

THE ROLE OF HUMAN RIGHT LAWS AND AUTHORSHIP NORMS IN PROTECTING TEXTUAL INTEGRITY¹

This is a draft chapter from Roberta Rosenthal Kwall, *THE SOUL OF CREATIVITY: SHOULD AMERICAN INTELLECTUAL PROPERTY LAW PROTECT THE INTEGRITY OF A CREATOR’S WORK* (forthcoming, Stanford University Press). Please do not distribute or quote without the permission of the author.

As Lawrence Helfer notes, “[h]uman rights and intellectual property, two bodies of law that were once strangers, are now becoming increasingly intimate bedfellows.”² Given this intimacy, can we justify enhanced protection for moral rights on the ground that they are human rights?

The universal concept of human rights includes civil and political rights (such as the freedom of expression) and economic, social, and cultural rights. Many prominent authorities have cited a variety of international declarations, covenants, and other binding agreements in support of a human rights framework for intellectual property. The core of this framework includes an “International Bill of Rights,” which consists of three key instruments: the Universal Declaration of Human Rights³; the International Convention on Economic, Social and Cultural Rights⁴; and the International Covenant on Civil and Political Rights.⁵

The Universal Declaration of Human Rights (UDRH), which was enacted in 1948, is a declaration rather than a covenant and therefore does not represent binding international law. However, the UDHR has the force of “customary” international law

¹ Roberta Rosenthal Kwall, *Raymond P. Niro Professor of Intellectual Property Law & Founding Director, DePaul University College of Law Center for Intellectual Property Law and Information Technology*.

² Lawrence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47 (2003) [hereinafter Helfer, *Conflict or Coexistence*].

³ The Universal Declaration of Human Rights of 1948, *available at* <http://www.udhr.org/UDHR/default.htm> (hereinafter *UDHR*).

⁴ United Nations, International Covenant on Economic, Social and Cultural Rights of 1966, *available at* http://www.unhchr.ch/html/menu3/b/a_ccscr.htm [hereinafter *ICESCR*]. As a covenant, the ICESCR is binding international law. The United States signed the Covenant in 1979 but it has never been ratified and therefore is not binding on the United States.

⁵ United Nations, International Covenant on Civil and Political Rights of 1966, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (hereinafter *ICCPR*). The United States ratified ICCPR in 1992. This covenant addresses freedom of expression and the right to “receive and impart information and ideas of all kinds...either orally, in writing or in print, in the form of art, or through any other media of ...choice.” Article 19, Paragraph 2. The “International Bill of Rights” also includes two Optional Protocols, neither of which was signed by the United States.

and is considered an authentic interpretation of the United Nations Charter.⁶ The key UDHR provision dealing with human rights in relation to moral rights is Article 27, Paragraph 2 which provides that “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”⁷

Article 27(2) was extremely controversial because there was no international consensus on how interests in intellectual creations should be protected. The protection of authors’ moral interests was added by a French delegate who was prompted by the lack of protection for this interest in the Anglo-American copyright regimes.⁸ Despite the objection by American and British delegates to the “moral and material interests” inclusion on the ground that this type of right should more properly be considered within the domain of copyrights,⁹ the provision ultimately was included after considerable discussion. Still, there was disagreement with respect to whether the protection of interests in intellectual property should be seen as a basic human right.¹⁰ Even with respect to those who voted favorably for the provision, there were mixed and varied motives. Specifically, not all of the delegates who cast a favorable vote necessarily agreed with the French delegate’s concern for moral rights.¹¹ Nonetheless, according to Paul Torremans, the UDHC embodies “the single most authoritative source of human rights norms,” and has served as the basis for validating authors’ moral rights in several cases.¹²

The second instrument that provided additional authoritative support for a human rights framework in intellectual property was the International Convention on Economic, Social and Cultural Rights of 1966 (ICESCR).¹³ As a covenant, ICESCR represents

⁶ David Shiman, *Economic and Social Justice: A Human Rights Perspective*, available at <http://www1.umn.edu/humanrts/edumat/hreduseries/tb1b/Section1/tb1-3.htm> (last visited February 21, 2007).

⁷ The balancing provision, Article 27, Paragraph 1, provides that “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” Unlike Article 27(2), Article 27(1) was uncontroversial because the public’s right to enjoy the progress of others was well established. Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1053. Thus, the key tension in a human rights framework is the protection of an author’s moral and material interests versus the right of the public to enjoy and share in the benefits of works. Finally, Article 19 of the UDHR protected the right to freedom of opinion and expression. The right to the protection of interests in intellectual creations was discussed in four of the seven formal sessions in which the UDHR was drafted. *Id.* at 1051.

⁸ Yu, *supra* note 7, at 1052.

⁹ The U.S. delegate was Eleanor Roosevelt. *Id.* at 1055.

¹⁰ *Id.* at 1070.

¹¹ Yu notes the following distinct rationales at play during the voting process in addition to concern for authors’ rights: a populist view that 27(2) also safeguards the interests of everyone; the idea that these rights were already included in the American Declaration on the Rights and Duties of Man which was adopted by more than twenty-one Latin American countries and the United States; a concern for the internationalization of copyright law, and an instrumentalist view that recognition of this right ultimately would support other important goals such as intellectual freedom. *Id.* at 1056-58.

¹² PAUL L.C. TORREMANS, *Copyright As A Human Right*, in COPYRIGHT & HUMAN RIGHTS at 7 (Kluwer, 2004) (discussing French cases involving Charlie Chaplin and John Huston).

¹³ ICESCR, *supra* note 4. ICESCR entered into force on January 3, 1976.

binding international law for over 150 member nations.¹⁴ Although the United States signed the Covenant in 1979, ICESCR has not been ratified in this country.¹⁵ Therefore, ICESCR is not binding here, unlike the Berne Convention or TRIPS. Article 15 of the ICESCR essentially borrowed language from Article 27 of the UDHR and transformed it into binding international law.¹⁶ ICESCR Article 15(1)(c) recognizes the right of everyone “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”¹⁷ This language is similar to that of Article 27(2) of the UDHR in that a work does not need to be copyrightable in order to be protected.

The material interests referred to in the ICESCR were based on the right to just remuneration for intellectual labor, while the moral interests were based on the French *droit moral*. The legislative history of the ICESCR also illustrates an ongoing debate over intellectual property’s worthiness as a human right.¹⁸ The United States delegation, led by Eleanor Roosevelt, was uncomfortable with a binding covenant.¹⁹ However, the United States and other constituencies were persuaded to sign ICESCR after passage of the Universal Copyright Convention.²⁰ Finally, the third instrument, the International Covenant on Civil and Political Rights (ICCPR) was passed in 1966, and became effective on March 23, 1976.²¹ The United States fully ratified ICCPR in 1992. Although ICCPR does not deal specifically with intellectual property rights, it does provide protection for the freedom of expression.²²

As a general matter, the drafting history of the UDHR and ICESCR reveals that the Western delegates were primarily concerned with political and civil rights, as

¹⁴ Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (**June 18, 2006**), online: www.ohchr.org/english/bodies/docs/RatificationStatus.pdf (last visited: xxxx).

¹⁵ “According to the law of treaties, a government that has signed but not ratified a treaty (like the Covenant) must ‘refrain from acts which would defeat the object and purpose of [the] treaty . . . until it shall have made its intention clear not to become a party . . .’ Unfortunately, courts in the USA are not likely to attach much importance to this rule if an action were brought before that claims the USA is defeating the object and purpose of the Covenant.” Shiman, *supra* note 6.

¹⁶ Although the ICESCR language is identical to the UDHR, Article 15 was not agreed upon until the United States signed the Universal Copyright Convention. The Latin American countries agreed to sign ICESCR because the language was based on its American Declaration. Yu, *supra* note 7, at 1058.

¹⁷ The balancing provisions, Article 15(1)(a) and 15(1)(b), recognize the right of everyone “[t]o take part in cultural life” and “[t]o enjoy the benefits of scientific progress and its applications.”

¹⁸ At the time, few observers considered the rights of authors and inventors to be human rights, yet “these rights were recognized at the birth of the international human rights movement.” See Laurence R. Helfer, *Collective Management of Copyright and Human Rights: An Uneasy Alliance*, in GERVAIS 90 (2007)(hereinafter *An Uneasy Alliance*). See also Yu, *supra* note 7, at 1042, 1047-48.

¹⁹ See Yu, at 1059.

²⁰ *Id.* at 1069.

²¹ ICCPR, *supra* note 5.

²² Article 19, Paragraph 2 provides that “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Again, Article 19, Paragraph 3 is the balancing provision, stating that the exercise of rights in Paragraph 2 may be subject to restrictions to respect the right or reputation of others.

opposed to the Soviet and Latin American countries that were especially interested in economic, social and cultural rights.²³ However, with respect to both the ICESCR and the ICCPR, newly emergent African and Asian states contributed significantly to the content and tone of these instruments so that they emphasized the rights of self-determination, national sovereignty over resources, and freedom from racial discrimination.²⁴ This period of development in the history of Intellectual Property law, called the Global Period, began at the end of the Second World War and is marked by the emergence of greater participation by developing countries in the intellectual property discourse.²⁵

Since the beginning of the twenty-first century, the United Nation's Committee on Economic, Social and Cultural Rights (CESCR) has increased its support for a human rights framework for intellectual property rights.²⁶ CESCR published a 2001 Statement on Article 15(1)(c)²⁷ and a 2005 General Comment interpreting this provision.²⁸ In its 2001 Statement, CESCR recommended that states take a balancing approach, consistent with human rights protection, between the protection of moral and material interests and the right to take part in cultural life.²⁹ CESCR stated that "intellectual property is a social product and it serves a social function."³⁰ In contrast, the CESCR recognized that "[h]uman rights are fundamental, inalienable, and universal entitlements belonging to individuals."³¹ In this fashion, CESCR endeavored to distinguish intellectual property rights from human rights, implying that the core obligations present in Article 15(1)(c) are more important than intellectual property rights.³²

²³ See Yu, *supra* note 7, at 1086, 1092, 1142.

²⁴ Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, at 14, available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf>, citing J. W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 66-67 (1987).

²⁵ Drahos, *supra* note 23, at 8.

²⁶ The Committee "is a supervisory body of eighteen human rights experts who monitor the implication of the Covenant." Helfer, *An Uneasy Alliance*, *supra* note xxx, at 87.

²⁷ Statement by the Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2001/15 (Dec. 14, 2001) [hereinafter *CESCR 2001 Statement*].

²⁸ Committee on Economic, Social and Cultural Rights [CESCR], *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author*, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.GC.17.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.GC.17.En?OpenDocument) [hereinafter *General Comment 17*].

²⁹ *Id.* at ¶ 4. Article 15.1(b) also requires balancing of the authors' rights with those of the public to enjoy the benefits of scientific progress and its applications. Also, Article 15.2 requires states to undertake steps necessary for the conservation, development, and diffusion of science and culture. See *infra* note 39.

³⁰ *Id.*

³¹ *Id.* at ¶ 6.

³² CESCR 2001 Statement, *supra* note 25, at ¶ 6. Some of the distinguishing characteristics between Intellectual property rights and human rights include: temporary nature of Intellectual property rights versus timeless expressions of human rights; assignability of intellectual property rights versus inalienability of human rights; and the protection of economic interests for Intellectual property rights versus assuring satisfactory standards of human welfare and well-being for human rights. General Comment 17, ¶ 2.

In 2005, CESCR published General Comment No. 17, officially interpreting Article 15(1)(c).³³ The comment picks up where the 2001 statement left off, lending additional support for a human rights framework for moral interests. The General Comment began by stating that the right to the protection of interests in intellectual creations “derives from the inherent dignity and worth of all persons” and that these rights should be contrasted with “most legal entitlements recognized in intellectual property systems.”³⁴ Thus, CESCR conveyed that the rights described in Article 15(1)(c) are fundamental human rights, unlike the typical view of intellectual property rights as expressions of the right to property. Regarding material interests, the committee recognized that protection of material interests has an economic dimension.³⁵ In contrast, the Committee considered moral interests to be of primary importance to the dignity of the author. The General Comment referred to the intention of article 27(2) of UDHR as recognizing the “intrinsically personal character of every creation of the human mind and the ensuing durable link between creators and their creations.”³⁶ Moral rights protection “safeguards the personal link between authors and their creations”³⁷ and assures the public of the authenticity of the protected works.”³⁸ According to the General Comment, the moral rights within the scope of ICESCR include the rights of attribution and integrity.³⁹ Thus, individual authors’ moral interests are indeed conceived of as human rights.⁴⁰

The Committee stated that existing protection for intellectual property rights did not necessarily need to meet ICESCR standards, as long as the protection available is suited to secure for authors the moral and material interests resulting from their productions. Additionally, state parties can adopt more protective standards as long as those standards do not unjustifiably limit the enjoyment of others. Thus, according to the General Comment, ICESCR provides a floor for human rights protection, which make up the “core obligations” of the Covenant.⁴¹

³³ Lawrence Helfer notes that such comments by the CESCR are interpretations rather than non-binding and thus can be viewed by governments as “aspirational.” Lawrence R. Helfer, *International Rights Approaches to Intellectual Property: Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 999 (2007) [hereinafter *Toward a Human Rights Framework*].

³⁴ General Comment 17, *supra* note 26, at ¶ 1.

³⁵ *Id.* at ¶ 2. See also Yu at 24-26.

³⁶ *Id.* at ¶ 12.

³⁷ *Id.* at ¶ 2.

³⁸ Yu, *supra* note 23.

³⁹ General Comment 17, *supra* note 26, at ¶ 13. “[T]he Committee considers that ‘moral interests’ in article 15, paragraph 1(c), include the right of authors to be recognized as the creators of their scientific, literary and artistic productions and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, such productions, which would be prejudicial to their honour or reputation,” citing article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works.

⁴⁰ *Id.* at ¶ 7. Here, CESCR reiterated that its definition of “authors” was limited in scope to natural persons or groups of individuals and thus it precludes human rights recognition of corporate authorship such as works made for hire. It did, however, acknowledge that communities might be authors in some situations.

⁴¹ The list of core obligations under General Comment 17, *supra* note 26, ¶ 39 includes:

- (a) To take legislative and other necessary steps to ensure the effective protection of the moral and material interests of authors;
- (b) To protect the rights of authors to be recognized as the creators of their scientific, literary and artistic productions and to object to any distortion, mutilation or other modification of, or other

In the end, the drafting processes of these documents are characterized more by the similarity among the participants than by their differences. Peter Yu notes that notwithstanding the differences, the human rights instruments discussed above do not dictate a particular level of protection with respect to the right to the protection of intellectual creations. Thus, “the drafting history strongly suggests the drafters’ determination to create a universal document.”⁴² Yet, there remain differing opinions concerning whether Intellectual property rights such as copyright can properly be considered human rights. Even with respect to the economic, social and cultural rights that were of concern to the non-Western delegates of the UDHR and ICESCR, it is fair to say that although some types of intellectual property rights legitimately can be seen as having a strong human rights basis, this is not necessarily the case with all intellectual property rights.⁴³

Despite the conceptual and practical difficulties of viewing all intellectual property rights as human rights, moral rights present a special situation. Although moral rights may not rise to the level of other rights we think of as human rights, arguably they present a more compelling case for human rights based on their concern with the dignity of human beings.⁴⁴ Lawrence Helfer, pointing to CESCR’s General Comment 17, emphasizes a core moral type of right embracing a “zone of personal autonomy in which authors can achieve their creative potential, control their productive output, and lead

derogatory action in relation to, their productions that would be prejudicial to their honour or reputation;

(c) To respect and protect the basic material interests of authors resulting from their scientific, literary or artistic productions, which are necessary to enable those authors to enjoy an adequate standard of living;

(d) To ensure equal access, particularly for authors belonging to disadvantaged and marginalized groups, to administrative, judicial or other appropriate remedies enabling authors to seek and obtain redress in case their moral and material interests have been infringed;

(e) To strike an adequate balance between the effective protection of the moral and material interests of authors and States parties’ obligations in relation to the rights to food, health and education, as well as the rights to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right recognized in the Covenant.

⁴² Yu, *supra* note 7, at 1142.

⁴³ *Id.* at 1077.

⁴⁴ See TORREMANS, *supra* note 12, at 16-17 (“From a Human Rights perspective the author or creator assumes also a lot of importance” which “manifests itself in the work produced . . . being acknowledged as having an intrinsic value as an expression of human dignity and creativity”). Cf. Rochelle Cooper Dreyfuss, *Patents and Human Rights: Where is the Paradox?* Molengrafica Series (Intersentia Antwerpen/Oxford)(differentiating copyrights from patents on the ground that human dignity concerns may be implicated with respect to works of authorship but not inventions).

independent, intellectual lives.”⁴⁵ Paul Torremans suggest that “the higher the level of creativity and the more important the input of the creator is, the stronger the Human Rights claim.”⁴⁶ This observation would appear to underscore the human rights significance for works meeting the standard of heightened originality with substantial creativity discussed in Chapter Five. Peter Drahos also hesitatingly posits that a personality based theory might justify at least some intellectual property rights as human rights.⁴⁷

Still, the issue of moral rights being accepted as a human right is far from an easy call. In the first place, to the extent something is categorized as a human right, it is beyond the power of individual states to adjust for their convenience or preference.⁴⁸ As H. G. Schemers concludes, “human rights are of such importance that their international protection includes the right, perhaps even the obligation, of international enforcement.”⁴⁹ Moreover, even if one were to accept the premise that, notwithstanding the above concern, universal recognition equates to a universal, human rights norm as a general matter,⁵⁰ with respect to moral rights there is the additional problem that they are not universally recognized, or at least not recognized in a universal manner. In discussing the historical compliance with Article *6bis* of Berne, Justin Hughes has observed that “state practice has been so varied that heightened deference to national autonomy should pervade any analysis of the *6bis* provisions.”⁵¹ Specifically, he demonstrates that in the period following 1928, several Berne members complied with their *6bis* obligations in a weak manner that was very similar to current compliance by the United States.⁵² Presently, universal recognition presents an especially high hurdle in light of the United States’ failure to embrace its moral rights obligation under Berne. Recall from Chapter 8 that the United States was particularly instrumental in the elimination of article *6bis* from the TRIPs agreement, and thus successfully avoided being subjected to the mandatory dispute resolution process on moral rights despite our theoretical obligation to enforce moral rights pursuant to Berne.⁵³

At best, then, we can say that moral rights enjoy widespread recognition. For example, the history of the drafting of UDRH and ICESCR shows that although there

⁴⁵ See Helfer, *Toward a Human Rights Framework*, *supra* note 31, at 996 (also noting the existence of a core material right for authors and that any additional intellectual property protections beyond these core rights must balance public access considerations).

⁴⁶ TORREMANS, *supra* note 12, at 19.

⁴⁷ Drahos, *supra* note 23, at 21.

⁴⁸ Drahos, *supra* note 23, at 15.

⁴⁹ **Check and verify the Schermers quote on page 579 in footnote 44 of Drahos.**

⁵⁰ Drahos disputes that universal recognition translates into a universal, human rights norm. Instead, with respect to intellectual property rights as a general matter, he argues that such rights should be seen as instrumental rights through which other types of human rights can be fashioned. Drahos, *supra* note 23, at 22.

⁵¹ Justin Hughes, *American Moral Rights and Fixing the Dastar “Gap,”* ___ Utah L. Rev. ___ (200--) **(pinpoint around footnote 237).**

⁵² *Id.* at xxx- near footnote 199 and near note 204 (noting that “most major common law countries—and several significant civil law countries—were members of the Berne Convention for decades before they passed moral rights statutes for the two Article *6bis* rights”).

⁵³ Yu, *supra* note 7, at 1132.

may not have been a universal consensus as to whether moral rights are human rights, there was a significant recognition that these interests are deemed worthy of protection in a human rights framework. I suggest that rather than focusing on whether moral rights are within the scope of human rights, the better question is whether the widespread recognition of moral rights means that they should be considered as “authorship norms” or common rules of engagement shared among the majority of interested citizens. Although traditionally norms are developed and enforced outside the legal system,⁵⁴ they also can influence the development of the law by creating *de facto* standards that can either substitute for the law or encourage legal compliance.⁵⁵ Thus, if attribution and integrity interests do indeed represent widespread authorship norms, the question raised is whether these norms ought to be translated in some fashion into our legal system. This Chapter argues that the incorporation of attribution and cabined integrity interests into our legal system is appropriate given the widespread nature of these authorship norms.

In addition to the common and civil law traditions, Jewish law presents a distinct legal tradition that can be mined for its treatment of integrity interests of authors in their works. Although most intellectual property laws are derived from the system of royal privilege-giving prevalent in medieval Europe,⁵⁶ the origins of intellectual property law under the Jewish legal system are unique. Jewish copyright law originated with a dispute in the sixteenth century involving the unauthorized copying of a new edition of Moses Maimonides’ code of Jewish law along with original commentaries.⁵⁷ With respect to attribution and integrity interests, however, the origins of Jewish law are far more ancient. In fact, according to Jewish tradition, a lack of regard for the right of attribution and integrity, the two most vital components of the moral rights doctrine, was the cause of the first sin and thus responsible for the downfall of humanity. In Chapter 2, verse 17 of Genesis, God commanded Adam not to *eat* from the Tree of Knowledge.⁵⁸ In Chapter 3, verse 3 of Genesis, Eve tells the serpent that she may not eat the fruit or *touch* it, or she will die.⁵⁹ The tradition of the Oral Law, used by Rabbinic authorities to understand Biblical passages, reveals that the serpent shoved Eve against the fruit and then said to her, “See, you did not die.” As she saw that she did not die from touching the fruit, the serpent convinced her that there would be no negative consequences from eating the fruit. The tradition then explains how this happened. Adam wanted to add a safeguard on the commandment of not eating the fruit, so he said not to even touch it. Nonetheless, Adam did not tell Eve that the commandment not to touch the fruit was his own innovation. He

⁵⁴ Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, __ Va. L. Rev. __ (2007) at 5 of draft.

⁵⁵ See Mark F. Schultz, *Copynorms: Copyright Law and Social Norms*, 201, 206-07 (focusing on the compliance aspects of file-sharing) **think this is chapter 10 in Peter Yu’s series**; Rothman, *supra* note 52, at 29 (discussing the incorporation of customary law into IP decisions).

⁵⁶ Drahos, *supra* note 23, at 2. Roman law, which was heavily influenced by Greek thought, was the source for both the common and civil law European systems. See Mladen Vukmir, *The Roots of Anglo-American Intellectual Property Law in Roman Law*, 32 IDEA 123, 127, 151-52 (1991-92).

⁵⁷ See Neil Weinstock Netanel, *The Maharam of Padua v. Giustiniani; the Sixteenth-Century Origins of the Jewish Law of Copyright*, 44 HOUSTON L. REV. __ (2007) for a detailed account of this case. One of the complicating features of this situation was that the defendant was not Jewish, thus forcing the judge to grapple with the thorny issue of the extent to which Jewish law could govern the conduct of a Gentile.

⁵⁸ ETZ HAYIM, TORAH AND COMMENTARY 15 (2001).

⁵⁹ *Id.* at 18.

let her think that is was G-d's commandment. Thus, according to Jewish tradition, by modifying G-d's original statement and by not correctly identifying what was G-d's command and what was his own addition, Adam triggered the expulsion from Eden.⁶⁰ In this narrative, Adam's incorporation of the safeguard regarding not touching the fruit and his failure to properly attribute this safeguard violated the message and meaning of God's original words.

Jewish law regarding attribution and integrity flows from the concept of *duty* as opposed to *right*. Although the moral lesson regarding the rights of attribution and integrity derive from the Creation narrative in Genesis, all relevant works of Jewish law on these points cite a statement from the Ethics of the Fathers, a tractate embodying the accumulated ethical and moral wisdom of the Jewish Sages dating back to between 200 and 500 C.E., as the direct legal source.⁶¹ The importance of having one's words properly attributed to the original source is emphasized in the Ethics of the Fathers in the following verse: "Whoever repeats a thing in the name of the one who said it brings redemption to the world."⁶² The commentary emphasizes that "[o]ne must display indebtedness to a source and mention him by name," thus proscribing taking false credit for someone else's statement.⁶³ This verse also embodies a responsibility to quote the source accurately.⁶⁴ Based on the language of this tractate, the responsibility for accurate quotation and attribution is viewed as a duty of the second speaker rather than a right of the first speaker. In fact, supporting this idea is a recent ruling to the effect that the obligation to give proper credit is perpetual, a ruling that makes perfect sense if the concept of attribution is viewed as a duty rather than a right. A duty, indeed, is perpetual; a right lasts only so long as the first speaker or her representative has the ability to enforce it.⁶⁵

Significantly, the importance of appropriate attribution is indicated in the Talmud, the central book of Jewish life encompassing over forty tractates of materials with a multitude of commentary. The Talmud goes to great lengths to establish attribution

⁶⁰ MOSHE WEISSMAN, *THE MIDRASH SAYS* 45-46 (Benei Yakov Publications 1980). According to this interpretation, Adam violated G-d's right of attribution by attributing to G-d words that He did not speak (specifically, the injunction not to touch the fruit). He also violated G-d's right of integrity by modifying G-d's original commandments.

⁶¹ PIRKEI AVOS, *ETHICS OF THE FATHERS* (Mesorah Publications, Ltd. 1984). See also Berel Wein, *PIRKEI AVOS, TEACHINGS FOR OUR TIMES*, (Shar Press 2003) (noting that Chapter 6 is a later addition to the rest of the text dating back to around the 4th or 5th century rather than around 200 C.E).

⁶² *Id.* Ch. 6, § 6, at 59.

⁶³ *Id.* at 59 n.6 (commentary by Rabbi Meir Zlotowitz).

⁶⁴ See MENASHE WEISSFISCH, *MISHNAS ZECHUYOS YOTZAIR* 97 (Hiachal Nachum 2002).

⁶⁵ See also *id.* at 115 (discussing a ruling by Rabbi Yosef Elyashiv, who is recognized by Orthodox Jews as one of the greatest living authorities).

Israeli law, whose roots derive largely from the common law tradition, some aspects of the civil law tradition, as well as the Torah, endorses strong protections for authors' moral rights. See, e.g., *Eisenman v. Qimron*, 54(3) P.D. 817 (1993) (an unofficial translation is available on line at: http://lawatch.haifa.ac.il/heb/month/dead_sea.htm#_ftn1 [translated by Michael Birnhack]) (holding that a professor's moral right of attribution was infringed by the publication without attribution of the deciphered text of one of the Dead Sea Scrolls).

through several generations of students and teachers but the idea of misattribution in the Talmud must be accessed within its tradition of flexible, collection authorship.⁶⁶ For example, from an attribution standpoint, the phrase “Rabbi X said” as used in the Talmud does not necessarily mean that “Rabbi X himself” but rather Rabbi X’s later disciples.⁶⁷ Thus, in the case of a disciple quoting his master, the omission of the true author or source was “probably a matter of convenience.”⁶⁸ Therefore, authorship of the material in the Talmud cannot be regarded the same as authorship in Western terms.⁶⁹ In contrast, as Jewish Studies scholar Sacha Stern notes, “if the true author of a saying is not obvious or known to all, failure to attribute is considered plagiaristic and condemned.”⁷⁰ Thus, “only *deceptive* plagiarism would have constituted a breach of the practice of attribution.”⁷¹

In contrast to Jewish law’s morally based concern with attribution and integrity interests, among the earliest *de facto* attribution and integrity protections were the result of the censorship and licensing regimes in place in England with respect to literary works in the middle of the seventeenth century. In order to earn the exclusive copyright protection of the Stationers’ Company charter, a publisher needed to obtain the author’s written permission.⁷² Specifically, once the censors operating in connection with the Stationers Company in London approved a particular version of a book, a bookseller had an exclusive license to print that would be jeopardized by making modifications. Moreover, licensing protected against an author being designated as the author of a work he did not create. In addition, as Susan Liemer has observed, “misattribution or modification of a work would thwart the registration system upon which the monopoly relied, because then something other than the registered work would be competing in the marketplace.”⁷³ Thus, this intricate dynamic protected aspects of authors’ rights in a limited way, although the impetus was economic concern with works registered to guild members rather than a focus on authorship dignity. Still, there was general displeasure by authors with respect to their overall lack of control regarding their creations.

As discussed in Chapters Eight, moral rights developed in the civil law tradition in the early nineteenth century, and it is in this milieu that we see most clearly the author’s personal interest in her creations as a justification for embracing moral rights as authorship norms. The French choice of the term “moral” for the designation of this personality interest underscores the idea of moral rights encompassing authorship norms given that the French definition of “moral” has a broad meaning which pertains to

⁶⁶ Sacha Stern, *Attribution and Authorship in the Babylonian Talmud*, 45 J. JEWISH STUDIES 28, 50-51 (1994).

⁶⁷ *Id.* at 47-48.

⁶⁸ *Id.* at 47.

⁶⁹ Stern notes that since any “sayer” of a saying in the Talmud was always seen as “the bearer . . . of his masters’ teachings and of other earlier traditions,” it is inappropriate to consider “any attributee . . . as an ‘author’ in the full, modern Western sense of the term.” *Id.* at 51.

⁷⁰ *Id.* at 47.

⁷¹ *Id.*

⁷² SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 37-38 (N.Y.U. Press 2001).

⁷³ Susan P. Liemer, *How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright*, 5 J. MARSHALL REV. INTELL. PROP. L. 1, 11 (2005).

principles or rules of appropriate conduct in a particular society.⁷⁴ Moreover, the civil law tradition supports both attribution and integrity interests equally as authorship norms. In contrast, the United States copyright discourse always has been very rights centered. Recall that utilitarianism is the predominant copyright justification in the United States, as evidenced by the Copyright Clause's affording protection for a limited time as an incentive to create.⁷⁵ Although the history of the Copyright Clause specifically contains evidence of a focus on utilitarian concerns, this perspective arguably does not have to represent the entire story. Assuming the ongoing relevance of the utilitarian conception that has shaped our thinking about copyrights, the question is whether we are free at this point in time to incorporate additional narratives into the discourse shaping copyright law. I suggest that we are free to do so and that pursuant to this perspective, copyright law, like all law, should be assessed in the context of a more fluid, multi-dimensional approach.

Despite the economically oriented justification for copyright law that still pervades our thinking in this regard,⁷⁶ in recent years scholars and even the judiciary are beginning to call for a more nuanced approach to intellectual property law generally. For example, both Madhavi Sunder and Peter Yu have argued that the utilitarian economically oriented justifications for intellectual property are insufficient and therefore, a broader spectrum of justifications is needed. Specifically, Yu argues that there is a need for the development of a holistic perspective on intellectual property so that the interface between intellectual property and human rights can be more fully mined.⁷⁷ Sunder contends that "intellectual property is about social relations and should serve human values."⁷⁸ Thus, whereas the traditional narrative of economic incentive is concerned with fostering creativity, a narrative steeped in social and cultural theory offers a "broader normative purpose for intellectual property."⁷⁹ Peter Drahos posits an instrumentalist view of intellectual property which echoes similar themes. He believes that the rights created through intellectual property laws should serve fundamental human

⁷⁴ PLURIDICIONNAIRE LAROUSSE 911 (1st ed. 1975) (defining "moral" as (1) "qui concerne les regles de conduites en usage dans une societe determinee" [pertaining to rules of behavior in a particular society]; (2) "se dit de ce qui est relatif a l'esprit, de ce qui est intellectuel (par opposition materiel, physique)" [pertaining to the spirit, concerned with the intellect (rather than material and physic)]). The English definition of "moral" encompasses this same idea. MERRIAM WEBSTER'S DICTIONARY (defining "moral" as "of or relating to principles of right and wrong in behavior"; "perceptual or psychological rather than tangible or practical in nature or effect"), available at www.m-w.com/dictionary/moral (last visited July 9, 2007).

⁷⁵ **Supra footnotes to chapter 3 & 4?? Check-RRK**

⁷⁶ The novelty of the perspective developed in this Article is reflected in the recent statement by a district court that "[c]opyright and trademark law are not matters of strong moral principle." Rather, "[i]ntellectual property regimes are economic legislation based on policy decisions that assign rights based on assessments of what legal rules will produce the greatest economic good for society as a whole." *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 406 F. Supp. 2d 274, 281 (S.D.N.Y. 2005).

⁷⁷ Yu, *supra* note 7, at 1137.

⁷⁸ Madhavi Sunder, *IP*³, 59 STANFORD L. REV. 258, 331 (2006).

⁷⁹ *Id.* at 331.

needs and values.⁸⁰ In his view, therefore, “[v]iewing intellectual property through the prism of human rights discourse will encourage us to think about ways in which the property mechanism might be reshaped to include interests and needs that it currently does not.”⁸¹

This theoretical approach suggests that we should be considering copyright law’s underlying theoretical framework as encompassing more than just the conventional utilitarian justification. In *MGM v. Grokster*,⁸² the Supreme Court implicitly endorsed this very approach by holding that a defendant can be liable for inducing copyright infringement, even absent specific statutory authority in the copyright statute.⁸³ In *Grokster*, the defendants distributed software that enabled users to exchange digital media through a peer-to-peer transfer network entirely outside of the defendants’ control.⁸⁴ The Court invoked the doctrine of inducement familiar under patent law as the basis for the defendants’ liability.⁸⁵ According to the majority opinion, “the record was replete with evidence that from the moment [the defendants] began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement.”⁸⁶ This result has been applauded on moral and ethical grounds.⁸⁷ In commenting on this decision,

⁸⁰ Drahos, *supra* note 23, at 24.

⁸¹ *Id.* at 25. See also TORREMANS, *supra* note 12, at 9 (noting that copyright and intellectual property rights were included in the human rights instruments only because they were viewed “as tools to give effect to and to protect other stronger Human Rights”).

⁸² 545 U.S. 913 (2005).

⁸³ The Court observed “that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” *Id.* at 936-37.

⁸⁴ The lower courts also concluded that no vicarious liability resulted because, given the lack of a centralized mechanism, the defendants lacked the ability to supervise and control the infringing conduct, which occurred after the products had passed to the end-users. See *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1041 (D. Cal. 2003) (holding that since the defendants did not facilitate “the exchange of files between users,” and they could not accrue actual knowledge “of specific infringement at a time when either defendant materially contributes to the alleged infringement”), *aff’d*, 280 F.3d 1154, 1162-63 (9th Cir. 2004). The lower courts also concluded that no vicarious liability resulted because, given the lack of a centralized mechanism, the defendants lacked the ability to supervise and control the infringing conduct, which occurred after the products had passed to the end-users. See *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1045 (D. Cal. 2003) (holding that the defendants are not vicariously liable because they “provide software that communicates across networks that are entirely outside Defendants control”), *aff’d*, 380 F.3d 1154, 1165 (9th Cir. 2004) (“It does not appear from any of the evidence in the record that either of the defendants has the ability to block access to individual users”).

⁸⁵ See Mark A. Lemley, *Inducing Patent Infringement*, 39 U.C. DAVIS L. REV. 225, 233 (2005) (“The Court’s opinion can be read merely to adopt the common law patent principle that those who advertise or affirmatively encourage others to infringe are liable for inducement.”).

⁸⁶ *Grokster*, 545 U.S. at 924.

⁸⁷ Immediately after the opinion was issued, Asher Meir, the Research Director at the Business Ethics Center in Jerusalem (an independent institute located in the Jerusalem College of Technology) wrote the following in an editorial in the *Jerusalem Post*: “I can’t comment on whether the court’s ruling is good law, but I can say that it is good ethics. A firm can’t take a ‘see no evil, hear no evil, speak no evil’ approach to the use of its product if there is a significant chance it is being improperly used, or if there is any active connivance in such improper use I believe that the clear ethical message of this ruling will be helpful in clarifying the importance of intellectual property rights.” Asher Meir, *Grokster File-Sharing and Glue-Sniffing*, THE JERUSALEM POST, July 3, 2005 at 17. According to Julie Sigall, the Associate

Madavi Sunder notes that “the Supreme Court chose to impose liability for what it saw as moral wrongdoing” rather than sanctify the economic argument as “supreme over all other arguments.”⁸⁸

A more fluid view of copyright generally would allow us to make room for the inclusion of the right of attribution and even a cabined right of integrity in our legal system. These rights are not concerned with economic reward but are concerned with a different agenda. A broader view of copyright would allow the United States to recognize explicitly the existence of authorship norms that support moral rights protection. John Merryman perceived these shared authorship norms years ago when he wrote that “the moral right is the product of legal development in western, bourgeois, capitalist nations with whom we have deep cultural affinity.”⁸⁹ He further remarked that “even though our legal traditions often seem quite different from theirs, the differences are superimposed on a common, shared cultural base.”⁹⁰ Indeed, the Final Report of the Ad Hoc Working Group on the United States’ Adherence to the Berne Convention similarly recognizes attribution and integrity as part of the authorship norms of “fair dealing.” The Report states that “[f]ailure to identify the author on the work defeats the statutory purpose; and is ‘unfair dealing’ with respect to the author and public.”⁹¹ It also recognized the norms of integrity protections by noting that courts could protect against integrity violations by invoking implied covenants of fair dealing and good faith, as well as resorting to industry practice to close contractual loopholes.⁹²

Moreover, even within our current framework, attribution in particular exists as an authorship norm even if it is not explicitly codified in the copyright statute. Attribution violations in general and plagiarism in particular are viewed as moral wrongs

Register for Policy and International Affairs at the Copyright Office, most participants in the *Grokster* decision are “reasonably satisfied” with the ruling and Congress has not been besieged with requests to modify the ruling. 71 PAT. TRADEMARK & COPYRIGHT J. (BNA) 667 (April 14, 2006).

In light of the Court’s holding, the *Grokster* opinion does not decide the appropriate prospective application of third party liability principles under *Sony*’s standard that the distribution of a commercial product “capable of substantial noninfringing uses does not give rise to contributory liability for infringement unless the distributor had actual knowledge of specific instances of infringement and failed to act on that knowledge.” *Groskter*, 545 U.S. at 927 (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)). In fact, the *Grokster* opinions manifested disagreement on the question whether the *Sony* rule should be modified or interpreted more strictly. Justice Breyer’s opinion emphasized that the approach taken by Justice Ginsburg’s more strict interpretation of *Sony* “would require defendants to produce considerably more concrete evidence—more than was presented here—to earn *Sony*’s shelter,” and thus “significantly weaken the law’s ability to protect new technology.” *Id.* at 959 (Breyer, J., concurring). Thus, it will be up to future litigants to continue this saga.

⁸⁸ See Sunder, *supra* note 76, at 286-88.

⁸⁹ John Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1043 (1976).

⁹⁰ *Id.* at 1043.

⁹¹ *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J. LAW & ARTS 513, 552 n.19 (1986) (also suggesting that an express contractual provision allowing omission of the author’s name would be unenforceable as against copyright policy).

⁹² *Id.* at 555.

in our society among both authors and audiences.⁹³ Writing from a criminal law perspective with respect to plagiarism, Stuart Green calls the “norm of attribution” as one grounded in the desire for esteem.⁹⁴ He sees plagiarism as a corollary to the rule of attribution and argues that they constitute a “powerful pair of social norms.”⁹⁵ Although attribution and plagiarism share a somewhat similar theoretical framework, they do differ in important respects insofar as a moral rights framework is concerned. First, whereas someone is considered to commit plagiarism even if they copy from deceased authors, the theory underlying the moral right of attribution really applies with the most force during the author’s lifetime. Also, the norms of plagiarism are such that the conduct is adjudicated and punished largely within the confines of academic or other such particularized professional spheres.⁹⁶ Lastly, plagiarism can occur even if the offender takes a relatively small amount of material or work that is otherwise unprotected by copyright law.⁹⁷ In contrast, as Chapter 5 argues, an attribution violation should only be triggered when the offender takes something from a work protected by copyright law (indeed the argument was made that moral rights should apply only to a subset of copyrightable works). Moreover, it is an open question whether and how the fair use doctrine, which addresses in part quantitatively small uses of copyrighted works, should interface with the application of moral rights laws. Chapter 10 explores this issue in more detail but this distinction is worth noting here insofar as it bears upon the differences between the moral right of attribution and plagiarism.

⁹³ Rebecca Tushnet, Naming Rights: Attribution and Law, xxx UTAH L. REV. xxx, 3 n.11 (2007) [hereinafter Naming Rights]. See also Henry Hansmann & Marina Santilli, *Authors and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 130-31 (1997) (noting that the negative right of attribution is “relatively unproblematic” and “has obvious utility in protecting artists from theft of the reputation they have cultivated and in protecting the public at large from being misled”); Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1184-85 (2005) (“Even in this postmodern era, anti-plagiarism norms remain quite strong). Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law*, 54 HASTINGS L.J. 167, 175 (2002) (noting that people view attribution as similar to a “moral obligation”). Recall the Alloy author (the young woman) just accused of plagiarism and the interest in this (**referenced under Authors in Disguise chapter**). But see Michael Landau, *Dastar v. Twentieth Century Fox: The Need for Stronger Protection of Attribution Rights in the United States*, 61 N.Y.U. ANN. SURV. AM. L. 273, 298 (2005) (“Copying a work without giving attribution is plagiarism, and the Court . . . is giving its blessing to the practice.”).

⁹⁴ Green, *supra* note 91, at 174. He sees this norm as one supporting the concept of plagiarism, which he traces back to both Jewish and Roman law. *Id.* at 177 (recounting the history of the term “plagiarism” in connection with literary works in Roman society). See also Harold C. Streibich, *The Moral Right of Ownership to Intellectual Property: Part I—From the Beginning to the Age of Printing*, 6 MEMPHIS ST. U. L. REV. 1, 5-6 (1975) (noting that both Greek and Roman culture “‘stigmatized’ plagiarism as a crime,” despite little enforcement “of the ‘moral right’ of a creator to his work”) (citing G.H. PUTNAM, *AUTHORS AND THEIR PUBLIC IN ANCIENT TIMES* 68 (3rd ed. Rev. 1896)). Recall also that the term “plagiarism” is derived from the Latin term for kidnapping (see *supra* note 25 and accompanying text in Chapter Two).

⁹⁵ Green, *supra* note 91, at 195.

⁹⁶ Green, *supra* note 91, at 199; David Nimmer, *The Moral Imperative Against Academic Plagiarism (Without a Moral Right Against Reverse Passing Off)*, 54 DEPAUL L. REV. 1 (2004) (endorsing the result in *Dastar* with respect to reverse passing off as a general matter but approving the norms of plagiarism in specialized settings such as the academy); Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 155 (2007) (noting that among the community of fan creators, plagiarism is “one of the most serious offenses” and that when such conduct surfaces, “fans are likely to publicly excoriate the plagiarist”).

⁹⁷ Green, *supra* note 91, at 201.

Notwithstanding these distinctions, however, both attribution and plagiarism share a concern for giving credit where credit is due. With respect to both attribution and plagiarism violations, the offender “steals” the credit to which the true author is entitled.⁹⁸ The notion that such “theft” is simply wrong represents a powerful authorship norm. Attribution is garnering increased attention by scholars working in law, the sciences and the humanities.⁹⁹ Interestingly, in the intellectual property academy, both low protectionists as well as high protectionists have proposed enhanced protections for attribution. Although it is not surprising that the high protectionists who otherwise favor increased moral rights protections would urge stronger attribution interests,¹⁰⁰ Rebecca Tushnet notes that even low protectionists who place the public interest over that of authors are advancing attribution concerns as “a matter of fairness to authors.”¹⁰¹ Jennifer Rothman argues that attribution customs deserve more consideration because they are motivated by aspirational objectives rather than goals such as avoiding litigation.¹⁰² Greg Lastowka notes that providing attribution protection “would acknowledge the fundamentally different dynamics of open copyright practices and promote the smooth functioning of reputation economies.”¹⁰³ Scholars also have demonstrated that attribution is important in a wide variety of creative enterprises including cuisine and even scholarship by law professors.¹⁰⁴ Significantly, the momentum for attribution rights **currently** is reflected in a proposed attribution rule by the Copyright Office that would allow people to copy “orphan works” whose copyright owners are known but not capable of being located, as long as attribution to *both* the author and the copyright owner is provided.¹⁰⁵ The impetus for this proposal was the sense by the Copyright Office that “attribution is critically important to authors, even those who consent to free use of their works.”¹⁰⁶

In the United States, the right of integrity is viewed with far more suspicion and resistance than the right of attribution, largely as a result of a culture emphasizing strong first amendment and public access values. As a result of these concerns, theorists question why the voice of the author of the original text should be privileged above

⁹⁸ *Id.* at 219.

⁹⁹ Fisk, *supra* note xxxx, at 52.

¹⁰⁰ See, e.g., Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademark Law*, 41 HOUSTON L. REV. 263 (2004).

¹⁰¹ Tushnet, *Naming Rights*, at XX. (near footnote 19.)

¹⁰² Rothman, *supra* note 52, at 47-48.

¹⁰³ See, e.g., Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41 (2007).

¹⁰⁴ See, Lastowka, *supra* note 101, at 60-61 (noting that according to a survey of French chefs, the most important norm governing recipe sharing was the expectation of proper attribution and positing that law professors also are motivated by reputational profits). See also Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 17-18 (MIT Sloan Working Paper 4576-06, Jan. 2006), available at <http://ssrn.com/abstract=881781>. Recall also the discussion in Chapter Six regarding the development of prevalent attribution norms by various sub-communities as a result of a largely unregulated legal landscape.

¹⁰⁵ See REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 110-11 (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>

¹⁰⁶ Lastowka, *supra* note 101, at 83 (quoting REPORT ON ORPHAN WORKS, *supra* note 103, at 10).

subsequent creators.¹⁰⁷ Charles Beitz indicates that, with respect to the issue of privileging, moral rights laws should somehow take into account the degree to which a work is well known and widely recognized.¹⁰⁸ Although Beitz does not specifically say why this should be the case, I suggest that the reason has to do with the underlying theory of moral rights as a legal measure designed to safeguard the dignity interests of authors. Recall from Chapter One the discussion regarding dignity being realized in the external embodiments of the author's inner creative process. Underlying the importance of the external is, I believe, the idea of the author's esteem which derives from a public acknowledgment of his creative efforts. As discussed in that Chapter, authorship dignity is facilitated by an appropriate regard for a work's meaning and for the external embodiment of an author's work as the means through which his message is communicated to the public. As seen through this lens, the damage resulting from a right of integrity violation is particularly problematic when the modified work is linked to the author through specific attribution or widespread public recognition.

Thus, although attribution may present a more clear cut, and easier to administer area than the right of integrity, both are deeply concerned with the author's dignity and esteem. In order for a right of integrity to be viable in the United States, it will need to balance carefully competing interests and incorporate a large degree of cabining measures. Interestingly, such balancing is characteristic of the human rights instruments discussed at the beginning of this chapter. Both the UDHR and ICESCR contain, in addition to the provisions calling for the author's right to be protected with respect to her moral and material interests,¹⁰⁹ separate provisions emphasizing the public's right to enjoy and benefit from works.¹¹⁰ Further, in contrast to the moral and material interests provision embodied in Article 27(2), the balancing provision of the UDHR was not controversial because the public's right to access and enjoyment already was well established.¹¹¹ In light of the challenge ahead for the right of integrity specifically, and moral rights as a whole, a new framework beyond VARA is needed for these interests. Until now, this text has focused on developing a multi-dimensional theoretical groundwork for the establishment of moral rights in the United States. The final chapter turns to the contours of a moral rights framework specific to the interests and needs of the United States.

¹⁰⁷ Charles Beitz, *The Moral Rights of Creators of Artistic and Literary Works*, 13 J. OF POL. PHIL. 330, 349 (2005).

¹⁰⁸ *Id.* at 349.

¹⁰⁹ See *supra* notes 3 & 4 and accompanying text.

¹¹⁰ Article 27(1) of the UDHR provides that "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." With respect to the ICESCR, Articles 15(1)(a) and 15(1)(b) recognize the right of everyone "[t]o take part in cultural life" and "[t]o enjoy the benefits of scientific progress and its applications." Helfer notes that balancing the public's interests with those of creators and inventors represents "one of the most challenging tasks" for the CESCR. Helfer, *An Uneasy Alliance*, *supra* note , at 88. To date, the CESCR has not yet drafted general comments interpreting the other subsections of Article 15 which protect the public's rights. *Id.* at 112.

¹¹¹ Yu, *supra* note 7, at 1053.