Moral Rights for University Employees
And Students: Can Educational Institutions Do Better Than the U.S. Copyright Law?

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MORAL RIGHTS FOR UNIVERSITY EMPLOYEES AND STUDENTS: CAN EDUCATIONAL INSTITUTIONS DO BETTER THAN THE U.S. COPYRIGHT LAW?

Roberta Rosenthal Kwall

I. INTRODUCTION

Copyright law in the United States is concerned almost completely with protecting the pecuniary rights of copyright owners. By assuring the copyright owner the exclusive rights to reproduce and distribute the original work, to prepare derivative works, and to perform and display publicly certain types of copyrighted works, the 1976 Act focuses on the inherent economic value of a copyright. In contrast, there is a doctrine called droit moral, or moral rights, which is well established in many European and Third World nations. Moral rights allow creators to safeguard their personal, as opposed to pecuniary, rights in their works. Although the exact contours of moral rights legislation differs among those countries which have adopted a version of the right, there are some universal aspects of the doctrine.

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1. Raymond P. Niro Professor of Intellectual Property Law, DePaul College of Law. © 1999 by Roberta Rosenthal Kwall. I would like to acknowledge the superb research assistance of Stephanie Towner, a second year student at DePaul College of Law and a former member of the first year DePaul Intellectual Property Legal Writing Section.

Essentially, the moral rights doctrine encompasses three major components: the right of disclosure, the right of attribution, and the right of integrity. Underlying the right of disclosure is the idea that the creator, as the sole judge of when a work is ready for public dissemination, is the only one who can possess any rights in an uncompleted work. Professor Neil Netanel has observed that this right is based upon two basic premises: “First, an author’s work cannot be said to exist as an independent thing, apart from the author, unless and until the author determines that it has been completed.” The right to determine the timing of a work’s public dissemination has particular significance for academics whose professional reputations rest largely upon the perceived quality of their scholarship. Second, according to Professor Netanel, “even after a work has been completed, the author alone may decide when and how the work will be publicly disclosed. Likewise, an author may prohibit publication of a completed manuscript even

5. In Seshadri v. Kasraian, 130 F.3d 798 (7th Cir. 1997), the court noted that “implicit in the copyright holder’s exclusive right to distribute copies of his work to the public [under 17 U.S.C. § 106(3)] is the right not to publish the work.” Id. at 805. Typically, however, this right to refuse to disclose is seen as a corollary to the right of disclosure under moral rights laws. See also Kwall, supra note 3, at 6.
though he has transferred publication rights and delivered the manuscript to his
publisher.” 6

The right of attribution, as its name suggests, safeguards a creator’s right to compel
recognition for her work and to prevent others from naming anyone else as the creator. It
also protects a creator’s negative rights of anonymity and pseudonymity.7 The right of
integrity lies at the heart of the moral right doctrine, as it prohibits any alterations of a
creator’s work that will destroy the spirit and character of the creator’s work.8 Although
adaptations of a work from one medium to another present the most obvious potential for
violations of a creator’s right of integrity, in reality any modification of a work can be
problematic from an integrity standpoint.9

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6 Netanel, supra note 4, at 384-85.
7 Kwall, supra note 3, at 7.
8 Kwall, supra note 3, at 8. See also Netanel, supra note 4, at 387 (noting that “at a minimum, th[is] right
has a negative aspect, which entitles an author to prevent the public presentation of his work in a manner or
context that is harmful to his reputation or contrary to his intellectual interests, personal style, or literary,
artistic or scientific conceptions.”).
9 Professor Netanel has observed that “[s]ome French courts and commentators have also recognized an
affirmative aspect of the right of integrity, which requires the transferee to preserve and publicly display or
disseminate the author’s work in accordance with the author’s wishes, notwithstanding any contractual
provision to the contrary. This positive aspect of the integrity right subjects a purchaser of a work, or a
publisher or producer who obtains the right to exploit a work, to an affirmative duty to promote, as well as
respect, the author’s artistic conception.”) Netanel, supra note 4, at 388. Some formulations of the moral
right doctrine also include a right of withdrawal, which would allow a creator to recall all existing copies of
a work following its actual publication. See Kwall, supra note 3, at 6. The practical inconsistency of
applying this aspect of the doctrine has caused some commentators to doubt its viability. See Sarraute,
Current Theory on the Moral Right of Authors and Artists Under French Law, 16 AM. J. COMP. L. 465, 477
In 1988, the United States joined the Berne Convention for the Protection of Literary and Artistic Works, the oldest multilateral treaty governing copyright protection. As a result, American creators can now obtain increased copyright protection internationally.\textsuperscript{10} Section 6bis of the Berne Convention recognized a right of attribution and a right of integrity, but the treaty contemplates that the specific legislation of the respective Union members will govern substantive applications of these rights within each member country.\textsuperscript{11} When the United States joined the Berne Convention, Congress believed that no additional moral rights protections were needed in this country given federal protections such as § 43(a) of the Lanham Act,\textsuperscript{12} § 106(2) of the 1976 Copyright Act, which governs the right to prepare derivative works, as well as the existing common law doctrines such as unfair competition, breach of contract,\textsuperscript{13} defamation and invasion of

\textsuperscript{10} Roberta Rosenthal Kwall, \textit{How Fine Art Fares Post VARA}, 1 MARQ. INTELL. PROP. L. REV. 1, 3 (1997)\textsuperscript{[hereinafter VARA].}

\textsuperscript{11} \textit{Id.}

\textsuperscript{12} See, e.g., Geisel v. Poynter Products, Inc., 283 F. Supp. 261 (S.D.N.Y. 1968) (author received injunction under Lanham Act where court found irreparable harm to his reputation resulting from the licensing of inferior "Dr. Seuss" toys which were marketed as authorized by the author).

\textsuperscript{13} Cf. Rey v. G.D. Lafferty, 990 F.2d 1379, 1392 n.10 (1\textsuperscript{st} Cir. 1992)(noting that although copyright law does not afford a licensor a moral right "to control the quality of licensed depictions," it is possible to obtain contractually approval provisions to assure appropriate quality control and high standards in the exploitation of one's creative work).
privacy law that had been used to redress moral rights violations.\textsuperscript{14} In addition, several states provided specific statutory moral rights protections for certain types of works, notably visual art.\textsuperscript{15} Still, in 1990, Congress enacted the Visual Artists Rights Act (VARA), a measure which was designed to enhance moral rights protections in the United States. This provision is codified in § 106A of the Copyright Act, and its effective date was June 1, 1991.

Notwithstanding the enactment of VARA, moral rights protection in the United States lags woefully behind the protection afforded creators in most other countries. I have argued elsewhere that in general, the 1976 Copyright Act could readily accommodate more widespread moral rights protections for creators,\textsuperscript{16} and that VARA specifically is a less than satisfactory response to the dearth of moral rights protection in

\textsuperscript{16} See Kwall, Marriage, supra note 3.
this country. My purpose here, however, focuses on how the lack of moral rights protections in this country fails those creators who are, at least in certain respects, most in need of the doctrine’s protections. These creators are the faculty and students of our nation’s universities. As the caselaw discussed below illustrates, the University setting provides an atmosphere with the potential to breed moral rights violations. As succinctly stated by Judge Easterbrook of the Seventh Circuit:

Many disputes may be compromised by converting the stakes to a common denominator such as money and splitting the difference. Few commercial disputes end up in court, because the disputants may readily compromise and move on. Other disputes are harder to resolve because they seem to involve principles for which no compromise is readily apparent. The result may be a private war. A dispute that would be resolved quickly in the commercial world may fester.\textsuperscript{18}

Colleges and universities provide the homes and training grounds for artists and authors all over the country. Students, faculty and other university employees create works of authorship in all imaginable forms under the auspices of these institutions.

\textsuperscript{17} See Kwall, \textit{VARA, supra} note 10. Some believe that the recently enacted Digital Millennium Copyright Act (DMCA) has potential for safeguarding authors’ moral rights in a broader context than VARA. Section 1202(a) of the statute prohibits the provision of false copyright management information (CMI) and Section 1202(b) prohibits the removal or alteration of CMI, as well as the distribution and public performance of works on which the CMI has been removed or altered. Further, § 1202(c) defines CMI broadly to include the title of the work, the author, copyright owner, and in certain instances the writer, performer, and director of a work. The net effect of these provisions is the preservation of the names of authors and other artists in connection with their works. This “quasi-moral rights” potentially can have a far greater impact than VARA because it applies to a larger category of works. It remains to be seen whether this aspect of the DMCA will be the focus of future litigation. I am indebted to Kenny Crews for this observation.

\textsuperscript{18} Weinstein v. University of Illinois, 811 F.2d 1091 (7\textsuperscript{th} Cir. 1987) (dispute concerning the order of names of authors of an academic publication).
Universities provide these creators with a nurturing environment where process and the intrinsic value of expression reign supreme. As two commentators recently observed:

Generating and disseminating information is the lifeblood of academic institutions and those who are employed by them. This is the case for several reasons. Institutional reputations are often built on the basis of works developed and published by their faculties. As a matter of internal promotion and tenure policies of those same institutions, the performance of employees, such as faculty members, may be measured in terms of the generation and publication of scholarly works. Finally, these works may be considered very valuable to both the individual and the institution, as they may be the source of considerable outside income which may either supplement individual salaries or enrich the coffers of the institution.\(^{19}\)

Universities, therefore, are in a unique position to nurture and protect the work of their faculty and students. My argument is that an important component of the function of universities in this respect is to provide assistance to their faculty, students and employees in securing moral rights in connection with their creations. Specifically, within the university confines, universities should attempt to better educate their authors about moral rights and, to the extent possible, to safeguard more effectively their authors’ moral rights.

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\(^{19}\) James B. Wadley & JoLynn M. Brown, *Working Between the Lines of Reid: Teacher’s Copyrights, Work-for-Hire and a New Washburn University Policy*, 38 WASHBURN L. J. 386, 387 (1999). These authors further observe: “The academic institutions that comprise our educational system are generally seen as playing a major role in the creation of such works, and it is largely assumed that such institutions serve that mission without driving economic motives.”
Part II of this Article provides an overview of moral rights protections in the United States, and compares the state of our moral rights doctrine with the protections existing in other parts of the world. Part III discusses recent litigation involving moral rights, or “quasi” moral rights claims, deriving from a university setting. This part demonstrates that the world of academia is likely to foster moral rights disputes and that it would be desirable for our law to provide more concrete mechanisms for assisting with these disputes. Part IV of this Article offers some concluding observations on what universities specifically can do to enhance the chances for moral rights protections for their faculty, students and employees.

II. A COMPARISON OF MORAL RIGHTS PROTECTION IN THE U.S. AND ABROAD

American courts have applied non-copyright doctrines to redress alleged violations of interests protected elsewhere by the moral rights of integrity and attribution. In particular, the increasingly liberal applications of unfair competition law generally and section 43(a) of the Lanham Act in particular have made these doctrines popular
substitutes for moral rights. Additionally, courts often rely upon express contractual provisions in granting relief to creators for violations of their right of integrity.

Moreover, the 1976 Copyright Act itself, even apart from VARA, contains some provisions which have the capacity for providing a limited substitute for moral rights.

In particular, a creator can prevent unauthorized alterations and modifications of her work by invoking § 106(2) to the extent such actions result in an unauthorized derivative work. Such an infringement action also may enable a creator to safeguard her right of attribution if a court were to enjoin the defendant’s use of the plaintiff’s work without an appropriate attribution. Moreover, the rights of integrity and attribution can be safeguarded under § 106(2) in situations where authorized adapters make mutilating changes in a creator’s work, and the resulting product is designated as “based upon” the creator’s underlying work.

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20 See e.g., Choe v. Fordham University School of Law, 920 F. Supp. 44 (S.D.N.Y. 1995) discussed infra at notes 81-88 & accompanying text. See also Kwall, Marriage, supra note 3, at 18-19 n. 72 and cases discussed therein.
21 See Kwall, Marriage, supra note 3, at 20, notes 73-74 and cases discussed therein.
22 See Kwall, Marriage, supra note 3, at 34-56.
23 Id. at 40.
24 Id. at 46, n.172.
25 See Kwall, Marriage, supra note 3, at 40-42. Cf. Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 (2d Cir. 1976) (applying 1909 Copyright Act to grant relief to a group of British writers and performers whose scripts had been edited extensively after they were produced into British television programs but prior to their broadcast on defendant’s American television network). Professor Netanel also
Notwithstanding these limited protections for moral rights in the United States, VARA represents the cornerstone for moral rights protection in this country.

Unfortunately, VARA’s narrow application to only particular works of fine art makes it of very limited value to creators as a whole. The statutory definition of covered works includes “a painting, drawing, print, or sculpture, . . . or a still photographic image produced for exhibition purposes only existing in a single copy . . . or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.”26 As for substantive rights provided by the statute, VARA affords creators of covered visual art relatively limited rights of attribution and integrity when modifications are made to their works that will prejudice their honor or reputation. The right of integrity provided by VARA is limited to intentional modifications and fails to include rights in reproductions of protected works.27 The statute also fails to define or provide any guidance with respect to how a determination of “prejudice” should be made, or what

notes that “the right of disclosure finds a limited parallel in section 106 of the Act, which accords copyright owners the exclusive right to distribute copies of a work to the public and to display the work publicly. An author who holds this right may determine whether and how his work is disseminated.” Netanel, supra note 4, at 395.

constitutes "honor" and "reputation". In addition, the right of attribution in VARA, while unlike the right of integrity in that it is not limited to intentional alterations, does not expressly include the negative rights of anonymity or pseudonymity, although the legislative history suggests the inclusion of these subrights within the scope of VARA. A separate section of the statute also contains special provisions for works of visual art that have become part of buildings.

The duration of the rights specified under VARA varies, depending on when the work was created with respect to the effective date of VARA. Section 106A(d) provides

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30 17 U.S.C. §113(d) (West 1996). This provision deals with installation of art in buildings and provides that a building owner is not liable for the destruction of a work caused by its removal from the building if the author consented to the installation prior to VARA's effective date; or if after VARA's date, the author and building owner sign an agreement providing that the removal of the work may cause its destruction. 17 U.S.C. §113(d)(1) (West 1996). One commentator has noted that this agreement is not as beneficial for artists as the waiver provision of 106A because it lacks needed specificity and potentially allows artists to be the victims of boilerplate. Robert J. Sherman, The Visual Artists Rights Act of 1990: American Artists Burned Again, 17 CARDOZO L. REV. 373, 420 (1995).

For works which can be removed from a building without causing their destruction, § 113(d) provides that VARA applies unless the building owner has made a diligent, good faith, attempt without success to notify the author of the removal or has provided written notice to the author, and the author fails to remove the work within 90 days. 17 U.S.C. §113(d)(2) (West 1996). A recent commentator has asserted that this provision "represents a curious compromise between the rights of artists and chattel owners of site-specific art, thus demonstrating the American tendency to balance interests in conflict." Vera Zlatarski, "Moral" Rights and Other Moral Interests: Public Art Law in France, Russia and the United States, 23 COLUM.-VLA J. L. & ARTS 201, 222 (1999).
that the moral rights safeguarded by the statute expire with the death of the author for works created on or after the effective date of VARA.\textsuperscript{31} For works created before the effective date of VARA, but title to which has not been transferred at the time of the effective date, the duration of rights under § 106A is co-extensive with the length of protection under copyright law.\textsuperscript{32} VARA also provides that the rights in joint works last until the death of the last surviving author.\textsuperscript{33}

Section 106A(e)(1) also provides that although an author’s VARA rights cannot be transferred, they can be waived “if the author expressly agrees to such waiver in a written instrument signed by the author.”\textsuperscript{34} That section also provides that the instrument must “specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified.”\textsuperscript{35} Moreover, the statute provides that one joint author can waive the specified rights for all of the other

\textsuperscript{32} In this context, “title” refers to title to the work of art, as opposed to transfer of the copyright. Neither the statute nor the legislative history offers any explanation for this strange dichotomy, but in its original form VARA provided a duration equal to that of copyright law. The current duration for works created on or after the effective date of VAVA was a result of a last-minute amendment by the Senate. \textit{Sen. Rep. No.} 101-416 (1990); \textit{H. R. Rep. No.} 101-514 (1990).
\textsuperscript{34} 17 U.S.C. §106A(e)(1) (West 1996).
\textsuperscript{35} \textit{Id.}
joint authors pursuant to a written instrument.\textsuperscript{36} This particular provision concerning unilateral waiver by one joint author is inconsistent with the moral rights laws of many other countries,\textsuperscript{37} and has been the subject of criticism here in the United States.\textsuperscript{38}

In contrast to the United States, many European and Third World nations have extensive moral rights laws.\textsuperscript{39} The laws of some countries reflect a monistic theory of protection derived from a Kantian-based philosophy.\textsuperscript{40} Under this view, a creator’s economic and moral interests are intertwined so that a country’s copyright law may be used in its entirety to protect the personal or intellectual interests of the author. Germany\textsuperscript{41} and Canada\textsuperscript{42} have such a system of protection. In contrast, the laws of other

\textsuperscript{36} \textit{Id.}

\textsuperscript{37} For example, in Germany, joint authors can allow changes only by joint decision. The Law on Copyright and Neighboring Rights, art. 8(2), 1965 BGB I, 1273, \textit{translated in 1 COPYRIGHT AND NEIGHBORING LAWS AND TREATIES, Germany.}

\textsuperscript{38} When VARA was enacted, Congress directed the Copyright Office to commission a report on the impact of the waiver provision. H.R. REP. NO. 101-514, AT 22 (1990), \textit{reprinted in 1990 U.S.C.C.A.N. 6915, 6932. The Final Report, which was issued in 1996, recommends the amendment of this provision so that one joint author cannot waive the moral rights of the other joint authors absent their written consent. Final Report of the Register of Copyrights, \textit{Waiver of Moral Rights Visual Art Works} 192 (March 1, 1996).}

\textsuperscript{39} \textit{See INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY} 120-40 (Anthony D’Amato & Doris Estelle Long eds., 1996). \textit{See also} Kwall, \textit{Marriage, supra} note 3, at 97-100 (appendix providing data on the moral rights protections in 35 countries contained in World Intellectual Property Organization, Copyright Law Survey (1981)).

\textsuperscript{40} According to Professor Netanel, Kant’s theory recognizes an author’s rights as personality rather than as property. Under this view, “an author’s personal right is that of the communication of one’s thought, which Kant depicted as an aspect of autonomy and freedom.” Netanel, \textit{supra} note 4, at 374-75.

\textsuperscript{41} See Netanel, \textit{supra} note 4, at 379 (noting that German copyright is unitary so that it protects the author's intellectual and personal interest in his work as well as his interest in the exploitation of his work.). \textit{See also} Thomas P. Heide, \textit{The Moral Right of Integrity and the Global Information Infrastructure: Time For a New Approach?}, 2 U.C. DAVIS J. INT’L L. & POL’Y 211, 240 n.152 (“Moral rights under German Law expressly entail three components: the right of dissemination, the right to recognition of authorship, and the right to integrity of the work. However, because of the monistic theory on which the law is based, economic and moral interests are intertwined. As a result, various other provisions throughout the Law on Copyright may be used to protect the personal or intellectual interests of the author. As it is impossible to cleanly separate economic from moral interests, the law in its entirety is to be considered when applying it to any given case. Adolf Dietz, Erster Teil, Urheberrecht, in GERHARD SCHRICHER, KOMMENTAR ZUM URHEBERRECHT 85, 228-29 (1987)”).
countries have been influenced more heavily by a dualist philosophy developed by Hegel. This view assumes that the author’s personal and economic interests are each protected by a legally and conceptually distinct set of rights.\textsuperscript{43} France, one of the strongest proponents of moral rights protection, adheres to this view.\textsuperscript{44} Specifically, “the conceptual duality of the French droits d’auteur finds practical expression in the different treatment given to moral and economic rights found in the French Act provisions governing alienability, transmission and duration.”\textsuperscript{45} Mexico’s position also is representative of the dualist approach.\textsuperscript{46}

In recent years, there has been a renewed interest in moral rights abroad. For example, under Russia’s 1993 Copyright and Neighboring Rights statute, authors retain their moral rights of paternity, disclosure and integrity even after they have transferred their economic rights.\textsuperscript{47} Vietnam’s Civil Code, approved in 1996, protects moral rights in perpetuity.\textsuperscript{48} Hong Kong’s new Copyright Ordinance, passed in 1997, also protects

\begin{itemize}
\item[\textsuperscript{42}] See Stephen Fraser, Berne, CFTA, NAFTA, & GATT: The Implications of Copyright Droit Moral and Cultural Exemptions in International Trade Law, 18 HASTINGS COMM. & ENT. L.J. 287, 293-95 (1998).
\item[\textsuperscript{43}] Netanel, supra note 4, at 379.
\item[\textsuperscript{45}] Netanel, supra note 4, at 381. Netanel also notes that French commentators discuss the predominance of moral rights over economic rights. \textit{Id}.
\item[\textsuperscript{46}] See Fraser, supra note 42, at 293-95.
\item[\textsuperscript{47}] See Vera Zlatarski, supra note 30. See also Bella Karakis, Moral Rights: French, United States and Soviet Compliance with Article 6bis of the Berne Convention, 5 TOURO INT’L L. REV. 105, 133 (1994) ("In May of 1991, the Supreme Soviet approved the change in its Fundamental Principles of Civil Legislation necessary to allow it to join the Berne Convention. The changes went into effect in January of 1992.") (citing Eric J. Schwartz, Recent Development in the Copyright Regimes of the Soviet Union and Eastern Europe, 38 J. COPR. SOC’Y OF THE U.S.A. 123, 148 (1991)).
\item[\textsuperscript{48}] \textit{Vietnam: Copyright Laws and Patents: Much to be Desired}, INT’L MAKT. INSIGHT REP., September 1, 1998; available at 1999 WL 13712083.
\end{itemize}
moral rights. 49 As of this writing, however, a European Union Directive on moral rights still has not surfaced. 50

It is interesting to contemplate the reasons underlying the difference between the limited protection afforded creators’ moral rights in the United States, and the scope of this doctrine in many other countries. The underlying force of American copyright law is that it serves as an economic incentive to production, which will in turn impact favorably on society. Thus, the theoretical framework in which American copyright law operates is concerned fundamentally with social utility, 51 and its contours largely derive from classical utilitarianism “and, to a lesser extent, by Lockean natural right theory.” 52 In contrast, the Continental copyright doctrine focuses on the author and her personal relationship to her work, viewing “copyright essentially as a means to protect the author’s individual character and spirit as expressed in” her literary and artistic creations. 53 The concept of commodification essentially is inconsistent with the Continental copyright doctrine’s focus on a creator’s work as a partial, or even a complete, “extension of the author’s personality [or] the means by which he seeks to communicate to the public.” 54

50 Other countries such as Australia also are contemplating increased protections for moral rights. See Peter Leonard, Moral Rights Law a New Legal Minefield, SYDNEY MORNING HERALD, April 4, 1995, at 40; Mark Juddery, Scriptwriters Have the Last Word, This Time, CANBERRA TIMES, July 13, 1998, at 15; Catherine Fox, AFA Out to Stop Moral Rights Law, AUSTRALIAN FINANCIAL REVIEW, August 18, 1998, at 27; Simon Minahan, Law & Order, SUN HERALD, May 16, 1999, at 17.
51 See Mazer v. Stein, 347 U.S. 201 (1954)(observing that the promotion of the arts and sciences is the primary purpose of the monopoly granted to copyright owners, with financial rewards to creators as a secondary concern). See also H.R. REP. NO. 2222, 60th Cong., 2d Sess. 7 (1909).
52 Netanel, supra note 4, at 365.
53 Id.
54 Id. at 363-64. According to Professor Netanel, “[a]n examination of these contrasting theoretical underpinnings is the key to understanding the divergent treatment given to alienability in the two systems.”
Moreover, as a general matter, we might assume that any system of ownership rights encourages people to devote time to the things that are most valued by the society in which they live. With respect to intellectual property specifically, "[t]he history behind the recognition (or non-recognition) of protection afforded a particular form of intellectual property often reflects the philosophical and cultural role that form of intellectual property plays in a country's heritage." In France, for example, where moral rights protections are among the strongest, a cultural tradition exists in which artists are elevated as a special class of laborers who possess almost spiritual qualities, and their works are treated as a special category or property. As a result, artists' rights often are protected against other parties' contract or property interests. In contrast, American artists possess a far lower social status than do their French counterparts, and the law essentially protects their works in the same manner as it does any other commercial object, thereby weighing the rights of creators against the rights of exploiters and users. Moreover, our reluctance to recognize moral rights undoubtedly also stems from the vast oppositional force of the entertainment and publishing industries whose exploitative abilities would be severely curtailed by a comprehensive moral rights scheme.

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*Id.* at 365. Moreover, Netanel asserts that "a cohesive legal doctrine of author autonomy and personal connectedness to one's original works promotes a very different conception of creative expression than does a proprietary copyright system. Thus, even if the United States analogues were to produce a short-term legal effect approximating the Continental system, their overall social effect—and long-term legal result—would vary substantially from that of the Continental system of autonomy inalienabilities." *Id.* at 398. Further, "it is certainly possible that the purported difference in the attitudes of Continental and American authors regarding the nature of expression and alterations of their work mirrors the opposing treatment of those works in the Continental and Anglo-American legal traditions." *Id.* at 421.

56. INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY, *supra* note 39, at 70.
58. *Id.*, at 20-21; Netanel, *supra* note 4, at 415.
The disparity in protection afforded moral rights among different nations presents an increasingly difficult challenge in the digital age. Indeed, "the possibilities of borderless exploitation of works, the endless ways of using digital work and the changes in how works are created" give rise not only to greater potential for moral rights violations but also highlight the difficulties presented by varying laws and enforcement mechanisms among different nations.  

III. MORAL RIGHTS ASSERTIONS IN THE UNIVERSITY SETTING

A review of the cases involving universities and their personnel in the context of moral rights, or "quasi" moral rights litigation reveals the following patterns among the parties to the lawsuits: student vs. university, student vs. professor, professor vs. student, and professor vs. university. Although the factual situations giving rise to these lawsuits vary, the underlying themes of many of these cases involve violations of authors' rights of attribution, integrity, and disclosure. It is useful to study this body of litigation for several reasons. First, an examination of these cases reveals important ways

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59 Heide, supra note 41, at 214.
60 Choe v. Fordham University School of Law, 920 F. Supp. 44 (S.D.N.Y. 1995)(suit by student based on law review's publication of his article with errors) (see infra notes 81-88 and accompanying text); Rainey v. Wayne State University, 26 F. Supp.2d 963 (E.D. Mich. 1998)(student sued university, her professor, and company based on the company's use of her artwork in an objectionable manner)(see infra note 61 and accompanying text).
62 Seshadri v. Kasraian, 130 F.3d 798 (7th Cir. 1997)(suit by professor against student for publishing paper allegedly written by professor under student's name)(see infra notes 89-97 and accompanying text).
in which the moral rights of those working in university settings are not being effectuated under the current law. Second, these cases also highlight that universities face particular types of challenges in dealing with their personnel with respect to moral rights issues. Third, a review of the cases in this area suggests ways in which universities can be more responsive to the moral rights of their faculty, students and staff. This Part will explore the first two of these inquiries, and Part IV will address the third.

A. Inadequacy of Other Legal Doctrines

A review of the case law involving universities and moral rights claims reveals a not-too-surprising truth at the very outset. In most of these cases, the plaintiffs are not primarily concerned with money. Instead, these cases are about safeguarding the plaintiff's reputational interests. The following discussion demonstrates that although other legal doctrines are sometimes relied upon in the United States as substitutes for a vigorous moral rights doctrine, these substitutes do not adequately address the reputational interests at stake in moral rights disputes.

Of course, reputational interests are critical in most lawsuits implicating moral rights types of controversies. What distinguishes moral rights oriented cases in the university context, however, is the recognition that often university faculty or students have relatively no commercial interest in their creations. Indeed, many academics do not create for the purpose of obtaining royalties, but instead desire widespread dissemination of their work for the sole purpose of building their professional reputations. Professor

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63 Weinstein v. University of Illinois, 811 F.2d 1091 (7th Cir. 1987) (suit by professor against university and its trustees based on publication of an article with the authors' names in the wrong order) (see infra notes 98-108 and accompanying text).
64 See generally Kwall, Marriage, supra note 3.
Linda Lacey writes of a hypothetical academic and poet, Susan, noting that her income primarily depends upon her academic status, and that she “has a high stake in ensuring that her works will not be distorted and that she will receive full credit as the author of her work.” Similarly, Mark Lemley has noted that although the absence of a right of attribution is not especially critical in a primarily commercial venture, in an academic context “attribution may be more important than the right to commercial control.” From a remedial standpoint, therefore, injunctions can assume a greater importance in these cases than compensatory damages or an accounting.

In the university context, claims encompassing violations of an author’s “right of disclosure” often play a prominent role. In order for plaintiffs to obtain relief in these situations, they must successfully invoke principles of copyright law since our legal system does not explicitly guarantee a right of disclosure. In *Williams v. Weisser*, for example, the defendant operated a business under the fictitious name “Class Notes”, publishing and selling notes of lectures delivered by plaintiff in his capacity as a professor of Anthropology at UCLA. The defendant paid a UCLA student to take plaintiff’s course, take notes and type them up. The defendant then placed a copyright notice in defendant’s notes, and reproduced and sold them.

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66 Lacey, *supra* note 65, at 1583.
67 Mark Lemley, *Rights of Attribution and Integrity in Online Communications*, 1995 J. ONLINE L. art 2. Par. 11 (asserting that “if authors want to be identified with their ideas, they need something more than copyright law will give them”).
68 See, e.g., Seshadri v. Kasraian, 130 F.3d 798 (7th Cir. 1997) (in lawsuit by professor against former student for publishing article allegedly written by professor under student’s name, plaintiff sought statutory damages and an injunction against the student’s attempting to republish the article in lieu of compensatory damages or an accounting).
This case was decided under the 1909 Copyright Act, under which unpublished works were protected by state common law copyright. The defendant disputed the professor’s ownership of the copyright by asserting that the common law copyright in plaintiff’s lectures belonged to his university. Rejecting the defendant’s argument, the court concluded that a professor, rather than the university for whom he works, owns the common law copyright to the lectures in the absence of evidence that the professor had assigned such to the university. The court further noted that “undesirable consequences” would follow from holding that the university holds the copyrights in its professors’ lectures. For example, such a result would make it difficult for a professor to give the same lecture when he changes jobs. Also, professors frequently switch their affiliations and typically, the courses they teach become defined over a period of time at the various universities where they work.

Although the plaintiff professor in Williams v. Weisser was able to obtain relief based on the defendant’s infringement of his common law copyright in the lectures, the unauthorized reproduction and sales of plaintiff’s lecture notes probably was not the only concern of the plaintiff in that case. In essence, the defendant’s activity also constituted a violation of the plaintiff’s right of disclosure, which guarantees an author the ability to determine the timing of a work’s first publication, as well as the form such publication

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70 Under the 1909 Act, federal copyright protection was available for works from the time of publication, and the state common law regime protected unpublished works. ROCHELLE COOPER DREYFUSS & ROBERTA ROSENTHAL KWALL, INTELLECTUAL PROPERTY-CASES AND MATERIALS ON TRADEMARK, COPYRIGHT AND PATENT LAW 233 (Foundation Press, 1996).
71 163 U.S.P.Q. at 45. The court observed: “A university’s obligation to its students is to make the subject matter covered by a course available for study by various methods, including classroom presentation. It is not obligated to present the subject by means of any particular expression. As far as the teacher is concerned neither the record in this case or any custom known to us suggests that the university can prescribe his way of expressing the ideas he puts before his students. Yet expression is what this lawsuit is all about.”
72 Id. at 45.
should take.\textsuperscript{73} \textit{Williams v. Weisser} was decided in 1969, but in September of 1999, an article appeared in the Chronicle of Higher Education discussing the prevalence of Internet companies engaging in the practice of paying students to take class notes and then posting this material on the Web.\textsuperscript{74} This disturbing practice is troublesome for reasons extending beyond copyright law’s concern with unauthorized reproductions, distributions, and preparations of derivative works.\textsuperscript{75} Suppose a professor engages in a dialogue with her students as part of a lecture in which he attempts to sketch out a new theory or research idea. The professor’s objection to a posting of such a lecture clearly will encompass a claim that her work is not ready for dissemination in a public forum and that she is the only one with the ability to judge when her work will be ready for a public airing. Although the practice of posting such lecture notes on the Web may be actionable as a matter of copyright law,\textsuperscript{76} an application of the current copyright law which is concerned exclusively with economic compensation does not theoretically address the reputational harm caused by the professor’s objection to the premature publication of her work.

Moreover, what if such lecture notes were published in an altered state, with important errors and omissions? If the United States had adequate moral rights protections, a plaintiff professor whose materials are used in this fashion would have a

\textsuperscript{73} In fact, in Williams v. Weisser, the court noted that an “author who owns the common law copyright to his work can determine whether he wants to publish it and, if so, under what circumstances.” \textit{Id} at 49.

\textsuperscript{74} Goldie Blumenstyk, \textit{Putting Class Notes on the Web: Are Companies Stealing Lectures?}, THE CHRONICLE OF HIGHER EDUCATION, (September 27, 1999), available on the Internet at http://chronicle.com/free/v46/i06/06a03101.htm

\textsuperscript{75} 17 U.S.C. §106 (West 1996).

\textsuperscript{76} Of course, an action under copyright law will only be possible if the professor’s lecture notes are fixed in a tangible form. See 17 U.S.C. §102(a) (West 1996).
cause of action for violation of her right of integrity. If the altered lecture notes were explicitly connected to her, she also could allege a violation of her right of attribution. Moreover, the right of attribution also allows an author to compel recognition for her particular work. Therefore, even if the lecture notes did not contain errors, but were not in any way designated as deriving from the professor’s particular class, a right of attribution violation also could be brought in those countries which maintain this cause of action.

The plaintiff in Williams v. Weisser apparently considered his lecture notes to be adequate for the purpose of a lecture outline, but objected to their commercial distribution with an association of his name. He believed that such a distribution jeopardized his professional standing. Moreover, the plaintiff believed the notes sold by the defendant to be defective in several critical respects.77 Since the United States lacks adequate moral rights protections to provide the appropriate doctrinal basis for these types of injuries, the court in Williams v. Weisser addressed these claims as part of its discussion on whether the defendant had invaded plaintiff’s privacy.78

Other courts have invoked the protection of Section 43(a) of the Lanham Act,79 which provides a federal remedy for use of either a “false designation of origin” or a “false description or representation” in connection with any goods or services.80 To the extent that an author’s works are published in an altered state, with her name attached, such publication can implicate § 43(a). This was the argument asserted by a law student against the Fordham International Law Journal based on the publication of his student

77 Williams v. Weisser, 163 U.S.P.Q.2d at 49.
78 See id. at 48-49.
comment with many errors. In Choe v. Fordham University School of Law, 81 Jerry Choe brought a § 43(a) action and a common law moral rights action against Fordham and its law journal, alleging mutilation of his article. 82 In dismissing the § 43(a) cause of action, the court stated that "the issue is whether the published Comment departed so substantially from the original work that Choe may be said not to be its author." 83 Moreover, the evidence in the case demonstrated that the errors at issue did not so detract from the plaintiff’s work that readers would be confused and fail to understand his argument. On the contrary, the evidence showed that a student writer in the Stanford law review accurately summarized plaintiff’s argument and was able to understand it. Therefore, plaintiff Choe could not prove the substantial distortion required to maintain a successful § 43(a) cause of action. 84

Choe v. Fordham aptly illustrates the difficulty of attempting to pigeonhole moral rights claims into a completely different doctrinal structure. Through 43(a), Congress intended to vindicate a producer’s economic interests by proscribing false representations that are likely to engender consumer confusion. Therefore, given the vastly different objectives between § 43(a)’s focus on economic rights, and the moral right doctrine’s focus on reputational interests, any protection that an author may receive for her personality rights under 43(a) is "merely fortuitous." 85 This difficulty is amply illustrated by the facts of Choe. Jerry Choe testified that "readers of his Comment in its current

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81 920 F. Supp. 44 (S.D.N.Y. 1995). The publication of the comment occurred after the student’s graduation from law school.
82 The facts of the case reveal that pre-litigation attempts to resolve the dispute failed. Ultimately, defendants sought to issue an errata sheet, but this option was not acceptable to Choe. Id. at 46. See also infra notes 160-62 and accompanying text.
83 Id. at 48.
84 Id. at 48-49.
85 Kwall, Marriage, supra note 3, at 24.
form would think the "author was very sloppy, careless, and stupid for putting some words where they don’t belong." The court’s response to this testimony was that despite these errors, readers would nonetheless be able to understand the plaintiff’s legal arguments and reasoning, and realize that the paper was well researched. Yet, the court’s ultimate conclusion is completely unresponsive to Choe’s primary concern that his professional reputation is diminished by the publication of this article. One of the most important hiring criteria applied by law firms is, in fact, a candidate’s writing ability. Yet, Choe was hampered in demonstrating this reputational harm because our legal system lacks a doctrine under which such a showing could have been made. It is interesting to note that the court, perhaps bothered by Choe’s dilemma, attempted to rationalize the result in this case by saying that the emergence of a federal common law moral rights cause of action “should occur in the first instance, if at all, at the circuit level and not in this court.”

B. The Joint Authorship Dilemma

Academic environments give rise to many co-authorship arrangements, and such collaborative efforts often result in difficult disputes. These disputes reveal that no adequate cause of action exists in this country to address a moral rights violation committed by one co-author who, in the opinion of her co-authors, mutilates the work. This was the scenario in Seshadri v. Kasraian, a recent dispute between an electrical engineering professor at the University of Wisconsin and his graduate student. The

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86 Choe v. Fordham University School of Law, 920 F. Supp. at 46 (quoting Choe’s Deposition at 215).
88 Choe v. Fordham University School of Law, 920 F. Supp. at 49.
89 130 F.3d 798 (7th Cir. 1997).
professor and student allegedly co-authored an article published in the *Journal of Applied Physics*. When they initially submitted the article to the journal, the student’s name was listed first.\(^{90}\) Subsequently, the professor had a substantial disagreement with the student, and the professor withdrew the manuscript from the journal prior to its acceptance.\(^{91}\) The student then resubmitted the article under his own name, signing an assignment of copyright to the publisher of the journal upon the article’s acceptance. The professor contended that upon taking this action, the student infringed his copyright because the professor was the sole author of the work.\(^{92}\) In contrast, the student argued that the article was a joint work, and as such he was entitled to license the copyright to a third party, subject only to a duty to account.\(^{93}\)

With respect to the joint authorship issue, the professor argued that he had written individually all but two sections of the paper, and that he wrote the two remaining sections from the drafts supplied by the student. The court disagreed with the professor’s argument that the work was solely authored, stating that “[a]nyone reading the correspondence” between the two parties “would conclude that the article was indeed a

\(^{90}\) Apparently, the professor and student had collaborated on four prior articles that were published in leading journals in their field, and every time the student’s name was listed first. 130 F.2d at 802.

\(^{91}\) The reason for the disagreement between the professor and the student was that the student decided against taking a course offered by the professor. Then, the professor apparently wrote to the student that he had revised the manuscript completely while the student was vacationing in France. The professor wrote to the Journal that the two had collaborated on the theoretical analysis and the student performed the numerical work, prepared the figures and typed the manuscript. The professor contended, however, that the preparation of the manuscript was based on certain erroneous information given by the student. The professor apologized to the journal for not being more careful in checking the manuscript. The professor requested the journal to delete his name from authorship and to permit him to withdraw the manuscript from consideration for publication. *Id.* at 802.

\(^{92}\) *Id.* at 802.

\(^{93}\) *Id.* at 801. The student offered to print an acknowledgment of the professor’s help but the professor declined, informing the student that he was “not permitted to publish any of [the professor’s] ideas and words “as his own. *Id.* at 803.
joint work." The court noted that "it would be odd for a senior professor to list a graduate student's name before his own if the student had contributed nothing more to the article than the usual assistance that a research assistant provides." Moreover, here the evidence showed that the student contributed significant copyrightable material, as he was "the acknowledged author of the first draft of two sections that occupy almost 5 pages of a 13 page article, as well as of the technical apparatus of the article, which includes a number of complicated graphs."

In addition to the joint authorship issue, the Seshadri case involved the interesting issue of how joint authorship rules interface with moral rights. On this point, the court observed:

If a joint work is marred by errors reflecting unfavorably on his coauthor, with quantifiable adverse effects on the coauthor's career, the coauthor might conceivably have some legal remedy, but it wouldn't be under the Copyright Act. We don't know what it would be under: possibly the law of contracts; in Europe it might be a violation of the author's "moral right" (droit moral), the right to the integrity of his work. . . . But all that matters here is that a joint author does not lose his copyright by being a lousy scholar; were that the rule, rights of joint authorship would be in legal limbo.

The interface between joint authorship and moral rights in academia also arose in Weinstein v. University of Illinois, in which a co-author sued the university, its trustees and employees, alleging that the publication of an article with the authors' names in the

94 Seshadri v. Kasraian, 130 F.3d. at 803.
95 Id. The court further observed: "Although professors and heads of laboratories are sometimes accused of taking credit for work done by their junior colleagues and graduate students, we have never heard of a case in which a professor listed a graduate student as the lead author of an article (in fact five articles) every work of which had been written by the professor, and the student's contribution being limited to doing some computations." Id. at 804.
96 Id. Section 101 of the 1976 Copyright Act defines a joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101 (definition of "joint work").
97 Seshadri v. Kasraian, 130 F.3d at 803-04.
98 811 F.2d 1091 (7th Cir. 1987).
wrong order violated the due process clause of the 14th amendment. Plaintiff Weinstein was an Assistant Professor of Pharmacy Administration in the College of Pharmacy of the University of Illinois at Chicago. He proposed a clinical program for practicing pharmacists, who would participate for two weeks in a clerkship under the guidance of professors. The University funded this program. The proposal to the University was made jointly by three professors, who agreed to write jointly on the results. Apparently, Weinstein and one of his co-authors disagreed about the content and conclusions of the proposed article. Although Weinstein had written one draft, his co-author wrote a second draft. Subsequently, the department head, as well as the Dean of the College of Pharmacy, urged the collaborators to resolve their differences and publish the article.

Weinstein’s co-author submitted his version of the article to the American Journal of Pharmaceutical Education and it was published with Weinstein’s name in third place.

Weinstein sued the co-authors, the department head, the Dean of the College of Pharmacy, the University, and its trustees, seeking relief under 42 U.S.C. § 1983, on the ground that the co-authors mutilated his work and stole the credit, thereby denying him due process of law.99

The district court dismissed the complaint, concluding that the article was a “work for hire” and owned by the university.100 The Seventh Circuit disagreed, concluding that the district court’s broad interpretation of the University’s copyright

99 Id. at 1093.
100 The 1976 Copyright Act defines a “work made for hire” as “a work prepared by an employee within the scope of his or her employment.” 17 U.S.C. §101(part 1 of the definition of a “work made for hire”). Section 201(b) of the statute provides that the employer, or other person for whom the work was prepared, is considered the author of a work made for hire unless the parties have agreed otherwise in writing. 17 U.S.C. 201(b). See also Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) (in determining whether a work fits within the statutory definition of a work for hire that focuses on whether the creator is an employee of another party, the employee status of the hired party will be determined by resorting to the general common law of agency).
policy was not warranted by the evidence presented in this case. The Seventh Circuit’s work for hire ruling, however, also necessitated a determination that as a matter of copyright law, Weinstein had no cause for complaint. Indeed, the co-author of a copyrighted work can make a unilateral decision to license the work, subject to an accounting to the other co-authors. As noted by the court in Weinstein, co-authors also can make changes in a work and publish the original or the revision. In a footnote, the court observes that “Weinstein tries to avoid” this result by asserting moral rights. According to the court, however, Weinstein must fail in this respect because “no jurisdiction has created the sort of moral right Weinstein invokes, let alone created any moral right through judicial decision.” Therefore, this federal court was “not about to foist so novel a principle on Illinois.”

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The district court based its conclusion that the article was a work for hire on the University’s Work for Hire policy which provides that “[w] orks created as a specific requirement of employment or as an assigned University duty” are works for hire. 811 F.2d at 1094. Therefore, because the University funded the clerkship program and because the plaintiff was required to conduct and write about clinical programs as part of his clinical professor duties, the article qualified as a work for hire.

101 811 F.2d at 1094. The Seventh Circuit’s conclusion on this point finds support among legal academics. See, e.g., Wadley & Brown, supra note 19; Russ Versteeg, Copyright and the Educational Process: The Right of Teacher Inception, 75 IOWA L. REV. 381 (1990); Rochelle Cooper Dreyfuss, The Creative Employee and the Copyright Act of 1976, 54 CHI. L. REV. 590 (1987). But see Leonard D. Duboff, An Academic’s Copyright: Publish and Perish, 32 J. COPYRIGHT SOC’Y 17 (1985); Todd F. Simon, Faculty Writings: Are They “Works Made For Hire” under the 1976 Copyright Act?, 9 J.C. & U.L. 485 (1983). The entire issue whether scholarship and teaching materials should be considered works made for hire is very controversial, and currently schools are adopting numerous strategies for insuring decisions in their favor. For a recent discussion of these issues, see Rochelle Cooper Dreyfuss, Collaborative Research Conflicts on Authorship, Ownership, and Accountability, VAND. L. REV. (forthcoming 2000).

102 Joint authors co-owning a copyright are viewed as tenants in common, “each having an independent right to use or license the copyright,” subject to a duty of accounting to the other co-owners for profits. See Community for Creative Non-Violence v. Reid, 846 F.2d at 1498 (quoting W. Patry, LATMAN’S THE COPYRIGHT LAW 116 (6th ed. 1986)).

103 811 F.2d at 1095.

104 811 F.2d at 1095 n.3.

105 Id.

106 Id.
Weinstein is a troublesome opinion not necessarily because of the ultimate result the court reached,\(^{107}\) but because it underscores that no remedy exists for a joint author when his fellow joint authors publish his work in an altered, or objectionable, state. To the plaintiff, the order in which his name appeared on the article was significant for several reasons having to do with his professional standing. For example, Weinstein argued that his not being listed as the first author precluded his use of this topic for a dissertation; diminished his accomplishments among other professors; and hampered his ability to show citations under his name given the prevalent practice of listing citations only under the name of the first author.\(^{108}\) Regardless of the validity of these reasons, the state of the law is such that he has no forum in which to litigate these issues, and no remedy for any such proven violations.

The law’s omission of a remedy for copyrighted works mutilated or altered in an objectionable manner unilaterally by one joint author is problematic. It has been demonstrated that this scenario is likely to arise in university settings given the prevalent practice of collaboration. Moreover, for co-authorship disputes involving VARA works, the law presents even more difficulty because VARA explicitly provides that one joint author can unilaterally waive the other joint authors’ moral rights.\(^{109}\) The undesirable consequences of this provision are obvious with respect to professors who collaborate with one another, or with their students, on VARA works.

C. Copyright Actions Against State Entities

\(^{107}\) The court concluded that Weinstein’s co-authors could publish the article in its revised form, that Weinstein was not deprived of property in violation of due process, and that his claim based on his unlawful discharge was frivolous.

\(^{108}\) Id. at 1093.
State institutions such as universities often use copyrighted materials without permission. The copyrighted materials most frequently used by state institutions include sheet music, sound recordings, books, motion pictures, films and videos, plays, photographs, training manuals and computer software. As of this writing, it is unclear whether plaintiffs will continue to have the ability to recover damages against state institutions for copyright infringement. This uncertainty also effects plaintiffs seeking to use copyright law, to the extent possible, to recover for moral rights violations.

In 1990, the Copyright Remedy Clarification Act ("CRCA") was passed, which expressly eliminated state immunity for copyright infringement. The copyright statute now provides that states are not immune from suit and that all remedies, both at law and in equity, are available against a state or instrumentality of a state to the same extent as are available against any other entity. Most significantly, section 501 of the copyright statute provides that for purposes of Chapter 5, dealing with copyright infringement and remedies, "any reference to copyright shall be deemed to include the rights conferred by section 106A(a)." Therefore, at present, state entities such as universities can be sued for direct violations of an author's moral rights under section 106A, and in the case of works

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109 17 U.S.C. §106A(e)(1). This provision has been subject to criticism. See Kwall, VARA, supra note 10, at 45 n. 246.

110 See, e.g., BV Engineering v. University of California, Los Angeles, 858 F.2d 1394 (9th Cir. 1988) (concerning an alleged infringement of computer programs by the University of California); Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962) (action under the 1909 Copyright Act for copyright infringement by a choir director for a state junior college and high school).


that are not covered by VARA, for indirect moral rights violations pursuant to other provisions of the copyright statute.\textsuperscript{113}

Prior to the enactment of this amendment to the 1976 Act, several courts had held that the 1976 Act failed to waive the states’ Eleventh Amendment immunity for being sued in federal court for damages.\textsuperscript{114} Since federal courts have exclusive jurisdiction over copyrighted matters, the immunity of state entities from copyright damage actions in federal court resulted in prospective injunctive relief against individual state officials as the only available remedy against state government defendants.\textsuperscript{115} As an exclusive alternative, this remedy clearly was unsatisfactory since an award of prospective, injunctive relief in federal court against individual state officials required copyright owners to identify and sue the state officials before any significant damage occurred. The state entity’s use could be complete by the time a lawsuit was brought, thus significantly diminishing the value of the copyrighted work.

The state of the law prior to the enactment of the CRCA may once again be in effect if the CRCA is declared unconstitutional. Last term, the United States Supreme Court declared that the provision in the Patent Code which is analogous to the CRCA is unconstitutional.\textsuperscript{116} In a companion case, it also concluded that the Lanham Act’s comparable provision, the Trademark Remedy Clarification Act, does not permit a State

\textsuperscript{113} See infra notes 125-129 and accompanying text.

\textsuperscript{114} See Richard Anderson Photography v. Brown, 852 F.2d 114, 120 (4\textsuperscript{th} Cir. 1988), cert. denied, 489 U.S. 1033, 109 S.Ct. 1171 (1989); BV Engineering v. University of California, Los Angeles, 858 F.2d 1394, 1400 (9\textsuperscript{th} Cir. 1988).

\textsuperscript{115} See 28 U.S.C. §1338(a)(providing federal district courts with original and exclusive jurisdiction over civil actions arising under federal copyright laws) and §301 (preempting all “equivalent” state laws).

\textsuperscript{116} The Supreme Court relaxed the application of the Eleventh Amendment immunity doctrine with respect to actions seeking prospective, injunctive relief against a state official for violations of federal constitutional law. Ex parte Young, 209 U.S. 123 (1908).

\textsuperscript{117} Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 119 S.Ct. 2199 (1999). See infra notes 118-129 and accompanying text.
to be sued for its alleged misrepresentation of its own product.\textsuperscript{118} These two cases were issued along with a third opinion in which the Court held, in an action brought against the state of Maine for violating the Fair Labor Standards Act, that Congress could not subject a state to suit in state court absent the state’s consent.\textsuperscript{119} Taken together, these new rulings potentially indicate a tremendous, and very worrisome, shift in the federal/state balance regarding lawsuits against states.

*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,\textsuperscript{120} which involved the Patent Remedy Clarification Act ("PRCA"), is perhaps the most telling of these three decisions with respect to the comparable copyright issue. The Court in *Florida Prepaid* concluded that the PRCA was an unconstitutional exercise of Congress’ authority because, although patents clearly are property for purposes of the Fourteenth Amendment, the PRCA is not justified under *City of Boerne v. Flores*,\textsuperscript{121} which set forth standards for legislation designed to redress Fourteenth Amendment violations. In *Florida Prepaid*, the Court essentially invalidated the PRCA because it ""does not respond to a history of ‘widespread and persisting deprivation of constitutional rights’ of the sort Congress has faced in enacting property prophylactic §5 legislation.""\textsuperscript{122} The majority was disturbed by the lack of evidence in the legislative record regarding state infringements of patents. The majority opinion also was clearly

\textsuperscript{118} College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S.Ct. 2219. The Court’s reasoning in this opinion can, in one sense, be construed fairly narrowly in that it largely seems to turn on the notion that the nature of the plaintiff’s interests in this case is not “property” within the meaning of the Fourteenth Amendment. Also, it is arguable that the Court is suggesting that its holding is only applicable to §43(a) actions. However, it is likely that this opinion will be interpreted more broadly in light of the Court’s resolution of the *Florida Prepaid* and Alden v. Maine. *See infra* note 119 and accompanying text.

\textsuperscript{119} Alden v. Maine, 119 S.Ct 2240 (1999).
\textsuperscript{120} 119 S.Ct. 2199 (1999).
concerned with what it perceived as the broad scope of the PRCA, to the extent that Congress "made all States immediately amenable to suit in federal court for all kinds of possible patent infringement and for an indefinite duration." 123 Interestingly, in support of its position that the scope of the PRCA is too expansive, the Court criticized Congress for failing to limit the coverage of the PRCA to cases where a State refuses to offer any state-court remedy for patent owners whose patents it had infringed. 124

In light of Florida Prepaid, it is worth pondering whether the CRCA would meet a similar fate. The dissenting opinion in Florida Prepaid notes that perhaps the CRCA might not be similarly invalidated because the legislative history of that statute includes many examples of copyright infringements by the States. 125 Therefore, arguably Congress was responding to widespread violations in enacting the CRCA, and this fact might be sufficient to sustain the CRCA under Boerne. On the other hand, it seems reasonable to suppose that the majority’s concerns regarding the breadth of the PRCA, no matter how unpersuasive, would also apply to the CRCA. 126

It is likely that the Supreme Court may have an opportunity to consider the constitutionality of the CRCA specifically as a result of litigation between the University of Houston and playwright Denise Chavez. The University published a collection of short stories by Chavez in 1985, and Chavez registered the copyright in her own name. In

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122 Florida Prepaid 119 S.Ct. 2199 at 2210 (quoting Boerne, 521 U.S. at 526).
123 Id.
124 Id. at 2208.
125 Id. at 2216 n. 9 (dissenting opinion).
126 Federal courts have original and exclusive jurisdiction over cases involving both federal copyright and patent laws. See 28 U.S.C. §1338(a). Therefore, the Court’s reasoning that the PRCA is too broad because it is not limited to instances in which a plaintiff has been unable to obtain a remedy in state court seems unpersuasive. Moreover, as the dissenting opinion in Florida Prepaid observed, it is questionable whether Congress should have been able to reasonably foresee that it would be required to consider the extent to
later years, the parties twice agreed on additional publishing contracts for the short story
collection, with a specified number of copies to be printed each time. Several years later,
Chavez was dissatisfied that the University had failed to correct errors in the earlier
printings and refused to permit the University to print any more copies than agreed to in a
1991 contract. The University disputed that Chavez had the right to limit the number of
copies it could print and declared its intention to print 5,000 more copies of the book.
The University also published an anthology of plays, identifying Chavez in a University
catalog as the selector of the plays. Chavez filed a lawsuit against the University,
claiming copyright infringement, violation of the Lanham Act in naming her as the
selector of the plays without her authority, and violation of her state law right of
publicity.\textsuperscript{127}

The Fifth Circuit, in its original consideration of \textit{Chavez v. Arte Publico Press},
held that although copyrights are a species of property, section 5 of the Fourteenth
Amendment does not embrace congressionally required waivers of state sovereign
immunity in legislation such as the copyright law which is authorized by Article I
constitutional powers. In other words, since Article I predates the Eleventh Amendment,
it is not an appropriate basis upon which to supersede the Eleventh Amendment, which is
a later amendment to the same document.\textsuperscript{128} However, as of this writing, \textit{Chavez} has
been remanded by the Fifth Circuit in light of the Supreme Court’s decisions last term

\textsuperscript{127} Chavez v. Arte Publico Press, 59 F.3d 539, 541 (5th Cir. 1995).
\textsuperscript{128} This same result was reached by a district court in Rodriguez v. Texas Commission on the Arts, 45
regarding the PRCA and the TRCA. Ultimately, any determination about the constitutionality of the CRCA Act will impact substantially the ability of plaintiffs to sue state universities for VARA violations as well as moral rights violations that are actionable pursuant to the 1976 Act generally.

D. Preemption

An additional problem encountered by plaintiffs litigating moral rights types of claims within a university context arises from preemption of other state laws. In this regard, the litigation involving university personnel parallels the case law involving situations arising in non-academic contexts. The difficulty courts often face when confronted with claims implicating moral rights in connection with copyrightable property is how the preemption provision of the 1976 Copyright Act should be applied. Section 301 of the Copyright Act expressly sets out a test for determining whether a particular state law is preempted by the 1976 Act. The test under §301 has two parts. The first part of the preemption test focuses on the nature of the work protected by the state law. Specifically, preemption will not occur if the state law does not pertain to “works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright.” In other words, the states are free to regulate all works that are not protected by the copyright law because of their nature or form of expression.

129 See supra notes 118-128 and accompanying text. The remand opinion is available at 180 F.23d 674 (5th Cir. 1999).


131 If a particular work is capable of copyright protection but is not fixed in a tangible medium of expression, protection may be obtained under state common law copyright.
The second part of the preemption test emphasizes the nature of the rights that the state law attempts to safeguard. If the state seeks to protect rights that are "not equivalent to any of the exclusive rights within the general scope of copyright," the state’s law will not be preempted by § 301.\textsuperscript{132} The application of the equivalency prong of the preemption test thus requires a determination whether a particular state law creates rights that are "equivalent" to any of the rights protected by § 106 of the 1976 Act.\textsuperscript{133} Thus, the preemption of a state law will occur only if both parts of the test in section 301 are satisfied. Therefore, is a state law grants "equivalent rights" to a work that does not come within the scope of federal copyright law, no preemption will result. Similarly, a state may protect federally copyrightable works as long as such protection does not encompass rights equivalent to the 1976 Act.

Moreover, a special preemption provision exists for works of art governed by VARA. VARA provides that state laws are not preempted if they 1) arise "from undertakings commenced before the effective date" of VARA; or 2) stem from activities violating rights that are not equivalent to those provided in §106A; or 3) arise from "activities violating rights which extend beyond the life of the author."\textsuperscript{134} Note that by virtue of this last preemption exemption, states are free to protect a creator’s moral rights posthumously, and many states actually do so.\textsuperscript{135}

Application of the copyright statute’s general preemption provision, or that of VARA specifically, requires courts to make the difficult determination of whether the

\textsuperscript{132} See 17 U.S.C. § 301(a)(West 1996)
\textsuperscript{133} These rights include the rights to reproduce the copyrighted work, to prepare derivative works based upon the copyright work, to distribute copies, and to publicly perform and display the copyrighted work 17 U.S.C. § 106 (West 1996).
\textsuperscript{135} The statutes in California, Connecticut, Massachusetts and Pennsylvania are representative of posthumous protection of an author’s moral rights. See Kwall, VARA, supra note 10, at 33 n.188.
state rights at issue are equivalent to those safeguarded by the copyright statute generally, or VARA in particular. The 1976 Act fails to define the term “equivalent,” but the legislative history indicates that a state cause of action will escape preemption if it contains elements that are “different in kind” from copyright infringement.\textsuperscript{136} As a general matter, then, if the state law is violated by some action other than the exercise of economic rights protected by §106 of the 1976 Copyright Act, there will be no preemption of the state law, even if that law is being applied to material which is considered within the subject matter of the 1976 Act’s coverage.

These principles were applied in \textit{Rainey v. Wayne State University},\textsuperscript{137} which essentially involved a moral rights claim asserted by a student whose work was used by an automobile manufacturer, without her permission, as a result of activity by her professor. In \textit{Rainey}, Mercedes-Benz contacted a professor at Wayne State University about a proposed art exhibit at the 1997 North American Auto Show. The project entailed student artists from Wayne State painting large cargo containers at the auto show to be displayed around the Mercedes-Benz exhibit. Plaintiff Jocelyn Rainey, who was at the time studying for her masters degree at the university, told the professor that she was

\textsuperscript{136} See H.R. REP. No. 94-1476, at 109 (1976), \textit{reprinted in} 1976 U.S.C.C.A.N. 5659, 5748. In applying this test, many courts have invoked Professor Nimmer’s “elements” test that asks whether the state law is one which is infringed by one or more of the acts protected under the 1976 Act. If the exercise of any of these rights protected under the copyright statute is all that is necessary to infringe the state law, preemption will result. In contrast, if the state law also requires other elements for infringement, no preemption exists. Kwall, \textit{VARA, supra} note 10, at 31. Another approach to equivalency invoked in conjunction with the 1976 Act focuses on the nature of the interests protected by the state law in question. Under this approach, preemption will result if the state law’s only objective is the same as that of the 1976 Act, namely the provision of economic incentives for creators. \textit{Id.}

interested in the project. In fact, plaintiff suggested the central theme of the exhibit, which was the use of “hands.”

The artwork created by Rainey which was displayed at the exhibit consisted of four paintings portraying colorful hands in different positions against colorful backgrounds. Mercedes-Benz prepared, in connection with the exhibit, a brochure promoting the exhibit which described the symbol of hands as “a gesture of ‘welcome’ and communication between all people.” Rainey’s work was included in the brochure, which was distributed to about 2000 people at the auto show. The brochures contained a photograph and short biography of each student artist, including Rainey, in addition to a reproduction of one work by every student. Rainey, like all the other students whose work was included in the brochure, was paid $1400, and was offered a paid trip to Barcelona, where the defendants were planning to continue the exhibit at another auto show. The plaintiff did not accept this trip.

Apparently, Mercedes-Benz also included in the brochure, without Rainey’s permission, reproductions of three of her other paintings. Rainey claimed that the professor had asked her to produce these other paintings for the sole purpose of allowing Mercedes-Benz to inspect the colors to be used on the cargo containers. Rainey also asserted that when she learned these paintings were included in the brochure, she sought the professor’s assistance, but he was not inclined to take any action to prevent the continued unauthorized copying and reproduction of these paintings. Rainey also argued

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138 Id. at 965.
139 Id, at 965-66.
140 Id. at 966.
that Mercedes-Benz published her works without identifying her as the creator, and that
one of the paintings was published upside down.\textsuperscript{141}

Although the \textit{Rainey} case involved works of fine art, VARA was not applicable
because that statute only applies to works of limited editions of two hundred or fewer
copies that are signed and consecutively numbered by the author.\textsuperscript{142} VARA also
specifically excludes protection for reproductions of works.\textsuperscript{143} Therefore, the plaintiff
had to rely exclusively on copyright infringement and the state claims of breach of a
fiduciary relationship; intentional infliction of emotional distress; fraud; and unjust
enrichment.

The reported opinion does not contain a substantive discussion of the copyright
cause of action. Instead, the court focused on the plaintiff's claims for indirect profits
under the copyright law. Concluding that any such damages in this case would be based
on speculation rather than "credible evidence", the court dismissed plaintiff's claim for
profit damages and limited her remedy to actual or statutory damages.\textsuperscript{144}

From a substantive standpoint, however, the majority of the court's discussion
concerned whether the plaintiff's state law claims for breach of fiduciary duty, intentional
infliction of emotional distress and unjust enrichment should be preempted by federal
copyright law. The court concluded that Rainey's claim for breach of fiduciary duty
against her professor is not preempted, because to prove this breach, she needs to prove
that she in fact had a fiduciary relationship with her professor and that he in fact breached

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{See} 17 U.S.C. §101 (West 1996)(definition of "work of visual art"). \textit{See also supra} note 26 and
accompanying text.

\textsuperscript{143} 17 U.S.C. § 106A(c)(3)(West 1996)

\textsuperscript{144} 26 F. Supp.2d at 972. The 1976 Copyright Act requires a plaintiff to elect between recovering actual
damages plus the infringer's additional profits, or statutory damages. 17 U.S.C. 504 (West 1996).
this relationship. This proof requires more than proof of the mere reproduction of her work which suffices for her claim of copyright infringement.\textsuperscript{145} In contrast, however, the court held the claims based on intentional infliction of emotional distress\textsuperscript{146} and unjust enrichment\textsuperscript{147} to be preempted.

In Rainey, the only cause of action that survived was the one against the student’s professor for breach of fiduciary duty. Therefore, any state-based cause of action against the company that had used her work in an upside down state without her permission was preempted. Of course, Rainey also involved a copyright claim, but I was unable to learn anything more about the final outcome of the copyright claim or the copyright damage award, other than what was reported in the opinion.\textsuperscript{148}

I have elsewhere examined the operation of the preemptive provisions of VARA,\textsuperscript{149} and the operation of the copyright statute’s general preemption provision in the context of state-based moral rights, and “quasi” moral rights claims.\textsuperscript{150} I have argued that the 1976 Act does not safeguard an author’s right to prevent destruction of her work or mutilations that alter the work beyond recognition, assuming there is not an attribution of authorship to the original creator. Similarly, the 1976 Act does not specifically protect an author’s right to compel recognition for her work and to prevent the designation of anyone else as the author. Therefore, such state-created rights would not be equivalent to those safeguarded by the 1976 Act in a technical sense. Nonetheless, such state laws

\textsuperscript{145} 26 F. Supp.2d at 968.
\textsuperscript{146} The court stated: “Ultimately, the only substantive issue to be resolved in plaintiff’s intentional infliction of emotional distress claim is whether defendants’ reproduced her work without her permission. The Copyright Act provides equivalent protection for this alleged wrong.” Id. at 969.
\textsuperscript{147} With respect to the unjust enrichment count, the court concluded that this claim did not require the plaintiff to prove any additional elements beyond those required to demonstrate copyright infringement. Id.
\textsuperscript{148} In seeking additional information, I contacted one of the plaintiff’s attorneys, but this conversation did not yield any new information.
\textsuperscript{149} Kwall, VARA, supra note 10, at 29-45.
could be preempted on the ground that they conflict with the spirit of the 1976 Act because that statute does not expressly prohibit distractions or require the provision of attributions in conjunction with public displays or performances of a work.\textsuperscript{151} Recall that one of Rainey’s complaints was that Mercedes-Benz published her work in the brochure without attributing authorship to her. For this specific omission, then, it is unlikely she would be able to establish copyright infringement under the 1976 Act, or receive appropriate redress under a state-based cause of action.

Regarding state-created rights of integrity, unauthorized modifications by one other than the copyright owner are actionable under § 106(2) of the 1976 Act, which safeguards the copyright owner’s right to prepare derivative works based upon the copyrighted work.\textsuperscript{152} Rainey’s complaint that one of her works was published upside-down presumably would be actionable as an unauthorized derivative work. Note, however, that § 106(2) as applied in this context primarily addresses the unauthorized use itself; it does not specifically target the alleged distortion which occurred in conjunction with the unauthorized derivative work.\textsuperscript{153}

Similarly, recall the earlier discussion regarding how a professor’s copyright would be violated by the unauthorized publication of her lecture notes, but that the current law does not provide a specific remedy designed to target the mutilation or distortion of such notes. Although such mutilations could be actionable as unauthorized

\textsuperscript{150} Id. at 37-45; Kwall, \textit{Marriage}, \textit{supra} note 3, at 72-91.
\textsuperscript{151} Kwall, \textit{VARA, supra} note 10, at 41.
\textsuperscript{152} Id.
\textsuperscript{153} In his testimony before Congress regarding VARA, Edward Damich (now a Court of Claims judge) noted that the late professor Nimmer thought that distortions and mutilations might not be included in the definition of “derivative works.” \textit{Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary}, 100th Cong. 545 (1988) (statement of Edward J. Damich, Associate Professor
derivative works, this cause of action does not expressly recognize the pain engendered by such distorted or mutilated publications. State-based actions attempting to redress these reputational harms likely would be preempted to the extent the state laws are violated by showing that an unauthorized derivative work has been created. Moreover, since the 1976 Act guarantees that the author of a work is the only one who can possess any rights in the uncompleted work and is the only one who can decide upon the timing and disclosure of her work, any state-created protection for an author’s right of disclosure which would make unauthorized publications of a professor’s lecture notes actionable would be redundant of the protections offered by the 1976 Act, and therefore preempted.154

These deficiencies in the 1976 Act and its application illustrate the difficulty many authors face in securing appropriate moral rights protections in this country. These difficulties occur not only in the university context, but in virtually every imaginable creative context. However, in light of the special role universities play in nurturing the creative endeavors of their faculty and students, it is appropriate to consider specific ways in which universities can more effectively safeguard authors’ moral rights. The following Part addresses these concerns and provides some specific suggestions for university-enhancement of moral rights.

IV. FACILITATION OF AUTHORS’ MORAL RIGHTS BY UNIVERSITIES

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154 Kwall, VARA, supra, note 10, at 41-42; Kwall, Marriage, supra note 3, at 87. Of course, this argument assumes that the professor’s lecture notes otherwise meet the requirements of copyright protection under the 1976 Act.
Universities are in a unique and powerful position in the American artistic community. They provide a refuge from the outside world. Within the confines of the university, authors are free to indulge in the creative process, often without having to be unduly concerned with an economic bottom line. In this respect, the nurturing creative environment afforded authors by universities differs substantially from the harsher realities of the non-academic world. 155

I would argue that universities have special responsibilities to safeguard the moral rights of authors operating within their creative environments. First, with respect to any work created for the university itself, or under its auspices, universities should be obligated to protect the moral rights of the author. This should be the case regardless of whether the author has assigned the copyright to the university directly or whether the work is deemed a "work made for hire" pursuant to a university copyright policy. Although the American approach of presuming initial ownership in the employer arguably can be justified when economically based copyrights are at issue, no compelling reason exists why an employee author should lose her personal rights to her creation. Thus, the implementation of such a proposal recognizes the reality that moral rights protect personal interests which are conceptually distinct from the economic interests safeguarded by copyright law. 156

155 The author's research assistant relates a story that when she worked for the Yale Drama School, the rehearsal period for some of the productions was as long as five weeks. Another week or two might be devoted to previews before the show was officially opened. In contrast, when she worked for professional companies, the actors and directors were lucky to get three weeks of rehearsal and two preview nights before the show had to open. This comparison illustrates that universities have the money and mindset to devote to the process. Professional companies cannot afford to pay all the actors, the director, and the support staff. Those companies need product they can sell quickly. See supra note 19. On the other hand, however, the time differential between university and professionally produced productions might be attributed, at least partially, to the reality that professionals require less rehearsal time.

156 See Kwall, VARA, supra note 10, at 11 (advocating the amendment of VARA by eliminating the express exclusion of works made for hire from coverage).
Second, universities should be encouraged to provide more education about authors' moral rights. This educational process should emphasize not only the protections under VARA,\(^{157}\) but also the reality that there are no specific protections for the moral rights of many authors in this country. Significantly, universities should also inform their authors that "quasi" moral rights protections can be achieved through contracts, and in some instances, through copyright law.\(^{158}\) Thus, universities should provide their faculty and student authors with education about how to negotiate moral rights as part of their contracts. Additionally, universities should provide assistance to authors with respect to dealing with contract disputes and violations. Such education can take multi-faceted forms. The Internet is an ideal vehicle for disseminating important information about these issues. Alternately, a university could provide web page links to free legal services. More elaborate educational plans could include an on-campus legal office dedicated to assisting authors with respect to copyright and moral rights issues. For those universities affiliated with a law school, informational assistance can be provided by intellectual property professors or even enterprising intellectual property law students.

Third, universities should encourage their faculty to be protective of their students' moral rights. Once academics in general are more generally aware of moral rights, they will be in a better position to inform their students of such rights and counsel their students about matters implicating moral rights. Moreover, professors who are educated about moral rights will, hopefully, be more sensitive to the exercise of their

\(^{157}\) A study of VARA's operation conducted by the Copyright Office revealed that much more education is needed among the general population of artists regarding VARA generally and the operation of its waiver provision specifically. See Kwall, VARA, supra note 10, at 45-52.

\(^{158}\) See supra notes 21-25 and accompanying text.
students' moral rights. Situations such as *Rainey v. Wayne State University*, in which a professor apparently ignored his student's request for assistance in safeguarding her personal interests in her work,\footnote{159} hopefully should arise less frequently with a more informed body of academics.

Finally, universities should encourage their personnel to be more sensitive to authors' moral rights when disputes arise. Recall *Choe v. Fordham*, in which a law student objected to the errors contained in his published law review article.\footnote{160} Prior to the suit, three remedial options were discussed by the Editorial Board with the student. These options included a republishing of the corrected article in a new issue and the distribution to all subscribers of stickers to be placed on the front page of the original article referring to the reprinted article. Apparently this option was chosen initially as the appropriate remedy by two professors and a former editor-in-chief of the Journal. Nevertheless, several months later, both professors changed their minds and suggested instead that the errors be corrected in a reprint, and that all subscribers receive an errata sheet.\footnote{161} When the Board's offer to issue an errata sheet was found unacceptable by the student, the litigation ensued.\footnote{162}

I do not intend to second guess the judgment of those involved in the *Choe* dispute. However, the analysis contained in this Article suggests that a more thoughtful and explicit consideration of the moral rights implications of this situation by members of the Journal and the professors involved might have facilitated a compromise that would have been acceptable to everyone concerned, thereby obviating the need to resort to

\footnote{159} See *supra* notes 137-148 and accompanying text. \footnote{160} See *supra* notes 81-88 and accompanying text. \footnote{161} 920 F. Supp. 44 at 46. \footnote{162} *Id.* at 47.
costly and time-consuming litigation. At a minimum, the provision of moral rights education by universities for the benefit of their faculty, students and staff certainly should result in more university personnel with greater sensitivity to the moral rights of authors.

As a general matter, the United States has not fared particularly well on a comparative basis regarding the implementation of authors’ moral rights. This Article has argued that universities have a special obligation to creators to safeguard their moral rights, even though the law may not yet require such measures. This obligation follows from the special position occupied by academia with respect to authors. The provision of stronger moral rights protection at the university level not only will benefit authors within the university setting, but also will strengthen the efforts to implement adequate moral rights protections for all creators.