1-1-1978

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Recommended Citation
Edward D. L. Yuen, Moral Right Revisited: Are We Closer to Full Protection for Authors, 1 HASTINGS COMM. & ENT. L.J. 419 (1978). Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol1/iss2/6

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Moral Right Revisited: Are We Closer to Full Protection for Authors?

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Member, third year class

Introduction

The Constitution gives to the Congress the power to secure the rights of authors in order to promote the "Progress of Science and useful Arts." The copyright laws which have resulted from the exercise of this power have, in major respects, compromised the rights of authors to competing interests.

The Copyright Revision Act of 1976 has brought significant changes to our copyright laws, changes which more fully recognize the rights of authors. The New Act has also been heralded as bringing United States copyright law into alignment with the copyright laws of other nations, thus making United States adherence to the Berne Convention a realistic possibility.

1. For convenience the term "author" is used throughout to refer to the creators of all art forms and is not restricted to literature. The term "publisher" is similarly used to refer to all commercial users of literary and artistic property.
3. Perhaps the clearest example of such a compromise is the existence of the manufacturing clause in our copyright laws. 17 U.S.C. § 601 (1976). The manufacturing clause has been a part of American copyright law since 1891. Generally, it requires books and periodicals in the English language to be manufactured in the United States in order to receive full copyright protection. The resultant benefit to American printers at the expense of authors, especially foreign authors, is obvious. For discussions which have called for the repeal of the manufacturing clause see McCannon, Study No. 35, The Manufacturing Clause of the U.S. Copyright Law, 2 Studies on Copyright 1123 (Arthur Fisher Mem. ed. 1963); Ashford, The Compulsory Manufacturing Provision: Copyright Protection to the Foreign Author, ASCAP, 4 Copyright L. Symp. 48 (1952).
6. The Berne Convention is a multilateral treaty, presently between over 60 countries, which prescribes certain minimum standards for the protection of literary and artistic property for its members. It is the oldest international copyright union having been formalized in...
This change of attitude, as evidenced by the New Act, is long overdue since American copyright law has long been considered an anomaly in the world of copyright legislation. For various reasons, some of which will be explored in this note, our copyright laws have resisted the trend of expanded copyright protection afforded authors in most countries. For example, the United States has continued the requirements of notice and registration as prerequisites to copyright protection in spite of the abandonment of all formalities by the Berne Convention. Our "manufacturing clause" is similarly unique in copyright legislation.

Despite the advances made by the New Act, the law of intellectual property in the United States continues to lag behind its European counterparts in at least one major respect. The "moral right" doctrine, which forms so prominent a part of copyright laws in civil law countries, has still not been adopted in this country. Moreover,

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1886. Although the United States was represented at the official organizational meetings in 1885 it did not sign the 1886 treaty. S. LADAS, INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 82 (1938) [hereinafter cited as LADAS].

Berne remains a major force in international copyright and retains its vitality through international revision conferences held approximately every 20 years. For a thorough discussion of the Berne Convention and its probable impact on American authors and publishers see Nimmer, Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law, 19 STAN. L. REV. 499 (1967).

7. Abelman and Berkowitz, International Copyright Law, 22 N.Y.L.S. L. REV. 619 (1977). Among other benefits, adherence to Berne would provide a greater measure of protection to authors and increase the number of nations with which the United States has international copyright relations, thereby broadening the protection of authors throughout the world. For a full discussion of the benefits which would be derived from accession to Berne see Nimmer, supra note 6, at 549-54.


9. Id. at § 408.

10. The Berne Convention articles were revised in Berlin in 1908 so that Berlin Convention, art. 4 provides that: "The enjoyment and the exercise of these rights shall not be subject to the performance of any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work..." UNESCO, COPYRIGHT LAWS & TREATIES OF THE WORLD (1977) [hereinafter cited as CLTW]. Copyright in almost all other countries is automatic with publication. For a discussion of the differences between American copyright law (prior to the New Act) and the Berne articles (which reflect the copyright legislation of most countries) see Derenberg, The Status of United States Authors and Works First Published in the United States Under the Universal Copyright Convention, 5 COPYRIGHT BULL. 206 (1958).

11. See supra note 3.

12. Some of the countries which explicitly provide for moral right protection in their copyright statutes include: Austria (Federal Act on Copyright in Works of Literature and Art and Related Rights (Copyright Act), Part II, ch. 1, § 68 (1936). Official German text: Bundesgesetzblatt, p. 131 (1936)); France (Law No. 57-296 on Literary and Artistic Property, Title I, art. 1, 6 (1957). Official French text: [1957] J.O. at 2723); West Germany (An Act dealing with Copyright and Related Rights, § IV, art. 12-14 (1965). Official German text:
circumstances are such that adoption of such legislation is unlikely in the foreseeable future.¹³

Forty years ago, one commentator observed that "despite the importance of the doctrine of moral right, it is amazing how little study has been accorded to it in American literature."¹⁴ Since that observation only two significant articles have been written on the subject.¹⁵ This note undertakes to present the concept of moral right, to identify the theoretical reasons for its rejection in this country, and to suggest how the doctrine might be incorporated into our case law without violating any principles of American jurisprudence.

**The Doctrine of Moral Right**

The doctrine of moral right is indigenous to continental Europe and was expressed by the French courts as early as 1850.¹⁶

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¹³ See infra note 32.


¹⁵ Katz, *The Doctrine of Moral Right and American Copyright Law: A Proposal*, ASCAP, 4 *Copyright L. Symp.* 79 (1952) [hereinafter cited as Katz]; Strauss, *Study No. 4, The Moral Right of the Author*, 2 *Studies on Copyright* 963 (Arthur Fisher Mem. ed. 1963) [hereinafter cited as Strauss]. Both above cited articles have been widely relied on by the courts and lawyers. Katz, however, argues that the copyright laws should be amended to include the moral right. This, the present writer thinks, is untenable. See text accompanying notes 33-48, infra. Strauss, on the other hand, argues that the same rights protected by the moral right doctrine are adequately protected by our courts through more traditional causes of action such as invasion of privacy, unfair competition and basic contract law. For a discussion of the inadequacy of this approach see text accompanying notes 53-61, infra.


seeks to encourage literary and artistic pursuits by granting to authors the exclusive right to exploit their work for a statutory period. Unlike the copyright, which is an economic right based on property concepts, the moral right is a personal right similar to those rights in tort which protect the individual from injury. The doctrine of moral right recognizes that upon the sale of their work authors part with more than an item of property. Through publication authors expose themselves to the public. The oft quoted concurring opinion of Judge Seabury in *Clemens v. Press Publishing Co.* well illustrates the concept.

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. 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. 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.

Under copyright authors have the exclusive right to sell their work; the right to have that work published in the manner in which they wrote it is protected by the moral right in those countries which recognize it.

While the right to prevent distortion of the work remains primary under moral right the doctrine has been expanded further. Like the copyright the moral right is now a bundle of rights. Ladas, studying the laws of various European countries, has categorized the moral right into three basic groups.

(1) *The right of authors to control the publication and presentation of their work.* Included in this first group is the right of authors

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18. Id. at § 302.
19. In keeping with the notion of copyright as a property right it may be sold, bequeathed by will or, should the owner die intestate, pass as personal property under applicable state laws. 17 U.S.C. § 201(d)(1) (1976).
21. Id. at 207, 67 Misc. at 184.
23. LADAS, at 576.
to create and publish in any form desired, refuse to create even after contracting to, modify the work at will and withdraw the work from publication when it no longer reflects their philosophy or conviction.

(2) The right of authors to have their authorship recognized. This, the so-called "paternity right," insures that the author's name will be affixed to his work. It also precludes the use of his name on any work not of his creation and the use of his real name when a nom de plume has been used.

(3) The right of authors to prevent any modification or mutilation of their work. This remains the cornerstone of the moral right doctrine. It allows writers to prevent users of their work from altering, and thereby distorting it. Painters are likewise protected in that it affords them the right to prevent mutilation of their work.

In addition to these three categories other aspects of the moral right include the right of authors to prevent excessive criticism of their work and a prohibition against other acts which may serve to injure the author's reputation or honor. Further, the moral right, being a personal right, is nonassignable. Oftentimes it is also held to be perpetual.

The latter two categories of the moral right doctrine presented above were incorporated into the Berne Convention Articles in 1928 at the Rome Convention. Article 6bis of the Berne Convention now reads:

(1) Independently of the patrimonial rights of the author, and even after the assignment of the said rights, the author retains the right to claim the authorship of the work as well as the right to object to every deformation, mutilation or other modification of the said work, which may be prejudicial to his honor or his reputation.

The presence of the moral right clause in the Berne Articles has been, and continues to be, a major stumbling block to United States adherence to the Berne Union. Prior to our joining the Universal Copyright Convention in 1954, several bills were introduced in

24. Id. This aspect of the moral right is intended to protect the author from all arts which may damage his professional standing. For example, an author would have a cause of action where his statements are quoted to endorse a commercial product. Strauss, at 123.

25. See infra note 89.

26. CLTW, Rome Convention, art. 6bis (1) (1928).

27. The Universal Copyright Convention (U.C.C.) is a multilateral treaty, presently between 70 countries, which provides certain minimum standards for the protection of literary and artistic property for its members. Overall, the U.C.C. provides a lesser measure of protection for authors than does the Berne Convention. Principally at the insistence of the United States the U.C.C. articles require compliance with notice and registration provisions as a
Congress to amend the copyright laws of this country to make adhesion to Berne possible. These bills were motivated by the obvious need for the United States to belong to an international copyright organization.28 Both the “Duffy Bill”29 and the “Shotwell Bill”30 contained provisions which would protect the moral right of authors; both failed.31 The failure of these bills marked the end of any serious legislative attempt to extend this protection to authors. With the United States now firmly a part of the Universal Copyright Convention, the pressure to amend the copyright laws to include the moral right in accordance with Berne requirements no longer exists.32 As the next section illustrates, amending the copy-

prerequisite to copyright protection. Also, no moral right protection is afforded under the U.C.C. See Abelman and Berkowitz, supra note 7, at 637-43.

The U.C.C. was sponsored by the United Nations and became effective on Sept. 16, 1955. It was intended to coexist with the Berne Convention and contains provisions which would preclude a Berne member from renouncing Berne and subsequently relying on the U.C.C. in copyright relations with other Berne members. 6 U.S.T. art. XVII.

28. Prior to joining the U.C.C., the United States belonged only to the Buenos Aires Convention on Literary and Artistic Copyright. In addition, the United States had bilateral arrangements with 38 countries with protection varying from country to country. Ringer and Gitlin, Copyrights 86-87 (rev. ed. 1965). Putting it mildly, international copyright protection for domestic authors was at best confusing. Moreover, prior to their accession to the U.C.C., the United States and the Soviet Union were the only major countries which did not belong to an international copyright union.

29. S. 3047, 74th Cong., 1st Sess. § 41(b) (1935) provided:

   Independently of the copyright in any work secured under this act, as amended, and even after assignment thereof, the author retains the right to claim the authorship of the work as well as the right to object to every deformation, mutilation, or other modification of the said work which may be prejudicial to his honor or to his reputation: Provided, however. That nothing in this paragraph shall limit or otherwise affect the right of full freedom of contract between the author of a work and an assignee or licensee thereof, or invalidate any express waiver or release by the author of any such rights or of any remedies or relief to which he might be entitled in consequence of a violation thereof, and the assignee or licensee of the author’s moral right may, with the author’s permission, make any change in the work which the author himself would have had a right to make prior to such assignment.

   In the absence of a special contract or notice by the author at the time he consented to the use of his work the necessary editing, arranging or adaptation of such work for publication in book form or for use in a newspaper, magazine, or periodical, in broadcasting, in motion pictures or in mechanical or electrical reproduction in accordance with customary standards and reasonable requirements, shall not be defined to contravene the right of authors reserved in this section: provided that nothing in this section shall be deemed to alter or in any manner impair any right or remedy of an author at common law or in equity.


31. The “Duffy Bill” as amended passed the Senate on August 7, 1935. In the House the bill was never acted on as Congress adjourned while it was still in committee. Ladas, at 860. The “Shotwell Bill” failed in Congress and was never given a hearing of which any known record was preserved. Katz, at 144.

32. Any chance for the inclusion of a moral right provision in our copyright law probably
right laws to include the moral right may have raised problems unimagined by the proponents of change.

**The Incompatibility of Moral Right With American Copyright Theory**

The reasons most often advanced for the rejection of the moral right doctrine in this country have been: the opposition of motion picture producers and other users of creative works, judicial and legislative ignorance of the doctrine and the ability of present contract and tort law to provide similar protection. While these reasons are partially valid, they fail to recognize the basic incompatibility of this doctrine with American copyright law as it has been developed. Despite the view of some commentators, the doctrine of moral right is repugnant to American copyright law. This, however, does not mean it is repugnant to American law in general.

The copyright clause of the Constitution provides that Congress shall have power to "promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the use of their Intellectual Creation."

Despite our accession to the U.C.C. there are still significant benefits for authors to be gained from accession to the Berne Convention. See Nimmer, supra note 6, at 549-54.

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33. Roeder, at 558. See *Hearings before a Subcomm. of the Comm. on Foreign Relations on Executive E*, 75th Cong., 1st Sess. (1937) (statements of Edwin P. Kilroe and Sydney M. Kaye). Mr. Kilroe, the copyright adviser to Twentieth Century-Fox Film Corporation, opposed the moral right doctrine by arguing that a "limitation on the right to change the plot, theme, sequence and description of the characters in literary works would bring havoc to the film industry." Id. at 20. Mr. Kaye, an attorney appearing on behalf of the National Association of Broadcasters, also opposed the doctrine fearing that the changes to works required by the broadcast medium would "make every broadcast program a potential source of lawsuits." Id. at 29. Professor Nimmer has observed that these objections were based "on a supposed, rather than actual, conflict." Since Article 6bis of the Berne Convention does not preclude alienability of moral rights users of works could simply acquire an author's moral rights by contract. Nimmer, supra note 6, at 549. Moreover, the Duffy Bill provided for the free alienation of moral rights. See supra note 29.

34. Katz, at 131-44.

35. Strauss, at 141-42.

36. Katz has written that: "The doctrine of moral right has fared badly in America not because it is basically repugnant to American law, but rather because it has not received the serious intellectual examination by either bench, bar, legislature or law school, to which it has been entitled." Katz, at 145.

exclusive Right to their respective Writings and Discoveries." As Ladas has pointed out, "copyright legislation passed in pursuance of this grant of power to Congress is to be construed in light of the constitutional provisions." To establish the incompatibility of the doctrine of moral right with American copyright it is essential to understand the theory of copyright which has been developed by our courts while construing the copyright clause. The United States Supreme Court case of Wheaton v. Peters, decided in 1834, advanced a theory of copyright which has survived intact to this day.

Between 1816 and 1827 Henry Wheaton authored twelve volumes of reports of cases before the United States Supreme Court. Prior to publication of the first volume, Wheaton transferred his rights in it to Matthew Carey. Carey allegedly deposited the title page of the volume with the clerk of the District Court of Pennsylvania to comply with the requirements of the Copyright Act of 1790. Carey subsequently transferred his copyright to the firm of Matthew Carey & Sons, which then transferred it to one Donaldson.

After publication of Wheaton’s reports, Richard Peters compiled and published a volume entitled Condensed Reports of Cases in the Supreme Court of the United States, in which the first volume of Wheaton's work was reproduced. Wheaton, along with Donaldson, brought suit seeking injunctive relief.

Peters answered by denying that the publication was an infringement of copyright and further argued that plaintiffs, having failed to comply with the requirements of the Copyright Act of 1790, had no copyright at all. The Circuit Court in Pennsylvania agreed, holding that plaintiffs’ failure to prove delivery of copies of the work to the Office of the Secretary of State pursuant to Section Four of the 1790 Act was fatal to their copyright.

On appeal to the Supreme Court the appellants stated the issue for the Court:

. . . [I]t is inquired whether the power granted to Congress by the constitution transfers the whole subject of property of authors to the exclusive authority and control of congress; so that the property of an author ceases to exist at all, without the legislation of congress: or whether it leaves the author in the enjoyment of his property, as he had it before the adoption of the constitution; and

38. LADAS, at 685.
merely attempts to improve what was supposed to be an imperfect enjoyment by authorizing congress to secure it."

The issue having been stated, appellants then contended that England had long recognized that "an author had, at common law, the sole and exclusive property in his copy . . . upon the foundation of natural right." Since Pennsylvania had never enacted a copyright statute, the English common law copyright ipso facto applied in Pennsylvania. Any noncompliance with the Copyright Act of 1790, therefore, served only to divest the author of rights granted by the Act; the remedies provided by the common law, including injunctive relief, were retained.

More succinctly, the issue before the Court was whether an author, after publication of his work, retained rights to that work based solely on his authorship; or are they wholly derived from the copyright statutes?

In their endeavour to establish a theory of copyright before the Court, appellants recognized the importance of distinguishing the author from the inventor, an inventor's patent having long been recognized as nothing more than a limited monopoly, wholly dependent upon statutory provisions for its existence. The appellants argued that:

The common law property of an author is not taken away by the constitution of the United States . . . In the constitutional clause relating to the rights of authors and inventors, there are two subjects, distinct enough in themselves, and only united by the form of expression . . . They are so widely different, that the one is property, the other a legalized monopoly. The one may be held and enjoyed without injury to others; the other cannot, without great prejudice. The one is a natural right, the other in some measure against natural right."

If the copyright is with patents "in all respects alike, and equally dependent on legislative favour for existence and protection," the economic benefit of a limited monopoly granted to the author to encourage literary pursuits would be the sole purpose of copyright. The public interest would be primary, the author's rights simply one of economic exploitation for a statutory period, and any further protection of the author would have to come from outside the copy-

41. 33 U.S. (8 Pet.) at 599.
42. Id. at 596.
43. Id. at 598.
44. Id. at 597-98.
right laws. The issue was significant and the exhaustive arguments of both the parties and the Court indicate their appreciation of the importance of the controversy.

Mr. Justice McLean rendered the opinion for the Court. The majority saw no distinction between copyrights and patents, accordingly Justice McLean asked:

In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? In the production of this, his mind has been as intensely engaged, as long, and, perhaps as usefully to the public, as any distinguished author in the composition of his book.

The result of their labours may be equally beneficial to society, and in their respective spheres they may be alike distinguished for mental vigour. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has never been pretended that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly . . .

That everyone is entitled to the fruits of his labour must be admitted; but he can enjoy them only, except by statutory provision . . .

For the Wheaton Court, "Congress instead of sanctioning an existing right . . . created it." It then concluded that the rights of authors, being conferred by statute, could only be acquired by strict compliance with the statutory provisions.

It is unfortunate that the Court did not recognize the intimate association of the author with his work, an association which simply does not exist between the inventor and his invention. In fairness to the Court, however, their seeming disregard for the unique relationship which exists between the author and his work is not wholly indefensible. It may be that the Court took greater cognizance of the public interest, subordinating the rights of the author to it. Insofar as benefits to the public are concerned it may very well be difficult to distinguish the contributions of the author from those of the inventor. Moreover, the Court was engaged in interpreting the Con-

45. Id. at 657.
46. Id. at 661.
47. The differences between authors and inventors are in fact numerous and significant. The intimate association of the author with his work simply does not exist between the inventor and his invention. Inventions, with rare exception, are publicly exploited with no identification of the inventor. Similarly, the uniqueness of a literary or artistic work does not exist with inventions. The inventions of the world would in all probability exist today whether or not their particular inventors ever existed.
MORAL RIGHT REVISITED

stitution. By granting protection to the author and the inventor in the same constitutional clause, didn't the Framers intend them to be in all respects treated alike? Wheaton established that they did not combine the rights of authors and inventors in the same clause merely "for brevity and comprehensiveness" but intended to confer the same rights. If the Wheaton case was correctly decided there is no place for the moral right doctrine in our copyright laws. Regardless, the decision has the inconsiderable advantage of tradition, it has stood for nearly a century and a half.

Before leaving Wheaton, the dissenting opinion of Justice Thompson deserves consideration. It has interest for our purposes because it presents a view of copyright generally compatible with the moral right doctrine.

While conceding the clouded origins of the common law rights of authors, Justice Thompson argued that they should nevertheless be recognized. Relying on Blackstone he wrote:

[T]he true mode of ascertaining a moral right, is to inquire whether it is such as the reason, the cultivated reason of mankind must necessarily assent to. No proposition seems more conformable to that criterion, than that everyone should enjoy the reward of his labour . . . Whether literary property is sui generis, or under, whatever denomination of rights may be classed, it seems founded upon the same principle of general utility to society. Thus considered, an author's copyright ought to be esteemed an invaluable right, established in sound reason and abstract morality.

Justice Thompson then argued that an affirmative statute does not abrogate a common law right. Thus, where the legislature has acted there will be two concurrent remedies. For Justice Thompson, the author's interest prior to publication is protected by the common law. Following publication these rights are secured by the Copyright Act. Since this security is limited in duration, upon termination the author's interest is again protected by the common law. "The protection for a limited time by the aid of penalties . . . proceeds upon the ground that the author, within that time, can so multiply his work, and reap such profits therefrom, as to enable him to rest upon his common law right, without the extraordinary aid of penal laws." Justice Thompson thus would afford authors a perpetual right.

49. Id. at 671 (Thompson, J., dissenting).
50. Id. at 690.
51. Id.
Whereas the majority precluded the development of a separate body of common law copyright protection, Justice Thompson recognized the existence of such a body of law established in "abstract morality," perceiving the Copyright Act as supplemental to it. Not only would the extent of copyright have been perpetual by his reasoning, its breadth would also have been expanded. The courts, rather than feeling the constraints of the monopoly concept in determining the rights of authors, would have been free to develop a common law copyright limited only by "sound reason and abstract morality."

It is important to bear in mind that the Wheaton decision narrowed the scope of copyright to the protection of the author's economic rights. It is not suggested that had the common law been recognized in the decision, a moral right would have been incorporated into our copyright laws. The evidence is quite to the contrary, moral right having never been recognized in either England or the United States. What Wheaton did, however, is establish a concept of copyright which is incompatible with the moral right doctrine. Copyright because of Wheaton begins and ends as a legalized limited monopoly.  

**The Need For an American Moral Right Doctrine**

As a result of the Wheaton decision it is now commonplace to speak of copyright as embodying only the economic rights of authors provided by federal statutes. This, however, does not mean that the personal rights of authors are wholly unprotected. To the extent that these rights have been upheld, American courts have found protection "under more conventional and respectable labels such as unfair competition, defamation, invasion of privacy and breach of

52. The theory of copyright developed by the Wheaton decision has remained intact. Nearly a hundred years later a Patent Office official reported to Congress that:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted . . . The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given.

H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1926).

The courts have similarly reaffirmed the position taken by the Wheaton Court. See Fox Film Corp. v. Doyal, 286 U.S. 123 (1932); Mazer v. Stein, 347 U.S. 201 (1954); Goldstein v. California, 412 U.S. 546 (1973).
Several commentators have argued that there is really no need for adopting the moral right doctrine since present contract and tort remedies offer the same protection to authors.\textsuperscript{54} There is obvious merit to this argument, for many courts have in fact upheld the personal rights of authors under traditional tort and contract theories.\textsuperscript{55}

There are, however, shortcomings to the present approach used by our courts. The “application of so many different doctrines to a subject matter which is intrinsically homogeneous produces confusion; choice of theory becomes dependent on a fortuitous combination of factors, rather than on the basic needs of the problem.”\textsuperscript{56} The wide variety of theories relied on by the courts have forced authors to resort to a “shotgun” approach in seeking to protect their rights. For example, in \textit{Landon v. Twentieth Century-Fox Film Corp.},\textsuperscript{57} the author of the book \textit{Anna and the King of Siam} alleged that a 1972 television series presented her work as a lighthearted comedy “punctuated with bursts of dubbed laughter” when her book is a serious literary work dealing with the struggle for human rights. Claiming damage to her reputation and the literary property she brought suit alleging defamation, invasion of privacy, misappropriation of literary property and wrongful attribution of credit.\textsuperscript{58} In \textit{Gilliam v. American Broadcasting Co.},\textsuperscript{59} plaintiffs also alleged mutilation of their work, a television comedy series entitled \textit{Monty Python’s Flying Circus}. They brought suit under the theories of breach of contract, copyright infringement, violation of section 43(a) of the Lanham Act (Federal Unfair Competition Act) and violation of the New York unfair competition statutes.\textsuperscript{60}

Having no recourse to the moral right, authors have also had to rely on contractual provisions to protect their rights. The results

\textsuperscript{53} NIMMER, NIMMER ON COPYRIGHT 444 (1963).
\textsuperscript{54} Strauss, at 41-42.
\textsuperscript{55} See NIMMER, supra note 53, at 444-53.
\textsuperscript{56} Roeder, at 575.
\textsuperscript{57} 384 F. Supp. 450 (S.D.N.Y. 1974).
\textsuperscript{58} On this issue the court held that the plaintiff having granted defendant the right to alter the work had no basis to complain. Further, the defendant, having truthfully acknowledged that the series was “based on” plaintiff’s work, did not engage in tortious conduct. \textit{Id.} at 500. For relevant portions of the contract granting Twentieth Century-Fox the right to alter the work see infra note 67.
\textsuperscript{59} 538 F.2d 14 (2d Cir. 1976).
\textsuperscript{60} In that 27 percent of the original program was omitted (24 minutes from each 90 minute program was cut to accommodate commercials) in contravention of contractual provisions to show the programs in their entirety, the court found sufficient likelihood of success on the merits to grant plaintiffs a preliminary injunction. \textit{Id.} at 19.
have been far from satisfactory. Although dictum, one court had occasion to write:

Title to the manuscript having passed by the completed contract . . . the defendant was not obligated to publish it at all, nor could plaintiff compel or prevent its publication, with or without his name. The objections, refusals, and wishes of the plaintiff after parting with the title in the property may betray the eccentricities of the author; but they have no greater weight in law than the wishes of a stranger to the transaction after it was consummated.61

More recently, in Preminger v. Columbia Pictures Corp.,62 a producer sought to enjoin the showing of an edited version of his film Anatomy of a Murder on television. In denying relief the court held that absent any specific contractual provision reserving to plaintiff the right to approve the editing of his film, the custom of allowing editing for commercials and time requirements would be determinative. While agreeing with the outcome of the case (no extensive cutting which would amount to mutilation was alleged) it does demonstrate the burden placed on the author to actively protect his work by contract. Interestingly, the court noted that Preminger had inserted contract clauses which called for his approval of any editing of two prior films he had sold to television. The court took this as evidence of an intent on Preminger's part to release this film without any control over editing.63 Since Anatomy of a Murder was a superior film to The Moon is Blue and Man with the Golden Arm, his two earlier films sold, it seems more likely that the omission of an approval clause was an oversight on Preminger's part.64

A further problem exists with contractual protection of an author's rights. As Katz has pointed out, the ability of an author to maintain and protect his rights is realistic only if equality of bargaining power is presumed.65 The absence of bargaining power may be extremely difficult for the plaintiff-author to prove. In Landon66 the plaintiff had, thirty years earlier, sold the right to renew the copyright to her work. Her claim that she was forced to give up her renewal rights as a condition to the defendant purchasing her work was dismissed. The court held that plaintiff needed to show that she

63. Id. at 602, 49 Misc. 2d at 369.
64. The contention that Anatomy of a Murder was one of the very few motion pictures with a AA-1 rating was not challenged by the defendant. Id. at 596, 49 Misc. 2d at 364.
66. 538 F.2d 14 (2d Cir. 1976).
wished to sell only the original copyright at the time she signed the contract, that she expressed this to the defendant and that the sale of the renewal right was forced upon her by virtue of the superior economic strength and market dominance of the defendant.\textsuperscript{67}

American courts are not adverse to extending protection to an author's moral right; they have, through a variety of legal theories, protected these rights. Fashioning a moral right doctrine suitable to the needs of the author, users of creative works and the public is possible and necessary. It is unfortunate that the needs of the publisher are often contrary to the rights of the author. This should not blind us, however, to the necessary relationship which exists between them. The interest of both must be balanced with an eye towards the benefit to the public.

It is also unfortunate that there is an implication that protection of the author must be at the expense of the public. This is true only if we consider the monopolistic nature of the copyright. Further reflection would reveal that fuller protection of the author, in the nature of moral right, benefits the public. Just as an author does not exist wholly apart from his work, society does not exist wholly apart from the work of its authors. Good literature, music and art become a part of the culture and heritage of the society which spawned it. Thus, the public also has a stake in maintaining the integrity of these works.\textsuperscript{68}

\textsuperscript{67} The court also noted that although the defendant “as the only interested buyer may have been in a position to drive a hard bargain with Landon, the exercise of such power is not the kind of conduct proscribed by the antitrust laws . . .” \textit{Id.} at 458. The hard bargaining of the defendant is especially apparent where the contract in part granted defendant the right to:

reproduce . . . spoken words taken from and/or based on the text or theme of said literary property . . . in . . . motion pictures, using for that purpose all or a part of the theme, text and/or dialogue contained in said literary property [and] adopt one or more versions of said literary property, to add to and subtract from the literary property, change the sequences thereof, change the title . . . in connection with works or motion pictures wholly or partially independent of said literary property . . . change the characters . . . change the descriptions of the said characters, and use all thereof in new versions, adaptations and sequels . . . \textit{Id.} at 459 (emphasis in original).

The effects of disproportionate bargaining seems to have been with us since the first Copyright Act. Barbara Ringer has noted that: “One year after the enactment of the first copyright law, Jeremy Belknap was forced to secure publication of “The Foresters,” possibly the first American novel, on terms that included not only the outright sale of the copyright but also a guarantee of the price of paper for the edition. Success changed the bargaining equation and a later contract between Belknap and the same publisher required no such sacrifices. The case with James Fenimore Cooper is very similar.” Ringer, \textit{Two Hundred Years of American Copyright Law} in \textit{ABA, Two Hundred Years of English and American Patent, Trademark and Copyright Law} 117 (1977).

\textsuperscript{68} See Roeder, at 575; Katz, at 123.
To summarize, establishing an American moral right doctrine would have the following advantages: (1) A single cause of action could be pleaded thereby eliminating the “shotgun” approach currently resorted to by authors to protect their work and reputation. Moreover, the tort theories currently used by authors often fail to adequately protect the author because they were not developed with his special needs in mind. (2) With a single cause of action to work with courts would be freed to establish rules relating to specific injuries to authors rather than having to decide the applicable limits of a wide variety of theories resorted to by plaintiffs. (3) A moral right doctrine would better accommodate the needs and realities of the author in the marketplace. The heavy reliance on contracts fails to adequately protect the author from injury to his work and his personality. (4) Since creative works form a part of the culture of a society, affording the author additional rights to protect his work also protects the society.

A Proposal For Adopting The Moral Right

As has already been stated, amending the copyright statues to include moral right protection would raise possible constitutional problems. The moral right, however, is consistent with American legal principles generally and could be readily adopted under tort concepts. An American tort for invasion of the moral right could be composed of three major components: the right to disclose the work, the paternity right and the right to the integrity of the work. 69

69. Many civil law countries also recognize the right of authors to withdraw their work from further publication when it no longer conforms to their philosophical convictions. For example, the French copyright law provides that:

Notwithstanding the transfer of the exploitation rights, the author, even after the publication of his work, shall enjoy, in relation to the transferee, the right to correct or retract. He cannot, however, exercise this right except on the condition that he indemnify the transferee beforehand for the loss that the correction or retraction may cause him.

CLTW, Law No. 57-296 on Literary and Artistic Property (France), Title II, art. 32.

It has been pointed out that the duty to indemnify would, in most cases, be so costly as to render the right nugatory. Strauss, at 134. A further reason for its exclusion from the scheme proposed is its ineffectiveness. As Sarraute observed: “The right of withdrawal is clearly of so little efficacy that it has never, to our knowledge, been exercised since the 1957 law [Law No. 57-296] was promulgated. No writer has found it desireable to ask the courts to assess the indemnity he would be required to pay . . . in order to secure the chimerical opportunity to attempt to suppress an already published work. Sarraute, supra note 15, at 477.
The Right to Disclose

Unpublished works\textsuperscript{10} have traditionally been protected in the United States by state law.\textsuperscript{11} The Copyright Act now extends to these works, thus allowing the author to enforce his right to exclusively exploit his work by means of the federal statutes.\textsuperscript{12} The right to exploit allows the author to determine the manner in which the work will be publicly disclosed, to prevent others from disclosing the work without his consent or to prevent publication altogether.\textsuperscript{13}

The protection afforded authors in this country, prior to publication, closely parallels that of moral right countries. Fuller protection is possible, however, by adopting the French approach of dealing with authors who have contracted to create a work and subsequently cannot complete it. Under moral right the author in such a situation cannot be compelled to create against his will. While American law insures the same result by denying specific performance in personal service contracts,\textsuperscript{14} the threat of damages for breach may have the effect of forcing authors to deliver an inferior work.\textsuperscript{15} French courts have protected the author in such situations by limiting damages to the return of any amounts received from the other party in all cases where failure to complete the contract is not the result of bad faith.\textsuperscript{16} The French approach more fully recognizes the intimate

\textsuperscript{70} "Publication" is defined in 17 U.S.C. § 101 (1976) as:
- the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.

\textsuperscript{71} Prior to the New Copyright Act state law automatically protected all creative works prior to publication. This, the so-called "common law copyright," applied to all creative works and precluded anyone but the author from publicly disclosing the work. See, e.g., \textit{Cal. Civ. Code} § 980(a) (West 1954).

\textsuperscript{72} 17 U.S.C. § 104(a) (1976).

\textsuperscript{73} See id. at § 106. See also \textit{Hemingway v. Random House, Inc.}, 296 N.Y.S.2d 771, 244 N.E.2d 250 (1969). Courts have also held that a creditor may not seize and publish the manuscript of an author. \textit{Dart v. Woodhouse}, 40 Mich. 399 (1879). See \textit{Bartlett v. Crittenden}, 2 F. Cas. 967 (C.C.D. Ohio 1849) (No. 1,076).

\textsuperscript{74} See, e.g., \textit{Harms v. Stern}, 222 F. 581 (S.D.N.Y. 1915) in which Learned Hand held that the agreement between a composer and publisher could not be specifically enforced where the composer repudiated the contract to deliver compositions to the publisher. The contract, however, was valid at law and the publisher could recover damages. See also \textit{Roller v. Weigle}, 261 F. 250 (D.C. Cir. 1919).

\textsuperscript{75} The Whistler case is perhaps the classic example of bad faith on the part of an artist. The famous painter had been commissioned to paint a portrait, after completing the work he became dissatisfied with the price and painted out the face of the work and refused to deliver it. The court while refusing to order Whistler to complete the contract did assess damages. \textit{Eden v. Whistler} (Trib. Civ. Seine, Mar. 20, 1895, D.P. 1898.2.465) (as reported in \textit{Roeder, at 559}).
relationship between the author and his work and protects him from being coerced to deliver an inferior work which may damage his reputation.

**The Paternity Right**

In comparison with the moral right countries, the ability of an author to control the use of his name in association with his work is severely limited in the United States. Adopting the moral right would permit an author to insist on the use of his name in connection with his work, to prevent his name from being used in connection with someone else’s work and to prevent the use of his real name if he chooses to publish under a pen name or anonymously.

Under present case law the burden is placed on the author to expressly reserve the right to have his name published with his work. Failing this he has no right to insist on the use of his name. In *Vargas v. Esquire, Inc.*, an artist, who had done a number of drawings for a magazine, failed in his attempt to have his name published with the drawings. In denying relief, the court interpreted the contract granting the magazine use of the author’s name as imposing no duty on the magazine to in fact use it. *Clemens v. Press Publishing Co.* involved the sale of a manuscript with no contractual agreement insuring the use of the author’s name. Although the suit involved payment for the manuscript, the court had occasion to observe that: “Title to the manuscript having passed by the completed contract . . . the defendant was not obligated to publish . . . with or without [the plaintiff’s] name.”

Aside from the courts, the New Copyright Act also places the burden on the author to expressly reserve the right to the use of his name with his work in “works made for hire.” Section 201(b) states: “In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for pur-

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The French courts have taken the position that an author’s “lack of inspiration” to complete a work contracted for, is not a breach of contract, but rather a risk understood and taken by all parties involved. Sarraute, *supra* note 15, at 468.


78. 164 F.2d 522 (7th Cir. 1947).


80. *Id.* at 207, 67 Misc. at 184.
poses of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."

Just as the author should be given credit for his work, he should be able to prevent the use of his name in association with a work not his own. This right appears to be as well protected in the United States as it is in countries which have adopted the moral right. The dictum in Clemens v. Belford, Clark & Co., that "no person has the right to hold another out to the world as the author of literary matter which he never wrote" has been upheld by later courts using a variety of legal theories. Its inclusion into an American moral right doctrine would not conflict with any established legal principles.

Moral right also safeguards the identity of an author who has chosen to publish under a pen name or anonymously. Whether this same right exists under American law is still the subject of controversy among legal writers. Ellis v. Hurst has been cited as authority by those arguing that such a right exists, as well as by those arguing against the existence of such a right. In the Ellis case, an author, who had developed a reputation from forty years of writing juvenile and historical works under his real name, sought to enjoin the publication of two of his stories under his real name which he originally published under a nom de plume. The court granted relief to the plaintiff under the then recently enacted New York right to privacy statute, which precluded the unauthorized use of a person's name "for advertising purposes or for the purposes of trade." The court noted, however, that such relief would not have been possible prior to the enactment of the statute. Since the New York statute served as the model for many states while drafting right to privacy legislation, it is probably safe to conclude that the decision in Ellis would be followed by a majority of states.

The Clemens decision, as well as the case of Shostakovich v.

82. 14 F. 728 (N.D. Ill. 1883).
83. Id. at 731.
85. Roeder, at 562.
86. 121 N.Y.S. 438, 66 Misc. 235 (1910).
Twentieth Century-Fox Film Corp., are also frequently cited as authority for the proposition that an author does not have the right to object to the use of his name in connection with his work. These cases, however, merely hold that a work which has entered the public domain may be reproduced in the manner in which they were published. In Clemens, the plaintiff sought to enjoin the use of his nom de plume, Mark Twain, from being used in connection with some of his sketches which had entered the public domain. In denying relief to Clemens, the court held that a work which is published without copyright becomes public property and "any person who chooses to do so has the right to republish it, and to state the name of the author in such form in the book." Shostakovich involved the work of a group of internationally famous Russian composers being used in an anti-Soviet film. Since the plaintiffs were Russian citizens their work was not entitled to copyright protection and the court citing Clemens denied the requested injunction to prohibit the use of their names with the film. There is no indication, however, that the court would have arrived at a different result than that found in Ellis had the composition been published under a nom de plume or anonymously.

The Right to Maintain the Integrity of the Work

The right of an author to prevent the distortion or mutilation of his work is the cornerstone of the moral right doctrine. While not recognizing moral right, American courts have also demonstrated a determined effort to protect the integrity of literary, artistic and musical works. Adoption of the moral right would facilitate the courts in this endeavour. Granz v. Harris exemplifies the lengths to which courts have gone in order to protect a work in the absence of moral right. There, an imaginative court held that where an assignee is obligated by contract to publish the name of the author with the work, there exists an implied duty to maintain the integrity of the work so as not to render the use of the author's name a false attribution of credit.

89. 80 N.Y.S.2d 575, 196 Misc. 67 (1948).
90. Clemens, supra note 82, at 730.
92. 196 F.2d 585 (2d Cir. 1952).
In *Stevens v. National Broadcasting Co.*, the California Superior Court came very close to granting an injunction on the basis of moral right. Not fully understanding the doctrine, however, Judge Nutter relied on an aspect of the right to privacy to enjoin commercial interruptions of the plaintiff’s film. The court granted relief in the following form:

The defendants . . . would be enjoined . . . from cutting 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.

*Granz* and *Stevens* are clear examples of the determination of American courts to protect the integrity of creative works. Their need, however, to resort to such tort concepts as invasion of privacy to protect an artistic work indicates a need for an American moral right doctrine.

**The Duration and Alienability of Moral Right**

In those countries where the moral right is recognized it is often deemed to be perpetual. It has been argued that since the honor and reputation of the author continues after his death, the right which protects his work and his name should similarly continue.

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94. Referring to Judge Frank’s statements in *Granz v. Harris*, Judge Nutter stated: “I frankly had a little difficulty in following Judge Frank’s remarks . . . and so my relief granted here will not be based upon his referring to so-called ‘moral rights’ and other ‘bundles of rights,’ which he stated are enforced in civil-law countries.” Id. at 756.
95. Judge Nutter based his opinion on the “false light” concept. Id. This form of invasion of privacy consists of publicity which places the plaintiff before the public in a false light. Thus, publicly attributing to the plaintiff “some opinion or utterance, such as spurious books or articles” has been held to violate the right to privacy. PROSSER, supra note 88, at 812.
96. Stevens, supra note 93, at 758. While the court did not attempt to define the phrase “distort materially or substantially,” Judge Nutter did indicate that interrupting a televised version of *Hamlet* in the middle of Hamlet’s soliloquy would substantially affect its mood. Id. The French courts have had little theoretical difficulty working with the equally vague concept of mutilation. Sarraute, supra note 15, at 480.
97. The wording in the following French statute is typical of moral right legislation: “The author shall enjoy respect for his name, his authorship and his work. This right shall be attached to his person. It shall be perpetual, inalienable and imprescriptible . . . .” CLTW, Law No. 57-296 on Literary and Artistic Property (France) Title I, art. 6.
According perpetuity to moral right on such grounds would not coincide with present American legal principles. The reputation of all individuals continues after death, yet the present law of defamation recognizes no right in the relatives of one deceased to bring such a suit.99

The perpetuity of the moral right finds better support and should be adopted on public policy grounds. The work of an author, as previously noted, is also a part of the society's heritage, any injury to the work is also an injury to the society. "For this reason," it has been stated, "the moral right should be deemed to be perpetual, and its protection . . . should be entrusted to institutions which are the natural guardians of the culture in each country, such as academies, associations of writers and artists, etc."100 Entrusting literary and artistic works to the protection of such organizations, however, should only come after works have entered the public domain and there are no heirs of the author to enforce the moral right.101 Prior to this, the right to enforce the moral right should pass to the author's heirs in the same manner as the copyright.102

100. Ladas, at 602.
101. A French statute of 1946 created an autonomous public institution called the National Literary Fund which has been given the task of "protecting the integrity of literary works, regardless of their country of origin, which, after the author's death, have fallen into the public domain." Sarraute, supra note 15, at 484. Note, however, that art. 6 of the 1957 French copyright law gives to the heirs of the author the right to protect the work following the author's death. Thus, when the National Literary Fund sought to confiscate a distorted version of Victor Hugo's Les Misérables the court held that since Hugo still had living heirs they alone could bring suit. Id.

Hungary also entrusts the protection of creative works in the public domain to literary, artistic and musical organizations:

After the expiration of the term of protection, the organizations entitled to represent the interests of authors, or other organs appointed by the Minister of Culture, shall be qualified to take action for the protection of the moral rights of the author, whenever the use of the work distorts it or is injurious to the reputation of the author.

CLTW, Copyright Act of April 26, 1969 (Hungary), ch. II, art. 12(3).

102. Entrusting the protection of creative works to literary, artistic or musical organizations, upon the death of the author, may be the source of conflict between differing rights. Under our copyright statutes, the ownership of the copyright in a work, if not bequeathed, will pass as personal property by the laws of intestate succession, thereby giving the deceased author's heir the exclusive right to exploit the work. 17 U.S.C. § 201(d)(1) (1976). If the right to enforce the moral right were in the hands of an organization, it would then be in a position to preclude the holder of the copyright from exploiting the work in any manner harmful to the reputation of the author or the work.

Most moral right countries, upon the death of the author, recognize the right of his heirs to both exploit his work and to enforce the moral right. See supra note 101. The French copyright statutes, however, provide that: "In case of manifest abuse of the exercise or non-exercise of the right to disclose a work by the deceased author's representatives . . . the
It should be obvious that not all aspects of the moral right can be perpetual. What has been termed the positive aspects of moral right, such as the right to create or modify the work, must of necessity terminate at the author's death. Just as clearly, the negative aspects, such as the right to prevent mutilation, should continue in perpetuity.

Just as the moral right is generally said to be perpetual, it is also frequently held to be inalienable. Katz has taken this to mean that the moral right is incapable of being expressly contracted away. Strauss, taking a contrary view, has argued that the right “is inalienable only in the sense that, like all personal rights, it is not capable of transfer by sale or gift. But there is no effective rule of law which prevents an author from waiving one or more of the components of the moral right.” Necessity, it seems, has driven the moral right countries closer to Strauss' position. The need of the motion picture industry to modify original works when adapting them to the screen, for example, has caused French courts to uphold contracts permitting alterations.

Adopting such a position, it has been argued, undermines the whole concept of moral right because the publisher, possessing superior bargaining power, will simply demand that all the author's rights be transferred. While admitting the possibility of this, a hard rule restricting the transfer of such rights would be adverse to current legal principles and seriously curtail the functioning of industries which rely on the use of creative works.

Roeder, recognizing the competing needs of the author and the publisher, has observed that:

tribunal civil may order any appropriate measure.” CLTW, Law No. 57-296 on Literary and Artistic Property (France), Title I, art. 20. See Brugnier Roure v. de Corton (Gaz. Pal. 1906.1.374, D.A. 1907, 137) (as reported in Strauss, at 126) where the court defended a work against the deceased author's heirs.

See supra note 97.

Ladas has also argued that the consent of an author should not be effective to transfer moral rights. To permit an author to renounce his right to the use of his name in connection with his work or to prevent alterations, Ladas maintains, would permit a deceit to be practiced on the public. LADAS, at 599. The weakness of the argument is that should the author choose not to object, although he has the right to, the deceit will be practiced on the public regardless.

Sarraute, supra note 15, at 481-82.

Katz, at 128-29.
On the one hand, a strict construction of the creator's moral right might leave him free always to withdraw his consent and insist that the work be presented only in its original form. On the other hand, the principle of freedom to contract must be recognized; highly complex and important investments have been made in industries which utilize and alter created works. Their investments must receive some protection. It is generally recognized, therefore, that authority to alter works may be granted and will bind the creator and his successors. The authority should be, in general, strictly construed in favor of the creator and nontransferable unless a contrary intent plainly appears.\textsuperscript{108}

Roeder also recognized the vulnerability of the author in contracting with publishers and suggests a limitation to preclude overreaching:

In no case should the modifications go so far as to attribute to the creator ideas which he does not believe and did not originally express; nor should the intrinsic esthetic quality of the work be subject to alteration; even though the power to modify be given, a tragedy cannot be changed to a comedy, a philosophic essay to a farce.\textsuperscript{109}

It is proposed that Roeder's suggestions present a workable and fair solution to a difficult problem. By proscribing extensive modifications, even where the author's consent has been obtained, the character of the moral right as inalienable is not totally lost. Holding all transfers of the moral right ineffective places an undue burden on the publisher which cannot but seriously disrupt the industries authors are dependent upon. The author's interest, rightly understood, militates against holding the moral right completely nontransferable.

A recent court, while conceding that the moral right is not recognized in the United States, stated what appears to be the prevalent attitude among American jurists. "Nevertheless," wrote the court, "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."\textsuperscript{110} The court is right in more ways than it perhaps intended. The plight of the author cannot be reconciled with the copyright laws. In the absence of both copyright and

\textsuperscript{108} Roeder, at 570.
\textsuperscript{109} Id. at 571. Such an approach would have afforded the plaintiff in Landon a cause of action. See text accompanying note 58, supra.
moral right to meet the obvious needs of the author, courts have had to test the limits of reason itself to meet the ends of justice. It is proposed that adoption of the moral right as outlined above would facilitate the courts in their effort.

Conclusion

In many respects the moral right in the United States occupies the same position as the right of privacy prior to the famous article by Warren and Brandeis. The courts, they concluded, using a variety of legal theories, were in reality protecting a basic right of individuals to be let alone which was entitled to separate recognition. In the case of moral right we have seen that our courts, whenever possible, have sought to protect the author when his rights have been obviously infringed. To do so, however, they have had to resort to a variety of legal theories which are oftentimes inappropriate. Would it not be preferable to adopt the moral right as an independent tort?

Adopting the moral right in this country could be accomplished with less difficulty than that which accompanied the right of privacy. The moral right exists, it is not an unknown concept with limits to be defined. The moral right statutes of the civil law countries, as well as the wealth of cases construing them, are a ready resource which could be drawn on.

The lack of precedence for the right to privacy did not preclude its adoption by our courts. Similarly, it should not act as a bar to the adoption of the moral right. Admittedly, invasion of privacy may have presented a more compelling need for judicial action; a threat of injury, however, should not go unchecked simply because it poses a threat primarily to a limited class. The multiple facets of the moral right also should not be an obstacle to its adoption as a single tort. The variety of ways the right to privacy may be invaded is again a ready and apt example.

112. Id. at 205.
113. Following the publication of the Warren and Brandeis article, several lower New York courts accepted the existence of a right to privacy. The Court of Appeals, in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902) rejected the existence of such a right on the basis of, inter alia, lack of precedence. The Supreme Court of Georgia, in Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905) rejected the reasoning in Roberson and became the leading case. PROSSER, supra note 88, at 803-04.
114. The right to privacy may be invaded by: (1) intrusion upon the plaintiff's solitude; (2) publicly disclosing private facts; (3) publicity which places the plaintiff in a false light in the public eye; (4) appropriation of the plaintiff's likeness or name for the defendant's benefit. Id. at 804-14.
American courts have demonstrated a willingness to protect the rights of authors. In those instances where obvious injustice has failed to be remedied by our courts the inadequacy of present tort and contract theories to meet the special needs of the author is to blame. The argument of opponents of the moral right, namely that our courts already substantially protect those rights covered by the doctrine, is the strongest argument in favor of adopting the moral right in this country. Since our courts are not adverse to protecting the interests of the author, the ends of justice would be better served by fashioning a doctrine more suitable to their special needs. It is always too soon to say that what is is adequate. Better solutions to age old problems should be sought.