Moral Rights in United States Entertainment Law: Is America Better off without them?

Katie M. Scholz
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American entertainment artists periodically call for greater moral rights protection. While they do give advantages to individuals, there are difficult logistical hurdles to overcome and risks to consider carefully. Greater moral rights protection may actually be a step in the wrong direction.

Introduction

During the last century, the United States transformed from an importer into an exporter of intellectual property.1 As American intellectual property holdings grew, so too did the need for international copyright protection. The foremost international treaty for copyright protection was the Berne Convention for the Protection of Literary and Artistic Works (Berne).2 The United States avoided signing Berne initially because it required protection for the moral rights of authors. In 1988, under pressure from the entertainment industry – which wanted greater international protection of their works – the United States finally signed Berne.3 At that time, Congress declared America in full compliance with Berne through copyright, trademark,4 and state law remedies. However, case law leaves doubt over the actual protection of moral rights in the United States. American authors and musicians insist the United States enact positive legislation to protect their moral rights and comply with Berne.5 While international harmonization and greater individual protection are noble goals, this raises the question: would the United States – and its entertainment industry – be better off without explicit moral rights

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2 Id. at 249. Moral rights codified in Berne Convention for the Protection of Literary and Artistic Works, Art. 6bis, Sep. 9, 1886.
3 Id.
5 Bird, supra note 1, at 266; after the UK protected moral rights in 2006, the US became the last major hold out.
protection? In fact, granting stronger moral rights protection for authors may be a step backwards for all involved as they could decrease the output of creative works. The United States also has a legal philosophy that may not be compatible with moral rights. Moral rights threaten many of the ideals American copyright law upholds – the public domain, fair use, and the first amendment. All parties need to strongly consider the ramifications of moral rights protection before lobbying further for their enactment.

This article answers the music industry’s demand for greater moral rights protection by examining the issue as it pertains to American entertainment. First, it is necessary to define moral rights. Second, it is important to determine the extent of their protection under American law. Finally, it is crucial to look at what the entertainment industry loses if further moral rights protection is enacted.

I. Moral Rights as Defined in International Law

Moral rights encompass four basic rights vested in an author: attribution, integrity, disclosure, and withdrawal. Attribution refers to the author’s right to credit. Integrity allows authors to prevent modifications to their work. Disclosure allows authors to choose when, and whether, to release their work to the public. Withdrawal allows authors to rescind their work from distribution. These rights are inalienable and protect the personal, non-economic interests of the author – the work is an extension of the author’s person. Infringement of moral rights arises when an author objects to a use of his or her work for harm to reputation or slander. Moral rights are linked to copyrightability – if a work is not copyrightable, there are no moral

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7 Id. at 363.
8 Id. at 364.
9 Id. at 362.
10 Id.
11 Id. at 356.
rights.\textsuperscript{13} Moral rights are also inalienable.\textsuperscript{14} While moral rights can be a powerful tool, there are protections against their abuse.\textsuperscript{15} For example, the right of disclosure is not exercisable for economic reasons alone, and the creator must reimburse those harmed.\textsuperscript{16} The length of moral rights protection is not yet settled in the international community. Some countries give perpetual protection; others limit it to the author’s lifetime.\textsuperscript{17} The lack of international uniformity makes these rights complex and hard to assert.\textsuperscript{18} International protection is crucial as Internet infringement ignores national borders\textsuperscript{19} and makes enforcement difficult.\textsuperscript{20}

The United States finally joined Berne when the need for international copyright protection was too great to ignore. Joining and complying with Berne allowed American authors to assert copyright in other countries and allowed America to take part in negotiation of later copyright treaties. However, there is still doubt over whether the American law complies with Berne. Many cases asserted in both the United States and Europe result in drastically different results.\textsuperscript{21}

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\begin{itemize}
  \item \textsuperscript{13} Rigamonti, \textit{supra} note 6, at 360.
  \item \textsuperscript{14} \textit{Id.} at 361.
  \item \textsuperscript{15} \textit{Id.} at 363.
  \item \textsuperscript{16} \textit{Id.} at 363. An author cannot hold refuse to disclose in favor of a higher bidder. If an author decides not to disclose, then he or she must return any payment given.
  \item \textsuperscript{17} Bailey, \textit{supra} note 12.
  \item \textsuperscript{19} Albert Fang, \textit{Let Digital Technology Lay the Moral Right of Integrity to Rest}, 26 CONN. J. INT’L L. 457, 458 (2011).
  \item \textsuperscript{20} Viacom Intern. Inc. v. Youtube Inc. 253 F.R.D. 256 (2008) – arguments concern who has responsibility to look for and remove infringing content. Over 100,000 take down requests were sent by Viacom and responded to by Youtube, the question is not whether YouTube complied, but whether YouTube has a duty to proactively seek out infringing material.\textsuperscript{21}
  \item \textsuperscript{21} Henry L. Self, \textit{Moral Rights and Musicians in the United States}, 2003-2004 \textit{ENT., PUBL. ARTS HANDBOOK} 165, 171 (2003); four Russian composers sought an injunction in New York and in France over the use of their music in an anti-Soviet themed movie that could give them a false imputation of disloyalty. France granted the injunction, New York did not.
\end{itemize}
II. Moral Rights Protection under United States Law

In fact, the uncertain protection for moral rights in the United States is what separates America from its trade partners. Although Congress declared the United States in compliance with the moral protection requirements of Berne, American courts do not recognize them. Moreover, Berne is a non-self-executing treaty. Petitioners are limited to relief available only under domestic law.

United States law has strong utilitarian roots, seeking to promote social utility by exchanging a limited monopoly for the work eventually entering the public domain. European law, alternatively, arises through philosophical justifications – based on labor invested in a work; trading perpetual moral rights for the author’s labor of creation. American copyright law specifically disavows labor alone as a justification for copyright. In fact, American copyright law emphasizes the economic rights of individuals. Moral rights, on the other hand, protect personality independent of economic interest.

A majority of cases asserting moral rights concern film copyrights and filmmakers. In fact, moral rights surface most often when old content is repackaged for a new medium. Historically, studios win authorship contests in courtrooms, leaving no protection for individuals. In addition, many studios operate on a work-for-hire basis, where copyright vests

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22 Rigamonti, supra note 6, at 354.
23 Peter Decherney, Auteurism on Trial: Moral Rights and Films on Television, 2011 Wis. L. Rev. 273, 317 (2011). A majority of film studios and the MPAA agreed at the time that there was adequate protection.
24 Self, supra note 21, at 167.
25 Id.
27 Id. at 326.
30 Id.
31 Decherney, supra note 23, at 273.
32 Id. at 276. For example: adaptation for home video systems, colorization, television, or digitization.
33 Id. at 273.
in the studio as employer. Enacting new legislation alone is not enough to overturn this precedent. Either the definition of authorship must change, or copyright law needs to specify an individual, or set of individuals, to vest moral rights. For the music industry, the authorship question is even more complicated because of the layers of copyright interests. The songwriter has a copyright in the lyrics. The composer has a copyright in the music. The singer has a copyright in their performance and the sound recording. Moreover, any later singer may get a statutory license to create a ‘cover’ in the song adding another copyright layer.\(^{34}\) And, anyone to whom these rights are assigned also have strong economic interests to use and modify copyrights. Musicians as a group are especially vulnerable because of the adaptability of music to different forms and contexts that could potentially reflect poorly on any party.\(^ {35}\) Moral rights complicate the issue further – who should have them? If all players had the right to stop disclosure or exercise withdrawal, the amount of music produced could drastically decrease.

The United States claims to protect moral rights through copyright and trademark infringement, privacy law and the Visual Artist Rights Act of 1990 (VARA). However, these actions do not overlap completely, leaving many creators unprotected.

Copyright law protects moral rights for copyright holders, including the derivative work right which substitutes for the right of integrity. For example, in Gilliam v. ABC,\(^ {36}\) Monty Python prevented ABC’s editing of The Flying Circus, asserting the changes made an unauthorized derivative work.\(^ {37}\) Derivative works cover transformations, adaptations, and recasts.\(^ {38}\) Copyright holders can also limit reproduction of their works.\(^ {39}\) While these rights are

\(^{34}\) Self, *supra* note 21, 168.

\(^{35}\) Self, *supra* note 21, 168.


\(^{37}\) Rigamonti, *supra* note 6, at 311.


\(^{39}\) Copyright Act, 17 U.S.C. § 106 (2002); although there are statutory exceptions for statutory licenses for radio broadcasts, cover bands, etc.
transferrable, American authors always retain the inalienable right to terminate the original transfer of their work in a window between 35-40 years after publication.\textsuperscript{40} This allows authors to renegotiate ownership. Authors also may contract to retain rights in their works.\textsuperscript{41} While this may disadvantage new authors in poor bargaining positions, it is an asset for established musicians who have better control.\textsuperscript{42} There is also heightened protection for unpublished works – similar to the right of disclosure.\textsuperscript{43} However, once a work lapses into the public domain, moral rights under copyright law are hard to assert.\textsuperscript{44}

If authors want control after they assign their copyright, trademark and unfair competition law are available. Trademark infringement covers false designation of origin and dilution of valuable marks. A product cannot have a false or misleading description as to the true author.\textsuperscript{45} Unfortunately, success is mixed for authors using false origin claims to remove their names from products.\textsuperscript{46} Alternatively, authors can assert that their name on packaging dilutes the selling power of their name as a mark. However, courts construe trademark law narrowly and may not allow any trademark claims for a work not protected by copyright.\textsuperscript{47}

In addition, privacy law, protected under state laws, protects authors from over-attribute and under-attribute and from reputation damage.\textsuperscript{48} For authors that want

\textsuperscript{40} Copyright Act, 17 U.S.C. § 203 (2002).
\textsuperscript{41} Self, supra note 21, at 169.
\textsuperscript{42} For example, Norman Granz successfully asserted breach of contract for omission of 8 minutes of his jazz recordings in a transfer to 10-inch records. Id.
\textsuperscript{43} Rigamonti, supra note 6, at 362.
\textsuperscript{44} Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003); Fox was unable to sue under copyright law because the work expired, entering the public domain.
\textsuperscript{45} Pettenati, supra note 18, at 431.
\textsuperscript{46} Decherney, supra note 23, at 300. It used to be common for studios to omit a name in favor of the pseudonym “Alan Smithee” where there was controversy.
\textsuperscript{47} Graeme W. Austin, The Berne Convention as a Canon of Construction: Moral Rights after Dastar, 61 N.Y.U. Ann. Surv. Am. L. 111, 113 (2005); the Dastar court was unclear on the reasoning; it may have been protecting the public domain.
\textsuperscript{48} Rigamonti, supra note 6, at 375.
dissociation from a product,\textsuperscript{49} over-attribution claims the author’s name implies an improper authorization or association.\textsuperscript{50} Moreover, for an author who wants association with a product, under-attribution suits assert omission yields an incomplete source indicator.\textsuperscript{51} Courts are willing to prevent over-attribution in cases where the artist’s reputation is at risk.\textsuperscript{52}

Congress granted limited moral rights protection through VARA.\textsuperscript{53} To date, VARA is the only federal moral rights legislation.\textsuperscript{54} VARA only protects the rights of attribution and integrity\textsuperscript{55} and does not apply to work-for-hire creations.\textsuperscript{56} Interestingly, several states had some form of moral rights protection prior to VARA.\textsuperscript{57} However, neither the state statutes nor VARA protected musical works.\textsuperscript{58} In fact, VARA has a very narrow scope;\textsuperscript{59} protecting only fine arts and sculptural works achieving renown in their field.\textsuperscript{60} In addition, VARA has had very limited success – only one successful suit in sixteen years.\textsuperscript{61}

III. **Lost in Protection**

There are many good reasons to enact moral right protection. They allow authors to negotiate for better royalties, control modifications, and choose their associations. However, the lack of moral rights protection may explain the global rise and success of American entertainment. In fact, granting moral rights protection may be a step in the wrong direction for

\textsuperscript{49} John Lennon successfully used this action to remove his name from poor quality recordings. Self, supra note 21, at 169.  
\textsuperscript{51} Id.  
\textsuperscript{52} Self, supra note 21, at 170. George Benson obtained a preliminary injunction to stop the release of “George Benson: Erotic Moods,” which used music Benson had created under a work-for-hire agreement on the grounds that it would irreparably harm his reputation.  
\textsuperscript{53} Bird, supra note 1, at 256.  
\textsuperscript{54} Bailey, supra note 12.  
\textsuperscript{55} Graubart, supra note 29.  
\textsuperscript{56} Fang, supra note 19, 461.  
\textsuperscript{57} Bird, supra note 1, at 254; 14 states had some protection, including rights of integrity and attribution. California still grants resale royalty rights.  
\textsuperscript{58} Id. at 255.  
\textsuperscript{59} Self, supra note 21, at 168.  
\textsuperscript{60} Bird, supra note 1, at 257.  
\textsuperscript{61} Id. at 260.
all parties involved. In addition, enacting moral rights protection leaves unanswered the issue of what rights individuals actually have. The film industry argues for moral rights to vest in the producer or the director – rarely are actors or scriptwriter mentioned. The music industry wants rights to vest in singers, not composers or lyricists. The authorship problem is not the sole issue; there are other concerns – fair use and first amendment protection, preservation of the public domain, and the chill on investment in the arts and entertainment industries.

The United States has strong fair use protection for works of parody and commentary. However, fair use directly conflicts with the right of integrity. American law freely allows transformative uses of copyrighted works that do not conflict with the economic opportunities of the first author. In 2006, the United Kingdom passed moral rights legislation with no parody protection. Without a parody defense, moral rights protection could result in private censorship, severely curtailing the ability to use copyrighted for expression under the first amendment. Strenuous enforcement of copyright and moral rights could eliminate satire altogether and suppress creativity.

America has a rich public domain for creators to draw from for inspiration, which is threatened by moral rights. Once copyright protection ends, under American law, the author loses all rights in the work. Moral rights may not die with copyright. A potential user could infringe moral rights on a work in the public domain – an idea anathema to American copyright

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62 Rigamonti, supra note 6, at 412.
63 Decherney, supra note 23, at 284.
64 Fang, supra note 19, 462.
65 E.g., in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), the United States Supreme Court allowed the group Two Live Crew to re-make Roy Orbison’s “Pretty Woman” because the new song occupied a different market.
66 Bird, supra note 1, at 268.
67 Id. at 269.
law. Users of public domain material need security that their uses and modifications will not invite litigation.

Granting protection to moral rights could chill investment in arts and entertainment. Producers of mass-entertainment take risks when investing in ideas, and will be less willing to invest with the additional gamble on litigious authors and moral rights infringement. Additionally, work-for-hire contracts are the industry norm. Even if Congress did recognize one or more individuals for vesting moral rights, entertainment producers will be less willing to work with litigious individuals. Granting the desired rights may leave authors unable to find producers and funds.

IV. Conclusion

While there are good reasons to enact moral rights protection, not limited to celebrating the creators of works and harmonizing American copyright with international law, there are many logistical and strategic issues to consider before supporting the enactment of further moral rights legislation in the United States. These issues range from re-defining authorship to finding a regime that protects the moral rights of authors, not assignees. However, moral rights also pose risks to the entertainment industry’s continued success. Before any moral rights legislation proceeds, all the players involved – Congress, authors, and copyright assignees – need to determine what moral rights protection are desired, and if that protection is worth alienation of authors and chilling the entire industry.

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69 McGilvray, supra note 26, at 335.
70 Id. at 332.
71 Id. at 336.
72 Decherney, supra note 23, at 289. When courts initially favored actors’ rights in television, potential advertisers backed away to avoid potential litigation.