Westlaw Delivery Summary Report for JAFFE,BARBARA

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†That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.† [FN1]

A GREAT artist creates a mural which, bearing his name, eventually reaches the hands of a purchaser who objects to the nude figures that the creator had seen fit to incorporate into his tableau. The purchaser, therefore, employs another artist to drape the figures. In a now famous decree the German Supreme Court, in 1912, held that the transferee of the mural, in a case involving these facts, could not have it changed to suit his individual preferences. [FN2] It is our purpose to investigate just how far the common law has gone to protect the creator in this and similar circumstances.

In this country, scant recognition has been given overtly, aside from the copyright law, to the legal problems raised by artistic creativeness. [FN3] Constant reference must be made to continental jurisprudence where the protection of the artist has been developed to a fine degree. [FN4] The doctrine which purports to protect the personal rights of creators, as distinguished from their merely economic rights, is known in France as ‡droit moral,‡ and, in its ‡moral right,‡ translation, has been used in English. [FN5] Despite some criticism, [FN5] it is difficult to find any other expression which would do as well without becoming unwieldy. [FN6] For these reasons, it will be adopted herein.

This doctrine, the outgrowth of centuries of literary and artistic creativeness, is indigenous to continental jurisprudence. Any attempt to set forth the entire content of the European development of the subject is far beyond the scope of this article which is primarily a study of the extent of its recognition by the common law, but a brief outline of its growth is not out of order. The doctrine has been best expressed and studied in France. As early as the beginning of the nineteenth century cases are found which,
emphasizing the criminal statutes against plagiarism, protected the right of the creator to have the form of
his work preserved from deformation by subsequent transferees. [FN7] Towards the middle of the century
the cases begin to show an appreciation of the special need of creators for protection of their works. In
1845, the Tribunal Correctionnel held that the sculptor Clesinger had the right to institute criminal
proceedings against transferees of a statue created by him on the ground that they had mutilated it. [FN8]
The court said:

... indépendamment de l'intérêt péconiaire, il existe pour l'artiste un intérêt plus précieux, celui de la
réputation ....

The case was appealed and the upper Court reversed, holding that a criminal proceeding was not in
order, but intimating that a civil action would lie. [FN9]

*556 The second half of the nineteenth century witnessed a rapid development of the concept. The
right to refuse to create, [FN10] the right of paternity, [FN11] the right to prevent deformation of the work,
[FN12] all received recognition in the civil courts. In 1901 the Cour de Cassation, the highest French Court,
gave official recognition to the doctrine in Cinquin C. Lecocq. [FN13]

The various ramifications of the doctrine have been constantly developed in Europe and, in addition to
the rights already mentioned, the moral right may now be said to consist of the right to create and to publish
in any form desired, [FN14] the creator's right to claim the paternity of his work, [FN15] the right to prevent
every deformation, mutilation or other modification thereof, [FN16] the right to withdraw and
destroy the work, [FN17] the prohibition against excessive criticism [FN18] and the prohibition against all
other injuries to the creator's personality. [FN19] Part of this doctrine has been incorporated into the Bern
Convention, as revised at Rome in 1928, Art. 6 bis of which reads as follows:

(1) Independently of the patrimonial rights of the author, and even after the assignment of the said
rights, the author retains the right to claim the paternity of the work, as well as the right to object to every
deformation, mutilation or other modification of the said work, which may be prejudicial to his honor or to
his reputation.

(2) It is left to the national legislation of each of the countries of the Union to establish the conditions
for the exercise of these rights. The means for safeguarding them shall be regulated by the legislation of the
country where protection is claimed.

*557 It is necessary, at this point, to distinguish the protection accorded by the copyright law from that
provided by the doctrine of moral right. The copyright law, of course, protects the economic exploitation of
the fruits of artistic creation; but the economic, exploitive aspect of the problem is only one of its many
facets and will not be treated herein, except incidentally. When an artist creates, be he an author, a painter, a
sculptor, an architect or a musician, he does more than bring into the world a unique object having only
exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of
public use. There are possibilities of injury to the creator other than merely economic ones; these the copyright statute does not protect. [FN20] Nor is the interest of society in the integrity of its cultural heritage protected by the copyright statute. Copyright law will prevent A from reprinting the work of B without permission and will thus give B a limited monopoly on that work which may be exploited for the economic advantage of B; but copyright law will probably not prevent C, the authorized publisher of B's works, from publishing them in a manner harmful to B's honor and reputation as a creator.

Busy with the economic exploitation of her vast natural wealth, America has, perhaps, neglected the arts; in any event American legal doctrine has done so, and the paucity of material outside the copyright law on the rights of creators forms a vivid contrast to continental jurisprudence. Yet the solution of the problems of the moral right is of tremendous importance in the United States today. The United States is not a member of the Union for the Protection of Literary and Artistic Works, which is governed by the Bern Convention as revised at Rome in 1928 and to which most of the nations of the world belong. Agitation to revise our copyright law so as to make the United States eligible for membership is constant and powerful. [FN21] Separate bills have been introduced into the Senate and the House of Representatives authorizing the entry of the United States into the Copyright Union, [FN22] but none has become law. Opposition has been violent *558 and one of the main objections is the inclusion of Article 6 bis [FN23] which, to a limited extent, incorporates the moral right doctrine. Opposition to the concept has been voiced most consistently by the motion picture producers [FN24] and other large exploiters of creative works. Yet despite the importance of the doctrine of moral right, it is amazing how little study has been accorded to it in American literature.

A. The Right to Create and to Publish, or Not, in any Form Desired. The very basis of all creative work lies in the protection of the right to create, which is a function of the right of individual liberty. The question immediately presents itself whether, under any circumstances, the law should deny to anyone this right to exercise the creative talent. One of the leading continental authors on moral right answers the problem categorically in the negative. [FN25] Situations may arise, however, where the right to create must be curbed. Exercise of various sovereign powers by the State may result in refusal of the right to create; thus, incarceration in prison or enforced military or labor service results in a curtailment of this right. By and large, however, modern liberal social philosophy and jurisprudence support the view that one of man's basic rights is the freedom to create.

A corollary to this right to create is the right not to create, to refuse to create. Here, again, the obvious is not so clear, for examples exist of enforced creation of the highest order. During the construction of Westminster Abbey, artists and artisans were impressed by royal decree; it is reported that Fra Filippo Lippi was imprisoned by Cosimo de Medici until a desired tableau had been painted. [FN26]

The immediate legal question presenting itself in exploring the extent of this aspect of moral right is the treatment accorded by law to contracts obliging one party to create. Equity, under *559 common-law concepts, will not decree creation, [FN27] and it is undoubtedly true that an injunction forbidding creation could never be obtained. [FN28] French law has likewise protected violation of the right to create. In the famous case of Eden v. Whistler, the artist-defendant, Whistler, had been commissioned to do a portrait of Lady Eden, the plaintiff's wife. When completed, Whistler exhibited the portrait at the salon; before delivery, however, and because he was dissatisfied with the price, Whistler painted out the head and refused

to deliver the picture. The lower French court decreed that Whistler deliver the picture to Eden; [FN29] on appeal, however, the court refused so to order, but held him liable for damages. [FN30] Although equity would not oblige creation, there is no reason to believe that American courts, in cases of breach by the creator of a contract calling for creation on his part, would not likewise allow recovery of damages, unless, of course, the contract were so broad as to be against public policy.

Once having created his work, the right of the creator initially to issue it, or not, in any form desired, is clearly protected by the common law. [FN31] Before voluntary, unambiguous publication by the creator of his work, a so-called "common-law copyright" exists therein which enables the creator, in his sole judgment, to withhold his work from the world. [FN32] Creditors cannot execute against an unpublished manuscript and publish it, [FN33] nor may the purchaser of an unpublished work at a bankruptcy sale. [FN34] The creator remains the complete master of his work until publication *560 (the meaning of which term is outside the scope of this article) has taken place.

Incidental to the right of the author to refuse to publish, certain continental countries recognize the right of the creator to rescind any contract of publication, for such personal reasons as change of conviction, at any time before the actual publication has taken place. [FN35] Another attitude is illustrated by the French case of Anatole France C. Lemerre. [FN36] The celebrated author-plaintiff, in 1882, had written a history of France which had been sold to the defendant publisher for 3000 francs. The latter accepted the manuscript and then did nothing for twenty-five years, at the end of which it was decided to publish the work. Anatole France protested on the ground that so many eventful changes had occurred since the writing of his book that to publish it would greatly damage his literary reputation. He sought to rescind the contract, offering to return the 3000 francs. The court held for the plaintiff and decreed the return of the manuscript. In Morang & Co. v. Le Sueur, [FN37] the Canadian Supreme Court similarly permitted rescission of a contract and decreed the return of the manuscript when the publisher refused to publish on the ground that the ideas expressed did not coincide with the general temper of the series in which the manuscript was to be published.

These cases illustrate the right to rescind upon failure of the publisher to perform; the common law, however, does not go so far as to permit an author to rescind where the publisher is not at fault. In Gale v. Leckie, [FN38] the plaintiff publishers, and the defendant, author of a manuscript entitled An Historical Inquiry into the Balance of Power in Europe, agreed to publish the manuscript and divide all profits. The printing had gone to 336 pages when the defendant refused to permit completion on the ground that his imprisonment would result from the publication and he would be subjected to persecution by the Pope. No proof of these pleas was made. An action for damages in special assumpsit was brought and Lord Ellenborough charged the jury that the action was maintainable. *561 A verdict for £156,105. £50 more than the cost of the paper and printing was returned. It is to be observed that the defendant did not prove any change of convictions. Thus the court, by permitting an action in special assumpsit and by allowing damages over and above the cost of paper and printing, recognized the existence of the contract and refused to treat it as rescinded.

Apparently, therefore, under the common law the right to rescind is limited to cases of fault on the part of the publisher, though the principle is capable of expansion in the future. A creator should have the right to rescind in the case of honest changes of conviction or in case of unforeseen events making for injury to

him. Otherwise, he would be gravely misrepresented to the public and might suffer irreparable damage. This fundamental change in our basic concepts of contract law could, probably, only be effected by special legislative action; though, perhaps, the doctrine of impossibility of performance or of implied conditions might be extended by the courts to cover this situation. The creator should be required, of course, to make the publisher whole for any pecuniary outlay as a condition precedent to the rescission.

A corollary to the right to rescind the contract of publication is the right to withdraw the work. As developed in continental doctrine, [FN39] this gives to the creator the right to purchase, at wholesale price, all outstanding copies of his work still in the hands of a person to whom he has sold the copyright or given a license. This right may be exercised in the same instances as those which permit the exercise of the right to rescind: e.g., where the convictions of the creator have undergone a radical change or new discoveries have made the work obsolete. [FN40] Like the right to rescind, the exercise of this right is generally limited to literary works. No examples of the exercise of this right have been found at common law.

B. The Right to Paternity. The right to paternity is simply the right of the creator of a work to present himself before the public as such, to require others so to present him, and to prevent others from attributing works to him which he has not devised. Out-and-out plagiarism presents at once the most obvious violation of this interest and the most serious invasion of the author's pecuniary rights. Yet, despite adverse public opinion, no legal sanctions for the prevention of literary piracy existed throughout the whole of the Classical and Middle Ages; [FN41] and even today, American copyright law affords but limited protection. The copyright protection accrues only to its holder; it applies only to copyright material; it expires within a limited term of years. The moral right goes further and protects the creator at all times, not only from unauthorized denial, but from false imputation of paternity as well. [FN42]

The obligation to disclose the name of the creator of a work extends not only to his true name, but also to the nom de plume. The moral right protects the identity of the creator as he has chosen it. Thus, in *Ellis v. Hurst* [FN43] the plaintiff-author had published two uncopyrighted stories under a nom de plume. Subsequently, after the plaintiff had acquired a reputation in his own name, the defendant published the two stories under the plaintiff's actual name, without permission. The plaintiff's motion for a temporary injunction on these facts was granted by the New York court under the theory that defendants were committing a breach of plaintiff's right of privacy. [FN44]

During the same year, in the same jurisdiction, the right to paternity was again passed on by the courts. [FN45] The plaintiff in the case called at the office of the old World and offered a manuscript story for $200; the defendant agreed to accept it if the plaintiff shortened the story somewhat. The plaintiff did so; the defendant then refused to publish the manuscript with the plaintiff's name as author, despite the fact that the original manuscript contained his name. The plaintiff brought an action for the price. The defendant's motion to dismiss the complaint was granted in the lower court, but on appeal the order was reversed. Three opinions were written by the three judges of the court on appeal, one dissenting. They show the divergent views regarding the moral rights. Judge Gavegan treated the matter as an ordinary sale. Judge Seabury, with a deep insight into the nature of the problem, said:

literary production in the same way that we would consider the sale of a barrel of pork. Contracts are to be so construed as to give effect to the intention of the parties. The man who sells a barrel of pork to another may pocket the purchase price and retain no further interest in what becomes of the pork. While an author may write to earn his living and may sell his literary productions, yet the purchaser, in the absence of a contract which permits him so to do, cannot make as free a use of them as he could of the pork which he purchased.... If the intent of the parties was that the defendant should purchase the rights to the literary property and publish it, the author is entitled not only to be paid for his work, but to have it published in the manner in which he wrote it. The purchaser cannot garble it or put it out under another name than the author's; nor can he omit altogether the name of the author, unless his contract with the latter permits him so to do.

The position of an author is somewhat akin to that of an actor. The fact that he is permitted to have his work published under his name, or to perform before the public, necessarily affects his reputation and standing and thus impairs or increases his future earning capacity.

As has been already stated, the right to paternity includes the right to prevent false attribution of paternity. In the early English case of Lord Byron v. Johnston, [FN46] the defendant advertised for sale certain poems falsely claimed to have been written by the plaintiff. The Court granted a temporary injunction. More recent cases have granted similar relief, relying on the doctrine of unfair competition [FN47] or the law of libel to sustain their decisions. [FN48] *564 Finally, some courts have based their decisions squarely on the special circumstances of the creator's position. [FN49] While disagreeing as to the principle upon which they grant relief, the courts seem to recognize, in one form or another, the right to paternity. The confusion of the principles and theories indicates an appreciation of the need, but a failure thoroughly to analyze and understand the fundamental problems facing the creator in our society.

The question of waiver of the right to paternity is one of the most difficult in the entire realm of moral right. [FN50] Moral rights are personal rights; they are not based on any theory of property, for whatever property [FN51] the creator may possess exists in the rights protected by the copyright statute. Moral rights are akin to those rights in tort which protect the individual against injury. They may not, therefore, be assigned; in general, however, they may be effectually waived before or after violation just as a blood donor, or boxer, waives his right against bodily injury. Waiver may, moreover, be implied from the nature of the work or the type of publication for which it is written. [FN52]

It has been suggested that determination of the validity of the waiver must depend on the public interest. Where the waiver has as its sole object the deception of the public [FN53] as in ghost-writing contracts or academic theses written for others [FN54] the waiver will be void and the true creator will be able to assert his rights of paternity. On the other hand, where the object of the waiver is not [FN55] deception of the public, as in the case of articles written for compilations where the views of the entire compilation and not those of the individual author are important, the waiver will be deemed valid. [FN56] The same is true of newspapers, reports of committees, and the like, where the public is aware that the whole is a compilation by anonymous authors.

C. The Right to Modify and to Prevent Deformation. This aspect of the moral right [FN57] often deemed to
constitute the whole doctrine [FN54] is at once the oldest and best known. It is certainly the most
dramatic aspect and the one, because of its survival in the creator even after assignment of the copyright,
most sharply differentiated from the exploitive right. Beyond dispute it is this aspect of moral right which
has aroused the most bitter antagonism. [FN55]

The right of the creator to modify his work is recognized in continental jurisprudence, [FN56] but has
never appeared in the common law. It may be defined as the right to make any additions, suppressions and
other modifications which the author may deem necessary in order to make the work conform to the state
of his intellectual convictions. The right is exercised only in relation to literary works either immediately
before publication or at the time of publication of a new edition. An example posed by the French jurist, M.
Pouillet, is the hypothetical case of Renan suddenly becoming convinced of the divinity of Christ pending
the publication of his famous work. Of course, the pecuniary rights of the publisher would have to be
protected and he would be entitled to reimbursement for any additional expenses incurred by him because
of the exercise of the right.

The right to prevent deformation has been recognized by English and American courts [FN57] and
theorists. It covers the body of *566 the work, its title, [FN58] and probably such incidentals as index,
preface, etc. [FN59] The theories advanced have been manifold. In 1890, an essay appeared in the Irish
Law Times [FN60] acknowledging that the point was novel and stating that an author whose work was
deformed could be protected under the copyright statute. It was pointed out that authors write for glory and
fame as well as for pecuniary advantage and developed the theory that an assignment of the copyright
permits copies of the work to be made, but this should be strictly limited to *accurate* copies; failure,
therefore, to print accurate copies, or, in other words, deformation of the work, would be an infringement of
the copyright.

This rationale is hardly satisfying: it would give rights accruing only to the owner of the copyright who
may or may not be the creator; it would protect only copyrighted works and would expire with the
copyright. The moral right protects the creator's personality. This was never the intent of the copyright
statute.

Libel law has also provided a common-law ground for the prevention of deformation. The adoption of
this theory is a recognition of the personal nature of the right and the need of protection for the honor and
that he had been employed by the defendant to go to Cincinnati, Ohio, to write up the existing flood
conditions in scripts to be used during the broadcasts by the commentator, Floyd Gibbons; the plaintiff
alleged that he had an established reputation for accuracy; on January 1, 1937, Gibbons delivered the
broadcast, representing that the plaintiff had created the script, but the account given was *567* false;
interpolations had been made in the script and the whole work deformed; as a result, the plaintiff sought
damages in the amount of $250,000 for injury to his reputation. A motion to dismiss the complaint was
denied. Theories of libel were relied on by the court.

Various other cases have suggested the use of a libel theory as a possible basis for the right to prevent
deformation. [FN62] Reliance on libel, however, presents difficulty. It is generally held that no injunction
will lie at common law, to restrain a personal libel. [FN63] Thus, a creator is immediately denied his best, oftentimes his sole, remedy. Moreover, certain technical rules, such as the required statement of the exact libellous words used and the occasional need of showing special damages, make the libel theory extremely clumsy. The conception of libel would have to be strained beyond the breaking point in order to protect creators of non-literary works, and to prevent deformation of works after the death of the creator. [FN64]

Another suggested theory upon which protection of this right may be based is that of unfair competition. In Prouty v. National Broadcasting Co., [FN65] the plaintiff brought suit in the federal court alleging that she was the author of the novel Stella Dallas; the defendant, without plaintiff's consent, had broadcast scenes purporting to be events in the life of Stella Dallas, the heroine of the plaintiff's book; the broadcasts were alleged to be an artistic degradation of the plaintiff's work and an injury to her reputation. A motion to dismiss the complaint was denied, the court resting its decision upon the principles of unfair competition.

The doctrine of unfair competition, however, is designed to protect economic rights. The very name suggests exploitation and values accruing therefrom. That the doctrine is capable of infinite expansion cannot be doubted, [FN66] but it seems incongruous to expand it to the protection of purely personal rights. The theory of unfair competition depends upon the fortuitous fact that to present a deformed work to the public may economically injure the creator by depriving him of his market; it does not satisfy the basic needs of the creator or of society, though it may, like theories based on copyright or libel, be a concurrent remedy in special situations.

In most of the other instances where the right to prevent deformation has been protected, no general theory has been advanced and the court, in granting relief, has recognized the peculiar needs of artistic creation. At least one court, however, in Pennsylvania, has seen fit to deny altogether the existence of the right. In Meliodon v. Phila. School District, [FN67] the plaintiff averred that he was a sculptor employed by the defendant to prepare certain models to be placed upon the Board of Education Building. He performed the work, delivered the models and was paid in full. The defendant then proceeded to change the models; and since the sculptural works were generally attributed to the plaintiff, he had been subjected to the ridicule and contempt of all artists and connoisseurs. The plaintiff further averred that as a result he had found it difficult to get other sculptural contracts and had been refused the right to enter a bid for the Custom House Building at Philadelphia. He sought $500,000 damages and a decree requiring the defendant to tear down the work and enjoining it from stating that the plaintiff had designed the models. The court held that on objections the bill would be dismissed, stating that the damage to reputation constitutes, if anything, a legal cause of action. The defendant was a government agency and would not be liable in tort. Nor could a decree be granted to destroy the work. The Court adopted the opinion of the lower court, which manifested a complete failure to recognize the fundamental implications of the problem:

*A careful reading of the averments in the bill reveals that the principal damage alleged is to the reputation of the plaintiff, for which he claims the sum of $500,000. This is in the nature of a tort wherein the plaintiff has an adequate remedy at law, and the school district is not liable for the tort of its agents, and the prayer for relief and the award of $500,000 damages is not the subject of equitable relief.

The plaintiff further prays that the defendant be directed to tear down the sculptural units or groups in question and that the Court decree that the plaintiff be permitted, at the sole expense of the defendant, to replace all said units or groups to his own satisfaction. Apparently the granting of such power would place the disposition of the entire case in the hands of the plaintiff to determine which groups were satisfactory .... We are of opinion that the plaintiff has not set forth any right justifying the issuance of an injunction and the relief prayed for.

The right to prevent deformation does not include the right to prevent destruction of a created work. The doctrine of moral right finds one social basis in the need of the creator for protection of his honor and reputation. To deform his work is to present him to the public as the creator of a work not his own, and thus make him subject to criticism for work he has not done; the destruction of his work does not have this result. Thus even in France, in *Lacasse et Welcome C. Abbé Quénard*, [FN68] it was held that the artist could not recover when murals painted by him on the walls of a church were destroyed, without notice, by the abbé.

For the same reasons, it is apparent that where a creator's name is not to appear, and the work is not so unique as to be immediately identified with the creator regardless of its anonymity, the right to alter, and a fortiori the right to destroy, is boundless. [FN69] The same would be true where a work, instead of being destroyed, is so deformed as no longer to be recognizable as that of the original creator. [FN70] Thus, in *Archbold v. Sweet*, [FN71] an English case, the plaintiff had written a work on criminal procedure which had gone through two editions. The plaintiff then sold the copyright to the defendant who proceeded to publish a third edition containing many deformities, with plaintiff's name placed ambiguously on the cover. In an action on the case, the court left it to the jury to decide whether the work would be reasonably believed to be by *570* the plaintiff, and, if so, to find for him. There was a verdict for the plaintiff.

Like most of the other aspects of the moral right, the right to prevent deformation is not absolute. Exceptions are recognized in the interest of public requirements. Thus the creator may always, as a corollary of his right to create, ratify and accept, as his own, modifications made by others of his work. While the creator is alive, the interest of society in preserving the integrity of the work is at a minimum, for who can judge better than the creator what constitutes the true and ultimate form of the work?

An authorization in advance allowing another to alter a created work presents different problems. On the one hand, a strict construction of the creator's moral right might leave him free always to withdraw his consent and insist that the work be presented only in its original form. On the other hand, the principle of freedom to contract must be recognized; highly complex and important investments have been made in industries which utilize and alter created works. Their interests must receive some protection. It is generally recognized, therefore, that authority to alter works may be granted and will bind the creator and his successors. The authority should be, in general, strictly construed in favor of the creator and non-transferable unless a contrary intent plainly appears.

Consent to alteration of a work may be express or implied. From the object of the contract it would seem that, unless expressly negatived, implications of authority to alter should be made in contracts having to do with compilations, newspaper and periodical articles, textbooks, plays, cinematic works, musical

works and architectural works. [FN72] There are also certain other implied authorizations to modify as demanded by conditions of cooperation in a contract; thus the publisher of a work should have the implied right to make orthographic corrections, corrections of dates, and so forth.

Compilations are presented to the public as such and imply that they express a composite viewpoint, rather than the different viewpoints of the collaborators. Therefore, the editor has the implied right to make such alterations in the text as are necessary to maintain the composite viewpoint.

*571 For the same reason, and because they are usually hastily prepared in the expectation of correction, articles written for periodicals and newspapers may, by implied authority, be altered. [FN73] Of course, the numerous anonymous articles appearing in such publications may be modified. [FN74]

Textbooks to be used in the schools for the instruction of students should also be subject to alteration; changing pedagogical needs and new discoveries in their respective fields make the implied authority to modify a probable term of the contract.

Likewise, plays and works to be used on the screen should be subject to implied authority to modify. The former usually must be modified in accordance with technical needs; the play is rare where the playwright has not soared beyond the limits of the stage on the wings of his imagination. Works to be used on the screen are usually originally destined for a different public by means of a different medium; in granting the screen-rights, therefore, rather liberal powers of modification should be implied.

In the case of music, generally speaking, modification of the original for a single performance should be impliedly permitted; the transient quality of a single performance minimizes the injury, if any, to the composer. This, of course, does not apply to those performances which are permanently recorded. Modifications in the work made necessary by the technical requirements of broadcasting should also be impliedly permitted when the right to broadcast is granted.

As has been already stated, authority to modify, whether express or implied, is never unlimited. In no case should the modifications go so far as to attribute to the creator ideas which he does not believe and did not originally express; nor should the intrinsic esthetic quality of the work be subject to alteration; even though the power to modify be given, a tragedy cannot be changed to a comedy, a philosophic essay to a farce. [FN75] This limitation on the scope of permissible alteration has received careful attention by one court:

*572 And now as to what is acquired when one procures the right to elaborate upon an original story. Upon this much need not be said. I take it that, while scenery, action and characters may be added to an original story, and even supplant subordinate portions thereof, there is an obligation upon the elaborator to retain and give appropriate expression to the theme, thought and main action of that which was originally written. The unqualified grant of this right is, I should say, fraught with danger to a writer of standing, particularly when he inserts no provision for his approval of such elaboration as may be made.

Nevertheless, elaboration of a story means something other than that the same should be discarded, and its title and authorship applied to a wholly dissimilar tale.\footnote{76}

D. The Prohibition against Excessive Criticism. Foreign jurisprudence clearly recognizes the tremendous power of the press and the devastating effects that criticism may have over creators and their works. Special legislation \footnote{77} protects the creator against abusive and malicious criticism of his works. In France the right to have his reply published is recognized. \footnote{78}

Under the common law the right to criticize is protected \footnote{79} and great liberality is shown the critic. \footnote{80} No legal right of reply is recognized. The only protection accorded the creator is under the law of libel which does not condemn the libel of a product as much as it does a libel of the person; \footnote{81} criticism of a created work, if libellous at all, is regarded as libel of a product, \footnote{82} and the plaintiff must prove falsity, malice and damages. This is too harsh a rule. The creative work of an artist or writer is not a mere manufactured product; it is a projection of the personality of the creator who should be protected against abusive and malicious criticism, \footnote{83} even if the latter is merely, under strict analysis, the expression of an opinion and, therefore, not libellous. The French doctrine allowing the creator the right to reply seems to be a happy one.

E. The Prohibition against any Other Attacks on the Personality of the Creator. There is, finally, a whole category of unpredictable injuries to the honor and reputation of the creator against which he is protected by his moral right. \footnote{83} These injuries may be committed either by persons in privity of contract with the creator or by third persons. Thus a publisher should advertise a work in keeping with its quality. It has been suggested that the price must be fixed by the publisher with the creator's consent and not raised or lowered to an inordinate degree; the work must not be sold at auction. The publisher must not delay publication, nor use a format unworthy of the work. These are some of the rules laid down in continental jurisprudence.

The common law has not generally passed on these questions. In \textit{De Bekker v. Stokes Co.}, \footnote{84} the New York court prohibited a change, by the defendant-publisher, of the title and format of plaintiff's work. In \textit{Planchè v. Colburn}, \footnote{85} an English case, the defendant-publishers engaged the plaintiff to write a work on armor for \textsection{The Juvenile Library}.\footnote{86} The plaintiff was to receive £100. In the course of the writing, the defendants decided not to publish the series. In an action for breach of contract, the defendants argued that the plaintiff had never tendered the manuscript; had he done so, the defendants argued, they could have used it in some other manner. The court held that the plaintiff was excused for not tendering since any other use of his work than in the \textsection{Juvenile Library} may have tended to injure his reputation. The plaintiff recovered a verdict for £50 which was affirmed. The court said:

\textsection{The considerations by which an author is generally actuated in undertaking to write a work are pecuniary profit and literary reputation. Now, it is clear that the latter may be sacrificed, if an author, who has engaged to write a volume of a popular nature, to be published in a work intended for a juvenile class of readers, should be subject to have his writings published as a separate and distinct work, and therefore liable to be judged of by more severe rules than would be applied to a familiar work intended merely for children.\footnote{87}
REMEDIES AND DURATION

Two problems, among the infinite number which may occur, require a brief discussion at this point — the questions of remedy for violation of the moral right and of its descent on death.

The cases already examined show that equity will grant relief in cases involving breach of the moral right. In very few cases will the legal remedy be adequate. The injury suffered by the creator will not be measurable in dollars and cents, although it may well be irreparable. The violation of the moral right is very often continuous and the remedy at law of no value whatsoever. In many instances, as, for example, in the case of a proposed publication, the violation is merely threatened and the expeditious intervention of equity would avert serious damage.

The remedy in equity would probably take the form of an injunction against the damaging activity, although it should not, by any means, be so limited. The circumstances of the suit may well demand the issuance of a mandatory decree requiring the removal of a deformation, \[\text{FN86}\] or the destruction of the work. \[\text{FN87}\] Once the violation of the moral right has been established, the remedy should be largely a matter for the discretion of the court. Of course, the creator should have the right, in law or equity, to recover monetary damages for injuries suffered.

The moral right is, in general, perpetual in duration, although certain of its incidents, such as the right to create or to modify, must die with the creator. It is of great importance, therefore, to ascertain in whom the right vests after the creator's death. There is no relation whatsoever between the surviving incidents of the moral right and the copyright in a work. The latter, a pecuniary right, is limited by statute, and if not already sold passes like any other chattel on the death of the creator. The basis of the moral right, however, is not pecuniary but is of a dual nature, protecting both the creator and the integrity of the culture. During the lifetime of the artist, the first basis is emphasized; in some countries this emphasis continues after death and results in the vesting of the moral right in the spouse and next of kin of the deceased creator on the ground that they are the natural guardians of his honor and reputation. \[\text{FN88}\] On the other hand, it seems sounder to reason that, the creator being dead, he cannot be damaged by any injury to his honor or reputation. His family and descendants, however, can be and should, therefore, have some remedy. The real reason, however, for protection of the moral right after the creator's death lies in the need of society for protection of the integrity of its cultural heritage. With this in mind, some countries have seen fit to give the matter the special legislative treatment it deserves, and have entrusted the moral right, after the death of the creator, to perpetual bodies charged with the protection of the creative works of the nation. \[\text{FN89}\]

THE PLACE OF THE DOCTRINE OF MORAL RIGHT IN OUR JURISPRUDENCE

Insofar as judicial recognition has been accorded the moral right, the expressed grounds on which common-law protection has been based have been those of libel, unfair competition, copyright and the right of privacy, with some groping towards an inarticulate, \textit{sui generis} tort theory. The application of so many
different doctrines to a subject matter which is intrinsically homogeneous produces confusion; choice of theory becomes dependent on a fortuitous combination of factors, rather than on the basic needs of the problem. [FN90] Theories of libel, with their concomitant necessity of setting forth the specific words, of proving pecuniary damage, of showing malice in cases of excessive criticism, together with the probable denial of injunctive relief, are not satisfactory; the concept of unfair competition, though forever expanding, loses its basic meaning when applied to the protection of personal, non-pecuniary rights. Copyright in America, as limited by statute, was designed to protect only the exploitive value of creation; its protection is not granted to the creator as such, but to the owner, the person having the power to exploit the creation. The right of privacy is extremely limited and, in some jurisdictions, exists only by virtue of a statute strictly construed and never designed to protect the moral right. The only satisfactory basis for the moral right is a tort theory of a personal sui generis nature.

Objection has been made [FN91] that many of the aspects of moral right have only a contractual basis which is recognized by finding terms already implicit in the contract. [FN92] Undoubtedly, many of the cases could be and have been decided upon this ground; certainly the contractual remedy often affords a concurrent form of action. But the judicial reading of terms into a contract is often no more than a judicial finding that a certain duty exists on the part of one person to society in general, or at least to the class represented by his co-contractant. [FN93] This, in effect, is the basis of a tort duty. Where a contract exists, the court is able to cast the duty in the form of an implied contractual mold; but where no contract exists between the parties, then the court is obliged to promulgate a tort duty. Thus in Drummond v. Altemus, [FN94] the federal court granted an injunction protecting the creator's right of paternity and right to prevent deformation against violation by a third party, not in privity of contract with the plaintiff. The court stated that the fact that such a right exists is too well settled upon reason and authority to require demonstration, and gave none. [FN95]

*577 Reference has been made herein to the social implications of the doctrine of moral right. A fuller exposition is necessary. [FN96] It has already been pointed out that the right to create is essentially an incident of individual liberty. So the whole doctrine of moral right, with its attendant emphasis upon personal protection is a function of the particular prevailing social ideologies. The growth of authoritarian concepts, with emphasis on the State, should militate against the doctrine. Thus, as the control of government over the individual reaches unprecedented heights, the freedom to create is necessarily curbed. Concentration camps, enforced labor and military service, emigration under duress, these are not conducive to creation. Likewise, the right to prevent deformation probably must be subordinated to the propaganda needs of the State; so it is with the other aspects of moral right.

Economic regimes must also influence the place of the doctrine to a marked degree. Those vitally interested in the doctrine of moral right fall generally into four groups; [FN97] the creators, the general public, the entrepreneurs who exploit the created works and the performers. The doctrine of moral right favors the creator and the public against the entrepreneur and the performer. The public has a definite interest in the doctrine for it protects the integrity of its culture and, protecting the creator, it stimulates creation. The creator, of course, has an obvious interest which is more than economic.

The interests of the entrepreneurs, the publishers, the motion picture producers, the broadcasters, the record manufacturers, etc., are distinctly adverse to the existence of the moral right doctrine. [FN98] Their

interest lies in deriving economic advantage from the created work. This interest is recognized and protected by the copyright law. Insofar, however, as exploitation means violation of the moral right, the creator should be protected.

Performing artists have been granted a large measure of protection under recently developed doctrine, and insofar as the performing artist is deemed a creator, some measure of protection to his moral right should be accorded. But in no way should a violation by a performer of the moral right of creators, whose works form the backbone of the performer's art, be permitted.

CONCLUSION

The doctrine of moral right is recognized by the common law to a limited extent. Its theoretical basis, however, has not been delineated, but support from the doctrines of libel, unfair competition, copyright and right of privacy has been sought. These doctrines, however, are not fully satisfactory and lead to confusion as to the basic elements of the doctrine. Actually, it is a tort doctrine granting unique protection to the honor and reputation of the personality of creators as such and as expressed in their works, and protecting the cultural heritage of civilization. It presents itself in several different aspects, and may be defined as the right of the creator to create, to present his creation to the public in any desired form or to withhold it, and to demand from everyone respect for his personality as creator and for his works. 


[FN4] For this purpose, reference will be made to Le Droit Moral de l'Auteur by Georges Michaélidès-Nouaros, Paris, 1935, which is the latest and best exposition of these problems. Hereinafter, reference thereto will be solely by the name of the author, followed by the page.


[FN6] The term is used in LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY (1938), and in the various discussions on the Revision of the Copyright Laws before the Comm. on Patents in 1936, etc.

[FN7]. See MICHÁELIDES-NOUAROS 17.


[FN9]. Cour de Paris, April 6, 1850, D. P. 1852.2.159. See also Marie C. Lacoraire, Cour de Lyon, July 17, 1845, D. P. 1845.2.128.

[FN10]. Pourchet C. Rosa Bonheur, Cour de Paris, July 4, 1865, D. P. 1865.2.201.


[FN14]. Pourchet C. Rosa Bonheur, Cour de Paris, July 4, 1865, D. P. 1865.2.201. See MICHÁELIDES-NOUAROS 183-203.


[FN16]. Agnes dit Sorel C. Fayard frères, Trib. Seine, Dec. 16, 1899, D. P. 1900.2.152. See MICHÁELIDES-NOUAROS 212-76.


[FN20]. For a suggestion contra, see An Author's Rights (1890) 24 IRISH L. T. 225.
[FN21]. See letter from Secretary of State Cordell Hull to the President, dated February 16, 1934; see message of President Roosevelt to the Senate, February 19, 1934.


[FN23]. Set forth supra p. 556.


[FN26]. See MacNeil, *Some Pictures Come to Court* in HARVARD LEGAL ESSAYS (1934) 247.


[FN28]. Cases granting negative injunctions against performance notwithstanding.


[FN30]. Cour de Paris, Dec. 2, 1897; Cour de Cassation, March 14, 1900. See also Pourchet C. Rosa Bonheur, Cour de Paris, July 4, 1865, D. P. 1865.2.201.

[FN31]. Occasionally, after being issued, a publication may be enjoined as libellous. See Pound, *Equitable Relief against Defamation and Injuries to Personality* (1916) 29 HARV. L. REV. 640, 641-46, 655, 665 et seq. And injunctions against the continued publication of certain types of work notably those of a treasonable or obscene nature have been granted.


[FN37]. 45 Can. Sup. Ct. 95 (1911); see also Planche v. Colburn, 8 Bing. 14 (1831).

[FN38]. 2 Starkie 107 (1817).


[FN40]. Where the publisher or other transferee of the work has infringed a moral right of the creator, the right to withdraw and destroy may be granted as a remedy at the suit of the creator. See Camoin C. Carco, Trib. Seine, Nov. 15, 1927, D. P. 1928.2.89, and note. But cf. Melidon v. Phila. School District, 328 Pa. 457, 195 Atl. 905 (1938).

[FN41]. Rogers, Some Historical Matter concerning Literary Property (1908) 7 MICH. L. REV. 101.

[FN42]. On this aspect of the American doctrine, see Swarts, La Giurisprudenza Americana in Materia de Diritto Morale di Autore (1931) IL DIRITTO DI AUTORE 207, and in German, [1931] ARCHIV FR URHEBER-FILM-THEATERRECHT 515.


[FN44]. N. Y. CIVIL RIGHTS LAW §§ 50, 51. This doctrine itself was a recent development, unrecognized until the famous article by Warren and Brandeis, The Right of Privacy (1890) 4 HARV. L. REV. 193.


[FN46]. 2 Mer. 29 (1816).


[FN50]. See MICHAélIDèS-NOUAROS 98 et seq.

[FN51]. Whether copyright is a property right remains a bone of contention among theorists. See, e.g., LADAS, INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY (1938) 1 et seq.; Finkelstein, Book Review (1939) 48 YALE L. J. 712.


[FN53]. See supra note 52.

[FN54]. See Executive Report No. 1, 75th Cong., 2d Sess. (1938) 4 (from the Committee on Foreign Relations on the International Copyright Union).

[FN55]. See Hearings on Executive E, supra note 24, at 19 et seq., 29 et seq.

[FN56]. MICHAélIDèS-NOUAROS 268 et seq.


53, 114 N. E. 1064 (1915).


[FN60]. An Author's Right (1890) 24 IRISH L. T. 225.

[FN61]. N. Y. L. J., Dec. 22, 1937, p. 2309. A similar complaint by the same plaintiff reached the Appellate Division and was dismissed. Locke v. Gibbons, 164 Misc. 877, 299 N. Y. Supp. 188, aff'd, 233 App. Div. 887, 2 N. Y. S. (2d) 1015 (1st Dep't 1938), because of the inherent difficulties in a libel theory for protection of moral right. The court said that the broadcast must be considered slander, not libel, and so the exact words must be set forth and special damages shown.


[FN64]. Several European countries have given the moral right to perpetual institutions or the State on the ground that the culture must be protected. See MICHAELIDES-NOUAROS 327 et seq.; see also Hoffman, European Legislation and Judicial Decision in the Field of Copyright in 1930 (1931) 8 N. Y. U. L. Q. REV. 369.


[FN70]. MICHAELIDES-NOUAROS 230 et seq.

[FN71]. 1 M. & Rob. 162 (Ch. 1832).

List suggested by MICHAÉLIDÈS-NOUAROS at 293.


MICHAÉLIDÈS-NOUAROS 286 et seq.

Law of July 29, 1881, as amended by law of Sept. 29, 1919, Art. 13, D. P. 1921.4.7.


Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 64 N. E. 163 (1902); SEELMAN, THE LAW OF LIBEL AND SLANDER IN THE STATE OF NEW YORK (1933) 95.


MICHAÉLIDÈS-NOUAROS 293 et seq.


8 Bing. 14 (1831).

Thus the German court, in the case cited supra note 2, required that the offending drapes be © 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

[FN87] In Camoin C. Carco, Trib. Seine, Nov. 15, 1927, D. P. 1928.2.89, the French court ordered the destruction of a picture which had been published against the will of the creator.

[FN88] In Duke of Queensberry v. Shebbeare, 2 Eden 329 (Ch. 1758), the English court allowed the representative of the deceased creator to enforce the moral right, but inferred that the next of kin could have waived all rights thereunder.


[FN90] The validity of any concept which binds the multiple aspects of the moral right together has not remained unquestioned. MICHAélIDèS-NOUAROS 70. But, despite some argument that each aspect has its separate jurisprudential basis, it seems evident that the basis of the moral right is unique to the need for protection of the creator's personality.


[FN95] In Pott v. Altemus, 60 Fed. 339 (C. C. E. D. Pa. 1894), the same court, on the same facts in a case wherein the plaintiff was the assignee of the work, refused relief on the ground that it had already granted relief on the creator's application.

[FN96] MICHAélIDèS-NOUAROS 78 et seq. gives this topic excellent treatment.

[FN97] Id. at 79.

[FN98] See statements on behalf of motion picture producers in the Hearings before the Committee on Patents, 74th Cong., 2d Sess. (1936) 1012 et seq. And see supra note 55.


[FN100]. The definition of Michaëlidès-Nouaros, at p. 68, is as follows: 

Le droit moral est le droit pour l'auteur de créer, de présenter ou non sa création au public sous une forme de son choix, de disposer de cette forme souverainement et d'exiger de tout le monde le respect de sa personnalité en tant qu'elle est liée à sa qualité d'auteur. 

53 Harv. L. Rev. 554

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