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**Unalienable Rights and Alienable Intellectual Property:  
Why “Moral Rights” Should Not Be Imported into U.S. Copyright Law**

by

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**Introduction and Summary**

In recent years, there have been calls for the United States to incorporate so-called “moral rights” of attribution and integrity into its laws and policies concerning copyrighted works.\* The U.S. House of Representatives Subcommittee on Courts, Intellectual Property, and the Internet held hearings that touched on moral rights in July 2014. Also, the U.S. Copyright Office co-sponsored an April 2016 symposium on the moral rights of authors, and in 2017, the Office launched a public study of the subject.

But current U.S. copyright law as well as contract law protect authors’ and creative artists’ rights to control whether they receive credit for their copyrightable works and whether their works are adapted into new media or transformed. Importing additional foreign-based moral rights restrictions into U.S. copyright law would create legal uncertainties, destabilize existing voluntary contract arrangements, reduce market freedom, and threaten the market value of copyrighted works.

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\* References to the principal authorities upon which we rely are at the end of the paper.

Thus, Congress should be wary of any new suggested injection of “moral rights” provisions into U.S. copyright policy. Instead, reforms to U.S. copyright law should be consistent with property and contract principles that are rooted in American constitutionalism and the common law. A cautious approach that includes careful examination of specific proposals involving moral rights is necessary to ensure that fundamental principles of U.S. copyright law and contract law, as well as the existing rights of copyright holders, remain secure.

“Moral rights” – as used in copyright and other laws of foreign countries – is not directed toward any common understanding of morality as such. Rather, moral rights thinking is premised on the idea that creative works are an expression of personality or the inner self and are deserving of special protection. In moral rights systems, it is often the case that authors’ right to be acknowledged as the creator of their works or to control the integrity of their works cannot be alienated or transferred.

The most widely recognized moral rights in foreign nations are the rights of attribution and integrity. The right of attribution – also called the right of paternity – is the right for an author or creative artist to receive credit for originating copyrighted works. Proper attribution typically involves the author’s name appearing on all copies of the work and sometimes on publicity materials tied to the work. The right of integrity is the right of an author or creative artist to protect his or her works from unauthorized changes or distortions. It also includes the right to make changes to their work or to authorize others to make changes to them.

“Moral rights” gained international recognition when they were added to the Berne Convention for the Protection of Literary and Artistic Works in 1928. The Berne Convention is an international copyright treaty. The most significant Berne Treaty provision regarding moral rights is Article 6*bis*:

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.

The U.S. Congress resisted membership to the Berne Convention for nearly a century. Yet mounting concerns over foreign piracy of U.S. copyrighted works and resulting revenue losses prompted Congress to pass the Berne Convention Implementation Act of 1988. Shortly thereafter the U.S. Senate ratified the treaty. In his remarks on signing the 1988 Act, President Ronald Reagan recognized that membership automatically granted the U.S. copyright relations with 24 new countries. Broader recognition of Americans’ copyrights abroad was an economic imperative, as President Reagan cited estimates for revenues losses to piracy in 1986 that exceeded \$2 billion for the entertainment industry and \$4 billion for the computer and software industries.

The 1988 Act declared that the Berne Treaty’s provisions “are not self-executing under the Constitution and laws of the United States.” Importantly, that means the Treaty’s terms are not directly enforceable because “[t]he obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.” The non-self-executing status of

the treaty essentially forecloses arguments made by proponents of stronger moral rights that the U.S.'s current copyright policies fail to meet the standards set forth in Article 6*bis*.

Indeed, U.S. copyright and contract laws secure basic rights of attribution and integrity, consistent with fundamental principles of the American constitutional order. In the Declaration of Independence, "Life, Liberty and the Pursuit of Happiness" are described as "unalienable Rights," meaning those rights inherently belong to human beings and cannot properly be sold or traded away. However, those things in which individuals possess rights of property – whether in land, personal possessions, money, or intangibles – are alienable. And it is part and parcel of individuals' rights to liberty and to pursue happiness that they decide for themselves whether, when, where, and how to acquire, sell, or trade for property.

Key provisions of U.S. copyright law embody basic principles of property ownership and contractual freedom in connection with authors' and creative artists' intellectual and physical labors. The exclusivity of rights that Congress is constitutionally empowered to secure to authors includes the right to decide whether or how reproductions of creative works will identify authors or creative artists who originally created them. Section 102(a) of the Copyright Act of 1976 provides that "copyright protection subsists... in original works of authorship fixed in any tangible medium of expression." Thus, Section 102(a) secures to authors and creative artists exclusive rights over attribution and crediting in an extensive range of creative works.

Copyright protections in derivative works also encompass rights of authors and creative artists concerning attribution and integrity. Derivatives are creative works that incorporate significant elements of prior original copyrighted works, such as adaptations of prior copyrighted works into new mediums. By declaring in Section 103(a) that the subject matter of copyright includes derivative works and by defining a "derivative work" in Section 101 to include "any... form in which a work may be recast, transformed, or adapted," the 1976 Act secured a wide scope for copyright protections in derivatives. The manner of publicly providing credit in derivative works to the authors or creative artists of the original works can be made part of licensing terms. Similarly, authors and artists can exercise their control over derivative works by licensing it only to such persons and in those forms that they reasonably expect will avoid resulting in "distortion, mutilation... or other derogatory action" relating to their works."

Significantly, key U.S. copyright statutory provisions presuppose a general policy of freedom of contract that is enforceable under the law of contracts. Privately negotiated contracts are critical legal and economic building blocks for the creation, acquisition, licensing, and sale of copyrighted works. Contracts provide a flexible means for exercising and enforcing rights regarding attribution and integrity in copyrighted works. Negotiated contract terms concerning the exclusive rights of authors and creative artists in their creative works enable authors and creators to exercise control over whether, when, or how they are credited for the use of their work. Also, contract terms empower authors and creative artists to exercise control over whether, when, or how their works may be translated, adapted, or otherwise transformed.

Today, copyright-intensive industries and individual authors alike rely upon sophisticated courses of dealing, collectively bargained contracts, as well as simple arms-length agreements to transfer copyright ownership in exchange for valuable consideration. For example, the motion picture and video game industries depend upon contractual arrangements among numerous

authors, creative artists, and others for coordinating the creation, development, and marketing of jointly created works.

Privately negotiated contracts allow for flexibility and customization in creative and commercial activities, while providing reasonable legal certainty to the parties. Contract terms can be continuously updated as circumstances warrant. These functions of contract are especially important in the Digital Age, when copyrighted works can be readily reproduced and transmitted in myriad ways and on a mass scale via the Internet, when collaborative copyrighted works require coordination between multiple parties, and when scalability, customization, and accessibility are critical for providing consumers with goods and services.

Importantly, customary contractual practices in copyright-intensive industries firmly rely upon the “works made for hire” doctrine. The doctrine governs who owns copyrights in creative works made by employees or independent contractors. The “works made for hire” doctrine is consonant with U.S. copyright law’s general policy of freedom of contract and has proven successful in promoting creation and commerce in copyrighted works. Although the Berne Convention is not in conflict with the work for hire doctrine, imposing additional moral rights restrictions on the transfer of creative works could undermine contractual relationships regarding copyrighted works and reduce their value.

There is strong reason to be skeptical that moral rights doctrines based on foreign law premises can fit America’s unique legal context without jeopardizing copyright and contract rights. Civil law systems prevalent in foreign nations feature comprehensive statutory codes that superintend commercial activities to a greater extent than the common law system that prevails in America. Comprehensive prescriptive legal codes do not have the same capacity for providing party coordination and responding to complexities.

Differences among foreign nations as to how moral rights are protected also raise the question of whether claims about moral rights being “unalienable” are overblown. If other nations can protect the moral rights of authors in their own ways, cannot the United States protect such rights consistent with its own legal system?

Moral rights advocates have called for the expansion of Visual Artists Rights Act of 1990, the establishment of a resale royalty for visual arts, stronger rights of attribution in non-dramatic musical compositions, and more. To the extent any of these measures are considered, strong preference should be given to copyright reforms that are consonant with property and contract concepts rooted in American constitutionalism and the common law. Any departure from the general policy of freedom of contract in copyrighted works should be based on compelling justifications, such as the need to remedy identifiable market failures causing consumer harm or to prevent deprivations of recognized rights of authors and creative artists – justifications that have not been shown to exist. If Congress ever considers new moral rights provisions, it should examine the scope of such provisions with a skeptical eye.

### **European Moral Rights Protections for Creative Works**

The concept of “moral rights” is rooted in nineteenth century continental European thought. Its origin is often traced back to the French Revolution. And its development is often associated

with French jurist André Morillot (1849-1922), who first used the term “*droit moral*” – “moral rights” – to define and defend the personal rights of authors. Moral rights in creative works are not directed toward morality as such, at least as commonly understood in the United States. Rather, in moral rights thinking, the personal rights of authors in creative works is distinct from economic rights in those same works.

Moral rights concepts took root in civil law nations, albeit according to somewhat different theories. In France, moral rights thinking developed primarily according to a dualist theory, whereby an author or creative artist’s economic and personal rights are separable, and the economic rights can be sold while the personal rights remain with the author or creative artist. And in Germany, another nation that contributed to moral rights thinking, a monist theory prevailed, whereby economic and personal rights in creative works are intertwined and not all of the rights of an author or creative artist are regarded as commercially viable.

Despite differing theoretical underpinnings for moral rights, as a general matter, moral rights thinking is premised on the idea that creative works are an expression of personality or the inner self and are deserving of special protection. In moral rights systems, the authors’ and artists’ right to be acknowledged as the creator of their works or to control the integrity of their works are regarded as inherent and therefore cannot be alienated or transferred. Or at the very least, transfers of personality rights are or should be subject to limitations. According to this view, authors and artists possess rights to sell or license their creative works and to receive financial returns – provided that their exercise of such economic rights does not divest them of personality rights.

The most widely recognized moral rights in foreign nations are the rights of attribution and integrity. The right of attribution – also called the right of paternity – is the right for an author or creative artist to receive credit for originating works. Proper attribution typically involves the author’s name appearing on all copies of the work and sometimes on publicity materials tied to the work. As William Strauss described in a July 1959 study commissioned by the U.S. Copyright Office on moral rights, the right of attribution also includes “the author’s right to prevent others from usurping his work by naming another person as the author, and to prevent others from wrongfully attributing to him a work he has not written.”

The right of integrity is the right of an author or creative artist to protect his or her creative works from unauthorized changes or distortions. It also includes the right to make changes to the work or to authorize others to make changes to it.

Less prominent “moral rights” include the right of disclosure (or divulgation), which is the right to determine the terms or circumstances of the work’s publication or introduction to the public. Additionally, the right of withdrawal is the right to retract economic rights in copyrighted works that are licensed to third parties provided the author bears the financial costs of such retraction. These latter two moral rights are less commonly recognized by foreign nations, and neither is included in the Article 6*bis* of the Berne Convention. Accordingly, the analysis provided in this paper is confined to the rights of attribution and integrity.

Although numerous foreign nations expressly provide such moral rights protections, nations differ as to how they define and enforce the terms of such rights. Among nations with moral

rights systems, for instance, protection term lengths for attribution and integrity rights often last as long as economic rights, but in some nations those moral rights are essentially perpetual.

### **Protections for Attribution and Integrity Rights Under the Berne Convention**

Moral rights gained international recognition when they were included in the Berne Convention for the Protection of Literary and Artistic Works. The Berne Convention is an international copyright treaty that was originally signed by ten countries in Bern, Switzerland, in 1886. The Berne Treaty has been revised at several subsequent conventions. At the 1928 Rome Convention, the Berne Treaty was amended to include moral rights protections for literary, scientific, and artistic works.

The most significant Berne Treaty provision regarding moral rights is Article *6bis*:

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.

Although the Berne Convention does not use the term “moral rights,” Article *6bis*'s references to rights of attribution and integrity as independent from authorial economic rights, including economic rights previously transferred by authors, unmistakably employ moral rights terminology.

The Berne Treaty obliges its members to adhere to the principle of “national treatment” whereby nations secure to foreign authors the same protections they provide for their own authors. The Treaty also obliges its members to provide a “baseline protection” or minimum protections for rights identified in the Treaty. Among those minimum protections, Article 5(2) requires that copyright terms run for the life of the author plus fifty years. As previously indicated, Article *6bis* includes protections for authors' rights of attribution and integrity. And Article 7(1) provides: “The enjoyment and exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of the protection in the country of origin of the work.”

### **U.S. Accession to the Berne Convention**

As recounted in further detail in our *Perspectives from FSF Scholars* paper, “The Logic of International Intellectual Property Protections,” the United States did not recognize copyright protections for foreign authors or secure the copyrights of Americans abroad until the Centennial Congress passed the International Copyright Act of 1891. Under the 1891 Act's reciprocity provisions, U.S. copyright protections were secured to authors or proprietors from those foreign nations that provided the equivalent to American authors and proprietors within their own borders. In the decades that followed, the U.S. entered into bilateral copyright treaties with several foreign nations. But it resisted membership to the Berne Convention for nearly a century.

Beginning in the mid-20th century, U.S. courts similarly declined to import foreign moral rights concepts into our nation's copyright law. For example, in a decision by the 7th Circuit Court of Appeals in *Vargas v. Esquire, Inc.* (1947), Judge James Earl Major wrote: "[S]o-called 'moral rights,' so we are informed, are recognized by the civil law of certain foreign countries," but "No such right is referred to by legislation, court decision or writers." The Seventh Circuit rejected what it characterized as a "change in the law of this country to conform to that of certain other countries," concluding "we are not disposed to make any new law in this respect." The decision in *Vargas* was cited in several subsequent federal and state court decisions that similarly declined to judicially create new law based on foreign moral rights concepts. Among the reasons given by courts for rejecting moral rights was the lack of clear or specified standards for analyzing and applying them. At the same time, courts recognized that author attribution or integrity interests could be contained within existing U.S. legal doctrines. As the U.S. District Court for the Southern District of New York noted in *Geizel v. Poynter Products, Inc.* (S.D.N.Y. 1968), "the doctrine of moral right is not part of the law of the United States... except insofar as parts of that doctrine exist in our law as specific rights—such as copyright, libel, privacy and unfair competition."

In his 1959 study for the U.S. Copyright Office on moral rights, William Strauss concluded that there was no need to resort to the doctrine of moral rights as such in the United States:

We believe that this is generally true for all aspects of the personal rights of authors, and that common law principles, if correctly applied, afford an adequate basis for protection of such rights. In our view, the contention that the author's rights of personality are not sufficiently protected in the United States, and the belief that there is an irreconcilable breach between European and American concepts of protection of authors' personal rights, seem to be dispelled by close scrutiny of the court decisions here and abroad... Given the same facts, the large majority of courts in American and abroad employ the same reasonable and equitable standards for the protections of authors' personal rights. This similarity of protection has been obscured by the differences of approach and terminology. There is a considerable body of precedent in the American decisions to afford to our courts ample foundations in the common law for the protection of the personal rights of authors to the same extent that such protection is given abroad under the doctrine of moral right."

But as the Berne Convention neared its 100<sup>th</sup> anniversary and concerns over foreign piracy of U.S. copyrighted works and resulting revenue losses, interest in U.S. membership to the Berne Treaty increased. In 1985, the U.S. State Department convened the Ad Hoc Working Group on United States Adherence to the Berne Convention and tasked it with identifying provisions in the U.S. that were relevant to the Berne Treaty and analyzing the computability of those provisions with the Treaty. The following year the Ad Hoc Working Group submitted its Final Report to the President and to Congress. The Final Report included the following overarching conclusion:

Given the substantial protection now available for the real equivalent of moral rights under statutory and common law in the United States, the lack of uniformity in protection of other Berne nations, the absence of moral rights provisions in some of their copyright laws, and the reservation of control over

remedies to each Berne country, the protection of moral rights in the United States is compatible with the Berne Convention.

The Final Report did identify specific provisions of U.S. copyright law that the Ad Hoc Working Group deemed incompatible with the Berne Treaty, and which would need amending prior to joining the Treaty. But the Final Report also affirmed: “[T]he totality of U.S. law provides protection for the rights of paternity and integrity sufficient to comply with *6bis*, as it is applied by various Berne countries.”

The 100th Congress or Bicentennial Congress (January 3, 1987 – January 3, 1989) took up in earnest the prospect of U.S. accession to the Berne Convention Treaty in earnest. During the 100th Congress, six days of hearings were held in various House subcommittees. Hearings were also held in Senate subcommittees. And during a recess, a five-member delegation travelled to Geneva and Paris to discuss issues relating to U.S. membership to the Berne Treaty with foreign copyright experts, including government officials and industry members. The House Report accompanying the 1988 Act recognized that “while protection of the rights of paternity and integrity in the United States may not be as broad as it is in some Berne member states, there are other members of Berne that impose even more limited protection.” And “[b]ased on a comparison of its laws with those of Berne member countries, and on the current status of Federal and State protections of the rights of paternity and integrity,” the Committee found that U.S. law met the requirements of Article 6bis. Similarly, the Senate Report concluded that protection for attribution and integrity rights were provided under existing U.S. law.

In early 1989, Congress passed and President Ronald Reagan signed the Berne Convention Implementation Act of 1988. Shortly thereafter the U.S. Senate ratified the treaty. In his remarks on the signing the 1988 Act, President Reagan stated: “Our membership will automatically grant the United States copyright relations with 24 new countries and will secure the highest available level of international copyright protection of U.S. artists, authors, and copyright holders.” Regarding the decades-long delay in U.S. membership to the Berne Treaty, President Reagan observed: “The cost to Americans has been substantial not only in terms of the violation of property rights but in terms of our trade balance as well.” President Reagan cited an annual trade surplus in copyrighted goods of over \$1 billion, which “would have been much larger had it not been for the pirating of American copyright work.” Estimates for revenues lost to piracy in 1986 exceeded \$2 billion for the entertainment industry and \$4 billion for the computer and software industries.

The 1988 Act declared that the Berne Treaty’s provisions “are not self-executing under the Constitution and laws of the United States.” This declaration that the Berne Treaty is not self-executing is significant because it means that the three branches of the U.S. government retain ultimate authority over the Treaty’s interpretation and terms of its domestic enforcement. In other words, the Treaty’s terms are not directly enforceable because “[t]he obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.”

The 1988 Act therefore declared that existing law and the modifications contained in the Act itself satisfy the United States’ treaty obligations under the Berne Convention. Further, it declared that the Treaty’s provisions “do not expand or reduce any right of an author of a work,



whether claimed under Federal, State, or the common law.” However, the 1988 Act did make a number of procedural changes to U.S. copyright law. Congress adopted what it called a “minimalist approach” and amended U.S. copyright law only where strictly necessary to join the Berne Convention. In this respect, the 1988 Act was primarily directed at reducing copyright formalities, or registration requirements for securing copyright protections. The 1988 Act provided that copyright owners are no longer required to place a copyright notice on individual publicly distributed copies of their copyrighted works. It also created an exception to the copyright registration requirement as a prerequisite for enforcing copyright protections through lawsuits for “Berne Convention works whose country of origin is not the United States.”

Some proponents of stronger moral rights protections in U.S. copyright law claim that the nation’s current copyright policies insufficiently protect moral rights and therefore fail to meet the standards set forth in Article *6bis*. Other proponents claim that adoption of stronger moral rights protections would at least make U.S. policy more consistent or more fully in compliance with the Berne Treaty. However, such claims are misguided. As indicated above, the Final Report of the Ad Hoc Working Group concluded that existing U.S. legal protections for attribution and integrity rights complied with Article *6bis* – a conclusion that was effectively endorsed by Congress. Through the 1988 Act, the political branches have deemed the Berne Convention a non-self-executing treaty requiring implementing legislation by Congress to enforce its obligations. The 1988 Act, including its minimalist changes to U.S. copyright law, constitutes the vehicle for the Treaty’s implementation. And as will be explained, substantive U.S. copyright and contract law secures basic rights of attribution and integrity, consistent with fundamental principles of the American constitutional order.

### **Protections for Authors’ Rights Rooted in the Fundamental Principles of American Constitutionalism**

From its inception, the American constitutional order has emphasized the role of private party initiative in acquiring, using, and selling property as means for seeking personal prosperity. According to the memorable words of the Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

In the Declaration, “Life, Liberty and the Pursuit of Happiness” are described as “unalienable Rights,” meaning those rights inherently belong to human beings as such and therefore cannot properly be acquired, sold, or traded away. However, those things in which individuals possess rights of property – whether in land, personal possessions, money, or intangibles like – are alienable. That is, rights in land, possessions, money, or intangibles can properly be acquired, sold, or traded without diminishing any natural or inherent rights that belong to human persons. Incident to individuals’ natural rights to liberty and to pursue happiness are their rights to acquire, use, and exchange property. And it is part and parcel of individuals’ rights to liberty and to pursue happiness that they decide for themselves whether, when, where, and how to acquire,

sell, or trade for property. In other words, individuals who transfer their property to third parties can continue to exercise their inalienable rights to create or acquire new property.

In his book *Vindicating the Founders: Race, Sex, Class and Justice in the Origins of America* (1997), Professor Thomas G. West described how the Founding Fathers' political philosophy regarding property encompassed not only protection – “the right to keep what one earns” – but also encouragement, recognizing that “laws regulating and defining property must allow labor, investment, and other productive effort to achieve their just reward.” West astutely emphasized the right of acquisition as critically important to the Founding Fathers' understanding of property rights:

We usually think about property in the familiar terms of capitalism (property rights are protected) versus socialism or communism (property rights are not protected). But through most of human history, laws have protected the rights of existing property owners—people in the government and their friends—while discouraging the acquisition of property by those who currently own little or nothing. That was the character of feudal law.

The founding of the American Republic ushered in important reforms to property law, bringing them into line with classical liberal political philosophy and republican principles of government. Between the late-18th and mid-19th centuries, states abolished feudal law aspects of their property systems such as primogeniture and entail. According to West:

After the founding, nuisance law and other rules governing property rights were gradually brought into conformity with the primacy of the right to acquire. Established wealth that had been passed on from one generation of the same family to another mostly disappeared in America. Money and positions circulated rapidly, as the efforts of succeeding generations determined anew their place in society.

Similar emphasis on the acquisition of property and its connection to liberty and the pursuit of happiness found expression in antebellum “free labor” ideology. For Abraham Lincoln and many other proponents of free labor ideology, wage labor pursuant to a voluntary contract with an employer, steady acquisition of capital, and attainment of self-employment in a professional calling constituted the means of self-improvement. As Lincoln stated in his *Address Before the Wisconsin State Agricultural Society* (1859):

The prudent, penniless beginner in the world, labors for wages awhile, saves a surplus with which to buy tools or land, for himself; then labors on his own account another while, and at length hires another new beginner to help him. This, say its advocates, is *free* labor – the just and generous, and prosperous system, which opens the way for all – gives hope to all, and energy, and progress, and improvement of condition to all.

In Chapter 9 of our book *The Constitutional Foundations of Intellectual Property: A Natural Rights Foundation* (2015), we examined how the free labor outlook grounded intellectual property rights.

The importance of the acquisition of property as a necessary ingredient to liberty and to pursuing happiness was further recognized in the decades following the Civil War. Throughout the 19th century, courts and legal writers frequently described the right to pursue a lawful calling and liberty of contract as unalienable rights that are incident to rights to liberty and to pursue happiness. For example, in *Butchers' Union Company v. Crescent City Company* (1884), Justice Joseph Bradley wrote: “[T]he right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase ‘pursuit of happiness’ in the Declaration of Independence.” In *Powell v. Pennsylvania* (1888), Justice John Marshall Harlan assented to the proposition that “the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, guaranteed by the Fourteenth Amendment.” And as Justice Rufus Peckham stated on behalf of the Court in *Allgeyer v. Louisiana* (1897) with regard to the “liberty” mentioned in the Fourteenth Amendment:

[T]he term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.”

Of course, the acquisition of property and contracts was not viewed in crassly materialistic terms. As Mark Warren Bailey explained in *Guardians of the Moral Order: The Legal Philosophy of the Supreme Court, 1860-1910* (2004): “In the nineteenth century, a theological and moral view of happiness predominated and was understood to possess both physical and spiritual elements... True happiness consisted of striving for and achieving one’s highest good through the full exercise of one’s faculties.” According to Bailey, several of the Justices of the Supreme Court during the late 19th and 20th centuries believed that the force of law “must be balanced against the demands of a man’s status as a moral agent. The law must allow for the operation of individual judgment and the exercise of free will in order for the individual to reach his full potential and attain his greatest happiness.”

According to Bailey: “[T]he assertion that the pursuit of happiness was the inalienable right of every individual stated a moral truth that antedated human institutions,” and “[i]n moral terms, it commanded that they exert their faculties and powers in order to sustain life and improve their own condition and that of others.” Thus, the fundamental principles of American constitutionalism regarded life, liberty, and the pursuit of happiness as “unalienable” and the acquisition of alienable property as one important means of serving those higher ends.

This understanding of property rights held by the Founding Fathers as well as by statesmen and jurists who served during the first 120 years of the life of the U.S. Constitution also provides a basis for understanding the nature and role of copyrights in the American constitutional order. At an April 2016 symposium on moral rights co-hosted by the U.S. Copyright Office and George Mason University School of Law’s Center for the Protection of Intellectual Property, Professor Mark Schultz characterized U.S. copyright law in light of those historic and philosophical foundations regarding property rights and compared them to continental European moral rights

concepts. As Schultz observed: “Americans were concerned with protecting private property chiefly for what it could do rather than for a status it conferred or because it was tied to their identity,” as appears to be the case for moral rights. Schultz further explained:

A natural rights foundation for property justifies copyright because it enables creators to flourish, to survive and thrive, conditioned on the need of others to survive and thrive. This foundation has led copyright to be institutionalized as a property right that facilitates the ability to make a living and to fully exploit and commercialize creations... The reproduction right, the derivative works right, the distribution right and public performance rights all enable creators to secure an economic return on their labors so that they and others may survive and thrive. One way in which they secure a return is by being able to freely alienate their rights to others who similarly employ them to survive and thrive.

Schultz acknowledged that a natural rights foundation does not prevent moral rights from being incorporated into the U.S. copyright system, “albeit with a bit of work.” As an example, Schultz pointed out that a moral right for attribution can be premised on a natural rights argument for human flourishing: “A right of attribution certainly enables creators to make a living by helping them develop a reputation that allows them to flourish and to fully exploit their works.”

Moreover, as we explain in detail in our book *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective*, the Intellectual Property Clause of the U.S. Constitution – sometimes called the “Copyright Clause” – was drafted and ratified in an intellectual climate that regarded literary property to be the product of a person’s intellectual labor and that rooted copyright protections in the right of the laborer to reap the financial rewards of his or her labor. Contained in Article I, Section 8, Clause 8, the IP Clause grants to Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” The IP Clause’s proviso that Congress “promote the Progress of Science and useful Arts” through copyrights and patent rights reflects the Founding Fathers’ interests in the encouragement of property, including the exercise of the right to acquire property.

### **The Broad Scope of Exclusive Rights for Authors Under U.S. Copyright Law**

Key provisions of U.S. copyright law embody basic principles of property ownership and contractual freedom in connection with authors’ and creative artists’ intellectual and physical labors. The exclusivity of rights in creative works includes the right to decide whether or how reproductions of creative works will identify authors or creative artists who originally created them. Section 102(a) of the Copyright Act of 1976 provides that “copyright protection subsists... in original works of authorship fixed in any tangible medium of expression.” From the act of creating original copyrightable works, the author or creative artist possesses the right to register his or her work and thereby enforce his or her legal copyright protections. And the exclusive rights attaching to an author or creative artist by virtue of his or her intellectual and physical labors can only be transferred to third parties by consent, including through an employment agreement or other negotiated contract. Thus, viewed in light of basic principles of property and contract, Section 102(a) secures to authors and creative artists exclusive rights over attribution and crediting in an extensive range of creative works.

## Rights of Attribution and Integrity Secured Through Rights in Derivative Works

Authors' and creative artists' rights of integrity – or rights to control transformations or adaptations of their creative works – are also secured by protections for “derivative works.” A “derivative work” is based on or derived from one or more works that already exist. In other words, derivatives are creative works that incorporate significant elements of prior original copyrighted works. Section 106(2) of the Copyright Act of 1976 provides that “the owner of copyright under this title has the exclusive rights to... to prepare derivative works based upon the copyrighted work.” The Copyright Act’s definition of “derivative work” includes “a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” Compilations, including “editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship,” also constitute derivative works under the Copyright Act. In general, if a derivative of a copyrighted work is used without the copyright owner’s permission, no copyright protections will apply to the unauthorized derivative work – or to those portions of the new work that are derived from the original work. Unauthorized recasting, transformation, or adaptation may constitute an infringement of the copyrighted work.

For authors and creative artists seeking to control credit for and transformations of their works, the significance of their exclusive rights in derivative works can hardly be understated. American authors and creative artists in prior eras lacked exclusive rights in derivatives and were unable to exercise control over attribution and the integrity of their works. Thus, the significance of exclusive rights in derivative works is best understood in light of their historical development.

In *Stowe v. Thomas* (1835), a well-known and controversial circuit court decision, Justice Robert Grier concluded that the Copyright Act of 1831 did not secure protections to authors when their works were translated and published without authorization. Wrote Justice Grier: “When [an author] has sold his book, the only property which he reserves to himself, or which the law gives to him, is the exclusive right to multiply copies of the particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed.” Based on a decidedly narrow reading of the 1831 Act, Justice Grier explained: “The same conceptions clothed in another language cannot constitute the same composition, nor can it be called a transcript or ‘copy’ of the same ‘book.’”

At issue in *Stowe v. Thomas* was a German translation of Harriet Beecher Stowe’s best-selling abolitionist novel *Uncle Tom’s Cabin* (1852). During the first year of its publication, *Uncle Tom’s Cabin* sold a record-breaking 310,000 copies in the United States. Yet sales of the book totaled over two million globally during its first year of publication, as the work was promptly translated and published overseas in French, Spanish, Italian, Polish, as well as other languages. According to Professor David S. Reynolds, the lack of international copyright protection, including protections for derivative works, cost Stowe perhaps two-hundred thousand dollars in royalties. Further, Reynolds points out: “Many more people saw plays based on *Uncle Tom’s Cabin* than read the novel.” Although play adaptations of Stowe’s novel were hugely popular in the 1850s and in the decades following the war, “[b]ecause of the copyright situation at the time, Stowe made nothing from the plays, which in a later era would have brought her millions.”

The unnamed Act of August 18, 1856, is widely regarded as Congress's response to the narrow scope of copyright protections pronounced in *Stowe v. Thomas*. Signed into law by President Franklin Pierce, the 1856 Act secured to copyright holders the exclusive rights in public performances of their works. Under the 1856 Act, copyright holders were no longer limited to seeking relief from infringing stage adaptations only when they could prove unauthorized public performers had "multipl[ied] copies of the particular combination of characters," as in *Stowe v. Thomas*. Instead, by virtue of their exclusive rights in stage adaptations or other public performances derived from their copyrighted works, authors could finally exert some measure of control over the integrity of their works.

The Copyright Act of 1870, which was the third major revision of U.S. copyright law, also broadened the scope of copyright protections. Signed by President Ulysses S. Grant, Section 86 of the 1870 Act provided that "authors may reserve the right to dramatize or translate their ... works." By the International Copyright Act of 1891, which was signed by President Benjamin Harrison, Congress made automatic the rights of authors in dramatizations and translations of their literary works, without requiring them to expressly reserve those rights.

The Copyright Act of 1909, the fourth major revision of U.S. copyright law, expanded significantly the rights of authors and creative artists in what are now known as derivative works. Section 1(b) of the 1909 Act provided that the author held the exclusive right:

[T]o translate the copyrighted work into other languages or dialects or make any other version therefrom, if it be a literary work; to dramatize it if it be a non-dramatic work; to convert it into a novel or other non-dramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, finish it if it be a model or design for a work of art...

Following the 1909 Act's passage, courts developed judicial standards for determining when a creative work is derivative of a pre-existing copyrighted work and also for determining what constitutes an infringing use. Under existing jurisprudence, infringement exists when a copyrighted work has been actually copied and when there is a "substantial similarity" between the pre-existing work and the derivative copy. In other words, a creative work that is "substantially similar" to a copyrighted original work is a derivative work, and the unauthorized reproduction of such derivatives constitutes copyright infringement. Ascertaining substantial similarity between a pre-existing and alleged derivative work require fact-specific inquiry into whether "an average lay observer would recognize the copy has having been appropriated from the copyrighted work," as the Second Circuit Court of Appeals explained in *Hamil America, Inc. v. GFI* (2d Cir. 1999). Courts consider whether the "total concept and feel" and their "aesthetic appeal" are the same. Copyright holders can license or otherwise assign to third parties the right to create derivatives. But absent such an assignment, use of a copyrighted pre-existing work by the derivative author or creative artist constitutes an infringement.

By declaring in Section 103(a) that the subject matter of copyright includes derivative works and by defining a "derivative work" in Section 101 to include "any... form in which a work may be recast, transformed, or adapted," the Copyright Act of 1976 built upon the policy of the 1909 Act. Reaffirmation of a wide scope for copyright protections with respect to derivative works is

evidenced by a statement in the House Report that accompanied what would later become the 1976 Act: “Between them the terms ‘compilations’ and ‘derivative works’ which are defined in section 101, comprehend every copyrightable work that employs preexisting material or data of any kind.”

Ownership of exclusive rights over derivatives in “any form” enables authors and creative artists to control whether or not new forms of their works will appear for commercial usage. The manner of publicly providing credit in derivative works to the authors or creative artists of the original works can be made part of licensing terms for the production of such derivatives. Similarly, authors and creative artists can maintain the integrity of their works as they see fit by specifying the forms that authorized derivative works may take. That is, authors and artists can exercise their control over derivative works by licensing it only to such persons and in those forms that they reasonably expect will avoid resulting in “distortion, mutilation... or other derogatory action in relation to” their works.

### **Protections for Authors Rights Under U.S. Contract Law**

Although key copyright statutory provisions secure the rights of authors and creative artists regarding attribution and the integrity of their works, those provisions presuppose a general policy of freedom of contract that is enforceable under the law of contracts. Privately negotiated contracts are critical legal and economic building blocks for the creation, acquisition, licensing, and sale of copyrighted works. Contracts provide a flexible means for exercising and enforcing rights regarding attribution and integrity in copyrighted works. Contracts enable industries as well as individuals to assign copyright ownership, coordinate commercial activities, and pursue livelihoods.

Under the American common law of contracts, the conduct of private parties is governed primarily by unwritten law based on voluntary consent of the parties and prevailing customs in trade and commerce. The common law presumes the primacy of private party initiative and voluntary decisionmaking, including through written and unwritten contracts for the acquisition, sale, and licensing of private property.

Under the common law, judicial decisions operating as binding precedent typically provide background expectations and default rules for acquisitions, sales, and licensing of private property through contracts. Of course, the American constitutional order is a mixed system, and not constituted by common law alone. Private party decisionmaking regarding the acquisition, use, and exchange of property is often made with reference to government institutional authority and practices that are codified in statute and regulations. Along with federal copyright statutory provisions, U.S. Copyright Office regulations, and judicial precedents interpreting copyright law, common law rules and presuppositions regarding private party initiative supply critical context for the exercise and enforcement of contract rights in copyrighted works.

Based on the natural law principle that a person has a right to the fruits of his or her own labor – and independent of federal copyright statutes – American common law historically has recognized that an author or creative artist who labors to produce a creative work possesses a property right in fee simple over that unpublished work. The author or creative artist possesses an exclusive right of control over the timing and manner of publication of the work, and can

assign all or some of his or her property rights in that work through a valid contractual agreement. In *Wheaton v. Peters* (1834), Justice John McLean drew upon a long line of judicial precedents in support of the U.S. Supreme Court's affirmation: "That an author at common law has a property in his manuscript, and may obtain redress against anyone who deprives him of it or by improperly obtaining a copy endeavors to realize a profit by its publication cannot be doubted." This right of authors in unpublished works is still recognized in state common law. It is also reflected in Section 104(a) of the Copyright Act of 1976, which secures protections for unpublished original works of authorship. These common-law based protections for unpublished copyrightable works provide a basis for the author or creative artist to assert rights regarding attribution in the event such works are published without authorization. Or at least such common law protections regarding unpublished works provides grounds to seek redress or "to object to any "distortion, mutilation or other modification" resulting from unauthorized publication of the work by a third-party.

Moreover, given that the broad scope of copyright protection in "original works of authorship fixed in any tangible medium of expression" as well as in derivative works encompasses rights regarding attribution and integrity, contracts regarding the ownership, reproduction, and adaptation of such copyrighted works are a critical means for exercising and enforcing those rights. Negotiated contract terms enable authors and creators to exercise control over whether, when, or how they are credited for the use of their work. Also, contract terms empower authors and creative artists to exercise control over whether or how their works may be translated, adapted, or otherwise transformed, including for purposes of generating derivative works.

Today, copyright-intensive industries and individual authors alike rely upon sophisticated courses of dealing, collectively bargained contracts for collaborative works, as well as simple arms-length agreements to transfer copyright ownership in exchange for valuable consideration. For example, the motion picture and video game industries depend upon contractual arrangements in coordinating the creation, development, and marketing of jointly created works. For producers of such collaborative creative works, securing copyright ownership is critical to ensuring they have the necessary legal authority to bring about the goods or services they intend to produce. The manner of providing credit or attribution to authors and creative artists who have contributed to such collaborative projects are routinely set forth in standard industry contracts that have been produced through painstaking negotiations and collective bargaining. Absent the producer's possession of exclusive rights in motion pictures or video games, conflicting claims by a single contributing author or by multiple contributing artists could delay products, disrupt the marketability of the product, or interfere with the aesthetic of the product chosen by the producer.

Indeed, privately negotiated contracts allow for flexibility and customization in creative and commercial activities. Contracting parties tailor the terms of their agreements to address circumstances and balance competing interests. Such terms can be continuously updated as circumstances and the interests of the parties warrant. In the American legal order, both case law precedents and statutory provisions often provide background defaults for contractual agreements, which the parties may be alter by express terms of their agreements. Contracts provide means for capably addressing complexities while providing reasonable legal certainty to the parties. These functions of contract are especially important in the Digital Age, when copyrighted works can be readily reproduced and transmitted in myriad ways and on a mass



scale via the Internet, when collaborative copyrighted works require coordination between multiple parties, and when scalability, customization, and accessibility are critical for providing consumers with goods and services.

By contrast, comprehensive prescriptive legal codes do not have the same capacity for providing party coordination and responding to complexities. For instance, even if comprehensive codes regarding moral rights of attribution and integrity could feasibly be established for different types of creative works and for different media platforms in a manner sufficient to provide parties with reasonable certainty and address everyday contingencies, updating their terms to address changing circumstances would prove impracticable.

### **Works for Hire Contracts Promote Creation and Acquisition of Copyrighted Works**

Importantly, customary contractual practices developed in copyright-intensive industries firmly rely upon the common law of agency and the “works made for hire” or “work for hire” doctrine. Specific contractual terms agreed upon by countless other entities and individuals similarly rely on the work for hire doctrine. The doctrine governs who owns copyrights in creative works made by employees or independent contractors. Although the Berne Convention is not in conflict with the work for hire doctrine, imposing additional moral rights restrictions on the transfer of creative works could undermine contractual relationships regarding copyrighted works and reduce the value for such works.

The work for hire doctrine’s connection to freedom of contract and its significance for present-day coordination of commercial dealings involving copyrighted works is best understood in light of its historical development. In disputes over copyright ownership involving works created in an employment context, court decisions dating back to the early 19th Century routinely considered the employer to be the copyright owner of works created on the job by employees. Consistent with those early decisions, the Supreme Court’s decision in *Bleistein v. Donaldson Lithographing Co.* (1903) found that ownership of the copyright to advertisements created by an employee pursuant to his job belonged to the employer.

Section 26 of the Copyright Act of 1909 incorporated concepts from those early decisions, providing: “In the interpretation and construction of this title... the word ‘author’ shall include an employer in the case of works made for hire.” Since the 1909 act did not include a definition of “works made for hire” or delineate its scope, courts decisions developed the parameters of the work for hire doctrine. Courts treated Section 26 of the 1909 Act as creating a rebuttable presumption that copyright ownership vests in the employer – a presumption that can be overcome by evidence of contrary intent by the parties. Express contractual reservation of copyright ownership in the author or creative artist overcomes the presumption.

According to the U.S. Court of Appeals for the Second Circuit, where a large proportion of copyright cases are litigated:

The essential factor in determining whether an employee created his work of art within the scope of his employment as part of his employment duties is whether the employer possessed the right to direct and to supervise the manner in which the work was being performed.

Beyond that essential factor identified by the Second Circuit in *Scherr v. Universal Match Corp.*, (2d Cir. 1969), another factor to be considered is whether the employer has the right to “direct and supervise the manner in which the writer performs his work.” Actual exercise of that right of control is not necessary for copyright to be vested in employers who hire employees for the purpose of creating the work. Nonetheless, as the Fifth Circuit Court of Appeals pointed out in *Murray v. Gelderman* (5<sup>th</sup> Cir. 1977): “An employer is entitled to the copyright only when the work was created by the employee within the scope of his employment.”

The 1909 Act did not expressly address whether Section 26 applied to commissioned works by independent contractors. Few such cases initially arose involving commissioned works. But in *Battleboro Publishing Co. v. Winmill Publishing Corp.* (2d Cir. 1966), the Second Circuit Court of Appeals incorporated into the work for hire doctrine a rebuttable presumption that copyright ownership vests in the party that commissioned a work.

The “work for hire” doctrine was altered by the Copyright Act of 1976. In Section 101 of the 1976 Act, Congress provided a definition of “works for hire”:

(1) a work prepared by an employee within the scope of his or her employment;  
or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire...

Subsequently, Congress’s passage of the Satellite Home Viewer Improvement Act of 1999, added sound recordings to the list of commissioned works that may be considered works made for hire.

Thus, the 1976 Act, as amended, tracks closely with the 1909 Act regarding works created by employees within the scope of their employment. However, 1976 Act limited the presumption of copyright ownership in the commissioning party that was recognized under the 1909 Act. In addition to requiring an express and signed written agreement, a work for hire may be established in an independent contractor setting only if the work involves one of the categories of works listed in the second clause of the definition.

It is against this legal backdrop that contractual practices in copyright-intensive industries have developed and contracts involving the creation, acquisition, sale, and licensing of copyright works have been agreed to and enforced. The contours of the work for hire doctrine provides a framework or guidance that contracting parties have relied on in customizing their own agreements and pursuing their own ends. The work for hire doctrine has been firmly established through successive stages of improvement in a distinct American legal context, and it is consonant with U.S. copyright law’s general policy of freedom of contract. The work for hire doctrine has also proven successful in promoting creation and commerce in copyrighted works.

The Berne Convention does not specifically address work for hire or define the “author” of a creative work. Accordingly, U.S. copyright law regarding work for hire is not in conflict with the Berne Treaty. Congress should be cautioned against making any alterations to the work for hire doctrine based on abstract considerations of moral rights that are divorced from the principles and context in which it was developed and continues to operate. Importing foreign-based moral rights provisions – even those ostensibly involving attribution or integrity – into U.S. copyright law regarding work for hire risks destabilizing existing voluntary contract arrangements that rely on that doctrine and reducing the economic incentives and returns for copyrighted works.

### **Why Congress Should Be Wary of Importing New Moral Rights into U.S. Copyright Law**

Congress should be cautioned against any imposing moral rights-based restrictions on freedom of contract regarding copyrighted works. Contractual freedom is a fundamental principle of American constitutionalism, coinciding with rights to acquire, use, sell, and license private property. Any departure from the general policy of freedom of contract in copyrighted works should be based on compelling justifications, such as remedying identifiable market failures causing consumer harm or to prevent deprivations of recognized and articulable rights of authors and creative artists.

Typically, moral rights claims are formulated in abstract or general terms. Importation of new foreign-based abstract concepts into U.S. copyright law would destabilize existing voluntary contractual arrangements. The injection of new doctrines and new restrictions would create legal uncertainties about the scope and meaning of new moral rights and their effect on exclusive rights – including contract rights – in copyrighted works. By undermining legal title and bargained-for expectancy interests in copyright works, such legal uncertainties would reduce their economic values and negatively impact incentives for new creations and acquisitions in copyrighted works.

Differences between American and foreign legal systems also counsel against importing continental European understandings of moral rights into U.S. copyright law. Civil law systems prevalent in foreign nations feature comprehensive statutory codes that superintend commercial activities to a greater extent than common law system that prevails in the America. Moreover, civil system adjudications do not provide the precedential effect and legal certainty that appellate judicial decisions routinely provide in common law systems. Abstract fairness considerations play a larger role in contract case adjudications in civil systems compared to common law systems, wherein parol evidence rule limits judicial interpretations of contracts to the four corners of the document and other legal doctrines limit judicial discretion. In short, there is strong reason to be skeptical that moral rights doctrines based on foreign law premises can fitted to America’s unique legal context without hazarding copyright and contract rights on different premises.

Also significant is the fact that foreign nations with civil law systems differ in their implementation of moral rights protections. As noted previously, several foreign nations, including France, regard moral rights as perpetual and inalienable. In other nations, such as the Netherlands, moral rights only last as long as protection terms for economic rights. And foreign nations differ as to how broadly they restrict transfers of attribution or integrity rights, with

nations adopting different exceptions for different types of media or under different circumstances. Such differences and confusion raise the question of whether claims about moral rights being “inalienable” are overblown. At the very least, differences in how foreign nations secure moral rights should make Congress hesitant to secure new moral rights outside the purview of property and contract concepts that lie at the core of U.S. copyright law. If other nations can protect the moral rights of authors in their own ways, cannot the United States choose to protect such rights consistent with its own legal system?

Along with variations among foreign nations’ restrictions on the transfer of rights of attribution and integrity, the fact that foreign nations effectively treat rights of attribution and integrity as waivable is an indicator that such rights really are not unalienable. As William Strauss pointed out in his 1959 report to the U.S. Copyright Office on moral rights:

Much confusion concerning the doctrine [of moral right of authors] has been created by the claim that the moral right is inalienable, whatever may happen to the property aspects of the copyright. Actually, the moral right is inalienable only in the sense that, like all personal rights, it is not capable of transfer by sale or gift. But there is no effective rule of law which prevents an author from waiving one or more of the components of the moral right.

As described by Professor Mark Schultz earlier in this paper, moral rights concepts fit more with status based views of property rights than the dynamic and freely transferrable view of property of American constitutionalism. That rights variously labeled “unalienable” are alienable in practice in foreign nations should make Congress particularly wary of adopting copyright reform measures that run contrary to American constitutionalism’s long-standing preference for treating property as freely alienable.

Privately negotiated contracts allow for flexibility and customization in creative and commercial activities. Contracting parties tailor the terms of their agreements to address circumstances and balance competing interests. Such terms can be continuously updated as circumstances and the interests of the parties warrant. In the American legal order, both case law precedents and statutory provisions often provides background defaults for contractual agreements, which the parties may be alter by express terms of their agreements. Contracts provide means for capably addressing complexities while providing reasonable legal certainty to the parties.

These functions of contract are especially important in the Digital Age, when copyrighted works can be readily reproduced and transmitted in myriad ways and on a mass scale via the Internet, when collaborative copyrighted works require coordination between multiple parties, and when scalability, customization, and accessibility are critical for providing consumers with goods and services. By contrast, comprehensive prescriptive legal codes do not have the same capacity for providing party coordination and responding to complexities. For instance, even if comprehensive codes established moral rights of attribution and integrity for different types of creative works and for different media platforms could be established sufficient to provide parties with reasonable certainty and address everyday contingencies, updating their terms to address changing circumstances would prove impracticable.

## **Additional American Legal Protections for Authors and Creative Artists**

In addition to U.S. copyright law and contract law, protections for authors' and creative artists' rights of attribution and integrity in their creative works are provided by other areas of U.S. law.

For example, the Visual Artists Rights Act of 1990 (VARA) appears to tap into moral rights concepts, providing in Section 106A that the author of any work of visual art "shall have the right... to claim authorship of that work." VARA also, for example, provides the right to prevent the use of his or her name as the author of "any work of visual art which he or she did not create" or any work he or she did create "in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation." However, the rights regarding attribution and integrity provided under Section 106A are limited to "work[s] of visual art" such as "a painting, drawing, print, or sculpture" existing in a single copy or sculpture or in a limited edition of 200 copies or fewer that are consecutively numbered and signed by the author.

The Lanham Act is the principal federal trademark statute. Section 43(a) of the Lanham Act provides a civil cause of action for persons damaged by another person's false designations of "origin, sponsorship, or approval" of his or her goods or services or by false descriptions of "the nature, characteristics, qualities, or geographic origin" of his or her or another person's goods or services. In *Dastar Corp. v. Twentieth Century Fox Film Corp.* (2003), the U.S. Supreme Court concluded that Section 43(a) does not require that the author or creative artist who originated the idea contained in a good or service receive public attribution, as the phrase the "origin of goods" in the Lanham Act "refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods." Some scholars and lower courts have read the *Dastar* decision as prohibiting any false designation of origin claims based on the creative or intangible content of goods or services. However, because *Dastar* involved a claim involving a documentary that was largely in the public domain and the copyright term for which was expired, other commentators have concluded that the actual holding in *Dastar* is limited to nonattribution claims. Thus, authors and creative artists may still have viable causes of action under Section 43(a) for misattribution – that is, for false designations regarding the origin or nature of his or her or another person's goods or services.

Unfair competition is a tort recognized in state law involving the causing of economic injury by the palming off one's goods as another person's goods. Libel and slander are also torts recognized in state law. The latter address injuries to a person's reputation or exposure to public contempt or injury to one's profession as a result of public communication of falsehoods through physical or spoken form. Certainly, a person's wrongful conduct amounting to a "distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to [another person's] honor or reputation" could give rise to causes of action under each of those torts. Although breach of contract is the principal cause of action pursued when one party to an agreement is harmed by the conduct of the other, harmful conduct by a contracting party that goes beyond the contemplated scope of the contract or harmful conduct by a third party who is not in privity of contract could furnish grounds for tort claims to recover damages. As William Strauss concluded in his report on moral rights: "Under the tort theories of libel or unfair competition the courts have held that in the absence of express contractual consent by the author, no changes in his work may be introduced that are not required by technical necessities of production or adaptation." Of course, Strauss recognized no

valid cause of action would exist under such tort theories when a person transfers of all of his or her rights in the work.

Importantly, libel and slander are construed by the courts consistent with First Amendment protections for the freedom of speech. A claimed right of attribution could constitute a kind of forced speech that is prohibited by the Supreme Court's First Amendment jurisprudence. Similarly, a claimed violation of a right of integrity from modifications of creative works alleged to be prejudicial to the author's honor or reputation could also be foreclosed by constitutional freedom of speech protections. Free speech interests relating to public comment in fair use settings or to matters of public concern protected by state anti-SLAPP (strategic lawsuits against public participation) lawsuits also limit libel and slander as ground for asserting moral rights claims. And thus, incorporation into U.S. copyright law of moral rights concepts such as a compelled attribution of authorship or prohibitions of criticisms of public figures or matters of public interest risk violating constitutional free speech principles. At the very least, more widespread adoption of attribution and integrity rights could spur rounds of litigation and have a chilling effect on the exercise of free speech rights.

The limited contours of these legal provisions and doctrines similarly point to the need for caution when considering incorporation of new moral rights provisions into U.S. copyright law. While providing protections to authors in specific contexts, VARA, the Lanham Act, and the torts briefly discussed above are all largely, if not entirely, in keeping with U.S. copyright and contract law. But incorporation of broadly defined new moral rights provisions may not be in keeping with fundamental property and contract principles found in the American legal order.

In recent years, moral rights advocates have called for the expansion of VARA, the establishment of a resale royalty for visual arts, stronger rights of attribution in non-dramatic musical compositions, and more. To the extent any of these measures are considered, Congress should necessarily specify the need for any such rights and carefully delineate the scope of such rights – especially including their relations to existing copyright protections and contractual practices and reliance interests – with a skeptical eye. A cautious approach to changes in the law based on moral rights concepts combined with careful examination of specific proposals involving moral rights is necessary to ensure that fundamental principles of U.S. copyright law and contract law and the existing rights of copyright holders remain secure.

## **Conclusion**

In recent years, calls have been made for the United States to incorporate so-called “moral rights” of attribution and integrity into its laws and policies concerning copyrighted works. But current U.S. copyright law as well as contract law protect authors' and creative artists' rights of attribution and integrity in their copyrightable works. Legal protections secured to authors and creative artists in U.S. are generally comparable to those provided in foreign nations. Any new importation of foreign understandings of moral rights concepts into U.S. copyright law would likely create conflicts with fundamental principles of U.S. copyright law as well as contract law, and would risk undermining the copyright protections and value of copyrighted works.

Moral rights gained international recognition when they were included in the Berne Convention for the Protection of Literary and Artistic Works, a copyright treaty. The most significant Berne Treaty provision regarding moral rights is Article 6*bis*, which provides that “[i]ndependently of the author’s economic rights... the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of... the said work, which would be prejudicial to his honor or reputation.” Pursuant to the Berne Convention Implementation Act of 1988, the treaty is non-self-executing, meaning U.S. domestic law has ultimate say over internal enforcement of treaty obligations.

Although key U.S. copyright statutory provisions secure the rights of authors and creative artists regarding attribution and the integrity of their works, those provisions presuppose a general policy of freedom of contract that is enforceable under the law of contracts. Privately negotiated contracts are critical legal and economic building blocks for the creation, acquisition, licensing and sale of copyrighted works. Contracts provide a flexible means for exercising and enforcing rights regarding attribution and integrity in copyrighted works. Negotiated contract terms concerning the exclusive rights of authors and creative artists in their creative works enable authors and creators to exercise control over whether, when, or how they are credited for the use of their work. Also, contract terms empower authors and creative artists to exercise control over whether or how their works may be translated, adapted, or otherwise transformed, including for purposes of generating derivative works.

Civil law systems prevalent in foreign nations that provide more stringent moral rights protections typically feature comprehensive statutory codes that superintend commercial activities to a greater extent than common law system that prevails in America. Comprehensive prescriptive legal codes do not have the same capacity for providing party coordination and responding to complexities. There is strong reason to be skeptical that moral rights doctrines based on foreign law premises can fit America’s unique legal context without jeopardizing copyright and contract rights.

Any newly inserted moral rights provision that restricts contractual freedom in copyrighted works constitutes a significant departure from the general policy of freedom of contract in copyrighted works that has prevailed in the U.S. for over 200 years. Any departure from that general policy should be based on compelling justifications, such as remedying identifiable market failures or to prevent deprivations of recognized and articulable rights of authors and creative artists – justifications that have not been shown to exist.

If Congress ever considers whether to adopt new moral rights provisions, it should necessarily specify the need for any such rights and carefully delineate the scope of such rights – especially including their relations to existing copyright protections and contractual practices and reliance interests – with a skeptical eye. A cautious approach with careful examination of specific proposals involving moral rights is necessary to ensure that the fundamental principles of U.S. copyright law and contract law and the existing rights of copyright holders remain secure.

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