MORAL RIGHTS AND MUSICIANS IN THE UNITED STATES

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2003–2004 ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 165 (2003)

I. INTRODUCTION

In March 2002, American pop singer Connie Francis filed suit against Universal Music Corporation in the federal District Court for the Southern District of New York.[1] Francis, who enjoyed international success in the 1960s with many hit records and films, claimed that Universal underreported and underpaid her artist royalties and breached several clauses in her recording contracts. As rape victim who has suffered from years of mental instability, Francis also objected to Universal's having allegedly licensed several of her recordings for use in sexually themed motion pictures. Seeking compensation for the latter, Francis claimed that the defendant's actions inflicted severe emotional distress on her and violated her moral rights.

If ever there was a compelling case for the recognition of moral rights of an artist, then surely Connie Francis' case is a contender. In a widely publicized incident, the young singer was attacked at knifepoint, beaten, raped and held captive for several hours in a hotel room by an unknown assailant in 1974.[2] According to her complaint, she thereafter suffered from severe mental illness and was checked in and out of mental institutions many times during the 1980s. She claims that she became addicted to prescription drugs and attempted to commit suicide as a result of her brutal attack. Thus, it is no surprise that she would strongly object to the presence of her relatively wholesome pop songs in a sexual context. The problem for Ms. Francis, and any other music artist who seeks to retain some control over her work after transferring or licensing her copyright, is that the United States legal system generally attempts to avoid explicitly recognizing the doctrine of so-called moral rights.

This article briefly examines the basic doctrine of moral rights, including its Continental history and failure to be explicitly embraced by the United States legal system. The article outlines various causes of action available to musicians seeking to vindicate their personal rights in American courts and considers examples of how those strategies have fared in the case law. It concludes with an evaluation of the strategies adopted by Connie Francis to vindicate what amounts to a moral rights claim.

II. OVERVIEW OF MORAL RIGHTS

The legal regimes of a number of nations recognize and protect, to varying degrees, entitlements of authors known as the "moral right" (*droit moral*) or, more commonly, "moral rights." These rights are classified among the body of the individual's personal rights[3] and, as such, tend to be treated entirely separately from the author's purely proprietary (i.e., economic) interests in her work. As a result, even after the author licenses or transfers some and even all economic rights in a work, moral rights may still permit the author to retain control over her creation for personal reasons.

Several different rights are located within the rubric of moral rights, all of which are unified by a focus on the value of the personal expression and individualism of the creator, as opposed to the potential for exploitation of her work. They include, primarily, the right of integrity, the right of attribution and the right of disclosure. The right of integrity, sometimes called the right to respect of the work, "lies at the heart of the moral right doctrine"[4] and is the focus of this article. The integrity right allows the author to prevent distortion, truncation or mutilation of her work that would misrepresent her expression[5] and may be used to prevent use of the work in a context or format of which the author does not approve. The right of attribution (or paternity) comprises several variations, including rights to be known as the author of one's work, to prevent attribution to the author of work written by another, to prevent others from being identified as the author of one's own work, and to publish anonymously or pseudonymously.[6] Finally, the right of disclosure (or divulgation) accords the author the sole right to decide when her work is complete and to submit it for publication, or instead to withhold it from dissemination.[7] Some countries also grant authors rights to prevent excessive criticism and to prevent assaults upon one's personality,[8] as well as rights of retraction and modification, which would permit the author to withdraw a work from circulation and change it, respectively.[9]

The origins of *droit moral* are traced to nineteenth century French common law[10] (which, as Professor Merryman observes, seems curious, as France subscribes to a system of civil law).[11] Various commentators have suggested that the English term "moral" does not correspond well the French *moral*, which is truly understood to convey something closer to "mental" or "intellectual,"[12] or perhaps "spiritual" or "personal."[13] The misnomer can give an inaccurate impression that the moral rights doctrine is "concerned with rights whose enforceability is a matter of moral suasion divorced from legal action"[14] and, some argue, may actually contribute to a reluctance to recognize such rights as binding law.[15] In any case, the term has by now become well accepted and is widely used among English speakers.[16]

Although to this day France remains "the undisputed champion of authors' moral rights,"[17] dozens of Western European and Latin American nations have followed France's lead and codified variations on and combinations of moral rights during the past two centuries.[18] A primary impetus for many nations to do so emerged in 1928, when moral rights were expressly added to the world's first and most influential multilateral copyright treaty, the Berne Convention. Article 6*bis* of that treaty recognizes limited versions of the "most well-established and almost universally accepted"[19] moral rights: those of attribution and integrity. It provides, in part:

> Independently of the author's economic rights, and even after the transfer of 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 shall be prejudicial to his honor or

reputation.[20]

The Berne Convention does not require uniformity of protection among members but establishes only minimum standards for protection, and many nations provide artists with more rights more extensive than are required by the treaty, both within and outside the boundaries of moral rights. The convention also leaves signatories free to establish the alienability and duration of their moral rights, including whether such rights survive the death of the author. In some nations such as France, protection is so strong that moral rights cannot be transferred or waived by the author[21] and endure for perpetuity.[22]

III. MORAL RIGHTS IN THE UNITED STATES

At the other end of the spectrum is the United States. Before the U.S. adhered to the Berne Convention in 1989, Congress surveyed a patchwork of analogs to certain moral rights scattered across the American legal system in various common law causes of action and federal and state statutes, and concluded that they would satisfy the minimum standards for protection of moral rights required by 6*bis*.[23]

The response of many critics, however, has been that this "Congressional finding flies in the face of numerous judicial and scholarly pronouncements on the subject" and that the U.S. is not in fact in compliance with Berne.[24] For many decades, courts and academics have consistently concluded that moral rights are, both figuratively and literally, foreign to the body of intellectual property law in the U.S. For example, the Second Circuit declared that "American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors."[25] In fact, the response to Connie Francis' case illustrates how unusual the notion of moral rights seems to many Americans; *Rolling Stone* magazine described hers as "the most bizarre rock & roll lawsuit in recent memory...."[26]

Nonetheless, Congress decided that additional provisions did not need to be added to the U.S. Copyright Act to bring it into conformity with the Berne Convention, which requires that each adhering state adopt "the measures necessary to ensure the application of this Convention."[27] Pointing to the Lanham Act and common law or First Amendment principles such as libel, privacy, defamation, misrepresentation and unfair competition, Congress claimed that existing U.S. law was adequate.[28]

This was apparently the result of an enormous amount of opposition to moral rights expressed to the legislature by various special interests when it was debating the Berne Convention Implementation Act ("BCIA"). "If the BCIA had any hope of passage, the task was presented of fashioning a method for the United States to join the Berne Union without incorporating Berne-style moral rights provisions into the fabric of American law. The law as passed purports to satisfy that goal."[29] Consequently, the House Committee stated unequivocally in the legislative history that the treaty was not considered self-executing, that domestic law was not in any way altered except through the implementation legislation itself, and that the implementing legislation was absolutely neutral on the issue of the rights of paternity and integrity.[30] The BCIA itself also specified that it did not "expand or reduce any right of any author" to assert the moral rights of attribution and integrity.[31]

Congress maintained this aversion to a per se obligation to recognize moral rights when it insisted that the Agreement on Trade-Related Aspects of Intellectual Property, which

incorporates the Berne Convention, expressly exclude the obligations of article 6*bis*.[32] The North American Free Trade Agreement also carves out a similar exception for the U.S.[33]

In 1990, Congress abandoned its stance of complete neutrality on moral rights with the Visual Artists Rights Act ("VARA"), which amended U.S. copyright law to grant artists a limited, waivable right to prevent mutilation or destruction of "works of visual art."[34] This legislation and nine similar state statutes, all of which protect only visual artists, now "represent the furthest explicit recognition of moral rights to be found in U.S. jurisprudence."[35]

An "overwhelming number" of commentators have denounced the failure of American courts and legislators to extend general moral rights protection to all authors[36] and called for a reform of the situation.[37] Putting aside normative issues, however, the practitioner whose client seeks redress for violation of what might be called a moral right must make use of existing doctrines of American law to fashion the most appropriate and persuasive case possible. Given the current legal climate of the United States, wherein aspects of the moral rights doctrine "may run contrary to the American socio-legal culture and border on the heretical," the artist's attorney must for now, at least, make do with what is available.

IV. PREVENTING MUSICIANS' WORK FROM APPEARING IN OBJECTIONABLE CONTEXTS

Among artists of the various disciplines, music composers and performers are especially vulnerable to moral rights violations for a variety of reasons, including the ready adaptability of music into many different contexts and formats, some of which may, in the opinion of the musician, impair the integrity of her work and reflect poorly on the artist.[38] Under the law of a country that embraces moral rights, the right of integrity would enable a musician like Connie Francis to, in the language of 6*bis*, object to a modification of, or derogatory action in relation to, her work that would be prejudicial to her honor or reputation. But because the integrity right is the "source of the greatest concern in American discussion on the moral right,"[39] Ms. Francis and countless other musicians would be well advised not to expect such an ability any time soon. Instead, they must utilize such doctrines and causes of action as copyright, contract, trademark and unfair competition, defamation, privacy and rights of publicity, and possibly others.[40]

A. Copyright Law

The federal Copyright Act itself, although primarily perceived as protecting economic rather than personal interests in works, can sometimes be used to indirectly achieve artists' moral rights goals, even aside from invoking the VARA. For example, the statutory license for reproduction of a musical composition stipulates that the licensee's arrangement must not change "the basic melody or fundamental character of the work."[41] Unauthorized modification of an artist's work by a licensee that significantly departs from the original might be actionable as a violation of the author's exclusive right to prepare derivative works, if she has not also licensed that right.[42] Professor Kwall asserts that section 501(b) of the Copyright Act, which entitles both the legal and beneficial owners of a copyright to institute an infringement action, might allow creators who no longer own the copyright in their works to still bring suit for infringement. Professor Ginsburg even suggests that the Digital Millennium Copyright Act's "Copyright Management Information" provision, codified at section 1202, may contain the "seeds" of a sort of general attribution right.

B. Contract Law

Integrity rights might be best protected in the United States by use of contract because, theoretically, an artist is of course free to retain explicit contractual rights to prevent uses of her work to which she objects.[43] "Any copyright owner who really cares about his moral rights can always protect them by inserting appropriate clauses in his contracts with publishers and producers...."[44] Clear, unambiguous language to this effect in the relevant license or transfer instrument can give the artist a powerful tool for vindicating her interests under a simple state law breach of contract claim. The problem with this view, as many are quick to point out, is that most artists (especially musicians) lack bargaining power that would enable them to demand inclusion of such terms.[45]

But even if an agreement is silent on such matters, courts may imply from the arrangement some level of obligation to respect the work's integrity. Pursuant to the duty of good faith and fair dealing inherent in every contract, the parties must not engage in actions that would harm or destroy the rights of one another.[46] Thus, it may be argued that "an unreasonable, unfair use of the work implicitly violates the author's consent to the use of his work."[47]

This reasoning was partially applied by the Second Circuit in *Granz v. Harris*, a 1952 case in which prominent jazz producer and promoter Norman Granz claimed breach of contract by a purchaser of master recordings of plaintiff's Jazz at the Philharmonic concert series.[48] The defendant apparently omitted about eight minutes of music from the original discs, which he purchased from plaintiff, and manufactured and marketed shorter, ten-inch records of the abbreviated performance.[49] Looking to the terms of the contract, the court noted that the defendant was required to include a credit line, "Presented by Norman Granz," on any commercial reproductions that he manufactured.[50] The court determined that this contractual duty to attribute to plaintiff the musical contents of the records "carries by implication, without the necessity of an express prohibition, the duty not to sell records which make the required legend a false representation."[51] The court concluded that defendant breached this implicit term of the contract and remanded for determination of whether plaintiff waived his right to an injunction to prevent the abbreviated records from being attributed to him.[52]

The concurring judge said, "the established rule is that, even if the contract with the artist expressly authorizes reasonable modifications... it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original."[53] Unlike the majority, the concurrence explicitly discussed the potential applicability of moral rights, but concluded that it is unwise to rest a decision on the doctrine where, as in Granz's case, it is unnecessary.[54]

C. Unfair Competition Law

The Second Circuit later relied on *Granz* in the highly influential *Gilliam v. ABC, Inc.* decision, which (as noted above) rejected a per se application of moral rights but nonetheless held that violation of the "author's personal right to prevent the presentation of his work to the public in a distorted form" is actionable as a violation of the Lanham Act.[55]

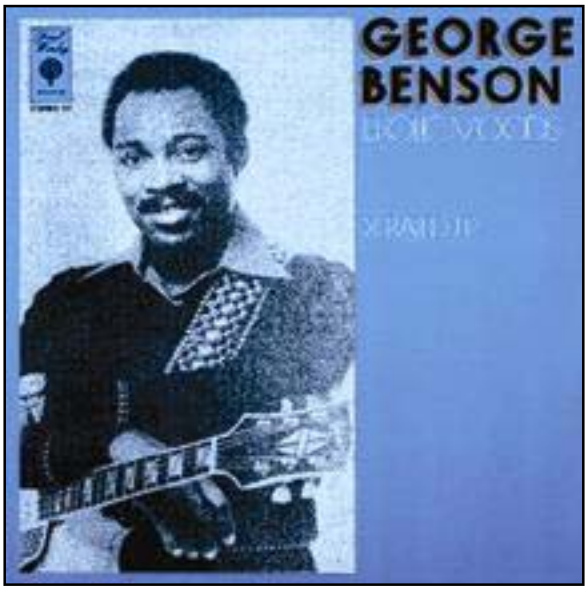
Section 43(a) of the Lanham Act can be a powerful legal tool for artists in some situations.[56] It recognizes a civil cause of action for the use in commerce of "any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation" that is likely to cause consumer confusion, mistake or deception.[57] "The courts have broadened traditional Section

43(a) false advertising into coverage of a wide variety of claims brought by individual writers, performers and artists. In a sense, they have carved out an entertainment industry Bill of Rights for such individuals, strongly supporting creativity and the success it brings."[58]

Similarly, common law and state statutory causes of action for unfair competition can sometimes be utilized effectively by artists to protect their personal interests. In fact, unfair competition claims are probably the most common means by which authors attempt to vindicate what amounts to a right of integrity.[59] And although the *Gilliam* decision was based in part on the presence of an express agreement between the parties, other courts have stated that even in the absence of a contract the law of unfair competition may protect against a "garbled" version of an artist's work.[60]

World famous jazz guitarist George Benson successfully used a Lanham Act claim to enjoin the distribution of one of his recordings in a context to which he objected.[61] Years before achieving international acclaim, Benson had been hired as one of several studio musicians to perform music composed and directed by others. He exercised no control over the musical style, contents or production of the record that emerged from that session. Defendants later recovered this archived recording, accentuated Benson's rhythm guitar performance and added the sounds of a woman's suggestive moaning to one track. The album that defendants released, "George Benson Erotic Moods," featured a large recent photograph of Benson on the cover as well as the caption "X Rated LP." Defendants also ran advertisements for Benson's "XXX Rated new LP and single."[62]

On plaintiff's motion for preliminary injunction, the court decided that the jacket design and advertisements were false descriptions and representations in violation of section 43(a) of the Lanham Act. "Defendants have more than likely misled the public as they doubtless intended into believing that their album contains recent recordings by George Benson as principal performer."[63] The court then concluded that defendants' misrepresentations threatened to cause irreparable harm to plaintiff's reputation, reasoning that disappointed purchasers might be deterred from buying other Benson albums in the future, and that the public might mistakenly believe that he endorsed "X Rated" material. "Thus defendants, attempting to capitalize on Benson's phenomenal success, have deceitfully packaged and advertised a product that anathema to his professional standing and personal stature."[64]



Many other musicians have achieved similar results by invoking Lanham Act section 43(a) to prevent over-representation of their contributions to and performance in older recordings.[65]

D. Defamation Law

Although it may frequently be more difficult than making out a claim for breach of contract or unfair competition, defamation law is often cited an another American "analogue" to

moral rights, and might sometimes be used to enforce an author's right of integrity.[66] For such claims, it is essential for the artist to establish that the defendant's objectionable use of her work somehow exposed her to contempt or public ridicule, to the detriment of her professional standing.[67]

This rule worked to the disadvantage of four Russian composers who sought an injunction in New York to prevent the continued use of their music in a motion picture that they felt portrayed an anti-Soviet theme.[68] Plaintiffs alleged that the unauthorized use of their works in "The Iron Curtain" indicated their approval and endorsement of, and participation in the film, which they argued cast upon them a false imputation of being disloyal to their country.[69] The court quickly dismissed their allegations, primarily because the works at issue were in the public domain. Even though plaintiffs' names appear in the opening credits of the film, the court ruled that there was "no ground for any contention that plaintiffs have participated in its production or given their approval or endorsement thereto. ... No such implication exists, necessarily or otherwise, where the work of the composer is in the public domain and may be freely published, copied or compiled by others."[70]

E. Rights of Privacy and Publicity

Although it fared no better before the court, the plaintiffs in *Shostakovich* also claimed in their complaint a violation of New York's general privacy statute, Civil Rights Law sections 50 and 51.[71] This statute, which was adopted in 1903 to address New York courts' refusal to recognize a common law right of publicity,[72] prevents unauthorized use "for advertising purposes, or for purposes of trade, [of] the name, portrait or picture of any living person...."[73]

A British musician who had significantly more success invoking section 51 to prevent the appearance of his work in an objectionable context is John Lennon, who was awarded damages for injury to his reputation caused by a low quality record album of his recordings.[74] Purportedly acting under a belief that they and Lennon had established a binding oral agreement concerning the release of an album of Lennon performing several classic 1950s rock and roll compositions, plaintiffs rushed to release their record album (titled "Roots") so as to beat to the market Capitol records, which disputed plaintiffs' entitlement to manufacture and distribute the recordings. The federal district court determined that plaintiffs' evidence was insufficient to establish that the parties ever entered into a contract[75] and later awarded damages to defendants on various counterclaims.

The Second Circuit upheld the district court's factual findings and reversed some of its damages awards, but sustained the award of damages to Lennon for injury to his reputation. The court dismissed plaintiffs' arguments that the artist's reputation was "virtually impervious," that their album did not really harm his reputation, and that the harm did not deserve any significant amount of compensation. "Comparison of the actual cover of the 'Roots' album... with Lennon's other album covers confirms that it is, as Lennon testified, cheap-looking, if not ugly. Comparison of the music confirms the trial judge's finding that the quality of the 'Roots' album was shoddy and fuzzy, with one out-of-tune track and indistinct voices in some places, all found by the trial judge and reasonably clear even to appellate ears unused to Lennon's style of music."[76] The court affirmed an award of $35,000 to Lennon on his counterclaim under Civil Rights Law section 51.

Although section 51 on its face protects only the right of publicity, courts have interpreted it broadly to also protect other rights of privacy.[77] About six states have adopted statutes based on the New York law, and most states recognize statutory and/or common law rights of publicity and privacy.[78] Artists can sometimes also claim that violations of the integrity of their works infringe their privacy rights.[79]

F. Other Possibilities

There are, of course, other causes of action that in the appropriate circumstances may approximate the integrity rights that a musician would enjoy in a state that explicitly protects moral rights. The creative practitioner might look to other federal statutes, as well as state statutes or common law for potentially applicable claims. For example, as noted above, Connie Francis claimed that Universal's licensing of her recordings for use in sexually themed motion pictures constituted intentional infliction of emotional distress,[80] given that her traumatic past had been so widely publicized.[81]

It is interesting to note that, while the *Shostakovich* plaintiffs did not include an emotional distress claim in their complaint, the court suggested *sua sponte* that plaintiffs' allegations might make out a claim for deliberate infliction of injury without a just cause under New York common law.[82] However, the court combined its examination of this issue with its consideration of moral rights generally and concluded that, "in the absence of any clear showing of the infliction of a willful injury or of any invasion of a moral right, this court should not consider granting the drastic relief asked on either theory" due to the unsettled state of moral rights law in the United States.[83] Thus, a reading of this decision suggests "that the court's discomfort with the moral right doctrine and the difficulty of its application provided the primary impetus for denying the plaintiffs' moral rights claims."[84]

This judicial hostility can also impede a strategy like that adopted by Connie Francis of invoking in federal court the moral rights laws of European nations in which the musician's works were distributed. Many courts are likely to simply dismiss such claims out of a wariness of applying foreign law to what amounts to a domestic dispute, and also an aversion to moral rights more generally. In dictum, one federal district court indicated that it would flatly refuse to consider such claims by the plaintiff musicians because "any international moral rights claims would lack merit... The United States courts generally do not recognize moral rights, unlike foreign jurisdictions."[85] In a footnote, the court suggested that it would be willing to hear such claims if alleged in the form of unfair competition, defamation, invasion of privacy or breach of contract.[86]

V. CONCLUSION

In his highly influential[87] 1976 law review article, Professor Merryman acknowledged the availability of the disparate American moral rights surrogates upon which Congress would later rely when adhering to the Berne Convention, but he dismissed the effectiveness and relevance of these purported "functional equivalents."[88] He summarized the situation facing artists in words that still ring true today: "At the bottom of it all is the significant fact that where the artist claims a violation of a personality interest, rather than a patrimonial interest, the civil law responds and our law does not. That is the real difference."[89]

The result is that musicians and attorneys must attempt to squeeze the "square peg" of a moral rights claim into the "round holes" of copyright, contract, trademark and unfair competition, defamation, privacy and rights of publicity, and other better-established doctrines of American jurisprudence, which can be very difficult; "The major difficultly facing American creators is the additional burden of molding moral rights claims into other recognized causes of action."[90] In the case of Connie Francis, it appears that perhaps invoking foreign moral rights laws and claiming emotional distress may not have been the wisest methods for seeking to establish Universal's liability.[91] Rather, case law suggests that Francis may be better off relying on claims that the licensing of her recordings for use in the objectionable films violated express or implied terms of her recording contracts, infringed her privacy or publicity rights, or perhaps exposed her to contempt or public ridicule, to the detriment of her professional standing.

Musicians like Francis and the practititioners who represent them would do well to examine how the "moral rights equivalents" have fared before courts in previous cases, think creatively, and do their best to pacify the current judicial hostility to the moral rights doctrine. Only in this way can artists hope to find aid in the American legal system for protecting what they feel are uses that damage the integrity of their work.

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[1] *See* Franconero v. UMG Recordings, Inc., No. 02-CV-01963 (S.D.N.Y. filed Mar. 11, 2002). UMG Recordings, Inc. was later substituted for Universal Music Corporation as the defendant.

[2] *See* Garzilli v. Howard Johnson's Motor Lodges, Inc., 419 F.Supp. 1210 (E.D.N.Y. 1976) (jury award of $2.5 million in suit by Francis and her husband against hotel owner affirmed).

[3] Other personality interests include the rights to one's reputation, privacy and identity. *See generally* SHELDON W. HALPERN, THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND "MORAL RIGHTS" (1988).

[4] *See* Roberta Rosenthal Kwall, *Copyright and Moral Right: Is an American Marriage Possible?*, VAND. L. REV. 1, 8 (1985).

[5] *See* MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 8D.04.

[6] *See id.* at § 8D.01[A].

[7] *See id*.

[8] *See* Kwall, *supra* note 4, at 5.

[9] *See* John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1026 (1976).

[10] *See* J.A.L. STERLING, WORLD COPYRIGHT LAW 16 (1999); *see also* Calvin D. Peeler, FROM THE PROVIDENCE OF KINGS TO COPYRIGHTED THINGS (AND FRENCH MORAL RIGHTS), 9 IND. INT'L & COMP. L. REV. 423, 447–52 (1999).

[11] *See id.* at 1028.

[12] *See* Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 818 (2001) (citing GRAND DICTIONNAIRE 583 (1993); CASSELL'S DICTIONARY 496 (1981)).

[13] *See* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886–1986 456 (1987).

[14] Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law – A Proposal*, 24 S. CAL. L. REV. 375, 390 (1951).

[15] *See* Lee, *supra* note 12, at 820.

[16] *See* Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244 (1978).
[17] Lee, *supra* note 12, at 803.
[18] For a survey of the moral rights protected by various countries' copyright laws, see Kwall, *supra* note 8, at Appendix.
[19] Stig Stromholm, *Copyright: Comparison of Laws*, in XIV INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, 3-44 (1990).
[20] Berne Convention Concerning the Creation of an International Union for the Protection of Literary and Artistic Works (Paris text), art. 6*bis*(1).
[21] *See* Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 7 (1988); Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC. 1, 16–17 (1980).
[22] *See* Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 12 (1997).
[23] *See* H.R. Rep. No. 100-609, 100th Cong., 2d Sess. 32–40 (1988).
[24] Nimmer, *supra* note 5, at §8D.02. *See also*, *e.g.*, Ginsburg, *supra* note 87, at 10 ("[we were] lying").
[25] Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14, 24 (2d Cir.1976).
[26] *Who's Sorry Now?*, ROLLING STONE 13, April 25, 2002.
[27] Berne Convention (Paris text), *supra* note 20, at art. 36(1). Article 6*bis*(3) also indicates: "The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed."
[28] Congress' conclusion was based in part on the findings of a working group appointed to examine the prospect of U.S. adherence to the treaty. *See Final Report of the Ad Hoc Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J. L. & ARTS 513 (1986).
[29] Nimmer, *supra* note 5, at § 8D.02[C].
[30] *See* H.R. Rep. No. 100-609, supra note 23, at 38.
[31] Berne Convention Implementation Act of 1988, § 3(b).
[32] *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9(1)
[33] North American Free Trade Agreement, art. 1701(3).
[34] 17 U.S.C. § 106A.
[35] Nimmer, *supra* note 5, at § 8D.02[A].
[36] Kwall, *supra* note 4, at 17–18.
[37] *See, e.g.*, Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, FORDHAM. INTELL. PROP. MEDIA & ENT. L.J. 601, 606 (2001) ("The United States must reconsider and change its stance on moral rights."); Patrick G. Zabatta, *Moral Rights and Musical Works: Are Composers Getting Berned?*, 43 SYRACUSE L. REV. 1095, 1129 (1992) ("Congress should face the reality that the various causes of action currently relied upon do not provide adequate redress for violations of such rights, and act to correct these deficiencies.").
[38] *See* Zabatta, *supra* note 37, at 1130 (also attributing musicians' vulnerability to the wide dissemination of their works and appropriation through digital sampling).
[39] Phyllis Amarnick, *American Recognition of the Moral Right: Issues and Options*, 29 COPYRIGHT L. SYMP. (ASCAP) 31, 32 (1983).
[40] *See* Lee, *supra* note 12, at 811 ("the artist must mold her allegation of a violation of integrity into some recognizable claim within the melange or patchwork of theories").
[41] 17 U.S.C. § 115(a)(2).
[42] *See id.* at § 106(2).
[43] *See id.* at 807.
[44] Zechariah Chafee, Jr., *Reflections on the Law of Copyright: II*, 45 COLUM. L. REV. 719, 729 (1945).
[45] *See* Lee, *supra* note 12, at 807; Cotter, *supra* note 22, at 80; DaSilva, *supra* note 21, at 56; Kwall, *supra* note 4, at 27.
[46] *See* Manners v. Morosco, 252 U.S. 317, 327 (1920) (Clarke and Pitney, JJ., dissenting).
[47] Gunlicks, *supra* note 37, at 618.
[48] Granz v. Harris, 198 F.2d 585 (2d Cir.1952).
[49] *See id.* at 587.
[50] *See id.* at 586.
[51] *See id.* at 588.

[52] *See id.* at 588–89.
[53] *See id.* at 590 (Frank, J., concurring).
[54] *See id.* at 591 (Frank, J., concurring).
[55] *See* Gilliam, 538 F.2d at 24. The *Gilliam* court also held that a licensee's unauthorized changes in a work that are so extensive as to impair the integrity of the original are actionable as copyright infringement. *See* Gilliam, 538 F.2d at 20–21.
[56] *See generally* J. THOMAS MCCARTHY, 4 MCCARTHY ON TRADEMARKS §§ 27:77–27:90 (examining applications of Section 43(a) in the literary and entertainment fields).
[57] 15 U.S.C. § 1125(a).
[58] JEROME GILSON ET AL., 2 TRADEMARK PROTECTION AND PRACTICE § 7.02[6][d].
[59] *See* Lee, *supra* note 12, at 811.
[60] *See*, *e.g.*, Preminger v. Columbia Pictures Corp., 49 Misc.2d 363, 267 N.Y.S.2d 594 (Sup.Ct.N.Y.County 1966), *aff'd*, 25 A.D.2d 830, 269 N.Y.S.2d 913 (1st Dept.1966), *aff'd*, 18 N.Y.2d, 273 N.Y.S.2d 80 (1966).
[61] *See* Benson v. Paul Winley Record Sales Corp., 452 F.Supp. 516 (S.D.N.Y. 1978).
[62] *See id.* at 517.
[63] *Id*. at 518.
[64] *Id*.
[65] See McCarthy, *supra* note 56, at § 27:84 (citing many similar cases).
[66] *See*, *e.g.*, Edison v. Viva Int'l, Ltd., 70 A.D.2d 379, 421 N.Y.S.2d 203 (1979) (publication of plaintiff's article in substantially different form and content actionable as libel).
[67] *See*, *e.g.*, Geisel v. Poynter Productions, Inc., 295 F.Supp. 331, 357 (S.D.N.Y. 1968) (defamation not established where defendant's great care, skill and judgment resulted in no injury to plaintiff's professional reputation).
[68] *See* Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 80 N.Y.S.2d 575 (N.Y.Spec.Term 1948), *aff'd* 275 A.D. 692; 87 N.Y.S.2d 430 (N.Y.App.Div. 1949).
[69] *See id.* at 68.
[70] *Id*. at 70.
[71] *Id*. at 69 (quickly dismissing plaintiffs' claim because a "lack of copyright protection has long been held to permit others to use the names of authors in copying, publishing or compiling their works").
[72] *See* J. THOMAS MCCARTHY, 1 THE RIGHTS OF PUBLICITY AND PRIVACY § 6.73.
[73] N.Y. Civil Rights Law § 50. Section 51 recognizes a civil cause of action for violation of section 50.
[74] Big Seven Music Corp. v. Lennon, 554 F.2d 504, 512 (2d Cir.1977).
[75] *See* Big Seven Music Corp. v. Lennon, 409 F.Supp. 122, 129 (S.D.N.Y. 1976).
[76] Big Seven Music Corp., 554 F.2d at 512.
[77] *See* McCarthy, supra note 72, at §§ 6:74–6:77.
[78] *See id.* at §§ 6:10–6:127 (surveying state statutes).
[79] *See, e.g., Sim v. Western Publishing Co.*, 573 F.2d 1318 (5th Cir.1878); *Gieseking v. Urania Records*, 17 Misc.2d 1034, 155 N.Y.S.2d 171 (1956).
[80] Under New York state law, this tort has four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." Howell v. New York Post Co., 81 N.Y.2d 115, 121, 612 N.E.2d 699 (1993).
[81] In a written ruling on several discovery disputes, the magistrate judge in the Francis suit seemed to suggest that, insofar as the defendant did not use any criteria to evaluate the suitability of licensing plaintiff's recordings for use in particular motion pictures, it would not be liable for intentional infliction of emotional distress. *See* Franconero v. Universal Music Corp., No. 02-CV-01963, 2002 WL 31682648, at *4 (S.D.N.Y. Nov. 27, 2002).
[82] *See* Shostakovich, 196 Misc. at 68–69.
[83] *Id*. at 71.
[84] Kwall, *supra* note 4, at 28.
[85] Johnson v. Tuff-N-Rumble Management, Inc., 2000 WL 1808486 (E.D.La.) *4. *But see* Monroig v. RMM Records & Video Corp., 196 F.R.D. 214 (D.Puerto Rico 2000).
[86] *Id*. at n.1.
[87] *See* Jane C. Ginsburg, *Symposium, Art and the Law: Suppression and Liberty—Have Moral Rights Come of Digital Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9 (2001) ("Anything written in the field in the United States since 1976 owes inspiration to... Professor Merryman's seminal article....").
[88] Merryman, *supra* note 9, at 1037.

[89] *Id*. at 1039.
[90] Kwall, *supra* note 4, at 23.
[91] The defendant filed a motion for summary judgment on several of Francis' claims, including those for intentional infliction of emotional distress and violation of moral rights, in February 2003. As of the time of this writing, the court had not yet ruled on the motion.