MORAL RIGHTS PROTECTION AND RESALE ROYALTIES FOR VISUAL ART IN THE UNITED STATES: DEVELOPMENT AND CURRENT STATUS

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I. INTRODUCTION

The moral rights landscape in the United States is currently composed of federal moral rights legislation, state moral rights legislation, and other causes of action that have produced results similar to those codified in moral rights laws. The outstanding legal authority in this area, the Visual Artists Rights Act of 1990 ("VARA"),[1] amended the Copyright Act of 1976,[2] and for the first time expressly provided for national statutory moral rights protection for the visual arts. VARA grants the author of a work of visual art the right of attribution and the right of integrity.

Prior to 1980, lawyers representing visual artists were faced with making creative arguments based on causes of action that developed in response to more general problems, such as defamation, violations of the right of privacy, unfair competition, contract interpretation, and other provisions of the Copyright Act.[3] California was the first state to enact moral rights legislation, effective in 1980. Currently, only eleven states have express moral rights statutes.[4] In some cases these statutes and common law tort actions provide broader protection than VARA. Their availability, however, is qualified by the doctrine of preemption, which holds that federal statutes trump state statutes and common-law causes of ac-

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[1] Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1991) (codified in scattered sections of 17 U.S.C.) [hereinafter VARA].

[2] Copyright Act of 1976, Pub. L. No. 94-553 (1976).

[3] In 1976, the United States Court of Appeals for the Second Circuit recognized a cause of action based on moral rights for the broadcasting of a truncated version of a Monty Python television program. The moral rights part of the decision was not followed by any other circuit. Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976).

[4] CAL. CIV. CODE § 987 (West 1992); CONN. GEN. STAT. ANN. § 42-116s (West 1992); LA. REV. STAT. ANN. R.S. 51:2152 (West 1992); ME. REV. STAT. ANN. tit. 27, § 303 (West 1991); MASS. ANN. LAWS ch. 231, § 85S (Law Co-op 1992); NEV. REV. STAT. ANN. § 598.970 (Michie 1991); N.J. STAT. ANN. § 2A:24A-1 (West 1992); N.M. STAT. ANN. § 13-4B-2 (West 1992); N.Y. ARTS & CULT. AFF. § 14.01 (McKinney 1992); PA. STAT. ANN. tit. 73, § 2101 (Purdon Supp. 1991); R.I. GEN. LAWS § 5-62-2 (1987). *See also* R.I. GEN. LAWS § 42-75.2-3 (1993).

tion when there is conflict. In order to get an accurate picture of the strength and extent of moral rights protection, the complication and uncertainty inherent in the doctrine of preemption must be remembered. Courts have held that state statutory and common-law causes of action have been preempted by federal statutes when the state provides a right *in addition* to the federal right.[5] This reasoning is based on the proposition that in some cases, if Congress has *not* provided a right, it made a decision that no one should provide that right in the interests of national uniformity.[6]

The theoretical underpinning of moral rights is that the artist's work reflects and embodies his or her personality. However, the impetus for enactment of federal moral rights legislation did not come from the gradual acceptance of this theory. The concept that the artist should continue to control the destiny of his or her work even after it was sold conflicted with the traditional reverence for private property rights. That the artist should have a personal right based on the act of artistic creation itself seemed also to depart from the utilitarian basis for copyright protection found in the United States Constitution.[7] There were scholars, legislators, and members of the Copyright Bar who had accepted the personality theory, but the event that eventually led to VARA was the adherence of the United States to the Berne Convention on March 1, 1989. Article 6*bis* of the Berne Convention provides:

> (1) Independently of the author's economic rights, and even after the transfer of 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 honour or reputation.[8]

The legislation addressing the rights of article 6*bis* was not enacted until about two years after the passage of the Berne Convention Implementation Act.[9] Against all reason,[10] the United States

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[5] *See* Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964). *See also* Compco Corp. v. Day-Brite Lighting, 376 U.S. 234 (1964) (companion case to *Sears*).

[6] *Id.*

[7] "The Congress shall have Power . . . To 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." U.S. CONST. art. I, § 8, cl. 8.

[8] *Guide to the Berne Convention, Art 6bis*, Pub. No. 615(E) (World Intellectual Property Organization) (1978) [hereinafter *Guide*].

[9] Berne Convention Implementation Act of 1987, Pub. L. No. 100-568, 102 Stat. 2853 (codified in scattered sections of 17 U.S.C.).

[10] *See generally Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 100th Cong., 1st and 2d Sess. 538 (1987) (statement of Edward J. Damich, Assoc. Prof. of Law, George Mason University School of Law).

delayed taking the position that the existing state statutes and other causes of action that produced moral rights-like results were sufficient to fulfill its obligations under article 6*bis* and therefore no federal moral rights statute was necessary.[11] As a result, the Berne Convention Implementation Act not only contained no moral rights provisions, but it also specifically denied the right to base a cause of action on the language of the Berne Convention, lest some hapless artist should attempt to obtain judicial relief based on article 6*bis* alone. Congress eventually enacted VARA, but it limited moral rights protection to the visual arts.

This article addresses the three features of the moral rights landscape in the United States: (1) the causes of action that yield moral rights-like results (coincidental causes of action), (2) the state moral rights statutes, and (3) VARA. This order was selected since it replicates the historical development of moral rights protection for visual art in the United States.

In this article, moral rights refers to the two general moral rights recognized by article 6*bis*: "the right of attribution" or "the right of paternity,"[12] and "the right of respect for the work" or the "right of respect"[13] and the various subrights included within them.

In addition, this article discusses the *droit de suite* or resale royalties; the right of the artist to obtain a payment from the resale of

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[11] Dr. Arpad Bogsch, Director General of the World Intellectual Property Organization ("WIPO"), testified before the Senate Subcommittee on Patents, Copyrights and Trademarks in favor of this position. *See generally U.S. Adherence to the Berne Convention: Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary*, 99th Cong., 1st and 2d Sess. 8 (1985) (statement of Dr. Arpad Bogsch, Director General, WIPO, Geneva, Switzerland).

[12] The right of attribution includes:

(1) the subright of proper attribution, that is, the subright against non-attribution of the author's work or attribution of the author's work to another;

(2) the subright against false attribution, that is, the subright against attributing to an author a work that she did not create or attributing a work to the author when it has been modified or distorted; and

(3) the subright of anonymity and pseudonymity, which includes the right to reject anonymity and pseudonymity. Note that the subright of proper attribution can be distinguished generally from the subright against false attribution because the former always involves the author's *work*, while the latter focuses primarily on the author's *name*.

[13] "Right of respect" refers to the right "to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the work." *See Guide, supra* note 8, at 41.

This right includes:

(1) the subright against modification, that is, the subright to object to acts that physically affect the original of the work itself but do not utterly destroy it, such as painting an unpainted sculpture;

(2) the subright against unfaithful reproduction, that is, the subright to object to poor-quality reproductions or derivative works involving copies that pervert the work;

(3) the subright against destruction; and

(4) the subright against distortion, that is, the subright to object to any derogatory action that does not physically affect the original or involve reproduction.

his or her work. This right, which is optional under article 14*ter* of the Berne Convention, was included in an early version of VARA, and it has been the subject of a recent study by the United States Copyright Office.[14]

II. Coincidental Causes of Action

Until the California moral rights statute became effective in 1980, the only realistic hope for an artist to obtain moral rights protection for his or her work of visual art was through various common-law causes of action, Section 43(a) of the Lanham Act (the federal trademark and unfair competition statute), or some provisions of the Copyright Act.[15] These coincidental causes of action are still available to supplement other protection, but the common-law causes of action are subject to preemption.

Prior to 1976, courts routinely rejected causes of action based expressly on moral rights. For example, a muralist argued in the 1938 case *Crimi v. Rutgers Presbyterian Church*[16] that his moral rights were violated when a church had his mural painted over because it portrayed Christ with a bare chest.[17] The court unequivocally stated that "the claim of this plaintiff that an artist retains rights in his work after it has been unconditionally sold, where such rights are related to the protection of his artistic reputation, is not supported by the decisions of our courts."[18] Similarly, in 1947, when an artist complained that his moral rights were violated by a magazine's publication of his drawings without attribution, the court stated that "[t]he conception of 'moral rights' of authors so fully recognized and developed in the civil law countries has not yet received acceptance into the law of the United States."[19]

In 1976, the United States Court of Appeals for the Second Circuit in *Gilliam v. American Broadcasting Co.*[20] recognized a cause of action based simply on a violation of moral rights. However, the acceptance of a separate cause of action based on moral rights did not significantly improve, because no other court followed the lead of *Gilliam*.

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14 *Droit de Suite. The Artist's Resale Royalty*, 1992 Reg. of Copyrights [hereinafter *Resale Royalty Report*].

15 *See generally* Edward J. Damich, *The Right of Personality: A Common-Law Basis for Protection of the Moral Rights of Authors*, 23 Ga. L. Rev. 1, 35-75 (1988).

16 89 N.Y.S.2d 813 (N.Y. Sup. Ct. 1949).

17 *Id.* at 819.

18 *Id.*

19 Vargas v. Esquire, 164 F.2d 522, 526 (7th Cir. 1947), *cert. denied*, 335 U.S. 813 (19 (quoting S. Ladas, The International Protection of Literary and Artistic Prope 802 (1938)).

20 538 F.2d 14 (2d Cir. 1976).

The common-law causes of action that produce moral rights-like results in some instances involve defamation, the right of privacy, unfair competition, and contract interpretation.[21]

Except for contract interpretation, the common-law causes of action and Section 43(a) depend on deception, invasion of privacy, or injury to reputation.[22]

A. *Defamation*

The essence of the tort of defamation is injury to the reputation of the plaintiff by making a false statement to another. There is precedent for using the tort of defamation to protect the right of attribution, specifically, the subright against false attribution. In *D'Altomonte v. New York Herald Co.*,[23] the court held that the plaintiff's reputation was injured by the defendant's attribution to him of an article that he had never written. In *Edison v. Viva International*,[24] the court held that the plaintiff's reputation was injured when the defendant published a distorted version of the plaintiff's article and attributed it to him. In *Edison*, it was not the mere distortion of the plaintiff's work that gave rise to the cause of action but the injury to the plaintiff's reputation that resulted from the *attribution* of the distorted article to the plaintiff. Because of the nature of the tort of defamation, there must always be either explicit or implicit identification of the plaintiff as author of the work. Where the author's work is not attributed at all or where the author's work is attributed to another, there can be no injury to the author's reputation and, therefore, no defamation. Thus, the tort of defamation cannot be used to protect the subright of proper attribution or the subright of anonymity or pseudonymity nor can it protect the right of respect except indirectly.

Even in the case of the subright against false attribution, there can be no recovery if the author's reputation has not been injured. This is significantly different from the unqualified right of attribution found in the language of article 6*bis*.[25]

Finally, as a stand-in for the subright of false attribution, the tort of defamation has two other shortcomings: (1) courts are reluctant to grant injunctions against false attribution because of

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[21] In addition, there were various provisions in the Copyright Act of 1976 that provided some moral rights-like results, although the Act did not specifically recognize moral rights until the passage of VARA. *See* Damich, *supra* note 15, at 41-47.

[22] *Id.* at 35-75.

[23] 189 N.Y.S. 200 (N.Y. Sup. Ct.), *aff'd*, 208 N.Y. 600 (1913).

[24] 421 N.Y.S.2d 203 (N.Y. Sup. Ct. 1979).

[25] Note that arguably the requirement of prejudice to honor or reputation applies only to the right of respect. *See Guide*, *supra* note 8.

freedom of expression concerns, and (2) traditionally, the tort of defamation cannot be asserted posthumously.[26]

B. *Right of Privacy*

A cause of action based on the common-law right of privacy has been successfully used to vindicate the subright against false attribution and may possibly be used to vindicate the right of anonymity and pseudonymity. The *Restatement (Second) of Torts* lists four kinds of acts that give rise to a cause of action: (1) unreasonable intrusion upon the seclusion of another, (2) appropriation of the other's name or likeness, (3) unreasonable publicity given to the other's private life (or public disclosure of private facts), and (4) publicity that unreasonably places the other in a false light before the public.[27]

The subright against false attribution corresponds to publicity that places the other in a false light before the public or appropriation of the other's name or likeness.[28] Courts have recognized, such a right in various circumstances. In *Kerby v. Hal Roach Studios*,[29] the defendant attributed to the plaintiff and published a letter that the plaintiff did not write and that cast doubt on her moral character. Similarly, in *Stevens v. NBC*[30] the plaintiff obtained a preliminary injunction to prevent the distortion of the film, "A Place in the Sun," by the insertion of commercials during its television broadcast. In *Big Seven Music v. Lennon*,[31] the court, on the grounds of misappropriation, enjoined the release of a record album that was compiled from John Lennon's tapes without his permission and which Lennon claimed distorted his work. After analyzing these cases, it becomes clear that courts focus their attention on the improper association of the plaintiff's identity with the work and that the integrity of the work is protected coincidentally.

There is no definite precedent in United States law for protecting the rights to remain anonymous or pseudonymous by using the "public disclosure of private facts" prong of the Restatement's right of privacy despite similarity of concept,[32] although scholars

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26 RESTATEMENT (SECOND) OF TORTS § 560 (1977).

27 *Id.* § 652A (1977).

28 *See* Damich, *supra* note 15, at 54.

29 127 P.2d 577 (Cal. Dist. Ct. App. 1942).

30 148 U.S.P.Q. (BNA) 755 (1966).

31 409 F. Supp. 122 (S.D.N.Y. 1976) (pertaining to an action brought by record company against ex-Beatle, John Lennon, for allegedly wrongfully preventing company's distribution of music produced by Lennon). The opinion is unclear whether the action was for invasion of privacy in addition to misappropriation or whether the misappropriation was the invasion of privacy.

32 *Id.*

often cite *Ellis v. Hurst*[33] for support. In *Ellis*, the plaintiff/author sued to prevent the publisher, who had the right to publish his book under a pseudonym, from publishing his book using his real name. However, a careful examination of *Ellis* reveals that it came before the same court twice, and that the second time the court found *against* the plaintiff.[34]

In sum, the right of privacy cases deal only with the right of attribution, not the right of respect.[35] Within the right of attribution, there is strong precedent protecting the subright against false attribution, where the attribution is to a work that has been tampered with. Authority is weaker for the subrights of anonymity and pseudonymity. The right of privacy cannot, however, be used to protect the subright of proper attribution if there is no attribution or if the author's work is attributed to another. In such cases, the artist's privacy has not been invaded since his or her identity is not used[36].

The right of privacy supplements the falsehood-dependent tort of defamation. For example, associating an anonymous author's real name with his or her work is not to make a false statement, and thus cannot be defamation, but it is an invasion of privacy. Even when a species of falsehood is involved, as in the case of "false light," the privacy cause of action does not focus on injury to the reputation but rather on loss of self-esteem.

C. *Unfair Competition*

The product identification aspect of the law of unfair competition yields moral rights-like results because it corresponds to the right of attribution. As in the tort of defamation and the right of privacy, the right of attribution can also indirectly enforce the right of respect. In general, the product identification aspect of unfair competition attacks all forms of "passing off,"[37] whether the defendant uses the name of the plaintiff to identify the defendant's product or whether the defendant uses his or her own name to identify the plaintiff's product ("reverse passing off").

Thus, unfair competition law has been used effectively to pro-

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[33] 121 N.Y.S. 438 (N.Y. Sup. Ct. 1910) (granting temporary injunction to author to prevent publication under his real name of two stories which had previously been published under a pseudonym).

[34] 128 N.Y.S. 144 (N.Y. Sup. Ct. 1910), *aff'd*, 145 A.D. 918 (N.Y. 1911).

[35] However, the right of respect can be indirectly protected if the defendant insists on attributing to the author a modified or distorted version of his or her work.

[36] One could argue that authors of some works are easily identifiable and that there is implicit attribution as in the *Lennon* case.

[37] CHARLES R. MCMANIS, UNFAIR TRADE PRACTICES IN A NUTSHELL 200 (1993).

tect the subright against false attribution, when the author's name is used either in conjunction with a work he or she did not create or with one of the author's works that has been distorted. Moreover, unfair competition law can also be used to protect the subright of proper attribution when the author's work is attributed to someone else. In *Smith v. Montoro*,[38] the plaintiff recovered because his role in a film was attributed to someone else.[39] It is still unclear, however, whether unfair competition law protects an author when the work is not attributed at all.[40]

In *Gilliam v. ABC*,[41] a landmark case pointing out the weakness of the indirect protection of the right of respect that results from unfair competition law, the American Broadcasting Company ("ABC") televised truncated versions of "Monty Python" programs. When Monty Python sued for an injunction, the court stated that the plaintiffs had a cause of action grounded in the federal, statutory law of unfair competition based on Section 43(a) of the Lanham Act. Section 43(a) provided a cause of action for a "false description or representation . . . in connection with any goods or services."[42] But Judge Gurfein, in his concurrence, stated that with "an appropriate legend to indicate that the plaintiffs had not approved the editing of the ABC version . . . there is no conceivable violation of the Lanham Act."[43] Since unfair competition law, like

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[38] 648 F.2d 602 (9th Cir. 1981) (concerning an actor's complaint that film distributors removed his name from credits and advertisements and substituted a different name and thereby stated a valid claim under the Lanham Act).

[39] *Id.*

[40] For example, Professor Nimmer cites *Smith v. Montoro* for this proposition despite the fact that the supportive language in the case is dictum because the case involved attribution of the author's work to another, not no attribution at all. M. NIMMER, COPYRIGHT § 8.21[E] nn.59.3-60.1 and accompanying text (1985); *see also* Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 19 n.72 (1985).

[41] 538 F.2d 14 (2d Cir. 1976) (granting injunction to producers of television comedy programs to prevent broadcast of edited versions of their program).

[42] 15 U.S.C. § 1125(a)(1) (1988); This section provides:

> [a]ny person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
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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 or another person's goods, services, or commercial activities by another person, or
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> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
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> shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

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

[43] 538 F.2d at 27 (Gurfein, J., concurring).

defamation and the false light prong of the right of privacy, depends on deception, there is no cause of action if that deception is effectively removed. According to Judge Gurfein, a distorted version of Monty Python's programs could be attributed to Monty Python and broadcast, as long as there was a disclaimer. Under Judge Gurfein's reasoning, disclaimers can undermine the moral rights-like results of unfair competition law. Fortunately for the plaintiffs, the court held that under the circumstances, a disclaimer would not be effective.[44]

Another weakness of Section 43(a) of the Lanham Act is that the goods or services must be involved in interstate commerce.[45] If a work is purely local, however, the author can have recourse to state unfair competition law.

D. *Contract Interpretation*

On occasion, United States courts have construed contracts involving literary and artistic works to produce moral rights-like results. In *Clemens v. Press Publishing Co.*,[46] for example, Judge Seabury held in a concurring opinion that the plaintiff/author was entitled to attribution where the book publication contract was silent on the matter. The judge reasoned that the very nature of a publication contract of literary property implied that the work could not be published without attribution. He further explained that the publisher could not publish it in garbled form or attribute it to someone else.[47] Despite the logic behind this opinion, it was not followed by the court in *Vargas v. Esquire*.[48] The *Vargas* court flatly denied the right of attribution to an artist who sold the rights in his drawings and all the rights in his name. The court rejected

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[44] Judge Lumbard, writing the majority opinion, noted that such a disclaimer would not "erase the indelible impression that is made by a television broadcast" and that a disclaimer at the beginning of the broadcast "would go unnoticed by viewers who tuned into the broadcast a few minutes after it began." *Id.* at 25 n.13.

[45] *See supra* note 42.

[46] 122 N.Y.S. 206, 208 (N.Y. App. 1910) (Seabury, J., concurring).

[47] Judge Seabury wrote:

> Even the matter of fact attitude of the law does not require us to consider the sale of rights to a literary production in the same way that we would consider the sale of a barrel of pork. Contracts are to be so construed as to give effect to the intention of the parties. . . . The rights of the parties are to be determined primarily by the contract which they make, and the interpretation of the contract is for the court. If the intent of the parties was that the defendant should purchase the rights to literary property and publish it, the author is entitled, not only to be paid for his work, but to have it published in the manner in which he wrote it. The purchaser cannot garble it, or put it out under another name than the author's; nor can he omit altogether the name of the author, unless his contract with the latter permits him so to do.

Id. at 207-08.

[48] 164 F.2d 522 (7th Cir. 1947).

the artist's contention that although the contract gave *Esquire* magazine the right to use his name and drawings, it did not give *Esquire* the right to publish his drawings without attribution.

Where the contract contains an express requirement to attribute the work, courts have used this kind of term to protect the integrity of the work. In *Granz v. Harris*,[49] the plaintiff/author of a master recording of a jazz concert entered into a contract with the defendant to make and distribute records of the concert. The contract provided for attribution, but it was silent regarding editing. The defendant produced and sold records of music from the concert which it had made from plaintiff's masters, but, although they were properly attributed; the records contained substantial deletions of music. The court held that the sale of the abbreviated records was a breach of contract. It reasoned that since the contract required the defendant to attribute the work to the plaintiff, there was an implied contractual duty not to make "the required legend a false representation."[50]

Courts have also protected the integrity of works without explicitly linking integrity to attribution. In *Preminger v. Columbia Pictures*,[51] the court construed the assignment of television rights to the movie "Anatomy of a Murder" to prohibit cutting and commercial interruptions that would amount to mutilation. Even in cases where the contract explicitly gives the right to edit, courts have held that a cause of action might lie for mutilation.[52]

E. *Copyright Act of 1976*

Aside from VARA, there are no provisions of the Copyright Act that expressly protect the right of attribution. The visual artist, however, can achieve some recognition of the right of respect by employing the right to prepare derivative works.[53] A derivative work is defined by the Copyright Act as "a work based upon one or more preexisting works . . . consisting of editorial revisions, annotations, elaborations, or other modifications."[54] If the artist has not transferred all of his or her copyright rights, he or she can argue that a physical change to the original is the unauthorized exercise of the right to prepare derivative works. But it may be asserted that the right to prepare derivative works is only exercised when the

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49 198 F.2d 585 (2d Cir. 1952).
50 *Id.* at 588.
51 148 U.S.P.Q. (BNA) 398 (N.Y. Sup. Ct. 1966).
52 *See, e.g., Autry v. Republic Productions*, 213 F.2d 667 (9th Cir. 1954).
53 17 U.S.C. §§ 101, 106(2) (1982).
54 *Id.* § 101.

change manifests additional creativity. Thus, the mere slashing of a canvas with a knife would not qualify nor would the utter destruction of the original.

If the artist licensed someone to make copies of his or her work, the artist could argue that a poor-quality reproduction was also an unauthorized exercise of the right to prepare derivative works. Again, however, the defendant could argue that a bad copy does not amount to a derivative work due to lack of any additional creativity.

F. *Summary*

Because defamation, privacy, and unfair competition all depend on the association of the artist with the work, they primarily yield results that imitate aspects of the right of attribution. Therefore, the right of respect is protected only insofar as it is linked with attribution. Violating the subright of false attribution—attributing to the artist a work that either she did not create or one that has been tampered with—the artist can look to the tort of defamation, the right of privacy, and unfair competition law. For violation of the subrights of anonymity or pseudonymity in its positive aspect—the right to remain anonymous or pseudonymous—the right of privacy, despite weak precedent, is most apt for this function. Unfair competition law provides protection against the attribution of the artist's work to another, but neither the common-law causes of action nor the Lanham Act provides protection when the artist's work is not attributed to anyone. Furthermore, when applying the tort of defamation, the artist must have sustained injury to his or her reputation, and in employing the Lanham Act, the artist's work must be in interstate commerce, and his or her remedy may be limited to a disclaimer.

Contract interpretation has produced results that imitate the right of attribution *and* the right of respect. There is weak precedent that an agreement to publish implies an agreement to attribute unless the agreement provides otherwise. There is also precedent that agreements to broadcast films imply that they cannot be edited to the point of distortion unless the agreement provides otherwise. It appears, however, that a United States court would enforce a contract that by its terms gave a party unlimited editing power.

Prior to VARA, and aside from the state statutes, only contract interpretation and the Copyright Act's right to prepare derivative works seemed to provide protection of the right of respect independent of the right of attribution. Neither the common law

nor the Lanham Act provided a cause of action in cases where the perpetrator of the distortion removed the attribution. In addition, there is no clear precedent in these bodies of law for the aspect of the subright of proper attribution that allows the artist to require attribution. Even if there were such precedent, it seems anomalous to permit the artist to assert the subright of proper attribution so that his or her distorted painting is attributed to him or her in order to allow him or her to enforce the right of respect. Furthermore, even if the work were attributed, it is arguable that a disclaimer would remove the falsehood or deception which trigger most of these causes of action.

Although the coincidental causes of action do not provide comprehensive protection, they remain important features of the moral rights landscape. Insofar as they are not preempted, their application is not limited to particular kinds of works.

III. State Moral Rights Statutes

Due to the shortcomings of the common law, the Lanham Act, and the Copyright Act without VARA, some states enacted bona fide moral rights statutes. The eleven states with moral right statutes are: California, Connecticut, Louisiana, Maine, Massachusetts, Nevada, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island.[55] They can be divided into two groups: "California-type" statutes that provide rights more closely corresponding to article 6*bis* and "New York-type" statutes that condition the right of attribution on publication or public display and condition the right of respect on publication or public display and on attribution. Six states follow the New York pattern regarding the right of attribution, and six (sometimes different) states follow the New York pattern regarding the right of respect. There are only three states that are "California-type": California itself, Connecticut and Massachusetts. Thus, the linkage between falsehood and deception and moral rights that we saw in most of the common-law causes of action and the Lanham Act persisted in most of the state statutes. Moreover, five of the states that clearly have New York-type statutes also require some showing of prejudice to reputation for violations of the right of respect. The "California-type" statutes, by contrast, do not require prejudice to reputation; indeed, they go beyond article 6*bis* by not even requiring prejudice to honor.

None of the states protect all of the literary and artistic works that are contemplated by article 2 of the Berne Convention. In

55 *See supra* note 4 and accompanying text.

general, they protect only works of visual or graphic art. Half of the states give moral rights protection only to works "of recognized quality" and only Massachusetts arguably protects motion pictures.

A. *Right of Attribution*

All of the states provide a right of attribution, but six state statutes apply the right only where there is some kind of public display or publication. The "California-type" statutes do not qualify the right of attribution in this way. For these states, the right of attribution includes the right "to claim authorship," and all but one also provide the right to disclaim authorship.[56] The right "to claim authorship" corresponds to the right to require proper attribution where the work is unattributed or where the artist's work is attributed to someone else. The right to disclaim authorship, however, provides the author with the right to—for example—affix a notice near an altered painting that he or she is not responsible for the change. Some statutes, however, define the right to disclaim to include the right to *prevent* attribution as well, thus providing the subright against false attribution. None of the state statutes explicitly provide the subright of anonymity, although it may be argued that this is implicit in the right to prevent attribution and the right to claim authorship. Only Massachusetts and New Mexico explicitly provide for pseudonymity, but, again, this right may be implicit in the right to prevent attribution and the right to claim authorship. Except for the publication/public display requirements of most of the states, the right of attribution provided by the state statutes includes most of the subrights of article 6*bis*.

B. *Right of Respect*

Virtually all the states couch the right of respect in terms of "alteration," "defacement," "mutilation," and "modification." Five states[57] are careful to add the modifier, "physical." Thus, all the states recognize the "subright against modification." Four states[58] also explicitly provide for a right against destruction, a right that is not explicitly provided for in article 6*bis*. Six states[59] seem to provide for the subright against unfaithful reproduction, but none of

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[56] Only Connecticut does not provide the right to disclaim authorship. *See supra* note 4.

[57] These states are California, Connecticut, Massachusetts, New Mexico, and Pennsylvania. *See supra* note 4.

[58] These states are California, Massachusetts, New Mexico, and Pennsylvania. *See supra* note 4.

[59] These states are Louisiana, Maine, Nevada, New Jersey, New York, and Rhode Island. *See supra* note 4.

them go so far as the subright of distortion, that is, the right to object to derogatory action that does not physically affect the original or involve reproduction.

In sum, protection of the physical integrity of works of visual art is widespread among the moral rights states, protection of the quality of reproductions is fairly well represented, and some of the states provide a right against destruction. However, the publication/public display requirement, the attribution requirement, and the requirement of prejudice to reputation in most of the state statutes severely tarnishes the lustre of the right of respect.

C. *Duration and Waivability*

Five states[60] explicitly provide for a moral rights term of life plus fifty years, which corresponds to the economic rights in the Copyright Act and to article 6*bis*. Other states are silent, which implies either that they last in perpetuity or, because they are personal rights, they expire at death.

Six states[61] provide that moral rights are waivable in writing; five[62] have no waiver provision. Applying the presumption of alienability, moral rights in these states would be alienable and waivable, unless they were considered personal. If article 6*bis* is construed to forbid alienability and waivers, none of the states meet this standard.

D. *Summary*

The eleven state moral rights statutes were an advance over the coincidental causes of action at least for those artists connected with these states. First, the mere codification of moral rights would render them more certain than vague common-law causes of action for which, in an individual state, there might not be precedent. Second, the right of attribution in the state statutes is more comprehensive. In addition to the subright against false attribution, the state statutes recognize the subright of proper attribution and probably the subright of anonymity and pseudonymity. Third, five states[63] do not condition the exercise of the right of respect on attribution, although two[64] of these retain a requirement of publication or public display. However, prejudice to reputation and the

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60 *See supra* note 57.

61 These states are California, Connecticut, Massachusetts, Nevada, New Mexico, and Pennsylvania. *See supra* note 4.

62 These states are Louisiana, Maine, New Jersey, New York, and Rhode Island. *See supra* note 4.

63 *See supra* note 57.

64 These states are New Mexico and Pennsylvania. *See supra* note 4.

availability of a disclaimer are also issues in the state statutes. The greatest drawback of the state statutes is the narrow subject matter that they protect—visual art (and in some states, "of recognized quality")—in contrast to the common-law causes of action, the Lanham Act, and the Copyright Act before VARA.

IV. Visual Artists Rights Act

The most obvious advantage of VARA over the state statutes is its national applicability. In addition, the right of respect is not linked to attribution, let alone to publication or public display. The subject matter of VARA is more limited than the state statutes, but it does not contain a quality test except for the subright against destruction. Perhaps its biggest drawback is that VARA does not provide for the subright against unfaithful reproduction.

A. *Right of Attribution*

VARA divides the right of attribution into three subrights: (1) the right to claim authorship; (2) the right to prevent the use of the author's name as author of a work that he or she did not create; and (3) the right to prevent the use of the author's name as author of a work "in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation . . . ."[65] The right to claim authorship corresponds to what I have called the subright of proper attribution.[66] The second and third rights correspond to the subright against false attribution. Although not explicitly mentioned, the legislative history states that the subrights of anonymity and pseudonymity are included.[67]

B. *Right of Respect*

The right of respect in VARA applies to any "intentional distortion, mutilation, or other modification" of the work which would be prejudicial to the author's honor or reputation.[68] This corresponds to my subright against modification. VARA also provides for the subright against destruction, but this subright applies only to works "of recognized stature," and it does not require preju-

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65 17 U.S.C. § 106A(a).

66 For a discussion of the right of attribution, see *supra* note 12.

67 "Proposed Section 106A(a)(1) creates a right of attribution that extends not only to the right to be identified as the author of a work, or to prevent use of the author's name when he or she is improperly identified as the author of a work of visual art, but also to the right to publish anonymously or under a pseudonym." H.R. Rep. No. 514, 101st Cong., 2d. Sess. 14 (1990).

68 17 U.S.C. § 106A(a)(3)(A).

dice to honor or reputation.[69]

VARA does not recognize a subright against unfaithful reproduction, but it is arguable that it recognizes a subright against distortion, that is, a right to object to any derogatory action that does not physically affect the original or involve reproduction. This argument is based on the fact that the right of respect mentions "distortion," and there is an exception to the right of respect regarding "lighting and placement" of the work.[70] Neither lighting nor placement is a physical act done to the work itself; therefore it seems that there is a subright against distortion. Since reproductions, however, are not covered by VARA, and lighting and placement are excepted, the scope of protection is very narrow.

C. *Duration and Waiver*

Although in United States law the economic rights last for the life of the author plus fifty years,[71] the moral rights last only during the lifetime of the author.[72] This does not comply with the language of article 6*bis*. Under the provisions of VARA, artists may waive their moral rights in a signed writing that specifically identifies the works and uses, but moral rights may not be transferred.[73]

V. Comparison of VARA and State Moral Rights Statutes

The state statutes extend moral rights protection to more kinds of works than VARA. For example, although Massachusetts[74] limits protection to works "of recognized quality," it protects motion pictures, a category of works specifically excluded from VARA. Furthermore, despite the requirements of public divulgation and damage to reputation, several states protect reproductions.[75]

On balance, the scope of moral rights protection is broadened in state statutes, taken as a whole. For example, in almost all of the states the artist may disclaim authorship as long as she has a "just and valid reason,"[76] while under VARA the subright to prevent attribution may be exercised only if the work is not that of the artist or if the artist's right of respect has been violated.[77] More signifi-

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69 *Id.* § 106A(a)(3)(B).
70 *Id.* § 106A(c)(2).
71 *Id.* § 302(a).
72 *Id.* § 106A(d).
73 *Id.* § 106A(e).
74 *See supra* note 4.
75 *See supra* note 57.
76 California, Louisiana, Maine, Massachusetts, New Jersey, New Mexico, New York, and Rhode Island provide that an author may disclaim for "just and valid reason(s)." *See supra* note 4.
77 *See* 17 U.S.C. § 106A.

cantly, several states recognize the subright against unfaithful reproduction.[78]

Clearly, the artist is better off with VARA if he or she lives in a state without a moral rights statute. However, depending on the work and the right asserted, the artist may be better off in one of the eleven states with moral rights statutes. But, will the artist be able to use the state moral rights statute or will he or she be precluded by the doctrine of preemption?

One of the prior versions of VARA stated that the state moral rights statutes would not be preempted "except to the extent that such . . . statutes would diminish or prevent"[79] the exercise of the federal moral rights. Instead, VARA contains a provision that closely tracks the preemption provision for the Copyright Act's Section 106 rights. There are, however, at least three arguments for an approach to preemption of moral rights that is more narrow than that for the Section 106 rights. First, the language of the VARA preemption provision is not as broad as the preemption provision for the section 106 rights.[80] Second, the VARA preemption provision provides a specific exception for rights "which extend beyond the life of the author."[81] Third, since Congress relied on the state statutes to demonstrate United States compliance with the moral rights provisions of the Berne Convention, it would be absurd for Congress to pass a federal moral rights statute that had the effect of weakening the moral rights protection available in the United States.

VARA and the state statutes combined do not produce the kind of moral rights protection envisioned by article 6*bis* of the Berne Convention. Hopefully, courts will not lessen the sum-total of moral rights protection in the United States by a draconian preemption analysis.

VI. United States Moral Rights Protection and Article 6bis

For the following reasons, United States law has a long way to go to comply with the language of article 6*bis*. First, article 6*bis* applies to all literary and artistic works. VARA applies only to a very narrow definition of visual art. The state statutes apply generally to works of visual and graphic art, but a little less than half require the work to be "of recognized quality." Only the common-

78 *See supra* note 57.

79 Transcript available from author.

80 For example, the VARA provision does not contain the phrase, "within the general scope of copyright." 17 U.S.C. § 301(a).

81 *Id.* § 301(f)(2)(C).

law causes of action and non-VARA provisions of the Copyright Act are not limited by kind of work. The common-law causes of action and the non-VARA provisions of the Copyright Act, however, do not provide the comprehensive protection of article 6*bis*, and the common-law causes of action depend on their acceptance in a particular jurisdiction.

Second, United States law, in general, does not provide the comprehensive protection of moral rights envisioned by article 6*bis*. Although VARA provides the same scope of protection of the right of attribution for visual art as article 6*bis* does, it falls short in the right of respect by not providing for the right against unfaithful reproduction. Only five states[82] recognize this right. It appears possible to achieve this kind of protection in the common law, however, through contract interpretation, as long as there is attribution.[83] The specific recognition of a right against destruction in VARA renders this right more secure in the United States than under article 6*bis*, which only arguably includes this right by implication as a "derogatory action."[84] Although the right against destruction applies only to works "of recognized stature,"[85] there is no need for a showing of prejudice to honor or reputation.

Third, the moral rights in VARA last only for the author's life.[86] As legislation passed *after* United States adherence, this does not conform to article 6*bis*, paragraph two.[87] Five states[88] comply better than VARA because their moral rights term equals the copyright term for economic rights. The remaining states that are silent and the common-law causes of action are susceptible to the argument that if these rights are purely personal, then they end with the artist's death.

Fourth, VARA's waiver provision goes beyond article 6*bis*, the official comments of which contemplate a much narrower scope for this practice.[89] Either explicitly or by presumption, all state statutes permit waiver. In general, common-law causes of action and the Lanham Act should be presumed waivable, although it may be argued that to waive defamation or false light is "anti-personal" and therefore unenforceable. The non-VARA provisions of the Copyright Act, of course, can be alienated.

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82 *See supra* note 57.
83 Granz v. Harris, 198 F.2d 585 (2d Cir. 1952).
84 *See Guide, supra* note 8.
85 17 U.S.C. § 106A(a)(3)(B).
86 *Id.* § 106A(d).
87 *See Guide, supra* note 8.
88 *See supra* note 57.
89 *See Guide, supra* note 8, at 42.

The major failing of United States law *vis-a-vis* the language of article 6*bis* is its narrow subject matter coverage and its failure to provide clear causes of action for poor quality reproductions, as well as for perverse derivative works and adaptations.

VII. Resale Royalties

Article 14*ter* of the Berne Convention provides:

> (1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.[90]

The theory behind resale royalties is that the author should share in the increase in value of his or her work. Although thirty-six countries recognize resale royalties, roughly half lack implementing legislation.[91] Aside from theory, resale royalties present problems in administration, such as determining the increase in value and collecting the royalty. Resale royalties have been successfully implemented in France, Germany, and Belgium; yet, in all three countries the resale royalty is levied on the total resale price rather than on the increase in value.[92] In Belgium and France, the royalty is levied effectively only on auction sales.[93] In Germany, resale royalties apply to auction sales and dealer sales, but on dealer sales the collecting society collects a flat percentage of gallery revenue paid partly to the qualifying artists and partly to an artists' social security fund.[94] Collecting societies appear to be essential to the smooth functioning of resale royalties, since only in those countries with efficient national authors' societies have resale royalties been successfully implemented.[95]

In the United States there is no federal resale royalties law, and only one state, California, has enacted resale royalties legislation. The California statute, passed in 1976, provides for a 5 percent royalty on the *total* resale price, if the resale price exceeds $1,000, *and* it equals or exceeds the prior purchase price paid by the seller.[96] Resale royalties are levied on resales of "fine art,"[97]

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90 *Id.* at 90.
91 *See Resale Royalty Report, supra* note 14, at ii-iii.
92 *Id.*
93 French galleries, however, do make payments to an artist's social security. *See id.* at 125.
94 *See id.* at iv.
95 *Id.*
96 Cal. Civil Code § 986(a) (West Supp. 1992).
97 *Id.* at 68.

and they are payable to the artist or assignee, during the artist's lifetime or until twenty years after his or her death.

In a recently completed study of resale royalties pursuant to a provision of VARA[98], the Copyright Office concluded that it was "not persuaded that there are legitimate economic interests of visual artists that would be helped by a resale royalty."[99] The study notes that the market for contemporary art may well suffer, because the marginal initial purchaser will refrain from purchases due to an increased risk of loss from a smaller resale profit.[100] Most art depreciates in value. Successful artists share in the increased value of their works by commanding higher prices for new works. The study points out, however, that as with the Berne Convention, if the European Community includes resale royalties in its law harmonization process, the United States might very well feel obliged to follow suit.[101]

In anticipation, the Copyright Office study sets out a model resale royalties system for visual art in the United States.[102] The rate would be between three and five percent on the total gross sales price, and the royalty would be levied only on auction sales. There would be a presumption that the work has increased in value, but the reseller/purchaser would be able to rebut this presumption. The royalty would apply to visual art as defined in VARA and would last for the copyright term—the life of the author plus fifty years. The resale royalty would be inalienable, but the artist could assign his or her rights to a collecting society.

The United States has not taken the lead in the case of resale royalties in much the same way it lagged in adopting moral rights. Nevertheless, it will probably acquiesce in resale royalties in order to remain in step with the other developed countries

VIII. Conclusion

In order to bring United States law into real compliance with article 6*bis*, Congress must at least: (1) extend moral rights protection to all literary and artistic works, (2) recognize the right against unfaithful reproduction, (3) change the term of moral rights protection to the life of the author plus fifty years, and (4) eliminate the vestiges of formalities required for the exercise of the rights of

98 *See Resale Royalty Report, supra* note 14.
99 *Id.* at 143.
100 *Id.* at 72-73.
101 *Id.* at 148.
102 *Id.* at 151-55.

copyright. A bill called the Copyright Reform Act of 1993[103] is currently pending before Congress to accomplish (4) by repealing Sections 411 and 412 of the Copyright Act, but there is neither movement nor widespread sentiment in favor of (1)-(3).

Ironically, United States adherence to the Berne Convention and the passage of VARA may have made real compliance with article 6*bis* more difficult. Wasn't the United States permitted to join the Berne Union without *any* federal moral rights legislation? Didn't Dr. Arpad Bogsch, the General Director of WIPO, state that the United States was in substantial compliance with article 6*bis*? Hasn't the United States demonstrated its good faith by going beyond Dr. Bogsch by enacting VARA? Yet, as this article clearly demonstrates, literary and artistic work does not enjoy in the United States the protection envisioned by article 6*bis*.

Full compliance will depend on advocacy by author and authors' rights organizations, by academics and by principled legislators and government officials. After all, this coalition was able to pass VARA even after the incentive to join Berne had been removed. Full compliance may also be hastened by pressure from other countries. The United States rightly insists that Berne Union members fulfill their obligations regarding economic rights; other Berne Union countries should insist that the United States fulfill its obligations under article 6*bis*.

Passage of more comprehensive moral rights legislation can also be enhanced by meeting the objections of copyright users. Some foreign countries have been content with enacting very general moral rights statements, but there is no reason why United States legislation cannot be tailored to allay the fears of the publishing, movie, recording, and computer industries that implementing moral rights would be prohibitively expensive. Indeed, even countries with broad moral rights statements in their laws often qualify moral rights protection in practice.

Moral rights advocacy should not stop, but it should be tempered with pragmatism. Moral rights stonewalling should stop and be replaced by good faith negotiation.

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[103] S. 373/H.R. REP. NO. 897, 103d Cong., 1st Sess. (1993). The identical bills sought to amend title 17 of the United States Code and were introduced on February 16, 1993.