

# Moral Rights of Authors in the USA

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## Keywords

attribution, author, authors, authorship, Berne Convention, disclosure, distortion, droit moral, first publication, honor, integrity, moral, mutilation, personality, plagiarism, reputation, rights, Urheberpersönlichkeitsrecht, U.S., USA

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## Introduction

Copyright law is generally about the legal rights of a copyright owner to control the copying of the copyrighted work, and to receive payment of damages for *unauthorized* copying. The copyright owner is initially the author(s), but the author(s) can transfer their ownership of copyright by written contract.

Moral rights of authors refer to a bundle of legal rights for protection of the honor and reputation of an author. Moral rights receive their fullest expression in French and German law, and two moral rights were added in 1928 to the Berne Convention for the Protection of Literary and Artistic Works.

The scope of this essay is specifically restricted to authors of text, and excludes artists who paint, sculpt, or create other works of visual art.

disclaimer

This essay presents general information about an interesting topic in law, but is not legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*. Because part of the audience for this essay is nonlawyers, I have included longer quotations from court cases than typical writing for attorneys.

## French & German Law, Berne Convention

There are two moral rights in Article 6<sup>bis</sup> of the Berne Convention:

1. **the right of attribution:** the true author has the right to have his/her name on the work, and non-authors are prevented from having their names attached to the author's work.

In French law, this right is called "droit à la paternité". Sarraute<sup>1</sup> has traced the origin back to a French judicial decision in the year 1837. This rule of law was first codified in France<sup>2</sup> in Article 6 of the French Law on Literary and Artistic Property No. 57-298 of

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<sup>1</sup> Raymond Sarraute, "Current Theory on the Moral Right of Authors and Artists Under French Law," 16 *American J. of Comparative Law* 465, 478 (1968). See also Edward J. Damich, "The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors," 23 *Georgia Law Review* 1, 14 (Fall 1988) (citing Stromholm for tracing the right back to a French case in 1835).

<sup>2</sup> Raymond Sarraute, "Current Theory on the Moral Right of Authors and Artists Under French Law," 16 *American J. of Comparative Law* 465, 466 (1968).

11 March 1957. The current French statute is Article L121-1 of the French Intellectual Property Code, Law No. 92-597 of 3 July 1992.

2. **the right of integrity:** distortion, mutilation, or other modification that would prejudice the author's honor or reputation is *not* permitted.

In French law, this right is called "droit au respect de l'oeuvre". Article 6 of the French Law No. 57-298 of 11 March 1957.

The following moral rights are *not* mentioned in the Berne Convention, but are part of the national law of France and some other countries:

3. **the right of disclosure:** the author has the final decision on when and where to publish. This right includes the right to withhold the work if it is not finished, or not ready for publication, according to the author's decision.

In French law, called "droit de divulgation". Article L121-2 of the French Intellectual Property Code, Law No. 92-597 of 3 July 1992. Supersedes Article 19 of the French Law No. 57-298 of 11 March 1957.

4. **the right to withdraw or retract:** when an author's views change, the author may purchase at wholesale price all of the remaining copies of the author's work, then prevent printing of more copies.

In French law, this right is called "droit de retrait ou de repentir". Article L121-4 of the French Intellectual Property Code, Law No. 92-597 of 3 July 1992. Supersedes Article 32 of the French Law No. 57-298 of 11 March 1957. Perhaps because the author must reimburse the publisher for costs, this right of withdrawal is rarely used in France.<sup>3</sup>

5. **the right to reply to criticism:** For example, French law gives the author a right to reply to a critic and to have the reply published in the same place as the critic's expression.
6. The publisher must not modify the author's work, except with the author's written consent. Article 56 of French Law No. 57-298 of 11 Mar 1957.

#### additional features

Each of these moral rights of the author are perpetual, inalienable, and descend to the heirs of the author. If the author transfers the economic rights (i.e., copyright) to another person or company, the author *always* retains the moral rights. Articles 6, 19, 29 of French Law No. 57-298 of 11 March 1957; Article 6<sup>bis</sup> of the Berne Convention.

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<sup>3</sup> Raymond Sarraute, "Current Theory on the Moral Right of Authors and Artists Under French Law," 16 American J. of Comparative Law 465, 476-477 (1968); Edward J. Damich, "The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors," 23 Georgia Law Review 1, 24-25, 40 (Fall 1988).

Moral rights arise from the French concept that a creative work contains the personality of its creator or author. Copyright is a property right, while the author's moral right is an extension of the author's character and personality. Personality is not transferable, which is why the author always retains the moral rights even after the author sells or transfers the copyright to another person or company. From this concept, it follows that *only* human-authors can claim moral rights. A corporation may be the legal author under a work-for-hire agreement, but a corporation *never* has moral rights.

Moral rights require a user to show *respect* for prior works, by neither mutilating nor distorting them, and by properly attributing authorship.

Modern French law has some limitations on moral rights of authors of software or audiovisual works. Articles L121-6 and -7 of the French Intellectual Property Code, Law No. 92-597 of 3 July 1992.

The German statute on Copyright and Related Rights (Gesetz über das Urheberrecht und verwandte Schutzrechte), §§ 12-14, (Sep 1965) contains the current moral rights in Germany.

### **View of U.S. Congress**

During the passage of the Berne Convention Implementation Act, the U.S. Congress specifically stated<sup>4</sup> in 1988 that rights equivalent to moral rights of authors were already recognized in the USA under:

1. the common law of misrepresentation and unfair competition,
2. § 43(a) of the Lanham Act, 15 USC § 1125(a)(1)(A), which prohibits "false designation of origin, false or misleading description of fact" that is "likely to cause confusion, ... mistake," or deception about "the affiliation, connection, or association" of a person with any product or service.
3. defamation (libel) law.

Therefore, Congress asserted that law in the USA already complied with 6<sup>bis</sup> in the Berne Convention, without any additions or changes to Copyright law in the USA.

The Berne Convention Implementation Act of 1988, 17 USC § 104(c), specifically prohibits any person in the USA from relying on the protection of any right or interest specified in the Berne Convention. In other words, all legal rights in the USA must drive from statutes in the USA or common law in the USA.

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<sup>4</sup> Senate Report 100-352, pp. 9-10, reprinted in 1988 U.S. CODE, CONGRESSIONAL, AND ADMINISTRATIVE NEWS 3706, 3714-15.

In 1990, the U.S. Congress passed the Visual Artists Rights Act, 17 USC § 106A that specifically gave authors of visual art (e.g., painting, drawing, print, sculpture, still photographic image) the following **rights of attribution**:

- the right to claim authorship
- the right to prevent his/her name from being attached to works that he/she did *not* create
- the right to prevent use of his/her name as the author after mutilation, distortion, or other modification of the work that is prejudicial to his/her honor or reputation

and the following **rights of integrity**:

- prevent any intentional mutilation or distortion of the work that is prejudicial to his/her honor or reputation
- prevent destruction of a work of recognized stature.

If the law in the USA already adequately protected moral rights of authors, why was it necessary to add 17 USC § 106A, and why were the rights there limited *only* to visual art? The addition of § 106A in 1990 casts doubt on the assertion of the U.S. Congress in 1988 that moral rights were already adequately recognized in U.S. law.

The Truth is that the law in the USA does *not* fully conform to the Berne Convention. A significant omission from U.S. Copyright Act and other sources of U.S. law is the absence of moral rights for authors of literary or musical works. See the cases cited below, beginning on page 29. Prof. Damich suggested in 1986 that “it is the lack of effective compliance among Berne countries, rather than the protection given moral rights in American law, that removes Article 6<sup>bis</sup> as an obstacle to U.S. adherence.”<sup>5</sup>

## Overview of Moral Rights in the USA

There are a *few* reported cases in the USA that appear to give relief equivalent to moral rights of authors. Nearly all of the recent cases involve only motion pictures, gramophone recordings, and television programs, perhaps because those high-value items make litigation worthwhile.

While it would be logical to organize cases according to each moral right that is involved, in practice such organization is *unsatisfactory* because some cases involve more than one moral right. For example, an author might want to have his name on his work, but not in its present mutilated form. So I have divided the cases into two sections, a section (beginning at page 7 below) on common-law equivalents in the USA to moral rights, and a section (beginning at page 29 below) on rejection of moral rights by judges in the USA.

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<sup>5</sup> Edward J. Damich, “Moral Rights in the United States and Articles 6<sup>bis</sup> of the Berne Convention: A Comment on the Preliminary Report ...,” 10 Columbia-VLA J. Law & Arts 655, 655 (1986).

Here, I give a brief overview of moral rights in the USA:

1. **attribution** An author in the USA has no legal right to have his/her name — or pseudonym — attached to his/her work, unless such a right is included in a written contract between author and publisher. See the leading case of *Vargas v. Esquire*, which is discussed at page 29, below.

After the U.S. Supreme Court decision in *Dastar* in 2003, an author has no clear cause of action in the USA against a plagiarist who puts the plagiarist's name on the author's work, because plagiarism is no longer a legal wrong in the USA. See my essay on plagiarism, at <http://www.rbs2.com/plag.pdf> .

2. **integrity** In general, an author has no legal right in the USA to prevent mutilation or distortion of his/her work. However, there are sporadic decisions in the USA recognizing the right of an author to prevent damage to his/her reputation, of which *Gilliam v. ABC*, 538 F.2d 14 (2dCir. 1976) is the leading case. New York State courts (see page 17, below) have sometimes protected an author's reputation. After the mutilation or distortion has been published or publicly displayed, libel law may be give a remedy to the author.
3. **disclosure** The moral right of disclosure is equivalent to the American right of first publication, see page 23, below. As I explain below, there are different reasons for the moral right of disclosure and the American right of first publication, but they give the same result.
4. **withdrawal** There is no legal right in the USA for an author to withdraw his/her work after publication. See my criticism of the right to withdraw, at page 42, below.

### **Cases in the USA recognizing an equivalent to a moral right**

The older cases do not mention moral rights of authors. Since 1950, some judges mention moral rights in their opinion and these mentions are quoted below.

Towards the end of the discussion of each case, I make some remarks about how the doctrine of moral rights of authors would have enabled the judge to decide the case.

*Samuel Clemens* (1883)

In 1883, Samuel Clemens sued a publisher for unauthorized reprinting of his works. Clemens had not copyrighted his works, so they were in the public domain and could be reprinted. Clemens asserted that the publisher had infringed his common-law trademark, "Mark Twain", but the court rejected that legal theory. The following quotation is only dicta.

Undoubtedly an author has the right to restrain the publication of any of his literary work which he has never published or given to the public. So, too, an author of acquired reputation, and, perhaps a person who has not obtained any standing before the public as a writer, may

restrain another from the publication of literary matter purporting to have been written by him, but which, in fact, was never so written. In other words, no person has the right to hold another out to the world as the author of literary matter which he never wrote.... Any other rule would permit writers of inferior merit to put their compositions before the public under names of writers of high standing and authority, thereby perpetrating a fraud not only on the writer whose name is used, but also on the public.

*Clemens v. Belford, Clark & Co.*, 14 F. 728, 730-731 (C.C.N.D.Ill. 1883).

*Drummond* (1894)

Drummond produced a set of a dozen lectures and then published “reports” of eight of these lectures in the *BRITISH WEEKLY*. Drummond did not own the copyright in his lectures, so copyright law is not involved in this litigation. Altemus copied the lectures from the *BRITISH WEEKLY*, made some additions and omissions, and then published the eight lectures as the complete set of all of the lectures. Drummond sued Altemus, seeking an injunction. The trial court judge tersely discussed the legal theory:

The complainant does not base his claim to relief upon the [copyright] statute, but upon his right, quite distinct from any conferred by copyright, to protection against having any literary matter published as his work which is not actually his creation, and, incidentally, to prevent fraud upon purchasers. That such right exists is too well settled, upon reason and authority, to require demonstration; ....

*Drummond v. Altemus*, 60 F. 338, 338-339 (C.C.Pa. 1894). I shudder when a judge says a legal theory is so well settled that no citations to authority are needed. At least, the judge should cite a treatise or textbook, which collects cases. The need for citations to authority is especially desirable in an early case like *Drummond*, in which the legal right had not been clearly established. But this judicial opinion cites no authority. The judge issued a preliminary injunction against continued sales of the book. The final result is not known, as this is the only published opinion in this case. The assignee of Drummond’s copyright, Pott, sued Altemus separately for a preliminary injunction, which was denied. *Pott v. Altemus*, 60 F. 339 (C.C.Pa. 1894).

The judge mentions “to prevent fraud upon purchasers”. Note that there was no fraud on Drummond — he knew that the book did not contain the entire text of his lectures, so Drummond was not misled by the Defendant’s assertions. Drummond is the only plaintiff in this case, so there is no plaintiff with standing to assert a cause of action for fraud. Therefore, fraud should not be mentioned.

From the viewpoint of this essay, *Drummond* seems to involve the moral right of integrity. Despite assertions by the publisher, the lectures are not authentic (additions and omissions having been made by the publisher) and four lectures are completely missing from this allegedly complete set. Thus Drummond’s work was mutilated or distorted by the publisher. There is also false attribution involved, in that the publisher added text and falsely attributed it to Drummond. There is no mention of moral rights of authors in *Drummond*.

*Curwood (1922)*

Curwood was a prolific novelist, who had written a short story called “The Poetic Justice of Uko San”. Defendants had transformed this story, with possible additions from two other works by Curwood, into a motion picture, titled “I Am the Law”. Defendants signed a contract with Curwood to sell Curwood’s screen rights to “Uko San” and allow Defendants to use Curwood’s name in advertising the motion picture. When Curwood saw the motion picture, he sued, because the picture “injures his standing, reputation, and prestige”, which looks like the moral right of integrity, although “moral right” does not appear in the judicial opinion. The trial judge wrote:

Aside from all this, however, it does not seem probable that Curwood would risk his standing, prestige, and reputation as an author by the sale of his name for attachment to any picture that a purchaser might see fit to produce, and all this for \$1,000. He is yet a young man; he has achieved success; he has reason to hope for much more, and upon the evidence before me I am wholly unable to believe that he would jeopardize it all, and sell his birthright for a proverbial mess of pottage. I will protect him by injunction against the present use of the name of ‘The Poetic Justice of Uko San,’ and his authorship thereof, in connection with the picture entitled ‘I Am the Law.’

*Curwood v. Affiliated Distributors*, 283 F. 219, 223 (S.D.N.Y. 1922). Remarkably, no cases are cited in this opinion. The opinion is skimpy on legal reasoning and the basis of the decision is some dubious use of contract law. The facts of the case mention that Curwood recently received \$ 50,000 for the motion picture rights of one of his stories,<sup>6</sup> which makes one wonder what Curwood sold to Defendants for a mere \$ 1,000. One month later, the same judge summarized his previous decision:

... Burr [a motion-picture businessman] and his associates acquired the screen rights to a story written by Curwood many years before, and which was long ago published in *Outing Magazine* under the title ‘The Poetic Justice of Uko San.’ The tale related to three bears that two hunters came upon in the Canadian Northwest, and, aside from the location in which its action takes place, has not the slightest resemblance to any scene or incident in ‘Hell’s Highway’ or in the picture ‘I am the Law.’ Nevertheless, when the latter picture was first advertised and shown, it was heralded as having been founded on James Oliver Curwood’s latest story, ‘The Poetic Justice of Uko San.’ For reasons appearing in my aforementioned opinion in the suit of *Curwood v. Affiliated, et al.*, I have restrained the further use of such misrepresentation.

*International Film Service Co. v. Affiliated Distributors*, 283 F. 229, 231 (S.D.N.Y. 1922). This opinion holds that the movie infringed the copyright on Curwood’s novel, “The Valley of Silent Men.”

From the viewpoint of this essay, *Curwood* seems to involve the moral right of integrity.

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<sup>6</sup> *Curwood*, 283 F. at 220.

*Prouty (1939)*

Olive Prouty, the author of a fictional book titled STELLA DALLAS, sued NBC for producing a radio program of the same name with the same fictional character. Prouty owned the copyright on her novel. NBC filed a motion to dismiss the suit because NBC alleged Prouty failed to state a claim upon which relief can be granted. The trial court denied the motion. Because this was a preliminary skirmish in litigation, this judicial opinion is *not* a judgment on the merits of the case.

Prouty's Complaint alleges:

[NBC] is engaged in broadcasting throughout the United States and Canada and to reception throughout the world skits as episodes in the life of Stella Dallas in the character portrayed in said novel under that name and title. These are a degradation in artistic quality and harmonious consistency from the said novel or from any play based thereon. They are not an adaption, change, addition, subtraction, use or treatment of said novel or of any play based thereon. They are improvisations of a person or persons unknown to the complainant. They are of inferior artistic and commercial quality. In this way, the respondent is misappropriating the title 'Stella Dallas' and the complainant's rights therein and to the imaginatively created personality Stella Dallas and to the complainant's established goodwill developed by the complainant's successful authorship, to matter of such inferior grade as to imperil the further sale of said novel and of any sequel thereto, and the reputation of the complainant as the well known author of Stella Dallas and thereby to imperil the further sale of other works which the complainant has written and is writing, whose future sales is dependent on the continued maintenance of the high reputation as an author which the complainant now has.

*Prouty v. National Broadcasting Co.*, 26 F.Supp. 265, 265-266 (D.Mass. 1939).

In modern terms, we might phrase the complaint as NBC created derivative works that violated Prouty's copyright in the character, Stella Dallas, that Prouty created. For purposes of this essay, the key claim is the unfair competition claim, in which plaintiff uses to vindicate her moral right of integrity in her characters. Note this is *not* mutilation of Prouty's text, because someone else wrote original text for the NBC broadcasts. The claim is that NBC broadcasted mutilation of characters created by Prouty, which would adversely affect Prouty's reputation amongst the audience.

The trial judge wrote:

If it should appear that in these broadcasts the defendant had appropriated, without plaintiff's consent, the plot and principal characters of the novel, and that the use being made of her literary production was such as to injure the reputation of the work and of the author, and to amount to a deception upon the public, it may well be that relief would be afforded by applying well-recognized principles of equity which have been developed in the field known as 'unfair competition.'

....

.... It is the injury to the author and a fraud upon the reading public that constitute the real offense alleged. Until there has been a hearing upon the merits, when the Court will have before it the text of the broadcasts, it is impossible to determine whether the plaintiff is entitled to the relief for which she has prayed.

*Prouty*, 26 F.Supp. at 266

*Prouty* is cited in some judicial opinions<sup>7</sup> and law review articles about moral rights of authors. *Prouty* is a weak case to cite, because: (1) it comes from a U.S. District Court, which is not precedential anywhere, and (2) it is not even the final opinion on the merits. The strongest statement one can make about this case is that the cause of action was allowed in this one case. That judges and scholars cite *Prouty* shows how weak moral rights are in the USA.

In a bizarre move, *Prouty* filed in Massachusetts for an injunction, although the case was pending in New York City. *Prouty*, 42 U.S.P.Q. 7 (D.Mass. 1939). The Massachusetts court properly refused to enjoin NBC.

#### *Granz v. Harris* (1952)

In *Granz v. Harris*, 198 F.2d 585 (2dCir. 1952), it was held that the sale of abridged jazz recordings breached a contract that required the copies be sold with the credit line “Presented by Norman Granz”. In obiter dictum, the court said that — ignoring the contract — if the abridged recordings had been sold with attribution to Granz, the producer of the recording, then the tort of unfair competition would have been committed.<sup>8</sup>

The essence of this case is in following terse nugget:

But the contract required the defendant to use the legend ‘Presented by Norman Granz,’ that is, to attribute to him the musical content of the records offered for sale. This contractual duty carries by implication, without the necessity of an express prohibition, the duty not to sell records which make the required legend a false representation. In our opinion, therefore, sale of the ten-inch abbreviated records was a breach of the contract. No specific damages were shown to have resulted. As such damages are difficult to prove and the harm to the plaintiff’s reputation as an expert in the presentation of jazz concerts is irreparable, injunctive relief is appropriate. [two footnotes omitted]

*Granz v. Harris*, 198 F.2d 585, 588 (2dCir. 1952).

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<sup>7</sup> *Granz v. Harris*, 198 F.2d 585, 589, n.3 (2dCir. 1952) (Frank, J., concurring); *Gilliam v. American Broadcasting Companies, Inc.*, 538 F.2d 14, 24 (2dCir. 1976); *Seroff v Simon & Schuster*, 162 N.Y.S.2d 770, 775 (N.Y.Sup. 1957).

<sup>8</sup> *Granz*, 198 F.2d at 588 and n.4, citing *RCA v. Whiteman*, 114 F.2d 86, 90 (2dCir. 1940).

From the viewpoint of this essay, *Granz* involves the moral right of integrity, because the original recordings were abbreviated in the new releases. In his concurring opinion, Judge Frank calls the abbreviated recordings a “garbled version” of plaintiff’s original work. *Granz*, 198 F.2d at 589 (Frank, J., concurring).

Notice how the court reaches this moral right of integrity in a two-step process. First, the contract required that the recordings be attributed to plaintiff. This attribution puts plaintiff’s reputation in the listener’s mind. In contrast, anonymous recordings would not affect plaintiff’s reputation. Second, the court found an implied contractual term that prohibited sale of abbreviated recordings (and presumed other mutilations of plaintiff’s original work), because such abbreviations would harm plaintiff’s reputation. This two-step analysis makes the moral right of integrity a corollary of the moral right of attribution. In the court’s view, anonymously published works can not involve the moral right of integrity, because there is no named author whose reputation could be damaged. Further discussion of the relationship between attribution and integrity is found below, at page 42.

*Granz* is now famous for a long concurring opinion of Judge Frank, who began by mentioning American law in 1952:

I agree, of course, that, whether by way of contract or tort, plaintiff (absent his consent to the contrary) is entitled to prevention of the publication, as his, of a garbled version of his uncopyrighted product. This is not novel doctrine: Byron obtained an injunction from an English court restraining the publication of a book purporting to contain his poems only, but which included some not of his authorship. American courts, too, have enforced such a right. Those courts have also enjoined the use by another of the characteristics of an author of repute in such manner as to deceive buyers into erroneously believing that they were buying a work of that author. Those courts, moreover, have granted injunctive relief in these circumstances: An artist sells one of his works to the defendant who substantially changes it and then represents the altered material to the public as that artist’s product. Whether the work is copyrighted or not, the established rule is that, even if the contract with the artist expressly authorizes reasonable modifications (e.g., where a novel or stage play is sold for adaptation as a movie), it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original. Under the authorities, the defendant's conduct here, as my colleagues say, may also be considered a kind of 'unfair competition' or 'passing off.' .... *Granz v. Harris*, 198 F.2d 585, 589 (2dCir. 1952) (Frank, J., concurring) [5 footnotes omitted].

Judge Frank mentions moral rights of authors:

Plaintiff, in asking for such relief, relied in part not on the contract but on the doctrine of artists’ ‘normal right,’ [sic] a compendious label of a ‘bundle of rights’ enforced in many ‘civil law’ countries. Able legal thinkers, pointing out that American courts have already recognized a considerable number of the rights in that ‘bundle,’ have urged that our courts use the ‘moral right’ symbol. Those thinkers note that the label ‘right of privacy’ served to bring to the attention of our courts a common center of perspectives previously separated in the decisions, and that the use of that label induced further novel and valuable judicial perspectives.

To this suggestion there are these objections:

- a. 'Moral right' seems to indicate to some persons something not legal, something meta-legal.
- b. The 'moral right' doctrine, as applied in some countries, includes very extensive rights which courts in some American jurisdictions are not yet prepared to acknowledge; as a result, the phrase 'moral right' seems to have frightened some of those courts to such an extent that they have unduly narrowed artists' rights.
- c. Finally, it is not always an unmitigated boon to devise and employ such a common name. ....

*Granz v. Harris*, 198 F.2d 585, 590 (2dCir. 1952)(Frank, J., concurring) [6 footnotes omitted].

Judge Frank concludes:

Without rejecting the doctrine of 'moral right,' I think that, in the light of the foregoing, we should not rest decision on that doctrine where, as here, it is not necessary to do so. *Granz v. Harris* at 591 (Frank, J., concurring).

#### *Gilliam* (1976)

*Gilliam v. ABC*, 538 F.2d 14 (2dCir. 1976) (ABC television network enjoined from editing Monty Python television program) is probably the most famous case in the USA in which a court granted the equivalent to moral rights. The Monty Python group of writers and actors were very careful to specify permissible editorial revisions in their contract with the British Broadcasting Corporation (BBC). The BBC licensed the television programs to Time-Life for broadcast in the USA. Time-Life then licensed some programs to the American Broadcasting Company (ABC) for showing on their network. The BBC did *not* have the contractual right to modify the final recordings that it broadcast. Therefore, the BBC could not license anyone to make such modifications, because "a grantor may not convey greater rights than it owns". *Gilliam*, 538 F.2d at 21.

ABC made significant editorial omissions from the program, in order to insert commercials. ABC deleted material that it believed was either obscene, scatological, or otherwise offensive to Americans. *Gilliam*, 538 F.2d at 23. ABC took 90 minutes of original program and deleted a total of 24 minutes. *Gilliam*, 538 F.2d at 18.

When the Monty Python group saw the result of ABC's editing, they were "appalled". Monty Python sued for an injunction. Judge Lasker in the U.S. District Court in New York City denied a preliminary injunction and plaintiffs appealed. A three-judge panel of the U.S. Court of Appeals for the Second Circuit reversed the trial court and ordered Judge Lasker to issue the preliminary injunction. The opinion of the U.S. Court of Appeals is the only published opinion in this case.

The U.S. Court of Appeals characterized the deletions by ABC:

During the hearing on the preliminary injunction, Judge Lasker viewed the edited version of the Monty Python program broadcast on December 26 and the original, unedited version. After hearing argument of this appeal, this panel also viewed and compared the two versions. We find that the truncated version at times omitted the climax of the skits to which appellants' rare brand of humor was leading and at other times deleted essential elements in the schematic development of a story line.[FN12] We therefore agree with Judge Lasker's conclusion that the edited version broadcast by ABC impaired the integrity of appellants' work and represented to the public as the product of appellants what was actually a mere caricature of their talents. We believe that a valid cause of action for such distortion exists and that therefore a preliminary injunction may issue to prevent repetition of the broadcast prior to final determination of the issues.[footnote omitted]

[FN12.] A single example will illustrate the extent of distortion engendered by the editing. In one skit, an upper class English family is engaged in a discussion of the tonal quality of certain words as "woody" or "tinny." The father soon begins to suggest certain words with sexual connotations as either "woody" or "tinny," whereupon the mother fetches a bucket of water and pours it over his head. The skit continues from this point. The ABC edit eliminates this middle sequence so that the father is comfortably dressed at one moment and, in the next moment, is shown in a soaked condition without any explanation for the change in his appearance.

*Gilliam*, 538 F.2d at 25.

Monty Python owned the common-law copyright in the unpublished script, and the BBC owned the statutory copyright in the videotape that it broadcast. There was also a legal issue of the complicated contract between Monty Python and the BBC. The U.S. Court of Appeals summarized the copyright infringement claim:

We then reach the question whether there is a likelihood that appellants will succeed on the merits. In concluding that there is a likelihood of [copyright] infringement here, we rely especially on the fact that the editing was substantial, i. e., approximately 27 per cent of the original program was omitted, and the editing contravened contractual provisions that limited the right to edit Monty Python material. It should be emphasized that our discussion of these matters refers only to such facts as have been developed upon the hearing for a preliminary injunction. Modified or contrary findings may become appropriate after a plenary trial.

*Gilliam*, 538 F.2d at 19.

Instead of stopping at the copyright/contract claims, the U.S. Court of Appeals went further and recognized the moral right of integrity had an equivalent in the Lanham Act's prohibition against "false designation of origin":

It also seems likely that appellants will succeed on the theory that, regardless of the right ABC had to broadcast an edited program, the cuts made constituted an actionable mutilation of Monty Python's work. This cause of action, which seeks redress for deformation of an artist's work, finds its roots in the continental concept of *droit moral*, or moral right, which may generally be summarized as including the right of the artist to have his work attributed to him in the form in which he created it. See 1 M. Nimmer, COPYRIGHT at § 110.1.

American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors. Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law, *Goldstein v. California*, 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed.2d 163 (1973); *Mazer v. Stein*, 347 U.S. 201, 74 S.Ct. 460, 98 L.Ed. 630 (1954), cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent. Thus courts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as contract law, *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952) (substantial cutting of original work constitutes misrepresentation), or the tort of unfair competition, *Prouty v. National Broadcasting Co.*, 26 F.Supp. 265 (D.Mass. 1939). See Strauss, The Moral Right of the Author 128-138, in *STUDIES ON COPYRIGHT* (1963). Although such decisions are clothed in terms of proprietary right in one's creation, they also properly vindicate the author's personal right to prevent the presentation of his work to the public in a distorted form. See *Gardella v. Log Cabin Products Co.*, 89 F.2d 891, 895-96 (2d Cir. 1937); Roeder, The Doctrine of Moral Right, 53 Harv.L.Rev. 554, 568 (1940).

Here, the appellants claim that the editing done for ABC mutilated the original work and that consequently the broadcast of those programs as the creation of Monty Python violated the Lanham Act s 43(a), 15 U.S.C. § 1125(a). [footnote quoting statute] This statute, the federal counterpart to state unfair competition laws, has been invoked to prevent misrepresentations that may injure plaintiff's business or personal reputation, even where no registered trademark is concerned. See *Mortellito v. Nina of California*, 335 F.Supp. 1288, 1294 (S.D.N.Y. 1972). It is sufficient to violate the Act that a representation of a product, although technically true, creates a false impression of the product's origin. See *Rich v. RCA Corp.*, 390 F.Supp. 530 (S.D.N.Y. 1975) (recent picture of plaintiff on cover of album containing songs recorded in distant past held to be a false representation that the songs were new); *Geisel v. Poynter Products, Inc.*, 283 F.Supp. 261, 267 (S.D.N.Y. 1968).

These cases cannot be distinguished from the situation in which a television network broadcasts a program properly designated as having been written and performed by a group, but which has been edited, without the writer's consent, into a form that departs substantially from the original work. "To deform his work is to present him to the public as the creator of a work not his own, and thus makes him subject to criticism for work he has not done." Roeder, *supra*, at 569. In such a case, it is the writer or performer, rather than the network, who suffers the consequences of the mutilation, for the public will have only the final product by which to evaluate the work.[footnote omitted] Thus, an allegation that a defendant has presented to the public a "garbled," *Granz v. Harris*, *supra* (Frank, J., concurring), distorted version of plaintiff's work seeks to redress the very rights sought to be protected by the Lanham Act, 15 U.S.C. §1125(a), and should be recognized as stating a cause of action under that statute. See *Autry v. Republic Productions, Inc.*, 213 F.2d 667 (9th Cir. 1954); *Jaeger v. American Intn'l Pictures, Inc.*, 330 F.Supp. 274 (S.D.N.Y. 1971), which suggest the violation of such a right if mutilation could be proven.

*Gilliam*, 538 F.2d at 23-25.

I criticize this morphing of mutilation (moral right of integrity) into the moral right of attribution ("false designation of origin" under the Lanham Act) beginning at page 42, below.

In a concurring opinion, Judge Gurfein disputed the need for the Lanham Act claim, because copyright law was adequate:

The Copyright Act provides no recognition of the so-called *droit moral*, or moral right of authors. Nor are such rights recognized in the field of copyright law in the United States. See 1 NIMMER ON COPYRIGHT, § 110.2 (1975 ed.). If a distortion or truncation in connection with a use constitutes an infringement of copyright, there is no need for an additional cause of action beyond copyright infringement. *Id.* at § 110.3. An obligation to mention the name of the author carries the implied duty, however, as a matter of contract, not to make such changes in the work as would render the credit line a false attribution of authorship, *Granz v. Harris*, 198 F.2d 585 (2 Cir. 1952).

*Gilliam*, 538 F.2d at 26 (Gurfein, J., concurring).

There is a current controversy whether the use of the Lanham Act in *Gilliam* remains viable after the U.S. Supreme Court decision in *Dastar* in June 2003. This controversy has not yet been addressed by any U.S. Court of Appeals, as of 15 Oct 2011.

New York State common law has the fullest expression of the moral right of integrity in the USA, e.g., in *Preminger v. Columbia Pictures*. I wonder if this local state common law influenced the judges in *Gilliam*. Indeed, *Gilliam*, 538 F.2d at 23 cited *Preminger*, but only for the proposition “Courts have recognized that licensees are entitled to some small degree of latitude in arranging the licensed work for presentation to the public in a manner consistent with the licensee's style or standards.” And this is the only citation in *Gilliam* to an opinion of a New York State court. If New York State common law influenced the judges in *Gilliam*, they concealed it well.

other federal cases in 1970-92

- *Rich v. RCA Corp.*, 390 F.Supp. 530 (S.D.N.Y. 1975) (singer obtained injunction against record company's use of current photograph of singer on jacket of re-release of old songs).
- *Big Seven Music Corp. v. Lennon*, 554 F.2d 504, 512 (2d Cir. 1977) (John Lennon's reputation injured by release of “shoddy and fuzzy” sound recordings.). From the viewpoint of this essay, *Lennon* seems to involve the moral right of integrity.
- *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981) (removal of actor's name from film credits was valid claim under Lanham Act). From the viewpoint of this essay, *Smith* seems to involve the moral right of attribution;
- *Lish v. Harper's Magazine Foundation*, 807 F.Supp. 1090, 1106-1108 (S.D.N.Y. 1992) (Magazine published 52% of a confidential letter from a famous writer to his prospective students. Held that no cause of action existed under the Lanham Act for editorial omissions: “the published version of the Letter was representative of the original.” No evidence of damage to reputation.).

In addition, my essay on plagiarism at <http://www.rbs2.com/plag.pdf> cites 14 cases in which authors alleged “false designation of origin” under the Lanham Act. This line of cases came to an abrupt end in June 2003 with the U.S. Supreme Court decision in *Dastar v. Twentieth Century Fox*, 539 U.S. 23. My essay on plagiarism discusses *Dastar* and criticizes its reasoning and result.

### **New York State Courts**

There is a line of cases in New York State courts, in which an author sued a publisher for libel or breach of contract, and the author sometimes won.

#### *Clemens (1910)*

In 1910, a concurring judge in an appellate court in New York City wrote:

Even the matter of fact attitude of the law does not require us to consider the sale of the 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 man who sells a barrel of pork to another may pocket the purchase price and retain no further interest in what becomes of the pork. While an author may write to earn his living, and may sell his literary productions, yet the purchaser, in the absence of a contract which permits him so to do, cannot make as free a use of it as he could of the pork which he purchased. 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 the 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.

*Clemens v. Press Pub. Co.*, 122 N.Y.S. 206, 207-208 (App. 1910) (Seabury, J. concurring).

This was an early recognition that a contract for writing is different from a contract for commodity goods. The equivalent to moral rights of the author is apparently found — without explanation by the court — in the custom of reputable publishers. In this case, the appellate court ordered a new trial, and the result of the second trial is not reported. *Clemens* has been cited in: *Harms, Inc. v. Tops Music Enterprises, Inc.*, 160 F.Supp. 77, 83, n.22 (S.D.Cal. 1958) (“Courts will protect against (a) the omission of the author’s name unless, by contract, the right is given to the publisher to do so, ....”); and *Edison v. Viva Intern., Ltd.*, 421 N.Y.S.2d 203, 205 (N.Y.A.D. 1979) (quoted below).

*Ellis v. Hurst* (1910)

The trial court stated the facts:

“The White Mustang” and “In the Apache Country” were first published in a periodical called the *Argosy*, in 1889. They were published under the nom de plume “Lieutenant R. H. Jayne,” and were not copyrighted.

*Ellis v. Hurst*, 121 N.Y.S. 438, 439 (N.Y.Sup. 1910).

Without the permission of the author, Ellis, the Defendant published the stories and attributed them to Ellis. Ellis had been an author of “juvenile and historical works for more than 40 years, and his reputation as a writer has been established under his own name”, so his name on the books probably increased sales of the books.

Ellis sued for an injunction prohibiting Defendants from using Ellis’ name on books or in advertising. The judge granted a temporary injunction, because New York Civil Rights Law §§ 50-51 (1909) “authorizes one to prevent or restrain the use of his name or picture by another ‘for advertising purposes or for the purposes of trade’ without the written consent of such person.” *Ibid.* at 439.

Ten months later, a different trial court judge withdrew the injunction, because the use of Ellis’ name was truthful. *Ellis v. Hurst*, 128 N.Y.S. 144 (N.Y.Sup. 1910), *aff’d without opinion*, 130 N.Y.S. 1110 (N.Y.A.D. 1911).

From the viewpoint of this essay, the right to attribution is implicated. The author wanted to continue using his pseudonym with these stories, but the court denied him that right.

*Packard* (1923)

Packard wrote a fictional story, titled “The Iron Rider”, and sold the motion picture rights to that story to Fox. The contract stated that the advertising and screen credits for Fox’s movie would include Packard’s name. Fox produced a movie titled “Smiles are Trumps” and credited Packard. Packard sued Fox for changing the name of Packard’s story in the movie version. The appellate court said “The unauthorized use of plaintiff’s name in connection with a story of a different title was a distinct damage to the plaintiff.” *Packard v. Fox Film Corporation*, 202 N.Y.S. 164, 167 (N.Y.A.D. 1923). As with the *Curwood* case in federal court a year earlier (see page 9, above), the legal basis for the *Packard* decision is not clear.

*Ben-Oliel* (1929)

In a 1929 case, Plaintiff was a lecturer and a writer. Defendant was a newspaper who published an article falsely attributed to Plaintiff. The factual content of the article was false, which could harm Plaintiff’s “reputation as an authority” in Plaintiff’s field. The highest court in New

York State unanimously held that Plaintiff's Complaint had made a sufficient case for libel, and reversed the dismissal of Plaintiff's Complaint. *Ben-Oliel v. Press Pub. Co.*, 167 N.E. 432 (N.Y. 1929).

In a 1937 case, a magazine article was falsely attributed to plaintiff. Plaintiff recovered for libel. *Gershwin v. Ethical Pub. Co. Inc.*, 1 N.Y.S.2d 904 (N.Y.City Ct. 1937).

*Seroff* (1957)

In a 1957 case, an author sued a publisher for issuing a French translation of the author's work that harmed the author's reputation. A New York State trial court held that U.S. law recognized equivalents to moral rights:

Nevertheless, a right analogous to "moral right", though not referred to as such, has been recognized in this country and in the common law countries of the British Commonwealth so that in at least a number of situations the integrity and reputation of an artistic creator have been protected by judicial pronouncements. The express grounds on which common law protection has been given include libel, unfair competition, copyright, and the right of privacy, with some groping toward what Roeder has called "a tort theory of a personal sui generis nature." Martin A. Roeder: *The Doctrine of Moral Right*, 53 Harv.L.R. 554, 576; See also, Katz: *The Doctrine of Moral Right*, 24 So.Cal.L.R. 375; [citations to 8 cases omitted].  
*Seroff v. Simon & Schuster*, 162 N.Y.S.2d 770, 774 (N.Y.Sup.Ct. 1957), *aff'd without opinion*, 210 N.Y.S.2d 479 (App.Div. 1960).

Plaintiff's right to some relief under a right analogous to a "moral right" being established, we turn then to the question of this defendant's duty with relation to that right under the contract between the parties.  
*Seroff*, 162 N.Y.S.2d at 776.

On the facts of this case, the author could *not* hold publisher liable for damage to his reputation from a distorted translation of author's book.

*Clevenger* (1960)

In 1960, the highest court in New York State again held that a libel theory was available for acts that infringed the moral right of attribution. The facts of the case are simple. According to the complaint:

In 1922 [Plaintiff] wrote and published 'Clevenger's Annual Practice of New York', and the following year sold this work, together with copyright, to defendants. From 1923 to 1956 he edited the annual editions of the work, and 'by careful and competent petent annual Revision \* \* \* achieved state-wide reputation of being a reliable Editor of reliable guide to New York Practice'. In 1956 he 'terminated his editorship' and 'revoked his consent to use of his name as Editor of any later Edition thereof'.

Notwithstanding that termination and revocation, the published 1957 edition of the work stated on the title page, below the words 'Annually Revised', that it had been edited and annotated by plaintiff. ....

....

In 1959, 'without plaintiff's consent or approval', the work was published with a title page that read, in pertinent part, as follows:

CLEVENGER'S ANNUAL PRACTICE OF NEW YORK  
1959  
ANNUALLY REVISED

The 1959 edition was in fact revised by defendants' editorial staff, not by plaintiff, and it is alleged that "defendants purposely excluded from title page of 1959 Edition all names except plaintiff's name of 'Clevenger's' in order to mislead Lawyers to believe erroneously that plaintiff edited said 1959 Edition because they could see only the name 'Clevenger's' ".

The complaint further alleges that there were 'over 200 misleading Errors of omission and commission in Texts of Practice Acts and Court Rules' in the 1959 edition, which are specifically alleged by section and rule number, and which allegedly consisted of omitting parts of amended sections and rules, omitting names of counties authorized to collect fees, misdescribing amendments, omitting or misstating effective dates of sections added or amended, omitting many current citations, and misstating, misclassifying and misapplying annotations. By virtue of the misleading format of the title page, 'many Lawyers and Law Librarians' attributed these errors to plaintiff, causing him to feel disgraced, dishonored and humiliated, and irreparably impairing his 'reputation as Lawyer and Law Writer, laboriously built up by careful and competent work over a period of fifty years', with the result that he 'has lost all employment, for first time in his lifetime, and can no longer obtain employment' *Clevenger v. Baker Voorhis & Co.*, 168 N.E.2d 643, 644 (N.Y. 1960).

The highest court in New York State held that the complaint stated a cause of action for libel. The court cited *Ben-Oliel v. Press Pub. Co.*, 167 N.E. 432 (N.Y. 1929) as the leading case. The final result of *Clevenger* is not reported. Clevenger had sold his copyright to Defendants, and under the contract Defendants had the right to use Clevenger's name in the title of subsequent books. *Clevenger*, 199 N.Y.S.2d 358, 360 (N.Y.A.D. 1960).

Moral rights are not mentioned in *Clevenger*. Note the errors in the work sounds like a mutilation (i.e., moral right of integrity), but the action is really about the moral right of attribution, because defendant's work (including errors) was wrongfully attributed to plaintiff. Defendant had the legal right to create and to publish mutilated or erroneous text, but no right to attribute that defective text to an innocent writer.

*Preminger* (1966)

Owner of movie "Anatomy of a Murder" and its producer, Otto Preminger, applied for an injunction prohibiting cuts in the movie to make it fit television broadcast time with commercial interruptions. The plaintiffs apparently did *not* mention the moral right of integrity, but instead asserted:

- Unless enjoined, the complaint asserts, defendants will
- a) detract from the artistic merit of 'Anatomy of a Murder';
  - b) damage Preminger's reputation;
  - c) cheapen and tend to destroy 'Anatomy' 's commercial value;

- d) injure plaintiffs in the conduct of their business;
- e) falsely represent to the public that the film shown is Preminger's film.

*Preminger*, 267 N.Y.S.2d at 596. Held that plaintiffs had licensed the movie for showing on television, and "custom prevailing in the trade" allowed minor cuts to be made. *Preminger v. Columbia Pictures Corp.*, 267 N.Y.S.2d 594 (Sup. 1966), *aff'd without opinion*, 269 N.Y.S.2d 913 (N.Y.A.D. 1966) (one of five judges dissented with opinion), *aff'd without opinion*, 219 N.E.2d 431 (N.Y. 1966). However, in obiter dictum, the trial court suggested that if the cuts reduced the 161 minute movie to 100 minutes, that might be "mutilation", and an injunction might issue. 267 NYS2d at 603. Note that adapting a work from one medium to another involves some changes, and — even in France — judges are tolerant of changes that are "necessary".<sup>9</sup>

#### *Edison (1979)*

In the late 1970s, an author sued a publisher for alleged mutilation of the author's article. The publisher moved to dismiss the complaint, but the trial court denied the motion, and the appellate court affirmed. The appellate court quoted Justice Seabury's words in *Clemens*, 122 N.Y.S. 206 (which words were quoted above), and said "... evidence should be taken as to the connotation of the words 'edit' and 'change' in the context of the publishing industry." *Edison v. Viva Intern., Ltd.*, 421 N.Y.S.2d 203, 205 (App.Div. 1979). The appellate court in *Edison* wrote about moral rights of authors:

The term "moral right", although recognized in civil law countries, is not mentioned in our Copyright Act, nor is it expressly mentioned in the Universal Copyright Convention which came into force in the United States on September 16, 1955. Nevertheless, a right analogous to "moral right", though not referred to as such, has been recognized in this country and in the common law countries of the British Commonwealth so that in at least a number of situations the integrity and reputation of an artistic creator have been protected by judicial pronouncements. The express grounds, on which common law protection has been given, range from copyright to tort. (*Seroff v. Simon & Schuster*, 6 Misc.2d 383, 387, 162 N.Y.S.2d 770, 774, *aff'd*, 12 A.D.2d 475, 210 N.Y.S.2d 479.)

Where, however, the parties have entered into a contract of publication, plaintiff's so-called "moral right" is controlled by the law of contract (*Id.* at 388, 162 N.Y.S.2d 770; see also *Packard v. Fox Film Corporation*, 207 App.Div. 311, 313, 202 N.Y.S. 164, 165; 36 N.Y.Jur., Literary Property and Copyright, § 9, p.162). Consequently, plaintiff Edison's moral right to protection has been subsumed in his contractual right to seek redress for the alleged mutilation of his article. ....

*Edison*, 421 N.Y.S.2d at 206.

The final result is not reported.

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<sup>9</sup> Raymond Sarraute, "Current Theory on the Moral Right of Authors and Artists Under French Law," 16 American J. of Comparative Law 465, 481 (1968); Russell J. DaSilva, "Droit Moral and the Amoral Copyright," 28 Bulletin of the Copyright Society of the USA 1, 34-35 (Oct 1980).

*Huttenbach* (1988)

In the 1980s, Professor Huttenbach wrote a history book that described the "Riga Ghetto and the surrounding Nazi concentration camps in Latvia" during 1941-43. The Society of Survivors of the Riga Ghetto paid some of Huttenbach's expenses plus \$25 per interview of each of more than one hundred survivors, and provided unique historical documents. Huttenbach transferred his copyright to the Society. The contract between the Society and Huttenbach said:

The manuscript agreed upon will be published under the authorship of professor Henry R. Huttenbach, with the Society mentioned as sponsor and/or publisher.

After a protracted dispute about editing of the manuscript, the Society sued Prof. Huttenbach. The trial court held "... neither party may publish nor use the work without the full consent of the other." *Society of Survivors of the Riga Ghetto, Inc. v. Huttenbach*, 535 N.Y.S.2d 670, 675 (N.Y.Sup. 1988). The trial judge handed the parties a legal stalemate, apparently to force them to work together in order to preserve their investment in the manuscript.<sup>10</sup> The trial court judge briefly mentioned moral rights of authors:

The copyright law of most countries of the world, recognizes a so-called "moral right" (*droit moral*) that protects authors from modification of their works in such a manner as to affect the artistic impression of the work. While the moral right doctrine as such has never been a part of United States copyright law, the case *Edison v. Viva International*, 70 A.D.2d 379, 421 N.Y.S.2d 203 (1st Dept. 1979), implies that under certain circumstances an author's work may be entitled to protection.

*Society of Survivors of the Riga Ghetto, Inc. v. Huttenbach*, 535 N.Y.S.2d 670, 673-674 (N.Y.Sup. 1988).

These cases in New York State — from *Clemens* in 1910 to *Riga Ghetto* in 1988 — are still good law in New York State in September 2011. Unfortunately for authors, most defendants in the USA are *not* subject to New York State common law.

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<sup>10</sup> *Society of Survivors of Riga Ghetto v Huttenbach*, 535 N.Y.S.2d 670, 675 (N.Y.Sup. 1988) ("This Court would like to order both parties here to work together and revise the manuscript with the assistance of a mutually agreed upon editor inasmuch as the effort expended has been enormous and the research performed is extremely valuable and to a large extent not capable of being duplicated. .... The Court cannot mandate cooperation between reluctant parties.").

### Right of Disclosure/First Publication

As explained below, beginning at page 29, courts in the USA have generally rejected moral rights of authors. The one exception — the moral right of disclosure, called the “right of first publication” in the USA — is discussed in the following paragraphs.

In tracing the common law back to the 1700s, one begins with Blackstone’s COMMENTARIES:

There is still another species of property, which, being grounded on labour and invention, is more property reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke, and many others, to be founded on the personal labour of the occupant. And this is the right, which an author may be supposed to have in his own original literary compositions: so that no other person without his leave may publish or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he has clearly a right to dispose of that identical work as he pleases, and any attempt to take it from him, or vary the disposition he has made of it, is an invasion of his right of property.  
[all footnotes omitted]

Sir William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Vol. 2, Chapter 26, ¶8, pages 405-406 (1st ed. 1765). [http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk2ch26.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk2ch26.asp) Blackstone assigns the right of first publication to the author, because of the author’s “personal labour and invention” in producing “an original work”. This is probably a straightforward property rule. It is a stretch to find an author’s moral right in Blackstone’s explanation, because Blackstone is silent about the author’s personality. In the next paragraph, Blackstone mentions the Roman law that if a scribe writes on “the paper or parchment of another”, then the writing (dictation?) belongs to the person owning the paper or parchment, but “in works of genius and invention” the work belongs to the author.<sup>11</sup>

In 1991, the U.S. Court of Appeals in New York City traced the origin of the right of first publication back to Lord Mansfield in England in the year 1769.

The right of an author under the common law to have the sole right of first printing and publishing his work was settled early in England by Lord Mansfield writing for the majority in *Millar v. Taylor*, 4 Burrows 2303 (1769).

*Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 762 (2dCir. 1991).

Quoted by *Hamil America Inc. v. GFI*, 193 F.3d 92, 98 (2dCir. 1999).

In 2005, the highest court in New York State wrote about law in England:

Parliament’s passage of the Statute of Anne in 1709 (8 Anne ch. 19) ... broadened the concept of copyrights to include the ability of an author to decide whether a literary work would be published and disseminated to the public (referred to as the “right of first publication”) and, if distributed, how the work would be reproduced in the future.

....

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<sup>11</sup> *Ibid.* Last paragraph on page 406.

In the latter half of the 18<sup>th</sup> century, a recognition emerged that the creation of a literary work should vest rights in its author similar to the ownership rights in perpetuity associated with other forms of tangible property. .... .. did the Statute of Anne supplant the common law or did it provide additional rights and remedies that coexisted with the common law? The first definitive ruling on this question appears in *Millar v. Taylor* (98 Eng. Rep. 201, 4 Burr 2303 [KB 1769] ).

*Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250, 254-255 (N.Y. 2005).

More about *Millar v. Taylor* is at page 39, below.

Up to the year 1978, unpublished works were protected in the USA by common-law copyright (i.e., state law), while federal, statutory copyright protected<sup>12</sup> published works. Common-law copyright contains the legal right that an author (or the author's assignee/heir) should determine when and where the work would be first published. As with French moral rights (and also with ownership of tangible property in the USA), the common-law right of first publication is perpetual, ending only when the work is published. But different from French law, an author in the USA could assign his right of first publication. See, e.g.,

- *Wheaton v. Peters*, 33 U.S. 591, 655 (U.S. 1834) (Discussing *Donaldson v. Beckett*, 4 Burr. 2408 (H.L. 1774): “Whether at common law an author of any book or literary composition, had the sole right of first printing, and publishing the same for sale; and might bring an action against any person who printed, published and sold the same, without his consent. On this question there were eight judges in the affirmative, and three in the negative.”);
- *Woolsey v. Judd*, 4 Duer 379, 11 How. Pr. 49 (N.Y.SuperiorCt. 1855) (Writer of a letter has the sole right to decide whether or not to publish, and the author may seek an injunction preventing publication by the recipient.);
- *Palmer v. De Witt*, 2 Sickels 532, 47 N.Y. 532 (N.Y. 1872) (“The author of a literary work or composition has, by law, a right to the first publication of it. He has a right to determine whether it shall be published at all, and if published, when, where, by whom, and in what form. This exclusive right is confined to the first publication. When once published it is dedicated to the public, and the author has not, at common-law, any exclusive right to multiply copies of it or to control the subsequent issues of copies by others. The right of an author or proprietor of a literary work to multiply copies of it to the exclusion of others is the creature of statute.”);
- *Boucicault v. Hart*, 13 Blatchf. 47, 3 F.Cas. 983, 988 (C.C.N.Y. 1875) (“The author has the exclusive [common-law] right to the first publication of his work, but no exclusive right to multiply copies or control the subsequent issues. This latter right is the creation of the statute of the United States.”);

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<sup>12</sup> Protected only if several formalities were done: (1) work registered with the government, (2) a copyright notice was attached to every copy, and (3) deposit of two published copies of the work for the Library of Congress.

- *Sarony v. Burrow-Giles Lithographic Co.*, 17 F. 591, 593 (C.C.N.Y. 1883) (“At the common law an author had the sole right of first printing and publishing for sale his writings;[footnote omitted] yet, after such publication made by him, it has been doubted whether he possessed any property rights in the production which could be infringed by republication by a stranger.”), *aff’d on other grounds*, 111 U.S. 53 (1884);
- *Jewelers’ Mercantile Agency v. Jewelers’ Weekly Pub. Co.*, 49 N.E. 872 (N.Y. 1898) (“[A publisher of reference books], of course, cannot have at the same time the benefit of the copyright statute and also retain its common-law right. No proposition is better settled than that a statutory copyright operates to divest a party of the common-law right.”);
- *Bobbs-Merrill Co. v. Straus*, 147 F. 15, 18 (2dCir. 1906) (“The owner of the common-law copyright has a perpetual right of property and the exclusive right of first general publication, and may, prior thereto, enjoy the benefit of a restricted publication without forfeiture of the right of general publication.”);

In 1909, the U.S. Congress passed a major revision of the Copyright Act, part of which said:

**Rights of author or proprietor of unpublished work**

Nothing in this title shall be construed to annual or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

17 U.S.C. § 2 (enacted 1909, abolished 1978). Note that this statute explicitly states the common-law right of first publication: “the author ... of an unpublished work ... [has the right] to prevent the ... publication, or use of such unpublished work without his consent....”

- *Caliga v. Inter Ocean Newspaper Co.*, 215 U.S. 182, 188 (U.S. 1909) (“At common law, the exclusive right to copy existed in the author until he permitted a general publication.”);
- *Ferris v. Frohman*, 223 U.S. 424, 435 (U.S. 1912) (“The public representation of a dramatic composition, not printed and published, does not deprive the owner of his common-law right, save by operation of statute.”);
- *Loew’s Inc. v. Superior Court of Los Angeles County*, 115 P.2d 983, 984 (Cal. 1941) (“... the author has the right of first publication....”);
- *Pushman v. New York Graphic Society, Inc.*, 39 N.E.2d 249, 250-251 (N.Y. 1942);
- *Chamberlain v. Feldman*, 89 N.E.2d 863, 865 (N.Y. 1949) (Owner of unpublished manuscript by Samuel Clemens owns the paper, but not the right to publish the work.)

- *Stanley v. Columbia Broadcasting System*, 221 P.2d 73 (Calif. 1950);
- *Hemingway's Estate v. Random House, Inc.*, 244 N.E.2d 250, 254 (N.Y. 1968);
- *Zachary v. Western Publishing Co.*, 143 Cal.Rptr. 34 (Cal.App. 1977);
- *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564 (U.S. 1985) (“The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.”);
- In 1992, the U.S. Congress amended 17 U.S.C. § 107 to include “the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all of the above factors.” This new statute expanded fair use, and contracted an author’s right of first publication. One wonders if the congressmen who voted for this amendment understood that they were overturning more than two centuries of common law.
- *Greenfield v. Philles Records, Inc.*, 780 N.E.2d 166 (N.Y. 2002);
- *Capitol Records, Inc. v. Naxos of America, Inc.*, 372 F.3d 471, 477, n.4 (2dCir. 2004) (quoting *Palmer v. De Witt*, 47 N.Y. 532, 536-37 (1872));
- *Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250, 254-257, 263-264 (N.Y. 2005) (history of common-law right of first publication);
- *Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531 F.3d 962, 971-972 (9thCir. 2008) (Summarizing California common-law copyright.).

#### works created after 1977

Common-law copyright for works created after 31 Dec 1977 was abolished by the Copyright Act of 1976, which declared that federal copyright attached automatically when the work was “fixed in any tangible medium of expression,” 17 U.S.C. § 102(a), and which preempted state law, 17 U.S.C. § 301(a).

The Copyright Act of 1976 continued the right of first publication in 17 U.S.C. § 106(3). Because § 106(3) does *not* explicitly mention “first publication”, it is necessary to supply judicial interpretation that § 106(3) does include the right of first publication. See e.g.,

- *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 552 (U.S. 1985) (The Copyright Act of 1976 “also recognized for the first time a distinct statutory right of first publication, which had previously been an element of the common-law protections afforded unpublished works. The Report of the House Committee on the Judiciary confirms that ‘Clause (3) of section 106, establishes the exclusive right of publications.... Under this

provision the copyright owner would have the right to control the first public distribution of an authorized copy ... of his work.’ [House of Representatives Report Nr. 94-1476] at 62, U.S. CODE CONG. & ADMIN. NEWS 1976, p. 5675.”);

- *Salinger v. Random House, Inc.*, 811 F.2d 90, 94 (2dCir. 1987) (“... the 1976 Copyright Act preempted the common law of copyright, 17 U.S.C. § 301(a), and brought unpublished works under the protection of federal copyright law, which includes the right of first publication among the rights accorded to the copyright owner, *id.* § 106(3).”), *cert. denied*, 484 U.S. 890 (1987);
- *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 299 (3dCir. 1991) (“Indeed, the statutory definition of ‘publication’ is ‘the distribution of copies ... of a work to the public by sale or other transfer of ownership,’ 17 U.S.C. § 101, a definition which tracks the language of section 106(3). ‘Publication’ and the exclusive right protected by section 106(3), then, are for all practical purposes, synonymous.”), *cert. denied*, 502 U.S. 939 (1991);
- *Wright v. Warner Books, Inc.*, 953 F.2d 731, 735 (2dCir. 1991) (“Section 106 of the Copyright Revision Act of 1976 ..., 17 U.S.C. § 106, ‘confers a bundle of exclusive rights to the owner of the copyright,’ *Harper & Row*, 471 U.S. at 546, 105 S.Ct. at 2223, among them ‘the right of first publication.’ *Salinger v. Random House, Inc.*, 811 F.2d 90, 95 (2d Cir.), *cert. denied*, 484 U.S. 890, 108 S.Ct. 213, 98 L.Ed.2d 177 (1987); see 17 U.S.C. § 106(3).”);
- *Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc.*, 832 F.Supp. 1378, 1388 (C.D.Cal. 1993) (“By including all forms of transfer, not just sale, and prohibiting only transfers ‘to the public,’ Section 106(3) effectively embodies the right of first publication. 1 [Paul] Goldstein, [COPYRIGHT] § 5.5. It entitles the copyright owner to decide when, under what circumstances, and for what price he will release copies of his work to the public.”);
- *Atlantic Recording Corp. v. Howell*, 554 F.Supp.2d 976, 984 (D.Ariz. 2008) (“However, the definition of ‘publication’ provided by the statute is essentially a codification of case law concerning the effect of first publication on an author's intellectual property rights. *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 36 (1stCir. 2003) (citing 1 NIMMER ON COPYRIGHT, § 4.04 (2001)); *Siegel v. Time Warner Inc.*, 496 F.Supp.2d 1111, 1150 (C.D.Cal. 2007). It is not clear that the terms ‘publication’ and ‘distribution’ are synonymous outside the context of first publication, which was the subject of discussion in *Harper & Row*.”).

In a famous U.S. Supreme Court copyright case, the Court stated:

The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work. .... The Nation’s clandestine publication afforded no such opportunity for creative or quality control.

*Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564 (1985).

The right of first publication is vested in the author, and for the author to have “quality control” suggests the recognition of a moral right of the author.

moral right or property rule?

It is not clear why the right of first publication survived and flourished in the USA, while other moral rights mentioned by Lord Mansfield in *Millar v. Taylor* were rejected in the USA. None of the law review articles on moral rights that I have read, and none of the judicial opinions that I have read, hints at an explanation for the acceptance of the right of first publication in the USA in contrast with the rejection of all other moral rights. I suggest the following reason. The first publication was a critical moment in the progress of a manuscript created before 1978, because that was when statutory copyright began (or when statutory copyright was lost by failure to comply with formalities in the statute) and also when the author typically began to receive money for his/her work. Accordingly, the law needed to designate someone as having the legal right to decide when and where to publish. I suggest that right naturally fell on the author, because the author possessed the manuscript at the time the expression was written. Seen in this light, the right of first publication in the USA only accidentally coincides with the moral right of disclosure — the right of first publication in the USA is a straightforward property rule, having nothing to do with either an author’s personality or moral rights.

On 4 Nov 2011, I searched all federal and all state cases in the USA in the Westlaw database for the query:

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(first /4 (disclos! publish! publication)) /P (moral /2 (right droit))
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This search returned two cases, neither of which are relevant to the history of the right of first publication. This result seems to confirm that moral rights had no influence on the development of the right of first publication in the USA.

Further, a search of all federal cases and all state cases in Westlaw for the French word “divulgateion” returned 18 opinions, none of which are relevant to the history of the right of first publication for text.<sup>13</sup>

I conclude that the right of first publication in the USA developed independently of the moral right of first disclosure in France and Germany. The two legal rights reached the same result for different reasons.

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<sup>13</sup> The closest hit was *Massachusetts Museum Of Contemporary Art Foundation v. Büchel*, 565 F.Supp.2d 245, 257 (D.Mass. 2008) (“... Congress declined to include in VARA protection for the right most closely tied to the preliminary stages of an artist's work, the ‘right of divulgation’ or ‘right of disclosure.’ This right gives the author of a work ‘complete discretion to determine if and when his work is ready to be displayed to the public.’”), *aff'd in part*, 593 F.3d 38, 62 (1stCir. 2010) (“A separate moral right of disclosure (also known as the right of divulgation) protects an author’s authority to ‘prevent third parties from disclosing [his or her] work to the public without the author’s consent,’ and is not covered by VARA.”).

## Moral rights rejected by courts in USA

As explained above, courts in the USA occasionally recognize rights equivalent to some moral rights of authors. Prof. Nimmer notes that when courts in the USA recognize legal rights equivalent to some moral right, the court “never labels [its decision] ‘moral rights.’”<sup>14</sup> Courts in the USA have consistently either avoided or condemned the concept of moral rights of authors, as demonstrated by the following quotations in chronological order.

### *Vargas* (1947)

In 1947, the U.S. Court of Appeals in Chicago heard a case involving an artist, Vargas, who wanted his name displayed on his drawings that were published in *ESQUIRE* magazine. The court denied the artist’s request to enjoin reproduction of his drawings, because the contract between artist and publisher did not mention attribution, and the artist transferred *all* of his rights — including the copyright — to the publisher. The U.S. Court of Appeals wrote:

Plaintiff [i.e., Vargas] advances another theory which needs little discussion. It is predicated upon the contention that there is a distinction between the economic rights of an author capable of assignment and what are called ‘moral rights’ of the author, said to be those necessary for the protection of his honor and integrity. These so-called ‘moral rights,’ so we are informed, are recognized by the civil law of certain foreign countries. In support of this phase of his argument, plaintiff relied upon a work by Stephen P. Ladas entitled *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* (page 575, et seq.). It appears, however, that the author’s discussion relied upon by plaintiff relates to the law of foreign countries. As to the United States, Ladas in the same work states (page 802):

“The conception of ‘moral rights’ of authors so fully recognized and developed in the civil law countries has not yet received acceptance in the law of the United States. No such right is referred to by legislation, court decision or writers.”

What plaintiff in reality seeks is a change in the law of this country to conform to that of certain other countries. We need not stop to inquire whether such a change, if desirable, is a matter for the legislative or judicial branch of the government; in any event, we are not disposed to make any new law in this respect.

*Vargas v. Esquire*, 164 F.2d 522, 526 (7th Cir. 1947).

As a matter of law in the USA, there is no moral right of attribution. Unless the contract between author and publisher specifically says the author will be identified in the publication, the publisher is free to omit the author’s name. See, e.g., *Jones v. American Law Book Co.*, 109 N.Y.S. 706 (N.Y.A.D. 1908); *American Law Book Co v. Chamberlayne*, 165 F. 313 (2d Cir. 1908); *DeBekker v. Stokes Co.*, 157 N.Y.S. 576 (N.Y.A.D. 1916) (publisher breached contract), *aff’d and questions answered*, 114 N.E. 1064 (N.Y. 1916); *Harris v. 20th Century Fox Film Corp.*, 43 F.Supp. 119 (S.D.N.Y. 1942). *Vargas* is in the mainstream of American law.

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<sup>14</sup> Melville B. Nimmer, “Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law,” 19 *Stanford Law Review* 499, 520 (Feb 1967).

*Shostakovich* (1948)

In an action in New York State court by three composers in the Soviet Union to prevent their *uncopyrighted* compositions from being used in a movie with an anti-Soviet theme, the court denied the composers' motion for an injunction. *Shostakovich v. 20<sup>th</sup> Century-Fox*, 80 N.Y.S.2d 575 (N.Y.Sup. 1948), *aff'd*, 87 N.Y.S.2d 430 (N.Y.App.Div. 1949) (two-sentence appellate opinion). The trial court wrote:

The wrong which is alleged here is the use of plaintiffs' music in a moving picture whose theme is objectionable to them in that it is unsympathetic to their political ideology. The logical development of this theory leads inexcapably [sic] to the Doctrine of Moral Right. (53 HARVARD LAW REVIEW<sup>15</sup>). There is no charge of distortion of the compositions nor any claim that they have not been faithfully reproduced. Conceivably, under the doctrine of Moral Right the court could in a proper case, prevent the use of a composition or work, in the public domain, in such a manner as would be violative of the author's rights. The application of the doctrine presents much difficulty however. With reference to that which is in the public domain there arises a conflict between the moral right and the well established rights of others to use such works. *Clemens v. Belford Clark & Co.*, [14 F. 728 (1883)]. So, too, there arises the question of the norm by which the use of such work is to be tested to determine whether or not the author's moral right as an author has been violated. Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be? In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined. Quite obviously therefore, in the absence of any clear showing of the infliction of a wilful injury or of any invasion of a moral right, this court should not consider granting the drastic relief asked on either theory. The motion is accordingly denied in all respects.

*Shostakovich*, 80 N.Y.S.2d 575, 578-579 (1948).

One must wonder if cold-war politics played a part in denying justice to the Russian composers. The composers also sued in France, but won there. *Soc. Le Chant de Monde v. Soc. Fox Europe et Soc. Fox Américaine Twentieth Century*, 1 Gazette du Palais 191 (13 Jan 1953), *aff'd*, D.A. Jur. 16, 80 (Cour d'appel Paris 1954).

(1962 - 1997)

In 1962, the U.S. Court of Appeals in New York City wrote:

There is apparently a right under continental law, which is similar to the 'property right' asserted by petitioner, the so-called 'moral right.' See e.g., Strauss, *The Moral Right of the Author*, 4 Am.J.Comp.[Law] 506 (1955). This seems to encompass the right to prevent the 'distortion, mutilation or other alteration' of an author's work. See art. 6*bis*, §(1) of the Brussels Convention (1948) [a revision of Berne Convention]; and that right may pass to the heirs of the author in certain circumstances. See art. 6*bis*, §(2) of the Brussels Convention

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<sup>15</sup> Note by Standler: The opinion omits the page number, but an earlier citation in the opinion makes clear that the article is by Roeder and begins at page 554.

(1948). Whether it would permit the heirs of Glenn Miller to protect ‘The Glenn Miller Story’ is unclear. But, in any event, the moral right, as such, is not recognized in this country. *Miller v. Commissioner of Internal Revenue*, 299 F.2d 706, 709, n.5 (2dCir. 1962), *cert. denied*, 370 U.S. 923 (1962).

In 1968, the U.S. District Court in New York City wrote:

However, the doctrine of moral right is not part of the law in the United States, [citing two cases], except insofar as parts of that doctrine exist in our law as specific rights — such as copyright, libel, privacy and unfair competition.

*Geisel v. Poynter Products, Inc.*, 295 F.Supp. 331, 339, n.5 (S.D.N.Y. 1968).

In 1976, the U.S. Court of Appeals in New York City wrote in a landmark case:

American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors. ....

*Gilliam v. American Broadcasting Companies, Inc.*, 538 F.2d 14, 24 (2dCir. 1976).

Quoted with approval in *Jacobsen v. Katzer*, 535 F.3d 1373, 1381 (Fed.Cir. 2008). This quotation is taken out of context in *Gilliam*, which does recognize the moral right to integrity.

In 1987, Judge Easterbrook of the U.S. Court of Appeals in Chicago wrote:

But no jurisdiction has created the sort of moral right Weinstein invokes, let alone created any moral right through judicial decision. A federal court is not about to foist so novel a principle on Illinois. There is no reason to suspect that the courts of Illinois are just about to adopt an approach that no American jurisdiction follows as a general matter. [citing two cases]

*Weinstein v. University of Illinois*, 811 F.2d 1091, 1095, n.3 (7thCir. 1987).

A former law student sued a law review for allegedly mutilating the author’s work with “numerous alleged substantive and typographical errors”. The U.S. District Court dismissed the claim “because the law in this Circuit does not recognize an author’s common law ‘moral rights’ to sue for an alleged distortion of his written work...,” and the U.S. Court of Appeals affirmed. *Choe v. Fordham Univ. School of Law*, 920 F.Supp. 44 (S.D.N.Y. 1995), *aff’d*, 81 F.3d 319 (2dCir. 1996) (per curiam). Later cases followed *Choe*: *Baker v. Urban Outfitters, Inc.*, 254 F.Supp.2d 346, 357 (S.D.N.Y. 2003); *Bach v. Forever Living Products U.S., Inc.*, 473 F.Supp.2d 1110, 1121 (W.D.Wash. 2007) (“Federal courts do not recognize ‘moral rights’ to sue for distortion of an author’s written work. [citing *Choe*]”).

In 1997, Judge Easterbrook of the U.S. Court of Appeals in Chicago wrote:

Until recently it was accepted wisdom that the United States did not enforce any claim of moral rights; even bowdlerization of a work was permitted unless the modifications produced a new work so different that it infringed the exclusive right under § 106(2).

*Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7thCir. 1997) (Easterbrook, J.).

Easterbrook then notes that Congress passed The Visual Artists Rights Act of 1990, 17 U.S.C. § 106A.. Quoted with approval in *Cort v. St. Paul Fire and Marine Ins. Companies, Inc.*, 311 F.3d 979, 985 (9thCir. 2002).

In 1997, Judge Richard Posner of the U.S. Court of Appeals in Chicago wrote:

If a joint work is marred by errors reflecting unfavorably on his coauthor, with quantifiable adverse effects on the coauthor's career, the coauthor might conceivably have some legal remedy, but it wouldn't be under the Copyright Act. We don't know what it would be under: possibly the law of contracts; in Europe it might be a violation of the author's "moral right" (*droit moral*), the right to the integrity of his work; and there are glimmers of the moral-rights doctrine in contemporary American copyright law.

*Seshadri v. Kasraian*, 130 F.3d 798, 803 (7th Cir. 1997).

#### *Zyla* (2004)

A case in the year 2004 clearly shows the absence of the moral right of attribution in the USA. Gail Zyla was the co-author of the second and third editions of a textbook on nutrition. After a dispute with the publisher, Zyla withdrew as co-author of the fourth edition. When the fourth edition was published, Zyla saw that her work was included in the fourth edition "without her permission and without appropriate attribution." *Zyla*, 360 F.3d at 246. The U.S. Court of Appeals summarized the litigation:

Zyla's suit in federal court sought damages and royalties, asserting seven causes of action: (1) copyright infringement; (2) violation of the Lanham Act, 15 U.S.C. § 1125(a); (3) breach of contract by Struble [the principal author of all four editions]; (4) breach of contract by Thomson [publisher]; (5) a petition for a declaration voiding an agreement signed by Zyla that reduced the royalties to which she was entitled for the fourth edition to 12.5%; (6) intentional interference with advantageous relations by Struble; and (7) violation of Mass. Gen. Laws Ann. ch. 93A, §§ 2 and 11 [unfair and deceptive trade practice]. After discovery, the district court entered summary judgment for defendants on all claims. [*Zyla v.*

*Wadsworth*, 2003 WL 21038056 (D.Mass. 2003)] *Zyla* appeals. We affirm. *Zyla v. Wadsworth, Div. of Thomson Corp.*, 360 F.3d 243, 246 (1st Cir. 2004).

Multiple causes of actions are desirable, because there is no clearly established legal right for an author to have his/her work attributed to him/her.

The U.S. Court of Appeals summarized the facts:

The fourth edition was published in August 2000, with Struble [the principal author of the three previous editions] listed as the sole author. Zyla bought a copy in February 2001 and says that she discovered then, to her surprise, that the fourth edition copied (1) her line edits to chapters one and two; (2) her definitions of terms used in those chapters; (3) a section that she had written on dietary reference intakes; (4) her revisions to the "Nutrition Action" sections of chapters one and four; (5) her drawing of a shopping cart; and (6) her caption for a photograph. Zyla received a copyright registration in those materials two months later, on April 6, 2001. In her registration application, she described the materials as a derivative work of the third edition. After obtaining the registration, Zyla called and wrote to Thomson [the publisher] and Struble, telling them that they had infringed her copyright.

Zyla was also displeased with the acknowledgments section to the fourth edition, which contained a statement that "I [Struble] am grateful for the work that Gail Zyla contributed to the second and third editions of this text; her insights are reflected in this new edition, still."

Zyla felt that this statement falsely implied that she had made no contribution to the fourth edition.

*Zyla*, 360 F.3d at 248-249.

Zyla's copyright claim failed because, during the preparation of the third edition, she had signed a written contract that assigned "all present and future copyrights in the [third edition] (including revised editions of the [third edition])" to the publisher. *Zyla*, 360 F.3d at 250.

Zyla's Lanham Act claim failed, because of the U.S. Supreme Court holding in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). *Zyla*, 360 F.3d at 251-252.

This would be a much simpler case — and perhaps winnable by Zyla — if the law in the USA recognized the moral right of attribution. The word "moral" appears nowhere in either the District Court's opinion or in the First Circuit's opinion. *Zyla v. Wadsworth*, 2003 WL 21038056 (D.Mass. 2003), *aff'd*, 360 F.3d 243 (1stCir. 2004). I am sympathetic to Zyla's claim for attribution, because her work appeared in the fourth edition that did not have her name as co-author.

A similar case, involving the co-author of a medical textbook, reached the same result as *Zyla*, again showing that an author has no right of attribution in the USA. *Vogel v. Wolters Kluwer Health, Inc.*, 630 F.Supp.2d 585 (M.D.N.C. 2008).

#### conclusion

As these brief quotations make clear, the moral rights of authors of books and technical papers are nonexistent in the USA.

## Discussion

Recognition of the moral rights of authors in the law of the USA would provide authors an important tool to fight such unjust behavior by others, who often have an advantage in rank, power, or authority. In writing this, I am thinking of supervisors who add their name to their subordinate's creative work, perhaps also deleting the name(s) of the subordinates.

author vs. publisher

There are several way a publisher can harm an author:

1. An author submits a carefully prepared final draft, which contains no typographical errors and no misspelt words. The editor and typesetter at a journal or book publisher can make a shambles of the author's work, by introducing errors in both grammar and content, substituting homonyms, misspelling words, .... The published version can be an embarrassment to the author.
2. The publisher of a book, who owns the copyright in the text, can authorize derivative works (e.g., translations, revised versions) without the approval of the original author.
  - a. If the original author's name appears on a bad derivative work, that author will be embarrassed by the poor quality of the work.
  - b. If the original author's name does not appear on a good derivative work, that author receives no public recognition for his earlier work.
  - c. A publisher can allow one of the original author's enemies to use substantial amounts of the original author's work in a new book. The result might be harmful to the original author's reputation.

The real problem is that all of the power and control is in the hands of the stronger party (e.g., publisher or employer), who is then in a position to abuse or exploit the weaker party (e.g., author).

Moral rights *could* be included in a carefully drafted contract. However, in reality, any written contract is likely to be drafted by the stronger party and offered to the weaker party as a Hobson's choice, without the opportunity for bargaining. A written contract is unable to change this imbalance of power, or the consequences that flow from the exploitation of the weaker party.

## author vs. plagiarist

Current copyright law in the USA does *not* allow an author to sue a plagiarist when either:

1. the plagiarist only copied a few paragraphs, which copying is probably legally justified under the “fair use” doctrine,
2. the plagiarist copied mostly facts and/or ideas, which are not protected by copyright law in the USA, despite being laboriously collected by an author, or
3. the author does not personally own the copyright (e.g., author’s copyright was transferred to employer or publisher, work of the U.S. Government, work-for-hire, or author disclaimed copyright).

See my separate essay on plagiarism at <http://www.rbs2.com/plag.pdf> . In the context of academic works, the author may not object to the copying of some text, equations, or diagrams. Instead, the author objects to the absence of a citation to the author’s original work. This invokes the moral right of attribution (“droit à la paternité”). As explained in my essay on plagiarism, this moral right of attribution was sometimes recognized in law in the USA during the 1980s and 1990s under the legal theory “false designation of origin” in the Lanham Act. Sadly, this equivalent to a moral right was extinguished in June 2003 by the U.S. Supreme Court in *Dastar*.

Despite many articles in legal journals about plagiarism, it is *not* clearly recognized by attorneys in the USA that the moral right of attribution would be most logical way to challenge plagiarism in court. However, several articles about moral rights have mentioned plagiarism.<sup>16</sup>

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<sup>16</sup> Exceptions are Martin A. Roeder, “The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators,” 53 Harvard Law Rev. 554, 562 (Feb 1940) (“Out-and-out plagiarism presents at once the most obvious violation of [the right to paternity]....”); William Strauss, “The Moral Right of the Author,” 4 American J. of Comparative Law 506, 508 (Autumn 1955); Russell J. DaSilva, “Droit Moral and the Amoral Copyright,” 28 Bulletin of the Copyright Society of the USA 1, 27 (Oct 1980) (“If an author is quoted or cited in another work, he has a right to have his name appear with the quote or citation.”).

### Why the USA hates “moral rights”

The phrase “moral rights” in English suggests that the rights are somehow *not* legal, but are moral or ethical.<sup>17</sup> Historically, the phrase “moral rights” comes from the French term “droit moral”, in which “droit” was translated and “moral” was not translated. Back in 1938, Stephen P. Ladas suggested the German word Urheberpersönlichkeitsrecht<sup>18</sup> — the right of the author’s personality — is a more accurate description than “moral rights”,<sup>19</sup> but that German phrase was apparently too lengthy to become popular amongst American lawyers.<sup>20</sup> The continuing use of a literally *inaccurate* phrase, “moral rights”, to describe these rights has probably hindered the adoption of these rights in the USA.<sup>21</sup> However, the English-language version of the Bern Convention (Rome 1928, and subsequent) uses the phrase “moral rights”,<sup>22</sup> which would make it confusing to change nomenclature now.

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<sup>17</sup> See, e.g., *Granz v. Harris*, 198 F.2d 585, 590 (2d Cir. 1952) (Frank, J., concurring) (“ ‘Moral right’ seems to indicate to some persons something not legal, something meta-legal.”).

<sup>18</sup> This German noun is the concatenation of three German nouns: (1) Urheber, (2) Persönlichkeits, and (3) Recht. The Urheber is the creator or author. Persönlichkeit is personality, the final s is the genitive ending. Recht is law. Urheberrecht — without Persönlichkeit — is copyright law. Persönlichkeitsrecht — without Urheber — is privacy law.

<sup>19</sup> Stephen P. Ladas, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY*, Vol. 1, § 272, p. 575 (1938) (citing unnamed “Germans”). See also: Martin A. Roeder, “The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators,” 53 *Harvard Law Rev.* 554, 555 (Feb 1940); Arthur S. Katz, “The Doctrine of Moral Right and American Copyright Law,” 24 *SOUTHERN CALIFORNIA LAW REVIEW* 375, 390 (July 1951) (citing Smoschewer in Germany in 1930); Roberta Rosenthal Kwall, “Copyright and the Moral Right: Is an American Marriage Possible?,” 38 *VANDERBILT LAW REVIEW* 1, 3, n.6 (Jan 1985); Edward J. Damich, “The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors,” 23 *Georgia Law Review* 1, 6 (Fall 1988) (Dr. Damich uses “personal rights” instead of “moral rights”).

<sup>20</sup> One could reduce the compound German noun to the simple acronym, UPR.

<sup>21</sup> See, e.g., Sidney A. Diamond, “Legal Protection for the ‘Moral Rights’ of Authors and Other Creators,” 68 *Trademark Reporter* 244, 244 (1978) (“... the doctrine [of moral rights] might well have received a warmer welcome in the United States if it had been referred to [as ‘right of the author’s personality’].”); *Granz v. Harris*, 198 F.2d 585, 590 (2d Cir. 1952) (Frank, J., concurring) (“The ‘moral right’ doctrine, as applied in some countries, includes very extensive rights which courts in some American jurisdictions are not yet prepared to acknowledge; as a result, the phrase ‘moral right’ seems to have frightened some of those courts to such an extent that they have unduly narrowed artists’ rights.”).

<sup>22</sup> Martin A. Roeder, “The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators,” 53 *Harvard Law Rev.* 554, 555 (Feb 1940).

Writers of law review articles in the USA about “moral rights” often contrast (a) civil law nations<sup>23</sup> that recognize moral rights with (b) common-law nations<sup>24</sup> that do not recognize moral rights. Because the USA is a common-law nation, the USA seems to appropriately reject moral rights of authors, but this gives the wrong answer for the wrong reason!<sup>25</sup> This kind of us vs. them polarization encourages a false dichotomy between civil law nations and common-law nations. Moreover, the dichotomy is factually wrong:

1. Canada (a common-law nation) has recognized moral rights of authors in statute since 1921, while Switzerland (a civil-law nation) recognized moral rights only since the 1990s.<sup>26</sup>
2. In France moral rights were created by judges in the 1800s and early 1900s, but not included in statute until 1957 — even in a civil-law nation like France, moral rights were created and propagated in the common law.<sup>27</sup>
3. Moral rights of authors are compatible with law in Anglo-American nations — Canada,<sup>28</sup> Australia,<sup>29</sup> and the U.K.<sup>30</sup> now include moral rights in their copyright statutes.

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<sup>23</sup> European nations.

<sup>24</sup> Anglo-American nations.

<sup>25</sup> See, e.g., *Moakley v. Eastwick*, 666 N.E.2d 505, 508 (Mass. 1996) (In a case involving a Massachusetts statute giving moral rights to an artist: “According to a commentator, the Act follows similar legislation in the States of California and New York ‘in attempting to graft onto a generally inhospitable common law tradition the civil law concept of *droit moral*, whereby a creative artist retains certain inalienable rights with respect to his or her creation before and after publication, display or sale’ (footnote omitted). [Vance R.] Koven, *Observations on the Massachusetts Art Preservation Act*, 71 MASS.L.REV. 101, 101 (June 1986).”) Koven’s footnote 4 cites two articles: an article by Roeder “but cf.” an article by Treece. Koven is correct that some lawyers in the USA have asserted moral rights are not compatible with common law. However, as explained in this essay, I believe the issue of “common-law tradition” is *not* relevant to adoption of moral rights.

<sup>26</sup> Cyril P. Rigamonti, “Deconstructing Moral Rights,” 47 *Harvard International Law J.* 353, 354, n.6 (Summer 2006). Nonetheless, Rigamonti believes it is a useful generalization. William Strauss, “The Moral Right of the Author,” 4 *American J. of Comparative Law* 506, 519 (Autumn 1955) (quoting Canadian Copyright Act of 1921).

<sup>27</sup> Raymond Sarraute, “Current Theory on the Moral Right of Authors and Artists Under French Law,” 16 *American J. of Comparative Law* 465, 465-466, 478 (1968); John Henry Merryman, “The Refrigerator of Bernard Buffet,” 27 *Hastings Law J.* 1023, 1026 (May 1976).

<sup>28</sup> Act Respecting Copyright, § 12(7) (4 June 1921).  
Copyright Act of 1985, § 14.1-.2 and § 28.1-2.

<sup>29</sup> Copyright Act of 1968, Part IX, Sections 189-195 (27 June 1968, amended 21 Dec 2000, 16 Aug 2004).

<sup>30</sup> Copyright, Designs and Patents Act 1988, Part I, Chapter IV, Sections 77-89 (15 Nov 1988).

This discussion *should* be about the advantages and disadvantages of moral rights of authors, *not* about civil-law nations vs. common-law nations.

Related to the previous paragraph is the intolerance in the USA by many politicians towards adopting foreign law, as if use of foreign law in the USA would somehow contaminate the USA and impair our freedom. This isolationism is in sharp contrast to science, engineering, and medicine, where discoveries and inventions in one nation rapidly spread worldwide.

The process of making and passing laws in the USA is often dominated by lobbying by well-financed special-interest groups. In copyright law, motion picture studios and book publishers can lobby against moral rights of authors, out of fear that more legal rights of authors will complicate life for movie studios and publishers. The community of authors, including professors at research-oriented universities, is financially poor and lacks political lobbying. In this respect, the USA has the best statutes that money can purchase.

Writing in 1940, Roeder explained that objections to moral rights by “motion picture producers and other large exploiters of creative works” was one of the main reasons why the USA had then not agreed to the Berne Convention.<sup>31</sup> In 1955, Strauss, a legal advisor to the U.S. Copyright Office, called moral rights in the Berne Convention “one of the principal obstacles to adherence by the United States”, although Strauss cited American cases that recognized the equivalent of some moral rights.<sup>32</sup> In 1967, Prof. Melville Nimmer said moral rights of authors “presents one of the most delicate issues bearing upon possible United States accession to the Berne Convention.”<sup>33</sup> Finally, in March 1989, the USA joined the Berne Convention — but, as noted in this essay, with *incomplete* recognition of rights in the USA equivalent to moral rights in France.

Writing in 1951, Katz gave two reason why judges in the USA have not recognized moral rights: (1) ignorance, and (2) stare decisis.<sup>34</sup> The ignorance of judges (and legislators) is helped by the fact that the phrase “moral rights” is literally inaccurate, as explained above.

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<sup>31</sup> Martin A. Roeder, “The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators,” 53 Harvard Law Rev. 554, 558 (Feb 1940).

<sup>32</sup> William Strauss, “The Moral Right of the Author,” 4 American J. of Comparative Law 506, 506 (Autumn 1955).

<sup>33</sup> Melville B. Nimmer, “Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law,” 19 Stanford Law Review 499, 518 (Feb 1967).

<sup>34</sup> Arthur S. Katz, “The Doctrine of Moral Right and American Copyright Law,” 24 Southern California Law Review 375, 410-411 (July 1951).

Katz traced the origin of moral rights to an opinion by Lord Mansfield in *Millar v. Taylor*, 98 Eng.Rep. 201, 251-252 (K.B. 1769).<sup>35</sup> The opinion in *Millar* could have been the beginning of common-law moral rights in Anglo-American law, but it was tacitly overruled by *Donaldson v. Beckett*, 1 Eng.Rep. 837 (H.L. 1774), which recognized that copyright was statutory, not common law.<sup>36</sup> Courts in the USA followed *Donaldson*, so we continue to wait for the U.S. Congress to write moral rights into the U.S. Copyright Act. Meanwhile, injustices against authors accumulate, but the current U.S. law gives no clear relief.

### **My comments of adoption of moral rights in the USA**

We do not need to adopt *all* of the moral rights specified in French law. Indeed, the Berne Convention only adopts *two* moral rights: attribution and integrity. As an advocate against plagiarists, I really want to see the USA adopt the moral right of attribution. The fact that some moral rights in France (e.g., right to withdraw or retract, or the right to reply to criticism) might give an American congressman heartburn is no reason to reject *all* of the French moral rights.

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<sup>35</sup> Arthur S. Katz, "The Doctrine of Moral Right and American Copyright Law," 24 Southern California Law Review 375 , 378-380(July 1951).

<sup>36</sup> Arthur S. Katz, "The Doctrine of Moral Right and American Copyright Law," 24 Southern California Law Review 375, 385 (July 1951) ("... the nascent doctrine of moral right in English copyright law was dealt a stunning blow [in *Donaldson v. Becket*.]"); Sidney A. Diamond, "Legal Protection for the 'Moral Rights' of Authors and Other Creators," 68 Trademark Reporter 244, 250 (1978) (quoting Katz); Susan P. Liemer, "How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright," 5 John Marshall Review Intellectual Property Law 1, 31 (Fall 2005).

## duration

The U.S. Constitution specifically restricts copyright law to “limited times”, which seems to conflict with the perpetual moral rights. I suggest trimming future moral rights in the USA to duration of the author’s life. Moral rights protect the reputation of an author, and — by analogy with libel law<sup>37</sup> and privacy law<sup>38</sup> — moral rights should end with the death of the author. Moreover, it is difficult to imagine heirs of an author suing under moral rights, except possibly in the rare works that have continuing significant royalty payments after an author’s death. When the royalty payments end at 70 years after an author’s death, there may be no heirs alive who remember the author and want to litigate moral rights to protect the author’s reputation, honor, etc. In my opinion, the difference between moral rights for the author’s life and perpetual moral rights may not have practical significance, however the perpetual moral rights may offend the U.S. Constitution. In other words, we should be open to compromise on duration, in order to get some moral rights in the USA.

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<sup>37</sup> *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 940, n.1 (Tex. 1988) (“While one cannot bring a cause of action for the defamation of a person already dead, one who is alive while he is defamed and later dies, has a cause of action for defamation which survives his death.”); *Gugliuzza v. K.C.M.C., Inc.*, 606 So.2d 790, 792, n.4 (La. 1992) (“In the United States, the common law rule denying a cause of action for defamation of a dead person has been uniformly followed in every jurisdiction which has addressed this issue. Note, *Dead But Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX.L.REV. 1525, n. 2 (1989); and B. Sanford, LIBEL AND PRIVACY § 4.4, at 101, n. 37 (2nd ed. 1991).”). RESTATEMENT (SECOND) OF TORTS (1977), § 560 (“One who publishes defamatory matter concerning a deceased person is not liable either to the estate of the person or to his descendants or relatives.”).

But see *Moyer v. Phillips*, 341 A.2d 441 (Pa. 1975) (Statute terminating defamation litigation on death of either party is unconstitutional, as a denial of equal protection of law.); *Pennsylvania v. Armao*, 286 A.2d 626 (Pa. 1972) (Invalidating criminal libel statute: 18 P.S. § 4412 (enacted 1939) (“Whoever writes, prints, publishes or exhibits any malicious or defamatory libel, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, thereby exposing him to public hatred, contempt or ridicule, is guilty of libel, a misdemeanor, ....”).

<sup>38</sup> *Swickard v. Wayne County Medical Examiner*, 475 N.W.2d 304, 309 (Mich. 1991) (Following rule in Prosser on Torts, 4th ed., § 117: “The right [of privacy] is not assignable, and ... there is no common law right of action for a publication concerning one who is already dead.”); *Cordell v. Detective Publications, Inc.*, 419 F.2d 989, 990-991 (6thCir. 1969) (“Unauthorized public disclosure of private matters .... lapses with the death of the person who enjoyed [the privacy right], and one cannot recover for this kind of invasion of the privacy of a relative, no matter how close the relationship. [two footnotes citing many cases omitted]”); *Maritote v. Desilu Productions, Inc.*, 230 F.Supp. 721 (N.D.Ill 1964), *aff’d*, 345 F.2d 418 (7thCir. 1965), *cert. den.*, 382 U.S. 883 (1965). See also RESTATEMENT SECOND OF TORTS, § 652I (“Except for the appropriation of one’s name or likeness, an action for invasion of privacy can be maintained only by a *living* individual whose privacy is invaded.” [italics added]).

Incidentally, the French solved the problem of no plaintiffs willing to sue for the moral rights of a dead author by creating a government agency to protect the integrity of works in the public domain.<sup>39</sup>

#### inalienable

We need moral rights to be inalienable to prevent more powerful parties (e.g., employers and publishers) from demanding that an author waive moral rights.<sup>40</sup>

#### work-for-hire

However, perhaps moral rights should not attach to an author's work when that work is a work-for-hire, because the moral rights could interfere with subsequent use of the work by the copyright owner who fully paid for the creation of the work.<sup>41</sup> This is especially true when there are multiple authors — perhaps a team of computer programmers — who are creating a work-for-hire. Denying moral rights to works-for-hire may make moral rights more acceptable to employers.

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<sup>39</sup> Raymond Sarraute, "Current Theory on the Moral Right of Authors and Artists Under French Law," 16 *American J. of Comparative Law* 465, 484 (1968).

<sup>40</sup> John Henry Merryman, "The Refrigerator of Bernard Buffet," 27 *Hastings Law J.* 1023, 1044 (May 1976) ("... prevent the artist from adhering to an agreement that he may have been too weak or too innocent to resist."); Edward J. Damich, "The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors," 23 *Georgia Law Review* 1, 66 (Fall 1988) (Only "renowned" authors "have the bargaining power to insist on unconventional terms....").

<sup>41</sup> This is in contrast with the copyright owner who acquired the copyright in a contract to publish a book. The publisher only pays royalties to the author. In the case of scholarly books, royalties will not compensate the author for the fair-market value of the author's time to create the work.

## art

The scope of this essay is limited to moral rights of authors of text. There is also a moral right of artists that prevents the destruction, defacement, alteration, or mutilation of a work of art. The prohibition against destruction makes sense when an artistic work (e.g., painting, mural, sculpture) is unique (i.e., quantity of one) and is part of the region's culture.<sup>42</sup> On the other hand, a published book probably exists in at least thousands of copies, so a private owner tossing one book into the trash does not deprive the public of access to the book in libraries. The prohibition against distortion or mutilation that would damage an artist's/author's reputation is common to both works of art and text, but in the case of an author's text usually only applies to editors and publishers.

## withdraw/retract

The moral right to withdraw or retract (see page 4, above) seems strange to me. If an author were to exercise this right, it would be like attempting to erase history. Not only are many copies of the now-withdrawn work in the hands of private owners or libraries, where they are safe from destruction, but also mistakes and changes of opinion are part of the legitimate history of civilization, which no one should attempt to erase. When an author's opinion changes, the obvious action is for the author to prepare a new edition of his/her work,<sup>43</sup> which explains the reason(s) for the change of opinion.

## morphing mutilation into attribution

*Granz v. Harris*, 198 F.2d 585, 588 (2dCir. 1952) — discussed at page 11, above — finds an equivalent to a moral right of integrity, but only in works attributed to an author, so that the moral right of integrity is a corollary of the moral right of attribution. If we focus *only* on the reputation of the author, then the two-step analysis in *Granz* is logical. And focusing only on reputation of the author seems appropriate in moral rights of authors, which derive from respect of an author's personality, reputation, or honor.

But there can be other harms to readers/listeners from mutilated or distorted works. For example, errors in a science or mathematics textbook introduced by a sloppy editor can confuse students. Abbreviated recordings of music could disappoint a listener who notices problems with

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<sup>42</sup> Similarly, subject to some conditions, one can not legally demolish a historic building without approval from a state or federal government agency. See, e.g., *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271 (3dCir. 1983); *Turchi v. Philadelphia Bd. of License and Inspection Review*, 20 A.3d 586 (Pa.Cmwlth. 2011).

<sup>43</sup> Raymond Sarraute, "Current Theory on the Moral Right of Authors and Artists Under French Law," 16 *American J. of Comparative Law* 465, 477 (1968).

the architecture of the music. However, errors made by an anonymous author who is either sloppy or incompetent, or bad performances of music by anonymous musicians, are *not* remedied under moral rights, despite causing the same harm to society as defective editing. If such harms are to be remedied, perhaps it should be under a warranty theory of fitness for particular purpose, *not* under moral rights of authors.

*Gilliam v. ABC*, 538 F.2d 14, 24-25 (2dCir. 1976) — discussed at page 13, above — morphs mutilation (moral right of integrity) into the moral right of attribution (“false designation of origin” under the Lanham Act). I agree that omissions not authorized by the authors could confuse the audience into believing that the entire program on ABC was an authentic copy of what Monty Python had intended.

The difficulty arises because the moral right of integrity requires that the mutilation/distortion by an editor adversely affect the reputation of the author(s) — in the language of the Berne Convention: “prejudicial to [the author’s] honor or reputation.” If the work is published without attribution (anonymously), then there is no effect on the author’s reputation. When the work is attributed to an author, mutilation/distortion by an editor *always* leads the reader or audience to an adverse conclusion about the named author, because the reader/audience will be *unaware* of addition/omissions by the editor.

The situation where an editor makes unauthorized additions or omissions in the author’s text, thereby mutilating or distorting the author’s work, violates the moral right of integrity. One should not automatically also invoke the moral right of attribution. If the moral right of attribution were invoked, one could solve the problem by amending the author credit to include “edited and improved by \_\_\_\_”. But that is the wrong solution! The proper solution is either to remove the mutilation/distortion, or to enjoin publication of the mutilated/distorted work.

adding attribution to 17 U.S.C.

I suggest that 17 U.S.C. § 106 be amended to include the moral right of attribution:

**(b)** The author(s) of any work has the exclusive legal right to have his/her name(s) displayed on all copies of the work, including attribution on the title page of a book or report, author’s byline of an article, or list of credits in a movie or recording. People who did not contribute to the creation of the copyrighted work must not be named as an author. It is specifically a violation of this exclusive legal right for a plagiarist to omit the true author’s name and substitute the plagiarist’s name. If the true author(s) voluntarily choose to remain anonymous, then the work must be attributed to anonymous and no one’s name may be listed as an author. This exclusive legal right of attribution is inalienable.

I suggest that the fair use statute, 17 U.S.C. § 107, be amended to require that any quotation, or any close paraphrase, be attributed to the author(s) named in the source of that quotation or paraphrase. Failure to include *both* attribution to the author(s) *and* mention of the source shall void any fair use defense to copyright infringement. Such an amendment would make U.S. Copyright law compatible with the Berne Convention, Article 10(3).

### Conclusion

As explained above on pages 7-22, courts in the USA occasionally recognize rights equivalent to the moral right of attribution or integrity (i.e., prevention of mutilation), often by finding a right in a written contract, industry custom, unfair competition, or libel. As explained on pages 23-28, the moral right of disclosure exists in the USA as a property right of first publication. Prof. Nimmer notes that when courts in the USA recognize legal rights equivalent to some moral right, the court “never labels [its decision] ‘moral rights.’ ”<sup>44</sup>

At pages 36-39, I argue that the phrase “moral rights” is a misnomer, and the conventional dogma about moral rights being *incompatible* with a common-law tradition is wrong. Indeed, it is a false dichotomy to have moral rights in civil-law nations, but not in common-law nations.

At pages 39-44, I make some suggestions for including some moral rights in the U.S. Copyright Act.

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<sup>44</sup> Melville B. Nimmer, “Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law,” 19 Stanford Law Review 499, 520 (Feb 1967).

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