

FROM THE PROVIDENCE OF KINGS TO COPYRIGHTED THINGS (AND FRENCH MORAL RIGHTS)

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I. INTRODUCTION

The most unique feature of contemporary French intellectual property law is the doctrine of moral rights. France stands out not only as the world's leading proponent of moral rights,¹ which perhaps distinguishes it as the country with the most comprehensive legal protection to authors of literary and artistic works,² but also because its doctrine of moral rights predominates over the more traditional economic rights that are typically associated with intellectual property law.³ The doctrine of moral rights has been incorporated into the intellectual property regimes of many countries in varying degrees,⁴ including, it could be argued, into the laws of the United States where there has been significant reluctance to adopt moral rights.⁵ The focus of intellectual property law in the United States has been almost exclusively on economic rights.⁶ However, there is continuing interest in

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1. See Karen Y. Crabbs, *The Future of Authors' and Artists' Moral Rights in America*, 26 BEVERLY HILLS B. ASS'N J. 167, 169 (1992).

2. See Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 97-100 (1985). See also Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 126 (1997) (indicating that France provides the most extreme protection for the inalienability of the right of integrity); Carol G. Ludolph & Gary E. Merenstein, *Authors' Moral Rights in the United States and the Berne Convention*, 19 STETSON L. REV. 201, 204 (1989) (noting that France and "other European countries influenced by natural law principles expressly recognize an artist's moral rights").

3. See Jill R. Applebaum, *The Visual Artists Rights Act of 1990: An Analysis Based on the French Droit Moral*, 8 AM. U. J. INT'L L. & POL'Y 183, 187 (1992).

4. See Dane S. Ciolino, *Moral Rights and Real Obligations: A Property-Law Framework for the Protection of Authors' Moral Rights*, 69 TUL. L. REV. 935, 946-47 (1995).

5. See Hansmann & Santilli, *supra* note 2, at 95. See also Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J.L. & ARTS 477, 478 (1990) (noting that there has been some debate in this country that moral rights are already protected through other legal doctrines); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L. J. 455, 496-98 (proposing that because moral rights are inalienable, they are at odds with traditional Anglo-American notions of copyright protection).

6. See Jimmy A. Frazier, *On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law*, 70 TUL. L. REV. 313, 315 (1995).

moral rights in the United States, particularly among advocates who propose amending the existing laws to expand the legal protection and interests of authors and artists.⁷

7. See Karen M. Corr, *Protection of Art Work Through Artists' Rights: An Analysis of State Law and Proposal for Change*, 38 AM. U. L. REV. 855, 856 (1989). See also Edward Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 946-47 (1990) (citing recent legislative activity in the United States directed toward addressing moral rights issues). Jaszi, *supra* note 5, at 496 (opining that by adopting these rights the United States would provide a solution to a number of legal and cultural dilemmas in copyright). See generally Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law — A Proposal*, 24 S. CAL. L. REV. 375 (1951) (proposing that the concept of moral rights should be incorporated into American law).

The moral rights doctrine has been inching its way into U.S. law for some time. The United States Congress enacted the Visual Artists Rights Act of 1990, embracing for the first time, and against its previous decisions, some form of moral right protection. See Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified in scattered sections of 17 U.S.C.). The statute defines and limits a work of visual art to paintings, drawings, prints or sculptures. See 17 U.S.C.A. § 101 (West Supp. 1999). They must exist in a single copy, or in a limited edition of two hundred copies or fewer that are signed and consecutively numbered by the author, or in the case of a sculpture, in multiple cast, carved or fabricated sculptures of two hundred or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author. See *id.* See also Thomas P. Olson, *The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reforms Since the 1909 Act*, 36 J. COPYRIGHT SOC'Y U.S.A. 109, 109-10 n.2 (1989) (noting numerous academic commentaries proposing reform of the Copyright Act).

Before 1990, there existed the 1988 National Film Preservation Act (NFPA). See Pub. L. No. 100-446, 102 Stat. 1782 (repealed 1992). The 1992 NFPA replaced the original 1988 version. See Copyright Amendments Act of 1992, Pub. L. No. 102-307, § 214, 106 Stat. 264 (current version at 2 U.S.C.A. § 179(l)-(w) (West Supp. 1999)). This was the first time the United States government passed legislation entailing moral rights in its history and this significant legislative enactment embraced concerns for artists' reputation and personality, bringing to mind policy considerations about the personality of the artists much like those found in the French moral rights. This Act specifically responded to artists' concerns about the colorization of famous black and white films. Among other things, it sought the protection of the reputation of the film makers by safeguarding the color integrity of their films. Prior to the act, a film maker could prevent colorization of his film only if he owned the copyright. If he had transferred his copyright interest, he retained no control over the film. Generally, the original filmmaker was not the copyright owner; his film was owned by the company that financed the film or perhaps by the producer. The U.S. Copyright Office took the position that colorized versions of films were derivative works and copyrightable themselves. If a filmmaker did not own the copyright or if the film had fallen into public domain, anyone could colorize it without their permission. The NFPA was created to protect film makers and directors against colorization of their films without their consent even when their films had fallen into public domain. See Elise K. Bader, *A Film of a Different Color: Copyright and the Colorization of Black and White Films*, 5 CARDOZO ARTS & ENT. L.J. 497, 499 (1986); Jon A. Baumgarten & Sally Hertzmark, *Color-Converted Motion Pictures are Registerable Derivative Works*, NAT'L L.J., JULY 27, 1987, at 28; Anne Marie Cook, 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, 325 (1988).

France also distinguishes itself as the country from where the individual rights that constitute the doctrine of moral rights had their legal

These exceptions to the existing copyright law were born out of philosophical considerations about justice and morality toward film makers in much the same way that nineteenth-century French courts began to succumb to arguments about protecting the honor of authorship and artistry. The Act expired in 1991 but was shortly thereafter revised. The new version preserves a limited number of films each year arguably without responding to the substantive issues surrounding the controversies about reputation that initially prompted the original act.

In addition to recent federal legislation, individual U.S. states have also considered the possible role this doctrine might have in U.S. law. See Ginsburg, *supra* note 5, at 489-90. Some states have adopted moral rights by expressly granting them in some form. See, e.g., CAL. CIV. CODE §§ 980-990 (West 1982 & Supp. 1999); CONN. GEN. STAT. ANN. § 42-116s to -116t (West 1992); LA. REV. STAT. ANN. § 51:2151-:2156 (West 1987); ME. REV. STAT. ANN. tit. 27, § 303 (West 1988); MASS. GEN. LAWS ANN. ch. 231, § 85s (West Supp. 1999); NEV. REV. STAT. ANN. § 597.720-.760 (Michie 1994); N.J. STAT. ANN. § 2A:24A-1 to -8 (West 1987); N.M. STAT. ANN. §13-4B-1 to -3 (Michie 1997); N.Y. ARTS & CULT. AFF. LAW §§ 11.01-14.03 (McKinney 1984 & Supp. 1999); PA. STAT. ANN. tit. 73, §§2101-2130 (West 1993); R.I. GEN. LAWS §5-62-2 to -6 (1995). See also Corr, *supra*, at 856-57 (noting that some states' laws have been more receptive to moral rights than federal law).

Key aspects of the doctrine are also embraced by article 6bis of the Berne Convention. See Berne Convention for the Protection of Literary and Artistic Property, Sept. 9, 1886, 828 U.N.T.S. 221 (last revised July 24, 1971) [hereinafter Berne Convention], to which the United States became a signatory for the first time in 1988. On October 31, 1988, President Ronald Reagan signed into law the 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.). See PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINE 935 (David L. Shapiro et al. eds., 3d ed. 1990).

In 1989, the Berne Implementation Act of 1988 went into effect. See *id.* at 935. One of the most considerable controversies resulting from the United States' adherence to the Berne Convention has centered around the question of whether the United States already complies with article 6bis of the Convention which requires some moral right protection. See Anne Moebes, *Negotiating International Copyright Protection: The United States and European Community Positions*, 14 LOY. L.A. INT'L & COMP. L.J. 301, 316-17 (1992). "[T]he 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." Berne Convention, art. 6bis. It has been argued that the United States complies with this requirement through the various state statutes, as well as several common law principles and unfair competition laws. See Damich, *supra*, at 945; Ludolph & Merenstein, *supra* note 2, at 203; Berne Convention Implementation Act of 1988, Pub. L. No. 100-568 §§ 2(3), 3(b), 102 Stat. 2853, 2853-2854; S. REP. NO. 100-352, at 38-39 (1989). In spite of its origin in France, the doctrine is without question becoming part of American law.

origins,⁸ although the underlying philosophical construction of the author's relationship that attends the individual rights is said to have evolved out of the writings of Germany's Immanuel Kant and Georg Hegel.⁹ The doctrine is more an assembly of four separate rights which are encompassed by it, than it is a uniform doctrine.¹⁰ Consequently, four rights contained therein have separate and independent histories from that of the doctrine itself.¹¹ The rights evolved from a societal concern about individual author's and artist's personality and reputation investments as they are exhibited through their creative work.¹² The individual rights can be traced back to their judicial beginnings through an examination of judicial opinions in nineteenth century French courts; however, the nomenclature used to identify the doctrine today does not have the same history. The doctrine of moral rights was first coined in an 1872 legislative journal,¹³ but its first legal adoption in French law was not official until 1992.¹⁴ This ratification was well over a century after the first judicial appearance of the first moral right and more than a quarter century after the French legislature officially recognized them individually, although not by that title, in a 1957 legislative amendment.¹⁵

8. See John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1026 (1976). See also Adolf Dietz, *ALAI Congress: Antwerp 1993 The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 201 (1995) (citing France as the "mother country" of moral rights); Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 465 (1968) (stating that the moral right has evolved gradually out of French court decisions "since the middle of the last century").

9. See Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 370-71 (1998). See also Ciolino, *supra* note 4, at 939 (noting that when French moral rights were finally codified into law in 1957, it was Hegel's dualist theory that was adopted, which provided authors with two distinct rights: personal and economic).

10. See Ciolino, *supra* note 4, at 940.

11. See Sarraute, *supra* note 8, at 467-83.

12. Moral rights are completely separate from the economic rights of the author or artists, and moral rights are personal to the artist. See Frazier, *supra* note 6, at 315.

13. See ANDRÉ BERTRAND, *LE DROIT D'AUTEUR ET LES DROITS VOISINS* 219 (1991), which states "[i]l n'apparut d'une manière structurée et sous son appellation de droit moral qu'en 1872 sous la plume d'André Morillot (Rev. crit. Lég. 1872, 29, Cf. § 1.14) avant de faire lentement son chemin dans la doctrine et la jurisprudence." (it did not appear in a structured manner under its title moral right until 1872 under the pen of André Morillot before slowly making its way into doctrine and jurisprudence) (translation by author).

14. See Dietz, *supra* note 8, at 201. Before the 1992 codification, the "term of droit moral . . . was not to be found in the French Copyright Act of 1957, either as a sub-title or in the very content of Article 6 of that law (now Article L. 121-1 of the Code)." *Id.* (footnote omitted).

15. See BERTRAND, *supra* note 13, at 220.

But, finally, it is by article 6 of the Law of March 11, 1957 that the concept of moral right took its place in French legislation. According to that article: The author enjoys the right to respect of his name and of the quality of his work.

The four separate and independent rights as previously mentioned are (1) the French *droit de divulgation*, which is the right of the author to decide whether or not the work is to be published; (2) the *droit de retrait (ou de repentir)*, which is the author's right to withdraw the work from publication or to modify it even after it has been made public;¹⁶ (3) the *droit a la paternite*, or the right of the author to have his name always associated with the work and to be acknowledged as its creator, as well as to disclaim authorship of works falsely attributed to him; and (4) the *droit a l'integrite*, which provides the author with the right to protect the author's work from alteration, mutilation, and excessive criticism without permission.¹⁷

The goal of this article is to go a step further than anyone has dared to go in the effort to trace the judicial origins of French moral rights by looking at the earliest French cases where the individual rights themselves were articulated or cases where the underlying policy of protecting more than economic rights of authors was advanced. This analysis begins by describing the French history that gave rise to France's first and modern intellectual property law, which was enacted during the eighteenth century French Revolution. It is important to note that the Revolutionary government that enacted the first law was politically motivated to reject all symbols of the centralized power and absolute control that the French monarchy had previously exercised over authors and artists. A polemic about authorship had already emerged, characterized by a tension between those who supported the traditional notions of governmental control over works of the mind and a burgeoning new and revolutionary notion about the individuality of creativity. The third part looks at some actual case reports recorded in the *Recueil Dalloz*,¹⁸ in which some of the rights that were to become moral rights were insinuated. The fourth part focuses on the nineteenth century as a transitory period when this tension between traditional and revolutionary notions was nourished by a threat to authors' rights inherent in the changing political forms of government in France along with the possible role that prominent intellectuals and politicians played in lobbying for protection of authors' rights.

This right is attached to his person. It is perpetual, inalienable and imprescriptible. At death it is transmitted to his heirs, and cannot not be conferred upon a third party by testamentary disposition.

Id. (translation by author).

16. This is the only right included in the doctrine that did not appear in a judicial opinion before the rights were codified. See Sarraute, *supra* note 8, at 476.

17. Article 6 of the Law of March 11, 1957. See also Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y U.S.A. 1, 3 (1980).

18. The *Recueil Dalloz-Sirey* is the French equivalent of West Reports. See Mitchel de S.-O.-I'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1357 (1995).

II. FRANCE'S MODERN INTELLECTUAL PROPERTY LAW

Prior to the Revolution of 1789, it was the monarch who defined artistic and literary culture. The monarch had become the central figure of national identity, and as God's earthly representative, all creativity was ultimately referred back to Him.¹⁹ The French monarchy not only defined cultural property, but the king also regulated art and culture long before the establishment of what is today intellectual property protection.²⁰ Prior to the French Revolution, French authors obtained a protected legal status over their works by receiving recognition of their authorship by grant of a "literary privilege" from the king. In 1777, the king issued a royal decree in favor of authors,²¹ making it possible for authors to have an official privilege in their works, which until then had been a right exclusive to the booksellers and publishers.²² The king granted these privileges selectively and generally to the author and the author's heirs for a particular work,²³ only limiting the author's privilege if the author conveyed the property to another party.²⁴

France's modern law governing intellectual property, which developed during the French Revolution, ended the centralized power the king had acquired under the ancien regime.²⁵ During the Revolution, revolutionaries advocated the destruction of all symbols of the ancien regime, including cultural and artistic property which was not yet viewed as part of the

19. See Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793*, in *LAW AND THE ORDER OF CULTURE* 109, 111 (Robert Post ed., 1991).

20. See RÉGIS MICHAUD & A. MARINONI, *FRANCE: TABLEAU DE CIVILIZATION FRANÇAISE* 83 (1928). Perhaps the most noteworthy example was the establishment of the French Academy by Louis XIII's minister Richelieu in Academy 1635, which marked the official regulation of the French language. See *id.*

21. The early intellectual property claims of publishers and booksellers to literary property were based on principles of ownership, not authorship, a theoretical difference not discussed in this Article.

22. The monarch in France, as well as in other European countries, had granted royal privileges to publishers, booksellers and authors from as far back as the fifteenth century. They were paid-for favors, of varying lengths of time, and often attached to the person and would apply to *any* work that the person would be the first to publish during that time instead of applying to a particular work. See ELIZABETH ARMSTRONG, *BEFORE COPYRIGHT THE FRENCH BOOK-PRIVILEGE SYSTEM 1498 - 1526*, at 118-19 (1990).

23. See CA Paris, 4e ch., March 29, 1878, S. Jur. II, 1878, 145.

24. See Cour de cassation, Cass. crim., May 28, 1875, D.P. I, 1875, 329, 329-30.

25. See Swack, *supra* note 9, at 370.

personality of the author.²⁶ However, a new national cultural policy erupted in order to stop the destruction of great works of art. This movement was initiated to preserve and protect artistic works for their value as part of the national heritage.²⁷ This new policy urged "a focus on the creator of art rather than on the patron, . . . bring[ing] the individual to the forefront and . . . present[ing] works of art as examples of the free spirit."²⁸

The first French copyright law was enacted in 1793 and was likely modeled after England's Statute of Anne²⁹ and the Copyright Act of May 1790,³⁰ which was America's first copyright act.³¹ The 1793 Decree establishing intellectual property law was the signpost to the modern history of intellectual property in France because upon its enactment, for the first time in France, literary rights were set by the democratic process.³² The 1793 Decree marked the revolutionary rupture with the past tradition of the king's regulation of literary rights. The decree also anticipated the modern separation of the arts from cultural standards traditionally imposed by the state. As the monarchy ebbed, the classical notions that the validity of art was determined by its compliance with rigid rules governing form and content vanished.³³ Art was free to be individualized, while subjectivity began to reign over the former objective model.³⁴ Innovative forms of art would evolve that no longer bowed to a superior authority.

Various theories regarding the role that the new Revolutionary government should take to protect intellectual property were debated prior to the passage of the 1793 legislation.³⁵ This was an era in French history

26. The response to the destruction of artistic and cultural artifacts was reminiscent of the ancien regime which had been the most centralized government in Europe. See Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1152-54 (1990).

27. See *id.* at 1151-52.

28. *Id.* at 1155.

29. Statute of Anne, 1710, 8 Anne, ch. 19.

30. Act of May 31, 1790, ch. 15, 1 Stat. 124.

31. See BERTRAND, *supra* note 13, at 24-25.

32. See generally ARMSTRONG, *supra* note 22 (discussing the book-privilege system in Europe and in France and detailing the scope of this system).

33. See ALBERT L. GUERARD, ART FOR ART'S SAKE 161 (1936).

34. Two of several important literary and artistic movements that influenced the direction of nineteenth-century art were Romanticism and a movement called Art for Art's Sake, both of which launched a refusal by artists to conform, manifested by the acknowledgment of no authority but the inspiration of the artist himself. See *id.* at 34-54. The Romantics, for example, were said to despise commissioned art and were suspicious of all authority external to themselves, a trend accentuated in the movement of *l'Art pour l'Art* (Art for Art's Sake). See N. H. CLEMENT, ROMANTICISM IN FRANCE 174 (Revolving Fund Series No. 9, 1939).

35. The model for the first law came from the school of thought that the role of government was to furnish a means by which to maximize the social utility of the creative process by legislating incentives for individual contributions to the social welfare. It had also

when the prevailing attitude about enlightenment was "that the essential quality of the Republic reposed in the genius of the individual citizens" through scientific and artistic achievements, and not in the sovereign.³⁶ As a consequence of the Revolution, there was the strong desire that artists' rights no longer be determined by the king.³⁷

Early rights of authorship in France were dominated by the concern for economic protection,³⁸ and the forefather of the early French copyright legislation, the Marquis de Condorcet,³⁹ argued strongly against the privatization of intellectual property.⁴⁰ Instead, de Condorcet favored a

been argued that a pre-existent right of property imbued in the author or creator by natural law and that positive law was the government's way to limit these rights in the interest of the public good, which was to make the products of intellectual activity available to the public after a specified time.

Others believed there were no pre-existent rights and that absent a specific statutory grant, no rights existed at all. Those who adopted this latter position were inclined to argue for a very strict interpretation of the 1793 Decree during the nineteenth century as they believed that the court's role was to rely on nothing more and nothing less than the language of the legislative decrees, consulting when necessary, historical records for legislative intent.

Proponents of the natural law theory argued that principles of ownership and possession were a natural limit to the scope of intellectual property rights for authors and artists so that those who had absolute dominion over intellectual property had the rights to do with it what they wished, whether or not they were authors or artists. See generally Hesse, *supra* note 19 (discussing natural law theory and the evolution of the legal identity of the author). This was certainly the prevailing position in the early case law. See Cour de cassation, Therm. 29, an 11, S. Jur. I, an 11, 851.

36. Sax, *supra* note 26, at 1156.

37. See Ciolino, *supra* note 4, at 938-39.

38. See Christine L. Chinni, *Droit D'Auteur Versus the Economics of Copyright: Implications for American Law of Accession to the Berne Convention*, 14 W. NEW ENG. L. REV. 145, 149-50 (1992). See also Cour de cassation, Jan. 10, 1826, D.P. I, 1826, 255, and CA Paris, 1re ch., June 18, 1840, D.P. II, 1840, 254, for examples of nineteenth-century cases that stood for the proposition that the 1793 Decree had as its exclusive goal to grant authors the right to sell, distribute, and convey all or part of their intellectual property.

39. See Hesse, *supra* note 19, at 115-30 (discussing Condorcet's role in the development of French copyright law).

40. See *id.* Denis Diderot was commissioned to write an argument favoring authors' claims to intellectual property on behalf of the Paris Publishers' and Printers' Guild whose chief, Le Breton, was responsible for Diderot's release after the latter was imprisoned because of his radical and unorthodox views. See THE AGE OF ENLIGHTENMENT 206-10 (Otis E. Fellows & Norman L. Torrey eds., 1942); Hesse, *supra* note 19, at 114.

Much like the English Stationers' Company had argued in the landmark English case of *Donaldson v. Becket*, 1 Eng. Rep. 837 (P.C. 1774). Diderot argued for greater authors' rights, believing it would serve the self interest of the publishers and enable them, as assignees, to argue for more rights. See Hesse, *supra* note 19, at 114. Just as the Stationers' Company lost its fight in *Donaldson*, Diderot's philosophies that ideas, coming directly from the individual mind, were inherently subjective and the most inviolable form of personal property did not seem to have influenced the 1793 Decree or its early interpretations. See *id.* at 114-15. See also Mark Rose, *The Author as Proprietor: Donaldson v. Becket and the*

governmental policy which provided an economic means to maximize the social utility of the creative process, thus, legislating the incentives for individual contributions to the general social welfare.⁴¹ A revolutionary French lawmaker and politician, de Condorcet, through his proposals, shaped the first French law emulating the prevailing political philosophies articulated by American lawmakers⁴² who also sought to strike a balance between private interests and the concern for the public good.⁴³ The philosophical and theoretical debates that can be observed in nineteenth century court decisions were a tension between these ideas and growing debates about authorship that preceded the passage of the 1793 Decree.⁴⁴ In 1799, the French Minister of Justice set the tone for the nineteenth century public debate when he addressed French magistrates regarding literary property and implored upon them to prosecute vigorously infringements upon the rights of authors.⁴⁵ He pleaded for judicial sensitivity toward authorship in the following address:

The government, responsible for executing the law, is informed that literary properties are openly violated, that there exist associations of men without prudence, who seize the best works and take from their owners the fruit of their eyes, of their travels, of the dangers they have braved, and the investments they spent on enterprises worthy of national recognition The Minister of Interior, who invites me to deal with this subject, assures me that several officers of their judicial police . . . be it by lack of care, be it by a false interpretation of the law, refused to lend their ministry to the claim of authors Literary property, should they be considered less sacred than other properties in the eyes of the republican magistrate? . . . It is to the intellectuals, to the dramatic authors, to all of the people of letters that we owe principally the uncontested superiority of the French language over all the languages of Europe. It is they

Genealogy of Modern Authorship, 23 REPRESENTATIONS 51 (1988) (providing a detailed analysis of *Donaldson v. Becket*).

41. See Hesse, *supra* note 19, at 115-30.

42. See generally FRANCK ALENGRY, CONDORCET: GUIDE DE LA REVOLUTION FRANÇAISE, THEORICIEN DU DROIT CONSTITUTIONNEL ET PRECURSEUR DE LA SCIENCE SOCIALE (1903).

43. See W.T. SHERWIN, MEMOIRS OF THE LIFE OF THOMAS PAINE 87 (1819). American Thomas Paine, himself, refused a copyright in his own work *The Common Sense* so that the book would belong immediately to the public or be in the public domain.

44. See generally Hesse, *supra* note 19 (discussing these philosophical and theoretical debates). See also Rose, *supra* note 40, at 52-53 (tracing cases prior to *Donaldson* that had addressed commercial and legal struggles between various booksellers).

45. See 2 REV. INT'L DE DROIT D'AUTEUR 98-99 (1954) (citing LAMBRECHTS, LE DROIT D'AUTEUR SOUS LA PREMIER REPUBLIQUE FRANÇAISE).

who render all nations tributaries of our art, of our tastes, of our genius, of our glory; it is by them that the principles and the rules of a wise and generous liberty penetrate beyond our borders and our sphere of activity. The government solemnly promises that it will grant the most constant protection to the properties of works of the mind⁴⁶

Moral rights did not seem to have been in the destiny of French intellectual property law, but instead the rights resulted from practical encounters in the courts. Although the development of the rights that came to be known as moral rights occurred without fanfare, their appearance in French law does seem to be related to important inquiries about the meaning of the law raised time and again in the French courts, and it seems no understatement that there was absolutely no consensus about the exact scope⁴⁷ and meaning of the legal concept of intellectual property in the nineteenth century.⁴⁸ With nothing to guide them except the text of the 1793 Decree itself, the courts heard many versions of the underlying policies regarding the meaning of intellectual property law. The diversity of opinions about the law informed their efforts to define the rights entailed therein. Consequently, the scope of the law was interpreted, defined, and even continuously refined because of the repeated debates about what intellectual property law was supposed to accomplish and for whom it was aimed. During its evolution, the law took on new meaning, including a protection for non-economic interests of authors and artists. As reflected in the debates, there was a philosophical tug between varying theories about intellectual property in general and, in particular, about what actual rights were to be construed from the 1793 statutory decree. The debate occurred concurrently with a growing recognition of the cultural role of authors.⁴⁹ This growing adoration of creative genius impelled the judiciary to fashion principles of moral justice as an important tenet of the law of authors' rights.⁵⁰ The proclivity toward protecting more than the economic interests of authors was not born out of rigid legal considerations but from social concerns about ethics and justice. As these concerns grew, the law expanded in favor of augmenting the rights and interests of authors. The debate about literary property profoundly influenced nineteenth century jurisprudence, not by producing definitive resolutions for the conflicting categories and

46. *Id.*

47. The courts recognized the need for judges to give meaning to the law with regard to scope (what types of works it covered) and coverage (to what extent the works were covered). See Cour de cassation, Cass. crim., May 16, 1862, S. Jur. I, 1862, 999.

48. See Cour de cassation, Cass. crim., Nov. 28, 1862, S. Jur. I, 1862, 41, 43.

49. See Sax, *supra* note 26, at 1152-54.

50. See Ciolino, *supra* note 4, at 939.

philosophical questions regarding intellectual property, but by facilitating an open discussion encompassing a very broad range of ideas and considerations about what the law should be.

III. NINETEENTH CENTURY JUDICIAL OPINIONS ON THE RIGHTS OF AUTHORS WERE EXPANDED BEYOND THE 1793 DECREE AND MORAL RIGHTS WERE INSINUATED

A. *The Method and Madness of French Case Reports*

Tracing French moral rights back to their judicial roots does present several noteworthy research and analytical challenges. First, French judicial decisions are difficult to trace and assess as they are not reported in the same detail, manner or custom as the common law system in the United States.⁵¹ Second, the same nineteenth century French courts to which the origin of the moral rights is attributed were not empowered, theoretically at least, to amend the existing law or create new law.⁵² Consequently, judicial opinions did not make explicit pronouncements in favor of changing the law, but only made interpretative analyses as the role of the French judge was expressly restricted to interpreting the Code and applying its rules,⁵³ which were themselves presumed to be endowed by universal principles constructed on universal values and believed to be applicable to private disputes.⁵⁴ However, there was often the need to amend the existing legislation to cover what had not been anticipated,⁵⁵ and it is arguable that in the interim French

51. See RENÉ DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY* 188 (Michael Kindred trans., Louisiana State Univ. Press 1972) (1960).

52. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 59 (1969). See also Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage Over the Civil Law*, 12 *TEMP. INT'L & COMP. L.J.* 87, 94-95 (1998). "[T]he legislator is considered the exclusive law-giver in the civil law tradition." *Id.* at 97.

53. "The French civil law system is premised on a supposedly all-encompassing and all-generating legal code. French judicial opinions merely apply the Code" Lasser, *supra* note 18, at 1327.

54. See Cappalli, *supra* note 52, at 95. There were many different issues regarding intellectual property that were in dispute in nineteenth century French courts, but the existing legislation and Civil Code were too broad to provide specific rules to resolve some of them. "Codes . . . are based upon general and incomplete constructs of reality and must necessarily be comprised of high level abstractions [L]arge spaces exist in the civil law system between relevant statements of law and the specific facts of actual human encounters." *Id.* at 102. See also Mitchell de S.-O.-I'E. Lasser's discussion, which notes that "[i]mplicit in this official portrait is a definition of the role of the civil judge: He mechanically (and unproblematically) fits fact situations into the matrix of the Code. Thus, 'the Code is supposed to have *already* judged'" Lasser, *supra* note 18, at 1327 (emphasis added).

55. There were several legislative amendments during the nineteenth century although none of them included the moral rights. See generally BERTRAND, *supra* note 13.

judges simply created normative rules when the facts of a case fell within a legislative gap.⁵⁶ Therefore, it also seems important to examine some of the social norms of the period by looking at cases that expressed a strong policy toward authorship and protecting authors in ways that were not addressed by existing laws. It is also instructive to examine the prevailing philosophies regarding authorship during the nineteenth century to understand the significance of the socio-political influences on the judiciary⁵⁷ and to explore the beliefs about authorship that occurred in France as a result of the dynamic ideological revolution in the latter part of the eighteenth century and how the intellectuals of the period reacted to the limitations of the existing law. No American academic studies concerning the French doctrine of moral rights examine the origins of moral rights by analyzing actual French cases⁵⁸ or by way of looking at some of the nineteenth century cultural context that may have given rise to it as a major feature of French intellectual property law today.

The first judicial ruling espousing a moral right policy occurred in 1828 when a Paris court announced the *droit de divulgation*.⁵⁹ However, the underlying philosophy of moral rights to protect the personality and reputation of the author and artist is said to occur most noticeably in French judicial opinions in the latter part of the nineteenth century.⁶⁰ These individual rights took well over a century before they were officially incorporated into French law,⁶¹ and today in France they are inalienable, unassignable, and perpetual, lasting even after the death of the author or artist.⁶² The particular cases and events that mark their beginning remain a somewhat illusive part of nineteenth century French judicial history, and surprisingly from a U.S. perspective, they were not ushered into French law by any landmark judicial decisions. In fact, no nineteenth century legislative

56. See Lasser, *supra* note 18, at 1354.

57. See *id.* at 1327.

58. The one possible exception is the 1998 article by Cheryl Swack. See Swack, *supra* note 9, at 374-79. Unlike Ms. Swack, this author has found cases that occurred earlier than those cited by Ms. Swack and therefore disagrees with assertions in that article about exactly when the rights of disclosure, attribution, and integrity occurred in French judicial history. This Article traces the actual earliest cases standing for the policy of those rights. See also BERTRAND, *supra* note 13, at 219 (indicating that the right of disclosure appears from 1828, and not as late as 1895, and that the right of integrity can be traced to an 1845 decision in contrast to the assertion that it occurred first in the twentieth century).

59. See BERTRAND, *supra* note 13, at 219 (indicating that a 1828 Cour de Paris case announced the *droit de divulgation*. Unlike Bertrand, this article cites an earlier case from 1826, which this author argues as the announcement of *droit de divulgation*).

60. See *id.*

61. See *id.* at 218-19.

62. See DaSilva, *supra* note 17, at 3-5.

declarations or decrees introduced moral rights into law either.⁶³ It is even surprising that moral rights insinuated themselves into French law at all because they simply were not a logical extension of the existing French law which had no underlying policies or principles advancing them.⁶⁴ France's legislation on intellectual property seemed antithetical to what had become the moral rights, as the legislation was designed to protect economic interests, promote the public good, and at the same time made neither absolute nor automatic, the basic legal rights of authorship that it announced.⁶⁵

Some French court reports memorialized the ideological tensions about intellectual property as they were debated during the nineteenth century and thereby gave some indication and insight as to how the various private conflicts over intellectual property were litigated and resolved. The courts took great liberty in their philosophical application of the law to these conflicts, and they appeared to have been responsive to authors' and artists' rights, mirroring the same concerns reflected in nineteenth century French society.⁶⁶ The texts that record the judicial decisions are useful in order to extrapolate some of the reasons for how and why the French judiciary resolved intellectual property disputes, sometimes seeming to expand the scope of the law. Many of the issues at the center of the nineteenth century philosophical debate about authorship were argued by the litigants, scholars, and artists themselves or their heirs.⁶⁷ The particular facts of the cases do not always seem relevant to the policies that developed toward the moral rights, but the allegations supporting the complaints, the defenses, and the rationale for the courts' rulings all provide valuable information about the legal transformation.

In the text of the court decisions, the arguments of both parties were repeated, preserving the essence of the ideological debate espoused by the

63. Although the legislature had the exclusive role to make law in the French civil system, none of the several nineteenth century legislative amendments to France's original intellectual property law addressed any of the moral rights. See BERTRAND, *supra* note 13, at 21.

64. See generally Hesse, *supra* note 19 (discussing the French law from which moral rights developed).

65. See generally *id.*

66. The French judiciary allows the introduction of socio-political theories, which in turn guide French judges in exercising their role of interpreting the law. See Lasser, *supra* note 18, at 1354.

67. "The teacher-scholar is the real protagonist of the civil law tradition. The civil law is a law of professors." MERRYMAN, *supra* note 52, at 59-60. Legal scholars are consistently cited in nineteenth century French judicial texts. Although they are often quoted in the body of the decision, they generally are cited in the footnotes of opinions as either proponents or opponents of a particular policy or view about the issue before the court. The judicial text then cites the scholar's treatise for further reference. Some of the most often cited nineteenth century scholars were Misters Merlin, Gastambide, and Renouard.

scholars.⁶⁸ French case reports did not typically report the salient facts of the cases, and they generally did not contain a complete factual record as is practiced in the common law system.⁶⁹ Retracing the judicial origins of the moral rights in the French civil system is therefore a difficult task because the judges re-characterized the specific case facts into general principles to make the decisions fit into the broader principles found in the Code.⁷⁰ The requirement that judges write their decisions was a product of the French Revolution,⁷¹ but judicial decisions were written anonymously and resulted from secret deliberations.⁷² Although nineteenth century judicial opinions were likely concise, they were also part of a tradition of writing opinions in a highly technical manner.⁷³ They typically contained only part of the actual decision, often making them difficult to read.⁷⁴

It is noteworthy that a vastly different policy about the law could even develop in the courts. It does not appear that there was a conscious effort to change the original policies. On the contrary, the courts were neither policymakers nor entrusted with the power to make law.⁷⁵ However, while they attempted to convey (sometimes very rigidly and narrowly while at other times responding to the romantic philosophy of creative genius) the meaning of the 1793 Decree, the law on intellectual property became what it was not originally intended to be, that is, a vehicle to sanction the relationship between the artist and his creation.⁷⁶ Consequently, the courts, apparently vulnerable to the persuasive forces of contemporary intellectuals,

68. From a review of numerous nineteenth century French judicial decisions in both the Supreme Court of Cassation and by appellate and trial courts, Professors Jane Ginsburg and Pierre Sirinelli accurately describe how the Supreme Court makes its decisions in general:

Cour de cassation decisions, including the most important, rarely exceed one or two pages in length. A decision of reversal will cite the legal texts that the lower court will be held either to have misapplied or to have violated. Next, it will state the principle for which these texts stand or the rules that the texts enunciate. It will then — usually in a single paragraph — set forth the facts and the lower court's reasoning in a manner demonstrating the error of the decision below. The key to understanding the decision is generally the Court's statement of the meaning of the cited texts. The Court is not quoting the rule verbatim but is paraphrasing it, often in a way that tends to reshape it.

Jane C. Ginsburg & Pierre Sirinelli, *Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Film Colorization Controversy*, 15 COLUM.-VLA J.L. & ARTS 135, 142 (1991).

69. See Cappalli, *supra* note 52, at 103.

70. See *id.* at 104.

71. See DAVID, *supra* note 51, at 45.

72. See *id.* at 55.

73. See *id.* at 45.

74. See *id.* at 45-46.

75. See MERRYMAN, *supra* note 52, at 59.

76. See Hesse, *supra* note 19, at 125-31.

established new policies for the direction of the law.

B. Nineteenth Century French Cases Regarding Intellectual Property

1. Property or Privilege Before 1793?

On August 4, 1789, just short of one month after the fall of the Bastille, the same revolutionary legislature that later passed the 1793 Decree enacted a resolution to abolish all of the privileges of the Old Regime.⁷⁷ The legislature apparently did not consider the implications to the property interests of authors because it made no comment about whether the “literary privileges” previously established by the king were also abrogated,⁷⁸ and it enacted no new statutory provisions to supplant the grant of literary privileges. The absence of a statutory provision governing intellectual property between 1789 and 1793 raised the question of the origins of the rights to intellectual property.⁷⁹ In Year Two of the French Revolution,⁸⁰ the Supreme Court of France⁸¹ reviewed this very issue in *Veuve Buffon C. Behmer*,⁸² in which one of the first post-Revolution judiciary tasks was to address the ideological question about the underlying nature of literary

77. See Cour de cassation, Therm. 29, an 11, S. Jur. I, an 11, 851. See also BERTRAND, *supra* note 13, at 26.

78. In the decision of Cour de cassation, Therm. 29, an 11, S. Jur. I, an 11, 851, the plaintiff argued that the legislators only intended to abolish feudal privileges and not rights to literary property and that the two had nothing in common. There was no explicit indication about what the 1789 legislature had in mind regarding literary privileges except that the deputies of the Third Estate responsible for passing this anti-privilege were rejecting the former powers of the king. However, it is also noted that the reformers rigorously defended private property rights. See PIERRE MIQUEL, *HISTOIRE DE LA FRANCE* 265 (1976).

79. See Cour de cassation, Therm. 29, an 11, S. Jur. I, an 11, 851.

80. The French Revolution that began in 1789 and lasted a whole decade resulted not only in a change in the form of government, but it also had as its goal the alteration of French society by destroying and erasing all the influences of and symbols related to the old traditions. See Sax, *supra* note 26, at 1152-54. See also generally ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE REVOLUTION* (John Bonner trans., Harper & Brothers 1856) (describing the French Revolution). Another way the revolutionary French government sought to distance itself from its past was to establish a new calendar erasing from society all references to and celebrations of the Catholic Church. Until the practice ceased under Napoleon Bonaparte, the French began to renumber each year beginning with Year One in 1793.

81. The French Cour de cassation was originally a nonjudicial body created to assist lower courts in their interpretations of statutes. Instituted in Paris, it became the highest court of the “ordinary” court system to assist the lower courts with the interpretation and application of the Napoleonic Code, but it did not have the power to make law. See MERRYMAN, *supra* note 52, at 93 (discussing the division of jurisdiction in the civil law system). As a result of the Code, French law was codified for the first time. Before the Revolution, there were many independent jurisdictions throughout France, each of which applied customary law.

82. Cour de cassation, Therm. 29, an 11, S. Jur. I, an 11, 851.

property and the law that attended to it. The factual conflicts raising the issue were immediate because the 1789 legislature, as part of its revolutionary rupture with the ancien regime, abolished all royal privileges.⁸³

In *Veuve Buffon*, the heir to a literary work sued a bookseller who had sold counterfeited copies of her husband's work.⁸⁴ The latter died prior to 1793, and so the question was whether or not his widow was intended to be covered by the 1793 Decree.⁸⁵ The importance of the notion of "property" in the concept of intellectual property was debated and contrasted to traditional notions of property.⁸⁶ Analogizing the rights contained in the 1793 Decree to the royal privileges that were part of the rejected institutions of favoritism of the pre-Revolutionary regime of royal privileges, the court found that because literary property was merely a privilege before 1793, it was still by definition nothing more, except now was granted by the 1793 Decree.⁸⁷ This question of whether literary property was another form of the traditional notions of property or a privilege of a different legal nature, was often at issue.⁸⁸ As late in the century as 1876, a debate in the Cour de Paris attempted to qualify the property rights of authors by stating that they differ from common property in principle and character. Common property was immediate, perfect, complete, absolute, and derived from natural law, whereas intellectual property was born out of "civilized" society's need for and interest in encouraging, honoring, and compensating the works of intelligence and art.⁸⁹ Literary property, it was stated, was a creation of the positive law and was solely a function of legislative enactment.⁹⁰

The *Veuve Buffon* decision illustrates that common property rights were considered to be greater rights than intellectual property rights; and by the court's decision, the traditional right of property ownership triumphed over

83. *See id.* at 852.

84. *See id.*

85. *See id.*

86. *See id.*

87. The *Veuve Buffon* case also states:

Or, un droit circonscrit pour le temps et les lieux, ne saurait être un droit de propriété, car la propriété est un droit absolu; le titre en est perpétuel: l'exercice en est partout respecté Ce qu'on appelle propriété littéraire, n'est donc qu'une faveur particulière, une exception au droit commun, une limitation apposée, au profit d'un auteur, sur les facultés industrielles des imprimeurs et des libraires.

Id.

88. *See* CA Paris, 1re ch., May 19, 1876, D.P. III, 1876, 230. In this case, the issue was whether legislative amendments in 1854 and 1866, which prolonged the duration of intellectual property rights extended to assignees, applied to people who inherited literary property before these amendments were enacted. As late in the century as 1876, courts still entertained various debates about the question of what constituted intellectual property.

89. *See id.*

90. *See id.*

literary property rights as the lower court actually ruled in favor of the defendant bookseller who admittedly sold pirated copies of the work in question.⁹¹ The favorable ruling was based on the defendant's ownership of the copies as he obtained them legally outside the jurisdiction of the French law, and, as the court recognized, through his own labor and ingenuity.⁹² The defendant bookseller acquired the pirated copies prior to the annexation of his country to France. He was arrested and jailed, and all his property, including the pirated copies, was confiscated but returned to him in France where he resumed his business. The lower court opined that because he obtained and sold the copies when he lived in a foreign country, he was not bound by the laws of France. Consequently, these pirated copies constituted his property which the courts refused to deny him. Presumably, any time a work by a French author crossed the national borders, it automatically fell into this domain of free access with impunity.⁹³

The lower court opinions supported the notion that literary property was a privilege, or minimally, a right of lesser importance than common property rights. On reversal, the Supreme Court of France articulated a policy very close to a theory of natural rights.⁹⁴ It held that the decree of August 1789 had nothing to do with the property right that authors acquired over their works, for it was the legitimate indemnity for their labor and naturally owed to them.⁹⁵ In Year Fourteen,⁹⁶ the Supreme Court seemed to affirm the decision in *Veuve Buffon*, but backed away from the natural rights argument it had enunciated earlier, finding instead another theory through which to achieve the result it desired. This time the Court established that the old individual privileges granted by the king were not abrogated in 1789, and it simply avoided the philosophical debate.⁹⁷ By its decision, the Court revived the old royal privileges as the legal source for those authors whose works pre-dated the 1793 Decree by limiting the scope of coverage of the 1793 Decree to those authors in possession of their works at the time of its passage.

91. See *Jugement du Tribunal du Departement de la Moselle*, Fruct. 7, an 7; *Appel 14 An 8, Jugement Confirmatif du Tribunal d'Appel at Metz*, Fruct. 14, an 8, cited in *Cour de cassation*, Therm. 29, an 11, S. Jur. I, an 11, 851.

92. See *Cour de cassation*, Therm. 29, an 11, S. Jur. I, an 11, at 852.

93. See *id.* This issue came before the courts again in Year 14, when the Supreme Court ruled that the law was applicable to those residents of newly acquired French territory who had previously legally acquired and sold pirated copies outside the jurisdiction of France. See *Cour de cassation*, Frim. 29, an 14, S. Jur. I, an 14, 197.

94. See *Cour de cassation*, Therm. 29, an 11, S. Jur. I, an 11, 851, 852.

95. See *id.* at 853.

96. See *Cour de cassation*, Cass. crim., Brum. 16, an 14, S. Jur. I, an 14, 177.

97. See *id.*

2. *Property vs. Privilege for Works Published After 1793*

In 1826, the Supreme Court of France continued to seek a way to articulate a policy regarding authors' rights when it decided *Muller C. Guibal*.⁹⁸ The Supreme Court compared intellectual property to traditional property rights, but unlike in the earlier court decision, this time the analogy was used to validate the concept of property.⁹⁹ The Court found literary property to be just as important as traditional notions of property. Specifically, the Court stated that "the rights that the law grants to authors over their works were neither less sacred nor less inviolable than the rights of ordinary property."¹⁰⁰ The Court had begun its efforts to balance the continuing conflict between private rights of authors and a pervasive policy of public access to literary property, as it opined that the private rights of authors did, in fact, supersede public access in some situations. The case was one in which the king himself¹⁰¹ had authorized the reprint of a book in the name of the state and for public purposes. However, the Court ruled that there was no legal authority, even for the state under orders from the king, to expropriate an author's rights without his consent.¹⁰² By 1843, the Supreme Court took the position that the goal of the 1793 Decree was to confer authors' rights analogous to real property rights and to recognize authors for the fruit of their thoughts and the products of their intelligence, thereby promoting an important social policy.¹⁰³

In 1875, an appellate court examined whether the State itself could claim a legal right to intellectual property.¹⁰⁴ This was an issue because the 1793 Decree set forth provisions that courts had previously interpreted by applying such provisions to authors.¹⁰⁵ The debate would again focus on the interpretation of the nature of intellectual property.¹⁰⁶ This case raised a question long debated in France — whether literary property was a real right of property (although limited for public purposes) or whether it was a privilege created by the legislature, without whose enactment it could not exist. The State's claim to literary property, according to the debate in this

98. Cour de cassation, Cass. crim., Mar. 4, 1826, S. Jur. I, 1826, 290.

99. *See id.* at 291.

100. *Id.* at 291 (translation by author). The original text of this case reads: "Que les droits que la loi accorde aux auteurs sur leurs ouvrages ne sont ni moins sacres ni moins inviolables que les droits de propriete." *Id.*

101. By April 1814, after Napoleon Bonaparte's fall, Louis XVIII was proclaimed king of France, and the French monarchy was restored. *See* MIQUEL, *supra* note 78, at 314.

102. *See* Cour de cassation, Cass. crim., Mar. 3, 1826, S. Jur. I, 1826, 291.

103. *See* Cour de cassation, Cass. crim., Dec. 12, 1843, S. Jur. I, 1843, 814.

104. *See* CA Seine, Feb. 3, 1875, D. P. II, 1875, 148, 148 nn.2-3.

105. *See id.*

106. *See id.*

case, depended entirely upon how the court concluded this issue.¹⁰⁷ The argument was that if literary property was a natural right, then the State would naturally have the right to claim literary property for itself.¹⁰⁸ However, if literary property was not the function of a natural pre-existing right, then logically, the courts would refuse to recognize that right in the State because it could not be regulated with regard to one of the important conditions that had been fixed by the law, namely, duration.¹⁰⁹ In the absence of any special provision regarding state ownership, the Court held that the State had a right to claim ownership of intellectual property and resolved the question about duration by declaring the State's rights as perpetual.¹¹⁰

3. *The Meaning of the Registration Formalities*

The Supreme Court of France was not immune to the pendulum swing regarding the ideas about authorship and the rights of authors that mostly divided the lower courts. It sometimes failed to guide the lower courts persuasively or even remain consistent about which policies were to prevail in literary property law. One of the most poignant examples of the vacillating Supreme Court in the nineteenth century was how it responded to the debate surrounding article 6 of the 1793 Decree.¹¹¹ Article 6 stated that all citizens who published a work of literature, regardless of genre, would be obliged to deposit two copies of that work at the *Bibliothèque Nationale*, at which time the citizen would receive a receipt signed by the librarian.¹¹² The question then became whether the failure to deposit those copies would preclude standing to prosecute infringers.¹¹³ Based on the number of

107. *See id.*

108. *See id.*

109. *See id.*

110. *See* Cour de cassation, Cass. crim., June 30, 1832, D.P. I, 1832, 634.

111. *See id.*

112. *See id.*

113. Article 6 stated:

Tout citoyen qui mettra au jour un ouvrage, soit de littérature ou de gravure, dans quelque genre que ce soit, sera obligé d'en déposer deux exemplaires à la Bibliothèque nationale ou au cabinet des estampes de la république, dont il recevra un reçu signé par le bibliothécaire; faute de quoi il ne pourra être admis en justice pour la poursuite des contrefacteurs.

1793 Decree, art. 6, *quoted in* Cour de cassation, Cass. crim., June 30, 1832, D.P. I, 1832, 634. Article 6 was argued to have as its goal to assure the conservation of the creative work as well as to legally determine who was its author. *Compare* GOLDSTEIN, *supra* note 7, at 544, 550 (discussing the rationale for making deposits and applying for federal copyright registration in U.S. copyright law). Although it is not a condition to copyright protection in the United States, failure to deposit copies upon demand might result in fines and extra

reported appellate and Supreme Court decisions addressing the implications of article 6, it was perhaps one of the most controversial issues in cases in the nineteenth century. Contained within the numerous discussions about this relatively simple and straightforward requirement were very important arguments about authorship. The issue was one in which the courts leaned toward fairness and justice for the author when the strict application of the law rendered results that seemed too harsh. Deciding cases on questions of moral justice, as opposed to the strict application of the established law, was a significant departure from what the courts set out to do. Although article 6 itself seems unimportant to the history of the development of moral rights, the cases that discussed the controversy surrounding it provide some of the best examples of how the social forces raised concerns that demanded more justice than was provided by the black letter law.

The courts viewed the requirements under article 6 as an affirmative obligation imposed on the author who wished to exercise for himself the rights granted in article 1.¹¹⁴ That the 1793 legislature mandated the deposit requirement as a prerequisite to acquire the rights was interpreted to mean that it did not consider them either automatic or natural.¹¹⁵ In 1828, an appellate court, referring to the literary rights as "privileges," enunciated the rule that if the author did not comply with the conditions set forth in article 6, he automatically surrendered his literary privilege to the benefit of the public domain.¹¹⁶

In 1832, the Supreme Court strictly applied article 6 in *Chapsal et Noel C. Simon*,¹¹⁷ ruling that it required, without exception, that all authors deposit two copies of their works with the *Bibliothèque Nationale*¹¹⁸ or be precluded from litigating infringement claims. The trial and appellate courts had barred the plaintiffs, Noel and Chapsal, from pursuing an action for infringement against Simon, who allegedly reprinted their work without their permission.¹¹⁹ Neither Chapsal nor Noel had ever taken two copies to the *Bibliothèque Nationale*, and consequently, the success of the defense resided

charges. *See id.* at 550. One of the policy reasons for the deposit requirement was simply to supply the Library of Congress with copies for its collection. *See id.*

114. Article 1 states that "[t]he authors of writings of all kinds, the composers of music, painters and drawers shall enjoy during their entire life, the exclusive right to sell, to have sold, to distribute their works in the territory of the Republic and to assign the property in whole or in part." *See* BERTRAND, *supra* note 13, at 27 (translation by author).

115. Cour royal et Conseil d'Etat, Nov. 26, 1828, D.P. III, 1828, 197.

116. *See id.*

117. Cour de cassation, Cass. crim., June 30, 1832, D.P. I, 1832, 633. Several of the lower courts, including d'Aix, de Riom et de Paris, had ruled against an earlier opinion of the Supreme Court creating uncertainty about this issue. *See* Cour de cassation, Cass. crim., Mar. 1, 1834, 66, 66 n.2; Gaz. Trib. Mar. 2, 1834, at 401.

118. *Bibliothèque Nationale* is the equivalent of the Library of Congress.

119. *See* Cour de cassation, June 30, 1832, D.P. I, 1832, 633-34.

in the gratuitous public domain. The appellate court first sought to determine whether any law, focusing on a subsequent law enacted in 1810 and its 1814 revision, explicitly abrogated the deposit requirement set forth in 1793.¹²⁰ The court determined that the laws of 1810 and 1814 did not abrogate the formality requirement of the 1793 Decree.¹²¹ At least two factors were important to the court. First, it looked at the language of each law to see at whom it had specifically targeted compliance. The 1793 Decree was distinguished from the laws of 1810 and 1814 because the former was addressed to authors, whereas the latter were specifically addressed to printers and publishers.¹²² The language in the text of article 6 did not, however, specify that the *author* had to make the deposits.¹²³ The court also examined the title of the two laws to ascertain whether or not either title was relevant to the meaning or purpose of the laws. The most interesting point to note in this discussion was that the court found that the Law of 1814 had as a subtitle the phrase “of the police of the press,” indicating a stronger connection with policies of governmental censorship than a relationship to the protection of intellectual property.¹²⁴ The Supreme

120. *See id.* at 634. *See also* BERTRAND, *supra* note 13, at 28. The legislature had enacted yet another statute in 1810 that mandated new registration rules. The later rule was more burdensome and came as part of a very complex and confusing amendment to intellectual property rights and the law governing the liberty of the press. In addition to the deposit requirement of article 6 of the 1793 Decree, article 48 of the law of 1810 required that each publisher deposit five copies of each work published at various government offices, including one for the *Bibliothèque Impériale*. An ordinance of 1814 was a revision of this latter decree, and it had stronger language requiring that no publisher shall print a writing before declaring his intentions to do so, or to sell or publish a writing in any way before having deposited the prescribed number of copies, which was five until an ordinance of 1828 reduced the number from five to two. *See generally* BERTRAND, *supra* note 13.

121. *See* Cour de cassation, Cass. crim., June 30, 1832, D.P. I, 1832, 634.

122. *See id.*

123. *See* Cour de cassation, Cass. crim., Mar. 1, 1834, at 66-67; Gaz. Trib. Mar. 2, 1834, at 401-02. The plaintiff argued that the language of the 1793 Decree was ambiguous. *See id.* The Law required a deposit of two copies from all *citizens* who wished to *mettre au jour* (publish) a work. *See id.* The French phrase *mettre au jour* was the point of contention in that it arguably means “to publish” or more literally “to put to the day,” as in to make public or available to the public. *See id.* Therefore, as the argument went, the 1793 Decree could have been addressed to printers and publishers, who, of course, actually published most works, and if so, it would be logical that if the decrees of 1793 and 1810 both applied to printers, the deposit requirement of 1810 abrogated the deposit requirement of 1793. *See id.* *See also* Cour de cassation, Cass. crim., June 30, 1832, D.P. I, 1832, 634.

124. Censorship was far from gone in nineteenth century France. In fact, during Napoleon’s Empire in 1806, a decree was passed on June 8 which gave the government the right to prohibit or use the police to suspend theatrical representations. Victor Hugo’s plays *Le Roi s’Amuse* and *Hernani* were both censored. *See generally* ODILE KRAKOVITCH, HUGO CENSURÉ: LA LIBERTÉ AU THÉÂTRE AU XIX SIÈCLE (1985).

In the August 7, 1814, issue of *Journal de Paris, Politique, Commercial et Littéraire*, an article appeared, memorializing an argument made by Mr. Fleury before the

Court concluded that the two laws were different enough in intent and purpose so that the latter did not abrogate the former.¹²⁵ Therefore, the consequences of non-compliance were explicit in the text of article 6, making its repercussions clear. Concurring with the court of appeals, the Supreme Court went on to say that the deposit requirement served a public purpose — that it served as notice to the public of the author's intention to safeguard his property interest in his literary work.¹²⁶ Of course, the corollary was that in the absence of the deposit, there was a presumption that the author wished for his work to be in the public domain. It was, therefore, incumbent upon any author, not the publisher or printer, to take the affirmative step to safeguard the author's property interest and to give notice to the public of that intention. Neither level of court discussed any social interest or notion of fairness. Courts simply favored a strict application of the law — a result that enriched the public domain over the individual rights of authors.¹²⁷

Not long after the decision in *Chapsal*, the Supreme Court was in the midst of a judiciary controversy.¹²⁸ Lower courts were still split on the issue, and several courts disagreed with and refused to follow the ruling in *Chapsal*,¹²⁹ prompting an article in a prominent legal periodical on

Chambre des Deputes, in which he spoke out against the presence of censorship. Mr. Fleury argued that there was one universal principle in all organized societies: the liberty of individuals must sometimes be subordinated to the general interests of society. Censorship was one method that the police could employ to prevent written threats to the security of the state and the individual. He also added that censorship was not incompatible with the constitutional charter and that there was no legislation that abolished it. However, in spite of the fact that it was legally permissive, and in theory served a role, he spoke out against the fears of its abuse, adding that men of letters should claim a "right" to express themselves and no longer allow that right to be confused with the word privilege. The liberty to express an opinion was not a privilege, but a right guaranteed by the constitution. It may be relevant that the 1810 Ordinance and the 1814 Decree were targeted specifically for the publishers and printers. After all, they are the source of broad dissemination of the printed word, and historically they were the group through which the monarchy had been able to control what information reached the public. See J. DE PARIS, POLITIQUE, COMMERCIAL ET LITTERAIRE, Aug. 7, 1814.

125. See Cour de cassation, Cass. crim., June 30, 1832, D.P. I, 1832, 634.

126. See *id.*

127. Later in 1853, in *Thoisnier-Desplaces et Michaud C. Didot*, the issue of fairness was discussed with regard to outcomes in literary property cases. See Cour de cassation, Cass. crim., July, 16, 1853, S. Jur. I, 1853, 545. What was important to the society was not that another work fell within the cultural heritage, but rather that authors be assured of legitimate compensation for their work. See *id.* Most important to society was the protection of the rights of the individual and his personality. See *id.*

128. See Cour de cassation, Cass. crim., Mar. 1, 1834, D.P. I, 1834, 66; Gaz. Trib. Mar. 2, 1834, 401.

129. In fact, *Terry C. Marchant* was an appeal from a protesting appellate court opinion rendered in 1833. The Appellate Court of Paris was just one of several that refused to follow the *Chapsal* ruling. See *id.* (acknowledging a departure from *Chapsal* and suggesting that the issue remained controversial in spite of the Supreme Court's decision in *Chapsal*).

jurisprudence and judicial debates on March 2, 1834, in which the arguments of *Terry C. Marchant* were reprinted.¹³⁰ In the two years it took the Court to reconsider the issue, it had become obvious that there were tremendous stakes riding on the decision. The Supreme Court tried to construe the language and statutory history to find a more practical approach, presumably an approach that reached a more equitable outcome.¹³¹ First, the Court looked at the deposit requirements of the 1810 Law, which mandated that five copies be deposited at various locations.¹³² One of the five copies required was destined for the *Bibliothèque Royale*, which for all practical purposes was the same destination of the two copies required in the 1793 Decree.¹³³ Consequently, the Court determined that compliance with the latter law accomplished the goal of the former.¹³⁴ Second, and most importantly, was the Court's concern with the practical implications of *Chapsal*.¹³⁵ It had been documented that since the 1810 Law, no authors had executed any other deposit requirement except the one prescribed by the 1810 Law.¹³⁶ It was argued that if it was imperative that the deposit be made pursuant to the 1793 Decree, there would be an interval of more than 20 years during which literary property would not be preserved.¹³⁷ Therefore, this twenty-year delay would be unjust because all authors who published works between 1810 and 1834 would be barred from seeking legal redress against any infringers and pirates of their works,¹³⁸ and only the public domain would benefit from such a major disallowance of individual ownership rights while depriving authors of legal protection for their most sacred property.¹³⁹

The attorney for the plaintiff argued that moral considerations influenced the revolutionary legislature to enact the first law protecting literary property.¹⁴⁰ Appealing to concerns about how the court should recognize and value authorship, he argued there was nothing in the world

130. See *Gaz. Trib. Mar. 2, 1834*, at 401. The *Gazette des Tribunaux* was printed in Paris from 1825 to 1955.

131. See *Cour de cassation, Cass. crim., Mar. 1, 1834, D.P. I, 66; Gaz. Trib. Mar. 2, 1834, 401*. The actual requirements for official registration remained rather unclear until May 29, 1925, when the legislature abrogated the disposition of article 6 as a preliminary condition to an infringement action. See BERTRAND, *supra* note 13, at 29, 102.

132. See *Cour de cassation, Cass. crim., Mar. 1, 1834, D.P. I, 66; Gaz. Trib. Mar. 2, 1834, 401*.

133. See *id.*

134. See *id.*

135. See *id.*

136. See *id.*

137. See *id.*

138. See *id.*

139. See *id.*

140. See *id.*

more noble, liberal, and unselfish as talent and genius.¹⁴¹ In addition, he argued that although it was pleasant to deliver these qualities to the public without any other compensation, except glory and a name to enrich the country, it was the responsibility of the courts to ensure the author's will regarding his property because any infringement of his right to his property was vile and despicable.¹⁴² The plaintiff's attorney then argued that the plaintiff had expressed his will, not by complying with article 6 himself, but through his publisher's compliance with the requirements of the decree of 1810.¹⁴³ The defendant argued that society should presume that the benefit derived by an individual from his work was the pleasure of contributing to a greater social good. Therefore, the author presumptively had no interest in exercising a property interest in his creations unless he exhibited an intention to reserve his rights by complying with article 6.¹⁴⁴

Ultimately, the Supreme Court reversed its decision in *Chapsal* by ruling in *Terry* that the Decree of 1810 and its revision in 1814 incorporated the deposit requirement of the 1793 Decree.¹⁴⁵ Therefore, the Court stopped numerous potential challenges to works published during the twenty-year period in question. The issue presented itself again before the Supreme Court in several different forms in the following years.¹⁴⁶ In 1839, the Cour Royale de Rouen opined that the deposit requirement was only a prerequisite to the right to sue and did not negate an author's inherent rights in his work because literary property was a pre-existing and natural right of the author.¹⁴⁷

141. *See id.*

142. *See id.*

143. *See id.*

144. In 1839, the Cour royale de Rouen gave a different perspective to this argument when it said the offense was not that someone reproduced the work of someone else which could be a useful and moral thing to do; instead, the offense was that someone reproduced a work determined to be the "property of someone else." *See* CA Rouen, 1er ch., Dec. 10, 1839, D.P. II, 1839, 74-75.

145. *See* Cour de cassation, Cass. crim., Mar. 1, 1834, D.P. I, 1834, 66; Gaz. Trib. Mar. 2, 1834, 401.

146. In 1852, in *Bourret et Morel C. Escrache de Ortega* the court heard arguments but did not decide the issue of whether the omission of the author's name by the printer or publisher precluded the author's right to sue under the deposit requirements of 1810 and 1814. *See* Cour de cassation, Cass. crim., Aug. 20, 1852, S. Jur. I, 1852, 234-36. Although the court conceded that compliance with the formalities of 1814 was generally enough to safeguard the literary property rights of the author, the specific issue was what happens when there is some irregularity in the act of compliance by the printer. *See id.* In 1872, the court decided *Garnier C. Levy*, a case in which the plaintiff argued that he had complied with article 6, but he did not have the receipt from the *Bibliothèque Nationale* as proof. *See* Cour de cassation, Cass. req., Nov. 6, 1872, S. Jur. I, 1872, 362-63. The court decided that it would consider a number of factors and use its own judgment to determine if sufficient proof of the deposit existed absent the formal receipt. *See id.*

147. *See* CA Rouen, 1er ch., Dec. 10, 1839, D.P. II, 1839, 74-75.

4. *The Earliest Moral Right: Right of Divulcation and the Separation of Economic and Personal Interest*

In 1828, the highest court granted the individual author a right that was clearly not part of the 1793 Decree and was to become one of the moral rights.¹⁴⁸ In its decision, the Court declared the right of divulcation. The case was *Widow Vergne C. Creditors of Mr. Vergne*, in which, again, an heir sued an infringer.¹⁴⁹ The decedent author, a reputable composer and a member of the French Conservatory of Music, entered a national competition where he performed the compositions that became the subject of this lawsuit.¹⁵⁰ He died shortly after performing his work but before publishing it. Although he never published the works, a creditor, being informed of their potential value, sued the composer's widow to seize the compositions as partial payment of a prior debt.¹⁵¹ The Court ruled that an unpublished manuscript was not property that could be seized anterior to the publication of a creative product, even if the manuscript had obvious value; there were private interests and rights that belong exclusively to the author.¹⁵² Therefore, the decision to publish belonged either to the composer himself or to his heir. Another issue debated by the defendant in this case was whether or not Mr. Vergne's public performance of his unpublished composition thrust his work into the public domain.¹⁵³ The Court created an absolute property right anterior to publication in the individual author, establishing new law and the first moral right.¹⁵⁴ The Court implied that it may have decided the case differently and settled the decedent's debt if the disputed property had been in any other form.¹⁵⁵ A footnote to this case reports that English judge and scholar William Blackstone (who had supported the author's common law right to literary property in England) influenced the Court's decision.¹⁵⁶

In 1862, the Supreme Court decided *Betheder et Schwabe C. Mayer et Pierson*,¹⁵⁷ a case in which the trial court determined that the 1793 Decree had, in part, the goal of protecting not only the author, but also the work of

148. See CA Paris, 1re ch., Jan. 11, 1828, S. Jur. II, 1828, 5.

149. See *id.*

150. See *id.*

151. See *id.* at 5-6 n.4.

152. See *id.*

153. See *id.*

154. See *id.*

155. See *id.*

156. See *id.* See also BERTRAND, *supra* note 13, at 219-20.

157. Cour de cassation, Cass. crim., Nov. 28, 1862, D.P. I, 1862, 40. For a discussion of Judge Blackstone's role in the English debate between individual rights and societal rights in intellectual property, see Rose, *supra* note 40, at 63-65.

art itself.¹⁵⁸ Stating that productions of art are the fruits of the mind, imagination, and genius, serving as an ornament for the nation which they glorified, the arguments asserted that creative products were, in some way, part of the author because he was the person to whom they most immediately belonged.¹⁵⁹ The Court searched for legitimate reasons to distinguish between those creative products that belonged in the category of fine arts and those that were industrial art. Photography was the medium of artistic expression at issue in this case, and the Court was deciding whether photography fell within the meaning of those products protected by the 1793 Decree. However, although photography was decidedly a production of the mind, it was important that it be a qualified product of the mind because it involved the operation of a machine. One of the criteria for distinguishing between the fine arts and industrial arts was to examine the nexus between the art and the personality of its author.¹⁶⁰ This connection was not so obvious in industrial art. Theorizing over the question of what is art, the Court argued that art has two distinctive meanings — one aesthetic and one legal.¹⁶¹ Just as judges were said to have the authority to determine whether or not a particular kind of work fell within the definition of the 1793 Decree,¹⁶² courts were exploring Hegel's theory of the dualistic attributes of intellectual property,¹⁶³ even though it was still argued that the law only understood the moment when the artist became a seller.¹⁶⁴ However, the point when the artist became a seller was argued to be when art also lost its prestige as art and faded away.¹⁶⁵

5. *Early Rulings of The Rights of Integrity and Paternity*

In 1845, it was the Trial Court of Paris in *Marquam C. Lehuby*¹⁶⁶ that decided that an editor did not have the right to alter a work submitted for publication even when he had purchased all rights to the work.¹⁶⁷ Marquam was an English Protestant and the author of several children's booklets on history and geography. He sold all rights to his works to Lehuby, a bookseller who, in his efforts to obtain approval from the church to use the books in Catholic parochial schools, edited various parts of the book,

158. See Cour de cassation, Cass. crim., Nov. 28, 1862, D.P. I, 1862, 40.

159. See *id.* at 41.

160. See *id.*

161. See *id.* at 43.

162. See Cour de cassation, Cass. crim., May 16, 1862, S. Jur. I, 1862, 998, 999.

163. See Cour de cassation, Cass. crim., Nov. 28, 1862, S. Jur. I, 1862, 41, 43.

164. See Cour de cassation, Cass. ch. réuns., May 27, 1842, S. Jur. I, 1842, 385, 386.

165. See *id.* at 386.

166. Trib. de comm. de Paris, Aug. 22, 1845, S. Jur. II, 1845, 549.

167. See *id.* at 550.

deleting forty to fifty pages out of the approximately four hundred pages of text, in particular, sections pertaining to religious matters.¹⁶⁸ The publisher simply wanted to make the books more marketable to the targeted schools. Marquam sued to prevent the publisher from publishing the books claiming that this change offended his *reputation* as an author. He succeeded in convincing the court of the potential harm to his reputation. Thus, the decision created another moral right for authors due to the court protecting the right of the author to stop the publication of his work if, without his permission, it has been altered or mutilated.¹⁶⁹ On these grounds, the court ruled that the book had to be returned to its original form.¹⁷⁰ Similarly, the court in *Vergniaud C. Roret*, ruled that it was a legal principle that an author who sold his work, even if he sold all of his rights to it, reserved the right to demand that no modification be made without his permission.¹⁷¹

In *Masson de Puitneuf C. Musard*,¹⁷² the defendant had purchased the right to use the plaintiff composer's music in some concerts that he directed but failed to give the composer credit, listing instead a fictitious name on the billing. The court found that the composer had the legal right to require that his name be used because, otherwise, there might be damage to his reputation.¹⁷³ Similarly, the court in *Vergniaud*¹⁷⁴ also decided that the law required there be no name added to or substituted for that of the authors, protecting the right of paternity.¹⁷⁵

IV. NINETEENTH CENTURY SOCIO-POLITICAL TRANSITION

There were numerous changes in the form of government in France during the nineteenth century. The nineteenth century rulers found a different relationship with culture than their predecessors. The king, who had once been the representative of divine knowledge and who was empowered to dictate the path of all works of culture in both substance and form, became less omnipotent, thereby exercising less control over art. Consequently, a new alliance emerged between the state and the author. Although there continued to be various efforts to control culture, mostly through laws of censorship, no central governmental policy ever reclaimed the power of prescribing works of art as it had previously done under the ancien regime. The emergence of the notion of creative genius liberated

168. *See id.*

169. *See id.* at 549-550.

170. *See id.*

171. CA Paris, 3e ch., Jan. 12, 1848, D.P. II, 1848, 142, 142-43.

172. 1836 Recueil Dalloz-Sirey, 242-43 (Lois et decisions diverse).

173. *See id.*

174. *See* CA Paris, 3e ch., Jan. 12, 1848, D.P. II, 1848, at 142-43.

175. *See id.*

artists, and in the realm of culture, the artists crusaded for the power of the imagination as well as the merit of the individual over the necessities of the state.¹⁷⁶ This cultural transition provided the historical context for intellectual property law in nineteenth century France. The transition offers an important social background, wherein both significant substantive and policy changes evolved in intellectual property law, which contrasted the founding, French intellectual property law — the 1793 Decree.

The king and all of his trappings were barely gone when cultural domination returned in the nineteenth century: first with Napoleon, then with the restoration of the monarchy,¹⁷⁷ and lastly with Napoleon III.¹⁷⁸ Consequently, although the forces of tradition had begun to wane, they retired slowly, igniting and protracting, throughout much of the nineteenth century, the conflict that erupted between those who supported tradition and those in favor of artistic autonomy.

Important nineteenth century intellectuals and literary figures were actively engaged in the debate about literary property and its relation to the idea of a public good. Alphonse de Lamartine, Honore de Balzac, and Victor Hugo all made passionate appeals to the French legislature against this notion when arguing for the law to tip the scales in favor of greater legal protection for authors and their families.

On March 3, 1841, Honore de Balzac appeared before the Parliamentary Commission¹⁷⁹ which was reviewing what would become the 1844 Amendment to the existing copyright legislation.¹⁸⁰ A few days later on March 13, 1841, Lamartine, who was politically the most active writer of the romantic movement in France,¹⁸¹ made a presentation before the Chamber of Deputies.¹⁸² Dedicated to helping the poor, he became a member of the Chamber of Deputies where he warned the nation of an impending revolt by the working class. His predictions were realized when revolt broke out in the 1843 Revolution, and Lamartine later became the

176. See DAVID OWEN EVANS, *SOCIAL ROMANTICISM IN FRANCE, 1830-1848*, at 98-99 (Octagon Books 1969) (1951).

177. This period spanned from 1814 to 1848. See generally MIQUEL, *supra* note 78.

178. Napoleon III was a peaceful man who despised war. GUERARD, *supra* note 33, at 262. Unfortunately for Napoleon III and the Second Empire, the exiled Victor Hugo scoffed the emperor and "succeeded in ruining the artistic appeal of the régime." *Id.*

179. See *Le Droit d'Auteur Selon Balzac*, 5 REV. INT'L DU DROIT D'AUTEUR 124, 124-25 (1954).

180. See BERTRAND, *supra* note 13, at 28.

181. The term romantic and its interpretation had profound and significant differences in England, Germany, and France. In each country, the word was endowed with special meanings not readily comprehensible to the others. See LILIAN R. FURST, *ROMANTICISM IN PERSPECTIVE* 17-22 (1969).

182. See *Le Droit d'Auteur Selon Lamartine*, 7 REV. INT'L DU DROIT D'AUTEUR 132, 132-33 (1955).

head of the provisional government. In the Chamber of Deputies, Lamartine debated the issues raised about intellectual property law, seeking to extend the private rights of authors.¹⁸³ Balzac believed the concept of the public interest was a terrible one, arguing that those who advocated for the public interest were adversaries of intellectual property.¹⁸⁴ Prior to the passage of the 1844 amendment, a group of heirs to several authors appeared before the legislature mocking the notion of public domain as an opportunity for theater directors to continue profiting from the work of authors long after the law ceased to protect the author or his heirs.¹⁸⁵

In 1849 Victor Hugo, one of the few great French writers who was a popular icon during his own lifetime, became the first president of the International Literary and Artistic Association (ALAI). The ALAI organized the 1883 convention in Berne, Switzerland, of writers, artists and editors of various countries. This convention created the international treaty on intellectual property, currently referred to as the Berne Convention.¹⁸⁶ Hugo made a very forceful attack against the governmental policy regarding intellectual property. He alleged that the French government had not taken literature seriously and argued for more legislation that took into account the contributions of intelligence and creativity.¹⁸⁷ He expressed anger toward the fact that literary property was not given the same legal protection as other forms of property in spite of the fact that, as a creation, it was more sacred. Hugo implored the legislature to stop treating the writer as a social outcast and to reject the notion of a public domain. He considered the notion of public domain as one way the state legitimized withholding intellectual property from artists.¹⁸⁸ Hugo felt that the only way to reconcile the contribution of the artist with the interests of society was to ensure authors the legal protection of property interests in their creations.¹⁸⁹

Lamartine, Balzac and Hugo expressed concerns about how the law balanced the conflicts between private rights and the public interest. All three believed that society should have no superior interest in creative property over the private interests of the author. Condemning those who advocated the public interest, they argued that the public domain was not only in violation of the property rights naturally due to authors as a consequence of their labor, but was also inconsistent with principles of individual liberty.

Residing in French intellectual property law, like the U.S. law, was the

183. *See id.*

184. *See Le Droit d'Auteur Selon Balzac, supra* note 179, at 124-25.

185. *See* 6 REV. INT'L DU DROIT D'AUTEUR 144, 144-45 (1955).

186. Berne Convention for the Protection of Literary and Artistic Property, Sept., 9, 1886, 828 U.N.T.S. 221 (last revised July 24, 1971).

187. *See* 6 REV. INT'L DU DROIT D'AUTEUR 144, 144-45 (1955).

188. *See id.*

189. *See id.*

notion that all such property would at some point end up in the public domain — an important concept intrinsic to the founding policies underlying the laws of literary property in general. However, in France, unlike in the United States, this notion was under constant attack for being the vehicle through which the law wore away at the private interests and the rights of authors.¹⁹⁰ The public domain became an illusive abyss into which all intellectual and artistic property was destined to fall, and it sometimes produced legal consequences that seemed unfair to the author. Based on the idea that all people should have equal access to the nation's cultural legacies without hereditary or arbitrary class distinctions and without privileges, the public domain reflected the belief that information and facts, even as they were revealed through individual creations, belonged to everyone because the advancement of human knowledge required unconstrained access to enlightenment.¹⁹¹ The commanding presence of this notion in nineteenth century legal conflicts suggests that artists constantly defended their ownership rights in their own creative products against those whose claims were based entirely upon the right of public domain. The French courts ultimately responded sympathetically to this issue in the text of a Cour de cassation decision in 1875: "In a conflict of interest between the public domain on one hand and the authors or their heirs on the other hand, we always lean in favor of the latter."¹⁹²

V. CONCLUSION

The French doctrine of moral rights presents an important, yet often troubling, and definitely challenging, difference between the philosophies underlying French and U.S. intellectual property laws.¹⁹³ The doctrine and its application in French law are not conceptually as difficult as they may appear, although perhaps they are culturally confusing. In France, there is an attitude about protecting culture that seems to transcend plain legal logic, while sometimes challenging the U.S. perspective,¹⁹⁴ as French moral rights

190. See Cour de cassation, Cass. crim., May 28, 1875, D.P. I, 1875, 328, 328-29 nn.1-2.

191. See Hesse, *supra* note 19, at 129.

192. Cour de cassation, Cass. crim., May 28, 1875, D.P. I, 1875, at 328-29 nn.1-2 (translation by author). The original language of the case reads: "Dans un conflit d'intérêt entre le domaine public d'une part, et les auteurs ou leurs ayants cause d'autre part, on incline toujours en faveur de ces derniers." *Id.*

193. See Sarraute, *supra* note 8, at 484-86.

194. For example, cultural differences and conflicts between the United States and France have been exemplified by recent conflicts regarding the U.S. market share of the European broadcast industry. In the past years, the entertainment industry has been the United State's second largest export earner, and one of the few areas of production for which the United States has enjoyed a trade surplus. See Brian L. Ross, Note, "I Love Lucy," *but the European*

seem to operate antithetically to basic tenets of protecting the liberty of free market negotiations and upholding bargained-for exchanges.¹⁹⁵ The salient American policy for copyright law has always been the promotion of the purported public interest. The rights granted by U.S. copyright laws were designed to serve as financial incentives for authors and artists to create literary and artistic works for public consumption.¹⁹⁶ Then, following a defined statutory period, these works become public property.¹⁹⁷ In view of the implications of moral rights to the U.S. idea of a free market of ideas, this doctrine presents some important theoretical and practical challenges.¹⁹⁸ Like its American counterpart, the first French law provided only for the protection of pecuniary interests, arguably emulating policies already instituted in U.S. law. Unlike the U.S. law, however, the French legislature did not derive its power to enact intellectual property statutes from a superior authority, and there was neither a stable government nor an enduring federal constitution in place at that time.¹⁹⁹ However, the law in France was

Community Doesn't: Apparent Protectionism in the European Community's Broadcast Market, 16 BROOK. J. INT'L L. 529, 531, 531 n.8 (1990). However, the French, alleging cultural imperialism, have been the chief European opponents to the American television market in Europe. See *id.* at 530 n.4. They have objected to the quantity of American products in the European broadcast market in general, and on French television in particular, on the pretext of protecting their culture. See *id.* Consequently, the French, through the European Economic Community, have sought to limit American access to their broadcast market, prompting U.S. industry allegations of irrational cultural protectionism. See generally *id.*

195. In 1983, a French court reached a decision on a moral rights issue that would seriously undermine U.S. policies governing contract and property principles had it been rendered in the United States. The court ruled in favor of a sculptor who sued Renault, France's major car manufacturer, after it decided to cease construction on a huge sculpture the artist had modeled to go outside the corporate headquarters. The court directed Renault not only to continue construction but it was implied that the company would have to maintain the integrity of the sculpture at significant future costs. Although the company agreed to settle the dispute by paying the agreed upon contract price, the court ruled that the artist had a moral right to have his work published. See Judgment of Mar. 16, 1983, Cass. 1e civ., July 1983 R.I.D.A. 80. See also Andre Françon & Jane Ginsburg, *Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work*, 9 COLUM.-VLA J.L. ARTS 381, 391 (1985) (providing a discussion of the Renault case).

196. See Note, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490, 1493-94 (1979).

197. See *id.* at 1493. See also U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power "[t]o 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").

198. For additional discussion of contemporary uses of moral rights in the French system, see Ginsburg & Sirinelli, *supra* note 68, at 135.

199. Article 1, section 8, clause 8 of the United States Constitution is the source of American copyright law. See U.S. CONST. art. I, § 8, cl. 8. It granted to Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to the respective Writings and Discoveries." *Id.*

transformed during the nineteenth century to include the moral rights protections that characterize French law today.

French copyright laws have stood out for at least a couple of reasons. First, they became a system providing legal sanction of equal importance to economic, as well as non-economic, rights, the latter being the category of rights that separated French and American copyright law in the most profound way. Second, in direct opposition to the historical denial of non-economic rights by the United States Congress, the French have been animate advocates of moral rights. Yet, these rights of personality in works of art were not part of France's original copyright scheme, nor were they explicitly part of the pre-statute philosophical debate. Instead, the source of these rights is the nineteenth century French court decisions. The nineteenth century began with a newly-codified law²⁰⁰ and legal system that engendered the modern French court system. It left a legacy of judicial interpretations of the 1793 Decree, as well as the subsequent decrees and ordinances affecting the rights of authors. The court decisions served as historical texts memorializing the continuation of theoretical debate about the relationship between authorship and knowledge, property and knowledge, and the role of the law in regulating the tension between private interests and the benefits of public domain. Whether or not courts strictly interpreted the language drafted by the legislatures or whether the issues before them required that they expand the law beyond the boundaries originally envisioned by the legislature, they usually commented on the policies, philosophies and politics espoused by the litigants, leading legal scholars, or by their own initiative.

The president of the French committee on authors' rights commented as follows:

It is no exaggeration to say that the degree of civilization of a country is measured by the protection it gives to works of the mind. . . . [I]n this respect, it is remarkable to find the greater respect a country pays to creative thought, the more importance it attaches to the moral element of copyright.²⁰¹

It is, therefore, not entirely surprising that the French conception of copyright law, viewed as the law that regulates the dissemination of literature and the arts within the society, has evolved to reflect the importance of these commodities in the French culture. The French see literature and art as the

On the other hand, nineteenth century France was fraught with precarious governments characterized by the struggle between the conservative and revolutionary ideas, a conflict that sprang out of the eighteenth century revolution.

200. See CODE NAPOLEON (photo. reprint 1960) (1804).

201. Philippe Pares, *The French Conception of Copyright*, 2 REV. INT'L DU DROIT D'AUTEUR 2 (1954).

epitome of their society. This explains, in part, the development of the doctrine of moral rights. For the French, culture had been a national symbol of power, a weapon through which they historically exerted dominance around the world.²⁰² It is probably no exaggeration to say that from the French perspective in modern times, they have continued to exert a cultural domination in the arts.²⁰³ Consequently, it is no surprise that the French conception of intellectual property embraced the concerns of artists. In the nineteenth century, the French had begun to hold artists as the individual purveyors of their nation's cultural heritage.

Recent efforts of prominent American filmmakers to secure protection for the integrity of art has raised a similar debate in the United States about the role the law should take to protect its national heritage through individual achievements. The notions of a free market may be too strongly entrenched in U.S. law to give way to an adoption of moral rights similar to the French. However, it is clear that the doctrine now has some immediate application in U.S. law.

The best way to summarize the concerns of the nineteenth century French about fairness to authors, while at the same time framing the issue within an American context, is to refer to an article by Jesse Hamlin published in the *San Francisco Chronicle*.²⁰⁴ The article discusses the unauthorized use of Ruth Bernhard's 1962 photograph *In the Box — Horizontal* for the ad image for the movie release of *Boxing Helena*. Bernhard was outraged by the use of the image she created for her famous photograph,²⁰⁵ but because the photograph was in the public domain, she had no legal recourse. However, she nicely summed up a concern with morality and justice that seemed to have prompted nineteenth century French society

202. At the time of the French Revolution in 1789, the French culture commanded admiration and imitation around the world, and France was considered the leading culture in Europe, and French language had succeeded Latin as the common speech of the civilized world. Prior to the enactment of the Napoleonic Code in the early nineteenth century, France's legal system was not among its cultural treasures. However, after the country codified its law under Napoleon Bonaparte, its legal institutions took a prominent position in the world and were imitated and used as a model in many other countries.

203. One commentator noted:

The just satisfaction granted to the interests of authors will not be foreign to the veritable glory to come of French Arts and Letters, to that glory which illustrates the attention of the whole world and which has contributed so much to increasing the powerful influence of our beautiful Motherland, making of it the center of modern Civilization.

Jean Matthysens, *Copyright Law Schemes in France During the Last Century*, 4 REV. INT'L DU DROIT D'AUTEUR 14 (1954).

204. See Jesse Hamlin, *Bernhard's Ready to Box Some Ears*, S.F. CHRON., Sept. 21, 1993, at E2.

205. Bernhard stated: "I haven't seen the movie, but from what I've read it sounds ugly and not a film I would go see." *Id.*

to demand the legal protection that necessitated the embodiment of moral rights in French intellectual property law. Seemingly helpless, Bernhard complained, "My lawyers tell me there's nothing we can do. Apparently, there's no copyright. We can't sue."²⁰⁶ Then she stirringly added, "But ethically, it's wrong."²⁰⁷ Nearly two hundred years ago, the French apparently began to make the very same allegations of moral injustice about the legal definitions and status of their intellectual property. Occasional social outrage culminated with the policy provisions that initiated the doctrine of moral rights in France.

206. *Id.*

207. *Id.*