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CREATING THE NATIONAL WEALTH: AUTHORSHIP, COPYRIGHT, AND LITERARY CONTRACTS

MICHAEL BRANDON LOPEZ*

*“Whereas if we approach a poet without this prejudice we shall often find that not only the best, but the most individual parts of his work may be those in which the dead poets, his ancestors, assert their immortality most vigorously.”*¹ – T.S. Eliot

ABSTRACT

The United States is a party to the Berne Convention for the Protection of Literary and Artistic Works. This Treaty provides for the protection of, among other things, author’s moral rights, which are independent of protection afforded by traditional United States copyright law. Despite the United States’ accession to this Treaty, author’s moral rights are not protected under current law, except in very narrow circumstances. This Article addresses the important role that authors have as originators of creative works that advance the cultural interests of the Nation and inspire future creative efforts. As such, this Article argues for adopting a regime that includes protection for author’s moral rights, through both statutory and contracts law. This Article discusses that the United States is not fulfilling its obligations under the Berne Convention, despite protestations to the contrary, and discusses the reasons for resistance to full adherence to the treaty. Moreover, this Article addresses the role of an author’s work and its relationship and importance to the public domain. In reaching these conclusions, this Article explores the historical development of copyright protection, its development in the United States, including discussions of both statutory law and historic case law addressing authors. In addition,

* This Article has been measured and shaped in large part by discussions with William P. Johnson at the University of North Dakota School of Law, and it is to him that I dedicate this work. The contributions of friends and colleagues in North Dakota cannot be underestimated – in particular, Patti Alleva, Gregory S. Gordon, Joshua P. Fershee, Michael Crowell Beard, Michael D. Lockhart, Michael S. McGinniss, Jan Stone, Benjamin J. Williams, and Larry Woiwode – all contributed to my intellectual development and growth which allowed for the shaping, depth, and reach of this argument to realize its full potential. Those many discussions refined my ideas, and their contributions to my own thinking are scattered throughout these pages. Though, in proper Medieval fashion – the errors are my own.

1. T.S. Eliot, *Tradition and the Individual Talent*, in MODERNISM: AN ANTHOLOGY, 152, 152 (Lawrence Rainey ed., 2005).

this Article examines the protections afforded to authors under current copyright law as well as Constitutional interpretations of the Federal Constitution's copyright clause as they relate to these issues. This Article also analyzes the effect of those interpretations on understanding the role of the author in relation to the rights and interests of the public. Finally, this Article addresses the changing framework for assessing the rights and interests of authors and the public in light of recent case law.

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I. INTRODUCTION

In 1579, the great Elizabethan poet Sir Philip Sidney wrote in his *A DEFENCE OF POETRY*, “[on] the behalf of all poets, that while you live, you live in love, and never get favour for lacking skill of a sonnet; and, when you die, your memory die from the earth for want of an epitaph.”² In his essay, Sidney exhorts the capacity poets have to create the world, to interpret the natural phenomena that we encounter and live in, and to shape reality.³ Sidney’s vision is a romantic one that would later be taken up by, among others, the poets William Wordsworth and Samuel Taylor Coleridge, all of whom illuminate the resources that poets are to the societies and communities in which we live, work, and operate.⁴ Ironically, Sidney’s *A DEFENCE OF POETRY* also had to guard against the rampant censorship that authors were forced to endure in his contemporary community in England, as part of the monopoly enjoyed by the Stationer’s Company, operating under the Royal seal.⁵ Operating within these confines, Sidney deftly moves the reader through his argument concerning poetry and its ability to tell truth through metaphor, allegory, and other rhetorical devices designed to fool the censors about his true literary message.⁶

2. SIR PHILIP SIDNEY, *A DEFENCE OF POETRY* 75 (J.A. Van Dorsten ed., Oxford Univ. Press 1966) (1595).

3. BERYS GAUT, *ART, EMOTION AND ETHICS* 4 (2007) (“Sidney argued that poetry, with its capacity to delineate precise situations and its power to move even obdurate hearts was of all discourses the most suited to teach virtue.”).

4. See JAY PARINI, *WHY POETRY MATTERS* 22 (2008).

5. CYNDIA SUSAN CLEGG, *PRESS CENSORSHIP IN ELIZABETHAN ENGLAND* 20-21 (1997).

6. Robert E. Stillman, *The Truths of a Slippery World: Poetry and Tyranny in Sidney’s “Defence,”* 55 *RENAISSANCE Q.* 1287, 1295 (2002).

Consequently, in our modern society, Sidney could not have anticipated authors have no right, absent contractual provisions to the contrary, to attribution for their work. Moreover, if authors did not believe the work conformed to their fullest abilities, or viewed the work as against their individual sensibility and morality they could not, absent contractual provisions to the contrary, cause the work to be withdrawn from publication.⁷ Indeed, authors without specific provisions embodied in a publication agreement, do not have an absolute right to the integrity of their work.⁸ Moreover, under our regime of copyright law, an author's work can be modified and distorted, ultimately subverting the author's intentions and artistic vision.⁹ As well, authors typically have no control to decide the timing and method of the publication, known as the right of disclosure.¹⁰ These aforementioned rights are known as moral rights, and they arguably vest intrinsically in the author as creator of an individual work of artistic merit, at the moment of that work's inception.¹¹

And yet we live in a society that cherishes notions of intellectual property, and that recognizes that creators of original works of artistic merit are deserving of reward in the form of a limited copyright to authors for their work.¹² Such a specific reward of exclusivity over their work ensures authors can exploit their original creations, while also maintaining the valid rights the public has to the intellectual achievements and advancements of author's creation, wherein at the limited-term expiration of the copyright the work passes into the public domain, free for all to use.¹³ These tensions concerning the private economic interests of the individual author, and the right of the public to the work, reflect the philosophical and economic struggle between the desire to allow an individual to exploit the fruits of

7. ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 23 (2010) ("Although copyright law would seem to be the most natural avenue for authors seeking to redress violations of the integrity of their texts, such protections historically have been noticeably absent from the statutory scheme. Rather than afford protection for the personal rights of authors with respect to their works, copyright law in this country predominantly safeguards the pecuniary rights of the copyright owner . . .").

8. *Id.* at 23-35 (discussing potential remedies available to an author under United States law).

9. *Id.*

10. *Id.* at 44.

11. See Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 356 (2006) (enumerating some of the major moral rights).

12. Benjamin Davidson, Note, *Lost in Translation: Distinguishing Between French and Anglo-American Natural Rights in Literary Property, and How Dastar Proves that the Difference Still Matters*, 38 CORNELL INT'L L.J. 583, 585 (2005) (discussing the Framers desire to balance public rights to works of intellectual advancement with the private, economic interests of individual authors).

13. Alina Ng, *The Social Contract and Authorship: Allocating Entitlements in the Copyright System*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 413, 423 (2009) [hereinafter Ng, *The Social Contract and Authorship*].

their intellectual labors, while recognizing the fundamental understanding that the public has a right to grow collectively as a society, without being unduly hindered by costs associated with access to the knowledge created.¹⁴ Consequently, these philosophical underpinnings of the United States' understanding of the balance between an individual's exploitation of their work and public rights of access are cemented in the Federal Constitution of the United States.¹⁵

Our present system devalues authors and the intrinsic value of what they create, while maintaining, incorrectly, an ideology that authors and their economic interests form the basis for the system.¹⁶ Too often under our present system the quality and intellectual merit of an author's work are compromised for the economic value that it can generate for commercial interests. Moreover, the authors themselves lack even the basic moral rights that authors in countries such as France, England, Germany, and Italy have enjoyed for, in some cases, hundreds of years.¹⁷ Furthermore, the United States is arguably not fulfilling its obligations under the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"), which specifically contains a clause asserting the validity of, and requiring the protection of, an author's moral rights.¹⁸ Article 6bis of the Berne Convention provides:

Independently of the author's economic rights, and *even after the transfer* of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.¹⁹

14. JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 11 (2008) (arguing that copyright protection should exist only so long as necessary to provide an incentive *to create*, and thereafter fall into the public domain).

15. U.S. CONST., art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for *limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (emphasis added)).

16. Alina Ng, *The Authors Rights in Literary and Artistic Works*, 9 J. MARSHALL L. REV. INTELL. PROP. L. 453, 459-60 (2009) (discussing the economically driven underpinnings of our current copyright system, and its effect on the public's treatment of works of creative authorship) [hereinafter Ng, *Author Rights*].

17. *See generally id.*; *see also* Davidson, *supra* note 12, at 585-86 (noting among other things that French authors frequently defend their economic and moral rights); Rigamonti, *supra* note 11, at 353-55 (providing an overview discussion of moral rights law in French, German, and Italian law).

18. Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

19. *Id.* at art. 6bis (emphasis added).

The United States, when it finally acceded to the Berne Convention in 1988, did so only after recognizing that its own efforts to protect its authors' works internationally were abysmally unsuccessful.²⁰ Even after acceding to the Berne Convention, the United States did so only with the recognition that its common law and statutory copyright protections were sufficient to protect an author's moral rights, as required under the Convention.²¹ This, however, is not the case. The national wealth, as embodied in our authors' artistic achievements and products, are derided of their literary value in a commercialized market designed to further the interests of publishing distributors, not authors themselves. Ultimately, under our current legal regime, the system serves to deprive the reading public of valuable works that would otherwise be in the public domain.²² Additionally, this expense comes at the ironic and hypocritical cost of authors' moral rights, whose interests the copyright system should have as its base purpose. Thus, in order to achieve the United States' goals under the Federal Constitution, our international obligations under the Berne treaty (part of the supreme law of the United States), and to advance society (all of which are embodied in our Constitutional provisions concerning copyright and the role of authors), we should recognize the moral *and* economic rights of authors.

Part II of this Article will provide a brief history of some of the major moments in literary copyright history from an Anglo-American perspective,²³ and include a brief overview of the United States' statutory approach to copyright protections, and subsequent amendments to the original Copyright Act of 1790. Part III will discuss the role of the author in the life of the community, moral rights, and the importance that authorship has to advancing the ideas and causes of society. Part IV will discuss the clash of philosophies underpinning the debate between economic interests, moral rights, and public rights. It will also address the nature of literary publishing contracts, and the inherent inability for the so-

20. Davidson, *supra* note 12, at 587.

21. Donald Francis Madeo, Note, *Literary Creation and American Copyright Law: Authors' Wishes Hardly Resting in Peace*, 5 HOFSTRA PROP. L.J. 179, 190-91 (1992) (discussing amendments to the Berne Convention designed to satisfy international requirements of moral rights, with United States' law); STEPHEN M. MCJOHN, INTELLECTUAL PROPERTY 148 (4th ed. 2012).

22. W. Russell Taber, Note, *Copyright Déjà Vu: A New Definition of "Publication" Under the Copyright Act of 1909*, 58 VAND. L. REV. 857, 862-63 (2005).

23. This Article will chiefly be focused on the rights of literary authors, that is, authors whose works are of a written form, for example, novels, plays, poetry. However reference will also be made to visual art, especially in light of the Visual Artists Rights Act of 1990 § 106A of the Copyright Act [hereinafter "VARA"], to elucidate that statute's damage to moral rights assertions under the common law.

called “carefully crafted bargain” to cure the United States’ deficiencies concerning authorial moral rights. Part IV also dispels the notion that the current legal system is adequate to protect author’s moral rights and their ability to assert them. Part V will suggest three solutions to these issues: (1) scaled back copyright protection terms, (2) statutory protections for author’s moral rights, and (3) using these statutory protections to provide increased bargaining power for negotiating authors.

II. LEGAL BACKGROUND: HISTORICAL DEVELOPMENT OF LITERARY COPYRIGHT LAW

In order to understand the progression of the law surrounding literary contracts, one must first look to the historical development of copyright, and specifically to the interrelationships between booksellers, censorship, and statutory enactments. Specifically, this section discusses early methods of publication and production followed by relevant laws and statutes affecting the legal background of literary contract law.

A. FROM MEDIEVAL MANUSCRIPT COPYING TO THE PRINTING PRESS

Prior to the introduction of the printing press in England, the work of copying a book had to be done by hand.²⁴ The results were spectacular, gorgeously beautiful works of art in their own right, but they came at a significant cost, as typically a monk or other member of a professional class of scribes could only copy a certain number of books in a lifetime.²⁵ With the introduction of the printing press by Johannes Gutenberg into the work of manuscript copying and publication, the number of books that could be printed substantially increased and had the result of simultaneously lowering the costs of books.²⁶ Subsequently, William Caxton’s introduction of the printing press into England in 1471²⁷ had the similar effect of lowering the cost of books, while allowing for a proliferation of

24. FRED LERNER, *THE STORY OF LIBRARIES: FROM THE INVENTION OF WRITING TO THE COMPUTER AGE* 46 (2d ed. 2009) (describing aspects of the manuscript copying process).

25. CHRISTOPHER DE HAMEL, *SCRIBES AND ILLUMINATORS* 7 (1992) (“A monk had other commitments as well as book production, and not only attended chapel up to eight times a day but also took turns in other tasks around the monastery’s school, kitchen, guest house or garden An eleventh-century monastic scribe, in no great haste, might achieve three or four moderate-sized books a year.”).

26. Steven Kries, *The Printing Press*, *THE HISTORY GUIDE*, <http://www.historyguide.org/intellect/press.html> (last updated May 13, 2004) (discussing the history of the printing press, and its effect on book publication).

27. *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.) 840; NORMAN FRANCIS BLAKE, *WILLIAM CAXTON AND ENGLISH LITERARY CULTURE* 5 (1991).

printers to spring up to feed the public's growing desire for cheap literary texts.²⁸ Indeed, as Benjamin Davidson notes,

Over the span of eighty years following the printing press's introduction, the guilds and their printing-age equivalents united to form the Stationers' Company, which, in 1557, was granted quasi-legislative and judicial powers to regulate the printing industry. The Company's status as a royally sanctioned monopoly, allowed it to control which authors and what content was printed, and because it abided by the social order, that so preoccupied the monarchs, the Stationers' Company played a critical role in the development of Anglo-American copyright law, ensuring that the interests of copyright holders would be forever subordinated to the public interest.²⁹

Accordingly, the intermix and symbiotic relationship between censorship, power, authority, and regulation of authorial rights emerged at an early date, and in tandem with the rise of new technologies, which are largely the precursors and foundations for our technologies of reproduction today. Indeed, the power and pervasive influence exercised by subsequent monarchs via the Stationers' Company helped to create the presumption that the only rights an author had were those of selling the manuscript itself, without any further rights attaching to the author after that sale.³⁰

The rights of booksellers, who acted as publishers and distributors of literary works, predominated over any claim that the author might have against shoddy publication work. Literary works were often badly put together, incomplete, and deprived the author of any future royalty rights. All of those rights vested in the booksellers, who enforced their rights through special decrees from the secretive proceedings of the Star

28. NORMAN FRANCIS BLAKE, *WILLIAM CAXTON AND ENGLISH LITERARY CULTURE* 5 (2003) (noting that “[i]n England Caxton is generally honoured as the man who introduced printing into England”); see also Blake's general discussion concerning selections of what Caxton chose to print, i.e. works that would likely please his audiences and sell many copies, but which were not generally held to a high literary standard.

29. Davidson, *supra* note 12, at 589. Davidson also aptly points out the psychological effect this had on some of the leading authors of the time, such as John Milton, whose *PARADISE LOST* remains a classic. *Id.* at 592-93. As Davidson sees it “in *AEROPAGATICA*, one of the first pieces by an author in support of authors, Milton championed authors' individuality, but not authors' rights.” *Id.* at 593 (emphasis added). But see Alina Ng, *Authors and Readers: Conceptualizing Authorship in Copyright Law*, 30 *HASTINGS COMM. & ENT. L.J.* 377, 390 (2008) (“In opposing censorship and state licensing of book printing, John Milton's *AEROPAGITICA* speech elevated the author to a dignified creator of works, who should not be subjected to the control of printers through royal and ecclesiastical censorship.”).

30. Davidson, *supra* note 12, at 590. But see Alina Ng, *Authors and Readers: Conceptualizing Authorship in Copyright Law*, 30 *HASTINGS COMM. & ENT. L.J.* 377, 390 (2008) [hereinafter Ng, *Authors and Readers*].

Chamber.³¹ Utilizing the authority of the Star Chamber, the Stationers' Company could thwart unauthorized publications, and close print shops not licensed by them.³² Such was the state of affairs that, as Davidson notes, "during the sixteenth and seventeenth centuries, when booksellers, printers, monarchs, and Parliament were all vying for control of the burgeoning book trade, no authors asserted any rights in British courts."³³ Indeed, the Star Chambers' decrees were so draconian that they permitted the banning of the printing of any book that conflicted with any decree promulgated under the secretive auspices of its orders and decrees, and went so far as to permit agents of the Stationers' Company the right to search premises for material that would contravene the censorship laws.³⁴

B. THE COMMON LAW AND THE STATUTORY BEGINNING OF COPYRIGHT

Nevertheless, the Star Chamber did, eventually, grant rights to authors over their work, allowing it to become a form of property.³⁵ In response, authors were required to sign contracts indicating their assent to the transferability of exclusive rights to the literary work in question to the publisher.³⁶ It was not until 1709 with the Long Parliament's passage of An Act for the Encouragement of Learning ("Statute of Anne"),³⁷ however, that copyright protections truly accrued as a matter of right on behalf of English authors. Indeed, the Statute of Anne is generally seen as the moment of conception for modern copyright law.³⁸

31. The Star Chamber was a secretive court enacted to deal with prominent individuals, whom it was thought an ordinary court could not justly try. Its secrecy, however, without any procedural safeguards, gave rise to its reputation for abuses of power, and it is now primarily viewed as exemplifying excesses of Royal authority, and its use as a political tool to thwart opposition to that authority. See, e.g., *Star Chamber Definition*, <http://www.duhaime.org/legaldictionary/s/starchamber.aspx> (last visited Jan. 5, 2013). The Star Chamber arguably influenced our own procedural protections and safeguards under the Federal Constitution. See *Pennsylvania v. Muniz*, 496 U.S. 582, 595-96 (1990) (discussing the rights and privileges arising under the Fifth Amendment). *Accord Donaldson*, (1774) 1 Eng. Rep. at 841 ("The Star Chamber was a criminal court, and had not constitutional authority to determine civil rights. That court has long since been abolished, without regret; and it is the happiness of the subject, that the common law has flowed through purer channels.").

32. Davidson, *supra* note 12, at 591.

33. *Id.*

34. See ORDINANCE OF THE STAR CHAMBER FOR THE CENSORSHIP OF THE PRESS (1566), reprinted in SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 315, 315 (Burton Adams & Henry Morse Stephens eds., Macmillan 1901).

35. Davidson, *supra* note 12, at 593-94.

36. *Id.* at 594.

37. An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times Therein Mentioned, 1710, 8 Anne, c. 19 (Eng.). [hereinafter Statute of Anne].

38. LIOR ZERNER, THE IDEA OF AUTHORSHIP IN COPYRIGHT 36-37 (2007).

Under the Statute of Anne, authors were granted a fourteen year monopoly over their work, which could be renewed for an additional fourteen years, thus ensuring the author's economic interests in their work under statutory law.³⁹ However, two important prevailing views at the time of the Statute of Anne's enactment were that (1) the publisher whom the author had transferred his rights to attained the perpetual copyright that the author had enjoyed at common law regardless of the Statute's period of protection concluding, and (2) at the conclusion of the twenty-eight year period established then by Statute, the copyright lapsed, and any publisher could subsequently reprint the work without fear of violating another publisher's copyright over the work.⁴⁰

1. *Relevant Case Law Interpreting the Statute of Anne*

Inevitably the courts were drawn into the controversy, and were required to interpret the statute. The two cases of significance dealing with the Statute of Anne were *Millar v. Taylor*,⁴¹ and *Donaldson v. Beckett*.⁴²

a. *Millar v. Taylor* – A Perpetual Common Law Copyright

In *Millar*, the 1769 English courts dealt with issues of copyright involving the work of poet James Thomson.⁴³ Andrew Millar, a bookseller, had acquired the rights to publish Thomson's THE SEASONS. Millar caused to be printed 2,000 copies of the work, and subsequently an additional 1,000 copies of the work.⁴⁴ Similarly, Robert Taylor, another bookseller, surreptitiously printed copies of the work, despite the fact that Millar still had quantities of the work on hand, who as a result of Taylor's allegedly unauthorized reproduction subsequently suffered economic injury by his printing of the work.⁴⁵

However, the work in question's copyright – THE SEASONS – had expired.⁴⁶ Therefore, the question presented to the court was whether there existed, as had existed at common law, a perpetual copyright vesting to the author, such that a work could never enter the public domain.⁴⁷ The court

39. BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW 11-12 (2004).

40. *Id.*

41. (1769) 98 Eng. Rep. 201 (K.B.).

42. (1774) 1 Eng. Rep. 837 (H.L.).

43. *Millar*, (1769) 98 Eng. Rep. at 202.

44. *Id.*

45. *Id.* at 202-03.

46. *Id.* at 206.

47. *Id.*

found for Andrew Millar, assessing that the Statute of Anne merely codified the common-law rights of a perpetual copyright vesting in an author, and concomitantly in the publisher, Millar, to whom the poet James Thomson had transferred his rights.⁴⁸

b. *Donaldson v. Beckett* – The House of Lords Reverses Course and Establishes the Modern Trend

However, the 1774 case of *Donaldson* reversed *Millar*, and found that no such common law right of perpetual copyright ever existed in an author, and the only one that did exist was that established by statute, under the auspices of the Statute of Anne.⁴⁹ The *Donaldson* case involves very similar facts to those at hand in *Millar* – the subject matter once again concerned the eponymous works of poet James Thomson.⁵⁰ After the *Millar* case was resolved in Andrew Millar’s favor, his heirs (Andrew Millar died the day after the decision was rendered),⁵¹ sold some of the rights in Thomson’s poetry to printer Thomas Beckett.⁵² After acquiring these rights the new copyright holders filed an action against Alexander Donaldson who had been printing illegal copies of the poems.⁵³ Relying on the decision in *Millar*, the Court of Chancery granted an injunction against Donaldson.⁵⁴

In a dramatic series of events the House of Lords convened a panel of Judges and submitted to them a series of questions, among them whether “the Statute of Anne displaced the common law cause of action or authors retained a perpetual property right in a copyrighted work despite statutory limitations.”⁵⁵ The judges found that such a common law right vested in authors.⁵⁶ However, the House of Lords rejected that finding, and instead

48. *Id.* at 208 (“The Act supposes an ownership at common law The sole property of the owner is here acknowledged in express words, as a common law right: and the Legislature who passed that Act, could never have entertained the most distant idea, ‘that the productions of the brain were not a subject matter of property.’” To support an action on this statute, ownership must be proved; or the plaintiff could not recover: because the action is to be brought by the owner; who is to have a moiety of the penalty.”).

49. *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.) 846-47.

50. *Id.* at 837-39.

51. *Millar*, (1769) 98 Eng. Rep. at 202.

52. *Donaldson*, (1774) 1 Eng. Rep. at 938.

53. *Id.* at 839, 847 n.1.

54. *Millar*, (1769) 98 Eng. Rep. at 202.

55. *Donaldson*, (1774) 1 Eng. Rep. at 846-47.

56. *Id.* at 847.

found that the common law's perpetual copyright for literary works did not exist, absent the statutory rights granted by the Statute of Anne.⁵⁷

2. *Effect of Millar and Donaldson*

The decision in *Donaldson* articulated the approaches that would form the criteria used in assessing issues concerning copyright, including rights at common law to perpetual copyrights versus limited copyrights established by statute. In discussing whether a perpetual right of copyright could accrue under the common law, the *Donaldson* court, mimicking the *Millar* court, noted:

For a right at common law must be founded on principles of conscience and natural justice. Conscience and natural justice are not local, or municipal. Natural justice is the same at Athens, at Rome, in France, Spain, and Italy. Copies of books have existed in all ages and they have been multiplied; and yet an exclusive privilege, or the sole right of one man to multiple copies, was never dictated by natural justice in any age or country; and of course the sole liberty of vending copies could not exist of common right, which gives an equal benefit to all. An exclusive privilege to exercise a natural faculty, is an encroachment upon the rights of man.⁵⁸

The remarks of the *Donaldson* court could not have predicted better the continuing debates that accompany copyright, extensions of copyrights, and the right of the public to have unfettered access to works that have fallen into the public domain.⁵⁹

What is equally compelling about the court's decision in *Donaldson*, is that it cites none other than John Milton in support of its decision to reverse *Millar*, and finds the only rights an author has in his work are those established by statute, in this case, the Statute of Anne.⁶⁰ The court could, arguably, have focused its analysis entirely on the instant legal issues at

57. Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1157 (1983) (citing 17 PARL. HIST. ENG. 953, 970-71 (H.L. 1774)).

58. *Donaldson*, (1774) 1 Eng. Rep. at 840.

59. The recent decision of *Golan v. Holder*, 132 S. Ct. 873 (2012), however, makes even this basic concept uncertain, as discussed *infra*.

60. Statute of Anne, 1710, 8 Anne, c. 19 (Eng.). The *Donaldson* court articulates, "the authority of such a man as Milton is of great weight; and he is represented as speaking, after much consideration on the very point. His words are, the just retaining of each man's copy, which God forbid should be gainsaid." *Donaldson*, (1774) 1 Eng. Rep. at 843. The court goes on to assert that, "But [Milton] does not say *how long* the copy should be retained . . . Milton could not wish that PARADISE LOST, which was sold for £5 . . . should continue a splendid fortune in the hands of a bookseller, and his own grand-daughter be obliged to beg a charity play." *Id.* (emphasis added).

hand before it, but instead it chose to recognize the force and importance of a spokesperson of the nation, in the form of poet John Milton. This is an extraordinary use of a literary figure by a court, and similarly, the court in *Donaldson* also referenced author Jonathan Swift as a qualified source regarding perpetual copyrights.⁶¹

C. DEVELOPMENT OF UNITED STATES COPYRIGHT JURISPRUDENCE:
THE COPYRIGHT ACT OF 1790 AND *WHEATON V. PETERS*

The Framers of the Constitution largely followed suit when they drafted the Copyright Act of 1790,⁶² which copied the Statute of Anne's twenty-eight year maximum copyright.⁶³ But a significant question remained as to whether the inclusion of the copyright clause in the Federal Constitution disturbed any common law rights authors might enjoy under the laws of the several states (including that of a perpetual copyright).⁶⁴ Indeed, in FEDERALIST NO. 43 James Madison speaks of authors enjoying a copyright at common law.⁶⁵ Madison writes, "[t]he copyright of authors has been solemnly adjudged in Great Britain, to be a right at common law."⁶⁶ The future development of American copyright law was shaped by both legal precedent and Congressional acts.

1. *The Case of Wheaton and the Making of United States' Copyright Jurisprudence.*

Any uncertainty as to the existence of a common law copyright vesting in the author, even with the presence of statutory rights, was extinguished with the case of *Wheaton v. Peters*.⁶⁷ *Wheaton* involved the Supreme Court

61. *Id.* ("Dr. Swift and Mr. Pultney were both clearly of opinion, that there was no common law right.").

62. Act of May 31 1790, ch. 15, 1 Stat. 124 [hereinafter Copyright Act of 1790].

63. J.A. Lorengo, *What's Good for the Goose is Good for the Gander: An Argument for the Consistent Interpretation of the Patent and Copyright Clause*, 85 J. PAT. & TRADEMARK OFF. SOC'Y 51, 64 (2003).

64. EDWARD C. WALTERSCHEID, NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 219 (2002) ("[T]he language of the first copyright statute, enacted in 1790, rather strongly suggests a perception by Congress that it was not creating a right but rather affirming and protecting an existing right. Thus, it refers to the copyright of maps, charts, and books already printed within the United States and to those who have legally acquired the copyright of any such map, chart, book or books. This reference to an existing 'copyright' is almost certainly to a perceived common-law right." (citations omitted)).

65. THE FEDERALIST NO. 43, at 220 (James Madison) (2010), *reprinted in* THE FEDERALIST PAPERS (Ian Shapiro ed., 2009).

66. *Id.* Of course Madison would have been correct had only the *Millar* decision been rendered by the time of the enactment of the first Copyright Act of 1790. However, it is indeterminate whether he was aware of the *Donaldson* decision.

67. 33 U.S. (8 Pet.) 591, 654-55 (1834).

reporter Henry Wheaton, who had taken care to compile substantial reports from the Court's terms, along with annotations.⁶⁸ The significant cost of these reports meant that they were beyond the reach of most lawyers.⁶⁹ Richard Peters, Wheaton's successor as court reporter undertook to condense the material contained in Wheaton's reports, and in the process undercut the cost of Wheaton's reports significantly.⁷⁰ Wheaton subsequently sued in Pennsylvania, and lost. He subsequently appealed to the United States Supreme Court where he argued that he had a common law right of copyright ownership in his works, in perpetuity.⁷¹ This was the issue the *Donaldson* court had dealt with in 1774, and the United States Supreme Court arrived at essentially the same result.⁷² While the Court acknowledged that an author has certain common law rights which attach to his work, that is vastly different from asserting "a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world."⁷³ But the Court certainly went further than this mere acknowledgement, and foreclosed the possibility of recognizing rights of a moral nature, as courts in France and other civil law jurisdictions had been doing.⁷⁴ Indeed, the Court asserts:

[t]he argument that a literary man is as much entitled to the product of his labour as any other member of society, cannot be controverted. And the answer is, that he realises this product by the transfer of his manuscripts, or in the sale of his works, when first published.⁷⁵

Thus, the work of the author had already, even at this early stage of copyright litigation in the United States, been reduced to that of commodity.⁷⁶

Finally, *Wheaton* established conclusively that the rights of authors regarding copyright arise by statute, and not common law.⁷⁷ The Court noted "that Congress, then, by this act [the Copyright Act of 1790], instead

68. *Wheaton*, 33 U.S. (8 Pet.) at 593.

69. *Id.*

70. *Id.*

71. *Id.* at 654.

72. *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837, 846-47.

73. *Id.* at 657.

74. Davidson, *supra* note 12, at 609-10 (noting that after the French Revolution, courts started providing more recognition to the creativity of authors).

75. *Wheaton*, 33 U.S. (8 Pet.) at 657.

76. *Id.* at 658. ("Does not the man who imitates the machine profit as much by the labour of another, as he who imitates or republishes a book? Can there be a difference between the types and press with which one is formed; and the instruments used in the construction of the others?").

77. *Id.* at 657-58.

of sanctioning an existing right, as contended for, created it. This seems to be the clear import of the law, connected with the circumstances under which it was enacted.”⁷⁸ Thus, *Wheaton* established the analytic framework for understanding author rights arising under the copyright laws, and continues to stand for the premise that author rights are ones of a statutory nature. Consequentially, absent a statutory grant of right for moral or other rights, authorial rights are not likely to be found in the common law.⁷⁹

2. *Statutory Modifications to United States Copyright Law*

While the *Millar* decision ultimately did not yield a common law right to perpetual copyright in an author’s work, the United States Congress may have succeeded in circumventing that common law specter via statutory means. Historically, since the Copyright Act of 1790, which granted a copyright similar to that found under the Statute of Anne of a fixed period of twenty-eight years (an initial term of fourteen years, with a renewable copyright of fourteen years), the United States Congress has consistently acted to extend the term of copyright protection granted under statute.⁸⁰ With the Copyright Act of 1831, Congress extended the initial copyright protection term to twenty-eight years, with a fourteen-year renewal, for a total of forty-two years.⁸¹ With the Copyright Act of 1909, Congress again acted to extend the term of copyright protections with an initial term of twenty-eight years, followed by a renewal period of twenty-eight years, for a total of fifty-six years.⁸² In the Copyright Act of 1976, the last major revision to the copyright laws, Congress extended the term of copyright protection (for works published after January 1, 1978) for fifty years beyond the life of the author.⁸³ The final revision to the term protections under statute came with the Copyright Term Extension Act of 1998, which extended copyright protections an additional twenty years, thus extending

78. *Id.* at 661. *Accord* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984).

79. *But see* Rigamonti, *supra* note 11, at 381-93, 410-11 (discussing common law remedies that are similar in nature to moral rights, but noting the uncertainty of their fate to achieve this quasi-moral rights function in the aftermath of *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003)).

80. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124.; *see also* Sue Ann Mota, *Eldred v. Reno – Is the Copyright Term Extension Act Constitutional?*, 12 ALB. L.J. SCI. & TECH. 167, 169 (2002); *Copyright Time: A History of Copyright in the United States*, ASS’N OF RES. LIBRARIES, <http://www.arl.org/pp/ppcopyright/copyresources/copytimeline.shtml> (last visited Oct. 31 2012) (containing an extensive, and brief overview of the major copyright revisions, and cases interpreting copyright law since the Copyright Act of 1790).

81. Copyright Act of 1831, ch. 16, § 1-2 Stat. 436, 436. *See also*, ASS’N OF RES. LIBRARIES, *supra* note 80.

82. The Copyright Act of 1909, ch. 320, § 1-2, 35 Stat 1075, 1080.

83. The Copyright Revision Act of 1976, Pub. L. No. 94-553, § 302, 90 Stat. 2541, 2573.

the protections under the Copyright Act of 1976 for the life of the author with an additional seventy years, and for works of corporate authorship either one hundred-twenty years after creation, or ninety five years after publication.⁸⁴

What remains striking about Congress' intent to protect the rights of authors is its persistent resistance to fulfilling its mandate under the Berne Convention to provide meaningfully for the moral rights of authors.⁸⁵ This approach serves only the interests of those who have powerful incentives to maintain a stranglehold on innovation by commercializing what is readily adaptable for consumption, based on a faulty market-based approach that values product-value over literary and artistic merit, discussed *infra*.⁸⁶

3. *Defining Authorship and Moral Rights*

Mieke Bal and Norman Bryson point out, “[l]ike ‘context,’ ‘authorship’ is an elaborate work of framing, something we elaborately produce rather than something we simply find.”⁸⁷ Thus, authorship, moral rights, and the role of the author in society are inextricably linked. This section discusses these important interrelationships, and the important role of the author in society.

a. Role of Authorship

In his seminal 1969 essay *What is an Author?*, cultural theorist Michel Foucault articulates a theory by which the function of the author is subsumed beneath the larger functions of language that enable the community to operate as a discourse.⁸⁸ Thus, the function of the author after assembling the final literary work is to disseminate it, at which point the author ceases to exist.⁸⁹ Foucault writes,

The author – or what I have called the ‘author-function’ – is undoubtedly only one of the possible specifications of the subject and, considering past historical transformations, it appears that the form, the complexity, and even the existence of this function are

84. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827 (1998).

85. Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 416-21 (2009).

86. Ng, *Author Rights*, supra note 16, at 459-62.

87. Mieke Bal & Norman Bryson, *Semiotics and Art History: A Discussion of Context and Senders*, in THE ART OF ART HISTORY: A CRITICAL ANTHOLOGY 243, 252 (Donald Preziosi ed., 2009).

88. Michel Foucault, *What is an Author?*, in THE ART OF ART HISTORY: A CRITICAL ANTHOLOGY 321, 324 (Donald Preziosi ed., 2009).

89. *Id.*

far from immutable. We can easily imagine a culture where discourse would circulate without any need for an author.⁹⁰

In Foucault's view, the author hardly stands as an iconic figure, absent societal recognition of the author as such.⁹¹ Instead the author's work becomes a series of discourses by which we each communicate with one another in the community.⁹² Such literary theories of understanding authorship have ebbed and flowed in the academy, and much postmodern literary theory seeks to elucidate and capture the essence of authorship and discourse, often through a cultural perspective.⁹³

But for the Framers of the Constitution, authors were individuals, and their work had social significance as well as personal significance. Thus, when one examines the copyright clause of the Federal Constitution, one sees the significance of the functional value of author *as* author, "by securing for limited Times to *Authors and Inventors*."⁹⁴ The Federal Constitution clearly connects the idea of limited, exclusive rights to authors and inventors. Of course, as modern evolution of literary and other creations has shown, such authors and inventors often take the shape of the corporate body, as opposed to a natural person.⁹⁵

Literary writers perform an important societal function, however. They are a source of national pride and a symbol of influence around the world.⁹⁶ And the process by which poets and writers arrive at their literary creations is an arduous task, requiring the author to go into himself and recover from the depths of his psyche the mappings of a novel, poem, or play that examines, mirrors, and questions the contours of society. Indeed, as Coleridge declared, "I see, not feel, how beautiful they are I may not hope from outward forms to win, the Passion & the Life, whose Fountains are within."⁹⁷ The author stands as an individual in relation to the entire

90. *Id.* at 333.

91. *See, e.g.*, JAMES A. MACKIN, COMMUNITY OVER CHAOS: AN ECOLOGICAL PERSPECTIVE ON COMMUNICATION ETHICS 22-23 (1997).

92. *Id.*

93. *Cf.* Elana Gomel, *Oscar Wilde, The Picture of Dorian Gray, and the (Un)Death of the Author*, NARRATIVE, at 74-92 (Jan. 2004) (for a general approach to discussing issues of authorship from a theoretical and postmodern situationalism).

94. U.S. CONST., art. I, § 8, cl. 8 (emphasis added).

95. Paige Gold, *Fair Use and the First Amendment: Corporate Control of Copyright is Stifling Documentary-Making and Thwarting the Aims of the First Amendment*, 15 U. BALT. INTELL. PROP. L.J. 1, 21-23 (2006).

96. KIM C. STURGESS, SHAKESPEARE AND THE AMERICAN NATION 184 (2004).

97. JOHN WORTHEN, THE GANG: COLERIDGE, THE HUTCHINSONS & THE WORDSWORTHS IN 1802, at 153 (2001).

community, and through the creative process is able to distill and unfold the spectrum of society, its errors, failings, pathos, and possibilities.⁹⁸

One can hardly think of England without recognizing the names of Shakespeare, and Chaucer, or of France without thinking of Voltaire or Sartre.⁹⁹ Even in the United States, most individuals are apt to know the legendary figure of Ernest Hemingway as big-game hunter, or his work *THE OLD MAN AND THE SEA*, or Mark Twain's *HUCKLEBERRY FINN*.¹⁰⁰ And the enduring importance of J.D. Salinger's *THE CATCHER IN THE RYE* cannot be overstated.¹⁰¹ The significance authors have to expose readers in a particular community to each other is one of the foundational roles an author serves – they help to explain and create fictions that we can then adapt into our own lives, and ultimately make into our own stories. In short, literature helps us to see one another, despite the inescapability of our own prison-houses of perspective.

b. Development of Moral Rights in Law

Despite the shared relations that the United States and Europe have had since the founding of the Nation, very little of that shared history has translated itself into an acceptance of moral rights in the United States.¹⁰² Moral rights (also known as *droit moral*) essentially recognize that a work of literary art is inseparable from the personality of the author, and thus, the author's fundamental connection in the work cannot be severed by merely transferring the copyrightable interests of their work.¹⁰³ Instead, while the publisher or other buyer of the work buys the right to reproduce the work, the author continues to maintain a connection to the work, recognized by

98. See Norman Holland, *The Power (?) of Literature: A Neuropsychological View*, *NEW LITERARY HISTORY*, Summer 2004, at 395-99 (discussing Coleridge, poetic insight, aesthetics, and reader response to literature).

99. See Donald Morris, *In Search of Lost Time*, *TIME* (Nov. 21, 2007), <http://www.time.com/time/magazine/article/0,9171,1686532,00.html> (discussing the identity of France as bound up in its cultural establishment [including writers], and its subsequent decline in recent time).

100. See, e.g., *Magazine Cover – Ernest Hemingway (Dec. 13, 1954)*, *TIME*, <http://www.time.com/time/covers/0,16641,19541213,00.html> (last visited Nov. 9, 2012); *Picturing Hemingway*, <http://www.npg.si.edu/exh/hemingway/ess-index2.htm> (last visited Oct. 1, 2012); see also Adam Gopnik, *The Man in the White Suit*, *NEW YORKER*, Nov. 29, 2010, at 78.

101. Jonathan Yardley, *J.D. Salinger's Holden Caulfield, Aging Gracelessly*, *WASH. POST*, Oct. 19, 2004, at C01. As well, the significance of *THE CATCHER IN THE RYE* might also be seen in the fact that from 1990-1999 it was the tenth most challenged (banned) book in classrooms. *100 Most Frequently Challenged Books: 1990-1999*, AM. LIBRARY ASS'N, http://www.ala.org/ala/issuesadvocacy/banned/frequentlychallenged/challengedbydecade/1990_1999/index.cfm (last visited Mar. 10, 2011).

102. Davidson, *supra* note 12, at 585-86.

103. *Id.* at 620.

vested moral rights interests.¹⁰⁴ The four traditional categories of moral rights are the rights of attribution, integrity, disclosure, and withdrawal. Specifically, the right of attribution, sometimes called the right of paternity, recognizes the right (or not) of the author to choose to have their name attached to their work.¹⁰⁵ An author's right to reject the gross modification or distortion of their work, even after transferring their copyrightable interests to another, is referred to as the right of integrity.¹⁰⁶ The right of disclosure allows the author to decide when the work is ready to be released to the public.¹⁰⁷ Finally, the right of withdrawal allows an author to decide that the work is no longer representative of the author, and so demand that the work be withdrawn from the commercial marketplace.¹⁰⁸ Despite claims moral rights are already protected under United States law, the United States' resistance to the Berne Convention evidences this deep mistrust and aversion to moral rights.¹⁰⁹

i. History of the Berne Convention

The Berne Convention, initially completed in 1886, is a multilateral treaty that is a major success in internationalizing and unifying protections for works of literary and artistic expression. The underlying purpose of the Berne Convention is to “demand that each member state accord to nationals of other members the same level of copyright protection as it accords its own nationals.”¹¹⁰ Thus, an author who publishes a work in France, and who subsequently transfers certain rights to a publisher in the United States, would presumably, absent an agreement to the contrary, retain their moral rights in that literary work, despite the United States' non-adherence to moral rights as specified, pursuant to the Berne Convention. The Berne Convention places authors at the center of its underlying purpose and protections, indicating “[t]he countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.”¹¹¹ The

104. Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1091-92 (2003).

105. Rigamonti, *supra* note 11, at 363-64.

106. *Id.* at 364.

107. *Id.* at 362.

108. *Id.* at 362-63.

109. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853; see also Bird, *supra* note 85, at 408-09. As of 2013, there were 166 signatory states to the Berne Convention. See *Contracting Parties*, WORLD INTELL. PROP. ORG. http://wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 (last visited Jan. 5, 2013).

110. MICHAEL A. EPSTEIN, EPSTEIN ON INTELLECTUAL PROPERTY § 4.03 (5th ed. 2006).

111. Berne Convention, *supra* note 18, pmbl.

history leading up to the Convention makes this focus of the treaty even more understandable. Indeed, it is unsurprising that the Berne Convention's central motivation is the protection of author rights, as the initial meetings which led to the actual negotiations of the Convention were led by none other than Victor Hugo, who presided as president of the *l'Association littéraire et artistique internationale*.¹¹²

For over a hundred years the United States refused to accede to the Berne Convention. One of the major issues on which the United States could not agree was the acceptance of moral rights, as embodied in Article 6bis of the Berne Convention.¹¹³ Indeed, as Amelia Vetrone notes,

In 1886, at the first signing of the Berne Treaty, the U.S. representative was perfectly honest about the reasons the U.S. was not signing the treaty. He issued a general declaration stating that, while the U.S. agreed in principal with the idea of international copyright protection, it saw immense obstacles to achieving it, particularly the threat posed to American manufacturing interests involved in the production of copyright works.¹¹⁴

This is because the United States' interests at the time in pirating works of British authors, among others, was too profitable to relinquish.¹¹⁵ Significantly, new technologies in the earlier part of the twentieth century made it increasingly difficult to agree on revisions of copyright law, including those relating to the Berne Convention.¹¹⁶ In 1988, not being a member of the Berne Convention made it increasingly difficult for the United States to protect its global economic interests, especially with the advent of videocassette piracy.¹¹⁷ In an effort to protect the United States against global piracy of its creative works, it acceded to the Berne Convention.¹¹⁸ Limiting the application of the treaty provisions, the United States stipulated that its copyright laws and the common law sufficiently

112. AMELIA VETRONE, *THE LEGAL AND MORAL RIGHTS OF ALL ARTISTS* 21 (2003); see also ARNOLD P. LUTZKER, *CONTENT RIGHTS FOR CREATIVE PROFESSIONALS: COPYRIGHTS AND TRADEMARKS IN A DIGITAL AGE* 158 (2d ed. 2002) ("The Berne Convention was inspired by Victor Hugo and the French intellectuals of the mid-19th century, who believed the individual author was being denied fair economic return on the fruits of his or her creativity.").

113. LUTZKER, *supra* note 112, at 160.

114. VETRONE, *supra* note 112, at 49.

115. *Id.* at 49-50. ("As it turned out, the United States was the most prolific copyright pirate in the world. It not only refused to enact any laws to protect foreign authors, but it actually appeared to encourage piracy. It seems that for one hundred years after the enactment of the first copyright statute in this country, American publishers were printing and selling copies of books by foreign authors, particularly British authors, without paying any royalties to them.").

116. *Id.* at 49-51.

117. *Id.* at 52.

118. EPSTEIN, *supra* note 110, § 4.03.

protected the interests identified in Article 6bis of the Berne Convention, such that it need not be bound by that provision.¹¹⁹ Moreover, because it was classified as a non-self-executing treaty, the Berne Convention needed to be implemented by act of Congress in order to become enforceable law.¹²⁰

The Berne Convention Implementation Act of 1988 specifically disavows Article 6bis of the Berne Convention.¹²¹ Section 3(b) of the Berne Convention Implementation Act of 1988 states:

(b) CERTAIN RIGHTS NOT AFFECTED. – The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law – (1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author’s honor or reputation.¹²²

Thus, the effect of section 3(b) of the Berne Convention Implementation Act of 1988 effectively froze the status quo of author rights in the United States.

ii. *The Promise and Reality of Moral Rights in the United States*

Moral rights, absent narrow provisions in state legislation and Visual Artist Rights Act [VARA], are not recognized in the United States.¹²³ While commentators and the United States Congress sought to distance itself from the idea that it was not fully complying with Berne when it acceded to the treaty, these promises have, arguably, proved illusory. If the

119. See Edward J. Damich, *Moral Rights in the United States and Article 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM. VLA-J.L. & ARTS 655, 655 (1985) (noting that the United States’ compliance with article 6bis of the Berne Convention was likely due more to non-compliance by other Berne signatories, than United States common law or other statutory law satisfying its requirements); see also VETRONE, *supra* note 112, at 51 (noting the powerful corporate media interests who lobbied the United States Congress against adopting Article 6bis of the Berne Convention).

120. Berne Implementation Act of 1988, Pub. L. No. 100-568, § 2, 102 Stat. 2853, 2853; JOHN MERRYMAN ET AL., *LAW, ETHICS, AND THE VISUAL ARTS* 468 (5th ed. 2007).

121. Berne Implementation Act of 1988, § 3(b)(1)-(2).

122. *Id.*

123. See generally Visual Artist Rights Act, 17 U.S.C. § 106A (2006). The scope of protection afforded under VARA is limited, and only applies to visual works of art. *Id.* However, it does represent a limited attempt to introduce Federally protected moral rights for unique, artistic creations.

United States was, in fact, in compliance with the Berne Convention, and truly believed its laws compatible with the requirements under Article 6bis of the Berne Convention, then why take such concerted effort to distance itself from the language and effects of that provision of the treaty? The most logical answer is that such rights are simply not yet fully compatible with the way business is done in the United States. Instead, the United States' system of copyright commodifies the author's work, such that when authors transfer their copyright in their work, any subsequent rights they might have concerning that work take second-class status to the economic primacy of exploitation of their creative works.¹²⁴

However, the United States relentlessly suggested in its ratification that it was in compliance with the Berne Convention by relying primarily on existing copyright laws (then the Copyright Law of 1976) and the common law of the United States.

However, this specious suggestion that the common law of the United States is sufficient to protect moral rights undermines the Berne Convention, and offers an illusory salve to authors seeking to effectuate their moral rights. Specifically, the Berne Convention, as an international treaty, executed under the Constitution and laws of the United States, and by virtue of the Supremacy Clause of the Constitution, is the law of every state of the United States.¹²⁵ However, the common law of the United States is particular to every state in the Union, and thus subject to the whims of that particular forum state's interpretation of its own laws as they apply to the Berne Convention.¹²⁶ Such an understanding of common law and copyright was early established in *Wheaton*, which forcefully declared that there was no federal common law, especially as it pertained to copyright.¹²⁷ Thus, the United States' approach to the Berne Convention is arguably one that does great disservice to that treaty's desire for uniformity in the protection of author rights.¹²⁸ By allowing piecemeal development under the common law, with the various predilections of various forums to approach the Berne Convention and the United States' obligations under them as they pertain (or don't) to moral rights, seems a particularly

124. See Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 368-70 (1993) [hereinafter Netanel, *Copyright Alienability Restrictions*].

125. U.S. CONST., art. 6, § 2.

126. See, e.g., William P. Johnson, *Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent*, 59 BUFF. L. REV. 213, 215 (2011) (discussing the imprecise analysis by state and federal courts of the binding, by virtue of the Federal Constitution's Supremacy Clause, United Nations Convention on Contracts for the International Sale of Goods ("CISG")).

127. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 654-55 (1834).

128. Berne Convention, *supra* note 18, pmbl.

haphazard way to enforce an international treaty, with uniformity at its heart.

The VARA, enacted in 1990, explicitly *does* establish moral rights in extraordinarily limited circumstances.¹²⁹ Under VARA, *visual* authors only have (and, indeed can only claim such rights during their lifetimes), the right of attribution and integrity, and not the other traditional rights of disclosure and withdrawal.¹³⁰ This Act suggests that moral rights are not adequately guaranteed under the common law, nor under the provisions of United States copyright law. Further, the limited amount of authors to which this act applies, including only those who create a visual work produced in small quantities, serves as a considerable statement of the continuing vitality of resistance to moral rights on a larger scale, and ultimately a frustration of the Berne Convention.¹³¹ Even under the substantial proscriptions under VARA, and its concomitant protections for visual authors, there have been significant limitations imposed.¹³²

Moral rights stand as separate rights from those arising under traditional Anglo-American views of copyright.¹³³ This is why looking to doctrines of tort and contract law, while potentially powerful devices to cure breaches of an author's agreement with their publisher, or to protect against personal defamation or other significant violations of the author's work, are arguably insufficient compared to the protections served by moral rights. This is particularly evident when Anglo-American views of copyright are compared to the moral rights authors are entitled to under the Berne Convention, or in foreign jurisdictions such as France and Germany.¹³⁴ In the final analysis, the approach that the United States has

129. 17 U.S.C. § 106A (2006). *See also* EPSTEIN, *supra* note 110, § 4.03 (“Since [the enactment of Berne Convention], the U.S. Congress has enacted explicit “moral rights” protections for a limited class of visual artists. However artists not covered by this statute, including creators of literary, musical, and audio visual works, must continue to look to other sources of U.S. law to protect these interests. The language of The Berne Convention Implementation Act explicitly states that membership in the Convention is not evidence of a recognition by the U.S. of a higher degree of moral rights protection than that already afforded by the Copyright Act.”).

130. *Id.*; *see* Rigamonti, *supra* note 11, at 356.

131. *See* Roberta Rosenthal Kwall, “*Author-Stories: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*,” 75 S. CAL. L. REV. 1, 26-32 (2001).

132. *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 143 (1st Cir. 2006) (holding that VARA did not apply to site-specific work of artist in park, thus allowing removal of a sculpture); *see also* Daniel Grant, *When Creator and Owner Clash*, WALL ST. J. (Aug. 31, 2010), <http://online.wsj.com/article/SB10001424052748703447004575449793518169052.html?KEYWORD=ascalon>.

133. *See* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 24-26 (1992) [hereinafter Netanel, *United States and Continental Copyright Law*]; *see also*, Ng, *The Social Contract and Authorship*, *supra* note 13, at 463-65.

134. Netanel, *United States and Continental Copyright Law*, *supra* note 133, at 23-48.

taken reflecting both its historic and contemporary unwillingness to adopt robust provisions pertaining to moral rights, and its enactment of the narrow VARA protections for a limited group of artists, does little more than to exemplify an approach that demeans the culturally important position that creators of artistic works of literary merit ought to occupy in the collective intellectual and cultural wealth of the nation, in favor of one which values at its core commercialization.

III. ECONOMIC, MORAL, AND PUBLIC INTERESTS, AND THE ROLE OF THE LITERARY CONTRACT

An astonishing number of new books and reprints of previously published books are published in the United States each year.¹³⁵ Accordingly, as literary contracts are then negotiated in such a large capacity in the United States, this section addresses the need to consider various rights to which authors are entitled, relevant case law, and the further role of literary contracts.

A. ECONOMICS, MORAL RIGHTS, AND THE PUBLIC INTEREST

The debate in this country turns on the interests between economic, moral, and public rights. Typically this debate is framed in terms of John Locke's theory of labor and ownership, a form of natural rights theory, for which a more modern understanding is that of an author possessing a series of rights under the collective umbrella of the work of literature itself.¹³⁶ Locke argued that whenever an individual puts his own creative forces into nature and produces something, then the rights of ownership in the thing produced naturally accrue to him as a result of those independent labors.¹³⁷ This view does not conflict with the theory arising under modern economics which puts the locus of interest on the contractual arrangement between a seller of goods (the work of literature) and a buyer of those goods (the distributor). It is only natural that such a transfer of ownership, or the rights to use those goods, necessarily entails a right of use that might preclude the original seller (the author) of doing what he would potentially have liked to have done with the thing sold, subsequent to the transaction. However,

135. See, e.g., *Bowker-Publishing Market Shows Steady Title Growth in 2011 Fueled Largely by Self-Publishing Sector*, BOWKER (June 5, 2012), http://www.bowker.com/en-US/aboutus/press_room/2012/pr_06052012.shtml. Even excluding the high amount of self-publishing reported, the number of literary works published is amazingly high. Particularly given the declining levels of readership in this digital age). But see Caleb Crain, *Twilight of the Books*, NEW YORKER (Dec. 24, 2007), http://www.newyorker.com/arts/critics/atlarge/2007/12/24/071224crat_atlarge_crain.

136. See Ng, *The Social Contract and Authorship*, *supra* note 13, at 459-61.

137. *Id.* at 459.

nothing thus far stated regarding these transactions is in direct conflict with moral rights, unless the ultimate buyer of the work wishes to use it in a way that is deleterious to the author's reputation, or the integrity of the work itself.

All of the aforementioned moral rights, embody traditional moral rights: (1) the author of a work has an inseparable interest, and absolute right to have their name attached (or not) to their personal creation; and (2) the work itself has some inviolate attribute that no one, except the author, should be able to manipulate. In doing either of these things, the intrinsic (though not necessarily commercial) value of the work is (potentially) destroyed, or irredeemably distorted, and potentially the author's ability to claim the work as their own is diminished or precluded, because the author can no longer truly take an authentic sense of ownership in the work.¹³⁸ Of course these rights could potentially be seen as injurious to economic returns, because under a moral rights theory regime the author retains a vested interest in the work that could infringe upon the distributor's ability to use the work in a particular way that it would like, but one for which the author might have a valid claim (under a moral rights regime) to block through injunctive relief, or to prevail in a cause for damages. This is not necessarily a negative thing, even though we are so often accustomed to seeing issues through an economically oriented paradigm, and so often recognize short-term values as more substantial than long-term ones.¹³⁹

The long-term value in having works of art that have their integrity, and attribution of the author intact, are manifold. They ensure that the work of the artistic creator whose creation is to be distributed into the commons of knowledge is one that meets with the author's expectations, and that the work is as the author intended it. That is not to say that works could not be improved once they enter the stream of commerce, but the value and primacy of intellectual products of the nation's artists and writers has, in the long-term, greater value than that which is motivated by improvement for short-term commercial gains.¹⁴⁰

No other author embodies this approach better than William Shakespeare. He is well known around the world, his plays are consistently (and often) performed, edition after edition of his work continues to appear, and he is deceased, thus unable to enjoy the economic or public remunerations from his remarkable work, especially since all of his creative

138. *Id.* at 486-88 (discussing "authentic authorship"); see also Ng, *Authors and Readers*, *supra* note 30, at 400-03.

139. *Id.* at 415.

140. *Cf.* Ng, *The Social Contract and Authorship*, *supra* note 13, at 493-94 (noting potential dangers when authors create without an authentic or ethical end).

works are in the public domain. How many careers in theater, cinema, academia, and the infinite series of subsidiary industries his works have created is unknown, but the integrity of his works is one that continues to be fiercely protected by scholars devoted to his life and career.¹⁴¹ He is as much a national treasure of Great Britain, and a symbol of the height of intellectual achievement, as he is an extraordinary addition to the Western canon of English literature.¹⁴² Yet, in Shakespeare's own lifetime he seems to have cared little about the editions that were churned out of his works, much to the disgruntlement of scholars who try to piece together what *is* Shakespeare, from what *is not*.¹⁴³ And while we have no knowledge of what Shakespeare's approach would have been to moral rights, the long-term value that has accrued over the centuries concerning his work is that they have far more social, aesthetic, and commercial worth intact in their integrity, and attributed to him, than if they were just passing works of literature that had been relentlessly distorted for profit, without an author. Commercialization, in the short-term, is by its nature not designed to work for the benefit of the long-term values of the community, or the intrinsic literary merit of a work of art.¹⁴⁴

The Framers recognized the importance of these long-term interests of society over the short-term value of commercial interests when they drafted

141. A more contemporary example of this rigorous debate occurred with a claim by scholar Donald Foster (known for his use of computer analysis in ascertaining authorship), of the discovery of a new poem, that he attributed to Shakespeare. See William S. Niederkorn, *A Scholar Recants on His 'Shakespeare' Discovery*, N.Y. TIMES (June 20, 2002), <http://query.nytimes.com/gst/fullpage.html?res=9903E5DD143FF933A15755C0A9649C8B63>.

142. Stephen Greenblatt, one of the foremost literary scholars of our era suggests in his biography of Shakespeare, *WILL AND THE WORLD: HOW SHAKESPEARE BECAME SHAKESPEARE* 12 (2005) that, "This is a book, then, about an amazing success story that has resisted explanation: it aims to discover the actual person who wrote the most important body of imaginative literature of the last thousand years." And Shakespeare's contemporary rival, the important English poet Ben Jonson, wrote in a prefatory poem to the First Folio that, "He was not of an age, but for all time!"

143. Debates center not only on *what* works have actually been authored, or which have not, but also *who* ought to be ascribed authorship to the works that we typically attribute to Shakespeare as Shakespeare. See, e.g. Robert McCrum, *Review: Shakespeare Revealed*, GUARDIAN (Apr. 22, 2007), <http://www.guardian.co.uk/books/2007/apr/22/classics.biography>. See generally *Printing Shakespeare*, BRITISH LIBRARIES, <http://www.bl.uk/treasures/shakespeare/printingshakes.html> (last visited Mar. 10, 2011); BRIAN VICKERS, *COUNTERFEITING SHAKESPEARE: EVIDENCE, AUTHORSHIP, AND JOHN FORD'S FUNERALL ELEGY* (2002); see also Jess Bravin, *Justice Stevens Renders an Opinion on Who Wrote Shakespeare's Plays*, WALL ST. J. (Apr. 18, 2009), <http://online.wsj.com/article/SB123998633934729551.html>.

144. Netanel, *Copyright Alienability Restrictions*, *supra* note 124, at 441. "Schopenhauer believed that, '[w]riting for money and reservation of copyright are, at bottom, the ruin of literature. No one writes anything worth writing, unless he writes entirely for the sake of his subject.'" *Id.* (quoting Arthur Schopenhauer, *On Authorship*, in *ESSAYS* 13 (T. Bailey Saunders trans., 1951)).

the Federal Constitution's copyright clause.¹⁴⁵ Following in the formidable footsteps of their British counterparts, they sought to provide for limited terms of protection for original authorial creations, like works of literary art.¹⁴⁶ Those protections walked the fine line between valuing the individual's right to economic exploitation of the fruits of his intellectual labor, while acknowledging the fundamental and overriding interest the public has to advancing – in effect – the wealth of the nation.¹⁴⁷ In assessing these three interests: economic, moral rights, and the public interest in knowledge, the Framers made an implicit recognition that knowledge never (or at least should never) halt at a particular place, never to develop or grow again, but rather that each contribution by each author was a further step in the overall process to civilization's growth and development.¹⁴⁸ However, this process has arguably been stunted by the relentless commercialization of the literary marketplace at the expense of works of literary art.¹⁴⁹ And it has done so at the expense of author's moral rights, which seems untenable, given the larger societal interests that the community has in the collective wealth of intellectual achievements and creations of its authors.

B. FORECLOSING THE DEBATE IN THE UNITED STATES: *DASTAR*,
ELDRED, AND *GOLAN*

In 2003, the United States Supreme Court laid the foundation for future moral rights litigation involving authors and their creative works. In three distinct opinions, the court shaped the current role of literary contracts. The following text discusses the background and effect of those decisions.

145. Davidson, *supra* note 12, at 602-03. “When the Founding Fathers drafted the Constitution, their purpose in including the Copyright clause was to implement, as the British had, a ‘public benefit rationale for copyright protection.’” (quoting Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring Public Interest*, 44 SANTA CLARA L. REV. 365, 423 (2004)).

146. *Id.*

147. Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1315-16 (2003).

148. *Cf.* Sony Corp. of Am. v. Universal City Studios, Inc. 464 U.S. 417, 429 n.10 (1984) (“In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.” (citations omitted)).

149. Natalie C. Suhl, Note, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203, 1214-15 (2002).

1. Dastar – *Closing the Door to Moral Rights Claims*

The issue of moral rights, copyright, and length of copyright protection terms are inextricably intertwined. Each represents aspects of the economic interests of the author and distributor, the moral interests of the author, and the public's interest in the protection of works, chiefly, though not exclusively as: economic (author and distributor), moral (author), and length of protection (public). Accordingly, some commentators have suggested that while moral rights are not explicitly recognized as a cause of action under United States law, certain aspects of the common law, or other statutes might be used to prevail in a way that provides a cause of action similar to that of moral rights.¹⁵⁰ Two important moral rights – attribution and integrity – attained a kind of quasi-enforceable status in the United States, under the Lanham Act.¹⁵¹ The Lanham Act protects consumers against false or misleading advertising, and also includes protections against trademark infringement, and trademark dilution.¹⁵² The provisions for which authors seeking a cause of action for attribution and integrity were invoked under Section 43(a) of the Lanham Act.¹⁵³

As Natalie C. Suhl notes, these provisions of the Lanham Act had been invoked because,

Moral Rights protection is limited in the United States, where the only viable course of action for non-visual authors is through the Lanham Act. Regarding both the Right of Attribution and the Right of Integrity, the Lanham Act provides only limited protection. . . . Thus, authors garner protection only where overt mutilations occur to the extent that the character of the work is changed so as to present a false designation of origin. Mutilation

150. See generally Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 601, 618-32 (2001).

151. Lanham Act, 15 U.S.C. §§ 1051-1141n (2006).

152. *Id.*

153. 15 U.S.C. § 1125(a) (“(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which – (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”).

of a work, therefore, which does not confuse the public's view of its origin, would not be actionable under the Lanham Act.¹⁵⁴

Thus, under these provisions of the Lanham Act, works which were distorted to a point which might cause deception, or which had purported a source of false origin might run afoul of the Lanham Act and subsequently achieve the fulfillment of quasi-moral rights enforcement. Such moral rights were otherwise almost elusively evaded by the United States Congress despite its accession to the Berne Convention.

The Supreme Court in *Dastar Corp. v. Twentieth Century Fox Film Corp.*,¹⁵⁵ however, effectively ended the use of the Lanham Act to achieve this purpose, and in the process significantly closed the door to other moral rights claims under other bodies of national law.¹⁵⁶ In *Dastar*, the Supreme Court faced the question of “whether § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), prevents the unaccredited copying of a work.”¹⁵⁷ The facts in *Dastar* surrounded the use of a television series, “Crusade in Europe,” that had been based on a book by General Dwight D. Eisenhower.¹⁵⁸ Twentieth Century Fox Film Corporation (“Fox”) had been granted exclusive television rights to create the series “Crusade in Europe,” based upon Eisenhower’s books.¹⁵⁹ It in turn contracted with Time, Inc. to produce the series, and Time in turn assigned its copyright to the series it produced to Fox.¹⁶⁰ The filmed series included footage created by members of the United States military forces, the British Ministry of Information, and other cameramen.¹⁶¹ While the publisher Doubleday, of General Eisenhower’s book, *CRUSADE IN EUROPE*, renewed its copyright prior to its expiration, Fox did not renew their copyright to the television series “Crusade in Europe.”¹⁶² Thus, the copyright held by Fox to the television series lapsed, and entered the public domain in 1977.¹⁶³ “In 1988, Fox reacquired the television rights in General Eisenhower’s book, including the exclusive right to distribute the Crusade television series on video and to sublicense others to do so.”¹⁶⁴ In 1995 “Dastar released a video set entitled

154. Suhl, *supra* note 149, at 1203.

155. 539 U.S. 23 (2003).

156. Rigamonti, *supra* note 11, at 409-12 (discussing the effect that *Dastar* has had on other potential claims for moral rights, under other bodies of law).

157. *Dastar Corp.*, 539 U.S. at 25.

158. *Id.* at 25-26.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 26.

163. *Id.*

164. *Id.*

World War II Campaigns in Europe.”¹⁶⁵ To make “World War II Campaigns in Europe,” Dastar purchased tapes of the original version of the “Crusade in Europe” television series, copied them, and subsequently edited them.¹⁶⁶ As part of this process, they made the series significantly shorter than the original, and inserted a variety of modest changes, including voice over narrations, and a new credits page.¹⁶⁷

Fox subsequently brought an action asserting that Dastar’s sale of its own video series (based substantially on the original “Crusade in Europe” series), had infringed Doubleday’s copyright in General Eisenhower’s book, and thus, subsequently, Fox’s exclusive television rights, which flowed from the book, without proper attribution, thus constituted “reverse passing off,” actionable under Section 43(a) of the Lanham Act.¹⁶⁸ The District Court found for Fox on all of the counts of its allegations, and judgment was subsequently affirmed by the Ninth Circuit Court of Appeals, who in their analysis of the issue concluded, “Dastar copied substantially the entire *Crusade in Europe* series created by Twentieth Century Fox, labeled the resulting product with a different name and marked it *without attribution* to Fox [, and] therefore committed a ‘bodily appropriation’ of Fox’s series.”¹⁶⁹

Dastar then was essentially a moral rights claim, masquerading as a trademark infringement suit under the Lanham Act. And the Supreme Court correctly identified it as such in a unanimous opinion.¹⁷⁰ The opinion was written by Justice Antonin Scalia, reversing the judgment of the Ninth Circuit, concluding:

[A]s used in the Lanham Act, the phrase ‘origin of goods’ is in our view incapable of connoting the person or entity that originated the ideas or communications that ‘goods’ embody or contain. Such an extension would not only stretch the text, but it would be out of accord with the history and purpose of the Lanham Act and inconsistent with precedent.¹⁷¹

What the Court did was to make clear to prospective litigants that claims and remedy for attribution are to be found in copyright law, and not under the auspices of the Lanham Act’s trademark protections.¹⁷² Moreover, the

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 27.

169. *Id.* at 27-28 (emphasis added).

170. *Id.* at 38 (noting that Justice Breyer did not take part in the consideration of the case).

171. *Id.* at 32.

172. *Id.* at 32-35; *see also* Rigamonti, *supra* note 11, at 410.

Court noted that “[t]he rights of a patentee or copyright holder are part of a ‘carefully crafted bargain,’ . . . under which, once the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution.”¹⁷³ Finally, the Court effectively closed the door to any moral rights claims, attempting to establish themselves under a quasi-common law rights claim. In discussing Fox’s claim under the Lanham Act, Scalia made mention of VARA, writing,

When Congress has wished to create such an addition to the law of copyright, it has done so with much more specificity than the Lanham Act’s ambiguous use of ‘origin.’ The Visual Artists Rights Act of 1990 . . . [provides for an] express right of attribution [and] is carefully limited and focused . . . Recognizing in § 43(a) a cause of action for misrepresentation of authorship of noncopyrighted works (visual or otherwise) would render these limitations superfluous. A statutory interpretation that renders another statute superfluous is of course to be avoided.¹⁷⁴

Scalia’s reference to VARA suggested that absent express Congressional creation of statutory rights for copyright (which it presumably would do so expressly and statutorily), the courts are not the venue for the establishment of these rights. This interpretation necessarily suggests that Congress’ assurances that the common law and other laws of the United States are sufficient to meet the requirements of the Berne Convention will be hollow, in that courts will now look closely to see if the rights being asserted are of a moral nature, and thus excluded (absent the narrow provisions under VARA) from compensability, if pursued as a claim arising under copyright.¹⁷⁵ Of course such a result is not entirely surprising, given the declaration by the Court in *Wheaton* that rights of holders arising under copyright law are necessarily statutory, and thus within the purview of Congress, and not the common law.¹⁷⁶ All of this reinforces the underlying recognition that allusions to other law and common law for the protection of specific rights, in this case authorial moral rights, is no substitution for statutory law intended to effectuate that purpose.

173. *Dastar Corp.*, 539 U.S. at 33-35 (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1989)).

174. *Id.* at 34-35

175. See Rigamonti, *supra* note 11, at 410.

176. See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 654-55 (1834).

2. Eldred – *An Erosion of the Public Interest*

The case to consider in tandem with *Dastar* is *Eldred v. Ashcroft*,¹⁷⁷ which involved a challenge to the Copyright Term Extension Act of 1998 (“CTEA”), on grounds that it exceeded Congress’s authority under the copyright clause of the Federal Constitution and also violated the First Amendment of the Federal Constitution.¹⁷⁸ The CTEA granted extensions on copyright terms in the United States by twenty years.¹⁷⁹ Thus, it extended works copyrighted by natural authors from the life of the author, and fifty years, to the life of the author and seventy years.¹⁸⁰ Works of corporate authorship were also extended to either one hundred and twenty years after their creation or ninety-five years after their publication.¹⁸¹ The bill was subsequently passed by a voice vote in both houses of Congress, and signed into law by then President William Clinton.¹⁸² In *Eldred*, the petitioners argued, *inter alia*, “the CTEA’s extension of existing copyrights does not ‘promote the Progress of Science’ as contemplated by the preambular language of the Copyright Clause. . . . they maintain that the preambular language identifies the sole end to which Congress may legislate.”¹⁸³ Justice Ginsburg, writing for herself and six other Justices rejected the Petitioner’s argument claiming the CTEA was unconstitutional.¹⁸⁴ Instead they found such authority to determine copyright terms and limits vests solely in Congress. “As petitioners point out, we have described the Copyright Clause as ‘both a grant of power and a limitation[.]’”¹⁸⁵ Thus, Ginsburg’s reasoning in her analysis of whether Congress had exceeded its authority under the copyright clause declared that, “We have also stressed, however, that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”¹⁸⁶ However, what is most troubling about Ginsburg’s analysis

177. 537 U.S. 186 (2003). While the petitioners in *Eldred* asserted other theories (e.g., violations of the First amendment) that Congress had exceeded its authority under the copyright clause in extending copyrights under the Copyright Term Extension Act, the authority of Congress to extend the term is the only issue that will be addressed here.

178. *Eldred*, 537 U.S. at 193-94.

179. See 1 LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 1:9 (3d ed. 2010).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Eldred v. Ashcroft*, 537 U.S. 186, 211-12 (2003). (“The CTEA’s extension of existing copyrights categorically fails to “promote the Progress of Science,” petitioners argue, because it does not stimulate the creation of new works but merely adds value to works already created”); see also Lawrence A. Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001).

184. *Eldred*, 537 U.S. at 221-22.

185. *Id.* at 212 (quoting *Grainham v. John Deere Co. of Kansas City* 383 U.S. 1, 5 (1966)).

186. *Id.*

is her repeated rejection of the overarching public interests that the copyright clause is intended to preserve, with its explicit language concerning the limited term of copyright protection.¹⁸⁷ In responding to Justice John Paul Stevens and Justice Stephen Breyer who each dissented separately in *Eldred*, Ginsburg states,

JUSTICE STEVENS' characterization of reward to the author as a 'secondary consideration' of copyright law . . . understates the relationship between such rewards and the 'Progress of Science.' As we have explained 'the economic philosophy behind the [Copyright] [C]ause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.'¹⁸⁸

Thus, Ginsburg concludes in *Eldred*, "as we read the Framers' instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause."¹⁸⁹

While the decision in *Eldred* causes concern that works might, depending on Congressional judgment, never pass into the public domain for the good of society, what is especially striking is the vehement language and dangerously anti-public interest analysis Ginsburg employed to respond to Stevens and Breyer's concerns.¹⁹⁰ One wonders, based upon the language employed by Ginsburg extolling the substantial deference Congress enjoys in areas of copyright law, whether any lengthy grant of copyright protection would run afoul of the 'limited times' requirement of the Federal Constitution.¹⁹¹ However, *Eldred* has received vast praise and criticism.¹⁹² For example, Representative Mary Bono, a proponent of the CTEA, spoke out regarding her support for the bill on the floor of the House of Representatives, in the United States Congress. Representative Bono stated, "Sonny [Bono] wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us."¹⁹³ One wonders whether

187. *Id.*

188. *Id.* at 212 n.18.

189. *Id.* at 222.

190. *Id.* at 221-22.

191. *Id.* at 241 (Stevens, J., dissenting) ("The *express grant of a perpetual copyright* would unquestionably violate the textual requirement that the authors' exclusive rights be only "for limited times" (emphasis added)).

192. *Id.* at 207 n.15.

193. 144 CONG. REC. H9952 (1998) (statement of Rep. Bono); *see also* Lessig, *supra* note 183, 1065-66.

the Court that decided *Eldred* wouldn't have lent a sympathetic ear to the concerns of Representative Bono, especially in light of their apparent adoption of the ideology that "copyright law *celebrates* the profit motive."¹⁹⁴

3. *Golan v. Holder – A Final Erosion of the Rights of the Public*

The most recent development in the United States Supreme Court's refusal to acknowledge the primacy of the public domain, of writers, and the necessity of author's moral rights, is the case of *Golan v. Holder*.¹⁹⁵ The outcome of the case was 7-2, with Justice Ruth Bader Ginsburg once again being assigned an important copyright clause decision, and Justice Stephen Breyer writing a dissent, in which Justice Samuel Alito concurred.¹⁹⁶ The case merits discussion in this article because it forms, along with *Dastar* and *Eldred* an important trilogy of cases in which the Supreme Court has repeatedly indicated that any statutory rights, for writers (including, *inter alia*, moral rights) must be statutory, and significantly, that the rights and interests of the public to the shared national wealth that writers and artists contribute to the fabric of society is also statutory, which must be guaranteed by Congress and not through constitutional protections as interpreted by the Court, arguably rendering the Court's duty to ensure the protections inherent in the copyright clause for both author and public a dead letter.¹⁹⁷

At issue in *Golan* were restored copyrights granted to foreign works that were currently in the public domain. In order for, as articulated in the case, the United States to be in full compliance with the Berne Convention, it was necessary for Congress to enact Section 514 of the Uruguay Round Agreements Act,

which grants copyright protection to preexisting works of Berne member countries, protected in their country of origin, but lacking protection in the United States . . . As a consequence of the barriers to U.S. copyright protection prior to the enactment of § 514, foreign works 'restored' to protection by the measure had entered the public domain in this country.¹⁹⁸

194. *Eldred*, 537 U.S. at 213.

195. 132 S. Ct. 873 (2012).

196. *Golan*, 132 S. Ct. at 873.

197. *Id.* at 888. "[W]e explained, the Clause 'empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause.'" *Id.* (emphasis added).

198. *Id.* at 878.

As this Article has repeatedly stressed, however, the United States has not achieved full Berne implementation due to its resistance to the acceptance – through statutory means – of author’s moral rights. Equally significant with *Golan*, however, is the Supreme Court’s dismissal of the public’s interest to works that were in the public domain, and which had been freely enjoyed by the members of the public. With the passage of Section 514, works that had previously been enjoyed freely (without the requisite of a royalty payment), would revert to a state of copyright protection through statutory restoration of their protected status, thus requiring schools, orchestras, charitable groups, among others, to be required to pay up, or not perform the work that they had been able to freely do prior to the law’s enactment.¹⁹⁹ The Court notes that Congress in passing section 514, included cushions for users of works previously freely available. However, this does not change the fact that once the period of applicability for those cushions ends, so too does the ability to freely use and disseminate the now-copyrighted work.²⁰⁰

In challenging Congress’ authority to enact section 514, the Petitioners in *Golan* argued that Congress had exceeded both its authority under the copyright clause, unilaterally deciding to remove works that had been enjoyed in the public domain and restoring them to copyrighted status, and, moreover, that Congress had violated the First Amendment.²⁰¹ The argument implicating the First Amendment is a fascinating approach to dealing with cases in which Congress has excessively guaranteed profit over the rights of the public through, *inter alia*, enormous terms of copyright protection, and restored a significant number of works to protection from their prior resting place in the public domain.²⁰² This Article, however, addresses only the argument petitioners advanced in arguing Congress exceeded its authority under the copyright clause.

The Court’s decision summarily deals with the copyright clause argument and suggests that the interests advanced by the Petitioner mirrored those addressed in *Eldred*.²⁰³ Once again, utilizing a troubled form of logic, the Court dismissed the Petitioners’ claim that there was anything “unlimited” about the duration or restoration of copyright

199. *Id.* at 893 (noting that works that could previously be used for free must now, after the passage of section 514, be obtained in the marketplace like any other copyrighted work).

200. *Id.* at 882-83.

201. *Id.* at 883.

202. *Cf. id.* at 904 (Breyer, J., dissenting) (“Apparently there are no precise figures about the number of works the Act affects, but in 1996 the then-Register of Copyrights, Marybeth Peters, thought that they ‘probably number in the millions.’”).

203. *Id.* at 884-85 (majority opinion).

protection afforded by Congress through its enactment of Section 514.²⁰⁴ However, it is not at all certain that the question presented by *Golan* can be dispositive in light of *Eldred*. For one, *Eldred* dealt with a lengthening of copyright terms, thus raising the question that whether such extraordinary grants of copyright term protections by Congress were such that a work could ever lapse into the public domain, such that Congress would violate the language of limitation – “limited Times” – expressly stated in the Federal Constitution.

In *Golan*, however, the logic and issue shifts – because the works at issue in *Golan* were *already* within the public domain, thus necessitating Congress resurrecting these foreign works from free use and placing them within the protection of U.S. copyright law. It is questionable whether any duration of time afforded by Congress to protect a copyrighted work would ever run afoul of the Court’s rationale. However, as seen in *Golan*, if Congress can withdraw works from the public domain at will, and grant copyright protection to some date fixed in the future, it seems that the purpose and restraints imposed by the Founders on terms of copyright protection would be rendered meaningless. In effect, these extensions would permit Congress to grant in substance – though not in name – a perpetual copyright. The Court avoids this conclusion largely on two grounds. First, the terms of protection granted by Congress are not unlimited, in that they do – whether it be the lifetime of the author or decades – have, in an abstract sense, a quantifiable limit to their duration.²⁰⁵ Second, Congress, not the court, is charged with determining the copyright laws that will best advance the demands of the Federal Constitution, and so changes in copyright – including advancing interests of authors and the public – must be made through statutory means, and not through the courts.²⁰⁶

However, Justice Breyer’s dissent articulates appropriately the costs that section 514 will have on the Nation. As he states it, “[i]f a school orchestra or other nonprofit organization cannot afford the new charges, so be it. They will have to do without – aggravating the already serious problem of cultural education in the United States.”²⁰⁷ Moreover, Justice Breyer notes that individuals wishing to use these now restored works often face the arduous requirements of searching for the copyright holders (especially if they are orphan works) of these previously freely available

204. *Id.* at 885.

205. *Id.*

206. *Id.*

207. *Id.* at 905 (Breyer, J., dissenting).

works. Such searches entail, “[u]nusually high administrative costs [that] threaten to limit severely the distribution of those works – works which, despite their characteristic lack of economic value, can prove culturally invaluable.”²⁰⁸ Such questions are, in Justice Breyer’s dissent, best addressed by the judicial branch. As he posits it, “the question is whether the Copyright Clause permits Congress to seriously exacerbate such a problem by *taking works out of the public domain without a countervailing benefit*. This question is appropriate for judicial resolution.”²⁰⁹ Unfortunately, the Court has adopted just such an approach, allowing for Congress to lengthen copyright terms well beyond the initial statutory grants created by the Framers. Now, in *Golan*, Congress may freely remove works, which have been relied upon to advance knowledge, the arts, and literary creation and expression, from the public domain. Permitting this activity comes with the added irony that Congress’ divestiture of these works from the public does little to promote the interests of authors – whom the copyright clause is designed to protect. Allowing Congress to remove these works from the public domain arguably does greater harm than good to the Nation’s cultural advancement.²¹⁰

After *Wheaton*, *Dastar*, *Eldred*, and *Golan* it is clear that any effort to attain moral rights for authors will have to come from Congressional action through the form of statutory requirements that explicitly provide for such rights, or through the legislatures of the states enacting their own protections, or be provided for specifically in the contractual agreements entered into between authors and the distributors of their work.

C. THE ROLE OF THE LITERARY CONTRACT

Henry C. Mitchell asserts,

“[i]t is also important to remember that the interests of authors and publishers generally run parallel, even if they are not identical. The relationship is analogous to the relationship between the members of the union and the management of a company: each seeks to gain at the expense of the other, but each needs the other to survive.”²¹¹

208. *Id.* Indeed, Justice Breyer also notes that this problem of “orphan works” has already resulted in libraries and universities being unable to make available substantial collections available to the public. *Id.*

209. *Id.* at 906 (emphasis added).

210. *Id.* at 910.

211. HENRY C. MITCHELL, *THE INTELLECTUAL COMMONS: TOWARD AN ECOLOGY OF INTELLECTUAL PROPERTY* 150 (2005).

This is a pragmatic view concerned with the underlying commercial transaction being consummated between two distinct parties with a shared purpose – publication of a particular literary work.²¹² It is also a narrow approach to an issue that has much larger dynamics, as illustrated by *Dastar* and *Eldred*, and by the concern that the Framers showed in drafting the Federal Constitution’s limited time requirement for copyright protection.²¹³ These larger issues should be of concern not only to individuals entering into a literary contract, whereby they seek some right of publication or other form of distribution, rather, these issues should be of concern to every member of our society; and, Mitchell’s contention that authors and publishers have an inherently shared interest should be especially scrutinized. While this is certainly true on a surface level, the underlying dynamics of the transaction are arguably not shared.²¹⁴ The power will more often than not, in negotiations between author and distributor, rest with the more powerful entity, typically the distributor.²¹⁵ After all, if the author had power of their own to print and publish, they probably would pursue that course of action. Thus, it is important at the outset to acknowledge that individual authors, especially those not yet recognized as having commercial value because of who they are will likely have an especially difficult time negotiating rights equivalent to moral rights. Moral rights should arguably be guaranteed under the Berne Convention, but authors are limited under United States laws pertaining to protections of authorial rights. It is important to recognize that as reassuring and desirable as it is to have a literary contract proposed, negotiated, and consummated between private actors, concerning distribution of a literary work of art viewed through a paradigm of an inherently private transaction, it is not so simple. Agreements to publish literary works cannot be viewed as simply occurring in a vacuum between two private parties, because of the significant intellectual and creative force those works have to render into the collective body of knowledge of the community – that is, the wealth of the nation.

212. See generally *id.* (providing examples of how this argument applies to user-centered intellectual property theories).

213. See *Eldred v. Ashcroft*, 537 U.S. 186, 242 (2003) (Stevens, J., dissenting).

214. Madeo, *supra* note 21, at 217 (explaining that current law does not provide an adequate remedy to authors’ work that is distorted throughout the publication process).

215. Ng, *Authors Rights*, *supra* note 16, at 471 (“The author alone is seldom capable, financially and strategically, of marketing the work or transforming the original work into a different artistic medium without the assistance of a publisher and financier. Even if the author may have the financial capability and market connections to market the work or transform the original into a new medium, he may lack the business acumen to manage the commercial exploitation of the work.”).

While literary contracts are chiefly private, between private parties, contracted according to their interests, demands, and desires, and guided by freedom of contract, this is not necessarily the best approach. There is a particular social importance which attaches to some literature, though admittedly, not all creative works.²¹⁶ Thus, we must reassess some of our traditional views concerning contracts as they apply to the narrow, specific cases of literary contracts, with a view to both the private, personal interests of the parties, and the larger, long-term public interests in ensuring that works of artistic integrity enter into the stream of commerce as the author intends through ensuring long-term benefit to the author in the form of moral rights, and that they subsequently become a part of the public domain of knowledge and use within a reasonable amount of time.

IV. ENSURING THE WEALTH OF THE NATION: COPYRIGHT TERMS, MORAL RIGHTS, AND AUTHORS AND THEIR CONTRACTS

In a speech before Congress, the great American writer Samuel Clemens (better known as Mark Twain), made the following remarks,

The excuse for a limited copyright in the United States is that an author who has produced a book and has had the benefit of it for that term has had the profit of it long enough, and therefore the Government takes the property, which does not belong to it, and generously gives it to the eighty-eight millions. That is the idea. If it did that, that would be one thing. But it does not do anything of the kind. It merely takes the author's property, merely takes from his children the bread and profit of that book, and gives the publisher double profit. The publisher and some of his confederates who are in the conspiracy rear families in affluence, and they continue the enjoyment of these ill-gotten gains generation after generation. They live forever, *the publishers do*.²¹⁷ (emphasis added)

Twain who was advocating for the increase in copyright protections then under consideration by Congress, clearly wanted longer terms, and

216. I do not entirely agree with the evaluation suggested by Alina Ng. However, I think she has correctly deduced and articulated the problems associated with a purely economic oriented methodology by which to assess artistic merit, and to decide from that perspective which works deserve copyright protection, as opposed to an approach that takes authorial ethics into account. *See id.* at 493-94.

217. *Arguments Before the Comm. on Patents of the Senate and House, Conjointly, on S. 6330 and H.R. 19583 to Amend and Consolidate the Acts Respecting Copyright*, 59th Cong. 116-17 (1966).

Congress subsequently enacted them, in the form of the 1909 Copyright Act.²¹⁸ But Twain's rhetoric is somewhat misdirected and misguided, in that it confuses two issues. It is not the government, per se which "takes the property," rather the government ceases to give it protection under law. This is an important distinction, because it is by negative act that a work of literary art becomes a part of the public domain, and not an active taking as Twain seems to imply.²¹⁹ Moreover, it is not the government who "gives the publisher double profit," by allowing the publisher to reprint without requiring royalties to be paid to the author, rather it is the common pool of knowledge and resources from which the publisher is drawing from the public domain, and disseminating to individuals that is the true subject of Twain's scorn. And that is the point.²²⁰ To not reward publishers who seize upon things as soon as they enter into the public domain, and who reprint an author's work without any concomitant requirement of payment to the author or his heirs. Instead, the point is to ensure the creative achievement never dies with the author – whether Mark Twain or Shakespeare – so that instead of vesting solely in the author's earthly representative (the work's distributor), it becomes accessible to all. In fact, the individual plaintiff at the center of *Eldred*, Eric Eldred, maintained a website where he collected and digitized books as they came into the public domain, free for all to use.

While Twain was undoubtedly concerned about the length of copyright at the time it existed, his philosophy nevertheless stands against the intent of the Framers, and arguably, against the overarching premise of intellectual achievement and knowledge.²²¹ Knowledge enjoys a privileged vantage point in society, both historically and today, and without free dissemination and exchange of knowledge, ideas, and creative achievements, society's growth is stunted, and every individual suffers as a result.²²² As Lawrence Lessig, the lawyer who argued *Eldred* before the United States Supreme Court, stated

218. ASS'N OF RES. LIBRARIES, *supra* note 80.

219. *Brulotte v. Thys Co.*, 379 U.S. 29, 30-34 (1964) (noting the right an author has to reap the economic benefit of his creativity, but balancing that right with the rights the public has to free and unfettered access to the creative work).

220. Lessig, *supra* note 183, at 1069 ("This modern, ordinary view, is far from our Framers'. When they chose not to protect copyright in perpetuity, it was not because they did not love property; nor was it because they were budding communists. It was instead because they believed in the power of the Enlightenment, and Protestant as they were, they believed enlightenment happened when culture was not controlled by the church. Their idea was that ideas and stories and culture would be free - as quickly as the law could set them free.").

221. *See, e.g., Lamont v. Postmaster General*, 381 U.S. 301, 308-09 (Brennan, J., concurring) (discussing the "marketplace of ideas" in the context of First Amendment concerns).

222. *Id.*

[W]e have become used to an idea that was not our Framers'. We have become accustomed to thinking of the monopoly rights that the state extends not as privileges granted to authors in exchange for creativity, but as rights. And not as rights that get defined or balanced against other state interests, but as rights that are, like natural property rights, permanent and absolute.²²³

Lessig's assessment stands in stark contrast to that suggested by Twain, and argues that rather than government running amok seizing authors' creative works, the stream of what can be "seized" and delivered into the public domain is steadily being reduced, with Congress' acquiescence (and the Supreme Court's acceptance) to the vast detriment of both authors and the public. Both authors and the public suffer when the effort to commercialize literary works becomes a relentless pursuit to keep them in private hands, for private purposes indefinitely, while keeping the public as a secondary concern.²²⁴ Such an approach demeans the cultural greatness that literary and other artistic works have to offer the social community, and ultimately restrains the potential for other creative works to emerge. Such restrictions serve to deprive society of valuable contributions of authors that might otherwise be more freely available.²²⁵ There is also a certain irony in enacting vast terms of copyright protection that no one will really ever live to see expire, while continuing to deny authors protections for moral rights. And it certainly begs the question of what interests have become the heart of what we are seeking to protect?²²⁶

It is difficult to find hope for the view that public interests should be an important consideration in our understanding of copyright law, when the Supreme Court seems to suggest that profit is the sole force which both motivates creativity, and ensures the progress of science.²²⁷ But this

223. *Lessig, supra* note 183, at 1068.

224. Ng, *Authors and Readers, supra* note 30, at 415 ("The grant of property rights to copyright owners and not authors in today's system creates a market for literary and artistic works that does not encourage the development of authorship and the process of creativity needed for the production of works for the public.")

225. Of course modern technology can also be mobilized in the effort to thwart access to literary work. *See, e.g.,* Matthew Finnegan, *Harper Collins Rouses Gang of Angry Librarians*, *TECHEYE* (Mar. 1, 2011, 2:10 PM), <http://www.techeye.net/internet/harper-collins-rouses-gang-of-angry-librarians>; Benedicte Page, *Fury over 'stupid' restrictions to Library ebook loans*, *GUARDIAN* (Mar. 1, 2011, 7:44 AM), <http://www.guardian.co.uk/books/2011/mar/01/restrictions-library-ebook-loans> (both articles discuss proposed restrictions, by publishers, on the number of times an electronic e-book can be downloaded and read by library patrons, under the licenses possessed by libraries).

226. Lessig, *supra* note 183, at 1068-69 (suggesting that those interests have become interests of commercialization, and profits in the hands of the few – certainly not, to respond to Twain's concerns about extending copyright protections, to the author).

227. Indeed, especially troubling is the restoration of copyright to those works which have entered the public domain. *See* Adam Liptak, *Restoring Copyright to Public Domain Works*, N.Y.

approach to conceptualizing literature, art, and creative achievements is symptomatic of a much larger societal problem, one which Lessig addresses quite forcefully. Lessig asserts:

This view of the naturalness of intellectual property is not simply the construction of overly eager Hollywood lobbyists. Is it not simply the product of campaign contributions and insider corruption. The reality is that it reflects the understanding of ordinary people, too. The ordinary person believes, as Disney's Michael Eisner does, that Mickey Mouse should be Disney's for time immemorial. The ordinary person doesn't even notice the irony of perpetual protection for Disney for Mickey, while Disney turns out *Hunchback of Notre Dame* (to the horror of the Victor Hugo estate), or *Pocahontas*, or any number of stories that it can use to make new work. The ordinary person doesn't notice, because the ordinary person has become so accustomed to the idea that culture is managed – that corporations decide what gets released when, and that the law can be used to protect criticism when the law is being used to protect property – that the ordinary person can't imagine the world of balance our Framers created.²²⁸

Literature, and other forms of art, have significant cultural value for our social community, and for the progress of society. This is embodied in our Federal Constitution, and is implicit in the balance that has been struck between private rights and public interests.

As has been made clear by *Wheaton* and *Dastar*, moral rights do not exist in the United States, absent Congressional enactment of express statutory protections designed to effectuate those rights.²²⁹ This is the wrong approach to dealing with authors and their literary works. While we continue to expand copyright term protections, we continue to deny basic rights to authors that have long been enjoyed in other countries, with whom we share similar histories and backgrounds. Instead of viewing such rights as anathema to economic or other commercial interests, we should recognize that works of art, especially those of a literary nature, serve the

TIMES (Mar. 21, 2011), <http://www.nytimes.com/2011/03/22/us/22bar.html>. Arguably, combining Congressional authority to extend again and again copyright protections to currently copyrighted work, thus preventing its expiration into the public domain, combined with retroactively granting copyright to those works that have entered the public domain, come dangerously close to rendering the Federal Constitution's public interest inherent in the copyright clause immaterial.

228. Lessig, *supra* note 183, at 1069.

229. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003). “When Congress has wished to *create* such an addition to the law of copyright, it has done so with much more specificity than the Lanham Act's ambiguous use of ‘origin.’” *Id.* (emphasis added).

overall wealth of the nation by increasing our common resources of knowledge, and provide the substance of our national identity and cultural spirit – all of which advances our collective national interests. As such, works of literary art should be treated in a way that recognizes their larger, long-term interests in the social community, which respects the creator of those works – *the author*. Little is lost by enacting copyright laws that protect the rights of attribution; indeed, absent an agreement to the contrary, such a right seems one basically ingrained in the right of an author's personhood and their literary creation, which is arguably inseparable from that personhood.

The right of integrity seems one equally calculated to bring about the long-term interests of ensuring works of literary and artistic merit that are not grossly distorted by short-term economic profit, and which ultimately enter the public domain.²³⁰ The rights of withdrawal, and disclosure potentially raise problematic issues, however, because they can occur after a contract has been signed, or after the work has already been placed on the market. However, with proper indemnification clauses or other similar requirements, or writing into law implied or express waivers of these protections, authors and their distributors can continue to carry on business with, moreover, this knowledge at the front-end of the relationship that those rights exist, and that they may (and probably should) be negotiated as part of the overall literary contract.

By enacting these provisions we honor and respect authors as part of the national wealth, acknowledge the intellectual creations that propel the nation forward, and ensure that these works meet with the expectations of their authors, that they continue to be identified as the creator of their work, and that the work not be distorted or modified, such that Hemingway's thoughtful, existential hero in *THE SUN ALSO RISES*, Jake Barnes, is not devolved into a comedic figure, better suited for laughter than for philosophical contemplation, or Bryce Courtney's *THE POWER OF ONE* is not distorted to change, for example, the location of the novel from South Africa to Texas, because politics, history, and ethical choice matter for these authentic works of literary art. Moreover, such rights should continue into the future, and be alienable to subsequent successors in interest of the author's moral right, such that an author's wishes continue to be

230. Netanel, *Copyright Alienability Restrictions*, *supra* note 124, at 439 (suggesting that “[w]hen a publisher usurps an author’s creative control, the author’s work can become an instrument for profit-maximization instead of authentic self-expression, leading to a uniform product that reflects an effort to create consumer needs, rather than to meet them”).

respected.²³¹ Indeed, as Donald Francis Madeo noted, in assessing the United States' lack of moral rights where author's literary creations are concerned, "[t]he current law does not penetrate the core problem – what happens when someone, whether it be a publisher, biographer or even a literary executor, ignores the wishes of the author violating the author's wishes and compromising the author's artistic integrity?"²³²

Of course, part of the problem with enacting moral rights is, in some ways, changing the view that an author's work is merely an economic product, exploitable, mutable, transferable, and not, as it arguably should be viewed, as something part of the larger cultural discourse and national wealth.²³³ However, simply because literary artifacts and the copyright protections they enjoy have so-long been viewed as being mere economic commodities in the eyes of the law, as exemplified by Ginsburg's opinion in *Eldred*, there is no reason to continue to view them as such. Instead, such prevailing views should become the flashpoint for restoring literature and its place in the cultural space of the community as a core American value, concomitant with the recognition of fundamental rights for literary creators.

All of these larger concerns regarding moral rights (and to an extent copyright protection terms), devolve back into the singular space they occupy at the outset – the contract between author and distributor of the author's work. This is the fundamental place, operating within the "carefully crafted bargain"²³⁴ that forms the backdrop for their negotiations. However, as with so many contracts negotiated between individuals and larger entities, authors will usually, though not always, be in a poorer position to bargain in terms of parity of bargaining power.²³⁵ However, with the recognition of moral rights, authors will be given new tools to ensure the integrity of their literary work, while also providing incentives to would-be distributors in crafting their agreements with authors.

By having statutory provisions concerning moral rights, these provisions would form the backdrop for any private negotiations taking place between author and distributor. They would inform both parties

231. *But see* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 580 (1985) (Brennan, J., dissenting) ("The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be prompted by securing to authors for limited periods the exclusive rights to their writings. Congress thus seeks to define the rights included in copyright so as to serve the public welfare and not necessarily so as to maximize an author's control over his or her product." (citations omitted)).

232. Madeo, *supra* note 21, at 217.

233. Lessig, *supra* note 183, at 1072-73.

234. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33 (2003).

235. Ng, *Author Rights*, *supra* note 16, at 471.

decisions, and could potentially provide the author with some greater leverage to extract from their distributor assurances that the work would be attributed to them, ensure the integrity of the work, and potentially allow the author to seek further specific assurances against the work being disclosed when not ready, or to withdraw the work if the author later fundamentally changes their intellectual viewpoint, such that the work is no longer representative of them. These statutory provisions could be subject to waiver with consent of the author, be required in certain instances by statute, or be non-waivable, depending on Congressional or other legislative decision. The point is, however, that such rights should be present at the front-end of the negotiations, and should form a cornerstone of author–distributor negotiations, as opposed to being something foreign and distant.

Finally, if the author consciously and freely chooses to relinquish their moral rights, they should receive, in addition to their already negotiated agreement, some form of further consideration.²³⁶ This is in accord with practices in other jurisdictions, and seems a reasonable one, calculated to ensure the overall fairness of the agreement – the author gives up something, and the distributor, in exchange, must pay or give something more for that relinquishment of right by the author. However, it must be recognized that often such consideration for relinquishment of moral rights will be little to nothing, and instead will be compelled (and thus rendered *pro forma*) as part of the overall approach of the distributor to getting the deal that most represents their demands. In such instances, the doctrine of unconscionability seems aptly suited to deal with these necessary and searching inquiries (should these agreements be litigated), to ascertain whether, in fact, the consideration was so low, and the moral right so great, that the term of the agreement should be struck in favor of an author’s moral rights, which is also, as has been argued, a vindication of public interests.²³⁷ Such a use of unconscionability is in accord with its underlying purpose, and should be used not to strike agreements that are merely so shocking to the conscience as to render them unenforceable, but also to vindicate substantial and significant public interests in the national wealth

236. Whether negligible or not, this requirement of additional consideration nevertheless gives notice to both writer and publisher of the right(s) for which release or modification are being negotiated, and places an additional right within the purview of the author for his authentic and creative work.

237. See Michael B. Lopez, *Resurrecting the Public Good: Amending the Validity Exception in the United Nations Convention on Contracts for the International Sale of Goods for the 21st Century*, 10 J. BUS. & SEC. L. 133, 165-66 (2010) (discussing in the context of international trade the use of unconscionability to equalize bargaining disparities in order to reduce the threat of overreaching).

of its literary and artistic creations.²³⁸ Of course, expanding the use of unconscionability this way will require a cultural shift in thinking on the part of courts, but so too will understanding moral rights as being *not* just author rights, but rights designed to effectuate a larger social purpose, by having in the public repository of knowledge works of genuine literary merit.

V. CONCLUSION: TOWARDS A LITERARY CONTRACT FOR TOMORROW

The great Danish philosopher Søren Kierkegaard wrote, “[t]here is something of greatness about me, but because of the poor state of the market I am not worth much.”²³⁹ Kierkegaard would have known much about the literary market at the time he lived. Though he was a particularly well-known figure in Denmark, and certainly in his hometown of Copenhagen, most of his works never sold especially well. And yet he has grown to be one of the most influential philosophers of our time, even though he died in 1855. Similarly, the philosopher Friedrich Nietzsche, whose works sold poorly, such as *THUS SPOKE ZARATHUSTRA*, *BEYOND GOOD AND EVIL*, and *THE GENEALOGY OF MORALS*, continue to inspire intellectual thought, debate, and societal growth, not just in his native Germany, but everywhere in the world.²⁴⁰ Poets like A.E. Housman, who could not even find a publisher for his seminal volume, *A SHROPSHIRE LAD*, now an enduring classic were forced to self-publish, before they could find commercial, and thus publishing recognition. Artists like the great Impressionist Vincent Van Gogh sold only a single painting in his lifetime, and yet now one is hard pressed to find a college dorm room or apartment that does not have a mechanically reproduced image of his “The Starry Night” or “Café Terrace at Night,” hanging in it.

All of these examples speak to the fundamental reasons of why the market is *not* necessarily the place best suited for creating and sustaining genius, but even more so, why the Federal Constitution provides for a limited times rationale for copyright protection. Indeed, one of the central

238. Cf. Phillip Bridwell, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 70 U. CHI. L. REV. 1513, 1516-20 (2003) (discussing the rise of “positive-freedom” criticism in assessing the usefulness of unconscionability).

239. SØREN KIERKEGAARD, *PAPERS AND JOURNALS: A SELECTION* 179 (Alastair Hannay ed. & trans., 1996).

240. See R.J. HOLLINGDALE, *NIETZSCHE: THE MAN AND HIS PHILOSOPHY* 179 (2001) (noting that the first three parts of Nietzsche’s *THUS SPOKE ZARATHUSTRA* [now a classic of philosophy] were commercial failures, and that his publisher declined to print the fourth edition); see also Peter Gay, *Introduction* to *BASIC WRITINGS OF NIETZSCHE*, at xix-xxiii (Walter Kaufmann trans., 2000).

contentions of this article is that the Framers never intended for works such as those, for example, by Housman, Nietzsche, Van Gogh, or Kierkegaard to stay forever in the domain of their publishers, long after they had died and could no longer reap the rewards of their creative genius. Instead, the intent was to reward them for a time, and then to release those works into the public milieu and discourse of intellectual thought, discussion, debate, and creativity of the larger social community, that the next generation of Van Gogh's, Kierkegaard's, Mozart's and Beethoven's might come forward to carry society ever further, through the advancement of knowledge and culture.

And yet our current system of copyright, avoidance of moral rights for authors, and misplaced trust in the fair, bargained for exchange between authors and their distributors is not best situated, as it currently stands, to effectuate the larger hope and purpose of the Federal Constitution's copyright requirements, nor the larger social interests which it is intended to serve. The modest proposals presented here, reducing the period of copyright years for a work to be protected, granting authors moral rights through creating statutory protections that can be used in contract negotiations, and utilizing doctrines like unconscionability to ensure the overarching public interest in literary works of artistic merit, represent a measured approach.

Such an approach protects private, economic interests (copyright protections remain intact) that reward individual creativity and ingenuity, authors (ensuring the integrity and attribution of their work), and the general public (that knowledge and information be recognized as something for everyone to participate and grow from). This is the ideology that should guide us as we continue to confront modern issues of copyright, author rights, and the contracts that authors enter into – and, as *Wheaton*, *Eldred*, *Dastar*, and *Golan* show, they are not likely to diminish or vanish. In suggesting this moderate proposal, the hope is that all of the individual holders of interest – distributors of authorial material, authors, and the public, see that through reasonably measuring each holder's interest, while constraining it in an equally measured way, everyone in society benefits, because we all have access to the knowledge, creativity, and information necessary to grow. The end goal of that growth should be to built upon – not replace – the artistic and literary greats who have come before, and to nourish the growth and development (and economic potential) of the next generation of Hemingway's and Van Gogh's that remain yet to be discovered and disseminated.