from publication or 120 years from creation, whichever expires first, under U.S. law, and, for seventy years from publication under French law. 17 U.S.C. § 302(c); C. PROP. INTELL., art. L123-3.

252 *See* DaSilva, *supra* note 8, at 3.

253 *See* 17 U.S.C. § 106(1); C. PROP. INTELL., arts. L.122-6, ¶ 1 (focusing on software), L.122-3 (concerning works in general). The French IP Code states:

> Reproduction shall consist in the physical fixation of a work by any process permitting it to be communicated to the public in an indirect way.
>
> It may be carried out, in particular, by printing, drawing, engraving, photography, casting and all processes of the graphical and plastic arts, mechanical, cinematographic or magnetic recording.

C. PROP. INTELL., art. L-122-3.

254 *See* 17 U.S.C. § 106(2); C. PROP. INTELL., arts. L.122-4 (also relating to translation, transformation and arrangement), L.122-6, ¶ 2 (focusing on software).

255 These rights granted to the author pertain whether the work has been sold, rented, leased, or lent. *See* 17 U.S.C. § 106(3); Council Directive 2001/29 2001 O.J. (L 167) 10 (EC) (on the harmonization of certain aspects of copyright and related rights in the information society); Council Directive 92/100, 1992 O.J. (L 346) 61 (EEC) (on rental right and lending right and certain other related rights); C. PROP. INTELL., art. L.122-63, ¶ 3.

256 *See* 17 U.S.C. § 106(4); C. PROP. INTELL., art. L.122-2. Under § 101 of the U.S. Copyright Act, to "perform" a work means "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101. This definition is very similar to the definition of the French IP Code, with the sole exception that the French provision includes public display:

> Performance shall consist in the communication of the work to the public by any process whatsoever, particularly:
>
> 1. public recitation, lyrical performance, dramatic performance, public presentation, public projection and transmission in a public place of a telediffused work;
>
> 2. telediffusion.
>
> Telecasting shall mean distribution by any telecommunication process of sounds, images, documents, data and messages of any kind.
>
> Transmission of work towards a satellite shall be assimilated to a performance.

C. PROP. INTELL., art. L122-2. As a result, showing movies or broadcast programs in a summer camp without consent of the copyright owners constitutes infringement both in the United States, *see* LEAFFER, *supra* note 18, at 322 (citing H.R. REP. NO. 94-1476, at 64, § 2 (1976)) and in France, *see* CA, Grenoble, Feb. 28, 1968, R.I.D.A., 1968, 57, 166, note Desbois.

257 *See* 17 U.S.C. § 106(5). In France, pursuant to article L.122-2 of the IP Code, "public presentation" is expressly mentioned as a form of performance. C. PROP. INTELL., art. L.122-2, ¶ 1.

258 The Digital Performance Right in Sound Recordings Act (DPRSRA), Pub. L. No. 104-39, 109 Stat. 336 (1995), amended section 106 of the 1976 Copyright Act by adding paragraph 6.

259 17 U.S.C. § 106(6).

much more generous towards performers and phonogram producers.[260] Both of them are granted a reproduction right,[261] as well as a right of public communication.[262] These rights specifically include performances, whatever the transmission process may be.[263] In addition, under French copyright law, "[t]he performer's written authorization shall be required for fixation of his performance,"[264] and "[t]he authorization of the phonogram producer shall be required prior to any . . . making available to the public by way of sale, exchange or rental . . . of his phonogram . . . ."[265] As it happens, this seemingly broad legal protection does not actually come under copyright within the European Union. Instead, the legal protection extends only to neighboring rights,[266] whose duration is much shorter. The longest period available under neighboring rights is fifty years, either from the date of the performance (with respect to rights of performers), or from the date of fixation (with respect to rights of phonogram producers).[267] The neighboring rights confer substantially fewer rights than the life of the author plus seventy years granted under copyright.[268] Therefore, any assertion that French law alone is fair and moral in this regard cannot stand.

In addition, regarding the scope of exclusive rights in pictorial, graphic, and sculptural works, American and French copyright laws both include "the right to reproduce the work in or on any kind of article, whether useful or otherwise."[269] Whereas the United States Copyright Act prescribes that a copyright in a drawing or model of a useful article does *not* extend to the making of such article,[270] French courts notably forbid the unauthorized making, from copyrighted drawings, of a jigsaw puzzle[271] or a

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260 Pursuant to article 9, ¶ 1 of Council Directive 92/100 1992 O.J. (L 346) 61, (EEC), performers and producers shall be granted a supplementary distribution right, respectively on fixations of their performances, phonograms or films: "the exclusive right to make available these objects, including copies thereof, to the public by sale or otherwise . . . ." *Id.*

261 *See* C. PROP. INTELL., arts. L.212-3, ¶ 1, L.213-1. Under article 212-3, the performer's reproduction right includes "any separate use of the sounds or images of [their] performance where both the sounds and images have been fixed." *Id.*

262 C. PROP. INTELL., arts. L.212-3, ¶ 1, L.213-1.

263 *Id.* at arts. L.212-3, L.213-1 are not restricted to digital audio transmissions.

264 *Id.* at art. L.212-3, ¶ 1.

265 *Id.* at art. L.213-1, ¶ 1.

266 *See supra* notes 135-46.

267 *See* C. PROP. INTELL., art. L.211-4, *as amended by* Law No. 97-283 of March 27, 1997, which has incorporated the Council Directive 93/98, 1993 O.J. (L 290) 9 (EC).

268 *See supra* notes 250-57.

269 17 U.S.C. § 113(a) (2006). Although article L.122-3 of the French IP Code contains no specific provision relating to pictorial, graphic, or sculptural works, it states that "[r]eproduction shall consist in the physical fixation of a work by any process permitting it to be communicated to the public in an indirect way." C. PROP. INTELL., art. L.122-3.

270 *See* 17 U.S.C. § 113(b).

271 Tribunaux correctionnel [Court hearing misdemeanor cases], La Seine, Feb. 28,

flower vase.[272] Such decisions, which relate to the French doctrine of the "unity of art,"[273] may be open to criticism since they amount to applying a sole legal regime to both fine art *and* manufactured goods.[274]

Finally, in contrast to the Copyright Act, the French IP Code is characterized by a resale royalty right, called *droit de suite*.[275] This right exists for the benefit of authors of an original work of visual art.[276] It consists of a sort of equitable sharing of the resale price based on the argument that, unlike other authors (such as novelists or songwriters), visual artists generally create one-of-a-kind works and do not have the opportunity to reproduce their graphic or three-dimensional works. A statutory royalty is consequently levied on the selling price obtained for any resale of such works by public auction or through a dealer,[277] subsequent to their first transfer by the author. As an integral part of the copyright prerogatives, the duration of such *droit de suite* is the life of the author plus seventy years.[278]

Although in the name of fairness, artists may call for the incorporation of the *droit de suite* in American law,[279] the Register of Copyrights, in a 1992 Report,[280] found insufficient justification for adopting such a resale-rights system on the federal level. The State of California took the opposite view and promulgated a resale right law under the 1977 California Resale Royalties Act, which provides:

> Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the

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1867, Annales de la propriété industrielle, artistique et littéraire, 1867, 13, 61 (1867).

272 CA, Paris, Dec. 29, 1904, Annales de la propriété industrielle, artistique et littéraire, 1905, 51, 14.

273 *See supra* note 124.

274 *See* academic opinions, *supra* note 133.

275 C. PROP. INTELL., art. L.122-8.

276 *Id.*

277 *Id.*

278 *See supra* note 249. At the moment, the royalty levied in France is a uniform three percent applicable on the net selling price. This French regulation is about to be amended due to the passage of EC Directive in 2001, a part of the ongoing harmonization of national IP laws in Europe. *See* Piotraut, *Under the EU Umbrella*, *supra* note 13. The Directive will be implemented into the national legislation of each EU member state. Council Directive 2001/84 2001 O.J. (L 272) 32 (EC). The royalty rates will then be modified, pursuant to a statutory sliding scale ranging from 0.25% to 4% of the sale price, with a maximum royalty amount of 12,500 Euros. Four percent would in principle apply for the portion of the sale price up to 500,000 Euros. Member States may, in this case, by way of derogation, "apply a rate of 5%." *Id.* at art. 4.

279 *See, e.g.*, Monroe E. Price, *Government Policy and Economic Security for Artists: The Case for the Droit de Suite*, 77 YALE L.J. 1333 (1968); Michael B. Reddy, *The Droit de Suite: Why American Fine Artists Should Have the Right to a Resale Royalty*, 15 LOY. L.A. ENT. L. REV. 509 (1995).

280 *See* U.S. Copyright Office, *Droit de suite: The Artists Resale Royalty* (1992). For a critical analysis, see Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report*, 16 COLUM.-VLA J.L. & ARTS 395 (1993).

> seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale.[281]

In California, therefore, a fine artist, such as a painter or a sculptor—or his heirs, legatees, or personal representative—may receive a royalty payment on the selling price of his works until the twentieth anniversary of the artist's death.[282]

Still, even absent such *droit de suite*, the United States Copyright Act could hardly be denounced as unfair to authors since a resale royalty may actually harm artists by adding a kind of tax to the selling price. Not only would this royalty add-on be unfair to buyers, but it could reduce demand for visual art.[283] In addition, the resale royalty "fails to take into account the value added by other persons and institutions in the art world such as critics, museums, collectors, dealers, and auction houses."[284] Last but not least, although the resale royalty right is generally presented as being part of copyright,[285] it should *not*, as a matter of fact, be considered an intellectual property right in the strict sense. Whereas ownership of copyright is said to be distinct from ownership of a material object,[286] the *droit de suite* actually relates exclusively to the sale of a material object *in the original*.[287]

2. Limitations on Rights

American and French legislation seem to have opposite conceptions regarding limitations on authors' rights. French copyright law is similar to copyright law in other European countries.[288] There, the statutes provide the rules and specific, enumerated exemptions.

United States law contains both specific exemptions from copyright—like those contained in sections 108 and 110 of the Act—and a general, residuary provision—fair use under § 107—

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281 CAL. CIV. CODE § 986(a) (1983).

282 *Id.* at pt. 7.

283 *See* LEAFFER, *supra* note 18, at 319.

284 *Id.*

285 *See* DaSilva, *supra* note 8, at 4.

286 *See supra* note 209.

287 The U.S. Copyright Act of 1976 abolished common law copyright for fixed works of authorship. *See* 17 U.S.C. § 301 (2006). Although works of fine art are naturally fixed in a tangible medium of expression, the California Resale Royalty statute does not refer to exclusive rights in copyrighted works such as public display, reproduction, adaptation, or distribution of copies. Why, therefore, should federal copyright law preempt it? Furthermore, in *Morseburg v. Baylon*, 621 F.2d 972 (9th Cir. 1980), the court found no preemptive effect under the 1909 Act. Nonetheless, Professor Leaffer asserts that "the Resale Royalty Act unduly interferes with basic copyright policy under §§ 109(a) and 106(3)" of the 1976 Copyright Act. LEAFFER, *supra* note 18, at 498.

288 French copyright law has become more similar to copyright law in other European countries especially since the passage of Council Directive 2001/29, 2001 O.J. (L 167) 10 (EC) which purports to accomplish, in particular, the harmonization of exceptions and limitations to certain restricted acts under copyright law. *See id.* at pmbl., ¶ 31.

designed to reach the specific cases of worthy, unauthorized uses that do not fall comfortably within any of the exemptions.[289] The U.S. fair use doctrine[290] is an equitable doctrine derived from judge-made law, and is actually an affirmative defense to an allegation of infringement.[291] A defendant will prevail on a charge of unauthorized use of plaintiff's work if he can demonstrate that his use was privileged, and came under the fair use exemption.

Under section 107 of the United States Copyright Act, the court must consider the following four factors to determine whether defendant's use, without plaintiff's consent, was nonetheless fair:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[292]

Although courts have held that copies made for commercial use are presumptively unfair,[293] the Second Circuit Court of Appeals has stated that commercial use and profit making are significant factors but are insufficient to defeat the privilege.[294] Instead, "whether there is a fair use depends on the totality of the [fair use] factors considered . . . ."[295] Because the doctrine is dynamic in nature, courts are able to adapt it to new circumstances.[296] As a result, consumers and users appear to enjoy greater benefits and be less limited by authors' rights under U.S. law than under French law.[297] It has been suggested that such

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289 LEAFFER, *supra* note 18, at 465-66.

290 17 U.S.C. § 107.

291 LEAFFER, *supra* note 18, at 427. Professor Leaffer avers that the doctrine of fair use is "a defense to copyright infringement that allows a third party to use a copyrighted work in a reasonable manner without the copyright owner's consent." *Id.* at 465-66.

292 17 U.S.C. § 107.

293 *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984).

294 Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

295 *Id.* at 309.

296 LEAFFER, *supra* note 18, at 466. For a different view, see Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990), arguing that although fairness should be an objective of the fair use doctrine, the concept of fairness is so vague that courts have too little guidance about how to apply it. *See generally* Eric A. Engle, *When is Fair Use Fair? A Comparison of EU and US Intellectual Property Law*, 15 TRANSNAT'L LAW, 187 (2002).

297 Article 13 of TRIPS obliges Member States to

> confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

restraints on limitations within the French IP Code reveal a reticence on the part of the French legislature to weigh the pros and cons of authors' rights on the one hand, against users' rights on the other.[298]

Notwithstanding those differences in conception, American and French laws contain a number of similar limitations on exclusive rights under copyright. First, both systems include compulsory licenses, even though the licenses are required more often under United States copyright law than under its French counterpart.[299] In the United States, for instance, compulsory licenses may be required:

> (a) For certain transmissions, such as secondary transmissions by cable television systems,[300] digital audio transmissions of sound recordings,[301] or satellite retransmissions of superstations and network stations for private home viewing;[302]
>
> (b) For certain reproductions and distributions, such as ephemeral sound recordings,[303] or making and distributing phonorecords of nondramatic musical works;[304] and
>
> (c) For certain uses, such as the use of certain works in connection with noncommercial broadcastings.[305]

The IP Code of France specifically sets forth upon payment of an *equitable remuneration*[306]: (a) a public lending right[307] imposed on

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TRIPS, *supra* note 43, at art. 13. *See, e.g.*, Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75 (2000). Professor Okediji argues that article 13 of TRIPS may actually threaten the U.S. fair use doctrine. The official position of the United States, however, is that the fair use doctrine is consistent with TRIPS. *See* PRES. WILLIAM J. CLINTON, STATEMENT OF ADMINISTRATIVE ACTION, AND REQUIRED SUPPORTING STATEMENTS, H.R. DOC. NO. 103-316 (1994).

298 André Lucas, *Droits des auteurs. Droit patrimoniaux. Exceptions au droit exclusif*, *in* 1248 JURIS-CLASSEUR PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 3 (2004).

299 Unlike specific exemptions on rights, compulsory licenses give anyone the right to use a work without the copyright owner's permission, provided that the statutory procedure is abided with, and the established royalties are paid. *See* LEAFFER, *supra* note 18, at 285. In addition to national statutory licenses, the European Court of Justice set forth a judicial compulsory license for publication of copyrighted television program schedules. Joined cases C-241/91P & C-242/91P, Radio Telefis Eireann and Indep. Television Publ'n, Ltd. v. Comm'n, 1995 E.C.R. I-743 (1995).

300 *See* 17 U.S.C. §§ 111(c)-(d) (2006).

301 *See id.* §§ 114(d)(2), (e)-(f), 115.

302 *See id.* § 119.

303 *See id.* § 112(e).

304 *See id.* § 115.

305 *See id.* § 118.

306 In 1987, France acceded to the Rome Convention of 1961 for the protection of performers, producers of phonograms, and broadcasting organizations.. Article 12 of the Convention provides: "If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single *equitable remuneration* shall be paid by the user to the performers, or to the producers of the phonograms, or to both" (emphasis added). International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

authors of books for the benefit of libraries open to the public;[308] and (b) a statutory license for transmissions of phonorecords imposed on performers and producers.[309]

As far as specific limitations are concerned, the statutes of the United States and France share one key provision: both refuse to grant copyright owners control over private performances or displays of their works. Sections 106(4) and 106(5) of the United States Copyright Act of 1976 limit the exclusive rights to *public* performance and display, just as article L.122-5(1) of the French IP Code exempts from the copyright monopoly "private and gratuitous performances carried out exclusively within the family circle" and its social acquaintances.[310] In addition, private copying may be a defense to copyright infringement under both American and French laws. In France, "copies or reproductions reserved strictly for the private use of the copier and not intended for collective use," are generally excused from infringement.[311] There is no similar statutory exemption in the 1976 Copyright Act. Nonetheless, in the *Betamax* case, the United States Supreme Court held that videotaping for private purposes constituted a fair use, absent proof of future or potential harm to plaintiffs.[312]

Under the fair use doctrine, as codified in the 1976 Act,[313] use of reproduced copies[314] for purposes of criticism, comment, news,

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307 C. PROP. INTELL., art. L.133-1 (added by French Act No. 2003-517 of June 18, 2003, Official Journal of June 19, 2003).

308 Pursuant to C. PROP. INTELL., art. L.133-1, ¶ 1, "[w]hen a work is subject to a publishing contract for its publication and distribution in a book form, the author may not object to the lending of copies of this publication by a library open to the public." In return, C. PROP. INTELL., art. L.133-1, ¶ 2, states that "[t]he lending creates a right for payment in favour of the author . . . ." Such payment, which is to be collected by certified copyright management societies, is due on the one hand, by the French State, and on the other, by publishers who sold those books to libraries. C. INTELL. PROP. arts. L.133-2, L.133-3.

309 According to C. PROP. INTELL., art. L.214-1:

> Where a phonogram has been published for commercial purposes, neither the performer nor the producer may oppose:
>
> 1. its direct communication in a public place where it is not used in an entertainment;
> 2. its broadcasting or the simultaneous and integral cable distribution of such broadcast.
>
> Such uses of phonograms published for commercial purposes shall entitle the performers and producers to remuneration whatever the place of fixation of such phonograms.
>
> Such remuneration shall be paid by the persons who use the phonograms published for commercial purposes under the conditions set out in items 1 and 2 of this Article.

310 *Id.* at art. L.122-5, ¶ 1.

311 *Id.* at art. L.122-5, ¶ 2. "[W]ith the exception of copies of works of art to be used for purposes identical with those for which the original work was created . . . ."

312 Sony Corp. of Am. v. Universal City Studios, 424 U.S. 417, 429 (1984).

313 17 U.S.C. § 107 (2006).

314 Copies can be produced by "phonorecords or by any other means . . . ." *Id.*

or reporting are generally privileged, or permitted.[315] This is almost equivalent to article L.122-5(3) of the French IP Code. Under this provision, once a work has been disclosed, and on condition that the name of the author and the source are clearly stated, copyright owners may not prohibit:

> (a) analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated;
>
> (b) press reviews;
>
> (c) dissemination, even in their entirety, through the press or broadcasting, as current news,[316] of speeches intended for the public made in political, administrative, judicial or academic gatherings, as well as in public meetings of a political nature and at official ceremonies.

As a result, both American and French case law have similarly denied copyright infringement for unauthorized computerized indexes of newspapers.[317]

Section 120(a) of the 1976 Copyright Act includes an exemption for architectural works located in a public place. It provides:

> The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.[318]

Now in France, even though courts are refusing in principle to deprive such works of the regular copyright protection,[319]

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315 "Section 107 [specifically] states that an original work copied for purposes of criticism or comment may not constitute infringement, but instead may be a fair use." Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992).

316 The supplementary adjective "*current*" under French law leads to a slight difference from the American copyright system. Under T.G.I., Paris, 3e ch., Oct. 25, 1995, R.I.D.A., 1996, 167, 294, French law only encompasses a *temporary* exemption on copyright with respect to news, so that legal protection reappears when a "current event" is no longer topical. Under American copyright law, the opposite is true. The exemption for current news is permanent. *See, e.g.*, Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968) (finding fair use in reproduction of pictures of President Kennedy's assassination because there was no competition between the parties and no injury to plaintiff).

317 *Compare* New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217 (D.N.J. 1977), *with* Soc. Microfor v. Soc. Le Monde, Oct. 30, 1987, R.I.D.A., 1988, 135, 78. *See also* Jane C. Ginsburg, *French Copyright Law: A Comparative Overview*, 36 J. COPYRIGHT SOC'Y 269, 281-83 (1989) (discussing the *New York Times* and *Soc. Microfor* decisions).

318 17 U.S.C. § 120(a).

319 *See, e.g.*, CA, Paris, Oct. 23, 1990, J.C.P., 1991, 21682, note Lucas. A few years earlier, this very court had similarly granted artist Christo the right to prohibit the distribution of postcards of his work, *i.e.*, an artistic wrapping, made of canvas and ropes, of the *Pont-Neuf*, a Parisian bridge. CA, Paris, 14e ch., Gazette du Palais, 1986, 1, 238. *See* also Bernard Edelman, *La rue et le droit d'auteur*, 11 D. [1992] 91.

scholars explain that:

> [R]eproduction of an architectural work in drawing, photograph, or film, is licit provided this work is not the main or exclusive subject of such drawing, photograph, or film, that is to say if it only represents a mere decoration or a background . . . . Finally, according to custom, an architectural work should not be regarded as *reproduced* when it represents less than 20% of a photograph."[320]

Identical limitations on exclusive rights exist in American and French laws with respect to computer programs. In particular, a lawful owner of a computer program is allowed to make an additional copy or an adaptation,[321] as well as to have such computer program maintained and repaired.[322]

Moreover, in *Campbell v. Acuff-Rose Music, Inc.*,[323] the United States Supreme Court found fair use in a commercial parody of a popular song, just as the French IP Code provides that "parody, pastiche and caricature, observing the rules of the genre" are outside the limits of copyright protection.[324]

Lastly, copyright laws of both the United States and France include a specific limitation on the distribution right. This is called the "first sale doctrine" in the United States,[325] and the "exhaustion of rights doctrine" under European Union law. This doctrine "is essential to ensure the free alienability of goods."[326] When a manufactured item which contains intellectual property rights is lawfully marketed, its buyer can dispose of it as he sees fit. The buyer's right to dispose includes, for example, the right to resell or to rent it out. This is so because the intellectual property rights in such product have been exhausted.[327]

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320 BERTRAND, *supra* note 14, at 799.

321 *See* 17 U.S.C. § 117(a); C. PROP. INTELL., art. L.122-6-1.

322 *See* 17 U.S.C. § 117(c); ANDRÉ LUCAS ET AL., DROIT DE L'INFORMATIQUE ET DE L'INTERNET 334 (2001).

323 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994). *See* Mattel, Inc. v. Walking Mt. Prods., 353 F.3d 792 (9th Cir. 2003) (finding fair use of Mattel's Barbie doll in a series of parody-based photographs).

324 On this basis, the *Cour de cassation* rejected an action brought against a famous singer impersonator. The impersonator was thus entitled to first "reproduce the original tune" so that the audience could immediately identify the parodied song; second, to commit travesty upon the lyrics, in order to "avoid any mistake" between the two songs; and third, to "mock, even insolently, the shortcomings of the real-life singer whom he impersonated." Cass. 1e civ., Jan. 12, 1988, R.I.D.A., 1988, 137, 98, note Françon.

325 *See* John M. Kernochan, *The Distribution Right in the United States of America: Review and Reflections*, 42 VAND. L. REV. 1407 (1989) (deploring the fact that the first sale doctrine limits the author's control over his works).

326 DINWOODIE ET AL., *supra* note 205, at 1222.

327 Pursuant to section 109(a) of the 1976 Act, "the owner of a particular copy or phonorecord lawfully made, . . . or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." 17 U.S.C. § 109(a). In Europe, the exhaustion of rights doctrine was created by the European Court of Justice (ECJ) in a case regarding a

Note, however, that while the underpinnings of the American first sale doctrine and the European exhaustion of rights doctrine are substantially similar, there is a critical distinction between the two with respect to the geographic scope of exhaustion. In *Quality King Distributors, Inc. v. L'Anza Research International, Inc.*,[328] the United States Supreme Court held in favor of a "worldwide exhaustion" principle. In *Silhouette International Schmied GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH*,[329] the European Court of Justice limited the doctrine to a "community exhaustion" principle. This holding precludes European Union Member States from adopting international exhaustion in their national legislation.[330] Now, with the possible exception of pharmaceutical patents,[331] I find very little fairness and morality[332] in this European solution. Community exhaustion, which relates to the free movement of goods policy within the European Union, has mostly been used by European companies to permit them to sell low-grade products outside western countries, with no risk of seeing those products re-imported in Europe. In addition, this judicial solution, which "has in fact increased the protection of trademark owners' interests at the expense of consumers,"[333] puts developing countries at a disadvantage by simultaneously depriving them of

producer's sound recording right. Case 78/70, Deutsche Grammophon GmbH v. Metro-SB-Großmärkte GmbH & Co. KG, 1971 E.C.R. 487, 1 C.M.L.R. 631 (1971) (holding that a German producer may not rely on his exclusive right of distribution to prohibit the marketing of records in Germany that he had previously supplied to a French subsidiary).

328 Quality King Distrib., Inc. v. L'Anza Research Int'l, Inc., 523 U.S. 135 (1998) (deciding that, although section 602(a) of the 1976 Copyright Act gives the copyright owner the right to prohibit the unauthorized importation of copies, the resale in the United States of goods (bearing copyrighted labels) obtained abroad does not constitute such copyright infringement). *See, e.g.*, John C. Cozine, *Fade to Black? The Fate of the Gray Market after* L'Anza Research Int'l, Inc. v. Quality King Distribs., Inc., 66 U. CIN. L. REV. 775 (1998); *but see* Elin Dugan, *United States of America, Home of the Cheap and the Gray: A Comparison of Recent Court Decisions Affecting the U.S. and European Gray Markets*, 33 GEO. WASH. INT'L L. REV. 397 (2001) (disagreeing with the holding of *Quality King*).

329 Case C-355/96, Silhouette Int'l Schmied GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH, 2 C.M.L.R. 953 (1998) (holding that European law prevented Austrian legislation from providing for exhaustion of trademark rights regarding goods marketed outside the European Economic Area (EEA) under the trademark by the trademark's proprietor or with the consent of the trademark's proprietor).

330 As a result of this prevention of exhaustion of international remedies, an IP rights' owner is entitled to oppose importation of goods marketed outside of any European Community Member State, or any country that adheres to the EEA.

331 The exception arises because western pharmaceutical firms may be reluctant to sell some patented medicines (such as anti-AIDS drugs) in developing countries because of the risk of goods re-exportation into developed countries at a low price; a problem which stems from international exhaustion.

332 I especially find little fairness or morality in the "community exhaustion" option with respect to copyrights.

333 Carl Baudenbacher, *Trademark Law and Parallel Imports in a Globalized World—Recent Recent Development in Europe with Special Regard to the Legal Situation in the United States*, 22 FORDHAM INT'L L.J. 645, 667 (1999).

their competitive export opportunities.[334]

In any case, American copyright law actually appears to limit owners' rights more than its French counterpart. Most of the additional limitations, however, have fair and moral purposes. For instance, whereas the IP Code of France exempts only the copying of a fine art work for artistic educational ends,[335] the United States Copyright Act permits a broader range of unauthorized uses of a work for instructional reasons. These include copying for purposes of "teaching (including multiple copies for classroom use), scholarship, or research . . ."[336] reproduction by libraries and archives for scholarly purposes;[337] and performance or display in the course of instructional activities.[338] Considering that the bases for these exemptions are quite fair and moral, and that these bases are the same in both systems, *i.e.*, to promote education, it seems inconsistent to limit them solely to artistic education.

Another reason for copyright limitations under American law relates to social or charitable purposes, the fairness and morality of which are beyond dispute. Social purposes can support exemptions of unauthorized ephemeral recordings,[339] performances,[340] and displays,[341] for "religious services," on the one hand, and for governmental bodies or non-profit organizations, on the other. Social purposes may also underpin the performance right exemption for not-for-profit veterans groups and fraternal organizations.[342] Exceptions granted for charitable purposes include: ephemeral recordings for transmission to blind and other handicapped audiences;[343] reproductions for blind or other

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334 *Id.* at 690.

335 *See* C. PROP. INTELL., art. L.122-5, ¶ 2. *See also* Sony Corp. of Am. v. Universal City Studios, 424 U.S. 417 (1984).

336 17 U.S.C. § 107 (2006).

337 *See id.* § 108 .

338 *See id.* §§ 110(1)-(2) (the former section of the statute especially relating to face-to-face teaching).

339 *See id.* §§ 112(b)-(c) (allowing, under certain conditions, a governmental body or other nonprofit organization to make no more than thirty temporary copies or phonorecords of a particular program (transmission), as well as "to make for distribution no more than one copy or phonorecord . . . of a particular transmission program embodying a performance of a nondramatic musical work of a religious nature, or of a sound recording of such a musical work . . . ." *Id.* § 112(c)).

340 *See id.* §§ 110(2)-(4). These sections exempt, under certain conditions, the performance of a non-dramatic literary or musical work, either "as a regular part of the systematic mediated instructional activities of a governmental body," *id.* § 110(2), "in the course of services at a place of worship or other religious assembly," *id.* § 110(3), or "without any purpose of direct or indirect commercial advantage . . . if the proceeds, after deducting the reasonable costs of producing the performance, are used . . . for . . . religious . . . purposes, " *id.* § 110(4).

341 *See id.* §§ 110(2)-(3) (relating to a display of a work, either "as a regular part of the systematic mediated instructional activities of a governmental body," *id.* § 110(2), or in the course of services at a place of worship or other religious assembly).

342 *See id.* § 110(10).

343 *See id.* § 112(d) (excusing certain ephemeral copies made by "a governmental body

people with disabilities;[344] and transmissions of literary works to the handicapped.[345] Although current French copyright law still forbids the unauthorized reproduction or performance of an entire work for charitable purposes,[346] a recent statute,[347] passed with the view of incorporating the EC Directive on Information Society[348] in the French IP Code, has just included such an exception for the benefit of people with a disability.[349] This sounds like an implicit recognition of the preexisting American exemption justifiability.

Exclusive rights may also be limited in the case of "accessory" or "incidental" uses of works. On these grounds, American copyright law exempts certain categories of performances from copyright protection, such as:

> (a) The "performance of a nondramatic musical work by a governmental or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization;"[350]
>
> (b) The "performance of a nondramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, or of the audiovisual or other devices utilized in such performance . . .;"[351]
>
> (c) In certain conditions, "a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, . . ."[352] which is not an exception accepted by French courts;[353]

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or other nonprofit organization entitled to transmit a performance of a work under section 110(8) . . ." from copyright infringement). *Id.*

344 *See id.* § 121 (exempting, in certain circumstances, the reproduction or the distribution of "copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities"). *Id.*

345 The literary works can be either *dramatic*, *see id.* § 110(9), or *non-dramatic*, *see id.* § 110(8), literary works.

346 *See* BERTRAND, *supra* note 14, at 254.

347 This statute was finally adopted on August 1, 2006.

348 Directive 2001/29, 2001 O.J. (L 167) 10 (EC) (on the harmonization of certain aspects of copyright and related rights in the information society).

349 In order to qualify for the handicapped exemption, the use must be directly related to the disability and be of a non-commercial nature, to the extent required by the specific disability. *See* C. PROP. INTELL., art. L.122-5, ¶ 7.

350 17 U.S.C. § 110(6) (2006).

351 *Id.* § 110(7).

352 *Id.* § 110(5), also known as the "*Aiken* exemption," after the United States Supreme Court decided *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

353 *See, e.g.,* Cass. civ., Jan. 2, 1946, 15/16 D. [1946] 133.

> (d) "[T]he relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodging of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission . . . ."[354]

This means that "the hotel is permitted to do what might be regarded as the functional equivalent of placing an ordinary radio or television set in its private rooms."[355] This provision contrasts with the current French case law position, since the *Cour de cassation* classified such re-transmission of a television broadcast into private hotel rooms as a *public* performance, despite the fact that each customer is supposed to "reside individually in a private apartment."[356] Prior judgments, however, have allowed a similar hotel exception,[357] so that the differences with United States copyright law on this issue are not structural ones.

Regarding "accessory" displays, American law contains an exemption that does not exist in France. In France, the exhibition of a copyrighted painting in an art gallery without the artist's consent has been condemned as an infringement of copyright.[358] Section 109(c) of the 1976 Copyright Act, in contrast, provides that

> the owner of a particular copy lawfully made . . . is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located."[359]

But even in France, where unauthorized exhibition is considered infringement, it is unusual for an artist to bring an infringement suit against a lawful proprietor on the ground of a public exhibition of its fine art works.

The French IP Code exempts certain "accessory" uses that do not exist under American copyright law. These include

> complete or partial reproductions of works of graphic or three-dimensional art intended to appear in the catalogue of a judicial sale held in France, in the form of the copies of the said catalogue made available to the public prior to the sale for the

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354 17 U.S.C. § 111(a)(1).

355 GORMAN & GINSBURG, *supra* note 124, at 603.

356 Cass. 1e civ., Apr. 6, 1994, 32 D. [1994] 450, note Gautier. *See also* B. Edelman, *La télédistribution dans les chambres d'hôtel*, 27 D. [1994] 209.

357 *See, e.g.*, Cass. 1e civ., Nov. 23, 1971, 6 D. [1972] 95, note R.L.

358 Cass. 1e civ., July 18, 2000, R.I.D.A., 2000, 188, 309. *See* Cass. crim., Sep. 3, 2002, R.I.D.A., 2003, 195, 347.

359 17 U.S.C. § 109(c).

> sole purpose of describing the works of art offered for sale,[360] . . . [as well as] any acts necessary for the accomplishment of a jurisdictional or administrative procedure provided by law, or undertaken for public safety reasons.[361]

Accordingly, regarding the economic rights issue, French *droit d'auteur*, which has been said to be the object of an ongoing "*pecuniarization*,"[362] appears to be very close to American copyright law.

B. *Moral Rights*

Stemming from the French concept of *droit moral*,[363] moral rights cover the non-economic aspect of the author's protection, based on the intimate link between a work and its creator, since "an author's intellectual creation has the stamp of his personality and is identified with him."[364] Although the adjective "moral" in the French expression has no precise English equivalent, Professor Ricketson notes that the terms "spiritual," "non-economic," and "personal" each "convey something of the intended meaning."[365] Such an approach seems to proceed "from a romantic idea of the artist and his work; it treats artists as a special class of laborers, and art works as a special category of property; and, at least in theory, it defends artists' rights even against the contract or property interests of third parties."[366]

With respect to their "non-pecuniary"[367] nature, moral rights are usually said to resemble rights of personality or individual civil rights.[368] This statement is open to challenge, however, because

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360 C. PROP. INTELL., art. L.122-5, ¶ 3(d). Although the purpose behind the unauthorized use was quite different from the authorized French exemption, the United States reached a similar legal conclusion in *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003). In *Kelly*, the Ninth Circuit held that creating low-resolution thumbnail images of copyrighted photographs for use in a virtual search engine is considered to be fair use.

361 C. PROP. INTELL., art. L.331-4 (inserted by Act No. 98-536 of July 1, 1998). As a result, an individual may not refuse to produce a document in a court on the grounds of his copyright in such work.

362 GAUTIER, *supra* note 95, at 35.

363 France is said to be the home country to the doctrine of *droit moral*. *See* 3 NIMMER, *supra* note 19, § 8D.01[A]. Actually, it seems that the title "*droit moral*" was first coined in 1872 by André Morillot, a French attorney, in his article titled *De la personnalité du droit de publication qui appartient à un auteur vivant*, REVUE CRITIQUE LÉGISLATIVE 29 (1872), and was soon approved by the French copyright law scholarly community and French courts. *See generally* BERTRAND, *supra* note 14, at 35-38; ROGER NERSON, LES DROITS EXTRA-PATRIMONIAUX 244 (1939).

364 *See* REGISTER OF COPYRIGHTS, REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (1961).

365 SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 456 (1987).

366 DaSilva, *supra* note 8, at 53. *See also* Peter Jaszi, *Towards a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455 (1991) (explaining how the moral rights doctrine relates to the Romantic vision of authorship).

367 DaSilva, *supra* note 8, at 3.

368 *See* TAFFOREAU, *supra* note 14, at 101, DE BELLEFONDS, *supra* note 10, at 244

moral rights are not inherent in an author's individuality, they just relate to a work.[369] Thus, the *Cour de cassation* itself acknowledged that moral rights should have nothing to do with the classic protected rights of personality.[370] For instance, moral rights in a literary work mostly provide its author with a right to respect for his work or his name.[371] In addition, it has also been held that a legal entity may be granted moral rights,[372] which does not fit the personality right analysis. Moreover, academics are still debating the accurate contents of personality rights under French civil law.[373] That is why Professor Raynard suggested, with good reason, that moral rights should be regarded as a mere derogation from the normal exploitation of a work, through a potential limitation on prerogatives of copyright assignees.[374]

Generally speaking, France's *droit moral* seems to hold an excessive place within copyright law,[375] which tends to undermine producers' economic expectations and to harm both modern creation and the public interest,[376] because, as Professor Leafer notes, "at one level, some works are simply not appropriate for moral rights, such as computer programs, databases, and other functional works."[377] Still, moral rights originally concerned only the fine arts and literature. It is the French doctrine of "unity of art"[378] that led to the present subjection of most copyrighted works to moral rights.

1. Types of Rights

The judicially constructed doctrine of *droit moral* has brought together a "collection of prerogatives, all of which proceed from the necessity of preserving the integrity of intellectual works and the personality of the author."[379] Although such "collection of prerogatives"[380] may vary from one country to another, American

(considering moral rights as *specific* rights of personality); Frédéric Pollaud-Dulian, *Droit moral et droit de la personnalité*, 29 JCP [1994] 3780. *See also* Ysolde Gendreau, *Droit d'auteur et droits de la personnalité en droit français, droit québécois et droit canadien*, *in* DROIT QUÉBÉCOIS ET DROIT FRANÇAIS: COMMUNAUTÉ, AUTONOMIE, CONCORDANCE 291 (H.P. Glenn ed., 1993).

369 LUCAS & LUCAS, *supra* note 82, at 303.

370 Cass. 1e civ., Mar. 10, 1993, D. 1994, 7, 78, note Françon.

371 *Id.*

372 *See* Cass. 1e civ., Dec. 8, 1993, R.I.D.A., 1994, 161, 303.

373 *See, e.g,*. BERNARD BEIGNER, LE DROIT DE LA PERSONNALITÉ (1992); PAUL ROUBIER, DROITS SUBJECTIFS ET SITUATIONS JURIDIQUES (1963).

374 Jacques Raynard, *Un film américain créé en noir et blanc ne peut être diffusé en France dans une version colorée*, note under Cass. 1e civ., May 28, 1991, D. 1993, 197, 201.

375 *See* BERTRAND, *supra* note 14, at 38.

376 *See id. See also* LEAFFER, *supra* note 18, at 369.

377 *Id.*

378 *See supra* note 130.

379 ALAIN LE TARNEC, MANUEL DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 25 (1966).

380 *Id.*

as well as French scholars generally agree that they include:[381]

> (a) The right of attribution (*droit à la paternité de l'œuvre*), which allows an author to claim authorship of his work and, therefore, to be acknowledged as the author of the work;
>
> (b) The right of integrity (*droit au respect de l'œuvre*), which is the right of an author to demand respect for his work, so that the work not be mutilated or distorted;
>
> (c) The right of disclosure (*droit de divulgation*), which provides authors with the right to decide when and in what form their work will be presented to the public; and
>
> (d) The right of modification or withdrawal (*droit de repentir ou de retrait*), where certain legal systems, such as France's, empower authors to make modifications to their published work, or even to withdraw them from publication.

Under the French IP Code, an author simultaneously enjoys, "the right to respect for his name, his authorship and his work;"[382] "the right to divulge his work;"[383] and "a right to reconsider or of withdrawal."[384] The granting of these various rights to an author are expected to illustrate how fairly French copyright law typically treats authors.

The concept of moral rights, which is basically only a feature of civil law systems, has "played little, and some may argue no, role in the . . . development of copyright in common law countries."[385] Some elements of moral rights have, however, gradually been introduced into American copyright law through both case law and legislation. In the United States, authors have been granted some moral rights protection by way of courts' decisions. This has not occurred solely through a unitary copyright law doctrine, "but through familiar doctrines of tort, contract or trademark law."[386] Examples of judge-made law in this area include: "a right to disclose or first publish a work; a right of modification or withdrawal of a work (normally subject to an obligation to indemnify aggrieved parties in respect of financial losses); a right to prevent excessive criticism of a work; and a right against false

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381 *See* 3 NIMMER, *supra* note 19, § 8D.01[A]. *See also* LEAFFER, *supra* note 18, at 361; DaSilva, *supra* note 8, at 3-4; BERTRAND, *supra* note 14, at 270-79; GAUTIER, *supra* note 94, at 222-27; DE BELLEFONDS, *supra* note 10, at 248-64; LUCAS & LUCAS, *supra* note 82, at 311-40; PIOTRAUT, PROPRIÉTÉ INTELLECTUELLE, *supra* note 91, at 54-59; TAFFOREAU, *supra* note 14, at 103-13.

382 C. PROP. INTELL., art. L.121-1. In addition, a co-author of an uncompleted contribution to an audiovisual work "shall be deemed the author of such contribution and shall enjoy the rights deriving therefrom." C. PROP. INTELL., art. L.121-6.

383 *Id.* at art. L.121-2.

384 *Id.* at art. L.121-4.

385 Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229, 230 (1995).

386 DaSilva, *supra* note 8, at 39.

attribution."[387]

Additional moral prerogatives in works of fine art have been granted over time under various state and federal laws. Several states have passed laws protecting rights of attribution and integrity. The states that have done so include California,[388] Connecticut,[389] Louisiana,[390] Maine,[391] Massachusetts,[392] New Jersey,[393] New Mexico,[394] New York,[395] Pennsylvania,[396] and Rhode Island.[397] Visual artists have been granted rights of paternity and integrity under federal law pursuant to the Visual Artists Rights Act (VARA) of 1990.[398] In addition, a form of attribution and integrity right in the internet environment has been enacted under the copyright management provisions of the 2000 Digital Millennium Copyright Act (DMCA.)[399]

Nevertheless, it has been argued that, unlike France's *droit d'auteur*, the present American copyright law does *not* fulfill certain international obligations regarding moral rights,[400] especially those stemming from the Berne Convention for the Protection of Literary and Artistic Works.[401] But such an assertion may still be questionable. Article 6*bis*, paragraph one of the Berne Convention states:

> 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

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387 Dworkin, *supra* note 385, at 230.

388 CAL. CIV. CODE § 987(a) (West 1980).

389 *See generally* CONN. GEN. STAT. § 42-116t (2006).

390 LA. REV. STAT. ANN. §§ 51:2152 to 51:2156 (2006).

391 27 ME. CODE R. § 303 (Weil 2006).

392 MASS. GEN. LAWS ANN. ch. 231 § 85S (West 2006). *See* Phillips v. Pembroke Real Estate, 288 F. Supp. 2d 89 (D. Mass. 2003) (holding that an injunction was warranted against the modification of a park in which a sculptor's site-specific artwork was displayed).

393 N.J. STAT. ANN. §§ 2A:24A-1 to 2A:24A-8 (West 2006).

394 N.M. STAT. ANN. §§ 13-4B-1 to 14-4B-3 (West 2006).

395 New York Artists' Authorship Rights Act, N.Y. ARTS & CULT. AFFAIRS LAW § 14.03 (McKinney 2006). *See* Edward J. Damich, *The New York Artist's Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733 (1984).

396 73 PA. STAT. ANN. §§ 2101-2108 (West 2006).

397 R.I. GEN. LAWS §§ 5-62-2 to 5-62-12 (2005).

398 Visual Artists Rights Act of 1990, Title VI of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128 (1990) [hereinafter VARA]. VARA amended the U.S. Copyright Act, essentially by adding section 106A, regarding the Rights of Certain Authors to Attribution and Integrity. However, VARA only protects works of visual art, such as paintings, drawings, prints or sculptures that exist in a single copy or in a limited edition of two hundred copies of fewer. *See* 17 U.S.C. § 101 (2006).

399 *See* 17 U.S.C. § 1202; *supra* note 159.

400 *See, e.g.*, LEAFFER, *supra* note 19, at 368.

401 Despite the U.S. adherence to the Berne Convention, after the passage of the BCIA of 1988. *See* Berne Convention, *supra* note 43.

honor or reputation.[402]

French copyright law, which allegedly places *droit moral* at its very core,[403] is thus presumptively in accord with Berne insofar as it encompasses the full range of moral rights.[404] It is somewhat paradoxical, therefore, that while the Berne Convention[405] expressly provides authors with a right to oppose any distortion, mutilation, or other modification of their works that would be prejudicial to their honor or reputation, France's *droit au respect de l'œuvre*[406] focuses solely on the work, so that it "does not permit to condemn, on the ground of moral rights, a breach of authors' honor or reputation."[407]

I do not agree with the widely held assertion that United States copyright legislation does not comply with article 6*bis* of the Berne Convention.[408] In any case, article 6*bis*, paragraph one of the Berne Convention has since been exempted under TRIPS.[409] As a matter of fact, while it is true that American copyright law may only recognize a limited moral rights concept, it is undeniable that Berne does not expressly require granting moral rights in themselves.[410] Under article 6*bis*, paragraph one, the treaty simply

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402 *Id.* at art. 6*bis*(1).

403 LUCAS & LUCAS, *supra* note 82, at 306; HENRI DESBOIS, COURS DE PROPRIÉTÉ LITTÉRAIRE, ARTISTIQUE ET INDUSTRIELLE 299 (1961).

404 This includes a specific integrity right in audiovisual works stemming from the French IP Code:

> Destruction of the master copy of [the final version of an audiovisual work] shall be prohibited.
>
> Any change made to that version by adding, deleting or modifying any element thereof shall require the agreement of [the director or, possibly, the joint authors, on the one hand, and the producer, on the other].

C. PROP. INTELL., art. L121-5.

405 Berne Convention, *supra* note 43, at art. 6*bis*, ¶ 1.

406 In English, "*droit au respect de l'œuvre*" translates to *integrity right*.

407 LUCAS & LUCAS, *supra* note 82, at 335. Moreover, other prominent *droit d'auteur* scholars have maintained that the Berne requirement of making damages available in order to remedy harm caused to an author's honor or reputation, actually relates only to potential economic damages in the exploitation of the author's works. These legal scholars cite the remarks made by British and Australian delegates at the Rome Conference of June 2, 1928, on the occasion of a Berne revision, as the basis for their arguments. *See* Bernard Edelman, *Entre copyright et droit d'auteur: l'intégrité des œuvres de l'esprit*, 40 D. [1990] 295; Philippe Gaudrat & Stéphane Grégoire, *Exercice des droits des auteurs. Droit moral. Droit au respect*, *in* 1213 JURIS-CLASSEUR PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 3 (2002).

408 *See Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 513, 547-57 (1986). *See also* Paul Edward Geller, *Comments on Possible U.S. Compliance with Article 6bis of the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 665 (1986); Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499 (1967).

409 Pursuant to article 9(1) of TRIPS, "[m]embers shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of [the Berne] Convention or of the rights derived therefrom." TRIPS, supra note 43, at art. 9(1). Moreover, the likelihood of an action against the United States in the International Court of Justice, seated in The Hague, for non-compliance with the Berne Convention is very slight. *See* 3 NIMMER, *supra* note 19, § 8D.02[D][1].

410 The actual term or expression "*moral rights*" is not set forth in the text of the treaty

asks member states to provide authors with certain components of moral rights, *i.e.,* a right to claim authorship of their works and a right to bar any distortion or mutilation of their works that would reasonably damage their honor or reputation.[411] United States law does seem to satisfy these requirements with respect to both attribution rights and integrity rights,[412] under doctrines that are not so different from French ones.

As far as the attribution right is concerned, the present United States Copyright Act provides that each author of a work of visual art, such as a painting, a drawing, or a sculpture,[413] shall have two rights. The first right is "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."[414] The second right is "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."[415] Although under American copyright law, such statutory prerogatives are expressly limited to visual artists,[416] they are nearly equivalent to an author's right under French law,[417] which enables the author to demand that the work be distributed under his name,[418] or to reestablish the truth in case of usurpation.[419] In addition to the visual artists, the right of attribution seems to be granted with similar elements (*i.e.,* the right to claim authorship and the right to prevent the use of the author's name) under both French and U.S. copyright laws.

There is no doubt that under France's IP Code, the right to claim authorship of a work is granted, in theory, free of condition

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(with the exception of article 11*bis*, paragraph (2), pursuant to which broadcasting and related rights "shall not in any circumstances be prejudicial to the moral rights of the author . . . ." Berne Convention, *supra* note 43, at art. 11*bis*(2)).

411 Such construction should be binding on France as well, since it has also been established under European Union law in a decision of the European Court of Justice. Joined cases C-92/92 & C-326/92, Phil Collins v. Imtrat Handels GmbH & Patricia Im- und Export Verwaltungs GmbH and Leif Emanuel Kraul v. EMI Electrola GmbH, § 20, 1993 E.C.R. I-5145 (1993). In *Phil Collins,* the court held that the protection of moral rights enables authors, in particular "to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honor or reputation." *Id.*

412 According to 3 NIMMER, *supra* note 19, § 8D.02[D][1], there is "no doubt that each of those rights is anything but orphaned within the legal framework of the United States." *Id.*

413 17 U.S.C. § 101 (2006), as amended by VARA, supra note 398.

414 17 U.S.C. § 106A, which was added under VARA, supra note 398.

415 *Id.*

416 Consequently, American scholars have suggested that moral rights protection should be extended to other categories of creators. *See, e.g.,* Stuart K. Kauffman, *Motion Pictures, Moral Rights, and the Incentive Theory of Copyright: The Independent Film Producer as "Author,"* 17 CARDOZO ARTS & ENT. L.J. 749 (1999).

417 *See* C. PROP. INTELL., art. L.121-1.

418 LUCAS & LUCAS, *supra* note 82, at 327.

419 *Id.*

to the author of the work.[420] This is the case regardless of the work's possible status as a work made for hire.[421] However, French courts have denied the attribution right to certain creators. In the *Barrault v. Citroën* case,[422] for instance, a commissioned draftsman demanded, on the grounds of his paternity right, that his contracting car manufacturer affix his name on the coachwork of each marketed vehicle. The judge rejected the claim, stating that "[i]n the field of industrial designs, the artistic work has an accessory character in comparison with the exploited product, so that success is mostly relying on a financial effort of the company that took an exploitation risk."[423] This solution, which sounds very pragmatic, seems nonetheless baseless under France's *droit d'auteur*. The French "unity of art" doctrine[424] "should not permit fine art works to be treated differently from copyrightable useful objects."[425]

Under American copyright law, on the other hand, in addition to the statutory attribution right for visual artists,[426] case law has provided artists and creators with an indirect right to require the use of their name in connection with their works.[427] As an example, in *Smith v. Montoro*,[428] the court held that the removal of an actor's name from the film credits and accompanying advertising material in connection with the film, as well as the substitution of another name, violated section 43(a) of the 1946 Lanham Act on trademarks,[429] as a false designation of origin of

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420 Pursuant to the French IP Code, each author shall enjoy the right to respect "for his name" and for "his authorship." C. PROP. INTELL., art. L.121-1.

421 *See, e.g.*, CA, Aix-en-Provence, 2e ch., Oct. 21, 1965, D. 1966, 4, 70, note Greffe.

422 *See* CA, Paris, 4e ch., Nov. 22, 1983, D. 1985 somm. 9, note Burst.

423 *Id.*

424 *See supra* note 124.

425 YOO, *supra* note 124, at 231.

426 17 U.S.C. § 106A (2006).

427 Even though U.S. copyright law does not expressly provide "ordinary" authors with an inherent moral right to be credited as author of their works. *See, e.g.*, 3 NIMMER, *supra* note 19, § 8D.03[A][1].

428 Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981). *See* Lamothe v. Atl. Recording Corp., 847 F.2d 1403 (9th Cir. 1988) (addressing removal by a songwriter of his coauthor's name on published music); Johnson v. Jones, 149 F.3d 494 (6th Cir. 1998) (substituting one architect's name for another's on architectural plans). *See generally* JANE C. GINSBURG ET AL., TRADEMARK AND UNFAIR COMPETITION LAW 618-42 (3d ed. 2001).

429 Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), reads in part:

> (1) 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–
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> > (A) 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 . . . .
>
> 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.

goods or services.

In the 2003 *Dastar* case,[430] the United States Supreme Court reversed a Ninth Circuit judgment where a film producer had committed a false designation of origin in releasing a video set, after its copyright had expired, without mentioning that it was first a Twentieth Century Fox product. Professor Jane Ginsburg expressed the view that from now on, "in the United States neither the copyright nor the trademark laws establish a right of attribution generally applicable to all creators of all types of works of authorship," and so the compliance of American copyright law with Berne might be challenged.[431] Two points warrant emphasizing, however. First, the Berne Convention does not require moral rights to be maintained after the work has entered the public domain.[432] Second, failing to attribute authorship for a work hardly constitutes a false designation of its origin. Accordingly, such absence of credit on a still-copyrighted work could possibly violate the Lanham Act, such that American copyright law would still acknowledge a kind of right to claim authorship of a work, in compliance with Berne.

In addition to providing an identical statutory right for authors to remain anonymous or to use a pseudonym,[433] both American and French copyright laws provide that in the case of a work falsely attributed to an author, the author alleging false attribution is permitted to forbid the use of his name as a creator of the work.[434] For instance in *Clevenger v. Baker Voorhis & Co.*, the New York Court of Appeals granted a former author and editor of law books the right to prevent his former publisher from using his name.[435] In this case, plaintiff Clevenger had terminated his

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Id. Many scholars criticized using the Lanham Act as a basis for relief in reverse passing off cases where copyrightable works are misattributed. *See, e.g.,* Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire between Copyright and Section 43(A)*, 77 WASH. L. REV. 985 (2002).

430 Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).

431 Ginsburg, *The Right to Claim Authorship*, *supra* note 7.

432 Berne Convention, *supra* note 43, at art. 6*bis*, ¶ 2. *But see* Ginsburg, *The Right to Claim Authorship, supra* note 7. As Ginsburg notes, "[w]hether or not the work is under copyright, its author remains the same person." *Id.* at 268.

433 *See* C. PROP. INTELL., art. L.113-6; 17 U.S.C. § 101. Under section 101 of the U.S. Copyright Act, an *anonymous* work is "a work on the copies or phonorecords of which no natural person is identified as author," while a *pseudonymous* work is "a work on the copies or phonorecords of which the author is identified under a fictitious name." *Id. But see* Clemens v. Belford, Clark & Co., 14 F. 728 (N.D. Ill. 1883) (finding that an author has no better or higher right in a *nom de plume* than he has in his birth name).

434 Under French law, authors have been protected under the moral rights doctrine, while American law has protected authors "under tort theories of libel, right of publicity, and invasion of privacy." DaSilva, *supra* note 8, at 43.

435 Clevenger v. Baker Voorhis & Co., 203 N.Y.S.2d 812 (N.Y. 1960). *See also Clemens*, 14 F. at 728 (holding that an author may restrain the publication of a literary work in the following two instances: first, where the work at issue is purportedly written by him, but in fact he never wrote it, and second, where he wrote the work, but never published it or

position as editor and had revoked his consent to have his name used as editor of any later editions. Nevertheless, defendant publisher indicated that Clevenger was the editor of a subsequent edition filled with errors.[436] In France, the court made a similar decision in the *Rodin* case,[437] holding that "attribution to Rodin, by means of an usurpation of name, of a work he actually did not make, undermines the sculptor's right to respect for his name and harms the artistic identity of his work."[438] Additionally, the knowing provision and dissemination of false copyright management information is prohibited under section 1202(a) of the DMCA.[439]

As far as the integrity right is concerned, authors of a work of visual art are granted an express American statutory right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to [their] honor or reputation,"[440] and "to prevent any destruction of a work of recognized stature . . . ."[441] Such protection of visual artists' rights appears to be analogous to the protection granted by French courts on the ground of "ordinary" moral rights.[442] For instance, in the classic *Fersing v. Buffet* case,[443] Bernard Buffet, a famous twentieth-century French artist, had actually made several paintings on various panels of a refrigerator. The individual who bought the refrigerator then cut up those panels in order to resell them separately and make a profit. Since the work had been designed as "an indivisible artistic unit,"[444] the court held against the new owner of the refrigerator as having violated the moral right of integrity Buffet had to his work.

Under the United States Copyright Act, visual artists may similarly have a right of integrity when their work "has been incorporated in or made part of a building in such a way that

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gave it to the public).

436 *Clevenger*, 203 N.Y.S.2d at 812.

437 CA, Paris, 13e ch., Mar. 23, 1992, R.I.D.A., 1993, 155, 181.

438 *Id.*

439 17 U.S.C. § 1202 (2006).

440 *Id.* § 106A (which was added under VARA, *supra* note 398).

441 *Id.* It has to be noted that, in the case of such work of a recognized stature, the conferred moral rights protection is wider than required under the Berne Convention, since "any intentional or grossly negligent destruction of that work is a violation of that right," even if it would *not* prove to be prejudicial to artists' honor or reputation. *Id.*

442 French scholars often consider the right of integrity to be the most essential part of *droit moral*. *See, e.g.*, PIERRE RECHT, LE DROIT D'AUTEUR, UNE NOUVELLE FORME DE PROPRIÉTÉ 291 (1969).

443 Cass. 1e civ., July 6, 1965, R.I.D.A., 1965, 47, 221. *See also* John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 2023 (1976) (concluding that, at the time, such right of integrity simply did not exist in American law).

444 Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 480 (1968).

removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work . . . ."[445] Likewise, under French law, the Paris Court of Appeals condemned an unjustified removal of an artistic fountain initially set up in a shopping mall.[446]

It is worth noting that under American VARA statutes,[447] a modification of a visual work is *not* considered a distortion, a mutilation, or other modification of that work whenever it is either "a result of the passage of time or the inherent nature of the materials . . ."[448] or "the result of conservation, or of the public presentation, including lighting and placement, of the work . . . unless the modification is caused by gross negligence."[449] However, such limitations, which could hardly be said to be unfair or immoral to artists, are very likely to be imposed under French copyright law too, considering that *droit au respect de l'œuvre* appears less powerful than the other categories of moral rights.[450] In the internet environment, a form of integrity right also arises from the DMCA. For example, section 1202(b) prohibits the intentional removal or alteration of any copyright management information, as well as the distribution of such altered works.[451]

Apart from visual arts or copyright management information, American courts, even absent a comprehensive statutory right, have protected the authors' integrity right. As far back as the 1950s, certain state courts have held that "an author has the right to prevent distortion or truncation of his work . . . ."[452] A federal court then confirmed this right in 1976, in the landmark case of *Gilliam v. American Broadcasting Co.*[453] *Gilliam* was about a *Monty Python* television show that had been broadcast by the ABC network in a drastically shortened and edited version. Defendant deleted twenty four minutes from each original ninety minute recording partly in order to make time for commercials, and partly because the original programs were said to contain offensive or obscene scenes. The Second Circuit held that these mutilations and truncations constituted both infringement of the plaintiff's

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445 17 U.S.C. § 113(d) (2006).

446 CA, Paris, 25e ch., July 10, 1975, R.I.D.A., 1977, 91, 114, note Françon. *See also* Conseil de Préfecture [former regional administrative court of first instance], Montpellier, Dec. 9, 1936, Gaz. Pal. [1937], 3, 34.

447 *Supra* note 398.

448 17 U.S.C. § 106(A)(c)(1).

449 *Id.* § 106(A)(c)(2).

450 *See* LUCAS & LUCAS, *supra* note 82, at 347. *See also* Jane Ginsburg & Pierre Sirinelli's note under the *Asphalt Jungle* case. Cass. 1e Civ., May 28, 1991, J.C.P. [1991] éd. E. II 220, 283, note Ginsburg & Sirinelli.

451 *See* 17 U.S.C. § 1202.

452 3 NIMMER, *supra* note 19, § 8D.04[A][1] (citations omitted).

453 Gilliam v. Am. Broad. Co., 538 F.2d 14 (2d Cir. 1976).

copyright in their scripts and, since the programs were presented under the author's name, a false designation of origin of goods, in violation of the Lanham Act.[454] *Gilliam* was not expressly based on the moral rights doctrine, but the court alluded to it in its reasoning.[455] The decision leads to a legal protection of integrity right, outside works of visual art, which is close to France's. As an example, the Paris District Court forbade a theater to put on Samuel Beckett's play, *Waiting for Godot*, using only actresses, because the Irish playwright had wanted it to be performed only by men, on the ground of integrity right.[456]

Even France's *droit au respect de l'œuvre*, however, has its limits. The integrity right in an audiovisual work may be exercised only with respect to the completed work.[457] In the same way, computer program writers have been denied the right to "oppose modification of the software by the [copyright] assignee . . . where such modification does not prejudice either [their] honor or [their] reputation . . . ."[458]

Furthermore, American and French copyright regimes appear to contain two series of convergent limitations upon the integrity right. First, regarding architectural works, section 120(b) of the United States Copyright Act provides that "the owners of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building."[459] Even though French copyright law allows an architect to oppose the complete destruction of his copyrighted building (on the sole ground of the author's right to respect for his work),[460] the United States limitation on making alterations to an architectural work resembles the French *Bonnier* doctrine.[461] The *Bonnier* doctrine stands for the proposition that an architect, his granted integrity right notwithstanding, cannot prohibit any and all changes to a building erected in accordance to his plan. He cannot, for instance, forbid the owner of the building to make required alterations in order to adjust it to the owner's new needs, unless those alterations happen to be seriously prejudicial to the architectural work.[462]

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454 *See* 15 U.S.C. § 1125(a).
455 DaSilva, *supra* note 8, at 48.
456 T.G.I., Paris, 3e ch., R.I.D.A., 1993, 155, 225.
457 C. PROP. INTELL., art. L.121-5, ¶ 5. *See* LUCAS & Lucas, *supra* note 82, at 343.
458 C. PROP. INTELL., art. L.121-7, ¶ 1.
459 17 U.S.C. § 120(b).
460 C. PROP. INTELL., art. L.121-1.
461 *See* Cass. 1e civ., Jan. 7, 1992, R.I.D.A., 1992, 152, 194.
462 *Id. See also* PIOTRAUT, PROPRIÉTÉ INTELLECTUELLE, *supra* note 91, at 57.

Secondly, United States as well as French courts have limited authors' integrity rights in the case of minor changes made to a work, especially where changes are made in order to present the work in another medium. Thus, both countries' courts have dismissed actions of authors claiming that a film adaptation of their novel grossly distorted its character. For example, in 1938, a New York court held that Theodore Dreiser had to tolerate changes made to his novel, *An American Tragedy,* as it was turned into a motion picture.[463] The same thing happened in France in 1966, when the *Cour de cassation* held that Georges Bernanos' heirs could not oppose each modification made to *The Dialog of the Carmelite Nuns* because such an adaptation requires the scriptwriter be given a relatively free hand.[464]

As it happens, French courts regrettably go to such extremes with the integrity right that certain judgments may actually call into question the fairness and morality of *droit d'auteur.* As illustrations, consider the following list of conduct that has been claimed, at times, to violate authors' moral right of integrity in their works, though such a conclusion may be open to challenge: superimposing a small logo of a television station in a corner of the screen that is broadcasting a film[465]; broadcasting a movie (originally made in black and white) in a colored version although such colorization had been lawfully done abroad (pursuant to foreign legislation)[466]; and bringing out an imaginary sequel to a novel that has passed into public domain.[467] Russell DaSilva is therefore right to wonder "whether vesting the artist with a 'moral right of integrity' is necessarily the fairest and most effective way to ensure that artists' interests are protected."[468]

Apart from any Berne requirement, the French IP Code also

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463 Dreiser v. Paramount Publix Corp., 22 COPYRIGHT OFF. BULL. 106 (N.Y. Sup. Ct. 1938), *discussed in* Comment, *Towards Artistic Integrity: Implementing Moral Rights Through Extension of Existing American Legal Doctrines*, 60 GEO. L. J. 1544 (1972).

464 Cass. 1e civ., Nov. 22, 1966, D. 1967, 485, note Desbois.

465 *See, e.g.,* T.G.I., Paris, June 29, 1988, R.I.D.A., 1988, 138, 328.

466 *See, e.g.,* Cass. 1e civ., May 28, 1991, R.I.D.A., 1991, 149, 197 (prohibiting a French television station from broadcasting a colored version of John Huston's movie, notwithstanding, on the one hand, the lawfulness of such colorization pursuant to American law and, on the other hand, the purpose of the Berne Convention, which is, according to its preamble, "to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works . . . ." Berne Convention, *supra* note 43, at pmbl.).

467 *See, e.g.,* CA, Paris, 4e ch. s. A, Mar. 31, 2004, R.I.D.A., 2004, 292, 202, note Pollaud-Dulian (prohibiting a writer and a publisher from marketing an imaginary sequel to Victor Hugo's *Les Misérables* on the ground of the famous novelist's right of integrity). Compared with this harsh and questionable decision, the United States Court of Appeals for the Eleventh Circuit, in *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) found fair use, based on the First Amendment of the United States Constitution, in a parody of Margaret Mitchell's copyrighted classic novel, *Gone With the Wind.*

468 DaSilva, *supra* note 8, at 37.

expressly protects two remaining components of moral rights, *i.e.,* the right of disclosure and the right of modification or withdrawal. But, once again, the superiority of France's *droit d'auteur* to United States copyright law can hardly be inferred from these rights. The French IP Code provides that "[t]he author alone shall have the right to divulge his work."[469] Similarly, in *Harper & Row*,[470] the United States Supreme Court acknowledged an analogous right of first publication in Gerald Ford's memoirs on the basis of the author's right to reproduce, distribute, and display the copyrighted work publicly.[471] It was held that the unauthorized publishing in a magazine of excerpts from a previously unpublished manuscript of the former President's book constitutes copyright infringement.

At first glance, there is one slight difference between the French and American solutions, regarding the beneficiaries of the right of disclosure. The author alone holds the right under French copyright law, while the copyright owner, who might be a copyright assignee, holds the right under American copyright law.[472] In actuality, that nuanced difference between the French and American rights here seems to be a purely theoretical one. This is so because in France, three things might complicate an author's refusal to have his work published after he has assigned away his rights, on the grounds of his moral rights.[473] First, the author would have to indemnify the assignee for the loss such refusal would cause him.[474] Second, courts may prohibit such a refusal in case of misuse.[475] And third, in the specific case of an

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469 C. PROP. INTELL., art. L.121-2. The provision continues that except for an audiovisual contract, such author "shall determine the method of disclosure and shall fix the conditions thereof . . . ," but this relates more to economic rights and contract drafting than to moral rights as such. In addition, the French IP Code provides that "[t]he author alone shall have the right to make a collection of his articles and speeches and to publish them or to authorize their publication in such form." C. PROP. INTELL., art. L.121-8.

470 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985).

471 *See* § 106, ¶¶ (1), (3), and (5) of the Copyright Act. In addition, the right of disclosure may be protected by unfair competition. *See, e.g.,* Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc., 216 F.2d 945 (9th Cir. 1954).

472 Although, as DaSilva, *supra* note 8, at 40, explains, "the right of first publication still belongs to the author, so long as he has not transferred his copyright . . . ."

473 In addition, certain scholars think that such a right of disclosure is exhausted by its first use, *i.e.,* as soon as the work has been lawfully published or performed in public. *See* Françon, *L'auteur d'une œuvre de l'esprit épuise-t-il son droit de divulgation par le premier usage qu'il en fait?* 6/7 GEWERBLICHER RECHTSCHUTZ UND URHEBERRECHT INTERNATIONALER TEIL (GRUR Int.) 264 (1973). *See also* LUCAS & LUCAS, *supra* note 82, at 316; GAUTIER, *supra* note 95, at 224. *But see* Gaudrat, *Droits des auteurs. Droits moraux. Droit de divulgation, in* 1211 JURIS-CLASSEUR PROPRIETE LITTERAIRE ET ARTISTIQUE 34 (2001); Pollaud-Dulian, *Moral Rights in France through Recent Case Law*, 145 R.I.D.A. 126 (1990).

474 *See, e.g.,* Cass. civ., Mar. 14, 1990, 18 D.P. I 497 (1990), note Planiol. As a result, only wealthy authors may actually exercise such right of divulgation, which would not prove very fair and moral.

475 Based either on "the event of manifest abuse in the exercise or non-exercise of the

audiovisual work, the French IP Code provides that:

> If one of the authors refuses to complete his contribution to an audiovisual work or is unable to complete such contribution due to circumstances beyond his control, he shall not be entitled to oppose use of that part of his contribution already in existence for the purpose of completing the work.[476]

Finally, I shall address the right of modification or withdrawal; that is, the right either to make modifications to a published work or to retract a work from publication. These rights do not exist under U.S. copyright law,[477] whereas the French IP Code provides that "[n]otwithstanding assignment of his right of exploitation, the author shall enjoy a right to reconsider or of withdrawal, even after publication of his work, with respect to the assignee."[478] Even though there is no complementary provision under U.S. law, I see very few factual differences between the two nations' legislation. First, it has been claimed that section 203 of the United States Copyright Act "does contain provision for termination of licenses, which in some situations could prove to be analogous to [France's] *droit de retrait*."[479] Second, the limitations and obligations arising under *droit de retrait* in French copyright law are so broad that the right is rarely used. Authors of software, in particular, do not enjoy a right of modification or withdrawal.[480] Also, courts seem to be scrutinizing the way in which this specific category of moral right is being used.[481] Above all, an author "may only exercise that right on the condition that he indemnify the assignee *beforehand* for any prejudice the reconsideration or withdrawal may cause him."[482] That is why the *droit de repentir ou de retrait* has been said to be nothing more than a "theoretician's fantasy."[483]

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right of disclosure by the deceased author's representatives . . . ." C. PROP. INTELL., art. L.121-3, or on the general ground of the abuse of right doctrine. *See* OLIVIER LALIGANT, LA DIVULGATION DES ŒUVRES ARTISTIQUES, LITTÉRAIRES ET MUSICALES 373, 378 (1983).

476 C. PROP. INTELL., art. L.121-6. It seems reasonable to conclude that such "use" of an uncompleted contribution may include publication.

477 A right of modification or of withdrawal does not exist in United Kingdom legislation, either, although a comprehensive moral rights regime has been passed under sections 77 through 89 of the U.K. Copyright, Designs and Patents Act of 1988, c. 48.

478 C. PROP. INTELL., art. L.121-4. In any case, such right of modification or withdrawal would never apply to the material support of a work—for instance a painting or a sculpture in original–it may only apply to copies of a work. *See, e.g.*, LUCAS & LUCAS, *supra* note 82, at 325.

479 DaSilva, *supra* note 8, at 42.

480 *See* C. PROP. INTELL., art. L.121-7, ¶ 2.

481 Cass. 1e civ., May 14, 1991, R.I.D.A., 1992, 151, 272, note Sirinelli.

482 C. PROP. INTELL., art. L.121-4 (emphasis added). The article continues, "[i]f the author decides to have his work published after having exercised his right to reconsider or of withdrawal, he shall be required to offer his rights of exploitation in the first instance to the assignee he originally chose and under the conditions originally determined." *Id.*

483 *See* RECHT, *supra* note 442, at 145.

As a result, according to Michael Gunlicks, "[n]o compelling reason exists to continue the controversy over moral rights and to resist a greater consensus between the European and American copyright systems[,]"[484] since both systems are based on the author's fundamental right to control his work; they both recognize the interests of the public; and they both limit moral rights.[485] Furthermore, it appears that in the United States, in addition to copyright, unfair competition, and trademark, "authors have turned to contract, defamation, and privacy laws to protect other aspects of their artistic personality and reputation."[486] Consequently, "without unfurling the banner of *droit moral*[,]"[487] American law is providing authors with most of the reasonable prerogatives conferred under French law on this basis.[488]

2. Main Features

As far as duration of moral rights is concerned, French copyright law appears to be fairer and more moral than its American counterpart. But, here again, one must look beyond the surface. Pursuant to the United States Copyright Act, the moral rights of attribution and integrity granted to visual artists shall endure for a term consisting of the author's life,[489] or, in the case of a joint work of visual art, the life of the last surviving author.[490] Absent any explicit federal protection for moral rights other than those granted to visual artists, it is not so easy to establish the duration of "ordinary" authors' moral rights. It may, however, be inferred from case law that, depending on the right in question, an author's moral rights should last either for the author's lifetime, or as long as the copyright itself is protected.

Clearly, both *Clemens v. Belford, Clark & Co.*[491] and *Clevenger*[492]

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484 Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601, 669 (2001).

485 *Id.*

486 LEAFFER, *supra* note 18, at 362 (citing Granz v. Harris, 198 F.2d 585 (2d Cir. 1952); Edison v. Viva Int'l, Ltd., 421 N.Y.S. 2d 203 (1979); Zim v. Western Publ'g Co., 573 F.2d 1318 (5th Cir. 1978)). *See also* Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988) (asserting that the existing right of personality, which has already produced a budding protection of authors' rights in U.S. case law, might provide authors with more comprehensive protection).

487 DaSilva, *supra* note 8, at 58. *See also* James M. Treece, *American Law Analogues of the Author's "Moral Rights,"* 16 AM. J. COMP. L. 487 (1968).

488 Nonetheless, some scholars believe that "American courts are still reluctant to embrace the moral right of artists." Brian T. McCartney, *"Creepings" and "Glimmers" of the Moral Rights of Artists in American Copyright Law*, 6 UCLA ENT. L. REV. 35, 36 (1998).

489 17 U.S.C. § 106A(d)(1) (2006).

490 *Id.* § 106A(d)(3).

491 Clemens v. Belford, Clark & Co., 14 F. 728 (N.D. Ill. 1883).

stand for the proposition that authors enjoy the right of attribution, which prohibits the false use of their name during their lifetime. This attribution right is available to authors who seek to restrain the publication of works for which they never authorized publication[493] and to authors who wish to protect their reputation.[494] The duration of other categories of protected rights, however, should, *a priori*, match the duration of the copyright itself. The right of first publication is clearly within this category since it is an integral part of copyright protection.[495] Therefore, denying the authorship claim in *Dastar* can be explained by the fact that the copyright had expired.[496] The court's protection of a form of integrity right in *Gilliam*[497] is perhaps explained by the fact that the copyright was still in force at the time.[498]

In addition, in order to protect aspects of their artistic personality and reputation, American authors may rely on the right of publicity to prevent the unauthorized use of their name or likeness. At the moment there is no consensus on the length or duration of the right of publicity. Federal courts in the United States "are divided on the question of whether or not the right survives the death of the author."[499] A post mortem right of publicity does exist under several states' laws, such as in California,[500] Tennessee,[501] and Texas.[502] The length of time granted under these laws varies greatly amongst these states, from as short as ten years, to as long as one hundred years.[503] "Under Tennessee law," however, "protection of publicity rights could extend indefinitely, so long as commercial use continues to be

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492 J.R. Clevenger v. Baker Voorhis & Co., 8 N.Y.2d 187 (1960).

493 Which was at issue in *Clemens*, 14 F. 728.

494 Which was at issue in *Clevenger,* 203 N.Y.S.2d 812.

495 *See* 17 U.S.C. § 106(5); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985).

496 Dastar Corp. v. Twentieth Century Fox Film Corp., 593 U.S. 23 (2003).

497 Gilliam v. Am. Broad. Cos., 538 F.2d 14 (2d Cir. 1976).

498 Although the holdings were different, both cases arose out of alleged violations of the Lanham Act.

499 DaSilva, *supra* note 8, at 44. *See, e.g.,* Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d. 215 (6th Cir. 1978) (allowing perpetuity of Elvis Presley's right of publicity); Memphis Dev. Found. v. Factors, Etc., Inc., 616 F.2d 956 (6th Cir. 1980) (refusing such perpetuity of Presley's right of publicity).

500 Astaire Celebrity Image Protection Act, CAL. CIV. CODE § 3344.1(a)(1) (West 2006).

501 Personal Rights Protection Act of 1984, TENN. CODE ANN. § 47-25-1105 *et. seq.*, (2006). Still, it has been construed as not applying to entertainment content. *See* Apple Corps. Ltd. v. A.D.P.R., Inc., 843 F. Supp. 342, 347 n.2 (M.D. Tenn. 1993).

502 TEX. PROP. CODE ANN. § 26.012 (Vernon 2006). *See also* FLA. STAT. § 540.08(1) (2006); UTAH CODE ANN. § 45-3-3 (2006); VA. CODE ANN. § 8.01-40(A) (2006); WASH. REV. CODE ANN. § 63.60.050 (2006).

503 *See* Baila H. Celedonia, *Recent Developments in the Right of Publicity in the United States*, Sept. 1, 2003, COWAN, LIEBOWITZ & LATMAN ARTICLES http://www.cll.com/articles/article.cfm?articleid=10.

made of the persona."[504]

The statutory monopoly under U.S. copyright appears to be limited in duration, whereas French *droit moral* is generally deemed to be perpetual.[505] In fact, the French IP Code distinguishes between categories of moral rights when addressing duration of protection provided. Thus, it uses the express term "perpetuity" regarding attribution and integrity rights.[506] The statutory language setting forth the right to disclose posthumous works, however, only provides that this right[507] "may be exercised even after expiry of the exclusive right of exploitation . . . ."[508] Nonetheless, academics consider France's right of disclosure to be perpetual as well.[509] However, given that article L.121-4 of the IP Code prescribes that only "the *author* shall enjoy" the right to reconsider or withdraw,[510] most French copyright law scholars think that this right should *not* survive the author's death,[511] unless the author has clearly expressed his intent that this right be transferred at his death.[512]

The Berne Convention does not require that attribution and integrity rights be perpetual. Article 6*bis*, paragraph two simply provides:

> The [attribution and integrity] rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.[513]

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504 *Id.*

505 *See, e.g.*, BERTRAND, *supra* note 14, at 261, 285; DE BELLEFONDS, *supra* note 10, at 246; Christophe Alleaume, *Propriété littéraire et artistique. Droits des auteurs. Durée de la protection*, *in* 1270 JURIS-CLASSEUR PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 8 (2003).

506 Pursuant to the French IP Code, the author's right to respect for his name, his authorship and his work "shall be perpetual . . . and imprescriptible. It may be transmitted mortis causa to the heirs of the author. Exercise may be conferred on another person under the provision of a will." C. PROP. INTELL., art. L.121-1.

507 It is undeniable that, as long as he lives, "the author alone shall have the right to divulge his work." *Id.* at art. L.121-2, ¶ 1.

508 *Id.* at art. L.121-2, ¶ 3.

509 *See, e.g.*, GAUTIER, *supra* note 95, at 228; Gaudrat, *supra* note 28, at 33.

510 C. PROP. INTELL., art. L.121-4 (emphasis added).

511 *See, e.g.*, BERTRAND, *supra* note 14, at 288; GAUTIER, *supra* note 95, at 446. *But see* Alleaume, *supra* note 505, at 10.

512 For example, in a will. *See, e.g.*, Tribunal civil, La Seine, Oct. 10, 1951, Gaz. Pal. [1951], 304-06, 290.

513 *See* Berne Convention, *supra* note 43, at art. 6*bis*.

This language clearly demonstrates that Berne only asks its members to maintain moral rights of attribution and integrity, either until an author's death or until the expiration of the economic rights, depending on the country. Thus, the U.S. legislation perfectly accords with that treaty on this issue.

On the other hand, one may question the rationale for the rights granted in perpetuity by *droit moral* in France. The standard claim is that the *droit moral* is the guardian of the rights of personality or of individual civil rights.[514] Because perpetual moral rights actually outlive the author's exclusive economic rights, these moral rights seem to bear no relationship to an author's rights of personality or his individual civil rights. Instead, the policy behind this perpetuity seems to uphold a general cultural interest. An aim such as this prevents *droit moral* from existing in the same category as the eminently individualistic copyright.[515] That is why perpetuity of moral rights has even been denounced as a "juridical heresy."[516] Furthermore, in the absence of a known heir who could protect his ancestor's moral rights, perpetuity is likely to grow more pointless as the years pass.[517]

Different principles seem to underlie the practice of moral rights in U.S. copyright law and French *droit d'auteur* to some degree. Once again, the asserted fairness and morality of the latter is open to challenge. French legal doctrine deems copyright to be an extension of the author's personality.[518] France's IP Code actually provides that moral rights "shall attach to his person,"[519] and shall be "inalienable . . . ."[520] Therefore, both assignment and waiver of *droit moral* are theoretically prohibited, even though this prohibition does not arise under the Berne Convention.[521] On the other hand, U.S. law prohibits under the 1990 provisions of VARA[522] only the transfer of visual artists' attribution and integrity rights.[523] VARA expressly provides that "those rights may be waived if the author . . . agrees to such waiver in a written instrument

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514 *See supra* note 368; DaSilva, *supra* note 8. DaSilva notes that some parties have suggested the need to distinguish "between the moral right itself and the right to exercise it." Dasilva, *supra* note 8, at 14. DaSilva further notes, however, that one "may question the practical wisdom of this distinction, for the heir, while not possessing the moral right, still is entitled to damages for its violation." *Id.*

515 *See* Mousseron et al., *supra* note 96, at 281.

516 RECHT, *supra* note 442, at 292, stating that personality rights cannot exist in perpetuity under French law.

517 *See* DE BELLEFONDS, *supra* note 10, at 246.

518 *See* Ladd, *supra* note 21.

519 C. PROP. INTELL., art. L.121-1, ¶ 2.

520 *Id.* at art. L.121-1, ¶ 3.

521 At least "so long as a transfer of economic rights is not deemed of itself to effect a transfer of moral rights." GORMAN & GINSBURG, *supra* note 124, at 533.

522 *See* VARA, *supra* note 398.

523 17 U.S.C. § 106A(e)(1) (2006).

signed by the author."[524] The waiver applies only to works and uses specified thereunder.[525]

American statutes address only the attribution and integrity rights of visual artists. It appears, however, that each one of the other categories of authors' moral rights may possibly be waived,[526] whereas only one of them may be transferred. There is no doubt that the right of first publication, an integral part of the copyright prerogatives,[527] can be waived, transferred, or sold.[528] The right to prevent any distortion, mutilation, or other modification of a work,[529] provided it is based on a claim of trademark infringement (false designation of goods)[530] rather than copyright infringement, might logically be subject to a possible waiver, but hardly to a transfer. Similarly, the right to claim authorship can rationally be relinquished (since authors have been granted a statutory right to remain anonymous or to use a *nom de plume*,)[531] but cannot be assigned. For instance, in *Roddy-Eden v. Berle*,[532] the New York Supreme Court held that a written agreement between a comedian and a ghostwriter, pursuant to which the ghostwriter was to write a novel to be published under the sole name of the comedian, was void as against public policy because it had "for its purpose and object the practicing of a fraud and deception upon the public."[533]

Compared with this quite fair decision in *Roddy-Eden,* the proclaimed inalienability of France's *droit moral* seems somewhat hypocritical. Despite the theoretically existing moral right to claim authorship, a number of French books, including novels, biographies and essays are marketed under famous people's names (such as actors, singers, or sportsmen) when ghostwriters actually pen them. As a matter of fact, although French courts, like U.S. courts, would in principle annul any agreement between such "visible" authors and ghostwriters,[534] such agreements are

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524 *Id.*

525 *Id.*

526 The concept of a waivable character of moral rights has been championed, especially, by Thomas F. Cotter. *See* Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1 (1997).

527 *See supra* note 495.

528 *See* DaSilva, *supra* note 8. at 41.

529 Judicially recognized in Gilliam v. American Broad. Cos., 538 F.2d 14 (2d Cir. 1976).

530 As precluded by section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (2006).

531 17 U.S.C. § 101. *See also* Clemens v. Belford, Clark & Co., 14 F. 728, 730 (N.D. Ill 1883) (stating that an author has no better or higher right in a *nom de plume* than he has in his birth name).

532 Roddy-Eden v. Berle, 108 N.Y.S.2d 597 (N.Y. Sup. Ct. 1951).

533 *Id.* at 599.

534 *See, e.g.,* CA, Paris, 1e ch., Feb. 1, 1989, R.I.D.A., 1989, 142, 301, note Sirinelli. In the past, on the other hand, French courts used to generously uphold waivers of attribution right. *See, e.g., Auguste Maquet v. Alexandre Dumas*, in which a district court held

frequently carried out in France because, most of the time, neither "visible" authors nor real ones are disposed to bring an action. Moreover, the author's right to publish pseudonymous or anonymous works, as permitted under the French IP Code,[535] amounts to an implicit waiver of the attribution right. Integrity rights in two types of works may be lawfully waived under French law. A waiver will be upheld in the case of collective works,[536] whose authors are not allowed to oppose corrections made with the view of harmonizing those works.[537] And, in the case of audiovisual works, authors and producers may agree on any change "by adding, deleting or modifying any element thereof . . . ."[538]

Beyond all else, the inalienability of French *droit moral* allegedly relates to its essentially author-centered purposes. Nevertheless, *droit moral* is often exploited for economic purposes under a remunerated waiver. Accordingly, certain authors in the field of music or motion picture may earn more money due to their moral rights than through the usual assignment of their economic exclusive rights.[539] As DaSilva noted, such a system "[is] based on the troublesome assumption that 'moral' and 'economic' interests can even be separated,"[540] which appears "somewhat artificial when we consider that an artist's name, reputation, and personality—like the goodwill of a business—are economic assets, and their violation gives rise to injuries which are at least analogous to business losses."[541] In France, this has unfortunately led to what André Bertrand calls a "shameless trade of moral rights,"[542] which is, of course, far from being fair and moral.

Having exhaustively examined the authors' actual legal position in France and in the United States, I reject the claim that French copyright law, despite a modest subset of additional granted rights, is in any way fairer or more moral than its American counterpart regarding the scope of the protection issue.

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that although Maquet had actually written the first draft of several novels published under Dumas's name (including the famous *Three Musketeers*), he had waived his attribution right in a written enforceable agreement. Tribunal civil, La Seine, June 22, 1922, *cited in* Louis Vaunois, *L'évolution du droit moral*, *in* MÉLANGES MARCEL PLAISANT 299 (1960)).

535 C. PROP. INTELL., art. L.113-6.

536 See definition under *id.* at art. L.113-5.

537 *See* GAUTIER, *supra* note 95, at 732.

538 C. PROP. INTELL., art. L.121-5, ¶ 3.

539 For instance, authors ask for money in return for their permission to produce a made-for-television abridgment of a movie, or to insert cuts for commercials and advertising in movies broadcast on television networks. *See* BERTRAND, *supra* note 14, at 71.

540 DaSilva, *supra* note 8, at 57.

541 *Id.* at 58.

542 BERTRAND, *supra* note 14, at 74.

V. CONCLUSION

Generally speaking, it is not always easy to distinguish, definitively, what is fair or moral from what is not. The recent *Metor-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* decision exemplifies this quandary in copyright law. The United States Supreme Court held against Grokster and StreamCast for having distributed free software products that allow computer users to share electronic files through peer-to-peer networks.[543] While consumers may well consider this holding to be unfair, copyright owners, on the other hand, will no doubt find this holding to be fair.

With that one reservation, the comparative study of French and U.S. copyright laws demonstrates that the widely-held notion of the so-called superiority of French law in terms of fairness and morality has to be reconsidered in light of justification for, access to, and scope of the copyright protection.

French and U.S. law actually appear to take similar positions on certain issues such as recognition of authors, nature of copyright, or infringement. Notwithstanding differences in conception, other topics, such as subject matter of copyright, formalities, ownership of copyright, as well as economic rights hardly reveal an intrinsic moral superiority of France's *droit d'auteur*. Finally, under the overly individualistic French copyright system, as characterized by its moral rights provisions, authors' interests actually end up being encroached upon, which is not exactly fair and moral. Accordingly, although the United States legislation may be more materialistic than France's *droit d'auteur*, I do not agree that it is less protective of authors' rights in practice.

First of all, a number of French and U.S. copyright provisions have been harmonized in the context of ongoing globalization. This has been happening pursuant to international treaties and conventions, as well as through similar national approaches taken by the two countries. For instance, under the national laws of both countries: no formality is required for copyright protection;[544] authors have to be granted some categories of moral rights;[545] and, under certain conditions, computer programs and compilations of data must be protected under copyright.[546] France and the United States have adopted similar legal positions regarding the term of copyright protection granted (life of the author plus seventy years

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543 Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

544 *See* Berne Convention, *supra* note 43, at art. 5(2).

545 *See id.* at art. 6*bis*.

546 *See* TRIPS, *supra* note 43. WIPO Copyright Treaty, arts. 4, 5, Dec. 20, 1996, 2186 U.N.T.S. 152.

for most works)[547] and the refusal to extend copyright protection to factual compilations.[548] Both the shared duration and the common refusal to extend copyright protection to factual compilations are derived from national courts and legislatures interpreting and enacting domestic law.

Next, the more utilitarian focus of the 1976 United States Copyright Act does not prevent its provisions from serving fair and moral ends. This is true even though individual decisions may be particularly criticized in terms of their fairness and morality (such as the *Dastar* judicial decision,[549] which could amount to depriving certain authors of a right to claim authorship).[550] Finally, the French system, just by permitting a "shameless trade of moral rights,"[551] can hardly hold itself out as a paragon of fairness and morality. One may even wonder whether *droit d'auteur* does not have that typically French fault of becoming fixed on probably generous—but dogmatic—tenets. Perpetuity and inalienability of France's moral rights exemplify this tendency. No matter how lofty their theoretical goals may be, they are more akin to ideology than to a normative framework suitable for governing human conduct and transactions. This lack of pragmatism leads to inefficient and incoherent outcomes.

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547 *See* C. PROP. INTELL., art. L.123-1; 17 U.S.C. 302 (2006). *See also supra* notes 256-57.

548 *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991); Cass. 1e civ., May 2, 1989, R.I.D.A., 1990, 143, 290, 309, note Kéréver.

549 *See* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).

550 *See* Ginsburg, *The Right to Claim Authorship*, *supra* note 7.

551 *See* BERTRAND, supra note 14, at 74.