You Can't Take It With You When You Die... Or Can You?: A Comparative Study of Post-Mortem Moral Rights Statutes from Israel, France, and the United States

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I. INTRODUCTION

Picture this, if you will: You’re a starving artist, straight out of college, living in a matchbox-sized room with cockroaches for roommates, waiting for your big break. To pass the time (and pay the bills) you get a highly coveted (though uncreative) job refurbishing old paintings of artists long since dead. You do everything you’re supposed to do – matching colors to a T, adding nothing new, just putting it back to the way it was “supposed” to be. Eventually, you get word – the great great granddaughter of the original artist is suing you for moral rights infringement: you weren’t supposed to fix it – you’re messing it up – leave it the way nature intended it to be.

Alternately, you’re an aspiring author. Despite your ongoing writer’s block, you finally hit the big one – a derivative work based on a book that has been in the public domain for generations; the original work must be fair game to base your new creation on, mustn’t it? Or – an editor, reading an impressive manuscript, but changing around a paragraph or two to get the author’s message across more clearly; surely the author won’t be offended if you make the work better. Imagine, even, you are the parent of a tragically deceased child. While cleaning out their lonely room, you discover a manuscript – an incredible, potential masterpiece – written by your extremely shy child before death – a manuscript, you know, he never would have published on his own; is it not your duty, now, to publish it? These examples make up a tiny sampling of the myriad of awkward situations that can arise when moral rights extend after an author’s death.
Moral rights – including the rights to attribution, integrity, and dissemination – is a sticky, controversial subject even standing on its own. Questions concerning the duration of these rights seem to compound the issue even further: If moral rights protection stems from a desire to protect the author’s intrinsic relationship with the work, when should the protection stop? Upon his death? Upon the expiration of the work’s copyright? …Never? Such questions become even more pressing when a country – especially a self-acknowledged “developing” country such as Israel – enacts a moral rights law of its own, and when consequently no one yet knows where the moral chips, as it were, will fall.

This Article will analyze Israel’s new Moral Rights statute within its newly-passed Copyright Act in light of two opposing, but equally influential, role models: France (whose approach to moral rights and author protection was essentially the model for all moral rights laws to come), and the United States (who has been grudgingly dragged into creating even minimal moral rights laws, kicking and screaming the entire way). Emphasis will be placed on moral rights duration, and post-mortem rights, in particular. Section II of this article introduces the different legal approaches taken by the Berne Convention, France, and the United States, as well as both Israel’s old and new approaches to moral rights. Section III further analyzes and compares these various statutes. Finally, Section IV demonstrates that Israel’s new Copyright Act – although more temperate and reasonable than the extreme measures taken by countries such as France – is still highly flawed. Extending both the right of attribution and the right of integrity after the author’s death threatens a loss of a healthy public domain and presents problems from the country’s own future culture and economy. In addition, it also
encourages frivolous and self-interested lawsuits, unfairly takes away property rights from rightful owners, and may actually even encourage the further distortion of the artist’s original message and meaning in itself. Israel, therefore, should err on the side of protecting the public domain by minimizing post-mortem moral rights protection.

II. THE VARIOUS STATUTORY APPROACHES TO MORAL RIGHTS PROTECTION

A. The Birth of International Copyright Law: The Berne Convention

As technology gets smarter, the world as we know it gets smaller. A world without reciprocal copyright protection consequently seems unheard of, but once upon a time, such a world existed. Until the first draft of the Berne Convention was created in 1886, copyright protection between countries was based primarily on bilateral treaties, and independent countries tended to create the laws they deemed fit for themselves.¹ Throughout its many incarnations, the Berne Convention eventually barred countries from requiring formalities (such as the requirement of copyright registration), created a minimum 50-year term of copyright protection after the author’s death, and mandated

¹ See Roberto Garza Barbosa, Revisiting International Copyright Law, 8 BARRY L. REV. 43, 47 [hereinafter Barbosa, Revisiting International Copyright Law]. The push for international copyright law began in France, and gained momentum after the 1858 creation of the International Congress of Authors and Artists, which was composed of authors of every kind, lawyers, and other influential members of society. In 1878, the Association Litteraire et Artistique Internationale followed, which eventually led to the proposal of the 1886 Berne Act, later signed by 10 influential countries. Since its creation, the Berne convention was revised in 1908, 1914, 1928, 1948, and again in 1971. The 1971 Act is the current version used. Id. at 46-48.

that a work created in any one of the Berne Convention signatory countries must receive the same protection (or more) within the borders of any other signatory country.\(^2\)

In 1928, international moral rights laws were created through the addition of Article 6bis,\(^3\) which provides:

\[
(1) \text{Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.}
\]

\[
(2) \text{The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.}
\]

\[
(3) \text{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.}\(^4\)
\]

Upon first read, this provision may sound quite demanding. The Berne Convention, however – presumably in a desire to remain flexible enough to interest as many possible-signatories as it could – left a lot of room for individual interpretation.\(^5\)

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\(^2\) Id. at 48.

\(^3\) Id.


Subsection 1 of Article 6bis gave authors two different strains of moral rights protection: the right to attribution, and the right to integrity.\(^6\) Generally, the right of attribution grants the author a right to ensure recognition (or lack thereof) as a work’s author.\(^7\) The right of integrity, on the other hand, grants the author the right to intervene when the author feels that a third party has modified the work in a way that impugns the author’s honor or reputation.\(^8\)

Subsection 2 of article 6bis begins with a straightforward duration demand: these moral rights \textit{shall} extend until at least the length of time granted for economic protection (i.e., the country’s individual duration grant for traditional copyright protection – according to the Convention, a minimum of 50 years), if not more.\(^9\) The Convention goes on, however, to include an extremely permissive exception: if, when a country signs the Berne Convention, it does not yet have a provision for post-death moral rights protection, they may choose to allow protection for “some of these rights” to cease upon the author’s death.\(^10\) This ambiguous subsection, in addition to subsection 3 of 6bis

\(^6\) Berne Convention, art. 6bis; \textit{see also} Roberta Kwall, \textit{Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul}, 81 NOTRE DAME L. REV. 1945 (2006) \[hereinafter Kwall, \textit{Intrinsic Dimension}\].


\(^8\) Kwall, \textit{Intrinsic Dimension, supra} note 6. \textit{See also} Rigamonti, \textit{Deconstructing Moral Rights, supra} note 8, at 364. The Berne Convention does not give a definition of “honor or reputation.” \textit{See generally Berne Convention.}

\(^9\) Berne Convention, art. 6bis(2). \textit{See also} Dillinger, \textit{Mutilating Picasso, supra} note 5, at 902.

\(^10\) Berne Convention, art. 6bis(2); Dillinger, \textit{Mutilating Picasso, supra} note 5, at 902. The phrase “some of these rights” leaves much room for interpretation as to whether some (or all) rights \textit{must} be included, or whether the signatory can continue without post-death moral rights protection. The World Intellectual Property Organization urges that at
(which allows each country to enforce the rights as they please), leads to the inevitable result that “moral rights protection...continue[s] to vary from nation to nation even under the Berne Convention.”

B. France: The Nurturing Mother of Moral Rights

Before the Berne Convention was even a twinkle in its creators’ eyes, France was chasing after the idea of a universal copyright law based on its belief that copyright protection is a natural right. In fact, cases recognizing an author’s right to attribution and integrity can be found at least as early as 1814, and quite possibly as early as the late 15th century. Being among the forefront of the conception of moral rights, France’s approach to moral rights protection became part of the inspiration for the Berne Convention. France, however, remained among the rebellious: the minimal standards

least one of the moral rights proscribed by the Convention must be provided after death. Dillinger, Mutilating Picasso, supra note 5, at 902-03.
11 See Berne Convention, art. 6bis(3).
12 Dillinger, Mutilating Picasso, supra note 5, at 903.
13 See Barbosa, Revisiting International Copyright Law, supra note 1, at 46.
14 See Cyrill P. Rigamonti, The Conceptual Transformation of Moral Rights, 55 AM. J. COMP. L. 67, 85-86 (2007) (describing an 1814 case in which the court decided that “‘a work sold by an author to a publisher or a bookseller must bear the author’s name and must be published as sold or delivered, if the author so desires . . . .’”) (quoting Trib. civ. Seine, Aug. 17, 1814) [hereinafter Rigamonti, The Conceptual Transformation of Moral Rights].
15 See Benjamin Davidson, Lost in Translation: Distinguishing Between French and Anglo-American Natural Rights in Literary Property, and How Dastar Proves That the Difference Still Matters, 38 CORNELL INT’L L.J. 583, 605 (2005) [hereinafter Davidson, Lost in Translation]. Ironically, France, in 1957, was one of the last countries to codify their moral rights laws; their caselaw was already so rich, they felt it was not necessary up until that point. See Rigamonti, The Conceptual Transformation of Moral Rights, supra note 14, at 89.
16 See id. at 96. The Victor Hugo Les Miserables case, discussed throughout this Article, was one of the handful of cases which were instrumental in getting the international moral rights movement started.
set forth in the Berne Convention just weren’t enough, and France has henceforth continued to offer far more moral rights protection to authors than the Berne Convention requires.\textsuperscript{17}

In addition to the rights of attribution and integrity required from the Berne Convention, France also grants authors the rights of disclosure and retraction.\textsuperscript{18} The right of disclosure grants authors the power over when and how to divulge his work to the public.\textsuperscript{19} Conversely, the right to retraction grants the right to withdraw the work from the public eye, even after publication, as long as the author “indemnifie[s] the assignee beforehand for any prejudice the reconsideration or withdrawal may cause him.”\textsuperscript{20}

And not only does France grant these additional rights to its authors – it also has made all moral rights “perpetual, inalienable and imprescriptable,” and can only be transferred upon the death of the author.\textsuperscript{21} Consequently, although economic copyright protection can be licensed away and generally expires seventy years after the author’s death,\textsuperscript{22} moral rights in France “attach to [the author’s] person,” so cannot be given away.


\textsuperscript{19} Swack, \textit{Safeguarding Artistic Creation}, \textit{supra} note 17, at 365; \textit{France IP Code}, art. L121-2.

\textsuperscript{20} \textit{France IP Code}, art. L121-4. See also Swack, \textit{Safeguarding Artistic Creation}, \textit{supra} note 17, at 365.

\textsuperscript{21} \textit{France IP Code}, art. L121-1.

\textsuperscript{22} \textit{Id.} at L123-1.
and presumably last for the rest of all eternity. At that point, the author’s heir has the charge of protecting the author’s works the way the author would have done so himself (and not for her own personal gain); once the heir has control, anyone who can prove a personal interest in the matter has standing to sue for mismanagement of the artistic works.

C. The United States: The Berne Convention’s Rebellious Child

While France views moral rights as merely a subset of a greater copyright scheme, the United States approaches authors’ rights in what scholars have referred to as a “patchwork theory”: that is, any moral rights protection given to an author is given through the utilization of many different means of legal enforcement, including such tools as contract law, right to privacy, defamation, or trademark law. True, copyright law in this country deals exclusively with economics; the means to the constitutional end (“promoting progress”) is to make sure the authors receive all the money they deserve to

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25 Id.

26 See Rigamonti, The Conceptual Transformation of Moral Rights, supra note 14, at 73. Rigamonti refers to this view of moral rights as the “monist” theory or the “moral rights orthodoxy.” It is the most common view of moral rights today, globally. Id. at 73-74. However, in practice, France is more of a “dualist” country. See generally Kwall, Intrinsic Dimension, supra note 6.

27 Id. at 75. While some say this approach is a way for the United States to get around its Berne Convention obligations, others say that it is, indeed, moral rights protection, even if the United States doesn’t refer to it as such. Id. at 75-76.
receive for their creation – or at least give them the power to choose who does.\textsuperscript{28} But although our moral rights protection seems minimal (or nonexistent) compared to the likes of France, there is a goody-bag of alternate solutions to the problem of the under-represented author.

Article 1, section 8, clause 8 of the U.S. Constitution – commonly referred to as the “Copyright Clause” – is the basis for all copyright and patent protection in the United States.\textsuperscript{29} The clause states that Congress has the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”\textsuperscript{30} Understandably, the Framers’ intent – to foster creativity and societal progress and to discourage the monopolies they seemed to fear so much – was made clear in the language of the clause by only granting these rights for \textit{limited times}, and in order to \textit{promote progress}.\textsuperscript{31} This clause eventually led to the current state of copyright protection today: the 1976 Copyright Act. Although the Act gives copyright protection aplenty, the lack of moral rights protection is almost conspicuous.\textsuperscript{32}

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\item \textsuperscript{28} Kwall, \textit{Intrinsic Dimension}, supra note 6.
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} U.S. \textit{CONST.} art 1, § 8, cl. 8.
\item \textsuperscript{31} \textit{See} Kwall, \textit{Intrinsic Dimension}, supra note 6.
\item \textsuperscript{32} \textit{See generally} 1976 Copyright Act, 17 U.S.C § 1-1332 (2006) [hereinafter \textit{1976 Copyright Act}]. The Copyright Act gives copyright holders the exclusive right to “(1) make, have made, or import, for sale or for use in trade, any useful article embodying that design; and (2) sell or distribute for sale or for use in trade any useful article embodying that design.” \textit{Id.} at § 1308. \textit{See supra} note 96 for further discussion on the Framers’ views and constitutional goals in relation to moral rights.
The closest thing to moral rights protection in the original 1976 Copyright Act can be found at section 106(2): the right to derivative works. This right grants the author (or copyright owner) the exclusive right to create derivative works based upon their original copyrighted work, and allows the author to sue both for copyright infringement and an integrity violation regarding the infringing derivative work. In 1998, Congress also enacted the Digital Millennium Copyright Act (DMCA), which grants a right of attribution through its prohibition of any alterations to copyright management information (CMI) attached to digital copyrighted materials. Outside of the Copyright Act, authors can also use other legal tools to protect themselves from what would otherwise be called moral rights violations, including section 43(a) of the Lanham Act, breach of contract, defamation, invasion of privacy, or the right of publicity.

33 See generally 1976 Copyright Act, §§ 106, 1202. Section 115 also contains a provision that might have some moral rights force behind it, which states that “a compulsory license includes the privilege of making a musical arrangement of the work that conforms to the style of the concerned performance, as long as the arrangement does not ‘change the basic melody or fundamental character of the work.’” KWALL, THE SOUL OF CREATIVITY, supra note 6, at chapter 3, p. 5; see 1976 Copyright Act, 17 U.S.C. § 115. However, very little litigation has arisen with respect to this section, and it may soon be eliminated. KWALL, THE SOUL OF CREATIVITY, supra note 6, at chapter 3, p. 5.

34 Id. at chapter 3, p. 7.

35 Id. at chapter 3, p. 6; Digital Millennium Copyright Act, 17 U.S.C. § 1202(a).

36 See Lanham Act, 15 U.S.C. § 1125(a). Although the Lanham Act is the law that primarily governs trademarks (and not copyright), this section protects the work from a “false designation of origin” or other false designation of fact which is likely to cause confusion. Courts have stretched the provision outside the scope of trademark to include any artistic work that is published in an altered state and which has the creator’s name attached. See, e.g., Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 (2nd Cir. 1976) (enjoining television station ABC from airing an edited and shortened version of plaintiffs’ program, because Lanham Act protects against false designation of mutilated works). However, many courts are hesitant to stretch 43(a) in this way, and it still addresses only economic damage, instead of moral rights’ focus on the author’s dignity, spirit, and message of the work. See Kwall, Intrinsic Dimension, supra note 6, at 1992-95.
Each of these remedies has its own durations and statutes of limitations, but with the possible exception of the right of publicity (whose duration varies widely based on state law), none of them give protection past an individual’s death.\textsuperscript{41}

\begin{quote}
Since the decision in the now-infamous case, \textit{Dastar}, the application of 43(a) has been limited, and can no longer be “used to prevent the unaccredited copying of a work in the public domain.” \textit{See} Rigamonti, \textit{Deconstructing Moral Rights, supra} note 7, at 385. Rigamonti adds, “there is no reason inherent in the statute [43(a)] that would prevent the Court from distinguishing \textit{Dastar} in a future moral rights case, for example by refusing to extend its holding to fact patterns that involve attribution to actual creators (authors) as opposed to copyright owners.” \textit{Id}.\textsuperscript{37}
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Many situations that would be protected by moral rights statutes elsewhere are easily prevented or redressed by proper contract drafting. For example, in \textit{Batiste v. Island Records, Inc.}, one of the artist’s names was left off of the album’s liner notes. 179 F.3d 217 (5th Cir. 1999). While this predicament would otherwise be redressable under a moral rights cause of action for violation of the right of attribution, it could easily have been avoided by proper contracting with the licensee responsible for publishing the work. Similarly, what may have otherwise been a violation of the artist’s right to integrity in \textit{Franconero v. Universal Music Corp} – the (unmodified, licensed) use of an artist’s song in a movie, the context of which the author found offensive – could have been remedied in the contract which licensed the use of the song in the first place. \textit{See} No. 02 Civ. 1963 (RO), 2003 U.S. Dist. LEXIS 22800 (S.D.N.Y. Dec. 18, 2003).\textsuperscript{38}
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Defamation protects individuals from false claims that harm their reputation. \textit{See}, e.g., \textit{New York Times v. Sullivan}, 376 U.S. 254 (1964). However, an action for defamation is distinguishable from a moral rights action for violation of integrity, as defamation requires both that the statement was false (whereas a moral rights claim could even be FAVORABLE toward the author), and must show actual damages (while moral rights integrity claims do not require monetary damages at all, or even any proof of actual negative harm to the author’s honor or reputation). \textit{See Id}.\textsuperscript{39}
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Invasion of privacy actions can be invoked primarily when a work has been published with false (or with no) attribution. The success of this cause of action may depend on the jurisdiction, however. \textit{See KWALL, THE SOUL OF CREATIVITY: SHOULD INTELLECTUAL PROPERTY LAW PROTECT THE INTEGRITY OF A CREATOR’S WORK?} (forthcoming 2008), at chapter 3, p. 15-16 [hereinafter KWALL, THE SOUL OF CREATIVITY].\textsuperscript{40}
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The right of publicity protects individuals from third party use of their persona “in an objectionable context or for an objectionable purpose.” \textit{Id} at 16. However, the nature of the action is that it only protects offspring of the person’s persona, including qualities like their voice or likeness, and not other works which may otherwise be protected by moral rights laws. \textit{See id} at 18.\textsuperscript{41}
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For a right of publicity law that ceases protection at death, see \textit{N.Y. CIV. RIGHTS LAW} § 50, 51. For an example of extended protection after death, see \textit{IND. CODE} § 32-36-1-8 (2002). Most state publicity statutes, however, give some sort of post-death protection.\textsuperscript{41}
\end{quote}
Because the United States had historically resisted moral rights legislation, it used the combination of these existing laws to claim compliance with the Berne Convention.\(^\text{42}\) Faced by mounting pressure from without and within, Congress finally (and grudgingly) gave moral rights a concession by enacting the Visual Artists Rights Act (VARA) in 1990 – the first-ever federal moral rights statute in the United States.\(^\text{43}\) VARA applies only to authors of works of visual art (including paintings, drawings, prints, and sculptures),\(^\text{44}\) and grants them the rights of attribution and integrity.\(^\text{45}\) Contrary to other typical moral rights laws, however, VARA’s protection from destruction applies only to works of “recognized stature.”\(^\text{46}\) VARA also seems to give more room for fair use exceptions than other moral rights statutes,\(^\text{47}\) and allows artists to waive their rights.\(^\text{48}\)

\(^{43}\) Id. at 858; Visual Artists Rights Act of 1990 (codified in scattered sections of 1976 Copyright Act, 17 U.S.C., but is primarily found in section 106A). By the time VARA was enacted, ten states had already passed their own moral rights statutes. Stern, A Matter of Life or Death, supra note 42, at 855.  
\(^{44}\) 17 U.S.C. § 101 (defining “visual art”). Note that definitions for phrases such as “prejudice,” “honor,” or “recognized stature” are missing from the definitions section. See id.; Kwall, The Soul of Creativity, supra note 39, at chapter 3, p.9.  
\(^{46}\) Id. at § (a)(3)(B).  
\(^{47}\) See 17 U.S.C. at § 107 (“[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement . . . .”). C.f. France IP Code, Art. L.122-5 (“Once a work has been disclosed, the author may not prohibit . . . on condition that the name of the author and the source are clearly stated: a) analyses and short quotations justified by the critical, polemic, educational, scientific, or informatory nature of the work in which they are incorporated; b) press reviews . . . ."); but see Swack, Safeguarding Artistic Creation, supra note 17, at 379 (listing “excessive criticism” as among the protective moral rights in France).  
Additionally, all moral rights protection under VARA generally ceases upon the author’s death.\(^{49}\)

\[D. \text{Israel: The Newborn}\]

Israel’s moral rights protection, however, is currently in an odd state of limbo. Its recently-enacted Copyright Act of 2007 will become binding on May 25, 2009,\(^{50}\) and it is not yet clear what direction all of its new provisions will take.

Israel’s old moral rights scheme was governed primarily by its judicial system and by a 1981 amendment to its Copyright Ordinance of 1924.\(^{51}\) The original statute was a mere five sentences in length, and granted the right to attribution (“to an extent and degree customary”) and the right of integrity.\(^{52}\) It further states that transfer of economic

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\(^{49}\) VARA § (d). VARA states that if a piece of visual art covered by VARA was created after VARA’s enactment, its moral rights protection ends upon the author’s death. If, however, it was created before VARA’s enactment and the author still holds title to the piece, moral rights protection extends until the life of the author plus seventy years. \textit{Id.} See supra section III for further analysis of this provision.

\(^{50}\) Israel: Copyright Act 2007, available at http://www.tau.ac.il/law/members/birnhack/IsraeliCopyrightAct2007.pdf (unofficial English translation); http://www.knesset.gov.il/Laws/Data/law/2119/2119.pdf (original Hebrew version) [hereinafter Israel’s Current Act]. Incidentally, the Copyright Act of 2007 is the first statutory copyright scheme created by Israel since it became an independent state – not just for moral rights; up until its creation, Israel’s acting copyright statute was the Copyright Act of 1911 – which was put in place by the British, before Israel was even an independent state. \textit{See} Michael D. Birnhack, \textit{Trading Copyright: Global Pressure on Local Culture, in The Development Agenda: Global Intellectual Property and Developing Countries} (Neil Netanel ed., forthcoming 2008) [hereinafter Birnhack, \textit{Trading Copyright}].


\(^{52}\) \textit{See} Israel Copyright Ordinance of 1924, art. 4A [hereinafter Israel’s Original Statute]. The right of integrity grants the author the right “that no falsification, damage or other change be made on his work, or that no other act be performed that denigrates that work in a manner liable to injure its author’s honor or reputation.” \textit{Id.} at art. 4A(b).
rights does not imply a transfer of moral rights. It says nothing about anonymous/pseudonymous works, the right not to put your name on a work, the right to prevent destruction of works, whether moral rights are transferable or waivable, or moral rights duration.

Israel’s new Copyright Act is similar to the old statute in many ways, though makes some significant changes. Like any typical copyright law, Israel’s new Act extends economic copyright protection to original literary, artistic, dramatic, or musical works which are fixed in any form, and things like ideas, procedures, facts, and news are not copyrightable. Copyright protection includes the rights to reproduction, publication, public performance, broadcast, making derivative works, and rental. Pure copyright protection is fully assignable, and generally lasts for seventy years after the author’s death.

Interestingly, although Israel has a separate chapter in its new Copyright Act solely dedicated to moral rights, it places the right to make a work available to the public within its list of exclusive copyright rights. Other moral rights explicitly

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53 See id. at art. 4.
54 See generally Israel’s Current Act.
55 Id. at art. 4(a). Sound recordings also receive copyright protection. Id.
56 Id. at art. 5.
57 Id. at art. 11.
58 Id. at art. 37.
59 Id. at art. 38. See arts. 39-44 for exceptions to this rule.
60 Id. at arts. 45-46.
61 Id. at art. 11(5), 15. See Part III, supra, for further analysis of these provisions. It is interesting that Israel places its right of divulgation among its list of exclusive copyright rights instead of recognizing it as a moral right; the right of divulgation is considered a moral right in other countries, like France. See, e.g., France IP Code, art. L121-2.
provided for in the Copyright Act are the right of attribution and the right of integrity.\textsuperscript{62} Regarding the right of attribution, the law states that the author has the right to “have his name identified with his work to the extent and in the manner suitable in the circumstances;”\textsuperscript{63} the right to integrity grants him the right that “no distortion shall be made of his work, nor mutilation or other modification, or any other derogatory act in relation to the work, where any aforesaid act would be prejudicial to his honor or reputation.”\textsuperscript{64}

Israel considers moral rights “personal and not transferable,” and they remain with the author even after some or all copyright protection has been transferred.\textsuperscript{65} Moral rights protection is tied to copyrightability, however, so protection can only be granted to copyrightable works for the period of time that copyright subsists (i.e., seventy years after the author’s death).\textsuperscript{66}

Moral rights infringement occurs whenever “[a] person who does in relation to a work, an act which is restricted by the moral right.”\textsuperscript{67} However, an act is not infringement if it was “reasonable in the circumstances of the case.”\textsuperscript{68} In addition, when deciding whether an action has infringed an author’s moral rights, a court may consider “the character of the work in respect of which the act was done,” the nature of the

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\textsuperscript{62} See id. at art. 46. \\
\textsuperscript{63} Id. at art. 46(1). \\
\textsuperscript{64} Id. at art. 46(2). No definitions or clarifications are given for words such as “derogatory act” or “prejudicial to his honor or reputation.” See generally id. at art. 1 (definitions). \\
\textsuperscript{65} Id. at art. 45(b). \\
\textsuperscript{66} Id. at art. 45(a). \\
\textsuperscript{67} Id. at art. 50(a). \\
\textsuperscript{68} Id. at art. 50(b). See section III, supra, for further analysis of this provision, and what “reasonable in the circumstances of the case” might mean.
\end{flushleft}
allegedly infringing act, whether the work was made for hire, “customary behavior in a particular sector,” and the “need for doing the act versus the damage caused to the author by the act.”

Although the damage caused to the author may be considered, however, the Act also states that the court can award damages to the author without any proof of injury. If a moral rights action is brought after the author’s death, the action can only be brought by the author’s “relatives” – defined as only a “spouse, descendant, parent or sibling.”

The Copyright Act also allows for some exceptions to the general rules. Israel provides a fair use exception to copyright protection, which allows use of a copyrighted work for purposes “such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.” When deciding whether a work has been infringed, the statute directs that the factors to be considered shall include . . . all of the following:

(1) The purpose and character of the use;
(2) The character of the work used;
(3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;

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69 Id. at art. 50(c).
70 Id. at art. 56(a). In awarding damages without proof of injury, however, the maximum amount awarded is NIS 100,000 (at the time of writing, the equivalent of about $30,000), and the court may (but not must) consider factors such as the scope of infringement, the duration for which it took place, the severity, actual injury, benefit derived by the defendant from the act, the character of the activity, the nature of the relationship between the defendant and the author, and the good faith of the defendant. Id. at art. 56(b).
71 Id. at art. 55.
72 Id. at art. 19(a).
(4) The impact of the use on the value of the work and its potential market.\textsuperscript{73}

The fair use provision, however, does not specify its relationship to moral rights and whether it applies to both moral rights and copyright, or just copyright itself.\textsuperscript{74} The Copyright Act also contains an “Innocent Infringer” provision, which creates an immunity for copyright or moral rights infringers who “did not know, or could not have known,” that the work they were infringing was copyrighted.\textsuperscript{75}

While there, of course, has been a significant lack of caselaw on these newly-enacted rules, the law of moral rights in Israel has been largely based in the judiciary, which has historically retained a wide range of strong interpretive power.\textsuperscript{76} The most notable moral rights case from Israel is \textit{Shanks v. Qimron}, also commonly referred to as the “Dead Sea Scrolls Case.”\textsuperscript{77} After reconstructing and filling in the gaps of what has been called “the single most important archaeological find of the twentieth century,” Quimron’s work on the Dead Sea Scrolls was published without permission in another

\textsuperscript{73} \textit{Id.} at art. 19(b) (emphasis added).

\textsuperscript{74} \textit{See generally id.} at arts. 18-32. The fair use provisions occur closer to the beginning of the Act, however, before the concept of moral rights has been introduced. \textit{See id.} at arts. 18-46.

\textsuperscript{75} \textit{Id.} at art. 58. \textit{See} section III of this Article for further analysis of this provision.

\textsuperscript{76} \textit{See} Birnhack, \textit{Trading Copyright}, \textit{supra} note 50. One reason the judiciary may have held such great power concerning decisions about moral rights is that the original 1981 moral rights amendment was, as discussed throughout this paper, extremely small, vague, and overly simple.


\textsuperscript{78} Michael D. Birnhack, \textit{The Dead Sea Scrolls Case: Who is an Author}, 23(3) E.I.P.R. 128 (2001) [hereinafter Birnhack, \textit{Dead Sea Scrolls}]. The Dead Sea Scrolls are a set of over 800 ancient scrolls dating back to 250 B.C. – 68 A.D., when Romans took over the site where they were found, and “provide direct evidence of the period in which Judaism was consolidated and . . . Christianity was born.” \textit{Id.}
scholar’s book. Qimron sued for copyright and moral rights infringement. Qimron was victorious, and the court found that Qimron had a copyright to the text; the work and creativity involved in piecing together the remains of the Scrolls was original enough to create authorship over the gaps he filled in. Fair use was out of the question – the Court pointed out that the work was published in its entirety and without attribution, and therefore it was unfair. Because the work was found copyrightable, the moral right to attribution was also infringed.

III. THE SPECTRUM OF APPROACHES TO MORAL RIGHTS, COMPARED

A. Moral Rights and Public Policy

Proponents of moral rights explain that there is an element to creating a piece of art that is not protected by copyright law alone. Many artists and scholars have attempted to identify and isolate this element over the years, though no singular definition seems to encapsulate the relationship an artist shares with his creation. Some have viewed the creator/creation relationship as a parent/offspring relationship, as the art is almost an external embodiment of the artist himself. Others see it as an endowment by an external source, or a gift, and the artist as just a conduit for such inspiration. Still others see artists as a mere keeper of the work – a short-term guardian between

79 Id.
80 Id. At the time, moral rights was not codified; it was entirely case-law based.
81 Birnhack, Dead Sea Scrolls, supra note 77.
82 Id.
83 See The Dead Sea Scrolls Case, section 23-24. Shanks did refer to the work of “a colleague” as partial creator of the work. However, the Court found this insufficient, as well. Id.
84 See, e.g., Kwall, Intrinsic Dimension, supra note 6, at 1948.
85 See id. at 1953-54.
86 Id. at 1965.
inspiration and release into the world.\textsuperscript{87} No matter the definition of this intrinsic connection, the aim of moral rights is to protect it, and fill in the gaps where traditional copyright protection leaves the author vulnerable.\textsuperscript{88}

1. The United States

The Framers of the United States Constitution had a very understandable monopoly-phobia.\textsuperscript{89} They saw copyright protection as such a monopoly, and therefore circumscribed the time limitation on all copyrights.\textsuperscript{90} The Copyright Clause also sets forth, however, the purpose of promoting progress.\textsuperscript{91} The United States was, of course, a newly budding country, and one of Framers’ primary objectives was to make the United States “culturally competitive.”\textsuperscript{92}

The desire to promote progress within the United States comported well with two philosophies that formed the basis of copyright law in this country: natural law theory, and utilitarianism.\textsuperscript{93} Natural law theory asserts that a person’s labor in relation to

\textsuperscript{87} \textit{Id.} at 1955-56. Many of these approaches may also be closely tied with religious or other spiritual belief or experience. \textit{See id.} at 1951-1961 (describing the numerous theological approaches to creativity, with an emphasis on Jewish and Christian traditions).

\textsuperscript{88} \textit{See id.} at 1972.

\textsuperscript{89} \textit{Id.} at 1981 (“[T]he Framers feared monopolistic concentrations of power and had a desire to foster an atmosphere of intellectual fluidity. James Madison, one of the primary forces behind the inclusion of the Clause, believed that both patents and copyrights were monopolies and therefore had to be circumscribed.”).

\textsuperscript{90} \textit{See id.} Interestingly, historians have described the Copyright Clause as a mere “afterthought” in the drafting of the constitution. \textit{Id.} at 1981 (citing EDWARD C. WALTERSCHEID, \textit{To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power}, 43 IDEA 1, 9 (2003)). Apparently, there was no recorded debate on the merits of the Copyright Clause, and it was approved by a unanimous vote. \textit{Id.}

\textsuperscript{91} \textit{See U.S. CONST.} art 1, § 8, cl. 8.

\textsuperscript{92} \textit{See Kwall, Intrinsic Dimension, supra} note 6, at 1982.

\textsuperscript{93} \textit{See id.} at 1978.
external objects, like creation of a piece of art, attaches property rights to that external object, and therefore grants the rights to possess or dispose of the object as he wishes.\textsuperscript{94} An artist’s creation, therefore, is a commodity, and all intrinsic value drops away.\textsuperscript{95}

Utilitarianism, on the other hand, encourages the greatest good for the greatest number of people. The combination of a fear of monopolies, a desire for progress and international competition, and the underlying philosophies of natural law theory and utilitarianism led the Framers to conclude that art – seen as a commodity by natural law theory – would best be regulated by economic incentives and rewards.\textsuperscript{96} This deep-seated obsession with promoting progress and protecting the public domain still seems extremely prevalent in U.S. culture today, and the current state of copyright protection mirrors this view: promotion of progress is the number one priority and is regulated through economic rewards; artists’ rights, and the protection of artists’ intrinsic relationships with their work, therefore fall by the wayside.\textsuperscript{97}

\textsuperscript{94} See id. at 1978-79.
\textsuperscript{95} See id. Some scholars, however, comment that mere economic regulation is not nearly as unfair and under-protective as many moral rights supporters claim: “[T]he economic principles underpinning American copyright law do not prevent it from being firmly based on a purpose of justice, with the aim of achieving fair and moral ends. . . . Indeed, the principles and goals underlying the revolutionary French copyright regime were far closer to their U.S. Counterparts than most comparative law treatments (or most domestic French law discussions) generally acknowledge.”). Jean-Luc Piotraut, An Author’s Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared, 24 CARDOZO ARTS & ENT. L.J. 549, 555-56, 556-67 (2006) [hereinafter Piotraut, French and American Law Compared].
\textsuperscript{96} See id. Proponents of moral rights argue that moral rights can still, in fact, comport to the Framers’ constitutional desires. Promotion of progress, it can be argued, is “best achieved through a legal framework that promotes the public’s interest I knowing the original source of a work and understanding it in the context of the author’s original meaning.” Rights to attribution and integrity, therefore, are appropriate means to protecting this information, and therefore promote progress, in turn. See id. at 1986.
\textsuperscript{97} See id. at 1946 (“Copyright law . . . rewards economic incentives almost exclusively. From its inception, United States’ copyright law has been designed to calibrate the
2. France

France, on the other hand, takes an extremely different approach to moral rights protection. Never having had to find its place in a competitive global scheme like a fledgling United States, France was free to focus on protecting centuries worth of art already created within its borders, and the artists that continue to flourish there today.

France’s dual copyright/moral rights scheme is more “individual centered” than that of the United States.\(^98\) As opposed to the United States’ desire to promote progress and its subsequent protection of economics-based incentives only, “French copyright law aims to protect the two key interests held by the author: his pecuniary and exploitative interests on the one hand, and his intellectual and moral interests on the other.”\(^99\)

Instead of a natural rights- and utilitarianism-based philosophy, French philosophy was based on the philosophy of Emmanuel Kant, which “viewed artists’ rights as grounded in personality rights rather than in traditional property rights.”\(^100\) It makes sense, then, that French law would identify this intrinsic dimension of art – and its consequent personality-based rights protection – as ever-lasting, and one which survives the author’s death (and which would therefore require post-mortem moral rights protection). This emphasis on personality rights instead of economics, however, has led optimal level of economic incentive to promote creativity.

\(^98\) See id. at 554 (2006).
\(^99\) Id. at 555.
\(^100\) Davidson, Lost in Translation, supra note 15, at 604-05.
some scholars to conclude that France is suffering the fate that the United States so fears: discouragement of future creativity, and eventual shrinking of the public domain.  

3. Israel

The United States’ approach to copyright law sprung from its culturally-poor, newly-blossoming economy; France’s approach was conversely based on its culturally-rich but economically secure state of being. Israel, however, is almost a pure hybrid of the two: a country barely older than a half-Century, but which is simultaneously the homeland of untold ancient artifacts and creative works. Israel’s economy, however, and its independence in the global market is still on shaky grounds.

Israel is home to many different ethnic and religious groups, each with their own heritage and culture. This multicultural nature leads to a rich pool of creative works that Israel would be right to protect. However, the “cultural trade balance” of artistic works in Israel is not equal: “much foreign material easily enters the country” but “cultural and political barriers [limit] exporting Israeli culture,” so for an artist, “the potential market is first and foremost the local, Hebrew-speaking rather small Israeli market.” Because of this history of over-protection of inter-Israel artistic works, Israel – if it wants to have an equal hand in a global market for creative works – seems as

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101 See Piotraut, French and American Law Compared, supra note 95, at 557 (“Since current artistic productions are mostly collective and expensive, the French copyright system, with its excessive focus on the individual artist or author, appears to hamper producers’ businesses and, accordingly, to harm modern creation. Some writers have even blamed the likely decline of the French motion picture and entertainment industry, and the ensuing significant job losses, on French copyright laws. If this is the case, the effect of these laws is far from socially fair and moral.”).
102 See, e.g., The Dead Sea Scrolls Case, supra note 77 (discussing the Dead Sea Scrolls).
103 See Birnhack, Trading Copyright, supra note 50, at 18.
104 Id. at 19.
though it must choose between encouraging further creation (by emphasizing progress through economic copyright means) or merely protecting those works already created (through extensive moral rights protection). If Americanization is infiltrating Israel’s economy so heavily because of this one-way flow of creative works, however,\textsuperscript{105} Israel’s policy should err on the side of doing what it takes to keep creating; otherwise, it may lose all of its rich cultural heritage to American television, anyway. As Michael Birnhack stated: “A small market with unique culture(s) and language can hardly withstand the mighty powers of global economy.”\textsuperscript{106}

\textbf{B. What Rights to the Statutes Actually Grant?}

1. The Berne Convention

As noted above, Article 6bis of the Berne Convention requires all signatory countries to provide authors “the right to claim authorship” and the right to “object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”\textsuperscript{107} In the common parlance of moral rights discussion, this provision essentially provides for the rights of attribution and integrity.

Contrary to many jurisdictions’ statutes, however, Berne makes no explicit reference to the right NOT to claim authorship. There is also no mention of attribution rights in relation to anonymous, pseudonymous, or ghost-written works.

\textsuperscript{105} See id.
\textsuperscript{106} Id. at 20.
\textsuperscript{107} Berne Convention, art. 6bis(1).
As to the right of integrity, Berne’s language is also rather ambiguous. The Convention first protects an author’s work from any “distortion, mutilation or other modification,” or any “other derogatory action” having to do with the work. No mention is made of exceptions for editing or upkeep, and no guidelines – like in some other approaches to moral rights – allow for reasonability under the circumstances. It also makes no reference to any protection from a work’s destruction. Ambiguity is added to ambiguity by the additional requirement of integrity infringement, “prejudic[e] to honor or reputation.” The Berne Convention is silent as to what this requirement means, when in fact something is prejudicial to an author’s honor or reputation, or whether actual damages are needed in order to prove such prejudice.

One can only assume that the creators of the Berne Convention left these doors so open as to 1) encourage more countries to adopt the convention by requiring only minimal standards, and 2) encourage each signatory country to further tailor its own moral rights regulation to its own needs.

2. The United States and VARA

VARA, like the Berne Convention, also grants both the rights of attribution and integrity. Unlike Berne, however, VARA’s protection only applies to works of visual

\[^{108}\] *Id.*  
\[^{109}\] *See id.*  
\[^{110}\] Evidence of the Berne Convention’s desire to be adaptable to individual countries’ policies can be found in additional language throughout article 6bis, including assigning the delegation of post-mortem moral rights to “the legislation of the country where protection is claimed,” the post-mortem duration exception for countries who did not have such duration pre-ratification, and by leaving “the means of redress for safeguarding the rights granted by [the] Article” to “legislation of the country where protection is claimed.” *See id.* at 6bis(2), (3).

\[^{111}\] *See 1976 Copyright Act, §106(A)(a) [hereinafter VARA].
VARA’s right of attribution explicitly gives authors the right both to claim authorship and to prevent the use of their names. The right to prevent the use of an author’s name applies to works he did or did not create, as well as the right to prevent use of his name if the artist’s work was distorted, mutilated, or modified in any other way, when such modification would be “prejudicial to his or her honor or reputation.”

Unfortunately, however, like Berne, VARA makes no mention of anonymous or pseudonymous works, and fails to define what “prejudice to honor or reputation” means or how one would prove such prejudice.

In addition to the right of attribution, it also grants the right of integrity to works of visual art that fall within VARA’s scope. This right grants the authors the right to “prevent any intentional distortion, mutilation, or other modification . . . which would be prejudicial to . . . honor or reputation.” The requirement that such modification be intentional may, in order to make the statute more objective and fair, slightly limit the scope of applicability of the right, and shield accidental or unknowing mutilators from liability. However, the qualification seems to still technically leave other reasonable art-modifiers susceptible to lawsuits, such as, for example, a building’s private owner modifying a commissioned mural on a wall in order to protect the public from depictions of nudity.

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112 Id. at § (a).
113 See id.
114 Id. at § (a)(2).
115 See generally id.
116 See generally id.
117 See id. at § (a)(3)(A).
118 See, e.g., Natalia Thurston, Buyer Beware: The Unexpected Consequences of the Visual Artists Rights Act, 20 BERKELEY TECH. L. J. 701, 701-02 (2005) (explaining how Diego Rivera’s 1934 row with John D. Rockefeller about “murdering” his commissioned
VARA does, however, grant some exceptions to this rule.\textsuperscript{119} First, it grants an exception for modification of a work due to the “passage of time or the inherent nature of the materials.”\textsuperscript{120} For example, the gradual wearing-down of a sculpture, or the fading of a painting or photograph, would be exempt from right of integrity actions. VARA also grants an exception for modifications which are the “result of conservation, or of the public presentation” of a work, \textit{unless} the modification is due to gross negligence.

Unlike the Berne Convention, which remained silent about the protection of modifications such as these, these exceptions limit VARA’s scope even further, and help whittle down the subjective nature of moral rights into a more objective and reasonable application.

In addition to protection from intentional modification prejudicial to honor or reputation, VARA grants another right unheard of in Berne – the right to prevent destruction.\textsuperscript{121} However, VARA once again limits the scope of its protections as much as possible, and grants this right to protection from destruction only to works of “recognized stature.”\textsuperscript{122} What “recognized stature” means, however, remains a mystery, as VARA provides no definition.\textsuperscript{123}

In addition to the rights mentioned above, there is yet another factor set forth in VARA that the Berne Convention failed to make explicit: the transferability and waivability of these moral rights. While Berne remained almost totally silent on this

\textsuperscript{119} See generally VARA.
\textsuperscript{120} Id. at § (c)(1).
\textsuperscript{121} See \textit{id.} at § (a)(3)(B).
\textsuperscript{122} Id.
\textsuperscript{123} See generally \textit{id.}
VARA demands that the moral rights granted within its provisions are not transferable.\textsuperscript{124} Interestingly, however, the rights \textit{are} waivable, if the author agrees to a waiver in writing.\textsuperscript{125} This dual approach to transfer and waiver seems a little puzzling when analyzed in context of the policies behind moral rights: moral rights fill in the gaps where authors were left unprotected before, and issues of unequal bargaining power such as found in traditional copyright law may still be present if moral rights may be waived away. One also wonders why, if moral rights are so unimportant and detachable from the artist that they may be waived, they may not also be transferred.

VARA, as a whole, seems to betray the United States’ hesitancy to the adoption of moral rights and its utilitarian approach to copyright protection at the same time. Because the United States was a signatory (albeit a grudging signatory) to the Berne Convention, it was forced to adopt \textit{some} measure of moral rights protection. The Berne Convention’s broad and vague scope of moral rights protection opened the door to the ability to limit those moral rights in almost any non-contradictory way. The United States directly took some of the Berne Convention language – for example, the right to prevent “distortion, mutilation, or other modification” of the work which would be “prejudicial to his honor or reputation” – but then slowly stripped away the broad implications allowed for by Berne. For example, the United States discarded the Berne protection from “other derogatory action” against works, it limited the scope to only

\begin{itemize}
\item \textsuperscript{124} Berne does qualify moral rights as being “[i]ndependent[] of the author’s economic rights,” and suggests that moral rights remain “even after the transfer of the said [economic] rights.” However, it makes no explicit mention of whether or not the moral rights themselves as transferable or waivable. \textit{See generally Berne Convention}, art. 6bis(1).
\item \textsuperscript{125} \textit{See} VARA §§ (e)(1).
\item \textsuperscript{126} \textit{See id.} In addition, section (e)(2) of VARA states that a waiver of any copyright right is not an implicit waiver of the artist’s moral rights, as well.
\end{itemize}
visual art, and granted exceptions for passage of time and for upkeep. United States may have made a step in the right direction in VARA as far as moral rights protection goes, but its stubborn petulance is prevalent between the lines.\textsuperscript{127}

3. France

France is generally recognized as the international model for moral rights protection, and the idea that “French law is superior to American law in terms of fairness and morality to authors” is the “almost unanimous opinion of the global community of copyright law scholars.”\textsuperscript{128} Because of France’s overriding emphasis on author protection, its moral rights statute goes far and above the rights granted by either the Berne Convention or VARA. While Berne and VARA grant only the rights of attribution and integrity, France gives two more: the rights to divulgation and retraction.\textsuperscript{129}

The French moral rights statute begins with an outright assertion of the right of attribution, and proclaims that “[a]n author shall enjoy the right to respect for his name, his authorship and his work.”\textsuperscript{130} This language is markedly different from that setting out the right of attribution in the Berne Convention and in VARA, which gives authors the right to “claim authorship.”\textsuperscript{131} Although this is the entirety of the language setting forth the French right of attribution, French case law has strictly enforced the right, and has

\begin{flushleft}
\textsuperscript{127} To add insult to injury, most United States citizens – artists and lawyers alike – are not even fully aware of the rights granted to them by VARA. \textit{See} Kwall, \textit{The Soul of Creativity}, chapter 3.
\textsuperscript{128} Piotrault, \textit{French and American Law Compared}, supra note 95, at 552.
\textsuperscript{129} \textit{See generally} France \textit{IP Code}.
\textsuperscript{130} \textit{Id.} at art. L121-1
\textsuperscript{131} \textit{See Berne Convention}; \textit{VARA}.
\end{flushleft}
included within this right the complimentary right to abstain from revealing his
authorship, as well.\(^\text{132}\)

The language demanding the “right to respect for [the author’s] work”
embraces the entire rule governing the right of integrity,\(^\text{133}\) and conspicuously lacks
the common language that usually demands prejudice to an author’s honor or reputation.
French law provides that the author need not show actual damage to honor or reputation
in order to receive relief, “nor need he justify his reasons for refusing to tolerate such
acts.”\(^\text{134}\) The right is not limited to modification or mutilation, as well – it includes
misrepresentations of a work, such as presenting the work in negative contexts.\(^\text{135}\)
Because of this wide-sweeping right, the application and invocation of the right is
completely subjective – “it is the author’s free choice that triggers protection,” and “third
parties who suppress, supplement, or otherwise modify a work do so at their own risk.”\(^\text{136}\)
Consequently, third parties have been held liable for moral rights violations for such
“infringements” as: casting both men and women in a famous play after the playwright
had made it clear that he did not want women acting in the show;\(^\text{137}\) placement of an
unaltered religiously-inspired piece of music as soundtrack to an advertising film;\(^\text{138}\) a

\(^{133}\) See id. at §7(1)(c).
\(^{134}\) Id. at §7(1)(c)(i).
\(^{135}\) Id.
\(^{136}\) Id.
\(^{137}\) Id. (citing TGI Paris, 3e ch., 15 Oct. 1992, R.I.D.A. 1993, no. 155, 225. See also Paris,
(theatrical production distorting play).
\(^{138}\) Id. (citing . Paris, 4e ch., 7 April 1994, D. 1995, somm. 56, obs. C. Colombet. See,
e.g., Caen, 6 May 1997, J.C.P. 1998, IV, 2928 (finding that the reproduction of a
scholarly work in advertising left in mail boxes violates moral right); Paris, 4e ch., 25
March 1998, R.I.D.A. 1998, no. 178, 254 (holding that publisher’s choice of title not
corresponding to tenor which author wished to give book was subject to moral right)).
candid criticism (that “contained neither abuse nor libel”) of Albert Camus’ work;¹³⁹ and the addition of an unauthorized but “neutral” preface to a newly-translated book.¹⁴⁰ Because of France’s vague and all-encompassing statutory language, the rights of attribution and integrity alone already significantly depart from the same rights set forth in the Berne Convention and in the United States 1976 Copyright Act.

French law departs even further, then, with the addition of the right of divulgation to the already-protective approaches to the rights discussed above. France’s right to divulgation gives the “author alone” the right to determine the method and conditions of disclosure to the public, and also, therefore, includes the right not to divulge the work.¹⁴¹ Further explanation of precisely what “divulgation” means is not given in the Code. French case law tells us, however, that – despite the means of disclosure – the author’s intent to bring the work to the attention of the public must be shown.¹⁴² For example, an artist’s consent to display a work temporarily does not necessarily imply that author’s intent to make the work available to the general public.¹⁴³

Finally, French law adds yet another right to the pile, and grants authors the complimentary right to retraction.¹⁴⁴ According to the Code, “the author shall enjoy a

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¹⁴⁰ *Id.*, at 550.
¹⁴³ See *id. (citing Paris, 2 Dec. 1897 (Whistler case), D.P. 1898, 2, 465, note Planiol, affirmed, Cass. civ., 14 March 1900, D.P. 1900, I, 497 (finding that the artist, in himself putting a painting in an art show open to the public, intended only to test critics’ reactions, not to divulge the work itself); TGI Paris, 1re ch., 20 Nov. 1991, R.I.D.A. 1992, no. 151, 340, note Kerever (finding that neither allowing the taping of a lecture course by listeners nor permitting the publication of a synopsis of the course constituted divulgation)).
the right to reconsider or of withdrawal, *even after publication* of his work.”\(^{145}\) The only restriction made upon this right requires the author, before withdrawal, to indemnify the assignee for any damages the withdrawal might cause.\(^{146}\) This right is the newest of the moral rights granted in the French Code, and was not even recognized in French case law before it was added to the Code in 1957.\(^{147}\)

As previously stated, the French rights to divulgation and retraction are found nowhere in Berne or VARA, and are therefore a significant departure (and significant addition of authorial rights) from what may be dubbed the international moral rights “norm.” These evince, above all, the extreme importance France places on its authors and subsequently, its authors’ rights. France’s broad rights-granting strokes seem to take the already extremely-subjective concept of moral rights, and make it even more subjective. It’s almost as if artistic endeavors or scholarly critique should come with a glaring disclaimer: *Create At Your Own Risk.*

4. Israel’s Old Approach

Although Israel’s new Copyright Act is the first copyright statute codified since Israel became an independent state, moral rights protection has been occurring in Israel for decades. Israel’s original copyright act was created in 1924, and moral rights were added to it in 1981.\(^{148}\) The original statute contained delegations of the most common moral rights – those of attribution and integrity – just as Berne and VARA.

\(^{145}\) *Id.*, at art. L121-4 (emphasis added).

\(^{146}\) *Id.* at art. L121-4.

\(^{147}\) *International Copyright Law: Israel*, supra note 51, at §7(1)(d).

\(^{148}\) *Id.* at §7(1).
Israel’s attribution statute, however, gave the author the right “to have his name stated with his work, to an extent and degree customary.”\textsuperscript{149} Like Berne, no provisions were made for anonymous or pseudonymous works, and it does not make explicit the right not to have his name stated, either. The curious portion of the statute, however, is the language that grants the right of attribution “to an extent and degree customary.”\textsuperscript{150} No definition or clarification of this language is given in the statute. However, the \textit{Dead Sea Scrolls Case} – applying this 1981 moral rights law to the creator’s right of attribution claim – found mere reference to the creator as a “colleague” to be a violation of this right.\textsuperscript{151}

This original statute’s language which sets forth the right of integrity, however, is even more puzzling. The statute reads: “The author is entitled that no falsification, damage or other change be made on his work, or that no other act be performed that denigrates that work in a manner liable to injury its author’s honor or reputation.”\textsuperscript{152} Although the statute uses the common “honor or reputation” language as per the Berne Convention, the amendment is worded in such a way that it can be interpreted to mean that almost \textit{any} modification of a work would be a violation of the right, whether or not the modification injured the author’s honor or reputation.\textsuperscript{153} Case law, however, looked to Israel’s legislative intent to interpret the rule, and found that a modification infringes the right of integrity only if it violates the author’s honor or reputation.\textsuperscript{154} Prejudice to honor or reputation, need not have been shown, but could have merely been

\begin{footnotes}
\item[149] \textit{Israel’s Original Statute}, §4A(a).
\item[150] See \textit{id}.
\item[151] See \textit{Dead Sea Scrolls Case}.
\item[152] See \textit{Israel’s Original Statute}, § 4A(b).
\item[153] See \textit{International Copyright Law: Israel, supra} note 51, at §7(1)(b).
\item[154] See \textit{id}. (citing Tau v. The Technion, C.C. (Haifa) 977/86, P.M. 5752 (3) 89, 109).
\end{footnotes}
anticipated.\textsuperscript{155} The statute also makes no explicit provision barring destruction of a work; however, destruction may be easily folded into protection from “damage or other change.”\textsuperscript{156}

The issues of waiver and transfer are absent in the 1981 moral rights amendment. The statute suggests that moral rights are not, in fact, transferable, by claiming that “[t]he author’s right . . . shall be independent of his material right in the work and it shall be in effect even after all or part of that right has been transferred to another.”\textsuperscript{157} However, this technically only implies that economic rights are separate and distinct from moral rights – it says nothing as to whether moral rights are transferable on their own. Nowhere else in the statute speaks to any ability to waive a moral right, either.

In general, the old Israeli Act was not only vague, as moral rights statutes tend to be – it was poorly written. Great amounts of discretion were consequently placed in the hands of judges, which was further exacerbated by the statute’s grant of power to the judiciary to determine an author’s compensation – whether or not actual damage to the author was proven.\textsuperscript{158} Israel was ripe for a new moral rights statute.

5. Israel’s New Approach

Israel’s new 2007 Copyright Act obviously recognized many of the problems in its first moral rights statute, and created a much more detailed law to replace it. The new Act grants the same two rights as the previous – the rights of attribution and integrity – but drastically changed some of the language.

\begin{footnotesize}
\textsuperscript{155} Id.
\textsuperscript{156} See Israel’s Original Statute, § 4A(b).
\textsuperscript{157} Id. at § 4.
\textsuperscript{158} Id. at § 5.
\end{footnotesize}
For instance, the language granting the right of attribution was changed from the right to “have his name stated with his work, to an extent and degree customary” to the right to “have his name identified with his work to the extent and in the manner suitable in the circumstances.”\textsuperscript{159} Presumably this change sprung from an acknowledgement that the previous language was extremely vague and subjective; however, the new language seems like a miniscule step in the right direction (if it’s a step at all). The statute still does not explicitly acknowledge a right in relation to anonymous or pseudonymous works, and still makes no mention of the right not to identify himself as the author. Most glaring of all, however, is the still-vague language qualifying the right “to the extent and in the manner suitable in the circumstances.”\textsuperscript{160} While a “customary” standard may be harder to identify than what is, presumably, here a “reasonableness” standard, the same dose of subjectivity and ambiguity still applies.

In addition to the language change concerning the right to attribution, the language granting the right of integrity now grants the author the right that “no distortion shall be made of his work, nor mutilation or other modification, or any other derogatory act in relation to the work, where any aforesaid act would be prejudicial to his honor or reputation.”\textsuperscript{161} This language is almost a mirror image of the language used in Berne, including the protection from “any other derogatory act” which was ignored by the United States in VARA. The editorial glitch in the last statute that could have caused the statute to encompass modifications that are not prejudicial has been remedied in the new

\textsuperscript{159} Id. at § 4A(a); Israel’s Current Act, art. 46(1).
\textsuperscript{160} See Israel’s Current Act, art. 46(a).
\textsuperscript{161} Id. at art. 46(2). The statute still makes no mention of destruction.
statute, by identifying “any aforesaid [derogatory] act” with the requirement of prejudice to honor or reputation.  

As mentioned above, Israel’s new Copyright Act also grants authors a right to divulgation similar to that in France; Israel’s, however, is placed within the scope of rights granted by copyright protection instead of being listed as an author’s moral right. Like France, the right grants the author the exclusive right to “[m]ake[] a work available to the public,” which means “the doing of an act in relation to a work that shall enable members of the public to access the work from a place and at time [sic] chosen by them.”

The new statute also grants new exceptions to what would otherwise have been moral rights infringement. For example, the statute deems any otherwise-infringing modification as shielded from liability if “the act was reasonable in the circumstances of the case.” Seeming to acknowledge its own vagueness, the statute then lists five factors which courts may take into consideration to determine whether an act was reasonable: 1) the character of the infringing work, 2) the nature and purpose of the infringing work, 3) whether the work was a work-for-hire, 4) the “[c]ustomary behavior in a particular sector,” and 5) the “need for doing the act versus the damage caused to the author by the act.” This list is interesting for a few reasons. First, the factors are not mandatory for a court to look at when deciding whether a work has infringed upon an author’s moral right; the statute says the court merely “may” take them into account. This paves the way for extreme subjectivity and lack of predictability/consistency in

162 See id.
163 See id. at arts. 11, 15.
164 Id. at art. 50(b).
165 See id. at art. 50(c).
infringement determinations. More interesting, however, is the factor drawing attention to the need for doing the act relative to the damage caused to the author. This is interesting in light of another provision in Israel’s new statute – that granting the ability to receive damages for moral rights infringement without providing proof of injury.

The most drastic departure Israel’s new Copyright Act seems to take, however – not just from its own past statute, but from any other statute mentioned above – is its addition of the “Innocent Infringer” clause.\textsuperscript{166} The clause states: “Where a copyright or a moral right has been infringed, but the infringer did not know, or could not have known, at the time of the infringement, that copyright subsists in the work, he shall not be obligated to pay compensation in respect of the said infringement.”\textsuperscript{167} Therefore, not only is there a “reasonability” exception in the Act, there is an apparent exception for those who infringe by accident. The nature, scope, and consequences of this exception are hard to predict. The statute seems to be placing an affirmative defense straight into any purported infringer’s hands. By granting the exception to situations where the infringer “did not . . . or could not have known, at the time of the infringement, that copyright subsists” puts the burden on the defense to prove their mental state at the time. Further, will ignorance of the law be a valid excuse here? If so, the court will be faced not only with difficult factual questions (i.e., it may be extremely difficult to prove knowledge of the existence of a particular copyright), but will have to decide whether an

\textsuperscript{166} See id. at art. 58.

\textsuperscript{167} Id. The new statute’s relationship between moral rights and fair use is also unclear. The section listing “Permitted Uses” makes no distinction as to whether the uses apply to copyright, moral rights, or both. The section, however, comes before any mention of moral rights, so it is possible that fair use applies to copyright only, and that moral rights infringement suits are still fair game. See generally id. at Chapter 4.
average person’s minimal understanding of copyright law suffices to support an “I didn’t know” defense.\textsuperscript{168}

Finally, the new Copyright Act states that the moral rights granted within the statute are “personal and not transferable,” even if copyright of the work has been assigned to another person.\textsuperscript{169} Waiver, however, is never mentioned.\textsuperscript{170} Because waiver of economic copyright rights is made explicit throughout the statute, however,\textsuperscript{171} one may safely assume that if the legislature intended moral rights to be waivable, they would have included a provision saying as much.

Looking at all these new provisions in context betrays Israel’s conflict between protecting its vast body of historical and cultural artifacts and encouraging creation in the future. It seems to generously grant rights to authors, but then simultaneously refrain from enacting bright-line rules and tests. The statute is left, then, overflowing with “reasonableness” standards and “common practice” standards and factors the court “may” look at, and the courts will end up doling out their pile of discretion with impunity. We are left with a statute that seems to be filled with rights and rules and warnings, but which is really fraught with subjectivity, vagueness, and lack of notice for those who might find themselves accused of infringement in the future.

\textsuperscript{168}One interesting implication of this clause arises in context of the \textit{Dead Sea Scrolls} case. Whether the innocent infringer clause is governed by a reasonableness standard (i.e., would/could a reasonable man have known the work was copyrighted) or an actual-knowledge standard (i.e., did the accused infringer \textit{actually} know whether the work was copyrighted), the defendant would have had a very strong argument for his innocence: he – nor a reasonable person, in all probability – did not and could not have known that the portions of the Dead Sea Scrolls pieced together by the plaintiff were copyrighted at the time. \textit{See generally Dead Sea Scrolls Case, supra} note 77.

\textsuperscript{169}\textit{See Israel’s Current Act}, at art. 45(b).

\textsuperscript{170}\textit{See generally id.}

\textsuperscript{171}\textit{Se, e.g., id.} at arts. 37, 45(b).
6. The Statutes Compared

It is obvious from the start that there is a wide spectrum of moral rights protection represented by these five statutes. The hesitant approach by the United States in VARA illustrates what looks like an attempt to create a moral rights statutes while giving as few actual moral rights as possible. Next comes the middle-ground set by the Berne Convention – a vague, squishy, stretchy law that can be pushed and pulled and prodded at the will of its individual signatory countries. And finally, to the other extreme, comes France and its all-encompassing, artist-revering, protection-before-progress point of view. Where does Israel stand in all this?

Israel’s new statute seems to be attempting to cover all its bases at once, and, as such, seemed to build its base around the Berne Convention. Similar language was used (for example, “prejudice to honor or reputation), and the same rights were granted (attribution and integrity). Then, however, deep gashes are cut into these rights by providing United States-esque weighing factors and reasonability tests – probably unheard of in French moral rights law. The pendulum swings once again in the opposite direction, however, by conditioning all of these exceptions with vague and subjective language, leaving the artist, once again, with room to argue and the ability to collect for mere subjective anticipation of possible future damage to honor or reputation.

There is still one more factor that helps define Israel’s place in the scheme of international moral rights regulation, however: moral rights duration.

\[172\] See Appendix A for a chart comparing the language and rights of each relevant statute.
C. Duration, and Its Implications

1. The Berne Convention

As shown throughout this Article, the Berne Convention says relatively little about the requirements for moral rights, and says it in relatively simple language. Its commentary on moral rights duration, however, stands out as surprisingly perplexing and complex. It starts out with a sweeping demand: moral rights shall be maintained after death until at least until the expiration of economic rights. But then it sets forth an unanticipated exception: “[T]hose countries whose legislation, at the moment of their ratification or accession to this Act, does not provide for the protection after death of the author of all the rights set out in the preceding paragraph [i.e., the rights of attribution and integrity] may provide that some of these rights may, after his death, cease to be maintained.”

This provision is out of the ordinary on two fronts. First off, one wonders why such an exception is granted in the first place – especially following the harsh-sounding demand set forth in the previous sentence, which suggests that post-mortem moral rights were extremely important to the writers of the Berne Convention. Perhaps, again, the Convention was purposefully designed in such a way to encourage (or, at least, not dissuade) potential signatories from signing, based on this provision alone.

The more perplexing question, however, lies in the language, “some of these rights may, after his death, cease to be maintained.” As Elizabeth Dillinger put it, “use of the phrase ‘some of these rights’ is ambiguous and leaves room for debate as to whether a Bern member nation may allow protection of moral rights to expire completely

173 See Berne Convention, art. 6bis(2).
174 See id.
at the time of an artist’s death, or whether it must continue to protect at least some aspect of moral rights after the artist’s death. In other words, does ‘some of these rights’ mean ‘some or even all’ or ‘some but not all’?"  

The answer to this question may lie in the World Intellectual Property Organization’s interpretation, which decided that a country that did not provide post-mortem moral rights at the time of signing could choose to continue to deny post-mortem protection for either the right to attribution or the right to integrity, but not both.  

2. The United States

Although the Berne Convention gives a few durational options for post-mortem moral rights, the United States seemed to take a different approach: ignore the Berne Convention completely.

Although there may be a slight (though rare) possibility to sue for moral rights-type infringement on behalf of a deceased artist, post-death protection from the Visual Artists Rights Act could have bequeathed the rights of attribution and integrity to heirs or other interested parties, as Berne demands. The United States, however, ignored this demand and created a complicated duration statute of its own. VARA’s duration limitation states, first and foremost, that any art created after VARA’s enactment “shall

\[175\] Dillinger, *Mutilating Picasso*, supra note 5, at 902.
\[176\] See id. at 903. Dillinger further explains that “the decision to require post-mortem protection of only one form of moral right, and not both, was apparently a concession to the fact that protection of moral rights in common-law countries would be provided in part through the law of defamation, and that no common-law cause of action exists for defamation of a dead person.” *Id.*
\[177\] Two of the most feasible ways to do this may be the heirs suing for actual (economic) copyright infringement if they were the beneficiaries of the artist’s copyright upon death, or possibly in a state where right of publicity rights extend after a person’s death, such as Indiana.
endure for a term consisting of the life of the author.”\textsuperscript{178} Any art created before its enactment “but title to which has not . . . been transferred from the author, [the author’s moral rights] shall expire at the same time as” the artist’s economic rights.\textsuperscript{179} In other words, the only way an artist would receive post-mortem moral rights for a piece of art would be if the piece of art was created before VARA was created AND if they still hold title/ownership of the creation.\textsuperscript{180}

Many scholars could (and do) easily argue that the United States does not need increased moral rights protection and is not really violating the Berne Convention because there are so many alternate ways to gain protection. However, there’s no way to get around the fact that VARA is in outright violation of the Convention it signed and ratified here.\textsuperscript{181}

3. France

France, as always, is the United States’ polar opposite. Not only does France satisfy the Berne Convention’s request to extend moral rights until the expiration of economic rights – in France, they last forever. France’s statute on moral rights has this to say about duration:

[Moral rights] shall attach to [the author’s] person.

\textsuperscript{178} VARA § (d)(1).
\textsuperscript{179} See VARA § (d)(2).
\textsuperscript{180} Joint works are protected by moral rights until the death of the last surviving author.
\textsuperscript{181} See supra section II for arguments about whether the United States’s patchwork approach to moral rights protection is enough. One additional factor contributing to the lack of post-death moral rights protection may also stem from the Framers’ fear – and banning of – monopolistic power. Extended (or perpetual) moral rights would be one more long-term monopoly of power.
It shall be perpetual, inalienable and imprescriptible. It may be transmitted mortis causa to the heirs of the author. Exercise may be conferred on another person under the provisions of a will . . . After his death, the right to disclose his posthumous works shall be exercised during their lifetime by the executor or executors designed by the author. If there are none, or after their death, and unless the author has willed otherwise, this right shall be exercised in the following order: by the descendants, by the spouse against whom there exists no final judgment of separation and who has not remarried, by the heirs other than descendants, who inherit all or part of the state and by the universal legatees or donees of the totality of the future assets.¹⁸²

The France statute makes it extremely clear that moral rights are to last in perpetuity. This means that innumerable generations may theoretically go by after the creation of a piece of art, and heirs who have never met nor known the author of the piece are granted the right to interpret the message and meaning of the original author’s piece of art and subsequently sue people based on what they think the author may have wanted – even if the piece of art has long been in the public domain and free for public use. It slightly minimizes the risk of post-death abuse of the rights by providing the author the option to confer his rights to people other than his heirs within his will. Abuse is also curbed by a provision that grants the court “appropriate measures” if “manifest abuse” is found; however, this remedy is only available for abuse concerning the exercise (or non-exercise) of the right of disclosure.¹⁸³

¹⁸³ *See id.* at art. L121-3. The same provision also grants judicial discretion when there is a dispute about whom the moral rights should transfer to upon death. *See id.*
Perpetual moral rights seem like an strange beast – especially after the work itself is absorbed into the vast expanse of the public domain. It seems to encourage some curious results, one of which was illustrated in the often-cited case concerning the heirs of Victor Hugo.\(^{184}\) Long after Hugo’s masterpiece, *Les Miserables*, was in the public domain, a third party wrote a sequel.\(^{185}\) One of Hugo’s heirs sued on behalf of Hugo for violation of integrity, and won the case in the Paris Court of Appeals.\(^{186}\)

An even further troubling consequence of post-mortem moral rights, however, lies in the perpetual right of divulgation. Divulgation gives the author, and the author only, the right to choose when and how their work is introduced to the public.\(^{187}\) This suggests that a piece of work created before an author’s death, when the author had a clear intention to public the work or not, can only be brought to the public (or prevented from being brought to the public) in accordance with those wishes after his death – for all of eternity. One consequently wonders what effect that would have on the public domain, however, and the future of literature and art as we know it.

For example, take the case of Anne Frank’s diary. Anne Frank did, in fact, want to be a writer one day, and – after already having begun writing her now-famous diary – heard a news report on the radio, while still shut up in the attic, encouraging survivors of


\(^{185}\) See *International Copyright Law: France*, supra note 24, at §7(3)(b).

\(^{186}\) See Rigamonti, *Deconstructing Moral Rights*, supra note 7, at 370. Upon further appeal, the Court de cassation overturned the decision, finding that a rule barring any sequel as a violation of moral right would be an error, and that the appellate court made no showing of how the sequel would create confusion or distort the work. See *International Copyright Law: France*, at §7(3)(b). However, the language of the court seems to suggest that – although this particular sequel wasn’t a violation of moral rights – other attempts at pieces of work already in the public domain could be.

the war to keep their paperwork and memorabilia so their stories can live on.\textsuperscript{188} Excited about the prospect, Anne decided that she DID want her diary published – but not all of it.\textsuperscript{189} Anne Frank then made a \textit{second copy} of her diary, excluding all portions of the original which she wouldn’t want the public to know about, so she would get the second copy published when she finally could walk free.\textsuperscript{190} After Anne’s tragic end, her father – her closest surviving heir – published her second diary, as per her wishes. However, as Anne’s diary gained in popularity and fame, a demand grew for more, and previously missing pages of the diary – those originally left out, with the sole intention of not being published – were added, and eventually published along with the rest of the original copy.\textsuperscript{191}

Anne’s intent \textit{not} to publish the original pages of her diary were made extremely clear by her creation of an entire new diary created for the purpose of publication. Under French moral rights law, her father would have been prevented from publishing the original diary, could have been sued on Anne’s behalf, and the public at large would have forever been deprived of their depth, importance, and beauty. Is this really what the French code had in mind?\textsuperscript{192}

\textsuperscript{189} See \textit{id.}
\textsuperscript{190} See \textit{id.} Excluded portions mainly touch upon her parents’ marriage and her difficult relationship with her mother. \textit{Id.}
\textsuperscript{191} See \textit{id.} The pages were published by a close friend of Anne’s father, whom her father had given the pages to in an effort to shield himself from neo-Nazi claims that the diary was forged. \textit{Id.}
\textsuperscript{192} Another example of post-humus publication of a piece of literature the author did not want to publish himself is a work by John Kennedy Toole – native New Orleanian and author of the Pulitzer Prize-winning \textit{A Confederacy of Dunces}. Although the author did
French courts have, in fact, demanded such a result. An heir of painter Nicolas de Stael – one who retained Stael’s post-mortem right to disclosure – wanted to introduce one of the painter’s sketches to the public, but was denied by the court. Perhaps it is a long-engrained American-capitalistic view of art as a commodity that makes me wonder if denial of a potential masterpieces to the public, even after copyright protection has expired, is the correct course of action after an artist has tragically died. Perhaps, however, it is my desire as an avid reader, an art lover, a writer and a musician, to have the opportunity to be exposed to the great works of humankind.

4. Israel’s Old Approach

Contrary to France’s much-thought-out and detailed explication of post-death moral rights, Israel’s original moral rights amendment – a mere five-paragraphs long in sum – has no explicit duration provisions at all. The closest the language ever comes is the assertion that the author’s moral rights are independent from their economic rights, and are not waived or transferred upon transfer of the economic rights. This provision

want Confederacy (which was published after Toole’s suicide) published, as shown by attempts to publish it himself in his lifetime, Toole also wrote another novel, The Neon Bible. Toole wrote the Neon Bible while he was still a teenager, but considered it too juvenile to publish, so never submitted it to publication (despite the fact that he tried desperately to publish his other work for years). See W. Kenneth Holditch, Introduction, in THE NEON BIBLE (John Kennedy Toole, 1994); Walker Percy, Foreword, in A CONFEDERACY OF DNCES (John Kennedy Toole, Grove Press, 1994); RENE POL NEVILS & DEBORAH GEORGE HARDY, IGNATIUS RISING: THE LIFE OF JOHN KENNEDY TOOLE (2005). Other examples of post-humus publication of works the author probably would not have published on their own: the diaries of Sylvia Plath, Che Guevara, and Kurt Cobain.

194 See generally Israel’s Original Statute.
195 See id. at § 4.
really speaks only to the existence and non-transferability of moral rights (if that), and
says nothing as to the relationship of moral rights duration in relation to copyright
duration, or whether moral rights last after death at all.

5. Israel’s New Copyright Act

The lack of clarity in Israel’s original moral rights amendment was remedied by
the new Copyright Act, which grants moral rights for the extent of the artwork’s
economic rights. 196 This durational grant is precisely the grant recommended (or,
demanded) by the Berne Convention. 197 In addition, despite Berne’s allowance for
countries that did not grant post-mortem moral rights upon signing (which, presumably,
Israel did not), Israel chose to provide copyright-term moral rights for both the rights of
attribution and integrity. 198

Israel’s adherence to Berne’s stipulations suggest that Israel’s motivations live in
the middle ground of the moral rights spectrum, along with Berne itself. The important
policies tearing Israel in two – a rich culture demanding protection, and a struggling
economy begging for a boost – force Israel to choose what policy is more important to its
people as a whole. Perhaps this durational middle-ground is its attempt to reconcile the
two competing ends – grant a moral rights monopoly for a long, but limited, time;

196 See Israel’s Current Act, art. 45. Specifically, the statute grants moral rights “during
the entire period of copyright in that work.” Id. at art. 45(a). Israel provides copyright
protection for 70 years after the author’s death, in general. Id. at art. 38.
197 See Berne Convention, art. 6bis(2). Berne originally urged copyright protection for 50
years after the author’s death. See Barbosa, Revisiting International Copyright Law,
supra note 1, at 48. Since then, most countries have upped the number to 70, including
Israel, France, and the United States.
198 See generally Israel’s Current Act.
meanwhile, encourage creation by truly throwing works in the public domain into the hands of the public.

IV. PROPOSAL

Because of this constant struggle between competing interests, Israel must look upon their new Copyright Act with new eyes – eyes which can discern the proper course, and decide which of the two policies must prevail. Looking at this issue in the context of post-death moral rights duration is appropriate, as post-mortem moral rights speak almost directly to the issues at hand: perpetual (or extremely long-lasting) moral rights will drastically discourage future creation and minimize the public domain, but protect important cultural and historical artifacts in an increasingly-Americanized world; short-term moral rights (like extermination upon the author’s death) will encourage creation and boost Israel’s creative market throughout the globe, but will leave historical and cultural artifacts prone to mutilation or destruction.\textsuperscript{199} What’s a developing country to do?

\textsuperscript{199} Other provisions in Israel’s new statutory scheme also seem contrary to its public policy, or just blatantly unfair and overly subjective. For example, the moral rights exception for infringement that was “reasonable in the circumstances” (see art. 50) could be an extremely important one for artists who created works in good faith; however, the non-mandatory factors for courts to acknowledge while making the decision should be mandatory. In addition, the allowance for damages without proof of injury (see art. 56) seems unfairly punitive, and should be abolished. The innocent infringer clause (see art. 58) is also extremely vague and will most likely cause more harm than good, and seems especially unnecessary if there is a working exception for reasonable acts under the circumstances; it should be abolished. Lastly, moral rights statutes in general are, by nature, inherently vague and subjective. Israel – and any other country contemplating moral rights regulation – should take care to provide as much detail, guidance, and consistency as possible for those who may worry about accidental infringement; being hauled into court after never having proper notice of an infringement is just blatantly unfair.
As we have seen, the United States takes an extremely pro-creation/pro-public domain approach to moral rights (and therefore resists any form of moral rights protection at all). France, on the other hand, admires the author above all, and seeks to protect its authors – and its already-rich historical body of artistic works – by enacting as much moral rights legislation as can be, and letting them last forever. France, however – once a hotbed of creation and inspiration, has lost its footing somewhat in the global creative market.\(^{200}\)

Israel is a country with a budding economy – a State that gained its own independence a mere six decades ago – and which must maintain a steady market in all fields in order to stay afloat in a competitive world. Because economic development could strengthen the State in extremely positive ways, it seems as though further creativity within its borders should be of utmost – or at least, very weighty – importance. My analysis throughout this paper has led me to believe that excessive post-death grants of moral rights (and even, moral rights in general) both discourages future creativity and makes the public domain smaller – a consequence which Israel may not be able to economically support.

Further, post-mortem moral rights may leave future artists in sticky positions. An artist who, like the “infringing” author in the Victor Hugo \textit{Les Miserables} case, bases a

\(^{200}\) See Piotraut, \textit{French and American Law Compared, supra} note 95, at 557 (arguing that French moral rights laws are less fair than most scholars think, and conversely, United States law is \textit{more} fair than it usually gets credit for: “Since current artistic productions are mostly collective and expensive, the French copyright system, with its excessive focus on the individual artist or author, appears to hamper producers’ businesses and, accordingly, to harm modern creation. Some writers have even blamed the likely decline of the French motion picture and entertainment industry, and the ensuing significant job losses, on French copyright laws. If this is the case, the effect of these laws is far from socially fair and moral.”).
new work off of a work in the public domain, takes a risk that their new work may land them in court, shelling out wads of cash, without the original artists’ great grandchildren ever having to prove actual damages. Creators will live in fear that they will be punished for their creations.

In addition, Israel’s law makes no explicit exception for modifications or damages made in the course of conservation or public display, like VARA. Although liability caused by such modifications are unlikely to be actionable, the deep pool of discretion Israeli judges carry when deciding reasonability seems relatively unfettered – enough so that those in charge of artistic conservation or display may fear legal action. Artists may feel that they are stuck in a rock and a hard place – leave the work untouched and get sued, or fix the work and get sued.

Although post-mortem moral rights implicitly carry with them an assumption that those who receive the creator’s rights after his death should take legal action only in the deceased author’s interest – not in their own. The nature of post-mortem rights, however, seems to call this idea into question. The more time that passes, the less the original author’s message, meaning, and intent will inevitably be to ascertain. As generations pass, heirs that are further and further removed from the original author may

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201 Israel’s statute does grant an exception for acts that were “reasonable in the circumstances,” though, so in reality it is very unlikely that modifications of this sort would be actionable. See Israel’s Current Act, art. 50(b). However, as discussed earlier in this Article, the factors a court may consider in the determination of such reasonability is an optional test, and much discretion is given to the individual judges to decide, based on the circumstances of the case. It is therefore not wholly inconceivable that someone get sued for “incorrectly” correcting a piece of work.

also feel less of a protective connection with him, and may therefore be more tempted – and able – to bring frivolous and self-interested lawsuits. The situation is further exacerbated by the fact that the statute requires these rights to go to direct descendants of the creator, and provides no provision granting the author the right to designate the moral rights recipient in his will.\textsuperscript{203} What happens, then, in situations of estranged family members? Evil, greedy children? Never-married but long-in-love elderly couples? The risk of abuse is multiplied.

Although Israel’s post-death grant of moral rights is limited to 70 years after the author’s death, these concerns are all still present. Perhaps different approaches for the different moral rights would make more sense in light of Israel’s strong policy interests.

For example, the concerns listed above, like discouragement of future creativity and encouragement of frivolous lawsuits, do not apply to such a drastic degree to the right of attribution. The purpose of the right of attribution is to give the author the ability to choose what he wants credit for and when – it does not speak to the intrinsic dimension of creativity nearly as much as rights like attribution. If the right to attribution were perpetual, as in France, the right may, in fact, slightly discourage future creation. However, when a the right to attribution has a term that is attached to the relevant copyright protection, this discouragement is probably minimal to nonexistent. Anyone who would want to build a new work based on an old work (and would then, presumably, be more hesitant to be forced to attribute the original work to the original author) would not be able to do so until the original work is in the public domain, anyway – the same amount of time granted by the new Israeli statute. For policy purposes, then, Israeli’s

\textsuperscript{203} See Israel’s Current Act, art. 55. The statute grants moral rights to the author’s “relatives,” under the statute: “a spouse, descendant, parent or sibling.” \textit{Id}.
grant of post-mortem rights of attribution seem negligible, and seem as if they would do little or no harm to future creativity.

The right of attribution, however, speaks directly to the intrinsic relationship between a creator and his work. According to Professor Roberta Kwall, “[c]entral to moral rights is the idea of respect for the author’s meaning and message as embodied in a tangible commodity because the author’s meaning and message reflect his creative process.”

A perpetual right of attribution, as in France, can (and does) discourage future creativity and minimize the public domain, as well as punish creators who wish to face the risk of liability. In my view, even a seventy-year extension of this right can lead to such a result, because it can also discourage healthy critique and parody.

More important, however, is the question of need for such an extension in the first place. If moral rights speak to protect the author’s relationship with his work, such an interest no longer exists after the author’s death. Why deprive the public of the right to create (and benefit from the creations of others) to protect a relationship that no longer exists?

Because of Israel’s underlying policy concerns, I therefore think it would be more appropriate for Israel not to protect an author’s right of integrity after his death – an option which, appropriately enough, would be acceptable under the duration exception in the Berne Convention.

Although Israel’s right to disclosure is not bundled as a moral right in its new Copyright Act, the right – whether an economic right or a moral right, in actuality – now

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204 Kwall, Intrinsic Dimension, supra note 6, at 1972.
205 See note 139, supra, for an example of a scholarly critique that was deemed an infringing work based on the right of integrity.
206 See section III(C)(1), supra, for further discussion of Berne’s duration exception for countries who did not provide post-mortem protection pre-ratification. See also Berne Convention, art. 6bis.
expires seventy years after the author’s death, as well. If this right is interpreted similarly to that of France’s right of dissemination, the same consequences will arise: heirs will be prevented from publishing a deceased artist’s works, and the public will be denied the opportunity to experience them. Any limitation on the right of disclosure post-death is a dangerous path to take. Because an author’s relationship with his work no longer exists after his death, the public’s interest in such work should take precedence. Artistic works serve not only the artist and his relationship with the creation, nor the public for mere entertainment value; good art can move people, educate people, and change people forever. Good art can also bring public interest, attention, and investment to an economy, so Israel’s interests – in increasing its people’s quality of life and increasing the strength of its economy and global competitiveness – are best served by limiting the right to disclosure to the author’s death, as well.

If abolishment of certain moral rights after an author’s death would threaten Israel’s rich cultural and religious history, however, such abolishment could pose a significant problem. But post-mortem moral rights protection may not be the only solution to this problem. Similar to VARA’s right to prevent destruction in regards only to works of relevant stature, Israel could enact a specific provision to prevent destruction and mutilation of works of cultural, historical, or religious importance. This would remove the element of over-protection of a nonexistent creator/created relationship, and focus entirely on preservation of history and culture. It would also leave such works available to the public for most artists who wish to create works inspired by the original creations, and therefore maintain the strength and encouragement of future creation and the public domain.
V. CONCLUSION

As this Article has shown, Israel’s new Copyright Act places it in a position where it must choose between two competing interests – that of protecting its rich cultural heritage, and that of promoting progress and remaining competitive in the international creative market. In comparison with the various approaches to moral rights taken by the Berne Convention, the United States, and France, Israel’s new statute seems to flip-flop between the two opposites, eventually landing closely to the more neutral-seeming Berne Convention. Grants of post-mortem moral rights duration, however, can threaten the success of Israel’s policy goals, so Israel should therefore minimize its protection of moral rights after an author’s death.