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Moral Rights and the Realistic Limits of Artistic Control

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MORAL RIGHTS AND THE REALISTIC LIMITS OF ARTISTIC CONTROL

Artists, musicians, and authors have a substantial need to protect their work from being presented to the public in a distorted form. In addition to their insecurity in depending on the public for financial support, most artists are relatively unsophisticated in the business, commercial, and legal aspects of their art. It is essential that artists understand the scope and limits of available protections — statutory, judicial, contractual, or otherwise.

Protection of artistic works raises difficult issues, some of which do not lend themselves to legal analysis and solutions. Foremost is the question: When has an artistic work been altered in such a way that the author/artist/composer may be damaged economically or personally? Other questions arise, such as: Has the original work been diluted and mutilated? Who is competent to decide? How far may authorized adaptations deviate in order to express the adapter's personal vision? To what degree do technological requirements affect the transfer of a work of art from one medium to another? Who should reshape the work to suit the newer medium? And finally, what protections are available for the creator's reputation and personality? There exists a growing tendency to recognize rights in personality and in the integrity of the creator's work. While it is laudable to champion increased rights for artists, there are problems and conflicts apparent in proposing to expand the right of integrity in the United States.[1]

This Comment explores the relative positions of musical composers, visual artists, and writers against the available legal protections for their personal rights. As one author recognizes: "[E]ven as American law begins to recognize artists' rights be-

1. Support for statutory or judicial recognition by the United States of a moral rights doctrine can be found in a number of thorough and well-reasoned law review articles. *See, e.g.*, Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244 (1978); Berg, *Moral Rights and the Compulsory License for Phonorecords*, 46 BROOK. L. REV. 67 (1979).

yond copyright, it does so within a tradition that is concerned for the interests of many parties."[2]

> We are the music-makers,
> And we are the dreamers of dreams,
> Wandering by lone sea-breakers,
> And sitting by desolate streams;
> World-losers and world-forsakers,
> On whom the pale moon gleams:
> Yet we are the movers and shakers
> Of the world for ever, it seems.[3]

The ancient troubadours had few restraints on their artistic expression. As they wandered, dependent on the spontaneous generosity of their listeners, they freely composed ballads out of current events. Whatever audience a troubadour could capture would be surprised either by new words to familiar melodies (sometimes secular variations on sacred hymns) or completely fresh material. As the early ballads spread, other balladeers modified them to suit their own talents and style, or their personal tastes in melody and meter. Names and other facts in the songs were freely adapted to suit a particular locale, and true authorship was difficult to fix.

Perhaps early ballad-makers longed for some protection to prevent distortion of their songs and damage to their artistic reputations. Perhaps they wished a monopoly over exploitation of their ballads for economic benefits. Today, the need for economic safeguards is met by federal copyright law, which provides the copyright owner with the exclusive rights to reproduce, distribute, publicly perform, or display the creative artist's work, and to prepare derivative works.[4] The federal statute does not, however, explicitly protect the artist's personal rights, generally called "moral rights."

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2. Da Silva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. CR. SOC. 1, 56 (1980). The author points up the limitations in application of the French statute, and questions whether vesting the artist with the moral right of integrity is the fairest and most effective way to ensure that artists' interests are protected. *Id.* at 12, 37.

3. A.W.E. O'Shaughnessy, *Ode*, A LITTLE TREASURY OF GREAT POETRY 676 (O. Williams ed. 1947).

4. 17 U.S.C. § 106 (1976).

I. Recognition of Moral Rights

The doctrine of moral rights exists in many civil law nations as a separate interest from the protection of the artist's economic rights. "It includes non-property attributes of an intellectual and moral character which give legal expression to the intimate bond which exists between a literary or artistic work and its author's personality; it is intended to protect his personality as well as his work."[5] Under this doctrine, the creator of an artistic work exercises rights in three main areas: 1) he may control publication and may withhold or withdraw the work from publication; 2) he may have his name associated with the work or protect his anonymity with a pseudonym, or he may protect against false attribution; and 3) he may control modifications and alterations of the work to prevent its distortion or mutilation.[6]

Most European countries are members of the Berne Convention which provides standards for the protection of *droit moral*, or moral rights.[7] Basically, two rights are described: the

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5. Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 Am. J. Comp. L. 465, 465 (1968).

6. Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 Trademark Rep. 244, 245 (1978).

7. UNESCO, Copyright Laws and Treaties of the World, Berne Copyright Union, Paris Act, Article 6 bis (2) (1971). Article 6, a revision of the 1928 Rome text of the Berne Convention, reads:

> (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.
> (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiration of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
> (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Id.

right of paternity (the right to have one's authorship recognized), and the right of integrity (the right to prevent others from mutilating one's work).[8] In one French case, the right of integrity was upheld when artist Bernard Buffet was able to oppose the sale of separate elements of the refrigerator he had painted, claiming the decoration was done as an integral artistic unit.[9] French law extends recognition of moral rights to the right of disclosure (the right to decide when or whether one's work is completed), and the right to withdraw or disavow (limited by the author's obligation to compensate a publisher for losses incurred by withdrawal of the work).[10]

Recognition of moral rights is well established in Europe, deriving largely from judicial decisions of French courts since the middle of the nineteenth century. When the rules that came out of these decisions became codified in 1957, respect for the work of art was supported by statute.[11] "Even before *droit moral* was codified, French jurists recognized that *droit moral* is attached not to the work, but to the person who created it, and thus it remains vested in the artist even after the object itself has been transferred."[12]

While the United States has not yet given official acknowledgement to a moral rights doctrine, the courts have struggled over the years to find a reasonable theory on which to uphold personal rights. Federal copyright law is designed to protect an author's economic rights by providing a limited-term monopoly over exploitation of the author's work[13] and remedial measures against infringement.[14] The thrust of the statute is to grant protections to the proprietary interests of the copyright owner, who may not be the artistic creator.

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8. *Id.*

9. Judgment of May 30, 1962, [1962] D. Jur. 570 (Cours d'appel Paris); Judgment of July 6, 1965, [1965] Gaz. Pal. 2, 126 (Cour de Cessation).

10. Sarraute, *supra* note 5, at 467, 477.

11. *Id.* at 465, 466.

12. De Silva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. CR. SOC. 1, 12 (1980).

13. 17 U.S.C. § 106 (1976).

14. *Id.* §§ 501-510.

II. Federal Statutory Protections

When the Copyright Act was revised in 1976, some of the changes were designed to bring the Act into conformity with international copyright doctrine and practice. Protection is now one-term[15] and available without formalities.[16] Limited recognition of a moral right for music composers is now part of the statute.[17]

Provided the owner of the copyright in a musical composition has authorized the initial distribution of a recording of the work, anyone else who so desires may obtain a compulsory license to make and distribute his own recording of the composition by paying the prescribed statutory royalties to the composer.[18] This scheme represents a compromise between the desire to encourage composers to continue creating (by providing them assurance of regulation of royalty collections) while discouraging monopoly within the recording industry, so that copyrighted music is accessible to the public.[19]

The music industry has always supported the compulsory license aspect of the copyright statute which secures their access to copyrighted music. Fears were expressed early that any grant by a composer or copyright proprietor of exclusive rights would permit monopolization of recording rights to popular music, "and by controlling these copyrights monopolize the business of manufacturing and selling music producing machines, otherwise free to the world."[20]

The House Report on the 1976 Copyright Act reveals the

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15. 17 U.S.C. § 302 (1976). A single term measured by the life of the author plus fifty years is consistent with most countries of the world.

16. *Id.* §§ 405(a), 408(a).

17. 17 U.S.C. § 115(a)(2). Once an authorized sound recording is distributed to the public, section 115(a)(2) provides: "A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work . . . ." *Id.*

18. Note, *Moral Rights and the Compulsory License for Phonorecords*, 46 Brook. L. Rev. 67 (1979).

19. Case Comment, *Copyright - Compulsory Licensing, Similar Use and Piracy*, 10 Suffolk L. Rev. 1275, 1278 (1976).

20. H.R. Rep. 2222, 60th Cong., 2d Sess. 4 (1909).

legislative intent of section 115: "The second clause of subsection (a) is intended to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted, or travestied."[21] This is directly analagous to the right of integrity component of *droit moral* recognized under French law.[22]

One experienced attorney who represents recording artists has serious questions about the extent of changes that may be made in arranging a song. He comments that the compulsory license section is vaguely worded, and that a judge may not have the appropriate understanding of music to make an easy or proper determination.[23] Some freedom must be given to the licensee in making his own creative product short of altering the integrity of the underlying composition. The arranger has the right to create an "individual instrumental or vocal arrangement."[24]

Although the 1976 Copyright Act preempts coextensive state protection, the Act preserves other federal remedies.[25] Section 43(a) of the Lanham Trademarks Act,[26] while primarily a law preventing deceptive packaging of goods in interstate commerce, has been interpreted to encompass a range of deceptive trade practices, including those resulting in false attribution and distortion of literary and artistic works.[27] A singer brought suit successfully under this theory when the re-release of an old album presented his old style and old songs to his public. The court found that the current likeness of the singer on an album cover constituted a misrepresentation because the recording was more than ten years old.[28]

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21. Copyright Law Revision of 1976, H.R. REP. No. 1476, 94th Cong., 2nd Sess. 109, (1976).

22. Rosen, *Droit Moral for Musical Compositions: Section 115 of the New Copyright Act*, 5 ART AND THE LAW 88 (1980).

23. Telephone interview with Stanley Diamond, practicing music law attorney, Los Angeles (September 1, 1983).

24. Edward B. Marks Music Corp. v. Foullon, 79 F. Supp. 664, 667 (S.D.N.Y. 1948).

25. 17 U.S.C. § 301(d) (1976).

26. 15 U.S.C. § 1125(a) (1970).

27. Rich v. RCA Corp., 390 F. Supp. 530, 185 U.S.P.Q. 508 (S.D.N.Y. 1975).

28. *Id.* at 531. *See, infra*, note 29 and accompanying text in which the Lanham Act is broadly applied.

III. The Monty Python Case

The case that has stirred up the most excitement over moral rights is the "Monty Python" case,[29] in which the Second Circuit articulated the frustration of trying to grant relief for violations of personal rights when no explicit statutory protection is available. The case involved the unauthorized deletion of twenty-four out of ninety minutes of a program made by Monty Python, the popular British comedy group. ABC made the deletions so commercials could be inserted, and censored portions that they found offensive or obscene. The district court found that the cuts impaired the integrity of the work causing it to lose its "iconoclastic verve."[30] Although the court formally based relief on section 43(a) of the Lanham Act, which was intended to deal solely with the use of trademarks for false advertising, the rationale of the court reveals outright recognition of *droit moral.*[31]

In his majority opinion, Judge Lumbard stated that although American copyright law recognizes only economic rights, these rights are so closely tied to personal or moral rights as to be nearly indistinguishable:

> [Although] courts have recognized that licensees are entitled to some small degree of latitude in arranging the licensed work for presentation to the public in a manner consistent with the licensee's style or standards . . . the cuts made [by ABC] constituted an actionable mutilation of Monty Python's work. This cause of action, which seeks redress for deformation of an artist's work, finds its roots in the continental concept of droit moral, or moral right, which may generally be summarized as including the right of the artist to have his work attributed to him in the form in which he created it.[32]

The court's attitude clearly is that copyright law should be the vehicle to recognize the position of the artist and the need for adequate legal protection. Such protection encourages produc-

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29. Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14, 20-21, 192 U.S.P.Q. 1, 5-8 (CA 1 1976).

30. *Id.* at 18.

31. Rosen, *supra* note 22, at 89.

32. Gilliam, 538 F.2d at 23-4.

tion and dissemination of artistic works.[33]

The British Broadcasting Company (BBC) entered an agreement with Monty Python in which the comedy group reserved control over editing. The BBC was not permitted to grant editing rights to ABC in the sub-license agreement. The recorded program was a derivative work based on the script in which Monty Python held the copyright. The recorded program's copyright was owned by the BBC, but its use of the recorded program was "limited by the license granted to BBC by Monty Python for use of the underlying script."[34]

Under the provisions of the 1976 Copyright Act, if the author has not transferred rights, any derivative version or public performance of the work would be an infringement of the author's copyright.[35] However, once the author has authorized an adaptation, under the Act the author may not legally object to the artistic result as long as the result conforms to the boundaries of the transfer agreement.[36] "One who obtains permission to use a copyrighted script in the production of a derivative work, however, may not exceed the specific purpose for which permission was granted."[37]

Due to the extent of the editing and the breach of the contractual provisions regarding editing, the court concluded there was a likelihood of copyright infringement. Because the broadcast version departed substantially from the original work, the court found a valid cause of action for the distortion under section 43(a) of the Lanham Act.[38] Judge Gurfein argued against the section 43(a) claim in his dissent, commenting that the statute does not deal with artistic integrity or moral rights.[39]

Cases since *Gilliam* appear to step lightly around the moral rights stand taken by the Second Circuit. In *National Bank of*

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33. *Id.* at 23.
34. *Id.* at 19.
35. 17 U.S.C. § 501(a) (1976).
36. Comment, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490, 1505 (1979).
37. Gilliam, 538 F.2d at 20.
38. *Id.* at 24-25.
39. *Id.* at 27.

Commerce v. Shaklee Corp.,[40] the court was persuaded by *Gilliam's* holding that copyright infringement occurs when a licensee exceeds his license, and that an author has rights over the context and manner of presentation of his work. The *Shaklee* court, however, emphasized contractual rather than intellectual property rights.[41]

Another post-*Gilliam* editing case[42] more directly observed that moral rights have found protection under case law in this country. The court found the plaintiff's moral right "subsumed in his contractual right to seek redress for the alleged mutilation of his article."[43] Again, the courts find it easier to recognize moral rights when a contract is involved. Even more recently, an Illinois court[44] adopted *Gilliam*'s holding that copyright infringement will be found when a licensee exceeds the license grant from the copyright holder by performing unauthorized editing.[45]

Gilliam's impact is yet to be fully realized. Unmistakably, a foundation has been established with the first clearly articulated acceptance of moral rights by a federal appeals court. The importance of the Second Circuit's decision has not been missed. When "the nation's premier copyright court"[46] establishes a new attitude, there is the promise of a new vitality in a doctrine that was previously avoided.

IV. State Protection for Visual Artists

Recognition of the need for expanded protection is growing, particularly in relation to visual artists. One commentator[47] suggests that visual artists create in a rather solitary manner. Consequently, associations are not formed as in the case of other creative artists. Musicians and composers have protective options available such as unions, performance rights societies (e.g.,

40. National Bank of Commerce v. Shaklee Corp., 503 F. Supp. 533 (1980).
41. *Id.* at 544.
42. Edison v. Viva International, Ltd., 70 App. Div. 2d 379, 421 N.Y.S. 2d 203 (1979).
43. *Id.* at 421 N.Y.S. at 206.
44. WGN Continental Broadcasting Co. v. United Video, 693 F.2d 622 (1982).
45. *Id.* at 625.
46. Gracen v. Bradford, 698 F.2d 300 (7th Cir. 1983).
47. Karlen, *Moral Rights in California*, 19 S.D.L. Rev. 675, 678 (1982).

ASCAP and BMI), as well as the federal copyright statute. Writers for television and film are bolstered by membership in active national and local unions and guilds. Novelists, choreographers, directors, scene designers, and other entertainment industry professionals also look to their unions and guilds for advice, comfort, and strength. Support groups and professional organizations are less available to visual artists; therefore, legal protections are essential.

Fine artists in California (creators of paintings, sculptures or drawings) have recently been afforded statutory protection[48] to prevent the intentional "physical defacement, mutilation, alteration or destruction"[49] of the artist's work, including the right to claim or disclaim authorship.[50] While no case law has yet emerged testing the statute, the influence of this bold legislation is beginning to be felt elsewhere.[51]

V. Alternative Theories of Relief

Without a formal moral rights statute addressing the works of writers, and without protection broader than that offered composers under the compulsory license section of the Copyright Act, artists will continue to seek redress of violations through alternative theories. Over the years the success rate has been inconsistent. While a number of opinions make reference to moral rights, the courts usually seek a contract or unfair practices basis for granting relief. In *Vargas v. Esquire, Inc.*,[52] the

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48. The California Art Preservation Act of 1979, Cal. Civ. Code § 987 (Deering Supp. 1982).

49. Cal. Civ. Code § 987(c)(1) (Deering Supp. 1982).

50. Cal. Civ. Code § 987(d) (Deering Supp. 1982).

51. New York has recently passed its own moral rights statute for visual artists similar to the California legislation. N.Y. Gen. Bus. Law § 228-m (1983). Legislation in this area is even more notable coming as it does from the two states with the largest population of artists, including major artists, and which are the centers of the publishing, art, and entertainment industries. The impact on other jurisdictions throughout the country is as yet unmeasured. In fact, no case law has yet emerged testing the California statute.

52. Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947), *cert. denied*, 335 U.S. 813 (1948). The court expressed its discomfort with the moral rights issue:

> Plaintiff advances another theory which needs little discussion. It is predicated upon the contention that there is a distinction between the economic rights of an author capable of assignment and what are called "moral rights" of the author said to be necessary for the protection of his honor and integrity. . . . What plaintiff in reality seeks is a change in the law

Seventh Circuit was unwilling to recognize an artist's paternity right. The artist had sold his drawings to *Esquire* magazine, which published them without attributing authorship to Vargas. Without a contractual provision requiring that Vargas' name be used, the court refused to allow a presumption of an agreement allowing the artist to claim authorship. Such unwillingness is not surprising considering there is no historical context in this country for an inherent right to claim authorship. Our copyright statute, in fact, provides that in the case of a work made for hire the employer may be considered the author.[53]

Relief was granted in a Second Circuit case[54] in which record producer Norman Granz contracted with the purchaser of his master recordings to require that credit to Granz be printed on the record labels. Abbreviated versions of the recordings were sold (bearing Granz's name on the jackets) and Granz objected. The court found a breach of the contract and false representation leading to unfair competition.[55] Once again, *droit moral* was considered and was seen as inappropriate as the basis for the decision.[56]

Artists are understandably confused with divurgent results such as these. Vargas had no specific contract clause requiring artist credit while Granz managed to obtain such an express provision. Without a statutory right in paternity, American courts are generally unwilling to provide relief when the parties have no contractual duties for the court to adjudge. Perhaps, too, the

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> in this country to conform to that of certain other countries. We need not stop to inquire whether such a change, if desirable, is a matter for the legislative or judicial branch of the government; in any event, we are not disposed to make any new law in this respect.

Id.

53. 17 U.S.C. § 201(b) (1976).
54. Granz v. Harris, 198 F.2d 585 (2d Cir. 1952).
55. *Id.*
56. *Id.* at 590. (Frank, J. concurring)

> [I]t is an actionable wrong to hold out the artist as author of a version which substantially departs from the original . . . [however] without rejecting the doctrine of "moral right," I think that, in the light of the foregoing, we should not rest decision on that doctrine where, as here, it is not necessary to do so.

Id. See Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 557 (1940).

Granz court was more sympathetic than the *Vargas* court because of the nature of the defendant's conduct in deleting eight minutes of performance from Granz's recordings.[57]

Some latitude is granted licensees to adapt a work in light of industry practice, yet an express contractual provision to enjoin editing will be upheld.[58] Relief was denied in a case involving Otto Preminger's movie, "Anatomy of a Murder," because it was found that the proposed cuts in the film were within acceptable limits. However, the court noted that substantial cuts could be described as "mutilation" and said: "Should such 'mutilation' occur in the future, plaintiffs may make application to this Court for injunctive or other relief. . . ."[59]

A prominent film director who had retained editing rights in his contract unsuccessfully sought to enjoin a television network from editing his feature film.[60] While the court was impressed with the "unusual and rare grant to plaintiff of sole control over production,"[61] they agreed with the trial court that the commercial interruptions did not affect the integrity of the film. They further took notice of testimony that "plaintiff's ability to command the highest compensation was not adversely affected by the televising of his films."[62] As in the *Preminger* case, the court felt impelled to interpret the contract according to the prevailing custom in the trade which allows stationmasters the right to use their judgment regarding cutting and editing.[63] Perhaps an attentive attorney could have preserved the protections sought by Preminger and the movie owner. A stronger case is made when editing is evaluated as violative of an agreement between the parties.

A New York court[64] questioned the existence of a moral

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57. Granz, 198 F.2d at 588.

58. Preminger v. Columbia Pictures Corp., 49 Misc.2d 363, 267 N.Y.S. 2d 594 (1966), *aff'd without op.* 25 App. Div. 2d 830, 269 N.Y.S.2d 913, *aff'd without op.* 18 N.Y.2d 659, 219 N.E.2d 431 (1966).

59. *Id.*

60. Stevens v. National Broadcasting Co., 270 C.A.2d 886, 76 Cal. Rptr. 106 (2nd Dist. 1969).

61. *Id.* at 893.

62. *Id.*

63. Preminger, 267 N.Y.S.2d at 599, 600.

64. Shostakovich v. Twentieth-Century Fox Film Corp., 196 Misc. 67, 80 N.Y.S. 2d 575, 579, 77 *aff'd* 275 App. Div. 692, 87 N.Y.S.2d 430 (1949).

right, though the claim was based on defamation, rather than on distortion of the plaintiffs' work. Several Russian composers brought suit because the use of their public domain music in the sound track of a film cast upon them the false imputation of being disloyal to their country, due to the film's political attitude. The court was hesitant to grant relief without a clear showing of the existence of libel, and "in the absence of any clear showing . . . of any invasion of a moral right . . . ."[65] Perhaps if the composers' music was not in the public domain, the result would have been different. The artists would then be entitled to protection under copyright law and would have more control over the use of their creations in a context which is not offensive to their beliefs. When the same composers brought suit in France, historically a more receptive forum, they succeeded with their libel claim, proving violation of their moral rights, and prevented the showing of the same film.[66]

On a theory of invasion of privacy, John Lennon succeeded in preventing distribution of a recording of his music on the grounds that the poor quality of both the recording and the album cover design amounted to mutilation of his work and injury to his reputation.[67] Evidence was presented that Lennon and his wife had posed nude for a previous album cover, to support the defendant's argument that Lennon's reputation was already impure. The court maintained that the trial court had come to the correct conclusion: the album cover was "cheap-looking, if not ugly," and the quality of the recording was "shoddy and fuzzy."[68] Fortunately for Lennon, the court was able to compare this album to Lennon's other work and appreciate the difference in quality. Another court with different musical taste and judgment might produce a contrary assessment. The *Lennon* decision raises the issue that the artist may be a victim of a court's subjective response to a piece of art.

When special knowledge is required to analyze and understand a particular cause of action, expert testimony is usually provided by both sides. While experts in computer technology, medicine, or even auto repair may differ, at least objective mea-

65. *Id.*
66. Judgment of Feb. 19, 1952, [1952] D. Jur. II 204 (Cours d'appel Paris).
67. Big Seven Music v. Lennon, 554 F.2d 504, 512 (2d Cir. 1977).
68. *Id.*

surements, tests, and standards based on industry practices are available for consideration. The arts do not lend themselves to such objectifying. Certainly, standards of taste exist and "classics" are universally recognized. But for a pop song, a new play by an unknown writer, a sculpture by a new artist, where are the tests? Which critic can claim that his or her personal taste is the most refined? While these questions are unanswerable, the insecurity of the artist's position is important to recognize.

When contractual protections were lacking in another New York case[69] the court was still inclined to find a theory for granting relief because, as the plaintiff claimed, the paperback reprint of a book altered the original text so extensively, primarily by omissions, as to constitute mutilation. A moral rights claim, the court suggested, is given limited recognition in New York, and is usually tied up with contractual terms. Yet, the court demonstrated its recognition of the problem when it stated, "[e]ven after a transfer or assignment of an author's work, the author has a property right that it shall not be used for a purpose not intended or in a manner which does not fairly represent the creation of the author."[70] The defendant publisher was ordered to inform the public that omissions and juxtapositions were made in the paperback version of the plaintiff's book.[71] A judicial stance of this nature is a hopeful sign that American courts are beginning to recognize, as do the Europeans, that an author has personal rights which remain with him even after proprietary rights have been transferred. While such recognition has been slow in coming, every vindication of a creator's rights along these lines has an influence on future judicial determinations.

VI. Problems and Evaluation

Editorial tampering is the historical enemy of a writer. Other concerns shared by writers are offered by a legal scholar who has studied the fields of publishing, entertainment, and the arts:

> What if he sells a story and it is never published?

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69. Chesler v. Avon Book Division, Hearst Publications, Inc., 76 Misc. 2d 1048, 352 N.Y.S. 2d 552 (N.Y. Sup. Ct. 1973).

70. *Id.*

71. *Id.*

> What if he sells an article, and a "collaborator" is foisted on him who then gets co-authorship credit? What if he sells an article that represents his views on a certain subject as of the time of writing, and the article is not published until years later when his views have changed? What if he sells an article to a publication of some repute, and later finds that it appears (via a transfer in bankruptcy, say) in another of dubious standing? While these questions might not arise as frequently as those pertaining to editorial interference, they are by no means as rare as one might suppose.[72]

A. Adaptation

A common occurrence in the entertainment world is the licensing by a relatively unknown writer of a work of fiction to a major television studio or to a film production company. Invariably, the author is not permitted to transfer the work to the screenplay format required for the medium. Experienced staff writers who understand the technology of television or film are given the job of adaptation.

Moral rights are at issue when a work is adapted to another medium. Many writers view adaptions with suspicion as a possible distortion or mutilation of their underlying work. When the new author arrives at his or her attorney's office with a contract offer, there is time to negotiate for some control over the adaptation. While editing control is rarely granted unless the writer commands the privilege by virtue of the writer's fame and desirability, some measure of involvement may be obtained. A writer can be included as a consultant, or as an associate writer during the adaptation process or at the editing stage. More success is likely if the artist is dealing with a small, independent production company willing to relinquish some control.

The adaptation of *The French Lieutenant's Woman* from the traditional literary print medium to the technologically ad-

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72. LINDEY, ENTERTAINMENT, PUBLISHING AND THE ARTS — AGREEMENTS AND THE LAW, 2308-09 (2d ed. 1983) (three-volume set containing valuable cases, comments and forms, including agency agreements for talent and creative works).

vanced medium of film illustrates inherent conflicts, though the problems never resulted in a lawsuit. When John Fowles' novel was adapted by the skilled playwright and screenwriter Harold Pinter, the resultant film was considered "dull and distancing."[73] While the movie was generally popular, its limitations kept it from being a critical success. Pinter, seriously interested in *form*, used the device of enclosing the movie within a movie as a way of dealing with the literary issues of the novel. In the book, the author created a narrator to discuss nineteenth century novels as his device for writing a nineteenth century novel. Pinter's choices and prerogatives were clever, sophistocated, and respectful of the novel's artistic integrity; yet, they did not work.[74] The adapter was concerned with preserving the original, underlying book; yet, he was not writing another version of the book — he was creating another form. Perhaps 'faithfulness to the original' is an inappropriate standard to determine whether an author's moral rights have been violated.

Along with the issue of standards arises the critical question: Who decides? The original author may be an excellent critic of novels, yet may not have the skill or esthetic sense to judge a screenplay, particularly when he or she is emotionally attached to the work being adapted. John Fowles was thoroughly satisfied with the film adaptation of his novel, even while the critics were not. More problems will undoubtedly arise when the film is shown on television, assuming the author's original agreement grants subsidiary rights to the film company, as is the usual industry practice.

Adaptations for television are typically worked into a format of multiple, brief scenes, with visuals occupying a more prominent position than dialogue. Because television is in the home, the material is designed to fit into a context of intimacy and casualness. Television exists as a commercial medium, and frequent commercial advertisements, usually loud and active, are inserted to hold the attention of the passive, even somnolent viewer.[75] As the *Gilliam* case points out, however, unauthorized

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73. Telephone interview with Paul Singer, Film Critic of *The Twin Cities Times* (June 22, 1983).

74. *Id.*

75. This author's experience as a broadcaster (producer, writer) from 1967-1976 has provided a perspective on some of the special needs and problems in working with the

editing can be considered substantial enough to alter the nature of the work, and a breach of the license agreement and copyright infringement may be found.[76]

One French scholar has expressed appreciation of the sensitive issues implicated when an author complains of distortion in the adaptation process. Just as critical a concern is the position of the judge in making a purely esthetic appraisal as the basis for a court decision.[77] He suggests that attorneys simplify the assignment of rights in adaptation contracts which would avoid placing the courts in a difficult position and which would make esthetic disputes unnecessary. One approach grants the author approval rights over the adaptation. Another arrangement would permit the author to create the script for a film adaptation of his or her work, modifications of which would require the author's consent. The final idea is the realistic alternative to the first two: "to trust the adapter and accept the risks involved."[78]

B. Legal Action

When the new writer is intent on bringing suit for violation of the personal integrity of his or her writing, the theory indicating the likeliest success is breach of contract. Case histories demonstrate that the courts are most comfortable determining rights and obligations of the parties according to the promises set forth in a written agreement. If the contract is silent in the particular area surrounding the violation, the writer's attorney may have to research customs in the trade and prior conduct between the licensee and other writers. If the defendant is a production company that often turns good writing into pornographic scripts, the court will likely find that the writer should have known such reputation. If plot elements are rearranged, the court would likely look at whether the writer's work appears garbled or mutilated before granting relief. Unless the court is highly offended by the defendant's conduct, the interests of both sides will be balanced.

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medium of television.

76. Gilliam, 538 F.2d at 20-21, 192 U.S.P.Q. 5-8.

77. Sarraute, *supra* note 5 at 482.

78. *Id.*

If express provisions of a contract have not been breached, yet the writer is dissatisfied with the treatment of his or her work, a theory of invasion of privacy or false representation may succeed in obtaining equitable relief. If the quality of a filmed version of the author's work is amateurish, poorly adapted, poorly performed, or difficult to see or hear, the artist's attorney may be able to bring a successful libel action, arguing injury to the writer's reputation and loss of future writing offers.

Statutory violations are another area in which the courts appear comfortable when called upon to assess a moral rights argument. A claim may succeed if the writer can show that the extent to which his or her story has been rewritten fundamentally changes its nature so that the public would be misled to believe the writer was the source of the work. If a television station interrupts the story excessively, changes key story elements, or alters the characters, the court may find a violation of the Lanham Act,[79] insofar as the writer is presented to the public as the creator of a work not his or her own.

When the writer argues that the serious manipulation of his or her story, language, or characters exceeds the boundaries of the transfer agreement, the court may find an infringement of the federal copyright statute. When the underlying work is used in an unauthorized manner and is fragmented or distorted, the courts are now more inclined to find an infringement of the writer's copyright control.

C. Cooperation in the Industry

One experienced attorney sees "sensitive editing of feature films for television" as the critical concern in the context of moral rights.[80] Whereas Congress, unlike legislatures in civil law countries, has appeared reluctant to issue expanded rights to artists,[81] the attorney suggests that the Motion Picture Associa-

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79. 15 U.S.C. § 1125(a) (1970).

80. Interview with Robert E. Gordon, practicing entertainment law attorney, in San Francisco (June 23, 1983).

81. Three different attempts were made in recent legislative history to amend the federal copyright statute by adding a new subsection (d) to section 113 ("Scope of exclusive rights in pictorial, graphic, and sculptural works"). Each proposal was sent to a committee of the Judiciary, with no serious action yet taken. The proposed "Visual Art-

tion of America (MPAA) set the standards for tasteful, careful editing, attentive to the input from professional groups such as the Directors Guild and the Writers Guild.

The television industry alone has yet to set up standards for the extent of permissible cuts, the maximum number of interruptions, and the duration of the interruptions. Their treatment of the problem is merely to identify some films as "edited for television."[82]

An affiliation agreement between the major studios and the guilds would reflect an awareness of the need for editing standards. Such industry cooperation may be the only viable means of influencing this practice. An author granting film rights is quite removed from the power level along the production chain. He or she is often thrilled with the opportunity to have a work produced, and accepts the position of impotence once the work is licensed. Some have distinguished themselves sufficiently to contract for some artistic control over editing. Occasionally protection is lacking because the contract is silent. More often than not, however, the contract will be written to exclude the artist.[83]

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ists Moral Rights Amendment" reads:

> Independently of the author's copyright in a pictorial, graphic or sculptural work, the author or the author's legal representative shall have the right, during the life of the author and fifty years after the author's death, to claim authorship of such work and to object to any distortion, mutilation, or other alteration thereof, and to enforce any other limitation recorded in the Copyright Office that would prevent prejudice to the author's honor or reputation.
>
> H.R. 8261, 95th Cong., 1st Sess. (1977);
>
> H.R. 288, 96th Cong., 1st Sess. (1979);
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> H.R. 2908, 97th Cong., 1st Sess. (1981);
>
> H.R. 1521, 98th Cong., 1st Sess. (1983).

The legislative assistants to Representative Barney Frank (D-Mass.) report that no hearings have yet been held on the most recent proposal, but that the resolution was refiled this session. Telephone interview with Ann Kelly (August 4, 1983), and Bill Black (August 16, 1983).

82. LINDEY, *supra* note 72, at 146.

83. Interview with Chris Door, Producer with Korty Films Co., in Mill Valley, CA. (August 5, 1983), emphasizing that "compromise is the nature of the film industry," and that unless one puts up his own money, "the studio and the network have the final cut." *Id.*

D. Emerging Technology — Unknown Encroachments

As new technology changes the face of popular entertainment, the rapid developments delight and frighten us at the same time. Electronic publishing, among the newest forms to emerge, is an electronic means of transmitting pictures and text over the air, by cable, or by telephone wires, displaying the text on a television screen or other terminal. The Federal Communications Commission (FCC) recently gave television stations permission to broadcast written or graphic information nationwide using a system called teletext.[84]

However, when such apparent freedom is granted to use a potentially powerful, pervasive medium, self-regulation may be inadequate. *California Lawyer*'s reporter projects concern when he states: "There are many unanswered questions about how copyright, libel, defamation, obscenity and privacy laws will apply to electronic publishing."[85] Some of those questions may be addressed if the Media Access Project in Washington, D.C. petitions the FCC for reconsideration of its rulings. Unclear as yet, are the possible risks to artists and their work when utilized over this medium.

VII. CONCLUSION

Until the artist is capable of bargaining from a position of power, his or her moral rights will be protected only through existing legal doctrines and a sympathetic court. Mutilation, serious alterations, publication of a truncated or garbled version of an artist's work have been treated by American courts as demanding some relief for the artist. Judicial opinions range from identifying the right in a work as purely proprietary to recognizing it as obviously personal. Many courts state that without statutory provisions for the protection of personal rights, only a contract between the parties can encompass the desired protections. More and more, the integrity of the work will be considered deserving of judicial protection, and grounds to support a remedy for a violation will reach to libel, unfair competition, copyright,

84. Carlson, *New Age Front Page*, CALIFORNIA LAWYER, June, 1983, at 14.
85. *Id.* at 18.

and the right of privacy. The burden of establishing the seriousness of the invasion and its material harm to the work is placed upon the artist and artist attorneys. Case law seems to point toward contract as the best basis for protection for writers licensing their work. The weakness of their bargaining position is a reality, though not a bar to effective negotiation.[86]

Recognition of moral rights may never be codified by statute in this country as it is in Europe. Yet, the enactment of the compulsory license section of the revised copyright statute[87] and the passage in two important states of protective statutes[88] for visual artists strongly indicate a favorable perspective. Legal scholars are notably encouraged by the interest in moral rights expressed by the nation's most respected copyright court in the *Gilliam* case.[89] The basis for a positive shift in perspective has been established, suggesting that this country's courts may develop and focus the support for artists' rights.

Since the human rights movements of the '60's, public consciousness of individual rights has continued to develop. Part of that development is respect for the creative spirit which blossoms most freely when the creator is allowed control over his means of expression, during and after creation. Recognition of the artist's personal rights in the integrity of his work is a healthy trend. A related concern is whether a moral rights doctrine places the artist in the position of censor of the work of other artists who are adapting the creator's work. Again, a balancing of interests is essential. Total control may translate as total deprivation of the public's need for creative nourishment. California and New York are pointing the way to an enlightened perspective regarding creators and their special needs, and our need to have access to work that is created without fear. As one

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86. Another insight from an entertainment industry insider emphasizes the difficulty of a creative artist's position. A writer is encouraged to take a "professional posture" and accept his part in the collaborative enterprise of producing a film or teleplay. If loss of control over a script sold to a studio or owned by a studio employer is too difficult to accept, this industry professional suggests the writer find "a medium without a producer." Telephone interview with Martin Sweeney, Business Representative of the Writers Guild of Hollywood, (July 28, 1983).

87. 17 U.S.C. § 115 (1976).

88. *See supra* note 36 and note 39.

89. Interview with Professor Neil Boorstyn, author of *Copyright Law* (1981), in San Francisco, October 18, 1983.

court admonishes: "Even the matter-of-fact attitude of the law does not require us to consider the sale of the rights to a literary production in the same way that we would consider the sale of a barrel of pork."[90]

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90. Clemens v. Press Publishing Co., 67 Misc. 183, 184, 122 N.Y.S. 206, 207 (Sup. Ct. 1910) (Seabury, J. concurring).

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