THE "MORAL RIGHTS" OF CREATORS OF INTELLECTUAL PROPERTY

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I. INTRODUCTION

The Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention")[1] is the oldest multilateral treaty protecting the products of intellectual endeavor. Although the United States had long sought international cooperation in the enforcement of intellectual property rights, Congress was unwilling to adopt the Berne Convention prior to 1988 because it contained, among other things, provisions protecting *droit moral*, or the "moral right,"[2] of the creators of written, recorded, and visual works. When the United States finally joined the ranks of the nations that recognize the Berne Convention a century after its first signing,[3] Congress side-stepped the issue of recognizing

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[1] Berne Convention For the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* Paris, July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention]. The text of the 1971 revision is also reproduced in 4 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT app. 27 (1989) [hereinafter NIMMER ON COPYRIGHT]. At the time of United States accession, 77 nations were members of the Berne Convention. *See* S. REP. No. 352, 100th Cong., 2d Sess. 6-7, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 3706, 3711-12 [hereinafter S. REP. No. 100-352].

[2] European jurisprudence has long recognized an author's personal rights in his work, which refer to the way he presents it to the world and maintains an identification with it. S. RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 ¶ 7.6, at 323, ¶ 8.93, at 456 (1987) [hereinafter RICKETSON]. Distinguished from an author's interest to commercially exploit his work, the doctrine of moral rights recognizes that an author embodies part of himself in his work, creating a personal interest deserving of protection. *Id.* ¶ 8.93, at 456. Although "moral rights" is an imprecise English translation of "non-economic" or "personal" rights first recognized under French law, it is now universally used. *Id.* at 456-57.

The German version, *das Urheberpersönlichkeitsrecht* (the author's "right of personality"), better connotes the notion of a right that is personal to the author, without begging the question of whether it is indeed a moral right. *See* Dietz, *Germany*, in M. NIMMER & D. GELLER, INTERNATIONAL COPYRIGHT LAW & PRACTICE § 7, at FRG-84 n.238 (1990).

[3] Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C. (1988)). Congress chose to "implement" the Berne Convention, rather than ratify it outright, in order to minimize the changes necessary to make United States copyright law compatible with the Berne Convention, while declaring that the implementation of the Berne Convention does not make it "self-executing under the Constitution and laws of the United States." *Id.* § 2(l). Given the constitutional supremacy of treaties, it is not clear that this declaration is dispositive of the self-execution issue. *See* 1 NIMMER ON COPYRIGHT, *supra* note 1, § 1.12; *see also* D. Nimmer, *The Impact of Berne on United States Copyright Law*, 8 CARDOZO ARTS & ENT. L.J. 27, 40 (1989) [hereinafter D. Nimmer] (the United States government implemented Berne "only through the most stingy means available").

any moral rights.

In addition to the legal right to prevent copying found in United States copyright law,[4] the Berne Convention invests authors and artists with certain moral rights, which include the right to claim authorship (the "right of paternity" or "right of attribution") and the right to object to the distortion or mutilation of their works that would harm their honor or reputation (the "right of integrity").[5] These rights were brought to public attention briefly in the late 1980s in connection with the debate over the computer color encoding, or "colorization," of black and white motion pictures.[6]

Even now that the United States has recognized the Berne Convention, these moral rights are generally not enforceable as legal rights under federal law.[7] Two years after recognizing the Berne Convention, however, Congress enacted the Visual Artists Rights Act of 1990[8] to provide visual artists, such as painters and sculptors, with the rights of attribution and integrity.[9] Creators of other forms of intellectual property currently do not have such rights.[10] Nonetheless, the federal courts have strained to find

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[4] 17 U.S.C. §§ 101-810 (1988).

[5] Berne Convention, *supra* note 1, art. 6*bis*(1), at 235. For a discussion of the rights of attribution and integrity, see RICKETSON, *supra* note 2, at 456; D. Nimmer, *supra* note 3, at 38; and Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 555 (1940) [hereinafter Roeder].

[6] *See generally* Kohs, *Paint Your Wagon—Please!: Colorization, Copyright and the Search for Moral Rights*, 40 FED. COM. L.J. 1 (1988) [hereinafter Kohs]; Note, *The Colorization of Black and White Films: An Example of the Lack of Substantive Protection for Art in the United States*, 63 NOTRE DAME L. REV. 309 (1988).

For a discussion of a motion picture creator's rights against colorization under French law, see Jaszi, *A Garland of Reflections on Three International Copyright Topics*, 8 CARDOZO ARTS & ENT. L.J. 47, 60 (1989) [hereinafter Jaszi].

[7] S. REP. No. 100-352, *supra* note 1, at 3715 (stating that "the 'moral rights' doctrine is not incorporated into the U.S. law" by the Berne Convention Implementation Act).

[8] Pub. L. No. 101-650, 104 Stat. 5128 (1990) (to be codified at 17 U.S.C. § 106A and other sections of title 17) [hereinafter Visual Artists Rights Act]. For a history of the Visual Artists Rights Act, see Symposium, *Artists' Rights: The Kennedy Proposal to Amend the Copyright Law*, 7 CARDOZO ARTS & ENT. L.J. 227 (1989).

The Visual Artists Rights Act preempted certain state statutes granting artists moral rights. Visual Artists Rights Act, *supra*, § 605. *See e.g.*, N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney Supp. 1991) (enacting rights of attribution and integrity for artists); California Art Preservation Act, CAL. CIV. CODE § 987 (West 1982 & Supp. 1991) (enacting right of integrity for artists). Congress also asked the Copyright Office to study the feasibility of granting artists the right to share in the proceeds of future sale of one's artwork, or *droit de suite*. Visual Artists Rights Act, *supra*, § 608. *See also* 2 NIMMER ON COPYRIGHT, *supra* note 1, § 8.22[A], at 8-301 ("distinguishable from the droit moral, the copyright laws of France, Italy and Germany have also recognized a droit de suite, which roughly translated, is the right of an artist to 'follow' or participate in the proceeds realized from the resale of the tangible embodiment of his work.").

[9] Visual Artists Rights Act, *supra* note 8, § 603.

[10] For example, the moral rights of creators of written works are not "covered" by the Visual Artists Rights Act.

legal protection equivalent to moral rights on other grounds, even before the United States recognized the Berne Convention.[11]

The current legal debate concerns whether, after recognizing the Berne Convention, the United States should now also explicitly recognize moral rights as enforceable legal rights of creators of other forms of intellectual property, as it has done so specifically for visual artists.[12] Part II of this Article will discuss the nature of moral rights and intellectual property. Part III will discuss and compare the logic of rights and privileges. Part IV will discuss the "norms" of rationality, morality, and legality. Part V will discuss the justification of property and the rights that pertain to it. Part VI will discuss the justification of intellectual property and its related rights. Finally, Part VII will discuss the justification of moral rights.

Although the issue of moral rights has arisen in connection with copyright laws protecting written, recorded, and visual works, the philosophical issues are the same for other forms of intellectual property, including those protected by patent law.[13] The question of moral rights pertaining to intellectual property is a fairly narrow one, yet it involves such fundamental issues as the relationship between reason and morality, and between morality and law.

II. MORAL RIGHTS AND INTELLECTUAL PROPERTY

Article 6*bis* of the Berne Convention provides in part that:

> 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.[14]

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[11] *See, e.g.*, Gilliam v. ABC, 538 F.2d 14 (2d Cir. 1976). In *Gilliam*, the court held that creators of *Monty Python's Flying Circus* could object to the recut American version of their television program under laws prohibiting unfair competition. However, the court refused to recognize any legal claim for moral rights infringement. *See* 2 NIMMER ON COPYRIGHT, *supra* note 1, § 8.21[C], at 8-258 to -262.

[12] Congress asked the Copyright Office to review the issues surrounding the use of technology to alter motion pictures in connection with the colorization debate. The resulting report urged Congress to "seriously consider a unified federal system of moral rights." *See* Executive Summary of Copyright Office Report, *Technological Alterations to Motion Pictures*, Copyright L. Rep. (CCH) ¶ 20,526 (March 15, 1989).

[13] This Article will not discuss trade secrets, another legal category of intellectual property, because one's rights to trade secrets are lost once they become public and hence the rights of attribution and integrity have no application.

[14] Berne Convention, *supra* note 1, art. 6*bis*(1), at 235.

This statement of the moral rights of attribution and integrity distinguishes these rights from the "economic right" to prevent others from copying or disseminating a written, recorded, or visual work without the creator's consent. The latter right against copying is well established as a legal right in the United States and in almost every other nation, except certain communist and developing nations. In the United States, the right of a creator of intellectual property to prevent unauthorized copying (in the case of artistic, written, or recorded works) or use (in the case of inventions) has its basis in the Constitution,[15] which is the source of both copyright and patent law. These rights have been justified on utilitarian grounds by numerous theorists, beginning with Adam Smith,[16] as providing an economic incentive to authors and inventors to sell, and therefore publicly disseminate, their intellectual property, which ultimately benefits the public.[17]

Before laws protecting intellectual property were instituted, any intellectual property rights that existed were strictly personal or moral in nature. Authors and inventors were not rewarded with economic rights, but with public recognition.[18] In some societies this right of recognition became a legal right. Aristotle noted that the ancient lawgiver Hippodamus of Miletus (born around 500 B.C.) proposed a law that any person who discovered something of advantage to the state should "receive honor."[19] It was not until the time of the Renaissance in Italy that laws granting authors and inventors economic rights to their works and inventions were instituted.[20] Thus, non-economic rights of the kind recognized by the Berne Convention may have actually preceded the economic rights which dominate United States copyright law today.

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15 "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

16 2 A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 278 (E. Cannan ed. 1976).

17 The Framers of the United States Constitution believed that the utility of the copyright and patent clause "will scarcely be questioned," and offered no additional justification. *See* THE FEDERALIST No. 43 (J. Madison) (J. Cooke ed. 1961). Recently, some authors have questioned the economic rationale for copyrights and patents. *See* Scherer, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (1980), *reprinted in* PATENTS AND ANTITRUST 3 (M. Handler ed. 1983) [hereinafter Scherer]; Breyer, *The Uneasy Case for Copyrights, A Study of Copyright in Books, Photocopies and Computer Programs*, 84 HARV. L. REV. 281 (1970) [hereinafter Breyer].

18 *See* Prager, *The Early Growth and Influence of Intellectual Property*, 34 J. PAT. OFF. SOC'Y 106, 111-12 (1952) [hereinafter Prager] (prizes and awards were given to artists to encourage creative activity).

19 ARISTOTLE, POLITICS *1268a (F. Susemihl 3d ed. 1882); *see also* ARISTOTLE, POLITICS 47 (*1268a) (W. Ellis trans. 1919) (translated version). Note that the Greek word "τιμή" means both *honor* and *honorarium*.

20 *See* Prager, *supra* note 18, at 128-33.

To say that the legal right to prevent others from exploiting one's intellectual property is an "economic right" does not mean that it is not also a moral right. For instance, under the Berne Convention, besides a person's legal right (which may also be a moral right) to prevent others from exploiting his intellectual property for profit, there are also legally recognized moral rights, which include the rights of attribution and integrity.[21]

Before proceeding any further, some specific instances of the moral rights of attribution and integrity should be examined. To illustrate the right of attribution, consider the case of an artist who agrees with an art distributor to paint twenty paintings and sign them using a pseudonym. Suppose that after delivering the paintings, the artist changes his mind about using the pseudonym. Should the artist have the moral and legal right to have his proper name put on the paintings? In France, the painter in this example does have this right, and the art distributor who commissioned the pseudonymous paintings does not have the legal right to enforce his contract with the painter to the contrary.[22] Due to the enactment of the Visual Artists Rights Act,[23] an American artist also has this right of attribution under United States law, and arguably, the original contract would not be enforceable.[24] Creators of other forms of in-

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21 *See supra* note 5 and accompanying text. The moral right of attribution is said to include the right to disclaim authorship of works that one did not create and to prevent the use of one's name in connection with a distorted version of one's work that violates the moral right of integrity. *See* Visual Artists Rights Act, *supra* note 8, § 603 (the rights of attribution and integrity were amended so that an artist's right to disclaim authorship of a work is now recognized); *see also* Roeder, *supra* note 5, at 561 ("A creator should have the right to rescind in the case of honest changes of conviction or in case of unforeseen events making for injury to him.").

22 *See* Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1024 n.2 (1976) [hereinafter Merryman] (citing Guille v. Colmant, [1967] Recueil Dalloz-Sirey [D.S. Jur.] 284, [1967] Gazette du Palais [Gaz. Pal.] I. 17 (Cour d'appel, Paris)).

23 *See* Visual Artists Rights Act, *supra* note 8.

24 If the painting is treated as a "work made for hire," it will be excluded from the definition of "work of visual art" under the Visual Artists Rights Act. Visual Artists Rights Act, *supra* note 8, § 602. The term "work made for hire" has a limited, technical meaning under the Copyright Act. *See* 17 U.S.C § 101 (1988). The Supreme Court has ruled recently that the definition of "work made for hire" should be narrowly construed. *See* Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). Unless the painter is an employee of the art distributor, or the paintings are being commissioned for use as a contribution to a collective work, it is probably not a "work made for hire" under the Copyright Act. *See generally* Lee & Hart, *The Practical Ramifications of Work for Hire after Reid: Outsiders Need Not Apply*, 7 COMPUTER LAW. 9 (No. 1) (Jan. 1990). Congress did decide to permit a visual artist to waive his rights of attribution and integrity to avoid inhibiting normal commercial transactions, but only allowed such waiver to apply to the specific person to whom the waiver was made. Congress required specificity of waiver to protect artists in relatively weak economic positions who might have otherwise been required to bargain away their rights. *See* H.R. REP. No. 514, 101st Cong., 2d Sess. 18, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6928 [hereinafter H. REP. 101-514].

tellectual property, however, still do not have this right under federal law.[25]

To illustrate the right of integrity, let us assume that a publisher obtains the right to reproduce a painting by a famous artist but makes certain alterations in the published version, such as brightening an evening scene into broad daylight and adding hats and scarves to some of the figures. Again, in France, the artist has the legal right to object to and enjoin such alterations if they are injurious to his reputation,[26] and under the Visual Artists Rights Act, an American artist has a similar right under federal law. However, creators of other forms of intellectual property may only be able to obtain a legal remedy under United States law if the changes to their works are so drastic that, if the seller were to apply the creator's name to the work, it would constitute "unfair competition" under the federal trademark statute as a "passing off" of an inferior work under the creator's name.[27] Thus, visual artists now have rights of attribution and integrity under federal law, but as previously mentioned, creators of other forms of intellectual property generally do not.[28]

Critics of the doctrine of moral rights argue that a creator's rights in his intellectual property are solely economic and should be completely alienable. This view rejects the notion of inalienable "personal" rights retained by the author or creator of a work after he has transferred the economic rights to that work. It is clear that moral rights such as those set forth in the Berne Convention, if generally recognized under United States law, will occasionally come into conflict with the economic rights of others to use, modify, and sell those works. For example, in the debate over the "colorization" of motion pictures, screen writers and directors spoke eloquently in favor of recognizing moral rights to preserve the integrity of black and white motion pictures they helped create and to prevent those motion pictures from being colorized. Owners of the economic rights to motion pictures expressed a contrary viewpoint, arguing that they had the right to alter their "property" as they saw fit. The

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25 *See* 2 NIMMER ON COPYRIGHT, *supra* note 1, § 8.21[E], at 8-277 to -278, -314 (stating that until recently "an author who sells or licenses his work does not, absent an appropriate contractual provision, have an inherent right to be credited as the author of the work"). Note that limited rights of attribution can be enforced under trademark law. *See* Rosenfeld v. Saunders, 728 F. Supp. 236, 243 (S.D.N.Y. 1990) (stating that "[a]ny false attribution of principal authorship constitutes a section 43(a) [of the Lanham Trademark Act] violation if it misrepresents the contributions of the person designated as author").

26 *See* Merryman, *supra* note 22, at 1029 (citing Millet, Judgment of May 20, 1911, Amm. I. 271 (Tribunal de la Seine)).

27 *See* Gilliam v. ABC, 538 F.2d 14 (2d Cir. 1976).

28 *See supra* note 25 and accompanying text.

latter viewpoint was succinctly summarized by the following remark: "The last time I checked I owned those films."[29] However, the question addressed in this Article is whether by "selling" a piece of intellectual property, the author or creator thereby cedes all rights—both legal and moral—to the purchaser of the property's economic rights, or whether certain inalienable moral rights remain with the author, artist, or inventor.

A. *Intellectual Property*

What is intellectual property?[30] The term "intellectual property" serves to denote the object of the legal and moral rights that are being examined in this Article.[31] It can also denote what is not in the "public domain"; that is, those works and inventions that are eligible for protection under copyright, patent, or trademark law.

Examples of objects that "embody" intellectual property include *inter alia* books, records, motion pictures, paintings, computer programs, machines, molecules, and processes. While these objects themselves are not intellectual property, they instantiate, or "embody," intellectual property. A person may own a book or a machine but not own the intellectual property rights to the contents of the book or the workings of the machine. It is tempting to simply say that intellectual property is whatever it is that intellectual property rights protect. However, to examine whether certain moral rights should be recognized as part of intellectual property rights, it is necessary to first distinguish intellectual property from the rights that protect it.

Generally speaking, an object is someone's property when it belongs to him; that is, when he and other people treat it as being connected to him in some way. Intellectual property is the intangible visions or ideas that a person has expressed, represented, built, or otherwise embodied in some tangible object. Although a person may claim ownership of an idea simply by thinking it or stating it orally, no legal rights arise under United States law un-

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[29] Kohs, *supra* note 6, at 2 (statement of Ted Turner).

[30] *See* Davoll v. Brown, 7 F. Cas. 197 (D. Mass. 1845) (No. 3,662) (earliest case defining "intellectual property" as "the labors of the mind, productions and interests as much a man's own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears").

[31] For example, *Black's Law Dictionary* defines "literary property" as "the exclusive right of owner to possess, use and dispose of intellectual productions, the term denotes the corporal property in which an intellectual production is embodied . . . ." BLACK'S LAW DICTIONARY 841 (5th ed. 1979) (citing Carpenter Found. v. Oaks, 26 Cal. App. 3d 784, 795, 103 Cal. Rptr. 368, 375 (Cal. Ct. App. 1972)). Patents are specifically recognized as a form of property. *See* 35 U.S.C. § 261 (1988).

til that idea is expressed in a "tangible medium" in the case of copyrights,[32] or is "reduced to practice" in the case of patents.[33] In addition, for someone to claim an idea as his own, whether expressed or unexpressed, there must be something new about it which he originated, invented, or created. For example, copyright law requires that a person's work must be "original" and not copied from others for it to be protectable.[34] Under patent law, an invention must pass the higher test of true novelty for it to receive protection as intellectual property,[35] because patents protect not only against copiers, but against subsequent independent inventors as well.

We start, then, with a fairly general notion of intellectual property, describing a person's original expression or embodiment of an idea. To begin our analysis, let us assume that there is this general notion of intellectual property in modern industrial societies, even though at earlier times in our culture, and perhaps today in other cultures, the notion of intellectual property is more limited.[36] We may not know in advance where to

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[32] 17 U.S.C. § 102(a) (1988).

> [A] work would be considered 'fixed in a tangible medium of expression' if there has been an authorized embodiment in a copy or phonorecord and if that embodiment 'is sufficiently permanent or stable' to permit the work 'to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.'

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 51, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5666.

[33] 35 U.S.C. § 102(g). To constitute an "invention," an inventor must reduce his idea to practice by embodying it in some distinct physical form. 1 A. DELLER, WALKER ON PATENTS § 46, at 199-200 (2d ed. 1964) [hereinafter DELLER]. *See also* 3 D. CHISUM, PATENTS § 10.06, at 10-100 (1991) [hereinafter CHISUM] ("reduction to practice occurs when the inventor constructs a product or performs a process that is within the scope of the patent claims and demonstrates the capacity of the inventive idea to achieve its intended purpose").

[34] 17 U.S.C. § 102(a). *See* 1 NIMMER ON COPYRIGHT, *supra* note 1, § 2.01[B], at 2-11 ("[a]ny 'distinguishable variation' of a prior work will constitute sufficient originality to support a copyright if such variation is the product of the author's independent efforts, and is more than merely trivial").

Compared to the standard of "novelty" required for patents, however, "[t]he test of originality is one of low threshold." Moore v. Lighthouse Publishing Co., 429 F. Supp. 1304, 1309 (S.D. Ga. 1977). "Originality does not signify novelty . . . . To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable." Feist Publications, Inc. v. Rural Tel. Serv. Co., 59 U.S.L.W. 4251, 4252-53 (U.S. Mar. 27, 1991) (holding that telephone "white pages" listings are not copyrightable because they do not involve the "modicum of creativity" required for copyright).

[35] 35 U.S.C. § 102. "Inventors are entitled to patents only if the means by which they apply their science are novel and denote invention and involve more than mere changes in size and dimensions. . . . In order to have a patentable method, it must be a new method." DELLER, *supra* note 33, § 55, at 233. For a discussion of "novelty" in patent law, see CHISUM, *supra* note 33, §§ 3.01-.08 (1990).

[36] An ancient author's exclusive rights to his work were terminated once the work was published. *See* Prager, *supra* note 18, at 116 (quoting the Roman author Symmachus:

draw the line between intellectual property and the public domain, but we do know that in our society there is such a dividing line, and by the process of analysis we can begin to see its contours. I intend to bring the concept of intellectual property into focus by analyzing the moral and legal rights that emanate from it.

III. The Logic of Rights and Privileges

Before turning to the rights pertaining to intellectual property, let us first examine the logic of moral and legal rights. The term "moral rights" is an unusual one for us in the United States. We are accustomed to talking about "civil rights," "human rights," and even "natural rights," but not about "moral rights." In expressing moral judgment, we are more likely to talk about what is moral or immoral than about moral rights. In my analysis, however, moral rights can be connected logically to what is moral and immoral as follows: if it is morally wrong for a person ("*x*") to commit an act ("q") against, or with respect to, another person ("*y*"), then *y* has a moral right ("R^M") against *x*'s doing q, which I shall represent by the following notation: $R^M yx(\sim q)$.[37] To say that *y* has no moral right against *x* regarding q is to say that it is morally permissible ("P^M") for *x* to do q against *y*, or $P^M xy(q)$. Put another way, if $P^M xy(q)$ is true, then *x* has the moral privilege of doing q.

There are two common, but logically related, fallacies concerning rights and privileges. The first is to say that if it is moral or legal for a person *x* to do action q with respect to person *y*,

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"When your song has gone out once you have given up all rights; a published work is free").

[37] For those readers unfamiliar with the notations of symbolic logic, the following is a key to the symbols used in this Article, wherein "f", "g", and "h" are variables for the purpose of this chart only:

Symbol(s)	*Meaning*
~f	not f
f V g	f or g
f & g	f and g
f => g	f implies g (if f then g)
f ≠> g	f does not imply g
f <=> g	f is logically equivalent to g (f if and only if g)
f <≠> g	f is not logically equivalent to g
d, e, m, q	action variables
x, *y*	person variables
P^Lfg(h)	f has a legal privilege against g with respect to h
P^Mfg(h)	f has a moral privilege against g with respect to h
R^Lfg(h)	f has a legal right against g with respect to h
R^Mfg(h)	f has a moral right against g with respect to h

then it must be immoral or illegal for *y* to bring about the opposite result, ~q. This is only true if *x* has a moral or legal right with respect to q, R*xy*(q), but it is not true if *x* has only a moral or legal privilege with respect to q, P*xy*(q). It may be both moral and legal for *x* to seek q and for *y* to seek ~q. Symbolically, this means that P*xy*(q) and P*yx*(~q) can both be true.[38]

The best example of conflicting privileges, P*xy*(q) & P*yx*(~q), is competition. For example, in sports or in business, a competitor *x* may seek outcome q with all his energy, and another competitor *y* may seek outcome ~q with equal determination. In many instances, this competition will result in harm, which may be psychological, economic, or even physical, for one or both of the competitors. Neither *x* nor *y*, however, will be acting illegally[39] or immorally,[40] so long as they each play by the rules. In the field of intellectual property, an inventor *x* may have the legal privilege of selling his invention, but a competitor *y* is also legally privileged to try to keep *x* from selling his superior invention by selling a different product to the same customers.[41]

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[38] Conflicting privileges are not the same as contradictory privileges, which in conjunction are always logically false. For example, P*xy*(q) & ~P*xy*(q) can never be true. A legal system cannot tolerate contradictory privileges or rights because from contradictory premises one can prove any nonsense statement, such as "New Yorkers have no moral rights" ("N"):

~ P*xy*(q)
~ P*xy*(q) V N
P*xy*(q) => N
P*xy*(q)

∴ N

As Kurt Gödel has shown, an axiomatic system cannot be both consistent and complete. *See* W.V. QUINE, METHODS OF LOGIC 183-85 (3d ed. 1978); D.R. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 17-19 (1979). This means that to the extent that we view law as a system of logically related statements about rights and privileges, the goal of perfect consistency will lead us to conclude that some statements, at least, will be unprovable by other statements within the system. *See infra* note 62 (discussion of Kelsen's *Grundnorm*).

[39] The economic harm that results when legal privileges collide is known by the Latin phrase, *damnum absque injuria*, or harm without a legally redressable injury. *See, e.g.*, Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805) (holding that a hunter who is in pursuit of a fox is not legally injured when someone else catches the fox first).

[40] *Cf.* Hausman, *Are Markets Morally Free Zones?*, 18 PHIL. & PUB. AFF. 317 (1989) (arguing against David Gauthier's notion of a "morally free zone" and stating that moral judgments are appropriate even with regard to perfectly competitive markets).

[41] The basic legal right of exclusivity provided by copyright and patent law is a negative right, R'*xy*(~q). *See* Rosenberg, PATENT LAW FUNDAMENTALS § 1.03, at 1-14 (2d ed. 1989). These laws do not confer any positive rights to make, use, or sell one's intellectual property that one would not otherwise have, R'*xy*(~q) ≠> ~R'*yx*(~q). Rather, they only provide the right to exclude others from copying or using one's intellectual property. *See id.* Thus, an inventor may have the right to exclude others from practicing his invention but have no right to practice it himself, because others have conflicting rights, R'*xy*(~q) & R'*yx*(~q). This would be true, for example, where *y* holds a domi-

The second fallacy related to rights and privileges is to infer that if a person has a *privilege* to do something, he also has a *right* to do that thing. For example, if it is legal for x to do q, one may incorrectly conclude that x has the legal right to do q. But to say that it is legal for x to do q, may only mean that it is x's legal privilege to do q.

This second fallacy is related to the first in the following way. The logical connection between rights and privileges is that if x has a privilege to do action q with respect to y, then y has no right to the opposite result, $\sim$q. This fundamental equivalence can be represented as follows:

$$Pxy(q) \iff \sim Ryx(\sim q)$$

As we have seen previously, two people can have privileges with respect to incompatible states of affairs, hence $Pxy(q)$ and $Pyx(\sim q)$ can both be true. It follows logically that $Pxy(q)$ and $\sim Rxy(q)$ can both be true. In other words, you cannot infer a right from a privilege:

$$Pxy(q) \not\Rightarrow Rxy(q)$$

Thus, for us to say that it is a legal or moral privilege for x to seek q against y, does not mean that x has the moral or legal right to do q. For example, to say that a person has no right, whether moral or legal, to prevent an author from claiming his intellectual property, is not to say that the author has a positive moral or legal right to claim authorship. It may only mean that it is his moral or legal privilege to do so. It may, in fact, be a case of conflicting privileges. Thus, the question of rights can be distinguished from that of privileges and may not be inferred by logic alone.

IV. Rationality, Morality, and Legality

Assuming that we now have some general concept of intellectual property and the logical apparatus to talk about the rights and privileges pertaining to such property, how do we determine: (a) whether there are moral rights pertaining to intellectual property; and (b) if such moral rights exist, whether some or all of such rights should also be legal rights?

Following the approach of Hans Kelsen,[42] I will start with a descriptive or "positivist" analysis of rights.[43] For instance, in

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nant, or "blocking," patent that allows him to prevent others from practicing their inventions (including holders of subservient patents). *Id.* at 1-16.

[42] H. Kelsen, Pure Theory of Law (M. Knight trans. 1967) [hereinafter Kelsen].

[43] According to Kelsen, a positivist right "involves a legal power to the extent that it

the United States, there are legal rights which attach to intellectual property. These legal rights are not facts about how the world is or about how people behave, but rather about how the world *ought* to be and how people *ought* to behave. Using Kelsen's terminology, legal rights are related to the world through the "norm" of legality.[44] To say, as a matter of legal description, that a person has certain legal rights with respect to his intellectual property, is to say that other people legally ought to act or not act in certain ways with respect to that property.

In addition to the norm of legality, I would like to distinguish and identify two other norms which, together with the norm of legality, form a kind of hierarchy. These two norms are the norm of morality and the norm of rationality,[45] which generate their own distinct "oughts." Thus, one can say that a state of affairs "ought to be" (a) in a rational sense, (b) in a moral sense, and (c) in a legal sense. Despite the efforts of philosophers over the centuries, there is no demonstrated direct logical relationship between any two of these three norms.

A. *The Norm of Rationality*

The norm of rationality yields the most fundamental "ought." It is fundamental in the sense that the norm of rationality can be used to justify the norms of morality and legality. However, the norm of rationality itself cannot be independently justified; it is grounded solely in human nature. In other words, one can answer the question: "Why ought I behave morally?" or "Why ought I obey the law?" on rational grounds. But one cannot answer the question: "Why ought I behave rationally?" on any grounds. The answer to that question appeals to the questioner's rationality, and therefore assumes the answer to the question being asked.

The norm of rationality that I wish to develop in this Article is a modest one, yet one with some content.[46] Put simply, to be

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constitutes an authorization to perform certain legal transactions" (*e.g.*, a license to sell liquor). *Id.* at 138.

[44] *Id.* at 4.

[45] My account of rationality and morality owes much to discussions with Professor Bernard Gert and his book on moral rules. *See* B. GERT, THE MORAL RULES (1973) [hereinafter MORAL RULES].

[46] In my view, rationality is not simply a formal matter of systematizing one's behavior to maximize the achievement of one's goals, but rather it is a substantive norm which can be applied to one's goals, as well as to the means one takes to attain those goals. *But see* C.G. HEMPEL, ASPECTS OF SCIENTIFIC EXPLANATION AND OTHER ESSAYS IN THE PHILOSOPHY OF SCIENCE 463-87 (1965).

rational is to not seek harm for one's self for its own sake.[47] A rational person may pursue any number of actions which involve actual or potential harm for himself, but his action will be considered rational so long as there is an offsetting benefit for himself or someone he cares about.[48] In other words, it is irrational for someone to pursue a course of action which involves probable harm for himself simply for its own sake without any offsetting benefit (including the avoidance of a greater harm). For example, it is irrational for someone to cut off his hand just for the experience. It is not irrational, however, for someone to have his hand amputated if the amputation is necessary to save his life. Similarly, it is irrational for someone to deprive himself of his property just for the sake of doing so; but it may be rational for someone to destroy his own property or to give it away to others because it gives him pleasure to do so or because it would benefit others.

Although there is no direct logical or necessary connection between the norms of rationality and morality,[49] the norm of rationality, as I have just defined it, can be used to support or justify[50] the norm of morality. For instance, if we were to seek the agreement of rational persons as to general rules of behavior (moral rules), rational persons would agree, at least publicly, on rules that prohibit the infliction of harm on others without their consent.[51] As a rule, therefore, what is irrational to do to one's

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47 *See* MORAL RULES, *supra* note 45, at 37; *see also* Gert, *Rationality, Human Nature, and Lists*, 100 ETHICS 279, 280 (1990) ("People act irrationally when they act in ways that they know (justifiably believe), or should know, will significantly increase the probability that they, or those for whom they are concerned, will suffer . . . death, pain (including mental suffering), disability, loss of freedom, or loss of pleasure, and they do not have an adequate reason for so acting.").

48 It may be objected that the terms "benefit" and "harm" are in themselves normative and require a further level of analysis. By "harm" I mean such things as death, disability, and loss of freedom. By "benefit" I mean such things as life, abilities, and freedom. These things are objectively harmful and beneficial, respectively, for human beings constituted as they are.

49 I reject the arguments of philosophers from Plato to Kant attempting to show that there is a necessary connection between morality and rationality. *See* I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 21 (L.W. Beck trans. 1959) [hereinafter KANT]; PLATO, REPUBLIC 32-33 (*353) (A. Bloom trans. 1968) [hereinafter PLATO, REPUBLIC]. There are numerous rational people who behave immorally. If it were necessarily irrational to behave immorally, then why would we hold people responsible for their immoral (and hence irrational) acts?

50 As I use the term "justification," it means a reasoning process that uses judgments from one norm to supply the content of, or validation for, another norm, such as giving reasons for recognizing a moral rule, or providing a moral basis for a legal right. Justification is to be distinguished from showing that something is just, which I interpret as only one kind of justification.

51 *See* MORAL RULES, *supra* note 45, at 76.

self is immoral to do to others.[52] For example, rational persons would publicly agree that "Thou shalt not kill" be a general moral rule, because to take the contrary position would be to advocate a world in which the chances of being killed are significantly increased, without any compensating benefits. This does not mean that all rational persons will abide by such a moral rule or that, in certain instances, a rational person may wish to have an exception made to that moral rule with respect to himself. The point is that moral rules, which form part of the norm of morality, can be justified by the norm of rationality in the sense that rational persons will agree that there ought (rationally) to be such rules.

B. *The Norm of Morality*

With respect to property, the norm of morality includes the general moral rule "Thou shalt not steal." Rational persons would publicly agree that there should be a rule against the unconsented taking of the property of others. This is because possession of property is beneficial, and to reject a moral rule against theft would be to advocate a world in which one is more likely to be deprived of such a benefit and hence suffer harm. Using the terminology of moral rights and privileges,[53] the moral rule "Thou shalt not steal" yields the moral right ("R^M") not to be deprived of one's property without one's consent and the logical equivalent that one is not morally permitted or privileged ("$\sim P^M$") to deprive others of their property without their consent:

$$R^M xy(\sim d) \iff \sim P^M yx(d)$$

The extent to which moral rights attach to intellectual property still remains unresolved by this logical analysis. If we assume that intellectual property is truly property, then we can conclude that there is a moral right not to be deprived of one's intellectual property without one's consent.

Morality is not limited to moral rules and moral rights. The notion of a moral ideal[54] is another aspect of morality, not essential

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[52] However, an important difference between an immoral action and an irrational action is that an action that involves harm for the actor is not irrational if there is a compensating benefit to the actor or someone else. An action that inflicts harm on another without his consent will still generally be immoral even if it benefits the actor or someone else.

[53] *See supra* Part III.

[54] Traditionally, Western moral philosophers from Plato onwards have focused on "The Good," or the positive side of morality. *See, e.g.*, T. AQUINAS, SUMMA THEOLOGICA,

to the analysis of moral rights, but central for many people, to the norm of morality. Rational people will agree that actions which confer benefits on others should be encouraged since it would be irrational to refuse such benefits for no reason. Moral ideals such as "Help those in need" cannot be formulated and agreed upon as general moral rules because one cannot help all people at all times in the same way that one can comply with the moral rule "Thou shalt not kill" with respect to all people at all times. Nonetheless, moral ideals can be rationally justified *qua* ideals and should be recognized as an important part of the norm of morality.

C. *The Norm of Legality*

This brings us to the third norm, the norm of legality. Because there are substantial social institutions, such as courts and legislatures, through which the norm of legality functions, it is easier to identify and describe the norm of legality than the norms of rationality and morality. Kelsen describes the norm of legality "as it is" by showing how it gives legal "meaning" to actions. To say, for example, that a certain act of homicide ("k") is murder (a legal normative term), is to give it meaning as an illegal act within the norm of legality. Using our rights calculus, if x's killing y is murder, then x is not legally privileged to kill y, $\sim P^{L}xy(k)$. Similarly, if it is illegal for x to exploit ("e") y's intellectual property without y's consent, $\sim P^{L}xy(e)$, then y has a legal right to prevent x from exploiting such intellectual property, $R^{L}yx(\sim e)$.

What is the relationship between the norm of morality and the norm of legality?[55] It is clear that the legal and the moral (as well as the illegal and the immoral) are not coextensive. One cannot infer from the fact that an act ("q") by x against y is immoral, that it is also illegal or vice versa:

$$\sim P^{M}xy(q) \; <\neq> \; \sim P^{L}xy(q)$$

Ques. 92, in THE POLITICAL IDEAS OF ST. THOMAS AQUINAS 24 (D. Bigongiari ed. 1953) [hereinafter AQUINAS, SUMMA THEOLOGICA]; ARISTOTLE, NICOMACHEAN ETHICS 1 (*1094a) (D.P. Chase trans. 1920); R.M. HARE, THE LANGUAGE OF MORALS (1952); KANT, *supra* note 49, at 9; G.E. MOORE, PRINCIPIA ETHICA (1922); I. MURDOCH, THE SOVEREIGNTY OF GOOD (1970); PLATO, REPUBLIC, *supra* note 49, at 184-85 (*505). I believe that conceptually the norm of morality follows the logic of the classic injunction: "First do no evil."

[55] Just as I deny the necessary connection between rationality and morality, I agree with the legal positivists who deny that there is a necessary connection between law and morality by observing that there are immoral laws that are laws nonetheless. *See* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) [hereinafter Hart]. *But see* Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

Nonetheless, certain portions of the domains of morality and legality can be related through the process of justification.[56] First, moral persons will agree that grievous breaches of morality ought (in a moral sense of "ought") to be illegal. If this is true, why do we not enforce morality by law in every case? The law is too costly and cumbersome an instrument to be brought to bear against every instance of immoral behavior. Moreover, if a legal code is to be practical and fair, it should have clear demarcations between what is legal and illegal so that everyone can know what is illegal and conform his behavior accordingly.[57] For example, not all intentional, unauthorized takings of property are illegal. To constitute the illegal act of larceny, a person must not only take property from another without consent, but he must also have the criminal intent (*mens rea*) to deprive the owner of that property permanently.[58] Similarly, the civil legal wrong (or tort) of conversion requires that certain factors be present, such as the intentional exercise of control over another person's property which seriously interferes with the owner's enjoyment of it.[59] In either case, there must be a substantial harm before a legally enforceable right arises, because it is not feasible for the law to regulate every trivial matter in life: *de minimis non curat lex*.[60]

Unlike laws and legal rights, moral rules and moral rights are intended to apply in every case. A "white lie" may not be legally punishable as fraud, and an unconsented "borrowing" of another's property may not be theft or conversion, but they are still immoral because they violate the moral rights of others. If, however, the degree of harm inflicted by an immoral action is minimal, the degree of moral condemnation may also be minimal.

Although moral and legal rights may differ in their scope of application, they are not unrelated. Contrary to those philosophers who emphasize the complete separation of law and morality,[61] the norms of morality and legality can be related by the moral justification of laws. Law and morality are intended to work in concert. The

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56 *See supra* note 50.

57 Wherefore human laws do not forbid all vices from which the virtuous abstain, but only the more grievous vices from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft, and suchlike.

AQUINAS, SUMMA THEOLOGICA, *Ques. 96*, *supra* note 54, at 68.

58 W.R. LAFAVE & A.W. SCOTT, CRIMINAL LAW § 8.5, at 721-22 (1986).

59 RESTATEMENT (SECOND) OF TORTS § 222A (1965).

60 Taverner v. Dominum Cromwell, Cro. Eliz. 353, 354, 78 Eng. Rep. 601, 602 (1594).

61 *See* KELSEN, *supra* note 42, at 1; Hart, *supra* note 55, at 629.

core of morality supports the core of legality. Killing and theft are morally wrong and that is why they ought (morally) to be illegal. It is only in the "penumbra," to use a common legal metaphor, that correlating the two norms becomes difficult. Such is the case with the rights of attribution and integrity. If we are not certain that the right to claim authorship is a true moral right, then we will not be certain whether that same right ought morally to be legally enforceable.

The second way in which law and morality can be related is that, since rational persons live in societies regulated by laws, they will agree that there ought to be a general moral rule of the form: "Thou shalt obey the law."[62] The rational justification of this moral rule is more problematic than that for "Thou shalt not kill." We can easily think of instances in which it might be immoral to obey the law. However, the rational justifications for the two rules are fundamentally the same. Rational persons will publicly agree that "Thou shalt obey the law" be followed as a general moral rule, because to argue otherwise would be to advocate a world in which one is more likely to suffer the harms prohibited by law without there being any offsetting benefit. Thus, law and morality are connected in two ways. First, grievous breaches of morality ought (morally) to be illegal and second, as a rule, breaches of legality ought (rationally) to be immoral.

We have seen that obedience to law can generally be morally justified. Individual laws and legal rights can also be morally justified. We will now examine whether the legal rights pertaining to property can be so justified.

V. The Justification of Property

As noted previously, there is a moral right not to be deprived of one's property without one's consent, $R^{M}xy(\sim d)$.[63] In cases of serious harm, that moral right is also a legal right, $R^{L}xy(\sim d)$. This way of expressing the moral right against theft presupposes a concept of property; but what is property?

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62 *See* Moral Rules, *supra* note 45, at 114. Kelsen believed that the entire norm of legality rests ultimately on the *Grundnorm* (basic norm), that laws "ought" to be obeyed. Kelsen, *supra* note 42, at 8. The question of whether or not there is a source of legal obligation independent and distinct from the moral obligation to obey the law is a subject of continuing debate. *See, e.g.*, Soper, *Legal Theory and the Claim of Authority*, 18 Phil. & Pub. Aff. 209, 236 (1989)(arguing that "the positivist's claim about the separation of law and morality must be presented and defended as a claim of political theory, rather than a conceptual claim about the meaning of 'law' and 'morality' as has traditionally been the case").

63 *See* Rationality, Morality, and Legality, *supra* Part IV.

Property is ultimately defined by the rights that pertain to it. If someone's use of an object violates your right to control that object, then the object can be said to be your property. We can describe what those rights are, but the more important question for our purpose is, what property rights ought there be? The question "What is property?" from a normative point of view resolves into the question "What property rights are justifiable?"

When we talk about "justifying property rights," we are talking about giving moral arguments, or rational arguments, or both, in support of the rights and privileges which constitute the institution of property. Not all laws and legal rights can be morally justified as being direct correlatives of moral rules and moral rights, as with laws against homicide. For example, there is no obvious moral basis for a law which requires drivers to drive on the right side of the road, as opposed to the left side of the road.[64] But the entire system of "rules of the road" can be justified (a) on rational grounds, if it maximizes general utility or minimizes general disutility, and (b) on moral grounds, if it is based on desert and it treats people equally, as we shall discuss below. On what grounds then, if any, can property rights be justified?

John Locke justified property rights on the basis of human labor which, he argued, when added to natural materials, made the product of that labor the laborer's own property.[65] This justification has been challenged by Karl Marx,[66] among others,[67] but remains the classic argument for the justification of property. Locke's argument justifies property by showing why we should have property rights. Is it a rational justification or a moral justification? Locke was not trying to show that property is something rational persons would choose to have—that he assumed. Locke's argument was an attempt at a moral justification.[68] He attempted to show why certain people, at least, *deserve* the prop-

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64 *See* P. DEVLIN, *Morals and the Criminal Law*, in THE PHILOSOPHY OF LAW 70 (R.M. Dworkin ed. 1977).

65 J. LOCKE, TWO TREATISES OF GOVERNMENT, 2D TREATISE § 27, at 328-29 (P. Laslett rev. ed. 1963) (3d ed. 1698) [hereinafter LOCKE].

66 K. MARX, ECONOMIC AND PHILOSOPHICAL MANUSCRIPTS OF 1844, at 69 (M. Milligan trans. 1959) (arguing from Locke's premise that private property is immoral because it alienates human labor).

67 *See, e.g.*, R. NOZICK, ANARCHY, STATE, AND UTOPIA 174-82 (1974)[hereinafter NOZICK]; Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31 (1989) [hereinafter Hettinger]; Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) [hereinafter Hughes].

68 Using other terminology, what Locke attempted to show was that the right to private property is a "natural right." *See* L. WEINREB, NATURAL LAW AND JUSTICE 80 (1987) [hereinafter WEINREB].

erty they have, and hence, why the unequal distribution of property rights does not violate the moral principle of equality.

Locke's argument starts with the unstated but sound premise that people have moral rights in and to their own bodies. Rational persons would agree that, as a general moral rule, people ought to have a moral right to bodily freedom and integrity. Similarly, moral persons would agree that a legal system ought to protect against serious limitations of bodily freedom and integrity. These are what we would call basic human and civil rights. A system of laws that arbitrarily abrogates these rights with respect to certain individuals (*e.g.*, a slave-owning society), is not morally justifiable.[69] Since a person has moral and legal rights with respect to his own body, what conclusions can be drawn about a person's rights to something that is manifestly outside the body, namely property? Does Locke's "labor theory" morally justify the institution of property? Unfortunately for our analysis, the rights that constitute the "institution of property" vary widely from society to society. Institutions of property include: communism, in which all property belongs collectively to the state; *laissez-faire* capitalism, in which private property rights are paramount; and primitive societies, in which the notion of having property rights in land or other natural resources is incomprehensible. Are all these systems of property morally justifiable?

Moral justification involves giving moral reasons for choosing one set of legal rights, laws, and institutions over others. This is not to say that there is one unique legal system which is *the* morally justified system. If a legal system enforces the basic moral rules against killing, theft, lying, and so on, it may be one of a number, perhaps an infinite number, of morally justifiable legal systems, just as there are a number that can be rationally justified. Moral reasoning, however, can be used to show that one legal system is preferable to another.

To morally justify a system of property and the complex of rights that are associated with it, a person has to abstract, or remove himself conceptually from the system, as Locke does with his "State of Nature" or as John Rawls does with his "original

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69 "The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only [by] positive law . . . ." Somerset v. Stewart, 98 Eng. Rep. 499, 510 (1772)(Lord Mansfield)(writ of habeas corpus frees an American slave brought to England). *But cf.* Scott v. Sandford, 60 U.S. 393 (1857) (freedom acquired by slave by virtue of residing in a non-slave state is denied when he returns home to slave state).

position,"[70] to determine whether that system imposes harm on, or withholds benefits from, arbitrarily chosen individuals or groups of people. If moral people can agree that a system of laws and rights is acceptable in the abstract, then we can say it is morally justifiable.

Moral justification is distinct from rational justification. Rawls believes that by rationally justifying an institution or system of laws, he will end up with a system that is morally justified, or just. He assumes that a rational person will use the so-called "maximin" principle to choose a legal system that would maximize the worst outcome (*i.e.*, make it as good as possible) under a proposed system of laws.[71] But it is equally rational for a person to adopt the "maximax" principle, which seeks to maximize the best outcome, to justify an entirely different social ordering. For example, a rational person could rationally justify a slave-owning society using the maximax principle on the grounds that there is some chance that he would end up a slave-owner rather than a slave, and that the benefits accruing to slave-owners are so great as to outweigh the risks of ending up as a slave. Such a society cannot be morally justified, however, because it arbitrarily deprives people of freedom and imposes other harms on one class of persons in violation of their moral rights.

As was implicit above, a primary principle involved in the moral justification of a system of legal rights, laws and institutions is that of equality of treatment. For example, moral persons may disagree as to whether a communist system of property is morally justifiable, but in any such debate a primary test will be whether people are treated equally.[72] When would different treatment of individuals not be arbitrary, and hence not in violation of the principle of equality? Differential treatment of similarly situated individuals is justifiable when the individuals deserve to be treated differently.[73] Hence, desert and equality are the two complementary principles of moral justification.[74]

Locke tried to show that the institution of property can be

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[70] J. RAWLS, A THEORY OF JUSTICE 17 (1971) ("the original position is the appropriate initial status quo which insures that the fundamental agreements reached in it are fair").

[71] *Id.* at 152-53.

[72] Even so, moral persons may differ as to whether to emphasize equality of opportunity or equality of result.

[73] Again, moral persons may differ as to whether to emphasize desert based on merit or desert based on need.

[74] Justice may be defined as the correspondence between legal rights, or entitlements, and desert. *See* WEINREB, *supra* note 68, at 215. However, a complete correspondence between the two may be practically, or even theoretically, impossible. *Id.* at 217-21.

morally justified using desert based on labor. If you begin with the morally unimpeachable premise that one has moral rights with respect to one's own body, then it is plausible to argue, as Locke did, that a legal system in which a person has rights to the fruits of his labor is morally justifiable in the circumstances he envisions in the State of Nature, because that person deserves those rights by virtue of his labor.[75] A person who exerts labor deserves to have property rights in the products of his labor because the value added by his labor to the raw materials ultimately contributes back to the general utility of society. Note that Locke's moral justification of private property depends on a rational, utility maximization premise. It is the implicit notion of desert, however, that makes it a moral justification. Thus, using Locke's argument, a system of property rights such as we have in western societies can be morally justified.

VI. The Justification of Intellectual Property

As we have seen, the moral right not to be deprived of one's property without one's consent is expressed by the moral rule, "Thou shalt not steal." However, we cannot say *a priori* what objects (tangible or intangible) the moral right against theft protects. The unauthorized use or copying of another person's intellectual property may not be equivalent to theft. It is easy to imagine a society in which it is morally permissible to exploit other people's intellectual property, $P^{M}xy(e)$, and less than a century ago, the United States was in fact such a society *vis-a-vis* foreign authors.[76] As we have done with the concept of property in general, let us examine what kinds of intellectual property rights can be justified.

As previously mentioned, Adam Smith and the Framers of the United States Constitution had an explicit utilitarian justification for granting copyrights and patents to protect intellectual property.[77] These legal rights were justified as providing economic incentives to authors and inventors to share the fruits of

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[75] *See supra* note 65 and accompanying text.

[76] *See, e.g.*, Funk v. Evening Post Publishing Co., 83 N.Y. Sup. Ct. (76 Hun.) 497, 27 N.Y.S. 1089 (Sup. Ct. 1894), *aff'd*, 152 N.Y. 619, 46 N.E. 292 (1897) (court upheld verdict which denied plaintiff, Dr. Funk, founder of Funk & Wagnalls, recovery on his libel claim against the *Evening Post* for an editorial calling him a "pirate" for publishing works copyrighted overseas without consent); *see also* T.G. Strong, Joseph H. Choate 194 (1917) (explaining that Dr. Funk conceded, during cross-examination by Mr. Choate, that Funk's favorable public reputation was based largely on the attack being waged against him by the *Evening Post*).

[77] *See supra* note 16 and accompanying text.

their intellectual labors with society. Intellectual property rights provide economic incentives by giving authors and inventors the legal right to prevent others from exploiting their intellectual property, $R^{L}xy(\sim e)$, and thus the ability to extract payment from others for the use of such property. The argument that intellectual property rights provide an economic incentive for authors and inventors to share works and inventions with society that they might otherwise keep to themselves, is a rational justification which attempts to show that intellectual property rights maximize social utility. Locke's moral justification for property, which builds on this rational justification, can be used to show that intellectual property rights, which clearly treat authors and "others" unequally, are not morally arbitrary because the author deserves those rights for having labored to create intellectual property, which ultimately benefits society.

One of Locke's assumptions in his justification of property is that there will be "as good and as large a Possession" in the raw materials left over for others in "the Common" after one has used one's labor to create property.[78] This assumption is intended to negate a potential counter-argument that by appropriating raw materials for one's self, one is depriving others of a good. Locke's assumption is questionable for tangible property in a world of limited resources, but it is not at all implausible in the case of intellectual property. When an author or inventor creates something which we call intellectual property, he is not taking something from the Common (*i.e.*, the public domain), but instead he is adding to the total sum of human knowledge and expression. Since legal rights to intellectual property are generally of limited duration,[79] the author or creator will ultimately be adding to the Common when his intellectual property rights expire. Thus, moral persons who find Locke's argument convincing will agree that intellectual property rights are morally justified, as being in accordance with the primary moral principles of equality and desert.

An alternative moral justification for intellectual property, which is more intuitive and more obscure, is based on the author's or inventor's personality. G.W.F. Hegel has argued that

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[78] LOCKE, *supra* note 65, § 36, at 334-35. *But see* NOZICK, *supra* note 67, at 178-82 (critique of the "Lockean Proviso").

[79] *See* 35 U.S.C. § 154 (1988) (utility patent protection extends for a period of 17 years); 17 U.S.C. § 302 (1988) (copyright protection extends for the life of the author plus 50 years for works created after 1977). Trade secrets, on the other hand, can be legally protected in perpetuity. *See generally* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974).

an author's or inventor's intellectual property is connected to him as an extension of his mind and personality.[80] Hegel believed that one's personality can be "embodied" in objects outside of one's body. According to Hegel's theory of rights, a person imposes his will on the external world by, among other things, the possession of objects.[81] The expression of a person's will through the "Act of Seizure"[82] is a part of the process of self-actualization. When others recognize a person's property rights in the objects he possesses, the external expression of his personality through external objects becomes objective.[83] Intellectual property belongs to the author or creator not because of the labor expended in creating it, as Locke argued, but because in some sense, it *is* the author or creator. An author's, or inventor's intellectual property is as much his as are, for example, his voice and facial expressions. Special property rights granted to authors or inventors are morally justifiable, since they protect the integrity of the author's or inventor's own personality.

On Hegel's analysis, an author ought to be treated differently from others with respect to his works, not because of desert, but because his works are a part of him. This is an attempt at a direct moral justification of intellectual property. If we can accept Hegel's argument that an author's work is an extension of himself, then we do not need Locke's argument of desert to justify intellectual property any more than we need to justify property in general in order to recognize a moral right of bodily integrity.

Each of the two foregoing moral justifications of intellectual property has its weaknesses. Locke's labor justification has a common sense appeal to it, but it may be challenged on the grounds that, in some instances of intellectual property, there may be no true labor in its creation, and hence no true desert of intellectual property rights. For example, when an inventor discovers something by accident or when an artist has a "gift" for his art and does not have to work at it, they may not deserve any special intellectual property rights in their respective inventions or creations.[84]

Although Hegel's analysis has an intuitive appeal, it may not

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80 *See* HEGEL, PHILOSOPHY OF RIGHT ¶ 51, at 45 (T.M. Knox trans. 1967) (stating that "property is the embodiment of personality").

81 *See* J.N. FINDLAY, HEGEL: A RE-EXAMINATION 310-11 (1976).

82 *Id.* at 311 ("Property must be acquired by an Act of Seizure . . . of which use is merely the expression.").

83 *See* Hughes, *supra* note 67, at 332-34.

84 *See id.* at 300-02; Hettinger, *supra* note 67, at 40-43.

withstand rigorous analysis. For example, does it really make sense to say that a piece of intellectual property such as a book or a painting, which is clearly distinct from its creator, is also a part of the creator? Moreover, the Hegelian justification is more convincing with respect to some forms of intellectual property than others. If a person creates or invents a utilitarian object such as a computer program or a new drug, to what extent is that an extension of the creator's "personality?" Rational persons may differ on that point. Finally, each of Locke's and Hegel's moral justifications only show that the institution of intellectual property is morally justifiable in general. They do not, in and of themselves, answer the question of whether specific moral rights flow from such property, which we shall now address.

VII. The Morality of "Moral Rights"

If intellectual property can be morally justified in general, then to take another person's intellectual property and exploit it without his permission is morally wrong, $\sim P^{M}xy(e)$. This is simply a corollary of the moral rule against theft, and it is true even if the taking is not illegal, $P^{L}xy(e)$. For example, failure to put a copyright notice on a written work may limit certain legal rights an author may have against persons who copy his work without permission,[85] but such copying is still morally wrong, $\sim P^{M}xy(c)$, even if it is legally permissible, $P^{L}xy(c)$.

If we accept either Locke's or Hegel's arguments, then there is a basic moral right to prevent the unauthorized exploitation of one's intellectual property. Thus, the dichotomy suggested by the Berne Convention between economic rights, on one hand, and moral rights, on the other, does not exist. The economic right to prevent exploitation of one's intellectual property is also a moral right. The more difficult questions raised by the Berne Convention, however, still remain: (a) whether there are other moral rights attendant to intellectual property; and (b) if so, whether such rights should be enforceable as legal rights?

All forms of property, and the rights attendant to them, have limits. Even if a person is the outright owner of a piece of tangible property, his rights to use that property are not unlimited.[86]

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[85] 17 U.S.C. § 401 (1988). *See* Heise, *Berne-ing down the House (and Senate): The Berne Convention Implementation Act of 1988*, 63 Fla. Bar J. 62 (1989) (discussing the effect that the Berne Convention's prohibition on formalities may have on the notice and registration requirements in current United States copyright law); D. Nimmer, *supra* note 3, at 31.

[86] For example, one cannot use real property in a way that interferes with the peace-

With respect to intellectual property, even the original creator's rights are not absolute. For example, there is a general legal principle that you can only have intellectual property rights in the expression or embodiment of an idea, and not in the idea itself.[87] If an author chooses to publish his work, he cannot prevent others from thinking, talking, or writing about the ideas he expresses in that work. However, his exact words and expression are copyrightable.

Opposed to the institution of intellectual property is the countervailing societal value placed on the free expression and dissemination of ideas.[88] Thus, to recognize that an author has certain moral and legal rights in his creations or inventions is not to say that those rights are unlimited or paramount.

Similarly, to say that a person is the holder of economic rights to exploit a piece of intellectual property is not to say that he can do whatever he wants with that property. Others may have rights with respect to that property, including the original author or inventor. We need, therefore, to determine where the "economic rights" to intellectual property end and where the "moral rights" of the creator, if any, begin.

It is established that the legal right to prevent the exploitation of one's intellectual property by others is alienable. An author or creator is free to transfer that right to whomever he pleases. But having transferred that economic right, are there residual moral rights which the author or creator retains with respect to his work? For example, if the author of a written work sells you the rights to publish that work, should you, as publisher, have the moral privilege to publish and not attribute the work to him, $P^{M}xy(p \ \& \sim a)$? Should you also have legal privilege to do the same, $P^{L}xy(p \ \& \sim a)$? Should the acknowledgment of authorship be a matter of legal and moral privilege, and therefore left to the agreement of the parties, or should the creators of intellectual property have an inalienable moral right, legal right, or both, to claim authorship and to protect the integrity of their works

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ful enjoyment by one's neighbors of their property, as expressed in the legal maxim "*et sic utere tuo ut alienum non laedas.*" William Aldred's Case, 9 Co. Rep. 57b., 59a., 77 Eng. Rep. 816, 821 (1611) (Wray, C.J.) (citing this maxim as a "rule of law and reason").

87 For copyrights, see 17 U.S.C. § 102(b) (1988) (codifying result of Baker v. Selden, 101 U.S. 99 (1880) (method of accounting was not protected by the copyright of the book in which it is set forth)). For patents, see Lyman v. Ladd, 347 F.2d 482 (D.C. Cir. 1965) ("naked ideas" are not patentable). *Cf.* Petraske, *Non-Protectible Elements of Software: The Idea/Expression Distinction is Not Enough*, 29 IDEA 35 (1988) (discussing the continuing problems in using copyright law to protect software).

88 *See* Hettinger, *supra* note 67, at 35.

against distortion or mutilation, even after they have transferred the economic rights to such works?

A. *The Right of Attribution*

Let us start with the right of attribution, also referred to as the right to claim authorship.[89] This right can be analyzed as two distinct rights: (a) a person's right to state publicly that he is the author or creator of a certain piece of intellectual property, regardless of whether or not he has sold the rights to copy or exploit such property; and (b) a person's right to require the current holder of the economic rights to such intellectual property to acknowledge his authorship.[90] Let us call the former the "Weak Right of Attribution" and the latter the "Strong Right of Attribution."[91]

The Weak Right of Attribution is fairly easy to justify as a moral right. To say that x has the moral right to claim authorship of his intellectual property, $R^M xy(c)$, is to say that any other person y, including the current owner of the economic rights to that intellectual property, is not privileged to keep x from claiming authorship, $\sim P^M yx(\sim c)$.

This moral right is equivalent to saying that y is not privileged to prevent x from speaking the truth. The right to speak the truth is clearly a moral right, unless the speaker's only purpose is to hurt someone else. It is also a legal right in our society, unless there is a justifiable need to restrict such speech.[92] The Weak Right of Attribution is therefore justifiable as a moral right, $R^M xy(c)$, because all rational persons would agree that freedom of speech is beneficial to them and that, as a general rule, no individual should be deprived of that freedom without his consent.

A parallel moral justification can be used to show that the Weak Right of Attribution should also be a legal right, $R^L xy(c)$. To take the contrary position would be to argue that y should be legally privileged to stop x from claiming authorship, $P^L yx(\sim c)$. This would arbitrarily deprive an author or creator of intellectual property of the right to speak freely, a right which others enjoy.

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89 *See supra* note 5 and accompanying text.

90 *See* RICKETSON, *supra* note 2, ¶ 8.105, at 467.

91 The Visual Artists Rights Act does not distinguish between the Strong and Weak Rights of Integrity. Visual Artists Rights Act, *supra* note 8, § 603. The absence of a more precise explanation of what the right "to claim authorship" means will no doubt be the subject of future litigation.

92 For example, if the speech presents a "clear and present danger" to the public welfare, it may be restricted. *See* Brandenburg v. Ohio, 395 U.S. 444, 444-48 (1969).

Thus, the Weak Right of Attribution ought morally to be a legal right. In fact, the legal right to claim authorship can be inferred from the basic freedom to speak the truth which, subject to certain limitations, is guaranteed by the first and fourteenth amendments of the United States Constitution.[93]

The Strong Right of Attribution is more difficult to justify. Can an author morally require that the current owner of the economic rights to a piece of intellectual property acknowledge his authorship? This is equivalent to saying that the holder of the economic rights to that intellectual property is not morally permitted to fail to acknowledge the creator's authorship, $\sim P^{M}yx(\sim a)$, unless he obtains the creator's consent. In other words, the Strong Right of Attribution implies that it is immoral to fail to attribute authorship of a work to which you have acquired economic rights.

Although it is sometimes difficult to make the distinction, the attribution of authorship falls in the category of conferring a benefit rather than avoiding a harm. The Strong Moral Right of Attribution would require the holders of economic rights to intellectual property to confer a positive benefit on the author or inventor, namely the public acknowledgment of authorship. This is a benefit, however, as to which some rational people may be indifferent. Some rational people may not care whether they receive acknowledgment for their works or not. For this reason, it is unlikely there would be a consensus among rational people that there ought to be a general moral rule against the non-attribution of authorship. Of course, it would be morally desirable, *i.e.*, a moral ideal, for people to give such attribution since it confers a benefit. It is a morally praiseworthy thing to do, but it is not immoral as a rule to fail to do so because such a rule cannot be rationally justified.

Can a direct moral justification of the Strong Moral Right of Attribution be found using the Hegelian personality theory?[94] The Strong Right of Attribution seems most plausible as a legal right in the context of literature and fine art. Such works are most clearly identified with their creators as expressions of their individuality.[95] Even if one accepts the literal identification of the

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[93] U.S. CONST. amend. I; amend. XIV, § 1.

[94] *See supra* note 80 and accompanying text.

[95] The personality theory of intellectual property was clearly put forward as a basis for the Visual Artists Rights Act: "[a]n artist's professional and personal identity is embodied in each work created by that artist." H. REP. 101-514, *supra* note 24, at 6925 (statement of John Koegel).

artist with his work as proposed by Hegel and the personality theorists, it is not clearly immoral to fail to identify an artist by name, much less attribute authorship of his work. Thus, the personality theory cannot serve as the basis for the Strong Moral Right of Attribution.

Some, however, including the United States Congress, will nonetheless continue to believe that it is wrong for the purchaser of the economic rights to an artistic work to exploit it without at least giving the artist credit.[96] As we have seen, however, the required attribution of authorship is not justifiable as a general moral rule. There appears to be less moral concern for the authors of more utilitarian works, such as computer programs or encyclopedias. Should the authors of, or multiple contributors to, such works each have the moral right to require acknowledgment of their authorship? Such a right is not unthinkable, but in view of the collaborative aspect of such works, and given the variety of intellectual property in general, there does not appear to be a compelling justification for the Strong Moral Right of Attribution.[97]

Thus, the Strong Right of Attribution is not a true moral right after all, $\sim R^{M}xy(a)$. An author or creator is morally privileged to seek attribution of his authorship, $P^{M}xy(a)$, but it is not his right. This does not mean that the holder of the economic rights to a work has a moral right not to acknowledge the authorship of that work, but that he has a moral privilege, namely to omit the attribution of authorship, $P^{M}yx(\sim a)$. In other words, this is a case of conflicting moral privileges, a conflict which may or may not be settled by agreement between the parties:

$$P^{M}xy(a) \ \& \ P^{M}yx(\sim a)$$

If the Strong Right of Attribution is not a true moral right, is there a non-moral justification for making the Strong Right of Attribution a legally enforceable right, $R^{L}xy(a)$? As previously discussed, legal rights are sometimes rationally justified on the basis of utility maximization.[98] The Strong Right of Attribution may provide some marginal incentive to authors or creators to develop and disseminate their works that the basic economic right to prevent unauthor-

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[96] *See* Visual Artists Rights Act, *supra* note 8, § 603.

[97] In France, which is the stronghold of moral rights, authors of computer software are not accorded moral rights. *See* Jaszi, *supra* note 6, at 62; Hoffman, Grossman & Nawashiro, *Moral Rights and Computer Software: An International Overview*, 5 COMPUTER LAW. 10 (No. 6) (June 1988).

[98] *See supra* notes 16-17 and accompanying text.

ized exploitation and the Weak Right of Attribution do not. But in view of the criticisms leveled against the basic economic arguments supporting the legal right to prevent copying—for example, that many authors and inventors would continue to produce their works even if others were legally free to copy or to use them[99]—this marginal analysis may not be convincing. Moreover, any increase in utility resulting from the granting of a Strong Right of Attribution to the creators of intellectual property must be weighed against any potential decrease in utility resulting from a decrease in demand for intellectual property subject to such a right. In other words, if the basis for instituting a Strong Right of Attribution is one of utility maximization, one should be certain that the net effect is positive.[100]

A paternalistic argument can also be made that creators of intellectual property deserve special protection because of their inferior bargaining position *vis-a-vis* those in the business of acquiring such property.[101] The moral principal of equality (in this case, equality of result) may be used to justify laws which aid those who are chronically disadvantaged.

The argument here would be that authors and inventors are not in a position to protect their moral privilege to claim authorship by contract, so the law must protect them against those with greater bargaining power by giving authors and inventors an inalienable legal right of attribution. This was a primary reason that Congress acted to protect artists in the Visual Artists Rights Act by providing them with a legal right of attribution.[102]

In constructing legal rights, however, we should avoid assumptions about whether one party to a transaction or the other will generally have the better bargaining position. Such assumptions may turn out to be wrong, and rights instituted on a paternalistic basis may instead hurt those whom we are trying to help by restricting that party's freedom to negotiate contracts that suit his interests. A Strong Legal Right of Attribution may, in fact, limit the number of persons interested in acquiring a piece of intellectual property or limit the amount they are willing to pay for intellectual property

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99 *See* Scherer, *supra* note 17; Breyer, *supra* note 17, at 284-91.

100 In the Visual Artists Rights Act, Congress provided that the artist's rights of attribution and integrity could be waived specifically in writing, but that such waiver only applies to the specific person to whom it is made. *See* H. REP. 101-514, *supra* note 24, at 6928-29. Since the artist may enforce his rights of attribution and integrity against any subsequent buyer, this may have an adverse effect on the secondary market for artwork. Congress has asked the Copyright Office to conduct a study of the extent to which the rights of attribution and integrity are waived. *See* Visual Artists Rights Act, *supra* note 8, § 608.

101 *See* H. REP. 101-514, *supra* note 24.

102 Congress believed that artists have a "relatively weak economic position." *Id.*

subject to such a right. Creators of intellectual property will always have at least one advantage in any negotiation for the economic rights to that property, namely, that the property is to some extent unique. This factor may not equalize the bargaining power in all cases, but it should negate the premise that the creators of intellectual property are at an absolute disadvantage and require legal intervention in their favor.

Thus, even on non-moral grounds, and notwithstanding the right of attribution set forth in the Visual Artists Rights Act, my conclusion is that the Strong Right of Attribution should not be enforceable as a legal right. Absent fraud or duress, the parties to a transaction involving the transfer of intellectual property rights should have the legal privilege to make any contractual arrangements they may wish with regard to the attribution of authorship.

B. *The Right of Integrity*

The second moral right codified in the Berne Convention is the right of integrity, which is the right of an author to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to a piece of intellectual property which would be prejudicial to the author's honor or reputation.[103] This right too can be divided into strong and weak versions.

The Weak Right of Integrity is simply an author's right to state his objection to a distortion of his work which would harm his reputation, $R^{M}xy(o)$. Like the Weak Right of Attribution, this moral right is justifiable on the grounds of free speech. It is not morally or legally permissible for someone to keep an author or creator from expressing his outrage at changes made to his work, especially when those changes are of so significant a nature as to adversely affect his reputation. Thus, using the same analysis as was used to justify the Weak Right of Attribution, the Weak Right of Integrity can be shown to be both a moral and legal right.

The Strong Right of Integrity involves the more difficult question of whether an author or creator of a piece of intellectual

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[103] In enacting the Visual Artists Rights Act, Congress went beyond the right of integrity set forth in the Berne Convention by giving visual artists the right to prevent the outright destruction of works of "recognized stature." Visual Artists Rights Act, *supra* note 8, § 603. Query whether a work, the stature of which is recognized as a prime example of bad art and which might otherwise be destroyed by its owners, becomes legally indestructible under the Visual Artists Rights Act without the artist's consent. *Cf.* Serra v. United States Gen. Serv. Admin., 847 F.2d 1045 (2d Cir. 1988)(prior to implementation of the Berne Convention an artist had no right to prevent the relocation of his sculpture after he sold it to the government).

property has the positive moral or legal right, or both, to prevent the owner of the economic rights from altering, distorting, or mutilating that intellectual property in a way that is prejudicial to the author's or creator's reputation, $R^{M}xy(\sim m)$. In other words, the Strong Right of Integrity holds that the owner of the economic rights to an item of intellectual property is not privileged to make changes to that intellectual property if they would amount to a distortion or mutilation of that work which would bring dishonor to the author or creator, $\sim P^{M}yx(m)$.

As with the Strong Right of Attribution, the Strong Right of Integrity is most persuasive as a moral or legal right in the case of literature and fine art. We generally believe that an artist should have the last word on the form and content of his work, and Congress has acted to provide visual artists with a Strong Right of Integrity.[104] Authors and creators of other works, however, are much more likely to expect and accept alterations of their work. Journalists expect their "copy" to be edited, screenwriters expect scenes to be cut from their screenplays, and inventors expect people to tinker with their inventions.[105] Such alterations are generally morally and legally permissible, perhaps because the authors or inventors expect such alterations and therefore can be deemed to have given their implicit consent. The question we must consider now is whether, independent of any such implicit consent, an alteration that is so outrageous as to bring dishonor to the author or creator should be immoral or illegal, or both.

Clearly, where there is an intent on the part of the owner of economic rights to inflict harm on an author or creator, the distortion or mutilation of a piece of intellectual property by such owner is immoral and the creator should have a moral right against such distortion or mutilation. Where there is no such intent, however, should the owner of the economic rights to a work be morally and legally privileged to adapt and modify a piece of intellectual property even when such modification results in a loss of reputation or honor to the creator? Rational persons would advocate that there be such a moral right against distortion or mutilation of one's intellectual property precisely in those instances in which there is actual harm to the creator, such as the loss of honor or reputation. In other words, the Strong Right of

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104 Visual Artists Rights Act, *supra* note 8, § 603.

105 This right of alteration may be justifiable on the ancient legal principle that whoever grants property is deemed also to grant all rights necessary to the use thereof: "*[l]ex est cuicunque aliquis quid concedit, concedere videtur, et id sine quo res ipsa esse non potuit.*" Richard Liford's Case, 11 Co. Rep. 46b., 52a., 77 Eng. Rep. 1206, 1217 (1627).

Integrity can be rationally justified as a direct moral right of a creator of intellectual property.

Following Hegel, the personality rights theorists would argue that because intellectual property is an extension of an author's or creator's personality, there is an inalienable right of the creator to prevent a mutilation or distortion which is so severe as to cause harm to his honor or reputation.[106] As skeptical as one may be about the Hegelian metaphysics behind the personality justification of property, the argument as applied to the Strong Right of Integrity for intellectual property is nonetheless persuasive. The Strong Right of Integrity is not a moral right because it is an inalienable right *of the creator* in the work, but rather because it is a personal right of the creator not to have his honor or reputation, which may be his primary asset, damaged by distorted versions of his work. In this regard, the Strong Right of Integrity is like the right of privacy or the rights against libel and slander.[107] These are direct moral and legal rights of a person against the infliction of intangible harm by others. Rational persons would agree that the Strong Right of Integrity should be recognized as a true moral right because to take the contrary position would be to advocate a world in which others would be permitted to use a person's intellectual property to inflict unconsented dishonor and loss of reputation on him without any offsetting benefit.

Against the Strong Right of Integrity it may be argued, for example, that unlike a person whose moral right against theft is violated by the act of stealing, the creator of intellectual property presumably receives some benefit when he transfers his economic rights to such intellectual property. These benefits could offset the harm of any subsequent acts of distortion or mutilation of that intellectual property by the holders of the economic rights. It could also be argued that the creators of intellectual property should be aware of the risks of distortion and mutilation when they sell their economic rights and that these risks are simply a cost of creating intellectual property and should be factored into the price of transferring the economic rights. We cannot simply reply that in selling the rights to the work, the creator did not sell all his rights to the work, because that begs the question. The question is whether there are residual rights of authors and creators to prevent the distortion or mutilation of their works.

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106 *See* Hughes, *supra* note 67, at 344.

107 *See* W.P. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS, § 112, at 785 (discussion of libel and slander); § 117, at 849 (discussion of the right of privacy) (5th ed. 1984) [hereinafter PROSSER & KEETON].

The fact that a person may have received some benefit in exchange for transferring the economic rights to his intellectual property does not *ipso facto* eliminate all rights he may have against the transferee, any more than a person's selling one-half of his land eliminates his right to prevent the transferee from interfering with his right to the peaceful enjoyment of his retained half. A person has a general moral and legal right against his neighbor's use of property in a way that causes him harm.[108] Similarly, the author or creator of a piece of intellectual property has a moral right against the mutilation or distortion of his work in a way which causes him loss of honor or reputation, irrespective of the fact that he sold his work to the malefactor. In other words, by selling the economic rights to a piece of intellectual property, the creator is not thereby giving the purchaser the right to use that property to the creator's detriment. Thus, the transfer of economic rights for value does not, by itself, negate the existence of a Strong Moral Right of Integrity.

If the Strong Right of Integrity is a true moral right, $R^{M}xy(\sim m)$, should we also recognize it as a legal right? We have seen in the case of the Strong Right of Attribution that the argument for the legal enforcement of moral rights is most compelling with respect to literature and fine art. We assume that an artist should have the final say as to the form and content of his work and we do not believe that someone who buys the economic rights to that work is buying the right to make any and all changes to it that he may desire. On the other hand, should the authors of utilitarian works, such as computer programs and encyclopedias, be afforded the same legal rights? Can the creators of such works seriously complain that their honor or reputation is damaged by alterations of their works? Moreover, it may be claimed that the loss of honor or reputation is much too vague a concept to be made the basis of an enforceable legal right.

Moral persons would agree that serious violations of the Strong Moral Right of Integrity should be illegal, not based on principles of equality and desert, but as a direct corollary of the Strong Moral Right of Integrity. The Strong Moral Right of Integrity should be enforced legally, just as the moral right against theft is enforced by laws against larceny and conversion, because

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108 *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 821D (1979) (defining "private nuisance" as a "nontrespassory invasion of another's interest in the private use and enjoyment of land"); *see also*, Aldred's Case, 9 Co. Rep. 57b., 59a., 77 Eng. Rep. 816, 821 (1611) (lime-kiln built too close to house, rendering house uninhabitable because of burning smoke entering it, gives rise to cause of action).

it involves the unconsented infliction of harm. As was previously mentioned, not every immoral taking of property is legally redressable as theft or conversion.[109] Similarly, not every change or alteration which adversely affects an author's or artist's reputation, even if immoral, will be a violation of the Strong Legal Right of Integrity. The harm to honor or reputation caused by such changes must be substantial and measurable. To the objection that the protected interests, namely the creator's honor and reputation, are too inchoate to be legally measured or proven, we may point to the ancient torts of libel and slander, in which loss of honor and reputation have been matters of legal proof for centuries.[110] Although it would probably not be appropriate to criminalize violations of the Strong Right of Integrity, it would be appropriate for an author or creator who has suffered loss of honor or reputation to seek damages from the tortfeasor in compensation for such loss.

The foregoing analysis suggests that a new civil cause of action, which we might call "tortious editing," be instituted as the basis for legally enforcing the Strong Right of Integrity. As a general legal right, the protection would not be limited to creators of fine art as is presently the case under the Visual Artists Rights Act. If an author or creator of a utilitarian work, such as a computer program or a machine, can prove that a distortion or mutilation of his work has resulted in a demonstrable loss of honor or reputation, he should be entitled to the same legal protection as the fine artist. Thus, we may conclude that the Strong Right of Integrity is both a moral right, $R^{M}xy(\sim m)$, and also ought morally to be enforceable as a legal right, $R^{L}xy(\sim m)$.

VIII. Conclusion

Of the several versions of the moral rights prescribed by the Berne Convention and discussed above, only the Strong Right of Attribution, *i.e.*, the right to compel others to acknowledge one's authorship of a work, is not justifiable either as a general moral right or as a general legal right. The Strong Right of Integrity, on the other hand, should be recognized as a true moral right and as an enforceable legal right. In the United States, the

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109 *See supra* note 60 and accompanying text.

110 The general distinction between libel and slander is that libel concerns written or printed words, whereas slander concerns oral or spoken words. As the laws of libel and slander developed, it was held that some defamatory words, if written, could be actionable without proof of actual damage to the plaintiff, but such damage had to be proven if the words were spoken. Prosser & Keeton, *supra* note 107, § 117, at 785-86.

Strong Right of Integrity is currently an enforceable legal right only for certain types of intellectual property. In the spirit of the United States accession to the Berne Convention, the Strong Right of Integrity should be explicitly recognized as a legal right for all types of intellectual property and should be enforceable with appropriate legal remedies.