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Moral Rights for Musical Compositions in the United States: It's Not Just Fair, It's an Obligation

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**Moral Rights for Musical Compositions in the
United States:
It’s Not Just Fair, It’s an Obligation**

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Introduction

In 2013, shortly after the song “Blurred Lines” was released, Marvin Gaye’s estate brought an infringement suit, claiming “Blurred Lines” violated the copyright in Gaye’s musical composition¹ “Got to Give It

1. “A musical composition consists of music, including any accompanying words, distinguishable from a sound recording, which results from the fixation of a series of musical,

Up.”² Gaye’s descendants first went to EMI Music Publishing Ltd., the exclusive administrator of “Got to Give It Up,” for assistance.³ EMI refused to bring an infringement suit against “Blurred Lines,” calling it “frivolous.”⁴ However, in 1977, Gaye had registered the copyright for “Got to Give It Up” with the United States Copyright Office, thus granting his descendants the right to bring infringement suits, regardless of what the music publisher or administrator said.⁵ Two years later, the Gayes won nearly \$4 million when the court found “Blurred Lines” infringed the copyright of “Got to Give It Up.”⁶

Setting aside the controversy within the music publishing industry that arose from this decision, a very interesting issue lurks in the background: What would have happened if Gaye had not retained copyright ownership of his musical composition? In short, the Gaye estate would have had no recourse when EMI attempted to bury their potential lawsuit, so they would have had to suffer in silence while Gaye’s musical composition was exploited.⁷ Fortunately, Gaye was a veteran singer-songwriter by the time “Got to Give It Up” was written, and knew his way around the music publishing industry enough to retain his copyright.⁸ Amateur songwriters, on the other hand, may not be so knowledgeable. Amateur songwriters could easily write a song and fail to protect their copyright ownership in the manner that Gaye protected his.⁹ Under those circumstances, once

spoken, or other sounds.” *Circular 56A: Copyright Registration of Musical Compositions and Sound Recording*, UNITED STATES COPYRIGHT OFFICE, (Feb. 2012) [hereinafter USCO], <https://www.copyright.gov/circs/circ56a.pdf>.

2. *Williams v. Bridgeport Music, Inc.*, 300 F.R.D. 120, 121 (S.D.N.Y. 2014).

3. *Williams v. Bridgeport Music, Inc.*, No. CV136004JAKAGR, 2014 WL 12498232, at *1 (C.D. Cal. July 10, 2014).

4. *Id.* Incidentally, EMI was also the music publisher for ‘Blurred Lines.’ *Id.*

5. *Williams v. Bridgeport Music, Inc.*, No. LACV1306004JAKAGR, 2015 WL 4479500, at *1 (C.D. Cal. July 14, 2015), *reconsideration denied*, No. LACV1306004JAKAGR, 2015 WL 12159220 (C.D. Cal. Oct. 6, 2015), *order clarified sub nom. Pharrell Williams, et al. v. Bridgeport Music, Inc. et al.* (C.D. Cal. Oct. 22, 2015).

6. *Id.* at *47. Note that in August 2016, Thicke and Williams appealed the judgment to the 9th Circuit Court of Appeals, but in March 2018, this finding of infringement was affirmed. Adrienne Gibbs, *Marvin Gaye’s Family Wins ‘Blurred Lines’ Appeal; Pharrell, Robin Thicke Must Pay*, FORBES (Mar. 21, 2018), <https://www.forbes.com/sites/adriennegibbs/2018/03/21/marvin-gaye-wins-blurred-lines-lawsuit-pharrell-robin-thicke-t-i-off-hook/#48a392fd689b>.

7. See USCO, *Stopping Copyright Infringement* (Mar. 10, 2010), <https://www.copyright.gov/help/faq/faq-infringement.html>. Section 501 states that to be liable for infringement, one must violate one of the exclusive rights of the copyright owner, indicating that if you do not have a valid copyright, you have no exclusive rights that can be violated. If there is not a violation, there is no cause of action.

8. ALL MUSIC, *Marvin Gaye*, <http://www.allmusic.com/artist/marvin-gaye-mn0000316834/discography> (last visited Mar. 7, 2017).

9. This paper does acknowledge that in the modern music publishing industry, there are private publishing companies owned by songwriters who wish to retain all ownership and control over their songs. Such songwriters, like Bob Dylan, Dr. Dre, Bruce Springsteen, and Paul Simon,

copyright ownership has been divested, moral rights can be an ideal vehicle for reinforcing songwriter protections.

This paper seeks to establish that the United States has a quasi-obligation to enact comprehensive moral rights legislation to remain compliant with the minimum protection standards set forth by the Berne Convention of 1886. In order to alleviate the anticipated economic and societal concerns stemming from this idea, this paper presents musical compositions as the initial work of authorship to receive moral rights, gradually easing the United States' transition into full compliance with the Berne Convention.¹⁰ Part I of this paper will cover a brief history of music law in the United States, focusing on how the exclusive rights granted by copyright manifest themselves within the music publishing industry. Part II of this paper dives into moral rights, particularly the rights of attribution and integrity, and how they differ from economic rights. It focuses on how the United States' current moral rights legislation diverges from the more robust legislation of other countries, and analyzes possible motivations for this divergence.

Part III of this paper discusses the necessity of moral rights protection for songwriters, discussing the unique disadvantages songwriters face in the music publishing industry. It explores how current United States law lacks a sufficient substitute for comprehensive moral rights legislation and analyzes the improbability of a detrimental economic impact should moral rights be granted to musical compositions. Finally, Part IV will conclude by arguing the moral rights legislation adopted by the Berne Convention's international community have rendered the United States' current moral rights legislation inadequate to comply with the Berne Convention's minimum protection standards. Although the minimum protection language has remained the same, the way that member countries have chosen to implement that language has arguably heightened the standards to which countries party to the Convention are held. In short, actions speak louder than words, and the United States' actions are not sufficient. As Gaye put it: "Oh, you know we've got to find a way to bring some understanding here today."¹¹

administer their songs themselves and enter sub-publishing agreements for collection and licensing outside of the United States and Canada. However, this tact is typically only successful among veteran songwriters, or singer-songwriters, who know the industry well enough to navigate sub-publishing and administration on their own. DONALD E. BIEDERMAN, ET AL., *LAW AND THE BUSINESS OF ENTERTAINMENT INDUSTRIES*, 640–641, (PRAEGER PUBLISHERS, 5th ed., 2007).

10. This is not to say other U.S. works of authorship should not also have moral rights protections, but their analysis is outside the scope of this paper.

11. AZ QUOTES, *Marvin Gaye Quotes*, http://www.azquotes.com/author/5402-Marvin_Gaye (last visited Mar. 18, 2017).

I. A Brief History of Music Law in the United States

The United States Constitution grants Congress the power to regulate copyright in Article I “by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries.”¹² Copyright law’s underlying purpose is to “stimulate artistic creativity for the general public good.”¹³ The Founding Fathers recognized the public benefit of creative works, and adapted copyright law as a temporary economic incentive for the creation of those works.¹⁴ Under copyright law, ownership of a copyrighted musical composition grants a songwriter access to a bundle of exclusive rights, including the right to reproduce the musical composition in copies, the right to prepare derivative works based on the musical composition¹⁵, the right to distribute copies of the musical composition to the public, the right to publicly perform the musical composition, and the right to publicly display the musical composition.¹⁶ These exclusive rights are referred to as economic, or exploitation, rights because they protect an author’s ability to economically exploit his or her copyrighted work.¹⁷

Musical compositions were the only federally-protected type of music in the United States for over sixty-five years, demonstrating that early proprietors of United States copyright law found it compelling to protect the interests of songwriters.¹⁸ While musical compositions were not among expressly protected works of authorship until 1831,¹⁹ they were routinely registered under the Copyright Act of 1790 as books.²⁰ The Copyright Act of 1831, the first comprehensive revision of United States copyright law, enumerated printed musical compositions in its list of federally protected

12. U.S. CONST. art. I, § 8, cl. 8.

13. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)

14. Jodie Griffin, *The Economic Impact of Copyright*, PUBLIC KNOWLEDGE, <https://www.publicknowledge.org/files/TPP%20Econ%20Presentation.pdf> (last visited May 15, 2017); see also NEW MEDIA RIGHTS, *What is copyright law, who created it, and why do people think we need it?* (Nov. 25, 2011), http://www.newmediarights.org/business_models/artist/what_copy_right_law_who_created_it_and_why_do_people_think_we_need_it.

15. “A derivative work is a work based on or derived from one or more already existing works.” USCO, *Circular 14: Copyright in Derivative Works and Compilations* (Oct. 2013), <https://www.copyright.gov/circs/circ14.pdf>.

16. 17 U.S.C.A § 106 (West 2002); There are other exclusive rights associated with sound recordings and other works of authorship, but their discussion is outside the scope of this paper.

17. COSCAP, *What are the economic rights of copyright owners?* (July 10, 2009), <http://coscap.org/faqs/what-are-economic-rights-copyright-owners>.

18. USCO, *Notable Dates in American Copyright*, <https://copyright.gov/history/dates.pdf> (last visited May 15, 2017).

19. USCO, *Circular 1a: A Brief Introduction and History*, <https://www.copyright.gov/circs/circ1a.html> (last visited Mar. 18, 2017).

20. William F. Patry, *Introduction: The First Copyright Act*, COPYRIGHT LAW AND PRACTICE (2000).

works.²¹ In 1897, the authors of musical compositions were granted protection against the unauthorized public performance of their works.²² In 1909, those authors were granted initial mechanical recording rights to those musical compositions, subject to a compulsory licensing provision.²³ Sound recordings were not granted federal copyright protection until 1972,²⁴ and there was no performance right for authors of those works until 1995.²⁵

Under copyright law, initial ownership of a copyrighted work vests in the author of the work, which, for musical compositions, is generally the composer, and the lyricist, if any (collectively, the “songwriter”).²⁶ The copyright owner derives an economic benefit from the copyright ownership of a musical composition by licensing out its uses within the bundle of exclusive rights.²⁷ In turn, the public derives a benefit from being able to experience the musical compositions through a multitude of vehicles. The copyright owner can issue a synchronization license for the use of the musical composition in a commercial or other work of visual art.²⁸ Performing rights organizations (or “PROs”) issue blanket licenses for the public performance uses of copyrighted songs, handling the distribution of royalties back to the musical composition’s copyright owner.²⁹ Because of the nature of blanket licenses, those publicly performing the musical compositions do not need to individually request permission from the copyright owner for those uses.³⁰

Unfortunately, the standard music publishing contract tends to divest a songwriter of his or her copyright ownership, granting it to the music publisher instead.³¹ Consequently, most beginning professional

21. USCO, *supra* note 17.

22. USCO, *supra* note 17.

23. *Id.*

24. USCO, *A Study on the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdiction*, <https://www.copyright.gov/docs/sound/> (last visited May 15, 2017).

25. USCO, *Digital Performance Right in Sound Recordings Act*, (June 28, 1995), <https://www.copyright.gov/docs/regstat062895.html>.

26. USCO, *supra* note 1 (stating that initial ownership of a musical composition vests in the composer and/or lyricist). Songwriters can be composers, lyricists, or both. FRANKLIN/NASHVILLE TN FUN TIMES GUIDE, *Songwriting Q&A: Facts About Songwriter Credits, Getting Paid & Plugging Songs*, https://franklin.thefuntimesguide.com/tips_for_writing_songs/ (last visited Mar. 18, 2017).

27. 17 U.S.C.A. § 106; *see also* BMI, *Types of Copyright*, https://www.bmi.com/licensing/entry/types_of_copyrights (last visited May 15, 2017). The owner of the sound recording must also consent to the synchronization license.

28. BMI, *supra*.

29. BMI, *supra*.

30. *Id.*

31. Don E. Tomlinson, *Everything That Glitters Is Not Gold: Songwriter-Music Publisher Agreements and Disagreements*, 18 HASTINGS COMM. & ENT L.J. 85, 103 (1995).

songwriters are not afforded the protection copyright ownership provides. Further, while these rights could conceivably be granted through contract law rather than copyright law, very few of the terms in a standard music publishing contract are negotiable.³² “Professional songwriters come in roughly two varieties – those who have a strong bargaining position with their publishers and those who do not,” and those who do not typically find themselves in a music publishing contract akin to a contract of adhesion.³³ Thus, the songwriters’ lack of copyright ownership, combined with their lack of contract bargaining power, create issues against which they need to safeguard.

For one, without copyright ownership and a contractual provision specifying otherwise, a songwriter has no right to pursue action against infringement.³⁴ In *Cortner v. Israel*, the songwriter-plaintiffs assigned their musical composition’s copyright to the American Broadcasting Company (or “ABC”), which used it as the theme song for ABC’s *Monday Night Football*.³⁵ After using the theme for four years, ABC commissioned another songwriter to write a derivative musical composition for future use on the same program, discontinuing the use of the theme song composed by the plaintiffs and using the derivative composition instead.³⁶ The Court held “the derivative composition [did] not infringe the preexisting composition” because ABC was the copyright owner and therefore had the exclusive right to commission any derivative works without the plaintiff-songwriters’ consent.³⁷ It was immaterial the plaintiff’s composition was the underlying work for the new theme; legally ABC could do anything it wanted with the composition absent any specific contractual obligations to the plaintiff.

Additionally, without contractual terms specifying specific uses or nonuses of a song, songwriters have no recourse if their work is publicly performed, even if the use is highly objectionable to them.³⁸ For example, the Piano Guys publicly performed Rachel Platten’s “Fight Song” during Donald Trump’s presidential inauguration, legal because of the blanket licenses issued by the PROs.³⁹ “Fight Song” had previously been used for Hillary Clinton’s failed presidential campaign, and Rachel Platten

32. *Id.* at 91.

33. Michael Kosser, *Do Songwriters Need Publishers? Or Can They Go It Alone?*, AM. SONGWRITER, at 36 (July/Aug. 1995); *see also* Tomlinson, at 92–93.

34. USCO, *supra* note 7.

35. *Cortner v. Israel*, 732 F.2d 267, 269 (2d Cir. 1984).

36. 732 F.2d at 270 (2d Cir. 1984).

37. *Id.* at 272; 17 U.S.C.A. §§ 101, 201(b) (West 2010).

38. PLAGIARISM TODAY, *U.S. vs. Europe: Moral Rights* (June 12, 2006), <https://www.plagiarismtoday.com/2006/06/12/us-vs-europe-moral-rights/>.

39. Raisa Bruner, *Rachel Platten Speaks Out About Her ‘Fight Song’ Playing at Inaugural Balls*, TIME (Jan. 23, 2017), <http://time.com/4643437/rachel-platten-fight-song-trump/>.

immediately tweeted “I want to make clear that at no point . . . did I or anyone on my team know of, approve, or endorse [the Piano Guys’] decision to play Fight Song tonight.”⁴⁰ Her objection was noted, but she still had no legal recourse for her objection. Thus, absent contractual protections and copyright ownership, professional songwriters generally find themselves up a creek without a paddle when it comes to protecting their interests in their musical compositions. This is where moral rights come in.

II. A Brief History of Moral Rights

To understand why the United States should adopt moral rights for songwriters, the history and practical implementation of moral rights must be explained. First, this paper will discuss how moral rights, particularly the rights of attribution and integrity, differ from economic rights, and how different countries have chosen to adopt moral rights in compliance with the Berne Convention. Second, this paper will explore how moral rights legislation was implemented in the United States, and the potential reasons for why its enactment is so different from that of other countries.

A. What Are Moral Rights?

The concept of moral rights originated with the Statute of Anne in 1710.⁴¹ The Statute of Anne was concerned not just with the purely economic interests of owners of intellectual property rights, but also with societal interest in the works they created.⁴² The overarching ambition of the Statute and its stated goal of the “Encouragement of Learned Men to Compose and Write Useful Books” was the societal interest of increasing learning and knowledge.⁴³ While the Statute only applied to creators of literature, it eventually conceptualized this notion for all artists.⁴⁴

Later, the Engraver’s Act of 1735 blended those economic and societal interests with the interests of the creative process.⁴⁵ The Engraver’s Act suggested maintaining artistic reputations was an integral factor in protecting the economic benefits of authors, positing authors create their works to “reap the sole benefit of their labors.”⁴⁶ Therefore, poor-quality copies of their work would likely harm their incomes by both

40. *Id.*

41. Susan P. Liemer, *How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright*, 5 J. MARSHALL REV. INTELL. PROP. L. 1, 7–13 (2005).

42. *Id.*

43. STATUTE OF ANNE, *An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies*, 8 Ann., c. 19 (1710) (Eng.).

44. Liemer, at 13.

45. *Id.* at 14–16.

46. *Id.*

causing prejudice against the true author's reputation, and selling for less money than the true author's work.⁴⁷ The Engraver's Act demonstrated a great respect for the creative process, which likely laid the foundation for moral rights legislation.⁴⁸

Moral rights legislation originated in Europe, namely France and Germany, and likely arose from the need to further protect the creative process alongside societal and economic interests.⁴⁹ Moral rights presume "the author's creative process not only results in a tangible product that is subject to the demands of . . . the marketplace, but also reflects the personality and self of the author."⁵⁰ While the exploitation rights protect the monetary value of a work to its creator, moral rights protect the personal and reputational value.⁵¹ Economic rights can be transferred and assigned away by the original copyright owner, but moral rights typically cannot.⁵² Further, once a work has entered the public domain and can be used by anyone free of charge and without permission, the moral rights of the author must still be respected.⁵³

In France, moral rights grant an author the right to "respect for his name, his authorship, and his work . . . [which] shall attach to his person . . . [and will] be perpetual, inalienable and imprescriptible."⁵⁴ The French moral rights are the right of disclosure, the right of attribution, the right to the respect of the work's integrity, the right of withdrawal, and the right to protection of honor and reputation.⁵⁵ Germany recognizes the same inalienable and descendible rights as France, but only allows them to last the length of the term of the associated economic rights.⁵⁶

47. Liemer at 14–16.

48. *Id.* at 15.

49. PLAGIARISM TODAY, *supra* note 38.

50. Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. AND LEE L. REV. 3, at 801 (June 1, 2001).

51. Betsy Rosenblatt, *Moral Rights Basics*, HARVARD LAW SCHOOL (Mar. 1998), <https://cyber.harvard.edu/property/library/moralprimer.html>.

52. Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law—A Proposal*, 24 S. CAL. L. REV. 375, 402 (1951); *see also* Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1 (Nov. 1997).

53. PLAGIARISM TODAY, *supra* note 38; *see also* STANFORD UNIVERSITY LIBRARIES, Copyright & Fair Use: Welcome to the Public Domain, <http://fairuse.stanford.edu/overview/public-domain/welcome/> (last visited May 16, 2017).

54. Art. L121-1 of the Code of Intellectual Property.

55. André Lucas, *Moral right in France: towards a pragmatic approach?*, <http://www.blaca.org/Moral%20right%20in%20France%20by%20Professor%20Andre%20Lucas.pdf> (last visited Mar. 18 2017).

56. *Copyright in the Federal Republic of Germany*, INTER NATIONES, E.V. D-53175 BONN, 7–9, *available at* <http://www.goethe.de/in/download/dengl/urheberrecht-e.pdf> (last visited Mar. 18, 2017).

Moral rights became more internationally recognized under the Berne Convention for the Protection of Literary and Artistic Works (the “Berne Convention”).⁵⁷ The purpose of the Berne Convention was to establish a system of equal treatment that internationalized copyright amongst its parties.⁵⁸ The goal was for the works of foreign authors to be treated at least as well as those of a country’s own nationals, and for the system to standardize that treatment across the board.⁵⁹ One of the basic principles of the Berne Convention is that copyright protection automatically exists from the time a qualifying work is fixed in a tangible medium without needing to be published or registered.⁶⁰ Under Article 2, qualifying works include literary works, musical compositions, films, software programs, and paintings, among others.⁶¹

Parties to the Convention are held to minimum protection standards to be granted, which, under Article 6*bis*, include moral rights.⁶²

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, the said work, which would be prejudicial to his honor or reputation.⁶³

This language indicates all countries party to the Berne Convention are required to protect an author’s right to have his or her name associated with his or her work, and to protect an author’s right to prevent others from

57. Thorvald Solberg, *Report of the Delegate of the United States to the International Conference for the Revision of the Berne Copyright Convention*, LIBRARY OF CONGRESS, pg. 9 (1908).

58. WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Berne Convention for the Protection of Literary and Artistic Works*, [hereinafter WIPO] <http://www.wipo.int/treaties/en/ip/berne/index.html> (last visited May 15, 2017).

59. WIPO, *Summary of the Berne Convention for the Protection of Literary and Artistic Works*, http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited May 15, 2017).

60. *Id.*

61. “The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.” Berne Convention for the Protection of Literary and Artistic Works, art. 2, sec. 1, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. TREATY DOC. NO. 99-27 (1986) U.N.T.S. 30 [hereinafter Berne Convention].

62. JANE C. GINSBURG, ET AL., TRADEMARK AND UNFAIR COMPETITION LAW, 530 (Carolina Academic Press, 5th ed. 2013).

63. Berne Convention, Art. 6*bis*, Sec. 1.

using his or her work in any way the author deems derogatory to his or her reputation.

Article 6*bis* does not stipulate which qualifying works must receive moral rights, so each of the 173 countries party to the Berne Convention adopted their own specifying legislation.⁶⁴ Most of the countries chose to enact moral rights legislation to encompass the qualifying works described in Article 2 of the Berne Convention.⁶⁵

◦ **G7 member**⁶⁶

* **G20 member**⁶⁷

A Select List of Berne Convention Parties and their Moral Rights Legislation⁶⁸

Country	Applies to All Works Under Art. 2	Term of Moral Rights	Statutory Reference
Australia *	X	Length of economic rights	s. 195AM, Copyright Act of 1968
Argentina *	X	Life + 70 years	IP Legislation, Act 11.723
Canada * ◦	X	Length of economic rights	Arts. 14.1, 14.2 Copyright Act (R.S.C., 1985, c. C-42)
Indonesia *	X	Life + 50 years	2.1.7.1, Copyright Act of the Republic of Indonesia
Germany * ◦	X	Perpetual	Art. 1, Sec. II, SS. 2, Act on Copyright and Related Rights
France * ◦	X	Perpetual	Art. L121-1, Intellectual Property Code
Mexico *	X	Perpetual	Art. 18-23, Federal Law on Copyright
India *	X	Length of economic rights	Sec. 57 of the Copyright Act, 1957
China *	X	Perpetual	Arts. 10, 20, Copyright Law of the People's Republic of China
South Africa *	X	Length of economic rights	Art. 20, Copyright Act No. 98 of 1978
United Kingdom * ◦	X	Length of economic rights	Arts. 77-89, Copyright, Designs and Patents Act 1988 (C. 48), Chapter IV
United States of America * ◦		Life of the author	17 U.S.C.A § 106A, Visual Artists Rights Act of 1990 (VARA)

64. WIPO, *Contracting Parties>Berne Convention*, http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 (last visited May 15, 2017).

65. *Id.*

66. *See infra* note 193.

67. *See infra* note 195.

68. WIPO, *supra* note 64.

Italy * °	X	Perpetual	Arts. 20, 22, Law no. 633 of 22 April 1941
Japan * °	X	Life + 50 years	Arts. 17-20, Copyright Act, Act No. 39 of 1899
Russia *	X	Life + 70 years	Copyright Law of 1993, Part IV, Civil Code of the Russian Federation
Saudi Arabia *	X	Life + 50 years	Art. 8, Copyright Law Royal Decree No. M/412 Rajab, 1424
Turkey *	X	Life + 70 years	Art. 14-17, Law No. 5728 of 23.01.2008, Law on Intellectual and Artistic Works
Republic of Korea *	X	Perpetual	Art. 11-15, Copyright Act of 1957, Act No. 9625 of April 22, 2009
Brazil *	X	Life + 70 years	Art. 24-27, Law No. 9610 of February 19, 1998, on Copyright and Neighboring Rights

While the associated bundle of rights attached to moral rights varies from country to country, all countries recognize the rights of attribution and integrity.⁶⁹ The moral right of attribution is the acknowledgment as credit to the author of a work, no matter who the copyright holder of the work is.⁷⁰ It prevents others from fraudulently claiming to have created the work, and ensures that the author can demand credit in every medium through which the work is distributed to the public.⁷¹ The right of integrity follows the notion that since “the work of art is an expression of the artist’s personality . . . [d]istortion, dismemberment or misrepresentation of the work mistreats an expression of the artist’s personality, affects his artistic identity, personality and honor, and thus impairs a legally protected personality interest.”⁷² It allows an author to demand his or her name be removed from the credits of a work, or to prevent the work from being released, if it has become prejudicial to his or her reputation.⁷³ These two moral rights effectively protect authors against any use of their work that affects their reputation.

69. *Id.*; see also WIPO, *supra* note 64. This includes the United States in its limited capacity. See *infra* Part II(B) “Moral Right Protection in the United States.”

70. Rosenblatt, *supra* note 51.

71. Rosenblatt, *supra* note 51.

72. John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1043 (1976).

73. Rosenblatt, *supra* note 51.

B. Moral Rights Protection in the United States

The United States became a party to the Berne Convention in part with economic interests in mind.⁷⁴ In President Reagan's own words, "the cost to Americans [of not joining the Berne Convention] has been substantial . . . the entertainment industry may have lost more than \$2 billion in potential revenue, and our computer and software industries more than \$4 billion."⁷⁵ After joining the Berne Convention in 1989, the United States enacted the Visual Artists Rights Act of 1990 (or "VARA") to fill its moral rights void.⁷⁶ Most likely, the United States enacted VARA in an attempt to comply with the Berne Convention's minimum moral rights standards and to obtain the resulting economic benefits. VARA specifically limits its moral rights protection to works of visual art that exist in no more than 200 copies.⁷⁷ Further, VARA includes provisions that allow artists to waive their moral rights entirely, and exempts work-for-hires from moral rights protection.⁷⁸ The United States is the only country party to the Berne Convention that does not grant moral rights to all the Berne Convention's qualifying works.⁷⁹

The United States' reticence to embrace moral rights in the way other Berne Convention signatories have is likely based upon several issues.⁸⁰ First, the United States Constitution granted Congress the power to regulate copyright, with "its principal aim [being] the interests of society as a whole . . . [r]ather than protecting some natural right."⁸¹ Moral rights are aimed at protecting natural rights, so they would seem to be outside the principal aim of the Constitution. VARA was not meant as a staunch protector of artists' rights.⁸² It gives the artists legal recourse after their

74. Orrin G. Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J., 171, 172 (1989). The United States did not actually become a party of the Berne Convention until 103 years after its initial implementation. *Id.*

75. *Remarks on Signing the Berne Convention Implementation Act of 1988*, 24 WEEKLY COMP. PRES. DOC. 1406 (Oct. 31, 1988), <https://www.reaganlibrary.archives.gov/archives/speeches/1988/103188b.htm>.

76. COPYRIGHT LAW OF THE UNITED STATES (TITLE 17), *Chapter 1: Subject Matter and Scope of Copyright*, <https://www.copyright.gov/title17/92chap1.html> (last visited Mar. 18, 2017).

77. 17 U.S.C.A § 106(a) (West 2002).

78. GOVERNMENT PUBLISHING OFFICE, *Title 17 – Copyrights*, <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title17/pdf/USCODE-2011-title17-chap1-sec106A.pdf> (last visited Mar. 18, 2017); a work made for hire is either (1) a work prepared by an employee within the scope of his or her employment or (2) a work specially ordered or commissioned for a specific use. USCO, *Circular 9: Works Made for Hire*, <https://www.copyright.gov/circs/circ09.pdf> (last visited Mar. 19, 2017).

79. See WIPO, *supra* note 64.

80. Nathan Murphy, *Theme et VARAtions: Why the Visual Artists Rights Act Should Not Protect Works-In-Progress*, 17(1) UCLA ENT. L. REV., 113 (2010).

81. *Id.* at 116.

82. *Id.*

work has been destroyed, so long as it was of “recognized stature.”⁸³ The “recognized stature” requirement arguably allows for the destruction of work society does not deem worthy of saving.⁸⁴ Thus, VARA is aimed at protecting the public’s interest in preserving or destroying certain works of societal interest; protecting the artist’s interest is incidental.⁸⁵

Second, it has been contended moral rights undercut traditional economic property rights, which U.S. law has conventionally protected very strongly.⁸⁶ Lawmakers feared the assertion of moral rights would “dampen rather than promote the creation of arts due to inefficiencies in the bargaining process and property holders’ fear of impending litigation if they commission a work.”⁸⁷ This might, in turn, have a detrimental effect on the economy. For example, under VARA, if a company allows a creator to erect his or her artwork on a building, regardless of who owns the economic rights to the work, the artist can prevent the artwork from being altered, mutilated, or destroyed.⁸⁸ Under those circumstances, it is possible that property owners may be disinclined to either commit to a permanent structure or face liability should they attempt to remove a work of recognized stature.⁸⁹ A commissioned work of visual art in which the artist retains moral rights potentially comes with both of those unsettling concerns.

Consequently, the inclusion of VARA’s waiver provision was a necessity because “artists’ rights should not be absolute . . . they should be tempered by commercial realities, provided that provisions [are] enacted to insulate authors from being unduly influenced to give away their new-found rights.”⁹⁰ The inclusion of VARA’s work-for-hire exemption

83. 17 U.S.C.A 106(a)(3)(B); *see also* Laura Gilbert, *Why the Visual Artists Rights Act Is Failing*, ARTSY, <https://www.artsy.net/article/artsy-editorial-why-the-visual-artists-rights-act-is-failing-to-protect-street-art-and-murals> (last visited Mar. 18, 2017). Artist Kent Twitchell, for example, won a \$1.1 million settlement after his mural of Ed Ruscha was painted over in 2006. *Id.*

84. It has been noted that the practical application of the recognized stature provision “neither protects fully the rights of artists in the integrity of their works, nor furthers the aims of United States copyright law as expounded in the copyright clause” and VARA should offer the same protection against the destruction of works as it does to their alteration or mutilation. Christopher J. Robinson, *The “Recognized Stature” Standard in the Visual Artists Rights Act*, 68 *FORDHAM L. REV.* 1935, 1937 (2000).

85. Natalia Thurston, *Buyer Beware: The Unexpected Consequences of the Visual Artists Rights Act*, 20 *BERKELEY TECH. L.J.* 701, 702 (2005).

86. Murphy, at 116.

87. Thurston, at 702.

88. LIBRARY OF CONGRESS, *Waiver of Moral Rights in Visual Artworks* (Jan. 10, 2003), <https://www.copyright.gov/reports/exsum.html>.

89. *Id.*

90. *Id.* The insulating provision referenced is merely the waiver can only be entered into via a signed, written agreement specifying the work and the precise uses to which the waiver applies. *Id.*

follows a similar line of reasoning. From an economic standpoint, the work-for-hire rule in copyright serves to lower “transaction and contracting costs by assigning the copyright to the party in the best position to exploit it.”⁹¹ Without the exemption, it is conceivable a corporation could hold the copyright under a work-for-hire arrangement, use the work in a way that alters, mutilates, or even destroys it, and then open itself up to liability if the artist retained rights under VARA. Although the waiver allows the corporation to insist the artist waive his or her VARA rights to avoid that issue, the work-for-hire exemption was built into the legislation because U.S. lawmakers understood the bargaining inefficiencies and costs associated with waivers.⁹²

Even with VARA, however, copyright scholars have noted “[t]he moral right of the artist . . . simply does not exist in [U.S.] law.”⁹³ VARA only applies to a limited number of visual artists, leaving those who dabble in music, film, books, and small-scale artwork to fend for themselves. The United States, however, insists it is in full compliance with the obligations set forth in the Berne Convention, citing both VARA and a patchwork of other elements of U.S. law.⁹⁴ As will be explained in Part III(B), while this may be true for some artists under very specific circumstances, it is not true for musical compositions and songwriters.⁹⁵

III. The Necessity of Moral Rights Protection for Songwriters

There are three key reasons why the United States should adopt comprehensive moral rights legislation for songwriters and their musical compositions. First, generally, songwriters are an underprivileged group of authors due to the unique nature of the music publishing industry and how it affects their ability to succeed through their creations. Second, despite the requirements of the Berne Convention and the contentions of many U.S. lawmakers, there is currently no adequate substitute for the rights of attribution and integrity. Third, comprehensive moral rights legislation has been successfully built into the copyright laws of the other 172 Berne Convention signatories, so the United States’ economic concerns relating to moral rights adoption are likely immaterial.

91. William M. Landes, *What Has The Visual Arts Rights Act of 1990 Accomplished?*, THE CULTURAL POLICY CENTER AT THE UNIVERSITY OF CHICAGO (Feb. 2001).

92. Landes, *supra*; see also Thurston, *supra* note 84, 86.

93. Merryman, at 1035–1036.

94. PLAGIARISM TODAY, *supra* note 38; see also Rosenblatt, *supra* note 51.

95. Artists other than songwriters are outside the scope of this paper and will not be discussed.

A. Songwriters Have a Unique Disadvantage Due to the Nature of the Music Publishing Industry

Songwriters have a unique disadvantage when it comes to protecting their interests in their musical compositions two important reasons. First, the standard language of music publishing contracts divests many songwriters of their copyright ownership, particularly when the songwriter is not established enough to negotiate better provisions. Second, songwriters generally lack sufficient leverage to negotiate better provisions because they do not have the support of a labor union, and they are typically unable to control the success or failure of their industry reputations due to a lack of proper attribution for their work.

1. *Most Songwriters Are Divested of Their Copyright Ownership*

It is vital for any author to retain copyright ownership of his or her work because United States copyright law does not bestow rights upon the original creator; it bestows rights solely upon the copyright owner.⁹⁶ In the case of songwriters in the music publishing industry, however, not only is it easy for them to be divested of copyright ownership, there are many vehicles to do so. For example, a third party can employ songwriters to create a musical composition as a work-for-hire, in which the initial copyright ownership will vest in the third party, and not in the songwriter.⁹⁷ In another instance, after initial copyright has vested in the songwriter, he or she can assign or transfer the copyright to a third party, making the third party the copyright owner.⁹⁸ In the most common circumstance, before the musical composition has even been created, the songwriter signs a contract with a music publisher agreeing to grant some, or even all, copyright ownership to the music publisher, for any work created under the contract.⁹⁹

The three most common types of songwriter contracts that deal with copyright transferability are an exclusive songwriter agreement (or “ESWA”), an administration agreement, and a co-publishing agreement.¹⁰⁰

96. USCO, *supra* note 7.

97. USCO, *supra* note 77; see also Kevin Zimmerman, *Watch Out for Work-For-Hire*, BMI (Nov. 22, 2006), https://www.bmi.com/news/entry/Watch_Out_for_Work-for-Hire.

98. GOVERNMENT PUBLISHING OFFICE, *supra* note 77 (see the section on “Transfer of Copyright”).

99. Tomlinson, at 103.

100. E.g., Michael Eames, *What's the Deal: Understanding Co-Publishing and Admin Deals*, ASCAP (Dec. 20, 2013), <https://www.ascap.com/help/career-development/whats-the-deal-michael-eames-pen-music>. Work-for-hire agreements are also very common in the music publishing industry, but because they operate in the same way as an ESWA and divest a songwriter of all copyright ownership, they do not need to be discussed in detail. Chris Robley, *The 3 most common music publishing deals for songwriters*, DIY MUSICIAN (Oct.

In an ESWA, the songwriter must transfer 100% of his or her copyright ownership to the publisher, who expends money, time and energy to bring the song into the public's ear.¹⁰¹ The standard ESWA contract grants the songwriter royalties of 50% of the song's income, with or without an advance against royalties.¹⁰² In an administration agreement, the songwriter retains 100% of the copyright ownership, and for an administrative fee, the publisher pays the song.¹⁰³ The typical administrative fee is only 15% to 20% of the song's gross income, leaving the songwriter with 80% to 85%.¹⁰⁴ Lastly, in a standard co-publishing agreement, the songwriter transfers only 50% of his or her copyright ownership to the publisher, and the publisher plugs the song for, typically, 25% of the gross income.¹⁰⁵ There, the songwriter typically receives a total of 75% of most sources of income on a 50/50 percentage basis with a 75/25 overall.¹⁰⁶

To the untrained eye, these deals do not pose a significant issue because only one of them divests the songwriter of 100% copyright ownership. However, co-publishing deals are typically reserved for songwriters who have the bargaining power to negotiate 100% copyright ownership retention, typically garnered through the popularity of their prior work, or contracts with multiple publishers.¹⁰⁷ Further, administration agreements are generally reserved for artists who have the capital to undertake the music publishing function themselves, which beginning professional artists typically do not.¹⁰⁸ Thus, amateur songwriters are

2, 2014), <http://diymusician.cdbaby.com/musician-tips/3-common-kinds-music-publishing-deals-songwriters/>.

101. BIEDERMAN, at 643.

102. *Id.* Low mechanical license fees for songwriters have presented a separate issue for economic rights in the digital age, but that discussion is outside the scope of this paper; *see also* John Seabrook, *Will Streaming Music Kill Songwriting?*, NEW YORKER (Feb. 8, 2016), <http://www.newyorker.com/business/currency/will-streaming-music-kill-songwriting>.

103. *Id.*, at 643–644.

104. *Id.*

105. *Id.* at 642–643.

106. *Id.* The proceeds from a musical composition are split 50/50 between the writer and the music publisher. In a typical co-publishing agreement, the writer receives 50 cents of every dollar earned as the writer, and then 25 cents of the music publisher's share for a total of 75 cents of every dollar. *Id.*; *see also* Shalisha Samuel, *Without a songwriter there is no song*, WIPO MAGAZINE (Sept. 2011), http://www.wipo.int/wipo_magazine/en/2011/05/article_0007.html.

107. SONGSTUFF, *Music Publishing Contracts*, http://www.songstuff.com/music-business/article/music_publishing_contracts/ (last visited Mar. 17, 2017). The first contract Prince signed at age 17 granted him creative control and ownership of the publishing rights. He could negotiate this deal because, even as an amateur artist, he had the interest of Warner Bros. Records, A&M Records, and Columbia Records, forcing the labels to vie for his commitment. Ted B. Kissell, *Prince's first manager reflects on the music icon's early days*, UCLA NEWSROOM (May 2, 2016), <http://newsroom.ucla.edu/stories/princes-first-manager-reflects-on-the-music-icons-early-days>.

108. Tomlinson, at 91.

commonly relegated to the ESWA: to either transfer 100% ownership of their rights to their publisher, or not be signed at all.

2. Unequal Bargaining Power Between Songwriters and Their Publishers Prevents Songwriters from Negotiating Protections into Their Contracts

The presence of additional provisions within each type of music publishing agreement can grant certain protections to songwriters, but the successful negotiation of these largely depend on the songwriter's bargaining power.¹⁰⁹ Coveted provisions include stipulating the manner and means of authorship credit, granting the right to enforce infringement suits even if the copyright lies with another, granting final approval rights to the songwriter for any uses of the music, or even granting full reversion of the assigned-away copyrights back to the songwriter after a specified period.¹¹⁰ So, although there are plenty of provisions that can be negotiated into a contract to protect songwriters who have given away their copyright, they are only a reality for songwriters who have sufficient leverage.¹¹¹ Unfortunately, the nature of the music publishing industry is such that songwriters typically lack adequate leverage to properly negotiate their contracts, even singer-songwriters and some veteran songwriters.

There are two key reasons why songwriters have so little leverage in the music publishing industry. First, they do not have the backing of a powerful labor union to engage in collective bargaining agreements for them, like screenwriters do under the Writers Guild of America.¹¹² Many songwriters do not consult a lawyer before signing agreements with their music publishers, and consequently do not understand the fine print of their contracts.¹¹³ A collective bargaining agreement through a labor union can

109. See, e.g., BIEDERMAN, at 645–648; see also Robert A. Celestin, Music Publishing and Copyright Basics, THE LAW OFFICES OF ROBERT A. CELESTIN (Mar. 22, 2011), <http://www.raclawfirm.com/music-publishing-copyright-basics/>.

110. Celestin, *supra*.

111. *Id.*

112. Seabrook, *supra* note 102. While there is a Songwriters Guild of America, that organization merely acts as an advocate to effectuate positive change in the law for songwriters, and is not a labor union. SONGWRITERS GUILD OF AMERICA, *Home*, <https://www.songwritersguild.com/motif/index.php> (last visited Mar. 18, 2017). Songwriters lack the protections the Writers Guild of America, SAG-AFTRA, and the Directors Guild of America garner for their associated artists. Writers Guild of America, West, *Guide to the Guild*, <http://www.wga.org/the-guild/about-us/guide-to-the-guild> (last visited Mar. 18, 2017); Screen Actors Guild-American Federation of Television and Radio Artists, *About*, <http://www.sagaftra.org/content/about-us> (last visited Mar. 18, 2017); Directors Guild of America, *About the DGA*, <https://www.dga.org/The-Guild/History.aspx> (last visited Mar. 18, 2017).

113. Cornelius Cowles, *The Relationship Between the Songwriter and the Publisher*, MUSIC, MONEY AND THE MIDDLEMAN, 101, 102, http://www.jetlaw.org/wp-content/uploads/2014/01/12_1VandJEntLPrac1011999.pdf (last visited Mar. 18, 2017); see also Tomlinson (discussing

remove a lot of the need to hire a lawyer to review contracts, and the looming threat of a strike puts pressure on a company refusing to renegotiate a poor contract.¹¹⁴

For example, songwriter Arthur Alexander attained “legend” status in the R&B, rock, and country songwriting communities with hits made famous by the Beatles, Bob Dylan, and the Rolling Stones, among others.¹¹⁵ Likely, Alexander’s legend status did not extend past the songwriting community into the general public, demonstrated because he spent his last fifteen years in general anonymity as a bus driver.¹¹⁶ Thus, despite his community legend status, Alexander was unable to renegotiate any of his music publishing contracts.¹¹⁷ “He never earned a penny from his hits in the 1960s and 1970s and was cheated out of his songwriter’s royalties” because he signed too many one-sided music publishing contracts.¹¹⁸ “[Alexander] was a victim of [the] cross-collateralization of studio fees and poor business sense.”¹¹⁹

In another example, in 1991, amateur singer-songwriting girl group TLC signed with Pebbitone without having a lawyer review their contracts.¹²⁰ Despite becoming the only female singing group in history to receive diamond certification from the RIAA¹²¹ and with worldwide sales

how many songwriters end up with one-sided music publishing contracts because they miss the fine print).

114. In 2007, WGA, SAG-AFTRA, and DGA threatened strike to force Hollywood to include their artists in new media revenues. Such a strike would “cripple Hollywood” because it would render producing any type of show impossible, “potentially pushing losses into the billions.” John Scott Lewinski, *WGA, SAG, DGA Strike Over New Media Could Cripple Hollywood*, ABC NEWS (Sept. 17, 2007), <http://abcnews.go.com/Technology/story?id=3619418&page=1>. That threat, despite shortening the 2007 writing season by nearly 2 months, resulted in the highest reported earnings by WGA West writers of all time. David Robb, *WGA Contract Talks Start Monday: Will Strike Threat Force Script Speed-ups – Again?*, DEADLINE HOLLYWOOD (Mar. 10, 2017), <http://deadline.com/2017/03/wga-contract-talks-strike-threat-1202041087/>.

115. Tomlinson, at 138–139.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 139.

120. Danni Hood, *[VIDEO] TLC’s CrazySexyStory According to The Original “C” (Crystal Jones) And Ian Burke* (Oct. 22, 2013), THE RYAN CAMERON SHOW (Radio broadcast), <http://v103.cbslocal.com/2013/10/22/video-tlcs-crazysexystory-according-to-the-original-c-crystal-jones-and-ian-burke/>.

121. Epic Records, *Multi-Platinum Superstars TLC Return with A New Album Featuring Brand-New Music*, PR NEWSWIRE (July 25, 2013), <http://www.prnewswire.com/news-releases/multi-platinum-superstars-tlc-return-with-a-new-album-featuring-brand-new-music-216941591.html>.

exceeding 23 million copies,¹²² the lack of revenue coming back to the band forced TLC to file Chapter 11 Bankruptcy.¹²³ The fine print of TLC's initial publishing and recording contracts left the trio with only 56 cents per album sold, and their companies refused to renegotiate their contract midway through its duration.¹²⁴

The second reason why songwriters lack leverage is that the nature of the modern music industry has made it difficult for songwriters who do not also perform their own work to sufficiently establish themselves. The way songwriters and their work is perceived within the industry has a direct impact on their ability to build their reputation.¹²⁵ Each prior work "serves as an advertisement for future works and an artist's reputation is built upon her entire body of work."¹²⁶ Although the songwriters are still paid regardless of whether consumers recognize a song as their work, attribution is still an important tool for building reputation and industry recognition.¹²⁷ For example, purveyors of reality television are familiar with Kandi Burruss, a regular on *The Real Housewives of Atlanta*, but are less likely aware she was the songwriter for Destiny's Child's "Bills, Bills, Bills," among many others.¹²⁸

A potential reason for this lack of songwriter eminence is many current music-listening vehicles do not support proper attribution. For songwriters, CDs are the ideal vehicle for musical consumption because they list every single contributing writer on the packaging.¹²⁹ Unfortunately, while CD sales hit 730 million in 2000,¹³⁰ they have

122. Kenneth Partridge, *TLC's 'CrazySexyCool' at 20: Classic Track-by-Track Album Review*, BILLBOARD (Nov. 15, 2014), <http://www.billboard.com/articles/review/album-review/6319789/tlcs-crazysexycool-at-20-classic-track-by-track-album-review>.

123. Beth Burkstrand, *TLC Settles Suit, Setting Aside Troubling Use of Bankruptcy*, N.Y. TIMES (Nov. 25, 1996), <http://www.nytimes.com/1996/11/25/business/tlc-settles-suit-setting-aside-a-troubling-use-of-bankruptcy.html>.

124. J. Rush Hicks, Jr., *Should a Record Company Be Alarmed When an Artist Files for Bankruptcy?*, 1 MEIEA JOURNAL 84–117 (2000).

125. Thurston, at 721.

126. *Id.*

127. *Id.*

128. *10 Hit Songs You May Not Know Kandi Burruss Wrote*, KANDIONLINE (Feb. 19, 2017), <http://kandionline.com/10-hit-songs/>. Prince is another artist who has penned, but not performed, many hit songs that nobody knew he was the songwriter for: Madonna's "Love Song," The Bangles' "Manic Monday," and Stevie Nicks' "Stand Back," to name a few. Kelli Bender, *11 Popular Songs You Never Knew Prince Wrote*, PEOPLE.COM (Apr. 21, 2016), <http://people.com/celebrity/songs-prince-wrote-for-others/>.

129. Jeffrey L. Michelman, *Album Notes 101*, ENTERTAINER LAW (2003), http://www.entertainerlaw.com/pdf/albumnotes_101.pdf.

130. Jake Brown, *12 Years of Album Sales: 2011 Year-End Soundscan Data*, GLORIOUS NOISE (Jan. 4, 2012), <http://gloriousnoise.com/2012/12-years-of-album-sales-2011-year-end-soundscan-data>.

dropped to 50 million in 2016.¹³¹ In CD sales' place, 208.9 billion songs, or the equivalent of 139.2 million album units, were streamed on demand between January 2016 and July 2016, alone.¹³² Unfortunately for songwriters, listeners streaming music will likely not encounter songwriting credits unless they go out of their way to search for them.¹³³ While listening to a song on iTunes, for example, the consumer sees the names of the performing artist and the label, the technical attributes of the song, and typically a list of the other songs the performing artist has available on iTunes.¹³⁴ There is no mention of the songwriter.¹³⁵

Another potential reason for this lack of songwriter eminence is some performing artists tend to negotiate songwriting credits on songs where they were barely a contributor. For example, Beyoncé has said “[y]ou know, when I was writing the *Destiny’s Child* songs, it was a big thing to be that young and taking control.”¹³⁶ Not only is there not a single *Destiny’s Child* song Beyoncé wrote herself, but almost every song for which Beyoncé is given songwriter credit also credits a full list of actual songwriters.¹³⁷ In fact, Beyoncé was ASCAP’s 2002 Songwriter of the Year for writing “Jumpin’ Jumpin’,” “Survivor,” and “Independent Woman,”¹³⁸ yet songwriter Cory Rooney, who penned “Independent Women” with her, plus Jennifer Lopez’s “I’m Real,” “Play,” and “Ain’t It Funny,” in addition to several others that same year, received no

131. Ed Christman, *U.S. Record Industry Sees Album Sales Sink to Historic Lows (Again) – But People Are Listening More Than Ever*, BILLBOARD (July 6, 2016), <http://www.billboard.com/articles/business/7430863/2016-soundscan-nielsen-music-mid-year-album-sales-sink-streaming-growth>.

132. *Id.*

133. Sammy Andrews, *Streaming Music Discovery: It’s More Than Just Showing Album Credits*, (July 29, 2015), <http://www.hypebot.com/hypebot/2015/07/streaming-music-discovery-its-more-than-just-showing-album-credits.html>. Services, like Apple Music, show only the headline artist and track title, rather than full album credits. *Id.*

134. *Bills, Bills, Bills – EP*, iTUNES, <https://itunes.apple.com/us/album/bills-bills-bills-ep/id400040769> (last visited May 15, 2017).

135. *Id.*

136. Amy Wallace, *Miss Millennium: Beyoncé*, GQ MAGAZINE (Jan. 10, 2013), <http://www.gq.com/story/beyonce-cover-story-interview-gq-february-2013?currentPage=1>.

137. Roger Friedman, *Beyoncé Takes Credit for ‘Writing’ Songs*, FOX NEWS (Oct. 18, 2005), <http://www.foxnews.com/story/2005/10/18/beyonce-takes-credit-for-writing-songs.html>. Robin Thicke listed himself as a songwriter for ‘Blurred Lines,’ but as soon as the Gayes were granted a trial date, was very quick to admit Pharrell Williams was the actual writer, while he was just in the room. *See, e.g.*, Sean Michaels, *Robin Thicke reportedly says he lied about co-writing ‘Blurred Lines’*, THE GUARDIAN (Sept. 16, 2014), <https://www.theguardian.com/music/2014/sep/16/robin-thicke-lied-co-written-blurred-lines-pharrell>.

138. ASCAP, *Songwriter of the Year*, <https://www.ascap.com/eventsawards/awards/popawards/2002/songwriter> (last visited Mar. 18, 2017).

recognition.¹³⁹ Thus, songwriters can easily end up overshadowed by the bigger name claiming writing credit and become swiftly overlooked.¹⁴⁰

Accordingly, songwriters need moral rights. If a songwriter wants to retain his or her copyright, he or she must have sufficient bargaining power with the music publisher. If songwriters want to negotiate provisions into their contracts to ensure their musical compositions are not being used in ways that can hurt their reputations, they must have sufficient bargaining power with the music publisher. To obtain sufficient bargaining power, songwriters must be able to both create and maintain their reputations within the industry. The industry itself controls whether the reputation of the songwriter is good or bad, and protecting artistic reputation is the backbone of moral rights legislation.¹⁴¹ Thus, the nature of the music publishing industry indicates songwriters require moral rights protection to counteract their unequal bargaining power.

B. There Are No Adequate Substitutes for Moral Rights Under Current United States Law

There is a *mélange* of legal theories U.S. lawmakers contend make up for the United States' limited moral rights protection. While this may be true for certain authors under certain circumstances, it is not true for songwriters in the music publishing industry, particularly due to their inability to rely on contract law for certain protections. This paper will explore how, in the United States, there is no adequate moral rights substitute for songwriters, focusing first on the right of attribution, and then second on the right of integrity.

139. Cory Rooney, ALL MUSIC, <http://www.allmusic.com/artist/cory-rooney-mn0002355491> (last visited Mar. 18, 2017).

140. The practice of performing artists adding their names to musical compositions for which they have barely contributed has an additional side effect other than just overshadowing the actual songwriters: it allows them to share in the collection of royalties. Friedman, *supra* note 136; accord, *supra* note 106 (demonstrating the songwriters only receive 50 cents of every dollar to split amongst themselves, so the greater number of songwriters, the smaller the cut each of them receives); *c.f.* Seabrook, *supra* note 102 (noting the songwriter who penned Little Mix's "Wings" received a royalty check for only \$17.72, despite the song's popularity, because the song credited eleven other songwriters to share in her royalties). This issue was further exacerbated when the Academy Awards, "exhausted by ballooning songwriting credits on nominated songs," decided that, from 2005 on, only three writers could be counted as nominees, while the rest would be cut. Kevin Fallon, *Does Beyoncé Write Her Own Music? And Does It Really Matter?*, THE DAILY BEAST (Apr. 29, 2016), <http://www.thedailybeast.com/articles/2016/04/30/does-beyonce-write-her-own-music-and-does-it-really-matter.html>. This is preferable in circumstances where the ballooned credit is the result of performing artists claiming credit for de minimus contributions. However, it is detrimental in circumstances where a fourth, actual songwriter ends up being cut from a chance to win Best Original Song because of the precedent now set.

141. Lee, at 801; *supra* note 28.

1. *The Right of Attribution*

There are several elements of U.S. law lawmakers have claimed fulfill the right of attribution. First, attribution under copyright law is acknowledgment as credit to the copyright holder that prevents others from fraudulently claiming to own the work, and bestows a cause of action against copyright infringement.¹⁴² However, the credit goes to the copyright holder, and not the original creator, and therein lies the issue. In fact, the Berne Convention does not even require copyright holder attribution, recognizing the fundamental issue with copyright law-attribution is it does not credit the actual creator, but the person who currently holds the economic rights.¹⁴³

Second, the Doctrine of Misappropriation, which employs a “one is not to reap where he has not sown” theory, attaches quasi-property rights to any person who invests labor to create an intangible asset.¹⁴⁴ For example, in *INS vs. AP*, the cornerstone of the misappropriation doctrine, INS took AP-gathered news stories and misappropriated them for INS’ own profit.¹⁴⁵ The Court found that so long as there is economic value to the work, the author will have a limited property interest against a competitor who would attempt to take unfair advantage of the work.¹⁴⁶ Unfortunately, subsequent court decisions have restricted the misappropriation doctrine to the news context, rendering its applicability to musical compositions, and any other work of authorship, moot.¹⁴⁷

Third, the right of publicity grants individuals the right to control and profit from the commercial value of their own identity.¹⁴⁸ Performing artists are the primary beneficiaries of the right of publicity because they have a name, likeness, or voice from which commercial value can be exploited.¹⁴⁹ Thus, while singer-songwriters also can benefit from the right of publicity, it is typically from the singer side, not the songwriter side. Songwriters are rarely known to the public, whether for their voice, name or likeness, because they typically stay out of the performing artists’

142. Rosenblatt, *supra* note 51.

143. *Id.*

144. Michelle L. Spaulding, *The Doctrine of Misappropriation*, BERKMAN KLEIN CENTER FOR INTERNET & SOCIETY AT HARVARD UNIVERSITY (Mar. 21, 1998), <http://cyber.harvard.edu/metaschool/fisher/linking/doctrine/index.html>.

145. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 234-38, 39 S. Ct. 68, 73, 63 L. Ed. 211 (1918).

146. *Id.* at 245.

147. *Id.*

148. BIEDERMAN, at 185-187; *see also Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988).

149. Flore Krigsman, *Section 43(a) of the Lanham Act as a Defender of Artists’ “Moral Rights”*, THE INTERNATIONAL TRADEMARK ASSOCIATION, 73 TMR 251 (1983).

limelight.¹⁵⁰ For example, many music connoisseurs are likely familiar with Stevie Nicks' "Stand Back" and Sinead O'Connor's "Nothing Compares 2 U," but few are likely aware both of those songs were written by Prince.¹⁵¹ Even though Prince is a prolific singer-songwriter, the public generally knows only of the songs he sang, not the ones for which he was merely the songwriter.¹⁵²

Fourth, defamation has been used as a cause of action against misattribution, closely related to the right of attribution.¹⁵³ Defamation is a false and unprivileged statement of fact that is harmful to someone's reputation, and published with negligence or malice.¹⁵⁴ Libel is written defamation and slander is verbal defamation.¹⁵⁵ A prerequisite for defamation is the artistic reputation in question must be sufficiently established to be defamed.¹⁵⁶ For example, in *Clevenger v. Baker, Voorhis & Co.*, the plaintiff, a highly-respected lawyer and legal writer, was held defamed by a legal treatise that had wrongfully attributed authorship to him because it contained over two hundred errors and implied his legal writing was of poor quality.¹⁵⁷ Had the plaintiff not been highly-respected in the field in question, the improper attribution would not have amounted to defamation because his reputation would not have been sufficiently established to be defamed.¹⁵⁸

Fifth, section 43(a) of the Lanham Act prohibits "false designation of origin. . . in connection with any goods or services," and confers a cause of action on "any person who believes that he is or is likely to be damaged" by such representations in commerce.¹⁵⁹ "This cause of action . . . finds its roots in the continental concept of *droit moral*, or moral right, which may

150. See *supra* Part III(A)(2), "Unequal Bargaining Power Between Songwriters and Their Publishers Prevent Songwriters from Negotiating Protections into Their Contracts" (discussing how performing artists overshadow songwriters).

151. Rudie Obias, *11 Songs You Didn't Know Were Written by Prince*, PHACTUAL, <https://www.phactual.com/11-songs-you-didnt-know-were-written-by-prince>. (last visited May 15, 2017).

152. See Rudie Obias, *11 Songs You Didn't Know Were Written by Prince*, PHACTUAL, <https://www.phactual.com/11-songs-you-didnt-know-were-written-by-prince>. (last visited May 15, 2017) (alluding to the fact that the public knows Prince as a singer, but fails to recognize his notable musical compositions).

153. Lee, at 802.

154. 28 U.S.C.A § 4101 (West 2010).

155. *Id.* Because of the formal elements required to plead it, libel has virtually no applicability when it comes to musical compositions. Therefore, this paper is referencing slander in its discussion. Krigsman, *supra* note 149.

156. Krigsman, *supra* note 149.

157. *Clevenger v. Baker Voorhis & Co.*, 8 N.Y.2d 187, 203 N.Y.S.2d 812, 168 N.E.2d 643 (N.Y. 1960).

158. Krigsman, *supra* note 149.

159. 15 U.S.C.A § 1125(a) (West 2012).

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.”¹⁶⁰ However, “origin of goods,” as used in the Lanham Act, is incapable of connoting the person or entity that originated the ideas the goods embody or contain, only the manufacturer.¹⁶¹ The Lanham Act is only concerned with whether consumers are aware of who created the physical goods or services in which they are partaking, not the original idea or concept.¹⁶² So, while a songwriter may have a cause of action by proving consumers will be confused or deceived as to the origin of the musical composition if it was improperly attributed, this cause of action only exists if the songwriter is also the producer of the physical goods made available to the public, i.e., the person manufacturing the manuscript or the sound recording embodying the underlying musical composition which the public would then purchase.¹⁶³

Thus, while there are several aspects of U.S. law that could, in theory, cover the right of attribution, they are too tenuous to provide the blanket protection original creators deserve. To hold attribution under copyright law sufficient implies only the copyright owner is worthy of protection, and to hold misappropriation sufficient implies only authors who create news are deserving of protection. To hold the right of publicity or defamation sufficient implies only artists who are sufficiently popular and well-known in their industry are worthy of protection, and to hold trademark law sufficient implies only artists who are the manufacturers of their works, e.g. artists who distribute the actual records their music is contained in, are deserving of protection. Moral rights are meant to protect the creative soul, and must be legislated as such.¹⁶⁴

2. *The Right of Integrity*

There are two elements of current U.S. law that purportedly protect authors in lieu of the right of integrity. First is defamation, but in a different sense than as it applies to the right of attribution. In cases where the artist’s lack of reputation is immaterial because the facts turn on the reputation of the work in question, defamation has been held as a potential cause of action for the right of integrity.¹⁶⁵ For example, in *Geisel v. Poynter Products, Inc.*, the plaintiff claimed defamation based on dolls of “inferior quality” that were created from his cartoons.¹⁶⁶ However, the

160. *Gilliam v. Am. Broad. Companies, Inc.*, 538 F.2d 14, 24 (2d Cir. 1976).

161. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 32 (2003).

162. *Id.* at 23.

163. *Id.*

164. Lee, at 801.

165. *Geisel v. Poynter Prod., Inc.*, 295 F. Supp. 331, 333 (S.D.N.Y. 1968)

166. *Id.*

court held there was no defamation because the degree of time and care used to create the dolls was not indicative of inferior design.¹⁶⁷ In defamation cases of this nature, there is a high standard with which the degree in quality and quantity of the offending work must depart from the original work to warrant relief.¹⁶⁸ This means if the alleged defamatory work improves upon the original work in any way, there can be no relief under defamation.¹⁶⁹

Applying this to the music publishing industry, defamation would deal primarily with covers and remixes of songs. Under those circumstances, an author would have to prove a very high level of poor-quality work in the remix or the cover, which, in the music industry, would be extremely difficult. Fundamentally, music is subjective, and to prove a defamation cause of action would be the equivalent of removing that subjectivity. Thus, while defamation may appear to grant the right of integrity to artists, the high standard it requires excludes its use for all unauthorized uses of a songwriter's work that are not poor quality.¹⁷⁰ The moral right of integrity does not require any level of quality or artistry to protect artists, so any law purporting to fill its shoes should do the same.¹⁷¹

Second, section 43(a) of the Lanham Act also can act as a right of integrity when used to claim false endorsement. Under those circumstances, the cause of action arises from the commercial use of aspects of a celebrity's identity that is likely to deceive or cause confusion as to the celebrity's endorsement or approval of the advertised goods or services.¹⁷² In theory, this could have served as a cause of action for Rachel Platten, who felt the use of her song in President Trump's 2017 inauguration falsely implied to consumers she was endorsing him. However, although tickets were sold to the inaugural ball, it is unclear whether the Piano Guys' use of her song was sufficient commercial activity to come under section 43(a) because their use was arguably a purely artistic work.¹⁷³ Purely artistic works, even those that turn a profit, are rarely covered under false endorsement because they are protected by the First Amendment.¹⁷⁴

167. *Id.*

168. Krigsman, *supra* note 149.

169. *Id.*

170. Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 364 (2006) (noting the right of integrity grants a creator rights to his work, regardless of whether the defendant's changes were beneficial or detrimental to the underlying work).

171. *See* Cotter, *supra* note 52.

172. 15 U.S.C.A § 1125(a).

173. *Id.*; INAUGURAL TICKETS, *2017 Presidential Inaugural Ball Tickets!*, <http://www.inauguraltickets.com/InauguralBallTickets.aspx> (last visited May 15, 2017).

174. *Id.*

Further, in general, pleading a section 43(a) violation poses difficulties for artists because the Lanham Act was designed to combat consumer confusion and deception, not violations of artistic integrity.¹⁷⁵ The Lanham Act mainly seeks to ensure consumers know the origin and sponsorship of the goods or services they are purchasing.¹⁷⁶ So, while an artist may have a cause of action by proving consumers will be confused or deceived, the courts are careful not to stretch the Lanham Act to cover matters that are typically of no consequence to consumers, such as the creative souls of authors.¹⁷⁷ This indicates that, although facts can be positioned in certain circumstances to encompass a section 43(a) claim, the law was not intended to protect artistic integrity and cannot be relied upon to do so.

C. Protecting Songwriters is Economically Sound for the United States

Even with the understanding that songwriters require moral rights protection and current United States law does not adequately provide such protection, the overarching concern for lawmakers is the economic impact of such legislation.¹⁷⁸ With that in mind, there are several reasons why the United States should take a keen interest in granting moral rights to songwriters. First, music plays an important economic role in society.¹⁷⁹ In 2014, the music industry contributed \$4.89 billion to the United States' gross domestic product (or "GDP").¹⁸⁰ Thus, it is in the country's best economic interests to protect songwriters because "without songwriters, there is no song," and without songs, there is no billion-dollar music industry.¹⁸¹ As it currently stands, songwriters must be wary when creating musical compositions because they risk damaging their reputations if overeager music publishers release their music before it is ready. Songwriters would likely be more apt to try new musical styles and ranges if they had more control over their work product. This would, in turn, benefit the public because there would be many new styles and genres of music to consume and profit from.

Second, the economic and constitutional concerns that arise in conjunction with granting moral rights to works of visual art under VARA

175. Dawn R. Duven, *The Present Scope of Recovery for Unfair Competition Violations Under Section 43(a) of the Lanham Act*, 58 NEB. L. REV. 159, 161 (1978).

176. *Dastar*, at 2043.

177. *Id.*

178. Murphy, at 116.

179. Vikas Shah, *The Role of Music in Human Culture*, THOUGHT ECONOMICS (Aug. 26, 2017), <https://thoughteconomics.com/the-role-of-music-in-human-culture/>.

180. *RIAJ Yearbook 2015*, THE RECORDING INDUSTRY ASSOCIATION OF JAPAN, <http://www.riaj.or.jp/riaj/pdf/issue/industry/RIAJ2015E.pdf> (last visited May 15, 2017).

181. Samuel, *supra* note 106.

do not apply to musical compositions. The nature of musical compositions negates the fear of risking a permanent structure.¹⁸² Distinguishable from works of visual art, the existence of a musical composition will not prevent a building from being torn down or remodeled just because the songwriter retains moral rights.¹⁸³ At most, songwriters will have the ability to refuse the use of their work in certain films, plays, or derivative works they deem derogatory, but the economic impact of that is immaterial. Performing artists can typically object to the exploitation of their name and likeness in works or activities they deem derogatory through the right of publicity, privacy, and trademark laws.¹⁸⁴ A songwriter, on the other hand, does not have the benefit of having his or her name, likeness, or voice commonly known to the public because a songwriter's commercial value lies in his or her work. If United States law protects the exploitation of a performing artist's commercial value, it ought to protect the exploitation of a songwriter's commercial value, as well.

Further, granting moral rights to musical compositions will not conflict with the Constitution's principal aim of protecting the interests of society. VARA was enacted in the wake of the Tilted Arc controversy, which was centered around litigation associated with commissioned work.¹⁸⁵ The Tilted Arc was a 120-foot-long, 12-foot-high steel sculpture, commissioned for the Federal Plaza in Manhattan, which was cut apart and dismantled after many employees objected to its presence because "it blocked too much of the open space in front of the building."¹⁸⁶ As Professor Joseph L. Sax wrote, "the rights of artists . . . would have to be stretched pretty far to include the right to compel unwilling people to experience their work . . . which would be the practical result if a large sculpture . . . must remain in a public unavoidably frequented place."¹⁸⁷ Distinguishing from the Tilted Arc case, there is no fear of a musical composition being thrust into the faces of the unwilling public. If the public does not want to experience a musical composition, the public can shut off the sound recording, plain and simple. Thus, should musical

182. See *supra* Part II(B), "Moral Rights Protection in the United States" (discussing property holders' fears regarding moral rights for works of visual art).

183. See *supra* Part II(B), "Moral Rights Protection in the United States" (discussing property holders' fears regarding moral rights for works of visual art).

184. Uses of a celebrity's persona that are not closely tied to commercial purposes are likely to be protected by the First Amendment; thus, the importance of the ability to commercially exploit the name and likeness. See *Winter v. D.C. Comics, Inc.*, 30 Cal.4th 881 (2003) (barring a right of publicity claim where the celebrity's name was used in a transformative way in an expressive work, such as a comic strip).

185. Thurston, at 720.

186. *Id.*

187. JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES*, at 27 (U. of Mich. Press, 1st ed., 1999).

compositions be granted moral rights, there is no fear of circumventing public cultural interest or dampening the economy.

Third, in practice, economies are not damaged by protecting the creative souls of songwriters. France, for example, is the undisputed champion of moral rights,¹⁸⁸ and has been the world's fifth-largest recorded music market for over the last decade in wholesale terms.¹⁸⁹ Its music industry revenue for 2014 was \$842.8 million, or .029% of its GDP.¹⁹⁰ Germany, the third biggest recorded music market and arguably the moral rights runner-up to France, had a 2014 music industry revenue of \$1.4 billion, or .036% of its GDP.¹⁹¹ In comparison, the United States, which boasts the world's largest recorded music market, had a 2014 music industry revenue which was .028% of its GDP.¹⁹² These statistics indicate that France and Germany's music industry contribution to their respective economies is on par with the United States' music industry contribution to its economy, with only a .008% difference in GDP contribution, at most. Accordingly, if France and Germany's music industry revenues, and by extension their economies, have not suffered from granting their songwriters moral rights, it is unlikely the United States' economy will suffer from doing the same.

Further, there are seven countries (the "G7") designated as having major advanced economies by the International Monetary Fund, collectively representing sixty-four percent of net global wealth.¹⁹³ Of these seven countries, the United States is the only one that does not recognize full moral rights for all qualified works of authorship under the Berne Convention.¹⁹⁴ To take it even further, the G20 is an international forum for the governments of the top twenty major economies, collectively representing over eighty-five percent of global GDP and over seventy-five percent of global trade.¹⁹⁵ Of these twenty countries, the United States is,

188. Lee, at 803.

189. Tim Ingham, *After 15 Years of Decline, France's Recorded Music Market Returns to Growth*, MUSIC BUSINESS WORLDWIDE, Jan. 31, 2017, <https://www.musicbusinessworldwide.com/frances-recorded-music-market-returned-to-growth-in-2016-for-first-time-in-15-years/>.

190. THE RECORDING INDUSTRY ASSOCIATION OF JAPAN, *supra* note 178.

191. *Id.* See also *Germany: Streams grow, CDs resilient*, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, <http://www.ifpi.org/germany.php> (last visited May 15, 2017).

192. Ingham, *supra*; see also THE RECORDING INDUSTRY ASSOCIATION OF JAPAN, *supra* note 178.

193. *Group of Seven*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/np/g7/020510.pdf> (last visited May 15, 2017).

194. See *supra* note 61, "A Select List of Berne Convention Parties and their Moral Rights Legislation," specifically Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States of America.

195. *G20 Members*, G20, <http://g20.org.tr/about-g20/g20-members/> (last visited May 15, 2017).

again, the only one that does not recognize full moral rights.¹⁹⁶ Thus, nineteen of the top twenty economies in the world have not been economically deterred by granting moral rights to all works of authorship that are also granted economic rights.

VI. VARA is Insufficient to Satisfy the Berne Convention's Moral Rights Minimum Protection Standards

The United States is not in compliance with the Berne Convention's minimum protection standards for two reasons. First, the language of the minimum protection standards, when broken down, requires the moral rights of attribution and integrity to be granted to all authors of all the Berne Convention's qualifying works. Article 6*bis* states the author shall have the right to claim authorship of the work, or the right of attribution, and the author shall have the right to object to any derogatory action in relation to the work that would be prejudicial to his honor or reputation, or the right of integrity.¹⁹⁷ The United States insists it has followed that standard because VARA grants the rights of attribution and integrity to a limited group of authors. However, the author referenced in Article 6*bis* is likely the same author the Berne Convention intended its economic minimum protection standards to apply to.¹⁹⁸

The Berne Convention's preamble states "[t]he countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, *the rights of authors in their literary and artistic works . . .*"¹⁹⁹ (emphasis added). Article 1 of the Berne Convention states clearly that its goal is the establishment of a Union to protect of authors of literary and artistic works, so, unless subsequent Articles specify differently, they are also likely referencing those same authors.²⁰⁰ The first sentence in Article 6*bis* is: "independently of the author's economic rights, and even after the transfer of the said rights, the *author shall . . .*" (emphasis added).²⁰¹ This language does not give any indication the author being referenced in Article 6*bis* is any different than the authors referenced in the preamble.

Article 2 further specifies the type of author the preamble is aimed at protecting: all authors of all the qualifying works, so long as they have

196. See *supra* note 61, Part II(A), "A Select List of Berne Convention Parties and their Moral Rights Legislation," specifically Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, the Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, and the United States of America.

197. Berne Convention, *supra* note 61.

198. *Id.*

199. Berne Convention, pmbl.

200. Berne Convention, art. 1.

201. Berne Convention, *supra* note 61.

been fixed in some material form.²⁰² Article 2 specifies literary and artistic works “shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books . . . dramatic or dramatico-musical works . . . *musical compositions with or without words* . . .” (emphasis added).²⁰³ Here, the United States falls short because VARA explicitly states only authors of works of visual art are to receive the rights of attribution and integrity.²⁰⁴

The second reason the United States is not in compliance with the Berne Convention’s minimum protection standards is the other countries interpreted Article 6bis to include *all* authors of *all* qualifying works.²⁰⁵ This is significant because the purpose of the Berne Convention was to create a system of equal treatment for copyrighted works.²⁰⁶ If the vast majority of the countries are treating copyrighted works a certain way, the minority should be expected to conform to those standards in order to take advantage of the other benefits membership offers. Countries party to the Berne Convention are expected to grant the same protections to foreign authors that they grant to their citizen-authors.²⁰⁷

However, the way it currently stands, an American author in France is afforded significantly more protection than a French author in the United States.²⁰⁸ In fact, an American author in any of the other 172 countries is afforded significantly more protection than those countries’ authors would be afforded in the United States.²⁰⁹ For moral rights, there is equal treatment amongst the other 172 countries, but there is unequal treatment when it comes to the United States. Thus, the United States’ implementation of VARA as its sole administrator of moral rights allows it to take advantage of the economic benefits of the Berne Convention, while simultaneously defeating the Berne Convention’s overarching purpose of equal treatment.

Conclusion

The United States has a quasi-obligation to implement much more comprehensive moral rights legislation to remain compliant with the

202. Berne Convention, art. 2. It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form. *Id.*

203. Berne Convention, art. 2.

204. 17 U.S.C.A § 106(a).

205. WIPO, *supra* note 64.

206. WIPO, *supra* note 59.

207. *Id.*

208. *See supra* note 61, Part II(A) “A Select List of Berne Convention Parties and their Moral Rights Legislation,” specifically France and the United States.

209. WIPO, *supra* note 64.

minimum protection standards set forth by the Berne Convention of 1886. The United States seeks to protect its economic interests, and, understandably, U.S. lawmakers are uneasy with the potential ramifications that could arise from increasing moral rights protection. However, not only does the explicit language of the Berne Convention indicate the United States is falling short of its obligations, but VARA is woefully insufficient for the United States to properly participate in the equal system of treatment shared by the other 172 signatories.

Musical compositions are a model work of authorship for the United States to grant moral right to because songwriters are the backbone of an industry that accounted for \$4.89 billion of the United States' GDP in 2014. Further, encompassing musical compositions within moral rights is in keeping with the United States' economic and societal interests, while also making strides to meet the Berne Convention's minimum protection standards. Moral rights for musical compositions do not have to undercut economic rights: they have not done so for the other 172 Berne signatories and do not present the same issues that moral rights for works of visual art under VARA present. With moral rights, songwriters will be able to create a song, and then ensure their reasons for creating the song, the message it was supposed to send, and what the song says about them as a creator, will be respected by all who seek to use that song. As Marvin Gaye once put it, "[a]n artist, if he is truly an artist, is only interested in one thing, and that is to wake up the minds of men, to have mankind and womankind realize that there is something greater than what we see on the surface."²¹⁰ Now, is that not worth protecting?

210. AZ QUOTES, *Marvin Gaye Quotes*, http://www.azquotes.com/author/5402-Marvin_Gaye (last visited Mar. 18, 2017).