STUDY NO. 4

THE MORAL RIGHT OF THE AUTHOR

By William Strauss

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PREFATORY NOTE

An earlier version of this study was published in the American Journal of Comparative Law, Autumn 1955 issue, vol. 4, No. 4, pp. 506–538. The revised version printed herein includes some additional material reflecting more recent developments. The contents of the earlier version are incorporated herein with the courteous permission of the Board of Editors of the American Journal of Comparative Law.

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THE MORAL RIGHT OF THE AUTHOR

It is frequently said abroad that the "moral" right of the author, i.e., the right to safeguard his artistic reputation—as distinguished from the property aspects of his copyright—is not sufficiently protected in the law of the United States. Even American lawyers have expressed this opinion.[1] The alleged nonexistence of protection of the author's moral right has been considered one of the principal obstacles to adherence by the United States to the Berne and Washington Copyright Conventions, both of which contain provisions for the protection of the right of the author to claim authorship in his work and to prevent others from interfering with its integrity. In the following pages we shall compare the protection of the author's personality rights under the doctrine of moral right in the European law with the protection given the author's personal rights under our law.

I. Theory and Application of the Doctrine of Moral Right in the European Copyright Law

A. THE THEORIES OF THE MORAL RIGHT

The theories on the moral right have been developed chiefly by French and German jurists. According to prevalent views, copyright has two facets: the property rights which are objects of commerce and which terminate after the period fixed by law; and the moral right which is inalienably attached to the person of the author and, depending on the particular theory, may or may not survive the property right aspects of the copyright.[2] The French, and to a lesser extent, the German courts have pioneered the application of the doctrine. Therefore, our study will be largely limited to an examination of the doctrine in these countries. There are, however, several important member countries of the Berne Copyright Union which, under their domestic law, provide protection for the author's personal rights without benefit of the moral right doctrine. Their systems will also be discussed briefly.

B. THE CONTENTS OF THE MORAL RIGHT

1. The moral right in the Berne Convention

Under Article 6*bis* of the Berne Convention in the Rome revision of 1928 the moral right has two components: the author's right of

[1] Ladas, The International Protection of Literary and Artistic Property 581 (1938); Roeder, "The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators," 53 Harv. L. Rev. (1940) 554; Katz, "The Doctrine of Moral Right and American Copyright Law—a Proposal," 24 So. Calif. L. Rev. (1951) 375; *id.*, Copyright Protection of Architectural Plans, Drawings, and Designs, 19 School of Law, Duke U. (1954) 224.

[2] Under the "German" theory the property rights and the moral right terminate together 50 years after the death of the author; under the "French" theory the moral right lasts forever.

paternity, and his right to the integrity of his work. Article 6*bis* of the Rome text reads as follows:

(1) Independently of the author's copyright, and even after transfer of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation, or other modification of the said work which would be prejudicial to his honour or reputation.

(2) The determination of the conditions under which these rights shall be exercised is reserved for the national legislation of the countries of the Union. The means of redress for safeguarding these rights shall be regulated by the legislation of the country where protection is claimed.

At the Brussels conference for the revision of the Berne Convention, held in 1948, the language of paragraph (1) of Article 6*bis* was broadened to prevent "any distortion, mutilation, or other alteration thereof or any other action in relation to the said work, which would be prejudicial to the author's honour or reputation."

Article 6*bis* of the Rome text provided for determination of the conditions and means of safeguarding the moral right by the member countries. Under the Brussels text this determination is left to the member countries only for the time after the author's death.[3] However, this ostensible change seems to be of limited effect, because the means of redress, i.e., the actual enforcement of the right, even during the author's life, is still governed by the laws of the member countries of the Union. As a consequence, protection of the moral right varies considerably from one member country to another.

2. The principal features of the moral right in the Berne countries

General recognition has been accorded in the laws of the Berne countries to the two rights protected under the Berne Convention: (*a*) the paternity right, and (*b*) the right to the integrity of the work.[4]

(*a*) *The paternity right.*—The paternity right is held to consist of the author's right to be made known to the public as the creator of his work, to prevent others from usurping his work by naming another person as the author, and to prevent others from wrongfully attributing to him a work he has not written.[5]

As to the first aspect of this right, it is said that the name of the author must appear on all copies as well as on advertising or other publicity for the work.[6] By virtue of the second aspect the author may prevent plagiarism of his work.[7] The third aspect is said to provide protection against false attribution of authorship, or against being named as the author of a work that has been mutilated.[8]

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[3] Art. 6*bis* (2). Art. 6*bis* (3), Brussels text, concerns the moral right during the author's lifetime:

"The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the Country where protection is claimed."

[4] Application of the terminology of the moral right doctrine in copyright statutes does not much antedate the Rome revision of the Berne Convention. In the copyright laws passed prior to 1928, the moral right is protected as such only in the Portuguese law of 1927. Other laws have dispersed provisions which are applicable to various components of the moral right or, as the Swiss Law (Art. 44), refer protection to general statutes.

[5] Michaelides-Nouaros, Le Droit Moral de L'Auteur (1935) 204, 205; Ulmer, Urheber- und Verlagsrecht (1951) 196; Desbois, Le Droit D'Auteur (1950) No. 591, would not include in the moral right the right to prevent wrongful attribution of authorship. He states that this right is inherent in any person, and has nothing to do with a work or copyright therein.

[6] Pouillet, Propriété Littéraire et Artistique (1908) No. 216, 317*bis*; Michaelides-Nouaros, *op. cit. supra*, at 143; Runge, Urheber- und Verlagsrecht (1948) 219.

[7] Pouillet, *op. cit. supra*, No. 507; Michaelides-Nouaros, *op. cit. supra*, at 212; Runge, *op. cit. supra*, at 59; Ulmer, *op. cit. supra*, at 160.

[8] Michaelides-Nouaros, *op. cit. supra*, at 214; Runge, *op. cit. supra*, at 59; Ulmer, *op. cit. supra*, at 196, 197 discusses only the first and second rights.

The French copyright law of 1957 [9] provides in Article 6 as follows:

The author shall enjoy the right to respect for his name, his authorship, and his work. This right shall be attached to his person.

It shall be perpetual, inalienable and imprescriptible.

It may be transmitted *mortis causa* to the heirs of the author.

The exercise of this right may be conferred on a third person by testamentary provisions.

Since this law did not become effective until one year after its promulgation, no cases decided under it are available at this time. The cases in which decisions were recently handed down by the French courts were pending when the new law took effect, and the previous French copyright law was applied to them. As far as the moral right is concerned, it may be said that Article 6 of the copyright law of 1957 is a codification of the theories on moral right expressed by the courts, and supplies no substantive changes. The French courts had extended the scope of the paternity right by holding that an author's name must appear in the work without change even after sale of the work [10] unless the author has consented to such change,[11] and that, in the case of several authors, all names must appear.[12] A work may not be published anonymously unless the author so stipulates in the contract.[13] False attribution of authorship has been condemned under the general rules of law.[14] An author has also been held entitled to prevent the affixing of his name to a disfigured work.[15]

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[9] Law No. 57–296 on Literary and Artistic Property ("Journal Official" March 14, 1957, p. 2723 and April 19, 1957, p. 4143) entered into force March 11, 1958 (cf. Art. 79, first par.). English transl. in CLTW, Suppl. 1958.—Prior to the passing of this law, the French copyright laws dating in substance from 1791 and 1793 had no provision on the moral right except for protection of an author's name under the Law for the Prevention of Frauds of Artistic Works of Feb. 9, 1895. The false use of an artist's name has recently been protected under this law in a civil action; *Leroy* v. *Didier, Netter and Ferrand,* Ct. App. Paris, Feb. 25, 1958. Gazette du Palais [hereinafter Giz. Pal.] May 24–27, 1958.

This provision and related provisions of the new French copyright law are discussed by Desbois, Le Droit Moral, XIX Revue Internationale du Droit d'Auteur (April 1958) 121.

[10] Civil Tribunal Seine [hereinafter Civ. Trib. Seine], March 12, 1836 in Pouillet, *op. cit. supra,* No. 512; later cases in Michaelides-Nouaros, *op. cit. supra,* at 143.

[11] Civ. Trib. Seine, August 7, 1868, Le Droit, August 9, 1868; Civ. Trib. Seine, December 17, 1838, Gazette des Tribunaux [hereinafter Gaz. Trib.] December 18, 1838; Civ. Trib. Seine, December 31, 1845 and December 31, 1868, Huard et Mack, Repertoire No. 1362; Civ. Trib. Seine, November 13, 1900, Pouillet, *op. cit. supra,* No. 316*bis*; Civ. Trib. Seine, December 29, 1896, Pataille [hereinafter Pat.] 1897, 126; see also Droit d'Auteur [hereinafter D.A.] 1931, 124.

[12] *Fleg* v. *Gaumont,* Civ. Trib. Seine, Feb. 20, 1922, Gaz. Trib. 1922.2.282; *Marquet* v. *Lehmann,* Civ. Trib. Seine, July 12, 1923, Gaz. Trib. 1923.2.271. In Poulailler called *"Bernard Frank"* v. *Bernhard Frank,* Civ. Trib. Seine, Dec. 7, 1955, Gaz. Pal. March 7, 1956, D.A. 1957, 29, 219, the court held that a writer who had chosen a pseudonym and became well known under that pseudonym, could not prevent a young less well known writer from using his real name as author of his publications. See also: *Lettre de France,* D.A. 1959, 30. In *Fernand Léger* v. *Réunion des théatres lyriques nationaux,* Civ. Trib. Seine, Oct. 16, 1954, VI Revue Internationale du Droit d'Auteur (Jan. 1955) 146, a stage designer sued for violation of his moral right because the design of a scene created by him had been omitted since the scene was dropped from the opera. Complainant demanded that all his costumes and stage designs be used in the opera, that defendant pay two million francs in damages and that the judgment be published. The court held that Léger was not a coauthor and had no right to demand changes in the opera. However, his moral right was held affected by leaving out his designs without his consent and he was awarded 10,000 francs in damages. The defendants further had to announce in all programs, posters, etc., that Léger was the author of the costumes and stage designs and that the design of the particular scene omitted was not shown because the same had been cut from the opera.

[13] Civ. Trib. Seine, June 2, 1904, Gaz. Trib. Aug. 25, 1904.

[14] Civ. Trib. Montpellier, Dec. 6, 1912; Civ. Trib. Seine, June 15, 1883, Michaelides-Nouaros, *op. cit. supra,* at 214; Cour de Paris [Court of Appeals, hereinafter Ct. App. Paris], March 20, 1826, Recueil Periodique Sirey [hereinafter S.] 1827.2.155.

[15] *Merson* v. *Banque de France,* Civ. Trib. Seine, May 28, 1930, Ct. App. Paris, March 12, 1936, Recueil hebdomadaire de jurisprudence Dalloz [hereinafter D.H.] 1936.2.246.

The German copyright law grants fairly inclusive statutory protection of the paternity right. The name of an author may not be omitted from his work unless he has consented thereto, or unless he cannot in good faith raise objections to its omission (e.g. in the case of certain contributions to newspapers).[16] An artist's name may be affixed to his work by another person only with the artist's permission. No one may quote from another person's work without indicating the source.[17]

(*b*) *The right to the integrity of the work.*—The author has the right to have the integrity of his work respected, i.e., he may prevent all deformations of it.[18] By virtue of this right the author is also deemed to be entitled to make changes in the work or to authorize others to do so.[19]

The exercise of the moral right as defined in Article 6 of the French copyright law of 1957 depends, to a large measure, on the method of publication used. Thus, if the work is published by a direct method of reproduction such as printing, the publisher, according to Article 56 of the law, must manufacture the edition in the form agreed to in the contract and may not modify the work in any way without the author's written consent. The same obligation of faithful reproduction presumably applies to a performance of a musical or dramatic work. However, if a work is to be adapted to a different medium, some flexibility must be allowed and, since the new copyright law does not expressly provide otherwise, it would seem that the rationale of the court decisions on this question would continue to be valid, namely, that changes necessitated by the new medium are permissible.[20]

In several instances the law circumscribes the exercise of the moral right in order to prevent abuses by an author. Thus, Article 10 provides that co-authors of a work of collaboration must exercise their rights by common accord and if they cannot agree, the question will be decided by the courts. Even more specifically, Article 16 limits the moral right in a contribution to a motion picture to the completed

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[16] Copyright Law in Literary and Musical Works of June 19, 1901 [hereinafter LUG] § 9; Copyright Law in Works of Art and Photographs of Jan. 9, 1907 [hereinafter KUG]. The Oberlandesgericht [hereinafter Ct. App.] Cologne Oct. 14, 1952, Gewerblicher Rechtsschultz und Urheberrecht [hereinafter GRUR] 1953, 499, held that a newspaper reporter usually has no paternity right in his contributions.

[17] LUG § 18. The Civil Division of the German Supreme Court decided in 110 Entscheidungen des Reichsgerichts in Zivilsachen [hereinafter RGZ] 393, April 8, 1925, that an architect was permitted to affix his name to a restaurant installation which he had created in the employ of another. However, the court was doubtful whether affixing the address of the architect was not misleading to the point of being unfair competition.

[18] Michaelides-Nouaros, *op. cit. supra,* note 5, at 219; Ulmer, *op. cit. supra,* note 5, at 197.

[19] Michaelides-Nouaros, *op. cit. supra,* 96, 241; Mittelstaedt, "Droit Moral im Deutschen Urheberrecht," GRUR 1913, 87; Mueller, Bemerkungen über das Urheberpersönlichkeitsrecht, Archiv für Urheber-Film- und Theaterrecht 1928 (hereinafter UFITA] 366. See *infra* note 34.

The recent case of *Société des Film Roger Richebé* v. *Société Roy Export Films et Charlie Chaplin,* Civ. Trib. Seine, Feb. 15, 1958, Gaz. Pal., June 7–10, 1958, involved protection of the moral right under the French law and under the Universal Copyright Convention. Charlie Chaplin's silent film "The Kid" was shown in France with the addition of a musical accompaniment and of subtitles which had not been approved by the author. Held, that Chaplin as author was entitled to the protection of his moral right (i.e., integrity of the work and respect of his name) under the French law since he enjoyed national treatment in France by virtue of Article 2 of the Universal Copyright Convention.

In *Thiriet, Van Parys and Henri Jeanson* v. *Société "Le Fanal", Jarre and Société "Films Ariane",* Civ. Trib. Seine, Feb. 8, 1957, XV Revue Internationale du Droit d'Auteur (April 1957) 144, phonograph records had been made from the film music without permission from all the authors, and with other unauthorized changes. Held, that there was injury to the moral right of the authors; defendants had to pay damages and the records had to be destroyed. But see: Roger-Ferdinand, L'affaire Carmen Jones, VIII Revue Internationale du Droit d'Auteur (July 1955) 3, dealing with the film "Carmen Jones" adapted from the opera "Carmen" by Bizet.

[20] See Desbois, *loc. cit. supra* note 9; see also note 48.

motion picture unless Article 1382 of the Civil Code is applicable against a person by whose fault the completion of the film was prevented.[21] As a possible further limitation, Article 15 provides that, if any author refuses or is unable to complete his contribution, he must permit the use of his contribution insofar as it is in existence.

The French courts have held that the user of a work by way of reproduction or performance must adhere strictly to the form and contents given the work by the author.[22] It is said that the publisher and theatrical producer violate their obligation if they make changes without the author's consent; that they have undertaken to make the work public in the form in which it has been submitted to them and could have refused to do so if they had been of the opinion that the work needed changes.[23]

The German copyright statutes provide, and the courts have held, that the assignee of a copyright usually cannot, without the author's permission, make changes in the work, its title, or in the author statement.[24]

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[21] Article 1382 of the French Civil Code provides: "Any action that causes damage to another makes the tort feasor liable for damages." Actions for violation of the moral right are more often brought in tort than in contract. However, the author must prove damages to a legitimate interest, violation of a duty and intent. Code Civil (Dalloz ed. 1946) notes to 1382, 1383.

[22] In *Merson* v. *Banque de France,* D.H. 1936.2.246, the Court of Appeals in Paris held that the copyright permits the artist to demand respect for his work even after assignment, and to keep the integrity and every detail of form intact. In *Chaliapine* v. *USSR and Bremer,* Ct. App. Paris, July 28, 1932, Recueil Periodique Mensuel Dalloz [hereinafter D.P.] 1934.2.139 the court said: Every author has a moral right in his work, and this must be recognized by the courts in all countries. The author has the right to prevent that his work be altered or mutilated in form or in spirit. *Accord:* Commercial Tribunal [hereinafter Com. Trib.] Seine, Aug. 22, 1845, S. 1845.2.459; Cit. Bordeaux, Aug. 24, 1863, S. 1864.2.194; Com. Trib. Seine, March 11, 1911, D.A. 1912, 141; Civ. Trib. Seine, Dec. 31, 1924, D.H. 1925. 35; Civ. Trib. Seine, Dec. 22, 1926, D.H. 1927. 125; Ct. App. Paris, Feb. 13, 1930, Annales de Droit Commercial [hereinafter ANN.] 1931. 369.

In *James* v. *Boutillet and Hachette Publishers,* Civ. Trib. Seine, December 31, 1924, D.H. 1925.2.54, plaintiff had permitted defendant B. to reproduce, in a school reader, certain extracts from his stories. B. without permission, made considerable changes. Held, that if B. wanted to include plaintiff's stories he should have respected the thoughts of the author and not distorted them.

In *Benoit-Lévy* v. *Soc. de prod. et exploit. du film "La Mort du Cygne" and Cinéma Péretre Palace,* the film "La Mort du Cygne" was presented in a cut version. Held, that, although the author had assigned performance rights, he had retained his moral right. The Paris Court of Appeals, affirming, decided the issue on a breach of contract basis. Civ. Trib. Seine, Oct. 24, 1941, *aff'd.* Ct. App. Paris, May 5, 1942, D.A. 1943, 80. (The lower court did not refer to the contractual clause.)

In *Prévert and Carné* v. *S.N. Pathé Cinéma,* Civ. Trib. Seine, April 7, 1949, Gaz. Pal., May 11, 1949, D.A. 1950, 70, a film was also cut without permission. Held, that the authors were entitled to 100,000 frs. damages each for violation of the moral right, but owed the producer 50,000 francs each in damages for unauthorized seizure of the film. (Copyright having been assigned, there was no infringement, and, therefore, no justification for seizure.)

In *Blanchar, Honegger and Zimmer* v. *Soc. Gaumont,* Gaz. Pal. July 22, 1950, Ct. App., Paris, affirming Civ. Trib. Seine, April 6, 1949, Gaz. Pal. May 21, 1949, the court held that cutting a film without permission by the film authors constituted a breach of contract. The court negatived the presumption of a tacit advance waiver of the moral right.

In *S.A. les Gémeaux* v. *Prévert and Grimault,* Gaz. Pal. May 23, 1953, D.A. 1953, 133, 1954, 39, *modified and aff'd,* Ct. App. Paris, April 18, 1956, D.A. 1957, 30, 31, two of the authors of a motion picture complained that the other authors of the animated design film had violated plaintiff's moral right, and they wanted the film withdrawn from exhibition. Held that the two authors had an inalienable moral right but that this right was limited by the rights of other collaborators; that withdrawing the film would in effect obliterate the moral right which the complainants wished to protect; that the film should be shown, but the receipts impounded until the matter had been decided on the merits.

[23] Desbois, *op. cit. supra,* note 5, No. 594.

[24] Section 9, LUG; § 12, KUG. In 119 RGZ 401, Jan. 14, 1928, the German Supreme Court held that a publisher could not intersperse a contribution to a periodical with criticism of the author's work, and thus distort the sense of the article. Held to be a breach of contract.

The classic German case on this point is the "Rocky Island with Sirens" case, 79 RGZ 397, June 8, 1912. Defendant had commissioned plaintiff to paint a mural in the stairway of his home, but after completion of the work defendant disliked the naked sirens and had them overpainted so that they appeared dressed. Held, that an artist has the right to present his work to the public in its original form. While the vendee has the right to sell or destroy the work, he has no right to change it. In so doing, he invades the artist's copyright which protects the work against unauthorized changes.

Accord: 125 RGZ, 174, July 3, 1929; 1 FR (Fed. Supr. Ct., West Germany) 125/52, Oct. 20, 1953, GRUR, 1954, 80.

3. Other components of the moral right

Some other components have also been claimed as part of the moral right: (*a*) the right to create a work; (*b*) the right to publish a work; (*c*) the right to withdraw a published work from sale; (*d*) the right to prevent "excessive" criticism of a work; and (*e*) the right to prevent any other violation of the author's personality.[25]

(*a*) *The right to create a work.*—The right to create a work is said to become part of the moral right when the author, having contracted with a user to create and deliver a work, is unwilling to do so. The effect of such a contract is said to depend on the moral right because creation is closely related to the personal and moral interests of the author, his honor and his reputation. An author could not be forced to create and publish a work against his will. His refusal to create the promised work, however, makes him liable for damages.[26]

The French courts have frequently refused to decree specific performance (but have awarded damages for breach of contract) where a work has not been delivered to the client; and, according to most text writers, such decisions are based on the author's moral right.[27] In Germany the same result is reached under general contract principles but is not considered to be based on the moral right.[28]

(*b*) *The right to publish or not to publish a work.*—The right to publish a work or to keep it secret is said to be as natural and incontestable as the right to create. It consists of the right of the creator independently to decide when and how to communicate his work to the public.[29]

Article 19 of the French copyright law of 1957 provides that the author alone has the right to divulge his work, and after his death his executors, if any, and after their death, or if the author willed otherwise, the persons named in Article 19 have such right. Although

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[25] These are said to be components of the moral right under the dualist or "classical" (French) theory. For other systems see: Smoschewer, UFITA 1930, 349; Mueller, UFITA 1929, 267.

[26] Michaelides-Nouaros, *op. cit. supra,* note 5, at 185, 186.

[27] The standard case cited on this point is *Whistler* v. *Eden,* Civ. Trib. Seine, March 20, 1895, D.H. 1898.2.465; Ct. App., Paris, Dec. 2, 1897, S. 1900.2.201; Supr. Ct. March 14, 1900, S. 1900.1.489, James McNeill Whistler has undertaken to paint Lady Eden's portrait for a fee of 100 to 150 guineas. Lord Eden sent a fee of 100 guineas. Whistler declared the fee insufficient but he cashed the check. The lower court held the contract valid and ordered Whistler—who meanwhile had overpainted Lady Eden's face in the picture—to restore the work to the *status quo ante* and deliver it to Lord Eden, or to pay ten francs penalty for every day of delay and to return the fee plus 5 percent interest and pay 1000 francs damages.

On appeal by Whistler, the Paris Court of Appeals held that this was an executory contract and that Eden, because the painting had never been delivered, had not acquired title to it. Therefore, the artist could not be forced to restore or part with the painting which he had "maliciously changed." However, Whistler was enjoined from otherwise using the painting, had to return the fee plus interest, and was held liable for the damages previously imposed by the lower court. The French Supreme Court affirmed the decision of the Court of Appeals. The case note in Dalloz (1900.1.489 at 490) criticized the decision as against contract rules.

In *Bouillot-Rebet* v. *Davoine,* Civ. Trib. Charolles, March 4, 1949, D.A. 1950, 83, the court held that an artist need not deliver a bust which seemed to him unfinished and unsatisfactory. However, while an artist may justly be jealous of his independence he, like anyone else, must respect contracts.

Plaisant, "Le Propriété Littéraire et Artistique," Extrait du Juris-Classeur Civil Annexes (1954), fasc. 8, No. 35 says: It seems that an author who refuses without justification to transfer title in the work and to deliver it after it has been completed, may be forced to give specific performance. To this statement Professor Escarra remarks in the foreword to Mr. Plaisant's work:

Mr. Plaisant insists that the moral right be subject to the control of the courts in order to prevent abuse of the right. He [Plaisant] also insists that sometimes the author should have to give specific performance. . . . These views which reflect recent tendencies of the courts . . . are open to question. Acceptable *in abstracto* they tend to weaken the basic value of the French doctrine of copyright, namely the preëminence and infrangibility of the moral right, and this at a time where this doctrine is subject to many attacks.

[28] Ulmer, *op. cit. supra,* note 5, at 191.

[29] Michaelides-Nouaros, *op. cit. supra,* note 5, at 187.

there is no provision that the right to divulge a work is a perpetual right, Article 19 further provides that it may be exercised after the expiration of the copyright.[30]

In France, the right to publish has often been tied up with the right to create, and the writers cite the same decisions in support of both rights. German writers generally do not consider the right to publish as part of the moral right.[31] Decisions of the German courts on this point are based on the Law governing publishing contracts and on the general contract provisions of the Civil Code.[32]

(*c*) *The right to withdraw the work from sale.*—The basis for the right to withdraw a work from the market after it has been published is rather dubious. The usual argument advanced is that, where the

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[30] Article 29 of the French copyright law of 1957 provides that the copyright is independent of property rights in the material object, but that the author or his successors to the copyright are not entitled to require the proprietor of the material object to place this object at their disposal for the exercise of the copyright. However, if the proprietor of the object manifestly abuses his property rights to prevent publication of the work, the courts may force him to permit publication. The proprietor of the object, on the other hand, has no right of publication. The exploitation right in posthumous works belongs to the successors of the author if disclosed within fifty years from the author's death; and only if the disclosure is made after that time, the exploitation rights belong to the proprietors of the work who effect publication or cause it to be effected (Art. 23).

In *Anatole France* v. *Lemerre,* Civ. Trib. Seine, Dec. 4, 1911, Pat. 1912.1.98, it was held that, as the publisher had not published the manuscript for twenty-five years, the author could not be compelled to damage his reputation by permitting publication of an obsolete work of his. The case turned on the point that the delay was unreasonable. The Com. Trib. Seine, Dec. 8, 1925, in *Wormser* v. *Biardot* (reported in 2 Olagnier, Le Droit d'Auteur 32 (1934)) held that three years' delay was excessive. In *Raynal* v. *Bloch,* Ct. App. Paris, Apr. 26, 1938, S. 1939.2.17, the author had transferred translation and performance rights; a delay of 4 years, until the last performance took place, was not held excessive.

In *Rouault* v. *Vollard Heirs,* Civ. Trib. Seine, July 10, 1946, D.A. 1946, 107, the heirs of Vollard, Rouault's dealer, had taken possession of a large number of paintings which Rouault claimed were unfinished. Held, that the painter retained all rights in his works and could complete, change, or destroy them.

The decision was adversely commented on by D.A. 1946, 121, 122, as going much too far in upholding the moral right:

"The court was misled into holding that intellectual works are outside the ordinary law and above any contract. There are no two different standards of laws, one for artists, and the other for ordinary human beings. The expression [that] 'despite any contract the right is inalienable,' is outdated and, in any case, too general. The theory of a right in the personality has consequences which appear more and more dangerous. Let us hope that the decision in the Rouault case will not make the moral right the basis of error or whim, and that it will not be invoked in the face of a contract freely entered into."

The Court of Appeals in Paris confirmed the lower court in the *Rouault* case (March 19, 1947, Gaz. Pal. April 26, 1947), but insisted to a greater extent on contract interpretation, and played down the moral right. See comments by Desbois, *op. cit. supra,* note 5, No. 541.

In *Dame Canal* v. *Jamin,* Civ. Trib. Seine, April 1, 1936, D.H. 1936.262, Ct. App. Paris, Feb. 28, 1938, D.A. 1938, 73, *rev'd on other points,* French Supreme Ct., May 1, 1945, D.A. 1946, 10, the court said:

"The concept and execution of literary and musical works are solely a product of the personal intellect; such works are the expression of the author's genius and part of his personality. The author is sole master of his thought and controls the conditions and the extent to which he wants to disclose them. He is, therefore, sole judge to decide whether or not, when, under what condition, his work should be published, and to what extent such publication should take place."

In the case of Rosa Bonheur, Ct. App., Paris, July 4, 1865, Pat. 1866.385, the artist's refusal to execute and deliver a painting made her liable to damages for breach of contract. The main difference between the *Bonheur* case and later cases seems to be that at the time of the *Bonheur* case nobody thought of the moral right.

Desbois, *op. cit. supra,* note 5, at 548; Michaelides-Nouaros, *op. cit. supra,* note 5, at 188.

In *Consorts Bowers* v. *Consorts Bonnard,* XIV Revue Internationale du Droit d'Auteur (Jan. 1957) 207, the French Supreme Court held that even unfinished artistic works were part of the community property between spouses with the result that the right of the artist to withdraw his work would terminate with partition of the community property. This result has been said to amount to a confirmation of the moral right by the court but at the same time to a withdrawal of all its efficiency. Garson, L'arret Bonnard et la propriété artistique, XV Revue Internationale du Droit d'Auteur (April 1957) 37. See also D.A. 1957, 214. This problem is treated in Article 25 of the copyright law of 1957 which provides that the right to disclose a work, to fix the conditions of the exploitation and to defend its integrity belong to the spouse who is the author or to whom such rights have been transferred. See also: Hauert, Contrôle et limites du droit moral de l'artiste, XXIII Revue Internationale du Droit d'Auteur (April 1959) 51.

[31] Ulmer, *op. cit. supra,* note 5, at 187, 191; Runge, *op. cit. supra,* note 5, at 556. The new German draft copyright law (§ 17) considers the right to publish one of the most important ingredients of the moral right (Report, pub. by the Ministry of Justice, Mar. 15, 1954, p. 107).

[32] Thus, 79 RGZ 156; 110 RGZ 275, 112 RGZ 173; 115 RGZ 858; Supr. Ct., Oct. 15, 1930, UFITA 1930, 633.

author has undergone a change of conviction or where, in the light of subsequent developments the work has become obsolete, he cannot be expected to permit further distribution.[33]

Article 32 of the French copyright law of 1957 gives the author the right to correct or retract his work. However, he cannot exercise this right except by indemnifying in advance the transferee of the exploitation rights for the loss that the correction of retraction may cause. If an author were to exercise this right after publication of his work, the cost of this indemnification may well render this right nugatory.[34]

(*d*) *The right to prevent excessive criticism.*—"Excessive" criticism has been defined as criticism made solely for the purpose of vexation.[35] It is, however, conceded by all writers that reasonable criticism must be free, no matter how severely it may condemn a work.[36]

It has been said that this right represents a new application of the right to the integrity of a work, and that, in France, it may be defended by invoking the law of July 29, 1881, as amended by the law of September 29, 1919.[37] However, under that law anyone, not just an

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[33] Michaelides-Nouaros, *op. cit. supra,* note 5, at 277; Ulmer, *op. cit. supra,* note 5, at 275. Against the right: Plaisant, *supra,* note 27, No. 47.

It seems that the cases brought forward in support of the right of withdrawal after publication in *France* did not support this thesis. They are:

Whistler v. *Eden,* D. H. 1898.2.465, S. 1900.2.201, S–1900.1.489, *supra,* note 27. In that case the work was not published, or even delivered.

Camoin v. *Carco,* D.P. 1928.2.89, Gaz. Pal. 1931.1.678. In that case the painter Camoin had torn up and discarded several of his paintings. Someone found and reassembled the canvasses, and sold them. Held, the painter could prevent such unauthorized publication.

Dame Olinquin v. *Lecocq,* S. 1900.2.122. This case turned on the question whether the property rights inherent in a copyright were community property between spouses. Held in the affirmative, but that the author-spouse retained his right to change the works or even "suppress" them, except where he did so only to annoy his ex-spouse.

Dame Canal v. *Jamin, supra,* note 30. Held, that *prior* to publication the author is the sole judge whether he wants to publish his work.

In *Germany:*

After publication the author has no right of recission, but may buy back at the wholesale price whatever copies the publisher has in stock. The author need have no reason, connected with the moral right or other, to do so.

[34] Desbois, *loc. cit. supra,* note 9, says: This means that in many circumstances the right which he is offered will vanish like a mirage: his means may not allow him to face such payment of damages even on a modest basis. Furthermore, the law is careful to prevent that scruples and remorse serve as a pretext for regrets quite different from a soul searching: the author cannot have recourse to the right of withdrawal in order to make a more advantageous contract than the one he had concluded before, since Article 32, par. 2, provides that if he regrets having exercised the right of withdrawal, he must offer first choice to his contract partner under the previous conditions. Finally, while he may rescind his contract, the injury caused thereby is mitigated since, far from having the right to go back on his word even for the purest of motives, all he has is an option either to overcome his scruples and fulfill his contract or to pay off his previous obligation in money and thereby repurchase his freedom.

Under Article 142 of the Italian copyright law an author may withdraw his work for reasons of the moral right. However, he must notify the Minister of Public Culture who in turn must give public notice of the author's intent. Also, the author must idemnify all persons who have acquired rights in connection with the reproduction, distribution or performance of the work.

Article 33 of the German draft copyright law grants the right of withdrawal if the transferee of the right to use the work does not properly exercise this right. No moral right seems to be involved here. Apart from various conditions which must be fulfilled before the right may be exercised, the author must pay equitable damages to all concerned.

Under all these laws the "right to withdraw a work is merely the possibility granted by the law, for various reasons, of rescinding a contract and paying damages therefor."

[35] Michaelides-Nouaros, *op. cit. supra,* note 5, at 287, considers the right to prevent such excessive criticism part of the moral right. On the other hand, Ulmer, *op. cit. supra,* note 5, at 188, 189, says: Critique must be free. Even malicious critique, in my opinion, is no violation of the droit moral.

Ulmer criticises the Polish copyright law of 1926 which protects (Art. 58) the author in cases of knowingly false criticism. He says, at 189: A defense against knowingly false criticism is feasible under the general rules of law. It seems objectionable to relate such a defense to copyright. The theory that the author should have against the critic a right to the respect of his work would lead to the unacceptable result of very extensive control of criticism by the courts.

[36] So held in France: *Borgo* v. *Poneigh,* Civ. Trib. Seine, Jan. 6, 1922, Pat. 1922, 256. *Benoit* v. *Rudler,* Civ. Trib. Seine, July 23, 1921, Pat. 1921.300. The Court of Appeals of Paris held in *Abragam and French Union of Critics* v. *Solane,* D.A. 1954, 37, that criticism of literary, musical or dramatic works is in the public interest and must be free. The writer, musician or actor must accept blame as well as praise, even where the criticism is against him personally as long as it remains within the frame of his work or performance.

[37] Michaelides-Nouaros, *op. cit. supra,* note 5, at 286 *et seq.*

author, has the right to reply in the same medium to any personal attack made upon him in a newspaper or periodical.

In Germany protection is afforded by the law of libel and slander.[38]

(*e*) *The right to relief from any other violation of the author's personality.*—This right is asserted to provide protection of the author's special personality. Any act is said to be prohibited that hurts the special personality of the author, i.e., his professional standing. Such an act may consist of a violation of an express or implied clause of a publishing contract, or of a tort.[39] This part of the moral right allegedly protects the author against unfair use or misuse of his name, his work, or his personality.[40] Thus, it is not permissible without the author's specific consent to use a work of art for commercial advertising, or to quote the author of a scientific book as endorsing commercial products by virtue of statements made in that book.[41]

4. Inalienability of the moral right

The moral right accrues to the author with the creation of his work and protects his freedom, honor, and reputation. Alienation of the substance of the moral right is considered impossible in view of the nature and the purpose of the right.[42] This approach has led some writers to the conclusion that any contract which permits acts detrimental to the author's honor must be void,[43] because the moral right cannot be an object of commerce.[44, 45] It is sometimes overlooked that this doctrine necessarily is riddled with exceptions and that, even in theory, the possibility of a contractual waiver has been admitted in

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[38] The provisions on libel and defamation (sec. 193, German Penal Code) or the tort provisions of the German Civil Code (§§ 823(2) and 826). Apparently, there are no decisions on this point involving the rights of authors.

[39] Michaelides-Nouaros, *op cit, supra,* note 5, at 293.

[40] See the *Bernard Frank* case, *supra,* note 12.

[41] *French* cases.

A work of art may not be used for commercial advertising, Civ. Trib. Seine, Apr. 3, 1897, Pouillet, *op. cit. supra,* note 6, No. 204 *bis.* Unreasonable increase in sales price may give rise to the suspicion that the author is mercenary, *Veuve Vaucaire* v. *Vermont,* Gaz. Trib. 1922.2.217. Unjustified interruption of publication of novel in newspaper held to invade moral right, *Viney* v. *Le Matin,* Pat. 1913.2.45.

Reproduction of work of art on cheese label not permitted, *Le Duc* v. *Ponible,* Pat. 1923.359. Text of scientific book may not be used for advertisement, Civ. Trib. Seine, July 22, 1876, March 4, 1880, Pouillet, *op. cit. supra,* No. 510 *bis.* Work of serious music may not be used in film next to Viennese Waltz, *Stravinsky* v. *Soc. Warner Bros.—First National Film,* Civ. Trib. Seine, July 27, 1937, D.A. 1938, 107.

German cases:

Increase in salesprice held *not* a violation of the moral right, 110 RGZ 275. (According to § 21 of the Law on Publishing Contracts a publisher may lower, but *not* increase the salesprice.)

Moving to a new location of, and making changes in a work of art held not violation of moral right, Ct. App. Hamburg, Dec. 23, 1932, GRUR 1933, 327.

[42] Michaelides-Nouaros, *op. cit. supra,* note 5, at 89; *accord: Ulmer, op. cit. supra,* note 5, at 60: Runge, *op. cit. supra,* note 5, at 224: Desbois, *op cit. supra,* note 5, No. 569.

[43] Michaelides-Nouaros, *op. cit. supra,* note 5, at 96; Mittelstaedt, *supra,* note 19, at 87; Mueller, *supra,* note 19, at 388.

[44] As to whether it is not, in fact, an "object of commerce," the opinions seem divided. See the Report of the Internat. Federation of Associations of Film Producers in D.A. 1954, 45; Baum, The Brussels Conference for the Revision of the Berne Convention, (English translation) 24 (1949).

Plaisant, *op. cit. supra,* note 27, No. 7 says:

"The inalienability of the moral right is proclaimed by numerous lower court decisions and by certain textwriters [*cit. om.*]. It seems to us, however, that application of this statement, without further qualification, would lead to impossible and inequitable results which, in the last analysis, would be contrary to the interests of the author. . . . It appears that, where the author has made an express contract, he cannot invoke his moral right where it is contrary to such contract."

Michaelides-Nouaros, Revue Hellénique de Droit International, July-Sept. 1953, 239, seems to recede to some extent from his former stand as to the inalienability of the moral right.

[45] Katz, *supra,* note 1, at 407, suggests that the moral right may be destroyed by laches, where the author fails to complain of a violation, but that "A right which is inalienable is not only non-transferable, it is also incapable of being expressly contracted away."

the form of a limited assignment of the exercise of the moral right,[46] or trusteeship.[47]

Article 1 of the French copyright law of 1957 provides that copyright exists by the mere fact of creation of an intellectual work, and Article 6 states that the moral right is inalienable and inprescriptible. Before this law went into effect, the French copyright law specified only that the copyright (i.e., the property rights), may be assigned in whole or in part.[48] Lacking any statutory basis for the claim of the inalienability of the moral right, the justification therefor was sought in the court decisions.

The French courts have consistently ruled out a presumption of a tacit waiver of the moral right,[49] but they permit reasonable changes without the author's consent in the case of a contribution to a collective work [50] or in the case of an adaptation.[51] An express contractual waiver of the moral right by the author is usually held valid.[52]

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[46] Michaelides-Nouaros, *op. cit. supra,* noté 5, at 93.

[47] Ulmer, *op. cit. supra,* note 5, at 68.

Article 11 of the French copyright law provides that authors of anonymous or pseudonymous work enjoy the moral and pecuniary rights granted in Article 1, but that they are represented in the exercise of these rights by the original publisher until such time as they declare their identity and prove their authorship. Under Article 56 a publisher may make changes in a work with the author's written consent and in the case of an adaptation, necessary changes are always permitted. The provision of Article 31 that "the transfer of authors' rights shall be subject to the condition that each of the rights transferred shall be specifically mentioned in the act of transfer" may well be applied to a contractual clause waiving the moral right, or entrusting its exercise to another person. Since the author, under Article 6, may provide by will for the exercise of the moral right by a third person, it may be that he could also do so by contract *inter vivos.*

[48] The French copyright law of 1957 provides that the exercise of the moral right may be limited by contract; upon written consent by the author, the publisher may make changes in the work (Art. 56, 2).

[49] Thus, *Blanchar, Honegger and Zimmer* v. *Société Gaumont,* note 22, *supra; Metro-Goldwyn-Mayer* v. *Hess,* Gaz. Pal. June 16, 1950; *Prévert and Carné* v. *S.N. Pathé Cinéma,* note 22, *supra; Théatre de l'Opéra Comique* v. *Valdo Barley,* D.H. 1936.2.26.

[50] Author not permitted to object to changes in contributions: Civ. Trib. Marseille, Dec. 19, 1902, Gaz. Trib. 1903.2.393; Civ. Trib. Seine, June 2, 1904, D.A. 1931, 116. If the author refuses to have his name on the changed work he may merely demand that his name be omitted: Ct. of Nancy, May 8, 1863, Pat. 1863. 380.

The right to be named as author of a part of a collective work is denied in Article 9 of the French copyright law of 1957, paragraph 3 of which reads as follows:

"A 'collective work' is a work created by the initiative of a physical person or legal entity who edits it, publishes it and discloses it under his direction and name, and in which the personal contributions of the various authors who participated in its development are merged in the totality of the work for which it was conceived, so that it is impossible to attribute to each author a separate right in the work as realized."

Article 13, par. 2 further provides: "The author's right [in a collective work] shall rest in this person". (i.e., the person in whose name the work was disclosed).

[51] *Bataille* v. *Bernhard,* Ct. App. Paris, Apr. 28, 1910, Ann. 1910.191.

[52] *Bernstein* v. *Matador et Pathé Cinéma,* the so-called "Mélo" case, D.H., 1933.533, D.A. 1933, 104, recently followed in *Barillet and Crédy* v. *Soc. Burgus Films,* Civ. Trib. Bordeaux, Jan. 15, 1951, D.A. 1952, 66.

In *Bernstein* v. *Matador et Pathé Cinéma, supra,* the French landmark case on the question, the playwright, Henri Bernstein, sued the defendant motion picture producers for violation of his moral right because of changes made by the defendants in adapting his work. The defendants admitted the changes, but claimed they were necessary and, furthermore, that they had been agreed to by the plaintiff. The question was whether a covenant which permitted all necessary changes was valid in the face of the author's "inalienable" moral right. The court held that this covenant, though unusual, was binding on the parties. To the plaintiff's allegation that, despite this clause, he retained the right to prevent any change that appeared unacceptable to him, the court replied in part:

"To maintain this theory, [plaintiff] relies on the textwriters and certain court decisions giving to authors of literary and artistic works the continuing right to watch over the integrity of their works that they have assigned, and to prevent mutilation and deformation of such works. These principles have never really come under discussion except in actions on contracts regarding publication and reproduction of a work [as distinguished from adaptation.] In such cases they are explained and justified because any change mutilates and alters the work. The case is different where a dramatic or literary work is adapted for a motion picture. There the original work remains intact, regardless of what is done in the new work which is inspired by, and more or less closely resembles, the original work but which is necessarily different because it is subject to different techniques and serves different ends. Therefore, it is an absolute necessity that such changes be permitted by the author and the author, once he has consented to them, is definitely bound by his consent even if later the changes seem completely to distort his work. The author may also consent to leave the decision concerning the amount of changes to his assignee."

In the *Barillet* case, *supra,* the court held that an author necessarily had to consent to all changes required for adaptation to a different medium, and that the question whether the moral right was violated was for the court to decide.

The German copyright law provides that the assignee of a copyright may not make changes in a work, its title, or the author statement. However, any such changes may be authorized by contract.[53] The law presumes consent where the author could not in good faith object to changes necessitated by the method of reproduction, or adaptation, or by the type of publication in which the work appears.[54] The German decisions are in accordance with these statutory provisions.[55]

The "inalienability" of the moral right may be defined as follows: By its very nature as a personal right, the moral right is not capable of transfer. Where a work is part of a collective work (of the kind in which contributions are commonly anonymous), the right to be named as author is deemed to be waived. Where a work is used by a direct method of reproduction or performance, the courts usually uphold the moral right to prevent changes; but where the work is adapted to a different medium, reasonable changes are permitted even without an express waiver of the moral right. Where the author has expressly waived his moral right he is bound by the contract and his moral right is unenforceable despite its alleged inalienability.

5. Transmission of the moral right to the author's heirs

Rights of personality usually expire with the death of the person under any system of law. But it has been said that the protection of the memory of a deceased author has necessitated an exception to the rule. This exception is alleged to have been generally admitted by the courts, the textwriters, and the laws for the protection of the author's personality.[56] According to most writers, not all components of the moral right pass to the author's heirs: the "positive" components die with the author; only the "negative" ones pass to the heirs. The right to create a work, to publish it, to change it, to withdraw it from circulation, and to destroy it, are said to be innate positive components. On the other hand, the right to prevent others from making changes or from committing acts detrimental to the author's reputation are considered negative components that require no personal act by the author and may, therefore, be transmitted to his heirs.[57]

Articles 19 and 20 of the French copyright law of 1957 carefully regulate the exercise of the right of publication after the death of the author. The group of persons that may exercise the right is quite narrow: first, the executors designated by the author; then, unless the

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The Court of Appeals in Paris in *Banque de France* v. *Consorts Luc-Olivier Merson,* March 12, 1936, D.H. 1936.2.246, held that the artistic property right contains a non-pecuniary right which attaches to the person of the owner and which makes it possible, in case of assignment, to enforce the respect due the work regarding its integrity. This right passes to the heirs of the artist. There is no doubt that the artist may forego the exercise of his moral right, but it must be shown that such abandonment clearly results from the documents and circumstances of the case.

[53] LUG, § 9(1); KUG, § 12(1).

[54] LUG, § 9(2); KUG, § 12(2).

[55] In 119 RGZ 401, Jan. 14, 1928, the German Supr. Ct. held that permission to publish an article in a periodical under the author's name did not carry with it an implied consent to changes completely distorting the sense of the article. Held against tacit waiver of moral right: Supr. Ct., March 28, 1936, GRUR 1936, 827; Ct. App. Hamburg, March 20, 1952, GRUR 1952, 588. Held, that contractual waiver of moral right is permissible: Landgericht (Dist. Ct.), Berlin, Nov. 4, 1930, UFITA 1931, 73.

[56] Michaelides-Nouaros, *op. cit. supra,* note 5, at 114, 115. *Accord:* Ulmer, *op. cit. supra,* note 5, at 210. Plaisant, *op. cit. supra,* note 27, No. 66, says:

"The moral right is basically a personal right. . . . After the death of the author the moral right passes to the heirs and legatees. However, the moral right does not keep its strictly personal character when the heirs get it: it becomes somewhat weakened."

[57] Michaelides-Nouaros, *op. cit. supra,* note 5, at 116. It is open to question whether the rights to publish or to destroy a work are, if at all, parts of the moral right, "positive" aspects of this right. Posthumous publication, or destruction of a work by the proprietor is permitted under most laws.

author has made a testamentary provision, the descendants, the spouse if not divorced and remarried, the heirs other than descendants who inherit all or part of the estate, the universal legatees or donees of all the future assets.

If any of the persons abuse the right in the course of its exercise, or if its nonexercise appears to amount to an abuse, the courts will decide on the matter. The same applies when the representatives of the author cannot agree on publication of a work, or when there is no known successor, no heirs and no spouse entitled to the estate. The public interest in the matter is safeguarded by the provision in article 20 that the Minister of Arts and Letters may refer such matters to the court.

Even before the French copyright law of 1957 went into effect, the French courts protected the integrity of a work after the author's death.[58] In one instance, the moral right of the heirs has been recognized after expiration of the copyright,[59] and the integrity of the work has been defended even against the author's heirs.[60]

In Germany, the heirs may enforce all rights inherent in the copyright, including those parts of the moral right recognized in the statute.[61] In view of the German theory of inseparability of the moral right and the property rights, all rights of both categories are held extinguished at the end of the term of copyright protection.[62]

6. Berne countries protecting the author's personal rights outside the copyright law

Some member countries of the Berne Union fulfill the requirements of Article 6*bis* of the Berne Convention by affording equivalent protection to authors under general laws for the protection of the personal rights of all individuals.[63]

(*a*) *Great Britain.*—The moral right as such is not part of the domestic British Law.[64] The Report of the Copyright Committee of 1952 preceding the Copyright Act, 1956 stated in part: [65]

219. We have headed this Part of our Report *droit moral* which we believe to be a term unknown to our jurisprudence.

220. We understand that in a number of Continental Countries specific legislation exists extending protection in respect of an author's honour and reputation. In the United Kingdom protection is given by the common law, in addition to various statutory provisions.

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[58] *Merson* v. *Banque de France, supra,* note 15.

[59] *De Pitray* v. *Schatz,* D.H. 1936.2.548.

[60] *Brugnier Roure* v. *de Corton,* Gaz. Pal. 1906.1.374, D.A. 1907, 137; see case of Mr. Taber of New York, in D.A. 1899, 111.

Michaelides-Nouaros suggests, *op. cit. supra,* note 5, at 332, that the exercise of the moral right after the author's death should be, at least in part, the task of professional organizations.

[61] Ulmer, *op. cit. supra,* note 5, at 210. The German Supr. Ct. first denied that the moral right, if it existed at all, passed to the heirs. *Heirs of Richard Wagner* v. *Earl of D.,* 41 RGZ 43 (1898). Later the Court reversed itself: *Heirs of Strindberg, Mueler* v. *Hyperion,* 102 RGZ 134 (1920).

[62] Ulmer, *op. cit. supra,* note 5, at 210.

[63] Fox, The Canadian Law of Copyright (1944) says at 429: "It must be remembered that the International Conventions have no direct effect either in Canada or in the United Kingdom, as they have not been given any direct statutory effect." See also *id.* at 431, 546.

[64] The British Copyright Act, 1956, 4 and 5 ELIZ. 2, chap. 74, contains no provisions on the moral right.

Hoffmann, Die revidierte Berner Übereinkunft (1935) 108, says that at the Rome Conference for the revision of the Berne Convention, the British and Australian delegates opposed any regulation of the moral right as contrary to British copyright and common law. They acquiesced when it was pointed out that the moral right was the equivalent of protection under the common law by action in tort.

[65] Presented by the President of the Board of Trade to Parliament by Command of Her Majesty, October, 1952.

224. We feel that in general many of the problems involved do not lend themselves to cure by legislative action, but are of a type that can best be regulated by contract between the parties concerned. Authors are already protected at common law against anything amounting to defamation of character.

225. In a field so vague and ill defined it seems to us to be impossible—even if it were considered desirable—to frame legislative proposals to meet all possible problems. In general, the common law of this country provides adequate remedies, and in addition there are certain statutory remedies to meet particular and defined cases. For example, Section 7 of the Fine Arts Copyright Act, 1862, gives artists a measure of protection against the unauthorized alteration of their drawings or the fraudulent affixing of signatures to them. We recommend that this protection should be continued, and that [it] should be extended to apply also in the case of literary and musical works.

(*b*) *Canada.*—Section 12(5) of the Canadian Copyright Act, 1921,[66] provides:

> Independently of the author's copyright, and even after the assignment, either wholly or partially, of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to restrain any distortion, mutilation, or other modification of the said work which would be prejudicial to his honour or reputation. 1931, c. 8, 5.5.

This provision is practically the same as Article 6*bis* (1) of the Rome-Berne Convention.

Mr. Fox, the well-known Canadian copyright expert, has said:[67]

> That part of the section [12(5), Copyright Law] is to some extent an illustration of the type of legislation that so often emerges from parliament—conceived in vagueness, poorly drafted, sententious in utterance, and useless in practical application.
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> . . . Until judicial decision, which is as yet lacking, has considered the section, it will remain the same sort of pious parliamentary hope as S. 11 of the Unfair Competition Act, 1932, . . . which did nothing to the common law.

Presumably in Canada, as in Great Britain, the common law is thought to afford protection to the personal rights of authors.

(*c*) *Switzerland.* Article 44 of the Swiss Copyright Law of 1922 refers protection of the moral right to the general provisions of the Civil Code and the Code on Obligations.[68]

Thus, the principal basis for protection of an author's personal rights is Article 28 of the Civil Code[69] which states in part: Anyone whose personal rights are violated by an unlawful act, shall have the right to demand that such act be enjoined by the courts. This provision has been said to protect the paternity right, to enable an author to prevent unauthorized changes in, or other acts concerning his work that affect its value,[70] and to defend his right of privacy.[71] In Switzerland, authors as a class enjoy no preferential treatment as regards their personal rights, but the rights are protected in much the same

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[66] Chap. 32, RSC 1927, as amended by chap. 8, 1931, chap. 18, 1935, chap. 28, 1936, chap. 27, 1938. See also § 26(2) Canad. Copr. Law. Cases on common law protection of authors' personal rights in Canada and Great Britain are to be found in Part II of this study.

[67] U. of Toronto L. J. 1945–46, 126. See also: Fox, The Canadian Law of Copyright (1944) 601, 602.

[68] Art. 27 to 29, Civil Code; Art. 49, Code on Obligations. See Bianco, Revue Suisse de la Propriété Industrielle et du Droit d'Auteur, 1952.2, 150.

[69] Egger, Annotations to the Swiss Civil Code, Art. 28, Note 26.

[70] Buergi, 66 Zeitschrift für Schweizer. Recht 10 (Switzerland 1947).

[71] *Ibid.*; see Tuor, note 72, *infra.*

In *Kasper* v. *Widow Hodler,* BGE (Swiss Fed. Courts) 40.2.127, July 20, 1944, the widow of a painter was held entitled to protection of her husband's memory. Unauthorized exhibit of a painting depicting the well known artist on his deathbed was held an invasion of the widow's right of privacy under Art. 28, Civil Code and Art. 49, Code on Obligations.

In *Mueller* v. *Rossi,* BGE 71.4.225, Dec. 7, 1945, it was held that the Swiss law (§ 173, Penal Code) offered no protection to the *artistic* reputation, but only protected against defamation of an artist's *personal* honor. *Accord:* In re Kupferschmidt, BGE 42.4.172, Oct. 18, 1946.

manner and to the same extent as they are protected in this country by the common law.[72]

II. The Moral Right and the Law of the United States

Only a few writers have discussed the doctrine of moral right in relation to the law of the United States.[73] Their conclusion, that the doctrine of moral right guarantees full protection of personal rights of authors, appears to be based more on the theoretical presentation of the doctrine by its European exponents than on its application by the European courts; conversely, the protection of authors' personal rights in the United States is presented by them in the light of those court decisions most unfavorable to authors.

The doctrine of moral right as such is not recognized in the United States as the basis for protection of personal rights of authors. Nor do our statutes provide for the protection of personal rights of authors as a class. The question is: how does protection given in the United States on other principles compare with that given abroad under the moral right doctrine? In order to find the answer, we shall consider our court decisions under the same headings used above in discussing the contents of the moral right.

1. The paternity right

There is no provision on the right of paternity in the American copyright law. Protection of the right to the proper attribution of authorship is provided under the general principles of law regarding contracts, or torts such as invasion of privacy, libel, or unfair competition.

The omission of an author's name was considered in *Clemens* v. *Press Publishing Co.*[74] An author sold publishing rights to a story and the manuscript contained the author's name, as did the galley proofs. The publisher then refused to publish the story except anonymously. The court held:

> Even the matter-of-fact attitude of the law does not require us to consider the sale of the rights to a literary production in the same way that we would consider a barrel of pork. Contracts are to be so construed as to give effect to the intention of the parties . . . . If the intent of the parties was that the defendant should purchase the rights to the literary property and publish it, the author is entitled not only to be paid for his work, but to have it published in the manner in which he wrote it. The purchaser cannot garble it or put it out

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[72] Tuor, Das schweizerische Zivilgesetzbuch (Swiss Civil Code) 70 (1948) states:
"The main principle on which our whole economic and legal system rests is the principle of personal freedom. This freedom, aside from the fact that its misuse is prohibited, is guaranteed to each person and provides protection against violation by others. This is the case not only where economic interests are violated, but also where there is damage to the personal rights of a person. The term 'personality' includes all rights, which are inseparable from the person."
They are: the right to life, physical and mental peace, freedom, honor, credit, name, and the right to privacy. *Accord:* Troller, Immaterialgüterrechte, vol. 1 (1959), 87.
In contrast thereto, the German Supreme Court, in 58 RGZ 24, Feb. 27, 1904 denied existence of a general right of personality. However, under the post-war Bonn Constitution the Supreme Court of the Federal Republic of Germany seems to have made a beginning toward recognizing a general right of personality. In a decision of May 25, 1954 (Neue Juristische Wochenschrift 54, 1404) the Court held that the Bonn Constitution grants as a constitutional right to each person a general right of personality which is protected as a right to honor and reputation, privacy, freedom of speech, and, generally, to his own personality. See also 15 Entscheidungen des Bundesgerichtshofs (Supreme Ct., Fed. Republic of Germany) 249, and comments by Ulmer in D.A. 1957, 14.
In Italy a general right of personality is not recognized. Sparano, Rassegna di Diritto Cinematographico, III, No. 1, Jan.–Feb. 1954.

[73] *Supra*, note 1. See also Françon, La Propiété Littéraire et Aristique en Grande-Bretagne et aux Etats-Unis (1955) chap. VI.

[74] 67 Misc. 183, 122 N.Y. Supp. 206 (1910).

under another name than the author's; nor can he omit altogether the name of the author, unless his contract with the latter permits him to do so . . . . As I interpret the contract . . ., their intent was that . . . the defendant should publish [the work] under the author's name. The action of the parties indicates the interpretation which they placed upon it. When the plaintiff presented his story to the defendant, it contained his name . . . . The galley proofs . . . had the plantiff's name printed upon [them]. The plaintiff . . . had the right to insist that the story should not be published except under his name.

Ellis v. *Hurst*[75] involved the unauthorized use of an author's name. Defendants had published under the author's true name the plaintiff's non-copyrighted books which originally had been published under a pseudonym. The court granted the author an injunction for the following reason:

The name of the plaintiff was in no way used in connection with these publications until the defendants assumed to use [it] . . . . The plaintiff never granted to the defendants the right to use his name . . . . I think that he has the right to the protection of the statute[76] in order to prevent his own name being used . . . without his consent.[77]

The use of an artist's name in a distorted version of his work was at issue in *Neyland* v. *Home Pattern Co.*[78] An unauthorized crude reproduction of a painting was used as an embroidery pattern and advertised as "straight from the painting" of the artist. The court held that merely to reproduce the painting without changes coupled with the artist's name would not violate his right to the protection of his privacy although it may be an invasion of his copyright. However, to use his painting as a design of a sofa cushion and to employ

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[75] 66 Misc. 235, 121 N.Y. Supp. 438 (1910); see Wittenberg, The Protection and Marketing of Literary Property (1937) 105.

[76] N.Y. Civil Rights Law, §§ 50, 51. See *Elliot* v. *Jones*, 66 Misc. 95, 120 N.Y. Supp. 898 (1910), *aff'd* 140 App. Div. 94, 125 N.Y. Supp. 119 (1910).

[77] In the *"Mark Twain"* case, *Clemens* v. *Belford, Clark and Co.*, 14 Fed. 728, (C.C. Ill. 1883), the court sustained a demurrer to complainant's prayer to enjoin defendant from publishing the author's sketches under his pseudonym "Mark Twain." There was no question of copyright as the sketches were in the public domain; they had been previously published without copyright and under the same pseudonym. The court held that defendant would have had the right to publish the works under the author's known real name, and no greater protection was due the author's equally well known pseudonym.

In an interesting dictum on the author's personal rights the court said:

"An author has the right to restrain the publication of any of his literary work which he has never published. . . . [*cit. om.*]. So, too, an author of acquired reputation and, perhaps, a person who has not obtained any standing before the public as a writer, may restrain another from the publication of literary matter purporting to have been written by him, but which, in fact was never so written. In other words, no person has the right to hold another out to the world as the author of literary matter which he never wrote; and the same would undoubtedly apply in favor of a person known to the public under a *nom de plume*, because no one has the right, either expressly or by implication, falsely or untruly to charge another with the composition or authorship of a literary production which he did not write. Any other rule would permit writers of inferior merit to put their compositions before the public under the name of writers of high standing and authority, thereby perpetrating a fraud not only on the writer, but also on the public."

British law: *Landa* v. *Greenberg*, (1908) 24 T.L.R. 441; *The "Sporting Times" Co.* v. *Pitcher Enterprise Co.*, (1912) Macg. Cop. Cas. 52; *Maitland-Davison* v. *The Sphere and Tatler*, (1919) Macg. Cop. Cas. 1928.

[78] 65 F. 2d 363 (2d Cir. 1933). In this case the painting had been previously published with the artist's permission in an article discussing the painter's work. But the artist had given the defendant no permission to use the painting in any manner. In *Curwood* v. *Affiated Distributors*, 283 Fed. 219 (D.C.S.D.N.Y. 1922) defendants, without authority, had mutilated plaintiff's story in adapting it for a motion picture, but had given plaintiff as the author. The court granted an injunction against use of author's name and title of the story. *Accord: Packard* v. *Fox Film Corp.*, 207 App. Div. 311, 202 N.Y. Supp. 164 (1923). See also *Metropolitan Opera Association* v. *Wagner-Nichols Recorder Corp.*, 101 N.Y. Supp. 2d 483 (1950), 107 N.Y. Supp. 2d 795 (Sup. Ct. 1951); *Kerby* v. *Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P. 2d 577 (1942). *Harris* v. *Twentieth Century-Fox Film Corp.*, 43 F. Supp. 119 (D.C.S.D.N.Y. 1942); *Lake* v. *Universal Pictures Co.*, 95 F. Supp. 768 (D.C.S.D. Cal. 1950).

Author's right to prevent being given as author of a distorted work upheld; *Drummond* v. *Altemus*, 60 Fed. 338 (C.C. Pa. 1894). Relief granted under theory of unfair competition: *Fisher* v. *Star Co.*, 231 N.Y. 414 (1921); under the theory of libel: *Ben-Oliel* v. *Press Pub. Co.*, 251 N.Y. 250, 167 N.E. 432 (1929); *Gershwin* v. *Ethical Pub. Co.*, 166 Misc. 39, 1 N.Y. Supp. 2d 904 (1937).

his name, without permission, to further the sale of such design was held to be clearly a misuse of the artist's work and name, and a violation of personal rights under section 51 of the New York Civil Rights Law.

The use of a performer's name in a distorted version of his performance was held objectionable in *Granz* v. *Harris*,[79] discussed later in connection with the right to the integrity of the work.

In *De Bekker* v. *Stokes*,[80] where the author was upheld as to his rights to the title and format of his contribution to a musical encyclopedia, the court implied a waiver of the author's right to have his name appear on the work: "The plaintiff was not entitled to have his own name appear in the book. There was no stipulation to expose the authorship. A name was chosen for the work. The parties are limited to it." [81]

False attribution of authorship was involved in *D'Altomonte* v. *New York Herald Co.*[82] An author sued for libel and invasion of privacy as he had falsely been given as the author of a sensational story. It was held that using the plaintiff's name as the author of such a story would expose him to ridicule and contempt and the defendant's demurrer to the libel count was overruled.

The case on the right of authorship cited most prominently by the critics of the United States law is *Vargas* v. *Esquire, Inc.*[83] in which an artist sought to enjoin the reproduction of some of his paintings without authorship credit, and demanded damages for misrepresentation. The complaint was dismissed. The case turned on the court's interpretation of a clause in the contract between the artist and the publisher of Esquire magazine which provided in part that "Vargas agrees . . . [that] the name 'Varga', 'Varga Girl', 'Varga, Esq.', and any and all other names . . . used in connection with [the paintings] shall forever belong exclusively to Esquire, and Esquire shall have all rights with respect thereto." The court found that "there [was] no ambiguity in the granting language, nor [could] there be an implied intention . . . of the parties of any reservation of rights [of authorship] in the grantor . . . , and the fact that no reservation was contained in the contract strongly indicates that it was intentionally omitted.[84]

This decision may well be criticized on the ground that Vargas' consent to the use of his name by Esquire did not necessarily convey the right to omit it altogether. The court could have implied a nega-

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[79] 198 F. 2d 585 (2d Cir. 1952).

[80] 168 App. Div. 452, 153 N.Y. Supp. 1066 (1916), *aff'd without op*, 219 N.Y. 573, 114 N.E. 1064 (1916). See also: *Jones* v. *American Law Book Co.*, 125 App. Div. 519 (1908); *Locke* v. *Gibbons*, 164 Misc. 877, 299 N.Y. 188, *aff'd without op.* 253 App. Div. 887, 2 N.Y. Supp. 2d 1015 (1938).

[81] *I.e.*, in encyclopedic works authorship need not be attributed. For Canadian (and British) law see Fox, *op. cit. supra*, note 63 at 570:

"The publication of any work under the name of an author, without his consent, which would injure his character or reputation would obviously constitute a libel (*Lee* v. *Gibbins* (1892) 8 T.L.R. 773; *Glyn* v. *Weston Feature Film Co.*, (1916) 1 Ch. 261) . . . , and if the public is induced to purchase such work in the belief that it was the work of the author in question, and such author is damaged by loss of sales of his own work, he has a remedy by way of action for passing off (*Miller* v. *Cecil Film Ltd.*, (1937) 2 All. E.R. 464)."

[82] 208 N.Y. 596, 102 N.E. 1101 (1913), *modifying* 154 App. Div. 458 (1913).

[83] 164 F. 2d 522 (7th Cir. 1947). See also 166 F. 2d 651 (7th Cir. 1948) *cert. denied* 335 U.S. 813 (1948); 81 F. Supp. 306 (D.C. Ill. 1948). *Compare Susy Products, Inc.* v. *Greeman*, 105 USPQ 146 (N.Y. Sup. Ct. 1955).

[84] As to foreign jurisprudence Michaelides-Nouaros, *op. cit. supra*, note 5, says at 208: In the countries . . . where there is no provision regulating this question the solution depends on the interpretation of the contract . . . [which may contain] an express or tacit clause. . . .

tive covenant, i.e., that the right to use the artist's name carried with it the duty not to omit his name.[85] But since a decision in favor of the artist could have been reached under common law principles, it seems unjustifiable to attack the court, as one writer has done,[86] for its refusal to adopt the moral right doctrine as such.[87]

Some proof for this view may be found in the recent decision in *Susy Products* v. *Greeman.*[88] An artist, known in his field for his fanciful figures and creations, formed a partnership for the manufacturing and selling of miniature pictures to the gift and novelty trade. He signed these articles with the *nom de plume* "Lowell," which name he had previously used and which was well known. The artist later withdrew from the firm which claimed that when he sold his stock and interests in the plaintiff corporation (successor to the partnership) he surrendered thereby his right to the use of the name "Lowell." The corporation brought an action to restrain the artist and others from using this name on products and from marketing products similar to those marketed by the plaintiff. The court dismissed the complaint and gave judgment to the artist on one of his counterclaims. The reasoning of the court was in part as follows:

> It is plaintiffs' contention that when defendant . . . sold his stock and interests in the plaintiff corporation he surrendered thereby his right to the use of the name "Lowell." I do not find this to be the fact, however. . . . [Defendant] never agreed, contracted, sold or assigned his name "Lowell" nor his right to sketch and create his little figures . . .
>
> Upon the proof adduced, plaintiffs' claim to an exclusive right of the use of the name "Lowell" on the future output of the artist . . . is untenable. The mere fact that during his association with [plaintiffs he] permitted his nom de plume to be used, did not vest in [plaintiffs] the exclusive right to use of the name under which he had been known.
>
> Plaintiffs have failed to establish any proprietary right to the use of the name. There is no proof of a writing or contract which tends to establish that [defendant] transferred or assigned to plaintiffs the exclusive right to the use of the name in question.

In another case [89] a well known pianist sued a record manufacturer on the basis of the New York Civil Rights Law, sections 50 and 51, and alleged that defendant had made inferior reproductions from phonograph records of plaintiff's performances, sold them as plaintiff's performances, and used plaintiff's name in connection with such sales. The court held that use of plaintiff's name was unauthorized while the plaintiff was under contract with a foreign corporation for reproduction of his performances on records for compensation, and the complaint was held sufficient to allege a cause of action under the Civil Rights Law. It was further held that the artist had a property right in his performance so that they could not be used for a purpose not intended and particularly in a manner which did not fairly represent his service.

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[85] Generally, U.S. courts tend to favor implied negative covenants. Williston, Contracts (1937 ed.) § 1449. In *Wood* v. *Lady Duff-Gordon,* 222 N.Y. 88, 118 N.E. 214 (1917) Cardozo, J. said: ". . . The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed [*cit. om.*]." See also: *Granz* v. *Harris* note 79, *supra.*

[86] Katz, 24 So. Calif. L. Rev. No. 4, 375, at 412.

[87] There is no doubt that the court considered the allegation of a violation of the moral right in the light of a separate cause of action. The critics of the Vargas decision also tend to superimpose the moral right on the contractual commitments in the form of an additional abstract right which is inalienable in spite of any waiver in the contract.

[88] 140 N.Y.S. 2d 904 (Sup. Ct. 1955).

[89] *Gieseking* v. *Urania Records,* 155 N.Y.S. 2d 171 (Sup. Ct. 1956).

In *Harms* v. *Tops Music Enterprises* [90] the court summarized the instances in which courts will protect the integrity of a man's intellectual work as follows:

> . . . To particularize: Courts will protect against (a) omission of the author's name unless, by contract, the right is given to the publisher to do so [cit. om.], or (b) false attribution of authorship [cit. om.], (c) infringement of originality of arrangement or recording of a song [cit. om.], as well as for (d) distortion or truncation of work as to text or content [cit. om.].

However—

> the mere allegation that the lack of control on the part of the plaintiff over the recording [made by the defendant] by resulting in inferior recording, might injure the reputation of the author and the plaintiff, [was] insufficient to bring it within the purview of the rule of unfair competition declared in the cases [cit. om.].

The protection of the paternity right by American courts [91] may be summed up as follows:

The author's right to have his name appear in connection with a contractual use of his work has been upheld in the absence of a waiver of that right. The right may be waived by contract. (The *Vargas* case represented a finding, perhaps erroneous, of such a waiver.) For a contribution to encyclopedic works there is a presumption of waiver if the paternity right is not expressly reserved.

The use of an author's name in a distortion of his work, a false attribution of authorship, and the unauthorized disclosure of an author's name have been held to be torts under the law of libel, unfair competition, or the right to privacy.

2. The right to the integrity of the work

The author's right to prohibit changes made by others,[92] to a large extent, is upheld in the United States under the law of libel or unfair competition. Here, as in Europe, the cases usually turn on the question whether or not a contract permits changes.

In *De Bekker* v. *Stokes* [93] the court prevented the defendant from publishing a work in a form other than that agreed upon. It had been stipulated between De Bekker and the Stokes Publishing Company that the plaintiff's book should be published "in such style and manner as [defendant] shall deem expedient." The Stokes Company, concurrently with making sales in the usual trade way, arranged with the defendant University Society to publish the work as two volumes of a ten volume series as a result of which the sales increased. The court said:

> It appears . . . that . . . the sales have been accelerated but the tenor of the agreement with plaintiff has not been kept. He has the right to insist that the Stokes Company should publish the book under the name of Stokes Encyclopedia of Music, however advantageous to him some other form of presentation to the public may be. . . . The plaintiff . . . has the right to preserve the identity of his creation.

In *Curwood* v. *Affiliated Distributors* [94] the court said:

> While scenery, action and characters may be added to an original story, and even supplant subordinate portions thereof, there is an obligation upon

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[90] 160 F. Supp. 77 (S.D. Cal. 1958).

[91] It should be noted that protection of the paternity right does not depend on copyright. This right exists as well in works in the public domain.

[92] As to the author's affirmative right to make changes (which does not warrant further discussion here) *supra*, at note 81; also: Ulmer, *op. cit. supra*, note 5, at 178.

[93] Note 80, *supra*.

[94] 283 Fed. 219 (D.C.S.D.N.Y. 1922). See also: *Manners* v. *Famous Players Lasky Corp.*, 262 Fed. 811 (D.C.S.D.N.Y. 1919).

the elaborator to retain and give appropriate expression to the theme, thought and main action of that which was originally written. . . . Elaboration of a story means something other than that the same should be discarded, and its title and authorship applied to a wholly dissimilar tale.

In *Granz* v. *Harris* [95] the defendants sold records of abbreviated versions of the plaintiff's musical performance, describing them as presentations of the plaintiff. These unauthorized cuts coupled with the attribution of the abbreviated version to the plaintiff were held to constitute the tort of unfair competition, a breach of contract, and to violate the plaintiff's personal rights in regard to his reputation. The court said in part:

. . . we think that the purchaser of the master discs could lawfully use them to produce the abbreviated record . . . provided he did not describe it as a recording of music presented by the plaintiff. If he did so describe it, he would commit the tort of unfair competition. But the contract required the defendant to use the legend "Presented by Norman Granz". . . . This contractual duty carries by implication, without the necessity of an express prohibition, the duty not to sell records which make the required legend a false representation. . . . As [specific] damages are difficult to prove, and the harm to the plaintiff's reputation . . . is irreparable, injunctive relief is appropriate.

In a concurring opinion, Judge Jerome Frank stated:

I agree, of course, that whether by way of contract or tort, plaintiff (absent his consent to the contrary) is entitled to prevention of the publication as his, of a garbled version of his uncopyrighed product. This is not novel doctrine: Byron obtained an injunction from an English court [96] restraining the publication of a book purporting to contain his poems only, but which included some not of his authorship [*cit. om.*] . . . Those courts . . . have granted injunctive relief in these circumstances: an artist sells one of his works to the defendant who substantially changes it and then represents the altered matter to the public as the artist's product. Whether the work is copyrighted or not the established rule is that, even if the contract with the artist expressly authorizes reasonable modifications (e.g., where a novel or stage play is sold for adaptation as a movie), it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original [*cit. om.*].

In *Royle* v. *Dillingham* [97] the court said:

The plaintiff protests against the production of his play written pursuant to contract for the defendants, on the ground of unauthorized changes and modifications in the text and structural arrangement thereof. The defendant apparently concedes that the changes are of a substantial character, but justifies [his act] on the ground of waiver and consent. I . . . fail to find the claimed waiver or consent. . . . There is nothing . . . that establishes either the proof or the presumption of consent. . . . The defendant by his letter . . . explicitly states that he has accepted plaintiff's play. All subsequent changes are dependent on the will of the plaintiff, whether its exercise be arbitrary or otherwise.

In *Drummond* v. *Altemus* [98] the court stated:

The complainant did send to a journal . . . and permit its publishers to print . . . reports of eight lectures . . ., but these did not give . . . a full and exact representation of these particular lectures, and of the remaining four lectures. . . . [N]o report . . . was furnished to the press or placed before the public. The defendant's book is founded on the matter which had appeared in the [journal], and if that matter had been literally copied, and so as not to misrepresent its character and extent, the plaintiff would be without remedy; but the fatal weakness in the defendant's position is that, under color of editing the author's work, he has represented a part of it as the whole, and even, as to the portion published, has materially departed from the reports.

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[95] 198 F. 2d 585 (2d Cir. 1952).
[96] *Byron* v. *Johnston* (1816), 2 Mer. 29.
[97] 53 Misc. 383 (1907).
[98] 60 Fed. 338, *supra*, note 78.

In *Prouty* v. *National Broadcasting Company*[99] defendant appropriated for broadcasting the title of the plaintiff's novel and used its characters without the plaintiff's consent. The plaintiff alleged that this was done in such a manner as to degrade the artistic quality and harmonious consistency of the novel. The court held:

> If it should appear that in these broadcasts the defendant has appropriated, without plaintiff's consent, plot and principal characters of the novel, and that use being made of her literary production was such as to injure the reputation of the work and [the] author, and to amount to a deception upon the public, it may well be that relief would be afforded by applying well-recognized principles of equity which have been developed in the field known as "unfair competition."

The decision in the equity suit of *Melodion* v. *Philadelphia School District*[100] has been seized upon by the critics of the United States law as an example of the denial of the protection given by the moral right doctrine.[101] The plaintiff, who had entered into a written contract with the School District of Philadelphia to do certain artistic work, averred that his models were so changed by direction of the superintendent of the school board that—

> as a result of the attribution of said [works] . . . to [plaintiff] and the general belief amongst artists and connoisseurs of art that said [works] are actually the creations of [plaintiff], he has been subjected to the ridicule and contempt of all, . . . who are familiar with the [works].

The plaintiff asked for damages and demanded that the school be required to tear down the altered work.

As we interpret the decision, the court declared that the alleged damage to the artist's reputation was a tort which, under a Pennsylvania statute regulating actions concerning public works[102] had to be litigated on the law side of the court. Therefore, the court declined jurisdiction. We are unable to concur in the view that this decision represents a denial of the author's personal rights as such. It was an unfortunate coincidence that, because of the defendant's status as a governmental agency, the plaintiff had no remedy at law.

In *Crimi* v. *Rutgers Presbyterian Church in the City of New York*[103] the plaintiff had painted a mural in the defendants' church. This mural was found objectionable and was obliterated. The artist brought action asking for equitable relief.

The court held for the defendants after an extensive discussion of the artist's moral right[104] and stated that all rights of an artist in

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[99] 26 F. Supp. 265 (D.C. Mass. 1939). Criticized by Roeder, *supra*, note 1, because "the doctrine of unfair competition . . . is designed to protect economic rights . . . [and] it seems incongruous to expand it to the protection of purely personal rights."

[100] 328 Pa. 457, 195 Atl. 905 (1938).

[101] Roeder, *supra*, note 1, at 569 says: "At least one court . . . has seen fit to deny altogether the existence of the [moral] right."

[102] Act of April 8, 1846, P.L. 272, 17 P.S. § 299.

[103] 194 Misc. 570, 89 N.Y. Supp. 2d 813 (1949). See notes in 2 Ala. L. Rev. (1949–50) 268; Wash. U.L.Q. (1951) 124.

[104] The court quoted Ladas, Roeder, and other writers on the moral right, and the French decision of the Court of Appeals in Paris in the case of *Lacasse and Welcome* v. *Abbé Quénard*, June 28, 1932, D.H. 1932.487. In that case a parish priest had accepted plaintiff's painting for his church, but the vicar general, on instructions by the bishop, had caused the paintings to be removed. Held, that the church was the property of the local diocese and that the parish priest had no right to accept the paintings on behalf of the bishop, who had not been consulted. Painting the baptismal font was an injury to the property of another. Further, the artist had made no reservation of right, as against the ordinary right of a proprietor to dispose of his property and destroy it.

Michaelides-Nouaros, *op. cit. supra*, note 5, at 231 would permit destruction where it completely obliterates the artist's original work, because in that case the "spiritual link" is broken. Desbois, *op. cit. supra*, note 5 at 607 doubts that the court in the Lacasse case would have sacrified the artist's right to the respect of his work with the same serenity if the mural had been painted with the consent of the ecclesiastical authorities.

regard to his reputation cease upon sale of his work. This statement seems to go too far, but on all other points in the decision is in line with rulings abroad [105] that after acquiring title and possession the vendee may destroy a work if he is displeased with it.

A curious twist to the assumption that the authors' personal rights find better protection in Europe than in the United States was provided by *Seroff* v. *Simon and Schuster*.[106] In this case the defendants as publishers of the author's book, had sold translation rights in that work to a French publisher who hired a translator and published a French version of the book. The plaintiff, on reading the French version, considered it a complete distortion and a flagrant falsification of the original text. He demanded of the defendants that they insist on recall of the French copies sold and correction of new copies.

The defendants admitted that some of the errors were quite serious and offered a sum to defray a part of plaintiff's expenses in settling the matter with the French publisher. This offer was rejected. When the French publisher denied the existence of any errors and refused to make changes, the defendants offered to the plaintiff an assignment of whatever rights they may have had against the French publisher. Thereupon, plaintiff sued defendants.

The court dismissed the complaint, not because plaintiff had no cause of action, but because he had sued the wrong defendant. The court found that defendants had sold translation rights in the usual manner and were not remiss in their duties in any manner.

As to the substance of the complaint, the court found serious and objectionable errors which—

> would warrant the granting of some relief to an author who was entitled to and interested in the preservation and integrity of his work if the parties responsible for the alteration . . . were before the court.

The court further stated that "a right analogous to 'moral right', though not referred to as such, has been recognized in this country and in the common law countries of the British Commonwealth, so that in at least a number of situations the integrity and reputation of an artistic creator have been protected by judicial pronouncements."

To sum up: Under the tort theories of libel or unfair competition the courts have held that in the absence of express contractual consent by the author, no changes in his work may be introduced that are not required by technical necessities of production or adaptation. However, complete destruction of a work which the author has unconditionally sold is not considered an invaison of the author's personal rights.

3. The right to create a work

We have previously pointed out that under the moral right doctrine the right to create a work refers to the author's refusal to perform a contract. Where a personal contract of this nature is in question, American courts commonly refuse to decree specific performance, but will award damages.[107] Negative covenants, on the other hand, may be

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[105] See the *French Lacasse* case in the preceding note. The German "Rocky Island with Sirens" decision held against mutilation, but *not* against destruction of the mural (see *supra*, note 24).

[106] Misc. 2d 883 (Sup. Ct. 1957).

[107] Corbin, Contracts (1951) § 1184. Contracts to create and deliver a literary or artistic work are personal contracts. Ball, Law of Copyright and Literary Property (1944) 565; Fox, *op. cit. supra*, note 63 at 586. In *Roller* v. *Weigle*, 261 Fed. 250 (D.C. Cir. 1919), the court said that "It would be intolerable if a man could be compelled by a court

enforced whereby an artist will be prevented from performing for another producer,[108] or an author from writing for a different publisher.[109] There are numerous decisions granting injunctions against an artist's or author's serving a competitor where an award of damages for breach of contract was deemed an inadequate remedy.[110]

4. The right to publish or not to publish

The right to publish a work or withhold it from publication is accorded under the copyright statute, [111] by common law copyright,[112] and under the concept of the right of privacy.[113] In the case of letters, the right is enforced even against the recipient.[114]

While in England common law copyright has been abolished,[115] the United States copyright statute provides:

> Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.[116]

This common law protection, together with the exclusive statutory right to publish and copy a copyrighted work adequately guarantees the author's excluscive right to publish his work and to prevent others from publishing it without permission.[117]

In *Pushman* v. *New York Graphic Society* [118] the New York Court of Appeals held that a common law copyright does not necessarily pass with the sale of a work of art, but that an artist, if he wishes to retain or protect this right, must reserve it when he sells a painting for pur-

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of equity to serve another against his will," citing *Boyer* v. *Western Union Tel. Co.*, 124 Fed. 246; *Shubert* v. *Woodward*, 167 Fed. 47; *Gossard* v. *Crosby*, 132 Iowa 155, 109 N.W. 483.

In *Harms and Francis, Day and Hunter* v. *Stern*, 222 Fed. 581, 229 Fed. 42 (2d Cir. 1916) it was held that an agreement to transfer for five years a publishing right in future musical works was a valid and binding contract. "While the agreement could not be specifically enforced, it imposed upon [the composer] an obligation to perform it, and the breach of the agreement could be redressed in an action for damages." See the decision in the French case of *Whistler* v. *Eden supra*, note 27.

[108] *Lumley* v. *Wagner*, 1 De G.M. and G. 604 (Ch. App. 1852); *Duff* v. *Russell*, 133 N.Y. 678, 31 N.E. 622 (1892).

[109] *Tribune Association* v. *Simonds*, 104 A. 386 (Ch. 1918). *Whitwood Chem. Co.* v. *Hardman* (1891) 2 Ch. 416, has somewhat narrowed down the broad decision on enforcing negative covenants in *Lumley* v. *Wagner*, *supra*, note 108. In *Kennerley* v. *Simmonds*, 247 Fed. 822 (D.C. N.Y. 1917) it was held that a negative covenant not to write and publish similar works is not presumed unless indispensable.

[110] *Cincinnati Exhib. Co.* v. *Marsans*, 216 Fed. 269 (D.C. Mo. 1914); *Shubert Theatre Co.* v. *Rath*, 271 Fed. 827 (2d Cir. 1922); *Assoc. Newspapers* v. *Phillips*, 294 Fed. 845 (2d Cir. 1923); *Erikson* v. *Hawley*, 12 F. 2d 491, 56 App. D.C. 268 (1926).

For Great Britain, *accord: Ward, Look and Co.* v. *Long* (1906) 2 Ch. 550; *Macdonald* v. *Eyles*, (1921) 1 Ch. 631.

For Canada, Fox, *op. cit. supra*, note 63, at 582, states that the rule restraining authors from doing anything to render publishers' rights valueless by superseding the first work with another and publishing it through another publisher must be restricted to cases where the author commits actual infringement of the first work.

[111] Title 17, U.S.C. § 1, Act of July 30, 1947 (61 Stat. 652) as amended.

[112] See notes 116 and 117 *infra*.

[113] The right of privacy as a doctrine is not yet universally accepted. 1 Callmann, Unfair Competition and Trademarks (1945) 37.

[114] *Gee* v. *Pritchard* (1818) 2 Swans, 402; *Denis* v. *Leclerc*, Supr. Ct., Territ. Orleans, 1811, 1-3 Mart. 159; *Baker* v. *Libbie*, 210 Mass. 599, 97 N.E. 109 (1912).

[115] British Copyright Act, 1911, 1 and 2 Geo. 5, c. 46, Part III, § 31.

[116] Title 17, U.S.C. § 2. All *commercial* rights in the work after publication depend on statutory protection. *Wheaton* v. *Peters*, 8 Peters 591 (U.S. 1834). The *personal* rights of the author are not affected and are enforceable whether or not the work is published, or under statutory copyright.

[117] In *Millar* v. *Taylor*, 4 Burr. 2303, 98 Engl. Rep. 201 (K.B. 1769) common law copyright was held to be perpetual; the case was overruled in *Donaldson* v. *Becket*, 4 Burr. 2408, 98 Engl. Rep. 257 (1774). In *Wheaton* v. *Peters*, *supra*, note 116, it was also held that common law copyright ends with publication. Until that event takes place the author has a common law action against anyone who publishes his manuscript without authority. *Caliga* v. *Inter Ocean Newspaper*, 215 U.S. 182 (1909).

The right to publish includes, of course, the right to refrain from publishing. *Wallace* v. *Georgia C. and N. Ry. Co.*, 94 Ga. 732, 22 S.E. 579 (1894).

[118] 25 N.Y. Supp. 2d 32 (Sup. Ct. 1914), 39 N.E. 2d 249 (Ct. App. 1942).

poses of publication. A common law copyright in unpublished works, possession of which is transferred but not for purposes of publication, always remains with the author or his legal successors. The recipient or possessor may keep or destroy, but may not publish the work.[119]

5. The right to withdraw the work from circulation

There is no provision in the United States copyright statute nor has any court decision been found permitting an author to withdraw his work from circulation after it has been published.[120] The author must find relief, if any, either in an action in contract or tort.

6. The right to prevent excessive criticism

Not only authors, but any person whose reputation has been unjustifiably injured has an action for libel. The action, however, dies with the person and, unless the libelous attack reflects on the family, there may be no recovery after the death of the libelled person.[121]

Criticism of literary or artistic works is permitted within the limits of "fair comment." In *Berg* v. *Printers' Ink Pub. Co.*[122] the court said:

> Fair and legitimate criticism is always permitted upon any work to which the attention of the public has been invited. It would not be a libel upon the plaintiff to say that the product of his pen was not good. Whatever is written cannot be said to be libelous except something which decreases or lowers plaintiff in his professional character [*cit. om.*]. . . . Criticism of another's activities as are matters of public concern is fair, if the criticism, even though defamatory, is based on facts truly stated, . . . is an honest expression of the writer's real opinion or belief, and is not made solely for the purpose of causing hurt to the other.[123, 124]

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[119] *Baker* v. *Libbie*, 210 Mass. 599, 97 N.E. 109 (1912); *Denise* v. *Leclerc*, *supra*, note 119; *Grigsby* v. *Breckinridge*, 65 Ky. 480 (1867); *State ex rel. Clemens* v. *Witthaus*, *Circuit Judge*, 228 S.W. 2d 4 (Missouri 1950).

In *Chamberlain* v. *Feldman*, 84 N.Y. Supp. 2d 713, 89 N.E. 2d 863 (1949) the Appellate Division of the New York Supreme Court held that independently of the sale of the manuscript the common law copyright or control of the right to reproduce belongs to the artist or author until disposed of by him and that, after the author's death, his estate may enjoin publication of an unpublished manuscript. There was held to be no presumption of transfer of publication rights by virtue of transfer of the manuscript.

[120] Such as Article 32 of the 1957 French copyright law, or section 26, German Law on Publishing Contracts (permitting the author to buy back copies at the lowest trade price), or the Portuguese Copyright Law, Art. 29, under which an author may terminate his contract with the publisher where the latter has so modified the work as to hurt the author's reputation, or Art. 142 of the Italian Copyright Law. Article V, last paragraph, of the Universal Copyright Convention may possibly be considered as, at least, implied recognition of the right of withdrawal. It states: "The [translating] license shall not be granted when the author has withdrawn from circulation all copies of the work."

[121] There may be criminal libel of a deceased person. *State* v. *Haffer*, 94 Wash. 136, 162 Pac. 45 (1917). The reason is that defamation of a dead person may be resented by relatives and tend to disturb the peace.

[122] 54 F. Supp. 795 (D.C.N.Y., 1943), *aff'd without op.*, 141 F. 2d 1022 (2d Cir. 1944). See also: *Battersby* v. *Collier*, 34 App. Div. 347, 54 N.Y. Supp. 363 (1898); *Shapiro, Bernstein and Co.* v. *Collier*, 26 USPQ 40 (D.C.S.D.N.Y. 1934).

[123] The court in the *Berg* case quoted from *Triggs* v. *Sun Printing and Pub. Association*, 179 N.Y. 144, 71 N.E. 739 (1904):

> "The simple purpose of the rule permitting fair and honest criticism is that it promotes the public good, enables the people to discern right from wrong, encourages merit, and firmly condemns and exposes the charlatan and the cheat, and hence is based upon public policy. . . . Criticism never attacks the individual, but only his work."

[124] Roeder, 53 Harv. L. Rev. 554 at 572 objects to the rule that the plaintiff must prove falsity, malice and damages. This is too harsh a rule," and recommends adoption of the French rule giving the right to a reply in the same medium. We have numerous provisions of that kind. "Retraction" statutes have been passed in Alabama, Georgia, Kansas, Michigan, Minnesota, New Jersey, North Carolina, North Dakota, and Ohio, (also Illinois, repealed two years later). Nevada (Comp. Laws 1929) and Ohio (Gen. Code, 1926, §§ 6319–2 to 6319–9) have penal statutes, making it an offense for a newspaper to refuse to publish an answer.

The right to reply, or to force retraction, may be an alternative to a libel action, but it is no substitute. Even in France it has not been so considered. A plaintiff in a tort action for violation of his moral right must also prove malice, injury, and damages. Dalloz, Code Civil (1946) Art. 1382, 1383, notes.

A public charge that a reporter violated a confidence (*Tryon* v. *Ev. News Assoc.*, 39 Mich. 636 (1878)), or that an author is a museum piece and a literary freak (*Triggs* v. *Sun Printing and Pub. Co.*, *supra*, note 123) is libelous *per se*. There need be no proof of special damages.

7. The right to relief from any other violation of the author's personal rights

In *Henry Holt and Co.* v. *Ligget and Myers Tobacco Co.*[125] the court said, concerning quotation from a scientific book in a cigarette advertisement, that the "publication was not one in the field in which [plaintiff] wrote nor was it a scientific treatise or a work designed to advance human knowledge. On the contrary, it is clear that the pamphlet intended to advance the sale of [defendant's] product . . . a purely commercial purpose. It cannot be implied that [plaintiff] consented to the use of his work for such a purpose."

In *Kerby* v. *Hal Roach Studios* [126] the supposedly fictitious name as the sender of a letter advertising a motion picture was actually the name of an artist. The court held that—

> to suggest that a woman has written such a letter . . . is to impute to her a laxness of character [and] a coarseness of moral fiber . . .; and to spread such imputations abroad, . . . is an invasion of privacy.

In the *Neyland* case [127] the unauthorized commercial use of a work of art was also held objectionable as an invasion of the artist's personal rights.

The case of *Shostakovich et al.* v. *Twentieth-Century Fox Film Corporation* [128] turned on the question whether musical works in the public domain may be reproduced on the sound track of a motion picture, the theme of which was in opposition to the composers' political conviction. Appropriate authorship credit was given to the composers,[129] there was no distortion of the works, and there was nothing in the film to indicate that its theme represented the composers' convictions. The demand for relief was based on Section 51 of the New York civil rights law (invasion of privacy), and on allegations of defamation, the deliberate infliction of an injury without just cause, and violation of the plaintiff's moral right as composers. The court found no invasion of privacy as the works were in the public domain. It found no libel and no injury as the works, being in the public domain, could be reproduced without permission and had, in fact, been faithfully reproduced. Concerning the allegation of a violation of the composers' moral right by the reproduction of their works in an inappropriate manner, the court asked: "Is the standard to be good taste, artistic worth, political beliefs, moral concepts, or what is it to be?"

The *Shostakovich* case has been pointed to by some writers as demonstrating the failure of our courts to protect the personal rights of

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In *Sullivan* v. *Daily Mirror*, 232 App. Div. 507, 250 N.Y. Supp. 420 (1931) a newspaper article implied that plaintiff sports-writer had been paid to write a favorable critique of a boxer. Held a libel, as plaintiff's honesty and loyalty to his paper and to the public was impugned.

For excessive criticism see further: *Cooper* v. *Stone*, 24 Wend. 434 (N.Y. 1840); *Dowling* v. *Livingstone*, 108 Mich. 321, 66 N.W. 225, (1896); *McQuire* v. *Western Morning News Co.*, (1903), 2K. B. 100; *Spoener* v. *Daniels*, 22 Fed. Cas. 934 (1854); *Potts* v. *Dies*, 132 F. 2d 734 (D.C. App. 1942).

For British and Canadian law, Fox, *op. cit. supra*, note 63 at 594 *et seq.*

[125] 23 F. Supp. 302 (D.C. Pa. 1938).

[126] 53 Cal. App. 2d 207, 127 P. 2d 577 (1942).

[127] *Supra*, note 78.

[128] 196 Misc. 67, 80 N.Y. Supp. 2d 575 (1948), *aff'd by memorandum opinion*, 275 App. Div. 692, 87 N.Y. Supp. 2d 430 (1949).

[129] The credit line read: "music—from the selected works of the *Soviet* Composers—Dmitry Shostakovich, Serge Prokofieff, Aram Khachaturian, Nicholai Miashovsky, conducted by Alfred Newman," (italics added)—making it obvious that the music was *not* composed for the film.

authors.[130] The court has been criticized for not considering the matter from the composers' point of view. In our opinion, the court asked a pertinent question. Even the European exponents of the moral right doctrine disagree as to whether the right should be based on a subjective or objective evaluation of the facts, while the European courts nearly always prefer the latter.[131] Were we to assume—as do the critics—that the circumstances under which the compositions were used were "obviously inappropriate," the answer would be equally obvious. But that is the whole question: *was* the use inappropriate, solely because the theme of the film ran counter to the composers' political beliefs, there being nothing in the film to associate the composers' beliefs with its theme.

Judge Frank said in *Grantz* v. *Harris* [132] in regard to the doctrine of moral right:

> A new name, a novel label expressive of a new generalization, can have immense consequences. . . . But the solution of a problem through the invention of a new generalization is no final solution. The new generalization breeds new problems. Stressing a newly perceived likeness between many particular happenings which had theretofore seemed unlike, it may blind us to continuing unlikenesses. Hypnotized by a label which emphasizes identities, we may be led to ignore differences. . . . For, with its stress on uniformity, an abstraction or generalization tends to become totalitarian in its attitude toward uniqueness.

To arm a composer with the right to suppress the use of his music in a film because he disapproves of the political view expressed in the film, would come close to censorship and would have little, if anything, to do with the protection of his personality.[133]

III. Summary

In the preceding pages three questions have been examined: What is the moral right? What protection is accorded the moral right in the countries which have adopted the doctrine? And what protection,

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[130] Katz, *supra*, note 1 at 414; Simpson and Schwartz, "Equity" Annual Survey of Am. Law (1948) 642 at 657.

Mr. Katz's hypothetical analogy of including the judge's opinion in a collection of opinions of "radical" judges seems to miss the point: publication of such a work in *this* country may be libel. In *Derounian* v. *Stokes*, 168 F. 2d 305 (10th Cir. 1948), it was held that an imputation of disloyalty to the country in a national crisis is an actionable libel. *Accord: Grant* v. *Reader's Digest Ass'n*, 151 F. 2d 733 (2d Cir. 1945).—But why should the judge care, or what could he do, if the collection were published in Russia?

[131] See the *Barillet* case, *supra*, note 52. Plaisant, *supra*, note 27, No. 15, says: The Supreme Court [of France] has formally held on May 14, 1945, that the exercise of moral right is subject to control and to evaluation by the courts.

[132] *Supra*, note 79.

[133] The *Shostakovich* case was litigated in France in 1953 under the style of *Soc. Le Chant du Monde* v. *Soc. Fox Europe and Soc. Fox Américaine Twentieth Century*, Ct. App. Paris, Jan. 13, 1953, D.A. 1954, 16, 80. The facts were as follows:

On July 7, 1949, plaintiff caused the film *"Le Rideau de Fer"* (Iron Curtain) to be seized. The lower court, on May 31, 1950, ordered the confiscation to be lifted and adjudged the Soc. Le Chant du Monde liable for damages in the amount of $9,000.00.

On appeal, it was held that plaintiff, as assignee of the composers, was entitled to sue for copyright infringement; that Russians enjoyed copyright in France regardless of the lack of reciprocity; and that, under the copyright law of 1793 seizure was in order.

In regard to the moral right the court held that there was "undoubtedly a moral damage." This moral damage, together with the copyright infringement, was thought to be worth $5,000. The film was again seized under Art. 3 of the copyright law of 1793 for infringement.

For British and Canadian law, Fox, *op. cit. supra*, note 63 at 569:

"In a proper case the author has the right to sue for damages to his reputation. *Archhold* v. *Sweet*, (1832), 1 N. and Rob. 162; *Angers* v. *Leprohon*, (1899), 22 Que S.C. 170. . . . Despite the great number of novels and other works which are grossly mutilated in transcribing them into cinematographic productions, no case is on record of this section [12 (5). Can. Copyr. Law] having been invoked."

if any, exists in the United States for the personal rights of authors which, under the doctrine, constitute the components of the moral right?

Article 6*bis* of the revised Berne Convention provides in paragraph (1) that the author shall have the right, during his lifetime, to claim authorship in his work and to object to any violation of the integrity of his work which would be prejudicial to his honor or reputation. This provision contains its own limitation, for a violation is not actionable unless there is a prejudice to the author's professional honor or reputation. Whether or not there is such prejudice is to be determined by the court, and not by the author. At the present time, Article 6*bis* of the Berne Convention seems to represent the limit of agreement among the adherents to the moral right doctrine, because most aspects of the moral right, such as its nature, it components, and its duration are far from crystallized.

Some writers have claimed for the doctrine of the moral right a broad scope which, however, has not yet emerged from the theoretical stage, and which has not found expression in the court decisions of the "moral right countries." The judicial enforcement of the moral right as such, whether based on statutes or, in the absence of any pertinent statutory provision, on court interpretation of the doctrine, rarely goes beyond recognition of the paternity right, and of the right to prevent changes in the work which the court, in its own opinion, considers to be prejudicial to the author's honor or reputation. The European courts, almost without exception, have refused to yield to attempts by authors to invoke the moral right on grounds untenable by objective standards. Manifestly, most courts in the "moral right countries" are not so impressed by the theories of the textwriters as to ignore contractual obligations and the equities on each side of the case.

The other rights claimed by some writers to be components of the moral right are not recognized as such in the Berne Convention. These other rights either have been protected on principles other than the moral right or have not been the subject of litigation. Thus, the right to create a work or to refuse to do so is merely a matter of denying specific performance of a contract to create and deliver a work; and the author is none the less liable for breach of contract. Whether the right to publish a work is considered a property right or a component of the moral right, where the author refuses to fulfill his obligation under a publishing contract, an interpretation of the contract by the court is necessary to settle the question.[134] The right to prevent "excessive" criticism, and the right to prevent any other attack on the author's "special" personality are enforced under the law of defamation, libel or slander, or on some other tort principle unconnected with the copyright law. The right to withdraw a work from circulation apparently has not been litigated in connection with the moral right, and the provisions in several laws granting this right are so restrictive that the right seems hardly more than an illusion.

The question of duration of the moral right is also controversial. Under the German law, present and proposed, the moral right terminates with the copyright, i.e., fifty years after the death of the author.

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[134] It remains to be seen how the French courts will deal with the provision in Art. 32 of the copyright law of 1957 that "Notwithstanding the transfer of the exploitation rights, the author, . . . shall enjoy, in relation to the transferee, the right to correct or retract."

In French jurisprudence and the French copyright law of 1957, the moral right is independent of the copyright term, and lasts forever. Under the laws of Great Britain and Switzerland personal rights of the author terminate with his death. The Berne Convention provides for protection of the author's moral right during his lifetime; after his death, according to paragraph (2) of Article 6*bis*, protection of the moral right may exist "insofar as the legislation of the Countries of the Union permits."

Despite strenuous efforts by the proponents of the moral right doctrine during the last thirty years, progress toward a uniform incorporation of the moral right in the copyright laws of the Berne countries has not been impressive. Some of the member countries of the Berne Union specifically protect the moral right as such (e.g., Austria, France, Italy, Portugal), or recognize it in dispersed provisions concerning one or more of the components of the moral right (e.g., Belgium, Germany, Netherlands), or provide such protection through recognition of the moral right by the courts without benefit of statute (this was the case in France before the copyright law of 1957 was in effect). Other Berne countries protect the moral right of the author only to the extent that, and in the same manner as, personal rights of all persons are recognized (e.g., Great Britain, Switzerland).

The fact that the French copyright law of 1957 and the German draft copyright law [135] reflect widely divergent theories on the moral right makes it apparent that an agreement on the principles of the doctrine is not to be expected in the foreseeable future. However, recent writings of European authors on the subject show a tendency to reduce to more acceptable proportions the formerly excessive claims made for the moral right and to consider, to a greater extent, the practical requirements of publishers and users of literary and artistic works.

Much confusion concerning the doctrine has been created by the claim that the moral right is inalienable, whatever may happen to the property aspects of the copyright. Actually, the moral right is inalienable only in the sense that, like all personal rights, it is not capable of transfer by sale or gift. But there is no effective rule of law which prevents an author from waiving one or more of the components of the moral right. While the courts in the "moral right countries" generally do not construe contracts as implying a tacit waiver of the moral right, there seems to be no decision voiding an agreement which expressly and unambiguously waives those personal rights that comprise the moral right. Moreover, in some situations there is a legal presumption of a waiver of the paternity right or of the right to prevent changes which may prejudice the author's professional standing. Thus, in the case of collective works, such as newspapers or encyclopedias, the paternity right, and sometimes the right to prevent changes, is presumed to be waived. Further, in the case of an adaptation of a work for a different medium, such changes as are reasonably required by the medium are held to be authorized.

Without using the label "moral right," or designations of the components of the moral right, the courts in the United States arrive at much the same results as do European courts. Substantially the same personal rights are upheld, although often under different principles.

[135] March, 1954.

Also, substantially the same limitations are imposed on these rights, frequently on the same basis.[136] Thus, both here and abroad:

(1) An author has the right to be given credit in the publication, performance, adaptation or other use of his work; but he may waive this right. For some types of publications, such as an author's contribution to a collective work, this right is presumed to be waived unless specifically reserved.

Conversely, an author has the right to restrain the use of his name in a work that is not his, or in a distorted version of his work; but he may waive this right.

(2) An author has the right to prevent prejudicial changes in his work; but he may waive this right. When he authorizes the use of his work in a different medium, he is presumed to have consented to the changes necessary to adapt his work to that medium.

(3) An author cannot be compelled to perform his contract to create a work; but he will be liable in damages for breach of such a contract.

(4) An author has the right to publish his work or to withhold it from publication; but he may assign or license this right.

(5) An author may prevent defamation of character (the "excessive criticism" of the moral right doctrine), and unfair use or misuse of his work by an action in tort, such as defamation, libel, slander, or unfair competition.

Judge Frank concluded in the case of *Granz* v. *Harris* [137] that there were adequate grounds in the common law for enjoining distribution of a distorted version, and hence there was no need to resort to the doctrine of moral right as such. We believe that this is generally true for all aspects of the personal rights of authors, and that common law principles, if correctly applied, afford an adequate basis for protection of such rights. In our view, the contention that the author's rights of personality are not sufficiently protected in the United States, and the belief that there is an irreconcilable breach between European and American concepts of protection of authors' personal rights, seem to be dispelled by close scrutiny of the court decisions here and abroad. While a few American courts may be thought to have been remiss in protecting authors' personal rights (especially in finding implied waivers in ambiguous contracts), such decisions are exceptional and may be considered erroneous under common law principles. Given the same facts, the large majority of courts in America and abroad employ the same resonable and equitable standards for the protection of authors' personal rights. This similarity of protection has been obscured by the differences of approach and terminology. There is a considerable body of precedent in the American decisions to afford to our courts ample foundations in the common law for the protection of the personal rights of authors to the same extent that such protection is given abroad under the doctrine of moral right.

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[136] We come to the final conclusion that, under different names and by different procedures, the Anglo-Saxon law resembles the French law more than may seem at first blush. To arrive at this conclusion we simply have to forget whether the moral right is or is not subject to alienation. Plaisant, *supra*, note 27, No. 22.

[137] 198 F. 2d 585 (2d Cir. 1952) (*concurring opinion*).

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