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Moral Rights of Artists in an International Marketplace

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Moral Rights of Artists in an International Marketplace

Leslie A. Pettenati

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I. INTRODUCTION

There is an important distinction between the economic rights and the moral rights of artists concerning copyright protection.¹ As we enter into the new millennium, the tremendous growth of technology and the Internet has made it difficult to define the moral rights of artists, and therefore, it is often difficult to determine whether an artist's moral rights have been violated. Due to the disparity of moral right protection among nations, the issues concerning moral rights of artists are confused further when their works enter the international marketplace.

Depending on the jurisdiction, works are protected in different ways.² For instance, in Latin America, Africa, and East Asia, moral rights protection is governed by the civil code.³ Other countries such as India, Israel, and the United States protect moral rights under judicial and statutory law.⁴ Thus, moral rights protection can be enforced either through codes, statutes, or through common law, depending on the legal system of the country where the moral rights claim arises.⁵

Despite efforts by international organizations to unify copyright protection, these organizations view moral rights of artists differently. In addition, each country has its own ideas as to what type of moral rights protection an artist is afforded.⁶ This disparity in moral rights protection in the international marketplace leaves artists without sufficient protection in the sense

¹ See Berne Convention for The Protection of Literary and Artistic Works, July 24, 1971, 24 U.S.T. 1749, art. 6bis, available at <http://www.law.cornell.edu/treaties/berne/6bis.html> (last visited Nov. 6th 1999) [hereinafter Berne Convention].

² See Jeffrey M. Dine, *Authors' Moral Rights in Non-European Nations: International Agreements, Economics, Mannu Bhandari, and the Dead Sea Scrolls*, 16 MICH. J. INT'L L. 545, 553 (1995).

³ See *id.*

⁴ See *id.* In the United States § 106A of the Copyright Act of 1976 provides federal moral rights protection for visual artists. See Copyright Act of 1976, 17 U.S.C. § 106A (1976). However not all state laws governing moral rights are preempted by §106A. See Amy L. Landers, Note, *The Current State of Moral Rights Protection for Visual Artists in the United States*, 15 HASTINGS COMM. & ENT. L.J. 165, 195-96 (1992). Where state law provides greater protection, or protection for artists other than visual artists not classified under § 106A, state law may govern. See *id.*

⁵ See Dine, *supra* note 2, at 553.

⁶ See *id.*

that there is no uniform system that guarantees protection. Further, with no common rules of enforcement, international systems of copyright protection are severely hindered.

This comment explores the chaotic nature of international protection for the moral rights of artists, and concludes that a more unified system of copyright protection for moral rights is necessary. First, basic definitions of moral rights under the United States copyright statute and other laws are presented. Second, the disparity in national protection is exemplified by a comparison of moral rights protection in the United States and France. These two countries are chosen because of their polar views on the role of moral rights. Third, international treaties and copyright institutions are explored. This section concludes that these international agreements have failed to solve the problem of moral rights protection. Fourth, three major issues in moral rights protection are briefly set out. Finally, this comment offers some tentative solutions that could create a more unified system of protection.

II. DEFINITIONS

A. *What Is A Copyright?*

Copyright is protection of subject matter that is original and "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated directly or with the aid of a machine or device."⁷ "To qualify for copyright protection, a work must be original to the author."⁸ A copyright owner is granted certain exclusive rights⁹ for a limited period of time.¹⁰ The

⁷ Copyright Act of 1976 § 102.

⁸ *Feist Publications, Inc. v. Rural Telephone Service*, 499 U.S. 340, 345 (1991). "To illustrate, assume that two poets, each ignorant of each other, compose identical poems." *Id.* "Neither work is novel, yet both are original and, hence, copyrightable." *Id.*

⁹ *See* Copyright Act of 1976 § 106. For example in the United States a copyright owner has the right to: "(1) reproduce the copyrighted work in copies or phonorecords; (2) prepare derivative works based upon copyrighted work; (3) to distribute copies of phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion picture or other audio visual works, copyrighted work publicly; . . . and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of digital audio transmission." *Id.*

rights of an author's¹¹ work may be transferred separately, bequeathed, or sold, and are considered a type of personal property.¹²

The basic philosophy of the United States Copyright Act is to provide an economic incentive to protect copyrighted works. Under this theory, economic loss that may occur when a work enters a foreign market is a great concern among copyright owners. The United States loses approximately twenty billion to forty billion dollars each year to intellectual property piracy.¹³ Countries such as Russia and China in which such piracy occurs, have attempted to enforce anti-piracy laws, however, their failed attempts have created international tension that has affected international trade.¹⁴ For example, China has responded to United States threats of sanctions in order to end intellectual piracy in China by threatening to suspend trade with certain American companies.¹⁵ Therefore, economic injury to copyrighted works in an international marketplace is a major concern among copyright owners. As I demonstrate below, additional injuries arise when an author's moral rights are violated.

B. *Moral Rights Defined*

Moral rights are the rights of artists to maintain the integrity and attribution of their original work, even after the economic rights have been sold or transferred.¹⁶ Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works defines an artist's moral rights as "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

¹⁰ See Copyright Act of 1976 § 302-03.

¹¹ The words author and artist are used interchangeably in this comment and mean all who create in whatever form.

¹² See Copyright Act of 1976 § 201(d).

¹³ See generally Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and its Effects Upon International Trade: A Comparison*, 46 BUFF. L. REV. 1 (1998).

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ Copyright Act of 1976 § 106A. See also *id.* § 113(d)(2). An owner of a building can remove a work of visual art that is part of the building if the removal does not destroy, distort, mutilate, or otherwise modify the work. See *id.*

reputation.”¹⁷ Moral rights are rooted in a European concept known as “droit moral,” which was entirely created under French judicial law.¹⁸

Droit moral encompasses four types of protections, although not all countries recognize all four rights.¹⁹ The first type of protection is the “right to publication.”²⁰ Under the right to publication, the author has the right to decide when, where, and how the work will be published, if in fact the author decides to publish the work.²¹ Under the right to publication, only the author has the right to publish the work and determine the scope of publication.

The second type of protection is the “right of paternity,”²² which is the right to claim authorship.²³ Therefore, if anyone other than the author claims authorship of a work, this claim will violate the author’s moral rights. The third right of protection, “right of integrity,”²⁴ prevents unauthorized alterations of the work.²⁵ Here, any unauthorized distortions or alterations of an author’s work is a violation of the author’s moral rights. The last type of moral rights protection is “the right of withdrawal.”²⁶ This right allows an artist to remove her work from the public.²⁷ The right of withdrawal is rarely used, and in some countries such as Spain, if an artist exercises such a right the artist must pay full compensation.²⁸

III. TWO OPPOSING VIEWS

A. *The United States*

The United States can trace its origins of copyright protection back to England as early as the 16th Century.²⁹ When the

¹⁷ Berne Convention, *supra* note 1, at art. 6bis.

¹⁸ See Dine, *supra* note 2, at 550.

¹⁹ See *id.*

²⁰ *Id.*

²¹ See *id.* at 551.

²² *Id.* at 550.

²³ See *id.* at 551.

²⁴ See Dine, *supra* note 2, at 550.

²⁵ See *id.* at 551.

²⁶ *Id.*

²⁷ See *id.*

²⁸ See *id.*

²⁹ See ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT, CASES, AND MATERIALS 1 (5th ed., The Michie Company 1999).

United States Constitution was enacted, the drafters included copyright protection under what is known as the Copyright Clause to grant rights of protection to those who created original works for a limited time, for the purpose of encouraging the "progress" of arts and science.³⁰

The first copyright act passed by the United States Congress was the Copyright Act of May 31, 1790.³¹ The 1790 Act provided protection for maps and charts.³² Amendments to that Act included other types of works, such as photographs, paintings and sculpture.³³ The Copyright Act of 1909 was enacted to encompass the contents of the prior copyright statutes and amendments that had been passed.³⁴ The current Copyright statute was enacted in 1976 as the Copyright Act of 1976 (The 1976 Act).³⁵

1. *The Copyright Act of 1976*

The 1976 Act broadened the scope of copyright protection for artists and gave them protection similar to that of European countries.³⁶ The types of artist's works that receive copyright protection are literary works, musical works including words, choreographic works, dramatic works including music, and pantomimes.³⁷ Artistic works such as pictorial works, graphic, architectural and sculptural works are also protected.³⁸ In addition, audio visual works,³⁹ including motion pictures, cartoons, and videos and are protected. Finally sound recordings are protected.⁴⁰

³⁰ See U.S. CONST. art. I. § 8, cl. 8. "The Congress shall have power. . .To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

³¹ See GORMAN & GINSBURG, *supra* note 29, at 4-5.

³² See *id.* at 5.

³³ See *id.* at 6.

³⁴ See *id.* at 6-7.

³⁵ See Copyright Act of 1976.

³⁶ See *id.*; see also PAUL C. WEILER, ENTERTAINMENT, MEDIA AND THE LAW, TEXT, CASES, PROBLEMS 236 (West Publishing Co. 1997).

³⁷ See Copyright Act of 1976 § 103.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

Despite seemingly broad protection, there was an intense debate over the issue of moral rights of artists, and many felt that the United States did not offer this protection in the 1976 Act.⁴¹ Members of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), a multilateral treaty which I will discuss in detail below, must comply with certain minimum standards set forth in treaty. The Berne Convention provides moral rights protection under Article 6bis of the treaty.⁴² The United States joined the Berne Convention with the exception of Article 6bis.⁴³ The United States was permitted to join the treaty without having to comply with Article 6bis because the United States provided presumably similar protection under state unfair competition laws as well as protection under the Lanham Act.⁴⁴ Congress also addressed this issue by enacting the Visual Artists Rights Act of 1990, which specifically gave moral rights protection to visual artists.⁴⁵ The Visual Artists Rights Act of 1990, however, only offers protection to visual artists; therefore, musicians and other artists who do not create works in the visual realm are not offered this type of protection.

The Lanham Act does provide some moral rights protection; however, the statute on its face has no such objective. The Lanham Act protects attribution of a work by prohibiting a person from making false or misleading descriptions that deceive the public as to the true author, thereby affecting the economic and commercial rights of the true author.⁴⁶ In addition, "some

⁴¹ See GORMAN & GINSBURG, *supra* note 29, at 537. The key provisions of the 1976 Act were (1) creating a federal system of protection for both published and unpublished works, (2) duration of protection, (3) transfer of rights, (4) copies for public distribution, (5) fair use, (6) limitations and copyright limitations, (7) the creation of a tribunal to deal with licensing rates, (8) divisibility of ownership. See *id.* at 8.

⁴² See Berne Convention, *supra* note 1, at art. 6bis.

⁴³ See WEILER, *supra* note 36, at 420.

⁴⁴ See Laura A. Pitta, *Economic and Moral Rights under U.S. Copyright Law Protecting Authors and Producers in the Motion Picture Industry*, 12 ENT. & SPORTS LAW. 3, 4 (1995).

⁴⁵ See WEILER, *supra* note 36, at 537.

⁴⁶ See The Lanham Act, 15 U.S.C. 1051, § 1125; see also Pitta, *supra* note 44, at 4-5.

courts suggest that a creator may object to the material changes in the work as a violation of unfair competition."⁴⁷

2. *The Defense of Fair Use*

One defense to copyright infringement in the United States is the defense of fair use.⁴⁸ The fair use doctrine is considered the most essential limitation on a copyright owner's protection.⁴⁹ The fair use exception developed through case law and is now incorporated into §107 of the 1976 Act.⁵⁰ The statute provides a non-exhaustive list of purposes that may qualify for fair use, i.e., "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."⁵¹ The fair use doctrine specifically applies to §106A of the 1976 Act, and can have a devastating effect on the moral rights protection of a work. For example, if a work is determined to be within fair use, the new work can copy and distort an original work and not be held liable for copyright infringement. A person may, therefore, benefit economically from copying and distorting an original work. The fair use doctrine exemplifies the United States' primarily economic view of artistic works.

One purpose of the fair use doctrine is to encourage the reproduction, and in some circumstances alteration, of works for the public's benefit.⁵² The fair use doctrine may apply if the second work benefits the public in some way and does not have a negative impact on the present and future profits of the underlying work.⁵³

The statute describes four factors that are considered in determining whether the fair use doctrine applies,⁵⁴ although the

⁴⁷ Pitta, *supra* note 44, at 4; *see also* Gilliam v. American Broadcasting, 583 F.2d 14 (2d Cir. 1976). The court in *Gilliam* held that editing footage from a television broadcast that omitted essential elements of the program created a valid cause of action under The Lanham Act. *See id.*

⁴⁸ *See* Copyright Act § 107 Limitations on Exclusive Rights: Fair Use.

⁴⁹ *See* GORMAN & GINSBURG, *supra* note 29, at 609.

⁵⁰ *See id.*

⁵¹ Copyright Act of 1976 § 107.

⁵² *See* GORMAN & GINSBURG, *supra* note 29, at 609; *see also* Leibovitz v. Paramount Pictures Corporation, 948 F. Supp. 1214, 1218 (S.D.N.Y. 1996).

⁵³ *See* GORMAN & GINSBURG, *supra* note 29, at 609.

⁵⁴ Copyright Act of 1976 § 107.

factors listed are not exhaustive.⁵⁵ The first factor is “the purpose and character of the use” including whether such use is for a commercial or non-profit purpose.⁵⁶ If the use is of a commercial nature, this factor would weigh against a finding of fair use.⁵⁷ The second factor the court considers is “the nature of the copyrighted work.”⁵⁸ The court looks to whether, for example, the original work is published or unpublished. If a work is unpublished, it may weigh against fair use. In addition, if the original work is a creative as opposed to a factual work, it weighs against fair use as creative works lie at the core of copyright protection. Under the third factor, the court considers “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”⁵⁹ In this inquiry, the court considers both the quality and quantity of what was taken from the original.⁶⁰ For instance, if the very essence, or “heart” of the work that makes it original to the author is taken and incorporated into a new work, this factor would weigh against a finding of fair use.⁶¹

⁵⁵ See generally *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

⁵⁶ Copyright Act of 1976 § 107.

⁵⁷ See *Nation Enterprises*, 471 U.S. at 539. Former President Gerald R. Ford granted publication rights to his biography to Harper & Row and Readers Digest Publishers which included the exclusive rights to initially publish excerpts of the work. See *id.* Harper & Row Publishers negotiated a deal with *Time Magazine* to publish an article shortly before President Ford's biography was released. See *id.* Shortly before the release of the *Time Magazine* article, a political magazine, *The Nation*, printed an article paraphrasing, and quoting President Ford's biography. See *id.* The court held that *The Nation's* use of the original work was commercial in nature and without sufficient originality. See *id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See *Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir. 1987). *Salinger* involved an action for copyright infringement by a well-known author against the publisher defendant that published an unauthorized biography incorporating unpublished letters authored by Salinger. See *id.* at 94. Despite the use of close paraphrasing instead of actual copying, the court held that there was an infringement of the original work. See *id.* at 97. The court held that the biography was an infringement because of the quality as well as the quantity of the original work that was taken when creating the biography. See *id.* at 97.

⁶¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). American rap artists, 2 Live Crew, copied and repeated a bass riff which was unmistakably identified with a song written and performed by Roy Orbison in order to create a parody of the song. See *id.* The song was *Oh Pretty Woman*. See *id.* The court held that the use was “transformative” in that it contained a sufficient amount of origi-

The fourth factor is the effect on the value of the copyrighted work by the work seeking fair use in the potential market.⁶² This factor is considered the most important.⁶³ Courts look to the economic impact that a new version will have on the original work's future revenue.⁶⁴ If the new work is primarily for commercial purposes, the court will presume that the new work is likely to cause economic harm to the original work.⁶⁵ If the work is not for a commercial purpose, however, the economic harm must be proven.⁶⁶ Thus, fair use may enable a person to change or distort an original work without being liable for infringement.⁶⁷ This raises question about the moral rights an artist has in an original work.

Parody, a form of fair use, is particularly limiting of moral rights. The nature of a parody is exemplified in *Annie Leibovitz v. Paramount Pictures Corporation*, where a photographer brought an action for copyright infringement for a famous photograph of actress Demi Moore that was published on the cover of *Vanity Fair* magazine.⁶⁸ The photo was altered without permission, and then used by Paramount Pictures to advertise a motion picture comedy.⁶⁹ In *Leibovitz v. Paramount Pictures Corporation*, the original photograph in *Vanity Fair* depicted a nude and pregnant Demi Moore.⁷⁰ The photograph was intended to reflect the beauty and pride that a woman embodies during her pregnancy.⁷¹ The alteration made to the original photograph recreated the effects of the original, (e.g. lighting, pose), and then airbrushed in a smirking male actor's head.⁷² Paramount Pictures Corporation claimed that their intent was

nality despite the copying of the exact musical riff, which was to the listener a signature of the original work. *See id.*

⁶² *See Salinger*, 811 F.2d. at 99.

⁶³ *See id.*

⁶⁴ *See* Copyright Act of 1976 § 107.

⁶⁵ *See Acuff-Rose Music, Inc.*, 510 U.S. at 569.

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See generally Leibovitz*, 948 F. Supp. at 1215. Paramount Pictures Corporations used the photograph to advertise the film *Naked Gun 33 1/3: The Final Insult*. *See id.*

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *See id.* The male actor was Leslie Neilson, who was also the lead actor in the film. *See Leibovitz*, 948 F. Supp. at 1215.

to parody the original photograph, which fell within the fair use exception.⁷³ After weighing the four factors discussed above, the court held that the two works were different enough to serve different markets.⁷⁴ The court agreed with Paramount Pictures and held that the alteration had sufficient originality to be considered a parody and was not an infringement of the original work.⁷⁵ The alteration was within the fair use doctrine.⁷⁶ The effect is that moral rights can be violated when a work is within fair use.

This decision is typical of the United States position on moral rights. If economic injury is not involved, courts do not typically look to the integrity of the work. Because of this economic focus, the United States offers little protection to the moral rights of artists. This approach is in direct conflict with countries such as France.

B. *France*

Countries such as France value moral rights more highly and consider these rights to be extensions of the artists themselves. The French law concept of moral rights focuses on artistic integrity and aims to protect the personal rights of the artist.⁷⁷ This concept of moral rights protection attempts to preserve an artist's vision, so that it may endure for generations. France does not allow the waiver of some moral rights.⁷⁸ Moral rights of artists are strictly protected in French courts.⁷⁹ French law "allows an artist to stop publication of his work; attribute his work anonymously, pseudonymously or to himself; deter material alterations to, or deny any uses of the work that he finds conflict with his expression, especially after its publica-

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See generally Vera Zlatarski, "Moral" Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States, 23 COLUM.-VLA J.L. & ARTS 201 (1999).

⁷⁸ See Stephen Fraser, *The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure*, 15 J. MARSHALL J. COMPUTER & INFO.L. 759, 804 (1997).

⁷⁹ See generally Zlatarski, *supra* note 77 for a further discussion of strict moral rights protection for artists under French Law.

tion.”⁸⁰ That is not to say that French moral rights protection is automatically superior.

At least one scholar has argued that French moral rights protection is impractical to enforce because of its strictness.⁸¹ In addition, French moral rights protection may be viewed as “elitist” in nature because protection is selective in that these rights are offered to a specific group of individuals who create artistic works, as opposed to protection for individuals who may be offended by a work or wish to protest a particular work and do not have similar rights to do so.⁸² This “select group of artists” is given rights that ultimately “conflict” with other moral interests of public art, which are of equal or paramount importance.⁸³

The conflict between American and French protection of moral rights is clearly illustrated in the French Case *Turner Entertainment Co. v. Huston*. The case was brought on behalf of the heirs of John Huston, the highly renowned director and actor, against the Turner Company to stop the exhibition of a colorized version of one of Huston’s films, originally shot in black and white. The Cour de Cassation, the highest court in France, held that the colorization by computer laser technology of a black and white film created by the American director was a violation of the director’s moral rights as protected under French law, even though the rights of performance to the film were acquired legally.⁸⁴ The court made the distinction between moral rights of an artist, which cannot be transferred, and the economic rights of an artist, which can be transferred.⁸⁵ The Turner Company argued that the colorization of the film was an adaptation, which is not a distortion of the underlying work, but rather an addition to the original work, and therefore, permitted because they had acquired the economic rights of the

⁸⁰ See Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 390 (1998). “Thus, in France, where pecuniary rights are subordinate to moral rights, an artist may be injured in ways that are not purely economic.” *Id.*

⁸¹ See generally Zlatarski, *supra* note 77, at 203.

⁸² See *id.* at 203-04.

⁸³ See *id.*

⁸⁴ See *Turner Entertainment Co. v. Huston*, CA Versailles, Civ. Ch., No. 68, Roll 615/92 (1994), No. 16 10 ENT. L. REP. 3 (1995).

⁸⁵ See *id.*

film.⁸⁶ The court, however, held colorization was not simply an adaptation. Instead, the choice of black and white related to the "aesthetic" aspect of the work; the "interplay of black and white" created a certain "atmosphere."⁸⁷ The court compared the director choosing black and white film to a sculptor choosing a medium such as marble or clay as opposed to bronze to create a work of art.⁸⁸

It is likely that an American court would have permitted the colorized film to be broadcast because an American court would have considered the ownership aspect of the work to be of great importance. Therefore, it is likely that an American court would consider the colorization an adaptation rather than a distortion, thereby allowing Turner to exercise this economic right. Clearly, then, there is a contrast in the way in which moral rights are perceived between states. While this might not present a problem if international agreements were in place to unify the laws, as the next section demonstrates, international agreements and institutions have fallen short of providing unified moral rights protection.

IV. INTERNATIONAL SOURCES OF LAW FOR INTELLECTUAL PROPERTY

A. *Universal Copyright Convention and The Berne Convention*

European participation in the Universal Copyright Convention (UCC), began in Geneva, Switzerland in 1952.⁸⁹ The UCC was created to provide a universal system of copyright protection.⁹⁰ In theory, the universal guarantee of copyright protection would promote broader distribution of works internationally, which in turn would promote the development of arts and science.⁹¹ Section 6 of the UCC distinguishes moral rights from economic rights by stating, "the moral right is attached to the person and is perpetual, inalienable and im-

⁸⁶ See *id.*

⁸⁷ *Id.*

⁸⁸ See *id.*

⁸⁹ See Universal Copyright Convention, July 24, 1971, T.I.A.S. 7868, 25 U.S.T. 1341.

⁹⁰ See *id.*

⁹¹ See *id.*

prescribable."⁹² The UCC attempts to resolve conflicts of law among countries by providing national treatment, which is agreeing that when a work enters into a foreign country, the law of that foreign country is applied to determine the protection of the work in that particular country.⁹³ However, the UCC was considered inadequate in its protection, and therefore, The Berne Convention for the Protection of Literary and Artistic Works was created.⁹⁴

The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)⁹⁵ began in 1886 with only ten members.⁹⁶ The Berne Convention like the UCC also provides for national treatment,⁹⁷ however, the Berne Convention is much broader because it sets forth minimum standards of protection.⁹⁸ Article 5 of the Berne Convention states: "[W]hen the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors."⁹⁹ The Berne Convention's objective is to prevent the huge disparity in protection between different countries concerning their copyright laws.¹⁰⁰

The Berne Convention set out to achieve this goal of universal protection by imposing certain minimum standards of copyright protection.¹⁰¹ Among such minimum standards are the right to distribution, moral rights protection, and an author's right to exclusive reproduction.¹⁰² Each member state must comply with the minimum standards of protection set forth in the Berne Convention, however, enforcement has been a prob-

⁹² *Id.*

⁹³ See Patrick Leahy, *Time for the United States to Join The Berne Copyright Convention*, 3 J.L. TECH. 177, 179 (1988).

⁹⁴ See Anne Moebes, *Negotiating International Copyright Protection: The United States and European Community Positions*, 14 LOY. L.A. INT'L & COMP. L. REV. 301, 315 (1992).

⁹⁵ See Berne Convention, *supra* note 1.

⁹⁶ See GORMAN & GINSBURG, *supra* note 29, at 9.

⁹⁷ See Leahy, *supra* note 93, at 179.

⁹⁸ See Moebes, *supra* note 94, at 315.

⁹⁹ Berne Convention, *supra* note 1, at art. 5(3).

¹⁰⁰ See Fraser, *supra* note 78, at 765.

¹⁰¹ See *id.*

¹⁰² See Susan Stanton, *Development of the Berne International Copyright Convention and Implications of the United States Adherence*, 13 HOUS. J. INT'L L. 149, 166-67 (1990).

lem.¹⁰³ Enforcement has not been successful because of the rapid growth of technology, lack of jurisdiction in foreign countries, and procedural constraints of foreign courts.¹⁰⁴

The Berne Convention, which the United States joined in 1989, offers moral rights protection similar to the Universal Copyright Convention.¹⁰⁵ Its purpose is to bring protection under a universal system to those countries that have signed onto the treaty.¹⁰⁶ However, unlike the Universal Copyright Convention, waiver of moral rights under the Berne Convention is permitted, and a distinction between moral rights and economic rights is made.¹⁰⁷ Participation in the Universal Copyright Convention does not affect membership or the terms of participation in the Berne Convention.¹⁰⁸ A member of the Universal Copyright Convention, therefore, can waive moral rights protection if it is also a member of the Berne Convention.

The United States, through the Berne Convention Implementation Act of 1988, joined the international treaty with the exception of the moral rights protection clause.¹⁰⁹ The United States' rationale for the rejection of the moral rights clause was that American authors were adequately protected by federal, state and common law.¹¹⁰ Among other things, Congress pointed to provisions under the 1976 Act, which provide protection against distortion of a work by granting an artist exclusive rights to prepare derivatives.¹¹¹ For example, a screenwriter

¹⁰³ See James J. Merriman, *Battling Motion Pictures in Turbid International Waters*, 23 CASE W. RES. J. INT'L L. 623, 635 (1991).

¹⁰⁴ See *id.*

¹⁰⁵ See WEILER, *supra* note 36, at 989.

¹⁰⁶ See *id.*

¹⁰⁷ See Berne Convention, *supra* note 1, at art. 6bis. Article 6bis states:

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

Id.

¹⁰⁸ See Universal Copyright Convention, *supra* note 89, at art. XVII. (explaining that members of the Universal Copyright Convention are bound by the terms of the Berne Convention.)

¹⁰⁹ See WEILER, *supra* note 36, at 420. The Moral Rights clause was not adopted due to the motion picture industry's opposition to the moral rights protection set forth in Article 6bis of the Berne Convention. See *id.*

¹¹⁰ See H. R. Rep. No. 609, at 33-34 100th Cong. 2nd Sess. (1988).

¹¹¹ See Copyright Act of 1976 § 106.

who would like to write a script based on a novel must get the permission from the author of the novel before creating a work based on the novel. Also under the 1976 Act, a person must obtain a compulsory license to reproduce a musical work, and must conform the reproduction to the same style and manner of the original.¹¹² For example, if a singer obtains a compulsory license to record a song written by another artist, the singer must not change the melody of the song. The 1976 Act also provides for certain termination and transfer of licenses.¹¹³ For example, if an artist transfers the right to create a derivative work based on her original work, future derivatives cannot be made once the transfer reverts back to the original artist.

The Lanham Act which also provides federal protection against false designations of origin and false descriptions.¹¹⁴ A violation of the act would occur when someone other than the artist claims artistic credit for the work. State laws provide protection for breach of contract, fraud, misrepresentation, unfair competition, defamation, invasion of privacy, and the right to publicity.¹¹⁵ However, perhaps later realizing that existing law did not provide adequate moral rights protection, especially for painters and sculptors, the United States adopted the Visual Artists Rights Act of 1990.¹¹⁶

B. *World Intellectual Property Organization*

Other international intellectual property organizations attempt to bring copyright protection under a minimum standards umbrella to offer universal protection to member states. The World Intellectual Property Organization (WIPO) in Geneva, Switzerland is a United Nations organization that deals with multilateral treaties and their legal and administrative issues.¹¹⁷ WIPO was created in response to the development of new technologies and their impact on copyright protection in-

¹¹² See *id.* § 115(a)(2).

¹¹³ See *id.* § 203.

¹¹⁴ See The Lanham Act § 43(a).

¹¹⁵ See H. R. Rep. No. 609, at 34 100th Cong. 2nd Sess. (1988).

¹¹⁶ See WEILER *supra* note 36, at 421.

¹¹⁷ See World Intellectual Property Organization, at <http://www.wipo.org/eng/dgtext.htm> (visited Nov. 6th 1999).

ternationally.¹¹⁸ As of 1998, over 170 countries were members of WIPO.¹¹⁹

One of the main goals of WIPO is to clarify and interpret existing international copyright rules in the context of new and future technologies.¹²⁰ WIPO recognizes moral rights as separate from an artist's economic rights.¹²¹ Under WIPO, economic rights include the right to copy, distribute, rent copies, broadcast, translate, perform in public, the right to make an adaptation of the original work, and protection for phonograms, and neighboring rights.¹²² Moral rights, however, provide authors with protection against mutilation or deformation of their works if they choose to oppose such distortion.¹²³ These rights under WIPO are usually inalienable, but can be waived by the artist.¹²⁴

C. *The World Trade Organization and The TRIPS Agreement*

The World Trade Organization (WTO) has had a huge impact on international copyright law.¹²⁵ Originally named GATT, but later changed to WTO,¹²⁶ the WTO deals with issues concerning trade of goods, services, as well as intellectual property.¹²⁷ Pursuant to the WTO, a member state that does not abide by the minimum standards set forth in the Berne Convention is at risk of trade retaliation.¹²⁸ Thus, retaliation will affect something larger than the copyright issue: international trade, which may also affect goods and services independent of copyrights.¹²⁹ Copyright issues under WTO are enforced by the Trade Related Aspects of Intellectual Property Agreement

¹¹⁸ See World Intellectual Property Organization: Copyright Treaty, December 20, 1996, Geneva, *reprinted in* 36 I.L.M. 65, at preamble (1997) [hereinafter World Intellectual Property Organization].

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See *International Protection of Copyright and Neighboring Rights*, available at <http://wipo.org/eng/general/copyright/into.html> (last visited Nov. 6, 1999). [hereinafter *Int'l. Protection*].

¹²² See *id.*

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See Fraser, *supra* note 78, at 766.

¹²⁶ See *id.*

¹²⁷ See generally World Intellectual Property Organization, *supra* note 118.

¹²⁸ See Fraser, *supra* note 121, at 766-67.

¹²⁹ See *id.*

(TRIPS), which is a multilateral agreement signed in 1995.¹³⁰ It sets out a minimum standard of protection for its members.¹³¹ The TRIPS Agreement allows protection of copyrights for its members, except in the area of moral rights, which are excluded.¹³² Essentially, the TRIPS Agreement requires that substantive obligations of WIPO and the Berne Convention be adhered to.¹³³ However, as stated, under the TRIPS Agreement, members do not have protection of moral rights,¹³⁴ therefore artists cannot object to distortion or mutilation of their work if the economic rights are acquired legally.

D. *Bilateral Agreements Between Countries*

Before the Universal Copyright Convention, a multilateral agreement, bilateral agreements between countries were made to ensure copyright protection of their works as they entered a foreign country.¹³⁵ One of the benefits of a bilateral agreement between two countries is guaranteeing copyright protection of works of one country prior to the other country's membership in a multilateral agreement.¹³⁶ However, bilateral agreements among nations do not provide any minimum standard scheme of protection, and therefore protection among countries differ and are not universal.¹³⁷

V. CONFLICTS IN INTERNATIONAL MORAL RIGHTS LAW

Which country's moral rights' copyright law will govern when a work enters into the international marketplace? The confusion over which country's law should govern in a case concerning the moral rights of a foreign artist is discussed in *Turner Entertainment Co. v. Huston*.¹³⁸ The French court had to

¹³⁰ See World Trade Organization Intellectual Property, available at <http://www.wto.org/intell> 1.htm (last visited Nov. 6th 1999).

¹³¹ See *Int'l. Protection*, *supra* note 121 for a discussion of intellectual property in addition to copyrights such as trademarks, industrial designs, patents, geographic indications, circuit layout designs, trade secrets, and test data.

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ See Merriman, *supra* note 103, at 625.

¹³⁶ See Leahy, *supra* note 93, at 180.

¹³⁷ See Merriman, *supra* note 103, at 625.

¹³⁸ See *generally* *Turner Entertainment Co. v. Huston*, CA Versailles, Civ. Ch., No. 68, Roll 615/92 (1994), No. 16 10 ENT. L. REP. 3 (1995).

decide whether they were going to apply United States copyright law because an American created the film and the film was copyrighted in the United States, or French law because the colored version of the film was to be broadcast in France.¹³⁹

Turner wanted United States copyright law to apply¹⁴⁰ because United States copyright laws provide less moral rights protection for artists.¹⁴¹ The heirs of John Huston¹⁴² wanted French law to apply because of the broad protection of moral rights of artists under French law.¹⁴³ In terms of compliance with international treaties in which France is a member, the court held that French law would apply, and therefore the artist's moral rights would be protected.¹⁴⁴ Despite the grant of the film's economic rights to Turner, the French court applied French law which provides greater protection of moral rights, therefore, Huston's rights as the artist were paramount to Turner's rights as the copyright owner.¹⁴⁵ An artist's moral rights are attached to the artist despite economic transfer of ownership,¹⁴⁶ and survive death, by transfer to the artist's heirs upon the death of the artist.¹⁴⁷

As the case demonstrates, United States and France have different notions about moral rights. The resolution of the conflict may rest upon the importance or insignificance of the asserted interest depending upon the court deciding the matter. The result is the absence of uniform protection, which the Berne Convention was written to achieve. Clearly, without some type of international regime, this conflict will continue to grow.

"Material reciprocity is an abrogation of the national treatment given to protectable works of expression."¹⁴⁸ If reciprocity had occurred in the *Turner* case, French law could not have protected Houston's moral rights. "The neighboring rights problem

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² John Huston was an American movie director. See *Turner Entertainment Co.*, No. 16 10 ENT. L. REP. 3, 4.

¹⁴³ See *id.* at 6.

¹⁴⁴ See *id.* at 7.

¹⁴⁵ See *id.* at 4.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

¹⁴⁸ Fraser, *supra* note 78, at 770.

exists not only because the listing of works included in the Berne Convention has historically been under-inclusive, but because of the different traditions used in protecting works of expression such as literature and motion pictures among countries in the Berne Union."¹⁴⁹ Moral rights should not depend on reciprocity; rather a strong multilateral agreement in favor of moral rights must be created. Moral rights of artists are an issue of great importance, which at this time has not been addressed, sufficiently in multilateral agreements or by other means.

VI. DIGITAL MANIPULATION OF AUDIO AND VISUAL WORKS

A. *The Internet and New Technology*

If the movement of copyrighted material limited the problems once facing the international community across national borders, this is no longer true. The Internet has changed the way in which an artist's work is distributed. As technology advances, the Internet provides new ways of not only transmitting a work but also copying and distorting original works.¹⁵⁰ The advance of technology has created a serious issue for copyright owners and has a direct impact on moral rights. Currently, there are many kinds of software that are available that allow someone to alter original works¹⁵¹ by distorting and manipulating the original image digitally. This software is easy to obtain and inexpensive to purchase.¹⁵²

Recently, because of the digital age and the vast number of ways works can be manipulated, courts have had more difficulty in determining whether a moral right has been violated.¹⁵³ If a court finds that a work has been legally acquired

¹⁴⁹ *Id.*

¹⁵⁰ See Timothy E. Nielander, *Reflections on a Gossamer Thread in the World Wide Web: Claims for Protection of the Droit Moral Right of Integrity in Digitally Distributed Works of Authorship*, 20 HASTINGS COMM & ENT. L.J. 59, 84 (1997).

¹⁵¹ See *id.*

¹⁵² See *id.* Among the types of software available is Corel's electronic paintbrush, which allows someone to alter an image at 15,000 pixels per inch. See *id.*

¹⁵³ See *Turner Entertainment Co. v. Huston*, CA Versailles, Civ. Ch., No. 68, Roll 615/92 (1994), No. 16 10 ENT. L. REP. 3, 4 (1995). The French court held that colorization of US director John Huston's black and white film *Asphalt Jungle* by the Turner Company violated Huston's moral rights even though the Turner Company legally acquired the economic rights of the film. *Id.*; see also *Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997) (for a discussion of moral rights).

and the alteration is an adaptation or a derivative, then the underlying work has been preserved and there has not been a violation of a moral right.¹⁵⁴ A derivative work is defined as follows:

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or modifications which, as a whole, represent an original work of authorship, is a "derivative work."¹⁵⁵

This definition is clearly open to interpretation, and in an era where distortion is so easily accomplished, it does little to clarify when moral rights have been violated. One example of a new way in which a work can be manipulated is 'digital sampling.' Digital sampling is a way in which sound recordings can be captured digitally, and then arranged differently from the original musical or sound recording, thereby altering the underlying work.¹⁵⁶ However, this reproduction may generate copyright infringement liability as well as a moral rights issue. Another example is evident in the *Turner* case, where visual art or movies are distorted through the use of new technology.¹⁵⁷ These problems, which arise from the use of new technology, are particularly relevant to moral rights because they usually involve the distortion of a work, not just the economic theft of the work. As a result, the current economically motivated system cannot easily protect creators from this distortion.

B. *The United States Response*

1. *Digital Performance Right in Sound Recordings Act of 1995*

The United States has attempted to keep up with new technology in relation to copyright protection, however, the laws do not adequately address moral rights. The impact of the shift

¹⁵⁴ See Copyright Act of 1976 § 103(a).

¹⁵⁵ *Id.* at § 101.

¹⁵⁶ See Niederlander, *supra* note 150, at 84-85.

¹⁵⁷ See generally *Turner Entertainment Co. v. Huston*, CA Versailles, Civ. Ch., No. 68, Roll 615/92 (1994), No. 16 10 ENT. L. REP. 3, 4 (1995).

from analog¹⁵⁸ to digital¹⁵⁹ technology was recognized by the Congress when it enacted the Digital Performance Right in Sound Recordings Act of 1995 (the 1995 Act).¹⁶⁰ The 1995 Act was passed in response to the overwhelming number of digital reproductions of sound recordings distributed through new technologies, and the lack of legal recourse for compensation in this new area of distribution.¹⁶¹ The 1995 Act creates a public performance right for authors or owners of sound recordings, which entitles them to royalties when there is a broadcast of the sound recordings via a digital subscription service.¹⁶²

2. *The United States Digital Millennium Copyright Act of 1998*

The United States Digital Millennium Copyright Act of 1998 (DMCA), is an expansion of the Digital Performance Recordings Act of 1995.¹⁶³ Now, under the DMCA, an artist is allowed to collect royalties for Internet broadcasts, and every time a copy of a sound recording is downloaded off of the Internet.¹⁶⁴ The 1995 Act, and the DMCA do not address moral rights and, therefore, are examples of the inadequate legislation in this age of technology.

3. *Manipulation of Movies in a Digital Age*

The United States Visual Rights Act of 1990 (VARA), did not include motion pictures in its scope of protection.¹⁶⁵ The is-

¹⁵⁸ Analog technology is numerical information represented by electrical signals. See THE AMERICAN HERITAGE DICTIONARY 25 (Dell Publishing Co. 1981).

¹⁵⁹ Digital technology is computer information represented electronically as digits. See *id.* at 201.

¹⁶⁰ See Mark Plotkin, *The Times They are a Changin'*, 1 VAND. J. ENT. L. & PRAC. 46, 47 (1999). Distribution of digital reproductions of sound recordings via the Internet and other technologies and the legal aspects of distribution are discussed. See *id.*

¹⁶¹ See *id.* at 46-7.

¹⁶² See *id.* "However, traditional copyright law still recognizes that if the same song is broadcast in an analog format (such as AM or FM radio), the owner of the sound recording receives no royalties." *Id.*

¹⁶³ See Niederlander, *supra* note 150, at 90.

¹⁶⁴ See *id.*

¹⁶⁵ See WEILER, *supra* note 36, at 437. "The original version of VARA included motion pictures in its conception of visual art. To secure passage of this act in the face of strong opposition from the Hollywood film studios Motion Pictures Association of America, VARA was revised to exclude films from its scope." *Id.*

sue that raises the most concern regarding rights in the motion picture industry is the colorization of popular classic films.¹⁶⁶ The Directors Guild of America has formed a powerful lobbying group in the United States that among other things proposes legislation.¹⁶⁷ The first piece of legislation proposed and actually in Congress was the Film Integrity Act of 1987,¹⁶⁸ which was to give the director and screenwriter the right to decide whether a "material alteration," such as colorization, should be permitted.¹⁶⁹ This type of artist integrity control is similar to what is provided for visual artists in VARA.¹⁷⁰ That Act was not enacted.¹⁷¹ The National Film Preservation Act of 1988 was introduced to Congress and enacted for a three-year trial period.¹⁷² The National Film Preservation Act of 1988 created a National Film Registry and National Film Preservation Board to work in conjunction with the Library of Congress, to decide on an annual basis which twenty-five films would be considered historically significant.¹⁷³ Members of the Board were composed of people from the motion picture industry.¹⁷⁴ The works that were chosen would be registered, and once registered any alteration of them could be shown, however, a disclaimer would have to be used in conjunction with showing the film.¹⁷⁵ The disclaimer would state that this alteration was done without permission.¹⁷⁶ The third legislation to be introduced was The Film Disclosure Act of 1992.¹⁷⁷ If enacted, the Film Disclosure Act of 1992 would have required materially altered films to be

¹⁶⁶ See *id.* at 437.

¹⁶⁷ See *id.* Members of this group include Steven Spielberg, George Lucas, Angelica Huston, Harrison Ford, Sally Field, Kevin Costner, and Michael Ovitz. See *id.*

¹⁶⁸ See *id.* Richard Gephardt sponsored this act. See *id.*

¹⁶⁹ See WEILER, *supra* note 36, at 419. Artists have the "[r]ight to determine the content of the work in question and to prevent any subsequent alteration that might materially affect its quality." *Id.*

¹⁷⁰ See *id.* at 437-38.

¹⁷¹ See *id.* at 437.

¹⁷² See *id.* at 438.

¹⁷³ See *id.* at 438. (Works such as *Gone with the Wind*, *Star Wars*, and *Snow White and the Seven Dwarfs* were selected).

¹⁷⁴ See WEILER, *supra* note 36, at 438.

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

labeled as such.¹⁷⁸ This legislation was not enacted even though attempts were made when the term of the National Film Preservation Act of 1988 ended in 1991.¹⁷⁹

The Theatrical Motion Picture Authorship Act of 1995 was also introduced but not enacted.¹⁸⁰ The Theatrical Motion Picture Authorship Act of 1995 would have allowed the economic rights of a film to remain with the film studio, while the moral rights remain with the director, screenwriter, and cinematographer.¹⁸¹ None of the proposed legislation discussed would have adequately protected the moral rights of the artist, because they would have allowed persons other than the artist to determine and allow a material alteration of the work.

C. *The International Approach*

Internet technology is changing at a rapid pace and multi-lateral treaties such as the Berne Convention must attempt to address these new technologies. "The permeability of the Internet makes it somewhat difficult to pinpoint when and where a work has been digitally manifested or made accessible in a given country."¹⁸² With respect to moral rights, this difficulty may be resolved by looking to the country where a digital copy of an altered work was made and stored.¹⁸³ Another way to resolve this difficulty may be to look to the country that is the source of the transmission of the altered work.¹⁸⁴

Internationally, two treaties were facilitated by WIPO in 1996 to deal with the expansion of technology through the Internet.¹⁸⁵ The New Copyright Treaty addresses digital technology by applying and reaffirming the provisions of the Berne Convention, including article 6*bis*, in connection with this new technology.¹⁸⁶ The second agreement, the WIPO Performances and Phonograms Treaty, directly addresses moral rights of performers by providing protection against a distortion that affects

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See WEILER, *supra* note 36, at 438.

¹⁸¹ See *id.*

¹⁸² See Nielander, *supra* note 150, at 90.

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* at 86.

¹⁸⁶ See *id.*

the integrity of their work.¹⁸⁷ Despite these efforts, more is needed.

VII. CONCLUSION

Copyright protection has been recognized internationally as having great economic and personal value. The emergence of international copyright law throughout history illustrates the need for copyright protection on both an economic and a moral rights level. The development and growth of multilateral treaties governing copyright protection and world trade agreements, including provisions relating to copyright, are examples of the importance of international copyright protection. There is, however, still a great deal of disparity among countries when the issue of moral rights arises. This lack of uniformity in moral rights protection is discouraging.

The attempts of multilateral agreements to unify copyright protection globally and guarantee protection to all their members have not unified protection of moral rights of the artist. Under these multilateral agreements, moral rights are not guaranteed, and in some cases, the rights can be waived, while economic protection is guaranteed and cannot be waived. Therefore, the moral rights issue is left unsettled.

In light of new technologies that are present and those that will be developed, legislation is not keeping up with the rate at which technological advances are developing, which makes a multilateral agreement strictly enforcing the moral rights of an artist that much more imperative. Moral rights protection must be strictly imposed and enforced under a multilateral treaty with proper guidelines such as the French regime which would prohibit the waiver of these rights. To achieve such a treaty, given the many differences among the nations on the scope of moral rights, compromise will be needed. One possible compromise is to limit the term of moral rights protection to the term of copyright protection. When the copyright term of protection expires, therefore, the moral rights protection will expire as well. This compromise will further the objective of copyright protection which is to encourage artistic creation by

¹⁸⁷ See *id.* at 86.

economically protecting those creations for a limited period, while respecting the artistic integrity of the work.

Moral rights protection is an issue that must not be overlooked. The differences among nations concerning this issue will inevitably increase in this new age of technology. History reflects failed attempts to unify moral rights protection; the future demands compromise and resolution.