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Deconstructing Moral Rights

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INTRODUCTION

One of the most noteworthy developments in transnational copyright law over the past twenty years has been the adoption of statutory moral rights regimes in a number of countries that had previously ardently rejected the civil law concept of moral rights as completely alien to their legal tradition, including the United States, the United Kingdom, Australia, Ireland, and New Zealand. The standard scholarly reaction to these developments is to ask what they mean for the two classic questions of comparative moral rights law, namely whether the common law countries fulfill the requirements for moral rights protection under international law and whether the common law countries provide a degree of protection comparable to that available in civil law countries.[1] In this context, the enactment of statutory moral rights appears to be simply another factor to be considered when measuring the substantive level of moral rights protection in the United States, just as the Supreme Court's recent *Dastar* decision,[2] the copyright management information provisions of the Digital Millennium Copyright Act of 1998,[3] or the Family Movie Act of 2005[4] are factors

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1. These questions have been the subject of scholarly inquiry since at least the 1930s. Examples of those inquiries include: Louis Swarts, *La giurisprudenza americana in materia di diritto morale di autore*, 2 IL DIRITTO DI AUTORE 207 (1931); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940); Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law*, 24 S. CAL. L. REV. 375 (1951); William Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506 (1955); James M. Treece, *American Law Analogues of the Author's "Moral Right,"* 16 AM. J. COMP. L. 487 (1968); John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976); Russell J. DaSilva, *Droit Moral and the Amoral Copyright*, 28 BULL. COPYRIGHT SOC'Y 1 (1980); Roberta Rosenthal Kwall, *Copyright and the Moral Right*, 38 VAND. L. REV. 1 (1985); Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988); Neil Netanel, *Alienability Resgtrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1 (1994).

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

3. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in 17 U.S.C. § 1202 (2000)).

4. The Family Movie Act of 2005, which exempts from copyright and trademark infringement liability certain services and technologies that enable individuals to skip and mute audio and video content in motion pictures, is Title II of the Family Entertainment and Copyright Act of 2005. Pub. L. No. 109-9, 119 Stat. 218, 223–24 (2005). The Family Movie Act was enacted as a partial legislative intervention in the pend-

in this type of analysis.[5] However, among these factors, the recognition of specific moral rights as part of copyright law is particularly significant, because it symbolizes a fundamental break with the traditional conception of moral rights in common law countries.

After all, it had been a canon of comparative copyright scholarship that the most significant difference between Anglo-American and Continental European copyright law was their respective attitudes toward moral rights. The inclusion of moral rights in statutory copyright law was generally understood to be the defining feature of the Continental copyright tradition, while the lack of statutory moral rights protection was considered to be a crucial component of the Anglo-American copyright tradition. This dichotomy had been celebrated and cultivated since World War II on both sides of the Atlantic to the point where the statutory protection of moral rights or the lack thereof had become an integral part of each legal system's identity, essentially dividing the world of copyright into two fundamentally different ideal types, one that includes moral rights, and another that excludes moral rights.[6] The common law courts were fully aware of this dichotomy, and while they recognized the existence of the concept of moral rights in civil law countries, they uniformly rejected its applicability in their own jurisdictions.[7] Against this background, the adoption of civil-law-style moral rights legislation is a major shift in terms of copyright theory, because it eliminates the key feature that distinguished common law from civil law copyright systems. The fact that the law of moral rights is a field in which the United States is an importer rather than an exporter of legal concepts makes this shift all the more noteworthy in times in which it is typically the law of the United States that is received in other countries,[8] especially in intellectual property law.[9]

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ing moral rights case of Huntsman v. Soderbergh, No. 02-M-1662 (MJW) (D. Colo. filed Aug. 29, 2002).

5. *See, e.g.*, Graeme W. Austin, *The Berne Convention as a Canon of Construction: Moral Rights After* Dastar, 61 N.Y.U. ANN. SURV. AM. L. 111 (2005); Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9 (2001); Justin Hughes, *American Moral Rights and the* Dastar *Decision* (Cardozo Law Sch., Working Paper No. 96, 2005).

6. Of course, the distinction between common law and civil law countries has never been entirely accurate in the context of moral rights because there are common law countries, such as Canada, which enacted moral rights legislation in the 1930s, and there are civil law countries, such as Switzerland, whose copyright statutes did not contain any specific moral rights provisions until the 1990s. It is only for ease of reference that I continue to use these terms throughout this Article.

7. *See, e.g.*, Granz v. Harris, 198 F.2d 585, 590 (2d Cir. 1952) (Frank, J., concurring); Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947); Geisel v. Poynter Prods., Inc., 295 F. Supp. 331, 340 (S.D.N.Y. 1968); Edison v. Viva Int'l, 421 N.Y.S.2d 203, 206 (1979); Seroff v. Simon & Schuster, Inc., 162 N.Y.S.2d 770, 774 (Sup. Ct. 1957); Shostakovich v. Twentieth Century Fox Film Corp., 80 N.Y.S.2d 575, 578–79 (Sup. Ct. 1948); *see also* 2 STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 802 (1938).

8. The influence of American law on other legal systems has been the subject of various studies. *See, e.g.*, Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229 (1991); *see also* Duncan Kennedy, *Two Globalizations of Law and Legal Thought: 1850–1968*, 36 SUFFOLK L. REV. 631, 634 (2003).

9. The most recent example is the export of the rules governing the legal protection of technological measures from the United States to the European Union ("EU") and from there into the law of the member states. The EU official in charge of drafting the relevant EU regulations openly stated that key provisions

This Article is a study of the now dominant mode of conceptualizing moral rights as inalienable rights of authors in their works. My purpose is to use comparative law to enhance our understanding of this particular concept of moral rights and to assess the effects of the recent wave of moral rights legislation in the United States and other common law jurisdictions on the substantive level of protection available to authors. More specifically, my claim is that, if the goal was to increase the overall protection of authors, it was a step in the wrong direction for the common law countries to adopt the civil law concept of moral rights, because the statutory moral rights regimes that were enacted in the United States and the United Kingdom have likely reduced rather than increased the aggregate level of authorial protection.

My analysis will proceed in four steps. Part I presents and illustrates the orthodox theory of moral rights by drawing upon the statutory moral rights regimes of France, Germany, and Italy, the strongholds of the Continental moral rights tradition. Part II disaggregates the civil law concept of moral rights into the concrete decisional rules of which it consists in order to create a reliable basis for comparison across different moral rights systems. Part III compares the moral rights orthodoxy to the conceptual alternatives traditionally used in countries which did not subscribe to the standard concept of moral rights until recently. My analysis will focus on the United States and the United Kingdom as two major representatives of the common law tradition and on Switzerland as an example of a civil law country that resisted the adoption of the Continental moral rights doctrine for decades. Part IV evaluates the effects of the newly enacted statutory moral rights regimes on the overall protection of authors in the United States and the United Kingdom.

I. The Moral Rights Orthodoxy

The orthodox theory of moral rights is that authors of copyrightable works have inalienable rights in their works that protect their moral or personal interests[10] and that supplement the set of economic rights traditionally granted to copyright holders in all jurisdictions.[11] The non-economic interests of authors are found worthy of protection because of the presumed intimate bond between authors and their works,[12] which are almost universally understood

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were based on the Digital Millennium Copyright Act. 17 U.S.C. § 1201 (2000). *See* Jörg Reinbothe, *Die EG-Richtlinie zum Urheberrecht in der Informationsgesellschaft*, 50 Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil [GRUR Int.] 733, 741 & n.44 (2001) (F.R.G.).

10. *See, e.g.*, Lionel Bently & Brad Sherman, Intellectual Property Law 231 (2d ed. 2004); 1 Stig Strömholm, Le droit moral de l'auteur 377 (1966) (Swed.) (defining moral rights as the "legal recognition of non-economic interests of the author").

11. The term "moral right" derives from the French expression "*droit moral*" and is a misnomer in the sense that moral rights are neither the opposite of immoral rights nor of legal rights. Instead, moral rights are meant to be the opposite of economic rights, which is what the traditional set of copyright entitlements is often called in Continental Europe.

12. *See, e.g.*, Haimo Schack, Urheber- und Urhebervertragsrecht 19, 144 (3d ed. 2005) (F.R.G.); Morris E. Cohn, *Author's Moral Rights: Film and Radio*, 1 Hollywood Q. 69, 69–70 (1945) ("The foundation of the doctrine [of moral rights] is the belief that the bond between an artist and his

to be an extension of the author's personhood.[13] The standard set of moral rights recognized in the literature[14] consists of the author's right to claim authorship (right of attribution), the right to object to modifications of the work (right of integrity), the right to decide when and how the work in question will be published (right of disclosure), and the right to withdraw a work after publication (right of withdrawal).[15] Since moral rights are commonly viewed as the product of French case law and German legal theory,[16] I will base my description of the moral rights orthodoxy on a brief overview of the international rules that call for the protection of moral rights and a review of current French and German law, combined with a few references to Italian law as the third important Continental moral rights jurisdiction.

A. Moral Rights in International Law

Although the protection of moral rights is chiefly a matter of national law, a brief review of the international basis of national moral rights statutes is helpful in understanding the common core of transnational moral rights law. The primary international reference for moral rights is the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"),[17] which has contained a moral rights provision since 1928. The first paragraph of Article 6*bis*, which is universally understood as codifying the moral rights of attribution and integrity,[18] reads:

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work is different from that between any other craftsman and his product."); Adolf Dietz, *The Artist's Right of Integrity Under Copyright Law*, 25 INT'L REV. INDUS. PROP. & COPYRIGHT L. 177, 182 (1994); Raymond Sarraute, *Current Theory on the Moral Rights of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 465 (1968) (describing moral rights as giving "legal expression to the intimate bond which exists between a literary or artistic work and its author's personality").

13. *See* EDUARDO PIOLA CASELLI, TRATTATO DEL DIRITTO DI AUTORE 61 (2d ed. 1927) (Italy); HENRI DESBOIS, LE DROIT D'AUTEUR EN FRANCE 259 (3d ed. 1978) (Fr.); PAOLO GRECO & PAOLO VERCELLONE, I DIRITTI SULLE OPERE DELL'INGEGNO 103 (1974) (Italy); FRÉDÉRIC POLLAUD-DULIAN, LE DROIT D'AUTEUR 402 (2005) (Fr.); 1 SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 587 (2d ed. 2005); ALAIN STROWEL, DROIT D'AUTEUR ET COPYRIGHT 323 (1993) (Belg.); Pierre Sirinelli, Le droit moral de l'auteur et le droit commun des contrats 10 (Dec. 18, 1985) (unpublished doctoral thesis, Université de Droit, d'Economie et des Sciences Sociales de Paris) (on file at Langdell Library, Harvard Law School) (Fr.).

14. *See, e.g.*, DESBOIS, *supra* note 13, at 472; 3 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 17:23, at 17:200 (3d ed. 2005); PIERRE SIRINELLI, PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE 54, 56 (2d ed. 2003) (Fr.); Damich, *supra* note 1, at 7; Netanel, *supra* note 1, at 24.

15. Note that French and German scholars often use the singular to refer to these prerogatives in order to convey the idea that they are just elements of a broader moral right of the author. More specifically, the terms that are used are "*droit moral*" (moral right) in France and "*Urheberpersönlichkeitsrecht*" (author's right of personality) in Germany.

16. *See, e.g.*, STRÖMHOLM, *supra* note 10, at 117; EUGEN ULMER, URHEBER- UND VERLAGSRECHT 208 (3d ed. 1980).

17. Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

18. *See, e.g.*, BENTLY & SHERMAN, *supra* note 10, at 232; 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT (2005) § 8D.01[B], at 8D-7; RICKETSON & GINSBURG, *supra* note 13, at 600–02; Gerald Dworkin, *Moral Rights in English Law*, 8 EUR. INTELL. PROP. REV. 329 (1986); Kwall, *supra* note 1, at 10.

> 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.[19]

While the Berne Convention was not the first multilateral treaty to include a provision on moral rights,[20] it rapidly became the most important international source of moral rights. Aside from the largely symbolic references to moral rights in the 1948 Universal Declaration of Human Rights[21] and the 1966 International Covenant on Economic, Social, and Cultural Rights,[22] very little happened after 1928 in terms of the international protection of moral rights. In fact, most international copyright treaties adopted after World War II do not contain references to moral rights. The Universal Copyright Convention of 1952[23] lacks any kind of moral rights provision,[24] and both the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") and the North American Free Trade Agreement ("NAFTA") explicitly exclude moral rights.[25]

The same reluctance to include moral rights in international instruments that provide access to effective enforcement mechanisms can be witnessed in the law of the European Union. Despite the fact that it has harmonized virtually every aspect of copyright protection over the past fifteen years, the European Union has excluded moral rights from its harmonization efforts on various

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19. Berne Convention, *supra* note 17, art. 6*bis*(1).

20. The Convention between the United States and Other Powers on Literary and Artistic Copyright, Aug. 11, 1910, 38 Stat. 1785, 155 L.N.T.S. 179, was amended in 1928 to include a moral rights provision in the newly created Article 13*bis*, *reported in* 22 AM. J. INT'L L. 135 (Supp. 1928).

21. Universal Declaration of Human Rights, G.A. Res 217A (III), art. 27(2), U.N. Doc. A/810 (Dec. 10, 1948) (invoking "the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author").

22. International Covenant on Economic, Social, and Cultural Rights, G.A. Res 2200A (XXI), art. 15(1)(c), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (referring to the right of every individual to "benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author").

23. Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132, *revised* July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178.

24. At that time, the omission of moral rights was celebrated as part of a victory of the American copyright system over foreign "*droit d'auteur*" systems that typically protect moral rights. *See, e.g.*, Joseph S. Dubin, *The Universal Copyright Convention*, 42 CAL. L. REV. 89, 101, 118 (1954).

25. Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS"), art. 9(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 81 ("[m]embers shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom."); North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, §§ 1701(2)(b), 1701(3), annex 1701.3(2), 32 I.L.M. 605 ("[n]otwithstanding Article 1701(2)(b), this Agreement confers no rights and imposes no obligations on the United States with respect to Article 6*bis* of the Berne Convention, or the rights derived from that Article."). Note that TRIPS technically establishes an obligation to comply with Article 6*bis* of the Berne Convention, but then makes this obligation ineligible for enforcement under the World Trade Organization's ("WTO") dispute resolution system. *See* RICKETSON & GINSBURG, *supra* note 13, at 617; Hughes, *supra* note 5, at 22–23.

occasions.[26] Moreover, the European Commission currently does not see any need for harmonization in this field[27] and resists the demands of some European academics for community-wide regulation of moral rights,[28] which is ironic given that the Commission routinely criticizes the United States for its lack of commitment to the cause of moral rights in copyright law.[29]

It was not until 1996 that moral rights again became the object of international regulation, when Article *6bis* of the Berne Convention was incorporated by reference into the World Intellectual Property Organization ("WIPO") Copyright Treaty ("WCT")[30] and expanded to apply to performing artists by the WIPO Performances and Phonograms Treaty ("WPPT"), with a slight, but significant, modification.[31] Article 5(1) of the WPPT reads:

> Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.[32]

Currently, Article 5 of the WPPT and Article *6bis* of the Berne Convention are the only relevant moral rights provisions on the international level. In moral rights parlance, they protect the rights of attribution and integrity of both authors and performers. Few European countries extend their statutory moral rights provisions to performers, but this will likely change upon implementation of the WPPT. While this Article is limited to the moral rights of authors, much of what is said also applies to the moral rights of performers to

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26. *See, e.g.*, Council Directive 2001/29 EEC of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, consid. 19, 2001 O.J. (L 167) 10; Council Directive 96/9 EEC of 11 Mar. 1996 on the Legal Protection of Databases, consid. 28, 1996 O.J. (L 77) 20; Council Directive 93/98 EEC of 19 Oct. 1993 Harmonizing the Term of Copyright and Certain Related Rights, art. 9, 1993 O.J. (L 290) 9; Council Directive 93/83 of 27 Sept. 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, consid. 28, 1993 O.J. (L 248) 15.

27. *See* European Commission, *Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights*, SEC(2004) 995, at 16 (July 19, 2004).

28. *See, e.g.*, Torben Asmus, Die Harmonisierung des Urheberpersönlichkeitsrechts in Europa (2004); Carine Doutrelepont, Le droit moral de l'auteur et le droit communautaire (1997); Axel Metzger, *Europäisches Urheberrecht ohne Droit moral?*, *in* Perspektiven Des Geistigen Eigentums und Wettbewerbsrechts–Festschrift Für Gerhard Schricker 455 (Ansgar Ohly et al. eds., 2005).

29. The European Commission has mentioned the lack of adequate moral rights protection in the United States for years in its annual report on U.S. trade barriers, even after the United States enacted federal moral rights legislation. *See, e.g.*, European Commission, *Report on United States Barriers to Trade and Investment*, 8, 65–66 (Dec. 2004) (referring to an "imbalance of benefits from Berne Convention membership to the detriment of the European side").

30. WIPO Copyright Treaty, art. 1(4), Dec. 20, 1996, 36 I.L.M. 65.

31. WIPO Performances and Phonograms Treaty, art. 5, Dec. 20, 1996, 36 I.L.M. 76.

32. *Id.* art. 5(1).

the extent that they currently are or will be protected by separate statutory rules.

B. The Civil Law Concept of Moral Rights

The copyright statutes currently in force in France,[33] Germany,[34] and Italy[35] contain provisions dedicated to the protection of the rights of disclosure, attribution, integrity, and withdrawal.[36] These rights are generally conceptualized as inalienable rights of authors in their works,[37] which means that they share the same three legal characteristics that determine whether a particular right granted to authors qualifies as a moral right.

First, moral rights are rights of *authors*, which is to say that only those human beings who *actually create* the work in question qualify as owners of moral rights.[38] Therefore, corporate entities and employers who hire third parties to create works for them do not qualify as authors.[39] As questionable as this notion of authorship may be from the perspective of literary theory[40] and modern artistic practices,[41] it is an integral part of many copyright doctrines, including the Continental doctrine of moral rights.[42] It is also routinely invoked by the courts to deny moral rights protection to persons or entities that do not qualify as authors in the moral rights sense. For example, one

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33. Since 1994, French copyright law is part of the French Intellectual Property Code, Law No. 92-597 of July 1, 1992, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 3, 1992, p. 8801 [hereinafter FIPC]. The FIPC essentially combines the moral rights provisions that were previously scattered throughout the French Act on Literary and Artistic Property of 1957. *See* Law No. 57-298 of Mar. 11, 1957, J.O., Mar. 14, 1957, p. 2723, arts. 6, 19, 20, 32, 47, 56.

34. The current German copyright statute dates back to 1965, but it has since been amended numerous times. *See* Urheberrechtsgesetz [Copyright Law], Sept. 9, 1965, Bundesgesetzblatt, Teil I [BGBl. I] at 1273, last amended by Gesetz, Sept. 10, 2004, BGBl. I at 1774 [hereinafter GCA].

35. The Italian Copyright Act was enacted in 1941 and has since been amended several times. *See* Law No. 633 of Apr. 22, 1941, Gazzetta Ufficiale della Repubblica Italiana [Gazz. Uff.], July 16, 1941, No. 166 [hereinafter ICA]. The Italian Civil Code also contains a few copyright provisions. *See* CODICE CIVILE [C.C.] arts. 2575–2583.

36. *See* FIPC, *supra* note 33, arts. L. 121-1, L. 121-2, L. 121-4; GCA, *supra* note 34, §§ 12–14, 42; ICA, *supra* note 35, arts. 12, 20–24, 111, 142–43. For English translations of a few of these provisions, see JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 311–13 (4th ed. 2002).

37. This concept of moral rights is sometimes—quite appropriately—called the "ideology" of moral rights. *See* John H. Merryman, *The Moral Right of Maurice Utrillo*, 43 AM. J. COMP. L. 445, 446 (1995); Netanel, *supra* note 1, at 6.

38. *See* ARTHUR R. MILLER & MICHAEL H. DAVIS, INTELLECTUAL PROPERTY 425 (3d ed. 2000) (describing moral rights as "inherent rights of authorship"). For a comparative study of authorship, see Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2003).

39. Although this principle is well-settled today, it was controversial in the past. *See, e.g.*, GEORGES MICHAÉLIDÈS-NOUAROS, LE DROIT MORAL DE L'AUTEUR 163–64 (1935).

40. *See, e.g.*, BENTLY & SHERMAN, *supra* note 10, at 232–33; Martha Woodmansee, *The Genius and the Copyright—Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUD. 425 (1984).

41. Examples of works that defy the conventional notion of authorship are digital mash-ups or computer-generated works, such as the ones that visitors of Cornelia Sollfrank's website can make by using her Net.Art Generator, http://nag.iap.de (last visited Mar. 27, 2006).

42. *See* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 41 DUKE L.J. 455, 496–500 (1991).

German court rejected a motion picture production company's request to be named in press materials released by the distributor of the motion picture on the grounds that economic rights do not provide a right to be named and that moral rights are not available to legal entities.[43] Moral rights are meant to protect authors who actually create the work in question as opposed to those who finance or commission the creation of that work and who may qualify as initial copyright owners, especially in countries recognizing the work-for-hire doctrine.[44] Not surprisingly, as I will show in more detail below, the tension between authors and copyright holders, which may result from a split between authorship and copyright ownership, is one of the most important themes in moral rights law today.

Second, moral rights are rights in *copyrightable works* similar in structure to economic rights, which is why moral rights law is considered an integral part of copyright law—the body of law governing rights in works of authorship. This is also the reason why France, Germany, and Italy decided to protect moral rights by modifying their copyright acts as opposed to enacting new non-copyright statutes or inserting them into pre-existing statutes outside copyright, such as their civil codes. The decision to insert moral rights into the copyright statutes was not a simple accident or a matter of pure legislative convenience, but instead the expression of the idea that moral rights are rights of authors in their works and therefore ought to be formally regulated as a part of copyright law. The copyright statutes of both France and Germany emphasize this point by explicitly mentioning two attributes and objectives of copyright protection: one moral and the other economic.[45] It is precisely the formal and conceptual unity of moral and economic rights as rights of authors in their works that is the essence of the "*droit d'auteur*" approach to copyright, which is generally viewed as the defining feature of Continental European copyright theory.[46] This conceptual unity also explains why

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43. *See* Oberlandesgericht Frankfurt [OLG Frankfurt] [Appellate Court] Feb. 15, 1990, 44 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1839, 1991 (F.R.G.); *see also*, Corte di cassazione (Cass.), sez. un., 28 luglio 1932 n.11, Giust. Pen. 1933, I, 910 (Italy), *reported in* 47 LE DROIT D'AUTEUR 66 (1934) (Fr.) (denying moral rights protection for publishers in the case of an outright assignment of the copyright); Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co., 53 U.S.P.Q.2d (BNA) 2021, 2023 (S.D.N.Y. 2000) (granting a motion to preclude evidence of moral rights damages on the grounds that plaintiff, the assignee of Igor Stravinsky's copyright in *The Rite of Spring*, lacked standing to sue because moral rights are "preserved strictly for the author" and "only assertable by the author/composer, or his heirs," as opposed to the assignees or owners of his economic rights); Confetti Records v. Warner Music UK Ltd. [2003] EWHC (Ch) 1274 [152] (Eng.) (stating that the assignment of a copyright does not affect the author's authorship for moral rights purposes and that the assignees are not entitled to complain of prejudice to their honor or reputation).

44. Continental copyright regimes generally do not recognize the work-for-hire doctrine, so authors almost always qualify as initial copyright owners. Germany and Italy have specific statutory provisions that make this clear. *See* GCA, *supra* note 34, § 7; ICA, *supra* note 35, art. 6. In France, the same principle is derived from FIPC, *supra* note 33, arts. L. 111-1, L. 113-7, L. 113-8. *See* STROWEL, *supra* note 13, at 323–24. Minor exceptions exist in France, but they are considered to be anomalous. *See, e.g.*, POLLAUD-DULIAN, *supra* note 13, at 379 (discussing FIPC, *supra* note 33, art. L. 113-5).

45. FIPC, *supra* note 33, art. L. 111-1; GCA, *supra* note 34, § 11.

46. *See, e.g.*, ANDRÉ LUCAS & HENRI-JACQUES LUCAS, TRAITÉ DE LA PROPRIÉTÉ LITTÉRAIRE ET AR-

moral rights are habitually discussed in the discursive context of copyright law rather than contracts or torts. Moreover, whether a particular right is a right in a copyrightable work is also the test that Continental copyright scholars use in determining whether that right qualifies as a moral right in the technical sense. For example, the right to object to the false attribution of authorship is not a moral right under this definition, because the false attribution of someone's work to another person does not require the latter to be the author of any work.[47] This does not prevent French courts from occasionally invoking the statutory basis of the moral right of attribution when adjudicating cases involving the false attribution of authorship,[48] but French scholars typically criticize this move as being incompatible with moral rights theory.[49]

Third, moral rights are *inalienable* in the sense that they can be neither transferred to third parties nor relinquished altogether.[50] They are personal to the author. To the extent that moral rights extend beyond the life of the author,[51] they are passed on to the author's heirs upon the author's death in accordance with the applicable local rules. In other words, moral rights cannot be transferred *inter vivos*, but they can be transferred *mortis causa*.[52] The element of inalienability is by far the most controversial characteristic of the civil law concept of moral rights, because it interferes with the principle of freedom of contract between authors and users of copyrightable works. More specifically, in addition to prohibiting an outright transfer of moral rights, it also sets a number of limits to the legally permissible content of copyright contracts.

TISTIQUE 307 (2d ed. 2001); William W. Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 174 (Stephen R. Munzer ed., 2001).

47. *See, e.g.*, GRECO & VERCELLONE, *supra* note 13, at 108–09; PIOLA CASELLI, *supra* note 13, at 527; RICKETSON & GINSBURG, *supra* note 13, at 601; SCHACK, *supra* note 12, at 19; Damich, *supra* note 1, at 13; Dworkin, *supra* note 18, at 331. *But see* GOLDSTEIN, *supra* note 14, § 17.24.2, at 17:212 (grouping with moral rights "the author's interest in not having his name used in connection with a work he did not create.").

48. *See, e.g.*, Cour d'appel [CA] [regional court of appeal] Paris, 13e ch. corr., Mar. 23, 1992, 155 Revue internationale du droit d'auteur [RIDA] 1993, 181 (Fr.); Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 31e ch., May 9, 1995, 167 RIDA 1996, 282 (Fr.). By contrast, the German courts strictly follow the theory and refuse to expand the moral right of attribution to cases in which a work is falsely attributed to a person, although they are inclined to grant relief on grounds other than copyright and moral rights. *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] July 8, 1989, 34 Zeitschrift für Urheber- und Medienrecht [ZUM] 180 (182) (F.R.G.).

49. *See* LUCAS & LUCAS, *supra* note 46, at 327–28, 331 & n.265; POLLAUD-DULIAN, *supra* note 13, at 417.

50. Note, however, that this does not mean that the author cannot authorize a third party to bring a moral rights claim in the author's name. *See, e.g.*, GRECO & VERCELLONE, *supra* note 13, at 105 n.5; Netanel, *supra* note 1, at 51.

51. While moral rights expire seventy years after the death of the author in Germany, they are declared to be perpetual in France and Italy. *See* GCA, *supra* note 34, § 64; FIPC, *supra* note 33, art. L. 121-1(3); ICA, *supra* note 35, art. 23. For Italy, see also C.C. art. 2934(2) (stating that inalienable rights are not extinguishable by prescription).

52. In France, Germany, and Italy, moral rights are "inalienable yet devisable." *See* FIPC, *supra* note 33, art. L. 121-1(3); GCA, *supra* note 34, §§ 28–29; ICA, *supra* note 35, art. 22(1). Note that in Germany, the same rule also applies to economic rights, which are equally inalienable yet devisable. *See* GCA, *supra* note 34, § 29.

As I will show in more detail below, it is a characteristic of the civil law concept of moral rights that the contractual limitations imposed by moral rights are packed into the legal attribute of inalienability, which tends to obscure rather than illuminate the contractual dimension of moral rights.

C. Individual Moral Rights in Continental Europe

I will conclude my description of the moral rights orthodoxy with a brief review of each individual moral right. In doing so, I will focus on the statutory design of these rights, which can then be contrasted both with the concrete decisional rules applied by the courts and with alternative conceptual approaches in jurisdictions that do not subscribe to the Continental concept of moral rights. The joint discussion of French, German, and Italian law is not meant to downplay substantive differences and doctrinal nuances that exist between these legal systems, but instead to underscore their general conceptual unity.

1. Rights of Disclosure and Withdrawal

The rights of disclosure[53] and withdrawal[54] are connected. The author has the right to decide whether the work in question should be released to the public and, once it is released, to decide whether it should be retracted because it no longer reflects the author's personal convictions. Consequently, the right of disclosure entitles authors to decide when their works are complete and when they are ready for publication and commercialization,[55] while the right of withdrawal empowers authors to retract the economic rights that they may have assigned or licensed to a third party in order to enable that third party to exploit the work.[56] A historically important example of the application of the right of disclosure is the question of whether creditors could force authors to sell their manuscripts or to publish previously unpublished works, which was generally decided in favor of authors.[57]

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53. *See* FIPC, *supra* note 33, art. L. 121-2; GCA, *supra* note 34, § 12; ICA, *supra* note 35, art. 12.

54. *See* FIPC, *supra* note 33, art. L. 121-4; GCA, *supra* note 34, § 42; ICA, *supra* note 35, arts. 142–43.

55. Note that in Germany, the right of disclosure also includes the right to be the first to publicly communicate or describe the contents of the work. GCA, *supra* note 34, § 12(2). Furthermore, in both France and Germany, specific rules exist regarding the application of the right of disclosure in the context of audiovisual works. *See* GCA, *supra* note 34, § 89; FIPC, *supra* note 33, arts. L. 121-5, L. 121-6.

56. Note that the right of withdrawal does not apply to motion pictures in Germany. GCA, *supra* note 34, § 90. In France, in the case of computer programs, it is available only if it is expressly stipulated in a contractual agreement. FIPC, *supra* note 33, art. L. 121-7(2).

57. *See* LUCAS & LUCAS, *supra* note 46, at 309; MICHAÉLIDÈS-NOUAROS, *supra* note 39, at 126, 132–33; POLLAUD-DULIAN, *supra* note 13, at 387, 390–91; ULMER, *supra* note 16, at 571. This is also the context in which the French term "*droit moral*" was first used in a technical sense. *See* André Morillot, *De la personnalité du droit de publication qui appartient a un auteur vivant*, 22 REVUE CRITIQUE DE LÉGISLATION ET DE JURISPRUDENCE 29, 35 (1872) (Fr.).

In the case of the right of withdrawal, authors can retract their economic rights only if they indemnify the other party to the contract *in advance*.[58] In addition, in France and Germany, if authors reconsider their decision and further divulge their work after retracting it, the assignees enjoy a right of first refusal and have the option of exploiting the work under the terms and conditions of the initial contract. Moreover, the right of withdrawal may not be exercised for just any reason. The German copyright statute specifically states that the right of withdrawal can be exercised only if authors can no longer reconcile the contents of their works with their personal convictions,[59] and the Italian copyright statute explicitly requires "serious moral reasons."[60] The same is true in France on the grounds that the right of withdrawal is subject to the general civil law rule that the abuse of rights is not protected, whereas such abuse is assumed whenever the author's exercise of the right of withdrawal is not motivated by his or her personal internal debate about whether to further divulge the work. In other words, monetary concerns alone will not suffice.[61] In view of these qualifications, it is not surprising that there are very few court decisions on the right of withdrawal, and it is safe to say that this moral right is largely an example of symbolic legislation.[62]

2. Right of Attribution

The right of attribution is the right of authors to claim authorship of their works, and it includes the right to determine whether and how the author's name shall be affixed to the work.[63] More specifically, the author has the right to be credited as the author of the work in question in the sense that relief is available against anyone who falsely claims to be the author of the work, who omits the author's name from a specific work, or who falsely attributes the

58. *See, e.g.*, T.G.I. Seine, Oct. 27, 1969, 63 RIDA 1970, 235 (Fr.) (holding in part that the French author Jean-Paul Sartre could not enforce his right of withdrawal against his publisher with regard to his book *L'existentialisme est un humanisme* for failure to provide advance indemnification to the publisher).

59. *See* GCA, *supra* note 34, § 42(1).

60. *See* ICA, *supra* note 35, art. 142(1); C.c. art. 2582; *see also* GRECO & VERCELLONE, *supra* note 13, at 119–20.

61. *See* Cour de cassation [Cass.] [highest court of ordinary jurisdiction], 1e civ., May 14, 1991, 151 RIDA 1992, 272, note Sirinelli (Fr.) (affirming an appellate court decision that dismissed an action seeking injunctive relief and damages brought by an author of comic strips against his former employer, because it was an abuse of the right of withdrawal to invoke this moral right for purely pecuniary reasons, such as the author's dissatisfaction with the customary share he received for the continued use of his work after termination of his employment).

62. *See* WILLIAM CORNISH & DAVID LLEWELYN, INTELLECTUAL PROPERTY 461 (5th ed. 2003) (stating that the right of withdrawal "appears to be exercised rarely"); EDUARDO PIOLA CASELLI, CODICE DEL DIRITTO DI AUTORE 603 (1943) (Italy) (calling the right of withdrawal important, but more as a matter of theory than practice); PIERRE RECHT, LE DROIT D'AUTEUR—UNE NOUVELLE FORME DE PROPRIÉTÉ 145 (1969) (Fr.) (calling the right of withdrawal a "fantasy of theorists"); SCHACK, *supra* note 12, at 152 (referring to the "rare" exercise of rights of withdrawal). Interestingly, neither Belgium nor Switzerland recognized the right of withdrawal when enacting statutory moral rights regimes in 1994 and 1992, respectively.

63. FIPC, *supra* note 33, art. L. 121-1; GCA, *supra* note 34, § 13; ICA, *supra* note 35, art. 20(1).

author's work to a third party.[64] For example, the highest court in France held that the organizer of an exhibition of artistic book covers violated the author's right of attribution, when the organizer casually placed his business cards next to the book covers, creating the false impression that he was the originator of the book covers on display.[65] The right to claim authorship also includes the right to insist that the work be released under the author's name. Therefore, it was a violation of the right of attribution to omit the photographer's name on the dust jacket of a book that prominently displayed one of his photographs.[66] Similarly, a German court found that it was a violation of the author's right of attribution when the German Department of Defense used a poster it had commissioned in magazine advertisements without including the artist's signature, which had been part of the original poster.[67] In addition to the right to claim authorship, authors also have a right *not* to claim authorship in the sense that they may elect to remain anonymous or to use pseudonyms instead of using their real names.[68] However, the right of attribution does not necessarily entitle the anonymous or pseudonymous author to prevent a third party from disclosing the author's real name.[69]

3. Right of Integrity

The right of integrity, perhaps the most important moral right,[70] provides authors with a right to prohibit modifications of their works without their consent,[71] regardless of whether the modification would negatively impact or objectively improve the work.[72] Both France and Germany go beyond the requirements of Article 6*bis* of the Berne Convention in that the modification in question does not have to be detrimental to the author's honor or reputation in order to qualify as a violation of the right of integrity. There are two exceptions to this rule. In France, the scope of the right of integrity is reduced to the mere protection of the author's honor and reputation if the work is a

64. *See, e.g.*, MANFRED REHBINDER, URHEBERRECHT 145–47 (14th ed. 2006).

65. *See* Cass. 1e civ., Jan. 31, 1961, Gaz. Pal. [1961], I, pan. jurispr. 406 (Fr.).

66. *See* CA Paris, 4e ch., June 10, 1993, 158 RIDA 1993, 242 (Fr.).

67. *See* OLG München July 3, 1967, 71 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 146, 1969 (F.R.G.); *see also* GRUR 74, 713 (F.R.G.) (holding that the failure to credit the author of a screenplay who had created the screenplay for his employer was a violation of the right of attribution, when the author's creative activities were beyond the scope of employment); OLG München, ZUM 44, 61 (F.R.G.) (holding that the right of attribution was violated when a director of a motion picture, who was also the co-author of the screenplay, was not mentioned in the credits section of the motion picture, even though he was credited on the videocassette box).

68. *See, e.g.*, GRECO & VERCELLONE, *supra* note 13, at 105 n.5, 106; POLLAUD-DULIAN, *supra* note 13, at 415; SCHACK, *supra* note 12, at 159.

69. *See, e.g.*, SCHACK, *supra* note 12, at 159; HANSJÖRG STOLZ, DER GHOSTWRITER IM DEUTSCHEN RECHT 82–83 (1971); Netanel, *supra* note 1, at 50.

70. *See* Roeder, *supra* note 1, at 565 ("Beyond dispute it is this aspect of moral right which has aroused the most bitter antagonism.").

71. *See* FIPC, *supra* note 33, art. L. 121-1; GCA, *supra* note 34, § 14; ICA, *supra* note 35, art. 20(1).

72. *See* Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 150, 32 (42) (F.R.G.).

computer program.[73] In Germany, a separate statutory regime was established for motion pictures and for works used in the production of motion pictures.[74] Authors of these works can invoke their moral rights of integrity only if their works are grossly distorted, and even if this is the case, they have a statutory duty to take into consideration the interests of the producer of the motion picture when exercising their right to object to gross distortions of their works. Applying these rules, a German appellate court denied injunctive relief to the author of the popular novel *The Neverending Story*, despite its finding that the producer of the movie adaptation had grossly distorted the work by inserting an ending that completely changed the substance of the work.[75] The Court explained its decision by referring to the fact that the author had previously agreed to a similarly distorted ending and by saying that the producer would suffer significant economic harm if injunctive relief were granted.[76]

Outside the context of computer programs in France and motion pictures in Germany, the general rule is that any and all substantive modifications are prohibited.[77] This prohibition applies to actual modifications of the substance of a particular work, such as rewriting a paragraph in a literary work, selling individual components of a work of art,[78] or cropping a portion of a photograph for use on a book cover.[79] It also applies to contextual modifications that leave the substance of the work intact, but that change the appearance or perception of the work by putting it into a context that differs from the one originally intended or envisioned by the author.[80] In Germany, the leading case on this issue is *Hundertwasser*, in which the highest court in Ger-

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73. FIPC, *supra* note 33, L. 121-7. Belgium adopted the same rule. *See* Law implementing the European Directive of May 14, 1991 regarding the legal protection of software of June 30, 1994, Moniteur Belge [M.B.], July 27, 1994, p. 19315, art. 4 (Belg.) (referring to Berne Convention, art. 6*bis*(1)).

74. GCA, *supra* note 34, § 93(1). In Italy, producers are statutorily authorized to make changes to works used in motion pictures to the extent that such changes are necessary for the adaptation of these works to the screen, and analogous limitations apply to architectural works. *See* ICA, *supra* note 35, arts. 20(2), 47.

75. OLG München, GRUR 88, 460 (F.R.G.); *see also* OLG Frankfurt, GRUR 91, 203 (holding that shortening a motion picture by one-third was a violation of the author's moral right of integrity). *But see* Kammergericht Berlin [KG Berlin] [Appellate Court] GRUR 106, 497 (F.R.G.) (holding that splitting the 1973 documentary "Battle of Berlin," which consisted of two thematically integrated parts, was not a gross distortion under GCA, *supra* note 34, § 93).

76. OLG München, GRUR 88, 460 (464) (F.R.G.).

77. *See, e.g.*, LUCAS & LUCAS, *supra* note 46, at 334; POLLAUD-DULIAN, *supra* note 13, at 422.

78. *See, e.g.*, Cass. 1e civ., July 6, 1965, Gaz. Pal. [1965], 2, pan. jurispr., 126 (Fr.) (holding that the separate sale of individual paintings that the French artist Bernard Buffet had attached to a refrigerator in order to create one single work was a violation of the artist's right of integrity). *But see* T.G.I. Paris, 3e ch., Nov. 26, 1997, 177 RIDA 1998, 284 (Fr.) (holding in part that the unauthorized use of a musical work as background music for the introductory and end credits of a motion picture did not amount to a violation of the composer's right of integrity, despite the fact that the work was split into two halves, because the work was not materially modified and its "spirit" was maintained).

79. *See, e.g.*, BGH, GRUR 73, 525; *see also* Echaurren v. Italian Post Office [2001] E.C.D.R. 14 (Court of Rome) (Italy) (holding that resizing a work for reproduction on postage stamp was a violation of the author's moral rights).

80. *See, e.g.*, LUCAS & LUCAS, *supra* note 46, at 335.

many held that adding customized frames to paintings that extended the patterns of these paintings violated the painter's moral right of integrity.[81] Another example of contextual modifications is the unauthorized use of a work for advertising purposes. For instance, a French court held that the unauthorized use of the pantomime character "Bip," created and performed by the famous French mime Marcel Marceau, for advertising a homeopathic drug in a medical journal was a violation of Marceau's moral rights in addition to infringing his economic rights.[82]

While the general prohibition of modifications seems like a bright line in the abstract, its practical application has turned out to be anything but straightforward, particularly in cases in which the author's right of integrity conflicts with rights of third parties, most notably real property rights in embodiments of the work in question. In these cases, the courts in both France[83] and Germany[84] relax the general prohibition of modifications and resort to a rather pragmatic ad hoc balancing of the conflicting interests instead of mechanically applying the general rule prohibiting any modifications.[85] A significant portion of cases in which French and German courts apply this balancing approach relates to the modification of architectural works undertaken by the owner of a building,[86] and the courts have gone both ways in these cases. For instance, a French court held that changing the interior décor of a building designed by an architect was an infringement of the architect's right of integrity, because the changes were significant and because the owner of the building made these changes without approaching the architect despite a contractual provision reiterating the owner's duty to safeguard the author's moral rights.[87] By contrast, a German court held that construction to increase the space available in the attic of a building qualified as a modification under copyright law, but did not violate the architect's right of integrity, because the financial interests of the owner

81. BGHZ 150, 32.

82. CA Versailles, 1e ch., July 9, 1992, 158 RIDA 1993, 208 (Fr.); *see also* Cass. 1e civ., Feb. 24, 1998, 177 RIDA 1998, 213, note Kéréver (Fr.) (affirming an appellate court decision which held that the unauthorized use of excerpts of a song by a television station for self-promotion was both a violation of the composer's right of integrity and an infringement of the record company's copyright); CA Paris, 4e ch., June 6, 1978, 99 RIDA 1979, 165 (Fr.) (holding the unauthorized use of the works of the French tapestry artist Jean Lurçat for advertising purposes to be a violation of the artist's moral rights); T.G.I. Nanterre, 1e ch., Nov. 5, 1997, Gaz. Pal. [1998], 2, pan. jurispr., 551 (Fr.) (holding the unauthorized use of a musical work by a television station in the context of promotional messages by sponsors of a particular television program to be a violation of the author's moral rights).

83. *See, e.g.*, Netanel, *supra* note 1, at 55 (pointing to the general doctrine of "abuse of right" as a tool for balancing conflicting interests).

84. In order for a German court to hold that the right of integrity is infringed, it must find (i) that the work has been modified, (ii) that the modification constitutes a tangible threat to the author's interests, and (iii) that these interests are not outweighed by conflicting considerations. *See* BGH, GRUR 76, 675; OLG München, ZUM 36, 307.

85. *See* Adolf Dietz, *The Moral Right of the Author*, 19 COLUM.-VLA J.L. & ARTS 199, 223 (1995); Hughes, *supra* note 5, at 60.

86. *See* POLLAUD-DULIAN, *supra* note 13, at 430.

87. T.G.I. Paris, 3e ch., Mar. 25, 1993, 157 RIDA 1993, 354 (Fr.).

of the building outweighed the architect's interest in preserving the status quo.[88] In sum, the precise scope of the moral right of integrity cannot be determined in the abstract, despite the fact that the inalienable rights rhetoric suggests otherwise.

II. Disaggregating Moral Rights

It is important for any comparative study of moral rights to go beyond the abstract presentation of the four individual moral rights discussed above. In this Part, I will show that these abstract rights can be reduced to more concrete decisional rules that are far narrower than the absolute rights language suggests[89] and that do not necessarily have to be conceptualized as inalienable rights of authors in their works.[90] Relying on the standard rights approach to moral rights instead of focusing on the concrete rules that courts apply in practice creates the triple risk of overestimating the actual scope of moral rights in civil law countries, underestimating the contractual implications of moral rights, and generating an unreliable basis for the comparison of civil law moral rights with the law of legal systems that do not fully endorse the dominant concept of moral rights. After all, the substantive level of protection depends on the concrete rules that courts use to adjudicate moral rights claims, not on the analytical framework that is used to conceptualize, rationalize, or justify these rules. In order to mitigate these risks, it is necessary to transcend the moral rights of disclosure, withdrawal, attribution, and integrity by translating them into concrete rules, using the specific conflicts that give rise to moral rights claims as a guide. In doing so, it is important to recognize that moral rights perform fundamentally different functions depending upon whether the alleged infringer is a third party who is not authorized to use the work at all or whether the alleged infringer is authorized to use the work under copyright law. Consequently, I will distinguish between a tort scenario (unauthorized use) and a contract scenario (authorized use) when identifying and contextualizing the individual decisional rules that are traditionally cobbled together under the umbrella of the moral rights doctrine.

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88. *See* OLG München, ZUM 40, 165; *see also* OLG Frankfurt, GRUR 88, 244; KG Berlin, ZUM 41, 208.

89. Disaggregating the concept of moral rights may also help to overcome some of the reservations against moral rights in common law countries. *See* Cornish & Llewelyn, *supra* note 62, at 455 (explaining that it was the "overbearing potential in foreign laws which had for long fuelled the common law antagonism towards them"); Hughes, *supra* note 5, at 60 ("American legal literature's tendency to treat moral rights as a kind of 'other' is not just a sign of insularity, it has been unhelpful in the sense that it casts these rights as powerful, strange, alien, and sometimes *absolute* forces.").

90. Although it is particularly insightful in the context of moral rights, the strategy of reducing legal concepts to specific conflicts in order to enable a search for functionally equivalent concepts has a broader range of applications. *See* Niklas Luhmann, Das Recht der Gesellschaft 388 (1993).

A. Tort Scenario

The tort scenario involves a conflict between the actual creator (author) of a work and a third party who is not authorized to use the work under traditional rules of copyright law (economic rights) and who uses the work in a way inconsistent with moral rights. In this scenario, cases can arise in the context of the rights of disclosure, attribution, and integrity, but not in the context of the right of withdrawal, because the latter requires the existence of a contract transferring or licensing economic rights that can then be withdrawn or revoked by the exercise of the author's right of withdrawal. In view of the moral rights outlined above, there are three decisional rules that the moral rights doctrine offers in the tort scenario. First, it is illegal to reveal a copyrighted work to the public without the author's consent. Second, it is illegal to disseminate a version of a work that has been modified without the author's consent. Third, it is illegal to interfere with the author's decision regarding attribution or anonymity, either by falsely claiming authorship or by changing or suppressing the author's name on copies of the work. It is in the context of these three rules that the absolute rights language typically associated with the moral rights doctrine makes the most sense, because it is an absolute right that is asserted against a potential infringer. A closer look at the three fact patterns in which these rules become relevant reveals that they perform different functions in different contexts, most of which are quite limited.

1. Moral Rights and Economic Rights

In cases in which authors also hold the copyright in their works, moral rights claims are merely supplementary to copyright infringement claims. To the extent that authors seek injunctive relief, the outcome does not turn on the application of the three rules just mentioned, and the decisional rules identified above do not carry independent weight, because everything moral rights strive to protect in the tort scenario may also be achieved by relying exclusively on economic rights.[91] The violation of moral rights in a tort scenario typically involves the reproduction or public performance of the work in question, which, if unauthorized, is also a violation of economic rights. More specifically, the economic right to create derivative works may be used to prohibit the publication of unauthorized modifications of the author's work,[92] which is the main concern of the moral right of integrity. Similarly,

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91. *See* Eduardo Piola Caselli, *Il diritto morale di autore*, 1 IL DIRITTO DI AUTORE 3, 9–10 (1930) (Italy) (observing that the exclusive rights of authors, even if enacted to protect their economic interests, can also be used to protect the personal and moral interests of authors, essentially because they can condition the economic use of their works on the respect of their non-economic interests).

92. *See, e.g.*, Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341 (9th Cir. 1988); Muñoz v. Albuquerque A.R.T. Co., 38 F.3d 1218 (9th Cir. 1994) (both involving conceptual modifications); *see also* Greenwich Workshop, Inc. v. Timber Creations, Inc., 932 F.Supp. 1210 (C.D. Cal. 1996); GRECO & VERCELLONE, *supra* note 13, at 112; NIMMER & NIMMER, *supra* note 18, § 8D.02[C], at 8D-11, 8D-12; Paul Goldstein, *Adaptation Rights and Moral Rights in the United Kingdom, the United States and the Federal Republic of Germany*, 14 INT'L REV. INDUS. PROP. & COPYRIGHT L. 43, 45, 49 (1983); Kwall, *supra* note

the unauthorized publication of a work may be prevented on the basis of infringement of the economic rights of reproduction, distribution, public performance, or public display, without the invocation of the moral right of disclosure.[93] Finally, if authors object to the reproduction of their works without proper attribution of authorship, they may prevent such reproduction on the basis of their economic rights alone, regardless of any moral right of attribution. The only reason why moral rights are not completely irrelevant in this scenario is that the combination of a moral rights claim and a copyright infringement claim may result in increased damage awards.[94] Beyond that, however, authors do not need moral rights to vindicate their personal interests in their works, and the invocation of moral rights will rarely be controversial when the author also holds the copyright in the work in question.

2. Moral Rights and Beneficial Ownership

The second fact pattern within the tort scenario relates to authors who have transferred their economic rights and have no traditional copyright infringement claim against a third party who uses the work without authorization. In this situation, the decisional rules identified above come into play, protecting authors against third parties even after the transfer of their copyrights. In this fact pattern, the function of moral rights in civil law countries is similar to the American doctrine of beneficial ownership, which, under certain narrowly defined circumstances, provides authors with standing to sue for copyright infringement even after the transfer of their copyrights.[95] From a comparative perspective, it is remarkable that moral rights can be understood as a functional equivalent of the idea of beneficial ownership, which is generally not recognized in civil law property systems. This also explains why moral rights claims that arise from this fact pattern are often not particularly controversial as a matter of policy, because the conduct in question would also infringe the author's economic rights if the author still owned these rights.

1, at 47; Netanel, *supra* note 1, at 43. *But see* Damich, *supra* note 1, at 38, 43 (arguing that the right of integrity is broader than the right to create derivative works).

93. *See, e.g.*, GOLDSTEIN, *supra* note 14, § 17.23, at 17:201. Interestingly, courts do not always feel the need to distinguish between moral and economic rights when deciding cases in this scenario. *See, e.g.*, CA Paris, 1e ch., Mar. 6, 1931, D.P. 1931, II, 88, note Nast (equating the author's moral right with his literary property when holding that the French painter Charles Camoin, who had cut quite a few of his paintings into pieces and thrown them into a publicly accessible trash can, could object to the divulgation of the paintings by the person who had found the pieces and reassembled them).

94. *See, e.g.*, CA Versailles, 1e ch., Nov. 5, 1998, 180 RIDA 1999, 367 (Fr.) (awarding damages for the violation of moral rights that were more than twice the amount of the damages awarded for copyright infringement); OLG Frankfurt, GRUR 91, 203 (205) (F.R.G.) (upholding the doubling of monetary relief because of a moral rights violation).

95. Infringement of Copyright, 17 U.S.C. § 501(b) (2000); *see also* Kwall, *supra* note 1, at 47–55. My point is *not* that authors can currently invoke the doctrine of beneficial ownership to protect their moral rights in the United States, but simply that moral rights in civil law countries perform a similar function in the sense that they also allow authors to sue for copyright infringement after the transfer of their copyrights, even though civil law scholars would not use the label of copyright infringement, but instead, of course, the label of moral rights.

In other words, alleged infringers of moral rights in this scenario are frequently in a difficult strategic position, because their behavior would be illegal under traditional copyright law even in the absence of any valid moral rights claim. In fact, since the issue is really one of standing to sue for copyright infringement, authors and their assignees could easily turn this fact pattern into a traditional copyright case, a move that the alleged infringer could not prevent from happening.[96] Therefore, it is not surprising that, in practice, these cases are rarely decided solely on the basis of the moral rights rules identified above, despite the fact that authors regularly assign or exclusively license their economic rights to market intermediaries.[97] Moreover, there are instances in which authors do not even have to assert their moral rights, because copyright holders are likely to step in to protect their own economic rights when an unauthorized third party reproduces or publishes one of their works.

3. Moral Rights Beyond Economic Rights

The third fact pattern involves a moral rights claim that does not have a parallel copyright claim, either because the work in question is in the public domain or because the moral right invoked by the author exceeds the scope of the author's economic rights. These cases are fairly rare,[98] but when they do arise, they are quite controversial, precisely because parallel copyright claims do not exist and the outcomes depend entirely on decisional rules derived from moral rights. In a recent case, the Paris Court of Appeals held that the publication of two sequels to Victor Hugo's *Les Misérables*, a work in the public domain, violated Hugo's moral right of integrity, which was invoked by one of his heirs.[99] However, not all Continental European countries extend moral rights protection beyond the term of the copyright. Germany, for instance, ties moral rights protection to copyright protection in the sense that moral rights protection ends when copyright protection ends. Perpetual moral rights protection, especially as it relates to the right of integrity, is viewed as incom-

96. Therefore, potential moral rights infringers sometimes try to turn the table by filing declaratory judgment actions in order to lock authors into the theme of moral rights, which is a useful strategy in countries that do not traditionally recognize moral rights. This is what happened in *Huntsman v. Soderbergh*, currently pending in Colorado district court. Case No. 02-M-1662 (MJW) (D. Colo. filed Aug. 29, 2002). A company in the business of editing motion pictures to remove violence, nudity, and profanity filed a declaratory judgment action against six prominent motion picture directors who claimed that the company violated their (moral) rights. The directors reacted by bringing in the Directors Guild of America, which combined its motion for leave to intervene on behalf of its entire membership with a motion to compel joinder of several motion picture studios as the holders of the copyrights in the motion pictures that were being edited. *See* Michael P. Glasser, Note, *To Clean or Not To Clean*, 22 CARDOZO ARTS & ENT. L.J. 129, 140–41 (2004).

97. *See, e.g.*, Jane C. Ginsburg, *Copyright, Contracts, and the U.S. Professorate*, *in* FESTSCHRIFT FÜR WILHELM NORDEMANN 711 (Ulrich Loewenheim ed., 2004) (providing an empirical analysis of copyright contracts between U.S. academics, universities, and publishers).

98. *See* LUCAS & LUCAS, *supra* note 46, at 349 (discussing the mostly "symbolic value" of the perpetual duration of moral rights); MICHAÉLIDÈS-NOUAROS, *supra* note 39, at 124.

99. CA Paris, 4e ch., Mar. 31, 2004, 202 RIDA 2004, 292, note Pollaud-Dulian (Fr.).

patible with moral rights theory because it ultimately turns moral rights into a vehicle for protection of a country's cultural heritage.[100]

The same is true for cases in which the scope of the moral right invoked by the author is broader than the scope of any economic right upon which the author may rely. In Continental Europe, this scenario is rather hypothetical, because, as explained above, authors can achieve little through moral rights that they could not achieve through their economic rights, provided that their works are not in the public domain. Nevertheless, this scenario is worth mentioning because the United States provides certain visual artists with the right to prevent the *destruction* of original embodiments of works of recognized stature,[101] which is a right that these artists would not have under traditional copyright law or the common law,[102] and which is usually not protected in Continental Europe.[103] European moral rights law typically limits the moral right of integrity to the right to object to *modifications* of the work,[104] and courts are reluctant to extend this right to the destruction of embodiments of works.[105] Interestingly, much of the controversy about moral rights in the United States stems from the selective expansion of moral rights beyond the scope of European moral rights protection, which exacerbates the tension between authors and property owners mentioned earlier.[106] The reason for this expansion is again the use of moral rights law for purposes of art preservation,[107]

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100. *See, e.g.*, SCHACK, *supra* note 12, at 153–54; *see also* Dietz, *supra* note 12, at 194. The possibility of enforcement of the right of integrity by a public official after the death of the author (as provided by Article 23(2) of the ICA, *supra* note 35) is not available under German copyright law.

101. *See* Rights of Certain Authors to Attribution and Integrity, 17 U.S.C. § 106A(a)(3)(B) (2000); *see also* Martin v. City of Indianapolis, 192 F.3d 608 (7th Cir. 1999) (holding that the destruction of a large outdoor stainless steel sculpture as part of an urban renewal project in violation of contractual notice requirements was illegal).

102. *See* Crimi v. Rutgers Presbyterian, 89 N.Y.S.2d 813, 819 (Sup. Ct. 1949).

103. *See* GRECO & VERCELLONE, *supra* note 13, at 117–18 (conceding but criticizing the general rule that Italian moral rights law allows owners to destroy works of art); LUCAS & LUCAS, *supra* note 46, at 342–45; REHBINDER, *supra* note 64, at 148; Dietz, *supra* note 12, at 191 (applauding the United States for its pioneering role in this field); Dworkin, *supra* note 18, at 335. Note that the protection of this right is not required under Article 6*bis* of the Berne Convention. *See* RICKETSON & GINSBURG, *supra* note 13, at 605.

104. Note, however, that Swiss copyright law establishes a duty for owners of original embodiments of works of authorship to first offer the work to the author prior to destroying it, if the owner could reasonably assume that the author has a justified interest in preserving the work. *See* Urheberrechtsgesetz [URG] [Copyright Law], Oct. 9, 1992, SR 231.1, art. 15 (Switz.) [hereinafter Swiss Copyright Act of 1992].

105. *See, e.g.*, CA Paris, 1e ch., Apr. 27, 1934, DH 1934, 385; Tribunaux administratif [TA] Grenoble, Feb. 18, 1976, 91 RIDA 1977, 116, note Françon; Landgericht [LG] München Aug. 3, 1982, 26 FILM UND RECHT [FuR] 513 (514), 1982; *see also* BGHZ 129, 66 (71) (obiter dictum) (stating that German graffiti artists who painted their works on the Berlin Wall could not prevent the destruction of the Berlin Wall on the basis of their moral rights). *But see* CA Paris, 25e ch., July 10, 1975, 91 RIDA 1977, 114, note Françon.

106. *See supra* text accompanying notes 83–88.

107. *See* Dworkin, *supra* note 18, at 335 (recognizing the distinction between genuine moral rights protection and art preservation and arguing that the responsibility for protecting works of art from destruction "should shift from the private rights of the author to those public authorities responsible for protecting our cultural heritage, enforceable by public law means"). A good example of the conscious use or abuse of moral rights for protecting a country's cultural heritage is Sehgal v. Union of India [2005] F.S.R. 39 (High Court of Delhi) (India), in which the Court explicitly stated that "it is possible to legally

and it is somewhat ironic to see that moral rights are most controversial in a tort setting when they are used for purposes other than the protection of the author's personal interest in his or her work.[108]

B. Contract Scenario

The bulk of cases in which the outcome turns exclusively on the application of rules derived from moral rights relates to what I call the contract scenario. In this scenario, authors invoke their moral rights against persons who are authorized to use the work under traditional copyright law, either because they have acquired the copyright (economic rights) from the author or because they have at least obtained a license to use the work.[109] Since this scenario pits the author against the copyright holder or a licensee, bringing a copyright infringement claim is usually not an option for the author, who has to rely on moral rights to prevail.[110] Despite the fact that all four moral rights apply in a contractual setting, the use of absolute rights language is misleading in this context, because moral rights change in nature from rights *in rem* to default and mandatory contract rules phrased in rights language.[111] The function of moral rights in the contract scenario is not so much to establish absolute rights of authors in their works, but to guide contract interpretation, to establish default rules, and to set compulsory terms with respect to very specific issues in copyright contracts. As the following overview shows, these issues relate to *remedies* in the case of the right of disclosure, *termination* in the case of the right of withdrawal, and *content* in the case of the rights of attribution and integrity. This is also the context in which the element of inalienability comes into play.

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protect the cultural heritage of India through the moral rights of the artist" and held that the creator of a badly damaged bronze mural sculpture, which had acquired the status of a national treasure in India, was entitled to the remnants of the sculpture and to damages on the basis of moral rights. *Id.*

108. This is not to say that authors may not have a personal interest in the preservation of their works of art, but the reason why these interests are protected is not so much to protect authors, but rather to use them as agents for the protection of a country's cultural heritage. *See, e.g.*, Kwall, *supra* note 1, at 15–16, 69 (explicitly invoking the protection of cultural heritage as a rationale for moral rights protection beyond the author's death).

109. This scenario also includes infringers of moral rights who derive the right to use the work from a copyright holder who is not at the same time the author. In these cases, there is no actual contract between the author and the alleged infringer, but the same issues arise, because the alleged infringer derives his legal position from the copyright holder who has a contractual relationship of some sort with the author. The courts will usually look to this contract to determine the legal position of the alleged infringer. *See, e.g.*, Gilliam v. Am. Broad. Corp., 538 F.2d 14 (2d Cir. 1976).

110. This is why copyright entitlements can never serve as a complete substitute for moral rights, even if the actual creator is also the initial copyright holder. *See also* Kwall, *supra* note 1, at 37 (discussing Wolfe v. United Artists Music Co., 583 F.Supp. 52 (E.D. Pa. 1983)).

111. It is no surprise that some commentators discussing the law of copyright agreements and specifically addressing the issue of mandatory rules in Continental European systems fail to factor moral rights into their analysis. *See, e.g.*, Paul Katzenberger, *Protection of the Author as the Weaker Party to a Contract under International Copyright Contract Law*, 19 INT'L REV. INDUS. PROP. & COPYRIGHT L. 731 (1988).

1. Right of Disclosure

The right of disclosure is not only a right to prevent third parties from disclosing the work to the public without the author's consent. In a contractual setting, it also stands for a particular contractual rule that relates to the availability of specific performance in copyright contracts. It is quite telling that it was *Whistler v. Eden*,[112] a contracts case, that led to the solemn declaration of the right of disclosure in French scholarship. The American painter James McNeill Whistler, who had been asked by Sir William Eden to paint a portrait of his wife, refused to hand it over after a disagreement about the proper price, and Sir Eden sued for the painting. Either shortly before or during the court proceedings, Whistler erased Lady Eden's face from the painting, replaced it with another woman's face, and made a few other changes. The case went up to the highest court in France, the Cour de Cassation, which affirmed the appellate court's decision that Whistler could not be forced to surrender the painting, that he was obliged to return the payment he had already received, and that he was enjoined from using the painting without rendering the face of Sir Eden's wife unrecognizable (which he had already done).[113] Ultimately, the Court did little more than apply the general principle expressed in Article 1142 of the French Civil Code, according to which the non-performance of a service contract gives rise to damage claims only, as opposed to specific performance.[114] Nevertheless, French scholars almost universally view this case as the foundational moment of the right of disclosure,[115] perhaps because the Court explicitly stated that the painter remained the "master of his work" until the actual delivery of the painting.[116] The rule that has emerged from *Whistler* is that whenever an author refuses to deliver or release a work under a contract with a commercial user, the author cannot be forced to create or disclose the work, and the user cannot obtain specific performance under the contract absent abuse.[117] However, the author is required to indemnify the commercial user for the exercise of the right of disclosure in contravention of their agreement.[118] This rule is mandatory because authors

112. Cass. ch. civ., Mar. 14, 1900, D.P. 1900, I, 497 (Fr.). The story of the case up to the appellate level is told by Whistler himself in JAMES MCNEILL WHISTLER, EDEN VERSUS WHISTLER—THE BARONET & THE BUTTERFLY (1899).

113. D.P. 1900, I, 497, 500.

114. CODE CIVIL [C. CIV.] art. 1142 (Fr.); *see also* Damich, *supra* note 1, at 11; André Françon & Jane Ginsburg, *Author's Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work*, 9 COLUM.-VLA J.L. & ARTS 381 (1985).

115. *See, e.g.*, LUCAS & LUCAS, *supra* note 46, at 311; POLLAUD-DULIAN, *supra* note 13, at 409; SIRINELLI, *supra* note 14, at 56; *see also* 1 STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 594–95 & n.54 (1938).

116. D.P. 1900, I, 497, 500 (Fr.).

117. *See, e.g.*, LUCAS & LUCAS, *supra* note 46, at 320; MICHAÉLIDÈS-NOUAROS, *supra* note 39, at 127–28 & n.1. For Germany, see, for example, ADOLF DIETZ, DAS DROIT MORAL DES URHEBERS IM NEUEN FRANZÖSISCHEN UND DEUTSCHEN URHEBERRECHT 83 (1968).

118. *See* DESBOIS, *supra* note 13, at 501; MICHAÉLIDÈS-NOUAROS, *supra* note 39, at 185, 189, 192; Sirinelli, *supra* note 13, at 559–61. *But see* CA Paris, 1e ch., Mar. 19, 1947, D. 1949, 20, note Desbois (holding that the heirs of an art dealer who had stored 806 unfinished paintings at the time of his death

cannot contract away their ability to substitute damages for the actual performance of the agreement, and any contractual clause purporting to do so would be invalid.[119] Therefore, the function of the moral right of disclosure in a contractual setting is to set a compulsory term for contracts involving commissioned works of authorship, according to which specific performance is not available. Instead of mystifying this point by phrasing it in terms of the author's inalienable moral right of disclosure, copyright scholars should recognize that the *Whistler* rule is simply an example of a more general rule arising from the law of service contracts.[120]

2. Right of Withdrawal

As explained earlier in this Article, the right of withdrawal is typically styled as the inalienable moral right to retract a particular work from commerce on the basis of a change in the author's personal convictions. A closer look at the actual decisional rule that underlies this conceptual structure reveals that the right of withdrawal simply imposes a mandatory term on every contract containing a copyright license or an assignment of specific economic rights. This mandatory term essentially says that authors are always entitled to rescind unilaterally the contract in question provided that they comply with the statutory requirements, most notably the advance indemnification of the other party to the contract. Contractual clauses that deviate from this rule are invalid.[121] While the contractual nature of the right of withdrawal is generally recognized under the dominant moral rights theory, the emphasis on absolute rights language again obscures the fact that the author's ability to rescind binding contracts unilaterally in derogation of the general principles of contract law is simply a special rule of contract law rather than an emanation of the legal nature of inalienable rights of authors in their works.[122] The same is true for the contract limitations imposed by the rights of attribution and integrity.

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were obliged to return the paintings to the artist without indemnification, despite the existence of an agreement between the art dealer and the artist according to which the art dealer would acquire the paintings upon completion of the artist's work).

119. *See* Netanel, *supra* note 1, at 51. For an analysis of the paternalistic ramifications of this rule in general, see Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 778–80 (1983).

120. The same rule has long been recognized in the United States. *See* RESTATEMENT (SECOND) OF CONTRACTS: CONTRACTS FOR PERS. SVC. OR SUPERVISION § 367 (1981).

121. *See, e.g.*, GCA, *supra* note 34, § 42(2); *see also* ICA, *supra* note 35, art. 142(2); C.c., art. 2582(2) (Italy); MICHAÉLIDÈS-NOUAROS, *supra* note 39, at 98.

122. This may be the reason why some commentators seem to assume that the right of withdrawal is a right *in rem* that entitles the author to call back individual copies from purchasers. *See, e.g.*, Kwall, *supra* note 1, at 6. By contrast, focusing on the contractual dimension of moral rights would make it clear that the right of withdrawal is typically just a contractual right to rescind a copyright contract that does not affect the status of copies already sold to the public. *See, e.g.*, GRECO & VERCELLONE, *supra* note 13, at 122.

3. Rights of Attribution and Integrity

The rights of attribution and integrity apply not only in tort scenarios, but also in contract scenarios. The cases in which moral rights are invoked in a contractual setting can be divided into two categories. The first category deals with default rules that define the duties of the parties to a copyright contract if the contract in question is silent on a particular issue. The second category relates to the imposition of mandatory terms from which the parties to a copyright contract cannot deviate even if they so wish.

a. Default Rules

In addition to express moral rights provisions, many Continental European copyright statutes also contain default rules for specific copyright contracts. These default rules receive little attention in moral rights scholarship despite their venerable origin,[123] because they are generally understood as mere applications of the broader principle protecting the moral rights of attribution and integrity. With respect to the right of attribution, for example, the French and Italian copyright statutes explicitly require publishers to affix the names of authors to each copy of the work, and German copyright law applies the same rule to anyone licensed to use the work.[124] Similarly, the French and German copyright statutes reiterate the validity of the right of integrity in contractual settings, either as default rules for publishing agreements or, more generally, as default rules for assignment and licensing contracts.[125] In Germany, for instance, contractually authorized users may not change the work or its title, unless the author cannot in good faith withhold consent.[126] These rules are default rules only, because the parties to the publishing agreement or to the licensing contract are expressly allowed to deviate from the statutory regimes. The crucial question is whether there are any outer limits as to how far beyond the statutory rules the parties can go, which depends upon the recognition of mandatory terms in copyright contracts.

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123. As early as 1814, a French court decided that "a work sold by an author to a publisher or a bookseller must bear the author's name and must be published as sold or delivered, if the author so desires, provided that there is no agreement to the contrary, except for typographical errors if it is a printed work or orthographical errors if it is a manuscript." Tribunal civil [Trib. civ.] Seine, Aug. 17, 1814 (Fr.), reported by 2 AUGUSTIN-CHARLES RENOUARD, TRAITÉ DES DROITS D'AUTEURS DANS LA LITTÉRATURE, LES SCIENCES ET LES BEAUX-ARTS 332–33 (1838) (Fr.); *see also* Tribunal commercial [Trib. com.] Paris, Aug. 22, 1845, D.P. 1845, IV, 435; Cass. ch. civ., Aug. 21, 1867, D.P. 1867, I, 369; JEAN RAULT, LE CONTRAT D'ÉDITION EN DROIT FRANÇAIS 353–61 (1927).

124. FIPC, *supra* note 33, art. L. 132-11(3); ICA, *supra* note 35, art. 126(1); GCA, *supra* note 34, § 39; *see also* ICA, *supra* note 35, art. 138. Note, however, that Italian law also specifically allows certain modifications. *See* ICA, *supra* note 35, arts. 41, 47.

125. *See* FIPC, *supra* note 33, arts. L. 132-22, L. 132-11(2); GCA, *supra* note 34, § 39.

126. *See* GCA, *supra* note 34, § 39. Note also that GCA, *supra* note 34, § 62 further extends the scope of application of GCA, *supra* note 34, § 39 to all uses covered by a statutory limitation. It essentially authorizes modifications that necessarily occur when using the work in accordance with a particular statutory limitation.

b. Mandatory Terms

It is part of the moral rights orthodoxy that mandatory terms in contracts relating to the rights of attribution and integrity are discussed under the rubric of *waivers* of moral rights.[127] In other words, instead of asking whether there are or should be certain compulsory terms or non-disclaimable duties in copyright contracts, the question is approached conceptually by asking whether the nature of moral rights allows them to be waived, which turns a contracts issue into a copyright issue.[128] Not surprisingly, the question of compulsory terms in copyright contracts is both the most important and the most controversial issue in moral rights law, because it reflects the general tension in the law of contracts and commercial law between a regulatory approach and a system based on freedom of contract.[129] In the context of copyright contracts, the Continental emphasis on moral rights tends to favor a moderate regulatory system over pure freedom of contract. However, the courts applying the concept of moral rights to agreements between authors and copyright holders or licensees exercise a great deal of discretion, and the outcomes in individual cases are difficult to predict. The conceptual framework provided by the moral rights orthodoxy, although routinely invoked by the courts, is ambiguous.[130] On the one hand, the dogma of the inalienability of moral rights suggests that authors cannot validly consent to conduct that violates their rights of integrity and attribution. On the other hand, authors regularly exercise their moral right of integrity when they consent to or approve of specific modifications to their works,[131] and their moral right to remain anonymous when they agree not to be named as authors of their works.[132] German courts have developed the theory of the "unwaivable core" to draw the line between invalid waivers and the lawful exercise of moral rights,[133] but other than saying that there is a limit to how much can be waived, this approach provides little additional guidance.

A good example for the unpredictability of moral rights cases in a contractual scenario is the French *Fantômas* case. The author of the popular French literary figure Fantômas entered into a contract with a motion picture company

127. *See, e.g.*, SCHACK, *supra* note 12, at 148. For a critique of the concept of waiver in the context of moral rights, see Netanel, *supra* note 1, at 49 (limiting the term "waiver" to the total relinquishment of rights, excluding contractual permission). A classic critique of the concept of waivers in general can be found in JOHN S. EWART, WAIVER DISTRIBUTED (1917).

128. This move effectively disconnects the discourse about copyright contracts from the general discussion about public policy limitations of freedom of contract. For an effort to reconnect contract and copyright scholarship in the context of moral rights, see Sirinelli, *supra* note 13.

129. *See* CORNISH & LLEWELYN, *supra* note 62, at 454. For a discussion of this theme in the context of the Uniform Commercial Code, see Allen R. Kamp, *Downtown Code: A History of the Uniform Commerical Code 1949-1954*, 49 BUFF. L. REV. 359 (2001).

130. *See* Netanel, *supra* note 1, at 59.

131. *See* LADAS, *supra* note 115, at 587; POLLAUD-DULIAN, *supra* note 13, at 389; Dietz, *supra* note 85, at 199, 221.

132. *See* ULMER, *supra* note 16, at 382.

133. *See, e.g.*, BGH, GRUR 73, 269 (271); ULMER, *supra* note 16, at 207, 216, 217, 379, 381; Goldstein, *supra* note 92, at 56.

for the production of several films based upon the author's novels. While the movie rights were transferred to the motion picture company, the contract contained a clause pursuant to which the personality traits of Fantômas could be modified only with the author's consent. When the author learned that the protagonist of his novels had been changed from frightening to comic, he objected on the grounds that this modification was a gross distortion of his work. The parties then amended their contract. In exchange for a lump sum payment, the author expressly accepted all changes that had been made, and the credit line in the motion picture was modified to reflect the fact that the movie version was only inspired by, but not based on, the author's work. In addition, the author's royalty rate was significantly reduced. A trilogy of Fantômas movies was released under this amended agreement. The movies were quite successful commercially, despite a number of negative reviews. Unhappy with his remuneration, the author sought to have the contract annulled, claiming that it violated his moral rights, and he sued for damages. The motion picture company defended on the grounds that the author had expressly accepted the fact that the movie version departed from the literary original and that he had been paid accordingly. The author prevailed before the trial court, which annulled the amendment and held that it contained a waiver provision that was tantamount to a sale of the author's dignity and thus was not only illegal but also immoral and against the public order.[134] Despite the strong language used by the trial court, the appellate court reversed.[135] The amended contract was upheld because (i) the author had exercised his inalienable moral rights by accepting the modifications made in exchange for payment,[136] (ii) the disclaimer in the credit line of the movie was sufficient to alert the public to these modifications,[137] and (iii) moral rights do not provide authors with the power to unilaterally abrogate contracts that were freely concluded in full knowledge of the circumstances.[138]

If there is a general set of rules that has emerged from the case law in France and Germany, it is (i) that authors cannot legally relinquish or abandon the rights of attribution and integrity altogether, (ii) that advance blanket waivers are unenforceable, and (iii) that narrowly tailored waivers that involve reasonably foreseeable encroachments on the author's moral rights are generally valid.[139] In the context of the right of integrity, this essentially means that courts are inclined to side with the author if the other party to

134. T.G.I. Paris, 3e ch., Jan. 7, 1969, 60 RIDA 1969, 166, 168 (Fr.).
135. CA Paris, 1e ch., Nov. 23, 1970, 69 RIDA 1971, 74 (Fr.).
136. *Id.* at 75–76.
137. *Id.* at 75.
138. *Id.* at 76.
139. For France, see DESBOIS, *supra* note 13, at 470, 542; LUCAS & LUCAS, *supra* note 46, at 308, 347–48; POLLAUD-DULIAN, *supra* note 13, at 388–89, 420. For Germany, see Gerhard Schricker, *Die Einwilligung des Urhebers in entstellende Änderungen des Werks*, *in* FESTSCHRIFT HEINRICH HUBMANN 409, 417 (1985); ULMER, *supra* note 16, at 207, 216–17, 379, 381; Dietz, *supra* note 85, at 221; Goldstein, *supra* note 92, at 56. For Italy, see GRECO & VERCELLONE, *supra* note 13, at 113.

the contract distorts[140] the work then attempts to invoke a generic waiver provision in its defense.[141] Conversely, the courts tend to rule against authors if the authors approve specific modifications either before or after the fact and then try to rely on their inalienable moral rights to reverse their previous decision to the detriment of the other party to the contract.[142] Regarding the right of attribution, the common denominator is that authors always preserve their right to disclose the fact of their authorship, even if they previously agreed to publish their work anonymously or under a pseudonym.[143] Whether such disclosure makes the author liable for breach of contract is a different question, which is decided on a case-by-case basis.[144] Yet another question is whether authors who contractually waive their moral right of attribution can later change their minds and demand attribution.[145] The general trend in France and Germany[146] is to recognize these waivers as valid,[147] but also to

140. If the allegedly infringing conduct does not amount to distortion, courts may uphold even a broad waiver provision. *See, e.g.*, T.G.I. Seine, June 15 and Nov. 30, 1961, D. 1962, 173, note Lyon-Caen (Fr.) (holding that when the author of a literary work unconditionally transfers his adaptations rights to a motion picture producer without reserving any particular right to control the adaptation of his work, the producer is bound to respect only the "general spirit" of the underlying work, and, provided that this is done, the author cannot object to modifications, as regrettable as they may seem from a literary perspective, and the author may neither retract his name nor prohibit the producer from mentioning that the movie is based upon the author's literary work); *see also* LUCAS & LUCAS, *supra* note 46, at 346.

141. Cass. 1e civ., Feb. 7, 1973, Gaz. Pal. [1973], 1, pan. jurispr., 404, note Sarraute (holding that a contractual clause leaving the final decision on modifications of a director's work to the motion picture producer was invalid as an advance waiver of the author's moral rights); *see also* T.G.I. Seine, May 27, 1959, 24 RIDA 1959, 149, 152–53 (Fr.) (holding that a global advance waiver of moral rights by a person whose memoirs were to be captured in a motion picture was invalid). Note that this principle is explicitly codified in the Austrian copyright statute. *See* Urheberrechtsgesetz [Copyright Law] Bundesgesetzblatt [BGBl.] No. 111/1936, § 21(3) (Austria).

142. *See* Netanel, *supra* note 1, at 56; *see also* ICA, *supra* note 35, art. 22(2) (stating that authors who knew about the modifications to their works and who accepted them cannot afterwards prevent these modifications from being implemented or ask that they be undone). Belgium has also codified these principles. *See* Law regarding copyright and neighboring rights of June 30, 1994, M.B., July 27, 1994, p. 19297, art. 1(2) (Belg.).

143. *See* DESBOIS, *supra* note 13, at 526; SCHACK, *supra* note 12, at 160; Dietz, *supra* note 85, at 220 (concluding that "an author can always disclose the real facts . . . and publicly proclaim his authorship" despite differences in national Continental legislation); Netanel, *supra* note 1, at 52. In Italy, this principle is explicitly codified in Article 21(1) of the ICA, *supra* note 35.

144. *See* LUCAS & LUCAS, *supra* note 46, at 332–33.

145. *See, e.g.*, T.G.I. Paris, May 30, 1984, 122 RIDA 1984, 220 (Fr.) (holding that the use of a musical composition in the motion picture *Twilight Zone* without crediting the composer of the classic theme music was a violation of the right of attribution, despite the fact that the composer had explicitly waived all his moral rights).

146. Note that Italy specifically addresses this question in Article 21(2) of the ICA, *supra* note 35, which was enacted to make sure that authors who initially agreed to publish their works anonymously or pseudonymously are entitled to request that future publications be made under their name, regardless of any contractual provision to the contrary. *See* PIOLA CASELLI, *supra* note 62, at 339–40.

147. *See, e.g.*, CA Paris, 4e ch., Mar. 6, 1991, D. 1992, Somm. 75 (holding that the use of a song in a television commercial without attribution of authorship requires specific and separate authorization, even if the agreement relating to the assignment of the copyright allows the assignee to use the song for commercial purposes). Note also that the German statute on publishing agreements allows publishers to make changes to a work that is part of a collection of works if the name of the author is omitted, thereby implying that at least authors of works for inclusion in a collection of works may validly agree not to be associated with their works. *See* Verlagsgesetz, July 19, 1901, Reichsgesetzblatt [RGBl.] at 217, § 44.

allow authors to unilaterally revoke them for the future,[148] at least after the passing of a certain time period.[149] These limitations on the permissible content of copyright contracts are inspired by moral rights concerns and have to be distinguished from limitations that derive from other public policy considerations, such as the protection of the public against fraudulent labeling of expressive content, which is sometimes invoked as a reason for invalidating or limiting ghostwriter clauses.[150] The result may be the same, but the concerns are different.

While the outcome of a particular moral rights case in this scenario is difficult to predict and while there may be variations across and within jurisdictions, there is no doubt that the function of moral rights in this context is to limit the permissible content of copyright contracts and to enable the courts to cut back on what they view as overly broad contractual authorizations harmful to the author.

C. Taking Stock

The preceding analysis reveals that the four individual moral rights, as applied in a contract scenario, can be reduced to the following concrete decisional rules. *First*, a person commissioning a work may not obtain specific performance, but may sue for damages if the author fails to deliver the commissioned work. *Second*, an author may unilaterally cancel contracts governing the exploitation of the author's economic rights on the basis of a change in the author's personal convictions, provided that the author indemnifies the other party to the contract in advance. *Third*, the default rule in contracts relating to the dissemination of copyrightable works is that unless an author chooses to remain anonymous, the author's name or pseudonym must be affixed to the work. Agreements regarding anonymity are subject to the compulsory rule that authors cannot validly bind themselves never to disclose their real identity. *Fourth*, the default rule in contracts relating to the dissemination of copyrightable works is that the works may not be substantially modified. While an author may consent to specific modifications both before and after the fact, the author may not validly consent in advance to unknown future modifications

148. *See, e.g.*, Cass. 1e civ., May 5, 1993, 158 RIDA 1993, 205 (Fr.) (holding that a ghostwriter clause, while not invalid, still did not amount to a full waiver of the author's moral right of attribution); CA Paris, 1e civ., Feb. 1, 1989, 142 RIDA 1989, 301, note Sirinelli (Fr.) (holding that a co-author who had waived her moral rights in a contract governed by New York law could nevertheless demand that she be mentioned in future French editions of the book in question).

149. *See* OLG München, ZUM 47, 964 (967) (holding that authors are contractually bound by their choice in favor of attribution or anonymity for five years, after which they can reverse their decision and retract their contractual waiver). The five-year period is inspired by GCA, *supra* note 34, § 41(4). In a decision involving an architectural work, the German Supreme Court indicated that it would uphold a contractual waiver of the right of attribution if confined to a specific embodiment of a work. *See* BGHZ 126, 245.

150. *See, e.g.*, STOLZ, *supra* note 69, at 70–79 (discussing legal doctrines, other than the doctrine of moral rights, that may affect the validity of ghostwriter clauses under German law to protect third parties, in particular consumers); SCHACK, *supra* note 12, at 160.

of the work left to the discretion of the other party to the contract. These four decisional rules, combined with the three decisional rules relating to the tort scenario,[151] are the substantive core of the Continental moral rights doctrine, which, as this Part has demonstrated, performs different functions in different factual and legal contexts. In hindsight, it is remarkable that these rules could even be combined in a single coherent theory with a uniform conceptual structure.

This is why the separation of these concrete rules from their specific conceptual shape is important for any study of moral rights. Keeping rules and concepts separate not only exposes the complexity of Continental moral rights law, but also shows that the actual scope of moral rights in Europe is not as broad and sweeping as their conceptual structure and associated rhetoric might suggest. For example, the element of inalienability, although absolutely central to Continental moral rights consciousness, boils down to little more than a handful of rather narrow limitations on the content of copyright contracts. The distinction between rule and concept, substance and form, is particularly crucial for this Article, the purpose of which is to examine the dominant mode of conceptualizing moral rights and the effects of its adoption in common law countries. Whether a particular country *substantively* protects moral rights depends on whether it recognizes the seven decisional rules that are part of the moral rights orthodoxy. Whether the country subscribes to the currently dominant *concept* of moral rights is a completely different question and depends on whether the country uses the legal constructs characteristic of the moral rights orthodoxy to rationalize, explain, and justify the legal validity of these seven rules. What is peculiar about the civil law approach to moral rights is not necessarily the protection of the seven decisional rules, but rather that these rules are theorized as inalienable rights of authors in their works. The following Part will show that these decisional rules can be and have been rationalized in a variety of ways without relying on the concept of inalienable rights of authors in their works.

III. The Comparative Dimension

The purpose of this Part is to reinforce the distinction between concepts and rules by studying the conceptual alternatives to the moral rights orthodoxy in common law and civil law countries and by showing that there is no inherent relationship between the use of a particular legal concept of moral rights and the particular level of substantive protection of moral rights. Many of the decisional rules underlying the orthodox theory of moral rights have been associated with completely different doctrinal constructs in the United States, the United Kingdom, and Switzerland, at least until the global wave of moral rights legislation reached these jurisdictions. My claims are that the same level of protection could be achieved on the basis of alternative

151. *See supra* Part II.A.

legal concepts and that the United States, the United Kingdom, and Switzerland did not need to switch to the dominant mode of conceptualizing moral rights to provide the same substantive level of moral rights protection that is currently available in France, Germany, and Italy. Slight modifications of the rules applied within the framework of the alternative concepts, to the extent substantively necessary, would have been sufficient and ultimately more effective in strengthening the protection of moral rights of authors in the United States, the United Kingdom, and Switzerland. In exploring the conceptual alternatives to the moral rights orthodoxy, I will follow the analytic developed in the preceding section by focusing on the seven decisional rules identified above and by distinguishing between the tort and the contract scenario.

A. Common Law Alternatives

Before the adoption of civil-law-style moral rights legislation, courts in the United States and the United Kingdom relied exclusively on legal concepts other than inalienable rights of authors in their works, such as defamation, passing off, trademark law, the right of privacy, and the law of contracts.[152] One of the first known judicial statements mentioning the interests underlying moral rights in a common law context was made by Lord Mansfield when he argued in favor of common law protection "of the copy prior to publication" in the 1769 landmark case of *Millar v. Taylor*:

> [B]ecause it is just, that an author should reap the pecuniary profits of his own ingenuity and labour. It is just, that another should not use his name, without his consent. It is fit, that he should judge when to publish, or whether he ever will publish. It is fit he should not only choose the time, but the manner of publication; how many; what volume; what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression; to whose honesty he will confide, not to foist in additions.[153]

Although this statement echoes standard complaints about piracy, rather than establishing the theory of moral rights,[154] it reads like a concise enu-

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152. *See, e.g.*, Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 82 (2d Cir. 1995); Geisel v. Poynter Prods., Inc., 295 F. Supp. 331, 339 n.5 (S.D.N.Y. 1968); Edison v. Viva Int'l, Ltd., 421 N.Y.S.2d 203, 206 (App. Div. 1979); Seroff v. Simon & Schuster, Inc., 162 N.Y.S.2d 770, 774 (Sup. Ct. 1957), *aff'd*, 210 N.Y.S.2d 479 (App. Div. 1960); CORNISH & LLEWELYN, *supra* note 62, at 454; NIMMER & NIMMER, *supra* note 18, § 8D.02[A], at 8D-9; Damich, *supra* note 1, at 35; Kwall, *supra* note 1, at 3, 18.

153. Millar v. Taylor (1769) 98 Eng. Rep. 201, 252 (K.B.). This statement is similar to one found in an early French case in which the court decided that the unauthorized publication of a religious sermon was unlawful. *See* CA Lyon, ch. corr., July 17, 1845, D.P. 1845, II, 128, 128 (Fr.) ("[T]he author must always preserve the right to review and correct his work, to control its faithful reproduction, and to choose the moment and the mode of its publication.").

154. *See* STRÖMHOLM, *supra* note 10, at 120 (discussing the significance of similar pronouncements found in the French 1845 case cited *supra* note 153).

meration of the set of rights available to authors in modern France and Germany, namely, in this order, the economic rights, the right of attribution, the right of disclosure, and the right of integrity. The following overview demonstrates that there are no obstacles built into common law concepts that would prevent the courts from generating the very same decisional rules that French, German, and Italian courts apply on the basis of the moral rights orthodoxy. In view of the work done by others in this field,[155] there is no need to replicate the entire body of American and English case law on moral rights to make this point. However, given the fact that this study differs from most previous studies in its objective and analytic, a brief review of the most pertinent cases is in order.

1. Tort Scenario

As explained earlier in this Article, moral rights perform very limited functions in a tort scenario and often overlap with traditional copyright infringement claims.[156] To the extent that there is a parallel copyright claim for the violation of moral rights in a tort setting, courts that operate in jurisdictions that do not recognize the Continental concept of moral rights tend to decide the moral rights conflict on the basis of traditional copyright law alone, even if the author's goal was to protect his or her personal interests in the work.[157] Therefore, legal alternatives to the concept of moral rights are best visible when parallel copyright claims do not exist. A search for American and English cases that involve a tort scenario and that turn exclusively on the application of the decisional rules underlying the moral rights theory reveals different results for the rights of attribution and integrity on the one hand and the right of disclosure on the other. There are only a few cases in which courts have applied the decisional rules underlying the rights of attribution and integrity. In contrast, the early case law relating to the right of disclosure is abundant because the economic rights available under American statutory copyright law were limited to *published* works until 1978.[158] Therefore, there were no parallel copyright claims available for unpublished works, the protection of

155. *See supra* notes 1, 5; Phyllis Amarnick, *American Recognition of the Moral Right*, 29 COPYRIGHT L. SYMP. (ASCAP) 31 (1983); Jane C. Ginsburg, *The Right of Integrity in Audiovisual Works in the United States*, 135 RIDA 2 (1988) (Fr.); Goldstein, *supra* note 92; Robert E. Hathaway, *American Law Analogues to the Paternity Element of the Doctrine of Moral Right*, 30 COPYRIGHT L. SYMP. (ASCAP) 121 (1983).

156. *See supra* Part II.A.

157. For example, in Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985), a case involving the unauthorized publication of core passages of former President Ford's unpublished memoirs, the U.S. Supreme Court invoked the copyright holder's economic rights of reproduction, adaptation, and public distribution to decide the case. By contrast, a German court would most likely have turned to the author's moral right of disclosure under GCA, *supra* note 34, § 12(2), which includes the exclusive right to publicly communicate or describe the content of a work of authorship. Interestingly, the Court in *Harper* also mentioned the author's "personal interest in creative control" in addition to the author's "property interest in exploitation of prepublication rights." *Harper*, 471 U.S. at 555.

158. For a historical account of the transition from publication to fixation as part of the U.S. Copyright Act of 1976, see Howard B. Abrams, *The Historic Foundation of American Copyright Law*, 29 WAYNE L. REV. 1119, 1130 n.29 (1983).

which is the primary role of the decisional rule underlying the moral right of disclosure. Until 1978, there remained a need for rules outside statutory copyright law in cases relating to the unauthorized disclosure of unpublished works even if the author also held the copyright in the work.

a. Right of Disclosure

The decisional rule associated with the right of disclosure, understood as the right to prevent third parties from disclosing works without the author's consent, is of venerable origin in both the United Kingdom and the United States. A number of early English cases applied the rule to fact patterns involving the unauthorized publication of manuscripts and other works,[159] the unauthorized publication of private letters or photographs,[160] and the unauthorized written disclosure of the contents of a play that had been performed on stage but had never been published in writing.[161] To the extent that legal concepts were invoked to generate and justify this decisional rule, they ranged from an unnamed common law right and a vague notion of property to breach of confidence and trust.[162] American courts followed the English courts in applying the decisional rule underlying the right of disclosure by acknowledging a right to prevent the unauthorized publication of a work.[163] Relief was granted on the basis of property, the right of privacy, and a *sui generis* common law right of first publication often referred to as common law copyright.[164] The term "common law copyright" was somewhat misleading in this context, however, because the right at issue was not a copyright in the sense of an exclusive right to reproduce the work, but rather a right to control the

159. *See, e.g.*, Prince Albert v. Strange (1849) 41 Eng. Rep. 1171 (Ch.) (enjoining the disclosure of some etchings made by Queen Victoria and Prince Albert); Duke of Queensberry v. Shebbeare (1758) 28 Eng. Rep. 924 (Ch.).

160. *See, e.g.*, Thompson v. Stanhope (1774) 27 Eng. Rep. 476 (Ch.); Pope v. Curl (1741) 26 Eng. Rep. 608 (Ch.); Holmes v. Langfier [1901–1904] MacG. Cop. Cas. 71 (K.B. 1903) (Eng.).

161. *See, e.g.*, Gilbert v. Star Newspaper Co. (1894) 11 T.L.R. 4 (Ch.) (Eng.); Macklin v. Richardson (1770) 27 Eng. Rep. 451 (Ch.).

162. *See, e.g.*, Mansell v. Valley Printing Co. [1908] 2 Ch. 441 (Eng.) (common law right in an unpublished literary or artistic work); Gee v. Pritchard (1818) 36 Eng. Rep. 670 (Ch.) (property and breach of trust); Fraser v. Edwardes [1905–1910] MacG. Cop. Cas. 10 (K.B. 1905) (Eng.) (breach of confidence); *see also* RICHARD GODSON, PRACTICAL TREATISE ON THE LAW OF PATENTS FOR INVENTIONS AND OF COPYRIGHT 226 (1823).

163. *See, e.g.*, Bartlett v. Crittenden, 2 F. Cas. 967, 968 (C.C.D. Ohio 1849) (No. 1,076) ("No one can determine this essential matter of publication but the author."); Gieseking v. Urania Records, Inc., 155 N.Y.S.2d 171 (Sup. Ct. 1956). With respect to the unauthorized publication of private letters, see Grigsby v. Breckinridge, 65 Ky. 480 (1867); Denis v. Leclerc, 1 Mart. (o.s.) 297 (Orleans 1811); Baker v. Libbie, 97 N.E. 109 (Mass. 1912); Eyre v. Higbee, 22 How. Pr. 198 (N.Y. Sup. Ct. 1861); *see also* CAL. CIV. CODE § 985 (West 2006), originally adopted in 1872 on the basis of § 434 of the draft Civil Code for the State of New York, N.Y. CODE COMM'RS, DRAFT OF A CIVIL CODE FOR THE STATE OF NEW YORK § 434 (Final Draft 1865).

164. *See, e.g.*, Press Pub. Co. v. Monroe, 73 F. 196 (2d Cir. 1896); Frohman v. Ferris, 87 N.E. 327, 328 (Ill. 1909) ("At common law the author of a literary composition had an absolute property right in his production which he could not be deprived of so long as it remained unpublished, nor could he be compelled to publish it."), *aff'd*, 223 U.S. 424 (1912); Chamberlain v. Feldman, 89 N.E.2d 863 (N.Y. 1949); LADAS, *supra* note 115, at 687; Damich, *supra* note 1, at 48.

publication of something that the person in question desired to keep private.[165] In fact, it was the recognition of the author's right to object to the unauthorized disclosure of unpublished works that laid the foundation for the doctrinal construction of the right of privacy.[166] When the decisional rule underlying the right of disclosure was folded into copyright law in the United States following the expansion of federal copyright law to unpublished works, the issue largely became one of ordinary copyright law.

b. Right of Attribution

As explained above, there are very few cases that involve the moral right of attribution in a tort scenario without also involving the adjudication of economic rights.[167] One example is *Ellis v. Hurst*,[168] in which an author who had published two books under a pseudonym objected to the publication of these books under his real name. This is a classic moral rights case because the author objected to the publisher's interference with his decision to use a pseudonym as a means of attribution. Since the author had dedicated the works to the public,[169] he could not rely on the economic rights available under the copyright statute as a basis for his objection. He invoked state privacy rights[170] to request that the books be published under his pseudonym, arguing that using his real name amounted to using his name for the purpose of trade and advertising without his consent. The court agreed and granted temporary injunctive relief, explicitly rejecting the defendant's argument that a book in the public domain could be published under the real name of the author.[171] Although the court later reached the opposite outcome when ruling on the merits,[172] this case nevertheless shows that the court did not turn to copyright or other rights of the author in his or her work when adjudicating the author's moral rights claim.

Another example is *Smith v. Montoro*,[173] in which the Ninth Circuit held that film distributors' substitution of an actor's name with a name of the distributors' own choosing in the film credits and the advertising material was unlawful because the distributors' false attribution of the actor's performance to a third party amounted to a false description or representation in the ad-

165. *See* Abrams, *supra* note 158, at 1133.

166. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890).

167. *See supra* Part II.A.

168. 121 N.Y.S. 438 (Sup. Ct. 1910).

169. *Id.* at 439.

170. *See* N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 1992).

171. *Ellis*, 121 N.Y.S. at 439.

172. Ellis v. Hurst, 128 N.Y.S. 144 (Sup. Ct. 1910), *aff'd*, 130 N.Y.S. 1110 (App. Div. 1911).

173. 648 F.2d 602 (9th Cir. 1981); *see also* Dodd v. Fort Smith Special Sch. Dist. No. 100, 666 F. Supp. 1278 (W.D. Ark. 1987) (issuing a preliminary injunction prohibiting the school district from distributing a book that was substantially copied from an uncopyrighted manuscript authored by teachers and students).

vertising or sale of goods or services under § 43(a) of the Lanham Act.[174] Further, in *Lamothe v. Atlantic Recording Corp.*,[175] the Ninth Circuit ruled that two co-authors who objected to the omission of their names from a record album cover and sheet music featuring the co-authored compositions stated a cause of action under the Lanham Act for express reverse passing off, and the court explicitly referred to the policy of "ensuring that the producer of a good or service receives appropriate recognition"[176] in support of its decision. Although American courts have yet to hold that authors can object to simple non-attribution as opposed to misattribution,[177] *Lamothe* came quite close, and there is no doubt that the Lanham Act could be used to make mere non-attribution actionable without distorting the statutory language. In fact, at least one commentator has already read *Montoro* and *Lamothe* 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."[178] Moreover, while it is true that *Dastar*,[179] in which the U.S. Supreme Court held that the Lanham Act could not be used to prevent the unaccredited copying of a work in the public domain, has led lower courts to deny relief under the Lanham Act in situations similar to *Montoro* and *Lamothe*,[180] there is no reason inherent in the statute that would prevent the Court from distinguishing *Dastar* in a future moral rights case, for example by refusing to extend its holding to fact patterns that involve attribution to actual creators (authors) as opposed to copyright owners.[181] The point is that a minor change in judicial interpretation or a slight legislative modification of the statute could generate the very same rule underlying the Continental moral right of attribution in a tort scenario without adopting civil-law-style moral rights.[182]

Aside from the few cases just mentioned, however, most cases discussed in legal scholarship as pertaining to the right of attribution are really instances

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174. *See* 15 U.S.C. § 1125(a) (2000). Note, however, that actors are not considered to be authors in Continental copyright law and would, if at all, enjoy only limited statutory moral rights protection.

175. 847 F.2d 1403 (9th Cir. 1988).

176. *Id.* at 1407.

177. *See* Damich, *supra* note 1, at 35–36; Hughes, *supra* note 5, at 36; Netanel, *supra* note 1, at 36; *see also* Cleary v. News Corp., 30 F.3d 1255, 1260 (9th Cir. 1994) ("[T]he Lanham Act does not create a duty of express attribution, but does protect against misattribution."); Morita v. Omni Publ'ns Int'l, Ltd., 741 F. Supp. 1107, 1114 (S.D.N.Y. 1990), *vacated by consent judgment*, 760 F.Supp. 45 (S.D.N.Y. 1991). In the English context, see Preston v. Raphael Tuck & Sons, Ltd. [1926] Ch. 667 (Eng.).

178. *See* PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT 286–87 (2001).

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

180. *See infra* text accompanying notes 334–346.

181. *See* Jane C. Ginsburg, *The Right To Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 269 (2004) (suggesting that Lanham Act claims could be preserved in attribution cases if *Dastar* were limited to its facts); Hughes, *supra* note 5, at 28 n.124, 44 (suggesting that relying on this distinction would have given the *Dastar* court "an easy out").

182. *See* Damich, *supra* note 1, at 62–63 (conceding that the current obstacles for full moral rights protection under the Lanham Act are not insurmountable, but arguing for the moral rights orthodoxy as the more direct way of achieving this goal). *But see* Kwall, *supra* note 1, at 18, 23–24 (suggesting that patchwork measures rarely approximate the degree of protection afforded by a cohesive legal doctrine).

of what is known as the right of non-attribution, which, as mentioned above, is not considered a moral right in German, French, or Italian legal theory.[183] To the extent that one accepts the right of non-attribution as a moral right, however, English and American cases on point are easy to find since the author's right to object to false attribution of authorship is widely recognized on the grounds of libel, passing off, invasion of privacy, and trademark law.[184]

c. Right of Integrity

Cases involving the decisional rule underlying the moral right of integrity in a tort scenario are similarly rare, but there are a few. In *Drummond v. Altemus*,[185] for instance, the court enjoined a publisher from selling a book that contained lectures by the plaintiff professor, albeit with "additions and omissions."[186] When the publisher defended himself on the grounds that the copyright had been dedicated to the public and that statutory copyright protection was not available, the court explained that the plaintiff did not base his claim on the copyright statute, but rather "upon his right, quite distinct from any conferred by copyright, to protection against having any literary matter published as his work which is not actually his creation, and, incidentally, to prevent fraud upon purchasers. That such right exists is too well settled, upon reason and authority, to require demonstration."[187]

In the most famous American moral rights case, *Gilliam v. American Broadcasting Co.*,[188] although there was a parallel copyright claim, the Second Cir-

183. *See supra* text accompanying notes 47–49.

184. *See, e.g.*, King v. Innovation Books, 976 F.2d 824 (2d Cir. 1992); Neyland v. Home Pattern Co., 65 F.2d 363 (2d Cir. 1933); Follett v. New Am. Library, Inc., 497 F. Supp. 304 (S.D.N.Y. 1980); Geisel v. Poynter Prods., Inc., 295 F. Supp. 331 (S.D.N.Y. 1968); Carroll v. Paramount Pictures, Inc., 3 F.R.D. 95 (S.D.N.Y. 1942); Estes v. Williams, 21 F. 189 (C.C.S.D.N.Y. 1884); Clemens v. Belford, Clark & Co., 14 F. 728 (C.C.N.D. Ill. 1883); Kerby v. Hal Roach Studios, Inc., 127 P.2d 577 (Cal. Dist. Ct. App. 1942); Ben-Oliel v. Press Publ'g Co., 167 N.E. 432 (N.Y. 1929); D'Altomonte v. N.Y. Herald Co., 139 N.Y.S. 200 (App. Div. 1913); Gershwin v. Ethical Publ'g Co., 1 N.Y.S.2d 904 (City Ct. 1937); Eliot v. Jones, 120 N.Y.S. 989 (Sup. Ct. 1910); Harte v. De Witt, 1 CENT. L.J. 360 (1874); Marengo v. Daily Sketch [1948] 1 All E.R. 406 (H.L.) (Eng.); Samuelson v. Producers' Distrib. Co. [1932] 1 Ch. 201 (Eng.); Wood v. Butterworth [1901–1904] MacG. Cop. Cas. 16 (Ch. 1901) (Eng.); Lord Byron v. Johnston (1816) 35 Eng. Rep. 851 (Ch.); Ridge v. English Illustrated Magazine, Ltd. [1911–1916] MacG. Cop. Cas. 91 (K.B. 1913) (Eng.); *see also* EVAN JAMES MACGILLIVRAY, A TREATISE ON THE LAW OF COPYRIGHT 213 (1912).

185. 60 F. 338 (C.C.E.D. Pa. 1894).

186. *Id.*

187. *Id.* at 338–39; *see also* Am. Law Book Co. v. Chamberlayne, 165 F. 313, 316–17 (2d Cir. 1908) (rejecting the author's claims that modifications to his article constituted "trespass to literary property" on the grounds that the author had transferred his literary property in the article to the publisher, but stating that if the author "has sustained damage because his article has been published in a mutilated or altered form or with some misrepresentation as to its authorship, he may, if he can prove his allegations, recover in an action for libel"); Benson v. Paul Winley Record Sales Corp., 452 F. Supp. 516, 518 (S.D.N.Y. 1978); Jaeger v. Am. Int'l Pictures, Inc., 330 F. Supp. 274, 278 (S.D.N.Y. 1971); Prouty v. Nat'l Broad. Co., 26 F. Supp. 265, 266 (D. Mass. 1939) (stating that if the use of the plaintiff author's novel "was such as to injure the reputation of the work and of the author . . . it may well be that relief would be afforded by applying well-recognized principles of equity which have been developed in the field known as 'unfair competition'").

188. 538 F.2d 14 (2d Cir. 1976).

cuit still discussed moral rights, not because it endorsed the idea of inalienable rights of authors in their works, but because it conceptualized the decisional rule associated with the moral right of integrity as flowing from the Lanham Act.[189] The American Broadcasting Company ("ABC") had obtained a license from the British Broadcasting Company ("BBC") to broadcast three programs written and performed by the popular Monty Python group, but since ABC, unlike the BBC, was supported by advertising, it edited the programs to accommodate commercials. The Monty Python group objected and successfully obtained a preliminary injunction. The court stated that the Monty Python group would suffer irreparable injury to its professional reputation and would likely succeed on the merits for two reasons. First, the substantial editing by ABC constituted an unauthorized creation of a derivative work in violation of Monty Python's copyright in the underlying script. Second, the distortion of the work attributed to Monty Python gave rise to a cause of action under § 43(a) of the Lanham Act as a misrepresentation of the author's work that created a false impression of the product's origin.[190] While this case reveals that doctrinal constructs outside copyright law may be available to generate the decisional rule underlying the moral right of integrity, it also shows that the existence of copyright infringement made the Lanham Act violation largely superfluous as a practical matter, and one wonders how the case would have come out if Monty Python had fully transferred its copyright in the script to the BBC. For the purposes of this Article, however, it is sufficient to note that the court again did not base its moral rights decision on any inalienable rights of authors in their works, but on trademark law.[191]

2. Contract Scenario

The situation in the contract scenario is reversed from the situation in the tort scenario in that there are only a few cases that apply the decisional rules derived from the right of disclosure (and no cases that establish the right of withdrawal), while there are many cases that relate to the rights of attribution and integrity.

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189. In the United Kingdom, it would be the common law tort action of passing off. *See* CHRISTOPHER WADLOW, THE LAW OF PASSING-OFF 645 (3d ed. 2004) ("It is also, at least in principle, actionable as passing-off to publish as the work of an identified author and without further explanation work which has been revised by another, or altered, distorted or mutilated.") (footnotes omitted).

190. Note that the concerns mentioned earlier in the context of the right of attribution as to the impact of the progeny of *Dastar* on Lanham Act claims also apply to the *Gilliam* case. *See supra* text accompanying notes 179–180; *see also infra* text accompanying notes 334–346. *But see* GOLDSTEIN, *supra* note 14, § 17.24.1, at 17:210 (suggesting that *Dastar* will not affect "an author's interest in not having a distorted work attributed to him"); Hughes, *supra* note 5, at 38 (explaining that while *Dastar* has undercut *Gilliam* as "the great white hope of moral rights," it "does not make *Gilliam* bad law" because *Dastar* is about non-attribution while *Gilliam* is about misattribution).

191. Of course, to the extent that the right of integrity is based on the Lanham Act, the general limitation discussed in the context of the right of attribution also affects the right of integrity because the mutilation of a work that has not been attributed to the author or that has been properly labeled as modified is unlikely to be actionable under the Lanham Act. *See supra* text accompanying note 177; Netanel, *supra* note 1, at 41–42.

a. Rights of Disclosure and Withdrawal

Regarding the right of disclosure, the most important question is whether authors can be forced to deliver their works to a third party if they contractually agree to supply a work for publication. As explained above, French doctrine invokes the right of disclosure to explain why authors cannot be forced to surrender works that they do not deem fit for publication in spite of their contractual obligations.[192] English courts have reached the same result on the basis of the common law. Under English law, as a general rule, if an author agrees to supply a publisher with a manuscript and fails to deliver it, the publisher may have a cause of action for damages but may not obtain specific performance.[193] To the extent that this outcome can be viewed as an acknowledgement of the decisional rule underlying the right of disclosure in a contractual setting, it is squarely based on the common law of contracts rather than on a theory of inalienable rights of authors in their works.[194]

Regarding the right of withdrawal, the question is whether authors are entitled to retract their economic rights or terminate licensing agreements if they no longer want their works to be communicated to the public. France, Germany, and Italy grant such a right as a matter of largely symbolic legislation,[195] while common law courts generally do not recognize it.[196] However, if this right were acknowledged in the United States or the United Kingdom, it would most likely be on the basis of the law of contracts and not on the basis of a non-patrimonial, inalienable right of the author conceptualized as an element of the author's copyright. For example, when the United States decided to provide authors with a compulsory contractual right to terminate transfers and licenses of their copyrights,[197] which is similar in structure to the Continental right of withdrawal,[198] it did not include that right in the

192. *See supra* Part II.B.1.

193. Clarke v. Price (1819) 37 Eng. Rep. 270 (Ch.) (holding that a publisher could not obtain specific performance under a contract with an author when the author failed to deliver a manuscript, nor was the publisher entitled to injunctive relief restraining the submission of the manuscript to another publisher); Gale v. Leckie (1817) 171 Eng. Rep. 588 (K.B.) (allowing a publisher to recover damages for the nonperformance of a contractual promise undertaken by an author to supply a manuscript for publication); CORNISH & LLEWELYN, *supra* note 62, at 461; MACGILLIVRAY, *supra* note 184, at 227–28 (confirming the basic rule, but explaining that in the case of agreements to furnish an unpublished manuscript already completed, specific performance would "probably" be available); Damich, *supra* note 1, at 66.

194. *See* Netanel, *supra* note 1, at 29–30.

195. *See supra* Part I.C.1.

196. *See, e.g.*, Southey v. Sherwood (1817) 35 Eng. Rep. 1006 (Ch.) (holding that a young author could not prohibit publication of a poem that he had left with a bookseller twenty-three years prior based on his claim that he no longer agreed with his earlier views and that publication would harm his reputation); Chaplin v. Leslie Frewin (Publishers) Ltd. [1966] Ch. 71 (A.C. 1965) (Eng.) (holding that Charlie Chaplin's son, who had assigned the copyright in his life story but had later changed his mind, could not restrain the publication of the story).

197. *See* 17 U.S.C. § 203 (2000).

198. Although this right can neither be waived in advance nor contracted away, it is not a moral right in the technical sense because the underlying rationale is not to protect the author's personal interest in the work. *See* H.R. REP. NO. 94-1476, at 124 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5740 (stating explicitly that § 203 is meant to be a "provision safeguarding authors against unremunerative

statutory section governing the rights of authors, but rather in the section relating to copyright ownership and transfer.

b. Rights of Attribution and Integrity

My analysis of the moral rights orthodoxy has shown that two questions are important when it comes to the application of the rights of attribution and integrity in contractual settings. The first question is whether common law courts recognize default rules preserving the authors' rights of attribution and integrity when contracts between authors and their licensees or assignees are silent.[199] Regarding the right of integrity, an early English case held that the assignee of a copyright is free to modify the work absent any express or implied provision to the contrary,[200] but most common law courts have since recognized that even if a contract is silent, the assignee or licensee of a copyright may not modify the work to the point where the publication of the modified work would harm the author's reputation, as that would amount to libel.[201] As a result, using the laws of contracts and defamation, common law courts have come to recognize a default rule according to which those contracting with authors must refrain from unauthorized substantive modifications.[202] Regarding the right of attribution, in contrast, assignees or licensees of a copyright are under no general obligation to publish the work under the author's name absent any special agreement,[203] despite a few judicial pronouncements to

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transfers" that is needed "because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited").

199. It is fairly clear that the courts will enforce express contractual provisions reserving specific rights to authors. *See, e.g.*, Granz v. Harris, 198 F.2d 585 (2d Cir. 1952); Lake v. Universal Pictures Co., 95 F. Supp. 768 (S.D. Cal. 1950); Manners v. Famous Players-Lasky Corp., 262 F. 811 (S.D.N.Y. 1919); Lowenfeld v. Curtis, 72 F. 105 (C.C.S.D.N.Y. 1896); Edison v. Viva Int'l, Ltd., 421 N.Y.S.2d 203 (App. Div. 1979); Royle v. Dillingham, 104 N.Y.S. 783 (Sup. Ct. 1907); Frisby v. British Broad. Corp. [1967] Ch. 932 (Eng.).

200. *See* Cox v. Cox (1853) 68 Eng. Rep. 1211 (Ch.); *see also* Hackett v. Walter, 142 N.Y.S. 209, 210 (Sup. Ct. 1913) (obiter dictum).

201. *See* Autry v. Republic Prods., Inc., 213 F.2d 667, 670 (9th Cir. 1954); Am. Law Book Co. v. Chamberlayne, 165 F. 313, 316 (2d Cir. 1908); Clevenger v. Baker, Voorhis & Co., 8 N.Y.2d 187, 190–91 (1960); Packard v. Fox Film Corp., 202 N.Y.S. 164, 166–67 (App. Div. 1923); Preminger v. Columbia Pictures Corp., 267 N.Y.S.2d 594, 599, 603–04 (Sup. Ct. 1966), *aff'd per curiam*, 269 N.Y.S.2d 913 (App. Div. 1966), *aff'd*, 219 N.E.2d 431 (N.Y.); Soc'y of Survivors of the Riga Ghetto, Inc. v. Huttenbach, 535 N.Y.S.2d 670, 673–74 (Sup. Ct. 1988); Joseph v. Nat'l Magazine Co. [1959] Ch. 14 (Eng.); Lee v. Gibbings (1892) 67 L.T.R. 263 (Ch.) (Eng.); Humphreys v. Thomson & Co. [1905–1910] MacG. Cop. Cas. 148 (K.B. 1908) (Eng.); Archbold v. Sweet (1832) 172 Eng. Rep. 947 (K.B.); *see also* 17 U.S.C. §§ 111(c)(3), 115(a)(2) (2000); LOUIS D. FROHLICH & CHARLES SCHWARTZ, THE LAW OF MOTION PICTURES 53–57 (1918); LADAS, *supra* note 7, at 804; LADAS, *supra* note 115, at 587; MACGILLIVRAY, *supra* note 184, at 213, 298.

202. *See, e.g.*, Stevens v. Nat'l Broad. Co., 148 U.S.P.Q. 755, 758 (Cal. Super. Ct. 1966); *see also* GOLDSTEIN, *supra* note 14, § 17.24.1, at 17:206. *But see* McGuire v. United Artists Television Prods., Inc., 254 F. Supp. 270 (S.D. Cal. 1966).

203. *See, e.g.*, Cleary v. News Corp., 30 F.3d 1255, 1259–60 (9th Cir. 1994); Vargas v. Esquire, Inc., 164 F.2d 522, 525–26 (7th Cir. 1947); Harris v. Twentieth Century Fox Film Corp., 43 F. Supp. 119, 121 (S.D.N.Y. 1942); De Bekker v. Frederick A. Stokes Co., 153 N.Y.S. 1066, 1069 (App. Div. 1915) (Jenks, P.J., concurring); *see also* Jones v. Am. Law Book Co., 109 N.Y.S. 706 (App. Div. 1908); GOLDSTEIN, *supra* note 14, § 17.24.2.1, at 17:213; Damich, *supra* note 1, at 70; Kwall, *supra* note 1, at 14; Netanel,

the contrary.[204] Nevertheless, mirroring the distinction between permissible non-attribution and impermissible misattribution mentioned above,[205] at least one court has been willing to read a term into a contract between a motion picture producer and an author of song lyrics pursuant to which the producer would not give screen credit to anyone other than the author.[206] Furthermore, there are collective bargaining agreements that regulate the important issue of screen credits in detail on a contractual basis.[207]

The second question is whether common law courts recognize mandatory contractual rules that trump express contractual provisions that either allow modifications or enable the suppression of the author's name. Since common law courts do not generally recognize even a default rule for the right of attribution, the question is primarily relevant for the right of integrity.[208] The following statement by Judge Frank in his concurring opinion in *Granz v. Harris*[209] suggests that the law sets outer limits as to what kind of conduct can be covered by generic contractual authorizations to alter a particular work:

> Whether the work is copyrighted or not, the established rule is that, even if the contract with the artist expressly authorizes reasonable modifications (e.g., where a novel or stage play is sold for adaptation as a movie), it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original.[210]

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supra note 1, at 37.

204. *See* Zorich v. Petroff, 313 P.2d 118, 122 (Cal. Dist. Ct. App. 1957); Clemens v. Press Publ'g Co., 122 N.Y.S. 206, 208 (App. Term 1910) (Seabury, J., concurring) ("If the intent of the parties was that the defendant should purchase the rights to the literary property and publish it, the author is entitled, not only to be paid for his work, but to have it published in the manner in which he wrote it. The purchaser cannot garble it, or put it out under another name than the author's; nor can he omit altogether the name of the author, unless his contract with the latter permits him so to do."); *see also* GOLDSTEIN, *supra* note 14, § 17.24.2.1, at 17:213 ("Contemporary developments in contract law may lead courts in the future to find an implied obligation to attribute authorship.").

205. *See supra* text accompanying note 177.

206. Miller v. Cecil Film Ltd. [1937] 2 All E.R. 464 (Ch.) (Eng.).

207. *See, e.g.*, CORNISH & LLEWELYN, *supra* note 62, at 458 (for England); *see also* WRITERS GUILD OF AMERICA, THEATRICAL AND TELEVISION BASIC AGREEMENT, art. 8, Appendix A art. 8 (2004); DIRECTORS GUILD OF AMERICA, INC., BASIC AGREEMENT OF 2005, art. 8 (2005). One wonders whether the hostility of the motion picture industry toward moral rights is in part motivated by the concern that state regulation of moral rights could interfere with the elaborate credit system that is currently in place and that seems to be an important element of the star system in the entertainment industry.

208. Note, however, that at least one court invalidated a ghostwriter clause on the basis that it was against public policy. *See* Roddy-Eden v. Berle, 108 N.Y.S.2d 597 (Sup. Ct. 1951). Nevertheless, the court did not invalidate the contract out of a concern for the author's reputation (it was the author who brought claims under the contract), but rather to prevent a fraud on the public. *Id.* at 599–600; *see also* Skinner v. Oakes, 10 Mo. App. 45 (1881).

209. 198 F.2d 585 (2d Cir. 1952).

210. *Id.* at 589 (footnote omitted). *But see* Netanel, *supra* note 1, at 48 (stating that the U.S. moral rights analogues are fully waivable, such that an author's advance waiver of further control over the work would defeat a subsequent claim based on the publication of a distorted version of the work).

However, hardly any cases implement this general principle in a straightforward manner.[211] The common law courts are reluctant to expressly overrule contractual authorizations, and when they do, they characterize their decision as narrowly interpreting the provision in question instead of openly invalidating it. For example, in *Curwood v. Affiliated Distributors, Inc.*,[212] a federal district court in New York sided with the author when the other party to the contract deliberately distorted the author's work and then defended itself on the basis of a generic waiver provision contained in the contract. More specifically, the court enjoined the use of the writer's name and the title of one of his stories in a motion picture that was supposed to be based on his stories but had been changed to the point where the story told in the motion picture was completely different. The court granted the injunction despite the fact that the contract between the writer and the motion picture company contained a clause expressly authorizing the motion picture company to "elaborate" on the stories "however needed,"[213] reasoning that "elaborating" does not include replacing the original story with a completely different one.[214] French and German courts would probably have reached the same outcome, but they would have justified their decision by conceptualizing the contractual provision at hand as an impermissible advance waiver of the author's inalienable moral right of integrity.

The fact that the *Curwood* court used the general law of contracts to reach the same outcome that Continental courts would have reached by invoking the moral rights doctrine illustrates the point that switching to the moral rights orthodoxy is not necessary to achieve the level of protection that is available to authors in Continental Europe,[215] although some scholars have suggested that it might be "easier" for courts to override a broad contractual provision on the basis of moral rights than to narrow down its scope on the basis of standard contract interpretation.[216] However, to the extent that the courts are reluctant to use contractual principles to generate the decisional rules underlying the moral rights orthodoxy, especially with respect to the right

211. This is quite different in Continental moral rights jurisdictions, especially in France, where courts often use strong language when invalidating contracts on the basis of moral rights. A famous case in point involves the colorization of John Huston's *Asphalt Jungle*. *See* Cass. 1e civ., May 28, 1991, 149 RIDA 1991, 197 (Fr.). For a detailed discussion of this case, see Jane C. Ginsburg & Pierre Sirinelli, *Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Film Colorization Controversy*, 15 COLUM.-VLA J.L. & ARTS 135 (1991).

212. 283 F. 219 (S.D.N.Y. 1922).

213. *Id.* at 221.

214. *Id.* at 222–23. Another example of narrowly construing a publishing agreement in favor of authors is Moseley v. Stanley Paul & Co. [1917–1923] MacG. Cop. Cas. 341, 341–42 (Ch. 1922) (Eng.) (enjoining the publication of a book upon the author's complaint that the book cover "was vulgar and offensive and injurious to his reputation as an author" on the basis that the book cover was outside the scope of a contractual provision according to which "all details as to the manner of production, publication and advertisement . . . shall be left to the sole discretion of the publishers").

215. *See also* Damich, *supra* note 1, at 40 ("[R]efusing to enforce a contract term that provides for unlimited modifications in the work . . . would be tantamount to recognizing to some degree the right of integrity, and the issue would no longer really be contract interpretation.") (footnote omitted).

216. *See* Dworkin, *supra* note 18, at 333.

of attribution, a statutory modification of contractual rules could change this situation without the need for the adoption of civil-law-style moral rights.[217]

B. Civil Law Alternatives

While the preceding analysis focused on the divide between common law and civil law approaches to the protection of moral rights, I will now turn to Switzerland to demonstrate that there are quite significant conceptual differences even within the civil law tradition and that it should not be assumed that all civil law countries have always subscribed to the moral rights orthodoxy. The case of Switzerland shows with great clarity that different legal systems that share the same legal, philosophical, and intellectual traditions do not necessarily develop the same legal concepts to deal with particular legal issues. Until 1992, when the new Swiss copyright statute was enacted,[218] Swiss copyright law did not contain any moral rights provisions similar to those contained in the French and German copyright statutes,[219] despite Switzerland being a civil law country with a legal tradition heavily influenced by German and French law. Nevertheless, there is no doubt that the Swiss courts protected moral rights well before 1992, and they did so on the basis of a doctrinal construct known in Continental legal theory as the "general right of personality."[220]

The main legal characteristic of rights of personality is that the objects of these rights are thought to be so closely connected to the individual that they are not considered a part of that person's freely alienable patrimony,[221] in sharp contrast to property rights and contractual rights.[222] The most common examples are a person's physical and sexual integrity, personal liberty, name, image, privacy, honor, and reputation. Accordingly, rights of personality usually include "the rights to one's identity, to a name, to one's reputation, one's occupation or profession, to the integrity of one's person, and to privacy."[223] To the extent that moral rights protect reputational interests (rights of attribution and integrity) or privacy interests (right of disclosure), the protection provided by the general right of personality is sufficient, and it does not come

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217. 17 U.S.C. § 203 could serve as a precedent for such contractual rules regarding copyright contracts.

218. Swiss Copyright Act of 1992, *supra* note 104.

219. The only provision that remotely related to moral rights was Article 43 of the Swiss Copyright Act of 1922. *See* Bundesgesetz betreffend das Urheberrecht an Werken der Literatur und Kunst, Dec. 7, 1922, BBl III 946, art. 43 (Switz.) [hereinafter Swiss Copyright Act of 1922]. This provision criminalized the false attribution of authorship, the failure to properly cite sources when required under the law, and the unauthorized publication of pictures.

220. On the general right of personality, see, for example, Basil S. Markesinis & Hannes Unberath, The German Law of Torts 74–78 (4th ed. 2002); Reinhard Zimmermann, The Law of Obligations 1085–94 (1996).

221. The classic explanation of the civil law notion of "patrimony" can be found at 1 Friedrich Carl von Savigny, System des heutigen römischen rechts 339–40 (1840) (defining patrimony as the totality of an individual's property rights and obligations); *see also* 1 Bernhard Windscheid, Lehrbuch des Pandektenrechts 107–10 (6th ed. 1887).

222. *See, e.g.*, 1 Louis Josserand, Cours de droit civil positif français 74–75 (2d. ed. 1932).

223. Merryman, *supra* note 1, at 1025.

as a surprise that Switzerland did not deem it necessary to include specific moral rights provisions in its copyright statute or to endorse a theory that relies on inalienable rights of authors in their works.[224] The conceptual difference between rights of personality and moral rights is that the former, although inalienable, are not rights of authors in their works, but instead are rights that are not premised on the existence of any copyrightable work and thus are not limited to authors.

In the United States, the right of personality is largely unknown as a legal category, and there are hardly any explicit references to it within the Anglo-American legal tradition. One notable exception is the canonical article by Warren and Brandeis on the right of privacy, which they conceptualized "as a part of the more general right to the immunity of the person,—the right to one's personality."[225] Therefore, in addition to providing an example of a civil law alternative to the moral rights orthodoxy, the Swiss case also shows what could have happened in the United States if the abstract right to one's personality advocated by Warren and Brandeis had been a more successful concept in the United States.[226]

1. General Rules

Articles 27 and 28 of the Swiss Civil Code of 1912[227] are universally understood as codifying the general right of personality. In combination, they provide decisional rules that can be used to adjudicate moral rights claims in both tort and contract scenarios. The current version of Article 28 grants judicial protection to anyone whose personality or personhood has been illegally violated.[228] A violation is considered illegal if it is not justified by statute, by prevailing private or public interests, or by the consent of the person whose personality or personhood has been violated.[229] Since the moral rights orthodoxy understands a work to be the emanation of an author's personhood, it is easy to see how a right protecting personhood could be used to protect moral rights. In fact, this is how moral rights were first understood in the nine-

224. Note also that Article 44 of the Swiss Copyright Act of 1922, *supra* note 219, which was in force until 1992, explicitly referred to the Swiss Civil Code for the protection of the author's right of personality, and the administrative statement explaining this provision explicitly said that "for the author, who believes that his personhood was violated by a particular—legal or illegal—use of his work, the pertinent provisions of the common law (Article 28 of the Civil Code and Article 49 of the revised Code of Obligations) provide sufficient protection." *See* Botschaft des Bundesrates und die Bundesversammlung zu dem Entwurf eines Bundesgesetzes betreffend das Urheberrecht an Werken der Literatur und Kunst, July 9, 1918, BBl III 571, 647 (Switz.).

225. *See* Warren & Brandeis, *supra* note 166, at 207; *see also* LADAS, *supra* note 7, at 802 (arguing that the interests underlying moral rights are protected in the United States "by the common law and State legislation concerning the right of personality in general").

226. For a conceptualist attempt to demonstrate the existence of the right of personality as a unifying principle in current American law, see Damich, *supra* note 1.

227. Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] Dec. 10, 1907, SR 210 (Switz.).

228. ZGB art. 28(1).

229. ZGB art. 28(2).

teenth century,[230] and some Continental courts operating firmly within the moral rights orthodoxy continue to categorize moral rights as a subset of the right of personality.[231]

While Article 28 deals with the right of personality in a tort scenario, Article 27 addresses the contract scenario by protecting individuals against self-imposed contractual restraints on the basis that no one may alienate or limit his or her personal liberty to a degree that would be contrary to the law or to morality.[232] At its core, this provision is a public policy limitation on the freedom of contract similar to the rules in common law against undue restrictions of personal liberty and against bargains in restraint of trade.[233] Its main area of application lies outside the field of copyright law and moral rights, and Swiss courts use it to void or limit contracts whose terms are considered excessively restrictive under the circumstances.[234] The standard formula is that commercial contracts are unduly restrictive "if they surrender the debtor to the arbitrariness of the creditor, abrogate his economic liberty, or constrain it to the point of jeopardizing the very basis of his economic existence."[235] It is not difficult to imagine how the first element of this formula could be deployed in a moral rights case involving unconditional advance waivers of moral rights. The less control authors retain over their work, the more they surrender their personhood expressed in the work to the discretion of assignees and licensees and the more the latter's power over the author's reputation increases.

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230. *See, e.g.*, ANDRÉ MORILLOT, DE LA PROTECTION ACCORDÉE AUX ŒUVRES D'ART, AUX PHOTOGRAPHIES, AUX DESSINS ET MODÈLES INDUSTRIELS ET AUX BREVETS D'INVENTION DANS L'EMPIRE D'ALLEMAGNE 108 (1878) (stating that the moral right enables authors to "prevent or suppress all aggressions, which, while attacking his work, would at the same time violate his conscience and his personhood"). As late as 1930, German scholars relied on the Swiss model when opposing the moral rights orthodoxy that had become increasingly dominant by that time. *See, e.g.*, Fritz Smoschewer, *Das Persönlichkeitsrecht im allgemeinen und im Urheberrecht*, 3 ARCHIV FÜR URHEBER- FILM- UND THEATERRECHT [UFITA] 119, 231, 349 (1930).

231. BGHZ 13, 334 (339) (F.R.G.); BGH, GRUR 73, 525 (526) (F.R.G.). Some German authors criticize the use of this language as misleading. *See, e.g.*, REHBINDER, *supra* note 64, at 142. By contrast, the Swiss Federal Supreme Court has more appropriately described the author's moral rights as "a part or a special side" of the general right of personality. *See, e.g.*, Bundesgericht [BGer] [Federal Court] June 17, 1987, 113 Entscheidungen des Schweizerischen Bundesgerichts [BGE] II 306, 311 (Switz.); BGE 114 II 368, 370 (1988) (Switz.).

232. ZGB art. 27(2).

233. *See, e.g.*, 6 WILLISTON ON CONTRACTS § 13.11 (4th ed. 1990); GUENTER TREITEL, THE LAW OF CONTRACT 453–77 (11th ed. 2003). A common law case in point is Hepworth Manufacturing Co. v. Ryott [1920] 1 Ch. 1 (A.C. 1919) (Eng.) (invalidating a contractual clause that prevented an actor who had gained a significant reputation under a pseudonym from using that name when performing in motion pictures produced by other companies). *See also* A. Schroeder Music Publ'g Co. v. Macaulay [1974] 3 All E.R. 616 (H.L.) (Eng.).

234. *See, e.g.*, BGE 104 II 118 (1978) (Switz.) (invalidating a management contract according to which the activities of a young singer were exclusively determined by the management agency); BGE 114 II 159 (1988) (Switz.) (reducing the contractual duty of a restaurant owner to procure beer exclusively from a certain manufacturer "for all time" to twenty years). Note that some German scholars rely on a similar provision in the German Civil Code, § 138(1), to explain the theory of the "unwaivable core" mentioned *supra* text accompanying note 133. *See, e.g.*, REHBINDER, *supra* note 64, at 237.

235. BGE 104 II 6, 8 (1978) (Switz.); *see* BGE 111 II 330, 337 (1985) (Switz.); BGE 114 II 159, 162 (1988) (Switz.).

Depending upon how this power is exercised, the result may be tantamount to the outright alienation of the author's reputation and personhood, which smacks of the kind of domination and power imbalance that is morally objectionable in the Continental tradition.[236] The following is a brief overview of how this conceptual framework, premised on the right of personality, was used to adjudicate moral rights claims in Switzerland.[237]

2. Rights of Attribution and Integrity

a. Tort Scenario

The first moral rights case brought before the Swiss Federal Supreme Court was decided in 1932 and involved a tort scenario.[238] The plaintiff was an architect who had entered a competition for the design of a building by submitting two separate proposals. He did not win the competition, but one of the central features of one of his proposals was ultimately incorporated into the winner's proposal at the request of the property owner, the defendant. The plaintiff first filed a complaint with the prosecutor alleging criminal copyright infringement, but the courts adjudicating the matter ultimately decided in favor of the defendant on the basis that the copyright in the plans had been transferred to the defendant. The plaintiff then filed a civil suit based on copyright infringement and general tort law that went up to the Federal Supreme Court. The Federal Supreme Court also ruled that the copyright had been transferred and dismissed the architect's copyright claim, but then the Court explained that authors have (i) a right to insist that their names are affixed to their works and that nobody else's name appears on their works, and (ii) a right to object to any deformation, mutilation, or other modification of their works that is prejudicial to their honor or reputation—all based on the general rules governing the right of personality.[239] The Court then held that while the architect did not have any cause of action based on the combination of his work with that of a third party because the final product actually improved his work, he was, nevertheless, entitled to monetary compensation for not being credited for his contribution.[240] This case demonstrates that civil law countries can protect the author's interest in attribution on the

236. *See, e.g.*, ÉTIENNE BLANC, TRAITÉ DE LA CONTREFAÇON 97–98 n.1 (4th ed. 1855) (reporting a case decided in 1852 in which the Tribunal de Paris held that publishers did not have a right to make substantive changes, explaining that the recognition of such right would put "the reputation and the credit of authors at the mercy of publishers"); MICHAÉLIDÈS-NOUAROS, *supra* note 39, at 98 (explicitly comparing the advance waiver of the right of integrity to the "moral slavery of the author").

237. The classic exposition of the Swiss approach to moral rights can be found at ALPHONS MELLIGER, DAS VERHÄLTNIS DES URHEBERRECHTS ZU DEN PERSÖNLICHKEITSRECHTEN (1929).

238. BGE 58 II 290 (1932) (Switz.).

239. *Id.* at 307.

240. *See also* BGE 84 II 570 (1958) (Switz.) (holding that the failure to mention the names of two architects on whose projects the enlargement of a church was based was a violation of their rights of personality that entitled them to monetary compensation and to the publication of the Court's decision in local newspapers).

basis of legal concepts that are not part of the moral rights orthodoxy. The same is true for the right of integrity.[241] For example, Charlie Chaplin's right of personality was held to be violated when, without his permission, his silent movie *Gold Rush* was offered for public performance in an altered version that omitted a few scenes and that was accompanied by a soundtrack authored by a third party.[242]

b. Contract Scenario

The leading Swiss case on moral rights relates to the right of integrity applied in a contractual setting.[243] The defendant, a Swiss Canton, had contracted with the plaintiff to write a textbook on calculus for use in the public schools. The plaintiff delivered the work, and several editions were printed. About fifteen years later, the defendant decided that changes should be made to the book, but negotiations with the plaintiff failed, so the defendant contracted with another author to update the book for a new edition. The plaintiff objected to what he considered to be severe distortions of his work. Eventually, he filed a suit against the defendant, alleging that he had not transferred the copyright to the defendant and that even if he had, the modifications were so severe as to amount to unauthorized distortions. The Court found that the plaintiff had transferred his copyright in the book to the defendant, but went to great lengths to explicitly reject the defendant's argument that the defendant's status as the copyright owner entailed a right to change the book at its sole discretion.[244] In particular, the Court clarified that modifications could not be such as to violate the author's right of personality, a statement that is closely analogous to the common law approach of allowing modifications unless they are defamatory.[245] The Court then explained that Article 27 of the Swiss Civil Code, as applied to the case at hand, meant that the transfer of the right to make changes would be an excessive restraint on the author's personhood if the transfer of that right allowed modifications that would distort the work or that would be disadvantageous to the author's honor or reputation.[246] While the Court confirmed that the copyright owner's right to change a work is not without limits, the Court ultimately refused to grant relief because the author had waited seven years before asserting his moral rights, which the Court determined to be a violation of the author's general duty of good faith.[247] Nevertheless, the conceptual framework spelled out by the Court

241. *See, e.g.*, BGE 117 II 466, 475–76 (1991) (Switz.) (applying the right of personality framework, but holding that changing the roof of a school building to increase classroom space and to externally insulate the concrete walls of the building did not violate the original architects' rights of personality).

242. BGE 96 II 409 (1970) (Switz.).

243. BGE 69 II 53 (1943) (Switz.).

244. *Id.* at 57–58.

245. *See supra* note 201.

246. BGE 69 II 53, 58 (1943) (Switz.); *see also* 2 Alois Troller, Immaterialgüterrecht 779 (1985).

247. BGE 69 II 53, 60 (1943) (Switz.).

could, in combination with default statutory rules contained in the Swiss Code of Obligations,[248] easily be applied to generate the decisional rules that French, German, and Italian courts derive from the moral rights orthodoxy.

3. Right of Disclosure

In Switzerland, the decisional rule underlying the moral right of disclosure in a tort scenario could be generated on the basis of the right of privacy, which is an integral part of the right of personality. While the scope of the right of privacy is by no means limited to works of authorship, it certainly protects an author's interest in keeping a work private. However, under the Swiss Copyright Act of 1922, authors did not even have to invoke the right of privacy because the economic rights available under that Act could be used to achieve the same outcome.[249] This is the result of the combination of two factors. First, under Swiss copyright law, economic rights are not limited to published works, and for that reason the scope of the right of disclosure, regardless of how it is conceptualized, is virtually identical to the scope of pertinent economic rights. Second, Swiss copyright law did and still does not recognize the work-for-hire doctrine,[250] so there is no discrepancy between authorship and initial copyright ownership that would require protection against disclosure beyond the protection available under traditional copyright law. These two factors also explain why even scholars who strongly believe in the moral rights orthodoxy have some difficulty distinguishing between the moral right of disclosure and the economic rights of public distribution and performance.[251]

Regarding the contract scenario, the Swiss law of contracts recognizes the general rule that authors can substitute money damages for specific performance in the case of commissioned works of authorship, based on the more general rule that specific performance is not available for personal services.[252] The

248. Article 384(1) of the Swiss Code of Obligations, SR 220, establishes a default rule for publishing agreements according to which the publisher is obliged to reproduce the author's work without omissions, additions, or modifications.

249. *See, e.g.*, BGE 120 IV 208 (1994) (Switz.) (applying the Swiss Copyright Act of 1922 and holding that a person who copied and distributed an unapproved and unpublished master's thesis to representatives of an organization criticized in the thesis committed the offense of criminal copyright infringement).

250. *See* Swiss Copyright Act of 1992, *supra* note 104, art. 6.

251. *See, e.g.*, Dietz, *supra* note 85, at 204 ("It cannot be denied that from a practical point of view, exercise of the divulgation right and exercise of one or several of the economic exploitation rights must not necessarily be conceived as two separate legal acts."); FRANÇOIS DESSEMONTET, LE DROIT D'AUTEUR 148 (1999) (discussing the newly recognized moral right of disclosure in Swiss copyright law under the heading of economic rights).

252. Despite the fact that the enactment of Article 98 of the Swiss Code of Obligations was a conscious departure from the model embodied in Article 1142 of the French Civil Code in that it strives to assure specific performance of obligations in general, the rendering of highly personal services, such as the services of authors and artists, are an exception to the general rule of specific performance. *See, e.g.*, Rolf H. Weber, *Die Folgen der Nichterfüllung*, *in* 6/1/5 BERNER KOMMENTAR ZUM SCHWEIZERISCHEN PRIVATRECHT, art. 98 n.5, 25, 42, 54 (Heinz Hausheer ed., 2000); *see also* DESSEMONTET, *supra* note 251, at 155.

controversy is not over this rule, but rather over whether artists should be partially remunerated for their efforts and reimbursed for their expenses if they ultimately fail to create and deliver a commissioned work. Some scholars argue that artists should be accorded such special status in comparison to other independent contractors.[253] However, the Swiss Federal Supreme Court recently rejected this view and held that an artist who was commissioned to design and create a mosaic on a wall of a school building, but failed to meet several deadlines, was not entitled to keep the advances that he had received and was not able to withhold any money to cover his expenses absent any specific agreement to the contrary.[254]

4. Statutory Regime

While the new copyright statute Switzerland enacted in 1992 does not mention the term "moral rights" and does not contain any right of withdrawal,[255] the statutory section that deals with the relationship between authors and their works explicitly recognizes the rights of attribution and disclosure in Article 9[256] and the right of integrity in Article 11 as part of the author's copyright.[257] Article 11 also states that even when a person is contractually or statutorily entitled to modify the work or to use it to create a derivative work, the author may object to any distortion of the work that is prejudicial to his or her personhood.[258] This provision simply codifies the standard test applied by the Swiss Federal Supreme Court prior to the adoption of this rule.[259] Anticipating the enactment of the new statutory regime, the Court explicitly stated that the purpose of the new statutory rules would not be to fundamentally revise pre-existing law, but rather to regulate it more concretely.[260] Not surprisingly, the Court has continued to rely on its earlier case law when deciding cases brought under the new statutory regime.[261] As a result, despite the conceptual shift that came with the statutory recognition

253. *See, e.g.*, DESSEMONTET, *supra* note 251, at 568.

254. BGE 115 II 50 (1989) (Switz.).

255. *See also* DESSEMONTET, *supra* note 251, at 154.

256. Interestingly, scholars have shifted their explanation for the decisional rule derived from the right of disclosure in a contract scenario. Instead of being viewed as a matter of the common law of contracts, it is now viewed as a result of the recognition of the moral right of disclosure. *See, e.g.*, Reto M. Hilty, *Der Verlagsvertrag*, *in* 2/1 SCHWEIZERISCHES IMMATERIALGÜTER- UND WETTBEWERBSRECHT 517, 531 (Roland von Büren & Lucas David eds., 1995).

257. *See* Swiss Copyright Act of 1992, *supra* note 104, arts. 9–11. Note that there is an exception to the right of integrity for owners of architectural works, who are expressly authorized to modify their buildings to the extent that such modifications do not amount to actionable distortions under Article 11(2). *See id.* art. 12(3).

258. Swiss Copyright Act of 1992, *supra* note 104, art. 11(2).

259. *See, e.g.*, BGE 117 II 466, 475–76 (1991) (Switz.); *see also* JACQUES DE WERRA, LE DROIT À L'INTÉGRITÉ DE L'OEUVRE 203 (1997) (conceptualizing Article 11(2) as a "particular emanation" of ZGB art. 27(2)); MANFRED REHBINDER, SCHWEIZERISCHES URHEBERRECHT 148 (3d ed. 2000) (applying the same reasoning to the right of attribution by invoking ZGB art. 27(2) to explain why ghostwriters could always reveal the fact of their authorship).

260. *See* BGE 117 II 466, 475 (1991) (Switz.).

261. *See, e.g.*, BGE 120 II 65 (1994) (Switz.).

of inalienable rights of authors in their works, the substance of Swiss moral rights law has remained virtually unchanged,[262] and the general right of personality continues to be invoked to protect the moral rights of performing artists, to whom the statutory moral rights provisions do not apply.[263] Finally, it is telling that scholars also invoke the right of personality[264] to deal with issues that were previously addressed in the statutory prohibition against the false attribution of authorship,[265] because it indicates that they view the right of personality as a substitute for copyright-based concepts of attribution and non-attribution.

IV. Form over Substance

The preceding Part revealed that alternative legal concepts are available in both common law and civil law countries to generate the decisional rules that French, German, and Italian courts derive from their particular concept of moral rights.[266] To the extent that some of the decisional rules derived from the alternative concepts do not go quite as far as the rules in legal systems that rely on the dominant mode of conceptualizing moral rights, minor tweaking would be sufficient to reverse any shortcomings without any need for a conceptual switch to moral rights orthodoxy. Nevertheless, the United States and the United Kingdom decided to shift gears by enacting statutory moral rights regimes modeled upon the idea of inalienable rights of authors in their works. The analysis of the moral rights orthodoxy in Part II demonstrated that moral rights protect the actual creators of copyrightable works against market intermediaries and, to a lesser extent, against third parties whose conduct conflicts with the interest of creators in the artistic control of their works.[267] It is precisely because of this protective purpose that moral rights are tied to creators through the principle of inalienability.[268] Thus, it is difficult to imagine any reason for the enactment of statutory moral rights other than to increase the protection of authors. At the very least, it seems fair to assume

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262. *But see* Swiss Copyright Act of 1992, *supra* note 104, arts. 14–15. For a detailed discussion of waivers and transfers of moral rights under Swiss copyright law after 1992, see Reto M. Hilty, Lizenzvertragsrecht 21–26 (2001).

263. *See, e.g.*, BGE 129 III 715 (2003) (Switz.) (holding that the unauthorized use of an actor's performance in a motion picture, inserted into a television commercial for dried meat snacks, violated the actor's general right of personality, although the infraction was not sufficiently severe to warrant the award of damages); *see also* Dessemontet, *supra* note 251, at 216 (explaining that for questions not fully regulated by the new statutory moral rights provisions, lawyers should continue to look to Articles 27 and 28).

264. *See, e.g.*, Dessemontet, *supra* note 251, at 218.

265. *See supra* note 219. Note that this provision was not carried over to the new copyright statute.

266. *See also* Ladas, *supra* note 115, at 578–79.

267. *See supra* Part II.

268. *See* Jon Holyoak & Paul Torremans, Intellectual Property Law 212 (2d ed. 1998); Merryman & Elsen, *supra* note 36, at 313 ("Notice that in the French statute the moral right is 'inalienable' and 'imprescriptible.' The obvious legislative purpose is paternalistic—to protect the artist, who is assumed to be an easy victim of collectors and dealers.").

that the conscious endorsement of the dominant mode of conceptualizing moral rights was not intended to reduce the protection for authors.

This Part will show that the recent wave of moral rights legislation has failed to increase the protection for authors in the United Kingdom and has actually resulted in a decrease in the overall protection for authors in the United States. In the United Kingdom, the adoption of a generous waiver regime has effectively undermined the strength of moral rights to the point where it is questionable whether the newly enacted rights even qualify as moral rights by the standards of the moral rights orthodoxy. In the United States, although moral rights legislation has increased the substantive level of protection for an exceptionally small group of authors, the narrow scope of the statutory regime has enabled a negative spillover effect for the vast majority of authors who are not covered by the statute, and, ironically, it is precisely the endorsement of the civil law concept of moral rights that has played a critical role in reducing overall protection for authors.

A. United Kingdom

Despite being a party to the Berne Convention since 1886, the United Kingdom did not have any statutory moral rights legislation until the 1988 enactment of the Copyright, Designs and Patents Act ("CDPA"),[269] which includes a chapter on moral rights.[270] Interestingly, the adoption of this chapter did not preempt the common law causes of action because the CDPA simply added a second layer of moral rights protection on top of the common law.[271] Although the enactment of the statutory moral rights regime followed an assessment by the Whitford Copyright Reform Committee that concluded that the United Kingdom inadequately protected moral rights,[272] converting to the dominant mode of conceptualizing moral rights contributed little toward raising the level of substantive protection for moral rights in the United Kingdom.[273] In fact, there is a plausible argument that the newly enacted statutory regime is, on balance, narrower than the common law, at least regarding the contract scenario.

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269. Copyright, Designs and Patents Act, 1988, c. 48 (Eng.) [hereinafter CDPA].

270. *Id.* §§ 77–89.

271. *See id.* § 171(4).

272. *See* REPORT OF THE COMMITTEE TO CONSIDER THE LAW ON COPYRIGHT AND DESIGNS, 1977, Cmnd. 6732, ¶¶ 51–57, at 16–18. Note that the Gregory Committee Report on Copyright Law that led to the Copyright Act of 1956 came to the opposite conclusion. *See* BOARD OF TRADE, REPORT OF THE COPYRIGHT COMMITTEE, 1952 [Cmd.] 8662, ¶¶ 219–26, at 80–82; *see also* CORNISH & LLEWELYN, *supra* note 62, at 455; Paul Abel, *The Brussels Convention and Its Influence on Domestic Copyright Legislation*, 3 INT'L & COMP. L.Q. 330, 336–37 (1954).

273. *See* William R. Cornish, *Moral Rights Under the 1988 Act*, 11 EUR. INTELL. PROP. REV. 449, 449 (1989) ("[T]hese newborn creatures are timid things, venturing little further than their common law forbears."); Jane C. Ginsburg, *Moral Rights in a Common Law System*, 1 ENT. L. REV. 121, 129 (1990) ("If many of the CDPA moral rights provisions seem cynical, or at least half-hearted, that may be because their drafters seem to have lacked real conviction in the desirability of moral rights.").

1. General Rules

The four rights included in the CDPA under the heading of "moral rights" are the right of attribution, the right of integrity, the right against false attribution of authorship, and the right of privacy relating to certain photographs and motion pictures.[274] By contrast, the rights of disclosure and withdrawal were not included, presumably because the former was already part of copyright law[275] and because the latter was not intended to be recognized. In addition, Article *6bis* of the Berne Convention and Article 5 of the WPPT do not mandate the protection of the rights of disclosure and withdrawal. Note also that neither the right against false attribution[276] nor the right of privacy of persons who commission photographs or movies of themselves for private purposes[277] qualify as moral rights in the technical sense,[278] which leaves only the core moral rights of attribution and integrity in the CDPA.[279] Under these two core rights, authors of copyrightable works and motion picture directors are entitled to be identified as authors or directors of their works, and they are entitled not to have their works subjected to derogatory treatment.[280] Although the CDPA may not have fully endorsed all aspects of the rhetoric of Continental moral rights theory,[281] the formal design of the rights of attribution and integrity corresponds to the moral rights orthodoxy in that they are conceptualized as rights of actual creators of copyrightable works that exist only in relation to their works and that cannot be assigned to third parties.[282] In terms of the duration of moral rights, the CDPA follows the German model in letting moral rights expire when the economic rights in the work expire.[283]

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274. CDPA §§ 77–89, 94–95, 103.

275. *See id.* §§ 16(1)(b), 18.

276. *Id.* § 84. This provision replaced § 43 of the Copyright Act of 1956, 4 & 5 Eliz. 2, c. 74 (Eng.), which, in turn, had replaced § 7 of the Fine Arts Copyright Act of 1862, 25 & 26 Vict., c. 68 (Eng.).

277. CDPA § 85. Note that there is no general right to privacy in English law. *See, e.g.*, Wood v. Sandow [1911–1916] MacG. Cop. Cas. 142 (K.B. 1914) (Eng.). A person cannot complain of the publication of his or her photograph except on the ground that the copyright in the photograph is his or hers, that the publication constitutes a breach of contract or confidence, or that it is libelous. *See* Corelli v. Wall [1905–1910] MacG. Cop. Cas. 41 (Ch. 1906) (Eng.); Palmer v. Nat'l Sporting Club, Ltd. [1905–1910] MacG. Cop. Cas. 55 (Ch. 1906) (Eng.). CDPA § 85 was introduced to compensate for changing the preexisting rule that the copyright in a photograph automatically vested in the commissioner of the photograph, which—as of the 1988 amendment—is no longer the case. *See* CORNISH & LLEWELYN, *supra* note 62, at 465; HOLYOAK & TORREMANS, *supra* note 268, at 221; Cornish, *supra* note 273, at 451–52.

278. *See also* SCHACK, *supra* note 12, at 155 (stating that the right of non-attribution "contained in the CDPA is at its core a *general* right of personality").

279. CDPA §§ 77, 80; *see also* KEVIN GARNETT ET AL., COPINGER AND SKONE JAMES ON COPYRIGHT 627 (15th ed. 2005); HOLYOAK & TORREMANS, *supra* note 268, at 212.

280. CDPA §§ 77(1), 80(1). In line with Article *6bis* of the Berne Convention, derogatory treatment requires prejudice to honor or reputation. *See* Confetti Records v. Warner Music UK Ltd. [2003] EWHC (Ch) 1274 [150] (Eng.).

281. *See* Cornish, *supra* note 273, at 449 ("There is no scheme of thought here that an author enjoys both moral and economic rights, all of them equal in status.").

282. CDPA § 94; *see also* CORNISH & LLEWELYN, *supra* note 62, at 455; GARNETT ET AL., *supra* note 279, at 626; Cornish, *supra* note 273, at 452.

283. CDPA § 86(1).

2. Limitations and Waivers

What distinguishes the British system from the French, German, and Italian moral rights regimes is that the rights of attribution and integrity come with a host of substantive limitations and exceptions that reduce the scope of their application to the point where statutory moral rights become largely symbolic. Aside from a number of restrictions on remedies,[284] for example, the rights of attribution and integrity do not apply to computer programs, to works made for hire, to works published in periodicals, or to collective works of reference,[285] and authors of musical works need not be named when the work is publicly performed.[286] Moreover, it is doubtful whether the right of attribution includes a right of anonymity,[287] and the CDPA specifically states that the right of attribution is not infringed unless previously asserted in a written instrument, with the exception of the public exhibition of artistic works, in which case affixing the author's name to a copy of the work is sufficient.[288] With respect to the right of integrity, the statutory definition of "derogatory treatment" explicitly excludes translations of literary or dramatic works, as well as arrangements or transcriptions of musical works involving no more than a change of key or register,[289] and it is questionable whether the right of integrity covers contextual modifications in addition to actual modifications.[290]

Aside from the issue of scope, the most important feature of statutory moral rights law in the United Kingdom is its exceptionally generous waiver regime.[291] The CDPA allows authors and directors to validly consent to any act that violates their moral rights.[292] It also empowers them to fully waive

284. For example, in cases involving the right of integrity, courts may limit injunctive relief to a mere disclaimer that dissociates the author from the illegally modified work, and in disputes involving the right of paternity, any delay in asserting this right must be taken into account in determining remedies. *See* CDPA §§ 103(2), 78(5).

285. *Id.* §§ 79(2)(a), 79(3), 79(6), 81(2), 81(4), 82; *see also* BENTLY & SHERMAN, *supra* note 10, at 238, 248; Gerald Dworkin, *The Exercise and Waiver of Moral Rights: The International State of Play*, *in* 4 INTERNATIONAL INTELLECTUAL PROPERTY LAW & POLICY 73-1, 73-7 (Hugh Hansen ed., 2000) (noting that employee authors "cannot exercise moral rights against anybody lawfully dealing with the work").

286. The applicable provisions do not include the public performance of a musical work. *See* CDPA §§ 77(3), 77(7). This exception is also called the "disc-jockey exception." *See* BENTLY & SHERMAN, *supra* note 10, at 238; CORNISH & LLEWELYN, *supra* note 62, at 457.

287. *See* BENTLY & SHERMAN, *supra* note 10, at 237.

288. CDPA §§ 77(1), 78.

289. *Id.* § 80(2).

290. *See, e.g.*, BENTLY & SHERMAN, *supra* note 10, at 244; GARNETT ET AL., *supra* note 279, at 647; Gerald Dworkin, *The Moral Right of the Author—Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229, 249–50 (1994); Irini A. Stamatoudi, *Moral Rights of Authors in England*, 4 I.P.Q. 478, 482, 490 (1997).

291. *See* Cornish, *supra* note 273, at 452. The waiver regime is reminiscent of the draft legislation on moral rights proposed in the United States in the 1930s. *See* H.R. 10632, 74th Cong. § 24 (2d Sess. 1936); S. 3047, 74th Cong. § 23 (1st Sess. 1935) (passed by the Senate, but stalled in the House). The proposed legislation would have introduced moral rights while fully preserving absolute freedom of contract and establishing a default rule that would have allowed all modifications in accordance with industry custom absent any provision to the contrary.

292. *See* CDPA § 87(1).

their moral rights in advance with a signed written instrument.[293] Furthermore, the CDPA states that informal waivers under the general law of contracts and principles of estoppel remain permissible despite the requirement of a written instrument.[294] What makes this regime extremely broad compared to the rules governing waivers developed by French, German, and Italian courts is that the CDPA expressly includes unconditional blanket waivers for future works.[295] As explained earlier in this Article, in France, Germany, and Italy, such waivers would be considered invalid as a violation of the very core of moral rights.[296] The breadth of the waiver provisions under the CDPA raises the question of whether the rights enacted under the heading of "moral rights" in the United Kingdom can really be called moral rights at all because the statutory validity of unconditional blanket waivers extinguishes any trace of inalienability, which is one of the key features of the concept of moral rights in a contractual setting.

3. Evaluating the CDPA

In assessing whether the CDPA has increased overall protection for authors, it is important to distinguish between cases that are inside and cases that are outside the narrow scope of the CDPA. For cases not covered by the CDPA, little has changed because common law actions remain available. However, it is at least conceivable that the exclusion of certain cases from the scope of the CDPA may be construed as a legislative value judgment according to which moral rights are not important outside the statutory regime and thus can safely be neglected. There is too little case law on the CDPA to determine whether the courts are willing to deploy this argument to cut back on moral rights protection under the common law. So far, there seem to be no cases in which this has happened.

In cases covered by the CDPA, authors benefit from a slight increase in protection in the tort scenario,[297] especially when moral rights are used to supplement parallel copyright claims.[298] However, this increase in protection in the tort scenario may be offset by the potential decrease in protection in the contract scenario. The likely reduction of protection within the contract scenario stems from the fact that while the enactment of statutory moral rights has solidified the contractual default rules associated with the rights of attri-

293. *See id.* § 87(2).

294. *Id.* § 87(4).

295. *Id.* § 87(3).

296. *See supra* text accompanying note 139.

297. *See, e.g.*, CORNISH & LLEWELYN, *supra* note 62, at 463 (arguing that authors will have their power of objection more readily enforced under the statutory regime than under the hodgepodge of common law actions); Cornish, *supra* note 273, at 450–51 (stating that the advancement of the right of integrity over the common law of defamation "would seem only to be marginal" and that there may be miniscule improvements over the separate tort of trade libel).

298. *See supra* Part II.A.1. A recent example is Sawkins v. Hyperion Records Ltd. [2005] EWCA (Civ) 565 (Eng.), in which a right of attribution claim was successfully tacked onto a copyright action for the unauthorized use of significantly edited public domain works.

bution and integrity,[299] the potential for mandatory terms has been eliminated by the exceedingly broad waiver system that the CDPA has put in place.

Whatever rights authors may have under the CDPA, they will be insignificant as a practical matter if market intermediaries can use their bargaining power to pressure authors to sign standard agreements containing express blanket waivers of any and all moral rights claims that could possibly arise in the future.[300] Since one of the primary functions of the moral rights orthodoxy in a contractual setting is to counter the presumed power imbalance between authors and market intermediaries, allowing unconditional blanket waivers defeats the very purpose of having a moral rights regime[301] unless the widespread adoption of standard waiver clauses is effectively resisted by trade associations or other lobbying groups.[302]

Moreover, it is at least conceivable that the statutory validity of blanket waivers could be used as an argument for undermining any potential limitations on waivers under the common law, despite the statutory reminder that the moral rights rules contained in the CDPA will not affect any rights or remedies relating to moral rights that are available otherwise than under the CDPA.[303] Therefore, the enactment of moral rights in the United Kingdom not only has likely failed to increase protection for authors, but it may also lead to an erosion of overall protection in the future. In the United Kingdom, this scenario may be merely hypothetical today, but in the United States, it has already become reality.

B. United States

In the United States, the first federal moral rights regime was enacted in 1990 with the adoption of the Visual Artists Rights Act ("VARA"),[304] which followed in the footsteps of a number of rarely litigated[305] and now largely

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299. For example, in Pasterfield v. Denham [1999] F.S.R. 168, 183 (C.C. 1998) (Eng.), the court explained that the passing of equitable title in copyright or the grant of an implied license to use a work for a specific purpose did not entail an implied waiver of the author's moral rights under the CDPA. This is tantamount to saying that the default rule in assignment and licensing contracts is that works cannot be modified absent an explicit contractual clause to the contrary. The author still lost, however, because the court ultimately held that minor alterations and omissions regarding a promotional brochure for the Plymouth Dome did not qualify as derogatory treatment under the CDPA and did not constitute passing off absent damages.

300. *See* Dworkin, *supra* note 290, at 257; 1 HUGH LADDIE ET AL., THE MODERN LAW OF COPYRIGHT AND DESIGNS 607 (3d ed. 2000).

301. *See* HOLYOAK & TORREMANS, *supra* note 268, at 222–23; Dietz, *supra* note 12, at 186; Stamatoudi, *supra* note 290, at 494, 506, 509–10.

302. *See* Dworkin, *supra* note 18, at 332–33 (pointing to doctrines that courts may use to strike down overly broad waiver clauses in copyright contracts).

303. CDPA § 171(4).

304. Visual Artists Rights Act of 1990 [VARA] §§ 601–10, 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 506 (2000). For a detailed analysis of the VARA, see Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945 (1990).

305. *But see* Pavia v. 1120 Ave. of the Ams. Assocs., 901 F. Supp. 620 (S.D.N.Y. 1995); Schatt v. Curtis Mgmt. Group, Inc., 764 F. Supp. 902 (S.D.N.Y. 1991); Wojnarowicz v. Am. Family Ass'n, 745 F.

preempted state statutes that have provided similar protection for moral rights since the 1980s.[306] What is remarkable about the VARA is that it follows the moral rights orthodoxy much more closely than the CDPA, but only with respect to an exceptionally small group of works. The primary difference between the CDPA and the VARA is that the U.S. Congress chose to establish two different, mutually exclusive regimes instead of merely adding a second layer of protection on top of the common law. Works that qualify for protection under the VARA are exclusively governed by the newly enacted § 106A of the U.S. Copyright Act. Any rights visual artists may have had under the common law or under state statutes for works now protected by the VARA are no longer available.[307] For all other works, the common law causes of action discussed earlier remain the only basis for moral rights protection.

1. Identity of Design—Diversity of Scope

Like the CDPA, the VARA ignores the rights of disclosure and withdrawal and instead focuses on the rights of attribution and integrity,[308] which are limited in their duration to the author's lifetime.[309] The right of attribution is phrased in terms of a right to claim and disclaim authorship,[310] and the statute explicitly mentions the right to prevent the use of the author's name in the event of a modification of the author's work that would be prejudicial to his or her honor or reputation.[311] The right of integrity includes the right to object to intentional modifications that would be prejudicial to the author's honor or reputation, and, as mentioned earlier, the VARA expands the right

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Supp. 130 (S.D.N.Y. 1990); Lubner v. City of Los Angeles, 53 Cal. Rptr. 2d 24 (Ct. App. 1996); Phillips v. Pembroke Real Estate, Inc., 819 N.E.2d 579(Mass. 2004); Moakley v. Eastwick, 666 N.E.2d 505 (Mass. 1996); *see also* Cotto Morales v. Rios, 140 P.R. Dec. 604 (1996).

306. *See* CAL. CIV. CODE § 987 (West 2006); CONN. GEN. STAT. ANN. §§ 42-116s to 42-116t (West 2006); LA. REV. STAT. ANN. §§ 51:2152–:2156 (West 2006); ME. REV. STAT. ANN. tit. 27, § 303 (West 2006); MASS. GEN. LAWS ANN. ch. 231, § 85S (West 2006); NEV. REV. STAT. ANN. §§ 597.720–.760 (West 2006); N.J. STAT. ANN. §§ 2A:24A-1 to -8 (West 2006); N.M. STAT. ANN. §§ 13-4B-2 to -3 (West 2006); N.Y. ARTS & CULT. AFF. LAW § 14.03 (West 2006); 73 PA. CONS. STAT. ANN. §§ 2101–2110 (West 2006); R.I. Gen. Laws §§ 5-62-2 to -6 (West 2006). Other states have enacted provisions that touch upon attribution or integrity in the context of works of fine art that are commissioned or acquired by the state or by certain art dealers. *See* GA. CODE ANN. § 8-5-7(a)(1) (West 2006); 815 ILL. COMP. STAT. ANN. § 320/5(2) (West 2006); MONT. CODE ANN. § 22-2-407 (West 2006); S.D. CODIFIED LAWS § 1-22-16 (West 2006); UTAH CODE ANN. § 9-6-409 (West 2006); WIS. STAT. ANN. § 44.57(4)(b)(2) (West 2006).

307. 17 U.S.C. § 301(f) (2000) (preempting state common and statutory law in relation to rights equivalent to those granted by § 106A); *see also* Bd. of Managers of Soho Int'l Arts Condo. v. City of N.Y., No. 01 Civ.1226 DAB, 2003 WL 21403333 (S.D.N.Y. June 17, 2003); Grauer v. Deutsch, 64 U.S.P.Q.2d 1636 (S.D.N.Y. 2002).

308. 17 U.S.C. § 106A(a)(1)(A), 106A(a)(3)(A) (2000).

309. *Id.* § 106A(d)(1). Note that some states provide protection for moral rights beyond the author's lifetime, typically fifty years, and to the extent to which they do, their statutes are not preempted by the VARA. *See* CAL. CIV. CODE § 987(g)(1) (West 2006); CONN. GEN. STAT. ANN. § 42-116t(d) (West 2006); MASS. GEN. LAWS ANN. ch. 231, § 85S(g) (West 2006); N.M. STAT. ANN. § 13-4B-3(E) (West 2006); 73 PA. CONS. STAT. ANN. § 2107(1) (West 2006).

310. 17 U.S.C. § 106A(a)(1) (2000).

311. *Id.* § 106A(a)(2).

of integrity to include a right to prevent destruction of a work of recognized stature.[312] Aside from these variations in scope, the conceptual design of the rights of attribution and integrity largely follows the design of moral rights in Continental Europe. They are rights of actual creators of copyrightable works,[313] they are independent of copyright ownership,[314] and they are personal to the author in the sense that they cannot be transferred to third parties.[315] Furthermore, the American waiver regime is similar to the case law developed in France, Germany, and Italy,[316] and dissimilar to the English system that allows unconditional blanket waivers. While waivers of moral rights are expressly permitted, provided that they are undertaken in a written instrument signed by the author, they must identify the work and the uses to which the waiver applies in order to be valid,[317] and consequently blanket waivers are unenforceable.[318] As a result, the VARA is in line with standard moral rights theory in its conceptualization of moral rights as inalienable rights of authors in their works that supplement the traditional set of economic rights listed in Section 106 of the U.S. Copyright Act.[319]

The crucial difference between the VARA and Continental European moral rights legislation is the exceedingly narrow scope of the moral rights regime established by the VARA.[320] In fact, most copyrightable works are excluded from protection[321] because the rights of attribution and integrity apply only to works of visual art, which are essentially defined as paintings, drawings, prints, photographs produced for exhibition purposes, or sculptures.[322] Fur-

312. *Id.* § 106A(a)(3). Both the right of integrity and the right to prevent use of the author's name in the event of a modification of the author's work that would be prejudicial to his or her honor or reputation are subject to certain qualifications for cases in which the work of authorship is part of a building. *See id.* § 113(d).

313. Since works made for hire are excluded from protection under the VARA, only authors in the sense of actual creators enjoy the rights available under the VARA. *See id.* § 101 (defining a "work of visual art").

314. *Id.* § 106A(b).

315. *Id.* § 106A(e)(1); *see also* H.R. REP. NO. 101-514, at 19 (1990), *as reprinted in* U.S.C.C.A.N. 6915, 6929 ("[A]n assignment or transfer of these rights to third parties would be contrary to the personal nature of the rights.").

316. One exception is that joint authors may waive attribution rights for each other. *See* 17 U.S.C. § 106A(e)(1) (2000).

317. *Id.*

318. *See* H.R. REP. NO. 101-514, at 19 (1990), *as reprinted in* U.S.C.C.A.N. 6915, 6929; *see also* Ginsburg, *supra* note 181, at 300.

319. 17 U.S.C. § 106 (2000).

320. *See* Hughes, *supra* note 5, at 15 ("[T]he real problem with VARA is not the strength of its provisions, but their scope.").

321. *See, e.g.*, NASCAR v. Scharle, 356 F. Supp. 2d 515, 528–29 (E.D. Pa. 2005) (blueprints for NASCAR trophy); Berrios Nogueras v. Home Depot, 330 F. Supp. 2d 48, 51 (D.P.R. 2004) (reproduction of artwork in promotional brochures); Maharishi Hardy Blechman Ltd. v. Abercrombie & Fitch Co., 292 F. Supp. 2d 535, 554 (S.D.N.Y. 2003) (fashion designer's embroidered dragon design on pant leg); Silberman v. Innovation Luggage, Inc., No. 01 Civ. 7109(GEL), 2003 WL 1787123, at *5 (S.D.N.Y. Apr. 3, 2003) (first and second generation reproductions of photographs); Peker v. Masters Collection, 96 F. Supp. 2d 216, 221–22 (E.D.N.Y. 2000) (posters); Choe v. Fordham Univ. Sch. of Law, 920 F. Supp. 44, 49 (S.D.N.Y. 1995) (law review comment), *aff'd per curiam*, 81 F.3d 319 (2d Cir. 1996).

322. *See* 17 U.S.C. § 101 (2000) (defining a "work of visual art").

thermore, these moral rights do not apply to works made for hire,[323] and more importantly, they generally do not apply to reproductions or copies,[324] but are limited to the *original embodiments* of the work in question.[325] Limiting moral rights to a particular set of original works of visual art not only greatly reduces the practical reach of statutory moral rights, but also excludes virtually all controversies in which the interests of authors as actual creators of copyrightable works conflict with the interests of market intermediaries and commercial users, which are precisely the most important fields of application of moral rights in Continental Europe. What is left is the controversy between artists and owners of works of visual art about the destruction and relocation of these works,[326] which is only a tiny fraction of the fact patterns to which moral rights apply in Continental Europe. Nevertheless, to the extent that the VARA applies, it leads to an increase in the protection for authors by providing them with a positive right of attribution, a right to object to the destruction of their works, and a clear prohibition of blanket waivers, even if the VARA may have preempted a few state moral rights statutes that were slightly broader than the VARA.[327] However, in order to assess the overall effect of the adoption of civil-law-style moral rights, it is important to examine how the narrow scope of application of these new statutory rights affects authors and works *not* covered by the VARA.

2. Evaluating the VARA

In theory, little should change for authors whose works are not covered by the VARA, and the alternative doctrines outlined earlier should still be available to them despite the enactment of statutory moral rights. In practice, however, it appears that these authors are negatively affected by the existence of moral rights statutes that exclude them because their exclusion invites the argument that since Congress intended to limit moral rights protection to a small subset of authors and works, it must have intended *not* to provide such protection to authors and works not covered by the statute. This argu-

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323. *Id.*

324. *See id.* § 106A(c)(3).

325. *See also* NIMMER & NIMMER, *supra* note 18, § 8D.06[A][2], at 8D-74 (noting that the definition of works of visual art "refers solely to physical items"). The limitation of moral rights to physical items has prompted some scholars to conceptualize moral rights as residual property rights by understanding the moral rights as equitable servitudes on chattels. *See, e.g.*, Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 101–02 (1997).

326. *See, e.g.*, Martin v. City of Indianapolis, 192 F.3d 608 (7th Cir. 1999); Carter v. Helmsley-Spear, Inc., 71 F.3d 77 (2d Cir. 1995); Hunter v. Squirrel Hill Assocs., No. Civ.A.05-861, 2005 WL 1995459 (E.D. Pa. Aug. 17, 2005); Scott v. Dixon, 309 F. Supp. 2d 395 (E.D.N.Y. 2004); Phillips v. Pembroke Real Estate, Inc., 288 F. Supp. 2d 89 (D. Mass. 2003); Flack v. Friends of Queen Catherine Inc., 139 F. Supp. 2d 526 (S.D.N.Y. 2001); English v. BFC & R E. 11th St. LLC, No. 97 Civ. 7446(HB), 1997 WL 746444 (S.D.N.Y. Dec. 3, 1997); Pavia v. 1120 Ave. of the Ams. Assocs., 901 F. Supp. 620 (S.D.N.Y. 1995).

327. *See, e.g.*, Edward J. Damich, *A Comparison of State and Federal Moral Rights Protection*, 15 HASTINGS COMM. & ENT. L.J. 953 (1993).

ment can be deployed against any potentially expansive applications of common law doctrines or statutory rules used to protect moral rights of authors outside the VARA, and it can be used to cut back moral rights protection that already exists under alternative doctrines.

a. Prelude

A first step in this direction was made in *Lee v. A.R.T. Co.*,[328] a case in which the defendant bought the plaintiff's notecards and lithographs from an art dealer, mounted them on ceramic tiles, and resold them to the public. The plaintiff, armed with two appellate court decisions holding that the defendant's business model was illegal under copyright law,[329] brought a copyright infringement suit on the basis that making and selling the tiles infringed her economic right to create derivative works.[330] However, the Seventh Circuit refused to follow the Ninth Circuit and ruled in favor of the defendant, holding that the tiles did not qualify as derivative works. While there may have been good reasons for this decision, the explanation offered by Judge Easterbrook is peculiar because it targets the idea of moral rights despite the plaintiff's exclusive reliance on her copyright claim and her omission of any moral rights argument. Judge Easterbrook reasoned that if the tiles were derivative works, then any alteration of a work would require the copyright owner's permission, which apparently sounded too much like the kind of moral rights that the United States should continue to reject.[331] He then said that the plaintiff's works would not qualify as works of visual art under the VARA and that it "would not be sound to use § 106(2) to provide artists with exclusive rights deliberately omitted from the Visual Artists Rights Act."[332] This argument combines the narrow scope of the VARA with the understanding of moral rights as copyright entitlements to support the conclusion that nothing outside the VARA, not even a copyright infringement claim, can be used to protect moral rights.[333] While this case is an example of how the moral rights orthodoxy can be used to limit moral rights protection in the United States, the

328. 125 F.3d 580 (7th Cir. 1997).

329. Muñoz v. Albuquerque A.R.T. Co., 38 F.3d 1218 (9th Cir. 1994) (mem.); Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341 (9th Cir. 1988).

330. 17 U.S.C. § 106(2) (2000).

331. *See Lee*, 125 F.3d at 582 ("If Lee (and the ninth circuit) are right about what counts as a derivative work, then the United States has established through the back door an extraordinarily broad version of authors' moral rights, under which artists may block any modification of their works of which they disapprove. No European version of *droit moral* goes this far."). Although it is true that the scope of moral rights in Continental Europe is often overestimated, the general rule against modification is central to the moral rights orthodoxy, which is why many European versions of *droit moral* actually do go "this far." *See supra* note 77 and accompanying text.

332. *Lee*, 125 F.3d at 583.

333. A similar argument, although without reference to the VARA, was made by a court rejecting a Lanham Act claim for failure to properly credit an alleged co-author as "duplicative" of (and preempted by) a parallel copyright claim. *See* Weber v. Geffen Records, Inc., 63 F. Supp. 2d 458, 463–64 (S.D.N.Y. 1999) (implying that the Lanham Act claims at hand could not be entertained because of a conflict with the "author's *copyright-protected* right to credit") (emphasis added).

Lee decision did not actually have that effect. It was the Supreme Court's *Dastar* decision that ultimately led to this result.

b. Main Act

In *Dastar*, Justice Scalia employed the *Lee* reasoning when he refused to turn § 43(a) of the Lanham Act into a "species of mutant copyright law"[334] and instead held that unaccredited copying of works in the public domain was not actionable as reverse passing off under the Lanham Act. In this case, the plaintiff had failed to renew the copyright on a television series based on Dwight Eisenhower's book *Crusade in Europe*, enabling the defendant to release its own video version of the series made from the original tapes without crediting the plaintiff. Since the original series was in the public domain, the plaintiff could not rely on copyright law, and it instead invoked the Lanham Act to seek injunctive and monetary relief. The Supreme Court correctly decided the case on the merits by preventing the plaintiff from replacing its lost copyright claim with a Lanham Act claim. However, the Court felt the need to address moral rights and the VARA in support of its decision, even though *Dastar* was not a moral rights case because it did not involve an author as required by the moral rights orthodoxy (the plaintiff was merely a copyright assignee).[335] Despite the fact that authorship was not an issue, Justice Scalia developed an argument made in the briefs[336] and said that recognizing in § 43(a) of the Lanham Act a cause of action for misrepresentation of "authorship" of works in the public domain would render the limitations of the VARA superfluous and that "statutory interpretation that renders another statute superfluous is of course to be avoided."[337]

Justice Scalia's reasoning is conceivable only because Congress decided to combine the endorsement of the moral rights orthodoxy with an exceptionally narrow scope of the recognized rights. Moral rights could hardly be perceived as conflicting with other doctrines if they had not been conceptualized as inalienable rights of authors in their works and neatly packaged as a separate *copyright* doctrine. More specifically, the argument that attribution claims are copyright claims because the right of attribution under the VARA is formally and conceptually part of the copyright law is only plausible because

334. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34 (2003). For a detailed analysis of the case, see Hughes, *supra* note 5, at 24–35.

335. In fact, it is analogous to the European cases mentioned above, *supra* note 43. *See* OLG Frankfurt, NJW 44, 1839 (F.R.G.); Cass., sez. un., 28 luglio 1932 n.11, Giust. Pen. 1933, I, 910 (Italy) *reported in* 47 LE DROIT D'AUTEUR 66 (1934) (Fr.); Confetti Records v. Warner Music UK Ltd. [2003] EWHC (Ch) 1274 [152] (Eng.).

336. *See, e.g.*, Brief for Petitioners at 7, 24, 30–31, *Dastar*, 539 U.S. 23 (No. 02-428).

337. *Dastar*, 539 U.S. at 35. Unfortunately, Justice Scalia failed to explain how this argument is to be reconciled with 17 U.S.C. § 301(d) (2000), which explicitly states that "[n]othing in this title annuls or limits any rights or remedies under any other Federal statute." *See also* Michael Landau, *Copyright, Moral Rights, and the End of the Right of Attribution under U.S. Trademark Law*, 19 INT'L REV. L. COMP. & TECH. 37, 39, 50 (2005) (explaining that the VARA was never meant to supersede and preempt other types of protection for proper attribution under other laws).

Congress subscribed to the moral rights orthodoxy. If Congress had not endorsed the dominant mode of conceptualizing moral rights and had instead made minor adjustments to pre-existing doctrines, Justice Scalia's line of reasoning would be difficult to follow because attribution rights would not be formally part of copyright law.[338] Unfortunately, in his quest against mutant copyright law, Justice Scalia has triggered the creation of a species of mutant moral rights law. By using distinct moral rights language in a case that had nothing to do with moral rights, he essentially opened the door for lower courts to apply the *Dastar* decision and its flawed moral rights logic to deny relief for authors in actual moral rights cases in which relief had previously been available.[339]

c. Aftermath

A good example of the negative spillover effect of the VARA as a result of the *Dastar* decision is *Williams v. UMG Recordings, Inc.*,[340] in which a federal district court in California held that the plaintiff's Lanham Act claim for misattribution of film credits for authorship and direction of a specific motion picture was barred by *Dastar* as a matter of law, despite the fact that the plaintiff would likely have been successful on the basis of precedents like *Montoro*[341] or *Lamothe*.[342] Interestingly, the *Williams* court pointed the author to contracts, collective bargaining, or copyright law as a potential source of moral rights protection,[343] thereby basically denying any kind of protection of the author's interest in attribution in a tort setting. Similarly, in *Zyla v. Wadsworth*,[344] an author brought a suit against her publisher on the grounds that the acknowledgments section of a book falsely downplayed her contribution as a co-author. The First Circuit, relying on *Dastar*, stated that § 43(a) did "not apply to the type of claim" the plaintiff raised and that claims of false authorship "should be pursued under copyright law instead."[345] What is troubling is not so much the outcome of these particular cases, but the clear implication that there is no right of attribution in the United States that could be enforced on the basis of the Lanham Act in an actual moral rights case. Seemingly to avoid conflicts between different bodies of law generated by the adoption of the moral rights orthodoxy, the right of attribution is pushed back into the arms of copyright law and, hence, mistakenly subjected to the substantive limitations

338. If rights of attribution were conceptualized as trademark rights, there would be no conflict of the type identified by Justice Scalia. *See* Landau, *supra* note 337, at 49; *see also* Ginsburg, *supra* note 181, at 282 (calling the argument regarding the VARA being the only federal locus for attribution rights "both perverse and wrong").

339. *See* Hughes, *supra* note 5, at 37; Landau, *supra* note 337, at 39, 44–45.

340. 281 F. Supp. 2d 1177 (C.D. Cal. 2003).

341. 648 F.2d 602 (9th Cir. 1981).

342. 847 F.2d 1403 (9th Cir. 1988).

343. *Williams*, 281 F. Supp. 2d at 1185.

344. 360 F.3d 243 (1st Cir. 2004).

345. *Id.* at 251, 252.

contained in the VARA. Unfortunately, virtually all lower courts have adopted this reading of the *Dastar* opinion.[346]

This development indicates that while the VARA has arguably increased moral rights protection for a very small number of authors,[347] its narrow scope has had the effect of decreasing protection for a large number of authors not covered by the VARA, especially regarding the moral right of attribution in the tort scenario. On balance, the importation of the civil law concept of moral rights has turned out to be counterproductive and in fact has reduced overall moral rights protection for authors. In view of these developments, the admittedly less spectacular conceptual alternative of making minor adjustments to pre-existing doctrines would likely have been more effective in increasing the overall protection for authors. Moreover, judges concerned with the purity of the American copyright tradition would probably not be as upset if the decisional rules European courts derive from their concept of moral rights were cast in more familiar language, such as the laws of torts and contracts. This is not to say that judges would or should be more inclined to increase the protection of moral rights if presented with a controversial decisional rule, such as the prohibition of blanket waivers, but the kind of knee-jerk response that seems to come into play whenever the specter of moral rights is raised would then not be as likely to determine the outcome of the case in question.[348]

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346. *See* Borrego v. BMG U.S. Latin, 92 F.App'x 572, 572 (9th Cir. 2004) (stating that under *Dastar*, plaintiff "no longer has a claim for 'reverse passing off'" for the false attribution of one of his songs to another songwriter); Radolf v. Univ. of Conn., 364 F. Supp. 2d 204, 221 (D. Conn. 2005) (reiterating that *Dastar* "forecloses any claim [the plaintiff] may formerly have had under the 'origin of work' provision of § 43(a) of the Lanham Act" based on use of the plaintiff's scientific research and data without proper attribution); Santa Rosa v. Combo Records, 376 F. Supp. 2d 148, 151 (D.P.R. 2005) (finding the Lanham Act inapplicable to singer's claim against record company for failure to give credit); Smith v. New Line Cinema, No. 03 Civ. 5274(DC), 2004 WL 2049232, at *4 (S.D.N.Y. Sept. 13, 2004) (dismissing plaintiff's claim that he was the true author of the motion picture *The Cell* and that the motion picture studio falsely attributed authorship to someone else on the basis that this claim is not actionable under *Dastar*); Carroll v. Kahn, No. 03-CV-0656, 2003 WL 22327299, at *5–*6 (N.D.N.Y. Oct. 9, 2003) (granting defendant's motion to dismiss for failure to state a claim under the Lanham Act when plaintiff alleged that defendant filmmakers failed to give him proper credit as author and/or producer of the motion picture in question); *see also* Bill Diodato Photography, LLC v. Kate Spade, LLC, 388 F. Supp. 2d 382, 395 (S.D.N.Y. 2005); Freeplay Music, Inc. v. Cox Radio, Inc., No. 04 Civ. 5238GEL, 2005 WL 1500898, at *3–*4 (S.D.N.Y. June 23, 2005); Hayes v. Ja Rule, No. 1:03CV01196, 2004 WL 1459352 (M.D.N.C. June 28, 2004); Boston Int'l Music, Inc. v. Austin, No. Civ.A. 021-12148-GAO, 2003 WL 22119228, at *2 (D. Mass. Sept. 12, 2003).

347. Note, however, that at least one empirical study found no evidence that moral rights legislation in the United States actually benefits authors. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 287–93 (2003).

348. This may explain why some scholars in favor of strengthening attribution rights have shifted the rhetoric from moral rights of authors to the benefits of attribution to society in general. *See, e.g.*, Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1175–76 (2005); *see also* Laura A. Heymann, *The Birth of the Authornym*, 80 NOTRE DAME L. REV. 1377, 1446 (2005) (distinguishing between a trademark and a copyright aspect of authorship, but then—in line with *Dastar* and the moral rights orthodoxy—claiming that "the concept of moral rights is a copyright concern").

V. Conclusion

The overarching theme that emerges from this Article is that there is no inherent relationship between legal concepts and substantive rules and that any comparative study of moral rights should distinguish between moral rights as a concept and moral rights as a set of rules. Parts I and II showed that the dominant mode of conceptualizing moral rights can be reduced to a set of substantive rules that are not even remotely as extreme as the solemn statutory declarations and high-flying rhetoric of the civil law tradition might suggest. Part III demonstrated that alternative conceptual approaches have been used in both common law and civil law countries to generate a comparable level of protection for moral rights, with some shortcomings in common law countries relating to the right of attribution in the tort scenario and mandatory terms for copyright contracts in the contract scenario. However, whatever these shortcomings may be, there is nothing inherent in these alternative concepts that would prevent judges from increasing the level of protection for authors if they so wished, and there was no need to switch to the dominant mode of conceptualizing moral rights to achieve that purpose. In fact, as the analysis in Part IV suggests, the enactment of statutory moral rights in the spirit of the civil law approach has done little to increase protection for authors in the United Kingdom and has done much to decrease the overall protection for authors in the United States. Therefore, if the goal was to increase protection for authors, it was a step in the wrong direction for common law countries to introduce the civil law concept of moral rights into their legal systems. Ultimately, the adoption of the moral rights orthodoxy in common law countries turned out to be an exercise in conceptual transformation and harmonization with partially perverse substantive effects. This counterproductive turn of events might have been averted if policymakers on both sides of the Atlantic had focused on the actual decisional rules and realized that the European concept of moral rights itself is just a patchwork of rules, albeit a highly theorized one.