THE INTEGRITY RIGHT OF AN MP3: HOW THE INTRODUCTION OF MORAL RIGHTS INTO U.S. LAW CAN HELP COMBAT ILLEGAL PEER-TO-PEER MUSIC FILE SHARING

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I. INTRODUCTION

In 1999, a nineteen-year-old Northeastern University undergraduate named Shawn Fanning created a computer service called Napster that allowed users to access a peer-to-peer ("P2P") network, enabling music file sharing that would forever change the environment of the music industry.[1] Upon launch, the number of Napster users doubled every two days.[2] At its peak, Napster had an estimated forty million users.[3] At the same time, entertainment industry sales dropped rapidly; by 2003, the recorded music and film industries were losing $7.6 billion annually due to piracy.[4] File sharing has since engendered a widely publicized controversy in the United States, fea-

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[1] JOSEPH MENN, ALL THE RAVE: THE RISE AND FALL OF SHAWN FANNING'S NAPSTER 36 (2003).

[2] *Id.* at 6.

[3] *Id.* at 101.

[4] LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 63 (2004) ("The recording industry estimates that it loses about $4.6 billion every year to physical piracy . . . . The [Motion Picture Association of America] estimates that it loses $3 billion annually to worldwide piracy.").

turing the "content holders" (record labels) and the "downloaders"[5] (who are looking more and more like the American public[6]) as the key players in this controversy. More than seven years of legal battles have not come close to eradicating file sharing, with music sales down thirty-six percent since 2000,[7] leading many to conclude that the record industry must adapt or else go the way of disco.[8] While various possible appropriate adaptations exist, this Comment discusses only one—the implementation of moral-rights protection for musical artists in the United States.

There are two types of interests at stake in a work of art: economic interests and personality interests.[9] Copyrights, which are strongly recognized in the United States, protect economic interests, whereas moral rights protect the artists' personality interests.[10] These interests can often conflict. The United States chooses to favor copyrights (i.e., economic rights) over moral rights. This focus on economic rights implies that only the economic interest is worthy of legal protection, leading music to be viewed merely as a commodity. This Comment argues that U.S. law ought to recognize moral rights for musicians in order to shift the view of music as a commodity to music as an art form with value beyond economics and to illustrate that musicians have a personal stake in their music. Finally, this Comment argues that such a shift in the view of music and musicians would discourage illegal music-file sharing over the long term and thus help the record industry survive the transition into the Digital Age.

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[5] It should be noted that, technically, these suits are usually against music uploaders (as opposed to downloaders); however, the term "downloader" will be used in this Comment to refer generally to those that utilize P2P programs to share music (both uploading and downloading) without permission from the copyright holder.

[6] *See* WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 126 (2004) (noting that Recording Industry Association of America (RIAA) lawsuits have targeted a diverse group of defendants, from a twelve-year-old girl to a Yale professor).

[7] Evan Serpick, *EMI Changes the Game*, ROLLING STONE, Mar. 6, 2008, at 19, 19; *see* DAVID KUSEK & GERD LEONHARD, THE FUTURE OF MUSIC: MANIFESTO FOR THE DIGITAL MUSIC REVOLUTION 101 (2005). In 2005, more files were downloaded illegally each *month* than had typically been sold by the music industry each *year*, and the number of downloaders continued to increase by more than 100% each year. *Id.*

[8] *See, e.g.*, FISHER, *supra* note 6, at 2 (suggesting that if widespread use of P2P systems continues, "the market for authorized sound recordings is bound to deteriorate").

[9] *See* Justin Hughes, *The Philosophy of Intellectnal [sic] Property*, 77 GEO. L.J. 287, 330, 339 (1988) (characterizing moral rights as protecting personality interests).

[10] *See id.*; Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 304 (2003).

Part II of this Comment provides a historical background of moral rights. This background includes a definition of moral rights, a contrast of moral rights with copyrights, a discussion of the countries that recognize moral rights, and an examination of the minimal extent to which the United States protects moral rights. Part III argues that U.S. law recognizes moral rights to such a minimal extent because the nation views art primarily as a commodity and that this view of art as a commodity contributes to illegal music-file sharing. This Comment then posits that the introduction of moral rights into U.S. copyright law would help discourage illegal file sharing. Part IV discusses reasons why record labels may initially be opposed to moral-rights legislation and then argues that moral rights are nonetheless necessary to help these record labels compete with ever-advancing technologies, with which copyright lawsuits are unable to keep pace.

II. CONTRASTING EUROPEAN AND AMERICAN LEGAL PROTECTION OF ARTISTIC WORKS

"Moral rights" and "copyrights" are both legal terms for groups of rights vested in artistic works. However, the two differ greatly in both the rights they afford and the theories used to justify those rights. These differences are reflected in a comparison of nations that legally recognize moral rights with nations that do not—with nations valuing art as a cultural contribution tending to recognize moral rights and nations viewing art as a commodity tending to disfavor moral rights because of their potential to limit the value of copyrights.

A. Moral Rights as a "Bundle of Rights": Protecting the Relationship Between Artist and Artwork

Moral rights theory begins with the premise that an artist gives a piece of herself through her work,[11] resulting in a unique relationship between the artist and the artwork.[12] In other words, the art is an extension of the artist.[13] Because of this special relationship, harm to the art is thought to result in personal harm to the artist.[14] Moral rights seek to prevent this sort of harm by allowing the artist to retain

[11] Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995); Kathryn A. Kelly, *Moral Rights and the First Amendment: Putting Honor Before Free Speech*, 11 U. MIAMI ENT. & SPORTS L. REV. 211, 211 (1994).

[12] Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 43 (1998).

[13] *Id.*

[14] *Id.*

control over the creative process and the final product.[15] In this sense, moral rights protect the artist's "personality interest."[16]

Like copyrights, moral rights are a "bundle of rights,"[17] with the rights of attribution and integrity comprising the core of this bundle.[18] The right of attribution[19] is the right to claim authorship of a work and to "determine where and how the author's name shall be affixed to the work."[20] This right also includes the right not to claim authorship—that is, to remain anonymous or to use a pseudonym.[21] This "helps ensure the artist's name is attributed to all her work and her work only."[22] Professor Susan Liemer describes this as "maintaining an accurate chain of title to the creative process."[23]

The second core moral right is the right of integrity, which is the right of the author to "prevent any deforming or mutilating changes to his work."[24] This right prevents the alteration or public presentation of the work in a context that would "injure [the artist's] honor or reputation."[25] Whether or not this right prevents the complete destruction of a work is a current source of controversy.[26]

Several other rights are sometimes included in the bundle of moral rights. The right of disclosure is the right to decide when "a work should be released to the public."[27] The right of withdrawal is the corresponding right to decide whether the work should be retracted after being released "because it no longer reflects the author's personal convictions."[28] Resale royalty rights entitle the artist to a

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[15] *Id.* at 44.

[16] *See* Hughes, *supra* note 9, at 339; Ong, *supra* note 10, at 304.

[17] Kelly, *supra* note 11, at 212.

[18] Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995).

[19] The right of attribution is also known as the right to paternity. *E.g.*, Liemer, *supra* note 12, at 47.

[20] Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 363 (2006).

[21] *Carter*, 71 F.3d at 81; Rigamonti, *supra* note 20, at 364.

[22] Liemer, *supra* note 12, at 49.

[23] *Id.* at 51.

[24] *Carter*, 71 F.3d at 81.

[25] Brian T. McCartney, *"Creepings" and "Glimmers" of the Moral Rights of Artists in American Copyright Law*, 6 UCLA ENT. L. REV. 35, 38 (1998) (quoting Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 13 (1997)).

[26] *Compare Carter*, 71 F.3d at 81 ("In some jurisdictions the integrity right also protects artwork from destruction."), *with* Liemer, *supra* note 12, at 51 ("Traditionally, the right of integrity does not protect the art work from total destruction by another.").

[27] Rigamonti, *supra* note 20, at 362.

[28] *Id.*

portion of the profits when others financially benefit from her work.[29] An additional moral right is the prohibition against excessive criticism, which protects the author against abusive and malicious criticism of her work.[30] Finally, moral rights may contain a broad prohibition against any other attacks on the personality of the creator.[31]

B. Moral Rights as Distinguished from Copyrights

Moral rights and copyrights both protect artistic works, but each protects different interests in those works. While copyrights protect economic interests—the potential profit that derives from the work—moral rights protect the artist's personality interest.[32] In this sense, copyrights are essentially economic rights that are often understood as property rights.[33] In contrast, "moral rights are personal rights; they are not based on any theory of property, for whatever 'property' the creator may possess exists in the rights protected by the copyright statute."[34]

Moral rights exist independently of any property interest in the work,[35] hence moral rights exist independently of copyrights.[36] Copyrights are insufficient to protect the artist's personality interest because, while copyrights protect the economic exploitation of artistic works, "when an artist creates . . . he does more than bring into the world a unique object having only exploitative possibilities . . . ."[37] In addition to profit-making capability, artwork has the ability to affect human emotion, cultivate new ideas, and serve as social commentary, among other things. Such supra-economic reasons necessitate the protection of artistic works; however, these additional reasons are not protected by copyright statutes. As a result, moral rights theory developed beyond copyright protection to protect the non-economic value of an artistic work.

Moral rights are not only independent of copyrights but also differ from copyrights in several key respects. First, each type of right affords a different duration of protection. Moral rights are perpe-

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[29] Liemer, *supra* note 12, at 55.

[30] Martin A. Roeder, Note, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 572 (1940).

[31] *Id.* at 573.

[32] *See* Hughes, *supra* note 9, at 351; Ong, *supra* note 10, at 304.

[33] *E.g.*, LESSIG, *supra* note 4, at 83.

[34] Roeder, *supra* note 30, at 564.

[35] Liemer, *supra* note 12, at 44.

[36] *See* Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 82 (2d Cir. 1995).

[37] Roeder, *supra* note 30, at 557.

tual,[38] whereas copyrights are limited by statute.[39] Additionally, moral rights are, theoretically,[40] unwaivable.[41] Copyrights can freely be bought and sold,[42] whereas moral rights are not transferable.[43] Copyrights are attached to the work, whereas moral rights are attached to the artist. This means that moral rights "remain vested in the artist even after the work has been transferred."[44] While the moral right is always granted to the creator, the copyright is almost always granted to the owner of the work.[45] In the American copyright system, the creator is the original owner (unless the work is a work for hire or assignment); however, the creator almost always assigns the copyright in a musical work to the record label.[46] It is therefore not unique for the author and the owner of a work, especially a musical work, to in fact be different people.[47] A final difference between copyrights and moral rights lies in remedies. Whereas remedies for copyright infringement usually take the form of money damages,[48] moral-rights violations usually entail equitable relief because "the injury suffered by the creator will not be measurable in dollars and cents, although it may well be irreparable."[49]

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[38] *See* RALPH E. LERNER & JUDITH BRESLER, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS AND ARTISTS 1256 (3d ed. 2005) (imparting that moral rights are inviolable).

[39] *See* Copyright Act of 1976, 17 U.S.C. § 302 (2006) (establishing that, as of 2007, copyright term is author's life plus seventy years if the owner is a natural person or the shorter of 120 years after creation or ninety years after publication if the owner is a corporation).

[40] Some nations' moral-rights statutes allow moral rights to be waived. *See* LERNER & BRESLER, *supra* note 38, at 1256–57.

[41] *Id.* at 1256.

[42] *See* 17 U.S.C. § 201(d)(1)–(2) (establishing that copyrights can be transferred in part or in whole).

[43] *See* Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co., No. 93 Civ. 0373 (KTD), 2000 U.S. Dist. LEXIS 1643, at *7 (S.D.N.Y. Feb. 17, 2000) (noting that moral rights are not assignable); Liemer, *supra* note 12, at 44 (stating that the artist cannot sell, give away, or bequeath moral rights).

[44] LERNER & BRESLER, *supra* note 38, at 1255–56.

[45] *See* Roeder, *supra* note 30, at 576 ("Copyright in America, as limited by statute, was designed to protect only the exploitative value of creation; its protection is not granted to the *creator* as such, but to the *owner*, the person having the power to exploit the creation.").

[46] *See, e.g.*, Rajan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. L.J. 1, 18–19 (2001).

[47] *See* Rigamonti, *supra* note 20, at 360.

[48] *See* 17 U.S.C. § 504 (2006).

[49] Roeder, *supra* note 30, at 574.

C. Moral Rights Are Generally a Continental European Phenomenon

Historically, continental Europe has recognized moral rights, whereas Anglo-American countries have failed to do so.[50] One author succinctly characterizes this split as "*droit d'auteur*[51] countries," which view intellectual property as tied to the author in a personal manner, as opposed to "copyright countries," which view intellectual property as simply another form of property.[52] As of 2003, eighty-one countries of the world, including Mexico, Canada, France, Germany, and Singapore,[53] recognized moral rights to varying extents.[54] The European Union also recognizes moral rights.[55]

The French legal system provides the strongest existing protection for moral rights.[56] It is thus no surprise that moral rights doctrine (known as "*droit moral*"[57]) was first developed in France during the nineteenth century.[58] This early *droit moral* doctrine was a hybrid of decisions handed down in French courts and the modern view of moral rights developing simultaneously in Germany.[59] The French moral-rights statute, codified in the Law of March 11, 1957,[60] establishes the rights of attribution, integrity, and disclosure and states that these rights are "perpetual, inalienable and imprescriptible."[61]

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[50] This has historically been true, although the United Kingdom adopted limited moral-rights legislation in 1988. *See* Copyrights, Designs, and Patents Act, 1988, c. 48 (Eng.); Rigamonti, *supra* note 20, at 354.

[51] Translated from French into English, meaning the "non-pecuniary, special (personal) right of an author, artist, etc. in his work." F.H.S. BRIDGE, THE COUNCIL OF EUROPE FRENCH-ENGLISH LEGAL DICTIONARY 208 (1994).

[52] Michèle Battisti, The Future of Copyright Management: European Perspectives (Sept. 27, 2000), http://www.ifla.org/IV/ifla66/papers/140-184e.htm.

[53] McCartney, *supra* note 25, at 71–72.

[54] LEONARD D. DUBOFF & CHRISTY O. KING, ART LAW IN A NUTSHELL 203 (2000).

[55] McCartney, *supra* note 25, at 71–72.

[56] *See* Liemer, *supra* note 12, at 41; Kimberly Y.W. Holst, Article, *A Case of Bad Credit?: The United States and the Protection of Moral Rights in Intellectual Property Law*, 3 BUFF. INTELL. PROP. L.J. 105, 108 (2006).

[57] "*Droit moral*" is treated as synonymous with "*droit d'auteur*," meaning the "non-pecuniary, special (personal) right of an author, artists, etc. in his work." BRIDGE, *supra* note 51, at 208.

[58] *See* Liemer, *supra* note 12, at 41–42.

[59] 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, 1206–10 (2002).

[60] JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 311 (4th ed. 2002).

[61] *Id.*

D. The Current State of Moral Rights in U.S. Law

Anglo-American copyright protection originates in the Statute of Anne.[62] In 1774, the British House of Lords held in *Donaldson v. Beckett* that no copyright protection existed beyond that granted by the Statute of Anne.[63] Since the Statute of Anne did not contain a moral-rights provision, moral rights were held not to exist at common law.[64]

This common-law focus on statutory interpretation bled into early American copyright law.[65] Article I, Section 8 of the U.S. Constitution establishes copyright protection in the United States.[66] Since the Constitution, like the Statute of Anne, does not explicitly grant moral-rights protection, moral rights have been held not to exist in U.S. copyright law.[67] The stance that U.S. law affords no moral-rights protection was carried over into the twentieth century and made clear in *Vargas v. Esquire*, in which the court held that while foreign countries may recognize moral rights, the United States does not.[68]

While art has been an important part of European culture for centuries,[69] the United States is a relatively young country and thus has a shorter history generally and a lesser quantum of artistic history specifically. Moreover, from its inception, the United States has been less focused on art than continental European countries. Early U.S. culture focused more on industry, with the nation quickly becoming a leader in trade and manufacturing; therefore, "while the European culture was marked with the works of great authors and artists, the culture of the United States was filled with names like Ford, Carnegie, and Rockefeller, who were leaders in industry."[70] The United States has historically imported most of its art.[71] In contrast, French art was world-renowned for centuries prior to the development of the *droit*

[62] *See generally* 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 Described, 1710, 8 Ann., c. 19 (Eng.); Susan P. Liemer, *How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright*, 5 J. MARSHALL REV. INTELL. PROP. L. 1, 12–14 (2005).

[63] Donaldson v. Beckett, (1774) 98 Eng. Rep. 257 (H.L.) (appeal taken from Scot.).

[64] *Id.*; Liemer, *supra* note 62, at 28–32.

[65] Liemer, *supra* note 62, at 32–36.

[66] U.S. CONST. art. I, § 8.

[67] *See* Liemer, *supra* note 62, at 34–35.

[68] Vargas v. Esquire, Inc., 164 F.2d 522, 526 (7th Cir. 1947).

[69] Holst, *supra* note 56, at 117–20.

[70] *Id.* at 122.

[71] *Id.*

moral.[72] U.S. law developed appropriately with this historical focus on industry and lack of artistic tradition, providing more protection for property rights[73] and less protection for the arts.[74] One author describes this phenomenon as follows: "Busy with the economic exploitation of her vast natural wealth, America has, perhaps, neglected the arts; in any event American legal doctrine has done so, and the paucity of material outside the copyright law on the rights of creators forms a vivid contrast to the continental jurisprudence."[75]

Although a leader in developing intellectual property, the United States waited more than one hundred years to join the Berne Convention, an international copyright agreement first ratified in 1886 and boasting 163 national signatories as of 2007.[76] This reluctance may be due in large part to the American desire not to recognize moral rights.[77] When the United States finally did join the Berne Convention, the nation's lack of moral-rights protection became a source of controversy because Article 6*bis* of the Convention requires signatories to recognize, at a minimum, the rights of attribution and integrity.[78]

Congress enacted the Berne Implementation Act in 1988 and officially joined the Berne Convention in 1989.[79] The Berne Implementation Act states that U.S. adherence to the Berne Convention does not "expand or reduce" authors' rights to "claim authorship to the work" (right to attribution) or "object to any distortion, mutilation,

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[72] *See* John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1042 (1976).

[73] *See* FISHER, *supra* note 6, at 138 (arguing that legal rights known as "property rules" enjoy greater protection in the United States); *id.* at 140 (stating that "[r]eal property rights are highly favored by the law").

[74] *See* Hughes, *supra* note 9, at 288 (stating that "ideas about property have played a central role in shaping the American legal order").

[75] Roeder, *supra* note 30, at 557.

[76] *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

[77] McCartney, *supra* note 25, at 40–41.

[78] *See* Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*., Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (rev., Paris, July 24, 1971) [hereinafter Berne Convention].

> 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.

Id.

[79] *See* Berne Convention Implementation Act.

or other modification" (right to integrity) of the work.[80] This Act can be fairly read to mean that the United States' signing of the Berne Convention does not grant authors the rights of attribution and integrity, despite the fact that membership to the Convention is conditioned on a nation's guarantee of those rights.

Congress has taken some statutory steps to bring the United States closer to compliance with the Berne Convention's moral-rights requirement. Congress enacted the Visual Artists' Rights Act (VARA) in 1990.[81] VARA establishes the right to paternity and integrity and the right to prevent destruction of the work if it is of "recognized stature."[82] However, VARA applies only to visual artists,[83] so it is not relevant to this Comment on the protection of musical works. In addition to VARA, several states have enacted limited moral-rights legislation.[84] Like VARA, however, these state statutes apply only to

[80] *Id.* § 3(b)(1)–(2).

[81] Visual Artists Rights Act of 1990, 17 U.S.C. § 106A(a) (1990).

[82] *Id.* § 106A(a)(1)–(3).

> [T]he author of a work of visual art—
>
> (1) shall have the right—
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> (A) to claim authorship of that work, and
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> (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create; [and]
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> . . . .
>
> (A) to prevent any intentional distortion, mutilation, or modification of that work . . . , and
>
> (B) to prevent any destruction of a work of recognized stature.

Id.

[83] *Id.* § 106A(b) (establishing that "only the author of a work of visual art has the rights conferred by subsection (a)"). Hansmann and Santilli postulate that VARA and similar state statutes are limited to visual art because the economic value of visual art is more dependent than other art forms on the artist's reputation. Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 108–09 (1997); *see also* Brian A. Lee, Making Sense of "Moral Rights": Artists' European-Style Intellectual Property Protections within the American System 46 (Mar. 7, 2008) (unpublished comment, on file with the Yale Law School Legal Scholarship Repository), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1015&context=yale/ylsspps. Lee provides another reason for the limitation of VARA and state statutes to visual art, postulating that visual art cannot be identically reproduced, whereas music, books, and motion pictures can be; this necessitates a right of integrity for visual art and not other art forms. Lee, *supra*, at 47; *see also infra* notes 84–85 (describing state statutes similar to VARA).

[84] *See, e.g.*, CAL. CIV. CODE § 987 (West 2009) (establishing that "physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against any alteration or destruction").

visual art and not to music.[85] Furthermore, VARA may preempt these state statutes.[86]

How can the United States be both a member of the Berne Convention and seemingly violate its moral-rights requirement? Congress sidesteps this issue by claiming that existing U.S. law adequately protects these interests through common-law causes of action, such as unfair competition, copyright, contract, defamation, and the right to privacy.[87] However, these common-law causes of action are grossly insufficient in protecting, and are in fact often at odds with, moral rights.

One way the United States arguably protects artists' moral rights is through trademark and unfair competition law under the Lanham Act.[88] The Lanham Act provides a cause of action against anyone who creates a "false designation of origin."[89] Commentators argue that this is comparable to the moral right of attribution because it prevents false claims to authorship of works.[90] A general problem with this approach is that the Lanham Act is designed to protect economic rights; it remedies the economic injury to the creator if he has been unfairly deprived of a market.[91] The Lanham Act does not, however, protect the personal rights that moral rights preserve.[92]

Commentators have also argued that U.S. copyright law protects moral rights.[93] For example, the compulsory-license doctrine allows musicians to "cover" songs written by others but states that the artist

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[85] *See, e.g.*, CAL. CIV. CODE § 987(b)(2) (protecting only "fine art" and defining the term as "an original painting, sculpture, or drawing, or an original work of art in glass"); N.Y. ARTS & CULT. AFF. LAW § 14.03(3)(e) (McKinney Supp. 2009) (stating that "[t]he provisions of this section shall apply only to works of fine art"); *see supra* note 83 (discussing possible reasons these statutes protect only visual art).

[86] *See* Benjamin S. Hayes, Note, *Integrating Moral Rights into U.S. Law and the Problem with the Works for Hire Doctrine*, 61 OHIO ST. L.J. 1013, 1025 (2000); *see also* Kelly, *supra* note 11, at 230.

[87] McCartney, *supra* note 25, at 40–41.

[88] 15 U.S.C. § 1125 (2006).

[89] *Id.* § 1125(a)(1)(A) (providing civil action against "any person who, on or in connection with any goods or services . . . uses in commerce any . . . false designation of origin . . . which is likely to cause confusion, or to cause mistake, or deceive as to the . . . origin").

[90] *See* Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24–25 (2d Cir. 1976).

[91] Roeder, *supra* note 30, at 568. *See also* Dastar Corp. v. Twentieth Century Fox Films Corp., 539 U.S. 23, 37 (2003) (holding that the Lanham Act only protects designation of *manufacturing* origin and not designation of *creative* origin).

[92] *See Dastar*, 539 U.S. at 37; *see supra* notes 88–92 and accompanying text.

[93] *See* Susan C. Anderson, Note, *Decontextualization of Musical Works: Should the Doctrine of Moral Rights Be Extended?*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 869, 874–75 (2006).

covering the song shall not "change the basic melody or fundamental character of the work,"[94] which is arguably akin to the right of integrity. However, the compulsory-license doctrine only protects the copyright owner, who is often not the creator.[95] Moreover, it protects only copyrighted works and expires with the copyright.[96] Moral rights protect all artistic works and are perpetual.[97]

Contract doctrine is the third U.S. legal regime claimed to protect moral rights because artists are, in theory, "free to insist on moral rights provisions in their contracts."[98] However, artists usually have very little bargaining power, particularly at the start of their careers, and have little knowledge of their contract rights.[99] Accordingly, artists often cannot afford to, or do not know to, insist on moral-rights provisions in their contracts.[100] Not only is contract law inadequate at protecting moral rights, but it often undermines the very protection moral rights afford. If freedom of contract is given priority over moral rights, moral rights can be waived in contract. Due to the large disparity in bargaining power between content providers and artists, content providers would likely always insist that artists opt out of moral-rights provisions in their contracts.[101]

III. TENSIONS BETWEEN MORAL RIGHTS AND ECONOMIC RIGHTS

Formal recognition of moral rights would establish legal interests that conflict with economic interests. Because U.S. policy seeks to retain priority for economic rights while also complying with the Berne Convention (in order to provide greater international protection for its economic rights-holders), the legislature has traditionally

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[94] 17 U.S.C. § 115(a)(2) (2006); Anderson, *supra* note 93, at 874.

[95] Roeder, *supra* note 30, at 566; s*ee supra* notes 44–47 and accompanying text.

[96] 17 U.S.C. § 115(a)(2).

[97] *See supra* text accompanying note 38.

[98] *See* Merryman, *supra* note 72, at 1043. This sentiment was echoed by now-Justice Stephen Breyer, who once wrote that statutory moral-rights protection is unnecessary because existing copyright law "provides a protective umbrella beneath which author and publisher can work out, *in their contract*, safeguards for the author." Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 290 (1970).

[99] Merryman, *supra* note 72, at 1043.

[100] *Id.*

[101] This was in fact the result after the relatively recent United States Supreme Court decision in *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001). In this case, the Court gave freelance journalists something akin to a moral right when it held that although publishers own the copyright to the collective work, they do not have the right to present the authors' individual articles out of context. *See id.* at 488, 493–97. However, the Court noted that this pseudo-moral right can freely be contracted away. *See id.* at 499.

argued that common-law causes of action sufficiently protect moral rights.[102] This line of reasoning, however, is presumably an attempt by Congress to avoid statutory moral-rights protection without violating the Berne Convention. Arguing that these common-law doctrines safeguard moral rights proves to be an absurdity because moral rights are in fact at odds with the economic interests these common-law doctrines were created to protect. Put another way, moral rights did not exist at common law, so it is nonsensical to argue they are protected by common-law causes of action.

A. Troubling Attempts to Protect Moral Rights Through Common-Law Causes of Action

While common-law causes of action may protect the artist's economic rights, they do not protect the artist's personal rights.[103] These personal rights can only be protected through moral-rights legislation. *Gilliam v. American Broadcasting Cos.*,[104] in which the United States Court of Appeals for the Second Circuit attempted to use trademark law to protect the authors' moral rights, illustrates this problem. In *Gilliam*, the writers of a television series brought suit against American Broadcasting Company for airing episodes of their series, which had been substantially edited, without the authors' permission.[105] The authors argued that these edited versions misrepresented their work to the public.[106] The Second Circuit held that the integrity of the authors' work, while not protected by U.S. law via any moral-rights legislation, ought to be protected under the Lanham Act:[107]

> American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors. Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law, cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent. Thus courts have long granted relief for misrepresentation of an artist's

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[102] *See supra* text accompanying note 87.

[103] Ong, *supra* note 10, *passim*.

[104] 538 F.2d 14 (2d Cir. 1976).

[105] *Id.* at 17.

[106] *Id.* at 19.

[107] For a discussion of the Lanham Act's arguable protection of moral rights, see *supra* text accompanying notes 88–92.

> work by relying on theories outside the statutory law of copyright.[108]

The court's noble intent in *Gilliam* clearly recognized that art contains interests worth protecting beyond economic interests. However, the court used inadequate means of protecting those interests. It attempted to transform moral rights into something very similar to what is already protected by copyright law.[109] Legal doctrines such as copyright, contract, and trademark protect economic rights; to say that they also protect moral rights is to say that moral rights reduce to economic rights, which they fundamentally do not. In essence, the court morphed moral rights into economic rights and, in doing so, rendered impotent the very non-economic interests that moral rights aim to protect.

Professor Burton Ong made a similar argument in his article, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*.[110] Ong is not reacting to *Gilliam*, but rather to Henry Hansmann and Marina Santilli's transposition of property law onto moral rights.[111] However, Ong's argument is akin to this concern with *Gilliam*-esque backdoor approaches to protecting moral rights because Ong likewise argues that moral rights cannot be protected via any economic doctrine—whether it be property law (as Hansmann and Santilli propose) or trademark law (as in *Gilliam*).[112] Moral rights should not be subjected to economic analysis, according to Ong, because doing so shifts the focus from moral rights' "intrinsic value as marks of respect for, and recognition of, the artistic contributions of the artist"—things that cannot be accounted for in an economic analysis.[113] Further, an economic analysis focuses on the artist's pecuniary interest, which is not the interest protected by moral rights.[114]

The implications of using a *Gilliam*-type attempt at safeguarding moral rights via laws that protect economic interests have been realized in at least one case, *Choe v. Fordham University School of Law*.[115] In *Choe*, the U.S. District Court for the Southern District of New York used *Gilliam*'s protection of the plaintiffs' interests through the Lan-

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[108] *Gilliam*, 538 F.2d at 25–26 (citations omitted).

[109] Ong, *supra* note 10, at 307.

[110] *Id. passim.*

[111] Hansmann & Santilli, *supra* note 83, at 101–02 (1997). *See generally* Ong, *supra* note 10.

[112] Ong, *supra* note 10, *passim*; *see generally* Hansmann & Santilli, *supra* note 83 (advocating for moral rights, but characterizing them as "divided property rights").

[113] *Id.* at 298.

[114] *See, e.g.*, *id. passim.*

[115] Choe v. Fordham Univ. Sch. of Law, 920 F. Supp. 44 (S.D.N.Y. 1995).

ham Act, rather than through recognition of moral rights, to conclude that there are no moral rights in U.S. law.[116] This is, ironically, converse to the court's intent in *Gilliam*,[117] and such an application of *Gilliam* is further evidence of the impossibility of protecting moral rights via an economic analysis.

B. The Lack of U.S. Statutory Moral-Rights Protection Results from Conflicts Between Moral Rights and Common-Law Causes of Action

Because moral rights exist independently of economic rights, the two naturally conflict on occasion. Resolving some of these conflicts requires choosing whether to give legal priority to either moral rights or copyrights—to the detriment of the other. Congress's refusal to formally recognize moral rights is likely driven by its preference for economic interests and thus its corresponding reluctance to recognize rights that may trivialize these economic interests.

For example, moral rights may interfere with freedom of contract in several ways.[118] First, moral rights are not waivable,[119] which limits parties' freedom to negotiate moral-rights provisions into and out of a contract. Second, moral rights abridge copyright licensing agreements by establishing that the artist retains moral rights, regardless of what is purportedly transferred via a license.[120] Finally, moral rights excuse the artist from completing a commissioned work for personal reasons, regardless of a contractual obligation to the contrary.[121]

The moral-rights doctrine may also interfere with current U.S. copyright law.[122] The moral right to resale profits, for example, not

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[116] *Id.* at 49 ("There is no federal claim for violation of plaintiff's alleged 'moral rights.' The Court in *Gilliam* stated that nearly 20 years ago.").

[117] *See* Gilliam v. Am. Broad. Cos., 538 F.2d 14 (2d Cir. 1976).

[118] *See* Rigamonti, *supra* note 20, at 374 (arguing that moral rights impose "a mandatory term on every contract containing a copyright license or an assignment of specific economic rights . . . that authors are always entitled to rescind unilaterally the contract").

[119] *See supra* note 41 and accompanying text.

[120] *See supra* note 44 and accompanying text (stating that moral rights remain vested in the artist even when the copyright is transferred).

[121] *See* DUBOFF & KING, *supra* note 54, at 205. The seminal case prompting recognition of this right in France was *Whistler v. Eden.* Cour de cassation [Cass. 1e civ.] [highest court of ordinary jurisdiction] Seine, Mar. 14, 1900, D.P. 1900, I, 497 (Fr.).

[122] Hayes, *supra* note 86, at 1015 ("In order to successfully attach moral rights to American law it would be necessary to effectuate significant change in the fundamental goals and philosophy of the federal copyright law.").

only conflicts with, but flies in the face of, the first sale doctrine.[123] The first sale doctrine establishes that the copyright owner's right to a particular copy of her work ends once that copy has *first* been sold.[124] The right to resale profits, in contrast, requires a royalty be paid to the creator *every* time a copy of her work is sold—and resold.[125] In addition, moral rights have the potential to restrict the use of a work in the public domain, which is problematic because works in the public domain are, by definition, unrestricted.[126] Finally, moral-rights theory conflicts with the work-for-hire doctrine, which is an exception to the general rule that the creator initially owns the copyright, [127] because moral rights do not allow "works for hire," in the sense that the author cannot contract away her moral rights.[128]

At least one U.S. federal circuit court has ruled that copyright law preempts other means of protecting artistic works. In *Laws v. Sony Music Entertainment*,[129] the plaintiff attempted to use the right of publicity to obtain relief from her record company, which licensed her song (in which the record company owned the copyright) for a use of which she did not approve.[130] The U.S. Court of Appeals for the Ninth Circuit held that the Copyright Act preempts the right of publicity because to conclude otherwise would imply that "virtually every use of a copyrighted sound recording would infringe upon the original performer's right of publicity."[131] This ruling reinforces the

[123] 17 U.S.C. § 109(a) (2006); *see* Desai, *supra* note 47, at 18.

[124] 17 U.S.C. § 109(a) ("[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.").

[125] Liemer, *supra* note 12, at 55; *see also supra* text accompanying note 29.

[126] Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S. 2d 575, 578 (N.Y. Sup. Ct. 1948).

[127] 17 U.S.C. § 101 (defining "work made for hire" as "(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work").

[128] Hayes, *supra* note 86, at 1027–31 (pointing out that moral rights potentially conflict with the work-for-hire doctrine). The author usually cannot contract away moral rights because they are not waivable. Liemer, *supra* note 12, at 44.

[129] 448 F.3d 1134 (9th Cir. 2006).

[130] *Id.* at 1136.

[131] *Id.* at 1145. Ironically, this is exactly the sort of implication that can be useful in helping to discourage illegal music-file sharing. *See infra* Part IV.C (discussing the need for a legally protected artists' right that is infringed when the consumer downloads).

notion that in the current U.S. legal regime an artist retains no rights to her work once she has transferred its copyright.[132]

In addition to conflicting with U.S. contract doctrine and copyright law, moral rights also conflict with the free alienability of property. In American law, property rights often take precedent over other rights,[133] and moral rights are essentially a form of servitude restricting the free alienability of intellectual property.[134] In an article titled *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, Hansmann and Santilli attempt to superimpose property law onto moral rights by arguing that in U.S. law "a seller of chattel generally cannot reserve rights in the chattel . . . that are enforceable against subsequent purchasers."[135] Moral rights, Hansmann and Santilli theorize, attempt to change this rule for art by allowing the author to create a negative servitude in her work, in the form of prohibiting deformation or mutilation without the author's permission.[136] In this way, moral rights lower the value of artwork as property by restricting the way the artwork can be used and transferred.[137]

Moral rights conflict with notions such as freedom of contract, copyright, and free transferability of property. Because the United States tends to favor protection of economic interests at (almost) all costs, there is a national reluctance to recognize moral rights. However, it is unclear just why economic rights, and doctrines protecting them, ought to be prioritized above other rights. Additionally, such a prioritization can lead to unintended consequences, some of which may in fact prove detrimental to the economic interest-holders.

IV. FOR THE LOVE OF MONEY: DRIVING FORCES BEHIND ILLEGAL MUSIC-FILE SHARING AND MORAL RIGHTS AS AN ANTIDOTE

One unintended consequence of prioritizing economic rights in artistic works has been a shift in society's view of those works. Society loses sight of the works' non-economic value when only the economic

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[132] Robert Gerber, *Copyright Act Preempts Singer's Right of Privacy and Publicity Claims Under California Law*, INTELLECTUAL PROP. LAW BLOG, June 29, 2006, http://www.intellectualpropertylawblog.com/archives/22883-print.html.

[133] *See* FISHER, *supra* note 6, at 138; Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 814 (2001).

[134] *See* JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 310 (4th ed. 2002); Hansmann & Santilli, *supra* note 83, at 101–02; Julie Levy, *Creative Works as Negotiable Instruments: A Compromise between Moral Rights Protection and the Need for Transferability in the United States*, 5 VAND. J. ENT. L. & PRAC. 27, 29 (2003).

[135] Hansmann & Santilli, *supra* note 83, at 101.

[136] *Id.*

[137] *See id.*

value is protected by law, causing the works to be viewed as commodities rather than as art.

A. Major Labels' Treatment of Music as a Marketable Commodity

Major labels view, treat, and market artists solely in terms of their profit-making ability, reflecting their view of music as a commodity. As Julie Levy writes, "in the United States, creative works are commodities that can be bought and sold. Copyrights give authors economic incentives to create but fail to recognize the final product as a reflection of the authors' personalities."[138] For the record label, "a hit song is an annuity, earning money year after year for its lucky owner,"[139] with its "lucky owner" almost always being the record company. In viewing music as a commodity, major labels attempt to maximize the profits derived from it, often at the expense of both the artist and music fans.

One way major labels have maximized profits is through decreased payments to artists.[140] Record contracts generally require artists to relinquish ownership of their sound recordings to the record label; this is accomplished by transferring the works' copyright.[141] Furthermore, artists realize only a very small fraction of the profits from their albums, with the majority going to the label. On average, the record label pays an artist a meager $1.43 for the sale of each compact disc with a suggested retail price of nineteen dollars.[142] Another example of decreased payments to artists is several major labels' continued deduction of "breakage" expenses from artists' royalties, despite the fact that "breakage" refers to record albums made of shellac, which have not been used in the industry for quite some time.[143]

As another method of reducing expenses, major labels have decreased the quality of the artists they sign[144] and decreased time spent

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[138] Levy, *supra* note 134, at 27.

[139] FREDRIC DANNEN, HIT MEN: POWER BROKERS AND FAST MONEY INSIDE THE MUSIC BUSINESS 32 (1990).

[140] *See* Gary Shapiro, *Sell Don't Sue*, ISM SOUND NETWORK NEWS, Feb. 1, 2006, http://www.ismsound.com/index/news/id.223.

[141] *E.g.*, Desai, *supra* note 46, at 18–19.

[142] *See* TED LATHROP, THIS BUSINESS OF MUSIC MARKETING AND PROMOTION: A PRACTICAL GUIDE TO CREATING A COMPLETELY INTEGRATED MARKETING AND E-MARKETING CAMPAIGN 81 (rev. ed. 2003).

[143] FISHER, *supra* note 6, at 158.

[144] MAT CALLAHAN, THE TROUBLE WITH MUSIC 9 (2005) (commenting that music was worth 51.7 cents per minute in 1992 and only fifteen cents per minute in 2002).

on artist development.[145] Instead of treating music as the non-commodifiable art form that it is, major labels treat music as something manufacturable. Matt Callahan states that "a large quantity of music is produced according to formulas, more or less rationally designed, and promoted for sale amongst the populace as a replacement for that which organically arises from amongst them."[146] He calls this "Anti-Music" and characterizes it as "the sonic equivalent of fast food."[147] Major labels have flooded the marketplace with this low-quality manufactured "music," leaving music consumers "to more readily consume the McMusic which can be more effectively controlled and more profitably sold than the genuine article."[148]

In addition to reducing expenses, major labels have increased costs to consumers.[149] Average compact disc prices rose from ten dollars to fifteen dollars between 1995 and 2000, despite the fact that the cost of producing a compact disc declined substantially during that period;[150] prices rose another 7.2% between 1999 and 2001.[151] This price increase was substantial enough to warrant scrutiny by the Federal Trade Commission after thirty states filed suit against the major labels for price fixing.[152]

Major labels have also exploited consumers in their treatment of music as a commodity by molding music fans into "markets." Just as lowering production costs and payments to artists exploits music and musicians, attempting to capture as much of the consumers' disposable income as possible exploits music fans.[153] As Ryan Mills writes,

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[145] *See* KUSEK & LEONHARD, *supra* note 7, at 108; Claire Matheson, *Could EMI Become No. 1 Bid. Target?*, BBC NEWS, May 22, 2007, http://news.bbc.co.uk/2/hi/business/6446255.stm ("[I]f consolidation continues, companies will be firmly focused on the money and not the music—and that means even less artist development and a lot more 'one-hit wonders'.").

[146] CALLAHAN, *supra* note 144, at 23.

[147] *Id.*

[148] *Id.* at xx.

[149] *See* Shapiro, *supra* note 140.

[150] *Too Much for Mozart*, ST. LEGISLATURES, Dec. 2000, at 10, 10; *U.S. States Sue Big Music*, CNNMONEY.COM, Aug. 8, 2000, http://money.cnn.com/2000/08/08/companies/record_industry.

[151] LESSIG, *supra* note 4, at 70.

[152] *U.S. States Sue Big Music*, *supra* note 150. The states asserted that the price increase caused consumers to pay $480 million more than they should have between 1997 and 2000. *Id.* The labels later settled with the FTC. Michele Wilson-Morris, *Five Major Labels Settle with the FTC over Retailer CD Pricing*, MUSICDISH, May 11, 2000, http://musicdish.com/mag/?id=974.

[153] *See* KUSEK & LEONHARD, *supra* note 7, at 30 ("[T]he music industry has had the amazing luxury of earning billions of dollars every year, despite the fact that the consumer has had to constantly sacrifice some essential needs and desires, simply to get any music at all.").

"music [is] no longer about the music; it [is] about grabbing the attention of the distracted listener and thus drawing a profit from them [sic]."[154] This treatment of music audiences as markets is "the destruction of an organic, uncommodifiable relationship between people and their creative expressions, and the construction of an exploitative one in its place."[155]

Finally, major labels also attempt to maximize profits by forcing others out of the market. There were only three "major labels" as of 2008, and each had its own distributors.[156] Large conglomerates also have a heavy hand in the radio and retail sectors of the music industry. Until recently, one such conglomerate, Clear Channel Communications, owned a majority of U.S. major radio stations and many live music venues.[157] Additionally, in 2002–2004, "big box" stores, such as Wal-Mart, sold more recorded music than traditional record stores, and Wal-Mart was the top music retailer of 2007.[158] This results in the manufacture, distribution, and sale of music largely by huge, profit-driven conglomerates, rather than boutique, music-driven companies.[159]

B. Major Labels' Commodification of Music Created an Environment Conducive to Illegal Music-File-Sharing

To many consumers there is a special quality of art that makes a fifteen-dollar pile of bricks, for example, inherently less valuable than a fifteen-dollar music compact disc.[160] As Rajan Desai writes, "[m]usic

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[154] Ryan Mills, Contemporary Music (Feb. 20, 2005) (unpublished paper), *available at* http://tonalatonal.blogspot.com/2005_02_01_archive.html.

[155] CALLAHAN, *supra* note 144, at 27.

[156] *See* DANNEN, *supra* note 139, at 111–12 (explaining that what makes a label "major" is that it does its own nationwide distribution).

[157] *See, e.g.*, Frank Ahrens, *Clear Channel Sale to End Era*, WASH. POST, Nov. 17, 2006, at D01 (characterizing Clear Channel as "a giant that dominated the industry and became the bogyman of media consolidation for the past half-decade").

[158] Record stores accounted for 36.8%, 33.2%, and 32.5% of recorded music sales in 2002, 2003, and 2004, respectively; "other" stores accounted for 50.7%, 52.8%, and 53.8% of recorded music sales in 2002, 2003, and 2004, respectively. Recording Indus. Ass'n of Am., 2006 Consumer Profile, http://76.74.24.142/E795D602-FA50-3F5A-3730-9C8A40B98C46.pdf. In 2006, record stores accounted for 35.4% of recorded music sales, and "other" stores accounted for 32.7% of recorded music sales. *Id.* Wal-Mart was the number one music retailer of 2007. Steve Knopper, *Wal-Mart Demands CD-Price Cut*, ROLLING STONE, Apr. 3, 2008, at 16.

[159] *See* KUSEK & LEONHARD, *supra* note 7, at 109. This is exemplified in the fact that "[Wal-Mart] is powerful enough that it can bypass the record industry entirely, as it did with the Eagles' *Long Road Out of Eden*, which sold 2.6 million copies exclusively through Wal-Mart." Knopper, *supra* note 158, at 16.

[160] It is this "special quality" that moral rights seek to protect.

has a purpose and a meaning greater than economic concerns."[161] Art is not necessarily intended to be profitable, and when a supplier commodifies it, it does not necessarily work the way a widget would in the marketplace.[162] Music cannot be mass-produced in a factory.[163] Sarah Zimmerman writes that "anytime you take something that is precious to you [like music] and commodify it, it'll eventually come back to hurt you."[164] In this case, treatment of music as a commodity "came back to hurt" major labels by causing consumers to likewise view music as a commodity.

At some point, major labels raised their prices too high and lowered their quality too far, forcing consumers to look for alternate channels of music distribution. It is at this point that Napster and similar services entered the market and filled this consumer need.[165] As Callahan writes: "What downloading has done is to expose the inequities inherent in the current system of music distribution. It has laid bare the way the music industry has functioned since recorded music became a profitable commodity."[166] This is similar to what occurred in the travel industry with the birth of online travel agents, such as Expedia and Orbitz. Airlines and hotels were forced to lower their prices and strengthen their quality standards[167] in order to com-

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[161] Desai, *supra* note 46, at 3.

[162] *See* GEORGE W.F. HEGEL, HEGEL'S PHILOSOPHY OF RIGHT 40–41 (T.M. Knox trans., Oxford Univ. Press 1949) (1821) (arguing that works of art may not be "things" because "while possession of these may be the subject of business dealings and contracts, as if they were things, there is also something inward and mental" about them); Hughes, *supra* note 9, at 315 (highlighting differences between ideas and physical property).

[163] This relates back to Callahan's characterization of mass-produced "McMusic" as something distinct from genuine "music." CALLAHAN, *supra* note 144, at xx.

[164] Sarah Zimmerman, *Jaded at Ten*, MAXIMUM ROCKNROLL, June 1994, *available at* http://www.arancidamoeba.com/mrr/sarahcol.html.

[165] *See* David W. Opderbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685, 1713 ("A successful P2P project allows tens of millions of users to subvert what is perceived as an unjust institution—the content industry's control over distribution of creative works . . . .").

[166] CALLAHAN, *supra* note 144, at 226.

[167] Jeff Higley, *Technology Talk Grips Las Vegas Show: Internet's Impact on Industry Turns into Focal Point at June Conference*, 217 HOTEL & MOTEL MANAGEMENT 6 (2002) (on file with author) (illustrating that Internet reservations have increased, and rates have decreased, with one hotel chain reporting Internet rates down forty percent); Jeremy A. Verlinda & Leonard Lane, The Effect of Internet on Pricing in the Airline Industry 2 (Nov. 2004) (unpublished paper, on file with author) (noting that air travel prices become more competitive "as the size of the Internet airline travel search population grows"); Carmina Perez, *E-Travel Site Takes Off*, CNNMONEY.COM, May 25, 2001, http://money.cnn.com/2001/05/25/living/q_orbitz/index.htm ("Orbitz could force airlines to lower fares in the immediate future . . . .").

pete with these new market entrants. As a result, revenue from leisure travel in the United States increased from $400 million in 1997 to $15.4 billion in 2000.[168] The record industry ought to use this as a model of successful competition with new technologies, rather than continuing to fight against them. In recent years, where the travel industry has lowered prices and increased quality, the record industry has increased prices[169] and decreased quality.[170] It is thus no wonder the record industry has witnessed the opposite result of the travel industry in battling competition from online distributors—record sales have plummeted,[171] while travel sales have skyrocketed.[172]

In maximizing music profits, major labels exploited artists and consumers by lowering quality and raising prices, while decreasing payments to artists. In blunt terms, major labels have been "stealing" from artists and consumers for decades,[173] creating a sort of "eye for an eye" mentality in the minds of many music consumers. Consumers felt, and continue to feel, that music is priced too high. This in turn caused consumers to become resentful toward major labels, which further increased demand for networks such as Napster by removing some of the guilt the consumer would normally feel for theft. In short, "[t]o much of the American public, the recording industry is greedy and rapacious. It is hard for many Americans to feel guilty about 'stealing' music by downloading free MP3s when they consider the recording industry to have been stealing from its artists for decades."[174]

This sentiment leads to resentment toward the industry and makes downloading more attractive.[175] Even consumers who oppose illegal downloading find trouble mustering sympathy for the record industry.[176] According to the recording artist Prince, the rise of illegal music-file sharing has "little [to] do with people's intrinsic respect [for] art and artists, and everything [to] do with the cynical attitude

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[168] OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION, E-COMMERCE'S IMPACT ON THE TRAVEL AGENCY INDUSTRY 6 (2001), *available at* http://www.sba.gov/advo/research/rs210tot.pdf.

[169] *See supra* notes 149–51 and accompanying text.

[170] *See supra* note 144 and accompanying text.

[171] *See, e.g.*, *supra* note 4 and accompanying text.

[172] *See, e.g.*, *supra* note 168 and accompanying text.

[173] "Stealing" here refers to lowering payments to the artists whose products they are selling and increasing prices to the consumers who are purchasing the products. *See supra* notes 140–43, 149–52 and accompanying text.

[174] Stacey M. Lantagne, Note, *The Morality of MP3s: The Failure of the Recording Industry's Plan of Attack*, 18 HARV. J.L. & TECH. 269, 280 (2004).

[175] KUSEK & LEONHARD, *supra* note 7, at 32; Lantagne, *supra* note 174, at 279.

[176] Lantagne, *supra* note 174, at 281.

of big industry conglomerates, which have consistently pushed [for] more and more commercial, highly profitable products at the [e]xpense of authentic art and respect [for] artists."[177] Because consumers do not sympathize with record labels, they feel less guilt for obtaining record labels' products without paying for them.

Moreover, sharing music files without permission is currently illegal as *copyright* infringement. An attempt to make P2P users feel guilty for copyright infringement is essentially a moral appeal. This appeal will fail for at least two reasons. First, copyright is inherently "amoral."[178] One author postulates that copyright is, in fact, amoral precisely because it ignores moral rights.[179] Simply put, many Americans see copyright as a money issue and not a moral issue.[180] To many young P2P users, illegally sharing music files is "harmless fun,"[181] akin to sneaking into a movie or reading a magazine in a bookstore coffee lounge and then placing it back on the shelf. Second, consumers by and large simply do not sympathize with record labels, thus making consumers less likely to view stealing from record labels as immoral.[182] In 2000, a poll revealed that forty to fifty-six percent of all respondents felt it was not immoral to download music without paying for it.[183] In addition, a 2003 survey indicated that three out of four teens feel it should be legal to share music files without paying the rightsholder.[184]

The Recording Industry Association of America (RIAA) and other interested parties[185] compare file sharing to stealing a compact

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[177] CALLAHAN, *supra* note 144, at 214.

[178] Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y U.S.A. 1 *passim* (1980) (copyright is amoral); *see* Lantagne, *supra* note 174, at 282–83 (stating that a moral appeal to stop copyright infringement will fail).

[179] DaSilva, *supra* note 178, at 6.

[180] *See* Lantagne, *supra* note 174, at 283.

[181] KUSEK & LEONHARD, *supra* note 7, at 101.

[182] *See* FISHER, *supra* note 6, at 124 (noting that as of 2003, sixty-seven percent of downloaders did not care whether the music they were downloading was copyrighted; this percentage was higher than ever before); Lantagne, *supra* note 174, at 278–83.

[183] FISHER, *supra* note 6, at 3; *see also* Lantagne, *supra* note 174, at 282 (indicating that "most people do not think it is immoral [to download MP3s] independent of copyright law").

[184] KUSEK & LEONHARD, *supra* note 7, at 101. Note that this does not indicate whether or not teens feel they ought to pay the *artist*.

[185] Congressman Howard Berman, Speech to the Computer & Communications Industry Association Regarding Solutions to Peer to Peer Piracy (July 25, 2002), *available at* http://www.house.gov/list/press/ca28_berman/ComputerCommunicationsIndustryAssosiation.shtml ("There is no difference between pocketing a CD in a Tower

disc, but frankly, American music consumers just do not buy it (literally).[186] First, many consumers download songs that they would not otherwise pay for; second, there is the notion that when a compact disc is stolen from a store, that store has one less disc to sell—the same is not true with digital music files.[187] Many consumers simply do not liken P2P music-file sharing to shoplifting. This, along with the absence of sympathy for record labels, amplifies the lack of guilt consumers feel for engaging in the activity, thus making illegal downloading more attractive and increasingly popular.

C. Moral-Rights Protection as a Remedy

Moral-rights protection can help undo the harmful side effects that have resulted from major labels' commodification of music, including causing consumers to lose sight of the value of music and refrain from feeling guilty for illegally downloading music. Commodification of music causes both the record label and the consumer to lose sight of that *je ne sais quoi*[188] in music that makes it something more than a disposable good. It is this same *je ne sais quoi* that moral rights seek to protect. As a result, enacting moral-rights legislation can help restore the value placed on music and help consumers decide once again that it is worth paying for. Moral rights can accomplish this, in part, by bolstering respect for art and artists.

A society's laws protecting art reflect the value (or lack thereof) placed on art by that society.[189] Consequently, a society with laws that protect only art's economic interests teaches its members that only the monetary value derived from art is worth protecting. Moral rights can create a social respect for art because they demonstrate that society views the non-economic value of art as important enough to warrant legal protection.[190] This social respect for art cultivated by moral rights can in turn help de-commodify music, which can make illegally downloading it less attractive.

Records and downloading copyrighted songs. . . . Theft is theft."). Notably, Congressman Berman represents California's Twenty-Eighth District, home to many major labels' West Coast headquarters.

[186] Lantagne, *supra* note 174, at 278.

[187] LESSIG, *supra* note 4, at 70–71 (citing Jane Black, *Big Music's Broken Record*, BUSINESSWEEK ONLINE, Feb. 13, 2003, http://www.businessweek.com/technology/content/feb2003/tc20030213_9095_tc078.htm).

[188] Translated from the French for "I do not know what" and meaning, roughly, "that little something; a quality that eludes description." NEW DICTIONARY OF CULTURAL LITERACY 70 (3d ed. 2002), *available at* http://www.bartleby.com/cgi-bin/texis/webinator/sitesearch?query=je+ne+sais+quoi&filter=col59&Submit=Go.

[189] *See* Liemer, *supra* note 12, at 41.

[190] *See* Ong, *supra* note 10, at 311–12.

In addition to creating respect for art, moral rights can create social respect for artists.[191] As Russell DaSilva writes: "[T]he failure of the federal copyright law even to address the issue [of moral rights] creates a national standard of indifference toward artists' rights."[192] Moral-rights legislation would help make the United States an environment in which contributions of the artist are recognized.[193] The current lack of moral-rights protection in the United States creates the perverse situation in which the owner of the art's copyright is protected under the law, while the actual creator of the art is not.[194] The current regime, therefore, not only gives preference to copyrights over moral rights, but also to content owners over creators.[195] Garnering respect for art and artists can help de-commodify music by increasing the value placed on it and thus making it something consumers are more ready to pay for and less likely to steal.

Moral rights can also create more consumer guilt for illegal music-file sharing by creating a second victim of illegal downloading—the artist. While consumers tend not to sympathize with major record labels, many downloaders would gladly pay for an album if the proceeds went directly to the artist.[196] However, consumers "are becoming aware that the record companies want them to pay somewhere between six to fifteen times what the artist makes from the sale of the [compact disc]."[197] The RIAA's widely publicized lawsuits

[191] *See* Holst, *supra* note 56, at 114.

[192] DaSilva, *supra* note 178, at 6.

[193] Ong, *supra* note 10, at 302.

[194] This is assuming the creator and the copyright owner are not the same person, which they usually are not. *See supra* notes 45–47 and accompanying text.

[195] *See* DaSilva, *supra* note 178, at 54.

[196] *See* Lantagne, *supra* note 174, at 280. This postulation finds support in the recent success of Radiohead's album, *In Rainbows*, which the band initially made available only as a download and allowed downloaders to name their own price. Paul Sexton, *Back to the Future*, BILLBOARD, Jan. 12, 2008, at 27. While the band has not released official U.S. sales figures as of the writing of this Comment, the average price paid for the download is estimated at between eight and nine dollars. *Id.* Even sources estimating more modest prices of two or three dollars acknowledge that this is nonetheless more than the band would have been paid as a royalty on a regularly-priced compact disc from its record label. Sheila Marikar, *Radiohead Lets Fans Set CD Price*, ABC NEWS, Nov. 6, 2007, http://abcnews.go.com/Entertainment/story?id=3826638&page=1. Musical group Nine Inch Nails has also reaped the benefits of the Radiohead model; Nine Inch Nails' 2008 album, *Ghosts I-IV*, was only available for purchase from the artist's own Web site and took in $1.6 million in sales its first week. *NIN Scores with Web Release*, ROLLING STONE, Apr. 3, 2008, at 16.

[197] KUSEK & LEONHARD, *supra* note 7, at 32.

against music downloaders[198] have ironically reiterated this fact to consumers.[199] Consumers see that it is the *record labels*—and not the artists—suing for downloading, which implies that it is the record labels' interests they are infringing, and not the artists', when they use P2P networks.

Moral-rights legislation, in contrast to copyright law, can help consumers frame illegal music-file sharing as stealing from the artist (and not merely the record label) by creating a legal right for artists that is infringed when music is illegally downloaded, even if the artist no longer owns the copyright. What is more, moral rights can help consumers see that they are stealing more than money when they download songs without permission; each song contains a piece of the artist himself.

Although adopting moral-rights protection into U.S. law would make it illegal to violate moral rights, it is not the fear of additional punishment that will discourage consumers from using P2P networks to share music. Instead, moral rights will help educate consumers that when they do so they are diverting income from a "starving artist," which will help create sympathy that can discourage consumers from downloading. Legally recognized moral rights will not help curb P2P music-file sharing by providing another cause of action by which to punish it but rather will make a statement about the value of art. In this way, moral rights can help to change consumer norms regarding the value of music.

V. TEACHING AN OLD DOG NEW TRICKS: CONVINCING CONTENT OWNERS THAT MORAL-RIGHTS PROTECTION IS NECESSARY

The recorded music industry would likely initially oppose moral-rights legislation because moral rights would limit the economic value of copyrights by restricting their use and alienability.[200] Additionally, moral rights would increase record labels' expenses in the form of time spent securing permission from the creator each time the label wanted to exploit the work. This decrease in economic value and

[198] *See, e.g.*, Capitol Records, Inc. v. Foster, No. Civ. 04-1569-W, 2007 U.S. Dist. LEXIS 33227 (W.D. Okla. Apr. 23, 2007); Priority Records LLC v. Chan, No. 04-CV-73645-DT, 2005 U.S. Dist. LEXIS 20360 (E.D. Mich. May 19, 2005).

[199] The suits have also caused a tremendous loss in the consumer's trust of the record labels. KUSEK & LEONHARD, *supra* note 7, at 147. Additionally, the suits have ironically provided valuable public relations for file sharing technology. Opderbeck, *supra* note 165, at 1721.

[200] Ironically, this desire to maximize economic potential is one of the very reasons consumers do not feel guilty about stealing from record labels via file sharing. *See supra* Part IV.

increase in expenses would essentially result in increased transaction costs to the content owners, making the content owners unlikely to support moral-rights legislation.

A. Benefits to Content Owners Will Outweigh Corresponding Decreases in the Value of Copyrights

Historical opposition to moral-rights legislation has in fact come most prominently from movie studios, record labels, publishers, and the like[201]—the copyright owners. During 1936 congressional hearings, major film producers argued against the United States joining the Berne Convention because of its moral-rights provision.[202] A representative at those hearings from Twentieth Century-Fox Film Corporation argued:

> Our chief objection, as I said, is to the moral clause. That is of great concern to the motion-picture industry; we must have a right to change an author's work. . . . A motion picture is intended to have entertainment value for the great masses and its financial success depends upon its mass-psychology entertainment value; the wider the appeal, the greater its value.[203]

Major record labels would likely endorse this argument as well because, like film studios, they are in the business of exploiting content to its maximum commercial potential.

Moral-rights protection would limit the use of copyrighted material by preventing anyone other than the creator from changing the art in certain ways.[204] This, in turn, could prevent changes which would make the art more economically viable,[205] thus lowering the value of the copyright. Moral rights would also limit the free aliena-

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[201] *See* Lee, *supra* note 133, at 804–05; David W. Opderbeck, *The Penguin's Paradox: The Political Economy of International Intellectual Property and the Paradox of Open Intellectual Property Models*, 18 STAN. L. & POL'Y REV. 101, 103 (2007) ("The standard narrative is that large corporate interests, such as . . . the entertainment industry, have been able to capture the lawmaking process such that the law has increasingly come to favor stronger intellectual property protection."); Roeder, *supra* note 30, at 558; Holst, *supra* note 56, at 112 (quoting Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of Authorship,* 1991 DUKE L.J. 455, 497).

[202] Berne Convention, *supra* note 78, art. 6*bis*.; *Hearings Before the H. Comm. on Patents*, 74th Cong. 1011–13 (1936) [hereinafter *Hearings*] (statement of Edwin P. Kilroe, attorney for Twentieth Century-Fox Film Corp. and Movietonews, Inc.).

[203] *Hearings*, *supra* note 202, at 1012.

[204] *See supra* notes 24–26 and accompanying text (stating that the moral right of integrity prevents alteration of the work by anyone other than the creator); *supra* notes 133–37 and accompanying text (stating that moral rights interfere with the free alienability of property).

[205] For example, remastering a recording, converting a recording into a new medium, etc.

bility of artistic works by placing servitudes on them.[206] Content owners are likely to argue that if creative works cannot be transferred freely, they are of little value in the United States.[207]

Several problems inherently exist in this argument. First, to say artistic works are of "little value" if they cannot be traded freely is to say they are of "less economic value"; this argument is flawed in that it views art as only having value in economic terms. Second, the file sharing problem is essentially music being traded *too* freely, so restraints on this literally "free" trade of music may not be harmful toward copyright owners after all. In fact, the entertainment "industry tends to favor strong intellectual property rules, even if such rules become a sort of trade barrier."[208] In this sense, moral rights are a necessary barrier against illegal trade via P2P networks.

Furthermore, this argument is fatally shortsighted. The record industry is notorious for fighting new technologies, losing the battle, and then blaming the new technologies for losses in sales.[209] Arguing against moral rights because of increased transaction costs would essentially become another instance of resisting new technology. These shortsighted approaches have not worked well for the record industry in the past, and it is highly unlikely such an approach is going to work in staving off illegal P2P music-file sharing. Rather than resisting new technologies, the record industry must learn to exploit them.[210] One crucial step in this lesson is realizing that the value of moral rights as vehicles for shifting consumer norms away from illegal music-file sharing outweigh the increased transaction costs due to moral rights.

While it is true that moral-rights protection would decrease the economic value of copyrights, it would also help decrease illegal file sharing. Over the long run, the increased transaction costs created by moral rights would likely be less than labels' losses due to file sharing. File sharing, although only popularly used to share music since 1999, has resulted in crippling losses to the music industry.[211] Major

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[206] *See supra* notes 133–37 and accompanying text.

[207] *See generally* Hansmann & Santilli, *supra* note 83 (focusing on the effects moral rights may or may not have on a work of art's economic value).

[208] Opderbeck, *supra* note 201, at 133.

[209] LESSIG, *supra* note 4, at 69.

[210] *See id.* at 73.

[211] *See* Norbert J. Michel, *The Impact of Digital File Sharing on the Music Industry: An Empirical Analysis*, 6 TOPICS IN ECON. ANALYSIS & POL'Y 1, 11 (2006) ("Our micro-level data test results suggest that file sharing may have reduced album sales (between 1999 and 2003) by as much as thirteen percent for some music consumers."); INT'L FED'N OF THE PHONOGRAPHIC INDUS., THE RECORDING INDUSTRY 2006 PIRACY REPORT: PROTECTING CREATIVITY IN MUSIC 4 (2006), http://www.ifpi.org/content/library/

labels are now forced to compete with P2P networks that distribute their product for free. Landes and Posner postulate that "[s]triking the correct balance between access and incentives is the central problem in copyright law."[212] P2P networks increase consumer access exponentially—to such an extent that incentives to create are threatened because record labels and artists receive no payment for their product when it is obtained via an illegal P2P network. In order to achieve Posner's balance, access to music must be limited to preserve incentives to create it. Moral rights can help limit access by discouraging consumers from sharing music files illegally. Accordingly, major labels' interest in decreasing illegal music-file sharing should outweigh their interest in preventing restrictions on the free alienability of copyrights. Freely alienable copyrights will be of no use to major labels if those copyrights become worthless due to an epidemic of illegal file sharing.[213]

B. Here We Are Now, Entertain Us: Innovations in Technology Require New Safeguards for Artistic Works

Digital distribution is a "unique test of the copyright system."[214] While the record industry has faced piracy since its inception, "piracy" no longer means a few copies of a dubbed cassette tape.[215] Works can now be copied with digital code and then distributed to the public on a widespread scale in new digital formats.[216] M-PEG Audio

piracy-report2006.pdf (estimating that almost twenty-billion songs were illegally downloaded worldwide in 2005).

[212] William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

[213] *See* KUSEK & LEONHARD, *supra* note 7, at 32 (urging that the music industry must put the needs of artists and consumers before "existing incumbents' business interests" if it is to survive).

[214] *See* LERNER & BRESLER, *supra* note 38, at 1994; Note, *Visual Artists' Rights in a Digital* Age, 107 HARV. L. REV. 1977, 1978 (1994).

[215] *See* FISHER, *supra* note 6, at 110; Darcie-Nicole Wicknick, *The RIAA Music Downloading Controversy: Both Sides of the Record*, MUSICBIZADVICE.COM, Oct. 17, 2007, http://www.musicbizadvice.com/a_little_history_on_music_piracy%20.htm.

> Before the invention of blank tape it was close to impossible to COPY a record. . . . Even after the invention of blank tape . . . copying a record was a clunky process at best, involving a reel-to-reel machine . . . . [When the cassette tape was invented], people began dubbing vinyl-to-cassette and cassette-to-cassette, but chances were low that they were selling them . . . . Dubbing was mostly kids at home who made mix tapes . . . .

Id.

[216] Wicknick, *supra* note 215.

Layer 3 (MP3), one such format, was invented in 1996,[217] and by 1999, "MP3" had become the most searched-for term on the Internet.[218] Additionally, the advent of P2P music-file sharing "drove demand for access to the Internet more powerfully than any other application."[219] Some scholars believe that the U.S. copyright system, as originally conceived, simply cannot handle digital technologies.[220] This necessitates looking outside the copyright system for new forms of protecting artistic works—moral rights are one such "new form."[221]

The law cannot keep up with increasing technology via copyright infringement lawsuits.[222] The RIAA's attempt to stop illegal file sharing via these sorts of lawsuits has failed miserably.[223] In fact, sales of recorded music continue to decline, despite the passing of nearly a decade since the RIAA won its legendary court battle to disarm Napster.[224] Sales of compact discs decreased nineteen percent in 2007, and digital sales leveled off that year.[225] In addition, 2007 saw the

[217] Mary Bellis, *The History of MP3*, ABOUT.COM:INVENTORS, http://inventors.about.com/od/mstartinventions/a/MPThree.htm ("invented" referring to date U.S. patent issued for MP3 format).

[218] MENN, *supra* note 1, at 110.

[219] LESSIG, *supra* note 4, at 296.

[220] *Visual Artists' Rights*, *supra* note 214.

[221] In addition to combating illegal digital distribution, the industry must also learn to use digital distribution to its advantage, as iTunes and Amazon.com have recently begun to do by launching their respective online MP3 storefronts.

[222] *See* FISHER, *supra* note 6, at 4 (commenting that record companies have been less successful at fighting off recent technologies than they were in shutting down Napster); KUSEK & LEONHARD, *supra* note 7, at 147.

[223] For example, Capitol Records sued an alleged music downloader for copyright infringement; the court rejected Capitol Records' Motion for Reconsideration after the lower court found the record label's copyright infringement claims "untested and marginal." Capitol Records, Inc. v. Foster, No. Civ. 04-1569-W, 2007 U.S. Dist. LEXIS 33227, at *5 (W.D. Okla. Apr. 23, 2007). In another such failed suit, Priority Records voluntarily dismissed its suit against an alleged music downloader because of issues regarding which member of the household was responsible for the downloading. Priority Records LLC v. Chan, No. 04-CV-73645-DT, 2005 U.S. Dist. LEXIS 20360, at *3, *7 (E.D. Mich. May 19, 2005). Circuit courts have refused to enforce RIAA subpoenas requiring Internet service providers to reveal the names of customers the RIAA believes to be copyright infringers. Recording Indus. Ass'n of Am. v. Charter Commc'ns, Inc., 393 F.3d 771 (8th Cir. 2004); Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc., 359 U.S. App. D.C. 85 (D.C. Cir. 2003). *Contra* Virgin Records Am., Inc. v. Thomas, No. 0:2006cv01497 (D. Minn. filed Apr. 19, 2006) (awarding jury verdict in favor of RIAA for $220,000). *See* FISHER, *supra* note 6, at 3 (considering the possibility that consumers know downloading music is illegal and continue to engage in it anyhow). *See generally* Lantagne, *supra* note 174.

[224] *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

[225] Steve Knopper, *Major Labels Drop the Ax*, ROLLING STONE, Dec. 27, 2007, at 15.

worst sales week in Nielsen SoundScan history.[226] Technology is ever-advancing, which means that the United States legislature and the content owners cannot afford to be sparing with rights for artistic works.[227] Each time the courts enjoin one generation of file-sharing systems, a new generation crops up, avoiding the legal issue that resulted in the injunction of the previous system.[228]

Any attempt by the music industry to limit illegal file sharing must take into account the fact that the Internet has morphed American values.[229] The generation currently coming of age has grown up thinking that everything on the Internet is free, and "the music industry must convince this generation that music is not one of the Internet's 'free goodies.'"[230] There are now teenagers entering adulthood who have never purchased a single compact disc and obtain all of their music for "free" via illegal file sharing.[231] In a 2007 consumer survey that asked young people about the last compact disc they purchased, popular answers included variations of: "I don't remember . . . I burn my music for free."[232] This is especially problematic because

[226] *The Worst Week Ever*, ROLLING STONE, Dec. 27, 2007, at 82 (indicating that the week of Sept. 7, 2007 was the worst in Nielsen SoundScan history).

[227] *See* Liemer, *supra* note 12, at 56–57; McCartney, *supra* note 25, at 72.

[228] For example, Scour and Aimster arose after Napster. FISHER, *supra* note 6, at 112. When content holders were victorious against them in court, Gnutella arose. *Id.* at 120. Next came Limewire and Bearshare. *Id.* at 121. KaZaA and Morpheus developed after these. *Id.*; *see also* Opderbeck, *supra* note 165, at 1689–90 ("As the RIAA's tactics have changed, P2P technology has kept pace.").

[229] *See* Lantagne, *supra* note 174, at 290.

[230] *Id.* at 291. This is further complicated by the fact that some content on the Internet is legally available for free (YouTube, Pandora Radio, etc.). This inconsistency not only confuses consumers but weakens the argument that content available online is worth paying for.

[231] *See* Scott Brown, *Digital Rights Management—Go, No Go, or Just Behind the Curtain?*, VIDEO INSIDER , June 4, 2007, http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=61417 ("Today we have at least two generations that have used PCs and widely available ripping software to copy and in some cases distribute music entertainment. . . . [T]here are teens and young adults out there who have never purchased a CD . . . ."); Shane Cartmill, *RIAA Ruins Lives of 531 More Music Fans*, MUSIC FOR LIFE, Feb. 17, 2004, http://homepage.mac.com/scartmill/iblog/C1469494906/E657060254/index.html ("There is a generation of people out there who have never purchased a CD in their lives. They are not going to buy worthless music at inflated prices.").

[232] Posting of they to Survey Central, What Was the Last CD You Bought?, http://surveycentral.org/survey/26051.html (Jan. 8, 2007 08:06 EST). Other answers included "[i]t's been soooo [sic] long," "I don't think I have ever purchased a CD," "I have downloaded some," "I stopped buying CDs because they rip you off with prices when I can download them for free online," "Too long ago," "What's a CD??," "I rarely purchase cds [sic]," "I prefer to burn my own, rather than spend 16-20 dollars for something that I'm only going to listen to maybe once or twice," "I don't purchase CDs," and "It's been so long, I don't remember." *Id.*

the generation that has grown up with the Internet is the same age demographic that has traditionally driven the record business.[233]

In order to combat illegal music-file-sharing, it is necessary to counteract this shift in values by changing consumer norms, particularly among the generation coming of age after the advent of the Internet. In order to urge consumers that they steal from artists when they use P2P networks to obtain music illegally, legally recognized artists' rights must exist that are infringed when consumers illegally download. Moral rights can provide this legally protected right for the artist.

VI. DYLAN'S GONE ELECTRIC: CONCLUSION, BUY IN OR CASH OUT

> *Who's going to throw that minstrel boy a coin? Who's going to let it roll? Who's going to throw that minstrel boy a coin? Who's going to let it save his soul?*
>
> —Bob Dylan, "Minstrel Boy"

The music industry will need to adapt if it is to survive into the Digital Age. This adaptation must involve some sacrifice, including willingness to limit the free alienability of copyrights and to lobby for moral-rights legislation. Moral rights will help to change the way young people view music. Rather than depicting music as a disposable commodity, introducing moral rights will help young people to realize the artistic and cultural value of music and to understand that when they use P2P software for music-file sharing, they are not only stealing from the record label but also from the artist.

Record labels are susceptible to losing artists, in addition to consumers, to digital distribution. Just as the Internet makes it easier for consumers to obtain music without the record label, it makes it easier for artists to distribute and market their music without the record label.[234] To prevent this, record labels must repair their relationships with artists and consumers. For decades, record labels have caused a disparity between themselves and artists by exploiting artists to maximize profits. Consumers have sided with artists, and in order to help win consumers back, record labels must bridge this gap by showing their support of artists; rallying for moral-rights legislation is one way of doing so.

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[233] KUSEK & LEONHARD, *supra* note 7, at 100.

[234] For example, well known artists such as the Smashing Pumpkins, the Eagles, and the Black Crowes have begun releasing albums on their own, without working with a record label. Evan Serpick, *NIN, Eagles, Pumpkins: Who Needs Labels?*, ROLLING STONE, Apr. 17, 2008, at 11 (further noting that "thanks to digital distribution . . . the labels are less necessary than ever").

This Comment does not intend to suggest that using P2P networks to download music illegally would disappear overnight upon the enactment of moral-rights legislation. Instead, it urges that the copyright system alone is not enough to eliminate this practice. It is also necessary to change the way in which music is viewed and to increase the value that is placed on it by American society. The United States has traditionally chosen to favor economic interests; this has resulted in stronger copyright protection, at the expense of moral-rights protection. A societal shift in the view of music, from an art form to a disposable commodity, has been an unintended consequence of favoring economic interests. This view of music as a commodity, coupled with advancing technology allowing new channels of music distribution, has called into question the way the music industry has traditionally functioned. Enacting moral-rights legislation would emphasize that music is more than just a marketable commodity and that the musician, and not just the record label, has a personal stake in each song he creates. This sort of message would over time help to create a social environment that has a greater respect for music and is thus more willing to pay for it and less likely to steal it.

Finally, it should be noted that moral-rights legislation (and more broadly increased social respect for art and artists) is just one piece in the puzzle that is the survival of the record industry into the Internet Age. Moral-rights legislation can help decrease illegal digital distribution of music, but record labels must also learn to create legal digital music distribution networks. It is imperative that record labels take other steps as well, such as lowering prices and offering consumers the increased convenience they get from digital (versus physical) distribution. Such steps, when coupled with moral-rights legislation, will help to link the shift in consumer norms effectuated by moral rights with an actual shift in consumer economic behavior, in the form of decreased illegal music-file-sharing. P2P file sharing allows consumers to obtain the same content in a more convenient and less expensive venue than the compact disc format offered by major labels.[235] Major labels must learn to use digital distribution to their advantage, thus matching the convenience offered by P2P; in essence, major labels must "find a way to protect artists while enabling this [file] sharing to survive."[236] When major labels match the conveni-

[235] It should be noted that some record labels have begun offering content online, via legal venues such as Apple's iTunes Store; however, compact discs remain the mainstay. *See, e.g.*, Ethan Smith & Nick Wingfield, *More Artists Steer Clear of iTunes*, WALL ST. J., Aug. 28, 2008, at B1.

[236] LESSIG, *supra* note 4, at 66.

ence offered by P2P networks, all that is left is the price point, and moral rights, in illuminating the artist's personality interest, can fulfill this last piece of the puzzle by helping consumers rediscover the value in music.