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# The Lost Tort of Moral Rights Invasion

Patrick R. Goold

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## THE LOST TORT OF MORAL RIGHTS INVASION

*Patrick R. Goold\**

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### ABSTRACT

*Moral rights are often portrayed as an unwelcome import into U.S. law. During the nineteenth century, European lawmakers, influenced by personality theories of authorship, began granting authors rights of attribution and integrity. However, while these rights proliferated in Europe and international copyright treaties, they were not adopted in the United States. According to a common historical narrative, U.S. courts and lawmakers resisted moral rights because they were deemed incompatible with the copyright tradition of treating expressive works as alienable property. What little moral rights U.S. law provides today is thus seen as a necessary evil, grudgingly accepted, simply to comply with international obligations.*

*This Article presents a history of moral rights protection that challenges, to a degree, that common historical narrative. The Article tracks how American courts adjudicated attribution and integrity disputes during the twentieth century. Doing so not only reveals that the American judiciary was more sympathetic to these claims than commonly appreciated, but, even more surprisingly, came close to developing a tort of moral rights invasion. While copyright historians know that courts have long provided proxy protection for moral rights under preexisting common law causes of action (e.g., defamation, unfair competition,*

*privacy, etc.), what is not widely known is how frequently courts were willing to protect attribution and integrity interests directly under the banner of moral rights. This Article tells the story of how courts in the mid-twentieth century, applying state law, increasingly articulated a “sui generis tort” of moral rights invasion. It then proceeds to question why the moral rights tort stagnated and was forgotten about in the late twentieth century.*

## I. INTRODUCTION

It is sometimes said that moral rights protection is an unwelcome import into U.S. law. Moral rights first appeared in civil law countries in the late nineteenth and early twentieth centuries. At this time, European lawmakers, influenced by “personality theories” of authorship and a desire to preserve culturally important artworks, began to bestow upon authors legal entitlements to claim authorship and to police the artistic integrity of their creative works.<sup>1</sup> But while these rights proliferated in other countries and in international copyright treaties, they were resisted within the United States. According to a common historical narrative, American lawmakers in the twentieth century refused to protect authorial moral rights for two related reasons: first, allowing authors to retain personal rights in the creative work after sale would conflict with copyright’s status as an alienable property right; and second, protecting authorial attribution and integrity interests was seen as incompatible with the utilitarian purpose of U.S. copyright.<sup>2</sup> Today, while the United States provides some minimal moral rights protection, through sources of law such as the Visual Artist’s Rights Act, it does so only to superficially comply with the requirements of the Berne Convention. “Grudgingly accepted,”<sup>3</sup> moral rights serve merely as “legal fig leaves,”<sup>4</sup> allowing the United States to satisfy its international obligations.

This Article presents a history of moral rights development in the United States that, to a degree, challenges the common historical

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1. See ELIZABETH ADENEY, *THE MORAL RIGHTS OF AUTHORS AND PERFORMERS* 9-97 (2006); PETER BALDWIN, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* 126-98 (2014).

2. See generally BALDWIN, *supra* note 1, at 8-9, 44-47.

3. Amy Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 266 (2012).

4. BALDWIN, *supra* note 1, at 20.

narrative. The Article tracks how American courts adjudicated attribution and integrity disputes during the twentieth century. Doing so reveals that the American judiciary was more sympathetic to authorial claims than is commonly appreciated. The most interesting finding is that U.S. courts applying state common law came surprisingly close to developing a unique tort of moral rights invasion. While copyright lawyers are aware that courts have long protected attribution and integrity interests under preexisting causes of action (such as unfair competition, privacy, and defamation),<sup>5</sup> what is not generally known is how frequently judges were willing to protect these interests directly under the banner of moral rights. In 1940, in the *Harvard Law Review*, Martin Roeder wrote that courts not only protected attribution and integrity interests under familiar causes of action, but also that there was “some groping towards an inarticulate, *sui generis* tort theory” of moral rights invasion.<sup>6</sup> As the Article highlights, this “groping” intensified from 1940 to 1980, with a high-water mark in the 1970s. During this period, courts, struggling to accommodate conflicting values, were on a path to developing an indigenous, homegrown, and distinctly American version of moral rights. After 1980, however, the judicial development of the moral rights tort stagnated and stalled. But the story of the lost tort of moral rights remains; and the story should provoke copyright lawyers to question some of the rhetoric surrounding American moral rights today. The reception of the moral rights concept in U.S. law was more complex, more favorable, and far less one-dimensional than sometimes portrayed.

Section II describes the cases on moral rights throughout the twentieth century. It tells the story of how U.S. courts came close to developing a unique moral rights cause of action, and how that movement withered after 1980. Section III speculates about why this movement fizzled out in the late twentieth century. Section IV concludes with a brief reflection on the importance of the lost tort to today’s debates about American moral rights.

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5. See, e.g., *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 513 (1986); Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229 (1995); BALDWIN, *supra* note 1, at 226-27.

6. Martin Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 575 (1940).

## II. MORAL RIGHTS IN THE COURTS

### A. Pre-1940

From the late nineteenth century up to the early 1940s courts, applying state common law, provided some protection for attribution and integrity interests. The terms “moral rights” and “*droit moral*” were not used, having not yet entered into widespread legal consciousness. However, courts did not merely apply existing common law causes of action. As Roeder later claimed, there was a groping toward a sui generis tort theory of moral rights protection during this time period.<sup>7</sup> While courts frequently employed familiar causes of action such as libel, unfair competition, and privacy to protect authorial interests,<sup>8</sup> there was also a string of cases that singled out authorial interests as a separate legal category requiring unique rules and treatment.

Arguably the most famous case—although by no means the clearest—from this era is *Clemens v. Press Publishing Co.*<sup>9</sup> In 1909, author William M. Clemens<sup>10</sup> offered to sell the defendant publishers a manuscript, which he claimed successfully solved a recent murder case (that of Hazel Drew<sup>11</sup>). The defendants agreed to buy the manuscript, provided it was shortened, and to publish it in the New York World newspaper.<sup>12</sup> In exchange for the story, the defendants promised to pay \$200 and to deliver 25 galley-proof copies to the plaintiff.<sup>13</sup> Clemens dutifully reduced the length of the story and delivered the modified manuscript to the defendants. At which point, the question arose whether the story would be published under the plaintiff’s name.<sup>14</sup> The defendants refused to publish Clemens’s name, while Clemens refused to allow the

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7. *Id.*

8. *See, e.g.,* Ben-Oliel v. Press Publ’g, 251 N.Y. 250 (1929); Ellis v. Hurst, 128 N.Y.S. 144 (App. Div. 1910); Harte v. De Witt, reported in *Rights in Literary Property*, 1 CENTRAL L.J. 360 (1874).

9. 122 N.Y.S. 206 (1910).

10. Nephew of Samuel L. Clemens (aka Mark Twain), *see* Obituaries, TRENTON EVENING TIMES (Nov. 25, 1931). He was born in Paris, Ohio and attended Buchtel College, which is now The University of Akron. *See* RON HUGHES, WHO KILLED HAZEL DREW? UNRAVELING CLUES TO THE TRAGIC MURDER OF A PRETTY SERVANT GIRL (2017).

11. The unsolved murder of Hazel Drew reportedly later inspired the 1990s television drama, *Twin Peaks*. *See* David Bushman & Mark Givens, *Hazel’s brutal murder was all but forgotten. Until she inspired ‘Twin Peaks,’* THE WASH. POST (May 11, 2017).

12. The New York World had a reputation for sensationalism and “yellow journalism.” *See* GEORGE JUERGENS, JOSEPH PULITZER AND THE NEW YORK WORLD 43-92 (1966).

13. *Clemens*, 122 N.Y.S. at 207.

14. *Id.*

publication to go ahead without receiving credit.<sup>15</sup> In response, the publisher refused to publish and refused to pay the \$200.<sup>16</sup> Clemens sued in the Municipal Court of the City of New York, but his complaint was dismissed on the merits at the end of trial. Clemens appealed to the Supreme Court of New York where he was successful,<sup>17</sup> although the reasoning of the court is far from clear. Two judges—Seabury and Gavegan—upheld Clemens’s claim while one judge—Lehman—dissented.<sup>18</sup> While Lehman found the contract had been rescinded once the dispute arose, and had nothing to say about moral rights, both Seabury and Gavegan discussed Clemens’s attribution interest.<sup>19</sup>

Gavegan was skeptical of Clemens’s attribution claim. Gavegan viewed the matter as purely about the sale of property.<sup>20</sup> The parties had successfully transferred property in the manuscript, he claimed.<sup>21</sup> Once Clemens delivered the writing and title vested in the publishers, all that remained was for the defendant to pay Clemens the agreed price. The defendant, having taken title of the manuscript, could do as it pleased with the work; the defendant could choose to publish it, or not publish, with or without the plaintiff’s name.<sup>22</sup> The “wishes of the plaintiff after parting with the title in the property may betray the eccentricities of the author,” Gavegan wrote, “but they have no greater weight in law than the wishes of a stranger to the transaction after it was consummated.”<sup>23</sup> Nevertheless, the fact that the defendant had *not* paid Clemens the agreed price meant that the plaintiff deserved relief and the trial court judgment was reversed with a new trial ordered.<sup>24</sup>

Seabury, by contrast, supported the author’s right to be named as the author. In a passage that would subsequently be quoted frequently, Seabury found that “[e]ven 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 we would consider the sale of a barrel of pork.”<sup>25</sup> Unlike the sale of pork, the author retains some rights in the manuscript even after sale.<sup>26</sup> The buyer in such cases “cannot make as free a use of [the

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15. *Id.*

16. *Id.*

17. *Id.* at 206.

18. *See id.*

19. *See id.*

20. *Id.* at 207.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* (Seabury, J., concurring).

26. *Id.* at 207-08.

manuscript] as he could of the pork which he purchased” in absence of a contract permitting such uses.<sup>27</sup> In particular, the purchaser “cannot garble [the work], 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.”<sup>28</sup> The reason, Seabury provided, was that the author’s reputation and standing, and thus his earning capacity, was affected by whether the work was published under his name or not.<sup>29</sup> In the present case, there was no reason to believe Clemens had contracted away his right to naming credit. Rather, Seabury found that the parties intended that the author’s name would appear on the work, based on the fact that the defendant had accepted the work with the plaintiff’s name upon it, and that the defendant had provided the plaintiff with 25 galley proofs of the work, each bearing the plaintiff’s name.<sup>30</sup>

Another interesting attribution case from the period is *Jones v. American Law Book Co.*<sup>31</sup> Basil Jones was hired to write articles on law for publication by the American Law Book Co.<sup>32</sup> One such article Jones wrote was called *Army and Navy*, to be published in the defendant’s *Cyclopedia of Law and Procedure*.<sup>33</sup> Jones objected to the defendant’s publication of his article without his name.<sup>34</sup> He based his claim for relief on, first, that the custom in publishing legal encyclopedias was to publish the author’s name, and second, that “irrespective of any custom or usage the right of an author to the public credit of his work and to the publication of his name in connection therewith is inherent and resides in him until waived or surrendered.”<sup>35</sup> The trial court judge agreed with this claim.

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27. *Id.* at 208.

28. *Id.*

29. *Id.*

30. *Id.*

31. 125 A.D. 519 (N.Y. App. Div. 1908). The case was apparently not the first controversy to arise between the parties, *see Hughes v. Jones*, 81 N.Y.S. 1131 (App. Div. 1903).

32. *Jones*, 125 A.D. at 519.

33. *Id.*

34. It is hard to say whether this was a case of non-attribution or of false attribution. According to the appellate court decision, written by Judge Houghton, “the only statement as to the authorship” was a “statement that it was edited by Henry A. Sharpe, Associate Justice Supreme Court of Alabama.” *Jones*, 125 A.D. at 520. Additionally, Houghton wrote that Basil Jones sued in order to have his name “substituted as author.” Richard Roger Bowker’s copyright treatise also reports that not only was Basil Jones’s name removed, but it was “replaced by that of a distinguished jurist.” RICHARD ROGER BOWKER, COPYRIGHT: IT’S HISTORY AND IT’S LAW 100 (1912). It is unclear whether readers would have believed Sharpe to be the author (in which situation the case resembles more of a false attribution fact pattern), or whether they would have understood from the statement that Sharpe was editing the work of some other uncredited person (a case more akin to non-attribution).

35. *Jones*, 125 A.D. at 520 (citing the opinion of the trial court below).

Judge McCall reasoned that the common law protected the author's right to decide whether to publish the work, and in what form such first publication would take place.<sup>36</sup> As this was the first publication of Jones's article, he had the right to decide whether its form would include his name or not. Furthermore, while the contract between Jones and the American Law Book Co. allowed the latter to edit the work, McCall found no reason to believe the right had been waived in the contract.<sup>37</sup>

However, McCall's judgment was reversed on appeal.<sup>38</sup> According to Judge Houghton, a reasonable interpretation of the employment contract permitted the defendant to omit Jones's name.<sup>39</sup> Houghton found that Jones entered into the defendant's employment, wherein he would work for a certain number of hours per day preparing and writing articles.<sup>40</sup> Furthermore, Houghton concluded that Jones, via contract, permitted the defendant to edit the articles "in any manner [that] the defendant desired."<sup>41</sup> The right to have his name appear on the article was not reserved in the contract.<sup>42</sup> But Houghton also suggested that the "character of the work and the manner in which [the] plaintiff" was employed were also significant.<sup>43</sup> Houghton distinguished the Jones case from the situation wherein an author is retained "to write a book or a play."<sup>44</sup> In the latter case, the contract could be read as "contemplating that the author should have his name appear, and thus enjoy whatever reputation the learning or brilliancy of the work might give him . . . ."<sup>45</sup> Houghton thus concluded that Jones had waived whatever right to attribution he initially may have enjoyed, and furthermore that this was not the type of case wherein it might be presumed that the parties had implicitly agreed to reserve the author's right to attribution.<sup>46</sup>

Arguably, courts were willing to provide even greater protection in cases of false attribution (i.e., either where the author's name was erroneously placed upon the work of another person, or when an author's work was incorrectly attributed to someone else). In the *Mark Twain*

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36. *Id.*

37. *Id.* ("It is true that [Jones] stipulated that whatever he produced should be submitted to a process of editing, but it would be a wide stretch of the imagination that would work out of that proposition a sale or waiver of his rights to ownership to or credit for the results of his labor.").

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 521.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*



*Case*—a case in which Samuel Clemens tried to restrain a defendant from printing uncopyrighted short stories previously published by Clemens—the court wrote (as obiter dictum) that “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.”<sup>47</sup> This dictum was subsequently relied upon in *Packard v. Fox Film Corp.*, a case in which the plaintiff, Frank L. Packard, sold to Fox the right to transform his story (*The Iron Rider*) into a movie, but where Fox proceeded to use the title of the story and the plaintiff’s name in connection with an entirely different story.<sup>48</sup> The Supreme Court of New York found that the plaintiff had a property right in his work, and that the defendants exceeded the rights they had acquired in the work.<sup>49</sup> The same conclusion was reached in *Curwood v. Affiliated Distributors, Inc.*<sup>50</sup> In that case, famous adventure novelist James Oliver Curwood contracted with Affiliated Distributors to make a movie adaptation of his story, *The Poetic Justice of Uko San*.<sup>51</sup> However, he successfully restrained distribution of the resulting motion picture on the grounds the defendants had used Curwood’s name and the manuscript’s title on a movie (*I Am the Law*) that told a “wholly different story” to that of *Poetic Justice*.<sup>52</sup> District Judge Knox found this actionable as it “injures [the

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47. *Clemens v. Belford, Clark & Co.*, 14 F. 728, 731 (Ill. Cir. Ct. N.D. 1883). The quote continues:

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; and the same rule would undoubtedly apply in favor of a person known to the public under a nom de plume, because no one has the right, either expressly or by implication, falsely or untruly to charge another with the composition or authorship of a literary production which he did not write.

*Id.*

48. 202 N.Y.S. 164 (App. Div. 1923).

49. *Id.* at 165. The Harvard Law Review agreed with the conclusion, but reasoned slightly differently. In *Recent Cases*, 37 HARV. L. REV. 776 (1923-24), the Review authors agreed that the “law recognizes not only the desire of an author to preserve a marketable reputation, but his pride of literary paternity as well.” But rather than tie this to a property theory, the Review found that both property and personal rights were violated by the defendant’s conduct. *Id.*

50. 283 F. 219 (S.D.N.Y. 1922).

51. *Id.*

52. *Id.* However, it is worth noting that while the movie, *I Am the Law*, did not faithfully represent the *Poetic Justice* story, it did still, on some level, reflect James Oliver Curtis’s work. The defendants’ movie was later found to be an infringing adaptation of another Curwood novel, called *The Valley of Silent Men*. See *Int’l Film Serv. Co. v. Affiliated Distribs., Inc.* 283 F. 229 (S.D.N.Y. 1922). Thus, while it was incorrect to, as the defendant did, hold out the movie as a licensed adaptation of *Poetic Justice*, it was nevertheless an unlicensed, and modified, version of *The Valley of Silent Men*.

author's] standing, reputation, and prestige, and is in derogation of his civil rights."<sup>53</sup>

Likewise, courts were willing to protect integrity rights to a degree.<sup>54</sup> In *Drummond v. Altemus*,<sup>55</sup> the Eastern District of Pennsylvania restrained (via temporary injunction) Altemus from selling a book containing uncopyrighted lectures delivered by Henry Drummond (the Lowell Lectures delivered in Boston in 1893).<sup>56</sup> The lectures in the book included "additions and omissions which essentially alter the productions of the author."<sup>57</sup> Circuit Judge Dallas wrote:

The complainant does not base his claim to relief upon the 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 . . . .<sup>58</sup>

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53. *Curwood*, 283 F. at 222. Judge Knox also elaborated upon movie producer's duty concerning editorial modifications: "I take it that, while scenery, action, and characters may be added to an original story, and even supplant subordinate portions thereof, there is an obligation upon the elaborator to retain and give appropriate expression to the theme, thought, and main action of that which was originally written." *Id.*

54. Bowker's treatise on copyright also wrote that courts would protect integrity interests. Bowker wrote that while some alterations such as "proof-reading correction or editorial revision" were permissible, it would be "contrary to equity when they pervert, obscure, or otherwise misrepresent the author." BOWKER, *supra* note 34.

55. 60 F. 338 (E.D. Pa. 1894).

56. The noted evangelist, biologist, and lecturer, Henry Drummond delivered the Lowell Lectures. When the lectures were copied and circulated, Drummond rushed to produce his own version. See HENRY DRUMMOND, *THE ASCENT OF MAN* (1894).

57. *Drummond*, 60 F. at 338; see also BOWKER, *supra* note 34, at 264. Henry Drummond was a frequent contributor to a periodical called the *British Weekly*. After delivering the Lowell Lectures, he sent reports of the lectures to the *British Weekly*; however, he did not send them full reports or transcripts. Henry Altemus, a Pennsylvania publisher, read the *British Weekly* reports and from them recreated the lectures as part of a book. However, it appears he departed even from the partial account in the British Reports. Judge Dallas found that "if [the *British Weekly* reports] had been literally copied, and so as not to misrepresent its character and extent, the plaintiff would be without remedy; but the fatal weakness in the defendant's position is that, under [the] color of editing the author's work, he has represented a part of it as the whole, and even, as to the portion published, has materially departed from the reports which he sets up in justification." *Drummond*, 60 F. at 339.

58. *Drummond*, 60 F. at 338-39. While the contention of this Article is that there was a groping towards a unique *tort* of moral rights from American courts during the mid-twentieth century, the *Royle* case illustrates that equity also played an important role. Some cases, such as *Curwood*, 283 F. 219, were brought as suits in equity, rather than suits in law, presumably because the plaintiff wished to obtain an equitable remedy, i.e., an injunction; see also *Stevens v. Nat'l Broad. Co.*, No. 871182, 1966 WL 6436 (Sup. Ct. L.A. Cty., C.A. Feb. 11, 1966). But equity may also have played a more substantive, and not merely remedial, role. In *Royle*, the judge's appeal to equitable jurisdiction could be evidence that the court viewed the attribution injury, not as a legal wrong, but as a distinct equitable wrong (a hypothesis which has an intuitive appeal, given the understanding of equity as correcting

The same holding was reached in *Royle v. Dillingham*, in which the defendants modified the plaintiff's play under a contract which provided that the defendants would make no changes.<sup>59</sup> Judge Leventritt held that:

Probably under the common law, and certainly under his contract, the plaintiff is within his rights in invoking equitable jurisdiction. Whether we have gone quite as far as other countries whose literary history is longer in the protection of literary property may be open to doubt; but there is, as there should be, a growing tendency to bestow on authors that full measure of protection which their unique property requires. Whether the work is great or trivial, original or adapted, the principle should be the same, so long as the work is the author's own.<sup>60</sup>

What really makes these cases interesting is that when the judges upheld authorial moral rights claims, they did not base—explicitly, anyway—those decisions upon preexisting common law causes of action. For example, rather than find that the authors could make out successful privacy, libel, or unfair competition cases, the judges could potentially be understood as upholding moral rights qua moral rights. The judgments could be interpreted as evidence that the law had some more specific (*lex specialis*) means of redress for authors' personal interests.

Of course, judges did in many other cases use preexisting causes of actions to uphold authorial attribution and integrity interests. For example, in *Ben-Oliel v. Press Publishing*, an article about the customs of Palestine under Mosaic Law was falsely attributed to Florence Ben-Oliel, a lecturer in New York.<sup>61</sup> The Court of Appeals of New York found that the damage to professional reputation that such an article could cause could potentially be grounds for a libel action. Similarly, in *Ellis v. Hurst*, the court found a breach of New York's statutory right of publicity when the defendant book publishers republished a book under the author's true name (Edward Ellis), which the author had originally published under a

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gaps or inadequacies in the law). The author suspects that this idea of moral rights invasion as an equitable wrong gradually became less prominent during the twentieth century as law and equity became ever more fused. See John C.P. Goldberg & Henry E. Smith, *Wrongful Fusion: Equity and Tort*, in *EQUITY AND LAW: FUSION AND FISSION* (Goldberg et al. eds.) (forthcoming) (describing the relation between equitable and legal wrongs, and the fusion of the two).

59. 104 N.Y.S. 783 (App. Div. 1907). Note that Drummond was not the only author suing Altemus for apparently producing garbled versions of lectures. See *Pott v. Altemus*, 60 F. 339 (E.D. Pa. 1894).

60. *Royle*, 104 N.Y.S. at 784.

61. 251 N.Y. 250 (1929).

pseudonym (Lieutenant R. H. Jayne).<sup>62</sup> Other cases upholding authorial moral rights under general common law causes of action exist.<sup>63</sup>

### B. 1940-1980

Cases upholding attribution and integrity interests continued to appear from the 1940s to 1980s. But in distinction to the pre-1940s cases, the terms “moral rights” and “droit moral” started to appear in court judgments. By the mid-twentieth century, the concept of “moral rights” was increasingly seeping into the U.S. legal consciousness; this was likely for two reasons.

First, in 1928, article 6bis was added to the Berne Convention in the Rome Revision Conference.<sup>64</sup> This provision required member states to protect the attribution and integrity interests of foreign authors.<sup>65</sup> During the 1930 to 1940 period, a number of legislative proposals were set forth to enable the United States to join the Berne Convention.<sup>66</sup> However, the idea of joining a union that would require the adoption of moral rights was resisted by some copyright industries, in particular, the motion picture industry.<sup>67</sup> Hollywood was troubled by the idea that scriptwriters could enjoy personal inalienable rights existing post-sale, because such rights could potentially interfere with movie studios’ ability to edit and distribute films.<sup>68</sup> Nevertheless, while attempts to join the Berne Convention failed,

62. 128 N.Y.S. 144 (App. Div. 1910).

63. See generally *Harte v. De Witt*, reported in *Rights in Literary Property*, 1 CENTRAL L.J. 360 (1874); *D’Altomonte v. N.Y. Herald*, 154 A.D. 453 (N.Y. App. Div. 1913); *Gershwin v. Ethical Publ’g Co., Inc.*, 166 Misc. 39 (N.Y. City Ct. 1937).

64. Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, as amended, Rome, June 2, 1928.

65. *Id.*

66. S. 2465, 74th Cong. (1935) (introduced by Mr. Ryan Duffy, Senator for Wisconsin); S. 3043, 76th Cong. (1940) (introduced by Mr. Elbert D. Thomas, Senator for Utah). See generally A.A. Goldman, *The History of U.S.A. Copyright Law Revisions from 1901 to 1954*, in *Copyright Society of the USA, Studies on Copyright*, vol. 2, 1101 (New Jersey, 1953).

67. See generally Statements of Barbara Ringer, *Berne Convention Implementation Act of 1987, Hearings on HR 1623 before the House Committee on the Judiciary*, 100th Congress (1987) at 694 (“I was certainly given to know all the local color that surrounded all those efforts to get us into Berne back in the Thirties, up through the bill that was introduced in 1940. The big opponent then was the motion picture industry, which had the same kind of reaction you are describing—that they were users rather than copyright owners and that they couldn’t possibly have moral rights; it would ruin the industry and so forth.”); see also Goldman, *supra* note 66, at 8-11 (noting the objection of motion picture producers to moral rights and to Berne ratification).

68. This concern was caused, or exacerbated, by the *Dreiser v. Paramount Publix Co.* litigation. In 1925, Theodore Dreiser wrote the twentieth century classic, *An American Tragedy*. Dreiser subsequently licensed Paramount to produce a motion picture version of the novel. Paramount intended to distribute the new motion picture in 1931. But, in July 1931, on the eve of the movie’s distribution, Dreiser filed for an injunction in Westchester County, New York. Dreiser alleged that

the open discussion of moral rights in Congress, coupled with the international adoption of moral rights, must surely have affected how courts viewed attribution and integrity cases.

Second, at this time, American lawyers began to publish the first academic texts regarding the “moral rights” of authors. In 1938, Stephen Ladas published *The International Protection of Literary and Artistic Property*,<sup>69</sup> in which he wrote that, while the moral right of authors was “fully recognized and developed in the civil-law countries,” such a right had “not yet received acceptance in the law of the United States” and that no such right was “referred to by legislation, court decisions or writers.”<sup>70</sup> By contrast, Martin Roeder’s 1940 Harvard Law Review article, *The Doctrine of Moral Rights: A Study in the Law of Artists, Authors and Creators*,<sup>71</sup> came to a different conclusion. Roeder found that the “doctrine of moral right is recognized by the common law to a limited extent,” although the theoretical basis of the right “ha[d] not been delineated.”<sup>72</sup> Looking over the cases, Roeder found that doctrines of libel, unfair competition, privacy, and copyright had been used to protect attribution and integrity interests, alongside an incipient sui generis tort of moral rights invasion.<sup>73</sup> However, the fact that the moral right had been

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Paramount had “botched” the portrayal of the novel. The motion picture failed to accurately convey the theme of social criticism found in the original novel, and instead focused too heavily on the court room drama. While the original contract between Dreiser and Paramount had clearly given Paramount the right to adapt the novel, Dreiser argued that there was an understanding that the movie would still be a faithful representation of the novel. Dreiser’s argument was unsuccessful, and the court declined to award an injunction (while providing no reasons for the order). Order Denying Plaintiff’s Injunction, *Dreiser v. Paramount Publix Corp.*, (N.Y. Sup. Ct. 1931). Such an episode arguably played into the hands of motion picture producers, and other “users” of expressive content, and enabled them to argue that giving authors more powerful rights could interfere dramatically with their own businesses.

69. STEPHEN P. LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* (1938).

70. *Id.* at 802. Ladas did go on to write that “[h]owever, the interests of the author grouped elsewhere under the term ‘moral right’ are protected in the United States by the common law and State legislation concerning the right of personality in general.” *Id.* With the benefit of hindsight the fact that the label “moral rights” was not referred to in the United States before 1938 is unsurprising; the term had not yet penetrated the American legal vocabulary.

71. Roeder, *supra* note 6. See also Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law—A Proposal*, 24 S. CAL. L. REV. 375 (1950). But see Zechariah Chafee, Jr., *Reflections on the Law of Copyright II*, 45 COLUM. L. REV. 719 (1945) (“For the time being, we had better concentrate our energies on the pecuniary aspects of copyright. We have enough trouble there. After we get the issues of dollars and cents settled satisfactorily, we can go on to moral rights.”).

72. Roeder, *supra* note 6, at 578. It seems likely that Martin Roeder had some exposure to the French legal system. See *Paid Notice: Deaths Roeder, Martin A.*, N.Y. TIMES (Aug. 5, 2000), <http://www.nytimes.com/2000/08/05/classified/paid-notice-deaths-roeder-martin-a.html> [<https://perma.cc/ZMN2-NT5F>] (writing that Roeder “had a degree from the Sorbonne in Paris”).

73. See generally Roeder, *supra* note 6.

developed in a piecemeal fashion was not fully satisfactory, as it led to “confusion as to the basic elements of the doctrine.”<sup>74</sup> The way forward, Roeder argued, was to continue to develop the unique tort theory of moral rights protection;<sup>75</sup> over the coming years, courts did precisely that.

One of the most famous cases from this era is *Shostakovich v. Twentieth-Century Fox Film Corp.*<sup>76</sup> The Russian composer Dmitry Shostakovich sued in New York to restrain Fox from distributing the film, *The Iron Curtain*.<sup>77</sup> *The Iron Curtain* dramatized U.S.S.R. espionage activities in Canada.<sup>78</sup> The movie used public domain music written by Shostakovich and credited Shostakovich as the composer in the opening credits.<sup>79</sup> Shostakovich sued under New York libel law.<sup>80</sup> The film portrayed one U.S.S.R. spy disowning the U.S.S.R. espionage activities.<sup>81</sup> Shostakovich claimed that the connection of his music to depictions of disloyalty made it appear as if he approved or endorsed such a film, and as if he were being disloyal to his country.<sup>82</sup> The court ultimately rejected Shostakovich’s libel action, finding that the mere fact that his music was played in the film did not necessarily imply that he approved or endorsed the movie’s message.<sup>83</sup> But more interestingly for the purposes of this Article is the court’s discussion of moral rights. Citing Roeder’s article, Judge Koch wrote that “[c]onceptually, 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.”<sup>84</sup> Koch acknowledged, however, that “the doctrine presents much difficulty.”<sup>85</sup> In particular, he found there may be a conflict between the author’s moral right and the rights of others to freely use public domain material.<sup>86</sup> As a result, Koch concluded that “in the absence of any clear showing of the infliction of a willful injury or of any invasion of a moral right, this court should not consider granting the drastic relief

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74. *Id.*

75. *Id.*

76. 80 N.Y.S.2d 575 (Sup. Ct. 1948). *See also Moral Right of Artists*, 49 COLUM. L. REV. 132 (1949) (discussing *Shostakovich v. Twentieth Century Fox*).

77. *Shostakovich*, 80 N.Y.S. 2d at 576.

78. *Id.*

79. *Id.*

80. *Id.* at 577.

81. *Id.* at 578.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

asked [for] on either theory.”<sup>87</sup> While not rejecting moral rights, and leaving the door open for their use in the future, the court decided not to rely on the concept in this case.

*Shostakovich* was quickly followed by *Granz v. Harris*.<sup>88</sup> Norman Granz was a famous Jazz impresario (producer and promoter) who created a series of well-known jazz concerts going by the name *Jazz at the Philharmonic*.<sup>89</sup> One of these concerts, which took place in Los Angeles, was recorded by Granz onto a sixteen-inch disk.<sup>90</sup> Granz sold the master disks to Herbert Harris (a phonograph manufacturer in New York), who in return would manufacture records for public sale.<sup>91</sup> Herbert Harris proceeded to re-record the musical composition onto smaller, ten-inch, disks.<sup>92</sup> Granz later sued Harris. The re-recording of the sounds had caused some of the records’ music to be deleted.<sup>93</sup> Granz claimed the elimination of the music “substantially detracted from the artistic quality of the musical performance with corresponding detriment to [his] reputation.”<sup>94</sup> Granz failed on this claim at trial. After listening to the two records, Judge McGhoey concluded that the only material deleted in the new recordings was the reaction of the audience and only a trivial amount of music, and thus the artistic quality of the music was intact.<sup>95</sup> However, this factual finding was overturned on appeal as clearly erroneous by the Second Circuit.<sup>96</sup> The appellate judges found that a “[full] eight minutes of music” was omitted.<sup>97</sup> The Second Circuit then held for Granz on the basis of breach of contract.<sup>98</sup> The contract between the parties required that the manufactured records bore the text: “Presented by Norman Granz.”<sup>99</sup> The contractual requirement that Harris credit Granz carried by

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87. *Id.* at 579. Shostakovich had greater success in France. Shostakovich and his co-plaintiffs successfully asserted their moral rights claim in French court and thus prevented the distribution of the film there. See PETER DECHERNEY, HOLLYWOOD’S COPYRIGHT WARS: FROM EDISON TO THE INTERNET 117 (2013).

88. 198 F.2d 585 (2d Cir. 1952). Norman Granz was a citizen of California and Herbert Harris was a citizen of New York, thus the case was filed in the Southern District of New York under diversity jurisdiction, while applying New York state law. See also *Preminger v. Columbia Picture Corp.*, 49 Misc. 2d 363 (N.Y. Special & Trial Term 1966).

89. *Granz*, 198 F.2d at 586.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Granz v. Harris*, 93 F.Supp. 906, 909 (S.D.N.Y. 1951).

95. *Id.* at 910.

96. See *Granz*, 198 F.2d 585.

97. *Id.* at 587.

98. See *id.*

99. *Id.* at 588.

implication a duty “not to sell records which make the required legend a false representation.”<sup>100</sup> It was, according to the court, a false representation to hold out Granz as the producer of the modified music.<sup>101</sup> The opinion also noted that, in absence of a contractual term, it would nevertheless be unfair competition to manufacture and sell this version under the plaintiff’s name.<sup>102</sup>

But the case is most known for the concurring opinion written by Judge Jerome Frank. Frank’s opinion revealed an internal struggle over the status of moral rights. At the outset, Frank appeared to endorse moral rights protection and found that it was, to an extent, already present in U.S. law:

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.’<sup>103</sup>

Yet, towards the middle of the opinion, Judge Frank highlighted that the term “moral rights” would be novel in U.S. law:

Plaintiff, in asking for such relief, relied in part not on the contract but on the doctrine of artists’ ‘moral right,’ a compendious label of a ‘bundle

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100. *Id.*

101. *Id.*

102. *Id.* However, the court did think the defendant could lawfully sell abbreviated versions of the music, “provided [the defendant] did not describe it as a recording of music presented by the plaintiff.” *Id.*

103. *Id.* at 589 (Frank, J., concurring).



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.<sup>104</sup>

Frank also noted a number of objections that could be raised to using the term "moral rights":

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. As we have said elsewhere: 'A new name, a novel label expressive of a new generalization, can have immense consequences.'<sup>105</sup>

After considering these objections, Frank came to a restrained conclusion: "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."<sup>106</sup> Much like Koch in *Shostakovich*, Frank seemed generally to support the idea of moral rights protection, but yet, noting some objections, was disinclined to base his decision upon the doctrine in a case such as this, where the same result could be reached under less controversial doctrines.<sup>107</sup>

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104. *Id.* at 590.

105. *Id.*

106. *Id.* at 591. Melville Nimmer in the 1976 edition of *Nimmer on Copyright* wrote that federal and state courts had held that "moral rights are not recognized in the United States." MELVILLE B. NIMMER, *NIMMER ON COPYRIGHT* 443 (1976). For this proposition, Nimmer cited Frank's concurrence in *Granz*, stating that Frank's opinion included a "discussion of the rejection by American courts of the term 'moral rights.'" *Id.* at 443 n. 390. This was erroneous as, if anything, Frank had come to the opposite conclusion, finding that moral rights were explicitly not rejected.

107. Judge Frank's determination to write about the state of moral rights in U.S. law is intriguing. Like the majority, Judge Frank could have decided the case on contractual grounds, and bypassed the moral rights issue altogether. This would have been a particularly easy step to take because the moral rights claim was not heavily relied upon by Granz's attorneys. Granz's attorneys' brief primarily argued that the parties' agreement did not permit modifications, and thus Harris's modification infringed the underlying copyright property right, Brief for Appellant at 7-15, *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952) (No. 03-3674). Granz's attorneys raised the moral rights issue

The moral rights tort took another incremental step forward in *Seroff v. Simon & Schuster*.<sup>108</sup> Victor Seroff, the author of a biography of Rachmaninoff, sued his publisher, Simon & Schuster, for allowing a poor French translation of the work to be published.<sup>109</sup> The court found that while most of the errors contained in the French translation were trivial, at some point the translator had “consciously sought to sensationalize and inject pungent language in order to make the book more attractive to a certain segment of the French public.”<sup>110</sup> Justice Geller wrote (somewhat obliquely) that the court “appreciates that the failure of the community, years ago, to protect their gifted men of letters led to tragedies which comprise scars in the history of civilization.”<sup>111</sup> Geller went on to note that while the precise cause of action had not been clearly defined by the plaintiff’s counsel, it would appear “to be analogous to what has been called the ‘moral right’ of an author or artist to object to any deformation, mutilation or other alteration of his work.”<sup>112</sup> Geller found that the term “moral right” is “not mentioned in our Copyright Act” but nevertheless:

[A] right analogous to ‘moral right’, though not referred to as such, has been recognized in this country and 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.<sup>113</sup>

Geller relied on Roeder’s article to bolster the claim that common law doctrines, and a sui generis doctrine of moral rights protection, had at times been used to protect authorial moral rights.<sup>114</sup> Nevertheless, relying on Seabury’s decision in *Clemens v. Press Publishing*, Geller found that, while authors have rights to “defend themselves against the free or slipshod use of their creations,” such rights may be transferred or

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only as a secondary argument. Should it be found that Granz reserved no rights in the work, then, the attorneys claimed, there was some authority that the creator could nevertheless prevent alteration or deformation of the work. *Id.* at 15 (citing *Clemens v. Press Publ’g*, 122 N.Y.S. 206 (1910) and Roeder, *supra* note 6). The fact that Judge Frank could easily have sidestepped the moral rights issue altogether makes one question why he felt it necessary to discuss U.S. moral rights protection at such length.

108. 162 N.Y.S.2d 770 (Special and Trial Term, 1957).

109. *Id.* at 771.

110. *Id.* at 773.

111. *Id.* at 774. Judge Geller’s son, Bruce, would later go on to have a successful career in the arts, as a television writer and producer (originating programs such as *Mission Impossible* and *Mannix*). See Bruce Geller and Stephen Gentry, *TV Executives, Die in Plane Crash*, N.Y. TIMES (May 23, 1978), <https://www.nytimes.com/1978/05/23/archives/bruce-geller-and-stephen-gentry-tv-executives-die-in-plane-crash.html> [http://perma.cc/62NJ-C2CM].

112. *Seroff*, 162 N.Y.S.2d at 774.

113. *Id.*

114. *Id.*

surrendered by contract.<sup>115</sup> Ultimately, the contract was interpreted as barring Seroff's claim. The contract permitted the publishers to translate the work for foreign publication.<sup>116</sup> Furthermore, the customary practice at such time, with which Seroff was aware, was that such translations and foreign distribution would frequently not be handled by the publisher, but would be contracted out to a third party.<sup>117</sup> It was held, therefore, that Seroff could not bring a claim against the publisher for the mistranslations, but instead "knew, or should have known, that Simon & Schuster would handle the book exactly as it did" and there was "no merit to plaintiff's contention that Simon & Schuster were remiss in their duty to him."<sup>118</sup> With hindsight, one wonders how the case would have been resolved had Seroff sued the translator, rather than his publisher.

Of course, New York was not the only state flirting with a tort of moral rights protection during this time. An interesting preliminary injunction was awarded in 1966 in the California case of *Stevens v. National Broadcasting Corp.*<sup>119</sup> In that case, the defendant was enjoined from:

[C]utting or editing the motion picture "A Place in the Sun" for the purpose of inserting therein in connection with the broadcast of said motion picture over television any commercials, [advertisements] or other messages, skits, speeches, playlets, musical or other material which will so alter, adversely affect or emasculate the artistic or pictorial quality of said motion picture so as to destroy or distort materially or substantially the mood, effect, or continuity of said motion picture as produced and directed by plaintiff.<sup>120</sup>

Relying on Frank's concurring opinion in *Granz*, Judge Nutter stated that "a court of equity has a duty when presented with a novel situation to fashion remedies to protect parties and litigants against new harms where it appears that there is an inadequate remedy at law," and, "I think the court has the right to protect the artistic integrity of a product."<sup>121</sup>

Arguably the high-water mark of moral rights came in the 1970s. A number of cases in this decade stand out, including *Chesler v. Avon Book Division*, *Hearst Publication*.<sup>122</sup> In 1972, Dr. Phyllis Chesler, a lecturer

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115. *Id.* at 775.

116. *See id.*

117. *Id.*

118. *Id.* at 777.

119. No. 871182, 1966 WL 6436 (Sup. Ct. L.A. Cty., C.A. Feb. 11, 1966).

120. *Id.*

121. *Id.*

122. 352 NY.S.2d 552 (Special Term 1973).

and prominent feminist psychologist, authored a book entitled *Women and Madness*, which was published by Doubleday in hardback.<sup>123</sup> Subsequently, Doubleday contracted with Avon Book to publish a paperback version (as the contract with Chesler permitted).<sup>124</sup> In this action, Chesler sued Avon Book, alleging that the paperback contained many changes (omitted or altered text, illustrations, footnotes, etc.) that amounted to a mutilation of her work.<sup>125</sup> Justice Arnold Fein of the New York Supreme Court found that the contract Chesler signed did not require that she consent to the format of the paperback version, but nevertheless, she was “not powerless to prevent slipshod or truncated use[s] of her work.”<sup>126</sup> Although the authorities were sparse, he agreed that “it is clear that even after a transfer or assignment of an author’s work, the author has a property right that it shall not be used for a purpose not intended or in a manner which does not fairly represent the creation of the author.”<sup>127</sup> Nevertheless, Fein, much like Frank and Koch previously, was unsure of the precise status of moral rights in New York law:

Plaintiff relies in part on the doctrine of an author’s ‘moral right’ which she asks the court to enforce so as to protect the integrity of her work. The authorities she cites do not establish that such right is recognized in New York. The careful and extensive discussion of the authorities in Seroff . . . indicates the problems and the limited recognition accorded to the concept.<sup>128</sup>

However, despite the unclear status of the doctrine, Fein agreed that:

[T]he plaintiff’s right to relief need not be bottomed upon the application of a theory of law which has not been afforded full recognition in this state. The court should not withhold appropriate relief by applying a rigid construction to causes of action or claims asserted by a plaintiff, if a right entitled to protection is shown.<sup>129</sup>

Ultimately, Fein agreed that the contract permitted Doubleday and its assignees to make alterations.<sup>130</sup> Nonetheless, the judge agreed that Avon Book must take appropriate action to inform the public that changes had been made. There is “an obligation to make known to readers that the right

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123. *Id.* at 553.

124. *Id.* at 554.

125. *Id.*

126. *Id.* at 555.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 557.

[of alteration] has been exercised.”<sup>131</sup> Fein concluded that “[t]his is simply telling the truth.”<sup>132</sup>

Similarly, in *Edison v. Viva International*, the New York Supreme Court appeared to uphold the idea of moral rights protection, but following *Seroff*, found that the author’s moral rights were superseded by contract.<sup>133</sup> In this case, Robert Edison’s article, *Why Do Men Hate Barbara Walters*, was substantially altered by the defendant publishers.<sup>134</sup> Edison complained that the article which was published was “materially altered, mutilated, and changed” in such a way that “destroyed the existing content of said article.”<sup>135</sup> Judge Murphy seemed somewhat sympathetic to this argument, finding that the term moral right, “although recognized in civil law countries, is not mentioned in our Copyright Act,” but that 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.<sup>136</sup>

Sadly for Edison, in this case, the contract was interpreted as permitting the defendant to make alterations without his consent.<sup>137</sup> Nevertheless, to “publish in the name of a well-known author any literary work, the authorship of which would tend to injure an author holding his position in the world of letters, has been held to be libel.”<sup>138</sup> Thus, the court concluded that if the plaintiff could specify particular passages in the article that expressed opinions different from that of the original, then he may have a good ground to plead libel.<sup>139</sup>

The last case in the 1970s is also the most well-known: *Gilliam v. American Broadcasting Co.*<sup>140</sup> The British comedy group, Monty Python, licensed the British Broadcasting Corporation (BBC) to show their television show, *The Flying Circus*.<sup>141</sup> The BBC granted Time-Life Films

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131. *Id.*

132. *Id.*

133. 421 N.Y.S.2d 203 (App. Div. 1979).

134. *Id.* at 204.

135. *Id.* at 205.

136. *Id.* at 206.

137. *Id.*

138. *Id.* at 207.

139. *Id.*

140. 538 F.2d 14 (2d Cir. 1976). *See also Comment: Protection of Artistic Integrity: Gilliam v. American Broadcasting Co.*, 90 HARV. L. REV. 473 (1976).

141. *Gilliam*, 538 F.2d at 17.

the right to distribute the shows in the United States, and subsequently Time-Life licensed American Broadcasting Company (ABC) to show two 90-minute specials of the programs.<sup>142</sup> ABC proceeded to alter the shows to make them suitable for broadcast.<sup>143</sup> The modifications included omitting parts of the programs, inserting commercials, and removing parts of the shows which were deemed offensive.<sup>144</sup> The Monty Python comedians saw the ABC version and were “appalled” at the treatment of their work, but were unsuccessful in their initial attempt to gain a preliminary injunction restraining ABC from showing the work.<sup>145</sup> However, on appeal, the Second Circuit granted the preliminary injunction, while writing supportively of the authors’ moral rights. Circuit Judge Lumbard wrote that it:

[S]eems 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.<sup>146</sup>

Lumbard acknowledged that American copyright law, “as presently written, does not recognize moral rights,” but nevertheless found that moral rights fit neatly with the economic incentive policy underlying the Copyright Act.<sup>147</sup> That is, the “economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law, 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.”<sup>148</sup> For this reason, 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.”<sup>149</sup> While such decisions are “clothed in terms of proprietary right in one’s creation, they also properly vindicate the author’s personal right to

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142. *Id.* at 17-18.

143. *Id.* at 18.

144. *Id.*

145. *Id.*

146. *Id.* at 23-24.

147. *Id.* at 24.

148. *Id.* (internal citations omitted).

149. *Id.*

prevent the presentation of his work to the public in a distorted form,” Lumbard wrote while citing Roeder’s article.<sup>150</sup>

Of course, the cases from this period do not all point in the same direction. Two cases from the 1940s in particular stand out as rejecting moral rights protection. First was the Seventh Circuit case of *Vargas v. Esquire*.<sup>151</sup> In this case, Alberto Vargas produced artwork (adult paintings of women) for *Esquire* magazine under contract, and gained notoriety as a “pin-up” artist.<sup>152</sup> *Esquire* proceeded to publish a number of Vargas’s paintings without his signature.<sup>153</sup> Vargas sued to enjoin their reproduction without his signature. However, the Seventh Circuit dismissed the claim, primarily on the ground that the relevant contract granted *Esquire* “the right to use, lease, sell or otherwise dispose of the [paintings] as it shall see fit.”<sup>154</sup> This contractual language led the court to conclude that this was a case in which the plaintiff “by plain and unambiguous language completely divested himself of every vestige of title and ownership of the pictures, as well as the right to their possession, control and use.”<sup>155</sup> Thus, the contract barred Vargas’s claim. But the court went further and also rejected the plaintiff’s claim that his moral rights had been breached. Relying on Ladas’s statement that moral rights protection had “not yet received acceptance in the law of the United States,” the court found that the plaintiff’s plea amounted to a prayer for a “change in the law in this country to conform to that of certain other countries,”<sup>156</sup> on which point the court wrote that it “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.”<sup>157</sup> How are we to interpret the court’s disinclination to make any new law in this respect? While hardly a ringing endorsement of moral rights, the court still seemed to leave some room for potential future judicial development of the right.

The most striking rejection of moral rights came in *Crimi v. Rutgers Presbyterian Church in City of New York*.<sup>158</sup> Alfred D. Crimi was employed in 1938 to paint a fresco for a local New York church.<sup>159</sup> Some

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150. *Id.*

151. 164 F.2d 522 (7th Cir. 1947).

152. *Id.* at 523.

153. *Id.* at 524.

154. *Id.* at 525.

155. *Id.*

156. *Id.* at 526.

157. *Id.*

158. 89 N.Y.S.2d 813 (App. Div. 1949).

159. *Id.* at 814.

of the parishioners objected to the mural, on the grounds that it depicted Christ with a bare chest and placed more emphasis on his physical attributes than his spiritual ones.<sup>160</sup> In 1946, the church painted over the mural without notifying the plaintiff.<sup>161</sup> The plaintiff sued hoping to compel the defendant to remove the obliterating paints, or alternatively to allow the plaintiff to remove the fresco from the church at the defendant's expense, or finally, for \$50,000 in damages.<sup>162</sup> Official Referee Lockwood, citing Ladas and Roeder, acknowledged that continental European countries provided authors with peculiar and distinctive rights in their works.<sup>163</sup> However, citing Ladas and *Vargas v. Esquire*, Lockwood concluded that the plaintiff did not retain rights after the work had been unconditionally sold.<sup>164</sup> The time for the artist to reserve rights was when the contract was drafted.

Nevertheless, even this case comes with a question mark next to it. Lockwood characterized the case as involving the *destruction*, rather than *modification*, of the artwork. Lockwood cited a passage from Ladas that posed the following question: "The [purchaser] is not permitted to violate [the artwork's] integrity but is he permitted to destroy the work of art?"<sup>165</sup> Lockwood proceeded to cite a French case holding that a church could destroy wall paintings without the consent of the original artist, and cited foreign authors on the issue of destruction of artworks.<sup>166</sup> This conceptualization was significant because, while many countries permitted authors to prevent the modification of artwork, far fewer entitled the author to object to complete destruction. Ladas, after noting that the purchaser of a work was not permitted to violate its integrity, decided that it was questionable whether this right extended to prevent destruction (in cases of works of art).<sup>167</sup> Indeed, article 6bis of the Berne Convention did not (and still does not) require Union members to grant authors rights against destruction, but it did require that states entitle the

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160. *Id.* at 815.

161. *Id.*

162. *Id.*

163. *Id.* at 816.

164. *Id.* at 819.

165. *Id.* at 817.

166. *Id.* at 816. The relevant case was *Lacasse et Welcome c. Abbé Quénard* (Cour de Paris, April 27, 1934, D.H.1934 p. 385), a summary of which can be found in AMELIA V. VELTRAONE, THE LEGAL AND MORAL RIGHTS OF ALL ARTISTS 41-42 (2003). Lockwood also cites French jurists writing on the subject of destruction. *Crimi*, 89 N.Y.S.2d at 817.

167. *Crimi*, 89 N.Y.S.2d at 817; Ladas, *supra* note 69, at 603. Although Ladas does appear to agree that destruction should be prevented as it may harm the public interest in preserving culturally important artworks.



author to object to prejudicial modifications.<sup>168</sup> One speculates whether Lockwood would have come to the same conclusion had he characterized the case as a modification issue.

Lastly, it is also important to keep in mind that courts also protected attribution and integrity interests through existing common law causes of action, such as *Clevenger v. Baker Voorhis*.<sup>169</sup> Once again, what distinguishes the cases above is that in these cases, the courts seemed to consider a tort of moral rights invasion as something distinct from causes of action such as libel, privacy, or unfair competition.

### C. *Post-1980*

When reading the cases in the 1940 to 1980 period, one gets a sense that courts were close to developing a unique tort of moral rights invasion. While some cases like *Vargas* and *Crimi* went against the grain, many courts exhibited a growing willingness to enforce a right analogous to moral rights. Intriguingly, this new cause of action was not a mere carbon copy of European moral rights, but instead was a distinctly American creation. In several respects, the budding moral rights tort was distinct from the romanticized version of moral rights portrayed by some comparative scholars. First, the normative justification for moral rights protection differed, arguably, from that found in continental Europe. With some exceptions, judges protected attribution and integrity interests, not out of respect for the inherent dignity of authorship, but because permitting false attribution or prejudicial modifications of works could harm authors' reputations; thus, there was a more defamation-like rationale to the moral rights tort.<sup>170</sup> And second, most judges concluded

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168. Hungarian attempts to extend the original article 6bis right of integrity to prevent destructions were unsuccessful, although the Berne Union members in Rome did recommend that destruction of artworks should be prevented. See ADENEY, *supra* note 1, at 137 (citing *Documents de la conference de Bruxelles 5-26 Juin 1948*, 427 (Berne 1951)).

169. 8 N.Y. 2d 187 (1960).

170. In some cases, the normative rationale took on a clearly economic flavor. As *Gilliam* demonstrates, some judges were concerned that authors' incentives to create would be dampened if the author could not police the attribution and integrity of the work. This rationale is similar to what Jeanne Fromer calls "expressive incentives," i.e., that the "incentive to create ought to be all that much stronger when intellectual property laws are structured to protect and to communicate solicitude for authors' personhood and labor interests." Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1746 (2012). This rationale should be distinguished from an alternative economic rationale focusing on third-party externalities, see Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL. STUD. 95 (1997). It is an interesting question whether this incentive rationale is consistent with modern copyright policy. In a number of fair use cases, courts have explained that copyright law should not be used to eradicate all activities which have the potential to dampen authors' creative

that moral rights could be waived via contract. Not many on the bench were willing to uphold inalienable moral rights like those found in some European countries. These idiosyncratic features of American moral rights protection came about as judges tried to reconcile conflicting moral and legal principles. On one hand, judges frequently had an intuition that authors deserved some attribution and integrity protection, but on the other hand, such protection necessarily had to co-exist with the rest of the U.S. legal system, which viewed copyrightable works as transferable commodities, and which was heavily consequentialist in tone. The judicial attempt to fit moral rights protection into the existing U.S. legal framework resulted in a toned-down, but uniquely American, conception of moral rights.

But something strange happened post 1980: the cases articulating a sui generis moral rights tort started to dry up. The cases referring to moral rights petered out in a noticeable way. Of course, such cases did not disappear altogether, as demonstrated by the 1988 case of *Society of Survivors of Riga Ghetto v. Huttenbach*.<sup>171</sup> In that case, holocaust survivors (of the Riga Ghetto) employed Professor Henry Huttenbach to document their wartime experiences.<sup>172</sup> The contract between the Society and Huttenbach assigned full copyright ownership to the Society, but also stated that the manuscript would be published “under the authorship of professor Henry R. Huttenbach, with the Society mentioned as sponsor or publisher.”<sup>173</sup> However, before the work was complete, the relationship between Huttenbach and the Society broke down. Members of the Society were unsatisfied with perceived inaccuracies in Huttenbach’s work and wished to terminate the contract with Huttenbach and to complete the work with another author.<sup>174</sup> The Society then sued Huttenbach for breach of contract. After holding that the Society had failed to prove a breach of contract, Judge Freedman proceeded to ask “whether the publisher as

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incentives. For example, allowing users to write scathing reviews may potentially have negative reputation-based consequences for some authors, and in turn may negatively affect their creative incentives; yet, such “harmful” consequences do not mean scathing reviews are copyright infringements. Instead, copyright, courts have explained, should only be used to deter activities which have a specific type of incentive effect, i.e., financial detriment flowing from economic substitution of goods in the marketplace. As a result, one wonders whether the type of reputation harm discussed in *Gilliam*, and possible consequential dampening of creative incentives, would be viewed by courts today as something with which copyright should be concerned. See *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994) (holding that cognizable market harm is market substitution, not harm from criticism). Thanks to Rebecca Tushnet for pointing out this issue.

171. 535 N.Y.S.2d 670 (1988).

172. *Id.* at 671.

173. *Id.* at 672.

174. *Id.* at 673.

owner of the copyright has the right to drastically change or revise the author's manuscript and then publish it either under another authorship or combined authorship."<sup>175</sup> Freedman answered negatively, not only because to do so would breach the credit clause in the parties' contract, but also because such lack of credit would amount to an infringement of the author's moral rights.<sup>176</sup> Freedman cited *Edison, Granz, and Gilliam*, repeating the familiar language that "a right analogous to 'moral right' . . . has been recognized in this country and in the common-law countries of the British Commonwealth," and concluded that use of the manuscript prepared by Huttenbach "would constitute passing off in violation of the author's moral rights."<sup>177</sup>

*Huttenbach* was the last case wherein one finds substantial judicial development of the moral rights concept. Nevertheless, the New York legal encyclopedia, *New York Jurisprudence*, continues to cite *Huttenbach*, *Edison*, and *Shostakovich* for the proposition that "a right analogous to a moral right has been recognized in this country so that in at least a number of situations, the integrity and reputation of an artistic creator have been protected by judicial pronouncements."<sup>178</sup> And there is the occasional dictum supporting moral rights. For example, Ruth Bader Ginsburg in *Community for Creative Non-Violence v. Reid* held that the author, Reid, may have rights against a copyright owner who would publish an "excessively mutilated or altered version" of artwork, and cited *Gilliam* and literature on moral rights.<sup>179</sup>

However, for the most part, explicit judicial discussion of authorial moral rights fell away after 1980. This is somewhat surprising given that academic commentary during this period was still generally supportive of moral rights protection. In 1976, the famous comparative law scholar, John Merryman, published an essay, *The Refrigerator of Bernard Buffet*, that argued for greater moral rights protection.<sup>180</sup> Merryman concluded that there was a substantial distance between "the protection of the integrity of the work of art in other parts of the world and the feeble functional equivalents in our law."<sup>181</sup> Also interesting is the 1988 article, *The Right of Personality: A Common-Law Basis for the Protection of the*

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175. *Id.*

176. *Id.* at 673-74.

177. *Id.* at 675.

178. 18 N.Y. Jur. 2d *Civil Rights* § 29 (2011).

179. 846 F.2d. 1485, 1498 (D.C. Cir. 1988).

180. John Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976).

181. *Id.* at 1049.

*Moral Rights of Authors*, by Edward Damich.<sup>182</sup> Damich argued that American common law contained a general background right of personality, which was the basis for other personal rights, such as the right of privacy.<sup>183</sup> And while not necessarily arguing for enhanced protection, Damich proposed that the general right of personality could provide a principled foundation for the development of moral rights,<sup>184</sup> should courts wish to develop such law. The question is, why did courts not continue to go down that path?

### III. REASONS FOR STAGNATION

There are obvious and interesting parallels between the evolution of moral rights in the United States and the evolution of the right of privacy. Both authorial moral rights and the right of privacy are considered to be “personal rights.” Both were principally judge-made common law developed rights. Indeed, Martin Roeder’s 1940 article shared a similar argumentative style with the famous article by Justices Warren and Brandeis, *Right to Privacy*: both articles cataloged the instances of protection under the disparate headings of the common law, from which a more specific legal right was induced.<sup>185</sup> But, whereas the right of privacy was ultimately adopted, in one form or another, by the majority of states, the moral rights tort failed to fully flourish.<sup>186</sup> Why was this the fate of moral rights?

One potential answer is that judges in the late twentieth century simply rejected the idea of moral rights. Perhaps the judiciary in the mid-twentieth century flirted with the idea of moral rights protection, but ultimately came to their senses in the late twentieth century and refused to push this un-American doctrine any further. This theory is

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182. Edward Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988).

183. *Id.* at 4.

184. *Id.*

185. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

186. Another interesting comparison is between moral rights and the right of publicity. The judicially created right of publicity not only flourished in the mid-twentieth century, but also was greatly influenced by some of the same individuals who were influential in the development of moral rights, see e.g. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* 202 F.2d 866 (2d Cir. 1953) (per Judge Jerome Frank); Melville Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBLEMS 203 (1954). If one were cynical, one might argue that the right of publicity, a transferable property right, flourished because this benefited Hollywood’s interests (who could then acquire and monopolize commercial exploitation of celebrities’ personas), whereas moral rights were antithetical to Hollywood’s interests because they placed greater power in the hands of creators. On the history of the right of publicity, see JENNIFER ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 45-64 (2018).

unpersuasive. There are no cases from this period which clearly reject the idea of moral rights protection. In the 1940s, cases such as *Vargas* and *Crimi*, at the very least, cast aspersions upon moral rights protections, but there is no equivalent stand-out case from the late twentieth century. Furthermore, at this time, academic commentary surrounding moral rights remained largely positive. There is, in other words, little evidence to believe that there was a reasoned rejection of moral rights.

However, a certain amount of judicial inertia surely played a role. While there is little reason to believe courts rejected moral rights, the issue of moral rights always raised—and continues to raise—mixed emotions amongst American lawyers. Koch's opinion in *Shostakovich* is typical: the judge appeared to have a moral intuition, or hunch, that authors deserve some attribution and integrity protection, but found this intuition hard to reconcile with countervailing intuitions about the property system and the place of free speech in American society. Given how typical this conflict was (and remains to be), it is not surprising that courts were somewhat hamstrung by indecision and did not wholly adopt a moral rights protection.

There was also no “trigger” case that would have spurred development of moral rights. Most cases, such as *Granz* or *Huttenbach*, did not require the court to use moral rights protection in order to uphold the author's claim. In such cases, courts could nearly always rely on a more familiar, less contentious cause of action, such as unfair competition or breach of contract, to reach the desired conclusion. On top of that, many of the controversies (such as *Seroff*) presented hard cases where it was not entirely clear which party should prevail. One wonders what would have happened if a case had come before an appellate court in which an aggrieved author had a strong and clear attribution or integrity interest, and the only feasible way to protect that interest was through a unique moral rights tort. Perhaps such a case would have acted as a “trigger” for moral rights development.

Arguably, the leading reason behind the stagnation was the impact of the Copyright Act of 1976. Congress chose not to adopt any significant moral rights protection during the copyright revision process.<sup>187</sup> The decision not to embed moral rights into the copyright statute potentially affected courts' desire to develop the concept further; Congress had the

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187. Partly this may have been based on the view that U.S. law already provided sufficient protection. A Copyright Office study prepared by William Strauss as part of the legislative revision process compared U.S. law to the laws of continental European states. Strauss concluded that “the courts in the United States arrive at much the same results as do European courts.” See William Strauss, *The Moral Right of the Author*, STUDY NO. 4, COPYRIGHT LAW REVISION, at 141 (1959).

opportunity to create an American moral rights law, should they have seen fit, but chose not to do so. The time for moral rights development was, perhaps, over. In addition, the Copyright Act contained a new provision preempting state laws' equivalent to the rights contained in the Copyright Act,<sup>188</sup> after which courts were perhaps unwilling to develop a state law moral rights cause of action, which could potentially be subject to a preemption claim. At least one commentator believed that courts were likely to find such an equivalency, and concluded that the adoption of the preemption clause "figures to wipe out the moral rights doctrine."<sup>189</sup>

In addition to the preemption clause, and the statute's failure to adopt a moral rights provision, the Copyright Act was also co-extensive with a shift in copyright law-making authority. In an intellectual history of copyright, Shyam Balganesch argues that the Copyright Act, and modern copyright law, was highly affected by the Legal Process School of jurisprudence, under which courts' ability to develop new law was restricted.<sup>190</sup> In the early twentieth century, courts operating under the influence of Legal Realism enjoyed a broad freedom to shape copyright law. But the prevailing legal philosophy by the mid-twentieth century had changed radically. After World War II, jurists were less enamored with the idea of unfettered judicial discretion.<sup>191</sup> The Legal Process School of jurisprudence emphasized Congress as the supreme law-making authority.<sup>192</sup> Judicial law-making faded somewhat into the background as courts were increasingly confined to a role of merely elaborating the statutory scheme put in place by Congress. If so, it is unsurprising that judicial development of moral rights of the early twentieth century eventually fell away.

The dominance of legislation at this time occurred not only on the federal level, but also on the state level. After the Copyright Act came into force, a number of states passed their own quasi-moral rights legislation. The New York Artists Authorship Rights Act (NYAARA) was signed in 1984 and the California Art Preservation Act (CAPA) was signed in 1979.<sup>193</sup> These laws provided that the author of certain fine artworks

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188. 17 U.S.C. § 301 (2018).

189. Jerry D. Chaney, *New Copyright Law Gives Authors Little Cause for Rejoicing*, 55(3) JOURNALISM & MASS COMMUNICATION QUARTERLY 515, 515 (1978).

190. SHAYMKRISHNA BALGANESH, *THE EVOLUTION OF AMERICAN COPYRIGHT LAW* (forthcoming 2018).

191. *Id.*

192. See, e.g., Richard H. Fallon Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 958 (1994) (attributing to the Legal Process School the view that Congress was the "principal agent of change and policy development").

193. 3 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 8D.08 (2017).

would have the right to claim authorship of the works and prevent their modification.<sup>194</sup> These statutes are partly preempted by the Federal Visual Artists Rights Act (VARA) of 1990.<sup>195</sup> Furthermore, these statutes do not provide moral rights protection in the sense that the term is used in the Berne Convention. The Berne Convention allows the author certain rights in respect to the incorporeal work.<sup>196</sup> That is, if someone displays a reproduction of a work, the Berne Convention would allow the author to claim authorship (or to restrain the display if it were prejudicial to his honor or reputation). However, the NYAARA, CAPA, and VARA laws only apply to the corporeal work.<sup>197</sup> That is, if someone were to display the original artwork without relevant credit, the author would be able to complain, but not so if the defendant only displayed a reproduction. Nevertheless, these laws surely contributed to the sense that moral rights protection was essentially a matter for legislation.

The United States' accession to the Berne Convention also contributed to this notion that the issue of moral rights was primarily a legislative matter. The Berne Convention Implementation Act was signed in 1988 and enabled the United States to join the Berne Union.<sup>198</sup> As a party to the Berne Convention, the United States has to comply with article 6bis by protecting attribution and integrity interests of foreign authors.<sup>199</sup> The process of Berne Convention implementation was largely a legislative process, and this arguably had the effect of reaffirming the idea that moral rights protection was something for Congress, not the courts, to create.

During the accession process, the infamous "patchwork thesis" also became a focus of debate. When assessing the American potential compliance with article 6bis, an Ad Hoc Working Group came to the controversial conclusion that, while U.S. law contained no explicit moral rights provision, a "patchwork" of federal and state causes of action, from state common law libel and privacy actions to the federal Lanham Act provisions on unfair competition, provided sufficient protection to attribution and integrity interests to enable the United States to join the Berne Convention without further legislation on moral rights.<sup>200</sup> This

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194. *Id.*

195. *Id.*

196. Berne Convention for the Protection of Literary and Artistic Works, art. 2(1), as amended, September 28, 1979.

197. NIMMER, *supra* note 193.

198. Berne Convention Implementation Act of 1988, 134 Cong. Rec. S. 14549 (Oct. 5, 1988).

199. *Id.*

200. *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, *supra* note 5.

highlights that by the mid-1980s, there were established “alternative” routes to moral rights protection. In particular, rather than claim moral rights protection, litigants were more likely to be successful if they claimed a lack of appropriate attribution amounted to a false designation of origin and reverse passing off under § 43(a) of the Lanham Act. The case *Smith v. Montoro* had paved the way for this argument.<sup>201</sup> Likewise, *Gilliam* also held that by altering Monty Python’s work and attributing such work to Monty Python was also a false designation of origin under the Lanham Act as it passed off ABC’s edits as the work of Monty Python.<sup>202</sup> The fact that these alternative causes of action became the locus of moral rights protection surely limited the need for courts to develop further a sui generis theory of moral rights protection.<sup>203</sup>

Lastly, one should not underestimate the influence, and perhaps the unintended consequences, of scholarly writing on this issue. In his famous essay, *The Refrigerator of Bernard Buffet*, John Merryman argued that U.S. law contained no moral rights protection and was deficient in comparison to continental law.<sup>204</sup> In 1976, Merryman wrote: “*Crimi* is one of the few American decisions addressing the moral right question, and its response is unequivocal: there is no moral right.”<sup>205</sup> But this essay likely had a paradoxical, even perverse, impact. Merryman was a supporter of strong moral rights protection. In his essay, Merryman, arguably, strategically over-read *Crimi* and downplayed the importance of existing American moral rights protections by giving short shrift to decisions like *Chesler*, *Edison*, and *Seroff*, with the goal of proving how deficient U.S. law was compared to the French and German. But in so doing, he sent a strong message to the American judiciary: as currently written, U.S. law does not protect moral rights. While Merryman intended his essay to spur the development of a moral rights protection, telling a precedent-minded judiciary that U.S. law unequivocally failed to protect moral rights likely had the opposite effect, and chilled the further development of moral rights law. Likewise, Damich started his 1988 article by recounting the stories of *Vargas* and *Crimi*, perhaps giving the false impression that these cases were typical or representative, when they

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201. 648 F.2d 602 (9th Cir. 1981).

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

203. It is also possible that the expansion of the derivative works right in § 106(2) of the Copyright Act has provided plaintiffs with another powerful tool with which to address integrity violations and, in consequence, lessened plaintiffs reliance on developing a sui generis tort of moral rights. Thank you to Peter Karol for highlighting this point.

204. Merryman, *supra* note 180, at 1039.

205. *Id.*



could plausibly be seen as outliers.<sup>206</sup> By promoting the “pure” and romanticized version of European moral rights, arguably, these scholars undercut the American version of the moral rights law that was still in its infancy.

#### IV. CONCLUSION

Moral rights are un-American; they are something that Europeans do, but find no purchase in the hardheaded, utilitarian, property-focused logic of American copyright law that upholds society’s interest in a robust public domain. This is familiar rhetoric in the debate about moral rights in the United States today. And, while there is much truth in the sentiment, it is—as most rhetorical arguments are—overly simplistic. While U.S. courts did not embrace moral rights to the extent that continental jurists did,<sup>207</sup> the American reception of moral rights was warmer than often portrayed. At the height of judicial sympathy towards authorial attribution and integrity claims, courts almost developed a unique state-law moral rights cause of action. This story should be kept in mind today. In 2018, the Copyright Office is examining the issue of moral rights, and in the wake of recent judicial developments, reassessing whether American copyright law is consistent with the Berne Convention obligations, and whether U.S. law should adopt more explicit moral rights protections.<sup>208</sup> The prescription of this Article is that, while this debate is ongoing, policy makers should forgo simplistic arguments about whether moral rights are something alien, and antithetical, to U.S. law, and instead focus on the normative questions at hand.

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206. Damich, *supra* note 182, at 1–2.

207. *But see* Cyril P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L. L. J. 353 (2006).

208. U.S. Copyright Office, *Study on the Moral Rights of Attribution and Integrity*, 82 FED. REG. 7870 (2017).