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Moral Rights and Section 43(a) of the Lanham Act: Oasis or Illusion?

by LARRY E. VERBIT*

Introduction

The City of Pittsburgh wants to paint a sculpture a different color. Wall murals created for the 1984 Los Angeles Olympics are in danger of being painted over or sandblasted. Elsewhere in Hollywood, a script is changed or a film is edited by someone other than its creator. Under American law, what rights can the creator of each of these works assert to prevent the alteration or misrepresentation of his work? Historically, American common law has not recognized such rights. Yet in recent years, artists have turned to the law of unfair competition as a possible source of protection. This article examines the development of American unfair competition law as applied to the moral rights of paternity and integrity in an artist's work.

Protection of an artist's work from unconsented alteration and protection from false attribution are two rights originating

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from the European doctrine of *droit moral*.1 *Droit moral* is known in the United States as moral rights. This article will limit its consideration to the two moral rights of paternity and integrity. The right of paternity has been defined as the "right of the creator of a work to present himself before the public as such, to require others so to present him, and to prevent others from attributing works to him which he has not devised."2 The right of paternity thus protects the artist through proper attribution of his work. The right of integrity has been termed "the right to modify and prevent deformation," and, further, "as the right to make any additions, suppressions and other modifications which the author may deem necessary in order to make the work conform to the state of his intellectual convictions."3 This article argues that this definition of integrity also includes the right to protect one's work from mutilation.

Although *droit moral* is followed in the majority of European countries and is incorporated in the Berne Convention,4 the United States has never become a signatory to the Convention. Opposition to the *droit moral* concepts espoused in article 6 of the Berne Convention Treaty was "voiced most consist-

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1. See Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940). *Droit moral* protections may be classified into four categories: "1) The right of disclosure (divulgation); 2) The right to withdraw or disavow; 3) The right of paternity, i.e., the right to have one's name and authorship recognized; [and] 4) The right of integrity of the work of art." Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 467 (1968).

2. Roeder, supra note 1, at 561-62.

3. Id. at 565.


The Berne Convention is an international treaty organization which established standards for protecting literary and artistic works. Article 6 of the Berne Convention (on *droit moral* rights) provides:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to said work, which would be prejudicial to his honor or reputation.

ently by the motion picture producers and other large exploit-
erors of creative works.” The broad concept of droit moral has
not been definitively recognized in the United States, either by
express case law or specific statutory promulgation. However,
in limited situations, courts have granted protection for an
artist’s moral rights under the guise of such causes of action as
libel, defamation, breach of contract, privacy, and unfair com-
petition. Other courts in dicta have indicated their support for
causes of action which, in effect, would protect an artist’s moral
rights. As evidenced by *Granz v. Harris* and subsequent
cases, discussed below, creative counsel have gained protection
for their clients’ artistic rights by finding new labels for the
rights encompassed in droit moral.

The interests that the concept of moral rights is intended to
protect are not within those otherwise covered by the Copy-
right Act. The copyright statutes are designed to protect the
economic interest of the copyright

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5. Roeder, supra note 1, at 558 (citing *Hearings Before a Subcommittee of the
Committee on Foreign Relations on Executive E*, 75th Cong., 2d Sess. 19 (1938)).
6. *But see* CAL. CIV. CODE §§ 987, 989 (West 1984); N.Y. ARTS & CULT. AFF. LAW
§ 14.53 (McKinney 1984). The California Art Preservation Act recognizes that a
work of fine art is an expression of an artist’s personality and subsequent destruction
or alteration of the work will result in harm to the artist’s reputation. The New York
act recognizes that an artist may have a legal right to object to alteration, mutilation,
defacing or other modifications of his work. L.D. DuBoff, THE DESKBOOK OF ART
LAW, Ch. XVIII-7(1977 & Supp. 1984).
7. See Comment, *Toward Artistic Integrity: Implementing Moral Right Through
Extension of Existing American Legal Doctrines*, 60 GEO. L.J. 1539, 1540 (1972). See
generally Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976); Granz v.
Harris, 198 F.2d 585 (2d Cir. 1952) (Frank, J., concurring) (concurrency indicating sup-
port for a § 43(a) claim); Follett v. New Am. Library, Inc., 497 F. Supp. 304 (S.D.N.Y.
law unfair competition can be grounds for a cause of action for misappropriation of
plaintiff’s creation).
8. See generally Autry v. Republic Prods., Inc., 213 F.2d 667 (9th Cir. 1954), dis-
cussed infra text accompanying notes 61-63; Jaeger v. American Int’l Pictures, Inc.,
9. 198 F.2d 585 (2d Cir. 1952).
10. See Maslow, *Droit Moral and Sections 43(a) and 44(i) of the Lanham Act—A
Judicial Shell Game?*, 48 GEO. WASH. L. REV. 377, 381 (1980). See also Bauer, A Fed-
eral Law of Unfair Competition: What Should Be The Reach of Section 43(a) of the
Lanham Act?, 31 UCLA L. REV. 671, 693 n.95 (1984). Since droit moral rights are not
protected statutorily in the United States, it has been necessary for counsel to find
other legal concepts under which to label alleged infringement of clients’ artistic
interests.
12. See Comment, supra note 7, at 1342 & n.17 and accompanying text. See also
rights are directed at the protection of the creator's perpetual personal interest in his creation, regardless of who owns the proprietary interest in the work. Since the United States does not recognize moral rights in its European context, a copyright infringement claim is not available to an artist who does not specifically retain the rights of paternity and integrity upon transfer of title to the work through sale, contract, or other means of ownership transfer. Artistic creations are alienable property and freely transferable under the Copyright Act. At least one court has found that an artist has waived all rights in his creation upon transfer of the copyright where there is no express agreement to the contrary.

Under the present statutory scheme, implementation of a moral rights doctrine in the United States would be in direct conflict with the proprietary interests of the transferee protected by copyright laws. Although establishment of moral rights laws would radically change copyright ownership interests and case law, its positive impact would simultaneously recognize the creator's ongoing interests and the public's right to enjoy the fruit of the artist's labor.

This article focuses on the means by which American courts have used unfair competition law, as developed through the common law and section 43(a) of the Lanham Act, to protect

18. For example, one who owns title to a copyrighted work would no longer be freely able to utilize the work, at least to the point of altering it in some way, without being subject to potential claims by its creator.
19. Trademark Act of 1946 (Lanham Act) § 43(a), 15 U.S.C. § 1125(a) (1982). This section provides as follows:

(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.
droit moral  paternity and integrity interests in lieu of formal recognition of the doctrine of droit moral. Specifically, this article addresses how one may protect against unconsented alteration or false attribution of one's work through the application of section 43(a). The article reviews the limited case law on this relatively novel section 43(a) cause of action. It also reviews those cases, including earlier common law cases, in which courts protected artists' rights using unfair competition. These cases will then be analogized to selected situations drawn from recent events in the entertainment industry which might have given rise to a cause of action for unfair competition under section 43(a).

I

Unfair Competition and Section 43(a) of the Lanham Act

In recent years, the law of unfair competition as promulgated in section 43(a) of the Lanham Act has been used by artists to assert their rights of paternity and integrity. The basis for such claims is found in both case law and statutory interpretation. This section examines cases where an artist's paten-

See infra text accompanying notes 50-53 for a discussion of section 43(a) of the Lanham Act.

20. The first case to hold specifically that a section 43(a) cause of action would likely succeed on the merits was Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976). On appeal by the plaintiffs for a preliminary injunction, the Second Circuit held that § 43(a) exists to protect a plaintiff's right not to have his work presented to the public in a distorted version and such acts should be recognized as stating a cause of action under the statute. Id. at 24-25. But see id. at 26 (Gurfein, J., concurring). See infra notes 154-81 and accompanying text.

21. See supra note 10 and accompanying text.

22. See generally Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976), discussed infra notes 154-81 and accompanying text (§ 43(a), held to protect against extensive editing of television broadcasts); Autry v. Republic Prods., Inc., 213 F.2d 677 (9th Cir. 1954), discussed infra notes 61-63 and accompanying text (editing theatrical films for television could result in sufficient changes in the film requiring application of a § 43(a) remedy); Follett v. New Am. Library, 497 F. Supp. 304 (S.D.N.Y. 1980) (discussed infra notes 122-42 and accompanying text (§ 43(a) violation resulted from false attribution to an editor as author of a book); Geisel v. Poynter Prods., Inc., 283 F. Supp. 261 (S.D.N.Y. 1968), discussed infra notes 86-102 and accompanying text (§ 43(a) held to serve as a remedy for false designation of origin).

23. See generally Granz v. Harris, 198 F.2d 585 (2d Cir. 1952), discussed infra notes 54-60 and accompanying text (a recording that was garbled, abbreviated and clearly different from the original gave rise to an unfair competition claim); Jaeger v. American Int'l Pictures, Inc., 330 F. Supp. 274 (S.D.N.Y. 1971), discussed infra notes 147-53 and accompanying text (although denying injunctive relief after balancing the
nity and integrity rights have been protected under unfair competition law and section 43(a), in the absence of an American *droit moral*.

A. Pre-Section 43(a) Case Law

The common law tort of unfair competition\(^{24}\) was recognized in the United States for more than one-half century\(^{25}\) before the implementation of section 43(a) in 1946.\(^{26}\) Many wrongs fell under the rubric of unfair competition, including trademark infringement and misrepresentations concerning the quality, nature, or source of goods.\(^{27}\) Thus, when one acted in a manner misleading or injurious to one's competitors or the public, a cause of action under common law unfair competition would arise.

1. International News Service v. Associated Press

One of the earliest unfair competition cases, *International News Service v. Associated Press*,\(^{28}\) involved an unfair competition claim grounded in a theory of misappropriation.\(^{29}\) The As-

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\(^{24}\) Common law unfair competition consists of a broad range of claims. See *infra* notes 25-27 and accompanying text.

\(^{25}\) Early landmark cases in which unfair competition was at issue include *New York & Rosendale Cement Co. v. Coplay Cement Co.*, 44 F. 277 (C.C.E.D., Pa. 1890) (plaintiff claimed that defendant's use of the name "Anchor Rosendale Cement" while not being located in Rosendale, N.Y. was "unfair and fraudulent competition"); *American Washboard Co. v. Saginaw Mfg. Co.*, 103 F. 281 (6th Cir. 1900) (plaintiff claimed that while its product was made with aluminum, defendant's was made with zinc but still called it aluminum, resulting in lost sales to plaintiff because consumers wanting aluminum were being misled by defendant and thus defendant was depriving plaintiff of his customers).

\(^{26}\) *Section 43(a) was enacted in 1946 as "a response to numerous problems that arose under the prior acts of 1905 and 1920." Bauer, supra note 10, at 679. For the text of section 43(a), see supra note 19.*

\(^{27}\) Bauer, supra note 10, at 673.

\(^{28}\) 248 U.S. 215 (1918).

\(^{29}\) Misappropriation arises with the intentional appropriation of another's property resulting in injury to the owner. In *INS v. AP*, the news articles appropriated by INS were held to be 'quasi-property,' the appropriation of which injured AP through unfair competition. *Id.* at 236, 242-44.
associated Press (AP) sued to enjoin International News Service (INS) from using AP news articles published in early editions and posted in AP windows. INS subsequently sent the information obtained from AP's articles to its own subscribers, where the articles were printed in newspapers competing with AP. The Court found that the product which was appropriated, the news element, was not subject to copyright claims. The Court then questioned whether a property right existed in news and whether the defendant's conduct in appropriating the AP's printed and published releases for commercial use constituted unfair competition in the trade. Finding that AP had a "quasi-property" right in the news matter, generated as a result of its business efforts, the Court determined that AP's economic interest was entitled to protection from unfair competition. In dicta, the Court reviewed factors which gave rise to the wrong and commented on "the device of rewriting complainant's news articles." The Court noted that:

The habitual failure to give credit to complainant for that which is taken is significant. Indeed, the entire system of appropriating complainant's news and transmitting it as a commercial product to defendant's clients and patrons amounts to a false representation to them and to their newspaper readers that the news transmitted is the result of defendant's own investigation in the field.

Although the Court dismissed copyright claims in the works or in the matter misappropriated by INS, it did find a "quasi-property" interest. This "quasi-property" interest was an economic proprietary interest, analogous to paternity in the droit moral context, and it established for AP the standing necessary to bring the unfair competition claim. The determination that a "quasi-property"/economic interest existed is consistent with the American approach which recognizes economic rights as opposed to moral rights. The Court's finding of unfair competition was influenced by the fact that INS re-

30. Id. at 220-31.
31. Id. at 233-34.
32. Id. at 232.
33. Id. at 236.
34. Id. at 242.
35. Id.
36. Id.
37. Id. See supra notes 31-33 and accompanying text.
38. See supra notes 11-17 and accompanying text.
wrote many of the misappropriated articles. Today, under statutory unfair competition section 43(a) of the Lanham Act, false attribution and mutilation claims could be argued in addition to misappropriation. However, it should be noted that the interest asserted by the AP was not one of moral paternity (because AP was not the actual writer of the news articles), but what might more appropriately be termed economic paternity.


In another early case, *Prouty v. National Broadcasting Company*, the United States District Court for Massachusetts denied the defendant's motion to dismiss, thus recognizing an unfair competition claim based on misappropriation of characters and plots from plaintiff's literary creation. The plaintiff was the author and copyright owner of an original novel entitled *Stella Dallas*. The defendant broadcast a variety of "skits as episodes in the life of . . . Stella Dallas in the character portrayed in said novel under that name and title." The essence of the plaintiff's claim was that by creating such a program and presenting it to the public without approval or consent, the defendant had misappropriated the title *Stella Dallas* and the plaintiff's rights therein, including her successful authorship of the work. The plaintiff further alleged that the radio skits were of inferior quality, thus degrading the artistic excellence associated with the title of the novel and its quality so as to "imperil the further sale of other works which the complainant has written and is writing," and producing a negative impact on the author's high reputation.

Prouty asserted a right to prevent alteration of her literary characters for use in another medium. Through an equitable unfair competition approach, the district court established a foundation for protecting an artist's moral rights:

If it should appear that in these broadcasts the defendant had appropriated, without plaintiff's consent, the plot and principal characters of the novel, and that the use being made of her literary production was such as to injure the reputation of the work and of the author, and to amount to a deception

39. See infra notes 103-19 and 135-39 and accompanying text.
40. See infra notes 147-71 and accompanying text.
42. Id. at 265.
43. Id. at 266.
44. Id. at 265.
upon the public, it may well be that relief would be afforded by applying well-recognized principles of equity which have been developed in the field known as "unfair competition..." It is the injury to the author and a fraud upon the reading public that constitute the real offense alleged.\(^{45}\)

These strong statements by the district court in this pre-Lanham Act case established unfair competition as a remedy for invasion of an artist's moral rights. Today such a claim would be pled under section 43(a) of the Lanham Act.

The *Prouty* court also addressed the defendant's contention that no actual competition existed between the printed literary form and radio broadcasts. However, the court held that "absence of the element of competition... is not necessarily fatal to the plaintiff's claim."\(^{46}\) Relying on the equities involved and citing *Vogue Co. v. Thompson-Hudson Co.*,\(^{47}\) the court noted that the term "unfair competition" is only a "convenient name for the doctrine...[and that] [t]here is no fetish in the word 'competition.'"\(^{48}\) Thus, the court de-emphasized the need for actual competition where the unfairness of the wrong offended principles of equity. In so holding, the court clearly established unfair competition guidelines under which redress could be sought for intrusion upon an artist's rights of moral paternity and integrity. The *Prouty* court recognized a concept which is today incorporated into the Lanham Act: mere likelihood of confusion is sufficient to state a cause of action for unfair competition.\(^{49}\)

### B. Post-Section 43(a) Case Law

Building on the groundwork established in *Prouty* for protecting an artist's moral rights, section 43(a) of the Lanham Act, promulgated in 1946, established the federal law of unfair competition.\(^{50}\) Under section 43(a), unfair competition claims may be invoked to protect the creator of a work against false attribution, misappropriation and mutilation of his or her work. However, even though *Prouty* appeared to endorse the validity of non-statutory unfair competition claims of this nature, little evidence exists that Congress intended section 43(a) to encom-
pass moral rights. In fact, it was almost six years after the passage of the Lanham Act before an opinion discussed moral rights at any length. Another two years passed before a section 43(a) unfair competition cause of action was filed to protect an artistic work from being presented in a manner potentially misleading and different from that for which it was created.

1. Early Section 43(a) Cases

The first post-Lanham Act case to explicitly discuss moral rights in an American context was *Granz v. Harris*. In *Granz*, the plaintiff, a well known record producer, contracted to sell to the defendant master recordings for a set of jazz concerts. The contract provided that the plaintiff be given the credit line “Presented by Norman Granz,” and that liner notes prepared by Granz be included on the record jackets. The defendant eventually pressed a record at a different speed and on smaller size discs than those for which the master recordings were created, deleting approximately eight minutes of music.

The majority found that the defendant could, consistent with the contract’s express terms, use the master discs to produce an abbreviated record. However, the court looked beyond the express provisions of the contract and found an implied contractual limitation on the defendant’s ability to do so because of the plaintiff’s required credit line. In effect, by marketing the truncated version of the Granz concerts and indicating, as contractually required, that Norman Granz was the source of the abbreviated concerts, the defendant committed the tort of unfair competition. The shortened versions presented to the public a garbled, abbreviated and clearly dif-

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51. See Maslow, supra note 10, at 384-86. See also Bauer, supra note 10, at 680-82.
52. See *Granz v. Harris*, 198 F.2d 585, 589-91 (2d Cir. 1952) (Frank, J., concurring) upheld on other grounds, discussed infra notes 54-60 and accompanying text.
53. See *Autry v. Republic Prods., Inc.*, 213 F.2d 667 (9th Cir. 1954), discussed infra notes 61-63 and accompanying text.
54. 198 F.2d at 589-91.
55. Id. at 586. ‘Liner notes’ are often included on album covers, describing the performer, composer, and history of the musical composition.
56. Id. at 587.
57. Id. at 587-88.
58. Id. at 588.
59. Id.
60. Id. at 589.
ferent record than that produced by Mr. Granz on his original masters.

By finding unfair competition factors implied in a contractual relationship, the court protected the creator's interest in having his work be free from alteration. Thus, *Granz* used breach of contract as a basis for protecting an artist's work. The strength of the holding, however, stems from the implied tort of unfair competition, which resulted when the defendant retained the required credit line while issuing a substantially altered version.

After *Granz*, the United States Court of Appeals for the Ninth Circuit reviewed a case in which section 43(a) was pled as a cause of action to prevent mutilation of an artist's work. In *Autry v. Republic Productions, Inc.*, noted cowboy star and singer Gene Autry attempted to prevent movies in which he acted from being shown on television in edited form. Because the court found that the plaintiff clearly contracted away the rights to exploit his performance, it never reached the section 43(a) issue. However, the court recognized that cutting and editing of films could reach a point of "emasculating the motion pictures so that they would no longer contain substantially the same motion and dynamic and dramatic qualities which it was the purpose of the artist's employment to produce." Additional, the court noted that with the advent of commercial television, a theatrical film could be so altered for presentation on television "as to make it appear that the artist actually endorses the products of the programs' sponsors." The implication of *Autry* was that a line might eventually have to be drawn on permissible editing; until the result was so foreign as to blatantly represent something that did not exist originally, the courts would refrain from assuming the role of artistic reviewer.

2. Preminger And Stevens Strengthen The Concept Of Protecting An Artist's Rights

The majority holdings in *Granz* and *Autry* were founded on contract law and avoided the moral rights issues. This appears to indicate a judicial reluctance to reach moral rights questions where the case can be disposed of on other grounds. Two sub-

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61. 213 F.2d 667 (9th Cir. 1954).
62. *Id.* at 669.
63. *Id.*
sequent cases showed less judicial reluctance to intervene in artistic determinations.\(^{64}\)

In *Preminger v. Columbia Pictures Corp.*,\(^ {65}\) the plaintiff, film producer and director Otto Preminger, sought to prevent television distribution of his film *Anatomy Of A Murder* under the defendant’s licensing agreements with over one hundred television stations. Those agreements permitted each individual television station to edit and cut the film for commercial interruption and time segment requirements, with no limit as to the amount of cutting that could be done.\(^ {66}\) Although in his contract Preminger reserved a final cut right in the film, the court determined that he had granted television distribution rights to Columbia Pictures with no limitations on editing or interruptions. Looking to industry custom, the court concluded that Preminger’s final cut rights applied only to theatrical release of the film. The court also found that Preminger was aware of the standard industry practice in licensing films to television, in which the right to interrupt for commercials and to edit for necessary time segments was included.\(^ {67}\)

The court noted, however, that the plaintiff would be entitled to injunctive relief if the cutting amounted to mutilation. The court implied that it would make an artistic determination that the film had been “mutilated” if the 161 minute film was cut to 53 minutes or even 100 minutes.\(^ {68}\) Although the court did not set specific guidelines for finding mutilation, its suggestion that mutilation would result where a film was cut by one-third dashed many filmmakers’ hopes for relief where cuts were less substantial.\(^ {69}\) Judge Rabin dissented on appeal,\(^ {70}\) and underscored the producer’s common law right, identified earlier in *Granz v. Harris*,\(^ {71}\) to have his work shown in an unmutilated version, particularly where the contract calls for giv-

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64. See *infra* notes 65-83 and accompanying text.
66. Id. at 399.
67. Id. at 401-02.
68. Id. at 402.
69. The only case holding that mutilation resulted from unauthorized cutting is *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976). In *Gilliam*, the court found that a twenty-seven percent cut of the television program mutilated the creator’s work. See *infra* notes 154-81 and accompanying text.
71. See *supra* notes 54-60 and accompanying text.
Three weeks after Preminger was decided, a California superior court considered Stevens v. National Broadcasting Company.73 In Stevens, producer and director George Stevens sought to enjoin the National Broadcasting Company (NBC) from cutting or interrupting his film *A Place In The Sun* for presentation on television. To a limited extent, Stevens was successful. The court enjoined NBC from distorting the effect, mood, and continuity of the picture through the manner in which commercials were inserted.74 Although the order allowed insertion of commercials, it prohibited their use in such a way as to “adversely affect or emasculate the artistic or pictorial quality of the film, or destroy or distort materially or substantially the mood, the effect or the continuity of the film.”75

*Preminger* was based on a contract analysis, whereas Judge Nutter based his holding in *Stevens* on the tort of false light.76 Judge Nutter found support in *Preminger’s* dicta for the underlying concept of protecting a work from substantial mutilation. He also relied on the finding in *Autry*77 and the concurrence in *Granz*,78 both of which accepted the premise that one should be protected from substantial mutilation of one’s creation. Although Judge Nutter expressly stated that he was not basing his order on the concept of moral rights,79 he held that through injunctive relief “the court has the right to protect the artistic integrity of a product.”80 Thus, the judge emphasized the

74. *Id.* at 758.
75. *Id.* See also Treece, American Law Analogues of the Author’s “Moral Right,” 16 Am. J. Comp. L. 487, 497 (1968).
76. 148 U.S.P.Q. (BNA) at 756. The tort of false light was applied by Judge Nutter “to protect the work of an artist, or an author, or a director or a producer where the commercial interruptions would tend to mislead the public, or would tend to actually emasculate or destroy the mood and effect of the creative work.” *Id.* at 755. The tort of false light occurs where a plaintiff is presented to the public in a misleading manner although the underlying facts might be accurate. See Prosser, *Privacy*, 48 Calif. L. Rev. 383, 398-400 (1960). In a moral rights context, this occurs where an artistic creation is attributed to plaintiff when it has been changed from its original form.
77. 213 F.2d 667 (9th Cir. 1954), discussed supra notes 61-63 and accompanying text.
78. 198 F.2d 585 (2d Cir. 1952), discussed supra notes 54-58 and accompanying text.
79. 148 U.S.P.Q. (BNA) at 756.
80. *Id.* at 757.
court's power to protect the moral integrity of an artist's creation.

Subsequent to the order for injunctive relief, NBC presented A Place In The Sun with nine commercial interruptions, and Stevens initiated contempt proceedings. The court found that the prior order was sufficiently broad to permit nine interruptions at scene and mood changes. However, one commentator has interpreted the court's holding as suggesting that "nine interruptions approached, perhaps even reached, the limits of permissibility, but did not constitute contempt because of the strength of the film."

Although both Preminger and Stevens sought to protect their works from alteration, neither advanced their claim under section 43(a). The limited history of section 43(a) as a cause of action in mutilation and alteration cases at that time, and the apparent reluctance of courts to make artistic determinations, may have deterred the plaintiffs' counsel in these cases from seeking redress under the Lanham Act.

3. Section 43(a) Found To Serve As A Creator's Remedy

The preceding cases indicate a reluctance on the part of courts to address moral rights directly. However, there appears to be a corresponding desire to protect artistic creations from both false attribution and alteration. With the promulgation of section 43(a), a potential statutory remedy was available to protect an artist's moral rights through unfair competition. With the exception of Autry v. Republic Productions, Inc., it took approximately twenty-two years for a court to consider section 43(a) in relation to protecting the work of an artist. Finally, in Geisel v. Poynter Products, Inc., the court held that section 43(a) serves as a creator's remedy for unfair competition arising from use of a false designation of origin or any false description or representation. The court emphasized

82. Id. at 572-73.
83. Treece, supra note 75, at 497 n.36.
84. Prior to 1966, only Autry v. Republic Prods., Inc., 213 F.2d 667 (9th Cir. 1954), addressed a section 43(a) mutilation or alteration cause of action. See supra notes 61-63 and accompanying text.
85. 213 F.2d 667 (9th Cir. 1954). See supra text accompanying notes 61-63.
87. Id. at 267. See supra note 19 for the text of section 43(a).
that section 43(a) is a remedial provision and should be read broadly.\(^8\)

In *Geisel*, the defendants marketed dolls displaying the plaintiff's well-known commercial name, Dr. Seuss, on the product. Defendants claimed an actual right to market such items under contracts to create illustrations and essays entered into by Geisel and the defendant's predecessors more than thirty years earlier.\(^9\) The court found the evidence asserting such contractual rights insubstantial and proceeded to analyze the defendant's actions under section 43(a). This unfair competition theory was based on the defendants' intentional misrepresentation to the public that the "plaintiff created, designed, manufactured, produced, authorized or approved the design of the dolls and the dolls themselves."\(^9\) The court found that the intent and probable effect of such misrepresentation was customer confusion and passing off of the products as those of the plaintiff.\(^9\) The court held that protection against such unfair competition was necessary to secure an artist's paternity and maintain his reputation.\(^9\)

The *Geisel* court clarified many longstanding questions concerning section 43(a). The case established that "origin" in "false designation of origin" was not intended to be a mere geographical reference, but that it applied to "any representation with respect to the originator of a product i.e. a particular source of manufacture by a certain business."\(^9\) Moreover, the court determined that a section 43(a) cause of action would exist under either an express or an implied representation that a product was authorized or approved by a particular person.\(^9\) Extending this concept, the court held that liability should not be limited to descriptions and representations that are literally false, but should include actions that create a false impression.\(^9\) The court also stated that actual palming off was not necessary, but that a showing of a likelihood of customer con-

\(^{8}\) Id. (referring to Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 548 (2d Cir. 1956) (Clark, C.J., concurring)).

\(^{9}\) Id. at 264 n.1 (S.D.N.Y. 1968).

\(^{10}\) Id. at 266.

\(^{11}\) Id.

\(^{12}\) Id. at 267.

\(^{13}\) Id. (quoting 1 CALLMAN, UNFAIR COMPETITION AND TRADEMARKS § 18.2(b) (3d ed. 1987)).

\(^{14}\) Id.

\(^{15}\) Id.
fusion as to the source of the goods is sufficient.96 Accordingly, the court determined that to obtain injunctive relief plaintiff was not required to show that the alleged misrepresentation resulted in the actual diversion of business or that customers were actually deceived. Rather, the "[p]laintiff need only demonstrate that the false representations 'have a tendency to deceive.'"97

The analysis in Geisel was extensive and has served as the reference point for subsequent cases which have attempted to find moral rights protection under the guise of section 43(a). As will be examined, such attempts by authors, performers, television and film producers and directors, and other artists have rarely been successful.98 Though some courts have appeared receptive to moral rights protection under section 43(a), the majority has narrowly limited its use as a remedy to false designation of origin and false attribution.99 Failure to give moral rights broader protection may be based on an overriding concern with economic interests.100 Thus, to provide even limited protection, courts have focused on the artist's contractual rights, if any, in the work he created, or, in the alternative, they have relied on the tort theories of misrepresentation or false light.101 However, a few cases have considered section 43(a) as a remedy where an artist's work has allegedly been mutilated.102

4. Current Section 43(a) Theories

Geisel and Yameta Co., Ltd. v. Capitol Records, Inc.,103 introduced an era in which section 43(a) was applied more frequently to protect artists. These post-1967 cases have broadened significantly the application of section 43(a) as an artist's remedy. An examination of the several cases which have contributed to the expanding reach of section 43(a) identi-

96. Id.
97. Id. at 268 (citing Parkway Baking Co. v. Freihofer Baking Co., 255 F.2d 641, 649 (3d Cir. 1958)).
98. Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976), is considered the only true mutilation case to have held favorably for a plaintiff. See infra notes 154-81 and accompanying text.
99. These interests may be considered analogous to the moral right of paternity.
101. See supra notes 54-84 and accompanying text.
102. See infra notes 145-81.
ARTISTS’ MORAL RIGHTS

fies three primary theories of relief: false designation of origin, literary false attribution, and alteration or mutilation.

a. False Designation of Origin

In several cases involving the music industry, false designation of origin and false description have been equated to the paternity right of false attribution. Although the moral rights holdings of these cases are limited to protection against false attribution, they are often cited for protection from unconsented alteration. As considered below, a finding of false attribution is often the result of mutilation. Thus, such a domino effect gives rise to a more successful moral paternity/false attribution claim under section 43(a) than under a mutilation/integrity right claim.

In Yameta, based on a section 43(a) claim, the court issued a preliminary injunction prohibiting Capitol Records from advertising and utilizing jacket art promoting Jimi Hendrix as a featured player on a particular album. In reality, Hendrix was a mere back-up musician on the album. The court found that the international acclaim achieved by Hendrix and the implication that he was a featured player on the album created a false impression of the artist’s contribution to the work and was likely to deceive consumers.

In Rich v. RCA Corp., singer Charlie Rich and CBS Records obtained an injunction under section 43(a) prohibiting RCA from distributing an album of songs recorded by Rich ten to fourteen years earlier. The gravamen of the complaint was likelihood of confusion; RCA had packaged the album with a contemporary picture of Rich and insufficient notice to the consuming public of the time period during which the songs were recorded. The court found likely deception of, and resultant confusion to, consumers as to the true contents of the package and the work itself. Furthermore, the court found that harm to Rich’s reputation and irreparable injury would likely result.

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104. See infra notes 180-81, 190-91 and accompanying text.
107. Id.
108. Id. at 530-31.
109. Id.
110. Id.
an earlier case with similar facts involving the same plaintiffs, CBS v. Gusto Records, Inc. In that case, the court did not enjoin distribution of the album, finding that an injunction might have caused considerable financial harm to the defendant. However, the court did require decals to be affixed on the albums to correctly identify their contents.

In Benson v. Paul Winley Record Sales Corp., noted jazz guitarist and singer George Benson brought an action under section 43(a) to enjoin distribution and sale of an album advertised as “George Benson, Erotic Moods” and captioned “X Rated LP.” The album contained tracks from recording sessions held five to twelve years earlier while Benson was unknown to the general public, serving merely as a back-up studio musician. After Benson gained international popularity, the defendant altered the recordings to highlight Benson’s guitar tracks and overdubbed one of the selections with the sexually suggestive moaning of a woman. The record was then packaged in an album jacket featuring a current picture of Benson and appeared to attribute the artistic content to him. The court found the defendant’s attribution false and misleading in violation of section 43(a) because it was likely to harm Benson’s reputation, mislead the public, and hurt the sale of future Benson albums.

If the integrity of the Benson and Hendrix contributions to the released albums had been enforceable through the concept of moral rights as followed in European countries, the defendants would have been prohibited from altering the performers’ guitar tracks and falsely describing Benson and Hendrix’s contributions to those albums as substantial. However,

112. Id. at 449.
113. Id. Rich v. RCA Corp., 390 F. Supp. 530 (S.D.N.Y. 1975) (cited frequently in support of section 43(a) false attribution and mutilation claims) was appealed to the United States Court of Appeals for the Second Circuit. Prior to a decision by the appellate court, the parties settled on terms similar to those ordered in CBS v. Gusto Records, Inc., i.e., affixing decals to the albums. Thus, both Rich and CBS had similar resolutions. Conversation with Donald E. Biederman, former counsel for CBS Records (Apr. 7, 1986).
115. Id. at 517.
116. Id.
117. Id.
118. Id. at 518.
119. See supra notes 1-10 and accompanying text.
while integrity rights alone do not give rise to a section 43(a) remedy, the Yameta and Benson plaintiffs were able to protect those same integrity interests by basing their claims in false attribution. Thus, as applied in Rich and CBS, section 43(a) has become an effective remedy in the music industry to protect against misrepresentation and to protect the moral right to be free from false attribution. As applied in Yameta and Benson, section 43(a) has also effectively prohibited alteration or mutilation of an artist's work which results in false attribution.

b. *Literary False Attribution*

The evolving interpretation by courts of section 43(a) as a broad remedial statute\(^\text{120}\) has given strength to authors’ claims for proper attribution of their work and freedom from material alterations of their creative product.\(^\text{121}\) This broad approach to section 43(a), which leads to support for protecting an author’s paternity and integrity rights, is demonstrated in *Follett v. The New American Library, Inc*.\(^\text{122}\)

*Follett* involved the publication and authorship attribution of an American edition of a book originally published in French, later translated to German and English, and thereafter re-edited and re-worked by Ken Follett for publication in Britain under the title *The Heist of the Century*. Follett was hired by a British publishing house to refashion the work by “restructuring the story, bringing style to the writing . . . , develop-

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120. *See supra* note 88 and accompanying text.
121. *See also* Chesler v. Avon Book Division, 76 Misc.2d 1048, 352 N.Y.S.2d 552 (Sup. Ct., N.Y. Co. 1973), a state case which found that “[a]n author or artist is entitled to judicial protection where there is sufficient demonstration of mutilation or other serious alteration of the creator's work.” *Id.* at 1051, 352 N.Y.S.2d at 556. The Chesler court found that even where the author contracted away the right for variations in the work, including condensed or abridged versions, the author should not be “powerless to prevent slipshod or truncated use of her work.” *Id.* at 1051, 352 N.Y.S.2d at 555. The court held that defendant must tell the truth about the work it was selling to the public, i.e., that it was not a book with the same content for which plaintiff had originally received critical acclaim. *Id.* at 1052, 352 N.Y.S.2d at 557. Although not brought as an unfair competition action, plaintiff’s claim for “tortious conduct, including the unfaithful and negligent reproduction of her work, libel and a violation of her civil rights,” rested under historical causes of action used to seek redress for acts which are accepted today as unfair competition. *Id.* at 1050, 352 N.Y.S.2d at 554. Here defendant’s sale of an abridged and condensed paperback version of plaintiff’s original book, after materially altering the work, misrepresented and falsely attributed its content to the original author. An acceptable resolution in this court’s view appeared to be placement of stickers on the product indicating that it was an abridged or condensed version of the original.
ing the characters and filling in gaps."  

During preparation of the re-worked manuscript, Follett sought to obtain both a by-line credit and an interest in the copyright. The proprietor of the literary rights, Star Agency Establishment, readily agreed to the credit request but not to the copyright request, which was later dropped. The by-line consisted of a title page credit of "Rene Louis Maurice with Ken Follett." The Heist of the Century was thereafter published in Britain with the Follett credit.

Subsequently, Follett authored two best sellers published by Arbor House and achieved international fame. After Follett ceased his association with Arbor House and joined the New American Library Company, Arbor House acquired the American rights to The Heist of the Century. Arbor House changed the title to The Gentlemen of 16 July, and prepared to release it at the same time New American scheduled the release of Follett's new novel, Key to Rebecca. Arbor House intended to promote The Gentlemen of 16 July, by exploiting Follett's editorial participation as that of an author. This was to be accomplished by creating authorship on the book's cover as "by the author of TRIPLE and EYE OF THE NEEDLE, KEN FOLLETT with Rene Louis Maurice." Only Follett's name was to appear on the spine portion of the book jacket. Follett filed suit to enjoin Arbor House from publishing the book and using the authorship attribution in a false and misleading manner.

In its analysis, the court reviewed customs and practices in the publishing trade. While Follett may have done more than edit the work, the parties did not agree on industry practices regarding authorship attribution for an editor. The

123. Id. at 306. The original French publication was attributed to "Rene Louis Maurice," a pseudonym for three French journalists who collaborated on the work. Id.
124. Id. at 307.
125. Id.
126. Id.
127. Id. Eye of the Needle and Triple by Ken Follett achieved both critical and financial success sufficient to induce New American Library to advance $3,000,000 to Follett for his next three books. Id.
128. Id. at 308.
129. Id. (emphasis in original).
130. Id.
131. Id. at 305.
132. Id. at 311.
plaintiff claimed that it was rare in the industry for a freelance editor to receive authorship credit, whereas the defendant argued that a publisher has discretion to attribute authorship to an editor where the editor’s work was “not trivial.”

In addressing the “key issue” of whether Arbor House’s planned designation of authorship violated section 43(a), the court found it necessary to consider the concept of “authorship.” It found that the book evidenced Follett’s style and craftsmanship and that his contributions were indeed substantial. However, it determined that those factors were insufficient to raise Follett to the level of “author” because he received a fixed plot, cast of characters and set of themes. Accordingly, the court found that Follett’s greater-than-ordinary editorial “contributions display[ed] none of the special creative attributes which are associated with authorship,” and that holding him out as principal author of the work was literally false. Analogizing to Benson, the court found that the intended attribution on the cover, spine and title page falsely made it appear that Follett was the major author of the book:

The Lanham Act, as construed in Benson . . . , is designed not only to vindicate “the author’s personal right to prevent the presentation of his work to the public in a distorted form” . . . but also to protect the public and the artist from misrepresentations of the artist’s contribution to a finished work.

In its final order, the court permitted Arbor House to display the credit “Rene Louis Maurice and Ken Follett.”

The Follett case is important in many respects. It clearly establishes that one should not receive false and misleading credit for one’s contribution to creative work, and protects the artist’s personal rights and the public’s right to be free from

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133. Id. This industry practice claim should be distinguished from the specific case where Follett negotiated the “with Ken Follett” authorship credit on the British edition of The Heist of the Century. See supra notes 124-26 and accompanying text.

134. 497 F. Supp. at 311. Arbor House’s president gave support to Follett’s claim when he testified that “authors do not permit editors to obtain authorship credit, . . . even if the revisions are substantial.” Id. at 309. Though the issue of industry practices was not identified by the court as the key issue in the case, it is related and important to this author’s overall analysis of the case.

135. Id. at 312.

136. Id.

137. Id.

138. Id.

139. Id. at 313 (quoting Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976)).
commercial misrepresentation. The court held both of these interests protectable under section 43(a).

Of particular note are the Follett court’s comments regarding industry practices. After reviewing asserted industry practices with respect to attribution of authorship, including the claim that substantial contributions may be attributed to individuals at the publisher’s discretion, the court emphatically stated that industry practices were of no resort against a misrepresentation that violates the Lanham Act. Because of this, where courts previously looked to standard trade practices to interpret contracts when authorship attribution was not expressly provided for contractually, they may now disregard trade practices and rely on their own experience, aesthetics, and intellectual capacity to determine whether an artist’s contribution to a work has been materially altered to the combined detriment of the creator and the public.

Findings of section 43(a) violations may be based on subjective assessments of artistic expression, leading to uneven determinations by judges whose exposure to the art form at issue may vary. However, despite this possible unevenness, artists may favor such an approach as it impliedly validates, recognizes, and gives priority to moral rights over industry trade practices. This approach to finding section 43(a) relief would be available after a court considered the contractual obligations of the parties. Thus, a court finding no contractual covenant covering the challenged false attribution or alteration might then proceed directly to section 43(a) considerations, disregarding any custom or industry standard.

Follett has expanded section 43(a) as an artist’s remedy and has strengthened the earlier holding in Gilliam v. American Broadcasting Companies, where mutilation resulted in false attribution. By extending Follett to mutilation cases, courts may disregard industry practices in determining whether mutilation has occurred. While mutilation, by itself, does not have a section 43(a) remedy, relief from mutilation may otherwise be based on a section 43(a) theory of false attribution where plaintiff has no recourse by contract.

140. 497 F. Supp. at 311. See also supra notes 133-34 and accompanying text.
141. Id. at 311.
142. See supra text accompanying notes 66-67.
143. 538 F.2d 14 (2d Cir. 1976). See infra notes 154-81 and accompanying text.
c. Alteration Or Mutilation Of An Artist's Work

An artist's work, whether it be literary, fine art, performance, or film, is the result of his or her skill, talent, aesthetics, and humanity. The artist's relationship to the work extends beyond its creation and includes an ongoing interest in retaining the work's integrity—that is, that it retain the shape, form, and content in which it was intended to exist. The statutory cause of action provided by section 43(a) gives artists a new means of protecting their works from mutilation. Until 1976, courts primarily recognized section 43(a) as a remedy for such acts only in dicta, and based their holdings on other grounds. The two cases considered below indicate a departure from that position and show the evolving protective use of section 43(a) in the area of mutilation and alteration of artists' works.

In *Jaeger v. American International Pictures, Inc.*, the plaintiff claimed that the English version of his film, "Kamasutra—Perfection of Love," was garbled, mutilated, and changed without his consent. He asserted three causes of action: (1) false attribution of his rights in literary property; (2) violation of section 51 of the New York civil rights law, by use of his name in connection with the promotion of the garbled and mutilated version; and (3) violation of section 43(a), which resulted from defendant's representation of the plaintiff as director and co-author of the allegedly distorted work. The court refused to grant the preliminary injunction on the ground that any present injury suffered by the plaintiff was "far outweighed by

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144. See supra notes 1, 3-4 and accompanying text.
145. See Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976). See also infra notes 154-81 and accompanying text.
146. See Autry v. Republic Prods., Inc., 213 F.2d 667, 669-70 (9th Cir. 1954), discussed supra text accompanying notes 61-63 (relief denied on contract grounds, though the court noted that cutting and editing of a film for television could violate unfair competition laws); Granz v. Harris, 198 F.2d 585, 590 (2d Cir. 1952) (Frank, J., concurring), discussed supra notes 54-60 and accompanying text (supporting relief against publication of a truncated version of an artist's work, though so held on contract grounds); Jaeger v. American Int'l Pictures, Inc., 330 F. Supp. 274, 278 (S.D.N.Y. 1971), discussed infra notes 147-53 and accompanying text (in rejecting defendant's motion to dismiss, the court noted that unfair competition may be proven where a film, severely garbled, distorted, or mutilated, is presented to the public bearing the creator's name).
the clear and substantial hurt defendant would suffer."

The court also denied the defendant's motion to dismiss. It is this holding and the court's analysis of the issues underlying its refusal to dismiss which support section 43(a) as a remedy for mutilation claims. The court stated that regardless of America's failure to provide a direct counterpart to the European doctrine of artists' moral rights, there was "enough in plaintiff's allegations to suggest that he may yet be able to prove a charge of unfair competition or otherwise tortious misbehavior in the distribution to the public of a film that bears his name but at the same time severely garbles, distorts or mutilates his work." Thus, the court found that the facts as stated in Jaeger's claim raised sufficient legal issues to support a finding of unfair competition. The court also stated that section 43(a) was an appropriate remedy for the false attribution claim, finding it at least arguable that the defendant falsely attributed to the plaintiff a film which no longer represented the plaintiff's artistic creation.

The Jaeger court implicitly recognized moral rights protection against mutilation and false attribution. While the court found support in Yameta and Granz for its position on false attribution, it failed to cite authority for protection against mutilation. By alternatively relying on the false attribution claim, the court obviously recognized the weakness of its position on mutilation. Thus, protection from mutilation once again found itself supported in dictum with no legal or case support.

The issue of moral rights protection was finally confronted in Gilliam v. American Broadcasting Companies. Gilliam has been embraced as the seminal case supporting a creator's moral right of integrity in his work through judicial use of the section 43(a) remedy. The case involved Terry Gilliam and

150. Id. at 281. Defendant had spent more than $245,000 in promotion and distribution activities up to the time of the hearing. Id.
151. Id. at 278.
152. Id.
153. Id.
154. 538 F.2d 14 (2d Cir. 1976).
the other members of Monty Python, a popular British comedy group. Monty Python, by agreement with the British Broadcasting Company (BBC), authored and performed a television comedy series. The Monty Python/BBC agreement contained detailed procedures and guidelines for editing, changing, and altering the group’s work. The court stated that the essence of the agreement was that, “while BBC retains final authority to make changes, appellants (Monty Python) or their representatives exercise optimum control over the scripts consistent with BBC’s authority and only minor changes may be made without prior consultation with the writers.” The agreement allowed Monty Python to retain all rights in the script not expressly granted, and gave to the BBC the right to license transmission of the shows in any overseas territory. The court noted that under the agreement the BBC was not specific-

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156. 538 F.2d at 17, n.2. The Agreement provided:

When script alterations are necessary it is the intention of the BBC to make every effort to inform and to reach agreement with the Writer. Whenever practicable any necessary alterations (other than minor alterations) shall be made by the Writer. Nevertheless the BBC shall at all times have the right to make (a) minor alterations and (b) such other alterations as in its opinion are necessary in order to avoid involving the BBC in legal action or bringing the BBC into disrepute. Any decision under (b) shall be made at a level not below that of Head of Department. It is however agreed that after a script has been accepted by the BBC alterations will not be made by BBC under (b) above unless (i) the Writer, if available when the BBC requires the alterations to be made, has been asked to agree to them but is not willing to do so and (ii) the Writer has had, if he so requests and if the BBC agrees that time permits if rehearsals and recording are to proceed as planned, an opportunity to be represented by the Writers’ Guild of Great Britain (or if he is not a member of the Guild by his agent) at a meeting with the BBC to be held within at most 48 hours of the request (excluding weekends). If in such circumstances there is no agreement about the alterations then the final decision shall rest with the BBC. Apart from the right to make alterations under (a) and (b) above the BBC shall not without the consent of the Writer or his agent (which consent shall not be unreasonably withheld) make any structural alterations as opposed to minor alterations to the script, provided that such consent shall not be necessary in any case where the Writer is for any reason not immediately available for consultation at the time which in the BBC’s opinion is the deadline from the production point of view for such alterations to be made if rehearsals and recording are to proceed as planned.

157. Id. at 17.

158. Id.
cally empowered to make unilateral changes in the work or alter the work once it had been recorded.\footnote{159}

Under its licensing authority, the BBC licensed Time-Life Films to distribute the Monty Python series in the United States within a package of British television programs. This agreement, to which Monty Python was not a party, allowed editing of programs “for insertion of commercials, applicable censorship or governmental . . . rules and regulations, and National Association of Broadcasters and time segment requirements.”\footnote{160}

In July 1975, Time-Life licensed the rights to six thirty-minute Monty Python shows to the American Broadcasting Company for presentation in two ninety-minute television specials.\footnote{161} The ABC/Time-Life agreement incorporated commercials, censorship, and time segment requirements similar to those encompassed in the BBC/Time-Life agreement. On October 3, 1975, ABC broadcast the first special after cutting approximately twenty-four minutes from the original ninety minutes of Monty Python material.\footnote{162} After viewing a tape of the edited version, Monty Python initiated legal action to prohibit broadcast of the second special scheduled for broadcast on December 26, 1975.\footnote{163}

Monty Python’s attempt to enjoin the broadcast was based on claims that the work had been mutilated in violation of section 43(a) of the Lanham Act and that the editing infringed common law copyright. Judge Lasker, in an unpublished opinion, cited extensively at the appellate level, did not grant the injunction but did require ABC to broadcast a disclaimer during the upcoming broadcast indicating that the group had “dis-associated itself from the program because of editing.”\footnote{164} Judge Lasker decided not to grant the preliminary injunction after considering the equities involved and the unanswered issues surrounding the litigation. The district court noted that [1] it was unclear who owned the copyright in the programs produced by the BBC from scripts written by Monty Python;

\footnote{159}{Id. at 21.}
\footnote{160}{Id. at 18 (quoting BBC/Time-Life Agreement of October, 1973).}
\footnote{161}{Id. Monty Python had previously refused to license the programs to ABC because the broadcast would be presented in a disjoined format. Id.}
\footnote{162}{Id.}
\footnote{163}{Id.}
\footnote{164}{Id. The court of appeals granted a stay of that order and required only limited notice indicating that the program was edited by ABC. Id.}
[2] that there was a question of whether Time-Life and BBC were indispensable parties to the litigation; [3] that ABC would suffer significant financial loss if it were enjoined a week before the scheduled broadcast; and [4] that Monty Python had displayed a "somewhat disturbing casualness" in their pursuance of the matter.165

The appellate court found that the district court's primary concern was the potential economic hardship to ABC if forced to cancel a program scheduled for broadcast within seven days of the hearing. However, Judge Lasker did find that mutilation of the shows occurred and was likely to cause irreparable injury to the plaintiffs.166 It was ABC's cutting of the shows which the United States Court of Appeals for the Second Circuit relied on six months later when it granted the preliminary injunction.

The appellate court found that "the cuts made constituted an actionable mutilation" of Monty Python's work167 and that plaintiffs would likely succeed on the merits of a mutilation theory. The court cited the European doctrine of droit moral for the "right of the artist to have his work attributed to him in the form in which he created it."168 The court held that copyright law provided no basis to support Monty Python's mutilation claim, since copyright interests are economic and "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."169 Limited by the economically based strictures on copyright law relief, the court sought refuge and support in the reasonings of Prouty, Granz, Autry, Geisel, Rich, and Jaeger.170 The court concluded that the truncated version of the programs materially "impaired the integrity of appellants' work" and that the version broadcast "represented to the public as the product of appellants what was actually a mere caricature of their talents."171

In Gilliam, the court found a way to protect artists' moral rights. Referring to Granz and Prouty, the court noted that

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165. Id.
166. Id. at 19.
167. Id. at 23-24.
168. Id. at 24.
169. Id.
170. Id. at 24-25.
171. Id. at 25.
relief from misrepresentation of an artist's work could be based in either contract or tort law. The court also cited Rich and Geisel in support of the proposition that "a representation of a product, although technically true, creates a false impression of the product's origin," and may be a violation of section 43(a). The court analogized Gilliam to Prouty, Granz, Rich, and Geisel, finding that ABC's editing of the works reached the point where the programs no longer represented the original creative endeavors. The result was false attribution of authorship, misrepresentation to the public, and injury to the artists. Concluding that mutilation occurred, the court suggested that section 43(a) would be a proper claim. "Thus, an allegation that a defendant has presented to the public a 'garbled,' distorted version of plaintiff's work seeks to address the very rights sought to be protected by the Lanham Act . . . , and should be recognized as a cause of action under that statute."

Judge Gurfein concurred in the finding of infringement of the common law copyright claim; however, he felt it unnecessary to consider the section 43(a) claim where the same relief could be granted on plaintiff's traditional claims. He stated: "[T]he Lanham Act is not a substitute for droit moral which authors in Europe enjoy." According to Judge Gurfein, the application of section 43(a) to artistic integrity is outside the scope of the Lanham Act which "only goes to misdescription of origin and the like." Despite Judge Gurfein's disagreement, the majority's holding that mutilation of an artist's work may support a section 43(a) unfair competition claim was a step forward for the protection of moral rights and gave rise to greater hope among the artistic community.

Gilliam has attracted significant interest in the legal and artistic communities for its apparent expansion of section 43(a) as a claim for mutilation of an artist's work. However, close reading indicates that the holding is limited to very specific facts and that mutilation itself is not the sole basis for the

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172. Id. at 24.
173. Id.
174. Id. at 24-25 (citing Autry v. Republic Prods., Inc., 213 F.2d 667 (9th Cir. 1954); Jaeger v. American Int'l Pictures, Inc., 330 F. Supp. 274 (S.D.N.Y. 1976)).
175. 538 F.2d at 27.
176. Id.
177. See Sokolow, supra note 155, at 34. See also Maslow, supra note 10, at 386-87.
court's finding of unfair competition.\textsuperscript{178} The rights asserted by Monty Python in the scripts may be viewed as moral rights, but these rights were also grounded in the group's contractual arrangement with the BBC. Since the group retained all rights not expressly granted to the BBC, Monty Python had economic and proprietary interests in those that remained. When ABC infringed on those rights, the underlying basis on which Monty Python asserted mutilation of the work was that the group retained editorial rights. Therefore, although asserting the group's interests as the artists who created the work, the group concurrently held an ownership interest in the altered product which could be protected by contract law. The opinion suggests that the court gave much credence to the contractual limitations by which Monty Python controlled the programs and through which it retained economic and proprietary interests in its creation.\textsuperscript{179}

When a product or work of art is altered without the creator's consent and is subsequently represented to the public as unchanged, a false attribution occurs. Thus, in this context, the moral right of integrity (the right not to have one's work altered) is inexorably linked to the moral right of paternity (the right to have one's work accurately attributed to him). The \textit{Gilliam} court recognized this link between the moral rights of paternity and integrity when it stated that the right not to have one's work mutilated "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."\textsuperscript{180} Accordingly,

\textsuperscript{178} The argument that mutilation alone does not support the court's holding was considered in \textit{The Monty Python Litigation}, supra note 155, at 623-24.

\textsuperscript{179} The court referred to "the fact that the editing was substantial, i.e., approximately 27 per cent of the original program was omitted, and the editing contravened contractual provisions that limited the right to edit the Monty Python material." 538 F.2d at 19 (emphasis added). Although this author does not find mutilation of an artist's work an independent ground supporting a section 43(a) claim, the \textit{Gilliam} court's determination that ABC's cuts affected "essential elements in the schematic development of a story line," id. at 25; see also id. at 25 n.12, combined with the omission of climactic scenes and resolutions, and the sheer enormity of the editing (more than one-quarter of the original was eliminated) enabled the court to draw on the earlier cases and the court's intellectual and aesthetic appreciation of art to conclude that mutilation had occurred. \textit{Preminger} also supports the theory that mutilation occurs with the deletion of a certain amount of the work. \textit{See supra} notes 65-72 and accompanying text. In \textit{Preminger}, the court implied that cutting one-third of the film could equal mutilation, while in \textit{Gilliam} twenty-seven percent of the film was cut.

\textsuperscript{180} 538 F.2d at 24. \textit{See also The Monty Python Litigation}, supra note 155, at 623 n.67 and accompanying text ("\textit{Gilliam} held that the right to insist on the integrity of
it appears that misdescription, misrepresentation, or false designation of origin is the statutory basis for which section 43(a) can be invoked to protect an artist's rights. In finding mutilation, the *Gilliam* court indirectly recognized the existence of a false attribution cause of action, strengthening the basis for utilizing a section 43(a) remedy.

Both *Gilliam* and *Jaeger* have increased the remedial reach of section 43(a) by adding the moral right of integrity as a consideration in statutory unfair competition claims. The following section considers how extensively section 43(a) has since been used as a remedy against infringement of the moral rights of paternity and integrity, and how section 43(a), as interpreted, might apply to selected recent events in the film industry, possibly amounting to moral rights violations.

II  
Analysis

A. Limitations On Section 43(a) As A Moral Rights Remedy

The moral rights of paternity and integrity are unofficially recognized by the courts. This section considers whether and to what extent these two moral rights have made a niche for themselves in our legal system under section 43(a) of the Lanham Act.

Since its promulgation in 1946, section 43(a) of the Lanham Act has served to redress the wrongs comprising unfair competition. These wrongs occur when there is "a false designation of origin, or any false description or representation. . . ." The moral right of paternity, which is the right to be free from false attribution, has also found protection under this section 43(a) language. Courts have held that an artist's work may be enforced through the Section 43(a) *paternity* right—the right to be free from false attribution of authorship" (emphasis in original)).

181. Trademark Act of 1946 (Lanham Act), § 43(a), 15 U.S.C. § 1125(a) (1982). Section 43(a) expressly prohibits "a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same. . . ."

182. These two moral rights are not recognized officially because they do not, per se, exist in our laws. Instead, the rights sought to be protected under these concepts are often preserved by application of other legal theories.


sented if the work does not properly and accurately identify contributions that the artist made to the work. This was the conclusion in the music cases, where the performer's actual contributions differed from that which was represented to the public, causing injury to both consumers and the artist.

Crossing artistic mediums, the court in Follett v. The New American Library used section 43(a) to enjoin a publishing company from falsely attributing an editor's contributions to a book as those of the primary author. Follett clearly supported the concept, inherent in the moral right of paternity, that attribution to a work should be limited to the extent of the actual contribution. Follett also established that industry practices had no import where false attribution violated section 43(a).

The potential impact of such holdings regarding industry custom is substantial and likely to continue as an issue in future entertainment industry litigation. It appears that an initial question a court must ask is whether there is a false attribution. The answer to this question must be influenced by considering industry practice. Even the Follett court considered evidence of industry customs in defining the terms author, editor, and contributor. Although questions remain over the future effect of the court's statement regarding industry customs and practice, there is no doubt that Follett strengthened section 43(a) as an effective remedy for infringement of the moral right of paternity when a work is falsely attributed to an artist or where a work is presented to the public in a form no longer representative of the artist's creation.

Whereas the moral right of paternity has found direct support under section 43(a), the integrity interest—the right to be


186. 497 F. Supp. at 311. See supra text accompanying notes 140-41.

free from mutilation or alteration of the creator's work—has found support in the holding of only one case, *Gilliam v. American Broadcasting Companies*,188 though also discussed in dicta of other cases.189 *Gilliam* seemed to present a landmark holding that unfair competition, as recognized by section 43(a), protects an artist's work from mutilation.190 However, *Gilliam* has found no express judicial support in the eleven years since its decision. This may be because a finding of mutilation is likely to create a concurrent claim for false attribution. When a work is mutilated, it is no longer that of its creator, and thus the creator's integrity interest is infringed. When the work is then presented to the public as that of the original creator, it simultaneously infringes on the creator's paternity interest. Where mutilation is found, courts may provide relief under a more traditional section 43(a) remedy, protecting an artist's right to be free from false attribution, rather than basing their holdings on the protection of an artist's integrity interest, a right which has been held protectable only in *Gilliam*.191

The cases considered above have shown the development of section 43(a) as an artist's remedy. Currently, there is no doubt that an artist can seek relief under section 43(a) where his moral right of paternity is infringed and a false attribution is found. However, protection of the moral right of integrity has not been recognized in the United States and will require expansion beyond *Gilliam* to create reliable protection under section 43(a).

B. Application To The Film Industry

The film industry utilizes the skills and talents of many artists and thereby is made susceptible to paternity and integrity infringement claims. One reason section 43(a) has had little impact on enforcing the moral rights of artists in the film and entertainment industries is that disputes are rarely litigated in court. Unions representing artists from various fields use contracts containing clauses which require members and employ-

188. 538 F.2d 14 (2d Cir. 1976). *See supra* notes 154-81 and accompanying text.
190. 538 F.2d 14 (2d Cir. 1976). *See supra* notes 154-81 and accompanying text.
191. *See supra* notes 178-79 and accompanying text.
ers to resolve differences in arbitration. Accordingly, no major section 43(a) claim for mutilation or false attribution, aside from Follett, has been litigated since Gillam. However, there have been several incidents which could have involved section 43(a) claims had they proceeded to litigation. A brief review of four such incidents and a discussion of how they might have been treated follows.

1. Writers

Gore Vidal was hired by Penthouse to write a screenplay for the film Caligula. In exchange, he was to receive a percentage of the profits and credit in the form of “Original Screenplay by Gore Vidal.” Vidal’s script was materially changed and he therefore sought to have his name removed from the film. Had he pursued the issue in court he could have raised two claims which would give rise to section 43(a) protection.

Vidal could have argued that his work was both mutilated and falsely attributed to him. Vidal’s script was changed and new material, consisting of hardcore pornographic sex scenes not included in Vidal’s script, was added by the director and producer. After the alteration, the film, containing the graphic footage, departed substantially from Vidal’s script. Unless Vidal retained an exclusive contractual right to approve all script changes, it is unlikely that a mutilation claim would be recognized as the sole basis for bringing a section 43(a) claim.

However, a concurrent claim for false attribution under section 43(a) would likely have been resolved in Vidal’s favor. Vidal could have argued that he was not the originator of the

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192. See, e.g., DIRECTORS GUILD OF AMERICA, INC., BASIC AGREEMENT OF 1984, art. 2, § 101, at 15: The following matters shall be subject to arbitration: ... all grievances, disputes or controversies over the interpretation or application of any Employee’s personal services contract or deal memo with respect to ... (2) cutting rights, ... (4) creative rights provisions (including, without limitation, all consultation and/or approval rights of any kind relating to any motion picture).

193. Gore Vidal is the author of several best selling novels including LINCOLN, BURR, and 1876. He has also written short stories, essays, plays, and film scripts.


197. See supra notes 188-91 and accompanying text.
completed work and that it was injurious to his reputation because it attributed to him the creation of hardcore pornographic sequences.\textsuperscript{198} This situation is analogous to *Benson v. Paul Winley Record Corp.*,\textsuperscript{199} where defendant's sale of an altered sound recording as an "X-Rated" album materially misrepresented the artist's work.

A compromise settlement between Vidal and Penthouse would be supported by *Follett*. The actual compromise, as reported in the trade press, resulted in removal of Vidal's name from the title and changed the credit from "Original Screenplay by Gore Vidal" to "Adapted From An Original Screenplay by Gore Vidal."\textsuperscript{200} As in *Follett*,\textsuperscript{201} the compromise credit more accurately represented the creator's contribution to the final product.

2. Directors

Potential section 43(a) issues frequently arise between a director and his producer, studio, or distributor. Two areas subject to dispute are film length and commercial viability. While the final film usually represents the artistic creativity of the director, in the business world of film production, artists' moral rights may be contracted away. They may also come under the umbrella of the Director's Guild of America Minimum Basic Agreement, which gives the producer authority over final artistic content.\textsuperscript{202} Therefore, it is difficult, if not impossible, for a director to assert complete final artistic control over his film.

However, there is a limited group of directors whose audience-drawing power and previous commercial success enables them to negotiate for final artistic control over their films. The right of artistic control over the film is obtained contractually.

\textsuperscript{198} Vidal noted that "the actors were signed on the strength of the script and my name. But now it's been turned into a porno film. . . . [W]e're talking about basement pornography." L.A. Times, Sept. 11, 1976, Pt. II, at 7, col. 1.


\textsuperscript{200} Daily Variety, July 12, 1979, at 6, col. 1.

\textsuperscript{201} *See supra* text following note 138.

\textsuperscript{202} *See DIRECTOR'S GUILD OF AMERICA, INC., MINIMUM BASIC AGREEMENT OF 1984*, art. 7, §§ 505 & 1502, at 48 & 51. Section 7-505 refers to the Director's Cut. "The Director shall prepare the Director's Cut of the film for presentation to the individual Producer and to the person designated . . . as having final cutting authority, in the ordinary course of business, over the motion picture." *Id.* at 48 (emphasis added). Also, § 1500 expressly states, "The Employer's decision in all business and creative matters shall be final." *Id.* at 59 (emphasis added).
ally, but may still be limited in certain respects. Even where a director may have artistic control over the final cut of a film for its initial theatrical release, he may not have any right to protect his work from subsequent editing for television censorship and time segment requirements, or from studio revisions prior to a re-release of the film. The director's artistic control may also be limited by length requirements, Motion Picture Association of America rating categories, and even by the producer or studio's subjective determination of the film's commercial viability.

Three recent disputes in the film industry involving unconsented cutting of a director's film are considered here in light of section 43(a).

a. Brazil

If anyone is familiar with the application of section 43(a) to protect a work from mutilation it is former Monty Python member, Terry Gilliam. Gilliam's recent film Brazil was the subject of a public tug-of-war between Gilliam and Universal Studios. As director, Gilliam had final editing rights for a film that was to be two hours and five minutes in length. He delivered the film at seventeen minutes over the contracted length. The studio was not pleased with the film or its length and required Gilliam to renegotiate certain terms of his contract in order to receive a final $4.5 million payment to be paid by the studio upon delivery of the film. The renegotiated terms gave Gilliam the opportunity to re-edit the film to two hours and twelve minutes. However, in the renegotiated contract, Universal gained the right to do any further editing, regardless of length, if the studio was unhappy with the next version submitted by Gilliam. Gilliam was later quoted as having said the renegotiation was necessary because it was like "a $4.5 million gun held to our heads."

203. A director's contract may include a maximum length for the completed film he is to deliver to the producer or studio. Producers, studios and exhibitors are interested in presenting films which do not reduce the number of times it can be exhibited each day because of excessive length, thus maximizing potential sales.
204. Universal City Studios, Inc. 1985.
206. Id. at 4, col. 1.
207. Id.
208. Id.
209. Id.
Gilliam subsequently delivered a re-edited version of the film, meeting the renegotiated two hour and twelve minute length requirement. Universal rejected the newly edited version, indicating that it would edit the film with or without Gilliam's further assistance. In the interim, while Gilliam and Universal continued their public dispute, Gilliam's original version was released in foreign markets and his two hour and twelve minute cut of the film received awards for Best Picture, Director and Screenplay from the Los Angeles Film Critics Association, whose members saw this version of the film at a secret screening. As a result of this critical recognition, Universal fully relented and released Gilliam's re-edited version without further editing or studio interference.

Gilliam probably would not have been able to resort to section 43(a) if he had pursued this issue in the courts. He clearly contracted away any right he had in the final product once he exceeded the two hour and five minute delivery length. In the renegotiated contract he gave the studio even greater editing rights based on the studio executives' opinion of the film. Universal's economic and proprietary rights evidenced by the contract were superior to Gilliam's moral right to maintain the integrity of his film. Furthermore, courts have required cuts to be substantial in order to give rise to relief. In Brazil, however, the cuts that would have been necessary to reach the original delivery length were only about eight percent of the first cut delivered. Although mutilation may result where small amounts of critical content are edited, there is no case support for a successful mutilation claim under section 43(a) based on the public facts of this case.

b. Reds

Another situation involving unconsented-to cutting, eventually resolved by an arbitrator in favor of the director, arose from Warren Beatty's attempt to prohibit American Broad-

210. Id.
213. See infra notes 214-19 and accompanying text (discussion of Reds, where an arbitrator found a five per cent cutting inappropriate where the underlying contract reserved all cutting rights in the director).
casting Companies (ABC) from cutting a reported six to sixteen minutes of the film Reds for television broadcast. Beatty claimed that ABC's intended cut significantly altered the movie and that he alone possessed a final cut right in the film. ABC claimed that its contract with Paramount Pictures gave it the right to "cut for broadcast standards." These claims parallel those in Gilliam v. American Broadcasting Companies, where the plaintiff retained certain rights in the work. Here, Beatty contractually retained final editing rights with no apparent provision allowing for television editing other than for "network continuity broadcast standards"—an apparent reference to airwave censorship. Although the proposed cuts were only five percent of the film, the arbitrator emphasized Beatty's contractual rights. "Beatty . . . had an absolute right of final cut that could not be violated by the network except for trims of words and images to make the movie more suitable for showing on television." The decision to prohibit ABC's proposed editing appears to be grounded on the strength of Beatty's contract, which, by giving him final cut rights, denied anyone else the right to alter the work. Thus, Paramount's situation was analogous to that of the BBC in Gilliam. It could not contract away a television editing right which it did not possess in the first place. This is, therefore, an example where an arbitrator or court may resort to contract law to protect a director's integrity interest without having to reach a section 43(a) question.

c. Once Upon A Time In America

The final situation involving unconsented-to cutting presents a formidable argument on behalf of section 43(a) protection of a director's film from mutilation. Once Upon A Time In America was cut from three hours and forty-seven minutes

219. Id.
to two hours and twenty-four minutes by the Ladd Company, for whom the film was made. Director Sergio Leone had a contract to deliver a two hour and forty-five minute film but instead presented to Ladd Company a three hour and forty-seven minute version. The length of the film was not economically viable for exhibitors or the studio because it could be shown only once a night while a shorter version could be shown twice. The studio cut over twenty-seven percent of the film, releasing a two hour and twenty-four minute version. When critics and audiences compared both versions, the consensus was that the original film had been mutilated.

Although these facts appear to give rise to a section 43(a) claim for mutilation, a court might be limited by the contract provision calling for delivery of a two hour and forty-five minute final cut. Even with a finding of blatant mutilation, a court is unlikely to enjoin a studio from commercially exploiting a multi-million dollar investment where the director knowingly contracted away his integrity interest, and breached express provisions of his contract by delivering a film which exceeded maximum permissible length.

Leone’s other interests in the work, such as his participation as a screenwriter, might create support for some form of relief under section 43(a). However, a court relying on Gilliam might find Leone’s contractual obligation to deliver a two hour and forty-five minute director’s cut overriding. Nevertheless, if the editing amounts to mutilation, a court could find that the

221. The Long and Short of It, TIME, June 18, 1984, at 82.
222. Id.
223. Critical response to the effect of the cuts is best expressed by film critics Vincent Canby of the New York Times and Pauline Kael of THE NEW YORKER:

What happened to ‘Once Upon A Time In America’ in its initial release here shouldn’t happen to a cheap roast beef. It wasn’t carved up—it was pulled to pieces by someone’s bare greedy hands. . . . Its nearly four hour form . . . seems about half as long as the shorter version. . . . Because of the manner in which it had been edited—read “butchered”—the narrative made little sense and the performances seemed . . . irrational.

Canby, The Festival Makes a Potent Case for Preservation, Sunday N.Y. Times, Oct. 21, 1984, § H (Arts and Leisure) at 23, col. 1, 2;

When Sergio Leone’s epic “Once Upon A Time In America” opened here in June, 1984, in a studio-hacked-down version . . . , it seemed so incoherently bad that I didn’t see how the full-length film could be anything but longer. A few weeks later, though, the studio people let me take a look at it, and I was amazed at the difference. I don’t believe I’ve ever seen a worse case of mutilation.

Ladd Company's version was not Leone's creation. If so, public distribution of the film and the attendant publicity attributing direction of the film to Leone would misrepresent the film's origin to the public. Under this analysis, the combined effect of mutilation and false attribution might give rise to a compromise section 43(a) remedy. A compromise remedy might consist of providing an appropriate disclaimer in the film credits, advertising, and publicity, or removing Leone's name entirely from the title, credits, and publicity.

Conclusion

This article has reviewed the legal bases for protecting moral rights in America. Since the United States does not recognize the European doctrine of droit moral per se, the courts have resorted to different legal theories to preserve the creator's moral interest in his work. A number of early cases based such protection on common law unfair competition. Since 1946, several artists have sought to protect their works under section 43(a) of the Lanham Act.

Review of existing case law indicates that only the moral right of paternity has been embraced by courts through section 43(a) protection. An artist's right not to have his work misattributed is accepted and substantiated through cases such as Granz, Geisel, Rich, and Follett. However, the moral right of integrity has not fared as well. While an artist's integrity rights can be protected by contract, legal precedent for applying section 43(a), primarily provided by Gilliam v. American Broadcasting Companies, is not strong. Absent contractual protection, the moral right of integrity might be protected by courts through section 43(a) on a finding of blatant mutilation resulting in false attribution, such as that which occurred in Once Upon A Time In America and Monty Python's Flying Circus.


225. See Autry v. Republic Prods., Inc., 213 F.2d 667 (9th Cir. 1954), discussed supra notes 61-63 and accompanying text. See also Geisel v. Poynter Prods., Inc., 283 F. Supp. 261 (S.D.N.Y. 1968), discussed supra notes 84-100 and accompanying text.