



**EFFECTIVE PROTECTION OF MORAL RIGHTS IN AUTHORS  
RIGHTS SYSTEMS OVER COPYRIGHT SYSTEMS**

**by Gloria Dominguez**

**LL.M. SHORT THESIS**

**COURSE: International and Comparative Intellectual Property**

**PROFESSOR: Caterina Sganga, Ph.D.**

**Central European University**

**1051 Budapest, Nador utca 9.**

**Hungary**

## **ABSTRACT**

The paper evaluates the application of current copyright laws in cases of moral right violations, focusing on the United States, which implemented a copyright system, and France, which implemented an author's right system.

The review of copyright laws is conducted based on the rationale that regulations established from a *iusnaturalism* perspective provide a better understanding of the object of moral rights viewed as personal rights, inherent and inalienable to the authors individuality, independent from economic rights. Author's rights system encourages authors to create while consistently retaining a measure of control over their creative work, whereas the utilitarian perspective implemented by the U.S. stands for promoting public good by disseminating useful works regardless of the author's personality and interest over it, having to resort to different branches of law such as trademark, tort and contractual law seeking for protection.

The moral rights examined throughout the paper are the right of integrity and the right of paternity, analyzed under the perspectives of ownership and duration, separation of economic and moral rights, criteria for awarding economic and moral compensation, restoration measures for authors damaged in their honor and reputation and contractual and statutory limitations.

The thesis shows that author's rights systems implementing *iusnaturalism* provide a more effective protection of moral rights over utilitarianism principles adopted by copyright systems and therefore establishes four rules inspired by the French approach claiming perpetual duration of moral rights, allowed transferability upon author's death as well as reasonable waivers to any authorized person, legal separation from his economic rights and a system that guarantees proper restoration to any occurred damages over his honor or reputation.

**To my Mom, Dad, Sisters and Grandma.**

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## INTRODUCTION

In 1886, the Berne Convention for the Protection of Literary and Artistic Works acknowledges the cross-border social, political and economic need to regulate and enforce copyright<sup>1</sup>. The most developed nations around the world made the issue a priority and drafted various regulations<sup>2</sup> protecting primarily the author's economic rights over their work.

However, traditional tension between civil law countries, hereinafter referred as "Author's right system countries", and common law countries denominated "Copyright system countries" led to a dispute over the nature of the legal protection provided to creative works, which created immediate confrontations on whether additional rights known as moral rights should be included into international regulations which would required to make a distinction between the personal and economic interests of the authors.

During the time of the Revolution, the French view of *droit d'auteur* was substantially similar to the American perspective. However, in the beginning of the nineteenth century as a result of a growing wave of intellectual productions by authors such as Victor Hugo, French legislator and courts were impelled - as a way to secure creativity - to explicitly recognize author's personal interests and authorial dignity. Their approach was based on philosopher Friedrich Hegel's *iusnaturalism* theory, which sustained that authors had naturally inherent personality rights over their creations that should survive market exploitation. France adhered to the Berne Convention since its first approval in 1886 meanwhile, the United States strongly resisted joining until 1988,

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<sup>1</sup> Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as last revised in Paris on July 24, 1971, 1161 U.N.T.S. 30

<sup>2</sup> See e.g. Japan's Copyright Law of 1899, Britain's Copyright Act 1911, Australia Copyright Act 1968, and Canada Copyright Act 1985.

when they adhered upholding a utilitarian approach over moral rights, that focuses on benefiting the common good by allowing public dissemination of the work, and hence granting society control over sold creations regardless of the authors' personal interests.

Based on the previous theoretical premises, the present thesis shows that when moral rights are conceived from a *iusnaturalism* perspective as a set of privileges emerging from the personal relationship between the author and his work, judicial and legislative bodies are able to provide a more effective protection to authors moral rights.

Chapter I will first analyze the historical and philosophical basis developed by the two systems; then, it will move to the description of the scope of the rights of integrity and paternity, which were the first to be internationally granted and are still the only rights regulated by article *6bis* of the Berne Convention; additionally both French and American courts have delivered most moral rights judgments analyzing their violation.

Chapter II is devoted to defining the guidelines used to assess the effectiveness of moral rights protection. It will focus on the issues of ownership and duration, separation of economic and moral rights, criteria for awarding economic and moral compensation, restoration measures for authors damaged in their honor and reputation and contractual and statutory limitations. These issues were selected after careful examination of the factors regulated and constantly disputed in both systems, according to case law and copyright regulations. Subsection 2.3.5 will also deal with contract scenarios and which default rules should be included as well as which mandatory terms can be waived.

Taking into consideration that each regulatory system is designed specifically to meet the social needs of their population, the task of evaluating which system provides a more effective

protection, one based on moral rights as separated personal rights or one based on economic rights dominance, is much required. Setting forward general guideline rules which will allow the performance of such evaluation has not been done before. The literature in the field has pointed out deficiencies and loopholes, and provided overall suggestions on required amendments in legislation<sup>3</sup>, creating an open space for scholars, intellectuals, judges and lawyers to develop new ideas, rules or guidelines, which is the task intended to be fulfilled.

The reason behind focusing on France and the United States is that, France is considered an important and constant source of artistic creations in Europe which has encouraged legislature to emphasize on the author's personality, deeming necessary to secure the author's work and creativity to focus in which Hegel suggested constitute natural inherent personality rights over their creations which should survive market exploitation, as for the U.S. considered until today the world's strongest economy and the home of copyright, is populated by a highly consumerist society, which minds are set to believe that after purchasing a work they are entitled to make unlimited use of it regardless of the interests of the author, while the author remains motivated by the idea of producing and creating works which will benefit society

As to the methodology, it will consist in conducting a comparative study between philosophical and legal approaches, how they apply when controversies arise and which arguments tend to be more persuasive on the eyes of the judges.

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<sup>3</sup>Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47, Harv. Int'l L.J. 353 (2006). See also Roberta Rosenthal Kwall, *The Soul of creativity: Should Intellectual Property Law protect the integrity of a creator's work-International norms*. Roberta Rosenthal Kwall, *The Soul fo Creativity: Forging a moral rights law for the United States*, Stanford University Press, 2009; The DePaul University College of Law, Technology, Law & Culture Research Series Paper no. 09-008, available at <http://ssm.com/abstract=1187102>. See also Robert C. Bird and Lucille M. Ponte, *Protecting Moral right in the United States and the United Kingdom, Challenge and opportunities under the U.K.'s new performance regulations*, 24 B.U. Int'l L.J. 213 (2006).

Chapters III and IV will develop an analysis on how France has applied its *Code de la Propriété Intellectuelle* (CPI) dated from 1956, by breaking down general provisions and court decisions. At the same time it will examine the functioning of the United States regulatory framework including the Visual Artist Rights Act (VARA), the Lanham Act, contract and tort, which constitute the current laws applied in cases of moral rights violations.

The intention of international regulations such as the Berne Convention is to set out harmonized principles and rights to which all contracting States should recognize. However, the case of moral rights imprinted in article 6bis is a case of harmonization failure, for until today France and the U.S. conceptualize them differently. In France, moral rights cover a broad range of artistic endeavors and are independent rights explicitly regulated by its *Code de la Propriété Intellectuelle*; whereas the U.S. have made authors, lawyers and judges come up with arguments claiming violations of moral rights by using trademark law, grounds for libel, invasion of privacy and unfair competition while also restricting the type of works to be protected to visual artistic creations.

Finally, the legal evaluation conducted by this paper intends to motivate other countries and scholars to take a closer look at their current application of copyright laws and determine if they are in line with international standards of protection of moral rights or if their national artists are still unprotected despite any existing but inefficient regulation.

## **CHAPTER I. IUSNATURALISM APPROACH TO MORAL RIGHTS**

Chapter I of this research provides a historical overview of the concept of moral rights highlighting the difference between conceiving them as a direct embodiment of authors' identity and creative soul sustained by *iusnaturalism*, and objectifying them not as a reward to authors' labor but rather as an economic incentivize for their artistic creation in order to promote public good, according with a utilitarian perspective.

Parts three and four will focus on the enactment and implementation of article *6bis* of the Berne Convention, describing the general scope of the rights of integrity and paternity regulated in the article. Lastly in section four, it will be discussed how the U.S. initially opposed the implementation of article *6bis*, the reason behind it until their adherence in 1988.

### **1.1 Iusnaturalism vs. Utilitarianism**

Laws are a result of human creation inspired by intellectuals, lawyers, judges, academics and philosophers during a certain period of time. Consequently, it is crucial to understand their origin in order to reflect the creator's genuine intention when enacting any rule, treaty, code, act or regulation.

That is the reason behind initially focusing on the philosophical approaches that motivated both Copyright and Author's rights systems to create moral rights regulations. Such approaches have constantly battled. On one side, *iusnaturalism* declares universal equality for all humans and respect to their natural property rights over themselves as well as over the assets they produce and can freely exchange with others; on the other side, utilitarianism claims that free market is the

only rational way of taking advantage of humans creative talents as well as economically more beneficial than recognizing natural rights over property.<sup>4</sup>

According to William W. Fisher, philosophically speaking the American limitation of copyright to economic rights has been understood as an expression of Benthamite utilitarianism and Lockean labor theory, while European focus on moral rights has been characterized as an emanation of Kantian or Hegelian personhood theory<sup>5</sup>.

We will first bring our attention to the *iusnaturalism* approach. This theory was originally upheld by German philosophers Immanuel Kant and Georg Hegel in 1785, who claimed that the rights of the author over his creative work were personality rights, as the work itself were extensions of their character and individuality, equivalent to any other person rights over their honor and reputation.<sup>6</sup>

According to Professor Lacey, Hegel and Kant contended that private property rights were of paramount importance when promoting self-expression and human development; they argued that works of art were created through a person's mental labor and thus embodied more of their personal essence. They developed a theory of personhood which supported not only the ideas of copyright in artistic products but also claimed moral rights over artistic works, as they were part of the artist's identity and hence should never be completely separated from each other.<sup>7</sup>

Inspired by the previous philosophical values, personality theorists asserted that copyright laws should serve to protect moral rights over economic interests and that societies should promote a

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<sup>4</sup> Amparo Muñoz Ferriol, *Bases Biológicas de la Ética de Popper: Entre el Iusnaturalismo y el Positivismo*. Universitat de Valencia, *Quaderns de filosofia i ciència*, 35, 149-59 (2005).

<sup>5</sup> See William W. Fisher, "Theories of Intellectual Property" in *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001).

<sup>6</sup> Herrera Meza, Humberto J., *Iniciación al derecho de autor*, 35-42 (Editorial Limusa. 1992) (Mex.)

<sup>7</sup> Linda J. Lacey, *Of Bread and Roses and Copyrights*, DUKE L.J., 1538-45 (1989).

climate of intellectual creativity by encouraging self-expression and personal fulfillment, rather than demanding creators to give up control over their work in exchange for pecuniary gain.<sup>8</sup>

During the French Revolution, French jurist Henri Capitant stated that the *droits de la personnalité* were intended to protect the person itself as well as the material goods emerged from the aptitudes, physical and moral qualifications of men.<sup>9</sup>

For the followers of the *iusnaturalism* theory, the economic aspect does not explain the nature of moral rights, but it only represents the reward granted to authors as a result of their work.

We now turn our attention to the utilitarian defense of moral rights, which sets out that innovation and creation are good and necessary to achieve general happiness, however they will tend to occur at a slower rate without the monetary incentive. In 1873 John Stuart Mill held that law is only justified when it promotes general happiness and pleasure. Hence, copyright should be designed to promote happiness by directly providing intellectual pleasure to all member of society, as copyright intention should be to benefit common good.<sup>10</sup>

According to John Locke property can be easily extended to intellectual works, basing his defense of property on man's labor and his ownership over it<sup>11</sup>, while as previously stated Hegel based his defense of property in the man's personality and his right to develop it in the physical world.

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<sup>8</sup> *Id.* Interestingly, Professor Lacey claims artists also create as a method of self-exploration, just like novelist Joan Didion who said: "I write entirely to find out what I am thinking, what I am looking at, what I see and what it means. What I want and what I fear". (quoting Joan Didion. *Why I write*. J. Steinberg ed. 1980)

<sup>9</sup> Dane Joseph Weber, *A Critique of Intellectual Property rights*. Christendom College, 2-5 (December 2002).

<sup>10</sup> Anderson, E., *John Stuart Mill and Experiments in Living*, reprinted in *Mill's Utilitarianism: Critical Essays*, 123-4 (ed. Lyons, 1991).

<sup>11</sup> Ashcraft, Richard, *Revolutionary Politics and Locke's Two Treatises of Government*, Princeton: Princeton University Press (1986).

For philosopher Jeremy Bentham actions of men were governed by their wills and desires, which intended to achieve pleasure, relief from pain, wealth and power without limits.<sup>12</sup> He also equated utility with value or happiness, sustaining that utility not only describes human motivation but sets the standard of right and wrong. The idea was set forward in 1789 and ever since it has served as a true inspiration to legislations around the world such as the case of moral rights regulations, holding that author's natural rights are limited to the benefits of positive law rights granted to the whole society, which should be able to utilize without limitations to their happiness all the works created for them.

## 1.2 Droit moral vs. copyright system

In 1763, in the wake of the French Revolution, France adopted its first copyright law which granted control to the monarchy over all creative endeavors. However, judicial interpretations reflected the public fervent desire to condemn public domain as a violation of property rights naturally generated by authors' labor, as well as inconsistent with the principles of individual liberty. This led to heated debates between prominent French intellectuals who were clearly favoring safeguards centered on the creator for his artistic endeavors.<sup>13</sup>

Such process resulted in the creation of the so called *droit moral*, which is a French term indicating that moral rights are neither the opposite of immoral rights nor of legal rights, but instead are meant to be opposite of economic rights, and therefore should be independent.<sup>14</sup>

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<sup>12</sup> See David Lyons, *Mill's Utilitarianism: Critical Essays* (editor) Lanham (Md.): Rowman & Littlefield (1997)

<sup>13</sup> See Calvin D. Peeler., *From the Providence of kings to copyrighted things*. INT'L & COMP. L. REV, 423 (1999).

<sup>14</sup> See Cyrill P. Rigamonti, *The conceptual transformation of moral rights*, 55 Am. J. Com. L. 67-8 (2007).

Regarding the copyright system implemented by the United States, the best example of the incorporation of the utilitarian approach can be found on Article 1, § 8 of the U.S. Constitution, which states that: “Congress shall have the power to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries”.<sup>15</sup>

The previous statement can be understood as exclusively aiming to produce a net societal benefit by limiting authors’ rights as long as it promotes progress. However, achieving social, economical and cultural progress can also constitute an incentive for author’s to create useful art which will leave their imprint on science and secure national cultural preservation.

In relation to the consequence of moral rights being regulated in the text of the U.S. Constitution, the purpose is to set a national standard by which States can mold their regulations assuring author’s rights will be secured for their contribution to progress.

Keeping in mind that the private motivation of authors should be to promote broad public availability of literature, music and arts as well as promote progress, American commentator Carl H. Settlemyer III decried moral rights and sustained that attributing to authors personal rights to control their work is a dangerous charter for private censorship<sup>16</sup>. He based his opposition on the demands of copyright industries, which perceive personal rights would impair their ability to modify the author’s works as they wish.

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<sup>15</sup> See U.S. Const. art. 1, § 8 (West 2006).

<sup>16</sup> Carl H. Settlemyer III. *Between Thought and possession: Artist moral rights and public access to creative works*. HEINOLINE (1992) full text available at: <http://heinonline.org/>

Finally, it should be noted that like France, most countries have implemented Author's rights systems and therefore are considered "author oriented" and fewer nations have implemented a Copyright system receiving the denomination of "society oriented"<sup>17</sup>.

### **1.3 Scope and implementation of art. 6bis of the Berne Convention: Right of integrity and right of paternity.**

In order to develop a clearer understanding of the scope of the rights of integrity and paternity, Article 6bis of the Berne Convention, which encourages their international recognition, was implemented literally in the leading worldwide regulation on moral rights:

"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".<sup>18</sup>

As it can be perceived from the content of the article, there are two moral rights which immediately stand out. The first is the right of paternity, also known as the right of attribution, which grants to the author the exclusive right to be recognized as the creator of a work, preventing authors from being misattributed to works they did not create. Paternity rights also include the author's right to remain anonymous or to make use of a pseudonymous in order to prevent excessive criticism to their artwork or against their personality.

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<sup>17</sup> E.g. Germany, Italy, Japan, Mexico, Morocco, Nigeria, Brazil are among some of the countries which are governed by a Authors rights system, while only the U.K and the U.S. are the biggest representatives of the copyright system.

<sup>18</sup> Berne Convention, *supra* note 1, art.6bis (1).

According to the *Code de la Propriété Intellectuelle*<sup>19</sup> the right of attribution is the right to claim authorship of the work, including whether and how the author's name should be affixed to the work. In 1961, the *Cour de Cassation* held the organizer of an exhibition of artistic book covers in violation of the right of attribution of the author for placing his business cards next to the covers and misleading the public by making them believe that he was the creator of the book covers which were being displayed.<sup>20</sup>

The second right is the right of integrity, which sets forward that only the creator can consent any alteration, distortion or destruction of the work, as well as prohibit presentations of his work in a derogatory manner contrary to his intention even without altering the work. According to André Lucas & Henri-Jacques Lucas the general rule is that any and all substantive modifications are prohibited. This rule applies to modifications of the substance of a particular work as well as to contextual alterations which leave the substance of the work intact, but do change its appearance by framing it in a context different that the one envisioned by the authors.<sup>21</sup>

Some countries such as France have gone beyond the requirements of article *6bis*, providing that the modification of the work does not have to be detrimental to the author's honor or reputation to qualify as a violation to his or her integrity right.

However, there are certain limitations to this approach, for instance there are real property rights cases in which significant changes made to buildings may conflict with the author's rights of integrity and the right of third parties. On this issue the French courts have tried to balance the conflicting interest by instead of harshly applying the general rule prohibiting all modifications,

<sup>19</sup> *Code de la Propriété Intellectuelle*, ch. I, arts. L-121-1 to -9 available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=180336](http://www.wipo.int/wipolex/en/text.jsp?file_id=180336) (last visited March 16, 2012) [herein after referred as CPI].

<sup>20</sup> See Cass. 1e civ, Jan. 31, 1961, Gaz. Pal [1961], I. pan, jurisprudencia, 406 (Fr.)

<sup>21</sup> See e.g. André Lucas & Henri-Jacques Lucas. *TRAITÉ DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE* 307, 2nd ed, 335 (2001).

they choose to closely evaluate the significance of the changes made to buildings in order to determine if there was an actual infringement of the architect's moral right of integrity, there is also the limitation that authors moral rights only apply to completed work, which, in the case of architecture, means a finished structure, therefore it does not cover the creative process of designing.<sup>22</sup>

According to architect Jadwiga Majdan, it should be noted that even though these two moral rights are considered inalienable rights by legal nature, in both France and the U.S. the exercise of the author's moral rights is subject to a test of reasonableness.<sup>23</sup> For example, in spite of the French law granting authors an almost absolute right of integrity, an author, in making a contract, gives permission to make modifications inherent to the mode of exploitation of his work so long as they do not result in a substantive alteration or distortion of the work, the same rules apply to the U.S., contractual exceptions and statutory limitations will be analyzed in further detail on Chapter II.

#### **1.4 Unites States implementation of art. 6bis**

Most scholars<sup>24</sup> which have researched and written on the subject of moral rights have jointly acknowledged the historic resistance of the U.S. to grant recognition and protection to authors' moral rights. Such resistance is clearly shown by the fact that it was not until 1988 when the United States finally decided to join the Berne Convention, after holding out for more than a century compared to other Author's rights systems.

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<sup>22</sup> Jadwiga Majdan. *Copyright, Moral Rights & Architects. Real Property Contracting Directorate*, 4-5, Public Works Government Services (February 2003) (Can.)

<sup>23</sup> *Id.* at 6.

<sup>24</sup> *See supra* note 3 for a list on the well known scholars in the field of moral rights.

According to Robert C. Bird, the reason why the U.S. surrendered in their opposition to adhering to the Berne Convention was the pressure applied by countries such as France that maintained that in the American Continent the U.S. had an international obligation to grant copyright an adequate protection, engendered by their emerging role as a global champion of intellectual property rights.<sup>25</sup>

That was the reason behind the enactment of the first federal moral rights law, adopted in 1990 under the name of Visual Artists Rights Act (VARA)<sup>26</sup> as a way of the U.S. to try to ensure some form of compliance to the Berne Convention, applying only to an exceptionally small group of works. There is also a speculation according to Professor Kwall that:

“On the last day of the 101st Congress, a major bill which authorized eighty-five new federal judgeships was passed. VARA was one of the unrelated measures included in the bill that was essentially serving the purpose of conciliating between senators, which would otherwise oppose the bill. Therefore, VARA was passed by the Senate only because Republican senators acquiesced in light of their common desire to pass the overall bill”.<sup>27</sup>

According to former State senator Alan Sieroty, the United States has been reluctant to accept and recognize moral rights because:

“Americans are very property minded and property rights are of great importance in our culture. So for people to say that they own something, but they cannot do what they want with it, because of the works integrity, that is difficult for most Americans to accept”.<sup>28</sup>

<sup>25</sup> Robert C. Bird and Lucille M. Ponte, *supra* note 3, at 157.

<sup>26</sup> Visual Artists Rights Act of 1990, Tit. VI of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128 (1990), 17 U.S.C. § 106A.

<sup>27</sup> Roberta Kwall, *supra* note 3, at 28-29.

<sup>28</sup> John Henry Merryman, Albert E. Eslen and, Stephen K. Urice. *Law, Ethics and the Visual Arts*. Kluwer Law International, 438-40, (4<sup>th</sup> Ed. 2007).

The U.S. justified its reluctance to enact any other further statutes since common law and existing regulations already provided compliance with the Berne Convention. The regulations used by authors in case of moral rights violations are Lanham Act, invasion of privacy, defamation, unfair competition, tort and contract law. These actions, procedures and suits will be studied in detail in chapter III. What is important to keep in mind is that unlike in France which views moral rights as personal rights granting them specific protection provided by the *Code de la Propriété Intellectuelle*, the U.S. until today continues to make use of other branches of law when claiming moral rights protection, which requires maneuvering different statutes and regulations trying to make the circumstance or situation adapt to it, although it was originally enacted to protect other commercial, criminal, civil and intellectual property rights.

To sum up this first chapter, as it can be observed the *iusnaturalism* approach to moral rights implemented by France captures the idea that art creates a personal relationship between the author and his work which entitles him to exclusive, inalienable and perpetual protection enabling him to maintain respect for his work and reputation.

On the other end there is the utilitarian approach implemented by the U.S. which argues that authors will be motivated first and foremost economically to create exclusive works which should be useful to society and contribute to economical, cultural, scientific and social progress despite of the author's personal interest as to the modification, attribution and general exploitation of his work. In this scenario moral rights are commonly waived being the main focus to draw profits and exploit as much as possible the purchased work.

After understanding the philosophical foundation of moral rights, the following chapter will deal with the proposed moral rights guideline integrated by a set of four rules which contrast how

France and the U.S. regulate the areas of ownership and duration, separation between economic and moral rights, restoration of authors honor and reputation, contract and statutory limitations. The aim of chapter II is to provide an overview on how both systems would handle these issues, giving some examples of State regulations and other countries statues.

## **CHAPTER II. MORAL RIGHTS GUIDELINE**

As it was described in the previous chapter the guideline to be set is based on the theory of *iusnaturalism*. The fact that author's should be entitled to personal rights over their work motivated the formation of four rules on issues that are regulated and in constant dispute across borders. Both France and the U.S. have different approaches on how to regulate the subjects of the scope of moral rights, ownership and duration of rights, provided remedies in case of violations and limitations to the free exercise of rights. The latter subjects will be examined individually and in detail during the following subchapters.

### **1. Guideline factors**

#### **1.2 Ownership and duration of moral rights**

The first subjects to examine are the inseparable ownership and duration of moral rights. After, France and U.S. delimited which moral rights to recognize and protect, they had to determine who should be recognized as the owner and the time frame in which he could exercise the rights conferred.

In regards to the subject of ownership, it is usually taken for granted that personal rights belong to a specific person and therefore cannot be transferred, however that is not the case of moral

rights, as it will be examined for they should be allowed by law or contractual provisions to be passed on by the original creator of the work to his heirs or other selected individuals after his death. According to the Berne Convention article *6bis* the rights granted to the author shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed, leaving an open door for countries either to limit or to expand the list of people who can claim moral rights.

In the case of the U.S., VARA establishes that only the author of a work of visual art can have the right to claim attribution and integrity over it regardless of whether the author is also the copyright owner, being the duration of the right the same copyright term applied for works created after 1991 which is during the lifetime of the author. In the specific case of joint works, all the authors involved are co-owners of the rights conferred and the duration term applied will consist of the life of the last surviving author.<sup>29</sup>

Most States in the U.S. comply with VARA by allowing the author alone to seek relief under their statutes, but there are some expectations to be mentioned<sup>30</sup>. The state of Maine<sup>31</sup> grants a cause of action to the authors as well as his personal representative, in California<sup>32</sup> when a work of fine art is threatened or damaged public or private non-profit art organization are allowed to seek injunctions in order to preserve or restore the integrity of the work. Finally Massachusetts<sup>33</sup> and New Mexico<sup>34</sup> grant standing to bona fide unions and other artists which have been previously

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<sup>29</sup> 17 U.S.C. § 106A (b) (d) (1-4) (West 2006)

<sup>30</sup> *E.g.* California, New York, Massachusetts, Maine, Louisiana, New Jersey, Pennsylvania, Rhode Island and Connecticut are states which have coded moral rights law. In addition, New Mexico, Utah and Montana enacted minimal related legislation. For further details *see* Melissa Boyle, Debra O’Conner and Stacy Nazzaro, *Moral rights protection for the Visual Arts*, Collage of Holly Cross, Department of Economics (August 2008).

<sup>31</sup> Maine’s Moral Rights Statute (1985).

<sup>32</sup> Cal. Civ. Code §987 (1979) (West 2006)

<sup>33</sup> Massachusetts Moral Rights Statute (1984).

<sup>34</sup> New Mexico’s Act Relating to Fine Arts in public buildings (1987).

authorized by the original creator. However the general rule of not allowing general transferability remains in place.

In France it is a different story; articles L121-1 to L121-8 of the CPI<sup>35</sup>, provide that due to moral rights features of perpetually and inalienability they shall only be transferred upon the death of the author.

After the author's death, his heirs who are the natural warden of his memory, become in charge of protecting his works the way the author would have done so himself and anyone who can prove a personal interest in the matter has standing to sue for mismanagement of the works by the heirs. Consequently, although economic copyright protection can be licensed away and expires seventy years after the author's death, in France moral rights continue to be attached to the author's person, thus cannot be given away or waived and will presumably last for eternity, taking this approach as a way of strengthen the moral right.<sup>36</sup>

In regards, to the disclosure of the work, which refers to making the creation known to the public, article L121-1 provides that the right of disclosure shall be exercised by the author himself or by any personally assigned executor. However, if there are none, or after their death, the right shall be exercised in the following order: "by the descendants, by the spouse against whom there exists no final judgment of separation and who has not remarried, by the heirs other than descendants, who inherit all or part of the estate and by the universal legatees or donees of the totality of the future assets, provided the author did not leave a will stating otherwise".<sup>37</sup>

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<sup>35</sup> See CPI, *supra* note 18.

<sup>36</sup> See André Lucas & Pascal Kamina Robert Plaisant, *International Copyright Law and Practice*, FRA § 7(3), n.86. 390 Paris, (June 9, 1964).

<sup>37</sup> See CPI, *supra* note 18, at L121-2.

This right does not go in hand with the expiration of the author's exclusive right to commercially exploit its work in order to obtain profit. France has followed the principle of moral rights lasting indefinitely being the reason behind it that moral rights are regarded as a separate body of protection to creators pecuniary rights.<sup>38</sup>

The feature of perpetual rights is not required by article *6bis* of the Berne Convention and as a matter of fact it may seem inconceivable for common law jurisdictions who sustain any means of action disappear with the death of the author.<sup>39</sup> Nevertheless, one should note that by recognizing moral rights as perpetual, cultural heritage can be defended and the interest of the collectivity becomes of important consideration. In addition, by not allowing moral rights to be assigned or transferred, carefully regulating contractual waivers, French Law assures that the author will not only be protected against third parties actions, but against detrimental actions against himself.

According to renowned moral right scholar Roberta Kwall, in some countries ownership can be inherited or exercised by the spouse if the author's death occurs and there is no specific provisions in his will. Some other countries like Italy entrust the deceased author's moral rights to an official body designated to protect the nation's creative works<sup>40</sup>.

What can be concluded as rule number one of the guideline is that effective ownership which goes hand in hand with moral rights duration should not be restricted. An effective system shall allow moral rights to be extended perpetually and to be transferred upon the author's death to copyright owner including producers, performers and broadcasters as well as their heirs, other

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<sup>38</sup> Law No. 92-597 of July 3, 1992, art. L.121-1. Journal Officiel de la République Française [Official Gazette of France], reprinted in the WORLD INTELLECTUAL PROPERTY ORGANIZATION: INTELLECTUAL PROPERTY LAWS AND TREATIES, COPYRIGHTS AND RELATED RIGHTS AND TREATIES.

<sup>39</sup> English law is considered a jurisdiction which finds it inconceivable to make moral rights perpetual. For further discussion see André Lucas, *Moral right in France: towards a pragmatic approach*, available at: [http://www.blaca.org/Moral right in France by Professor Andre Lucas.pdf](http://www.blaca.org/Moral%20right%20in%20France%20by%20Professor%20Andre%20Lucas.pdf)

<sup>40</sup> Kwall, *supra* note 3, at 14-5.

family members, artists unions, bona fide individuals even State authorities, for the artistic work does not cease to exist or is buried with the author.

The continuation of the exercise of moral rights after the author's death is important because over time, selected works have proven to add in economic or social value.<sup>41</sup> It is also becoming a common practice to reproduce works such as movies or paintings created several years ago.<sup>42</sup> Therefore, protection of older creations can only be claimed if there is a legal owner with the right to oppose any modifications, alterations, misattribution or non-attribution of the work.

## 1.2 Separation between economic and moral rights compensation

In cases where authors hold copyrights in their works, moral rights claims are merely supplementary to copyright infringement claims<sup>43</sup>. According to Eduardo Piola exclusive rights of authors, even if enacted to protect their economic interest can be used to protect their personal and moral interest as well since they can condition the economic use of the work to the non-economic interest.<sup>44</sup>

However, the fact that economic and moral right infringement can be claimed in one single lawsuit does not mean that courts should only examine author's economic rights and provide remedies to cure the financial harm he endured if the author has also proven an infringement to

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<sup>41</sup> Acclaimed painters like Leonardo Da Vinci and Vicent Van Gogh acquired more fame after their death, making their works very valuable after they were not able to claim moral rights over them. Another case is the sequel of Victor Hugo's *Les Misérables* written in 1885 and decided on 2004 allowing a third persona to write a continuation of his novel. For further discussion see Kim Willsher, *Heir of Victor Hugo fails to stop Les Miserables II: France highest appeal court allows modern sequel to 1860's masterpiece*, The Guardian, 31 Jan. 2007, available at [www.guardian.co.uk](http://www.guardian.co.uk).

<sup>42</sup> See *Turner Entertainment Co. v. Huston CA Versailles*, civ. ch. December 1994, translated Ent. L. Rep. Mar. 1995 (in this case the film *Asphalt Jungle* was reproduced in 1950, but it was not colorized until 1988, when it was acquired by Tuner)

<sup>43</sup> Rigamonti, *supra* note 3, at. 368-69.

<sup>44</sup> See Eduardo Piola Caselli, *Trattato del Diritto morale di autore* 3, 9-10 (1930) (Italy).

his moral rights by which he can sustain an even greater harm to his honor and reputation impairing him to conduct subsequent sells or causing him public humiliation. Courts have the legal obligation to study moral rights violations and make a reasonable and fair compensation if required.

Author's moral rights differ from copyrights in that the latter enables the author to earn a living from his work by granting him the exclusive rights to authorize others to use his work under agreed terms and to take action against unauthorized uses. However, controlling the commercial activity of reproduction and distribution of the work is very different from the following moral rights: the right of the author to consent the dissemination of his work after it has been modified, the right of the author to remain anonymous or demand that all copies of the distributed work suppress his name and the right to oppose false claims that he holds the authorship of a work.

The rights just described refer to personal rights were authors evaluate not only economical losses but most importantly detriments to his fame seeking to maintain a certain quality or imprinted personality in his work which distinguishes him from others.

In tort scenario cases, it is crucial to make the distinction between the two rights since the combination of moral rights and copyright infringement claims may result in increased damage awards.<sup>45</sup> As it was mentioned in the above paragraphs, the author may have been harmed in his reputation which led to declining on his sales, therefore upholding a double monetary relief would provide for an adequate compensation in addition to ordering other measures such as restoring the work to its original form.

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<sup>45</sup> See Rigamonti, supra note 14, at 370.

The last point to be addressed on this subject is that in many situations such as the Gilliam et al., v. Am. Broad. Comp. Inc. case which will be reviewed in chapter IV, the copyright owner is different from the moral right owner, they both hold statutory rights but while the first has only an economic interest the second should indefinitely hold a personal interest over it.

According to scholars Hansmann and Santilli, there are some cases in which owners of copyrights can seriously affect moral right holders: i) By altering without consent artist's existing works lowering not only the price that the artist can command for new works but also the price that collectors could get by reselling the artist's already completed works which reputation has diminished ii) By misattributing the work to other authors or not complying with the author's anonymous claims affecting the artist in the sales of his or her future works since each work is an advertisement for the others, iii) If there is a public non-pecuniary interest in preserving works intact as important elements in a community's culture, but the owner decides to alter the work because it considers it is economically optimal having to bear only with a small fraction of the costs, the moral right owner would undergo social rejection and damage to his honor, fame as well as reputation.<sup>46</sup>

What can be determined as rule number two from the developing guideline is that on the subject of separation of author's economic and moral rights, the system is effective if the rule applied to misattribution or non-attribution and mutilated or modified works addresses economic damages endured by the authors as well as damages suffered to his honor, reputation, dignity, spirit or message he portrait for the work he created.

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<sup>46</sup> Henry Hansmann & Marina Santilli, *Author's & Artist's Moral Rights: A Comparative legal and economic analysis*, 26 J. LEGAL STUD. 95, 134 (1997).

### 1.3 Restoration of the author's honor and reputation

Author's reputation represents a primary component of the value of the work. Author's popularity can increase the market value of his art, making moral rights very valuable to hold in hand as alteration or misattribution can result in harmful threats to the works dissemination.

Infringement can be proven not only by showing that the defendant actions were prejudicial to the authors honor and reputation, but a reasonableness defense should operate to determine if such treatment was required by law or necessary to avoid breach of contract. The damage sustained by the author should be detrimental to his popularity and honor possibly causing him to lose some of his future contracts and reduce the quality of his work.

In the U.S. VARA provides for the common remedies, which are available to artists and certain artists' organizations including injunctive and declaratory relief, actual damages, and attorney and expert witness fees. While the statutes of California, Massachusetts and Pennsylvania specifically provide a limited right of attribution to the author as he can only prevent display when the work is altered in a manner that would reasonable harm his reputation.<sup>47</sup>

However, the States of Rhode Island and New Mexico grant the author the rights to prohibit public display of his work irrespective of threatening his reputation.<sup>48</sup> This approach is the same implemented by France which law provides that in order for the author to receive an injunction relief, he does not need to show actual damage to his honor or reputation or to justify his reason for refusing to tolerate certain acts conducted against his work. In addition, the right is not limited

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<sup>47</sup> Cal. Civ. Code, *supra* note 29; Mass. Gen. Laws Ann, ch. 231, § 85S (c) (West 2006); 73 PA. Cons. Stat. Ann. § 2104(a) (West 2006).

<sup>48</sup> N.M. Stat. Ann. § 13-4B-3(A) (West 2006); R.I. Gen. Laws § 5-62-3 (2006).

to modification or mutilation but it includes misrepresentations of a work, such as presenting the work in negative contexts.

Due to control granted to author's in France Author's rights system, the application of moral rights is considered completely subjective, in the words of professor Galia Aharoni "it is the author's free choice that triggers protection," and "third parties who suppress, supplement, or otherwise modify a work do so at their own risk."<sup>49</sup> Consequently, third parties are held liable for moral rights infringement as was the case in a 1992 dispute where the French court found a violation for Irish poet and playwright Samuel Beckett's right of integrity when a director, contradicting Beckett's direction casted two women instead of two men for the play *Waiting for Godot*.<sup>50</sup>

There are a variety of remedies available in France in cases where the work is found unauthentic, the most common is awarding damages, however destruction of the offending work and publication of the determination of in-authenticity are also obtainable.<sup>51</sup>

Australian legislation provides remedies for infringement of moral rights including injunctions, public apologies and damages for loss. The particular loss for which damages may be awarded is not specified and there's disagreement about whether an artist would be able to recover damages for grief and distress.<sup>52</sup>

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<sup>49</sup> See Galia Aharoni. *You can't take it with you when you die...or can you? A comparative study of Post-Mortem rights moral rights statutes from Israel, France and the United States*. 17 U. Balt. Intell. Prop. L.J. 103 (2009).

<sup>50</sup> CASLON ANALYTICS NOTE-MORAL RIGHTS CASES HIGHLIGHTS (May 2006) available at <http://www.caslon.com.au/mrcasesnote.htm>. Also see Thomas P. Heide. *The moral right of integrity and the global information infrastructure: Time for a new approach*, 2U.C. DAVIS J. INT'L & POL' Y, 247-48 (1996).

<sup>51</sup> See John Henry Merryman, *The Moral right of Mauricie Utrillo*, 43 A. J. Comp. L. 445-54 (1995).

<sup>52</sup>In Australia the Copyright Amendment Act was passed by Parliament in December of 2000 .The legislation follows contentious reports by the Copyright Law Review Committee conducted in 1988-1999, and the 1994

Finally, rule number three of the guideline is that effective and proper restoration requires national laws and court decisions to try to restore the author's personal and artistic original position which he enjoyed before the moral right infringement. Therefore effective remedies should be observing the infringed party's claim, incorporate or combine actions including statutory damages, costs and reasonable attorney fees, injunction orders to prevent damaging or destroying the work, allowing the author to obtain injunction relief's against practices that might display his work in a misleading, disparaging, or derogatory circumstance, fashion, or context; destruction of prejudicial works, public apology and publication of the determination of inauthenticity should also obtainable.

#### **1.4 Contractual and statutory limitations**

Although legal systems can be very protective of certain rights, that being the case of moral rights in France, they should also provide for statutory limitations as no personal rights can be absolute and it is only reasonable to take into consideration the interest of third parties as well as respect their freedom of expression providing they may intent to develop new and alternative works inspired by previous creations.

U.S. statutory limitations can be found in VARA which restricts the right of integrity by providing that in cases of modification of a work of visual art which results from the passage of time or the inherent nature of the materials will not be considered distortion or mutilation. In addition to that, when it comes to modification of a visual artwork followed by an act of

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discussion paper on *Proposed Moral Rights Legislation for Copyright Creators*. CASLON ANALYTICS-INTELLECTUAL PROPERTY (February 2007), available at <http://www.caslon.com.au/ipguide18.htm>

conservation or public presentation, including lighting and placement, the author cannot claim infringement unless such modification was caused by gross negligence.

Among the explicit statutory limitations provided in France by the CPI, the following three articles regulate the issues of ownership transferability, unfinished works and authors general restrictions, applied in the case of audiovisual works. Article L121-5 states that in case of completed audiovisual works, changes to the original version can be made and should be respected if the author had previously agreed to the modification of any element. It also provides that transfers of audiovisual works to another person who has in mind a different mode of exploitation shall require prior consultation with the director<sup>53</sup>.

Article L121-6 includes the situation in which authors refuses to complete his contribution to an audiovisual work or is unable to do so due to circumstances beyond his control, in such scenario he shall not be entitled to oppose use of that part of his contribution already in existence for the purpose of completing the work.<sup>54</sup>

Article L121-7 provides limitations to the right of author's to claim at all times statutory and contractual stipulations which are more favorable to him. The exceptions are the following: authors may not oppose modification of the software by the assignee of the rights where such modification does not prejudice either his honor or his reputation and; authors may not exercise his right to reconsider or of withdrawal.<sup>55</sup>

According to Heide, although the CPI indicates moral rights are inalienable, French courts have allowed some limited contractual waivers only if such waivers are reasonable, respect the general

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<sup>53</sup> See CPI, *supra* note 18, at. ch. I, art L121-5.

<sup>54</sup> See CPI, *supra* note 18, at art. L121-6

<sup>55</sup> *Id.* at. art. L121-7

spirit of the author and do not cause substantive alteration or distortion to the work. Blanket waivers on future changes or uses of the work are unenforceable.<sup>56</sup>

In a well-known case in France where the court favored the defendant and upheld the contract, an author agreed to receive an economic payment after learning that the protagonist of his novels had been altered in a manner he objected. After the agreement was consolidated, the defendant modified the credit line in the movie stating that the version was only inspired as opposed to based on the author's work, which initiated the author's lawsuit claiming contractual annulment for moral rights infringement, however the court upheld the contract for the author had agreed to the modifications after receiving a sum of money and the credit line was sufficient to inform the public about the author's contribution. Moreover, the court ruled that: "moral rights do not grant authors the right to unilaterally abrogate freely conducted contracts where the author had full knowledge of the situation".<sup>57</sup>

In all cases, France incorporates the general rule that authors remain in control of their work and shall maintain their rights, however it also allows for parties to agree and stipulate otherwise.

After covering the main statutory limitations provided in France and the U.S., the subject next in line is of contractual limitations. In this scenario what needs to be kept in mind is the general rule, that contracts constitute a meeting of minds which terms should be negotiated bilaterally before signed by the parties, just as in the case of copyright contracts.

According to scholar Rigamonti, moral rights contracts should include default rules which define the duties of the parties as well as mandatory terms, from which the parties to the contract can not

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<sup>56</sup> See Heide, *supra* note 50, at. 249.

<sup>57</sup> Cyrill Rigatoni, *supra* note 3, at 74-6 (discussing French *Fantomas* case at CA Paris 1 e ch., Nov. 23, 1970, 69 RIDA 1971, 74-76)

deviate from even if they wish so. In respect to mandatory terms, flexibility of the feature of inalienability should be granted, as authors should be able to exercise their freedom on contract and decide on whether to consent to the waiver of their moral rights or continue to approve of specific modifications and attribution to the work.<sup>58</sup>

An effective moral right system would have to comply with the fourth rule of the guideline which is to include and recognize both contractual and statutory limitations, made by authors who are fully aware of their circumstances and therefore have conscientiously decided to enter into a more restricted agreement.

To recap and conclude this second chapter, the four rules that constitute the effectiveness guideline are: (1) Effective ownership and duration of moral rights shall allow these rights to be perpetual and transferable upon the author's death to whoever he authorizes; (2) Effective separation of author's economic and moral rights translates into applying the same rule which addresses economic damages endured by the authors to cases of misattribution or non-attribution as well as mutilated or modified works which may be prejudicial to the author's honor, reputation, dignity, spirit or the artistic message he portrait; (3) Effective restoration requires national law and court decisions to try to restore the author's personal and artistic original position which he enjoyed before the moral right infringement by applying a range of remedies including statutory damages, injunction orders to prevent damage or destruction to the work, injunction reliefs against practices that might present his work in misleading, disparaging, or derogatory circumstances, fashions, or contexts; destruction of offending works, public apology and publication of the

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<sup>58</sup> *Id.* at 375. In 1814, a French court ruled that works sold from an author to a publisher or book seller must bear the author's name and be published as sold or delivered, if the author so desires, provided there is no contrary agreement and making the exception for typographical or orthographical errors in the original manuscript. Tribunal Civil [Tri civ.] Seine, Aug. 17, 1814 (Fr.) reported by AUGUSTIN-CHARLES RENOUEAU, TRAITÉ DES DROITS D'AUTEURS DANS LA LITTÉRATURE LES SCIENCE ET LES BEAUX-ARTS 332-333 (1898).

determination of in-authenticity should also obtainable. Lastly (4) The legal author's right system shall include and allow both contractual and statutory limitations, made by authors who are fully aware of their circumstances and therefore have consciously decided to enter into a more restricted.

As it can be observed, the French Author's rights system and the U.S. copyright system have taken different approaches to comply with the rules of the Convention. France, has gone beyond the principales established recognizing moral rights as inalienable, perpetual and imprescriptible, whereas the U.S. under the federal statute of VARA has assted minimal compliance.

Taking into consideration the basic standards set by each legal system on the issues of ownership and duration of rights, separation between economic and moral rights, restoration of author's honor and reputation and, statutory and contractual limitations, the following chapter will explain how their moral rights regulation are generally applied including specific cases of limitations to their exercise. Chapter III will give an overview of the main provisions established by the French Intellectual Property Code and the U.S. laws employed to claim protection of moral rights including VARA, Lanham Act, defamation and invasion of privacy.

### **CHAPTER III. RULES AND APPLICATION OF THE CURRENT LEGAL MODELS**

#### **3.1 Code de la Propriété Intellectuelle**

The CPI was enacted on July 1, 1992 creating a single regulation which includes both economic and moral rights of authors along with a wide range of artistic endeavors.<sup>59</sup>As it was mentioned

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<sup>59</sup> See CPI, *supra* note 18, at. chapter II, art. L112-1 to -4 regulate the works of the mind protected regardless of their kind, form of expression, merit or purpose. The works included are the following: books, pamphlets and other literary, artistic and scientific writings, lectures, addresses, sermons, pleadings and other works of such nature,

in the previous chapter, section L121-1 to L121-8 regulates the moral rights of integrity and paternity.

In respect of the right of integrity the Code covers four situations: i) physical alteration of the original work, ii) alteration to a reproduction or copy, iii) changing the context or situation of the work and iv) the performance or interpretation of the work.<sup>60</sup>

In order to ensure the author's right of integrity, France has gone beyond the requirement established by article 6*bis* of the Berne Convention, which requires any modification or derogatory action to be prejudicial to the author's honor or reputation in order to constitute a violation, instead, French Law has provided two scenarios in this case. The first is that modifications to the work do not have to be detrimental to the author's honor or reputation since a mere physical alteration can result in structural changes to the original work creating grounds for a violation. The second scenario is where authors should have the right to oppose every use of the work in a context that denigrates the meaning of it, even without causing it substantial or minimal alteration.<sup>61</sup>

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dramatic or dramatico-musical works; choreographic works, circus acts and feats and dumb-show works, the acting form of which is set down in writing or in other manner; musical compositions with or without words; cinematographic works and other works consisting of sequences of moving images, with or without sound, together referred to as audiovisual works; works of drawing, painting, architecture, sculpture, engraving and lithography; graphical and typographical works; photographic works and works produced by techniques analogous to photography; works of applied art; illustrations, geographical maps; plans, sketches and three-dimensional works relative to geography, topography, architecture and science; software, including the preparatory design material; creations of the seasonal industries of dress and articles of fashion; as well as authors of translations, adaptations, transformations or arrangements of works of the mind, anthologies or collections of miscellaneous works or data shall enjoy the protection afforded by this Code, without prejudice to the rights of the author of the original work.

<sup>60</sup> *Id.* at. art. L121-1 to-2

<sup>61</sup> *See* Buffet v Fersing (1962) Dallos [D. Jur] 570, 571 (Cour d'appel Paris) (in this case the artist Bernard Buffet created a painting on six panels signing only one. Defendant, who owned the painting, dismantled it and sold each panel separately. French court ruled the painting was intended to form a single work of art, granting Buffet damages for violations of his right of integrity).

It is important to keep in mind that because of the French philosophical approach to moral rights as an extension of the author's personality therefore considered natural personal rights, they are deemed as inherent, inalienable and imprescriptible, which translates on moral rights not allowed to be waived and also not capable of being lost or impaired by neglect or disuse.

Moreover on this issue, the Directorate General for Education and Culture part of the European Union Commission set up a guideline intended for project promoters of Education and Culture projects including actions in the context of dissemination, exploitation and subcontracting of moral rights. The guideline incorporates suggestions in case of subcontracting parts of the project work to a third party seeing as during the development of the artistic work the author's moral rights can easily be infringed producing serious consequences. Hence being preferable to make a provision in the subcontracting agreement with the subcontractor author that the material he will create may be the subject of subsequent manipulations by the commissioning entity, which may alter to a certain extent, the integrity of the work.<sup>62</sup>

In respect to the right of paternity the artist holding this moral right has standing to institute seizure of the offending work and an inquiry into its authenticity by bringing a civil or criminal action for wrong attribution of the work. According to scholar John Henry Merryman, the holder of the legal right of paternity has a significant *de facto* power of attribution that is a sort of franchise, since the author's work may become commercially successful it can constitute a significant source of income.<sup>63</sup>

On the subject of ownership and attribution rights, the French approach to author's moral rights over works for hire is that authors of intellectual works who are the creative mind behind it, shall

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<sup>62</sup> European Commission, Directorate General for Education and Culture. *Dissemination and exploitation of results of our programmes*, available at: [http://ec.europa.eu/dgs/education\\_culture/valorisation/ipr\\_en.htm](http://ec.europa.eu/dgs/education_culture/valorisation/ipr_en.htm))

<sup>63</sup> Merryman, *supra* note 26, at. 446.

by the mere fact of its creation, enjoy an exclusive property rights over their creation effective against all persons. The French Copyright Law also provides that:

"The existence or the conclusion by the author of an intellectual work, of a contract to make a work, or an employment contract, shall imply no exception to the enjoyment of the exclusive recognized right over his work".<sup>64</sup>

In an employer-employee context, French courts have awarded employers the economic component of copyright and have granted employees with the author's moral right component. According to French Copyright Law, in situations involving commissioned works or works intended to constitute part of a collective whole, authors of the work retain both the economic and moral rights components of copyright transferring the economic right to the principal.<sup>65</sup>

### 3.1.2 Limitations

For practical purposes in subchapter 2.3.4, limitations were clearly separated by contractual and statutory. The same logic will be followed in the context of French limitations.

Regarding contractual limitations, French and other European Courts<sup>66</sup> have a history deciding against authors if the author has approved specific modifications to his work either before or after the alteration occurred and then tried to rely on the feature of inalienability of his moral rights seeking to reverse their decision which of course will be in detriment of the other party to the contract.

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<sup>64</sup> France Law No. 57-298 on Literary and Artistic Property art. 6 (1985 text) reprinted in COPYRIGHT LAWS AND TREATIES OF THE WORLD [here in after referred as French Copyright Law].

<sup>65</sup> Robert A. Jacobs, *Work-Hire and the Moral right Dilemma in the European Community: A U.S. perspective*, 29 B.C. INT'L & COMP. L. REV. 16, 32-33, n. 3 (1993).

<sup>66</sup> Belgium is among the EU member States which has codified the principle that authors who knew of the modification of the work and accepted them cannot afterwards prevent such modifications from being implemented or demand they should be undone. See Neil Netanel, *Alienability restrictions and the enhancement of Authors Autonomy in the United States and Continental Copyright Law*, 12 CARDOZO ARTS AND ENT. L. J. 1 (1994).

When it comes to statutory limitations, the CPI article L122-5 provides that once a work has been disclosed, meaning publicly presented on condition that the name of the author and source are clearly stated, the author may not prohibit:

“a) analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated; b) press reviews; c) dissemination, even in their entirety, through the press or by broadcasting, as current news, of speeches intended for the public made in political, administrative, judicial or academic gatherings, as well as in public meetings of a political nature and at official ceremonies; d) complete or partial reproductions of works of graphic or three-dimensional art intended to appear in the catalogue of a judicial sale held in France, in the form of the copies of the said catalogue made available to the public prior to the sale for the sole purpose of describing the works of art offered for sale”.<sup>67</sup>

In addition to the previous allowed uses of the author’s work which he can not oppose to provided his right of attribution is respected, parody, pastiche and caricature shall be also permitted as well as acts that are necessary to access the contents of an electronic database for the purposes of and within the limits of the use provided by contract.

Article L122-5 resembles the fair use doctrine employed by the U.S. which will be studied further on this chapter, limiting author’s rights in exceptional and specific cases where his work will be used for educational, scientific, communication, political, judicial or academic purposes which intent to have a positive impact on society.

## **3.2 United States**

### **3.2.1 VARA**

The Visual Artists Rights Act (VARA) was enacted by Congress in 1990. Its aim was to encourage visual artists to create and disseminate works of art by affording them protection

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<sup>67</sup> See CPI, *supra* note 18, at. art.L122-5

against any destruction or damage of the work, since they viewed works of art as having positive societal effects.

VARA explicitly recognized the moral rights of attribution and integrity. The latter right encompasses: i) the right to prevent intentional distortion, mutilation or prejudicial modification of the work that could affect the author's honor or reputation and ii) the right to prevent any intentional, grossly negligent distortion of a work of a recognized stature.<sup>68</sup>

There are however some immediate limitations provided by VARA to the author's right of integrity. First, the provided protection shall only be awarded to the original work of art not to reproductions of it which means that to claim any damage, the alteration, mutilation, distortion or modification must be done to the physical work itself, not to any prints or images of it.<sup>69</sup>

Secondly and related to the issue of ownership, VARA prohibits transfer of integrity rights to third parties, even if the author has conveyed his economic rights. Nevertheless, it allows authors to waive their rights provided they expressly agree to such waiver in a written signed instrument which shall specifically identify the work and uses of it. It is important to emphasize that the waiver can only apply to the work and uses identified.<sup>70</sup>

Current practices in the U.S. demonstrate an increasing wave on the written waivers of moral rights protection for artworks attached to a building or works of public art<sup>71</sup>. Artists do not have bargaining power over real estate owners, industries, art collectors and collecting institutions

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<sup>68</sup> 17 U.S.C. §106A (a) (West 2006).

<sup>69</sup> *Peker v. Masters Collection* 96 F. Supp. 2<sup>nd</sup> 216 (E.D.N.Y. 2000) (in this case court dismissed artist Peker's VARA claim on the ground that the modification done to his work by the company Masters Collection was done on the reproduction of posters not on the original work of fine art. However it granted copyright claims for unauthorized reproduction).

<sup>70</sup> 17 U.S.C §106A (e)

<sup>71</sup> See Collage Art Association. *Intellectual Property and the Arts: Artists and Moral Rights*. CAA New 29, n. 3, (May 2003) available at <http://www.collegeart.org/ip/>

whose intention is to make profits out of the created work while obtaining a contractual waiver of the artist moral rights as a way of securing no future law suits opposing any modifications or misattribution of the work.

In addition to real estate owners, industries, art collecting institutions who seek to obtain contractual waivers, according to the LA Weekly publishers have also been drafting all-rights contracts to discourage authors and artists from invoking their moral rights. Author's response to this approach is that all-rights contracts are dangerous considering that their purpose is to undermine the principle that each right in a contract must be claimed separately and specifically, and that any right not claimed remains with the author.<sup>72</sup>

The same logic of weak bargaining power over sculptors, painters or author's applies to young blossoming artist who seek to earn a reputation and make a living out of their work, therefore may accept having to compromise and waive their moral rights.

Thirdly and associated with the subject of duration of moral rights, VARA stipulates that the expiration of rights shall go in hand with the author's lifetime meaning they will expire after the death of who created the work. However there is an exception to the general rule of moral rights enduring the life of the artist which applies to works created before June 1, 1991 when VARA was enacted stating that works still in possession of the artist will endure his lifetime plus seventy years after his death.<sup>73</sup>

Since the last paragraphs have made reference to different artistic professions, it follows to establish the non-extensive list of work covered by VARA. VARA provides moral right

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<sup>72</sup> Nancy Updike. *Green Eggs and Lawsuits-Artists Contracts and Money*. LA Weekly, July 26, 2001, available at <http://www.laweekly.com/ink/01/35/coverupdike.shtml>.

<sup>73</sup> 17 U.S.C §106A (3) (A)-(B) (West 2006)

protection exclusively over paintings, drawing, sculptures, still photographic images produced for exhibition only. These works should not only be a unique print as mentioned earlier in this subchapter, but should also be signed and numbered in editions of 200 or less.

The consequence of VARA creating an exclusive list of works is that the status of other works not specifically excluded will remain uncertain such as mixed-media, craft works or a piece of performance art “fixed” on videotape<sup>74</sup>, such works incorporate both works covered and uncovered, leaving it to courts to determine if VARA should protect them.

Finally, even if the work does meet the VARA definition of “works of art”, there are still a number of exceptions that may prevent the artist from protection. One of the exceptions concerns works “works made for hire”. The 17 U.S. Copyright Act defines works made for hire as: first a work prepared by and employee within the scope of his employment and second a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, supplementary work, compilation, instructional text, test, answer material for a test or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire”.<sup>75</sup>

This legal fiction argues that when a creator constructs a copyrightable work in the context of certain employment relationships, authorship vests in the person for whom the creator works.<sup>76</sup>

Despite of VARA’s attempts to provide effective protection to artist’s moral rights, according to attorney Elizabeth M. Block this federal regulation has failed to identify a very sensitive point,

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<sup>74</sup> Jeffrey P. Cunard, *Moral rights are for Artists: The Visual Artists Rights Act*. CCA News, 27, n.3( June 2002) available at: [http://www.collegeart.org/caa/news/2002/may\\_june/moral\\_rights.html](http://www.collegeart.org/caa/news/2002/may_june/moral_rights.html)

<sup>75</sup> 17 U.S.C. § 101 (1) (B) (1988).

<sup>76</sup> Robert A. Jacobs, *supra* note 59.

that is when a work becomes eligible for protection.<sup>77</sup> Block argues against the *MASS v. Büchel* decision sustaining that VARA's protection should not extend to unfinished works and the definition of creation established by the Copyright Act is not an appropriate eligibility standard. Instead, she suggests that works should be entitled to VARA's protection when artist's present their work to the public.<sup>78</sup>

By allowing artists to determine when the work should be released to the public, artists are given full control over dissemination of their work and accordingly, their reputations. Disclosure also protects the dignity of the artist by respecting the signature and the presentation the artist chooses.<sup>79</sup>

The final important VARA exception to the protection of the right of integrity is the term of recognized stature, which has created a great deal of conflict in the U.S and is not employed by French law. Recognized stature can be interpreted as recognized quality, however it has not yet been defined by VARA leaving it to courts to set the bar on the significant social, economic or cultural importance of the work and choosing the elements to prove its standing.<sup>80</sup> The framers of VARA intended this concept to be a gate-keeping mechanism to prevent frivolous suits rather

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<sup>77</sup> See Elizabeth M. Block, *Using public disclosure as a vesting point for Moral Rights under the Visual Artist Rights*, 154-56, MICH. L. REV. 110:153 (2000). Attorney Elizabeth Block analyzes the case *Mass. Museum of Contemporary Art Found. Inc. v Büchel*, 593 Fed F3d 38, 51 (1<sup>st</sup> Circuit, 2010). *Mass. Museum of Contemporary Art Found. Inc. v Büchel* was the first case to raise the question of when works become eligible. In 2005 the Mass. Museum of Contemporary Art (MASS) entered into an agreement with Swiss visual artist Christoph Büchel to construct a work by the name of *Training ground for Democracy* to be displayed in the main Museum gallery. However due to problems in the relationship between the parties, Büchel abandoned the project while MASS, in an attempt to display the unfinished work of Büchel sued him in order to obtain a declaration allowing them to show the work, but Büchel filed a counterclaim to stop the exhibition of his unfinished work. On this issue, the District Court found that the unfinished work was not covered by VARA, determining that MASS could display the work. However, the appellate Court ruled that because VARA was part of the Federal Copyright Act, which states that "a work is created when it is fixed in a copy for the first time and when a work is prepared over a period of time the portion of it that has been fixed at a particular time, constitutes the work as of that time", hence the work was sufficiently created when Büchel abandoned it.

<sup>78</sup> *Id.* at. 157.

<sup>79</sup> Susan P. Lierner, *Understanding Artists Moral rights: A Premier*, 7 B.U. PUB INT'L L. J. 41, 52-53 (1998).

<sup>80</sup> Jeffrey P. Cunard, *supra* note 68, at. 6-8.

than to be a high hurdle, they meant for judges to inquire on the fact of the stature of the work of art as opposed to questioning the author's general stature.<sup>81</sup>

In conclusion, when artist's cannot make their case by seeking protection under VARA, for their works are expressly excluded, the number of editions is higher than 200 or for other causes resulting from VARA's limitations, authors may attempt to prove moral infringement through invasion of privacy, defamation or trademark law.

### **3.2.2 Invasion of privacy**

Invasion of privacy can constitute a ground for claiming moral right infringement in cases where works are being published without the author's authorization or if the author has become a victim of false attribution of works. However, in the U.S. the scope of this right varies notoriously from state to state, for instance the New York statute does not make actionable the use of an author's name, portrait or picture in connection to any production sold or disposed by the author, which according to Roberta Rosenthal "this provision fails to recognize moral right's fundamental premise that there must be accountability for the interest protected by the doctrine following a grant of the right to use the work".<sup>82</sup>

There are some other cases where the right of privacy is confused with the right of publicity, the latter representing an avenue for safeguarding textual integrity when the text at issue is an individual persona rather than a conventional work of authorship. The right of publicity differs

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<sup>81</sup> The most influential case on recognized stature is *Carter v. Helmsley-Spear*, 861 F.Supp. 303 (S.D.N.Y. 1994), aff'd in part, vacated in part, 71 F.3d 77 (2d Cir. 1995) (Judge Edelstein enunciated a test for recognized stature that required a two-part inquiry. First the work in question should be meritorious and second, the merit should be recognized by critics, collectors, art historians or the local community). See *United States v. Martin*, 192 F.3d 608 (7th Cir. 1999). (Manion J., dissenting) (it is not the intent of VARA to require judges or the jury to make aesthetic judgments, since they can easily become bias to the opinion).

<sup>82</sup> Kwall, *supra* note 3, at. 33-4.

from the right of privacy in that publicity rights enable individuals, usually celebrities, to protect themselves from unauthorized commercial appropriation of their persona.<sup>83</sup>

### 3.2.3 Defamation

The law of defamation offers authors an avenue for relief in cases where their works are publically disseminated in such a manner that would injure their professional reputation. In the case of infringement to the right of integrity the injury may take form in a mutilated, altered or modified publication version of the creators work. The right of paternity may be infringed if the distorted work is of poor quality and is published under the author's name resulting in a false attribution and associating him with a lacking quality work.

According to professor Kwall, the key to a successful defamation action is that the author shows public ridicule and injury to his professional standing as a consequence to the unauthorized works displayed. The bottom line is that the author can only claim a violation if he can prove damage to his professional reputation. Moreover, the author must be sufficiently well-known in order to have a solid reputation and therefore rights to invoke.<sup>84</sup> This takes us back to what VARA defines as "recognized stature" of works.

In the case of *Am. Law Book Co. v. Chamerlayne* infringement to the right of integrity required demonstrating that the modifications of the work, in this case an article constituted a trespass to literary property which resulted in damage sustained by the author since the article was published

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<sup>83</sup> *Waits v. Frito-Lay Inc.* 978 F2d 1093 (9<sup>th</sup> Cir.1992) (illustrates the concept of rights to privacy exercised by singer Tom Waits who sued Frito-Lay after using a sound imitating his voice in a Doritos commercial. The jury awarded Waits damages for the economic value of his voice and for the injury he incurred to his mental well being and professional reputation).

<sup>84</sup> Kwall, *supra* note 3, at. 33.

in a mutilated or altered form or with some misrepresentation as to his authorship, which constitutes enough ground to recover in an action for libel.<sup>85</sup>

### 3.2.4 Lanham Act

Moral right infringement can be claimed under trademark law in case a person attempts to pass off an author's works as their own as well as trying to pass off his own work as the author's work; the latter situation may also constitute unfair competition which is a stated purpose of the Lanham Trademark Act of 1946 that protects people engaged in commerce from false advertising and other unfair trade practices.<sup>86</sup>

The right of attribution is implicated by Section 43 of the Lanham Act, which provides as follows<sup>87</sup>:

Any person who, on or in connection with any goods or services uses in commerce any false designation of origin, false or misleading designation of fact, or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

In regards to the paternity right, American courts have yet to hold that authors can object to simple non-attribution as opposed to misattribution, since the Lanham Act does not create a duty of express attribution but does explicitly as noted by the previous provision, protect against misattribution. There is however one commentator<sup>88</sup> who has read the cases of *Smith v.*

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<sup>85</sup> See *Am. Law Book. Co. v. Chamberlayne*, 165 F. 313, 316-17 (2<sup>nd</sup> Cir. 1908)

<sup>86</sup> See 15 U.S.C. § 1051 (West 2006).

<sup>87</sup> See 15 U.S.C. § 1125(a) (West 2006)

<sup>88</sup> See Paul Goldstein, *International Copyright: Principles, Law and Practices*, 286-87, Oxford University Press, 2001.

Montoto<sup>89</sup> and Lamothe v. Atlantic Recording Corp.<sup>90</sup>, as holding that “distributing a work without attributing authorship violates the Lanham Act because it implies that the publisher rather than the actual author created the work”.

Now when it comes to well known authors which work would be instantly attributed to him or in case he has decided to register his work as a trademark, similar to any brand or product any distortion or alteration may constitute trademark dilution. Under federal law when deciding whether a mark is well known or famous enough, courts look at the following factors: (1) degree of distinctiveness; (2) duration and extent of use; (3) amount of advertising and publicity; (4) geographic extent of the market; (5) channels of trade; (6) degree of recognition in trading areas; (7) any use of similar marks by third parties; (8) whether the mark is registered. After the prerequisites for dilution claims are satisfied, the owner of a mark can bring a civil action against any use of that mark that may dilute its distinctive quality either by blurring or tarnishment.<sup>91</sup>

Although the Lanham Act can accommodate and provide alternative moral rights protection, the fact is that the statute on its face has no such objective. This Act more accurately protects against infringement to author’s economic and commercial rights.<sup>92</sup>

Lastly and most importantly, it should be remembered that trademark law contains the popular fair use doctrine exception, briefly explained in the following subchapter.

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<sup>89</sup> Smith v. Montoro 648 F.2d 602 (9<sup>th</sup> Cir. 1981) (in this case the Ninth Circuit held that film distributors substituting an actor name with their own in the film credits and the advertisement material was unlawful because of the distributors false attribution of the actor’s performance to a third party)

<sup>90</sup> Lamonthe v. Atlantic Recording Corp. 847 F.2d 1403 (9<sup>th</sup> Cir. 1988) (court ruled that two co-authors who objected to the omission of their names on the record cover album and sheet music stated a cause of action under Lanham act for express reverse of passing off)

<sup>91</sup> 15 U.S.C § 1125 (c) (West 2006)

<sup>92</sup> *Id.* Also 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).

### 3.2.5 Fair use doctrine

The defense of fair use is considered the most essential limitation to owner's rights in case of copyright infringement occurred in the U.S.

This doctrine was developed through case law and later incorporated into §107 of the 1976 Act, which provides a non-exhaustive list of purposes that may qualify for fair use, for instance "criticism, comment, news reporting, teaching -including multiple copies for classroom use-, scholarship, or research".<sup>93</sup>

As a consequence of the U.S. codifying the fair use doctrine, public rights to use creative works at the expense of the individual interest of the creator have increased, having devastating effects on moral right protection of a work.<sup>94</sup>

An example of the negative effects could be if a work is determined to be within the exception of 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.<sup>95</sup>

As it was mentioned earlier there is a list of purposes that may qualify as fair use, nevertheless one of the most utilized and opposed by artists is the exception to parody since it may have a very negative effect towards the author's reputation or substantially alter the content of the work, this was the case in *Campbell v. Acuff*, which led the Supreme Court to create a four-part test in order to determine if the fair use exception could apply to parody. The conducted test consisted in

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<sup>93</sup> U.S. Copyright Law of 1976, last amended in December 2001, available at <http://www.copyright.gov/title17/>

<sup>94</sup> Monica E. Antezana, *The European Union Internet Copyright Directive as even more than it envisions: Towards a supra.EU Harmonization of copyright policy and theory*, 26 B.C. INT'L & COMP. L. REV.415, 423-34 (2003).

<sup>95</sup> Leslie A. Pettenati, *Moral Rights of Artists in an International Marketplace*. Pace International Law, vol.12. Issue 2, art. 8 (September 2000).

examining: 1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiability of the portion used; and (4) the effect of the use on the market for the original.<sup>96</sup>

The fair use doctrine perfectly embodies the U.S. utilitarian approach to moral rights, which focuses on the public dissemination of creative works and not the protection of the artist's personality.<sup>97</sup>

The purpose of the fair use doctrine is to encourage the works reproduction even if it requires altering the works as long as it serves the public benefit and does not have a negative impact on the present and future profits of the underlying work.

What can be concluded from this chapter is that by using French *iusnaturalism* approach to moral rights, regulating them as personal rights therefore recognizing them as perpetual, inalienable and imprescriptible, author's are provided an effective safeguard to freely exercise their rights of integrity and paternity over time, by any authorized person, independent from his economic rights and in a system that guarantees proper restoration to any occurred damages over his honor or reputation. Once a set of rules are determined, legislative and judicial bodies can apply a guideline which is actually based on the essence of moral rights, eternally securing author's motivation to create art.

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<sup>96</sup> Campbell v. Acuff Rose Music, 114 S.Ct. 1164 (1994) (the Supreme Court decision conducted the four-part-test on the copyrighted song, "Oh Pretty Woman", in the following way: (1) *the purpose and character of the use* -- whether the band's use of the song was so "transformative" that it created a totally new different work that did not supplant the original; (2) *the nature of the copyrighted work* - whether the copyrighted version was original for it to enjoy the heightened protection; (3) *the amount and substantiability of the portion used* --whether the band used too substantial a portion of the original song in their remake; and (4) *the effect of the use on the market for the original* - whether the rap version of the song was found not to have a negative effect on the market for the original or licensed derivatives of the original).

<sup>97</sup> Bird and Ponte, *supra* note 3, at. 248.

The following and last chapter will apply the four individual rules of the guideline to particular cases occurred in the U.S. and France. The aim is study the facts and court findings to determine which system provides a more effective protection in the selected area of moral rights.

#### **CHAPTER IV. APPLICATION OF THE GUIDELINE TO CASE LAW IN ORDER TO EVALUTE THE SYSTEM'S EFFECTIVENESS**

To accomplish an efficient evaluation of the selected cases, first the relevant facts will be narrated including the court's findings and second, the established guideline rules will be applied in order to determine if there is an effective compliance to the created standard.

It should be noted that the logic behind selecting the following cases was to choose disputes that according to court's outcomes best showcased the subject of ownership, duration, separation of economic and moral rights, author's restoration of his honor and reputation and contractual and statutory limitations.

##### **4.1. United States case law**

###### **-Gilliam v. Am. Broad. Comp. Inc.<sup>98</sup>**

Gilliam, a company of comedy writers and performers created the TV show Monty Python. They entered into an agreement with British Broadcasting Company (BBC) under which BBC acquired the right to record the performance of the script and the right to license television broadcasts of the program, once recorded, to overseas territories. The agreement also stipulated that BBC was not to make any significant edits to the TV show after it was recorded.

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<sup>98</sup> Gilliam v. American Broad. Comp. Inc 538 F.2d 14 (2<sup>nd</sup> Cir. 1976).

BBC broadcasted the show and then sold their license rights to American Broadcasting Company (ABC). The agreement did not contain any provisions on allowing modifications of the work. However, when ABC broadcasted the show it made significant edits to the program, they deleted twenty seven percent of the original program in order to make room for commercials.

Gilliam sued ABC seeking to stop the broadcasting of the show arguing that ABC's edits impaired the integrity of the original work. The Trial Court for the Southern District of New York denied Gilliam's preliminary injunction in part because Judge Lasker was unsure of the ownership of the copyright in the recorded program.

Gilliam appealed. The Appellate Court found Gilliam was the owner of the copyright to the script given that the recorded program was a dramatization of the script, and thus was entitled to copyright protection as a derivative work; therefore Gilliam had the right to control the use of it. The court also stipulated that while BBC did obtain the rights to the derivate work, Gilliam did not grant them the right to modify the work hence BBC could not sell the right to edit the show to ABC.

Finally the appellate court for the Second District ruled that ABC had impaired the integrity of the work, which action constituted a violation under Lanham Act that prevents people from making a representation of a product that could create a false impression of the product's origin. The court directed the issuance of a preliminary injunction by the district court enjoining television station ABC from airing an edited and shortened version of plaintiffs' program, because Lanham Act protects against false designation of mutilated works.

After the facts have been narrated, what follows is to compare the court's outcome to the established guideline rule on the subject of separation between economic and moral rights. As it

was previously upheld, the guideline argues that an effective independence of rights translates into applying the same rule which addresses economic damages endured by the authors to cases of misattribution and modification of works which changes may be prejudicial to the author's honor and reputation.

An effective legislative and judicial system shall be able to indentify separate rights and analyze the different infringement claims. To distinguish between the author's right to control the reproduction and distribution of the work which can affect his maximization of profits and overall economic gains from the author's additional rights to control not the way the work is handled but how it is presented to the public, is a very tricky and complex task.

Nevertheless, this separation task has to be done in order to guarantee that the author who brings his creativity into society can claim violations over his economic rights and his moral rights, feeling reassured that the work will be treated as he wanted it to be treated, and, in case its treatment or presentation substantially differs from his wishes he can still have a legal claim opposing the modification or misattribution by means of injunctions or reliefs in addition to being awarded a certain amount of damages.

In 1976 when *Gilliam v. Am. Broad Cos. Inc.* was decided, the U.S. was still strongly opposing joining the Berne Convention, this made the judicial task of recognizing the independence of economic and moral rights much harder. And, while the district court struggled to identify and separate author's economic rights over controlling the reproduction and distribution of derivative works from his additional moral rights which were not even recognized by the Copyright Act; the Appellant Court's outcome was based on the mutilation of the work done by ABC to Monty

Python programs resulting in a violation to the integrity of the work protected by the Lanham Act, which granted author's the right to claim the integrity of the work should be respected.

As it can be observed the fact that the court factually separated economic and moral rights despite that legally there was still no conceptual difference recognized, grants the author's the opportunity to claim mutilation, modifications, distortion or misattribution to his work in addition to claiming possible infringement to his economic rights over controlling the reproduction of his work. In *Gilliam v. Am. Borad. Cos. Inc.*, the U.S. copyright system successfully proved efficiency on the subject of separation between economic and moral rights.

However, it should be mentioned that unfortunately, most American practices show that in situations where contracts between author's and distributors, collectors or industries where the subject of modification rights is not addressed, courts will protect a creator only against excessive mutilation of his work.<sup>99</sup>In addition to that, according to professor Rosenthal American courts are still hesitant on stretching the covered ground by Lanham Act and continue to only address economic damage, instead of moral rights focusing on the author's dignity, spirit, and message of the work.<sup>100</sup>

### **-Shostakovich v Twenty Century Fox Film Corp<sup>101</sup>.**

This case illustrates the discontented of creators who cannot fit their moral rights cause of action into any of the alternate theories provided by U.S. law on the area of moral rights. American

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<sup>99</sup> Peter Jaszi, *Garland of Reflections on Three International Copyright topics*, 8 CARDOZO ARTS & ENT. L.J. 47 (1989).

<sup>100</sup> Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic dimension of the artistic soul*. Notre Dame L.R. 81, 1992-95 (May 2006)

<sup>101</sup> *Shostakovich et al vs Twentieth Century-Fox Film Corporation*. Supreme Court, N.Y. Co. (6-7-1948) 80 N.Y.S. 2d 575

creators consider that the major difficulty they face within their Copyright system is the additional burden of molding moral rights claims into other recognized causes of action.<sup>102</sup>

The following are the relevant facts of the case. In 1948, Hollywood's first major anticommunist film of the Cold War "Iron Curtain" was released. Twentieth-Century Fox, the studio that made the film, used on its soundtrack music from Soviet citizen Dmitry Shostakovich among other prominent Russian composers.

After the film's release, the composers filed a lawsuit against Fox in both French and United States courts. Russian composers sought injunctive relief against Twentieth-Century Fox studio for using their music in a film that in the plaintiff's view had an anti-Soviet theme. In addition, Twentieth-Century Fox used the plaintiff's name on the credit lines of the film. The Shostakovich plaintiffs based their right to relief on following four grounds: i) New York's statutory right of privacy; ii) defamation; iii) the deliberate infliction of an injury without just cause; and iv) violation of moral rights.

Regarding the first claim on the right to privacy, the court observed that "lack of copyright protection has long been held to permit others to use the names of authors in copying, publishing or compiling their works." As for the defamation claim, the court reasoned that because of the music's public domain status the plaintiffs claim for libel was refused.

In respect to the plaintiff's claim for the infliction of willful injury, the court treated it in conjunction with their moral rights claim. The court's outcome declined the opportunity to vindicate the plaintiff's interests by refusing to grant the requested relief, emphasizing that

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<sup>102</sup> Jazci, *supra* note 92, at. 2-3

Shostakovich made no allegations of distortion and no did not clearly show infliction of a willful injury. A reading of the American Shostakovich opinion suggests, however, that the court's discomfort with the moral right doctrine and the difficulty of its application provided the primary impetus for denying the plaintiff's moral rights claims.

After the U.S. court's reasoning in *Shostakovich v. Fox*, in 1953 *Soc le Chant de Monde v Twentieth Century Fox* which case disputed the same issue was taken to French courts<sup>103</sup>. And, contrary to the U.S. ruling, French court's outcome allowed the film to be enjoined from distribution in France ensuring protection of the author's moral right to prohibit the decontextualization of his music because it could be adverse to the author's reputation and honor, thereby impairing his legally protected integrity interest.

After analyzing the facts and court findings, when applying the guideline rules on separation between economic and moral rights and proper restoration of author's honor and reputation, the U.S. copyright system has proven ineffective. When comparing the contrasted decisions reached by the American and French courts, the latter adequately took into consideration the author's legitimate fear of the film damaging his honor and reputation since his music was specifically attributed to him while being used in a context contrary to his personal view. On the other hand, the U.S. rejected all claims basing their analysis on economic rights and giving more relevance to the public domain status of the work, over taking out of context the creator's intention. On the subject of restoring author's honor, the French court prohibited the use of Shostakovich compositions in the U.S. anti-Soviet film.

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<sup>103</sup> *Soc. Le Chant de Monde v. Soc. Fox Europa*, Cour d'appel [CA] [regional court of appeal] Paris, 1e ch.,Jan.13 1953.Gaz. Pal. 1953, 191,(Fr).

According to Professor Merryman a reading of this decision suggests court's discomfort with the moral right doctrine which may have been the primary impetus for denying Shostakovich plaintiff's their moral rights claims. Merryman also argued that: "At the bottom of it all is the significant fact that where the artist claims a violation of a personality interest, rather than a patrimonial interest, the civil law responds and our law does not. That is the real difference".<sup>104</sup>

#### 4.2. French case law

##### **-Bernard-Rousseau v. Soc. des Galeries Lafayette<sup>105</sup>.**

Acclaimed painter Henri Rousseau died in 1910. Sixty one years later, his granddaughter Bernard brought an action against Galleries Lafayette, a department store in Paris for using window displays of reproductions of Rousseau's work in altered images and colors.

Before the 1995 and 1997 reforms to the CPI on the subject of copyrights term of protection, France had established a fifty year limitation to the author's exercise of his economic rights. This situation changed after the 1990's amendments which increased the number of years to seventy as the time frame upon the author's death in which his economic rights over the work may subsist.

Consequently, according to the laws in that time period Rousseau's copyright protection lapsed in 1960 making his work became part of the public domain. However, given the French *iusnaturalistic* approach to the independence of moral rights from economic rights and the Author's right system's view that moral rights embody the author's right to protect the integrity and attribution of his work that is an extension of his personality, granted Rousseau's

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<sup>104</sup> See John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1026 (1976).

<sup>105</sup> Tribunal de grand instance [TGI] [ordinary court of original jurisdiction] Paris, 3e ch., 13 Mar. 1973 (unpublished), referred to in John H. Merryman, Albert E. Eksen & Stephen K. Urice, *supra* note 26, at. 423.

granddaughter with a standing claim in court. The claim was that the author's moral rights, being perpetual and descendible, continued in force and in the control of his heirs, who were entitled to oppose any modification, misattribution or non-attribution to the work.

The *Rousseau v. Soc. des Galeries Lafayette* exemplifies a legitimate invocation of the right of integrity which is to combat an adaptation that does not truthfully represent the work.<sup>106</sup>

When applying the guideline rule on moral rights duration which proposes the achievement of effective moral right protection by granting author's perpetual integrity and paternity rights, the outcome is a perfect match between the rule and the case.

This case sets a good example of why this rule on prolonging moral right over indefinite time should be considered by other systems. The main reasons being that author's do not take their work into their grave, therefore allowing the continuation of the exercise of moral rights after the author's death is important since over time selected works tend to add in economic or social value. In addition, recent practices suggest that the reproduction of works created several years ago is increasing and new artist are modifying, mutilating and misattributing works as they please without the author's heir's consideration.<sup>107</sup>

As a result, both older and newer authors are potentially less encouraged to create in a system where the integrity and attribution of their work cannot hold to be a fully respected and guaranteed by law. However, I do want to point out that making moral rights perpetual should also have its limitations, either statutory and or contractual. For instance, if the distributor,

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<sup>106</sup> See Natalie C. Suhl, *Moral Rights Protection in the United States under the Berne Convention: A fictional work?*. Fordham Intellectual Property, Media and Entertainment L. J. 1203, 1206 (2002)

<sup>107</sup> Eriq Gardner: *Jay-Z losses round in legal fight over the "Big Pimpin" sample. Heirs of Egyptian film composer are asserting "moral rights" in a composition.* The Hollywood Reporter (May 5, 2011) available at: <http://www.hollywoodreporter.com/thr-esq/jay-z-loses-round-legal>. This article narrates the case in which popular singer Jay-Z is currently facing a lawsuit for moral rights violation for sampling a musical composition "Khosara, Khosara" originally recorded for use in the 1960 Egyptian film by the name of Fata Ahlami.

publisher, art collector or industry has in mind some functional, useful or necessary changes to be made to the work over a reasonable period of time, they should negotiate the conditions, modifications and rights with the author before signing the agreement in order to make it beneficial for both parties and still respect the integrity of the creator's moral rights.

**- Aage Fersing v. Ministère Public et Musée Rodin<sup>108</sup>**

In 1971 at a Versailles auction, Aage Fersing bought the moulds for a statue representing 'a lady with a face looking as if she were about to faint'. The mould carried no indication of origin of authorship. In 1980 the Musée Rodin in Paris which institution had been appointed by artist Auguste Rodin as the guardian of his moral rights was contacted by Mr. Fersing who announced to them his intention to make a cast from the moulds claiming they were a sculpture by Rodin. However, the Musée Rodin was unable to authenticate the moulds and Mr Fersing was informed that he would not be allowed to use them to create a work bearing Rodin's signature.

In 1982 Mr. Fersing presented a mould indicating the title L'Extase with the signature A.Rodin at a foundry and ordered that a bronze sculpture be made from it and in 1983 he intended to sell the bronze sculpture at Sotheby's in London. But when crossing the French border, Mr. Fersing was detained by custom control, who reported the case to the Musée Rodin and orders were given for the statue to be held back.

Subsequently the Musée Rodin sued Mr. Fersing for infringement of Rodin's right of paternity. The court ruled in favor of the Musée Rodin on the basis that false attribution of a sculpture to

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<sup>108</sup> See Aage Fersing c. Ministère Public et Musée Rodin, Cour d'Appel de Paris, 23 March 1992, 155 RIDA janv. 1993.

Rodin constituted an infringement of the artist's right of respect for his name' and for the artistic identity of his work.

In this French case, as well as in the previous one studied, the guideline rule on moral rights ownership applies perfectly, demonstrating that effective ownership is to be achieved by allowing moral rights to be transferred upon the author's death to any person he authorizes and considers adequate to continue exercising his integrity or paternity rights. In the present dispute, artist Auguste Rodin entrusted his moral rights to be guarded and protected by the Musée Rodin who sued and won the claim against the misattribution of Rodin's sculpture. The reason why it is important to extend ownership moral rights over time and to other people, is that modifications of misattributions can produce serious negative consequences to the author's honor and reputation, for creating poor quality of just works opposing his artistic view and displayed on museums, galleries or buildings. And if the deceased author has been created a bad reputation, in consequence these museums or galleries exhibiting his work will also be greatly affected.

An effective system shall allow moral rights to be transferred by the author's will or by heritage to copyright owner including producers, performers and broadcasters as well as their heirs, other family members, artists unions, bona fide individuals even State authorities, for the artistic work does not cease to exist after the author's death.

### **-Fantômas case<sup>109</sup>**

This last case portrays the importance of including and respecting contractual provisions agreed by the parties and demonstrates how France has complied with complementing the moral rights legal framework by including limitations to author's rights.

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<sup>109</sup> See TGI Paris, Jan. 7, 1969, Allain, RIDA, Apr. 1969, 166 (distortion of Fantômas); Apr. 18, 1979.

The author of the popular French literary figure *Fantômas* entered into a contract with a motion picture company for the production of several films based upon the author's novels. The contract contained clauses transferring the author's movie rights to the motion picture company as well as a clause pursuant to which the personality traits of *Fantômas* could be modified only with the author's consent.

Later on, the motion picture company changed the protagonist of *Fantômas* novels from frightening to comic and as soon as the author learned about the change he objected on the grounds that this modification was a gross distortion of his work.

Consequently, the parties decided to amend their contract and the novel's author expressly accepted all changes that had been made in exchange for a certain payment. The author also agreed that the credit line in the motion picture should be modified to reflect the fact that the movie version was only inspired by, but not based on, the author's work.

After signing the amended agreement, a commercially successful trilogy of *Fantômas* movies was released and the author sought to have the contract annulled, claiming it violated his moral rights, and he sued for damages.

The motion picture company claimed the author had expressly accepted the fact that the movie version departed from the literary original and that he had been paid accordingly. But *Fantômas* prevailed before the trial court, annulling the amendments to the contract on the ground that a waiver was against the author's dignity and against the public order.

The motion picture appealed and the Appellate Court reversed upholding the amended contract because first, the author had exercised his inalienable moral rights by accepting the modification

made in exchange for money; second, the disclaimer in the credit line of the movie was sufficient to alert the public about the modifications and third, moral rights do not provide authors with the power to unilaterally abrogate contracts that were freely concluded in full knowledge of the circumstances.

The *Fantômas* case fits precisely into the standard established by the fourth rule of the guideline which provides that an effective system shall include, allow and respect both contractual and statutory limitations made by the authors who are fully aware of the circumstances and have consciously decided to surrender or exchange certain terms and conditions, allowing the work to be reasonably, functionally and usefully modified for the public.

As a result of the court ruling in the *Fantômas* case, a general judicial principle has been applied by French courts which is that contract waivers *ex ante* of the right of integrity is void, while *ex post* waivers are generally considered valid because in this case, the author can sense the modifications, as they already have been done and can agree in awareness. Nevertheless, French courts have also admitted *ex ante* waivers in specific cases where the author has forced the contracting party to mention on the movie, book or music cover that the author which created the inspiring book, novel or song did not create the movie.

The author can reserve his right to consent or prohibit the changes. In this case, abuse may be possible on the part of the author, thus the person modifying the work would have to prove that the modification is reasonable or that the refusal over it is abusive. He can also specify in a contract to which modifications he agrees and to which ones he does not. However, if these modifications distort his work, he will be able to object to them.

The reason why waivers are so conflicting in France, is that French Law has granted moral rights with the characteristic of inalienability which means they cannot be repudiated or transferred to others, however this should not prevent contracts from giving a mandate to a society or an agent which will have the power to discuss exceptions to moral rights the authors.

On a final note, what is important about this issue is that every agreement should be reasonably balanced, in other words all parties should partake on the decision of which rights are to be waived or transferred, the type of modifications to work that will be allowed and fair compensations in case the arrangement is violated.

## **CONCLUSION**

Derived from the French conception of moral rights, understood to convey something closer to the mental, intellectual, spiritual and personal state of the creator, emerges the legal obligation of nations which intend to secure the flow of creativity, to recognize integrity and attribution rights as inherent to the author, perpetual and inalienable.

Personal rights derive from the work as an expression of the author's personality, who should at all times, unless he has expressly agreed otherwise, be able to control any modifications, alterations and attribution to his work.

Consequently, an effective system should grant moral rights characteristics that will allow the author to freely and perpetually dispose of his work, transfer its creations to others, exercise his economic and moral rights and achieve proper restoration of his honor or reputation in case it was damaged as a result of an infringement.

A balanced legal framework should also include limitations, statutory and contractual, in order to provide standing for all the parties involved.

When comparing the French Author's Rights System against the U.S. Copyright System, analyzing their philosophical approaches, copyright history, application of their current rules and regulations and finally case law, what can be concluded is that in seeking to establish rules on how to determine which system provides a more effective protection to moral rights, the constituted guideline drafted by the present paper has its basis on the French Intellectual Property Code because it conceptualizes moral rights as personal rights, independent and additional author's rights which have proven to necessarily require a single, extensive and detailed regulation which grants authors a special treatment, unlike in the U.S. where authors should meet certain requirements and fulfill certain standards in order to have a legal claim over infringement to their moral rights.

Today France remains the undisputed champion of author's moral rights and the tendency is that other Western European and Latin American nations are following its lead, codifying variations and combinations of moral rights regulations.

At the end, regardless of which system proves more effective the main issue still remains unresolved, which is the current need to agree on and create a stronger uniform and international protection for moral rights. Unfortunately the minimal compliance approach of the U.S. and other countries to the Berne Convention, has caused disparity between common law and civil law jurisdictions making authors feel less motivated to create new works as they have no assurance that their creations will be well protected.

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