

“No One Expects the Spanish Inquisition”— Twice: Subduing the Moral Rights Monster*

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I. INTRODUCTION

What do you get when you cross “The Holy Grail,”¹ a Betamax, and a bar full of abstaining Mormons? The French! Confused? Any reader would be, but this Comment should clear up any accidental surrealism. The Constitution confers to Congress the 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.”² An important, yet often-overlooked, aspect of this power is its permissive, and not absolute, nature.³ However, Congress exercised this power and created a decidedly Anglo-American framework

* The author took this quotation from his favorite Monty Python skit skewering the Church and the Spanish Inquisition.

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1. The author contends this is arguably the best movie ever created by Monty Python.
2. U.S. CONST. art. I, § 8, cl. 8.
3. See *id.* art. I, § 8, cl. 1 (noting that the phrase “shall have Power” does not impose a duty upon Congress to create an exclusive right for authors and inventors for their respective works).

of protection for these creators and their works.⁴ Based upon England's Statute of Anne, U.S. copyright laws focused on protecting the author's economic interests in his work, and not specifically upon protection of the author himself.⁵ This focus on economics evolved contrary to continental Europe's primarily civil law, granting protections for the authors personally.⁶ Sometimes referred to as *droit moral* (moral rights),⁷ these personal rights and their respective protections serve to safeguard the artist's "right of *personality* enshrining the act of individual creative expression."⁸ Indeed, one French proponent argues that these rights are the key to maintaining a culture's vitality.⁹

Under *droit moral*,¹⁰ an author has certain rights embedded in his works regardless of copyright ownership or physical transfer of the protected work.¹¹ "The rights spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist's personality, as well as the integrity of the work, should therefore be protected and preserved."¹² Under the auspices of *droit moral* lie the rights of disclosure, paternity (attribution), integrity, withdrawal, and the right to prevent excessive criticism or assault upon one's personality.¹³ This Comment intends to define those rights and to highlight the fundamental impasses the rights face in U.S. copyright law, a contractually oriented market, and, ultimately, the Constitution. Accordingly, it will conclude that the public interest lies not in the adoption of *droit moral's* precepts, but in more limited rights of

4. See Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79, 86 n.34 (1996).

5. See *id.* The Statute of Anne, 8 Ann., c. 19 (1709) (Eng.), was passed by Parliament in order to break the monopolistic grip licensed publishers and printers had over the dissemination of written works. The perception was that through licensing, the government had means to censor speech. See Roberta Rosenthal Kwall, *Author-Stories: Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 17 n.63 (2001).

6. See Yonover, *supra* note 4, at 86-87.

7. France delineates its protections for authors according to their economic rights (*droit patrimonial*) or their personal rights (*droit moral*). See Edward J. Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733, 1734 (1984).

8. William Cornish, *The Author as Risk-Sharer*, 26 COLUM. J. L. & ARTS 1, 6-7 (2002) (emphasis added) (citing M. le professeur Henri Desbois).

9. See *id.* at 8 (citing the stance of Mme. Vessilier-Ressi).

10. "Droit moral" is often interchanged for "moral rights" in the United States, and any substitution is intended to stay within the context described. See *generally* Yonover, *supra* note 4; Kwall, *supra* note 5 (noting the use of "moral rights" within the articles' titles and within the texts themselves).

11. See Damich, *supra* note 7, at 1734.

12. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (citing RALPH E. LERNER & JUDITH BRESLER, ART LAW 417 (1989)).

13. See Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 5 (1985).

attribution and integrity that assure a greater bargaining position for authors and increased public access to the expression of ideas.

II. GERMINATION OF DISCORD

In 1949, Twentieth Century Fox produced a movie using music composed by “several prominent Russian composers.”¹⁴ Citing alleged anti-Soviet themes presented in the movie, these composers brought suit in both American and French courts, seeking to enjoin the use of their music within the film.¹⁵ However, the claims asserted in each court were decidedly different in character.¹⁶ In France, the composers merely asserted, and the court upheld, an injury to their moral rights.¹⁷ But in America, the legal landscape forced the composers to argue primarily on the grounds of privacy, defamation, and intentional infliction of an injury without just cause.¹⁸ A moral rights claim was also asserted, but the court reviewed it in conjunction with the intentional infliction of an unwarranted injury.¹⁹ Having declared the composers’ work within the public domain, the American court quickly discarded both the privacy and defamation claims.²⁰ As to the intentional infliction of an injury and the alleged moral rights violations, the court opined that relief in the form of moral rights protection may be allowed in certain circumstances, but that the composers failed to allege “distortion” of their work that caused a willful injury to be inflicted upon them.²¹ Thus, the divergent ideologies in author protection were exposed. In France, the court enjoined the release of Twentieth Century Fox’s movie while the composers’ music served as the soundtrack, but in America, the composers received no such injunctive relief.²² The chasm dividing the rulings remained for over twenty years until a group of comedic auteurs, again from across the Atlantic, chose to reassert, in an American court, an author’s dominion over his work.²³

14. *Id.* at 26 (citing *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948)).

15. *See id.*

16. *See id.*

17. *See id.* at 28 (citing *Société Le Chant du Monde v. Société Fox Europe*, Jan. 13, 1953, Cours d’appel, Paris, D. Jur. 16, 80).

18. *See id.* at 27.

19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.* at 28.

23. *See Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 15 (2d Cir. 1976).

III. "THE SPANISH INQUISITION"—PART I

In 1975, the American Broadcasting Company (ABC) acquired the broadcasting rights to a series of comedic sketches created by the British comedy troupe, Monty Python.²⁴ Prior negotiations with the troupe served as notice to ABC of the troupe's unease in granting excessive editing rights to outside parties.²⁵ In fact, Monty Python's contract with the British Broadcasting Company (BBC) expressly called for the troupe's participation in any editing outside that necessary for obscenity restrictions or advertising time.²⁶ More importantly, they "retain[ed] all rights to the scripts."²⁷ Contrary to such notice, however, ABC broadcasted the first of three edited Monty Python specials.²⁸ The network had edited twenty-four minutes out of the original ninety, but claimed that commercial time and the offensiveness of some of the material required the expansive cuts.²⁹ Having reached a negotiating impasse with ABC over what they perceived as the broadcasted version's discontinuity, Monty Python sued to enjoin the network's further broadcasting of their material.³⁰ The judge ruled against the troupe, citing questions of actual copyright ownership.³¹

On appeal, the United States Court of Appeals for the Second Circuit granted Monty Python's injunctive request based upon "an injury to professional reputation [that] cannot be measured in monetary terms or recompensed by other relief."³² The court specifically found that ABC's editing was substantially more than is reasonably allowed to the licensees and "constituted an actionable mutilation of Monty Python's work."³³ Noting, however, that the wellspring of this cause of action lay in *droit moral*, which Congress had, as yet, not incorporated into U.S. copyright laws, the court successfully folded the mutilation issue into the scope of another intellectual property regime: the Lanham Act.³⁴ Under the court's interpretation, 15 U.S.C. § 1125(a) offered protection against misrepresentations that could injure a person's business or personal

24. *See id.* at 18.

25. *See id.*

26. *See id.* at 17-18.

27. *Id.*

28. *See id.* at 18.

29. *See id.*

30. *See id.*

31. *See id.* Monty Python sued under the name of one of its main writers, Terry Gilliam. *See id.* at 17.

32. *Id.* at 19.

33. *Id.* at 23-24.

34. *See id.* at 24.

reputation.³⁵ ABC's broadcast of the truncated Monty Python skits was a mutilation of that work and opened the troupe to public criticism for work not entirely their own.³⁶ By awarding an injunction to Monty Python, the court seemed to validate both copyright concerns and moral rights under the guise of trademark law, a path of indirect jurisprudence concurring Judge Gurfein took with exception.³⁷

Gilliam v. American Broadcasting Cos., despite Judge Gurfein's reservations, represented a high-water mark for moral rights advocates. Starting with Professor John Henry Merryman's *Hastings Law Journal* article, "The Refrigerator of Bernard Buffet," and extending to such luminaries as Professors Jane Ginsburg, Roberta Rosenthal Kwall, and Edward Damich, the moral rights movement seemed to be gaining the momentum necessary for widespread acceptance.³⁸ Indeed, California and New York legislated certain moral rights provisions to protect both authors and their works within the respective states.³⁹ This momentum, however, slowed at the federal level. In 1988, the United States formally endorsed the Berne Convention for the Protection of Literary and Artistic Works.⁴⁰ Notwithstanding this endorsement, the government refused to accept as binding article 6 bis of the Berne Convention, which guarantees authors the moral rights of integrity and attribution.⁴¹ Instead, the government asserted that the panoply of state and federal claims (much like those asserted in *Gilliam*) were sufficient to uphold the spirit of the article.⁴² Once again, moral rights were thwarted at the federal level.

IV. FEDERAL IMPLEMENTATIONS

Two years later, the federal armor began to crack. Although not a total conversion to the European model, the Visual Artists Rights Act of 1990 (VARA) merged limited rights of attribution and integrity into the

35. *See id.* (citing 15 U.S.C. § 1125 (1975)).

36. *See id.* at 24-25 (stating the basic claim and applying the facts *sub judice*).

37. *See generally id.* at 26-27 (reiterating that the Copyright Act did not provide for moral rights and that the Lanham Act is no substitute in dealing "with artistic integrity").

38. *See generally* John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976); Damich, *supra* note 7; Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9 (2001); Kwall, *supra* note 13.

39. *See* CAL. CIV. CODE ANN. §§ 987-989 (Deering's Supp. 2003); N.Y. ARTS & CULTURAL AFFAIRS LAWS §§ 11.01, 14.03 (McKinney Supp. 2003).

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

41. *See* Ginsburg, *supra* note 38, at 10 (citing H.R. REP. NO. 100-609, 100th Cong., 2d Sess., at 37-39 (1988)).

42. *See id.*

1976 Copyright Act.⁴³ However, these rights had been nearly impossible to legislate due the ongoing opposition Congress was experiencing as a result of its refusal to accept article 6 bis of the Berne Convention.⁴⁴ Movie studios, publishers, and media outlets took advantage of congressional unease regarding the Berne Convention to oppose VARA on the grounds of increased production costs or other certain disastrous consequences.⁴⁵ These opposition efforts resulted in a watered-down extension of attribution and integrity rights to visual artists only.⁴⁶ Additionally, VARA's protections extend solely to "works of visual art," which include "a painting, drawing, print, or sculpture, existing in a single copy [or] in a limited edition of two hundred copies or fewer that are signed and consecutively numbered by the author."⁴⁷ Glaringly outside of VARA's scope are motion pictures, audiovisual works, books, newspapers, and other scholastic or news-oriented media.⁴⁸

V. "THE SPANISH INQUISITION"—PART 2

Where Congress could not reign in the major entertainment and news outlets, however, time and technology have. In Colorado and Utah, editing companies have been deleting or editing "offensive" material in popular movies and reselling the "bowdlerized" content to conservative and religious families and groups.⁴⁹ These companies use varying editing techniques that implicate many areas of copyright law.⁵⁰ For example, a company named Clean Flicks purchases a regular retail DVD, makes a master editing copy, and digitally removes any offensive material.⁵¹ The edited copy is then resold or rented at a premium above the retail price.⁵² Clean Flicks makes only one copy per master DVD purchased; thus, they contend they do not violate copyright laws.⁵³ Another company, ClearPlay, avoids physical copyright infringement altogether. ClearPlay produces DVD software that tells the DVD player when to skip over a

43. 17 U.S.C. § 106A (2000).

44. *See generally* H.R. REP. NO. 514, 101st Cong., 2d Sess., at 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6917 (noting a less than enthusiastic endorsement of the Berne Convention due to article 6bis).

45. *See* Kwall, *supra* note 5, at 28-29.

46. *See id.* at 28.

47. 17 U.S.C. §§ 101, 106A(a) (2000).

48. *See id.*

49. *See* Drew Clark, *Bowdlerizing for Columbine: Why American Directors Have No Moral Rights to Their Movies*, at <http://slate.msn.com/id/2077192/> (Jan. 20, 2003).

50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.*

retail DVD's offensive scenes.⁵⁴ Thus, ClearPlay neither purchases, copies, nor resells edited material; it merely accommodates a user's desire to avoid offensive material on an otherwise regularly purchased DVD.⁵⁵

Hollywood did not seem to mind these small interlopers until one editing representative, Trilogy Studios, asked several high-profile directors to review and support its new editing process.⁵⁶ Their reaction was "swift and immediate."⁵⁷ The Directors Guild of America sought an injunction against the companies in order to stop distribution of the edited movies or any software that essentially accomplished the same edited result.⁵⁸ However, the directors did not own the copyrights; the studios did.⁵⁹ Therefore, the lack of any standing under copyright law forced the directors to assert the *Gilliam-Lanham* Act misrepresentation claim, as a pretense, to protect their moral rights.⁶⁰ Seemingly, the movie studios foresaw the case's direction and placed their hefty copyright ownership status firmly behind the directors.⁶¹ Having weathered a prior moral rights rift with its directors concerning colorization of black and white films, the studios were intent on keeping moral rights on the backburner, as well as preserving a future market for themselves in edited film content.⁶² The question now lies with a federal circuit court on whether to address the directors' claims of moral rights or to forego such adjudication in favor of more readily applied copyright laws.

VI. THE PUBLIC INTERESTS

The Supreme Court has emphatically stated the purpose of the Copyright Act:

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

54. *See id.*

55. *See id.*

56. Trilogy Studios uses software comparable to Clear Play with one major exception: instead of skipping offensive scenes, Trilogy digitally adds content to mask any offensive material, thus avoiding the skipping process. *Id.*

57. *Id.*

58. *See id.* The suit coincided with the national retailer Albertson's decision to provide for rental the edited versions of certain movies. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.*

access to the products of their genius. . . . The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the *public* from the labor of authors.⁶³

From such words one can infer basic copyright tenets forgotten by those advocating moral rights. The foremost tenet is that copyright law is primarily for the *public* interest, not the author's.⁶⁴ That "monopoly privileges . . . are neither unlimited nor primarily designed to provide a special private benefit" implies that Congress is not in the business of maximizing an author's and copyright owner's value in his work.⁶⁵ "The copyright law . . . makes reward to the owner a secondary consideration."⁶⁶ The reward is merely an inducement to create for the consuming public;⁶⁷ thus, as many moral rights activists lament, the 1976 Copyright Act is not the ultimate vehicle whence to attach moral rights.⁶⁸

A. *Whose Balance Is This Anyway?*

Justice Stevens's majority opinion in *Sony Corp. of America v. Universal City Studios* contains dicta that perpetuates conflicting views on the proper balancing of rights under the Copyright Act. As noted above, the Supreme Court in *United States v. Paramount Pictures* placed the public interest as the primary import of copyright, while relegating the author's rewards in such as secondary.⁶⁹ This was later reiterated in *Sony*. However, Justice Stevens also invoked a necessary congressional balancing between the creator's rights of control and exploitation of his work against the public's "interest in the free flow of ideas, information, and commerce."⁷⁰ This forces an interpretation of the Intellectual Property Clause,⁷¹ a permissive constitutional grant of power,⁷² that

63. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (emphasis added) (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)).

64. *Contra* Kwall, *supra* note 13, at 2 ("[T]he primary objective of our copyright law is to ensure the copyright owner's receipt of all financial rewards to which he is entitled, under the 1976 Act."); Yonover, *supra* note 4, at 86 ("Until the enactment of VARA, the focus of the 1976 Copyright Act was on protecting the pecuniary rights of copyright owners." (footnotes omitted)).

65. *Sony Corp.*, 464 U.S. at 429.

66. *Id.* (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948)).

67. *See id.*

68. *See generally* Ginsburg, *supra* note 38, at 11, 13 (noting deficiencies in VARA and the Digital Millennium Copyright Act that would hinder full implementation of attribution and integrity rights); Damich, *supra* note 7, at 1737-39 (outlining copyright preemption problems faced by states' moral rights legislation); Yonover, *supra* note 4, at 122 (noting fair use doctrine would necessarily trump many assertions of attribution and integrity rights).

69. *See Sony Corp.*, 464 U.S. at 429.

70. *Id.*

71. *See* U.S. CONST. art. I, § 8, cl. 8.

72. *See id.* art. I, § 8, cl. 1.

makes the goal (the promotion of science and the useful arts for the public benefit) as important as the means (exclusive rights to authors and inventors in their works) by which it is achieved. Suggestively, if this goal were being fulfilled prior to enactment of the copyright laws, Congress was under no obligation to secure those exclusive rights for authors or inventors. Indeed, Congress had no obligation whatsoever “[t]o promote . . . the useful Arts.”⁷³ To equate the means, which invariably could come in many forms and under no legislative rubric, to the one legislatively agreed-upon goal seems disingenuous at best.

Not only does the prescribed congressional balancing test elevate the secondary importance of an author’s reward to the level of the public interest, it also creates a new class of constitutionally protected people: authors and inventors.⁷⁴ The Constitution is replete with public interest articles, clauses, and amendments,⁷⁵ but is nearly devoid of the same, protecting certain classes of people.⁷⁶ It strains credibility to posit that authors and inventors suffered the cruel fates shared by African-Americans and women that served as the impetuses for the constitutional protections garnered by these classes.⁷⁷ Additionally, Article 1, Section 8 of the Constitution, a section filled with public interest clauses, is an unlikely location for a protective codicil guarding the interests of a numerically challenged and nonpolarized group such as authors and inventors.⁷⁸

73. *Id.* art. I, § 8, cl. 8.

74. Because the Intellectual Property Clause is a permissive grant of power, the Copyright Act is a necessary conduit to achieve this theory. However, the combination of the Act’s emphasis on a copyright owner’s exclusive rights to his work and the Act’s initial grant of copyright ownership to the author allows us to bridge the statutory gap into constitutional grounds. *See id.* (preserving exclusive rights for limited times for authors and inventors); 17 U.S.C. §§ 106, 201 (2000) (expressing exclusive rights in copyright and initial ownership in such rights).

75. *See* U.S. CONST. art. I, § 8, cl. 5 (coining of money); art. I, § 8, cl. 12 (raising and supporting armies); art. III, § 1 (establishing the Judiciary); amend. VIII (prohibiting excessive fines and cruel and unusual punishment).

76. *But cf. id.* amend. XIII-XV (abolishing slavery, extending citizenship to naturalized persons born in the United States, and extending voting rights to U.S. citizens of all races), amend. XIX (women’s suffrage), amend. XXVI (voting rights to all citizens eighteen years or older).

77. It is also important to remember that these two classes, as well as the eighteen-year-olds who garnered the right to vote within the context of the draft and the Vietnam War, were all afforded protection by constitutional amendments instituted decades after the Framers had drafted the Intellectual Property Clause.

78. *See generally* U.S. CONST. art. I, § 8, cl. 1 (the power to lay and collect taxes); art. I, § 8, cl. 3 (regulating international and interstate commerce); art. I, § 8, cl. 7 (establishing post offices); art. I, § 8, cl. 13 (providing for a Navy).

B. *It Is the Public's Balance*

The more consistent interpretation of the Intellectual Property Clause as it applies to Justice Stevens's balancing test places the public's interests on both sides of the fulcrum, with the resulting balance setting the limits on the scope of exclusive economic and control rights a creator may have in his work. Thus, authors and inventors only receive what Congress may distill from competing public interests, while the Court's emphasis on the public interest as the primary import of copyright law remains. Professor Glynn S. Lunney, Jr., of Tulane University School of Law proposes such a public interest equation.⁷⁹ His review of *Sony* asserts that Justice Stevens did not mean to grant authors an equal footing with the public interest.⁸⁰ Instead, a court should balance "societal benefits [in] expand[ing] public access" to an author's works⁸¹ against the likelihood that too much expansion "might reduce the supply and variety of original works available by impairing the incentives for their creation."⁸² Distilled simply, the public's desire of access must be measured against the quality and quantity of works to which they have access. Necessarily, the inducement offered to authors and inventors must *serve* these interests, not be parcel to them.

VII. PUBLIC INTERESTS MEET THE AUTHORS'

The application of Professor Lunney's balancing equation, with its emphasis on the public's interest in copyright, negates much of the foundation for the enactment of moral rights. While one could argue that these rights have little or nothing to do with copyright law and everything to do with the personal rights of authors and inventors,⁸³ it is clear that these rights are not constitutionally mandated.⁸⁴ Therefore, any enactment of moral rights must be measured carefully against the Constitution and the goals it wishes to achieve.⁸⁵ Additionally, to assure

79. See Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 981-82 (2002).

80. See *id.* (analogizing a balance of public interests in fair use determinations).

81. *Id.* at 982 (quoting *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 431-32 (1984)).

82. *Id.*

83. See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) ("[M]oral rights exist independently of an artist's copyright in his or her work.").

84. See *Marbury v. Madison*, 5 U.S. 137, 174 (1803) (declaring "[i]t cannot be presumed any clause in the Constitution is intended to be without effect").

85. *Id.* at 180 ("[W]hat shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.").

uniformity, the practical effects resulting from the institution of moral rights must be judged as they affect the marketplace of ideas, as well as the economic marketplace. Having expressed the historical context of moral rights in the United States and the prescribed public interest component imbued within the Intellectual Property Clause, the remainder of this Comment will attempt such adjudication.

Droit moral encompasses a bundle of rights offered to authors regardless of copyright ownership.⁸⁶ These rights include disclosure, paternity (attribution), integrity, withdrawal, and the right to prevent excessive criticism and assault on one's personality.⁸⁷ Many trace the origin of *droit moral* to the French, who steadfastly claim the bundle of rights are to extend beyond an author's reputational interests into a more personal sphere of protection.⁸⁸ The French, however, do not have a two-hundred-year experience with the equivalent of a First Amendment.⁸⁹ This may explain why many commentators exclude the rights of preventing excessive criticism or assault upon one's personality when advocating moral rights in the United States.⁹⁰ Such rights eventually collide with defamation protections that are strictly limited by the First Amendment, which exists to protect such criticism, not condemn it.⁹¹

Likewise, strong Anglo-American contractual and economic property ideals contradict an author's right of withdrawal.⁹² Withdrawal rights theoretically allow an artist "to recall all existing copies of her work if, following *actual* publication, she experienced a radical change of

86. See Kwall, *supra* note 5, at 2-3.

87. See *id.* at 5.

88. See *id.* at 24-25 ("[T]he distinction between the broader concept of an assault upon an author's dignity, as opposed to the more narrow conception of assault upon reputation, becomes readily apparent upon examining the laws of France . . . whose . . . are among the . . . most established."); Cornish, *supra* note 8, at 6-7 (concerning French laws: "[T]he right as a whole was not merely a property right . . . ; it was also a right of *personality*. . ."); Damich, *supra* note 7, at 1734 ("The personal rights of authors were first legally recognized in France under the name of *droit moral*, and that country remains their foremost exponent.").

89. See Yonover, *supra* note 4, at 92-93.

90. See, e.g., *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (discussing only the rights of attribution and integrity); Damich, *supra* note 7 (discussing generally attribution, integrity, and disclosure within states' moral rights legislation as they apply to the Copyright Act's preemption clause); Ginsburg, *supra* note 38, at 11, 13 (linking attribution and integrity rights to the Digital Millennium Copyright Act).

91. See generally *N.Y. Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (setting defamation standard of intent to "actual malice" when commenting on public officials); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967) (setting "actual malice" standard for defamation of public figures); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974) (setting negligence as the *per se* floor in states' standards for defamation of a private figure).

92. See generally Kwall, *supra* note 13, at 17 n.67 (noting the roots of legal economic rights jurisprudence in the Anglo-American model).

the convictions that originally provided the impetus for [that work].”⁹³ Such a determination is directly contrary to the Copyright Act’s First Sale doctrine⁹⁴ and established property rights in title available under the Uniform Commercial Code.⁹⁵ Also, the Constitution through the Intellectual Property Clause seeks only the public benefit “in the free flow of ideas, information, and commerce.”⁹⁶ Therefore, the author’s convictions bear little or no relationship to the public’s interest in the expression of ideas. Once offered, the marketplace of ideas is enriched despite the author’s misgivings, and it is the marketplace that should serve as a filter of that idea’s vitality, not the author.⁹⁷

From an economic standpoint, a withdrawal right would increase costs and place greater risk within contractual relations, something contract law attempts to reduce. Take, for example, a major motion picture.⁹⁸ If the United States operated under the French paradigm that dictates moral rights are inalienable,⁹⁹ the many “authors” in a film project could at any time enjoin the distribution of the film, if not demand total extraction of their “work” from its body.¹⁰⁰ To place this comparison in perspective, a film’s screenwriters, director, actors, setmakers, and costumers could all claim a withdrawal right in their work. With such inherent risk to the movie studio and no possible means to acquire a waiver, the studio will necessarily attempt to drive down costs to reflect more properly its share of that risk. Unfortunately, the parties with which the studio contracts will also do so by attaching a premium to their work as they pass the risk of having their own work sit uncompleted onto the studios. Although this may seem attractive at first blush,¹⁰¹ the passing of risk does not answer the studio’s or the public’s concerns over whether the film will ever be released. Under the pretense

93. *Id.* at 6 (emphasis added).

94. *See* 17 U.S.C. § 109(a) (2000) (explaining that lawful owners of copyrighted materials are free to dispose of the copy as they wish).

95. U.C.C. §§ 2-401, 2-403 (2000).

96. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

97. Although this theory could logically extend to forced disclosure of every thought or idea an author may envision, privacy and involuntary servitude concerns should avoid such a conclusion. *See, e.g., Am. Broad. Cos. v. Wolf*, 52 N.Y.2d 394, 401-03 (N.Y. Sup. Ct. 1981) (concerning the inequities of enforcing specific performance in employment contracts).

98. For argument’s sake and due to unavailability of legal counsel for many movie producers, we shall assume a “work made for hire” agreement does not apply. However, one could just as reasonably apply this argument to media not covered by the “work made for hire” doctrine, e.g., music. *See* 17 U.S.C. § 101 (2000).

99. *See Damich, supra* note 7, at 1738.

100. *See Kwall, supra* note 13, at 6.

101. *See Cornish, supra* note 8, at 4 (arguing that distributors are in the better position to shoulder financial risks in the world of copyright).

of withdrawal, an author could legally extort a studio or, more simply, act on arbitrary animus to shelve the film.

The right of withdrawal often requires an author to indemnify the contracting party for the exercise of a withdrawal.¹⁰² However, the speculative nature of publishing or distributing makes remuneration difficult, especially if the work is enjoined before initial release. Meanwhile, the distributor has wasted time and incurred opportunity costs that may have cost tens of millions of dollars in substitute projects. Reliance on indemnification to support the moral right of withdrawal is foolhardy and does not serve the public interest in the expression of ideas. Enactment of a withdrawal right once again places the interest of one (or a few) equal to or above the interests of society in general.

The rights of integrity, attribution, and disclosure are not so easily dismissed. VARA folded limited integrity and attribution rights into the Copyright Act of 1976;¹⁰³ yet, these same rights under *droit moral* have a much broader scope.¹⁰⁴ Under the right of integrity, an author's work cannot be altered such that the spirit of the work is destroyed.¹⁰⁵ This is precisely the right *Gilliam* upheld when it applied the Lanham Act in granting Monty Python relief against ABC.¹⁰⁶ Professor Kwall feels, however, that *Gilliam* relied more upon licensing issues¹⁰⁷ than application of the Lanham Act,¹⁰⁸ yet regards both the Lanham Act and contractual remedies as inappropriate substitutes for integrity rights.¹⁰⁹

The Copyright Act contains four main interrelated factors concerning an author's integrity rights: (1) initial ownership in copyright, (2) transfers of copyright ownership, (3) derivative works, and (4) VARA.¹¹⁰ The application of these four factors dictates who may assert copyright protection.¹¹¹ It is noteworthy to understand that an author is the first vested copyright holder in his work unless he has authored such work while in the scope of employment or has

102. See Damich, *supra* note 7, at 1749.

103. See 17 U.S.C. § 106A (2000).

104. VARA applies only to certain visual arts and specifically excludes motion pictures, audiovisual works, and many news-oriented media. See 17 U.S.C. §§ 101, 106A (2000). Full implementation of integrity and attribution rights would apply to all expressive works.

105. See Kwall, *supra* note 13, at 8.

106. See *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 24 (1976).

107. See Kwall, *supra* note 13, at 34-35.

108. 15 U.S.C. §§ 1051-1127 (2000).

109. See Kwall, *supra* note 13, at 24, 26.

110. 17 U.S.C. §§ 201(a)(b)(d) (2000) (dealing with initial ownership and transfer of such); *id.* § 106 (derivative works); *id.* § 106A (VARA).

111. See *id.* § 106.

contractually transferred the copyright to another.¹¹² This alone should be sufficient to protect an integrity right through the copyright holder's affirmative claim as the sole lawful creator of derivative works.¹¹³ Therefore, the problem of integrity lies in copyright ownership transfers¹¹⁴ and VARA.¹¹⁵

Before the problems of integrity are properly addressed, the right of attribution must be discussed. The two rights are specifically interwoven in the context of an author receiving credit for his work, especially after he has assigned the copyright to another. In such case, the copyright owner is generally under no obligation to identify the author of the copyrighted work,¹¹⁶ which is precisely what the right of attribution demands.¹¹⁷ A farther-reaching goal of attribution is to prohibit the use of the author's name on a mutilated version of his work.¹¹⁸ Thus, the interplay of integrity and attribution assures an author that the original work will always be the only work and, as such, will always be accredited to him. This leads back to the problems of copyright transfers and VARA, which, incidentally, mirror the nexus of competing interests that are present in the conflict between Hollywood directors and the companies editing their products.¹¹⁹

VIII. THE EDITING PROBLEM

As previously mentioned, small editing companies located in Utah and Colorado were using various editing techniques to filter what they perceived as offensive material out of regular retail motion picture DVDs.¹²⁰ Techniques used consisted of the simple (making a master editing copy in which scenes were deleted), the technically simple (programming the DVD player to skip scenes on an otherwise unedited DVD), and the technically sophisticated (programming the DVD player to insert clothes on top of a nude actress).¹²¹ Prior to the studios joining the directors in their injunctive suit, the directors only had standing to

112. *See id.* §§ 201(a)(b)(d).

113. *See id.* § 106.

114. *See id.* § 201(d).

115. *See id.* § 106A.

116. *See* Damich, *supra* note 7, at 1743; *cf.* Ginsburg, *supra* note 38, at 13 (noting "it is not copyright infringement even willfully to miscredit the author").

117. *See* Kwall, *supra* note 13, at 7 (noting that the right also "prevents others from naming anyone else as the creator").

118. *See* 17 U.S.C. § 106A(a)(2) (2000); Damich, *supra* note 7, at 1743 (discussing N.Y. ARTS & CULTURAL AFFAIRS LAWS § 14.55 (McKinney 1984)).

119. *See* Clark, *supra* note 49.

120. *See id.*

121. *See id.*

claim violations of the Lanham Act and of their moral rights.¹²² However, unlike the plaintiff in *Gilliam*, the directors were lacking the element of likelihood of confusion so important in Lanham Act misrepresentation claims.¹²³ In *Gilliam*, the court correctly held that the ABC broadcast of Monty Python's *Flying Circus* was the "first opportunity" the troupe had for national exposure in the United States.¹²⁴ Additionally, Judge Gurfein suggested that an ABC disclaimer noting the edited content and aired at the beginning of the broadcast, was likely to go unnoticed by those tuning in a few minutes late.¹²⁵ Taken together, these two factors were enough to find that reputational injury, through misrepresentation, had occurred by means of ABC's editing and their attribution of the edited work to Monty Python.¹²⁶ The directors face no such problems in Utah and Colorado. Consumers who rented or purchased the edited movies, or the software to effect such editing, presumably did so in order to avoid offensive material.¹²⁷ They knew what the original DVDs contained and intentionally sought a substitute. This was not a case of first impression between an unknown comedy troupe and its national audience, an impression that would accordingly dictate one's future success, but a much more limited target audience's desire to view inoffensive fare by presently enriched and established directors.¹²⁸

The weakness in the directors' Lanham Act claims leads them, much to the chagrin of movie studios, to claim analogous moral rights under VARA. Expressly under VARA, the directors lose this claim because motion pictures are outside the scope of its protection.¹²⁹ However, this does not mean the movie studios want a judge extolling the virtues of moral rights for Congress to hear. Thus, they entered as copyright holders on the side of the directors. But what if the judge pontificates on the availability of moral rights as a cause of action? What should he say?

Due to the transfer of their copyrights, the directors would assert both attribution and integrity interests in their works. In attribution, they would claim that the edited works were a mutilation of the originals and

122. *See id.* (noting the studios and not the directors held the copyrights).

123. *See id.*

124. *See Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 19 (2d Cir. N.Y. 1976).

125. *See id.* at 27 n.13.

126. *See id.* at 24 (citing violation of the Lanham Act, 15 U.S.C. § 1125(a) (1975)).

127. *See Clark*, *supra* note 49 (noting that the applicable consumers were often members of clubs created for the sole purpose of finding inoffensive entertainment).

128. *See id.*

129. *See* 17 U.S.C. § 101 (2000) (defining a "work of visual art" as not including a motion picture).

should not bear their names.¹³⁰ Relatedly, the editing companies would violate the directors' integrity rights if they edit the original works sufficiently to constitute a mutilation.¹³¹ The defendants are not without legal recourse, however. According to the exact nature of the alleged infringement, the individual defendants have at their disposal the First Sale¹³² and Fair Use¹³³ doctrines of the Copyright Act. Clean Flicks, for example, purchases a retail DVD, copies it, and edits the copy for offensive material.¹³⁴ As only one copy is made per purchased retail DVD, Clean Flicks is likely to assert both first sale and fair use.¹³⁵ Although the First Sale doctrine expressly applies only to an owner's right of disposition in a lawfully purchased copyrighted work,¹³⁶ fair use may cover any alterations to that work.¹³⁷ The fact that Clean Flicks purchases one retail DVD for every copy quiets most of the directors' claims of an infringed economic right.¹³⁸ Unlike the other defendants, however, Clean Flicks sells or rents its edited copies for profit.¹³⁹ Therefore, it has the specific trademark problem of post-sale confusion due to consumer resale of its physical product.¹⁴⁰ Reliance on post-sale confusion as held in *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.* may obviate further exploration of the moral rights implications in regard to Clean Flicks,¹⁴¹ but that leaves the question of how to adjudicate the consumer's fair use interests in purchasing editing software for their DVD players.

ClearPlay and Trilogy Studios do not rent or sell a modified copy of a copyrighted work.¹⁴² In one especially important way, these two companies mirror the defendant in *Sony*: they are both on trial for their

130. See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (noting the rights of attribution).

131. See *id.*

132. 17 U.S.C. § 109.

133. *Id.* § 107.

134. See *Clark*, *supra* note 49.

135. See *id.*

136. See 17 U.S.C. § 109.

137. See *id.* § 107. *But cf.* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 n.30 (1984) (creating judicial guidelines for fair use).

138. Having no market for themselves to exploit this related "inoffensive material," the directors enjoy the maximum economic benefit allowed in the purchase of their work. See *Clark*, *supra* note 49.

139. See *id.*

140. See *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 872 (2d Cir. 1986).

141. See *id.*; see *Clark*, *supra* note 49.

142. See *Clark*, *supra* note 49.

product's ability to "skip" unwanted viewing material.¹⁴³ In fact, the present two defendants have done much less than Sony in that their products cannot record and, thus, time-shift copyrighted material.¹⁴⁴ ClearPlay seems to have the easier task in proving fair use.¹⁴⁵ Its product merely skips offensive scenes without physically altering the material.¹⁴⁶ In most ways, it is most like the *Sony* defendant in that its product is used within the privacy of homes, still requires an individual to purchase or rent the copyrighted material, and is used primarily in a noncommercial context.¹⁴⁷ Accordingly, the studios will have a hard time proving harm caused by ClearPlay's software in both its current market¹⁴⁸ and any potential markets,¹⁴⁹ important prerequisites for combating fair use claims in copyright infringement cases.¹⁵⁰ The directors with their claims of integrity and attribution violations have no direct rebuttal to a fair use determination. Their claims will be balanced against fair use below.

Trilogy Studios' technique for editing offensive material adds another layer of mischief.¹⁵¹ Unlike ClearPlay, Trilogy adds its own digital material to gloss over what they feel are offensive scenes.¹⁵² Adding material is a more deliberate alteration of one's work when compared to ClearPlay's simple skipping of offensive material; otherwise, Trilogy's fair use factors are similar to ClearPlay's.¹⁵³ The studios, with copyrights in hand, could argue their exclusive right to create derivative works and that any additions made by Trilogy constitute such.¹⁵⁴ If the changes were not sufficient to constitute a derivative work, however, the studios would fall back on substantial similarity in order to

143. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 423 (1984) (noting consumers' use of the VTR's pause and fast forward functions to skip unwanted commercials).

144. *See id.*; Clark, *supra* note 49.

145. *See* Clark, *supra* note 49.

146. *See id.*

147. *See Sony Corp.*, 464 U.S. at 456 (explaining its reasons for a fair use determination).

148. Their works are still bought by ClearPlay users; in fact, the availability of such software may increase sales. This is a double-edged sword, however, because it also establishes harm in any future edited-content markets.

149. The minimal success of defendants shows this to be a stunted market ignored by the studios, and without firm evidence of the studios' impending entry should be amenable to third-party entry.

150. *See Sony Corp.*, 464 U.S. at 456. *But cf. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994) (holding no presumptions of infringement can be held due solely on the commercial nature of the use and its likelihood to affect the copyrighted work's profits).

151. *See* Clark, *supra* note 49.

152. *See id.*

153. Both utilize software placed on consumer-owned DVD players, require the purchase of the retail DVD, and conform to a primarily noncommercial use. *See id.*

154. *See* 17 U.S.C. § 106 (2000).

prove infringement, but this puts a fair use defense back into play. In that case, the directors' claims of integrity and attribution stand a better chance of success than the studios' infringement causes of action.

In reviewing all of the claims, the court must remember *Sony*: balance the public interest in greater access to copyrighted works against the public want of greater quantity and quality of such works.¹⁵⁵ Upholding the directors' claims of integrity and attribution reduces public access to copyrighted works and, perhaps, to a greater level of subjective quality. Yet, applying fair use liberally to allow Trilogy to add digitally its own material may open the door to other editors' similar efforts. As Professor Kwall has noted, "[I]t is already possible to do a full body and face scan of an actor . . . and have that scanned persona appear as a newly created performance."¹⁵⁶ One could easily imagine the antithesis of Trilogy Studios stripping unassuming actors of their clothes in order to satisfy a customer's prurient interest, something the actor never bargained for in his employment contract. With the threat of such a fate for actors, musicians (altering song lyrics), or authors (reworking of whole chapters) made likely by liberal fair use determinations, the public's interest in quantity and quality of copyrighted works could well be harmed.

The optimal judicial conclusion does not upset the balance of public interests and offers limited integrity and attribution rights to authors. Professor Kwall suggests addressing certain language in the Copyright Act that directly,¹⁵⁷ or implicitly,¹⁵⁸ allows an author to sue for infringement regardless of copyright ownership.¹⁵⁹ This goes too far. First, the cases relied upon, *Cortner v. Israel* and *Kamikazi Music Corp. v. Robbins Music Corp.*, are too extreme to offer enlightenment on a moral rights standing issue. In both, an artist sued for copyright infringement of his works through a shadow corporation comprised

155. See *Sony Corp.*, 464 U.S. at 431-32.

156. Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the 21st Century*, 2001 U. ILL. L. REV. 151, 154.

157. See Kwall, *supra* note 13, at 47-49 (citing *Cortner v. Israel*, 732 F.2d 267, 271 (2d Cir. 1984) and *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69, 74 (S.D.N.Y. 1982) as examples of 17 U.S.C. § 501(b)'s application of a "beneficial owner" and as examples of an author without a copyright nonetheless having standing to sue for copyright infringement).

158. See *id.* at 49-55 (citing 17 U.S.C. § 203 as retaining for the author a "beneficial ownership" interest due the section's permissive grant to return to the author his copyright regardless of present contractual terms).

159. See *id.*

solely of the artist as stockholder.¹⁶⁰ A natural extension of this argument allows an artistically removed stockholder of a copyright-holding publisher to sue for infringement due to his beneficiary and ownership status in that corporation. This seems implausible, and therefore, the cited cases should be read as exceptions rather than as rules. Additionally, the reliance on section 203 of the Copyright Act and its permissive grant to an author in liberating his copyright from assignment creates a dubious statutory interpretation problem. Professor Kwall asserts this grant places an author in a “beneficial ownership” status with the concomitant right to sue for infringement under section 501.¹⁶¹ Such an interpretation creates a circularity problem. If, under section 106, a copyright owner holds the exclusive right to prepare derivative works and exercises that right, a copyright-transferring author under Professor Kwall’s scheme could sue for copyright infringement. Not only is section 106 made meaningless by section 501, the copyright owner’s benefit in the transfer of the copyright is greatly burdened and reduced. Extension of “beneficial owner” under section 501 creates moral rights standing (through the Copyright Act) that serves to inhibit the quantity of copyrighted works available to the public and, therefore, should be avoided.

A better strategy is to enforce the precepts of copyright as they stand presently and add a good faith duty upon copyright owners to enjoin any unauthorized use of an author’s work that harms the author’s rights of attribution or integrity. Additionally, an affirmative duty of attribution should be placed upon all copyright holders in regard to the author’s work and any derivative forms of it. In our directors’ case, that would mean applying the Copyright Act’s fair use standards to the defendants’ works.¹⁶² ClearPlay, like Sony before it, merely allows a consumer knowingly to skip over unwanted material.¹⁶³ Unlike Sony, its functional software parts are hidden, whereas the video tape recorder (VTR) was available for all to see. This fact should not be dispositive. In both circumstances, the owner knows of their functions and will not be confused by mysterious editing or skipping. Any improbable after-sale

160. See generally *Cortner*, 732 F.2d at 271; *Kamakazi Music Corp.*, 534 F. Supp. at 74 (noting in both cases the suing corporation was an entity entirely set up for the benefit of its one shareholder: the artist).

161. See Kwall, *supra* note 13, at 54-55 (citing 17 U.S.C. § 501(b) (1982)).

162. See 17 U.S.C. § 107 (2000); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (providing judicial explanations of § 107’s fair use standards).

163. See Clark, *supra* note 49; *Sony*, 464 U.S. at 423.

confusion¹⁶⁴ created by the software-imbued DVD player will have to be shown by the plaintiffs. Finally, ClearPlay's software benefits the public interest by creating greater public access to copyrighted works through audiences traditionally predisposed to avoiding subjectively offensive material.

Trilogy Studios could very well follow ClearPlay's reasoning if not for its addition of digital material to mask offensive scenes. It could be argued that Trilogy was both creating greater public access as well as adding to the quantity and quality of copyrighted works, but to follow that reasoning would open the gates to any form of similar editing that focused on nontraditional audiences predisposed to avoiding the original material. The purpose of fair use is not to exhibit a third party's wares upon someone else's creative vehicle.¹⁶⁵ And although the analogous situation of parody often substantially copies a host's work and later adds original elements to it, the Supreme Court has recognized parody's critical nature as commentary allowed under fair use.¹⁶⁶ For Trilogy to assert a *Campbell*-like social commentary fair use defense would strain credibility.¹⁶⁷ More properly, the court should rule that Trilogy either went beyond fair use and created derivative works in violation of the studios' exclusive rights under copyright or infringed upon those copyrights due to substantial similarity. This maintains the exclusive rights of the copyright holder while also maintaining sufficient protection for authors to create more and better works.

IX. WHAT CONGRESS CAN DO

Establishing a copyright holder's good faith duty to enjoin any unauthorized use of an author's work that violates the author's rights of attribution or integrity also maintains a balance of public interests. A copyright holder acquires no disadvantage in his contractual relations with an author by enjoining uses from which the holder does not profit and may even protect his own market for the licensed work. Contrarily, an analogous standing for the authors themselves prejudices a copyright holder in its contract because its exclusive rights in copyright could be marginalized in every exercise by the author. This does not maintain the public interest balance. By avoiding complete moral rights standing for

164. See *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 872 (2d Cir. 1986).

165. See generally 17 U.S.C. § 107 (noting purposes of fair use included to comment, criticize, report, teach, or research).

166. See *Campbell*, 510 U.S. at 579.

167. Indeed, would the consumer recognize the edited scenes as commentary at all?

authors so that a copyright holder maintains his right to prepare derivative works, the quantity and quality of copyrighted works are more likely to increase.¹⁶⁸ In fact, providing authors with moral rights standing in the form of an integrity right only serves to protect those marginal authors whose expressions are least likely to make a qualitative impact on society. A prolifically successful author generally does not need his work modified; therefore, a copyright holder will not likely need to make a derivative in order to profit commercially. The marginal author, however, will probably need some kind of alteration performed on his work in order for the copyright holder to profit. Without the unfettered right to prepare a modified work ensuring public acceptance, the copyright holder has no incentive to publish, and the public interest suffers.¹⁶⁹ Lastly, shifting the duty of protecting an author's integrity to the copyright holder also serves another public interest: the long-term viability of that work.¹⁷⁰ Assuming a copyright holder's greater access to resources, both financial and logistic, the holder is in a much better position to enjoin unauthorized physical destruction of an author's works.¹⁷¹

The current theory that copyright holders need not attribute a work to its author is one of many sources of irritation with authors and moral rights advocates.¹⁷² There are few circumstances in which giving proper attribution will necessarily prejudice a copyright holder's contractual relations with the author.¹⁷³ More importantly, an attribution duty helps an author's bargaining position as his renown grows with each work.¹⁷⁴ In the case of a derivative work, the presumption should be to attribute the work to the original author as well as to the author of any new material placed within the derivative.¹⁷⁵ Accordingly, either author may opt out of attribution if he feels the new work does not represent his creative ideals.

168. This assumes a large proportion of copyright holders have resources to capitalize upon the expansion of those copyrights' markets.

169. Publishing the work in a publicly unacceptable form can be analogized to the falling tree in a forest with no one around to hear it.

170. See Damich, *supra* note 7, at 1750.

171. See *generally id.* (noting California's Moral Rights legislative preamble explicitly stating the public interest in art preservation).

172. See Ginsburg, *supra* note 38, at 13 (explaining that even willfully miscrediting an author is not a copyright violation).

173. One could imagine a situation in which an author morally compromises his character to the detriment of the copyright holder, but this is probably the exception rather than the rule.

174. This helps address an issue raised by Congress in discussion of the 1976 Copyright Act. See Kwall, *supra* note 13, at 54 n.196 (citing H.R. REP. NO. 1476, 94th Cong., 2d Sess. 109, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5740).

175. This rule would not apply to authors who create under the work-for-hire doctrine.

This compromise protects an author's right of attribution fully while also protecting his right of integrity against noncontractual infringers of his work. The rule leaves the author the decision as to whom to leave his integrity right when transferring a copyright. This choice is a sufficient protection considering the public interests in a copyright holder's promulgation of copyrighted works and in the subsequent fair use of the works. Additionally, the attribution right helps to assure an author of his right of disclosure.

The right of disclosure allows the author to be "the sole judge of when a work is ready for public dissemination."¹⁷⁶ Under the attribution right assigned here, the author has the luxury of choosing whether he will attach his name to the respective works.¹⁷⁷ If he is contractually forced to give up a script, song, or research paper before he feels it is complete, he can have his name taken off the work, thus avoiding the personal injury of criticism that moral rights seek to limit.¹⁷⁸ It is in the interests of a copyright holder to allow an author's name to stay attached to his work, but in the event of a breach, the copyright holder still holds the expression as written and can seek other contractual remedies.

X. CONCLUSION

This Comment has attempted to illustrate the shortcomings of *droit moral* within the public interest paradigm of copyright law. Although far more limited than their French predecessors, limited rights of integrity, attribution, and disclosure are possible if Congress and U.S. courts "ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."¹⁷⁹ By imputing a good-faith duty upon copyright holders to uphold an author's attribution and integrity rights with reasonable efforts, the balance of public interests represented by greater access to copyrighted works and its want of more and better works is maintained. Accordingly, limiting the author's right of integrity to noncontractual infringers allows a copyright holder to maintain his exclusive rights under copyright, while making more probable the release of derivative works with their accompanying fair use. The presumption of attribution for an author upholds his dignity by allowing him the choice of assigning his name to a work, while necessarily helping him gain public acceptance in that name. Such acceptance increases the

176. Kwall, *supra* note 13, at 5.

177. *See id.*

178. *See* Damich, *supra* note 7, at 1749.

179. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (footnotes omitted)).

author's bargaining strength at the contractual stage and forces would-be copyright holders to negotiate for use of the work. Although this may raise costs for the copyright holders, the increase will be on merit, rather than on an artist's arbitrary exercise of his moral rights.