

2006

Moral Rights Protection in the United States and the Effect of the Family Entertainment and Copyright Act of 2005 on U.S. International Obligations

Brandi L. Holland

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Brandi L. Holland, Moral Rights Protection in the United States and the Effect of the Family Entertainment and Copyright Act of 2005 on U.S. International Obligations, 39 *Vanderbilt Law Review* 217 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol39/iss1/6>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Moral Rights Protection in the United States and the Effect of the Family Entertainment and Copyright Act of 2005 on U.S. International Obligations

ABSTRACT

Alteration of a motion picture has become legal as a result of the Family Movie Act, an attachment to the Family Entertainment and Copyright Act approved by Congress and signed by the President in early-2005. The “family movie” provision, championed by U.S. Representative Lamar Smith, Chairman of the House Judiciary Committee’s Internet and Intellectual Property Subcommittee, indemnifies any company that makes filtered versions of movies without authorization from the copyright owners. Proponents claim the bill is a way to put content-filtering back into the hands of individual families, while critics claim their copyrights are violated whenever a company redistributes their work for profit. At issue in this Note is this controversial law in relation to the United States’ international obligations. The Family Movie Act appears to be contrary to our international obligations because it does not require the permission of the content creator or owner, but rather creates an exemption from copyright and trademark liability for filtering. The Author argues that there is a difference between enacting legislation that permits persons other than creators or authorized distributors of a motion picture profit from content filtration and a scheme that allows individuals, in the privacy of their own homes, to filter out undesired content. In fact, allowing a for-profit company to commercially market a product that alters an artist or copyright owner’s artistic vision is a violation of moral rights—rights of the creators of the copyrighted works. The United States, as a party to the Berne Convention, is obligated to uphold and protect the moral rights of an artist. The Author further argues that the United States has historically provided inadequate protection to moral rights and that it should withdraw from the Berne Convention, accepting any associated sanctions. Otherwise, by disguising its minimal protections of moral

rights, the United States seriously misleads foreign artists who desire to publish or distribute their works in the United States.

TABLE OF CONTENTS

I.	INTRODUCTION	219
II.	THE HISTORY AND INFLUENCE OF THE MORAL RIGHTS	222
	A. <i>The Origins of the Moral Rights Doctrine</i>	222
	B. <i>International Focus on Copyright and the Birth of the Berne Convention</i>	226
	C. <i>The Universal Protection of the Berne Convention of 1886</i>	227
	D. <i>The Contrast between European and Anglo-American Treatment of Moral Rights</i>	228
III.	THE UNITED STATES' SLOW INDUCTION OF BERNE PRINCIPLES AND ATTEMPT TO COMPLY WITH ITS OBLIGATION TO PROTECT MORAL RIGHTS	230
	A. <i>The United States' Initial Reluctance to Commit to Berne</i>	230
	B. <i>U.S. Compliance through WIPO-TRIPs</i>	231
	C. <i>U.S. Compliance through the Visual Artists Rights Act</i>	233
	D. <i>The United States' Defense to Copyright and Moral Rights through the Fair-Use Doctrine</i>	235
	E. <i>Gilliam v. American Broadcasting Companies, Inc. and its Refuge Under the Lanham Act § 43(a)</i>	238
	F. <i>Individual States Statutory Compliance Outside of Federal Law</i>	240
	G. <i>An Illustration of the Comparative Weakness of Protection in the United States</i>	241
IV.	THE ENACTMENT OF THE FAMILY MOVIE ACT AND ITS IMPACT ON THE UNITED STATES' INTERNATIONAL OBLIGATION TO PROTECT ARTISTS' RIGHTS UNDER THE BERNE CONVENTION	242
	A. <i>The Proposal of the Family Movie Act of 2004</i>	242
	B. <i>ClearPlay's New Technology Finds Protection under the Family Movie Act of 2005</i>	245

C. *Where Does the U.S. Law Stand and Does it Comply with U.S. International Obligations?* 248

V. CONCLUSION..... 251

I. INTRODUCTION

Many countries in continental Europe recognize that authors and artists have legal interests in their work that exist independently of the legal interest created by copyright laws. These legal interests remain with the author or artist even after the copyright is transferred to another party and the work is no longer in the hands of the author or artist. Among these legally recognized interests are four distinct rights that are collectively known as authors' and artists' "moral rights."¹ These moral rights include: (1) the right of integrity, under which the artists can prevent alterations in their work; (2) the right of attribution or paternity, under which the artists can insist that their work be distributed or displayed only if their name is connected with it; (3) the right of disclosure, under which the artists can refuse to expose their work to the public before they feel it is satisfactory; and (4) the right of retraction or withdrawal, under which the artists can withdraw their work even after it has left their hands.² For civil law countries,³ moral rights are inalienable. In contrast, common law countries such as the United States historically have not recognized the collective moral rights as a legal interest.⁴ By ignoring the legality of moral rights, the United States effectively renders unenforceable any attempt by an artist to retain such rights in a creation after transferring ownership of their work. In effect, the United States views moral rights as non-economic rights of the artist or author.⁵

1. See Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, July 24, 1971, 1161 U.N.T.S. 3, available at <http://www.law.cornell.edu/treaties/berne/6bis.html> (last visited Mar. 8, 2005) [hereinafter Berne Convention]; see also Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, Sept. 9, 1886, S. TREATY DOC. NO. 99-27 (1986).

2. See Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 368-70 (1998) (categorizing four distinct moral rights).

3. Civil law countries are those such as Germany, France and Spain. Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 200 (1995).

4. See Swack, *supra* note 2, at 380.

5. See Stuart Kauffman, Note, *Motion Pictures, Moral Rights, and the Incentive Theory of Copyright: The Independent Film Producer as "Author"*, 17 CARDOZO ARTS & ENT. L.J. 749, 754 (1999).

There is an important distinction between an artist's economic rights and an artist's moral rights when related to copyright protection.⁶ This distinction presents a basic divergence between the intellectual property law regimes found in civil law countries and those found in the common law countries like the United States.⁷ The debate and controversy increased in recent years as the United States and the European Community struggled to determine whose policies concerning intellectual property would dominate the international legal order.⁸ An important focus of this controversy concerns the Berne Convention on Copyright. Originally drafted in 1886, the Berne Convention requires that signatory countries provide protection for moral rights, particularly the rights of paternity and integrity.⁹ For more than 100 years, the United States refused to sign the Berne Convention, because it disagreed with the protections afforded by the moral rights clause.¹⁰ In 1989, the United States reversed its position and signed the Berne Convention,¹¹ claiming that U.S. law had evolved to the point where it could provide the minimal protection for artists' moral rights required by the Convention.¹²

As the new millennium emerges, the growth of technology and the internet has made it difficult to define the moral rights of artists, especially across the international marketplace. Often the difficult issue is determining whether there has been a violation of an artist's moral rights or whether a particular use of the artist's work is an exemption from violation. The United States recently enacted legislation that exempts many actions deemed by artists as infringements and violations of moral rights. This legislation—the Family Entertainment and Copyright Act of 2005¹³—is comprised of four independent laws, including the law at issue in this Note, the Family Movie Act of 2005 (FMA).¹⁴ The FMA amends federal copyright law to create an exemption from copyright infringement for: (1) the act of rendering imperceptible portions of audio or video

6. Berne Convention, *supra* note 1.

7. See Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 2, 26, 29 (1994) (discussing a distinction between civil law and common law countries).

8. Leslie A. Pettenati, *Moral Rights of Artists in an International Marketplace*, 12 PACE INT'L L. REV. 425, 435–36 (2000).

9. *Id.* at 438–39.

10. *Id.* at 439.

11. The signing of the treaty followed congressional passage of the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

12. See H.R. REP. NO. 100-609, at 33–34 (1988).

13. Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218 (2005).

14. Family Movie Act of 2005, Pub. L. No. 109-9, tit. II, 119 Stat. 218 (2005) [hereinafter FMA].

content in movies by or for the owner or lawful possessor of authorized copies of such movies in the course of private home viewing; and (2) the use of technologies allowing such movie content to be rendered imperceptible where the technology does not create a copy of the altered version.¹⁵

FMA directly addresses copyright and trademark issues and also legalizes technologies such as those sold by ClearPlay, Inc.¹⁶ ClearPlay employees review motion pictures and create software filters that remove offensive scenes and audio from movies. This process occurs without notice to or permission from the original authors, copyright owners (movie studios), or movie directors.¹⁷ Essentially, artists argue that ClearPlay makes derivative works in violation of the Copyright Act¹⁸ and that ClearPlay's editing software violates artists' moral rights by allowing lawful possessors (home viewers) to make modifications or other derivations from the original movies.¹⁹ When Congress enacted FMA, the bill amended the Copyright Act and clarified the legality of movie filtering in the privacy of homes via personal DVD-players.²⁰ This amendment, however, fails to adequately protect moral rights and thus violates U.S. obligations under the Berne Copyright Convention,²¹ a violation that is actionable under the WTO's TRIPs provisions.²²

Part II of this Note presents an overview of the moral rights doctrine and discusses the historical and theoretical development of the doctrine in Europe, its treatment in the United States, and its relation to the Berne Convention. Part III of this Note examines the regimes under U.S. laws that purport to protect moral rights and

15. *Family Movie Act of 2004: Hearing on H.R. 4586 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 9 (2004) [hereinafter *Hearing on H.R. 4586*], available at <http://judiciary.house.gov/media/pdfs/printers/108th/94286.pdf>.

16. ClearPlay is a software company that provides filtering technology. See ClearPlay: The Technology of Choice, <http://www.clearplay.com/About.aspx> (last visited Oct. 2, 2005) [hereinafter *ClearPlay Services*]. This technology can either be downloaded to work with an individual's own DVD-player as an added filtering feature or comes in the form of an actual ClearPlay enabled DVD-player which can be purchased through ClearPlay. See *id.*

17. *Hearing on H.R. 4586*, *supra* note 15, at 69 (explaining that these technologies create "family friendly" versions of movies without the copyright owner's permission).

18. *Id.*

19. *Id.* ClearPlay has fourteen filter settings. *Id.* at 73–74.

20. Backgrounder on the Family Movie Act, <http://www.grassfire.org/39/backgrounder.asp> (last visited Oct. 2, 2005).

21. See Berne Convention, *supra* note 1.

22. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 346–47, 33 I.L.M. 1197, 1221 (1994) [hereinafter *TRIPs*], available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

comply with the Berne Convention. Part IV of this Note analyzes the impact of FMA, the dealings and procedures of companies like ClearPlay, and whether the U.S. will still meet its international obligations as a signatory to the Berne Convention. Part V of this Note concludes that the United States' compliance with the Berne Convention was already fragile, and enactment of FMA will most surely place the United States in violation of its duty to protect moral rights as a member of the Berne Convention and the WTO.

II. THE HISTORY AND INFLUENCE OF THE MORAL RIGHTS

A. *The Origins of the Moral Rights Doctrine*

In the late-fifteenth century, the introduction of the printing press to England spurred the beginning of a movement to protect authors from having their work duplicated. As the number of presses increased, so did unauthorized copying of authors' works.²³ The authorities sought to control the unauthorized duplication by granting publishers a near monopoly.²⁴ A confirmation of the monopoly given to publishers occurred through Parliament's codification of the Licensing Act of 1662 (Licensing Act). The Licensing Act established a register of licensed books that could only be administered and distributed by the Stationer's Company.²⁵ The Stationer's Company comprised a group of printers who often utilized their legal powers to censor publications.²⁶ The Stationer's Company developed its own internal system for regulating competition, now known as Stationer's copyright,²⁷ effectively a private copyright

23. Kelly Campbell, *It's the Law: Keeping Abreast of Copyright Law Can Keep You Out of Hot Water*, May 2004, <http://www.copyright.com/media/pdfs/article-04-07.pdf>.

24. See, for example, the research collected by the Association of Research Libraries in, *Timeline: A History of Copyright in the United States*, <http://www.arl.org/info/frn/copy/timeline.html> [hereinafter *Timeline*] (this historical data is compiled by American Research Libraries, which is a non-profit organization that reports on current issues of interest to academic and research library administrators, staff, and education professionals). "In economics, a monopoly . . . is defined as a persistent market situation where there is only one provider of a product or service." Wikipedia, *Monopoly*, <http://en.wikipedia.org/wiki/Monopoly>. The character of a monopoly is illustrated by a lack of competition for the good or service at issue. *Id.*

25. *Timeline*, *supra* note 24.

26. *Id.*

27. Wikipedia, *History of Copyright*, § 1.1, http://en.wikipedia.org/wiki/History_of_copyright (last modified Nov. 7, 2005). Wikipedia is a free content encyclopedia written collaboratively by people from all around the world. See

system made enforceable by the Stationers' monopoly.²⁸ Essentially, the Licensing Act proved an effective, yet rudimentary, way to establish legal consequences for those who would publish or duplicate unauthorized works.

Although the Licensing Act attempted to provide fundamental protections of authors' work from fraudulent duplication, it lapsed after just three years due to the alleged abuse of the monopoly by the Stationer's Company.²⁹ The lapse of the Licensing Act dramatically relaxed the government's censorship standards and hurt not only the Stationer's Company but also the authors.³⁰ In response to outcries from both groups, Parliament enacted the Statute of Anne in 1710.³¹ The Statute of Anne served to placate concerns of both the English booksellers and printers.³² In addition, the Statute of Anne was the first true copyright protection and gave an author rights for a fixed period.³³

The Statute of Anne established the foundation of authors' ownership of their creation and a fixed term of protection for copyrighted works.³⁴ The Statute of Anne provided two kinds of copyright. For past works, it extended the Stationer's copyright for a period of twenty-one years.³⁵ For future works, it gave the author the exclusive right to print the work for fourteen years, with the

Wikipedia, FAQ, http://en.wikipedia.org/wiki/Wikipedia:Overview_FAQ (last modified Nov. 12, 2005). The site is a "wiki," which means that anyone can edit articles. *Id.*

28. Wikipedia, History of Copyright, *supra* note 27.

[T]he stationer's copyright was literally a right to copy—that is, a right to reproduce a given work for sale. The basic purpose of this right was to provide order for the book trade by establishing a method to enable publishers to have the exclusive right to publish a work without competition as to that work. And the sanctions for copyright came from the company, for it was the company, not the author, which granted the copyright.

LYMAN R. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 71 (1968).

29. See PATTERSON, *supra* note 28, at 61, 115; Press Release, Federation of European Film Directors, *FERA Defends the Creative Rights of Every Nation*, Oct. 18, 2002, available at <http://www.aidaa.org/fera/cdep/181002en.html> (last visited Oct. 10, 2005).

30. See PATTERSON, *supra* note 28, at 71.

31. The Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), available at <http://www.copyrighthistory.com/anne.html>. The Statute of Anne was the first British copyright law, enacted in 1709 and entering into force in 1710. *Id.* The statute is generally considered to be the first fully-fledged copyright law. *Id.* The Statute was also reprinted in WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 1461–64 (1994) and in PATTERSON, *supra* note 28, at 143.

32. The Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

33. *Id.*

34. *Id.* Protection was for fourteen years and renewable for fourteen more if the author was alive upon expiration of the original protection. *Id.*

35. *Id.*; see also Wikipedia, Statute of Anne, pt. I, http://wikisource.org/wiki/Statute_of_Anne (last modified Nov. 7, 2005).

stipulation that the right was renewable by an author for another fourteen years.³⁶ Two influential changes occurred with the passing of the Statute of Anne by Parliament. First, the statute allowed people outside the Stationer's Company to hold the copyright.³⁷ Second, the statute attempted to break the monopoly of the Stationers by limiting the term of copyright—a radical change for the Stationers, who until then had enjoyed perpetual copyright.³⁸ The Statute prevented the Stationers from having a monopoly where they could control the market for an author's work.³⁹ Although initially lacking political support, the Statute of Anne was a fundamental change in the right direction.⁴⁰

Under the old theory of copyright based on the England privilege system, there were competing views on copyright protection held by booksellers, such as the Stationer's Company and authors. The booksellers justified copyright on economic grounds.⁴¹ They had a pecuniary interest and needed exclusive rights to an author's work so they could make an adequate profit and cover the costs of a printing press and the author's manuscripts.⁴² For these reasons the booksellers were outraged when the Statute of Anne affected the term limit on copyrights. Even though the Statute restored order to the trade, it also fundamentally changed the nature of the booksellers' monopoly. Hence the booksellers fought back by adopting a competing strategy that the authors previously lobbied for themselves.⁴³ Their strategy focused on the theory that authors had a natural right to protect their own ideas.⁴⁴ If authors owned the works they created, then they would own a perpetual property right. Because property rights are transferable, authors could theoretically assign their copyright to the booksellers and circumvent the restrictions of the Statute of Anne. This natural rights theory became an effective strategy that was successful in both the eyes of the booksellers and the authors; authors had a natural right to ownership.⁴⁵ With a

36. The Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

37. *Id.*

38. *Id.*

39. *Id.*

40. See *infra* Parts II.B-III.C.

41. Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 5 (1988).

42. *Id.*

43. See PATTERSON, *supra* note 28, at 140-58.

44. *Id.* Both the United States and Great Britain, however, initially rejected this idea. See Burger, *supra* note 41, at 5.

45. PATTERSON, *supra* note 28, at 140-51.

majority of the trade lobbying for one theory, the natural rights approach quickly spread to other countries.⁴⁶

Although most of the natural rights history stems from England, France was one of the first countries to codify the natural rights approach.⁴⁷ France recognized that an artist has, in addition to an economic interest, a natural right to the qualities that the artist instills at the work's creation. These qualities remain part of the work despite the artist's physical relinquishment of the object to others.⁴⁸ These qualities collectively constitute an author's *droit moral* or moral right. Moral rights collectively represent four different rights: (1) the right of integrity, under which the artist can prevent alterations of his work; (2) the right of attribution or paternity, under which the artist can insist that his work be distributed or displayed only when his name is connected with it; (3) the right of disclosure, under which the artist can refuse to expose his work to the public before he feels it is satisfactory; and (4) the right of retraction or withdrawal, under which the artist can withdraw his work even after it has left his hands.⁴⁹

The evolution of the natural rights approach reflected a completely new conception of copyright. The difference between the natural rights approach and the traditional economic rights approach reflected an international difference between countries and the rights they afforded their artists. National borders did not constrain natural rights theories and most of the countries supporting this ideology extended their laws not only to their own artists but also to artists of foreign countries.⁵⁰

As most of continental Europe began to adopt the natural rights theory, the Anglo-American philosophy rejected it,⁵¹ focusing on the final ownership of the copyright of the work.⁵² The differences in copyright protection between Anglo-American countries and continental Europe were initially not a concern because the trafficking of artistic works during the late-eighteenth and early-nineteenth centuries was predominantly domestic.⁵³ The call for international copyright protection arose later in the nineteenth

46. *Id.* (stating that even if the authors sold their rights to publishers, under the natural rights approach they *always* retained their personal or "moral rights").

47. *Id.* at 8–9.

48. Eric B. Hiatt, *The "Dirt" on Digital "Sanitizing": Droit Moral, Artistic Integrity and the Directors Guild of America v. Cleanflicks et al.*, 30 RUTGERS COMPUTER & TECH. L.J. 375, 393 (2004).

49. See Swack, *supra* note 2, at 368–70 (categorizing four distinct moral rights).

50. Burger, *supra* note 41, at 7.

51. Swack, *supra* note 2, at 380–82.

52. *Id.*

53. Alexander A. Caviedes, *International Copyright Law: Should The European Union Dictate Its Development?*, B.U. INT'L L.J. 165, 169 (1998).

century as the level of international trade grew.⁵⁴ Works from different countries were targets of piracy because their authors were unprotected on an international scale.⁵⁵ In 1858, the first international Congress of Authors and Artists met in Brussels and laid the groundwork for the drafting and signing of a treaty that would afford international protection.⁵⁶ The Congress met a few times afterwards, each time adopting resolutions and asking governments to join in passing legislation for the international protection of authors.⁵⁷

B. *International Focus on Copyright and the Birth of the Berne Convention*

The Congress of Authors and Artists included participants from many different countries and represented a variety of interests.⁵⁸ Subsequently, the Congress evolved into L'Association Littéraire et Artistique Internationale (the Association).⁵⁹ The Association determined that the only way to succeed in protecting copyrights would be to form a union. Consequently, the Association called a meeting in 1883 for parties deemed "interested" in the international union.⁶⁰ The meeting convened in Berne, Switzerland, where the participants drafted a treaty containing ten articles that provided a foundation for the international treatment of copyright protection.⁶¹ After the completion of the basic formalities of the treaty, the Swiss government invited others countries to meet in Berne on September 8, 1884, to form an international copyright union.⁶²

At the Conference of 1884, before discussion of the new draft began, the German representatives asked whether it might be better to change from "the national treatment principle in favor of a treaty that would codify an international law of copyright and establish a uniform law among all contracting states."⁶³ Although there was favorable support, many other participating countries did not agree

54. *Id.*

55. *Id.*

56. Burger, *supra* note 41, at 11-15.

57. *Id.* The Association also changed its name to L'Association Littéraire et Artistique Internationale (ALAI). *See id.* at 11.

58. Burger, *supra* note 41, at 11 n.57 (stating that the countries represented were Belgium, Canada, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden, Norway, Switzerland, and the United States).

59. *Id.* at 11.

60. *Id.* at 11-12.

61. *Id.* at 12.

62. *Id.*

63. *Id.*

with the idea.⁶⁴ The speculated reason for the lack of support is that the countries would have been required to make changes in their domestic laws, which many did not want to implement.⁶⁵

The rejection of the German proposition was significant because it revealed the participants' differing views of copyright protection. The Conference attendees segmented into three separate groups based on their different viewpoints. The first group favored a codified international law of copyright—universal treatment and law across each country.⁶⁶ The second group comprised countries that wanted very little universal regulation and as much national independence as possible.⁶⁷ The third group established an intermediate position between the first two groups. This third group favored a codified international law but also desired domestic flexibility.⁶⁸ They supported the idea of universal protection but were weary of the chaos such a dramatic change would entail.

These differing views of copyright protection began to polarize the countries as they worked on drafting the treaty. The countries that favored a universal law argued that the Convention should protect all authors who published in a union, regardless of their nationality.⁶⁹ The 1884 draft, however, only protected authors who were nationals of Union-member countries and publishers within the Union.⁷⁰ As a result, even though the Union-members adopted universal protection, the countries were free to create exceptions domestically which caused those countries favoring universal law to become the least mainstream ideology. It would be the intermediate group, however, whose ideas would emerge two years later as the mainstream of the Berne Convention of 1886.⁷¹

C. The Universal Protection of the Berne Convention of 1886

The Conference of 1886 included ten countries that signed the Berne Convention and took a significant step towards providing international and universal protection for authors and artists.⁷² The Convention established the concept of an author's exclusive rights, which functioned as a minimum standard that all member countries

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 13.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 14.

72. *Id.* at 15.

were required to recognize.⁷³ “The fundamental principle of the Berne Convention was, and continues to be, national [protection].”⁷⁴ The national protection afforded by the Convention is crucial because the participating countries could no longer discriminate against foreign authors. “Berne signatories [must] grant authors who are nationals of other Berne countries the same protection they accord to their own citizens.”⁷⁵ Although this was a victory for artists, it was only one of the many hurdles to overcome due to the disparities of protection amongst different countries. The artists’ protection extended only within those participating countries of the Berne Convention. The next strategy of the union-members was for the Berne Convention to target and gain additional membership to continue to expand protections for artists’ worldwide.

D. *The Contrast between European and Anglo-American Treatment of Moral Rights*

The United States was most likely not a party to the Berne Convention because of its opposing views on moral rights. Moral rights (a natural rights approach), as depicted in European countries, are distinguished from traditional property rights (the Anglo-American approach). Moral rights derive from French law.⁷⁶ The French view of moral rights extends beyond an author’s property interests to encompass “non-property attributes of an intellectual and moral character which give legal expression to the intimate bond which exists between a literary or artistic work and its author’s personality; it is intended to protect his personality as well as his work.”⁷⁷ Similar to France, Germany employs the term *Urheberpersönlichkeitsrecht* to describe artists’ interests, which refers to a creative artist’s right of personality.⁷⁸ Both France and Germany address the fact that an artist places physical embodiments of their personality into their work.⁷⁹ Under the civil law view, moral rights

73. *Id.*

74. *Id.* at 16.

75. *Id.* at 16–17.

76. See Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 465–67 (1968).

77. *Id.* at 465.

78. See Brian T. McCartney, “Creepings” and “Glimmers” of the Moral Rights of Artists in American Copyright Law, 6 UCLA ENT. L. REV. 35, 37 (1998) (citing *Das Persönlichkeitsrecht im Allgemeinen und im Urheberrecht*, 3 ARCHIV FÜR URHEBER-, FILM-, FUNK- UND THEATERRECHT (Germany 1930)). Arthur Katz also translates, *das Urheberpersönlichkeitsrecht* as “the author’s (creator’s) right of personality.” Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law: A Proposal*, 24 S. CAL. L. REV. 375, 390 (1951).

79. McCartney, *supra* note 78, at 37.

are more than simple economic rights.⁸⁰ In fact, moral rights are more than simply “moral preferences; they are legally enforceable rights vested in creative artists.”⁸¹

In the natural rights view, even after an artist transfers their economic rights to the work, the artist retains two rights associated with the work: (1) the right of integrity and (2) the right of paternity.⁸² These two rights alone demonstrate the fundamental distinction between the United States’ utilitarian and economic approach and the natural rights approach taken in most civil law countries.

Although the United States enacted limited provisions embodying both of these ideas, these ideas are clearly distinct in their purest natural rights form.⁸³ First, the right of integrity prevents alteration that would injure or damage an artist’s reputation or honor.⁸⁴ This right, in effect, is the cloak of protection for an artist’s personality. The right of integrity in its purest form “prohibits the public presentation of a creative artist’s work in a context or manner harmful to her reputation or contrary to her ‘intellectual interests, personal style, or literary, artistic or scientific conceptions.’”⁸⁵ Under this protection, the artists retain the privilege of deciding when to reveal their work and the continuing right to prevent mutilation or alteration, even after relinquishing their economic rights to the work. Secondly, the right of paternity is an artist’s right to “be publicly identified with his or her work and to avoid misattribution of authorship.”⁸⁶ Artists have the right to: (1) have their name associated with their work, (2) disavow association with a work, and (3) prevent having another’s name associated with their work.⁸⁷ These rights illustrate that artists, in a natural rights or civil law approach to moral rights, have interests in their work that transcend the physical creation itself and continue even after the transfer of economic ownership.

80. *Id.*

81. *Id.*

82. *Id.* at 37–38.

83. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. VI, 104 Stat. 5089, 5128–33 (1990) [hereinafter VARA] (codified in scattered sections of 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506).

84. See Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 13 (1997); see also Katz, *supra* note 78, at 390–91; Sarraute, *supra* note 76, at 465–67.

85. See McCartney, *supra* note 78, at 38.

86. *Id.*

87. *Id.*

In contrast, the United States affords its creators the protection of copyright law.⁸⁸ The driving force behind the U.S. copyright law, however, is a utilitarian motivation.⁸⁹ The United States grants artists' rights to advance the public welfare by providing incentive for creativity and innovation.⁹⁰ In continental Europe, the driving motivation of copyright law is a derivative of natural rights belonging to the artist.⁹¹ Due to the explicit utilitarian view of the U.S. Constitution,⁹² the U.S. view on copyright protection derives from economics.⁹³ Furthermore, the United States does not value an artist's creative work by its contribution to society or its overall social utility. Perceived value directly relates to the price that the public is willing to pay for the work.⁹⁴ Thus, the United States does not protect moral rights as an artist's natural right; rather, artists' rights, which the United States protects, are for the benefit of the U.S. economy. The United States has been reluctant to recognize a true moral right. In fact, where the United States has enacted pieces of the moral right, they have significantly limited its definition.

III. THE UNITED STATES' SLOW INDUCTION OF BERNE PRINCIPLES AND ATTEMPT TO COMPLY WITH ITS OBLIGATION TO PROTECT MORAL RIGHTS

A. *The United States' Initial Reluctance to Commit to Berne*

Although bills safeguarding artists' moral rights were introduced in Congress in 1979, they drew little federal support from the utilitarian-minded members of Congress.⁹⁵ The issue of federal protection of moral rights continued to hang in question as the United States considered whether to join the Berne Convention.⁹⁶ The debate over whether to join the Berne Convention came down to the

88. Natalie C. Suhl, Note, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203, 1212–13 (2002).

89. *Id.* at 1213.

90. *Id.* at 1214.

91. *Id.* at 1213.

92. "Congress shall have the Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8 (the Copyright Clause is the cloak of protection afforded to U.S. artists).

93. Suhl, *supra* note 88, at 1214.

94. *Id.*; see also Netanel, *supra* note 7, at 26.

95. Suhl, *supra* note 88, at 1213.

96. *Id.* at 1212–13.

controversial issue of whether the United States wanted to provide moral rights protection to artists within its borders.⁹⁷

Members of Congress found themselves facing a massive amount of conflict when they deliberated the Berne Convention Implementation Act.⁹⁸ In 1988, after almost a century of indecision, the United States reluctantly signed the Convention.⁹⁹ Nevertheless, the United States successfully evaded the issue of moral rights due to a new enactment by Congress. The Berne Convention Implementation Act of 1988¹⁰⁰ allowed Congress to side-step the debate over whether to provide additional protection and recognize artists' moral rights. The Act stated that the Berne Convention was not "self-executing" in that "existing law satisfied the United States' obligations in adhering to the Convention, its provisions are not enforceable through any action brought pursuant to the Convention itself, and neither adherence to the Convention nor the implementing legislation expands or reduces" any rights to claim authorship of a work or to object to any distortion, mutilation, or other modification of a work.¹⁰¹ Thus, it is likely that the United States only joined the Berne Convention to ease international criticism for not providing a higher standard of protection to its authors and artists.¹⁰²

B. U.S. Compliance through WIPO-TRIPs

The United States initially resisted the idea of moral rights, as evidenced by the century-long debate over joining the 1886 European Berne Convention for the Protection of Literary and Artistic Works.¹⁰³ Although the United States does not fully protect moral rights, the United States has made progressive steps in that direction. In 1967, the United Nations created a Convention establishing the World Intellectual Property Organization (WIPO) as a specialized agency designed to promote the protection of intellectual property worldwide.¹⁰⁴ The WIPO Copyright Treaty, adopted by the

97. *Id.* at 1212.

98. *Id.*

99. Christopher J. Robinson, *The "Recognized Stature" Standard In The Visual Artists Rights Act*, 68 *FORDHAM L. REV.* 1935, 1941 (2000).

100. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

101. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995) (citing S. REP. NO. 100-352, at 9-10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706, 3714-15).

102. *See* Suhl, *supra* note 88, at 1213.

103. *See* Burger, *supra* note 41, at 5; *see also* Robinson, *supra* note 99, at 1941 (discussing the United States' slow acceptance of Berne and its development of VARA).

104. Suhl, *supra* note 88, at 1212.

WIPO in 1996, provides additional protections for copyright necessary in the modern information era.¹⁰⁵

In addition, in 1995, the United States joined the World Trade Organization (WTO),¹⁰⁶ which is an international organization overseeing a large number of agreements that define the “rules of trade” between its member nations.¹⁰⁷ The United States supported the WTO regarding the Trade-Related Aspects of Intellectual Property Rights (TRIPs), which is an international agreement on the subject of “intellectual property.”¹⁰⁸ The TRIPs agreement covers areas of law such as copyright, patents, trademarks, trade secrets, and designs.¹⁰⁹ The enactment of TRIPs in 1994 was an unprecedented and effectively mandatory globalization of intellectual property law. The TRIPs agreement may be the most important international agreement on copyright, patents, and other intellectual property rules the United States has ever supported.¹¹⁰

In one sweeping move, the TRIPs agreement took many of the substantive provisions of the main WIPO conventions and created new measures covering enforcement and dispute settlement.¹¹¹ Moreover, by incorporating the substantive rights of the Berne, Rome, and Paris Conventions,¹¹² the TRIPs agreement maintained a minimum level of protection. Furthermore, the TRIPs agreement established a group of specific rights that serve as a baseline for all participating members.¹¹³ For example, the TRIPs agreement required all WTO members to abide by Articles 1 through 21 of the Berne Convention, even if the member never signed the original

105. *Id.*

106. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

107. *Id.*; see also Wikipedia, World Trade Organization, http://en.wikipedia.org/wiki/World_Trade_Organization (discussing the establishment of the WTO) (last visited Oct. 8, 2005).

108. Understanding the WTO: The Agreements; Intellectual Property: Protection and Enforcement, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm.

109. *Id.*

110. *Id.*

111. *Id.*

112. See, e.g., Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on Nov. 13, 1908, completed at Berne on Mar. 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, 1161 U.N.T.S. 3 [hereinafter Berne Convention]; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

113. WTO Agreement, *supra* note 106, pmbl.

Convention.¹¹⁴ Therefore, the United States' membership and involvement in the WTO creates standards the United States must meet.

C. U.S. Compliance through the Visual Artists Rights Act

In addition to the United States' international obligations, in 1990, Congress also partially embraced the tenets of the Berne Convention by passing the Visual Artists Rights Act of 1990 (VARA).¹¹⁵ VARA recognizes the moral rights of attribution and integrity in the context of a limited class of visual arts and protects both the reputations of certain visual artists and the works they create.¹¹⁶ This Act came two years after Congress decided to recognize the moral right as an amendment to the Copyright Act of 1976.¹¹⁷ VARA, although narrow, brought the United States closer into line with much of the European community, where artists have had protection for their moral rights for many years.

VARA grants artists limited rights of integrity and attribution in their works of visual art.¹¹⁸ U.S. artists now have the right to (1) prevent the use of their names on work they did not create (right of

114. TRIPS, *supra* note 22, art. 9, at 324.

115. VARA, *supra* note 83, at 5128-33.

116. Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 82-83 (2d Cir. 1995).

117. Copyright Act of 1976, 17 U.S.C. § 101 (1988).

118. See 17 U.S.C. § 101 (2002) (defining a "work of visual art" as:

(1) 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 two hundred or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author).

The statute specifically excludes as a "work of visual art":

(a)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture, or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandizing item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(b) any work made for hire; or

(c) any work not subject to copyright protection under this title.

attribution)¹¹⁹ and (2) prevent the “distortion, mutilation, or modification” of their works under certain circumstances that would be prejudicial to their honor or reputation (right of integrity).¹²⁰

Despite Congress’s recognition of these federally-created moral rights, these specific moral rights are still inferior to those recognized by the United States’ European counterparts. While the enactment of VARA suggests that America is on its way to recognizing the moral right of creative artists, VARA has three distinct shortcomings. First, VARA only protects a specific type of artist.¹²¹ Second, VARA only protects certain types of art.¹²² Finally, even if a work meets the VARA definitions of “visual artist” and “visual art,” a number of exceptions may still prevent the artist from protection.¹²³ One of the many exceptions concerns works “made for hire”¹²⁴—the definition of a visual art in the Act excludes a “work made for hire.”¹²⁵ The relevant part of the Copyright Act defines a work made for hire as “a work prepared by an employee within the scope of his or her employment.”¹²⁶ This exception will effectively exclude most of the professionals who are seeking to have their work protected. Another exception is that VARA’s right of integrity does not extend to complete destruction except for works of “recognized stature.”¹²⁷ Even

119. *Id.*; see also 17 U.S.C. § 106A(a)(1)–(2) (1990), available at http://www.law.cornell.edu/uscode/html/uscode17/uscode17_00000106---A000.html (last visited Oct. 2, 2005). The Visual Artists Rights Act of 1990 added § 106A. Pub. L. No. 101-650, 104 Stat. 5089, 5128. VARA states that, generally, § 106A is to take effect six months after the date of its enactment; that is, six months after December 1, 1990. *Id.*

120. 17 U.S.C. § 106A(a)(3)(A)–(B) (1990), available at http://www.law.cornell.edu/uscode/html/uscode17/uscode17_00000106---A000.html (last visited Oct. 2, 2005).

121. *Id.* § 106A(b).

122. *Id.* § 106A(c)(3).

123. *Id.* § 106A(c)(1)–(3).

124. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 85 (2d Cir. 1995).

125. 17 U.S.C. § 101(B) (2002), available at http://www.law.cornell.edu/uscode/html/uscode17/uscode17_00000101---000.html (last visited Mar. 19, 2005).

126. *Id.* § 101(1) (citing the specific employee/employer relationship). The idea behind “work-for-hire,” in general, is work that is subject to substantial control by the person who commissions the work has less connection with the personality of its creator than in the case of work done independently by an artist. This theory lies in cases dealing with motion picture films. Often in the United States, there is a presumption that the director is a “work-for-hire,” and that the producer holds the copyright to the film; in the European view, it is presumed that the director of a film is an “author” and as such has moral rights in the film. See *Cour de cassation* [highest court of ordinary jurisdiction], *Cass. 1e civ.*, May 28, 1991, 149 R.I.D.A. 197 (deciding that directors could prevent the unauthorized colorization of black and white films, as they are violations of moral rights).

127. VARA provides that an artist “shall have the right to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.” 17 U.S.C. § 106A(a)(3)(B) (2005), available at <http://www.copyright.gov/title17/92chap1.html#106a> (last visited Oct. 10, 2005).

setting aside an artists' economic interests, most artists, whether they are successful or not, presumably would prefer not to have their work destroyed, even after selling the work. In addition, society is probably better off by preserving creative works, even for display. Lastly, rights under VARA only endure for the life of the artist.¹²⁸

In contrast, the moral rights in Article 6bis of the Berne Convention endure after the artist's death or at least until the expiration of the economic rights.¹²⁹ In VARA, Congress deliberately shortened the duration to the life of the artist.¹³⁰ In fact, the Senate deliberately shortened the duration to the life of the artist alleging that the more liberal individual states' statutes enabled the United States to comply with the Berne Convention.¹³¹ Finally, the United States expressly limited the federal moral rights by the copyright's fair-use doctrine.¹³² This doctrine allows for a variety of exempted uses, which Congress has decided do not violate an artist's moral rights.

D. *The United States' Defense to Copyright and Moral Rights through the Fair-Use Doctrine*

Despite the United States' recognition of federal integrity and attribution rights, those rights are significantly more limited than their European counterparts. In addition to previously discussed limitations, federal moral rights are also expressly subject to copyright's fair-use doctrine.¹³³ The fair-use doctrine is an affirmative defense to copyright infringement.¹³⁴ Fair-use is a judicially created defense, which Congress codified in § 107 of the Copyright Act of 1976¹³⁵ and termed an "equitable rule of reason."¹³⁶ The fair-use defense is a limitation on the exclusive rights of the copyright owner,

128. 17 U.S.C. § 106A(d)(1).

129. See Berne Convention, *supra* note 1.

130. See 136 CONG. REC. 36,948 (1990); see also 136 CONG. REC. H3111, H3112 (daily ed. June 5, 1990) (statement of Rep. Kastenmeir).

131. 136 CONG. REC. 36,948.

132. 136 CONG. REC. H8266, H8270 (1990); see also 17 U.S.C. § 107 (1994). VARA amended § 107 by adding the reference to § 106A. Pub. L. No. 101-650, 104 Stat. 5089, 5132.

133. 17 U.S.C. § 107.

134. *E.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (stating that fair-use is an affirmative defense).

135. See 17 U.S.C. § 107.

136. *E.g.*, *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 448 (1984) (stating that the fair-use section of the Copyright Act enables courts to "apply an 'equitable rule of reason' analysis to particular claims of infringement"); H.R. REP. NO. 94-1476, at 65-66 (1976) (noting that the fair-use doctrine "is an equitable rule of reason"); S. REP. NO. 94-473, at 62 (1975) (also noting that the fair-use doctrine "is an equitable rule of reason").

including reproduction, adaptation, distribution, public performance, and public display of rights.¹³⁷ Reduced to a more basic definition, the fair-use doctrine permits usage of a work that would otherwise be infringing, on the grounds that doing so yields a greater public benefit than denying it.¹³⁸

However, determining the scope of when to apply the fair-use doctrine as a legal defense to infringement is difficult.¹³⁹ To determine the fair-use defense in any particular case, Congress requires that courts consider factors including (1) the purpose of the use,¹⁴⁰ (2) the nature of the copyrighted work, (3) the substantiality of the portion used in relation to the entire work, and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁴¹ The fair-use doctrine attempts to strike a balance between the dual risks that the United States has been struggling with since the beginning of copyright: on one side, depriving artists of a monopoly may reduce their incentive to continue and create, and on the other, granting a monopoly may reduce the creative ability of other artists.¹⁴² Thus, the factors above are guidelines for courts to consider in determining whether a use falls under the defense of fair-use and thus is not infringement. The factors, however, are broad and not confining, rigid rules.¹⁴³

The U.S. Supreme Court has applied the four factors of § 107 four times¹⁴⁴ and has consistently given the greatest weight to factors one and four.¹⁴⁵ In applying the first factor, to determine the purpose

137. 17 U.S.C. § 107 ("Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work . . ."); *id.* § 106A(a) ("Subject to section 107 . . .").

138. Tyler G. Newby, Note, *What's Fair Here is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?*, 51 STAN. L. REV. 1633, 1637 (1999).

139. See *Weissmann v. Freeman*, 868 F.2d 1313, 1323 (2d Cir. 1989) ("Congress established these nonexclusive factors as a guide to courts considering fair use.").

140. See *id.* (including whether such use is of a commercial nature or is for nonprofit educational purposes).

141. 17 U.S.C. § 107(1)–(4), available at <http://www.copyright.gov/title17/92chap1.html#1-38> (last visited Oct. 9, 2005).

142. Newby, *supra* note 138, at 1637–38.

143. H.R. REP. NO. 94-1476, at 66 (1976). The Report stated that § 107 was intended to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." *Id.*

144. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 599–600 (1994) (holding that commercially distributed parody of "Oh, Pretty Woman" might be fair use); *Stewart v. Abend*, 495 U.S. 207, 237 (1990) (holding that incorporation of a magazine story into commercially distributed movie was not fair use); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985) (holding that a magazine's publication of key portions of not-yet-published presidential memoir was not fair use); *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 495–98 (1984) (holding that noncommercial, private home copying of television programs for the purpose of "time-shifting" is fair use).

145. Newby, *supra* note 138, at 1639.

of the use, a court typically finds in favor of fair-use where the purpose of the infringement was for nonprofit use instead of commercial use.¹⁴⁶ Even if the use is commercial, however, it may be found to be a fair use, “so long as it appears that the public will derive some otherwise inaccessible benefit”¹⁴⁷ from the use. Thus, although a court may be inclined to find fair-use if the use is not for profit, the use is not dispositive, but more indicative of a presumption towards a fair-use defense.

The Court’s consideration of the fourth factor—the effect on the potential market for or value of the work—weighs “not only the extent of market harm caused by the infringement” but also whether “unrestricted and widespread conduct of the sort . . . would result in a substantially adverse impact on the potential market, for the original work.”¹⁴⁸ A court’s determination of this factor, not surprisingly, often depends on whether the court found the use to be a commercial one.¹⁴⁹ Courts are more likely to find that the fourth factor weighs against fair-use if the use of the work was commercial in nature, especially when the use competes with the original copyrighted work.¹⁵⁰

Even though the fair-use doctrine is a flexible rule, it is difficult to apply to the theory of moral rights because moral rights are inherently incongruous. The fair-use doctrine is an explicit statutory limitation on U.S. artists’ federal moral rights.¹⁵¹ These federal moral rights, although limited, are still similar to their European personality-based counterparts, codified in the Berne Convention.¹⁵² Thus, if these federal moral rights are collectively the artists’ right of personality, then they are much more than intellectual property rights, which can be conferred upon certain users by the fair-use doctrine.¹⁵³ True moral rights are not like property rights, in that they are transferable to others, even for a limited time, or sold away.¹⁵⁴

146. *Id.*

147. *Id.* at 1640.

148. *Id.* at 1641 (quoting *Campbell*, 510 U.S. at 590).

149. *Id.* at 1642.

150. *Id.*

151. L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USER’S RIGHTS* 171 (1992) (“The moral-rights doctrine is to the author what the fair-use doctrine is to the user each being a limitation on the monopoly of copyright to benefit a class of persons favored by the constitutional copyright clause.”).

152. Berne Convention, *supra* note 1.

153. Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 62 (1997) (discussing how federal moral rights and the fair-use doctrine are incompatible).

154. *Id.* at 67.

*E. Gilliam v. American Broadcasting Companies, Inc. and its Refuge
Under the Lanham Act § 43(a)*

Although the concept of moral rights is a recent addition to U.S. legislation, U.S. courts have acknowledged bits of moral rights.¹⁵⁵ Moral rights were typically cloaked in the “guise of other legal theories” such as copyright, unfair competition, invasion of privacy, defamation, and breach of contract.¹⁵⁶ Artists’ moral rights were also indirectly established by the Lanham Act of 1992,¹⁵⁷ which typically regulated trademark infringement.

Section 43(a) of the Lanham Act essentially regulates both an artist’s right of attribution and right of integrity.¹⁵⁸ Fundamentally, the right of integrity allows an artist to prevent a work’s alteration.¹⁵⁹ Yet, § 43(a)’s definition is narrower: § 43(a) defines regulation of integrity not as an alteration but as a substantial change to a work without the artist’s permission.¹⁶⁰ The artist’s claim of injury under § 43(a) is based on the credit for the work being attributed to the artist, who did not give his final authorization, not based on the work itself being altered.¹⁶¹ Thus, the Lanham Act provides that the artist has the right to prevent any public representation of their work that threatens their reputation. The Lanham Act essentially protects against modifications of a given work that may affect the public’s judgment of the artist.¹⁶²

155. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 82 (2d Cir. 1995).

156. *Id.*

157. 15 U.S.C. § 1125(a) (1992):

(a) Civil action.

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, or

in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such an act.

158. Suhl, *supra* note 88, at 1216–26.

159. *See Swack, supra* note 2, at 370–72 (categorizing four distinct moral rights).

160. Suhl, *supra* note 88, at 1222.

161. *Id.*

162. *Id.* at 1223.

The leading precedent in the United States on this issue is *Gilliam v. American Broadcasting Companies, Inc.*¹⁶³ *Gilliam* held that ABC's broadcasting of a highly edited version of Monty Python skits violated § 43(a).¹⁶⁴ The Second Circuit held that ABC's unauthorized editing substantially changed the skits, allowing the public to associate the edited skits as Monty Python's original work.¹⁶⁵ The court's conclusion was that the editing of Monty Python's skits equated to mutilation and violated the right of the artist to have the work attributed to him in the form in which he created it.¹⁶⁶ Although *Gilliam* is a milestone for moral rights protection in the United States, *Gilliam* does not represent the subsequent standard for protection afforded via the right of integrity in § 43(a).¹⁶⁷

According to § 43(a), a plaintiff must prove either actual consumer confusion or deception in addition to the actual violation of integrity.¹⁶⁸ *Gilliam* and its progeny push the courts for an expansive reading of § 43(a) to enforce the author's "personal right"¹⁶⁹ to reject his work if it has been altered, mutilated, or distorted.¹⁷⁰ In cases that follow *Gilliam*, however, courts continuously distinguish cases on their facts and refuse to read such an expansive theory into § 43(a).¹⁷¹ For example, in *Choe v. Fordham University School of Law*,¹⁷² the court explicitly struck down the validity of an Article 6bis claim for moral rights protection due to the lack of federal jurisdiction.¹⁷³ This example is more representative of U.S. courts' refusal to offer explicit protection for moral rights under 6bis and their persistent tendency to distinguish subsequent cases on their facts.¹⁷⁴ It is unlikely that cases following *Gilliam* will enforce an artist's right to reject his work absent gross mutilation.

163. *Gilliam v. American Broadcasting Co.*, 538 F.2d 14, 24 (2d Cir. 1976).

164. *Id.*

165. *See Id.*

166. *See Id.*

167. *Gilliam* has yet to be followed.

168. *See George Basch Co. v. Blue Coral Inc.*, 968 F.2d 1532, 1537 (2d Cir. 1992). In addition, this is excluding the possibility that the defendant's actions were intentionally deceptive. *Id.*

169. *See Gilliam*, 538 F.2d at 23-24.

170. *Id.* at 24.

171. *See Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1997); *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 82 (2d Cir. 1995); *Choe v. Fordham University School of Law*, 920 F. Supp. 44, 48 (S.D.N.Y. 1995); *Benson v. Paul Winley Record Sales Corp.*, 452 F. Supp. 516, 517 (S.D.N.Y. 1978); *English v. BFC & R E. 11th St. LLC*, 1997 WL 746444 (S.D.N.Y. Dec. 3, 1997).

172. *Choe*, 920 F. Supp. at 44.

173. *Id.* at 49.

174. *Id.*

F. Individual States Statutory Compliance Outside of Federal Law

As many as eleven states have enacted moral rights protection statutes, which aim to cover the rights of paternity and integrity, but only in certain works.¹⁷⁵ For example in 1979, artists achieved a small victory when the California State legislature passed the California Art Preservation Act.¹⁷⁶ Soon after, New York's state legislature followed California by enacting the Artist's Authorship Rights Act in 1983.¹⁷⁷ Following these highly influential precedents, nine other states also passed moral rights statutes.¹⁷⁸ Accordingly, the focus of state statutory laws revolves mainly on the California and New York approaches.¹⁷⁹ The latter states enacting moral rights statutes modeled them from either one or the other of those approaches.¹⁸⁰ Although both approaches emphasize preservation or attribution, neither approach accounts for the full protection of moral rights like those established in Europe.

Despite the additional protections afforded by these state statutes, they have clear shortcomings and, thus, still do not effectively strengthen United States' compliance with its international obligations. For instance, the protection of a state statute extends only as far as the state's jurisdiction.¹⁸¹ An artist's works may be altered outside of the state of creation without being subject to the protections of the state statutes.¹⁸² In addition, federal copyright law preempts most state moral rights legislation where

175. See CAL. CIV. CODE § 987 (West Supp. 1998); CONN. GEN. STAT. ANN. §§ 42-116s to -116t (West 2004); LA. REV. STAT. ANN. §§ 51:2151-56 (West 1995); ME. REV. STAT. ANN. tit. 27, § 303 (West 1995); MASS. GEN. LAWS ANN. ch. 231 § 85S (West Supp. 1996); N.J. STAT. ANN. §§ 2A:24A-1 to -8 (West 1995); N.M. STAT. ANN. § 13-4B-1 to -3 (Michie 1995); N.Y. ARTS & CULT. AFF. LAW § 14.01-03 (McKinney 1995) [hereinafter N.Y. LAW]; PA. STAT. ANN. tit. 73 §§ 2101-2110 (Purdon Supp. 1996); R.I. GEN. LAWS §§ 5-62-2 to -6 (1995).

176. California Art Preservation Act, CAL. CIV. CODE §§ 987-89 (Deering 2004).

177. Artists' Authorship Rights Act, N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 2004).

178. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 82 (2d Cir. 1995).

179. See, e.g., Edward J. Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733, 1741 (1984); Sophia Davis, *State Moral Rights Law and the Federal Copyright System*, 4 CARDOZO ARTS & ENT. L.J. 233, 257-59 (1985); Jane Engdahl, *Moral Rights in State Statutes: A Comparison of the California Art Preservation Act and the New York Artists' Authorship Rights Act*, 34 COPYRIGHT L. SYMP. (ASCAP) 203, 240 (1987).

180. See CONN. GEN. STAT. ANN. §§ 42-116s to -116t (West 2004); LA. REV. STAT. ANN. §§ 51:2151-56 (West 1995); ME. REV. STAT. ANN. tit. 27, § 303 (West 1995); MASS. GEN. LAWS ANN. ch. 231 §85S (West Supp. 1996); N.J. STAT. ANN. §§ 2A:24A-1 to -8 (West 1995); N.M. STAT. ANN. §§ 13-4B-1 to -3 (Michie 1995); PA. STAT. ANN. tit. 73 §§ 2101-2110 (Purdon Supp. 1996); R.I. GEN. LAWS §§ 5-62-2 to -6 (1995).

181. Michael E. Horowitz, Note, *Artists' Rights in the United States: Toward Federal Legislation*, 25 HARV. J. ON LEGIS. 153, 198-99 (1988).

182. *Id.*

coverage overlaps. This is the most serious shortcoming of the states' statutory regimes since many state laws have provisions for which there are no equivalents in the federal law.

Section 301 of the 1976 Copyright Act¹⁸³ describes a two-pronged test to determine whether the provisions of the Copyright Act preempt state law.¹⁸⁴ The first prong states that federal law will not preempt state law when there is no overlap of protection and the subject matter does not fall under the scope of the Copyright Act.¹⁸⁵ The second prong permits states to safeguard rights that are not "equivalent to any of the exclusive rights within the general scope of the copyright."¹⁸⁶ If, however, the exercise of any of the exclusive rights under the Copyright Act infringes the state law, then that state law is preempted.¹⁸⁷ Despite the additional protections which states' statutory law provides to artists, it can be difficult to determine when federal law will preempt those laws. Inherent in moral rights protection is the protection afforded by copyright and, therefore, since Congress has constitutional power over copyright, Congress has the power to truly fulfill our international obligation to protect moral rights.

G. *An Illustration of the Comparative Weakness of Protection in the United States*

When comparing U.S. law to European law, the weaknesses and limitations of artist's integrity protection is best exemplified by a case involving Turner Entertainment's colorization of the black and white film, *The Asphalt Jungle*.¹⁸⁸ In the United States, colorization of a film creates a derivative work.¹⁸⁹ A legal derivative work is conditioned upon the will of the copyright owner's exclusive derivative right.¹⁹⁰ In this case, the film director's heirs protested the

183. 17 U.S.C. § 301 (1988).

184. Eric M. Brooks, Comment, "*Tilted Justice: Site-Specific Art and Moral Rights After U.S. Adherence to the Berne Convention*," 77 CAL. L. REV. 1431, 1465 (1989).

185. *Id.*

186. *Id.* at 1466 (quoting 17 U.S.C. § 301(b)(3) (1988)).

187. *Id.*

188. See *Turner Entertainment Co. v. Huston*, Cour d'appel [CA] [regional court of appeal] Versailles, civ. ch., Dec. 19, 1994, No. 68, Roll 615/92, translated in 16 ENT. L. REP. 3 (1995), available at <http://www.peteryu.com/intip/turner.pdf>. The French court held that colorization of U.S. director John Huston's black and white film *Asphalt Jungle* by the Turner Company violated Huston's moral rights even though the Turner Company legally acquired the economic rights of the film. *Id.*; see also Suhl, *supra* note 88, at 1226-27.

189. Suhl, *supra* note 88, at 1226.

190. *Id.*

colorization.¹⁹¹ U.S. courts held, however, that the heirs did not have a successful cause of action because, under the film contract, the director signs away all rights to the producer.¹⁹² The director's heirs also filed suit in France to prevent a French television station from broadcasting the colorized version of *Asphalt Jungle*.¹⁹³ The French courts ruled under French law that the director's creative contribution to the film makes him the author.¹⁹⁴ Under French law, the director, as author, maintains his moral right of integrity even after the industry's standard assignment of his rights to the producer.¹⁹⁵

The holdings of these two decisions from the United States and France illustrates that U.S. copyright law is a utilitarian economic approach, consistent with the Anglo-American tradition. While successful causes of action for moral rights protection under § 43(a) do exist in cases such as *Gilliam*, those cases are more representative of infringement, unfair competition, and mutilation.¹⁹⁶ Thus, it is evident that moral rights protection, as an artist's natural right to qualities embodied in his work, is transparent. In the United States protection of moral rights is primarily for the benefit of market. As the *Asphalt Jungle* case demonstrates, the United States, although purporting to comply with Article 6bis of the Berne Convention, does not provide an artist a broad or consistent means of moral rights protection. Instead, the United States' protection is quite limited relative to that afforded by other Berne Convention member countries.

IV. THE ENACTMENT OF THE FAMILY MOVIE ACT AND ITS IMPACT ON THE UNITED STATES' INTERNATIONAL OBLIGATION TO PROTECT ARTISTS' RIGHTS UNDER THE BERNE CONVENTION

A. *The Proposal of the Family Movie Act of 2004*

Supporters of movie filtering technology in the U.S. House of Representatives won a victory on July 21, 2004, when the House Judiciary Committee voted to send the FMA¹⁹⁷ to the full House for

191. *Id.* at 1226–27.

192. *Id.* at 1227.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Gilliam v. Am. Broad. Co.*, 538 F.2d 14, 26–29 (2d Cir. 1976).

197. Family Movie Act of 2004, H.R. 4586, 108th Cong. (2004).

consideration.¹⁹⁸ FMA originally passed a House subcommittee by a vote of eleven to five before its submission to the House Judiciary Committee.¹⁹⁹ Representative Lamar Smith introduced the bill to allow the sale of technology that skips over objectionable material on DVD movies in the consumer's private household.²⁰⁰ After receiving strong support in the House, the FMA went before the Senate where it also received immediate support from multiple Senators indicating that FMA would soon become law.²⁰¹

In fact, on January 25, 2005, the Senate reintroduced an amended FMA as part of the Family Entertainment and Copyright Act of 2005, which was comprised of four independent bills.²⁰² Senator Orrin Hatch initiated the process, and the Family Entertainment and Copyright Act of 2005²⁰³ was unanimously approved by the Senate.²⁰⁴ Recently, Representative Smith reintroduced the bill to the House where the Judiciary Committee reviewed it and cleared it for the White House on April 19, 2005.²⁰⁵ Representative Smith was the initial sponsor of the original bill in June 2004 and has been faithfully advocating filtration technology for parents that want to shield children from violence, sex, and profanity in movies.²⁰⁶ The FMA created a narrowly defined safe-harbor for distributors of such technologies.²⁰⁷ Specifically, the FMA stated that distributors would not face liability for copyright or trademark infringement, as long as they complied with the requirements of the

198. H.R. Rep. No. 108-670, at 39 (2004), 2004 WL 2045264, available at <http://judiciary.house.gov/media/pdfs/108-670.pdf>.

199. Backgrounder on the Family Movie Act, <http://www.grassfire.org/39/backgrounder.asp>.

200. Family Movie Act of 2004, H.R. 4586, 108th Cong. (2004).

201. 151 CONG. REC. S450 (daily ed. Oct. 10, 2005), available at <http://www.govtrack.us/congress/record.xpd?id=109-s20050125-39&bill=s109-158> (last visited Mar. 19, 2005).

202. Brian Franks, *New Bill Looks to Combat Piracy*, THE SIGNAL (Santa Clarita, California), Jan. 27, 2005, available at <http://www.the-signal.com/News/ViewStory.asp?storyID=6337> (stating that the four independent bills are: the ART act, the Family Movie Act, the National Film Preservation Act and the Preservation of Orphan Works Act).

203. Press Release, Senator Orrin G. Hatch, Hatch Introduces Family Entertainment Act, Jan. 25, 2005, http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1267&Month=1&Year=2005.

204. *Senate Approves Copyright Bill*, TECH LAW JOURNAL, Feb. 1, 2005, available at <http://www.techlawjournal.com/topstories/2005/20050201.asp>.

205. *Id.*; see also Summary & Status for the 109th Congress, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN00167:@@L&summ2=m&> (listing a timeline for all major actions concerning the bill).

206. *Senate Approves Copyright Bill*, *supra* note 204.

207. Press Release, *supra* note 203.

Act.²⁰⁸ On April 27, 2005, the President signed the FMA, and it became law.²⁰⁹

FMA creates a new exemption in § 110(11) of the Copyright Act for skipping and muting content in motion pictures during playback of an authorized copy of the motion picture in a household.²¹⁰ The new language exempts specified conduct from copyright infringement and amends § 32 of the Trademark Act of 1946²¹¹ by adding a new section.²¹² The newly appended § (3)(A) states “[a]ny person who engages in the conduct described in paragraph (11) of § 110 of title 17,²¹³ United States Code, and who complies with the requirements set forth in that paragraph is not liable on account of such conduct for a violation of any right under this Act.”²¹⁴ Section 110(11) protects,

(11)(A) the making of limited portions of audio or video content of a motion picture imperceptible by or for the owner or other lawful possessor of an authorized copy of that motion picture in the course of viewing of that work for private use in a household, by means of consumer equipment or services that—

- (i) are operated by an individual in that household;
- (ii) serve only such household; and
- (iii) do not create a fixed copy of the altered version; and

(B) the use of technology to make such audio or video content imperceptible that does not create a fixed copy of the altered version.²¹⁵

In this amended bill, even an advertisement qualifies under the Copyright Act as a “motion picture,” and thus a product or service that enables the skipping of an entire advertisement would be beyond the scope of the exemption.²¹⁶ Moreover, the phrase “limited portions” refers to portions that are both quantitatively and qualitatively

208. *Id.*

209. Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218.

210. *Id.*

211. 15 U.S.C. § 1114(1)(a)–(b)(2005).

212. Family Movie Act of 2004, H.R. 4586, 108th Cong. (2004).

213. *Id.* (stating that exemption will apply to

(11)(A) the making of limited portions of audio or video content of a motion picture imperceptible by or for the owner or other lawful possessor of an authorized copy of that motion picture in the course of viewing of that work for private use in a household, by means of consumer equipment or services that—

- (i) are operated by an individual in that household;
- (ii) serve only such household; and
- (iii) do not create a fixed copy of the altered version.).

214. *Id.*

215. *Id.*

216. *Id.* (quoting 17 U.S.C. § 101 which states “[m]otion pictures are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.”).

insubstantial in relation to the work as a whole.²¹⁷ The enacted FMA differs from the version passed by the House in 2004 in that it adds two “savings clauses,”²¹⁸ only one of which is applicable to copyright law:

The copyright savings clause makes clear that there should be no spillover effect from the passage of this law: that is, nothing shall be construed to have any effect on rights, defenses, or limitations on rights granted under title 17, other than those explicitly provided for in the new section 110(11) exemption.²¹⁹

At the heart of the FMA is an attempt to clarify the legality of movie filtering in the privacy of households and create a legalized parental control option in DVD-players.

B. *ClearPlay's New Technology Finds Protection under the Family Movie Act of 2005*

FMA alleviates any liability for companies such as ClearPlay, Inc.²²⁰ ClearPlay is a company that sells filtration technology for DVD-players, which enables the removal of PG-13 and R-rated material from hundreds of popular movies.²²¹ After purchasing a DVD-player equipped with ClearPlay's filtration technology, customers can purchase specific filters created by ClearPlay for individual movies at a cost of \$7.95 per month.²²² To create a filter, the ClearPlay staff identifies content that generally falls under the categories of graphic violence, sexual content, and language.²²³ After the customer installs a filter, the DVD-player will either automatically skip or mute specific scenes based on fourteen different customizable settings used by the customer.²²⁴

Proponents of ClearPlay and related services argue that motion picture fans have become increasingly concerned about offensive movie content.²²⁵ The purported need for this filtering software reflects the fact that parents must actively remember to manually turn down the volume of movies playing objectionable content or skip past entire scenes with objectionable content.²²⁶ ClearPlay states that

217. Press Release, *supra* note 203.

218. *Id.*

219. *Id.*

220. ClearPlay Services, *supra* note 16.

221. *Id.*

222. Postings of ClearPlay's subscription choices, <http://www.clearplay.com/shopcart.aspx> (last visited Nov 9, 2005).

223. ClearPlay Services, *supra* note 16.

224. *Id.*

225. Family Movie Act of 2004, H.R. 4586, 108th Cong. (2004).

226. *Id.*

their filtration technology simply strengthens the ability of parents who already filter out content that they believe is inappropriate.²²⁷ Parents see the number of entertainment sources steadily increasing and diluting their overall ability to control their children's exposure.²²⁸ When Representative Smith introduced the bill in the House, he stated, "[f]ortunately, technology exists that shields children from violence, sex and profanity. It is the electronic equivalent of fast-forwarding over unwanted content."²²⁹ Both Representative Smith and Senator Orrin Hatch favored the FMA, which created an exemption in the copyright laws to ensure companies such as ClearPlay are not sued for copyright or trademark infringement.²³⁰ Senator Hatch also claimed that the bill would end costly litigation and ensure the "viability of small companies like ClearPlay, which are busy creating innovative technologies for consumers that allow them to tailor their home viewing experience to their own individual or family preferences."²³¹ Accordingly, Congress enacted FMA and bolstered the rights of individuals to view movies in a private setting with parental control features on personal DVD-players.

Critics argue that content filtering companies like ClearPlay only focus on parental control as a ploy.²³² Specifically, critics charge that companies such as ClearPlay sell to the public for profit, not morality.²³³ Recently, ClearPlay felt the wrath of its critics when the major motion picture industry felt entitled to a portion of ClearPlay's profits. ClearPlay and other companies that comprise this niche were sued in September 2002 by eight Hollywood movie studios, sixteen prominent directors, and the Directors Guild of America for both copyright and trademark infringement.²³⁴ The plaintiffs claimed that companies like ClearPlay illegally profit from selling software that essentially edits movies that they neither created, nor owned any rights to.²³⁵

227. *Id.*

228. *Id.*

229. Jesse J. Holland, *Bill on DVD Filtering on Fast-Forward*, HOUSTON CHRONICLE, Feb. 3, 2005.

230. *Id.*

231. *Id.*

232. *DGA v. Clean Flicks, et al.*, DGA AGENCY UPDATE, Fall 2002, at 2, http://www.dga.org/dga_members/agencyupdates/agency-update-fall-2002.pdf (publication of the Director's Guild of America, Los Angeles, California).

233. *Id.*

234. *Derivative Rights, Moral Rights, and Movie Filtering Technology: Hearing Before the Subcomm. On Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 22-26 (2004) (statement of Bill Aho, CEO of ClearPlay, Inc.), available at <http://judiciary.house.gov/media/pdfs/printers/108th/93773.pdf>.

235. *DGA v. Clean Flicks, et al.*, *supra* note 232.

Long before this suit began, the opponents of ClearPlay claimed that no other company or individual had the right to sell unauthorized versions of motion pictures.²³⁶ In fact, opponents of ClearPlay argued that directors should always have the opportunity to participate in any editing of their work.²³⁷ For example, directors previously worked with airline vendors and cable networks to create more family friendly versions of their work.²³⁸ Furthermore, the plaintiffs pointed out that after editing a film, they would often license the edited versions of the film and that they were willing to license such films to ClearPlay and similar companies.²³⁹ Thus, opponents of companies like ClearPlay stated that they are not against family-friendly versions of films that utilize modern technology. ClearPlay's opponents, however, objected to allowing private companies to profit by offering "an edited, abridged version of a movie" and without input from the studio or current copyright owner.²⁴⁰

Opponents of ClearPlay also contest arguments such as those posed by Senator Hatch and Representative Smith that ClearPlay technology was a necessary tool for family-friendly movies. The opposition countered such arguments by stating that consumers can simply elect not to view certain movies²⁴¹ and that the motion picture industry already has a voluntary rating system to help families choose appropriate movies.²⁴² The rating system indicates the level of sexual or violent content and the target audience age on every motion picture released in the theater, on DVD, or VHS.²⁴³

There were opponents to Congress' enactment of FMA and its carved out exception for companies like ClearPlay. In fact, there was and still remains litigation whose outcome will now be affected by the enactment of the FMA. While ClearPlay claims that its technology is

236. Michael Apted, *President's Letter*, DGA MAGAZINE, May 2004, available at http://www.dga.org/news/v29_1/dept_prezreport-504.php3.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Hearing on H.R. 4586*, *supra* note 15, at 67–70 (statement of Jack Valenti, President and Chief Executive Officer, Motion Picture Ass'n of America).

241. *Id.* at 9 (statement of Marybeth Peters):

I cannot accept the proposition that not to permit parents to use such products means that they are somehow forced to expose their children (or themselves) to unwanted depictions of violence, sex, and profanity. *There is an obvious choice—one which any parent can and should make: don't let your children watch a movie unless you approve of the content of the entire movie.*(emphasis added).

242. *Id.*

243. *Id.*

lawful under the Copyright Act, others allege that the technology is an infringement and that the FMA is unconstitutional. Though the case is pending, it is likely that ClearPlay's software will be deemed a legal, non-infringing, fair-use of the motion pictures as long as they do not physically copy or alter the DVDs based on the FMA's exception to the Copyright Act.²⁴⁴ Nevertheless, this ruling and the passage of the FMA will have domestic policy implications and remains highly inconsistent with European views.²⁴⁵

C. *Where Does the U.S. Law Stand and Does it Comply with U.S. International Obligations?*

While moral rights protection in the United States is consistently weaker than that of European countries, it attempts to comply with the minimum standards of its international obligations. "The future of our creative industry . . . depends on the ability of the U.S. trade negotiators to persuade other nations to respect our copyrights by strictly complying with their international obligations under the Berne Convention and the WIPO Copyright Treaty."²⁴⁶ The problem with legislation such as the FMA is that it violates principles of artistic freedom and expression. Even though the United States' federally-enacted moral rights do not protect an artist's personality rights, the law does at least recognize the concept of protecting artistic freedom.²⁴⁷ The National Endowment for the Arts, whose

244. Drew Clark, *Bowdlerizing for Columbine? Why American directors have no moral rights to their movies*, SLATE, Jan. 20, 2003, <http://slate.msn.com/id/2077192/>. This is also due to the affirmation that the FMA has seen in both houses of Congress and now placed in the Family Entertainment and Copyright Act of 2005. Furthermore, ClearPlay is consistently distinguished from similar companies such as CleanFlicks and MovieMask, which physically alter the motion picture. *See id.*

245. Press Release, Federation of European Film Directors, FERA Defends the Creative Rights of Every Nation (Oct. 18, 2002), *available at* <http://www.aidaa.org/fera/cdep/181002en.html>. This article states that the current stage of U.S. legislation supporting FMA is exploitation. *Id.* It further states that FMA would allow destruction of moral rights by allowing hundreds of films, distributed on DVD in American markets and on the internet, which are censored for commercial reasons, by publishing companies who edit the films without the permission of either their authors or of the U.S. studios that own them. *Id.*

246. *Hearing on H.R. 4586, supra* note 15, at 69.

247. *See* NATIONAL ENDOWMENT FOR THE ARTS, STRATEGIC PLAN: FY2003-2008, at 3 (2003) (stating the concept that "[a]rtistic work and freedom of expression are a vital part of any democratic society"), <http://www.nea.gov/about/Strategic/FY2003-2008StrategicPlan.pdf>; *see also* SAM RICKETSON, THE BERNE CONVENTION: 1886-1986 456 (1997):

Any author, whether he writes, paints, or composes, embodies some part of himself—his thoughts, ideas, sentiments and feelings—in his work, and this gives rise to an interest as deserving of protection as any of the other personal

mission is to strengthen the arts throughout the United States,²⁴⁸ seeks to preserve works of art and believes that part of the preservation is to ensure artists are involved in the portrayal of their creations.²⁴⁹ Thus, allowing companies to use technology such as ClearPlay's to edit motion pictures and sell them for profit without the permission of the copyright owner greatly weakens the United States' already fragile compliance with international obligations.

ClearPlay's technology alters how audiences perceive the artist's work. This altered perception of an artist's work is a clear breach of the U.S. obligations to protect moral rights.

Failure to adequately protect the exclusive right of copyright owners to authorize the making of derivative works and the rights of authors would violate U.S. obligations under the Berne Copyright Convention. Moreover, a breach of the obligation relating to derivative works would be actionable under the WTO TRIPS provisions, which might result in sanctions.²⁵⁰

The enactment of the FMA undermines the U.S. obligations in international treaties, discourages foreign artists from publishing their works in the United States, and results in protection of censorship in the U.S. media.²⁵¹ International obligations to empower artists should have swayed Congress to reject the FMA and enforce a European-style moral right—the right to force their audience to experience the art as the artist intended.

Moral rights protection in the United States is consistently weaker than the protection afforded by European nations. In the United States, artists have the ability to bring claims under the Lanham Act, just as directors and studios did against ClearPlay, which provides artists with at least some means to protect their federal moral rights. In fact, the rights afforded through § 43(a) of the Lanham Act were the primary reason that Congress decided U.S. law met its moral rights obligations defined in the Berne Implementation

interests protected by the institutions of positive law, such as reputation, bodily integrity, and confidences. The interest in question here relates to the way in which the author presents his work to the world, and the way in which his identification with the work is maintained.

248. See *id.* at 2.

249. *Id.* at 8; see also 15 U.S.C. § 1125 (2005); 17 U.S.C. § 106A (2005).

250. *Hearing on H.R. 4586, supra* note 15, at 69.

251. In fact, many critics of the FMA argue that it was enacted to protect censorship. See Majorie Heins, *BLEEP: Censoring Hollywood?*, CENSORSHIP NEWS ONLINE, Summer 2005, http://www.ncac.org/cen_news/cn98bleep.htm ("Censorship under the guise of child protection has traditionally been, and continues to be, a convenient excuse for not educating children—about media, critical thinking, and moral values.").

Act.²⁵² The enactment of the FMA, however, severely limits the artist or copyright owner's ability to bring a claim against infringers and violators of their moral rights. This limitation directly conflicts with the stated obligations under the Berne Convention that an "author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification" thereof.²⁵³ Accordingly, it is one thing to say that an individual, in the privacy of their own home, should be able to filter out undesired content from a motion picture if they choose to do so by, for example, fast-forwarding through an illicit scene. It is another issue altogether to say that the U.S. government freely exempts private companies from federal law to allow such companies to commercially market a product that alters a director's artistic vision.²⁵⁴

The focus of the FMA is not to exempt modifications done with the permission of the director or owner. Instead, the FMA creates an exemption to U.S. federal trademark and copyright laws for companies to profit by selling adaptations of another owner or artist's motion picture, better known in FMA as filtering.²⁵⁵ This legislation clearly violates an artist's right of integrity and is unconstitutional. Congress cannot permit editing of an artist's work without the permission of the artist or the owner of the copyright, without essentially vitiating freedom of expression and control of derivative works.²⁵⁶ Hence, the United States should stop disguising what is in effect a blatant disregard for its international obligations under multiple treaties. If the United States continues to act autonomously, it should stop pretending to be in compliance with its international obligations. After passing the FMA, the United States ignored its international obligations and disregarded its responsibility to foreign artists and authors who wish to publish works in the United States. The United States has taken a grave step away from protecting moral rights and has significantly weakened an artist's ability to make sure

252. 133 CONG. REC. H1293 (daily ed. Mar. 16, 1987) (statement of Rep. Robert Kastenmeier).

253. Berne Convention, *supra* note 1.

254. *Hearing on HR 4586*, *supra* note 15, at 10.

255. Backgrounder on the Family Movie Act, *supra* note 199.

256. 17 U.S.C. § 106(2) (2005) (giving the author the exclusive right to prepare "derivative works based on the copyrighted work"). The Copyright Act further defines a "derivative work" 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, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a 'derivative work.'

17 U.S.C. § 101 (2005), available at <http://www.copyright.gov/title17/92chap1.html#101>.

that the relevant audience will view the artist's work as was intended. The United States should withdraw from the Berne Convention and let artists and authors of the world know that their visions will not be protected but will be susceptible to alterations. Thus, withdrawing from the Berne Convention would be a responsible action and would put unsuspecting artists on notice of the risks they take in publishing works in the United States.

V. CONCLUSION

Moral rights protection is limited in the United States and the only viable federal course of action for authors and artists is through the Lanham Act. Unfortunately, the Lanham Act only protects against consumer deception in the market and does nothing to protect an artist or author's creativity. Hence, authors only receive protection in the United States where overt mutilations change the character of the work and present a false designation of the work's origin. Moreover, mutilation that does not confuse the public's view of its origin would not be actionable under the Lanham Act. By enacting the FMA through the Family Entertainment and Copyright Act of 2005, companies such as ClearPlay can now legally create derivative works that stem from alterations of motion pictures without any consequences. This exemption from the law essentially changes the level of U.S. protection of moral rights from minimal to almost nonexistent, especially in comparison to the protection afforded by other Berne Convention member countries.

Congress's recent support of the Family Entertainment and Copyright Act of 2005 indicates that the United States will have trouble complying with its international obligations on moral rights, particularly its obligation under the Berne Convention to comply with Article 6bis. Under Article 6bis, all member countries must enforce that the "author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification" thereof.²⁵⁷ For true compliance with the Berne Convention, U.S. law has to depart from its utilitarian, economically-driven tradition and provide protection to authors in a manner consistent with the other member countries. The enactment of FMA, however, weakens the already minimal protection offered by the United States to artists under the Berne Convention. Furthermore, the TRIPs agreement requires all WTO members to abide by Articles 1 through 21 of the Berne Convention, even if they never joined the original

257. Berne Convention, *supra* note 1.

convention.²⁵⁸ Therefore, the United States' membership and involvement in the WTO should have established a floor from which their obligation extended.

The enactment of the FMA increases the chance that both domestic and foreign artists could have their works altered despite the fact that it may completely change the meaning behind their creations. By failing to comply with our stated international obligations, the United States will likely find that artists are discouraged from producing a progressive and creative final product for fear of its manipulation, modification, and censorship. The United States will also likely find some type of backlash from the complying members of other WTO members or Berne Convention signatories. Therefore, the United States should act preemptively and simply withdraw as a party to the Berne Convention. Accordingly, the United States should also be ready to accept sanctions that may stem from violation of the TRIPs agreement.

*Brandi L. Holland**

258. TRIPs, *supra* note 22, art. 9, at 324.

* J.D. Candidate, May 2006, Vanderbilt University Law School. B.S.M., 2003, Tulane University, A.B. Freeman School of Business. I would like to thank *all* of my family for their support in my legal journey thus far and above all, I would like to thank my husband, Nicholas, for his patience, endorsement, and more importantly his contributions to my editing process.