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VOLUME 3

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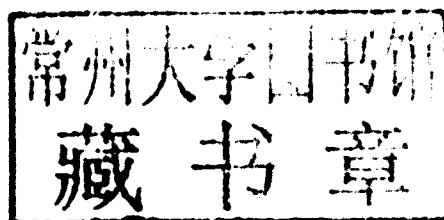
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Certain references in the text, not otherwise identified, are as follows:

<i>Reference</i>	<i>Identification</i>
BCIA	Berne Convention Implementation Act of 1988 (see Overview) (see also Appendix 2A <i>infra</i>)
Commerce Rep. (DMCA)	H.R. Rep. No. 105-551, Part 2, 105th Cong., 2d Sess. (1998) (see Appendix 53 <i>infra</i>)
Conf. Rep.	H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. (1976) (see Appendix 5 <i>infra</i>)
Conf. Rep. (DMCA)	Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 105-796, 105th Cong., 2d Sess. (1998) (see Appendix 57 <i>infra</i>)
Current Act (1976 Act)	17 U.S.C. § 101 <i>et seq.</i> (Pub. L. 94-553, 90 Stat. 2541) (see Appendix 2 <i>infra</i>)
Decennial	January 1, 1978 — March 1, 1989 (see Overview <i>infra</i>)
DPRA	Digital Performance Rights in Sound Recordings Act of 1995 (see Appendix 2H)
Hearings on GATT Intellectual Property Provisions	<i>General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions</i> , Joint Hearings Before the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary and the Subcommittee on Patents, Copyrights, and Trademarks of the Senate Committee on the Judiciary, 103d Cong., 2d Sess. (August 12, 1994)
H. Rep.	H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) (see Appendix 4 <i>infra</i>)
H. Rep. (AHRA)	H.R. Rep. No. 102-873 Part 1, 102d Cong., 2d Sess. (1992). (see Appendix 37 <i>infra</i>)
H. Rep. (BCIA)	H.R. Rep. No. 100-609, 100th Cong., 2d Sess. (1988) (see Appendix 32 <i>infra</i>)

<i>Reference</i>	<i>Identification</i>
H. Rep. (DMCA)	H.R. Rep. No. 105-551, Part 1, 105th Cong., 2d Sess. (1998) (see Appendix 52 <i>infra</i>)
H. Rep. (DPRA)	H.R. Rep. No. 104-274, 104th Cong., 1st Sess. (1995) (see Appendix 45 <i>infra</i>)
H. Rep. (FECA)	H.R. Rep. No. 109-33(I), 109th Cong., 1st Sess. (2005)
H. Rep. (PRO IP)	H. R. Rep. No. 110-617, 110th Cong., 2d Sess. (2008)
H. Rep. (SCPA)	H.R. Rep. No. 98-781, 98th Cong., 2d Sess. (1984) (see Appendix 30 <i>infra</i>)
H. Rep. (SHVA)	H.R. Rep. No. 100-887(I), 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 5611
OCILLA	Online Copyright Infringement Liability Limitation Act (see § 12B.01[C] <i>infra</i>)
Reg. Rep.	Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess., Copyright Law Revision (House Comm. Print 1961) (see Appendix 14 <i>infra</i>)
Reg. Supp. Rep.	Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., Copyright Law Revision Part 6 (House Comm. Print 1965) (see Appendix 15 <i>infra</i>)
SAA	Statement of Administrative Action (see § 18.06 [C][2][c] <i>infra</i>)
S. Rep.	S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975) (see Appendix 4A <i>infra</i>)
S. Rep. (AHRA)	S. Rep. No. 102-294, 102d Cong., 2d Sess. (1992) (see Appendix 36 <i>infra</i>)
S. Rep. (BCIA)	S. Rep. No. 100-352, 100th Cong., 2d Sess. (1988) (see Appendix 35 <i>infra</i>)
S. Rep. (DMCA)	S. Rep. No. 105-190, 105th Cong., 2d Sess. (1998) (see Appendix 54 <i>infra</i>)

*Reference**Identification*

S. Rep. (DPRA)

S. Rep. No. 104-128, 104th Cong., 1st Sess. (1995) (see Appendix 46 *infra*)

Trans. Supp. Prov.

Transitional and Supplementary Provisions (see Appendix 2 *infra*)

TRIPs

Trade-Related Aspects of Intellectual Property Rights (see § 18.06[A] *infra*)

U.C.C.

Universal Copyright Convention (see Appendices 24 and 25 *infra*)

U.S.P.Q.

United States Patent Quarterly

1909 Act

Act of March 4, 1909, ch. 320, 35 Stat. 1075, as thereafter codified in 17 U.S.C. § 1 *et seq.*, and as amended (see Appendix 6 *infra*)

1997 Hearings, Serial No. 33

The WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act, Hearing Before the Subcommittee on Courts and Intellectual Property, Serial No. 33 (Sept. 16-17, 1997)

2000 Hearings, Serial No. 145

United States Copyright Office and Sound Recordings as Work Made for Hire, Hearing Before the Subcommittee on Courts and Intellectual Property, Serial No. 145 (May 25, 2000)

CHAPTER 8D

Moral Rights

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§ 8D.01 Introduction

[A] Types of Moral Rights

Certain countries of the world have long recognized rights personal to authors, and as such viable separate and apart from the economic aspect of copyright.¹ Their separate viability is such that a full transfer of copyright may suffice for all economic purposes, but may exert no impact on the assertion of these claims.² In France, home country to the doctrine,³ these rights are known as *le droit moral*,⁴ or moral rights.⁵ “The adjective ‘moral’ has no precise English equivalent, although ‘spiritual’, ‘non-economic’^{5.1} and ‘personal’^{5.2} convey something of the intended meaning.”⁶

It is beyond the scope of this treatise to treat moral rights under the laws of their

¹ World Intellectual Property Organization, *Guide to the Berne Convention* 41 (1978); H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 16 (1990). “The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation.” *Id.* at 5. See *id.* at 22 (“Moral rights claims go to creators’ reputations, not to rights of economic exploitation.”).

² *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (Treatise cited), *cert. denied*, 517 U.S. 1208, 116 S. Ct. 1824, 134 L. Ed. 2d 930 (1996). “This notion of independence is, of course, basic to the whole concept of moral rights.” S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* 467 (1987).

³ S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* 456 (1987). Apart from France, moral rights appear to be of greatest importance in Germany and Italy. See Chap. 17 *infra*. See generally *International Copyright Law and Practice*. For another country affording a wide panoply of moral rights, see Chaves, “Brazil” § 7[1] in *id.*

⁴ The singular number under French grammar connotes an indivisible package of rights, as distinguished from the plural “moral rights,” reflective of the current American concept of divisibility. See § 10.02 *infra*. Nonetheless, even in France the plural has also crept in. See Lucas & Plaisant, “France” § 7 in *International Copyright Law and Practice*.

⁵ See H. Rep. (BCIA), p. 33 n.63 (Treatise cited). The Teutonic analog to this Gallic right is *das Urheberpersönlichkeitsrecht*, or “the right of the author’s personality.” See 1 S. Ladas, *The International Protection of Literary and Artistic Property* 575 n.2 (1938).

^{5.1} Nonetheless, one should not take the reference to “non-economic” as gospel: “[B]oth moral and remunerative rights are legal rights, and, as legal rights, have economic consequences.” Note, *Authors’ Moral Rights in Non-European Nations: International Agreements, Economics*, Mannu Bhandari, and the *Dead Sea Scrolls*, 16 Mich. J. Int’l L. 545, 577 (1995).

^{5.2} On the provocative thesis that misattribution shares some of the odium of confessions extracted under torture, see de Grazia, *Sanctioning Voice: Quotation Marks, the Abolition of Torture, and the Fifth Amendment*, 10 Cardozo Arts & Ent. L.J. 545 (1992).

⁶ S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* 456 (1987).

European homelands.⁷ Some may overlap others, and perhaps no country

(Text continued on page 8D-5)

⁷ For extensive bibliographies of articles on the subject, see Register of Copyrights, *Technological Alterations to Motion Pictures* 82 n.139 (1989); S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* 456 n.435 (1987). See generally Strauss,

(Footnote continued on page 8D-5)

affords every conceivable species of moral right. In brief, the following summary encompasses the various rights that can be grouped together under this rubric. First, there are numerous variations on the attribution right^{7.1} (*droit au respect du nom*; also, *droit à la paternité*):⁸

- the right to be known as the author of his work;⁹
- the right to prevent others from falsely attributing to him the authorship of a work that he has not in fact written;¹⁰
- the right to prevent others from being named as the author of his work;¹¹
- the right to publish a work anonymously or pseudonymously, as well as the right to change his mind at a later date and claim authorship under his own name;
- the right to prevent others from using the work or the author's name in such a way as to reflect adversely on his professional standing.¹²

In addition, there are several distinct categories that comprise the classic *droit moral*:

- the right to prevent others from making deforming changes in his work (*droit au respect de l'oeuvre*);¹³

The Moral Right of the Author, 2 Studies on Copyright 963 (Fisher ed. 1963); Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 Am. J. Comp. Law 465 (1968); Treece, *American Law Analogues of the Author's "Moral Right,"* 16 Am. J. Comp. Law 487 (1968). For a wonderful contrast in perspectives, compare Merryman, *The Refrigerator of Bernard Buffet*, 27 Hastings L. J. 1023 (1976), to Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 Northwestern U. L. Rev. 1011 (1988).

^{7.1} *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995) (Treatise cited), *cert. denied*, 517 U.S. 1208 (1996).

⁸ The standard custom has been, Anglicizing its French roots, to refer to this right under the rubric "paternity." See, e.g., H. Rep. (BCIA), p. 38. Given the sexist underpinnings of that language — not to mention its confusion over wherein gestation occurs — this treatise departs from that tradition, and uses the gender-neutral term "attribution." (It also shifts between masculine and feminine pronouns.) Moreover, even in the field of biology, judicial treatment of paternity is undergoing re-evaluation. See Dolgin, *Just A Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. Rev. 637 (1993). The further irony should be noted that economic rights in France also trace their etymology to fatherhood: they are called *les droits patrimoniaux*.

⁹ See § 8D.03[A] *infra*.

¹⁰ See § 8D.03[B] *infra*.

¹¹ See § 8D.03[A][2] *infra*.

¹² This right combines aspects of both the attribution and integrity rights. Under Berne Convention jurisprudence, it probably comes closer to the integrity right. See § 8D.01[B] *infra*. Under the Visual Artists Right of 1990, by contrast, it forms one branch of the attribution right. See § 8D.06[B][1] *infra*. The general discussion below attempts to gather U.S. law on the subject under the integrity right. See § 8D.04[A][2] *infra*. See also § 8D.03[B][2] *infra*.

¹³ See § 8D.04[A] *infra*.

- the right to publish a work, or to withhold it from dissemination (*droit de divulgation*);¹⁴ and
- the right to withdraw a published work from distribution if it no longer represents the views of the author (*droit de retrait*; also, *droit de repentir*).¹⁵

Under French law, the moral right is conceived as perpetual, inalienable, and imprescriptible.¹⁶ In theory, therefore, even today in France, an outrageous stage or film version of *Le Médecin Malgré Lui* could be challenged and subjected to the full range of sanctions for violation of the moral right. Moreover, even if Molière's line has long since expired in the three centuries since that play was penned, the French state might still be able to protect the integrity right under a *parens patriae* theory.¹⁷

[B]—Article 6bis of the Berne Convention

Article 6bis of the Berne Convention¹⁸ states:

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.¹⁹

¹⁴ See § 8D.05[A] *infra*.

¹⁵ See § 8D.05[B] *infra*. This retraction right is the least recognized among moral rights internationally; it is always subject to the qualification that the retracting author must pay full compensation for pulling back her interests that were previously granted. See Note, *Authors' Moral Rights in Non-European Nations: International Agreements, Economics, Mannu Bhandari, and the Dead Sea Scrolls*, 16 Mich. J. Int'l L. 545, 554. (1995).

¹⁶ Statement of Ralph Oman in *Moral Rights in our Copyright Laws*, Hearings Before the Subcommittee on Patents, Copyrights and Trademarks of the Committee of the Judiciary, United States Senate, 101st Cong., 1st Sess. 163 (1989). See Lucas & Plaisant, §§ 7[3] & 7[4] in *International Copyright Law and Practice*. In addition to France, countries in the French legal tradition similarly provide that moral rights are inalienable and imprescriptible. S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* 467 n.510 (1987) (Senegal, Benin, Central African Republic).

¹⁷ S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* 474 (1987) (“the protection of moral rights *post mortem auctoris* might be entrusted to a government or public agency concerned with the promotion of national culture or to some other appropriate body”). Cf. Mass. Gen. L. § 85S(g), reproduced in § 8D.10[F] *infra*.

¹⁸ On the Berne Convention generally, see § 17.01[B][1] *infra*.

¹⁹ Berne Convention (Paris text), art. 6bis(1). The Berne Convention elsewhere provides that when a country chooses to legislate particular exemptions to authors' rights, the author's moral rights must nonetheless be scrupulously observed. *Id.* art. 11bis(2). See *id.* art. 10(3). Although the United States has taken advantage of some of those exemptions, it is not always clear that it has done so in a way that safeguards the moral rights thereby implicated. See §§ 8.15[C] N. 49 and accompanying text; 8.18[E] N. 129 *supra*. A question thereby arises as to compliance of the United States with Berne Convention strictures. See § 8D.02[D] *infra*.

From among the various species of moral rights canvassed above,²⁰ this treaty provision recognizes two: integrity and attribution. As to the former, the right to “object to any distortion, mutilation or other modification” does not extend to the right, recognized in some Continental jurisdictions, to object to outright destruction of the subject work.²¹ The semi-official guide published by the Berne Convention’s secretariat comments that this “right of respect” is “very elastic and leaves a good deal of latitude to the courts.”²² As to the latter, the guide elaborates three branches of the Berne “paternity” right, *i.e.*, to assert that the author is the work’s creator; to publish anonymously or pseudonymously, with the option of later changing his mind and abandoning anonymity; and to prevent use of his name with reference to a work that he did not create.²³

Notably absent from Berne Convention requirements under the foregoing language are an initial dissemination and a retraction right.²⁴ Although the laws of some countries protect moral rights to a greater extent than Article 6*bis* requires,²⁵ the foregoing language establishes the Berne minimum.²⁶

The language quoted above constitutes the first paragraph of Article 6*bis*. The second paragraph requires moral rights to continue past the author’s death for as long as economic rights subsist, except that countries that recognize no *post mortem* moral rights upon Berne accession may continue to afford no protection after the author’s death.²⁷ Finally, the third paragraph specifies that the means of redress for safeguarding the Article 6*bis* rights “shall be governed by the legislation of the country where protection is claimed.”²⁸ That clause gives each member state significant leeway in the implementation of moral rights.²⁹

²⁰ See § 8D.01[A] *supra*.

²¹ S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* 470 (1987). See § 8D.04[B] *infra*.

²² World Intellectual Property Organization, *Guide to the Berne Convention* 42 (1978).

²³ World Intellectual Property Organization, *Guide to the Berne Convention* 41 (1978). Contrast these rights with the three types of attribution rights created by the Visual Artists Rights Act of 1990. See § 8D.06[B][1] *infra*.

²⁴ Note that a divulgation right may exist in Berne by implication. W. Nordemann, K. Vinck & P. Hertin, *International Copyright and Neighboring Rights Law* 87 (1990); S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* 476 (1987).

²⁵ See, *e.g.*, Lucas & Plaisant, “France” §§ 7[1][a], 7[1][c] in *International Copyright Law and Practice* (rights of divulgation and retraction).

²⁶ See § 17.01[B][1] *infra* on Convention minima.

²⁷ Berne Convention (Paris text), art. 6*bis*(2).

²⁸ Berne Convention (Paris text), art. 6*bis*(3).

²⁹ “[T]he remedies available in each country may differ considerably.” S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* 475 (1987). On the other hand, some commentators disagree that this paragraph gives leeway in the implementation of moral rights — calling paragraph 3 “superfluous,” they note that “[r]emedies always follow the law of the country of protection.” W. Nordemann, K. Vinck & P. Hertin, *International Copyright and Neighboring Rights Law* 88 (1990) (emphasis original).