

# Protection is Impossible without Recognition: How the No Child Left Behind Act Will Leave Moral Rights Behind

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## I. INTRODUCTION

The idea that authors and artists have moral rights in their creations, also referred to as *droit moral*, originated in France during the period of the French Revolution.<sup>1</sup> The *droit moral* has been described as a “collection of prerogatives, all of which proceed from the necessity of preserving the integrity of intellectual works and the personality of the author.”<sup>2</sup> The doctrine of moral rights attempts to secure the intimate bond that exists between a literary or artistic work and its author’s personality.<sup>3</sup> In France, the primary justification of moral rights is the idea that the work or art is an extension of the artist’s personality and an expression of his innermost being.<sup>4</sup> To mistreat the work of an artist is to mistreat the artist, to invade his area of privacy, to impair his personality.<sup>5</sup> The importance of moral rights is to prevent the attack on the person to a greater extent than to prevent the attack on the work. The doctrine of moral rights traditionally recognizes four inalienable rights: 1) *droit de divulgation*, known as the right of disclosure (the right of author to decide when to reveal his work to the public or have it published); 2) *droit de repentir ou de retrait*, known as the right to correct or withdraw works previously disclosed to the public; 3) *droit de paternité*, known as the right of attribution (an author has the right to be identified as the author or to remain anonymous and the author has right to prevent the use of her name on a work that she did not create); and 4) *droit au respect de l’oeuvre*, translated as the right of integrity (right of preventing the work from being deformed, destroyed, or altered so as to

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<sup>1</sup> Calvin D. Peeler, FROM THE PROVIDENCE OF KINGS TO COPYRIGHTED THINGS (AND FRENCH MORAL RIGHTS), 9 *Ind. Int’l & Comp. L. Rev.* 423, 427 (1999).

<sup>2</sup> Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists’ Rights in France and the United States*, 28 *Bull. Copyright Soc’y USA* 1, 7-9 (1980). *Id.* at 3 (translating A. LE TARNEC, *MANUEL DE LA PROPRIETE LITTERAIRE ET ARTISTIQUE* 25 (1966)).

<sup>3</sup> Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 *Am.J.Comp.L.* 465 (1968).

<sup>4</sup> J.H. MERRYMAN & A. ELSEN, *LAW, ETHICS, AND THE VISUAL ARTS* 240 (2d ed. 1987), 145.

<sup>5</sup>*Id.*

respect the reputation of the author).<sup>6</sup> This body of rights makes up the moral rights in French law.<sup>7</sup> Not all countries have been as eager to adopt the doctrine of moral rights and some countries have chosen to only embrace a partial moral rights doctrine. The United States has been reluctant to recognize the full spectrum of moral rights, asserting that there are already sufficient protections in place protecting artists' moral rights.

This paper will begin by examining the reasons the United States has given for not adopting specific legislation recognizing moral rights. After tracing the origins of moral rights in Europe and how moral rights are recognized in European countries today, specifically France, the differences will become apparent in how the United State has recognized moral rights. By exploring the possible reasons for the differences between the approaches and the likely impact the No Child Left Behind Act<sup>8</sup> will have on moral rights protection, it will become apparent that the United States is not likely to be following the European approach in the foreseeable future.

## II. THE TOUR DE FRANCE OF MORAL RIGHTS

As early as 1791 in France there was recognition of moral rights in the theatre context.<sup>9</sup> Moral rights in France continued to develop through decisions that were handed down from French courts; these decisions were based on principles that existed in France and also from Germany's views on moral rights.<sup>10</sup> European intellectual property law derives in large part from the property theories developed by Immanuel Kant and George Wilhelm Friedrich Hegel.<sup>11</sup> Kant and Hegel viewed private property as being acquired not by labor but by joining one's individual will to some object external

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<sup>6</sup> Roberta Rosenthal Kwall, *FAME*, 73 Ind. L.J. 1, 18-21 (1997).

<sup>7</sup> Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 480 (1968) (Comparing American law and the French doctrine of moral right)

<sup>8</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.) (reauthorizing the Elementary and Secondary Education Act).

<sup>9</sup> Christine L. Chinni, *Droit D'Auteur Versus The Economics Of Copyright: Implications For American Law Of Accession To The Berne*, 14 W. New Eng. L. Rev. 145, 150 (1992).

<sup>10</sup> Natalie C. Suhl, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 Fordham Intell. Prop. Media & Ent. L.J. 1203, 1208-1209 (2002).

<sup>11</sup> Thomas F. Cotter Pragmatism, *Economics, and the Droit Moral*, North Carolina Law Review November 1997 76 N.C.L. Rev.1, 7

to the self.<sup>12</sup> This view proposed that the thing possessed came to embody the owner's personality and by this reasoning a person may alienate property by removing his will from the thing possessed.<sup>13</sup> For example, under Kant's theory, the mere ownership of a book would not allow the person to copy it, because copying the book would interfere with the author's prerogative of deciding when and how he will communicate through his publisher with the public.<sup>14</sup> It is an extension on this view of property that led to recognizing that an artist has a personal connection with their work and, as such, they are entitled to personal rights that are independent of any economic rights they may receive. Emphasizing an intrinsic relationship between the author and his work, moral rights recognize that an artist creates works not only for economic reasons, but also to express the unique personality of the author.<sup>15</sup> Many artists themselves support this belief, as evinced by Martin A. Roeder's statement that "[w]hen an artist creates, be he an author, a painter, a sculptor, an architect or a musician, he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use."<sup>16</sup>

French law gives the most leeway to moral rights; as such France has been dubbed the "mother country" of moral rights.<sup>17</sup> France recognizes the complete doctrine of moral rights: the right of attribution, the right of integrity, the right of disclosure and the right of withdrawal. In France, moral rights are not viewed as a subsection of intellectual property; they are the foundation upon which intellectual property rights rest. Moral rights are so fundamental that they were used as a starting point when France had to deal with the new issue of the right of publicity.<sup>18</sup> While moral rights have had great success in being recognized under French law, adopting moral rights in their entirety has been

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<sup>12</sup> Id. citing G.W.F. Hegel, *PHILOSOPHY OF RIGHT* § 44, 50, 51-58 (T.M. Knox trans., Oxford Univ. Press 1952) (1821); Immanuel Kant, *The Philosophy of Law* 81-84 (W. Hastie trans., Augustus M. Kelley Publishers 1974) (1796).

<sup>13</sup> Id. Citing Hegel supra note 11 § 51.

<sup>14</sup> Id. Citing Kant supra note 11 at 101.

<sup>15</sup> Henry Hansmann, & Marina Santilit, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 *J. LEGAL STUD.* 95, (Jan. 1997).

<sup>16</sup> Martin Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 *Harv. L. Rev.* 554, 557(1940).

<sup>17</sup> Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 *COLUM. VLA J.L. & ARTS* 199, 201 (1993).

<sup>18</sup> Sheldon W. Halpern, *Of Moral Right and Moral Righteousness*, 1 *Marq. Intell. Prop. L. Rev.* 65, 72, 1997 citing Acquarone, *L'ambiguité du droit à l'image*, 22 *Recueil Dalloz* 129, 132-36 (June 6, 1985)

rejected by other countries, particularly the U.S.<sup>19</sup> The United States, often known for being forward-thinking, has been slow to recognize artists' moral rights. When it comes to moral rights, France is wearing the yellow shirt with the United States trailing behind.

### III. THE UNITED STATES: A BULLHEADED APPROACH TO THE BERNE CONVENTION

The United States has been slow to recognize moral rights, especially in comparison to the French adoption of the doctrine. Apart from the narrow rights of integrity and attribution that 106A of the Copyright Act affords to qualifying works of visual art, state and federal law do not systematically protect an author's moral right in their work.<sup>20</sup> The push towards recognition of moral rights began in the mid 1970's when states began enacting their own legislation protecting the moral rights of an artist.<sup>21</sup> The extent of U.S. reluctance is evident by the actions of the United States in relation to the Berne Convention for the Protection of Literary and Artistic Works, specifically Article 6bis. In an effort to harmonize European moral rights laws the Berne Convention was amended in 1928 to include Article 6bis, a moral rights provision. Article 6bis makes it clear that signatories must recognize the rights of integrity and attribution,<sup>22</sup> stating:

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

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<sup>19</sup> Elaine B. Gin, *International Copyright Law: Beyond The Wipo & Trips Debate*, *Journal of the Patent and Trademark Office Society*, 86 J.Pat & Trademark Off. Soc'y 763, 768 (2004).

<sup>20</sup> Paul Goldstein, GOLDSTEIN ON COPYRIGHT, Aspen publishers, 2006, volume 3§ 17.23, 17:201.

<sup>21</sup> Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 44-45 (1997).

<sup>22</sup> Article 6bis limits the right of integrity to distortions, alterations, or changes in the work that might damage the artist's reputation. Berne Convention for the Protection of Literacy and Artistic Work, art. 6bis (2), 828 U.N.T.S. 221

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where the protection is claimed.<sup>23</sup>

Despite the fact the Berne Convention is “the highest internationally recognized standard for the protection of works of authorship of all kinds,”<sup>24</sup> or that the rights protected under Article 6bis are not as broad as the rights protected under French law and that signatories are free to choose what must be done to protect the rights of attribution and integrity, the United States waited over sixty years to sign Article 6bis. The United States’ bullheaded refusal to join Berne was due to reluctance in changing their substantive copyright laws concerning length, formalities, notice, and moral rights.<sup>25</sup> In addition, U.S. publishers and other commercial distributors vigorously opposed any incorporation of these rights into American law.<sup>26</sup> When the United States finally became a signatory it meant that they were now required to recognize the rights of integrity and paternity. Instead of enacting legislation to recognize moral rights, the US asserted that adequate provisions already existed to protect artists’ moral rights. Noting that “Article 6bis of Berne has generated one of the biggest controversies surrounding the United States adherence to Berne,”<sup>27</sup> the House Report on the 1988 amendments that conformed the 1976 Copyright Act to the Berne Convention’s requirements stated that the state and federal laws of the United States satisfied the requirements of Article 6bis.<sup>28</sup> Congress decided that the current laws in the United States, including federal and state statutory and common law, were sufficient, and that no legislation was needed to comply with the requirements of Article 6bis.<sup>29</sup> According to this view there were a variety of laws that provided

[t]he kind of protection envisioned by Article 6bis. Federal laws include 17 U.S.C. § 106, relating to derivative works; 17 U.S.C. § 115 (a) (2), relating to distortions of musical works used under compulsory license respecting sound recordings; 17 U.S.C. § 203, relating to

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<sup>23</sup> *Berne Convention Implementation Act of 1998*, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

<sup>24</sup> S. REP. NO. 100-352, 100<sup>th</sup> Cong., 2d. Sess. 2 (1998), reprinted in 1988 U.S.C. C.A.N. 3706, 3707 (on the Berne Convention Implementation Act of 1988, Pub. L.No. 100-568, 102 Stat. 2853 (1988)).

<sup>25</sup> Marshall A. Laeffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 375, (1991).

<sup>26</sup> Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 Colum. VLA J.L. & Arts 229, 239-340 (1995).

<sup>27</sup> Berne House Report, *House Judicial committee Berne convention Implementation Act of 1988*, legislative report No. 100-609, HR 4262 May 6, 1986

<sup>28</sup> Berne House Report, 33-34, 1042-1043.

<sup>29</sup> *Final report of Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, reprinted in 10 Colum.- VLA J.L. & Arts 513, 554-55 (1986); H.R. REP. NO. 100-609, at 38 (1988).

termination of transfers and licenses; and section 43(a) of the Lanham Act, relating to false designations of origin and false descriptions. State and local laws include those relating to publicity, contractual violations, fraud and misrepresentation, unfair competition, defamation, and invasion of privacy. In addition, eight states have recently enacted specific statutes protecting the rights of integrity and paternity in certain works of art. Finally, some courts have recognized the equivalent of such rights.<sup>30</sup>

The Berne Implementation Amendments as written further emphasized that the United States believed their current laws were more than sufficient stating, “the obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law,” and that “[t]he amendments made by this Act, together with law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.”<sup>31</sup> The Berne Implementation Committee was so convinced that the existing laws of the United States were sufficient to fulfill the requirements of the Berne Convention that they chose not to even “address the question of whether new provisions should be added to the Copyright Act or other statutes with respect to the author’s right of paternity<sup>32</sup> or right of integrity.”<sup>33</sup> While the Berne Implementation Committee may have been convinced, an examination of the various provisions touted as being sufficient in protecting moral rights shows that they have numerous deficiencies.

#### a. The Lanham Act

The Lanham Act was one of the methods Congress was referring to when they claimed there were already adequate provisions under U.S. law that protected authors’ rights of attribution and integrity. The Lanham Act allows actions against those who use another person’s mark in a deceptive or misleading way and protects people who are engaged in commerce against unfair competition.<sup>34</sup>

While the majority of the Lanham Act relates to registered trademarks, 43(a), in contrast, does not

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<sup>30</sup> *Berne House Report*, 33-34 (1042-1043)

<sup>31</sup> Pub. L. No. 100-568, § 2(2), (3), 102 Stat. 2853 (Oct. 31, 1998).

<sup>32</sup> Melville B. Nimmer, NIMMER ON COPYRIGHT § 8D.01, at 8D-5 (1994) (paternity rights are rights of attribution which include the authors right to be known as the author of his work, the right to prevent others from falsely attributing ownership to him of a work that he has not written; the right to prevent others from being named as author of his work, the right to prevent others from using the work or the author’s name in a way that would adversely reflect on the authors professional standing and reputation).

<sup>33</sup> *The Berne Implementation Report*, S. REP.No. 100-352, 100<sup>th</sup> Cong., 2d. Sess. 2 (1988), reprinted in 1998 U.S.C.C.A.N. 3706, 3715.

<sup>34</sup> Lanham Act of 1946, 15 U.S.C. § 1127 (1982)

mention trademarks at all. 43(a) of the Lanham Act was written to be a federal false advertising statute but it has also been said to have become a federal law of unfair competition.<sup>35</sup> The broad language contained in section 43(a)<sup>36</sup> resulted in courts interpreting it in differing ways and ultimately applying it liberally to a variety of claims.<sup>37</sup> It was this liberal application of 43(a) that may have fostered the United States' belief that artists' attribution rights could be protected through the provision because it did not allow for the false representation as to origin of goods. This section has been used in protecting an artists' moral rights with varying degrees of success. One of the most well-known cases where 43(a) was discussed, as an indirect way to protect the moral rights of integrity and attribution, is *Gilliam v. American Broadcasting Cos.*<sup>38</sup>

In *Gilliam*, the court explored how a copyright owner may be able to bring a false designation of origin claim under the Lanham Act. The court recognized the Lanham Act as “the federal counterpart to state unfair competition laws has been invoked to prevent misrepresentations that may injure plaintiff’s business or personal reputation, even where no federal trademark is concerned.”<sup>39</sup> The plaintiffs, members of the popular comedy troupe Monty Python, had agreed with the British Broadcasting Corporation (“BBC”) that the troupe would write and deliver scripts for a series of television programs, subject to the conditions that BBC could make only minor changes in the work without prior consultation with the writers, and that the writers otherwise retained all rights in the scripts.<sup>40</sup> In 1973, BBC licensed the right to distribute the series in the United States to Time-Life Films, which in turn licensed the American Broadcasting Company (“ABC”).<sup>41</sup> When ABC's

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<sup>35</sup> J. Thomas McCarthy, Lanham Act § 43A: The Sleeping Giant Is Now Wideawake, 59-5PG *Law & Contemp. Probs.* 45, 45-46 and 48, (1996).

<sup>36</sup> Lanham Trademark Act, 15 U.S.C. § 1125 (2000) Section 43(a) states; “any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which. . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.”

<sup>37</sup> Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act?*, 31 *UCLA L. REV.* 671, 685-95. (1984).

<sup>38</sup> 538 F.2d 14 (2d Cir. 1976).

<sup>39</sup> *Gilliam*, 538 F.2d at 24-25.

<sup>40</sup> *Id.* at 17.

<sup>41</sup> *Id.* at 17-18.

broadcast of the first special omitted twenty-four of the original ninety minutes of recording (allegedly to make time for commercials and to delete portions ABC deemed offensive or obscene), Monty Python sued to enjoin the scheduled broadcast of the second special, alleging violations of its rights under copyright law and under §43(a) of the Lanham Act.<sup>42</sup>

Although unsuccessful in their attempt to convince the district court to issue a preliminary injunction, the plaintiffs prevailed on appeal to the Second Circuit. The United States Court of Appeals for the Second Circuit recognized in effect that the plaintiffs were essentially seeking to enforce a moral right: the right of integrity, which did not exist under the US Copyright Act.<sup>43</sup> The court concluded that such mutilation of a work, while “theoretically subsumed within the doctrine of moral right, should be litigated under the Lanham Act.”<sup>44</sup> The court found a likelihood of success on the merits for both the copyright and Lanham Act claims.<sup>45</sup> In regards to the copyright claim, the court found that the economic right of adaptation could be applied to vindicate the author’s interest.<sup>46</sup> The court held that ABC, in mutilating the BBC programs through its editing, had exceeded the scope of its license and had made an unauthorized derivative work<sup>47</sup> of the underlying scripts to which Monty Python had retained copyright.<sup>48</sup> In addition, while the court did not expressly recognize the authors’ moral rights<sup>49</sup> the court held that the plaintiffs had successfully shown that the defendants had violated section 43(a) of the Lanham Act. The court found that the defendant’s broadcast of the distorted version of the plaintiff’s work falsely represented the work as originating from Monty Python, concluding that “an allegation that a defendant has presented to the public a ‘garbled,’

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<sup>42</sup> Id. at 18.

<sup>43</sup> Id. at 23-24.

<sup>44</sup> Eric B. Hiatt, *The Dirt on Digital Sanitizing: Droit Moral, Artistic Integrity and The Directors Guild of America v. Clean Flicks et al.*, 30 Rutgers Computer & Tech. L.J. 375, 387 (2004)

<sup>45</sup> *Gilliam* at 23.

<sup>46</sup> Id. at 24.

<sup>47</sup> §103 of the Copyright Act gives copyright protection to derivatives. A derivative work is defined under 17 U.S.C. § 101 as a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a derivative work.

<sup>48</sup> Rick Moretneson, *DIY After Dastar: Protecting Creators Moral Rights Through Creative Lawyering, Individuals Contract and Collective Bargaining Agreements*, 8 Vand.J.Ent.&Tech.L.335 (2006) (discussing how it is extremely rare that a writer retains copyright in their scripts)

<sup>49</sup> *Gilliam*, 538 F.2d at 17-19.

distorted version of plaintiff's work seeks to redress the very rights sought to be protected by the Lanham Act.”<sup>50</sup> By editing the work as the defendant had done and then attributing it to Monty python, ABC had falsely indicated that Monty python was the author of the work as edited.<sup>51</sup> This constituted a false designation of origin or a false description of the entertainment services in violation of subsection 43(a).<sup>52</sup> The court found that ABC’s edited version had so mutilated the original work of the Plaintiffs that it had “impaired the integrity” of the plaintiff’s creation and was “a mere caricature of their talents.”<sup>53</sup> The court’s decision, while depending on Lanham Act Principles, had also extensively referred to principles of the moral right doctrine<sup>54</sup>, leading many artists and commentators to believe that *Gilliam* offered an opportunity for the advancement of artists’ moral rights within the doctrine of unfair competition. It was not long, however, until the scope of protection under 43(a) was sharply constrained by the decision of the Supreme Court in *Dastar v. Twentieth Century Fox Film Corp.*<sup>55</sup>

In *Dastar* the Plaintiff had made a TV series about WWII, but failed to renew the copyright in the series causing it to fall into the public domain.<sup>56</sup> The defendant produced a video set that it had made from the tapes of the plaintiffs public domain series and sold it as its own product.<sup>57</sup> The plaintiff sued alleging that the defendants sale of its video without proper credit to the plaintiff’s television series constituted reverse passing off<sup>58</sup> in violation of the Lanham Act 43(a).<sup>59</sup> The plaintiff essentially claimed the defendant’s actions had made it likely that consumers would think the plaintiff’s product had come from the defendant. The Supreme Court rejected the plaintiff’s claim,

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<sup>50</sup> Id. at 24-25.

<sup>51</sup> Id. at 24-25.

<sup>52</sup> Id. at 24-25.

<sup>53</sup> *Gilliam* at 25.

<sup>54</sup> Hiatt supra 43 at 387

<sup>55</sup> 539 U.S. 23(2003)

<sup>56</sup> Id. at 2044.

<sup>57</sup> Id. at 2044.

<sup>58</sup> Id. at 2045.

<sup>59</sup> 43(a) is concerned with types of activities the first is false advertising and the second is the ‘passing off’ of goods under another persons trademark. Courts use the term passing off in three specific situations: 1) trademark infringement without intent to defraud, but where consumers are likely to be confused; 2) trademark infringement with intent to defraud and confuse buyers; and 3) substitution of one brand of goods when another brand is ordered. See Natalie C. Suhl, Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work, 12 Fordham Intell. Prop. Media & Ent. L.J. 1203, 1217 (2002).

reasoning that if the defendant had merely bought copies of the plaintiff's television series and had just repackaged them as the defendant's own, this would have violated 43(a).<sup>60</sup> The court said that the phrase "origin of goods" under the Lanham Act referred to the manufacturer of the physical goods, not to the person who created the ideas or communications embodied in the goods.<sup>61</sup> The court decided the defendant was the origin of the videos for the purposes of 43(a) and there was no misrepresentation.<sup>62</sup> The court reasoned that to find Lanham protection in this case would cause the Lanham Act to conflict with copyright law, which grants the public a right to copy works of authorship without attribution once their copyright has expired.<sup>63</sup> Moreover, the court found that recognizing a 43(a) cause of action here would render the limitations Congress placed on the express moral right of attribution in the copyright act superfluous.<sup>64</sup> On a more general level, the court cautioned against misuse or overextension of trademark and related protections into areas traditionally occupied by patent or copyright law.<sup>65</sup> Many artists were dismayed at a decision that seemed to suggest that when a product falls within the subject matter of patent or copyright law, but does not merit protection under patent or copyright law, courts should avoid construing the Lanham Act to provide a substitute form of protection.<sup>66</sup> Where it had seemed that the United States was moving towards more recognition of moral rights after the *Gilliam* decision, hopes were dashed after *Dastar*.

While it seems likely that protection of integrity and attribution will not be found under 43(a), even before the decision of *Dastar* there were numerous reasons why 43(a) was not sufficient in protecting artists' moral rights. The first weakness is that the Lanham Act is meant to protect economic rights,

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<sup>60</sup> *Dastar* at 2049.

<sup>61</sup> *Dastar* at 2049.

<sup>62</sup> *Id.* at 2049.

<sup>63</sup> *Id.* at 2048.

<sup>64</sup> *Id.* at 2048. (When Congress passed the Visual Rights Act, it was very specific in only protecting the rights of attribution and integrity for author's who create works of visual art. 17 U.S.C. § 106A (2000). A work of visual art is defined in 17 U.S.C. § 101 as a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.)

<sup>65</sup> *Dastar* at 2048.

<sup>66</sup> *Id.* at 2048.

which are separate from the personal rights an artist has in their work. It is this personal right of an artist, not their economic rights, which moral rights are concerned with.<sup>67</sup> Furthermore, even if 43(a) was able to be used to protect the moral right of attribution it would only give partial protection. 43(a) would protect the right of attribution only to the extent that attribution must not be false; it does not require that attribution be given. It is also important to note that, while the plaintiffs in *Gilliam* were successful, it was only because they had not assigned their economic rights in the scripts, which is unusual. Under *Gilliam*, the court only suggested that protection may be given to the copyright holder, but this may not always be the author of the work. In *Gilliam*, the mutilation was quite severe, which creates a high burden of proof one must meet to protect their right of integrity; even more troubling is that, to have a claim under 43(a), one must show a likelihood of consumer confusion,<sup>68</sup> which is often expensive and hard to prove. It is clear that, even though Congress asserted 43(a) to be one means of adequately protecting artists' moral rights, *Dastar* makes it unlikely that a court will find moral rights protection under 43(a).

b. State laws

Some state statutes concerning moral rights existed at the time the United States signed on to the Berne Convention. These were another method that Congress claimed protected moral rights to such an extent that there was no need for further legislation. One of these state statutes was the California Art Preservation Act, which recognized moral rights in "fine art".<sup>69</sup> The California Act recognized both an attribution right, which allows the artist to "retain at all times the right to claim authorship, or, for a just and valid reason, to disclaim authorship of his or her work of fine art," and an integrity right, which prohibits the intentional "physical defacement, mutilation, alteration, or destruction of a work of

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<sup>67</sup> Melville B. Nimmer, NIMMER ON COPYRIGHT § 8D.01, at 8D-4 (1994).

<sup>68</sup> 15 U.S.C. 1125(a)(1)(A)(2000) provides in part that a cause of civil action exists when any person who on or connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading representation of fact which (a) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods or services or commercial activities by another person

<sup>69</sup> Cal. Civ. Code § 987(West.Supp. 1997)

fine art.”<sup>70</sup> As is made evident by the language of this statute, it is very narrow in scope as it pertains only to what could be deemed “fine art.” Furthermore, state statutes only gave protection to those artists that resided in the state; so, if an artist lived in a state that did not have a statute, she was denied protection completely. In fact, it was more than likely that an artist would live in a state where there was not a statute, since only eight states had such statutes at the time.<sup>71</sup> More importantly, Article 6bis(3) requires that “[t]he means of redress for safeguarding the rights granted by this Article (i.e., moral rights) shall be governed by the legislation of the country where protection is claimed” and the comment to Article 6bis(3) refers to “legislation of the country” as “national law,” thereby making it clear that the moral rights protections of Article 6bis ought to be embodied in federal law, not a patchwork of state laws.<sup>72</sup>

c. Alternative Protections for Moral Rights

Congress claimed that various provisions of the 1976 Copyright Act had the capacity to protect moral rights. 106(2)<sup>73</sup> of the Copyright Act allows an artist to prevent unauthorized derivatives of her work, and the right of integrity and attribution can be protected in cases where an authorized “adapter makes mutilating changes in a creator’s work, and the resulting product is designated as based upon the creator’s underlying work.”<sup>74</sup> In addition, express contract provisions<sup>74</sup> are always available to an artist to protect their moral rights.

While Congress may have found these to be sufficient, there are numerous deficiencies that show how inadequate they are in protecting moral rights. The most blatant weakness is the limited protection that the Copyright Act affords by only expressly protecting the attribution and integrity rights or works of visual arts.<sup>75</sup> Other provisions, such as the right to prepare derivatives, only give protection to the copyright owner, which is not always the creator of the work. In addition, while the

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<sup>70</sup> Cal.Civ. Code § 987(d)

<sup>71</sup> Russ VerSteeg, *Federal Moral Rights For Visual Artists: Contract Theory and Analysis*, 67 Wash.L.Rev. 827, 833 (1992) citing Article 6bis.

<sup>72</sup> Id. at 833.

<sup>73</sup> §106 says in part that the owner of copyright has the exclusive rights to prepare derivatives based upon the copyrighted work.

<sup>74</sup> Roberta Rosenthal Kwall, *Moral Rights of University Employees and Students: Can Educational Institutions Do Better Than U.S. Copyright Law*, *Journal of College and University Law*, 27 J.C. & U.L. 53, 2000, 57.

<sup>75</sup> See supra note 62.

idea of express contract provisions seems sufficient, it is good in theory only. In contract negotiations, more often than not, the artist is not in a position to bargain for such provisions. Also, moral rights are meant to be alienable and automatic; they should not have to be expressly contracted for.

#### d. Visual Artists Rights Act of 1990

The Visual Artists Rights Act (VARA) of 1990 was thought by some to be a major development in the history of *droit moral* in the United States. VARA amends the Copyright Act of 1976 by expressly providing for limited federal recognition of moral rights.<sup>76</sup> Like the state statutes, VARA recognizes both attribution and integrity rights, but scope is limited as it applies only to “works of visual art,” a very narrow category or works of authorship.<sup>77</sup> The former include the rights to claim authorship of the work and to prevent the use of one's name as the author of a work created by another; in addition, the statute recognizes an overlapping attribution/integrity right, similar to the right at issue in *Gilliam*, that allows the author to prevent the use of his or her name as the author of the work in the event of a “distortion, mutilation, or other modification . . . which would be prejudicial to his or her honor or reputation.”<sup>78</sup> Finally, VARA establishes an integrity right “to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation” and “to prevent any destruction of a work of recognized stature.”<sup>79</sup>

Initially, VARA looked like it could have been a giant step in the right direction; its limited scope, however, makes it more of a baby step. VARA only applies to works of visual arts<sup>80</sup>, a small area of the arts which results in many artists being left without any protection under VARA. Furthermore, unlike her French or German counterpart, the American author may waive her rights, as long as she does so in a signed written instrument specifically identifying the work and the uses to which the waiver applies.<sup>81</sup> In fact, many artists appear to be unaware they even have such rights under VARA.

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<sup>76</sup> 17 U.S.C. § 101, *Visual Artists Rights Act of 1990*, Pub.L.No. 101-650 § 601-610, 104 Stat.5128 (1990) (codified in part in 17 U.S.C. § 101, 106A, 107, 113, 301,411, 412, 506 (1996)).

<sup>77</sup> *Id.*

<sup>78</sup> 17 U.S.C. § 106 A(3)(a)

<sup>79</sup> 17 U.S.C. § 106 A(3)(b)

<sup>80</sup> 17 U.S.C. § 106A

<sup>81</sup> 17 U.S.C. §106A (e)(1)

A report discloses that more than one quarter of the respondents who were surveyed by the Copyright Office in 1994-95 were unaware that artists who create certain works of art have moral rights.<sup>82</sup> Six percent responded that they had even been pressured or coerced into waiving their moral rights.<sup>83</sup> The report also suggested that written waivers may become increasingly common with respect to commissioned works and works incorporated into buildings.<sup>84</sup> The report concluded that “the operation of the waiver provision is so far somewhat ephemeral . . . the vast majority of artists do not even have a written contract for commission of visual art works.”<sup>85</sup> If not waived, the artist’s rights terminate at death if the work was created after June 1, 1991.<sup>86</sup> What this means is that, under VERA, if I paint moustaches on a painting by a famous painter such as Ismael Checo, I will have violated his moral rights under VARA. In contrast, if I paint moustaches on a Paul Jackson Pollock painting I will not have violated Pollock’s VARA rights, because VARA protection ends with the death of the author, which would not be the case in France. Even more disturbing is that, in some cases where an artist has asserted protection under VERA, courts have said recognition is “best viewed as a gate keeping mechanism- protection is afforded only to those works of art that art experts, the art community, or society in general view as possessing stature.”<sup>87</sup> The doctrine of moral rights is not supposed to depend on or consider the stature of a work. Allowing courts to award protection under VERA based on their personal judgments as de facto art critics is not embracing the essence of what moral rights are meant to stand for: the author’s personality as embodied in the work. While it is apparent that the United States and France have different ways of viewing moral rights and the extent to which they are protected, an examination as to the possible reasons behind these discrepancies is quite telling.

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<sup>82</sup> Waiver of Moral Rights in Visual Artworks: Final Report of the Register of Copyrights 163 at 185 (March 1, 1996)

<sup>83</sup> Waiver of Moral Rights in Visual Artworks: Final Report of the Register of Copyrights 163 at 137 (March 1, 1996)

<sup>84</sup> Id. at 154.

<sup>85</sup> Id. at 184.

<sup>86</sup> 17 U.S.C. §106A (d)(1)

<sup>87</sup> *Carter v. Helmsley-Spear*, 861 F.Supp.303, 325 (S.D.N.Y. 1994) *rev’d in part and aff’d in part*, 71 F.3d77 (2d Cir. 1995).

#### IV. PLAYING CATCH UP

It is no surprise that Europe is far ahead of the United States in protecting moral rights. While some scholars have suggested the reason is due to the greed of Americans<sup>88</sup>, a good argument can be made that it is due to the age difference between the countries. While the United States was being established by the Pilgrims and the Puritans, Europe, “comprised of nations that are old,”<sup>89</sup> already had centuries of rich cultural history.<sup>90</sup> The recognition of arts and literature can be seen in European culture as early as 1500 B.C.<sup>91</sup> From the poetry of Homer, to the philosopher Nero, to the artist Michelangelo, to the musician Bach and the writer Keats, European culture is rich with prestige. With Europe having so many years of established rich culture, it is no surprise that the United States has yet to catch up in protecting moral rights. When comparing the United States to Europe, our culture is literally centuries behind. Based on the slow development of the American arts,<sup>92</sup> it is not surprising that author’s rights are not expressly recognized in United States law.<sup>93</sup>

The United States began with a group of people fleeing tyranny. Once in America, they faced extreme hardships and struggled for survival. Education, especially the focus on arts and humanities, took a back seat to farming and religion.<sup>94</sup> As the United States began to establish itself as a nation, the focus was on trade and manufacturing.<sup>95</sup> Arts were not recognized or appreciated to the same extent that the achievements of Ford, Carnegie and the Rockefellers were.<sup>96</sup> Europe has had centuries to foster both rich culture and the appreciation of the culture. From this appreciation it is only natural that they progressed to protecting the works of artists. In comparison, the United States is still evolving and playing catch up to European culture. Even today it is not a stretch to say that many parents would prefer their child to grow up and be a doctor or a C.E.O. as opposed to an artist.

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<sup>88</sup> Edward T. Saadi, *Sound Recordings Need Sound Protection*, 5 Tex.Intell.Prop. L.J. 333, 334 (1997).

<sup>89</sup> Kimberly Y.W. Holst, *A Case Of Bad Credit?: The United States And The Protection Of Moral Rights In Intellectual Property Law*, Buffalo Intellectual Property Law Journal, 3 Buff.Intell.Prop.L.J. 105, 117(2006).

<sup>90</sup> Id. at 117.

<sup>91</sup> Id. at 118 citing F. Melian Stawell & Francis Sydney Marvin, *THE MAKING OF THE WESTERN MIND: A SHORT SURVEY OF EUROPEAN CULTURE* I-4(1923).

<sup>92</sup> In fact US did not produce significant literary and artistic works until the late 1800’s.

<sup>93</sup> Id. at 123.

<sup>94</sup> Id. at 121 ( Schooling and religion were so close that lessons were usually taught from the bible.)

<sup>95</sup> Id. at 122.

<sup>96</sup> Id. at 122.

Without recognition and appreciation of the arts, there will not be protection. The National Endowment of the Arts is the most prominent source of governmental support for the arts. Their funding, however, gets cut each year<sup>97</sup> and many believe that the NEA is a luxury we can no longer afford<sup>98</sup> (yet the agency's annual budget is equivalent to approximately five inches of a B-1 bomber<sup>99</sup>). It is apparent the U.S. does not appreciate the arts the way their European counterparts do. A way to foster recognition of the arts is to ensure that future generations are being encouraged to explore their creativity and to teach them about the great artists of the world for inspiration. Unfortunately, the passage of the No Child Left Behind Act has made it even harder for this appreciation to develop. This lack of appreciation will have a direct effect on impeding the recognition of the arts which goes hand in hand with moral rights protection.

#### V. NO CHILD LEFT BEHIND

On January 8, 2002 President George Bush signed The No Child Left Behind Act<sup>100</sup> (NCLB) into law. The purpose of NCLB is to require all students to perform at their grade level in math and language arts, ultimately reaching 100% proficiency by 2014<sup>101</sup>, with schools having to report yearly progress until 2014. To show achievement, all states beginning in 2005 had to test students in grades three through eight in math and reading annually and at least once during high school.<sup>102</sup> To continue receiving federal education funding, all states must now rate schools based on whether their students are making "adequate yearly progress," as measured by the students' performance on standardized tests.<sup>103</sup> While nothing in the law suggests less focus on music (in fact, music is named as a core subject<sup>104</sup>), the reality is that schools are finding themselves having to stretch their budgets and music

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<sup>97</sup>Julie C. Van Camp, *Freedom of Expression at the National Endowment for the Arts*, 1996-2005  
[www.csulb.edu/jvancamp/freedome2.html](http://www.csulb.edu/jvancamp/freedome2.html)

<sup>98</sup> Id. citing John Frohnmayer, *LEAVING TOWN ALIVE: CONFESSIONS OF AN ARTS WARRIOR* (Boston: Houghton Mifflin Company, 1993) p.45 (Congressman Dana Rohrabacher (R-CA) and Philip Crane (R-IL) are reported by John Frohnmayer, the NEA chairman ousted by President Bush to believe we cannot simply afford art in an era of fiscal austerity and that art isn't the government's business.)

<sup>99</sup> Van Camp supra note 95.

<sup>100</sup> 20 U.S.C. § 6301

<sup>101</sup> Bruce M. Smith, *Who Really Needs Educating?*, 85 Phi Delta Kappan 98, 98 (2003)

<sup>102</sup> James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 *N.Y.U. L. Rev.* 932, 940 (2004).

<sup>103</sup> See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 1454-56 (codified at 20 U.S.C. § 6311(c)).

<sup>104</sup> Id. and 20 U.S.C. § 7801(11) (Supp. I 2001).

and art classes are the first to go since they are not subjects that are being tested for. Schools have to focus on test preparation and must align their curriculums to meet the NCLB requirements.<sup>105</sup> As jazz musician Wynton Marsalis explained, "[States] are spending a fortune to meet the new accountability standards and the [P]resident's No Child Left Behind Act and the arts just aren't something that can be measured with a multiple choice test."<sup>106</sup>

Teachers and educators have recognized the impact of NCLB has had on other subjects. In a report from the Center on Education Policy, a majority of school leaders reported achievement gains under NCLB, but 71 percent also reported reducing time in at least one other subject to increase reading and math instructional time.<sup>107</sup> A study in California showed a fifty percent decline in music education programs over the past five years, with an actual student loss of over one-half million students.<sup>108</sup> The problem is not just in California, it is across the United States. In Nebraska public schools are cutting courses in music, art, driver's education, and foreign language to devote money to prepare for testing;<sup>109</sup> in Minnesota, a district that used to have a three-teacher music program chose not to fill the spot when one of the teachers retired, instead opting to use the resources for reading remediation;<sup>110</sup> and, in Yonkers, New York, in order to spend more on test preparation, they are eliminating all visual arts, vocal, and instrumental programs.<sup>111</sup> A recent study funded by the Carnegie Corporation found that schools are teaching more math, science, and reading as a result of the NCLBA.<sup>112</sup> While teaching more of the subjects that are tested, schools are also "substantially cutting back on social studies, government, foreign language, geography, and the arts".<sup>113</sup> These are just a few examples of

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<sup>105</sup> Ryan S. Vincent, *No Child Left Behind, Only the Arts and Humanities: Emerging Inequalities In Education Fifty Years After Brown*, 44 Washburn L.J. 127, 143 (2004).

<sup>106</sup> *Id.*

<sup>107</sup> *From The Capital To The Classroom*, March 2006, p.7, <http://www.cep-dc.org/nclb/Year4/Press/> (Last viewed 3/1/2007)

<sup>108</sup> Music For All, *The Sound Of Silence*, 2004, [www.music-for-all-.org/sosrelease.html](http://www.music-for-all-.org/sosrelease.html)

<sup>109</sup> Vincent supra note 104 at 145 citing National Education Association, *Stories From the Field: Cuts Leave More and More Public School Children Behind*, at <http://www.nea.org/esea/storiesfromthefield.html>

<sup>110</sup> Chris Roberts, *Educators Charge Arts Lag Under No Child Left Behind*, Minnesota Public Radio, March 13, 2007, <http://minnesota.publicradio.org/display/web/2007/03/13/nclbandarts> (Last viewed 3/24/2007)

<sup>111</sup> National Education Association, *Cuts Leave More and More Public School Children Behind*, <http://www.nea.org/esea/storiesfromthefield.html>. (Last viewed 3/1/2007)

<sup>112</sup> *Id.* citing Kate Ackerman, *Law Causing Schools to Shift Away From Liberal Arts*, Chattanooga Times Free Press, Mar. 9, 2004, at A4.

<sup>113</sup> *Id.*

the cuts to the arts in public school. These cuts are the norm, not the exception. With such drastic cuts of our arts in the public schools, the future of the arts is on unstable ground.

As discussed, it is the European's appreciation of the arts and the artist that led to protecting their moral rights and ultimately that has resulted in a culture full of arts that is to be envied. European countries have a vastly different way of looking at the arts and making sure students are exposed to art and music. France specifies the development of artistic skills as a national objective aiming to provide opportunities for the expression of artistic talent.<sup>114</sup> England specifies the development of an appreciation of aesthetic and other artistic achievements.<sup>115</sup> While the United States does not even mention culture development as an educational aim, France believes secondary schooling is expected to develop a "taste for taking part in cultural and artistic activities."<sup>116</sup> In France arts and music are compulsory subjects to the age of sixteen.<sup>117</sup> In Sweden, 230 hours of art and 330 hours of craft is required during nine years of compulsory education.<sup>118</sup> All of these examples show a stark contrast to the approach of the United States, where a majority of our schools are no longer even offering music or art courses, let alone requiring them.

With the arts being cut in our schools, our culture is going to feel the effect. Without introducing our children to the arts, it is foreseeable they will grow up not appreciating the importance of the arts, in addition to many not being interested in the arts. Without interest in the arts, future generations will be even less inclined to offer artists the protection they deserve. This means, in addition to having a society who is ignorant of the arts, we will be stunting the growth of our culture. Ultimately, the passage of the NCLB will result in further delay, if not outright rejection, of future moral rights protection.

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<sup>114</sup>Caroline Sharp and Joanna Le Metais, *The Arts, Creativity and Cultural Education: An International Perspective*, 2000 p.22, <http://www.inca.org.uk/pdf/finalreport.pdf>

<sup>115</sup>Id.

<sup>116</sup>Id. at 24

<sup>117</sup>Id. at 26

<sup>118</sup>Id. at 27